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Third state intervention in civil armed conflict

Justifications for circumventing the principle of
non-intervention

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Summary

Since the adoption of the Charter of the United Nations the pattern of conflict in the international arena has drastically changed. From largely being a scene for inter-state conflicts, internal conflicts have predominated the post-war era. The few international conflicts that the post-war world has witnessed have originated in civil conflicts.

The principle of non-intervention implies the duty for third states to abstain from interfering in other states' domestic affairs. This fundamental principle governing inter-state relations is implicitly laid down in the prohibition on the use of force in Article 2(4) of the Charter, but has been confirmed and clarified by subsequent legal instruments. In spite of the general consensus on the principle of non-intervention among the members of the international community, individual states make persistent attempts at circumventing the principle by invoking various justifications for intervening in civil conflict. Intervention by third states internationalises the internal conflict and presents an imminent risk of escalation.

The two most frequently invoked justifications for intervening in civil conflict are the justifications of consent and collective self-defence. At times, states also intervene for the alleged purposes of establishing or restoring democratic governance or furthering the process of self-determination. The protection of the population of the target state against gross violations of human rights and the rescue of own nationals in danger in the territorial state constitute another two common state justifications.

The present thesis presents an analysis of the current state of the principle of non-intervention in the light of the extensive interventionist state practice. In doing this, the legal history of the principle of non-intervention is retraced in order to demonstrate the constant divergent opinions of states. The object of attaining consensus, in spite of the persistent disagreement, has led to ambiguous results. Although states frequently take advantage of the margin of interpretation built into the legal instruments, it should be observed that states usually tend to diverge as to the determination of the facts rather than on the conditions for a lawful exercise of the justifications. The justifications of consent and collective self-defence have been frequently abused in state practice. Nevertheless, the legal tenability of these justifications is generally recognised, provided that a large number of conditions are met. The additional justifications examined in the present thesis have encountered widespread criticism from both third states and legal scholars. Moreover, their legal foundation, as embodied in a contextually interpretation of Article 2(4), is open to fundamental objections as to its compatibility with the overwhelming purpose of maintaining international peace and security.

Abbreviations

A.J.I.L.	American Journal of International Law
FRD	G.A. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations
ICJ	International Court of Justice
MPLA	People's Movement for the Liberation of Angola
OAS	Organisation of American States
OAU	Organisation of African Unity
UNYB	Yearbook of the United Nations

1. Introduction

It is common knowledge that civil conflicts have dominated the post-war period. Although not covered by the Charter of the United Nations, their significance cannot therefore be ignored. This is especially important when considering the fact that they often escalate into inter-state wars as a result of intervention by third states. Intervention presents an imminent risk of escalation, which makes conflicts harder to control and resolve. It is therefore of utmost importance to develop better understanding, possible control and anticipation for intervention.

Third state intervention can partly be explained by the failure of the collective security system of the UN leading many states to resort to force unilaterally. Naturally, states also intervene in order to protect political, economic and security interests. Also after the end of the Cold War, when the super Powers precipitated to impose their political values on newly independent states, the phenomenon of intervention shows no sign of abating. Neighbouring states are often active contributors to violence, escalation and regional instability in spite of their limited military capacity. With the end of decolonisation and the Cold War the formerly violent international conflicts over decolonisation and the East-West ideologically based conflicts have given way to internally based conflicts. The principal reasons for the outbreak of civil war are claims to independence or autonomy by separatist groups or claims by minorities for respect of their basic human rights. Ethnic, religious and regional conflicts will most likely continue to be the dominant issue in internal conflicts in the future.

In principle, there is general consensus on the importance of the principle of non-intervention as one of the fundamental principles governing inter-state relations. The principle, originally only implicitly laid down in Charter, has been developed, clarified and confirmed, for instance, by the Declaration on Friendly Relations and Co-operation among States. As a result of the irreconcilable interests and continuous political disagreement between states, the legal provisions are however unclear and ambiguous. This result was accepted in order to attain consensus. The divergent interpretations of the legal instruments have rendered possible persistent attempts by third states to circumvent the principle of non-intervention by invoking various justifications for intervening in civil conflicts. Although there is little prospect that the international community will arrive at a consensus on the underlying principles in the near future it is nonetheless important to set the limits for lawful forms of intervention.

The reader is welcome to consider the following quotation from an unknown author. *“International law cannot itself provide the answers. It can only assist in formulating the answers when there is sufficient political consensus*

to move towards that. But international law is part of and not extraneous to the current debate on the limits and control of intervention.”

1.1 Purpose

The purpose of the present study is to examine under what circumstances the principle of non-intervention has to yield to justifications that have developed through state practice with respect to intervention in civil conflict. In this connection, reactions to the invoked justifications from other members of the international community and the organs of the United Nations will be taken into consideration. The thesis also aims to examine the most commonly invoked justifications in the light of the doctrine, in order to determine their legal foundations and tenability as well as the conditions, limitations and practical problems for their application. *Which are the exceptions to the principle of non-intervention in present-day international law? Under which conditions may the exceptions be invoked and which are their legal foundations?*

In examining the validity of the commonly invoked justifications I shall also attempt to examine the following issues. By retracing the divergent opinions as expressed by states during the deliberations on various legal instruments dealing with the principle of non-intervention, the thesis aims to show the deeply rooted disagreement and thereby to explain the often ambiguous result. However, the presentation of the legal history of the principle of non-intervention also aims at illustrating the deeply embedded consensus on the importance of this principle. The thesis aims at showing how states try to reconcile their justifications with the principle of non-intervention as laid down in the Charter and subsequent legal instruments. States frequently take advantage of the margin of interpretation of the main legal instruments in the area. The thesis aims to find out which are the legal provisions that are the most prone to divergent interpretations and thus most frequently used by states in order to interpret an actual situation in accordance with their own political interests. The purpose is also to examine whether the legal instruments adopted subsequently to the Charter in any way clarify the ambiguities of the Charter with respect to the principle of non-intervention. *Which are the expressions on which the divergent interpretations turn? Have legal instruments subsequent to the Charter helped to elucidate the ambiguities?*

1.2 Delimitations

The purpose of this essay is to examine third state intervention in *civil conflict*. Cases of third state intervention in inter-state wars thus fall outside the scope of the present study. It is also important to point out that the current essay exclusively focuses on *third state* intervention. Cases in which the domestic governmental authorities, so to speak, intervene in a domestic

conflict between internal opposing factions are not dealt with. Finally, it is necessary to note that only *unilateral intervention* by individual states upon their own initiative is of relevance for the study. Consequently, collective intervention by the UN, and its eventual conformity with Article 2(7) of the Charter, lies outside the scope of this survey.

It is needless to say that the following pages are not to be seen as an attempt to exhaustively examine the lawfulness of the grounds states invoke in justification of their intervention in internal conflict. Issues such as humanitarian intervention and the right to self-determination are the subjects of extensive attention in the literature. My thesis differs from these works in that it is not an attempt at constructing legal foundations for a specific type of intervention in order to make it reconcilable with the principle of non-intervention and thus legally acceptable. It is common knowledge that both legal authors and states diverge as to the lawfulness of these justifications as well as their practical application. However, it is inevitable to some extent to present some central doctrinal views on the lawfulness of the justifications. The intimate relationship between doctrine and state practice further unables a strict division between the both angles of approach. The purpose of the brief examination of the additional justifications in Chapter 6 is to see to what extent state practice is consistent and scholarly opinions uniform in order to provide a complete survey of the status of the principle of non-intervention in present-day international law. The examination thus serves the purpose of estimating the possibility of accepting those claims as legal developments of the principle of non-intervention by pin-pointing the main points of disagreement on which a possible recognition turns. It could be argued that the lawfulness of these justifications presents itself differently in classical inter-state wars. Unlike internal wars, where these justifications are gauged against the principle of non-intervention, international law does not require neutrality from third states in inter-state conflicts.

1.3 Material

Generally, it can be noticed that there is not much literature on intervention as a general phenomenon of inter-state relations. In substance, the literature on intervention consists in specific works that analyze the lawfulness of one form of intervention or works that aim to provide a strict political or humanitarian framework for the issue. Civil conflict is extensively debated as for the *jus in bello* aspect, whereas the *jus ad bellum* receives much less attention in the doctrine, with the exception of the struggle for self-determination by dependent peoples. Naturally, the literature is abundant as concerns specific cases of controversial third state involvement in internal conflict. Studies on international law on the use of force have been useful for the analysis of the justification of intervention in collective self-defence. The large number of articles from the American Journal of International Law have been useful as well. The brief articles expressing opposed scholarly views on controversial subjects such as the U.S. invasion of

Panama (cf. A.J.I.L. Vol. 84, 1990) have provided a broad basis for a better comprehension of the disagreement. Various books and articles by Antonio Cassese and, in particular, *Foreign Armed Intervention in Internal Conflict* by Antonio Tanca have further largely contributed to the structure of the essay.

1.4 Disposition

In the first two chapters the reader becomes acquainted with the concepts of internal conflict and intervention. The thesis provides a brief introduction to the characteristic features of civil conflict and the concept and means of intervention with a view to introducing the reader to the complexity of conflict resolution with respect to escalated internal conflicts. In Chapter 4 I shall present the legal development of the principle of non-intervention as originally implicitly laid down in the Charter of the United Nations and later confirmed and developed in a number of resolutions. The examination of state opinions expressed during the deliberations serves to show the deep divisions between participating states as to the content and scope of the principle. The main concern of the present essay is the analysis of third state justifications for intervention in civil conflicts as dealt with in Chapters 5 and 6. These two chapters serve to illustrate a few common types of involvement and are not to be perceived as exhaustive in nature. The division into two chapters is justified by the frequency by which the justifications are invoked as well as their general acceptance by members of the international community and the doctrine. The relatively detailed analysis of the justification of self-determination can be explained by its specific status of a generally recognised norm of international law and by its changing character in time. In the final chapter I shall endeavor to provide an analysis of the current state of the principle of non-intervention as challenged by the extensive interventionist practice of states.

2 Internal Conflict

2.1 The concept of internal conflict and insurgency

An internal conflict opposes at least two groups of inhabitants of a state. Of those groups, one may be the government as well as another non-governmental group of individuals. In the event of foreign intervention, an internal conflict remains internal on condition that the intervening state assists the established authorities and not the insurgent movement. The two legitimate governments are in that case aligned on the same side against the rebel forces. Thus, only when a third state aids the rebel forces will the conflict take on an international character.¹

The classification of a conflict is crucial as to the legality of forcible intervention by a third state. If the internal conflict is of minor intensity the conflict is not characterised as a civil war but solely as a domestic unrest. In that case, foreign support to the established authorities is permissible. This is the reason why states are often unwilling to recognise the gravity of a conflict in their territory. In the determination of the character of a conflict one must also consider whether there has been outside intervention turning the internal conflict into an inter-state conflict. States have sometimes been divided as to the character of an on-going conflict. For instance, in the war in Vietnam the warring parties to the conflict were divided on the nature of the conflict. South Vietnam and its ally, the United States, held that the conflict was an international war that had started with the attack on South Vietnam by North Vietnam. Thus, the United States claimed to be acting in collective self-defence against the Chinese-supported invasion by North Vietnam. On the other hand, North Vietnam held that the conflict was of colonial nature.²

Although sometimes confused with other forms of irregular movements, insurgency differs from both guerrilla warfare and terrorism. Insurgency occurs when the authority of the government is particularly weak or open to challenge due to widespread popular discontent. Unlike infiltration, insurgency has political objectives and is aimed at replacing the government as an alternative source of authority. In contrast to insurgency, urban guerrilla movements typically aim to change the behaviour or the composition of the government through the extensive use of coercive force. Although the rule of insurgents is unlikely to be one of terror, they might employ force to compel obedience to their rule. Governmental forces trying

¹ Malanczuk, Peter (ed.): *Akehurst's Modern Introduction to International Law*, seventh revised edition, London 1997, p. 318; Dinstein, Yoram: *War, Aggression and Self-defence*, second edition, Cambridge 1994, p. 6.

² Gray, Christine: *International Law and the Use of Force*, Oxford 2000, p. 57-59.

to repress the insurgents usually resort to force to regain the confidence of the local population. This forcible measure risks intensifying the popular support for the insurgents. Internal conflict is therefore often said to be a struggle for the hearts and minds of the people. The political circumstances usually favour the insurgents and the governmental authorities are thus likely to be defeated in spite of their superior military capacity.³

Even when the origins of insurgency are local, an insurgent movement frequently depends on external support. Thus, insurgency is rarely a purely domestic matter but has in most cases also international implications. Owing to the complex relation between internal and external support insurgency is problematic in international relations. Furthermore, governmental efforts to suppress domestic uprisings often impinge on the state's relations to its neighbours. When ethnic groups exist across state borders, insurgency may spread to a neighbouring country or result in a wave of refugees crossing the borders of the neighbouring state. Ethnic loyalty in the neighbouring country may result in the creation of a movement friendly of the insurgents. Eventually, the purely domestic conflict may lead to an inter-state war.⁴

2.2 The history and characteristics of internal conflict

Since 1945 most of the wars have been civil wars. Even the few inter-state wars that the post-war world has witnessed have started as civil conflicts. The decrease in inter-state wars is partly due to the fact that states no longer try to enlarge their territory by conquest. Although border disputes between neighbouring states are not uncommon, attempts at territorial enlargement have stopped to be a major cause of war in the post-war era. Throughout the world there appears to be a general acceptance of the territorial status quo. On the other hand, states frequently try to increase their influence in world politics by assisting the part in an internal conflict that shares their ideological conviction. The globally spread ideologies give many occasions for third states to intervene and accentuate thereby the risk of intra-state wars escalating into full-scale inter-state wars.⁵

Fear of the destructiveness of nuclear weapons also helps to explain the diminution in traditional inter-state wars. Not only the nuclear powers have become more reluctant to use force, but also smaller states refrain from the use of force in international relations for fear of an escalation of the conflict eventually leading to intervention by nuclear powers. A third reason for the decrease in the number of wars between states is probably the diminishing role of force in modern societies. It is no longer possible for a state to rely

³ Northedge, F.S. (ed.): *The Use of Force in International Relations*, London 1974, p. 112-114.

⁴ Northedge (ed.) p. 111.

⁵ Malanczuk (ed.) p. 318; Northedge (ed.) p. 100.

on force to impose its will on foreign states. In the international arena the political circumstances have had a moderating effect on the use of force. The opposite seems to have been the case as regards the use of force in managing domestic troubles. In spite of their unlimited military capacity, states are surprisingly vulnerable to violent attacks by internal armed groups. Because of the continuous menaces to the government, in order to achieve political change, many states are constantly on the verge of civil war or disintegration.⁶

The industrial progress at the end of the nineteenth century was at the bottom of the imperialist politics of the European states. However, on the other hand, the industrial progress had implications on the social hierarchy in society and led to the creation of mass political movements and a fundamental change in existing political parties. The newly created political groups considered the interests of the state to be an ideological matter, thereby laying the ground for the internationalisation of internal conflicts. The mass political movements proved to be an excellent instrument to achieve internal political change. The spread of the doctrines of Communism and Fascism induced other states, which were not directly concerned, to play a role in the outcome of civil conflicts.⁷

In African and Asian states the reaction to industrialisation and modernisation was similar to the one in Europe implying the mobilisation of the masses. However, the African and Asian states were faced with some specific problems. Tensions between countryside and town and between modernisation and tradition were greater than in Europe. Moreover, the ethnic diversity and the artificial structure of many of the newly created states obstructed the nation-building. The particular features of these states are their extremely weak national centres with a periphery constituted of self-contained traditional societies where modernisation has not found its way. The political awareness during the struggle for independence appears to have weakened owing to the many expectations that were not complied with by the nationalist leaders. In many of these states internal conflict has continued to ravage since independence. In consequence, the political leaders have resorted to force and relied on the support of the police and the army to maintain order. In these circumstances, the military has frequently taken power through military coups that have been welcomed by political opposition groups but which have initially led to even greater disorder. The frequency of coups in Africa shall not be interpreted as a measure of their popularity but is rather due to the political indifference of the people living in the countryside and the ease with which coups can be staged in countries with a single political centre. In states where the political power is decentralised in regional centres of power the risk of military coups is lesser. However, if the regional political centre coincides with an ethnic division or

⁶ Northedge (ed.) p. 99-101.

⁷ Northedge (ed.) p. 105-106.

with a proportionately large part of the state's natural resources the danger of secession is particularly acute.⁸

Paradoxically, the consequence of economic development in less developed countries is often the outbreak of an internal conflict. Ethnic rivalries and social inequalities tend to increase in the wake of economic development. A conflict is likely to be more violent in a country where there has been some development than in a country which is even less developed and where the political power is still exclusively confined to the elite.⁹

The reason for the relatively high frequency of internal conflicts in post-colonial states is not solely the intense international involvement, but also the characteristics of post-colonial states themselves. By comparison with newly born European states, post-colonial states had less time to develop effective state structures and a spirit of national identity. Furthermore, it can be argued that post-colonial states had to lay these two foundations simultaneously. The difficulty in nation-building and state-building at once consists in the lack of an overarching national identity that recognises the local government. A developing state, which has reached an intermediate level of democracy, is more conflict-prone than an autocracy or a democracy. Under such political conditions, there is no potential for resolving conflict peacefully, nor the violent repression of dissenting views that characterises an autocratic state.¹⁰

2.3 Causes and effects of internal conflict

Unlike international conflicts, where territorial and border disputes are the most common issues of conflict, civil conflicts are generally fought over ethnic, religious and regional autonomy, ideological systems or access to national power positions. The latter is the most violent source of conflict in internal conflicts. Disputes over decolonisation, national independence, ethnic, religious and regional autonomy are also very likely to involve the use of force. The number of conflicts over ethnic, cultural or regional autonomy was steadily increasing until 1990. Since then, a slow decrease in number has been noticed at the same time as a proportionate decrease in the number of violent conflicts of this type has taken place. This new trend can be explained by the steadily growing attention to minority rights since the mid-1970s. However, the former colonial powers and the super Powers appear to have had a greater interest in stabilising the regimes and ensuring block loyalty than complying with minority rights. Thus, the outbreak of many ethno-political conflicts around the end of the Cold War can be explained by the freezing function of the East-West rivalry. In consequence, the end of the Cold War involved the emergence of formerly suppressed or

⁸ Northedge (ed.) p. 106-108.

⁹ Northedge (ed.) p. 109-110.

¹⁰ Henderson, Errol A.; Singer, David J.: *Civil War in the Post-colonial World, 1946-92*, Journal of Peace Research, Vol. 37, No. 3, 2000, p. 275, 278-279.

ignored underlying potential sources of conflict as important issues of conflict.¹¹

According to Brown, four main combinations of elements for the outbreak of an internal conflict have been put forward in the scholarly literature. Those are structural factors such as weak states, security concerns and ethnic geography; political factors such as discrimination by political institutions, exclusionary national ideologies, inter-group politics and elite politics. In addition to those two factors, economic-social factors such as widespread economic problems, discriminatory economic systems and economic development and modernisation, and cultural/perceptual factors such as patterns of cultural discrimination and problematic relations between different groups in society play an important role in determining the predisposition of a state to violence. However, Brown argues that important factors such as the roles played by domestic elites and neighbouring states have been disregarded by many authors. He further maintains that all domestic conflicts can be explained by one of four sets of causes; internal mass-level factors, external mass-level factors, internal elite-level factors or external elite-level factors. Internal elite-level factors, i.e. bad political leaders, constitute the most common background to the outbreak of an internal conflict. Conflicts triggered by internal elite-level factors fall into three main categories: ideological conflicts, conflicts where criminal groups challenge state control and power struggles between competing elites. Power struggle conflicts are by far the most common type of conflict and often involve governmental campaigns to repress ethnic minorities and democratic movements. Another reason for internal power struggles is elite vulnerability as a result of weakening state structures, political transition, economic problems and pressure for political reform. Ethnic propaganda is often employed to encourage group solidarity and thus political affiliation.¹²

The effects of an internal conflict on a neighbouring state fall into five main categories: problems related to mass refugee movements, economic and military problems as well as problems related to instability and war. As a result of an internal conflict an emergence of aggressive nationalism is often noticed.¹³

¹¹ Pfetsch, Frank R.; Rohloff, Christoph: *National and International Conflicts, 1945-1995 – New empirical and theoretical approaches*, London 2000, p. 130-131, 134, 138, 185.

