

MILITARY LAW REVIEW VOL. 83

An International Law Symposium: Part II
Introduction

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International Law Under Contemporary Pressures

Soviet International Law Today: An Elastic Dogma

The Seizure and Recovery of the S.S. Mayaguez:
A Legal Analysis of United States Claims

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MILITARY LAW REVIEW

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AN INTERNATIONAL LAW SYMPOSIUM: PART II

INTRODUCTION

This volume completes the two-volume symposium which started with volume 82.

Volume 82 opened with the transcript of a panel discussion on new developments in the law of war. It continued with the first part of a major article by Major Thomas E. Behuniak on the seizure and recovery of the merchant vessel *Mayaguez*. That article is completed in the present volume. Volume 82 also presented an article by Captain Coil on war crimes during the American Revolution, and a review by Major Norman Cooper and Major James Burger on the book *Just and Unjust Wars*.

The present volume opens with a lecture delivered by Professor John N. Hazard at The Judge Advocate General's School during 1978. In this lecture, Professor Hazard reviews the various sources and types of pressures for change which have been exerted on international law during recent decades.

Professor Hazard notes that, as a matter of history, international law and related old structures and institutions have often been successful in accommodating new demands. He cautions that some pressures should be resisted. However, he is optimistic overall that desirable pragmatic compromises can be worked out in the future. This will be true especially if the United States avoids an isolationist stance and participates actively in the shaping of international law and relations.

Professor Hazard's lecture, dealing as it does with new developments in international law in general, may be considered a companion piece for the panel discussion on new developments in the law of war which was presented in volume 82.

Professor Hazard is a noted authority on Soviet concepts of international law. These concepts, and socialist concepts in general, are among the sources of pressure for change in international law which he recognizes in his lecture. Because of this, it is appropriate to

include in volume 88 an article by Major Eugene Fryer which provides an overview of Soviet international law today.

Major Fryer briefly examines the evolution of Soviet ideas on international law, with emphasis on the work of the scholar G. I. Tun-kin. He then describes some of the distinctive features of contemporary Soviet international law, such as peaceful coexistence and socialist internationalism. Major Fryer concludes that Soviet ideas concerning international law have matured and are entitled to be taken seriously in the West.

The law of forcible self-help is one area of international law which has been undergoing great change, under the pressures of ideology and economics exerted by great powers and third-world states alike. However, part 2 of Major Behuniak's article, dealing with the national right of self-defense, points out an area of law which has not undergone as much change as would perhaps be desirable.

In part 1 of his article on legal justifications for United States action in the Mayaguez incident, Major Behuniak set forth three major legal arguments and provided his evaluation of their merits. In part 2, he continues with a description of the fourth and last major claim.

The United States asserted that it was acting in self-defense, doing what it considered necessary to protect United States nationals and their property abroad. The Government further asserted that the specific measures employed in the recovery operations were legally acceptable, both as to types and as to amounts of force used.

Major Behuniak concludes that the self-defense rationale is sustainable under international law. If the United Nations Charter had been implemented as its authors originally visualized, national self-defense measures would be unnecessary and could without harm be declared illegal. However, that state of affairs does not exist.

Major Behuniak concludes also that the measures employed are defensible, except for the aerial bombardment of the Cambodian mainland.

Volume 88 concludes with two book reviews. The first of these

was prepared by Professor George K. Walker, discussing *Sea Power and the Law of the Sea*, by Mark W. Janis. Again, this review serves to emphasize the continuing importance of the law of the sea, and the many changes which have taken place in that area of law under the pressure of new military and political realities.

Professor Walker uses the opportunity to set forth a summary of the goal-oriented decision theory developed by Professors McDougal, Lasswell, and Reisman of Yale University. This decision theory can be applied in every area of international law. It is complex and demanding, but no more so than is necessary in a time of rapid and extensive changes in old assumptions and approaches.

As military lawyers, we are ultimately most interested in developments affecting the law of war. The second review, by Major James A. Burger, directs our attention back to this area of law, and to the military realities underlying it. Major Burger examines three publications of the Stockholm International Peace Research Institute. One is the 1978 SIPRI yearbook, *World Armaments and Disarmament*. The second is a companion volume, *Arms Control, A Survey and Appraisal of Multilateral Agreements*. The last is *Tactical Nuclear Weapons: European Perspectives*. Major Burger finds much of merit in each of these volumes for their careful presentation of data.

PERCIVAL D. PARK
Major, JAGC
Editor, *Military Law Review*

INTERNATIONAL LAW UNDER CONTEMPORARY PRESSURES *

by Professor John N. Hazard **

Professor Hazard, a widely known authority on Soviet law and policy, delivered this lecture on 21 September 1978 to an audience of military attorneys at The Judge Advocate General's School, Charlottesville, Virginia.

Professor Hazard discusses the political and social pressures which have been exerted on international law since World War II by new nations, colonially and racially oppressed peoples, the economic have-not countries, human rights activists, and others. He reviews historical pressures and suggests examples of successful accommodation of old structures to new demands.

While some pressures should be resisted, others represent legitimate demands which can and should be met at least in part. Professor Hazard concludes that the United States should participate actively in seeking desirable, pragmatic compromises in international law and relations.

*This is the text of the Seventh Annual Edward H. ("Ham") Young Lecture in Military Legal Education, delivered at The Judge Advocate General's School, Charlottesville, Virginia, on 21 September 1978. The opinions and conclusions expressed in this lecture are those of the author and do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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I. INTRODUCTION

Has international law, as it was known before World War II, been altered beyond recognition under the pressures of contemporary world politics? For many Americans who studied or practiced before the war, the answer will be in the affirmative. Some go so far as to say that law has given way to politics; that no foreign office senses the restraints of law as it formulates national policy.

Curiously, Americans are not alone in sensing the impact of political pressures upon the law. Other Westerners from what is often called these days the First World feel the same way, as evidenced by interventions of Western ambassadors before organs of the United Nations. And not only Westerners, for avowed socialists from what is being called the Second World and statesmen from developing countries, now categorized as the Third World, are also declaring that something new is in the making. The only difference is in the evaluation. For the West the situation suggests chaos and despair; for the other two worlds the new system in the making is cause for elation.

II. THE CONTEMPORARY PRESSURES

What are the pressures that are influencing international lawyers and what might be a desirable response to them? That is the subject to which I address myself. Although the pressures are widely known, it may be worth a moment's reflection to review them, if only to provide bearings for our trip through stormy seas. Without question the strongest pressure comes from the erstwhile colonials, the peoples of the Third World. They have been and still are pressing to be "free." Although decolonization is almost complete, there are still a few enclaves and islands for which the Third World clamors. And there are still some situations of continuing dependence upon the metropole which have caused the Third World's statesmen to coin the term "neo-colonialism." With this they denounce economic and political ties to former metropolises as vigorously as they used to denounce the legal bonds of their colonial period.

Coupled with the long-standing anti-colonial pressure is to be sensed a newer one, by no means felt so widely, yet still prominent, especially in southern Africa. This is the pressure to be accepted individually as equals. Here the complaint is "racism," which, when coupled with domination of a majority race by a minority, is now being called "internal colonialism." It is often classed together with anti-colonial demands generally as a natural extension of the legal obligation to recognize the right of self-determination.

The pressures come by no means solely from colonially and racially oppressed peoples, although they are most audible among such peoples. There are highly evident pressures for autonomy of peoples within long established states such as Spain, France and even Britain. Talk to a Catalan in Barcelona, a Basque in San Sebastian, a Breton in Rennes; even a Scot or Welshman, not to mention a Catholic Irishman in Belfast, and one quickly senses the intensity with which minority peoples of the same race as the majority rulers are incensed by long periods of domination by others. And this pressure for autonomy is not limited to unitary states; it is to be felt in federations structured along ethnic lines. It is being brought to the surface in the Soviet Union where Georgians, Armenians, Azerbaijanis, Lithuanians and Ukrainians indicate their restlessness not only as individuals through personal dissent, but as entire peoples when their national language and culture is perceived to be threatened by the dominant people of the federation.

There is also increasingly evident pressure exerted by peoples represented already by states recognized in international law. Here we find demands for equality with the Great Powers; grumblings against the veto power reserved to the Great Powers in the Security Council of the United Nations. On occasion we Americans even see revealed heartache on the part of good neighbors of the United States who think that their just complaints as equals are ignored in Washington.

Some of this pressure extends into the process of international lawmaking: evidenced by the desire expressed by a multitude of new states to be permitted to share as equals in the process of codifying customary international law so that they can consider the issues and rectify inequalities if they be found to exist. This pressure has given rise to the Vienna diplomatic conferences called to

codify the law of treaties and diplomatic intercourse. The same pressure is making itself felt in the seemingly unending conference on the law of the sea, especially as land-locked countries which have long been denied a voice press for recognition of their needs.

With increasing intensity the world senses pressures for recognition of human dignity, of human rights. These were largely ignored before they emerged at the Nuremberg trials of the Nazis as a just claim. The Nuremberg judges recognized that the leaders of a formerly great state were international lawbreakers for mistreating and even killing their fellow citizens in what has come to be known as the "holocaust." This claim of a right to protection internationally against one's own government has been acknowledged by much of the world in the Helsinki agreement and in the instruments creating the various regional structures designed to hear complaints of individuals against their own governments.

Finally, there are the pressures in the economic field for a sharing of the world's resources: the pressures from small states to be given some part of the income expected to flow from exploitation of the deep sea bed; the pressures of the raw-materials-producing states to be recognized as having a right to link the sales prices of their materials through "indexing" to the cost of manufactured goods needed for their development. Most recently, there have been the pressures expressed in dramatic form in the United Nations General Assembly Resolution on a New International Economic Order; pressures now so strong that former colonies have been emboldened to demand recognition on the part of former metropolises of a duty of "restitution," which means a duty to reimburse the former colony for damages and lost profits over centuries of colonial exploitation.

Merely to list these pressures does more than refresh our memories, for putting them together heightens the impact of what has happened. Many of us have tended to overlook this impact as we have witnessed the emergence of each individual situation, but now that the whole drama has been revealed, the alarm has been sounded in the West. In the aggregate, especially as aggregated in the United Nations special General Assemblies devoted to a New International Economic Order, they have shocked governments, and most notably that of the United States, into considering, or perhaps even making, a final demonstration of opposition, a "last stand."

III. PRESSURES ON INTERNATIONAL LAW IN HISTORY

Those who have an historical bent cannot but relate the obviously severe pressures of our time to what has gone before in international law as a body of rules has been hammered out over the centuries in the diplomatic practice of states. Even international law's founding father, the legendary Hugo Grotius, sensed in the early 17th century that his people were facing pressures too great to be tolerated, and he accepted a commission to write a seminal treatise justifying in law the retaliation by the admirals of the Dutch East India Company against the Portuguese for attempting to monopolize the sea lanes. He demanded recognition of the right of uninhibited navigation.

Likewise, in the early 20th century, the Tsar of Russia sensed the pressures from the common people of Europe for establishment of a law of war that would insulate them from the armies that swept intermittantly across Europe. He invited the heads of state to meet in preparation of a code to protect civilians during wartime. Not all responses to popular pressures have been so humanitarian. Thus historians in weak countries have noted resistance of the German General Staff to legitimation of guerrilla warfare, the lone manner with which weaker peoples can resist the heavy hand of professional armies. The outlawing of guerrillas by the Hague Conventions is seen as a response to the strong pressures of the German professionals.

From the point of view of the Austro-Hungarian Emperor, Franz Josef, Woodrow Wilson's demand that peoples of his Empire be accorded the right of self-determination must have looked like intolerable pressure for violation of all that he held sacred as law. How could Wilson support a Masaryk utilizing the protection of the United States to plan the dismemberment of the Austro-Hungarian Empire from his Pittsburgh refuge. Certainly also the Germans, although bound to accept the then acceptable rule that to the victors belong the spoils, could not have looked with favor upon the dismembering of the German Empire in Africa and Asia, even though it was dressed in the new garb of a League of Nations mandate

system, instead of being formalized as a simple transfer of property from a vanquished state to a victor.

Perhaps this brief review is enough to suggest that pressures upon existing international law have been increasing since Grotius' time in variety and intensity, requiring statesmen together with their legal advisers to make adjustments whether they liked them or not. Policy has had to conform to new rules as statesmen sought to foster the interests of their states and of the peoples they represented.

IV. NEW PRESSURES FROM LESSER PEOPLES AND POWERS

If there is novelty in our time, it is not the fact of pressures for change but the methods of exerting these pressures that are new. It is the evolution of the United Nations that makes the difference. No delegation in San Francisco seems to have anticipated what has happened. On the contrary, the founders seem to have had in mind creation of a strengthened League of Nations, not something entirely new that would put the semblance of power and perhaps even power itself in the lesser peoples and the lesser states. A Great Power system was to be preserved, as is evident from the structure of the Security Council with the veto in the Great Powers. This was so, notwithstanding the emphasis placed upon codification and development of international law in which every member presumably would share.

This combination of Great Power vetoes and codification and development of international law by every member meant that law would be evolved to meet the needs of a post-war world, but the rules would remain unenforced if their application had tread heavily upon the sensibilities of a Great Power.

The Great Powers were not, however, to be all-powerful, for the lesser powers were to be accorded some protection in that the international legal system was to be permeated with the concept of "voluntariness." Treaties could no longer be forced upon them, and international lawmaking was to be with their participation. States were to be recognized as "sovereign," and with a new meaning. Art.

2 (7) of the United Nations Charter was to protect against intervention in domestic affairs. No state was to be required to accept the jurisdiction of the International Court of Justice against its will, and the resolutions of the General Assembly were explicitly denied the force of law. Clearly, what change there was to be had to proceed at a controlled pace so the inevitable pressures of a post-war world could be expected to be accommodated in an orderly fashion. The pressures would be absorbed into the existing body of international law without causing any of the governments then functioning upon the international scene to sense that revolution in the international order had occurred or was in the making.

How different is the sense of alarm that now pervades the international community in the West, and in those states of the non-West classified in United Nations practice with the West, notably Japan! There is a sense that, although the veto system remains intact within the Security Council, it is not the marching of armies under Security Council resolution that is to be anticipated. The pressures are of another kind, of another order, as indicated by the enumeration already made. In a nutshell, the alarm derives from pressures emanating from a new majority, often lacking in military strength unless joined by a Great Power, but compelling nevertheless. The pressures come from people clamoring for recognition, and even from individuals who until recently could have had no claim to status as subjects of international law.

V. ALARM FOR AMERICANS

For Americans the alarm is occasioned by pressures emanating from two sources: on the one hand from the Soviet Union and its socialist allies of the Second World, and on the other from the developing Third World. On some occasions the two worlds join hands, but it would be a mistake to think that they present at all times a united force. Most importantly, the Soviet Union cannot be expected ever to renounce its veto in the Security Council, no matter what pressures are exerted from those with which it unites on one or another issue. Secondly, one need only follow the conference on the law of the sea to find divergence of interest on a specific issue. In that case the point in issue is freedom of navigation through

straits and through fishing zones on what has been traditionally the high seas. Then there are the divergent positions of the Soviet Union and much of the Third World on issues of what is often called the "North-South conflict." The Soviet Union shows no inclination to share its resources with the developing states with no strings attached.

As between the Second and Third Worlds it is unquestionably the Soviet Union that causes greatest concern in the West because there is still a sense among most Westerners that the Third World, although able to make loud protests, is impotent, so that its "demands" may be resisted with impunity. The Soviet Union's Great Power standing, reemphasized daily by reports of its growing military might on land and sea and in the air, and by its newly recruited proxy armies, gives such great weight to its demands that pressures for change supported by the Soviet Union cannot be ignored. They have to be faced and sometimes countered if they touch vital nerves.

Less noticeable, but no less important in many minds, is the added force of ideological affinity often bridging the gap between the Second and Third Worlds. To be sure, the impact of the troops of the Second World is now being felt throughout parts of Asia and Africa, but the influence of the Second World was not always supported by such evidence of the traditional instruments of power. Well before the arrival of the armies, in whatever guise, the Second World was making its influence felt in attempting to woo adherents to its camp by touting the attractiveness of its socialist creed. To the colonials, the argument in favor of complete recognition in international law of the right of self-determination could not but prove attractive.

The Second World has always sensed the appeal of this argument, and it has claimed to be the sole champion of the idea, notwithstanding the fact that Woodrow Wilson had been the champion of the concept as early as World War I in his effort to break up the great empires on the side of the Central Powers. Even though the founders of the United Nations had been cautious at San Francisco in wording the Charter to limit the status of "self-determination" as a "right," the colonials, supported by massive pressures exerted by international lawyers of the Soviet Union, have been arguing that the right not only should be recognized, but that in fact already exists.

There has been no more constant theme in Soviet international legal literature than "liberation" as a right. To Soviet diplomats it is already so clearly recognized in international law that aid in support of "liberation struggles" can be given with impunity by the Second World. In short, there is constantly enunciated the claim that international law now recognizes the concept of "just," i.e. legal, wars in support of the anti-colonial struggle.

To the widely felt anti-colonial pressures must be added the anti-racist pressures in international law. Although far slower to make their appearance, they have now been recognized in a United Nations resolution, and they have now made "apartheid" illegal in international law. Almost no one thinks that Article 2 (7) is violated when the world speaks out against South Africa and its apartheid policy. The West long lagged behind the Second World in supporting the Third World in its demands for recognition in international law of anti-racist principles. With this lag the Second World has reaped a harvest of good will for its early stand. Time will tell whether the rather lately adopted anti-apartheid policies of the First World can overcome the bad taste created in many Third World mouths during the early years of struggle for recognition of this critical concept.

The Soviet Union's lawyers are not recent arrivals in the ante-rooms of Third World statesmen. They created an early model argument for Third World foreign offices to use in support of policies of confiscation of foreign investment. Back in the early months of the Russian revolution, Soviet lawyers argued that nothing in international law required payment of debts incurred by a prior government to finance anti-revolutionary repression, and nothing required compensation for property nationalized from bourgeois owners, whether they were nationals or foreigners. Although the argument was resisted forcefully by foreign creditor states, the argument has made its mark.

One can today meet only unbelieving smiles from the Third World when one demands payment for nationalized foreign investments. No one now argues that nationalization is illegal. What little argument that remains has to do with compensation: the West arguing still that it must be prompt, adequate and effective, and the Third World that if any just claim for compensation exists, it is more than offset by a counterclaim for damages suffered over years of colonial

domination. This position against compensation stretches over even to new investment generally. Nothing but fear lest investment cease now dissuades the Third World from arguing that repayment of investment loans is not required by law. Thus it is expediency and not law that protects the foreign investor.

Indeed, under attitudes supporting the United Nations Resolution on a New International Economic Order, the "haves" must recognize their duty to the "have-nots" to support them with outright grants requiring no repayment, even if the grantor was never a colonial power. It is a duty of the rich to support the poor, a duty already recognized by the Swedish Government.

VI. A RESTRUCTURED "GENERAL INTERNATIONAL LAW"

Perhaps the most far-reaching claim of the Second and Third Worlds goes beyond the demands for recognition of one or another of the principles indicated above: It is for recognition that "general international law" has already been extensively restructured and is now binding upon all states, whether they shared in the restructuring or not; whether they are members of the United Nations or not; and whether they like the restructured law or not. The claim is the more surprising since it flies in the face of the concept of voluntary assumption of obligations, which predominated in the earlier days of existence of the United Nations. Soviet jurists have been in the forefront of those making this argument, even though it is far from the position of their colleagues of the 1920's who tended to reject the principles of "general international law," meaning primarily customary law, unless one or another principle suited their purposes.

Soviet scholars of the 1920's looked upon customary law as the creation of the bourgeois powers of the nineteenth and early twentieth century, and hence, generally unacceptable. Only those principles were applied that met careful scrutiny to determine whether their application would harm Soviet interests. Thus the law of diplomatic intercourse was accepted, even though customary in origin, when rejection of it resulted in lack of protection for Soviet agents

and offices abroad. The keystone principle of *pacta sunt servanda* was accepted at Brest Litovsk in 1918 only after it became evident that refusal to make and adhere to a treaty would lay the fledgling Soviet Russia open to the continuing advance of the Imperial German armies.

Contemporary Soviet literature on customary international law might suggest that Soviet jurists, and those who follow their leadership in the Third World, have been won over to acceptance of the traditional principles of international law, but such is not the case. The custom that is now being proclaimed as binding is a new "custom," so new that Professor R.Y. Jennings of Cambridge was moved to say in a lecture before the International Law Association in 1976 that it deserved only to be called "instant custom," which is to say that it was not customary law at all.

What is arresting for those in the First World who follow the argument is that custom today is said to be evidenced by resolutions of the General Assembly, which by Charter provision are not to be recognized as sources of law at all. Thus the resolutions today are claimed to be indications of what the world has come to accept as custom; indeed, the Soviet authors call them "crystallized custom." When supported by a large majority within the General Assembly, inclusive of representatives of each of the three worlds, they are said by Soviet authors to be quite enough to support a diplomatic claim, even against states that did not vote for the resolution in the General Assembly, or could not vote by virtue of not being members.

The Soviet argument goes even further to embrace the concept of a new *jus cogens*, which is composed of principles which no state can violate even if it finds another state that would like to join with it in a treaty of contrary mind. Members of the First World could not, under this concept, make an agreement among themselves to be recognized as binding by other states unless that agreement met the requirements of the new *jus cogens*, as established by resolutions of the General Assembly of the United Nations. Thus, there is established another avenue of creation of international law through General Assembly resolution in spite of the Charter provision limiting the law-making force of such resolutions.

One may ask whether there are any parameters to the new *jus*

cogens. The answer seems to be that there are: those established by the United Nations Resolution on Friendly Relations and Cooperation among States, adopted without dissent on the occasion of the 25th anniversary of the United Nations. Thus, if a principle has been set forth in that resolution, it is part of the new *jus cogens* and binding upon all to prevent the creation of treaty provisions to the contrary.

VII. IS ACCOMMODATION POSSIBLE?

Let us now turn to the second topic proposed for consideration, namely what might be an appropriate American response to the situation that has been sketched? Is it resistance or accommodation, and if the latter, will it be possible to accommodate without losing all that Americans hold dear?

A prominent group of American scholars and practitioners, joined together in a committee of the American Branch of the International Law Association, recently concluded that the pressures within the law of the sea conference exerted by the Third World were so great for unacceptable change that serious thought should be given to contingency planning for alternative methods to preserve and protect important legal norms. In short, such great change was threatened that the United States delegation should withdraw from the conference and advise the government to go it alone.

In contrast to this view a Canadian with long experience in the United States both as student and as professor has recently published his conclusion that withdrawal on general or specific issues is undesirable for the West. In his view too much attention has been given by some Westerners to the evident conflict of ideologies between East and West and too little to accommodation on specific issues on which accommodation is possible. He believes that on a step by step basis a pragmatic solution of specific problems facing the international community can be found, and that out of solution of specifics will come preservation of peace and an international law that is acceptable.

This Canadian, Professor Edward McWhinney of Vancouver, sees interests emerging among the neutral and neutralized countries

which will create a force for stability of law when combined with those of the non-aligned countries. In his words, "All these interests combine to produce pressures to institutionalize and bureaucratize and 'civilize' East-West relations in Europe on a permanent basis." He puts his faith in review conferences, such as that required periodically by the Helsinki Final Act, if the fears of return to the Cold War can be disposed of. Although he speaks here of Europe, he expects peaceful relations to arise elsewhere if Europe can be calmed.

Two dissenters on the American branch committee on the law of the sea seem to agree with McWhinney, for the two co-editors of the American Journal of International Law, Professor Oscar Schachter and Louis Henkin, both rejected that part of the majority's view calling for alternative planning and withdrawal. Under their view the United States delegation should remain at the conference to continue the negotiations, for the alternative might be anarchy.

The issue is joined: should Americans work for a breaking off of relations with jurists engaged in restructuring international law, or should they remain in the conference rooms to attempt to preserve what they can of the law they revere? An answer to this question of tactics is not easy to find. In my own mind, I keep returning to the day I sat at Lake Success as an observer at meetings of the preparatory committee of the United Nations establishing the structure of the International Law Commission. One of the most telling comments was made by Britain's delegate, the late Professor James L. Brierly, on whose manual of international law many students have cut their teeth as they entered upon the subject.

Brierly argued that if the International Law Commission were to attempt to codify customary law, it must of necessity draft a code that would be no more than the lowest common denominator acceptable to all. This common denominator would be far less than the body of law created by international practice over the years prior to World War II. He looked around him at the representatives of new states which were at the time just beginning to emerge, and notably to the scholar representing the Soviet Union. He concluded that these relative newcomers could not be expected to accept the records in the filing cabinets of the British Foreign Office or of other long-established foreign offices as evidence of customary law, much less as proof of what the law should be if it were to be "developed."

To him the filing cabinets were the best evidence of what general international law really was, and he did not want to lose this evidence in a codification conference.

Brierly's fears have been realized in part. Codification conferences have often rejected custom as established by Western foreign office files, and they have established radically new rules as they codify and develop. Who would argue to the contrary in view of what has happened at the conference on the law of the sea? Delegates entered the conference when general international law still provided for a three mile territorial belt, in spite of some incursions into the rule, and when a wide economic zone was only a claim of a few Latin Americans who constantly faced claims filed by states representing fishermen who insisted on their right to fish in the open sea. Before long, even without formal agreement, most of the states were accepting a twelve-mile territorial belt and a 200-mile economic zone, and some rights for land-locked states. Further, many were talking of a sea bed that was the "common heritage of mankind" from which individual states could be excluded unless they obtained a license from some international authority and paid a tax on their profits to an international agency. Clearly, conferences to codify can open a Pandora's box.

In contrast with the record of the conference on the law of the sea, there has been far wider acceptance of the conventions on the law of treaties and on diplomatic representation, signed as a result of the Vienna diplomatic conferences. Although there has been slowness in ratification, most scholars have hailed the results as proof that conferences can be effective in establishing without question rules of law that all must adhere to. To be sure, the Vienna conference on the law of the sea witnessed opposition on the part of the United States delegation to the proposed Article 85 recognizing the principle of *jus cogens*, to which reference has already been made. The delegation feared that it would be used to the disadvantage of the established powers, as is now proving to be the case, but this was but a small part of the convention, and the West found that it could accommodate successfully the wishes of the rest of the world.

Far more difficulty has been met when the restructuring of customary law relates not to a single topic like the law of treaties or diplomatic intercourse, but to general international law as a whole.

The steps leading up to the adoption, at the 25th anniversary of the United Nations, of the Resolution on Friendly Relations and Cooperation among States gave rise to serious doubts on the part of many Westerners as to whether the proponents of the idea in the Second and Third Worlds intended to discard all pre-World War II law and to begin again with the creation of new norms.

Some of the proponents of the Friendly Relations resolution, most notably the Yugoslavs, talked in terms of bringing in the new states which had not been able to share in the formulation of traditional international law to reconsider what was necessary for "peaceful coexistence" in a much divided world. The very use of the words "peaceful coexistence" caused alarm because it had come to be associated with Soviet foreign policy, and to many Westerners that policy represented attitudes and positions on world order which they were not prepared to accept.

Professor McWhinney has chronicled the stages through which the discussion of peaceful coexistence law passed before it was transformed acceptably by the United Nations committee into a law of friendly relations and cooperation among States. He concludes that the early stages of the debate constitute an example of the kind of discussion which he thinks undesirable because it focusses on broad generalities which are unimportant to a step-by-step pragmatic development of international law.

McWhinney's argument that accommodation is possible, and even advantageous, if Western diplomats follow a pragmatic policy of reaching accommodation on practical problems in a step-by-step approach, and that it is unproductive to engage in debate over general principles of law, is attractive. Still, I find myself sceptical as I observe the radical developments that have occurred and are occurring in international law in application of general theories hammered out of the past sixty years.

VIII. EXAMPLES OF UNDESIRABLE ACCOMMODATION

Some examples will help clarify the issue of desirability of accommodation. The most prominent is the practice that has de-

veloped around the concept of self-determination and its recognition in international law. Few Americans would want to oppose it as a right, for it was fundamental to the thinking of the Founding Fathers of these United States, and it has since come to be imbedded in the American psyche. Further, Americans generally have wished that others might be free and have taken positions against the colonial system, although, for reasons of strategic defense, there have been periods when the Portuguese empire and others have been condoned.

In spite of this general acceptance of the right of self-determination, Americans have sometimes noted that exercise of the right indiscriminately and without delay can cause more international unrest than it overcomes. Look at the problems raised by the speedy liberation of the Belgian Congo by the Belgian Government. A transitional regime under United Nations auspices might have cushioned the shock and reduced tensions. Likewise, the speedy transfer to Indonesian authority of what is now called West Irian without providing a chance to the Melanesian inhabitants to decide whether they wanted to join Indonesia or their blood brothers in Papua New Guinea has given rise to insurgency which still goes on. The world has come to realize that this way of exercising the right has dire consequences, and efforts are now being made by the United Nations in South West Africa to provide for transition and plebiscite.

Likewise, much confusion is caused when claims are made that a regime in power is not representative of a people, and that this creates a right to revolt and to obtain foreign aid in support of the revolt against a regime composed of nationals of the country concerned. To argue that the regime relies too heavily for political and economic stability upon a former metropole or upon some other source of strength abroad is a hollow defense of revolutionary action, especially when the revolutionaries obtain their strength from a foreign power under circumstances that are no less "neo-colonial." My ears still burn from what they heard from President Sukarno of Indonesia when he landed commandos on Malaysian beaches, avowedly to unseat a regime that he thought so reliant upon Britain as to be "neo-colonial."

Exercise of the right of self-determination, and aid in the exercise of the right, need to be limited narrowly in law if chaos is not to

result. Broadly generalized statements of the right are not ones to which Americans ought to accommodate themselves.

The same may be said for declarations concerning the law of peaceful coexistence. For years American statesmen and many others from the West generally resisted accommodation to Second World demands that all the world coexist peacefully and accept conventional sounding principles. Yet the literature from the Second World has been full of indications that peace is possible only when all the world accepts Second World values, and even governmental structures. Coexistence means continuation of ideological struggle for such a world, as stated quite frankly in the Soviet Communist Party Program of 1961.

The term "peaceful coexistence" has appeared to mean only an armistice, in spite of valiant Soviet efforts to establish that it means "cooperation." Such an armistice, a no-war situation, desirable as peace is to all Americans, has seemed inadequate not only to Americans but to a majority of the members of the United Nations. That is why the title was rejected for the 25th anniversary resolution and Friendly Relations and Cooperation substituted as less ideologically slanted.

In spite of this history the President of the United States found it expedient to accommodate his policy to the demands of his Soviet hosts for recognition of peaceful coexistence. He seems to have thought that it would be a gracious gesture toward detente. But once the accommodation had been made, it is now difficult for his successor to resist the ideological struggle that goes with peaceful coexistence without appearing to be for Cold War, and even to oppose the military assistance to Africans who are ideologically attuned to Soviet policies.

Another area in which accommodation seems undesirable is the Second World's position on disputes resolution. Throughout all its sixty years the Soviet Union through its diplomats has resisted third party resolution of its disputes with others. It has tried to retain constant control over resolution by insisting on negotiation between the disputing parties. This position favors the strong, and as the Soviet Union gains strength, its position in dispute resolution is bound to prevail over all but equally powerful states. It is quite pointless to argue that diplomatic negotiation preserves

"sovereignty," for that places emphasis upon form rather than reality. A "sovereign" who is weak can hardly protect his "sovereignty" against the strong, as he might before an impartial, third party arbitrator. This being so, it seems undesirable to accommodate to the Second and Third World position that the International Court of Justice and all other tribunals are to be avoided as arbiters, and that States should accept diplomatic negotiation as the preferred method of dispute resolution.

Accommodation of the demands for recognition of new obligations toward the Third World requiring grants on a systematized basis is to be considered with care. While it is obvious that the developing world requires help, unlimited grants made systematically can lead under present conditions of inexperience only to inefficient use of aid, and even to disruption of domestic order as the general public learns of corruption in high places in the recipient country's government. It is heartening to find some Third World figures recognizing that grants without supervision lead only to corruption on a wide scale.

Certainly the claims for restitution lack reality, as they appear in the Resolution on a New International Economic Order. Much as it might seem desirable to former colonials to force Portugal to make restitution to its former colonies of funds representing resources withdrawn over a period of 500 years without equitable payment, Portugal can no longer finance even her own economy, and the same may be said for most of the former metropolises.

IX. A TECHNIQUE FOR PRESERVING VALUES

Professor Robert L. Meagher of the Fletcher School of Law and Diplomacy¹ has considered in great detail how much the West can accommodate the demands constituting the foundation of a New International Economic Order, while retaining its essential values. He has shown how skillful diplomacy by Western representatives has made it possible to change the proposed resolution on a New International Economic Order from a statement of "obligations," to a statement of "aspirations" which can be accepted by the First

¹Tufts University, Medford, Massachusetts.

World. The negotiations leading to the formulation of this resolution are a model for those diplomats attempting to meet the contemporary pressures being placed upon international lawmakers.

Some areas of international law that were long thought to be difficult to develop have proved over the years to be quite manageable. One has to think only of the numerous conferences on legal problems met in meshing private-enterprise trade with state trading. Between the wars every private-enterprise state resisted demands of state traders for recognition of state trading delegations with diplomatic immunity and privileges. Yet one by one, private-enterprise states concluded commercial treaties with the Soviet Union to recognize the delegations, in return for concessions on the Soviet side. Wholly acceptable law on the topic has now been established.

At the time of the formulation immediately after World War I of the Havana Charter on foreign trade, great thought was given by draftsmen to a method through which political consideration could be eliminated from state traders' deals, and how to find a *quid pro quo* for most-favored-nation treatment granted to state traders. While solution of both problems has never been formulated in ideal terms, private-enterprise states have found it possible to live and prosper in the commercial relationships formed with state traders. Commerce has increased, pleas of immunity have been rare, as most contracts have provided for commercial arbitration, and state trading delegations have not abused their diplomatic status.

Perhaps the thorniest problems currently remaining pertain to the protection of human rights. The issue in international law is whether they have become matters of international concern outside the prohibitions of Article 2(7) of the United Nations Charter, and, if so, what issues in the field are subject legitimately to such concern. The Soviet and American positions have become quite clear.

On the Soviet side, human rights are to be protected in international law only in the aggregate. Racism and sex discrimination are seen as topics appropriate for the concern of the international community, while complaints of individuals, since the latter are not subjects of international law, are wholly within domestic jurisdiction, and so within the prohibitions of Article 2(7).

For Americans, the Helsinki Final Act is thought to have brought

all human rights problems, including those of individuals, within the scope of legitimate concern of states acting under principles of international law, and the President of the United States has so stated. The Soviet response has been strident, so that it is clear that no accommodation can be expected by either side.

X. SUMMARY

In summation, international law is in transition, probably more extensive transition than at any time in its history. Much of the change is unacceptable to those who treasure values of a traditional sort, although most of the changes are very much desired by the Second and Third Worlds, relatively recently arrived upon the scene of international relations.

Pressures for change are not novel in international law, for it has always been subjected to various pressures. Indeed, it has developed to its present stage in response to pressures. Those who counsel withdrawal from institutions seeking to reshape the law are unrealistic, for change cannot be resisted en masse. An appropriate response for those who would preserve the values they cherish would seem to be continuation of participation in the process of reformulation of international law. The record shows that skillful participation can result in measured change. Discriminating opposition to new principles, and accommodation to those that can be accepted without loss of values, can result in a corpus of new law within which the West can live and thrive.

The conclusion seems obvious that leadership is to be favored over abdication of leadership. All is not lost or likely to be lost by participation, although international lawmaking for some years to come will appeal more to those who enjoy performing in the arena of move and countermove, than to those who would prefer to take their stand on principles which they learned decades ago and from which they will accept no change.

SOVIET INTERNATIONAL LAW TODAY: AN ELASTIC DOGMA *

by Major Eugene D. Fryer * *

In this article, Major Fryer deals with a topic belonging as much to comparative as it does to international law. He opens with a description of the Soviet view of international law, and a preliminary conclusion that Soviet concepts in this area are indeed entitled to be taken seriously as law.

The article continues with a short discussion of the evolution of Marxist and Leninist ideas concerning the nature and purposes of law. Included is a glimpse at the contributions of specified Soviet scholars.

Major Fryer next examines some of the distinctive features of the contemporary Soviet view of international law. Discussed are such concepts as peaceful coexistence and socialist internationalism.

International law, formerly seen by the Soviets as hopelessly dominated by bourgeois interests, has latterly

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been discovered by them to be moving in a socialist direction. This movement has come about as the emerging nations have participated more and more fully in the shaping of international relations.

Major Fryer concludes that the Soviets have developed mature concepts of international law, although these concepts may seem strange to Western lawyers. The growth of the Soviet concepts has been in an increasingly pragmatic direction.

I. INTRODUCTION

An examination of contemporary Soviet law can be flawed by biases in the perspective of both the researcher and the reader which tend to prevent development of real understanding. This tendency, equally endemic in evaluations of both Soviet national law and the Soviet approach to international law, was consciously recognized by the author and resisted, hopefully with at least fair success, throughout the present undertaking.

It may, on the one hand, be debated unendingly whether Soviet domestic or international law is law at all. Perhaps it is a cynical mix of Soviet power, policy and propaganda. Recognizing that Soviet normative values are generally out of symphony with traditional Western legal notions, are not the latter sullied or compromised to some degree by conceding validity to the former? Or, on the other hand, conceding to Soviet arrangements some status akin to that of law, is that body of principles sufficiently regular and durable to be recognizable as a legal system, either nascent or developed?

For the purposes of this article, many such propositions which may be thought either to be threshold or ultimate were bypassed in order to view Soviet international law in being. Soviet international law will be outlined in its historical development, general structure and ideological basis on the understanding that these facets of the Soviet legal system are of themselves worthy of note

by the Western lawyer who sees the universe of law as other than ethnocentered and static.¹

The Soviets claim to have captured general international law by virtue of its ongoing, gradual transformation in its value structure from a bourgeoisie to a socialist oriented institution. This process, it is said, conforms to the Marxist-Leninist dialectic of the historical march toward world communism.² As propaganda-tinged as this claim might be, it is all the same a persistent claim. An unguarded glance at the contemporary development of values in international law might persuade the viewer that the claim is neither completely propagandistic nor frivolous.

Therein is the importance of examining the Soviet view as put forth by the Soviets, both in terms of the claimed dialectical process and of Marxist-Leninist values and terminology. An appreciation of these Soviet referents is elemental to understanding the past and the future of Soviet international law. At the connecting point in this developmental process, such appreciation is also necessary to an understanding of the present Soviet view of international law.

As general orientation, it is helpful to note by contrast some typi-

¹There is considerable disagreement among the socialist states as to the unity or distinctive Sovietness of socialist international law. A leading American scholar of socialist law attributes this to the operation of polycentric forces among the socialist states. The fact remains, nevertheless, that among these states, the Soviet Union is the principal actor in international affairs and its views are more widely shared by them than not. J. Hazard, *Communists and Their Law* at viii (1969). For purposes of this examination, socialist international law will be approached, therefore, from the Soviet view.

²The present leading Soviet authority on Soviet international law, G. I. Tunkin, rejects the earlier views of Soviets and others who saw no possibility of creating an operative international law because of the conflict between the socialist and capitalist states. Tunkin sees the dialectical process in full swing; the bourgeois international law—

thesis is meeting the counterthrust of the Marxian socialist antithesis, and a new synthesis is coming into being. "One need not wait until the achievement of the new thesis to have international law; it is here already and it is progressive because it marks a transition from an outworn epoch of history to the epoch of the future."

G. Tunkin, *Ideologicheskaya Bor'ba i Mezhdunarodnoe Pravo (Ideological Struggle and International Law)* (1967), quoted in Hildebrand, *Soviet International Law: An Exemplar for Optimal Decision Theory Analysis*, 20 Case W. Res. L. Rev. 141, 186 (1968).

cal perspective-biased approaches to Soviet legal theory which, for instance, dismiss Soviet Marxist-Leninist norm articulation as sloganeering.³ From this perspective, the American scholar Lissitzyn views Soviet legal theory as aberrational, hopefully to be reintegrated into traditional international law.⁴ From another perspective, Professor Hans Kelsen discredited Soviet Marxist-Leninist formulations by claiming them to be mere political and historical expedients. He claimed to have mastered a more refined and therefore more correct insight into these ideological bases than have the Soviets.⁵

Neither of these biases, both representing extremes, are offered by their advocates as conclusory. They are ingrained cognitive referents. They color the process of inquiry and deny the treatment of reality as fact. More productive as a comparative law approach is to view the system as it is viewed by its own legal thinkers. Thus treated, the general atmosphere and dynamics of the system are more likely to come forward than if Soviet doctrine were rethought and reformulated in a conventional Anglo-American manner.⁶

Marxist-Leninist formulation is not simply pabulum for the Soviet public and smokescreen to the world. It is the fundamental language of Soviet decisionmaking and policy formulation. It is the language in which Soviet officialdom receives formal and advanced schooling. What appear to be stereotyped phrases of Party doctrine, "slogans" as it were, convey fairly precise meanings which may be shaded by subtle changes in choice of words and in word order.⁷ It is not unnatural that the highest legal thought is similarly couched—all the more so for international law which, as in other states, reflects so closely national foreign policy and diplomatic concerns.

Throughout the following examination, the impact on Soviet international law of the vagaries of historical forces and Soviet needs will be noted. For the Soviets, this does not necessarily detract from the consistency or continuity of Marxist-Leninist thought as a

³O. Lissitzyn, *International Law Today and Tomorrow* 51 (1965).

⁴*Id.*, at 70.

⁵H. Kelsen, *The Communist Theory of Law* 149-50 (1955).

⁶See Butler, *Introduction* to G. Tunkin, *Theory of International Law* (W. Butler transl. 1974), at xiv.

