

EDITORIAL COMMENT

THE RESISTANCE IN AFGHANISTAN IS ENGAGED IN A WAR OF NATIONAL LIBERATION

For 'tis the sport to have the engineer
Hoist with his own petard.

Hamlet III, 4

On December 24, 1979, Soviet troops began landing at Kabul Airport and at other bases in Afghanistan. By December 27, some five thousand Soviet soldiers were estimated to be in Kabul alone. Soviet troops and tanks were crossing into Afghanistan. Afghan soldiers who might have resisted were rendered ineffective when their Soviet advisers had them turn in their ammunition for blanks. On December 27, Soviet *spetsnaz* troops attacked Prime Minister Amin's palace complex, overcame loyal Afghan troops and killed Amin. Meanwhile, Babrak Karmal, who had been dismissed from his post in the Afghan Foreign Service months earlier and had withdrawn to Moscow, broadcast a speech from Tashkent, purporting to invite the Soviet Union into Afghanistan on behalf of the Afghan Government!¹

Since the invasion, there have been over 100,000 Soviet troops in Afghanistan at all times, with the numbers sometimes running as high as 115,000. The bulk of the fighting has been conducted by Soviet forces. The Wakhan corridor has been virtually annexed by the Soviet Union and several provinces are reported to be substantially depopulated and under virtual occupation by Soviet forces. Afghan resistance forces, popularly known as *Mujahidin*, operating from sanctuaries outside Afghanistan as well as within the country, continue to fight the Soviet forces and the governmental apparatus that was introduced and is supported by the USSR.

I.

The United Nations has repeatedly criticized the Soviet presence and called for withdrawal. On January 6, 1980, scarcely 10 days after the invasion, the Security Council by a vote of 13 to 2 stated:

The Security Council,

Gravely concerned over recent developments in Afghanistan and their implications for international peace and security,

Reaffirming the right of all peoples to determine their own future free from outside interference, including their right to choose their own form of government,

¹ Scholarly accounts of the Soviet invasion may be found in H. BRADSHER, *AFGHANISTAN AND THE SOVIET UNION* (1983); and J. COLLINS, *THE SOVIET INVASION OF AFGHANISTAN: A STUDY IN THE USE OF FORCE IN SOVIET FOREIGN POLICY* (1986), especially at pp. 77–94. On U.S. anticipation of the invasion, see Z. BRZEZINSKI, *POWER AND PRINCIPLE* 427 (1983).

1. *Reaffirms anew* its conviction that the preservation of sovereignty, territorial integrity and political independence of every State is a fundamental principle of the Charter of the United Nations, any violation of which on any pretext whatsoever is contrary to its aims and purposes;
2. *Deeply deplores* the recent armed intervention in Afghanistan, which is inconsistent with that principle;
3. *Affirms* that the sovereignty, territorial integrity, political independence and non-aligned status of Afghanistan must be fully respected;
4. *Calls* for the immediate and unconditional withdrawal of all foreign troops from Afghanistan in order to enable its people to determine their own form of government and choose their economic, political and social systems free from any outside intervention, coercion or constraint of any kind whatsoever²

The draft resolution failed to be adopted because of the Soviet veto. Eight days later, the General Assembly, meeting in emergency session and immune to veto, passed a resolution closely tracking the vetoed draft resolution of the Security Council.³ The Assembly reaffirmed "the inalienable right of all peoples to determine their own future and to choose their own form of government free from outside interference." In its operative provision, the resolution "[c]all[ed] for the immediate, unconditional and total withdrawal of the foreign troops from Afghanistan in order to enable its people to determine their own form of government and choose their economic, political, and social systems free from outside intervention, subversion, coercion or constraint of any kind whatsoever." This language was affirmed on November 20, 1980 and has been reaffirmed annually since that time;⁴ it has been ignored by the Soviet Union whose military intervention continues unabated.

II.

