1980

Internal Conflicts and Foreign States: In Search of the State of Law

Michel Krauss

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INTERNAL CONFLICTS AND FOREIGN STATES:
IN SEARCH OF THE STATE OF LAW*

Michel Krauss**

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* This article is a translation of the original text, which was published in March, 1980, in La Revue de Droit de l'Université de Sherbrookes.

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It commands the future:
a valid ideal, but
imperfectly achieved.

O.W. Holmes

Introduction

Intense guerilla warfare has engulfed the Ethiopian province of Eritrea since 1976. On the one hand, the "Popular Front for the Liberation of Eritrea" (P.F.L.E.) enjoys some popular support. It also receives economic and military assistance from Somalia, South Yemen, and Syria. On the other hand, the Eritrean Liberation Front (E.L.F.), like the P.F.L.E., is fighting for "true self-determination" of the Eritrean people, with the backing of Iraq and Saudi Arabia. In addition, the Ethiopian military government is striving to maintain the state's territorial integrity. To this end it receives assistance from the Soviet Union, Cuba and Israel.¹

Aside from its currency, there is little that is earth-shattering about this conflict; it has been accorded minor coverage by the media. The conflict does illustrate, however, many of the thorny problems confronting contemporary international law. The course of contemporary international affairs is determined at least as much by internal events as by international crises.² One of the principal ways in which internal relations influence world order is certainly when they involve

violent conflicts. Although it has long been acknowledged that such conflicts could have important repercussions on a global level, interest in this subject on the part of the international legal community is relatively recent.

The principal reason for this growing interest is the substantial number of "internal conflicts" that the world has witnessed since the Second World War. One jurist has predicted, for the near future, from ten to fifteen revolutions a year in Third World countries. In 1964, the New York Times enumerated over a thousand cases of "unequivocal" civil wars, internal riots, terrorist attacks and coups. This serious increase in the number of internal conflicts has been accompanied by a radical decrease in the number of classical interstate "wars of aggression" and, as the Eritrean example suggests, by an increase in the involvement of foreign states in internal conflicts. In light of the present hostilities in Angola, Cambodia, Eritrea, Iraq, the Ogaden, Spanish Sahara, and Chad (to name only a few), one wonders if Rousseau could posit with the same conviction of two centuries ago that "la guerre est une relation d'Etat à Etat", i.e., "[W]ar is a relation of State to State".

In this paper, we intend to delineate the state of international law on this subject by proposing an answer to the following question: "What norms does the international community enunciate concerning the relations that foreign states should have with the parties to an internal conflict?" At the risk of accusations of "formalism" or "legalism," we shall refrain from suggesting de lege ferenda solutions, while nonetheless referring

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4. The causes of this increasing number of "internal conflicts" will be commented upon briefly infra pp. 230-32.
7. See note 209 infra.
8. See Chaumont, Commentaries, 55 Annuaire de L'Institut de droit international 530 (1953).
to Section 38(1) of the Statute of the International Court of Justice as the source of contemporary law. Some jurists reject these rules out of hand, by adducing conflicts, such as the one in Eritrea, which would appear to negate them. We stress that international legal norms, as is the case for those of municipal law, may exist even if they are not fully respected. The fact that rules have been transgressed does not reduce their normative force, unless the transgressions are sufficiently numerous and manifest the intentions of the international community to eliminate them and to create new ones.

Some authors have held that international legal principles are today nothing more than simple myths that, while useful in law courses, have little bearing on the conduct of states. It is becoming increasingly evident that this thesis is not entirely unfounded, and the claim that it springs from a "néo-juridisme bâtarde issu du croisement du droit naturel et de la science politique" will not suffice. It is, however, possible to respond eloquently to these critics, as does Professor Brownlie:

The United Nations Charter, and the rules of International Law existing apart from the Charter, are but imperfect instruments

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9. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   (b) international custom, as evidence of a general practice accepted as law;
   (c) the general principles of law recognized by civilized nations;
   (d) subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rule of law.

Statute of I.C.J., art. 38(1).

Our starting point will be the assumption that states, and people generally, agree that their common interest lies in the respect of the Charter and of the customs to which it refers.\textsuperscript{12}

To determine the international norms concerning the relations that foreign states should have with the parties to an internal conflict, three competing doctrines will be examined. Only one of them, in our opinion, reflects the state of contemporary law. Each doctrine involves certain difficulties, which we shall note throughout the study as well as in our conclusions. Finally, a "new development"--the concept of the right of all peoples to determine their own future--will be analyzed in order to identify its possible effects on the "traditional" state of the law.

\textit{Note on the terminology}

It seems appropriate to justify the choice of the term, "internal conflict," in preference to the conventional nomenclature, "civil war." The choice of terms is not based solely on the possibility that the latter expression might be contradictory;\textsuperscript{13} consideration of certain key elements of contemporary international law is a more determinant factor.\textsuperscript{14}

\begin{itemize}
  \item \textsuperscript{11} I. Brownlie, International Law and the Use of Force by States at vii (1965).
  \item \textsuperscript{13} See the quotation from Rousseau, \textit{supra} p. 174.
  \item \textsuperscript{14} See U.N. Charter art. 2(4) which renders the legal status of "war" doubtful. \textit{See also} art. 2(7) which largely exempts internal "matters" from U.N. control. Also, the near-disappearance of the classic "Declaration of War," which will be discussed later, leads us to choose the term "conflicts" rather than "wars." See Mayerowitz, \textit{La guérilla et le droit de la guerre}, 7 Revue belge de droit international 67 (1971).
\end{itemize}
The definition that we have given to "internal conflict" is essentially classical. In armed inter-state conflict all the protagonists are fully subject to international law. By contrast, internal armed conflict is characterized by a fundamental inequality in that at most only one of the parties has state status (or, to be more precise, the status of being the legal representative of the state in question). Thus, "colonial liberation wars," inter-ethnic conflicts and military putsches have always been considered "internal conflicts." This legal imbalance is at the root of the first of the three legal doctrines on the subject of foreign states and internal conflicts which we shall examine.

Chapter 1: In Search of the State of Law

Preliminary Remarks

Mention has already been made of the Eritrean conflict. In Ogaden, where ethnic Somali forces are also fighting to obtain their independence from Ethiopia, the government of Ethiopia has called upon Cuban military aid to combat the secessionists. This assistance is a source of concern to the West, especially to the United States. American protests, however, have not dealt with the right that Cuba has to support the Ethiopian government. Instead, they have been concerned with the advisability of such an important intervention in the context of détente, which many have regarded as a symbolic truce on ideological expansion. Ethiopia has frequently in-

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15. The following caveat seems appropriate here: this generally accepted definition of "internal conflict" presupposes indivisibility in the legal representation of a state. Such a presumption is at times overtly contested by authors whose opinions will be examined pp. 210-13 infra. See E. Castren, Civil War 31 (1966).

16. "Colonial liberation wars" have greatly contributed to the crystallizing of international law in this field. See generally, Wehberg, La guerre civile et le droit international, 63 Recueil des cours 13 (1938).

17. The only apparent legal objection deals with the possibility that communist countries had illegally flown over the airspace of certain foreign states in order to reach Ethiopia. New York Times, Dec. 14, 1977, § 1, at 1, col. 7.

Such American protests vividly underline the lack of complaints concerning Cuba's right to be present in the Horn of Africa.
sisted on, and the West has offered no denial of, its "sovereign right to call for outside aid to defend its territorial integrity." 18

Legal arguments raised in the Ogaden conflict illustrate the present importance of "conventional" international law in this area. Our inquiry into the state of law in fact reveals a rather sophisticated normative system aimed at governing the relations between foreign states and the parties to an internal conflict. According to one doctrine, this system is distinguished by the noteworthy advantage that it accords to the established government. We shall see, however, that this doctrinal trend has been challenged by two other schools of thought which attract minority support.

For the moment, let us suggest a priori several possible norms for determining the conduct of foreign states toward an incumbent government 19 and the opponents of such a regime: 20

1. The duty of foreign states to assist the incumbent government, coupled with a prohibition against aiding its opponents; 21

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19. The term "incumbent government," is preferable to "legal government." See I. Brownlie, supra note 11, at 323-324. "Incumbent government" designates a government which has already exercised sovereignty over the state's territory and which continues to exercise it over at least a part of that territory. Obviously, some cases may arise where no government meets these criteria (e.g., the Angolan conflict before the triumph of Mr. Neto's forces). In such cases, the "vacuum" will be filled by a hasty recognition of one faction as "incumbent." See pp. 201-02 infra; Rousseau, Chronique des faits internationaux, Revue générale de droit international public, N.S., 116-118 (1965).
20. Not included are the logically imaginable hypotheses implicating the right or duty to assist the opponents, and not the established government, because such solutions simply do not appear even plausible in the context of a community of sovereign states.
21. This first solution, which may appear extreme, has already been advocated by certain states. See, e.g., League of Nations O.J. 264 (1937) (Mexican declaration during the Spanish War).
2. The right to assist the incumbent government, coupled with a prohibition against aiding its opponents;

3. The right to help any one of the parties to the internal conflict;

4. A prohibition against assisting any party to the conflict (i.e., obligatory neutrality).

We submit that the dominant trend, both in doctrine and in practice, results in de facto application of the second solution through the establishment of a normative system which we have labeled "belligerency as a juridical act." 22

I. Belligerency as a Juridical Act: The Principle of Aid to the Incumbent Government

There is no rule of international law which forbids the government of one State to render assistance to the established legitimate government of another State with a view to enabling it to suppress an insurrection against its authority. Whether it shall render such aid is entirely a matter of policy or expediency and raises no question of right or duty under international law.

22. Many authors describe this majority doctrine as the "theory of non-intervention"; see, e.g., R. Oglesby, supra note 6. This description is accurate to the extent that aid to the established government does not institute an "intervention." Such a designation, however, is of doubtful utility. Indeed, for many, "non-intervention" has another meaning—that of a symmetrical prohibition against assisting any of the parties in a conflict (our fourth solution). Was it not Tallyrand who said, "non-intervention est un terme plutôt mystérieux et qui signifie intervention", i.e., "[N]on-intervention is a rather mysterious term, which implies intervention,"? This semantic ambiguity of the "non-intervention" label has led us to discard it in our effort to describe the competing doctrine.
If assistance is rendered to the legitimate government, it is not a case of unlawful intervention, as is the giving of assistance to rebels who are arrayed against its authority.\textsuperscript{23}

A. Historical Origins of the Doctrine

While the dominant point of view favors continued support of the incumbent government, it is nonetheless innovative in the protection, however relative, that it accords to the opponents of such a government. Indeed, it is important to note that the division of the globe into sovereign states began toward the end of the Middle Ages, long before democratic political theory became popular. In times of crisis, the solidarity among incumbent governments of different states was quite strong; the international legitimacy of such governments proceeded \textit{ipso facto} from the efficacy of their rule.\textsuperscript{24}

Since each government shared similar political values, the obvious tendency was to regard foreign rebels as common enemies. Not surprisingly, this state of affairs produced a simple legal norm: foreign states might \textit{at all times} assist the sovereign in suppressing a rebellion.\textsuperscript{25}

Rebels, on the contrary, had no option whatsoever of acquiring even a limited legal personality, unless and until they managed to overthrow the incumbent government.\textsuperscript{26}

Effects of this early normative system could be felt until relatively recently. In the seventeenth century, peace treaties stipulated that, in case of rebellion,

\begin{itemize}
\item \textsuperscript{23.} Garner, \textit{Questions of International Law in the Spanish Civil War}, 31 Am. J. Int'l L. 66, 68 (1937).
\item \textsuperscript{24.} It goes without saying that inter-state conflicts existed and were numerous. Moreover, these conflicts were quite legal, and served as safety-valves which provided for the settlement of disputes. What we wish to emphasize here is the great homogeneity of the embryonic inter-state system and the repercussions of such homogeneity on state attitudes toward internal conflicts.
\item \textsuperscript{25.} R. Aron, \textit{Guerre et paix entre les nations} 103-32, 1187 (1956).
\item \textsuperscript{26.} Even then, there was no guaranty of international capacity. See R. Oglesby, \textit{supra} note 6; Wodie, \textit{La sécession du Bafra et le droit international public}, 73 Revue générale de droit international public, N.S., 1036 (1962).
\end{itemize}
signatory states would refuse all aid to rebels and would deliver them to the sovereign authorities. More recently, the desire to maintain the status quo was illustrated by the "Tobar doctrine," according to which any regime that had come into power by overthrowing a signatory government would simply not be recognized. Thus, the French army brutally suppressed the Spanish revolution of 1829, and England, one year earlier, treated the Portuguese rebels led by Don Miguel in the same manner. The crushing of the Hungarian uprising of 1848 by Czar Nicolas, in response to Austria's request (Austria at that time exercising sovereignty over much of what is now Hungary) is yet another indication of international solidarity in cases of internal uprisings.

