

THE INTERNATIONAL LEGAL ASPECTS OF THE LITHUANIAN SECESSION

The hardliners in Moscow are openly demanding a military crackdown or coup in Vilnius. But even they realize that its effect would be short-lived, shorter than in General Jaruzelski's Poland. Tanks make poor ploughs, and paratroops are no good at milking cows.

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I do not think it is in the best interests of the West just to sit on the fence, praying for the Balts and for the good health of Mr. Gorbachev. We, too, are praying for his good health, but we are doing more. We are giving a helping hand to the reformers and bitter medicine to the hardliners. It should be clearly stated by all democracies that another Tiananmen Square, and a "business-as-usual" attitude afterwards, would not be conceivable in the Baltic states. They should declare that the activation of Soviet troops here would be viewed as a repetition of the aggression of 1940.

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The West should act in its own interests. This is an international problem, not an internal Russian problem. The international community is entitled to say a few words about it.'

I. INTRODUCTION

In 1940, the Union of Soviet Socialist Republics ("USSR" or "Soviet Union") invaded the Baltic states of Lithuania, Latvia and Estonia. Soon after, the Soviets coerced the states into voting for annexation, and all three were officially annexed by the Soviet Union. On March 11, 1990, Lithuania declared its independence from the Soviet Union. Latvia and Estonia soon followed with declarations of their own. Other Soviet republics are toying with the idea of sovereignty.

President Gorbachev has been fighting a losing battle to hold the Soviet Union together. Indeed, had President Saddam Hussein's Iraqi troops not invaded Kuwait in August 1990, the breakup of the Soviet Union would undoubtedly have dominated international attention throughout the past year.

This note explores the international legal aspects of Lithuania's attempt to secede from the Soviet Union. Most of the issues discussed involve the Soviet Union's attempt to coerce Lithuania back into the USSR, or at least to secede on Moscow's terms. The balance of the issues concern international pressure exerted to compel Moscow to settle the dispute peacefully, as well as the legality of international intervention in the affair. Part II introduces the Baltic States' historical setting, and surveys Lithuanian history. Part III concerns the international and domestic law which governs the USSR/Lithuanian relationship. Part IV addresses the question of whether Lithuania is, or could be considered, a

1. Algimantas Cekuolis, Sajudis member and Soviet people's deputy and member of the Lithuanian Communist Party Central Committee, writing in *The Independent*, Mar. 3, 1990, at 11, col. 1.

state in international law. Part V discusses the use of force in international law. Article 2(4) of the United Nations Charter forbids the use of force. One exception to this prohibition is the use of force in self-determination struggles. Part VI is a discussion of this exception in the context of the Lithuanian secession.

II. HISTORICAL REVIEW²

Lithuania's history is a troubled one. Nestled between Russia and Germany, its recent history has been written by these two powerful countries.

Such has not always been the case, however. Fourteenth century Lithuania was a great empire, whose holdings stretched from the Baltic Sea to the Black Sea. But by the end of the eighteenth century all three Baltic provinces were in Russian possession. In the early twentieth century, Europe was dominated by military empires, and Baltic independence was unthinkable in such a context.

The First World War changed all of this. Both Germany and Russia had been defeated and were relatively weak. The three Baltic states of Lithuania, Estonia, and Latvia officially came into being. They were recognized by the international community and were admitted as members of the League of Nations.³ In fact, Lenin entered into peace treaties with all three in 1920.

On August 23, 1939, Joseph Stalin and Adolph Hitler entered into the Molotov-Ribbentrop pact.⁴ The pact itself was comprised of two protocols. The first protocol provides in pertinent part:

In the case of a territorial and political rearrangement in the areas belonging to the Baltic states, the Northern border of Lithuania will form the border of the German and Soviet spheres of interest. . . . In the case of a territorial and political rearrangement of areas belonging to the Polish state the German and Soviet spheres of interest will be divided roughly by the line of the rivers Marev, Vistula and San. . . .⁵

The second protocol consisted of a German trade of Lithuania for sections of Poland.⁶

In 1940, the Baltic States⁷ were occupied and annexed by the Soviet Union. Both the individual Baltic States, and subsequently the Soviet Union, passed laws which requested and granted, respectively, annexation.⁸ The Baltic States thus ceased to exist — they became members of the USSR. The West, however, has not recognized the validity of the annexations.⁹

In 1941, the Baltic States fell under German occupation, as Hitler's divisions quickly conquered them on his drive north to capture Leningrad.¹⁰ Between 1944

2. Unless otherwise noted, the general historical accounts referred to were reported in *The Independent*, Mar. 27, 1990, at 21, col. 1.

3. *The Independent*, Mar. 3, 1990, at 11, col. 1.

4. *Id.*

5. *The Independent*, June 3, 1989, at 28, col. 4.

6. *The Independent*, August 28, 1989, at 6, col. 2.

7. The Baltic States comprises Estonia, Latvia, and Lithuania.

8. *Id.*

9. *N.Y. Times*, Jan. 18, 1991, at A7, col. 4. In fact, the United States continues to maintain ties with the vestigial diplomatic missions of each of the Baltic States in Washington, D.C. *Id.* Then Prime Minister Margaret Thatcher stated that the 1975 Helsinki Accord legitimated the existing Soviet borders, but others disagree, including the Finnish foreign minister. *The Independent*, Mar. 28, 1990, at 1, col. 2.

10. H. MICHEL, *THE SECOND WORLD WAR* 218 (1968).

- 1945, the Baltic States were liberated by the Red Army and have been members of the USSR ever since. The Soviet Union has recently acknowledged the illegality of the 1940 annexations.¹¹

For years the Cold War effectively precluded any reform. However, the wave of democratic reforms which swept eastern Europe in the late 1980's changed all of this.

In 1989 the Lithuanian Communist Party ("LCP") split from the party in Moscow.¹² The new party, now called Sajudis,¹³ gained a majority in the February 24, 1990, elections,¹⁴ and on March 11, 1990, declared Lithuania to be an independent state.¹⁵ Despite Lithuanian pleas to the rest of the world for economic aid and recognition, none has yet been forthcoming.¹⁶

In response to these actions, the USSR imposed economic sanctions on Lithuania. It withdrew shipment of all of its oil supplies¹⁷ and eighty-five percent of its natural gas supplies.¹⁸ Lithuania is primarily an agricultural society — attempts to starve the indigenous population into submission would thus prove fruitless. But its economy is dependent upon oil which it refines for domestic consumption, with the balance sold to the Soviet Union. Because Lithuania has no oil resources of its own, it must therefore import all of that which it refines and then exports.¹⁹

The economic sanctions imposed by President Gorbachev were lifted after four months' duration,²⁰ when it became clear to the Kremlin that they only served to fan the flames of the nationalist movement in Lithuania. A political stalemate developed in which the Lithuanians had declared independence, but the Soviet Union refused to accept the declaration. The international community became very vocal in its support of the Baltic States. President Gorbachev, keenly aware of the attention, initially did not use force to subdue the breakaway republics.