⁷M. Gehlen, *The Politics of Coexistence* 23-24 (1967).

guiding, normative base. Neither should apparent Soviet departures from these dialectical strictures give rise to substantial belief that the dialectical process has been compromised or even forsaken. Such all-or-nothing dogmatism cannot be ascribed to the Soviets, for the doctrine and objectives of Marxism-Leninism in the Soviet Union share in the same elasticity by which basic American constitutional ideals find present day relevance in the United States.⁹ Through this mechanism of living or "creative" Marxism, therefore, theory and practice may harmonize in the dialectical movement toward Communism. Theory and practice are conceived by the Soviets as one, not as separate entities. Theory is reality.⁹

The thesis presented in the title of this paper is not innovative. Statements of the ultimate Soviet goal always have been public, candid and straightforward: world communism. The foreign policy and international law articulation supportive of this goal have been likewise single-purposed. New only is the impact of present day Western-Soviet detente, as viewed by the Soviets, upon Soviet legal formulation of the means to this mandatory end of gradual world communism. The law they have formulated for these relations is the "law of peaceful coexistence." This Soviet view of international law will be examined in its Marxist-Leninist character to determine its programmatic fidelity and present vitality.¹⁰

⁹ The ability of his followers to affect the proper combination of dogmatism and flexibility was of particular concern to Lenin. While expecting Communists to be steadfast in their loyalty to the ideas and spirit of the official doctrine, he warned them that they must never allow ideology to become a political straitjacket, a vice in which flexibility of tactics had to be sacrificed to dogma. They must have the political sagacity, he insisted, to know when to take "two steps backward" in the interest of the ultimate realization of that doctrine. According to the tenets of creative Marxism, the "strictest loyalty to the ideas of the Communist must be combined with the ability to make all the necessary practical compromises . . ."

¹⁰ Lenin, *Left-Wing Communism: An Infantile Disorder*, Selected Works 138 (1938), quoted in Gehlen, *supra* note 7, at 26.

⁹Gehlen, *supra* note 7, at 25.

¹⁰See Lapenna, *The Legal Aspects and Political Significance of the Soviet Concept of Co-Existence*, 12 Int'l & Comp. L.Q. 741 (1963).

II. THE DOCTRINAL AND OTHER ROOTS OF
SOVIET INTERNATIONAL LAW

A. GENERAL

The evolution of Soviet international law shares much of the seeming illogic and unevenness of the parallel theories and development of Soviet domestic law.¹¹ Marxism-Leninism has been shaped throughout the Soviet era to articulate the rules for and justify state conduct while adhering to that ideology as closely as the short-term press of random problems and objectives would allow. According to Soviet theorists, however, the continuous thread of Marxist-Leninist legal thought gives the development of Soviet international law a scientific and rational character.¹²

Basic Marxism, as developed in the 19th century, provided only dim illumination of the approach toward international or domestic law to be taken by the Communists actually charged with implementing the universal plan. It was said that all law was class oriented, being developed to serve the needs of the dominant class of any society during the given era and, corollatively, to suppress and neutralize contradictory interests and needs of the society's nondominant classes. The law so derived was seen as a superstructure arising from the productive relations, control of the means of production, of the era.

Thus, in pre-tribal society, when the means of subsistence or production were shared throughout the population, there was and could have been no law since there were no contradictory interests. With familial, then tribal, and later more complex divisions of labor and control over the means of production, competing interests arose.

¹¹*Id.* at 758. "As international law is a branch of law in general, the Soviet theory of international law has followed all the changes which Soviet general theory of state and law has gone through." As to international law theory, the demands upon ideology of political reality and Soviet needs is "felt, even more strongly than in the general theory of state and law."

¹²G. Tunkin, *Theory of International Law* 3 (W. Butler transl. 1974) (hereinafter cited as G. Tunkin, *Theory*).

These tensions were dampened by rules imposed by those controlling the means of production, the "haves," on the "have nots." According to Marx, the have-nots most often were the flesh personification of the economic means of production, *i.e.* labor. Thus, in slaveholding society, the law of the period was protective of the *status quo* relationships of that period. Law was a means by which the slaveholding elite prevented challenges from the competing interests of nonslaveholders and slaves. The model is likewise appropriate to the feudal-vassal era and to the present era, all of which, according to orthodox Marxism, represent a linear progression to the ultimate benefit of the "have nots": their control over their own lot, over the means of production.

As small crafts and trading evolved into mercantilism with the rise of the bourgeois class of small producers and traders, the rule of feudalism was replaced by the rule of the bourgeoisie. They, to the extent they were the beneficiaries of the toil of others, needed a superstructure of law to protect their economic *status quo* from erosion through demands of the toilers. Modern industrialization, in this manner, saw the complete subjugation through law of the industrial worker, the proletarian, and other peripheral toilers. According to Marx and modern Soviet interpretations, the "have not" classes, through grinding interplay of taxation, criminal law, and civil law, were held at a subsistence level in order to minimize their aspirations to develop at the expense of the bourgeoisie and to minimize their cost as a factor of production which would reduce the profits of the bourgeois "haves."

But, say the Marxists, just as the displacement of the feudal elite by the bourgeoisie represented a general betterment of mankind through a broadening in control of the means of production, so must the tension of present bourgeoisie-proletarian relationships produce a further and ultimate historical broadening as the productive base comes under the control of the toilers themselves.

During a transitional period following this proletarian seizure of control, law and its state matrix will be useful but only to eradicate the bourgeoisie as a class. The utility of law, which is by definition class-coercive, will fade with this end of class rivalry, and law and state as a result of progressive irrelevance will wither and disappear.¹³ In the place of law and state will arise a system of relation-

¹³ See J. Hazard, *The Soviet System of Government* (4th ed. 1968).

ships based on spontaneous, egalitarian, natural justice, which because of its then-collective acceptance, will require no coercive mechanism of enforcement.¹⁴

B. EARLY ANTI-LAW PHILOSOPHY

It is natural that the smoke and victory of the 1917 "Great October Revolution" and the general war-induced social and political deterioration throughout Europe early convinced the Soviet leadership that the historical liberation of the world proletariat was imminent. Soviet concepts concerning international relations and international law at the outset of this early period, therefore, were of a virtually hypothetical character.¹⁵

The Soviets, preoccupied with achievement of internal stability despite civil war, engaged in general iconoclasm in international law. They renounced disadvantageous Tsarist treaty obligations by way of the theory of state succession or through employment of the principle of *clausula rebus sic stantibus*.¹⁶ Across-the-board nationalization of all "means of production" and the bourgeois fruits thereof was accomplished without compensation. International subversion and mass agitation of foreign proletarians was undertaken to hasten Western downfall. The implication for a regime of international law is fairly clear from the early statement of Lenin that:

We live not only in a state but in a system of states,
and the existence of the Soviet Republic side by side with

¹⁴Nasinovsky, *The Impact of Fifty Years of Soviet Theory and Practice on International Law*, Proceedings of the American Society of International Law, 1968, at 195-96. Evgeny N. Nasinovksy's remarks were delivered as part of a panel discussion held during the fourth session of the 62nd annual meeting of the American Society of International Law, on 26 April 1968.

¹⁵See B. Ramundo, *The (Soviet) Socialist Theory of International Law* (1964).

¹⁶G. Tunkin, *Theory*, *supra* note 12, at 29. It is interesting to note that, from the perspective of the 1970's, Professor Tunkin sees this Soviet rejection of bourgeois norms as causing a decrement in the body of general international law and not merely as Soviet nonadherence to enduring legal principle:

It is correct to say that with the emergence of the Soviet state, certain of the then existing norms of general international law rejected by the Soviet state ceased to be norms of general international law. But it is very important to add in this connection that the contraction of general international law occurred at the expense of reactionary norms.

Id. at 30.

imperialist states for a prolonged period of time is unthinkable. In the end either one or the other will conquer. Up to this end, a number of most horrible collisions between the Soviet Republic and the bourgeois states is inevitable.¹⁷

Then, as throughout Soviet history, there were within the leadership both hard-line and moderate orientations regarding the inevitability of conflict. The relatively moderate and politically astute Lenin overwhelmed a more doctrinaire but influential faction which viewed any compromise with capitalism as treasonous and which had called for Lenin to put substance into his revolutionary plan for the world. To Lenin, stability on the home front realistically could be won only through willingness to deal with and, if possible, exploit the international capitalist enemy.¹⁸

Accordingly, the Soviet state during this period embraced those values of international law which served its purposes of regime stabilization and its desire for freedom from foreign threat. These values included respect for state sovereignty, the equality of states, and non-interference in the internal affairs of states.¹⁹ Employment of these techniques to further unilateral Soviet interests became the

¹⁷V. Lenin, *Sochineniya* (Works) 22 (3d Russian ed.) quoted in Lapenna, *supra* note 10, at 743. Herein lay the basis for the early stated Soviet theme of the "inevitability of war" ominously and repetitively plumped by Stalin. Contrasted with its apocalyptic thrust, this Lenin statement has also served as the theoretical Soviet basis for the present policy of coexistence. At present it is characterized by the diminished emphasis on violence required by nuclear era exigence and by the expedient temporary nature of coexistence. The latter, however, is played down for the sake of credibility. See generally B. Ramundo, *Peaceful Coexistence: International Law in the Building of Communism* (1967).

¹⁸M. Gehlen, *supra* note 7, at 164, citing the prevalence of Lenin's view over that of the party right wing led by Bukharin, who was eventually and conclusively purged by Stalin.

¹⁹G. Tunkin, *Theory*, *supra* note 12, at 29. Again from the Soviet perspective of the 1970's, Professor Tunkin refers to these basic values of general international law as "old democratic principles," a Soviet term of art which injects into the old form a new "progressive" socialist content with an anti-capitalist bias. Thus, for example, the Soviet formulation of the principle of state sovereignty precludes capitalist meddling in Soviet affairs. However, it does not prevent Soviet efforts at the "strengthening of socialism" in other countries. For Soviet utilization of sovereignty, among other general international law concepts, as both "sword and shield," see Ramundo, *supra* note 17, at 6.

characteristic feature of the Soviet approach to international law during this period and indeed up to the present. It represents a minimum commitment approach to international law and has been described by an American authority as "defensism."²⁰

This highly positivistic approach to international law was and remains based on the Soviet proposition that, in the absence of a common international view of *jus cogens*, only consent, or the agreement of states, can be the basis for binding normative international law. This extends to the applicability of customary international law.²¹ The operation of this consent requirement occurs along a reactionary-progressive schism as perceived according to Soviet values and is shaped by situational and ideological needs.²² Thus, the development of international law can be "progressive" only, and norms not facilitative of the growth of communism cannot bind socialist states.

Despite or by virtue of this minimum embrace of international law in the early period, the Soviets maintained an international law posture consistent with Marxist-Leninist views on the class basis of law and on the international character of the dialectical class struggle.²³

C. RECONCILING LAW AND MARXISM IN VIEW OF PRACTICAL CONSIDERATIONS

In the early post-revolution years, however, the Soviets appeared to be beating a very un-Marxist retreat on the issue of the withering of law. Domestically, this development was marked by a relatively timely rehabilitation of the "rule of law" and the encouragement of respect for state and legal institutions, both of which values were essential to the effective functioning of the regime.²⁴ Both legal

²⁰Ramundo, *supra* note 17, at 87.

²¹G. Tunkin, *Theory*, *supra* note 12, at 118.

²²See Ramundo, *Czechoslovakia and the Law of Peaceful Coexistence: Legal Characterization in the National Interest*, 22 *Stan. L. Rev.* 963 (1970) [hereinafter cited as Ramundo, *National Interest*].

²³M. Gehlen, *supra* note 7, at 30.

²⁴Berman, *United States-Soviet Relations*, 22 *Stan. L. Rev.* 943, 947-48 (1970).

form and substance had assumed, of course, a new "progressiveness" necessary for the building of communism.

For similar reasons and subject to the new socialist content, international law was refurbished. The first to do this was E. A. Korovin. He claimed to announce in 1928 what had developed in the early years as a pluralistic doctrine of international law. This doctrine was intended for use only until the end of that period of international transition to communism, during which law would be necessary.²⁵

Unable to deny the existence of the preponderant bourgeois international law, but unable to find within it a base-superstructure for what he saw as emerging socialist principles of international law, Korovin could not subscribe to the concept of a universal international law. A socialist international law, he said, had emerged to govern relations of the new Soviet state with the bourgeois world. A distinct capitalist international law applied to inter-capitalist affairs, and yet another hybrid type of international law attached to relations between capitalist states and their colonies and "half-colonies."²⁶

Through the concept of pluralism, then, Korovin sought to isolate socialist international law and thereby to preserve the purity of Marxism.²⁷ But the partitioning of international law along ideological base-superstructure lines did not rule out the type of interclass dealings consistent with Lenin's pragmatic view of compromise. Korovin defined three areas of interest in which interclass accommodation might be had:

- (1) Humanitarian interests independent of political tendencies, such as are manifested in the fight against epidemics and the protection of historic monuments or products of art;
- (2) Material, *i.e.* economic interest of a merely technical character, for instance concerning postal, telegraphic, rail, sea communications and the like; and

²⁵H. Kelsen, *supra* note 5, at 148.

²⁶*Id.* at 157.

²⁷B. Ramundo, *supra* note 15, at 17.

(3) Material interests of social, *i.e.* political importance.²⁸

The ideological debate among Soviet legal scholars over the relationship of compromise to international class struggle prevented development of a common view at this period on a theory of international law. Korovin's pluralistic theory gave way to that of E. B. Pashukanis, which recognized only one international law, applicable to socialist and capitalist states alike, in the body of which were emerging socialist principles. Again, this universal interclass law was relevant only during the world transition to communist nonlaw and was an expedient for provisional compromise between antagonistic systems.²⁹

Beneath Pashukanis' construct lay an unstated ideological legal nihilism for which later he was to strictly account.³⁰ Pashukanis conceded the existence of international law only *arguendo*. He judged that the lack of a centralized international enforcement mechanism required the Marxist-Leninist conclusion that there was no international law. By this, he meant that a dominant international interest could not enforce its will upon other international interests. To the extent that he recognized international law, he saw it as a means to obtain, through agreement, a tactical compromise with the international bourgeoisie.

Lenin's guidelines on the utility of compromise left little question that accommodation was a tool for use in the dialectical struggle:

To tie one's hands in advance, to tell the foe openly—a foe now armed better than we are—whether or not we shall fight with him, and when, is not the revolutionary spirit, but stupidity. To accept battle when this is known to be

²⁸*Id.*, at 17 note 170.

²⁹Lapenna, *supra* note 10, at 759.

³⁰*Id.* During his zenith, Pashukanis held top Soviet academic legal positions. In 1935 he retracted his theories after intense criticism from both academic and political quarters of his passing play at legal nihilism. In 1936 he was stripped of his positions. In 1937 he was executed. After Stalin's death, Pashukanis was partly rehabilitated, and his universalist theory of international law as restated by other authorities again found a measure of acceptability. See Hazard, *Renewed Emphasis Upon a Socialist International Law*, 65 Am. J. Int'l L. 143 (1971) [hereinafter cited as Hazard, *Renewed Emphasis*].

an advantage of the enemy and not ourselves is a crime. The policies of the revolutionary class which do not know how to carry through an adroit maneuver, a tolerationist policy, and compromise so as to evade a battle known to be disadvantageous are good for naught.³¹

The eclipse of the provisional compromise theory of Pashukanis is attributable to the rise and prevalence until 1938 of the view, represented typically by M. Rappoport, that it was the merciless class struggle alone which determined the nature of contemporary international law. This rather random and apocalyptic approach to international law was rejected in turn by Andrei Vyshinsky in 1938. Vyshinsky, then doyen of the Soviet legal community, condemned Rappoport's ruthless class struggle formula as harmful to the Soviet state. He rejected also Pashukanis' provisional compromise approach as counterrevolutionary.

Synthesizing these two extremes, Vyshinsky proclaimed the formula of "struggle and cooperation" as the basis of international law. Retaining the defensive aspects of positivism and unilateral characterization, Vyshinsky brought to his definition of international law the two previously elusive aspects of class basis and enforcement mechanism:

We define international law as the totality of norms regulating the relations between states in the process of their struggle and cooperation—expressing the wills of the ruling classes of those states—whose application is assured by the compulsory power of the states, whether individually or collectively.³²

The universalist view of Vyshinsky was to hold exclusive sway until 1956, and decreasingly thereafter until 1958. At that later

³¹E. Pashukanis, *Sovetskoe Gosudarstvo i Revolyutsiya Prava* (The Soviet State and the Revolution in Law), No. 11-12, at 16-49 (1930), citing V. Lenin, *The Children's Disease of Leftism in Communism* (1920), translated and collected in Babb & Hazard, *Soviet Legal Philosophy* 244-45 (1951).

³²A. Vyshinsky, *Voprosy Mezhdunarodnogo Prava i Mezhdunarodnoy Politiki* (Questions of International Law and International Politics) 480 (1949) quoted by Lapenna, *supra* note 10, at 760.

date, it was thought that relations between the post-World War II socialist bloc countries, with their common bases and interests, were bringing an increasingly socialist orientation to general international law. This incipient socialist cooptation of general international law was aided, in the Soviet view, by the greater acceptability to emerging, formerly colonial polities, of socialist instead of bourgeois values.

In 1956, the Twentieth Congress of the Communist Party of the Soviet Union ordered the entire matter of the nature of international law examined in light of these developments. In 1958, G. I. Tunkin assayed the emergence of distinctively socialist principles in general international law. Though universal international law remained applicable to all agreeing states, Tunkin recognized as well that among socialist states a new commonly shared ethic had come to influence relations. This ethic he labeled "socialist, or proletarian, internationalism."

By 1962, Tunkin had reconciled this multifaceted basis of international law with universality by way of the Marxian dialectic. He claimed that general international law consisted of several socially different elements. Those components pertaining to the relationship of struggle and cooperation between states of differing social systems were said to be the principles of the law of peaceful coexistence. Those components applicable to socialist relations, *i.e.* "socialist internationalism," were founded on conflict-free cooperation.

This diversity of bases was not the bifurcation of international law it seemed. It was in ideological terms the linear, historical, dialectical perfection from lower to higher, from bourgeois to socialist. Thus, within a universal, general international law, "reactionary" norms were seen as evolving into more progressive forms by their interplay with socialist influences through the relations of peaceful coexistence. The ultimate principles of socialist internationalism represent a finished product of law at the higher end of the general international law spectrum, the harmonization of interests through the cooperation of nonantagonistic socialist states.

Under this formulation, the status of contemporary general international law at any period is the dialectical moment of developmental connection in this interplay between values of bourgeois and

socialist legality. The fully developed principles of socialist internationalism were no longer subject to such dialectical interplay with bourgeois principles, and emphasis in the body of general international law had tipped in balance from bourgeois to socialist values.³³ This socialist-tinged contemporary international law proclaimed by the Soviets bears closer examination from an ideological perspective, both as to structure and content.

III. THE DISTINGUISHING FEATURES OF THE CONTEMPORARY SOVIET VIEW OF INTERNATIONAL LAW

A. GENERAL

The Soviet view of the structure and content of international law is foremost a reflection of Soviet foreign policy needs.³⁴ Those foreign policy objectives are said to be peace and the free development of peoples.³⁵ More directly, the policy of peaceful coexistence and its supporting law are employed to strengthen the world position of the Soviet Union and to promote its national self-interest generally. The simultaneous achievement of several purposes may be seen at the root of the Soviet policy of peaceful coexistence:

- (i) popularity because of the strong appeal of the idea of peace,
- (ii) attaining political maxima in foreign policy without being involved in a world war,
- (iii) further internal development of the Soviet Union for which a long period of peace is an essential condition.³⁶

³³B. Ramundo, *supra* note 17, at 22.

³⁴G. Tunkin, *Theory, supra* note 12, at 273.

³⁵*Id.*, at 278.

³⁶Lapenna, *supra* note 10, at 774. Concerning the first of the quoted purposes, popularity, the popularity of peaceful coexistence may lead to acceptance of the Soviet approach in other respects as well.

Implicit during the reign of peace which would prevail under this Soviet scenario for inter-class *detente* is the continued automatic operation of the dialectical development toward world socialism. Peace would assure the preservation and strengthening of socialistic gains. At the same time, it would allow full play of the contradictions, both reactionary and progressive, within and among bourgeois states.³⁷ The developmental thrust of these contradictions historically can be only "progress," that is, the emergence of socialism.

Assured of the attainment of their goal of world communism without ultimate recourse to a gain-cancelling nuclear war, the Soviets insist that the policy of peaceful coexistence is not a temporary or tactical propogandistic ruse: it is a general line of historical development.³⁸ The Soviet people know that time is working in their favor and that each additional year of peaceful coexistence of the two systems, the socialist and the capitalist, strengthens the former and undermines the latter.³⁹

These forces operate toward achievement of Soviet world objectives to the maximum possible extent. They are complemented by a law of peaceful coexistence, maximally portrayed as the new universal international law.⁴⁰ A minimum foreign policy objective con-

³⁷W. Zimmerman, *Soviet Perspectives on International Relations* 91 (1969).

³⁸See Khrushchev, *On Peaceful Coexistence*, 38 *Foreign Aff.* 1 (1959).

³⁹E. Korovin, *Vklad SSSR v Mezhdunarodnoe Pravo*, *Sovetskoe Gosudarstvo i Pravo*, No. 11, at 30 (Nov. 1947), cited in Goodman, *The Soviet Design for a World State* 179 (1960).

⁴⁰Ramundo, *Fraternal Assistance to Czechoslovakia: The Law of Peaceful Coexistence Unmasked*, 6 *J. L. & Econ. Dev.* 16 (1969) [hereinafter cited as *Ramundo, Unmasked*].

Since 1956, the Soviets have claimed that the law of coexistence is contemporary international law on two grounds. First, in Marxist terms of base and super-structure, the objective conditions of the peaceful coexistence of socialist and capitalist states demand the law of peaceful coexistence. Second, in non-Marxist terms, the world community's general acceptance of the Charter of the United Nations, . . . is said to embody the principles of peaceful coexistence. To further buttress the position of the law of coexistence, the Soviets have sought its express acceptance through codification, ostensibly because of the need continuously to update the law to keep pace with contemporary social development. Western resistance has been based on the claim that peaceful coexistence is too pro-Soviet in its orientation, and too susceptible to exploitation to be acceptable as the basis for world order; it is generally felt in the West

tinues to be full flexibility internationally to pursue Soviet national goals. The supporting minimal law of peaceful coexistence in this sense is the defensive "... strict insistence upon positivism and the right to reject the binding force of principles deemed nonprogressive or reactionary."⁴¹ Both the minimum and maximum Soviet objectives are served by the positivistic minimum approach.

Thus, in describing the operation of the Soviet model, Tunkin now reasserts that, since there is no unified world-community view internationally, the interstate law is necessarily inter-class law.⁴² There being no unified view, norm formulation can be only by the agreement of states.⁴³

As a bow in the direction of *jus cogens*, Tunkin states that it is generally recognized that imperative principles and norms exist in contemporary international law.⁴⁴ The content of these imperative principles, of course, is subject to varying interpretation according to the particular class orientation from which the legal system is viewed. Compatibility of bourgeois notions of *jus cogens* with the Marxian laws of societal development therefore determines the effectiveness and ultimately the legal validity of the imperative norm.⁴⁵ As to the inter-class applicability of *jus cogens*, it is only

that the vagueness and ambivalence of the component principles portend mischievous ease of characterization in the Soviet interest.

Ramundo, *National Interest*, *supra* note 22, at 967. For a detailed background on unsuccessful Soviet attempts to win universal codification of the law of peaceful coexistence, see Hazard, *Coexistence Law Bows Out*, 59 Am. J. Int'l L. 59 (1965)

⁴¹Ramundo, *Unmasked*, *supra* note 40, at 26.

⁴²G. Tunkin, *Theory*, *supra* note 12, at 27. Herein Tunkin, for dialectical reasons, faults two Western legal scholars, DeVisser and Alwyn V. Freeman, for seeing a basis of common values as necessary for international law. Says Tunkin:

The concept that the basis of law is community, particularly a common ideology, is completely unfounded The history of human society shows completely the opposite: in a pre-class society, where this community between people was more significant, there was no law; only with the emergence of class contradictions, with the destruction of the tribal community does law emerge.

International law, just as municipal law, is a phenomenon peculiar to a class society.

Id. at 26.

⁴³*Id.* at 158.

⁴⁴*Id.* at 157.

⁴⁵*Id.*

natural that agreement is the only effective cement in view of conflicting socialist and nonsocialist value shading. A similar bar exists against socialist acceptance of customary norms of general international law. According to Tunkin:

The formative process resulting in a customary norm of international law . . . is completed when states recognize a customary rule of conduct as a norm of international law.⁴⁶

. . . .

An international custom (or usage) becomes an international legal custom . . . only as a result of such recognition.⁴⁷

B. THE SOVIET LAW OF PEACEFUL COEXISTENCE

It has been said that there is disagreement among Soviet jurists as to the structure and content of the Soviet law of peaceful coexis-

⁴⁶*Id.* at 117.

⁴⁷*Id.* at 118.

⁴⁸*Id.* at 124. Professor Berman underestimates the magnitude of Soviet recognition of the general notion of both *jus cogens* and custom (begging the question of their value content) by himself overlooking the admissibility of value-shaded characterization of these norm sources. Nevertheless, Berman sheds much light on the ideological background for Soviet positivism through contrast with the United States approach to norm formation:

The Soviet emphasis upon treaties as the major and almost exclusive source of international law corresponds not only to the Soviet political interest in retaining freedom of action in the absence of express consent by treaty, but also to the Soviet view of domestic law as the expression of state policy. The United States, created by a revolution that exalted natural rights and due process of law, tends to view the international legal order as founded on similar principles. The Soviet Union, created by a revolution that exalted the state as the political arm of the ruling class, tends to view the international legal order as being founded on the agreement of the wills of states in the international community. Both in international law and domestic law, the Soviet emphasis on legislation as the predominant source of law facilitates the central control of law in the interests of policy and reflects the concept of law as a means of such control.

Berman, *supra* note 24, at 950.

tence. This problem arises from the nonstatic, dialectical view of a law composed of law in being and law in the making: of presently subsumed and desirable principles.⁴⁹

"All jurists, however, agree that the essence of the fundamental principles [of the law of peaceful coexistence] is all that is 'progressive,' that is, in the interest of socialism, usually as defined by the Soviet Union, in legal development."⁵⁰ Thus, a formulation of component principles can never be exhaustive and must be expandable to meet new conditions. The result is a vague and open-ended legal formulation that can be invoked to meet the changing needs of Soviet foreign policy.⁵¹ Tunkin's view of the content and form of the law of peaceful coexistence probably has prevailed among Soviet scholars since 1970.⁵²

Subsumed within the universal scope of this new general international law of peaceful coexistence are two types of class relations to which three types of normative principles apply. All the normative principles, *i.e.*, those acceptable to the Soviets, must have a progressive socialist content. "Reactionary" values have no status as norms since they apply only between capitalist and capitalist, and represent, therefore, a step backward from dialectical, progressive normativeness as well as from universality. Three types of normative principles extant in general international law are correlated with three types of class relations,

- (1) Those applicable [for socialist states] to inter-class,

⁴⁹Ramundo, *National Interest*, *supra* note 22, at 965.

⁵⁰Ramundo, *Unmasked*, *supra* note 40, at 17. "The Soviets had always claimed stridently that the law of peaceful coexistence embodies progressive legal development, present as well as future, and less stridently, that the Soviet Union, the most experienced builder of the new progressive society is in the best position to judge what is progressive." *Id.*

⁵¹Ramundo, *National Interest*, *supra* note 22, at 966. For a recapitulation of various Soviet formulations of the law of peaceful coexistence, see B. Ramundo, *supra* note 17, at 28-31.

⁵²Hazard, *Renewed Emphasis*, *supra* note 30, at 142. Tunkin's views are said by his American translator to "comprise one of the principal legal pillars upon which East-West cooperation has been constructed following the Twentieth Party Congress of the Communist Party of the Soviet Union in 1956." Butler, *Introduction* in G. Tunkin, *Theory*, *supra* note 12, at xx.

i.e., capitalist relations, that is, the norms of the law of peaceful coexistence:

(2) Those applicable to socialist intra-class relations, *i.e.* the norms of "socialist internationalism" which represent a higher development and application of the preceding; and

(3) "Old democratic principles," *i.e.* those normative survivals of the bourgeois general international law which when infused with socialist content of varying degree are suitable for application generally either to inter-class or intra-class relations, *i.e.* to both (1) and (2), above.⁵³

Respectively, the inter-class norms of the law of peaceful coexistence are capsulized by Tunkin as:

1. The principle of nonaggression;
2. The principle of peaceful settlement of disputes;
3. The principle of self-determination of peoples;
4. The principle of disarmament;
5. The principle of respect for human rights;
6. The prohibition of war propaganda; and
7. The principle of peaceful coexistence.⁵⁴

The intra-class principles of "socialist internationalism" or "proletarian internationalism," to be discussed more fully below, are loosely described by Tunkin as:

1. Fraternal friendship and close cooperation;
2. Comradely mutual assistance in the protection of socialist gains; and
3. Socialist or proletarian internationalism.⁵⁵

The "old democratic principles," applicable with some socialist value-adjustment to both inter-class and intra-class state relations, are, according to Tunkin:

⁵³See generally, G. Tunkin, *Theory*, *supra* note 12. The bracketed words are the author's.

⁵⁴*Id.* at 49-86.

⁵⁵*Id.* at 431, *et seq.*

1. Respect for sovereignty;
2. Noninterference in internal affairs;
3. The right to self-determination;
4. Equality of states;
5. Good neighborly fulfillment of international obligations (*pacta sunt servanda*); and
6. "Et cetera."⁵⁶

According to the Soviet view, the principles of peaceful coexistence entered into law in the early years of the Soviet state, indeed shortly after the period of foreign military intervention in the post-revolutionary civil war. At this time, Lenin was said to have committed the Party to economic competition as the really "decisive sphere of struggle for the states of the two systems."⁵⁷ The principle of peaceful coexistence, as law, received first international expression, according to Tunkin, in normalization treaties with countries of the East—Persia, Afghanistan and Turkey, concluded in the early years of the Russian Soviet Republic.⁵⁸

The February 1920 peace treaty between Soviet Russia and Estonia is said by an American scholar to be the first fairly durable communist-bourgeois agreement.

This treaty marked the formal recognition of a stalemate of forces in which Soviet Russia could neither be crushed nor expanded further, and thus opened what proved to be a prolonged period of relatively normal relations with capitalist states. From this time onward, the subject of

⁵⁶*Id.* at 86.

⁵⁷G. Tunkin, *Theory*, *supra* note 12, at 17.

⁵⁸*Id.* at 18. Most non-Soviet observers, however, are uniform in dating the emergence of principles identifiable with the present Soviet principles of the law of peaceful coexistence to the five 1954 principles of *Pancha Shila*, concerning the settlement of the Tibetan border dispute between India and China.

These principles were: (1) the maintenance of mutual respect for the territorial integrity and sovereignty of other states; (2) nonaggression, *i.e.*, the mutual obligation not to attack other states; (3) the mutual obligation of nonintervention in the internal affairs of other states; (4) mutual equality and the granting of equal advantages; and (5) peaceful coexistence.

The 1955 Bandung Conference of Afro-Asian states formally adopted these principles as representative of their collective aspirations and expressive of their united anti-colonialism and hostility toward Western capitalism. W. Friedman, *The Changing Structure of International Law* 322 (1964).

peaceful coexistence acquired a prominent status in Soviet thought.⁵⁹

Lenin added a further personal touch to the Soviet pursuit of peaceful coexistence through his formal instructions to the Soviet delegation at the 1922 Genoa conference on European economic reconstruction. Tunkin says, "Lenin pointed out that peaceful coexistence necessarily includes mutually advantageous agreements of the Soviet state with capitalist countries not only upon economic, but also political questions. . . . At the same time Lenin stressed that the Soviet state in making compromises, would not depart from positions of principle."⁶⁰ As in the Estonian case, a certain cynicism underlay the "compromise" and perhaps underwrote Soviet positions of principle. For example, in unofficial notes to G. V. Chicherin, the Soviet delegation chief at Genoa, Lenin is reported to have referred to Soviet concessions at this conference as temporary and purely tactical.⁶¹

Tunkin faults critics of peaceful coexistence who attempt to represent the concept of peaceful coexistence as merely a "temporary tactical maneuver of communists"⁶² or as "only a new tactical phase in weakening the bonds of the free world,"⁶³ or as basically incon-

⁵⁹Goodman, *supra* note 39, at 166. Inevitably, ulterior motives are said to have impelled this agreement and rendered it no true expression of nonantagonism. The Soviet leadership is said to have been loathe to spill in Estonia the blood of Red Army men so long as Estonia could be brought into the Soviet orbit by its own internal disintegration, properly assisted by covert Soviet support. *Id.*

⁶⁰G. Tunkin, *Theory*, *supra* note 12, at 17. As reported by Lapenna:

Peaceful coexistence does not mean the "coexistence of ideas." *Kommunist*, the theoretical and political journal of the Central Committee of the Communist Party of the Soviet Union wrote in this respect: "But does this principle, which concerns relations among states entail the slightest slackening of the struggle between the ideologies, the world outlook of the antagonistic classes. No! Because it is impossible to reconcile antagonistic classes and to eliminate the class struggle of ideas. Socialism will inevitably win over capitalism, but this victory is impossible without a struggle of ideas, without the victory of the revolutionary Marxist-Leninist ideology."

Kommunist, No. 8, at 62 (1962), translated in 14 *Curr. Dig. Soviet Press* 11-14 (No. 23), quoted in Lapenna, *supra* note 10, at 733.

⁶¹Goodman, *supra* note 39, at 168.

⁶²G. Tunkin, *Theory*, *supra* note 12, at 43. Tunkin refers here to the view of United States Senator William Knowland as of 1962.

⁶³*Id.* Cited as the view of, among others, the former West German Chancellor, Conrad Adenauer.

sistent with Communist doctrine.⁶⁴ "It is more," says Tunkin, "than an absence of war inspired only by the alternative of thermonuclear destruction."⁶⁵ Peaceful coexistence is not a passive hiatus⁶⁶ or the mere "maintenance of peace between the two opposed systems."⁶⁷ "Peaceful coexistence," says Tunkin, "is not something fixed once and for all. Peaceful coexistence will vary in time from the standpoint of breadth and depth and reliability and is therefore dynamic, inherently active and frankly pointed to both cooperation and struggle."⁶⁸

The content of the law of peaceful coexistence, its principles, must thusly be appreciated as "dynamic" and "variable," contrary to the Western inclination toward rigorous legal normativism. For either perspective, the content of each principle is largely conjectural. If such ambiguity should prove insufficient for maximum Soviet flexibility, the circular catchall of the law of peaceful coexistence, *i.e.*, the component principle of peaceful coexistence, is the most open-ended and ambiguous of all. It is with the unstated progressive spirit of this principle that all others must harmonize.

Tunkin's *Theory of International Law* is the foremost Soviet teaching text on that subject, and his hypothetical empiricism is noteworthy in his assay of the content of the component principles of the law of peaceful coexistence.

1. *The principle of nonaggression*

In the Soviet view, this principle has obtained legal normativeness through the agreement of states, and separately by the very progressiveness of the principle from the Marxist-Leninist view of a

⁶⁴*Id.* Cited as the view, in 1961 of, among others, the Deputy Permanent Representative of the United States at the United Nations, Ambassador Plimpton.

⁶⁵*Id.* at 44. Tunkin rejects this thesis of H. Morganthau, expressed in *A New Foreign Policy for the United States* (1969).

⁶⁶*Id.* at 45. Tunkin is here citing two Yugoslav jurists, Bartos and Radoikovich, who critically call for a more outgoing building of peace in a more positive or "active peaceful coexistence."

⁶⁷*Id.* at 43. This is said by Tunkin to be the view of American Professor John N. Hazard.

⁶⁸*Id.* at 46. "The intensity of struggle and the degree of cooperation differ in relations among various, and between one and the same states on various questions and at various times." *Id.* at 37.

developing *jus cogens*. Normativeness by agreement is had through operation of the United Nations Charter as to the prohibition against the use of force or the threat of force.

A further unstated but imperative progressive requirement of international law prescribes the "duty of states to refrain in their international relations from military, political, economic or any other form of coercion aimed at the political independence or territorial integrity of any state."⁶⁹ Tunkin, unlike Lenin⁷⁰ and Vyshinsky⁷¹ earlier, sees no diminution of the significance of the principle of nonaggression because of the frequent absence of effective sanctions against violators.

This principle of the law of peaceful coexistence is in force only in bourgeois-socialist state relations. It can have no applicability to harmonious intra-socialist state relations. Additionally, this double standard of nonaggression is complemented by similar differential treatment of the two traditional international law notions of the right of self-determination of peoples and the principle of respect for state sovereignty.

The special content of these two norms, grouped for purposes of intra-socialist relations under the principle of "socialist internationalism," will be discussed more fully below. Particular reference will be made to the 1968 experience of Czechoslovakia.

2. *The principle of peaceful settlement of disputes*

This principle is described as the corollary to the prohibition against the use of all types of force between states. Pacific settlement is to be accomplished "on the basis of sovereign equality of states and in accordance with the principle of free choice of means"

⁶⁹*Id.* at 54. Compare Preamble, U.N. General Assembly Declaration of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 121, U.N. Doc. A/8028 (1970).

⁷⁰See H. Babb & J. Hazard, *supra* note 31, at 244-45. On this account, Tunkin scores the view of Belgian legal scholar DeVisscher, while passing over a similar proposition which was among the very few with international law import actually subscribed to by Lenin.

⁷¹See generally A. Vyshinsky, *supra* note 32.

including those of article 33 of the United Nations Charter.⁷² Tunkin therefore views any compulsory jurisdiction over disputes as coercive *per se*. Suggestions that the International Court of Justice might legitimately operate in this fashion in the name of a strengthened world order are thought to be inadmissible "panacea."

3. *The principle of self-determination of peoples*

This principle is at the base of the contemporary anti-colonial orientation of general international law, partly by operation of the Charter of the United Nations and partly due to the inherent progressiveness of the value.⁷³ The positiveness of self-determination is so clearly manifest that states of the world community are obliged by this principle of law to render support to peoples⁷⁴ struggling against colonialism.⁷⁵

Such struggles can be suppressed only in violation of international law, both because of this principle, and, in the event of international suppression, in violation of complementing principles valuing nonintervention. Indeed, the nonrecognition of a new state formed by an anti-colonial or anti-reactionary popular movement is a form of intervention in the affairs of other states.⁷⁶

One step below the threshold of *de jure* state recognition, the Soviets claim that a group struggling for national liberation and independence and the creation of its own state is itself a "nation." Such a group must "under contemporary international law be considered to be the subject of international law . . . even though due to opposition it might not yet have achieved this objective."⁷⁷

The inter-class principle of self-determination with its bias in favor of progressive popular independence movements, of course, has no applicability among states where the even more progressive socialist internationalism principle of self-determination insures the

⁷²G. Tunkin, *Theory*, *supra* note 12, at 60.

⁷³B. Ramundo, *supra* note 17, at 144.

⁷⁴*Id.*

⁷⁵G. Tunkin, *Theory*, *supra* note 12, at 67.

⁷⁶B. Ramundo, *supra* note 17, at 100.

⁷⁷G. Tunkin, *Theory*, *supra* note 12, at 68. Especially noteworthy is the recent boost in international legal personality of certain movements involved in struggles previously considered to be purely internal to a sovereign territory.

dialectical progress of peoples away from reactionary diversions, as in Czechoslovakia in 1968, *infra*.

4. *The principle of disarmament*

"[P]rogress toward fulfillment of the principle of disarmament must be the result of agreement between states, and in this sense, the development of the content of the principle is only at the formative stage."⁷⁸ The United Nations Charter prohibition of aggression is seen as the logical call to disarmament and the end of the arms race. It is said that such progressive Charter principles are regrettably vague and only inferential. This weakness is attributed to the resistance of various capitalist states during Charter formulation.⁷⁹

The 1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict extended the full applicability of the supplemental 1949 Geneva Conventions to:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in their exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, art. 1(4), *quoted in* 16 Int'l Leg. Materials 1391, 1397 (1977).

Previously, such conflicts were wholly within the police power of the incumbent government of the territorial state concerned. Rebels were subject to treatment as traitors or criminals in the discretion of the government involved. The effect of article 1, Protocol I, is to confer the status of "lawful combatants" upon insurgents participating in the struggles described above. If such insurgents are captured, they are entitled to prisoner-of-war status under article 1. Both statuses of course depend upon satisfaction of other technical requirements concerning command relationships and military status of the insurgents. In short, such struggles, by inclusion in Protocol I, have been internationalized even while objectively remaining internal armed conflicts.

Other equally "internal" armed conflicts not sharing the "progressive" character of article 1, Protocol I conflict are subject to a smaller range of humanitarian protections. These are provided by Protocol II, the companion document to Protocol I. Insurgents in such nonprogressive struggles remain subject to traditional sanctions imposed by the incumbent government. The result of such "progressive" norm formation is enhanced recruiting leverage for internal forces fighting for "progressive" causes.

⁷⁸G. Tunkin, *supra* note 12, at 79.

⁷⁹*Id.* at 77.

Consistent with Soviet espousal of disarmament at an early stage is the expression in the 1955 Warsaw Pact agreement of socialist willingness to enter agreements for ". . . the adoption of effective measures for the general reduction of armaments and the prohibition of atomic, hydrogen and other methods of mass destruction."⁸⁰

5. *The principle of respect for human rights*

This principle is approached by the Soviet invocation of a "domestic affairs" buffer. Pointing out progressive Soviet social, economic and cultural legislation, "e.g. the right to work, the right to social security, the right to education, and so forth,"⁸¹ Tunkin states that "the extent and character of human rights within a specific state (they do not exist outside a state) are defined in the final analysis by the nature of the state, and this nature is itself a product of the economic system of a given society."⁸²

Logically conforming to this base-superstructure paradigm of law, Tunkin posits therefore that "both the extent of rights and their substance are different in states with different social systems."⁸³ At best, Tunkin sees international human rights declarations as indicative of incipient values only. Such declarations do "not mean that human rights are directly regulated by international law, nor that

⁸⁰Treaty of Friendship, Cooperation and Mutual Assistance (Warsaw Pact), art. 2, 219 U.N.T.S. 3 (1955).

⁸¹G. Tunkin, *Theory*, *supra* note 12, at 79.

⁸²*Id.* at 82.