¹² Brown, Michael E. (ed.): *The International Dimensions of Internal Conflict*, Cambridge, Mass. 1996, p. 573, 575-576, 585-586.

¹³ Brown (ed.) p. 591, 595.

3 Intervention by third states

3.1 The concept of intervention

As will be further dealt with in Chapter 3.3 intervention is an imprecise term which includes a wide variety of actions. Nonetheless, the general definition of intervention is an act limited in time and scope, that is directed at changing or preserving the political structure of the target state and which lies outside the ambit of normal relations among states.¹⁴ Intervention can also be defined as a "dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condition of things".¹⁵ The International Court of Justice stated in its ruling in the Nicaragua case that: "it is the element of coercion, which defines, and indeed forms the very essence of, prohibited intervention".¹⁶

A more elaborated definition is proposed by Vertzberger. According to him "foreign military intervention is coercive state-organised and state-controlled, convention-breaking, goal-orientated activities by one sovereign state in the territory of another, [sic!] activities directed at its political authority structure with the purpose of preserving or changing that structure, affecting thereby its domestic political process, and/or certain of its foreign policies by usurping its autonomous decisionmaking authority through the use of extensive military force."¹⁷

3.2 Interventionist behaviour and criticism

Intervention is a characteristic and persistent feature of international society. The significant role of intervention stems from the fact that states have economic and security interests outside their own territory. When these assets are threatened the foreign state will intervene using political, economic or diplomatic pressure in order to secure its assets. However, intervening openly is often an expensive, ineffective and perhaps even counter-productive measure and is therefore generally exclusively undertaken by powerful states.¹⁸

Military intervention has changed the origins of the international use of force from a use of force between states stemming from international disagreement to an international use of force originating in an intra-state

¹⁴ Northedge (ed.) p. 101.

¹⁵ Tanca, Antonio: Foreign Armed Intervention in Internal Conflict, Dordrecht 1993, p. 17.

¹⁶ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits, 1986 ICJ Reports 14, paragraph 205.

¹⁷ Vertzberger, Yaacov Y.I.: Risk Taking and Decisionmaking – Foreign Military Intervention Decisions, Stanford 1998, p. 114.

¹⁸ Northedge (ed.) p. 116-117.

conflict. The increase in number of forcible interventions has also meant a shift away from the purely military use of force to a political use of force. Thus, the direct use of force to occupy territory or to exterminate enemy forces has given ground to a coercive use of force designed to change the behaviour of an adversary and to force him to comply with the demands of the intervening state.¹⁹

The growing trend in interventionist behaviour is thus towards covert assistance. This tendency can be explained by a number of reasons. Primarily, for many states, resorting to an all-out war implies serious dangers in proportion to the state's interests because of the technical progress in military equipment. Hence, intervening by undertaking relatively limited covert action diminishes the risk of violent retaliation from a state with great military capacity. The progress in means of communication, for instance new methods of intelligence and political propaganda, further promotes this kind of action. Finally, with the decreasing distance between states has emerged an increasing need to extend one's security zones.²⁰

Since the end of the Second World War there has been increasing criticism of the extensive interventionist policy of the super Powers. Opinions have been put forward arguing that intervention presents a threat to peace especially in internal conflicts involving insurgency. The belief that external involvement aggravates domestic conflict rather than diminishes its impact on international relations has gained widespread recognition. The criticism among many Third World states cannot exclusively be explained by the super Power behaviour but also by the rejection of the idea of a hierarchy of states as being contrary to the principle of equal sovereignty for all states. Particularly in ex-colonial and non-aligned states is intervention regarded as an act of neo-colonialism or imperialism.²¹

The status of the rules prohibiting forcible intervention in internal conflicts is uncontroversial. The many interventions in Latin America, Asia and Africa during the Cold War were not due to an uncertainty about the identification of the rules, but to their application in practice. Although, in theory, there was general consensus on the relevant principles, states were divided on Cold War lines as to the actual facts. The end of the Cold War brought an end to the aggressive interventionist policy of the US and the USSR thus facilitating the task of the United Nations to play a constructive role in resolving internal conflicts. For instance, owing to the supervising role of the UN in domestic elections, the Security Council may now find it easier to determine the legitimate representative of a state.²²

¹⁹ Northedge (ed.) p. 102.

²⁰ Bull, Hedley (ed.): *Intervention in World Politics*, Oxford 1984, p. 164-165.

²¹ Northedge (ed.) p. 119-120.

²² Gray p. 52, 80, 82-83.

3.3 Means of intervention

There is a wide range of various acts which constitute intervention in internal conflict. Military involvement covers the most diverse activities from the deployment of combat troops to the building of logistical infrastructure. Logistics concern the ability of a state to supply materials and personnel on a regular basis during the whole duration of the struggle. This can prove to be a difficult task when the distance between the supplying state and the battlefield is considerable. The deployment of troops may be effectuated by sending small combat units for specific assignments instead of employing traditional large-scale operations. Air-incursion and naval military actions also qualify as direct combat involvement. Moreover, highly qualified military personnel is likely to be recruited from a foreign state's military staff. Training officers or troops in the donor state or in the state where the personnel is to be stationed is also a common feature of military involvement. Military assistance may include the selling or supplying of arms or the giving of financial support in order to purchase arms. In practice, states usually do not send armed troops to fight in the territory of another state but confine themselves to supplying arms to support one faction in a civil conflict. Fear of counter-measures by other states supporting the opposite side in the struggle is probably the main reason for pursuing this policy. However, states seem to be less hesitant to send troops in the event of foreign subversion. In addition to these rather apparent types of involvement one should also mention activities such as threats, demonstrations, shows of force, the allowing of access to one's territory for launching attacks on the territory of another state and the giving of transit facilities. Dunér classifies military involvement behaviour into three main types according to their closeness to the combat itself: combat involvement, para-combat involvement and supporting activities. These main categories are then subdivided into direct and indirect involvement leading to a scheme of six different types of interference.²³

²³ Dunér, Bertil: *Military involvement: The escalation of internal conflicts*, Stockholm 1980, p. 38-39, 46-47; Malanczuk (ed.) p. 324; Vertzberger p. 122.

4 Legal development of the principle of non-intervention

4.1 Pre-Charter development

During the period prior to the First World War the doctrines on the individual state's right to protect its interests in the international arena were extensive. Thus, several legal grounds for intervention existed; for instance, intervention on humanitarian grounds was considered lawful. However, as is the case today, many interventions that were engineered under the ostensible banner of human concerns appear to have been carried out on the basis of political motives. Latin America was the main target for intervention by many European states. In consequence of the European expansionist policy in Latin America, President Monroe made, in 1823, his famous announcement stating that all European states should stay out of Latin America. The doctrine, which was primarily a question of national security policy for the United States, was later to go under the name of the Monroe Doctrine. During the remainder of the 19th century and the beginning of the 20th, many doctrines established in Latin America came to further the development of the principle of non-intervention. In 1928, the Kellogg-Briand Pact²⁴ was signed declaring that all conflicts were to be resolved by peaceful means. In 1936, the United States finally agreed to sign, with the Latin American states, the Buenos Aires Protocol establishing the principle of non-intervention. Hence, a particular interamerican non-interventionist policy was set out.²⁵

4.2 Charter of the United Nations

The Charter of the United Nations is a codification of the conception of justice that had developed during the interwar period. Only condemning intervention in domestic affairs by the United Nations itself in Article 2(7), intervention by third states was not specifically mentioned in the Charter. The reason for this was the difficulty of determining the exact scope of what would be considered as intervention. However, the application of the principle of non-intervention to individual states can be deduced from other articles such as Article 1(2) stating the principle of equal rights and self-determination of peoples and Article 2(1) expressing the principle of the sovereign equality of member states. As a rule, however, the principle of

²⁴ The *General Treaty for Renunciation of War as an Instrument of National Policy* was signed in Paris by the American Secretary of State and the French Foreign Minister.

²⁵ Bring, Ove: *Aggression, självförsvaret och non-intervention – Tre studier i internationall rätt*, Uppsala 1982, p. 47-51.

non-intervention is generally held to be covered by the general Article 2(4) on the principle of the non-use of force in international relations.²⁶

However, the Charter is not a very effective instrument with regard to intervention as it merely deals with the issue in a limited way. First of all, only certain types of intervention are condemned, i.e., the use of force and the threat of force. As has been noted in Chapter 3.2, the open use of force against another state remains rather uncommon by comparison with the covert use of force. However, the general wording of the second part of the article seems to cover all possible uses of force that are not compatible with the aims of the United Nations. Hence, all forcible one-sided interventions must be considered to fall under the prohibition. However, the Charter only focuses on protecting the territorial integrity and political independence of a state. Accordingly, the principle of non-intervention in the Charter is relatively narrowly formulated and overlooks other ways for a state to impose its will on another state, for instance, by trying to change the composition of its government or to determine the outcome of an internal conflict. Furthermore, the article does not explicitly cover activities such as indirect intervention in the form of financial support to insurgent movements. However, such activities are likely to be incompatible with the aims of the United Nations, for instance the principles set forth in Articles 1(2) and 2(1).²⁷

The difficulty of applying the Charter provisions on intervention in internal conflict is not only due to the ambiguity of its wording but also to its content. The Charter was formulated with respect to problems arising out of conflicts between states. However, since the Second World War, we have been faced with another type of conflicts, opposing a legitimate government to an insurgent movement or a movement of national liberation supported by another state.²⁸

Rules prohibiting forcible intervention in civil conflict have subsequently been set forth in several General Assembly Resolutions elaborating on the UN Charter rules on the use of force. Already in 1949 the General Assembly declared, in its *Resolution 375 on The rights and Duties of States*, that every state had the duties to refrain from intervention in the internal or external affairs of another state and from fomenting civil strife in its territory as well as to prevent activities within its territory favouring civil strife.²⁹

4.3 GA Resolution 2131 (XX) on the Inadmissibility of Intervention in the Domestic

²⁶ Ramsbotham, Oliver; Woodhouse, Tom: *Humanitarian Intervention in Contemporary Conflict: a reconceptualization*, London 1996, p. 38-40; Bring (1982) p. 52.

²⁷ Bring (1982) p. 52-53; Bull (ed.) p. 20-21.

²⁸ Higgins, Rosalyn: *Problems and Process – International Law and how we use it*, Oxford 1995, p. 239.

²⁹ Gray p. 51.

Affairs of States and the Protection of Their Independence and Sovereignty (1965)

The issue of "The inadmissibility of intervention in the domestic affairs of states and the protection of their independence and sovereignty" was considered by the General Assembly at the request of the USSR. In its opinion, tension in the world had increased in the main due to the large number of acts of interference in the domestic affairs by third states, thereby undermining the political independence of the territorial state. The proponents of the USSR draft further argued that a declaration would be of vital importance to the smaller states which were not able to defend themselves against outside interference. The United States retorted by opposing the Chinese communist doctrine of intervention embodied in the so-called wars of national liberation. The United States further held that it would always stand up against such interventions in support of peoples' liberty to choose their own political policy. The United States' delegation further argued that covert intervention represents an even more serious threat to international peace and security than overt intervention does. In the second draft declaration, introduced by 18 Latin American states, attention was drawn to the various forms of indirect aggression. Namely, the organising and training of armed bands as well as arms supply. The third draft declaration, introduced by several African and Middle Eastern states, stressed the importance of the respect for the right of self-determination and the struggle against neo-colonialism for newly independent states. It was also held that no excuse should be acceptable for states intervening against liberation movements. The fourth draft declaration, later adopted by the General Assembly on 21 December 1965, by a vote of 109 to none with one abstention, was introduced by Peru and Mali and eventually sponsored by another 55 states.³⁰

In spite of the general agreement, several states expressed reservations on the ground that the instrument was vague and imprecise and substantially based on political considerations rather than on juridical analysis. It is important to note that the deliberations took place during the period of decolonisation when many states were concerned about the newly independent states' right to develop their political organisation without external interference. In consequence, there was much discussion about indirect forms of subversion which is also reflected in the final text.³¹ The first and second paragraphs declare that:

"No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the

³⁰ 1965 UNYB, p. 87-93.

³¹ 1965 UNYB p. 93; Doswald-Beck, Louise: *The legal validity of military intervention by invitation of the government*, The British Year Book of International Law, Vol. 56, 1985, p. 209.

personality of the State or against its political, economic and cultural elements are condemned.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.”

4.4 GA Resolution 2625 (XXV) on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970)

A principle of non-intervention, which is much broader in scope than Article 2(4), has developed through state practice and interpretations of the Charter provisions. The Declaration on Friendly Relations (hereinafter the FRD), passed unanimously by the General Assembly in 1970, constitutes an interpretation and confirmation of the explicit and implicit legal principles of the Charter. The formulation of the principle of non-intervention in the Declaration covers explicitly indirect intervention as well as non-armed interventionist acts destined against the political, economic and cultural elements of a state. The Declaration is the result of the examination of existing Charter norms undertaken by the Special Committee between 1964 and 1970. In spite of the many years of negotiations, state practice has shown that the Declaration is open to various divergent interpretations. For instance, some states read in an implicit exception to the duty not to intervene as regards national liberation movements. The decision by the Committee to work on the basis of unanimity was motivated by the conviction that any other approach would prove inadequate in order to achieve a useful document. In spite of the general wording of the Declaration the instrument is of great importance as it represents a clarification of what was believed by the member states to be the Charter law at that time. As regards the binding force of the instrument there has been some disagreement among the member states. However, it is generally believed that the instrument is more of a legal set of binding rules than a mere recommendation.³²

Following the long preamble the prohibition of the threat or use of force is examined. In its eighth and ninth paragraphs the important role of indirect force in the post-war era is recognised. The paragraphs read as follows:

³² Bring (1982) p. 54; Rosenstock, Robert: *The Declaration of Principles of International Law concerning Friendly Relations: A Survey*, A.J.I.L., Vol. 65, 1971, p. 713-714; Bull (ed.) p. 38.

”Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”

The draft resolutions of the delegates concerning the principle of non-intervention differed both in scope and profundity. The Socialist and uncommitted countries proposed a catalogue of specific empirically based examples of prohibited interventions. Thus, the Yugoslav and the Mexican drafts both proposed a set of various acts amounting to legally impermissible interventions. In contrast to those detailed proposals, the United Kingdom draft was abstract, general and modest in character. Western delegations argued that interaction and attempts to influence the actions and policies of other states are inevitable features of an interdependent world. Thus, the role of international law should not be to prevent such activities, but to ensure that they are not in conflict with principles of international law such as the principle of self-determination. Accordingly, an exhaustive enumeration of acts of unlawful intervention would not only be inexpedient, but would also make the definition of competing principles problematic. Against this view was pointed out the importance of the principle of non-intervention as a complement to the principle of self-determination for post-colonial countries. The proponents of a wide range of enumerated, detailed acts of unlawful intervention also wanted to establish a category of legally permissible interventions. According to this point of view, an act of intervention would be lawful if it was undertaken in order to defend a higher right, for instance, the right of self-determination. The opponents of this opinion held that in setting up a category of lawful interventions states would automatically try to extend the area of permissible acts.³³

The principle of non-intervention was included in the Declaration principally at the insistence of Eastern Europe and Latin American states. As has been showed in the previous paragraph, there was profound disagreement on the elaboration of the text concerning the principle. Thus, from 1966 until 1970 there was virtually no debate on non-intervention. At first, the United States was even unwilling to recognise that the prohibition of intervention by individual states was included in the Charter at all, arguing that the only principle of non-intervention found in the Charter was Article 2(7), which merely concerns intervention by the United Nations. This position was later abandoned. The view of the Soviet delegation was criticised for not taking into account the growing importance of intervention by the indirect use of force. A compromise text, covering the indirect use of force, was established by the Latin American, African and Asian states and

³³ McWhinney, Edward: *The "new" countries and the "new" international law: the United Nations' special Conference on Friendly Relations and Co-operation among States*, A.J.I.L., Vol. 60, 1966, p. 21-24.

resulted in the adoption in 1965 of GA Resolution 2131. The text of the Resolution was drawn directly from the draft of the Committee on the prohibition of the use of force. However, the Western states did not accept Resolution 2131 as a final statement on the principle of non-intervention. They argued that the Resolution was too broadly worded and that the Committee should be free to elaborate and clarify the wording of it. A draft statement, with the aim of providing a juridical framework based on Resolution 2131, was thus elaborated. However, also this formulation was criticised for only focusing on armed force, not taking into consideration economic and political pressures amounting to a level where the political independence of a state is threatened. The adoption of Resolution 2131 enabled states which did not want the Committee to consider the principle of non-intervention to introduce a procedural resolution by which the Committee was to abide by Resolution 2131. The controversy among the different groups of delegations was so profound that serious consideration was given to exclude the principle from the Declaration.³⁴ The final solution is sweeping in scope and reads as follows:

”The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.”

4.5 GA Resolution 3314 (XXIX) on the Definition of Aggression (1974)

The Definition of Aggression, adopted by consensus on 14 December 1974, was the final product of the seven years long endeavours of the Fourth Special Committee established by the Assembly in 1967. For the Definition to be adopted by consensus a series of delicate compromises on numerous

³⁴ Rosenstock p. 720, 726-729; Houben, Piet-Hein: *Principles of international law concerning Friendly Relations and Co-operation among States*, A.J.I.L., Vol. 61, 1967, p. 716-718.

questions had to be made. In consequence, it has been largely criticised for remaining silent on controversial issues as well as for building into itself the prevailing conflicts of interpretation. The Definition is limited to armed aggression, thus excluding any form of economic and ideological aggression from its application. These forms of aggression were said to fall outside the scope of the term "aggression" in the Charter. The relevant provisions are subparagraphs (e), (f) and (g) of Article 3 in the Definition. These paragraphs read as follows:

"Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

In subparagraph (e) military bases on foreign territory are dealt with. The provision should be understood in the light of the post-World War II practice of granting the right to station forces in the territory of an ally. The opposition during the debates merely concerned the illogical place of the provision in the Definition of Aggression since armed force was rarely being used in these cases. Paragraph (f) indicates two guilty parties. First, the state that allows its territory to be used for acts of aggression by another state and, second, the state actually undertaking those acts from the territory of the first-mentioned state. However, the provision merely holds the state which places its territory at the disposal of another state responsible while it remains silent as to the responsibility of the acting state. The provision further presupposes awareness by the territorial state of the prohibited acts on its territory. However, the text does not indicate whether the territorial state would be excused if it proved that it had applied all possible means in order to prevent the commission of the unlawful acts. The state, which assists the aggressor state by allowing territorial access, actually commits an act of indirect aggression. The main concern of subparagraph (f) is to confirm the illegal character of such acts and to show that they are as severely condemned as the principal act of aggression.