On January 11, 1991, however, Soviet military units attacked and captured the Lithuanian press and militia center.²¹ Seven people were hurt in the process.²² Two days later, on January 13, 1991, Soviet tanks dispersed a crowd who had formed a human barricade around the television broadcast center in Vilnius. The broadcast center fell to the Soviets.²³ Fifteen people died, and scores more were injured.²⁴ On January 20, 1991, a unit of the Soviet Interior Ministry²⁵ attacked and captured a Latvian government ministry

11. N.Y. Times, Aug. 19, 1989, § 1, at 1, col. 2.

12. The Independent, Dec. 27, 1989, at 1, col. 2.

13. Meaning "movement."

14. The Independent, Mar. 3, 1990, at 11, col. 1.

15. The Independent, Mar. 12, 1990, at 1, col. 2.

16. Iceland has recently recognized Lithuania. L.A. Times, Feb. 16, 1991, Pt. A, at 2, col. 1.

17. The Independent, Apr. 19, 1990, at 1, col. 2.

18. The Independent, Apr. 20, 1990, at 1, col. 2.

19. The Independent, Apr. 24, 1990, at 12, col. 1. Soviet oil, gas, and coal account for more than ninety percent of Lithuania's energy needs. The Independent, April 19, 1990, at 12, col. 1.

20. N.Y. Times, Jan. 12, 1991, § 1, at 1, col. 1.

21. *Id.*

22. *Id.*

23. N.Y. Times, Jan. 13, 1991, § 1, pt. 1, at 1, col. 3.

24. N.Y. Times, Jan. 21, 1991, at A1, col. 1.

25. It is unclear whether President Gorbachev ordered the attack, and it is quite possible that

building.²⁶ At least five Latvians died in the attack.²⁷

Many observers accused President Gorbachev of attempting to divert international attention away from the internal strife by timing the crackdown in the Baltic States to coincide with the U.S.-led coalition's attack on Iraqi forces in Iraq and Kuwait.²⁸ President Bush was quick to condemn the Soviet use of force, but did not follow up his rhetoric with strong sanctions. This reluctance apparently resulted from the President's desire to maintain the successful international coalition against Iraq.²⁹

On February 9, 1991, Lithuanians went to the polls to vote on independence. The ballot read simply, "Are you for the independent and democratic state of Lithuania?" Eighty-four percent of the population took part in the vote, and ninety percent voted in favor of independence.³⁰ Latvia and Estonia followed with their own referenda on March 3, 1991, with similar results.³¹

III. THE LAW GOVERNING RELATIONS BETWEEN LITHUANIA AND THE USSR

The legal issues which govern the relationship between Lithuania and the USSR are far from settled. Soviet domestic law relating to the present situation is not entirely clear. In addition, many of the international legal principles involved are far from settled.

All three Soviet Constitutions³² have provisions allowing for the secession of member republics. There is, however, no constitutional mechanism for secession.³³ Thus, although theoretically the right to secede is purported to have existed since

this military unit acted on its own accord. But despite the fact that this same unit had been involved in other incidents, President Gorbachev had made no move to curb their activities. *N.Y. Times*, Jan. 21, 1991, at A1, col. 1.

26. *Id.*

27. *Id.*

28. *N.Y. Times*, Jan. 18, 1991, at A7, col.1.

29. *N.Y. Times*, Jan. 15, 1991, at A7, col. 3. President Bush was criticized by many members of Congress for his inaction. On January 15, Senator Bill Bradley (D. — N.J.) said on *Today* (NBC television broadcast, Jan. 15, 1991), "It would be a sad irony if the price of Soviet support for freeing Kuwait was American acquiescence in Soviet aggression against another illegally annexed country." *Id.*

30. *N.Y. Times*, Feb. 11, 1991, at A2, col. 3.

31. *N.Y. Times*, Mar. 4, 1991, at A3, col. 4. In each republic, approximately eighty percent of those eligible to vote did so. In Latvia, 73.6 percent of the population approved the measure, and in Estonia, 77.8 percent did so. This is remarkable, in that native Latvians only comprise fifty-two percent of the Latvian population. About thirty percent of Latvian's population consists of Russians. In addition, native Estonians make up only sixty-five percent of their country's population. Thus, native Russians are also supporting Baltic secession. The Russian population is smallest in Lithuania, so this fact was not generally known until the Latvian and Estonian referenda. *N.Y. Times*, Mar. 5, 1991, at A3, col. 1.

Not to be outdone, President Gorbachev held his own referendum on March 17, 1991. He wanted his ballot to say, "Do you consider it necessary to preserve the Union of Soviet Socialist Republics, in which the rights and freedoms of people of any nationality will be fully guaranteed?" Many republics, however, did not follow this precise wording, and many republics also added their own secessionist questions to the ballot. The vote was boycotted in six of the fifteen republics. Only about fifty percent of those who voted approved. *N.Y. Times*, Mar. 19, 1991, at A1, col. 6.

32. The Soviet Union has had three constitutions since its inception in 1917. Lenin's constitution was put in force in 1924, Stalin's in 1936, and Brezhnev's in 1977.

33. Shortly after the Lithuanian declaration of independence, the Soviet Union passed a law which did provide for a means for secession. This law was not a constitutional provision, however. See *infra* notes 48-49 and accompanying text.

1924, in practical terms, it has never existed.³⁴ The international community, for the most part, has never recognized the 1940 Soviet annexation of Lithuania. Moreover, most nations have failed to recognize the current statehood of Lithuania — if indeed it exists — leaving the international community in a logically untenable position.

These are but a few of the legal issues confronting those attempting to resolve the power struggle between Lithuania and the USSR. None of these issues have simple solutions. Both sides claim the other is acting illegally.

Although it becomes increasingly clear that legal norms have taken a back seat to political and economic considerations, it is instructive to examine such legal issues to see how Lithuania's struggle for independence, if and when resolved, may form the basis of a "state practice" argument in the future.

A. Is Lithuania Acting Legally?

Whether Lithuania is acting legally must first be examined against a backdrop of the differences between international law and Soviet domestic law. Unless Lithuania should engage in crimes against the international community, the question of its secession is purely one for domestic Soviet law. One commentator points out in no uncertain terms that "[t]here is no rule against rebellion in international law. It is within the domestic jurisdiction of states and is left to be dealt with by internal law."³⁵ Thus, many of the legal issues involved in the affair may only be resolved by consulting Soviet law.

As stated, all three of the constitutions of the USSR have provisions allowing a member to secede from the Union. At first glance, then, it seems to a Western observer that Lithuania is merely exercising its constitutional rights by declaring its independence. Unfortunately, this is a naive assumption. It flounders on two constitutional grounds. First, the Soviet approach to constitutional law is fundamentally different than Western conceptions. Second, article 74 of the current Soviet constitution provides that any conflict of law issue between the USSR and a member republic is to be resolved in favor of the USSR.³⁶

The right to self-determination for all constitutive members of the State was included in the first Party Program of 1903.³⁷ Lenin subsequently interpreted this to include "the right to secede and form a separate state."³⁸ Lenin believed that the only way to maintain the unity of separate nations was to allow for the freedom of each of them to secede.³⁹ It is for this reason that each Soviet Constitution allows for the freedom of secession. In pertinent part, the 1924, 1936 and 1977 Soviet Constitutions provide, respectively:

Article 4. Every union republic shall retain the right of free secession from the Union.

Article 6. [A]mendment, limitation or repeal of article 4 shall require the consent of all republics constituting the Union of Soviet Socialist Republics.⁴⁰

34. See *infra* notes 36-50 and accompanying text.

35. See M. SHAW, *INTERNATIONAL LAW* at 568 (1986).

36. See *infra* note 47 and accompanying text.

37. A. UNGER, *CONSTITUTIONAL DEVELOPMENT IN THE USSR* 46 (1981).

38. *Id.* at 46, (quoting 19 V. LENIN, *COLLECTED WORKS* 243 (1960-70)).

