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Workshop: "International Customary Law on the Use of  
Force: A Methodological Approach

**Consistency, Universality, and the Customary Law of Interstate Force**

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**I. Introduction**

This workshop is addressing a difficult set of issues: the nature and content of the customary law regulating the circumstances in which states may use force against one another. The questions I have been asked to discuss - consistency and universality of practice with respect to the customary international law of force - are not the least complex of those we confront.

Before one can consider consistency and uniformity of practice, however, one must determine what one means by practice. To answer this question, it is helpful to ask why one would accord legal force to a custom at all. If we can explain this, it is easier to identify the practice which is one of the constituent elements of customary international law. Scholars have argued that the justification for labeling a consistent practice as *Alaw@* is that such a practice gives rise to justified expectations that states will behave in the future as they have done in the past.<sup>1</sup> If we can assume that a consistent practice becomes law because states are justified in expecting that the practice will be repeated, it would seem to follow that consideration of a number of the issues we address can be facilitated by asking, what sort of behavior can reasonably be said to give rise to justified expectations? It is such behavior, and only such behavior, which ought to count as practice.

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<sup>1</sup> *See, e.g.*, J. G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 38-39 (10<sup>th</sup> ed. 1989).

Although I know that there is tremendous dispute on this score, I believe, as I have written elsewhere, that the type of behavior most relevant to determining the customary law regarding the use of force is that relating to the actual use of force.<sup>2</sup> The fact that a state uses force in given circumstances surely is inconsistent with a reasonable expectation that the state will not use force in such circumstances; if the most crucial behavior for our purposes is that which gives rise to reasonable expectations, then a reasonable public official, seeking to determine when he should reasonably expect other states to use force and what reactions he should expect to uses of force by his own state, should therefore focus on the circumstances in which force has actually been used. This is not to say that statements or non-binding votes in international organizations are irrelevant, but only that such behavior is at best a proxy for decisions in concrete cases on whether to use force, and cannot outweigh the evidence of actual behavior. On this assumption, then, I will address the question of consistency of practice and uniformity of obligation primarily by examining states' decisions, in particular cases, to use or refrain from the use of force.

This is not to say that the actions of states not directly involved in particular conflicts will be excluded from this analysis of practice. On the contrary, since states will have occasion to act with respect to conflicts in which they are not participants in a number of ways, such actions must be considered. It would obviously be misleading to describe a situation in which State A took territory from State B by force without discussing whether third states reacted to the territorial seizure by recognizing it or instead by imposing sanctions on State A until it relinquished its acquisition.

But the fact that we are addressing these questions in the context of determining the customary international law regarding the use of force raises another issue: how do we determine what level of consistency and degree of uniformity are necessary to establish a putative norm as a legal rule? In my opinion, the best way to do this is to examine the histories of established rules; such a procedure allows us to see how consistent practice was in the period during which the rule was formed, and how uniformly the

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<sup>2</sup> ARTHUR M. WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* 1-27 (1997).

rule has been applied. To be sure, this puts us in the odd position of having to identify rules of law before we can examine criteria which would let us determine whether the rules are rules of law. One way around this dilemma is to ask, not how is the rule created, but rather, what real world effects would one expect to see if a rule has been created? If one can identify such effects, one can identify rules, and once the rules are identified, an historical inquiry into the formation of rules becomes possible.

But what real world effects *would* one expect to see if a rule has been created? As I have written elsewhere, presumably one would expect states generally to obey the rule - otherwise, it would not be true that there was a general practice of states that the rule would be obeyed.<sup>3</sup> Further, on the presumably relatively rare occasions when the rule was violated, one would expect states affected by the violation to react negatively - the more serious the rule violation, the more negative the reaction ought to be.<sup>4</sup> Conversely, if states come to accept a state of affairs created by some action, such acceptance argues against the illegality of the action which produced the state of affairs.

We can now say how we ought to proceed. Uses of force in which states can engage without suffering some sanction more serious than criticism cannot, according to the above criteria, be considered unlawful; one could therefore formulate a rule of customary international law to the effect that force may be used in such circumstances. On the other hand, uses of force which are uncommon and which, when they take place, lead to serious negative consequences for the state using force, are unlawful, permitting us to assert the existence of a customary international legal rule forbidding such uses of force. Having identified rules of customary law, we can examine the practice which led to the emergence of these rules; the degree of consistency of that practice will give us an indication of how much consistency is necessary to constitute a

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<sup>3</sup> WEISBURD, *supra* n. 2, at 4-13.

<sup>4</sup> *Id.*

rule of customary international law. Similarly, if there seem to be exceptions to the rule, or if it is limited in its application, we will learn something about the uniformity of obligations created by customary international law.

## II. Rules

In this section of this article, I will describe the rules whose formation I propose to examine, explaining my reasons for considering these rules to be legally binding. In following sections, I will seek to determine what these examples can tell us about the degree of consistency of practice required before a norm acquires the character of a legal rule, and the degree to which such a status depends on the uniformity with which the rule is observed. Because there are a great many norms which are candidates for consideration as rules of customary international law respecting the use of force, it is impossible in a brief presentation to consider all such rules. I propose therefore to discuss three broad categories of such norms: those relating to the use of force to overthrow or to resist the overthrow of colonial rule by European states, those relating to a state's conquest of territory, and those relating to a state's efforts to overtly use its military in an attempt to change the government of another state.

### A. Rules Relating to European Colonialism

At the end of World War II, there were large areas of the world, in many cases thousands of miles distant from Europe, the populations of which were largely non-European but which were ruled by European states. In the early twenty-first century, there remain relatively few areas outside Europe which are ruled by European states.<sup>5</sup> This end to Europe's colonization of Africa and of large parts of Asia came about in part through uses of force. One can discern certain patterns in these uses of force, which patterns arguably represent rules of customary international law. In this section, I will describe a number of conflicts that arose in the context of decolonization, and seek to identify the legal rules that emerged from these conflicts.

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<sup>5</sup> *Information from Non-Self-Governing Territories transmitted under Article 73e of the Charter of the United Nations: Report of the Secretary General*, U.N. GAOR, 59<sup>th</sup> Sess., U.N. Doc. A/59/71 (2004).

### 1. *France/Vietnam, 1945-54*

By the end of 1946, France's efforts to reassert control over its colony of Vietnam had led to war between France and the Viet Minh, a political organization whose leader, Ho Chi Minh, had proclaimed Vietnam's independence in 1945. The rest of the world took little notice until late 1949, when the Viet Minh extended diplomatic recognition to the People's Republic of China (PRC). This action led the United States to brand the Viet Minh as a Communist organization, and to provision by the United States of large quantities of military aid to France; by 1954, the United States was paying 80% of France's expenses in fighting the war. Similarly, the PRC provided significant aid to the Viet Minh, in particular heavy artillery. With this aid, the Viet Minh were able to inflict a significant defeat on France in 1954 by capturing the French post at Dien Bien Phu. Prior to that event, a conference had convened in Geneva to seek a negotiated end to the fighting. After the fall of Dien Bien Phu, and after the failure of American efforts to attract further support for the French, the Geneva conference produced an agreement that ended the fighting between the Viet Minh and France, and led to the independence of the northern portion of Vietnam. It should be noted that, once the fighting attracted international interest, the principal focus of outside states was in pushing for some type of negotiated settlement. That is, other states seemed to see the issue as more political than legal - their focus was on negotiating an end to the conflict, rather than on evaluating the legalities of it.<sup>6</sup>

### 2. *Indonesia/Netherlands 1945-49*

Like France, Netherlands had seen its colony in Indonesia conquered by Japan during World War II. Indonesia likewise declared its independence in 1945, and the Netherlands emulated France in seeking to restore the pre-war status quo. The disagreement led to fighting between the two sides. Indonesia had attracted the support of the Arab League in 1946, and the United States, the United Kingdom, India and Australia all took steps indicating a similar view. The Security Council called for a cease-fire in August, 1947, and established a Good Offices Committee later that year; that Committee worked out an agreement in January, 1948, but that agreement broke down in December of that year when the Netherlands resumed military operations. The international reaction was one of condemnation. The United States suspended Marshall plan aid to the Netherlands East Indies, and the United States Congress considered various

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<sup>6</sup> WEISBURD, *supra* n. 2, at 64-68.

proposals to end other aid to the Netherlands. Other states also made their opposition to the Dutch action clear. Ultimately, after a debate in which the United States, the Soviet Union, Australia and other states all labeled the actions of the Netherlands as illegal, the Security Council adopted resolutions calling upon the Netherlands to free those Indonesian leaders whom it had arrested<sup>7</sup> and then to discontinue its military operations and negotiate with the Indonesian authorities the terms of a transition to independence<sup>8</sup> (neither resolution was a decision under Chapter VII of the U.N. Charter<sup>9</sup>). The Netherlands bowed to all of this pressure, and transferred sovereignty to Indonesia in December, 1949. It should be stressed that, in this crisis, third states threatened the Netherlands with significant negative actions and labeled its action illegal (although refraining from either threats of military action or the adoption of binding resolutions in the Security Council that would have obliged the Netherlands to act). Further, this pressure played an important role in the final resolution of this matter.<sup>10</sup>

### 3. *France/Tunisia 1952-56*

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<sup>7</sup> S.C. Res. 63, U.N. Doc. S/1150 (1948).

<sup>8</sup> S.C. Res. 67, U.N. Doc. S/1234 (1949).

<sup>9</sup> S.C. Res. 63, U.N. Doc. S/1150 (1948), S.C. Res. 67, U.N. Doc. S/1234 (1949).

<sup>10</sup> WEISBURD, *supra* n. 2, at 68-70.

France established a protectorate over Tunisia in 1881. By 1952, many Tunisians sought independence. When reforms France introduced proved to be less sweeping than had been hoped, violence resulted. The conflict waned after France granted complete internal autonomy in 1954; after France granted independence to Morocco, pressure for Tunisian independence increased, and France yielded to it, granting independence in 1956. Third parties did not become involved in this matter militarily; however, the conflict was discussed in the General Assembly of the United Nations in 1952, that body ultimately adopting a resolution calling for negotiations between France and the Tunisians with the object of permitting self-government to Tunisia. As in the Indonesian matter, the resolution treated the colony and the colonial power as equals.<sup>11</sup>

#### 4. *France/Morocco 1953-56*

In August, 1953, France removed the sultan of Morocco from office, as he had become associated with nationalists in his country who sought the end of the French protectorate. By October, 1953, terrorism had broken out in Morocco; France sought to regain control through the use of force, but was unable to do so. France was ultimately forced to free the sultan, permit him to resume his throne, and - in 1956 - grant independence. As was true in the case of Tunisia, the General Assembly in 1952 adopted a resolution on the matter, its language substantially identical to that adopted with respect to Tunisia. After the sultan was deposed in 1953, the General Assembly again took up the matter, but the resolution that was subsequently offered - which referred to the rights of the Moroccans to democratic institutions - failed to obtain the required two-thirds majority, in part because of doubts regarding the competence of the United Nations to address what some states saw as an internal matter. The General Assembly in 1954 and 1955 contented itself with noting the parties' intentions to negotiate. Again, this matter demonstrated increasing opposition to the fundamental legitimacy of the concept of colonialism.

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<sup>11</sup> *Id.* at 70-71.

Third state reaction to this situation was not confined to diplomatic discussion, however. The nationalists established bases in the Spanish protectorate in northern Morocco, apparently with the acquiescence of Spanish authorities. Egypt permitted Moroccans to establish training facilities in its territory, and to open offices. Other states permitted propaganda radio broadcasts from their territory. In other words, third state reaction was not limited to condemnations of colonialism, but also included concrete assistance to anti-colonial groups.<sup>12</sup>

##### 5. *France/Algeria 1954-62*

Beginning in 1954, an armed struggle began in Algeria aimed at obtaining independence from France. Unlike Morocco and Tunisia, Algeria was not a protectorate; rather, France had incorporated Algeria as an integral part of its territory. The struggle was long, very bloody, and ultimately unsuccessful for France. Algeria was granted independence in 1962. This conflict gave further impetus to the proposition that European colonialism was inherently illegitimate. This conclusion follows from an examination of state practice. Thus, in 1960, the General Assembly adopted a resolution recognizing Algeria's right to independence and self-determination; in 1955, in contrast, an item relating to Algeria had been deleted from the Assembly's agenda. Further, Egypt and several Communist states provided arms to the insurgents. The Arab League provided money. Tunisia, Libya and Morocco permitted arms intended for the Algerian independence forces to move across their territories. Finally, Tunisia permitted these same forces to base themselves in Tunisian territory.

