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INTERNATIONAL LAW GOVERNING AID TO OPPOSITION GROUPS IN CIVIL WAR: RESURRECTING THE STANDARDS OF BELLIGERENCY

Robert W. Gomulkiewicz*

I. INTRODUCTION

Civil wars and wars of revolution are a part of America's past and its foreign policy present and future. Since World War II the world's wars have been largely wars of insurgency.¹ The destructive capacity of nuclear weapons makes total world war remote.² However, the breakdown of colonial empires, dissatisfaction with the distribution of wealth, and the rise of people's expectations have made civil war a fact of twentieth century politics.³ Superpowers, in competition for allies and influence, have often armed these conflicts, leading to an increase in the duration and destructiveness of civil wars.⁴

Despite its revolutionary inception, the United States has often sided with the incumbent government in these wars.⁵ In the 1980's, however, the United States has increasingly funded armed opposition groups. Aid for groups such as the Afghan mujahedeen has received bipartisan support; assistance to the *contra* rebels has met with strong Congressional and grassroots opposition.

The United States has often looked to international law to justify its assistance of armed opposition groups. International law includes numerous provisions that regulate the conduct of states in times of

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1. J. BOND, *THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR* 33 (1974); Falk, *Janus Tormented: The International Law of Internal War*, in *INTERNATIONAL ASPECTS OF CIVIL STRIFE* 185 (J. Roseneau ed. 1964). Some estimate that 80-90% of the victims of armed conflict after World War II were victims of noninternational conflicts. See G. VON GLAHN, *LAW AMONG NATIONS* 614 (5th ed. 1986).

2. Farer, *Intervention in Civil Wars: A Modest Proposal*, in 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 509, 510-11 (R. Falk ed. 1968); Luard, *Civil Conflicts in Modern International Relations*, in *THE INTERNATIONAL REGULATION OF CIVIL WARS* 7, 9 (E. Luard ed. 1972).

3. Luard, *supra* note 2, at 10-11.

4. *Id.* at 15.

5. R. TABER, *THE WAR OF THE FLEA: A STUDY OF GUERRILLA WARFARE THEORY AND PRACTISE* 174 (1965).

war.⁶ These laws, however, are more relevant to world wars with many states openly participating, than to civil wars.⁷ Moreover, governments regularly neglect those traditional laws which concern the legality of aiding an armed opposition group.⁸

There is a need to rethink and restate the laws of war as they relate to civil war. The reformulation must take account of present realities, the most important of which is the interference of outside governments in civil strife. The challenge is to create a rule of law that channels behavior in a constructive way.⁹ A rule requiring abstinence, no matter how well intentioned, will likely be disregarded.¹⁰

One important standard is the traditional law of belligerency. Although the doctrine has fallen into disuse, the belligerency standards are a good test of the legitimacy of an armed opposition group as an actor for social, political, or religious change on behalf of dissatisfied citizens. Nations need not return to formal declarations of belligerency. The belligerency criteria, however, should be resurrected as a threshold test for assisting armed opposition groups. Use of the belligerency standards in this way generally assures that before the group can receive international assistance, it must attain widespread popular support and operate with a respect for human rights.

In the United States, Congress should play a lead role in implementing standards which prescribe when the United States may aid armed opposition groups. Congress is the actor in foreign policy most apt to use international law as a restraint on warmaking.¹¹ To be effective in

6. See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3115, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3219, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Prisoners in Time of War, Aug. 12, 1949, 6 U.S.T. 3517, T.I.A.S. No. 3365, 75 U.N.T.S. 287; Hague Convention with Respect to the Laws and Customs of War on Land, 1899, 32 Stat. 1803, T.S. No. 403, 26 Martens Nouveau Recueil (ser. 2) 949; Hague Convention Respecting the Laws and Customs of War on Land, 1907, 36 Stat. 2277, T.S. No. 539, 3 Martens Nouveau Recueil (ser. 3) 461.

7. See Falk, *supra* note 1 at 185-86.

8. See J. BOND, *supra* note 1, at 33-34; Farer, *supra* note 2, at 514-16; Higgins, *International Law and Civil Conflict*, in THE INTERNATIONAL REGULATION OF CIVIL WARS 169, 172 (E. Luard ed. 1972).

9. R. FALK, THE INTERNATIONAL LAW OF CIVIL WARS 1, 10 (R. Falk ed. 1971) (introduction).

10. Farer, *supra* note 2, at 517-18.

11. See Kreisberg, *Does the U.S. Government Think that International Law Is Important?*, 11 YALE J. INT'L L. 479, 482-83 (1986); Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 118 (1986).

this capacity, Congress needs standards that allow the United States to defend its interests in the contemporary world without compromising its respect for international law.¹² The belligerency test strikes this balance. Congress needs to have standards in place before executive action. The belligerency standards should be adopted by Congress as permanent threshold test criteria, employed whenever the executive wishes to assist armed opposition groups in civil war.

II. THE LAWS OF WAR: ARMED OPPOSITION IN A LEGAL CONTEXT

A. *Evolution of the Laws of War*

International law of war has a history of fits and starts. Initially, international law sought to restrain the use of force under the doctrine of “just wars.”¹³ With roots in Roman Catholic thought, this doctrine describes the circumstances in which it is just to resort to war to solve an international conflict. This notion was difficult to enforce and was subject to the subjective interpretation of every head of state. The “just war” period was followed by an era in which war simply became a fact of life in international relations.¹⁴

Perspectives changed somewhat after the destruction of World War I. Nations attempted to prevent future wars by concluding treaties, such as the Kellogg-Briand pact, which outlawed resort to war to resolve international controversies.¹⁵ The League of Nations instituted procedural checks in an attempt to restrain the use of force, for the most part without success.¹⁶

Following the second World War, member nations drafted Article 2(4) of the United Nations Charter to prohibit the use of force, except for individual or collective self-defense under Article 51.¹⁷ The General Assembly has refined the definition of “use of force” in resolutions such as the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance

12. Falk, *supra* note 1, at 186–87.

13. See Moore, *Legal Standards for Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 191, 192 (1983).

14. *Id.*

15. Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57; see Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, in PROCEEDINGS OF THE SEVENTY-EIGHTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 74, 75 (1984).

16. Moore, *supra* note 13, at 193.

17. See *id.*

with the Charter of the United Nations.¹⁸ Recently, the International Court of Justice ("I.C.J.") in the *Military and Paramilitary Activities in and Against Nicaragua* case ("*Paramilitary Activities*" case) ruled that, apart from Articles 2(4) and 51 of the United Nations Charter, customary international law prohibits the use of force against another nation, except in self-defense.¹⁹ The I.C.J. also ruled that the use of force against a country violates customary international law prohibiting intervention in the internal affairs of a country.²⁰

B. *Traditional Law of Civil War*

Traditional international law of war puts internal wars into three categories: Rebellion, insurgency, and belligerency.²¹ Rebellions are small-scale, localized conflicts which are usually solved with police measures.²² A state of belligerency is on the opposite end of the pole. An insurgency is a conflict that lies somewhere between a rebellion and a state of belligerency.²³ A state of belligerency may be declared when four elements are met: One, the conflict is more widespread than a local dispute; two, the opposition controls a significant portion of territory; three, the opposition administers the occupied land; and four, the opposition is obeying international laws of war.²⁴ A nation may recognize a condition of belligerency either by state action or by a formal declaration.²⁵ Outside nations may also declare neutrality during a state of belligerency so that they are entitled to protection of the laws of neutrality during times of war.²⁶

18. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), U.N. Doc. A/8028 (1971), reprinted in 9 INT'L LEGAL MATERIALS 1292 (1971).

19. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 99-102 (Judgment on the Merits of June 27).

20. *Id.* at 107-08.

21. 2 L. OPPENHEIM, INTERNATIONAL LAW 249-50 (H. Lauterpacht 7th ed. 1952).