The intention of the Assembly, as of the abortive initiative by the Security Council, has been clear and consistent: a foreign invasion has sought to suppress the Afghans' right to determine their form of government and to choose their economic, political and social system. The implications of that consistent finding are far-reaching, but have not been drawn yet. Nor, unfortunately, has the language used by the Assembly taken full advantage of the international legal vocabulary that the Assembly itself has developed for such events. The result has been to deprive the Afghan resistance as well as those third states supporting it of substantial international authority,

² UN Doc. S/13729 (1980).

³ GA Res. ES-6/2 (Jan. 14, 1980).

⁴ GA Res. 35/37 (Nov. 20, 1980); GA Res. 36/34 (Nov. 18, 1981); GA Res. 37/37 (Nov. 29, 1982); GA Res. 38/29 (Nov. 23, 1983); GA Res. 39/13 (Nov. 15, 1984); GA Res. 40/12 (Nov. 13, 1985); and GA Res. 41/33 (Nov. 5, 1986).

while, coordinately, releasing the Soviet Union and the Government in Kabul that it has established and maintained from international obligations they should bear.

The principles upon which the Assembly has been drawing in these serial resolutions were stated with greatest authority in the Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970.⁵ The instrument was an ambitious codification of contemporary international law and has been widely accepted since that time. The declaration provides, in parts pertinent to our discussion:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

The operational implications of this right are particularly important. They are explicated in the declaration four paragraphs later:

Every State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

Peoples engaged in resisting the suppression of their right of self-determination are fighting what has come to be known as a "war of national liberation." Under the theory of such wars, they are international conflicts. Article 1(4) of Additional Protocol I to the 1949 Geneva Conventions provides:

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁶

Protocol I "supplements" the Geneva Conventions of 12 August 1949. Although the Soviet Union has not ratified Protocol I, it remains bound by all of those provisions of the Protocol which are declaratory of custom or reiterations of the 1949 Conventions. The Soviet Union has repeatedly supported the idea of "wars of national liberation"; whatever others may think of the validity of the notion, the Soviet Union can hardly now re-

⁵ GA Res. 2625 (Oct. 24, 1970).

⁶ Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Final Act, *adopted* June 8, 1977, *reprinted* in 16 ILM 1391 (1977) (entered into force Dec. 7, 1978).

sist this part of Protocol I, Article 1(4), on the ground that it is not international law.

III.

In view of these legal developments and of the explicit language of the serial resolutions of the General Assembly, the Afghan Mujahidin resistance should be viewed as the military arm of a people engaged in a war of national liberation. In these circumstances, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States establishes the following coordinate international rights and obligations as between the parties:

- (1) the Mujahidin are entitled to fight against the Soviet Union and the Soviet-supported Government in Kabul;
- (2) the Mujahidin are entitled to call upon third states for support in their struggle;
- (3) third states are under an obligation to provide such help to the Mujahidin in their resistance; and
- (4) neither the Soviet Union nor the Soviet-supported Government in Kabul is entitled to characterize the support that third states are obliged to and do, in fact, render to the Mujahidin as a violation of international law or in any way a violation of its own rights.

Many of these legal consequences, all of which flow directly from the facts of the case and contemporary international law, have not been adequately expressed in the General Assembly's resolutions. It is unfortunate, for the failure to use the proper language has reduced the efficacy of the norms in question. It is to be hoped that in the coming session, the General Assembly, in its resolution on Afghanistan, will make proper reference to the war of national liberation being conducted by the Mujahidin. In addition to underlining the lawfulness of third-party support of the Mujahidin and the prohibition on the Soviet Union and the Government in Kabul from protesting or seeking to penalize the fulfillment of this international obligation, such a resolution may have the added effect of persuading states that had expressed reservations about the attempts to introduce the theory of "wars of national liberation" into the corpus of international law that the term need not be one-sided or used only to support totalitarian expansion. It may be used by the General Assembly in a responsible and evenhanded fashion, consistent with the basic principles of the United Nations Charter.

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