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AFGHANISTAN'S CIVIL WAR (1979-1989): ILLEGAL AND FAILED FOREIGN INTERVENTIONS

Abstract

For about ten years now people in NATO member states have, on a daily basis, been confronted with the faltering attempts by their troops to create a semblance of stability in Afghanistan. It is now widely recognized that Afghanistan has become an intractable international problem.

This article, however, focuses on previous attempts to impose solutions. Beginning in the late 1970s and continuing throughout the 1980s, the two Cold War superpowers, the USSR and the USA, intervened in Afghanistan's affairs. In this article the legality, under international law, of those efforts is examined. This requires an extensive analysis of international law as applicable to external interventions in civil wars.

It will be demonstrated that neither the USSR's invasion of Afghanistan, nor the USA's massive support of the Afghan rebels, was reconcilable with international law. Considering the fact that these ill-advised interventions in Afghanistan backfired on both superpowers, they constitute a good object lesson to demonstrate that the prohibition of external interventions in civil wars not only reflects what international law demands, but is also simple common sense. Recent interventions in Bahrain and Libya are also briefly examined as to their legality, and this examination includes projections whether the unsatisfactory results of the Afghanistan interventions will be replicated there.

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INTRODUCTION

Since 2001 NATO forces, partly in the guise of ISAF, have been engaged in a seemingly never-ending war in Afghanistan. Despite a plethora of new initiatives aimed at stabilizing the deteriorating situation, it is not possible to estimate whether, or when, the foreign troops will ever be able to leave Afghanistan without the country immediately spiralling into an escalating civil war.

The current conflict is, however, only the latest episode in a history of external aggression and internal civil war in Afghanistan. Ever since its emergence as an entity distinguishable from its neighbours at some point in the 18th century, Afghanistan has been the object of foreign interference and attempts at occupation, often accompanied by civil strife.

This unwanted outside attention is not due to Afghanistan's natural riches, but rather to the coincidence of its geographical location: it is situated at the eastern most edge of the strategically important and resource-rich Middle East, and borders Central Asia, another strategic hub full of natural resources.¹ Thus it has been Afghanistan's fate to serve alternately as a buffer between, or as a battleground for, rival powers seeking domination in neighbouring areas.

The "War on Terror" launched by the USA and its allies in response to the deadly terrorist attacks on America in September 2001 led to a direct attack upon and invasion of a feuding Afghanistan. Ironically, the Soviet Union, the USA and others had just over a decade earlier intervened in Afghanistan's previous civil war, which had escalated as of 1978.

This article examines the legality of these earlier interventions. It begins with a brief outline of the historical background to the USSR's invasion of Afghanistan in 1979 and the USA's response thereto, and then examines in depth the international law rules on external interventions in civil wars. Based on this detailed legal analysis it will be shown that neither the Soviet nor the American actions regarding Afghanistan could be justified under the UN Charter and/or customary international law.

This violation of the law is made all the more relevant by the fact that subsequent events demonstrated that the Soviet and American interference had actually "boomeranged" on both superpowers. The Soviet Union, by the time of its

¹ D. Ross, *Beyond the Soviet Invasion: Afghanistan and the Concept of Self-Determination*, 48 *University of Toronto Faculty of Law Review* 92 (1990), p. 99; T.M. Cynkin, *Aftermath of the Saur Coup: Insurgency and Counter-insurgency in Afghanistan*, 6 *Fletcher Forum of World Affairs* 269 (1982), p. 269; M. Hauner, *The Soviet Geostrategic Dilemma*, in M. Hauner, R. L. Canfield (eds.), *Afghanistan and the Soviet Union, Collision and Transformation*, Westview Press, Boulder: 1989, Ch. 7, p. 161; A. Hyman, *Afghanistan Under Soviet Domination, 1964-83*, (2nd ed.), Macmillan Press Ltd., London: 1984, p. 3.

withdrawal in 1989, had suffered a humiliating defeat, and the massive American support of the mostly radical Afghan rebels was to set in motion a chain of events that would lead to 9/11 and the current conflict.

An analysis of the events between 1979 and 1989 – during Afghanistan's civil war – reveals that the prohibition of external interventions in civil wars not only reflects the state of the law but is also simply common sense, a conclusion which unfortunately may be confirmed by the ongoing events in Bahrain and Libya.

1. BACKGROUND

Afghanistan, a desperately poor country always prone to internal rebellion, finally achieved full independence in 1919, following three Anglo-Afghan Wars and repeated threats to its existence by Tsarist Russian (later Soviet) expansionism in Central Asia.

Following the abolition of its monarchy in 1973, Afghan communists were able to take power in a coup, the so-called *Saur Revolution*, in 1978. It is unlikely the Soviets instigated the coup, but it certainly became a turning point in the bilateral relationship.² Vital Soviet economic and military assistance, which had been pouring into the country since the 1950s, increased to the point where it became the vehicle for complete Afghan dependence on the USSR.³

² A. Rasanayagam, *Afghanistan, A Modern History* (2nd ed.), I. B. Tauris, London: 2005, p. 70. He points out that the Soviet news agency TASS at first referred to the events in Afghanistan as a “coup d'état”, not as a revolution, indicating unpreparedness; a point also made by W. Maley, *The Afghanistan Wars*, (2nd ed.), Palgrave Macmillan, Basingstoke: 2009, pp. 20, 23-24; S. Galster, *Afghanistan: The Making of U.S. Policy, 1973-1990*, in *The National Security Archive, Volume II: Afghanistan: Lessons from the Last War, The September 11th Sourcebooks*, 2001, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/essay.html> accessed December 1, 2011; p. 8. He claims that “U.S. Embassy officials in Kabul ... detected no Soviet hand in the coup”; H. Bräker, *Die langfristigen Interessen der Sowjetunion in der Region Mittelost und die Islam-Frage in Zentralasien* (The long-term interests of the Soviet Union in the Middle East and the question of Islam in Central Asia) in H. Vogel (ed.), *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Nomos Verlagsgesellschaft, Baden-Baden: 1980, p. 17. He, on the other hand, claims the USSR at least supported, if not organized, the coup; he argues that a military coup in Afghanistan was impossible without the many Soviet military advisors knowing about and supporting it.

³ G. Linde, *Afghanistan und der Nachbar im Norden* (Afghanistan and the neighbour to the north) in H. Vogel (ed.), *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Nomos Verlagsgesellschaft, Baden-Baden: 1980, p. 74. According to him, the Soviets provided 56.5 % of all aid received by Afghanistan in the period 1956-1961 and 65 % of all aid for the period 1962-1967; Hyman, *supra* note 1, pp. 33-34; L. Dupree, *Afghanistan* (2nd ed.), Princeton University Press, Princeton: 1980, p. 630.

Communist infighting and a radical reform programme had, by early 1979, led to civil war. After first rejecting Afghan requests earlier in the year for a military intervention, the Soviet government changed its mind in late 1979, and the Soviet invasion of Afghanistan began at Christmas. During the next decade on average about 100,000 Soviet troops were stationed there.

Faced with severe international criticism by both the west and the non-aligned states of its intervention in Afghanistan's civil war,⁴ the Soviet Union was forced to articulate a legal justification for its actions. In doing so, it relied on customary international law and the UN Charter. It was argued that Soviet troops had been sent to Afghanistan at the request of the Afghan government,⁵ a move entirely consistent with the traditional right of every state to aid a foreign government in restoring order in the face of a rebellion, a legal right even more valid when the rebellion was supported by foreign powers.⁶

The USSR argued that inasmuch as the Afghan rebellion was supported and instigated from abroad, Soviet actions were also consistent with Article 51 of the UN Charter and Article 4 of the 1978 Soviet-Afghan Treaty of Friendship. By supporting the legitimate Afghan government the Soviet Union was merely exercising collective self-defence.⁷ Furthermore, the actions of these foreign powers were also threatening the Soviet Union's borders, allowing the Soviets to take defensive action in their own right.⁸

⁴ GA Resolution ES- 6/2 (January 1980), passed by 104:18:18 votes (call for withdrawal: para. 4); Afghanistan was also suspended from the Organisation of Islamic Conference; many states imposed sanctions on the USSR.

⁵ *Russia says military airlift was justified*, M. Binyon, *The Times*, 29.12.1979, pp. 1, 4; *UN votes for troop withdrawal*, *The Times*, 15.01.1980, p. 1; L. Doswald-Beck, *The Legal Validity of Military Intervention by Invitation Of the Government*, 56 *British Yearbook of International Law* 189 (1985), pp. 231-233.

⁶ Binyon, *supra* note 5, pp. 1, 4; Doswald-Beck, *supra* note 5, pp. 231-233.

⁷ Instructions to the Soviet Ambassador to the UN in New York, ordering him to argue that the Soviet invasion was justified according to Article 51 of the UN Charter; Instructions to the Soviet Ambassadors in Berlin, Warsaw, Budapest, Prague, Sofia, Havana, Ulan-Bator and Hanoi; these Ambassadors were also instructed to inform the respective governments that the Soviet Union had acted at the request of the Afghan government and in conformity with Article 51 of the UN Charter and the Afghan-Soviet Treaty of 1978; similar instructions were issued to the other Soviet Ambassadors (pp. 138-141); reprinted (incl. German translation) in P. Allan, P. Bucherer, D. Kläy, A. Stahel, J. Stüssi-Lauterburg (eds.), *Sowjetische Geheimdokumente zum Afghanistankrieg (1978-1991)* (Secret Soviet documents relating to the war in Afghanistan), vdf Hochschulverlag, Zürich: 1995, pp. 132-137, 142-147 (UN).

⁸ *Concerning the events in Afghanistan*, *Pravda*, 31.12.1979. In this article it is pointed out that the Soviet Union had never made a secret of the fact that it would not allow Afghanistan to become a bridgehead for an "imperialistic" aggression against the USSR;

Elements of all these justifications can be found in Brezhnev's speech at the Soviet Communist Party Congress on February 23, 1981:

Imperialism launched a real undeclared war against the Afghan revolution. This also created a direct threat to the security of our southern frontier. In the circumstances, we were compelled to render the military aid asked for by that friendly country. We will be prepared to withdraw with the agreement of the Afghan government. Before this is done, the infiltration of counterrevolutionary gangs into Afghanistan must be completely stopped ... Dependable guarantees are required that there will be no new intervention.⁹

Within the socialist bloc the Soviet invasion was also justified on the basis of the so-called "Brezhnev Doctrine" (which will later be briefly examined). This socialist version of international law both justified and demanded the support of the proletarian class that had triumphed in Afghanistan in the *Saur Revolution* of 1978 against any imperialistic attack, be it foreign or domestic.¹⁰

These justifications require close examination.

reprinted in P. Bucherer-Dietschi, A. Stahel, J. Stüssi-Lauterburg (eds.), *Strategischer Überfall - das Beispiel Afghanistan, Quellenband - Teil 1* (Strategic attack- the example of Afghanistan, Primary Sources, Volume 1), Grauwiller Offsetdruck, Liestal: 1991, pp. 261-266 (incl. German translation); *US help for Afghan rebels threatened Russia, Pravda says*, M. Binyon, *The Times*, 02.01.1980, p. 5; Nicholas Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 *Yale Journal of World Public Order* 209 (1980-1981), p. 237; R. J. Matsson, *Politische und völkerrechtliche Aspekte der sowjetischen Invasion Afghanistans 1979/1980 und die Position der Sowjetunion* (Political and international law aspects of the Soviet invasion of Afghanistan in 1979/1980 and the Position of the Soviet Union), 21 *Österreichische Zeitschrift für Außenpolitik* 79 (1981), p. 86.

⁹ Leonid Brezhnev, *Address to the 26th Soviet Communist Party Congress*, February 23, 1981; translated by TASS; excerpts printed in *The New York Times, Excerpts From Address By Brezhnev To The Soviet Communist Party Congress*, 24.02.1981, p. 6.

¹⁰ Instructions to the Soviet Ambassadors in Berlin, Warsaw, Budapest, Prague, Sofia, Havana, Ulan-Bator and Hanoi; the Ambassadors were instructed to inform the respective governments that the Soviet Union had also acted to "defend the revolution's achievements" against Amin's attempts at "liquidating" them. This particular justification was omitted in the instructions to the other Soviet Ambassadors (pp. 138-141); reprinted (incl. German translation) in P. Allan et al. (eds.), *supra* note 7, pp. 132-137. In an editorial in the East German daily *Neues Deutschland*, 29.12.1979, it is claimed that the Soviets had been guided by their "internationalist duty" when deciding to defend the Afghan people against "external aggression" and "internal counter-revolution"; *Concerning the events in Afghanistan*, *Pravda*, 31.12.1979. In this article Soviet actions are also justified as having been in defence of the "achievements of the April Revolution," as the revolution and its success had become the most important matter of concern for the Afghan people; both reprinted in P. Bucherer-Dietschi, et al. (eds.), *supra* note 8, pp. 247-248 (*Neues Deutschland*); pp. 261-266 (*Pravda* and German translation).

2. THE LEGALITY OF THE SOVIET INVASION OF AFGHANISTAN

2.1 Intervention by invitation of the Afghan government

There is no doubt that by the time of the Soviet invasion in December 1979 Afghanistan was in a state of civil war. The Central Committee of the Soviet Communist Party had already come to this conclusion in the spring of 1979, when the Afghan government did not manage to fully re-assert its control over Herat following the uprising there in March.¹¹ The Afghan army was falling apart, as many recruits, and especially conscripts, were deserting, often joining the rebels to fight against the government. During the Herat crisis the Afghan government requested Soviet military support, as the leading Afghan politicians had come to the conclusion that they no longer had the resources to reassert control.¹² Although the USSR first turned down this request, the Afghan situation was deemed dire by the Soviets.¹³ Once Herat had been brought back under the control of the government, other provinces erupted.¹⁴

¹¹ D. Loyn, *Butcher & Bolt, Two Hundred Years of Foreign Entanglement in Afghanistan*, Windmill Books, London: 2009, p. 185; W. M. Reisman, J. Silk, *Which Law Applies to the Afghan Conflict?*, 82 *American Journal of International Law* 459 (1988), p. 469.

¹² Soviet Prime Minister Kosygin, when reporting to the Politburo on a telephone conversation he had had with Taraki on March 17, 1979, states that Taraki “requests that we dispatch Tadzhiks to serve as crews for tanks and armoured cars, dressed in Afghan uniforms” (at p. 11); Foreign Secretary Gromyko reports a similar request made by then Afghan Foreign Secretary Amin (at p. 17); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, pp. 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html> last accessed December 1, 2011; also Document 2 (Transcript of Telephone Conversation between Kosygin and Taraki of March 18, 1979, during which the Afghan request is made); Loyn, *supra* note 11, p. 186 (he claims there were twenty requests).

¹³ G. Lenczowski, *The Soviet Union and the Persian Gulf: an Encircling Strategy*, 37 *International Journal*, 307 (1981-1982), p. 317; Matsson, *supra* note 8, p. 84; W. Blum, *Killing Hope, US Military & CIA Interventions since World War II*, Zed Books Ltd., London: 2003, p. 342; Cynkin, *supra* note 1, p. 277; Reisman & Silk, *supra* note 11, pp. 470-471.

¹⁴ Loyn, *supra* note 11, 186; Cynkin, *supra* note 1, 276; Reisman & Silk, *supra* note 11, p. 470; Henning Behrens, *Die Afghanistan-Intervention der UdSSR, Unabhängigkeit und Blockfreiheit oder Mongolisierung Afghanistans: Eine Herausforderung für das internationale Krisenmanagement* (The intervention in Afghanistan by the USSR, independence and non-alignment or Afghanistan’s mongolization: A challenge for international crisis management), Tuduv-Verlagsgesellschaft, München: 1982, p. 51; Linde, *supra* note 3, p. 84; W. Berner, *Der Kampf um Kabul: Lehren und Perspektiven* (The battle for Kabul: lessons and perspectives), in H. Vogel (ed.), *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Nomos Verlagsgesellschaft, Baden-Baden: 1980, p. 357.

There can therefore be no doubt that the Soviet Union intervened in a civil war within Afghanistan, and did not merely aid a legitimate government in restoring law and order following a small uprising (which might warrant a different legal evaluation).¹⁵ As far as the right of foreign states to intervene in civil wars is concerned, customary international law is the only source of legal rules which can be referred to. Rules on this subject specifically applicable to Afghanistan have never been codified.

As is often the case in matters dealt with in customary international law, the rights of foreign powers in civil war situations have always been extremely controversial and remain so. Nearly every possible position has been adopted at one time or another, although it is argued herein that by 1979 a consensus had developed with regard to the right of foreign powers to intervene in civil war situations.

At the outset however it should be noted that “intervention,” as evaluated and discussed here, is to be understood as an *active engagement* – involving military support (weapons and/or soldiers) – by a foreign state in favour of one of the participants in a civil war situation. The customary international law rules discussed here do not necessarily apply to lesser means of “intervention” in a civil war, such as broadcasting propaganda from abroad, politically and diplomatically supporting one side in the conflict or maintaining pre-agreed bilateral economic assistance, although it must be acknowledged that in some instances it is difficult to draw the line between bilateral “assistance” and active military support. However, in assessing the legality of the Soviet invasion of Afghanistan there can be no doubt that the USSR rendered active military support to the government side in the civil war.

2.1.1. Pre-WW II customary international law

Traditionally, there was wide-spread consensus on the right of foreign governments to intervene in civil wars, probably derived from the concept that a state can act legitimately only through its government.¹⁶ Thus it was seen as legitimate

¹⁵ Article 3 e) of the *Definition of Aggression* (GA Resolution 3314 (XXIX)) implies that a state can legally send its troops onto another country's territory at that country's request, which is implied in its definition of an act of aggression, *inter alia*, as follows: “The use of armed forces which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement”; Doswald-Beck, *supra* note 5, p. 189; Ch. C. Joyner & M. A. Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 *Virginia Journal of International Law* 621 (1984-1985), pp. 643-644.

¹⁶ Permanent Court of International Justice, *German Settlers in Poland*, Advisory Opinion (Series B, B06), September 10, 1923, at 22: “States can act only by and through their agents and representatives” (available at: http://www.icj-cij.org/pcij/serie_B/B_06/Colons_allemands_en_Pologne_Avis_consultatif.pdf last accessed 12/12/2011); Doswald-Beck,

and legal to intervene in a foreign civil war if that intervention was based on the request or invitation of the recognized government of the state concerned.¹⁷

Conversely, this meant that foreign intervention on the behalf of rebels was always illegal, as such support was directed against the state's representatives and therefore, by implication against the state itself.¹⁸ Only when a rebellion had gained such force that it was granted "belligerent status" did a policy of neutrality become obligatory.¹⁹ This traditional view is reflected in the Convention on the

supra note 5, p. 190; T. J. Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 *Harvard Law Review* 511 (1968-1969), p. 526; he also correctly points out that the "ruling classes" were anxious to protect each other from internal revolution; N. J. Padelford, *The International Non-Intervention Agreement and the Spanish Civil War*, 31 *American Journal of International Law* 578 (1937), p. 586. He adds that it was in the interest of "public law and authority" to differentiate between "established governments" and "unrecognized and irresponsible rebels".

