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The Control of Foreign Intervention in Internal Conflict*

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I. DELIMITATION OF THE PROBLEM

A. INTERVENTION IN INTERNAL CONFLICT AS A MAJOR PUBLIC ORDER CONCERN

The nuclear arms race, the economic gap between the have and have not nations and the weakness of international organization have long been recognized as major public order concerns. During the last few years it has become increasingly evident that intervention in internal conflict is also a major concern. The recent events in the Congo, Cyprus, Czechoslovakia, the Dominican Republic, Hungary, Laos, Lebanon, Nigeria, Palestine, Vietnam, and Yemen make this concern self-evident. The problem, though, may be more pervasive than even these dramatic incidents suggest, for our world is both increasingly revolutionary and increasingly interdependent.

Professor C. E. Black has predicted "ten to fifteen revolutions a year for the forseeable future in the less developed societies." [1] Former Secretary of Defense Robert McNamara recently reported that while "at the beginning of 1958 there were 23 prolonged insurgencies going on around the world, as of February, 1966, there were 40. Further, the total number of outbreaks of violence has increased each year: in 1958 there were 34; in 1965 there were 58." [2] And Professors Leiden and Schmitt, in their summary of revolution in the modern world, assert that "even a cursory view of recent history forces an acknowledgment that we are living in a new era of revolution. . . ; the last third of the twentieth century promises to be a period of almost constant revolutionary turmoil . . . ." [3] This increase in violent revolutionary activity is a complex phenomenon about which little is known except that it is almost certainly a result of interaction among a number of systemic and psychological variables. Among the more likely causative factors are the great increase in newly independent and underdeveloped nations of the

1. C. BLACK, THE DYNAMICS OF MODERNIZATION 166 (1966).
2. R. MCNAMARA, THE ESSENCE OF SECURITY 145 (1968).
3. C. LEIDEN & K. SCHMITT, THE POLITICS OF VIOLENCE: REVOLUTION IN THE MODERN WORLD 212 (1968).

third world, resulting from the accelerated process of decolonization after World War II; a widening economic gap between the have and have not nations, coupled in some areas with an actual decrease in per capita income (described by Oran Young as an "asymmetrical distribution of values" in the system or the "so-called North-South problem");[4] an accelerating rate of social change, resulting from technological and communications explosions; the parameters of a nuclear balance of terror that may sometimes encourage limited and proxy wars; a fragmentation into competing factions of an international system which was once divided between more monolithic blocs; an intense ideological competition (the so-called East-West problem); and strong revolutionary and nationalistic myths shared by many Communist and non-Communist reformers.

Many of these same factors, particularly the continued high level of cold-war confrontation and the continuation of colonial and racially divided regimes in a world increasingly aspiring to genuine self-determination, have also encouraged more frequent intervention. Since a number of these trends contributing to increased revolutionary and interventionary activity may be accelerating, it seems possible that the control of intervention in internal conflict may become an even more critical problem in the future.

We have arrived at this critical point in the upswing of revolutionary and interventionary activity without either accepted norms differentiating permissible from impermissible external interference or international machinery well suited for the control of intervention. The history of efforts to manage international conflict is the twin history of normative clarification and the development of international organization; but such efforts typically have been mere responses to the public order problems which acted as triggering events.[5] Since the problem of intervention in internal war has developed into a core public order problem chiefly since World War II, neither the present normative structure for control of coercion nor the institutional capacity of present international organizations is well suited to its control.

It is true, of course, that the post-Napoleonic period in Europe and the Spanish Civil War both triggered concern with the problem of intervention, but these earlier efforts lacked the sophistication of current dialogue; and for the most part what lessons were learned were never effectively assimilated into the international law of conflict management.[6] Thus, the United Nations, which is the central

4. Young, *Intervention and International Systems*, 22 J. INT'L AFFAIRS 177, 179 (1968).

5. For a brief history of the international law of conflict management see M. Kaplan & N. Katzenbach, *Resort to Force: War and Neutrality*, in THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 198-228 (1961), *reprinted in* II R. FALK & S. MENDLOVITZ, THE STRATEGY OF WORLD ORDER 276 (1966).

6. The Spanish Civil War was particularly significant for the development of intervention theory in that it was one of the major triggering events stimulating writing about intervention. See Borchard, *"Neutrality" and*

structure for the control of international conflict, is largely a reaction to situations of overt aggression, particularly World War II. As a result, the armed attack-defense abstractions of the Charter provide little guidance as to permissibility of assistance to either a widely recognized government or insurgents in a situation of internal war. Article 2(4) of the Charter prohibits the use of force in international relations but does not bar the use of force internal to a state. The difficulty is in determining when external assistance to one side or another in internal war threatens "the territorial integrity or political independence" of a State as proscribed by Article 2(4). Similarly, Article 51 preserves the right of individual and collective defense against an armed attack. But when is assistance to one side or another an armed attack and when is it collective defense? The abstractions of the Charter also provide little guidance in determining the legitimacy of some non-authority-oriented interventions, such as the classic "humanitarian intervention," where objectives are other than the influencing of authority structures. Finally, customary international law, with its focus on the now largely defunct distinctions between rebellion, insurgency and belligerency, and with its simplistic insistence on the sanctity of military assistance to a widely recognized government, is equally inadequate. Contemporary discussion about the definition of aggression still reflects most of these ambiguities.

The institutional side of the Charter is also deficient in dealing with intervention in internal war. A central problem in appraising most interventions is the need for impartial fact-finding and disclosure. We need answers to such questions as: What is the extent of Hanoi's involvement in insurgencies in Laos, Thailand and Vietnam? What was the chronology of external intervention on behalf of the competing factions in Vietnam? What was the role of the United States with regard to the competing factions in the Dominican and Stanleyville operations?

While sometimes useful, as in Laos, Lebanon, and Yemen, the Charter machinery for fact-finding is ad hoc, subject to cold war currents, and frequently unavailable when most needed. In addition, the only real reporting requirements of the Charter relate to action taken in defense against an armed attack or as enforcement by regional agencies; and since assistance to one side or another in

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Civil Wars, 31 AM. J. INT'L L. 304 (1937); Garner, *Questions of International Law in the Spanish Civil War*, 31 AM. J. INT'L L. 66 (1937); O'Rourke, *Recognition of Belligerency and the Spanish War*, 31 AM. J. INT'L L. 398 (1937).

The Vietnam War has been another such triggering event; in the last few years there has been a flood of writing about revolution and intervention. See generally I THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1968). Volume II of THE VIETNAM WAR AND INTERNATIONAL LAW will be published in 1969 and together the two volumes give some indication of the intense current interest in intervention. Both volumes are sponsored by the American Society of International Law.

internal conflict may frequently be neither of these, such assistance often goes unreported. This was the case in Vietnam during the five years prior to the Tonkin Gulf incident of 1964, despite a sustained high level of conflict. Moreover, the Charter structure is equally lacking in machinery to catch internal war in its early and more malleable stages, before positions harden and a lasting political solution becomes next to impossible.

The increase in interventionary and revolutionary activity, coupled with the poorly developed responsive capability of the international system, suggest that the development of normative and institutional controls on intervention in internal war is an urgent task for those concerned with public order problems. To be most useful this development should be compatible with the broader Charter framework, which has been a major evolutionary step in conflict management, and should build on the effective features of existing international institutions.

B. SOME INTELLECTUAL TRAPS IN THEORIZING ABOUT INTERVENTION

Before outlining a suggested approach to the control of intervention it is useful to enumerate some of the common sources of intellectual confusion in theorizing about intervention. The two principal sources seem to be terminological confusion and the contextual fallacy.

1. *Terminological Confusion*

Terminological confusion has been a major cause of the intellectual rigor-mortis which has characterized much of the discussion about intervention. The confusion stems from the different senses, at least four in number, in which the term intervention is commonly used in discourse about international relations.[7]
These are:

(1) as a synonym for transnational interaction or influence;
(2) as a statement that a particular transnational interaction violates authoritative community expectations about permissible international conduct;

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7. That the confusion is still with us is suggested by the Editor's Foreword to a recent symposium on intervention which identifies the cause of conceptual confusion about intervention as the "result of the dual usage of the term . . . as an *analytical* concept by political scientists and as an *operational* concept by diplomats and strategists." *Editor's Foreword*, 22 J. INT'L AFF. ix (1968). Though the referents are vague, the *analytical* usage probably refers to the fourth meaning of the term as a nominal definition of a problem for study and the *operational* usage probably refers to the first meaning of the term as a synonym for transnational interaction or influence. The *operational* usage, however, may refer to any of the first three senses of the term.

(3) as a personal policy judgment that a particular transnational interaction is wrong; and
(4) as a definition of a problem for study.

Although there is an interrelation among these four senses, failure to separate them and to recognize that two of the four are value charged is to court needless intellectual confusion.[8]

The first sense in which intervention is used, as a synonym for transnational interaction or influence, may be illustrated by an excerpt from a classic article on intervention by Professor Wolfgang Friedmann:

> The relevant question for the international lawyer is at what point the manifold forms and degrees of intervention may be said to amount to an act of unlawful interference with the sovereignty of another country.[9]

In this excerpt, Professor Friedmann uses intervention to refer to a whole range of transnational interactions by which states influence the actions of other states. Used in this sense, intervention is not intended to carry normative overtones as to legitimacy of conduct, but is intended simply to refer to a range of transnational interactions. *Unless otherwise clear from the context, intervention is used throughout this essay in this first sense.*

The second sense in which intervention is used, as an assertion that a particular transnational interaction violates authoritative community expectations about permissible international conduct, is simply an assertion about what we might loosely call international law. In this sense, intervention refers to the scientific task of describing authoritative community expectations; and as such it can be used accurately or inaccurately. When used in this sense, intervention is strictly an assertion about a state of affairs and thus need not be a value charged statement; but as a practical matter an observer's own value preferences often intrude.

The third sense in which intervention may be used, as a personal policy judgment that a particular transnational interaction is wrong, refers to an observer's own judgment as to the permissibility of a particular interaction. Used in this sense the term merely signifies that an interaction is viewed by the observer as impermissible. Intervention is often used this way in everyday speech and is, of

8. In a recent article on *The Concept of Intervention* Professor James N. Rosenau may have identified a fifth meaning of the term. That is, as a statement about how the term is popularly or specially used based on empirical observation of linguistic usage. Although such observation might be useful in determining community expectations, this sense does not seem sufficiently common to justify major treatment. See Rosenau, *The Concept of Intervention*, 22 J. INT'L AFF. 165, 175 (1968).

9. Friedmann, *Intervention, Civil War and the Rôle of International Law*, 1965 PROC. AM. SOC. INT'L L. 67, 69. Professor David A. Baldwin consciously equates intervention with influence. Baldwin, *Foreign Aid, Intervention, and Influence*, 21 WORLD POLITICS 425, 426 (1969).

course, value charged when so used. Symptomatic of this expression of a negative value judgment, *Webster's* defines intervention in terms of the pejorative "interference" instead of the neutral "influence." [10] All recommendations as to what the rules of intervention ought to be must necessarily make a value judgment. Thus, when used in this sense. we should insist on the observer's making his policy preferences explicit for appraisal by others, and we should prefer the more particular statements of policy preference to high level generalizations.

The fourth sense in which intervention is used, as a definition of a problem for study, delimits a range of transnational interactions with which the declarant is expressing interest or concern. Such uses of the term intervention are neither true nor false but only more or less useful. Their usefulness depends on the relevance of the declarant's area of concern to real world problems and the degree of selectivity (inclusive of the relevant and exclusive of the irrelevant with respect to the declarant's professed concern) in transactions chosen for study. Used in this sense intervention need say nothing about whether a particular interaction is good or bad. It is important to recognize, however, that the delimitation of a particular range of events for study is not value free. A scholar is faced with a potentially infinite range of problems on which to lavish his attentions. His choice of a particular range of interactions assumes the value importance of those interactions. As Jones and Mayo remind us, the recognition of a "problem" assumes nonfulfillment of value demands, that is, a gap between value demands and their realization.[11] As such, the identification of a problem is necessarily value charged.

Several common confusions among these four senses illustrate the danger of terminological confusion. Richard Falk calls attention to the importance of distinguishing between the first and second senses of intervention when he says:

> As William Burke shows well in his excellent treatment of minor coercion, it is important to distinguish between the facts alleged to constitute intervention and the legal determination of these facts as intervention. Does a documented assertion that United States military aid to South Viet Nam constitutes "intervention" make it "intervention" in a legal sense? [12]

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10. "[A]ny interference in the affairs of others; especially, interference of one state in the affairs of another." WEBSTER'S NEW WORLD DICTIONARY 765 (College ed. 1966).
11. Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318, 327 (1964).
12. R. FALK, LEGAL ORDER IN A VIOLENT WORLD 343 (1968). Professor Falk was referring to Burke, *The Legal Regulation of Minor International Coercion: A Framework of Inquiry*, in ESSAYS ON INTERVENTION 87, 88-89 (R. Stanger ed. 1964).

But then in his own definition of intervention he fails to make clear whether he is using it in the second, third or fourth sense. According to Falk:

> "Intervention" refers to conduct with an external animus that credibly intends to achieve a fundamental alteration of the state of affairs in the target nation.[13]

Aside from the considerable difficulties in determining the referent of "external animus" and "fundamental alteration," does the definition indicate that Professor Falk believes that all such transnational interactions are illegal, that they ought to be illegal, or that they constitute the range of interactions with which he is concerned? From the context, I believe that he means the last, although the reader cannot be sure. In any event, explicit focus on the sense in which the definition was being offered would, I believe, have enabled Professor Falk to further refine his definition.

Similarly, the key to the seeming paradox of the famous Talleyrand description of non-intervention as "a mysterious word that signifies roughly the same thing as intervention," [14] seems to lie in the confusion of senses in which intervention may be used. Literally, Talleyrand must have been using the term in its first sense, meaning interactions having transnational impacts. As such, there is little difficulty in the assertion that in an interdependent world nonaction can produce effects in a third state as realistically as can action. But the paradox is introduced when the statement is interpreted as saying something about intervention in the second or third sense. It is certainly a contradiction to maintain that an interaction both violates and does not violate authoritative community expectations, or to maintain that an interaction is both right and wrong at the same time. Yet sometimes the Talleyrand statement seems to be invoked in these latter senses to justify any coercive interaction or to condemn alike any foreign policy of action or inaction. James Rosenau points out the absurdity of following this seemingly logical position when he says:

> the height of definitional vagueness is occasionally reached when inaction is regarded as intervention. Having defined intervention as the impact that one state has on the affairs of another, logic leads some observers to classify inaction as intervention whenever consequences follow within a state from the failure of another to intrude upon its affairs. Such a conception, for example, leads to the absurd conclusion that the United States avoidance of the conflict in Indochina in 1954 and its extensive involvement in that part of the world a decade later both constitute intervention.[15]

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13. *Id.*
14. *See* Modelski, The International Relations of Internal War 9 (Research Monograph No. 11, Center of International Studies, Princeton University, 1961).
15. J. Rosenau, The Concept of Intervention 12 (paper delivered at the Con-

Another common form of terminological confusion is the failure to distinguish between intervention in its second and third senses, that is, between an assertion about authoritative community expectations as to permissible conduct on the one hand, and personal policy preference on the other. When one asserts that Soviet action in Czechoslovakia is impermissible intervention, does it mean that such action contradicts the writer's personal policy preference, that it violates community expectations about lawful conduct, or both? The operation called for here is not the separation of "is" and "ought" but clear focus on the separate intellectual tasks of either describing trends in community expectations as to permissible conduct or giving the writer's personal policy preference.

Confusion between the fourth sense in which intervention is used and either the second or third sense may also be a potent source of confusion. At the Princeton Conference on Intervention and the Developing States two years ago substantial audience skepticism greeted an outstanding paper on intervention by James Rosenau.[16] I believe this skepticism stemmed largely from confusion between the third and fourth senses of the term. Rosenau was formulating a particularly thoughtful definition of intervention for the purpose of delimiting events for empirical study. Many in the audience mistook this limited definition as implying that the speaker approved of all interactions falling outside his definition. Since many in the audience held strong views on the impermissibility of interactions outside the delimited area, they rejected the considerable insights in the paper simply because of an intellectual confusion about what the author meant.

A second source of audience skepticism about the paper, which also has its genesis in terminological problems, is, I believe, more justified. Professor Rosenau defined intervention for purposes of "operationalizing" the concept (*i.e.*, in the fourth sense) as interactions which are both convention-breaking and authority-oriented.[17] This definition contains impressive insight as to the importance of these two factors. But since it was rooted more in a search for the core meaning of intervention in linguistic usage and in factors making for convenience in study, rather than in relevance to values at stake in some real world problem, it could not be a sufficiently inclusive definition for study of the full range of intervention problems. The simple truth is that the same values at stake in this "core definition" are also at stake in other situations not included in the definition, that intervention is therefore popularly alleged in other situations, and that these other situations are also worthy of study. To be most useful, the criterion of relevance for determining inclusiveness and

ference on Intervention and the Developing States, sponsored by the Princeton International Law Society and held at Princeton, N.J., on November 10-11, 1967).

16. *See* Rosenau, *supra* note 8, at 165.

17. *See* Rosenau, *supra* note 8, at 167.

exclusiveness in operationalizing a problem in this fourth sense must be rooted in the policies at stake which justify recognition and study of a problem, not simply in linguistic usage or in convenience in study. This is not to say that Rosenau's definition is not useful. It is impressively insightful in calling to our attention two important variables in interventionary situations; but it is not a definition inclusive of the range of interactions which are shaped by common policies and common conditioning factors and which therefore justify analysis together.

In a recent article Professor Rosenau recognizes the audience skepticism toward his definition of intervention and defends his initial formulation. In doing so, he identifies what he takes to be the chief source of the confusion: "the root of the problem seems to be that two basic and interrelated distinctions were overlooked—namely, the distinction between the common-sense and operational meanings of intervention on the one hand and between intervention as an empirical phenomenon and an analytic concept on the other." [18] Although both sources of confusion may have contributed to the misunderstanding, I believe that by far the principal source of confusion (and one which underlies both of the above reasons given by Rosenau) resulted from failure to adequately identify the value problems inherent in talking about intervention. First, it was not clear to the audience that the defining of events for study did not mean that all events so defined were impermissible and everything else permissible. Second, the definition, no matter how precise, was not explicitly related to the values at stake in interventionary situations, and as such was overly narrow. Both sources of confusion are inevitable unless we keep our eye on the four senses in which intervention is commonly used and unless we insist on relating the utility of a definition of intervention to the values at stake in interventionary situations.

2. *The Contextual Fallacy*

A second major source of confusion in theorizing about intervention can conveniently be termed the contextual fallacy. The contextual fallacy is the failure clearly to recognize the diversity of issues and contexts in which intervention is alleged and to formulate a framework for inquiry which organizes these diverse claims according to features of the context which raise common issues of policy and are shaped by common conditioning factors. The legal realists repeatedly demonstrated that as the legal issue changes the result too may change. Legal doctrines which purport to decide more than one issue will usually be unstable. For example, traditional discussion about internal conflict characterizes revolutionary activity as rebellion, insurgency, or belligerency without providing sufficient sharpness to indicate that these characterizations are often conclusary

18. *See* Rosenau, *supra* note 8, at 173.

terms which vary with the legal issue. Thus, the issues may include such diverse problems as the rights of neutral shipping, the applicability of conventions regulating the treatment of prisoners of war, recognition, and permissibility of military assistance to a contending faction. Moreover, intervention has been claimed across a broad spectrum of activities, including student exchange programs, conditions on economic aid, the free Quebec statements of former French President De Gaulle,[19] efforts to provide relief supplies to civilians in Biafra, and the recent subjugation of Prague by Soviet tanks. Most of these allegations raise different intervention issues.

Even when the issue is kept relatively stable, theorists frequently approach the problem of control of interventionary conduct as if claims of intervention were asserted in one or two homogeneous contexts capable of policy responsive regulation by one or two all encompassing rules. In fact, though, both the situations in which claims are made as well as the types of claims vary widely. In dealing with claims of military intervention in internal conflict, for example, claims range through use of the military instrument in the territory of a third state for the protection of human rights, use of the military instrument against the territory of a state providing assistance to an opposing faction, assistance to one-half of a divided nation engaged in a struggle with the other half, and at least eighteen other claims.[20]

A symptom of the contextual fallacy is the tendency to define intervention in high level generalizations without careful separation of issues and contexts. An example, which evinces terminological confusion as well, is Oppenheim's definition: "dictatorial interference by a State in the affairs of another State for the Purpose of maintaining or altering the actual condition of things." [21] Such definitions are by themselves so devoid of content that any real meaning they convey is little more than pseudo-knowledge comparable to saying that sleeping pills put one to sleep because they contain a dormative agent. A healthy antidote to this form of the contextual fallacy is to remember that definitions are never true or false, only more or less useful. Perhaps even more to the point, unless serving an explicit *raison d'être* definitional exercises about intervention frequently seem to divert energy from the performance of the intellectual tasks necessary for fruitful problem solving.

Contextuality means more precise specification of intervention issues, and with respect to each, a map of features of the context which may affect policy. Thus, to avoid the contextual fallacy, a framework for control of intervention must carefully separate the types of intervention claims which present common policies and common condi-

19. *See* N.Y. Times, July 25, 1968, at 1, col. 2.

20. For a full breakdown of these claims see part IV of this essay.

21. I OPPENHEIM, INTERNATIONAL LAW 305 (8th ed. Lauterpacht 1955). Brierly's widely quoted definition is at an only slightly lower level of abstraction. His definition is: "dictatorial interference in the domestic or foreign affairs of another state which impairs that state's independence." J. BRIERLY, THE LAW OF NATIONS 402 (6th ed. Waldock, 1963).

tioning factors. The problem of intervention can be adequately clarified only by more precisely differentiating the relevant claims.

C. THE OUTLINES OF A POLICY RESPONSIVE APPROACH

1. *The Problem for Study*

In a world in which it is meaningful to speak of a global community, there is by definition a high level of transnational interaction. Events in Leopoldville and decisions made in Washington, Tel Aviv, or Moscow may be felt around the world, sometimes in a matter of hours or even minutes. It is obviously too broad, then, if one is defining intervention for purposes of delimiting the problem for study, to include all actions having impact abroad. The totality of transnational interactions is neither an economical nor a policy responsive basis for study.

In narrowing this range of interaction for purposes of defining events for study, the most useful approach is to relate the definition to the reasons for our concern about intervention. That is, in order to get a useful handle on intervention, the interactions chosen for study should be those potentially most destructive of the values at stake, the threatened loss of which prompted the allegations of intervention. As will be examined in a later section, the policies principally at stake in the intervention context seem to be self-determination, the protection of human rights, and the maintenance of world order.[22] Since these policies are most acutely affected by coercive interactions, it would seem that coercive transnational interactions constitute the broadest intervention concern. Coercive interactions, by whatever method—military, economic, or ideological—would under this approach be considered as intervention for purposes of delimiting the broadest problem for study. This broadest definition of intervention is not watertight; for example, some forms of "cultural imperialism" might not be included even though they raise important questions of community policy. But no definition ever will be watertight; and the defining of intervention in terms of coercive transnational interaction does seem to identify the most critical community concern.

Intervention in its broadest sense, then, encompasses the full range of claims on a continuum of major-minor coercion by all methods and with respect to all values. There is no bright-line distinction on the basis of motivation for coercion, method of coercion, or values affected by coercion; and to pursue such a distinction is to miss the point of the concept of intervention. For purposes of economy of effort, however, it is useful to further delimit the range of interactions for study. Accordingly, this paper will be concerned principally with coercive actions by one international actor aimed at the authority structures of another and effectuated through military strategies.

22. These policies are developed in part III of this essay.

Non-authority-oriented claims, such as humanitarian intervention, will also be considered if they involve claims to use military strategies and are currently recurring problems.

Claims concerning authority structures are particularly important since the control of authority structures provides a base for coercion with respect to a wide range of values. And claims concerning military strategies are important because of their characteristically high coercive impact. The sending of Soviet tanks to Czechoslovakia, the landing of United States marines in the Dominican Republic, and the supplying of arms to Nigeria or Biafra are generally more coercive and have greater consequences for important community policies than economic assistance to those states. Moreover the community consensus is generally greater with respect to claims concerning authority structures and military strategies than with respect to claims concerning economic assistance programs or foreign exploitation of natural resources. These latter claims, couched in the rhetoric of "neocolonialism" and "economic imperialism," are likely to become increasingly important and certainly deserve attention,[23] but at the present time the control of intervention in internal conflict seems both to be the more pressing problem and to reflect greater community consensus about impermissible conduct.

The problem of intervention in internal conflict may also be conceptualized in conventional legal terms as one of defining aggression. Although such high level generalizations as "aggression" and "coercive transnational interaction" can be useful, if we are to achieve the working degree of specificity necessary to avoid the contextual fallacy, it is important to keep in mind that the real questions for study are formulated only at a more specific level in the section of this essay discussing recurrent claims presenting common policies and conditioning factors.

The use of the term "internal conflict" instead of the prevailing "civil strife" or "civil war" is a deliberate choice intended to include both external sponsorship of conflict and external participation in indigenous conflict. The two are important for study; yet the "civil war" terminology popularly carries overtones which both confuse location of conflict with sponsorship and beg the question by suggesting normative conclusions. The use of this "civil war" terminology has given rise to such veiling of the policy issues as the representation of the central issue in the dispute about the legality of the Vietnam War as whether the War should be regarded "as 'civil war' or as a peculiar modern species of international war." [24] While the

23. *See generally* Baldwin, *supra* note 9.

24. I THE VIETNAM WAR AND INTERNATIONAL LAW, *supra* note 6, at 4. Professor Falk has elsewhere shown a perceptive awareness of the danger in the use of the term "civil war." In his innovative study of *The International Law of Internal War* he points out:

> The term "internal war" is consciously selected as a substitute for the usual designation: civil war. This is done to facilitate an accurate perception of the modern phenomena of intrastate political

term "internal conflict" is not free from such overtones, it is sufficiently more free of them to justify its use whenever there is danger of normative confusion.

2. *The Methodology*

As a useful technique for clarifying policy choices, this paper will follow an outline which facilitates explicit performance of the intellectual tasks in decision.[25] That is, definition of the problem for study, description of the problem in its broadest context, clarification of policies, description and analysis of past trends, and invention and evaluation of policy alternatives.

Behavioral approaches to the problem of intervention usually seek to avoid normative appraisal. No such comfort is available to the international lawyer, however, as normative appraisal is a principal stock in trade. This normative aspect of the problem makes it imperative that scholars concerned with the appraisal of intervention set out the basis for their appraisal as explicitly as possible. As the Swedish political economist Gunnar Myrdal has indicated, social scientists should work from explicit value premises to enable appraisal by others.[26] The third section of this essay seeks to develop

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violence. It is especially important to appreciate the extent to which external actors participate in internal wars so as to distract the mind from a predisposition to view internal war as a domestic matter.

Falk, *Janus Tormented: The International Law of Internal War*, in INTERNATIONAL ASPECTS OF CIVIL STRIFE 185, 217 (J. Rosenau ed. 1964).

Linda Miller also considers the terminology problem and rejects "internal war" for "internal conflict," "internal violence," and "internal disorder." She points out that: "Many significant internal disorders, for example the recurring violence in the former Belgian Congo, are not 'wars.'" L. MILLER, WORLD ORDER AND LOCAL DISORDER: THE UNITED NATIONS AND INTERNAL CONFLICTS 3 (1967).

25. The methodology of this essay loosely follows the policy-oriented approach recommended by Myres McDougal and Harold Lasswell which I have found to be a helpful analytic tool. For a general introduction see Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968). I also owe an intellectual debt to the "new analytical school" for the section on terminological confusion. *See, e.g.*, Summers, *The New Analytical Jurists*, 41 N.Y.U.L. REV. 861 (1966).

26. Gunnar Myrdal, the Swedish political economist, places great importance on the idea that social scientists should work from explicit value premises; that is to say, a person should set out his personal preferences and predilections as clearly as possible when dealing with social data. By so doing, he will enable one who reads his exposition to evaluate what he says in the light of those preferences. It is only in this way according to Myrdal, that any manageability and real intelligibility may be attained in handling social phenomena.

Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 669 (1960).

See also Thompson, *Normative Theory in International Relations*, in THEORY AND REALITY IN INTERNATIONAL RELATIONS 94 (J. Farrell & A. Smith eds., Colum. paperback ed. 1968).

The complexities of the international scene and the urgency of cur-

the basic community policies at stake in intervention and is an installment on this duty.

It is also helpful to keep in mind that to date only beginning efforts have been made at scientific study of the causes of revolution and the effects of intervention. In this state of the art, disagreements about interventionary activities may frequently turn as much on differing or insufficient data for predicting effects on values as on value disagreement. With better data, apparent value conflicts may sometimes be narrowed. Behavioral approaches to the problem of intervention are perfectly compatible with the recommended framework, and more policy responsive results will doubtless await better data about revolution and intervention.

To avoid the contextual fallacy and to accurately describe past trends, it is important to classify the separate claims which present common policies and common conditioning factors. The classification of claims recommended in the fourth section of this essay is intended to meet these needs and to provide a useful tool for clarifying policy choices. The complexity of the recommended classification simply reflects the complexity of the real world; approaches which fail to focus on this complexity will inevitably oversimplify the problem.

It does not follow, however, that because the problem is complex one must recommend a large number of intervention rules or adopt an ad hoc approach. A balance must always be struck between many detailed rules which are policy responsive for a larger number of contexts, and the common requirement of all legal systems that the rules offer certainty and ease of application. In striking the balance one must guard against both overemphasis of illusory certainty and recommendation of only incidentally policy responsive rules on the one hand and against an ad hoc approach offering little guidance on the other. All approaches must deal with this danger that rules will be either too general to be policy-responsive or too specific to be useful; there is nothing incompatible between definite rules and a policy oriented approach.

The recommended approach also seeks an appropriate balance between normative and institutional concerns. The problem of control of intervention is inescapably related to normative clarification about permissible intervention. No amount of procedural control or international organization can transcend the necessity of making value

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rent problems heighten the need for normative thinking. It would be reassuring to say that the literature abounds with serious writing on normative problems. The truth is that discussion of normative problems appears to lag both in status and prestige. It does not figure extensively in listings of research awards. Its spokesmen constitute no more than a handful of observers. Numerically superior by far are the so-called value-free social scientists. Behaviorist approaches to international-relations theory are currently in vogue. Nevertheless, the need for serious and exacting normative thinking is ever more clear.

Id. at 105.

judgments about interventionary activities. But control of intervention also requires development of the procedures and institutions for securing compliance with non-intervention rules. Concern with the institutional weaknesses of the international system affecting the control of intervention is particularly important in view of the inadequacy of present institutions and the relative neglect of the institutional side of the problem.

In accordance with these suggestions, it will be helpful first briefly to orient ourselves in the current theory concerning the causes, conditions and course of intrastate change, the systemic factors influencing external interference, and the organization of the world community to respond to claims of intervention; second to attempt clarification of the basic community policies at stake in intervention; next to discuss the principal interventionary problems organized by claims which raise common policies and are affected by common conditioning factors; then to examine the institutional weaknesses of the international system affecting the control of intervention and to make recommendations for improvement; and finally to evaluate past standards and proposals for the control of intervention and to suggest new alternatives.

II. THE PROCESSES OF INTRASTATE CHANGE, EXTERNAL INTERFERENCE, AND DECISION AS CONTEXT

The broadest context in which claims of intervention in internal conflict are presented and decided includes the process of intrastate change, the process of external interference, and the international legal process. A brief thumbprint of each is presented here more by way of illustration of the range of relevant variables than as a detailed exploration of all the important features of the context.

A. THE PROCESS OF INTRASTATE CHANGE

For convenience in analysis, the process of intrastate change will be explored in terms of the *participants* in intrastate change, the *objectives* of the participants in seeking change, the *situations* in which the change takes place, and the *strategies* by which the changes occur.

Participants

A threshold problem concerning the process of intrastate change is deciding when change is internal to a state and when it is international. For example, was the Algerian War internal to France or international? Is the Vietnamese War internal to Vietnam or international between North and South Vietnam? Is the Nigerian War internal to Nigeria or international between Nigeria and Biafra? Similarly, problems of delimiting the relevant entity arise with respect to events in Anguilla, the Congo, Rhodesia, and the divided states of Germany, China, and Korea. Since characterization as internal or international may have important legal consequences, it should be rooted in the policies at stake in interventionary situations.

That is, characterization for a particular legal purpose should be based on the effect on self-determination, protection of human rights, and maintenance of world order resulting from the characterization. For example, in the Nigerian War the most critically affected policy seems to be self-determination, and consequently the principal issue is substantially one of the genuine demands and identifications of the people of Biafra balanced against the impact a separate Biafra would have on the remainder of Nigeria (minimum human rights may also be seriously threatened in the Nigerian War). In divided country conflicts, on the other hand, the most critically affected policy seems to be the maintenance of world order, and consequently the principal issue is more the threat to the stability of the international system in treating the two competing entities as one.[27]

Objectives

The objectives of the participants in the process of intrastate change vary widely. In pursuit of maximization of their values they may be a small group of adventurers competing for personal power, idealists seeking modernization of a neo-feudal system or an end to a social system based on racial discrimination, governmental officials seeking greater internal decision making autonomy, or political activists dedicated to major structural changes through implementation of a political ideology. In many of the nations of the underdeveloped world, as well as in some nations of the developed world, government may be autocratic or totalitarian, socially unresponsive to the needs of the people, unconcerned with minimum human rights, or only incompletely centralized. The presence of a large number of governments in one or more of these categories assures the generation of great demand for internal change.

Situations

Situations in which intrastate changes in authority structures frequently occur and may conveniently be grouped include the breakaway colony, the war of secession, the cold-war divided nation conflict, and the competition for internal authority structures. This last category includes such diverse situations as the palace coup, the sudden collapse of organized government, and the prolonged revolution against the governing elite. The range of situations in which major internal structural changes occur suggests the futility of seeking to control intervention in internal conflict through one all-encompassing rule.

Strategies

It is useful to remind ourselves in a study on intervention in internal conflict that probably most intrastate change occurs non-vio-

27. For development of this point in the context of the Vietnam War, see Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 YALE L.J. 1051, 1055 (1967).

lently through economic, political and ideological change. It is commonplace for political power to shift peacefully through elections or other institutional procedures; and certainly such non-coercive change should be preferred. But since intervention frequently takes place in revolutionary situations and involves claims of interference with the right to self-determination through revolution, it is important that we understand the nature of revolution and civil violence. Although there are still great gaps in our understanding, an increasing number of works provide useful insight into the revolutionary process.[28]

Crane Brinton, in his classic study of the English, French, Russian and American revolutions, first published in 1938, approaches the problem of revolution from an historical perspective.[29] Rather than attempting isolation of the causative factors in civil violence, Brinton describes the phases of revolution evident in these four instances. He cautions, however, that the type of revolution exemplified by these four is but one type, and that generalizations on the basis of this type may not prove accurate in dealing with other types.[30] He also points out that not all revolutions are movements on the left, citing the fascist revolutions in Germany and Italy which brought Hitler and Mussolini to power.[31]

Brinton describes five symptoms of revolutionary societies which emerge as tentative uniformities from the English, French, Russian and American revolutions.[32] First, the societies were economically on the move and the revolutionaries were not suffering from crushing oppression. Rather, "revolutionary movements seem to originate in the discontents of not unprosperous people who feel restraint, cramp [and] annoyance . . . ." [33] Second, revolutions have an element of class conflict. It is not just a simplistic have and have not conflict, but more an expectations gap. Paradoxically, revolutions are more likely when social classes are rather close together than when they are far apart. Third, there is a widespread disaffection of the intellectuals from the governing elite. Fourth, for whatever the reason, whether corruption or rapid change in the environment, existing governmental machinery is inefficient. And fifth, the established elite suffers disaffection from within and increasing political ineptitude.

28. *See generally* H. ARENDT, ON REVOLUTION (1963); C. BRINTON, THE ANATOMY OF REVOLUTION (rev. ed. 1965); C. JOHNSON, REVOLUTIONARY CHANGE (1966); C. LEIDEN & K. SCHMITT, THE POLITICS OF VIOLENCE: REVOLUTION IN THE MODERN WORLD (1968); G. PETTEE, THE PROCESS OF REVOLUTION (1938); Gottschalk, *Causes of Revolution*, 50 AM. J. SOC. 1 (1944); Gurr, *Psychological Factors In Civil Violence*, 20 WORLD POLITICS 245 (1967); *Hearings on The Nature of Revolution, Before the Senate Comm. on Foreign Relations*, 90th Cong., 2d Sess. (1968).
29. C. BRINTON, THE ANATOMY OF REVOLUTION (rev. ed. 1965).
30. *Id.* at 262.
31. *Id.*
32. *Id.* at 250-53.
33. *Id.* at 250.