22. Boals, *The Relevance of International Law to Internal War in Yemen*, in THE INTERNATIONAL LAW OF CIVIL WARS, *supra* note 9, at 303, 313. A rebellion usually is a minor instance of internal war. Rebellions include violent protests involving a single issue (Indian language riots; Soviet food riots) or an uprising so rapidly suppressed as to warrant no acknowledgment of its existence at an international level (East European rebellions against Soviet domination). Falk, *supra* note 1, at 199.

23. Boals, *supra* note 22, at 313-14. A state of insurgency might also exist because nations failed to formally declare a state of belligerency. See E. LUARD, CONFLICT AND PEACE IN THE MODERN INTERNATIONAL SYSTEM 155 (1968).

24. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 270-71 (1947); 2 L. OPPENHEIM, *supra* note 21, at 249-50; G. VON GLAHN, *supra* note 1, at 617.

25. Falk, *supra* note 1, at 203. A nation can recognize a state of belligerency by respecting a blockade instituted by one of the combatants.

26. *Id.*; E. LUARD, *supra* note 23, at 154.

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The categories are significant because they determine whether it is legal to give assistance to an armed opposition group. Governments are prohibited from giving aid to rebels during a local rebellion, although they may give aid to the incumbent government.²⁷ An insurgent group is deserving of “recognition” under international law.²⁸ Outside governments, however, are only permitted to give assistance to the incumbent government and not the insurgents,²⁹ although some scholars contend that aid to the incumbent government should be frozen or terminated as well once a situation of insurgency exists.³⁰ When a state of belligerency exists, an outside government may give formal diplomatic recognition to the belligerent group and may give it military or economic aid.³¹

Although the distinctions between types of civil wars are longstanding precepts of international law, the last time that they were seriously applied was in the American Civil War.³² Nations have ignored the formality of declaring a state of belligerency in recent civil wars, including those in the Congo,³³ Yeman,³⁴ and Algeria.³⁵ This has led scholars to assert that the doctrine of belligerency does not comport with the realities of modern civil war.³⁶

Commentators criticize use of the belligerency standards because there is no central international body to judge or declare when a state of belligerency exists.³⁷ They also criticize the notion that it is legal to give aid to an incumbent government of questionable legitimacy, while aid to an insurgent group is prohibited.³⁸ Nations have intervened in civil strife when it suits them, regardless of the prerequisites for sup-

27. E. LUARD, *supra* note 23, at 154.

28. H. LAUTERPACHT, *supra* note 24, at 270–71.

29. E. LUARD, *supra* note 23, at 155.

30. See Moore, *A Theoretical Overview of the Laws of War in a Post-Charter World, with Emphasis on the Challenge of Civil Wars, “Wars of National Liberation,” Mixed Civil-International Wars, and Terrorism*, 31 AM. U.L. REV. 841, 845 (1982).

31. H. LAUTERPACHT, *supra* note 24, at 175–76; see also Boals, *supra* note 22, at 313; Fraleigh, *The Algerian Revolution as a Case Study in International Law*, in THE INTERNATIONAL LAW OF CIVIL WARS, *supra* note 9, at 179, 210–15. Some writers contend that once the belligerency standards exist, states are under a duty to make a declaration of belligerency. H. LAUTERPACHT, *supra* note 24, at 175–76, 240–43.

32. Wright, *The American Civil War*, in THE INTERNATIONAL LAW OF CIVIL WARS, *supra* note 9, at 30, 49.

33. McNemar, *The Postindependence War in the Congo*, in THE INTERNATIONAL LAW OF CIVIL WARS, *supra* note 9, at 244.

34. Boals, *supra* note 22, at 313–14.

35. Fraleigh, *supra* note 31, at 217.

36. Higgins, *supra* note 8, at 171; Luard, *supra* note 2, at 20.

37. Falk, *supra* note 1, at 206; Higgins, *supra* note 8, at 171.

38. Farer, *supra* note 2, at 514–16.

porting a belligerent. Commentators declare that declarations of belligerency have become a dead letter in international law.³⁹

The International Court of Justice's opinion in the *Paramilitary Activities* case does not address the doctrine of belligerency. The court did not settle the question of when international law permits states to assist armed opposition groups. The court, however, did make several significant pronouncements on intervention in civil strife. It held that no general right to intervene in support of an opposition group exists in international law.⁴⁰ The I.C.J. ruled that arming and training rebel groups amounts to a "threat or use of force" under customary international law, but solely supplying funds to a rebel group does not.⁴¹ Both types of assistance, however, breach the customary law prohibiting intervention in the internal affairs of a country.⁴² In addition, the court held that, under customary international law, providing weapons or other support to a rebel group does not constitute an "armed attack" against the incumbent government which would permit the incumbent government to resort to self-defense.⁴³

C. *The Search for New Standards To Govern Civil War*

The demise of the doctrine of belligerency and the proliferation of intervention in civil strife have prompted international law scholars to search for new standards to govern third country intervention in civil war, including a call for new conferences on the law of war to deal with the problem.⁴⁴ Many third world nations and Soviet bloc countries contend that intervention is justified to oust colonial powers and racist regimes.⁴⁵ They rely on the provision of the United Nations Charter that guarantees the self-determination of peoples. Self-determination has found expression in numerous United Nations General Assembly Resolutions, as well as the 1977 Geneva Protocols on the Humanitarian Law of Armed Conflict.⁴⁶ The I.C.J. in the *Paramili-*

39. J. BOND, *supra* note 1, at 33-34; Higgins, *supra* note 8, at 171.

40. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 109-10 (Judgment on the Merits of June 27).

41. *Id.* at 119.

42. *Id.* at 124.

43. *Id.* at 103-04.

44. See J. BOND, *supra* note 1, at 194. The conferences that drafted the Protocols to the Geneva Conventions did not take up this task. See Gasser, *International Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 31 AM. U.L. REV. 911, 912 (1982).

45. Beres, *Ignoring International Law: U.S. Policy on Insurgency and Intervention in Central America*, 14 DEN. J. INT'L L. & POL'Y 75, 79-80 (1985).

46. See, e.g., G.A. Res. 2383, 23 U.N. GAOR Supp. (No. 18), U.N. Doc. A/7218 (1968); G.A. Res. 3103, 28 U.N. GAOR Supp. (No. 30), U.N. Doc. A/9030 (1973); *Diplomatic*

tary Activities case alluded to interventions to oust colonial powers but did not rule on or elaborate on such an exception to the general rule of nonintervention in internal disputes.⁴⁷

Some writers contend that the standard of intervention should, in part, depend upon whether the civil war occurs in a country's sphere of influence.⁴⁸ Other commentators look to more mechanical and objective tests for determining whether a grant of aid to an armed opposition group is lawful. For example, the doctrine of "counter-intervention" has been recognized as an emerging law of intervention in civil strife.⁴⁹ Under counterintervention, if a state intervenes on behalf of one side, other states are free to provide assistance of an equal nature to the opposing side to counter the effect of the initial grant.

International law could also set caps on the type and quantity of assistance provided both to the opposition and to the incumbent government. For example, it might be appropriate to provide military training and noncombat advisors, but not to participate directly through the use of troops or transport crafts.⁵⁰ Some scholars contend that all aid, to both the opposition and the incumbent, should be frozen once a genuine internal conflict begins.⁵¹

Legal standards are ineffective unless they can minimize the discretion of individual nations. Thus, many encourage increased use of supranational organizations to police compliance with whatever norms are agreed upon to govern international intervention in civil

Conference on Reaffirmation of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II Additional to the Geneva Conventions, 32 U.N. GAOR Supp. (No. 45), U.N. Doc. A/32/144, reprinted in 16 INT'L LEGAL MATERIALS 1391 (1977). The Reagan administration has recommended against ratification of Protocol I, in large part due to the Protocol's treatment of wars of national liberation. See Letter of Submittal from the Secretary of State, Dec. 13, 1986, reprinted in 26 INT'L LEGAL MATERIALS 563 (1987); see also Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA PAC. BASIN L.J. 55, 68 (1984).

47. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 108-10 (Judgment on the Merits of June 27).

48. Falk, *supra* note 1, at 237.

49. See *Id.* at 207; Higgins, *supra* note 8, at 176-77; see also Farer, *supra* note 2, at 518. Farer contends that we should legitimate assistance short of tactical military support, either to incumbent governments or rebels. But he would absolutely prohibit commitment of combat troops, battlefield advisors, or volunteers, no matter how few or how negligible their effect. Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 HARV. L. REV. 511, 532-36 (1969).

50. See Sohn, *Gradations of Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 225, 227-28 (1983).

51. See Moore, *A Theoretical Overview of the Laws of War in a Post-Charter World, with Emphasis on the Challenge of Civil Wars, "Wars of National Liberation," Mixed Civil-International Wars, and Terrorism*, 31 AM. U.L. REV. 841, 845 (1982).

wars.⁵²

Policy makers in the United States have also searched for legal justifications to explain their recent grants of assistance to various opposition groups. Particularly with respect to aid to the *contra* rebels in Nicaragua, the debate over the legality of United States support has been heated. The United States government argues that its aid to the *contras* is based on the idea of collective self-defense.⁵³ The United States government contends that because Nicaragua is funding revolutionaries against various Central American governments, the United States may fund the *contras* against the Nicaraguan government.⁵⁴ In addition, the controversial doctrine of humanitarian intervention has been raised as a possible justification for intervention in civil war, primarily with respect to aid to Miskito indian groups who oppose the Sandinista government.⁵⁵

Officials in the Reagan administration have recently contended that the United States is justified in giving aid to opposition groups that are fighting to install a democratic government in their country.⁵⁶ This theory is commonly called the "Reagan doctrine." Based on the Reagan doctrine, the President has asked for funding for opposition groups in Angola, Kampuchea, and Afghanistan.⁵⁷

III. CRITICISM OF THE PROPOSED STANDARDS FOR CIVIL WAR

The new analyses of the law of civil strife have fallen short of dramatically improving the traditional laws of war.⁵⁸ Grants of assistance to peoples struggling for self-determination draw some support from codification of the right to self-determination in numerous multilateral conventions.⁵⁹ Those conventions, however, do not explicitly validate outside aid to achieve the right. If international law permits

52. See Falk, *supra* note 1, at 227; Higgins, *supra* note 8, at 178-79.

53. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 102 (Judgment on the Merits of June 27).

54. Joyner & Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621, 651-67 (1985); Comment, *The Legal Implications of United States Policy Towards Nicaragua: A Machiavellian Dilemma*, 22 SAN DIEGO L. REV. 895, 929-36 (1985); see Motley, *Is Peace Possible in Central America?*, DEP'T ST. BULL., Mar. 1984, at 67-69.

55. Joyner & Grimaldi, *supra* note 54, at 667-70.

56. See Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 142-44 (1986). For a spirited exchange on the Reagan Doctrine, see generally TAKING THE STAND: THE TESTIMONY OF LIEUTENANT COLONEL OLIVER L. NORTH (1987).

57. See *infra* notes 142-51 and accompanying text.

58. See Falk, *supra* note 1, at 188, 191.

59. Cassese, *supra* note 46, at 68-69.

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those struggling for self-determination to receive outside assistance in their struggle, self-determination is afforded special status over the struggle for other basic human rights, such as the right to political or religious freedom, where assistance is not sanctioned. Those seeking to legitimize intervention on behalf of rebels fighting for self-determination are in some measure returning to the days of “just wars.”⁶⁰

A second problem with permitting assistance to peoples struggling for self-determination is that the right itself is ill-defined and subject to manipulation by states that desperately want to justify intervention. It is often open to question as to whether the opposition group is fighting for those who qualify as a “peoples” under international human rights law, or whether the group is a legitimate representative of a qualified “peoples.” The problem of definition also applies to the purported right to assist groups seeking to throw off a “racist government.” Beyond the core problem of defining racism, it may be difficult to determine whether a racist regime is one that has laws institutionalizing discrimination, or whether government action or inaction short of that would be sufficient.⁶¹

The problem of permitting nations to exercise too much discretion might be remedied if the judgment regarding intervention were placed in the hands of a supranational organization such as the United Nations. This recommendation, however, is beset with difficulties as well. The demise of the effectiveness of the United Nations in war and peace matters hardly bears repeating.⁶² Confidence in supranational organizations is on the wane, not on the rise, in the latter part of the twentieth century.

If decisions concerning the legitimacy of intervention were left to the Security Council, the decisions seem destined to fall prey to the same sort of deadlock that has prevailed in the Council over recent cases of use of force.⁶³ Western nations would likely object to determinations on intervention being made in the General Assembly where they are hopelessly outnumbered and could be bullied by third world

60. *Id.*; Moore, *supra* note 13, at 195–96.

61. *See generally* Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 150, 150–63 (I. Brownlie 2d ed. 1981).

62. *See* E. LUARD, *supra* note 23, at 157–61; Higgins, *supra* note 8, at 178–80; Luard, *supra* note 2, at 23–25; *see also* J. CROSS, *CONFLICT IN THE SHADOWS: THE NATURE AND POLITICS OF GUERRILLA WARFARE* 158–60 (1963) (United Nations has difficulty coping with conflict by or against states of major power blocs and with unconventional wars).

63. *See supra* note 62; McDougal, *Law and Minimum World Public Order: Armed Conflict in Larger Context*, 3 UCLA PAC. BASIN L.J. 21, 31 (1984).

states and the Eastern bloc.⁶⁴ Likewise, nations from all parts of the globe have eschewed submitting matters of war and peace to the International Court of Justice.⁶⁵

The various objective standards that have been proposed to circumscribe intervention in civil wars, such as “counterintervention” and caps on the quality and quantity of assistance, arguably have positive qualities. They remove political value judgments from the evaluation of whether intervention is lawful. The rules apply to civil wars across the board, regardless of political orientation. The rules implicitly acknowledge that intervention is a fact of life and that it is the role of international law to describe the content of intervention, rather than wish it away.⁶⁶

The proposed objective standards, however, have their limitations. The right to counterintervention merely recognizes the present reality of international participation in national wars: when one superpower intervenes on behalf of either the incumbent government or the opposition, another superpower will intervene on the other side to prevent the country from falling into the “enemy camp.” The law of counterintervention does nothing to delimit the incidence or scope of intervention. The same is true of the school that would tolerate interventions within a superpower’s sphere of influence.

Counterintervention, coupled with proposed limits on the quantity and type of assistance, moves in the direction of describing some limit to intervention. For example, counter-assistance could be limited to the amount given to the other side, with those aiding the incumbent required to freeze aid at pre-civil war levels to prevent escalation. While it makes some theoretical sense for international law to equalize the war in terms of outside assistance, permitting “the best man to win,” the equalization standard runs counter to the reason for outside intervention in the first place. An outside nation generally intervenes because it wants its side to prevail. The incentive is to give aid so that the opposition ally will gain the upper hand or the incumbent government ally will successfully squelch unrest, not to equalize the odds. Moreover, the difficulty of monitoring the counterintervention and the levels and types of aid given raises workability problems.

64. See generally Higgins, *supra* note 8, at 178–80.

65. Most recently Iran, and then the United States. See generally Comment, *Reaccepting the Compulsory Jurisdiction of the International Court of Justice: A Proposal for a New United States Declaration*, 61 WASH. L. REV. 1145 (1986) (United States joins countries such as the Soviet Union, the Peoples Republic of China, and Iran in rejecting the Court’s jurisdiction).

