

## The Invasion of Czechoslovakia: 1968<sup>†</sup>

During the night of August 20-21, approximately 175,000 "Warsaw Pact" troops<sup>1</sup> crossed Czech borders to occupy Prague and other strategic locations in Czechoslovakia. World response to the invasion was instantaneous. Virtually all the nations of the free world, three Communist states (one a member of the Warsaw Pact), and leaders of the French, Italian and Swiss Communist parties condemned the invasion. Authoritative Czech organs—the Central Committee of the Czech Communist Party, the Presidium of the National Assembly, the National Assembly, the Czech Foreign Ministry, the Czech Socialist Party, the Slovak Communist Party—denounced the invasion as a "violation of international law and the United Nations Charter". The Czech Government and the extraor-

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\* Associate Professor, School of Law, University of Alabama; graduate Yale Law School (LL.B.), Member American Society of International Law.

<sup>†</sup>This article, which was prepared as a working paper for forums conducted by state and local bar associations of the American Bar Association, attempts to state the principal legal issues relating to the invasion of Czechoslovakia. Although it concludes that the invasion is unlawful, it is not intended to be a brief against the Soviet Union or the other members of the Warsaw Pact; if it were, the case would be urged far more strongly. For pedagogical purposes, the article presents the Soviet justifications of the invasion with more force and clarity—and with more frequent reference to legal norms—than have Soviet diplomats or Government sources. For an almost macabre example of Soviet argumentation, see Press Group of Soviet Journalists, *ON EVENTS IN CZECHOSLOVAKIA* (1968). In order not to burden the practicing lawyer, the within article omits most citations.

For the history of the events surrounding the invasion, the author has relied principally on R. LITTELL (Ed.), *THE CZECH BLACK BOOK* (1969); C. CHAPMAN, *AUGUST 21ST: THE RAPE OF CZECHOSLOVAKIA* (1968); *The New York Times*, in particular, T. Szulc, *An Account of First Seven Days of The Soviet-Led Intervention in Czechoslovakia*, N.Y. Times, Sept. 2, 1968 at 6; and a series of translations of Czechoslovak radio broadcasts by the United States. Full citations to any omitted sources for facts stated in the text will be furnished by the author on request.

<sup>1</sup>These Warsaw Pact troops (occasionally referred to as the "Warsaw Pact invaders") were from the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, and the Union of Soviet Socialist Republics.

Estimates of the total number of Warsaw Pact invaders in Czechoslovakia reached 650,000; the more realistic number appears to be about 500,000. See T. Szulc, *Prague Aids Say German Red Units Left by Third Day*, N.Y. Times, Sept. 3, 1968 at 1, col. 1.

dinary 14th Congress of the Communist Party of Czechoslovakia demanded speedy withdrawal of the occupation forces.

Despite the almost universal condemnation of the invasion, not one Government supported its position with a comprehensive examination of the relevant prescriptions of international law. Governments frequently, but not invariably, charged the Warsaw Pact invaders with violations of international law and the United Nations Charter. These assertions of law, however, were phrased at the highest levels of abstraction; the invasion was characterized simply as an "armed intervention," an "international crime," and a violation of the principle of "non-interference in the affairs of other states." For example, Delegates to the Security Council, in debates of August 21, 22, 23 and 24, rested their "legal" arguments on brief references to the United Nations Charter and to General Assembly resolution 2131 (XX). The United States delegate to the Special Committee on Principles of International Law analyzed the invasion in light of the principles of Article 2 of the United Nations Charter, and made only the briefest mention of traditional and developing norms of international law.<sup>2</sup>

Nowhere were the prescriptions of international law ignored as much as in the arguments of the Soviet Union.<sup>3</sup> Indeed, Soviet justifications of the invasion, which made only the most minimal and half-hearted references to international law, were often a mockery of the propositions on which they were based. Most notable was the Soviet production of an unsigned document that implied that Czech leaders "invited" the Warsaw Pact forces to enter Czechoslovakia; this "invitation" was soon followed by a Soviet attempt to form a Czech government to issue it.

Lest the limited references to international law be thought justified because the invasion was such a clear violation of international law, it is well to recall that only minimal sanctions were imposed on the Soviet Union following the invasion. Despite the almost universal condemnation of the invasion, leaders of the world community made only modest use of contemporary institutions capable of imposing (albeit remedial) sanctions on the Warsaw Pact invaders. The United Nations Security Council debated the Czech question for only four days. As may have been expected, a resolution condemning the "armed intervention" fell before a Soviet veto.

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<sup>2</sup>H. Reis, *Legal Aspects of the Invasion and Occupation of Czechoslovakia*, 49 Dept. of State Bull. 394 (1968).

<sup>3</sup>Translations of the principal Soviet arguments are collected in The Joint Committee on Slavic Studies, *THE CURRENT DIGEST OF THE SOVIET PRESS* (hereinafter cited as "CDSP"), Vol. XX, No. 34 (September 11, 1968). See also *ON EVENTS IN CZECHOSLOVAKIA*, *supra*, note †.

The author has not attempted an exhaustive analysis of the justifications of the Czechoslovak invasion that were pressed by Warsaw Pact invaders other than the Soviet Union.

Council members, however, did not push through a proposed resolution, procedural in nature and thus not subject to the veto, which would have authorized the Secretary-General to make inquiries about the personal safety of the Czech leaders. An emergency session of the General Assembly was not called, as had been the case when the Soviet Union intervened in Hungary in 1956. There was no attempt to have a special committee of the General Assembly investigate the invasion by interviewing such men as Ota Sik, a Deputy Premier and economic planner, who left Czechoslovakia after the invasion. No action was taken to secure passage of a General Assembly resolution condemning the invasion. It is true that there has been a gradual increase in allegiances to NATO, and an enlargement of NATO forces, but these actions have been justified principally by reference to the need to redress the balance of power in Europe, and not to the requirements (or sanctions) of international law.<sup>4</sup>

Only limited sanctions were imposed by individual States acting outside international or multinational institutions. West European response to the invasion was "muted to an extraordinary degree".<sup>5</sup> Some trade credits and deliveries to the Soviet Union and its allies were delayed, and certain cultural exchanges were postponed. The Netherlands cancelled a proposed tour by the Mayor of Moscow, and Denmark reportedly withdrew an invitation previously extended to the Rumanian President and Communist Party leader. Soviet naval ships were refused entry to West Baltic ports and numerous states relaxed immigration restrictions for Czech émigrés. However, sanctions which could result in major value deprivations for the Warsaw Pact invaders, have not been taken.

The United States' reaction to the invasion has hardly been dedicated to molding world opinion to encourage respect for the development of international law. President Johnson, in a brief and restrained statement on the invasion, noted that the invasion was a violation of the United Nations Charter, but beyond that, made no reference whatsoever to international law. When confronted with the Soviet Union's ideological justification for the invasion—a justification which, as will be shown has no foundation in international law—Secretary of State Rusk pressed for clarification of the justification, instead of simply demonstrating its incompatibility with traditional norms of international law.<sup>6</sup>

<sup>4</sup>H. Cleveland, *NATO After the Invasion*, 47 FOREIGN AFFAIRS 251 (1969).

<sup>5</sup>Editorial, *NATO's Czech Reprisal*, N.Y. Times, Sept. 2, 1968 at 18, col. 1.

<sup>6</sup>Secretary Rusk's speech to the General Assembly is excerpted in N.Y. Times, Oct. 4, 1968 at 14, and reprinted in full in LIX Dept. of State Bulletin, Oct. 21, 1968 at 405. See also Secretary Rusk's speech *Some Myths and Misconceptions About U.S. Foreign Policy*, LIX Dept. of State Bulletin, Oct. 7, 1968, at 350.

The widespread failure to make detailed reference to international law, coupled with the minimal sanctions imposed on the Warsaw Pact invaders, leads one to question whether appropriate use was made of international law in responding to the invasion of Czechoslovakia. This paper seeks to demonstrate, in modest fashion, that the principles of international law—in particular, the doctrines of “aggression”, “intervention” and “self-defense”—though formulated in highly flexible terms, have an abiding relevance to this controversy.

To support its thesis, this article first places the Czechoslovak invasion in its historical context, with brief focus on the liberalization beginning in January of 1968. Its second task is to review, the doctrines of permissible and impermissible coercion, and to analyze the legality of the invasion itself. In its concluding section, this paper attempts an impressionistic examination of the relevance of international law to the invasion of Czechoslovakia.

## **I The Invasion in Historical Context**

Although the Czechs and Slovaks established one of the earliest possible entities in Central Europe, their history has been marked by foreign domination, religious persecution, and political impotence. These factors, a recent study hypothesizes, have led to a basic national characteristic, namely, “an attitude of acceptance (of authority) on the surface and of resistance within, with individual and national survival being the overriding aim.”<sup>7</sup>

Communism has been Czechoslovakia’s most recent authoritarian structure. Following the 1948 coup d’état, for almost twenty years Czechoslovakia was the “most pliant”<sup>8</sup> of the Soviet satellites. From 1953 to 1968, power was concentrated in the hands of Antonin Novotny, who was First Secretary of CCP Central Committee from 1953 to January, 1968, President of the Republic from 1957 to May, 1968, and Chairman of the National Front from April, 1959 to 1968. Novotny was a committed Stalinist. Under his guidance in foreign affairs, the “Czechoslovak régime did nothing unless told to do so by Moscow and . . . everything Moscow wanted it to do”.<sup>9</sup> The trends toward destalinization and polycentrism within the Soviet bloc, which so importantly affected the Communist

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<sup>7</sup>Z. Elias and J. Netik, *Czechoslovakia* (hereinafter cited as Elias & Netik), in W. Griffith, Ed., *COMMUNISM IN EUROPE*, vol. 2 at 155, 161 (1967).

<sup>8</sup>Z. BRZEZINSKI, *THE SOVIET BLOC* 436 (1967).

<sup>9</sup>Elias & Netik, *supra* note 7, at 232.

régimes in Hungary, Poland and Rumania, had but little initial impact in Czechoslovakia.

An economic crisis in the early 1960s, however, together with the intra-bloc trend to polycentrism, led to disaffection within the Novotny régime. By the mid-60s, "the rule of dogmatism had reached its peak. . . ."<sup>10</sup> "A new economic program entrusted more decision-making capacity to the Government—as opposed to the Party. . . . Pragmatism took the place of dogmatism in politics, in the economy, and even in ideology".<sup>11</sup> The Communist Party "was no longer the all-seeing, all-powerful, unquestioned authority that it had once been."<sup>12</sup>

Novotny was unable to mollify the demands for reform within Czechoslovakia, and on January 5, 1968 Alexander Dubcek replaced him as First Secretary of the Communist Party. Two trends toward liberalization marked the eight-month "Czechoslovak spring" which followed. First, the Communist Party consciously sought a greater distribution of political and economic power. The Party encouraged greater political independence among the Slovaks by proposing a federalized State. It attempted to insure that "in actual practice" the National Assembly would be "the supreme organ of state power in the Czechoslovak Socialist Republic"<sup>13</sup> and that the Council of Ministers would function effectively as the principal executive organ of the State. It indicated a willingness to tolerate the formation of political and social organizations outside the National Front. It encouraged workers to participate to a greater extent than previously in the management of the economic organizations employing them. It promised that economic enterprises would be relatively independent from State organs, and there were even indications that a "free market", rather than the State (or the Party), would determine the goals of production. Most importantly, there was greater and freer participation in decision-making at all levels of policy formulation.