On numerous occasions, states have resorted to force vicariously or claimed that the persons acting were volunteers and thus not part of the state's regular armed forces. The need for a clarification of the controversial question of state responsibility for indirect aggression was thus of vital importance. However, the members of the Special Committee differed about the inclusion of such a provision. Some members argued that the Definition would lose much of its value if a provision on the indirect use of force was not inserted. When the opponents later shifted position the first step was

taken towards an overall acceptance. Nevertheless, various difficulties remained to be solved. For instance, subparagraph (g) does not deal with small-scale acts of individuals. On the contrary, it speaks of armed bands and groups whose acts amount to acts of aggression. This wording also has another implication, namely that the provision shall not be construed as enlarging the permissive area of legitimate self-defence. Thus, the acts committed by any of the actors mentioned in subparagraph (g) must amount to the gravity of the acts enumerated in Article 3 (a-f) to legitimise an act of self-defence. Accordingly, acts of terrorism or subversion do not normally amount to the gravity of an act of aggression and consequently do not legitimise an act of armed force in self-defence. Two main types of aggression are covered by the provision. First, when the armed forces are being sent by or on behalf of the state the state is entirely responsible. Secondly, in the case of difficulties in the determination of the state responsibility, the act is likely to fall within the wording "*or its substantial involvement therein*". Moreover, there was profound disagreement as to the range of prohibited activities covered by the provision. Some states wanted to extend it both in terms of acts and perpetrators whereas others wanted to remove the last part of the paragraph. The final words of the paragraph led to even greater confusion with respect to the question of whether a state could be held responsible for other acts than the sending of armed forces.

States further engaged in an extensive debate on the relation of paragraph (g) to the right of peoples forcibly deprived of the right to self-determination to struggle to that end and to seek and receive support embodied in Article 7 of the Definition. Some states wanted to ensure that the liberty to engage in a struggle for self-determination overrides the duty not to send armed bands in accordance with Article 3(g). The exception of the whole of Article 3, and not only paragraph (g), in Article 7, implies that, on the condition that "struggle" and "support" are interpreted as allowing the resort to the use of force, all the acts enumerated in Article 3 would be licensed. Accordingly, the resort to force by guerrilla and resistance movements in their struggle for self-determination, or the armed support by third states, would not be considered to constitute an act of aggression provided that the cause of the struggle is lawful and just. The conflict of interpretation is now substantially focused on the word "struggle" in Article 7. The final version of subparagraph (g) generally met with acceptance and was said to be an important landmark.³⁵

³⁵ Broms, Bengt: *The Definition of Aggression*, Recueil des Cours de l'Académie de Droit International, Tome 154, 1977, p. 352-354, 365-366, 386-387; Stone, Julius: *Hopes and loopholes in the 1974 Definition of Aggression*, A.J.I.L., Vol. 71, 1977, p. 225, 237-239; Rifaat, Ahmed M.: *International Aggression – A study of the Legal Concept: Its development and Definition in International Law*, Stockholm 1979, p. 273-274.

4.6 Subsequent legal instruments

At the Conference on Security and Co-operation in Europe, in Helsinki in 1975, a catalogue of principles, the *Helsinki Final Act*, was elaborated. There has been some controversy as regards the binding nature of the document. Regardless of its legal character, the Declaration of Principles guiding the relations between participating states remains an important instrument since it constitutes the expression of consensus by thirty-five member states of the international community. The principle of non-intervention, contained in principle 6 of the Declaration, was extensively formulated. The debate at the following conferences in Belgrade and Madrid came to deal with the relation between the principle of non-intervention and the seventh principle on human rights. Eastern states took the view that the principle of non-intervention predominates over the principle of the protection of human rights. Consequently, they held that the criticism from the Western states, that the Eastern faction was not fulfilling its obligations in this respect, constituted an illegal interference in the domestic affairs of the states in question. The Western faction maintained that concerns for human rights could not be considered an issue falling exclusively under the internal jurisdiction of a state and hence that debates over human rights issues never could be regarded as an illegal interference.³⁶

Numerous resolutions on the topic of intervention have been adopted by the General Assembly since Resolution 2131 and the FRD. For instance, in *Resolution 36/103 on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, of 9 December 1981, the General Assembly recalls Resolution 2131 and expresses its concerns at the serious threat to international peace and security that any form of interference or intervention, direct or indirect, overt or covert, represents. The resolution, which was adopted by a vote of 120-22-6, does not refer specifically to the interference in civil strife but points out the prohibition of encouraging or tolerating activities aimed at the overthrow of the government. However, Resolution 36/103 has limited value because of the large number of developed Western states voting against it.³⁷

In Resolution 40/9, of 8 November 1985, the General Assembly addresses a solemn appeal to Member States to solve conflicts by peaceful means, to refrain from the threat or use of force and to abstain from any act of intervention.

Resolution 42/22 on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, of 18 November 1987, reiterates several of the principles contained in Resolution 2131. Accordingly, states are reminded of their obligation to refrain from

³⁶ Bring (1982) p. 54-57; Cassese, Antonio (ed.): *The Current Legal Regulation of the Use of Force*, Dordrecht 1986, p. 423.

³⁷ Doswald-Beck p. 211-212.

interfering in civil strife in another State. The General Assembly further reaffirms the duty of states not to use or encourage any form of coercion against the territorial integrity or political independence of another State. Moreover, states are reminded of the right of all peoples to freely determine their political status and to pursue their economic, social and cultural development without external interference. Moreover, Resolution 42/22 recalls the duty of states to refrain from propaganda for wars of aggression.

5 Main justifications for intervention

The traditional classical international law requires third states to remain neutral with each of the warring parties once the insurgent movement has reached the standing of belligerents. By belligerents is usually meant that the movement has effective control over extensive parts of the territory in question and that it appears as an organised fighting unit. However, the law seems to be perceived differently today. Governments will often ask for external help to fight a group of insurgents with reference to the principle of the legitimate government's right to ask for support. On the other hand, the insurgent movement will ask for support arguing that they are engaged in a war of national liberation or that their struggle is legitimate because of an undemocratic government. Furthermore, it is likely to ask for help referring to the recognition of the insurgent movement as the legitimate government of a part of the territory or to governmental violations of human rights. Most of the attitudes that a foreign state can adopt to meet these requests speak in favour of helping the established authorities and not the insurgent movement. States may argue that the domestic unrest has not yet reached the level of insurgency and hence that the rules on neutrality are not applicable. Furthermore, it is generally held that arms can be legally sold to the established authorities as long as belligerency has not been recognised.³⁸

In the UN system states systematically try to circumvent the Charter prohibition of the use of force and the principle of non-intervention. Thus, states make use of various expedients to justify their interventions. For instance, by trying to expand the scope of article 51 of the Charter by various interpretations or by invoking other exceptions, for instance the consent of the injured state allegedly precluding the wrongfulness of the use of force in domestic matters. Moreover, intervention is likely to be motivated by a combination of various economic and military-strategic state interest and legal justifications. This circumstance makes the interpretation of state behaviour even more difficult. States also intervene to protect political, religious and ethnic groups or for ideological reasons.³⁹ In the present chapter we will examine the two main justifications invoked by intervening states in order to determine their legal tenability. Namely, the justifications of consent and collective self-defence.

³⁸ Bull (ed.) p. 40-41.

³⁹ Vertzberger p. 115.

5.1 Justification: Intervention with the consent of the incumbent government

5.1.1 State practice and scholarly views on consent as a legitimising circumstance for intervention

5.1.1.1 Inconsistent state practice and divided scholarly views

Although not explicitly mentioned in the Charter, the principle that use of force in the territory of another state is justified with the consent of the latter, was generally accepted by the delegates at the San Francisco Conference in 1945. Thus, the right of a state to invite help from another state, in fighting for instance a civil war, was taken for granted. The principle of consent was well established in the international community and therefore not explicitly sanctioned in the Charter. Nevertheless, this principle was to conflict with other principles set forth explicitly in the Charter, for instance the principle of self-determination. The principle of consent is usually invoked when a state, ravaged by a civil war, and a third state both consider that only external armed military support can help to put an end to the domestic conflict. The current view on intervention with consent of the territorial state is that there must not be any doubts as to the voluntary character of the giving of consent by the lawful government. Furthermore, it must not suppress the right to self-determination of the people of the territory and must not violate human rights or entail such violations. Moreover, it must not constitute interference in the domestic affairs of the territorial state.⁴⁰

The issue of consent merits close examination since it is the only possible justification for intervention by third states if the Security Council has not given its authorisation. There have always been divided opinions among scholars as to the legality of intervention by invitation. The question as to whether it is to the legitimate or the effective government that the right to express consent should be assigned has been commonly debated. General consensus concerning this question has not yet been reached in the doctrine. Brownlie maintains, however, that the scholarly doctrine as well as state practice seem to indicate that foreign intervention on behalf of the legitimate government is lawful. The principle that aid given to the legitimate government is permissible is further held to exist in customary law. When there is no organised movement against the legitimate government or when the opposition movement merely opposes a part of the government's policy, foreign support to the government is always assumed to be legal. However, Brownlie admits that third state interference runs the risk of increasing chaos which involves an even greater threat to international peace. The

⁴⁰ Cassese, Antonio: *Violence and Law in the Modern Age*, Cambridge 1988, p. 32-33, 37, 41.

diversity of state practice has not been of much help. During the Cold War states divided on political lines as to the determination of the lawful government, whether there had been an invitation and whether the latter had been freely given. The debates about intervention by invitation in the Security Council and the General Assembly have substantially been a matter of determining whether the invitation was the actual reason for the intervention. Although state practice has not always been uniform, states have always been conscient of the risks of such a right, namely, the eventual violation of the right to self-determination, the prohibition of the use of force and the principle of non-intervention and, in particular, the risk of abuse.⁴¹

At the end of the era of decolonisation France concluded defence treaties with most of its former colonies. Practice shows that the conflicts, in which France has intervened at the invitation of various African governments, have been purely domestic conflicts. France has not invoked that its treaty-based right to intervene is unlimited but that the principle of non-intervention applies simultaneously. Thus, France has maintained that it would not intervene against a widespread popular uprising. However, practice shows that France has intervened on numerous occasions against military coups. Among African states an extensive practice of intervention by invitation has been established. It is argued that this is partly due to the structural weakness of many African states. Although preference has been expressed for UN-authorized interventions, bilateral and subregional military aid still prevails. In general, foreign intervention against military coups and secessionist movements has not been largely criticised. On the other hand, intervention against popular uprisings and political conflicts over the control of the government has given rise to opposition. During the Cold War the super Power practice of invoking the alleged invitation by foreign governments was regarded with suspicion because of the numerous cases of abuse. However, the legal validity of intervention at the invitation by a government was never called into question. Since the days of the Cold War the pattern of conflict has changed. Instead of the typical Cold War types of internationalised internal conflicts by proxy, the instances of intervention today cover a multiplicity of various ethnic and secessionist claims.⁴²

5.1.1.2 The controversies

5.1.1.2.1 Discretionary recognition of the legitimacy of the incumbent government

⁴¹ Nolte, Georg: Eingreifen auf Einladung – Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung, Berlin 1999, p. 629-630; Gray p. 72; Brownlie, Ian: International Law and the Use of Force by States, Oxford 1963, p. 321-323, 327.

⁴² Nolte p. 631, 633-639.

Giving help to the established authorities has often been considered legal. An argument in favour of the right of a government to invite outside help is that interference is only prohibited in its dictatorial form. Since intervention by invitation has no character of one state imposing its will on another, it cannot be in contravention of international law. Another argument put forward in favour of the right of intervention upon demand is the role of the government as the agent of the state authorising it to seek foreign help as long as it is not overthrown. However, this traditional view is open to an objection as to the actual representative competence of a government whose authority is called into question by an internal uprising. Moreover, if the insurgency involves a claim to secession the uncertain status of the territory in question suspends the right of the established authorities to seek foreign assistance. Bowett sharply criticises invitation as a legal ground for legitimising intervention. His main objection to the doctrine is the subjectivity of the recognition of the legitimate government by third states.⁴³

5.1.1.2.2 Discretionary determination of the level of insurgency

It is generally believed that third states only have the right to give support to the established authorities as long as the level of the domestic conflict does not amount to insurgency. A demand for external help from a government faced with a situation of insurgency is an indication that the government no longer has any effective power. Consequently, the government is no longer considered the legal representative of the state. However, this doctrine is open to doubts as to the subjectivity of the determination of the degree of the domestic unrest. Bowett does not adhere to this traditional doctrine of distinction between rebellion and insurgency. The main argument for such a rejection is that the determination of the level of insurgency is entirely discretionary in the hands of the intervening state. Accordingly, states will be willing to recognise a situation of insurgency in a state whose regime they would like to see overthrown. On the other hand, states will be reluctant to acknowledge the gravity of an internal conflict in other states and hence deny their interventionist behaviour.⁴⁴

5.1.1.2.3 Conflict with the right to internal self-determination

Bowett further argues that the doctrine of consent conflicts with the principle of self-determination of peoples. External interference in a domestic struggle for governmental power is likely to influence the outcome of the civil strife and the people would thus be prevented from determining its own political future. All forms of assistance, which have a potential impact on the outcome of an internal conflict, would therefore be prohibited.

⁴³ Doswald-Beck p. 191; Malanczuk (ed.) p. 322-324; Norton Moore, John (ed.): *Law and Civil War in the Modern World*, Baltimore 1974, p. 42.

⁴⁴ Piguet, Christophe: *La guerre civile en droit international*, Lausanne 1982, p. 40; Norton Moore (ed.) p. 41.

However, state practice shows that the main emphasis of the right of self-determination is rather on preserving the unity and independence of the state than on promoting the free will of the people. Consequently, if a government asks for external help to fight a secessionist movement, such an aid would only be in conflict with the right to self-determination if the people wishing to secede was recognised as being entitled to self-determination. Moreover, the right to self-determination is not to be interpreted as the right to democratic government. Thus, the people is not considered to be deprived of their right to self-determination if the government has taken power through a military coup, provided that the people entitled to self-determination is represented in the government. Claims by intervening states justifying their intervention as an attempt at establishing democratic rule in a foreign state have met with opposition. The opponents have argued that it is the mere outside interference that constitutes a violation of the principle of self-determination, not the lack of democratic rule in the territorial state.⁴⁵

5.1.2 Consent in the light of the Definition of Aggression and ILC:s Draft Articles on State Responsibility

5.1.2.1 The Definition of Aggression Article 3(e)

Foreign armed intervention has frequently been employed to maintain a government in power. The justification for the involvement in the domestic affairs of another state has been to restore domestic order. During the Cold War many governments were maintained merely because of financial or material support from the super Powers and other states who wanted to maintain their influence. Armed intervention at the invitation of a government has generally been considered a legal means to maintain domestic order or to protect the government against army mutiny if the local unrest does not amount to a civil war.⁴⁶ This right has been concluded from Article 3(e) of the *Definition of Aggression*, which states that as an act of aggression shall be qualified:

”The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement”.

The right of a state to send troops to another state, with the consent of the latter, is thus only negatively recognised in Article 3(e). Doswald-Beck argues that the sending of troops to another state is legal provided that the operations undertaken on the foreign territory are of limited character. As limited operations would be categorised the sending of help to deal with certain minor disturbances and the employment of peace-keeping forces

⁴⁵ Norton Moore (ed.) p. 42; Doswald-Beck p. 202-207.

⁴⁶ Gray p. 60-63.

provided that they do not interfere in internal affairs or try to change the political structure of the territorial state.⁴⁷

5.1.2.2 ILC:s Draft Articles on State Responsibility Article 29

Consent expressed by the territorial state can take the form of an ad hoc invitation or be included in a previous agreement between the two states. According to Article 29 of the *ILC:s Draft Articles on International Responsibility of States* (1980), is consent one of the circumstances precluding the wrongfulness of an otherwise prohibited act.⁴⁸ The article reads as follows:

- ”1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.
2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present draft articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

According to paragraph 1, consent must thus be valid and given, prior to the unlawful act, by a legitimate authority representing the state. Furthermore, the action must be undertaken within the limits of the given consent. Paragraph 2 adds an important exception to the right set forth in paragraph 1. Accordingly, actions that violate a peremptory norm remain unlawful in spite of consent given by the injured state. The characteristic features of a peremptory norm according to paragraph 2 are identical to the ones stated in Article 53 of the *Vienna Convention on the Law of Treaties* (1969). A peremptory rule is thus generally binding and the international community must be convinced both of its binding nature and of its inderogability.⁴⁹

In the opinion of Tanca, armed intervention presents two separate elements being the objects of different rules of international law; the actual act of intervention and the use of armed force. The legal validity of consent should therefore be examined separately in relation to each of these rules. Consent with respect to intervention is generally accepted both in literature and in state practice. Some authors even go so far as to argue that in case of consent there cannot be any intervention at all as the element of coercion is absent. Consent, with respect to the prohibition of the use of force, is generally considered to preclude the wrongfulness of the forcible act. However, this thesis is only tenable if the sole purpose of the prohibition is to protect individual states against armed coercion from other states. On the other hand, if one considers that the prohibition also covers the purpose of

⁴⁷ Doswald-Beck p. 189.

⁴⁸ Tanca p. 13.

⁴⁹ Cassese (ed.) (1986) p. 148-149.

preserving world peace, one might come to a different conclusion. Such a duty not to resort to force would then exist vis-à-vis the whole international community and not only against the contracting state. Consequently, provided that the prohibition of the use of force is an obligation erga omnes, consent cannot preclude the wrongfulness of the intervention since consent only applies to the relation between the two contracting states. Accordingly, for the action to be lawful, the acting state would need the consent of the whole international community, preferably through an authorisation by an United Nations organ. Nevertheless, if one considers that the content of the prohibition to use force merely concerns force used against another state, consent of the target state would suffice to make the action lawful. This latter view is supported by Tanca who also points out the consensus in state practice as regards the right to give foreign support on the basis of consent by the territorial state.⁵⁰

According to Ronzitti, the use of force in a foreign state may involve the breach of two rules: the principle of the non-use of force in international relations and the principle of self-determination. The latter principle is likely to be infringed when a foreign state attempts to influence the composition of the government of another state, in this way preventing the local population from choosing their own political leaders, or when it tries to subordinate the population to its own interests. The ban on the use of force has been listed on numerous occasions as a peremptory rule of international law. It is uncertain whether the principle of self-determination meets all the conditions in order to attain the status of a peremptory norm. However, in practice, the ineffectiveness of consent is not so often due to the violation of a peremptory norm as to the invalidity of consent itself. For instance, the government expressing consent may not be recognised as the representative authority of the state. In some cases, states abuse the given consent to justify long term operations during a civil war or to justify their continued presence by invoking a so called *ex post facto* consent. This justification will be further examined in the next chapter.⁵¹

5.1.2.3 Ex post facto consent

To constitute a factor precluding the wrongfulness of the use of force, consent must be given prior to the commission of the unlawful act. In cases of *ex post facto* consent, the authority that has seized power as a result of the unlawful intervention subsequently consents to the intervention or to the continued presence of the foreign troops in the country. In some cases, it is the intervening state that appoints the subsequent political leader as, for instance, in the 1979 Soviet invasion of Afghanistan. In this case the subsequent consent by the newly set up government did not cancel out the illegality of the intervention. Even if the new government had been considered the legitimate representative of Afghanistan, the consent would

⁵⁰ Tanca p. 17-20, 47.