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<sup>12</sup> *Id.* at 71-73.

This last circumstance gave rise to an incident of particular significance for our discussion. In 1958, France carried out an air-raid on a Tunisian town, justifying its action by noting that the town was a base of the nationalists and that French aircraft operating over Algeria had drawn fire from the town. Despite offering these justifications, France was heavily criticized. Furthermore, after the United States and United Kingdom had proffered their good offices to resolve the controversy between Tunisia and France, their proposed a solution called on France to withdraw troops it had stationed in Tunisia but did not require Tunisia to cease providing sanctuaries for Algerian nationalists. France accepted this approach.<sup>13</sup>

In short, the Algerian conflict saw both an increase in support for the concept of self-determination and a decreased willingness to acknowledge the legitimacy of efforts by colonial powers to retain control of their colonies. In particular, third states permitting guerrillas to operate from their territory were not only not subjected to criticism, but were supported in their claims that their territory was off limits even to arguably defensive military actions by the colonial power.

#### 6. *United Kingdom/Cyprus 1955-59*

In 1955, the island of Cyprus was a British colony. Eighty per cent of the population was ethnically Greek; the remainder was ethnically Turkish. The Greek majority, as well as the population of Greece itself, strongly supported the union of Cyprus with Greece, or *Enosis*. In 1955, the Greek Cypriots, with the support of Greece itself, commenced a campaign of terrorism against the British aimed at bringing about *enosis*. Turkey adamantly opposed such a step, however, and supported maintenance of British sovereignty over Cyprus. By 1959, the United Kingdom had concluded that the strategic needs it had thought demanded its retention of sovereignty over Cyprus could be satisfied by maintaining bases on the island; Greece and Turkey had each concluded that it could not attain its maximum goals. The three states therefore agreed that Cyprus would become independent, Greece and Turkey each forcing its ethnics on the island to accept this result. While the United Kingdom had obvious reasons to refrain from retaliating against its NATO ally Greece for supporting the Greek Cypriots, it is nonetheless noteworthy that Greece was able to support the pro-*enosis* forces without being facing a British response.<sup>14</sup>

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<sup>13</sup> *Id.* at 74-75.

<sup>14</sup> *Id.* at 76-77.

### 7. *Indonesia/Netherlands 1960-62*

As of 1960, western New Guinea was a colony of the Netherlands, although Indonesia claimed sovereignty. When the Netherlands announced its intention to send naval units to the area in April, 1960, Indonesia objected strongly, insisting that the area was part of its territory. The Netherlands argued that the inhabitants of what Indonesia called West Irian should be permitted to exercise the right of self-determination, deciding for themselves whether to become part of Indonesia. Indonesia rejected this argument, and began largely ineffectual efforts to introduce its forces into New Guinea, through sea- and air-borne attacks which the Dutch were generally able to defeat. Despite Indonesia's lack of battlefield success, the position of the Netherlands was weak. In 1961, a General Assembly resolution calling for self-determination for the area if negotiations failed did not obtain the two-thirds majority required for adoption. The United States banned from its territory Dutch aircraft carrying military personnel, while in 1962 the Soviet Union offered arms to Indonesia. In August, 1962, the Netherlands agreed to an arrangement whereby the United Nations would administer the area for six months, after which Indonesia would take over administration for six years, with a plebiscite to be held in the sixth year.<sup>15</sup>

This incident clearly shows that, by the early 1960's, many states were willing to acquiesce in uses of force aimed at acquiring territory when the attacker was a third-world state and the territory in question was a European colony.

### 8. *Portugal/Angola 1961-1974*

Beginning in 1961, various nationalist groups in the Portuguese colony of Angola began operations aimed at winning independence from Portugal. By 1974, the conflict had reached a stalemate; in April of

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<sup>15</sup> *Id.* at 33-35. In the event, the plebiscite took the form of a vote in 1969 by eight consultative assemblies, which opted to become part of Indonesia, ARTHUR S. BANKS ET AL. (EDS.) *POLITICAL HANDBOOK OF THE WORLD 2000-2002* 508 (2003).

that year, a military coup in Portugal brought to power a government determined to end the war. That government had signed cease-fires with all the Angolan opposition groups by October, 1974.

The groups opposing Portugal attracted widespread support. Zaire and Zambia permitted nationalists to establish bases in their territories. Algeria, the Soviet Union and the PRC provided arms and training. The Organization of African Unity (OAU), individual African states, India and the Scandinavian states all provided financial support for the opposition. Over time, international opposition to Portugal's effort to maintain its position grew very strong. In 1962, the General Assembly adopted a resolution condemning Portugal and asking the Security Council to impose sanctions by a vote of 57-14-18, with 11 states not voting. In contrast, a 1973 General Assembly resolution which added to the earlier resolution calls for states to provide material support for the opposition groups was adopted by a vote of 105-8-16, with 6 states not voting. The year 1969 saw what was perhaps the most striking illustration, in the course of this conflict, of states' willingness to support the use of force against colonialism while condemning efforts by colonial powers to maintain their positions. In that year, Zambia complained to the Security Council of Portuguese incursions into Zambian territory from Angola and from Portugal's colony on the east coast of Africa, Mozambique. Portugal responded by complaining of Zambia's permitting its armed opponents from both colonies to base themselves in Zambia. The ensuing Security Council debate focused entirely on Portugal's failure to permit its colonies to enjoy the right of self-determination. Essentially no attention was paid to Portugal's complaint regarding Zambian aid for insurgents. The debate ended with the Security Council adopting a resolution condemning Portugal by eleven votes to none, with four abstentions.<sup>16</sup>

This conflict illustrates again the phenomenon observed in connection with the war for independence in Algeria, in which colonial powers faced international condemnation for attacking insurgent bases in other states, while states providing aid for insurgents enjoyed broad support.

#### 9. *Portugal/Guinea-Bissau 1961-1974*

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<sup>16</sup> WEISBURD, *supra* n. 2 at 77-79.

The narrative of the fighting in Portugal=s Guinea-Bissau colony strongly resembles that for Angola. Guinea-Bissau=s neighbors provided strong backing for the insurgents, the assistance in the case of the Republic of Guinea taking the form of both bases and actual participation in the fighting through the provision of artillery support. As was true in Angola, a number of outside states - the Soviet Union, Cuba, Czechoslovakia, Algeria, the PRC, and Ghana provided arms, military training, or both. Guinea-Bissau=s neighbors complained to the Security Council of Portuguese incursions, Portugal responded with complaints of support for the insurgents, and the Security Council ended by adopting resolutions either criticizing or condemning Portugal. By 1970, Portugal had gotten to the point that it denied all involvement in a raid it had in fact carried out on the capital of the Republic of Guinea in conjunction with opponents of the Republic=s government - the raid being aimed at both the government and the Guinea-Bissau insurgents. Finally, as was true in Angola, the fighting ended after the 1974 coup in Portugal, and in spite of a battlefield stalemate.<sup>17</sup>

Here again, even though third states were strongly supporting anti-colonial insurgents, it seems the world took the position that anything done to oppose colonialism was acceptable, while any actions by colonial powers directed at states providing such support was illegitimate.

#### *10. India/Portugal 1961*

In December, 1961, India invaded and conquered the Portuguese enclave of Goa. Goa was subsequently incorporated into the territory of India. India subsequently justified its actions primarily on anti-colonialist grounds. Its position was strongly supported by many Communist and third-world states; Portugal itself recognized India=s sovereignty over Goa after the 1974 coup.<sup>18</sup>

This incident is significant for a number of reasons. First, the only state with a claim to Goa other than India was Portugal. After Portugal recognized India=s sovereignty over that territory, it would be difficult to sustain any legal argument that such sovereignty did not exist. Second, India acquired sovereignty over Goa through a classic cross-border invasion. It wanted the territory, and took it. Unlike most of the other uses of force discussed in this section, this incident did not involve external support for anti-colonial

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<sup>17</sup> *Id.* at 79-80.

<sup>18</sup> *Id.* at 35-37.

insurgents, but an initiative taken by an external state, leading to the incorporation of the territory in question, not to its independence. The wide-spread support for India=s action nonetheless makes clear that, after this 1961, it became very difficult to argue that customary international law forbids even cross-border invasions if such uses of force are directed against European colonialism.

*11. United Kingdom/South Yemen 1963-67*

This conflict was an effort by Arab nationalists to eliminate the British presence in the southwestern portion of the Arabian peninsula. The British had founded their control on their relationships with certain traditional rulers, whose states the British hoped to form into a Federation of South Arabia, through which they hoped to maintain their influence. The nationalists were strongly supported by the United Arab Republic, which was at that time seeking to install a friendly government in Yemen, the state north of the area under British control. Britain appeared to lose interest in the conflict fairly quickly. Since the groups opposed to it were also opposed to the traditional rulers, political concessions to the opposition would have been at the expense of these same rulers and were unavailable to the British. However, reliance on purely military measures also became problematic after the United Kingdom announced in 1964 its intention to grant independence to the Federation in 1968, retaining only a base in the city of Aden, followed by its 1966 announcement of its decision not to retain even an Aden base. The Security Council in 1964 adopted a resolution deploring the United Kingdom=s carrying out an air attack on a fort in Yemeni territory in response to an air attack from Yemen on the territory of the traditional states the British were supposed to be protecting; rather than vetoing the resolution, the United Kingdom abstained. When a similar air attack from Yemen took place in 1966, the British did not retaliate, but took the matter to the Security Council, which refused to investigate. This refusal to protect its allies further undermined the British position. By 1967, the traditional rulers had been replaced in their states, and the United Kingdom was seeking only to withdraw as fast as possible. It finally did so in November, 1967.<sup>19</sup>

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<sup>19</sup> *Id.* at 80-82, 184-186.

Clearly, the United Kingdom felt constrained to limit its efforts to thwart Arab nationalism in South Yemen, and the outcome of the conflict there was thus not terribly surprising.

#### *12. Portugal/Mozambique 1964-74*

The particulars of this conflict differ somewhat from those of the other wars for the independence of Portugal=s African colonies. Nationalist guerrillas of the FRELIMO organization began operating against the Portuguese authorities in 1964. By 1974, FRELIMO had managed to shift its operations from the northern part of the country to the western and then to the central part of the country, demonstrating the inability of the Portuguese to contain it. The Portuguese military understood that FRELIMO thus had the strategic initiative and military morale declined, contributing to the April, 1974 Portuguese coup. In September, 1974, Portugal and FRELIMO agreed to a cease-fire and the formation of a FRELIMO-dominated transitional government.

During the conflict, FRELIMO received essential support from Tanzania and Zambia, both of which permitted FRELIMO to establish in their territories bases which were essential to its operations. The Soviet Union, the PRC, the German Democratic Republic, Tanzania, Algeria and Egypt all provided arms and training to FRELIMO. Mozambique was mentioned in the many of the United Nations instruments which referred to Portugal=s other colonial wars, and FRELIMO also received political support from the PRC. While Portugal received some support from the United States and certain Western European states, Western European support began to disappear after 1971. Portugal=s most reliable allies were South Africa and Rhodesia; Rhodesia was particularly useful, as its forces engaged in joint operations with those of Portugal, motivated by the close cooperation between FRELIMO and the principal opponent of the Rhodesian government, the Zimbabwe African National Union (ZANU).

It should be noted, however, that Portugal refrained from operating against the two states providing bases to FRELIMO, Zambia and Tanzania, aside from raids into their territories in hot pursuit of FRELIMO forces and some shelling of Tanzanian territory just north of Mozambique=s northern border. In particular, Portugal did not curtail Zambia=s access to Mozambiquan ports, Zambia=s only outlet to the sea. While fears of loss of income and leverage played a role in this decision, so also did fear of international repercussions.<sup>20</sup>

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<sup>20</sup> *Id.* at 82-85.

The events of this conflict reinforce the conclusion that assistance to anti-colonial forces was considered highly legitimate by the 1970's. Not only did states provide aid to such forces, but the colonial powers who were under attack refrained from retaliating even against the most vulnerable suppliers of such aid.