The second major trend in the Czechoslovak spring was an effort to formulate and safeguard civil rights for the people of Czechoslovakia. Freedom of speech and press were insured, and the censorship system was abolished. Police relaxed their enforcement of laws restricting freedom of organization. The Party "urged a reduction in the functions of the Ministry

<sup>10</sup>*Id.* at 274.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 275.

<sup>13</sup>The Action Program of the Communist Party of Czechoslovakia, adopted at the plenary session of the Central Committee of the Communist Party of Czechoslovakia on April 5, 1968 (hereinafter cited as "Action Program"), translated in P. ELLO, *CZECHOSLOVAKIA'S BLUEPRINT FOR FREEDOM* 89, 129 (1968).

of the Interior, the once dreaded policy ministry.”<sup>14</sup> It promised “necessary safeguards” for civil servants, and encouraged the rehabilitation of individuals “unlawfully condemned and persecuted” in the Party purges of the early 1950s. “The legal policy of the Party was based on the principle that . . . the basic guarantee of legality is proceedings in a court which are independent of political factors and are bound only by law.”<sup>15</sup>

Both of these trends toward liberalization meant a change in the role of the Communist Party. The “leading role” of the Party was no longer to be based on the “monopolistic concentration of power in the hands of Party bodies.”<sup>16</sup> The Party’s goal was not to practice “its leading role by ruling the society but by most devotedly serving its free, progressive socialist development.”<sup>17</sup>

By March of 1968 it was apparent that the Czechoslovak trend toward liberalization had created considerable anxiety within the Soviet bloc. On both a bilateral and multilateral basis, Communist leaders met to discuss the Czechoslovak liberalization, its consequences for the Soviet bloc, and measures that could (or should) be taken against it. In late May, Prime Minister Kosygin apparently sought a Czechoslovak commitment to prohibit anti-Soviet comments in the Czechoslovak press. A mid-July meeting of the leaders of Bulgaria, Hungary, East Germany, Poland and the Soviet Union produced a letter to the Central Committee of the Czechoslovak Communist Party—a letter which warned the Party to retain its “guiding role” in society, and which advised an “offensive against rightist and antisocialist forces”, the “cessation of the activities of all political organizations that oppose socialism”, and the “Party’s assumption of control over the mass media”.<sup>18</sup> A studiously prolonged Warsaw Pact exercise on Czechoslovak territory, and Russian troop maneuvers near the Czech border, pressured Dubcek to accept these proposals, and it appears that in negotiations at Cierna and Bratislava, he did so in small part.

But Dubcek’s tactics in early August—he actively sought support from Rumania and Yugoslavia—belied a wholehearted acquiescence in the Soviet (and certainly the Polish and East German) demands. Dubcek’s seeming reluctance to implement the Cierna and Bratislava agreements, and a power shift within the Soviet Politburo, appear to have triggered the Soviet invasion.

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<sup>14</sup>E. Taborsky, *The New Era in Czechoslovakia* (hereinafter cited as “Taborsky”), 17 (11) *EAST EUROPE* 19, 23 (1968).

<sup>15</sup>Action Program, *supra* note 13 at 133.

<sup>16</sup>*Id.* at 110.

<sup>17</sup>*Id.*

<sup>18</sup>The letter is titled *To the Czechoslovak Communist Party Central Committee*, and was printed in *Pravda* on July 18, 1968 at 1-2. It is translated in XX (2) *CDSP* 4-6 (1968).

The key task in appraising the legality of the invasion is to determine whether the deployment of Warsaw Pact forces in Czechoslovakia was a lawful or an unlawful use of force. It is to the doctrines of "permissible coercion" and "impermissible coercion", thus, that we now turn.

## **II. Permissible and Impermissible Coercion<sup>19</sup>**

During the course of the last two centuries, scholars, jurists and national and international officials have invoked a small number of legal doctrines in their attempts to restrict, or to justify, resort to coercion in inter-state relations. Employment of these doctrines has not been consistent; but a rigid uniformity is not to be expected in the relatively disorganized world community, in which officials of both the attacking state and the target state<sup>20</sup> invoke these doctrines to justify or oppose use of coercion, and other members of the world community judge these claims to legality.

Whatever the confusions in usage, these doctrines have had two general functions. The first has been to distinguish between permissible and impermissible coercion. Words such as "aggression", "intervention", "retaliation", "measures short of war" and "delicts" have pointed to types of inter-state coercion which the world community (or a claimant) has regarded as illegal. In complement to these concepts, terms such as "self-defense", "pacific blockade", "self-help", "interposition" and "retortion" often characterized lawful responses by a target state to illegal coercion.

The second general function of these doctrines has been to establish a nexus between impermissible coercion on the one hand, and permissible coercion, on the other. This nexus, in a most simplistic statement of traditional theory, has operated to limit the type and degree of coercion which may be employed legally by an attacking state. For example, by authorizing the target state to respond in "self-defense" to "aggression", the nexus imposed a community-authorized deterrent and sanction on the attacking state. In parallel fashion, the nexus imposed a requirement of proportionality on the type and degree of coercion that might legally be employed by a target state in response to impermissible coercion. It is

<sup>19</sup>The distinction between permissible and impermissible coercion is developed, comprehensively and with extraordinary insight, in M. McDUGAL AND F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961) (hereinafter cited as McDUGAL & FELICIANO).

<sup>20</sup>Use of the labels "attacking state" and "target state" serves the purpose of convenience only. The author does not mean to suggest that international conflicts have only two states as participants, that the participants in international conflicts are always "states," or that in any given situation it will be possible to sharply distinguish between the "attacker" and the "target."

accordingly now generally recognized as unlawful to remedy a relatively inconsequential "delict" by making extensive use of military force, under a claim of "self-defense", to destroy or acquire substantial resources in a target state. In consequence, doctrines about permissible and impermissible coercion are found in pairs, ranging along a continuum with highly intense coercion at the one extreme, and at the other, that minimal degree of coercion normally found in interstate relations. "Aggression" has generally marched hand-in-hand with "self-defense", "measures short of war" with "self-help", and a "wrong" or a "delict" with "intervention".

#### *A. Unlawful Use of Coercion*

To disentangle the doctrines about permissible and impermissible coercion, one must focus first on impermissible coercion, and, in particular, aggression and intervention. Despite futile efforts to define these terms, and despite their generality and the great number and variety of factual situations to which they may be applied, it should not be thought that they are without a "core" content. In fact a community consensus about the illegality of certain types of coercion in inter-state relations has evolved; it finds explicit expression in Article 2(4) of the United Nations Charter, which forbids the "threat or use of force in international relations against the political independence or the territorial integrity" of a target state. This consensus developed initially from the widely shared belief that it was essential to proscribe the more highly intense forms of coercion. It has expanded, however, to prohibit relatively intense coercion directed against target states, unless the state employing coercion is acting pursuant to a United Nations decision or in self-defense. To determine the contours and limits of this consensus, the historical development of the doctrines of "aggression" and "intervention" is surveyed briefly hereunder.

##### 1) AGGRESSION

Contemporary prohibitions against aggression have evolved principally from the experiences of two world wars. At the turn of the present century, writers viewed traditional international law as not limiting resort to highly intense military violence. Rather, their principal focus was regulating the relations between participants, and between participants and non-participants, once aggression had been committed, and war had broken out. Whether this traditional view was an accurate statement of state practice is open to question. Within Europe, the dominant powers did judge the permissibility or impermissibility of resort to military force, and did take remedial actions to redress the balance of power once it was threatened.



Whatever the permissibility or impermissibility of aggression and war in the nineteenth century, World War I resulted in the first significant attempt by the world community to limit resort to the more highly intense forms of coercion in international relations. Mindful of the vast destruction and violence of that war, the drafters of the Covenant of the League of Nations sought to impose on its members, "obligations not to resort to war".<sup>21</sup> Each member of the League thus undertook to "preserve against external aggression the territorial integrity and existing political independence" of other League members.<sup>22</sup> Each member was also required to take certain procedural steps before employing military force; the assumption being that a delay in resort to violence would tranquilize the contenders. The League Council, further, was authorized to make recommendations to each of the members of the League in the event of war, or a threat of war.

The League Covenant, however, did not eliminate the possibility that a member could legally resort to war. As a theoretical matter, a member complying with the procedural requirements of the Covenant could lawfully employ high levels of military coercion against a target state. To close the supposed gaps in the Covenant, the signatories of the Pact of Paris renounced "war as an instrument of national policy", and undertook to settle disputes by "peaceful means".<sup>23</sup> League practice, supplemented by bilateral and multilateral treaty commitments to avoid aggression, affirmed the community consensus that it was illegal for an attacking state to employ extensive military force (except in self-defense or pursuant to a League decision) to acquire or destroy substantial resources of or in a target state.

The Soviet Union participated in this community consensus about the illegality of extensive use of military force against a target state. Its draft definition of aggression,<sup>24</sup> submitted to the Disarmament Conference of the League of Nations in 1933, made clear that an "aggressor" was that State which was the first to invade, bombard or blockade a target state. Under the Soviet definition, armed attack was almost impermissible per se; it could not be justified on grounds that the target state repudiated its debts to

<sup>21</sup>LEAGUE OF NATIONS COVENANT, preamble.

<sup>22</sup>LEAGUE OF NATIONS COVENANT art. 10.

<sup>23</sup>Treaty for the Renunciation of War (Briand-Kellog Pact), August 27, 1928, in BRIGGS, *supra* note 41 at 968.

<sup>24</sup>J. STONE, *AGGRESSION AND WORLD ORDER* 34-5 (1958) (hereinafter cited as *AGGRESSION AND WORLD ORDER*). For a more recent Soviet definition of aggression, see *Id.* at 201-2, and *Report of the 1956 Special Committee on the Question of Defining Aggression*, U.N. GAOR, 12th Sess., U.N. Doc A/3574 at 30-1 (1957). The Soviet Union has also concluded both bilateral and multilateral treaties prohibiting aggression. See *AGGRESSION AND WORLD ORDER* at 212-3.

the attacking state, infringed the privileges of the diplomatic representatives of that state, or illegally restricted the rights of the citizens of the attacking state.

The vast destruction of World War II, and the failure of the League system, did not mean community abandonment of attempts to proscribe aggression. The Allied response to Axis aggression, the Nuremberg judgments, the numerous post-war alliances, and, most importantly, the United Nations Charter, reaffirmed the illegality of highly intense coercion employed against a target state. Members of the United Nations, thus, undertook to refrain from the "threat or use of force against the territorial integrity or political independence of any state".<sup>25</sup> The Charter drafters further envisioned that the Security Council, with armed force eventually at its disposal, might take both provisional and enforcement measures in the event of a "breach of the peace", a "threat to the peace" or an "act of aggression".<sup>26</sup> These terms extend Council jurisdiction beyond instances of "aggression", as traditionally conceived, and permit the Council to review all relevant facts before recommending or deciding upon a solution for a particular dispute.<sup>27</sup>

Despite the abortive efforts to define "aggression", and the shift in authority from the Security Council to the General Assembly, the United Nations has in practice reaffirmed the illegality of major coercions, i.e., the extensive use of military force (other than in self-defense or pursuant to a United Nations decision) to acquire or destroy substantial resources of or in a target state.<sup>28</sup> The United Nations action in Korea, the General Assembly resolutions condemning the intervention in Hungary in 1956, and several other General Assembly resolutions,<sup>29</sup> are sufficient proof of this point.