⁵¹ Cassese (ed.) (1986) p. 149-152.

have been invalid. In other cases, the foreign intervention enables a new local government to take power. Foreign forces often collaborate with local movements of national liberation to overthrow the existing regime or to justify their continued presence in the country. Those were the cases in the 1978 invasion of Kampuchea by Vietnam and the invasion of Uganda by Tanzania in 1979.⁵²

5.1.3 Determining the legitimacy of the authority expressing consent. Effective control and popular support.

If one recognises the right of a government to invite foreign help, the question still remains to identify the authority of the state entitled to express this request. Two fundamentally divergent opinions can be distinguished as regards the determination of the legitimate government. The first one consists in considering the government legitimate owing to its *de facto* control. In this case, the illegitimacy of its origin has no importance. The other criterion in determining the legitimate government is to examine whether it has popular approval. In order to consider that a government has *de facto* control, the territory must be under governmental control without any foreign support. If the government needs help to quell an insurrection it is not in *de facto* control and thus not legally entitled to invite foreign help. The sole circumstance that a government finds it necessary to call in foreign help shows that the outcome of the conflict would be uncertain without it and, thus, that the identity of the governmental representative is unclear. In other words, the government ceases to be a free agent since its security depends on foreign help. Matters of internal law, such as the determination of the legitimate government, thus become dependent on international military force. In state practice the most important criterion is the existence of *de facto* control. This policy also helps states to avoid delicate standpoints on the formal recognition of unpopular regimes. A premature recognition of a new government can amount to an abuse of the principle of consent when the recognition is made as a pretext for assisting the insurgents. However, this problem has already been partly resolved by the legitimacy which is accorded to a regime by the membership of the state in the UN. State practice shows that in spite of a government's loss of control, it usually continues to be recognised by other states and also often acts on the behalf of the state until a new regime is *de facto* in control of the territory.⁵³

It has been argued that a freely and fairly elected government may still preserve its status for the purpose of inviting outside help even if it has lost all effective control over the territory. Already during the Cold War a doctrine of legitimacy of the government, that went beyond the effective control, existed. Thus, the apartheid government of South Africa was prevented from seeking foreign support in the light of the principle of self-determination. Although there is a tendency of privileging the requests by

⁵² Cassese (ed.) (1986) p. 160-163.

⁵³ Doswald-Beck p. 192-199; Brownlie p. 323; Malanczuk (ed.) p. 322-323.

democratic governments, threatened by a military coup or a secessionist movement, the practice has not yet gone so far as to make invitations by unrepresentative governments invalid. During the last decade the idea that the legitimacy of a government should be of vital importance in the determination of the legality of an intervention has gained much force. Thus, governments, which practice genocide and other acts in violation of fundamental human rights, are prohibited, by the principle of self-determination and by the general law of human rights, from seeking foreign help. The interventions in Sri Lanka and Lebanon (1987-90 and 1976-1990) have showed that the legitimacy of the government is an important factor in the determination of the permissibility of the intervention by foreign states.⁵⁴

Tanca distinguishes between two different categories of intervention where consent is invoked as a justification. The first category includes cases where there is an incumbent government with high effectiveness facing an internal rebellion; the second category covers the cases where there are several clearly separated factions in an internal conflict. As regards the first category, there is general agreement among states as to the lawfulness of invitation. Many of the interventions belonging to this category took place before 1970 and usually involved a former colonial or protecting power. Cases falling under the second category have frequently been criticised when the consent has been given by an entity whose authority was not entirely established due to a lack of effective control over the territory. The alleged purpose of the interventions has also been called into question; states have submitted that the real purpose of the interventions was to take sides in the internal conflict. In the case of the Cuban intervention in Angola in 1976, consent was given by the MPLA, which controlled only twenty per cent of the territory. The meanings were deeply divided as to the lawfulness of the Cuban involvement which played a major role in the subsequent conquest of the rest of the Angolan territory by the MPLA. The states that had previously recognised the MPLA government supported the Cuban intervention in order to defend Angola against South African aggression. However, they did not contend a right to defeat the other internal factions. In general, states seem reluctant to rely exclusively on consent in cases of clear-cut internal unrest.⁵⁵

Tanca concludes that, at present, there seems to be no alternative criterion to effectiveness in determining the legitimacy of an authority. Neither historic rights nor constitutional democratic rights are generally accepted. Thus, Tanca takes the opposite view to Doswald-Beck who asserts that the legal representative of a state could be another entity than the regime in power provided that it is perceived as more truly representing the state. Tanca rejects this view on the ground that the legal personality of a state would thus be dependent on the recognition policy of other countries. Recognition by third states is not a solid basis for determining the legitimate government

⁵⁴ Nolte p. 631, 633, 636-639.

⁵⁵ Tanca p. 26, 30-31, 35, 48.

since each state grants recognition according to its own subjective, political interests. A government that is propped up and kept in power by a foreign state should be denied recognition in virtue of its lack of effectiveness and not because of its unpopularity. If a government lacks effective authority exclusively because of foreign subversion it may still request foreign aid. The external influence must be proved and must amount to the level where the internal rebellion would not have taken place without its encouragement, direction and financial support. In this case, the effectiveness of the government, and thus the legal ability to invite foreign help, is presumed. In all those cases of intervention, the principle of internal self-determination is likely to be violated when the aim of the intervention is to keep the government in power against the will of the people. The absolute right of the government to request foreign assistance has been undermined by the increasing importance of this principle.⁵⁶

5.2 Justification: Intervention in collective self-defence and counter-intervention

5.2.1 Collective self-defence

5.2.1.1 Collective self-defence as a legal justification and its applicability in internal conflicts

Self-defence has been invoked as a justification in almost all cases of armed intervention over the last thirty years. Although the concept of collective self-defence is not always explicitly invoked as a justification for armed intervention, most cases of armed intervention involve claims to help the threatened state. Some authors argue that, in addition to the condition of consent by the territorial government, a prior intervention in favour of the insurgents is necessary in order to justify an intervention. Accordingly, Gray maintains that even in the case of a request to intervene by the threatened government, it has come to be considered illegitimate to intervene in an internal conflict. Only when there has been, in addition to the invitation by the government, intervention on the behalf of the insurgents may such intervention be justifiable. This exception to the principle of non-

⁵⁶ Tanca p. 24-25, 35-36, 49-50; Doswald-Beck p. 243.

intervention is probably the most established justification but at the same time the most frequently abused. States being the target of intervention on this ground often deny the existence of an invitation or reject the claim that there has been prior foreign subversion. These were the cases in Czechoslovakia (1968) and Afghanistan (1979) where the USSR used forcible intervention in an attempt to overthrow the governments. The outside intervention in the case of Czechoslovakia was explained in the words of the Brezhnev doctrine of limited sovereignty for socialist bloc states. Accordingly, the move away from the one-party rule in Czechoslovakia was said to be the result of foreign subversion, thus legitimising a forcible response by the USSR in collective self-defence. Gray further notes that states seem to have justified their interventions sometimes as acts of collective self-defence under Article 51 of the Charter and, at times, merely as legitimate responses to a prior outside intervention. In examining governmental statements since 1956, Doswald-Beck comes to the same conclusion as Gray; namely that justifications for intervention always seem to include the argument that external help has previously been given to the insurgents.⁵⁷

The legal provision of self-defence in Article 51 of the United Nations Charter only becomes relevant in case of a breach of the prohibition of the use of force in international relations set forth in Article 2(4) of the Charter. In order for the principle of self-defence to be applicable to internal conflicts, the conflict must take on an international dimension. This is the case when a third state intervenes in the domestic conflict or when the established government crosses the borders of a neighbouring state in order to fight an internal uprising.⁵⁸

5.2.1.2 Scholarly opinions on the concept of collective self-defence

The controversial concept of collective self-defence, which permits a third state to intervene in favour of another state under attack, is the subject of divergent interpretations. Basically, there are four possible interpretations. The widest interpretation gives any state the right to intervene in favour of any other state where an armed attack has occurred. Some authors propound the theory that the target state must have consented to the collective action, whereas others argue that a previously concluded defence treaty is necessary for the intervention to be lawful. Finally, some authors interpret the principle as being exclusively applicable in the event of an attack on the intervening state itself, in addition to the attack on the principle victim state. In any event, an act of self-defence must meet the requirements of necessity, imputability and proportionality to be regarded as lawful.⁵⁹

⁵⁷ Gray p. 66-67; Doswald-Beck p. 213.

⁵⁸ Tanca p. 51-52, 84.

⁵⁹ Tanca p. 56-57.

Tanca argues that collective self-defence implies a more extensive right than individual self-defence. In the event of several states being threatened at the same time, defensive reactions would merely be concerted exercise of the right of individual self-defence. In consequence, the concept of collective self-defence must include a right of a third state, which is not itself threatened, to use force to help another state in exercising its right to individual self-defence. Accordingly, Tanca rejects the view that an intervening state must be threatened itself to allow it to undertake any action in collective self-defence. In adopting such a view the whole concept of collective self-defence would be deprived of any useful function.⁶⁰

Bowett represents a very restrictive minority view of self-defence. He argues that only in the case of an armed attack against one state, which also constitutes a threat to the security of a third state, may this latter intervene in self-defence. It is important to note that, in this case, the measures undertaken by the states whose security is threatened should be categorised as acts of collective self-defence against the aggressor state and not as based on any right of intervention. To consider that the right to collective self-defence applies whenever a third state considers it necessary to intervene, would take away all meaning from the principle of non-intervention. Moreover, such a position cannot be compatible with the system of collective security where the Security Council's has the primary responsibility for the maintenance of peace and security. In subscribing to such a view, we approach the nineteenth-century doctrine of self-help to a state's allies. Bowett further argues that this misconception stems from the confusion of the terms collective self-defence and collective security. It is only when the security of the state itself is threatened that it may intervene. Otherwise, it has the same general interest in maintaining international peace as all other members of the international community. Nevertheless, this does not give him a right to undertake any unilateral forcible action.⁶¹

Tanca admits that it is difficult to reconcile a right of third states to forcible intervention, at the mere request of the state under attack, in a system whose main objective is to limit the individual use of force to the greatest extent possible. He further points out that if the prohibition of the use of force is perceived as an obligation *erga omnes*, the violation of the rule would constitute an infringement of the legal interests of the international community and thus serve as a legal basis for intervention by any third state, regardless of the Charter provision. However, the request for help by the victim state would be a necessary condition for the *erga omnes* rule to be considered violated. In the absence of such a request, there is no ground for collective self-defence and any third state must abstain from intervening. This view is also reflected in state practice where individual states always claim the existence of a demand from the victim state when the threat against themselves is not serious enough to confer upon them the right to

⁶⁰ Tanca p. 84-85.

⁶¹ Norton Moore (ed.) p. 39, 46-49.

exercise individual self-defence. State practice shows that in no cases have the intervening states claimed a right to intervene without the previous demand by the victim state. This view was also upheld by the ICJ in the Nicaragua case.⁶²

5.2.1.3 External involvement justifying a self-defensive reaction

According to Tanca, there are five different types of external involvement against which states frequently invoke collective self-defence to justify their interventions. The external involvement ranges from overt, full-scale intervention to various covert means of coercive influence.⁶³

The first category deals with cases of direct intervention by a third state for the benefit of the insurgents. Such an intervention is twofold illegal as it violates, not only the prohibition against the use of force, but also the principle of non-intervention. The state under attack is thus entitled to defend itself in virtue of the principle of self-defence. This opinion is also expressed in Resolution 2131, in the FRD (principles (a) and (c)) and in Resolution 42/22 (part I n.13). Overt operations of such a magnitude are not common. The Cuban intervention in Angola in 1976 and the French intervention in Chad in 1983 meet these requirements. In both cases previous intervention (by South Africa and Libya respectively) had taken place in favour of the insurgents. The government's right to resort to force in individual or collective self-defence is generally accepted regardless of whether the effective authority of the government has been undermined by the insurgency.⁶⁴

In the second category collective self-defence is invoked as a justification for intervention against a previous intervention by irregular forces in favour of the insurgents. Irregular forces are to be understood as troops not having an official status and whose actions no state assume the responsibility for. Operations undertaken by irregulars often go under the name of indirect aggression. An indirect attack can take two different forms. Either volunteers or mercenaries are sent abroad to participate in the struggle of an insurgent movement against the legitimate government; or opposition groups are received in the territory of the supporting state in order to receive training and arms for the purpose of launching an attack on their state of origin. Intervening states usually respond by resorting to force against the state where the insurgents are given sanctuary, support and arms. When these acts involve the use of force they do not only fall under the ban of the prohibition of the use of force, but are also prohibited under the FRD (principle a, paragraphs 8 and 9), the Definition of Aggression (Article 3 (g)), Resolution 42/22 (part I n. 6) and the Helsinki Final Act (principle II paragraph 2). These instruments condemn indirect supportive acts by third

⁶² Tanca p. 85-87, 89.

⁶³ Tanca p. 59.

⁶⁴ Tanca p. 59-62.

states such as the provision of sanctuary. Opinions differ as to the admissibility of a right to self-defence against these types of indirect aggression. However, when the aggressive acts are undertaken on a large scale with presumed governmental involvement there is no doubt as to the legality of self-defensive reactions. UN practice has showed that the use of force against a state giving sanctuary to foreign rebels is prohibited. Likewise, the mere supply of arms or munitions or the giving of logistical help does not amount to a level of involvement, which justifies armed counter-measures. Only when there is certain and irrefutable proof that a third state is about to send its armed forces may armed force be used. This is also the view of the ICJ in the Nicaragua case.⁶⁵

The third category comprises actions such as external infiltration and encouragement of civil strife. These hidden forms of subversion are much more common than the actions in the previously examined category. The inadmissibility of these types of action is beyond any doubt when they involve a substantial use of force challenging the target state's security. However, these types of actions are hard to detect and the responsibility is usually disclaimed by the allegedly involved state. Subversive action is often used in order to take advantage of a situation of internal unrest. The covert character of these operations makes it hard to determine the degree of the original internal dissatisfaction. Consequently, governments faced with a situation of internal unrest invite foreign help arguing that the unrest is merely a result of previous external involvement. In this way, governments can manage to stay in power in spite of a large-scale purely domestic uprising. Intervening states also derive advantage from this excuse in their involvement in states whose governments they support. It is important to note that actions falling under this category do not amount to an armed attack, justifying self-defence within the meaning of Article 51 of the Charter. In the Nicaragua case, the ICJ presented a rigid view of the concept of armed attack, stating that actions, short of sending armed bands of considerable strength, cannot be defined as armed attacks.⁶⁶

The fourth category covers situations of defensive reactions in response to an alleged external threat against the victim state. In many of those cases the alleged threats proved to be entirely negligible or of such a low intensity that they could hardly threaten the state's security. State practice shows that in the cases where evidence was provided to support the foreign intervention, the reaction from third states was not entirely negative. According to the ICJ's narrow definition of the concept of armed attack, in the Nicaragua judgement, actions falling short of being armed attacks but yet violating Article 2(4) would only give rise to a possible right of individual counter-measures, as opposed to the right of self-defence (collective or individual). In considering the effect of an activity on the victim state, it is clear that it is likely to differ depending on the circumstances at the time of the attack and

⁶⁵ Cassese (1988) p. 36, 41; Tanca p. 62-64.

⁶⁶ Tanca p. 67-69.

the military capacity of the victim state. Tanca argues that the rigid definition of the concept of armed attack by the ICJ therefore implies negative consequences for a weak state being the target of armed foreign aggression short of an armed attack. He further maintains that such a narrow interpretation certainly prevents escalation but also fails to put all states on the same footing since small, weak states are more vulnerable to attacks of a lower intensity.⁶⁷

A somehow peculiar case occurs when the intervening state claims to be acting in individual self-defence against a threat originating in the target state because of internal disorder. To this fifth category belongs the Indian intervention in East Pakistan and the Israeli intervention in Lebanon in 1982. One of India's justifications for its armed intervention was the necessity to defend itself against the threat to the Indian economy and security that the inflow of refugees from East Pakistan represented. It is important to note that Pakistan in no way attempted to harm India and that the inflow of refugees was not engineered to destabilise Indian territorial integrity and political independence. The different reactions to those two cases by the international community can be explained by the principle of self-determination. Whereas the purpose of the Indian intervention was to promote the self-determination of the people of Bangladesh, the Israeli intervention repressed the struggle for the same right by the Palestinian people.⁶⁸

5.2.1.4 The authority entitled to ask for external support in the exercise of the right to self-defence

The theory on the effectiveness of a government as a factor permitting it to consent to foreign intervention also applies with respect to self-defence. Thus, the government must have control of the territory and its authority must be unquestioned. If these conditions are not fulfilled, this must have been the case before the external involvement and the undermining of the authority and the territorial control must be a direct effect of the external involvement. One exception to this presumption in favour of the incumbent government is the case of a people's just struggle for self-determination. According to the external dimension of self-determination, peoples have the right to seek and receive help to pursue their aims. It follows that a government, faced with a people entitled to self-determination, does not have the right to repress the struggle and must further accept external help to the struggling people and abstain from seeking help in self-defence.⁶⁹

5.2.1.5 Territorial limits of the self-defensive action

⁶⁷ Tanca p. 73-75, 96-97.

⁶⁸ Tanca p. 76-77, 81.

⁶⁹ Tanca p. 82-83.

In spite of external involvement, internal conflicts tend to take place in the territory of the victim state. According to Tanca, various arguments could be advanced to support the view that foreign operations should be confined to the territory of the target state. One argument in favour of this opinion is the vague definition of the concept of armed attack. Thus, an intervention can only be justified as collective self-defence when the original attack amounts to an armed attack. Moreover, only in this case may the defensive reaction be undertaken in the territory of the aggressor state. On the other hand, when consent by the victim state is the sole legal justification for the foreign involvement, the intervention must be limited to the territory of the victim state. Such a distinction would be advisable considering the uncertainty that surrounds the concept of armed attack and would also countercheck the effect of escalation and internationalisation in internal conflicts. However, Tanca admits that the choice between justifying an external operation by consent or as collective self-defence is a highly theoretical question whose main value probably lies in the possibility of extending hostilities to the territory of the aggressor state.⁷⁰

5.2.2 Counter-intervention

5.2.2.1 Counter-intervention in favour of the established authorities

According to Tanca, counter-intervention implies the right of a third state to intervene in favour of another state without being threatened itself, without the request of the victim state and in response to a prior illegal intervention not amounting to an armed attack. As will be seen below, Tanca rejects the legal validity of such a doctrine.

Tanca starts by noticing that the two main derogations to the prohibition of the use of force, namely self-defence and consent of the target state, have limited application in practice. The absence of a criterion for determining the legal representative of a state, apart from the rather elastic concept of effectiveness, implies that a government, whose effective authority is questioned as a result of an internal conflict, is not entitled to express consent to a foreign intervention. As a result of the frequent rejection of consent as a legal basis for intervention states usually invoke the existence of an external threat justifying a defensive reaction. However, as regards self-defence, the range of situations when self-defence can be legally invoked and external help requested is rather limited. The possibility of invoking self-defence is also frequently precluded by the fact that the authority requesting foreign help is a puppet government brought to power by the intervening state. It thus lacks authority to express valid consent to foreign intervention. Moreover, centralised action by the United Nations has on several occasions failed to constitute an effective means of counteracting

⁷⁰ Tanca p. 91-92, 94-95.

illegal intervention. Consequently, the question to be answered is whether there exists an individual right of counter-intervention in the case of an unlawful foreign intervention in an internal conflict followed by the failure to act by the United Nations. Such a right would confer upon a state the right to act even if it is not the direct object of an armed attack and without awaiting the request by the victim state to act in response to the act of aggression. Tanca rejects such a theory. He maintains that it would be hard to reconcile the right of an individual state to intervene on its own initiative, even in situations where the aggression does not amount to an armed attack.

State practice shows that the doctrine of counter-intervention, i.e., intervention as a response to a prior illegal intervention, has no support. Thus, even in the face of Security Council inaction, no state has claimed a right to intervene on the basis of counter-intervention. States disapproving of a prior intervention usually confine themselves to verbal condemnation or to providing military and logistical support to the losing faction. Thus, there is no tendency towards an additional exception to the prohibition of individual use of force by states. This practice is also confirmed by the Nicaragua judgement, which will be further examined in Chapter 5.2.3 below.⁷¹

5.2.2.2 Counter-intervention in favour of the insurgents

The prevailing view is that assistance to insurgents is unlawful. This view is expressed for instance in Resolution 2131 which declares that: "*no State shall organise, foment, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State*". An exception to the general prohibition to assist insurgents is generally invoked when the established authorities are receiving foreign aid. It is held that the help to the insurgents is given in order to counterbalance the foreign help to the established authorities. This frequently claimed right to counter-intervention is supported by the argument that it is necessary to maintain the independence of the state where the civil war is taking place. The independence is said to be threatened since the established authorities have lost public approval and since they depend on their foreign supporters. Some scholars even argue that counter-intervention on the side of the insurgents is legal since it is not even an intervention but a mere attempt at restoring the balance among states. According to this doctrine, third states intervening on behalf of the insurgents do so to avoid that the state intervening in the first place takes advantage from its superiority. Thus, counter-intervention on the side of the insurgents should be regarded as an act of international solidarity.⁷²

⁷¹ Tanca p. 126-134.

