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ARTICLE 4 OF THE DRAFT DECLARATION OF RIGHTS AND DUTIES OF STATES

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Aide De Memoire

THIS paper is mainly an effort to collect all the pertinent treaties and authorities bearing on a State's responsibility for fomenting civil strife. It also primarily seeks to analyse the scope and limitations of that legal duty. As far as I know this is the first time this subject matter has been treated in this manner.

Tangentially it touches on the following points which are of vital concern to international law and the United Nations today: (1) what is the United Nations Charter's concept of aggression and (2) does the Charter forbid member states from using or even threatening to use armed force of any kind and under any circumstances in their foreign relations?

The crisis in the Middle East underscores the paramount importance of the subject matter of this paper, and illustrates the fact that we are not dealing here with something of mere academic interest. We have in the Middle East elements of aggression, the use of force, intervention, and the fomenting of civil strife-all of which are dealt with in this paper.

A full month of research and another three weeks of writing and some more research went into the making of this paper. It was written under the direction of Professor Louis B. Sohn. Professor Sohn and another Harvard professor are themselves engaged in essaying to codify the "Rights and Duties of States" for the United Nations. I am happy to say that they have been able to make use of this paper and have found the collation of authorities and precedents most helpful in their enormous task.

In 1949 the International Law Commission drafted pursuant to a General Assembly resolution[1] a Declaration on the Rights and Duties of States.

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[1] Resolution 178 II; GAOR II (A/925) 112 (1947).

Article 4 of that Draft Declaration reads:

Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife.[2]

Aside from the importance of this article as a contribution to the codification of international law, it would seem to have a particular relevance for our age. A reading of contemporary history especially after World War II is enough to show that subversion, infiltration, and incitement to civil war is the order of the day.

The primary purpose of this paper, then, is to scrutinize the legal duty imposed on States by Article 4.[3] This calls for an inquiry on three different levels and the paper is divided accordingly.

Part One consists of examining the various sources of international law (e.g., treaties, declarations, treatises) in order to determine the extent to which his duty was recognized *prior* to the United Nations Charter.

Part Two is an exposition of any changes in this area wrought by the United Nations Charter and subsequent resolutions of the General Assembly.

Part Three is an effort to delineate the nature, the exceptions, and the limitations of this rule in international law.

PART I — TREATISES

The beginnings and the foundations of this principle are discernible in the writings of various publicists as early as 1758. Monsieur De Vattel, for example, thought as a consequence of the liberty and independence of nations that all have a right to be governed as they think proper, and "that no state has the smallest right to interfere in the government of another [4] He further urges sovereigns not to allow their citizens to do any injury to the subjects of another State or to offend that State itself.

And this, not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature, which forbids all injuries, — but also because nations ought mutually to respect each other, to abstain from all offense, from all injury, from all wrong...[5]

Leone Levi wrote in 1888:

The State must not allow plots or conspiracies to be organized within the State against the Sovereign of other States.[6]

[2] SOHN, Basic Documents 22 (1956).
[3] Hereafter unless expressly indicated otherwise, Article 4 will always refer to the International Law Commission's draft Declaration.
[4] VATTEL, The Law of Nations bk. II, c. IV, sec. 54, 154 (Cnitty transl. 1883).
[5] VATTEL, *op. cit.*, bk. II, c. VI, sec. 72, 246.
[6] LEVI, International Law sec. 67-91 (1888).

William Hall, writing in 1890, was of the opinion that *prima facie* a state is responsible for all acts or omissions taking place within its territory by which another state or the subjects of the latter are injuriously affected.[7] And he considered it indisputable that a state must in a general sense provide itself with the means of fulfilling its international obligations.

If its laws are such that it is incapable of preventing armed bodies of men from collecting within it, and issuing from it to invade a neighboring state, it must alter them.[8]

In the first edition (1905) of Professor Oppenheim's treatise on International Law he suggests that every state has the duty to abstain and to prevent its organs and subjects from any act which contains a violation of another state's independence or territorial and personal supremacy.[9]

The mere fact that a State is a member of the Family of Nations restricts its liberty of action with regard to other States because it is bound not to intervene in the affairs of other States.[10]

By the fifth edition (1937) of Oppenheim's treatise there is an explicit recognition of the duty enunciated in Article 4.

...States are under a duty to prevent and suppress such subversive activity against foreign governments as assumes the form of armed hostile expeditions or attempts to commit common crimes against life or property.[11]

Taking as their starting point the sovereign equality and independence of States, these writers have reasoned and concluded that each State has the obligation of non-interference in the internal affairs of other States and the duty to prevent their nationals from activities injurious to another State's independence or territorial integrity. Ultimately, the duty which Article 4 seeks to impose on States is based on the aforementioned principle, in international law, of non-interference.

TREATIES AND CONVENTIONS

If the duty was still general and in its formative stages before the nineteen hundreds, recent treaties and multilateral conventions have given some precision to this obligation.

In 1923 the States of Central America signed a General Treaty of Peace and Amity. The parties obligated themselves in case of civil war not to intervene in favor of or against the Government of the country where the

[7] HALL, Treatise on International Law pt. II, c. IV, 213 (3d ed. 1890).
[8] HALL, *op. cit.*, at 217.
[9] OPPENHEIM, International Law c. II, pt. IV, sec. 125, 172.
[10] OPPENHEIM, *op. cit.*, at 173.
[11] 1 OPPENHEIM, International Law c. II, pt. IV, sec. 127a, 238 (5th ed. Lauterpacht editor 1937).

conflict takes place.[12] And more specifically they agreed

not to permit any person, whether a national, central american or foreigner, to organize or foment revolutionary activities within its territory against a recognized Government of any other Central American Republic. None of the contracting Governments will permit the persons under its jurisdiction to organize armed expeditions or to take part in any hostilities which may arise in a neighboring country, or to furnish money or war supplies to the contending parties...[13]

Thirteen American States were signatories to the Habana Convention on Civil Strife in 1928. This Convention was more detailed and put forth the additional duties of (1) disarming and interning rebel forces crossing their boundaries, (2) forbidding traffic in arms and war material, and (3) preventing the arming and equipping of vessels intended to operate in the rebellion.