In summary, it is aggression and therefore illegal to employ extensive military force and violence (except in self-defense or pursuant to a United Nations decision) to acquire or destroy substantial resources of or in a target state. In the words of one noted scholar, lesser degrees of coercion

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<sup>25</sup>U.N. CHARTER art. 2(4).

<sup>26</sup>U.N. CHARTER art. 39.

<sup>27</sup>M. McDougal & W. Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1, 6-9 (1968).

<sup>28</sup>For an excellent discussion of United Nations practice relating to permissible and impermissible coercion, see R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (hereinafter cited as HIGGINS) 167-228 (1963).

<sup>29</sup>E.g., the Peace through Deeds Resolution, General Assembly Resolution 380 (V), U.N. GAOR, 5th Sess., U.N. Doc. A/1775 (1950); the Essentials of Peace Resolution, U.N. GAOR 4th Sess., Report of the First Committee, U.N. Doc. A/1150 and Corr. 1 in Annex at 231,233-4, and U.N. GAOR, 261st Meeting, U.N. Doc. A/PV. 261 at 438-9 (1949).

are also "impermissible" if the coercion is of such order and proportions as reasonably to bring about expectations in the target state of the insufficiency of non-military countermeasures and of an immediate necessity for a military response.<sup>30</sup> To determine the legality of even lower degrees of coercion, a brief impressionistic examination of the doctrines of intervention is given hereunder.

## 2) INTERVENTION

Contemporary doctrines about the legality or illegality of intervention have their principal roots in two historical trends.<sup>31</sup> The first is the coming of age of the Latin American republics, the consolidation of United States power on the North American continent, and the shift of United States policy from "dollar diplomacy" to the "good neighbor policy". The second is the attempt to replace the European "balance of power" system, which had proven incapable of maintaining modest stability in Europe by the turn of the twentieth century, with international organizations that were entrusted, in varying degrees, with the maintenance of international peace and security.

### (a) *Intervention in the Americas*

In the early nineteenth century the European powers on numerous occasions employed military force—in the form of armed invasion and temporary occupation, naval blockade, seizure of governmental institutions (most particularly, customs)—against several Latin American nations. Toward the end of that century, European interventions in the Americas decreased in number and in the coerciveness of the armed forces employed, and the United States replaced the European states as the principal intervening state in Latin America. Its principal method of intervention was by the dispatch of armed forces, most notably, the Marines, but it also used the techniques of naval bombardment, pacific blockade and embargo.

The stated goals of both European and United States interventions were generally quite similar: the enforcement of contract debts owed by the target state to nationals; the redress of treaty violations; and the protection of nationals against disturbances within the target state, and against denials of justice, illegal seizures of their property and illegal detention.

<sup>30</sup>MCDUGAL & FELICIANO, *supra* note 20 at 200. See also J. Moore, *The Lawfulness of Military Assistance to the Republic of Viet Nam*, 61 AM. J. INT'L L. 7 (1967).

<sup>31</sup>The most comprehensive recent study of the legality and illegality of intervention is A. THOMAS & A. THOMAS, *NON-INTERVENTION* (1956) (hereinafter cited as THOMAS & THOMAS).

During this period, North American and European jurists fashioned two blanket doctrines to justify the often disparate types of intervention. "Intervention for the protection of lives and liberty of citizens abroad", asserted some, was legally justifiable, presumably as an exercise of "sovereignty" by the intervening state.<sup>32</sup> "Humanitarian intervention" was permissible when the acts of a target state, in the words of two noted commentators, were "contrary to the laws of humanity."<sup>33</sup>

Latin American diplomats and jurists, as might be expected, were equally creative in fashioning doctrines that asserted the illegality of intervention. By 1868 Dr. Calvo had enunciated the doctrine that bears his name; it held illegal armed intervention by one state to enforce the private claims of its citizens. Attempts to codify the Calvo doctrine were made throughout the first decades of the twentieth century, but failed principally because of United States opposition.<sup>34</sup>

Disputes about the legality of the 19th and early 20th century interventions in the Americas were put to rest in 1933, when the Sixth International Conference of the American States adopted the Convention on the Rights and Duties of States. Article 8 of that Convention read: "No state has the right to intervene in the internal affairs of another."<sup>35</sup> Prior to World War II, other Latin American conferences, and the practice of the United States, reaffirmed this principle. The principle, however, took its most elaborate form in the Charter of the Organization of American States, which asserted:<sup>36</sup>

No State or group of States has the right to intervene, directly or indirectly for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

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<sup>32</sup>THOMAS & THOMAS, *supra* note 31 at 303-358.

<sup>33</sup>See generally THOMAS & THOMAS, *supra* note 31 at 372-390; BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 338 (1963); E. STOWELL, *INTERVENTION IN INTERNATIONAL LAW* 125 ff. (1921); MOORE, 6 *INTERNATIONAL LAW DIGEST* 347-367 (1906); L. OPPENHEIM, (Lauterpacht, ed.) *I INTERNATIONAL LAW* 312-3 (1955), (hereinafter cited as OPPENHEIM).

<sup>34</sup>One exception was The Hague Convention II of 1907, which prohibited recourse to armed force for the recovery of contract debts. This obligation, however, did not apply when the debtor state refused to reply to an offer of arbitration, or, if it accepted the arbitration, rendered settlement impossible. It also did not apply when the debtor state failed to submit to an arbitral award. See generally OPPENHEIM, *supra* note 33 at 309, note 3, and the remarks of Secretary of State Root to the United States Delegation to The Hague Convention, reprinted in M. WHITEMAN, *V DIGEST OF INTERNATIONAL LAW* 413 (1965).

The history of the Latin American attempt to obtain a United States commitment to the principle of non-intervention is set forth in THOMAS & THOMAS, *supra* note 31 at 55-64.

<sup>35</sup>Quoted in THOMAS & THOMAS, *supra* note 31 at 62.

<sup>36</sup>CHARTER OF THE ORGANIZATION OF AMERICAN STATES art. 15.

It is not to be thought that this principle proscribed coercive use of military force that was in fact a legitimate exercise of the right to self-defense.<sup>37</sup> At the time of the drafting of the OAS Charter, it was also clear that certain non-coercive methods of interaction—diplomatic protest, non-recognition—would not be considered forms of intervention.<sup>38</sup> Use of armed force under OAS auspices, finally, was to be permissible.

*(b) Intervention in Europe*

From the demise of Napoleon's Continental System until the outbreak of World War I, the European community was in general agreement that intervention was legal, whether the intervention took the form of armed invasion and temporary occupation, naval blockade, or bombardment. To some extent the goals of intervening powers paralleled the goals of the European powers in the Americas, namely, the protection of nationals against deprivations imposed by lesser-developed target states. More importantly, intervention in Europe aimed at suppressing possible threats to the balance of power, most particularly, revolutions, and attempts by European states to extend their territorial base. A premise of the Congress of Vienna was that a balance of power should be maintained on the Continent; and the inevitable corollary was that intervention was permissible to maintain this balance. Use of military force was a permissible method to reach this goal, and to bring back into the European system certain "disturbed areas", i.e., States "eliminated" from the European alliance because their "internal structures" had undergone an "alteration brought about by revolt".<sup>39</sup> By such reasoning, and by the use of armed force, the monarchies of Spain and Naples were restored, and at a later date, the Austro-Hungarian empire was saved from disintegration. During this period, as one noted scholar has put it, "intervention was the order of the day".<sup>40</sup>

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<sup>37</sup>See Inter-American Treaty of Reciprocal Assistance (Rio Treaty) art. 3 in THOMAS & THOMAS, *supra* note 31, at 435, 437, and the remarks of Professor A. A. Berle, who played an instrumental role in drafting the OAS Charter, in A. THOMAS & A. THOMAS, *THE DOMINICAN REPUBLIC CRISIS 1965* (1967) at 100.

<sup>38</sup>A. Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law*, 40 AM. J. INT'L L. 121 (1946).

<sup>39</sup>Excerpted from the Protocol of Troppau (1820), quoted in R. PALMER & J. COLTON, *A HISTORY OF THE MODERN WORLD* 450 (1965).

<sup>40</sup>C. Fenwick, *Intervention: Individual and Collective*, 39 AM. J. INT'L L. 644, 649 (1945).

The thirty-year period following the Congress of Berlin saw no major attempt at limiting the general view that intervention was permissible. Europe was at peace; in Europe, thus, the question of the permissibility or impermissibility of intervention was moot. In Africa and Asia, where both the European powers and the United States were engaged in colonial competition and expansion, but few local authorities invoked international law, and no significant doctrines of impermissible intervention developed.

Community consensus about the illegality of certain types of intervention began to congeal after the First World War. Although the drafters of the League Covenant focused principally on the more highly intense forms of coercion, they did not overlook lesser forms of inter-state coercion. Article 12 of the Covenant, thus, specified that League Members could submit to the Council "for inquiry" disputes that were "likely" to lead to a "rupture". Decision about the permissibility or impermissibility of intervention could thus be entrusted to an international body, which, in the authoritative statement of a Special Committee of Jurists, was to decide immediately, having due regard to all the circumstances of the case and the nature of the (coercive) measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.<sup>41</sup> Subsequent to 1923,<sup>42</sup> both the practice of the League, and the writings of the majority of jurists, confirmed that any coercive use by members of armed force (except in self-defense or pursuant to League decision) would contravene the Covenant, even if the use of force could not be labelled "aggression" or "war".<sup>43</sup> The Pact of Paris of 1928, in supplement of this principle, required signatories to settle "all conflicts", whatever "their nature or origin", by the techniques of pacific settlement. In the period following World War I, even the Soviet Union accepted the principle that the use of armed force against a target state (other than in self-defense) was a form of impermissible intervention.<sup>44</sup>

It was the United Nations Charter, however, that crystallized an international consensus about the impermissibility of certain types of intervention. Article 2(4) requires Members "to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State". The terms "threat or use of force" clearly envision that coercive use of *armed* force is unlawful; more importantly, the Charter drafters noted that other types of coercion fell within the proscription of Article 2(4).<sup>45</sup> A determination of the permissibility of

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<sup>41</sup>Quoted in H. BRIGGS, *THE LAW OF NATIONS* (hereinafter cited as BRIGGS), 961-2 (1952).

<sup>42</sup>In 1923 an Italian cruiser bombarded, and landed an expeditionary force on the Greek island of Corfu to retaliate against a Greek failure to meet the Italian demands pressed after the assassination in Greece of the Italian General Tellini and four of his aides. The League handled the matter "supinely." BRIGGS, *supra* note 41 at 960; see also E. COLBERT, *RETALIATION IN INTERNATIONAL LAW* 81-87 (1948).

<sup>43</sup>The literature is summarized in BRIGGS, *supra* note 41 at 962-3.

<sup>44</sup>See the provisions of the Soviet treaties cited in *AGGRESSION AND WORLD ORDER*, *supra* note 24 at 212-3, and Article 3 of the Treaty of Neutrality and Non-Aggression of June 24, 1931 between the Soviet Union and Afghanistan, 157 L.N.T.S. 371 (1931). That article proscribed both armed and unarmed intervention.