⁷² Malanczuk (ed.) p. 319-320; Piguet p. 43.

Other scholars argue that counter-intervention is only legitimate when it occurs on the side of the established authorities. In consequence, a counter-intervention on the side of the insurgents, once there has been external support for the government, would constitute an illegal act. However, in practice, the determination of, on the one hand, the good side and the bad side, and on the other hand, the initial intervention and the counter-intervention is at times not easy.⁷³

In spite of their extensive practice, states do not generally claim a right to use forcible intervention to help the insurgents in overthrowing the established authorities. Given the state practice since World War II, some authors have questioned the legal tenability of the principle of non-intervention. However, intervention undertaken to help oppositions does not usually involve the employment of foreign troops but rather the use of various types of covert assistance. Moreover, states have generally opposed any use of their territory as an operative base for opposition forces for fear of forceful retaliation. Intervening states are reluctant to use armed force openly in favour of the opposition even when they actually challenge the legitimacy of the effective government. However, during the Reagan era the United States developed a rather extensive view as regards the legitimacy to support opposition forces. The development of the "Reagan doctrine" implied the duty to help "freedom fighters" against socialist governments. This doctrine proved to be a large interpretation of the doctrine developed by former colonies legitimising the use of force by movements of national liberation during the process of decolonisation. However, the legal basis put forward in justification of the massive financial support given to opposition forces during this period was self-defence and not a legal right to intervene to assist the insurgents. Likewise, in the Nicaragua case the United States justified their intervention on the basis of collective self-defence.⁷⁴

5.2.3 Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States)

5.2.3.1 Background to the dispute and the Nicaraguan counts

After the fall of the government of President Somoza in July 1979, a new government was installed by the Sandinista rebels, who had led the armed opposition to the President. This group subsequently became practically the sole party represented in the government. Opponents to the new government formed themselves into irregular militant groups. The attitude of the United States to the new government was in the beginning positive, but later changed. As a consequence, financial aid was suspended in January 1981. The official reason for the change of attitude was the alleged Nicaraguan involvement in the guerrilla forces in El Salvador. However, the Sandinista

⁷³ Bull (ed.) p. 25.

⁷⁴ Gray p. 74-76.

government had also established close ties with the Soviet Union and Cuba. The Nicaraguan opposition forces, also known under the name of *contras*, became organised into two main factions: FDN and ARDE. These two groups operated along the borders with Honduras and Costa Rica respectively. The US support to these forces was, after an initial period of discretion, made public and financial aid was planned for. The *contras* were trained and armed and received logistical and strategic support from the United States. Military advisers from the United States were also sent to El Salvador to help the government fight the Salvadoran rebels (FMLN), supported by the Nicaraguan government. The fighting between the *contras* and the Nicaraguan governmental forces did not result in important territorial acquisition for the rebels, nor did the governmental forces, in spite of received aid from Cuba and the Soviet Union, succeed in defeating the rebels.⁷⁵

On 9 April 1984 Nicaragua filed in the registry of the Court an application instituting proceedings against the United States. Nicaragua contended that the United States government was in effective control of the *contras*, who had caused considerable material damage as well as loss of human life. Nicaragua further claimed that the acts of the US government, by which it devised the strategy and directed the tactics of the *contras*, were aimed at overthrowing the government of Nicaragua. Moreover, it was contended by Nicaragua that some operations were carried out by persons under the direct command of the United States government. In consequence, Nicaragua claimed that the United States had violated Article 2(4) of the Charter as well as Articles 18 and 20 of the Charter of the OAS. It was also contended that the United States had acted in violation of the sovereignty of Nicaragua. In addition to Nicaragua's treaty-based claims, it also founded its allegations on the regulation of these obligations in customary international law. The United States claimed to have provided, upon request, proportionate and appropriate assistance to third states, with reference to the inherent right of self-defence sanctioned by Article 51 of the Charter. Nicaragua requested the Court to declare that the United States is under a duty to cease all use of force, indirect or direct, overt or covert, against Nicaraguan territory. Moreover, the Court should declare that the United States must desist from all violations of the territorial integrity and political independence, including intervention in the external or internal affairs, of Nicaragua. The United States was also reminded of its duty to cease all forms of support to organisations, individuals or groups engaged in military operations against Nicaragua.⁷⁶

5.2.3.2 Legal issues raised before the Court

⁷⁵ Hilaire, Max: International Law and the United States Military Intervention in the Western Hemisphere, The Hague 1997, p. 97-98; 1986 ICJ Reports 14, para. 18-20.

⁷⁶ 1986 ICJ Reports 14, para. 15, 20-24.

The Nicaragua case raises many pertinent questions of law and politics. Although the Court had adjudicated disputes concerning the principle of the non-use of force in the past, for instance in the *Corfu Channel case* (UK v. Albania, 1949), the United States had never been a party to the previous conflicts. Moreover, the relevant issues of non-intervention and the non-use of force are broad and controversial. Considering the veto-policy of the United States, constantly preventing the Security Council from examining its foreign and national security policy, the Court took on a highly controversial task. Unlike Guatemala and Cuba who never had a chance to plead their cases before the Security Council, Nicaragua succeeded in circumventing the US veto by referring the dispute directly to the Court.⁷⁷ Several of the questions dealt with by the Court are of relevance for the present study. Namely, the question of aid to rebels, the principle of non-intervention and the exercise of the right of collective self-defence as a reaction to supportive activities in favour of the opposition.

As has been showed in the previous chapter, Nicaragua based its claims both on treaties, by which the United States is bound, and on customary international law. However, the Court was excluded from taking into consideration the invoked treaties due to the US multilateral treaty reservation. This reservation to the jurisdiction of the Court, under Article 36 paragraph 2 of the Statute of the Court, excludes application of the treaties unless all parties to the treaties affected by the decision by the Court are also parties to the case before the Court. The Court concluded that El Salvador, a party to the two multilateral treaties at stake, would be affected by the decision of the Court. In consequence, the Court must refrain from applying these treaty provisions. However, this conclusion did not prevent the Court from examining the claims in the light of international customary law as one of the sources of law, which the Court is entitled to apply according to Article 38 of the Statute. In the context of determining the applicable international customary law, the United States claimed that the Court must refrain from applying a rule of customary law which is also the subject of a treaty provision. The Court rejected this interpretation maintaining that principles enshrined in treaties do not automatically cease to exist and apply as customary law. The Court further declared that the area governed by the two sources and their content do not exactly overlap. The Court then proceeded to determine the content of the relevant rules of customary law on the non-use of force and non-intervention. The Court ascertained that evidence of customary law was to be found in the practice of states and in their *opinio juris*. Both parties to the dispute agreed that the prohibition on the use of force sanctioned in Article 2(4) of the Charter correspond in essential to the customary rules governing the principle. The *opinio juris* on this principle was deduced by the Court from, for instance, the FRD and the US acceptance of regional instruments such as the Helsinki Final Act and the Montevideo Convention on Rights and Duties of States.

⁷⁷ Hilaire p. 100.

The Court further called attention to the recognition of less grave forms of the use of force recognised by the FRD.⁷⁸

5.2.3.2.1 The definition of "armed attack" and other conditions for the exercise of collective self-defence

The Court started by observing that the wording of Article 51 of the Charter refers to the inherent right to self-defence. Thus, the Charter recognises the existence of the right of self-defence in customary law. The principle is likewise recognised by the FRD. In order to list the requirements for a lawful use of the right of self-defence, the Court proceeded to the establishment of acts amounting to armed attacks. Accordingly, the Court commenced by noting that not only actions by regular forces constitute armed attacks, but also acts undertaken by irregular forces according to Article 3(g) of the Definition of Aggression. This instrument was held to reflect custom. The Court concluded that the sending of armed bands to the territory of another state was to be considered an armed attack provided that the attack would have been considered as such had it been carried out by regular troops. Nevertheless, the Court excluded from the definition of armed attack the supply of arms, provision or logistics. Such assistance is to be regarded as a threat or use of force or as an act of intervention. The Court continued by observing that a state, which is the subject of an act of aggression, must declare itself to be the victim of an armed attack. Thus, customary international law does not permit a state to exercise the right of collective self-defence on its own assessment of the facts. Moreover, the Court ascertained that there is no rule in customary law permitting a third state to act in collective self-defence without a previous request by the victim state.⁷⁹

The Court noted that the acts of the United States, which consisted in the mining of Nicaraguan territorial and internal waters and attacks on Nicaraguan ports, oil installations and naval bases, constitute a violation of the prohibition of the use of force unless these actions are justified by circumstances excluding their unlawfulness. The Court further observed that the assistance to the *contras* amounts to a prima facie violation of the same prohibition according to the FRD. This resolution declares that participation in acts aimed at "*organizing or encouraging the organization of irregular forces or armed bands...for incursion into the territory of another state*" and "*participating in acts of civil strife...in another state*" are prohibited when the acts "*involve a threat or use of force*". The Court concluded that the arming and training of the *contras* constitute such acts. Nevertheless, not all forms of assistance can be considered to amount to a use of force. For instance, the mere supply of funds to the *contras* would not fulfil these

⁷⁸ 1986 ICJ Reports 14, para. 42, 56, 172-176, 183, 188-189, 191.

⁷⁹ 1986 ICJ Reports 14, para.193-199.

requirements but would nevertheless constitute an act of intervention in the internal affairs of Nicaragua.⁸⁰

The Court continued by examining whether the use of force by the United States can be justified as an act of collective self-defence. For this to be the case, Nicaragua must have engaged in an armed attack against El Salvador, Honduras or Costa Rica. As regards El Salvador, the Court noted that the supply of arms from Nicaraguan territory to the rebels in El Salvador does not constitute an armed attack. Turning to Costa Rica and Honduras, the Court did not consider the evidence of border incursions sufficient. The Court next proceeded to examine the actual conduct of the alleged victim states in order to find out whether they considered themselves the victims of armed attacks by Nicaragua. The Court found no evidence of such a situation at the time when the United States first embarked. Thus, neither of the countries have mentioned collective self-defence or armed attack in their communications with the Court. Moreover, the United States has failed to report its exercise of the right of self-defence according to Article 51. The Court asserted that although this very obligation was not valid in the present case, due to the multilateral treaty reservation, it was not prevented from considering this aspect in adjudging the conduct of the United States. The Court concluded that the Nicaraguan actions against the three countries did not amount to an armed attack. Consequently, the United States justification of collective self-defence cannot be upheld. Thus, the United Nations has violated the principle of the non-use of force.⁸¹

5.2.3.2.2 The principle of non-intervention and the lawfulness of counter-measures

The principle of non-intervention, although not explicitly spelt out in the Charter, is considered to be part of customary law by the Court. Substantial practice and the *opinio juris* of states favour such a statute. Already in 1949, the Court recognised the principle in the *Corfu Channel case*. This being the case, the Court next undertook to determine the content of the principle and the conformity of state practice. As regards the content, the Court noted that the principle prohibits all direct or indirect interference in the external and internal affairs of states. By internal or external affairs is to be understood matters on which the state is permitted to decide freely in virtue of the principle of state sovereignty. For instance, the formulation of foreign policy and the elaboration of an economic, cultural and social system are matters falling within the sphere of decision which is exclusively in the hands of the territorial state. The decisive element of intervention, i.e. the coercive nature of the action, is particularly strong when the intervention is forcible. These types of actions are in violation both of the principle of the non-use of force and the principle of non-intervention. As regards the conformity of state practice, the Court started by noting that there have been a considerable

⁸⁰ 1986 ICJ Reports 14, para.227-228.

⁸¹ 1986 ICJ Reports 14, para. 229-235, 238.

number of interventions for the benefit of opposition forces in recent years. The Court therefore proceeded to determine whether the practice reflects a general belief in a right of states to intervene in favour of an opposition movement whose cause appears particularly worthy because of its political or moral values. For a new rule of customary law to emerge, the practice of states must be settled and accompanied by the *opinio juris*. The Court found that states have not justified their conduct by such a new right to intervene. State practice is supported by the fact that, although the political motive of the United States in the present case was to support an opposition movement struggling for a good cause, the United States has legally justified its conduct by reference to the right of collective self-defence. Accordingly, the Court reached the conclusion that no such right exists in contemporary international law.⁸²

Next, the Court examined whether a third state may undertake any forcible action in response to a violation of the principle of non-intervention against another state. Such a right would be analogous to the right of collective self-defence in the event of a violation of the prohibition of the use of force by an armed attack. The sole difference would be that both the original forcible act violating the principle of non-intervention and the action in response would be less grave than in the case of an armed attack. Thus, the question that arises is whether the United States had such a right in response to the intervention in El Salvador by Nicaragua. The Court concludes that neither under Charter-law, nor under customary international law, does a state, who is not the victim itself, have the right to undertake any collective measures against an attack which does not amount to an armed attack. In confirmation of its conclusion, the Court takes note of the fact that such a right has not been claimed by the United States as an indication of a lack of *opinio juris*.⁸³

Nicaragua contended that the US activities had the twofold purpose of overthrowing the government in order to replace it by an acceptable government, and the damaging of Nicaraguan economy and weakening of the Nicaraguan political system in order to coerce the government of Nicaragua to accept the policies imposed by the United States. The Court concluded that the US support for the *contras* did not constitute an armed attack within the meaning of Article 3(g) of the Definition of Aggression. The Court based its conclusion on the finding that the United States had not created the opposition movement but merely financed, armed and trained it. In order for the mere support of an opposition force to fall under Article 3(g), the supporting state must control or have created the opposition movement. Otherwise, the article only applies on the sending of the state's own forces. Consequently, the US acts did not amount to an armed attack but merely to an act of indirect use of force pursuant to Resolution 2131 and the FRD. The Court declared that acts of assistance and support to armed bands, whose purpose is to overthrow the government of a state, amount to

⁸² 1986 ICJ Reports 14, para. 202, 205-209.

⁸³ 1986 ICJ Reports 14, para. 210-211.

an intervention in the internal affairs of another state regardless of whether the objectives of the intervening state are as far-reaching as those of the armed bands. In consequence, the United States has violated the principle of non-intervention by financially supporting the *contras* and by providing for training, arms and logistical support and intelligence.⁸⁴

The Court then turned to the question of a possible justification for the US intervention. The Court started by rejecting the idea that intervention would be allowable on invitation by the rebel forces. Accordingly, the Court considered that the principle of non-intervention would lose its effectiveness if such an interpretation was accepted. The question remains as to whether the actions by the United States can be justified on the ground that they constitute a lawful response to the supply of arms by Nicaragua to the rebel forces in the other South American states. The United States claimed that its conduct was similar to the one adopted by Nicaragua in its assistance to the armed opposition in El Salvador, Costa Rica and Honduras. The Court rejected this claim. Proportionate counter-measures can only be undertaken by the victim state itself when the original act of force does not amount to an armed attack.⁸⁵

5.2.3.3 Dissenting opinion of Judge Schwebel

Judge Schwebel, in his dissenting opinion, criticises several aspects of the Court's majority judgement. First of all, he finds the Court's conclusion inconsistent with the Definition of Aggression. Accordingly, he argues that the Court, in maintaining that an act of indirect aggression does not amount to an armed attack, takes the opposite view of the United Nations' interpretation and state practice. In consequence, he asserts that Nicaragua's actions against El Salvador amount to an armed attack since Nicaragua is substantially involved (cf. Article 3(g) in fine) in the sending of armed bands, groups and irregulars to El Salvador. Moreover, the substantial involvement of Nicaragua includes the supply of arms and munitions, training and sanctuary to Salvadoran insurgents. The acts undertaken by the Salvadoran rebels, as a result of the Nicaraguan assistance, amount to armed attacks in the meaning of the other subparagraphs of Article 3. It follows that, for a state to act in self-defence it is not necessary to show that the rebels act as agents of the foreign state but merely that the supporting state is substantially involved. Judge Schwebel thus emphasises the thin line as expressed in Article 3(g) between the sending of armed bands and the substantial involvement by a state in such activities.⁸⁶

Judge Schwebel further opposes the view expressed by the Court relating to the requirement of an armed attack for an action of self-defence to be lawfully undertaken. First, Judge Schwebel contends that the question of

⁸⁴ Hilaire p. 102; 1986 ICJ Reports 14, para. 239, 241-242.

⁸⁵ 1986 ICJ Reports 14, para. 246-249.

⁸⁶ 1986 ICJ Reports 14, Dissenting Opinion of Judge Schwebel, para. 162, 166-167, 170.

whether acts short of armed attacks may justify reactions in self-defence was not an issue in the present case since both parties accuse the other of armed attacks. Nevertheless, he wishes to point out that the wording of Article 51 should not be understood as restricting the right of self-defence under customary international law. The Court's conclusion on the lawfulness of counter-intervention and the possibility of counter-measures by the victim state is erroneous, according to Schwebel, for all the reasons mentioned above. Accordingly, El Salvador, being the victim of an armed attack, should not be limited to counter-measures but may invite foreign assistance in the exercise of its right to self-defence. According to Judge Schwebel, a contrary view implies the denial of the right of defence for small, weak states. Moreover, he notes that the Court does not clearly indicate whether the counter-measures undertaken by the victim state may include the use of force.⁸⁷

Judge Schwebel finally contends that the US involvement in Nicaragua does not constitute an unlawful intervention. In support of this conclusion he submits the following arguments. When the Junta took the power from the government of President Somoza, in order to be recognised, it agreed with the OAS to govern in accordance with certain democratic standards. Those contractual conditions have not been respected by the government of Nicaragua. Accordingly, when the United States, being a member of the OAS, demanded Nicaragua to act in accordance with its undertakings given to the OAS, the United States did not intervene in the internal or external affairs of Nicaragua. Instead, the acts of the United States are to be regarded as well-grounded efforts to make Nicaragua comply with its international obligations. However, assuming that the agreement implied the creation of an international obligation, it does not thereby follow that the United States is entitled to forcibly persuade Nicaragua to fulfil its obligations. The US plea of collective self-defence is not only valid against the claims of unlawful use of force but also against Nicaragua's claims of unlawful intervention according to Articles 21 and 22 of the OAS Charter. Article 21 states that American states bind themselves to refrain from the use of force except in the case of self-defence in accordance with existing treaties or in fulfilment thereof. Article 22 declares that measures adopted for the maintenance of peace and security do not constitute a violation of the principles set forth in Articles 18 and 20. It follows that when a state charged with intervention actually was acting in collective self-defence, its measures should not be treated as intervention but as acts of justified counter-intervention or self-defence.⁸⁸

5.2.3.4 Reactions of the parties and implications of the judgement

⁸⁷ 1986 ICJ Reports 14, Dissenting Opinion of Judge Schwebel, para. 172-173, 175-177.

⁸⁸ 1986 ICJ Reports 14, Dissenting Opinion of Judge Schwebel, para. 243, 246-250.