66. See, e.g., Falk, *supra* note 1, at 207–08; Farer, *supra* note 2, at 517–18.

IV. CRITICISM OF THE UNITED STATES'
JUSTIFICATIONS FOR SUPPORT OF OPPOSITION
GROUPS: THE *CONTRAS* AS AN EXAMPLE

The United States' justifications for lending assistance to the rebels in Nicaragua have come under attack from scholars and the International Court of Justice. If the scale of human rights abuses against the Miskito Indians was egregious, the United States might intervene on the basis of humanitarian intervention.⁶⁷ Recent evidence, however, seems to suggest that the abuses have abated significantly.⁶⁸ Moreover, the intervention would have to be in strict adherence to the guidelines for humanitarian intervention,⁶⁹ including the provision that the intervention not be designed to overthrow the authority structure of the incumbent government.⁷⁰ Indeed, the United States has been reluctant to couch its support of the rebels in terms of humanitarian intervention, perhaps fearing that it will set a precedent for other nations to intervene at other times, ostensibly for humanitarian motives.⁷¹

The International Court of Justice, applying customary international law, has rejected the United States' claim that United States aid to the *contras* is legitimate under the doctrine of collective self-defense.⁷² The court rejected the United States' position for several reasons. First, the right of self-defense exists only in response to an armed attack. The court ruled that providing assistance to opposition groups, even arms and logistical support, does not amount to an

67. Joyner & Grimaldi, *supra* note 54, at 655-57; see Ryan, *Nicaragua Still Denies Indian Rights*, Seattle Times, Mar. 10, 1987, at A12, col. 1. *But see* Burke, *The "Genocide" in Nicaragua*, Seattle Times, Apr. 27, 1987, at A13, col. 1 (calling alleged Sandinista genocide of Miskito Indians a CIA hoax). There is some dispute among scholars as to the legitimacy of the doctrine of humanitarian intervention. Compare Brownlie, *Humanitarian Intervention in LAW AND CIVIL WAR IN THE MODERN WORLD* 217, 217-28 (J. Moore ed. 1974) with Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD*, *supra*, at 229, 229-51.

68. See Burke, *The "Genocide" in Nicaragua*, Seattle Times, Apr. 27, 1987, at A13, col. 1.

69. Beres, *supra* note 45, at 78-79.

70. Joyner & Grimaldi, *supra* note 54, at 656.

71. *Id.* at 657.

72. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 146 (Judgment on the Merits of June 27). For a discussion of the merits and demerits of the United States' claim of self-defense, see Friedlander, *Confusing Victims and Victimizers: Nicaragua and the Reinterpretation of International Law*, 14 DEN. J. INT'L L. & POL'Y 87, 92-93 (1985); Reichler and Wippman, *U.S. Armed Intervention in Nicaragua: A Rejoinder*, 11 YALE J. INT'L L. 462 (1986); Rostow, *Nicaragua and the Law of Self-Defense Revisited*, 11 YALE J. INT'L L. 437, 454 (1986). See generally Moore, *The Secret War in Central America and the Future of World Public Order*, 80 AM. J. INT'L L. 43 (1986); Rowles, *The United States, the O.A.S., and the Dilemma of the Undesirable Regime*, 13 GA. J. INT'L & COMP. L. 385 (1983).

armed attack under international law.⁷³ Thus, Nicaraguan assistance to opposition groups in El Salvador, Costa Rica, and Honduras did not rise to the level of an armed attack permitting United States intervention in defense of the aggrieved governments.

Second, in order for a third country to legally intervene on behalf of another in collective self-defense, the victim of the armed attack must request the support of the third country.⁷⁴ The I.C.J. in *Paramilitary Activities* found that none of the victims of attacks by Nicaraguan-supported rebels requested the United States to assist them in collective self-defense.⁷⁵ Third, the I.C.J. concluded that the United States' actions did not meet the elements of "necessity" and "proportionality" which are generally accepted elements of a claim of self-defense. The Court ruled that the United States did not comply with the condition of "necessity" because it instigated support for the *contras* several months after the threat of the Salvadoran rebels had been repulsed and rebel activities had been greatly reduced.⁷⁶ The Court ruled that the mining of Nicaraguan harbors, attacks on ports and oil installations, and the continuation of aid long after the presumed attack by Nicaragua violated the condition of proportionality.⁷⁷

As a member of the Organization of American States ("O.A.S.") the United States has treaty obligations in addition to its obligations under customary international law. In order for the United States to act in collective self-defense, some commentators contend that the United States must, in a timely fashion, invoke the Rio Treaty, activating the collective defense provisions of the O.A.S. alliance.⁷⁸ To date, neither the United States nor El Salvador has submitted control of the conflict to the O.A.S. Indeed many inter-American treaties seem to prohibit intervention in the affairs of another American state under most circumstances.⁷⁹

The Reagan doctrine is somewhat akin to the just war doctrine and is the democratic counterpart to the Third World/Soviet bloc argument that aiding opponents of colonial or racist regimes is legitimate. Thus, the Reagan doctrine is subject to the same criticisms as the

73. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-04 (Judgment on the Merits of June 27).

74. *Id.* at 105.

75. *Id.* at 119-23.

76. *Id.* at 122.

77. *Id.* at 122-23.

78. Joyner & Grimaldi, *supra* note 54, at 665-67; Comment, *supra* note 54, at 932-36. Professor Moore takes issue with Joyner and Grimaldi's argument. Moore, *The Secret War in Central America and the Future of World Public Order*, 80 AM. J. INT'L L. 43, 104-05 (1986).

79. See Comment, *supra* note 54, at 915-18.

traditional just war doctrine and its contemporary renditions. United States aid to democratic opposition groups is beset with other difficulties.⁸⁰ The extent of the opposition's commitment to democracy is often open to question⁸¹—indeed, many Marxist groups claim to be fighting for democracy. Groups sporting the democratic label may not have a substantial following in their native country. Some groups claiming to fight for democracy alienate citizens by abusing human rights.

The I.C.J. in the *Paramilitary Activities* case pointed out that the United States has raised intervention based on ideology as a political argument, not a legal one. The court's opinion seems to intimate that intervention based on the ideology of an opposition group is contrary to customary international law.⁸²

It is clear that the United States is groping for legal standards that will allow it to protect its interests and pursue its foreign policy goals. Legal norms are most often used by the executive branch as post hoc justifications rather than standards for behavior.⁸³ Congress has stepped in from time to time to impose conditions on the grant of foreign aid to incumbent governments or opposition groups,⁸⁴ but the conditions were imposed on a case-by-case basis, after the executive had acted. If international law is to be effective as a force to constructively channel United States intervention in civil wars, it must be a permanent factor in the decision-making process, and it must comport with political realities and the realities of civil war.⁸⁵

80. Schachter, *supra* note 56, at 142–44. Cross argues that non-communist insurgents face two difficulties: First, the communist state often employs tough measures of repression and has strong control of society; second, it is difficult for the insurgents to have specific positive political objectives. J. CROSS, *supra* note 62, at 132–34.

81. The opposition in Angola, headed by a former student of Mao Tse-tung, Jonas Savimbi, is an example. See *Angola's Resilient Rebel*, U.S. NEWS & WORLD REP., Feb. 10, 1986, at 11.

82. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 108–10 (Judgment on the Merits of June 27).

83. See Kreisberg, *supra* note 11, at 480.

84. See W. REVELEY, *WAR POWERS OF THE PRESIDENT AND CONGRESS—WHO HOLDS THE ARROWS AND THE OLIVE BRANCH* 25, 226–27 (1981).

85. R. FALK, *supra* note 9, at 10; Falk, *supra* note 1, at 188; Friedlander, *supra* note 72, at 88; Kreisberg, *supra* note 11, at 481.

V. A NEW STANDARD FOR ASSISTANCE TO REBEL GROUPS; AN OLD STANDARD REEXAMINED AND REVITALIZED

A. *The Proposal: A United States Standard for Assisting Opposition Groups*

The United States should only give assistance to armed opposition groups that have qualified as a belligerent under international law. In order to satisfy the test of belligerency the opposition group must: One, control a significant portion of national territory; two, administer the territory it controls; three, comply with international laws of war.⁸⁶ In addition, the conflict with the incumbent government must be more than a local disturbance.⁸⁷

The belligerency guidelines should be adopted by Congress as permanent threshold guidelines to be utilized in every instance in which the President requests Congress to grant financial assistance to an armed opposition group.⁸⁸

The guidelines should apply to all types of military assistance (for example, troop training, sales of arms, logistical support, intelligence sharing). The guidelines should also apply to so-called humanitarian assistance (such as clothing, food, and medicine), unless the aid complies with International Red Cross standards for giving humanitarian assistance.⁸⁹ However, the guidelines should not prevent the United

86. 2 L. OPPENHEIM, *supra* note 21, at 249-50; G. VON GLAHN, *supra* note 1, at 617.