*13. Related But Distinct Conflicts: Actions by White Minority Governments, 1966-89*

The foregoing conflicts all involved efforts by European states to defend overseas dependencies from nationalist insurgencies, or actions by non-European states adjacent to European colonies to absorb those colonies. These uses of force should be compared to actions by South Africa and Rhodesia in the period 1966-1989. South Africa sought both to maintain control of what is now Namibia - originally administered by it under a League of Nations mandate - and to fend off attacks by the African National Congress (ANC), which was seeking to overturn South Africa's minority regime. The white minority government of Rhodesia, having declared independence from the United Kingdom, was seeking to maintain itself in the face of an insurgency led by ZANU.

The crucial difference between the stakes in these conflicts and the stakes in those of European colonies was, of course, that the white minority governments of South Africa and Rhodesia were not seeking merely to maintain control of outlying overseas territories, as was true in the cases of the European governments trying to avoid the loss of colonies, but to survive. None of the conflicts previously discussed involved threats to the home territory of colonial powers. Perhaps because of this difference in stakes, these governments were more willing to use force against states aiding their enemies than were colonial powers in other situations.

Thus, in the course of its efforts to maintain control over Namibia, South Africa provided active assistance to an insurgency against the government of Angola, as that government was itself aiding the anti-South African insurgency in Namibia. Indeed, South Africa committed its own troops to fighting in the Angolan civil war, attacking Angolan government forces. South Africa desisted from this course of action only after the prospect of conflict between its troops and those of Angola's ally, Cuba, became serious, and only after obtaining an agreement whereby, in return for recognizing Namibian independence and removing its troops from Angola, South Africa obtained the agreement of Angola to cease assisting the ANC and of Cuba to withdraw its troops from Angola. Similarly, after a newly independent Mozambique permitted ZANU

military units to operate from Mozambique and closed its border to Rhodesia, depriving Rhodesia of important access to the sea, Rhodesia organized an insurgent group called RENAMO to operate against both the FRELIMO government of Mozambique and ZANU forces. When the Rhodesian internal war ended in 1980, South Africa began supporting RENAMO because of Mozambique=s support for the ANC, though RENAMO continued fighting even after South Africa reduced its aid to RENAMO in 1984, the Mozambiq uan civil war not ending until 1992. South Africa also conducted raids into Botswana in 1985 and into Zimbabwe and Zambia in 1986, in both cases allegedly directed against ANC targets, though it should be noted that the governments of the raided states all insisted that the raids had not in fact been so limited.<sup>21</sup>

In other words, Rhodesia and South Africa were both willing to carry out cross-border operations in the course of these conflicts, targeting not only insurgent groups, but also territorial governments aiding insurgent groups. Their actions stand in sharp contrast to those of France, the United Kingdom, and Portugal discussed above. Again, however, this contrast in behavior is accompanied by a difference in the consequences of losing the conflicts as between the colonial powers, on the one hand, and the white minority governments, on the other.

### Analysis

An examination of these conflicts permits us to deduce the existence of certain rules of customary international law. First, a state=s provision of assistance to groups fighting for the independence of European colonies is lawful, even if that assistance extends to use of the state=s own forces to invade the colony. Second, it is unlawful for a European colonial power to use force outside the territory of a colony it is seeking to defend, even when such a use of force is limited to attacks on bases of the group against which it is fighting.

These rules seem to follow from the examples in this section. The genesis of the first rule can be seen in China=s assistance to the Viet Minh and the worldwide opposition to the attempts of the Netherlands to

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<sup>21</sup> *Id.* at 85-94, 198-200.

retain its Indonesian colony; thus, by 1950 it had become clear that the world was growing intolerant of European colonialism. When African states began providing bases and other assistance to groups fighting for the independence of French and British colonies, the lawfulness of aiding such struggles was established, and was reinforced by the support India and Indonesia received for their outright seizures of colonies. The second rule is illustrated by the acquiescence of France, Portugal and the United Kingdom in restrictions on their abilities to cross borders to attack groups with which they were, in essence, at war.

At the same time, the limits of these rules are shown by the actions of Rhodesia and South Africa. Even though the conflicts in those entities could be analogized to efforts to obtain independence for colonies, Rhodesia and South Africa were not colonies in any realistic sense. While this fact did not affect international willingness to support the opponents of the Rhodesian and South African governments, neither Rhodesia nor South Africa ever accepted any obligation to confine their uses of force to their own territories.

### B. Rules Relating to Territorial Conquest

Since World War II, there have been relatively examples of states using force in an effort to acquire territory that clearly had not been subject to their sovereignty prior to the conflict. In the few cases which have occurred, some attempts at conquest have been subject to strong international sanctions; in some, however, the attempts have not only succeeded, but done so against a background of international indifference or outright acceptance. This portion of this paper will describe the uses of force of this character since 1945 to provide a basis for subsequent analysis. In this connection, it should be noted that two of the conflicts described above - that between Indonesia and the Netherlands with respect to West Irian, and that between India and Portugal regarding Goa - are also relevant to this portion of the discussion.

#### *1. PRC/Tibet 1950*

China had, by the late eighteenth century, established itself as the overlord of Tibet. While all Chinese were forced to leave Tibet during the disorder accompanying the fall of the Manchu dynasty in the early twentieth century, other states continued to acknowledge China's suzerainty over the area. After the government of the PRC had established itself, it demanded that the authorities in Tibet acknowledge Chinese authority by September, 1950. When the Tibetan authorities did not do so, Chinese troops invaded; by May, 1951, the two sides had entered into an agreement whereby Tibet acknowledged Chinese suzerainty and agreed to permit the entry of Chinese administrators and military units. At the time of the invasion, the

matter was raised in the United Nations, but - while concern was expressed because of the use of violence - China=s authority in the region was acknowledged.<sup>22</sup>

It might be argued that this discussion is out of place, in that China =s claim to authority in Tibet was sufficiently well established that the invasion could be seen, not as an effort to acquire territory, but rather as a re-assertion of central control after an interregal period. It is set out here because of the difference between the international reaction to this incident and the reaction to the efforts of European states to retain sovereignty over colonies where they had been in power for long periods of time, in some cases exceeding the duration of Chinese control of Tibet, and where their control had been considerably greater than that of China over Tibet.

## 2. *Western Sahara 1973-?*

In 1973, a group called POLISARIO, made up of inhabitants of the Spanish colony known as Spanish Sahara, began military operations aimed at attaining independence. A year later, in 1974, Morocco and Mauritania agreed to partition the territory. Those states argued that the area had been subject to their sovereignty prior to Spanish colonization, and that they were therefore entitled to resume control upon Spain=s departure. Spain had no interest in carrying out a colonial war and in November, 1975, entered into the Tripartite Agreement with Mauritania and Morocco whereby those two states would assume administrative control of, though not sovereignty over, Western Sahara. The agreement further required Morocco and Mauritania to respect the views of the local assembly of notables regarding the future of the territory. The General Assembly, on December 10, 1975, adopted two resolutions on Western Sahara, one calling for the application of the principle of self-determination, the other *Ataking note* of the Tripartite Agreement, which was difficult to reconcile with self-determination. A majority of the assembly of notables accepted the Morocco/Mauritania partition on February 26, 1976, although a majority of the same body had also endorsed POLISARIO. On February 27, 1976, POLISARIO proclaimed the independence of the

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<sup>22</sup> *Id.* at 174-176.

former Spanish Sahara under the name of the Saharan Democratic Arab Republic (SDAR).

POLISARIO, strongly supported by Algeria, had begun operations against Morocco and Mauritania. Its operations were initially quite effective. Mauritania gave up the fight in 1979, recognizing the SDAR. POLISARIO also received considerable diplomatic support. The SDAR was admitted to the OAU and received diplomatic recognition from seventy states.

Despite severe early setbacks, however, Morocco did not give up. After Mauritania abandoned its claim under the partition agreement, Morocco asserted sovereignty over the entire Western Sahara. In 1980, it fundamentally altered its military tactics and strategy and halted POLISARIO's success. Using its new approach, it had control of almost the entire territory of Western Sahara by 1988. Throughout the war, Morocco also received considerable international support, including arms supplies from the United States and France. Conservative Arab states provided financial assistance. A number of states took steps that indicated de facto recognition of Moroccan sovereignty over the area.<sup>23</sup>

In 1988, Morocco and POLISARIO accepted in principle a UN proposal for a cease-fire, with a referendum to determine the future of the area, the cease-fire finally taking effect in 1992.<sup>24</sup> As of this writing, the referendum has not taken place, with Morocco continuing to insist upon autonomy for the area within the framework of Moroccan sovereignty.<sup>25</sup> Morocco remains in control of the area.<sup>26</sup>

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<sup>23</sup> *Id.* at 244-246.

<sup>24</sup> *Id.* at 246.

<sup>25</sup> *Security Council Extends UN Mission for Referendum in Western Sahara until 31 October*, UN Press Release SC/8077 (April 29, 2004).

<sup>26</sup> CIA WORLD FACTBOOK 2003, available on the Internet at <http://www.cia.gov/cia/publications/factbook/geos/wi.html>, visited May 4, 2004.

### 3. *Indonesia/East Timor 1975-83*

After the 1974 military coup in Portugal, political disagreements began to manifest themselves among the inhabitants of the Portuguese colony of East Timor (the colony formed the eastern portion of the island of Timor; the western portion was a province of Indonesia). One group, called FRETELIN, sought independence from Portugal; the other, the UDT, sought to maintain ties with that country. The UDT attempted a coup in August, 1975. The Portuguese authorities did nothing, and abandoned their posts on August 27. However, FRETELIN fought back, and was in control of East Timor by the first week of September. In October, Indonesia - apparently concerned by FRETELIN's radical rhetoric - invaded East Timor from West Timor. Apparently seeking greater international support, the FRETELIN government declared independence on November 28, 1975; it was recognized, however, only by those African states which had formerly been Portuguese colonies. At the same time, the UDT declared that East Timor was part of Indonesia. On December 7, 1975, Indonesia carried out an air- and seaborne attack on the capital of East Timor; it had more than 20,000 troops in East Timor by January, 1976. On July 17, 1976, Indonesia declared East Timor to be its twenty-seventh province after a request from a Apopular representative assembly whose representative character was questionable. FRETLIN resistance to the invasion began to weaken in 1977, and had become very limited in its effectiveness by 1983, as Indonesia sought to establish its control with great energy and massive brutality.

Initial reaction to the invasion was split. In the immediate aftermath of the invasion, both the Security Council and the General Assembly adopting resolutions deploring the invasion, but ten states - including Japan, India, Saudi Arabia, and all ASEAN states except Singapore voted against the General Assembly Resolution, and forty-three abstained. The Security Council did not address the matter after 1976. By 1978, a General Assembly resolution calling for self-determination for East Timor, but not mentioning Indonesia, was adopted by a vote of only 59-31-44. By 1987, the matter did not come before the General Assembly. Furthermore, a number of states affirmatively indicated their acceptance of Indonesia's claim of sovereignty, through various diplomatic actions which implicitly acknowledged Indonesian control.<sup>27</sup>

The situation changed after the Asian economic crisis of the late 1990's led to the resignation of Indonesian President Suharto. His successor, in June, 1999, proposed a referendum on East Timor=s

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<sup>27</sup> WEISBURD, *supra* n. 2, at 247-250.

future. That referendum took place in August, 1999, with a very large majority voting for independence from Indonesia.<sup>28</sup> Pro-Indonesian militias in the area reacted with great violence, which Indonesian security forces did nothing to stop. However, the Indonesian government agreed, in September, 1999, to the dispatch of troops under United Nations auspices to the area and to the establishment of a United Nations administration to oversee the restoration of order. East Timor became fully independent in 2002.<sup>29</sup>

#### 4. *Somalia/Ethiopia 1975-88*

At the time Somalia became independent, it sought to bring within its borders all territory inhabited by ethnic Somalis. Among such areas was the Ogaden Desert in Ethiopia. After the 1969 military coup in Ethiopia, Somali groups in the Ogaden began armed resistance to the Ethiopian government. As early as 1975, Somalia provided substantial logistical support to those groups. In July, 1977, Somalia sent its regular forces across the border in an effort to conquer the Ogaden.

The international response was strongly negative. The Soviet Union and Cuba provided massive support; the German Democratic Republic and the People's Democratic Republic of Yemen provided troops and technicians. States, including the United States, which had agreed to provide arms to Somalia prior to the invasion cancelled those agreements after the invasion. While some Arab states provided aid to Somalia, the quantity was small relative to the aid Ethiopia received. It should also be noted, however, that the Soviet Union had made clear to Ethiopia that it would not provide assistance for a counter-invasion of Somalia, and a number of states refusing to aid Somalia, or providing only limited aid to that state, made clear that their attitudes would change in the event of an Ethiopian invasion.