First: to use all means at their disposal to prevent the inhabitants of their territory, national or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife.

Second: To disarm and intern every rebel force crossing their boundaries...

Third: To forbid the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied.

Fourth: To prevent that within their jurisdiction there be equipped, armed or adapted for warlike purposes any vessel intended to operate in favor of the rebellion.[14]

Again in 1934, the Republic of Central America undertook by treaty to establish the obligation of non-intervention in each other's internal affairs and declared as a consequence of this principle that

...the signatory Governments agree not to permit any person to promote or develop revolutionary movements within their territory against the Government of any other Central American Republic...[15]

The Final Act and Convention of the Habana Meeting of Foreign Ministers in 1940 recommended, aside from the duties already expressed in the previously mentioned treaties, the additional obligation of American States to prevent the inhabitants of their territory from spreading subversive ideologies in another American country.[16]

To use the necessary means to prevent the inhabitants of their territory... (from) spreading subversive ideologies in another American country.[16]

[12] General Treaty of Peace and Amity of the Central American States, February 7, 1923, Art. 4, 2 Hudson, International Legislation 904.
[13] *Ibid.*, Art. 14.
[14] Convention on Duties and Rights of States in the Event of Civil Strife, February 20, 1928, Art. I, 4 id. 2418.
[15] Treaty of Central American Confraternity, April 12, 1934, Art. 4, 6 id. 826.
[16] Final Act of the Havana Meeting of Foreign Ministers, July 30, 1940, Art. VII, 3 Dept. State Bul. 132-134 (1940).

The effort to establish these duties by treaty has not all been confined to Latin American States. A number of Near-Eastern States in the Saadabad Pact of 1937 also undertook

to prevent, within its respective frontiers, the formation or the action of armed bands, associations or organizations for the overthrowing the established institutions, with a view to disturbing the general order or security, whether on the frontier or elsewhere, in the territory of the other Party, with a view to injuring the government regime of this other Party.[17]

In the notes exchange (1933) between President Roosevelt and Maxim Litvinoff, Commissar for Foreign Affairs of the USSR, Mr. Litvinoff informed the President that upon the resumption of diplomatic relations between the two governments, it will be the fixed policy of the government of the USSR:

1. To respect scrupulously the indisputable right of the United States to order its own life within its own jurisdiction in its own way and to refrain from interfering in any manner in the internal affairs of the United States...
2. To refrain, and to restrain all persons in government service and all organizations of the government or under its direct and indirect control, including organizations in receipt of any financial assistance from it, from any act overt or covert liable in any way whatsoever to injure the tranquility, prosperity, order, or security of the whole or any part of the United States... and, in particular, from any act tending to incite or encourage armed intervention, or any agitation or propaganda having as an aim, the violation of the territorial integrity of the United States... or the bringing about by force of a change in the political or social orders of the whole or any part of the United States...
3. ...not to form, subsidize, support or permit on its territory military organizations or groups or permit on its territory military organizations or groups having the aims of armed struggle against the United States... and to prevent any recruiting on behalf of such organizations and groups.[18]

As a result of the assassinations of King Alexander and Barthou at Marseilles a Convention for the Prevention and Punishment of Terrorism was drafted at Geneva in 1937. Although it never came into force, it did reaffirm as a principle of international law that

...it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape, undertake as hereinafter provided to prevent and punish activities of this nature and to collaborate for this purpose.[19]

With the advent of radio, new possibilities of disturbance in the political life of peoples arose. The history of recent event has shown how effective

[17] Treaty of Non-aggression, July 18, 1937, Art. 7, 7 id. 825.
[18] Notes Exchanged between President Rooseevlt and Maxim M. Litvinoff, Commissar of Foreign Affairs of the USSR, November 16, 1933, 1 Dept. State, Eastern European Series.
[19] Convention for the Prevention and Punishment of Terrorism, November 16, 1937, art. 1, para. 1, 7 id. 865.

subversive propaganda broadcast can be in fomenting civil strife. An attempt was made to meet this problem by "international legislation". Twenty-one States became parties to the Geneva Convention on the Use of Broadcasting in the Cause of Peace. The parties to this agreement mutually covenanted

...to prohibit and, if occasion arises, to stop without delay the broadcasting within their respective territories of any transmission which to the detriment of good international understanding is of such a character as to incite the population of any territory to acts incompatible with the internal order or the security of a territory of a High Contracting Party.[20]

Declarations of Private Groups

Private organizations in their desire to further the rule of law among nations have drawn up, from time to time, declarations of principles in international life which includes the duty of States expressed in Article 4.

The *Académie Diplomatique Internationale* of Paris formulated under the chairmanship of Dr. Alejandro Alvarez a "draft declaration of the fundamental basis and the great principles of modern international law." It does not purport to be a treaty, but merely a declaration, presumable of *existing* principles. It is limited to a restatement of only what are deemed to be the fundamental principles which constitute the basis of the structure of international law.[21]

Under *Titre* V the more fundamental duties under international law which States owe one another and the international community of which they are members are listed as follows: the obligation to maintain on their territory governments sufficiently stable to enable them to fulfill their international obligations, *to prevent conspiracies within against the safety or internal order of other States*, to observe vigorously their duties under international law.