87. *See supra* note 86. Some writers add a condition that states have "a practical necessity to define their attitude to the civil war." *See* 2 L. OPPENHEIM, *supra* note 21, at 249-50. This requirement was added to Oppenheim's treatise in its sixth edition. *See Id.* at v. 197-98. Compare the sixth edition with 2 L. OPPENHEIM, INTERNATIONAL LAW 205 (H. Lauterpacht 5th ed.) and 2 L. OPPENHEIM, INTERNATIONAL LAW 154 (A. McNair 4th ed.). The new requirement was included to prevent "abuse for the purpose of a gratuitous manifestation of sympathy with the cause of the insurgents." 2 L. OPPENHEIM, *supra* note 21, at 250. It is dubious whether this purpose is attainable because, among other reasons, most nations find it always necessary to define their relation to a dispute for diplomatic and ideological reasons.

88. Congress must establish specific guidelines and criteria which will help it decide whether the belligerency standards have been met. The guidelines should set out how much territory will constitute a "significant portion" of national territory. In addition, the criteria could provide guidance as to what types of activities and organization will lead Congress to conclude that the opposition "administers the territory." For example, is there a nonmilitary government organization, are taxes collected, are health and education services provided? Congress must also use its resources to gather information in the field regarding whether the guidelines have been met.

89. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 124-25 (Judgment on the Merits of June 27) (in order to escape condemnation as internal intervention, aid must be limited to Red Cross purposes--to "prevent and alleviate human suffering" and "protect life and health and to ensure respect for the human being;" the aid must also be given without discrimination).

States from making diplomatic contacts with the opposition group.

B. Rationale for United States Employment of the Belligerency Test

From the standpoint of the United States, a rule of international law applicable to assistance to opposition groups in civil war must cut a delicate balance between the United States' need to intervene in civil war when it is in the national interest and an aspiration to limit the use of war as a policy tool.⁹⁰ The rule cannot be so detached from current state practice and strategic reality that the United States government will constantly see compliance as incompatible with its best interest. International law should not be weakened to the point of permitting unlimited intervention in civil war without an attempt to channel or mold the interference in a constructive fashion.⁹¹ The long-neglected belligerency standards seem to strike this delicate balance.

The requirement that an opposition group control a significant portion of land and implement an administrative structure will help to assure that the group has legitimacy as a representative of people struggling for social, political, or religious change. The belligerency standards comport with the method that guerrillas use to wage popular insurgency.

Initially guerrillas do not concentrate on seizing territory from the government.⁹² Their first task is political rather than military.⁹³ The guerrillas must convince the population that the guerrillas' cause is the people's own and increase popular participation in the revolution.⁹⁴ The people are only willing to participate in organized violence if there is no alternative, the cause is compelling, and there is a reasonable expectation of victory.⁹⁵ "Without the consent and active aid of the people, the guerrilla would be a bandit and could not long survive."⁹⁶

If the revolution grows, the guerrillas are able to hold territory.⁹⁷ If the guerrilla group does not successfully convert the people to its

90. See Falk, *supra* note 1, at 186; Kreisberg, *supra* note 11, at 480-81.

91. See Falk, *supra* note 1, at 210-11; Farer, *supra* note 2, at 515.

92. See R. TABER, *supra* note 5, at 31, 156.

93. See J. CROSS, *supra* note 62, at 130.

94. See J. BELL, THE MYTH OF THE GUERRILLA: REVOLUTIONARY THEORY AND MALPRACTICE 22-23, 52-53 (1971); E. SNOW, RED STAR OVER CHINA 272-77 (Evergreen ed. 1973). One scholar and participant in guerrilla warfare argues that the best method of converting people to the guerrilla cause is by guerrilla military success, rather than simple dissemination of propaganda. R. DEBRAY, REVOLUTION WITHIN THE REVOLUTION?: ARMED STRUGGLE AND POLITICAL STRUGGLE IN LATIN AMERICA 47-59 (1967).

95. R. TABER, *supra* note 5, at 31, 156.

96. *Id.* at 20.

97. *Id.* at 36-37, 57.

cause, it will remain on the run. The acquisition of territory generally begins in the countryside where opposition support is greatest and it is most difficult for regular troops to defend. The takeover then gradually moves to small villages and towns and, in the final stages of the revolution, to large cities.⁹⁸

The guerrillas will establish bases in the territory that the government is no longer capable of controlling. After the establishment of such bases the opposition will institute an administrative structure.⁹⁹ Commonly, the opposition administration will enact a code of law, collect taxes, institute land reform, establish schools and hospitals, and continue dissemination of its political ideas.¹⁰⁰ The guerrillas are now in position to influence the economic, as well as the political and military, welfare of the country. They also control resources that make victory more likely.

It is generally in the best strategic interest of the United States to wait until the guerrillas control and administer a portion of the country. United States support for an unrepresentative opposition group hurts United States policy in several ways.

United States support may cause irritation in this country's relations with other states. Although international law does not always play a dominant role in domestic policy debates, it plays a significant role in international diplomacy.¹⁰¹ Most scholars agree that, even in this age of uncertainty about the laws of civil war, aid to unrepresentative opposition groups or rebels propelled from abroad is a disfavored state action in the international community.¹⁰² United States adherence to the belligerency guidelines assures that the nation avoid one of the most egregious state actions with respect to civil wars.

The greatest discomfort in international relations usually comes from allies in the region where the illegal intervention occurs. Those allies must work closely with the incumbent government on a day-to-day basis. If the opposition does not have legitimacy or a realistic chance of prevailing in the civil war, the neighboring countries do not

98. *Id.* at 36-37; R. DEBRAY, *supra* note 94, at 59-67 (the fight in the countryside is more important to the revolution than urban insurrection).

99. R. TABER, *supra* note 5, at 40; *Mao's Primer on Guerrilla War* (S. Griffith trans.), in *THE GUERRILLA AND HOW TO FIGHT HIM* 7 (T. Greene ed. 1962).

100. R. TABER, *supra* note 5, at 40-42; *see 1,000 Rebels Surrender in Philippines*, *Seattle Times*, June 17, 1987, at A11, col. 1 (leftist shadow government exposed that collected taxes in villages).

101. W. REVELEY, *supra* note 84, at 20; Kreisberg, *supra* note 11, at 483-85; Van Dyke, *The Riddle of Establishing Clear and Workable Rules To Govern Armed Conflicts*, 3 *UCLA PAC. BASIN L.J.* 38 (1984).

102. *See Higgins, supra* note 8, at 184; Sohn, *supra* note 50, at 227.

want to alienate the incumbent government by supporting the opposition. They are acutely aware that the incumbent government may be in power for some duration and must be reckoned with.