¹⁷ S. R. Schwenninger, *The 1980s: New Doctrines of Intervention or New Norms of Nonintervention?*, 33 *Rutgers Law Review* 423 (1980), p. 428; W. Friedman, *Intervention, Civil War and the Role of International Law*, 59 *American Society of International Law Proceedings* 67 (1965), p. 72; E. Luard, *Superpowers and Regional Conflicts*, 64 *Foreign Affairs* 1006 (1985-1986), p. 1010; R. Oglesby, *A Search for Legal Norms in Contemporary Situations Of Civil Strife*, 30 *Case Western Reserve Journal of International Law* 30 (1970-1971), pp. 36-37; T. J. Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 *Columbia Law Review* 266 (1967), p. 271; and Farer, *supra* note 16, pp. 511, 526-530; J. N. Moore, *Legal Standards for Interventions in Internal Conflicts*, 13 *Georgia Journal of International & Comparative Law* 191 (1983), p. 194; J. W. Garner, *Questions of International Law in the Spanish Civil War*, 31 *American Journal of International Law* 66 (1937), p. 68; I. Brownlie, *International Law and the Use of Force by States*, Oxford University Press, Oxford: 1963 (reprint 1968), p. 327; Padelford, *supra* note 16, p. 586; P. C. Jessup, *The Spanish Rebellion and International Law*, 15 *Foreign Affairs* 260 (1936-1937), p. 265.

¹⁸ T. D. Woolsey, *Introduction to the Study of International Law, Designed As an Aid in Teaching, and in Historical Studies* (4th ed.), Scribner, Armstrong & Co., New Haven: 1874, p. 56 (§ 41); Doswald-Beck, *supra* note 5, p. 190; Friedman, *supra* note 17, pp. 69, 72; Farer, *supra* note 17, pp. 271-272; and *supra* note 16, pp. 511, 526-530; Moore, *supra* note 17, p. 194; Garner, *supra* note 17, p. 67; Padelford, *supra* note 16, p. 586; Jessup, *supra* note 17, p. 265.

¹⁹ Garner, *supra* note 17, p. 70; Farer, *supra* note 16, pp. 511-512; Luard, *supra* note 17, pp. 1009-1010; Q. Wright, *United States Intervention in the Lebanon*, 53 *American Journal of International Law* 112 (1959), p. 122; Oglesby, *supra* note 17, p. 32; Doswald-Beck, *supra* note 5, pp. 196-197. According to her, an insurgency must fulfil the following four criteria in order to achieve "belligerent" status: "1) existence of a civil war ... ; 2) occupation and ... administration of a substantial part of national territory by insurgents; 3) observance of the rules of warfare ... 4)...practical necessity for third states to define their attitude" (she is here relying on Oppenheim's definition); R. Higgins, *Intervention and International Law* in H. Bull (ed.), *Intervention in World Politics*, Clarendon Press, Oxford: 1984, Ch. 3, p. 40 (requirements 1 and 2, but she adds the requirement of an "organized fighting unit"); M. Krauss, *Internal Conflicts and Foreign States: In Search of the State of Law*, 5 *Yale Studies in World Public Order* 173 (1978-1979), pp. 187-190; relying on Section 8 of the 1900 *Règlement* passed by the *Institut de Droit International*. He concurs with requirements 2

Rights and Duties of States in Event of Civil Strife, concluded in 1928 and applicable in the Americas.²⁰

Nevertheless, while this view of the right of intervention was widely-held, it was not without controversy among international law scholars even during its heyday. Most notably Stowell in 1921, and Hall in 1924, advocated a policy of non-intervention in civil wars and argued that intervening on either side was illegal.²¹

While Hall and Stowell were expressing a minority view at the time, the major powers' policies during the Spanish Civil War (1936-1939) did demonstrate a growing ambivalence on the part of foreign states insofar as intervening in civil wars was concerned.²² Although the Spanish Republican Government was recognized as the legitimate government of Spain, there was a consensus that outside powers should not intervene on either side in the government's fight against the fascist rebellion. This policy, semi-officially adopted by all the major powers, is often referred to as the *Spanish Non-intervention Agreement*.²³

In practice, however, it is undeniable that this policy was not adhered to. The Soviet Union and, to some extent France, tried to aid the Spanish Government, while Germany and Italy intervened massively on the fascist side.²⁴ It must also be kept in mind that the policy of non-intervention was mainly an attempt to avoid a general European war; it was not motivated by a desire to uphold international law.²⁵ Indeed the agreement proved to be very controversial among international

and 3; Jessup, *supra* note 17, pp. 270-273 (demanding "a very considerable degree of organization and stability", and that the insurgents are "contending on more or less equal terms" with the government's forces).

²⁰ Article I (the text of the treaty is available at: <http://www.oas.org/juridico/english/treaties/a-27.html>, accessed December 12, 2011).

²¹ E. C. Stowell, *Intervention in International Law*, John Byrne & Co., Washington, D.C.: 1921, pp. 330-340; W. E. Hall, *A Treatise on International Law* (8th ed.), The Clarendon Press, Oxford: 1924, p. 347 (§ 94).

²² Moore, *supra* note 17, p. 194.

²³ The so-called "Spanish Non-intervention Agreement" was not a formal convention, but was based on an exchange of notes between, in the end, twenty-seven different states. It was initiated by an exchange of notes between France and Britain in August 1936. These notes resulted in the "International Committee for the Application of the Agreement regarding Non-intervention in Spain," set up in September 1936. The Committee was responsible for the supervision of the agreement's implementation; Padelford, *supra* note 16, pp. 579-582; Jessup, *supra* note 17, pp. 268-270; Friedman, *supra* note 17, pp. 70, 72; Wright, *supra* note 19, p. 122.

²⁴ Friedman, *supra* note 17, pp. 70, 72; Luard, *supra* note 17, p. 1010; Wright, *supra* note 19, p. 122; Garner, *supra* note 17, pp. 66-67, 68.

²⁵ *Eden Hard At Work to Stave Off A War; Clash of Powers Now Over Spain Would Dash His Hopes of Mending European Quarrels in Fall*, Ferdinand Kuhn Jr., The New York Times, 23.08.1936, E4; Wright, *supra* note 19, p. 122; Padelford, *supra* note 16, p. 578; Jessup, *supra* note 17, pp. 265-266.

lawyers, with some explicitly arguing it was not only novel, but actually illegal under international law for states to agree to ignore a recognized government's request for assistance in a civil war or, even worse, to prohibit individuals from exporting arms to that government.²⁶ Even some of the states officially participating in the *Non-intervention Agreement* acknowledged that it was a "breach of principles of international law."²⁷

Nevertheless, the very fact that the major powers of the day obviously did believe that it was justifiable to ignore the government's pleas for support in its civil war – despite the fact that the opposing Spanish fascists never gained "belligerent status" – can be viewed as the beginning of a change in attitude towards the automatic primacy accorded to recognized governments in civil wars.

2.1.2. Post-WW II developments

Following WW II, the right of intervention in a civil war at the request of a government became increasingly controversial. This was due to a variety of changing international conditions.

2.1.2.1. Non-application of the old rules

For one thing, it was becoming increasingly evident that the old principle that rebellions were to be ignored until they had achieved "belligerent status" existed only on paper.²⁸ No rebellion since the US Civil War (1861-1865) had ever been granted "belligerent status," even though a number of rebellions

²⁶ Brownlie, *supra* note 17, p. 324. He points out that the Spanish and Mexican governments "challenged" the international legality of the agreement (fn. 5); E. Borchard, 'Neutrality' and Civil Wars, 31 *American Journal of International Law* 304 (1937), pp. 305-306; Garner, *supra* note 17, pp. 66-71; he does not express an opinion, but raises doubts as to the foreign powers' attitude towards the recognized Spanish government; Padelford, *supra* note 16, p. 586, states that "to apply to unrecognized and irresponsible rebels the same principles that are applicable to sovereign states and established governments is to encourage rebellion and disorder and to weaken public law and authority. The law can not [sic] long afford to do this."

²⁷ Soviet representative Litvinov at the 17th Ordinary Session of the Assembly at the League of Nations (September 1936). On that occasion the Portuguese and, of course, the Spanish representatives also claimed the accord to be in violation of international law, although the Soviet and Portuguese representatives went on to justify this violation as a necessity, given the international situation; Padelford, *supra* note 16, pp. 581, 585, 586 (incl. fn. 21 and 22).

²⁸ Doswald-Beck, *supra* note 5, p. 197; Higgins, *supra* note 19, pp. 41-42; Friedman, *supra* note 17, pp. 72-73; Oglesby, *supra* note 17, p. 32; Krauss, *supra* note 19, pp. 203-204; he also acknowledges this argument, but poses the question whether states' behaviour during some crises (such as the Spanish Civil War) did not imply implicit recognition of the

had ended in a change of government (Spain being one of the notable examples).²⁹ It was (and is) therefore questionable whether the rules on insurgencies and belligerency can still be viewed as part of customary international law.³⁰

2.1.2.2. Recognition of governments

More importantly, however, changing attitudes towards the status and legitimacy of a state's government served to undermine the value of a governmental request for outside intervention in a civil war. The recognition of governments as legitimate representatives of states became heavily politicized in some cases, and increasingly pragmatic in others. This undermined the relevance of formal recognition by other states when attempting to judge a government's legitimacy.

On the one hand, the USA for many decades refused to accept the *de facto* situation in China and did not recognize Mao Tse Tung's government as the representative of China. Instead it recognized the Taiwanese government, based on its more convenient ideological outlook, even though there was no doubt that the Taiwanese government was in control of only the small island of Taiwan, and that there was no realistic prospect of a change in that situation in the future.³¹

On the other hand, states generally tended to adopt an increasingly pragmatic evaluation of who was in *de facto* control of the state concerned when deciding whom to deal with, seemingly thereby willing to deal even with foreign-imposed governments.³² Not only were the Soviet-imposed communist governments in Eastern Europe universally recognized, but such recognition was even accorded to the Hungarian government imposed by the Soviet Union following the failure of the uprising in 1956, albeit only after a few years time.³³

The recognition of a government therefore either deteriorated into a mere political statement without any relation to the facts, or became so "realist" that

rebels as belligerents. As also acknowledged by him, state behaviour has, however, been notably erratic as far as the treatment of insurgents is concerned, so that assuming a "confirmation by implication" of a rule not invoked seems problematic.

²⁹ Doswald-Beck, *supra* note 5, p. 197; A. S. Hershey, *The Essentials of International Public Law and Organization* (2nd ed.), The Macmillan Company, New York: 1927, pp. 206-207. The last example he can find is the recognition, in 1861, of "the Southern Confederacy" during the American Civil War, although he claims the USA was also close to recognizing the belligerent status of rebels in Cuba in 1869 and 1896, but in the end refrained from doing so.

³⁰ Doswald-Beck, *supra* note 5, p. 197.

³¹ Wright, *supra* note 19, pp. 120-121; Friedman, *supra* note 17, p. 71; Doswald-Beck, *supra* note 5, pp. 197-198. Although not referring to China, she offers numerous other examples, such as the rapid recognition of the Adoula government in the Congo in 1961, despite the fact it had no proper control over the country.

³² Doswald-Beck, *supra* note 5, pp. 194-195.

³³ *Ibidem*, p. 195.

some recognized governments could hardly claim to be legitimate in any other way, apart from relying on geo-politics.³⁴ By 1980 many governments, including the UK's, had consequently decided to abandon the custom of formally recognizing other governments.³⁵

The increasing tendency to adopt a "realist" approach to foreign governments and to judge them on the basis of their *de facto* control of the state meant that Hall's view, that a government that required outside support to stay in power should not be supported, gained more coinage. After all, a government requiring foreign intervention against its own people was *not* in control.³⁶

2.1.2.3. Decolonisation, self-determination, and non-interference

The de-colonisation process was also raising doubts about the right of a colonial government to call in foreign assistance in an attempt to quash a nationalist movement fighting for self-determination, thereby further undermining the deference granted to "governments".³⁷ Furthermore, following the Universal Declaration of Human Rights and the increasing attention paid to human rights, a government's treatment of its own citizens began to be taken into account in assessing possible interventions.³⁸

Doubts began to emerge whether a racist or tyrannical regime – even if in *de facto* control – should be accorded with any kind of recognition.³⁹ This development was to extend so far that by the 1970s, the UN General Assembly recognised some national liberation movements, instead of repressive governments, as the legitimate representatives of specific states.⁴⁰

³⁴ Farer, *supra* note 16, p. 526.

³⁵ Doswald-Beck, *supra* note 5, pp. 194-195.

³⁶ *Ibidem*, p. 196; J. A. Perkins, *The Right of Counterintervention*, 17 Georgia Journal of International & Comparative Law 171 (1987), pp. 190-191; Farer, *supra* note 17, pp. 272-273; Krauss, *supra* note 19, pp. 209-210.

³⁷ Doswald-Beck, *supra* note 5, pp. 200-201. She also, however, notes the limited acceptance of the principle of self-determination when it conflicts with the *uti posseditis* principle (pp. 202-203).

³⁸ Schwenninger, *supra* note 17, p. 429.

³⁹ *Ibidem*, p. 428; Doswald-Beck, *supra* note 5, pp. 195, 197 (obvious examples being the non-recognition of Rhodesia and its government following its unilateral declaration of independence, and the non-recognition of South Africa's control over Namibia (South-West Africa)).

⁴⁰ Resolution 2918 (1972) referring to the national liberation movements of Angola, Guinea-Bissau, Cape Verde and Mozambique; Resolution 3111 (1973) referring to Namibia; Resolution 3113 (1973) referring once more to the Portuguese colonies; Resolution 3115 (1973) referring to Rhodesia; Resolution 3151 G (1973) referring to South Africa.

This international fluidity led to a situation in which there was no consensus on what the international law rules were concerning interventions in civil war, because many areas of the law were still in a state of flux and had not yet been developed sufficiently.⁴¹ There were those who vehemently argued in favour of retaining the traditional legal rules, and those who strongly opposed just that. Nor did prevailing state practice provide any clear guidelines, as specific interventions in a civil war were routinely based on other, additional justifications.

On the other hand, only a short time after WW II regional treaties were concluded that did explicitly outlaw any external interference in the internal affairs of another country, such as the OAS Charter⁴² and the Warsaw Pact.⁴³

These regionally-adopted principles of non-intervention were to develop into a general principle of international law at a universal level that came to be viewed as applicable to civil war situations as well. Two almost simultaneous and arguably contradictory developments enabled this to happen.

On the one hand, under the influence of the negotiations which were to lead in 1966 to the conclusion of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESR), it became increasingly unacceptable to argue that it was legitimate to intervene in an internal conflict in order to help an authoritarian government suppress a revolting population.⁴⁴ This led to the widespread realization that distinctions had to be made between different kinds of government, so that the whole rigid concept of intervention in an internal conflict simply at the request of the recognized government became untenable.

On the other hand, these developments in the sphere of civil and political rights, and more generally in the field of human rights, took place against the backdrop of the de-colonisation process. Many new states, which had only just joined the United Nations, were extremely anxious to safeguard their new status as independent states against any attempt of encroachment.⁴⁵

⁴¹ Friedman, *supra* note 17, pp. 72-74; Luard, *supra* note 17, pp. 1010-1011; Brownlie, *supra* note 17, p. 327; Farer, *supra* note 17, pp. 273-274. Writing in 1967, he describes the legal situation regarding interventions in civil wars as the "normless present".

⁴² Article 19 (the OAS Charter was concluded in 1948; 119 UNTS 3).

⁴³ Article 8; The Warsaw Security Pact (1955), Treaty of Friendship, Cooperation and Mutual Assistance; 219 UNTS 2962.

⁴⁴ J. Rohlik, *Some Remarks on Self-Defense and Intervention: A Reaction to Reading Law and Civil War in the Modern World*, 6 Georgia Journal of International & Comparative Law 395 (1976), pp. 409-411.

⁴⁵ Doswald-Beck, *supra* note 5, pp. 209-211, 252; Perkins, *supra* note 36, p. 189; Krauss, *supra* note 19, pp. 212-213.

The principle of self-determination, included in Article 1(2) of the UN Charter, was the obvious anchor for securing, in international law, the developing states' new-found independence and freedom from external interference.⁴⁶ In this struggle, the newly independent states were massively supported by the Soviet Union, which was also anxious to strengthen the concept of self-determination, a concept outlined in some detail in Lenin's *Decree on Peace* of October 26, 1917.⁴⁷ The subsequent progression of the principle of self-determination into a right of self-determination was confirmed by the two covenants, the ICCPR and the ICESR,⁴⁸ whose common Article 1 states:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This was a confirmation of the view already taken by the General Assembly in its 1960 Resolution on the Granting of Independence to Colonial Countries and Peoples.⁴⁹

It may be argued that as of the mid-1960s these twin developments led the UN General Assembly to pass numerous resolutions, by large majorities, in which the principle of non-interference in the domestic affairs of other states was frequently reiterated.⁵⁰ Although such prohibitions, as far as civil wars were concerned, were often directed at the foreign support of rebel groups, the principle of non-interference also came to be increasingly seen as a general rule, which could readily be interpreted as also prohibiting military interventions *on behalf* of beleaguered governments. Deciding who should govern was increasingly seen as a facet of a people's right of self-determination; a decision to be arrived at, if necessary, even by civil war.⁵¹

⁴⁶ Schwenninger, *supra* note 17, pp. 428-429; Rohlik, *supra* note 44, p. 406; Perkins, *supra* note 36, p. 185; Moore, *supra* note 17, pp. 195, 196.

⁴⁷ *Decree on Peace*; delivered at the *Second All-Russia Congress of Soviets of Workers' and Soldiers' Deputies*, 26 October 1917 and published by *Izvestiia*, 27.10.1917; this decree can be found at: <http://www.historyguide.org/europe/decree.html> and <http://www.firstworldwar.com/source/decreeonpeace.htm> both last accessed December 1, 2011.

⁴⁸ Ross, *supra* note 1, p. 96.

⁴⁹ GA Resolution 1514 (1960), Article 2; E. Klein, *Nationale Befreiungskämpfe und Dekolonisierungs-Politik der Vereinten Nationen: Zu einigen völkerrechtlichen Tendenzen* (Wars of National Liberation and the United Nations' Policy of Decolonisation: Some of the tendencies in international law), *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 618 (1976), p. 641.

⁵⁰ Schwenninger, *supra* note 17, pp. 428-429; Higgins, *supra* note 19, p. 37.

⁵¹ O. Schachter, *The Right of States To Use Armed Force*, 82 *Michigan Law Review* 1620 (1983-1984), p. 1645; Rohlik, *supra* note 44, pp. 409-411.

In 1965 the General Assembly passed, by a 109:0:1 vote, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It stated, *inter alia*, that “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.”⁵² These sentiments were reaffirmed in the 1970 General Assembly’s Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, which was passed without a vote.⁵³

Although the Resolution as such was not legally binding, the fact it was passed by consensus, and explicitly referred to international law allows for the conclusion that the states viewed the content of the Declaration as being reflective of their interpretation of the international law.⁵⁴ In its 1986 judgment in the *Nicaragua Case* the ICJ confirmed that the principle of non-intervention had become “part of customary international law.”⁵⁵

By the 1970s, the majority view held that customary international law required states to refrain from intervening in other states’ civil wars, whether at the request of the rebels, or at the request of the government.⁵⁶ This outcome

⁵² GA Resolution 2131 (XX) (1965). It should, however, be noted that the US representative stated that the USA regarded Resolution 2131 as a “statement of attitude and policy ... *not* as a declaration or elaboration of the *law* governing non-intervention” (emphasis added); Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 *American Journal of International Law* 713 (1971), p. 727.

⁵³ GA Resolution 2625 (XXV) (1970): “Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”

⁵⁴ This is also confirmed by the US attitude. While the US Representative had declared that Resolution 2131 (1965) was a mere policy statement, not a statement of law, he had explicitly mentioned the *Declaration* – finally passed in 1970, but being drafted since 1964 – as having “the precise job of enunciating that law” as far as non-intervention was concerned. Rosenstock, *supra* note 52, pp. 714-715, 726-729; Perkins, *supra* note 36, pp. 186, 188; P. A. Pentz, *The Mujahidin Middleman: Pakistan’s Role in the Afghan Crisis and the International Rule of Non-Intervention*, 6 *Dickinson Journal of International Law* 377 (1987-1988), pp. 385-387.