The United States' reaction to the judgement was overall negative. Accordingly, it held that it would disregard the ruling on the basis that the Court lacked jurisdiction to hear Nicaragua's claim as being one of political nature and thus reserved for the Security Council. The Court was further criticised for having relied on General Assembly resolutions which were held to have no legal authority. Moreover, it was asserted that the actions of Nicaragua had not been judged as severely as the US actions, allegedly of a less defensive nature. Furthermore, the narrow interpretation of the right of self-defence was argued to result in a denial of this right to a state victim of secret warfare.⁸⁹

Nicaragua welcomed the Court's judgement as an encouragement. Although it was aware of the lack of enforcement competence of the Court, the victory was perceived as yet another weapon in the public debates and was hoped to influence the American public opinion as well as future debates in the American Congress. Nicaragua called upon the General Assembly to recommend that the United States comply with the judgement. This was the sole possible action for Nicaragua because of the American veto in the Security Council.⁹⁰

The United States disregarded the General Assembly resolution. Accordingly, it continued its operations to overthrow the Sandinista government. The Sandinista regime was later replaced by the new government of Chamorro, which had been supported by the US during the UN supervised elections in Nicaragua. The new government signed an aid agreement according to which the government would refrain from continuing further proceedings against the United States in order to obtain compensation in exchange for the aid package. This agreement can be regarded as an acknowledgement of the importance of the Court's ruling by the United States. In spite of the relative significance that the United States accorded to the judgement, it continued to apply the same policy in practice. For instance, in Panama (1989), the United States violated some of the fundamental rules adjudicated by the Court in the Nicaragua case. Although the Court's judgement was largely criticised by legal scholars in the United States, it was regarded as a victory for the rule of law in international relations by authors from other parts of the world.⁹¹

⁸⁹ Hilaire p. 105-106.

⁹⁰ Hilaire p. 106-107.

⁹¹ Hilaire p. 101, 107-108.

6 Additional justifications for intervention

In the present chapter I shall examine some of the additional justifications that third states invoke for legitimising interventions in internal conflicts. Those are intervention to further self-determination or to promote democracy, intervention for humanitarian purposes and intervention in order to protect a state's own nationals abroad. These justifications are often complementary to the two principal justifications examined in the previous chapter. The common features of the additional justifications are that they are less frequently invoked and generally less accepted in the doctrine and by other states. In the following pages we will look at state practice and scholarly views on these justifications with a view to examining if, to what extent and under what conditions these justifications are tenable, i.e., their possible role as exceptions to the general principle of non-intervention.

6.1 Justification: Intervention to further the process of self-determination

6.1.1 The principle of self-determination – its controversies, dimensions and relevance for the present study

The principle of self-determination has a twofold relevance for the present study. First of all, and most importantly considering the aim of this essay, the principle of self-determination has sometimes been invoked by third states in order to justify interventions in the domestic affairs of other states. Secondly, as briefly introduced in Chapter 5.1.1.2.3 above, the principle of self-determination is most likely to be violated in all instances where a third state intervenes in order to impose its political views by assisting one side in an internal conflict.

One important distinction with respect to the principle of self-determination is its internal and external dimensions. The external aspect of the right to self-determination protects the free choice of the people to decide its own destiny vis-à-vis external pressure and influence. External self-determination is thus the ability of a people or a minority to conduct their international relations by choosing independence or union with another state. Internal self-determination implies the right of a people in a sovereign state to elect and keep a government of its choice and the right of ethnic, racial, religious or other minority living in a sovereign state not to be oppressed by the central government. The internal dimension of self-determination also prevents an incumbent government from asking for foreign aid to crush an internal uprising. The need for external support is an indication that the

government is not effective and consequently that the people's right to internal self-determination should prevail over the government's freedom to invite external assistance.⁹² This latter aspect of the right to self-determination has already been examined above (Chapters 5.1.1.2.1, 5.1.3 and 5.2.1.4 in connection with the issue of the subject entitled to invite foreign assistance.

The principle of self-determination is intertwined with other norms of international law and presents itself with several controversial issues. One constantly disputed question is the determination of the beneficiaries of the right to self-determination. In this connection, the question arises as to whether the right only refers to peoples under racist regime, foreign domination and colonial rule or whether it also applies to peoples in a sovereign state whose fundamental political rights are not respected. The exercise of the right, i.e., the modes and the conditions for its exercise, divides legal authors as well. Particularly, the practical reconciliation between secessionist claims and the territorial integrity of sovereign states is up to now an unsolved question. The most controversial issue is perhaps whether third states have the right to assist movements of national liberation in their forcible pursuit of the right to self-determination. The present study focuses on this last issue as expressed in legal instruments, as used by states in practice and as discussed by legal scholars in the doctrine. The issue of the right of third states to give assistance to liberation movements is closely connected with the question of whether liberation movements themselves are entitled to resort to force in the exercise of their right to self-determination. The question of the legality of external assistance is thus dependent on this preliminary question. Consequently, in the present essay both issues will be considered by concerns of clarity.

6.1.2 The legal regulation on the right of dependent peoples to struggle and to seek and receive support in the exercise of the right to self-determination

The right to self-determination is explicitly expressed in Charter Articles 1(2) and 55 and implicitly in Articles 73 and 76 dealing with non-self-governing territories and the international trusteeship system. However, two decades after the San Francisco Conference the position had drastically changed owing to the movement of decolonisation. The principle of self-determination, originally sanctioned in the Charter as a political ideal without any directions for its exercise, had formed into a legal right. One of the main reasons for this gradual change was the adoption of the Declaration on the Granting of Independence to Colonial Peoples (1960).⁹³

⁹² Corten, Olivier; Klein, Pierre: *Droit d'ingérence ou obligation de réaction? Les possibilités d'action visant à assurer des droits de la personne face au principe de non-intervention*, Bruxelles 1992, p. 252; Tanca p. 100, 111.

⁹³ Calogeropoulos-Stratis, Spiros: *Le recours à la force dans la société internationale*, Lausanne 1986, p. 97; Dugard, C.J.R.: *The Organisation of African Unity and Colonialism*:

The Declaration on Colonialism, passed by the General Assembly by the vote of 90 to none, with nine abstentions⁹⁴, made no mention of force. Instead it stressed the peaceful exercise of the right to self-determination by all peoples. Until 1965, the General Assembly confined itself to considering colonialism a serious threat to world peace and as irreconcilable with the UN ideals of universal peace. Accordingly, it condemned all repressive measures directed against dependent peoples as well as foreign assistance to the metropolis in the struggle against its colonies. However, since 1965, the General Assembly has taken a step further in that it has started to call upon third states to assist liberation movements with moral and material assistance. For instance, in response to the denial of self-determination by South Africa, Portugal and Rhodesia, the General Assembly passed a resolution⁹⁵, recognising the right of colonial peoples to struggle for their right to self-determination and to invite third states to provide material and moral assistance. The deliberate ambiguity of the word struggle led some states to argue that armed struggle was allowed and other states to deny all use of force in the struggle for self-determination. In the following resolutions the disagreement between states continued. Accordingly, the relation between the right to self-determination and the principles on the non-use of force and self-defence was deliberately left obscure. The relevance of the resolutions authorising a particular use of force remained unclear and open to various interpretations. Consensus was attained only at the price of ambiguity. For instance, Resolution 36/103, which proclaims the right of peoples to wage both political and armed struggle, met with a considerable number of abstentions and negative votes.⁹⁶

The FRD, being the first instrument unanimously to recognise the right to self-determination, begs the controversial question of the right to use force. Instead, emphasis is placed on the duty of states not to use force against a people entitled to self-determination. The right of a people to resist to governmental repression is conditioned by the forcible nature of the denial of the right to self-determination by the colonial state. Moreover, peoples, forcibly deprived of the right to self-determination, are only entitled to seek and receive support provided that the aid is in accordance with the purposes and principles of the Charter. Wilson stresses that resistance does not necessarily imply the use of force by the people, although this meaning is likely to have been the intention of the majority of states. Wilson further notes that the provision limits the forcible reaction by the people to the case of a previous use of force by the state organs and cannot therefore be

An inquiry into the plea of self-defence as a justification for the use of force in the eradication of Colonialism, The International and Comparative Law Quarterly, Vol. 16, 1967, p. 173.

⁹⁴ Abstentions by Australia, Belgium, Dominican Republic, France, Portugal, Spain, UK, US and the Union of South Africa.

⁹⁵ Resolution 2105 (XX) 20 December 1965, adopted by the vote of 74-6-27.

⁹⁶ Gray p. 45-46, 48; Sureda, Rigo A.: *The Evolution of the Right of Self-determination – A study of United Nations Practice*, Leiden 1973, p. 324, 331.

interpreted as authorising the use of force in order to secure a right. In turn, Abi-Saab interprets the legitimising of resistance as the granting of a *jus ad bellum* to liberation movements under the Charter. The controversial issue of providing assistance to movements of national liberation was the subject of many different suggestions during the debates on the FRD. For instance, it was argued that intervention in order to help a movement struggling for self-determination should not be considered a violation of the principle of non-intervention. Although no such provision was included, the final wording can be said to have been a great concession by the Western states to the non-aligned countries in that assistance is allowed under certain conditions. The formulation met with wide support in the Special Committee.⁹⁷

The Definition of Aggression also contains a provision on the right of liberation movements to struggle and to seek and receive external support in the saving clause in Article 7. This provision has already been dealt with in Chapter 4.5 above.

6.1.3 The invocation of self-determination as a justification for intervention in internal conflicts in order to assist liberation movements in state practice

The principle of self-determination has undergone a fundamental change since the end of decolonisation. From applying exclusively to the three traditional categories of peoples, the right to self-determination has found a different application outside the colonial context. As concerns recent state practice and doctrinal debate on internal self-determination, the considerations on pro-democratic intervention, examined in Chapter 6.2 below, are also of relevance.

The Pakistani conflict illustrates the role of self-determination as a right claimed in a non-colonial setting. The repressive actions in East Pakistan by West Pakistani troops, in order to crush the autonomist movement, led to an important flow of refugees from East Pakistan to India. The establishment of the Bangladesh provisional government by the East Pakistani autonomist party, the Awami League, was immediately recognised by India. The Indian justifications for its massive attacks in December 1971 were manifold. Among others, India claimed to be acting in favour of the self-determination of the Bengali people and in self-defence against a previous Pakistani armed attack. India also justified its action as necessary in order to protect the Indian economy and security threatened by the massive inflow of East Pakistani refugees, as dealt with in Chapter 5.2.1.3 above. Only a few

⁹⁷ Gray p. 46-47; Wilson, Heather A.: *International Law and the Use of Force by National Liberation Movements*, Oxford 1988, p. 99; Abi-Saab, Georges: *Wars of national liberation and the laws of war*, *Annales d'études internationales*, Vol. 3, 1972, p. 100; Sahovic, Milan (ed.): *Principles of International Law Concerning Friendly Relations and Co-operation*, Dobbs Ferry, N.Y. 1972, p. 359, 362-363.

members of the UN openly condemned the Indian action. The Security Council failed to take a position on the issue and the subsequent General Assembly Resolution met with negative votes from India and the socialist countries since it did not recognise the existence of Bangladesh. The creation of the independent state of Bangladesh was later accepted by the international community as a *fait accompli*. However, the procedure by which Bangladesh became independent was never recognised by the UN and was even openly condemned by a few states.⁹⁸

Although hostilities in East Pakistan finally led the Secretary general to declare that the civil war threatened international peace and security, it was the Indian military intervention that decided the issue. Accordingly, in spite of the fact that East Pakistan was physically separate from West Pakistan and differed linguistically and racially as well, it is doubtful whether the East Pakistan independence can be directly related to a widespread acceptance of the right to self-determination. Instead it was the military power of a strong political ally that triumphed.⁹⁹

In 1975, after the de facto withdrawal of the Portuguese army, but before the official date of independence of East Timor, an armed conflict broke out between the two factions of national liberation. The reason for the conflict was the two groups' divergent opinions on the future of East Timor. One of the groups, FREITILIN, favoured independence from Indonesia whereas the other faction wanted East Timor to be an integral part of Indonesia. Indonesia was meanwhile involved in the training of the movements opposing FREITILIN. The Indonesian intervention was justified as necessary in order to re-establish order so that the people of East Timor could exercise its right to self-determination. However, the Indonesian intervention also enabled the establishment of a temporary government by the pro-Indonesian faction before the FREITILIN troops were completely defeated. This event was interpreted by the Indonesian government as an expression of the people's free choice, which was rendered possible owing to the re-establishment of order by the Indonesian intervention. Consequently, in spite of the FREITILIN control of the territory, the Indonesian intervention led to the unification of East Timor with Indonesia.¹⁰⁰

Tanca argues that only in the case of Bangladesh did the people concerned actually meet the legal conditions justifying foreign assistance in the struggle for self-determination. In the case of East Timor, the struggle did not take place between the people and the former administering power but between local groups who fought for the entire control of the territory after the Portuguese withdrawal. The Indonesian intervention therefore implied the denial of the free choice of the people by imposing one faction. The

⁹⁸ Tanca p. 108, 163-164.

⁹⁹ Alexander, Yonah; Friedlander, Robert A. (ed.): Self-determination: National, Regional, and Global Dimensions, Boulder, Colorado 1980, p. 317-318.

¹⁰⁰ Tanca p. 108, 166.

annexation of East Timor met with almost unanimous condemnation. Resolutions were adopted by both the General Assembly and the Security Council rejecting Indonesia's justification of self-determination and stressing the fact that the right to self-determination of the people of East Timor could only be exercised provided that the Indonesian troops withdrew from the territory. Tanca notes that this case, as well as the case of Bangladesh, confirms the majority view in the doctrine, namely that the principle of self-determination does not justify foreign direct armed intervention even when the action is undertaken in favour of a people entitled to this right.¹⁰¹

6.1.4 The lawfulness of giving assistance to liberation movements in the doctrinal discussion

6.1.4.1 Self-determination in the colonial context

In spite of the generous formulation of the first article of the Declaration on Colonialism, all peoples are not entitled to self-determination. In its traditional conception the right to self-determination was merely recognised to the three classical categories of peoples. The signification of this colonial dimension of the right to self-determination was the independence of these categories of dependent peoples. Thus, self-determination was a right that could exclusively be exercised through the state organism.¹⁰²

Wilson distinguishes between three different sets of arguments put forward in justification of the right of liberation movements to resort to force in their struggle for self-determination and for third states to support them. The first, and most commonly invoked, legal basis is the plea of self-defence. This justification has been argued in three ways. First, self-defence has been invoked against the original colonial invasion. For instance, the plea of collective self-defence was set forth by India as a justification for its annexation of the Portuguese colony of Goa in 1961. This argument can be rejected on the basis of intertemporal law by which the acquisition of territorial title by force at a time when this mode of annexation was not illegal confers good title. Moreover, this justification is inconsistent with the principle of efficiency. A second way of arguing is the plea that colonialism constitutes permanent aggression against which colonial peoples have a right to defend themselves. This view was propounded by a large number of developing states in the deliberations on the FRD and the Definition of Aggression. Such a broad interpretation of Article 51 was not accepted by the Western bloc on the basis that the right to self-defence belongs exclusively to states and that the occurrence of an armed attack is a necessary condition for a right to self-defence. The third argument focuses on the status of liberation movements as distinct from that of the administering state as recognised in the FRD. It follows that liberation

¹⁰¹ Tanca p. 109, 167.

¹⁰² Corten p. 253-254.

movements are considered as subjects of international law and hence that they have the authority to use force in self-defence. This limited justification has not been embraced by developing states since it does not legitimise the use of force to eradicate colonialism. Western states have emphasised the restricted wordings of the FRD and the Definition of Aggression, which do not explicitly allow either armed resistance or armed struggle. The second main justification is founded on the idea that the use of force is justified against colonial domination, alien occupation and racist regimes irrespective of the prohibition on the use of force. Accordingly, wars of national liberation are an exception to the general prohibition on the use of force and anti-colonialism is considered to be a part of higher law. This justification, widely embraced by developing countries and Eastern bloc states, is not accepted by Western states mainly on the basis of the rejection of the concept of *just war*. The third argument put forward in justification of the use of force by liberation movements is the acceptance of a right to revolution. Such an approach would be identical to the one that international law adopts with regard to civil wars, i.e., it neither condones nor condemns it. This argument has been rejected by the developing states for a number of reasons. It is argued that it does not recognise the international character of wars of national liberation. Moreover, such a right would uphold the traditional principle of non-intervention to the side opposed to the government and would therefore be unfavourable to the movement of national liberation.¹⁰³

In an essay in the *International and Comparative Law Quarterly* from 1967, C.J.R. Dugard examines the plea of self-defence invoked by the OAU for justifying their campaign of assistance to liberation movements in the dependent territories of Southern Rhodesia, South West Africa, the Republic of South Africa and the Portuguese territories in Africa. This question received full attention during the discussions in the Special Committee leading up to the FRD. The objections to this proposal focused on the untenable view of colonialism confined to one state as an armed attack against another state and thus the inapplicability of Article 51. Dugard concludes that it is not possible to justify the actions of the OAU as an exercise of the right to self-defence and accordingly that the member states of the OAU are acting in violation of the principle on the non-use of force in international relations. However, Tanca notes that the non-aligned countries aimed primarily at the recognition of national liberation struggles as conflicts with an international character and consequently applicability of Article 2(4) and the Charter provision on self-defence to them. As we have seen above, the Declaration contains no provision conferring the right to self-defence. Nevertheless, the international character of the struggles is recognised in the sixth paragraph of principle (e).¹⁰⁴

¹⁰³ Wilson p. 130-135.

¹⁰⁴ Dugard p. 158, 160, 170-172, 187; Tanca p. 101.

The persistent rejections of the claim of self-defence by the occidental states and the dangerous consequences of an application of this principle to peoples, and not only to states, contradict such a recognition. Interference by third states on this basis would render escalation of colonial conflicts legitimate. The justification of self-defence appears to have been abandoned in the light of the non-recognition of this principle by the FRD and the Definition of Aggression.¹⁰⁵

Cassese distinguishes between issues that states appear to agree upon and controversial questions where state opinions divide profoundly. The latter category includes the questions of whether a liberation movement is entitled to employ force in the exercise of the right to self-determination and the nature of lawful foreign assistance. Naturally, the disagreement between states is the greatest when it comes to the right to provide forcible assistance. The occidental powers maintain, in line with their point of view as concerns the right of liberation movements to use force, that aid provided to these movements must be in accordance with the Charter. Forcible assistance would consequently be excluded. On the other hand, the states arguing in favour of such a right assert that any other assistance than military aid would be inexpedient and illogical with the right of the peoples to take forcible action. By way of conclusion it can be argued that although movements of national liberation do not have a generally recognised right to use force, they are not prohibited from doing so. As regards the right of third states to provide assistance, Tanca concludes that they have a legally recognised right to do so. However, this right cannot be interpreted as a duty besides with respect to humanitarian assistance. When it comes to political and financial support it is argued that states have a right to provide such assistance. As regards military assistance by third states, Cassese concludes that state attitude towards assistance seems to be the same as for the forcible struggle by the peoples themselves. That is, there is no legally recognised rule admitting such acts, but third states are not thereby prevented from providing such assistance on condition that the support does not include the sending of troops.¹⁰⁶

6.1.4.2 Self-determination outside the colonial context

With the end of the decolonisation era, the giving up of apartheid in South Africa, and the recognition of the right to self-determination of the Palestinian people, the debate over forcible assistance by third states has lost much of its urgency. The application of the right to self-determination outside the colonial context has not implied any state support for the use of force for this end. Still less is there any support for the right of ethnic groups to use force to secede from existing states. However, when claims to secession, or even more limited autonomy, are met with forcible repression,

¹⁰⁵ Cassese, Antonio: *Le droit international et la question de l'assistance aux mouvements de libération nationale*, *Revue belge de droit international*, Vol. XIX, 1986, p. 314-315.