<sup>45</sup>At San Francisco, Committee I/1 reported that "(t)he unilateral use of force or *similar coercive measures* is not authorized or admitted." Report of Rapporteur of Commission I to Plenary Session, 6 U.N.C.I.O. 245, 247 (1945).

coercion, further, was not to take place in a vacuum. The terms "territorial integrity and political independence" are of broad scope, and permit analysis of the impacts of a "threat or use of force" on such varied factors as the resources of a target state, the freedom of decision of its officials, the authority and control exercised by its institutions, its leadership or institutional structures, etc.<sup>46</sup>

The Charter also granted the Security Council more far-reaching jurisdiction to determine the permissibility of interventions than the Covenant had given to the League Council. Under the Charter, the Security Council has authority to "investigate" disputes which might lead to international friction; it may also take "provisional measures" or "enforcement action" to resolve "threats to the peace" or "breaches of the peace". The Assembly, too, has more explicit powers to determine the permissibility of interventions than did its League counterpart. The Assembly's competence in the maintenance of international peace and security, as is well known, increased with its passage of the "Uniting for Peace Resolution".<sup>47</sup>

United Nations practice in dispute contexts has expanded the concept of "impermissible intervention" to include, not only armed incursions against a target state, but also the organization by an intervening state of volunteers to participate in military actions against a target state,<sup>48</sup> the maintenance of irregular troops in a target state,<sup>49</sup> the training by an intervening state of refugees to engage in guerilla war in a target state,<sup>50</sup> and the furnishing of arms and other supplies to guerillas operating in a target state.<sup>51</sup> In each of these cases relatively high levels of coercion were directed against the political independence or territorial integrity of a target state.

Apart from its actions in particular dispute situations, the United Nations, in a variety of ways, has emphasized the world community's preference for peaceful change, and its abhorrence of impermissible intervention.

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<sup>46</sup>For analyses of the factors relevant to determining whether intervention has occurred, see W. Burke, *The Legal Regulation of Minor International Coercion: A Framework of Inquiry*, in Falk, ed., *THE VIETNAM WAR AND INTERNATIONAL LAW* 79 (1968).

<sup>47</sup>U.N. General Assembly Resolution 377 (V). See generally MCDUGAL & FELICIANO, *supra* note 19 at 252-3; HIGGINS, *supra* note 28 at 227-8.

<sup>48</sup>See General Assembly Resolution 498 (V).

<sup>49</sup>*E.g.*, the presence of Nationalist Chinese troops in Burma, condemned by General Assembly Resolution 707 (VII), based on a draft resolution to be found in "Report of the First Committee", U.S. Doc. A/2391, U.N. GAOR 7th Session Annexes, Agenda Item 77 at 4, and adopted at U.N. GAOR, 428th Meeting, U.N. Doc A/PV.428 (1953). See also U.N. General Assembly Resolution 815 (IX), based on a draft resolution to be found in "Report of 'Ad Hoc' Political Committee", U.N. Doc A/2762, U.N. GAOR, 9th Session, Annexes, Agenda Item 63, at 10. See also HIGGINS, *supra* note 28 at 184.

<sup>50</sup>HIGGINS, *supra* note 28 at 189-95.

<sup>51</sup>*Id.*

The General Assembly has repeatedly affirmed Member obligations to comply with the Charter Article that proscribes the threat or use of force against the territorial integrity or political independence of a target state. One of the more important of these General Assembly resolutions, which was sponsored by Czechoslovakia in 1965, reads in part as follows:<sup>52</sup>

1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.
2. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed toward the violent overthrow of the régime of another State, or interfere in civil strife in another State.

In summary, during the last four decades it has been illegal for an attacking state, unless acting in self-defense or pursuant to United Nations decision, to employ military force, at relatively intense levels of coercion, substantially to limit the freedom of decision of the officials of a target state, to work modest changes in its institutional or leadership structures, or significantly to restrict a target state from obtaining access to or utilizing its resources. Indeed, in recent years it has become clear that, in certain circumstances, a non-military "threat or use of force" against the "territorial independence or political integrity" of a target state may also be unlawful.<sup>53</sup> These proscriptions may expand in scope as the world becomes increasingly interdependent to embrace even moderate levels of coercion, whether military, ideological or economic, which is directed against a target state.

### 3) AGGRESSION, INTERVENTION AND THE INVASION OF CZECHOSLOVAKIA

That the Warsaw Pact invaders directed highly intense coercion against the territorial integrity and political independence of Czechoslovakia is indisputable; a brief review of the aftermath of the invasion will be proof enough of this point.

An initial goal of the Warsaw Pact invaders was to use armed force to work changes in the leadership structures of Czechoslovakia. On the morning of August 21st, Soviet troops entered the Central Committee building,

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<sup>52</sup>General Assembly Resolution 2131 (XX).

<sup>53</sup>See generally B. MURTY, *PROPAGANDA AND WORLD PUBLIC ORDER* (1968).



and seized Dubcek, National Assembly President Smrkovsky, and Central Committee member Kriegal. The Soviet troops forced the three Czech leaders from the building. One report indicates that Dubcek was injected with a sedative. The Czech leaders were led into armored cars, where they were bound with rope and then transported to a resort. Elsewhere Soviet troops "arrested" Premier Cernik, led him handcuffed from his office, and took him to join his colleagues. Treatment was so harsh during the ensuing period of internment that Premier Cernik "feared for (his) life and that of (his) comrades".<sup>54</sup> At approximately the time when Dubcek and the others were seized, Messrs. Indra and Lenart sought President Svoboda's approval of a "provisional Government of workers and peasants".

The Warsaw Pact invaders also directed intense pressure against the Czech leaders during negotiations in Moscow from August 23rd to 26th. These negotiations, in Mr. Smrkovsky's words, occurred "in the shadow of tanks and planes".<sup>55</sup> When President Svoboda refused to negotiate in Mr. Dubcek's absence, Dubcek, Smrkovsky, Cernik and Kriegal were flown to Moscow and presented (still bound) to Mr. Brezhnev—a technique hardly appropriate as a preliminary to a "frank and comradely" negotiating session. During negotiations, Brezhnev apparently threatened "absorption" of Czechoslovakia into the Soviet Union, and the "destruction" of the 14 million inhabitants of Czechoslovakia. So intense was the Soviet pressure that, according to one report, President Svoboda, perhaps to secure a foothold in the bargaining, drew a revolver and threatened to kill himself. But the techniques of Soviet pressure are best illustrated in the communiqué issued after the Moscow negotiations: it recorded an "agreement" that the Warsaw Pact troops would be withdrawn only "as the situation" in Czechoslovakia should be "normalized".

"Normalization"—with the troops of the Warsaw Pact invaders in Czechoslovak territory—has been a euphemism for the coercive limitation of freedom of decision by Czech officials. First, Secretary Dubcek has noted that "since the August events it has become inevitable to adopt (certain) more serious measures".<sup>56</sup> When explaining the results of the Moscow negotiations to the Czechoslovak National Assembly, Assembly President Smrkovsky noted that the Assembly would be "forced" to take "exceptional measures" vis-à-vis the press, radio and television. Measures which would "result in the dissolution of the political clubs", and which

<sup>54</sup>SZULC, *supra* note †, at 6, col. 4.

<sup>55</sup>*Id.* at col. 8.

<sup>56</sup>The quotations in this paragraph are from the translations of Czechoslovak radio broadcasts referred to in note †, *supra*; Mr. Smrkovsky's statements also appear in *THE BLACK BOOK*, *supra* note †.

would "prevent additional political parties from being formed", were also "required" of the Assembly. Emergency powers, continued Mr. Smrkovsky, "will have to be granted" to the Government. All these measures were "indispensable" with a view to the "normalization of the situation" and the "departure of foreign troops". Failure to implement the Moscow agreements, in language attributed to Soviet special envoy Kuznetsov, would mean that "unforeseeable consequences may ensue".

Intense levels of coercion were also directed at Czechoslovak governmental institutions and the Czechoslovak people.<sup>57</sup> Immediately after the invasion, the troops of the Warsaw Pact invaders seized television and radio stations, and major newspaper facilities. Although Warsaw Pact troops appeared reluctant to use their weapons against the citizens of Czechoslovakia, some 70 individuals died in consequence of the invasion. During the first two months of "normalization" following the invasion, this pattern of coercion continued. Suffice it to note the more blatant examples. Thus, the Soviet Union "insisted" on the dismissal of key Czech leaders, including Foreign Minister Jiri Hajek and Interior Minister Pelikan. Soviet troops dispossessed soldiers of the Czechoslovak Socialist Republic. The Soviet ambassador to Czechoslovakia pressured the Justice Ministry to initiate trials against "counterrevolutionary elements", and the Commander

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<sup>57</sup>Certain bills passed by the National Assembly in the fall of 1968 illustrate the extent to which the Moscow agreements restricted Czechoslovak political independence, and limited the policy alternatives open to the Czechoslovak leaders. A bill reinstating censorship gave the relevant "Office for Press and Information" the right directly or through authorized persons to prevent publication in the periodical press or other mass information media of information containing facts that are at variance with the vital interests of the domestic or foreign policy of the state. A "temporary measure to strengthen public order" authorized the Government "to dissolve" organizational meetings if a meeting "might disturb important state interests", or "runs counter to the law", or "is directed against the socialist order", or "in any other way threatens public order". Could broader mandates for repression have been devised?

"Instruction No. 1 for press, radio and television" also reveals the degree of force used by the Soviet Union during the Moscow negotiations, and, at the same time, its intolerance of any publicity of its coercive techniques. This Instruction, which Bratislava Pravda reprinted from the weekly POLITIKA, reads in part as follows:

On the basis of the conclusions of the Moscow talks, the government is laying down the following obligatory guidelines for directing the content of press, radio and television:

"1—Not to publish anything that could be taken as criticism of the Soviet Union, the Polish People's Republic, the GDR, the Bulgarian People's Republic, the Hungarian People's Republic, or the communist parties in these countries. Not to publish anything that could be construed as attacking the basis of socialism, the Czechoslovak Communist Party, other political parties, the system and position of the National Front, and the position of our army and security. This also concerns information from abroad.

"2—Not to publish information and articles attacking the foreign military units on the territory of our state and causing conflicts and action against them.

"3—Not to use the term occupation and occupiers."

The quotations in this footnote are from TRANSLATIONS.

of the Warsaw Pact invaders threatened to send troops into the schools of Czechoslovakia if school teachers did not adopt a "more favorable attitude toward the Soviet Union".<sup>58</sup> In the economic sphere, the Soviet Union appears to have forced the Czechoslovak government to abandon its plans to have workers participate in factory management. In the realm of politics the Soviet Union sought and obtained a commitment to declare invalid the extraordinary 14th Congress of the Communist Party of Czechoslovakia.

There is, however, no need to belabor the obvious. By using the presence of Warsaw Pact troops on Czech territory to exert military leverage on Czech leaders, the Warsaw Pact invaders used the threat of force to curtail the freedom of decision of these leaders, and to work fundamental changes in the composition and policies of Czechoslovak institutions. Unless the invasion is justified by doctrines of permissible coercion, it was and is clearly illegal. Whether it is illegal because it was an "aggression" or "intervention" is a question that is almost academic; so intense was the coercion employed that it could aptly be characterized by either concept. It would not be correct to label the invasion an "intervention" or an "aggression", however, if it were justified by international law doctrines defining "permissible coercions".

### *B. Permissible Coercion*

It is axiomatic that not every crossing of state borders by military forces is coercive, and that not every modestly forceful or highly intense use of military forces against a target state is illegal. Permissible coercions cover a broad range. At the one extreme is the minimal degree of coercion normally found in state relations. At the other is the use of high levels of force in self-defense, or in fulfillment of a sanctioning decision of a community organization.

