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Intervention in XIXth century international law and the distinction between rebellions, insurrections and civil wars

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1. Introduction

The XIXth century is characterized by the proliferation of revolutions, insurrections and civil wars: in European national states, subjects frequently revolted against their rulers to obtain constitutional reforms or to overthrow the governments installed or reinstated by the Congress of Vienna in 1815 after the end of the Napoleonic Wars, while in multinational empires, like the Austrian, Russian and Ottoman Empires, nationalities insurged to break free and establish their own nation-state. In this period, revolutions and civil wars were a frequent phenomenon in Latin America as well, first in the context of the struggle for independence of the Spanish colonies, and then within the newly independent, but highly unstable, republics.[2] A civil war would eventually break out also in the United States (1861-1865).

Because of the increasing interconnectedness of the 'Family of Nations' and the globalization of commercial interests, many of these situations of internal unrest were accompanied by external armed intervention.[3] It is not surprising, then, that in this period intervention becomes a proper legal notion. Indeed, most international law treatises of the XIXth century contained a lengthy chapter on intervention, often found in the section on the fundamental rights and duties of states.[4] Monographs and pamphlets in several languages were written on the specific subjects of intervention and, from the end of the century, civil wars (the latter normally with a chapter on third state intervention).[5]

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[2] S. C. Neff, *War and the Law of Nations. A General History*, 165 (2005).

[3] Ibid.

[4] *See*, e.g., C. Calvo, *Le droit international théorique et pratique*, vol. I, 264 ff. (4th ed., 1887); P. Fiore, *Nouveau droit international public suivant les besoins de la civilisation modern*, vol. I, 497 ff. (2nd ed., 1885); W. E. Hall, *A Treatise on International Law*, 281 ff. (3rd ed., 1890).

[5] *See*, e.g., J. S. Mill, 'A Few Words on Non-Intervention', *Fraser's Magazine*, December 1859 (reproduced in *The Vietnam War and International Law*, vol. 1, 24-38 (R. A. Falk ed., 1968)); L.-B. Hautefeuille, *Le principe de non-intervention et ses applications* (1863); E. Vidari, *Del principio di intervento e di non*

Leading legal scholars also delivered public lectures on intervention, including Oxford Professor Mountague Bernard (All Soul's College, 3 December 1860) and the Italian Giuseppe Carnazza Amari (University of Catania, 16 November 1872).[6] The matter, however, remained remarkably controversial. As Pradier-Fodéré noted in 1885, 'toute est contradiction et confusion' in this area.[7]

This was, however, an exaggeration. If international law did not yet regulate the conduct of hostilities in civil wars,[8] rules developed during the XIXth century in relation to the legality of intervention in situations of internal unrest occurring in another country. These rules were contained not only in treaties, but also in customary international law: indeed, this period sees the progressive affirmation of customs, based on the 'common consent' of the Family of Nations, as an established source of international law.[9] The present article looks at how some of these customary rules on intervention developed. In particular, different forms of internal unrest are examined in order to establish whether they entailed different regimes of external intervention.[10] The article will start with

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intervento (1868); C. Wiesse, *Le droit international appliqué aux guerres civiles* (1898; first edition: *Reglas de derecho internacional aplicables a las guerras civiles* (1893)); F. H. Geffcken, *Das Recht der Intervention* (1887); A. von Floecker, *De l'intervention en droit international* (1896); A. L. Valverde, *La intervención: estudio de derecho internacional público* (1902); A. Rougier, *Les guerres civiles* (1903); Ch. de Morillon, *Du principe d'intervention en droit international public et des modifications qu'il a subies au cours de l'histoire* (1904); A. Cavaglieri, *L'intervento nella sua definizione giuridica. Saggio di diritto internazionale* (1913); H. G. Hodges, *The Doctrine of Intervention* (1915); E. C. Stowell, *Intervention in International Law* (1921); A. Cavaglieri, *Nuovi studi sull'intervento* (1928); H. Mosler, *Die Intervention im Völkerrecht* (1937).

[6] The lectures have been published as M. Bernard, *On the Principle of Non-Intervention* (1860); and G. Carnazza Amari, *Nuova esposizione del principio del non intervento* (1873).

[7] P. Pradier-Fodéré, *Traité de droit international public européen et américain*, vol. I, 547 (1885).

[8] Despagnet, for instance, noted that '[l]a guerre civile est étrangère au Droit international qui ne s'occupe que des rapports entre États indépendants; seulement l'humanité commande d'observer dans les guerres civiles les lois auxquelles se conforment les peuples civilisés dans les luttes entre Etats' (F. Despagnet, *Cours de droit international public*, 605 (3rd ed., 1905).

[9] *See*, e.g., Sir R. Phillimore, *Commentaries upon International Law*, vol. I, 68 (3rd. ed., 1879); L. Oppenheim, *International Law: A Treatise*, vol. I, 15-25 (1905). 'Common consent' means 'the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance whatever and disappear totally from the view of one who looks for the will of the community as an entity in contradistinction with its single members' (ibid., at 15). The role of *opinio juris* as an element of custom, however, is still uncertain in this period (J. P. Kelly, 'Customary International Law in Historical Context. The Exercise of Power without General Acceptance', in *Reexamining Customary International Law*, 72 (B. D. Lepard ed., 2017)), and non-European views were completely ignored in the identification of customs (ibid., at 49). Natural law also did not completely disappear as a source: Phillimore, for instance, still includes 'Divine Law' and 'the Revealed Will of God' among the sources of international law (Phillimore, this footnote, at 68). 'Reason' is considered a source of law by Phillimore (ibid.) and Westlake (J. Westlake, *International Law*, vol. I, 14-15 (1904)).

[10] Due to space constraints, this article will not explore special regimes of intervention that developed during the XIXth century, particularly in relation to the Ottoman Empire: as Koskenniemi has noted, '[a] right or duty to intervene outside Europe was routinely asserted … If the lawyers sometimes disagreed on the opportunity or manner of conducting intervention, they never doubted its principle' (M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, 131 (2001)). On European interventions in the Ottoman Empire, *see* E. Augusti, 'L'intervento europeo in Oriente nel XIX secolo: storia contesa di un istituto controverso', in *Constructing International Law: The Birth of a Discipline*, 277-330 (L. Nuzzo & Milos Vec eds., 2012).

rebellions and insurrections and will then move to discuss civil wars by distinguishing three situations: that where the civil war has led to the de facto secession of part of a state, that where the insurgents have been recognized as belligerents by the government of the state in civil strife and/or by third states, and that of a civil war where no recognition of belligerency has occurred. Finally, this article will briefly look at the alleged existence of a customary rule providing for recognition of insurgency and at its effects on third state intervention.

The article's overall purpose is to fill a gap in contemporary international law literature: even though there has been a renewed scholarly interest in intervention by invitation as a consequence of armed conflicts in Syria, Mali, Ukraine and Yemen, there are hardly any recent academic publications on the legal history of intervention in situations of internal unrest. The article will primarily focus on the scholarship and state practice of the XIXth century: although occasional references will be made to contemporary commentators and cases, the analysis and conclusions that will be developed in the following pages relate to the law of armed intervention as it existed in the 1800s and should not be transplanted to present day's international law unless otherwise indicated.

2. Rebellions and insurrections

From at least the mid-XVIIth century, a duty not to interfere in the internal and external affairs of other states comes to be seen as a corollary of the sovereign equality of states and as an instrument for states both to protect themselves from external interferences and to consolidate sovereignty internally: 'the recognition that the government of each country is supreme within its territory implies that no external authority, be it universal or national in character, should interfere with its exercise of governmental powers on domestic matters since this would undermine the very basis of its sovereignty'.[11] Interferences in the external and internal affairs of other states, then, were impermissible not because they were prohibited by a specific rule, but because they were incompatible

[11] R. Grote, 'Westphalian System', *Max Planck Encyclopedia of Public International Law*, vol. X, 871-872 (R. Wolfrum ed., 2012). As Bhuta notes, '[t]he "truly foundational status" acquired by the notion of the will of the state in the nineteenth century presupposed a plurality of autonomous state orders that held legal and political supremacy over a particular population and territory, and which were internally constituted in a manner which refracted these historical, spatial, and geographic particularities of a people (nation) and place (territory)' (N. Bhuta, 'State Theory, State Order, State System – Jus Gentium and the Constitution of Public Power', in *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, 406 (S. Kadelbach, T. Kleinlein, & David Roth-Isigkeit eds., 2017; footnotes omitted)). The consequence was that '[i]nterference in the "interior" or "reserved domain" of states corresponding to *this* (spatially-delimited) cohort of political and legal orders was strictly prohibited and the absoluteness of their rights as states consecrated' (ibid.; emphasis in the original).

with state sovereignty. This emphasis on non-interference not as a discrete norm but as a means to protect sovereignty is reflected in the works of the scholars of the time, most famously in Vattel.[12]

In this framework, *all* disputes between a sovereign and his subjects were considered an exclusively internal affair of the concerned state: as a rule, the law of nations did not address them.[13] Even though classifications of different forms of internal unrest had already appeared in XVIIIth century's scholarship,[14] therefore, in practice until the second half of the XIXth century the European powers did not normally distinguish between them when it came to external intervention.[15] Otherwise said, states claimed they could or could not interfere in a situation of internal unrest occurring in another country regardless of its qualification. In all cases, the principle of non-intervention (as the duty of non-interference came to be more frequently referred to in the 1800s)[16] only allowed support for those who were deemed to be the legitimate sovereigns, seen as the embodiment of the state: support for insurgents was excluded unless the third states could claim a just title to wage war against the one where the internal strife occurred.

The Lieber Code, adopted on 24 April 1863 as instructions given to the Union forces during the American Civil War, is arguably the first official document that identifies and defines discrete situations of internal strife. In particular, the Code distinguishes between insurrection ('the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view'),[17] rebellion ('an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same

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[12] In a famous passage of his work, for instance, Vattel writes that '[i]t is an evident 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. Of all the rights that belong to a nation, sovereignty is, doubtless, the most precious, and that which other nations ought the most scrupulously to respect, if they would not do her an injury' (E. de Vattel, *The Law of Nations, Or, The Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with three Early Essays on the Origin and Nature of Natural Law and on Luxury*, Book II, 289 (first published 1758; B. Kapossy & R. Whatmore eds., 2008)). Winfield argues that this passage contains 'the germ of the modern rule of non-intervention' (P.H. Winfield, 'The History of Intervention in International Law', 3 *British Year Book of International Law*, 133 (1922-1923)).

[13] R. Sapienza, *Il principio del non intervento negli affari interni*, 136 (1990); J. Siotis, *Le droit de la guerre et les conflits armés d'un caractère non-international*, 19 (1958); E. Castrén, *Civil War*, 39 (1966); L. Moir, *The Law of Internal Armed Conflict*, 3 (2007).

[14] Vattel, for instance, distinguishes between rebels, popular commotion, sedition, insurrection and civil war (Vattel, *supra* note 12, Book III, at 641-642, 644).

[15] Lord McNair & A.D. Watts, *The Legal Effects of War*, 30 (1966).

[16] Until the XIXth century, the expressions used in the diplomatic language were *se mêler, s'immiscer* and *s'ingérer*, not *intervenir* (Sapienza, *supra* note 13, at 43-44)). This broad terminology included not only the use of armed force, but any exercise of jurisdiction on the territory of another sovereign (ibid., at 44-50).