¹⁰⁶ Cassese, *Revue belge*, p. 307, 321-326.

as in the cases of Kosovo, the Chechens, and the Kurds, the repressed people's case for self-determination may be strengthened.¹⁰⁷

One of the difficulties in extending the principle of self-determination lies in its incompatibility with the territorial sovereignty of states. It has been argued that the safeguarding of territorial integrity has put the principle of self-determination in a disadvantageous light ever since the claims to independence by the former colonies have been replaced by modern secessionist movements founding their actions on cultural, economic and religious antagonism. The former colonial peoples' right to internal self-determination has been disregarded. However, unlike the right to external self-determination, which is subject to the rule of one time exercise, internal self-determination is an ongoing right. According to Cassese, the saving clause in paragraph 7 of the FRD grants the right to internal self-determination for peoples belonging to racial and religious groups who are denied access to government (not equal rights). Cassese further argues that even a right to external self-determination may be conceived under the saving clause on condition that the religious or racial groups are denied participatory rights, that their fundamental rights are violated and that peaceful settlement within the borders of the state cannot be reached.¹⁰⁸

Corten, among many other authors, asserts that the right to self-determination continues to be applicable after the end of the decolonisation period. Corten argues that the formulation "*all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter*" in the FRD states that the principle of self-determination shall have a continued constant application after a state has achieved independence. The internal aspect of the principle of self-determination implies that the free choice of political regime of the people shall not solely be protected against external interventions but that it shall also correspond to the will of the people. According to this point of view the effective control of the government is not enough for legitimate authority, it should also have the popular approval of the governed people. The consequence of Corten's arguments would be to consider that peoples, whose fundamental rights are denied by the regime, constitute an additional category entitled to the right of self-determination.¹⁰⁹

Corten points out that the legal instruments recognising the use of armed force by the movement of national liberation, and its right to seek and receive external support to this end, were aimed at the traditional aspect of self-determination, i.e., the colonial context. The question that arises is therefore whether these provisions also are applicable on the principle of

¹⁰⁷ Gray p. 50.

¹⁰⁸ Alexander p. 319; Cassese, Antonio: *Self-determination of peoples – A legal reappraisal*, Cambridge 1995, p. 118-120.

¹⁰⁹ Corten p. 255-259.

self-determination outside the traditional colonial context. Due to the internal character of these conflicts, in contrast to the colonial conflicts classified as international armed conflicts, international law applies the principle of neutrality. Corten argues that, provided that international law recognises a more extensive interpretation of the right to self-determination, it also recognises the right of these peoples to resort to armed force against the regime which deprives them of this right. This conclusion follows from the wide scope of the prohibition in the FRD for a government to forcibly deprive a people of this right and, as a logical corollary, the right of the people to resist to the forcible denial of this right. The issue of assistance to peoples exercising their right to self-determination outside the colonial context appears to be questionable. Corten argues however, *de lege ferenda*, that in comparing the two contexts of self-determination and by recognising their identical origin and ratio, it would be appropriate to give peoples deprived of their fundamental rights the same possibilities of receiving external support in their struggle for internal self-determination.¹¹⁰

6.2 Justification: Intervention to promote democracy

6.2.1 State practice and legal bases for pro-democratic intervention

Originally, the United States based its pro-democratic unilateral actions on the failure of the UN collective security system. It was argued that the prohibition on the use of force in the Charter did not have an absolute character and that it should be interpreted in the light of the provisions for a collective security system. In consequence, Article 2(4) was considered to allow the use of force to further world public order and to justify pro-democratic interventions by the US. Naturally, democracy was to be understood from the American point of view in contrast to pro-socialist invasions by the USSR. This policy was the purport of the legal justifications for the intervention in Grenada. The United States' intervention in Grenada in 1983, with the consent by the lawful authority, had the alleged purpose of regional peacekeeping and protection of nationals. However, the unrest was at an early stage and the US nationals did not seem to be in real danger.¹¹¹

Naturally, with the end of the Cold War, the legal basis for pro-democratic intervention shifted. Instead of being predicated on the failure of the collective security system, proponents of a right to pro-democratic intervention based their action on a will to further the purposes of the UN. The breakdown of the governments of Eastern Europe promoted the idea of

¹¹⁰ Corten p. 261, 264-265, 267-268.

¹¹¹ Gray p. 42.

a right to democratic governance for all peoples and helped to vindicate the right of pro-democratic intervention.¹¹²

Gray asserts that states do not generally seem to rely on the defence of democracy as a legal justification for intervention. However, on two occasions, the UN has given its authorisation to forcible intervention to restore democracy. Those are the interventions in Haiti (1994) and in Sierra Leone (1997). In the case of Haiti, the UN referred to the exceptional character of the operation and pointed out that its action was not in any way to be regarded as setting a precedent, even for UN action, let alone for forcible action by individual states. In the case of Sierra Leone, the democratically elected government, that had taken power as a result of UN supervised elections, was overthrown by a military coup in 1997. The forcible restoration of the legitimate government was led by Nigeria, acting in the name of ECOWAS, which had been given the express consent by the democratically elected president. The United Nations did not condemn the action but awaited a peace agreement before giving any express approval. Gray concludes that the lack of authorisation, in other situations of defeat by the democratically elected government, shows that a right of pro-democratic intervention cannot be deduced from these instances. Eventually, a right to restore democratic governance would be accepted in cases where the result of an election under UN supervision has not been accepted.¹¹³

6.2.2 Pro-democratic intervention in the doctrine

In the American Journal of International Law of 1990, professors Nanda, Farer and D'Amato engage in a debate concerning the lawfulness of the American intervention in Panama (1989). Professor Nanda examines each of the four justifications invoked for the American intervention "Operation Just Cause". One of those was the restoration of democracy due to General Manuel Noriega's annulment of the election of the US-supported opposition candidate that had taken place in May 1989. Nanda argues that even if one considers that Noriega had climbed to power by force and remained in power against the will of the people, an intervention to replace his autocratic rule by a democratic government must be considered illegitimate. Moreover, no international legal instruments permit such an intervention and an expansive interpretation of Article 2(4), allowing the use of force for the realisation of other values in the Charter, must be outruled as not being in accordance with state practice. Nanda also refers to Schachter, who opposes the view that a contextual interpretation of Article 2(4) should be undertaken in situations where the UN collective security system does not work. This thesis was originally advanced by professor Reisman who also argues that the failure of the UN has made unilateral self-help necessary. Reisman concludes that Article 2(4) should be reinterpreted to allow the use of force for a good cause, for example, popular rule. According to Schachter, the

¹¹² Gray p. 42.

¹¹³ Gray p. 43-44.

principle of self-determination should not be given priority over, for instance, the principle of non-intervention. Schachter further rejects an expansive interpretation of Article 2(4) in order to legitimise wars fought for a good cause. Regardless of its lawfulness, military intervention to promote democracy is unlikely to constitute an effective means. Nanda concludes that the majority of states do not read in a right of democratic representation in the right of self-determination.

D'Amato focuses in his essay "*The Invasion of Panama was a Lawful Response to Tyranny*", on the civil liberties and fundamental freedoms of the people of Panama. Accordingly, he criticises Nanda and Farer for their statist conception of international law based on states instead of peoples as actors in the international arena, and for their static belief in customary law as incorporated in timeless treaties. According to D'Amato, customary law has developed with the US interventions in Grenada and Panama, which represent important milestones on the way to a new conception of the principle of non-intervention. He further advocates that human rights law demands intervention in situations where any form of government becomes tyrannic. D'Amato also argues that the US intervention in Panama did not constitute a use of force against the territorial integrity nor the political independence of Panama. The reason for this conclusion is that the US never attempted to annex, incorporate or colonise Panama. After the withdrawal of the intervention forces Panama was still an independent nation with intact territorial integrity. Farer takes the opposite view, maintaining that the principle of non-intervention expresses the principle of equal sovereignty for all states. Farer continues by stating that if sovereignty means anything, it means that a state cannot compromise the territorial integrity of another state or dictate the structure of its governing institutions. Schachter opposes the thesis that interventions for a good cause should not be considered to be contrary to the territorial integrity or political independence of the target state. Instead, he argues that an invasion, even brief in character, is in violation of the right of a state to control access to its territory. Moreover, to overthrow the government of an independent state is beyond any doubt against the political independence of that state.¹¹⁴

Hoffman refers to Walzer who, in his book *Just and Unjust Wars*, asserts that intervention to establish democracy is, unlike intervention to promote the right to self-determination, illegal. Walzer presents two arguments in favour of his opinion. Firstly, in contrast to self-determination, democracy is not yet recognised as a principle of international order. Moreover, it is argued that freedom from tyranny can only be enjoyed as a result of a struggle of the repressed people and therefore cannot be received through

¹¹⁴ Nanda, Ved P.: *The Validity of United States' intervention in Panama under international law*, A.J.I.L., Vol. 84, 1990, p. 494, 497-500; D'Amato, Anthony: *The invasion of Panama was a lawful Response to Tyranny*, A.J.I.L., Vol. 84, 1990, p. 516-517, 519-520, 523; Farer, Tom J.: *Panama: Beyond the Charter Paradigm*, A.J.I.L., Vol. 84, 1990, p. 507; Schachter, Oscar: *The legality of Pro-democratic Invasion*, A.J.I.L., Vol. 78, 1984, p. 646-647, 649.

external help. Opponents of this view maintain that the governmental means of repression are likely to undermine the possibility of the people to obtain freedom on their own. Furthermore, it is argued that the principle of non-intervention is based upon the assumption that the government materialises the will of the governed. In consequence, if a state has a tyrannical government, it should not be entitled to this protection against outside interference.¹¹⁵

6.3 Justification: Intervention for humanitarian purposes

6.3.1 Humanitarian intervention as a justification in state practice

In some instances, states have justified their interventions by invoking the need to intervene because of the grave violations of human rights committed by a foreign state against its own population. At times, target states consent to intervention by a third state in order to protect its own nationals from inhuman treatment due to a state of anarchy reigning in the country. According to Ronzitti, humanitarian intervention is without a doubt unlawful and constitutes a breach of the peremptory rule of the non-use of force. However, state practice has showed that consent by the territorial state can operate as a precluding factor.¹¹⁶

Of the many instances of unilateral intervention, only a few have actually been characterised as humanitarian interventions. Moreover, in many cases, the result of the intervention has been welcomed by the international community but only on rare occasions has the recognition been based upon the doctrine of humanitarian intervention. As an illustrative example can be mentioned the intervention in Congo in 1964 by Belgium and the United States. Congolese rebel forces had taken 800 Europeans of different nationalities hostage, threatening to kill them like they had already done with a large number of Congolese nationals. The rescue operation lasted three days and the foreign troops were thereafter immediately withdrawn. Around 2000 persons were rescued, of which 200 were Congolese. The justification put forward in favour of the intervention was humanitarian and not to side with the government against the rebel forces. Although this case has been described in the literature as one of the clearest instances of humanitarian intervention, it is important to note that the intervening powers had political and economic motives to protect the government. This was also the outcome of the operation since the capital of the rebels was in the hands of the governmental forces when the foreign intervention forces left the country. The circumstance that the government had given its consent to the

¹¹⁵ Bull (ed.) p. 25-26.

¹¹⁶ Cassese (ed.) (1986) p. 154-155; Cassese (1988) p. 38.

operation further reduces the value of this instance as a case of precedence.¹¹⁷

Verwey concludes, after having examined nine cases of alleged humanitarian intervention, that in many of the cases the intervention was exclusively aimed at rescuing the intervening state's own nationals. Moreover, the prolonged presence of the foreign troops and the scope of the operations were frequently disproportionate to the original purpose of the action. Consequently, in most cases, a desire to influence the authority structure of the target state was the main motive behind the intervention.¹¹⁸

6.3.2 Scholarly opinions on humanitarian intervention

The controversial issue of the lawfulness of humanitarian intervention is basically a question of Charter interpretation. Some authors assert that the prohibition of the use of force of the Charter has a contextual character and thus, by giving emphasis to the protection of human rights, humanitarian intervention can be considered an additional exception to the prohibition on the use of force. On the other hand, some authors argue that the prohibition on the use of force is absolute and extensive in character. The restrictive interpretation of Article 2(4) gives member states the right to use force when the forcible action is not in contravention of the purposes of the UN. Furthermore, it is argued that a genuine humanitarian intervention is compatible with the UN Charter since the protection of human rights is one of the main purposes of the Charter. At times, it is even argued that member states have a duty to intervene in order to protect human rights in virtue of Article 56 of the Charter. In the light of the importance of the protection of human rights set forth in several human rights documents, some authors assert that the duty of states to protect human rights is coequal to their duty to further international peace and security. Because of the importance of the implementation of human rights for the maintenance of international peace and security, it is even argued that humanitarian intervention is in the overall interest of the international community. The derivation of a right to humanitarian intervention from Charter Article 56 has been largely criticised. It is pointed out that the explicit wording of the provision only allows member states to act in co-operation with the Organisation and thus excludes any unilateral action by a member state. It is also emphasised that human rights documents in no way allow the use of force to promote these rights. Furthermore, it is held that the most important purpose of the Charter is the protection of international peace and security and hence that the protection of human rights should not be prioritated with respect to this fundamental purpose. Proponents of a doctrine of humanitarian intervention further argue that such a right is necessary due to the lack of action on the part of the UN. In consequence, one would have to fall back on customary

¹¹⁷ Bring, Ove: FN-stadgan och världspolitiken – Om folkrättens roll i en föränderlig värld, second edition, Stockholm 1997, p. 131, 139; Cassese (ed.) (1986) p. 62.

¹¹⁸ Cassese (ed.) (1986) p. 66.

law. Against this point of view it can be argued that the failure of the security system was not unexpected, but incorporated in the Charter from its establishment. Moreover, to rely on a right of humanitarian intervention in customary law, it must be beyond any doubt that such a right is actually established. This does not seem to be the case. The majority of authors maintain that intervention to protect nationals in another state also should include persons of other origins who are accidentally in the territory of the target state. This point of view is said to be more in line with the humanitarian nature of the intervention than interventions which are exclusively focused on the protection of the nationals of the target state. This policy is also said to be less prone to abuse.¹¹⁹

Tanca rejects the theory that a third state would be allowed to intervene in another state because it is responsible for gross violations of human rights. However, he admits that the doctrine of humanitarian intervention played a decisive role in the cases of the Vietnamese overthrow of the Pol Pot regime in Kampuchea (1978) and the Tanzanian overthrow of the government of Uganda in 1979. In spite of the human rights violations committed by these regimes, it is beyond any doubt that humanitarian concerns were not the sole purpose of the interventions. Although the interventions led to the setting up of new governments and were welcomed by the local population, the Vietnamese intervention in Kampuchea was condemned by the United Nations owing to the prolonged presence of Vietnamese troops in the country. In this connection, and because of the somehow hasty recognition of the new regime in Uganda, Tanca denies the existence of a general right to intervene in foreign countries to overthrow an unpleasant or even criminal government. This reluctance is reinforced by the lack of a generally accepted criterion determining the acceptability of a government. Tanca further argues that any additional rule permitting a derogation from the prohibition on the use of force by an individual state must be based upon clear and reasonable criteria. Yet the United Nations led operations to provide safe havens for the Kurdish population of Iraq and the intervention in Somalia provide evidence of a growing importance of human rights in relation to the principle of the inviolability of state sovereignty.¹²⁰

In his essay on humanitarian intervention, Verwey advocates a solution where the protection of humanitarian interests would only take place in very exceptional cases of emergency. Instead of basing his doctrine on the revival of inherent rights under customary law, Verwey refers to the overriding principle of necessity whose value has been generally recognised as a basic principle of law. Verwey sets up seven conditions to be met for a humanitarian intervention to be lawful. First of all, the intervening power must have a relative disinterest in the situation. Moreover, the situation must be one of emergency where fundamental non-political rights are seriously threatened or violated. Furthermore, all peaceful means must have proved to

¹¹⁹ Bring (1997) p. 126-127, 140-143.

¹²⁰ Tanca p. 111-114.

be unuseful and UN action ineffectual or not possible. The intervening state must limit its actions to the original purpose of the rescue operation, which must also be proportionate. Finally, the intervening state must prove that its action is not likely to lead to a greater human loss than the situation for which the operation is intended and that it does not constitute a threat to the peace.¹²¹

6.4 Justification: Intervention in protection of nationals abroad

6.4.1 Protection of nationals in state practice

States intervening for the purpose of rescuing its nationals abroad often invoke the incapacity or unwillingness of the territorial state to resolve the situation. Necessity, lack of time to await a Security Council authorisation and the limited purpose of the operation are other justifications that have been invoked by states. In spite of the overall negative reactions by some members of the international community, intervening states seem to be convinced of the lawfulness of their actions. States condemning these operations have preferred to deny the existence of a situation of danger rather than denying the validity of the right to use force for such purposes. However, it can be argued that the state of emergency as well as the territorial government's attitude are often more easily objectively established by the state whose nationals are in danger than by the territorial state. In the situation of an outbreak of internal conflict there is rarely a clearly identifiable authority that can be held responsible. In some instances opposing factions are struggling for the power, in other cases the official authority has been undermined or has no longer any effective control. These circumstances are usually invoked by the intervening state as evidence of the incapability of the authority to protect the foreign nationals.¹²²

In practice, many acts of intervention have gone beyond the mere protection of nationals to include the protection of the government against rebel forces threatening to overthrow it. On a few occasions the United States has claimed to be acting both at the invitation by a government and in protection of its own nationals to justify its forcible intervention. The actual result of these interventionist acts has been the overthrow of the old government in favour of a newly installed government. Moreover, there have been doubts as to the actual existence of the invitation as well as its constitutional legitimacy. These twofold justifications were used to legitimise the American intervention in the Dominican Republic (1965) and in Grenada (1983), which led to criticism in both the Security Council and the General Assembly in the case of the Dominican Republic, and to condemnation by the General Assembly in the case of Grenada. Most of the cases, which have

¹²¹ Cassese (ed.) (1986) p. 74-75.

¹²² Tanca p. 118-120.

met with negative reactions, involved subsequent operations reaching beyond the initial purpose of the intervention. Third states have thus rather questioned the applicability of the principle on the facts than the legal validity of the principle itself. The controversy usually concerns questions relating to the gravity of the situation and the determination of the effective authority.¹²³

6.4.2 Legal foundations and conditions for a right to protect nationals abroad

The question of the admissibility of armed intervention with a view to protecting a state's own nationals abroad is a highly debated and controversial question in international law. The need to protect nationals abroad often arises in situations where there is internal unrest leading to the breakdown of law and order and the undermining of the authority of the government. The Charter contains no express reference to the protection of nationals. Thus, the lawfulness of rescue operations depends on the interpretations of the provisions on the non-use of force and the right to self-defence of the Charter. Accordingly, some writers propound the theory that a Security Council authorisation is necessary to legitimise a rescue operation, and that the concept of armed attack in Article 51 hardly can be said to cover a situation of danger for citizens abroad. Other scholars maintain that the right to protect nationals constitutes a fundamental right of every state. The foundation of this argument is the idea that a state is allowed to act in self-defence, not only when its territory is under attack, but also when the target of the foreign attack is its nationals. Finally, some authors base the legality of the use of force to protect nationals on the non-absolute character of the prohibition of the use of force. According to this view, a rescue operation cannot be said to violate the territorial integrity or the political independence of the territorial state; nor would it be in contravention of the purposes and principles of the United Nations.¹²⁴

Provided that the right to protect nationals abroad is perceived as a part of the legal right to self-defence, the exercise of this right is also subject to the general requirements of self-defence. Accordingly, the act of intervention must be proportionate and limited to its original purpose. Moreover, the lives of the nationals must be immediately and indisputably threatened by the foreign state or by terrorists. It is further argued that this principle applies whether the established authorities cannot or will not act in order to help the foreign nationals. Moreover, it is assumed that all possibilities of a peaceful settlement of the conflict must have proved unsuccessful.¹²⁵

Operations with the purpose of saving nationals abroad do not usually have the consent of the territorial state. However, in some cases, such consent has

¹²³ Gray p. 63-65; Tanca p. 121.