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<sup>28</sup> Information from Government of East Timor website, <http://www.gov.east-timor.org/>, visited May 4, 2004.

<sup>29</sup> Information from the website of the United Nations Transitional Administration in East Timor, <http://www.un.org/peace/etimor/etimor.htm>, visited May 4, 2004.

Somali forces had enjoyed initial success, but could not withstand Ethiopian forces once Ethiopia began to receive outside assistance. Somali troops had left Ethiopia by March, 1978. Somali groups within Ethiopia continued their activities, however, while Ethiopia began to aid dissident groups inside Somalia. Somalia also reported incursions by Ethiopian forces. In the face of these Ethiopian actions, Somalia was able to increase its military cooperation with the United States. Ultimately, in 1988, Somalia and Ethiopia signed a peace treaty.<sup>30</sup>

#### 5. *Iraq/Iran 1980-88*

In 1975, Iraq and Iran concluded an agreement. In return for Iran's closing its border to Iraqi Kurds, who were in rebellion against the Ba'ath government of Iraq, Iraq agreed that the border between the two states should be the middle of the Shatt al Arab waterway, abandoning its claim to the whole of the Shatt. This was a significant concession by Iraq, as the Shatt al Arab provided Iraq's only outlet to the sea. Relations between the two states worsened after the fall of the shah. Iranian calls for revolts by Shi'ites throughout the Gulf region threatened Iraq directly, because of its Shi'ite majority, and also threatened Iraq's access to the sea, in light of the significant Shi'ite presence in a number of the Persian Gulf sheikhdoms. After Iraq responded to attacks on certain government officials with repression, Iran called for the overthrow of the Ba'ath government.

Iraq's September, 1980, invasion of Iran came against this background. Iraq hoped, by seizing Iranian territory, to force a peace treaty under which it could regain control over the whole of the Shatt al Arab and reduce the danger to its government. Iraq's attack was initially successful, but Iran was able to turn the tide of battle by 1982; Iraqi forces abandoned Iranian territory in June of that year. The following month, Iran invaded Iraq, demanding, as the price of a withdrawal, very large reparations, replacement of the Ba'ath regime, and the trial of Iraqi president Saddam Hussein as a war criminal. Over the next six years, Iran was unable to make more than minor lodgments on Iraq's territory, its attacks realizing little success but

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<sup>30</sup> WEISBURD, *supra* n. 2 at 37-40.

costing it many casualties. In the spring and summer of 1988, Iraq first ejected Iranian troops from its territory and then attacked into Iran. At that point, Iran accepted a Security Council Resolution calling for a cease-fire and withdrawals to international boundaries. Iraq accepted the resolution in August, 1988, and the fighting ended.

This conflict is of considerable significance for customary international law. First, the reaction to it by third states was quite striking. There was at no point any doubt about the facts. Iraq invaded Iran in an effort to acquire territory. In 1982, after it had expelled Iraqi forces, Iran invaded Iraq in order to force a change in its government. Despite these apparent violations of Article 2(4) of the United Nations Charter, a number of states provided arms to one or the other, or both, of the combatants. Also, the Security Council's attitude was surprising. It did not adopt a resolution calling for the parties to withdraw to international boundaries until it adopted Resolution 514 July, 1982 - only after Iraq had withdrawn from Iran. It did not invoke Chapter VII of the United Nations Charter until the adoption of Resolution 598 in 1987.

A second legally striking aspect of the war was the reemergence of the concept of neutrality. Both Iraq and Iran attacked shipping in the Persian Gulf. Iraq attacked vessels, Iranian and third-state, carrying Iran's oil exports, which generated money crucial to Iran's war effort. Iran attacked tankers carrying oil from and other vessels voyaging to ports in Kuwait and Saudi Arabia. Both these states provided significant financial support for Iraq, and also served as transshipment points for Iraqi bound cargo. A number of states dispatched naval vessels to protect third state vessels from Iranian attacks on the theory that the states whose flags those ships flew were neutral in the conflict, and thus not subject to attack. Similarly, the Security Council, in its Resolution 552 of 1984, characterized Saudi Arabia and Kuwait as states not parties to the hostilities<sup>31</sup> and demanded an end to attacks on shipping to those states.<sup>31</sup>

#### 6. *Argentina/United Kingdom 1982*

In 1833, the United Kingdom seized the Falkland Islands from Argentina. The Argentines then inhabiting the islands were replaced by British settlers. The conquest remained a sore point in Argentina, however, and in April, 1982, Argentine troops occupied the islands. The United Kingdom determined to take them back. It dispatched a task force for this purpose from Great Britain. In the time it took for the British force to arrive off the Falklands, efforts were made to resolve the controversy. Argentina refused any

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<sup>31</sup> *Id.* at 47-51.

peaceful solution which did not guarantee ultimate Argentine sovereignty over the islands. The British landed on May 21, 1982, and the Argentine forces surrendered on June 14.

The Security Council determined that the invasion was a breach of the peace<sup>32</sup> but the dominant international reaction was a desire to avert armed conflict between Argentina and the United Kingdom. After unsuccessful efforts to mediate, the United States imposed economic sanctions on Argentina and provided assistance to the British. The European Community, somewhat unenthusiastically, also imposed sanctions on Argentina. The Meeting of Foreign Ministers of states parties to the Rio Treaty adopted a resolution on May 29 condemning the efforts by the United Kingdom to retake the islands, but took no steps to provide concrete assistance to Argentina.<sup>32</sup>

#### 7. *Iraq/Kuwait 1990-91*

On August 2, 1990, Iraq's army overran Kuwait. Iraq sought to incorporate Kuwait in order to take advantage of its oil wealth, to eliminate the debt Iraq owed for Kuwait's financial support during Iraq's war with Iran, and for reasons of prestige. Third states reacted strongly and negatively. The United States, the United Kingdom and the Soviet Union were all convinced that the conquest was a flagrant violation of international law. The United States was also concerned about the threat posed by Iraqi control of a large portion of the world's oil. The Security Council, on August 2, determined that the invasion amounted to a breach of the peace under Chapter VII of the Charter. On August 6, it imposed mandatory economic sanctions on Iraq. By late August, the United States had persuaded Saudi Arabia to request defense assistance, and a multinational force was assembled in Saudi Arabia to defend that kingdom from any Iraqi assault. In addition to the United States, France, the United Kingdom, Egypt and Syria all sent ground troops. A total of twenty-three states contributed naval forces to enforce the blockade of Iraq imposed by the Security Council on August 25. On November 29, 1990, the Security Council authorized states cooperating with Kuwait to use all necessary means<sup>32</sup> to expel Iraqi forces from Kuwait if Iraq had failed to

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<sup>32</sup> *Id.* at 52-55.

comply with the Security Council's resolution by January 15, 1991. Efforts to persuade Iraq to withdraw failed, and on January 16, 1991, the United States, the United Kingdom, France and Saudi Arabia began a very heavy air campaign against Iraq. After Iraq failed to comply with further ultimatums, the ground forces assembled in Saudi Arabia attacked Iraqi positions in Kuwait on February 24. By February 28, Iraqi forces had been forced from Kuwait after suffering severe military defeats; on that day, Iraq accepted the Security Council's terms for a cease-fire.

While many states did not actively contribute to the efforts against Iraq, a surprisingly large number did. Further, no state provided Iraq with anything other than verbal support.<sup>33</sup>

### Analysis

One striking aspect of this list of conflicts is their relatively small number. Nine attempts to acquire territory over a forty-three year period is not that many. Further, it seems clear that international reaction to such territorial seizures depended on the circumstances of the seizure. Thus, when the territory seized was an area subject to European colonial control but inhabited by a primarily non-European population, many states acquiesced in or openly insisted the invader. Similarly, when the area had, in the recent past, been a European colony but had not yet been recognized as a state, conquest by a neighboring state triggered only acquiescence. Similarly, what could be seen as the restoration of China's colonial control of Tibet aroused no international opposition. However, when the invaded territory was not a European colony and was clearly considered by the international community to be part of the territory of the defending state, the international reaction was generally strongly negative. Somalia's invasion of the Ogaden, the Argentine attempt to conquer the Falklands, and Iraq's subjugation of Kuwait all aroused significant international opposition. This observation, however, makes all the more surprising the apparent lack of international interest in the Iran/Iraq war. One wonders if the fact that the victim state, Iran, was also something of an international pariah affected the response of the international community. Nonetheless, the foregoing record

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<sup>33</sup> *Id.* at 55-58.

suggests the following rule of customary international law: it is unlawful for a state to forcibly seize territory from another state when the territory in question is understood internationally to be subject to the sovereignty of the state from which it is taken, and when the territory is not a European colony. Note, however, the limits of this rule: it does not apply to seizures of European colonies, and it does not apply to seizures of territory whose status is in dispute, as for example is the situation of Kashmir.

### C. Efforts to Forcibly Change the Government of Another State

States have used force in an effort to change the regime of another state several times since World War II. International reaction to such efforts has varied greatly, depending on the circumstances. As will be seen, some such efforts were greeted with acquiescence, some encountered purely verbal criticisms, and some were actively opposed by third states.

#### *1. United States/Guatemala 1954*

Concerned by what it saw as the Communist leanings of the administration of President Arbenz of Guatemala, the United States secretly organized a coup to overthrow Arbenz's government. The decision to actually launch the coup was taken after Guatemala received a shipment of arms from Czechoslovakia in May, 1954. The United States, whose role in the coup was not known at the time, had its very small force of Guatemalan exiles invade that country from bases in Honduras on June 17, 1954. The invasion was supported by air raids flown by CIA employees from bases in Nicaragua and, in particular, by propaganda broadcasts from a radio station which called itself *A Voice of Liberation*.<sup>20</sup> These broadcasts and the air raids combined to destroy the morale of the government and to produce a demand from the army that Arbenz either resign or come to terms with the invaders. He resigned on June 27.

Guatemala's efforts to take the matter to the Security Council were unsuccessful. On June 20, Guatemala appeared before the Council, claiming to be the victim of aggression from Honduras and Nicaragua. A Brazilian/Colombian resolution referring the matter to the Organization of American States (OAS) was accepted by all members of the Security Council except the Soviet Union, which vetoed it. The Council refused even to place the matter on the agenda when Guatemala raised it again on June 25; Brazil, Colombia and the United States argued that the OAS was all ready dealing with the matter, and the United States pressured the United Kingdom and France to abstain on the agenda vote. In fact, however, the OAS was not dealing with the matter. Arbenz did not agree to receive a fact-finding mission until after the June 25

vote, and the mission did not depart until the day after Arbenz resigned. Since its mission was overtaken by events, it never arrived in Guatemala City.

While the United States= success in concealing its role in this matter obviously limited third state reaction to its behavior, it is important to note that part of the hesitancy of Latin American states in responding to the coup flowed from their own fear of Communism in the hemisphere.<sup>34</sup>

## 2. *Soviet Union/Hungary 1956*

On October 24, 1956, after massive public demonstrations of discontent, the Central Committee of the Hungarian Worker=s party appointed Imre Nagy as prime minister and János Kádár as party leader. Nagy responded to demands of the demonstrators by ending the one-party state and promising free elections. Although the appointments of Nagy and Kádár had been approved by representatives of the Central Committee of the Communist Party of the Soviet Union, the Soviet Union after Nagy=s response to the demonstrations became concerned at the possibility of losing control of Hungary and at the risk of unrest in other East European states. It therefore decided to intervene in Hungary. Representatives of the Soviet Central Committee met with Nagy on October 30, agreeing to withdraw Soviet troops from Hungary and raising no objection to a multi-party government. The following night, Soviet troops began withdrawing from Budapest. At the same time, however, other Soviet troops invaded Hungary. By the middle of November, the Soviet units had crushed the Hungarian popular forces, inflicting heavy casualties. The Soviet Union justified its action by reference to an invitation from Kádár, who had formed a government after leaving Budapest on November 1 and allying himself with the Soviet Union.

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<sup>34</sup> *Id.* at 209-211.