39. A. UNGER, *supra* note 37, at 46.

40. KONST. SSSR arts. 4 and 6 (1924) (enacted by General Secretary V. Lenin).

Article 17. Every union republic shall retain the right of free secession from the USSR.⁴¹

Article 72. Every union republic shall retain the right of free secession from the USSR.⁴²

Thus, it is clear that the right to secession is explicitly stated in each Soviet Constitution. But, as will be demonstrated, this does not mean that an actual right exists.

Soviet constitutions do not have the same legal validity that most western constitutions do. This is particularly true with respect to the right to secession. As stated by a foremost commentator, Lenin felt that although the right to secession was clearly one of the constitutive principles of national sovereignty, it would rarely, if ever, actually be employed. In practice it has ceased to have any effect as a right as we usually use the word.⁴³ The following exchange is particularly revealing:

The attitude of the authorities is perhaps best exemplified by the reply of a senior investigator in the 1961 trial of a group of Ukrainian nationalists charged with an attempt to 'sever' the Ukraine from the USSR: 'Lukyanko, you are a literate man, so why pretend to be a simple-minded dolt. You understand perfectly well that *article 17 of the Constitution only exists for [the delusion of] the outside world.*'⁴⁴

Stalin's constitutional scholars accounted for the seeming paradox by arguing that "experience in building the world's first multinational socialist state . . . has shown that where nations have the right to self-determination, including the right to secession, they will freely associate."⁴⁵

Perhaps this seeming contradiction between purported policy and actual practice can be partially explained by investigating the Soviet approach to law in general. It seems that, while in the West we tend to think that "all that is not forbidden is allowed," the Soviet view is the reverse. "All that is not allowed is forbidden" is a fairly accurate characterization of the Soviet approach. One commentator has noted that, in the Anglo-American context, constitutions, both written and unwritten, are associated with the limitation of arbitrary power, whereas the Soviet constitutions exist to empower the State.⁴⁶

Given this dichotomy, it is important to note that although the constitutions all specifically provide for the right to secession, none of them spells out a mechanism for secession. Thus, in our terms, no right to secession exists at all in Soviet law.

Furthermore, it is important to note that article 74 of the 1977 Soviet Constitution takes any wind left in Lithuania's sails. Article 74 provides, in pertinent part, that "[i]n the event of a divergence between a union republic law and an all-union law, the law of the USSR shall prevail."⁴⁷ Thus, Lithuania's declaration of independence of March 11, 1990 is subject to the law of the USSR

41. KONST. SSSR art. 17 (1936) (enacted by General Secretary Joseph Stalin).

42. KONST. SSSR art. 72 (1977) (enacted by General Secretary Leonid Brezhnev).

43. A. UNGER, *supra* note 37, at 46.

44. *Id.* at 87 (emphasis added).

45. *Id.*

46. W. BUTLER, SOVIET LAW 143-144 (1988).

47. KONST. SSSR art. 74 (1977).

and is therefore illegal. Additionally, the Lithuanian Legislature has passed many laws which by their very terms are contrary to USSR law.

All of the foregoing, however, must be read in light of a law passed April 3, 1990, which provides, in very general terms, for a mechanism for secession.⁴⁸ In essence, the law provides that secession will only take place after the party wishing to secede successfully executes a referendum vote. The parties then would enter into negotiations and agree to stipulate a transitional period not to exceed five years.⁴⁹ Under these terms, therefore, Lithuania's recent action is illegal, and Lithuania can only bring itself within the law by repealing its declaration of independence and entering into negotiations — something which it has repeatedly said it would not do.

In conclusion, Lithuania's actions have been illegal in terms of Soviet law. Thus, the USSR is in a position that enables it to take action against Lithuania which arguably would amount to an entirely internal affair. Characterization of the affair as internal or international is key to the understanding of the legality of any steps taken by other States.⁵⁰

B. Is the USSR Acting Legally?

This question must be addressed in two parts: (i) has the USSR acted illegally in the past?; and (ii) is it now acting illegally?

Importantly, both questions should be asked together, for if only the latter question is raised, it becomes a simple question to answer. In fact, the issue is then, "Is the USSR acting within its right to suppress a mounting rebellion which threatens the very core of the USSR?" If merely phrased in this manner, it seems clear that the USSR is acting within its right to hold itself together as a nation, both in terms of domestic and international law.

But if the two questions are taken as a whole, the question can be rephrased, "Is the USSR acting within its right to hold together a Union which, under international law, is illegally constituted in the first place?" This note addresses the latter formulation.

The first part of the question, addressing whether the USSR acted legally when it occupied and annexed Lithuania in 1940, is relatively easy to answer. The occupation of Lithuania was clearly in violation of international law.⁵¹ In addition, if the annexation of Lithuania was without Lithuania's consent, then it also was in violation of international law.⁵²

48. The Independent, Apr. 4, 1990, at 1, col. 2.

49. The Independent, Apr. 11, 1990, at 1, col. 4.

50. In general, if the situation is classified as purely internal, all other States must refrain from taking part. If, however, the situation is an international in nature, there are steps the international community may take to influence the outcome of the affair. See *infra* notes 67-85 and accompanying text.

51. Article 2(4) of the U.N. Charter specifically outlaws the unjustified use of force, and the occupation of Lithuania clearly involved the unjustified use of force. See *infra* notes 99-108 and accompanying text.

52. For example, Article 5(2) of the Consensus Definition on Aggression, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974), states, "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility." The annexation was clearly an act of aggression if done so without the consent of the Baltic States. See *infra* notes 131-132 and accompanying text.

Indeed there is evidence to support this. The Lithuanians claim the annexation was illegal.⁵³ No international fact-finding body has ruled on the legality of the annexation, but basically it comes down to the Lithuanian's word against that of the Soviet Union. As is noted below, for the annexations to have been legal in international law, Lithuania would have had to have consented, and the Lithuanians claim that they did not. Granted, it does not logically follow that because they do not consent now, they did not consent then; but common sense suggests that, in all probability, the country did not consent to the annexation in 1940.⁵⁴ Thus, if a fact-finding body were to rule on the situation, it is likely they would find the annexation to have been without the consent of Lithuania, and thus illegal.

The second part of the question, whether the USSR is acting within its rights in maintaining an illegally constituted union, forms the basis of the remainder of this note.

C. Does the USSR Have a Legal Claim to Lithuania?⁵⁵

The Soviet Union annexed the Baltic states in 1940 — a half of a century ago.⁵⁶ While the West has never recognized these annexations,⁵⁷ the practical reality is that the Baltic states have been integral members of the Soviet Union since that time. Given the level of Soviet investment in Lithuania, can the USSR claim, in effect, that the *statute of limitations* has run and that Lithuania should be treated under international law as a part of the USSR and not as an independent state? Here, too, international law is not well-settled. Notwithstanding the extensive discussion as to whether such an argument could be persuasively set forth, in practice it never has.