Apparently in the ripples they spread, revolutions can have a major unsettling effect on the international system. Brinton points out that revolutions are frequently accompanied by a kind of messianic zeal spilling over into foreign wars to spread the gospel.[34] And with respect to the role of force in successful revolutions Brinton says:

> [W]e may suggest in very tentative and hypothetical form the generalization that no government has ever fallen before attackers until it has lost control over its armed forces or lost the ability to use them effectively—or, of course, lost such control of force because of interference by a more powerful foreign force, as in Hungary in 1849 and in 1956, and conversely that no revolutionists have ever succeeded until they have got a predominance of effective armed force on their side.[35]

Louis Gottschalk, writing in 1944, postulated three complexes of factors which may cause revolution.[36] First, "a demand for change, . . . itself the result of (a) widespread provocation and (b) solidified public opinion . . .," [37] second, "a hopefulness of change, which is itself the result of (a) a popular program and (b) trusted leadership," [38] and third, which was regarded as the necessary immediate causes of a revolution and . . . to know why revolutions, when they stressed the multiple causation of revolution and particularly made the point that "provocations alone do not create revolutions.[39] If they did, we should always be having revolutions, for some of them are constantly to be found in human society. . . ." [40]

Chalmers Johnson, in a recent book on *Revolutionary Change*,[41] approaches the problem from a social systems perspective. He seeks to identify "a theoretical formulation of the necessary and sufficient cause of a revolution and . . . to know why revolutions, when they do occur, sometimes succeed and sometimes fail." [42] Johnson answers this query with a theoretical formulation which postulates two necessary causes and a third sufficient cause of revolution. The first necessary cause is "a disequilibrated social system—a society which is changing and which is in need of further change if it is to continue to exist." [43] The change can occur in the values of society or in its environment, and can be either progressive or regressive, but must lead to a dissynchronization between values and environment. Johnson also indicates that the one characteristic of a disequilibrated

34. *Id.* at 213.
35. *Id.* at 89-90.
36. Gottschalk, *Causes of Revolution*, 50 AM. J. SOC. 1 (1944).
37. *Id.* at 7.
38. *Id.*
39. *Id.*
40. *Id.* at 5.
41. C. JOHNSON, REVOLUTIONARY CHANGE (1966).
42. *Id.* at 90-91.
43. *Id.* at 91.

social system which most contributes to revolution is "power deflation," or the lessening of the power based on popular expectation of legitimacy of the status-holders in society and the resulting increased necessity to resort to force to maintain the system.[44] Although it largely contradicts the popular myth, Johnson suggests, as does Gottschalk, that social problems alone or a social system in disequilibrium can never in themselves be sufficient causes of revolution.[45]

A second cluster of necessary causes is described by Johnson as:

> the quality of the purposeful change being undertaken while a system is disequilibrated. This quality depends upon the abilities of the legitimate leaders. If they are unable to develop policies which will maintain the confidence of nondeviant actors in the system and its capacity to move toward resynchronization, a *loss of authority* will ensue. Such a loss means that the use of force by the elite is no longer considered legitimate, although it does not necessarily mean that a revolution will occur at once.[46]

Johnson's third and "sufficient" cause of revolution "is some ingredient, usually contributed by fortune, which deprives the elite of its chief weapon for enforcing social behavior (*e.g.*, an army mutiny), or which leads a group of revolutionaries to *believe* that they have the means to deprive the elite of its weapons of coercion." [47] He refers to these causes as "accelerators," and indicates that they are the principal factors affecting whether or not the revolutionaries will succeed.[48] The three types of accelerators given by Johnson are factors directly influencing the effectiveness of a system's armed forces, ideological beliefs about an effective way to overcome the elite's armed forces, and special operations launched against the armed forces by a band of revolutionaries.[49]

Another useful theoretical treatment of civil violence is that of Ted Gurr, who explores the psychological factors in civil violence from a frustration—aggression perspective.[50] Although Gurr does not reject the relevance of the theoretical work based on critical features of the social structure, he takes the position that the most fruitful model of civil violence will be based on the psychological characteristics of man's reaction to society.[51] Using such a model Gurr advances eleven propositions for predicting the likelihood and magnitude of civil violence. The eleven are divided into two principal groupings. These groupings are propositions about "*instigating*

44. *Id.*
45. *Id.* at 92.
46. *Id.* at 91.
47. *Id.*
48. *Id.* at 91-92.
49. *Id.* at 99.
50. Gurr, *Psychological Factors In Civil Violence*, 20 WORLD POLITICS 245 (1967).
51. *Id.* at 245-47, 251.

variables, which determine the magnitude of anger, and . . . *mediating variables*, which determine the likelihood and magnitude of overt violence as a response to anger." [52] The interrelationship between the two groupings determines the likelihood and magnitude of violence.

Propositions in the first grouping are related to Gurr's basic premise that "the necessary precondition for violent civil conflict is relative deprivation, defined as actors' perception of discrepancy between their *value expectations* and their environment's apparent *value capabilities*." [53] Propositions in this grouping include: severity of relative deprivation increases the likelihood of violence; [54] strength of anger varies "inversely with the extent to which deprivation is held to be legitimate;" [55] and strength of anger varies "directly with the proportion of all available opportunities for value attainment with which interference is experienced or anticipated." [56]

Propositions in the second grouping are related to Gurr's observation that civil violence as a response to anger can be influenced by a number of mediating variables reflecting the degree of social control or facilitation of violence.[57] Propositions in this category include: "Any decrease in the perceived likelihood of retribution tends to increase the likelihood and magnitude of civil violence;" [58] the likelihood of violence varies "inversely with the availability of institutional mechanisms that permit the expression of nonviolent hostility;" [59] and the likelihood of violence varies "directly with the availability of common experiences and beliefs that sanction violent responses to anger." [60]

In simplified form, Gurr's model for predicting the likelihood and magnitude of civil violence has as principal inputs the society's value expectations, including intensity of commitment to values and legitimacy of deprivation, the society's value capabilities, including degree of deprivation and proportion of opportunities interfered with, the society's control of violence, including retribution and institutionalization of peaceful channels of protest, and the society's facilitation of violence, including its beliefs and traditions sanctioning violence.[61] Both the relative deprivation inputs and control of violence inputs are critical.

Though Johnson and Gurr approach the problem of revolution from the different perspectives of macro and micro theory, they seem to be in substantial agreement on a number of critical causa-

52. *Id.* at 251.
53. *Id.* at 252-53.
54. *Id.* at 254.
55. *Id.* at 260.
56. *Id.* at 263.
57. *Id.* at 263-65.
58. *Id.* at 265.
59. *Id.* at 269.
60. *Id.* at 271.
61. *Id.* at 252.

tive factors. Both seem to agree that a gap between value expectation and realization is an important causative factor, that expectations about legitimacy of deprivation or authority of the depriving elite's use of force are significant, and that perception of the likelihood of the application of effective control measures is a critical variable. An important tenet of both theories is that civil violence is not simply a function of poor material conditions or an underdeveloped society producing few goods and services, but is related in a number of critical ways to the psychological attitudes of the participants. These attitudes include subjectivities about relative deprivation, legitimacy of the ruling elite's use of force, legitimacy of the revolutionaries' use of force, and appraisal of the revolutionaries' chances to escape punishment or overcome the control resources of the ruling elite. Gottschalk's and Brinton's work would also seem to substantially support these conclusions.

Although current theories of civil violence are useful, there is much of relevance to the control of intervention that they do not answer.[62] For example, what is the likelihood of minority seizure of control in revolutions and what factors predispose to minority control? Must a majority of the populace support the revolutionaries for the revolution to succeed? Under what conditions might outside assistance alter this? What conditions lead to prolonged conflicts highly destructive of societal values instead of swift victories or palace coups? What is the effect of external assistance by various methods to one side or the other in terms of effect on destructive violence or minority seizure of control? To what extent do successful or unsuccessful revolutions foster other revolutions by a demonstration effect? What effect do revolutions have on the stability of the international system? The answers to these and other questions as yet only imperfectly understood might materially assist in formulating control measures for intervention.

There is also a growing body of data on the conditions for successful guerrilla insurgency and counter-insurgency operations.[63]

62. Ted Gurr does suggest that his frustration—aggression model provides a ready model for investigation of the effects of foreign intervention. And he hypothesizes that:

> intervention on behalf of the deprived is likely to strengthen group support . . . and may, as well, heighten and intensify value expectations . . . . Foreign assistance to a threatened regime is most likely to raise retribution levels . . ., but may also alter aspects of value capabilities . . . and strengthen justification for violence among the deprived, insofar as they identify foreigners with invaders . . . .

Id. at 277.

63. *See, e.g.*, R. DEBRAY, REVOLUTION IN THE REVOLUTION? (1967); J. PAGET, COUNTER-INSURGENCY OPERATIONS (1967); Kinley, *Development of Strategies in a Simulation of Internal Revolutionary Conflict*, 10 AMERICAN BEHAVIORAL SCIENTIST 5 (November, 1966); Pye, *The Roots of Insurgency and the Commencement of Rebellions*, in INTERNAL WAR 157 (H. Eckstein ed. 1964). Since the perspectives from which they are written vary from the

Although insurgency theory is interrelated with revolution theory, since insurgency may be externally initiated, the two theories need not be congruent. It is widely agreed that successful counter-insurgency operations require a ratio of government forces to insurgents of at least 10 to 1. The force ratio in the British counter-insurgency operation in Malaysia is said to have been on the order of 50 to 1. Fidel Castro is even said to have maintained that the Cuban insurgents became invincible when they reached a ratio of 500 government soldiers to 1 insurgent.[64]

It also seems to be generally accepted insurgency theory that insurgent operations against an entrenched elite backed by a modern army will be a long drawn out conflict. The prolonged insurgencies in Algeria, Malaya, Yugoslavia, and Vietnam would seem to bear this out. In addition, it is generally accepted that nonmilitary strategies may also have a critical bearing on the resolution of an insurgency, whether employed on behalf of the insurgents or the government. In fact the importance of political and social reform in successful counter-insurgency operations is so much a part of the dominant myth about insurgency that it may be in danger of being overemphasized.

B. THE PROCESS OF EXTERNAL INTERFERENCE: SOME SYSTEMIC FACTORS

Just as change within a state is a product of the totality of forces at work internally, the process of external interference occurs within a broader context and is shaped by the systemic variables of the international system.[65] In time, it may be expected that a theory of intervention comparable to those of revolution for the internal arena, which will seek to explain interventionary phenomena in terms of critical systemic variables, will emerge. In fact, Oran Young and several others have already suggested a number of systemic factors which seem to have a high correlation with periods of greater interventionary activity. Young defines intervention nominally (in the fourth sense) as "organized and systematic activities across recognized boundaries aimed at affecting the political authority structures of the target." [66] He divides systemic factors contributing to high levels of intervention within a system into those making for *opportunities* and those making for *motivation.* As opportunity factors he includes disparity in effective power among the

revolutionary to the counter-revolutionary, studies on insurgency theory are often more polemical than the literature on civil violence. Régis Debray's *Revolution in the Revolution,* which has been described as a primer for Marxist insurrection, is an example.

64. R. DEBRAY, *supra* note 63, at 76.

65. *See generally* INTERNAL WAR, *supra* note 63; INTERNATIONAL ASPECTS OF CIVIL STRIFE (J. Rosenau ed. 1964).

66. Young, *Intervention and International Systems,* 22 J. INT'L AFF. 177, 178 (1968).

international actors, the structure of the international system (unipolar, multipolar or other), the internal viability of the actors, and the level of interdependence within the system. He also indicates that the impact of the structure of the international system may be altered by the degree of collusion among major powers and by the nature of prevailing military technology.[67] As motivational factors he includes asymmetrical distribution of values, more rapid change in effective power than in other values, the existence of crusading ideologies, and high levels of competition among competing public order systems.[68]

Because of the pervasive influence of the larger international context on the processes of intrastate change and external interference, it seems useful briefly to examine the features of the present international system most relevant to the control of intervention in internal conflict. For convenience in analysis, these features will be explored in terms of the *participants* in the system, the *objectives* with which the participants act, the *situations*, spatial and temporal, in which the interaction takes place, the *base values* or resources available to the participants, the *strategies* employed by the participants in their interactions, the immediate *outcome* of the process of interaction, the longer range *effects* of the interaction on the international system, and the broader context of *conditions* in which transnational interactions take place.

Participants

A few years ago, Morton Kaplan hypothesized a model of "a loose bipolar system" which seemed to describe the then international system.[69] Today it might be more accurate to speak of a loose bipolar system getting looser. The East-West split between the Soviet Union and the United States remains the dominant feature of the system, but the two camps no longer look as monolithic as they once did. In the Communist camp, Peking and to some extent even such smaller nations as Cuba and Yugoslavia go their own way and peddle their own brand of ideology. In fact, the recent Moscow Conference of Communist Parties declared "there is no longer a center of the Communist movement." [70] Similarly, in the Western camp, the increased nationalism of De Gaulle's France (it seems premature to speak of Pompidou's France) has at least temporarily driven a wedge into the alliance of the Western democracies. The Soviet invasion of Czechoslovakia seems temporarily to have retarded this centrifugal force in the Western camp, but what its long range effect will be remains to be seen.

Somewhat qualifying this break-up of the monoliths is the ques-

67. *Id.* at 180-82.
68. *Id.* at 182-84.
69. *See* Kaplan, *Intervention in Internal War: Some Systemic Sources*, in INTERNATIONAL ASPECTS OF CIVIL STRIFE, *supra* note 65, at 92, 93.
70. TIME, June 27, 1969, at 26.

tion of the degree of cooperation on vital issues, despite ideological differences, among the members of each camp. If the myth of monolithic Communism has unduly influenced American foreign policy, we should be careful lest we create a counter-myth which fails to take into account cooperation on vital issues and even increased competition against the West.

The international system is also characterized by the emergence of new power blocs, particularly in Asia and Africa, and by a proliferation of new actors. The 51 original members of the United Nations have grown in only twenty-three years to 126; and a large number of mini-states are still in the wings. Most of these newly independent states are former colonies still largely underdeveloped and still undergoing political and economic growing pains. Many, reflecting their background of crazy-quilt colonial development, may never be economically or politically viable as presently constituted. Even the more fortunate seem to have a built-in social disequilibrium accentuated by extreme poverty and efforts at rapid modernization.

The impact of these features on the level of intervention is substantial. The great increase in the number of third world nations, coupled with their instability, practically ensures a high level of civil violence and a high turn-over in authority structures. Many simply await the "accelerator" factors before bursting into violence. Furthermore, the high level of competition between the ideologies of the East and West, and even among the participants within each grouping, tends to turn such nations into ideological battlegrounds.

Another feature of the international system which is particularly important for the control of intervention is the present imperfect level of international organization. The United Nations and regional organizations such as the Organization of American States (OAS), the Organization of African Unity (OAU), the North Atlantic Treaty Organization (NATO), the Southeast Asian Treaty Organization (SEATO), the Central Treaty Organization (CENTO), the Arab League, and the Warsaw Pact may play important roles both as intervening actors and as institutions for the control of impermissible intervention. The United Nations, however, mirrors the existing splits within the world community and in dealing with serious public order issues is substantially dependent upon great power unanimity. To date, its major role in internal conflict, as typified by the United Nations Operation in the Congo (ONUC) and by the United Nations Peace-Keeping Force in Cyprus (UNFICYP), has been dependent as well on the consent of the state concerned and has been fairly rigidly limited to peace-keeping rather than peace-making operations. Although it has played some role in most interventionary situations, such as those in Hungary, Czechoslovakia, Lebanon, Yemen, and the Dominican Republic, for the most part it has not been able to deal effectively with either these situations or the more dangerous major power competitive interventions as in Greece, Laos, and Vietnam.

Even as presently constituted, though, the United Nations may have a number of important roles in the control of intervention which are just emerging. For example, the recent General Assembly resolutions in effect authorizing members to assist insurgents in Southern Rhodesia,[71] South Africa and South-West Africa,[72] and the Portuguese colonies [73] suggests an important legitimizing role in recognizing one or another competing faction. There is also precedent for UN fact-finding missions in situations of internal conflict, as in the Greece, Laos, Lebanon, and Yemen investigations, but as yet the record is far from satisfactory in this task. Finally, of course, the office of the Secretary-General has unique capability for mediation and settlement assistance.

In evaluating proposals for the control of intervention one should be on guard against claims that either assume an unrealistic omnipotence for the United Nations out of an excess of idealistic zeal or ignore the real potential for control which the organization already possesses or which could be cultivated with a little effort.

Since regional organizations reflect a less universal and more homogeneous membership than does the United Nations, and since they are more apt to be dominated by a great power, there is a substantial and largely unresolved question as to the limits of legitimate independent action by such organizations. Certainly the Arab League or the OAS cannot justify coercive action against Israel or Cuba simply on the basis of collective regional determination, and no one is impressed with assertions of greater legitimacy in the invasion of Czechoslovakia simply because the collective machinery of the Warsaw Pact was employed. In many situations short of these "horribles," however, regional organizations may have a significant role to play in the control of internal conflict. Although the parameters of legitimate regional action and the relationship of regional organizations to the United Nations are as yet unclear, interventionary claims by regional organizations, as with the OAS in the Dominican Republic and the OAU in Rhodesia, seem to be here to stay.

Objectives

A critical feature of the present international system is the existence of fundamentally different public order systems and sub-systems. Each is espoused by its champion in Washington, Paris, Moscow, Peking or Havana. This intense ideological competition between East and West, and among the Communist states, is a principal motivation for what is probably the most spectacular and dangerous

71. G.A. RES. 2262, 22 U.N. GAOR, Supp. 16, at 45-46, U.N. Doc. A/6716 (1967).
72. G.A. Res. 2307, 22 U.N. GAOR, Supp. 16, at 19-20, U.N. Doc. A/6716 (1967) (South Africa); G.A. Res. 2372, 22 U.N. GAOR, Supp. 16A, at 1-2, U.N. Doc. A/6716/Add.1 (1968) (South-West Africa).
73. G.A. Res. 2270, 22 U.N. GAOR, Supp. 16, at 47-48, U.N. Doc. A/6716 (1967).

form of intervention today. Some of these cold-war interventions are prompted by an aggressive proselytizing spirit, as is illustrated by Havana's attempts to foster guerrilla insurgencies throughout Latin America, and others by a determined defensive stance, as seems the case with the United States policy of containment.

One feature of the present world which suggests the likelihood of even higher levels of interventionary activity is the contemporary growth in militant revolutionary and interventionary ideology. This growth in militance seems in part a product of competition among the major Communist centers of ideology in Moscow, Peking, and Havana, and in part a worldwide growth in attitudes condoning use of violence for attainment of social justice. Régis Debray's recent exposition of the Havana ideology in his *Revolution in the Revolution*.[74] illustrates the revolutionary fervor of some Marxist theorists who argue for abandonment of united front tactics in favor of uncompromising protracted guerrilla insurrection. The recent Soviet "Breshnev Doctrine" [75] upholding the right of intervention to maintain the ideological purity of any socialist regime, although radically different from that of Régis Debray, further indicates the growth in interventionary attitudes. It remains to be seen whether this new Soviet doctrine of "socialist self-determination" is an aberrational doctrine and whether it is intended for countries other than those in Eastern Europe already dominated by the Soviet Union.

A second major contemporary ideological motivation for intervention is anti-colonialism. Themselves products of the breakdown of the colonial system after World War II, the third world nations have called for assistance to insurgent groups in colonial areas. Algeria may be classified as an example of an anti-colonial struggle which received substantial assistance in this manner. Areas of current applicability include South-West Africa and the Portuguese colonies in Africa.

A third source of motivation for contemporary intervention, which sometimes overlaps anti-colonialism, is the existence of regimes which deny self-determination on a racial basis. The activities of African states and the OAU in assisting insurgencies within Rhodesia, South Africa and South-West Africa are perhaps the chief contemporary examples.

Other sources of motivation for civil violence and intervention include regional or religious unity, as in the Pan-Arab movement; modernization of feudal societies, as was a factor in Egyptian military assistance to the Republicans in Yemen; the desire for increased influence or access to oil resources or other wealth, as perhaps is the case with the alleged French aid to Biafra; and a crazy-quilt pattern of newly independent states lacking homogeneous ethnic, linguistic, or cultural backgrounds.

74. R. DEBRAY, *supra* note 63.

75. *See* Pravda Article Justifying Intervention in Czechoslovakia, 7 INT'L LEG. MATERIALS 1323 (1968).

Situations

The level of interdependence in the global community is high and rising. The transportation and communications revolutions of recent decades have increased the level of global interaction explosively. Felt interdependencies are real, as is reflected by the mutual security arrangements with forty-two countries to which the United States is currently a party.[76] If fortress America concepts were attractive in an earlier day, they are totally unrealistic in the kind of world in which we now find ourselves, and the same is true for other major powers. To suggest that there is no turning back from broad international involvement, however, is not to suggest neglect of the hard questions as to what interests are legitimate and how legitimate interests may best be protected, whether they be those of the United States or of any other country. Thus, the issue is not whether the Viet Cong will stage an amphibious landing in Los Angeles unless stopped in Vietnam, but is instead a fundamental question of how the United States can best protect legitimate interest elsewhere which may have real effects within the United States.

The increasing interdependence throughout the world seems to be a significant factor in the increase of foreign involvement in internal conflicts. It also seems to carry with it cultural and technological exchange that probably accelerates social change, which in turn increases the likelihood of civil violence. It may also widen the expectations gap as persons in Southern underdeveloped countries become increasingly aware of the standard of living in the more industrialized societies of the Northern hemisphere.

The degree of protection which the international system accords to legitimate interests, and the institutional structures available for achieving needed change peacefully, are factors which also seem significant for the level of interventionary activity within a system. Although the present system has a plethora of specialized international agencies which do make an impact on both the protection of legitimate interest and needed social change, present institutions are rudimentary given the magnitude of the problems. The history of present functional agencies and regional communities is a recent one, though; and the degree of international co-operation achieved by them is a bright spot, so much so that the functional school of international law theorists emphasizes an "international law of co-operation." [77] As specialized and regional organizations expand their competence and are able to cope more effectively with needed change, they may work a significant reduction in interventionary activity.

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76. STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 90TH CONG., 1ST SESS., COLLECTIVE DEFENSE TREATIES 1 (Comm. Print 1967).

77. *See* W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 60-64 (1964).

Base Values

One feature which Oran Young suggests may be an important factor in the extent of interventionary activity within an international system is the degree of discrepancy in effective power among the actors. The contemporary international system exhibits a great range in this regard. Major actors, such as the United States and the Soviet Union, maintain a military establishment far larger than that of other actors in the system, although it may also be true that in terms of usable power many other states maintain a military apparatus sufficient to deter or at least discourage military action against them. The armies of North Vietnam, North Korea, and Cuba are but three examples. Moreover, it is arguable that much of the intervention which otherwise might result from substantial discrepancies in effective power is prevented by competitive pressures among the superpowers. In areas of greater freedom of action, as in Eastern Europe for the Soviet Union and Latin America for the United States, there may be greater likelihood of such overt intervention as occurred in Hungary and Czechoslovakia in Eastern Europe and Cuba and the Dominican Republic in the Caribbean. In other areas of the globe where competitive pressures are more evident, the result may be an increase in covert intervention but a great reluctance to intervene openly. The observation that the most dangerous type of intervention is the competitive intervention between superpowers not only seems accurate but is also mirrored in the patterns of intervention of the superpowers. The growth of the guerrilla insurrection as a strategy of intervention also seems to have increased the actors able to engage in interventionary activities, for the resources allocated to such indirect forms of intervention need not be major.

A second factor in resource allocation which may play an important role in the amount of interventionary activity is the pattern of distribution of all other values, particularly wealth, within the international system. The present international arena exhibits an asymmetrical distribution of values, a pattern which affects all regions, but which is most noticeably a North-South split between the relatively industrialized nations of the North and the third world nations of Africa, Asia and Latin America. If the relative gap between have and have not nations continues to widen with the resulting increase in unrealizable expectations, it can be expected to foster increased demands for drastic restructuring which may lead to increased revolutionary and interventionary activity.

The degree of internal stability of the actors within the international system seems to be another factor affecting the degree of interventionary activity. In this regard, the built in functional disequilibrium of many third world states, and the concern over the viability of existing colonial boundaries, heighten the problem. It is particularly relevant that the widespread African antipathy to secessionist movements, as in Biafra and Katanga, reflects the almost universal African concern that if a secessionist movement succeeds

anywhere on the continent it may set off a chain reaction affecting a host of other vulnerable entities only nominally nations. The African concern is also heightened because present fragmentation on the continent may already be greater than can be supported by economic realities.

It may also be relevant to observe that rigid implementation of totalitarian controls, as is the pattern in most Communist countries (Yugoslavia and briefly Czechoslovakia to the contrary), seems to have effectively prevented revolutionary change. Spain and Haiti are non-Communist examples. In the current East-West ideological conflict, the thoroughgoing totalitarian regimes have so far exhibited relative immunity to guerrilla strategies.

Strategies

The international system exhibits a wide range of interventionary strategies. If intervention is defined broadly as any coercive transnational interaction, then such interactions may be carried out by any method, military, diplomatic, economic or ideological. But by its nature military intervention remains the most critically coercive. Patterns of military intervention in the contemporary system include arms sales or grants, military training missions at home and abroad, initiation of or assistance to guerrilla insurgencies, aid to exile groups, assistance of military advisory or transportation units, the commitment of regular combat units as by both sides in Vietnam, and outright invasion as in Czechoslovakia.

One development in strategies affecting the likelihood of interventionary activity is the shift advocated by some Marxist theorists from emphasis on political efforts, typified by the united front, to emphasis on the guerrilla insurgency. Régis Debray, who seems to be a spokesman primarily for the Cuban style of revolution, demonstrates this shift when he writes:

> [A]t the present juncture, the principal stress must be laid on the development of guerrilla warfare and not on the strengthening of existing parties or the creation of new parties.
>
> That is why insurrectional activity is today the number one political activity.[78]

It should not be assumed that this militant Havana line is necessarily that of Moscow, or even of Peking. The point is simply to highlight one insurrectionary line which calls for widespread guerrilla insurgency as the first order of business. Such attitudes can, as Chalmers Johnson theorizes, provide a powerful "accelerator" effect which may trigger revolution. The insurrectionary movements in Guatamala, Columbia, and Venezuela seem to owe their existence, at least in part, to this newer line. Recent events in Uruguay, where a small band of revolutionaries is harassing the militarily weak

78. R. DEBRAY, *supra* note 63, at 116.

Uruguayan government, suggest an even newer strategy of urban rather than rural guerrilla activity which may have even more profound implications for the spread of insurrectionary activity. This shift toward guerrilla insurrections as a strategy for assuming power also seems to have been greatly influenced by the guerrilla successes in Yugoslavia, China, Algeria, Cuba, and North Vietnam.

Outcomes

The outcome of this process of external interference is the high level of intervention, both in frequency and intensity, noted at the outset of this paper. Though military intervention for the purpose of collecting debts or enforcing international obligations may have declined since the nineteenth century, military intervention motivated by ideological competition for political authority seems to have substantially increased. This is an increase to which all major international actors as well as the newly independent third world nations have contributed. Their patterns of participation, though, have varied widely, ranging through retention of former colonies, preservation of spheres of influence, mutual defense, anti-colonialism, and militant proselytizing of a particular political system.

Effects

Intervention can itself be a significant factor affecting the level of interventionary activity within a system. Successful or even protracted guerrilla movements (as in Vietnam today) may foster other guerrilla movements by demonstration, an effect similar to the wave of fascist regimes which came to power just prior to World War II or the trends toward democratic regimes and against colonialism shortly after the War.[79]

The interventionary conduct of actors in the system may also affect the level of interventionary activity in that the conduct of states is one of the prime sources of authoritative expectations as to the permissibility of conduct within the system. To intervene in one situation is to concede the legitimacy of reciprocal conduct engaged in by one's competitors. If used without critical examination of what cases are alike, this reciprocity principle may cloud the illegitimacy of even an unlike intervention. Thus did Senator Eugene McCarthy deemphasize Soviet actions in Czechoslovakia by reference to American actions in Vietnam and the Dominican Republic.[80]

Intervention may also alter the balance of power in such a way as to increase the chances of future intervention, as Czechoslovakia may have done. It may result in intervention subsidiary to an on-going conflict, as currently seems to be the case with North Vietnamese forces in Laos and Cambodia and the insurgency in Thailand. And it

79. For a brief discussion of this "demonstration effect," see Deutsch, *External Involvement In Internal War*, in INTERNAL WAR, *supra* note 63, at 100-01.

80. *See* N.Y. Times, Aug. 22, 1968, at 22, col. 1.

may result in the coming to power of militantly interventionist regimes. In fact, with the exception of Yugoslavia, regimes which have come to power by a protracted guerrilla war in which they received at least some outside assistance seem to be among the most militantly interventionist regimes. They include North Vietnam, China, Algeria and Cuba.

Conditions

One overriding condition affecting the international system which has critical consequences for the control of intervention is the present nuclear stalemate. The development of nuclear weapons and systems for their delivery against major population centers has rendered all out war an unthinkable event which might both wipe out a substantial portion of mankind and wreak destructive genetic aftereffects into the distant future. With the deployment of ABM and MIRV systems the nuclear arms race may be entering an even more dangerous and unstable period. Yet the nuclear balance is such that it is unlikely that any major participant will develop a first strike capability; in fact the maintenance of the system may depend on this. Absent critically needed agreement on effective arms control the nuclear stalemate is likely to continue.

The effect of this stalemate on interventionary practices has been mixed. On the one hand, the threat of all out nuclear war has probably deterred interventions in high risk areas felt to be under the hegemony of a nuclear adversary, as seems to be the case with United States policy in Eastern Europe and Soviet policy in Latin America. But on the other hand, it has also provided a nuclear umbrella which may have encouraged some forms of limited war and indirect confrontation. Clearly, the danger of escalation has also rendered the competitive intervention between nuclear adversaries or their proxies the most dangerous form of contemporary intervention. The existence of this nuclear threat and the particularly acute danger of competitive interventions between nuclear adversaries suggests the overriding importance of the need both to avoid nuclear war as a first priority goal of non-intervention norms, and to formulate special rules aimed at high risk areas, such as the cold-war divided nations.

Although the global legal process does not exhibit the degree of centralization and control characteristic of national systems, there is an effective global constitutive process which creates authoritative expectations concerning the legitimacy of interventionary activities.[81] This more diffuse legal system is shaped by the practices of states, resolutions of the United Nations. the writings of publicists, and statements of the representatives of nation states and international organizations. The structure of the international legal system and the expectations of legitimacy which flow from it are themselves conditioning factors which influence the level of intervention-

81. The most comprehensive description of this global constitutive process is McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision* (pts. 1-2), 19 J. LEGAL ED. 253, 403 (1967).

ary activity within the international system and which must be taken into account in formulating rules for the regulation of intervention. The next section will briefly explore the organization of this international legal process and the framework of rules which have emerged for the control of intervention in internal conflict.

C. THE ORGANIZATION OF THE INTERNATIONAL LEGAL PROCESS TO RESPOND TO CLAIMS OF INTERVENTION

The international legal process is marked by a lack of centralization and, with respect to major public order issues, a weak sanctioning process. The lack of centralization extends through the range of authority functions which must be performed by any complete legal system. Thus, with respect to the prescribing function there is no central legislature with the authority of those with which we are accustomed in the domestic legal order. With respect to the applying function there is only a judiciary lacking in compulsory jurisdiction and which at least in major public order disputes is usually ignored. And with respect to the sanctioning process there is no powerful executive controlling an international police force. But these great differences between the international and domestic legal systems should not obscure the great similarity of functions being performed in both. That the international system is more diffuse does not make it any less real, only weaker in some respects and harder to describe in all.[82]

Claims of unlawful intervention flowing from the processes of intrastate change and external interference may be presented to a range of decision makers, including the United Nations, regional organizations, the officials of nation states, international legal scholars and many others. Within the United Nations, claims may be presented to the Security Council, the General Assembly or the Secretary General. To the extent that the Security Council is able to respond, members and non-members alike may be bound by its determinations. For the most part, however, the Security Council has not been able to respond in instances of major power disagreement. The aberrational response in the Korean situation resulted from Soviet absence because of a dispute over the exclusion of Communist China from the United Nations; the Congo operation resulted from an initial shared perception by the major powers that United Nations intervention would prove advantageous to their interests. Czechoslovakia and the Bay of Pigs demonstrate the inability to respond against the strong interests of a major power despite clearly unlawful interventions.

The General Assembly of the United Nations has played, through the machinery of the Uniting for Peace Resolution, a modest role in responding to claims of intervention, as the Hungary and Lebanon-Jordan cases illustrate. But the Soviet-French refusal to pay for the

82. For development see McDougal, Lasswell & Reisman, *supra* note 81.

Suez and Congo operations illustrates the limitations of an enlarged General Assembly peace-keeping competence. More importantly, in the Greek and Oman cases the General Assembly called for cessation of assistance to a particular faction in internal conflict, and in recent resolutions concerning Rhodesia, South Africa, South-West Africa, and the Portuguese colonies, the General Assembly has been playing a new role in legitimating assistance to one or another faction in internal conflict.

The Secretary-General may also function as a decision maker responding to claims of unlawful intervention. He may investigate on his own authority (by implication from Article 99 of the Charter), as did Trygve Lie in Greece and Dag Hammarskjold in Laos and Lebanon, or he may carry out fact-finding or observation missions on instructions from the Security Council or General Assembly (pursuant to Article 98), as did U Thant in Yemen and the Dominican Republic. U Thant's peace proposals for the Vietnam War also illustrate a dimension of the decision-making capabilities of the Secretary-General in internal conflict situations.[83]

The United Nations framework in theory provides for community review of breaches of the peace or acts of aggression. For the most part, however, the various organs of the United Nations have demonstrated only modest capabilities in providing community review of allegations of unlawful intervention. The touchstone of effective UN action remains major power agreement, at least in the area of major power concern.

Regional organizations such as the OAS and the OAU add some degree of community review and fact-finding capability, but their committed membership, and in some cases their domination by a superpower, severely limit the usefulness of their determinations.

Suggestions for institutional change which seek to strengthen the present inadequate community review and fact-finding procedures constitute a critical part of any comprehensive framework for dealing with intervention. But absent greater centralization in the international system the officials of nation states will remain the major decision makers responding to claims of intervention. This creates a severe auto-interpretation problem in which national decision-makers must frequently pass on the legitimacy of their own actions. The auto-interpretation problem should not cause us to throw up our hands in despair, however. There is no escape from the problem short of more effective community review; in the absence of such review scholars can attempt to clarify the community interest at stake and can recommend rules and procedures for improved control. International legal scholars and political theorists have in fact been contributing dramatically in the last few years to an understanding of the problem of control of intervention, and their areas of agreement probably overshadow their areas of disagreement. The writings

83. *See generally* L. GORDENKER, THE UN SECRETARY-GENERAL AND THE MAINTENANCE OF PEACE (1967).

of publicists are a source of relatively disinterested community review of allegations of unlawful intervention and as such contribute to community expectations as to impermissible conduct. The extreme *realpolitik* argument that the international system provides no control of intervention both understates the capacity of the international system to respond to claims of intervention and avoids personal responsibility for appraisal of the community interest.

In response to the claims of unlawful intervention presented for decision, the international legal process has established at least two major sets of rules which to some extent vie with one another. The selection of the relevant set of rules is frequently a critical choice point in legal argument about the permissibility of a particular intervention, and their reconciliation is one of the major tasks for intervention theorists.

The first set of rules stems from the United Nations Charter. Basically, the Charter provides that unilateral force may not be used across international boundaries except in defense against an armed attack threatening major values.[84] This Charter proscription embodies the substantial insight of the Kellogg-Briand Pact, critical in the nuclear age, that force not be used in international affairs as an instrument of national policy no matter how great the non-forceful grievance. This framework, although of great importance in condemning the unilateral export of revolution as an instrument of national policy, does not always provide adequate guidance for other interventionary situations. For example, given some degree of indigenous insurgency, the armed attack-defense abstractions of the Charter provide little guidance as to the legitimacy of external assistance at the request of either the recognized government or insurgents. A principal reason is the difficulty involved in determining which faction represents the people of the state. Similarly, the armed attack-defense abstractions provide little guidance in determining the legitimacy of consensual use of force in situations where objectives are other than the influencing of authority structures. The armed attack test of Article 51 of the Charter does seem to have its principal relevance for control of intervention in determining at what point external intervention becomes a covert invasion justifying response against the territory of the intervening state.[85] As a result, the useful reporting requirement of Article 51 has been largely bypassed by states intervening in internal conflict on request. There are, of course, other Charter principles which may provide guidance for some of these situations, such as subjecting unilateral use of force to subsequent community review in the Security Council and the obligation embodied in Article 33 of the Charter to seek peaceful solution to problems.