This solidarity weakened toward the end of the eighteenth century as rival imperial powers increasingly declined to intervene to prevent the independence of their opponents' colonies. This change of strategic interest gradually brought about a change in the legal norms which, from that time on, provided for the possibility of some international recognition of rebels. Obviously, such recognition could not be interpreted as recognition of a government, for to acknowledge a rebel group as a legitimate government before the end of hostilities would clearly constitute an illegal intervention into the incumbent government's affairs. Thus, doctrine and practice gradually created a lesser form of recognition: the recognition of belligerency.

International conflicts during the eighteenth and nineteenth centuries witnessed the birth of this new rule and the gradual decline of the earlier one. Thus, when France recognized the rebel colonies of North America in February of 1776 (i.e., before the final victory of Washington's forces), Great Britain interpreted this act as a casus belli. The recognition of belligerency was at that time embryonic, and any foreign state's act of granting some status to rebels was seen as an illegal intervention. Shortly thereafter,

27. This doctrine was incorporated into treaties in Central America between 1907 and 1923 and was on several occasions invoked by the United States. See Falk, Janus Tormented: The International Law of Internal War, in International Aspects of Civil Strife 231 (J. Rosenau ed. 1962).

28. See note 26 supra.
however, in 1817, the United States recognized the Spanish colonies as belligerents, and did not confer recognition as states upon them until five years later. Indeed, it is said that by the time of the American Civil War, a definite crystallization of the doctrine of recognition of belligerency had been brought about.29

Recognition of belligerency was applied with relative frequency to internal conflicts in the nineteenth century.30 Such recognition constituted one element of a normative system by which rights and obligations towards both parties to an internal conflict were imposed on foreign states. Cardinal features of such a system were the qualified legality of aid to the incumbent government, on the one hand, and the prohibition of assistance to its opponents, on the other.

B. Aid to the Incumbent Government

A distinction must be made between an uprising that does not have as its objective the overthrow of the established regime, and an insurrection that is specifically directed toward violent change in the government of the state. Our discussion will proceed along the lines of this distinction.

Moreover, as to those uprisings that do aim at overthrowing the established government, it is appropriate to distinguish between "mere rebellions" and "belligerency per se." Indeed, there may exist a halfway point between two phases of internal conflict, particularly in relation to former American foreign policy.31

29. See McNair, The Law Relating to the Civil War in Spain, 53 L.Q. Rev. 475 (1937). The concept already had a viable existence before 1861 and was in fact regularly invoked by the United States. It is thus preferable to speak of "crystallization" rather than "birth" of this doctrine at the time of the American Civil War.

30. See J.B. Moore, A Digest of International Law 164–205 (1906).

31. The "state of insurgency" concept is discussed pp. 193–94 infra.
1. Uprisings Not Aimed at the Overthrow of the Incumbent Government

Such uprisings as race riots, post-earthquake lootings, or demonstrations against a specific government policy are not normally aimed at replacement of a regime. One such uprising occurred in 1964, when Kenyan, Ugandan, and Tanzanian soldiers rebelled in order to obtain an increase in salary and an "Africanization" of the officers' corps; their respective governments asked for aid from the United Kingdom.

In this type of situation, neither doctrine nor actual state practice leaves any doubt as to the total discretion of the foreign state to respond to a request for assistance. In fact, the nature of this aid differs little from that of goods sold to a state in the context of international commerce. It is well established that sovereignty encompasses the right to solicit aid from another state and, conversely, to accord assistance to another state in circumstances such as these, which do not affect the representative character of the petitioning government.

32. Professor J.N. Moore refers to "non-authority oriented internal conflicts." See Moore, The Control of Foreign Intervention in Internal Conflict, 9 Va. J. Int'l L. 209, 259 (1969). This brings to mind the disturbances of 1978 in Bermuda, which prompted the local government to call for help from British military forces. There are of course numerous other recent examples of such international military aid.

33. This aid includes the sale of arms and the training provided for the armed forces of the "assisted" state.

34. Both sorts of transactions are in fact "normal" interactions. To prohibit them would make typical diplomatic relations impossible, in the same manner as would a prohibition against presently accepted pressure tactics used by one state in order to influence a neighboring state. This important point was raised by representatives of several states during the discussions that preceded the adoption of Resolution 2131 by the General Assembly in 1965. See G.A. Res. 2131, 20 U.N. GAOR, Supp. (No. 14) 11, U.N. Doc. A/6014 (1965). This resolution will be discussed in more detail pp. 195 & 226-28 & n. 79, infra.
2. Uprisings Aimed at Overthrowing the Incumbent Government

a) "Mere Rebellions"

From the point of view of the incumbent government, the rebel forces are invariably common criminals. If the government feels that normal application of the legal process is insufficient to reestablish order, it will apply laws of exception.

The criminal character of the rebels' acts is obviously a question of domestic law. It has no effect on the position of foreign states, for whom the insurrection (at this stage) is legally of no importance. The political drama does not modify the legal status of the incumbent government, which remains:

... en tout temps, fondé à solliciter un appui matériel pour préparer et consolider ses défenses: il n'est pas interdit aux tierces puissances de consentir des prêts au gouvernement légal, voire de laisser s'organiser sur leur territoire des expéditions militaires en sa faveur.

Here again doctrine and state practice agree in treating the "mere rebellion" as an internal affair of

35. "Inciting to Civil War" is often punishable by the death penalty. In Czarist Russia, the intention alone was punishable by death, without any proof of actus reus. C. Zorgbibe, La guerre civile 1 (1975).

36. For example, in Canada, the War Measures Act, Can. Rev. Stat. c. W-2 (1970), was invoked in Quebec in 1970. The recent application of "martial law" in South Korea, following the assassination of President Park by a small clique, is a more contemporary example of an incumbent government's reaction to small-scale internal disorders. See The Montreal Gazette, Oct. 27, 1979, at 1.

37. *I.e.*..., "... at all times, justified in soliciting material support to prepare and to consolidate its defenses; third powers are not forbidden to authorize loans to the legal government, [or] even to allow military expeditions in its [i.e., the legal government's] favor to be organized on their territory." C. Zorgbibe, * supra* note 35, at 59.
the state in question, having no effect on the relations between the latter and foreign states. By acquiring the status of "belligerents," however, the opponents of the incumbent regime are endowed with a real, if restricted, legal personality. This situation transforms the rights and obligations of foreign states.

b) Belligerency

Again, it is important to note that, until the end of the eighteenth century, internal conflicts were not considered to be subject to the general law of war.

A new political context modified the state of law as early as the American Revolution, when the United Kingdom, in addition to applying regular criminal law to the rebels, also adopted a law prohibiting all commerce with the American colonies. This initial recognition of belligerency was followed rapidly by others.

38. Such an attitude has sometimes been adopted in situations where the rebellion is not so minor. Thus in September 1967 (three months after the proclamation of the state of Biafra), the chiefs of state of the member countries of the Organization for African Unity (OAU) declared that this conflict was "une affaire interne du Nigéria dont la responsabilité relève avant tout de la responsabilité des Nigérians eux-mêmes," i.e., "an internal affair of Nigeria the primary responsibility for which is that of the Nigerians themselves". See J. Saliton, La reconnaissance d'etat 161 (1971). This is a case of a refusal to recognize belligerency. The result of such a refusal is that the insurrection remains a "mere rebellion" as regards the refusing country. It also vividly illustrates the present-day relevance of the doctrine of belligerency as a juridical act.

39. It should be noted that this is not a case of the creation of a new state nor of a duality in the state representation, but rather of a temporary "transparency" of the state entity as regards the outside world. See C. Zorgbibe, supra note 35, at 5.

40. An Act to Prohibit all Trade and Intercourse with the Colonies During the Continuance of the Present Rebellion, 16 Geo. 3, c.5 (1776) [hereinafter cited as Colonial Trade Prohibition Act].

41. In The Prize Cases, 67 U.S. (2 Black) 635, 694 (1862), it was admitted that this English law constituted a recognition of the existence of a state of war between Great Britain and its American colonies.
and the doctrine was solidly entrenched by the time the first treatise on the subject was published in 1865.42

(i) Recognition of Belligerency by the Incumbent Government

Where the internal conflict has attained a certain importance the incumbent government may deem it opportune officially to acknowledge the existence of belligerency between the state it represents and a fraction of its nationals gathered together on its territory. The established government can then react toward the insurgents as if it were at war with them.44 Rarely explicit,45 this recognition generally consists of a law46 or an act.

42. T. Bernis, The Recognition of Rebel Belligerency (1865). Note that the American War of Independence, by its duration and importance, helped clarify the state of law in this area.

43. The necessary conditions permitting an incumbent government to recognize a state of belligerency have never been codified (unlike those governing the recognition of belligerency by foreign states). See p. 221 infra. Bluntschli enumerated three conditions which would give the rebels the possibility of being recognized by the incumbent government:

1) They must be organized into a military force;
2) They must respect the laws of war;
3) They must fight in good faith.

J. Bluntschli, Opinion impartiale sur la question de l'Alabama, 2 Revue de droit international et de législation comparee 452, 457 (1870). In spite of this opinion, it must be admitted that this recognition is purely discretionary, with no necessary conditions. This author has found no evidence of any authoritative adoption of Bluntschli's criteria.

44. This entails, inter alia, the application of the law of war rather than of the usual criminal law, as well as the unaccountability of the incumbent government for rebels' acts affecting foreign states. C. Zorgbibe, supra note 35, at 17, 47-50. The incumbent government also acquires the right to demand that the insurgents respect the rules of war.

45. At times the recognition is quite explicit: for example, the acknowledgment by the American Congress on July 4, 1861, of the existence of a state of war with the Southern Confederation; or, more recently, Nigeria's declaration of war against Biafra on August 12, 1967. Before this date, the Nigerian authorities had limited themselves to police operations.

46. See Colonial Trade Prohibition Act, supra note 40; and Excise Law, Act of July 13, 1861, Ch. 3, 12 Stat. 255 (1861) (interpreted as being the equivalent of a Declaration of War in The Prize Cases, 67 U.S. (2 Black) 635, 695 (1862)).
of war. 47 Opinion seems divided, 48 but it appears that recognition of belligerency by the incumbent government is not binding on foreign states, which are free to recognize or to disregard this fiction of the nation-state entity. In practice, of course, it is obvious that foreign states must at times submit to measures of war taken by the incumbent government after such recognition. 49 Nonetheless, as the Paul Jones affair50 illustrates, foreign states are legally unaffected by any recognition of belligerency that they have not themselves recognized.

(ii) Recognition of Belligerency by Foreign States

The principal element of the "juridical act" doctrine, which distinguishes it from the normative system of the Middle Ages, consists in the possibility for the insurgents to obtain an international status. This status is acquired through the recognition by a foreign state of the state of belligerency prevailing in the country torn by internal conflicts. Before such recognition of insurgents as belligerents, the rebellion has no legal existence in the eyes of foreign states; the incumbent government is the sole representative of the state. After such recognition, foreign states have the obligation of remaining neutral in the internal conflict. Having itself (through such recognition) attacked the legitimacy of the incumbent government, a foreign state can no longer furnish it aid. The juridical act consisting in the recognition of belligerency by a foreign

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47. E.g., the blockade imposed by Spain on the ports controlled by the forces of General Franco in 1936; the blockade ordered by President Lincoln on April 9, 1861 against the Confederation.
49. See J. Westlake, Traité de droit international public 24 (1924).
50. During the American Revolution, a squadron of rebel forces led by Captain Jones intercepted and boarded three British commercial vessels, which were then taken to the Danish port of Bergen. Not having recognized the belligerency of the Americans, Denmark delivered the vessels to the English and never accepted the American claim that Denmark was obliged to remain neutral in the conflict.
state entails the application of the fourth option outlined above: obligatory neutrality.