The principal Soviet justifications for the Czechoslovak invasion focus on all these types of permissible coercion. An initial justification claims that there was no coercion employed in the invasion (or only coercion of a minimal degree) because Czechoslovak authorities "invited" or "consented" to the presence of the Warsaw Pact troops. A second argument insists that the invasion was a lawful exercise of the invaders' rights to self-defense, and a third claims the invasion to have been justified because it was taken pursuant to joint decision within a regional organization. A final argument submits that the foregoing history of the doctrines of aggression and intervention is incorrect, and that in the last two decades a "rule

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<sup>58</sup>C. Farnsworth, *Soviet in Warning on Czech Schools*, N.Y. Times, Oct. 13, 1968, at 1, col. 3.

of the game" has developed which permits the Soviet Union to employ coercion against potentially defecting members of the Soviet bloc. (To the best of the author's knowledge, neither the Soviet Union nor any of the other Warsaw Pact invaders has attempted a careful exposition of these arguments, with citation to relevant precepts of international law.)

# 1) INVITATION OR CONSENT OF THE TARGET STATE

A principal justification of the invasion of Czechoslovakia insists that Czechoslovak authorities invited its Warsaw Pact allies to assist in the suppression of "counterrevolutionary" elements in Czechoslovakia.<sup>59</sup>

Traditional international law holds that it is legal for the government of one state to "render assistance" to the "established legitimate government of another state with a view (toward) enabling it to suppress an insurrection against its authority".<sup>60</sup> Historically, "assistance" may be rendered either on invitation by an established legitimate government, or with the consent of that government.<sup>61</sup> Rendering such "assistance", however, has traditionally been thought to be illegal when a rebellion in the recipient state has passed the bounds of insurrection or insurgency, and has become belligerency.<sup>62</sup>

That these traditional conceptions require modification for contemporary purposes is beyond question. Leading scholars, mindful of the principles of self-determination and the possibility that "honest home-grown" rebellion might lead to "international conflagration", have begun to work modest changes in the traditional doctrine<sup>63</sup>—changes that restrict the opportunities of one state to deploy its forces upon the invitation or with the consent of another state. For present purposes, however, let us assume the validity of the traditional doctrine. That doctrine, in modest fashion, sought to limit coercion in international relations by permitting one state to render military assistance to another only if (inter alia) two conditions were met: 1) factual inquiry must disclose some form of "invitation" for or consent to the military actions of that state; and 2) the invitation or consent must be

<sup>59</sup>See the TASS Statement printed in Pravda and Izvestia on Aug. 21, 1968 at 1, translated in XX(34) CDSP 3 (1968).

<sup>60</sup>Garner, *Questions of International Law in the Spanish Civil War* 31 AM. J. INT'L L. 66, 68 (1937).

<sup>61</sup>THOMAS & THOMAS, *supra* note 31 at 22.

<sup>62</sup>R. Falk, *Janus Tormented: the International Law of Internal War*, in Rosenau, ed. INTERNATIONAL ASPECTS OF CIVIL STRIFE 185, 196-7; MCDUGAL & FELICIANO, *supra* note 19 at 194, footnote 164; Q. Wright, *United States Intervention in the Lebanon*, 53 AM. J. INT'L L. 112, 119-25 (1959); HIGGINS, *supra* note 28 at 211. Some writers assert that intervention to suppress even a nascent rebellion is unlawful. See E. Lauterpacht, *Intervention by Invitation*, 7 INT'L & COMP. L. Q. 102, 103 (1958).

<sup>63</sup>Cf. W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 271 (1964); MCDUGAL & FELICIANO, *supra* note 19 at 192-3, footnote 164.

from the established government of the state in whose territory the military forces were to be deployed. Neither of these conditions was met when the troops of the Warsaw Pact invaders entered Czechoslovakia.

Immediately after the invasion of Czechoslovakia, Soviet leaders produced an "Appeal to the Czechoslovak People" authored by a "Group of Members of the CCP Central Committee, the CSR Government, and the National Assembly".<sup>64</sup> The Appeal's authors stated that they had "taken on (themselves) the initiative of rallying all patriotic forces (i.e. the Warsaw Pact troops) in the name of (their) socialist future and (their) homeland".<sup>65</sup> The Appeal nicely complemented the TASS assertion that "party and state leaders of the Czechoslovak Socialist Republic have requested the Soviet Union and other allied states to give the fraternal Czechoslovak people immediate assistance, including assistance with armed forces".<sup>66</sup>

There is every evidence, however, that the Appeal was a fabrication. It had no signatories, and apparently no Czechoslovak has admitted to signing it. It is inconceivable that President Svoboda, First Secretary Dubcek, Premier Cernik, Foreign Minister Hajek, or National Assembly President Smrkovsky authorized it. In the statements following the invasion, none of the principal organs of the CCP or the Czechoslovak government admitted to its authorship.<sup>67</sup> The leading Soviet candidates for a "new" Presidium, Messrs. Indra, Holder and Bilak, did not sign the Appeal, even though under considerable Soviet pressure to do so on August 21, 1968. Indeed, in October a Moscow pamphlet entitled "On the Events in Czechoslovakia" made no reference to the "invitation" when justifying the invasion. In short, the "invitation", on the basis of contemporary evidence, may well have been a Soviet creation.

It is also not to be assumed that the Czechoslovak people or government consented to the invasion. Immediately following the attack, authoritative Czech organs denounced the invasion as illegal, and the extraordinary 14th Congress of the Communist Party of Czechoslovakia demanded speedy withdrawal of the occupation forces. Popular abhorrence of the invasion was demonstrated by the failure of the Soviet Union to organize a conservative "puppet" government.

<sup>64</sup>Printed in *Pravda*, Aug. 22, 1968 at 1, and translated in XX(34) CDSP 3-5 (1968).

<sup>65</sup>*Id.* at 4.

<sup>66</sup>Printed in *Pravda*, Aug. 21, 1968 at 1 and translated in XX(34) CDSP 3 (1968).

<sup>67</sup>The 26th Extraordinary Plenary Session of the National Assembly declared that no constitutional organ . . . has been empowered to discuss the arrival of foreign troops, nor (has a constitutional organ) . . . approved any such discussion, nor has (any constitutional organ) invited the occupation troops of the five states of the Warsaw Pact.

Consent to the invasion, further, cannot be deduced from events in the months after the invasion. Mention has been made above at the intense levels of coercion directed in Moscow at the Czech leaders to obtain a commitment to "normalization". It is true that the Czech National Assembly ratified a treaty authorizing the stationing of Soviet forces on Czech soil,<sup>68</sup> and that Article 2 of that Treaty (which by its terms is not retro-active) stipulates that the "temporary presence of Soviet troops in the territory of the Czechoslovak Socialist Republic does not violate its sovereignty". However, this treaty is also a result of the agreements reached in Moscow from August 23 to August 26; and to the foregoing discussion for evidence of the high levels of coercion directed at Czech leaders to obtain a commitment that this treaty would be signed. No precept in international law requires that forced acceptance of the Soviet presence be characterized as "consent" to that presence.<sup>69</sup>

In summary, there is no substance to an argument that the invasion of Czechoslovakia is permissible because Czechoslovak authorities "invited" or "consented" to the entry into Czechoslovakia of the Warsaw Pact invaders.

## 2) SELF-DEFENSE

The Soviet justifications of the Czechoslovak invasion have all urged that the invasion was an exercise of the rights to "individual" and "collective self-defense". In its initial commentaries on the invasion, the Soviet Union claimed that the Warsaw Pact invaders were defending themselves or Czechoslovakia against "external forces hostile to socialism" which were acting "in collusion" with "counterrevolutionary forces" in Czechoslovakia.<sup>70</sup> In subsequent writings,<sup>71</sup> they found a different type of threat to the socialist camp. Their argument, paraphrased broadly, is as follows: Czechoslovakia occupies a key geographical position in the Soviet bloc. On the one hand, it borders both West Germany and the Soviet Union; on

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<sup>68</sup>Treaty between U.S.S.R. Government and the C.S.R. Government on the Conditions for the Temporary Stationing of Soviet Troops on C.S.R. Territory, printed in Pravda, Oct. 19, 1968 at 1 and translated in XX (42) CDSP 1-2 (1968).

<sup>69</sup>Just the opposite is the case: the treaty is "without legal effect" and "void". The International Law Commission stated the established rule in Articles 48 and 49 of the DRAFT ARTICLES ON THE LAW OF TREATIES 61 AM. J. INT'L L. 277, 406-9 (1967). See also LORD MCNAIR'S THE LAW OF TREATIES (1961) at 209-10 on the transformation of the traditional views regarding the validity of treaties obtained by coercion.

<sup>70</sup>See the TASS Statement translated in XX(34) CDSP at 3 (1968).

<sup>71</sup>S. Kovalev, *Sovereignty and the Internationalist Obligations of Socialist Countries*, Pravda, Sept. 26, at 4, translated in XX(39) CDSP 10 (1968), and N.Y. Times, Sept. 27, 1968 at 3.

the other, it separates key European communist states. Despite Czech protests to the contrary, the liberalization of the spring and summer of 1968 might have led to a shift in the allegiances of its peoples from the Soviet bloc to the Western European countries. This shift would have drastically altered the balance of power in Europe, which is premised on the fact, concurred in by the Western powers, that Soviet borders are and should be protected against the West European states by a buffer of its "junior allies". Altering the balance of power might have meant that West Germany could mount an armed attack against the Soviet Union from just across its borders. A "neutral" Czechoslovakia might also have permitted army infiltration of the Soviet bloc by the Western powers. Liberalization in Czechoslovakia did threaten the Soviet bloc. To eliminate this threat, the argument concludes, the Warsaw Pact invaders exercised their inherent right of self-defense, and invaded Czechoslovakia.

Customary international law has long recognized a right to self-defense, but not without limitations.<sup>72</sup> In its classic statement, recourse to self-defense was legitimate only when there was a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation"; the actions taken in self-defense, further must involve "nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept closely within it".<sup>73</sup> An anticipatory right of self-defense did exist in traditional international law, but actions in self-defense had to be in necessary response to actual coercion or a threat of imminent coercion, and had to be proportional, or reasonably related to the scope and degree of force employed by the attacking state.<sup>74</sup> The twin requirements of necessity and proportionality, it should be noted, are but a corollary of the community preference for peaceful change. It was failure to meet these requirements that led the Lytton Commission to declare illegal the Japanese invasion of Manchuria in 1931, and the Nuremberg Tribunal to hold that the German invasion of Norway in 1940 was not a justifiable action in self-defense.

It has been urged strongly that the United Nations Charter worked a fundamental change in the traditional concept of self-defense, eliminating the right to anticipatory self-defense, and restricting the use of force in

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<sup>72</sup>See generally MCDUGAL & FELICIANO, *supra* note 20 at 207 *et seq.*; D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* (1958) (hereinafter cited as BOWETT).

<sup>73</sup>The statement is Secretary of State Webster's, and is quoted in BRIGGS, *supra* note 41 at 985.