The second set of international law rules applicable to intervention

84. For refinement of this generalization see M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961).

85. *See* Moore, *supra* note 27, at 1068.

antedated the Charter and has continued to develop under the Charter as a more specific response to the areas in which the Charter provides little guidance. These are the norms of intervention of customary international law. Again, however, like the sometimes complementary Charter generalities, customary law frequently provides little guidance for solution of concrete cases. A principal reason for this is the ambivalence toward intervention within the international system. This ambivalence results in seemingly contradictory proscriptions, such as the General Assembly resolutions proscribing intervention in the affairs of third states and those of African sponsorship recommending intervention to assist insurgent movements in Rhodesia and South-West Africa; Soviet sponsorship of definitions of aggression which proscribe military intervention while promulgating the principle of "socialist self-determination" in the invasion of Czechoslovakia; Indian repudiation of intervention while intervening in Goa for the stated purpose of eliminating colonialism; and OAS non-intervention norms broadly prohibiting intervention in the affairs of states within the hemisphere while proclaiming Communism incompatible with the basic principles of the Organization. These conflicting pronouncements reflect real clashes of interest which distort development of consistent norms.

A lack of "neutral principles" is not wholly the cause of the confusion, however. It is also a lack of clarification of criteria for identifying like cases which should be treated alike (which is perhaps really the heart of what Professor Wechsler was saying in his famous "neutral principles" article).[86] For example, General Assembly resolutions and the work of the International Law Commission on intervention provide few criteria for characterization of like cases, leave most of the hard questions unanswered, and have a tendency to beg the question by relying on such conclusory terms as "aggression," "intervention," and "civil strife." Thus the General Assembly said in Resolution 380 (V) in 1950:

> *The General Assembly* . . . condemning the intervention of a State in the internal affairs of another State for the purpose of changing its legally established government by the threat or use of force,
>
> 1. Solemnly reaffirms that, whatever the weapons used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world . . .[87]

In a more specific though still incomplete and over-simplistic vein the International Law Commission provided in the 1954 Draft Code of Offenses Against the Peace and Security of Mankind:

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86. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

87. G.A. Res. 380, 5 U.N. GAOR, Supp. 20, at 13-14, U.N. Doc. A/1775 (1950).

Article 2. The following acts are offenses against the peace and security of mankind: . . . .

> (4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.
>
> (5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.
>
> (6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State . . . .[88]

And in 1965 the General Assembly simplistically declared in the Declaration on Inadmissibility of Intervention:

> Considering that armed intervention is synonymous with aggression and, as such, is contrary to the basic principles on which peaceful international co-operation between States should be built,
>
> Considering further that direct intervention, subversion and all forms of indirect intervention are contrary to these principles and, consequently, constitute a violation of the Charter of the United Nations, ...
>
> 1. No State has the right to intervene, directly, or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.
>
> 2. . . .[N]o State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State . . . .[89]

The General Assembly and International Law Commission are not the only bodies making vague pronouncements about non-intervention. One of the broadest and vaguest is Article 18 of the Revised Charter of the Organization of American States which provides:

88. 9 U.N. GAOR, Supp. 9, at 11-12, U.N. Doc. A/2693 (adopted by the International Law Commission July 28, 1954).

89. G.A. Res. 2131, 20 U.N. GAOR, Supp. 14, at 11-12, U.N. Doc. A/6014 (1965).

> 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. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.[90]

In addition to the vagueness, incompleteness, and complementarity of such authoritative pronouncements on intervention, another reason for the lack of guidance provided by customary international law is the lack of agreement among publicists as to what the norms are or ought to be. The traditional rule is said to be that it is lawful to assist a widely recognized government at its request, at least until belligerency is attained.[91] Presumably once belligerency is attained it is lawful to aid either side if the assisting state is willing itself to become a belligerent. A competing rule first espoused by Sir William Hall at about the turn of the century,[92] and subsequently echoed by a number of contemporary scholars,[93] is that it is unlawful to assist either the recognized government or insurgents once an insurgency breaks out and the outcome is uncertain. Newer theories espoused by a few scholars or officials also include those proscribing all intervention absent prior United Nations authorization,[94] proscribing tactical assistance only,[95] and legitimating intervention for purposes of wars of national liberation,[96] modernization,[97] anticolonialism,[98] or "social-

90. L. SOHN, BASIC DOCUMENTS OF THE UNITED NATIONS 140, 143 (2d ed. rev. 1968).

91. *See* Borchard, *"Neutrality" and Civil Wars*, 31 AM. J. INT'L L. 304, 306 (1937); Garner, *Question of International Law in the Spanish Civil War*, 31 AM. J. INT'L L. 66, 68 (1937); O'Rourke, *Recognition of Belligerency and the Spanish War*, 31 AM. J. INT'L L. 398, 410 (1937). Professor Friedmann wrote a few years ago:

> What is probably still the prevailing view is that the incumbent government, but not the insurgents, has the right to ask for assistance from foreign governments, at least as long as insurgents are not recognized as 'belligerents' or 'insurgents.'

Friedmann, *Intervention, Civil War and the Role of International Law*, 1965 PROC. AM. SOC. INT'L L. 67, 72.

92. W. HALL, INTERNATIONAL LAW 287 (6th ed. 1909); W. HALL, INTERNATIONAL LAW 347 (8th ed. 1924).

93. *See* W. FRIEDMANN, *supra* note 77, at 264-67; Wright, *United States Intervention in the Lebanon*, 53 AM. J. INT'L L. 112, 121-22 (1959).

94. *See* R. BARNET, INTERVENTION AND REVOLUTION: THE UNITED STATES IN THE THIRD WORLD 278-80 (1968).

95. *See* Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 HARV. L. REV. 511 (1969); Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 COLUM. L. REV. 266, 272 (1967).

96. A view particularly associated with Communist theorists in China, Vietnam and Cuba.

97. *See* K. Boals, The Role of International Law in the Internal War in Yemen: An Interpretative Essay 69-76 (unpublished paper prepared for the American Society of International Law Study Group on Civil Strife, 1969).

98. A view particularly associated with the newly independent states of Af-

ist self-determination." [99] The impact of the Charter on the customary law or on these newer proposals has largely been ignored—a strange testament to the duality of the framework for appraisal of intervention.

III. THE BASIC COMMUNITY POLICIES AT STAKE IN INTERVENTION

To be useful, non-intervention standards must be relevant to the community policies which they are intended to serve. Yet far too often they seem to be rooted only in a logical spiral in the sky. Though policy differences and difficulty in fully articulating community policies ensure that there will not be universal agreement, appraisal of the reasons why the international community regards some kinds of intervention as wrong is a useful first step. Identification of the policies at stake in intervention, of course, will not provide a clear chart to wisdom, as in particular cases major policies may conflict. But without such identification policy choices simply go unperceived.

For purposes of appraising non-intervention standards the community policies at stake in intervention should be clarified from the perspective of the scholar identified with the broadest global community. The identification should not be that of the advocate interested in maximization of one nation's interest. This latter perspective is also useful, but if dialogue about international law is to add anything, it should be based on shared community interest.[100]

The basic policies at stake in intervention seem to be self-determination, the preservation of minimum human rights, and the maintenance of minimum public order. To these three principal policies, the process principles applicable in choosing effective non-intervention standards might also be added.

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rica and Asia. See R. FALK, THE NEW STATES AND INTERNATIONAL LEGAL ORDER 51, 64-65 (1966), *reprinted from* 118 HAGUE ACADEMY RECUEIL DES COURS 1 (1966). See also the discussion of the "use of force in self-defense against colonial domination" in the Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States, 23 U.N. GAOR, Agenda Item No. 87, at 37-38, 63-64, U.N. Doc. A/7326 (1968), and the discussion of "the right of peoples to receive assistance in their struggle against colonialism" in the Report of the 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States, 21 U.N. GAOR, Annexes, Agenda Item No. 87, at 22, 96-97, U.N. Doc. A/6230 (1966).

99. *See* the Pravda Article Justifying Intervention in Czechoslovakia, *supra* note 75.

100. For an excellent statement of the utility of a legal perspective on foreign relations see Falk, *Law, Lawyers, and the Conduct of American Foreign Relations* [to be published in 78 YALE L.J. 919 (1969)].

A. SELF-DETERMINATION

1. *Its Referent*

Self-determination refers to the freedom of a people to choose their own government and institutions and to control their own resources.[101] Thus Article One of the International Covenant On Civil And Political Rights, adopted by a 1966 resolution of the General Assembly and typical of a host of community pronouncements, provides:

> All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development. . . . [and] freely dispose of their natural wealth and resources. . . .[102]

Self-determination may be denied by either external or internal coercion. As against external coercion, the philosophical underpinnings of self-determination rest on an amalgam of the historical importance of the nation state and the democratic principle that persons primarily affected by decision should have the right to participate in the decision process. It is quite natural, then, that when one state seeks to force a decision on another in an area regarded as primarily internal to the latter, the coercion will be widely regarded as illegitimate intervention. This feeling of illegitimacy is heightened when the coercion is applied against internal authority structures which control a wide range of decisions about internal value production and allocation. Perhaps for this reason, there is a strong community consensus against colonialism, in which internal authority structures are controlled by another state. Sporadic intervention for the purpose of policing the form of government of another state, and even external domination of economic resources, may also seriously deny self-determination. In fact, self-determination may be threatened by external domination of any value. Charges of neo-colonialism are sometimes leveled in these situations of non-authority-oriented coercion.

As against internal coercion, self-determination is the freedom of the people of an entity, with respect to their own government, to participate in the choice of authority structures and institutions and to share in the values of society. Totalitarian or discriminatory regimes which deny their peoples self-determination in this sense may do so as effectively as the most thoroughgoing colonial regime. Thus,

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101. *See generally* H. JOHNSON, SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS (1967); T. Mensah, Self-Determination Under United Nations' Auspices (unpublished J.S.D. dissertation in the Yale Law Library, 1963); Report of the 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States, *supra* note 98, at 91-99.

102. G.A. Res. 2200, 21 U.N. GAOR, Supp. 16, at 52-58; U.N. Doc. A/6316 (1966).

perhaps the strongest area of community consensus about self-determination today is that the discriminatory regimes of South Africa and Rhodesia deny their black populations self-determination.

Since history teaches that self-determination, whether denied by external or internal coercion, is sometimes attainable only through revolution, there is nothing in the principle of self-determination which excludes revolutionary change. The United Nations has indicated in the revolutionary situations in Algeria, Hungary, Rhodesia, South Africa, South-West Africa and the Portuguese colonies that the principle of self-determination need not be sacrificed to the status quo.

If self-determination includes freedom to overthrow an unrepresentative government, or to break away from a colonizing state, it also includes freedom from coercive externally sponsored revolutions. The referent must always be to the genuine demands and identifications of the people. The recent "Brezhnev Doctrine" of "socialist self-determination," [103] intended as a justification for the Soviet invasion of Czechoslovakia, must be rejected precisely because the referent of self-determination is not to the genuine demands and identifications of the people of Czechoslovakia, as events since then have amply confirmed. In fact, one will look in vain in the "Brezhnev Doctrine" for any referent of "socialist self-determination" other than preservation of Soviet interests in Eastern Europe.

Similarly, "modernization" is sometimes asserted to be a basic community policy at stake in intervention. One writer has even taken this so far as to suggest that the legitimacy of intervention should rest on its effect on modernization.[104] There is certainly significant support in the international community for the proposition that centralized and production-oriented societies are preferred to traditional, decentralized and agrarian societies. But for this desire for modernization not to contradict that for self-determination it must be a genuine preference of the people of the entity. For others to coercively impose their own notions about the value of "modernized" society smacks of the paternalism of nineteenth century missionaries and the "white man's burden." "Modernization," then, is more usefully regarded as one aspect of the general principle of self-determination.

2. *The Scope of Peoples to Whom It Is Applied: the Problem of Defining Self*

A second question concerning self-determination is the scope of the peoples to whom it is applied. The question can also be stated as one of defining the self which is to have the right of determination.[105] For most purposes, this question is definitively answered in the international system by invoking the boundaries of the nation state,

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103. *See* the Pravda Article Justifying Intervention in Czechoslovakia, *supra* note 75.

104. *See* K. Boals, *supra* note 97, at 69-76.

105. *See* H. JOHNSON, *supra* note 101, at 112-135; T. Mensah, *supra* note 101, at 282-329.

although philisophically one might be on sounder ground to answer it by reference to the principle that those affected by decision should have a voice in decision. In some contexts, however, the issue of the scope of an entity becomes acute. For example, in wars of secession, such as the Nigerian Civil War or the Congo crisis, are Biafra and Katanga to be considered as separate entities for purposes of self-determination or are they to be included in the larger whole? The same issue may be raised in anti-colonial wars. Thus, was Algeria to be considered part of France or one or more separate entities for purposes of self-determination? The issue was also presented in the Indonesian-Netherlands dispute concerning West Irian, where Indonesia viewed West Irian as part of Indonesia, and is presented by the Vietnam War, where determination of whether the relevant entity is South Vietnam or all Vietnam is a major choice point in disagreement about the War. In making this characterization in Vietnam, though, considerations of minimum public order may be even more important than self-determination. Other internal conflict situations which raise, at least in part, this scope of entity issue include the American Civil War, the Sudan, Anguilla, and Quebec.

Criteria which could be applied in making the determination about scope of entity include constitutional boundaries, geographic boundaries, historical relation, economic viability and sociological and psychological factors.[106] Have the people historically constituted a nation? Do they share a common ethnic, religious or linguistic identity? Are the old and new entities economically viable? Do the people live within a common geographic area? Do they share common institutions and political authority or common awareness as a people?

It is probably best to begin this determination by including everyone affected. That is, to ask which characterization would best maximize the values at stake for everyone affected and then to apply whatever criteria seem to be most relevant to the particular case. While it is probably impossible to fix any criteria which will always be most responsive to the values of everyone affected, the demands and identifications of all the people and the economic consequences for both entities seem to be particularly important factors.

3. *The Problem of Determination*

A third question of particular relevance for choice among non-intervention standards is how genuine self-determination is determined. Given the referent to the genuine demands and identifications of the people of an entity, rather than to some mystical territorial notion, how are those demands and identifications ascertained? In

106. These criteria are suggested by Thomas Mensah. *See* T. Mensah, *supra* note 101, at 289-329.

some cases the situation may be clear enough or the community consensus great enough for General Assembly resolution. And whether an accurate reflection of self-determination or not, at least such General Assembly resolutions are an authoritative community decision. Situations of internal conflict in which General Assembly pronouncements about self-determination (or cessation of intervention) have been made include Greece, Hungary, the Congo, Algeria, Southern Rhodesia, the Portuguese colonies, Oman, South Africa, and South-West Africa.[107] The fairness of such resolutions, of course, depends on their accordance with the genuine demands of the people of the entity and with consistency in treating like cases alike. In the absence of such community determinations, the ascertainment of genuine self-determination during the course of internal conflict presents both a severe auto-interpretation problem and a severe measurement problem.[108] These problems suggest that absent prior external assistance, partisan military intervention in authority-oriented internal conflict should be impermissible. A fortiori, the deliberate unilateral export of revolution or use of force for the imposition of authority structures presents the gravest of dangers to genuine self-determination.

In some contexts internationally supervised free elections may be a useful technique for ascertaining the genuine demands of a populace. For example, non-partisan intervention in situations involving a breakdown of order might usefully be conditioned on genuine free elections. The elections following the United States—OAS intervention in the Dominican Republic seemed to produce an outcome at least as consistent with genuine self-determination as was promised by continuation of the anarchy prior to the intervention, although neither alternative will necessarily lead to long-run political stability. The election and plebiscite are certainly imperfect tools for ascertaining subjectivities, but if conducted and supervised fairly, with op-

107. *See* G.A. Res. 109, 2 U.N. GAOR 12-14, U.N. Doc. A/519 (1947); G.A. Res. 193, 3 U.N. GAOR 18-21, U.N. Doc. A/810 (1948); G.A. Res. 288A, 4 U.N. GAOR 9-10, U.N. Doc. A/1251 (1949); G.A. Res. 382, 5 U.N. GAOR, Supp. 20, at 14 U.N. Doc. A/1775 (1950) (Greece); G.A. Res. 1133, 11 U.N. GAOR, Supp. 17A, at 1, U.N. Doc. A/3572/Add.1 (1957) (Hungary); G.A. Res. 1474 (Emer. Sess. IV), U.N. GAOR, Supp. 1, at 1, U.N. Doc. A/4510 (1960) (the Congo); G.A. Res. 1573, 15 U.N. GAOR, Supp. 16, at 3, U.N. Doc. A/4684 (1960) (Algeria); G.A. Res. 2262, 22 U.N. GAOR, Supp. 16, at 45-46, U.N. Doc. A/6716 (1967) (Southern Rhodesia); G.A. Res. 2270, 22 U.N. GAOR, Supp. 16, at 47-48, U.N. Doc. A/6716 (1967) (the Portuguese colonies); G.A. Res. 2302, 22 U.N. GAOR, Supp. 16, at 49-50, U.N. Doc. A/6716 (1967) (Oman); G.A. Res. 2307, 22 U.N. GAOR, Supp. 16, at 19-20, U.N. Doc. A/6716 (1967) (South Africa); G.A. Res. 2372, 22 U.N. GAOR, Supp. 16A, at 1-2, U.N. Doc. A/6716/Add.1 (1968) (South-West Africa).

108. Tom Farer has colorfully illustrated the difficulty in ascertaining genuine self-determination during the course of internal conflict. *See* Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, *supra* note 95, at 513-518.

portunity for major competing factions to be heard, they are the best techniques we have for providing large numbers of persons a voice in decision. As such, it is not surprising that there has been strong support within the United Nations to adopt the plebiscite "as a regular international instrument" for ascertaining self-determination.[109]

B. MINIMUM HUMAN RIGHTS

Although minimum human rights are also a part of self-determination, they are separate to the extent that there are strong community policies for their protection regardless of the majority sentiment within an entity. The Universal Declaration of Human Rights, approved by a resolution of the General Assembly in 1948,[110] sets forth a number of such human rights on which there is at least nominal international agreement. Among those set forth are rights to be free from discrimination on the basis of race or sex, rights to life, liberty and the security of the person, and rights to be free from slavery, torture or inhuman treatment. The 1966 International Covenant on Civil and Political Rights reaffirms these rights.[111]

The Convention on the Prevention and Punishment of the Crime of Genocide, in force since 1951, is one of the most specific and important guarantees of minimum human rights. Article 1 of the Convention defines genocide as:

> . . .[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.

Article II specifies the prohibited acts:

> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.[112]

These and other community pronouncements about minimum human rights suggest that there may be room within appropriate safeguards for retention of something approximating the traditional categories of "humanitarian intervention" and "intervention for the protection of nationals."

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109. *See* H. JOHNSON, *supra* note 101, at 64.
110. G.A. Res. 217A, 3 U.N. GAOR 71-77, U.N. Doc. A/810 (1948). *See generally* E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY (1964).
111. G.A. Res. 2200, 21 U.N. GAOR, Supp. 16, at 52-58, U.N. Doc. A/6316 (1966).
112. 78 U.N.T.S. 277 (1951). The Convention came into force on January 12, 1951, in accordance with Article XIII. *See Status of Multilateral Conventions*, U.N. Doc. ST/LEG/3, Rev. 1. *See generally* McDougal & Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683 (1950).

C. MINIMUM PUBLIC ORDER

The common interest in minimum public order is an interest in maintaining an orderly world in which cooperation can proceed with respect to all values.[113] In its most general meaning, minimum public order includes the need to maintain the stability of the international system and to avoid a general nuclear exchange. In an era of massive overkill the avoidance of nuclear war is the most important concern of the world community. Because of its importance, situations which particularly threaten major power conflict, such as assistance to insurgents across cold-war boundaries separating the divided nations, should be singled out for special treatment. Similarly, adventures in a competing major power sphere of influence, whether justified by self-determination or not, as for example a hypothetical United States assistance to insurgents in Czechoslovakia, are much too dangerous. Situations threatening major power conflict always run the risk of escalation to a general nuclear exchange or, in its absence, a prolonged limited war.

The policy of minimum public order also reflects a preference for change by peaceful processes rather than by coercion. Coercive change can be destructive of a wide range of values and can deter gain through cooperation. Unilateral export of revolution or external use of force for the imposition of internal authority structures may present a dangerous threat to this policy.

A third policy included within minimum public order is minimization of destruction within a contested entity. As internal conflict is prolonged by lack of settlement machinery or by competitive interventions, it may lead to increased destruction within the entity. Similarly, inadequate laws of warfare or failure to abide by the laws of war may needlessly increase the destruction within an internal conflict. The reduction of the level of destruction within internal conflict must be a major concern of intervention controls.

The UN Charter reflects these policies in its proscription of unilateral force in international relations as a modality of major change or as a technique for dispute settlement. As corollaries to this proscription, the Charter provides in letter or spirit that the unilateral use of major force against the territory of another entity is permissible only in response to an armed attack, must be proportional, and is subject to community review by the Security Council. Military strategies are wasteful and disruptive even in the absence of a major threat of nuclear escalation, and the strong community preference must be for minimization of their use. In a world without a perfectly effective centralized peace-keeping machinery, however, there are real defense interdependencies. As such, the individual or collective use of force in defense against an armed attack, as authorized by Article 51 of the Charter, is an important feature of the international sys-

113. For a comprehensive statement of the principle of minimum public order see M. MCDOUGAL & F. FELICIANO, *supra* note 84, at 121-260.

on *The United Nations and Internal Conflict*, but it does not subsume the full range of intervention in internal conflict. Neither does it achieve a clear focus on the different claims presented within each category.

As an analytic tool for clarification of policy choices, Professor Richard Falk has postulated a fourfold division of internal conflict into "civil strife without significant foreign intervention," "civil strife with foreign intervention by states other than great powers or their surrogates," "civil strife with foreign intervention by the great powers or their surrogates," and "civil strife in which the foreign intervention is alleged to take the form of an 'armed attack.'" [115] This classification by source and amount of external involvement, although useful in describing world order consequences, begs the question for normative clarification about when external involvement is permissible.

In a more behavioral definition, Professor James Rosenau divides internal strife into personnel wars, authority wars, and structural wars. Personnel wars are those "perceived as being fought over the occupancy of existing roles in the existing structure of political authority . . .;" authority wars are those "perceived as being fought over the arrangement (as well as the occupancy) of the roles in the structure of political authority . . .;" and structural wars are those "perceived as being not only contests over personnel and the structure of political authority, but also as struggles over other substructures of the society. . . ." [116] Although particularly insightful in calling attention to the great range of international effects of the diverse types of internal conflict, and in establishing operational categories for study of these effects, the Rosenau division is too general for normative clarification.

Neither these nor any other classification scheme suggested to date has achieved a comprehensive classification of claims of intervention in internal conflict presenting common policies and common conditioning factors. As an alternative classification the fol-

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be accurately assessed." Only after such categories have been established will social scientists begin to comprehend the preconditions of internal violence, the courses such disorders take, and the long-term consequences of their evolution.

Id. at 4.

Categories useful for analyzing internal conflicts from one perspective may not be useful for other purposes. Thus the present study, the first concerned with the role of the United Nations in contemporary internal conflicts, employs categories chosen for their value in assessing the Organization's record. The writer does not suggest that these categories are adequate for a theoretical approach to the international relations of internal violence.

Id. at 6.

115. *See* R. FALK, *supra* note 98, at 67-68.

116. Rosenau, *Internal War as an International Event* in INTERNATIONAL ASPECTS OF CIVIL STRIFE 45, 63-64 (J. Rosenau ed. 1964).

lowing six major categories are suggested, subject to appropriate contextual breakdown of the claims subsumed under each: type I situations, claims not relating to authority structures; type II situations, claims relating to anti-colonial wars; type III situations, claims relating to wars of secession; type IV situations, claims relating to indigenous conflict for control of internal authority structures; type V situations, claims relating to the use of external force for imposition of internal authority structures; and type VI situations, claims relating to cold-war divided nation conflicts. Together these six situations make up an intervention-in-internal-conflict spectrum which might be represented by the following continuum:

I	II	III	IV	V	VI
Non-authority-oriented intervention	Anti-colonial wars	Wars of secession	Indigenous conflict for control of internal authority structures	External imposition of authority structures	Cold-war divided nation conflicts

Although the spectrum is roughly one of increasing threat to community values as one moves from the lower to higher categories, the correlation is only approximate and some conflicts in lower categories might present greater threats than others in higher categories. For example, a war of secession in the United States or the Soviet Union would be likely to present a greater world order threat than the conflict in Yemen for control of internal authority structures.

With more complete contextual breakdown these six situations include the following claims:

Type I Situations: Claims Not Relating to Authority Structures.

A. Claims to provide military assistance to a widely recognized government in the absence of internal disorders.
B. Claims to assist a widely recognized government in controlling non-authority-oriented internal disorders.
C. Claims to use the military instrument in the territory of another state for the protection of human rights.

Type II Situations: Claims Relating to Anti-Colonial Wars.

A. Claims to assist a colonial power in an anti-colonial war.
B. Claims to assist the break-away forces in an anti-colonial war.
C. Claims by an administering authority to use the military instrument to prevent break-away.

Type III Situations: Claims Relating to Wars of Secession.

A. Claims to assist the federal forces in a war of secession.
B. Claims to assist the secessionist forces in a war of secession.
C. Claims that external assistance to an opposing faction justifies assistance.

tem. Any non-intervention framework likely to be widely accepted must preserve this defensive right. This suggests a need for allowing pre-insurgency assistance to a widely recognized government, since such assistance may be required for adequate defense against external attack. It also suggests a need for allowing counter-intervention on behalf of a widely recognized government, at least if necessary to counter covert armed attack.

D. PROCESS CRITERIA FOR EFFECTIVE NON-INTERVENTION STANDARDS

The policies of self-determination, minimum human rights and minimum public order seem to be the principal community policies at stake in intervention. In recommending non-intervention standards for effectuating these policies, however, other criteria relating to the effectiveness of rules are also applicable. The principal such process criteria seems to be that non-intervention standards should be reasonably acceptable, workable, certain, and effective.

Acceptable refers to the likelihood that government actions will tolerably conform to the standard. In a system which relies partly on governmental action for the development of customary law, often repeated governmental action may have a law-creating role. A high incidence of foreign office conformance, then, will in turn strengthen the authority of the standard. A low incidence of conformance, on the other hand, may detract from both the authority of the standard and the authority of international law in general. In a world with only a rudimentary sanctioning process, however, acceptability can easily be over-emphasized at the expense of policy-responsiveness. The most acceptable standard in terms of real-world compliance may be no standard at all. Thus, on balance, acceptability is a valid concern, but it should not be taken to the extreme of major sacrifice of policy-responsiveness.

The second criterion for effectiveness is that a standard be reasonably workable. Workable refers to the realism with which a standard treats the features of the international system. For example, unless covertly announcing an absolute non-intervention standard, it would be unworkable in the present system to premise permissible intervention on prior Security Council approval.

The third criterion is that a standard be reasonably certain. Certainty refers to the reliability with which a standard can be usefully applied to specific cases. To be certain in this sense, a standard must be reasonably definite and reasonably complete. To the extent that a standard is uncertain it neither provides guidance for decision nor serves the fundamental principle of fairness in all law that like cases should be treated alike. As has been seen, the traditional international law of non-intervention suffers from an abundance of vagueness, incompleteness and complementarity in the initial choice of normative systems. Perennial problems in definiteness include the identification of a "recognized government," the point at which in-

ternal violence reaches a level requiring a freeze on external assistance, and the point at which external assistance to insurgents justifies counter-intervention.

The final and most important criterion, interrelated with all of the others, is that a standard be reasonably effective. Effectiveness refers to the responsiveness of a standard to community policies at stake. A standard which is acceptable, workable and certain is of little use if it is not also reasonably policy-responsive. There is a temptation, too frequently indulged in recommending non-intervention standards, to over-emphasize the value of acceptability and certainty at the expense of policy-responsiveness. A balance of emphasis seems more likely to produce meaningful standards.

IV. INTERVENTION IN INTERNAL CONFLICT: CLAIMS PRESENTING COMMON POLICIES AND CONDITIONING FACTORS

An essential element of policy responsive non-intervention standards is clarification by claims presenting common policies and common conditioning factors. The great diversity of situations in which claims of intervention are raised makes this problem of classification critical. Frequently, however, no effort is made to identify like cases presenting common policies and affected by common conditioning factors, and it is often assumed that a single rule will be policy responsive for the entire range of intervention. Scholars almost mystically continue to pursue this will-o'-the-wisp of a single non-intervention rule, even though they would not dream of one rule for all jurisdiction, treaty-interpretation or tort law. Furthermore, when classification has been attempted, though some of the schemes have been insightful, they have not presented the most useful classification for formulating policy responsive rules for the full range of intervention phenomena. At the present stage of intervention theory a comprehensive policy-responsive classification of intervention situations is badly needed.

The most insightful past classifications have included the following. Linda Miller has divided internal conflict into "colonial wars," "internal conflicts involving a breakdown of law and order," and "proxy wars and internal conflicts involving charges of external aggression or subversion." [114] This breakdown is useful for a focus

114. L. MILLER, WORLD ORDER AND LOCAL DISORDER: THE UNITED NATIONS AND INTERNAL CONFLICTS 4-7 (1967). Linda Miller demonstrates a sensitive awareness of the need for comprehensive classification.

> Inquiry into internal disorders remains in a "pre-theoretical" stage. As Eckstein argues, it is necessary to develop "descriptive categories in terms of which the basic features of internal wars can be identified, in terms of which their nuances and broader features can be depicted in general structural concepts, classes (or types) constructed, and resemblances of cases to one another or to types can

Type IV Situations: Claims Relating to Indigenous Conflict for the Control of Internal Authority Structures.

A. Claims to assist a widely recognized government in a struggle for control of internal authority structures.
B. Claims to assist an insurgent faction in a struggle for control of internal authority structures.
C. Claims to assist any faction in a struggle for control of internal authority structures where a widely recognized government cannot be distinguished.
D. Claims that external assistance provided to an opposing faction justifies assistance.
E. Claims to use the military instrument in the territory of another state for the purpose of restoring orderly operations of processes of self-determination in conflicts over internal authority structures involving a sudden breakdown of order.
F. Claims to use the military instrument against the territory of a state providing assistance to an opposing faction.

Type V Situations: Claims Relating to External Initiation of the Use of Force for the Imposition of Internal Authority Structures.

A. Cold-war claims for the use of the military instrument in the territory of another state for the purpose of maintaining or imposing "democratic" or "socialist" regimes.
B. Claims for the use of the military instrument in the territory of another state for the purpose of altering internal authority structures which deny self-determination on a racial basis.
C. Claims to assist exile or refugee groups for the purpose of restoring self-determination.

Type VI Situations: Claims Relating to Cold-War Divided Nation Conflicts.

A. Claims by one-half of a cold-war divided nation to take over the authority structure of the other half or to assist an insurgent faction in a struggle for control of internal authority structures.
B. Claims to assist the widely recognized government of a cold-war divided nation to resist takeover of its authority structures by the other half of the divided nation or to counter assistance provided to an insurgent faction by the other half.
C. Claims to use the military instrument against the territory of one-half of a cold-war divided nation which is providing assistance to an insurgent faction in the other half.

A full development of participation claims would also include

claims to participate because of special treaty rights.[117] In most situations, however, such treaties should not be a source of additional rights, because if they were, any non-participation standard could easily be avoided by the simple expedient of concluding a treaty with the government. Moreover, since self-determination is a principal reason for non-participation, there is some difficulty in allowing one government to conclude an external arrangement to guarantee itself against revolution. Perhaps because of this sensitivity to self-determination, most mutual defense treaties guarantee only against external attack. Nevertheless, there may be some special circumstances, such as treaties with associated or protected mini-states or treaties resulting from the establishment of a state, for example, the 1960 Greece-Turkey-United Kingdom Treaty of Guarantee with Cyprus,[118] which may complicate the picture.

Although undoubtedly others, in addition to claims to participate because of special treaty rights, may be added, this classification into twenty-one claims includes most of the basic claims concerning foreign participation in internal conflict. Many of these participation claims might also be further broken down by type of assistance. That is, was the claim to participate a claim to provide economic assistance, organization and political skills, armaments (by grant, cash sale, or sale on long term credits), military training or advisory missions, territorial sanctuary, citizen volunteers, or regular combat troops? Although certainly relevant, for the most part this additional precision in the division of claims does not seem to be sufficiently helpful to justify the further breakdown.

A complete description of claims concerning internal conflict would also include, in addition to these participation claims, the full range of claims concerning the conduct of internal war (that is, claims concerning the regulation of hostilities), and the full range of claims concerning relations with third States (including claims concerning recognition).

It might also be pointed out that some conflicts include claims in more than one situation or suggest claims cutting across several situations. For example, the Congo crisis presented type I claims to assist in controlling non-authority-oriented disorders and for the protection of human rights, a type III claim to assist the federal forces in a war of secession with Katanga province, and a type IV claim for the purpose of restoring orderly processes of self-determination. Similarly, the British invasion of Anguilla suggests a type II claim by Britain as an administering authority to use the military instrument to prevent break-away and a type III claim by

117. For the extraordinary looseness with which at least pre-Charter customary international law regarded claims to intervene on the basis of an alleged treaty right see Oppenheim's list of seven reasons for which intervention was permissible. I OPPENHEIM, INTERNATIONAL LAW 306-10 (8th ed. Lauterpacht 1955).

118. 382 U.N.T.S. 3 (1960).

Britain to assist the forces of the St. Kitts-Nevis-Anguilla federation in a war of secession with Anguilla. Depending on the degree of authority in fact retained by Britain over her former colony either or both claims could be applicable. The point is that the six situations are not intended as watertight compartments, but only as a useful framework for development of claims. And as in the case of the British invasion of Auguilla, the more specific claims should provide a useful technique of analysis for most situations which may arise.

Each of the twenty-one participation claims will be considered in turn. On each I will attempt to isolate the important conditioning factors, explore existing community expectations, and suggest appropriate policy-responsive standards.

TYPE I SITUATIONS: CLAIMS NOT RELATING TO AUTHORITY STRUCTURES

This category is intended to focus on claims which have only an incidental effect on authority structures; that is, claims which only peripherally affect the political and social institutions of an entity even though they may be highly coercive in their limited impact. As such, this category really includes a broad range of minor coercion claims, including claims of reprisal and even the now largely defunct claim to use coercion for collection of alleged international debts. The most relevant sub-categories for a current study of foreign participation in internal conflict, however, seem to be claims to provide military assistance to a widely recognized government in the absence of internal disorders, claims to assist a widely recognized government in controlling non-authority oriented internal disorders, and claims for the protection of human rights. Since these three claims are by definition non-authority oriented, they generally present only a low order threat to self-determination. All three claims may also constitute permissible pre-insurgency assistance, as developed in the discussion of type IV claims to assist a widely recognized government, and the first two are by definition always permissible pre-insurgency assistance under the suggested criteria for determining an insurgency. It should be noted also that the last two of these type I claims frequently depend on the deployment of external combat units in small scale tactical operations.

A. CLAIMS TO PROVIDE MILITARY ASSISTANCE TO A WIDELY RECOGNIZED GOVERNMENT IN THE ABSENCE OF INTERNAL DISORDERS

There seems to be no question that in the absence of internal disorders military assistance may be provided to a widely recognized government. Most military assistance programs fall into this category and such programs are commonplace. Legitimate defense interdependencies against external threats justify such assistance and

in the absence of internal disorder such assistance does not really present an intervention in internal conflict problem.

The problem, however, is determining when the level of internal conflict is such as to require cessation of assistance or a prohibition of increased assistance in order to avoid participation in internal conflict. If the threshold is too low, military assistance programs would be frequently interrupted by the low level internal violence endemic to many developing nations. On the other hand, if the threshold is too high, the non-participation requirement would be compromised. Despite the possibility of confusion with the traditional doctrine, "insurgency" seems the best term to indicate this non-participation threshold. Because of acute involvement with the type IV claim to assist a widely recognized government in an indigenous conflict for the control of internal authority structures, the development of criteria for determining the insurgency threshold will be deferred until the type IV situation is discussed. It is sufficient at this point to indicate that pre-insurgency assistance to a recognized government is widely regarded as permissible.