⁵⁵ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgement (Merits), ICJ Reports 1986, 14, paras. 202, 205.

⁵⁶ Pentz, *supra* note 54, 387-390; Perkins, *supra* note 36, pp. 183-195; Doswald-Beck, *supra* note 5, pp. 250-252, esp. 252; L. B. Sohn, *Gradations of Intervention in Internal Conflict*, 13 *Georgia Journal of International & Comparative Law* 225 (1983), pp., 226, 227; Schwenninger, *supra* note 17, p. 429, who even claims that a “clear international consensus ... against outside interference” had emerged; Ch. Gray, *International Law and the Use of Force* (3rd ed.), Oxford University Press, Oxford: 2008, p. 81, similarly argues that this position

was, firstly, the result of de-emphasizing the government's role in international law under the weight of human rights considerations; and, secondly, the consequence of the right of self-determination, which was viewed as granting to the people the sole right to decide who should govern them, if necessary even by civil war.

Against the above background it must be pointed out that although the principle of non-intervention had by the 1970s become the majority view, it was not uncontroversial, nor was its practical application easy.⁵⁷

There were some who argued that the principle of non-intervention was a misnomer, and that its adoption was actually an intervention *per se*. Taken to its extremes, a policy of non-intervention would not only be impracticable, but also oblige a state to end bilateral assistance programmes in support of another state if it were possible to argue that maintaining them would lend support to the government's struggle against rebels.⁵⁸ On the other hand, reducing such programmes would seriously weaken any government dependent on them and therefore

was "generally agreed." See also R. Fisher, *Intervention: Three Problems of Policy and Law*, reprinted in R. A. Falk (ed.), *The Vietnam War and International Law*, Princeton University Press, Princeton: 1968, pp. 137, 140, 145; J. Quigley, *The Reagan Administration's Legacy to International Law*, 2 Temple International & Comparative Law Journal 199 (1987-1988), p. 204; D. G. Partan, *Legal Aspects of the Vietnam Conflict*, reprinted in R. A. Falk (ed.), *The Vietnam War and International Law*, Princeton University Press, Princeton: 1968, p. 227; and Schachter, *supra* note 51, p. 1641, who obviously views this rule as uncontroversial. Rohlik, *supra* note 44, pp. 406-407; Wright, *supra* note 19, pp. 119-121. Wright claims that the rule of non-intervention in civil wars was already the "predominant view" when he was writing in 1959; Oglesby, *supra* note 17, pp. 38-39, 41, writing in 1970, claims however that a new norm in favour of "bloc intervention" may be developing; Moore, *supra* note 17, p. 199; it should, however, be pointed out that although Moore supports this majority view the – according to him – permissible exceptions are quite generous, mostly coinciding with US policies. Friedman, *supra* note 17, pp. 72-74, only claims however that, in international law, it is no longer possible to differentiate between support of a government and support of rebels, his implication being that neither are any longer properly regulated by international law; Luard, *supra* note 17, p. 1011, seems to agree with Friedman.

⁵⁷ Rostow, *supra* note 8, p. 223. Rostow, writing in 1980-1981, simply states, for example, that "international law always has recognized one State's right to appeal to another for military assistance against revolution"; Joyner/Grimaldi, *supra* note 15, pp. 642-643, 644; M. J. Matheson, *Practical Considerations for the Development of Legal Standards for Intervention*, 13 Georgia Journal of International & Comparative Law 205 (1983); R. Ullman, *Reflections on Intervention*, 52 Revista Juridica Universidad de Puerto Rico 127 (1983), pp. 130-131; writing in 1983, he argues that the traditional rules of international law as far as interventions are concerned still apply; Krauss, *supra* note 19, pp. 218-219.

⁵⁸ Perkins, *supra* note 36, pp. 195-196; Farer, *supra* note 17, pp. 274-275; and *supra* note 16, pp. 530-531; Moore, *supra* note 17, p. 195.

offer indirect assistance to the rebels.⁵⁹ “Non-intervention” was therefore in truth “intervention” in another state’s internal upheavals.⁶⁰ Furthermore, other states would always intervene when it was in their interests to do so.⁶¹

This view resulted in some actually putting forward the argument that customary international law should be adapted in such a way so as to generally allow outside intervention in a civil war as long as it was ensured that the conflict remained an internal one and was not orchestrated from abroad.⁶²

Despite the fact that some of these objections constituted valid criticisms of the principle of non-intervention in a civil war, advocates of the majority view correctly counter-posed that it was possible to differentiate between the continuation of bilateral aid programmes – compatible with a policy of non-intervention – and active support of the governmental side in an internal conflict.⁶³ As far as military cooperation programmes were concerned, however, once civil war had erupted the suspension of weapons deliveries and military advice was always possible and justified.⁶⁴

Furthermore, insofar as intervention in a civil war is understood as military support of one side in a conflict – which is the topic of this article - the principle of non-intervention does not impact on the maintenance of non-military bilateral cooperation or aid programmes.

2.1.2.4. State practice

As early as the late 1950s state practice also began to reflect doubts about the pre-WW II rules on intervention. Interventions in internal conflicts were increasingly depicted as reactions to prior foreign interference by others.⁶⁵

⁵⁹ Perkins, *supra* note 36, pp. 195-196; Matheson, *supra* note 57, p. 206; Moore, *supra* note 17, p. 195.

⁶⁰ J. J. Lador-Lederer, *Intervention – A Historical Stocktaking*, 29 *Nordisk Tidsskrift Int’l Ret.* 127 (1959), pp. 128, 131; Matheson, *supra* note 57, pp. 206-207; Ullman, *supra* note 57, pp. 133-134, puts forward a related argument by claiming that a rule of non-intervention would aid repressive regimes and undermine human rights. His argument, however, seems contradictory, given the fact that he argues that the traditional rules in favour of supporting governments in civil wars still apply, but then criticizes the rule of non-intervention on the basis that it aids repressive incumbents.

⁶¹ Lador-Lederer, *supra* note 60, p. 136; Farer, *supra* note 17, pp. 274-275.

⁶² Farer, *supra* note 17, pp. 275-279, esp. 276 (his “threshold” is the prohibition of foreign involvement in actual combat); and *supra* note 16, pp. 532-540; Krauss, *supra* note 19, pp. 220-221.

⁶³ Perkins, *supra* note 36, pp. 196-197.

⁶⁴ *Ibidem*.

⁶⁵ Lador-Lederer, *supra* note 60, pp. 132-133; Brownlie, *supra* note 17, pp. 325-327.

The Soviet intervention in Hungary in 1956,⁶⁶ as well as the 1958 US/British interventions in Lebanon and Jordan⁶⁷ in favour of the respective governments were justified on the basis of previous foreign support of the rebels. Nonetheless, the interventions received little international support.⁶⁸

Similarly, when the United States invaded the Dominican Republic in 1965,⁶⁹ it was mentioned that a request for assistance had been received from a government official,⁷⁰ but that request was initially claimed to have related only to the protection of US nationals there.⁷¹ Later, when that justification became untenable due to the large number of American troops deployed in the country, the right to collective self-defence was invoked, also on behalf of the OAS,⁷² against Cuban and Soviet attempts to install a communist government. When justifying the invasion to the American public, President Johnson actually confirmed the thesis that – except for communist takeovers – “revolution in any country is a matter for that country to deal with.”⁷³ Apart from the UK and China (still represented by Taiwan) no UN state officially supported the US intervention on legal grounds.⁷⁴ When the USA decided to intervene in the civil war in Vietnam in the 1960s,

⁶⁶ *Declaration by the Soviet Government on the Principles of Development and further Friendship and Cooperation between the Soviet Union and Other Socialist States*, October 30, 1956; available at: <http://www.fordham.edu/halsall/mod/1956soviet-coop1.html> last accessed October 26, 2011; Rostow, *supra* note 8, pp. 224-225, 227-228; R. F. Turner, *Soviet Attitudes on the Permissibility of the Use of Force in International Relations*, in J. Norton Moore, R. F. Turner (eds.), *International Law and the Brezhnev Doctrine*, University Press of America, Inc., Lanham: 1987, pp. 89-90; Doswald-Beck, *supra* note 5, pp. 223-224; K. Rider Schmeltzer, *Soviet and American Attitudes Toward Intervention: The Dominican Republic, Hungary and Czechoslovakia*, 11 *Virginia Journal of International Law* 97 (1970-1971), p. 112.

⁶⁷ President Eisenhower, *A Message to Congress*, July 15, 1958; Wright, *supra* note 19, p. 112.

⁶⁸ GA Resolution 1004 (1956); the resolution was passed by 50:15:8 votes (condemning the Soviet invasion of Hungary). As far as the British/US interventions are concerned, see: Doswald-Beck, *supra* note 5, pp. 216-217; Wright, *supra* note 19, pp. 114; Gray, *supra* note 56, pp. 95, 174, 176.

⁶⁹ In 1963 a military junta had deposed the democratically elected government of the Dominican Republic. In April 1965 that junta was itself overthrown by supporters of the former President; civil war erupted.

⁷⁰ Doswald-Beck, *supra* note 5, pp. 213, 226-230; it should, however, be pointed out that the validity of any request by Dominican authorities was very much in doubt. In the Security Council debate the US delegate claimed a request had been received by “Dominican law enforcement and military officials”; Sohn, *supra* note 56, p. 227.

⁷¹ Doswald-Beck, *supra* note 5, p. 227; Schmeltzer, *supra* note 66, p. 105.

⁷² The OAS passed a resolution confirming the American view after the invasion had taken place (at its Tenth Meeting of Consultation); Schmeltzer, *supra* note 66, p. 106.

⁷³ President Johnson, *Address to the Nation*, May 2, 1965; quoted by Quigley, *supra* note 56, p. 202.

⁷⁴ Doswald-Beck, *supra* note 5, pp. 228-229.

at the official request of the South Vietnamese government, it again invoked Article 51 of the UN Charter.⁷⁵

States' tendency to justify their interventions in other states' internal conflicts on the basis of Article 51 of the UN Charter, rather than relying on the government's request for assistance, continued in the 1970s and 1980s. Angola justified Cuba's support in its battle against internal rebels as collective self-defence, due to South Africa's prior support of UNITA. Libya's attempt to justify its repeated interventions between 1981 and 1984 in Chad's civil war on the basis of the Chad government's request was condemned by the OAU.⁷⁶ Meanwhile France, which later also intervened in Chad, at all times claimed its troops would only fight Libyan troops, not the indigenous rebels,⁷⁷ a distinction compatible with Article 51 of the UN Charter, but not with the traditional legal right of intervening in a civil war at a government's request.⁷⁸

2.1.2.5. Conclusions to section 2.1.2

The events just outlined indicate that by the early 1970s a formal request by the recognized government of a state was no longer deemed sufficient to justify an outside intervention in civil war situations. States felt it necessary to provide additional grounds in their legal justifications, even where the existence of a valid invitation by a foreign government was not in doubt.⁷⁹ Intervening states unflinchingly cited prior foreign support of rebels and invoked Article 51 of the UN Charter. State practice therefore appears to confirm the existence of the general rule of non-interference in purely internal civil wars in customary international law.⁸⁰

In consequence of the above trends, the British Foreign Office issued the following legal advice in 1984:

⁷⁵ *The Legality of United States Participation in the Defense of Viet-Nam*, 04/03/1966; 54 Department of State Bulletin, 1966, p. 474; reprinted in 60 *American Journal of International Law* 565 (1966).

⁷⁶ Doswald-Beck, *supra* note 5, pp. 220-221; Gray, *supra* note 56, p. 96.

⁷⁷ Doswald-Beck, *supra* note 5, p. 221.

⁷⁸ *Ibidem*; Gray, *supra* note 56, pp. 96-98, 167.

⁷⁹ Doswald-Beck, *supra* note 5, p. 214; Lador-Lederer, *supra* note 60, pp. 132-133.

⁸⁰ Doswald-Beck, *supra* note 5, pp. 251-252; Gray, *supra* note 56, pp. 81, 85-88, points out that another popular way for states to intervene in internal conflicts is by disputing the existence of a civil war (prohibiting intervention) and claiming that there was simply "domestic unrest below that threshold". States can then justify aiding the respective government in restoring order (she provides a number of examples). This state practice, described by Gray, further confirms the existence, in international law, of the prohibition of intervention in a civil war, even at the government's request. As is mentioned in the conclusion of this article, this reflects the policy adopted by Saudi Arabia when intervening in Bahrain in early 2011.

International law does, however, place two major restrictions on the lawfulness of states providing outside assistance to other states. One is that any form of interference or assistance is prohibited ... when a civil war is taking place and control of the state's territory is divided between warring parties.⁸¹

2.1.2.6. Afghanistan

By December 1979, the Soviet Union could no longer claim to be legally entitled to intervene in the Afghan civil war simply by virtue of the request of the Afghan Government. Although the Soviet Union's official justification may have been acceptable under customary international law prior to WW II, developments since then had first raised doubts regarding such arguments and, by the 1970s, led to the majority view that any intervention in a purely internal civil war was illegal.

This conclusion is confirmed by the attitude of both the Soviet Foreign Secretary and the Soviet Prime Minister: they had both, in March 1979, internally deemed a Soviet intervention in Afghanistan's civil war at that government's request to be illegal under international law. Foreign Secretary Gromyko offered the following legal assessment:

I completely support Comrade Andropov's proposal to rule out such a measure as the deployment of our troops into Afghanistan...we must keep in mind that from a legal point of view too we would not be justified in sending troops. According to the UN Charter a country can appeal for assistance, and we could send troops, in case it is subject to external aggression. Afghanistan has not been subject to any aggression. This is an internal affair, a revolutionary internal conflict, a battle of one group of the population against another.⁸²

Also, the Soviet Union's invasion was widely and overwhelmingly condemned by other states.⁸³ The General Assembly, in its Resolution on Afghanistan, chose to re-affirm the principle of non-intervention:

⁸¹ *Is intervention ever justified?*, British Foreign Office, Foreign Policy Document No. 148 of July 1984; extracts reprinted in 57 *British Yearbook of International Law* 614 (1986), p. 616.

⁸² Soviet Foreign Secretary Andrej Gromyko (at 14); Soviet Prime Minister Kosygin reported to the Politburo that he had replied to Taraki's request for a Soviet intervention in March 1979 by telling him that such a move "would be direct aggression on the part of the U.S.S.R. against Afghanistan" (at 19); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, pp. 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html> last accessed 01/12/2011.

⁸³ GA Resolution ES-6/2 (1980), passed in a 104:18:18 vote.

... Reaffirming the inalienable right of all peoples to determine their own future and to choose their own form of government free from outside interference...

Recognizing the urgent need for immediate termination of foreign armed intervention in Afghanistan so as to enable its people to determine their own destiny without outside interference or coercion...

1. Reaffirms that respect for the sovereignty, territorial integrity and political independence of every State is a fundamental principle of the Charter of the United Nations, any violation of which under any pretext is contrary to its aims and purposes;
2. Strongly deplors the recent armed intervention in Afghanistan, which is inconsistent with this principle...
4. Calls for the immediate, unconditional and total withdrawal of the foreign troops from Afghanistan in order to enable its people to determine their own form of government and choose their economic, political and social systems free from outside intervention, subversion, coercion or constraint of any kind whatsoever...⁸⁴

Many states that condemned the Soviet invasion did not discuss in detail the – disputed – validity of the Afghan government's request,⁸⁵ but stressed that the USSR had intervened in an internal conflict which should be resolved by the Afghan people.⁸⁶ Venezuela's representative spoke for many states when he stated that the conflict in Afghanistan was "part of an internal process to determine the political future of the country and should not be interfered with by external actions of the type denounced here."⁸⁷

Thus the Soviet invasion of Afghanistan and the international reaction to it actually confirmed the prohibition in customary international law of intervention in civil wars on either side.

⁸⁴ GA Resolution ES-6/2 (1980).

⁸⁵ The question as to whether there had been a valid Afghan request prior to the Soviet invasion will be discussed later; doubts were certainly raised at the UN, Matsson, *supra* note 8, p. 87.

⁸⁶ Japan, Egypt, Norway, the Netherlands, Jamaica, Zambia, Yugoslavia, Tunisia, Australia, West Germany, Senegal, Sweden, Nigeria, Bangladesh, Austria, Ivory Coast, Bahrain, Oman, Morocco. In addition further states made the same point, but also disputed the Afghan government's request: Pakistan, Singapore, Spain, Liberia, Portugal, Panama and France.

⁸⁷ UN Doc. S/PV.2188 (1980).

2.2. Right of counter-intervention

Based on the alleged intervention by other states, including the USA, Pakistan and Iran, in Afghanistan's civil war,⁸⁸ the Soviet Union could argue that it was not asserting the right of intervening in a civil war at the request of the government but, owing to the prior foreign interventions on behalf of the rebels, was claiming a right of counter-intervention in support of the Afghan government.

Even among those supportive of the majority view outlined above regarding the unlawfulness of intervening in a civil war on either side, there are those who argue that customary international law does entitle foreign states to claim a right of counter-intervention when prior foreign intervention in a conflict has taken place.⁸⁹

This is not a convincing view. In contrast to what its supporters argue, state practice does not confirm that a right of counter-intervention exists in customary international law. Never has a state officially relied on such a justification.⁹⁰

⁸⁸ Z. Brzezinski, Carter's National Security Advisor at the time of the Soviet invasion of Afghanistan; see: *Oui, la CIA est entrée en Afghanistan avant les Russes...* (Yes, the CIA did enter Afghanistan before the Russians did...); Interview given to Vincent Jauvert, *Le Nouvel Observateur*, 15.01.1998; an English translation is available at: <http://www.globalresearch.ca/articles/BRZ110A.html> accessed October 26, 2011; R. M. Gates, *From the Shadows, The Ultimate Insider's Story of Five Presidents and How They Won the Cold War*, Simon & Schuster Paperbacks, New York: 1996 (this edition: 2006), pp. 143-149; the recent US Defence Secretary was Deputy Director of the CIA at the time. He points out that the CIA was looking at options for granting such support as of early 1979, and confirms that US President Carter authorized covert funding of the mujahedeen in July 1979; Loyn, *supra* note 11, p. 191 (although he claims US support of the mujahedeen was only initiated in 1980); Doswald-Beck, *supra* note 5, p. 232.

⁸⁹ Schachter, *supra* note 51, pp. 1641-1644; Perkins, *supra* note 36, pp. 171-183, 197-205; Gray, *supra* note 56, pp. 81, 92; Sohn, *supra* note 56, pp. 229-230; Partan, *supra* note 56, pp. 228-229; although he acknowledges that it would be the "better result" to view intervention and counter-intervention as unlawful, he believes counter-intervention to be permissible self-defence under the UN Charter (without explaining this assertion) – L. N. Cutler, *The Right to Intervene*, 64 *Foreign Affairs* 96 (1985-1986), pp. 102, 106-111. He, however, limits the right of counter-intervention to supporting the "democratic side" in a civil war (whether that would be the rebel or governmental side). Besides being wholly impractical (who would be able to judge the democratic credentials of the respective rivals, especially on the insurgent side?), it seems obvious that this theory, outlined by Cutler in 1985, was meant to justify multiple American interventions, while condemning similar Soviet actions. This becomes evident when he claims US support of the Afghan rebels to be justified although "their commitment to ... democratic government ... may require further demonstration" (at p. 108). There is also no evidence of state practice or *opinio juris* in support of Cutler's argument.

⁹⁰ Gray, *supra* note 56, pp. 92-98, seems to disagree. However, she is only able to name two examples where she explicitly claims that intervention in a civil war took place without the interventionist claiming to be acting under Article 51, and neither is convincing. As far

When a state has intervened in a civil war-like situation, and justified this on the basis of prior foreign intervention, that state has invariably relied on Article 51 of the UN Charter and claimed a right of collective self-defence against external aggression.⁹¹ This was also the line the Soviet Union took in Afghanistan, as will be explained shortly.⁹² State practice therefore indicates that a customary right of counter-intervention, distinct from Article 51, does not exist in international law.