This doctrine of recognition of belligerency by foreign states developed slowly -- as did the states themselves. The states that invoked it did not always distinguish clearly between sanctioning a state of belligerency (i.e., legally recognizing a condition already existing in fact) and simply approving the legitimacy of the insurgents' struggle. For instance, in 1837 the United States recognized the belligerency of Canadian rebels, in spite of the fact that they possessed neither territory nor any solid governmental structures. A rather cloudy state of law was somewhat clarified in the American Civil War when the United States accused the United Kingdom of having prematurely recognized the belligerency of the Southern Confederation. The conduct of the parties involved, and the opinions of third parties to this post-Civil War diplomatic crisis, revealed clearly that certain factual conditions had to exist in order to permit a foreign state's legal recognition of belligerency, and that premature recognition constituted illegal intervention prejudicial to the incumbent

51. See p. 179 supra.
52. These were often the more economically and politically active states who, faced with port blockades, etc., had a great deal of difficulty in conforming to the fiction of the legal non-existence of the insurgents. For discussion on the evolution of this practice, see 2 A. Kiss, Répertoire français du droit international public (1966); 1 J. B. Moore, supra note 30; 5 M. Whiteman, Digest of International Law (1968) [hereinafter cited as 5 Whiteman].
54. On May 13, 1861, Britain issued a proclamation of neutrality in the conflict between the North and South. See 1 J.B. Moore, supra note 30, at 190. This proclamation was followed by similar edicts in Spain and France in the month that followed.
55. Reference here is to the Alabama Claims Case. See pp. 197-98 infra. For an interesting summary of the evolution of this conflict, see A. Cook, The Alabama Claims: American Politics and Anglo-American Relations (1975) [hereinafter cited as Cook]. For a more purely legal commentary, see Bluntschli, supra note 43; 2 A. de Lapradelle & J. Politis, Recueil des arbitrages internationaux 712 (1924).
These conditions, which were incorporated into Section 8 of the Règlement of the Institute of International Law, consisted of the following:

a: the insurgents must control an important part of the national territory;

b: they must have a governmental structure that exercises effective sovereignty over that territory;

c: they must engage in combat through an organized army that respects the laws and customs of war.

It should be noted that the first two criteria are also constitutive elements of the state. Thus, a "virtual state" must exist in order to permit the "fiction" of sovereignty established by a foreign state's recognition of belligerency.

It is important to emphasize that such recognition of insurgents does not endow them with a full legal personality. Rather, they acquire a "functional personality" applicable only to the relevant internal conflict.

56. In the Alabama Claims Case, the American claim was eventually abandoned, as the British recognition was fully justifiable in law. Indeed, Britain acted following gestures by the American government which amounted to its recognition of the existence of a state of war. See Cook, supra note 55, at 27. Obviously, an incumbent government which has recognized the belligerency of its rebels has no title to dispute a similar act by a foreign state.

57. See 18 Annuaire Institut de droit international 227 (1900).

58. See C. Zorgbibe, supra note 35, at 78 (enumerating many examples of the application of these criteria).

59. Another school of thought considers non-recognition of belligerency, once all criteria have been satisfied, as much an abuse as the refusal to recognize a state. See pp. 208 ff. infra. This school advocates a theory of "belligerency as a state of facts," and not "belligerency as a juridical act."

60. This expression would appear to be the most appropriate of the various terms used to describe the belligerents' international legal standing. See E. Castren, supra note 15.
This personality is necessarily transitory and partial. The insurgents acquire rights of belligerency toward foreign states (including, importantly, the right to inspect vessels and to enforce maritime blockades); but they may not develop complete diplomatic ties with other countries. The legal status of recognized belligerents is limited by the functional requirements of the conflict at hand.61

(iii) Belligerency as a Juridical Act

We have just seen that certain factual conditions must be satisfied to permit a legal recognition of belligerency by a foreign state. Are these necessary conditions also sufficient in themselves? Does their existence require recognition of belligerency? In other words, is belligerency a state of facts or a juridical act?

During the *Alabama* conflict,62 United States Ambassador Fish wrote to his English counterpart Molley on precisely this point. The American legal position on the matter, according to Fish, was that:

> Each sovereign power must decide, for itself alone, the question whether it wished at a given time to bestow rights of belligerency upon insurgents against another power.63

It appears that the bulk of doctrine supports this position, which denies to insurgents any right to for-

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61. Thus, after having declared itself neutral in the Nigeria-Biafra conflict, the United Kingdom sent a consular employee with no diplomatic status to the rebels' capital city.
62. See pp. 197-98 infra.
63. See 1 J.B. Moore, *supra* note 30, at 192.
eign state recognition of their belligerency. This doctrine is of course justified by the fact that insurgents are not de plano subjects of international law. In this regard, Professor Hall has observed:

As a belligerent community is not itself a legal person, a society claiming to be belligerent, and not to have permanently established its independence, can have no rights under that law. It cannot therefore demand to be recognized and recognition... is from the legal point of view a concession of pure grace.

Thus, belligerency as a juridical act turns on the access of foreign states to factual data on the rebellion. Indeed, the doctrine seems to be fundamentally corollary to the principles of state sovereignty and of the indivisibility of state representation.

64. See E. Castren, supra note 15, at 110; Wehberg, L'interdiction du recours à la force: le principe et les problèmes qui se posent, 78 Recueil des cours 74 (1951); Scelle, La guerre civile espagnole et le droit des gens, Revue générale de droit international public, N.S. 272 (1938); McNair, supra note 29; W. Hall, International Law 34 (8th ed. 1924) [hereinafter cited as Hall]; Balladore-Paglieri, Quelques aspects juridiques de la non-intervention en Espagne, Revue de droit international et de législation comparée 287 (1937).

65. See Hall, supra note 64, at 39.

66. See text accompanying note 16 supra. One of the effects of foreign state recognition of belligerency is the abandonment by the "recognizing-state" of its right to claim from the "victim-state" compensation for the losses suffered by its nationals as a result of the hostilities. See The Three Friends 166 U.S. 63 (1896). It is apparent that, even though the recognition of belligerency does not sanction the creation of a new state, it does in effect make the state in conflict "transparent" with respect to the recognizing state. Indeed, such recognition is a means of attributing to a non-state entity the status of subject of international law. It is precisely this non-state status of the insurgents (who would have remained nationals of a state whose government had not lost all effective power, had it not been for this recognition) which explains the inevitably optional nature of this recognition.
It is perhaps useful to point out some of the implications of this doctrine. For one, the foreign state may recognize the belligerents as soon as certain factual conditions exist. Following such recognition, the foreign state will no longer have the right of offering assistance to the incumbent government. It is, however, equally possible for foreign states not to recognize the belligerents, since belligerency is a purely juridical act rather than the inevitable consequence of a state of facts. In that case, the foreign state remains free to help the threatened government. Finally, nothing prevents a foreign state which has recognized belligerency from withdrawing this recognition (to which the insurgents have no right), for reasons of political strategy, or simply in order to confirm the evolution of the conflict. Clearly, the doctrine of "belligerency as a juridical act" permits foreign states, which remain free to modify the legal status of the belligerents, to assist the incumbent government, or to refuse assistance, as they desire.

(iv) The "Règlement" of the Institute of International Law

In treating insurrectional movements, the Règlement de Neuchâtel, adopted by the Institute of International Law, endorses in both letter and spirit the doctrine of "belligerency as a juridical act." The Règlement sets forth no prohibition against assisting the incumbent government. On the contrary, Section 2(1) prohibits the impeding of measures taken by the incumbent government in order to reestablish its "internal stability." Six of the nine sections of the Règlement are aimed at the "attribution of the title of 'belligerents' to the insurgents," and it is clear that aid may be given to

67. Thus, in August 1967, the United Kingdom reconsidered its previous status of neutrality in the Nigeria-Biafra War and decided to withdraw its recognition of Biafra and to supply arms to the central government.
68. See Appendix 1, supra note 57.
69. But see Id. §§ 6 & 7.
the incumbent government,70 until the optional recognition of belligerency.

c) Postscript: The Hazy "State of Insurgency"

This concept, at one time found in the writings of American jurists and used by the United States Department of State,71 has been well described as constituting a "twilight zone between rebellion and belligerency."72 According to some authors,73 the "state of insurgency" entails a special set of rules applicable to maritime hostilities. The preponderance of authority, however, suggests that the recognition of a state of insurgency by a foreign state signifies its admission of the existence of a "civil war," without acknowledgement of the legal effects of this recognition under the "belligerency" doctrine. These foreign states would consequently be legally free to define their relations with the incumbent government. The recognition of a "state of insurgency" is thus more a function of factual than legal considerations. Its legal consequences have indeed been characterized as "floues, voires indéfinies."74 This doctrine was invoked princi-

70. The rapporteur, A. Desjardins, claims that "on sape l'indépendence des États en paralysant les efforts qu'ils peuvent faire pour réprimer une révolte", i.e., "[T]he independence of States is undermined by paralyzing the efforts which they can make to repress a revolt." Id. at 76.

71. See, e.g., Wilson, Insurgency and International Maritime Law, 1 Am. J. Int'l L. 46 (1907); The Three Friends, 166 U.S. 63, 65-66 (1896).

72. Farer, Foreign Intervention in Civil Armed Conflict, 142 Recueil des cours 318 (1974).

73. See Wilson, supra note 71; R. Oglesby, supra note 6, at 113.

pally during the Spanish Civil War,\textsuperscript{75} and has never really been clarified, so that its present-day usefulness is rather doubtful.\textsuperscript{76}

C. Aid to the Opponents of the Incumbent Government

During an internal conflict, the incumbent government is confronted by insurgents who aspire to replace it in at least part of the national territory. The rebels' goals naturally lead them to seek support abroad. Indeed, foreign states represent not only potential military allies for the insurgents, but also the possibility of international legitimization of the rebel "government."

\textsuperscript{75} International recognition of this conflict, through the declaration of non-intervention, was not accompanied by express recognition of "belligerency." The British position throughout this rebellion clearly illustrates the confusion that surrounds this "half-way" concept. Indeed, the United Kingdom refused to confer rights of belligerency on the Nationalist rebels, but nonetheless recognized the state of insurgency. This recognition of a purely factual situation induced the British courts to accord to the "insurgent" government rights similar to those granted regular governmental entities. The "transparency" of the Spanish state became juridically complete, so that in practice the British recognition of "insurgency" differed little from a granting of "belligerent" status. Cf. Banco de Bilbao v. Rey, [1938] 2 K.B. 176. (British refusal to recognize as valid decrees of the \textit{de jure} Republican government with regard to a bank within the \textit{de facto} control of the Nationalist rebels); In re: The Arantzazu Mendi [1939] 1 All E.R. 719. (British refusal to implead the \textit{de facto} Nationalist government in a libel case on the grounds that the Nationalists were protected by sovereign immunity.)

\textsuperscript{76} In 1947, Sir H. Lauterpacht insisted that:
Actually, international law knows of no 'recognition of insurgency' as an act conferring upon insurgents international rights following from a well defined status. That insurgency has been recognized in any given case means that specific rights have been created . . . . It does not create a status from which further and more general rights may be deduced.

Recognition in International Law 274 (1947).
Principles of national unity and of territorial integrity, when applied to the state in conflict, are, however, incompatible with foreign state aid to the insurgents. These legal principles are, of course, shared by all states. Indeed, they possess an incomparable persuasive force for those younger states created during the process of decolonization and anxious to affirm their national character. It was in this legal context that the norms governing foreign states' relations with insurgent forces were developed.

1. Fomenting the Internal Conflict

It is unlawful to provoke an armed conflict on the territory of another state. This prohibition derives from the principle of state sovereignty and from its corollary which forbids intervention by one country in the internal affairs of another.