In international custom, the principle has evolved that belligerent occupation itself does not give the occupier any prescriptive rights: "The rule that has emerged in international law — well before the prohibition of war⁵⁸ and regardless of which state is the aggressor — is that belligerent occupation, by itself, cannot produce a transfer of title over territory to the occupying State."⁵⁹ Furthermore, "[n]o territory under belligerent occupation can be validly annexed by the occupying Power acting unilaterally."⁶⁰

Thus, application of the relatively settled law to these facts produces a simple result. For the inclusion of Lithuania into the USSR to have been legal, the Soviet Union must be found not to have acted unilaterally. In other words, the

53. The Independent, Feb. 21, 1990, at 1, col. 2.

54. Most commentators agree that the annexation was unilaterally executed. See, e.g., H. MICHEL, *supra* note 10, at 45.

55. The following discussion should be read in the light of the Conference on Security and Cooperation in Europe, Final Act (Helsinki Accord), Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975), reprinted in 14 ILM 1292 (1975). One purpose of the Helsinki Accord was to acknowledge the legitimacy of the borders which then existed in Europe. See generally Damrosch, Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs, 83 A.J.I.L. 1 (1989). Many of the signatories of the Helsinki Accord, however, have never recognized the 1940 annexations. See, e.g., Wash. Post, Mar. 29, 1990, § 1, at A31, col. 1.

56. The Independent, Mar. 27, 1990, at 21, col. 1.

57. The Independent, May 2, 1990, at 8, col. 1.

58. See *infra* note 101 and accompanying text.

59. Y. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 157-158 (1988).

60. *Id.* at 158.

occupation of Lithuania in 1940 is of no legal effect whatsoever, and the only claim the USSR can make is that the annexation was with the full support of the peoples of Lithuania. It is likely, however, that the Soviet Union did act unilaterally, and fraudulently conducted the 1940 annexation referendum. If this is the case, it is axiomatic that the USSR has no right in international law to the territory known as Lithuania.

Given this premise, and political issues aside for the moment, why does the West not clamor for the rights of the Lithuanian people to their land? A partial answer is suggested as follows.⁶¹

As noted, the international community has not recognized the 1940 annexations. But, as Dinstein notes, “[i]t is not entirely certain what non-recognition of territorial acquisition means in practice. But probably the gist of non-recognition is that, despite a continuous and effective control over the annexed territory, no prescriptive rights evolve in favour of the aggressor.”⁶² Dinstein further comments that if the historical reality of the situation is such that the annexed territory is indeed part and parcel of the occupying state, then the international community should “capitulate” to the facts and award the occupying state rights in the territory involved.⁶³ In the case of the extinction of an entire state, however, the time required for the vesting of the prescriptive rights should be postponed as long as possible, but this principle cannot ever be completely avoided.⁶⁴ Dinstein concludes:

These remarks are merely tentative and speculative, for they concern a theme that has not yet been seriously debated in a concrete setting. The criminalization of aggressive war has been a part of positive international law only since the *Nuremberg* Judgment. In the relatively short time that has elapsed, the international community has not been called on to resolve, in a specific case of post-aggression annexation, a clash between the legal principles of non-prescription and self-determination, on the one hand, and the gravitational pull of the facts, on the other. It is impossible to forecast, with any degree of confidence, what direction the future practice of States will take with respect to this subject-matter.⁶⁵

At first blush, it seems Professor Dinstein has found in the Lithuanian secession a test case for his hypothesis. But at this time, it appears unlikely that the issue of prescription will be discussed in this instance due to the political fragility of the situation. If it were to be openly debated, Dinstein’s commentary would be helpful in pinpointing the issue, but would not aid the parties in settling the dispute. He provides no standard to apply to the present facts to determine whether the requisite time has passed, for example. Of course, Professor Dinstein should not be criticized for failing to provide a standard — one simply does not exist.

If the USSR does indeed put forth this argument, it would open an entire Pandora’s Box of sub-issues. How long does the clock have to run? Did the

61. For a more complete discussion, see *infra* section VII.

62. Y. DINSTEIN, *supra* note 59, at 160.

63. *Id.* at 161.

64. *Id.*

65. *Id.*

Soviet Union toll the bell when it acknowledged the annexation was illegal? Is it sound policy to base the question of self-determinacy of a people on a principle based primarily on property law? The complexity of these issues defies simple solution.

When international policy considerations are taken into account, the answer seems clear — the USSR should not be allowed to claim the legality of the inclusion of Lithuania on the grounds of prescription. Two well-developed principles of international law far outweigh such an argument. First, international law holds as a sacred tenet the inviolable sovereignty of each nation — a sovereignty disregarded by the Soviet Union in 1940. Second, international law prohibits aggression — the acts of the Soviet Union in 1940 can hardly be characterized otherwise.

Thus, although it is possible in theory that the USSR has acquired prescriptive rights to the territory known as Lithuania, it would be a difficult argument to maintain, and indeed the Soviet Union has not made the argument to date. The issue itself goes to the question of whether Lithuania should be considered a state. This question has important ramifications in international law.⁶⁶

D. Can Events in Lithuania be Classified as Civil War?

Strictly speaking, the present situation is not a civil war. A brief discussion of the international law related to civil war, however, is important for two reasons. First, the situation could degenerate into civil war at any time. Second, it may be helpful to analyze recent events in Lithuania under the rubric of civil war, because the international legal issues are relatively clear on this point, whereas the international community remains uncertain as to how the present situation should be characterized.

In the first few weeks after Lithuania declared its independence, President Gorbachev limited the use of armed force largely for political reasons. He refrained from the use of force because he did not wish to jeopardize the Soviet Union's rapidly improving relationships with the West. The Berlin wall was dismantled in November of 1989,⁶⁷ and US-Soviet relations were thawing. A summit was planned for June, 1990, and both sides were hoping for substantial arms reductions in Europe.⁶⁸ In addition, the Soviet economy was in a state of disarray, with a real danger of fiscal collapse.

The United States, then, had both a carrot and a stick to wave at Mr. Gorbachev, in the form of arms reductions in Europe and economic sanctions. If it were not for these compelling factors, it is unlikely that the Soviet Union would have been so understanding toward Lithuania. Except for the fact that the use of armed force has been limited, all the indicia of civil war, or at least a war of secession, are present. My thesis is that, were it not for the intervention⁶⁹ of the United States, the situation would have degenerated into that of civil war,

66. See *infra* notes 86-98 and accompanying text.

67. N.Y. Times, Nov. 10, 1989, at A1, col. 3.

68. See, e.g., N.Y. Times, Apr. 7, 1989, § 1, at 1, col. 6.

69. This raises questions as to whether the United States is acting legally by intervening in the situation, and more fundamentally, whether the U.S. is intervening at all. See *infra* notes 126-130 and accompanying text.

albeit a short one. By historical standards, what is happening in Lithuania never should have happened.

Basically, a civil war exists in international law only if specific conditions exist.⁷⁰ First and foremost, there must actually be a state of war within the country involved, and this means armed conflict.⁷¹ Secondly, the rebel forces must be organized under a government which controls a certain territory of its own, and "is acting for the time being like the government of an independent state at war."⁷²

All of these conditions are met in the current instance except one: the existence of armed conflict.⁷³ The Sajudis government is at least arguably in control of the area constituting Lithuania, and is conducting itself as an independent state. It has declared itself independent.⁷⁴ It has attempted to enforce its own customs and immigration.⁷⁵ It has created its own postage stamp.⁷⁶ Most importantly, it has also attempted to enter into international relations.⁷⁷

If the state of civil war is found to exist, what can other countries do? For example, can they, in accordance with international law, become involved in the conflict? The answer in this context seems to be no. Shaw notes that "[i]nternational law treats civil wars as purely internal matters, with the possible exception of self-determination conflicts."⁷⁸

Civil wars exist because rebel factions in a given state gain power to the point where they are able to bring armed force to bear on the existing government. The question thus becomes, when do these rebels become international actors, and what consequences result from affording them international personality?