<sup>74</sup>BOWETT, *supra* note 72 at 269; BROWNLIE, *supra* note 33 at 257, 261; P. JESSUP, *A MODERN LAW OF NATIONS* 166 (1948); MCDUGAL & FELICIANO, *supra* note 19 at 217 ff.; D. O'CONNELL, *1 INTERNATIONAL LAW* 343 (1965).

self-defense to respond to armed attack. The argument, in brief summary, is as follows: Article 2(4) of the Charter requires members to refrain from the use or threat of force against the territorial integrity or political independence of a target state. Article 51 of the Charter creates an exception to this basic principle; it provides that no provision in the Charter is to impair the inherent right of individual or collective self-defense in case of armed attack. A corollary to this exception is that use of force in self-defense against a threat of intense coercion, but not an armed attack, is inconsistent with the overriding principle of Article 2(4). The employment of high levels of coercion in self-defense is thus unlawful unless taken in response to an armed attack. Against these standards, of course, the invasion of Czechoslovakia cannot be justified as an action in self-defense, because Czechoslovakia had not mounted an armed attack against the Warsaw Pact invaders.

This syllogistic limitation on the traditional right of self-defense, however, ignores the history of Articles 2(4) and 51. The authors of Article 2(4) noted that the right of self-defense remained "unaffected" and "unimpaired" by the language of Article 2(4).<sup>75</sup> The drafting history of Article 51, further, reveals no considered attempt to limit the customary right to anticipatory self-defense. Speeches interpreting the final draft of Article 51, for example, refer to the inherent right of self-defense against aggression, rather than armed attack. Article 51, it will be remembered, was an attempt to provide some autonomy for regional organizations, and not an effort to legislate changes in the customary law of self-defense.

By itself, the legislative history of both Articles 2(4) and 51 is persuasive that the traditional right of self-defense remains unimpaired. It is, however, inconclusive, for the process of Charter interpretation extends beyond examination of textual materials and their *travaux préparatoires*. When interpreting a constitutional document like the United Nations Charter, the principal goal of interpretation is to ascertain the genuine shared expectations of the document's framers, and to temper these expectations by taking into account overriding community policies at the time of interpretation.<sup>76</sup> It hardly bears mention that several nations in the contemporary world possess weapons of vast destructive capability, together with vehicles to deliver these weapons in a matter of seconds. It is inconceiv-

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<sup>75</sup>Report of Rapporteur of Committee I to Commission I, 6 U.N.C.I.O. Docs 446, 459 (1945); approved in the Report of Rapporteur of Commission I to Plenary Session, 6 U.N.C.I.O. Docs. 245, 246 (1955).

<sup>76</sup>M. MCDUGAL, H. LASSWELL, J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER*, 1967; O. LISSITZYN, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 AM. J. INT'L. L. 895, 986-7 (1967).



able that the Charter framers would have expected a target state to await a devastating blow before responding in self-defense. Contemporary policy militates against this result. Recognizing this fact, some scholars have claimed that an armed attack may begin when a missile is launched, or crosses the territorial borders of an attacking state. Others, in more forthright fashion, have rightly noted that it does not make "sense"<sup>77</sup> to require that target states await a final blow "in the posture of sitting ducks".<sup>78</sup>

To assert that the traditional right of self-defense remains unimpaired is not, of course, to open Pandora's box to multiple factitious claims by attacking states that their actions are in anticipatory self-defense. The requirements of necessity and proportionality do impose limitations on the right to self-defense, and do permit officials and scholars to judge the legitimacy of claims to anticipatory self-defense.<sup>79</sup> United Nations practice supports this conclusion. When Israel invaded Egypt in 1956, it asserted that its goals were to block further fedayeen raids from Egyptian territory. Members of the United Nations, however, felt that the invasion was a disproportionate response to the feyadeen raids, and condemned Israel.<sup>80</sup> The Council reached similar conclusions about the Israeli commando attack against the Beirut airport in 1968.

The claim to self-defense by the Warsaw Pact invaders does not meet the requirements of necessity and proportionality. The requirement of necessity demands, in the case of anticipated attack, a high degree of imminence. To such imminence existed prior to the invasion of Czechoslovakia. Certainly there is no evidence that Czechoslovakia was about to, or did, threaten to use force against the Warsaw Pact invaders. The Soviet Union did assert that "external hostile forces" were acting "in collusion" with "counterrevolutionary forces" in Czechoslovakia. As evidence, it claimed the existence of "hidden arms caches" and "illegally operating radio transmitters" in Czechoslovakia, provocational statements by "Western" radio stations, diplomats and academicians, and the "infiltration" of Czech borders by armed "counterrevolutionaries" (presum-

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<sup>77</sup>C. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 (II) *Recueil des Cours* 451, 498 (1952). Professor Henkin has also accepted this view. See L. Henkin, *International Law and The Behavior of Nations*, 114 (II) *Recueil des Cours* 168, 265 (1965 II). See also MCDUGAL & FELICIANO, *supra* note 19 at 238-41.

<sup>78</sup>M. MCDUGAL & W. REISMAN, *supra* note 27 at 8.

<sup>79</sup>For an excellent example of the type of contextual analysis, see M. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963).

<sup>80</sup>See, e.g., The remarks of Mr. Lall of India and Mr. Trujillo of Ecuador at U.N. GAOR, 562nd Meeting (First Emergency Special Session), U.N. Doc. A/PV. 562 (1956) at 25, 31 respectively.

ably Czech refugees) and "spies and saboteurs" dispatched by "imperialist intelligence agencies."

The Soviet Union, however, has yet to offer proof of these allegations (other than to point to "inflammatory" articles and other publications in the Western press, and to "inciting" speeches by Western diplomats). Further, in recent months, Czech authorities have stated that the so-called "hidden arms caches" actually belonged to the Czechoslovak People's Militia; and these authorities have also denied the existence of "illegally operating radio transmitters". During the same period, the Warsaw Pact invaders did not "produce" "armed" Czechoslovak "counterrevolutionaries" or "Western" "spies" or "saboteurs". Indeed, the Czechoslovak authorities have adopted a policy of not staging trials of "counterrevolutionaries." The Soviet Union, finally, went to considerable lengths to promise the security of the Western state that it had claimed was the principal sponsor of "external forces" that acted "in collusion" with counterrevolutionaries in Czechoslovakia.

It also does violence to the requirement of necessity, to claim, as has the Soviet Union, that the invasion of Czechoslovakia was justified by the eventual threat to the Soviet Union to be caused by the "neutralization" of Czechoslovakia. This threat is obviously far too remote to support a claim to anticipatory self-defense. Too many contingencies intrude between the threat and its realization. At the least, Czechoslovakia would have had to become "neutral" or "pro-Western". Prior to the August invasion, however, official pronouncements did affirm that the "basic orientation" of Czechoslovakia's foreign policy was "in alliance and cooperation with the Soviet Union and other socialistic states".<sup>81</sup> Czechoslovak authorities had not renounced the Warsaw Pact, as did the Nagy Government in Hungary in 1956. Even if Czechoslovakia did become "pro-Western", it would not follow that the Western European countries would use it as a "corridor" to mount a direct or indirect attack against the Soviet Union. Indeed, assuming that the West European countries would so use a "neutral" Czechoslovakia—a thoroughly implausible assumption—it still would be possible for the Soviet Union to take appropriate action in self-defense at the time that the attack appeared imminent. But there is no need to parade these contingencies. In an age in which most powers can inflict inestimable damage on others in a matter of seconds, it makes little sense to justify a claim to anticipatory self-defense by devising a scenario that might take half a decade to unfold.

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<sup>81</sup>ACTION PROGRAM, *supra* note 13 at 173.

Let us assume, however, that in August of 1968 there were "counter-revolutionary elements" in Czechoslovakia, that "hostile forces" were acting "in collusion" with them, and that the possibility of Czechoslovak "neutralism" did pose an "imminent threat" to the fundamental interests of the Soviet bloc. Even on these gratuitous assumptions, the invasion would not meet the strict standards of proportionality. The number of troops entering Czechoslovakia, estimated at 500,000 to 650,000, was obviously far in excess of the number required to uproot the 40,000 "counter-revolutionaries" which the Soviet Union believed to be operating in Czechoslovakia. (It must be remembered that the Czechoslovak Army, which numbered approximately 200,000, was loyal to the régime, and more than adequate for this task.) The armor and firepower possessed by the Warsaw Pact invaders was vastly disproportionate to the threat posed by an unspecified number of "hostile external forces", "spies" and "saboteurs". More importantly, if the purpose of the invasion was to protect the Soviet bloc from a potential threat from the West European countries, it would have been sufficient to seal off Czechoslovakia's Western borders. Certainly 500,000 troops were not needed for this purpose. If Israel's invasion of Egypt in 1956 was not in reasonable response to the fedayeen raids directed against it from Egyptian territory, it is obvious that, by comparison, the invasion of Czechoslovakia in 1968 was vastly disproportionate to any possible threat to the security of the Soviet bloc. There is thus no basis for a claim to self-defense by any of the Warsaw Pact invaders.

### 3) PERMISSIBLE ACTIONS THROUGH REGIONAL AGENCIES AND COLLECTIVE SELF-DEFENSE

A third justification asserts that the invasion was a legitimate action of a regional agency. It argues that the deployment of Warsaw Pact forces in Czechoslovakia was a lawful dispute-settling exercise of authority by a regional organization. Alternatively, it insists that the invasion was a legitimate action "in collective self-defense" "in conformity with existing treaty obligations".

The first of these arguments can be stated most strongly by reworking the analysis which State Department legal experts used to justify the Cuban quarantine.<sup>82</sup> As a preliminary, let us assume that the Joint Command of the Warsaw Pact decided, pursuant to Article 5 of the Warsaw Treaty, that the invasion was an "agreed measure" "necessary to strength-

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<sup>82</sup>A. Chayes, *The Legal Case for U.S. Action on Cuba*, 47 Dept. of State Bull. 763 (1962); L. Meeker, *Defensive Quarantine and the Law*, 53 AM. J. INT'L L. 514 (1963).

en” the “defensive power” of the Treaty signatories, to “guarantee the inviolability of their frontiers”, and to “provide defense against *possible* aggression”. Let us further assume that the Joint Command decision was “recommendatory” in form and substance.

The argument begins by asserting that the invasion was an action authorized by a regional organization and was consistent with the United Nations Charter. It is well known that members may resort to these agencies when seeking solutions to disputes that the Security Council is to encourage pacific settlement of “local disputes” through regional organizations, and that the Security Council may utilize regional organizations for “enforcement actions”. There are two principal limitations on the authority of these agencies. Regional agencies may deal with “matters relating to the maintenance of international peace and security” *provided only that* “their activities are consistent with the Purposes and Principles of the United Nations.”<sup>83</sup> Regional agencies, further, may not take “enforcement actions” without the authorization of the Security Council.<sup>84</sup>

Neither of these limitations, the argument continues, is applicable to the deployment of Warsaw Pact forces in Czechoslovakia. The troop deployment was not an “enforcement action” requiring prior authorization by the Security Council. The Charter, Security Council practice, and a decision of the International Court of Justice all make clear that “enforcement actions” are Security Council decisions which are obligatory and involve the use of armed force. “Enforcement actions” do not include United Nations measures which are merely “recommendatory”. Although Article 53(1) refers to enforcement actions by regional agencies, rather than by organs of the United Nations, the “words are properly given the same meaning in this context”.<sup>85</sup> “Recommendatory” actions by regional agencies are thus distinguished from “obligatory” decisions, with only the latter, as “enforcement actions”, requiring prior Security Council authorization. Since the (assumed) Joint Command decision was “recommendatory”, and was thus not an “enforcement action” requiring prior Security Council authorization, the deployment of Warsaw Pact forces in Czechoslovakia was in accordance with Chapter VIII of the Charter.