This basic principle is of course reiterated both in doctrinal sources and in the numerous treaties and declarations emanating from international bodies. It is not necessary to elaborate on this point other than

77. The term "unlawful" would appear to be the appropriate one. In any case it has become a suitable term since 1945, when article 2(4) of the U.N. Charter came into effect and prohibited recourse to inter-state war. Obviously, a foreign state's fomenting a conflict is a clear casus belli. See, e.g., Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, 20 U.N. GAOR, Supp. (No. 14) 11, U.N. Doc. A/6014 (1965) [hereinafter cited as Declaration on the Inadmissibility of Intervention].

78. For a list of references, see 1 D. O'Connell, The International Law 238 (1965).
2. Help to Opponents After the Outbreak of Internal Conflict

a) During a "Mere Rebellion"

We have seen that insurgents have no international legal status during the stage of "mere rebellion." Again, this situation is corollary to principles of state sovereignty and independence. All assistance given to the rebels by foreign states during this period would thus constitute an illegal intervention. This principle, affirmed explicitly in the settlement of the

Caroline affair has been confirmed in more modern practice. One might wonder, however, if the Caroline rule applies even when the insurgents have acquired the status of "belligerents."

b) During Belligerency

Several authors assert that belligerents may legally receive foreign assistance. This opinion is, however, far from generally accepted.

Thus, Section 2(2) of the Règlement of the Institute of International Law confirmed in explicit terms the illegality of aid to belligerents. This position has been upheld both in multilateral agreements and by case-law. The classic case in this respect is, of course, the Alabama affair. During the Civil War, the Confederacy (whose ports were quite effectively blockaded by Union forces) ordered and took delivery of

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80. During the night of December 29, 1837, British soldiers crossed the Canadian-American boundary in order to destroy the steam ship Caroline, which had been used to aid the rebels of Upper Canada. The exchange of letters which ensued between U.S. Secretary of State Webster and Lord Ashburton attests to the illegal character of the American assistance to the Canadian insurgents.

81. In Strait of Corfu, [1949] I.C.J. 3, the International Court admitted, inter alia, that the customary rule illustrated in the Caroline case was still in effect in contemporary international law.


83. See, e.g., Covenant of the Arab League art. 8; Charter of the Organization of American States art. 15; Interamerican Convention of 1928 ("Havana Agreement") art. 1 (concerning the rights and duties of States during civil wars); and the 1957 Protocol to the Havana Agreement art. V.

84. See The Three Friends, 166 U.S. 1 (1896).
several warships in England. This fleet of ships literally devastated the Union Navy. When hostilities had ceased, the Americans complained about this "aid to the insurgents." The Treaty of Washington of 1871, and the arbitration award of 1872 which followed, clearly affirmed the illegality of aid to rebel forces, even when these forces had been granted "belligerent" status by the foreign state in question.

Aid provided by foreign states to rebel forces would thus be, in all cases:

... patently incompatible with the very foundation of international law, which is built on the sovereignty of States and their right to determine the form of their regime.

85. The Alabama, Alexandra, Florida, Georgia and Shenandoah. Not only were these ships built in England, but they were also anchored in British ports on many occasions. Note that Great Britain had recognized the belligerency of the South.

86. The arbitration court of Geneva ordered Great Britain to pay the United States $15,000 as compensation for damages.

87. As early as 1863, Lord Palmerston had justified the British position, maintaining that there was no legal government in the United States, but rather two belligerent governments. See Cook, supra note 55, at 18. This interpretation was clearly rejected by the Treaty of Washington and the arbitration award of Geneva, in which the distinction between the incumbent government (repository of state sovereignty) and the not-yet-victorious insurgents was made.

88. I.e., whether or not the phase of "belligerency" was replaced by that of "mere rebellion."

D. "Belligerency as a Juridical Act": Justification and Critique of the Theory

1. Justification of the Theory

Professor Friedmann's concise statement of the theory is a crucial one. To cite principles of state sovereignty, territorial integrity, independence, and non-intervention is an indirect way of justifying the "belligerency as a juridical act" doctrine by referring to the rights of citizens organized in states to "self-determination."90

These principles are undoubtedly part of--even inherent in--contemporary international law. It would perhaps not be going too far to say, with Friedmann, that these principles are the "very foundation" of international law. Indeed, they seem to have been made entrenched by paragraphs (1), (4), and (7) of Article 2 of the U.N. Charter.

Thus, in its Strait of Corfu judgment, the International Court of Justice emphasized that "between independent states, respect of territorial sovereignty is one of the foundations of international relations."91

One year later the Court decided that Colombia could not legally grant asylum, in its Lima embassy, to a dissident Peruvian leader; such a gesture constituted, for the Court, a breach of Peru's sovereignty, and "an intervention in matters which are exclusively within the competence of that State."92

Each state, represented by its government, is thus protected by principles forbidding "the threat or use of force"93 against its territorial integrity and constraining other states from intervening in its domestic affairs.

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90. See J.-F. Guilhaudis, Le droit des peuples à disposer d'eux-mêmes 109-34 and 201-09 (1976). It is useful to contrast this right of states with the conceptually (and legally) independent notion of self-determination for "peoples" not constituting a state.
These norms have been reiterated so many times by international bodies\(^9\) that their force cannot seriously be questioned. As the incumbent government is the only legal representative of the state, it enjoys the two prerogatives *par excellence* of state sovereignty: (1) the possibility of asking for assistance from another state and, (2) the ability to grant aid to another state.\(^9\) Only the representative of the state can legally solicit outside help. Accordingly, foreign states may not respond to requests for assistance on the part of the internal enemies of this representative. Finally, since the foreign state has its own sovereign discretion to grant help to a foreign government, it is therefore free to adopt a "hands-off" policy. Professor Leurdijk emphasizes:

> The preferential treatment of the ruling faction that resulted from this system was not based on any political or ideological sympathy, but was attributable solely to the fact that it is, after all, through their governments that states participate in international relations.\(^9\)

\(^9\) The following list is not exhaustive: Charter of the Organization for African Unity, preamble, arts. 2, 3, 5; Covenant of the Arab League, preamble, arts. 2, 5, 8; Charter of the Organization of American States, arts. 1, 2, 15, 16, 17, 18; San Salvador Charter (Central American Union), art. 3; North Atlantic Treaty, art. 1; South-East Asia Collective Defense Treaty, preamble, art. 1; Warsaw Pact, preamble, arts. 1, 8.

\(^9\) See Fitzmaurice, General Principles of International Law, 92 Recueil des cours 5, at 177 (1957).

power that each state has to determine whether a state of belligerency exists in another state. We shall now examine some of the drawbacks of this normative system.

a) Drawbacks of the Theory in a Decentralized Global Power Structure

Actually, foreign states are rather free, given limitation of capability, to determine their own relations with insurgent and incumbent.97

This statement hardly appears to be compatible with the doctrine of "belligerency as a juridical act," which prohibits all aid to insurgents while generally allowing such aid if it is destined for the incumbent government. Falk's affirmation, however, was less a statement of the theory of this normative system than an attempt to describe its actual functioning. This gap between theory and practice is largely a product of the political decentralization of contemporary international society.

Foreign states are in fact free to recognize or to ignore the existence of objective facts that might constitute a state of belligerency. The implications of this discretion are clear. For instance, the incumbent government has considerable advantages if it can prevent the state of "belligerency" from being recognized.98 Cuban aid to the Ethiopian government during the Eritrean conflict was therefore licit, in spite of the control exercised by the rebel forces in Eritrea (where they had taken over most governmental functions), simply

97. Falk, supra, note 27, at 201.

98. The annoyance of the United States following the recognition of a "state of belligerency" by the Europeans during the Civil War is thus quite understandable. The Americans even referred to the "immoral" character of the Confederate regime in their attempt to prevent such recognition; see Cook, supra note 55, at 99. Senator Sumner's grasp of the politicization of this legal concept was illustrated by his complaint, "How can it be neutral to create rights that somehow become binding afterwards?" quoted in C. Zorgbibe, supra note 35, at 74.
because Cuba chose not to recognize this state of affairs. A conceptually clear legal doctrine has thus become significantly distorted because of its political consequences.

Even if aid to the incumbent government is clearly legal, though, it is still necessary to determine which government is "incumbent." In some cases, where there are several competing governments, and no legal repository of sovereignty, assistance to the "incumbent government" thus becomes the result of a strategic choice. At times, invocation of the principle of "aid to the incumbent government" lacks credibility.

99. This case is submitted only as an example. We are therefore intentionally silent as to the subject of the foreign aid that the Eritrean secessionists may have received, and which could legitimate the Cuban assistance according to the doctrine of collective self-defense.

100. "Political objectives distort the connection between the status of insurgency and the existence of the facts warranting it; such a distortion is often disguised, however, by the decentralized grant of competence that authorizes the third state to characterize an internal war and to proceed as it sees fit." Falk, supra note 27, at 202.

101. It is not even necessary, in our opinion, to invoke United Nations Charter art. 51 to legitimate such aid, for, if the internal conflict has not been fomented by a foreign state, no armed aggression exists. Art. 2, para. 4, and art 51 do not apply to what would thus amount to mere exercises of state sovereignty.

102. The Angolan civil war provided a rather clear example of this point. It is possible to invoke the Korean and Vietnamese wars in the same light. This author, however, is of the opinion that the epithet, "internal conflicts", is not really applicable to those two situations.

103. This was true of the U.S. intervention in Lebanon in July, 1958. Its legality is clear, despite the fact that, as the State Department admitted, the "Lebanese government" controlled only a minute part of the national territory. See Wright, United States Intervention in Lebanon, 53 Am. J. Int'l L. 112 (1959). This particular case of aid can be justified by the principle of the indivisibility of state sovereignty, i.e., the repository of sovereignty does not change until the incumbent government is totally deprived of de facto authority. See C. Zorgbibe, supra note 55, at 132. The French intervention in Gabon, aimed at restoring to power the clique that had been overthrown the day before, is more problematic. See Schindler, Le principe de non-intervention dans les guerres civiles, 55 Annuaire de l'institut de droit international
Justifications given by interventionist states certainly seem to confirm the continued acceptance by the international community of the principle of aid to the incumbent government. The power of the individual state to recognize such a government, however, makes any standardization of criteria for clearly identifying violations of this principle difficult.

b) Recognition of Belligerency: An Outmoded Concept? 104

We have seen that the recognition of rebel belligerency by foreign states is an essential component of the "belligerency as a juridical act" doctrine. Although it is not absolutely correct to assert, as some do, that "such a doctrine has not been applied for several decades," 105 it is nonetheless true that the tendency among states is to avoid all express recognitions. This makes the legal evaluation of state claims extremely difficult. For example, did the "non-intervention agreement" signed by 27 states during the Spanish Civil War constitute a modification of the principle of "aid to the in-

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103. (Continued)
454 (1973). The more extreme cases are those of Hungary (where the Soviet intervention of 1956 was ratified by the government that it brought to power) and the Dominican Republic (where Mr. Stevenson invoked "the call of the legal government" before the Security Council, even though none of the factions involved in the struggle was, at the relevant times, recognized by the American government).
104. See R. Oglesby, supra note 6, at 100-111.
105. Leurdijk, supra note 96, at 148. In fact, the United States and the United Kingdom declared themselves neutral in the Nigerian conflict on July 11, 1967 (Le Monde, July 12, 1967), and there is no reason why these declarations should not be considered express recognitions of belligerency. (We have already seen that this recognition was later revoked by the United Kingdom.) Moreover, the reality of the concept of recognition of belligerency is illustrated by its mention in the 1957 Protocol to the Havana Agreement.
"cumbent government,"\textsuperscript{106} as many contend, or was it rather proof of an implicit recognition of General Franco as a "belligerent"?\textsuperscript{107}

Foreign states, therefore, rarely perform the explicit juridical act of recognizing a state of belligerency.\textsuperscript{108} Verifying contemporary compliance with the traditional doctrine is difficult. One author goes so far as to say:

\begin{quote}
The functional role attributed to the distinctions between rebellion, insurgency and belligerency is more an invention of commentators than a description of state behavior.\textsuperscript{109}
\end{quote}

c) Other Critiques

It is worthwhile briefly to discuss some other problems relating to the traditional doctrine.