International reaction to the invasion was limited. The General Assembly adopted resolutions harshly criticizing the Soviet Union and the new Hungarian government immediately after the invasion, and in 1957 and 1958, but not subsequently. In 1957 and in subsequent sessions until 1963, the General Assembly's Credentials Committee recommended taking no decision on the credentials of the Hungarian delegation, but this recommendation had no effect on the capacity of that delegation to vote. Aside from these actions within the United Nations, however, there was little reaction to the invasion. Indeed, the United States had made clear to the Soviet Union in late October that it would not interfere; in 1957, the United States recalled its ambassador from Hungary, but did not break off diplomatic relations. And, of course, the actions of the United Nations and the United States were directed at Hungary, not at the state which had carried out the invasion, the Soviet Union.<sup>35</sup>

### *3. United States/Cuba 1961*

In 1960, the United States began organizing a force of Cuban exiles which was intended to invade Cuba, thereby sparking a popular revolt that would overthrow the Communist government of that state. When President Kennedy took office in 1961 and was informed of the plan, he permitted it to go forward. On April 14, Kennedy ordered that the invasion proceed. The exile force, which had trained in Guatemala with that state's cooperation, departed for Cuba on that day from Nicaragua, with Nicaraguan government cooperation. On April 15, CIA aircraft flown from Nicaragua by Cuban exiles carried out raids on Cuban military airfields, two of the planes proceeding to Florida where they were called defectors from the Cuban air force. When Cuba attacked the United States in the United Nations because of the raid, the United States cancelled plans for further air support of the invasion. The invasion itself took place on April 17; it sparked no popular uprising, and the invaders were forced to surrender on April 19.

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<sup>35</sup> *Id.* at 211-213.

The United States, Honduras and Nicaragua all denied any connection to the invasion. In the General Assembly, only Communist states directly attacked the United States, but other states made statements implying their belief in American responsibility. The only resolution the General Assembly was able to adopt called only for peaceful action to remove tension. A Mexican resolution insisting on the importance of non-intervention attracted a majority of less than the two-thirds required for adoption. Outside the General Assembly, statements were made calling for non-intervention or criticizing actions taken against Cuba, but not specifically condemning the United States. No other form of disapproval was expressed.<sup>36</sup>

#### 4. *United States/Dominican Republic 1965*

In 1963, President Juan Bosch of the Dominican Republic was overthrown in a military coup. There remained groups supporting Bosch in the country, however, leading to efforts, on April 24, 1965, to arrest some military officers thought to be linked to pro-Bosch forces. The net effect of these efforts was to trigger a pro-Bosch uprising. By April 27, poorly disciplined pro-Bosch forces controlled important parts of Santo Domingo, the capital; an anti-Bosch military junta had forces outside the city.

In the face of fears for the safety of American citizens and of reports that the pro-Bosch forces included many Communists, the United States inserted military units. Marines landed on April 28, U.S. Navy vessels having been off the Dominican coast since the crisis began. Reports of more Communists, probably imaginary atrocities, and the weakness of the anti-Bosch junta led to a decision to dispatch more troops. A total of 23,000 American military personnel were in the country by May 8. By May 2, U.S. President Lyndon Johnson had added to his earlier justification for the intervention - that of evacuating American citizens - a refusal to tolerate the creation of another Communist government in the Western Hemisphere.

The Council of the OAS on April 30 called for a cease-fire in the Dominican Republic and also authorized the establishment of an international security zone in Santo Domingo in the area where non-Dominicans had been assembling for evacuation. On the same day, the Council authorized the calling of a

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<sup>36</sup> *Id.* at 213-215.

Meeting of Consultation of Foreign Ministers; on May 1, the Meeting of Consultation authorized the sending of a special committee composed of representatives of five Latin American states to investigate and to seek to re-establish peace.

On May 6, the Meeting of Consultation authorized the establishment in the Dominican Republic of an Inter-American Peace Force, intended to absorb the American force and bring it under the direction of the OAS. After that date, the United States made no further unilateral moves with its troops. After the Inter-American force was formally established, it began to withdraw troops. Ultimately, six other states contributed troops to the force. By the end of May, the United States had abandoned unilateral efforts to find a political solution. That task fell to a committee established by the Meeting of Consultation, the committee including the United States ambassador to the OAS. The committee was able to bring about an agreement establishing a provisional government, and under which elections were held in June, 1966. All of the peace force had departed the Dominican Republic by September, 1966.

Aside from the actions of the OAS, the matter was discussed in the United Nations. A majority of the Security Council rejected resolutions offered by the Soviet Union condemning the intervention and calling for an American withdrawal. There was criticism of the United States in the General Assembly, but no real support for resolutions directly attacking the actions of the United States.<sup>37</sup>

##### 5. *Soviet Union et al./Czechoslovakia 1967*

In early 1968, the Communist Party of Czechoslovakia initiated a number of liberalizing measures, permitting greater individual freedom and also transferring authority from the party to the government of Czechoslovakia. While Czechoslovak officials frequently affirmed their loyalty to the Soviet Union and the Warsaw Pact, other persons, taking advantage of the more liberal atmosphere, called for changes in foreign and defense policies, and attacked the Soviet Union. Between January and August, 1968, at meetings of the Communist Parties of the Warsaw Pact member states, Czechoslovak party leaders sought to reassure their

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<sup>37</sup> *Id.* at 219-224.

confrères, who in turn demanded that the Czechoslovak Party reassert control of the mass media and limit individual freedom. Complaints regarding the Czechoslovak failures in this regard were contained in an August 17 letter from the Communist Party of the Soviet Union to the Czechoslovak party. On August 20, the armies of the Soviet Union, Bulgaria, the German Democratic Republic, Hungary and Poland invaded and quickly subdued Czechoslovakia, which did not resist. Apparently, the Soviet Union feared that the ideas behind the Czechoslovak reforms could lead to loss of Communist control of Czechoslovakia or a weakening of the Warsaw Pact and could, ultimately, spill over into the other East European states or the Soviet Union.

The reactions of other states were weak. The United States announced it would limit its response to the United Nations because of the importance of arms control talks with the Soviet Union. In the General Assembly, no resolution critical of the Soviet Union was proposed, though there were critical speeches. In the Security Council, not only was a condemnatory resolution defeated by the Soviet veto, but Algeria, India and Pakistan all abstained.<sup>38</sup>

#### 6. *Tanzania/Uganda 1978-89*

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<sup>38</sup> *Id.* at 224-226.

In October, 1978, Uganda invaded the part of Tanzania with which it shares a border. Ugandan troops withdrew by mid-November, but not before inflicting atrocities upon the inhabitants of the area and considerable material damage. Uganda controls the high ground along this border, and Tanzanian authorities therefore concluded that this portion of their border could not be secure as long as Idi Amin controlled the Ugandan government. Tanzania therefore invaded Uganda in January, 1979, with the goal of replacing the Amin government. Their troops were accompanied by Ugandan exiles. Amin=s forces had been routed, the capital taken, and a new government sworn in by mid-April. The members of the new government were Ugandan exiles, chosen at a conference in Tanzania held under Tanzanian government authority. Due to the difficulties the new government faced, Tanzanian troops remained in Uganda until May, 1981. A few states provided financial assistance to Tanzania during the fighting, and Mozambique sent troops. A number of African states, India, the permanent members of the Security Council, and the European Community expressed approval of the new government in various ways almost immediately. Several Muslim states and Nigeria criticized Tanzania, and the Islamic Conference provided \$ 4 million to Amin, but the OAU took no position on the matter and Uganda did not raise the matter in the United Nations, at the urging of other African states. There is some reason to believe that the weak reaction to the invasion reflected international revulsion at the poor human rights record of the Amin regime.<sup>39</sup>

#### 7. *Vietnam/Kampuchea 1978-1989*

In December, 1978, Vietnam invaded the neighboring state of Democratic Kampuchea. By January 10, 1979, a new government - the People=s Republic of Kampuchea - had been established and the Kampuchean army routed. However, Communist and non-Communist guerillas remained active, and Vietnam maintained large forces in the country. In April, 1985, Vietnam announced its intention to withdraw by 1995; it moved this date up to 1990 in August, 1985. Vietnamese troops had been withdrawn by September, 1990. Fighting continued between the government of the People=s Republic and its opponents

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<sup>39</sup> *Id.* at 40-42.

until a UN-brokered agreement was signed on October 23, 1991; this agreement led to a period of UN administration, followed by elections which established a new government.

Vietnam had justified its invasion by reference to Kampuchean border incursions prior to December, 1978, and also made reference to the horrible human rights record of Democratic Kampuchea. However, it appears that Vietnam was primarily motivated by its desire to assume the de facto leadership of Indo-China, and the necessity of overcoming Kampuchean resistance to this idea if it was to succeed.

Third state reaction to Vietnam's actions was strongly negative. China attacked Vietnam's northern border in February, 1979, partly to punish Vietnam's action; China informed the United States of its planned attack prior to carrying it out, but the United States did not object. The General Assembly seated the Democratic Kampuchean delegation rather than the delegation of the People's Republic of Kampuchea each year from 1979 through 1988 and adopted resolutions calling for the withdrawal of foreign forces. ASEAN echoed that position, and the European Community and Japan each imposed embargoes on Vietnam. Although the Soviet Union had originally supported Vietnam because of the two states' mutual concerns about China and had, at the time of the invasion vetoed a Security Council resolution calling for the withdrawal of foreign forces from Kampuchea - with thirteen of the fourteen other Security Council members supporting the resolution - even the Soviet Union pressured Vietnam to withdraw after the Gorbachev regime took power. Apparently, all of this external pressure explains Vietnam's actual withdrawal in 1990.<sup>40</sup>

#### 8. *France/Central African Empire 1979*

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<sup>40</sup> *Id.* at 42-44.

France overthrew Emperor Bokassa I of the Central African Empire on September 20, 1979, replacing him with the former president of what had been, prior to Bokassa, the Central African Republic. France, which had provided extensive economic aid to Bokassa, apparently acted in part because of embarrassment at Bokassa=s notorious violations of human rights and in part because of growing opposition within the country from persons not terribly sympathetic to France=s economic interests in the Empire. Also, Bokassa had been making efforts to cultivate Libya. that state, as well as Benin and Chad publicly criticized the invasion, while Zaire and Sengal expressed support for it. There is also reason to believe that France received private criticism from others of its African allies. Neither the United Nations nor the OAU considered the matter.<sup>41</sup>

#### 9. *Soviet Union/Afghanistan 1979-89*

In December, 1979, the Soviet Union faced an awkward situation in Afghanistan. In April, 1978, a Marxist-Leninist party, the People=s Democratic Party of Afghanistan (PDPA), had seized power in a coup. The PDPA=s social and economic program aroused great resentment and provoked armed opposition. The situation was very bad for the PDPA by the fall of 1979, when PDPA defense minister Hafizullah Amin, the leading exponent of the harsh measures which had led to the war, seized power. The Soviet Union became convinced that, under Amin, the PDPA was likely to be defeated. Such a defeat, in turn, would lead to the emergence of a government unfriendly to the Soviet Union in a state on the Union=s border. The Soviet Union therefore decided to intervene in Afghanistan. Its invasion began on December 19. On December 27, Amin was killed as Soviet troops sought to arrest him. On the same day, Babrik Karmal, a PDPA leader more moderate than Amin, announced in a radio broadcast from Soviet territory his seizure of power and a request for assistance from the Soviet Union.

Over the next eight years, the Soviet Union became enmeshed in a guerilla war. The guerillas received extensive support from Pakistan and the United States. In December, 1986, the Gorbachev

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<sup>41</sup> *Id.* at 226-227.

government informed Najibullah - Karmal=s successor - that the Soviet Union would be withdrawing its forces. An announcement by the Soviet Union in early 1988 that it would begin its withdrawal in that year led to an agreement in April, 1988, between Afghanistan, Pakistan, the Soviet Union and the United States. Under that agreement, Afghanistan and Pakistan undertook to refrain from interfering in each other=s internal affairs. The Soviet Union and the United States guaranteed the agreement, and also agreed that, if the Soviet Union continued to aid the PDPA, the United States could provide aid to the guerillas. The Soviet withdrawal was complete by February, 1989. The PDPA continued to resist the guerillas. In late 1990, the Soviet Union and the United States agreed to stop providing arms to their respective clients. The PDPA finally collapsed in April, 1992, the rebels seized power, and the unrest continued.