⁸³*Id.* The exercise of various civil rights which in the Soviet Union may conflict with overall needs for social control, or with the long range goal of the building of communism, are subject to express defeasance under the new (1977) Soviet Constitution. For example, article 50 requires that the exercise of the rights of free speech, press, and assembly be thoroughly harmonious with the interests of socialism. Constitution (Basic Law) of the Union of Soviet Socialist Republics, art. 50, in 29 *Curr. Dig. Soviet Press* 1, 6 (9 Nov. 1977). For examples of similar defeasors in the 1936 constitution, see art. 125 thereof in J. Hazard, *The Soviet System of Government* 239 (4th ed. 1968) [hereinafter cited as J. Hazard, *Government*].

This subordination of individual rights to the common interest in socialism, or alternatively for the sake of social control, is generically labeled "socialist legality" at the domestic level. Through parallelism it is applied by Tunkin internationally to create a *laissez faire* "non-principle."

they have ceased to basically be the domestic affairs of a state."⁸⁴ Further, "[c]onventions on human rights do not grant rights directly to individuals, but establish mutual obligations of states to grant such rights to individuals, as through implementing municipal legislation of individual states, taking into account the special features of their social system."⁸⁵

6. *The prohibition of war propaganda*

This limitation is seen by the Soviets as conforming to both the United Nations Charter and to the prohibition against aggressive war implied in the recognition by the Nuremberg International Military Tribunal of such war as a crime against peace.⁸⁶

7. *The principle of peaceful coexistence*

This is the bootstrap to the inter-class law of peaceful coexistence, by which the general body of that law and each principle acquire elasticity. This component principle of peaceful coexistence presupposes the existence of, but is not limited by, the other elements of the overall law of peaceful coexistence. Aptly put, the principle "reflects their content in a generalized form, although it does not constitute the simple sum of these principles."⁸⁷ At the minimum pole of the Soviet maximum-minimum objectives is the inclusion in this principle of "the mutual obligation not to dispute the legality of another state's political, economic and social system."⁸⁸

C. THE SOVIET PRINCIPLE OF SOCIALIST INTERNATIONALISM

In the familiar Marxist-Leninist legalese of base and superstructure, the Soviets explain the dialectical emergence of a better,

⁸⁴G. Tunkin, *Theory*, *supra* note 12. The "domestic affairs" defense was the basic Soviet theme throughout the 1977-78 Belgrade follow-up meeting which assessed Party performance under the Helsinki final act of 1975. See, e.g., Matveyev, *Who is Holding Up the Belgrade Meeting's Work*, 29 *Curr. Dig. Soviet Press* 19 (28 Dec. 1977).

⁸⁵*Id.* at 83.

⁸⁶*Id.*

⁸⁷*Id.* at 78.

⁸⁸*Id.* at 74.

higher magnitude of international law applicable in intra-socialist relations.

The world system of socialism . . . is a new type of economic and political relationship between countries. Socialist countries have an economic basis of the same type—social ownership of the means of production; a state system of the same type—the authority of the people headed by the working class; a single ideology—Marxism-Leninism; common interests in defending revolutionary achievements and national independence from infringements of the imperialist camp; a single great objective—communism. This socio-economic and political community creates the objective basis for lasting and friendly inter-state relations in the socialist camp.⁸⁹

The problem is how to preserve the universality of general international law despite divergent bases and superstructures of at least the two main types of social systems, the bourgeois and the socialist. Dealing with this problem, Tunkin explains that principles of general international law are not cast aside as the focus of the inquiry shifts to intra-socialist relations. Instead, those principles are merely dialectically negated. In intra-socialist state practice, the old quality of the norm gives way to norms having a higher, progressive quality. A saving, universal dialectical thread links, and therefore universalizes, new and old.⁹⁰ At this linking junction we find contemporary, general international law.

The textual but less than exhaustive explication of the principles of socialist internationalism, again by Tunkin, is circular. He identifies two components, first, fraternal friendship and close cooperation, and second, comradely mutual assistance in the protection of socialist gains. Both are infused by and subsumed in a third, socialist or proletarian internationalism. The content of these principles is tersely sketched, first,

[i]n accordance with the international legal principles of fraternal friendship and close cooperation, each state of

⁸⁹Programma Kommunisticheskoi Partii Sovetskogo Sojuza (Program of the Communist Party of the Soviet Union) (1964), cited by G. Tunkin, *Theory*, *supra* note 12, at 427.

⁹⁰*Id.* at 445.

the socialist commonwealth has not only a moral and political, but also a legal duty to strengthen friendship and close cooperation with the other countries of the world system of socialism;⁹¹

second,

[t]he principle of comradely mutual assistance includes the right of each state of the world system of socialism to obtain assistance from other socialist countries and, at the same time, the obligation of each socialist state to render assistance to the other socialist countries. This obligation of mutual assistance applies equally to the spheres of political, economic, military and other relations;⁹²

and third,

[i]n addition to that which enters into the content of the principles of fraternal friendship, close cooperation, and mutual assistance as principles derived from the broader principle—the principle of proletarian internationalism, the latter also provides that each state of the socialist camp must take into account in its activity, both the national interests of its people and the common interest of the entire system of world socialism.⁹³

⁹¹*Id.* at 435.

⁹²*Id.* Incipient socialist states, often loosely characterized as progressive factions or "peoples", likewise enjoy this right of "comradely" assistance from the Soviet Union in the establishment and strengthening of socialism. This phenomenon is presently vital in certain areas of Africa. See the reciprocal expression of solidarity in the Constitution of the People's Republic of Angola, art. 15, 2 Rev. Socialist L. 195, 197 (Sept. 1976).

⁹³*Id.* at 437.

The failure to arrive at a definitive formulation stems from the Soviet desire to create the concept of a generalized legal obligation to serve the changing needs of the socialist camp as it marches toward socialism under the leadership of the Soviet Union. Thus conceived, socialist internationalism is a cosmetic device for the ordering of Soviet relationships with client states.

Ramundo, *National Interest*, *supra* note 22, at 967.

Tracing this concept of socialist solidarity back to its Marxist roots requires the use of analogy at two instances. The first is with the call of Marx himself for the unity of the toiling class worldwide, before the existence of any state of the proletariat.⁹⁴ The second parallel is with the socialist unity exemplified by the union of the various sovereign republics in the Union of Soviet Socialist Republics.⁹⁵

Such class and Soviet domestic analogies by implication bring to the international community of socialist states the notion likewise that the national or individual interest is to be subordinated to the common good in the building and strengthening of socialism.⁹⁶ This international subordination of the individual to the collective has been analyzed through matching the principle of socialist internationalism with the Soviet domestic concept of "socialist legality." The latter concept may work a defeasance of individual rights, if their exercise may be incompatible with strengthening of socialism.⁹⁷ Under this formula, it is the Soviet Union, specifically,

⁹⁴*Id.* at 4:

Marx wrote in the founding manifesto of the International Association of Workers: "The experience of the past has showed that a scornful attitude toward a fraternal alliance, which must exist among the workers of various countries and impel them to stand behind each other in their struggle for liberation, is punished by the general defeat of their uncoordinated efforts."

⁹⁵*Id.* This unification was to build socialism and "to defend the gains of the socialist revolution together from the swoops of imperialists. Relations of the new type between the Soviet republics, governed by the formation of the U.S.S.R., were molded precisely on the basis of the principles of proletarian internationalism." *Id.* at 5.

The fifteen Union republics of the Soviet Union, one of which is Russia itself, are each sovereign legal entities under international law with the right to secede from the Union. Constitution (Basic Law) of the Union of Soviet Socialist Republics, art. 72, 29 *Curr. Dig. Soviet Press* 7 (9 Nov. 1977). This status and right, however, are to be exercised in the overall interests of strengthening socialism, and separatism is, therefore, at least until the dialectical attainment of communism, historically antithetical.

⁹⁶"This redefinition (of sovereignty) is putting the members of the commonwealth in a new legal relationship. Outsiders may now ask whether the result is not to create a new form of federation in law even though the term 'federation' is not used." Hazard, *Renewed Emphasis*, *supra* note 30, at 147.

⁹⁷Ramundo, *Unmasked*, *supra* note 40, at 21.

the Communist Party of the Soviet Union, which would decide what conduct of nations is "selfishly egocentric" and which is progressive.

The 1968 case of Czechoslovakia is illustrative. The socialist parameters on national sovereignty and self-determination were officially, if hazily, described by *Pravda* afterward. In reconciling the military action of five Warsaw Pact countries with world protests over the violation of Czech sovereignty and self-determination, it was said:

The groundlessness of such reasoning consists primarily in that it is based on an abstract, non-class approach to the question of sovereignty and the rights of nations to self-determination.⁹⁸

. . . .

[I]n the Czech exercise of self-determination] none of their decisions should change either socialism in their country or the fundamental interests of other socialist countries and the whole working class movement which is working for socialism.⁹⁹

It was thought that the Czech deviations, far from being an exercise of the sovereign right of Czech "progressive" self-determination, would have negated the self-determination of the toiling masses and represented an anti-dialectical deprivation of the sovereignty of Czechoslovakia by turning the country over to the enemies of the Czech people, the imperialists.¹⁰⁰

Effecting this solidarity by military means through interaction of the principle of socialist internationalism with those of sovereignty and self-determination was not elective for the socialist community.¹⁰¹ Mandatory solidarity is grounded, according to Tunkin, on

⁹⁸*Sovereignty and International Duties of Socialist Countries*, *Pravda*, September 27, 1968, reprinted by *The New York Times*, September 27, 1968, and in 7 *Int'l Leg. Materials* 1323 (1968) [hereinafter cited as *Sovereignty*, *Pravda*].

⁹⁹*Id.* at 1324.

¹⁰⁰*Suvernitel i Internatsional 'nye Obiazannosti Socialisticheskikh Stran (Sovereignty and the International Obligations of Socialist Countries)*, *Pravda*, September 26, 1968, at 4, cited by Ramundo, *Unmasked*, *supra* note 40, at 22.

¹⁰¹Ramundo, *Unmasked*, *supra* note 40, at 19, citing Irrinin and Nickolaev, *Sotsialisticheskii Internatsionalizm v Deistvii (Socialist Internationalism in Action)*, *Sovetskoe Gosudarstvo i Pravo (Soviet State and Law)*, No. 12, at 8 (1968).

Lenin's rejection of the bourgeois notion of self-determination as an instrument for the creation of nation states. Lenin, he says, "stressed that the principle of self-determination is, on the contrary, a means of bringing nations together on the basis of socialism." "The purpose of socialism," Lenin says, "is not only the destruction of those who would splinter mankind into small states and of those who would isolate nations, but also of amalgamating them."¹⁰² Accordingly, in 1963, it was the Soviet view that "[s]upport, consolidation and defense of these gains (of socialism), won at the price of heroic effort and the self-sacrifice of each people represents a common international duty and obligation for all socialist countries" [emphasis supplied].¹⁰³

Tunkin, citing experiences of 1956 in Hungary, of 1968 in Czechoslovakia, and of other times in Korea and in Vietnam, indicates the heavy responsibility of the Soviet Union in this regard.¹⁰⁴ The principles of socialist internationalism have become international legal principles by way of custom. This is evidenced by practice of these types as well as by treaty.¹⁰⁵

Post-1968 treaty acceptance of the aspects of socialist internationalism learned through the Czech experience is noted in the case of the Treaty of Friendship, Cooperation, and Mutual Assistance Between the Union of Soviet Socialist Republics and the German Democratic Republic, signed at Moscow on October 7, 1975.¹⁰⁶ This 25-year treaty is unequivocal in its reaffirmation "that the preservation, consolidation and defense of the socialist gains . . . is

¹⁰²G. Tunkin, *Theory*, *supra* note 12, at 10.

¹⁰³*Sovereignty*, *Pravda*, *supra* note 95, at 1324.

¹⁰⁴G. Tunkin, *Theory*, *supra* note 12, at 435. "The Soviet state, as the oldest socialist state whose historic fate has been the most difficult task of paving the way for a new socio-economic formation, always precisely fulfills its duties arising from the principle of socialist internationalism." *Id.*

¹⁰⁵*Id.* at 433 and 441, for examples of economic, cultural and technical assistance provided under the "fraternal friendship and close cooperation" features of socialist internationalism. An example of this socialist cooperation is the Charter of the Council for Mutual Economic Assistance (COMECON), 368 U.N.T.S. 253 (1959). This document provides at article 2, "Purposes and Principles," paragraph 2, that "economic and scientific-technical cooperation shall take place in accordance with the principles of complete equality of states, respect for sovereignty and national interest, mutual advantage and friendly mutual aid."

¹⁰⁶Reproduced in *New Times* 41/75 at pp. 12-13.

the common internationalist duty of the socialist countries."¹⁰⁷ Echoing *Pravda*, the parties "proclaim their readiness to take the necessary measures to protect and defend the historic gains of socialism and the security and independence of both countries."¹⁰⁸

D. THE NEW FUNCTIONS OF "OLD DEMOCRATIC PRINCIPLES"

Supplemental to both the principle of peaceful coexistence and that of socialist internationalism in Soviet international law are familiar-sounding "old democratic principles." These vary in their socialist content according to which of the two branches of international law they support. Again, the universality of the entire body of law, including these old principles, is preserved through operation of the moment of dialectical connection during the process of linear refinement of each old norm on its progression to a purely socialist principle. These retained principles function in each branch of the international law with less than normative weight because they are not sufficiently progressive to rank as component principles of either peaceful coexistence or socialist internationalism.¹⁰⁹

The inter-class operation of the old democratic principles of respect for state sovereignty, noninterference in internal affairs, the right to self-determination, equality of states, and *pacta sunt servanda*, is subject to the familiar corrective influence of the ambiguous, but progressive, principle of peaceful coexistence. Tunkin describes this evolution as occurring "largely through the mechanism of interpretation in such a manner as to root out reactionary institutions, principles and norms, and ascribe a democratic or progressive content."¹¹⁰

The intra-socialist operation of old democratic principles of the same name is likewise subject to automatic dialectical correction through their circular relation and subordination to the open-ended principle of socialist internationalism.¹¹¹ Their exercise, as partly

¹⁰⁷*Id.* at 12.

¹⁰⁸*Id.* at 13.

¹⁰⁹Ramundo, *National Interest*, *supra* note 22, at 967.

¹¹⁰G. Tunkin, *Theory*, *supra* note 12, at 87.

¹¹¹*Id.* at 439.

illuminated by examination of the history of fraternal and comradely mutual assistance, may not be toward egotistically national ends. Rather, "they aim at strengthening and developing relations of the fraternal commonwealth of socialist countries, at ensuring the construction of socialism and communism, and at protecting the gains of socialism from the infringements of forces hostile to socialism."¹¹²

IV. CONCLUSION

Through the creation of new norms and by the retention of certain traditional norms of international law, the Soviets have created their own framework for the international legal order.¹¹³ As seen by the Soviets, the value underlying such norm-making is the historical Marxist-Leninist developmental pressure toward world communism. By operation of historical factors, the Soviet Union is inescapably the leading agent in this process. Its national interests and world influence can fairly be equated with interests of a vital world communism.

The Soviets perceive an increasingly anti-imperialistic, anti-bourgeois world trend, mainly inspired by a shift in this direction within various international organizations. As a result, it is the contemporary Soviet view that:

The creative role of the international legal ideas of the October Revolution is far from exhausted. The change of the co-relation of forces to the advantage of socialism and peace ensures a further increase in the role of the international legal ideas of the October Revolution in the development of contemporary international law.¹¹⁴

Despite the inter-class ideological struggle and progression toward world socialism, it is acknowledged by the Soviets that a broad

¹¹²*Id.* at 438.

¹¹³Ramundo, *National Interest*, *supra* note 22, at 967.

¹¹⁴G. Tunkin, *Theory*, *supra* note 12, at 20.

range of accommodation is possible. Most fruitful in this field and most pursued in current activity are economic and technical accords beneficial to the Soviets. The lack of distinction between ideology and pragmatism in this regard is synthesized in a 1956 critique by Khrushchev of Stalin's view on the degeneracy of capitalist productive capability:

We must study the capitalist economy attentively and not take a simplified view of Lenin's theses of the decay of imperialism; he [Lenin] noted, "but study the best that the capitalist countries' science and technology have to offer in order to use the achievements of world technological progression in the interests of socialism."¹¹⁵

Additionally, one step beyond the purely material toward somewhat more political areas, Soviet-Western accommodation has been achieved in matters necessary for global dealings in a complex, technologically interrelated world system. Such a normalization of "housekeeping" relationships include, for example, civil aviation, desalinization, and telecommunication agreements.¹¹⁶

Beyond these fairly routine inter-state dealings, there is said to be a wide field of cooperation also on political questions. Precedents include the creation of the United Nations, various agreements on Indochina, the 1963 nuclear test ban treaty and the 1968 nuclear nonproliferation agreement. Still other examples are the 1970 agreements with the Federal Republic of Germany and the 1971 Quadripartite Agreement on Berlin.¹¹⁷

The more political the scope of the accord, however, the more likely are the Soviets to retrench into ideological defensism. In so doing, they preserve national flexibility by formulations which have

¹¹⁵Address by N. S. Khrushchev to the Twentieth Party Congress of the Communist Party of the Soviet Union, cited by M. Gehlen, *supra* note 7, at 46.

¹¹⁶Berman, *supra* note 24, at 955. For lists and discussion of other such house-keeping accords, see Berman, *id.*; Hildebrand, *supra* note 2, at 188; McWhirney, *Changing International Law Method and Objectives for the Era of the Soviet-Western Detente*, 59 Am. J. Int'l L. 1 (1965).

¹¹⁷G. Tunkin, *Theory*, *supra* note 12, at 38.

special Marxist-Leninist significance. Thus, article I of the 1972 agreement on the basic principles underlying current Soviet-United States *detente* states that the new relationship will be conducted on the basis of "peaceful coexistence." Normal relations are to be conducted according to the principles of "sovereignty," "equality," "noninterference in internal affairs," and "mutual advantage."¹¹⁸ The 1975 Helsinki Final Act, joined in by thirty-five nations of diverse social structures, but by its terms of no binding effect, makes similar reference to ideologically pregnant socialist values.¹¹⁹

Many American scholars in Soviet legal matters have noted that incrementalism is the only workable approach to breaking down Soviet restrictions on the scope of inter-class accommodation.¹²⁰ It is most strikingly said that "instant peace cannot be achieved by starting with those problems over which we are hopelessly divided by our respective security interests."¹²¹ The Soviet view of compromise is still reminiscent of Korovin's restrictive categories of inter-class agreement enumerated above.

Thus, the Soviet view of compromise through international law sees a potential for agreement up to but stopping at "ideological problems."¹²² The areas of mutual accommodation are, therefore, peripheral and the "conflict persists at the center."¹²³

Peaceful coexistence is not a conflictless life. As long as different social-political systems continue to exist, the antagonisms between them are unavoidable. Peaceful

¹¹⁸Basic Principles of Relations Between the United States of America and the Union of Soviet Socialist Republics, May 29, 1972, United States-U.S.S.R., 68 Dep't State Bull. 898 (1972), reprinted in 11 Int'l Leg. Materials 757 (1972).

¹¹⁹Final Act, Conference on Security and Cooperation in Europe, August 1, 1975, reprinted in 14 Int'l Leg. Materials 1293 (1975).

¹²⁰Berman, *supra* note 24, at 960; McWhinney, *supra* note 113, at 2.

¹²¹Berman, *supra* note 24, at 960.

¹²²G. Tunkin, Theory, *supra* note 12, at 48.

¹²³Freeman, *The Impact of Fifty Years of Soviet Theory and Practice on International Law*, Proceedings of the American Society of International Law, 1968, at 210. Alwyn V. Freeman's remarks were delivered as part of a panel discussion held during the fourth session of the 62d annual meeting of the American Society of International Law, on 26 April 1968. One of Mr. Freeman's fellow panelists was Evgeny N. Nasinovsky, *supra* note 14.

coexistence is a struggle—political, economic and ideological. . . . Coexistence means that one does not fight the other, does not attempt to solve international disputes by arms, but that one competes through peaceful work and cultural activities. But we would cease to be Marxist-Leninists if we forgot the elementary laws of social life, the laws of class struggle.¹²⁴

¹²⁴Pravda, February 13, 1957, cited in I. Guzybowski, *Propaganda And The Soviet Concept Of World Order*, 31 *Law & Contemp. Prob.* 498 (1966).

THE SEIZURE AND RECOVERY OF THE S.S.
MAYAGUEZ:
A LEGAL ANALYSIS OF UNITED STATES CLAIMS*

by Major Thomas E. Behuniak**

PART 2

In part 1 of this two-part article, Major Behuniak began his examination of the legal basis for United States actions taken in response to the 1975 seizure by the Cambodian government of the American flag merchant vessel Mayaguez.

The first part, which appeared in volume 82, set forth the facts of the case and analyzed three of four major legal claims or arguments advanced by the United States.

In the first claim, the seizure of the ship is characterized as an act of piracy. Major Behuniak concludes that this claim is invalid because the seizure was an action of representatives of a national government acting in

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their official capacity, and not an action of individuals for private gain.

The second claim, closely related to the first, asserts that the seizure contravened international law because it took place on the high seas, not in Cambodian territorial waters. This claim also is considered to be invalid. Although the seizure took place many miles from the Cambodian mainland, it happened near islands over which Cambodia asserts sovereignty. Thus, this United States argument is incorrect on the facts.

The third claim asserts that the ship was entitled to enjoy the right of, and was engaging in innocent passage. Major Behuniak considers that this claim is valid on the grounds that the ship was making a routine voyage over a heavily travelled sea lane to deliver freight to a port in Thailand. The ship had no capability for espionage, sabotage, or combat.

In part 2, below, Major Behuniak discusses the fourth and last major claim, that of self-defense. In this claim the United States asserts the right to protect its nationals and their property abroad. Dependent upon this claim is a further assertion by the United States, that the specific measures employed were legally acceptable in terms of both types and amounts of force used.

Concerning the self-defense claim, Major Behuniak notes that there is some authority for the proposition that protection of nationals abroad is no longer an acceptable legal rationale. The United Nations Charter generally prohibits use of force and intervention. Certainly there is danger that the self-defense argument can be abused. However, Major Behuniak concludes that, despite these problems, this right of protection continues to be needed in the absence of effective international machinery to protect human rights.

Major Behuniak considers also that the specific measures employed by the United States are legally defensible. The only exception concerns the aerial bombing opera-

tions on the Cambodian mainland, which, under the circumstances, were excessive in relation to the amount and types of force needed to recover the ship and crew.

As mentioned in the headnote to part 1 of this article in volume 82, although the Mayaguez incident occurred in 1975, it continues to have importance as a precedent for use in other situations which have arisen subsequently. Further, it raises significant questions concerning the legal regime of the seas, questions which will have to be considered by international lawyers and statesmen for years to come.

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I. INTRODUCTION

In the spring of 1975, the United States-supported Government of the Khmer Republic surrendered to Khmer Rouge rebel forces, who quickly formed the Government of the National Union of Cambodia. Less than a month after its installation, this new government attempted to assert its sovereignty by seizing a United States merchant vessel, the S.S. Mayaguez, which was sailing through the Gulf of Siam. After failure of diplomatic efforts to obtain the release of this ship and its crew, the United States retook the ship by armed force, and the crew was released by the Cambodians.¹

In the first part of this article, the factual history of the Mayaguez incident was set forth, and three arguments justifying United States action in that incident were discussed. The first two claims, that of piracy and that of unlawful seizure on the high seas, were dismissed as invalid. The third claim, of right to and engagement in innocent passage, was found to be valid, however.

This second part discusses the claim that the United States was acting in self-defense to protect its nationals and their property abroad. Considered in conjunction with this claim is the closely related one that the specific self-defense measures employed were proper under international law.

¹A detailed factual description of the Mayaguez incident may be found in part I of this article, 82 Mil. L. Rev. 41, 46 (1978).

It is concluded in this part that such a self-defense effort was proper. In drawing this conclusion, the author recognizes that claims of self-defense are peculiarly subject to abuse, and that efforts have been made to limit as narrowly as possible the right of states to use force under any circumstances. However, in the absence of effective international machinery to make self-help unnecessary, it cannot be concluded that the self-defense rationale used in this case is unsound.

As for the specific measures used, it will be shown that these also were legally justifiable, with the exception of aerial bombardment of the Cambodian mainland.

II. SELF-DEFENSE CLAIM TO PROTECT UNITED STATES NATIONALS AND THEIR PROPERTY; RELATED CLAIM THAT SPECIFIC MEASURES EMPLOYED WERE PROPER UNDER INTERNATIONAL LAW

A. *THE CLAIMS*

The United States asserted two claims under this heading: the claim of self-defense, in protecting its nationals and their property abroad; and the claim that the specific measures of forcible self-help employed in this regard were in all particulars valid under international law. Because the second claim cannot be valid if the first is not also valid, they will be considered together in this section. Though mutually related, the former claim is broader in scope than the latter. As such, it will be considered first.

The claim of self-defense in protecting United States nationals and property can be found in three major statements of the United States government. In the May 14th letter to the United Nations Secretary General, United States Representative John Scali warned:

In the absence of a positive response to our appeals through diplomatic channels for early action by the Cambodian authorities, my Government reserves the right to take such measures as may be necessary to protect the

lives of American citizens and property, including appropriate measures of self-defense under Article 51 of the United Nations Charter.²

In the letter informing the United Nations Security Council President of actions in the Gulf of Thailand, Scali explained that, "In the circumstances the United States Government has taken certain appropriate measures under Article 51 of the U.N. Charter whose purpose it is to achieve the release of the vessel and its crew."³

In his report to the United States Congress on the matter, President Ford stated: "Our continued objective in this operation was the rescue of the captured American crew along with the retaking of the ship *Mayaguez*."⁴ This objective also was referred to frequently by Secretary of State Kissinger during a May 16th news conference⁵ and again at a news conference on May 24th.⁶ Reference to the claim also can be found in statements by the White House Press Secretary,⁷ Secretary of Defense Schlesinger,⁸ and again by the President during an interview on May 20th.⁹

In regard to the narrower claim that the specific measures employed in self-defense were valid, Secretary of State Kissinger, at his news conference of May 16th, defended the interdiction operation against the Cambodian gunboats as an attempt to force the boats back to the island of Koh Tang and prevent movement of any of the crew to the mainland, where rescue would become extremely difficult.¹⁰ He defended the boarding and island operations as essential for the recovery of the ship and rescue of its crew.

With respect to the troop landing on Koh Tang, the Secretary stated: "We genuinely thought, or at least we suspected, that a number of them might have been brought to the mainland. We

² Appendix B, *infra*.

³ *Id.*

⁴ Appendix D, *infra*.

⁵ 72 Dep't of State Bull. 753, 756, 759 (1975).

⁶ *Id.* at 806.

⁷ Appendix D, *infra*.

⁸ Washington Post, May 16, 1975, at A-1, col. 3 [hereinafter cited as Post].

⁹ N.Y. Daily News, May 21, 1975, at 3.

¹⁰ Note 4, *supra*.

thought that a substantial number of them would probably be on the island. Had we not thought this, there was no reason to land on the island."¹¹

Lastly, Secretary Kissinger defended the mainland bombing as a measure designed to bring maximum pressure on Cambodian authorities to release any of the crew being held on the mainland and as a measure directly relating to the defense of United States troops, who were then under heavy attack on the island of Koh Tang.¹² Dr. Kissinger stated:

Now, as it turned out, there seems to have been some relationship between the release of the crew and the attacks on the mainland. That is to say, some members of the crew were told that they should tell the Wilson, that they were being released on the assumption that this would end the bombing attacks. And when we received this word, shortly after midnight—then all actions except those that were judged to be immediately necessary for the military operations were stopped. There was some risk. It is clear that either the attack on the island or the attack on the mainland could lead to American casualties if the Cambodians deliberately moved the prisoners into an area where they would be exposed to attack On the other hand, we tried to confine our attack to clearly military objectives, so that there would have had to be a very provocative intent on the part of the Cambodians.¹³

Later in the conference, the Secretary observed:

Some attacks occurred after the men had been released. At that point our biggest problem was that we had several hundred marines on the island who were under very heavy attack. There were also 2,400 Communist forces on the mainland, and we wanted to absorb their energies in other things than attempting to intervene with our disengagement efforts on the island. That was the general concept of the operation.¹⁴

¹¹*Id.* at 755-56, 759.

¹²*Id.* at 756, 759, 760.

¹³*Id.* at 755-56.

¹⁴*Id.* at 760.

The Secretary denied that the bombing had a "punitive intent," observing that:

when you say "punitive intent," the intent of the operation was as I described it—to rescue the men and to recover the ship. Obviously any damage that is done in the process has a punitive effect, whatever the intention is. We tried to gear the action as closely to the objective as was possible.¹⁵

Secretary of Defense Schlesinger expressed similar views in respect to the United States operations on the mainland and in Cambodia's offshore waters. At a May 15th press conference, he expressed the opinion that Cambodia's decision to release the crew was the direct result of both the United States landing on Koh Tang and the mainland bombing, but particularly the latter. He added that "the bombing attacks were necessary to insure that Cambodian forces from the mainland could not interfere with the Marine landing on Tang Island."¹⁶ Later, during an announcement on the extent of United States casualties, the Secretary characterized the mainland bombing as "a very prudent, limited use of force" motivated by the desire "to protect the marines on the island."¹⁷

In defending the United States rescue operation at an interview with newsmen on May 20th, President Ford also stated that the bombing action had been necessary to protect American marines still fighting on Koh Tang. He further declared that there had been no "punitive" element in the bombing of the airfield and oil depot near Kompong Som subsequent to the release of the Mayaguez and its crew.¹⁸ The President's defense of these and other measures of

¹⁵*Id.* at 756.

¹⁶*Post*, May 16, 1975, at A-10, cols. 4-5.

¹⁷*N.Y. Times*, May 21, 1975, at 4-C, col. 4. It is reported, however, that "a Pentagon official said the air strikes were part of a general attack plan that included the possibility of landing Marines on the mainland in the Sihanoukville area 'if necessary' to try to rescue the Mayaguez crew." *Id.* at 1, col. 4.

¹⁸*N.Y. Daily News*, May 21, 1975, at C-3. The President is reported to have said: "As long as we felt there was any possibility of making it more difficult to protect the lives of the marines on Tang Island, we were going to continue with the military operations which were essential."

force employed during the course of the rescue operation is also set forth in his May 15th report to Congress on the matter.¹⁹

B. TRENDS IN DECISION

The discussion below is divided into three parts, (1) self-defense in general; (2) self-defense and the protection of nationals and their property abroad; and (3) criteria for the appraisal of claims of self-defense in protecting nationals and their property abroad. Each part focuses upon an aspect of self-defense which is pertinent to the United States claims presently under study.

In the first part, the concept, development and present status of the principle of self-defense are summarized. The second part deals with the question whether or not an act of intervention by a State to protect its nationals and their property is justified by the international law concerning self-defense. In the final part, an attempt will be made to determine the existence of, analyze, and reconcile if in conflict, any recently formulated criteria for appraising the legality of alleged cases of State intervention to protect nationals based upon the right of self-defense.

The discussion to follow is concerned primarily with the unilateral noninstitutionalized use of *force* by individual States in self-defense. Forcible actions authorized by a competent international organ (e.g., police actions, sanctions, collective defense measures)²⁰ and other measures which have been characterized as self-defense but do not involve the use of force (e.g., economic, ideological, diplomatic)²¹ will not be examined.

Later he is reported to have added: "Because we still had Marines on the island who were under attack and being fired at and until we got them off safely, it made good military sense to continue the bombing of the two airfields and two harbors." *Id.* at 6-C.

¹⁹ Appendix D, *infra*.

²⁰ For the treatment of such actions, see I. Brownlie, *International Law and the Use of Force by States* 328-49 (1963); and M. McDougal & F. Feliciano, *Law and Minimum World Public Order* 245-53 (1961).

²¹ See M. McDougal & F. Feliciano, *supra* note 20, at 49-50, 190-96, and 228-29, for a discussion of these measures in depth.

1. Self-defense in general

Prior to 1914, States possessed, as an aspect of sovereignty, an unhampered right to resort to war.²² Though the right existed, there was a tendency to provide theoretical and moral bases for waging war. The right was rarely asserted without some stereotyped plea, such as self-preservation, necessity, protection of vital interests and defense of legal rights, or merely allegations of injury to rights or national honor and dignity.²³

A number of writers from the 16th to the 19th centuries attempted to distinguish between just and unjust war.²⁴ For example, Vattel, the primary authority invoked by States at the end of the 18th century, observed in 1758 that the right to use force or to wage war belonged to States no further than was necessary for their defense and for maintaining their rights.²⁵

However, the large variety of grounds for waging war admitted during this period indicated the unreality of any theoretical justification based upon such subjective concepts as self-preservation and necessity.²⁶ Moreover, any legal distinction between just and unjust wars was meaningless because of the absence of international authority to apply it.

In practice, justification for a war was a matter finally decided by the participants to the conflict.²⁷ Consequently, writers for the most part abandoned the effort to maintain any legal distinction between just and unjust wars by the 20th century,²⁸ and it thus became apparent in the period immediately preceding the creation of the League of Nations that resort to war and war itself was beyond the regulatory confines of international law.²⁹

²²See Von Elbe's classification of references to the opinions of writers at 33 Am. J. Int'l L. 684 (1959).

²³*Id.* at 686.

²⁴See H. Lauterpacht, *The Grotian Tradition*, 23 Brit. Y.B. Int'l L. 1-53 (1946).

²⁵3 E. de Vattel, *Le Droit des Gens* c.3 (Pradier-Fodere ed. 1863), cited in Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 2 *Recueil des Cours* 455-56 (1952).

²⁶See Brownlie, *The Use of Force in Self-Defense*, 37 Brit. Y.B. Int'l L. 183-84 (1961).

²⁷Waldock, *supra* note 25, at 457.

²⁸See W. Hall, *International Law* 82 (8th ed. 1924).

²⁹Waldock, *supra* note 25, at 457.

By the 20th century, it had also become State practice to differentiate lesser uses of force from war and to observe certain legal conditions in cases in which resort to force was not regarded as formal war. Such cases triggered the application of the rights and duties of belligerency and neutrality.³⁰ These lesser uses of force, commonly referred to as forcible measures of self-help short of war, grew in significance as the dislike for war and its consequences increased, together with the claims of neutral States to rights of neutrality in the event of war.³¹ In theory, they created a legal regime for the use of force which was not considered to be a state of war, and were classified as "pacific" modes of settling disputes.³² In practice, however, their categorization was affected by the artificiality of the state-of-war doctrine.³³

There were various forms of forcible measures of self-help, and they were generally discussed under the labels "retorsion," "reprisals," "embargo," "pacific blockade," and "intervention."³⁴ However, it has been noted that:

these terms were only descriptive labels and did not represent a scientific division of forcible measures short of war. Thus Pacific Blockade was only a particular naval measure which was employed for the purpose of reprisal or intervention. So also Embargo, i.e., detention of shipping, was merely a particular measure of reprisal. Moreover, the words "retorsion," "reprisals" and "intervention" were not even used by all jurists with the same meaning. However, the general position in regard to forcible self-help was clear enough. It was recognized to be unexceptional in law if it was (1) a retorsion, (2) a legitimate reprisal, (3) a legitimate intervention or (4) a legitimate act of self-defense or self-protection.³⁵

Retorsion consists of legal but intentionally unfriendly acts which have a retaliatory or coercive purpose. Though retorsion is not lim-

³⁰*Id.*; 2 I. Oppenheim, *International Law* c.2 (7th ed., Lauterpacht 1952).

³¹*Id.*

³²Waldock, *supra* note 25, at 457.

³³Brownlie, *supra* note 26, at 188.

³⁴2 I. Oppenheim, *supra* note 30.

³⁵Waldock, *supra* note 25, at 457-58. See also Brownlie, *supra* note 26, at 188.

ited to retaliation by the same or similar response, the acts thereunder must be legal without regard to the conduct of the State towards which the action is directed. This is in contrast with a situation involving the use of force in self-defense, when the conduct of the target State forms the basis for the legality of the defensive action taken.⁸⁶

Reprisals, as distinguished from retorsion, are injurious and otherwise illegal acts of one State against another which are permissible for the purpose of compelling the target State to conform with recognized norms of international law, or to consent to a settlement of a dispute created by its own international delinquency.⁸⁷ Three conditions were set down in customary international law to establish the legitimacy of reprisals: There must have been an illegal act on the part of the target State; the act of reprisal must be preceded by a request for redress of the wrong committed by the target State; and the measures adopted must not be excessive, in the sense of being out of proportion to the wrong done.⁸⁸

A conflict of opinion existed as to whether armed reprisals were forbidden by the Covenant of the League of Nations. There was general agreement, however, that retorsion was not prohibited by the Covenant.⁸⁹ Under the United Nations Charter, reprisals involving recourse to armed force were finally declared illegal *per se*.

⁸⁶ I. Oppenheim, *supra* note 30, at 135-42. See also J. Stone, *Legal Controls of International Conflict* 288-89 (1973); Waldock, *supra* note 25, at 458. A common form of retorsion consists of increasing a tariff rate against products exported from a country which discriminates against the products of the State taking the retorsive action.

⁸⁷ I. Oppenheim, *supra* note 30, at 136-43; J. Stone, *supra* note 36, at 289-90.

⁸⁸ Waldock, *supra* note 25, at 458-60. The best account of the customary law of nonbelligerent reprisals is found in the *Naulilaa Case*, decided in 1928 by a special German-Portuguese Arbitral Tribunal. The case arose out of certain measures taken by Germany against Portuguese territory in retaliation for the killing of three German officers in Portuguese territory by members of a Portuguese frontier post, at a time in the First World War when Portugal was still neutral. The case has become a landmark for the customary law on reprisals. 2 *Reports of Arbitral Awards* 1012, cited and reported in Waldock, *supra* note 25, at 460.

⁸⁹ Waldock, *supra* note 25, at 476.

unless they related to the concept of self-defense.⁴⁰ In this connection, article 2, subsection (4) of the Charter declares in part: "All members shall refrain in their international relations from the threat, or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." There is, however, no similar prohibition against acts of retorsion under the Charter.⁴¹

Intervention is the third category of national self-help recognized by customary international law. The term, however, is often used loosely and with rather different meanings. It has been pointed out that "few questions in the whole range of international law are more difficult than those connected with the legality of intervention. Few have been treated in a more unsatisfactory manner by the bulk of the writers on the subject."⁴² Though the term intervention is often used to denote almost any act of interference by one State in the affairs of another, it is, realistically, a dictatorial interference in the internal or external affairs of a State in a manner impairing its territorial integrity or its political independence.⁴³ As in the case of reprisals, customary law has dealt with the legality or illegality of armed intervention.⁴⁴

In theory, intervention, being in violation of a State's sovereign independence, was contrary to international law.⁴⁵ Nonetheless it has been noted that there were various grounds on which intervention was generally recognized to be legal: (1) under a specific treaty right to intervene; (2) by an act of legitimate reprisal; (3) in the exercise of an alleged right to protect nationals abroad; and (4) in self-defense.⁴⁶ A treaty right depended simply on the treaty's terms,⁴⁷ and reprisals have already been discussed. The right to

⁴⁰See Bowett, *Reprisals Involving Recourse to Armed Force*, 66 Am. J. Int'l L. 1 (1972) [hereinafter cited as Bowett, *Forcible Reprisals*]; Bowett, *Economic Coercion and Reprisals by States*, 13 Va. J. Int'l L. 1 (1972) [hereinafter cited as Bowett, *Economic Coercion*].

⁴¹See I. Brownlie, *supra* note 20, at 282, and Waldock, *supra* note 25, at 493-4.

⁴²Harlow, *The Legal Use of Force Short of War*, 92 U.S. Nav. Inst. Proceedings 89 (Nov. 1966).

⁴³I. Oppenheim, *supra* note 30, at 272.

⁴⁴Winfield, *The Grounds of Intervention in International Law*, 5 Brit. Y.B. Int'l L. 149-82 (1924).

⁴⁵See A. J. Thomas, Jr. & Ann V. W. Thomas, *Non-Intervention* 74-78 (1956).

⁴⁶Waldock, *supra* note 25, at 461.

⁴⁷Winfield, *supra* note 44, at 155-59.

protect nationals abroad, when supported by force, took the form either of reprisals or of self-defense.⁴⁸ Of these four grounds for intervention, only self-defense, including the right to protect nationals abroad, remains to be examined further.

It has been observed:

National self-defense is an essential right which necessarily justifies conduct which would otherwise be illegal because in many circumstances it is the only means available in the contemporary international system which can provide adequate protection to certain essential rights. Hence, the right of self-defense is premised on a wrong done or threatened by another state.⁴⁹

It is this precondition which distinguishes self-defense from the "rights" of self-preservation and necessity.⁵⁰

In regard to the right of self-preservation, it was frequently said in the 19th century that States possessed the right to use force against other States in the interest of self-preservation.⁵¹ Such action could be taken even in the absence of an act of aggression or a specific threat from another State. It has been noted that:

A much broader doctrine than that of the right of self-defense has been asserted; the so-called right of self-preservation. As declared, a right of self-preservation, if it existed, would permit a state to violate all norms of international law, thus violating rights of other states, if necessary to avert an impending injury to its interests. In other words, the state has a right to protect itself against an actual or threatened violation of its vital interests, as distinguished from a violation of its rights, even though there be no legal attack or imminent danger thereof. By such a doctrine, a state can do all that needs to be done to preserve its existence even at the expense and in disregard of the rights of innocent states.⁵²

⁴⁸Waldock, *supra* note 25, at 461, 467.

⁴⁹Harlow, *supra* note 42, at 92.

⁵⁰W. Hall, *supra* note 28, at 322; D. Bowett, *Self-Defense in International Law* 9 (1958).

⁵¹A. J. Thomas, Jr. & Ann V. W. Thomas, *supra* note 45, at 81-82.