[17] Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 ('the Lieber Code'), 24 April 1863, Article 149. The text can be read in *The Laws of Armed Conflicts*, 3-23 (D. Schindler & J. Toman eds., 1988).

who seek to throw off their allegiance to it and set up a government of their own'),[18] and civil war ('war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government').[19] In the Lieber Code, then, the difference between rebellion and insurrection is based on scale, but that between rebellion and civil war is mainly based on purpose: while, in a rebellion, the rebels try to escape the sovereignty of a state, in a civil war the factions compete for sovereignty over the whole country.[20] Apart from that, as David Armitage observes, in the Code the difference between rebellion and civil war is evanescent, with 'war of rebellion' being a type of civil war.[21] In any case, the Code does not address the issue of how third states must behave in relation to the several forms of internal unrest it identifies.

Unlike its rules on the conduct of hostilities, the definitions of different forms of internal unrest adopted by the Lieber Code did not have a significant impact on either state practice or scholarship. 'Rebellion' never turned into a term of art in international law and came to be occasionally used descriptively to refer not to a large scale secessionist insurrection as suggested in the Code, but to its specular opposite, i.e. 'a sporadic challenge to the legitimate government by a faction within a state for the purpose of seizing power'.[22] Insurrection (or insurgency), on the other hand, was employed to refer to a factual situation where there was 'a more sustained and substantial internal conflict when the groups in revolt against the government of the state are sufficiently well-organized to offer effective resistance with the object of obtaining control of the government and to prevent the access of supplies from outside states'.[23] Differently from what the Lieber Code provided, then, what distinguished an insurrection from a mere rebellion was the fact that, in the former, the situation had gone 'beyond the control of the *de jure* government, by the magnitude of the hostilities and the consequent uncertainty of the result'.[24]

In any case, the occurrence of neither rebellions nor insurrections was ever considered sufficient to displace the application of the principle of non-intervention in the internal affairs of other states: as the US Secretary of State Seward noted on 19 June 1861, the employment of force by a government against an insurrection 'by no means constitute[s] a state of war impairing the sovereignty of the government, creating

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[18] Ibid., Art. 151.
[19] Ibid., Art. 150.
[20] Neff, *supra* note 2, at 257. The Lieber Code, however, acknowledges that '[t]he term [civil war] is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government' (*supra* note 17, Art. 150).
[21] D. Armitage, *Civil Wars. A History in Ideas*, 190 (2017).
[22] R.P. Dhokalia, 'Civil Wars and International Law', 11 *Indian Journal of International Law*, 224 (1971). *See* similarly R. Higgins, 'Internal War and International Law', in *The Future of the International Legal Order*, vol. III, 86 (C. E. Black and R. A. Falk eds., 1971).
[23] Ibid., at 225.
[24] Q. Wright, 'International Law and the American Civil War', 61 *ASIL Proceedings*, 51 (1967).

belligerent sections, and entitling foreign States to intervene or to act as neutrals between them, or in any other way to cast off their lawful obligations to the nation thus for the moment disturbed'.[25] The dispute between the government and the rebels/insurgents, therefore, continued to be the domestic matter of the concerned state.[26] As a consequence, third states were prohibited from supporting directly or indirectly the insurgents[27] and had the option (but – except from when provided in a treaty of alliance or guarantee – no obligation) to support the incumbent government directly or indirectly upon its request (unless a treaty prohibited such support). This was well epitomized in the interventionist practice of the Holy Alliance in the first half of the XIXth century, with Russia, Prussia, Austria and France intervening in several European states in order to quell liberal insurrections and restore or maintain in power 'ceux que Dieu a rendus responsables du pouvoir'.[28] Certain treaties explicitly recognized the right of a government to be assisted when facing an insurrection: in the 1835 Treaty between Bolivia and Peru, for instance, the former committed to support the latter to quell General Salaverry's insurrection.[29] The Resolution on the rights and duties of foreign Powers and their ressortissants towards the established and recognized governments in case of insurrection, adopted at the Session of Neuchâtel by the Institut de droit international in 1900, also implies that governments can request foreign military assistance until the insurgents have been recognized as

[25] Mr. Seward to Mr. Adams (London), 19 June 1861, in *Fontes Juris Gentium* Series B, Section 1, Vol. 1, Part 2, 109 (V. Bruns ed.,1933).

[26] McNair and Watts, *supra* note 15, at 31. As the New York District Court observed, '[i]nternational law has no place for rebellion; and insurgents have strictly no legal rights, as against other nations, until recognition of belligerent rights is accorded to them' (*The Ambrose Light (United States v. The Ambrose Light etc.*), New York District Court, 30 September 1885, 25 *Federal Reporter*, First Series, 412).

[27] This was so unless the third state could justify the support for the insurgents as a reprisal, or declared war on the state involved in the civil war, or could invoke a title to intervene, i.e. the protection of its own immediate security or of seriously endangered essential interests on grounds of self-preservation or of a treaty based right. The vagueness of the exceptions to the rule has led Koskenniemi to conclude that '[t]he system simply [did] not allow the hierarchization of the freedom to intervene and the freedom of not to be intervened against' (M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, 150 (2005)). The notion of self-preservation, in particular, was much broader than that of self-defence, as it included the right to use forcible measures not only to react against an armed attack, but in any situation where the rights and even the essential interests of the state were in danger (R. Lesaffer, 'Too Much History: From War as Sanction to the Sanctioning of War', in *The Oxford Handbook of the Use of Force in International Law*, 46 (M. Weller ed., 2015)). On self-preservation, *see* also M. Roscini, On the "Inherent" Character of the Right of States to Self-Defence', 4 *Cambridge Journal of International and Comparative Law*, 637-639 (2015).

[28] Circular to the Austrian, Prussian, and Russian Ministers, at Foreign Courts, Laybach, 12 May 1821, in *British and Foreign State Papers*, vol. 8: 1820-1821, 1203 (1830). *See* Oppenheim, *supra* note 9, at 65-66; M. Bennouna, *Le consentement à l'ingérence militaire dans les conflits internes*, 19 (1974). The Holy Alliance states (Austria, Prussia, Russia, later joined by France) intervened in support of monarchs in Naples and Piedmont (1821), Spain (1822), and the Papal States (1831). Britain did not participate in the interventions and turned down requests for assistance by both France and the Spanish liberal insurgents (J. Bew, '"From an umpire to a competitor": Castlereagh, Canning and the Issue of International Intervention in the Wake of the Napoleonic Wars', in *Humanitarian Intervention: A History*, 127 (B. Simms & D.J.B. Trim, 2011)).

belligerents.[30] In addition, the Resolution provides for an obligation on third states not to interfere with the measures taken by a government to re-establish internal order and not to provide the insurgents with arms, ammunition, military *matériel*, or financial aid.[31] Third states are further required not to allow a hostile military expedition against the 'established and recognized' government to be organized in their territory.[32]

In the absence of a treaty providing for an obligation to assist a government facing an insurrection, third states could have always adopted a position that we can call, for lack of a better expression, of *negative equality* with respect to the rebellion or insurrection in another state, and thus refrained from assisting *any* of the parties involved in the internal unrest.[33] Negative equality could have been an obligation assumed by treaty, but was more frequently a unilateral decision made on the basis of political considerations, and should not be confused with neutral status in a technical sense and with non-intervention. If '[t]he two pillars of the laws of neutrality are non-participation and non-discrimination'[34] and if the principle of non-intervention allows both participation and discrimination in favour of one party (the incumbent government), negative equality only means that the third state has opted not to intervene on the side of the government against the insurgents in spite of its request: it entails, therefore, non-participation on either side but not necessarily non-discrimination as the insurgents still do not have belligerent rights. While '[a] neutral nation may, if it is so disposed, without a breach of its neutral character, grant permission to both belligerents to equip their vessels of war within its territory',[35] for instance, in case of negative equality the third state could only deny, but not grant, such permission to both the governmental and rebel ships, as it would still be required to deliver to the incumbent government of the state in civil strife the war or merchant ships equipped by the rebels that enter its ports.[36] Furthermore, unlike in a negative equality regime, neutral states must acquiesce to certain limitations to their freedoms and those of their nationals, in particular the right of

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[29] Rougier, *supra* note 5, at 363.
[30] Articles 2(2) and 7, text in *Annuaire de l'Institut de droit international*, 227 (1900). The 1928 Havana Convention on the Duties and Rights of States in the Event of Civil Strife explicitly allows the provision of arms and war materials to the government facing the civil strife until recognition of belligerency has occurred (Art. 1(3), League of Nations, *Treaty Series*, Vol. CXXXIV, 45).
[31] Article 2(1) and (2). The supply of arms, ammunition, military *matériel*, or financial aid by a third state's nationals, however, is not prohibited.
[32] Article 2(3).
[33] The expression 'negative equality' is often used by contemporary scholarship on intervention by invitation to refer to an *obligation* not to assist either the government or the armed opposition group(s) allegedly arising for third states when a civil war breaks out (see, e.g., E. de Wet, 'Reinterpreting Exceptions to the Use of Force in the Interest of Security: Forcible Intervention by Invitation and the Demise of the Negative Equality Principle', *AJIL Unbound*, vol. 111, 308 (2017)). This article uses the expression in a different sense, i.e. not as referring to a legal obligation, but to indicate the situation when a state *opts* not to intervene on any side in a civil war even though it could have supported the government upon its request.
[34] Y. Dinstein, *War, Aggression and Self-Defense*, 27 (6th ed., 2017).
[35] US Supreme Court, *The* Divina Pastora, 17 U.S. 52 (1819), at 71.
[36] Article 3 of the 1928 Havana Convention.

belligerents to visit and search neutral ships on the high seas, to blockade and to confiscate contraband.[37]

3. Civil wars resulting in de facto secession

The 1863 US Supreme Court's judgment on the *Prize Cases* was, according to Armitage, 'the first-ever attempt to define civil war'.[38] In the judgment, Justice Grier, writing for the majority, explained that '[a] civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents – the number, power, and organization of the persons who originate and carry it on'.[39] He then indicated when an insurrection becomes a civil war: '[w]hen the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*'.[40] The Supreme Court's definition of civil war, therefore, is different from that adopted one month later in the Lieber Code: for the former, civil wars are secessionist in purpose, while for the latter in civil wars the insurgents fight for control of the whole country. The result is that, for the Supreme Court, the American Civil War was indeed a civil war, while for the Code it was a mere rebellion.

It is worth pointing out that, in the XIXth century, the expression 'civil war' was used to refer not only to conflicts within a state, but also to those between the metropolis and her colonies[41] and those between a suzerain state and its vassals.[42] Conflicts between protected and protector states, on the other hand, were of an international or a civil

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[37] As Bernard notes, 'neutral nations suffer, and are bound to suffer, their merchant-ships to be forcibly detained and searched on the high seas, and the property of their subjects to be seized and confiscated for acts which in time of peace would fall within the common course of legitimate trade' (M. Bernard, *A Historical Account of the Neutrality of Great Britain during the American Civil War*, 113 (1870)).

[38] Armitage, *supra* note 21, at 182.

[39] *The Prize Cases*, 67 U.S. 2 *Black* 635 (1862), at 666.