The troop deployment, the argument continues, was also consistent with the Purposes and Principles of the Charter: Article 1(1), for example, authorizes “effective collective measures for the prevention and removal of threats to the peace”. The troop deployment did not violate other Purposes

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<sup>83</sup>U.N. CHARTER art. 53, para. 1.

<sup>84</sup>U.N. CHARTER art. 52, para. 1.

<sup>85</sup>Meeker, *supra* note 82 at 521.

and Principles. Article 2(4), properly read, proscribes only those threats or uses of force which are inconsistent with the Charter. The Warsaw Pact action, as previously noted, was in accordance with Chapter VIII of the Charter; it thus falls outside the prohibitions of Article 2(4). It follows, the argument concludes, that the Warsaw Pact troop deployment in Czechoslovakia was lawful.

This argument rests on a highly gratuitous assumption of fact. In actuality there is no evidence that the Joint Command of the Warsaw Pact did make a "recommendatory" decision to deploy Pact forces in Czechoslovakia.

More importantly, the argument misconceives the role of regional organizations in the United Nations system, both as that role was envisioned by the Charter framers, and as it has developed in United Nations practice. After heated debate of the Dumbarton Oaks Proposals, which clearly subordinated regional organizations to the Security Council, the Charter framers granted regional organizations a measure of primary responsibility in two areas. The first was the peaceful settlement of local disputes, where regional organizations were authorized to employ persuasion and, presumably, only low levels of coercion. The second involved actions in "collective self-defense." In these latter circumstances regional organizations could employ high levels of coercion until the Security Council took appropriate remedial actions against the attacking state. When functioning in both these areas, regional organizations were to report to the Security Council. There was no need, however, to obtain the Council's prior approval.

The Charter framers used several techniques to insure that the Security Council would have authority and control over other actions of regional agencies, most particularly, the employment of high levels of force other than in collective self-defense. The Security Council, for example, had jurisdiction over coercive activities by regional agencies which were "threats" to the peace" or "breaches of the peace".

A second control device was to require Security Council "authorization" before regional agencies undertook "enforcement actions". At San Francisco, the core content of the "enforcement action" concept was beyond dispute: it referred to Security Council decisions which were binding on United Nations members, and which directed the employment of moderate to high levels of coercion against a target state. The Charter framers, however, did not grapple with the conceptual problems of applying the "enforcement-action" concept to the actions of regional agencies.<sup>86</sup>

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<sup>86</sup>See, e.g., *Report of Mr. Paul-Boncour, Rapporteur on Chapter VIII, Section B*, 12 U.N.C.I.O. Docs. 502, 505-14 (1945).

Perhaps because of this, the "enforcement-action" concept, as applied to regional agencies, has atrophied in United Nations practice. When debating the legitimacy of regional-agency actions, the Council has gradually shifted from analysis of the meaning of "enforcement action", and from decision as to whether Security Council authorization should precede, be contemporaneous with, or follow the actions of a regional agency. Instead, the Council has viewed regional-agency action in the broader context of permissible and impermissible coercion. In practice, debate about "enforcement actions" has shaded into study of whether a particular action by a regional agency has violated the Charter's prohibitions against the threat or use of force against the political independence or territorial integrity of a target state.<sup>87</sup>

The prohibitions in the Charter against the threat or use of force are the third device chosen by its framers to regulate the activities of regional agencies. Article 52 of the Charter, thus, requires that the activities of regional agencies be consistent with the Principles and Purposes of the United Nations Charter. Among the Principles is Article 2(4) which, as has already been noted, requires Members to refrain from using force or the threat of force against the territorial integrity or political independence of a target state. Employment of high levels of coercion by regional agencies (other than in self-defense or pursuant to Security Council authorization) was thus contrary to the Charter, and, in the view of the framers, the Security Council could intervene to take appropriate corrective action.<sup>88</sup>

In practice the United Nations has basically honored the framers' allocation of functions between its organs and regional organizations. Thus, regional organizations have assisted in the peaceful settlement of disputes,<sup>89</sup> and have employed moderate levels of coercion in self-defense,<sup>90</sup> without obtaining the prior authorization of the Security Council. In the one case—Hungary in 1956—in which highly intense coercion was employed against a target state under the supposed aegis of a regional arrange-

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<sup>87</sup>See generally, L. SOHN, *CASES ON UNITED NATIONS LAW* (1967) at 862 ff., and, in particular, the remarks of Mr. Beeley of the United Kingdom at 951-2 and Mr. Morozov of the Soviet Union at 984, 987.

<sup>88</sup>The phrase in Article 2(4)—"or in any other manner inconsistent with the Purposes of the United Nations"—was inserted in the Charter to "insure that there should be no loophole" 6 U.N.C.I.O. 335 (1945). It is a travesty of both the "ordinary meaning" of Article 2(4) and its *travaux préparatoires* to read this phrase as qualifying the general prohibition of the threat or use of force in international relations against the political independence or territorial integrity of a target state.

<sup>89</sup>*E.g.*, The Dominican Republic in 1965. For further comment on this situation, cf. footnote 100 *infra*.

<sup>90</sup>See Resolution 1 of The Sixth Meeting of Consultation of Ministers of Foreign Affairs of the OAS, quoted in SOHN, *supra* note 87 at 939.

ment,<sup>91</sup> the Soviet veto on the Security Council prevented the Council from *condemning* the use of coercion. There is no question that Council *authorization* of the employment of coercion would not have been forthcoming.

It follows that a regional organization, unless acting in collective self-defense or pursuant to a Security Council resolution, may not lawfully direct highly intense coercion against a target state. Any such employment of coercion would be inconsistent with Article 2(4) of the Charter. There was, of course, no explicit Council authorization of the invasion of Czechoslovakia. Tacit consent to the invasion cannot be deduced from the Security Council actions in late August 1968; a Soviet veto, indeed, prevented a majority of the Council from condemning the invasion.<sup>92</sup> The actions of the Warsaw Pact invaders, thus, are in violation of Article 2(4) of the Charter and illegal unless, of course, the invasion was an action in collective self-defense. We are thus led to the second aspect of the "regional-agency" justification of the Czechoslovak invasion, namely, that it was a lawful action in collective self-defense in conformity with existing treaty obligations.

Rational policy-making requires, as a general proposition, that more rigorous standards govern the legality of an action in collective self-defense than in an action in individual self-defense. A threat of force against a cohesive regional grouping will probably be of less consequence than an equivalent threat directed at a single member. The group will usually have greater aggregate military and non-military resources at its disposal than any one of its members. In consequence, one noted authority has suggested that it may be appropriate to require a higher degree of imminence of attack, and more exacting evidence of compelling necessity, for coercive response by the group as such than would reasonably be demanded if the responding participant were a single state.<sup>93</sup>

The invasion of Czechoslovakia then, measured by these standards, was clearly not a lawful action in collective self-defense. The transparent failure of the Soviet Union to justify the invasion as a legitimate exercise of its right to individual self-defense has been noted *supra*. Given the more rigorous application of the requirements of proportionality and necessity to actions in *collective* self-defense, it follows, *a fortiori*, that the Warsaw

<sup>91</sup>See the remarks of Mr. Sobolev of Russia, U.N. SCOR, 754th meeting, U.N. Doc. S/PV. 754 at 10 (1956).

<sup>92</sup>The draft resolution (U.N. Doc. S/8761, Aug. 22, 1968) condemned "the armed intervention of the Union of Soviet Socialist Republics and other members of the Warsaw Pact in the internal affairs of the Czechoslovak Socialist Republic..." The vote was 10 (Brazil, Canada, China, Denmark, Ethiopia, France, Paraguay, Senegal, United Kingdom, United States): 2 (Hungary, USSR): 3 (Algeria, India, Pakistan).

<sup>93</sup>MCDUGAL & FELICIANO, *supra* note 19 at 251.

Pact invaders have not met the tests of necessity and proportionality, that the invasion cannot be justified on the ground of collective self-defense, and that the invasion was unlawful.

### *C. Rules of the Game*

In mid-September, 1968, the Soviet Union published its ideological justification of the invasion.<sup>94</sup> It noted that, although the Soviet bloc “respects” the “democratic norms of international law”, these norms must be “subordinated” to the “laws of the class struggle and the laws of social development”. One of these laws of the class struggle requires deference to “proletarian internationalism”, the “rallying of all forces and sections of the international working class in an effort to implement their common international class objectives”. Respect for “proletarian internationalism”, however, must not lead one to overlook the “main contradiction” of the age, namely, the “struggle” between “socialism” and “imperialism”. This “struggle”, in view of the immense destructive capability of contemporary weapons, must be tempered for the moment by the principle of “peaceful co-existence”. For the present, then, the doctrines of “proletarian internationalism” must stop (at least temporarily) at the borders of the socialist camp. Within these borders, they supercede “bourgeois” notions of “international law”, “self-determination” and “sovereignty”, and in fact authorized the Soviet bloc to wage a struggle not in words but in deeds for the principles of self-determination of Czechoslovakia’s peoples, (and) for their inalienable right to decide their destiny for themselves after profound and careful consideration.<sup>95</sup>

This argument deserves statement in more familiar terms. It asserts that “rules of the game” developed between the Soviet bloc and the Western world after Churchill and Stalin “negotiated” the post-World-War-II division of Europe. One such rule is that neither the United States nor the Soviet Union may interfere or intervene directly or indirectly in the other’s “sphere of influence”; the corollary to this rule is that either power, within its “sphere of influence”, may take whatever measures it deems necessary to safeguard the integrity of its own bloc. This rule, asserts one commentator, is the “ultimate lesson of Hungary in 1956”.<sup>96</sup>

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<sup>94</sup>S. Kovalev, *Sovereignty and the Internationalist Obligations of Socialist Countries*, Pravda, Sept. 26, 1968 at 4, translated in XX (39) CDSP 10-12 (1968). The paraphrasing of this article includes statements appearing in an East German justification of the invasion.

<sup>95</sup>*Id.* at 11.

<sup>96</sup>E. McWHINNEY, *PEACEFUL COEXISTENCE AND SOVIET-WESTERN INTERNATIONAL LAW* 94 (1964).



The "spheres-of-influence" rule, the argument continues, is of long standing. It has its roots in the Western failure after World War II to oppose Soviet tampering with the East European revolutions. The Western response to Soviet actions in East Germany in 1953, in Poland and Hungary in 1956, and in Czechoslovakia in 1968, all evidence the West's acceptance of the rule as a matter of practice. The rule, further, is reciprocal. Apart from verbal harangues, the Soviet Union did not significantly oppose United States assistance to the Guatemalan rebels in 1954, or the invaders of Cuba in 1960. The Soviet Union violated the rule in the fall of 1962 when it installed offensive ground-to-ground missiles in Cuba, but the United States enforcement of the rule—by means of the Cuban quarantine—led to Soviet withdrawal of the missiles.

This rule, the argument concludes, is firmly embedded in the expectations of the contemporary world community, and will doubtless be honored in future decisions. As such, it takes on the character of customary international law. Since the action by the Warsaw Pact invaders is within the scope of this rule, it is thus legal.