⁵²*Id.*

The concept of a right to take action in self-preservation has been largely discredited in the legal authorities as beyond the bounds of and destructive to any legal order.⁵³ It is also certain that such action is contrary to the proscriptions of the United Nations Charter and supporting documents.⁵⁴

It is also said that States through the 19th century reserved the right to use force against other States in analogous circumstances based upon the doctrine of necessity.⁵⁵ Some writers treat this doctrine as an aspect of the right of self-preservation.⁵⁶ However, one author considered the operation of the doctrine of necessity as identical with the use of force in the exercise of the right of self-preservation.⁵⁷ In any case, the doctrine is viewed as a complete rejection of all law.⁵⁸ It emerged from the fact that States were considered to possess an unrestricted right to resort to war.⁵⁹ Like the principle of self-preservation, the doctrine of necessity has since been largely discredited in the legal authorities.⁶⁰ Thus, it eventually became accepted as part of customary international law that only the use of force by a State in self-defense could justify a violation of another State's sovereign independence.⁶¹

Perhaps the most significant precedent which justifies an act of intervention on the grounds of self-defense, and which further defines and limits such right, is the famous *Caroline* case.⁶² In this case, the American steamship *Caroline* was employed in 1837 to transport personnel and equipment from United States territory across the Niagara River to Canadian insurgents on Navy Island and then to the Canadian mainland. This assistance to the insurgents had not been prevented by the United States Government. Thereafter, Canadian troops crossed the Niagara River into the territory of the United States and, after an engagement in which several United States nationals were killed or wounded, they set the *Caroline* on fire and sent her drifting over Niagara Falls.

⁵³*Id.* at 82, 84-85; Waldock, *supra* note 25, at 462.

⁵⁴See, for example, article 2(4), quoted in the text above note 41, *supra*.

⁵⁵2 I. Oppenheim, *supra* note 30, at 297-98.

⁵⁶*Id.* at 297.

⁵⁷Brownlie, *supra* note 26, at 189.

⁵⁸Waldock, *supra* note 25, at 462.

⁵⁹I. Brownlie, *supra* note 20, at 48.

⁶⁰*Id.* at 216; 2 G. Schwarzenberger, *International Law* 30-31 (1958).

⁶¹Waldock, *supra* note 25, at 462; HQARLOW, *supra* note 42, at 93.

⁶²1 I. Oppenheim, *supra* note 30, at 300-01; 1 C. Hyde, *International Law* 239-40, 821-22 (2d ed. 1945).

In the ensuing diplomatic confrontation, Great Britain rested its case on the basis of legitimate self-defense. The United States did not deny that circumstances might exist in which Great Britain could invoke the right of self-defense, but contended that they did not exist in the Caroline incident. The diplomatic controversy terminated with a British apology, in which, however, Great Britain did not assume any legal responsibility for the killing or wounding of United States nationals.

The two governments, although they disagreed over the particular facts of the case, were in agreement as to the standards applicable to armed intervention in self-defense. First, initially there must be a necessity for self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation. Second, the acts done in self-defense must not be unreasonable or excessive, since acts justified by necessity for self-defense must be limited to that necessity and kept within it.⁶³

This description of the basis for exercise of the right of self-defense has received widespread acceptance. It is generally recognized as a reasonably accurate statement of the true scope and application of the principle in customary international law today.⁶⁴ One present day writer, however, takes a different view of the Caroline formulation and its application, and concludes:

It is clear that this formulation was not applied in the resolution of the Caroline controversy. The formulation was probably unrealistically restrictive when stated in 1841. In the contemporary era of nuclear and thermonuclear weapons and rapid missile delivery techniques, Secretary Webster's formulation could result in national suicide if it actually were applied instead of merely repeated.⁶⁵

⁶³1 C. Hyde, *supra* note 62, at 239.

⁶⁴See Harlow, *supra* note 42, at 94; Waldock, *supra* note 25, at 463.

⁶⁵Mallison, *Limited Naval Blockade or Quarantine Interdiction: National and Collective Defense Claims Valid Under International Law*, 81 Geo. Wash. L. Rev. 335, 348 (1962). (Note that Professor Mallison was one of the participants in the Law of War Panel whose proceedings are published at 82 Mil. L. Rev. 3 (1978).

On the basis of the *Caroline* case, it is stated that legitimate self-defense has three main requirements: first, an actual infringement or threat of infringement of the rights of the defending State; second, a failure or inability on the part of the other State to use its own legal powers to stop or prevent the infringement; and third, acts of self-defense strictly confined to the object of stopping or preventing the infringement and reasonably proportionate to what is required for achieving this object.

As a basis for intervention, self-defense is distinct from reprisals. Reprisals were only legitimate in response to an international wrong committed by the target State. For self-defense, it is sufficient if there is a threat of injury which cannot be averted in time by means other than force. Moreover, self-defense is preventive in nature. It does not include the right to exact reparation for injury or damage actually done to the responding State. Reprisals, on the other hand, possess this punitive character and purpose.⁶⁶

Another instance widely cited by writers as an example of the recognition in practice of the customary right of self-defense, but on the seas, is the *Virginius* case.⁶⁷ In 1873, a vessel flying the flag of the United States was transporting arms to Cuba for the use of insurgents rebelling against Spanish rule. Spanish forces seized the vessel on the high seas, and, after conducting it to a Cuban port, summarily executed several British subjects and United States nationals who were either members of the ship's crew or passengers thereon.

Great Britain protested only the summary execution of British subjects. It not only did not complain of the seizure of British subjects but recognized that Spain retained a right of self-defense under the particular circumstances. The British admission of self-defense at sea in the face of an imminent threat was in keeping with

On the other hand, Waldock noted in 1952 that it was then commonly accepted that, "in the particular circumstances, the destruction of the *Caroline* fell within these principles." Waldock, *supra* note 25, at 463. See also 1 C Hyde, *supra* note 62, at 239.

⁶⁶Waldock, *supra* note 25, at 464; Bowett, *Reprisals Involving Recourse to Armed Force*, 66 Am. J. Int'l L. 1, 2-4 (1972).

⁶⁷Unless otherwise indicated, this account is adapted from W. Hall, *supra* note 28, at 328-31.

the views expressed by both the United States and Britain in the Caroline case.⁶⁸

The United States, at the outset, also made a strong protest, but against both the seizure and the summary executions. Thereafter, though, it withdrew to the more reasonable conception of self-defense recognized by the British. It has been noted that "the result of the *Virginius* case is not surprising since it involved only action on the high seas, whereas the *Caroline* is construed to justify the actual invasion of foreign territory on the basis of a reasonable claim to national self-defense."⁶⁹

In the era of the League of Nations, neither the Covenant of the League nor the Pact of Paris, also called the Kellogg-Briand Pact, both of which renounced "war as an instrument of national policy," contained an express reservation of the right of self-defense. In fact, neither instrument mentioned self-defense at all.⁷⁰ The League Assembly, however, considered self-defense to be an obligation as much as a right.⁷¹ Further, in the negotiations of the Pact, several States made statements emphasizing that the right of self-defense was inherent in every State and was not restricted in any way by the Pact.⁷² The United States Government, for example, regarded the right of self-defense as so firmly established in international law that no express reservation to the Pact was required. It considered the right inherent, and therefore not susceptible to being contracted away either by implication or omission.⁷³

It is thus apparent that, under the League system, the customary principles and requirements applicable to armed intervention in self-defense remained intact. Further, League members accorded a sense of primacy to reasonable claims of national self-defense. Unfortunately, however, history demonstrates that during this period there was a tendency, when resort was had to force, either to label otherwise aggressive actions as measures of legitimate self-defense, or to continue use of the label after the needs of defense were fairly

⁶⁸See Waldock, *supra* note 25, at 465.

⁶⁹Mallison, *supra* note 65, at 348-49.

⁷⁰C. Hyde, *supra* note 62, at 1682-85.

⁷¹S. Giraud, *Hague Recueil* 692-820 (1984), cited in Waldock, *supra* note 25, at 476-77.

⁷²Waldock, *supra* note 25, at 477, and authorities there cited.

⁷³See Mallison, *supra* note 65, at 350 and n.80.

met. Examples include Japan in Manchuria, Italy in Abyssinia, Russia in Finland. The claim of self-defense was disallowed by the League of Nations in all the above cases.

The claim of self-defense met a similar fate in the Nuremberg and Tokyo Tribunals in respect to the several invasions undertaken by Germany and Japan during and before World War II.⁷⁴ The Nuremberg Tribunal expressly reaffirmed that the proper limits of the right of self-defense are those stated in the Caroline case.⁷⁵ This tribunal also held, in response to the argument that every State is the sole judge of whether particular circumstances call for resort to force in self-defense, that "whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."⁷⁶

On this basis, therefore, although a State necessarily remains the initial determinor whether forcible action in self-defense is warranted by the circumstances, its decision is not final and will be subject to subsequent review by other decision makers, both international and national.⁷⁷

While the League system did not significantly affect the right of States to resort to forcible measures of self-help, it did signify a significant shift in the attitude of the world community toward the application of force in general.⁷⁸ Though the League system died for several reasons not pertinent to this discussion, its idea, that the competence to apply force should reside with a centralized authority, did not. Following the Second World War, it again found expression in the United Nations system. Unlike the League Covenant and the Pact of Paris, the United Nations Charter does not make the mistake of limiting its proscriptions to a state of war. Instead, it proscribes the threat or use of force, which covers the entire spectrum of actions involving the use of force, regardless of description.

⁷⁴ See Waldo, *supra* note 25, at 478; Harlow, *supra* note 42, at 94.

⁷⁵ Trial of German Major War Criminals, The Judgment (Command Paper 6964) at 28 (1946).

⁷⁶ *Id.* at 30.

⁷⁷ M. McDougal & F. Feliciano, *supra* note 20, at 218-20.

⁷⁸ J. Brierly, *The Law of Nations* 408 (6th ed. 1962).

Article 2, paragraph 3 of the charter provides, "All members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered." Paragraph 4 then states a negative corollary, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." The third provision relevant to the use of force by States is contained in Article 51 of the Charter. It attempts to prescribe the requirements for the use of force in self-defense, and provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Considered together, it may be argued that the above provisions make it clear that the use of force by States is prohibited except in the face of an "armed attack," and then only until the Security Council has taken adequate measures to restore peace and security.⁷⁹

The Charter then gives the Security Council the competence and capability to employ measures to counter threats to and breaches of the peace or acts of aggression, including the use of such armed force as may be necessary to restore and maintain peace and security.⁸⁰ It then goes on to provide that Members must make their forces and facilities available for these peacekeeping purposes.⁸¹ It even creates a Military Staff Committee to advise and assist the

⁷⁹1 I. Oppenheim, *supra* note 30, at 152 *et seq.*

⁸⁰U.N. Charter art. 42.

⁸¹*Id.*, art. 48.

Security Council and provide strategic direction for the armed forces placed at its disposal.⁸²

The Charter further provides an alternate method for restoring and maintaining peace and security, in recognizing both the existence of regional arrangements and agencies, and the fact that they have the competence to deal with matters appropriate for regional action, provided they and their activities are consistent with the purposes and principles of the United Nations Charter.⁸³ Moreover, the Charter notes that such agencies may take enforcement action where appropriate, but not without authorization from the Security Council.⁸⁴

Thus, under the United Nations system, a scheme has been set up whereby at least in theory the competence to employ force in international affairs is transferred from individual States to a central authority. When the Charter's provisions are considered by themselves, they seem to leave only a few instances where the use of force by individual States can be justified. From this perspective, self-defense is permitted but only in the face of an "armed attack" and only until the Security Council has acted in the matter. However, the State facing such attack may be assisted by its allies, since collective self-defense is also recognized by Article 51.

The opinion has been advanced that customary international law regarding forcible measures of self-help has been virtually abrogated by the provisions of the Charter.⁸⁵ Support for this position can be found in a resolution issued by the United Nations General Assembly, entitled "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations."⁸⁶ One cannot help but conclude from a reading of the text of the declaration that the General Assembly is clearly of the view that the unilateral use of force by States is circumscribed by the Charter to the narrowest possible limits.

⁸²*Id.*, art. 47.

⁸³*Id.*, art. 42, para. 1.

⁸⁴*Id.*, art. 53, para. 1.

⁸⁵See I. Brownlie, *supra* note 20, at 481 *et seq.*

⁸⁶G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc A/8028 (1971).

The declaration states that the threat or use of force is a violation of international law, and that the United Nations Charter "shall never be employed as a means of settling international issues." In addition, forcible reprisals are specifically outlawed.⁸⁷ In regard to intervention, it is declared:

No State or group of States has the right to intervene directly or indirectly for any reason whatever in the internal or external affairs of any other State. Consequently armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law.⁸⁸

On the other hand, a more pragmatic view is shared by a significant and ever growing number of distinguished writers.⁸⁹ For example, one author observes:

Despite the pronouncements of the charter and the resolution of the General Assembly, however, if international law is properly defined as those rules for the conduct of interstate relations to which states bind themselves in their activities, then the best that can be said for the charter provisions, in light of state practice since 1945, is that they represent what the world community believed the law ought to be rather than what it is. It is submitted that the members of the United Nations have agreed to be bound by the strict charter limitations only

⁸⁷*Id.*, at 122.

⁸⁸*Id.*

⁸⁹For example, see J. Stone, *supra* note 36, at 96; A. J. Thomas Jr. & Ann V. W. Thomas, *The Dominican Republic Crisis 1965*, at 16 (1967); Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 *Iowa L. Rev.* 325, at 334 (1967) [hereinafter cited as Lillich, *Self-Help*]; Lillich, *Forcible Self-Help Under International Law*, 22 *Nav. War Coll. Rev.* 56 (1970) [hereinafter cited as Lillich, *Forcible Self-Help*]; Lillich, *Intervention to Protect Human Rights*, 15 *McGill L. J.* 205, 210 (1969) [hereinafter cited as Lillich, *Intervention*]; McDougai & Reisman, *Response (to Comment by Marshall)*, 3 *Int'l Lawyer* 435 (1969), 3 *Int'l Lawyer* 435 (1969); Falk, *The Beirut Raid and the International Law of Retaliation*, 63 *Am. J. Int'l L.* 415, 430 (1969); Bowett, *Forcible Reprisals*, *supra* note 40, at 1-2; and McDougai, *The Use of Force on the High Seas*, 20 *Nav. War Coll. Rev.* 44, 46 (1968).

to the extent that the central authority is capable of filling the gap left by a state's renunciation of the right to use force in its own interest. Beyond this, while the charter provisions remain as a moral proscription against the use of force, they cannot be said, in actuality, to provide a real test of its legitimate application in any particular case.⁹⁰

In this respect, another author has observed, "Clearly, a law, which prohibits resort to force without providing a legitimate claimant with adequate alternative means of obtaining redress, contains the seeds of trouble."⁹¹

These scholarly but realistic views signify a gradual awakening to the fact that sanctions which were built into the United Nations Charter, or were to be implemented through it in order to create a more viable world order, have not actually materialized. Further, the absence of collective machinery to protect States and individuals against unlawful acts and deprivations calls for careful and perhaps strained interpretation of those provisions of the Charter regulating the use of force. These provisions presuppose tolerance of the international community for, and acquiescence in, unilateral exercise of the right of self-help, when such exercise is appraised as reasonable under all the circumstances.⁹²

With respect to the General Assembly's pronouncement on intervention, it is submitted that the formulation is too vague in characterizing certain methods of coercion by States as unlawful. First, a certain degree of coercion is inevitable in the day-to-day interaction of States. Much of otherwise legitimate activity is harmful to other states for the very reason that States are competitive. In short, pressure can assume many forms.

Second, concerning the phrase "the subordination of the exercise of its sovereign rights" in the above formulation, much depends on what a State considers its sovereign rights to be. Finally, it would

⁹⁰McHugh, *Forcible Self-Help in International Law*, 25 *Nav. War Coll. Rev.* 61, 70-71 (Nov.-Dec. 1972).

⁹¹Waldock, *supra* note 25, at 490.

⁹²See Lillich, *Forcible Self-Help*, *supra* note 89, at 57, 65; Mallison, *supra* note 65, at 350.

be ludicrous to characterize a particular state action as illegal simply because the State in question sought an advantage over another State. Many relationships, if not all, are established on the basis of reciprocal advantage, despite an appearance of inequality of obligation between the participants in such relationships.

One noted author, referring to the above statements on nonintervention, suggests that coercive measures be characterized as lawful or unlawful by their intent. He continues, "In other words, measures not illegal *per se* may become illegal only upon proof of an improper motive or purpose." He then cites an example of the tort of conspiracy in which two or more persons conspire to commit acts which are lawful *per se* but which are motivated predominantly by the desire to injure the economic interests of the plaintiff rather than protect the interests of the defendants.⁹³

From this perspective, it can be concluded that the limiting or controlling of acts of intervention must be accomplished under accepted customary international norms for intervention (i.e., self-defense).⁹⁴ However, one cannot simply harken back to traditional law for its concept of individual self-defense, for the "thou-shall-not philosophy"⁹⁵ of the Charter has left an impression which may have had the effect of superceding, to some extent, the customary international law formulations of the right of national self-defense. With this in mind, it follows that the provisions of Article 51 of the Charter⁹⁶ must be evaluated in an effort to determine what impact, if any, they have on these customary formulations.

It has been said that Article 51 appears to show "the results of inadequate statutory drafting," and consequently, "it probably is not surprising that some writers have attempted to place such a narrow and restrictive interpretation on Article 51 that it is given a meaning more restrictive than that expressed in the corresponding customary law."⁹⁷ In this regard, it has been contended that the right of self-defense which has received general acceptance in the past has a content identical with the right expressed in Article 51 of

⁹³ Bowett, *Economic Coercion*, *supra* note 40, at 5.

⁹⁴ See notes 44-48, *supra*.

⁹⁵ The phrase is borrowed by McHugh, *supra* note 90, at 71.

⁹⁶ Article 51 is quoted in full in the text above note 79, *supra*.

⁹⁷ Mallison, *supra* note 65, at 361.

the Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs . . ." That is, its exercise is limited to the case of armed attack.⁹⁸

If considered to be narrowed by article 51, the right of self-defense would not be triggered by any form of aggression or other injurious conduct affecting essential State rights other than an armed attack. Furthermore, it would preclude the customary right of anticipatory self-defense.⁹⁹ Proponents of this view argue that, despite the difficulties inherent in the restrictive view, to permit more latitude would open the door to a multitude of abuses, which, in turn, would make intolerably difficult the maintenance of world public order.¹⁰⁰

On the other hand, Article 51 has been interpreted to allow reasonable forcible measures to defend against violations of national security or other essential rights of a State, whether such violations take the form of specific armed attack or other acts of direct or indirect aggression.¹⁰¹ Waldo, for example, has argued as follows:

The right of individual self-defense was regarded as automatically excepted from both the Covenant and the Pact of Paris without any mention of it. The same would have been true of the Charter, if there had been no Article 51, as indeed there was not in the original Dumbarton Oaks proposals. Article 51, as is well known, was not inserted for the purpose of defining the individual right of self-defense but of clarifying the position in regard to collective understandings for mutual self-defence, particularly the Pan-American treaty known as the Act of Chapultepec. These understandings are concerned with

⁹⁸See I. Brownlie, *supra* note 20, at 280. Article 51 is quoted in full in the text above note 79, *supra*.

⁹⁹See Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 *Am. J. Int'l L.* 872, 873, 878 (1947); M. McDougal & F. Feliciano, *supra* note 20, at 283; Wright, *The Legality of Intervention Under the United Nations Charter*, 52 *Am. Soc. Int'l L. Proc.* 81, 83-84.

¹⁰⁰See 2 I. Oppenheim, *supra* note 30, at 154.

¹⁰¹See D. Bowett, *supra* note 50, at 24; M. McDougal & F. Feliciano, *supra* note 20, at 234-36.

defence against external aggression and it was natural for Article 51 to be related to defence against "attack." Article 51 also has to be read in the light of the fact that it is part of Chapter VII. It is concerned with defence to grave breaches of the peace which are appropriately referred to as armed attack. It would be a misreading of the whole intention of Article 51 to interpret it by mere implication as forbidding forcible self-defense in resistance to an illegal use of force not constituting an "armed attack." Thus, it would, in my view, be no breach of the Charter if Denmark or Sweden used armed force to prevent the illegal arrest of one of their fishing vessels on the high seas in the Baltic.¹⁰²

It has been argued further that:

It is erroneous to conclude, as these authors appear to do, that the right of self-defense has no other content than the one determined by the Charter. The right of self-defense belongs to member states not by grant under the Charter, but by virtue of a pre-existing customary and natural right long recognized by international law. Further, insertion of the word "inherent" in Article 51 indicates a clear intent to preserve the traditional right of self-defense. This conclusion is supported by the language of the U.N. drafting committee which, in discussing this particular provision, stated that ". . . the use of arms in legitimate self-defense remains admitted and unimpaired." Accordingly, the phrase, "if armed attack occurs" should not be construed in an overly restrictive sense which would prohibit action otherwise permitted under pre-existing customary international law.¹⁰³

Proponents of this position also argue that, properly interpreted, Article 51 permits anticipatory self-defense. It is reasoned that, since the inherent right always included anticipatory self-defense, it remains legitimate under the United Nations Charter. It is further

¹⁰²*Id.*

¹⁰³Harlow, *supra* note 49, at 93. Though the quoted argument omits supporting authority, substantially the same argument with cited legal support is stated in M. McDougal & F. Feliciano, *supra* note 20, at 234-36.

reasoned that the phrase, "if an armed attack occurs," is merely descriptive of a specific category of self-defense. According to this view, it was desired to emphasize that the right of individual, and more particularly of collective, self-defense had not been taken away in the process of conferring power on the Security Council to take preventive and enforcement measures for the maintenance of peace.¹⁰⁴

It also has been observed that the English text of Article III of the Charter provides that the French text is one of the "equally authentic" texts of the Charter. The term "armed attack" appears in the French text as "agression armée." A more literal translation of "armed attack" in French would be "attaque armée." Accordingly, the restrictive interpretation is not as clear and unambiguous as some claim it to be and goes beyond the necessary meaning of the words.¹⁰⁵

Whether or not article 51 permits a broader interpretation, it has been noted that States have consistently acted as if it does so permit.¹⁰⁶ Moreover, it has been reasoned that to limit self-defense to an armed attack scenario dangerously underestimates the potential of modern weapon systems. Such limitation could result in national suicide. Further, it discounts the possibility that nonmilitary aggression could achieve a degree of coercion comparable in intensity and proportion to an armed attack.¹⁰⁷

Argument has raged over the entire spectrum of possible limitations on the right of self-defense, and it is becoming increasingly difficult to say where the line can safely be drawn. Nevertheless, a considerable body of opinion argues that the test of the Caroline Case, less rigidly construed in view of developments in methods of modern warfare, still represents a generally acceptable set of limiting standards for exercising the right of self-defense.¹⁰⁸

Furthermore, it is argued that a distinction should be drawn as to whether an action in self-defense takes effect within another State's

¹⁰⁴Waldock, *supra* note 25, at 32-33.

¹⁰⁵*Id.* at 32; Mallison, *supra* note 65 at 361, n.118.

¹⁰⁶See McHugh, *supra* note 90, at 72.

¹⁰⁷See Mallison, *supra* note 65, at 363-64; Waldock, *supra* note 25, at 498; M. McDougal & F. Feliciano, *supra* note 20, at 237-39.

¹⁰⁸See J. Brierly, *supra* note 78, at 420. This view is shared by a number of noted publicists, including Stone, Bowett, Waldock, McDougal and Mallison.

territorial jurisdiction, upon the high seas, or inside the territorial jurisdiction of the State taking the defensive action. The argument is that, in the case where the action takes effect within another State's jurisdiction or upon the high seas, the requirement of necessity will have to conform to extremely strict standards. The standard will ordinarily be higher in the case of action within another State's jurisdiction than upon the high seas. In the case of action on the high seas, the standard normally will be higher than within the self-defending State's own territory.¹⁰⁹ However, regardless of the locus of the action, the basic requirements of self-defense—necessity and proportionality—must in the final analysis be subjected only to "the most fundamental and comprehensive test of all law, reasonableness in a particular context."¹¹⁰

To be examined next are the substantive and essential rights which may be protected by the right of self-defense. It must be determined whether those rights include the right, as claimed by the United States, to protect nationals and their property abroad. If so included, the nature and limitations on exercise of this right must then be examined.

It is quite clear that the rights of territorial integrity and political independence are substantive and essential rights for which the right of self-defense serves as a means of protection.¹¹¹ Certain essential economic rights have also been considered as substantive rights to which the right of self-defense applies, though the conclusion concerning economic rights is still subject to debate.¹¹²

2. The Protection of Nationals and Their Property Abroad As Self-Defense

Unilateral intervention by States in the affairs of other States for the protection of nationals and their property has been recognized in the past by authorities and confirmed through the practice of

¹⁰⁹See D. Bowett, *supra* note 50, at 21-22; Harlow, *supra* note 49, at 94.

¹¹⁰See M. McDougal & F. Feliciano, *supra* note 20, at 218.

¹¹¹See D. Bowett, *supra* note 50, at 269-70; M. McDougal & F. Feliciano, *supra* note 20, at 227-28. For analysis in depth of these rights, see D. Bowett, *supra* note 50, at 29-65.

¹¹²See D. Bowett, *supra* note 50, at 106-14, for further discussion of this issue.

States.¹¹³ The exercise of this right has been considered in the nature of self-defense.¹¹⁴ Vattel's comment on the matter notes that:

Whoever wrongs the State, violates its rights, disturbs its peace, or ignores it in any manner whatever becomes its enemy and is in a position to justly punished. Whoever ill treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and if possible, force the aggressor to give full satisfaction or punish him, and otherwise the citizen will not obtain the chief end of a civil society, which is protection.¹¹⁵

Many other scholars have recognized that the use of forcible state action to protect the lives and property of nationals abroad was sanctioned by customary international law. For example, Dunn states: "It is only occasionally when aliens are placed in a situation of grave danger from which the normal methods of diplomacy cannot extricate them, or where diplomatic negotiation for some other reason is believed to be useless, that forceful intervention is apt to take place"¹¹⁶

Oppenheim notes: "The right of protection over citizens abroad, which a State holds, may cause an intervention by right to which the other party is legally bound to submit. And it matters not whether protection of the life, security, honour, or property of a citizen abroad is concerned."¹¹⁷

Hyde observes:

When, however, in any country, the safety of foreigners in their persons and property is jeopardized by the impotence or indisposition of the territorial sovereign to afford adequate protection, the landing of a foreign public force of the State to which such nationals belong, is to be anticipated.¹¹⁸

¹¹³*Id.* at 87.

¹¹⁴J. Westlake, *International Law* 299 (1904).

¹¹⁵This statement of Emmerich de Vattel is quoted in DeLima, *Intervention in International Law* 116 (1971) (citation omitted).

¹¹⁶F. Dunn, *The Protection of Nationals* 19 (1932).

¹¹⁷I. Oppenheim, *supra* note 30, at 309.

¹¹⁸C. Hyde, *supra* note 62, at 647.

Commenting in 1949, Jessup writes:

Traditional international law has recognized the right of a State to employ its armed forces for the protection of the lives and property of its nationals abroad in situations where the state of their residence, because of revolutionary disturbances or other reasons, is unable or unwilling to grant them the protection to which they are entitled.¹¹⁹

Lastly, Bowett, in 1958, states: "The right of the state to intervene by the use or threat of force for the protection of its nationals suffering injuries within the territory of another State is generally admitted, both in the writings of jurists and in the practice of states."¹²⁰ Bowett further observes that the view that protection of nationals is an integral part of the more general right of self-defense,

receives support both from the writings of jurists in which the interest of a state in the safety of its nationals is identified with the state's interest in its own security, and from the identity of the conditions imposed upon the exercise of the right of self-defense in general.¹²²

Opposed to the right to intervene to protect nationals is the principle of nonintervention by one state in the affairs of another.¹²³ Professor Lillich points out, however, that this principle has caused some confusion, and therefore, needs to be defined as particularly as possible.¹²⁴ He then argues:

Intervention . . . means "dictatorial interference in the sense of action amounting to a denial of the independence of the State." Thus, while all measures of forcible self-help may constitute intervention in the ordinary sense, when used as a word of art it denotes and condemns only

¹¹⁹P. Jessup, *The Modern Law of Nations* 169 (1949).

¹²⁰D. Bowett, *supra* note 50, at 78.

¹²¹Bowett, *The Use of Force in the Protection of Nationals*, 43 *Trans. Grotius Soc'y* 116 (1937).

¹²²Winfield, *The History of Intervention in International Law*, 3 *Brit. Y.B. Int'l L.* 130, 139 (1922-23).

¹²³Lillich, *Self-Help*, *supra* note 59, at 330.

¹²⁴*Id.*, at 330-31.

those forceful coercive measures designed to maintain or alter the political situation in another state. Hence the use of force primarily to protect the lives and property of nationals of the intervening state, depending upon one's conceptualistic preference, either was not an intervention at all, or, if it was, then a legally justifiable one. [citation omitted]¹²⁵

In any case, regardless of doctrinal disputes, the right to resort to force to protect nationals clearly was recognized in the traditional practice of States. In the absence of other methods of enforcement, few States have been ready to renounce this means of securing compliance with the minimum standard of treatment for their nationals.¹²⁶ And although the right was unhesitatingly exercised by stronger States and was subject to abuse, it has been noted that, to give up the right without obtaining any other adequate means of redress, would have "played into the hands of law-breakers."¹²⁷

Notwithstanding the widespread acceptance in customary doctrine and practice of the right to protect nationals, many doubts have been raised concerning its continued validity because of the possible limiting effect of the United Nations Charter on the right.

The continued existence of the right can be challenged on the ground that nowhere is the right specifically excepted from the prohibitions on the use of force contained in the Charter. This is particularly true of article 2(4).¹²⁸ Moreover, article 2(7) prevents intervention "in matters which are essentially within the domestic jurisdiction of any state." The only exception concerns United Nations enforcement actions under Chapter VII with respect to threats to the peace, breaches of the peace, and acts of aggression.

Also, following the establishment of the United Nations, it was observed by some writers that the use of force to protect nations abroad was inconsistent with that organization's purpose of promoting collective enforcement and peace-keeping measures:

¹²⁵See Waldock, *supra* note 25, at 331-32. See also, Nanda, *United States Action in the Dominican Crisis: Impact on World Order, Part I*, 43 *Denver L.J.* 43-44 (1966).

¹²⁶Waldock, *supra* note 25, at 332.

¹²⁷I. Brownlie, *supra* note 20, at 433; text above note 78, *supra*.

¹²⁸P. Jessup, *supra* note 119, at 169-70.

The landing of armed forces of one state in another is a "breach of the peace" or "threat to the peace" even though under traditional international law, it is a lawful act. It is a measure of forcible self-help, legalized by international law because there has been no international organization competent to act in an emergency. The organization defect has now been at least partially remedied through the adoption of the Charter, and a modernized law of nations should insist that the collective measures envisioned by Article 1 of the Charter shall supplant the individual measures approved by traditional international law.¹²⁹

Nevertheless, it was further observed:

It would seem that the only possible argument against the substitution of collective measures under the Security Council for individual measures by a single state would be the inability of the international organization to act with the speed requisite to preserve life. It may take some time before the Security Council, with its Military Staff Committee, and the pledged national contingents are in a state of readiness to act in such cases, but the Charter contemplates that international actions shall be timely as well as powerful.¹³⁰

As has been pointed out earlier, these great expectations of the post-Charter period have not materialized. Consequently, the lack of effective collective enforcement machinery to protect States and individuals against unlawful acts requires an interpretation of Charter provisions regulating, not prohibiting, the use of force. Such an interpretation must respect, with international community tolerance and acquiescence, unilateral claims to self-help appraised to be reasonable in light of all the circumstances.¹³¹ For example, in the cases of the Congo and the Dominican Republic, to be discussed later, it is doubtful, due to political problems, whether the United Nations or other appropriate international organizations could have acted in time to safeguard lives.¹³²

¹²⁹*Id.* at 170-71.

¹³⁰See text at notes 89-92, *supra*.

¹³¹A. J. Thomas, Jr. & Ann V. W. Thomas, *supra* note 89, at 22.

¹³²See Lillich, *Self-Help*, *supra* note 89, at 338.

Turning to the limitation of article 2(7) of the Charter on the right to intervene to protect nationals, the argument has been generally accepted that this domestic jurisdiction clause no longer shields States in human rights matters.¹³³ Domestic jurisdiction has come increasingly to be viewed as a relative concept, variable in character and extent.¹³⁴ As such, it is felt by many authorities that the world-wide concern over the manner in which people are treated by States, and the practices of the United Nations in the human rights area clearly demonstrate that human rights have been removed from the exclusive jurisdiction of States and placed in the domain of international responsibility and concern.¹³⁵ Consequently, human rights have been determined to be beyond the reach of article 2(7) insofar as United Nations or State action is concerned, even in cases not amounting to a threat to the peace.¹³⁶

Turning further to consideration of the view that article 2(4) also prohibits the threat or use of force by States to protect nationals abroad, it seems ironic that this provision would encumber rather than advance one of the primary purposes of the Charter. The protection of aliens abroad is part of the more general goal of promoting the protection of human rights and fundamental freedoms.

After comparing the various views expressed by national representatives in the United Nations, one noted author observed:

A large majority of States clearly considers the maintenance of international peace and security as the primary purpose of the United Nations. They perceive this goal as being attainable only through a constant restriction of the opportunities for legal initiation of unilateral force and a correlative centralization in the United Nations of the authority to utilize force. Consciously sacrificing the alternative Charter goal of justice and promotion of even minimal human rights to the overriding concern of *minimum* world public order, equated with the

¹³³ M. Rajan, *United Nations and Domestic Jurisdiction* 57 (1958).

¹³⁴ Reisman, *Humanitarian Intervention to Protect the Ibos*, in *Humanitarian Intervention and the United Nations* 177 (R. Lillich ed. 1973).

¹³⁵ *Id.* at 190-91.

¹³⁶ Fonteyne, *Forcible Self-Help to Protect Human Rights: Recent Views from the United Nations*, in *Humanitarian Intervention in the United Nations* 197 (R. Lillich ed. 1973).

sheer avoidance of forceful interactions in *international relations*, they try to fill all possible gaps in the system of Charter restrictions on forceful State initiatives. This approach deprives the Charter of a flexibility which, while probably not intended originally, has nevertheless become necessary in view of the breakdown of the effectiveness of the Security Council in discharging its functions and the failure of the world organization to create a machinery whereby not only the absence of international violence but also a minimum of human dignity can be ensured.

The closed system thus created by interpreting Article 2(4) broadly, while interpreting Article 51 narrowly, is clearly intended to achieve this minimum goal; any use of force regardless of its motivation or purpose is prohibited unless it falls within the purview of Article 51 or Chapter VII. Intentions are irrelevant; any use of force not justifiable under one of those two heads is illegal *per se* even if it could have a beneficial effect on other purposes of the Charter, such as human rights, for instance.¹³⁷

A growing number of scholars have joined with the quoted author in questioning the wisdom of this restrictive approach. These doubts are based upon the failure of the world community to establish the machinery for collective security and enforcement envisioned by the framers of the Charter. Further fueling such doubts is the ineffectiveness of the Security Council in discharging the obligation entrusted to it by the Charter.¹³⁷ Two arguments in favor of the continued validity of the right of forcible self-help to protect nations have been advanced in human rights cases. Under these arguments, self-help may be justified in spite of article 2(4) of the Charter. Both arguments are analogous with the ones that justified the right under customary doctrine and practice.

¹³⁷See generally, Reisman, *supra* note 134; Bogen, *The Law of Humanitarian Intervention: U.S. Policy in Cuba (1898) and in the Dominican Republic (1965)*, 7 Harv. Int'l L.J. 296 (1965); A. J. Thomas, Jr. & Ann V. W. Thomas, *supra* note 89; Nanda, *supra* note 125; Lillich, *Self-Help*, *supra* note 89; McDougal & Reisman, *Response*, *supra* note 89, at 438; Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 Va. J. Int'l L. 205 (1969); Lillich, *Intervention*, *supra* note 89; McHugh, *supra* note 90.

The first argument states that such self-help measures do not impair the territorial integrity or political independence of the intervened State. The action is taken by the intervenor State simply to rescue its nationals from a danger which the intervened state cannot or will not prevent. As such, the intervention does not contravene article 2(4).¹³⁸ It has been pointed out that a newly admitted factor in this argument is the duration of the interference, for this can be helpful in distinguishing interventions that are basically sanctions from those that are mere aggressions.¹³⁹ A case involving a limited use of force as a sanction can more easily be justified under article 2(4) of the Charter.

The second argument is based on the saving clause contained in article 151 of the Charter, the inherent right of self-defense.¹⁴⁰ The rationale is that self-defense of the State is no different from the self-defense of its nationals. Thus an armed attack against nationals of a State constitutes an attack against the State itself. Intervention is necessary because the protection of nationals is an essential function of the State.¹⁴¹

Collective review by the international community of a State's claim of right to use forceful measures to protect its nationals is of recent origin. The discussion to follow will examine such review in instances where States have asserted the right.

One instance was the review by the League of Nations of the Japanese claim that Japan had lawfully sent its armed forces into Manchuria in September of 1931. The Japanese plea was based in part on the right of self-defense to protect the lives and property of its nationals.¹⁴² China took issue with Japan's claim, calling it "a dangerous principle to assert that in order to protect nationals and their property in a foreign country a large number of troops may

¹³⁸ A. J. Thomas, Jr. & Ann V. W. Thomas, *supra* note 89, at 16. The same argument would also apply in response to objections under article 2(7).

¹³⁹ See Falk, *The United States and the Doctrine of Nonintervention in the International Affairs of Independent States*, 5 How. L.J. 168, 176, n.34 (1959).

¹⁴⁰ See generally the text above notes 93-112, *supra*.

¹⁴¹ See D. Bowett, *supra* note 50, at 91-105; Bowett, *supra* note 121; A. J. Thomas, Jr. & Ann V. W. Thomas, *supra* note 89, at 20.

¹⁴² Brown, *Japanese Interpretation of the Kellogg Pact*, 27 Am. J. Int'l L. 100 (1933).

occupy so many places, destroy so much property and kill so many innocent people."¹⁴³

It is not clear whether China was challenging a State's right to use force to protect nationals under any conditions, or whether it was merely claiming that Japan had not met the requirement of proportionality.¹⁴⁴ The League Council's resolution was equally unclear. It merely noted the Japanese representative's statement that his "Government will continue, as rapidly as possible, the withdrawal of its troops, which has already begun, into the railway zone in proportion as the safety of the lives and property of Japanese nationals is effectively assured . . ." ¹⁴⁵ Subsequently, the League Council appointed a commission to inquire into the matter.

Meanwhile, Japan landed troops in Shanghai, claiming in part that its action was again necessary to protect its nationals.¹⁴⁶ The commission reported that only one, not both of Japan's military actions could not be considered as measures of legitimate self-defense.¹⁴⁷ Although the League Assembly adopted the commission's report, and although there was some discussion of the validity of the Japanese claim of self-defense based on the protection of its nationals in the resolution adopted on the matter, the League Assembly did not pass on Japan's claim.¹⁴⁸

During the Suez crisis of 1956, one of the British claims rested on the right of the British Government to take measures essential to protect the lives of its citizens.¹⁴⁹ The British further claimed that the right of self-defense, recognized in article 51 of the United Nations Charter, covered the situation where there was an imminent danger to the nationals of a State.¹⁵⁰ The United Nations, however, did not pass on the validity of the British claim. This was in part due to the multiplicity of other claims raised during the conflict.¹⁵¹

¹⁴³ Statement of 25 September 1931, 12 *League of Nations O.J.* 2284 (1931).

¹⁴⁴ For a discussion of this point, see I. Brownlie, *supra* note 20, at 242, 294-96.

¹⁴⁵ Statement of 30 September 1931, 12 *League of Nations O.J.* 2307 (1931).

¹⁴⁶ 13 *League of Nations O.J.* 331, 345 (1932).

¹⁴⁷ *League of Nations O.J.*, Spec. Supp. 112, at 72 (1933).

¹⁴⁸ *Id.*, Spec. Supp. 111 (1933).

¹⁴⁹ 558 *Parl. Deb.*, H.C. (5th ser.) 1277 (1956), cited in 5 M. Whiteman, *Digest of International Law* 643 (1965); Fawcett, *Intervention in International Law*, 103 *Recueil des Cours* 347, 400 (II-1961).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

The United States claim of right to send its forces to Lebanon in 1958 was based in part on the right to protect American lives during an insurrection.¹⁵² The United States action was discussed by both the United Nations Security Council and the General Assembly. However, the Security Council adopted no resolution the subject, mainly because of a Soviet veto. The General Assembly did not officially pass on the legality of the claim.¹⁵³

In the latter part of 1964, the rebels in the Congo seized thousands of nonbelligerents and held them as hostages for concessions from the central government. This seizure itself was contrary to international law. When rebel demands were not met, forty-five of the hostages were slaughtered and threats were made that the rest would be massacred.¹⁵⁴ A Belgian paratroop battalion, transported in American planes and through British facilities, was moved to the Ascension Islands. After collapse of further negotiations for the release of the hostages, the paratroopers were dropped in an emergency rescue operation in which two thousand persons were rescued in four days.¹⁵⁵

To justify their participation in the rescue operation, the United States claimed a responsibility to protect United States citizens from the imminent danger then existing in the area, as well as the lives of other nationals.¹⁵⁶ The Belgians claimed essentially the same rights.¹⁵⁷ The operation was attacked in the Security Council by several African States and the Soviets. The charges raised were based on factual distortions, however, and are not relevant as precedent.¹⁵⁸

The claim of domestic jurisdiction was raised also. However, the Africans were estopped from claiming immunity of domestic jurisdiction in human rights matters in view of previous pro-intervention declarations made by them in the United Nations.¹⁵⁹ Most signifi-

¹⁵²39 Dep't State Bull. 182 (1958).

¹⁵³See generally Potter, *Legal Aspects of the Beirut Landing*, 52 Am. J. Int'l L. 727 (1958); Wright, *United States Intervention in Lebanon*, 53 Am. J. Int'l L. 112 (1959).

¹⁵⁴51 Dep't State Bull. 841-45 (1964).

¹⁵⁵52 Dep't State Bull. 16, 18, 22 (1965).

¹⁵⁶51 Dep't State Bull. 841 (1964); 52 Dep't State Bull. 17 (1965).

¹⁵⁷See E. Lefever, *Crisis in the Congo* 10-11 (1965).