A right of counter-intervention would in practice result in nothing but a return to the traditional law rules in favour of intervention in support of a government, as state practice confirms.⁹³ As already outlined above, states have instead

as the 1974 Turkish intervention in Cyprus in response to the prior Greek intervention is concerned, it is uncertain whether the situation in Cyprus could at that time be described as a “civil war”. Furthermore, Turkey – in its justification – did not rely on a right of counter-intervention, but on rights allegedly granted to it in the 1960 *Treaty of Guarantee*. Also, as Gray herself acknowledges, the action was condemned in a 117:0 vote in the General Assembly (Resolution 3213 (1974), despite the prior Greek intervention not being in serious doubt. The second example concerns the repeated French and Libyan interventions in Chad, in relation to which she claims that both states sometimes referred to Article 51, but only referred to prior foreign involvement in the civil war there. However, since both states did intermittently invoke Article 51, it seems a rather daring assumption to conclude they did not do so when *not* explicitly mentioning the Article. Furthermore Libya’s intermittent reliance on the government of Chad’s invitation was not accepted by the OAU.

⁹¹ Lador-Lederer, *supra* note 60, pp. 132-133; Doswald-Beck, *supra* note 5, pp. 214-216; UK as regards Jordan (1958); USA, as regards its intervention in Lebanon (1958), which was explicitly supported by France insofar as legal justification is concerned; Gray, *supra* note 56, pp. 95, 96-98, 167, 168-169; UK as regards Jordan (1958); USA as regards Lebanon (1958), and Vietnam (as of 1961); USSR as regards Hungary (1956) and Czechoslovakia (1968); Angola in relation to the presence of Cuban troops there (as of 1975); and – intermittently – France and Libya as regards Chad (1981-1984). As far as the US involvement in Vietnam, and its reliance on Article 51 are concerned, see also: *The Legality of United States Participation in the Defense of Viet-Nam*, 04.03.1966; 54 Department of State Bulletin, 1966, p. 474; Wright, *supra* note 19, pp. 112-113; Friedman, *supra* note 17, p. 71; Schachter, *supra* note 51, pp. 1641-1644. Schachter argues that a right of counter-intervention exists. He then, however, argues that prior foreign intervention might justify any counter-intervention on the basis of “collective self-defence” (at p. 1642), and confirms the USA relied on Article 51 as far as Nicaragua was concerned (at p. 1643). No examples of state practice confirming a “right of counter-intervention”, distinct from Article 51, are given; Sohn, *supra* note 56, pp. 229-230, seems to view the right of counter-intervention not as a distinct right, but as collective self-defence under Article 51.

⁹² Gray, *supra* note 56, p. 167.

⁹³ Joyner/Grimaldi, *supra* note 15, pp. 647-649, spell out this consequence. They claim that a right of counter-intervention, based on prior foreign involvement in a civil war, exists, but then go on to point out that “counter-interventionary aid to insurgents” can never be legal under any circumstances; Gray, *supra* note 56, p. 92, makes a similar point; Perkins, *supra* note 36, pp. 221-224, disagrees, and argues that “illegal intervention in support of a government” justifies “counter-intervention in support of insurgents”. However, he fails to provide any examples of state practice or accepted *opinio juris* in support of his argument.

relied on Article 51 of the UN Charter when they have intervened, and claimed prior foreign involvement. It also follows that no state has ever intervened on behalf of rebel groups and *legally* justified this on the basis of prior foreign support of *the government*, nor does it seem possible to make such a claim. Thus a right of counter-intervention would grant the government the kind of supremacy in a civil war that the principle of non-interference was meant to eradicate.

As stated above, when states have in practice resorted to supporting rebel movements, they have never justified their actions on the basis of a foreign state's support of a government. Most often such support for rebels has been offered only covertly, in an attempt to avoid having to provide a legal justification at all.⁹⁴ When that could not be avoided, because the evidence was overwhelming, either individual or collective self-defence on behalf of third states was invoked, or in the case of intervention by socialist states, the right to support national liberation movements.

For example, when the USA intervened on behalf of the Nicaraguan Contra rebels in the 1980s, this was officially justified as collective self-defence in support of El Salvador and Honduras against Nicaraguan support for local rebels.⁹⁵ Politically speaking, the Reagan Administration did refer to the Soviet and Cuban support of the Nicaraguan Government, but this argument was never used in a legal context.⁹⁶

Similarly, South Africa justified its massive interference, in the mid-1970s, in Angola's and Mozambique's civil wars, and its support of the opposition there (UNITA and RENAMO), on the basis of self-defence. The support afforded to the two governments by Cuba and the Soviet Union was not part of South Africa's legal arguments.⁹⁷

There is therefore no compelling evidence of a customary international law right of counter-intervention, distinct from Article 51, nor should there be.

Notwithstanding these arguments, even supporters of the existence a right of counter-intervention could not overcome the factual obstacles against the assumption of such a right on the part of the Soviets in the Afghan situation. Although it is clear that there was some external, mainly Pakistani and Iranian, but also – by December 1979 – some American support of the Afghan rebels, there is

⁹⁴ Gray, *supra* note 56, p. 106.

⁹⁵ A. C. Arend, *International Law and the Recourse to Force: A Shift In Paradigms*, 27 *Stanford Journal of International Law* 1 (1990-1991), p. 13; Quigley, *supra* note 56, p. 202; Schachter, *supra* note 51, p. 1643; R. A. Falk, *Intervention and National Liberation*, in H. Bull (ed.), *Intervention in World Politics*, Clarendon Press, Oxford: 1984, Ch. 8, pp. 119-133, 125-126; Gray, *supra* note 56, pp. 76, 106.

⁹⁶ Schachter, *supra* note 51, pp. 1642, 1643; Gray, *supra* note 56, p. 76.

⁹⁷ Gray, *supra* note 56, pp. 107-110.

no doubt that any such support was still very limited, and certainly could not in any way be deemed to have matched the Soviet support of the Afghan government prior to the invasion. Furthermore, even the internal Soviet analysis came to the conclusion that the uprising was of indigenous origin and not orchestrated from abroad.⁹⁸ Lastly, the massive Soviet invasion of Afghanistan could certainly not be claimed to be proportional in relation to any external aid the Afghan rebels were receiving.⁹⁹

The Afghanistan situation thus serves as an example of the lack of logic in the position of those academics who reject a right of intervention in accordance with customary international law, while accepting a right of counter-intervention. Were the Pakistanis, Iranians and Americans acting on the basis of a right of counter-intervention due to the prior massive Soviet support of the Afghan government, or were the Soviets entitled to intervene precisely because of that prior external intervention on behalf of the rebels? The Afghan situation clearly underlines the impracticability of assuming a right of counter-intervention.

It must therefore be concluded that the Soviet Union could not have claimed to be acting in accordance with a customary international law right of counter-intervention, as such a right did not exist. Even had such a right existed, the actual facts would not have justified Soviet actions. This latter point is confirmed by the fact that, despite the extensive discussions in the Soviet Politburo in March 1979 regarding the external support for the rebels,¹⁰⁰ Foreign Secretary Gromyko and

⁹⁸ Soviet Foreign Secretary Gromyko, *see* note 82; in a "Report" to the Central Committee of the Soviet Communist Party, of April 1, 1979, Gromyko, Andropov, Ustinov and Ponomarev concluded that the anti-government "performances" were of a "predominately internal character" ; reprinted (incl. German translation) in P. Allan et al. (eds.), *supra* note 7, pp. 91, 99; Politburo Member Andrej Kirilenko (at pp. 4, 9-10), Prime Minister Kosygin (at pp. 6, 11, 14), Chief of the KGB Andropov (at p. 14) at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, pp. 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html> last accessed December 1, 2011; Loyn, *supra* note 11, 186.

⁹⁹ As far as the requirement of "proportionality" is concerned if a "right of counter-intervention" is accepted, *see*: Schachter, *supra* note 51, p. 1644; also Partan, *supra* note 56, pp. 228-229.

¹⁰⁰ Soviet Foreign Secretary Gromyko declared that the events in Herat were "being directed by the hand of the U.S.A." (at p. 17); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, pp. 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html> last accessed December 1, 2011.

Prime Minister Kosygin nevertheless believed a Soviet invasion at the Afghan government's request to be illegal under international law.¹⁰¹

2.3. Collective self-defence

In its justification of the invasion the Soviet Union claimed it was acting in accordance with Article 51 of the UN Charter, allowing for collective self-defence, and Article 4 of the Afghan-Soviet Treaty of Friendship, which stated:

The High Contracting Parties, acting in the spirit of the traditions of friendship and good-neighbourliness and in the spirit of the Charter of the United Nations, shall consult with each other and shall, by agreement, take the necessary steps to safeguard the security, independence and territorial integrity of the two countries.

2.3.1. "Armed attack" on the USSR

Any use of force in self-defence can only be justified on the basis of an ongoing armed attack on the state concerned. The Soviet Union at no point explicitly claimed that an armed attack on the Soviet Union was taking place.

In various Soviet statements there are, however, indications that the USSR's invasion of Afghanistan was of a defensive nature in order to protect its own borders. It was sometimes claimed that the external support of the Afghan rebels was directed against the Soviet Union and threatened the security and stability of its borders.¹⁰²

Leaving aside obvious strategic goals there is, however, no evidence or indication that Pakistani, Iranian, or US support for the Afghan rebels was in any way directed against the Soviet Union, or its borders, nor could the facts on the ground give rise to any interpretation which could justify the assumption that an "armed attack" on it was taking place. In fact, prior to the Soviet Union's invasion, there were no incidents directed against Soviet territory.

¹⁰¹ Soviet Prime Minister Kosygin (at p. 19); Foreign Secretary Andrej Gromyko (at p. 14); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, pp. 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html> last accessed December 1, 2011.

¹⁰² This view is, for example, supported by Julius Mader. Writing for the GDR military publishers in 1988, he claims the US involvement in Afghanistan was only a cover for organizing an attack on the Soviet Union which was the true goal of the Americans (*CIA-Operation Hindu-Kush* (CIA-Operation Hindu-Kush), *Militärpolitik aktuell*, Militärverlag der Deutschen Demokratischen Republik, Berlin: 1988, p. 12).

Only if it were accepted that an attack on a state's strategic interests justified the use of force in self-defence could the Soviet Union possibly have claimed that external support for the Afghan rebels was harming its vital interests. However, there is no doubt that such an expansive view of the right of self-defence is overwhelmingly rejected.

Having said that, there are certainly elements of such "sphere of interest" thinking in international geopolitics. They were evident in the Soviet Union's justifications of its invasions in Hungary and Czechoslovakia. The repeated references to the "commonwealth of socialist states," where foreign interference would not be tolerated, constituted a vital element of the Brezhnev Doctrine and points in that direction.¹⁰³ The USA, too, tended to claim a right to protect its strategic interests by force if necessary. In 1823 US President Monroe had announced the so-called Monroe Doctrine:

That we should consider any attempt on the part of the allied powers, to extend their system to any portion of this hemisphere as dangerous to our peace and security... that we could not view any interposition for the purpose of oppressing or controlling in any manner their destiny by any European Power, in any other light than as an unfriendly disposition towards the United States.

The Johnson Doctrine of 1965¹⁰⁴ and the Carter Doctrine of 1980 (in reaction to the Soviet invasion of Afghanistan) are further notable examples of that American attitude, which seems to delineate the world according to "spheres of interest".¹⁰⁵ In his State of the Union Address Carter had declared:

Let our position be absolutely clear: An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force.¹⁰⁶

However, it has never been seriously argued that these political statements by US Presidents reflected international law, or provided any kind of legal justification

¹⁰³ Schmeltzer, *supra* note 66, pp. 115-116; Luard, *supra* note 17, pp. 1007-1008, 1014-1015.

¹⁰⁴ In his Address to the Nation on May 2, 1965, Johnson declared – in respect of the American invasion of the Dominican Republic – that: "Revolution in any country is a matter for that country to deal with. It becomes a matter calling for hemispheric action only ... when the object is the establishment of a communist dictatorship."; Quigley, *supra* note 56, p. 202.

¹⁰⁵ Schwenninger, *supra* note 17, pp. 423, 431; Oglesby, *supra* note 17, p. 38.

¹⁰⁶ *State of the Union Address 1980* by President Jimmy Carter, 23/01/1980; available at: <http://www.jimmycarterlibrary.gov/documents/speeches/su80jec.phtml> accessed October 26, 2011.

for the use of force under Article 51 of the UN Charter.¹⁰⁷ The Soviet Union would undoubtedly have been the main opponent of any attempt by the USA to modify international law in order to accommodate these doctrines.

The Soviet Union therefore could not claim to have been the object of an “armed attack.”

2.3.2. Meaning of “collective self-defence”

The meaning of “collective self-defence” under Article 51 of the UN Charter has not been without controversy. Bowett held the view that Article 51 only granted states the right to use force in “collective” self-defence when each of the acting states could individually lay claim to a right of self-defence.¹⁰⁸

Bowett’s argument was founded on his basic view that the UN Charter could only limit, but not create, states’ rights in international law.¹⁰⁹ If states solely coming to the aid of a state that invoked the right of self-defence could not themselves claim to be acting in self-defence, they could only justify their actions on the basis of protecting international peace.¹¹⁰ The UN Charter, however, had outlawed any unilateral assessment by one state of whether another state’s claim of self-defence was justified.¹¹¹ Collective self-defence under Article 51 therefore, according to Bowett, was intended to merely grant those states that had themselves been attacked the right to act in concert when acting in self-defence.¹¹²

This view of collective self-defence has, however, been overwhelmingly rejected and has not been confirmed by state practice.¹¹³ Bowett’s main legal argument fails to convince. The right to use force – individual or collective – in self-defence under Article 51 can only be invoked until such a time as “the Security

¹⁰⁷ Schmeltzer, *supra* note 66, pp. 119-120; Schwenninger, *supra* note 17, p. 431; Joyner/Grimaldi, *supra* note 15, pp. 659, 668-670; Rohlik, *supra* note 44, p. 402; Friedman, *supra* note 17, pp. 69-70; Wright, *supra* note 19, p. 117.

¹⁰⁸ D. W. Bowett, *Collective Self-Defence under the Charter of the United Nations*, 32 *British Yearbook of International Law* 130 (1955-1956), pp. 139-140.

¹⁰⁹ *Ibidem*, pp. 131-132.

¹¹⁰ *Ibidem*, p. 137.

¹¹¹ *Ibidem*, pp. 138-141.

¹¹² *Ibidem*. There is an indication that there is still some support for Bowett’s view of collective self-defence: see ICJ *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. USA*), Judgement (Merits), ICJ Reports 1986, pp. 14, 105. In the Dissenting Opinion of Judge Jennings, p. 545, he states: “But there is another objection to this way of looking at collective self-defence... The assisting State surely must, by going to the victim State’s assistance, be also, and in addition to other requirements, in some measure defending itself. There should even in ‘collective self-defence’ be some real element of self involved with the notion of defence.”

¹¹³ Schachter, *supra* note 51, pp. 1638-1639; Rohlik, *supra* note 44, pp. 423-424; Wright, *supra* note 19, pp. 118-119; Perkins, *supra* note 36, pp. 206-207.

Council has taken measures necessary to maintain international peace and security”, so there is no danger of it replacing the UN’s responsibility for international peace. The right to use force – individual or collective – in self-defence is limited to the time span necessary for the UN’s collective security system to be able to intercede. The way Article 51 is phrased (“individual or collective self-defence ... if an armed attack occurs against *a* Member of the United Nations” (emphasis added)) provides another indication that “collective” self-defence is also possible even if only one member state has been attacked.

State practice also confirms the view that collective self-defence is justified under Article 51 when other states come to the aid of a state that has suffered an armed attack.¹¹⁴ Mutual defence treaties, like the Rio Treaty,¹¹⁵ the NATO Treaty¹¹⁶ or the Warsaw Pact,¹¹⁷ regularly assume(d) that an attack on one member state of the organisation was sufficient to justify the use of force in self-defence by all member states against the aggressor.¹¹⁸ Furthermore, states that have in the past invoked a right of collective self-defence have rarely, if ever, themselves been the object of an armed attack, but instead have claimed they were aiding another state in its defence against external aggression.¹¹⁹

It must therefore be assumed that collective self-defence under Article 51 allows a state that has not been attacked to use force in the defence of an attacked state, insofar as the other criteria of the Article have been met, and until such time as the Security Council acts.

2.3.3. “Armed attack” on Afghanistan

For the Soviet Union to successfully claim that its invasion of Afghanistan was an act of collective self-defence on behalf of Afghanistan, there would have had to have been an armed attack on that state.

However, there is no evidence of an armed attack on Afghanistan. Even though there is evidence of foreign support for the Afghan rebels, there is absolutely no indication that foreign troops had entered the country prior to the Soviet invasion. The external support that was forthcoming was mainly material support (money and probably weapons) and, especially in the case of Pakistan,

¹¹⁴ Schachter, *supra* note 51, p. 1639; Rohlik, *supra* note 44, pp. 423-424; Wright, *supra* note 19, pp. 118-119.

¹¹⁵ Article 3 (1), Inter-American Treaty of Reciprocal Assistance (1947), 21 UNTS 324.

¹¹⁶ Article 5, The North Atlantic Treaty (1949), 34 UNTS 241.

¹¹⁷ Article 4, Treaty of Friendship, Co-operation and Mutual Assistance (1955), 219 UNTS p. 2962.

¹¹⁸ Schachter, *supra* note 51, p. 1639.

¹¹⁹ *Ibidem*; Rohlik, *supra* note 44, pp. 423-424.

the provision of shelter for rebels and connivance with and support of their insurgent activities in Afghanistan.

Despite this external support there is no doubt that the insurgency in Afghanistan had indigenous origins and was mainly organized by Afghans living in Afghanistan. In internal discussions this was also acknowledged by the Soviet leaders who, in March 1979, came to the conclusion the Soviets could not intervene in Afghanistan because the uprising involved one part of the population fighting against another.¹²⁰

The ICJ in the *Nicaragua Case* has confirmed that material support of indigenous rebels by other states does not amount to an “armed attack” so long as that support is not so far-reaching so as to justify treating the rebel groups as an extended arm of the foreign state.¹²¹ It cannot seriously be argued that Pakistani, Iranian, and American support ever attained that level.¹²²

The Soviet claim that foreign support for the rebels amounted to an “aggression”, as defined in Article 3 g of the 1974 GA Resolution on the Definition of Aggression,¹²³ is unmerited. The decision whether an “armed attack” has occurred necessitates an independent evaluation.¹²⁴

¹²⁰ Chief of the KGB Andropov declared: “To deploy our troops would mean to wage war against the people, to crush the people, to shoot at the people. We will look like aggressors, and we cannot permit that to occur;” (at p. 21); a sentiment echoed by Soviet Foreign Secretary Gromyko (page 14), at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, pp. 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html> last accessed December 1, 2011.

¹²¹ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgement (Merits), ICJ Reports 1986, 14, para. 195; the ICJ declared (emphasis by author): “But the Court does *not* believe that the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States”; T. J. Farer, *Drawing the Right Line*, 81 *American Journal of International Law* 112 (1987), p. 113; Perkins, *supra* note 36, pp. 207-208; Gray, *supra* note 56, pp. 174-177.

¹²² However, subsequent to the Soviet invasion, there were efforts to create the impression that the rebellion in Afghanistan was completely orchestrated from abroad: Mader, *supra* note 102, writing for the GDR military publishers in 1988, for example, goes to extraordinary lengths to try and prove that the “counter-revolution” was organized by the USA, Pakistan, Iran, the UK, some Arab states and Western Germany, with only a few thousand Afghans actually supporting the rebellion (at pp. 5-6, 17-19, 29-39, 41-53, 68-75).