First, it is somewhat difficult to reconcile the necessary criteria for allowing a recognition of belligerency\textsuperscript{110} with "modern" methods of combat (notably,}

\begin{footnotes}
\textsuperscript{107} Balladore-Paglieri, \textit{supra} note 64, at 291. \textit{See also} Scelle and Cassin, \textit{Le blocus de Bilbao et le droit des gens}, L'Europe nouvelle, 437 (1937). Note that a \textit{third} interpretation of this agreement is that it does not at all modify legal doctrine because foreign states are not obliged to offer help to the established government. Nothing prevents a foreign state from foregoing its right to aid an incumbent government. Thus, a self-imposed neutrality would have no effect whatsoever on the traditional legal norm. \textit{See} Rousseau, \textit{La non-intervention en Espagne}, 19 Recueil des cours 225 (1938).
\textsuperscript{108} See C. Zorgbibe, \textit{supra} note 35, at 73, 77-78; Pinto, \textit{supra} note 10, at 475, for other examples of express recognition of belligerency.
\textsuperscript{109} Falk, \textit{supra} note 27, at 206.
\textsuperscript{110} See Appendix 1, \textit{supra} note 57, art. 8.
\end{footnotes}
In addition, it may seem inappropriate to apply the doctrine of "aid to the incumbent government" in cases where state sovereignty is divided: \textit{i.e.}, where each opposing "government" is to some extent "incumbent." Conflicts between a government-member of a federation and the federal government illustrate this case — both governments could claim to exercise sovereign powers on the "litigious territory."\(^{112}\) This question, of course, deserves thorough study. Within the framework of the present study, however, we can only suggest the hypothesis that aid granted to the government-member by a foreign state would not be tainted with the same illegality as that accorded to "mere" insurgents, especially if the government-member had the constitutional power to solicit such aid.

Finally, some authors have expressed the opinion that, because the traditional rule permitting aid to the incumbent government is no longer respected by Communist bloc states, the continuing respect accorded it by non-Communist states has thus become "dysfunctional."\(^{113}\) Without delving into the important strategic problem that is involved here, we might indicate that "lapses" have occurred on both sides of the ideological fence.\(^{114}\)


\(^{112}\). This problem is raised by Professor O'Connell, \textit{Annex}, 55 Annuaire de l'institut de droit international 589 (1973). For an analysis of this problem focusing on Québec, \textit{see} J. Brossard, \textit{L'Accession à la souveraineté et le cas du Québec} 94 (1976).


\(^{114}\). Note the invasion of Czechoslovakia by the armed forces of the Warsaw Pact in 1978. Having failed in his initial attempts to justify this invasion as a reply to a supposed invitation by the incumbent Czech regime, Leonid Brezhnev resorted to the surprising claim that it was legitimate for the Soviet Union to intervene within its "sphere of influence" in order to do away with any governments having pro-Western tendencies. The Brezhnev doctrine might be compared with the statement made on May 2nd, 1965, by
Moreover, the existence of such "lapses" does not conclusively prove (either in international or national law) the obsolescence of such a norm. When one refers to legal claims made by states in these and in other circumstances, one realizes that the traditional norm is still upheld by the international community.

It should be mentioned that the drawbacks of the doctrine of "belligerency as a juridical act" do not pertain to the existence of the norm in contemporary law as much as to its continued usefulness in a heterogeneous global community. Thus, the recent rarefaction of foreign state recognitions of belligerency does not affect the principal rules of the international legal system, i.e., the prohibition against aiding insurgents, on the one hand, and the option of assisting the incumbent government, on the other.

It is, of course, true that competing legal formulae have been advanced to regulate the behavior of foreign states during an internal conflict. Unlike the "belligerency as a juridical act" doctrine, which confers important advantages upon the incumbent government, the two competing theories that we shall examine below involve a symmetric treatment by foreign states of both parties to hostilities. One of these theories, "belligerency as a state of facts," would result in the isolation of the internal conflict; the other, "belligerency as war," would entail its instant internationalization.

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114. (Continued)
President Johnson to the effect that the United States would no longer tolerate pro-Communist revolutions in the Western hemisphere. Friedmann, supra note 89, at 47, asserts that both of these statements are strategic maneuvers rather than legal claims.

115. See note 97 supra.

116. In the Nigerian conflict, which did not involve any policy of "spheres of influence," both ideological blocs provided assistance to the incumbent government. More recently, the United States refused legally to condemn aid to the Ethiopian government. See note 17 supra; N.Y. Times, Dec. 14, 1977, § 1, at 1, col. 4.
During the Spanish Civil War, League of Nations delegates admitted openly that aid to the incumbent government did not violate the Covenant, i.e., that such aid did not constitute illegal interference in the internal affairs of the conflict-torn state. Cf. 18 League of Nations O.J. 16 (1937) (Soviet declaration condemning assistance to the rebels); id. at 18 (relevant resolution).
II. Belligerency as a State of Facts: The Principle of Judicial Isolation of the Internal Conflict

It is interesting to contrast the passage introducing the previous section\(^\text{117}\) with the one below, articulated in the context of the same "civil war":

So far from there being any active duty to assist a government in suppressing an insurrection, there is... the view that the governments of other states ought to abstain from any such action on the ground that it is an intervention in the domestic affairs of another state.\(^\text{118}\)

The "view" to which Professor McNair referred favors the fourth of the \textit{a priori} possibilities enumerated earlier: obligatory neutrality.\(^\text{119}\) Under its precepts, foreign states would be prohibited from assisting parties to an internal conflict. Before examining this position in detail, we might note that it shares several elements with the doctrine permitting aid to the incumbent government. It is only with regard to this aid that there is a substantial controversy.

A. The Uncontested Aspects of the Controversy

Let us stress what should at this point be evident: no norm of customary or written international law prohibits recourse to armed force to alter the political status of a state from within that state.\(^\text{120}\) International law does not forbid internal revolution, and it

\(^{117}\) See text accompanying note 23, supra.

\(^{118}\) McNair, supra note 29, at 474.

\(^{119}\) See p. 179 supra.

\(^{120}\) U.N. Charter art. 2, para. 7, provides that: "Nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter." Contra, id. art. 4, para. 2. In fact, violent internal changes occur often and, generally, without the involvement of foreign states. See Rostow, supra note 89, at 843.
encourages internal social progress. What it does not countenance is the international use of force in relations between states.

The doctrine to which Professor McNair was referring agrees with the "belligerency as a juridical act" thesis on two essential points: (1) the option for foreign states to assist the incumbent government in dealing with minor agitation and, (2) the absolute prohibition against aiding insurgents. It is on the determination of the moment at which aid to the incumbent government is no longer licit that the controversy centers. The theory of "belligerency as a state of facts" prescribes, in effect, a passive attitude on the part of foreign states in all cases of real uprising. This doctrine has a respectable intellectual legacy and, at first glance, several theoretical advantages. Its principal drawbacks, we submit, are that it hardly corresponds to actual state practice, and that it ignores what is perhaps the most basic principle of contemporary international law, a principle which, paradoxically, this doctrine was designed to respect.

B. The Controversial Point: The Theory and its Advantages

1. The Theory

The view that international law prohibits aid to the incumbent government during all genuine uprisings is not a new one. The opinion was shared by a number of scholars toward the end of the nineteenth century and has subsequently been voiced by several contemporary

121. See U.N. Charter preamble, arts. 1 & 2.
122. Id., art. 2, para. 4.
123. See p. 183 supra.
124. See p. 195 supra.
125. See Bluntschli, Le droit international codifié 476 (1886); P. Pradier-Fodere, Droit international public européen et américain 584 (1885); Rougier, supra note 48, at 362.
Some even maintain that it constitutes the prevailing doctrinal view.\textsuperscript{127}

This theory does not question the right to assist the incumbent government during disorders that do not threaten its legitimacy or its existence (\textit{e.g.}, after earthquakes). The situation is different, however, in the case of revolutions.\textsuperscript{128} According to several of the proponents of this theory, it is unlawful to assist a government that is unable, alone, to suppress the rebellion. Hence, the oft-quoted opinion of Professor Hall:

\begin{quote}
The fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict without it is uncertain, and consequently, that there is a doubt as to which side would ultimately establish itself as the legal representative of the state.\textsuperscript{129}
\end{quote}

For others, it is the legitimacy of the established government, rather than its viability, that is undermined by its request for help. It follows that foreign aid to the incumbents would be illegitimate, as it would change the "natural" outcome of the conflict.\textsuperscript{130} As early as 1898, Professor Wiesse wrote:

\begin{quote}
\textsuperscript{126} See, \textit{e.g.}, Brownlie, \textit{supra} note 11, at 322; Hall, \textit{supra} note 64, at 346; Lauterpacht, \textit{Contemporary Practice in the United Kingdom in the Field of International Law--Survey and Comment}, 7 Int'l & Comp. L.Q. 92, 102-105 (1957); Wehberg, \textit{La guerre civile et le droit international}, 63 Recueil des cours 56 (1938); Wright, \textit{supra} note 103.

\textsuperscript{127} See C. Zorgbibe, \textit{supra} note 35, at 55.

\textsuperscript{128} For an outline of the "traditional" view regarding aid to an incumbent government during revolts, see pp. 184-85 \textit{supra}. Note that it is precisely the more serious internal troubles that induce incumbent governments to ask for outside help. Thus one might suspect that, despite theoretical distinctions, supporters of this view would have a tendency to look with suspicion upon most requests for aid. For an illustration of this circular logic, see Hall, \textit{supra} note 64, at 347.

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} For discussion of the impact foreign aid has on the principle of self-determination, see p. 220 \textit{infra}.\end{quote}
All interventions during civil wars represent a denial of the right of peoples to conduct their affairs with full independence. The fact that the intervention has been solicited by one of the parties to the conflict is of no consequence, even if that party is the incumbent government.131

We have here, in fact, two slightly different expressions of one basic opinion, an opinion which rejects the claim that rebel belligerency (and the legal obligation of foreign state neutrality that accompanies it) must be recognized by foreign states in order to take effect. We have seen that such recognition is one of expediency, that is, constitutive of rights for the rebels. Rejection of this claim would transform any such recognition into a declarative act. In other words, this doctrine transforms belligerency (and its legal effects) from a juridical act to a state of facts. This point is implicit in Professor Fitzmaurice's claim that:

[T]here may come a point when the giving or continuance of assistance or support to the legitimate government, at any rate in active form, may cease to be justified, or alternatively constitute a failure to recognize a state of belligerency for the insurgent authority, where such recognition is clearly due.132

131. C. Wiesse, Le droit international appliqué aux guerres civiles 86 (1896) (emphasis supplied). The original French text reads:

Toute intervention dans une guerre civile constitue une atteinte au droit des peuples de régler eux-mêmes leurs propres affaires avec une entière indépendance. Le fait qui l'une des parties sollicite l'intervention n'est nullement de nature à la rendre légitime, alors même que la demande émanerait du gouvernement établi.

132. Fitzmaurice, supra note 95, at 172 (emphasis supplied).
A parallel might be drawn between this reasoning and the doctrine of state recognition. Such recognition is said, by what is probably the dominant opinion in this field, to have merely a declaratory effect. According to Professor Brierly:

A state may exist without being recognized, and if it does exist in fact then, whether or not it has been formally recognized by other states, it has the right to be treated by them as a state.

It is tempting to conclude that the recognition of belligerency must have the same sort of effect.

It is also possible to support this doctrine by analogy with the legal evolution of the concept of declaration of war. Such declarations have lost much of their practical importance. Indeed, rules governing violent conflicts between states now apply largely to factual situations rather than only to "declared" wars. A reasonable conclusion, then, is that objective criteria have replaced optional declarations in other areas of international law as well.

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133. See Brossard, supra note 112, at 400 (additional sources listed therein).