This argument, too, misstates the criteria for determining when "usage" or a "moral norm" becomes "customary law", and overlooks significant aspects of the history of the last two decades. In the opinion of most jurists,<sup>97</sup> two elements are essential to establish a norm of customary international law. A "material" element demands past uniformity in state behavior, and a "psychological" element requires that a certain degree of "oughtness" attend these behavior patterns. Commentators traditionally find this degree of "oughtness" in state expectations that a rule is "legally obligatory", "legally right", or "legally binding", or in state actions taken "in fulfillment of a legal obligation". Not all states must have adhered to a particular custom, or have attributed the required degree of "oughtness" to it, for a rule of international law to develop. The custom, however, must be generally accepted.

In more scientific terms, five steps are essential for the formation of a rule of customary international law:<sup>98</sup>

- "(i) the formulation and designation of a requirement as to behavior in contingent circumstances
- "(ii) an indication that that designation has been made by persons recognized as having the competence (authority or legitimate role) to perform that function and in accordance with procedures accepted as proper for that purpose

<sup>97</sup>C. HYDE, *I. INTERNATIONAL LAW* (2nd ed.) 4 (1945); J. Kunz, *The Nature of Customary International Law*, 47 *AM. J. INT'L L.* 662 (1953); M. McDUGAL, H. LASWELL, I. VLASIC, *Law and Public Order in Space* 115 (1963).

<sup>98</sup>O. Schachter, *Towards a Theory of International Obligation*, 8 *VA. J. INT'L L.* 300, 308 (1968).

- “(iii) an indication of the capacity and willingness of those concerned to make the designated requirement effective in fact
- “(iv) the transmittal of the requirement to those to whom it is addressed (the target audience)
- “(v) the creation in the target audience of responses—both psychological and operational—which indicate that the designated requirement is regarded as authoritative [in the sense specified in (iii) above] and as likely to be complied with in the future in some substantial degree.”

It is readily apparent that the “spheres-of-influence” rule has not become a rule of customary international law. It does not possess the required degree of “oughtness”; it is not generally regarded as “legally obligatory” or “legally binding”; and it does not state an “authoritative” requirement of behavior that has been accepted as such by its target audience. The United States has repeatedly protested the assumption that the Soviet Union has an exclusive “sphere of influence” in Eastern Europe.<sup>99</sup> The general world community denied the existence of such a “sphere of influence” when it condemned Soviet interventions in Hungary in 1956 and Czechoslovakia in 1968. Countless General Assembly resolutions have affirmed that major coercion is prohibited, regardless of whether it occurs within or without a particular “sphere of influence”. To state that the “spheres-of-influence” rule has become a norm of customary international law is to equate a temporary deference to power with a general community understanding that a long-standing custom, with a sound basis in policy, may be honored in future decisions.

### III Conclusion

The flagrant violation of international law by the Warsaw Pact invaders is in striking contrast to the disorganized and almost complacent Western response to the invasion. That the Warsaw Pact invaders employed force unlawfully is beyond dispute; yet the Western powers chose not to use the United Nations to label the invasion illegal, or to impose community-wide sanctions on the invaders. The obvious disparity between the gross unlawfulness of the invasion, and the minimal sanctions imposed on the invaders, raises a host of questions for the concerned lawyer:

Are the doctrines of “aggression”, “intervention” and “self-defense” adequate in a world marked by a high degree of interdependence, a great variety of military weapons, and numerous economic, diplomatic, ideological and military techniques for exerting high levels of coercion against target states? Was the Western response to the invasion a breakdown in

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<sup>99</sup>D. Rusk, *Some Myths and Misconceptions About U.S. Foreign Policy*, 59 Dept. of State Bull. 350, 351 (1968).

the traditional sanctioning process? Or is the traditional model of the sanctioning process—which assumes that a “delict” will be followed by a roughly proportionate “sanction”—simply inapplicable to a bi- or tri- polar world?

It is impossible to attribute the passive Western response to the invasion, to supposed defects in the doctrines of “aggression”, “intervention” and “self-defense”. It is true that scholars and diplomats have bemoaned the generality of these doctrines, noting that the same troop movements, in one context, may constitute “aggression”, and in another, “self-defense”. Several august bodies have also been unable to agree on definitions of these terms.

It is not to be assumed, however, that these doctrines, any more than other general legal concepts, spare decision-makers the very difficult problems of finding the relevant facts, and then evaluating these facts in relation to the policies underlying the basic legal doctrines. It should also not be thought that these doctrines are any more susceptible than other general legal concepts, to rigid definitions that anticipate all future contingencies. The doctrines, as has been demonstrated, do have a “core” content. At their “penumbra” they require examination of varying degrees of coercion, and analysis of a sequence of events; they do not restrict focus to isolated “military” events, but rather demand a full contextual analysis. In consequence they permit careful factual distinctions between events which, at first glance, may appear quite similar.<sup>100</sup> Certainly in their application to

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<sup>100</sup>This is not believed to be an appropriate context in which to examine the complex factual and legal issues surrounding the “intervention” by the United States in the Dominican Republic in 1965. Suffice it to note that a careful analysis reveals significant differences between that “intervention” and the invasion of Czechoslovakia. Thus, after the first week of both crises, the Warsaw Pact invaders had twenty-five times as many troops in Czechoslovakia as the United States did in the Dominican Republic. The Warsaw Pact invasion was largely a reaction to the “liberalization” policies of an established government. The United States action occurred in a country torn by revolution, with two factions contending for power. The principal goal of the Warsaw Pact invaders was to arrest, and perhaps reverse, this trend toward liberalization. The goals of the United States in the Dominican Republic were initially to safeguard the lives of United States citizens, and then to mediate between the two hostile factions in the hope of forming a broadly representative government. A secondary goal of the United States—apparently founded on inadequate information—was to avert the possibility of a Communist takeover in the Dominican Republic; to achieve this goal, the United States clearly gave modest support to the more conservative of the two factions.

The strategies of the two countries were also in marked contrast. The Soviet Union clearly employed intense coercion, both against the leaders of Czechoslovakia, and against its government institutions. The United States for the most part attempted to separate the two rival factions to avoid unnecessary destruction of life and property. In supporting the more conservative of the two factions, the United States did employ low levels of coercion to influence the outcome of the struggle for power; for example, it jammed the radio of the Caamano faction, and did not impede (and perhaps assisted) the military actions of the Imbert faction. But these levels of coercion are far lower than those employed by the Soviet Union in

the invasion of Czechoslovakia the doctrines yield incontrovertible conclusions.

If it is incorrect to blame the passive Western response to the invasion on defects in the doctrines of international law, it is myopic to view the sanctioning process by focusing only on events occurring in Western capitals immediately after the invasion. Pertinent historical materials are not yet available, but it may be appropriate to suggest that the community consensus about the unlawfulness of aggression and intervention had a modest deterrent effect on Soviet leaders. The Soviet Union did not move against Czechoslovakia in mid-summer, 1968, even though it had massive numbers of troops on Czech borders. Mikhail Suslov apparently opposed the invasion, correctly estimating that the invasion might alienate Communist party leaders throughout the world. These leaders might not voice their opposition to the invasion in the language of international law, but the reasons for their opposition would doubtless touch on the policies underlying the international-law doctrines prohibiting major coercions. When the invasion did occur, the troops of the Warsaw Five were apparently under instructions not to use their weapons except in special circumstances. In contrast, the Soviet troops in Hungary in 1956 engaged in much indiscriminate shooting.

Events within Czechoslovakia also were part of the international sanctioning process. The Czechoslovaks did not exercise their right to self-defense; but a military confrontation with the Warsaw Pact invaders, which outnumbered the Czechoslovak army roughly two to one, would have meant incalculable losses of life and property. This is not to say that the Czechoslovaks ignored the precepts of international law. Authoritative Czechoslovak organs made repeated reference to international law to protest the invasion and occupation. In both written and oral communications, Czechoslovak officials took pains to dispute the "evidence" proffered by the Soviet Union as justification for the invasion. It may even be that the policies underlying the prohibitions against aggression and inter-

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Czechoslovakia. There is no question that the United States could have routed the Caamano faction, but it did not attempt to do this.

The outcomes of both "interventions" were also significantly different. The Soviet Union succeeded in arresting the trend toward liberalization in Czechoslovakia; Soviet troops remain in that country at the time of this writing (March, 1969). In the Dominican Republic, in contrast, Hector Garcia Godoy, with the consent (in effect) of both the contending factions, became President of a Provisional Government. Within six months after the outbreak of the rebellion, all the Inter-American Peace Forces were withdrawn from the Dominican Republic.

This brief comparison, of course, does not exhaust the pertinent distinctions between the Warsaw Pact and the United States "interventions". For additional facts, see T. SZULC, *DOMINICAN DIARY* (1965), and the bibliographic materials cited in SOHN, *supra* note 87 at 1072.

vention—the community preference for peaceful change, respect for state sovereignty, etc.—have served as important moral supports for the non-military, largely passive, but nevertheless effective Czechoslovak resistance to the occupation.

Long-term Western reactions to the invasion also cannot be excluded from a comprehensive view of the international sanctioning process. The NATO defense system was strengthened and improved. It became less likely that NATO members, after August 24, 1969, would submit notices of withdrawal from that organization, or that the United States Congress would pass legislation calling for troop reductions in Europe. Western nations will doubtless be more circumspect in responding to Soviet proposals for a *détente* than might otherwise have been the case. Historians may discover that the Soviet Union, anxious to renew the climate of *détente*, appeared willing to make limited concessions to the West.

A comprehensive view of the sanctioning process, nevertheless, does not explain away the almost apathetic Western response to the invasion. It is possible to ascribe this response to institutional defects in the contemporary international sanctioning process; certainly there is a wide gap between contemporary sanctioning institutions and the model international peace plans that have been designed in the last several centuries. Even within the bounds of contemporary realities, however, there were opportunities for a firmer Western response to the invasion. A Western (or NATO) invasion of Czechoslovakia might have been out of the question because of the high probability that it would have led to general war. There may have been some merit, however, in Mr. Kennan's suggestion that the United States send 100,000 troops to West Germany on the understanding that their presence would terminate only after the Warsaw Pact invaders withdrew from Czechoslovakia. More effective use might have been made of the United Nations. Although the Soviet veto would probably have blocked substantive action in the Security Council, the General Assembly might have passed resolutions imposing modest economic or diplomatic sanctions on the Warsaw Pact invaders. After the Hungarian intervention in 1956, it will be recalled, the General Assembly Credentials Committee refused to recognize the credentials of the representative from Hungary. Certainly the General Assembly could have passed a resolution condemning the invasion as a violation of the Charter.

In fact, the Western response to the invasion appears to have been governed largely by a pre-invasion policy, namely, to avoid direct involvement with Czechoslovakia in the hope of not provoking the Soviet Union to increase pressure on that nation. Whether the invasion is proof of

the success of this policy, or evidence of its failure, is open to question. The invasion thus should prompt a re-examination of this policy, with particular attention to the predicted trend toward Soviet, American and Chinese "spheres of domination". Division of the world into three separate regional groupings, with the dominant power in each group free to employ high levels of coercion against any member of the group, is antithetical to the purposes of the United Nations Charter, runs counter to a host of doctrines of international law, and does violence to the developed rules proscribing intervention and aggression. If it is impossible to combat the "spheres of domination" concept with military, economic or diplomatic strategies, it is critical to employ every available communications technique to mold a community consensus against acceptance of the concept. International institutions should be employed whenever possible to reach this end; the failure of the General Assembly to censure the Warsaw-Pact invaders must not be allowed to repeat itself.