Moreover, regional allies that act as a way station for the guerrillas may become hotbeds for anti-United States tension.¹⁰³ If the guerrillas anger the host country, the host's anger will not only be directed toward the guerrillas. It will also be directed at the United States which supports the guerrillas and will not allow the host to deal harshly with the guerrillas or to move the guerrillas out of the country entirely. It is not uncommon for a friendly government to be damaged by abetting a controversial United States policy.¹⁰⁴

Giving assistance to illegitimate opposition groups can also erode domestic congressional¹⁰⁵ and grassroots¹⁰⁶ support for American foreign policy. A great deal of energy is spent trying to pull along and persuade a reluctant Congress to support an opposition group that has not demonstrated that it is a legitimate representative of the people in its country. Garnering this support disperses and dilutes political energy that could be channeled in other directions.¹⁰⁷ Support of unrepresentative opposition groups can also enrage a significant number of private citizens, resulting in acts of civil disobedience.¹⁰⁸

American support of an opposition group that is not a legitimate representative of a substantial segment of a foreign people also alienates the United States from the foreign citizens who are caught in the civil war. If a substantial number of people are not supporting the opposition, it is often an expression that: One, although not entirely satisfied with the incumbent regime, they are not so dissatisfied so as to resort to arms; two, the opposition group is not the people's choice as a replacement for the incumbent; three, the guerrillas' ideology has

103. See Reichler & Wippman, *supra* note 72, at 471 (none of the countries presently under armed attack, El Salvador, Costa Rica, and Honduras, admits supporting the *contras*; Costa Rica has condemned U.S. support); *The Contras Won't Change*, NEWSWEEK, Apr. 13, 1987, at 31-32 (unrest caused in Honduras due to *contras*).

104. See *Central American Leaders Push for August Summit*, Seattle Times, June 17, 1987, at A5, col. 1 (point of contention between the United States and Honduras is whether *contras* can stay in Honduras); *Honduras Reportedly Wants Contras Out by June 15*, Seattle Times, June 5, 1987, at A2, col. 1; *Costa Rica Strains To Handle Refugees*, Seattle Times/Seattle Post-Intelligencer, Mar. 15, 1987, at A11, col. 1 (war between *contras* and Sandinistas has created massive flow of refugees into Costa Rica, which causes Costa Rican government political and social problems).

105. See W. REVELEY, *supra* note 84, at 20, 186.

106. See *id.* at 20.

107. See McNeil, *Central America: U.S. Fantasyland*, Seattle Times, Mar. 10, 1987, at A11, col. 1 (Iran-*contra* aid controversy and lack of bipartisan support strangled Caribbean Basin Initiative and debt relief, which at one time enjoyed broad support).

108. See *infra* notes 152-54.

not taken root; and four, the guerrillas have not convinced the people that success is probable.¹⁰⁹ If a substantial portion of the population has not embraced the opposition, then the people are less likely to tolerate the dangerous conditions of war. People will be willing to accept those dangers if the incumbent government is too oppressive and the opposition is the people's hope.¹¹⁰ If the rebels are operating outside the will of the people, the people will be angry at the rebels and the country that is forcing war onto their fields and roads. In the long run, alienating the citizens of a country has more damaging consequences than angering one foreign government. Governments come and go, but the memories of the people are not easily expunged.

If the President seeks to give assistance to a representative opposition group, there is a greater chance that the aid can be given overtly, avoiding the need to resort to covert assistance. Decisions that are subjected to the public policy process are likely to be more in tune with foreign and domestic tolerance for intervention.¹¹¹ While public airing of the issue of whether to support a certain group may draw some opposition, a public airing also allows the President to actively procure public support for the proposed intervention. Intervention that has been conceived and directed from the confines of the executive offices has often led to severe policy errors because the decisions did not accurately account for national and international reactions.¹¹² United States intervention absent public support has likewise led to unhappy foreign policy results.¹¹³ The wisdom of a foreign policy publicly debated and publicly supported is reflected in our constitutional framework which gives Congress power in decisions of financial assistance in support of United States foreign policy objectives¹¹⁴ and the right to declare war.¹¹⁵

Beyond the domestic problems of covert assistance, covert assistance can tend to have a corrupting influence on relations with other

109. See R. TABER, *supra* note 5, at 20, 31.

110. See *id.* at 31.

111. W. REVELEY, *supra* note 84, at 186.

112. *Id.* at 188.

113. Consensus on military decisions is most firm when it is the product of decision by the legislative process, responsive to the views of citizens whose interests are affected. *Id.* at 178. The full play of representative democracy is most likely to produce policy in the general interest. *Id.* If most citizens do not at least acquiesce in national policy, the country plunges into controversy with potentially grim impact on United States effectiveness at home and abroad. Versailles and Vietnam show the consequences of internal division over United States initiatives overseas. *Id.* at 176.

114. W. REVELEY, *supra* note 84, at 44.

115. See H. SUMMERS, *ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR* 33-69 (1982).

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countries. If the aid is covert, the foreign government will have to make denials regarding United States involvement when evidence of the United States' intervention comes to light. The process of covering for the United States ultimately taints the credibility of the foreign government in the eyes of the international community and its own citizens, which can undercut its stature.

The requirement of control and administration of territory by the opposition may play a catalytic, as well as a restraining role in United States foreign policy. Congress or the executive may be more inclined to support a shift in support from an unpopular incumbent government to a legitimate opposition if standards for recognizing a viable opposition group are the law. Once the belligerency standards are met, a President, Senator, or a member of Congress could urge that the time has come to recognize that the people have cast their lot with another group and the time is right to become allied with the inevitable successor, before the successor becomes completely alienated from the United States. Such a move might help ease out a teetering despot or push along peace negotiations that have been stalled because the incumbent government feels safely propped up by United States support. Of course the United States need not recognize an opposition group that meets the control and administration tests. The belligerency standards are a good guide to political legitimacy, however, and could be an important factor on those occasions when the United States decides to side with the armed opposition against an old incumbent ally.

The test for the recognition of an armed opposition group as a belligerent also provides that the opposition group abide by international law.¹¹⁶ Of particular concern is the requirement that the opposition group comply with those laws of war demanding respect for human rights.¹¹⁷ This element of the belligerency test is important for several reasons. First, human rights violations by the armed opposition against its fellow citizens provides evidence that the group is not the legitimate representative of the people. Opposition group human rights violations erode popular support—the very support that is crucial to the opposition's ultimate success.¹¹⁸ This notion is consistent with guerrilla war strategy.¹¹⁹ A fundamental tenet of modern guer-

116. G. VON GLAHN, *supra* note 1, at 167.

117. See Lobel & Rafner, *Is United States Military Intervention in Central America Illegal?*, 12 HUM. RTS. 23, 25, 40 (1984).

118. See *Salvadorans Flee Farms After Reported Rise in Brutal Rebel Abuses*, Seattle Times/Post-Intelligencer, Apr. 26, 1987, at A24, col. 1.

119. See R. TABER, *supra* note 5, at 154.

rilla warfare is that the fighters not treat the people roughly or steal from them. Successful guerrilla leaders insist upon rigid discipline and scrupulously correct behavior by the soldiers in order to prevent them from alienating the local population.¹²⁰

Opposition group human rights violations also erode Congressional and grassroots support in the United States. Recent legislation granting aid to the *contra* rebels contains provisions that show Congress' concern that the armed opposition not violate human rights.¹²¹ Again, the belligerency test generally assures that the United States supports an opposition group that has legitimacy and popularity both at home and in the United States.

C. *Implementation of the Belligerency Standards by the United States*

One of the difficulties in proposing legal standards for regulating intervention in civil war is enforcement. As mentioned before, some scholars propose that supranational organizations perform this role.¹²² The chances seem remote, presently, that any such organization is in a position strong enough to enforce international laws of civil war.¹²³ So long as authority in the international community remains decentralized, the most effective legal restraints are those that are applied from within, rather than from without, a sovereign state.¹²⁴ States must

120. See, e.g., *Mao's Primer on Guerrilla War*, *supra* note 99, at 6-7.

All actions are subject to command; do not steal from the people; be neither selfish nor unjust. Replace the door [used as a bed in summer] when you leave the house; roll up the bedding in which you have slept; be courteous; be honest in your transactions; return what you borrow; replace what you break; do not bathe in the presence of the women; do not without authority search the pocketbooks of those you arrest.

Id. at 6.

Many people think it impossible for guerrillas to exist for long in the enemy's rear. Such a belief reveals lack of comprehension of the relationship that should exist between the people and the troops. The former may be likened to water and the latter to the fish who inhabit it. How may it be said that these two cannot exist together? It is only the undisciplined troops who make the people their enemies and who, like the fish out of his native element, cannot live.