Empêcher que sur leur territoire se trament des conspirations contre la surêté ou l'ordre interieur d'un autre État.[22]

Early in 1942 a number of Americans and Canadians began to consider, under the chairmanship of Manley Hudson, the possibility of arriving at a community of views with reference to the steps which might be taken at the end of the war to increase the usefulness of international law. The result of these meetings was a formulation in 1944 of "The International Law of the Future: Postulates, Principles and Proposals."[23]

[20] Convention concerning the Use of Broadcasting in the Cause of Peace, September 23, 1936, art. 1, 7 id. 411.
[21] 30 Am. J. Int'l L. 279 (1936).
[22] 9 Académie Diplomatique Internationale, Séances at Travaux 47 (1935).
[23] 38 Am. J. Int'l L. Supp. 41 (1944).

Principle 4 of that document reads:

Each State has a legal duty to prevent the organization within its territory of activities calculated to foment civil strife in the territory of any other State.[24]

Proposed Definitions of Aggression

Several of the proposed definitions of aggression have considered as an aggressor any State which supports armed bands formed in its territory and which invade the territory of another State.

The USSR proposed definition in 1933 declares the aggressor to be that State which first commits one of the following acts —

Provisions of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory all the measures in its power to deprive those bands of all assistance or protection.[25]

The draft definition submitted by Bolivia included as an act of aggression "support given to armed bands for the purpose of invasion."[26]

And the draft definition submitted by the Philippines considered a State an aggressor which first commits certain enumerated acts, one of which was —

To interfere with the internal affairs of another nation by supplying arms, ammunition, money, or other forms of aid to any armed band, faction or group, or by establishing agencies in that nation to conduct propaganda subversive of the institutions of that nation.[27]

These sources establish at least two principles in international law which should govern the relationship of States: (1) the broad one of non-intervention in the internal affairs of a State and (2) the more specific duty of a State to prevent the organization within its territory of certain activities for the purpose of inciting civil strife in the terrtory of another.

Part II — United Nations Charter

Having seen that the duty under Article 4 existed in international law prior to 1946, the next question is what the United Nations Charter has done to it, if anything. A cursory examination of the Charter will not reveal anything resembling Article 4. The Charter, in my opinion, has

[24] *Ibid.*, 78.
[25] Definition of Aggression drafted by the Committee on Security Questions (Geneva Disarmament Conference 1932-1933) based on Soviet draft of the same time; GAOR VII, (A/2211) 19 (1952).
[26] *Ibid.*, 23.
[27] *Ibid.*, 24.

neither extended nor modified the principle contained in Article 4. And surely it has not made the duty more definite. However, Article 4 is in harmony with the Charter and may be derived from parts of the Preamble and certain articles of Chapter I.

San Francisco Conference

During the San Francisco Conference three countries, namely, Panama, Mexico, and Cuba, made proposals to the effect that the Conference should adopt a Declaration of Rights and Duties of Nations and Panama actually presented a draft to serve as a basis for discussion.[28] Panama, for example, proposed to amend Chapter I, paragraph 1 of the Dumbarton Oaks proposal as follows:

> To maintain international peace and security in conformity with the fundamental principles of international law and to maintain and observe the standards set forth in the "Declaration of Rights and Duties of Nations" and the "Declaration of Essential Human Rights" which are appended to the present Charter, and which are made an integral part thereof.[29]

And then, under Chapter II which dealt with the Principles of the Organization, Panama further proposed to enumerate these rights and duties. But while the Committee received these suggestions with sympathy, they decided that the present Conference, if only for lack of time, could not proceed to realize such a draft in an international contract. The Committee was of the opinion that once the Organization was formed it could better deal with the declaration through a special commission.[30]

Evidently the delegations supporting the idea of a declaration meant it to serve as a guiding principle in the external conduct of States which if observed would help carry out some of the purposes expressed in the Preamble and Article 1 of the Charter.

Dr. Alfaro, in the explanatory note appended to the Panamanian draft declaration clearly stated that Articles 21 and 22 (Article 4 is based on this article) "deal with two duties that conduce to the preservation of peace."[31] Mr. Hsu (China) expressed in broader terms the same idea. He argued that in order to serve its chief purpose, namely, the maintenance of peace, the United Nations was required to bring about the settlement of disputes by peaceful means and in conformity with the principles of justice. Now without such a declaration international law would be difficult to ascertain as it had been previously and the temptation to decide issues on the ground of political expediency will not have been removed.[32]

[28] Dr. Alfaro presented the International Law of the Future, *supra* at Part II, page 8.
[29] 3 UNCIO 265.
[30] 6 UNCIO 397.
[31] U.N. Doc. a/285, pp. 19-20 (1947).
[32] GGAOR IV Plenary Meetings 540 (1949).

Preamble

The second part of the Preamble contains an enumeration of the specific policies which "the peoples of the United Nations" announce their determination to pursue in achieving the purpose expressed in the Preamble's first part.[33] One of the policies is "to practice tolerance and live together in peace with one another as *good neighbors.*" To say that fomenting civil strife hardly qualifies a State as a good neighbor is to belabor the point. It is significant that this part of the Preamble was specifically invoked by the General Assembly in its resolutions dealing respectively with the Greek question and measures to be taken against war propaganda.