In the initial stages of rebellion, rebels are afforded no international status and any aid extended to the rebels would clearly be in contravention of international law.⁷⁹ On the other hand, aid to the existing government in the suppression of the rebels is clearly legal.⁸⁰ There comes a point, however, where it is necessary to recognize the rebels as "belligerents."⁸¹ Once the rebels are so

70. J. BRIERLY, *THE LAW OF NATIONS* 141 (1963).

71. *Id.* at 141.

72. *Id.*

73. At least fifteen people have died in clashes in Lithuania. *N.Y. Times*, Feb. 10, 1991, § 1, pt. 1, at 1, col. 1. While these casualties are significant in a moral sense, it is unlikely that they indicate armed conflict under international law.

74. *The Independent*, Mar. 12, 1990, at 1, col. 2.

75. *The Independent*, Mar. 30, 1990, at 11, col. 4.

76. The Soviet Union has agreed to honor the stamps. Interestingly, the Lithuanians did not know what price to print on the stamps, since the ruble is still the official currency. The Lithuanians did not wish to endorse the Soviet economy by acknowledging the ruble on their stamp, so they merely printed the figure, without specifying the currency. *N.Y. Times*, Feb 9, 1991, § 1, at 1, col. 3.

77. *The Independent*, May 2, 1990, at 8, col. 1. Czechoslovakia, for instance, has indicated that it will open an "office of representation" in Lithuania. *N.Y. Times*, Feb. 17, 1991, § 1, pt. 1, at 24, col. 5. It is unclear what an "office of representation" is, and how it differs from an embassy. Obviously, Czechoslovakia chose this wording to indicate that it was not yet willing to accord Lithuania full recognition, but this would be the next logical step. See *infra* notes 86-98 and accompanying text.

78. See M. SHAW, *supra* note 35, at 568. The self-determination exception is considered *infra* at notes 124-138 and accompanying text.

79. *Id.* at 568-572.

80. *Id.*

81. *Id.* at 568-69. Insurgency is another status the rebels could theoretically enjoy, although this

characterized, there is a duty to remain neutral in the affair.⁸² The assumption, I think, is that if the rebels are sufficiently powerful, there must be an element of popular support for the rebels involved, and thus it becomes a matter for the country itself to resolve, in the context of self-determination.

What effect does the recognition of the rebels as belligerents have on their international status? Professor Brierly explains the likely effect:

[T]he effects of the recognition are purely provisional; it puts both belligerent parties [the existing government and the belligerents] in the position of states; but only for the purposes and for the duration of the war. It differs radically, therefore, from a recognition of the revolting part of a state as independent.⁸³

But is this an entirely accurate statement of the law? If it is, and the belligerents are granted the status of a state, even if merely "for the purposes . . . of the war," then *a fortiori*, once the rebels reach a certain stage, the recognition of them as belligerents would make any use of force upon them illegal within the parameters of article 2(4) of the United Nations Charter.⁸⁴ I have not seen such an argument made along these lines. Lithuania, however, would surely benefit if this were an accurate statement of the law pursuant to article 2(4). The West would merely have to recognize Lithuania as a belligerent, not a state — something which would be easier to do since it is difficult to see how Lithuania could be recognized as a state.⁸⁵ The Soviet Union would be legally precluded by the international community from taking any further action.

Consequently, although the situation is not yet capable of classification as a civil war, conditions in Lithuania are sufficiently similar to warrant an examination of the body of international law of civil war. Reasoning by analogy, it seems that the West may be under an international legal obligation to remain neutral in the affair.

Of course it is possible that the situation is incapable of being classified as a civil war. This would be the case, for instance, if Lithuania is to be considered an independent state. It is to this issue that we now turn.

IV. IS LITHUANIA A STATE?

The issue of whether Lithuania is classified as a state is one of the most important aspects of the controversy. The status of Lithuania is vital in defining the rights of third parties to intervene. It also clarifies the duties owed Lithuania by the USSR. If Lithuania is to be considered a state in international law, then the duties owed it by the USSR in international law change dramatically. This is especially true with respect to the duty to refrain from using force on another state.⁸⁶

Professor Brierly describes the requisite factors in the determination of whether an entity is, or should be, recognized as a State:

A new state comes into existence when a community acquires, with a reasonable probability of permanence, the essential characteristics of a state, namely an

is a "lesser" status than belligerency. I do not address this classification because (1) it is falling into disfavor as a legal status, and (2) it adds little to this discussion.

82. *Id.* at 569-570.

83. J. BRIERLY, *supra* note 70, at 142-143.

84. *See infra* notes 99-108 and accompanying text.

85. *See infra* notes 86-98 and accompanying text.

86. *See infra* notes 99-108 and accompanying text.

organized government, a defined territory, and such a degree of independence of control by any other state as to be capable of conducting its own international relations.⁸⁷

Professor Shaw notes that "Article 1 of the Montevideo Convention on Rights and Duties of States, 1933, lays down the most widely accepted formulation of the criteria of statehood in international law."⁸⁸ These include "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."⁸⁹ It is difficult to see how Lithuania could be considered to be sufficiently independent from the Soviet Union to be considered a state.⁹⁰ The usual test is whether the community is capable of conducting its own international relations.⁹¹ According to the United Nations, Lithuania had not reached this level as of March 14, 1990, and that it "would not be eligible [for admission to the UN as a State] for a long time."⁹²

Many laymen do not understand the role recognition plays in the creation of a state. For that matter, nor do many international lawyers. Two schools of recognition exist. The "constitutive" school claims that a state only comes into existence through its recognition by other states.⁹³ This attitude is not favored by international legal scholars, although politicians often advance it.⁹⁴ The "declarative" school claims that recognition is merely a declaration by a state that it intends to treat the community as a state, and invites the rest of the world to do so as well.⁹⁵ In this respect, recognition is seen as more of a political than a legal act. Scholars prefer this approach because it affirms the primacy of practical reality to legal fiction.⁹⁶

It follows from this discussion that, while many states might believe that they can *wish* Lithuania into existence merely by recognizing it as a state, the legal reality is that this probably is not the case. Of course, how one answers this question depends upon which school one adheres to.

It appears that, recognized or not, Lithuania is not yet a state in international law. This has important ramifications, particularly in the discussion of the use of force which follows.⁹⁷ It should be noted that most of the documents which outlaw the use of force or aggression discuss it in terms of states acting upon other states.⁹⁸ Lithuania, therefore, will be unable to avail itself of these provisions unless she is seen as a state.

Additionally, if Lithuania is not a state, then by definition, the USSR-Lithuanian relationship is not an international relationship. In this case, the

87. J. BRIERLY, *supra* note 70, at 137.

88. M. SHAW, *supra* note 35, at 127.

89. *Id.*

90. The Lithuanian economy is wholly dependent upon the Soviet Union. It has no currency of its own, and the rubles it has are not capable of international exchange. Lithuania does, however, export a great deal of food to the USSR, and in this sense it is self-sufficient. See *The Independent*, Apr. 18, 1990, at 1, col 2.