In addition to the actions of the United States and Pakistan discussed above, a large number of states took other actions to punish the Soviet Union. The United States refused to ratify and important arms limitation treaty and imposed economic sanctions. The United Kingdom, Canada, New Zealand and the European Community also imposed economic sanctions. A number of states denounced the invasion, imposed diplomatic sanctions, and boycotted the 1980 Moscow Olympic Games. The General Assembly adopted resolutions demanding the withdrawal of foreign troops from Afghanistan in each year from 1981 through 1987, the 1987 resolution attracting more votes than the 1981 resolution. The decline in the Soviet Union=s international standing and the practical difficulties this decline imposed in terms of its relations with other states was an important factor in its decision to withdraw from the Afghanistan.<sup>42</sup>

#### *10. United States, Honduras, Argentina/Nicaragua 1981-88*

In 1979, after the overthrow of the Somoza dictatorship in Nicaragua by the Sandinistas, internal opponents of the new regime began an effort to overthrow the new government. In 1980, Honduras began supplying the insurgents with arms and offered them a base in its territory; in 1981, Argentina was providing the insurgents with money, training, and advisors. Both of these states apparently acted because of ideological

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<sup>42</sup> *Id.* at 44-46.

opposition to the Sandinistas. In the meantime, relations between the Carter administration in the United States and Nicaragua deteriorated as President Carter came to conclude that Nicaragua was providing aid to the opponents of the government of El Salvador. Carter suspended aid to Nicaragua on the last day of his term. In April, 1981, the new Reagan administration terminated aid to Nicaragua. While the administration acknowledged that Nicaragua had terminated its aid to the Salvadorean rebels, it claimed that Nicaragua was providing other sorts of assistance. In fact, however, the United States, had decided to support efforts to overthrow the Sandinistas, or at least to force them to democratize, fearing the threat they posed to other Central American states. In August, President Reagan authorized covert operations by the CIA to interfere with arms shipments from Nicaragua to rebels in other states; this order led the CIA to begin organizing a political superstructure for the rebel groups that had started to organize in 1979. In November, President Reagan authorized the CIA to fund and direct the Nicaraguan rebels, which became known as the FDN. After a rebel attack in March, 1982, the Sandinistas initiated a domestic crackdown. In the next month, former Sandinista supporters denounced them and in June formed a second anti-Sandinista group, ARDE, distinct from the FDN. Both ARDE and American Indian groups opposed to the Sandinistas received CIA aid in their efforts to overthrow the Sandinistas, though the CIA controlled these groups to a lesser extent than it did the FDN.

Subsequently, the United States organized speedboat attacks on Nicaraguan petroleum storage facilities and, early in 1984, laid mines in Nicaraguan waters. When the mines damaged non-Nicaraguan merchant vessels and sank two Nicaraguan fishing boats, the resulting publicity led Congress to cut off aid to the Nicaraguan rebels. The administration reacted by obtaining substituted funding from Saudi Arabia and Brunei. When the facts of the so-called Iran-contra affair, of which this funding scheme was one element, became public in the winter of 1986-87, the administration came under pressure to seek a peaceful solution to the Central American fighting. The Speaker of the United States House of Representative, Jim Wright, assisted the administration, and supported an initiative by President Arias of Costa Rica. That initiative led to a peace plan endorsed by the presidents of Central American countries in August, 1987. On March 21<sup>st</sup>, 1988, however, the Sandinistas and their opponents agreed to a cease-fire.

The primary reaction of third states to this situation was to seek a peaceful resolution. A number of American states, the OAS and the United Nations became involved in this effort. The United Nations and the

OAS also provided crucial assistance for the 1990 Nicaraguan elections and the demobilization of the rebels. The United States was extensively criticized for its actions in Nicaragua. Security Council debates beginning in 1983 took this tone; the United States was on several occasions the lone negative vote on resolutions condemning its mining, its embargoes of Nicaragua, and its refusal to abide by the decision of the International Court of Justice holding American support for the rebels to be unlawful. There were also a number of resolutions adopted by the General Assembly criticizing the United States. However, no sanctions were imposed on the United States. Nor were Honduras or Nicaragua criticized, despite the former=s providing bases for the rebels and the latter=s incursions into Honduras.<sup>43</sup>

#### *11. India/Sri Lanka 1983-90*

The civil war in Sri Lanka between the Sinhalese majority dominated government and the Tamil minority aroused intense interest in India. Sri Lanka had sought closer relations with the United States and the ASEAN states, which ran counter to India=s desire to dominate the whole of South Asia. Also, the Tamil population of southern India strongly supported the Sri Lankan Tamils, and the Indian government sought to avoid offending the Indian Tamils.

India=s interest manifested itself in arming and training Tamil militants, including the Liberation Tigers of Tamil Eelam (LTTE) and in unsuccessful efforts to mediate. In 1987, Sri Lanka determined to open an offensive against Tamil militants. These operations, in May, caused heavy civilian casualties and triggered Indian protests, but Sri Lanka persisted. On June 3, 1987, an Indian food convoy heading for Tamil areas of Sri Lanka was turned back by the Sri Lankan navy. On June 4, Indian aircraft, escorted by Indian warplanes, dropped relief supplies over Tamil areas of Sri Lanka. After this airdrop, the Sri Lankan military curtailed its activities. By the end of July, 1987, India and Sri Lanka had reached a far-reaching agreement: Sri Lanka would agree to a cease-fire in the civil war and pull its troops back to their barracks, the Tamil militants would surrender their arms, India would close the militants= bases in India, India would provide military assistance to

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<sup>43</sup> *Id.* at 227-232.

carry out the agreement upon the request of the Sri Lankan government, elections would be held in Tamil areas of Sri Lanka and Sri Lanka would coordinate with India elements of its foreign and defense policies. The agreement became effective on July 29, 1987; Sri Lanka requested Indian military assistance the next day.

The Tamil militants, in particular the LTTE, had not been consulted during the negotiations, and refused to surrender their arms. India concluded that it would have to use force to disarm the militants; when it did so, it found itself at war. Over the next two years, India was unable to defeat the Tamils. On June 1, 1989, the president of Sri Lanka asked India to withdraw its troops. India was reluctant to do so, in part because of fears of disorder in Sri Lanka but also because it was reluctant to risk the loss of prestige that it thought would follow its deferring to Sri Lanka, 1989 being an election year. The fact that the war was stalemated, however, provided India a powerful incentive to pull its troops out. A withdrawal agreement was reached in September, 1989, and the last Indian troops left Sri Lanka in March, 1990.

There was little third state reaction to this series of events. At the time of India's actions in June, 1987, Sri Lanka was unable to gain the support of any permanent member of the Security Council, and therefore did not raise the matter in that forum. There was some criticism of the actions of June, but none of the July agreement. Indeed, a number of states, including the United States, welcomed that agreement, despite the Indian oversight of Sri Lankan defense policy that the agreement established. Likewise, India's initial reluctance to heed the Sri Lankan withdrawal request in 1989 drew some criticism, but evoked no foreign pressure.<sup>44</sup>

## 12. *United States/Grenada 1983*

In 1981, relations between Grenada and the United States were not warm. Grenada's government was leftist in orientation, received arms from Cuba, the Soviet Union, and North Korea, and maintained relatively large armed forces despite the military weakness of its neighbors. Also, Grenada was constructing

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<sup>44</sup> *Id.* at 232-234.

an airport with a runway long enough for very large jet aircraft; the United States feared that the airport would be used for military purposes by Cuba and the Soviet Union. Over the next two years, however, Grenadan Prime Minister Bishop moderated his policies, convinced that hostility to the United States was costly for Grenada. This moderation was resisted by other members of Grenada's government, who were more doctrinaire in their Marxism than was Bishop. The military likewise was opposed to Bishop's policies. This situation culminated in what amounted to a coup on October 19, 1983; Bishop and a number of his supporters were murdered, and a number of civilians were also killed. Power was assumed by a military council, which immediately sought to reassure foreigners on the island and stated that all who wished to leave could do so when the airport reopened on October 24.

The United States had some concerns for the safety of American citizens on Grenada. Further, the Organization of Eastern Caribbean States - composed of very small island states - as well as Jamaica and Barbados decided, on October 21, to impose diplomatic and economic sanctions against the new government, and requested American military intervention on October 22. The United States decided to intervene on October 23, fearing to be seen as impotent and also concerned about the spread of Communism - although Cuba had not welcomed the coup. American resolve on this score was reinforced when the U.S. Marine barracks in Beirut, Lebanon, was destroyed by a suicide bomber; President Reagan felt that the United States must show resolve in the circumstances. Reagan ordered that the invasion proceed on October 24. It took place the following day. The troops involved were almost entirely American, although police contingents from Caribbean states were landed on October 28, by which time the fighting was over and the revolution council overthrown. American combat troops had left by December 15 and a new government was chosen by elections in 1984. The last American noncombat troops left in 1985. It should be noted that the intervention was quite popular in Grenada.

The motives for the intervention were mainly ideological. Various justifications were offered, but all were doubtful. More specifically, the United States cited an invitation by the Governor-General of Grenada, but it was unclear whether the invitation preceded the invasion and whether the Governor-General had the authority to issue it. Likewise, the invitation from the Eastern Caribbean states was of doubtful relevance, since the treaty establishing their organization did not confer on the organization to intervene in the members' internal affairs. The need to protect foreigners was advanced as a justification, but it was unclear that

foreigners were in danger or that they could not have been evacuated without overthrowing the government.

International reaction to the intervention was negative but purely rhetorical. The United States vetoed a Security Council resolution deploring the invasion as unlawful and the General Assembly adopted a resolution to the same effect. A number of American allies supported one or both resolutions. However, no sanctions were imposed, and the new Grenadan government was seated by the General Assembly in 1984.<sup>45</sup>

### *13. United States/Panama 1989*

Relations between the United States and Panama were very bad by 1989. Panama was at that time dominated by a military dictator, Manuel Noreiga. Noreiga had been indicted in the United States for drug trafficking in 1988, and in May, 1988, nullified a presidential election in Panama that had been won by a political opponent, Guillermo Endara. After the United States imposed certain sanctions on Panama in November, 1989, the Panamanian National Assembly declared Panama to be in a state of war with the United States on December 15. On December 16, one American Marine was killed at a Panamanian roadblock, and an American naval officer was beaten. On December 17, the United States decided to invade. The invasion took place on December 20. Endara was sworn in as President on an American base in Panama shortly before the invasion. The large American force quickly overcame resistance; American troop strength was down to pre-invasion levels by February 20.

The Americans had no real justification for the invasion. There was little evidence of any military threat from Panama to American forces, or of any danger to American lives. The United States relied in part on the Panama canal treaties, but those instruments confer no obvious authority on the United States to overthrow Panama's government. The United States also claimed to be supporting democracy and fighting drug trafficking, but the legal adequacy of such motives is doubtful.

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<sup>45</sup> *Id.* at 234-238.

In any event, international reaction was mixed. The allies of the United States supported it in the Security Council and in the General Assembly. The latter adopted a critical resolution, but the margin was only 75-20-39. Further, the representative of the new Panamanian government was seated by the Assembly. The OAS adopted a resolution regretting the invasion. No sanctions were imposed on the United States.<sup>46</sup>

#### *14. NATO/ Yugoslavia 1999*

The Kosovo region of Serbia - the main constituent state of the Federal Republic of Yugoslavia - was in the summer of 1998 in a state of unrest. The population was 90% ethnic Albanian and was subject to repression by the Serbian government. That repression increased that summer, with Serbian authorities perpetrating massacres of non-combatants and hundreds of thousands of persons becoming internal refugees. Even in the face of Security Council demands for an end to its operations against civilians, Serbia continued its policy. In the fall of 1998, NATO placed its air forces on alert, the last step before beginning a campaign of aerial bombing of Serbia. At that point, Yugoslavia agreed to a monitored cease-fire, an agreement endorsed by the Security Council. The cease-fire collapsed after a short period, however, and Serbian repression resumed. In March, 1999, NATO convened a meeting between Serbia and the principal element of the Albanian armed opposition, the Kosovo Liberation Army. Serbia refused to accept an agreement, and NATO thereupon commenced a bombing campaign directed against Serbian forces in Kosovo and against Serbia itself. The bombing campaign ended in June, after NATO had begun to hint at using ground forces in addition to air forces, with Serbian acceptance of NATO's terms. The Security Council agreed that the United Nations would administer Kosovo indefinitely, until its future status was determined. That is, the Security Council confirmed the results of the bombing and effectively deprived Serbia of control of part of its territory.

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<sup>46</sup> *Id.* at 238-240.