Resolution 109 II:

> 1. **Whereas** the peoples of the United States have expressed in the Charter of the United Nations their determination to practice tolerance and to live together in peace with one another as good neighbors...
>
> * * *
>
> 4. **Calls upon** Albania, Bulgaria, and Yugoslavia to do nothing which could furnish aid and assistance to said guerrillas.[34]

* * *

Resolution 110 II:

> **Whereas** in the Charter of the United Nations the peoples express their determination... to practice tolerance and live together in peace with one another as good neighbors.
>
> 1. **Condemns** all forms of propaganda, in whatsoever country conducted, which is either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression.[35]

* * *

Article 1

One of the main purposes of the United Nations is "to maintain international peace and security", Article 1(1), it would seem that fomenting civil wars would come, if they had international repercussions which is usually the case, under "threats to the peace" or "breaches of the peace".[36]

In order to maintain international peace and security, the United Nations is committed to suppress acts of aggression, Article 1(1). If fomenting civil strife is aggression, what form of aggression is it, and does that form correspond with the Charter's concept of aggression?

Based on the meticulous report prepared by the Secretary General in 1952,[37] I would say that fomenting civil strife is *indirect aggression.* Ac-

[33] SOHN, Basic Documents 1 (1956).
[35] Resolution 110 II; GAOP II (A/519) 14 (1947).
[35] Resolution 110 II; GAOR II (A/519) 14 (1947).
[36] SOHN, *op. cit.*, at 2.
[37] Report Secretary General, U.N. Doc. (A/2211) (1952).

cording to that report the characteristic of indirect aggression appears to be that the aggressor State, without itself committing hostile acts as a State, operates through third parties who are either foreigners or nationals seemingly acting on their own initiative. The concept of indirect aggression has been construed to include certain hostile acts or certain forms of complicity in hostilities in progress. These acts by the aggressor State are designed to undermine a country's power of resistance, or to bring about a change in its political or social system. Mr. Spiropoulous (Greece) made this distinction between direct and indirect aggression:

> The essential distinction between direct and indirect aggression was that the one implied the use of armed force while the other did not. The former connoted war in the accepted sense while the latter assumed the form of the "cold war".[38]

It would appear that fomenting civil strife fits the foregoing discussion of indirect aggression.

Is indirect aggression within the Charter's concept of aggression? It would answer that in the affirmative also. Admittedly the emphasis laid in the Charter was on armed aggression or direct aggression and many delegations would hold that fomenting civil strife as a form of indirect aggression is not aggression within the meaning of the Charter. But as the Iranian delegate pointed out, armed aggression although the most extreme and typical form was not the only form. Any act which served the same ultimate purpose as armed attack, or involved the use of coercion to endanger the independence of a State should be considered as aggressive.[39] Even the United Kingdom delegate, who was strongly opposed to the views exemplified by the Iranian, suggested that the *objects* towards which acts were directed might be a better criterion for a definition than the *character* of the acts themselves. And that Article 2(4) of the Charter indicated that basically, acts of aggression were those directed against the territorial integrity or political independence of any State.[40] It cannot be denied that fomenting civil war is directed at least against the political independence of a state.

Bolivia and the Philippines, during the San Francisco Conference, submitted definitions which characterized fomenting civil strife as aggressive.[41] The Conference itself decided not to define aggression because of the possible dangers of any detailed listing of prohibited acts.[42] It did not reject as such any particular element which may go into making up the constitutive parts of the definition. Mr. Hsu (China) suggested that the reason the Charter did not refer specifically to indirect aggression was probably because, at the time of its drafting, the ideas on the subject had

[38] GAOR IX, Supp. 11 (A/2638) 6 (1953).
[39] *Ibid.*, at 4.
[40] *Ibid.*, at 7.
[41] *Supra* at Part I, page 7.
[42] Report of Rapporteur. Committee 3. Commission III; 12 UNCIO 505.

not taken any definite shape and that the authors, in view of the last war, has been mainly concerned with preventing war.[43]

The majority of drafts submitted in either the 1953 or 1956 Special Committee on Aggression regarded fomenting civil strife as aggression. The Soviet draft regards it as indirect aggression but the individual Chinese, Paraguayan, Mexican drafts and the joint drafts of Iran and Panama, and the Dominican Republic, Paraguay and Peru all view it as aggression without qualifications.

The International Law Commission declared itself in favor of including indirect aggression in the definition of aggression. In this connection, the report of the Commission in its third session in 1951 states:

> The Commission gave consideration to the question whether indirect aggression should be comprehended in the definition. It was felt that a definition of aggression should cover not only force used openly by one State against another, but also indirect forms of aggression such as fomenting of civil strife by one State in another, the arming by a state of organized bands for offensive purposes directed against another, and the sending of "volunteers" to engage in hostilities against another State.[45]

There is another possible source for Article 4 in the Charter. The second part of paragraph 2, Article 1, states that it is a purpose of the United Nations "to take other appropriate measures to strengthen universal peace".[46] Assuming that fomenting revolutions is not desirable and disruptive of the peace, I should suppose that a declaration outlawing such a "pastime" would fall under "other appropriate measures". An enunciation of the principle if accepted by a majority of nations would serve as an assurance to States of the security of their own institutions, social and political. This in turn should help to strengthen the fabric of universal peace by engendering a feeling of security and creating an atmosphere conducive to friendly relations and mutual trust among nations.

Although there is no express mention in the Charter of the principle found in Article 4, it is, however, in consonance with the Charter and based on its Preamble and Purposes. Consequently, one can safely say, that Article 4 may be implied from those provisions just examined without unduly stretching them. To be sure, there are delegations which hold the contrary view.