91. M. SHAW, *supra* note 35, at 128-129.

92. *The Independent*, Mar. 14, 1990, at 7, col. 1; see also *The Independent*, Mar. 13, 1990 at 12, col. 5.

93. M. SHAW, *supra* note 35, at 208-213. See also J. BRIERLY, *supra* note 70, at 138-140.

94. M. SHAW, *supra* note 35, at 208-213.

95. *Id.*

96. *Id.*

97. See *infra* notes 99-108 and accompanying text.

98. See, e.g., article 2(4) of the United Nations Charter. See also *infra* notes 99-138 and accompanying text.

discussion of international law must be confined to Western attempts to influence the situation.

V. WHEN IS FORCE ALLOWED?

International law has come to outlaw, in all but certain instances, the use of force. This has not always been the case, however. In fact, prior to the twentieth century, there was no such prohibition.⁹⁹ This attitude changed, however, with the advent of World War I and the formation of the League of Nations.¹⁰⁰ The Kellogg-Briand Act outlawed resort to war, but fell short of outlawing force.¹⁰¹ Thus, states were often free to resort to force which fell short of actual war.¹⁰² Professor Shaw explains this result:

In view of the fact that this treaty has never been terminated and in the light of its widespread acceptance, it is clear that prohibition of the resort to war is now a valid principle of international law. It is no longer possible to set up the legal relationship of war in international society. However, this does not mean that the use of force in all circumstances is illegal.¹⁰³

An important step for the purposes of this discussion was taken by the United Nations when it outlawed the use of force, not just acts of war. The key provision is article 2(4) which declares: "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."¹⁰⁴ This provision is now widely recognized as a principle of customary law, and as such is binding upon all states, even states that are not a party to the United Nations.¹⁰⁵

While there are certain exceptions¹⁰⁶ to the prohibition on the use of force, none seem relevant in this situation. The two main exceptions include the use of force in self-defense and in self-determination.¹⁰⁷

It is clear that the use of force by any party in the current context could not be characterized as self-defense. The Soviet Union has resorted to the use of force, but it has done so to quell an internal rebellion, conduct which is governed by domestic law. "International law does not forbid rebellion, it leaves it within the purview of domestic law."¹⁰⁸ No country could claim to be acting in self-defense if it aided Lithuania. Lithuania itself might wish to claim self-defense in

99. See, e.g., M. SHAW, *supra* note 35, at 539-542.

100. *Id.* at 542-43.

101. *Id.* at 543.

102. *Id.*

103. *Id.*

104. U.N. CHARTER art. 2, para. 4.

105. See generally L. HENKIN, R. PUGH, O. SCHACHTER AND H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 677 (1987); see also M. SHAW, *supra* note 35, at 544.

106. M. SHAW, *supra* note 35, at 547-557.

107. Lithuania's independence movement is most definitely a struggle for self-determination. The self-determination exception, however, is most likely not applicable in this instance. The exception arises from the Consensus Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974). An examination of the legislative history surrounding this document reveals that the USSR specifically required that the exception apply only in instances of colonial rule, presumably to preclude any of its member republics from claiming the exception in the future. See *infra* notes 124-138 and accompanying text.

108. M. SHAW, *supra* note 35, at 555.

the matter, but as any armed conflict would be a civil war, its actions would have no international character and, thus, could not be condemned by the international community under article 2(4).

Therefore, article 2(4)'s prohibition on the use of force applies in this situation. This means that the rest of the world must refrain from using force to attempt to resolve the situation. It is, as the Soviet Union maintains, an internal affair. As long as Lithuania remains dependent upon the USSR, it is not a state, and international law has nothing to say about what happens within the border of the Soviet Union, international human rights law aside.

A. Does Economic Coercion Constitute Force?

As noted, article 2(4) generally prohibits the use of force.¹⁰⁹ The development of this body of law has been paralleled by the development of the technology of nuclear weapons and other sophisticated weaponry. The effect of these technological developments has been to make the resort to force more and more unthinkable. Thus, it can be argued that, at least to some extent, the practice of states has followed the law, and resort to force is becoming increasingly uncommon, at least among developed countries.

When discussing states' practices, however, it becomes necessary to define what constitutes force for the purposes of article 2(4). In the absence of military pressure, many countries — especially the United States — have resorted to applying economic sanctions against other states in order to influence events abroad. Thus, if states' practices have established a customary international legal principle respecting the use of armed force, this is not the case with respect to the resort to economic sanction. Whether economic sanctions are illegal is not a well-settled question in international law.

Many have advocated the use of economic sanctions against the Soviet Union to curb the use of force in Lithuania.¹¹⁰ The legal issue is whether such economic pressure amounts to force, made illegal by Article 2(4).¹¹¹ Much has been written, both pro and con, as to whether economic force should be, or is, illegal. Professor Shaw notes that while article 2(4) mentions only force, the preamble to the United Nations Charter mentions "armed" force, and article 51,¹¹² which authorizes self-defense, specifically mentions "armed" force as well.¹¹³ The implication, argue some, is that article 2(4) prohibits all types of force, not merely armed force.¹¹⁴ However convincing this argument may be, it is not clear merely from an examination of the article itself.

109. See *supra* notes 99-108 and accompanying text.

110. For example, on January 22, 1991, the European Economic Community ("EEC") blocked a food-aid package to the USSR in response to the military crackdown in Lithuania and Latvia. *N.Y. Times*, Jan. 23, at A1, col. 1. Actually, the EEC did not have the authority to veto the aid package, which had previously been voted upon by its members, but it effectively tabled the grant of aid until at least late February 1991. *Id.* The package was finally approved on March 4, 1991. *N.Y. Times*, Mar. 5, 1991, at A3, col. 1.

111. The legality of the Soviet Union's sanctions against Lithuania are to be settled by consulting Soviet law, and is thus largely beyond the scope of this note, which concerns international law. See *supra* notes 32-50 and accompanying text.

112. U.N. CHARTER art. 51.

113. See M. SHAW, *supra* note 35, at 545.

114. *Id.*

The 1970 Declaration on Principles of International Law¹¹⁵ was an attempt by the United Nations to clarify specific issues in international law.¹¹⁶ It provides for the "duty of states to refrain . . . from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state."¹¹⁷

The Charter of Economic Rights and Duties of States,¹¹⁸ approved by the General Assembly in 1974, specified that "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." Thus, there is some support for the view that economic coercion is illegal in light of the United Nations Charter.¹¹⁹ States' practice, however, has been directly contrary to this supposition. In fact, it has become commonplace for states to administer economic sanctions in a time when nuclear arsenals make armed force unthinkable.

Professor Farer argues that article 2(4) is concerned with armed force, but qualifies this stance somewhat.¹²⁰ In his paper, Professor Farer takes issue with Professor Stone, who argues that economic coercion amounts to force, and is thus illegal under article 2(4).¹²¹ Farer concludes that:

under some circumstances, economic coercion can be a violation of international law. However, in light of State practice, I believe that the circumstances in which this will be the case are so unusual that a State's use of economic power to influence another State is *prima facie* legitimate; and an enormously heavy burden of proof must lie on the State claiming that economic coercion constitutes aggression, and therefore justifies a violent response.¹²²

Initially it might seem that Professor Farer is merely attempting to justify U.S. practice, but, in fact, he is doing something much more subtle. As noted, self-defense is an instance when the use of force is justified.¹²³ Self-defense assumes a prior use of force. Thus, if "force" is construed to include economic coercion, the use of economic sanction would justify the use of armed force in self-defense upon the party imposing the sanctions. This is obviously something to be avoided. But the debate among scholars continues as to whether economic coercion is, or should be, considered force.