Russia opposed NATO=s action, but there was otherwise little opposition. A Russian Security Council Resolution condemning the bombing was defeated by a vote of 12 against to only three in favor. There is reason to think that this general acceptance of the bombing resulted from memories of the role played by Yugoslavia in conniving in the widespread atrocities perpetrated by Bosnian Serb forces during the war in Bosnia-Herzegovina.<sup>47</sup>

#### 15. *United States, United Kingdom, Australia/Iraq 2003*

On March 19, 2003, the United States, the United Kingdom, and Australia attacked Iraq.<sup>48</sup> President Bush of the United States announced the end of major combat operations on May 1, 2003, after the United States and its allies had eliminated all organized Iraqi resistance.<sup>49</sup>

The United States justified its action by reference to Iraq=s failure to abide by Security Council Resolution 687, which imposed disarmament obligations on Iraq,<sup>50</sup> arguing that this non-compliance revived the authorization to use force against Iraq in Security Council Resolution 678<sup>51</sup>; the United States also asserted that the attack was necessary to defend the United States and the international community from the threat posed by Iraq.<sup>52</sup> The United Kingdom also justified the attack as necessary to enforce Resolution 687, though it did not rely on any authority in Resolution 678.<sup>53</sup> Australia=s position was similar to that of the United Kingdom, though relying on Resolution 678.<sup>54</sup>

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<sup>47</sup> A. Mark Weisburd, *International Law and the Problem of Evil*, 34 VAND. J. TRANSNAT=L L. 225, 231-33 (2001).

<sup>48</sup> David E. Sanger & John R. Burns, *Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein*, N.Y. TIMES, Mar. 20, 2003, at A1.

<sup>49</sup> Michael R. Gordon, *Between War and Peace*, N.Y. TIMES, May 2, 2003, at A1; David E. Sanger, *Aftereffects: Bush Declares >One Victory in a War on Terror*, N.Y. TIMES, May 2, 2003, at A1; Eric Schmitt & Bernard Weinraub, *Pentagon Asserts the Main fighting is Finished in Iraq*, N.Y. TIMES, Apr. 15, 2003 at A1.

<sup>50</sup> S.C. Res. 687, U.N. SCOR, 46<sup>th</sup> Sess., 2981<sup>st</sup> mtg., U.N. Doc. S/RES/687 (1991).

<sup>51</sup> S.C. Res.678, U.N. SCOR, 45<sup>th</sup> Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990).

<sup>52</sup> *Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/2003/351 (2003).

<sup>53</sup> *Letter Dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/2003/350 (2003).

<sup>54</sup> *Letter Dated 20 March 2003 from the Permanent Representative of Australia to the United Nations*

The Joint Resolution of the United States Congress authorizing the United States to use force against Iraq expanded somewhat on the motives of the United States for its attack. The joint resolution referred to Iraq's continued possession of weapons in violation of Resolution 687, its harboring of terrorists, and its repression of its own citizens, and noted that an American statute called the Iraq Liberation Act called for the replacement of the government of Iraq.<sup>55</sup>

It should be noted that the legal justifications offered by the attackers were questionable. As I have argued in more detail elsewhere, the Security Council Resolutions on which the United States and Australia relied do not authorize individual states to use force without the approval of the Security Council.<sup>56</sup> No one argued that Iraq was threatening an imminent attack on anyone, or that there was any risk in Iraq of great loss of life because of governmental violations of human rights. While Iraq was universally, if apparently incorrectly, supposed to have refused to abide by Security Council decisions under chapter VII requiring Iraqi disarmament, the structure of the United Nations appears to offer no lawful means to deal with such a refusal if any permanent member of the Security Council is determined to block action.

There was considerable and vigorous international criticism of the attack on Iraq. While a number of

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*Addressed to the President of the Security Council*, U.N. Doc. S/2003/352 (2003).

<sup>55</sup> Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1498 (2002).

<sup>56</sup> A. Mark Weisburd, *The War in Iraq and the Dilemma of the International Control of the Use of Force*, 39 TEX. J. INT'L L. (forthcoming).

states assisted the United States and United Kingdom with peace-keeping after May, 2003,<sup>57</sup> many others publicly labeled the attack unlawful and refused to assist in the occupation of Iraq. No state has imposed sanctions on the United States or the United Kingdom, however. Also, the Security Council has taken steps to assist in the reconstruction of Iraq<sup>58</sup> and has characterized the Governing Council appointed by the occupying powers as embodying the sovereignty of Iraq.<sup>59</sup>

### Analysis

In each of these fifteen conflicts, states used force to change, or attempt to change, the governments of other states. International reaction to these actions was quite varied. Vietnam=s effort to install a puppet government in Kampuchea and the Soviet Union=s similar attempt in Afghanistan evoked harsh criticism and concrete international sanctions. On the other hand, American actions in Cuba, the Dominican Republic, Nicaragua, Grenada and Panama drew criticism but no sanctions. The same is true of the actions by the Soviet Union in Hungary and Czechoslovakia. France=s intervention in the Central African Empire was almost ignored. The actions of Tanzania in Uganda and of India in Sri Lanka could be said to have received international support, rather than criticism. The Kosovo action was welcomed by some states and strongly

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<sup>57</sup> See Coalition Provisional Authority Press Release 20031211 (2003) available at [http://cpa-iraq.org/pressreleases/20031211\\_Coalition\\_Country\\_List.pdf](http://cpa-iraq.org/pressreleases/20031211_Coalition_Country_List.pdf) (last visited May 12, 2004).

<sup>58</sup> S.C. Res.1483, U.N. SCOR, 57<sup>th</sup> Sess., 4761<sup>st</sup> mtg., U.N. Doc. S/RES/1483 (2003); S.C. Res.1500, U.N. SCOR, 57<sup>th</sup> Sess., 4808<sup>th</sup> mtg., U.N. Doc. S/RES/1500 (2003).

<sup>59</sup> S.C. Res.1511, U.N. SCOR, 58<sup>th</sup> Sess., 4844<sup>th</sup> mtg., U.N. Doc. S/RES/1511 (2003).

opposed by a few. The conquest of Iraq has generated vituperative criticism, but no sanctions.

Despite the variety of reactions to these interventions, it would appear that one can infer a rule from them. In the cases of the American intervention in the Western Hemisphere, in those involving the Soviet Union in Eastern Europe, in the French case, and in the Indian case, what was involved was a great power intervening in a state within its sphere of influence. Of course, the concept of a sphere of influence has no formal status in international law. However, as a practical matter, it is obvious that the world is prepared to accept the reality that powerful states will dominate certain of their weaker neighbors or, in the case of France, former colonies. In the Afghan and Kampuchean cases, however, the intervening state was not intervening in its sphere of influence but seeking to extend that sphere, over the objections of the affected state. It was in these cases, where the use of force sought to alter rather than to maintain the status quo in the region, that the international reaction was most negative. The remaining cases are difficult to classify. Tanzania's overthrow of Amin could plausibly be seen as an instance of self-defense, with the world's reaction flowing in part from the universal contempt in which the Idi Amin regime was held. Similarly, fears of humanitarian catastrophe accounted for the broad, though not unanimous, support expressed for the Kosovo bombing.

The most difficult case to analyze is the conquest of Iraq. Many states have associated themselves with this action in a limited way, but many others have done all they could short of actually imposing sanctions on the conquerors to express their dismay. In this case, one may wonder whether a reluctance to trigger the hostility of the United States may account for the limited character of the international reaction. That is, the United States may simply be too powerful to sanction. Furthermore, it is uncertain what view the invaders themselves may come to take of their action. That is, if the occupation becomes difficult enough, they may come to repudiate the claims of authority to act unilaterally which led to the invasion. Indeed, it may be difficult to characterize the international reaction to the conquest until the post-conquest occupation has ended.

One may thus draw from these conflicts the following rule: despite Article 2(4)'s prohibition on uses of force against any state's political independence, government changing interventions by great powers acting within their spheres of influence will be treated as lawful. However, if a state - whether or not a great power - uses force to change the government of a state not previously dominated by it, the use of force will be treated as unlawful, unless there is a good case that the overthrown government was a very serious violator of human

rights. The conquest of Iraq is the outstanding exception to these rules, but the outcome of that situation remains to be seen.

### III. Consistency, Universality of the Emergence of the Rules

The foregoing discussion has generated three rules of customary international law whose histories will permit us to investigate the concepts of consistency and uniformity as applied to that body of law as it relates to the use of force. These rules are: 1) providing assistance to insurgents fighting against European colonialism<sup>60</sup>, and uses of force against European colonies by third world states are lawful, while European colonial powers cannot lawfully use force against the territory of other states supporting anti-colonial insurgencies, even if the use of force is aimed solely at insurgent bases; 2) using force to seize all or a part of another state's territory is unlawful, unless the territory in question is a colony of a European state; however, conquest of a former colony is lawful so long as the colony is arguably not a state itself; 3) using force to change the government of another state is lawful for a great power acting in its sphere of influence, lawful when the ousted regime was a very serious violator of human rights, and otherwise unlawful. This last rule, however, does not take account of the conquest of Iraq.

Before we can determine what these rules tell us about consistency and uniformity in the customary international law of the use of force, however, we need to examine those concepts. A number of authorities use the words 'consistency' and 'uniformity' almost synonymously.<sup>61</sup> However, these words may be usefully employed to express two different ideas. I will use the term 'consistency of practice' to refer to the

<sup>60</sup> 'European colonialism' in this context means the control by a European state of an area outside of Europe and inhabited primarily by persons who are neither European by birth nor descendants of Europeans. It does not refer to regions distant from Europe inhabited primarily by the descendants of Europeans, nor to entities distant from Europe dominated by the descendants of Europeans but not under the control of a European state.

<sup>61</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5-6 (5<sup>th</sup> ed. 1998); *Asylum Case*, 1950 I.C.J. 266, 276-77.

extent to which the uses of force which have given rise to a rule resemble another, without regard to the identity of the states involved. I will use the term *uniformity of practice* to refer to the extent that rules appear to apply to all states. While this distinction will break down in some cases, it can help refine the discussion.

It will be simplest to begin our discussion with uniformity of practice, since our cases make it obvious that customary rules regarding the use of force are not uniform. Thus, European colonial powers face strict limits in attempting to maintain control of their colonies, while non-European states may conquer former colonies without reference to the wishes of the inhabitants. Invasions to seize territory are unlawful, unless the territory is that of a colony. Invasions to change a government are unlawful - but not if the government is a very serious violator of human rights, or the invader is a great power acting within its sphere of influence. In short, one generally cannot determine the customary law status of a particular use of force without knowing both the political relationships of the states involved at the time force is used and the political objectives of the state using force.

While rules are not uniform, in that different rules appear to apply to different states, it does at least seem possible to talk of rules relating to particular categories of states - that is, it seems accurate to speak of rules apply to *great powers acting within their spheres of influence* or *European colonial powers*. We do not, that is, face the situation of one set of rules governing Albania, a second set applying to Andorra, a third to Argentina, and so on, with different rules for each state.

Even this categorization raises difficulties for lawyers, however. First, the criteria that mark the categories are inconsistent with the concept of the sovereign equality of states. Second, they are quite fluid. The existence of a *sphere of influence*, for example, turns on factors which lawyers are ill-equipped to assess. Likewise, attitudes toward the question whether particular human rights violations are serious enough to justify outside intervention have varied over time for reasons that are difficult to isolate - why is the absence of international intervention to halt the Rwandan genocide seen as a failure of the international system<sup>62</sup> while the mass killings in Bangladesh in 1971 and in Cambodia in the mid-70's evoked no similar reaction?

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<sup>62</sup> See, e.g., *10 years after Rwanda genocide, Annan unveils plan to stop future massacres*, U.N. News Service, April 7, 2004, available at <http://www.un.org/apps/news/story.asp?NewsID=10337&Cr=Rwanda&Cr1=Genocide> (last visited May 13, 2004).

Similarly, human rights violations in Kosovo in 1999 were treated as justifications for international action without regard to Serbian sovereignty, while no action was taken with respect to similar human rights violations in East Timor in the same year.

This lack of uniformity with respect to rules regarding the use of force may be inevitable, however. It reflects at least two factors. First, as a matter of fact, states are not equal with respect to military power. The international legal system has at various times dealt with this difference by acknowledging it and conceding greater legal authority to more powerful states. The example of this phenomenon most familiar to contemporary observers is the Security Council of the United Nations. The veto power of the five permanent members puts them in a class separate from the rest of the world with respect to legal control of the use of force, in that it effectively precludes Council action against any permanent member. What is not always remembered, however, is that this arrangement reflects the assumption of the framers of the United Nations Charter that the United Nations would relatively frequently be called upon to use force to preserve peace,<sup>63</sup> (an assumption that presumably accounts for the extensive attention given in the Charter to ensuring that the United Nations would have both available military forces and a command structure ready to control these forces<sup>64</sup>), and that the permanent members would bear the major burden when the use of force was required.<sup>65</sup> In other words, the veto reflected the belief that the world's main military powers were being asked to assume special responsibilities, but would not do so if not accorded special powers.