134. J. Brierly, The Law of Nations 139 (6th ed. 1963). The history of the state of Israel has, of course, contributed to the evolution of law in this area. Cf. Lauterpacht, supra note 126, at 175 ("The basic principle governing the recognition of States and governments applies also to recognition of belligerency . . . . The essence of that principle is that recognition is not in the nature of a grant or a favour . . . . but a duty imposed by the facts of a situation.").

135. See Schindler, supra note 103, at 441.

136. See, e.g., Geneva Conventions of 1949, ch. I, art. 2, No. 970, 75 U.N.T.S. 31, 32 (stipulating that the conventions apply in "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . . ").

137. One should note, however, the weaknesses of these analogies. Indeed, since war has been eliminated as a legal means of settling interstate conflicts, see U.N. Charter art. 2, para. 4, a formal declaration of war is no longer of any interest to a belligerent state. Application of these rules to "undeclared wars" is thus necessary to accomplish the humanitarian goals established in the Geneva Conventions of 1949. Internal conflicts, however, raise
2. The Advantages of the Theory

a) The Apparent Advantages

As has been indicated, the doctrine of "belligerency as a state of facts" has several attractive features.

First, it is immediately evident that this theory appears to remedy the disadvantages arising from the subjectivity of the "belligerency as a juridical act" doctrine. Instead of waiting for discretionary -- and increasingly rare -- recognition before impressing neutrality on foreign states, such neutrality comes into force as soon as "objective factual conditions" exist.

Second, this theory can be seen as a safeguard of the independence of states. Indeed, many feel that prohibiting aid to either party to any internal hostilities is an excellent means of respecting the sovereignty of the state in conflict. Wright, for example, asserts

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137. (Continued)
a different problem. There is no international norm prohibiting a formal "civil war" with a declaration of belligerency; in fact, such a formal declaration was explicitly provided for in an international document as recently as 1957 and was applied in 1967. See note 105 supra. The reasons for transforming a "juridical act" into a "state of facts" when dealing with international war are irrelevant when dealing with internal conflicts. Regarding the argument derived from the "recognition of states" doctrine, one might note that the concept of "belligerency" arises precisely in those situations where a collectivity does not constitute a state. See W. Bishop, International Law 393 (3rd ed. 1971). Consequently, while the existing-but-not-yet-recognized state is a subject of international law, insurgents do not benefit from such status. Thus one may justifiably object to the transposing of the declaratory effect of recognition from instances of international war to cases of internal conflict.

138. See p. 206 supra.
that:

It clearly belongs to the sovereignty of a state, as recognized by the Charter, to ask for such help but it must be emphasized that sovereignty belongs to the state, and not to the government, and a government beset by internal revolt of such magnitude that the result is uncertain is not in a position to speak for the state.139

Finally, some authors maintain that the isolation of the internal conflict which would result from the "belligerency as a state of facts" doctrine satisfies the principle of self-determination of peoples, who are accordingly able to choose their form of government without submitting to outside interference.140

b) Critical Examination of These Advantages

Under closer scrutiny, the purported advantages of this doctrine prove to be somewhat less impressive. Although it is claimed to be more "objective" than "belligerency as a juridical act", in fact the contrary is true. Scholars are not at all in agreement as to the factual conditions that are necessary and sufficient automatically to transform insurgents into belligerents. For some, these conditions are those of the Règlement of 1900 (i.e., identical to those that allow recognition of belligerency).141 For others, it does not seem to be

140. See Chaumont, Analyse critique de l'intervention américaine au Vietnam, Revue Belge de droit international 75 (1968). Chaumont states: "Un point est incontestable; que ce soit au bénéfice du gouvernement établi ou d'une autorité de fait, l'intervention étrangère est par définition de nature à aliéner la liberté de choix du peuple", i.e., "One point is indisputable: whether it be for the benefit of the established government, or of a de facto authority, foreign intervention is by definition of such a nature as to alienate the people's freedom of choice".
141. Cf. Lauterpacht, supra note 126, at 104 ("The test which it is called upon to apply at this point would appear to be analogous to . . . that which is employed for that purpose of determining whether it is appropriate to recognize the belligerency of the insurgents.").
necessary that these conditions be fulfilled.\textsuperscript{142}  Furthermore, even if there were general agreement on these factual conditions, the decentralized structure of international decision-making would still compel states to decide whether the said conditions existed in each particular case.\textsuperscript{143}  It is hard to imagine cases where reasonable disagreements could not arise.\textsuperscript{144}  By contrast, according to Fitzmaurice, supra note 95, at 179, it would be necessary and sufficient that the uprising "incarnates the national will."  However, this is a criterion whose application would be subject to many different interpretations with respect to any given conflict.  This of course returns one to the starting point, \textit{i.e.}, discretionary "belligerency as a juridical act."  For Wright, supra note 139, at 148, the criterion is that the incumbent government is prohibited from the moment that the insurgents "jeopardize the government."  The same remark as that made regarding the "national will" can of course be repeated here.  Moreover, it should be noted that this criterion would (paradoxically) encourage incumbent governments to be extremely authoritarian in order to be able to quell any incipient dissidence and in such a way prevent the development of any group that, because it had been tolerated for some time, could grow to the point where it "jeopardized the government."  Finally, by a circular logic, this opinion could easily lead to a refusal to tolerate any solicited assistance simply because it is solicited.  See note 128 supra.

\textsuperscript{143}  See p. 205 supra.

\textsuperscript{144}  For example, it is often alleged by a government that insurgents have received foreign assistance.  Such outside aid would authorize foreign states to aid the incumbent government through the customary doctrine of collective self-defense, incorporated in U.N. Charter art. 41.  See Kelsen, \textit{Collective Security and Self Defense Under the U. N. Charter}, 42 Am. J. Int'l L. 783 (1948).

Some authors contest this point of view, but their opinion is a marginal one difficult to reconcile with state practice.  See Bowett, \textit{The Interrelation of Theories of Intervention and Self-Defense}, in Law and Civil War in the Modern World 38-35 (J.E. Moore ed. 1974).  It is not our intention here to discuss the doctrine of self-defense, but only to suggest that, in cases where a foreign state is in doubt as to the legal possibility of assisting the incumbent government, it can always "cover itself" by alleging that illicit aid has been furnished to the insurgents.  Such allegations are effectively made in a growing number of cases.  Thus, the doubts created as to the applicability of the traditional doctrine have not significantly altered state behavior.  Rather, they have simply added another complicated element, often impossible of verification, to legal justifications of their behavior.  The doctrine of "belligerency as a state of facts," far from its professed aim
the doctrine of "belligerency as a juridical act" permits a precise determination of the moment when a neutral regime is instituted.

The doctrine of "belligerency as a state of facts" is equally open to criticism as regards state sovereignty and independence. Indeed, one could claim that it is incompatible with such independence. Sovereignty is, of course, a state prerogative; but the state as a legal entity can act only through its government, which is the repository of the attributes of sovereignty. Obviously, this concept implies the free exercise of state powers by governmental authority. One of these powers is the discretionary appeal for help from other states. To deny the use of this power to the incumbent government would be truly to limit the sovereignty and the independence of the state that it represents.\textsuperscript{145} Such a limit on state sovereignty is hard to reconcile with the oft-expressed will of states -- and especially of recently created states -- to protect their territorial integrity, to defend their borders, and to use fully the powers that have traditionally devolved upon independent countries.\textsuperscript{146}

Finally, arguments based on the principle of self-determination of peoples\textsuperscript{147} are far from conclusive.\textsuperscript{148} Such arguments do not take into account the fact that the principle of "belligerency as a state of facts" would only aggravate the problem of clandestine aid, while at the same time encouraging artificial legal justifications of any aid overtly furnished to the incumbents.\textsuperscript{149} Moreover, these arguments seem to posit that

\textsuperscript{144} (Continued)

of simplifying or objectifying the law, has burdened it with yet another variable. This has the effect of making the judicial appreciation of state actions almost intolerably difficult.

\textsuperscript{145} This position has been eloquently expressed by many jurists. See, e.g., I. D. O'Connell, supra note 78, at 589; C. Zorgbibe, supra note 35, at 62, 65.


\textsuperscript{147} See Chaumont, supra note 140.

\textsuperscript{148} The principle of self-determination of peoples will be discussed at pp. 44-52 infra.

\textsuperscript{149} See sources cited note 144 supra.
a state "left to itself" will attain in some miraculous way the "true self-determination" of the "peoples" that compose it. Such a position, we submit, naively mistakes brute force for the "will of the people."151

c) State Practice

There are two factors which make it difficult to determine which doctrine states actually favor. First, how does one explain cases of inaction by foreign states? Is it that they feel a legal obligation not to help the incumbent government ("belligerency as a state of facts"), or is it rather that they choose not to grant assistance ("belligerency as a juridical act")? Clearly, it is exceedingly difficult to offer concrete proof in support of the doctrine of "belligerency as a state of facts": every case of isolation of an internal conflict could possibly be explained by reference to the "belligerency as a juridical act" doctrine.

Even when this neutrality becomes formalized, the characterization of the situation remains ambiguous. Thus, the Non-Intervention Agreement, adopted by twenty-nine

150. The meaning of this expression becomes increasingly problematic in a world where international interactions are increasingly intense, and where aid of all sorts may be granted before the mysterious moment of belligerency is reached.

151. As Professor Moore states: "The judgment that self-determination requires that neither the recognized government nor the insurgents can ever be aided disarmingly conceals the naive assumption that whatever takes place within the confines of a territorial entity is pursuant to genuine self-determination of peoples, and that outside 'intervention' is necessarily disruptive of self-determination." Moore, The Lawfulness of Military Assistance to the Republic of Vietnam, 61 Am. J. Int'l L. 30 (1967).

152. See Padelford, The International Non-Intervention Agreement and the Spanish Civil War 31 Am. J. Int'l L. 378 (1937). As Padelford notes, "there was no one instrument which all signed or adhered to, in spite of constant employment of the term 'agreement.' The agreement was merely a concert of policy, and its fulfillment depended entirely upon the initiative of each state." Id., at 580.
governments during the Spanish Civil War, constituted for some the proof of the legal obligation of neutrality; for others, it was nothing more than a collective choice to abstain from assisting the Spanish government; for still others, it was an implicit recognition of belligerency under the "juridical act" doctrine. 

Not only is direct state support of the "belligerency as a state of facts" doctrine almost non-existent, but circumstantial proof in support of the doctrine is also hard to find. By the same token, proof of the application of the doctrine of "belligerency as a juridical act" is also frequently not as clear as one might hope. The tendency among "assisting" states to justify their aid to the incumbent government by invoking prior foreign aid to the insurgents singularly obscures the legal question that aid presents.

153. Lauterpacht, supra note 126 at 105.
155. Almost, but not completely. Thus, the Chilean delegate to the General Assembly declared in 1968 that, "In the opinion of the Chilean delegation, the principle of non-intervention prohibits all interventions by third-states in the internal or external affairs of a state, even at the request of the established government," quoted in Pinto, supra note 12, at 283.
156. See pp. 200-06 supra.
157. See note 144 supra; Pinto, supra note 10, at 486. The incumbent government, by claiming that the rebellion that it is combatting was "fomented" from beyond its borders, becomes in effect twice eligible for outside assistance. The "assisting" foreign states can justify their acts by invoking not only aid to a government that requested it, but also collective self-defense. If the first motive is undermined by doctrinal inconsistencies based, inter alia, on a conception of the "right" of "peoples" to self-determination, such is not the case for the second justification. It is not surprising, then, that recourse to this technique, which blurs an otherwise relatively straightforward situation, is increasingly common. See, e.g., Le Monde, Aug. 22 and Dec. 26, 1968 (concerning the Biafra conflict) and Dec. 29, 1969 (regarding the Kurdish revolt in Iraq).
Second, it is difficult not to acknowledge that the
legality of assistance to the incumbent government (i.e.,
the "belligerency as a juridical act" doctrine) appears
to be confirmed by unambiguous cases. Numerous declar-
a tions to this effect have been made. Even the disci-
ples of the "belligerency as a state of facts" doctrine
recognize that foreign states often assist incumbent
governments, despite the fact that an objective "state
of belligerency" clearly exists. Many examples have
already been alluded to. The recent American refusal
legally to condemn the Soviet and Cuban aid to Ethiopia,
as long as the assistance serves only to suppress the
internal rebellion, is one. Other examples could be
mentioned: the British and Soviet aid to Nigeria in the
Biafran conflict (whereas the states that had recognized
Biafra refused to provide it with overt military assis-
tance); the Soviet aid to Iraq to combat Kurdish
rebels; the Greek conflict of the 'forties. There is

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158. For example, the claim made by Ambassador Fish, p. 190
supra. In 1957, when the British assisted the Sultan of Muscat in
suppressing a five-year-old rebellion, the British Foreign Secre-
tary justified this intervention in the following terms: "This is
an internal affair relating to the Sultan of Muscat. The fact that
he has appealed to us does not, in our view, oblige us to inform
One year later, John Foster Dulles, dealing with the U.S. inter-
vention in Lebanon, summarized the American legal position as fol-
lows: "We do not introduce American forces into foreign countries
except on the invitation of the lawful government of the State
concerned." 38 Dep't State Bull. 947 (1958). Similar statements
were also made by the French government regarding its aid to Zaire
in 1978, and by the Cuban government concerning its current mili-
tary presence in several African countries.