As can be seen, it is not absolutely clear whether economic sanctions constitute "force" for the purposes of article 2(4). State practice has been to apply such sanctions freely. It seems, then, despite arguments, such as Professor Farer's, that economic coercion is not contrary to international law.

115. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

116. As such, it is not binding in any way upon States but is instructive in the interpretation of charter provisions. M. SHAW, *supra* note 35, at 544.

117. *Id.* at 545, quoting The Declaration on Principles of International Law, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

118. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974).

119. Professor Shaw notes: "It does seem that there is at least a case to be made out in support of the view that such actions are contrary to the United Nations Charter, as interpreted in numerous resolutions and declarations. But the issue is controversial." M. SHAW, *supra* note 35, at 545.

120. Farer, *Political and Economic Aggression in Contemporary International Law*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 121 (A. Cassese ed. 1986).

121. J. STONE, *CONFLICT THROUGH CONSENSUS* (1977).

122. Farer, *supra* note 120, at 127 (emphasis deleted).

123. See *supra* notes 106-107 and accompanying text.

VI. DOES LITHUANIA'S INDEPENDENCE MOVEMENT CONSTITUTE A SELF-DETERMINATION EXCEPTION TO ARTICLE 2(4)?

If Lithuania resorts to violence to assert its independence, could it be considered in violation of international law? The United Nations have addressed the situation, and a ready answer can be found by consulting the law relating to the Consensus Definition on Aggression ("Definition").¹²⁴ The Definition explicitly provides that resort to means that would otherwise be defined as aggression are subject to a special exception in the case of a people's struggle for self-determination. Unfortunately, an examination of the legislative history surrounding the Definition indicates that Lithuania is unable to avail itself of the self-determination exception.¹²⁵ Thus, Lithuania would be in violation of international law, should they initiate armed rebellion.

Before discussing self-determination, it is necessary to distinguish among force, intervention and aggression.¹²⁶ "'Intervention' . . . is a term used to describe a spectrum of intrusions — some major, some minor, some lawful, some unlawful."¹²⁷ Thus, an intrusion is not necessarily illegal. Professor Henkin writes:

Prohibitions of intervention and interference, it should be clear, are part of the quest for an ideal of equally sovereign and independent nations. Complete independence is, of course, an illusory goal; if, indeed, it was ever otherwise, today the interdependence of all nations is a commonplace. Some act of any nation may reverberate everywhere. Big powers, in particular, affect domestic affairs in other nations by their mere existence. American political and economic policies, whether of action or inaction, may "intervene" in the national life of other states as effectively as would sending the Marines. In a sense, to "intervene" to influence the policy of another government is the very purpose of all diplomacy and of all international agreements. International society could not deal with all these interventions by general "rule" even if it wished to.¹²⁸

Thus, some forms of intervention are illegal, others are not. The substance and intention of the intervention must be investigated to determine its validity. Therefore, economic sanctions are not automatically illegal merely because they constitute intervention.

"Force," whatever that term might include, is an intervention in the affairs of another, conducted for the purposes of influencing the other's political, economic or military actions,¹²⁹ and can thus be distinguished from mere intervention. Aggression, basically, is a type of force which is used without justification.

124. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

125. When the Definition was being drafted, the self-determination exception was hotly debated. The USSR finally agreed to the exception, but required that it be limited to instances of colonial struggle. See *infra* notes 134-136 and accompanying text.

126. I distinguish among the three, although many commentators do not. These terms are often used carelessly, and sometimes interchangeably, but I feel that they are legal terms of art, and thus deserving of more care and respect.

127. Higgins, *Intervention and International Law*, in H. BULL, *INTERVENTION IN WORLD POLITICS* 40 (1984).

128. L. HENKIN, *HOW NATIONS BEHAVE* 153-154 (1979) (quoted in L. HENKIN, R.C. PUGH, O. SCHACHTER AND H. SMIT, *supra* note 105, at 660 (1987)).

129. See also *supra* notes 99-108 and accompanying text.

To recap, intervention describes the effects of action or inaction by one state upon another state. Intervention may thus be intentional or unintentional, and either lawful or illegal. It is impossible to avoid intervention.

Force, on the other hand, is an intentional act, or failure to act, which has as its aim the exercise of influence upon another state. Force is generally illegal, but can be justified in some circumstances.

Aggression is the unjustified use of force. The United Nations attempted to define aggression. If my supposition is correct, and aggression is the unjustified use of force, then a discussion of what the Definition contains and does not contain is critical to the foregoing analysis — *i.e.*, whether Lithuania's struggle for freedom could be considered aggression, and therefore contrary to international law.¹³⁰

The Definition was approved by the General Assembly in 1974. It first attempts to define aggression, and then specifically outlaws all aggression.¹³¹ Article 3 of the Definition sets forth seven scenarios which are defined to be acts of aggression.

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State, which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of

130. It is noteworthy that article 3 does not mention the use of economic coercion. This could mean that economic coercion is not illegal as an unjustified use of force. But it should also be noted that, by its definition, aggression involves the initial use of force, and it allows for the legality of, for example, self-defense (compare article 6 of the Definition with article 51 of the Charter). Economic coercion in practice has been employed only in a punitive manner, and thus, as a result, usually is preceded by an unlawful act of the sanctioned country. Thus, there is a sense in which economic coercion is not an uncoerced act, and thus would not qualify as aggression, and perhaps this is why the Definition does not address it. It is also why I chose not to include the Definition in the discussion of whether economic coercion constituted force for the purposes of article 2(4).

131. Article 5(2) states: "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility." G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

such gravity as to amount to the acts listed above, or its substantial involvement therein.¹³²

Article 7 provides the exception which allows for the self-determination of peoples.

Nothing in this definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.¹³³

On the surface, this seems to fit the exigencies of our situation perfectly. The occupation and annexation of Lithuania were, as described, illegal, and an example of "alien domination."

Unfortunately, however, this might not be the case. An inspection of the drafting history of the document reveals why. An original draft stated merely that "[n]one of the preceding paragraphs may be interpreted as limiting the scope of the Charter's provisions concerning the right of peoples to self-determination, sovereignty and territorial integrity."¹³⁴ An intense debate ensued as to which cases would be protected and which would not. In particular, the USSR wanted to limit the provision to extend only to colonial situations.¹³⁵ There is a general feeling that this is indeed the case. Shaw notes that:

[A]n international law concept of what constitutes a people for these purposes has been evolved, so that the "self" in question must be determined within the accepted colonial territorial framework. Attempts to broaden this have not been successful and the UN has always strenuously opposed any attempt at the partial or total disruption of the national unity and territorial integrity of a country.¹³⁶

Shaw further notes that "[s]elf-determination as a concept is capable of developing further so as to apply to sovereign states in various ways including secession, but that has not as yet happened."¹³⁷ Thus, the law as it now stands only allows a self-determination exception in instances of colonial territory. It has not yet developed to include the case where a portion of a state wishes to secede. It does not appear, however, that anything in article 7 itself would preclude such a development. In his discussion of the history of the drafting of the Article, Ferencz states that:

The formulation of Article 7, tied in with the related provisions elsewhere, was another demonstration that agreement could be reached in wording even where there was really no agreement in principle. The technique employed was one,

132. THE CONSENSUS DEFINITION OF AGGRESSION (1974), art. 3, quoted in 2 B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* 17 (1975).