Nor was this approach entirely innovative. It was similar, in the status it accorded powerful states, to the Concert of Europe. Like the permanent members, the European great powers under the Concert system

<sup>63</sup> See, e.g., Doc. 391, III/3/19, 12 U.N.C.I.O. 334, 334 (1945) (question from Canadian delegate regarding states' obligations to provide military forces to the organization); Doc. 320, III/3/15, 12 U.N.C.I.O. Docs. 315, 316 (1945) (observation by Netherlands delegate that smaller states were binding themselves, in advance, to go to war upon a decision of the Security Council. @).

<sup>64</sup> See U.N. CHARTER arts. 43 (special agreements by which members agree to provide military forces on the call of the Security Council); 44 (ad hoc representation on the Council of state called upon to provide forces under article 43 but not serving on Council); 45 (obligation to hold air force units immediately available); 46 (plans for the use of force to be made by the Military Staff Committee); 47 (creation of Military Staff Committee).

<sup>65</sup> Thus, the New Zealand delegate to the United Nations Conference on International Organization observed that it was obvious to anybody that if the great nations, who have to set their military forces into operation, were required to do it by a majority vote of a number of small nations which could make no great contribution, the Organization would fall because of a lack of weight, @ Doc. 459, III/1/22, 11 U.N.C.I.O. Docs. 332, 334 (1945), and the delegate of the Soviet Union defended the veto by reference to the responsibilities and duties that would be imposed upon [the permanent members], @ *id.* at 332.

were accorded primacy because their capacities for action were greater than those of weaker states.<sup>66</sup>

Indeed, it seems that some such system is inevitable as long as military power is unequally distributed among states. Given that fact, it will be more expensive to seek to control some states than it will be to control others, while the number of states capable of overpowering others militarily is likely to be limited. As a practical matter, therefore, it makes sense to accord a special status to powerful states, since they could not be controlled anyway and might be induced to use their power, in some cases at least, for other than purely selfish reasons.

The second reason why categorization of states with respect to the use of force seems inevitable is that the international value system cannot be static. In 1945, states were prepared to say that the maintenance of peace was so important a value that *all* states= territorial integrity and political independence were sacrosanct. But that consensus broke down almost at once over the issue of European colonialism, as shown by the international reaction to the Netherlands= efforts to reassert control over Indonesia. Similarly, the world=s willingness to ignore massive human rights violations is simply less in 2004 than it was in 1945. It is most implausible to assume that actions taken against states who are acting contrary to contemporaneous strongly held international values will be evaluated no differently from actions taken against states which conform to such values. If values change over time, however, it is difficult to see how the law can avoid dealing with classifications of states which, for all their fluidity, seem obvious in the context of the values of a particular time.

How then do these conclusions regarding the uniformity of rules relate to the question of consistency in application? First and most obviously, it seems clear that the concept of consistency must be applied in the context of an international community in which states= rights with respect to the use of force depend on the category into which they fall. Within that context, however, it would seem that rules are consistently applied, with respect to *uses* of force. Thus, every use of force by a colonial power against the territory of a state

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<sup>66</sup> CLYDE EAGLETON, INTERNATIONAL GOVERNMENT 250-252 (1948).

assisting an insurgency triggered international disapproval so great that colonial powers ceased to use force in this manner. Similarly, all attempts at territorial conquest, outside the colonial context, were not only treated as illegitimate, but failed. No invasion to change a government carried out by a great power within its sphere of influence triggered more than a rhetorical response.

It also seems clear, however, that complete consistency is impossible in light of the character of the rules under which states are allowed to use force. These rules are permissive. States are never *obliged* to use force. Thus, while uses of force against states which massively violate human rights may consistently be treated as lawful, all states which massively violate human rights will not have force used against them. For example, no force was used against Indonesia in 1999 with respect to widespread human rights violations in East Timor; foreign troops were introduced only after Indonesia agreed to such a step. And, as far as I know, no one has ever suggested using force against Russia because of its alleged human rights violations in Chechnya. Yet such inaction has not given rise to arguments that force may not be used in any case where state practice suggests that it is permissible because it is not used in every such case.

It is important to note, however, that the consistency apparently required to create a rule of customary international law in this area does not seem to demand many examples of practice before a rule is established. Thus, France in 1958 agreed to the limitations on the use of force against Algerian insurgents based in Tunisia with, as far as the record indicates, little precedent. Yet by 1964, the United Kingdom was unprepared to defend its own use of force against a fort in Yemen in response to an air attack from Yemen on its protectorate in South Yemen. And by 1969, Portugal's actions against insurgent bases in Zambia earned Security Council condemnation. While the legal significance of the condemnation is not great, it is quite significant that, after this incident, Portugal was reluctant to attack insurgent bases in countries bordering on its colonies. We see, therefore, what appears to be a rule created after, at most three instances of practice.

This characterization may, however, misstate the situation somewhat. One may speculate that customary law regarding the use of force will develop on the basis of relatively few actual uses of force. For one thing, uses of force are, and could be predicted to be, uncommon. They are, after all, costly, they can easily lead to difficulties with states not parties to the conflict in which force is used, and there will always be unexpected developments when force is used - and such developments are generally unpleasant. If uses of force do not take place frequently, states must therefore form their expectations regarding the legality of such

activity on the basis of the few examples which are available.

Furthermore, many types of use of force in the contemporary world are likely to evoke reactions from a relatively large number of states. For example, when the Soviet Union replaced the Hungarian government, or the United States did the same thing in Grenada, the General Assembly of the United Nations had to decide whether to seat the delegation from the new government. Likewise, a number of states had occasion to decide whether to recognize Indonesian sovereignty over East Timor. And Argentina, Bahrain, Brazil, Gabon, Gambia, Malaysia and Slovenia all were forced to take a position regarding the lawfulness of the NATO attack in Kosovo by virtue of their sitting on the Security Council at the time.<sup>67</sup> In such cases, states are obliged to make a decision with respect to the results of a use of force, even though they were not themselves involved in hostilities. And of course, if a relatively large number of states take part in the use of force, the effect on customary international law must necessarily be significant. When the entire NATO alliance took part in military action against Serbia in response to a fear of massive human rights violations in Kosovo, there was necessarily an impact on the customary rule regarding humanitarian intervention. This effect was reinforced by the Security Council's decisive rejection of Russia's condemnatory resolution,<sup>68</sup> but the effect would have been significant in any case.

Perhaps because so many states have occasion to take positions on give uses of force, it seems clear that the rationales states offer to justify their action play little role in establishing rules of customary international law. It is more difficult to deceive a great many states than it is to deceive a few. In any event, states do not, in practice, feel obliged to accept as true assertions they know to be false. For example, when Vietnam

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<sup>67</sup> Judith Miller, *Russia's Move to End Strikes Loses: Margin Is a Surprise*, N.Y. TIMES, Mar. 27, 1999, at A7.

<sup>68</sup> *Id.*

sought to replace the government of Kampuchea, it made reference to the undisputable fact that the government of Democratic Kampuchea had engaged in almost unimaginable violations of human rights. The Vietnamese-installed People=s Republic of Kampuchea was not seated in the General Assembly, however, apparently because states generally believed that Vietnam had acted in order to reduce Kampuchea to a satellite, and not because of any interest in human rights. Similarly, the Soviet Union=s specious claim that it had invaded Afghanistan by invitation was not taken seriously even though, if the claim had been true, it might arguably have justified the invasion.

There remains one crucial question. As observed above, customary legal rules regarding the use of force are uniform only within categories. It is not true that identical rules apply to all states. As just noted, very little practice seems to be needed to create a rule of customary law in this area. So - could there be a situation where, through perhaps one instance of practice, one state establishes itself as being in a legal class of one, subject to essentially no restrictions? This issue, of course, is raised by the actions of the United States in conquering and administering Iraq largely unilaterally, and also by the National Security Strategy<sup>69</sup> promulgated by the United States. That strategy rejects imminence of attack as a condition on the right to self defense, insisting on the lawfulness of preemption.<sup>70</sup> It also calls for American armed forces Astrong enough to dissuade potential adversaries from pursuing a military build-up in hopes of surpassing, or equaling, the power of the United States.@<sup>71</sup> Certainly, the United States seeks to be in a class by itself, at least as far as actual power is concerned.

Is this result legally possible? Of course it is. International law can take any form states choose. Even the concept of *jus cogens* is no bar to change, at least if that concept draws its meaning from Article 53 of the Vienna Convention on the Law of Treaties, that is, as referring to norms Aaccepted 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.@<sup>72</sup> If the

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<sup>69</sup> WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept., 2002) available at <http://www.state.gov/documents/organization/15538.pdf> (last visited May 13, 2004).

<sup>70</sup> *Id.* at 15.

<sup>71</sup> *Id.* at 30.

<sup>72</sup> Vienna Convention on the Law of Treaties, May 23, 1969, pt. V, ' 2, art. 53, 1155 U.N.T.S. 311 (emphasis

international community as a whole ceases to recognize a norm as one from which no derogation is permitted, then derogation is permitted.

But has such a change come about? There is a basis for saying that it has. The United States has made very broad claims to a right to act unilaterally and to maintain its military predominance. Further, it has actually attacked Iraq in circumstances that are the equivalent of an assertion in an actual case to a right to unilaterally determine when its uses of force are or are not lawful. In addition, the reaction of other states to these claims has been somewhat ambiguous. Some states have criticized them strongly, but have refrained from imposing sanctions on the United States, other than such sanction as is implied by a refusal to actively assist the American effort in Iraq. Other states have, more or less strongly, associated themselves with the American invasion, implicitly at least supporting the legal claims which the invasion embodies. And, as noted above, the United Nations Security Council has adopted resolutions that accept the American occupation of Iraq as a fact, which could be characterized as equivalent to an acceptance of the lawfulness of the actions of the United States.

Nonetheless, it would seem premature to say that a change in customary law has as yet taken place. It remains possible that the United States will abandon the claims it has made, in that the difficulties which the United States is experiencing in the course of its occupation of Iraq may have given American policy makers second thoughts as to the prudence of unilateralism. One has the impression that American officials assumed that they could persuade other states to assist their efforts in Iraq by arguing that the matter was too important to the world to permit the American effort to fail, regardless of other states' views of the lawfulness of the actions of the United States. In fact, however, the United States has received relatively little assistance from other states, and risks losing some of the aid it is receiving. Also, the role the United Nations has come to play in Iraq is at least in part a reflection of an American desire to share the burden it faces and an acknowledgment that only the United Nations has the legitimacy needed to persuade the Iraqi people to

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added).

accept new political arrangements. Given the problems the United States has encountered in asserting its freedom from constraint, it would not be surprising if it abandoned such claims in the future.

One final observation is necessary. The thrust of the foregoing paragraph is that whether we have seen the beginnings of a rule of customary law according practically unlimited discretion to the United States to use force depends on the future actions of the United States. That is, if the United States persists in its unilateralism despite the prudential considerations just discussed, it will be difficult to avoid the situation in which the recognition of its predominance becomes a matter of state practice. This follows because, despite their criticisms of its actions, other states have been unable or unwilling to impose sanctions on the United States, that is, to treat its actions as unlawful. Thus, it appears to rest with the United States itself to determine the ultimate legal significance of its actions. In other words, while it is too early to determine whether the invasion of Iraq has created a rule recognizing the right of the United States to use force unilaterally, it appears that whether such a rule comes to exist depends on the unilateral determinations of the United States.

## **CONCLUSION**

This paper has sought to describe a number of conflicts and the rules of customary international law to which they appear to have given rise, and to show by reference to the development of those rules how requirements of consistency and uniformity actually operate with respect to the customary international law of the use of force. It concludes that rules are uniform only with respect to discrete groupings of state, and that relatively few instances of practice can give rise to such rules, that is, that practice, though consistent, need not be long-subsisting. Finally, the paper argues that it is too early to tell whether we find ourselves dealing with the logical extension of the conclusion that rules are not uniform and the little practice is needed for a rule - that is, with a situation where one state is the sole member of a class which the law exempts from all restrictions, such exemption deriving from one instance of practice.