In the debates of the Sixth Committee of the Fourth General Assembly, the Belgian delegate stated that Article 4 was a rule embodying principles *not* recognized by the Charter.[47] Likewise, the Israeli delegate had misgivings. He thought Article 4 represented certain "developments of international law" and was not an expression of existing international law.[48]

[43] GAOR IX, Supp. 11 (A/2638) 13-15 (1954).
[45] International Law Commission, GAOR IV, Supp. 9 (A/1858) 4 (1951).
[46] SOHN *op. cit.*, at 2.
[47] GAOR IV, 6th Committee 174-175 (1949).
[48] GAOR IV, 6th Committee 181 (1949).

This controversy in the Legal Committee arose mainly because the International Law Commission did not make quite clear the nature of the Declaration. Was it a declaration of existing law, i.e., a codification? Or was it a proposal *de lege ferenda*? The Commission in its report only says that "the article of the draft Declaration enunciate general principles of international law."[49]

The picture is further confounded by the Preamble of the draft in its last part which declares that these rights and duties were formulated "in the light of new developments of international law and in harmony with the Charter of the United Nations".[50] This statement is inaccurate and misleading.. It seems to say that *all* the articles of the Declaration were formulated "in the light of *new developments*". But Article 1 of the Declaration, for example, is a restatement of Article 2 of the Charter and existing principle of international law.[51] Actually the draft Declaration contains three principles of international law: (1) those expressly stated in the Charter; (2) others generally accepted by all states; (3) principles which should be incorporated in international law but which, at the present time. were still in the process of development. If it is conceded that Article 4 falls within the second category of principles, the Belgian and Israel objections would seem to disappear. The Belgian delegate admits that "in calling the draft Declaration a common standard of conduct. his delegation did not question the fact that some principles enunciated in the draft *had already become positive law and had, consequently, binding force.*"[52]

Part One of this paper has resolved, in my opinion, that the duty expressed by Article 4 was an existing principle of international law prior to the United Nations Charter.

General Assembly Resolutions[53]

The General Assembly has made two notable contributions in this area. Its "Essentials of Peace" resolution in 1949 and its "Peace Through Deeds" resolution in 1950 have affected the status of Article 4 within the United Nations framework. Only a possible derivative before. Article 4 has now been given clear recognition as a necessary principle to be observed

[49] Report International Law Commission, GAOR IV, Supp. 10 (A/925) 10 (1949).
[50] Sohn, *op. cit.*, at 2.
[51] Sohn, *op. cit.*, at 26; Oppenheim, *op. cit.*, c. II, pp. 217-242 (5th ed. Lauterpacht editor).
[52] GAOR IV, 6th Committee 174 (1949).
[53] Although beyond the scope of this paper, a general problem must be mentioned. How legally binding is a General Assembly resolution for (1) member States and (2) for non-member States? I take it, however, that resolutions involving such fundamental purposes of the United Nations will have very great weight whatever the answer to the previous questions may be.

by member states in the conduct of its international relations.

The pertinent parts of the resolution of 1949 read:

The General Assembly:

1. Declares that the Charter of the United Nations, the most solemn pact of peace in history, lays down basic principles necessary for an enduring peace; that disregard of these principles is primarily responsible for the continuance of international tension; and that it is in accordance with these principles in the spirit of cooperation on which the United Nations was founded.

Calls upon every nation.

* * *

3. To refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State, or at fomenting civil strife and subverting the will of the people in any State.[54]

* * *

In the debates of the First Committee it was apparent that the purpose of this resolution was maintenance of international peace and security. And as the title of the resolution succinctly expresses, the observance of the principles laid down in this resolution was thought essential for the lessening of international tensions which were endangering the peace. Thus, Sir Zafrulla Khan (Pakistan) "welcomed the opportunity for a reaffirmation of faith in the principles which constituted the very foundation of international peace and security" and he found that all the essentials required to secure and maintain the kind of peace his delegation was interested in were present in the draft resolution.[55]

Taking a more limited view. Mr. Lopez (Philippines) thought the draft resolution proposed terms that would enable two conflicting worlds to co-exist. He went on to say that the resolution's "immediate purpose was that of maintaining a balance the Powers."[56]

The members of the United Nations pledged themselves in the Charter to keep the peace. If as this resolution declares refraining from fomenting civil strife is essential to the maintenance of the peace, it must follow that States are duty bound to act in accordance with the resolution.

The resolution "Peace Through Deeds" goes as follows:

The General Assembly,

* * *

Condemning the intervention of a State in the internal affairs of another State for the purpose of changing its legally established government by the threat or use of force.

1. **Solemnly** reaffirms that, whatever the weapons used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world.[57]

[54] Resolution 290 IV: U.N. Doc. A/1167 (1949).
[55] GAOR IV. 1st Committee 4th Session 270 (1949).
[56] *Ibid.*. at 298.
[57] Resolution 380 V: GAOR V. Supp. 20 (A/1775) 13 (1950).

Notice that, in this resolution, aggression is interpreted broadly by the General Assembly, since it may take the form of "fomenting civil strife in the interest of a foreign power", and may also be committed "otherwise". The phraseology employed would seem also to suggest that fomenting civil strife is considered to be an indirect aggression. At any rate, fomenting civil strife in the interest of a foreign power is branded and singled out as a form of aggression. Consequently, such activities are illegal and any State initiating them would be considered an aggressor.

PART III

Hitherto the duty imposed by Article 4 has been dealt with as one. But in order to determine its scope with accuracy it must be separated into two. The first ("Every State has the duty to refrain from fomenting civil strife in the territory of another State") consists of what I call the *primary duty*. The second ("and to prevent the organization within its territory of activities calculated to foment such civil strife") establishes the *secondary duty*.