¹⁵⁸Nanda, *supra* note 125, at 475-477.

¹⁵⁹Reisman, *supra* note 134, at 186.

cant was the fact that the operation was carried out by non-United Nations forces, but this point was not raised. Moreover, the claims of the right to protect nationals were not rejected by the Security Council. The operation has been found to be lawful by the vast majority of scholars who have examined the case.¹⁶⁰

The action was undertaken supposedly with the permission of the Congo's legitimate government. Because of this, it may be argued that technically it was not a case involving the use of forcible self-help at all. Nevertheless, considering the total context of the operation, it has been argued that "the United States treated the Congolese invitation as just another factor permitting it to participate in a humanitarian intervention."¹⁶¹

In the Dominican Crisis of 1965, an interim military junta, which had replaced the constitutional government in 1963, was challenged by a revolt. The United States landed a marine force to save the lives of United States citizens, as well as foreign nationals, within the Dominican Republic. However, after these people were removed, the United States forces stayed on, ostensibly to maintain order. Its action was subsequently legitimized by the Organization of American States, which replaced the United States force with an O.A.S. force.¹⁶²

The difficulty with the intervention was in the fact that the United States remained after foreign nationals had been evacuated. Most of the subsequent criticism was directed at this aspect of the operation.¹⁶³ It is significant that critics of this operation did not challenge the lawfulness of the claim to protect nationals under article 51 of the United Nations Charter *per se*. Conceding that there was imminent danger to foreign nationals,¹⁶⁴ these critics argued that the United States should not have remained after the initial humanitarian action was concluded.¹⁶⁵ The case, no matter what conclusions are drawn about the entire operation, indicates the continued viability of the right to protect nationals.

¹⁶⁰ Lillich, *Self-Help*, *supra* note 89, at 340.

¹⁶¹ *Id.*

¹⁶² Factual accounts can be found in Nanda, *supra* note 125; A. J. Thomas, Jr. & Ann V. W. Thomas, *supra* note 89; and Lillich, *Self-Help*, *supra* note 89, at 341.

¹⁶³ 52 Dep't State Bull. 60-64, 730-33 (1965).

¹⁶⁴ See Comments of Senators Clark, Morse, and Fulbright, 111 Cong. Rec. 23, 24, 27, 155, 858 (1965).

¹⁶⁵ Nanda, *supra* note 125, at 458.

As previously noted, the justification advanced for the continued validity of the right to protect nationals under article 51 of the United Nations Charter has not gone without criticism. The main concerns are, first, that a State could abuse the right by employing it as a pretext to use force to achieve its preferred political objectives¹⁶⁶ and, second, that it would encourage the use of a greater degree of force than necessary by the acting State.¹⁶⁷

In view of the increasing involvement of the United Nations with human rights matters and of the rising concern of world public opinion with inequalities within the present world community, it is unfortunate that more attention is not given in debates on forcible intervention to what has clearly become an alternate major goal of the United Nations—the promotion and protection of human rights. This is particularly true in light of the incapability of the United Nations to take effective action in cases of actual or threatened human rights deprivations, and the lack of significant results in those cases where nonforcible measures have been taken.

For the sake of humanity, some forcible initiative by individual States must remain within their power and authority, as long as the United Nations scheme originally contemplated is unable to effectively fulfill its major functions. It is also realistic to assume that no State with the capability to act will allow its nationals to be threatened with death or injury abroad, as State practice discussed above demonstrates.

The potential dangers in acceptance of this self-help initiative should not be overlooked. It is these dangers, together with the reluctance of States to accept what they believe to be a curtailment of their sovereignty, that forms the basis for opposition to the exercise of forcible self-defense measures to protect nationals.¹⁶⁸ The Soviet intervention in Czechoslovakia and, some will argue, Vietnam, are examples tending to show the truth of this proposition.

More important, a fear of abuse should not prevent exceptional measures to meet emergency situations which, in today's highly de-

¹⁶⁶See I. Brownlie, *supra* note 20, at 301.

¹⁶⁷See Lillich, *Self-Help*, *supra* note 88, at 337.

¹⁶⁸See D. Bowett, *supra* note 50, at 104-05; I. Brownlie, *supra* note 20, at 298, 340.

¹⁶⁹See M. McDougal & F. Feliciano, *supra* note 20, at 416.

centralized state of the international community, appear to be the only ones likely to produce some results in protecting against human rights violations at present.¹⁷⁰ Also the threat that recognition of a right of self-defense to protect nationals abroad would permit large-scale intervention unrelated to the dangers to which the nationals are exposed can be met by requiring compliance with the rule of proportionality¹⁷¹ and other well-defined limiting criteria.

There is substantial evidence to indicate that State resort to force in various circumstances, if not applauded, will at least not be indicted.¹⁷² The question then arises, under what specific practical conditions can resort to force by States to protect nationals be rendered tolerable or even legitimate?

3. Criteria For Judging Validity

The short answer to the question presented in the preceding paragraph is "reasonableness." Yet it may not be very helpful for decision-makers to be told that a use of force will be tolerated if reasonable. Although the term is acceptable as a standard of conduct, it is also vague with reference to any particular situation.¹⁷³ What are the criteria for reasonable state conduct with respect to the use of force in self-defense to protect nationals?

Scholars examining past doctrine and practice have constructed a number of criteria for evaluating the legitimacy or at least community acceptability of a claimed right of forcible self-help to protect nationals. Three such efforts are particularly worthy of discussion. They are authored by Bowett,¹⁷⁴ Lillich,¹⁷⁵ and Nanda.¹⁷⁶ While overlapping on several points, these authors do vary somewhat in their construction of their respective tests. This writer will attempt to construct a separate set of criteria by working and combining the

¹⁷⁰See Lillich, *Self-Help*, *supra* note 89, at 335.

¹⁷¹See D. Bowett, *supra* note 50, at 105.

¹⁷²See generally *id.*

¹⁷³M. McDougal & F. Feliciano, *supra* note 20, at 218. See also Mallison, *supra* note 65, at 345-46, 350, 355.

¹⁷⁴See D. Bowett, *supra* note 50, at 87-105; Bowett, *supra* note 121, at 116-126.

¹⁷⁵Lillich, *Self-Help*, *supra* note 89, at 347-51; Lillich, *Intervention*, *supra* note 89, at 218-19; Lillich, *Forcible Self-Help*, *supra* note 89, at 63-65.

efforts of these authors. These criteria will then be used to appraise the validity of the United States claims analyzed in this section.

Unless otherwise indicated, the supporting sources for the material in the discussion that follows can be found in one or more of the works of the three authors cited above.¹⁷⁷

The criteria below are subdivided into substantive, procedural, and preferential criteria.

(a) *Substantive Criteria*

(1) *Nationality of the persons protected*

As a condition precedent to protection by a State, there must be an allegiance of the person protected to the State. This connection constitutes the basis for the State's right and duty of protection. It normally arises out of the citizenship or nationality of the persons protected. In the absence of this nexus of nationality or citizenship, it is difficult to bring this protection within the concept of self-defense. In general, it is due to their nationality that persons can be regarded as part of a State. Thus their protection can be undertaken by a State as defense of the State itself.

(2) *Fundamental character of the rights involved*

Here a balance must be struck between the amount of destruction to be anticipated from the armed intervention, and the importance of the rights sought to be protected. This weighing process tends to result in a restriction, in principle, of the exercise of this right of protection to situations where there is a threat to or deprivation of the most fundamental human rights, such as the right to life, liberty, or freedom from injury.¹⁷⁸ As a rule, threats to or deprivations of property rights alone are not sufficient. An exception to this rule may be made where the property interests of the State or its nationals are essential. In such a case, essentiality is based upon a showing that their destruction or loss would involve an immediate, serious and irremediable injury, and that no offer of compensation or other remedy would be adequate.

¹⁷⁶Nanda, *supra* note 125, at 453-60, 473-79.

¹⁷⁷*Id.*

¹⁷⁸See also Moore, *supra* note 137, at 263-64.

(3) Extent of violation

Such protection should be permissible only when a substantial deprivation of fundamental human rights or values is involved. While the number of persons affected is not completely irrelevant, it does not necessarily determine the legality of the claim to protection. Just counting heads is not sufficient for decisionmaking purposes. A more sophisticated approach advanced by Bowett is:

to have recourse to the principle of relativity of rights which demands a weighing of the one state's right of territorial integrity against the other state's right of protection. This is also demanded by the requirement of proportionality which is common both to reprisals and to self-defense. The measures of self-defense, of protection, must be proportionate to the danger, actual or imminent, to the nationals in need of protection.¹⁷⁹

Using both the principle of relativity and the requirement of proportionality as guides, one must examine the type as well as the extent of the violation before determining whether forcible action is warranted in a particular situation. This approach has been declared "preferable to a prior attempt to catalogue those rights to be protected and those rights to be left unprotected by the sanction of self-help."¹⁸⁰

(4) Immediacy of violation

The danger calling for the forcible protection must be either ongoing or imminent. The State whose duty it is to provide the protection in the first instance must be unable or unwilling to do so. A State need not wait for an actual violation to occur before taking protective action. In the final analysis, the test is one of objective reasonableness in context.

(5) Relative disinterestedness of the acting State

Sometimes it has been said that the acting State must be totally disinterested and not motivated by other more selfish consid-

¹⁷⁹ D. Bowett, *supra* note 50, at 93.

¹⁸⁰ Lillich, *Self-Help*, *supra* note 89, at 349.

erations. This has been attacked as being both naive and unrealistic where the decision whether to intervene falls upon a single State. In practice, only relative disinterestedness is required, and considerations of political interest should not, alone, invalidate an action, so long as the overriding motive of the action is the protection of rights of the acting State's nationals.

(6) Degree of coercive measures employed

In the intervention itself, the principles of necessity and proportionality are applicable. If recourse to force is unavoidable, the acting State should employ only an amount of force that is reasonably calculated to accomplish its objectives. In so doing, the territorial integrity and political independence of the target state must also be respected and not unnecessarily affected.

(7) Limited duration of protective action

The protection action must also be only of a duration that is necessary to achieve its humanitarian objectives. In this regard, Lillich observed that "the longer the troops remain in another country, the more their presence begins to look like a political intervention."¹⁸¹

b. Procedural Criteria

(1) Exhaustion of remedies; pacific means

Where the situation permits, noncoercive methods of persuasion should first be employed in keeping with article 2(3) of the United Nations Charter. That provision obligates members to seek solutions to international disputes by peaceful means. This condition is consistent with the United Nations goal of minimizing international armed conflict. If this condition is met, it adds credibility to the action of the intervening State.¹⁸²

(2) Lack of any other recourse

This criterion dovetails with the previous criterion and, in addi-

¹⁸¹*Id.* at 850.

¹⁸²See also McHugh, *supra* note 90, at 76.

tion, provides that priority of action be given to international bodies, such as the United Nations, since they are in the most favorable position to represent the inclusive interests of the community at large. However, where delay is intolerable and a timely response by an international body is unlikely, or where it is obvious that effective action by such a body will not be forthcoming, a State need not stand by hopelessly but may take action that the situation demands.¹⁸³

(3) Reporting of actions by the intervening State

In order to minimize the abusive invocation of the right to protect nationals with force, the actions, the motives behind them, and evidence to support the decision to intervene, all should be promptly reported to an appropriate international body, such as the United Nations Security Council, for review, appraisal and world community reaction. This would have the beneficial effect of making the acting State air its reasons for acting, including any self-interest, upon the record.¹⁸⁴

(c) Preferential Criteria

(1) Priority of collective action

In the absence of institutionalized community action, collective measures should be preferred over individual action. Therefore, a prospective intervenor should consult with other States as is practicable and attempt to obtain their support in the action. While the action does not gain in legitimacy by being collective rather than individual, there is a presumption that collective action is more likely to promote relative disinterestedness and genuine humanitarian concern. Collectivity, however, cannot be made an absolute requirement, for a lack of interest on the part of other States or undue delay should not leave victims of human rights violations needlessly unprotected.¹⁸⁵

(2) Invitation to use force

The invitation or consent of the target state should be sought by

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵See also Reisman, *supra* note 184, at 175-79, 188.

the prospective intervenor. While technically there is no intervention if the intervenor gains the consent or invitation of the de jure government of the target State, it must be kept in mind that not every invitation or consent to intervene is valid. There always exists the possibility that the invitation or consent was given under duress or other pressure. Moreover, in certain instances where there are various factions struggling for power and control of the target State, the representative character of the inviting or consenting authority may be subject to question.

The absence of consent or invitation in situations where rights of nationals are in imminent danger of substantial deprivation either by an unlawful element in the target State or by the government of the target State itself, should not, standing alone, preclude the use of force from being found lawful, provided the other requirements of legitimacy previously discussed are fulfilled. This criterion should only be considered as evidence in support of forcible action to protect nationals, and not as an essential prerequisite for such action.

C. VALIDITY AND APPRAISAL

1. Nationality of the Persons Protected

It is clear the crew members of the *Mayaguez* were United States nationals. Furthermore, the *Mayaguez* was owned and operated by United States nationals and had United States registry. This nexus provided the basis for the United States claim and brought it within the scope of self-defense.

2. Fundamental Character of the Rights Involved

The United States argued that its action was necessary "to protect the lives of American citizens and property."¹⁸⁶ Had the action been undertaken solely to protect property (i.e., the ship), the United States claim would have to fail. The nature of the property and the type of deprivation involved does not necessarily result in

¹⁸⁶See text above note 2, *supra*.

the destruction or loss of essential rights. Such loss or destruction would not necessarily involve an irremediable injury.

An argument can be made, however, that reasonable grounds existed for believing that the lives, liberty and well-being of the ship's crew were in danger. Without provocation or other good reason, the crew was recklessly fired upon and attacked by Cambodian authorities.

This act alone can qualify as an act of aggression under the United Nations General Assembly's definition of aggression. It was "an attack by the armed forces of a State on the . . . marine fleets of another State."¹⁸⁷ Bands of armed soldiers were also used in the capture, removal, and subsequent detention of the crew. Crew members themselves feared for their lives during the ordeal and at times were exposed to dangers by their captors.¹⁸⁸

Cambodia's initial silence and failure to respond and explain its actions and intentions contributed significantly to rising apprehension among United States officials concerning the safety and fate of the captured crew. It can be argued that Cambodia's behavior generated fears of prolonged detention and harsh treatment for the crew, as well as humiliating negotiations for their release.¹⁸⁹ Indeed, memories of the Pueblo incident loomed large in the minds of United States decision-makers.¹⁹⁰ The unfriendly state of United States-Cambodian relations at the time,¹⁹¹ and the reports that ruthless and inhumane measures were being taken by the new but unstable regime against large segments of Cambodia's population,¹⁹² added further reason to fear for the lives, safety and fate of the crew.

¹⁸⁷27 U.N. GAOR, art. 8(d), U.N. Doc. A/RES/3314 (1975).

¹⁸⁸See R. Rowan, *The Four Days of Mayaguez* c.2 (1975). "They are shooting at us," and "We're being captured" echoed loudly throughout the Mayaguez. *Id.* See also part 1 of this article, 82 Mil. L. Rev., 49, 64 notes 26, 27, and 87.

¹⁸⁹See *id.*, notes 47, 79, 94, 121, 134, 135.

¹⁹⁰See *id.*, notes 46 and 113. See also *id.*, note 47, which describes an incident in 1968, in which the Cambodians seized a United States patrol boat in the Mekong River and demanded a ransom of one tractor or bulldozer for each crew member seized.

¹⁹¹See generally *id.*, notes 1-5 and accompanying text.

¹⁹²See *id.*, note 47.

It can be argued that the fact that no significant harm or prolonged detention came to the crew indicates that their lives were not in danger. After all, the crew of the Panamanian vessel seized by Cambodia some days before had been released unharmed. It can be counter-argued, however, that the Panamanian seizure can be distinguished on the facts,¹⁹³ and that in the Mayaguez case no significant harm or prolonged detention occurred because of swift and decisive action by the United States to protect its nationals.

3. *Extent of Violation*

Some may contend that the relatively small number of United States nationals involved (40) should have precluded a forcible infringement of the territorial integrity of Cambodia. Although this fact has some relevance, its importance decreases as the human rights values affected become more fundamental. In the present case, the fundamental character of these rights has been demonstrated in the preceding paragraph.

Furthermore, they were infringed in a violent and reckless fashion, so much so that Cambodia's actions can qualify, as has been pointed out above, as an act of aggression and a serious violation of the freedom of navigation. The crew was arbitrarily attacked, placed under armed guard, and forcibly removed from their ship. They were also forcibly taken over a 3-day period to several locations in and around the Cambodian mainland for no apparent good reason, except that maybe the Cambodians contemplated detaining them for an extended period of time.¹⁹⁴ Finally, they were exposed to dangers, to hostile action which was in large measure precipitated by the failure of Cambodian authorities to respond to efforts to communicate with them and explain their actions and intentions.¹⁹⁵

Applying the principle of relativity of rights, it would appear the United States right of protection outweighed what appeared to be a limited interference with Cambodia's territorial integrity off the coast of that country.

¹⁹³See *id.*, note 40.

¹⁹⁴See *id.*, text above notes 47 and 113, *supra*.

¹⁹⁵See *id.*, notes 74, 79, 121, 131, and 134-35, *supra*.

4. *Immediacy of Violation*

It is clear that the danger was an ongoing one. Moreover, it can be argued that, in light of what was happening, the lack of an overture on the part of Cambodian authorities generated a well-founded concern on the part of United States officials that the crew would be further victimized unless swift action was taken.¹⁹⁶ In this regard it should be noted that at one point during their captivity the crew was told they would be shot if they went outside their sleeping quarters.¹⁹⁷ As previously pointed out, a State need not wait for an actual violation to occur before taking protective action to prove to the most skeptical that a danger exists.¹⁹⁸

5. *Relative Disinterestedness of the Acting State*

Insofar as the motives of the United States are concerned, the evidence indicates that political considerations were among the factors which motivated the interventionary action. They included, for example, the fear of being generally perceived as a "paper tiger"; restoring credibility among allies in view of recent setbacks in Southeast Asia; curtailing aggressive overtures by North Korea against South Korea; fear of another Pueblo incident and humiliating negotiations; and deterring interference with the freedom of ocean navigation.¹⁹⁹ Nevertheless, it has been consistently pointed out that the overriding concern and motive for the action was the protection of United States nationals.²⁰⁰ This is certainly how the majority of the international community viewed it in applauding the United States action.²⁰¹

¹⁹⁶See *id.*, notes 94, 121, 131, and accompanying text.

¹⁹⁷See *id.*, text above note 116, *supra*.

¹⁹⁸See also remarks of Undersecretary Mann during the Dominican crisis of 1965, quoted in Nanda, *supra* note 126, at 463.

¹⁹⁹See part 1 of this article, 82 Mil. L. Rev. 52-54, 55, notes 41-49, 53, and accompanying text.

²⁰⁰See *id.*, notes 40-41, 47, 121, and accompanying text. See notes 4-9, 18, and accompanying text, *supra*. See also Presidential letter to Congress, *infra* Appendix D.

²⁰¹See U.S. News & World Report, May 26, 1975, at 17-19.

6. Degree of Coercive Measures Employed

Here we are concerned with the measures taken as part of the interdiction operation against Cambodian gunboats and the fishing vessel carrying the crew to the mainland on Wednesday, May 14th.²⁰² Included also are the recovery operations carried out on the following day against the Mayaguez, Koh Tang Island, and the Cambodian mainland.²⁰³

It is submitted that the interdiction measures were a necessary and reasonable exercise of force. They were an attempt to prevent members of the crew from being moved to the mainland. Such movement would have made their rescue much more difficult, if not impossible, and would have involved use of much greater force and interference with Cambodia's territorial integrity. The primary measure used in the operation, jet fighters, was the only one available at the time. Other recovery personnel and equipment were not yet in the area. The fighters attacked the gunboats only after visual and other warnings failed to turn the gunboats and the fishing vessel back to the Koh Tang, and only after they were fired upon by the gunboats. It seems clear that the measures were employed against the gunboats and fishing vessel in a calculated and prudent manner, moving progressively in steps from low to high intensity.

It does not appear that anyone has objected to the methods used to recover the ship itself. No shots were fired by or from the destroyer which was involved in the operation, and every precaution (e.g., bullhorns, interpreters) was taken to warn anyone on the Mayaguez of the intentions of the boarding party.²⁰⁴

It is submitted also that the landing operation involved only an amount of force reasonably calculated to accomplish the rescue of members of the crew. They were genuinely thought to still be on Koh Tang Island.²⁰⁵ It is reported that, upon observing the fishing

²⁰²See part 1 of this article, 82 Mil. L. Rev. 63-66, text at notes 80-101.

²⁰³See *id.*, text at notes 137-63.

²⁰⁴See *id.*, notes 121, 128, 153, and accompanying text. See note 11 and accompanying text, *supra*. See also Presidential statement to Congress, Appendix D, *infra*.

²⁰⁵See part 1 of this article, 82 Mil. L. Rev. 75, text at note 139.

boat with its American passengers approaching the U.S.S. Wilson, the commander of the destroyer stated:

[U]p until two minutes ago I would have bet anything that the crew of the Mayaguez was on the island. It was so logical, with only 1,500 to 1,600 yards of water separating the ship and the Island. In this strange Cambodian chess game, why would Phnom Penh move all their pawns to the mainland (the Commander was a chess expert)? It didn't make sense. Not unless they were going to keep them on the mainland.²⁰⁶

The amount of force employed in the landing was far from being excessive. If anything, it was not enough, for from the beginning, the operation was in trouble due to unanticipated stiff resistance from a force ranging from 150 to 300 Cambodian soldiers.²⁰⁷ In fact, after eventual establishment of a beachhead, the landing operation turned into a 12-hour defensive evacuation operation.²⁰⁸

Also indicative of the reasonableness of the measures employed on Koh Tang was the plan to use three Cambodian language experts with bullhorns, who were to announce to the islanders that the landing force would leave peacefully if the Cambodians would simply release crew members held captive by them. As it turned out, the helicopter carrying these experts was shot down a mile from the island during the initial landing, and, therefore, the plan was not implemented.²⁰⁹

There is some question concerning the reasonableness of the dropping of America's largest conventional bomb on the island during the engagement. It should be noted, however, that the evidence does not indicate that anyone was killed or injured from this action, and that its purpose, as indicated earlier, was either to clear an alternate landing area for helicopters, or to create panic and divert the attention of the Cambodians at a time when the evacuation efforts were in trouble.²¹⁰

²⁰⁶R. Rowan, *supra* note 188, at 213.

²⁰⁷See part 1 of this article, 82 Mil. L. Rev. 75, text at note 138.

²⁰⁸See *id.*, text at notes 160-62.

²⁰⁹See *id.*, text at note 137.

²¹⁰See *id.*, text at note 160.

The most troublesome aspect of the measures employed in the rescue and recovery operation concerns the necessity for the mainland operations. These involved the bombing of the Ream airfield, where several American-made T-28 propeller-driven trainers were located and 17 of them destroyed. A second strike was directed against a fuel storage area at the Ream naval base in the port of Kompong Som, where some 2400 Cambodian troops and several gunboats were believed to be stationed.²¹¹

The mainland strikes were originally designed, in part, to bring pressure to bear on Cambodian authorities to release any of the crew who might have been held on the mainland.²¹² This is confirmed in the remarks of Secretary of State Kissinger, including those indicating that a relationship existed between the release of the crew and the attacks on the mainland.²¹³ Further confirmation comes from the comments of Secretary of Defense Schlesinger, who, in support of the mainland bombing, stated that Cambodia's decision to release the crew was primarily the direct result of this bombing.²¹⁴

It is significant to note that, although these decisionmakers attempted to establish a relationship between the bombing and the crew's release, the fact of the matter is that, at the time of the first strike, which was against the Ream airfield, the crew of the *Mayaguez* was already boarding the U.S.S. *Wilson*.

Although denied by United States decisionmakers,²¹⁵ this pressure tactic has a punitive aspect. This causes it to look more like a forcible reprisal,²¹⁶ than a measure of self-defense directly and immediately related to the actual rescue of nationals. And it is the lack of this punitive aspect that distinguishes self-defense measures, which are preventive in character,²¹⁷ from reprisals. As pointed out earlier in this paper, forcible reprisals are unlawful under the United Nations Charter provisions limiting the use of force.²¹⁸

²¹¹ See *id.*, text at notes 127, 155-58.

²¹² See *id.*, text at notes 12-13, 15-17.

²¹³ See *id.*, text at notes 12-13.

²¹⁴ See *id.*, text at note 16.

²¹⁵ See *id.*, text at notes 15, 18.

²¹⁶ See *id.*, text at notes 37-38.

²¹⁷ See *id.*, text at note 66.

²¹⁸ See *id.*, text at note 40.

The mainland bombing was also designed, in part, to protect against any attack on United States troops at Koh Tang Island by the estimated 2400 Cambodian troops believed to be stationed in the vicinity of the Ream naval base, or by planes from the Ream air base.²¹⁹ Confirming this purpose, President Ford stated:

I am not going to risk the life of one Marine. I'd never forgive myself. If the Cambodians attack the Marines, it would be too great a risk not to have this supportive action on the mainland.²²⁰

The mainland bombing must also fail as a protective defense measure in that it did not meet the principle of necessity required by the concept of self-defense. The evidence does not show immediacy of a threat from the mainland. In fact, there appears to be no evidence to show that any preparations were being made to use either the troops or the planes in question to attack the marines, who were some 35-40 miles away. Further, it appears that the second United States strike was not directed against any troop concentration, but at a fuel storage area. It is difficult to see how this property became a threat to the marines on Koh Tang Island. Finally, in view of the superior air power that was available, it is difficult to believe that the United States felt it necessary at the time to bomb a handful of T-28 propeller-driven trainers.

Like the dropping of America's largest conventional bomb on Koh Tang, the mainland bombing appears, in large measure, to have been a precautionary action. The energies and attention of the Cambodians were supposed thereby to be diverted to other things, in the event they were contemplating any countermeasures against the actions then taking place in the Gulf of Siam. If considered in this light, then the United States has, by its actions, failed in its obligation as an intervening State to respect and to avoid affecting unnecessarily the territorial integrity and political independence of Cambodia.

7. Limited duration of protective action

²¹⁹See *id.*, text at notes 13-14, 16-18.

²²⁰See *id.*, text at note 129.

It is obvious that the United States met this test. Starting with the interdiction operation, the intervention lasted less than two days and was immediately terminated when the last of the marines was evacuated from Koh Tang Island.

8. Exhaustion of Remedies by Pacific Means

Reasonable attempts to settle the crisis diplomatically were undertaken by the United States in satisfaction of the criterion. Although it had no relations with the new regime in Cambodia, the United States attempted to engage the services of the United Nations Secretary General,²²¹ Peking,²²² Prince Sihanouk,²²³ the public media, and private sources²²⁴ in an effort to settle the matter peaceably.²²⁵ Cambodia, on the other hand, failed to respond to any diplomatic overtures or other pressures for some two and one-half days.²²⁶ And when a Cambodian response finally reached the United States, military operations were well underway.²²⁷ Moreover, the response was full of propaganda and did not clearly indicate the Cambodians' intentions with regard to the crew.²²⁸

Although some may contend that the United States did not allow enough time for diplomacy to work,²²⁹ the extent of time given to diplomacy was reasonable in view of the influence of other factors in the situation, such as the lack of any response by Cambodia to diplomatic initiatives; the nature of the Mayaguez seizure and subsequent movements of the ship and crew towards the mainland; Cambodian resistance during the United States interdiction operation; the possibility that some of the crew had already been moved to the mainland; the risk that further delay might have made rescue and recovery impossible; the hostile nature of the new regime and fears of another Pueblo incident; and the pressures exerted by Thailand in objecting to the use of its territory as a base of opera-

²²¹ See *id.*, notes 74, 134.

²²² See *id.*, note 121 and text at note 50.

²²³ *Id.*

²²⁴ See *id.*, text at notes 118-21.

²²⁵ *Id.*

²²⁶ See *id.*, text at notes 128, 135.

²²⁷ See text at notes 137-47.

²²⁸ See *id.*, text at notes 141-47.

²²⁹ See *id.*, for example, note 135 and accompanying text.

tions for the rescue and recovery of the Mayaguez.²³⁰ The requirement for use of pacific remedies calls only for such reasonable attempts as the situation permits. And as one United Nations official observed: "It was all too obvious; the Cambodians were not ready for diplomacy."²³¹

9. Lack of any other recourse

It is obvious that international enforcement machinery was not likely to be effective in the present case. And even if it had been, delay would have been inevitable, thereby preventing a timely response, which was demanded by the situation. Only diplomatic methods were forthcoming from the United Nations, and they too proved to be ineffective.²³²

10. Reporting of Actions of the Intervening State

The record is quite clear on this point. The actions both contemplated and carried out by the United States were promptly reported to the United Nations Secretary General and the Security Council, together with explanation and evidence.²³³ This was in accordance with article 51 of the United Nations Charter.

11. Priority of Collective Action

Although attempts were made to obtain the diplomatic services of other States, no attempts were made to obtain active military support in the action for obvious reasons. However, the territory of Thailand was used as a base for some operations during the crisis period. And although Thailand strongly voiced her objections to the use of her territory for reasons set forth elsewhere in this paper,²³⁴

²³⁰These factors were summarized in remarks by Secretary Kissinger at a news conference on 16 May 1975. They are quoted in part 1 of this article, 82 Mil. L. Rev. 70-71, note 121. See also *id.*, text at note 128; *id.*, notes 53, 94, 131-36.

²³¹See *id.*, note 135.

²³²See *id.*, text at note 121.

²³³See text of letters in Appendix B, *infra*.

²³⁴See part 1 of this article, 82 Mil. L. Rev. 55-57, note 58 and accompanying text.

it is interesting to note that no active measures were taken by her to prevent such use by the United States during the crisis period.²³⁵ It should also be noted that world reaction to the seizure and subsequent rescue and recovery action was overwhelmingly in favor of the United States.²³⁶

12. *Invitation to Use Force*

The nonapplicability of this criterion in the present case is obvious.

13. *Summary*

The following general observations are based upon the application of the criteria above:

(1) The persons protected were United States nationals, and the property was theirs also.

(2) Their fundamental rights of life and liberty were involved.

(3) There was serious and substantial violation of these fundamental human rights.

(4) The violation was both ongoing and imminent.

(5) The United States acted with relative disinterestedness.

(6) Except for the mainland air strikes, the United States employed an amount of force reasonably necessary and proportionate to the need to accomplish the rescue and recovery of its nationals. The force used did respect as far as possible, and did not unnecessarily interfere with the territorial integrity and political independence of Cambodia.

(7) The protective action was only of a duration necessary to achieve the rescue and recovery of United States nationals.

²³⁵*Id.*

²³⁶See U.S. News & World Report, May 26, 1975 at 19-22.

(8) To the extent permitted by the situation, the United States first made reasonable attempts to effect a solution by peaceful means.

(9) Effective enforcement action by the United Nations or other international organization was not forthcoming.

(10) The United States reported its actions to the United Nations in a timely and proper fashion.

(11) The United States did not attempt to obtain the active military support of other States in the action. Moreover, it did not appear that any such support would have been forthcoming, had such an effort been made.

(12) The criterion of invitation or consent to intervene is not applicable in the present case.

III. CONCLUDING REMARKS

This paper has attempted to describe, analyze and determine the validity of a series of claims of legal right asserted by the United States concerning the seizure of one of its merchant ships by Cambodian authorities,²³⁷ with the result that:

1. The assertion that the seizure of the *Mayaguez* was an act of piracy is invalid. As article 15 of the 1958 Convention on the High Seas makes clear, piracy consists of illegal acts of violence committed "on the high seas" for "private ends" by the crew of a "private ship"—not by a governmental vessel, for a governmental purpose, in claimed territorial waters. The failure to consult with and rely upon the advice of international lawyers, as well as the political

²³⁷Hearings concerning the seizure and recovery of the *Mayaguez* were conducted by the House Subcommittee on International Political and Military Affairs of the Committee on International Relations. When this article was written, the author did not yet have the report of this House subcommittee. The report should be very useful to other students of the *Mayaguez* incident and related matters. See H.R. Rep., House Subcomm. on International Political and Military Affairs of the House Comm. on International Relations, 94th Cong., 1st Sess., parts I, II, and III (1975). Also not available when this article was written was Paust, *The Seizure and Recovery of the Mayaguez*, 85 Yale L.J. 744 (1976).

basis for the assertion, is apparent from the analysis of this claim, above.

2. The claim that the Mayaguez was seized on the high seas likewise cannot stand in light of past trends and the present practice of the international community of States. If any rule of general application concerning the extent of territorial seas exists today, it is a 12-mile rule. This would bring the Mayaguez within claimed Cambodian territorial waters at the time of the seizure.

The analysis of this claim further indicates a need for an international convention on the extent of territorial waters for all nations. Such an agreement should prevent disputes of this nature from arising in the future.

3. The validity of the United States claim to the right of actual engagement in innocent passage is apparent from the analysis. Apparent also is the unlawful and serious conduct of the Cambodian authorities in infringing upon this right. In addition, the treatment of this claim above shows the present vagueness of the law on the subject of innocent passage. There is need to clarify further the character of innocent passage, as well as the rights and obligations of both the coastal and flag States with respect to it.

4. The claim of action in self-defense to protect nationals is arguably valid. This is true despite criticism that this rationale is no longer acceptable under international law because of its potential for abuse and because of the limitations of the United Nations Charter on the use of force and intervention.

The related claim that the measures employed by the United States to protect nationals were reasonable under existing international standards is, with one exception, also valid. The mainland bombing operations cannot stand, for reasons discussed earlier. Discussion above has attempted to stimulate support for a policy calling for a limited measure of unilateral forcible self-help to protect human rights and fundamental freedoms in the world arena.

The absence of effective international machinery to protect human rights, coupled with the inability of the world community to promptly respond in an institutionalized manner to situations where the well-being and freedom of human beings are threatened, demon-

strates the continuing need for as well as the legal validity of a limited right of individual self-defense to protect nationals by armed force. Both the supposed absolute doctrine of nonintervention and the "classic" approach to the Charter's prohibition against the use of force leaves this writer with the impression that individuals in many parts of the world today may have less protection than in previous times.

It is contrary to all that is decent, moral, and logical to require a State to stand aside and watch while human rights violations take place, in order to meet the requirements of some blanket or blackletter prohibition against the use of force at the expense of more fundamental human values. Even a system of minimum public order demands a certain amount of justice, respect, and protection for individuals.

While the banners of sovereignty and conflict-minimization should continue to fly high in the international arena, the colors of self-help to protect by force if necessary the world's most valuable resource, people, must also be displayed in certain emergency situations for the sake of innocent victims of tyranny. This must be the case until, if ever, effective international enforcement machinery is made operational.

As this paper has attempted to show, abusive invocation of the right of self-defense to protect nationals abroad can be a danger. However, this danger is minimal when considered in light of the fundamental human values at stake. It is therefore strongly recommended that prompt and serious consideration be given to the enactment of a convention or resolution providing for the authorization of self-help measures, or for intervention by the United Nations, a regional body, or a group of States. Such self-help measures or other intervention could be used only where substantial violations of fundamental human rights or freedoms are ongoing or imminently threatened. The responsible State would have either to be unable or unwilling to act effectively in the matter. Such a proposal should contain both authorization for intervention, and strict control measures and other safeguards similar to the criteria constructed in the preceding section from the efforts of noted scholars who have examined doctrine and practice on the subject.

A proposed resolution providing for a similar authorization of in-

tervention by the United Nations, a regional organization, or a group of States has been drafted. It can also be used as a guide for the slightly broader convention or resolution recommended herein.²³⁸ It is submitted that such a step could lead to striking a favorable balance between the need for minimum public order and the protection and promotion of human rights. Human rights in this context include, in other words, that which has been declared an essential State interest, the protection of nationals.

For the benefit of those who are primarily interested in upholding at the expense of other values the principle of nonintervention and prohibition on any use of force, the following observation of Professor Lillich is offered. He has pointed out that "a prohibition of violence is not an absolute virtue; it has to be weighed against other values as well."²³⁹ Considering the still decentralized condition of the international community, the major purposes of the United Nations must be understood to include recognition of humanitarian self-help relief against prior unlawfulness. As was declared by a noted statesman: "Peace is a coin which has two sides; one is the avoidance of the use of force, and the other is the creation of conditions of justice. In the long run, you cannot expect one without the other."²⁴⁰

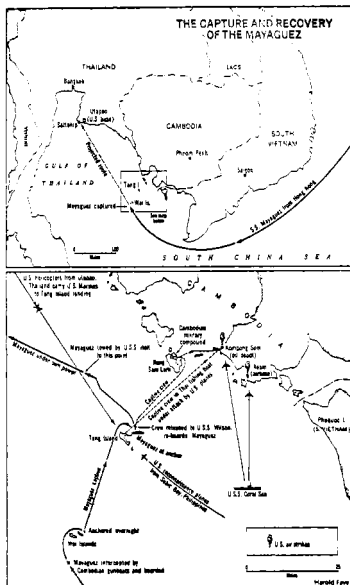
²³⁸See Note, *A Proposed Resolution Providing for the Authorization of Intervention by the United Nations, a Regional Organization or a Group of States in a State Committing Gross Violations of Human Rights*, 13 Va. J. Int'l L. 340 (1973).

²³⁹Lillich, *Forcible Self-Help*, *supra* note 89, at 65.

²⁴⁰Statement of Secretary of State Dulles, quoted in Lillich, *Forcible Self-Help*, *supra* note 89, at 65.

APPENDIX A

(This map was originally published as the frontispiece to Roy Rowan, *Four Days of Mayaguez* (1975). It is reproduced here with Mr. Rowan's kind permission.)



APPENDIX B

[74 Dep't of State Bull. 720 (1975)]

U.S. LETTER TO U.N. SECRETARY GENERAL, MAY 14

USUN press release 40 dated May 14:

Dear Mr. Secretary General: The United States Government wishes to draw urgently to your attention the threat to international peace which has been posed by the illegal and unprovoked seizure by Cambodian authorities of the U.S. merchant vessel, Mayaguez, in international waters.

This unarmed merchant ship has a crew of about forty American citizens.

As you are no doubt aware, my Government has already initiated certain steps through diplomatic channels, insisting on immediate release of the vessel and crew. We also request you to take any steps within your ability to contribute to this objective.

In the absence of a positive response to our appeals through diplomatic channels for early action by the Cambodian authorities, my Government reserves the right to take such measures as may be necessary to protect the lives of American citizens and property, including appropriate measures of self-defense under Article 51 of the United Nations Charter.

Accept, Mr. Secretary General, the assurances of my highest consideration.

Sincerely,

JOHN SCALI
[U.S. Representative to the United Nations]

U.S. LETTER TO U.N. SECURITY COUNCIL
PRESIDENT, MAY 14

My Government has instructed me to inform you and the Members of the Security Council of the grave and dangerous situation brought about by the illegal and unprovoked seizure by Cambodian authorities of a United States merchant vessel, the S.S. Mayaguez, in international waters in the Gulf of Siam.

The S.S. Mayaguez, an unarmed commercial vessel owned by the Sea-Land Corporation of Menlo Park, New Jersey, was fired upon and halted by Cambodian gunboats and forcibly boarded at 9:16 p.m. (Eastern Daylight Time) on May 12. The boarding took place at 09 degrees, 48 minutes north latitude, 102 degrees, 58 minutes east longitude. The vessel has a crew of about 40, all of whom are United States citizens. At the time of seizure, the S.S. Mayaguez was en route from Hong Kong to Thailand and was some 52 nautical miles from the Cambodian coast. It was some 7 nautical miles from the Islands of Poulo Wai which, my Government understands, are claimed by both Cambodia and South Viet-Nam.

The vessel was on the high seas, in international shipping lanes commonly used by ships calling at the various ports of Southeast Asia. Even if, in the view of others, the ship were considered to be within Cambodian territorial waters, it would clearly have been engaged in innocent passage to the port of another country. Hence, its seizure was unlawful and involved a clearcut illegal use of force.

The United States Government understands that at present the S.S. Mayaguez is being held by Cambodian naval forces at Koh Tang Island approximately 15 nautical miles off the Cambodian coast.

The United States Government immediately took steps through diplomatic channels to recover the vessel and arrange the return of the crew. It earnestly sought the urgent cooperation of all concerned to this end, but no response has been forthcoming. In the circumstances the United States Government has taken certain appropriate measures under Article 51 of the UN Charter whose purpose it is to achieve the release of the vessel and its crew.

I request that this letter be circulated as an official document of the Security Council.

Sincerely,

JOHN SCALI
[U.S. Representative to the United Nations]

APPENDIX C

35 Facts on File 331 (1975)

MAY 15 CAMBODIAN COMMUNIQUE OFFERING TO RELEASE THE MAYAGUEZ

Since we liberated Phnom Penh and the entire country, U.S. imperialism has conducted repeated, successive intelligence and espionage activities with a view to committing subversion, sabotage, and provocation against the newly liberated New Cambodia in an apparent desire to deny the Cambodian nation and people, who have suffered all manner of hardships and grief for more than five years because of the U.S. imperialist war of aggression, the right to survive, to resolve the problems of their economy and build their country on the basis of independence and initiative as an independent, powerful, neutral and nonaligned nation. Secondly, the U.S. imperialists have tried to block our sea routes and ports as part of the above mentioned strategic goal.

In the air, U.S. imperialist planes have been conducting daily espionage flights over Cambodia, especially over Phnom Penh, Sihanoukville, Sihanoukville port and Cambodia's territorial waters. They even resorted to an insolent show of force, trying to intimidate the Cambodian people. On the ground, U.S. imperialism has planted its strategic forces to conduct subversive, sabotage and destructive activities in various cities by setting fire to our economic, strategic and military positions and so forth.

On the sea, it has engaged in many espionage activities. U.S. imperialist spy ships have entered Cambodia's territorial waters and

engaged in espionage activities there almost daily, especially in the areas of Sihanoukville port, from Pring Tang and Wai Island, to Pres Island, south of Sihanoukville.

These ships have been operating as fishing vessels. There have been two or three of them entering our territorial waters daily. They have secretly landed Thai and Cambodian nationals to contact their espionage agents on the mainland. Those who were captured have confessed all of this to us.