133. THE CONSENSUS DEFINITION OF AGGRESSION (1974), art. 7, quoted in 2 B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* 18 (1975).

134. 2 B. FERENCZ, *supra* note 133, at 47.

135. *Id.* at 545.

136. M. SHAW, *supra* note 35, at 161.

137. *Id.* at 162.

which had almost become customary, of leaving the text so vague that the opposing parties might each interpret it to their own advantage should the need arise. In the words of one of the delegates: "The definition had reached a sufficient level of abstraction to be acceptable."¹³⁸

International law on this point is not well-settled. There is limited consensus on whether the current situation could be classified in international law as a struggle for self-determination. The common-sense answer to this question is that it does indeed amount to a self-determination conflict, but this does not mean that it does so in international law.

Although this case might prove valuable to test the boundaries of international law, it is unlikely that this situation will be considered an example where the law of self-determination provides an exception to the rule prohibiting the use of force. Current events in Lithuania are unlikely to prove fertile ground for the seeds of legal change, given the political sensitivity of the situation. The issue will undoubtedly be resolved by political and economic means, and not by resort to legal channels.

VII. CONCLUSION

Whether Lithuania is acting legally is not a question for international law, but rather one for domestic law. In this case, it seems that Lithuania is acting illegally in that there is no Soviet right, in the Western sense of the word, to secession. Consequently, in broad terms, the USSR might be seen to be acting justly—as opposed to legally—in its efforts to keep the Union together. Whether the Soviet Union is acting legally is another matter. It is almost certain that it did not act legally in 1940. There is some basis, however, for the contention that it is now within its rights in attempting to force Lithuania back into the fold.

First, international law has as a fundamental tenet the respect for the sovereignty of the state. In this sense, the USSR is acting legally in its attempts to keep the Soviet Union together. Second, under international law, the Soviet Union is the arbiter of the legality of its actions, since "there is no rule against rebellion in international law," and thus the law governing the Soviet Union's attempts to quell the revolt are governed by domestic law. Third, there is a sense that the illegal taint of Lithuania's inclusion in the USSR has been overcome by time, and the USSR now has prescriptive rights in the territory of Lithuania grounded in international law. Thus, it appears that the Soviet Union is probably not in violation of international law, although its action in the past is most likely illegal. Of course, this issue is probably the most hotly contested in the affair, so it is unfair to dismiss it in a brief paragraph.

The situation can not yet be classified as civil war, but by analyzing it as such, light can be thrown on the issue of outside intervention in the affair. The rest of the world has no right to intervene in the matter. As noted by Henkin, however, some form of intervention is inevitable, so the rule should be restated in terms of force. Thus, no state may use force in the attempt to influence the outcome of the situation. It does not appear, however, that this prohibition on

138. 2 B. FERENCZ, *supra* note 133, at 48-49.

the use of force includes a prohibition on the use of economic sanctions to persuade the USSR in any way.

May the West grant economic aid to Lithuania? If this is purely an internal matter, or a civil war, the answer is no. If, however, this is classified as a struggle for self-determination, the Definition lends some support to the contention that the West may grant economic, and even military, aid to Lithuania. Article 7 provides that "[n]othing in this definition . . . could in any way prejudice the right to self-determination . . . of peoples forcibly deprived of that right . . . nor the right of these peoples to struggle to that end and to seek and receive support" But, as we have seen, the international legal community has declined, so far, to extend the definition of self-determination to include a case such as this. The West, then, has no legal right to interfere in what is an internal affair.

Much of the above discussion seems to assume that the West is only to eager to intervene in the Lithuanian affair. But since the initial declaration of independence, this has proven not to be the case. Norway and Sweden refused to give the Lithuanians much needed oil. President Bush declined initially to meet with any of the Lithuanians,¹³⁹ and also declined to extend aid.¹⁴⁰ He finally met with Prime Minister Landsbergis for thirty minutes, to get a first-hand report of the conditions there.¹⁴¹ Chancellor Kohl and President Mitterand refused aid, and wrote a letter to the Lithuanians¹⁴² urging them to engage in talks with Moscow. Margaret Thatcher, then British Prime Minister, met with Prime Minister Landsbergis, but also refused to aid or to recognize the Lithuanians.¹⁴³ On the surface, it seems that the West, for once, is siding with the USSR on a self-determination issue. But this is not the case.

The West, and the U.S. in particular, have as their primary goal the peaceful transition of the USSR from a socialist economy to a market economy.¹⁴⁴ President Gorbachev, it is believed, is trying to accomplish this, and thus he must be supported in everything he does. Never before has a Soviet leader had so many friends in the West, and so many enemies at home.

In addition, the startling events of 1989 have caused the world to re-think self-determination issues. Prior to 1989, there was the belief that self-determination was only something which could be granted by the state, and thus the role of the international community was to insure that no state infringed on this right. But in 1989, the unthinkable happened. A wave of democratic reform swept Europe which caught the West off guard — so much so that no Western politician is taking credit for what happened. The changes took place because the people demanded them. And once the movement started to gain momentum, it proved impossible to stop.

139. *The Independent*, Apr. 24, 1990, at 12, col. 1.

140. *The Independent*, Apr. 25, 1990, at 1, col. 2.

141. *The Independent*, May 2, 1990, at 8, col. 1.

142. *The Independent*, Apr. 27, 1990, at 1, col. 2. Chancellor Kohl and President Mitterand have maintained their moderate approach. They recently made a statement that continued repression will sour East/West relations, but they have not joined in calls for sanctions to be levied upon the Soviet Union, evidently in order to keep the lines of communication with President Gorbachev open. *N.Y. Times*, Jan 23, 1991, at A1, col. 1.

143. *The Independent*, May 8, 1990, at 1, col. 2.

144. *See, e.g., The Independent*, Mar. 28, 1990, at 21, col. 7.

This is the Western view of the events in Lithuania today. Secession, it is believed, is inevitable. Viewed in this light, it is understandable that the West can afford to "abandon" Lithuania in its support of President Gorbachev.

Is this reasoning sound, however? Lithuanians fear discussions with Moscow regarding independence for fear that the mood will change. The Soviet Union is the weakest it has been since World War II. It is best, the Lithuanians urge, to strike while the iron is hot. The law passed by the USSR providing for a mechanism for secession may only be a ruse to tempt the runaway republic back into the flock, and then to clamp down during the five year transition period in ways that would make secession even more difficult than it seems to be now. Lithuanians feel that it is now or never. The West, however, seems content to wait and see.

Of course, it is recognized that the Soviet Union, although fiscally weak, remains one of the most militarily powerful nations on earth, and the West would be foolish to attempt to use force in this situation. By no means am I advocating anything of the kind. Especially since a hostile West would only increase pressure on President Gorbachev, and possibly lead to his downfall. In this event — a worst-case scenario — Soviet hard-liners would inevitably take over, and this could negate the startling and encouraging gains that have occurred in East-West relations over the past year. It would also most likely spell the end to any Lithuanian independence. Ironically, the best thing the West can do for Lithuania is to support its supposed rival, President Gorbachev.

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