PRIMARY DUTY

The primary duty is involved when a State acts on its own, that is, when a State is acting through its government or through its agents or private citizens by explicit command or authorization. In these cases, the duty is fundamental, broad, and strict. Vattel, for instance, strongly condemns "evil practices tending to produce disturbances in other States, to keep up dissensions therein, to corrupt the citizens."[58] Hall is clearly of the opinion that one of the grounds on which intervention may be said to be allowed is when a Government foments rebellion abroad.[59] According to Professor Lauterpacht —

> No elaborate argument is necessary, in the present stage of international law, in order to arrive at a condemnation of this form of intervention. There is, in international law, no right (and no corresponding duty) more absolute, more rigid or more formal than freedom from external interference.[60]

Professor Preuss is of the same opinion. He states that this duty of non-interference has never been questioned in principle by states and he found that even governments which have been manifestly guilty of initiating or encouraging revolutionary movements against foreign governments have consistently denied all connection with such movements.[61] The Japanese Government defended its role in the establishment of Manchukuo on the

[58] VATTEL, *op. cit.*, bk II, c. V, sec. 64.
[59] HALL, *op. cit.*, sec. 91 at 283.
[60] LAUTERPACHT, Revolutionary Propaganda by Governments, 13 The Grotous Society 156 (1928).
[61] PREUSS, International Responsibility for Hostile Propaganda, 28 Am. J. Int'l L. 652 (1934).

ground that "the movement for the proclamation of independence of Manchuria was a genuine, spontaneous, popular and natural one." However, the Council of the League, after investigating the matter came to the exact opposite conclusions.[62]

Several other instances will serve to illustrate the strictness with which nations view this rule. The French National Convention in 1792 carried away by the revolutionary zeal of that period passed a decree promising to come "to the aid of all peoples who wish to recover their liberty."[63] The decree brought such an immediate challenge and strong protests from the countries of Europe especially Great Britain that the National Convention repealed it in 1793.

President Cleveland, in 1898, demanded the recall of Lord Sackville, the British Minister at Washington, for having privately advised an American citizen how he should vote in a presidential election. When the British Government refused to recall Lord Sackville the President terminated his mission.[64]

Honduras and Nicaragua charged before the Central American Court of Justice Guatemala and El Salvador with fomenting revolution in Honduras. In July 1908 the court issued an interlocutory decree instructing the defendant governments to refrain from acts which might imply direct or indirect interference with the revolution in Honduras and to confine in one place immigrants suspected of a hostile attitude towards the Honduran Government.[65] In the final judgment rendered in December 1908 the court held by a majority of votes that the defendant governments were not guilty of the charges brought against them. The suit was decided not on the ground that a cause of action did not exist but because intentional malice or culpable negligence was not sufficiently proved.[66]

The scope of this primary duty is further illuminated by an examination of its foundations. One of the clearest and oldest established principles of international law is a State's right to independence.[67] Now the very essence of this independence is the State's right to determine for itself free from external interference its constitution and political institutions. Therefore, *any* direct or indirect activity by a State which undermines that freedom of choice *is* an international delinquency. Careful note should be taken of what it is that international law protects. What concerns international law is not so much the actual political system of a State as the State's right to determine that political system by its own *free will*.

Are there any exceptions to this primary duty? Yes, (1) when a state

[62] League of Nations Official Journal, Special Supp. 112, p. 92 (1932).
[63] Decree of November 19, 1792, Archives Parlementaires, LIII (lere ser.) p. 474.
[64] HARLOW, The United States: From Wilderness to World Power, 501 (1949).
[65] 2 Am. J. Int'l L. 838 (1908).
[66] 3 Am. J. Int'l L. 434-436 (1909).
[67] OPPENHEIM, *op. cit.*, sec. 112 at 217; sec. 124 at 234.

of war exists between two or more nations reason would suggest that such a duty ceases temporarily to inhibit the actions of the belligerents. (2) International law prior to the United Nations Charter allowed intervention on the following grounds: self-preservation, intervention under the authority of the body of states, and intervention to preserve rights of succession to thrones.[68] However, after the Charter came into force, I am convinced that such rights of intervention were ruled out.[69]

The system of the Charter is based on the following principles: (1) resort to war, or to the threat or use of force, is generally prohibited; (2) the cases in which the use of force is permitted are specified by the Charter. Two provisions of the Charter, paragraphs 3 and 4 of Article 2, are pertinent in this connection. Article 2, paragraph 3, provides as follows:

> All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Once it is postulated that States must settle their disputes "by peaceful means", war is unconditionally prohibited as a means of exercising a right, opposing violation of a right or redressing a wrong.

Article 2, paragraph 4, provides as follows:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This paragraph confirms and supplements the preceding paragraph. It prohibits recourse to "the threat or use of force." It is not only war properly so called which is prohibited, but also the use of force, though it might be claimed that limited use of force does not constitute resort to war and is not intended to do so. It is not merely the use of force which is prohibited but also the threat of its use.