[40] Ibid., at 666-667 (emphasis in the original). Justice Grier concluded, therefore, that the hostilities between the Union and the Confederacy were not a mere insurrection, but a civil war, and prize law consequently applied. *See* also US Supreme Court, *Williams v. Bruffy*, 96 U.S. 176 (1877), at 186 ('When a rebellion becomes organized and attains such proportions as to be able to put a formidable military force in the field, it is usual for the established government to concede to it some belligerent rights'). In *Underhill v. Hernandez*, the US Supreme Court also identified as a civil war the situation 'where the people of a country are divided into two hostile parties, who take up arms and oppose one another by military force', a situation in which 'generally speaking, foreign nations do not assume to judge of the merits of the quarrel' (*Underhill v. Hernandez*, 168 U.S. 250 (1897), at 252-253). The judgment refers to the 1892 civil war in Venezuela and uses the expressions 'civil war' and 'revolution' interchangeably (ibid., at 253).

[41] Siotis, *supra* note 13, at 48-50. It is only in 1977 that wars of national liberation would acquire a special status under Protocol I Additional to the 1949 Geneva Conventions on the Protection of Victims of War.

[42] P. Fauchille, *Traité de droit international public*, vol. I, Part I, 541-542 (1922). The Danubian principalities (Moldavia and Wallachia) and Serbia, for instance, were vassals of the Ottoman Empire from 1856 to 1878, Bulgaria from 1878 to 1908 and Egypt from 1841-1914.

character depending on the nature of the protectorate.[43] As to unions of states, the conflict between two countries joined in a personal union was considered international, while if the union was real the conflict rather constituted a civil war.[44]

In theory, 'a civil war … was, by *definition*, a conflict that was fully the equal of an interstate war and hence was a war in the true sense'.[45] This would most visibly occur when a secessionist armed conflict had led to the de facto independence of the rebellious provinces. Indeed, as already claimed by Vattel in the XVIIIth century, 'when a nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground, in every respect, as a public war between two different nations'.[46] In this scenario, Vattel affirmed that, as in an interstate war, foreign powers could assist the party in a civil war 'which appears … to have justice on its side', although only after an attempt to mediate between the belligerents has proved unsuccessful.[47] Vattel's argument resonates in mainstream XIXth century scholarship.[48] In his public lecture on the principle of non-intervention delivered in 1860, Mountague Bernard, the first Chichele Professor of International Law at the University of Oxford, distinguished between a rebellion and a revolt: '[a] successful rebellion changes a government or a dynasty; a successful revolt makes two States out of one'.[49] In the former case, third states have a duty to abstain from interfering on either side, as 'both parties, though struggling with each other, are all the while integral parts of one State, which does not cease to be one because a change in its constitution is being wrought out by the sharp agony of intestine discord instead of being conducted peaceably'.[50] In the latter case, on the other hand, 'interference ceases to be intervention' as there are 'two nations in arms against each other'.[51] The principle of non-intervention, therefore, does not apply as the civil unrest is no longer the internal affair of one state. Pradier-Fodéré adds that, when a secessionist party has managed to establish a distinct political entity and appeals to foreign powers, third states may, on the basis of their political interests, recognize it as belligerent or as a new state, although this could lead them to be involved in the conflict as an ally of the new state.[52] Bello agrees and, like Vattel, argues that when, in a civil war, an insurrectional faction achieves control of some part of the national territory, establishes a government, administers justice and, therefore,

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[43] Despagnet, *supra* note 8, at 604.
[44] Ibid.
[45] Neff, *supra* note 2, at 257 (emphasis in the original).
[46] Vattel, *supra* note 12, Book III, 645, 648. *See* also ibid., Book II, 291.
[47] Vattel, *supra* note 12, Book II, 291. *See* also ibid., Book III, 649.
[48] Not everyone, however, was an admirer: the Marquis de Olivart saw Vattel's theory of intervention in civil wars as 'funestísima, madre de abusivas intervenciones' (El Marqués de Olivart, *Del reconocimiento de beligerancia y sus efectos imediatos*, 7 (1895)).
[49] Bernard, *supra* note 6, at 22.
[50] Ibid., at 21.
[51] Ibid., at 22.
[52] Pradier-Fodéré, *supra* note 7, at 590-591.

exercises sovereignty, it becomes a subject of international law and the conflict must be treated by third states as if it were one between two states.[53] Third states, therefore, can remain neutral, intervene on the side of either belligerent, or offer their mediation.[54] The only criteria that guide the decision are justice and one's own interests.[55] During the wars of independence of the Spanish colonies in the Americas, for instance, the United States and the United Kingdom chose to adopt a neutral position and did not treat the insurgents' ships as piratical or delivered them to Spain upon capture.[56] Both the United States and the United Kingdom justified the application of the law of neutrality on the de facto independence achieved by the Latin American republics.[57] As Sir William Vernon Harcourt, the first Whewell Professor of International Law at the University of Cambridge, noted in his letters to *The Times* under the *nom de plume* Historicus, '[w]hen a sovereign State, from exhaustion or any other cause, has virtually and substantially abandoned the struggle for supremacy it has no right to complain if a foreign State treats the independence of its former subjects as *de facto* established; nor can it prolong its sovereignty by a mere paper assertion of right. When, on the other hand, the contest is not absolutely or permanently decided, a recognition of the inchoate independence of the insurgents by a foreign State is a hostile act towards the sovereign State which the latter is entitled to resent as a breach of neutrality and friendship'.[58] In the end, then, 'the only legitimate test of the establishment of de facto independence is the *cessation of a substantial struggle* on the part of the former Sovereign to assert his authority'.[59]

It should be emphasized, however, that, as noted by Bello, the United States and Britain had the *option*, but not the obligation, to remain neutral in relation to the conflicts in question: they could have also taken side and become co-belligerents, exactly as it happens in an international war.[60] This was implied by the US Supreme Court's judgment in the case of the *Santissima Trinidad* (1822):

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[53] A. Bello, *Principios de derecho internacional*, 299 (3rd ed., 1873).
[54] Ibid., 301. *See* also Phillimore, *supra* note 9, at 571.
[55] Bello, *supra* note 53, at 301.
[56] Bennouna, *supra* note 28, at 28.
[57] *See* the speech of the British Foreign Secretary, Canning, of 16 April 1823, quoted in Sir H. Lauterpacht, *Recognition in International Law*, 187 (1947). US President Monroe's annual message of 2 December 1817 affirmed that the United States 'regarded the contest not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having as to neutral powers equal rights' (J. B. Moore, *A Digest of International Law*, vol. I, 173 (1906)). In his 1822 message, Monroe repeated that '[a]s soon as the [revolutionary] movement assumed such a steady and consistent form as to make the success of the provinces probable, the rights to which they were entitled by the law of nations, as equal parties to a civil war, were extended to them' (Message to Congress, 8 March 1822, ibid., 174). Similarly, the United States declared its neutrality in the contest between Mexico and the rebellious Texas because the latter 'had declared its independence and at the time was actually maintaining it' (Mr. Forsyth, Secretary of State, to Mr. Gotostiza, Mexican minister, 20 September 1836, ibid., 176).
[58] *Letters by Historicus on Some Questions of International Law*, 9 (1863).
[59] Ibid., 17 (emphasis in the original). *See* also Lauterpacht, *supra* note 57, at 8-9.
[60] An obligation to remain neutral, however, could have arisen from a treaty: *see infra*, footnote 128.

> The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere to the prejudice of either belligerent without making ourselves a party to the contest, and departing from the posture of neutrality.[61]

In another judgment, the Supreme Court was more explicit and found that, in the conflicts where parts of a foreign empire are trying to assert their independence, 'a nation may engage itself with one party or the other – may observe absolute neutrality – may recognize the new state absolutely – or may make a limited recognition of it'.[62]

Apart from secessionist conflicts that had led to the de facto independence of new states, however, the problem was how to distinguish civil wars from lesser forms of internal strife like rebellions and insurrections, which continued to be an internal affair of the concerned state and to which the principle of non-intervention still applied. As practice was confused and language employed inconsistently, a practical tool emerged particularly in the second half of the XIXth century: recognition of belligerency.

4. Civil war where belligerency was recognized

Although logic suggested that belligerency would arise and the law of neutrality would become applicable once the threshold of a civil war had been reached, in practice states exercised significant discretion and decided on a case-by-case basis.[63] The decision of a state to consider a situation of internal unrest in another state as a *de jure* war came to be known as recognition of belligerency. Recognition of belligerency in relation to civil wars started to develop during the wars of independence of the Latin American colonies from Spain (1810-1830) as a consequence of the above mentioned US and British neutral position in relation to those conflicts.[64] A proper doctrine of recognition of belligerency,

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[61] *The* Santissima Trinidad, 20 U.S. 283 (1822), at 337.
[62] *United States v. Palmer*, 16 U.S. 610 (1818), at 634.
[63] Neff, *supra* note 2, at 261.
[64] H. Wehberg, 'La guerre civile et le droit international', *Recueil des Cours*, vol. 63, 38 (1938); Lauterpacht, *supra* note 57, at 176-182; J. L. Esquirol, 'Latin America', in *The Oxford Handbook of the History of International Law*, 554-556 (B. Fassbender & A. Peters eds., 2012). The British Foreign Secretary Canning's dispatch of 1825 to the British minister at Constantinople in relation to the Greek insurrection also seemed to refer to belligerency where he wrote that 'a certain degree of force and consistency acquired by any mass of population engaged in war entitles that population to be treated as a belligerent' (quoted in *The Ambrose Light*, *supra* note 26, at 440).

however, was elaborated only in the second half of the XIXth century by the US Supreme Court, particularly in its judgments related to events occurred during the American Civil War, where several European states recognized the insurgent Confederates as belligerents and declared their neutrality while the Union government continued to consider the conflict as a mere rebellion.[65] The doctrine was eventually codified in the already mentioned Resolution on the rights and duties of foreign Powers and their ressortissants towards the established and recognized governments in case of insurrection, adopted by the Institut de droit international in 1900. The Resolution distinguishes between recognition by the government facing the internal unrest and recognition by third states. The former, which is granted by the political and executive departments of the government and not by the judiciary,[66] is the counterpart in civil wars of a declaration of war in an international one: they both establish a state of war in the technical sense under the customary international law of the time. Even though it is a unilateral act, then, recognition of belligerency produces constitutive effects for other subjects (the insurgents and third states) because a customary rule so provides. These effects are that the entire spectrum of the laws of war becomes applicable to the conflict between the government and the insurgents, who may then exercise belligerent rights also beyond the national territory, including 'rights of blockade, visitation, search and seizure of contraband articles on the high seas',[67] and that the law of neutrality can regulate the relations between the belligerents and third states. After recognition, the government is also no longer responsible for the acts of the insurgents towards third states and their nationals.[68]

Recognition by the government could take place explicitly 'by a categorical declaration' or, more frequently, implicitly through the exercise of belligerent rights beyond national territory (particularly on the high seas) that leaves no doubt as to the intention to recognize.[69] The proclamation by the government of a (belligerent) blockade on the coasts controlled by the insurgents, for instance, normally entailed their recognition as belligerents, providing that the blockade was consistent with international law, i.e. it was effectively maintained.[70] There is no obligation on the government to grant