Id. at 6-7.

121. See Continuing Appropriations Act for Fiscal Year 1987, Pub. L. No. 99-591, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3341; Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3191 (Boland amendment); Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, 1985 U.S. CODE CONG. & ADMIN. NEWS (99 Stat.) 1003.

122. See *supra* note 52 and accompanying text.

123. See *supra* notes 62-65 and accompanying text.

124. W. REVELEY, *supra* note 84, at 266; McDougal, *supra* note 63, at 24.

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police their own behavior and bring whatever pressure they can to bear on states that deviate from the legal norm.

An international standard concerning intervention in civil war can be enforced for United States foreign policy by Congress. Congress could adopt permanent guidelines that incorporate international law belligerency standards for granting aid to opposition groups. Congress is the best body to enforce the belligerency standards because of its constitutional role in foreign policy. Article I gives Congress control over raising federal funds, authorizing expenditures, and appropriating funds for foreign aid.¹²⁵ Financial assistance to an opposition group ultimately depends on the action of Congress, which can condition its grants.¹²⁶

Congress has conditioned use of funds on several occasions. For example, the Foreign Assistance Act of 1971 prohibited the use of funds for troops or advisors in Cambodia, and the 1973 Supplemental Appropriations Act denied use of funds for combat activities in North or South Vietnam, Laos, or Cambodia.¹²⁷ Congress has conditioned aid grants to the government in El Salvador and to the *contra* rebels in Nicaragua.¹²⁸

Congressional involvement is important because it builds executive-legislative consensus in foreign affairs. National consensus on foreign policy decisions is most prevalent when the decisions are the product of the legislative process.¹²⁹ Legislative approval generally assures widespread popular support for the intervention in war. Congress also plays an important role in revising and pointing out defects in foreign policy decisions; it is removed from the initial executive decision to act, and may be closer to other national and international constituencies that will be affected by the policy.¹³⁰

Although Congress has given aid to opposition groups with conditions attached, the conditions have been formulated on a case-by-case basis. Congress has often acted under heavy pressure from the executive branch, after the President had already taken steps toward com-

125. U.S. CONST. art. I, § 8; W. REVELEY, *supra* note 84, at 44-45.

126. W. REVELEY, *supra* note 84, at 126.

127. *Id.* at 122.

128. See the discussion in Lobel & Rafner, *supra* note 117, at 38, 40. See also NEWSWEEK, Mar. 13, 1987, at 32 (Republican Senators threaten to withdraw support for *contra* funds unless administration puts more into peaceful solutions); *President Shifts Focus of Argument for Contras*, Seattle Times, May 4, 1987, at A8, col. 3 (focus away from military realm to that of promoting free speech and elections).

129. W. REVELEY, *supra* note 84, at 178; H. SUMMERS, *supra* note 115, at 33-69.

130. W. REVELEY, *supra* note 84, at 188.

mitting the United States in a civil war.¹³¹

Congress should install permanent criteria to be used in deciding whether to support armed opposition groups. If these criteria are in place in advance of executive action, the President will have to tailor his or her actions to comply with Congressional standards.¹³² The President will know that financial assistance will not be forthcoming, or will come at a very high political price, if a proposal to support an opposition group does not meet Congressional standards. The belligerency standards should be the centerpiece of the Congressional standards.

Congress need not fund an opposition group even if the group meets the initial requirements for assistance. These requirements should be used as a practical threshold test, with the ultimate decision to be made with an eye toward other relevant political factors. For example, although a Marxist guerrilla group meets the belligerency threshold, Congress may not want to assist the group due to its political orientation. This allows Congress to have flexibility in its decision making, but also gives it a measure of control and continuity over United States grants of assistance to opposition groups in civil strife.

In addition to taking the initiative in passing permanent standards, Congress needs to take a more active role in enforcing the conditions that it sets on grants of assistance to groups involved in civil war. In the past, Congress has often left monitoring to the executive.¹³³ But Congress need not do so. It has power under the Constitution to investigate other branches of government preparatory to lawmaking or while overseeing execution of acts of Congress.¹³⁴ With respect to the belligerency standards, Congress can independently assess whether an armed opposition group effectively controls a significant portion of national territory, has set up an administrative structure there, and whether the opposition group is respecting international law.

VI. THE BELLIGERENCY TEST AS A WORLD STANDARD: ANSWERING THE CRITICS

Nations need not return to the days of formal declarations of belligerency. The United States, however, should urge other nations to employ the belligerency standards as a threshold test for assisting

131. *Id.* at 137-38.

132. See *id.* at 195-96.

133. See Lobel & Rafner, *supra* note 117, at 38 (President required to make certification under law granting aid to El Salvador).

134. W. REVELEY, *supra* note 84, at 30.

armed opposition groups. The standards can be memorialized in treaties and United Nations resolutions; they can be raised in diplomatic contacts and public pronouncements on the legality of assistance.

As discussed previously, the belligerency test has been criticized in recent scholarship. Commentators acknowledge that the international law of civil war requires some way of demonstrating the legitimacy of an opposition group.¹³⁵ Commentators fail to recognize, however, that the belligerency standards closely follow the way in which armed opposition groups gain legitimacy in modern civil wars. Moreover, the standards are not divorced from the theory of modern guerrilla war as some suggest.¹³⁶ Control of territory, establishment of an administrative regime, and respect for international law are integral aspects of successful guerrilla warfare.¹³⁷

Critics of the belligerency test contend that it is unenforceable because there is no international body to effectively determine when the belligerency standards have been met.¹³⁸ However, this criticism is applicable to most laws of war. Enforceability of an international law of civil strife is tested by whether the law comports with state interest and the strategic reality of civil war.¹³⁹

Democratic governments such as the United States face substantial foreign and domestic political costs when they support illegitimate opposition groups, as discussed above.¹⁴⁰ Based on these costs alone, it may be wise for a government to adopt the belligerency standards. Totalitarian governments such as the Soviet Union, however, also face ample costs when they support unpopular opposition groups. The Soviets naturally come under criticism in the West for such support, which can be costly in terms of trade and other benefits of normalized relations with the West.¹⁴¹ Perhaps more importantly, the Soviets alienate countries in the developing world when they assist illegitimate opposition groups and incumbent governments. Soviet support of opposition groups that lack popular support also undermines Soviet claims that it is assisting peoples fighting for self-determination.

135. Moore, *Toward an Applied Theory for Regulation of Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 31 (J. Moore ed. 1974).

136. Higgins, *supra* note 8, at 171.

137. *See supra* notes 92–100 and accompanying text.

138. Falk, *supra* note 1, at 206; Higgins, *supra* note 8, at 171.

139. Boals, *supra* note 22, at 336–37.

140. *See supra* notes 101–13 and accompanying text.

141. *See* Schachter, *supra* note 56, at 127; *cf. Soviets Backing off on Aid to Nicaragua*, *Seattle Times*, Nov. 16, 1987, at A2, col. 4 (Soviet desires to conclude nuclear weapons treaty with United States contribute to Sandinista's decision to negotiate with the *contras*).