In view of the wording of the Article a restrictive interpretation might suggest itself. Can it not be argued that the threat or use of force not intended to infringe the territorial integrity or political independence of a State is allowed? References to the preparatory work shows that such an interpretation would not accord with the intention of the authors of the Charter. The words "territorial integrity and political independence" did not appear in the Dumbarton Oaks draft. When they were introduced by the Australian and other draft amendments submitted by various Governments, it was done with the strongly expressed desire to ensure respect for

[68] 6 MOORE, Digest of International Law 2 (1906).
[69] However, under the Charter intervention in the domestic affairs of a state are allowed in the following cases: (1) when the United Nations acts through the Security Council pursuant to Chapter VII of the Charter, (2) when member states intervene pursuant to a General Assembly resolution as provided by the terms of the "United for Peace" resolution, and (3) intervention by initiation of a party to a civil war as this term is understood in international law.

the territorial integrity and political independence of States and not with a view to permitting resort to the threat or use of force in certain cases.[70]

It would seem, then, that under the present status of international law, this primary duty is generally without exceptions. Professor Lauterpacht writes:

> The duty of non-interference especially by fomenting revolution is a fundamental one. Accordingly, the obligation of governments in this matter must needs be obligation of governments in this matter must needs be subject to a rigid and exacting interpretation.[71]

An obvious and frequent objection to this statement of the law is that a State may be accused of fomenting civil strife if it spreads propaganda against totalitarian systems of government or encourages resistance of populations to totalitarian excesses. With the emergence of a Communist State avowedly bent on world revolution and the destruction of "capitalistic States" plus the insidious techniques of the "cold war" this valid objection becomes a vital and important one. To begin with, let us be frank. Such propaganda *is* designed to foment civil strife otherwise there would be no purpose to them. What we want actually is an exception because we believe in freedom and regard totalitarian governments as an evil. Basically, there are two interests involved which must be weighed: the interest of the free world to insure the enjoyment of freedom for all peoples, and the interest to establish the rule of law among nations. Obviously, no rule of law can exist which sets a double standard. If subversive propaganda is prohibited to the communist powers, the prohibition must also apply equally to the non-communist powers. The end for which the propaganda is waged cannot justify the means assuming we want a uniform set of rules to govern the external conduct of nations.

The apparent dilemma this problem poses suggests. to my mind, an answer. Both interests are not mutually exclusive; in fact, they are complimentary. For example, the universal observance and effective enforcement of human rights would accomplish to a large extent both ends. What this suggests is that the primary duty we speak of cannot be viewed in isolation. It must be thought of as only one component in the totality of considerations that must go into the creation of a world order. It is not enough to say "do not foment civil wars" and stop there. So long as there is no effective machinery for settling the natural and conflicting interests of States resort to such activities is inevitable. Correlatively an organization equipped with the necessary powers to enforce those settlements and keep the peace must also exist. Without these pre-requisites, the primary duty of States to refrain from fomenting civil strife in any form though recognized by all nations as a legal duty will continue to be honored more in the breach than in the observance.

[70] Report Secretary General, GAOR VII (A/2211) 23 (1952).
[71] LAUTERPACHT, *op. cit.*, at 159.

Secondary Duty

The primary and secondary duty of States not to foment civil strife are not co-extensive. The latter duty is narrower and different considerations are involved. In the first place, the State is no longer acting directly. Its responsibility for an international delinquency of this type arises through culpable negligence or complicity. Its sole duty is to exercise due diligence in preventing the organization within its territory of activities calculated to foment civil strife and, in case such acts have nevertheless been committed, to procure satisfaction and preparation for the wronged State, as far as possible, by punishing the offenders and compelling them to pay damages when required.[72]

A failure to distinguish between what I have called the primary and secondary duty of a State has caused a great deal of confusion. Thus, we find in some writers sweeping statements as to the scope of this secondary duty. Calvo asserts unequivocally that international law imposes upon the State the duty to prevent its subjects from committing acts prejudicial to interests of friendly nations and to oppose plots and conspiracies of any nature whatsoever likely to disturb their security.[73] Fauchille also has general statements to the effect that it is the duty of the State "to prevent within its territory plots, conspiracies and in general attempts against a foreign Power."[74] The naturally severe condemnation which has attached to illegal interferences in the internal affairs of other states has possibly misled these writers in determining the range of the secondary duty.

These general statements of responsibility are more proper in connection with the primary duty. No doubt some States have given extensive protection to other States in this regard but they have been extended for reasons of politics and not because of international law. Powerful States will successfully resist exaggerated foreign demands for repressing plots and interests of friendly nations, and to opposite plots and conspiracies of any conspiracies against their neighbors; weak communities, otherwise of a democratic and tolerant disposition, will be driven by threats and pressure to a submissive attitude of repression and to excessive vigilance both in legislation and in practice.

Under general international law what kinds of activities must a State supress within its territories? Put in another manner the same issue may to stated: to what degree must a State supress revolutionary activities against a foreign State engaged in, either singly or jointly, by private persons? The answer to this question must look to the municipal law and practice of nations. Since international law leaves the enforcement of the secondary duty to each State, its municipal laws would logically reflect the individual views of States as to the extent of its international obligation.

[72] HALL, *op. cit.*, pt. II, c. IV, 217-219.
[73] CALVO, Le Droit International III, sec. 1298 (5th ed. 1896).
[74] FAUCHILLE, Traite I, pt. 1, sec. 255 (1922).

From whatever unanimity exists among States, we can then derive the proper scope of the secondary duty.

Unfortunately, the attitudes and practices of States show considerable variation depending upon the motivation behind their enforcement of this particular duty. Advanced and progressive States with democratic institutions have not been eager to protect foreign governments and constitutions more than absolutely necessary. On the other hand, precarious revolutionary governments menaced by subversive designs will be apt to demand and to concede broad protection against such activities. Thus there evolved two general types of systems: the Anglo-American group based on the principles of neutrality and the second group of European and Latin American States whose policies are based on mutual insurance.