¹²³ GA Resolution 3314 (1974).

¹²⁴ Article 6 of the *Definition of Aggression* (GA Resolution 3314 (1974)); Matsson, *supra* note 8, p. 89.

Without an “armed attack” on Afghanistan, the Soviet Union could not claim to be acting in “collective” self-defence under Article 51 of the UN Charter.¹²⁵ As the civil war obviously was an internal uprising, the USSR also could not rely on Article 4 of the Afghan-Soviet Treaty of Friendship, as it is crystal clear that support given under Article 4 could only be justified against external threats.¹²⁶ This is confirmed by Article 1 of the Treaty, which states:

The High Contracting Parties solemnly declare their determination to consolidate and deepen the unshakable friendship between the two countries and to develop co-operation in all fields on the basis of equality of rights, *respect for national sovereignty and territorial integrity and non-interference in each other's internal affairs*.¹²⁷

Besides which, any use of force authorized by a bilateral treaty but in violation of the UN Charter would be invalid under Article 103 of the Charter. This could not have been intended by the two states, for in its Preamble the Afghan-Soviet Treaty confirms the parties’ “fidelity to the purposes and principles of the Charter of the United Nations.”

2.4. Factual problems

In addition to having proved that the Soviet Union’s official justifications were unconvincing, it must be pointed out that the Soviet arguments had another weakness: the lack of a valid request by the Afghan government for its own removal from office.

It goes without saying that an intervention (or counter-intervention) in a civil war at a government’s request requires just such a request.¹²⁸ This also applies to collective self-defence. A state cannot defend another state against an armed attack against that state’s wishes.¹²⁹ Although disputed by some international lawyers, this view has been confirmed by the ICJ in the *Nicaragua*¹³⁰ and the

¹²⁵ Matsson, *supra* note 8, p. 90; Behrens, *supra* note 14, p. 67; Berner, *supra* note 14, p. 324; U. Ulfkotte, *Kontinuität und Wandel amerikanischer und sowjetischer Politik in Nah- und Mittelost 1967 bis 1980* (Continuity and change in American and Soviet policy in the Near and Middle East 1967 to 1980), Schäuble Verlag, Rheinfelden: 1988, pp. 321-322.

¹²⁶ Turner, *supra* note 66, p. 106; Berner, *supra* note 14, p. 324.

¹²⁷ Emphasis by author.

¹²⁸ Rohlik, *supra* note 44, p. 426.

¹²⁹ *Ibidem*; Wright, *supra* note 19, pp. 118-119; Turner, *supra* note 66, p. 106; Gray, *supra* note 56, pp. 184-187; a point also made by Mader (writing for the GDR military publishers), *supra* note 102, p. 6; he explicitly claims the Soviet Union’s actions were justified on the basis of collective self-defence following “eleven” requests by the Afghan government.

¹³⁰ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. USA*), para. 199.

*Oil Platforms*¹³¹ Cases, and by state practice.¹³² In 1956 Norway, a NATO member, informed the Soviet Union that American troops could only defend the country at its request. Similarly the Soviet Union, when invoking the Warsaw Pact to justify its invasion of Hungary, acknowledged the necessity of a prior request by the Hungarian government.¹³³ As far as the Americas are concerned, the 1947 Inter-American Treaty of Reciprocal Assistance explicitly requires the “request of the State or States directly attacked” before other member states can resort to defensive actions.¹³⁴

The contrary arguments are that Article 51 of the UN Charter, and most regional security treaties, do not *explicitly* mention a state’s request as a prerequisite, and/or that such a requirement is “formalistic”.¹³⁵ These arguments are far short of convincing. Just as a sovereign state can decide to merge with another state, it can also decide not to defend itself against an armed attack. Allowing another state to intervene, notwithstanding the lack of a request, would not only severely undermine the attacked state’s sovereignty, but would in fact lead to the supremacy of the will of the intervening state’s government over that of the attacked state’s government – a clearly unacceptable state of affairs given the principle of sovereign equality. Therefore collective self-defence can only be justified when the intervening state has been asked for support by the attacked state.

¹³¹ ICJ, *Case Concerning Oil Platforms (Iran v. USA)*, Judgement, ICJ Reports 2003, p. 161, para. 51.

¹³² Gray, *supra* note 56, pp. 186-187.

¹³³ Wright, *supra* note 19, pp. 118-119.

¹³⁴ Article 3 (2) Inter-American Treaty of Reciprocal Assistance (1947), 21 UNTS 324.

¹³⁵ F. Kirgis, *The Jurisprudence of the Court in the Nicaragua Decision*, 81 American Society of International Law Proceedings 258 (1987), p. 258; he suggests the requirement of a request was introduced by the ICJ because the majority of judges had not been convinced by their own arguments regarding the phrase “armed attack”; J. N. Moore, *The Nicaragua Case and the Deterioration of World Order*, 81 American Journal of International Law 151 (1987), p. 155; he describes the ICJ’s view as “formalistic”; ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, p. 14, para. 105; Dissenting Opinion Judge Jennings, paras. 544-545; he describes the court’s view, regarding the necessity of a request by the victim state, as perhaps “sometimes unrealistic”; he does, however, not dispute that the “victim State must both be in real need of assistance and must want it”; Judge Schwebel makes a similar point in his Dissenting Opinion, at para. 191; he states, in relation to the majority view: “and the only kind of request for assistance that appears to count is one formally and publicly made. But where is it written that, where one State covertly promotes the subversion of another by multiple means tantamount to an armed attack, the latter may not informally and quietly seek foreign assistance?”; Judges Jennings’s and Schwebel’s readings of the ICJ’s judgement seem to reflect an exaggerated interpretation of the court’s “request” requirement, especially as the – additional – requirements Judge Schwebel complains about were not mentioned by the ICJ; see also: Gray, *supra* note 56, pp. 185-186.

The Soviet invasion of Afghanistan, however, is unlikely to have been preceded by a valid request by the recognized Afghan government.¹³⁶ Amin had taken power as President of Afghanistan in September 1979, a state of affairs officially recognized by the Soviet Union.¹³⁷ Although there had been previous Afghan requests for a Soviet intervention by both Taraki and Amin, the Soviets never produced a coherent version of events to substantiate their claim of a similar request in December 1979.¹³⁸ It should, however, be noted that the former British Ambassador to Moscow, Braithwaite, claims that Amin had asked for the dispatch of Soviet troops “up to the very last minute”, that he had been informed of the Soviet troop deployment commencing in late December 1979 and was, in fact, in a “state of euphoria” at the prospect.¹³⁹

The first (and so far only) official request that became known to the outside world, however, was the request by the newly installed President Karmal, which was broadcasted on December 28, 1979.¹⁴⁰ At that time the Soviet invasion had been ongoing for a couple of days.¹⁴¹ The Americans claimed that Karmal’s request had, in fact, been broadcast from a Soviet Central Asian republic, indicating that Karmal had not yet even returned from his Soviet exile at the time of his request.¹⁴²

¹³⁶ Reisman/Silk, *supra* note 11, pp. 481-483, 485-486; Behrens, *supra* note 14, p. 66.

¹³⁷ Reisman/Silk, *supra* note 11, pp. 470-471.

¹³⁸ A. von Borcke, *Die sowjetische Interventionsentscheidung: Eine Fallstudie zum Verhältnis sowjetischer Außen- und Innenpolitik* (The Soviet decision to intervene: a case study on the relationship between Soviet domestic and foreign policy), in H. Vogel (ed.), *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Nomos Verlagsgesellschaft, Baden-Baden: 1980, p. 136; Berner, *supra* note 14, pp. 324-326, lists all the different versions of events provided to the media by Soviet and Afghan officials as far as the Afghan request is concerned and concludes that the claim the Afghan government had requested the Soviet invasion was “absurd”.

¹³⁹ R. Braithwaite, *Afgantsy, The Russians in Afghanistan 1979-1989*, Profile Books, London: 2011, pp. 82, 87, 95; Braithwaite also points out that Afghan troops did not at any stage fight the Soviet troops once the invasion commenced, and that the Afghan population initially welcomed the Soviet invasion (pp. 88, 107-108).

¹⁴⁰ The request, broadcast by Kabul radio on December 28, 1979, was reprinted in the *Pravda* edition of December 29 and in the East German daily Neues Deutschland of December 29, 1979 (German translation); both can be found in Bucherer-Dietschi et al. (eds.), *supra* note 8, pp. 244, 245.

¹⁴¹ The exact dates vary from author to author; Loyn, *supra* note 11, p. 189 (invasion December 22; Afghan request December 27); Rostow, *supra* note 8, 237 (invasion December 27; Afghan request December 28); W. M. Reisman, *The Resistance in Afghanistan Is Engaged In a War of National Liberation*, 81 *American Journal of International Law* 906 (1987), p. 906 (invasion December 24; Afghan request December 27).

¹⁴² Reisman, *supra* note 141, p. 906; and Reisman/Silk, *supra* note 11, p. 472; Matsson, *supra* note 8, p. 87; Cynkin, *supra* note 1, p. 278; Pentz, *supra* note 54, p. 380; Maley, *supra* note 2, p. 30; Hyman, *supra* note 1, p. 165.

The Soviet version of events is further undermined by the fact that there was some heavy fighting around the presidential palace in Kabul once the Soviets had entered the capital, a fact which does not fit easily with a government requesting just such an intervention.¹⁴³ The fact that President Amin was killed during the Soviet invasion, apparently by Soviet troops,¹⁴⁴ and that he was later accused of having been a CIA-agent by both the Soviet press¹⁴⁵ and the new Afghan government¹⁴⁶ robs the Soviet claim of an Afghan governmental request for the Soviet invasion of credibility.¹⁴⁷ Even taking into account Braithwaite's contrary assertions with regard to Amin's request for Soviet intervention, it can be safely assumed he did not request his own removal from office by force.

There remains, however, one further possible legal justification for the Soviet invasion – one that did not require the Afghan government's consent: the Brezhnev Doctrine. Although the Soviet Union did not refer to it at the UN, the Brezhnev Doctrine was referred to in socialist countries, especially in the media there, as a possible justification of Soviet actions in Afghanistan.¹⁴⁸ The understanding of international law, as expressed in the Brezhnev Doctrine, will thus be briefly examined.

¹⁴³ Loyn, *supra* note 11, p. 189; Reisman, *supra* note 141, p. 906; and Reisman/Silk, *supra* note 11, pp. 472, 482; Blum, *supra* note 13, p. 342; J. N. Moore, *The 'Brezhnev Doctrine' And the Radical Regime Assault on the Legal Order*, in J. N. Moore, R. F. Turner (eds.), *International Law and the Brezhnev Doctrine*, University Press of America, Inc., Lanham: 1987, p. 23; Turner, *supra* note 66, p. 104.

¹⁴⁴ Loyn, *supra* note 11, p. 189; Rostow, *supra* note 8, p. 237; Reisman, *supra* note 141, p. 906; and Reisman/Silk, *supra* note 11, p. 474; Blum, *supra* note 13, p. 342; Rasanayagam, *supra* note 2, p. 91; Maley, *supra* note 2, p. 30; Moore, *supra* note 143, p. 23; Ulfkotte, *supra* note 125, 315; Gates, *supra* note 88, p. 133.

¹⁴⁵ In an article entitled *Karmal Babraks's appeal* in the *Pravda* edition of December 30, 1979, Amin was accused of having been a "spy for American imperialism"; a German translation was published in the East German daily *Neues Deutschland* of December 30, 1979; both reprinted in P. Bucherer-Dietschi et al. (eds.), *supra* note 8, pp. 249-252; Doswald-Beck, *supra* note 5, p. 231; Lenczowski, *supra* note 13, pp. 314, 318; Blum, *supra* note 13, pp. 342-343.

¹⁴⁶ Pentz, *supra* note 54, p. 380; von Borcke, *supra* note 138, p. 137; Berner, *supra* note 14, pp. 345, 348, 361-362.

¹⁴⁷ R. Amer, *The United Nations' Reactions To Foreign Military Interventions*, 31 *Journal of Peace Research* 425 (1994), p. 438; Matsson, *supra* note 8, pp. 85, 87-88; Behrens, *supra* note 14, p. 66; Linde, *supra* note 3, p. 86; O. Roy, *The Lessons of the Soviet/Afghan War*, Adelphi Papers 259, The International Institute for Strategic Studies, London: 1991, p. 14.

¹⁴⁸ Loyn, *supra* note 11, p. 190.

2.5. The Brezhnev Doctrine

2.5.1. Explanation of the concept

Although there were continuous efforts at developing and justifying a socialist version of international law, the main impetus for the claim that a separate, socialist international law existed in practice arose out of the Warsaw Pact invasion of Czechoslovakia in 1968.¹⁴⁹

The Soviet Union had at first reverted to the familiar claim of a governmental request, based as usual on allegations of foreign support for the counter-revolutionaries. However, firm letters to the UN by the Czech Parliament's President, by various MPs, and by some government ministers to the effect that there had been no such request, required the adoption of a different line of argument.¹⁵⁰

Although neither developed nor dogmatically justified by Brezhnev, the then Soviet General Secretary was the first major Soviet politician to officially outline the main arguments justifying the intervention in Czechoslovakia on the basis of the defence of socialism. His speech at the Fifth Congress of the Polish United Workers' Party on November 12, 1968, led to the identification of this line of argument with his person; hence the "Brezhnev Doctrine". Brezhnev's decisive statement was:

When internal and external forces hostile to socialism attempt to steer the development of a socialist country toward the restoration of a capitalist order, when a threat to the socialist cause arises in that country – a threat to the security of the socialist commonwealth in general – this then becomes not only a problem for the people of that country, but a common problem, a matter for concern, for all the socialist countries.¹⁵¹

¹⁴⁹ J. N. Hazard, *Renewed Emphasis Upon A Socialist International Law*, 65 *American Journal of International Law* 142 (1971), pp. 142-143.

¹⁵⁰ *Declaration of the Presidium of the Central Committee of the Czechoslovakian Communist Party*, 21/08/1968; English translation available at 7 *International Legal Materials*, 1968, p. 1285; the Czechoslovak Ambassador to the UN declared before the Security Council: "We categorically request the immediate withdrawal of the armed forces of the five Warsaw Pact states"; he was later backed up at the UN by the Czechoslovak Foreign Secretary who replied to Soviet claims of a governmental request: "No such demand was ever made"; quoted in *Words, words, words ... The United Nations and the 1968 invasion*, D. Vaughan, Czech Radio; available at: <http://www.radio.cz/en/article/112945> last accessed October 26, 2011; Schmeltzer, *supra* note 66, pp. 117-119; W.E. Butler, "Socialist International Law" or "Socialist Principles Of International Relations"?, 65 *American Journal of International Law* 796 (1971), p. 798; Oglesby, *supra* note 17, p. 37; Turner, *supra* note 66, pp. 96-97.

¹⁵¹ Leonid Brezhnev, as quoted by Schmeltzer, *supra* note 66, pp. 103-104; L. Romaniacki, *Sources of the Brezhnev Doctrine of Limited Sovereignty and Intervention*, 5 *Israel Law Review* 527 (1970), p. 528; Turner, *supra* note 66, pp. 83, 102.

According to the Brezhnev Doctrine, Soviet attitudes to international law were based primarily on the concept of “peaceful coexistence”, a principle supposedly reflected in the Preamble and Article 1 of the UN Charter.¹⁵² “General” international law, as it developed after 1945, was “of a general democratic character”, as it had resulted from the cooperation of capitalist and socialist states.¹⁵³ As such, “general” international law served to preserve the principle of “peaceful coexistence” between otherwise antagonistic states.¹⁵⁴

Besides this “general” international law there was a separate, regional or “local” international law that only applied to the relations between those states belonging to a specific group implicitly recognized under “general” international law.¹⁵⁵ Capitalist states were thus able to conclude treaties between each other, not based on “general” international law, but on capitalist, bourgeois values.¹⁵⁶ The same therefore applied to socialist states, which had the right to conclude treaties based on their shared socialist values.¹⁵⁷

Relations between socialist states were consequently governed by their regional socialist international law, with “general” international law being primarily applicable only in their relations with capitalist states.¹⁵⁸ “Local” socialist international law was based on the concept of socialist or proletarian interna-

¹⁵² G. E. Glos, *The Theory and Practice of Soviet International Law*, 16 *International Lawyer* 279 (1982), p. 283; Schmeltzer, *supra* note 66, p. 100; Ch. Osakwe, *Socialist International Law Revisited*, 66 *American Journal of International Law* 596 (1972), p. 597; Hazard, *supra* note 149, p. 144; V. Pechota, *The Contemporary Marxist Theory of International Law*, 75 *American Society of International Law Proceedings* 149 (1981), p. 153; Rostow, *supra* note 8, pp. 219-220, 229-230; Matsson, *supra* note 8, p. 91; Turner, *supra* note 66, pp. 45, 49-56; Turner also outlines the historical development of the concept based on Lenin’s and Stalin’s support of it.

¹⁵³ Pechota, *supra* note 152, pp. 150, 152 (quote); W. W. Kulski, *The Soviet Interpretation of International Law*, 49 *American Journal of International Law* 518 (1955), p. 519; G. I. Tunkin, *The Contemporary Soviet Theory of International Law*, 31 *Current Legal Problems* 177 (1978), pp. 185-187; Turner, *supra* note 66, p. 45.

¹⁵⁴ Glos, *supra* note 152, p. 283; Romaniecki, *supra* note 151, pp. 533-534; Kulski, *supra* note 153, p. 526; Turner, *supra* note 66, p. 45; Rostow, *supra* note 8, p. 234; however, the era of “peaceful coexistence” in international law was supposed to be only temporary, valid until the time had come when socialism triumphed worldwide; Tunkin, *supra* note 153, pp. 180, 184, 187, describes “contemporary international law” as the “law of the period of transition from capitalism to socialism”.

¹⁵⁵ Butler, *supra* note 150, p. 799; Osakwe, *supra* note 152, p. 597; Rostow, *supra* note 8, p. 218; Matsson, *supra* note 8, p. 91; Turner, *supra* note 66, pp. 47-48.

¹⁵⁶ Tunkin, *supra* note 153, pp. 180, 182, 186.

¹⁵⁷ Romaniecki, *supra* note 151, pp. 535, 540; Kulski, *supra* note 153, p. 521; Rostow, *supra* note 8, p. 234; Matsson, *supra* note 8, pp. 90-91; Tunkin, *supra* note 153, pp. 182, 186; Turner, *supra* note 66, p. 47.

¹⁵⁸ Turner, *supra* note 66, pp. 45, 88.

tionalism.¹⁵⁹ This meant socialist states could cooperate much more closely and aid each other much more effectively than would have been possible under “general” international law.¹⁶⁰ Socialist states therefore had to come to the aid of the proletariat of a socialist society embroiled in a struggle against counter-revolutionary forces.¹⁶¹

An intervention based on the necessity of defending a socialist state’s proletariat against counter-revolutionary forces did not necessarily require that state’s government’s request, especially in cases where the government concerned was itself guilty of counter-revolutionary tendencies (as was the case in Czechoslovakia in 1968).¹⁶² The other socialist state’s sovereignty, however, is not violated, because in socialist states “the people”, not the government, were the sovereign.¹⁶³ These arguments are sometimes also referred to as the concept of “limited sovereignty”,¹⁶⁴ or as the principle of “socialist self-determination.”¹⁶⁵

Applied to Afghanistan the Brezhnev Doctrine could be argued to justify the Soviet invasion on the basis of defending the achievements of the Afghan proletariat against counter-revolutionary forces, such as the “reactionary” imams and the Afghan President (and alleged CIA-Agent) Amin.