[65] Olivart, *supra* note 48, at 2.
[66] *The Ambrose Light*, *supra* note 26, at 412; US Supreme Court, *The Three Friends*, 166 U.S. 1 (1897), at 63.
[67] Ibid.
[68] Rougier, *supra* note 5, at 409; Wehberg, *supra* note 64, at 99.
[69] Article 4(1) of the Neuchâtel Resolution. The application of certain laws of war for humanitarian purposes, however, does not in itself amount to recognition of belligerency (Art. 4(2)). *See*, in this sense, Articles 152 and 153 of the Lieber Code.
[70] *The Ambrose Light*, *supra* note 26, at 443. In relation to the American Civil War, the US Supreme Court also found that '[t]he proclamation of blockade is itself official and conclusive evidence … that a state of war existed' (*Prize Cases*, *supra* note 39, at 670). A blockade is effective when it is 'maintained by a force sufficient really to prevent access to the coast of the enemy' (Declaration of Paris, 16 April 1856, Art. 4, text in E. Herstlet, *The Map of Europe by Treaty; Showing the Various Political and Territorial Changes Which Have Taken Place Since the General Peace of 1814*, vol. II, 1283 (1875)).

recognition of belligerency to insurgents, which is also not submitted to any requirements: as the US Supreme Court noted, 'to what extent [belligerent rights] shall be accorded to insurgents [by the government] depends upon the considerations of justice, humanity, and policy controlling the government'.[71] The fact that the government has recognized the insurgents as belligerents, however, estops it from complaining against a similar measure adopted by third states.[72]

Similarly to what happened in interstate wars, where the existence of a state of war could be recognized by the parties to the conflict or, with the limited effect of triggering the law of neutrality, by third states,[73] recognition of belligerency by third states entailed their acceptance of the exercise of the full spectrum of belligerent rights by both parties to the civil war, particularly outside the territory of the concerned state.[74] The conflict, in other words, was treated by the recognizing states *as if* it were a conflict between states.[75] Care should be taken, however, to distinguish recognition of belligerency by third states from recognition of statehood and of government. Indeed, recognition of belligerency 'is not so much the recognition of a new government or state as recognition of the fact of the existence of a war',[76] without taking position on the legitimacy of a government or the independence of a state.[77] As the US Supreme Court pointed out, in recognition of the existence of a civil war 'the very object of the contest is, what [recognition of the

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[71] *Williams v. Bruffy*, *supra* note 40, at 187.

[72] C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, vol. I, 79 (1st ed., 1922).

[73] M. Mancini, 'The Effects of a State of War or Armed Conflict', in Weller (ed.), *supra* note 27, at 990-991; McNair and Watts, *supra* note 15, at 10.

[74] The Queen's Advocate Sir John Harding, for instance, advised the British government in relation to the question raised by Garibaldi's expedition to the Kingdom of the Two Sicilies that '[i]f Her Majesty's Government considers that a Civil War actually exists between the "Dictatorial Government of Southern Italy" and that of His Majesty the King of the Two Sicilies, in which Great Britain is to be strictly neutral, and that the Dictatorial Government has in fact attained (howsoever) an independent and Sovereign existence and governs "de facto" a portion of the Neapolitan dominions', then Britain could recognize the validity of a blockade proclaimed by the de facto government so long as it was effective (reproduced in H.A. Smith, 'Some Problems of the Spanish Civil War', 18 *British Year Book of International Law*, 19 (1937)). The fact that third states have not recognized belligerency does not deprive the government of its belligerent rights if it decides to exercise them. It only means that the insurgents cannot exercise them if neither the government nor third states have recognized belligerency (G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. II, 704 (1968)).

[75] McNair and Watts, *supra* note 15, at 32. In relation to the American Civil War, where Britain had recognized the insurgents as belligerents, the British Foreign Secretary, Lord Russell, explained that 'there is, as regards neutral nations, no difference between civil war and foreign war' (quoted in J. Lorimer, *The Institutes of the Law of Nations. A Treatise of the Jural Relations of Separate Political Communities*, vol. I, 147 (1883)).

[76] Dhokalia, *supra* note 22, at 228. As the Neuchâtel Resolution's Rapporteur, Desjardins, put it, 'en reconnaissant la belligérance, la tierce puissance déclare qu'une lutte civile est assimilable à une guerre internationale engagée dans un intérêt public avec des troupes régulières et pourvoit aux nécessités de l'heure présente; en reconnaissant l'indépendance, elle admet l'existence définitive d'un État nouveau' (*Annuaire de l'Institut de droit international*, vol. XVII, 91-92 (1898)).

[77] As William Harcourt writes, '[b]elligerency is a temporary fact, capable of being treated roughly and in the lump. Whereas recognition has to do with a newly created *status* of sovereignty, which, being in the

independence of a new state] supposes to be decided'.[78] Bernard explains it very clearly: when the insurgents are recognized as belligerents, their 'flag and commission are not those of a Sovereign State; but they are those of an organized body of persons, who, so far as waging war goes, are able to act as a Sovereign State; for the purposes of the war, therefore, they are permitted by the neutral to confer within his jurisdiction the same substantial powers and immunities as if the revolted community were really Sovereign'.[79] The effects of recognition of belligerency and of recognition of government are also quite different. As McNair and Watts write, 'a recognition as a Government does not itself involve any admission of the right of the newly recognized Government to exercise belligerent rights in the course of its conduct of hostilities against the former Government'.[80] However, the newly recognized government (and not that from which recognition has been withdrawn) can request external support (at least as far as the recognizing state is concerned), while if belligerency is recognized the law of neutrality becomes potentially applicable.[81]

Like that granted by the government, recognition of belligerency by third states is a unilateral act that produces effects on the government and the insurgents involved in a civil war because of a customary rule – arguably formed by the 1860s - providing for such effects, i.e. the applicability of the law of neutrality. Unlike that by the government, however, recognition of belligerency by third states has effects only *inter partes* (i.e., between the belligerents and the recognizing third state), and does not prejudice the position of other third states or the relations between the government and the insurgents.[82] It also has no retroactive effects.[83] Under Article 9 of the Neuchâtel Resolution of the Institut de droit international, once granted the recognition may be withdrawn, even if the situation has not changed, although the withdwrawal does not operate retroactively.[84]

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nature of a permanent right, necessarily supposes the attribute of exact metes and bounds' (*Historicus supra* note 58, at 10-11). *See* similarly L.-J.-D. Féraud-Giraud, 'De la reconnaissance de la qualité de belligérants dans les guerres civiles', 3 *Revue générale de droit international public*, 291 (1896).

[78] *The* Divina Pastora, *supra* note 35, at 65.

[79] Bernard, *supra* note 37, at 115. *See* also the diplomatic correspondance in relation to the American Civil War, where the states recognising the belligerency of the Confederates cautioned that this did not equate to recognition of statehood (in Bruns (ed.), *supra* note 25, Series B, Section I, Tome I, Part 2, 126-127).

[80] McNair and Watts, *supra* note 15, at 34.

[81] Ibid.

[82] Y. Dinstein, *Non-International Armed Conflicts in International Law*, 109-110 (2014).

[83] Castrén, *supra* note 13, at 172.

[84] Some authors, however, disagree with this view and argue that recognition may not be retracted unless it was conditional and the conditions were not fulfilled (Castrén, *supra* note 13, at 192, 194; Rougier, *supra* note 5, at 396-397). Others argue that the withdrawal may take place only if the circumstances that founded the recognition have changed (Wiesse, *supra* note 5, at 35). At the end of the American Civil War, Britain and France declared that their recognition should be considered as withdrawn and that they would no longer admit Confederate ships in their waters because the conflict had de facto ceased (Moore, *supra* note 57, at 187). Spain did the same (ibid., 188).

Declarations by third states adopted specifically to recognize the insurgents as belligerents are rare: examples are that made by Peru with respect to the Cuban insurgents in 1869 and that by Bolivia in relation to the Chilean insurgents in 1891.[85] Far more frequent are recognitions resulting from proclamations of neutrality[86] or from the third state's explicit acceptance of or acquiescence in the exercise of belligerent rights affecting foreign interests by the parties to the civil war,[87] such as the recognition of a belligerent blockade proclaimed by the government or the insurgents (i.e. the acquiescence to the search and seize of their vessels on the high seas by the belligerents), or the admission of the rebels' ships into their ports on equal footing with those of the government. In 1874, for instance, in response to the intention of the Serrano government to blockade the Northern coasts of Spain during the Third Carlist War the British Foreign Office's legal advisors commented that '[a]ssuming the blockade to be effective Her Majesty's Government must … recognize the fact that it exists *de facto* and *de jure*. The result, however, will be that the Carlists henceforth become belligerents'.[88] British recognition of belligerency also followed the blockade of the insurgents' ports by Spain in the independence wars in Santo Domingo (1864), Venezuela (1871) and Haiti (1876).[89] At the outbreak of the American Civil War, US President Lincoln proclaimed the blockade of the ports controlled by the Confederacy.[90] Although Lincoln always denied that the blockade amounted to recognition of belligerency, Britain proclaimed her neutrality a month later, on 13 May 1861, and recognized the existence of hostilities between the United States and the Confederate States, claiming that British interests were gravely affected by the war.[91] Brazil, France, the Netherlands, the Hawaii and Spain followed suit.[92] The US government complained, arguing that British recognition was unnecessary and premature and thus constituted 'an act of wrongful intervention, a departure from the

[85] Rougier, *supra* note 5, at 399-400. Read the text of Peru's recognition in Olivart, *supra* note 48, at 33.
[86] Earl Russell to Mr Adams (London), 30 August 1865, in Bruns (ed.), *supra* note 25, Series B, Section I, Tome I, Part 2, 120. *See* also Dinstein, *supra* note 82, at 113.
[87] *The Ambrose Light*, *supra* note 26, at 443. The court found that the United States had granted 'implied recognition' of belligerency to the Colombian insurgents in a note of the US Secretary of State to the Colombian minister in Washington of 24 April 1885 (ibid., 443-45).
[88] H. James, W.V. Harcourt and J. Parker Deane, 6 February 1874, in Lord McNair, *International Law Opinions*, vol. II, 389 (1956).
[89] S. Sivakumaran, *The Law of Non-International Armed Conflicts*, 18 (2012).
[90] Read the text of the proclamation in Hall, *supra* note 4, at 40-41. According to Cassese, '[t]his Proclamation amounted to recognition of belligerency' (A. Cassese, *International Law*, 126 (2nd ed., 2004)). The blockade was terminated on 23 June 1865.
[91] The text of the proclamation is reproduced in T. Ortolan, *Règles international et diplomatie de la mer*, vol. II, 502-504 (1864).
[92] Castrén, *supra* note 13, at 45; Wehberg, *supra* note 64, at 28; Neff, *supra* note 2, at 262. The text of France's declaration and Spain's decree are in Ortolan, *supra* note 91, at 500-501 and 504-505, respectively. Russia, the German Confederation and Austria-Hungary, on the other hand, refused recognition (Q. Wright, 'The American Civil War, 1861-1865', in *The International Law of Civil War*, 82 (R. Falk ed., 1971)). The refusal can be explained on the traditional hostility of the three countries towards any form of internal disorder that dated back to the time of the Holy Alliance.

obligations of existing Treaties, and without sanction of the law of nations'.[93] The United States did not contest the right to recognize, only the fact that recognition of belligerency was granted too early, when the conditions did not exist yet.[94] This argument, however, is unpersuasive: once the government has recognized belligerency (in this case, by blockading the coasts controlled by the insurgents), the civil war is potentially turned into a war in the legal sense also for the third states, whether or not the conditions for recognition of belligerency by third states are met: as the Law Officers of the Crown noted, if the government 'declared a formal blockade, it would have no reason to complain if foreign States simply recognized the rebels as belligerents'.[95] Indeed, in the later phases of the civil war the Union government protested against violations of neutrality by third states, not against its application.[96] In any case, no foreign intervention took place on the side of the Confederates: in spite of political sympathies, the preliminary Emancipation Proclamation issued by President Lincoln on 22 September 1862, which branded the civil war as a fight against slavery, made it unsustainable for abolitionist nations such as Great Britain and France to become openly involved in support of the South.