Some ships carry dozens of kilograms of plastic bombs and several radio-communication sets with which they try to arm their agents to sabotage and destroy our factories, ports, and economic, strategic and military positions. These persons have successively confessed to us that they are CIA agents based in Thailand and that they entered Cambodia's territorial waters through Thai waters.

On May 11, 1975, our naval patrol captured one ship near Prince Island facing Sihanoukville port. This ship, disguised as a fishing boat, was manned by a crew of seven heavily armed Thais carrying, among other things, two 12.7-mm machine guns and a quantity of plastic bombs, grenades and mines. At the same time, we found a powerful U.S.-built radio-teletype set capable of maintaining communications from one country to another.

These people have admitted that they are CIA agents sent out to conduct sabotage activities and to make contact with the forces set up and planted by U.S. imperialism before it withdrew from Cambodia. Later on, at dawn on 12 May, another ship manned by seven Thai nationals and disguised as a fishing vessel reached Pres Island near Sihanoukville port with the same intention as the previous ships. These ships were operating in the territorial waters of Cambodia. At certain points they moved within only four or five kilometers from the coast, at other times they even accosted Cambodian islands and landed at these islands. Such was the case at Pring, Pres, Teng and other islands.

This is a definite encroachment on Cambodia's sovereignty—an encroachment they dare to make because they are strong and because Cambodia is a small and poor country with a small population that has just emerged from the U.S. imperialist war of aggression lacking all and needing everything. The Cambodian nation and

people, though just emerging from [the] U.S. imperialist war of aggression and needy as they are, are determined to defend their territorial waters, national sovereignty and national honor in accordance with the resolutions of the N.U.F.C. (National United Front of Cambodia) and of the successive national congresses. Accordingly, Cambodia's coast guard has never ceased its relentless patrols inside Cambodia's territorial waters.

As part of the U.S. imperialists' espionage activities in our territorial waters, on May 7, 1975, a large vessel in the form of a merchant ship flying the Panamanian flag entered deeply into Cambodian territorial waters between Wai and Tang Islands and intruded about 50 kilometers past Wai Island coastward. Seeing that this ship had intruded too deeply into Cambodian territorial waters, our patrol then detained it in order to examine and question the crew and then report to higher authorities, who would in turn refer the matter to the R.G.N.U.C. (Royal Government of the National Union of Cambodia) for a decision. We did not even bother to inquire about the ship's cargo.

The crew was composed of Thais, Taiwanese, Filipinos and Americans. It was evident that this ship, having intentionally violated Cambodian territorial waters, has only two possible goals: either to conduct espionage or to provoke incidents. It certainly did not lose its way. If it did it would not have entered our waters so deeply. However, the R.G.N.U.C. has decided to allow this ship to continue its route out of Cambodia's territorial waters. This is clear proof of our goodwill. Though this ship had come to provoke us inside our territorial waters we still showed our goodwill.

Then on 12 May 1975 at 1400 our patrol sighted another large vessel steaming toward our waters. We took no action at first. This ship continued to intrude deeper into our waters, passing the Wai Island eastward to a point four or five kilometers beyond the islands. Seeing that this ship intentionally violated our waters, our patrol then stopped it in order to examine and question it and report back to our higher authorities so that the latter could report to the Royal Government. This vessel sails in the form of a merchant ship code-named Mayaguez, flying American flags and manned by an American crew.

While we were questioning the ship, two American F-105 aircraft

kept circling over the ship and over the Wai and Tang Islands until evening. From dawn on 13 May between four and six American F-105's and F-111's took turns for 24 hours savagely strafing and bombing around the ship, the Wai and Tang Islands and Sihanoukville port area. At 0530 on 14 May six U.S. F-105 and F-111 aircraft resumed taking turns strafing and bombing. According to a preliminary report, two of our patrol vessels were sunk. We still have had no precise idea of the extent of the damage done or the number killed among our patrolmen and the American crewmen.

What was the intention, the reason, for this ship entering our territorial waters? We are convinced that this American ship did not lose its way, because the Americans have radar, electronic and other most sophisticated scientific instruments. It is therefore evident that this ship came to violate our waters, conduct espionage and provoke incidents to create pretexts or mislead the opinion of the world people, the American people and the American politicians, pretending that the Cambodian nation and people are the provocateurs while feigning innocence on their part.

The world people, the American people and the American politicians have already seen the U.S. imperialists successfully bullying the peoples of small countries who refused to bow to their will. The U.S. imperialists used to bully Russia in the past. Cuba, China, North Korea, North Vietnam and other countries having independence and honor were also bullied by them. Now they have created the incident in Cambodian territorial waters to create a pretext for attacking the Cambodian nation and people. However, we are confident that the world people, as well as the American people, youth and politicians who love peace and justice will clearly see that the Cambodian people—a small, poor and needy people just emerging from the U.S. imperialist war of aggression—have no intention and no wherewithal, no possibility of capturing an American ship crossing the open seas at large. We are able to capture it only because it had violated our territorial waters too flagrantly, and had come too close to our nose.

Therefore, the charge leveled by the U.S. imperialists—that we are sea pirates—is too much. On the contrary, it is the U.S. imperialists who are the sea pirates who came to provoke the Cambodian nation and people in Cambodian territorial waters, just as they had only fomented subversion in our country, staged a coup d'etat

destroying independent, peaceful and neutral Cambodia, and committed aggression against Cambodia causing much destruction and suffering. Now they are looking for pretexts to deceive world opinion and that of the American people and politicians so as to destroy a country which refuses to bow to their will. We are confident in the good sense of the world people and the American people, youth and politicians who love peace and justice.

Regarding the Mayaguez ship, we have no intention of detaining it permanently and we have no desire to stage provocations. We only wanted to know the reason for its coming and to warn it against violating our waters again. This is why our coast guard seized this ship. Their goal was to examine it, question it and make a report to higher authorities who would then report to the Royal Government so that the Royal Government could itself decide to order it to withdraw from Cambodia's territorial waters and warn it against conducting further espionage and provocative activities. This applies to this Mayaguez ship and to any other vessels like the ship flying Panama flags that we released on May 7, 1975.

Wishing to provoke no one or to make trouble, adhering to the stand of peace and neutrality, we will release this ship, but we will not allow the U.S. imperialists to violate our territorial waters, conduct espionage in our territorial waters, provoke incidents in our territorial waters or force us to release their ships whenever they want, by applying threats.

Hu Nim
R.G.N.U.C. Information and
Propaganda Minister

APPENDIX D

[74 Dep't of State Bull. 721-22 (1975)]

STATEMENT BY WHITE HOUSE PRESS
SECRETARY, MAY 14

White House press release dated May 14:

In further pursuit of our efforts to obtain the release of the SS *Mayaguez* and its crew, the President has directed the following military measures, starting this evening Washington time:

—U.S. marines to board the SS *Mayaguez*.

—U.S. marines to land on Koh Tang Island in order to rescue any crew members as may be on the island.

—Aircraft from the Carrier *Coval Sea* to undertake associated military operations in the area in order to protect and support the operations to regain the vessel and members of the crew.

MESSAGE TO THE CAMBODIAN AUTHORITIES
FROM THE U.S. GOVERNMENT, MAY 14

White House press release dated May 14:

We have heard radio broadcast that you are prepared to release the S.S. *Mayaguez*. We welcome this development, if true.

As you know, we have seized the ship. As soon as you issue a statement that you are prepared to release the crew members you hold unconditionally and immediately, we will promptly cease military operations.

STATEMENT BY PRESIDENT FORD, MAY 15 *

At my direction, United States forces tonight boarded the American merchant ship S.S. *Mayaguez* and landed at the Island of Koh Tang for the purpose of rescuing the crew and the ship, which had been illegally seized by Cambodian forces. They also conducted supporting strikes against nearby military installations.

I have now received information that the vessel has been recovered intact and the entire crew has been rescued. The forces that have successfully accomplished this mission are still under hostile fire but are preparing to disengage.

I wish to express my deep appreciation and that of the entire nation to the units and the men who participated in these operations for their valor and for their sacrifice.

PRESIDENT FORD'S LETTER TO THE CONGRESS,
MAY 15 *

May 15, 1975.

DEAR MR. SPEAKER: (DEAR MR. PRESIDENT PRO TEM:)
On 12 May 1975, I was advised that the S.S. *Mayaguez*, a merchant vessel of United States registry en route from Hong Kong to Thailand with a U.S. citizen crew, was fired upon, stopped, boarded, and seized by Cambodian naval patrol boats of the Armed Forces of Cambodia in international waters in the vicinity of Poulo Wai Island. The seized vessel was then forced to proceed to Koh Tang Island where it was required to anchor. This hostile act was in clear violation of international law.

In view of this illegal and dangerous act, I ordered, as you have been previously advised, United States military forces to conduct the necessary reconnaissance and to be ready to respond if diploma-

*Made in the press briefing room at the White House at 12:27 a.m. e.d.t., broadcast live on television and radio (text from White House press release).

tic efforts to secure the return of the vessel and its personnel were not successful. Two United States reconnaissance aircraft in the course of locating the Mayaguez sustained minimal damage from small firearms. Appropriate demands for the return of the Mayaguez and its crew were made, both publicly and privately, without success.

In accordance with my desire that the Congress be informed on this matter and taking note of Section 4(a)(1) of the War Powers Resolution, I wish to report to you that at about 6:20 a.m., 13 May, pursuant to my instructions to prevent the movement of the Mayaguez into a mainland port, U.S. aircraft fired warning shots across the bow of the ship and gave visual signals to small craft approaching the ship. Subsequently, in order to stabilize the situation and in an attempt to preclude removal of the American crew of the Mayaguez to the mainland, where their rescue would be more difficult, I directed the United States Armed Forces to isolate the island and interdict any movement of the ship itself, while still taking all possible care to prevent loss of life or injury to the U.S. captives. During the evening of 13 May, a Cambodian patrol boat attempting to leave the island disregarded aircraft warnings and was sunk. Thereafter, two other Cambodian patrol craft were destroyed and four others were damaged and immobilized. One boat, suspected of having some U.S. captives aboard, succeeded in reaching Kompong Som after efforts to turn it around without injury to the passengers failed.

Our continued objective in this operation was the rescue of the captured American crew along with the retaking of the ship Mayaguez. For that purpose, I ordered late this afternoon [May 14] an assault by United States Marines on the island of Koh Tang to search out and rescue such Americans as might still be held there, and I ordered retaking of the Mayaguez by other marines boarding from the destroyer escort HOLT. In addition to continued fighter and gunship coverage of the Koh Tang area, these marine activities were supported by tactical aircraft from the CORAL SEA, striking the military airfield at Ream and other military targets in the area of Kompong Som in order to prevent reinforcement or support from the mainland of the Cambodian forces detaining the American vessel and crew.

At approximately 9:00 P.M. EDT on 14 May, the Mayaguez was

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retaken by United States forces. At approximately 11:30 P.M., the entire crew of the Mayaguez was taken aboard the WILSON. U.S. forces have begun the process of disengagement and withdrawal.

This operation was ordered and conducted pursuant to the President's constitutional Executive power and his authority as Commander-in-Chief of the United States Armed Forces.

Sincerely,

GERALD R. FORD

BOOK REVIEW:

SEA POWER AND THE LAW OF THE SEA: THE NEED FOR A CONTEXTUAL APPROACH *

Janis, Mark W., *Sea Power and the Law of the Sea*. Lexington, Mass.: Lexington Books, 1976. Pp. xvii, 99. Cost: \$11.00.

*Reviewed by George K. Walker * **

In this book review, which is almost an article, Professor Walker examines and evaluates a book which explores interrelationships between the needs and capabilities of the world's naval fleets, on the one hand, and the development of the law of the sea, on the other hand.

* This book review has previously been published in slightly different form at 30 Nav. War Coll. Rev. 88 (Spring 1978), and at 6 Ocean Dev. & Int'l L. 421 (1979). It is reprinted here with the kind permission of Commander W. R. Pettyjohn, U.S. Navy, editor of the Naval War College Review, and of Mr. Ben Russak, president, Crane, Russak & Company, Inc., 347 Madison Ave., New York, N.Y. 10017.

The opinions and conclusions expressed in this review are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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The author gratefully acknowledges the assistance of John Norton Moore, Walter L. Brown Professor of Law, and Director, Center for Oceans Law and Policy, School of Law, University of Virginia, Charlottesville, Virginia; and Commander J. Ashley Roach, JAGC, U.S. Navy, and Commander Dennis F. McCoy, JAGC, U.S. Navy, immediate past and present heads, respectively, of the International Law Division, U.S. Naval War College, Newport, Rhode Island. All of them read the manuscript and offered many helpful comments and criticisms.

The author also acknowledges his intellectual debt to Emeritus Professor Myres S. McDougal and to Professor W. Michael Reisman of the Yale Law School.

While Professor Walker finds much of merit in Mr. Janis' work, he concludes that the book would be still better if its author had used the "contextual method of problem solving through decision theory." Specifically, Professor Walker recommends use of the "policy science approach," i.e., the goal-oriented decision theory refined by Professors McDougal, Lasswell, and Reisman of Yale University.

The heart of Professor Walker's review is a summary of the Lasswell-McDougal-Reisman decision theory. This review has previously been published in two other journals. It is republished here because of the benefit our readers may reap from exposure to this method of decisionmaking, highly regarded in academic and governmental circles.

I. INTRODUCTION

If 1976 was a very good year for naval books of general application and interest¹, the beginnings of the United States Navy's third century may have signalled a rethinking of navies' roles in the international power process and ultimately in all aspects of international interaction. Ken Booth's *Navies and Foreign Policy*² appeared in 1976, following D. P. O'Connell's *Influence of Law on Sea Power* (1975),³ Edward Luttwak's *Political Uses of Sea Power* (1974)⁴ and James Cable's *Gunboat Diplomacy* (1975).⁵ And, for the Soviets, Admiral S. G. Gorshkov has produced his "summa of

¹Sweetman, *Notable Naval Books of 1976*, 103 U.S. Nav. Inst. Proc. 95 (Jan. 1977).

²K. Booth, *Navies and Foreign Policy* (1977), reviewed by Simpson at 30 Nav. War Coll. Rev. 134 (Fall 1977).

³D. O'Connell, *The Influence of Law on Sea Power* (1975), reviewed by Harlow at 29 Nav. War Coll. Rev. 124 (Fall 1976), and by Davidson at 78 Mil. L. Rev. 202 (1977).

⁴E. Luttwak, *The Political Uses of Sea Power* (1974), reviewed by McNulty, 27 Nav. War Coll. Rev. 83 (Jan.-Feb. 1975).

⁵J. Cable, *Gunboat Diplomacy: Political Application of Limited Force* (1971).

naval power,"⁶ *Sea Power and the State*,⁷ said to be "dense, rich, logical and almost overpowering in breadth."⁸

The latest American study on the relationship of military power at sea to international law as the flow or process of authoritative controlling decision⁹ is Mark W. Janis' *Sea Power and the Law of*

⁶Kenney, *A Primer on S. G. Gorshkov's Sea Power of the State*, 29 Nav. War Coll. Rev. 94 (Spring 1977).

⁷S. G. Gorshkov, *Sea Power and the State* (1976). This work was translated from the Russian by the U.S. Naval Intelligence Support Center, Washington, D.C.

⁸Kenney, *supra* note 6, at 94.

⁹See Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 Yale Stud. World Pub. Ord. 1, 30-33 (1974); Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 Va. L. Rev. 662, 667-68 (1968).

For purposes of this article, the reviewer has adopted the broad, contextual view of international law, and in particular the law of the sea, espoused by Professors Lasswell, McDougal, and Reisman of the New Haven school of thought. This view contrasts with the more traditional approach of the positivist theoreticians of the nineteenth century. That time saw Napoleon, Carl von Clausewitz, Antoine Henri Jomini, Otto von Bismarck, and the Von Moltkes as the leading exponents of military science and statecraft. It was also the era of such legal philosophers as John Austin in England, a former British army officer turned lecturer in law; and John Chipman Gray in the United States, who defined law as "the rules which the courts . . . lay down for the determination of legal rights and duties." J. Gray, *Nature and Sources of Law* § 191 (1909).

The contextual and positivist approaches may be contrasted with the functional approach. This third approach is exemplified by the work of Alfred Thayer Mahan, set forth in his book, *The Influence of Sea Power Upon History* (1890), and other writings. In law, the functional approach is represented by Oliver Wendell Holmes, who wrote that the life of the law is not logic systematically derived from the decisions of appellate courts, but instead is the experience of life itself. O. Holmes, *The Common Law* 5 (M. Howe ed. 1963).

As demonstrated by the writings of Suzuki and Moore cited above, the Lasswell-McDougal jurisprudence combines law with other disciplines. Specifically, the rudimentary eclectic approaches of the legal realist, historical, and sociological schools of thought are coupled with new intellectual methods and disciplines. These latter include systems analysis and anthropology. For an analysis of international law as approached by different schools of jurisprudence, see McDougal, Lasswell, & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 Va. J. Int'l L. 188 (1968).

Scholarship at the Naval War College has experienced similar intellectual growth. Indeed, Mahan perceived the value of a non-doctrinaire approach at least as far back as 1887. This was at roughly the same time Holmes was a law student, presumably beginning to formulate his ideas. See Crowl, *Education Versus Training at the Naval War College: 1884-1972*, 26 Nav. War Coll. Rev. 2 (Nov.-Dec. 1973); Turner, *Convocation Address*, 25 *id.* 1 (Nov.-Dec. 1972).

the Sea.¹⁰ His theme is well stated in the introduction and his final chapter:

The law of the sea is the creature of international order, reflecting patterns of compromise and consensus, insofar as they exist, among the competing and complementary interests of states. Since security interests are vital to every country, it is only reasonable to expect that states will consider sea power when devising ocean policy. It would be remarkable if a workable legal order for the oceans did *not* accommodate national naval interests.

Sea power influences the development of the law of the sea not only by imposing the need to reconcile naval interests in international negotiations, but when naval force is used to advance national claims to international law of the sea Navies often have a role in this process of . . . law making.¹¹

. . . .

International society, like any society, needs a more complex legal system when more actors relate in more ways. The steadily increasing number of ocean users and uses means that a more detailed ocean law is inevitable. Navies will be ensnared in this new complexity. But the new ocean order will not only impede the accomplishment of some naval missions, it will facilitate others. Remem-

¹⁰M. Janis, *Sea Power and the Law of the Sea* (1976). A Princeton graduate, Mr. Janis is also a former Rhodes Scholar. While at Oxford University, he earned the B.A. and M.A. in jurisprudence. As an officer in the naval reserve, he has taught international law and relations at the Naval Postgraduate School, Monterey, California. He is a J.D. candidate at Harvard Law School.

¹¹M. Janis, *supra* note 10, at xvii. The reviewer has intentionally omitted the word "customary" before the phrase "law making." Mr. Janis recognizes by implication, and this review illustrates, that the world's navies play a vital role in shaping other sources of international law as well as custom. These other sources include treaties, *id.* at 80-85; general principles of law (if the prescriptions of national legislatures be considered evidence of such principles), *id.* at 13-18; and the writings of the most highly qualified publicists, *id.* at 75, 86, citing M. McDougal & W. Burke, *The Public Order of the Oceans* 12-13 (1962). (See also I.C.J. Statute art. 38(1).)

brance and reverence of the old ocean order will not be enough. Navies must reexamine their relationships to the law of the sea and their preferences for legal rules keeping the emerging ocean order in mind.¹²

He acknowledges that "the new ocean order is bound to create some difficulties for naval operations," noting that the old ocean order was ideally suited for the mobility of powerful navies, whereas the emerging new consensus "will impose restraints on ocean use where before there were none."¹³

This article will first review Mr. Janis' exposition of these themes. Second, we will examine his book in the context of other recent seminal publications, notably Booth's *Navies and Foreign Policy*, O'Connell's *Influence of Law on Sea Power*, Luttwak's *Political Uses of Sea Power*, and Cable's *Gunboat Diplomacy*. Third, we will examine his monograph in the context of international law to illustrate the breadth of sources that must be considered when a naval operation is being planned or when situations involving potential or actual conflict develop in the ocean environment.

Finally, the article will illustrate the utility of the contextual method of problem solving through decision theory, particularly the policy science approach. With respect to the latter, this writer's intellectual debt to Professors Myres S. McDougal and W. Michael Reisman is readily and happily acknowledged.¹⁴ While *Sea Power* has certain shortcomings, whether viewed from the traditional perspective of a lawyer or from the policy science vantage point, the book is a very commendable first effort by an outstanding young scholar with real promise for the future.

The first four chapters focus on the four major naval powers, the United States, the Soviet Union, Great Britain, and France, and on these states' interests in law-of-the-sea issues, as well as each nation's domestic interests in "ocean policy processes," and the reflection of naval interests in each country's ocean policy. Chapter Five analyzes primarily interests of states having only coastal navies in the main law-of-the-sea issues.

¹²M. Janis, *supra* note 10, at 92.

¹³*Id.*

¹⁴See note 9, *supra*.

Each of the first four chapters begins with a subchapter on naval interests in law-of-the-sea issues, setting forth the major powers' conceptions of their navies' missions or roles, as seen by the head of each navy or by an authoritative decision-maker in the equivalent of the American Department of Defense.¹⁵ The subchapter continues by discussing the strategic deterrent forces and those vessels that would carry out conventional missions.¹⁶ Chapter 1 analyzes the principal legal issues in present law-of-the-sea negotiations that affect the United States Navy: right of passage through straits, including analysis of the significance of straits crucial to American naval interests; transit along coasts, and therefore, the issue of definition of the territorial sea; and military use of the deep seabed.¹⁷

This theme is repeated in succeeding chapters to demonstrate that the positions of the Soviet Union, Britain, and France are similar to that of the United States on straits and the territorial sea, although the British and French stance is less clear and may be subject to change in the future.¹⁸ The United States and U.S.S.R. differ on the issue of military uses of the seabed, the United States

¹⁵M. Janis, *supra* note 10, at 1, concerning the United States; *id.* at 23, concerning the U.S.S.R.; *id.* at 39, concerning Great Britain; and *id.* at 53, concerning France. The missions of the coastal navies are generalized as "protect[ing] the coast, defend[ing] the state against maritime attack, and enforce[ing] national maritime regulations." *Id.* at 53. Presumably Mr. Janis means that the coastal states' navies would be thus employed in such tasks for the benefit of their own national territories. However, this does not take into account alliance commitments. These include the North Atlantic Treaty Organization, the Rio Pact, and the Warsaw Pact. In these alliances, national fleets could perhaps play a secondary but vital role in unified operations.

¹⁶M. Janis, *supra* note 10, at 1-3, concerning the United States; *id.* at 23-24, concerning the Soviet Union; *id.* at 40-41, concerning the United Kingdom; and *id.* at 54-55, concerning France. At *id.* 63-64, Mr. Janis classified the remainder of the world's navies into three groups, depending on number of major surface combat vessels, such as cruisers, destroyers, frigates, and larger ships.

Mr. Janis properly refers the reader to standard sources such as Jane's Fighting Ships for descriptions of each country's navy. However, he perhaps should have considered the heightened power of combinations of navies such as those represented by the alliances mentioned in note 15, *supra*.

For a more detailed analysis of the recent growth of the Soviet navy, see J. Cable, *supra* note 5, at 130-53.

¹⁷M. Janis, *supra* note 10, at 3-9.

¹⁸*Id.* at 24-27, 40-43, and 55-56.

favoring a regime permitting implantation of listening devices, while the Soviet Union has desired complete demilitarization of the seabed.¹⁹ Mr. Janis attributes this difference to "scientific lag" or perhaps a desire for propaganda, and notes third-world support for total demilitarization.²⁰

The bulk of the fifth chapter recounts the differences between the naval powers and the coastal states on the straits issues, and the general consensus in favor of a twelve-mile territorial sea except for questions related to economic resources.²¹ The discussion of naval interests in law-of-the-sea issues in the first five chapters cites standard references relating to naval missions and naval forces. Mr. Janis relies on treaties and standard works on the law of the sea in laying the groundwork for his analysis of recent international negotiations relating to law-of-the-sea issues. He frequently cites the *Informal Single Negotiating Text (ISNT)*, the *Revised Single Negotiating Text (RSNT)*, or individual states' positions relating to the negotiations, and cites United Nations General Assembly resolutions in point.²²

Mr. Janis' summary of the United States' internal decision-making process for formulating a coherent oceans policy reveals the bewildering complexity, or morass, of governmental agencies that have an input, or finger in the pie, for these issues.²³ While the corresponding subchapters on the role of British and French naval interests in the ocean policy process also discuss the internal governmental decision-making processes, some attention is paid to the strength of private shipping interests and public opinion.²⁴ Except for indirect references to pressures on Congress, and a listing of commercial interests and nongovernmental organizations, there is little discussion of the great influences these groups can bring (and have brought) to bear on official decision-making.

¹⁹ Compare *id.*, at 9, with *id.*, at 27.

²⁰ *Id.* at 27, 70-72.

²¹ *Id.* at 64-70.

²² As indicated in the text of this review at note 99, *infra*, the book is dated to the extent that the Informal Consolidated Negotiation Text of 1977 has been distributed.

²³ M. Janis, *supra* note 10, at 10-13.

²⁴ *Id.* at 43-46, 57-58.

The U.S.S.R. navy's role in its ocean policy process is, as with most things Soviet, still much of "a riddle wrapped in a mystery inside an enigma." However, certain externalities of Soviet national interests, such as its growing merchant fleet and the composition of the U.S.S.R. delegation to the law-of-the-sea conferences, give some keys to its internal decision process, as Mr. Janis suggests.²⁶ One egregious omission from the analysis in the chapter on coastal navy states²⁷ is any discussion of the pressures that shipping interests of countries such as Japan and the Panlibhon nations (Panama, Liberia, Honduras) may have exerted on the negotiations or on national decision processes. Similarly, there is little mention of the interests of states that are great consumers of fish and other marine resources.²⁸

Mr. Janis sees these crucial interests of the world's navies in ocean policy: the breadth of the territorial sea, conditions for the right of transit through international straits for warships, and the use of the deep seabed for military purposes.²⁹ In each chapter he relates the legal position of the major naval powers and the coastal states to the available stated positions of their navies' decision-makers. As with the Soviets in other parts of the book, concrete information is scarce. The coastal states' positions vary and perforce are only summarized.

The sixth chapter, "Navies and the Development of the Law of the Sea," examines naval interests' influence on the development of the law of the sea, or the "process [of] authoritative decision [that]

²⁵Radio broadcast of Winston Churchill (1 Oct. 1939), quoted in 1 W. Churchill, *The Second World War* 448-49 (1948).

²⁶M. Janis, *supra* note 10, at 28-30. See also W. Churchill, *supra* note 25.

²⁷M. Janis, *supra* note 10, at 63-72. To be sure, the distinction between passage of merchant ships and passage of war ships through straits was drawn. *Id.* at 65. However, there is no comparison for size between major maritime carriers, unlike that provided for the four great naval powers.

²⁸Kemp & Ullman, *Toward a New Order of U.S. Maritime Policy*, 30 *Nav. War Coll. Rev.* 98 (summer 1977). This article explores some of the worldwide issues concerning food, fuel, and transportation which must be resolved by decisionmakers.

²⁹M. Janis, *supra* note 10, at 13-18, concerning the United States; *id.* at 30-35, concerning the Soviet Union; *id.* at 46-49, concerning the United Kingdom; *id.* at 58-60, concerning France; and *id.* at 64-72, concerning states having primarily coastal navies.

generates [the] law of the sea both by custom and by convention,"³⁰ referring to the seminal work by Professors Burke and McDougal.³¹

The subchapter on naval power's influence on the development of customary law of the sea notes the beginnings of customary international law in the last two centuries, then plunges abruptly into the 1972-73 Cod War between the United Kingdom and Iceland.³² While the latter conflict makes the point, a more complete historical discussion might have mentioned the influence of the cannon-shot rule on the evolution of the three-mile limit,³³ the practice of collecting debts by gunboat diplomacy developed in the nineteenth century,³⁴ or the Corfu Channel Case of 1947.³⁵ These customs have since been vindicated³⁶ or repudiated³⁷ by international convention. Introduction of such paradigms would have provided a natural transition to the subchapter on "Naval Interests and the Law of the Sea Negotiations."³⁸

The influence of naval action on international custom and custom's impact on national courts was not discussed in the sixth chapter³⁹ nor did the author examine the reciprocal effect of customary inter-

³⁰*Id.* at 75.

³¹M. McDougal & W. Burke, *supra* note 11.

³²M. Janis, *supra* note 10, at 76-80.

³³See generally S. Swartztrauber, *The Three-Mile Limit of Territorial Seas* (1972).

³⁴See 5 M. Whiteman, *Digest of International Law* 412 (1965).

³⁵Corfu Channel Case, [1949] I.C.J. 4, 28.

³⁶Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, art. 14-17, 15 U.S.T. 1606, 1610-11, T.I.A.S. No. 5639, 516 U.N.T.S. 205, 214-16.

³⁷Hague Convention No. 2 Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, art. 1, 36 Stat. 2241, 2251, T.S. No. 541 [hereinafter cited as Hague Convention No. 11].

³⁸M. Janis, *supra* note 10, at 80-85.

³⁹E.g., *Paquete Habana*, 175 U.S. 677 (1900). *But see* *The Over the Top*, 5 F.2d 838, 842 (D. Conn. 1925); *Diggs v. Shultz*, 470 F.2d 461, 465-67 (D.C. Cir.), *cert. denied*, 411 U.S. 931 (1972).

For studies concerning the incorporation of international law into national law, see Bourguignon, *Incorporation of the Law of Nations During the American Revolution—The Case of the San Antonio*, 71 Am. J. Int'l L. 270 (1977); Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 20 *id.* 239 (1932); Dumbauld, *Independence Under International Law*, 70 *id.* 425 (1976).

national law on sea power, a theme of Professor O'Connell's study⁴⁰ and a factor considered in Cable's *Gunboat Diplomacy*.⁴¹ Mr. Janis' study of the interplay of naval interests and the development of international agreements to govern the regime of the oceans concentrates primarily on negotiations conducted during the recent Law of the Sea Conference. The naval input into the development of treaty norms is old; for example, Matthew Fontaine Maury, and therefore the United States Navy, was a major force in early conferences on weather problems.⁴² Similarly, the opposition of naval interests to arbitration, as articulated by Alfred Thayer Mahan,⁴³ which perforce requires a treaty, must have had its impact. As Professor O'Connell has pointed out, treaty law has also had an influence on the employment of naval force.⁴⁴

The final chapter, "Navies and the New Ocean Order," concludes that the new ocean order—whether based on convention or consensus through new customary norms—"is bound to create some difficulties for naval operations." The old regime based on freedom of the seas was "suited for the mobility of powerful navies." The new norms for the oceans will follow a theme of restricted use. "The navies of the world will not only be called upon to respect new national, regional and international maritime laws, but sometimes [will be] expected to help establish rules in times of conflict and uncertainty."⁴⁵

⁴⁰Examples include the customary three-mile limit of territorial waters in the Battle of the River Plate and later developments, and also the *Altmark* incident. D. O'Connell, *supra* note 3, at 30-32, 40-44.

⁴¹Compare O'Connell's treatment of the *Altmark* episode with that of J. Cable, *supra* note 5, at 23-32.

⁴²See H. Daniel, *One Hundred Years of International Co-operation in Meteorology (1873-1973)*, WMO No. 345, at 4-5 (1973).

⁴³A. Mahan, *Mahan on Naval Warfare* 289-90 (A. Westcott ed. 1941). Mahan's opponent was Elihu Root, prominent New York lawyer, secretary of state under Theodore Roosevelt from 1905 to 1909, and a founder of the American Society of International Law. See Moore, *Law and National Security*, 51 *Foreign Aff.* 408 (1973).

⁴⁴D. O'Connell, *supra* note 3, at 33-36, discussing the effect in the Graf Spee incident of the Hague Convention of 1907 Concerning the Rights and Duties of Neutral Powers in Naval War. *Id.* at 48-50, concerning the effect of the London protocol of 1936 on submarine warfare during World War II.

⁴⁵M. Janis, *supra* note 10, at 92.

Mr. Janis views the United States and the Soviet Union, more than the lesser naval powers, as facing the great dilemma (or frustration) of possessing relatively overwhelming naval force in an era of decreased high seas mobility due to the new restrictive international norms.⁴⁶

Professor O'Connell would agree with Mr. Janis that "the law of the sea . . . dictates the practicalities of [the] deployment of sea power," and that the professional insights of the naval officer who is aware of the law, and the lawyer who understands what goes on inside warships, must be the result of a continuing dialogue.⁴⁷ Professor O'Connell would also include the developing technology of navies in the list of active factors in self-defense⁴⁸ which are permitted under international law,⁴⁹ in contrast with Mr. Janis' apparent conclusion that the new norms may serve only as a cramp on the style of the mobile navy.⁵⁰

More importantly, Professor O'Connell would urge the world's naval staffs (and, this writer would add, decisionmakers at the national policy level) to become cognizant of the trends that have been postulated and to plan accordingly. Actions taken should include establishment of organizational "machinery . . . for rapid appreciation of the legal issues and equally rapid reaction if the theory of self-defense is to be effectively translated into terms of sea power."

II. A COMPREHENSIVE APPROACH TO THE LAW OF THE SEA AND SEA POWER

Mr. Janis' monograph is an excellent linear study of the relationship between sea power and the law of the sea, particularly in the

⁴⁶*Id.* at 90-91. See J. Cable, *supra* note 5, 130-53, concerning the enigma of the growing Soviet naval forces.

⁴⁷D. O'Connell, *supra* note 3, at 189.

⁴⁸*Id.*

⁴⁹U.N. Charter arts. 2, 51. See also McHugh, *Forcible Self-Help in International Law*, 25 Nav. War Coll. Rev. 61 (Nov.-Dec. 1972).

⁵⁰M. Janis, *supra* note 10, at 90-91.

situation of peacetime norms. However, a law-oriented study of the problem would demand a more comprehensive approach, both as to sources for norms and the theoretical foundations of international law.

While his fifth chapter does justice to two traditional sources of international law, treaties and custom, he inexplicably omits reference to general principles of law recognized by civilized nations, and to the two subsidiary sources, judicial decisions and the "teachings of the most highly qualified publicists of the various nations."⁵² To be sure, these sources may not be as sharply defined or as persuasive as treaties or custom,⁵³ but such national court decisions as *Pacquet Habana*⁵⁴ or *Schooner Exchange v. McFadden*⁵⁵ have had great influence on the development of international law.

Similarly, the great writers such as Hugo Grotius, John Bassett Moore, Myres S. McDougal, or Grigori Ivanovich Tunkin, to name only a few, are frequently cited. Mr. Janis often refers to these writers, but he does not list them as a source of international law. The perspective of any author writing about international law should be considered as well; compare the widely varying approaches of Professor Ian Brownlie⁵⁶ or Lord McNair,⁵⁷ representing the traditional British and European school in style or in thought; the views of jurists from emerging nations such as Judge Roy of India,⁵⁸ who see a larger community of law and legal institutions; the input of great regional scholars such as Judge Alvarez⁵⁹

⁵² D. O'Connell, *supra* note 3, at 189.

⁵³ I.C.J. Stat. art. 38(1)(c) and (d).

⁵⁴ See generally H. Steiner & D. Vagts, *Transnational Legal Problems* 278-79 (2d ed. 1976), and sources cited there; I. Brownlie, *Principles of Public International Law* 15-26 (2d ed. 1978).

⁵⁵ 175 U.S. 677 (1900). In this case the Supreme Court discussed customary international law.

⁵⁶ 11 U.S. (5 Cranch) 116 (1812).

⁵⁷ I. Brownlie, *supra* note 53.

⁵⁸ A. McNair, *The Law of Treaties* (1961).

⁵⁹ Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 Am.J. Int'l L. 863, 881-83 (1961).

⁶⁰ See, e.g., the dissenting opinion of Judge Alvarez in the *Asylum Case*, *Columbia v. Peru*, [1950] I.C.J. 266, 290.

and Carlos Calvo,⁶⁰ who reflect the perspectives of Latin America; the Soviet approach to international law issues, as, for example, Tunkin's concept of the relationship of law and the Communist Revolution;⁶¹ or the policy science approach of Professor McDougal.⁶² Mr. Janis has treated Soviet perspectives on international law elsewhere, with specific reference to Admiral Gorshkov's works,⁶³ but brief articulation of these perspectives in the work under review might have made clear the theory behind the Soviet pronouncements.

Mr. Janis' monograph relies heavily on conversations among states, the preparatory work for such treaties, the debates of international organizations and conferences (which may or may not be part of the *travaux préparatoires*—preparatory work, or "legislative history" as American lawyers would put it—of treaties), and customary international law.

However, nowhere does the author note the important distinctions between treaties among nations and binding as to them⁶⁴ and the important use of treaties as evidence of customary international law.⁶⁵ The great division of authority on the proper use of *travaux*

⁶⁰The "Calvo clause" is frequently found in international concession agreements with Latin American nations. It states that a foreigner doing business within a host state is entitled only to nondiscriminatory treatment. On being admitted to the state's territory, he consents to be treated only as well as the host state treats its own nationals. The foreign investor agrees not to seek the diplomatic protection of his own nation, and to submit to local jurisdiction all questions arising under the agreement. See generally I. Brownlie, *supra* note 53, at 529-30; H. Steiner & D. Vagts, *supra* note 53, at 522-29.

The issue of treatment of foreign businessmen is of more than academic interest to the military profession, because armed force cannot be used against a host state to enforce collection of contract debts. Hague Convention No. 11, *supra* note 37.

⁶¹G. Tunkin, *Theory of International Law* 22-54, 79-83, 114-31, 136, 179-83, and 225-37 (W. Butler transl. 1974). For an historical perspective on Russian attitudes toward international law, see W. Butler, *The Soviet Union and the Law of the Sea* 3-16 (1971). See also Major Fryer's article, *Soviet International Law Today: An Elastic Dogma*, in the present volume, *supra*.

⁶²Compare, for example, the analysis of the law of treaties in M. McDougal, H. Lasswell & J. Miller, *The Interpretation of Agreements and World Public Order* (1967), with A. McNair, *supra* note 57.

⁶³Janis, *The Soviet Navy and Ocean Law*, 26 *Nav. War Coll. Rev.* 52 (Mar.-Apr. 1974).

⁶⁴I.C.J. Stat. art 38(1)(a).

⁶⁵I. Brownlie, *supra* note 53, at 5, 12.

preparatoires is not developed.⁶⁶ The importance of the Truman Proclamation, asserting jurisdiction over the continental shelf adjacent to the United States, and the Latin American states' claims for a wide fishing zone,⁶⁷ could have been tied to a generally-recognized source for customary international law that he would urge for the world's navies, namely, practice among nations.⁶⁸ Some discussion of national attitudes about law and sources of the law would have been a useful addition to the study.⁶⁹

To be considered comprehensive, an examination of law-of-the-sea issues should explore the problems in their total context. Viewed in its largest geographic scope, the law of the sea includes law concerning coastal land, the sea and its tributary waters, the seabed, air space and outer space. Each of these geographic features is interrelated with the others, and the legal regime of the sea and the seabed cannot be properly considered without a thought for the other geographic arenas.

For example, what does it profit a nation to demand a three, six or twelve mile limit for purposes of coastline security if its adversary can collect all the data it needs by reconnaissance satellite in violation of the Convention on Peaceful Uses for Outer Space?⁷⁰ The naval commander's judge advocate must have an appreciation of the

⁶⁶ Compare, e.g., M. McDougal, H. Lasswell, & J. Miller, *supra* note 62, at 123-32, 363-65, and 868-69, with A. McNair, *supra* note 57, at 411-23. See also I. Brownlie, *supra* note 53, at 606, 608-09; Restatement (Second) of the Foreign Relations Law of the United States § § 146-47 (1965); and the Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31, 32, reproduced at 63 Am. J. Int'l L. 875, 885 (1969), and 8 Int'l Leg. Mat'ls 679, 691-92 (1969).

⁶⁷ See M. Janis, *supra* note 10, at xiv. The Truman Proclamation and claims to a 200-mile fishing zone are discussed also in Janis, *supra* note 63, at 53-54.

⁶⁸ M. Janis, *supra* note 10, at 75-85. See also I. Brownlie, *supra* note 53, at 6-10, interpreting I.C.J. Stat. art. 38. See also Rubin, *The International Legal Effects of Unilateral Declarations*, 71 Am. J. Int'l L. 1 (1971).

⁶⁹ See, e.g., Esagain, *The Position of the United States and the U.S.S.R. on Treaty Law and Treaty Negotiations*, 46 Mil. L. Rev. 31 (1969); Harben, *Soviet Attitudes and Practices Concerning Maritime Waters*, 15 JAG J. 149 (1961); G. Tunkin, *supra* note 61.

⁷⁰ 1962, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205. For a policy science study of a peaceful regime for space, see M. McDougal, H. Lasswell & I. Vlasic, *Law and Public Order in Space* (1963).

circumstances that would permit destruction of such satellites. Air operations are a major factor in naval power today, yet Mr. Janis gives little consideration to what rules there are for air warfare⁷¹ and for peaceful use of airspace.⁷²

Mr. Janis' scope is peacetime use of the oceans; however, the law of armed conflict—also a part of international law—has important norms binding on nations, particularly in a projection context:⁷³ rights of fishing vessels,⁷⁴ rights of merchant ships,⁷⁵ submarine cable protection,⁷⁶ mine warfare⁷⁷ and blockade,⁷⁸ the rights of belligerent vessels in neutral ports,⁷⁹ hospital ships,⁸⁰ the rights of disadvantaged persons involved in naval operations (the wounded

⁷¹ DeSaussure, *The Laws of Air Warfare: Are There Any?*, 12 JAG L. Rev. 242 (Fall 1970), 5 Int'l Lawyer 527 (1971). *But cf.* M. Janis, *supra* note 10, at 6, 8. *See also* Gibb, *The Applicability of the Laws of Land Warfare to U.S. Army Aviation*, 73 Mil. L. Rev. 25 (1976).

⁷² *See* Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

⁷³ K. Booth, *supra* note 2, at 224-35. Booth recognizes the role of navies in norm development. However, he considers it in a nonlegal context emphasizing foreign policy and naval affairs. In airspace, for example, there is no "contiguous zone" or "economic zone." Convention on International Civil Aviation, art. 2, *supra* note 72.