B. CLAIMS TO ASSIST A WIDELY RECOGNIZED GOVERNMENT IN CONTROLLING NON-AUTHORITY-ORIENTED INTERNAL DISORDER

This category includes military assistance by one state for the purpose of restoring order in another state when the disorder stems essentially from causes other than competition for control of internal authority structures. Although few internal disorders are totally devoid of authority overtones, some are sufficiently non-authority-oriented to justify separate emphasis. Perhaps the clearest example of events in this category include the pre-Matadi Congo crisis in July 1960, and the Tanganyika (now Tanzania), Uganda, Kenya disorders in 1964.

Essentially all of these disorders were sparked by a mutiny of African soldiers against their European officer corps for higher pay or Africanization of the corps. In the Tanganyika mutiny, which led to general rioting, President Jullius Nyerere requested military assistance from Britain. A force of 500 British Royal Commandos restored order at a cost of one man dead and two injured and quickly left the country. Ethiopian and Nigerian troops, which replaced the British Commandos, stayed about a year. Events in Uganda and Kenya followed a similar course.[119]

Although the Tanganyika crisis had political overtones and was at least psychologically related to the Zanzibar coup which immediately preceded it, at the time the British flew in troops from Aden it was not primarily an authority-oriented disorder aimed at the Nyerere regime. Reaction in the United Nations to the Tanganyika,

119. *See* Lefever, *The Limits of U.N. Intervention in the Third World*, 30 REV. OF POLITICS 3, 11-12 (1968).

Uganda, Kenya operations indicated that the British actions were regarded as legitimate by the world community.

In its early stages of sporadic mutiny against the Belgian officer corps the Congo crisis seems to have had still fewer political overtones. One commentator has even suggested that had the United States provided immediate military assistance when requested by the Congo government on July 12, the costly subsequent crisis could have been avoided in a manner similar to the later Tanganyika, Uganda, Kenya crisis.[120]

There are no bright-line distinctions between authority-oriented and non-authority-oriented disorders, but the Tanganyika experience suggests the desirability of preserving an area of unilateral competence to assist in quelling non-authority-oriented internal disorders at the request of the widely recognized government. Many of the newer states have inadequate internal police forces and may easily be unable to deal with internal disorders, particularly those resulting from breakdowns in Army discipline. Powerful bandit groups and private armies may also be a continuing threat in many poorly centralized societies, and there seems to be little reason why a widely recognized government should not be allowed to receive foreign assistance to control such groups. Burma and Southern Thailand provide examples of internal conflicts partly resulting from such bandit armies.

Although it might be suggested that competence to intervene in non-authority-oriented disorders should rest exclusively with the United Nations, the contrast between the Congo and the Tanganyika crises suggests that such a limitation might be undesirable. As much as we would like the greater security of a more centralized response, the political realities of the present United Nations severely limit its ability to provide a reliable and flexible response.

Lastly, since non-authority-oriented internal conflicts are not insurgencies, consistency with the principle allowing pre-insurgency assistance suggests that it should be permissible to assist a widely recognized government to control such disorders.

C. CLAIMS TO USE THE MILITARY INSTRUMENT IN THE TERRITORY OF ANOTHER STATE FOR THE PROTECTION OF HUMAN RIGHTS

Customary international law recognized a right to use the armed forces in the territory of another state both for humanitarian intervention and for the protection of nationals.[121] Humanitarian intervention encompassed use of force for the protection of persons other than nationals from gross denial of fundamental human rights and was frequently a collective undertaking. According to Professor Richard Lillich, the doctrine is "so clearly established under custom-

120. *Id.* at 15-18.

121. *See, e.g.*, I OPPENHEIM, *supra* note 117, at 309, 312-13.

ary international law that only its limits and not its existence are subject to debate." [122]

Some scholars have argued that Article 2(4) of the Charter, proscribing "the threat or use of force against the territorial integrity or political independence" of another state, terminated this customary law right.[123] Others have urged that when construed together Article 55, providing for respect for human rights, and Article 56, pledging all members "to take joint and separate action . . . for the achievement of the purposes set forth in Article 55," re-enforce the customary law right of humanitarian intervention.[124] The truth seems to be that the Charter speaks in complementary policies on the one hand of restricting unilateral force as an instrument of national policy, and on the other of urging action for the protection of human rights. Consequently, both interpretations are plausible on a major purposes rationale. The real difficulty seems to be, as is true with respect to many intervention claims, that the Charter is simply not responsive to the problem. For example, it is certainly open to argument that humanitarian intervention does not threaten "territorial integrity or political independence." As a result, arguments made on the basis of the Charter seem more useful as exercises in logical derivation than as criteria for decision.

The major recent instances of claims in this category include the 1964 joint Belgian-United States rescue operation in the Congo, the initial landing of a small contingent of United States marines during the disorders in the Dominican Republic in 1965, and perhaps the initial brief introduction of Belgian troops after the July 1960 breakdown of order in the Congo. In each case the claim was made that a breakdown of order or a deliberate violation of human rights threatened the lives of nationals of the intervening state and that the intervention was requested by the lawful government. In the joint Stanleyville rescue mission the action was undertaken at the request of the widely recognized Congolese government, and over 2,000 civilian hostages of over eighteen nationalities were rescued within a four-day period. In the Dominican Republic the operation was at least nominally requested by a faction engaged in authority-oriented internal conflict; and in the 1960 Belgian dispatch of troops to the Congo the action was taken apparently without the consent of Prime Minister Lumumba but with the permission of Foreign Minister Bomboko.

In the absence of insurgency, of course, if a widely recognized government requests foreign assistance for the protection of human

122. R. Lillich, Intervention to Protect Human Rights 8 (unpublished paper presented at a Regional Meeting of the American Society of International Law at Queen's University on November 22-23, 1968).

123. *See* I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 433 (1963); Wright, *The Legality of Intervention Under the United Nations Charter*, 51 PROC. AM. SOC. INT'L L. 79, 88 (1957).

124. *See* McDougal & Reisman, *Response by Professors McDougal and Reisman*, 3 INT'L LAWYER 438, 444 (1969).

rights, such assistance should be permissible just as is other pre-insurgency assistance. Even in other circumstances, however, some such interventions should be permissible if carefully safeguarded.

There is some danger that actions which go beyond pre-insurgency assistance may conceal authority-oriented claims, as has been alleged in both the Congo and Dominican Republic operations. But despite this danger, it seems undesirable to prohibit all external assistance for the purpose of preserving fundamental human rights if such assistance is narrowly confined to humanitarian objectives. In most of these situations there is practically no real interference with meaningful self-determination and only low levels of violence or threats to international peace. Moreover, the recognition of such a competence would seem to encourage at least a minimum level of respect for fundamental human rights. When widespread loss of human life is at stake because of arbitrary action, it would seem mere sophistry to argue that community policies or legalities prevent effective action. Other factors suggesting preservation of some unilateral interventionary competence, even beyond pre-insurgency assistance, are the present lack of international machinery for the enforcement of human rights and the necessity to take quick decisive action in what is usually a crisis situation; international organizations are simply not able to respond with the same dispatch as individual states. For these and other reasons, a number of scholars have recently affirmed the legitimacy of a limited right of humanitarian intervention "as a minimum enforcement measure to protect human rights." [125] Scholars recently affirming this right include Professor Myres McDougal and Dr. Michael Reisman,[126] and Professor Richard Lillich.[127] Sir Hersh Lauterpacht is also associated with this position.[128] In fact, some such right is probably present international law.

Intervention for the protection of human rights which goes beyond pre-insurgency assistance, however, should be adequately limited to ensure that it serves community policies. In the most comprehensive review of these claims to date, Professor Richard Lillich has suggested five useful criteria for judging the permissibility of interventions for the protection of human rights. They are: (1) the immediacy of violation of human rights, (2) the extent of violation of human rights, (3) an invitation from appropriate authorities to use forcible self-help, (4) the degree of coercive measures employed, and (5) the relative disinterestedness of the intervening state.[129]

125. *See* R. Lillich, *supra* note 122, at 4.
126. *See* McDougal & Reisman, *supra* note 124.
127. *See* R. Lillich, *supra* note 122, at 4; Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967).
128. *See* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 120-21 (1950); I OPPENHEIM, *supra* note 117, at 312-13 (Lauterpacht ed.).
129. *See* Lillich, *Forcible Self-Help by States to Protect Human Rights*, *supra* note 127, at 347-51; R. Lillich, Intervention to Protect Human Rights, *supra* note 122, at 16.

To these criteria might be added a minimal effect on authority structures, a prompt disengagement consistent with the purpose of the action, and immediate full reporting to the Security Council and appropriate regional organizations. If the protection of human rights requires the overthrow of authority structures, it would seem best to require United Nations authorization as a prerequisite for action. To allow unilateral action in such cases would be to permit all manner of self-serving claims for the overthrow of authority structures.

With respect to the extent of the threat to human rights which justifies intervention, the answer largely seems to depend on the extent of values threatened by the intervention. A threat of widespread loss of human life would seem to be the clearest justification and seems to have constituted most of the past instances in this category.

Although an invitation to use forcible self-help may be important in reducing the coercion necessary to effectuate the protection of human rights, it does not seem necessary as a sine qua non for humanitarian intervention. The Dominican operation is an example of a situation in which such an invitation did not seem particularly meaningful.[130] Biafra may be another.

To summarize, intervention for the protection of human rights should be permissible if made prior to the outbreak of insurgency at the request of a widely recognized government. In addition, some interventions for the protection of human rights which go beyond pre-insurgency assistance should be permissible. Criteria for determining legitimacy of interventions which go beyond pre-insurgency assistance include:

(1) an immediate and extensive threat to fundamental human rights, particularly a threat of widespread loss of human life;

(2) a proportional use of force which does not threaten greater destruction of values than the human rights at stake;

(3) a minimal effect on authority structures;

(4) a prompt disengagement, consistent with the purpose of the action; and

(5) immediate full reporting to the Security Council and appropriate regional organizations.

TYPE II SITUATIONS: CLAIMS RELATING TO ANTI-COLONIAL WARS

Anti-colonial wars are conflicts to establish the independence of internal authority structures from foreign authority and control. Examples have been the American Revolution, the Netherlands-Indonesian War, the Algerian War, the first Vietnamese War (in part), and at the present time the insurrections in Angola, Mozambique and Portuguese Guinea.

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130. *See* the description of the circumstances surrounding the invitation in the Dominican operation in Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order*, 43 DENVER L. REV. 439, 465-67, (1966).

Anti-colonial wars differ from wars of secession in the lesser degree to which internal authority structures of the break-away regime have participated in decision-making for the entity and in the greater clarity of separation of the dominant and subordinate entities prior to break-away. They are also frequently associated with racial or developmental differences between the two entities. The distinction is one of degree rather than bright-line clarity, but the consequences of the distinction are great. For unlike the difficulties in ascertaining which way self-determination cuts in the war of secession, there is a strong community consensus against colonialism. This consensus is demonstrated most dramatically in the Declaration on the Granting of Independence To Colonial Countries and Peoples first adopted by the General Assembly in 1960. The vote then was ninety for, none against, and nine abstentions. A subsequent vote in 1961 reaffirmed the Declaration and established a Special Committee of Seventeen to oversee its implementation. The vote was ninety-seven for, none against, and four abstentions. And in 1962 the General Assembly increased the membership of the Committee of Seventeen to a Committee of Twenty-Four and again reaffirmed the Declaration, this time by a vote of one hundred and one for, none against, and four abstentions.[131] Professor Egon Schwelb points out that because of this overwhelming adoption without substantive dissent the Declaration of 1960 amounts to an assertion about present international law.[132]

The Declaration provides in pertinent part:

> *The General Assembly . . . solemnly proclaims* the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations; And to this end *Declares* that:
>
> 1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
>
> 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. . . .
>
> 4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.
>
> 5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, wihout any conditions or reservations, in accordance with their freely expressed will

131. E. SCHWELB, *supra* note 110, at 66-69.
132. E. SCHWELB, *supra* note 110, at 70.

> and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom. . . .
>
> 7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.[133]

A. CLAIMS TO ASSIST A COLONIAL POWER IN AN ANTI-COLONIAL WAR

Because of the strong community consensus against colonialism and the usually stronger status of the colonial power vis-a-vis the colony, claims to assist a colonial power have been rare.

Two instances which are somewhat aberrational are those of United Nations support for Britain in the non-armed struggle with the break-away regime in Rhodesia and United States support for France during the first Indo-China War. The Rhodesian instance was aberrational because of the racial policies of the break-away Ian Smith regime, which promoted a kind of internal colonialism along racial lines; the first Indo-China War was aberrational because United States support was not provided in sympathy with France's continuing colonial aspirations, but in a spirit of containment of Communism. As such, the United States consistently pressured France to grant greater autonomy to the non-Communist Vietnamese nationalists. The United States position, though, was consistently compromised by the colonial aspects of the war.

The strong community feeling against colonialism suggests that assistance to a colonial power in an anti-colonial war should be illegitimate in the absence of some unusual circumstances such as the Rhodesian racial policies prompting collective authorization by the United Nations.[134] One difficulty with this generalization is that some conflicts, such as the first Indo-China War, raise other claims such as assistance to a faction engaged in authority-oriented internal conflict, perhaps complicated further by external assistance to an opposing faction. The only guide to clarification in such cases presenting multiple claims would seem to be awareness of all of the claims presented and classification by major policies at stake.

B. CLAIMS TO ASSIST THE BREAK-AWAY FORCES IN AN ANTI-COLONIAL WAR

Although assistance to the break-away forces in an anti-colonial war may frequently support genuine self-determination (Rhodesia being a counter-example), such assistance may have serious adverse consequences on minimum public order. The support of a guerrilla movement, regardless of how much it promotes self-determination,

133. G.A. Res. 1514, 15 U.N. GAOR, Supp. 16, at 66-67, U.N. Doc. A/4684 (1960).

can have severe destructive effects and should not be undertaken lightly. Moreover, even though a struggle is in its broadest outlines one of anti-colonialism, there are frequently competing insurgent factions espousing different public order systems. The consequences of assistance to one of these insurgent groups may be as much an interference with self-determination as colonialism itself. For these reasons it seems preferable to proscribe all assistance to break-away forces in an anti-colonial war until the United Nations authorizes individual or collective assistance to a particular faction, although in practice the Afro-Asian world may not accept this restriction. Collective United Nations authorization has the substantial advantages of deterring counter-assistance to the other side, providing community judgment about the legitimacy of competing demands for self-determination and the necessity of the use of force, and minimizing the danger of self-serving classification for parochial motives. There is already precedent in United Nations practice to support such collective determinations authorizing individual states to provide assistance to break-away forces in an anti-colonial war. On November 17, 1967, the General Assembly passed resolution 2270 which provides:

> *The General Assembly*, . . .
> *Appeals again* to all States to grant the peoples of the Territories under Portuguese domination the moral and material assistance necessary for the restoration of their inalienable rights. . . .[135]

The resolution also requested all states to withhold military assistance from Portugal.[136] And on June 12, 1968, the General Assembly adopted a resolution calling upon:

> all States to provide the necessary moral and material assistance to the Namibian [South-West African] people in their legitimate struggle for independence. . . .[137]

Although such resolutions still raise questions of fairness in applicability and reasonable efforts to avoid resort to coercion, collective authorization is far preferable to individual determination with its danger of self-serving characterization.

It would seem desirable, then, to prohibit all external assistance to any faction in an anti-colonial war until the United Nations authorizes individual or collective assistance to one or the other faction,

134. On the Rhodesian case see McDougal & Reisman, *The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968).

135. G.A. Res. 2270, 22 U.N. GAOR, Supp. 16, at 47, 48, U.N. Doc. A/6716 (1967) (Article 12). The General Assembly repeated this provision in a 1968 resolution on the Question of Territories Under Portuguese Administration, G.A. Res. 2395, 23 U.N. GAOR, Supp. 18, at 59, U.N. Doc. A/7218 (1968) (Article 5).

136. G.A. Res. 2270, 22 U.N. GAOR, Supp. 16, at 47, U.N. Doc. A/6716 (1967) (Article 8).

137. G.A. Res. 2372, 22 U.N. GAOR, Supp. 16A, at 1, 2, U.N. Doc. A/6716/Add.1 (1968) (Article 10).

as it has done both in the case of South-West Africa and the Portuguese colonies of Angola, Mozambique, and Portuguese Guinea. The consensus in the world community seems sufficiently opposed to colonialism to ensure that the General Assembly will authorize assistance in most instances where it would genuinely promote self-determination.

C. CLAIMS BY AN ADMINISTERING AUTHORITY TO USE THE MILITARY INSTRUMENT TO PREVENT BREAK-AWAY

The primary policy in appraising claims by an administering authority to prevent the break-away of a colony, protectorate, or trust territory is again self-determination. Self-determination, however, may occasionally be offset by the complementary principle of responsibility, as in cases where a territory is so small that complete independence is impractical. The rapidly declining number of trust territories under the international trusteeship system suggests that this latter category may be very small indeed. General Assembly or Trusteeship Council determination seems to be the most reliable guide to the legitimacy of claims in this category. In fact, both the Trusteeship Council and the General Assembly Committee of Twenty-Four have been active in assessing the legitimacy of relationships between administering powers and their dependencies. Absent special treaty rights or United Nations recognition of the continuing legitimacy of an arrangement, then, community policies against colonialism suggest that such claims should be impermissible. This conclusion is strongly supported by section four of the Declaration on the Granting of Independence to Colonial Countries and Peoples which provides that: "All armed action or repressive measures of all kinds directed against dependent peoples shall cease . . . and the integrity of their national territory shall be respected." [138]

TYPE III SITUATIONS: CLAIMS RELATING TO WARS OF SECESSION

Wars of secession are conflicts over permanent territorial division of a territory formerly consolidated under a unitary internal authority structure. In popular parlance they are particularly likely to be called civil wars. Examples in this category include the American Civil War, the attempted Katanga secession and the Nigerian-Biafran Civil War. Although cold-war divided nation conflicts may have overtones of wars of secession, because of their unique position in the international system they also present other policies and conditioning factors requiring their separate treatment.

Wars of secession could certainly present a major threat to the stability of the international system if, for example, they occurred in a major nuclear power or if major powers intervened on opposing sides. The greatest threat to minimum public order in most wars

138. G.A. Res. 1514, 15 U.N. GAOR, Supp. 16, at 66-67, U.N. Doc. A/4684 (1960).

of secession, however, seems to be that outside intervention will prolong the struggle and unnecessarily increase the internal suffering. British assistance to the South in the American Civil War is one example and alleged French aid to Biafra may prove to be another. In every case, however, wars of secession present a major problem in self-determination. The major self-determination issue, discussed previously in the section on basic community policies, is the scope of the peoples to whom self-determination should be applied. In the Nigerian Civil War does one look to the Biafran demands only or to the demands of the people of Nigeria as a whole? Is the principal criterion the economic effect of split-off, the tribal antagonism between the Ibos and other Nigerians, the effect on the stability of other African boundaries which also crosscut tribal rivalries, or something else?

The danger of competing interventions prolonging the struggle and the complexity of identifying the scope of peoples to whom self-determination is to be applied in such struggles strongly suggest that unilateral assistance to either faction in a war of secession should be prohibited absent a collective United Nations decision as to which faction may be aided. One question for inquiry might be the extent to which regional determination of legitimacy of assistance to a faction should be available in addition to United Nations determination. The strong African opposition to the secession of Katanga and Biafra and the danger of further African balkanization might suggest sufficient regional concern in these cases to justify regional determination by the OAU.

A. CLAIMS TO ASSIST THE FEDERAL FORCES IN A WAR OF SECESSION

Examples of claims in this category include United Nations assistance to the central Congo government to resist the secession of Katanga,[139] and British assistance to the Nigerian federal government.

The principal problem in the application of a "non-participation without collective authorization" standard to claims to assist the federal government is that the federal government is likely to have been receiving arms from friendly powers prior to the secession attempt. To require termination of this assistance after creating a military supply dependency may well work as intervention in favor of the secessionist forces. Although there is no neutral solution to this problem, perhaps the best practical solution absent collective authorization is to limit the military assistance provided the federal government to the sources and amount of assistance being provided immediately prior to the secession attempt. Collective United Nations authorization (and possibly regional authorization), however, could

139. With respect to the U.N. Congo operation see generally E. LEFEVER, UNCERTAIN MANDATE: POLITICS OF THE U.N. CONGO OPERATION (1967); L. MILLER, *supra* note 114, at 66-116.

permit increased assistance to the federal forces or require cessation of all assistance.

B. CLAIMS TO ASSIST THE SECESSIONIST FORCES IN A WAR OF SECESSION

A classic example of assistance to the secessionist forces was the British aid provided to the Confederate states during the American Civil War. Since *The Alabama Claims* arbitration in 1872, growing out of United States claims against Britain for deprivations inflicted by the *Alabama* and other Confederate cruisers built in Britain, such assistance has been regarded as illegal.[140] Section six of the Declaration on the Granting of Independence to Colonial Countries and Peoples provides contemporary evidence of this illegality. Section six declares:

> Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.[141]

A recent example of a claim to assist secessionist forces is the French aid allegedly being provided the Biafran forces in the Nigerian Civil War. Absent a collective community determination that Biafra should be aided, all such assistance may only prolong the war, is highly suspect in seeking to answer the scope of peoples problem by external coercion, and should be prohibited. Humanitarian assistance intended to prevent widespread civilian starvation, and not intended as authority-oriented assistance, of course, is quite another matter and should be vigorously encouraged.[142]

C. CLAIMS THAT EXTERNAL ASSISTANCE TO AN OPPOSING FACTION JUSTIFIES ASSISTANCE

A recent study of the rhetoric of intervention shows that two of the most common justifications put forth by governments in support of their interventions are that assistance was requested by the lawful government and that prior external assistance justifies counter-intervention.[143] If factually accurate, the claim of counter-interven-

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140. For the opinion of the tribunal in *The Alabama Claims* arbitration see W. BISHOP, INTERNATIONAL LAW 864 (2d ed. 1962) (the actual decision rested narrowly on the duties of a neutral toward a belligerent).

141. G.A. Res. 1514, 15 U.N. GAOR, Supp. 16, at 66-67, U.N. Doc. A/4684 (1960).

142. *See* R. Lillich, *supra* note 122, at 13-14; W. M. Reisman, Memorandum Upon Humanitarian Intervention to Protect the Ibos 15-16 (unpublished paper written in collaboration with Professor Myres McDougal).

143. Bohan, American and Soviet Justifications of Armed Intervention: A Study in Law and Propaganda (unpublished paper delivered at the Regional Meeting of the American Society of International Law on Bloc Law and Intervention, Tallahassee, Florida, March 27-29, 1969).

tion on behalf of federal forces probably ought to be allowed. Once significant external assistance is being provided to the secessionist forces, there is little in one-sided isolation of the conflict which inspires confidence that self-determination will necessarily result. The right of counter-intervention would mean that if significant military assistance is being provided to secessionist forces, comparable military assistance may be provided to federal forces even in excess of pre-secession levels. In order not to create an endless series of escalating claims by competing powers aiding opposing factions, however, it seems wise to restrict the right of counter-intervention to assist on behalf of federal forces. This restriction would seem to accord with prevailing expectations as to the illegitimacy of assisting secessionist forces.

TYPE IV SITUATIONS: CLAIMS RELATING TO INDIGENOUS CONFLICT FOR THE CONTROL OF INTERNAL AUTHORITY STRUCTURES

This category includes all conflicts for control of internal authority structures which have substantial indigenous origin and support, whether personnel wars, authority wars or structural wars. Again, however, the cold-war divided nation context is excluded for separate treatment even though it may have overtones of similar claims. Representative conflicts in this category, most of which have involved unilateral or collective intervention, include the Spanish Civil War, the Greek Civil War, Malaysia, Lebanon, Yemen, Guatemala, Laos, the Congo, Cyprus, the Dominican Republic, and Hungary.

Claims relating to indigenous conflict for the control of internal authority structures are easily the most difficult non-intervention claims to deal with as they present serious policy clashes sometimes suggesting contradictory solution. Resulting standards must uneasily reconcile revolutionary change reflecting genuine internal demand with the need to proscribe imported revolution and to maintain minimum public order. Moreover, claims in this category are usually motivated by ideological considerations, often reflecting deeply divisive splits in the world community. Because of the cold-war overtones of many interventions in this category and the difficulty of political solution, it is unrealistic to expect much effective United Nations involvement. Where cold-war aspects are subordinate, of course, as in the Congo, Cyprus and Yemen conflicts, a United Nations presence may be possible.

Some claims concerning conflicts in this category are not claims to assist a particular faction, but are claims to restore order or to restore conditions allowing the people free choice between competing factions. Examples of conflicts involving such claims include Cyprus and the second stage of the Dominican Republic operation. Since these are not claims of assistance to either faction, some such interventions may be consistent with a rule that neither faction may be aided. Consequently, these claims will be examined as a separate subcategory.

A. CLAIMS TO ASSIST A WIDELY RECOGNIZED GOVERNMENT IN A STRUGGLE FOR CONTROL OF INTERNAL AUTHORITY STRUCTURES

There is considerable uncertainty today as to the legality of military assistance to a widely recognized government in a struggle for control of internal authority structures. Under what is generally said to be the traditional view, a widely recognized government is in a privileged position vis-a-vis an insurgent faction, at least until the status of belligerency is reached.[144] Even after belligerency is reached, it is not clear that the traditional view does anything more than require a choice between ending assistance and loss of neutrality with respect to the new belligerent party. Unquestionably, state practice catalogues many instances of assistance to a widely recognized government engaged in an insurgency, and the rhetoric of state practice shows that a request by the lawful government is perhaps the principal justification given for intervention. A growing number of scholars, however, have urged that assistance to both sides should be prohibited when an insurgency breaks out.[145] The 1965 General Assembly Declaration on Inadmissibility of Intervention, which provides that "no State shall . . . interfere in civil strife in another State. . . .," lends support to this position.[146]

Though the stability of the international system might sometimes be promoted by a rule which permitted assistance to a widely recognized government engaged in a struggle for control of internal authority structures, in the usual type IV situation the possible denial of self-determination in thwarting popular demands for change seems too high a price to pay. Hungary is a good example. Accordingly, once an indigenous insurgency breaks out and the ruling elite are faced with a serious challenge to their authority, it seems preferable to prohibit external military assistance even to a widely recognized government. This prohibition, however, should permit an exception allowing comparable assistance to a widely recognized government whenever impermissible external assistance is provided to an insurgent faction, and an exception allowing pre-insurgency levels of assistance to continue.

In a world divided between intensely competing world order systems this non-intervention rule entails considerable risk that one side will adhere to it while others do not. Under conditions of guerrilla warfare, which are said to require a favorable government force ratio of from 10 to 1, it may be easier to evade the "no assistance to insurgents" requirement than the "no assistance to widely recognized government" requirement. Such a rule may also be self-defeating in those cases in which an armed minority seeks takeover of a government. The difficulty of determining which way

144. *See* the authorities collected at note 91 *supra.*
145. *See* the authorities collected at notes 92-94 *supra.*
146. G.A. Res. 2131, 20 U.N. GAOR, Supp. 14, at 11-12, U.N. Doc. A/6014 (1965).

genuine self-determination cuts, however, probably justifies this standard absent detectable foreign intervention on behalf of insurgents.

As in type III situations, since withdrawal of pre-existing military support may amount to intervention on behalf of insurgents, continuation of levels of assistance provided to a widely recognized government prior to the outbreak of conflict should be permissible. Today many recognized governments are likely to be receiving external military aid on a continuing basis, and creation of a military supply dependency may even be the objective of such aid. In these circumstances it might unfairly advantage the insurgent to require total cessation of military aid to the widely recognized government.

The greatest problem with the suggested standard prohibiting increased military assistance to a widely recognized government after an insurgency breaks out is in determining when the critical threshold has been reached. Did Che Guevara's operation in Bolivia constitute an insurgency requiring a freeze on military assistance to the Bolivian government? Do the estimated 1,000 terrorists in Uruguay require a freeze on military assistance to the Uruguayan government?[147] When did the 1956 Hungarian uprising require a freeze? If the insurgency threshold is too low, and includes sporadic or small-scale civil violence, the high prevalence of such violence in many undeveloped and relatively decentralized societies suggests that the rule will be neither acceptable nor workable. On the other hand, if the threshold is too high it may be largely ineffective. For the most part, scholars urging the applicability of the non-intervention standard to the recognized government have unaccountably neglected this critical problem of ascertaining the threshold requiring a freeze on military assistance. One test for determining this threshold, suggested by Quincy Wright, is whether the outcome is in doubt.[148] Professor Wright, however, does not provide any criteria for determining when the outcome is in doubt. Another possibility is the criteria for recognition of belligerency. Lauterpacht gives these criteria as:

> the existence of a civil war accompanied by a state of general hostilities; occupation and a measure of orderly administration of a substantial part of national territory by the insurgents; [and] observance of the rules of warfare on

147. *See* N.Y. Times, Jan. 23, 1969, at 12, col. 4.

148. Some writers have taken the view that only if civil strife has been generally recognized as "belligerency," obliging outside states to be "neutral," are such states forbidden to give military assistance to either faction, but where belligerency has not been recognized, and the situation is one merely of "insurgency," military aid may be given to the recognized government but not to the insurgents. The predominant opinion, however, follows the view stated by Hall, that in respect to military intervention, the critical line is not recognition of belligerency, but the uncertainty of the outcome.
Wright, *supra* note 93, at 122.

> the part of the insurgent forces acting under a responsible authority. . . .[149]

This classic belligerency test served to create a duty of neutrality toward the contending belligerents (unless a state was itself willing to become a belligerent), and to regulate a host of legal relations between the contending factions. Although the test is slightly responsive to the problem of non-participation, it is vague, outdated for current internal conflict, and suspect in that belligerency was never really intended as an absolute bar to participation.

Still another possibility for determining the non-participation threshold is the "convenient criteria" for "distinguishing a genuine [internal] . . . conflict from a mere act of banditry or an unorganized and shortlived insurrection," set out in the Final Record of the Geneva Diplomatic Conference of 1949. These criteria are:

> (1) That the Party in revolt against the *de jure* government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
> (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
> (3) (a) That the *de jure* Government has recognized the insurgents as belligerents; or
> (b) that it has claimed for itself the rights of a belligerent; or
> (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
> (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
> (4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
> (b) that the insurgent civil authority exercises *de facto* authority over persons within a determinate territory.
> (c) that the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
> (d) that the insurgent civil authority agrees to be bound by the provisions of the Convention.[150]

The difficulty with these criteria is that they were not developed for the purpose of requiring a freeze on military assistance,[151] and that

149. II OPPENHEIM, INTERNATIONAL LAW 249 (7th ed. Lauterpacht 1952).
150. 10 WHITEMAN, DIGEST OF INTERNATIONAL LAW 40-41 (1968). I owe the discovery of this interesting test to Rosalyn Higgins.
151. It is helpful to keep in mind that the insurgency threshold problem is also

they make extensive use of the inappropriate recognition of belligerency standard. Nevertheless, they do suggest some useful factors, such as the necessity of the recognized government to make use of its regular military forces, which might be incorporated into more responsive criteria.

Although a completely satisfactory answer may have to depend on the total context in light of the purposes of the restriction, the following four criteria are suggested as useful for determining whether internal conflict has reached a level which requires a freeze on military assistance to the recognized government.

(1) the internal conflict must be an authority-oriented conflict aimed at the overthrow of the recognized government and its replacement by a political organization controlled by the insurgents;
(2) that the recognized government is obliged to make continuing use of most of its regular military forces against the insurgents, or a substantial segment of its regular military forces have ceased to accept orders;
(3) that the insurgents effectively prevent the recognized government from exercising continuing governmental authority over a significant percentage of the population; and
(4) that a significant percentage of the population supports the insurgent movement, as evidenced by military or

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a critical problem for the applicability of rules regulating the conduct of internal conflict. Although my suggested criteria may have some carryover value for this regulation of conduct issue, they are primarily responsive to the participation issue. These Geneva Conference criteria, on the other hand, are directed at the regulation of conduct issue; that is, at the applicability of the Geneva Conventions regulating the conduct of hostilities. Article three of each of the four Geneva Conventions of 1949 provides:

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

Comment on this article in the Final Record of the Geneva Conference points out:

> . . . What is meant by "armed conflict not of an international character?"
>
> That was the burning question which arose again and again at the Diplomatic Conference. . . . The expression was so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry. For example, if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article? In order to reply to questions of this sort, it was suggested that the term "conflict" should be defined or, which would come to the same thing, that a certain number of conditions for the application of the Convention should be enumerated. . . .

Id. at 39-40.

supply assistance to the insurgents, general strikes, or other actions.

It would certainly seem that a prima facie case for a freeze on further assistance has been made out when these four criteria are present. The first criteria, that the internal conflict must be an authority-oriented conflict, should be a necessary condition of an insurgency. Thus when internal conflict is non-authority-oriented, it is not an insurgency requiring a freeze on assistance. The second criteria, that the recognized government is making use of most of its regular military forces against the insurgents, also seems particularly responsive, since if the government has most of its military resources in reserve, additional external assistance to the government forces seems less critical.

Applying these criteria to the Bolivian and Uruguayan cases, although the first criterion is met, there does not seem to be sufficient satisfaction of any of the last three criteria to justify characterization as an insurgency. On the other hand, the 1956 Hungarian uprising quickly satisfied all four conditions.

B. CLAIMS TO ASSIST AN INSURGENT FACTION IN A STRUGGLE FOR CONTROL OF INTERNAL AUTHORITY STRUCTURES

Existing expectations as to the lawfulness of assistance to an insurgent faction are predominantly against lawfulness in the absence of collective United Nations authorization. Both those writers, such as Hall, who advocate treating recognized governments and insurgents alike, and those who take the traditional position allowing assistance to a widely recognized government, regard assistance to insurgents as unlawful. Moreover, General Assembly resolutions on non-intervention and proposed drafts defining aggression uniformly proscribe such assistance to insurgents.[152] The practice of states, however, has not always been consistent with this view. Thus the United States is alleged to have intervened covertly on behalf of an insurgent faction in Guatemala in 1954 and to a lesser extent in Iran in 1953,[153] and the Soviet Union, Peking, North Vietnam, and Cuba have frequently sponsored or supported wars of national liberation. This assistance to insurgents varies from the relatively minor United States activities in Iran to the major North Vietnamese involvement in Laos and South Vietnam. In recent years the Afro-Asian states have been willing to regard assistance to insurgents in states maintaining racially discriminatory regimes as permissible, but the substantial community consensus against such regimes and the General Assembly determinations authorizing assistance to the insurgent forces set these instances apart.

One of the principal dangers in allowing assistance to insurgents

152. *See, e.g.*, the Soviet Draft Definition of Aggression, 9 U.N. GAOR, Annexes, Agenda Item No. 51, at 6-7, U.N. Doc. A/C.6/L.332/Rev.1 (1954).
153. *See* R. BARNET, *supra* note 94, at 225-36.

is that assistance may be aggressively provided to spread the world view of the intervening power. In fact, it may simply conceal external sponsorship of what amounts to a covert armed attack; for if a faction assisted has only negligible internal support, then military assistance to it is functionally very close to an external attack. The United States sponsorship of the Bay of Pigs invasion and Havana's sponsorship of the guerrilla insurgency in Bolivia are good examples of this. As such, these situations are really type V situations concerning external initiation of force for the imposition of internal authority structures, rather than type IV situations.

Because of the dangers involved in permitting assistance to insurgents, in the absence of collective United Nations authorization such assistance should be prohibited.

C. CLAIMS TO ASSIST ANY FACTION IN A STRUGGLE FOR CONTROL OF INTERNAL AUTHORITY STRUCTURES WHERE A WIDELY RECOGNIZED GOVERNMENT CANNOT BE DISTINGUISHED

In most internal conflicts, it is readily apparent which side is the incumbent and which the insurgent. Such factors as wide diplomatic recognition, historic continuity of political authority, continuing exercise of administrative functions, control of the regular military apparatus, representation in international organizations, and continuing control of major cities and ports, set the two factions apart. The characterization "widely recognized government" which is used in this essay is shorthand for indicating an incumbent faction strongly satisfying these conditions. The legal effect of this characterization is to permit pre-insurgency assistance and counter-intervention on behalf of the faction so characterized.