Unlike that by the government, recognition of belligerency may only be granted by third states when certain requirements are met by the insurgents. Indeed, a premature recognition would amount to an intervention in the internal affairs of the state where the insurrection takes place, as claimed by President Lincoln during the American Civil War. The requirements for recognition of belligerency by third states are factual, and do not take into account the purpose of the insurgents: as the British Foreign Secretary, Lord Russell, quoting Canning, stated, 'the size and strength of the party contending against a Government, and not the goodness of their cause, entitle them to the character and

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[93] Letter of Mr. Seward to Mr. Adams, 27 August 1866, in Bruns (ed.), *supra* note 25, Series B, Section I, Tome I, Part 1, 266.

[94] Siotis, *supra* note 13, at 85. According to the US Secretary of State, the conflict in North America was 'an armed sedition seeking to overthrow the government, and the government [was] employing military and naval forces to repress it. But these facts do not constitute a war presenting two belligerent powers' (Letter or Mr. Seward to Mr. Dayton, 17 June 1861, in Bruns (ed.), *supra* note 25, Series B, Section I, Tome I, Part 2, 108).

[95] J.B. Karslake, C.J. Selwyn, R. Phillimore, 14 August 1867, in Lord McNair, *supra* note 88, vol. I, at 144. The French Minister of Foreign Affairs, Thouvenel, made the same point (Letter of M. Thouvenel à M. Mercier, 11 May 1861, in Bruns (ed.), *supra* note 25, Series B, Section I, Tome I, Part 2, 105). US courts agreed with these views: *see*, e.g., *The Ambrose Light*, *supra* note 26, at 443; *Prize Cases*, *supra* note 39, at 670.

[96] Siotis, *supra* note 13, at 86. The *Alabama Claims* arbitration (1872) addressed Britain's recognition of the Confederacy and the violation of her obligations as a neutral power. On 14 September 1872, the tribunal found that Britain had breached the rules on neutrality and had to pay compensation to the United States. The tribunal, however, did not pronounce on the justification for British recognition of the Confederacy, although it has been suggested that it implicitly rejected the US contention that the recognition was unlawful (R. R. Wilson, 'Recognition of Insurgency and Belligerency', 31 *American Society of International Law Proceedings* 140 (1937)). *See* the text of the Award in (1872) 24 RIAA 125.

treatment of belligerents'.[97] The requirements, which largely correspond to those identified by the US Supreme Court for the existence of a civil war,[98] are codified in Article 8 of the Neuchâtel Resolution of the Institut de droit international: the insurgents must have gained control of a certain part of the national territory, set up a provisional government that exercises the rights attached to sovereignty over that territory, and conduct hostilities with organized troops, submitted to military discipline and consistently with the laws and customs of war.[99] In the January Uprising of 1863-1864, for instance, France refused to recognize the Polish insurgents as belligerents because, in addition to lacking stable control of territory, '[t]he Poles in arms have no government, not even a *de facto* government, for one cannot accord this title to an assembly of a few men whose names are a mistery and whose location is unknown. Neither is it possible to regard as an army those bands and parties who fight, sometimes in one place and sometimes in another, always courageously but without common direction, under a variety of chiefs who do not recognize a single superior. …'.[100] In spite of their request, no state granted recognition of belligerency to the pro-monarchy insurgents of Admiral de Mello in the Brazilian revolt of 1893-1894 on the ground that they consisted only of some units of the Navy and had not established and maintained a political organization.[101] In the first Cuban civil war (1868-1878), the United States considered but eventually did not grant recognition of belligerency lacking the necessary conditions,[102] although certain Latin

[97] Letter of Lord Russell to Lord Lyons, 21 June 1861, in Bruns (ed.), *supra* note 25, Series B, Section 1, Vol. 1, Part 2, 109.
[98] *See supra*, Section 3.
[99] With regard to the requirement of compliance with the laws and customs of war, certain authors have interpreted it as actual compliance, others as mere capacity to comply (Sivakumaran, *supra* note 89, at 12).
[100] Statement of President Stourm to the French Senate, reproduced in Ch. Zorgbibe, 'Sources of the Recognition of Belligerent Status', 17 *International Review of the Red Cross*, 121 (1977).
[101] Moore, *supra* note 57, at 202-203.
[102] As President Grant declared on 6 December 1869, 'the context has at no time assumed the conditions which amount to a war in the sense of international law or which show the existence of a de facto political organisation of the insurgents sufficient to justify a recognition of belligerency' (Moore, *supra* note 57, at 194). On 13 June 1870, Grant expanded his views: 'Fighting, though fierce and protracted, does not alone constitute war; there must be military forces acting in accordance with the rules and customs of war … and to justify a recognition of belligerency there must be, above all, a *de facto* political organization of the insurgents sufficient in character and resources to constitute it, if left to itself, a state among nations capable of discharging the duties of a state, and of meeting the just responsibilities it may incur as such toward other powers in the discharge of its national duties' (ibid., 194-195). In his annual message of 7 December 1875, Grant did not change opinion: 'I fail to find in the insurrection the existence of such a substantial political organization, real, palpable, and manifest to the world, having the forms and capable of the ordinary functions of government towards its own people and to other states, with courts for the administration of justice, with a local habitation, possessing such organization of force, such material, such occupation of territory, as to take the contest out of the category of a mere rebellious insurrection, or occasional skirmishes, and place it on the terrible footing of war, to which a recognition of belligerency would aim to elevate it' (ibid., 196-197). In his 6 December 1897 message, President McKinley also considered whether the Cuban insurrection of 1895-1898 possessed 'beyond dispute the attributes of statehood, which alone can demand the recognition of belligerency in its favor' and concluded that it would be 'unwise and therefore inadmissible' to grant recognition of belligerency to the Cuban insurgents (ibid., 198, 200). McKinley, however, mixes recognition of independence with recognition of belligerency: the requirements for belligerency are not the same as the attributes of statehood.

American states (Peru, Bolivia, Colombia, Venezuela) recognized belligerency and Venezuela, Peru, Mexico and Chile even recognized the independence of the island.[103]

According to mainstream legal scholarship, there was no obligation on third states to recognize, and conversely no right of the insurgents to be recognized as belligerents, not even when the above mentioned requirements were met.[104] This view was eventually incorporated in Articles 4 and 9 of the Resolution of the Institut de droit international. Indeed, recognition is a political act that normally occurs when third states decide that they would benefit from it, for instance when the hostilities approach their borders or in case of a maritime war that negatively affects foreign trade:[105] as the US Secretary of State Fish noted on 25 September 1869, 'every sovereign power decides for itself, on its responsibility, the question whether or not it will, at a given time, accord the status of belligerency to the insurgent subjects of another power'.[106] US courts confirmed that '[r]ecognition [of belligerency] may rightfully be given or withheld by other nations, according to their views of their own interests, their moral sympathies, their ties of blood, or their treaty obligations; or according to their views of the merits or demerits of the revolt, its extent, or probabilities of success'.[107] There is, then, a negative obligation not to grant recognition until the conflict meets certain characteristics, but no positive obligation to concede it, not even if those characteristics are present.[108] The opposite view, most famously championed by Lauterpacht,[109] does not find support in state practice. In

[103] Castrén, *supra* note 13, at 47; Wehberg, *supra* note 64, at 33; Marquis de Olivart, 'Le différend entre l'Espagne et les États-Unis au sujet de la question cubaine', 4 *Revue générale de droit international public* 618 (1897).

[104] A. D. McNair, 'The Law Relating to the Civil War in Spain', 53 *The Law Quarterly Review* 478 (1937); Hall, *supra* note 4, at 34-35. This is consistent with what occurred in relation to interstate wars in the pre-UN Charter era, where a *de jure* war would arise only when at least one party manifested its intention to establish a state of war regardless of the existence of hostilities.

[105] Hall, *supra* note 4, at 36-37. Some writers have argued that the existence of an interest in recognizing the insurgents as belligerents is a legal requirement for such recognition. McNair, for instance, requires that 'the recognizing State and its people [be] closely affected by the hostilities', which normally occurs when the civil war takes place in a neighbouring country or is wholly or partly maritime (McNair, *supra* note 104, at 476). *See* also Despagnet, *supra* note 8, at 607; Rougier, *supra* note 5, at 384; Féraud-Giraud, *supra* note 77, at 285; L. Oppenheim, *International Law. A Treatise*, vol. II, 249 (7th ed., H. Lauterpacht ed., 1952). This interest or practical necessity to define their attitude towards the conflict, however, cannot be seen as a legal precondition for recognition of belligerency by third states: it is rather the political reason for such recognition. In a number of cases, insurgents were recognized by third states as belligerents without the existence of a specific interest: Peru, for instance, recognized the Cuban insurgents in 1869 'simply because of its openly proclaimed intention to cause trouble for Spain' (Zorgbibe, *supra* note 99, at 124). Desjardin's Draft Article 9, that required, for a third state to recognize insurgents, that the recognition was necessary to safeguard a national interest was also not included in the final version of the Neuchâtel Resolution of the Institut de droit international (*Annuaire de l'Institut de droit international*, vol. XVII, 89 (1898)).

[106] Moore, *supra* note 57, at 192.

[107] *The Ambrose Light*, *supra* note 26, at 419.

[108] O. Corten, 'La rébellion et le droit international: le principe de neutralité en tension', *Recueil des Cours*, vol. 374, 94 (2014).