159. See, e.g., Schindler, supra note 103, at 431-33.
160. See Wodie, supra note 28, at 1045-46.

161. From 1944 on, Great Britain openly furnished military
assistance to the Greek government so that it could resist a Marx-
list-oriented revolutionary movement. This overt aid was never
denounced by an international body. Three years later, the Greek
government complained about the reciprocal, but quite limited, aid
that Communist states had subsequently given to the insurgents.
The General Assembly reacted on October 21, 1947, by inviting the
states involved to refrain from helping these "franco-tireurs." See
little point in attempting an exhaustive enumeration here.\textsuperscript{162} Finally, several multilateral agreements (such as the 1957 Havana Protocol)\textsuperscript{163} and bilateral treaties,\textsuperscript{164} from the distant past up to modern times, confirm international practice in this area.

International behavior demonstrates that aid solicited by an incumbent government is furnished openly. Benefiting from a presumption of efficacy, and not yet having completely lost its power, the incumbent government can legally solicit aid from foreign states. In contrast, assistance given to the party in revolt before it exercises exclusive power on the contested territory is illicit and thus usually covert. Premature recognition of the insurgents as the "legal government," which often accompanies such assistance,\textsuperscript{166} is yet another indicator of the contemporary state of the doctrine of aid to the incumbent government.

\textsuperscript{162} See Brownlie, supra note 11, at 322, for examples of several other unambiguous cases. 2 A. Kiss, supra note 52, at 411, demonstrates that French practice consists of justifying aid to the lawful government (e.g., aid to Gabon in 1964, to Chad since 1968, to Zaire in 1977-78). Anglo-American practice has already been illustrated several times. Thus, the American "assistance" to the Guatemalan and Nicaraguan governments in 1960 was "requested" by the incumbent governments. See 5 M. Whiteman, supra note 52, at 534-35.

\textsuperscript{163} See note 83 supra.\textsuperscript{164} See Brownlie, supra note 11, at 543.

\textsuperscript{165} In 1823, Simon Bolivar required that a treaty between Mexico and Colombia include the following "guarantee clause": "If, by misfortune, the internal calm of one of these states is disturbed by turbulent men, . . . both parties shall undertake to form a common front against them, assisting each other by whatever means are in their power, until law and order are reestablished," quoted in Pinto, supra note 10, at 471.

\textsuperscript{166} This was the case during the Spanish and Algerian Civil Wars, among others. More recently, the premature recognition of the Sandinista Liberation Front (F.S.L.N.) as the legal government of Nicaragua preceded or accompanied the aid of several States to these insurgents. Again, this behavior illustrates both the continuing normative force of the principle legalizing aid to incumbent governments, and the operational weakness of such norms in a decentralized decision-making structure. See C. Zorgbibe, supra note 35, at 130.
III. Belligerency as War: The Principle of Symmetric Aid

Our doctrinal study would not be complete without mentioning a principle which gives rise to the third a priori option previously enumerated. Again, this opinion is not a novel one. In the mid-eighteenth century, Vattel stated that:

Any foreign power may legally assist an oppressed people that asks for such assistance

* * *

...[if] conflict degenerates into a civil war, foreign powers may aid the party whose cause they find the most just.

Several contemporary scholars also plead in favor of the legality of the "symmetric aid" doctrine. That is, foreign states may not foment an internal conflict; but once it has broken out, they may assist the faction of their choice.

The basis of this doctrine deserves some examination. Like the "belligerency as a state of facts" principle, the principle of "symmetric aid" places the parties to the conflict on an equal footing as soon as hostilities become pronounced. While a neutrality regime reigns under the doctrine of "belligerency as a state of facts," the doctrine of "symmetric aid" analogizes the internal conflict to a war between two sovereign states, and thus allows each party to receive

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167. See p. 179 supra.
168. E. de Vattel, Le droit des gens ou le principe de la loi naturelle 56 (Book IV Paris 1758). The original French reads: "Toute puissance étrangère est un droit de soutenir un peuple opprimé qui lui demande son assistance," and, "(si) les choses en viennent à une guerre civile, les puissances étrangères peuvent assister celui des deux partis qui leur paraît fondé en justice." See also Carnazza-Amari, Nouvel exposé du principe de non-intervention, 5 Recueil des cours 552.
169. See note 82 supra.
assistance from its allies.\textsuperscript{170}

We have already discussed in some detail the legal criticisms of any doctrine which provides for equal treatment of all parties to an internal conflict in a world composed of sovereign nation-states.\textsuperscript{171} The doctrine of "symmetric aid" has the additional disadvantage of failing to respect the norm prohibiting the use of force in international relations.\textsuperscript{172} Intervention to help rebels, in effect, constitutes an aggression against the state in turmoil and is thus a violation of the most essential norm of contemporary international law.\textsuperscript{173} As for international practice, the behavior of states who assist insurgents confirms the illicit character of such actions.\textsuperscript{174}

\begin{itemize}
\item \textsuperscript{170} See Falk, The International Law of Internal Wars: Problems and Prospects, in Legal Order in a Violent World 122 Falk ed. 1968).
\item \textsuperscript{171} See pp. 212-19 supra.
\item \textsuperscript{172} The classic codification of this norm is U.N. Charter art. 2, para. 4. It is of no avail to invoke art. 51 as an exception to art. 2, para. 4 in this case. Collective self-defense is exercised at the request of the government that holds the title to state sovereignty and not at the demand of the belligerents who aspire to that title.
\item \textsuperscript{173} See p. 33 supra. The situation was hardly different before the San Francisco conference. Scelle, supra note 64, at 272.
\item \textsuperscript{174} See notes 103 & 162 supra. The thorny question of the so-called "humanitarian right" to assist insurgents in certain cases will not be discussed here. See generally Schindler, supra note 103, at 480, articles reprinted in 82 Revue générale du droit international public 5-234 (1978). Furthermore, this article excludes those cases where both belligerent parties exercised sovereign powers before the onset of the conflict. See note 112 supra.
\end{itemize}

In addition to the examples already cited, it might be useful to recall other cases where aid to insurgents was accompanied by the latter's sudden metamorphosis into the incumbent government. When aid to insurgents is not covert it is often purportedly provided to "incumbents." Thus, the Palestine Liberation Organization (P.L.O.) is recognized by many states as the only "lawful government" of "Palestine," and is equipped with a "cabinet" and a sophisticated tax structure to facilitate its "governmental" operations. Aid provided to the P.L.O., instead of supporting the "belligerency as war" position, illustrates the legal weakness of this doctrine and the longevity (at least on a formal level) of the principle of the legality of aid to incumbent governments. See note 162 supra. The conflicts in Cyprus, Katanga, and the Western Sahara are also quite revealing on this point.
Chapter 2: Some Comments on Internal Conflicts, Foreign States, and the Principle of Self-Determination

Preliminary Remarks

On November 13, 1974, the head of a "liberation movement" addressed the United Nations General Assembly in order to explain to its members that foreign states may legally assist insurgents fighting to obtain "self-determination." 175

Many jurists have also defended the right of "peoples" to receive foreign aid in the exercise of their "right" to determine their political future. 176 For others, this "right" implies an obligation of neutrality in every situation where a "people's" self-determination is involved. 177 The principle of the right of peoples to self-determination may thus support both the "belligerency as a state of facts" and the "symmetric aid" doctrines. 178 Analysis of this principle is therefore in order.

A preliminary caveat is perhaps appropriate. It is not intended that the following reflections be construed as a detailed analysis of the status of the right of self-determination in positive international law. Adequate treatment of this complex question would exceed the aims of this paper. 179 Hence, we shall satisfy our-

175. The leader referred to is Yassir Arafat.
176. See generally sources cited notes 82 & 157 supra.
178. Some authorities conclude that this principle permits foreign states to assist the insurgents but not the incumbent government, particularly in colonial wars. See Pinto, supra note 10, at 494.
179. See generally S. Caloggeropoulos-Stratis, Le droit des peuples à disposer d'eux-mêmes (1973); Chowdhury, The Status and Norms of Self-Determination in Contemporary International Law, in Essays on International Law and Relations, supra note 96, at 72; Emerson, Self-Determination, 65 Am. J. Int'l L. 459 (1971); Green, Self-Determination and Settlement of the Arab-Israel Conflict, Proc. Am. Soc'y Int'l L. 40 (1971); Guilhaudis, supra note 90; Menan, The
selves with examining whether actual practice, or the multilateral conventions and declarations enunciating the "self-determination" principle, seem to justify setting aside the tradition of aid to the incumbent government.

I  The Ambiguity of Texts and Declarations

A. The Texts

President Woodrow Wilson tried to insert into article X of the Covenant of the League of Nations, which reaffirmed the principles of state sovereignty and territorial inviolability, a provision to the effect that the right of self-determination would have priority over these other two principles. His efforts were unsuccessful. The international community did not want to subordinate state sovereignty and inviolability to the exercise of the right of peoples to self-determination. 180

This fundamental conflict between, on the one hand, the claimed rights of "peoples" and, on the other, state prerogatives, is essential to the understanding of our problem. There is little doubt that, since the Second World War, political independence has become a "synonym of liberty, of justice, of equality, of good", while colonization, to the contrary, is regarded "as plunder, as the ultimate evil." 181 The first article of the United Nations Charter, for example, states that one of the goals of the United Nations is:

179. (Continued)


180. See Farer, supra note 72, at 330.

181. Guilhaudis, supra note 179 at 19-20. The original text reads "Synonyme de liberté, de justice, d'égalité, de bien," and "comme une course au trésor, comme le mal."
1(2) To develop friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples...182

It is, however, neither obvious nor inevitable that this article, or the evolution which it signifies, confirms the thesis of Mr. Arafat. If self-determination of "peoples" is a principle of which the international community approves, the application of this principle must be within the normative framework that this community defines. This framework is one of states and not one of peoples183, as we may discern from some other key articles in the Charter, including: Article 2(1) (sanctioning state sovereignty); Article 2(7) (limiting U.N. intervention in domestic affairs); and, especially, Article 2(4) (prohibiting the extra-territorial use of force).

As Hans Kelsen has pointed out, the Charter grants specific rights to states, rather than to "peoples." Despite its language, when seen in the context of the Charter as a whole, the second paragraph of its first article does appear to deal with states rather than peoples. In that sense, it corresponds to the principle of "sovereign equality" that is proclaimed in the first paragraph of Article 2.184 Thus read, the word "people" constitutes a special reference, not to itself, but to the human element of a state. This pattern of reference may be read back into the phrase "We, the people of the United Nations" in the preamble of the Charter. Other multilateral texts have adopted the same formula.185

"Self-determination of peoples" then (except in colonial situations which, apart from the ones in Rhodesia, Namibia and several minuscule territories are declining

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182. U.N. Charter art. 1, para. 2. See also U.N. Charter art. 55 (international economic and social cooperation).

183. Even the name of "The United Nations" is misleading, as the U.N. was and is clearly an organization of states rather than of nations or peoples. See Rostow, supra note 89, at 848 (quoting Gunnar Myrdal).