In some internal conflicts, however, there may be no incumbent government or the competing factions may have roughly similar credentials to represent the incumbent. For example, at the time of the breakdown of order which precipitated the United States Dominican intervention, neither faction in the Dominican conflict could be meaningfully identified as a widely recognized government.[154] Similarly, I would characterize the Yemen conflict as one in which a "widely recognized government" cannot be distinguished, although United Nations seating of the Republicans makes this less clear. Certainly at the time the external assistance to both factions began, it was meaningless to factually characterize the Republicans and Royalists as either incumbent or challenger. According to Kathryn Boals' account of the conflict:

> The internal war in Yemen began in September, 1962 when a group of army officers carried out a palace coup against the ruling Imam and proclaimed the Yemen Arab Republic in place of the Kingdom of Yemen. The ousted

154. *See* note 130 *supra*. United States claims in the Dominican operation, however, were predominantly not claims to assist a particular faction.

> Imam and his supporters immediately began organizing a counter-revolution, recruiting northern Yemeni tribesmen and requesting help from Saudi Arabia in the form of training bases, arms, money, and supplies. Meanwhile the Republicans asked the United Arab Republic for technical and military assistance.
>
> With Saudi Arabia helping the Royalists and the United Arab Republic aiding the Republicans, fighting between the two sides began in October, 1962. . . .[155]

Subsequently, a number of states recognized the Republican forces, including the Soviet Union, the United Arab Republic and the United States. And the day following United States recognition, the General Assembly voted to seat the Republican delegation as the representative of Yemen.[156] These factors cut for permitting counter-intervention on behalf of the Republican forces. Diplomatic recognition, however, is frequently based more on political than on objective criteria and this seems to have been the case in Yemen. As such, diplomatic recognition alone, at least when the recognition pattern is significantly mixed, should not be decisive. The collective community endorsement of the Republicans by the United Nations credentials decision was perhaps more significant. But although such an endorsement deserves considerable weight, it is not the same thing as specific United Nations authorization of intervention on behalf of a particular faction. Despite the subsequent community recognition of the Republicans, the early commencement of intervention prior to substantial recognition, the lack of effective Republican control, the leadership of the insurgents by the ousted incumbent, and the substantial authority and control exercised by the ousted Imam and his supporters suggest that neither faction qualified as a widely recognized government and that external assistance to either faction should be impermissible.

In contexts such as the Yemen and Dominican conflicts, where the incumbent and insurgent forces cannot be readily distinguished, it seems desirable to treat both sides as if they were insurgents and prohibit all partisan military assistance to both. Where government and insurgent forces are factually indistinguishable there is no reason to allow either pre-insurgency assistance or counter-intervention to either faction. In such conflicts the dangers to self-determination of permitting partisan external assistance strongly suggests a flat prohibition on military assistance to either side, absent collective United Nations authorization. In such cases also, recognition of one side or the other, if premature, may itself constitute an impermissible intervention.[157]

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155. *See* K. Boals, *supra* note 97, at 4.
156. *See* K. Boals, *supra* note 97, at 6-8.
157. *See* II OPPENHEIM, *supra* note 149, at 250.

D. CLAIMS THAT EXTERNAL ASSISTANCE PROVIDED TO AN OPPOSING FACTION JUSTIFIES ASSISTANCE

Most commentators have regarded assistance to government forces, provided to offset external assistance to insurgents, as lawful.[158] To regard such counter-intervention as unlawful might be to deprive a state subject to a covert external attack of its right to collective defense under Article 51 of the Charter. And even if external assistance is provided to an indigenous insurgent movement the success of the insurgency certainly carries little meaning for determining the genuine demands of the people. The rhetoric and practice of states and United Nations practice also support this claim. For example, during the 1948 Greek Civil War external assistance was provided to the Greek insurgents, primarily by Yugoslavia.[159] Offsetting assistance was provided to the Greek government by the United States and was clearly regarded as lawful by the General Assembly.

If the counter-intervention exception is not to be totally open ended, permitting powers intervening on both sides to make escalating claims that each is simply responding to increases in assistance by the other, it would seem desirable to limit the exception to the widely recognized government side. And since military assistance programs to government forces are legitimate prior to the critical insurgency threshold, if the exception were available on the insurgent side, as a practical matter military assistance to insurgents would never be lacking for rationalization.

If counter-intervention is permissible only on behalf of a widely recognized government, the United States would have been able to provide offsetting assistance to the widely recognized government during the Greek Civil War but would not have been able to provide assistance in 1956 to offset the Soviet assistance to the Hungarian rebels. Although harsh in terms of self-determination, this result seems entirely consistent with the demands of system stability.

It should be pointed out that the counter-intervention exception is only necessary after the critical insurgency threshold requiring a freeze on assistance to recognized government forces has been passed.

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158. The only specific statement to the contrary seems to be that of Professor Quincy Wright who argues:

> It would appear that illegal intervention in the domestic jurisdiction of a state should not be made the occasion for counter-intervention but should be dealt with by the United Nations as it was in the Congo. Intervention to prevent civil strife from developing into international hostilities is within the legal competence of the United Nations. Only in this way can illegal counter-intervention designed to stop illegal intervention by another state be avoided.

Wright, *Non-Military Intervention*, in THE RELEVANCE OF INTERNATIONAL LAW 5, 16-17 (K. Deutsch & S. Hoffmann eds. 1968). In addition, Richard Barnet's proposed "prohibition on unilateral assistance" standard would also bar counter-intervention. See R. BARNET, *supra* note 94, at 278-80.

159. *See* R. BARNET, *supra* note 94, at 111-12.

Below that threshold military assistance to a widely recognized government is permissible in its own right.

Once above the insurgency threshold there is a major issue as to how much external military assistance to insurgents is necessary to justify counter-intervention and how much counter-intervention is in turn justified. Rather than treat this problem as one of assistance thresholds, the most effective approach seems to be to allow the recognized government to receive military assistance comparable to that being provided to insurgents. When assistance to insurgents stops, then comparable assistance to the government forces should be stopped. This requirement that assistance be comparable does not require a one-to-one troop count, or a one to one weapons count, but means that the political and military effect of the offsetting assistance be proportional, taking into account the balance of forces required in an insurgent conflict and the difficulty of estimating covert assistance to insurgents.

E. CLAIMS TO USE THE MILITARY INSTRUMENT IN THE TERRITORY OF ANOTHER STATE FOR THE PURPOSE OF RESTORING ORDERLY PROCESSES OF SELF-DETERMINATION IN CONFLICTS OVER INTERNAL AUTHORITY STRUCTURES INVOLVING A SUDDEN BREAKDOWN OF ORDER

This claim differs from the last four in that it is not a claim to provide partisan assistance to a particular faction. And unlike the claim to assist a widely recognized government in controlling non-authority-oriented disorders of the type I situation it is made in a type IV situation of a conflict for the control of internal authority structures. The principal examples of claims in this category are the second stages of the United States Dominican Republic operation and the United Nations Cyprus and, in part, Congo operations.

This category includes perhaps the most likely internal conflict situations for a United Nations peacekeeping presence. There is little difficulty in establishing the lawfulness of such a collective presence, at least when the United Nations is acting with the permission of the widely recognized government. But unilateral actions in this category, such as the Dominican Republic operation prior to meaningful OAS involvement, are highly controversial and present a much more difficult question.[160] On the one hand, there is a serious risk that claims of neutrality might mask support for a particular faction; and even if good faith neutrality is pursued, it is almost impossible to achieve, as normally one side will benefit more from cessation of hostilities. On the other hand, pressures for such interventions stem from the genuine interdependencies among nations which sometimes

160. The most comprehensive analysis of the legal issues raised by the Dominican operation is Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order—Part I*, 43 DENVER L. REV. 439 (1966), *Part II*, 44 DENVER L. REV. 225 (1967).

create strong interests in avoiding minority seizure of control of one's neighbors. Conflicts involving a sudden breakdown of order in a small state may present a particular danger of such minority seizure of control, both because of the weakness of effective military opposition and the small size of the force necessary to successfully seize power. And if good faith neutrality among factions is pursued, and genuinely free elections are substituted for armed conflict, self-determination may well be promoted. Another substantial benefit which may result from a successful intervention in this category, of course, is the ending of the destruction and loss of life involved in the usual civil authority struggle.

As a tentative resolution of claims in this category, I would permit such claims if sufficiently safeguarded to ensure that they are not merely self-serving operations masking external imposition of authority structures. In doing so, I recognize that interventions in this category present a serious danger of self-serving action, and if in practice the suggested safeguards prove unworkable, then such interventions should be prohibited in the absence of collective United Nations authorization. Conditions which such claims should meet to be adequately safeguarded are: (1) a genuine invitation by the widely recognized government, or, if there is none, by a major faction; (2) relative neutrality among factions, with particular attention to neutrality in military operations; (3) immediate initiation of and compliance with the decision machinery of appropriate regional organizations;[161] (4) immediate full reporting to the Security Council and compliance with United Nations determinations; (5) a prompt disengagement, consistent with the purpose of the action; and (6) an outcome consistent with self-determination Such an outcome would be defined as one based on internationally observed elections in which all factions are allowed freely to participate on an equal basis, which is freely accepted by all major competing factions, or which is endorsed by the United Nations. System stability suggests that such interventions should also not take place in an area committed to an opposing bloc.

A state contemplating such an intervention must plan in advance on meeting these conditions and must in fact successfully meet them. If these conditions are met, claims in this category would largely conform to the basic standard for type IV situations, which is that partisan military assistance, other than pre-insurgency assistance to a widely recognized government, may not be provided to any faction engaged in indigenous conflict for the control of internal au-

161. Such claims, of course, must also be consistent with the more particularized requirements of applicable regional arrangements, Article 20 of the Revised Charter of the Organization of American States, for example, casts some doubt on the permissibility of such claims in the absence of agreement by the Organ of Consultation acting under Article 6 of the Inter-American Treaty of Reciprocal Assistance. See L. SOHN, *supra* note 90, at 118-20, 140, 143.

thority structures absent unauthorized military assistance to insurgents or collective United Nations authorization.

F. CLAIMS TO USE THE MILITARY INSTRUMENT AGAINST THE TERRITORY OF A STATE PROVIDING ASSISTANCE TO AN OPPOSING FACTION

The principal instances in which one assisting state has made the claim that assistance to an opposing faction justifies the use of the military instrument against the territory of another assisting state seem to be the French bombing of the Tunisian frontier village of Sakiet Sidi Youssef during the course of the Algerian war,[162] Egyptian bombing raids against Saudi Arabian villages during the Yemen conflict,[163] Portuguese bombing of areas in Zambia allegedly being used as bases for guerrilla activities against Portuguese Africa,[164] and the United States bombing of North Vietnam during the Vietnam war.[165] Although not itself just an assisting state, the Israeli raids against Jordan and Lebanon in retaliation for their assistance to Palestinian refugee groups attacking Israel are in many ways similar.[166] Of these instances, only the Egyptian raids occurred in an unequivocal type IV situation. The French bombing occurred in a type II anti-colonial war, the American in a type VI divided nation conflict, and the Israeli and Portuguese in a situation with type V external initiation of force overtones. Since these instances for the most part raise similar issues, they will be treated together here rather than repeating this claim in each situation where it occurs. Because of its importance, however, the Vietnam claim will be deferred to the discussion of the type VI divided nation situation.

The first step in appraising these claims is to ascertain the lawfulness of the claimant's participation in the internal conflict. Since in some cases the claimant's participation is itself unlawful, as was Egyptian participation in Yemen, *a fortiori* the use of the military instrument against the territory of a state providing assistance to an opposing faction is unlawful. The French and Portuguese claims are at least questionable on this same score.

If the claimant's participation is otherwise lawful, then the principal issue is squarely presented. Under the Charter, the criterion for resolution of this issue is simply whether the assistance to the op-

162. *See* M. CLARK, ALGERIA IN TURMOIL—THE REBELLION: ITS CAUSES, ITS EFFECTS, ITS FUTURE 363-66 (1960).

163. *See* Boals, *supra* note 97, at 23; N.Y. Times, Aug. 17, 1969, at 16, col. 4, 5-6.

164. *See* N.Y. Times, Dec. 2, 1968, at 2, col. 4.

165. For joinder of issue on the question of permissibility of United States bombing of North Vietnam during the Vietnam War see Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 YALE L.J. 1051, 1073-78 (1967); Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 76 YALE L.J. 1095, 1126-27, 1140-42 (1967).

166. *See generally* Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415 (1969).

posing faction amounts to an armed attack within the meaning of Article 51. If it does, then the claimant may respond proportionally to the attack. If not, such a response is unlawful. This resolution of the issue adopts the restrictive view of self-defense which limits it to response against an armed attack under Article 51 of the Charter. There would be some scholars who would urge the less restrictive interpretation not limiting the right of self-defense to that of Article 51.[167] Professor Richard Falk, on the other hand, has pointed out that there is a strong community interest in discouraging geographic escalation of internal conflict. Thus he argues that unilateral reply against the territory of an assisting state should always be impermissible if assistance is covert.[168] Since most assistance to a genuine indigenous faction would not amount to an armed attack, avoiding geographic escalation is for the most part consistent with the requirements of Article 51 of the Charter. If, however, assistance to insurgents is massive and intense, and threatens major values in the target state, such assistance may constitute an armed attack under Article 51 of the Charter. Similarly, if intervention takes the form of initiation of the insurgent movement, and is simply a type V situation of indirect armed attack, then Article 51 may be invoked if major values are threatened. Such instances can be expected to occur infrequently. Even when they do occur, for reasons of strategy assisting nations will rarely choose to respond against the territory of another assisting state. But it is unrealistic to restrict the right of defense to situations in which armed attack is overt. The terriorist bomb can as substantially threaten fundamental values as armies on the march.

In its recent work on defining aggression, the United Nations Special Committee on the Question of Defining Aggression adverted to this claim of reply against the territory of an assisting state. Paragraph eight of a thirteen-power draft provides:

> When a State is a victim on its own territory of subversive and/or terrorist acts by irregular, volunteer or armed bands organized by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defense against the other State under Article 51 of the Charter. . . .[169]

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167. *See, e.g.*, D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 184-193 (1958); M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 233-241 (1961); J. STONE, AGGRESSION AND WORLD ORDER 92-101 (1958).

168. *See* Falk, *supra* note 165, at 1125, 1140-43.

169. Report of the Special Committee on the Question of Defining Aggression, 23 U.N. GAOR, Agenda Item No. 86, at 9, U.N. Doc. A/7185/Rev.1 (1968). With slight changes in wording, paragraph eight has become paragraph seven in the latest 13-power draft proposal. *See* Report of the Special Committee on the Question of Defining Aggression, 24 U.N. GAOR, Supp. 20, at 8, U.N. Doc. A/7620 (1969), *reprinted in* 8 INT'L LEG. MATERIALS 663, 664 (1969).

Senator John Sherman Cooper, the United States representative to the General Assembly, objected to this paragraph both on the ground of its ambiguity and on the ground that as an absolute it would unduly restrict the right of individual and collective defense. Senator Cooper pointed out:

> Now, there can be no doubt that the acts enumerated in this paragraph may involve the use of force within the meaning of Article 2(4) of the Charter. If we understand the foregoing paragraph correctly, its effect is thus that so far as the United Nations Charter is concerned, whether a state may defend itself against force employed by another state to destroy its population, change its government, or inflict physical damage upon its people or territory, depends simply on the techniques of force selected. In practical terms this means that for a large—and perhaps at present the most dangerous—class of aggressions, the victim must deal with the aggressor only in the victim's own territory and must deal with the aggressor alone and unassisted, regardless of the level of intensity to which the illegal force used against the victim may rise. This paragraph appears to us, therefore, to be seriously at variance with the Charter, and we doubt that on reflection the principle of conduct it contains would commend itself to governments. Its practical effect could be to protect an aggressor. . . .
>
> [W]hat I have said assumes that the "reasonable and adequate steps" referred to in the paragraph are intended to be purely internal; i.e., confined to the territory of the victim state. It is worth noting that such a provision is not a part of international law. . . .[170]

Senator Cooper would seem to be correct both in noting that there is no present international law requirement prohibiting reply against the territory of an assisting state if such assistance amounts to an armed attack, and in rejecting such a prohibition as an unwarranted restriction on the right of individual and collective defense. The real test is not a simplistic *a priori* geographic rule, but whether external involvement, covert or overt, is so extreme as to amount to an armed attack.

TYPE V SITUATIONS: CLAIMS RELATING TO EXTERNAL INITIATION OF THE USE OF FORCE FOR THE IMPOSITION OF INTERNAL AUTHORITY STRUCTURES

Type V situations are those in which there is little or no indigenous conflict for the control of internal authority structures; that is, the conflict is externally initiated. One factor which may be indicative (but not necessarily decisive) of a type V situation is the participation of personnel of the allegedly assisting entity in leadership positions and in tactical operations. Claims in this category

170. Cooper, *U.N. Legal Committee Discusses the Question of Defining Aggression*, 59 DEP'T STATE BULL. 664, 670-71 (1968).

are that a state may use its military instrument to externally impose its choice of internal authority structures on another state. In their baldest form, such claims simply assert a right of external choice of government. In their less candid form, they are sometimes masked as assistance to an indigenous faction or as counter-intervention. Examples are the puppet government set up by the Soviets during their 1939 invasion of Finland, the United States use of Cuban exiles in the Bay of Pigs invasion, and the alleged government request to combat "foreign forces hostile to socialism" in the 1968 Soviet invasion of Czechoslovakia.[171] None of these instances reflects genuine indigenous conflict.

There is little doubt that in the absence of United Nations authorization such claims are generally regarded as violations of international law; but in recent years such claims are being made with increasing frequency and have been predicated on the requirements of self-determination. One group of claims is made by the African states, which assert a right to overthrow discriminatory regimes in South Africa, South-West Africa, and Rhodesia.[172] The claims are implemented by the external fostering of insurgencies in those countries (as well as by the assisting of internal insurgencies).

A second recent claim is that made by the Soviets in their overt invasion of Czechoslovakia. In the now famous "Brezhnev Doctrine," published in Pravda and intended to justify the Czechoslovakia intervention, the Soviets argue:

> It has got to be emphasized that when a socialist country seems to adopt a "non-affiliated" stand, it retains its national independence, in effect, precisely because of the might of the socialist community, and above all the Soviet Union as a central force, which also includes the might of its armed forces. The weakening of any of the links in the world system of socialism directly affects all the socialist countries, which cannot look indifferently upon this. . . .
>
> Naturally the Communists of the fraternal countries could not allow the socialist states to be inactive in the name of an abstractly understood sovereignty, when they saw that the country stood in peril of antisocialist degeneration.[173]

In Czechoslovakia there could be no claim of assistance to a widely recognized government to defeat an insurgency, for there was neither invitation nor insurgency at the time of the Soviet invasion; rather, it was the very changes pressed by the Czechoslovakian government

171. *Compare* the Tass Statement on Military Intervention *with* the Declaration of the Presidium of the Central Committee of the Czechoslovakian Communist Party in 7 INT'L LEG. MATERIALS 1283-84, 1285 (1968).

172. *See generally* R. FALK, *supra* note 98; R. TAUBENFELD & H. TAUBENFELD, RACE, PEACE, LAW, AND SOUTHERN AFRICA (The Tenth Hammarskjöld Forum 1968).

173. *See* the Pravda Article Justifying Intervention in Czechoslovakia, *supra* note 75, at 1323-24.

itself which the Soviets sought to roll back. Indeed, there seems to have been little concern even with the appearance of invitation from the government, although an official Tass statement did allege a Czechoslovakian government request.[174] Under the "Brezhnev Doctrine" of intervention to preserve "socialist self-determination," the Soviets are essentially asserting a legal right to external imposition of government in the socialist countries of Eastern Europe.

A third recent claim asserting a right of external imposition of authority structure is that made by the Arab countries in justifying continuing guerrilla activity against Israel. Although the Arab-Israeli conflict has a complex history in which the Arabs have many legitimate grievances, the Arabs are essentially asserting a right to overthrow the government of Israel for the purpose of restoring self-determination to Palestinian Arabs.[175]

Because of the danger that such claims may merely mask a self-serving export of one's own demands, as Czechoslovakia amply demonstrates, as well as the serious public order threat they present, these claims must be regarded as impermissible in the absence of broad community support evidenced by United Nations endorsement. Even with UN endorsement, some would argue that such import of revolution is a violation of state sovereignty. If we are to deter self-serving individual claims and to recognize legitimate demands for self-determination, however, it seems appropriate to accord the community as a whole, acting through the United Nations, the competence to authorize initiatives to restore self-determination. The responsibility for such authorization should not be taken lightly and should fairly consider alternative peaceful modes of change and the likelihood of a major public order threat from the authorization of the use of force.

Military interventions in type V situations which do not have United Nations authorization and which seriously threaten major values, such as political and territorial integrity, may constitute an armed attack under Article 51 of the Charter giving rise to the right of individual and collective defense.

A. COLD-WAR CLAIMS FOR THE USE OF THE MILITARY INSTRUMENT IN THE TERRITORY OF ANOTHER STATE FOR THE PURPOSE OF MAINTAINING OR IMPOSING "DEMOCRATIC" OR "SOCIALIST" REGIMES

Claims in this category, particularly if undertaken in a crusading spirit in the committed area of an opposing bloc, present an acute

174. *See* the Tass Statement on Military Intervention, *supra* note 171, at 1283-84.

175. For a summary background of the Arab-Israeli conflict see SENATE COMM. ON FOREIGN RELATIONS, 90TH CONG., 1ST SESS., A SELECT CHRONOLOGY AND BACKGROUND DOCUMENTS RELATING TO THE MIDDLE EAST (Comm. Print. 1967).

public order threat. Since these claims are unlikely to receive United Nations approval, they should be regarded as clearly impermissible.

The most flagrant example of intervention in this category is the recent Soviet invasion of Czechoslovakia. The United States sponsored Bay of Pigs invasion of Cuba, however, and the Che Guevara operation in Bolivia present essentially the same claim. In none of these cases was there any significant internal insurgency at the time the military instrument was employed. All represent a fairly bald attempt at external imposition of a favored form of government and all are impermissible under international law.

B. CLAIMS FOR THE USE OF THE MILITARY INSTRUMENT IN THE TERRITORY OF ANOTHER STATE FOR THE PURPOSE OF ALTERING INTERNAL AUTHORITY STRUCTURES WHICH DENY SELF-DETERMINATION ON A RACIAL BASIS

One factor justifying separate treatment of claims for the purpose of altering authority structures which deny self-determination on a racial basis is the extraordinary community consensus against such denial. This consensus is evidenced by the United Nations Declaration on the Elimination of All Forms of Racial Discrimination adopted by the General Assembly in 1963. The Declaration provides in part:

> *The General Assembly,* . . .
>
> *Alarmed* by the manifestations of racial discrimination still in evidence in some areas of the world, some of which are imposed by certain Governments by means of legislative, administrative or other measures, in the form, *inter alia,* of *apartheid,* segregation and separation, as well as by the promotion and dissemination of doctrines of racial superiority and expansionism in certain areas,
>
> *Convinced* that all forms of racial discrimination and, still more so, governmental policies based on the prejudice of racial superiority or on racial hatred, besides constituting a violation of fundamental human rights, tend to jeopardize friendly relations among peoples, co-operation between nations and international peace and security, ...
>
> *Convinced further* that the building of a world society free from all forms of racial segregation and discrimination, factors which create hatred and division among men, is one of the fundamental objectives of the United Nations,
>
> 1. *Solemnly affirms* the necessity of speedily eliminating racial discrimination throughout the world, in all its forms and manifestations, and of securing understanding of and respect for the dignity of the human person;
>
> 2. *Solemnly affirms* the necessity of adopting national and international measures to that end. . . .[176]

176. G.A. Res. 1904, 18 U.N. GAOR, Supp. 15, at 35-37, U.N. Doc. A/5515 (1963).

The greatest danger in type V situations is probably self-serving definition of self-determination. There can be little doubt, however, that in view of the General Assembly Declaration on the Elimination of Racial Discrimination there is a broad community consensus that self-determination is denied to the black African in South Africa and Rhodesia. The same is true, though complicated by the problem of colonialism, in South-West Africa and the Portuguese colonies of Angola, Mozambique and Guinea. But though these denials of self-determination of the black African are extreme, there are also other peoples of the world deprived of self-determination; for example, the peoples of Czechoslovakia and Hungary following the Soviet invasions or the peoples of Haiti under the present regime of President-for-Life Francois Duvalier. In each case, even if a collective community decision is reached that force is necessary and justified for achieving self-determination, we must still be concerned with the destructiveness of coercive change and the threat to minimum public order of attempted coercive change. In the case of Western assistance to insurgents in Hungary or Czechoslovakia, the public order threat seems intolerably high. In Southern Africa it is lower but still of substantial concern; and in Haiti it seems still lower.

Because it reflects a wide range of interests cutting across the cold-war, collective United Nations determination seems the best way to lessen both the danger of self-serving claims about self-determination and the danger of cold-war clashes resulting from intervention in a committed area. It is unlikely that the United Nations will authorize Western assistance to insurgents in Hungary or Czechoslovakia. The United Nations, however, has authorized individual use of force in Southern Rhodesia, South Africa, South-West Africa and the Portuguese colonies.

The Southern Rhodesian resolution of November 7, 1968 is only a little stronger than most such second generation General Assembly resolutions authorizing individual use of force on behalf of insurgents fighting against colonial or discriminatory regimes. The Rhodesian resolution, urges

> all States, as a matter of urgency, to render all moral and material assistance to the national liberation movements of Zimbabwe [Southern Rhodesia], either directly or through the Organization of African Unity . . . .[177]

The Resolution also condemns

> the illegal intervention of South African forces in Southern Rhodesia and calls upon the United Kingdom, as the administering Power, to ensure the immediate expulsion of

177. G.A. Res. 2383, 23 U.N. GAOR, Supp. 18, at 58, U.N. Doc. A/7218 (1968) (Article 14). A 1967 Southern Rhodesia resolution contained an identical provision. *See* G.A. Res. 2262, 22 U.N. GAOR, Supp. 16, at 45-47, U.N. Doc. A/6716 (1967) (Article 16).

> all South African armed forces, including the police, from Southern Rhodesia and to prevent all armed assistance to the racist minority regime . . . .[178]

And the South African resolution of December 13, 1967 provides:

> *The General Assembly* . . .
> *Noting with grave concern* that the racial policies of the Government of South Africa have led to violent conflict and an explosive situation,
> *Convinced* that the situation in the Republic of South Africa and the resulting explosive situation in southern Africa continue to pose a grave threat to international peace and security, . . .
> 8. *Appeals* to all States and organizations to provide appropriate moral, political and material assistance to the people of South Africa in their legitimate struggle for the rights recognized in the Charter . . . .[179]

The 1968 Report of the Special Committee on the Policies of *Apartheid* of the Government of the Republic of South Africa removes any doubt that this language is a call for military assistance to insurgents in South Africa (or for external initiation of insurgency). In referring to this provision the Committee reports:

> The Special Committee takes note of the view of the liberation movement of South Africa that the policies and actions of the South African Government have obliged it to seek the achievement of the legitimate rights of the people by means including an armed struggle. The primary responsibility for the present violent conflict rests on the South African Government, since it has defied decisions by the United Nations, rejected a peaceful solution of the situation in conformity with the principles of the United Nations and tried to impose its inhuman racist policies by brutal repression . . . .
> In view of recent developments, the Special Committee feels that the General Assembly should strongly reaffirm its recognition of the legitimacy of the struggle of the people of South Africa and urge all States and organizations to provide greater moral, political and material assistance to them in this legitimate struggle.[180]

In the short run the Rhodesian, South African and similar resolutions are unlikely to be successfully implemented against the effective military forces of most of these regimes. But they do repre-

178. G.A. Res. 2383, 23 U.N. GAOR, Supp. 18, at 58, U.N. Doc. A 7218 (1968) (Article 10).
179. G.A. Res. 2307, 22 U.N. GAOR, Supp. 16, at 19-20, U.N. Doc. A/6716 (1967).
180. Special Committee on the Policies of *Apartheid* of the Government of the Republic of South Africa, Report, 23 U.N. GAOR, Agenda Item No. 31, at 31, U.N. Doc. A/7254 (1968).

sent an important community determination that self-determination is denied sufficiently to justify resort to force. In making such determinations, it seems incumbent on the General Assembly to carefully consider non-forceful alternatives for achieving self-determination and to be aware of the adverse public order consequences from authorizing use of force. Absent such specific United Nations authorization, claims in type V situations for external initiation of force to secure self-determination should be impermissible.

C. CLAIMS TO ASSIST EXILE OR REFUGEE GROUPS FOR THE PURPOSE OF RESTORING SELF-DETERMINATION

Arab claims to overthrow the State of Israel for the purpose of restoring self-determination to Palestinian Arabs are the most important claims in this category. Regardless of the legitimacy of Arab grievances, such claims to use force on behalf of refugee groups should be impermissible absent collective United Nations authorization of the use of force. At this point in time there is no reason to prefer the self-determination of the Arab refugees to that of the Israelis, and the continuation of a state of belligerency seems inconsistent with the basic principle of the United Nations Charter.

Other situations presenting claims in this category, though not as clearly, are the United States assistance to Cuban refugees in the Bay of Pigs invasion, the abortive 1968 Cap-Haitian landing of Haitian exiles rumored to be operating from the Bahamas (if in fact the small scale operation received any governmental assistance), and the North Vietnamese training and infiltration of South Vietnamese cadre who went North at the time of the Geneva settlement in 1954. Regardless of which way self-determination seems to cut, the danger of self-serving claims and the threat to minimum public order suggest that all such claims to assist refugee or exile groups should be impermissible absent collective United Nations authorization. Moreover, the Bay of Pigs and Vietnamese instances involved such third party initiation and sponsorship that in reality the claims to restore self-determination to exile groups were merely covers for cold-war claims for the purpose of imposing "democratic" or "socialist" regimes.

A related question, presented over a range of claims but particularly critical with respect to claims to assist refugee or exile groups, is the question of duty to prevent such groups from operating from one's territory. The Arab states' acquiescence in, if not encouragement of, the operations of the Arab guerrilla organizations from their territory is a particularly acute example. This question, however, is complicated by doubts whether some of the Arab states are politically or militarily strong enough to prevent such use of their territory.

In any event, at least the impermissibility of toleration of one's territory as a base for armed activities against another state seems

reasonably clear in theory. The 1965 General Assembly Declaration on Inadmissibility of Intervention is representative of many authoritative pronouncements when it provides:

> [N]o State shall organize, assist, foment, finance, incite or *tolerate* subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State. . . . (Emphasis added).[181]

TYPE VI SITUATIONS: CLAIMS RELATING TO COLD-WAR DIVIDED NATION CONFLICTS.

Claims relating to the cold-war divided nations of China, Germany, Korea and Vietnam have overtones of conflicts from types I through V, but because of their peculiar features and their acute involvement with the major cold-war public order problem, they can most usefully be treated separately. That these divided nations present an acute public order problem is evidenced by the least critical two, Korea and Vietnam, having precipitated the two major wars since World War II. The other two divided nations, China and Germany, have constituted a continuing source of cold-war tension.

One peculiar feature of the divided nations is the fiction, carefully maintained by both halves, that each is really the legitimate government of the entire nation. In each case both halves are clearly de facto entities in their own right, with separate social and political institutions, military forces, and diplomatic representation. Moreover, each of the divided nations is linked through a series of treaty commitments with the cold-war bloc which supports it; and major powers feel a strong commitment to stand by these undertakings, partly because of legitimate fear about loss of credibility in the other divided nation situations. These factors have combined to make the cold-war divided nations perhaps the most acute public order threat in the international system. Under such circumstances, it must be regarded as the gravest of transgressions for one half of a cold-war divided nation to attack the other half or to assist an insurgency in the other half. For the purpose of maintaining world public order, the halves of these divided nations are really more than separate countries, and should certainly not be regarded as simply one nation. The civil war label is particularly misleading in concealing the dominant public order concern of these conflicts.[182]

Internal conflicts within the divided nations which do not involve participation of the other half may be classified much as any other internal conflict, and for that reason this separate section contains only claims concerning conflict involving both halves.

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181. G.A. Res. 2131, 20 U.N. GAOR, Supp. 14, at 11-12, U.N. Doc. A 6014 (1965).

182. For development of this point in the context of the Vietnam War see Moore, *supra* note 165, at 1054-58.

A. CLAIMS BY ONE HALF OF A COLD-WAR DIVIDED NATION TO TAKE OVER THE AUTHORITY STRUCTURE OF THE OTHER HALF OR TO ASSIST AN INSURGENT FACTION IN A STRUGGLE FOR CONTROL OF INTERNAL AUTHORITY STRUCTURES

The two principal examples of such claims have been North Korean claims in the invasion of South Korea and North Vietnamese claims in what has at least been substantial assistance to an insurgency in South Vietnam. Apparently North Korea has also recently begun the infiltration of guerrillas into South Korea.[183]

The North Korean claim in the invasion of South Korea was decisively rejected by the United Nations in a collective defense action which has remained the paradigm of UN action in response to a breach of the peace.[184] The Vietnam case has remained controversial, complicated by such factors as an uncertain international settlement, significant indigenous support for the Viet Cong, and the covert nature of the attack.[185]

Despite the ambivalent response of the world community in the second Vietnam War, however, public order considerations evidenced by the very existence of the War make it imperative that the use of the military instrument by one-half of a divided nation against the territory of the other be prohibited, whether constituting an all out attack or simply covert assistance to an insurgency. And this should be so regardless of the legitimacy or justice of any non-forceful grievance which one half has against the other. It is likely that the Chinese and Soviet blocs would feel justifiably aggrieved at sustained military assistance provided from Taiwan to an insurgency on mainland China or from West Germany to an insurgency in East Germany. And what works one way in international law must also work the other.

This prohibition of involvement of one-half of a divided nation in conflict in its twin simply treats the two halves as separate international entities (which in view of the policies at stake is a minimum characterization), and applies what is essentially the prohibitions of the type IV and V situations. It should be emphasized, though, that the reasons for the prohibition of assistance may be much more important in the divided nation context.

B. CLAIMS TO ASSIST THE WIDELY RECOGNIZED GOVERNMENT OF A COLD-WAR DIVIDED NATION TO RESIST TAKEOVER OF ITS AUTHORITY STRUCTURES BY THE OTHER HALF OF THE DIVIDED NATION OR TO COUNTER ASSISTANCE PROVIDED TO AN INSURGENT FACTION BY THE OTHER HALF

Public order considerations and de facto realities strongly sug-

183. *See* N.Y. Times, Jan. 9, 1969, at 4, col. 5.
184. *See generally* L. SOHN, CASES ON UNITED NATIONS LAW 474-90, 509-27 (2d ed. rev. 1967).
185. *See* I THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1968).

gest that the two halves of the cold-war divided nations should be treated as separate states.[186] As such, one-half of a divided nation subjected to an attack from the other half should have all the rights of individual and collective defense under the Charter of the United Nations. In fact, that has been the case in both Korea and Vietnam, with the United Nations in Korea and the United States and a number of its allies in Vietnam assisting in collective defense of the entity under attack. Moreover, since North and South Korea and North and South Vietnam are separate international entities for purposes of the lawfulness of the use of force, assistance by North Korea or North Vietnam to insurgents in the South triggers a right of counter-assistance to the widely recognized government under the situation IV (d) standard. Not to allow counter-assistance would tie the hands of the government forces and prevent effective sanction against covert attempts at takeover.

C. CLAIMS TO USE THE MILITARY INSTRUMENT AGAINST THE TERRITORY OF ONE HALF OF A COLD-WAR DIVIDED NATION WHICH IS PROVIDING ASSISTANCE TO AN INSURGENT FACTION IN THE OTHER HALF

There is no doubt that in cases of overt invasion across national boundaries, as in the Korean War, the right of defense includes the right to proportional response against the territory of the invading state. There is less authority, however, on the question of response against the territory of a state which is providing assistance to an insurgent faction. Apparently the only major precedent in the divided nation context is the United States response against the territory of North Vietnam.

Richard Falk has argued strongly in the Vietnam context against the permissiveness of such response outside of the territory of the state undergoing internal conflict on the grounds that the discretion

186. McDougal and Feliciano point out:

> In the Korean conflict, neither of the initial participants—the Republic of Korea and the North Korean People's Republic—recognized the other as a state. The Soviet Union argued to the United Nations that the exercise of violence in Korea could not be characterized as unlawful coercion since the conflict was an internal or civil one and the Charter prescriptions are not applicable to coercion between two groups within a single state. The decisions reached by the United Nations in the Palestine and Korean cases suggest that conflicts involving a newly organized territorial body politic, or conflicts between two distinct territorial units which the community expects to be relatively permanent, are, for purposes of policy about coercion, to be treated as conflicts between established states. Thus, the applicability of basic community policy about minimum public order in the world arena and competence to defend against unlawful violence are not dependent upon formal recognition of the technical statehood of the claimant-group by the opposing participant.