⁷⁴ *See* Hague Convention No. 11 on Certain Restrictions with Regard to the Exercise of the Right to Capture in Naval War, Oct. 18, 1907, art. 3, 36 Stat. 2396, 2408-09, T.S. No. 544.

⁷⁵ *Id.*, arts. 5-8. *See generally* R. Tucker, *The Law of War and Neutrality at Sea: 1955 Naval War College International Law Studies 74-108* (1957).

⁷⁶ Hague Convention No. 4, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, Regulations, art. 54, 36 Stat. 2277, 2308, T.S. No. 539.

⁷⁷ *See* Hague Convention No. 8 on the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541.

⁷⁸ *See* Mallison & Mallison, *A Survey of the International Law of Naval Blockade*, 102 U.S. Nav. Inst. Proc. 45 (Feb. 1976).

⁷⁹ Hague Convention No. 13 on the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, arts. 5-9, 12-20, 24-25, 36 Stat. 2415, 2427-32, T.S. No. 545.

⁸⁰ Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 Aug. 1949, arts. 14, 22-35, 6 U.S.T. 3217, 3230, 3234-40, T.I.A.S. No. 3363, 75 U.N.T.S. 85, 96, 100-06 (hereinafter cited as Geneva W.S. at Sea); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, art. 20, 6 U.S.T. 3114, 3130, T.I.A.S. No. 3362, 75 U.N.T.S. 31, 46. *See also* Hague Convention No. 10, Adaptation to Maritime War of the Principles of the Geneva Convention, Oct. 18, 1907, arts. 1-8, 36 Stat. 2371, 2383-86, T.S. No. 543.

and shipwrecked at sea,⁸¹ civilians,⁸² and prisoners of war),⁸³ and so on. Mr. Janis might have mentioned the Nuclear Non-Proliferation Treaty,⁸⁴ the Antarctic Treaty,⁸⁵ or the Latin American nuclear free zone,⁸⁶ both for their possible impact on oceanic law problems and as evidence of the trend toward codification of the law relative to peaceful uses of the deep sea bed.⁸⁷

Assuming that the scope is to be limited to peacetime naval operations, or to cold war confrontation, discussion of the Soviet-United States Incidents Agreement,⁸⁸ conventions on the international

⁸¹ Geneva W.S. at Sea, *supra* note 80.

⁸² Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 6 U.S.T. 3518, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

⁸³ Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

The United States has participated in the drafting of the two new Geneva protocols additional to the four Geneva Conventions of 1949 cited in notes 80-83, *supra*. These two protocols provide protection for victims of international and also noninternational armed conflicts. The protocols have now been signed. See 16 Int'l Leg. Mat'ls 1391 (1977).

For discussion and interpretation of the new protocols, see Baxter, *Modernizing the Law of War*, 78 Mil. L. Rev. 165 (1977); and Taylor, *et al.*, *Law of War Panel: Directions in the Development of the Law of War*, 82 Mil. L. Rev. 3 (1978).

⁸⁴ Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, U.N.T.S.---

⁸⁵ Antarctic Treaty, Dec. 1, 1959, arts. 5, 6, 12 U.S.T. 794, 796, T.I.A.S. No. 4780, 402 U.N.T.S. 71, 76.

⁸⁶ Treaty for the Prohibition of Nuclear Weapons in Latin America, with Protocols I and II thereto, Feb. 14, 1967, 22 U.S.T. 754, T.I.A.S. No. 7137, 634 U.N.T.S. 364.

The Senate has not given advice and consent for Protocol I to this treaty, although the President signed it on 26 May 1977.

⁸⁷ M. Janis, *supra* note 10, at 15, 17, 34, and 70-72.

⁸⁸ Agreement Between the U.S.S.R. and the United States on the Prevention of Incidents on and over the High Seas, 25 May 1972, 23 U.S.T. 1168, T.I.A.S. No. 7379; protocol thereto, 22 May 1973, 24 U.S.T. 1063, T.I.A.S. No. 7624.

Mr. Janis has recognized the connection between peacetime uses of the sea, and activities which take place during wartime. Peacetime use is the context within which the law-of-the-sea negotiations have usually taken place. See Janis, *Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception*, 4 Ocean Dev. & Int'l L. J. 51 (1977). However, he has not mentioned this connection in *Sea Power and the Law of the Sea*.

rules of the road,⁸⁹ mercantile agreements⁹⁰ that indicate policy shifts as important as those in the law-of-the-sea negotiations, and the welter of environmental treaties and national legislation,⁹¹ would have placed the evolving oceanic law in its proper context by providing deeper perspectives.

Finally, the naval officer—be he a line officer or a judge advocate—must be aware of the ever-present factors of national criminal statutes that limit or prescribe conduct on the oceans,⁹² his

⁸⁹The older convention was International Regulations for Preventing Collisions at Sea, 17 June 1960, 16 U.S.T. 794, T.I.A.S. No. 5813. Recently this was superseded as to the United States and some of the other signatories by the Convention on the International Regulations for Preventing Collisions at Sea, 20 Oct. 1972, ___ U.S.T. ___, T.I.A.S. No. ___, ___ U.N.T.S. ___. The new convention is discussed in Cannon & Libbey, *Running Into Danger*, 103 U.S. Nav. Inst. Proc. 109 (July 1977).

⁹⁰One example is the United States-U.S.S.R. Maritime Agreement, 14 Oct. 1972, 23 U.S.T. 3573, T.I.A.S. No. 7513. This agreement is discussed in Bourden, *The Meaning of the United States-Soviet Maritime Agreement*, 27 Nav. War Coll. Rev. 65 (Sept.-Oct. 1974).

⁹¹There are at least three collections of treaties and national legislation and regulations dealing with the vast and rapidly-expanding field of environmental law. The Bureau of National Affairs has published the International Environmental Guide (1976). Also available is J. Barros and D. Johnston, *The International Law of Pollution* (1974). Finally, volumes 6 through 6B of Benedict on Admiralty, edited by A. Sann, S. Bellman, and E. Cohn, contain treaties and legislation concerning all maritime matters.

⁹²The term "special maritime and territorial jurisdiction of the United States" is defined by statute to include, *inter alia*:

The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

18 U.S.C. § 7(1) (1976), and

Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

18 U.S.C. § 7(5) (1976).

own code of military discipline,⁹³ and his navy's general regulations that may have the force of law.⁹⁴ To be sure, these sources are usually considered in the context of individual responsibilities, but fleet commanders also risk indictment or preferment of charges for participation in piracy,⁹⁵ for hazarding vessels,⁹⁶ or for disobedience of lawful regulations and orders,⁹⁷ among other possibilities.

Thus while his study is valuable as a monograph on the role of naval power and current trends in the law-of-the-sea conference negotiations, a broader perspective at the beginning would have made possible a more comprehensive analysis later. The product would have been a weightier, and therefore, perhaps, less attractive, book for many readers. Sea lawyers will be happier with *Sea Power* as it is, to be sure. For the professional military man who is not a lawyer, these comments are not intended to denigrate a fine monograph, but to appraise him of the need to probe more deeply, perhaps with the aid of his judge advocate, for more nearly definitive answers to very complex issues.

"Vessel of the United States" is defined to mean, "a vessel belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof." 18 U.S.C. § 9 (1976).

Crimes punishable under the special maritime and territorial jurisdiction of the United States are triable in the federal district courts. These crimes include arson, 18 U.S.C. § 81 (1976); assaults and maiming, *id.* §§ 113-114; conspiracy, *id.* §§ 371-372; theft, *id.* §§ 661-662; homicide, *id.* §§ 1111-1115; piracy, *id.* §§ 1651-1661; cruelty to seamen, *id.* § 2191; inciting to riot or mutiny, *id.* § 2192; and destruction of vessels, *id.* §§ 2271-2275. This list is not exhaustive. The federal district courts can also try military personnel for the more usual federal crimes such as stealing government property.

⁹³Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1976) [hereinafter cited as U.C.M.J.].

⁹⁴*See* U.S. Navy Regulations, 1973, 32 C.F.R., Part 700 (1977).

⁹⁵18 U.S.C. §§ 1651-1661 (1976).

⁹⁶U.C.M.J., art. 110, *codified at* 10 U.S.C. § 910 (1976). *See also* 18 U.S.C. § 2278 (1976).

⁹⁷For example, failure to follow the asylum procedures mandated by the Navy Regulations, art. 0940, 32 C.F.R. § 700.940 (1977), could result in prosecution for failure to obey a lawful general order or regulation. U.C.M.J. art. 92, *codified at* 10 U.S.C. § 892 (1976). *See also* U.S. Navy Regulations, 1973, art. 0605, 32 C.F.R. § 700.605 (1977), which requires observance of international law; *id.*, arts. 0914-17, 0920, 32 C.F.R. §§ 700.914-17, 700.920 (1977), which also deal with international legal matters. These are examples of legal requirements that may affect the exercise of sea power.

Time will reveal an additional gap in the coverage of *Sea Power* as the law of the sea continues to develop along certain established lines and perhaps with some of the new inputs mentioned above.⁹⁸ Already the *Informal Consolidated Negotiating Text*⁹⁹ has emerged from the law-of-the-sea conference to supplant the *Revised Single Negotiating Text* relied on by Mr. Janis. The accelerating pace of legal developments should prompt text publishers in this area, as in others,¹⁰⁰ to adopt the military services' use of loose-leaf, ring-binder formats for easy insertion of changes, rather than the traditional hard-cover binding.

III. A POLICY SCIENCE APPROACH TO PROBLEMS OF THE LAW OF THE SEA

At least one configurative, multidimensional policy science study of the law of the sea has been written,¹⁰¹ and others are no doubt on the way¹⁰² or in print. Professor McDougal and his Yale associates took over a thousand pages to consider *The Public Order of the Oceans* under this method, compared with the 109 pages of *Sea Power*. Even explanations of the policy science approach to

⁹⁸ See Walker, Book Review, 16 Va. J. Int'l L. 982, 988 (1976).

⁹⁹ U.N. Doc. A/CONF.62/WP.10 of 15 July 1977, and Corr. 1.

¹⁰⁰ Compare the format of the Manual for Courts-Martial, United States, 1951, with that of the Manual for Courts-Martial, United States, 1969 (Rev. ed.), in the versions generally available for use within the military service.

¹⁰¹ M. McDougal & W. Burke, *supra* note 11. Professor McDougal has indicated that the principles and institutions of the old oceanic order, which he and Professor Burke had felt served mankind well, may be dissolving today. McDougal, *The Law of the High Seas in Time of Peace*, 25 Nav. War Coll. Rev. 35, 36 (Jan.-Feb. 1973).

¹⁰² See J. Moore, Report of the Director: Center for Oceans Law and Policy 13-14 (1976); Moore & Tipson, *The Center for Oceans Law and Policy: Charlottesville Moves Forward*, 3 Va. Bar Ass'n J. 9, 10-11 (1977). Mr. Booth has carefully limited his excellent study to navies and naval affairs, resisting the temptation to delve into the wider area of maritime policy. K. Booth, *supra* note 2, at 10.

problem-solving have been lengthy.¹⁰³ The scholarship in this field has been extensive.¹⁰⁴ The policy science approach is not the only school of jurisprudence,¹⁰⁵ but it may be unique in its theory *about* law as an integral part of the social process as distinguished from theories of law as an entity unto itself,¹⁰⁶ to be studied in a vacuum.

¹⁰³The best analyses of the law-and-science-policy methodology are those of Suzuki, *supra* note 9, and Moore, *supra* note 9. See also Moore, *supra* note 9, at 665 note 4. Professor McDougal's article on law of the seas in peacetime is a good, brief demonstration of how policy-science analysis has been employed in law-of-the-sea contexts. McDougal, *supra* note 101.

¹⁰⁴See e.g., the bibliographic lists in Suzuki, *supra* note 9, at 3 note 1; Moore *supra* note 9, at 664 note 3.

¹⁰⁵For an interesting overview of the different schools of thought concerning jurisprudence, the philosophy of, or about, law, and the approach of each school toward international law, see McDougal, Lasswell, & Reisman, *supra* note 9. The major schools are positivism, natural law, realism or sociological jurisprudence, the historical school, and the communist approach.

The positivist school sees law as a positive command from the sovereign. This approach has prevailed chiefly in Anglo-American legal philosophy. It was developed during the 19th century by John Austin, a former British army officer.

The natural law approach views law as pointing toward an ideal to be realized in the future. This approach is still current among some scholars. However, it was in popular vogue especially in the 18th century. Internationalists such as Hugo Grotius were influenced by natural law theories. Thinkers such as Thomas Jefferson, principal author of the United States' Declaration of Independence, also relied upon the natural law approach to problem-solving.

Legal realism, or sociological jurisprudence, was developed in this century to explain law within the context of the social sciences. A well-known proponent of this set of theories was Justice Oliver Wendall Holmes.

The historical school sees law primarily as an outgrowth of the historical development of a people. This philosophy has been advanced primarily by European thinkers.

The communist approach is based upon the theories of Marx and Lenin, updated in the light of experience. See generally G. Tunkin, *supra* note 61; Fryer, *Soviet International Law Today: An Elastic Dogma*, *supra* this volume, at ____.

This brief sketch is a vast overgeneralization, and is included merely to indicate the great variety of the theories concerning law. In this regard, law is analogous with military strategy and policy, or military operations, concerning which there are also many and often conflicting theories.

¹⁰⁶Suzuki, *supra* note 9, at 18, citing McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry*, 4 J. Conflict Resolution 337 (1960); Moore, *supra* note 9, at 665-66.

The policy science model is not the only relatively new method for examining complicated issues now used in decision-making processes.¹⁰⁷ Among those more familiar to military commanders are systems analysis and game theory, often based on economics or numbers.¹⁰⁸ Others include economic analysis, decision analysis, and cost-benefit analysis, often computer-supported.¹⁰⁹ Even as such models may "offer the basis for an improved explanation of happenings in international politics,"¹¹⁰ the policy-science schema may help the decisionmaker in placing law and its role in context. These complex analytical tools are not necessary for simple decisions,¹¹¹ and there are the problems of keeping the study realistic¹¹² and the terminology understandable. However, use of a new or meta-language, as with the employment of Latin terms by doctors or lawyers, may promote clarity by providing agreed-upon meanings.¹¹³

¹⁰⁷ See generally Starron, *Approaches to Decision Making*, in *Management: Concepts and Practice* 88-108 (F. Brown ed. 1976).

¹⁰⁸ *Id.* at 103; T. Bauer, *Requirements for National Defense* 47-111 (1975); Tibbetts, *A Practitioner's Guide to Systems Analysis*, 28 *Nav. War Coll. Rev.* 21 (winter, 1975).

¹⁰⁹ Starron, *supra* note 107, at 103, 105-08; Williams, *Decision Analysis: Toward Better Naval Management Decisions*, 27 *Nav. War Coll. Rev.* 39 (July-Aug. 1974). For examples of decision analysis, see Jackson, *A Methodology for Measuring Support Outputs in Relation to Inputs-Productivity*, *id.* at 90. As indicated by Quade in his introduction to *Analysis for Military Decisions*, the terms used in decision theory by various authors often have overlapping meanings, or carry different connotations in various disciplines. Quade, *Introduction, Analysis for Military Decisions* 3 (E.S. Quade ed. 1964).

¹¹⁰ K. Booth, *supra* note 2, at 136. That these models need not be based exclusively in the disciplines of mathematics or economics is demonstrated by the work of K. Knorr & O. Morgenstein, *Political Conjecture in Military Planning* (1968), as well as that of T. Bauer, *supra* note 108, at 98. These authors urge, or recognize the need for, the input of politics (in a non-pejorative sense) into systems analysis. See also Shimkin, *The Social Sciences and National Defense: Trends, Potential, and Uses*, 30 *Nav. War Coll. Rev.* 41 (summer 1977).

Conversely, some systems analysts urge the use of quantitative data in addition to the more subjective inputs of history, experience, judgment, analogies, and the principles of war. Lewis, *A Method for Conceptualizing Combat Theory*, 28 *id.* 45, 46-47 (fall 1975). Similarly, the policy scientist starting from a law/policy base will want to incorporate economics or data concerning wealth as inputs into his or her analysis of the social process.

¹¹¹ Moore, *supra* note 9, at 680.

¹¹² Tibbetts, *supra* note 108, at 29-30; Quade, *Pitfalls in Systems Analysis*, in *Analysis for Military Decisions* 301, 309 (E.S. Quade ed. 1964).

¹¹³ Moore, *supra* note 9, at 680; Quade, *supra* note 112, at 310-11.

We will now sketch the policy science model and will place Mr. Janis' book, and other recent studies related to ocean law, in context to illustrate how the system works and what is its potential usefulness for the naval decisionmaker, be he professional military man or legal specialist. Attention will be focused on the effective power process, as distinguished from the larger social-process model. References, except to the recent studies reviewed in this article and occasionally to policy science materials, will be minimal, but the reader is invited to examine more comprehensive analyses available elsewhere, upon which this section of the article is based.¹¹⁴

A. SOCIAL PROCESS

Policy scientists begin their consideration of problems in the context of the social process, that ongoing interaction of persons and other participants (nations, navies, etc.) in an increasingly interdependent series of communities, starting with a world community and working down through a series of interlocked, interdependent and interacting communities (regional organizations such as NATO, the EEC, etc.; nations; state and local governments) to the smallest (the family or the tribe).¹¹⁵

The social process may be divided into eight value processes: power, the giving and receiving of support in government, politics, and law; wealth, the production and distribution of goods and services, and consumption; enlightenment, the gathering, processing and dissemination of information; skill, the opportunity to acquire and exercise capability in vocations, professions and other social activities; well-being, synonymous with safety, health and comfort; affection, personal intimacy, friendship and loyalty; respect, personal or ascriptive recognition of worth; rectitude, participation in forming and applying norms of responsible conduct.

Through the methodology of claim, participants (individuals, navies, nations) act in various ways to optimize the above values as

¹¹⁴ See Suzuki, *supra* note 9, at 3 note 1, and at 5 note 2; Moore, *supra* note 9, at 664 note 3, and 665 note 4.

¹¹⁵ See Suzuki, *supra* note 9, at 19-22; Moore, *supra* note 9, at 667.

goals through various institutions that affect resources¹¹⁶ (often known as "base values," "base" being employed in the same sense of source of resources, as the original connotation of "naval base"). These eight value processes "have no magical quality and are chosen for their convenience in [the] analysis of [the] social process."¹¹⁷

To make theory into practical reality for the naval commander: maintenance of high morale is a constant problem, and is a sought-after goal aboard ship. Examined in the policy-science context, values for enhancing morale might include: proper administrative or disciplinary measures to punish shipboard theft as corrosive of morale (power); encouragement of advancement through successful completion of rate examinations, thereby increasing sailors' pay and prestige (wealth, enlightenment, respect); ordering men to leadership school (enlightenment, skill, rectitude); encouraging leave and liberty, commensurate with the needs of the service (well-being in the sense of improved mental health from a "change of pace"); affection, developed through renewal of shoreside friendships.

These goals are, of course, achieved through a continuum of time,¹¹⁸ space, and other dimensions collectively known to policy scientists as phase analysis, which will be examined later in this article. Law, as part of the effective power process (as distinguished from naked power, or the assertion of authority by sheer expedience or brute force),¹¹⁹ is seen as the flow of authoritative and controlling decision.¹²⁰

Put another way, law is the comprehensive process of authoritative decision, or the constitutive process, in which rules are continuously made and remade. The function of rules of law is to communicate the perspectives (demands, identifications and expectations) of people in communities about this comprehensive process of decision. The rational application of these rules in particular in-

¹¹⁶Suzuki, *supra* note 9, at 22-23; for an example of claims considered within the context of the law of the sea, see McDougal, *supra* note 101, at 89.

¹¹⁷Moore, *supra* note 9, at 669.

¹¹⁸Time is a factor in systems analysis and in conventional economics. See T. Bauer, *supra* note 108, at 62; C. Hitch & R. McKean, *Elements of Defense Economics* 149-62 (1967).

¹¹⁹McDougal, *supra* note 101, at 36; McDougal, *Authority to Use Force on the High Seas*, 20 Nav. War Coll. Rev. 19 (Dec. 1967).

¹²⁰Compare the discussion following in the text of this article with S. Falk, *The Environment of National Security* 16 (1973).

stances requires their interpretation, as with any other communication, in terms of who is using them, with respect to whom, for what purposes, and in which contexts.¹²¹

Law is seen, then, as the proper result of the power process; but to a policy scientist law must be viewed in the broader context of other values—for example, law (as commonly understood by laymen) must be considered in relation to the “laws” of wealth or economics (also as commonly understood by the layman). Furthermore, the functioning of the effective power process, or law, must be considered against a background of interdependent nations and other communities. “No state has complete freedom of effective choice today. We are all scorpions in the same bottle.”¹²²

Mr. Janis’ study does not explicitly adopt a policy science approach. He does recognize this interactive process indirectly by his reference to *Public Order of the Oceans* by McDougal and Burke, in Chapter 6,¹²³ and in his introductory declaration that “[t]he law of the sea is in the midst of turmoil.”¹²⁴ Regrettably, he does not postulate a definition of “the law of the sea,” although he is careful to define sea power as “force and threat of force on the oceans.”¹²⁵

It would appear, however, from close examination of the book and its sources that he goes at least halfway toward the policy scientist’s contextual treatment of law within the social process. Janis’ citation of UN General Assembly resolutions (not considered “law” by traditional writers), and preparatory drafts of conventions (not approved by some scholars as bases for interpretation of treaties except in specific circumstances), and his inclusion of descriptions of various pressure groups’ attitudes, such as the United States maritime industries’ positions on law-of-the-sea issues, all suggest Janis’ unarticulated employment of policy scientists’ phase analysis.

¹²¹ Suzuki, *supra* note 9, at 31, 33, citing McDougal, *A Footnote*, 57 Am. J. Int’l L. 383 (1963); Moore, *supra* note 9, at 668; McDougal, *supra* note 119, at 22.

¹²² McDougal, *supra* note 119, at 20.

¹²³ M. Janis, *supra* note 10, at 75.

¹²⁴ *Id.* at xiii.

¹²⁵ *Id.* The definition of power can be elusive, and power itself always exists relative to other factors. See S. Falk, *supra* note 120, at 16-24. And see generally A. Berle, *Power* (1969); H. Lasswell, C. Merriam, & T. Smith, *A Study of Power* (1950); H. Lasswell & A. Kaplan, *Power and Society: A Framework for Political Inquiry* (1950).

B. PHASE ANALYSIS

Phase analysis is a breakdown of law as the comprehensive process of authoritative decision into component elements and sequences.¹²⁶ The procedure is similar to that used by the careful military commander when planning an operation with explicit reference to timing, units of friendly and enemy forces involved, and so on.

The policy scientist's phase analysis includes six or seven descriptive reference points: (1) participants (who interacts, from individuals ranging upward through nations to the world community as a whole); (2) perspectives on how a participant views a problem, i.e., as a neutral, a detached observer, or an advocate for a point of view); (3) situations (the physical circumstances of an interaction, which include geographic features [a river being a more clearly defined boundary, for example, than the territorial sea's limit]; the time at which the interaction takes place; institutionalization, or the degree of organization in which interactions occur [the current "turmoil" over the law of the sea perhaps being an example]; and crisis level, which may generate different expectations under varying intensities of crisis);¹²⁷ (4) base or resource values—power, skill, enlightenment, wealth, respect, rectitude, affection, and well-being—that participants have at their command for achievement of desired ends in the legal process; (5) strategies—coercive or persuasive modalities in the form of diplomacy, ideology, economics, or military force—for the manipulation of base values to achieve denied goals; (6) outcomes and (7) effects, short and long term results of the process of interaction.¹²⁸

Mr. Janis obliquely employs a similar but not as comprehensive analysis. In his chapter on the United States,¹²⁹ for example, he lists the almost bewildering cast of actors involved in decisions on the ocean policy process: the executive branch, Congress, non-governmental institutions, and their components. Curiously, he

¹²⁶ Moore, *supra* note 9, at 669.

¹²⁷ See Bathurst, *Crisis Mentality: A Problem in Cultural Relativity*, 26 *Nav. War Coll. Rev.* 55 (Jan.-Feb. 1974); C. Piersall, *An Analysis of Crisis Decision-Making*, Center for Naval Analyses Professional Paper No. 41 (1970).

¹²⁸ See Suzuki, *supra* note 9, at 23-27.

¹²⁹ M. Janis, *supra* note 10, at 1-22.

makes no reference to the federal judiciary, with its capacity to fashion a federal common law to promote uniform international law norms,¹³⁰ or to interpret the United States Constitution and the federal statutes and treaties that are the supreme law of the land.¹³¹

Perspectives of the actors—from what viewpoints the participants speak—are indicated by inference, particularly in the chapter on the United States Navy.¹³² In this regard, Booth's more general analysis of the "players" and their characteristic perspectives should also be consulted.¹³³

The geographic situations at stake—straits passage, width of the territorial sea, and deep seabed interests—are one of the central themes of the book. However, as indicated above, Janis provides only limited discussion of other geographic aspects of the oceans covered by international law norms other than the law-of-the-sea negotiations.¹³⁴

Power resources—particularly the strengths of the world's navies, and foreign equivalents of the United States Coast

¹³⁰ See, e.g., C. Wright, *Handbook on the Law of Federal Courts* § 60, at 281 (3d ed. 1976).

¹³¹ U.S. Const. art. VI, § 2. For the classic example of a situation in which a treaty may constitutionally regulate activity that an act of Congress may not, see *Missouri v. Holland*, 252 U.S. 416 (1920). For a description of how the courts are involved in the interplay among other participants, see Edwin Borchard's description of the evolution of the migratory bird treaty upheld in the *Missouri* case. Borchard, *Treaties and Executive Agreements—A Reply*, 54 *Yale L.J.* 616, 632 (1945).

No treaty and no law enacted by Congress can nullify a fundamental freedom protected by the Bill of Rights. *Reid v. Covert*, 354 U.S. 1 (1957). In any event "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *reaff'd*, *Copper v. Aaron*, 358 U.S. 1, 18 (1958).

¹³² M. Janis, *supra* note 10, at 10-18.

¹³³ Booth, *supra* note 2, at 127-36. See also *id.*, 202-04, for discussion of "the personality of the leaders" as a factor.

¹³⁴ For an essay describing how geographical limitations constrain one nation in its quest for naval power, see Smith, *Constraints of Naval Geography on Soviet Naval Power*, 27 *Nav. War Coll. Rev.* 46 (Sept.-Oct. 1974).

Guard—are given careful attention by Mr. Janis.¹³⁵ However, he does not discuss other important power variables, such as the impact on deterrence decisionmaking of the other two legs of the triad, which are land-based ICBM's and the Strategic Air Command,¹³⁶ not to mention Army and Marine Corps forces that would be involved in the projection phrase of any naval operation.¹³⁷

The important factors of national wealth¹³⁸ and the levels of readiness (skills) and training (enlightenment) are mentioned, but there is little attention given to those often intangible, but nevertheless real, resources of respect, affection, and so forth.¹³⁹

The strategy of military coercion or suasion is a great theme of *Sea Power*, which recognizes by implication strategies of diplomacy, (e.g., the LOS negotiations), economics (e.g., claims of the United States fishing industry), and ideology (implicit in Admiral Gorshkov's description of the U.S. Navy as "an instrument of imperialist policy").¹⁴⁰ The distinction between coercive strategy

¹³⁵M. Janis, *supra* note 10, at 1-3; compare K. Booth, *supra* note 2, at 113-25, and J. Cable, *supra* note 5, at 98-129, for their more analytical approaches.

¹³⁶Concerning the triad concept, see A. Quanbeck & B. Blechman, *Strategic Forces: Issues for the Mid-Seventies*, 5 ff. (1973); R. Sobrino & Stanford Research Institute, *Deterrence Study: A Primer in Nuclear Deterrence 71-74* (1974); Holloway, *The Role of the Services in Support of Foreign Policy*, 102 U.S. Nav. Inst. Proc. 66, 72 (May 1976).

¹³⁷Compare Booth's recognition of the "interconnectedness" of land, sea and air forces. K. Booth, *supra* note 2, at 188-89.

¹³⁸Compare Booth's recognition of the base value, wealth, which he labels "economic factors." *Id.* at 197-202. An important source of wealth in the oceans is considered in Franssen, *Oil and Gas in the Oceans*, 26 Nav. War Coll. Rev. 50 (May-June 1974). See also Blechman & Kuzmack, *Oil and National Security*, 26 Nav. War Coll. Rev. 8 (May-June 1974).

¹³⁹Kenneth Booth recognizes these factors. K. Booth, *supra* note 2, at 205-06. Current literature also indicates the authors' awareness of the close relationship between these resources and the main business of navies. See, e.g., the several short articles in 103 U.S. Nav. Inst. Proc. 18-39 (Aug. 1977). See also S. Falk, *supra* note 120, at 16-24.

¹⁴⁰M. Janis, *supra* note 10, at 24, quoting Gorshkov, *Navies in War and Peace*, 100 U.S. Nav. Inst. Proc. 61-62 (Oct. 1974). Even a general who declared that "war is an extension of policy by other means" recognized that ideological input is also relevant to the conduct of war. See Gibbs, *Clausewitz on the Moral Forces in War*, 27 Nav. War Coll. Rev. 15 (Jan.-Feb. 1975).

using military force, and persuasive military strategies, recognized by Cable¹⁴¹ and Luttwak,¹⁴² albeit with different terminology, would have sharpened the focus of inquiry. A similar demarcation between coercive and persuasive economic,¹⁴³ diplomatic and ideological strategies would have been helpful.

Booth's chapter on "The Functions of Navies,"¹⁴⁴ with its triangular diagram of navies' diplomatic, military and policing roles, is perhaps the best description of the use of naval power (a resource) as a diplomatic or military instrument. His policy objective of prestige, and standing demonstrations of naval power in distant waters as part of the manipulation objective, would be seen as ideological strategies by the policy scientist.¹⁴⁵ He says little about navies' use in economic enjoyment and contribution to internal development.

If Booth had not limited his work to navies and naval affairs, doubtless he would have expanded on economic aspects of maritime strategy. His succeeding chapters¹⁴⁶ develop these strategies and their interrelationships. There is a great difference, for example, between a persuasive economic strategy founded on subsidizing the United States merchant marine so that it can compete with foreign rivals,¹⁴⁷ on the one hand, and imposition of civil penalties, criminal fines and forfeitures, or restrictions on fishing and importation of

¹⁴¹ J. Cable, *supra* note 5, at 23-65.

¹⁴² E. Luttwak, *supra* note 4.

¹⁴³ Studies of coercive and persuasive economic strategy include N. Alford, *Modern Economic Warfare (Law and the Naval Participant): 1963 Naval War College International Law Studies* (1967), and H. Clem, *United States International Economic Policy* (1976).

¹⁴⁴ K. Booth, *supra* note 2, at 15-25, also published as *Roles, Objectives and Tasks: An Inventory of the Functions of Navies*, 30 *Nav. War Coll. Rev.* 83-97 (summer 1977).

¹⁴⁵ Kenneth Booth addresses the ideological issue also. K. Booth, *supra* note 2, at 204-05. See also S. Falk, *supra* note 120, at 128-42, and S. Falk & T. Bauer, *The National Security Structure* 137-48 (1972 rev.). For an example of a policy science approach to development of this strategy, see B. Murty, *The Ideological Instrument of Coercion and World Public Order* (1967).

¹⁴⁶ K. Booth, *supra* note 2, at 26-112, 235-68.

¹⁴⁷ See generally G. Gilmore & C. Black, *The Law of Admiralty*, ch. 11 (2d ed. 1975).

illegally caught fish under the Fishery Conservation and Management Act of 1976, on the other hand.¹⁴⁸

Outcomes and effects, the results of the interactive process, are dependent on the quality of treatment of the phases that precede them. Although not articulated as such, *Sea Power* does recognize that the oceans decision process has products—e.g., the Fishery Conservation and Management Act, or the demise of the three-mile limit—that are the result of this complex interrelated and interdependent process.

C. AUTHORITY FUNCTIONS

The policy scientist also perceives the threads of seven authority functions within the legal process as follows:

intelligence-gathering, the obtaining and supplying of information to the decision maker; promotion, the recommendation of policy; prescription, the promulgation of norms—as in legislation; invocation, the provisional application of a prescription—as by a grand jury indictment; application, the final application of a prescription—as by an appellate decision; termination, the ending of a prescription; and appraisal, the evaluation of the degree of policy realization achieved.¹⁴⁹

The Fishery Conservation and Management Act is an apt illustration. Regional fishery management councils, established by the Act,¹⁵⁰ must prepare fishery management plans that must contain descriptive data¹⁵¹ and may contain catch limits and permit requirements.¹⁵² This illustrates the intelligence-gathering function. The promotion function begins when the Secretary of Commerce re-

¹⁴⁸ 16 U.S.C. §§ 1821-25, 1856-61 (1976).

¹⁴⁹ Moore, *supra* note 9, at 671. Compare the simpler model postulated by Starron, *supra* note 102, at 100. Starron, however, refers to various sources of law as "sources of policy." In so doing, he implicitly recognizes the authority function of prescription. *Id.* at 101.

¹⁵⁰ Eight such councils are established by the act. 16 U.S.C. § 1852(a) (1976).

¹⁵¹ 16 U.S.C. § 1853(a) (1976).

¹⁵² 16 U.S.C. § 1853(b) (1976).

views and approves the plan,¹⁵³ thereby promoting its policies. The prescription function is completed when the Secretary publishes the plan in the Federal Register,¹⁵⁴ the official daily gazette of the United States Government.¹⁵⁵ Invocation would occur when an authorized officer issues a citation, arrests an alleged offender, or seizes fishing vessels or fish,¹⁵⁶ subject to later trial of the case. The application function would occur when a federal district court tries the case¹⁵⁷ subject to appeal.¹⁵⁸ Termination of a prescribed rule under the act might occur when a new law-of-the-sea treaty is ratified by the United States.¹⁵⁹ The appraisal function of the Act includes reports by the Secretary of Commerce to Congress and the President,¹⁶⁰ research,¹⁶¹ and reports by the fisheries councils to the Secretary.¹⁶²

Sea Power was not written in a law-policy science format, and hence makes little explicit reference to the authority function. Primary attention has been given to the intelligence, promotion, prescription and appraisal functions in Mr. Janis' description of the background and development of the LOS negotiations.

D. THE DECISION PROCESS

Having set up this comprehensive matrix for describing the interaction of values in the context of phase analysis and authority functions, the policy scientist would proceed to the decision process, consisting of five steps or "intellectual tasks": (1) clarification of goals; (2) description of past trends; (3) analysis of conditions affecting those past trends; (4) projection of future trends, and (5)

¹⁵³ 16 U.S.C. § 1854(a), (b) (1976).

¹⁵⁴ 16 U.S.C. § 1855(a) (1976).

¹⁵⁵ See K. Davis, *Administrative Law Treatise* § 6.02 (3d ed. 1972).

¹⁵⁶ 16 U.S.C. § 1861(b), (c) (1976).

¹⁵⁷ 16 U.S.C. § 1861(d) (1976). Cable uses the term "applications [of naval force]" in much the same way a policy scientist would, to mean bringing home a prescriptive norm to violators thereof. J. Cable, *supra* note 4, at 157-73.

¹⁵⁸ 28 U.S.C. § 1291 (1976).

¹⁵⁹ 16 U.S.C. § 1881 (1976).

¹⁶⁰ 16 U.S.C. § 1855(f) (1976).

¹⁶¹ 16 U.S.C. § 1854(e) (1976).

¹⁶² 16 U.S.C. § 1852(h)(4), (5) (1976).

evaluation of policy alternatives.¹⁶³ As Professor Moore has correctly observed, "These tasks are performed by all of us, implicitly or explicitly, when we make any decision."¹⁶⁴ With addition of feedback loops, this general process is found in all decision-making models.¹⁶⁵ The basic military planning process employs similar methodology.¹⁶⁶

Sea Power does state the goals or missions of the world's principal navies as articulated by the admirals.¹⁶⁷ Should these be goals for the law of the sea as a whole? Should not a broader goal—national, and coinciding with the general international ideals of the United Nations Charter,¹⁶⁸ perhaps condensed to a preference for human dignity¹⁶⁹—have been stated as the core ideal from which other subgoals descend and depend? Nearly all nations mentioned in *Sea Power* are parties to the United Nations Charter and therefore must be held accountable to its principles and purposes.

Even if the analysis considers only the goals of armed forces or navies as the relevant focus, a generalized classification such as that employed by Booth might have been more comprehensive:

- (1) Projection of force functions:
 - (i) General war;
 - (ii) Conventional wars;
 - (iii) Limited wars and interventions;
 - (iv) Guerrilla wars.
- (2) Balance of power functions:
 - (v) Strategic nuclear deterrence;
 - (vi) Conventional deterrence and defense;

¹⁶³ Moore, *supra* note 9, at 672-73; Suzuki, *supra* note 9, at 33-41.

¹⁶⁴ Moore, *supra* note 9, at 672.

¹⁶⁵ See, e.g., Starron, *supra* note 107 at 93-94.

¹⁶⁶ See generally Bureau of Naval Personnel, U.S. Dep't of Navy, NAVPERS 94408, *The Military Planning Process*. The history of the military planning process is traced by Cullen in his article, *From the Kriegsschule to the Naval War College: The Military Planning Process*, 22 Nav. War. Coll. Rev. 6 (Jan. 1970), and Buell, *Admiral Edward C. Kalbfus and the Naval Planner's "Holy Scripture": Sound Military Decision*, 25 Nav. War. Coll. Rev. 31 (Mar.-Apr. 1973).

¹⁶⁷ See M. Janis, *supra* note 10, at 1, concerning the United States; *id.* at 24, concerning the Soviet Union; *id.*, at 39-41, concerning Great Britain; and *id.*, at 53-55, concerning the Republic of France.

¹⁶⁸ U.N. Charter preamble and arts. 1, 2.

¹⁶⁹ See Moore, *supra* note 9, at 676, and Suzuki, *supra* note 9, at 36-37.

- (vii) Extended deterrence and defence;
- (viii) International order.
- (8) Diplomatic functions:
 - (ix) Negotiating from strength;
 - (x) Manipulation;
 - (xi) International prestige.
- (4) Domestic functions:
 - (xii) Border/coast guard responsibilities;
 - (xiii) Nation-building.

As Booth points out, such a classification "can only provide a guide and perspective for the specific analyses[,] . . . the ultimate aim when assessing such a subjective and contextual concept as utility."¹⁷⁰

These goals, or value preferences, are usually socially derived and are, therefore, strongly influenced by current conventional values.¹⁷¹ It would, therefore, behoove the military decision-maker to attempt to approximate widely accepted societal ideas, beliefs, and goals (often crystallized into positive law or statements such as the United Nations Charter Preamble) as he postulates his goals and subgoals within the military decision process.¹⁷²

Immediate past trends, and conditions affecting those trends, are described by Mr. Janis starting with the 1958 law-of-the-sea treaties, and tracing later developments through 1975. A look at deep-rooted past trends, such as those behind the traditional three-mile limit,¹⁷³ and reasons for such trends, might have underscored his thesis concerning the role navies and naval power may play in developing the law of the sea.¹⁷⁴ Mr. Janis projects certain future trends, recites policy alternatives, and evaluates these alternatives in the light of their impact on the world's principal

¹⁷⁰ K. Booth, *supra* note 2, at 274.

¹⁷¹ Starron, *supra* note 107, at 95.

¹⁷² Perhaps the lack of such an attempt is one reason why, as viewed by some, the Vietnam war "went wrong." For an example of the difference between acting within the law and acting outside the law, see Moore, *supra* note 43.

¹⁷³ See generally S. Swartrauber, *supra* note 38; C. Colombos, *The International Law of the Sea* §§ 95-139 (6th ed. 1967).

¹⁷⁴ M. Janis, *supra* note 10, at xviii, 75-85, 91-92.

navies.¹⁷⁵ Courses are charted "for the reconciliation of naval interests in a new international ocean order,"¹⁷⁶ but his preferred choice is not stated.

IV. CONCLUSIONS

As Professor Knight has observed, there are at least three schools of thought on the role of international law in national security policymaking:

International law is a "pious fraud" and should have no effect whatever on the making of national security policy.

International law should be considered as one among many relevant factors in determining national security policy.

International law should be regarded as absolutely binding on the United States and determinative of all national security policy decisions.¹⁷⁷

None of the authorities reviewed in this article, and particularly Mr. Janis' fine monograph, would adhere to the "pious fraud" view. The difference between the "absolutely binding" approach and the "among factors" theory is an issue of perspectives and breadth of approach. Any good lawyer will say that you must obey the law. Mr. Janis would not quarrel with this; he is concerned with how some of the law of the sea came to be, the influencing factors on this law,

¹⁷⁵*Id.*, at 89-92.

¹⁷⁶*Id.*, at xvii.

¹⁷⁷Knight, *The Law of the Sea and Naval Missions*, 103 U.S. Nav. Inst. Proc. 32 (June 1977). The Knight article is a good survey of current law-of-the-sea problems, organized by legal issue involved. Knight urges that the United States "take all measures necessary to ensure that future legal developments concerning the use of ocean shores do not unacceptably retard [its] ability to carry out traditional and prospective missions of [its] naval forces." Among such measures Knight envisions the taking of action to set precedents for exercise of rights of navigation before crises arise. *Id.*, at 39. Compare Knight's approach with Janis' nation-by-nation approach, set forth by the latter in *Naval Missions and the Law of the Sea*, 13 San Diego L. Rev. 583 (1976). Janis recast this approach in *Sea Power and the Law of the Sea*.

and factors that can (or should) influence its development. He does omit certain sources and substantive parts of the law, and both the lawyer and the professional military man should be aware of this book's lack of a configurative legal approach. To have used such an approach would have required a treatise at least the size of Colombos' *International Law of the Sea*, with over 850 pages of text.