2.5.2. Compatibility with international law

There can be no doubt that the “Brezhnev Doctrine” as outlined above was not compatible with the UN Charter. The use of force in support of the “international proletariat” could not be reconciled with the ban on the use of force (Article 2(4), which is generally viewed as being of a *jus cogens* nature, and certainly not with the right of self-defence under Article 51.¹⁶⁶ Furthermore, the 1968 invasion of

¹⁵⁹ Hazard, *supra* note 149, p. 145; Matsson, *supra* note 8, p. 91; Moore, *supra* note 143, pp. 14, 17; Turner, *supra* note 66, pp. 45, 81.

¹⁶⁰ Glos, *supra* note 152, pp. 293-294; Butler, *supra* note 150, p. 799; Osakwe, *supra* note 152, pp. 597-598; Hazard, *supra* note 149, pp. 144-145; Pechota, *supra* note 152, p. 154; Moore, *supra* note 143, pp. 15-17; H. Dahm, *Afghanistan als Lehrstück der politischen und militärischen Doktrin Sowjetrußlands* (Afghanistan as a prime example of Soviet Russia’s political and military doctrine), in H. Vogel (ed.), *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Nomos Verlagsgesellschaft, Baden-Baden: 1980, pp. 200-201, 206-209.

¹⁶¹ Schmeltzer, *supra* note 66, p. 104; Butler, *supra* note 150, pp. 796-797; Osakwe, *supra* note 152, p. 598; Hazard, *supra* note 149, p. 145; Pechota, *supra* note 152, p. 154; Matsson, *supra* note 8, p. 92; Moore, *supra* note 143, p. 14; Dahm, *supra* note 160, pp. 200-201, 206-209.

¹⁶² Pechota, *supra* note 152, p. 154; Dahm, *supra* note 160, pp. 206-209, 211, 221.

¹⁶³ Turner, *supra* note 66, pp. 85-87; Dahm, *supra* note 160, pp. 200-201, 206-209, 221.

¹⁶⁴ Romaniecki, *supra* note 151, p. 527.

¹⁶⁵ Moore, *supra* note 143, p. 9.

¹⁶⁶ Butler, *supra* note 150, pp. 799-800; Romaniecki, *supra* note 151, p. 538; Rostow, *supra* note 8, pp. 236, 240-241; Moore, *supra* note 17, p. 197; and *supra* note 143, p. 18.

Czechoslovakia clearly demonstrates that the use of force amounted to a complete rejection of the concepts of sovereign equality and political independence (Article 2(1), as the intervention took place not only against the “counter-revolutionary” government’s wishes but, most likely, against the wishes of the vast majority of Czechoslovakians, thereby violating their right of self-determination.¹⁶⁷

The differentiation between “local” and “general” international law made by the Soviet jurists was also untenable.¹⁶⁸ The UN Charter provides that any regional agreement contrary to it cannot be applied (Article 103). This is confirmed by the fact that the principles on which the Brezhnev Doctrine was based cannot be found in any of the treaties concluded between the socialist states, which contradicts the notion that a “local” international law had developed. Treaties concluded between the Soviet Union and other socialist states, such as the Warsaw Pact and various treaties of friendship, including the Afghan-Soviet Treaty of December 1978,¹⁶⁹ in fact routinely and explicitly referred to the UN Charter.¹⁷⁰

Outside of the socialist bloc the Brezhnev Doctrine was therefore overwhelmingly rejected, and not only by the “western” but also by the non-aligned states.¹⁷¹ The fact that the Johnson Doctrine of 1965¹⁷² was a reverse mirror image of the Brezhnev Doctrine did, of course, not serve to diminish the undoubted illegality of both.¹⁷³

The Soviet invasion cannot therefore be justified under international law on the basis of the Brezhnev Doctrine.

¹⁶⁷ Schmeltzer, *supra* note 66, p. 104; Romaniacki, *supra* note 151, pp. 538-539; Rostow, *supra* note 8, p. 210; Moore, *supra* note 143, p. 18; Turner, *supra* note 66, p. 86.

¹⁶⁸ Butler, *supra* note 150, pp. 799-800.

¹⁶⁹ The Preamble of the Afghan-Soviet Treaty of Friendship states, *inter alia*, that the two states were “reaffirming their fidelity to the purposes and principles of the Charter of the United Nations” (the text of the treaty is available at: http://untreaty.un.org/unts/60001_120000/2/16/00002763.pdf accessed December 12, 2011).

¹⁷⁰ As far as the Warsaw Pact (1955) is concerned, the Preamble stated that the state parties were “guided by the objects and principles” of the UN Charter. For the text of the Warsaw Pact, see: 219 UNTS 2962; Butler, *supra* note 150, p. 798; Romaniacki, *supra* note 151, p. 533.

¹⁷¹ A draft resolution condemning the Soviet/Warsaw Pact invasion of Czechoslovakia in 1968 was defeated in the Security Council by a Soviet veto (10:2:3 votes).

¹⁷² In his Address to the Nation on May 2, 1965, Johnson declared – in respect of the American invasion of the Dominican Republic – that: “Revolution in any country is a matter for that country to deal with. It becomes a matter calling for hemispheric action only ... when the object is the establishment of a communist dictatorship.”; Quigley, *supra* note 56, p. 202.

¹⁷³ Joyner/Grimaldi, *supra* note 15, p. 679; Oglesby, *supra* note 17, p. 38.

2.5.3. Application to Afghanistan

Advocates of the Brezhnev Doctrine had still another problem: the doctrine was not applicable to Afghanistan.

The whole concept of the Brezhnev Doctrine was based on the premise that a “local” international law had developed, which applied only between the socialist states, i.e. the states belonging to the socialist bloc. It was generally agreed that the concept was therefore only to apply within the Warsaw Pact.¹⁷⁴

Afghanistan, however, despite being under communist rule, had always been non-aligned, and was not a member of the socialist bloc. In fact, Article 5 of the Afghan-Soviet Treaty of Friendship explicitly stated:

The Union of Soviet Socialist Republics respects the policy of nonalignment pursued by the Democratic Republic of Afghanistan, that policy being an important factor for the maintenance of international peace and security.

In one of the first moves to calm international outrage after the invasion, the Soviet Union consequently guaranteed Afghanistan's status as member of the non-aligned movement.¹⁷⁵

By invading Afghanistan the Soviet Union had thus undoubtedly committed a serious violation of Article 2 (4) UN Charter, and violated Article 1 of the Afghan-Soviet Treaty of Friendship as well.¹⁷⁶

¹⁷⁴ D. Binder, *Brezhnev Doctrine Said to be Extended*, The New York Times, 10.02.1980, p. 10; Rostow, *supra* note 8, p. 233; he also quotes from a letter sent by the Soviet Politburo to the Central Committee of the Czech Communist Party of July 15, 1968, pointing out that “the frontiers of the socialist world have moved to the centre of Europe, to the Elbe and the Bohemian Forest. And we shall never agree to these historic gains of socialism and the independence and security of our peoples being placed in jeopardy”; Matsson, *supra* note 8, pp. 91-95; Turner, *supra* note 66, pp. 107-113; von Borcke, *supra* note 138, p. 128.

¹⁷⁵ Turner, *supra* note 66, p. 107.

¹⁷⁶ Matsson, *supra* note 8, p. 95; J. N. Moore, *Panel One: General Discussion*, 13 Georgia Journal of International & Comparative Law 231 (1983), p. 236; Behrens, *supra* note 14, p. 67.

3. FOREIGN SUPPORT FOR THE AFGHAN MUJAHEDDEEN IN THEIR FIGHT AGAINST THE SOVIETS

3.1. Background

The Afghan rebels had always received some support from abroad in their attempt to topple the Afghan government. Notably Iran¹⁷⁷ and Pakistan¹⁷⁸ became involved early on.

The main driving force behind the support of the Afghan rebels was, however, the USA, without which the massive Pakistani intervention would have been unthinkable.¹⁷⁹ Even prior to the Soviet invasion, the Carter Administration had decided to support the mujahedeen.¹⁸⁰ In July 1979 Carter had signed an Executive Order authorizing covert support which, according to the sources available, consisted mainly of “non-military” aid.¹⁸¹ Following the Soviet invasion, that support escalated on a yearly basis.¹⁸² In January 1980 Carter authorized the covert supply of weapons.¹⁸³

¹⁷⁷ Loyn, *supra* note 11, p. 191; Galster, *supra* note 2, p. 23; Roy, *supra* note 147, pp. 42-43.

¹⁷⁸ Loyn, *supra* note 11, p. 191; Z. Khalilzad, *The War in Afghanistan*, 41 *International Journal* 271 (1985-1986), pp. 290-291; Cynkin, *supra* note 1, p. 289 (although he, somewhat improbably, claims the Pakistanis were “hesitant” in their support); Galster, *supra* note 2, p. 15; Rasanayagam, *supra* note 2, pp. 107-108; Maley, *supra* note 2, pp. 56-58; Roy, *supra* note 147, pp. 39-42.

¹⁷⁹ Cynkin, *supra* note 1, p. 288; Gates, *supra* note 88, pp. 131-134, 146-147; the recent US Defence Secretary was Deputy Director of the CIA at the time. He claims that it was the Pakistanis, especially President Zia ul-Haq, who were putting pressure on the Americans to support the mujahedeen, even prior to the Soviet invasion.

¹⁸⁰ Blum, *supra* note 13, p. 344; Galster, *supra* note 2, pp. 10-11 (he claims the USA started meeting the rebels as of April 1979, following a decision made by Brzezinski to that effect); Rasanayagam, *supra* note 2, p. 83; Maley, *supra* note 2, p. 66.

¹⁸¹ Z. Brzezinski, Carter’s National Security Advisor at the time of the Soviet invasion of Afghanistan, *Oui, la CIA est entrée en Afghanistan avant les Russes...* (Yes, the CIA did enter Afghanistan before the Russians did...); Interview given to Vincent Jauvert, *Le Nouvel Observateur*, 15/01/1998; an English translation is available at: <http://www.globalresearch.ca/articles/BRZ110A.html> accessed October 26, 2011; Gates, *supra* note 88, pp. 143-149; the recent US Defence Secretary was Deputy Director of the CIA at the time; he points out that the CIA was looking at options of granting such support already in early 1979, and confirms that US President Carter authorized covert funding of the mujahedeen in July 1979. Apparently, only support for “insurgent propaganda” and other “non-military” support were authorized. He does, however, acknowledge that there was pressure within the US Administration to provide more support; Blum, *supra* note 13, p. 344; Galster, *supra* note 2, p. 14.

¹⁸² Loyn, *supra* note 11, p. 191 (who, however, claims that the USA only supported the mujahedeen as of 1980); Gates, *supra* note 88, pp. 251-252, 319-321.

¹⁸³ A. J. Kuperman, *The Stinger Missile and U.S. Intervention in Afghanistan*, 114 *Political Science Quarterly* 219 (1999), p. 221; Cynkin, *supra* note 1, p. 288; Rasanayagam, *supra* note 2, p. 104; Maley, *supra* note 2, p. 66.

Carter's policy was continued and reinforced by the Reagan Administration.¹⁸⁴ As far as Afghanistan was concerned, NSDD 75 (1983) outlined US policy as follows:

The U.S. objective is to keep maximum pressure on Moscow for withdrawal and to ensure the Soviets' political, military, and other costs remain high while the occupation continues.¹⁸⁵

This policy seems to have been stepped up considerably following NSDD 166 (1985), entitled "US Policy, Programs, And Strategy in Afghanistan", a document which has still not been de-classified. According to most accounts NSDD 166 authorized support for the Afghan rebels "by all means available".¹⁸⁶

In any case, the – sometimes surprisingly reluctant¹⁸⁷ – Reagan Administration provided the CIA with ever more resources to finance the mujahedeen,¹⁸⁸ often egged on by Congress,¹⁸⁹ itself heavily influenced by Congressman Charlie Wilson.¹⁹⁰ Although everybody knew the USA was supporting the rebels, all aid was provided by the CIA in the context of a "covert operation."¹⁹¹

By 1987 US aid had increased to at least \$600 million/year,¹⁹² an escalation topped by the fact that in 1986 the Reagan Administration – again under pressure

¹⁸⁴ Blum, *supra* note 13, p. 345; Cynkin, *supra* note 1, p. 288.

¹⁸⁵ *National Security Decision Directive* No. 75 of January 17, 1983, pp. 1-9, 4; available at: <http://www.fas.org/irp/offdocs/nsdd/nsdd-075.htm> last accessed December 1, 2011.

¹⁸⁶ Kuperman, *supra* note 183, pp. 227, 243; Rasanayagam, *supra* note 2, p. 116; Malley, *supra* note 2, p. 67; Roy, *supra* note 147, p. 35; Gates, *supra* note 88, pp. 348-349, being the CIA Deputy Director at the time, describes NSDD 166 as setting "forth a new American objective in Afghanistan: to win. To push the Soviets out."

¹⁸⁷ Kuperman, *supra* note 183, pp. 222-225, 228-230, 234-235; Galster, *supra* note 2, p. 16; Roy, *supra* note 147, pp. 34-36; Gates, Deputy Director of the CIA at the time, confirms that the CIA had opposed delivering Stinger missiles until "late 1985" (*supra* note 88, p. 349).

¹⁸⁸ Loyn, *supra* note 11, pp. 195-196; Roy, *supra* note 147, pp. 34-36.

¹⁸⁹ Loyn, *supra* note 11, pp. 196-198; Kuperman, *supra* note 183, pp. 226-227; Blum, *supra* note 13, p. 345; Galster, *supra* note 2, pp. 1-2, 16; Rasanayagam, *supra* note 2, p. 105; Roy, *supra* note 147, pp. 34-36; Gates, *supra* note 88, pp. 320-321.

¹⁹⁰ An interesting account of Charlie Wilson's exploits for the mujahedeen is provided in George Criley's book *Charlie Wilson's War*, Atlantic Books, London: 2002; Charlie Wilson's pivotal role is also confirmed by the Deputy Director of the CIA at the time (Gates, (*supra* note 88, pp. 320-321).

¹⁹¹ Blum, *supra* note 13, p. 345; Galster, *supra* note 2, pp. 1-2.

¹⁹² Gates, *supra* note 88, pp. 251-252, 319-321, 349; then Deputy Director of the CIA, provides the following data: 1981-1983 \$ 60 million/year; \$ 100 million in 1984; \$ 250-300 million in 1985, and \$ 375-425 million in 1986; Loyn, *supra* note 11, pp. 204, 219 (altogether \$3 billion; at the end aid to the Afghan rebels amounted to 75 % of the CIA budget); Kuperman, *supra* note 183, pp. 227-228; Blum, *supra* note 13, p. 345; Galster, *supra* note 2, p. 18.

from Congress – had agreed to provide the mujahedeen with Stinger missiles in order to shoot down Russian helicopters.¹⁹³ This was remarkable because up until then the USA had insisted on official “deniability”, i.e. assuring that none of the weapons delivered could be traced back to the USA.¹⁹⁴ As far as the Stinger missiles were concerned, it was obvious that only the USA could have provided them, so this decision marked a new departure in US support of the mujahedeen.¹⁹⁵ This massive US support for the Afghan rebels was made even more significant by the fact that Saudi Arabia and the Gulf states had pledged to match the US contribution dollar for dollar.¹⁹⁶

Although this article concentrates on US support for the mujahedeen, it obviously follows from the above that many other states became involved on the side of the mujahedeen as well. Egypt contributed by supplying Soviet-made weapons, which they had received during their once-close alliance with the USSR.¹⁹⁷ Western allies of the USA, mainly the UK,¹⁹⁸ also participated in supporting the Afghan “freedom fighters”.¹⁹⁹

Saudi Arabia and the Gulf states not only provided massive financial support, but also knowingly tolerated the fact that some of their own citizens went to Afghanistan to fight the Soviets.²⁰⁰ Among them was the Saudi Arabian Osama bin Laden, who would later organize the terrorist organization Al-Qaeda, which was to go on to infamously launch the outrageous terrorist attacks on the USA in September 2001. His status, at the time of these terrorist attacks, as a “guest” of the Afghan Taliban government would lead, in 2001, to Operation *Enduring Freedom* and the current conflict in Afghanistan.

¹⁹³ Kuperman, *supra* note 183, pp. 219, 232, 234-235; Khalilzad, *supra* note 178, p. 290; Galster, *supra* note 2, p. 18; Loyn, *supra* note 11, p. 204 (although he dates the delivery of Stinger missiles to 1985); Rasanayagam, *supra* note 2, p. 116; Maley, *supra* note 2, p. 67.

¹⁹⁴ Kuperman, *supra* note 183, pp. 222-223; Galster, *supra* note 2, p. 18; Roy, *supra* note 147, p. 35.

¹⁹⁵ Kuperman, *supra* note 183, p. 234; Roy, *supra* note 147, pp. 35-36.

¹⁹⁶ Loyn, *supra* note 11, p. 204; Khalilzad, *supra* note 178, pp. 291-292; Kuperman, *supra* note 183, p. 228; Cynkin, *supra* note 1, pp. 279, 282, 288-289; Galster, *supra* note 2, pp. 22-23; Rasanayagam, *supra* note 2, p. 106; Maley, *supra* note 2, p. 68; Mader, *supra* note 102, p. 43; Gates, *supra* note 88, pp. 320-321.

¹⁹⁷ Cynkin, *supra* note 1, p. 288; Maley, *supra* note 2, p. 68.

¹⁹⁸ Loyn, *supra* note 11, pp. 198-199; Maley, *supra* note 2, pp. 67-68; Mader, *supra* note 102, p. 29.

¹⁹⁹ Ross, *supra* note 1, p. 103.

²⁰⁰ Roy, *supra* note 147, pp. 43-44; Gates, *supra* note 88, p. 349.

3.2. The legality of US support for the rebels

As has already been pointed out, many other states also became involved in the effort to support the rebels, none more so than Pakistan. Nonetheless concentration on the efforts of the USA seems justified, because the massive escalation in outside involvement and support for the mujahedeen would have been unthinkable without the USA's leadership.

Any examination of the legality of the US involvement in Afghanistan is complicated by the fact that its nature as a "covert operation" meant that no official legal justification was ever proffered. Issuing such a justification would obviously have countermanded the attempt to preserve the "deniability" of US actions.

Nevertheless, as the following discussion will demonstrate, there are only a limited number of justifications the USA could have resorted to. Without any justification the massive involvement of the USA in Afghan affairs would clearly constitute an illegal intervention in that state's internal affairs, a violation of the principle of non-interference in another state's civil war, and thereby a violation of Afghanistan's sovereignty.²⁰¹

3.2.1. US support for the mujahedeen: July 1979 – December 1979

Insofar as any material assistance was given to the mujahedeen prior to the Soviet invasion, in accordance with Carter's Executive Order of July 1979, this was clearly illegal under international law. It should be noted that this assistance programme went beyond maintaining pre-existing relations – it was a novel policy of support for a faction in a civil war trying to depose that state's government.

Despite the clear legal situation Ross, in an article,²⁰² seems to be making an attempt to argue that the Soviets had been violating the Afghans' right of self-determination prior to the Soviet invasion, thereby presumably, by implication, providing a justification for US support for the Afghan rebels *prior* to that date.²⁰³ This line of reasoning is based on the assumption that the communist Afghan

²⁰¹ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, paras. 195, 241; in para. 241 the ICJ stated: "The Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally far-reaching"; Sohn, *supra* note 56, p. 227 (general principle); Pentz, *supra* note 54, pp. 385-390 (dealing with the legality of the Pakistani support of the Afghan rebels).

²⁰² Ross, *supra* note 1, pp. 92-116.