M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 221 (1961).

available to nation states should be curtailed in ambiguous covert attack situations and that the danger of escalation from such response is too great.[187] Though these arguments are persuasive in some contexts, they do not sufficiently take account of the functional equivalence of overt invasions and some massive covert attacks. Moreover, they overemphasize the difficulty of appraisal of such claims. In most cases assistance to an indigenous insurgent faction would simply not amount to an armed attack. But if in the cold-war divided nation context such assistance is massive and intense, threatens major values in the target state, and is rendered with a more or less long run objective of territorial unification, then it would seem that it does constitute an armed attack under Article 51 of the Charter justifying a proportional defensive response against the territory of the assisting entity. Persistent claims by both halves of the cold-war divided nations that each represents the entire nation heighten the probability that sustained assistance to insurgents in one half by the other half represents a take over attempt. *A fortiori*, if the assistance really amounts to an externally initiated insurgency masking a covert invasion, then if major values are threatened in the target state a defensive response is justified. Whether such a response against the territory of the attacking entity is an effective strategy, however, is another question, and perhaps one carrying a substantial burden of persuasion.

V. INSTITUTIONAL WEAKNESSES OF THE INTERNATIONAL SYSTEM AFFECTING THE CONTROL OF INTERVENTION AND SOME RECOMMENDATIONS FOR IMPROVEMENT

A. PROBLEMS AND PROSPECTS

The history of efforts in international conflict management shows that both normative and institutional developments are important for progress.[188] It is essential to have standards for appraisal as well as institutional mechanisms for their effectuation. Publicists, however, have been largely preoccupied with the normative appraisal of intervention and have woefully neglected the institutional side. And as has been seen, existing international organizations were largely a response to conventional war and are poorly equipped for the control of intervention in internal conflict.

New and untried international machinery should not be thought of as a panacea for the control of intervention. As the founders of the League of Nations learned, attitudes and beliefs about the settlement of international conflict may play a critical role.[189] But it

187. *See* Falk, *supra* note 165, at 1125-26, 1140-43.

188. *See* M. Kaplan & N. Katzenbach, *Resort to Force: War and Neutrality*, in THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW, 198-228 (1961), *reprinted in* II R. FALK & S. MENDLOVITZ, THE STRATEGY OF WORLD ORDER 276 (1966).

189. *See* I. CLAUDE, SWORDS INTO PLOWSHARES (2d ed. 1959).

can be confidently predicted that given the present infancy of institutional machinery for coping with intervention, institutional development holds great promise.

A number of intervention problems recur with sufficient frequency to suggest major institutional needs. First, most decisions to intervene are unilateral decisions and as such pose a greater threat of impermissible action than collective decisions. Although there is no guarantee that collective decisions will always promote the community interest, the greater the community participation the more likely that decisions will transcend the purely national interests of any one nation. Additionally, collective decision which includes the rival superpowers offers greater assurance of conflict avoidance. For these reasons, collective decision should be preferred. A related problem is the complimentary need to establish effective institutions for collective authorization in areas of needed change.[190] If a general non-intervention proscription is to be workable, then such effective agencies for community authorization are a necessity.

Second, there is a significant fact-finding and disclosure problem in the appraisal of most interventions. Was the Stanleyville mission simply a non-authority-oriented humanitarian intervention or was it also aimed at the Gbnye regime? What was the participation of Yugoslavia and Albania in the 1947 Greek Civil War? What was the extent of Syrian and Egyptian military involvment in the 1958 Lebanon crisis? What is the role of Hanoi in insurgencies in Laos, South Vietnam, and Thailand? Are the French providing military assistance to the Biafran government in the Nigerian Civil War, and if so what is the extent of the assistance? Were United States military operations in the Dominican Republic in fact relatively neutral among the competing factions? Was the election of Balaguer a fair election? What is the extent of Cuban military assistance to insurgents in Venezuela? Techniques which may be useful in dealing with these fact-finding problems include reporting requirements and an international agency for observation and disclosure. In a recent General Assembly resolution, the Assembly recognized the importance of fact-finding in the settlement of international disputes and urged states "to make more effective use of the existing methods of fact-finding. . . ." [191] Unfortunately, however, existing methods of fact-finding are not wholly responsive to the problem of intervention.

Third, both the problem of intervention in internal conflict and

190. *See* R. FALK, *On Legislative Intervention by the United Nations in the Internal Affairs of Sovereign States*, in LEGAL ORDER IN A VIOLENT WORLD 336 (1968).

191. G.A. Res. 2329, 22 U.N. GAOR, Supp. 16, at 84, U.N. Doc. A 6716 (1967) (Article 1). This resolution also requested:

> the Secretary-General to prepare a register of experts in legal and other fields, whose services the States parties to a dispute may use by agreement for fact-finding in relation to the dispute . . . .

Id. at Article 4.

the problem of intensification of internal conflict (as well as the problem of proliferation of nuclear weapons) are worsened by the burgeoning arms race in conventional weaponry and in military assistance programs. The magnitude of these programs today is so great that it is appropriate to speak of a military assistance race. The secrecy of such programs and the growing demand for conventional weaponry may lead to an escalating spiral of competitive armament, miscalculation, and conflict. The Middle East provides a dramatic example.

Fourth, settlement of internal conflict is a difficult problem at best, but it seems particularly intractable in the later stages of a prolonged conflict. The problem of settlement in Vietnam provides vivid illustration. The continuation of the Nigerian, Yemen, and Cyprus conflicts adds additional testimony. There is clearly a major need in internal conflict for early invocation of settlement machinery and for the creation of more effective techniques of settlement.

Fifth, there is a need for greater agreement on standards for appraisal of intervention and for a greater role for such standards in national decision processes. Too often the only perspective which seems to be represented in national decision processes is a kind of spur of the moment *realpolitik*. Reversal of this dominance requires a concerted effort by scholars concerned with intervention to clarify areas of agreement as well as disagreement. The American Society of International Law currently sponsors a panel for the study of internal conflict,[192] and one planned feature of its keystone study is a summation of such agreement. The effort to distill at least a minimum consensus on the standards for appraisal of intervention is worthwhile and is likely to be more productive than the rhetoric of debating scholars would suggest. Reversal of the dominance of *realpolitik* requires as well concern for how non-intervention standards are fed into national decision processes, and proposals for their more effective input.

In partial response to these problems, the following recommendations for institutional improvement seem to offer promise. Though some are presented more specifically than others, I am not as wedded to the details as to the general ideas.

B. RECOMMENDATIONS FOR IMPROVEMENT IN THE INTERNATIONAL CONSTITUTIVE PROCESS

1. *The General Assembly as an Authorizing Agency*

One of the problems with proscribing partisan intervention in internal conflict is that some such interventions may promote genuine self-determination, as might be the case in Rhodesia and Haiti. The danger of leaving such judgments to unilateral determination, though, is a strong reason for proscribing such intervention. Yet to

192. Study Group on the Role of International Law in Civil Wars (Civil War Project of the American Society of International Law).

be truly acceptable and effective, a system for the control of intervention must provide for legitimate demands for change. One solution to this problem is to strengthen the role of the General Assembly as an authorizing agency. This strengthening should be accompanied by non-intervention standards which clearly proscribe partisan assistance in internal conflict absent General Assembly authorization.

General Assembly authorization could take the form of recommending assistance to a faction, of recommending a particular kind of assistance, or of recommending withdrawal of assistance. In any event the General Assembly's role need not take the form of ordering or supervising collective military action, but simply of authorizing member states to take action individually. General Assembly resolutions which simply recommend action avoid the debilitating financial problems of the Congo and Middle East operations as well as the considerable political difficulties in maintaining a consensus for collective action. Of course, General Assembly authorization also has the very substantial advantage of avoiding the veto.

There is already precedent for such General Assembly recommendations in the 1967-68 Rhodesia, South Africa, South-West Africa, and Portuguese territories resolutions callings for assistance to the national liberation movements in those countries.[193] As these resolutions suggest, General Assembly authorization is a workable prerequisite for action in cases in which there is a strong community consensus. Lacking such consensus, intervention is suspect both in terms of self-determination and in the danger of conflict escalation resulting from major power disagreement.

One difficulty with this proposal is that as presently constituted the General Assembly is grossly malapportioned, both in terms of population and in terms of effective power.[194] This malapportionment increases the likelihood of an abuse of power. But this danger of abuse seems slight in comparison with the normless present in which individual states are asserting competence to make such determinations unilaterally. Moreover, because of the greater influence exercised by major powers, the present malapportionment is not as extreme as it might seem.

A second difficulty with this proposal, also not fatal, is the constitutional objections under the Charter. The two principal objections would be that such General Assembly recommendations "intervene in matters which are essentially within the domestic jurisdiction" of a state contrary to Article 2(7), and that they constitute action which may be taken only by the Security Council.[195] These consti-

193. *See* text at notes 135-37 and 177-80 *supra*.

194. *See* L. SOHN, *supra* note 184, at 248-90.

195. With respect to Security Council action this second objection would be replaced by the Article 24 limitation of Security Council authority to "the Maintenance of international peace and security." See Sohn, *The Role of the United Nations in Civil Wars*, in III R. FALK & S. MENDLOVITZ, THE STRATEGY OF WORLD ORDER 580, 582 (1966).

tutional objections should be appraised in the perspective of the trend of effective power away from the Security Council and to the General Assembly (perhaps slowed down or reversed in recent years). The reasons for this trend are many, but chief among them are the failure to sustain the wartime cooperation among the major powers, resulting in the abuse of the veto and inability to effectuate an Article 43 agreement, and the great increase in membership of the General Assembly.[196]

With respect to the "intervention in domestic jurisdiction" objection, in the Spanish,[197] Rhodesian, South African, South-West African, and Portuguese territories resolutions the General Assembly recommended action on the basis of a general consensus that a particular regime denied self-determination. Arguably, the South-West African and Portuguese territories resolutions rested on the special authority of the General Assembly in colonial and trusteeship matters. Certainly, the "domestic jurisdiction" limitation is weakest in resolutions concerning colonial and trust areas.[198] And the Rhodesian resolution may be a special case in that the Security Council had already found that the Rhodesian situation constituted a threat to international peace and security. The application of enforcement measures under Chapter VII of the Charter is an exception to the "domestic jurisdiction" limitation of Article 2(7). But even so, taking all of these resolutions together, particularly the South African resolution, there is precedent for a broad interpretation of General Assembly competence which would support the suggested authorizing role. The real test, of course, would be a recommendation solely on the authority of the General Assembly in a situation such as Haiti, which is not a trust or colonial area.

With respect to the objection that General Assembly recommendations, which could include recommendations for military assistance, constitute action which may be taken only by the Security Council, the Spanish, Rhodesian, South African, South-West African, and Portuguese territories resolutions could again be cited as precedent for a broad General Assembly competence. The resolution in the Spanish case, however, did not go so far as to authorize military assistance, but only recommended severance of diplomatic relations; and in the Rhodesian case the Security Council had previously branded the Rhodesian situation as constituting a threat to international peace and security. Additional precedents for General Assem-

196. *See* Goodrich, *The UN Security Council*, in III R. FALK & S. MENDLOVITZ, *supra* note 195, at 169.

197. G.A. Res. 39, 1 U.N. GAOR 63-64, U.N. Doc. A/64/Add.1 (1946).

198. [T]he United Nations has in the past shown constant interest in revolts of non-self-governing peoples against the colonial Powers, and regardless of objections raised against interference in matters of domestic jurisdiction, it can be said that a "colonial revolution is now legally as well as practically a matter of concern to the whole community."

Sohn, *supra* note 195, at 580.

bly recommendations concerning internal conflict are the resolutions passed in 1947 and 1948 calling upon Albania, Bulgaria, and Yugoslavia to withhold assistance from the Greek guerrillas,[199] the 1949 resolution recommending that all states "refrain from the direct or indirect provision of arms or other materials of war to Albania and Bulgaria until the [United Nations] . . . has determined that the unlawful assistance of these States to the Greek guerillas has ceased, . . ." [200] the 1960 resolution calling on all states to refrain from intervention in the Congo,[201] and the 1967 resolution calling for the removal of British troops from Oman.[202] Although these resolutions strongly support a General Assembly competence to call for withdrawal of assistance (even from an incumbent government), admittedly the recent Rhodesian, South African, South-West African, and Portuguese territories resolutions, authorizing military assistance to national liberation movements in those countries,[203] go a step further.[204]

The 1950 Uniting for Peace resolution specifically authorizes General Assembly recommendations for "collective measures" and for "the use of armed force." [205] Though the Uniting for Peace machinery is rusty with disuse, and is based on the Security Council's inability to act because of lack of unanimity of the permanent members,[206] the constitutional capacity of the General Assembly which it evidences lends support to General Assembly power to recommend the use of armed forces.

Finally, the 1962 Advisory Opinion of the International Court of Justice in the *Certain Expenses of the United Nations* case [207] also lends some support to a broad General Assembly authorizing role.

199. G.A. Res. 109, 2 U.N. GAOR 12-14, U.N. Doc. A/519 (1947); G.A. Res. 193, 3(1) U.N. GAOR 18-21, U.N. Doc. A/810 (1948).
200. G.A. Res. 288A, 4 U.N. GAOR 9-10, U.N. Doc. A/1251 (1949).
201. G.A. Res. 1474 (Emer. Sess. IV), U.N. GAOR, Supp. 1 at 1, U.N. Doc. A/4510 (1960).
202. G.A. Res. 2302, 22 U.N. GAOR, Supp. 16, at 49-50, U.N. Doc. A/6716 (1967).
203. The Rhodesian, South African, South-West African and Portuguese territories resolutions all contain the language "moral and material assistance" in calling for assistance to national liberation movements in those countries. The Oman resolution also calls for assistance but uses less specific language. The resolution appeals: "to all Member States to render all necessary assistance to the people of the Territory [Oman] in their struggle to obtain freedom and independence. . . ." *Id.* at Article 9.
204. For purposes of constitutional analysis it is useful to focus on the precise claim which the resolution raises. For example, a resolution calling for cessation of assistance to insurgents is more clearly constitutional than a resolution calling for assistance to insurgents to overthrow a widely recognized government.
205. G.A. Res. 377A, 5 U.N. GAOR, Supp. 20, at 10-12, U.N. Doc. A/1775 (1950).
206. Apparently also recommendation of the use of armed force under the Uniting for Peace resolution is authorized only "in the case of a breach of the peace or act of aggression." *Id.* at Article 1.
207. [1962] I.C.J. 151.

In the *Certain Expenses* case a majority of the Court upheld the power of the General Assembly to initiate the United Nations peacekeeping operations in the Congo (ONUC) and the Middle East (UNEF). The Court emphasized that such actions were taken with the consent of the host government and were thus not "enforcement action." [208] Resolutions recommending national military assistance to liberation movements seem to present a stronger case for the constitutionality of General Assembly competence than the ONUC or UNEF cases in that they do not constitute collective action under the United Nations flag, but they present a weaker case for constitutionality in that they recommend coercive measures without the consent of the government.

Though the issue is not free from doubt, existing authority seems to support a broad General Assembly competence with respect to internal conflict, including authority to recommend to member nations the use of military measures on behalf of an insurgent faction, as long as such recommendations are consistent with the purposes and principles of the Charter. General Assembly authorization, like all exercises of power, is subject to abuse. But on balance the development of a broad General Assembly authorizing competence, if coupled with a clear proscription of partisan military assistance absent such authorization, promises to be a significant advance in the control of intervention in internal conflict.

2. *A Proposal for International Reporting of Military Assistance*

International reporting of military assistance would serve a number of purposes. First, it would serve a "blue-sky" function, developing community awareness of the magnitude of the military assistance race, exposing individual interventionary activities, and inviting community appraisal. Second, it would assist in fact appraisal of interventionary situations. For example, if non-intervention standards require a freeze on military assistance to the government forces once the insurgency threshold is reached, reporting of military assistance would enable appraisal of the permissible level of continuing assistance. Third, reporting could serve as an early warning device for spotting conflicts in an early stage when they may be most amenable to settlement. Thus, if a sudden increase in military assistance indicated the outbreak of conflict, and if reporting were to the Secretary-General, he might pursue diplomatic initiatives or refer the dispute to the Security Council. Finally, reporting might prevent an arms spiral resulting from miscalculation of a competitor's assistance.

Despite these substantial advantages, the international system does not even have rudimentary reporting machinery applicable to intervention in internal conflict. There is no general arrangement for reporting arms transfers or other forms of military assistance. And

208. *Id.* at 164-66, 170, 177.

the only real reporting requirements in the Charter, Articles 51 and 54, have proven only peripherally relevant to the internal conflict problem. Article 54 provides that:

> The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

But this reporting requirement is vague, applies only to regional agencies or arrangements, and in practice has not proven of substantial benefit in the internal conflict context. Article 51 provides that "Measures taken by Members in the exercise of . . . [the] right of self-defense [if an armed attack occurs] shall be immediately reported to the Security Council. . . ." But in practice the antecedent "self-defense if an armed attack occurs" seems to have been interpreted as applying to military response against the territory of a hostile state rather than to assistance in internal conflict. The pattern of United States reporting in the course of the Vietnam War demonstrates this interpretation; the first explicit reporting to the Security Council seems to have been in response to the Tonkin Gulf raids on the North and the commencement of the regular bombing of the North.[209] It is a tragic commentary on the adequacy of present reporting requirements that neither side in the Vietnam War meaningfully reported its actions to the Security Council for almost three years after significant hostilities were commenced. In other instances of intervention, such as the 1964 British assistance in Kenya, the joint Belgian-United States rescue mission in the Congo, and military assistance programs in the absence of internal conflict, the armed attack antecedent is not even relevant. The reporting requirement of Article 51, then, has not proven responsive to the internal conflict problem.

In the last few years there have been several proposals for limited reporting arrangements, but perhaps because there is not yet full commitment to the need for such arrangements, little seems to have come of them. In December, 1965, Malta sponsored a resolution in the First Committee of the General Assembly which called for "establishment of a system of publicity through the United Nations" for the transfer of armaments.[210] The resolution was defeated 19

209. *See* Public U.S. Communications to the Security Council and Secretary-General in *Hearings on S. 2793 Before the Senate Committee on Foreign Relations*, 89th Cong., 2d Sess., pt. 1, at 634-35 (1966).

210. 20 U.N. GAOR, Annexes, Agenda Item No. 28, at 1, U.N. Doc. A/C.1/L.347 (1965). In support of the resolution, Mr. Pardo, the delegate from Malta said:

> Malta did not question the right of any country to request arms for the protection of its security or of any State to grant such requests; however, the secrecy surrounding many transactions of that kind . . . could endanger world peace . . . .
>
> The United Nations had no reliable information on the arms traffic; yet the accumulation and transfer of armaments were matters

to 18 with 39 abstentions, but apparently the vote was taken on short notice and was not a true indication of the support which might have been mustered had such a plan been properly presented.[211] And in his June, 1967 speech on the Middle East President Johnson proposed that "the United Nations immediately call upon all of its members to report all shipments of all military arms into this area and to keep those shipments on file for all the peoples of the world to observe." [212] The proposal was never implemented.

In view of the usefulness of a reporting arrangement and the inadequacy of present machinery, the United States should take the initiative in the United Nations to draft a multilateral treaty for the reporting of military assistance to the Secretary-General. The scope of the treaty would be subject to negotiation but might include:

(1) all governmental and private transfers of military armaments to another country and the terms of the transfer—grant, sale, sale on credit, etc.;
(2) the transfer of military or para-military personnel from one country to another;
(3) foreign military training and assistance missions;
(4) domestic military training programs for foreign nationals; and
(5) foreign para-military groups enjoying sanctuary.

The duty of reporting would be on the assisting state. To avoid the difficulties of the League of Nations arms registration plan, it should be made clear that the treaty would only establish a reporting arrangement and would not limit or prohibit military assistance.[213]

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which might threaten the maintenance of international peace and security . . . .

Malta realized that publicity alone would not solve the urgent problem of the international traffic in armaments; it might, however, mitigate some of the dangerous consequences of that trade by enabling the United Nations to be apprised of and to discuss dangerous situations before armed conflicts erupted.

20 U.N. GAOR, First Comm. 222-23 (1965).

211. 20 U.N. GAOR, First Comm. 240 (1965). The United States did not actively support the proposal but indicated that it might well support "some variant of the proposal." Mr. Foster, the United States delegate, said:

Regional competition in conventional arms among the smaller Powers posed a grave threat to world peace and frequently diverted funds away from the urgent needs of economic development. The United States would welcome any initiatives for the control and reduction of conventional arms, which might well include some variant of the proposal made by the representative of Malta.

Id. at 236.

212. N.Y. Times, June 20, 1967, at 18, col. 1, 7.

213. Article VIII (6) of the League Covenant provided for "full and frank" interchange of information concerning the scale of national armaments. This provision, however, was associated in Article VIII with a comprehensive plan for reduction of national armaments to be formulated by the Council of the League. See generally II OPPENHEIM, INTERNATIONAL LAW 122-26 (7th ed. Lauterpacht 1952).

The treaty might also provide for an annual report from the Secretary-General to the Security Council which would summarize military assistance activity and possibly even catalog instances of non-reporting. Another possibility might be the establishment of a reporting agency responsible to the Secretary-General.

If it is felt that secrecy in military operations should be preserved in cases of collective defense against an armed attack, the treaty might contain a provision allowing a statement of assistance in lieu of detailed reporting whenever a claim is made that assistance is being provided in collective defense against an armed attack. Such a claim would only be allowed on behalf of a widely recognized government and, as a result of the statement of claim and assistance, would be subject to community appraisal.

A multilateral treaty endorsed by the General Assembly seems a better procedure for effectuation than a General Assembly resolution alone. If the substantial traffic in private arms is to be included, then domestic implementing legislation will probably be necessary. A prior treaty may make this domestic implementation politically easier.[214] More importantly the multilateral treaty technique followed in approval of the Nuclear Non-Proliferation Treaty provides an opportunity for nations principally concerned to shape the final arrangement and assures greater likelihood of compliance.[215] A bargaining process seems essential if the arrangement is to be effective, since the United States will certainly need the agreement of the Soviet Union. Because of the complexity of the issues and the political difficulty of Charter amendment, implementation by amendment of the Charter seems out of the question.

A principal objection which might be raised to a reporting requirement is that some nations may refuse to sign the treaty or may continue secret military assistance. Admittedly, if the scope of the treaty is broad, as it should be for maximum responsiveness to the internal conflict problem, a significant number of violations may go undetected. Further, if the scope is too broad, the number of signatories to the treaty may fall off drastically. But these difficulties do not seem any greater than those which accompany all worthwhile arms control proposals, including both the Nuclear Test Ban and the Nuclear Non-Proliferation Treaties. And since compliance is voluntary, the ultimate protection of reciprocal non-compliance is always available.

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214. Though there seems to be plenty of constitutional basis for federal implementing legislation, a prior treaty would also strengthen the constitutional underpinnings of legislation in implementation of the treaty. See Missouri v. Holland, 252 U.S. 416 (1920).

215. On the legislative history of the Nuclear Non-Proliferation Treaty see M. WILLRICH, NON-PROLIFERATION TREATY: FRAMEWORK FOR NUCLEAR ARMS CONTROL 61-64 (1969). For the General Assembly resolution commending the Treaty and urging the widest possible adherence see G.A. Res. 2373, 22 U.N. GAOR, Supp. 16A, at 5, U.N. Doc. A 6716 Add.1 (1968).

There are at least three reasons which suggest that such a treaty might work. First, the military assistance race is expensive and dangerous and there are some indications that at least the major powers are becoming increasingly aware of their common interest in its control.[216] Second, once some nations begin reporting, world opinion may exert pressure on other nations to report. Major violations would be likely to be discovered and would focus attention on the impermissibility of covert operations. Third, even if we reported and our adversaries did not, it is not clear that we would be in any worse position than we are in now. In fact, that was precisely the position in which the United States found itself under the International Control Commission reporting arrangements during the early years of the Vietnam War. Most major assistance is known quickly, and there might even be an advantage in openly reporting instead of suggesting improper motives by covert operations. For these reasons, a multilateral treaty for the reporting of military assistance seems well worth the try.

3. *Fact-Finding in the Intervention Context: Suggestions for International Observation and Disclosure*

In some kinds of international disputes, fact disagreement may be a significant causative factor. For example, the dispute between the German and Netherlands governments about responsibility for the sinking of the Dutch steamer *Tubantia* in 1916 was in large part a dispute about whether in fact the *Tubantia* was torpedoed by a German submarine. After an International Commission of Inquiry reported that the sinking was probably caused by a German submarine, the German government paid compensation for the loss.[217] Similarly, border disputes may sometimes turn on fact dis-

216. The interest in control is strongly shared by the developing nations as well. Mr. Pardo, the delegate from Malta, pointed out in presenting his proposal for a publicity system for arms transfer that: "the *per capita* rates of military expenditure of some of the poor countries were among the highest in the world, and much of that expenditure went for arms imports." 20 U.N. GAOR, First Comm. 222 (1965). A recent article in the *New York Times* on the military expenditures of the developing nations points out that: "Military expenditures of the underdeveloped countries are rising faster than their gross national products . . . ." N.Y. Times, Aug. 18, 1969, at 1, col. 5, 6.

It is interesting to speculate on the effect that a multilateral treaty for the reporting of military assistance might have had on the Cuban missile crisis. It is even possible that such a treaty might have deterred the Soviets from attempting to secretly emplace nuclear missiles in Cuba and thereby have prevented the crisis.

217. *See* the Report of the Secretary-General on Methods of Fact-Finding, 20 U.N. GAOR, Annexes, Agenda Items 90 and 94, at 1, 10-11, U.N. Doc. A/5694 (1965).

See generally with respect to international fact-finding machinery, Report of the Secretary-General on Methods of Fact-Finding, *supra;* Franck & Cherkis, *The Problem of Fact-Finding in International Disputes*, 18 W. RES. L. REV. 1483 (1967); Note, *UN Fact-Finding as a Means of Settling Disputes*, 9 VA. J. INT'L L. 154 (1968).

agreements which may be settled by submission to international fact-finding. Generally, however, disputes underlying internal conflict are not caused by fact disagreements and will not be settled by submission to international fact-finding. Most such conflicts are competitive authority struggles in which the ultimate issue is the success of one or another faction. This is true of interventions as well, most of which seem to result from a political commitment to one side or another. Some interventions, of course, might be deterred by more accurate factual information as, for example, counter-intervention resulting from misperception of aggression. But for the most part, the core fact problem in the intervention context is more a fact-disclosure than a fact-finding problem. The chief value of fact-disclosure lies not in enabling immediate settlement of conflict but in establishing a basis for appraisal and in deterring impermissible assistance by exposing it. Probably the principal need for fact-disclosure as a deterrent is for disclosure of assistance to insurgents. Such disclosure may be helpful in deterring both impermissible assistance to insurgents and impermissible claims of counter-intervention made on behalf of incumbents. Disclosure of assistance to incumbents is also important, but such assistance is more often openly provided.

Examples of international fact-disclosure are the United Nations Special Committee on the Balkans, the United Nations Special Committee on Hungary, the Secretary-General's Special Representative to Oman, the United Nations Observation Group in Lebanon, the Security Council Sub-Committee on Laos, and the 1959 OAS investigations of the situations in Panama and Nicaragua.[218]

A second form of fact-finding which may be useful in the process of settlement of internal conflict is international observation of elections or supervision of a cease fire. Unlike fact-disclosure missions, such observation and supervision missions usually depend on prior agreement between the parties to the dispute. Examples of observation and fact-finding in this category include the United Nations Temporary Commission on Korea, the United Nations Truce Supervision Organization, the United Nations Emergency Force, the Security Council Committee on the Indonesian Question, the United Nations Observation Mission in Yemen, the United Nations Malaysia Mission,[219] and the International Commission for Supervision and Control in Vietnam.[220]

A third concern of fact-finding in the intervention context is in-

218. *See* the Report of the Secretary-General on Methods of Fact-Finding, *supra* note 217, at 28 (the Balkans), 32 (Hungary), 43 (Oman), 41 (Lebanon), 42 (Laos), and 47 (Panama and Nicaragua).

219. *See* the Report of the Secretary-General on Methods of Fact-Finding, *supra* note 217, at 28 (Korea), 40 (UNTSO), 31 (UNEF), 39 (Indonesia), 42 (Yemen), and 44 (Malaysia).

220. *See* Hannon, *The International Control Commission Experience and the Role of an Improved International Supervisory Body in the Vietnam Settlement*, 9 VA. J. INT'L L. 20 (1968).

vestigation of an internal situation as a basis for community appraisal of self-determination or denial of human rights. Examples in this category include the United Nations Commission on the Racial Situation in the Union of South Africa, the General Assembly Sub-Committee on the Situation in Angola, the General Assembly Special Committee for South-West Africa, the General Assembly Special Committee on the Policies of *apartheid* of the Government of the Republic of South Africa, and the United Nations Fact-Finding Mission to South Vietnam.[221] Both the Trusteeship Council and the Special Committee on the Granting of Independence to Colonial Countries have also been actively engaged in fact-finding concerning self-determination.[222]

As these examples indicate, there is an abundance of international fact-finding machinery useful in the intervention context. Most of it, however, is ad hoc machinery invoked by the General Assembly, Security Council, Secretary-General, or Council of the OAS in particular cases and as such is subject to political pressures and cold war tensions. Aside from those established for special situations, the only standing bodies for general fact-finding are the Panel for Inquiry and Conciliation created by the General Assembly in 1949,[223] which has never been used;[224] the Peace Observation Commission created in 1950 pursuant to the Uniting for Peace Resolution, used in connection with the Balkan situation in 1951;[225] and the register of experts to be established by the Secretary-General pursuant to a unanimous General Assembly resolution in 1967.[226] The Panel for Inquiry and Conciliation is essentially a list of available experts maintained by the Secretary-General. Although not wholly clear, apparently it may be used by any organ of the United Nations or by a joint request from any two or more states party to a controversy. The Peace Observation Commission is invoked by a two-thirds vote of the members of the General Assembly present and voting "if the Security Council is not exercising the functions assigned to it by the Charter with respect to the matter in question."[227] It is thus subject to even stronger political pressures and cold war tensions than are other ad hoc bodies. The non-use of this standing machinery for fact-finding suggests both a strong preference for flexible response and the inadequacy of this permanent

221. *See* the Report of the Secretary-General on Methods of Fact-Finding, *supra* note 217, at 30 (South Africa), 33 (Angola), 34 (South-West Africa), 35 *(apartheid)*, and 35 (Viet-Nam).
222. *See* Franck & Cherkis, *supra* note 217, at 1505-08.
223. *See* the Report of the Secretary-General on Methods of Fact-Finding, *supra* note 217, at 25-27.
224. Note, *supra* note 217, at 173.
225. *See* the Report of the Secretary-General on Methods of Fact-Finding, *supra* note 217, at 27.
226. G.A. Res. 2329, 22 U.N. GAOR, Supp. 16, at 84, U.N. Doc. A/6716 (1967).
227. G.A. Res. 377A, 5 U.N. GAOR, Supp. 20, at 10-12, U.N. Doc. A/1775 (1950) (Article 3).

machinery. Because of this inadequacy, the Netherlands in 1966 proposed a permanent fact-finding organ, limited "to the establishment of facts," and which could be invoked by "the United Nations and the specialized agencies . . . [and any] two or more States." [228] The Netherlands suggested that the proposal be implemented by General Assembly resolution.[229] To date the proposal has not been implemented.

A common deficiency of all of this machinery, existing and proposed, is that it requires invocation by United Nations action, with all of the resulting political disability, or invocation by at least two states party to a dispute, which, if fact-disclosure is the goal, is usually unrealistic. If the substantial advantages of fact-disclosure in the intervention context are to be maximized, there is a need for permanent international machinery shielded from political pressure and available to any state which wishes to use it. It should not be necessary or sufficient to rely on self-serving "white papers" in support of claims of impermissible assistance to insurgents or permissible counter-intervention. Such international machinery might also be a useful way of implementing Article 51 by establishing the facts in situations of alleged armed attack.

Without too strongly recommending any particular institutional structure,[230] it seems useful to explore the possibility of a permanent fact-disclosure agency available to any state wishing to use it for the investigation of an alleged armed attack or intervention in internal conflict. If it is felt desirable to narrow the range of states which might invoke it, it might be made available only to states re-

228. 21 U.N. GAOR, Annexes, Agenda Item No. 87, at 111, 112, U.N. Doc. A/6373 (1966).

229. *Id.* at 113.

230. *See* the exploration of the strengths and weaknesses of various structures for international fact-finding machinery in Note, *supra* note 217, at 173-78.

In the context of an article appraising the Dominican crisis, Professor Ved Nanda has called for the establishment of permanent regional and international fact-finding organs. He points out:

> [I]n the Dominican situation or any other similar situation, the criteria of necessity and proportionality to determine permissibility of the use of coercive measures will have a meaningful reference only if the "facts" are known. Therefore, it is imperative that independent fact-finding bodies on regional and international levels be established. It is suggested that as a preliminary step, regional organizations such as the OAS should set up a permanent fact-finding organ with its representatives stationed in the capital of each member state. The mechanics of setting up such an operation should not pose too much of a problem. It is realized that this suggestion involves the risk of a major power in a regional organization exercising a preponderance of influence and control in such an agency, and thus the reported "facts" may be colored; however, as a first step, it is still preferable to the present situation wherein a state assumes the competence of unilaterally defining the character of a situation and subsequently justifying its response by reference to the character so defined.

Nanda, *supra* note 160, Part I, at 479.

questing investigation of military assistance or the use of the military instrument in their own territory. The agency should also be available to any organ of the United Nations. It would be limited solely to the establishment of facts and would be purely voluntary. The experience of the United Nations Special Committee on the Balkans, and the United Nations Commission on the Racial Situation in the Union of South Africa suggests that even when a voluntary agency is denied access to the territory of a state under investigation it can still make a useful report.[231] The agency would be composed of a diplomatically protected staff recruited from relatively neutral countries, such as Sweden, India, Canada, and Yugoslavia, and perhaps also recruited from as wide a geographic base as possible, and would be equipped to respond promptly to an appropriate request. Establishment of the agency could be either by General Assembly or Security Council resolution,[232] but in view of the veto problem and the need to encourage the General Assembly role as an authorizing agency, General Assembly creation and supervision seems preferable. Since existing fact-finding machinery does not specifically include a standing observation of elections capability, it might also be worth considering the feasibility of establishing a second chamber with an observation capability.

Regardless of institutional structure, whether ad hoc, permanent, or hybrid, there is a need for greater fact-disclosure capability in the international system. New institutions should be relatively insulated from political pressures and should be available to any state seeking to justify either a claim of impermissible assistance to insurgents or of permissible counter-intervention.

4. *Prospects in Search of Development*

In addition to strengthening the role of the General Assembly as an agency for community review of intervention, promoting agreement on the international reporting of military assistance, and encouraging international observation and disclosure, at least three other prospects for improvement in the international constitutive process deserve serious inquiry for possible development.

The first of these is a technique for collective recognition.[233] Counter-intervention is available only on behalf of a faction readily identifiable as the widely recognized government. For purposes of this

231. *See* the Report of the Secretary-General on Methods of Fact-Finding, *supra* note 217, at 28 (the Balkans), and 30-31 (South Africa).

232. For discussion of the competence of the Security Council or General Assembly to create a permanent fact-finding body see Note, *supra* note 217, at 178-81.

233. "Community procedures for recognition of status" are suggested by Rosalyn Higgins as a useful technique for dealing with internal conflict problems. See Higgins, *Internal War and Internatinoal Law* 49 [to be published in C. BLACK & R. FALK, III THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: CONFLICT MANAGEMENT (1970)].

standard, a "widely recognized government" may be identified by a range of factors, such as historic contiguity of political authority, continuing control of the administrative apparatus, control of the regular military apparatus, representation in international organizations, continuing control of major cities and ports, and particularly wide diplomatic recognition relative to competing factions. Since wide diplomatic recognition is particularly helpful, collective community recognition, would greatly assist in making the "widely recognized government" characterization. As such, collective recognition should be thought of in the internal conflict context as one aspect of the general problem of centralized legitimation of assistance. Although, as the Yemen case illustrates,[234] legitimation of assistance should probably not depend solely on UN credentials decisions, the General Assembly should be encouraged to expand its competence in dealing with recognition problems, already demonstrated with respect to Iraq, Yemen, and the Congo.