185. See note 94 supra.
in importance\textsuperscript{186}) often may not be an alternative to the right of states to determine their future. When applied to states, the idea of self-determination tends to protect and perfect sovereignty, rather than to undermine it. In this context, it can easily be seen that assistance to insurgents who do not represent states, but who combat such representatives, would violate basic treaty principles. Likewise, requests for aid by incumbent state governments (except in real "colonial" situations\textsuperscript{187}) would, if answered affirmatively, probably be in accord with such principles.\textsuperscript{188}

\textsuperscript{186} In this article the term "colonial" is used in the strictly judicial sense, not in the larger sociological sense. Thus, although some Québécois or Ulsterites may feel that they live in "colonies," the point is that these territories are component parts of states, and that few areas of the globe have not yet been partitioned into states.

\textsuperscript{187} Id.

\textsuperscript{188} A complicated question concerns the legality of a foreign state furnishing military aid to an incumbent government whose avowed goal is to deny the self-determination of a "people." Arguably, this would constitute the use of force in a "manner inconsistent with the purpose of the United Nations." U.N. Charter art. 2, para. 4. The problem is, of course, in large part one of determining if the internal conflict in question involves the exercise of "self-determination," and if the group involved qualifies as a "people" who are denied this right. See Calogeropoulos-Stratis, supra note 179 at 45.

Shindler, supra note 103, at 445, concludes that: "Il paraît clairement illicite d'aider une puissance coloniale à réprimer l'insurrection d'un peuple colonial. En revanche, la situation est beaucoup moins claire pour des guerres de sécession qui ne sont pas en même temps des guerres de libération coloniale," i.e., "It appears clearly illicit to help a colonial power repress insurrection by a colonial [i.e., colonized] people. On the other hand, the situation is much less clear for wars of secession which are not at the same time wars of colonial liberation." The contemporary practice whereby foreign states condemn an incumbent government's suppression of the colonial uprisings (e.g., Namibia) would appear to confirm the first part of this opinion. However, the colonial problem, as indicated above, is no longer the most common one, as the majority of "liberation movements" now operate within states.
B. The Declarations

The Charter of the United Nations has of course been "supplemented" by numerous resolutions emanating from that agency's principal organ, the General Assembly. Although the Assembly has, "neither explicitly nor implicitly, received any sort of legislative power," it would not be unreasonable to conclude that an unanimous (or near-unanimous) resolution represents an interpretation of the Charter, and would thus be considered declaratory of international law. Such declarations could not, of course, abrogate a fundamental principle of international law, such as that of the sovereignty and territorial integrity of states. Indeed, this has never been their purpose.

Thus, in 1960, the General Assembly reaffirmed the "inalienable right" of "colonial peoples" to self-determination, while at the same time emphasizing that any attempt to destroy the territorial integrity of states was incompatible with the aims and principles of the Charter. Five years later, the Assembly again brought together the two principles of self-determination of "peoples" and the sovereignty of states, in its "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, and the Protection of their Independence and Sovereignty."

Probably "the most important official document produced on this question" is the "Declaration of Principles of International Law Concerning Friendly Relations..."
and Cooperation among States" of 1970. Its preamble emphasizes the "significant contribution to contemporary international law" represented by the "principle of equal rights of peoples and of their right to self-determination", and posits concurrently:

That any attempt to destroy, either partially or totally, the territorial integrity of a state or a country, or to interfere with its political independence, is inconsistent with the purposes of the Charter.

The history of intense negotiations that determined the content of the Declaration is particularly informative. Representatives of ten states proposed that the following words be inserted in the Declaration:

Peoples who are deprived of their legitimate right of self-determination and complete freedom are entitled to exercise their inherent right of self-defense, by virtue of which they may receive assistance from other States.

These ten states claimed that the right of collective self-defense was vested in peoples. Aid to such "peoples", they contended, was therefore not a violation of Article 2(4) of the Charter. This opinion was hotly contested by other states, which pointed out that this right belonged only to sovereign states, and that its exercise by so-called "peoples" would have disastrous consequences for international public order. Read in the light of these legal debates, several excerpts from the official text of the Declaration are of particular interest:

196. Id., at 451.
197. Id. at 451-452. See also note 172 supra.
Every state has the duty to refrain from any forcible action which deprives peoples... of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter. Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful. 198

Resolution 2625 (XXV), adopted by the General Assembly without any official vote, has been called "a masterpiece in ambiguity" 199 in its treatment of foreign state obligations during an internal conflict. It restates, without at all resolving, the dilemma of attempting to promote "peoples" rights to self-determination in a legal system whose functional unit is the state. Except in the face of the classical colonial situation, the principles of territorial integrity and of the illegality of non-government-requested intervention seem to emerge relatively unscathed from multilateral texts and declarations. 200

II State Practice

State practice tends to confirm both the legality of aid to incumbent governments in non-colonial situa-
tions and the prohibition of aid to insurgents, despite
the evolution of the "self-determination" doctrine.

The Biafran conflict has already been alluded to as
a case in point. Assistance was overtly granted to the
Lagos regime, and African leaders openly favored "pre-
serving the unity of the State of Nigeria."201 In
(formerly) Eastern Pakistan, India hesitated openly to
support Bengali rebels and felt obliged to allege a
Pakistani attack on Indian territory to justify its in-
tervention. (India, a multi-ethnic State par excellence,
surely realized the possible consequences of any exten-
sion of "self-determination" doctrines.) Even as Bangla-
desh proclaimed its independence amid harsh repression
from the Karachi government, no state would openly pro-
claim the right of the Bengali "people" to its political
self-determination.202 One scholar has called the
Nigerian and Pakistani experiences, respectively, "the
extreme unction and the formal burial" of any "national
liberation" theory of foreign state intervention.203

Similar cases come to mind, from the so-called in-
ternational "conspiracy of silence" during the rebellion
of Iraq's Kurdish population204 to the atrociously cruel
massacre of Hutu-tribe rebels in Burundi.205 Indeed,
the states created during post-World War II decoloniza-
tion often value most highly the principles of terri-
torial integrity and state sovereignty. Third World
nations often stigmatize any "wars of national liber-
ation" in which they have no strategic interest.206 The

201. Salmon, supra note 185, at 161.
202. See Guilhaudis, supra note 90, at 58.
203. Farer, supra note 72, at 354.
204. See Fontaine, Le malheur d'être Kurde, Le Monde, March
19, 1975 at 3, col. 5.
205. Two hundred fifty thousand Hutus were exterminated by
government troops loyal to President Micombero, who was attempting
to "unify" his country. The O.A.U. sent the following congratula-
tory message to the President after the Hutu rebellion had been
-crushed: "Thanks to your actions, peace will be rapidly restored,
national unity consolidated, and territorial integrity preserved."
Farer, supra note 72, at 402.
206. Compare the declarations of several states during the
discussions preceding the adoption of General Assembly Resolution
2131 in 1965: Mexico, 20 U.N. GAOR (1408th plen. mtg.) 6-16.
Communist bloc, which proudly voices support for many "liberation fronts" has expressly denied even the principle self-determination of states, and is actively assisting the incumbent government of Ethiopia in its efforts to crush the attempts of two different "peoples" to "determine their future." Not only have the Western nations not contested the legality of this assistance, but they have on the contrary emphasized the principle of territorial integrity.

It is, then, completely inaccurate to claim that state practice confirms any legal right to assist ethnic insurgents or any legal obligation not to assist incumbent governments which combat such insurgents. In a world composed of nation-states, the vast majority of which are multi-ethnic, one scholar has aptly concluded that:

C'est un mythe qui mène le jeu, le mythe de l'unité nationale et de l'intégrité territoriale. Construit autour de l'État et non du mouvement de libération, ce mythe a imposé son dictat - des 'peuples' lui ont été sacrifiés.

Conclusion

Our examination of the state of positive law reveals no fundamental modification since the days of the Caroline and Alabama affairs. Foreign states must not aid insurgents, but may assist incumbent governments until a juridical act has bound them to passive neutrality. We have seen that this doctrine suffers from important drawbacks. But we have also seen that the international community has yet to replace it with another normative system.

207. See note 114 supra.
208. I.e., "It is a myth which guides the action, the myth of national unity and of territorial integrity. Built around the State and not the liberation movement, this myth has imposed its own dictate--'peoples' have been sacrificed to it." See note 116 supra.
210. Guilhautis, supra note 90, at 59.
Of course, our study should not obscure the important—and often contrary—socio-political reality alluded to in the introduction. Since 1945, with increasing covert interventions and the spread of the "Cold War" to the four corners of the globe, illicit foreign state interventions in internal conflicts have certainly been a prime cause of international tension.211

The socio-political factors inherent in what can only be described as a lessening of the influence of international law on state behavior have been well documented elsewhere,212 We provide a brief summary here:

1. The communication revolution has permitted world-wide exposure for competing (and, since World War II, increasingly incompatible) ideologies. At the same time, this "shrinking" of the world has led to an expansion of each bloc's zone of strategic interest. Thus, internal affairs of formerly isolated states take on an increasing importance for that state's peers. Indeed, the division of the world into ideological blocs (a phenomenon not sufficiently understood at the San Francisco conference) reinforces each bloc's impression that the outcome of every foreign internal conflict is vital to its own security. Thus, considerable pressure is placed on traditional legal norms by states which are constantly tempted to "arrange" things their way. Hungary, Czechoslovakia, and Chile are the results.

2. Military technology has advanced to the point where direct inter-bloc confrontations could have decidedly disastrous effects on the world. Internal conflicts, on the other hand, permit inter-bloc competition at less risk. One scholar has concluded that:

211. Obviously, internal conflicts may at times be mere international wars fought by proxy. Thus, the People's Republic of Vietnam has attempted to camouflage its recent invasion of Cambodia as an indigenous rebellion by a group which, of course, Hanoi quickly recognized as the incumbent government, i.e., eligible for overt Vietnamese aid. See Le Devoir, Oct. 27, 1978, at 9.

212. See R. Oglesby, supra note 6, at 134, for an especially interesting analysis.
The C.I.A. and Cominform, rather than traditional armed forces, have become the protagonists of contemporary world struggle.213

International society reacted passively to the Brezhnev doctrine in 1968 and hardly blinked when South Vietnam was invaded in 1973. Israel watches helplessly as foreign states arm Palestinian guerillas, leaving the Israeli government little choice but to rely on force. Indeed, the inter-state use of force in self-defense has become the prime sanction against violations of Article 2(4) of the Charter.214 In this field of positive international law, as in others,215 norms seem to be progressively transformed from influences on state behavior to mere determinants of the form and rhetoric of state actions. It is in this context that Justice Holmes' thoughtful words take on a new relevance: "It commands the future: a valid ideal, but imperfectly achieved."

POSTSCRIPT

The Afghanistan crisis, which occurred just after this article was completed, serves as a poignant reminder both of the contemporary state of law and of its chronic violation by the Soviet bloc.

Thus, Moscow presented its invasion of Afghanistan as a reply to a request for aid by the Kabul government, in its fight against moujahidin insurgents. The latter are apparently "counter-revolutionary, counter-progressive elements who are toys in the hands of international imperialism."216 This Soviet attempt to mask classic aggression by recourse to internal-conflict rhetoric brings to mind similar efforts in 1956 (Hungary), 1968

213. Luard, Civil Conflicts in Modern International Relations, in The International Regulation of Civil Wars 9 (E. Luard ed. 1972).
214. See Rostow, supra note 12, at 286.
215. Id.
216. Interview with the new editor of the Kabul News-Times, reprinted in Le Monde, Jan. 9, 1980.
Executions of the Afghan Chief of State, his four wives, and their offspring obviously did not render Moscow's explanations any more plausible; and they were resoundingly rejected by Security Council and General Assembly majorities.

As Babrak Karmal attempts to become a second Janos Kadar, one can only reflect sadly that the conquest of Afghanistan illustrates both the continued force of the norm permitting aid to incumbent governments (why else would Moscow attempt so absurdly to legitimize its invasion in this way?) and its increasing perversion to ends totally incompatible with world order.

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217. In the last case, the aggressor was, of course, the Soviet surrogate, Vietnam.