The policy scientist, and those engaged in other broad-based, multi-disciplinary examinations of the problem of ocean space, would assert that international law is but one influential factor in the oceans policy process.¹⁷⁸ The policy scientist would say that international law is but the outcome of the effective power process, only one aspect of the total social process. The viewpoint of the policy scientist would, therefore, include the viewpoint of those holding international law to be "absolutely binding," as one small part of a larger, more complex, configurative matrix.¹⁷⁹

Sea Power supplies part of the mosaic for effective decisionmaking under this concept, and thus represents a valuable addition to the literature in this field, from the policy science viewpoint. However, *Sea Power's* 109 pages could not have analyzed the subject fully from a policy science viewpoint; McDougal and Burke's great *Public Order of the Oceans* runs over a thousand pages.

Even with these limitations, Mr. Janis has produced a fine short book that should be of immediate assistance to the military officer or the military lawyer who grapples with these complex problems of the law of the sea. Its quality gives promise of excellent contributions to future scholarship from the author.¹⁸⁰

¹⁷⁸Compare K. Booth, *supra* note 2, at 280, and Moore, *supra* note 48.

¹⁷⁹Booth recognizes that there is a complex relationship between navies and foreign policy. The policy scientist insists that there is an equally complex relationship between policy in general and naval force. One outcome of policy in general is law, a factor which must be considered along with other factors. Naval force, for the policy scientist, is merely one aspect of military strategy. Strategy, in turn, is just one of several alternatives, the others being diplomacy, economics, and ideology.

Booth has carefully limited the scope of coverage of his book to navies and naval affairs. He avoids consideration of maritime affairs otherwise. *Id.*, at 10.

¹⁸⁰See the bibliographical sketch of Janis at note 10, *supra*.

It is hoped, however, that this review has re-emphasized the complex nature of the "troubled common" of the altered ocean environment,¹⁸¹ whether seen from the aspect of the military commander, the lawyer, or the policy scientist. Not many military commanders can or should make policy or practice law; not many lawyers can or should make policy¹⁸² or wage war; nor can or should many policy scientists or decision theorists wage war or practice law.

All three disciplines, and other professions as well, can learn from the processes of the others and should be aware of the multifaceted issues of sea power and ocean law which will have to be dealt with during the United States' third century. It is hoped, however, that the lawyers, analysts, policy scientists and military officers concerned will pool resources to assist governments in evolving a workable law of the sea, based on sound policies, for the new order of the oceans.

¹⁸¹See K. Booth, *supra* note 2, at 274-81.

¹⁸²See J. Cable, *supra* note 5, at 69-97.

¹⁸³The head of the antitrust division of the Department of Justice criticizes law schools in this regard. Specifically, he feels that some law schools have spent too much time training policy makers and too little time training lawyers. Kauper, *Reflections on 4 Years of Government Service*, 21 L. Quadrangle Notes 16, 18 (1977); compare Walker, *Crisis in the Courts: A Response of Legal Education to the Charges of Incompetence in the Defense of Criminal Cases*, 24 N.C. Bar 13, 14-15 (No. 1, 1977).

The Naval War College at Newport, Rhode Island, is, however, presently committed to the goal of educating senior naval officers broadly. The hope is that such officers will become or continue to be aware of the multifaceted, multidimensional nature of their profession. Crowl, *Education Versus Training at the Naval War College: 1884-1972*, 26 Nav. War Coll. Rev. 2 (Nov.-Dec. 1973); Turner, *Convocation Address*, 25 Nav. War Coll. Rev. 2 (Nov.-Dec. 1972).

The controversy within the Navy over technical training versus broadgauge education for professional military officers is not new. See, e.g., Mahan, "Theoretical" Versus "Practical" Training, in Mahan on Naval Warfare 8-15 (A. Westcott ed. 1941).

Nor does the issue arise solely within the military services. Much has been written concerning the proper role of law schools. See, for example, Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale L.J. 203 (1943); *Symposium in Honor of Hardy Dillard*, 54 Va. L. Rev. 583 (1968). Contrast Cantrall, *Practical Skills Can and Must be Taught in Law Schools*, 6 J. Leg. Educ. 316 (1954), and Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?*, 38 A.B.A.J. 907 (1952), with McClain, *Legal Education: The Extent to Which "Know-How" in Practice Should Be Taught in the Law Schools*, 6 J. Leg. Educ. 302 (1954), and McClain, *Is Legal Education Doing Its Job?: A Reply*, 39 A.B.A.J. 120 (1953).

BOOK REVIEW:
THREE SIPRI PUBLICATIONS

Stockholm International Peace Research Institute, *World Armaments and Disarmament, SIPRI Yearbook 1978*. London: Taylor & Francis Ltd., 1978. Pg. 518. Cost: UK pounds 18.00.

Stockholm International Peace Research Institute, *Arms Control, A Survey and Appraisal of Multilateral Agreements*. London: Taylor & Francis Ltd., 1978. Pp. 238. Cost: UK pounds 10.50.

Stockholm International Peace Research Institute, *Tactical Nuclear Weapons: European Perspectives*. London: Taylor & Francis Ltd., 1978. Pp. xvi, 371. Cost: UK pounds 10.50.

*Reviewed by James A. Burger**

The *SIPRI* (Stockholm International Peace Research Institute) *Yearbook* is a yearly report on armaments in use and planned, and on disarmament efforts. This year's edition, which is the Institute's ninth, was published early in the year to be in time for the United Nations General Assembly's special session devoted to disarmament, which was held in New York City from 23 May to 30 June 1978. The purpose of the Stockholm International Peace Research Institute is to conduct research into problems of peace and conflict, with particular attention to problems of disarmament and arms regulation.

The *Yearbook* was published in 1978, the year of the United Nations Disarmament Conference. That conference has been convened by United Nations officials as the world's largest and most repre-

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sentative gathering on disarmament.¹ SIPRI notes its concern with increasing militarization of the world and the seeming futility of disarmament efforts. By SIPRI estimates, expenditures on arms have now increased to \$360 billion per year² with the Third World taking an increasingly big share. The authors find this significant because the Third World is not only spending more on arms but for the first time is now able to buy modern military equipment. The nations belonging to this bloc now have access to the most sophisticated military equipment available and the money to buy it.

The authors are especially concerned with developments in nuclear weapons. On the strategic level there have been developed what they refer to as CEP (Circular Error Probability)³ warheads which make it possible for ICBM's (Intercontinental Ballistic Missiles) to strike their targets within tens of meters. Such warheads in turn can be launched from the new US M-X weapon system, which will use mobile land based ICBM's to make destruction by an enemy more difficult.⁴ The Russians also are increasing the accuracy of their nuclear missiles and have similarly developed a mobile missile system.

On the tactical level there have been developments not only in accuracy but in the size of the weapons. Nuclear weapons have been miniaturized to make them more mobile, and their destructive effect has been limited, making it possible to use them in close combat situations. These miniaturized tactical nuclear weapons include the enhanced-radiation reduced-blast type—the so-called "neutron bomb." All this seems to make nuclear war a feasible alternative to conventional warfare which, instead of merely being a deterrent to all-out war, might be an acceptable means to achieve limited objectives.⁵

¹Teltsch, *U.N. Votes Compromise Arms Text*, N.Y. Times, July 1, 1978, at 1.

²SIPRI Yearbook 1978, at 3.

³Defined as, ". . . the radius of a circle, centered on the target, within which 50 per cent of the weapons or munitions aimed at the target will fall." *Id.* at 4.

⁴For a presentation of the debate on the new MX (missile, experimental), see Gray, *The Strategic Forces Trail: End of the Road?* 56 *Foreign Aff.* 771 (1978). Mr. Gray takes the position that the U.S. should deploy the new MX ICBM.

⁵The whole problem of feasible alternatives is well discussed in the Gray article, *id.*

There are also developments to be seen in the conventional weapons area such as the FAE (fuel air explosive) which may be used in a CBU (cluster bomb unit). The SIPRI authors state that this bomb could have the explosive effect of 10 kg of TNT and could be carried by a helicopter.⁶ It could be developed in larger form for cruise missiles. The authors state that in the conventional weapons area there is an ever-closing gap between the destructive power of conventional and nuclear weapons. It seems likewise that there are alternatives to nuclear weapons without giving up their destructive capability.

There is also an interesting discussion of the impact of arms development on the human environment.⁷ This problem may be as far reaching as what the authors describe as "geophysical warfare" or environmental warfare, or it may exist solely in the effect on the environment of the use of high explosives, or in the persistent problem of chemical and biological weapons.⁸ One other aspect of modern warfare, but by no means the last topic to be discussed, is the problem of military satellites.⁹ The SIPRI authors envision satellites reporting on and directing operations from the sky, and missiles designed to seek out and kill the satellites. Space warfare is already here.

While describing arms developments, the *Yearbook* also enumerates the efforts which are being made to limit armaments. Some efforts are being made on a bilateral basis such as the SALT

⁶SIPRI Yearbook 1978, at 6.

⁷*Id.* at ch. 3, 43-67.

⁸Note that the United States has agreed to the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, entered into force for United States, Apr. 10, 1975, 26 U.S.T. 571, T.I.A.S.No. 8061 [hereinafter cited as Geneva Gas Protocol]. The United States is also a party to the Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction, entered into force for United States, Mar. 26, 1975, 26 U.S.T. 683, T.I.A.S.No. 8062 [hereinafter cited as Biological Stockpiling Convention]. For a summary of the position of the Department of Defense on the use of chemical and biological weapons, see Dept't of Army Field Manual No. 27-10, The Law of Land Warfare (Cl, 1976) [hereinafter cited as FM 27-10]. Despite these generally accepted treaties on chemical and biological weapons, discussion persists concerning their usefulness, and further conventions are proposed.

⁹SIPRI Yearbook, ch. 5, 104-130.

(Strategic Arms Limitation Treaties) negotiation, between the United States and the Soviet Union, others multilaterally between the NATO and Warsaw Pact Countries such as the MFR (Mutual Force Reduction) talks.¹⁰ There is also the CCD (Committee on Disarmament) which is tied in with the United Nations.¹¹ It was decided at the most recent disarmament negotiation in New York that the CCD would be expanded in membership, hopefully embracing those major states which had not previously participated, and including more of the Third World States.¹²

Aside from negotiations and their resultant treaties which concern reduction of armaments, there are also those agreements which make particular types of warfare illegal. There is the Convention on the Prohibition of Military or Other Hostile Use of Environmental Modification Techniques, which the UN Secretary General opened for signature in May of 1977.¹³ There are also plans to obtain agreement on a treaty which would prohibit the production of CW (chemical warfare) agents and require their destruction.¹⁴ The *Yearbook* discusses both the treaty on environmental modification and the one on chemical warfare.

Perhaps even more interesting are the implications of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflict.¹⁵ In that conference, which ended at Geneva in June of 1977, 124 participating nations proposed the adoption of two additional protocols to the Geneva Conventions of 1949 on the protection of victims of armed conflict.¹⁶

¹⁰In the United States they are normally referred to as MBFR (Mutual Balance of Force Reduction) talks.

¹¹The CCD is not a United Nations created organization, but it reports to the United Nations General Assembly, and the Assembly in turn asks it to take specific problems under discussion.

¹²Teltsch, *supra* n.1.

¹³The text of this agreement is reproduced in the SIPRI Yearbook at 392. The United States is a signatory to the agreement.

¹⁴SIPRI Yearbook at 360. See also the discussion of the Geneva Gas Protocol, and the Biological Stockpiling Convention, *supra* n.8.

¹⁵For a discussion, see Baxter, *Modernizing the Law of War*, 78 Mil. L. Rev. 165 (1977).

¹⁶Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Convention, 16 Int'l Legal Materials 1391 (1977).

The United States is a signatory to the protocols but has not yet ratified them.¹⁷ These protocols will supplement the Geneva Conventions of 1949, and along with the Geneva Conventions and the Hague Treaties of 1899 and 1907, will be one of the major statements of the law of armed conflict.

The Protocols will have an important effect on the law in regard to the development and use of weapons. They extend protections of civilians and prohibit "indiscriminate attacks."¹⁸ Starvation as a method of warfare is prohibited,¹⁹ and care must be taken to protect the natural environment against widespread, long-term and severe damage.²⁰ Weapons must be reviewed as to legality before development and use.²¹ The *SIPRI Yearbook* does not go into detail on these matters, but it does put the Protocols into the context of the disarmament picture as a whole.

The *Yearbook* notes that no agreement was reached on what it refers to as "dubious" weapons.²² This is a term which is now in usage to describe weapons which are appropriate objects of future agreement to bar their use.²³ There was no agreement at Geneva to

¹⁷The United States signed the protocols on 12 December 1977.

¹⁸Article 51 of Protocol I states:

Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) Those which are not directed at a specific military objective;
- (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

¹⁹Article 54, Protocol I.

²⁰Article 55, Protocol I.

²¹Article 36, Protocol I. The United States already has such a requirement. It is found in Dep't of Defense Instruction 5500.15, Review of Legality of Weapons Under International Law (October 16, 1974).

²²*SIPRI Yearbook* at 11.

²³There was a panel discussion of what are called "dubious" weapons at the spring 1978 meeting of the American Society of International Law. It will be published in the next volume of the Society's Proceedings.

single out particular weapons as being illegal, although the conference did pass a resolution calling upon the United Nations to convene a special government conference on the subject.²⁴ The SIPRI authors do not take a position on particular weapons in this volume, although they note that the two leading military blocs resisted efforts to reach agreement on the prohibition of incendiary weapons, and that it was not possible to prohibit high velocity or fragmentation weapons.²⁵

The *SIPRI Yearbook* discusses all these topics. With the reader's understanding that it deals with unclassified materials, it is a thorough review of what has happened during the past year as to weapons developed and as to curbs agreed upon. It gives exhaustive statistics from a variety of sources, and is an excellent research tool listing as authorities government journals and reports, research institute studies, and resolutions. To the lawyer who may want an understanding of the weapons problem or even who might be called upon to review the legality of a weapon or its use, the *SIPRI Yearbook* is a valuable tool.²⁶ Care must be taken as to statistics, but the reader should not be hindered by the purpose of the organization. SIPRI has a cause to espouse, but taken as a whole its books are excellent reference sources which give the reader an understanding of the issues and a knowledge of what is going on in the area.

Accompanying the Yearbook is a companion volume entitled *Arms Control, A Survey and Appraisal of Multilateral Agreements*, which gives a synoptic view of the existing agreements both on arms control in general and the laws of war as they pertain to it. The text, excerpts, or summaries of almost every pertinent agree-

²⁴Actually, discussion on weapons took place primarily at Lucerne where a number of meetings of government experts were convened to consider this particular topic. The next meeting to be held will take place at Geneva in September of 1978.

²⁵The United Nations, the Swedish government, and SIPRI have all taken positions that particular weapons should be banned. SIPRI has published *Incendiary Weapons* (1975), *Chemical Disarmament: New Weapons for Old* (1975), and *The Law of War and Dubious Weapons* (1976). It has also announced a new volume entitled *Anti-personnel Weapons* (1978), which will discuss small arms, fragmentation weapons, and delayed action weapons among others.

²⁶On the subject of the legality of weapons, see also Robblee, *The Legitimacy of Convention Weaponry*, 71 Mil. L. Rev. 95 (1976).

ment are included, from the Declaration of St. Petersburg of 1868 to the Protocols to the Geneva Conventions just recently signed at Bern. Included with the texts are a commentary, a handy reference guide to the status of the treaties, and a list of nations which are parties. This book was printed for distribution in connection with the UN Disarmament Conference, but it is separately available and makes an excellent companion volume to the *SIPRI Yearbook*.²⁷

The Yearbook is not the only book on weapons published by SIPRI. It has in the past published materials on incendiary weapons, chemical disarmament, and what have been referred to as weapons of dubious legality. One of the most interesting books is the 1978 volume entitled *Tactical Nuclear Weapons: European Perspectives*. This book is an introduction to and analysis of what are called TNW's (Tactical Nuclear Weapons). It has special significance to the United States, which has an estimated 7000 nuclear warheads in Europe. There is a real need to understand the nature of tactical nuclear weapons and how they may be used in war. The SIPRI book gives the reader an overview of how tactical nuclear weapons entered the European armament picture, how planning is done and their use controlled at least in so far as the NATO countries are concerned, and what use is contemplated for them in general. There is discussion of the new mini-nukes and enhanced radiation weapons. The arguments both for and against their use are provided by military, governmental and independent authorities. The reader is given an understanding of the problems, and is provided with a massive bibliography of references.

It should be noted that the United States position in regard to the use of nuclear weapons is that they are not prohibited by any existing treaty or customary rule.²⁸ This was pointed out at the signing of the Protocols when the United States issued a statement of understanding that the new rules established at Geneva were not in-

²⁷For a similar compilation of treaties and materials published yearly by the U.S. Arms Control and Disarmament Agency, see U.S. Arms Control and Disarmament Agency, *Arms Control and Disarmament Agreements, Texts and History of Negotiations*, U.S. Government Printing Office (1977).

²⁸*Supra*, note 24. The volume on outer space is advertised as, *Outerspace—Battlefield of the Future?* (1978).

²⁹FM 27-10, *supra* n.8, at 18.

tended to regulate or prohibit the use of nuclear weapons.³⁰ This did not mean, however, that no rules apply at all, and the customary principles of international law might not limit the use of nuclear weapons. Query, what principles should be applied to TNW's. This will be an interesting problem to solve. The SIPRI book does not attempt to solve it, but does present the situation in which the problem is found. It makes the problem of tactical nuclear war real and understandable. All the SIPRI books are well worth reading for the lawyer involved in weapons study and analysis.

³⁰ Ambassador Aldrich, the United States Representative to the fourth Session of the Diplomatic Conference, which produced the protocols, stated:

It is the understanding of the United States that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons. We further believe that the problem of nuclear weapons remains an urgent challenge to all nations which must be dealt with in other forums and by other agreements.

The statement was made at Geneva on 9 June 1977. It was later incorporated into Understanding 1 to Protocol I to the Geneva Conventions of 1949 at the signing ceremony on 12 December 1977.

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review*. With volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after brief examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review in the *Military Law Review*.

Notes are set forth in Section IV, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section II, Authors or Editors of Publications Noted, and in Section III, Titles Noted, below, the number in parentheses following each entry is the number of the corresponding note in Section IV. For books having more than one principal author or editor, all authors and editors are listed in Section II.

II. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

Bander, Edward J., *Legal Research and Education Abridgement* (No. 1).

- Binkin, Martin, Herschel Kanter and Rolf H. Clark, *Shaping the Defense Civilian Work Force: Economics, Politics, and National Security* (No. 2).
- Blechman, Barry M., and Stephen S. Kaplan, *Force Without War: U.S. Armed Forces as a Political Instrument* (No. 3).
- Clark, Rolf H., Martin Binkin, and Herschel Kanter, *Shaping the Defense Civilian Work Force: Economics, Politics, and National Security* (No. 2).
- Claude, R. P., editor-in-chief, *Universal Human Rights* (No. 4).
- Farley, Philip J., Stephen S. Kaplan, and William H. Lewis, *Arms Across the Sea* (No. 5).
- Kanter, Herschel, Martin Binkin, and Rolf H. Clark, *Shaping the Defense Civilian Work Force: Economics, Politics, and National Security* (No. 2).
- Kaplan, Stephen S., Philip J. Farley, and William H. Lewis, *Arms Across the Sea* (No. 5).
- Kaplan, Stephen S., and Barry M. Blechman, *Force Without War: U.S. Armed Forces as a Political Instrument* (No. 3).
- Koch, Gary, editor-in-chief, *Journal of Corporation Law* (No. 6).
- Kress, Lee Bruce, Marius H. Livingston, and Marie G. Wanek, editors, *International Terrorism in the Contemporary World* (No. 7).
- Lewis, William H., Philip J. Farley, and Stephen S. Kaplan, *Arms Across the Sea* (No. 5).
- Livingston, Marius H., Lee Bruce Kress, and Marie G. Wanek, *International Terrorism in the Contemporary World* (No. 7).
- Nenninger, Timothy K., *The Leavenworth Schools and the Old Army: Education, Professionalism, and the Officer Corps of the United States Army, 1881-1918* (No. 8).

1979] PUBLICATIONS RECEIVED AND BRIEFLY NOTED

Scaif, Robert A., editor, *Defense Law Journal* (No. 9).

Smith, Robert Ellis, *Privacy: How to Protect What's Left Of It* (No. 10).

Wanek, Marie G., Marius H. Livingston, and Lee Bruce Kress, *International Terrorism in the Contemporary World* (no. 7).

III. TITLES NOTED

Arms Across the Sea, by Philip J. Farley, Stephen S. Kaplan, and William H. Lewis (No. 5).

Defense Law Journal, edited by Robert A. Scaif (No. 9).

Force Without War: U.S. Armed Forces as a Political Instrument, by Barry M. Blechman and Stephen S. Kaplan (No. 3).

International Terrorism in the Contemporary World, edited by Marius H. Livingston, Lee Bruce Kress, and Marie G. Wanek (No. 7).

Journal of Corporation Law, edited by Gary Koch (No. 6).

Leavenworth Schools and the Old Army: Education, Professionalism, and the Officer Corps of the United States Army, 1881-1918, by Timothy K. Nenninger (No. 8).

Legal Research and Education Abridgement, by Edward J. Bander (No. 1).

Privacy: How to Protect What's Left of It, by Robert Ellis Smith (No. 10).

Shaping the Defense Civilian Work Force: Economics, Politics, and National Security, by Martin Binkin, Herschel Kanter, and Rolf H. Clark (No. 2).

Universal Human Rights, edited by R. P. Claude (No. 4).

IV. PUBLICATIONS NOTED

1. Bander, Edward J., *Legal Research and Education Abridgement*. Cambridge, Mass.: Ballinger Publ. Co., 1978. Pp. xii, 215.

The publisher of this small book asserts that "[i]t will become an indispensable working tool for the lawyer, law professor, law student, scholar, writer, librarian, college and high school student—anyone seeking a working knowledge of the current status of the world of law." Whatever the merits of this lofty claim, the book seems aimed more at the law student and non-lawyer, than at the experienced attorney.

The term *abridgement*, in the title, is used by the author to mean a "brief digest of the law," like an abstract. The book is essentially a dictionary, or rather a miniature encyclopedia, in three parts. Parts I and II consist of lists of terms arranged in alphabetical order. Each term is accompanied by a short explanatory essay. Most of these essays are less than a page in length, but several fill as much as three or four pages.

Part I is entitled "Legal Research Techniques." This opens with a three-page section on legal research texts, listing eleven texts, with information about each. The alphabetical listings follow. There are fifty-five entries in this part, starting with "Abbreviations," and ending with "Words and Phrases." The various entries describe how to research points of law in the various source materials commonly available.

Part II, "Subject and Topic Research," ranges over ninety-two listings, from "Accounting" to "Zoning." This part does for the different areas of law, or other activities which can be the subjects of research, what the first part does for sources and methods of research.

Part III is the appendix. It opens with a reprinted case report which is used for illustration in some of the entries in Part I. This is followed by a sample checklist for legal research in general; explanations of how to use Shepard's Citations and American Law Reports Annotated; and a discussion of how to find statutes cited to the United States Statutes and the United States Code.

The book has a detailed table of contents, including all entries or listings in Parts I and II. The "Index and Source Finder" at the end of the book is a subject-matter index.

The author is a law librarian and attorney who has published various articles and books on law and legal research.

2. Binkin, Martin, Herschel Kanter, and Rolf H. Clark, *Shaping the Defense Civilian Work Force: Economics, Politics, and National Security*. Washington, D.C.: The Brookings Institution, 1978. Pp. xii, 113. Price: \$2.95, paperback.

In this small book, the authors discuss the efficiency and cost-effectiveness of the civilian work force of the Department of Defense. They consider whether some jobs presently performed by civilians should be performed at all, or by military personnel or private-sector contractors. This study is not presented as a complete analysis in itself, but rather as a starting point for further research and analysis. An earlier version was published in 1977 by the Senate Committee on Armed Services. After a short introductory chapter, the second of the seven chapters provides an overview of civilian employment within the Department of Defense, including guidelines for use of civilians, and the cost of civilian manpower. Thereafter follow chapters on the interests of bureaucrats and politicians in defense manpower; efficiencies in the use of civilian personnel, including relative costs, and potential utilization under current and revised policies; and the relative costs of in-house and private contractor operations.

The authors conclude "that many defense civilian employees are [overpaid], that many . . . jobs . . . cannot be justified in national security terms, and that the components of the total work force—military, federal civilian, and contract employees—are not efficiently proportioned" (page 72). They recommend that these deficiencies be remedied, and they argue that billions of dollars could be saved as a result.

The book has a detailed table of contents. Three appendices show the composition of the defense civilian work force, the manner in which the Government makes decisions concerning civilian manpower, and the bases for the authors' cost derivations. Dozens of statistical tables are scattered throughout text and appendices.

Martin Binkin, the principal author of this study, is a senior fellow in the Brookings Foreign Policy Studies program. Herschel Kanter is also a Brookings senior fellow, and Rolf H. Clark, a commander in the U.S. Navy, was a Brookings Federal Executive Fellow in 1977-78.

The Brookings Institution describes itself as "an independent organization devoted to nonpartisan research, education, and publication in economics, government, foreign policy, and the social sciences generally." It claims to serve two principal purposes, first, "to aid in the development of sound public policies," and second, "to promote public understanding of issues of national importance."

The organization was founded in 1927 through the merger of three similar institutions, all founded a few years previously. General administration is in the hands of a board of trustees headed by a chairman and vice chairman. Immediate direction of the policies, program and staff is provided by a president, who also has final responsibility for the decision whether to publish a manuscript.

3. Blechman, Barry M., and Stephen S. Kaplan, *Force Without War: U.S. Armed Forces as a Political Instrument*. Washington, D.C.: The Brookings Institution, 1978. Pp. xviii, 584. Price: \$19.95, hardcover; \$8.95, paperback.

The jacket of this book explains its purpose:

The United States has used military forces short of war as an instrument of diplomacy on many occasions and in many areas of the world in the years since the Second World War. This book describes and analyzes the circumstances accompanying 215 shows of force and examines how effective these actions were in helping to attain U.S. foreign policy objectives.

The book opens with an introductory chapter. Thereafter the chapters are grouped into three parts. Part One, Aggregate Analyses, contains four chapters covering a variety of topics, such as trends in the size, type, and activity of participating military forces; direction of attention toward objectives sought, instead of motives, and on outcomes of effort rather than upon success or fail-

ure; various aspects of the problem of measuring outcomes; and a variety of situational factors, such as previous uses of United States forces in specified regions, personal diplomacy, presidential popularity, the role of the Soviet Union, and the strategic weapons balance, among other topics.

Part Two, Case Studies, comprises the bulk of the book. It is a collection of five essays, each focussing on a different part of the world, written by area specialists who are or were associated with Brookings Institution on a part-time basis. "The Laotian War of 1962 and the Indo-Pakistani War of 1971" was prepared by David K. Hall, an assistant professor of political science at Brown University. "Lebanon, 1958, and Jordan, 1970" was written by William B. Quandt, formerly of the University of Pennsylvania, and now director of the Middle East office of the National Security Council staff. "The Dominican Republic, 1961-66" was prepared by Jerome N. Slater, professor of political science at the State University of New York at Buffalo. "The Berlin Crises of 1958-59 and 1961" is by Robert M. Slusser, professor of history at Michigan State University. Finally, "Yugoslavia, 1951, and Czechoslovakia, 1968," was prepared by Philip Windsor, a reader in international relations at the London School of Economics and Political Science.

Part Three, Conclusions, is short. The authors concluded that United States use of force has been successful more often than not. This success has been short term in nature, serving mainly to delay unwanted developments abroad. Despite this short-term character of these successes, the use of force has been worth while overall because it has gained time for diplomacy to do its work. The authors then proceed to discuss types of situations in which success can be expected.

The book is supplemented by four appendices containing information about the incidents surveyed in the opening chapters. A detailed table of contents and a subject matter index are provided. Scattered throughout the book are dozens of tables, setting forth statistics and information about incidents and their outcomes.

Mr. Blechman was head of the Brookings Institute defense analysis staff when the study was being prepared. In 1977 he became an assistant director of the U.S. Arms Control and Disarmament Agency. Stephen S. Kaplan is a research associate in the Brookings Foreign Policy Studies program.

For a description of the Brookings Institution, its nature, origins, structure, and purposes, see Note No. 2, above.

4. Claude, R. P., editor-in-chief, *Universal Human Rights*. New York, N. Y.: Earl M. Coleman Enterprises, Inc. Quarterly periodical. Vol. 1, No. 1, Jan.-Mar. 1979. Pp. 104. Price: \$39.50 for the four issues of 1979; \$19.50 "for individual subscribers certifying that the journal is for their personal use."

This new periodical bears for a subtitle, "A Comparative and International Journal of the Social Sciences, Philosophy and Law." This is expanded slightly in the editor's introduction where Professor Claude states that "though the appeal of human rights is universal, the understanding of human rights dynamics is too primitive to ensure effective international development." The journal is intended to promote such understanding and, incidentally, to mark the thirtieth year since the adoption and proclamation of the Universal Declaration of Human Rights. That document is reproduced in the back cover of the issue.

This new journal is sponsored by the Division of Behavioral and Social Sciences at the University of Maryland. The editor-in-chief, Richard Pierre Claude, is a professor of government and politics at that university.

The greater part of this first issue is devoted to a symposium, "Human Rights and U.S. Foreign Policy." The authors of the four short articles in this section are from both government service and academic life. The symposium is opened by a writing of Patricia M. Derian, assistant secretary of state for human rights and humanitarian affairs.

The symposium is followed by two comparative articles, one on human rights in the islamic world, and the other on human rights in West Germany.

The first issue closes with a research note, "Indices of Political Imprisonment." This writing discusses problems of definition and of collecting data. The note closes with one and one-half pages of statistics on numbers of political prisoners in various countries.

5. Farley, Philip J., Stephen S. Kaplan, and William H. Lewis, *Arms Across the Sea*. Washington, D.C.: The Brookings Institution, 1978. Pp. x, 184. Price: \$7.95, hardcover; \$2.95, paperback.

Since World War Two, the United States has been the world's largest exporter of weapons. The major customers for American arms have been the countries of the Middle East and around the Persian Gulf. In 1977, the Carter administration announced a policy of curtailing arms shipments.

This short study assesses United States policy, past and present, concerning arms sales abroad. The authors recommend that the United States not withdraw from the arms market, but not promote sales either. They urge that care be taken by United States policy makers to ensure that arms sales be consistent with the interests of the United States in particular, and with maintenance of international security in general.

This small book contains only six chapters. The opening chapter provides an overview of the role of the United States in the world arms market. The next three chapters deal with three categories of arms transfers. Chapter 2, Security Assistance, discusses United States governmental policies and practices in providing military aid to allied nations. Chapter 3, Arms Sales, deals with both governmental sales and private commercial sales of weapons. There is some discussion of legislation concerning arms sales. Chapter 4 considers export of the technology necessary to produce weapons. Joint production of arms within NATO, and cooperation with the developing countries are both discussed. Policy recommendations are made.

The last two chapters set forth at some length the authors' views concerning a reasonable arms export policy for the United States. Treaty commitments are considered, and particular attention is paid to the Middle Eastern and Persian Gulf states, as well as African nations. Moderation and selectivity in promotion of arms sales are urged. Congressional review and oversight of executive branch policies are encouraged.

The book contains a detailed table of contents and a subject matter index. Several statistical tables are set forth in the first two chapters.

Philip J. Farley was formerly a senior fellow at the Brookings Institution. He is now Deputy U.S. Special Representative for Nonproliferation Matters in the Department of State. Stephen S. Kaplan is a research associated in the Brookings Foreign Policy Studies program. William H. Lewis is a senior officer in the Bureau of African Affairs of the Department of State. He worked as a senior fellow at Brookings while on leave from the Department of State in 1974-75.

For a description of the Brookings Institution, its nature, origins, structure, and purposes, see Note No. 2, above.

6. Koch, Gary, editor-in-chief, *Journal of Corporation Law*. Iowa City, Iowa: University of Iowa College of Law. Triannual periodical. Vol. 4, No. 1, fall 1978. Pp. 237. Price: \$13.50 for the three issues of the academic year 1978-79; \$4.50 for one issue.

This periodical is in its fourth year of publication but is noted here because it has not previously been seen by the editor of the *Military Law Review*.

Promotional literature explains that the *Journal* "is a student-run legal periodical that is devoted to discussion of the problems of the modern business enterprise." A long opening article entitled "Tax Consequences for Corporate Divisions of the Family Farm" is followed by two shorter articles on valuation in parent-subsidiary mergers, and on personal influence as a force in the development of corporation law.

The volume continues with three student notes dealing with mergers, state taxation affecting interstate commerce, and antitrust law. The volume concludes with a three-part recent development section, covering federal taxation, S.E.C. accounting requirements, and the attorney-client privilege as applied to corporations.

A table of contents is provided at the beginning of the volume. A combined outline and table of contents is also provided at the beginning of the long opening article on tax law. A short italicized headnote appears at the beginning of the third article, on personal influence.

7. Livingston, Marius H., editor, with Lee Bruce Kress and Marie G. Wanek, *International Terrorism in the Contemporary World*. Westport, Conn: Greenwood Press, 1978. Pp. xvi, 522. Price: \$37.50.

This large volume is a collection of forty-six separately authored essays and related aids for the reader, dealing with many types and aspects of terrorism and its consequences. The essays are grouped in seven parts.

After a foreward by Governor Brendan T. Byrne of New Jersey, the first part, General Introduction, begins. The book is the outgrowth of a three-day symposium, *Terrorism in the Contemporary World*, which was held at Glassboro State College, New Jersey in 1976. The five introductory writings provide an overview of terrorism, international and transnational.

Part II, *International Terrorism in Selected Parts of the World*, is the longest of the seven parts. It contains thirteen chapters. Three deal with problems in Northern Ireland, and two each with the Middle East and Africa. There are articles also on terrorism and its control in Sweden and the Soviet Union. One article covers both the American Ku Klux Klan and the Vietnamese National Liberation Front. There are articles also on terrorist problems in Central America and West Germany. This part closes with an essay on student protest in the United States and Japan.

The third part, *Some Psychological Aspects of International Terrorism*, contains three articles. These deal with such topics as sadism, paranoia, discontent, and frustration, in relation to terrorism.

Part IV covers the political consequences of terrorism, in seven articles. Covered are topics such as police terrorism, survival of hostages, the communications media in relation to terrorism, and intelligence operations. Included also are essays concerning terrorism as a tool for manipulation of the democratic process, political assassination, and some moral and philosophical issues raised by terrorism.

The six essays of Part V discuss various legal problems of terrorism. Application of the international humanitarian law of armed conflict is explored, as are the possibilities of an international crimi-

nal court. A draft convention on international crimes is set forth. Discussed also are hijacking, taking of hostages, political offenses, and United States efforts at deterrence of terrorism.

Part VI, International Terrorism and the Military, consists of three essays. Use of terrorism as a military weapon, the phenomenon of nuclear terrorism, and the growth of terrorism in recent decades as an alternative form of war, are all discussed in these essays.

The final part, "Some Historical Aspects of International Terrorism," contains seven essays. Four of these deal with various aspects of the Nazi Holocaust. Covered in these essays are the Nazi concept of killing and murder, the will to live, the Schutzstaffel (SS), and persecution of the Armenians. The other three essays deal with terrorism in literature, future trends in terrorism, and how to avoid consequences of terrorism in the future.

Aids for the reader, in addition to the introductory essays, include a table of contents, a selected bibliography of writings on terrorism, an appendix listing the participants in the 1976 symposium by name and place of employment, a section containing biographical sketches of all the contributors to the volume, and a subject-matter index.

The principal editor, Marius H. Livingston, was an associate professor and chairperson of the history department at Glassboro State College, as well as director of the 1976 symposium out of which this volume grew. He died on 14 December 1977. Lee Bruce Kress is an assistant professor of history at Glassboro State College, and Marie G. Wanek is a full professor at the same institution.

8. Nenninger, Timothy K., *The Leavenworth Schools and the Old Army: Education, Professionalism, and the Officer Corps of the United States Army, 1881-1918*. Westport, Conn.: Greenwood Press, 1978. Pp. 173. Price \$15.95.

The prestigious institution which today is known as the U.S. Army Command and General Staff College, at Fort Leavenworth, Kansas, was first established in 1881 as the School of Application for Cavalry and Infantry. This school provided an officer basic course

primarily for lieutenants, dealing with small-unit tactics and company administration.

After the Spanish-American War, the institution was upgraded to a postgraduate school. Its mission was to prepare well qualified officers for general staff duties and positions of high command. By this time, the institution consisted of two schools, the Army School of the Line, and the Army Staff College.

The author of this small book traces the origins of the Leavenworth schools in the German, French, and British higher military schools of the nineteenth century. He provides an account of the founding and early organization and operation of the Leavenworth institution under the influence of General William T. Sherman and later officers. Finally, the author examines the officer corps and the performance of the American Expeditionary Forces during World War I, as an example of practical application of the teachings of Leavenworth.

The book includes a brief table of contents; six short appendices providing chiefly information about Leavenworth graduates by rank and branch; a bibliographic essay; and a subject-matter index.

The author is an archivist employed in the Military Archives Division of the National Archives, located in Washington, D.C. This book is Number 15 in the Greenwood Press series, "Contributions in Military History."

9. Scalf, Robert A., editor, *Defense Law Journal*. Indianapolis, IN: The Allen Smith Company, 1979. Index for Volumes 18 through 27. Pp. v, 212. Current Service, Volume 28, No. 1. Pp. vi, 109. Prices: \$25.00 for bound volume; \$5.00 for current service issue.

The *Defense Law Journal* deals with tort law. This index volume updates and substantially replaces the first Index to *Defense Law Journal*, published in 1969. That index covered volumes 1 through 17 of the *Journal*, and was updated by annual pocket parts.

The new index volume lists by subject and by author all the articles appearing in volumes 1 through 17, as well as all articles appearing in volumes 18 through 27. These four indices fill only about

one sixth of the volume, however. The heart of the index volume is the "Index of Subjects," covering all types of writings appearing in volumes 18 through 27.

A typical current service issue of the *Defense Law Journal* includes one or more leading articles, but the bulk consists of case notes. In the first issue for volume 28, as an example, there is one leading article, "Review of Recent Tort Trends," by William E. Knepper. This is followed by eight case notes, grouped variously under headings such as, "Practical Trial Suggestions," "Cases Won by the Defense," "Significant Court Decisions," and "Damage Awards." Two of the notes are supplemented by editorial comment and annotations.

In the new index volume, only leading articles from volumes 1 through 17 are indexed, whereas all types of writings found in volumes 18 through 27 are listed. The inclusion of articles from the earlier volumes is explained in the preface: "[T]he greatest value of *Defense Law Journal* has always been, and continues to be, the articles it has presented through the years . . ." Thus, to this extent the new index volume replaces the index of 1969.

In the index volume, articles are listed by title, author, volume number, and page number in the two indices of articles by subject. They are listed by title, volume, and page in the two indices of authors. The large Index of Subjects lists main subjects alphabetically in bold face type, from "Absolute Liability" to "X-Rays." Under each subject heading are listed topics, and in some cases subtopics, with volume and page numbers. There is a very short table of contents at the beginning of the volume.

The first current service issue for volume 28 includes a table of contents; for the one leading article, a one-page list of topics discussed in the article; a similar list at the beginning of each of the four sections mentioned above; and a "Ready-Reference Index," by subject, topic, subtopic if applicable, and page number.

10. Smith, Robert Ellis, *Privacy: How to Protect What's Left of It*. Garden City, N.Y.: Anchor Press/Doubleday, 1979. Pp. xi, 347. Price: \$10.00. Index.

During the present decade, the subject of the individual's right to

privacy has been given unprecedented amounts of attention. This book is one man's effort to assist the lay person without legal training to cope with demands of private and public agencies for information about him or her, and with the uses those agencies may or may not make of information already collected.

After a short introduction and a chapter discussing traditional privacy protections and their inadequacy in the computer age, Mr. Smith launches into the main part of the book, which deals with informational privacy. Chapters within this part deal briefly with bank records, criminal records, consumer credit bureaus, consumer investigations and employment records.

This part continues with a chapter on files of the federal government, which includes notes about the census and about military discharges. A note about the law of privacy in Canada is also included. This long part continues with discussion of insurance records, mailing lists, medical records, legal privileges against disclosure, academic records of all sorts, social security numbers and the social security system, state government files including adoption records and juror investigations, tax records, and telephone privacy.

The part on informational privacy is followed by part III, entitled "The New Technology and Your Rights," with chapters on computers, electronic surveillance, fingerprinting, lie detection, surveillance devices, and voice comparison.

Part IV, "Physical Privacy," contains chapters on sexual privacy, and privacy in the mails and the workplace. The chapter on privacy in the community includes notes on search and seizure, door-to-door sales, use of maiden names by married woman, and press coverage of one's activities. This part closes with a chapter on privacy in the home, and noise as an invasion of privacy.

The book closes with a part entitled "Psychological Aspects of Privacy," containing one short chapter. This section is followed by two pages of footnotes, and an index.

The author, Robert Ellis Smith, is an attorney and is the publisher of a newsletter called *Privacy Journal*, in Washington, D.C. He formerly worked for the American Civil Liberties Union, and before that, for the Office of Civil Rights, in the Department of Health, Education, and Welfare.

INDEX FOR VOLUME 83

I. INTRODUCTION

This index follows the format of the vicennial cumulative index which was published as volume 81 of the *Military Law Review*. That index was continued in volume 82. Future volumes will contain similar one-volume indices. From time to time the material of volume indices will be collected together in cumulative indices covering several volumes.

The purpose of these one-volume indices is threefold. First, the subject-matter headings under which writings are classifiable are identified. Readers can then easily go to other one-volume indices in this series, or to the vicennial cumulative index, and discover what else has been published under the same headings. One area of imperfection in the vicennial cumulative index is that some of the indexed writings are not listed under as many different headings as they should be. To avoid this problem it would have been necessary to read every one of the approximately four hundred writings indexed therein. This was a practical impossibility. However, it presents no difficulty as regards new articles, indexed a few at a time as they are published.

Second, new subject-matter headings are easily added, volume by volume, as the need for them arises. An additional area of imperfection in the vicennial cumulative index is that there should be more headings.

Third, the volume indices are a means of starting the collection and organization of the entries which will eventually be used in other cumulative indices in the future. This will save much time and effort in the long term.

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