VII. APPLICATION OF THE BELLIGERENCY STANDARDS TO CONTEMPORARY ARMED OPPOSITION GROUPS

The United States currently gives assistance to several armed opposition groups, including the opposition in Afghanistan.¹⁴² The opposition in Afghanistan represents the majority of Afghans.¹⁴³ The government in power was forced on the country by a foreign power and does not legitimately represent the people. Despite overwhelming Soviet firepower, the opposition controls substantial area in the countryside and the mountain regions.¹⁴⁴ They govern those areas just as they did before the Soviet intervention. While the Soviets have been criticized for human rights violations, the opposition seems to respect the rights of its country members.¹⁴⁵

The United States has also begun aiding Jonas Savimbi's National Union for the Total Independence of Angola ("UNITA"). UNITA comes very close to meeting the belligerency elements. It controls about one-third of the national territory and a similar percentage of the population. It is not clear, however, whether UNITA has established an administrative system in the territory it holds.¹⁴⁶ The UNITA forces may not be abiding by the laws of war; there have been reports of human rights abuses.¹⁴⁷ Even if UNITA satisfies the belligerency test, some scholars contend that strong foreign policy factors should persuade Congress not to assist UNITA.¹⁴⁸

The legitimacy of the opposition group and the illegitimacy of the incumbent regime has made financial assistance to the Afghan rebels easy to come by. By contrast, when aid to the Nicaraguan *contra* rebels is proposed, the victories for the executive branch, if they come,

142. *Insurgencies: Two of a Kind*, NEWSWEEK, Mar. 23, 1987, at 32-33; see generally Rubin, *Afghanistan: The Resistance Has an Opportunity*, International Herald-Tribune, Aug. 18, 1987, at 4, col. 3.

143. Karp, *The War in Afghanistan*, FOREIGN AFF., Summer 1986, at 1040.

144. *Id.* at 1031-32 ("The Democratic Republic of Afghanistan remains essentially a city-state, with military outposts in the hinterland and a secure civilian presence only in Kabul and a few other towns."); see also Okun, *The Situation in Afghanistan*, DEPT ST. BULL., Jan. 1987, at 84-86.

145. See *Situation of Human Rights in Afghanistan*, U.N. Doc. A/41/778 (1986); AMNESTY INTERNATIONAL, *AFGHANISTAN: TORTURE OF POLITICAL PRISONERS* (1986).

146. See Smith, *A Trap in Angola*, FOREIGN POL'Y, Spring 1986, at 64-65. See generally Marcum, *Angola: Twenty-Five Years of War*, CURRENT HISTORY, May 1986, at 193; *Dancing to a Tin Drummer*, TIME, Sept. 29, 1986, at 47.

147. Marcum, *supra* note 146, at 230.

148. Smith, *supra* note 146, at 74.

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are pared down and conditioned.¹⁴⁹ Many members of Congress believe in the legitimacy of the Sandinista government, at least relative to the *contras*.¹⁵⁰ The *contras* have made some progress and have the support of some citizens, but the *contras* control little national territory. Their support is often undercut by human rights abuses against peasants.¹⁵¹ These rights abuses also undercut United States support for the opposition.

United States support for the *contras* has generated a great deal of fervent opposition at the grassroots level. Numerous citizens organizations send aid to the Sandinistas.¹⁵² Some American citizens go in person to help the Nicaraguan government, in defiance of the United States embargo on aid to the Sandinistas.¹⁵³ *Contra* aid is also the subject of consistent nonviolent protests nationwide which often tie up the police and the courts.¹⁵⁴

Since the *contras* have not demonstrated their legitimacy, American support has been criticized in the international forum as United States sponsored intervention, rather than indigenous uprising. Even loyal Latin American allies have been loathe to rally to the *contras* at the

149. See, e.g., *Sending "A Clear Signal": Congress Sets the Stage for New Contra-Aid Fight*, Seattle Times, Mar. 12, 1987, at A1, col. 4. Both the Reagan administration and Congress have recognized that the *contras* do not meet the belligerency standards. See DEPT. OF STATE, AMERICAN FOREIGN POLICY DOCUMENTS 962-63 (1985) (transcript of White House press briefing, Feb. 16, 1985); H.R. Res. 1777, 100th Cong., 2d Sess. (1987) (by a vote of 103 for and 257 against, the House rejected an amendment to the State Department authorization bill to characterize the *contras* as legitimate insurgents and expressing the sense of Congress that President Reagan recognize a state of belligerency in Nicaragua under international law).

150. See Serafino, *U.S. Assistance to Nicaraguan Guerrillas: Issues for Congress*, Issue Brief, Foreign Affairs and National Defense Division, Congressional Research Service 1, 10 (Mar. 17, 1987) (available from the Library of Congress, Order Code IB84139).

151. See, e.g., *The New Contras?*, NEWSWEEK, June 1, 1987, at 32-39; *Opposition Leader Joins Contra Ranks*, Seattle Times/Post-Intelligencer, May 31, 1987, at A8, col.1 (bolstering "moderate" ranks within the *contra* leadership); *Contras Are Gaining Momentum in Nicaragua, Say Eyewitnesses*, Seattle Times, Apr. 29, 1987, at A10, col. 1; *Contras Called Ready After Training in U.S.*, Seattle Times, Mar. 24, 1987, at A4, col. 1.

152. See *"Quest for Peace": Groups Counter U.S. Aid to Contras by Raising \$30 million for Other Side*, Seattle Times, Apr. 23, 1987, at A12-13, col. 1. Since 1981 some 60,00 Americans have visited Nicaragua. At least 500 groups nationwide work for the end of United States aid to the *contras*. Those groups claim to have raised \$30.2 million in goods and services for aid to the Nicaraguan government in an attempt to match the \$100 million in aid given by the United States to the *contras*. *Id*; see also *Pragmatic Engineer Working in Nicaragua "Wasn't There To Die."* Seattle Times, Apr. 30, 1987, at A3, col. 1; Seattle Times, Apr. 30, 1987, at A3, col. 6.

153. See *supra* note 152.

154. See, e.g., *UW Confrontation over Ben Linder Leads to an Arrest*, Seattle Times, May 2, 1987, at A10, col. 1; *Big Protest Snarls Traffic Near CIA*, Seattle Times, Apr. 27, 1987, at A2, col. 5; *Thousands Join March on Capitol*, Seattle Times/Post-Intelligencer, Apr. 26, 1987, at A1, col. 5.

urging of the United States.¹⁵⁵ Moreover, *contra* presence in Honduras and Costa Rica has led to friction between those countries and the United States.¹⁵⁶

The United States has also begun channeling aid to the armed opposition in Kampuchea. The opposition in Kampuchea does not meet the belligerency test. Although the forces of the three groups comprising the opposition have grown in size and effectiveness, they do not control a significant portion of national territory.¹⁵⁷ The grip on the territory that they do hold is probably too weak to administer the territory. The opposition has had difficulty achieving broad participation in its struggle, even though the incumbent regime in Phnom Penh was installed by Vietnam.¹⁵⁸ This may be explained by the predominance of the widely hated Khmer Rouge in the opposition and the failure of the two non-communist groups to demonstrate an ability to defeat the Vietnamese-backed government in the battlefield. Some scholars argue that aid to the the opposition groups may be ill-advised in any event.¹⁵⁹

VIII. CONCLUSION

The international law of civil war is in flux. The international community would be served best by reemphasizing the traditional test of belligerency. In this way, governments may assist opposition groups as state interest requires, but only those groups that are legitimate representatives of the people. International adherence to the belligerency standards protects persons in a country from premature intervention by a foreign power, and protects the foreign power from the political costs of such intervention.

The United States, through Congress, should adopt the belligerency standards as a permanent threshold test for assisting armed opposition groups. The United States should also begin to stress the standards in the international community in treaties, United Nations resolutions, and diplomatic practice.

155. See Reichler & Wippman, *supra* note 72, at 471; see also *Costa Rica Forbids Contra Group To Meet*, Seattle Times, Mar. 9, 1987, at A4, col. 1.

156. See *supra* note 155; *The Contras Won't Change*, NEWSWEEK, Apr. 13, 1987, at 31-32; *Honduras Reportedly Wants Contras Out by June 15*, Seattle Times, June 5, 1987, at A2, col. 1.

157. See Gordon, *The Third Indochina Conflict*, FOREIGN AFF., Fall 1986, at 66-74.

158. See generally Bach, *A Chance in Cambodia*, FOREIGN POL'Y, Spring 1986, at 75-95; Becker, *Stalemate in Cambodia*, CURRENT HIST., Apr. 1987, at 156-58; *Sihanouk Calls for More Rebel Unity*, International Herald-Tribune, Aug. 31, 1987, at 2, col. 6.

159. Gordon, *supra* note 157, at 82.