²⁰³ Ross does also not reach a definite conclusion as to whether he agrees with this line of argument; external support of the Afghan rebels is only mentioned in one paragraph (*Ibidem*, p. 103).

governments prior to the invasion were mere “puppet” governments, guided by the Soviets, so that Afghan resistance *prior* to the Soviet invasion (including external support) could consequently be justified on the basis of the right of self-determination.²⁰⁴

Such an argument fails to convince and must be rejected. The basis of Ross’ argument is flawed. While discussing the “puppet” nature of the communist Afghan governments, and without providing any relevant evidence for his far-reaching claims,²⁰⁵ he himself asserts that the Afghan Amin government, the last communist government before the Soviets invaded, had “incurred the wrath of the Soviets”,²⁰⁶ a turn of events hardly reconcilable with the notion of a “puppet government”. Ross also admits that the assumption that the Soviets had violated “Afghan self-determination” prior to the invasion “runs the risk of expanding the self-determination doctrine to a point where it loses meaning”.²⁰⁷ There is nothing to add to this prescient observation.

Afghanistan at that stage was in the throes of civil war. Based on the majority view outlined above regarding foreign intervention, i.e. that customary international law prohibits any intervention in a civil war, the provision of aid to the rebels against the Afghan government – which at that time was recognized by the USA – was a violation of international law. Supporting the rebels against an indigenous government could not even be reconciled with traditional, pre-WW II customary international law, which also prohibited such support. No justification based on a right of “pro-democratic” intervention can be put forward either, since that theory had not been seriously developed yet in 1979 (leaving aside the fact that the mujahedeen’s democratic credentials were non-existent, as subsequent events have demonstrated).

Thus it can be seen that supporting the rebels prior to the Soviet invasion was clearly an illegal intervention in the Afghan civil war.

3.2.2. US support for the mujahedeen subsequent to the Soviet invasion

3.2.2.1. Collective self-defence

Having established that the Soviet invasion of Afghanistan was illegal and a clear violation of Article 2(4) of the UN Charter, it follows that Afghanistan had suffered an “armed attack” by the Soviet Union. Could the USA therefore

²⁰⁴ *Ibidem*, pp. 106-109.

²⁰⁵ *Ibidem*, pp. 107-108.

²⁰⁶ *Ibidem*, p. 101.

²⁰⁷ *Ibidem*, p. 109.

claim to be acting in collective self-defence when aiding the Afghan mujahedeen in fighting against the Soviet invaders?

Although at first glance this is a seemingly attractive proposition, any reliance on Article 51 of the UN Charter by the USA lacks one decisive criterion: there was no valid request by an appropriate Afghan body for US aid against the Soviets. As has already been discussed it is overwhelmingly agreed upon that a state claiming to be acting in collective self-defence of another state, without having been attacked itself, must have received a request by the attacked state for any use of force to be justified, a view confirmed by the ICJ.

The USA could not claim to have received such a request. Neither the previous Afghan government under President Amin, nor the new Afghan government under President Karmal issued such a request. Nor was there any Afghan government-in-exile which was recognized by the USA and could have asked for support. As far as the mujahedeen were concerned, there was no uniform organization which spoke on behalf of all of them.²⁰⁸ Even Pakistan recognized seven different rebel groups, and there were many more,²⁰⁹ and relations between some of these groups were “characterized by conflict, including actual warfare.”²¹⁰

Furthermore, although the USA had refused to recognize the new Karmal government, diplomatic relations had been maintained, and the new government continued to represent Afghanistan internationally.²¹¹ In fact, immediately after

²⁰⁸ Doswald-Beck, *supra* note 5, p. 243; Khalilzad, *supra* note 178, pp. 285-289; Cynkin, *supra* note 1, pp. 278-282; Galster, *supra* note 2, p. 20; Maley, *supra* note 2, pp. 48-49, 52-54; he points out that even in 1992, after the communist government had collapsed, “there was no unified group or party capable of exercising legitimate rule throughout Afghanistan’s territory”; Roy, *supra* note 147, pp. 35-36, states that, despite financial incentives from the USA to “establish a unified political entity that could challenge the legitimacy of the Kabul regime,” – “the Mujahedin gave little indication of organizing themselves”; A. Hyman, *Afghan Resistance: Danger from Disunity*, Conflict Studies No. 161, The Institute for the Study of Conflict, London: 1984, pp. 22-24; Gates, *supra* note 88, p. 348.

²⁰⁹ Doswald-Beck, *supra* note 5, p. 206, claims there were 37 different rebel groups fighting the Afghan government.

²¹⁰ Khalilzad, *supra* note 178, p. 288 (quote); Gates, *supra* note 88, p. 348; the recent US Defence Secretary and Deputy Director of the CIA at the time, states, referring to the Afghan mujahedeen: “No one should have had any illusions about these people coming together politically, before or after a Soviet defeat. Certainly no one at the CIA had such fantasies”; Ross, *supra* note 1, p. 102; Cynkin, *supra* note 1, 282, 298; Galster, *supra* note 2, p. 20; Rasanayagam, *supra* note 2, pp. 110, 120.

²¹¹ Amer, *supra* note 147, p. 431; Khalilzad, *supra* note 178, p. 289; he also describes a failed attempt by the mujahedeen in 1985, to take Afghanistan’s seat at the UN (p. 286); the confusion within the Reagan Administration as far as the treatment of the Afghan government and the rebels are concerned is evidenced by various contradictory news reports: *Reagan Bars Ties to Afghan Rebels*, Bernard Gwertzman, The New York Times, 17.06.1986, p. 7;

the invasion, on January 11, 1980, the Credentials Committee at the UN explicitly approved the credentials of the new Afghan government's representative in a resolution supported, notably, by the USA.²¹² Even as late as 1989 the US government was still contemplating whether it would be advisable to shift official recognition to the mujahedeen, an indication that even at this late stage in the Afghan conflict it did not recognize the mujahedeen's authority to speak for the state of Afghanistan.²¹³ The US Special Envoy to the mujahedeen, Peter Tomsen, has referred to the mujahedeen "government" – the AIG, which was set up in the late 1980s – as a "Potemkin Government", and it was only recognized by four states, the USA not being among them.²¹⁴

International reaction to the new Afghan government under Karmal was therefore markedly different from what it had been towards the Vietnamese-installed Cambodian government in 1979,²¹⁵ or the Soviet-installed government in Hungary in 1956.²¹⁶ It must therefore be concluded that President Karmal's government was, while disapproved of, not rejected outright as rightful international

US May Establish Afghan Rebel Ties, Richard Halloran, *The New York Times*, 18.06.1986, p. 8; *Afghan Rebels Get Support from U.S. For A Government*, Robert Pear, *The New York Times*, 06.05.1988; available at: <http://www.nytimes.com/1988/05/06/world/afghan-rebels-get-support-from-us-for-a-government.html?scp=1&sq=afghan+rebels&st=nyt> last accessed December 1, 2011.

²¹² *Yearbook of the United Nations for the Year 1980*, p. 320.

²¹³ *U.S. Considering Diplomatic Shift on Afghanistan*, Elaine Sciolino, *The New York Times*, 19.03.1989; she points out that the "Bush Administration" was "considering a formal break in relations with the Soviet-backed Afghan Government" but was "not ready to recognize the rebel government in exile"; available at: <http://www.nytimes.com/1989/03/19/world/us-considering-diplomatic-shift-on-afghanistan.html?scp=2&sq=elaine+sciolino&st=nyt> last accessed December 1, 2011; in a further article (*Bush Names Envoy to Afghan Rebels*, *The New York Times*, 06.04.1989) a few weeks later, Elaine Sciolino explains that despite sending "a special envoy to the American-backed Afghan rebels" the State Department had decided to "stop short of formal recognition of the Afghan government-in-exile"; available at: <http://www.nytimes.com/1989/04/06/world/bush-names-envoy-to-afghan-rebels.html?scp=1&sq=afghan+rebels&st=nyt> last accessed December 1, 2011; Roy, *supra* note 147, p. 35, points out that only in 1989, after much US pressure, did the mujahedeen manage to establish a "bureaucratic, corrupt and inefficient monster", the AIG.

²¹⁴ P. Tomsen, *The Wars of Afghanistan, Messianic Terrorism, Tribal Conflicts, and the Failures of Great Powers*, Public Affairs, Philadelphia: 2011, pp. 257, 261, 289, 293 (quote), p. 320; Maley, *supra* note 2, pp. 125-126; Maley points out that even Pakistan abstained when the "Interim Government" – ultimately successfully – attempted to gain Afghanistan's seat at the OIC. No such success was forthcoming at the UN.

²¹⁵ Amer, *supra* note 147, p. 431.

²¹⁶ Doswald-Beck, *supra* note 5, p. 195 (Hungary was not represented at the UN between 1957-1963; the new Cambodian government's credentials were repeatedly rejected by the UN as of 1979).

representative of Afghanistan.²¹⁷ This is also confirmed by the fact that the Geneva Peace Accords of 1988 were agreed to without the rebels' participation.²¹⁸

Thus the USA could not plausibly claim to have received a valid request for support against the Soviets by an authoritative organ that represented the state of Afghanistan. The massive US support of the mujahedeen therefore cannot be justified by the invocation of Article 51.²¹⁹

3.2.2.2. Counter-intervention

The USA could possibly claim that, based on the Soviet invasion of Afghanistan in support of the communist government against the Afghan rebels, it was exercising its customary international law right of counter-intervention by its massive support for the rebels.

It has, however, already been explained that a right of counter-intervention does not exist in customary international law, and certainly not in support of rebels, and that this should remain so.²²⁰ As no state has ever explicitly referred to its "right of counter-intervention" it seems unlikely the USA would have relied on such a justification anyway.

3.2.2.3. Wars of National Liberation

Reisman has argued that US support of the mujahedeen was justified by the concept of "wars of national liberation".²²¹ Afghanistan was subject to Sovi-

²¹⁷ Maley, *supra* note 2, p. 65, disapprovingly quotes UN Secretary General Pérez de Cuéllar as refusing to negotiate with the Afghan rebels as it was against the UN's "philosophy to be in touch with the enemies of governments."; Khalilzad, *supra* note 178, p. 289, although deploring the situation, acknowledges that the Afghan government had achieved a "degree of international acceptance" and was often treated as the "legitimate authority" in the western media; Blum, *supra* note 13, p. 347, accuses the USA of acting "as if the Afghanistan army and government" ... "with a large following of people" ... "didn't exist."

²¹⁸ The Geneva Peace Accords were negotiated between Afghanistan and Pakistan, with the USA and the USSR acting as guarantors.

²¹⁹ Moore, *supra* note 176, p. 236, disagrees with this assertion: according to him support of the "Afghan people" was justified under Article 51. Unfortunately, he offers no arguments in support of this categorical statement.

²²⁰ Pentz, *supra* note 54, pp. 394-395, 400-401, disagrees; he argues that Pakistani assistance to the Afghan rebels was justified on the basis of the right of counter-intervention following Soviet support of the Afghan government. Besides claiming that the existence of such a rule was "generally agreed", he provides no evidence of its actual existence.

²²¹ Reisman, *supra* note 141, pp. 906-909; Ross, *supra* note 1, pp. 105-107, who may be supportive of this argument. He cites Reisman's article without commenting on it, but does go on to examine whether the Afghan resistance was based on a right of self-determination *prior* to the Soviet invasion (the argument being that the communist government was a puppet government). On this topic, too, his conclusions seem uncertain, so that it is difficult to ascertain his views.

et “alien domination”,²²² so the US was legally entitled to support the people of Afghanistan in their struggle against foreign suppression by delivering weapons and other aid.²²³ According to him, the mujahedeen, supported by the vast majority of the Afghan people, constituted a national liberation movement.

Reisman goes on to accuse the General Assembly of having failed to have “used the proper language” by not clearly establishing that the mujahedeen were engaged in a war of national liberation,²²⁴ thereby “depriving the Afghan resistance, as well as those third states supporting it, of substantial international authority.”²²⁵ This raises the question whether the General Assembly had – as Reisman implies – failed in its duty towards Afghanistan, or whether the norm Reisman seems to be relying on perhaps does not exist in customary international law.

The concept of “wars of national liberation” was developed mainly by newly independent former colonies in cooperation with socialist states, originally against stiff western opposition.²²⁶ Developing countries and the socialist states repeatedly argued that a people which was subject to colonisation had the right to rise up and rid itself of the colonizer, by force if necessary.²²⁷ They argued that such an armed struggle was justified and compatible with international law, especially the right of self-determination, and could therefore be actively supported by other states, even including military aid.²²⁸ The right of self-determination, as embodied in Articles 1, 55, 56, 73, and 76 UN of the Charter, as well as the Declaration on the Granting of Independence to Colonial Countries and Peoples,²²⁹ was viewed as granting non-self-governing peoples the right to immediate and full independence.²³⁰

²²² Definition of Aggression, Article 7, GA Resolution 3314 (1974).

²²³ Reisman, *supra* note 141, pp. 907-909; Reisman’s arguments seem to be supported by Quigley, *supra* note 56, pp. 209-210.

²²⁴ Reisman, *supra* note 141, p. 909.

²²⁵ Reisman, *supra* note 141, p. 907; he goes on to state that a General Assembly Resolution was necessary to “*underline the lawfulness* of third-party support” of the mujahedeen (at p. 909; emphasis by author).

²²⁶ Romaniecki, *supra* note 151, p. 537; Rostow, *supra* note 8, p. 215; H. Trofimenko (a Soviet expert on Soviet-American relations), *The Third World And The U.S.-Soviet Competition: A Soviet View*, 59 Foreign Affairs 1021 (1980-1981), pp. 1022, 1028, 1034-1035; Friedman, *supra* note 17, p. 72; Oglesby, *supra* note 17, pp. 39-40; Dahm, *supra* note 160, pp. 186, 189-191; Berner, *supra* note 14, p. 328.

²²⁷ Rostow, *supra* note 8, p. 229; Trofimenko, *supra* note 226, p. 1028; Gray, *supra* note 56, pp. 59-60.

²²⁸ Oglesby, *supra* note 17, pp. 39-40; Gray, *supra* note 56, p. 60.

²²⁹ GA Resolution 1514 (1960).

²³⁰ Schmeltzer, *supra* note 66, pp. 99-100; Rosenstock, *supra* note 52, p. 730.

Resolution 1514 had, however, only mentioned a dependent people's entitlement to "exercise *peacefully* and freely their right to complete independence,"²³¹ a sentiment repeated in the preamble of resolution 1654.²³²

The developing and socialist states nevertheless maintained that the use of force by national liberation movements was justified.²³³ It was argued that colonialism was to be viewed as perpetual use of force or an enduring act of aggression by the colonizer from the moment the territory was seized. Therefore the use of force by the colonized against the colonizers was justifiable as self-defence under Article 51²³⁴ and other states supporting such national liberation movements were merely exercising collective self-defence.²³⁵ Such support was thus not an illegal intervention in the internal affairs of another state, but was, to the contrary, entirely compatible with the UN Charter.²³⁶ This argument was based squarely on the right of self-determination, and arguably strengthened by the fact that the General Assembly had recognized various national liberation movements as the authoritative representatives of their respective states.²³⁷

Another line of argument was that the ban on the use of force in Article 2 (4) did not apply to wars of national liberation, as national liberation movements using force to realize their right to self-determination were acting strictly in accordance with the UN's basic principles.²³⁸

²³¹ GA Resolution 1514 (1960), Article 4.

²³² GA Resolution 1654 (1961).

²³³ Arend, *supra* note 95, pp. 10-12; Falk, *supra* note 95, pp. 119, 123; Turner, *supra* note 66, pp. 56-71; Dahm, *supra* note 160, p. 186; Berner, *supra* note 14, p. 328; Gray, *supra* note 56, p. 60.

²³⁴ Klein, *supra* note 49, pp. 633, 644-649; Rosenstock, *supra* note 52, p. 730; R. E. Gorelick, *Wars of National Liberation: Jus Ad Bellum*, 11 Case Western Reserve Journal of International Law 71 (1979), pp. 74, 76-77, 77-80; Krauss, *supra* note 19, p. 227; Turner, *supra* note 66, pp. 64-65; S. M. Schwebel, *Wars of Liberation – As Fought in U.N. Organs*, in J. N. Moore (ed.), *Law and Civil War in the Modern World*, The John Hopkins University Press, Baltimore: 1974, Ch. 17, p. 447; as he points out this argument was part of India's justification of its 1961 invasion of Goa, which at time was still a Portuguese colony. This reasoning was explicitly rejected by the USA's UN Ambassador during the subsequent debates.

²³⁵ Rosenstock, *supra* note 52, p. 730; Gorelick, *supra* note 234, p. 76.

²³⁶ Schmeltzer, *supra* note 66, pp. 99-100; Rosenstock, *supra* note 52, p. 730; Gorelick, *supra* note 234, p. 74.

²³⁷ Resolution 2918 (1972) referring to the national liberation movements of Angola, Guinea-Bissau, Cape Verde and Mozambique; Resolution 3111 (1973) referring to Namibia; Resolution 3113 (1973) referring once more to the Portuguese colonies; Resolution 3115 (1973) referring to Rhodesia; Resolution 3151 G (1973) referring to South Africa.

²³⁸ Gorelick, *supra* note 234, pp. 80-83; Krauss, *supra* note 19, p. 227; Turner, *supra* note 66, pp. 65-66; Gray, *supra* note 56, p. 61; Schwebel, *supra* note 234, pp. 450-451.

These arguments met with strong resistance on the part of the western states.²³⁹ They insisted that the UN Charter was applicable, and that the right of self-determination could not in any way circumvent or limit the ban on the use of force in Article 2 (4).²⁴⁰ Therefore they opposed attempts to explicitly legalize the use of force by national liberation movements and, even more so, attempts to legitimize external support for a military campaign.²⁴¹ Many western states viewed the term “war of national liberation” as merely an attempt by the socialist states to disguise their true intentions of installing communist regimes in the Third World.²⁴² Discussing Vietnam, for example, US Vice-President Humphrey declared in 1965:

South Viet Nam is the testing ground for the so-called ‘war of national liberation’ – a contest in which totalitarians believe they can baffle and defeat not only the forces of the Republic of South Viet Nam but also the forces of the most advanced of all nations. In South Viet Nam our adversaries seek to demonstrate decisively that arrogant militancy – and not peaceful coexistence – is the path to eventual Communist triumph.²⁴³

Nevertheless, the socialist and developing states managed to secure some successes at the General Assembly. While Resolution 1514 had already demanded that “all armed action or repressive measures of all kinds directed *against* dependent peoples shall cease”,²⁴⁴ it was in Resolution 2105 that the “legitimacy of the *struggle* by the peoples under colonial rule to exercise their right to self-determination and independence” was recognized, and that the provision of “material and moral assistance” to such “national liberation movements” was explicitly

²³⁹ Rosenstock, *supra* note 52, pp. 719-720, describes western resistance even against the inclusion, in the 1970 Declaration on Friendly Relations (GA Resolution 2625), of the “prohibition of the use of force against dependent people”; Falk, *supra* note 95, pp. 123-124, 128-129; Gorelick, *supra* note 234, pp. 74-75, 76-77, 80, 82; Krauss, *supra* note 19, p. 227; Gray, *supra* note 56, p. 60; Schwebel, *supra* note 234, p. 447.

²⁴⁰ Klein, *supra* note 49, p. 633; Rohlik, *supra* note 44, pp. 400, 407-409; Moore, *supra* note 17, p. 196; Gorelick, *supra* note 234, pp. 75-76, 80, 82; Schwebel, *supra* note 234, p. 447, points out that the USA’s UN Ambassador Adlai Stevenson rejected India’s justification of its invasion of the Portuguese colony of Goa in 1961 on that basis during the UN debates.

²⁴¹ Oglesby, *supra* note 17, pp. 39-40; Moore, *supra* note 17, p. 196; Gorelick, *supra* note 234, pp. 75-76, 80, 82.