A second prospect deserving development is Senator Edward Kennedy's proposal for a permanent United Nations emergency relief force to assist victims of conflicts like the Nigerian Civil War.[235] It is an international disgrace that the United Nations has not even been able to bring into existence a permanent force for humanitarian assistance to victims of natural and political disasters. Since such a force would not provide military assistance and need not necessarily have a military capability, forceful sponsorship of such a proposal by one of the major powers would seem to have a significant chance of success. It is important that the United Nations be strengthened whenever possible by exploitation of just such areas of shared concern.

The third prospect in need of development is thorough revision of the conventions on the laws of war, protection of civilians and treatment of prisoners for greater responsiveness to internal conflict.[236] Just as existing international organizations are largely a response to conventional war and are inadequate for dealing with internal conflict, so too present conventions on the conduct of war are largely a response to conventional war. As a result of an uneasy compromise, the Geneva Conventions of 1949 purport to require at

234. *See* the discussion of the Yemen case under the type IV (c) claim to assist any faction in a struggle for control of internal authority structures where a widely recognized government cannot be distinguished.

235. *See* N.Y. Times, Feb. 9, 1969, at 1, col. 4.

> Such a force would be endowed with a staff of international relief experts, with funds and emergency supplies and would be ready to move quickly to any part of the world on invitation to help victims of disaster.

Id.

236. *See generally* Petrowski, Law and the Conduct of Internal War (unpublished paper, 1967, prepared for Phase III of the American Society of International Law Civil War Studies Project); Note, *The Geneva Convention and the Treatment of Prisoners of War in Vietnam*, 80 HARV. L. REV. 851 (1967).

least minimum humanitarian standards "in the case of armed conflict not of an international character," [237] but in practice the ambiguity as to who is bound by the Conventions and the limited protection which they offer have rendered them less than satisfactory. Moreover, the excesses with which both sides in the Vietnam War have conducted hostilities, and the outmoded technological basis of most of the conventions on the laws of war, also suggest a strong community interest in thorough revision. The conclusion of the Vietnam War might be an opportune time to press for such revision. Specific problems which might be addressed include criteria for determining the threshold of internal conflict for applying the laws of war (the old belligerency test is hopelessly uncertain), the identification required of combatants in order to be protected, the responsibility of an assisting state for the treatment of prisoners of war, the limits of permissible guerrilla strategies, and the limits of permissible weapons systems and military targets in combatting an insurgency.

Institutional changes in the international constitutive process should not be thought of as panaceas for the control of intervention. The creation of new agencies and procedures is not likely to significantly alter underlying political and economic realities. But where there is a need for institutional change, new agencies and procedures may significantly aid in moderating and even avoiding conflict. Present international institutions are so unresponsive to the problems of intervention in internal conflict that institutional changes appear to offer significant promise for the control of intervention.

C. RECOMMENDATIONS FOR IMPROVEMENT IN THE NATIONAL CONSTITUTIVE PROCESS: THE SYSTEMATIC INCLUSION OF INTERNATIONAL LAW AS AN INPUT IN FOREIGN POLICY PLANNING

For the past twenty years a debate has raged within the United States between the legalists and anti-legalists.[238] The anti-legalists have criticized an approach to American foreign-policy which they allege has obscured the national interest in a cloud of legal rhetoric and moral precept. The legalists in turn have intensified their call for world peace through law and have for the most part dismissed the anti-legalists as latter day Machiavellis. Though both camps have some truth on their side, much of the argument has that air of unreality which comes from debate without dialogue. The anti-legalists are probably correct in their charge that the rhetoric of legal obligation and world order frequently conceals a failure to make a tough minded assessment of the national interest. Their own

237. *See* note 151 *supra*.

238. *See* Falk, *Law, Lawyers, and the Conduct of American Foreign Relations* [to be published in 78 YALE L.J. 919 (1969)]. I owe the useful "legalist" "anti-legalist" terminology to Professor Falk.

engagement with this enterprise is a promising development. But in their attack on the legalists, the anti-legalists may have engaged in an overkill which itself obscures the real contribution which the legalist tradition can make to the defining of the national interest.

The national interest is more than simply barrels of oil per day or military potential; it also includes the kind of world order which we would like to see established. An international law approach, if rooted firmly in the usually harsh realities of the international system, has an important and complementary role to play in defining the national interest.[239] Much of the legalist tradition, which the anti-legalists justly condemned, was a pre-legal realist approach which, perhaps because of the influence of the continental jurists, seemed to hang on longer in international law. Although today there are still some amateurs of the irrelevant, most international lawyers are as concerned with power realities and the interrelation of law and society as is the staunchest proponent of the *realpolitik* school. The lawyer and the international relations theorist frequently achieve a different and complementary focus, however. The international relations theorist tends to be concerned with power relations and the consequences of national action for those relations. The international lawyer tends to emphasize normative appraisal, the clarification of community common interest, and institutional techniques for implementing the kind of world order espoused. In a world in which reciprocity is a principal sanction, the clarification of areas of common interest is necessarily a part of the national interest. And if rooted firmly in the real world, one can hardly fault international lawyers for attempting to use law and institutional development as tools for social change.

If international law has suffered in the legalist-anti-legalist debate, it has suffered even more from lack of representation in the national foreign-policy process. In fact, a good argument can be made that a major cause of the superficial use of international law by national foreign-policy planners is the failure to systematically include international law as an input in the policy planning process. The sad truth is that there is no way in which international law is systematically introduced in policy planning within the present structure of the foreign-policy process in the United States. In contrast, political, economic, military and international relations inputs are introduced in a score of more or less institutionalized ways from Cabinet level representation to Assistants to the President for National Security Affairs. This is not to say that international law and lawyers have not sometimes influenced policy planning, as they most assuredly have. To use the example of the Cuban missile crisis, Leonard Meeker, the then Deputy Legal Adviser of the Department of State, George Ball, the Under Secretary of State, Nicholas Katzenbach of the Justice Department, and former Secretary of State Dean

239. *See* Moore, *supra* note 165, at 1088-89.

Acheson, were all called on to present an analysis of the legal issues.[240] But in view of the strong interest in securing systematic inclusion of international law in the foreign policy process, reliance on episodic participation of influential lawyers, some of whom may even represent the anti-legalist tradition,[241] is grossly inadequate.

In a recent paper, Professor Richard Falk proposes a new Cabinet level position, Attorney General for International Affairs, as a response to this problem.[242] While I endorse the reasons for his proposal, I doubt whether in practice an Attorney General for International Affairs is a workable solution. My doubt stems principally from the political unreality of creating a new Cabinet position for international affairs in competition with the Secretary of State. There is also a substantial question whether extensive new foreign-policy machinery is the best way to respond to the problem. The Jackson Subcommittee on National Policy Machinery concluded in 1961 after lengthy hearings on the problem of foreign-policy making that "radical additions to our existing policy machinery are unnecessary and undesirable." [243] Moreover, given the skepticism with which international law is widely regarded, it seems unrealistic to expect a new Cabinet position solely for advice on international law. Although the proposal has the substantial merit of encouraging independence and impartiality in international legal advice, it is no bargain if achieved at the cost of political impossibility.

As an alternative proposal, and one which hopefully is workable while still effecting a significant improvement, I suggest that the office of Legal Adviser of the Department of State be upgraded to Under Secretary of State for International Legal Affairs and that the new Under Secretary be made a permanent ex officio member of the National Security Council.[244] The statutory description of the new office should indicate that a principal duty is to participate in the foreign-policy planning process and to provide impartial advice to both the Secretary of State and the National Security Council

240. *See* E. ABEL, THE MISSILE CRISIS 59, 73 (Bantam ed. 1966). Leonard Meeker, who later became the Legal Adviser of the Department of State, is said to have originated the suggestion to call the United States action a "defensive quarantine" instead of a "blockade." *Id.* at 59.

241. Dean Acheson is said to have taken the position during the deliberations in the Cuban missile crisis that "legal niceties were so much pompous foolishness in a situation where the essential security of the United States, its prestige, its pledged word to defend the Americas, was threatened." *Id.* at 59. See also *id.* at 73.

242. *See* Falk, *supra* note 238, at 13-14.

243. Concluding statement by Senator Henry M. Jackson, in THE NATIONAL SECURITY COUNCIL 65, 66 (H. Jackson ed. 1966). See also Hilsman, *Improving the Foreign Policy "Machinery,"* in THE PRESIDENTIAL ADVISORY SYSTEM 271 (T. Cronin & S. Greenberg eds. 1969).

244. Existing law provides that Under Secretaries may become members of the National Security Council to serve at the pleasure of the President "when appointed by the President [to the National Security Council] . . . . with the advice and consent of the Senate . . . ." 50 U.S.C. § 402(a)(7) (1964).

on the basis of international law. The National Security Council is the principal advisory agency to the President on major public order issues and should provide an adequate forum for the Legal Adviser to participate in the process.[245] As with the present Legal Adviser, the new Under Secretary would be appointed by the President, with the advice and consent of the Senate.[246] In choosing the appointee, independence of judgment and background in newer approaches to international law should be stressed. The present office of the Legal Adviser ranks equally with the eleven Assistant Secretaries of State.[247] This proposed change would put the office on a par with that of Under Secretary of State for Political or Economic Affairs, which ranks immediately below the Under Secretary.[248]

One advantage of this proposal is that it encourages the systematic inclusion of international law in the foreign-policy process without requiring major governmental reorganization. In doing so, it builds on the office of Legal Adviser, which is the governmental office most involved in providing legal advice on major foreign-policy issues.[249] The Legal Adviser has the substantial resource base of the Department of State and, because he may have to defend it later, a personal stake in decision. In recent years, there seems to be a trend toward greater emphasis on the role of the Legal Adviser in the policy planning process and in general, since the establishment of the office in 1931, there has been a strong tradition of the appointment of Legal Advisers well qualified in international law.[250] In fact, the present Legal Adviser, John Stevenson, is a past President of the American Society of International Law.

Two limitations with the proposal are that the President may sometimes bypass the National Security Council and that even as upgraded the new Under Secretary would still be subordinate to the Secretary of State. An example of the first problem occurred during the Cuban missile crisis when President Kennedy relied most heavily on an ad hoc group of advisers which later came to be known as the Executive Committee of the National Security Council.[251] If

245. *See id.* at 31, 39, and 293. The statutory authority for the National Security Council is 50 U.S.C. § 402 (1964).

246. The statutory authority for the office of Legal Adviser of the Department of State is 22 U.S.C. § 2654 (1964) (Supp. III. 1968).

247. 22 U.S.C. § 2653 (1964) (Supp. III, 1968). See also 5 U.S.C. § 5315 (1964) (Supp. IV, 1969).

248. *See* 22 U.S.C. § 2653 (1964) (Supp. III, 1968); 5 U.S.C. §§ 5313-14 (1964) (Supp. IV, 1969).

249. For a thorough analysis of the work of the Legal Adviser's Office see Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633 (1962). Professor Bilder points out that "most Legal Advisers . . . have become heavily involved in high-level policy questions having legal implications." *Id.* at 638.

250. *See* the list of Legal Advisers *id.* at 635 n.5. The immediate predecessor of John Stevenson was Leonard Meeker.

251. *See* E. ABEL, *supra* note 240, at 99; R. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 30-31 (1969).

the enabling act which makes the new Under Secretary a permanent member of the National Security Council stresses that the purpose of the addition is to facilitate his participation in the foreign-policy planning process, however, it may at least serve as a reminder of the importance of including the new Under Secretary in any ad hoc advisory group. Moreover, the purpose is not to put the President in a procedural strait jacket and any proposal which attempts to do so should be avoided. In any event, since President Nixon has recently affirmed his intention to rely on the National Security Council as the principal arm of the President in foreign-policy planning, perhaps this limitation is largely imaginary.[252] With respect to the second problem, that of subordination to the Secretary of State, the new Under Secretary will participate directly in the work of the National Security Council as well as report to the Secretary of State. If it is clear from the enabling act creating the new office that the inclusion of impartial judgment about international law is the principal purpose of the new office, a competent Under Secretary should be able to successfully interject international law into the decision process from his base on the National Security Council.

In addition to the proposal to upgrade the office of Legal Adviser to that of Under Secretary of State for International Legal Affairs and to make the new Under Secretary a member of the National Security Council, it might also be useful to pursue less institutionalized techniques for including international law in the foreign-policy process. One possibility might be for the President to add to his staff an Assistant to the President for International Legal Affairs, a position in some ways similar to that of Assistant to the President for National Security Affairs, now held by Dr. Henry Kissinger.[253] It might also be useful for the Senate Foreign Relations Committee to add a similar position to its staff. Whatever the technique, efforts aimed at restructuring the national decision process to make it more sensitive to the common interest in an effective international legal order may be quite useful in implementing normative agreement about the control of intervention.

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252. *See The National Security Council System: Responsibilities of the Department of State*, 60 DEP'T. STATE BULL. 163 (1969).

> To assist him in carrying out his responsibilities for the conduct of national security affairs, the President has designated the National Security Council as the principal forum for consideration of national security policy issues requiring Presidential decision.

Id. at 165.

253. The responsibility of the Assistant for International Legal Affairs, however, would largely be to advise the President concerning national security issues and he would not oversee a national security staff. See THE NATIONAL SECURITY COUNCIL, *supra* note 243, at 302-03.

VI. TOWARD POLICY RESPONSIVE CONTROL: AN EVALUATION OF PAST STANDARDS AND RECENT PROPOSALS AND A SUMMARY OF TENTATIVE RECOMMENDATIONS

A. EVALUATION OF PAST STANDARDS AND RECENT PROPOSALS

Past standards for the control of intervention have been deficient principally because they failed to clarify the community policies which they sought to promote,[254] failed to focus on the full range of intervention claims, and overemphasized normative appraisal at the expense of institutional development. As a result, past standards have been overly simple and only episodically policy responsive. Recent proposals, though largely suffering from these same difficulties, have been based on a generally more sophisticated awareness of the total context than past standards. But despite this rising level of sophistication, the field continues to be dominated by the snipe hunt for one all-encompassing non-intervention rule.

1. *The Traditional Standard*

The traditional standard is said to be that it is lawful to assist a widely recognized government at its request and unlawful to assist insurgents, at least until belligerency is attained.[255] Once belligerency is attained, apparently it is lawful to aid either side if the assisting state is willing to itself become a belligerent. In practice, this may still be the most widely accepted standard, as is evidenced by the frequency with which an invitation from a widely recognized government is advanced as a justification for intervention. Its philosophical underpinnings, however, have been thoroughly discredited.

A principal drawback of the traditional standard is that it may serve as a Maginot Line for the status quo. That is, it may be used to justify suppression of indigenous revolutionary movements. The 1956 Soviet invasion of Hungary to assist government forces in suppressing the genuine internal revolution is a good example. Similarly, self-determination may sometimes suggest assistance to insurgents, as in South-West Africa and Haiti. The traditional rule seems more rooted in self-contained notions of sovereignty than in the requirements of genuine self-determination.

Other difficulties with the traditional standard are that it is nonresponsive for conflicts in which there is no clearly recognizable government side,[256] and that the vague belligerency threshold for per-

254. Professor Tom Farer's proposal for a prohibition of participation in tactical operations, however, is rooted in an explicit statement of his understanding of community policies. *See* Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 HARV. L. REV. 511, 513-522 (1969).

255. *See* authorities cited note 91 *supra*.

256. For example, what guidance does it provide for the Dominican Republic or Yemen cases?

mitting assistance to either side seems to be out of step with the Charter limitations on use of force.

On the other hand, the traditional standard did have some strengths. If insurgents could not lawfully be aided prior to belligerency, there was no difficulty in distinguishing foreign initiation of insurgency as a form of covert armed attack from assistance to an indigenous insurgency. There might also be some advantage in promoting stability of government, although if stability is achieved only by denial of self-determination this would certainly be suspect. Moreover, the traditional standard may sometimes have been more policy responsive to the needs of war prevention than contemporary proposals. As Korea, Vietnam, Cuba, Czechoslovakia, Hungary and most of the major power conflicts since World War II demonstrate, major powers are particularly sensitive to shifts perceived as upsetting the stability of the international system and are likely to intervene to preserve the status quo. A standard which prohibits assistance to insurgents across such cold war boundaries and permits assistance to widely recognized governments may sometimes serve to prevent major power clashes and to preserve system stability. In differentiating between insurgents and widely recognized government, the traditional standard may also have reflected a number of differences between them which are important for policy realization. Thus, incumbents are likely to control the organized military and may be a party to international agreements guaranteeing their government or protecting against external attack. Both of these factors may make military assistance to insurgents more dangerous than assistance to incumbents.

On balance, however, the traditional standard is unsatisfactory. It is not necessary in responding to the acute danger of major power intervention on behalf of insurgents across cold-war boundaries, or to the generally greater risk to world order of providing assistance to insurgents, to legitimate repressive assistance to incumbents. And unless one is willing to carve up the world into major power spheres of influence and recognize a right of self-determination within each sphere only at the pleasure of the major power, the traditional standard presents too great a danger of self-serving interference with genuine internal demands for revolutionary change. The traditional standard also fails to provide criteria for appraisal of the full range of intervention claims and fails to focus on institutional machinery for control.

2. *The Neutral Non-Intervention Standard*

A second standard, first enunciated by William Hall,[257] and recently championed by Quincy Wright,[258] is that it is impermissible to

257. W. HALL, INTERNATIONAL LAW 287 (6th ed. 1909); W. HALL, INTERNATIONAL LAW 347 (8th ed. 1924).

258. *See, e.g.*, Wright, *United States Intervention in the Lebanon*, 53 AM. J. INT'L L. 112, 122 (1959).

aid either faction in a struggle for control of authority structures once the outcome is uncertain. Presumably prior to the "outcome in doubt" threshold it is permissible to assist the widely recognized government. The principal advantage of this neutral non-intervention standard is that it better serves self-determination by lessening the opportunities for self-serving claims masking external interference. An underlying premise is that unilateral external interference presents a greater threat to self-determination than does allowing genuine indigenous conflict to run its course. Even though intervention on either side is not necessarily disruptive of self-determination, the difficulty in determining the demands of self-determination and the danger of unreviewable external claims on balance probably support this premise. For this reason, the neutral non-intervention standard has been attracting an increasing following in recent years.[259] In fact, the 1965 General Assembly Declaration on Inadmissibility of Intervention seems to embody this standard, and a good case can be made for the proposition that it is present international law.

The principal drawback with the neutral non-intervention standard as developed to date is that its proponents have not provided workable criteria for determining when assistance to incumbents must be frozen to pre-insurgency levels. Frequently, incumbents may be receiving military assistance as part of an on-going aid program prior to the outbreak of an insurgency. Since the prohibition of all such assistance would deny genuine defense interdependencies against external attack and would be completely unacceptable in practice, the neutral non-intervention standard must distinguish such assistance from partisan assistance in internal conflict. Moreover, since cessation of an on-going military aid program may amount to intervention on behalf of insurgents, there is strong reason for permitting continuation of assistance at the pre-insurgency level. These difficulties do not appear to be insoluble,[260] and elsewhere in this

259. *See* W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 264-67 (1964).

260. Professor Tom Farer, in his critique of the neutral non-intervention standard, offers the following hypothetical which he says "illustrates one feature of the presently insoluble definitional difficulties" associated with the neutral non-intervention standard:

> On January 1, 1965, country I becomes independent. Country C immediately offers massive economic and military assistance, which is accepted. In 1967, armed civil strife breaks out in I and quickly reaches dimensions which threaten the survival of the incumbent government. Is country C an interventionary power if it fails to terminate its aid program?

Farer, *supra* note 254, at 530. Adverting to the dilemma that both withdrawing and continuing aid might critically affect the internal authority struggle (particularly in view of the quasi-dependent status of many underdeveloped states) he concludes that "the concept of nonintervention cannot be made operational in any form that might conceivably be acceptable to the international community." Farer, *supra* note 254, at 530-31. Al-

essay I suggest criteria for determining when a level of conflict is reached which requires a freeze on partisan assistance.[261]

A second problem with the standard, which is also not fatal but which in practice is cause for concern, is that it frequently seems to obscure legitimacy of counter-intervention on behalf of a widely recognized government. There is little merit in arguing that the auto-interpretation problem prevents partisan assistance to a widely recognized government if unlawful external assistance is already being supplied to insurgents. Non-intervention as a requirement of self-determination is much too suspect in these circumstances. And if the standard is taken to the point of condemning assistance to a widely recognized government in meeting what amounts to a covert armed attack, then it loses all justification. There is some danger that in these situations writers relying on this standard will focus on the relatively open responsive assistance to the widely recognized government and ignore or minimize the covert assistance to the insurgents. In fact, this seems to be the case in Professor Wolfgang Friedmann's treatment of the Vietnam War.[262] It may be that similar non-intervention feeling played a role during the Spanish Civil War in discouraging intervention by the Western democracies on behalf of the recognized Spanish government despite the substantial intervention of Hitler and Mussolini on behalf of the insurgents.[263] The cost of the non-intervention by the democracies was an insurgent win by the Franco forces. The antidote to this problem, however, is simply clear focus on the legitimacy of counter-intervention on behalf of a widely recognized government.

A third difficulty with the neutral non-intervention standard is that like the traditional standard it fails adequately to deal with the full range of intervention claims or to focus on institutional machinery for control. This deficiency is particularly acute with respect to non-authority-oriented intervention, and in this category the stan-

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though a valid criticism of the typical formulation of the neutral non-intervention rule, which did not clearly focus on the need to permit pre-insurgency assistance to be maintained, Farer's criticism does not take sufficient account of the difference between freezing all assistance (military and economic) at pre-insurgency levels and allowing an unlimited increase in all assistance. This third alternative of freezing assistance at pre-insurgency levels, while not purporting to have zero effect on the internal authority struggle, may well promote community policies by isolating the conflict and minimizing the effect of external assistance. The real problem, and one on which critics and supporters of the rule alike have not focused, is the need to develop workable criteria for determining when assistance to incumbents must be frozen.

261. *See* the discussion with respect to the type IV (a) claim to assist a widely recognized government in a struggle for control of internal authority structures.

262. *Compare* Friedmann, *Law and Politics in the Vietnamese War: A Comment*, 61 AM. J. INT'L L. 776 (1967), *with* Moore, *Law and Politics in the Vietnamese War: A Response to Professor Friedmann*, 61 AM. J. INT'L L. 1039 (1967).

263. *See generally* H. THOMAS, THE SPANISH CIVIL WAR (1961).

dard should probably not be followed. The standard is also suspect in non-partisan interventions in authority-oriented conflicts. In both these categories other criteria for control may be more responsive to community policies than the non-intervention standard.

Despite these difficulties, if incorporated into comprehensive recommendations for control which focus on the pre-insurgency, counter-intervention, non-authority-oriented, and non-partisan-assistance problems, the neutral non-intervention standard provides probably the most useful normative base of any generally accepted standard.

Professor Richard Falk has recently suggested a standard which, although it achieves a different focus, approximates the neutral non-intervention standard. He divides violent conflict into type I conflict, involving "the direct and massive use of military force by one political entity across a frontier of another;" type II conflict, involving "substantial military participation by one or more foreign nations in an internal struggle for control;" type III conflict, involving "internal struggle for control of a national society, the outcome of which is virtually independent of external participation;" and type IV conflict, involving an authorization by "a competent international organization of global (IVa) or regional (IVb) dimensions . . . [for] the use of force." [264] Falk postulates that in type I conflict it is permissible to reply against the territory of the attacking state as in response to an armed attack under Article 51 of the Charter; in type II conflict it is only "appropriate to take offsetting military action confined to the internal arena;" in type III conflict "it is inappropriate for a foreign nation to use military power to influence the outcome;" and in type IV conflict international authorization or prohibition "resolves the issue of legality," at least if the authorizing organization is the United Nations.[265]

Falk's recommendation for his type III conflict is essentially the neutral non-intervention rule. His recommendation for his type II conflict, however, introduces a new claim; that is, the claim to use the military instrument against the territory of a state providing assistance to an opposing faction. His recommendation that counter-intervention be confined to the internal arena is intended to minimize the auto-interpretation problem and the danger of escalation.

For reasons given more fully elsewhere in this paper,[266] this *a priori* geographic rule seems undesirable in cases in which covert external assistance amounts to an armed attack. But despite my disagreement with Falk's suggestion when writ large, it expresses an important distinction between the right to counter-intervention and the right to reply against the territory of an assisting state. The two claims are separate and the second requires a finding of an armed attack. In all situations, reply against the territory of an assisting

264. *See* R. FALK, LEGAL ORDER IN A VIOLENT WORLD 227-28 (types I, II, and III), and 273 (type IV) (1968).

265. *Id.*

266. *See* the discussion of the type IV(f) and VI(c) claims.

state represents a serious escalation and should be permissible only after a clear finding of extreme foreign involvement amounting to an armed attack.

Professor Falk's recommendation for his type II conflict is ambiguous; but if it means that counter-intervention should be available on behalf of insurgents as well as the widely recognized government then it seems undesirably broad. To allow counter-intervention on behalf of insurgents is to sanction a spiral of escalation on both sides, and would as a practical matter reduce the non-intervention standard to a non-rule. Allowing counter-intervention on behalf of a widely recognized government and not on behalf of insurgents does not treat the competing factions equally; but this lapse of neutrality in favor of the incumbents is strongly called for by the danger of competing counter-interventions, the need to permit pre-insurgency assistance to the widely recognized government coupled with the problem of ascertaining the insurgency threshold, the need to preserve the Article 51 right of collective defense against an armed attack, and the greater danger to world order in providing assistance to insurgents.

3. *A Prohibition of Participation in Tactical Operations*

In recent articles in the *Columbia* [267] and *Harvard Law Reviews*,[268] Professor Tom Farer has suggested a "flat prohibition of participation in tactical operations, either openly or through the medium of advisors or volunteers" [269] as a single rule for the control of intervention in internal conflict. Under this rule Farer postulates that all military assistance is permissible except assistance involving the personnel of the assisting state in combat.[270]

Farer's proposal is an imaginative departure and has a number of advantages over the traditional and neutral non-intervention standards. Perhaps the most important advantages are relative ease of detection of violation and relative neutrality between contending factions. Other important underpinnings of the proposal relate to the greater danger of tactical assistance. Thus Farer cautions that the commitment of troops to tactical operations may psychologically commit an assisting state and convert an indigenous struggle for control of internal authority structures "into a defense of interna-

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267. Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 COL. L. REV. 266 (1967).
268. Farer, *supra* note 254.
269. Farer, *supra* note 267, at 275.
270. The crucial distinction is the possibility of combat; the rule would prohibit any entry by foreign personnel into areas in which both incumbent and rebel units were known to be active. A foreign power would, on the other hand, be legally free to provide any type or amount of aid other than that which would be at all likely to involve its personnel in combat.
Farer, *supra* note 254, at 532.

tional law." [271] He also points out that foreign casualties occasioned by external participation in tactical operations may increase the likelihood of escalation [272] and that foreign participation in tactical operations may greatly increase the physical and cultural damage to the society in which the conflict occurs.[273] All of these factors suggest that tactical assistance should have a special burden in contexts in which they may be operative. Farer's approach is also noteworthy in that it is premised on an explicit statement of his understanding of community policies and a good identification of the core problem of intervention. Reasons given for concentrating on military assistance are that it has the most intense impact on the community policies at stake and offers a broader community consensus for regulation.

Despite these strong points, however, Farer's proposal is fatally deficient and if adopted as a single standard for the control of military intervention would be a serious regression. It is fatally deficient in that it is too permissive in legitimating some forms of serious military intervention not involving participation in tactical operations now widely regarded as unlawful. As a result, it is unlikely to receive wide acceptance. The proposal also seems questionable in that it condemns some relatively benign forms of intervention, such as non-authority-oriented intervention, simply because they involve participation in tactical operations. Moreover, it seems heavily dependent on several questionable assumptions about its acceptability, the nature of process criteria for effective legal rules, and the outcome of internal conflict absent external participation in tactical operations. Finally, just as is true of the traditional and neutral non-intervention standards, the Farer proposal fails to provide criteria for appraisal of the full range of intervention claims and fails to focus on institutional machinery for control.

The first deficiency, that the test is too permissive in legitimating some forms of intervention seriously threatening community policies, is the most serious. Examples of interventions which would be permissible under the proposal because not involving participation in tactical operations, and which nevertheless seem to seriously threaten community policies, include: the deliberate initiation by Hanoi and Peking of a rebellion in Thailand; French military assistance to the secessionist Biafran regime; the indirect United States invasion of Cuba at the Bay of Pigs by training, supplying, and instigating Cuban exiles (there may have been minimal U.S. participation in tactical operations); Cuban provisioning of Communist rebels in Venezuela; Chinese training of Communist rebels in Indian border areas; Saudi Arabian assistance to the Royalists in Yemen; and Arab and Soviet assistance to Palestinian refugees in guerrilla attacks on Israel. The rule would also legitimate hypothetical West German

271. Farer, *supra* note 254, at 532.
272. Farer, *supra* note 254, at 532-33.
273. Farer, *supra* note 254, at 535.

training and supplying of East German or Czechoslovakian insurgents, United States provisioning of Hungarian freedom fighters, Taiwanese training and provisioning of refugee mainland Chinese for guerrilla operations on the mainland, and North Korean instigation of guerrilla operations in South Korea utilizing native South Koreans trained in the North. Regardless of the success or failure of such intervention attempts, they would certainly pose a serious threat to minimum public order. Why should the international community ignore the external encouragement of guerrilla operations or terrorist murder squads as an instrument of national policy? A little reflection shows that some of these interventions even pose a threat of nuclear confrontation. It is also significant that these activities would be characterized as aggression under the most widely used tests for aggression,[274] and that they would be regarded as impermissible under every major non-intervention standard except Professor Farer's. That Professor Farer would regard these activities as permissible suggests a serious insensitivity to minimum public order. And if he is really covertly seeking to promote greater fluidity so that popular rebellions will succeed, he should be careful lest he promote too much fluidity at the cost of success for unpopular foreign inspired insurgencies and a dangerous increase in the number of violent conflicts.

A second and lesser difficulty with Professor Farer's proposal is that it is too restrictive in condemning interventions simply because they involve participation in tactical operations. For example, if humanitarian intervention for the prevention of gross abuse of human rights is ever permissible, it seems likely that it will usually

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274. *See* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 143-48 (1961). Professor Farer's proposal would also legitimate activities proscribed by both the Soviet and United States draft definitions of aggression currently before the United Nations Special Committee on the Question of Defining Aggression. The Soviet draft definition of aggression provides:

> The use by a State of armed force by sending armed bands, mercenaries, terrorists or saboteurs to the territory of another State and engagement in other forms of subversive activity involving the use of armed force with the aim of promoting an internal upheaval in another State or a reversal of policy in favour of the aggressor shall be considered an act of indirect aggression.

Report of the Special Committee on the Question of Defining Aggression, 24 U.N. GAOR, Supp. 20, at 4, 5, U.N. Doc. A/7620 (1969) [Section 2(C)]. The six-power draft jointly sponsored by the United States provides:

> The uses of force which may constitute aggression include . . . :
>
> (6) organizing, supporting or directing armed bands or irregular or volunteer forces that make incursions or infiltrate into another State;
>
> (7) organizing, supporting or directing violent civil strife or acts of terrorism in another State; or
>
> (8) organizing, supporting or directing subversive activities aimed at the violent overthrow of the Government of another State.

Id. at 8, 9 (Section IV).

need to be effectuated by the regular military units of a foreign power participating in tactical operations in the rescue or protection effort (or at least participating in a zone in which there is a substantial possibility of combat). Although this is not the core problem to which Farer has addressed himself, he does not make clear whether his rule is intended to apply to such situations.

Another situation in which I believe Farer's rule to be too restrictive is intervention on invitation for the purpose of controlling non-authority-oriented internal disorders. An example is the Tanganyika disorder in 1964 in which the British responded to President Julius Nyerere's request for assistance by landing 500 British Royal Commandos. Though casualties were minimal, I suppose that the British participated in tactical operations (or a zone of combat) at least as meaningfully as did the United States marines in Lebanon who were greeted on the beaches by Coca-Cola salesmen.[275] Yet the British assistance was generally accepted in the United Nations and did not seem to compromise community values.

Perhaps the most important context in which the Farer rule may be too restrictive is in providing military assistance to a widely recognized government to offset impermissible external assistance provided to insurgents. In this counter-intervention context, Farer's point, that the commitment of regular troops to tactical operations may psychologically commit a nation to conflict and increase the chances of escalation, is a good one. His concern with the level of destruction within the entity undergoing internal conflict is also important, as the decision to commit foreign forces to tactical operations may well intensify the destructiveness of the conflict. Both the Spanish Civil War and the Vietnam War illustrate this. But if an insurgency in its initiation and continuation simply amounts to a covert armed attack, it would seem a questionable limitation of the defensive right in Article 51 of the Charter to prohibit defensive assistance amounting to participation in tactical operations. Farer is probably right that if a government is viable, most of the time such tactical assistance should not be necessary. But I am not convinced that that is always the case, as, for example, when an entity is an economically poor nation with only small internal security forces, or a newer nation which has not yet had an opportunity to build up an experienced army. Under such conditions it does not seem implausible that an insurgent minority with foreign sanctuary and an unlimited draw on foreign training and supply could bring down a more broadly representative government which is slow to respond in seeking or obtaining foreign assistance. If that is the case, a later infusion of foreign troops may sometimes be the only way to protect the more representative government against foreign sponsorship of a less representative insurgent. Vietnam seems to me to have some of the elements of such a case. Certainly during the early stages of the conflict the South Vietnamese army was poorly trained and equipped,

275. *See* R. BARNET, INTERVENTION & REVOLUTION 268 (1968).

and many observers have reported that the situation had deteriorated badly before the magnitude of the insurgency was officially recognized and greater United States assistance was triggered.[276] More importantly, if counter-intervention is adequately to preserve defensive rights it would seem necessary to recognize explicitly a right to proportional counter participation in tactical operations whenever external assistance to insurgents amounts to participation in tactical operations. Farer does not indicate whether his proposal is intended to include such a reciprocity exception.

In addition to being too permissive for some interventions and too restrictive for others, Farer's approach to the problem of control of intervention is not the most useful for clarifying problems in achieving control in different intervention situations. Non-authority oriented interventions, anti-colonial wars, wars of secession, indigenous conflicts for control of internal authority structures, external imposition of authority structures, and cold-war divided nation conflicts reflect the great diversity in intervention situations. Clarification of the problem of control of intervention requires recognition of this diversity and the exploration of conditioning factors and policies at stake in each different context. Failure to deal explicitly with this diversity is a principal reason that Farer's proposal is frequently not policy responsive.

The Farer proposal also seems heavily dependent on several questionable assumptions. The first is an explicit assumption about the acceptability of the proposal.[277] Yet it was not followed by Germany or Italy in the Spanish Civil War, by the Soviets in Hungary or Czechoslovakia, by Britain in Tanganyika or Malaya, by Cuba in Bolivia, by North Vietnam in Laos and South Vietnam, by Egypt in Yemen, and by the United States in Lebanon, the Dominican Republic, and Vietnam. This list suggests that nations which correctly or incorrectly perceive that they have the military capability will intervene to the point of participation in tactical operations when they feel that their vital interests are at stake or when they feel the risk is small. There is little in the international system to suggest that this will not continue to be the case. Moreover, the widespread community concern with intervention, as evidenced by Latin American sensitivities embodied in the sweeping Article 18 of the Revised Charter of the OAS, also suggests that the free-wheeling Farer proposal will not be widely accepted. Even the Soviets and militantly anti-colonial powers are likely to reject the proposal as too sweeping. Since the proposal is less restrictive than the neutral non-intervention standard it may in fact more often coincide with the generally anarchic state practice than does the neutral non-intervention standard. Nevertheless, this hardly seems a very persuasive argument for its adoption.

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276. *See, e.g.*, A. SCHLESINGER, THE BITTER HERITAGE 15-16, 19, 20-31 (1966).
277. Farer, *supra* note 267, at 271, 276-78.