[109] For Lauterpacht, there is a duty on third states to recognize belligerency when the required conditions are present, as '[t]he law cannot refuse to acknowledge the legal consequences of facts which are not in themselves unlawful and which, as between sovereign States, normally give rise to legal rights and

the Polish insurrection of 1830-1831, although the insurgents had a government, control of some territory and observed the laws and customs of war, they were not recognized as belligerents by any third states as, the conflict being limited to land, their interests were not affected.[110] Similarly, in the Hungarian insurrection of 1848-1849 against Austrian rule, the insurgents were not recognized as belligerents even though the conditions for recognition had been met.[111] As the Mixed Claims Commission (Italy-Venezuela) found in the *Sambiaggio* case, '[a]lthough the [1898] insurrection in Cuba assumed great magnitude and lasted for more than three years, yet belligerent rights were never granted to the insurgents by Spain or the United States so as to create a state of war in the international sense'.[112] No state recognized the insurgents as belligerents in the 1891 Chilean civil war (with the exception of Bolivia)[113] in spite of their having gained control of part of the national territory, established a government at Iquique and controlling the Navy.[114] During the Spanish Civil War (1936-1939), the Nationalists were also famously not recognized as belligerents even though they undoubtedly met the recognition requirements. In relation to the conflict, France pointed out that '[l]'octroi des droits de belligérant est une question politique' and thus refused to grant recognition to Franco's rebels.[115] Similar statements were made by other states.[116]

4.1 Recognition of belligerency and intervention by third states

Even though, as has been seen in the previous Section, recognition of belligerency normally took the form of, or resulted from, a declaration of neutrality, neutrality was not an *obligation* automatically arising from recognition of belligerency as assumed by so

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obligations' (Lauterpacht, *supra* note 57, at 175). Fiore also argues that the insurgents have the right to be recognized as belligerents when the conflict reaches the level of a civil war (P. Fiore, *Il diritto internazionale codificato*, 50-51 (3rd ed., 1900)). *See* also G. Balladore Pallieri, 'Quelques aspects juridiques de la non-intervention en Espagne', XVIII *Revue de droit international et de législation comparée*, 287-288 (1937); Bluntschli, *Le droit international codifié*, 291, §512 (5th ed., transl. by M.C. Lardy and A. Rivier, 1895); Bernard, *supra* note 37, at 115-116.

[110] Castrén, *supra* note 13, at 43; Wehberg, *supra* note 64, at 23. Read the text of France's refusal to recognize belligerency in Poland in Balladore Pallieri, *supra* note 109, at 308-309.

[111] Castrén, *supra* note 13, at 44: Wehberg, *supra* note 64, at 25-26. All states considered the conflict between Austria and Hungary as a civil, not international, war (ibid.).

[112] Mixed Claims Commission (Italy-Venezuela), *Sambiaggio* case, 13 February and 7 May 1903, RIAA, vol. X, 515.

[113] The insurgents were in control of the routes that Bolivia had to use to reach the sea (Wiesse, *supra* note 5, at 25).

[114] Castrén, *supra* note 13, at 48; Wehberg, *supra* note 64, at 34.

[115] Statement of Ambassador Corbin before the Sub-Committee on Non-Intervention, 2 July 1937, quoted in Ch. Rousseau, 'La non-intervention en Espagne', 19 *Revue de droit international et de législation comparée*, 515 (1938).

[116] Ibid., 515-516.

many commentators.[117] In other words, if a proclamation of neutrality necessarily implied recognition of belligerency (as there cannot be neutrality in a technical sense without at least two belligerents),[118] a recognition of belligerency by third states in other forms (e.g., a declaration of recognition *expressis verbis*, or the acquiescence in the exercise of belligerent rights by the parties to the civil war beyond national territory) did not necessarily entail neutrality. Indeed, recognition of belligerency merely acknowledged the existence of a war in the legal sense between a government and its subjects, removed it from the domestic jurisdiction of the concerned state and considered it 'as much as if it was waged between two independent nations'.[119] If the civil war had to be treated 'as if' it was an interstate conflict, then third states could either maintain their neutrality or support one of the belligerents and become at war with the other.[120] Le Fur, for instance, argues that, at least until the creation of the League of Nations, 'chaque Etat se trouvait absolument libre de reconnaître un belligérant ou un gouvernment nouveau et, une fois la belligérance reconnue, de rester neutre ou au contraire de prendre parti pour l'un des belligérants'.[121] Wheaton, citing Vattel, also writes that 'whilst the civil war involving the contest for the government continues, other States may remain indifferent spectators of the controversy, still continuing to treat the ancient government as sovereign, and the government *de facto* as a society entitled to the rights of war against the enemy; or may espouse the cause of the party which they believe to have justice on its side. … In the latter case, it becomes, of course, the enemy of the party against whom it declares itself, and the ally of the other; and as the positive law of nations makes no distinction, in this respect, between a just and an unjust war, the intervening State becomes entitled to all the rights of war against the opposite party'.[122] Wheaton's views heavily influenced the US

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[117] *See*, e.g., Despagnet, *supra* note 8, at 605-606; Dinstein, *supra* note 82, at 108-113; S. Wills, 'The Legal Characterization of the Armed Conflicts in Afghanistan and Iraq: Implications for Protection', 58 *Netherlands International Law Review*, 181 (2011); Sivakumaran, *supra* note 89, at 15; Judge Ammoun's Separate Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 92.

[118] *The Three Friends*, *supra* note 66, at 76.

[119] US Supreme Court, *Ford v. Surget*, 97 U.S. 594 (1878), 611.

[120] This appears to be also the view of some contemporary scholars like J. Crawford, *The Creation of States in International Law*, 381 (2nd ed., 2006) ('In nineteenth-century international law non-intervention [in cases of recognition of belligerency] was an option rather than a duty … and the obligation of neutrality with respect to both parties entailed by such recognition was self-imposed'); Bennouna, *supra* note 28, at 18; Falk, *supra* note 109, at 203 (after recognition of belligerency 'as with a truly international war, a state is given the formal option of joining with one of the belligerents against the other or of remaining impartial'); A. Miele, *L'estraneità ai conflitti armati secondo il diritto internazionale*, vol. II, 495 (1970).

[121] Louis Le Fur, 'La Guerre d'Espagne et le Droit', 21 *Revue de droit international*, 54 (1938).

[122] H. Wheaton, *Elements of International Law*, 32 (6th ed., W. B. Lawrence ed., 1855). Halleck, who served as a general in the Union army during the American Civil War, criticizes Vattel and Wheaton where they argue that foreign states may support the party in a civil war that they deem to have justice on its side and maintains that, as a rule, foreign states may not intervene to support any party in a civil war, not even when the insurgents have achieved de facto statehood, because 1) no foreign power can become the judge of the justice of war; and 2) the justice or injustice of the cause does not entitle a foreign power to intervene (H. W. Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War*, 73-74

Supreme Court's jurisprudence. In *Ford v. Surget*, the Court found that, in case of belligerents engaged in a civil war, a foreign power 'may assist the government *de jure* as an independent power, or it may assist the insurgents, in either of which cases it becomes a party to the war, or it may remain impartial, still continuing to treat the government *de jure* as an independent power whilst it treats the insurgents as a community entitled to the rights of war against its adversary'.[123] In a lesser known passage of the *Caroline* correspondance, the US Secretary of State, Webster, also pointed out that 'when civil wars break out in other countries, [a government] may decide on all circumstances of the particular case upon its own existing stipulations; on probable results, on what its own security requires, and on many other considerations. It may be already bound to assist one party, or it may become bound, if it so chooses, to assist the other, and to meet the consequences of such assistance'.[124] The United States was not the only country to adopt this position. Justifying Britain's intervention in support of Queen Isabella in the First Carlist War (1833-1840), for instance, the British Foreign Secretary, Viscount Palmerston, affirmed that '[i]n the case of a civil war, proceeding either from a disputed succession, or from a long revolt no writer on international law denied that other countries had a right, if they chose to exercise it, to take part with either of the two belligerent parties'.[125]

Recognition of belligerency, then, did not compel third states to observe neutrality: it only entailed an obligation on the belligerent parties of the civil war to treat the recognizing state(s) and their nationals as neutrals to the extent that they did not engage in non-neutral activities. Whether or not third states could have resorted to armed force in support of one of the belligerents, on the other hand, was not determined by the occurrence of recognition of belligerency, but by the customary and treaty rules that regulated resort to war and to intervention: for the latter (and for some writers, the former too),[126] under XIXth century international law the third state needed to prove the existence

(1861)). It is only when it has been invited by both contending parties in a civil war that external intervention becomes permissible (ibid., 339). In a mere insurrection, however, the insurgents are not capable of being a party to any agreement in relation to foreign intervention and, therefore, only invitation from the government is legally relevant (ibid.).

[123] *Ford v. Surget*, *supra* note 119, at 610. *See* also ibid., 614, where the Court expressly refers to Wheaton.

[124] Letter of Mr. Webster to Mr. Fox, 24 April 1841, in *British and Foreign State Papers*, vol. 29: 1840-1841, 1135 (1857).

[125] Quoted in H. Wheaton, *History of the Law of Nations in Europe and America*, 537 (1845). Even though Palmerston does not expressly refer to recognition of belligerency, he refers to the parties to the civil war as 'belligerents'.

[126] Floeckher, for instance, argued that war was permissible only when the purpose was to repel an attack, to defend itself against hostilities, to obtain the execution of a treaty, and to protect justified interests (A. de Floeckher, 'Les conséquences de l'intervention', 3 *Revue générale de droit international public*, 332 (1896)). For Despagnet, a war was just if it met three conditions: 1) it is in response to the unjustified attack, or threat of attack, by another state, which is serious enough to justify war as a response; 2) the reaction is proportionate to the attack; 3) pacific solutions to the dispute are pointless, impossible or dangerous (Despagnet, *supra* note 8, at 609-610). Vidari also maintained that the reasons justifying war also justified intervention and that war was just only when it aimed at repelling an offense or at enforcing the exercise of

of a legal title, such as self-preservation, a treaty-based right, or a claim to reparations.[127] The view that sees recognition of belligerency as entailing an obligation to remain neutral does not reflect state practice and is counter-intuitive: if recognition of belligerency assimilated the internal conflict to an international one, then the same rules would apply, and there is no obligation to remain neutral in relation to an interstate conflict (unless a treaty provides otherwise).[128] It is true that Article 7 of the Resolution of the Institut de droit international affirms that '[s]i la belligérance est reconnue par les Puissances tierces, cette reconnaissance produit tous les effets ordinaires de la neutralité', but the article does not refer to neutrality as an *obligation* arising from recognition of belligerency: it merely emphasizes the default option for third states (or, to put it differently, it provides for a rebuttable presumption of neutral status for third states),[129] which could however be reverted should they decide to take side on the basis of a legal title to intervene or to declare war.

4.2 The twilight existence of the doctrine of recognition of belligerency after 1865

The doctrine of recognition of belligerency starts to wane already after 1865. The current British Manual on the Law of Armed Conflict concedes that the doctrine 'has declined to the point where recognition of belligerency is almost unknown today'.[130] The Turkel Commission's Report on the *Mavi Marmara* incident also found that the doctrine of

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one's rights (Vidari, *supra* note 5, at 10). *See* also Halleck, *supra* note 122, at 312-327; A. W. Heffter, *Le droit international public de l'Europe*, 221-222 (3rd ed., transl. by J. Bergson, 1857). For similar views in contemporary scholarship, *see* Corten, *supra* note 108, at 95; A. Verdebout, 'The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis', 1 *Journal of the History of International Law*, 223 ff. (2014). Neff, however, is skeptical: 'There was no consensus … that offensive war was wrong *per se* or that defensive war occupied some kind of legally privileged position over offensive war' (Neff, *supra* note 2, at 198). Dinstein concurs: 'States and statesmen in the nineteenth (and early twentieth) century did not consider the freedom of war to be a fatal flaw in the structure of international law. Nor did they find it inconceivable that, by invoking its own sovereignty, each State was empowered to challenge the sovereignty of other States' (Dinstein, *supra* note 34, at 81).

[127] After recognition of belligerency has been granted, the existence of such titles needed to be demonstrated by third states also for an intervention in support of the government, its consent to intervention no longer being able to justify it.