²⁴² Falk, *supra* note 95, p. 123; Moore, *supra* note 143, p. 3.

²⁴³ Hubert Humphrey, US Vice President, at the 1965 Annual *National Governors’ Association Meeting*; *Memorable Quotes*; available at: <http://www.nga.org/cms/home/about/nga-annual--winter-meetings/page-nga-annual-meetings/col2-content/main-content-list/1965-annual-meeting.html> accessed October 26, 2011.

²⁴⁴ GA Resolution 1514 (1960), Article 4.

welcomed.²⁴⁵ This had been a compromise phrase, which tried to paper over the difference in attitude between western states on the one hand, and socialist and developing states on the other towards the legitimacy of the use of force by liberation movements. The question whether the “struggle” may be conducted by force was deliberately left unanswered.²⁴⁶

Finally, by the 1970s the socialist and developing states managed to achieve majorities for resolutions that explicitly allowed the use of force on the part of liberation movements. After Resolution 2621 (1970) referred to the “inherent right of colonial peoples to struggle by all necessary means at their disposal”, Resolutions 3070 (1973) and 3246 (1974) declared “armed struggle” to be a legitimate way for liberation movements to proceed.²⁴⁷

This seemingly startling success in establishing far-reaching rights for national liberation movements had, however, one serious defect: they were not supported by the western states, which either abstained or voted against the resolutions legitimizing the use of force.²⁴⁸ As General Assembly Resolutions have no legally binding character, they are dependent on near-unanimous votes of acceptance in order for states to be able to claim them to be reflective of universal *opinio juris*. The determined and consistent resistance by western states to the concept of wars of national liberation meant that the GA Resolutions were therefore not sufficient evidence of wide-spread *opinio juris*. Western opposition in fact proved the opposite, namely that the principles put forward by developing and socialist states were not viewed as reflective of customary international law by the developed states.²⁴⁹

As had already been the case during the debates on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter,²⁵⁰ this became evident once more in the discussions leading up to the passage, in December 1974, of the Definition of Aggression by the General Assembly.²⁵¹ Socialist and developing states realized that western opposition to the concept of wars of national liberation movements

²⁴⁵ GA Resolution 2105 (1965), Article 10.

²⁴⁶ Klein, *supra* note 49, p. 625; Gray, *supra* note 56, p. 60; Schwebel, *supra* note 234, pp. 453-454.

²⁴⁷ GA Resolution 2621 (1970), Article 2; Resolution 3070 (1973), Article 2; Resolution 3246 (1974), Article 3.

²⁴⁸ Klein, *supra* note 49, p. 632; Rohlik, *supra* note 44, pp. 407-409; Gorelick, *supra* note 234, p. 83; Gray, *supra* note 56, p. 62; Schwebel, *supra* note 234, pp. 448-457.

²⁴⁹ Rohlik, *supra* note 44, pp. 407-409; Gorelick, *supra* note 234, p. 83; Schwebel, *supra* note 234, pp. 454-456.

²⁵⁰ GA Resolution 2625 (1970).

²⁵¹ GA Resolution 3314 (1974); Rosenstock, *supra* note 52, pp. 731-732 (referring to near identical discussions surrounding the passage of Resolution 2625 (1970)); Krauss, *supra* note 19, pp. 227-228; Schwebel, *supra* note 234, pp. 448-454, 456; Schwebel outlines

had to be placated if the Definition of Aggression was to achieve a status that justified the claim it was reflective of customary international law. While western states were not able to achieve their goal of completely deleting any reference to liberation movements, socialist and developing states also had to agree that any reference to the use of force by liberation movements be removed.²⁵² As a result, Resolution 3314 in the end returned to the compromise phrase of 1965, whereby the right of people to “struggle” for independence and to receive support in that endeavour was recognized.²⁵³

Subsequent discussions demonstrated that this was interpreted in widely differing ways by various states: while western states vehemently argued that it remained impermissible to aid liberation movements militarily, developing and socialist states took the opposite view.²⁵⁴ Thus the discussions subsequent to the Resolution again serve to demonstrate that one section of the community of states, the western states, consistently argued that military aid to liberation movements was illegal.²⁵⁵ This consistent western opposition, led by the USA, meant that no norm in customary international law allowing military support of national liberation movements was ever created.²⁵⁶ As US Representative Gimer had already stated before the Legal Committee of the General Assembly in 1970, during a debate on the Declaration on Friendly Relations:

We agree, as the U.K. said, that states are not entitled ‘under the Charter, to intervene by giving military support or armed assistance in non-self-governing territories or elsewhere. The support ... states were entitled to give to peoples deprived of self-determination was ... limited to such support as was in

the relevant discussions on Resolution 2625 (1970) in detail, but also refers to the nearly identical discussions surrounding the passage of Resolution 3314 (1974); Rohlik, *supra* note 44, pp. 411-412; Gorelick, *supra* note 234, pp. 76, 83-84; Gray, *supra* note 56, pp. 60-62.

²⁵² Klein, *supra* note 49, pp. 632-633.

²⁵³ GA Resolution 3314 (1974), Definition of Aggression, Article 7.

²⁵⁴ Klein, *supra* note 49, p. 633; Rohlik, *supra* note 44, pp. 411-412; Gray, *supra* note 56, pp. 60-62; Rosenstock, *supra* note 52, pp. 731-732 (referring to nearly identical discussions surrounding the passage of Resolution 2625 (1970)). The compromise achieved was that a people subject to “forcible action” in its fight for self-determination was “entitled to seek and to receive support in accordance with the purposes and principles of the Charter”. The enduring disagreement as far as the interpretation of this phrase was concerned remained, namely, whether such support could go beyond political and moral support (western states) and include military aid (socialist and many developing states); Gorelick, *supra* note 234, pp. 85-87; Schwebel, *supra* note 234, pp. 453-454, 456.

²⁵⁵ Klein, *supra* note 49, pp. 651-652; Schwebel, *supra* note 234, pp. 450-451, 453, 454-455.

²⁵⁶ Rosenstock, *supra* note 52, p. 733; Rohlik, *supra* note 44, pp. 407-409, 411-412; Gorelick, *supra* note 234, pp. 83, 87 (referring in particular to US opposition), pp. 92-93; Krauss, *supra* note 19, p. 230; Schwebel, *supra* note 234, pp. 448-457.

accordance with the purposes and principles of the charter and was therefore controlled by the overriding duty to maintain international peace and security.' In short, the declaration does not constitute a licence for gun-running ...²⁵⁷

As a consequence of the above, it must be concluded that while the General Assembly cannot be said to have failed in its duty towards the Afghan mujahedeen, its Resolutions provide no support for a USA claim that its massive support of the mujahedeen with weapons and money was based on a legally recognized right to militarily support national liberation movements.

Reisman also severely undermines his own argument when he states that a declaration by the General Assembly that the mujahedeen's struggle was a "war of national liberation" might cause western states to look at the concept more favourably.²⁵⁸ This is an implicit confirmation that the norm Reisman seeks to rely on to justify US support of the mujahedeen did not exist.

Therefore it must be concluded that the right of self-determination, in combination with the concept of wars of national liberation, does not confer any right on states to militarily support such liberation movements. As a consequence, the USA could not successfully invoke such a right.

There is thus little doubt that the US support of the mujahedeen prior to the Soviet invasion violated the customary international law principle of non-intervention in a civil war; the intervention amounted to an unjustified interference in another state's internal affairs.²⁵⁹ The massive and decisive US support of the mujahedeen following the Soviet invasion was illegal under international law. The USA could not claim to be acting in collective self-defence, since it had received no valid Afghan request to that effect. It could also not rely on a right of counter-intervention, nor on a right of military support of national liberation movements, as neither had become part of customary international law.

The USA and its allies also chose to ignore General Assembly Resolution ES-6/2, which "appealed"

... to all States to respect the sovereignty, territorial integrity, political independence and non-aligned character of Afghanistan and to refrain from any interference in the internal affairs of that country.²⁶⁰

²⁵⁷ Statement by Mr. Gimer, US Alternate Representative to the UN General Assembly, before Committee VI (Legal), Declaration on Principles of Friendly Relations, September 24, 1970; 63 Department of State Bulletin, 1970, pp. 623-627, 626.

²⁵⁸ Reisman, *supra* note 141, p. 909.

²⁵⁹ Gray, *supra* note 56, p. 106, describes the USA's massive support for opposition groups in Angola, Cambodia, Nicaragua, and Afghanistan as coming "close to blatant disregard, if not rejection, of the legal principle of non-intervention."

²⁶⁰ GA Resolution ES-6/2 (1980), para. 3.

CONCLUSIONS AND REMARKS ON THE “ARAB SPRING”

The illegal Soviet and (mainly) American interventions in Afghanistan’s civil war ended in disaster for both superpowers.

The Soviet Union paid heavily for its attack on Afghanistan. The invasion proved to be disastrous for Soviet foreign policy, as it led not only to swift, near universal condemnation by other states, but also cost the country a lot of its support among the non-aligned states. Furthermore, the war proved unpopular at home and was costly both in terms of lost lives and money.²⁶¹

As concerns the illegal American involvement, the result is hardly any better. Although some Americans, like Brzezinski,²⁶² claim that the Soviet defeat in Afghanistan was an important milestone in the downfall of communism, the price paid by the Americans was high. Muslim fanatics, violently opposed to America, democracy, and western values in general, some of whose Arab supporters would later return to kill thousands of civilians in New York, were heavily subsidized by American taxpayers. The contribution of the Soviet defeat in Afghanistan to the downfall of communism is, on the other hand, somewhat tenuous: given the severe economic crisis that had affected the socialist bloc by the mid-1980s, it seems likely the system would have crumbled without America’s heavy involvement in Afghanistan. The former British Prime Minister Tony Blair has concluded:

I examined how in Afghanistan we had supported what became the Taliban in order to stop the Russians, precisely in the name of managing the situation; ... and how in each case the consequence of such ‘realism’ had been simply to create a new, and potentially worse, source of instability.²⁶³

Afghanistan is thus a case study that serves to demonstrate the realism behind the international law prohibition against external interference in civil wars. For both protagonists, non-interference in Afghanistan’s civil war would have been the preferable, lower cost option in the long run.

More recently, interventions in the context of the “Arab Spring” have come under discussion. Although no final conclusions can yet be drawn as to the success

²⁶¹ Galster, *supra* note 2, p. 24; Kuperman, *supra* note 183, pp. 236, 239; Rasanayagam, *supra* note 2, p. 115; von Borcke, *supra* note 138, p. 169; Roy, *supra* note 147, p. 33.

²⁶² Z. Brzezinski, Carter’s National Security Advisor at the time of the Soviet invasion of Afghanistan, *Oui, la CIA est entrée en Afghanistan avant les Russes...* (Yes, the CIA did enter Afghanistan before the Russians did...); Interview given to Vincent Jauvert, *Le Nouvel Observateur*, 15.01.1998; an English translation is available at: <http://www.globalresearch.ca/articles/BRZ110A.html> accessed October 26, 2011

²⁶³ T. Blair, *A Journey*, Hutchinson, London: 2010, p. 369.

of these foreign interventions, the first tentative predictions on the outcome can be made. These suggest that, just as in Afghanistan, the foreign interventionists in the Arabic uprisings and/or civil wars may find it hard to realize their goals.

In March 2011 Saudi Arabia, with the support of other Gulf Cooperation Council member states, decided to intervene militarily in Bahrain's internal conflict. The Saudi government seemed to rely exclusively on the Bahraini government's request.²⁶⁴ The Bahrain government, without providing any evidence for its claim, also implicated Iranian involvement in the uprising. Many commentators have, however, suggested that the Bahraini reliance on foreign military support to suppress parts of its own population will most likely backfire.²⁶⁵ Not only was the move, as has been explained in this article, contrary to international law, but the crisis in Bahrain, caused by the wide-spread feeling among the Shiite majority of being discriminated against by the minority Sunni rulers, has not been and will not be resolved by foreign military intervention. The only likely result is a radicalisation of the opposition, which in the future may be more than willing to accept foreign support.

The decision by some NATO member states, to commence an air campaign in Libya, also received widespread publicity. Shocked by allegations that the Ghaddafi regime may be planning to bomb its rebelling citizens, the Security Council, acting under Chapter VII of the Charter, authorized the UN member states to "take all necessary measures... to protect civilians and civilian populated areas," and to impose a no-fly-zone.²⁶⁶ A bombing campaign, carried out mainly by NATO air forces, was initiated and lasted for six months. The Gaddafi regime was overthrown, and Gaddafi himself was captured and killed by the rebels.

This military intervention in Libya's civil war is controversial in many ways. Some have argued that the Security Council's premise, namely that Gaddafi was going to bomb his own population, was incorrect. In a detailed analysis of the situation in the North African country Hugh Roberts has argued that there is not a shred of objective evidence that would confirm this assertion. As he explains it,

²⁶⁴ *GCC troops dispatched to Bahrain to maintain order*, Al Arabiya News, 15.03.2011; available at: <http://www.alarabiya.net/articles/2011/03/14/141445.html> accessed November 28, 2011.

²⁶⁵ F. Zakaria, *A New Middle East*, TIME Magazine, 16.05.2011, p. 18; E. Bronner, *Security forces in Bahrain expel protesters from heart of the capital*, International Herald Tribune, 18.03.2011, pp. 1, 6; E. Bumiller, *Saudis and U.S. seek to dispel tensions*, International Herald Tribune, 07.04.2011, p. 6; P. Cockburn, *The divided Kingdom*, The Independent (Viewpaper), 08.08.2011, pp. 2-3; A. Shadid, *Bahrain emerges as cornerstone of counterrevolution*, International Herald Tribune, 16.09.2011, p. 5; Shadid concludes that the "harsh crackdown" had turned Bahrain "into a tinderbox."

²⁶⁶ UN Security Council Resolution 1973 (2011).

the situation in Libya was a typical civil war scenario, with each side – both the government and the rebel forces – resorting to military force. On February 21, 2011, international news stations informed viewers that the Gaddafi regime was “using its air force to slaughter peaceful demonstrators.” Roberts points out there was no evidence of this, and, according to Human Rights Watch, the total death toll in Libya between February 15 and February 21 was “only” 233, a lower number than during uprisings in Tunisia, Egypt, and Algeria, where western states felt no necessity to intervene forcefully.²⁶⁷

Furthermore, doubts have arisen as to the legality of this intervention under international law. Reinhard Merkel has argued that, although the UN was claiming that its only aim in Resolution 1973 was to protect civilians, in reality the world community was taking sides in a civil war. He therefore views Resolution 1973 as inconsistent in and of itself with international law, because it violated Libya’s sovereignty. In his view, only if events comparable to genocide, such in Rwanda in the early 1990s, were taking place, could a different assessment be justified.²⁶⁸

Even if, due to the Security Council’s wide discretion when acting under Chapter VII, Reinhard Merkel’s view may not be wholly convincing, there can be little doubt that the way some NATO states (with the support of token Arab forces) implemented Resolution 1973 was in violation of the resolution itself, and thus of international law.²⁶⁹ Far from simply protecting civilians in an ongoing civil war, the intervening states successfully engineered regime change by toppling Ghaddafi’s government, and thus forcefully took sides in an internal conflict. Such action was not justified by Resolution 1973.

²⁶⁷ H. Roberts, *Who said Gaddafi had to go?*, London Review of Books, 17.11.2011; available at: <http://www.lrb.co.uk/v33/n22/hugh-roberts/who-said-gaddafi-had-to-go/print> accessed November 29, 2011, pp. 1-21.

²⁶⁸ R. Merkel, *Völkerrecht contra Bürgerkrieg, Die Militärintervention gegen Gaddafi ist illegitim* (International Law v. Civil War, The military intervention against Gaddafi is not legitimate), *Frankfurter Allgemeine Zeitung*, 22.03.2011; available at: <http://www.faz.net/aktuell/feuilleton/voelkerrecht-contra-buergerkrieg-die-militaerintervention-gegen-gaddafi-ist-illegitim-1613317.html> accessed November 29, 2011, pp. 1-4.

²⁶⁹ *Putin attacks Britain and the US for ‘violating Libya resolution’*, Mary Dejevsky, *The Independent*, 12.11.2011; available at: <http://www.independent.co.uk/news/world/europe/putin-attacks-britain-and-us-for-violating-libya-resolution-6261163.html> accessed November 25, 2011; Putin accused the UK and the USA of “taking the side of one of the warring parties”, thereby “committing a crude violation of the UN resolution.”; *China expresses regret for military strike against Libya; AU [African Union] panel says it’s opposed to foreign military intervention in Libya*: media report; both [xinhuanet.com](http://news.xinhuanet.com); both 20.03.2011; available at: http://news.xinhuanet.com/english2010/china/2011-03/20/c_13788512.htm; http://news.xinhuanet.com/english2010/world/2011-03/20/c_13788058.htm both accessed December 1, 2011.

Arguments to the contrary, i.e. that the removal of Ghaddafi's regime was the only way to permanently protect civilians, fall short of being convincing. As Hugh Roberts has explained, this assertion is also unsupported by the evidence. In fact, it was Ghaddafi's regime that on four occasions offered a cease-fire, an offer the rebels repeatedly rejected. Furthermore, despite there being reports of atrocities being committed by rebel forces against civilians, there was not one report of intervention by the NATO states to protect those numerous civilians who still supported Ghaddafi. It became obvious that only those civilians who sided with NATO's view of the internal conflict deserved protection.²⁷⁰ Furthermore, before the Libyan government had time to respond to the UN Resolution, many western politicians, including British Defence Secretary Fox, were already calling for Ghaddafi's removal. There can thus be no doubt that the way the military intervention in Libya was conducted amounted to an illegal intervention in a civil war. Not Libyans, but western states decided who should rule that country in the future.

Although it is too early to predict the final outcome of this intervention, early indications are that western states were, once again, mistaken. There are reports of wide-spread human rights abuses under the new regime.²⁷¹ It remains unclear who actually rules Libya, and whether the new regime actually has majority support. Lastly, the chances for a democratic future for Libya are not promising. The decision by the new rulers to introduce the Sharia as basis of all law in Libya, without Libyans having had a chance to express their views on the matter, bodes ill as far as future democratic development is concerned. Thus the "liberation" of Libya may well end up resulting in nothing more than the replacement of one dictatorship by another.

The rule of non-intervention in a civil war has been developed because experience has shown that intervention on either side often, as in Afghanistan's case, leads to counter-interventions, which in turn can lead to international armed conflicts. Furthermore, a party to a civil war that cannot win on its own is unlikely to be able to provide stable government in the future, leading to never-ending interventions and possibly to further conflict as well. In Afghanistan, both its communist government as well as the disparate mujahedeen groups fighting against it have proved unable to govern without foreign support. Lastly, outside interventionists often do not understand the parties, or the policies they are supporting, because they are unaware of the internal political and cultural dynamics. In Afghanistan,

²⁷⁰ Roberts, *supra* note 267, pp. 1-21.

²⁷¹ *Revealed: Libya's new reign of terror; UN: abuses of human rights rife in lawless new Libya*; K. Sengupta, *The Independent*, 24.11.2011; pp. 1-3.

this was particularly evident in the American support of the most radical Muslim groups against the Soviets.

Unfortunately, politicians seem to be unwilling to heed these lessons. As recent events in Bahrain and Libya have demonstrated, the urge to intervene is strong, even though the outcome is at best uncertain, and most likely negative. International law could offer a more realistic guide to a successful foreign policy than the often irrational and unrealistic policies adopted by state leaders in violation of it. For both the USSR and the USA, the appropriate legal course of action, namely non-interference in Afghanistan's civil war, would have been the preferable, lower-cost option in the long run, as it would probably have been for the Afghans themselves as well. Sadly, it would not be surprising if the same conclusion will in the future have to be drawn in respect of Bahrain and Libya.