A second questionable assumption which Farer makes is in overemphasizing the weight accorded certainty at the expense of policy effectiveness as a criterion in selecting a standard for the control of intervention.[278] Definiteness of standard and ease of detection of violation are certainly important criteria for rule selection, and it is probably easier to identify serious violations under Farer's test. But the certainty of Farer's test can be easily overstated in a setting which by its nature encourages adversary interpretation of the facts. It is worth remembering that despite substantial evidence there is still considerable controversy about whether regular North Vietnamese troops were engaged in tactical operations in South Vietnam prior to the commencement of regular bombing of the North in February, 1965. There is even greater uncertainty as to the timing and role of native North Vietnamese cadre in participation in tactical operations in the South. How many cadre must participate and in what capacity to violate the rule or to justify counter-intervention by participation in tactical operations? I am suggesting that though the rule ranks fairly high in enabling detection of violation, the covert nature of insurgent operations in an adversary setting (and sometimes of government operations as well) still leaves a not inconsiderable fact-finding and disclosure problem. Moreover, though Farer's test scores high on certainty, it frequently rates an unsatisfactory on policy effectiveness. Yet certainly the most important process criterion for rule selection is policy effectiveness with respect to self-determination, minimum human rights, and minimum public order. Out of concern with these policies we rightly reject an intervention standard which says that intervention is always permissible, even though such a standard is more certain and may reflect the actual practice of states to a greater degree than Farer's proposal. Felix Cohen has long since shown that the more certain rule of awarding a new born mule to the first roper is an insufficient reason for adopting the first roper test as the legal rule of ownership.[279] Fortunately, the choice among norms of intervention is not, as Farer seems to suppose, an either-or choice between ad hoc characterization offering little guidance and his proposed test.[280] Careful delineation of the major intervention claims, with development of a few policy effective standards, is another alternative which, though it may not yield rules as certain as Farer's, may be considerably more policy responsive at a not intolerable cost in definiteness of application.

A third questionable assumption which Farer makes is that

> any government which enjoys significant support from sub-

278. *See* Farer, *supra* note 267, at 271, 275-79; Farer, *supra* note 254, at 522-26, 541. "A sacrifice of normative flexibility seems required in order to facilitate the always onerous task of effective legal characterization of state behavior." Farer, *supra* note 254, at 541.

279. *See* Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 367 (1954).

280. *See* Farer, *supra* note 254, at 522-36.

> stantial sections of the populace will defeat any insurgency if it has an unlimited draw on material and foreign training facilities for its officers and administrators.[281]

To be complete Farer should add that to support his proposal this must also be so where the insurgents have an unlimited draw on material and foreign training facilities for their officers and administrators and enjoy foreign sanctuary for their bases and combat missions. Phrased completely, the assumption is that a representative government with external assistance will always win in a conflict with insurgent forces with external assistance as long as all assistance to both sides is below the "participation in tactical operations" threshold. Farer supports this critical assumption as an "empirical conclusion" based on the outcomes of the "insurgencies in Greece, Columbia, Venezuela, Peru, the Philippines, and Burma." [282] Aside from the fact that in none of these insurgencies did the insurgents enjoy an unlimited draw on material and foreign training plus foreign sanctuary, (Greece came closest to it but was still a long way from the kind of external assistance that might have been rendered to the insurgents if Stalin had clearly supported them),[283] to generalize about all possible insurgencies from these six is quite a leap of faith. The assumption seems questionable in situations where a country has only a small security force, where a country is newly independent and has not yet built up an efficient military, and where the insurgent training and build up catches the government by surprise and there is not time for an effective training and assistance program to begin to pay off on the government side. Vietnam has demonstrated that there is no such thing as an instant army, regardless of unlimited draw on foreign dollars and training facilities.

Though government forces often have a number of inherent advantages over insurgents, such as ability to employ armor and air power, to secure resupply through regular channels, and to control the administrative and patronage apparatus, it is also pertinent to advert to some of the disadvantages. These include the responsibility of the government to maintain essential services throughout the society, and the need for a force ratio for successful counter-insurgency operations of at least ten to one. Recent terrorist activities in Uruguay illustrate this difficulty. Guerrilla activities there are estimated to be the work of about 1,000 well organized guerrillas in a population of more than 2.5 million; yet they have been able to pose a significant threat to the stability of democratic processes in that militarily weak country.[284] The Uruguayan government is said to

281. Farer, *supra* note 267, at 277.
282. Farer, *supra* note 267, at 277.
283. *See* R. BARNET, *supra* note 275, at 110-12, 121. Barnet quotes Stalin as telling the Yugoslav Vice-Premier: "The uprising in Greece must be stopped, and as quickly as possible." R. BARNET, *supra* note 275, at 121.
284. *See* N.Y. Times, Jan. 23, 1969, at 12, col. 4.

have only one police station for every 400 square miles and only 200 soldiers for every 4,000 square miles.[285] Interestingly, Uruguay has a reasonably democratic government and, according to the *New York Times*, "only 6 per cent of Uruguay's voters favored Marxist-Leninist candidates in the last election in 1966. . . ." [286]

Even if Farer's assumption were accurate it is still beside the point whenever a widely recognized government is unable to secure external assistance. In such situations Farer's rule legitimates external initiation of insurgency without the check of counter-participation on the government side. In fairness to Farer's proposal, however, it seems unlikely that many widely recognized governments will be unable to secure external assistance, and if they cannot perhaps it says something about their representativeness. But in a post Vietnam world in which being a world policeman may seem an unattractive role, the possibility of a widely recognized government being unable to secure external assistance to combat a foreign inspired insurgency is a major flaw in Farer's argument. The problem exists in any event, but other standards do not legitimate assistance to insurgents.

Whether for these or other reasons, at a recent regional meeting of the American Society of International Law, Professor Farer indicated some "modulation" away from his proposal to a more general non-intervention standard.[287] It is to be hoped that this will be a lasting "modulation."

4. *A Prohibition on Unilateral Intervention*

In a recent book entitled *Intervention and Revolution* [288] Richard Barnet suggests a flat "prohibition on unilateral intervention." [289] According to Barnet, only collective intervention by the United Nations should be permissible.[290] Going a step further, Barnet implies that his proposal is required by Articles 39-44 and 51 of the Charter.[291] There are, of course, obvious advantages to a rule prohibiting unilateral intervention. Chief among them is avoidance of the auto-interpretation problem which makes each nation the judge of its own actions. In addition, collective action not only increases the likelihood that intervention will serve community goals, but it also reduces the risk of major power involvement on opposing sides. But in spite of these substantial advantages, Barnet's suggestion is simplistic and unworkable.

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285. *Id.* at col. 7.
286. *Id.* at col. 8.
287. The meeting was the Regional Meeting of the American Society of International Law on *Bloc Law and Intervention*, at Tallahassee, Florida, March 27-29, 1969. "Modulation" is Professor Farer's term.
288. R. BARNET, INTERVENTION AND REVOLUTION (1968).
289. *Id.* at 280.
290. *Id.* at 278-80.
291. *Id.* at 278-79.

A first difficulty with the suggestion is that it fails to take account of the problem of differentiating permissible military assistance programs from intervention in internal conflict. That is, it fails to provide criteria for delimiting the critical insurgency threshold above which additional assistance becomes impermissible. In a world with substantial defense interdependencies it is obviously too broad to prohibit all unilateral military assistance programs whether or not there is internal conflict. As a practical matter, then, any non-intervention standard must come to grips with this pre-insurgency threshold problem. That Barnet's suggestion fails to deal with this problem does not make it theoretically unsound, but only less useful.

A second difficulty, however, which does go to the soundness of the suggestion, is that it would prohibit unilateral counter-intervention on behalf of a widely recognized government. As has already been pointed out, the basis for the neutral non-intervention rule collapses once it is established that substantial external assistance is being supplied to one of the competing factions. It is hard to see, how "the internal dynamics of revolution itself provide an important measure of the popularity of the contending forces" [292] in a situation in which one side is receiving substantial external assistance. Whatever validity there is in the notion of self-determination resulting from "the internal dynamics of revolution," this reason for denying assistance collapses once it is established that substantial external assistance is being provided to one of the competing factions. Similarly, if the principal reason for non-intervention is the difficulty in determining genuine self-determination and the consequent danger of self-serving claims by an intervening power, then this reason also collapses if a foreign power is already intervening. Moreover, if counter-intervention is impermissible, the suggestion may effectively deny the Article 51 defensive right in situations of covert rather than open invasion.[293] And contrary to Barnet's understanding, there is nothing in Article 51 of the Charter limiting "armed attack" to open invasions.[294] In fact, some scholars question whether self-defense under the Charter is even limited to the Article 51 right of defense against an armed attack.[295]

Professor Quincy Wright, the leading proponent of the neutral non-intervention standard, has also recently adopted the position that

292. *Id.* at 280.

293. Barnet would prohibit unilateral "foreign intervention in a civil war" but would permit "collective defense against a foreign invasion. . . ." *Id.* at 279. He fails to take account, however, of the sometimes considerable difficulty in characterizing a particular conflict as civil war or foreign invasion. A case in point is Barnet's characterization of the Vietnam War as a civil war, a characterization which many, including the writer, find unpersuasive. *Id.* at 218. This difficulty in characterization, really a difficulty in reconciling defensive rights under the Charter with the duty of non-intervention, is one of the factors suggesting preservation of the right of counter-intervention on behalf of a widely recognized government.

294. *Id.* at 278-79.

295. *See* authorities cited note 167 *supra*.

counter-intervention should be prohibited in the absence of collective United Nations action.[296] In the present cold-war atmosphere, however, it is completely unrealistic to rely on collective United Nations action as the sole response to impermissible intervention. Counter-intervention is one of the major claims put forth by states in justification of intervention and Barnet's and Wright's proposal to deny it is unlikely to be widely accepted.

A third difficulty with the Barnet suggestion is that like all other single rule approaches it fails adequately to focus on the full range of intervention claims. Consequently, the suggestion seems overly restrictive with respect to non-authority-oriented interventions. Some such interventions, for example, humanitarian intervention for the prevention of widespread loss of life, may actually promote community policies and may require faster action than is possible from a politically charged multi-national organization.

Barnet's proposal also seems to be premised on three questionable assumptions. The first is an assumption about the dynamics of revolution and intervention in which he seems to go far beyond even the questionable assumption made by Tom Farer. Farer postulates that a representative government with external assistance will always win in a conflict with insurgent forces with external assistance as long as all assistance to both sides is below the "participation in tactical operations" threshold.[297] Barnet, however, comes close to suggesting that if a government is representative no amount of foreign assistance to insurgents can topple it;[298] and he does say that if counter-intervention is necessary "no amount of repressive force short of wholesale murder and resettlement of the population has a chance of achieving lasting success."[299] While I agree with Barnet that the prognosis for exporting revolution where the conditions are not ripe is poor, as witnessed by the fate of Che Guevara and his band, to conclude that if a government is representative no amount of foreign assistance can topple it is absurd. It is also inconsistent with Barnet's criticism (whether right or wrong) of United States activities on behalf of insurgents in Iran and Guatemala, which according to Barnet's own account overthrew popular governments with only a minimum of foreign involvement.[300] Further, the suppression of the

296. *See* Wright, *Non-Military Intervention*, in THE RELEVANCE OF INTERNATIONAL LAW 5, 16-17 (K. Deutsch & S. Hoffmann eds. 1968). "It would appear that illegal intervention in the domestic jurisdiction of a state should not be made the occasion for counter-intervention but should be dealt with by the United Nations as it was in the Congo." *Id.* at 16.

297. *See* text note 281 *supra*.

298. *See* R. BARNET, *supra* note 288, at 280.

299. R. BARNET, *supra* note 288, at 280.

300. *See* R. BARNET, *supra* note 288, at 225-29 (Iran), 229-36 (Guatemala).

> Arbenz's [the President of Guatemala] general popularity was probably down from his peak strength in the last election, but there is no evidence that popular feeling had turned decisively against him. His downfall was the direct result of the defection of the army un-

insurgents in Malaya with British assistance, and in Greece with United States assistance, demonstrates that Barnet exaggerates when he says that if counter-intervention is necessary it will only be successful if it constitutes "wholesale murder."

A second questionable assumption which seems to underlie Barnet's suggestion is an overemphasis on the present capacity of the United Nations for collective action in internal conflict. The Congo and Cyprus operations demonstrate an important United Nations capability for collective action in the control of internal conflict; but they also demonstrate just how cumbersome present United Nations machinery is for such operations.[301] The United Nations financial crisis should remind us of the precariousness of the consensus for such operations even when they seem to involve a minimum of East-West conflict.[302] In fact, the lack of agreement on the financing of major peace-keeping operations, such as ONUC and UNEF, suggests that such operations may have even less chance of approval today. In these circumstances, rather than stressing collective United Nations action, it seems more fruitful to focus on the General Assembly as an agency for authorizing or proscribing individual national actions. This is not to suggest that the potential of the United Nations for effective action should be neglected, but rather that it is important to distinguish between collective action and collective authorization, and that at the present time the strengthening of the General Assembly as an agency for community review may be particularly fruitful for internal conflict problems. In any event, it smacks of the unreality of the legalist tradition at its worst to overemphasize the present institutional capacity for the control of intervention.

The third questionable assumption Barnet makes is that his suggestion is a present requirement of international law.[303] As has been pointed out, nothing in the Charter definitively answers the question whether a widely recognized government may be assisted at its invitation in an internal struggle for control. Barnet cites no evidence that the framers of the Charter adverted to the problem of changing what had been widely assumed to be the traditional rule of customary international law, that a widely recognized government could be assisted at its request. Although an argument could be made that the

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der the stimulus of a foreign invasion financed and directed by the United States.

R. BARNET, *supra* note 288, at 235.

301. *See generally* A. COX, PROSPECTS FOR PEACEKEEPING (1967); E. LEFEVER, UNCERTAIN MANDATE: POLITICS OF THE U.N. CONGO OPERATION 207-22 (1967); L. MILLER, WORLD ORDER AND LOCAL DISORDER: THE UNITED NATIONS AND INTERNAL CONFLICTS 65-148, 201-14 (1967); R. RUSSELL, UNITED NATIONS EXPERIENCE WITH MILITARY FORCES: POLITICAL AND LEGAL ASPECTS 135-45 (Brookings Staff Paper 1964); Lefever, *The Limits of U.N. Intervention in the Third World*, 30 REVIEW OF POLITICS 3 (1968).

302. For a review of the problem of financing peace-keeping see L. SOHN, CASES ON UNITED NATIONS LAW 763-818 (2d ed. rev. 1967).

303. *See* R. BARNET, *supra* note 288, at 278-79.

principle of self-determination in Article 1 of the Charter requires a neutral non-intervention standard, the implication from Barnet's work that Articles 39-44 and 51 of the Charter require his rule is sheer fantasy.

5. *Modernization as a Touchstone*

In a recent essay on the role of international law in the conflict in Yemen, Kathryn Doherty Boals suggests "a principle of modernizing legitimacy . . . . [for appraising all] intervention by one society in the internal affairs of another . . . ." [304] Under this principle the sole test of legitimacy is whether "a state's intervention . . . [has] a reasonable possibility of contributing to the modernization of the society in which it . . . [takes] place." [305] Modernization, in the sense of self-sustaining economic growth and centralization of authority, does seem to be a widely shared community goal.[306] To make it the touchstone of legitimacy, however, seems both unwise and unworkable. The principal faults with the proposal are that it fails to take into account the full range of community policies at stake in intervention and that it is hopelessly uncertain in application.

Modernization may be an important aspect of self-determination, but to legitimate intervention by its effect on modernization is to run a substantial risk of validating external denial of self-determination. The referent of genuine self-determination must be the demands of the people of the entity in question. If the people prefer other values to modernization, then coercive external imposition of modernization would be a denial of self-determination. Self-determination in all of its aspects would make a more complete touchstone than modernization alone.[307] Yet because of the difficulty of determining the genuine demands of a people, and the consequent danger of self-serving claims, even self-determination as a touchstone has yielded to a non-intervention standard. This should certainly be the case when, in addition to the uncertainty of determination, the touchstone itself may deny self-determination. For the people of one entity to set themselves up as benevolent judges of the proper amount of modernization to be coercively imposed upon others smacks of the nineteenth century paternalism which was the principal justification for colonialism.

304. K. Boals, The Role of International Law in the Internal War in Yemen: An Interpretative Essay 69, 74-75 (unpublished paper prepared for the American Society of International Law Study Group on Civil Strife, 1969).

305. *Id.* at 74. "Modernizing legitimacy" is also defined as:

> legitimacy measured in terms of the relative capacity of the contending groups to develop the consciousness, creativity, institutionalized power, and justice necessary for coping with the revolution of modernization.

Id. at 69.

306. *See* Farer, *supra* note 254, at 521-22.

307. For development of the full range of claims to self-determination see T. Mensah, Self-Determination Under United Nations' Auspices 31-44 (unpublished J.S.D. dissertation in the Yale Law Library, 1963).

The modernization touchstone also fails adequately to consider the policy of minimum public order. As postulated by Kathryn Boals, the principle of modernizing legitimacy would not focus on "preventing intervention as such but [on] preventing interventions which do not foster modernization." [308] In other words, as long as "intervention . . . [has] a reasonable possibility of contributing to the modernization of the society in which it . . . [takes] place," [309] it should be permissible and perhaps even encouraged regardless of the threat to world order. Just as Tom Farer's prohibition on participation in tactical operations seems to result from preoccupation with the Vietnam War, Kathryn Boals' principle of modernizing legitimacy seems to result from preoccupation with the Yemen War. But even though the Yemen War presents only a relatively small threat to world order, external intervention may well have intensified the loss of life and internal destruction. Minimum public order in all of its senses is frequently a critical policy at stake in intervention. It is only a small step from downgrading it to justify wars of modernization to downgrading it to justify cold war claims for the purpose of imposing "democratic" or "socialist" regimes.

A second fault with the principle of modernizing legitimacy is that it is hopelessly uncertain. Assuming that modernization may be given a specific meaning which will command wide support, an assumption not without considerable doubt, how does one evaluate the impact on modernization of a particular intervention? For example, which way does modernization cut in Algeria, the Congo, the Dominican Republic, Lebanon, Nigeria, Rhodesia, and Vietnam? Might modernization sometimes result simply from the cultural shock attendant on massive military intervention in a quasi-feudal society regardless of the faction supported? Is the choice of one or another competing faction ever a sufficiently significant cause of modernization to justify a test of modernizing legitimacy? In view of these and other uncertainties, the danger of self-serving claims that an intervention promotes modernization seems too great to support a modernization test.

B. SUMMARY OF TENTATIVE RECOMMENDATIONS

Intervention is truly a monochromatic term for a polychromatic reality.[310] Because of this diversity, recommendations for the control of intervention must provide a technique for adequately focusing on the wide range of issues. As a tentative classification of issues concerning foreign participation in internal conflict, it is recommended that intervention be divided into six basic situations, each situation in turn being divided into more specific claims. The six situations

308. K. Boals, *supra* note 304, at 75.

309. K. Boals, *supra* note 304, at 74.

310. *See* Moore, *Intervention: A Monochromatic Term for a Polychromatic Reality* [paper prepared for the Princeton Conference on Intervention and the Developing States, Nov. 10-11, 1967, to be published in II THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1969)].

are: type I situations, claims not relating to authority structures; type II situations, claims relating to anti-colonial wars; type III situations, claims relating to wars of secession; type IV situations, claims relating to indigenous conflict for control of internal authority structures; type V situations, claims relating to the use of external force for imposition of internal authority structures; and type VI situations, claims relating to cold-war divided nation conflicts. These six situations are then further divided into the twenty-one more specific claims set out in the table of contents.

This classification of issues concerning foreign participation in internal conflict into six basic situations and twenty-one claims is not intended as a slot machine for mechanical solution of intervention problems. It is offered instead as a useful technique for contextually identifying like cases and for formulating standards for appraisal. The complexity of intervention is a complexity of the real-world. The suggested classification merely reflects that complexity in the interest of obtaining a useful handle on it. As Professors McDougal and Feliciano point out, a principal task in clarifying policy choice is:

> that of presenting to the focus of attention of the various officials who must reach a decision about the lawfulness or unlawfulness of coercion, the different variable factors and policies that, in differing contexts and under community perspectives, rationally bear upon their decisions . . . .[311]

Recommendations for control must also take into account that the institutional framework for international conflict management is gravely unresponsive to the problems of control of intervention in internal conflict. The United Nations was structured in response chiefly to conventional aggression, and even that structure has in large measure gone unimplemented. Recommendations for control must take this institutional weakness into account and should achieve a balance of emphasis between recommendations for appraisal and recommendations for institutional improvement.

1. *Recommendations for the Appraisal of Intervention*

The need for community review of intervention claims and for institutional mechanisms for change suggest that both the General Assembly and the Security Council should be recognized as having authority to deal with claims of unauthorized intervention or of denial of self-determination. There is a danger of abuse in such centralized authority, particularly in view of a General Assembly which sometimes demonstrates a disturbing schizophrenia in dealing with claims of Western colonialism in Asia and Africa and Communist colonialism in Eastern Europe. Unless the status quo is to be frozen, however, the alternative seems to be preservation of a more danger-

311. M. MCDOUGAL & F. FELICIANO, *supra* note 274, at 151.

ous unilateral competence. In practice, UN action is likely only in cases of wide community agreement shared by the superpowers, and examples to date, such as the recent Rhodesia and South-West Africa resolutions, have borne this out. The absence of United Nations action in the Vietnam War, where the superpowers were on opposing sides, demonstrates the reverse side of the coin. The danger of abuse of power, though, does suggest that for either authorizing or proscribing interventions a resolution specifically concerned with use of force should be required.

In the absence of UN action, non-participation should be the basic standard for appraisal of intervention in authority-oriented internal conflict. That is, it should be impermissible to intervene for the purpose of maintaining or altering authority structures in another state. This standard, however, must be qualified by the need to take account of pre-insurgency assistance to a widely recognized government and by the need to permit counter-intervention on behalf of a widely recognized government. In addition, it seems justifiable in the present institutionally weak system to qualify the non-participation standard to sometimes permit carefully safeguarded non-partisan participation for the purpose of restoring orderly processes of self-determination.

For an intervention standard to be acceptable and workable it must permit assistance to a widely recognized government prior to insurgency. Nations have legitimate defense interdependencies against external attack, and in the absence of internal conflict, assistance to a widely recognized government is clearly permissible. If internal conflict is minor or is non-authority-oriented, this privilege of external assistance to the government should be continued. Such assistance may enable a militarily weak state to suppress a powerful band of bandits or to control non-authority-oriented rioting. Moreover, since low level internal violence is endemic in many third world nations, it would be unworkable to require termination of assistance on every occasion of internal violence. A prerequisite of a workable non-participation standard, then, is criteria for determining the threshold of internal conflict requiring non-participation.

In the recommendations which follow, four criteria for determining the non-participation threshold are suggested. Because it is a necessary condition, the first criterion deserves particular attention. It is that "the internal conflict must be an authority-oriented conflict aimed at the overthrow of the recognized government and its replacement by a political organization controlled by the insurgents." This means that assistance may be provided at the request of a widely recognized government to suppress a bandit group or to quell a non-authority-oriented internal disorder as in the Tanganyika, Uganda, Kenya disorders of 1964. This criterion emphasizes the policy choice that the basic non-participation standard should be limited to authority-oriented internal conflict.

After a conflict becomes an insurgency requiring non-participation, the danger that cessation of assistance to the government may

work as an intervention on behalf of insurgents suggests that it should be permissible to continue pre-insurgency levels of assistance.

The second qualification of the basic non-participation standard is that assistance to a widely recognized government should be permissible to offset impermissible assistance to insurgents. If the principal reason for the non-participation standard is the difficulty of determining genuine self-determination, with a resulting preference for allowing indigenous conflict to run its course, the force of the standard collapses if impermissible foreign assistance is already being supplied to insurgents. Allowing counter-intervention on behalf of a widely recognized government and not on behalf of insurgents does not treat the competing factions equally, but this lapse of neutrality in favor of the incumbents is strongly called for by the danger of competing counter-interventions, the permissibility of pre-insurgency assistance to the widely recognized government, the need to preserve the right of collective defense against an armed attack, and the generally greater threat to world order of assistance to insurgents.

Counter-intervention on behalf of a widely recognized government should be comparable to the impermissible assistance being supplied to insurgents. That is, the political and military effect of the offsetting assistance should be proportional, taking into account the balance of forces required in an insurgent conflict and the difficulty of estimating covert assistance to insurgents. In addition, counter-intervention should be restricted to the territory of the state undergoing internal conflict unless the impermissible assistance to insurgents is so substantial as to amount to an armed attack under Article 51 of the Charter. This recommendation rejects both Professor Falk's proposal that it is always impermissible to reply against the territory of a covertly attacking state and the view that self-defense under the Charter is not restricted to defense against an armed attack. As an absolute, Professor Falk's proposal is an unwarranted restriction on the right of individual and collective defense. And not to restrict the right of reply against the territory of an assisting state to responses against an armed attack would be much too open-ended for the frequently ambiguous internal war context. Factors which are important in determining whether impermissible assistance to insurgents is so substantial as to constitute an armed attack include the degree of external initiation, whether intervention is motivated by an objective of territorial expansion, and the amount and kind of external support, particularly the involvement of foreign personnel in tactical operations.

The third qualification to the basic non-participation standard would sometimes permit non-partisan participation for the purpose of restoring orderly processes of self-determination in conflicts involving a sudden breakdown of order. This qualification is intended to differentiate situations in which intervention in authority-oriented conflict is not rendered on behalf of a particular faction but is in-

stead a non-partisan operation intended to substitute free elections or negotiated settlement for continued conflict. Because of the difficulty in maintaining neutrality and the consequent danger of self-serving claims by a participating power, the justification for this third qualification is not as clear as that for the first two. Nevertheless, some such interventions may promote community policies by ending internal conflict and restoring orderly processes of self-determination, and if carefully safeguarded an exception seems justified.

If none of these three qualifications are present, it should be impermissible to assist any faction in an authority-oriented internal conflict or to otherwise use the military instrument against another state for the purpose of affecting authority structures. Prohibited assistance should include economic as well as military aid and outright arms sales as well as grants or sales on long term credit. Arguably, outright sales of military armaments should not be considered assistance. But the difficulty of distinguishing outright sales from various credit arrangements, the desirability of minimizing the level of internal violence, and the reciprocity of the non-participation standard suggest that even outright sales should be prohibited.

In addition to the three qualifications to the basic non-participation standard, non-authority-oriented intervention for the protection of human rights should sometimes be permissible. Of course, if such intervention is at the request of a widely recognized government prior to insurgency it is permissible under the first exception to the non-participation standard, at least to the same extent as other pre-insurgency assistance. But even if made in other circumstances, the importance of the protection of fundamental human rights, the lack of adequate institutional protection for human rights, and the small threat to community policies of most such interventions suggest that if carefully safeguarded such interventions should be permissible. There is strong recent support from the scholarly community for the continued validity of such a limited right of humanitarian intervention.[312]

The following three recommendations summarize these normative suggestions. Although they are personal policy recommendations for the appraisal of intervention, in each case there are strong community expectations supporting them. In fact, with the possible exception of the qualification for non-partisan participation in authority-oriented conflict, a good case can be made that these recommendations summarize the present international law of non-inter-

312. *See* McDougal & Reisman, *Response by Professors McDougal and Reisman*, 3 INT'L LAWYER 438, 444 (1969); Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967); R. Lillich, Intervention to Protect Human Rights (unpublished paper presented at a Regional Meeting of the American Society of International Law at Queen's University on November 22-23, 1968).

vention in internal conflict as well as present community consensus permits.

I. An intervention in internal conflict is permissible if specifically authorized by the General Assembly or Security Council, even though in the absence of such authorization it would be impermissible. Conversely, if the General Assembly or Security Council specifically calls for cessation of a particular intervention, continuation is impermissible even though in the absence of such prohibition it would be permissible.

II. It is impermissible to assist a faction engaged in any type of authority-oriented internal conflict or to use the military instrument in the territory of another state for the purpose of maintaining or altering authority structures. The three qualifications to this basic non-intervention standard are:

(A) Assistance to a widely recognized government is permissible prior to insurgency. After a conflict becomes an insurgency, it is impermissible to increase but permissible to continue the pre-insurgency level of assistance. Criteria for determining insurgency, for this purpose of permitting pre-insurgency assistance, include:
  (1) the internal conflict must be an authority-oriented conflict aimed at the overthrow of the recognized government and its replacement by a political organization controlled by the insurgents;
  (2) that the recognized government is obliged to make continuing use of most of its regular military forces against the insurgents, or a substantial segment of its regular military forces have ceased to accept orders;
  (3) that the insurgents effectively prevent the recognized government from exercising continuing governmental authority over a significant percentage of the population; and
  (4) that a significant percentage of the population supports the insurgent movement, as evidenced by military or supply assistance to the insurgents, general strikes, or other actions.

(B) Assistance to a widely recognized government is permissible to offset impermissible assistance to insurgents; if assistance to insurgents or the use of the military instrument against another state constitutes an armed attack within the meaning of Article 51 of the Charter, it is permissible to reply proportionally against the territory of the attacking state.

(C) The use of the military instrument in the territory of another state for the purpose of restoring orderly processes of self-determination in an authority-oriented conflict in-

volving a sudden breakdown of order is permissible if it meets the following conditions:

(1) a genuine invitation by the widely recognized government, or, if there is none, by a major faction;
(2) relative neutrality among factions, with particular attention to neutrality in military operations;
(3) immediate initiation of and compliance with the decision machinery of appropriate regional organizations;
(4) immediate full reporting to the Security Council and compliance with United Nations determinations;
(5) a prompt disengagement, consistent with the purpose of the action; and
(6) an outcome consistent with self-determination. Such an outcome is one based on internationally observed elections in which all factions are allowed freely to participate on an equal basis, which is freely accepted by all major competing factions, or which is endorsed by the United Nations.

III. Non-authority-oriented intervention for the protection of human rights may sometimes be permissible. Criteria for determining legitimacy include:

(A) an immediate and extensive threat to fundamental human rights, particularly a threat of widespread loss of human life;
(B) a proportional use of force which does not threaten greater destruction of values than the human rights at stake;
(C) a minimal effect on authority structures;
(D) a prompt disengagement, consistent with the purpose of the action; and
(E) immediate full reporting to the Security Council and appropriate regional organizations.

At a time when the United Nations is concerned with the problem of defining aggression,[313] the activities termed "impermissible" in these recommendations may be conceptualized as "aggression." There seems to be little advantage in using the aggression termi-

313. In December, 1967, "noting that there is still no generally recognized definition of aggression," the General Assembly passed a resolution establishing a thirty-five member Special Committee on the Question of Defining Aggression. The Special Committee has issued several reports and is currently considering a number of draft definitions of aggression. See G.A. Res. 2330, 22 U.N. GAOR, Supp. 16, at 84-85, U.N. Doc. A/6716 (1967); Report of the Special Committee on the Question of Defining Aggression, 23 U.N. GAOR, Agenda Item No. 86, U.N. Doc. A/7185/Rev.1 (1968); Report of the Special Committee on the Question of Defining Aggression, 24 U.N. GAOR, Supp. 20, U.N. Doc. A/7620 (1969).

nology, however, and it may even obscure the consequences of classification.

(2) *Recommendations for Institutional Improvement.*

The history of efforts at international conflict management shows that both normative and institutional developments are important for progress. It is essential to have standards for appraisal as well as institutional mechanisms for their effectuation. Existing international organizations, however, are largely a response to conventional aggression and are poorly equipped for the control of intervention in internal conflict. Major institutional needs include the strengthening of collective community decision-processes for authorizing needed change and for responding to claims of unauthorized coercion, development of a reliable observation and disclosure capability, measures for control of the military assistance race, mechanisms for settlement of internal conflict in early more tractable stages, and a strengthening of the role of international law in national decision processes.

In partial response to these institutional weaknesses, it is recommended that the General Assembly be strengthened as an agency for community review of intervention, that the United States should sponsor a multilateral treaty for the reporting of military assistance, that the General Assembly should establish a permanent observation and disclosure agency available to any state which wishes to use it for the investigation of intervention in internal conflict, and that other institutional changes in the international constitutive process, particularly machinery for collective recognition, a UN emergency relief force, and revision of conventions on the conduct of war, should be explored. It is also recommended, with respect to the domestic constitutive process, that the Legal Adviser of the Department of State be upgraded to Under Secretary of State for International Legal Affairs and made a permanent member of the National Security Council.

The recommendation that the General Assembly should be strengthened as an agency for community review of intervention is interrelated with the first recommendation for the appraisal of intervention. Although there is a danger of abuse in strengthening General Assembly competence, the danger seems slight in comparison with the normless present in which individual states are asserting unilateral competence to take action to effectuate preferred change. Moreover, General Assembly action seems unlikely in the absence of wide community agreement shared by the superpowers. Recognition that General Assembly authority extends to authorizing as well as proscribing intervention is simply recognition of an authority already exercised by the Assembly in the 1967-68 Rhodesia, South Africa, South-West Africa, and Portuguese territories resolutions. Such a General Assembly authorizing competence is not constitu-

tionally clear under the Charter, particularly in other than colonial situations, but on balance the precedents seem to support it.

International reporting of military assistance would develop community awareness of the magnitude of the military assistance race, expose interventionary activities, assist in fact appraisal, serve as an early warning device for initiating settlement efforts in the early, more easily manageable stages of internal conflict, and assist in avoiding miscalculations of intention. Despite these benefits of reporting, however, there is no international machinery for reporting military assistance at the present time. The best procedure for implementation of such reporting machinery seems to be a multilateral treaty endorsed by the General Assembly. Such a procedure would provide an opportunity for nations principally concerned to shape the final agreement and would assure greater likelihood of compliance. Though some nations might refuse to sign such a treaty or might continue secret military assistance, the common interest of the major powers in controlling the military assistance race, the pressure of world opinion on non-complying states once some nations begin to report, and the reduction of the credibility gap by open reporting, suggest that such a treaty would have a reasonable chance of success.

For the most part, disputes underlying internal conflict are competitive authority struggles which cannot be settled by submission to international fact-finding. There is, however, a real need for international observation and disclosure to establish a basis for appraisal and to deter impermissible assistance by exposure. Although existing international machinery has been useful in this regard, there is a need for new machinery, relatively insulated from political pressure and available to any state seeking to invoke it. One possibility is a permanent observation and disclosure agency available on a voluntary basis to any state which wishes to use it for the investigation of an alleged armed attack or intervention in internal conflict. Such an agency would be limited solely to the observation and disclosure of facts, would be composed of a diplomatically protected staff from neutral countries, and would be established and supervised by the General Assembly.

With regard to institutional changes in the national constitutive process, it is recommended that the office of Legal Adviser of the Department of State be upgraded to Under Secretary of State for International Legal Affairs and that the new Under Secretary be made a permanent ex officio member of the National Security Council. This recommendation is intended to systematically introduce an international law perspective into the foreign-policy planning process. Although political, economic, and military considerations are now introduced in a score of more or less institutionalized ways, there is no systematic way in which international law is taken into account. By making the new Under Secretary a member of the National Security Council, the principal foreign-policy advisory agency,

and by specifying in the enabling act that one of his principal duties is to provide impartial advice on the basis of international law, it is hoped that the strength of the international law tradition can also be brought to bear on foreign-policy planning.

The following five recommendations summarize these suggestions for improvement in the international and domestic constitutive processes. They are not advanced as panaceas for the control of intervention; new agencies and procedures are not likely to significantly alter underlying political realities. They are advanced, however, as suggestions which offer both real promise for improvement and a reasonable chance for implementation.

I. The General Assembly should be strengthened as an agency for community review of intervention. General Assembly authority should be recognized as extending to authorizing as well as proscribing intervention.

II. The United States should take the initiative in the United Nations to sponsor a multilateral treaty for the reporting of military assistance. The scope of the treaty would be subject to negotiation but might include:

(1) all governmental and private transfers of military armaments to another country and the terms of the transfer —grant, sale, sale on credit, etc.;
(2) the transfer of military or para-military personnel from one country to another;
(3) foreign military training and assistance missions;
(4) domestic military training programs for foreign nationals; and
(5) foreign para-military groups enjoying sanctuary.

III. The General Assembly should establish a permanent observation and disclosure agency available to any state which wishes to use it for the investigation of armed attack or intervention in internal conflict. Such an agency would be limited to observation and disclosure of facts, would be purely voluntary, and would be under the supervision of the General Assembly.

IV. Additional changes in the international constitutive process deserving study include:

(A) machinery for collective recognition;
(B) a permanent UN emergency relief force to assist victims of natural and political disasters; and
(C) revision of conventions on the laws of war, the protection of civilians, and the treatment of prisoners of war for greater responsiveness to internal conflict.

V. As a recommendation for improvement of the national constitutive process, the office of Legal Adviser of the Department of State should be upgraded to Under Secretary of State for International

Legal Affairs, and the new Under Secretary should be made a permanent ex officio member of the National Security Council. The statutory description of the office should indicate that a principal duty of the new Under Secretary is to participate in the foreign-policy planning process and to provide impartial advice on the basis of international law to both the Secretary of State and the National Security Council.