Under the first system, only those revolutionary activities which take the form of an armed hostile expedition emanating from American or British territory are suppressed. According to Professor Lauterpacht, in Great Britain conspiracies, plots and treasonable practices against foreign States are not punishable under the law of England, except when they are related in certain special ways to the common crime of murder, or when they amount to levying war against a Power at amity with England. The Act of 1870 is primarily a measure of neutrality in wars between third Powers, Section 11, which constitutes a new feature of the Act of 1870 relates equally to times of peace and war. It provides that any person engaged in fitting out or in the preparation of a naval or military expedition to proceed against the dominions of any friendly state, or assisting therein or employed in any capacity in such expeditions, shall be guilty of an offense against the Act and shall be punishable by fine and imprisonment. According to Section 12, any person who aids, abets, and counsels or procures the commission of any offense against the Act shall be punished as a principal offender.[75]

The law of the United States is, with regard to the subject under discussion, confined almost exclusively to hostile expeditions. Similarly as in Great Britain, it forms part of the neutrality law; and the expression "Neutrality Act" does not, here also necessarily imply the existence of a state of belligerency. The Act of 1948 gave the following formulation to the relevant provision of the criminal law of the United States:

> Whoever, within the territory or jurisdiction of the United States or any of its possessions, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or who takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years or both[76].

[75] LAUTERPACHT, Revolutionary Activities Against Foreign States, 22 Am. J. Int'l L. 113-114 (1922).
[76] Passed June 25, 1948, c. 645, sec. 1, 62 Stat. 745, 18. Code Ann. 217 (1950).

In applying the law relating to hostile expeditions, American courts have not on the whole shown an inclination to extend unduly the restrictions placed upon American citizens. They insist on strict proof that the purpose of the alleged offense was some attack or invasion, from the territory of the United States, of another country as a military force.[77] It has been held that assistance rendered to expeditions proceeding from other countries is not illegal, and that the existence of an expedition from the United States is a condition precedent to the existence of accessories. In *U.S. v. Hart* Judge Butler charged the jury as follows:

> To justify a conviction it must be proved that a military expedition was **organized in this country;** and that the defendant provided means here, in Pennsylvania, for assisting it on the way to Cuba, as charged, with knowledge that it was such an expediton. Thus you see questions are presented for consideration, first, was such an expedition organized in this country? Second, did the defendant provide means for it, here, with knowledge. (Emphasis provided.)[78]

This seems to be the main characteristic feature of the obtaining law.

Under the second system revolutionary acts of a treasonable character against a foreign government are treated as criminal offenses. According to Article 102 of the German Penal Code a German who either at home or abroad, or a foreigner who, during his residence in Germany, undertakes an act against a state not belonging to the German Empire which if committed against the German Empire would be punishable as treason in the meaning of the code, shall be liable to imprisonment up to ten years.[79] The range of these treasonable acts is certainly a wide one. The Russian Penal Code of 1903 was the broadest of all. It threatened with punishment not only all attempts, and even participation in organizations working for such objects. And it is not without interest to note that the principle underlying this kind of legislation has been introduced into the criminal law of Soviet Russia. In a decree promulgated on February 25, 1927, defining offenses against the state and anti-revolutionary crimes, such acts are included in the latter designation as are directed against a State of workers even if that state does not belong to the Union of Soviet Socialistic Republics.[80] Some of the South and Central American Republics, much troubled as they are by internal revolutions, approach this type of legislation. Thus the Penal Code of Peru of 1924 makes it an

[77] *Ex parte Needham*, 1 Pet. C.C. 487 Fed. Cas. 10080 (1817); Charge to Grand Jury, 5 Blatchf. 555, Fed. Cas. 18264 (1866). Actual contact of the members or elements of an expedition within the territory of the responsible state is not indispensable. The ability of the members to assemble beyond the limits of the state is in itself an evidence of pre-arrangement within the state. *U.S. v. Murphy*, 84 Fed. 609 (1898).

[78] *U.S. v. Hart*, 78 Fed. 869 (1887); *U.S. v. Trumbull*, 48 Fed. 99 (1819). See also *U.S. v. The Itata*, 49 Fed. 646 (1892).

[79] LAUTERPACHT, *op. cit.*, *supra* note 75 at 117.

[80] *Ibid.*

offense not only to violate the territorial sovereignty of a foreign state by performing these acts of sovereignty and by invading it in violation of international law (Sec. 297), but also to commit acts calculated to alter by force the political order of other states.[81]

The foregoing exposition indicates no common measure of agreement on the scope of State responsibility for preventing and repressing revolutionary acts of private persons. The rule of international law must then be deduced necessarily from such minimum unanimity as exists.

The secondary duty can be stated in this way: States are under a duty to restrain persons resident within its territory from engaging in such revolutionary activities against friendly states as amount to organized acts of force in the form of hostile expeditions against the territory of those states.

CONCLUSIONS

Given the present realities of international life, this narrow formulation of the secondary duty would seem to be the safer one. A State cannot be made the guarantor and protector of foreign governments and constitutions. The safeguarding of these institutions are the proper concern of the individual State itself. Even with the increasing sense of solidarity among the community of Nations especially due to the existence of the United Nations, a greater amount of protection would tend to infringe on rights and freedoms given to individuals by democratic constitutions, and because of this a wider protection may be impossible to grant.

The problem is further complicated by the present ideological struggle between communism and democracy. If the two ideologies are irreconcilable as they seem to be, then the battle is a permanent and mortal one. Consequently, no democratic nation if it is truly dedicated to its ideals and values will want to prevent activities which it regards as tending or actually undermining the communist world. We must also consider that Communist States pursue as a matter of policy the infiltration and subversion of other States and the fact that Communist governments do not abide by the rules unless it suits their purpose.

Under such conditions to afford foreign States greater protection than previously outlined and to make such an enlargement mandatory under international law is not possible.

[81] *Ibid.*, at 118.