¹²⁴ Cassese (1988) p. 36; Tanca p. 117-118.

¹²⁵ Cassese (1988) p. 41; Norton Moore (ed.) p. 44.

been given at the request of the state whose nationals are in danger. The question is thus to determine whether a peremptory norm is infringed when a state uses force to protect its nationals abroad. The infringement of a rule of peremptory international law invalidates the consent (cf. Chapter 5.1.2.2). Some states claim that such a use of force is permitted. In consequence, the requirement of the acceptance of a rule by the whole international community is not fulfilled. In consequence, the prohibition on forcible intervention to protect nationals abroad cannot be said to be a norm of peremptory character. It follows that consent by the legitimate authority is valid. This conclusion is also supported by the International Law Commission as well as state practice.¹²⁶

In general, it can be held that in situations of emergency, where the undertaken operations are limited to their initial purpose, state practice coincides with the views expressed in the legal literature. The question that arises is thus one of legal admissibility of the practice. Tanca argues that it is problematic to classify the right of protection of nationals within the framework of self-defence since the element of imputability is absent. As regards the element of necessity it would be hard to consider the loss of a limited number of individual lives as threatening an essential interest of the state whose nationals are in danger. On the other hand, to let the legality of a rescue operation depend on the number of nationals that are in danger seems unacceptable as well. Tanca embraces the theory propounded by Ronzitti according to which a customary rule that allows derogation from the ban on the use of force for protection of nationals exists. For this theory to be workable a few strict conditions have to be fulfilled: the existence of an objective situation of danger, the impossibility of solving the conflict by non-forcible means, inaction of the territorial authority and proportionality of the rescue operation. State practice seems to support this hypothesis. However, given the exceptional character of this justification, it is likely to play a limited role.¹²⁷

¹²⁶ Cassese (ed.) (1986) p. 153-154.

¹²⁷ Tanca p. 122-125.

7 Conclusion

7.1 The current state of the principle of non-intervention

In the following chapter a conclusion of the analysis on the current state of the principle of non-intervention will be presented. As has been showed in Chapters 5 and 6, this fundamental principle is constantly challenged by the persistent attempts by third states at justifying intervention in civil conflict.

7.1.1 The justifications of consent and collective self-defence

The validity of intervention with consent of the territorial government and intervention in collective self-defence is generally accepted both by the members of the international community and by legal authors. A few conditions are however of vital importance in order to avoid abuse to the greatest possible extent. The practical application of these justifications is further substantially linked to various problems of definition.

The legal validity of intervention with consent of the incumbent government seems to have been deeply rooted even before the Charter came into being. Although the Charter brought with it some competing principles, as for instance the principle of self-determination, the idea of consent seems to have, at the most, gone through a minor modification tightening up the conditions for its lawful exercise. Several conditions must thus be met in order to make intervention on the basis of consent lawful. Provided that all the requirements are fulfilled it can be argued that there is not even an act of intervention since it has lost its authoritarian character. Consent must be given prior to the act of intervention and there must be no doubt as to its voluntary character. Any invocation of an *ex post facto* consent is thus excluded.

The question of determining the authority entitled to express consent divides legal scholars and has led to a considerable number of problems of definition in state practice. The question arises whether it is the popular or the effective authority that has the representative competence to express consent. The prevailing view among legal authors is to favour effective control of the territory. Although the criterion of popular support has gained some recognition, it is contradicted for several reasons. Recognition of an authority on the basis of its democratic representativeness would increase the discretionary character of third state assessment of the internal conflict. This margin of discretionary recognition by third states also plays a role with respect to the determination of the level of the domestic unrest and thus the legal validity of intervention. Finally, in virtue of the principle of internal

self-determination the intervening state is prevented from imposing a government, which does not have popular support.

In practice, the problems have largely been of political character and have focused on the determination of the facts rather than challenging the doctrine of consent itself. Given the many instances of state abuse the debates have turned on the questions of whether an invitation has actually taken place and whether the formerly legitimate government still has representative competence to express consent although its authority is called into question by the internal uprising. The implicit recognition of agreements on the stationing of foreign troops on another state's territory in Article 3(e) of the 1974 Definition of Aggression and the role of consent as precluding the wrongfulness of an otherwise unlawful act in the ILC's Draft Articles further support the recognition of consent as a legitimate ground for intervention.

By way of conclusion, it can be observed that the difficulty in determining the legitimate authority to express consent is especially complicated with respect to civil conflicts, since it is exactly this authority that is questioned. In spite of the increasing consensus on democratic values among member states of the international community, it is still of vital importance, with a view to preserving the effectiveness of the principle of non-intervention, that the representative authority continues to be determined on the basis of its de facto control of the territory. It can be argued that the basis for obvious abuse of the doctrine of consent has subsided in the wake of the end of the Cold War. However, states are still likely to divide on the actual facts due to political affiliation and ethnic or religious solidarity with the governing majority or the insurgent minority. With respect to armed intervention, it has been argued that consent is not *against* the target state and that it therefore rules out the application of the preemptory norm of the prohibition to use force. However, it could also be argued that consent, which is only applicable between the contracting parties, cannot preclude the wrongfulness of the unlawful act since the use of force in the international arena inevitably will constitute a threat to the international peace and security in the light of the risk of escalation.

Collective self-defence is the most well established justification for intervening in civil conflict but also the most frequently abused. The provision in Charter Article 51 becomes relevant with respect to civil conflict due to the internationalisation by third state intervention. The conditions for a lawful exercise of collective self-defence are manifold. Most importantly, there must have been foreign subversion in favour of the insurgents. The required degree of the subversive involvement, in order to legitimise a response in collective self-defence by third states together with the incumbent government, has been specified in the Nicaragua case. Moreover, the aggrieved state must declare itself the victim of an armed attack and must express a request for help by third states. The authority

entitled to invite foreign assistance is prevented from asking for such help in its struggle against a people entitled to self-determination.

In order to justify a defensive reaction in self-defence the foreign subversion must amount to an armed attack. Provision of arms, munitions and funds as well as logistical aid does not justify a response in collective self-defence. Pursuant to Article 3(g) in the Definition of Aggression, only when the foreign subversion comprises the sending of armed bands of considerable strength undertaking large-scale actions with a presumed governmental involvement are third state reactions in collective self-defence deemed legitimate. Assistance short of an armed attack is merely considered a threat or use of force or as an unlawful act of intervention. US support to the *contras* in the Nicaragua case did not amount to the actions covered by Article 3(g). The Court held that in order for the mere support of an opposition movement to fall under Article 3(g) the third state must control or have created the movement. The US had only financed, armed and trained the *contras*.

According to the Nicaragua judgement there is no legal right of a third state, which is not the victim itself, to undertake any armed collective measures in response to acts short of an armed attack. This justification has received no support in state practice and has been widely rejected in the legal literature. In the light of the rigid view on the concept of armed attack by the ICJ covert subversive actions do not justify a response in collective self-defence but only individual counter-measures by the aggrieved state. Whether these counter-measures may be of forcible nature is unclear. It has also been argued that a right to assist the insurgents exists when the governmental authorities receive outside help. However, also in this connection, although frequently invoked, the supporting arguments seem rather vague. Moreover, state practice shows that states do not seem to rely on this justification for legitimising their interventions. The Nicaragua judgement does not support a right to counter-intervention for the benefit of the insurgents. Such a right was not claimed by the US, which further indicates its lack of *opinio juris*. The Court also held that such a right would result in the principle of non-intervention losing its effectiveness.

By way of conclusion, it can be noticed that the ICJ tightroped between the irreconcilable interests of preventing escalation and protecting the equal right of self-defence for all states. The right of collective self-defence is especially important for small states with limited military capacity. Moreover, military actions falling short of an armed attack are likely to affect weak states more seriously. As we have seen above, the ICJ chose to give the priority to the interest of preventing escalation by emphasising the requirement of armed attack and, moreover, to interpret it restrictively. An infringement of the principle of non-intervention thus has to amount to an armed attack in order for an incumbent government to receive external help in the exercise of its right to self-defence. Accordingly, a powerful state can train and arm insurgents with a view to overthrowing another state's regime

without having to fear an armed response from the target state's allies. The counter-measures that the target state would be entitled to according to the judgement are unlikely to include the use of force. Such a right would result in an even greater confusion of the concept of armed attack and inevitably increase the grey area between the institution of individual self-defence and the one of counter-measures. Whereas it can be argued that this rigid interpretation substantially decreases the possibility of a small state fending off covert subversive acts attempted at overthrowing its regime, the overwhelming interest of maintaining international peace and security by preventing escalation of internal conflicts should prevail.

7.1.2 The justifications of promoting self-determination and democracy and of protecting human rights and the intervening state's own nationals

Four additional justifications for intervention in internal conflict have been briefly examined in the present thesis. The common features of these justifications are that they are less commonly invoked and generally accepted to a lesser degree. Furthermore, they are usually invoked in addition to the justifications of consent and collective self-defence.

Intervention in civil conflict to further the process of self-determination must be deemed to have received wide recognition during the decolonisation period although states divide on the legal basis for such a right. Although the right to self-determination is laid down in several legal instruments its content is still unclear and its practical application ambiguously worded. The nature of the assistance to liberation movements turns on the definition of the word "*struggle*", on which states divide deeply. Consensus appears to have been reached that a third state may intervene by providing, at the most, military support. However, the sending of armed troops in state practice has led to more or less widespread condemnation. Moreover, the suppressed people is only entitled to seek external support on condition that the government *forcibly* deprives the people of its right to self-determination. Although it would be desirable to extend the concept of self-determination to other beneficiaries than peoples under colonial rule, racist regime or foreign domination, present day self-determination does not seem to have gathered such uniform support among states nor in the doctrine. This reluctance is partly due to the respect for the territorial integrity of sovereign states. Moreover, the legal provisions on self-determination were intended to regulate self-determination in its colonial context.

Intervention in internal conflict to promote democracy has received very little support by the majority of the international community as well as the legal literature. The discretionary determination of what democratic values are is the principal argument against the validity of such a doctrine. In spite of the general advance of democratic values with the end of the Cold War, democracy is not yet recognised as a principle of international order.

Moreover, states do not generally seem to rely on such a right for justifying unilateral intervention in civil conflict. However, it can be noted that the US has recently invoked the undemocratic regime of Iraq as an additional justification for its imminent invasion. Only when a government, democratically elected as a result of UN supervised elections, is overthrown, might a right to restore the democratic governance be legitimate. Moreover, it is generally rejected to read in a right to democratic governance in the right to self-determination. Without support from the principle of self-determination, the sole possibility of legal support in favour of a right to promote democracy is to be found in an extensive interpretation of Charter Article 2(4). According to such an interpretation the use of force for the realisation of other values laid down in the Charter is permissible. This interpretation, by which the principle of self-determination would prevail over the principle of non-intervention, is argued to have no support in state practice.

Intervention in civil conflict in order to prevent gross violations of fundamental human rights has rarely been explicitly invoked by intervening states. State practice also shows that most cases of alleged humanitarian intervention were aimed at influencing the political structure of the target state. For an intervention to be labelled humanitarian, the intervening state must not exclusively come to rescue of its own nationals or of individuals of a specific origin. For humanitarian intervention to be deemed legitimate the intervening state must have a relative disinterest in the situation and must limit its operation in scope and time to the original purpose of the operation. Moreover, peaceful resolution of the conflict and UN action must have failed and the situation must be one of emergency. Like pro-democratic intervention, the legal validity of humanitarian intervention also turns on the interpretation of Article 2(4) of the Charter. Accordingly, some authors advocate an extensive interpretation of the ban on the use of force whereas others give preference to a contextual reading of the provision according to which other purposes of the Charter, as for instance the protection of human rights, are allowed to prevail.

Intervention in internal conflict in protection of the intervening state's own nationals has received considerable support from third states as well as the doctrine. This justification is however subject to several requirements for its legitimate exercise. Accordingly, an objective situation of danger and inaction by the territorial authority must have been established. The rescue operation must further be necessary, proportionate and limited to its original purpose. Criticism from third states has substantially concerned cases where the intervening state has gone beyond the original purpose of the operation to support one warring faction. Hence, the legitimacy of the doctrine itself has not been seriously challenged. The legal validity of the right to protect nationals abroad depends on the interpretation given to Articles 2(4) and 51 of the Charter. It is argued that such intervention is in accordance with Article 2(4) since it neither violates the territorial integrity nor the political independence of the target state and does not conflict with the purposes and

principles of the Charter. By arguing that Article 51 does not only cover cases where the territory of a state is under attack, but also cases in which its nationals are in danger, some authors base the legal validity of the doctrine on this article.

By way of conclusion, with respect to the additional justifications, it can be established that the individual use of force for the implementation of these values is ruled out. This is held to be the case even when the use of force is the only way of implementing these values. Accordingly, international law of today serves the sole purpose of restoring status quo.¹²⁸ Moreover, the requirements set forth for their lawful exercise are so extensive as to make their practical application an uncommon feature in inter-state relations. The principle of non-intervention thus seems to have lost very little of its predominant position with respect to these justifications. In present-day international law only intervention for the protection of nationals abroad appears to have received large support from the international community. The reasons for this general acceptance are probably the “in-and-out” character of the operation, its twofold legal foundations and its close connection to the legitimate interests of the intervening state. Accordingly, a sincere purpose of rescuing nationals abroad is reconcilable with the principle of non-intervention; although of very little practical implication.

In spite of the persistent attempts at eroding the predominant role of the principle of non-intervention, and the flagrant violations of it, the principle remains relatively unaffected. This is mainly due to the lack of an *opinio juris* as a result of the divergent political interests of states. Thus, paradoxically, at the same time as political antagonism challenges the validity of the principle through intervention, it also strengthens it in that state practice is never uniform enough to modify its content. The sets of possible justifications elaborated through state practice are thus rather evidence of the prominence and continued unchanged existence of the principle of non-intervention.

7.2 The principal interpretative problems and the role played by legal instruments subsequent to the Charter

It can be concluded that the disagreement in state practice frequently has been a matter of establishing the facts of an actual situation in order to determine whether the relevant legal provisions apply to it. Whereas the disagreement on these questions used to be strictly ideological/political, this might no longer be the case in the wake of the end of the era of decolonisation and the Cold War. The aspect of time, with the ever-changing political ties between states, renders the determination of a development of the *opinio juris* even more difficult. It can be argued that,

¹²⁸ Tanca p. 146.

given the strong political influence on states' reactions to instances of violations of the principle of non-intervention, it is even questionable whether they should be considered as conclusive for the development of the *opinio juris*. What used to be political alignments have developed into affiliations based on other common interests such as religion, ethnicity, culture, natural resources and development. However, the extensive intervention policy of the super Powers in developing countries still has a considerable impact on these states' reactions to violations of the principle of non-intervention. The interpretative disagreement thus subsists but is no longer exclusively politically predictable.

The need to clarify the principle of non-intervention as a result of its implicit treatment in Charter Article 2(4) resulted in its inclusion in various subsequent resolutions. The question thus arises whether these instruments have led to an elucidation of the principle. By looking at state practice it can be observed that most disagreements actually turn on the wordings of Charter provisions 2(4) and 51. Subsequent instruments thus frequently refer back to the unclear provisions, purposes and principles of the Charter that they were intended to clarify. Naturally, the FRD cannot in any way modify the original content of the Charter and is not legally binding being a General Assembly resolution. However, the number of cases which revolves around the interpretations of Charter provisions cast serious doubts as to the effectiveness of the General Assembly resolutions. An additional circumstance, further weakening the practical importance of these resolutions, is their ambiguous wordings. At the time of the deliberations, the object of attaining consensus was apparently considered more important than actually clarifying the principles. Consequently, the disagreement between states, already present during the deliberations, on the actual meaning of a number of expressions was built into the resolutions.

Article 2(4) contains several of the most disputed expressions. The wording "*in their international relations*" has been used in support of colonial powers' right to use force against its colonies. The colonies were not considered as separate entities until the express provision in paragraph 6 of principle (e) in the FRD. The formulation "*territorial integrity or political independence of any state*" has been used in justification, for instance, of operations such as the US invasion of Panama, for the alleged purpose of restoring democracy in the country. As the intervention did not have the purpose of annexing, incorporating or colonising Panama, the territorial integrity was said not to have been violated. With relation to military operations with the purpose of rescuing the intervening state's own nationals, it has been argued that such interventions do not violate the territorial integrity nor the political independence of the target state because of the "in-and-out" character of the operations. As regards the formulation "*in any other manner inconsistent with the Purposes of the United Nations*" great disagreement can be observed both between legal scholars and in state practice. The very essence of the interpretative problem is whether the use of force, normally in violation of the provision in Article 2(4), is justified if it

is undertaken in order to further other purposes set forth in the Charter. This interpretation has been advanced with respect to all the additional justifications. Closely linked to this question is the question of the absolute or non-absolute character of the prohibition on the use of force, i.e., whether the prohibition should be extensively or restrictively interpreted. The formulation has led to restrictive interpretations, which constitute the most serious threats to the prohibition on the use of force and the principle of non-intervention. It is further asserted that the purpose of maintaining international peace and security, in virtue of the provisions on the use of force and non-intervention, is not to be considered as a higher principle than the protection of other values in the Charter. The meaning of the expressions “*inherent right*”, “*collective self-defence*” and “*armed attack*” in Article 51 has already been dealt with in a rather detailed way in the thesis. The divergent interpretations of these expressions are decisive for the legitimacy of the justifications of collective self-defence, protection of a state’s own nationals and intervention in order to further the process of self-determination.

The interpretation of the word “*struggle*” is relevant for the right of dependent peoples to resort to force in their relations to the colonial power and for third states’ right to assist them. In the Declaration on Colonialism the word “*struggle*” was not included. It was not until the adoption of the FRD that the word was used, although in a neutral sense through the circumlocution “*actions against and resistance to*”, which met with general acquiescence. The word actually had been used before, for instance in Resolutions 2105 and 36/103, where the meaning of the word was the right of peoples to wage *armed struggle*. However, these resolutions met with an important number of abstentions and negative votes. Although not explicitly stated in the FRD, it is frequently argued that the document intended to cover also armed struggle. In support of this interpretation it can be argued that it is only as a response to a *forcible* denial by the government that the people is entitled to act. The exact meaning of the word was a major point of disagreement during the deliberations on the FRD. The word “*struggle*” can also be found in Article 7 of the Definition of Aggression. Also in this connection the exact meaning of the word has been the object of divergent interpretations. As a corollary to the right to armed struggle the exact meaning of the word “*support*”, in the FRD and the Definition on Aggression, is also a controversial issue.

In addition to the legal inability of these instruments to amend the Charter provisions, each of these instruments also contains articles intended at emphasising the predominant role of the Charter. These clauses refer back to the Charter stating that no provisions shall be construed “*as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful*” or “*as affecting the relevant provisions of the Charter relating to the maintenance of*

international peace and security".¹²⁹ By way of conclusion, it can thus be argued that subsequent instruments do very little to resolve the interpretative problems embodied in most Charter norms. Moreover, when they do so they ascertain, through the saving clauses, that nothing is to be construed as modifying the Charter norms. Since the entire debate revolves around the proper interpretation of the relevant Charter provisions and exactly what means are allowed in order to implement the purposes and principles of the Charter, the references back to the Charter do little more than assure the continuation of the debate and preserve the uncertainty (cf. FRD principle (e) paragraph 5 in fine). When subsequent instruments have dealt with the questions at all, consensus has been attained at the price of ambiguity. The question naturally arises whether such great importance should be attached to achieving consensus so as to justify deliberate ambiguous results.

¹²⁹ Definition of Aggression, article 6; FRD, principle (c), paragraph 5.

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