[128] As Walzer notes, neutrality is 'a matter of choice, not of duty' (M. Walzer, *Just and Unjust Wars*, 96 (5th ed., 2015)). Schwarzenberger also notes that '[u]nder international customary law, a neutral Power is free at any time to change its status into one of belligerency' (Schwarzenberger, *supra* note 74, at 573). An obligation to remain neutral, however, could arise from neutralisation treaties. Belgium, for instance, was neutralised by the Treaty for the Separation of Belgium and Holland, 15 November 1831 (Articles 7, 25, in 82 CTS 255) and Luxembourg by the Treaty Relative to the Grand Duchy of Luxembourg, 11 May 1867 (Art. 2, in 135 CTS 1).

[129] It does not seem that a declaration of neutrality is necessary for a third state to acquire that status, being it sufficient that it makes manifest 'in some way a clear intention to act as a neutral State in a legal sense' (McNair and Watts, *supra* note 15, at 33-34).

[130] UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 384, Section 15.1.2 (2004).

recognition of belligerency 'has become less important and today is almost irrelevant'.[131] No government involved in an internal armed conflict has expressly recognized the insurgents as belligerents in the XXth century.[132] In some cases, however, they adopted measures that might imply a recognition of belligerency, as in the case of Nigeria's blockade of the ports controlled by the insurgents and their treatment as prisoners of war during the Biafran civil war (1967-1970),[133] the boarding and searching of ships on the high seas by France during the Algerian war of independence (1954-1962),[134] and Israel's naval blockade of Gaza in 2007.[135] The concerned governments, however, did not consider such measures as entailing a recognition of the insurgents as belligerents.[136] As to third states, the only unequivocable post-1945 case is that occurred on 17 June 1979, when the members of the Andean Group (Bolivia, Colombia, Ecuador, Peru and Venezuela) recognized both parties in the armed conflict in Nicaragua as belligerents.[137] As Dinstein suggests, however, this paucity of contemporary practice does not necessarily entail that the doctrine of recognition of belligerency has fallen into desuetude.[138] All in all, the doctrine succeeded in cheating death: military manuals, including the recent US Military Manual, still refer to it,[139] and so does the 1957 Protocol to the 1928 Havana Convention on Duties and Rights of States in the Event of Civil Strife.[140] The records of the Diplomatic Conference that adopted the 1949 Geneva Conventions on the Protection of Victims of War also show that the Conventions were not intended to touch upon the issue of recognition of belligerency and left it to the regulation of customary international

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[131] Report of the Public Commission to Examine the Maritime Incident of 31 May 2010, 2011, 46, <https://www.gov.il/BlobFolder/generalpage/alternatefiles/he/turkel_eng_a_0.pdf>.

[132] Gasser argues that the last case of recognition of belligerency by the government occurred during the 1902 Anglo-Boer War (H.-P. Gasser, 'International Humanitarian Law', in *Humanity for All: The International Red Cross and Red Crescent Movement*, 559 (H. Haug ed., 1993)). It is doubtful, however, whether this was a case of recognition of belligerency in a civil war: the answer depends on whether the Transvaal Republic and the Orange Free State were classed as sovereign or semi-sovereign states and, therefore, on whether the conflict was international or not.

[133] Ch. Rousseau, 'Chronique des faits internationaux', 72 *Revue générale de droit international public*, 234 (1968). *See* also E.I. Nwogugu, 'The Nigerian Civil War: A Case Study in the Law of War', 14 *Indian Journal of International Law*, 24-25, 29-30 (1974).

[134] *See* N. Ronzitti, *Diritto internazionale dei conflitti armati*, 371 (5th ed., 2014). *Contra*, *see* Bennouna, *supra* note 28, at 29.

[135] I. Scobbie, 'Gaza', in *International Law and the Classification of Conflicts*, 302 (E. Wilmshurst ed., 2012).

[136] Bennouna, *supra* note 28, at 29.

[137] Joint Declaration of the Foreign Ministers of Member States of the Cartagena Agreement on the Situation in Nicaragua, 16 June 1979, quoted in R. Nieto Navia, '¿Hay o no hay conflicto armado en Colombia?', 1 *Anuario colombiano de derecho internacional*, 147 (2008). The 1981 Joint Franco-Mexican Declaration on El Salvador recognized the Salvadorian opposition as 'une force politique représentative, disposée à assumer les obligations et à exercer les droits qui en découlent': it is doubtful, however, that this means recognition of belligerency (text of the Declaration in J. Charpentier, 'Pratique française du droit international – 1981', 27 *Annuaire français de droit international*, 904 (1981)).

[138] Dinstein, *supra* note 82, at 111. Of the same opinion is Scobbie, *supra* note 135, at 304; K. Mačák, *Internationalized Armed Conflicts in International Law*, 77-78 (2018).

[139] Department of Defense, Law of War Manual, June 2015 (Updated December 2016), 75-76, <https://www.hsdl.org/?abstract&did=797480>.

[140] Article 2, text in 284 UNTS 201.

law.[141] References to recognition of belligerency are occasionally still made. In his Separate Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, for instance, Judge Ammoun found that '[t]he recognition by the United Nations of the legitimacy of the Namibian people's struggle against the South African aggression is nothing less than a recognition of belligerency'.[142] In 2008, the Venezuelan National Assembly also supported President Chavez's call for Colombia to recognize the belligerent status of the Revolutionary Armed Forces of Colombia (FARC) and of the National Liberation Army (ELN), although it did not recognize them itself.[143]

5. Civil wars where recognition of belligerency did not occur

For a minority of writers, belligerency in civil war and the consequences that it entailed did not necessarily depend on its recognition by an existing state. For Bluntschli, for instance, '[o]n reconnait … la qualité de belligérants aux partis armés qui, sans avoir reçu d'un état déjà existant le droit de combattre les armes à la main, se sont organisés militairement, et combattent de bonne foi en lieu et place de l'état pour un principe de droit public'.[144] Lauterpacht agrees: '[a] clearly ascertained state of hostilities on a sufficiently large scale, willed as war at least by one of the parties, creates *suo vigore* a condition in which the rules of warfare become operative. Such hostilities constitute a fact creating legal consequences in international law between the parties to the contest (whether States or not) and outside States'.[145] Nielsen makes a comparison with recognition of statehood and government: 'International law does not say that a State is not in existence so long as it is not recognized. A new régime or government may gain control of a country and be the *de facto,* and from the standpoint of international law therefore the *de jure,* government, even though other governments may not choose to "recognize" it, as is often said, or as might probably better be said, to enter into customary diplomatic relations with it. And it seems to me that the same political situation may exist with respect to a state of belligerency, when the term is used to connote simply the fact

[141] Final Record of the Diplomatic Conference of 1949, Vol. II, Section B, 336.
[142] Separate Opinion of Judge Ammoun, *supra* note 117, at 92.
[143] 'Venezuelan Legislature Supports Belligerent Status for Colombian Rebels', 18 January 2008, <https://venezuelanalysis.com/news/3080>. The call, however, fell on deaf ears: Colombia considered it an interference in her internal affairs (ibid.). Dinstein has also argued that the recognition of the armed opposition in the Syrian civil war as 'the legitimate representative of the Syrian people' is 'a variation of "recognition of belligerency"' (Dinstein, *supra* note 82, at 111).
[144] Bluntschli, *supra* note 109, at 291, §512.
[145] Lauterpacht, *supra* note 57, at 245.

of the existence of war'.[146] This was also the opinion of the Law Officers of the Crown, who noted in 1864 that 'the question, whether a state of war does or does not exist between insurgents holding possession of a particular territory, and a Government claiming their allegiance and attempting to subdue them, is one of fact, quite as much as of law; and, if the facts are such as really to constitute a state of war between the contending parties, according to the law of nations, it is not, we think, competent, by law, to any neutral Power, to withdraw its ships and subjects, upon the high seas, from the operation of the ordinary laws incident to that state of things, merely by declining to acknowledge its existence'.[147]

These views, however, do not seem to reflect the general practice of the XIXth century. When a civil war meeting the requirements for belligerency occurred but recognition was not granted, a state of war in the material (but not legal) sense was considered to exist and the law of peacetime, including the principle of non-intervention, continued to apply. Third states, therefore, could support those they deemed to be the lawful government of the concerned state upon its invitation (unless a treaty prohibited such support):[148] as Castrén observes, '[i]n so far as no recognition has been granted, it is the lawful Government alone which represents the State exactly as it has done previously, both domestically and in foreign affairs'.[149] In 1849, for instance, Russia intervened in the civil war between Austria and Hungary at the request of the Austrian Emperor and in 1840 several European states intervened against the rebellious Pasha of Egypt, Mehmet Ali, on the side of the Ottoman Sultan.[150] As in rebellions and insurrections, however, even when recognition of belligerency was not granted third states could have maintained a position of *negative equality* by declining requests by the incumbent government for support (in the absence of a treaty obligation to accept them).[151] The law of *neutrality*, however, with its rights and obligations provided under customary international law for both belligerents and neutral states, could only have applied in a civil war when recognition of belligerency had occurred and a state of war in the legal sense

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[146] F. K. Nielsen, 'Insurgency and Maritime Law', 31 *American Society of International Law Proceedings*, 147 (1937).
[147] Quoted in P. C. Jessup, 'The Spanish Rebellion and International Law', 15 *Foreign Affairs*, 267 (1937).
[148] Article II of the Additional Convention to the General Treaty of Peace and Amity adopted at the Central American Peace Conference of 1907, for instance, provided that '[n]o Government of Central America shall in case of civil war intervene in favor of or against the Government of the country where the struggle takes place' (text in 2 *American Journal of International Law Supplement*, 229-230 (1908)). Almost identical language is contained in Art. IV of the 1923 General Treaty of Peace and Amity, signed by the five Central American republics (text in 17 *ASIL Supplement*, 117-122 (1923)).
[149] Castrén, *supra* note 13, at 105-106.
[150] P. Bastid, 'La révolution de 1848 et le droit international', *Recueil des Cours*, vol. 72, 245-247 (1948); and Sir S. Baker (ed.), *Halleck's International Law*, vol. I, 98-99 (3rd ed., 1893), respectively.
[151] While the principle of non-intervention and neutrality were, respectively, an obligation and a status under customary international law, negative equality could only be provided in a treaty or by unilateral declaration.

established.[152] Indeed, as the US Supreme Court found, 'the maintenance unbroken of peaceful relations between two powers when the domestic peace of one of them is disturbed is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency'.[153] Several cases confirm this view. During the Third Carlist War (1872-1876), the Law Officers of the Crown advised that 'until [the Madrid] Government shall cease to treat the Insurgents as Insurgents, or 'Pirates', … or until if ever Her Majesty's Government think fit to recognise the insurgents as belligerents', coals could be provided to the ships of the Spanish government, but not to those of the insurgents: it is only after recognition of belligerency that the duties of neutrality start to apply and coals for the purposes of war cannot be supplied to either party.[154] The French Minister of Foreign Affairs also authorized not to treat as pirates the ships of the insurrectional authorities when a country is 'en pleine guerre civile comme l'Espagne',[155] but he warned that this was not a consequence arising from neutrality, as none of the insurrectional parties had reached the conditions for recognition of belligerency: the only legitimate authority, in France's view, was the Madrid government.[156] During the Vivanco insurrection in Peru (1856-1858), the Peruvian minister to the United States, Osma, pointed out that '[i]t was necessary for the Government of the United States officially to recognize a state of civil war in Peru' before US nationals could avail themselves of neutral status.[157] Spain's Instructions in relation to the war with the United States over Cuba provided that the right to visit foreign merchant ships could only be exercised, 'dans les guerres intérieures, civiles ou insurrectionnelles', when a third state had recognized the belligerent status of the insurrectional party.[158] In the Polish uprising of 1830-1831, where no recognition of belligerency was granted to the insurgents, the law of neutrality was not applied: Austria transferred to the Russians the arms of a Polish expedition that had been found in her territory.[159] Similarly, in spite of its efforts, the Paris Commune (1871) did not manage to obtain recognition of belligerency from Germany, which therefore returned to the

[152] Wehberg, *supra* note 64, at 40.
[153] *The Three Friends*, *supra* note 66, at 2.
[154] J.D. Coleridge, H. James, J. Parker Deane, 28 October 1873, in Lauterpacht, *supra* note 57, at 269.
[155] Note of the French Foreign Affairs Minister, the Duc de Broglie, to the French consuls in Spain, 4 August 1873, in A.-Ch. Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. II, 433, §772, (1966),
[156] Ibid.
[157] Note of the Peruvian Minister to the United States, Osma, to the US Secretary of States, Cass, quoted in R. R. Oglesby, *Internal War and the Search for Normative Order*, 29 (1971). The US Secretary of State replied that whether a civil war or not existed in Peru was a question of fact and that, therefore, recognition was not necessary 'unless in the progress of the contest their interests were brought into question' (Letter of Mr. Cass, Secretary of State, to Mr. Osma, Peruvian minister, 22 May 1858, in Moore, *supra* note 57, at 182-183).
[158] Instructions de 24 avril 1898 pour l'exercice du droit de visite à l'occasion de la guerre hispano-américaine, reproduced in 5 *Revue générale de droit international public*, Documents, 7 (1898).
[159] Wehberg, *supra* note 64, at 24.

French government those captured while trying to leave the city.[160] The 1900 Resolution of the Institut de droit international confirms this practice.

6. Recognition of insurgency and foreign intervention

Between the end of the XIXth and the beginning of the XXth century, a doctrine of recognition of insurgency (as distinguished from belligerency) was developed by certain writers on the basis of the practice of the United States and, to a lesser extent, Britain in relation to the internal strife in the Latin American states, in particular Cuba (1895-1898),[161] Haiti (1888-1889),[162] Bolivia (1899),[163] Chile,[164] and Brazil (1893-1894).[165] In the *Three Friends* case, for instance, the US Supreme Court found that the attitude of the United States in relation to the Cuban insurrection perfectly illustrated '[t]he distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in the material sense and of war in a legal sense', as 'the political department has not recognized the existence of a de facto belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare'.[166] According to Castrén, recognition of insurgency entailed 'acknowledgment of the existence of an armed revolt of grave character and the incapacity, at least temporarily, of the lawful government to maintain public order and exercise authority over all parts of the territory'.[167] The Finnish author maintains that recognition of insurgency had constitutive effects like that of belligerency: in particular, it conferred certain specific rights on the insurgents (but did not trigger the application of the entire spectrum of the law of armed conflict, as in recognition of belligerency) within the territory of the state where the internal unrest takes place (including the territorial waters), but not on the high seas.[168] On the other hand, recognition of insurgency did not

[160] A. Wilhelm, 'Protectorat et neutralité', 22 *Journal de droit international privé*, 768 (1895).
[161] Moore, *supra* note 57, at 242-243. *See* President Cleveland's message of 2 December 1895 and Presidential proclamation of 12 June 1895 (1 *American Journal of International Law* 48, 50-51 (1907)).
[162] Moore, *supra* note 57, at 201.
[163] Ibid., 243.
[164] In the 1891 Chilean civil war, although the insurgents controlled certain ports, the British government did not recognize them as belligerents but allowed them to exercise certain belligerent rights (McNair, *supra* note 104, at 485-486).
[165] Moore, *supra* note 57, at 203. *See* Sivakumaran, *supra* note 89, at 17; Castrén, *supra* note 13, at 209-210. According to Neff, recognition of insurgency continued to exist in the XXth century 'although quietly and little noticed' (Neff, *supra* note 2, at 275).
[166] *The Three Friends*, *supra* note 66, at 63-64
[167] E. Castrén, 'Recognition of Insurgency', 5 *Indian Journal of International Law* 445-446 (1965). *See* also V. A. O'Rourke, 'Recognition of Belligerency and the Spanish War', 31 *American Journal of International Law* 403 (1937).
[168] Castrén, *supra* note 167, at 446.

affect the rights of third states as in the case of neutrality.[169] Castrén concedes, however, that '[i]t is … impossible to define in advance the legal situation consequent on recognition of insurgency' and that it can be difficult to distinguish it in practice from recognition of belligerency.[170]

Hersch Lauterpacht identifies the reasons why third states might have had an interest in recognizing insurgency: '[i]t may prove expedient to enter into contact with insurgent authorities with a view to protecting national interest in the territory occupied by them, to regularizing political and commercial intercourse with them, and to interceding with them in order to ensure a measure of humane conduct of hostilities'.[171] In particular, as Dinstein writes, the third state recognizing insurgency 'signals that it will maintain some relations with the insurgents, in order to safeguard its own interests (and those of its nationals) in the territory actually under their sway' instead of going through 'the futile channels of the Government'.[172]

In reality, one can doubt that a customary norm providing for *recognition* of insurgency, 'intermediate between peace and recognized civil war'[173] and from which specific legal consequences ensued, ever existed in international law. Insurgency was, by definition, a factual situation which occurred regardless of it being recognized by the government or by third states: when it took place, then, recognition was merely declarative as in the case of recognition of statehood, and did not have a constitutive character like recognition of belligerency. Relevant practice was inconsistent and limited to a couple of states, influential as they might have been. There is also no mention of recognition of insurgency in the Neuchâtel Resolution of the Institut de droit international.

In any case, the fact that 'recognition of insurgency' was granted by third states was not considered to displace the application of the principle of non-intervention. Such recognition did not impose on third states an obligation of negative equality and, even less, made the law of neutrality applicable.[174] States, therefore, remained free to choose

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[169] Ibid..

[170] Ibid. Lauterpacht explains that '[t]he difference between the status of belligerency and that of insurgency in relation to foreign States may best be expressed in the form of the proposition that belligerency is a relation giving rise to definite rights and obligations, while insurgency is not' (Lauterpacht, *supra* note 57, at 270).

[171] Ibid.

[172] Dinstein, *supra* note 82, at 113-114.

[173] Letter of Mr. Hay, US Secretary of State, to Mr. Bridgman, Minister to Bolivia, 14 March 1899, in Moore, *supra* note 57, at 242.

[174] As Hyde writes, '[r]ecognition of a condition of insurgency in a foreign country is merely a reckoning with a state of facts. It confers no special rights on the insurgents; it manifests no design to aid them; it affords no ground of complaint to the parent State; it imposes on the foreign State none of the burdens of a neutral (Hyde, *supra* note 72, 82). *See* also Dinstein, *supra* note 82, at 114; Higgins, *supra* note 22, p. 88.

between assisting the established government or opting for not intervening on either side on the basis of their interests or treaty obligations.

7. Conclusions

Even though classifications of different forms of internal unrest had already appeared in XVIIIth century's scholarship, until the XIXth century states did not normally distinguish between them when it came to external intervention. All forms of internal unrest were considered an exclusively internal matter and the principle of non-intervention, as a corollary of state sovereignty, only allowed third states to support the legitimate sovereign.

As a consequence of the proliferation of internal unrest in the post-Napoleonic era, this scenario becomes more complex in the XIXth century and different situations are identified. In mere rebellion or insurrection, third states continued to be required to comply with the customary principle of non-intervention, which essentially entailed that they were prohibited from supporting directly or indirectly the insurgents and had the option (but – except from when provided in a treaty of alliance or guarantee – no obligation) to support the lawful government directly or indirectly upon its request (unless a treaty prohibited such support). The principle of non-intervention, however, was significantly limited by the fact that - if one accepts the view that war, in this period, was either a right inherent in state sovereignty or an extra-legal phenomenon – a state could have always declared war on that in internal unrest in order to support the insurgents.[175] If it decided to intervene without establishing a state of war, however, the third state had to justify the intervention on the basis of the existence of a legal title, such as self-preservation, a treaty-based right, or a claim to reparations. A state could have also maintained a position of negative equality with respect to the rebellions and insurrections occurring in another country, i.e. it could have declined requests for assistance from the government facing the internal unrest (unless it had a treaty obligation to provide such assistance) while still not supporting the insurgents. Negative equality could have been decided unilaterally by a state out of political considerations or could have been an obligation if so provided in a treaty, but must not be confused with the status of neutrality which could only arise when a war in the legal sense occurred.

In two cases, internal unrest was considered a *de jure* war: when, in a civil war, the secessionist insurgents had managed to achieve de facto statehood, and when the

[175] An example of armed support to insurgents that took the form of a *de jure* war is the US resort to force against Spain during the second Cuban civil war in 1898.

belligerency of the insurgents had been recognized by the government they were fighting against and/or by third states. In such cases, the principle of non-intervention and the law of peace were displaced and the same rules that applied to interstate wars were triggered, with the consequence that third states had the option between remaining neutral or becoming involved in the conflict on either side as co-belligerents: whether the latter option was permissible or not was determined by the rules on the legality of war and intervention existing at the time, and not by the occurrence of the recognition of belligerency. This article, therefore, has refuted the common assumption according to which recognition of belligerency entailed an automatic obligation on third states to remain neutral with respect to a civil war. This view never fully corresponded to state practice and was already rejected by several writers of the time.

Although the issue remained controversial, XIXth century state practice and mainstream scholarship suggest that, in other cases of civil war where recognition of belligerency had not occurred and where de facto secession had not been achieved, the principle of non-intervention continued to apply, with the consequence that third states could have only intervened on the side of the incumbent government, although, like in rebellions and insurrections, they could have always declared war against it to support the insurgents or opted for a position of negative equality by declining the requests for assistance from any party.

The tripod rebellion-insurrection-civil war has lost any relevance today: in contemporary international law, the only internal unrest classification that counts from the perspective of third state intervention is that between internal armed conflict and situations short of armed conflict, as, according to some scholars, the occurrence of the former determines the emergence of an obligation of negative equality on third states,[176] although for others the incumbent government continues to be entitled to request assistance.[177] With regard to the law of neutrality, to the extent that states do not resort to recognition of belligerency the only situation of internal unrest that could now trigger its applicability would be that of an internal armed conflict which has led to the creation of a new state and has therefore become an international armed conflict.

[176] *See*, e.g., O. Corten, *The Law Against War. The Prohibition on the Use of Force in Contemporary International Law*, 289-290 (2010). See also Art. 2 of the Resolution of the *Institut de droit international* on 'The Principle of Non-Intervention in Civil Wars', adopted at the 1975 Wiesbaden session, in 56 *Annuaire de l'Institut de droit international*, 547 (1975).
[177] *See*, e.g., Dinstein, *supra* note 82, at 76-79; P. Pustorino, *Movimenti insurrezionali e diritto internazionale*, 248-252 (2018).