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COMMENT

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Introduction

ON MANY OCCASIONS since 1945 questions have been raised concerning the meaning and application of the United Nations Charter's provisions regarding the control of force. Controversy has centered on Article 2, paragraph 4 — the general prohibition against the use of force or threat thereof — and Articles 51 and 53, which stipulate exceptions to the general proscription contained in Article 2(4). Under the best of circumstances one could not have expected general agreement on the application of the Charter's standards to the complexities of political conflicts in the real world. The best of circumstances have certainly not been present since 1945. There has been instead an exceptional degree of conflict and polarization among governments. The inability of the United States and the Soviet Union to agree on the application of the Charter's standards and the conviction of each power that the other posed a serious and continuing threat to its interests had a profound impact on attitudes and orientations toward the Charter regime. Governments interpreted the Charter in the light of the belief that Permanent Members acting in the Security Council would not exercise their primary responsibility for the maintenance of international peace and security. Claims regarding the circumstances under which force could be lawfully used without the approval of the Security Council were also influenced by these considerations. The attitudes of decisionmakers in the United States and the Soviet Union toward the Charter were influenced by images of each other as a continuing threat. These

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images exerted an important influence over decisions by U.S. and Soviet policy-makers regarding the use of force and furthered controversy over the meaning and application of Articles 51 and 53 of the Charter.

Legal policies including claims with respect to the scope and application of the inherent right of individual and collective self-defense have not been unaffected by the strategic policy concerns which preoccupied decisionmakers during the confrontation period of the Cold War. Having identified their own national security with the formation of alliance systems and the preservation of these systems against not only direct attack, but in some cases against changes of regime which were perceived to have adverse political consequences, both the United States and the Soviet Union have made broad claims concerning the exercise of the right of collective self-defense and each has invoked the right in circumstances challenged by the other.[1] Deliberate distortions of fact notwithstanding, conflicting worldviews have produced radically divergent characterizations of the situations which involve the use of force in collective self-defense. A regime entitled to lawfully request assistance to resist "aggression" in the view of one power has not been so entitled to seek help to non-existing "aggression" in the view of the other. Controversy over the exercise of the right of self-defense

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[1] Among the instances in which such controversies have occurred are Lebanon (1958) and Czechoslovakia (1968). The claims and counter-claims are well illustrated in the following documents:

Lebanon: *See* Address of President Eisenhower, 39 DEP'T STATE BULL. 182 (1958); Remarks of President Eisenhower to the General Assembly, 3rd Em. Spec. Sess. U.N. GAOR 7-10 (1958); *cf.* Remarks of A. Gromyko (Representative of the Soviet Union) to the General Assembly, *id.* at 10-16. The Soviet Representative referred to the invocation of Article 51 with respect to the U.S. action in Lebanon as "extremely far-fetched, as is evident from the fact that, under the said Article 51, the right of collective self-defense may be invoked 'if an armed attack occurs against a Member of the United Nations.'" *Id.* at 12.

See also U.N. Doc. A/3876 (18 Aug. 1958) and Wright, *United States Intervention in The Lebanon*, 53 AM. J. INT'L L. 112 (1959).

Czechoslovakia: *See* TASS Statement on Military Intervention in Czechoslovakia, 21 Aug. 1968, reprinted in 7 INT'L LEGAL MATERIALS 1283 (1968); *see also* U.N. Doc. A/8759 (21 Aug. 1968); *cf.* Reis, *Legal Aspects of the Invasion and Occupation of Czechoslovakia*, 59 DEP'T STATE BULL. 394, 396 (1968). *See also* T. Franck, *Who Killed Article 2(4)?* 64 AM. J. INT'L L. 809 (1970); T. FRANCK & E. WEISBAND, WORD POLITICS: VERBAL STRATEGY AMONG THE SUPERPOWERS (1972).

U.S. claims to use force in collective self-defense in Indo-China were of course also challenged by the Soviets. Vietnam presents a unique set of issues especially concerning the interpretation of the 1954 Geneva Agreements. U.S. claims regarding the use of force in collective self-defense are found in: U.S. Dep't. of State, Office of the Legal Adviser, The Legality of United States Participation in the Defense of Vietnam, 4 March 1966, reprinted in 60 AM. J. INT'L L. 565 (1966); Stevenson, *U.S. Military Action in Cambodia: Questions of International Law*, 62 DEP'T STATE BULL. 765 (1970).

has not only concerned the level of intervention which constitutes an armed attack in specific cases and the right of a particular regime to request assistance. There has also been uncertainty over whether Article 51 permits the exercise of the inherent right of self-defense if, and only if, an armed attack occurs or whether the article preserves undiminished a customary right to use pre-emptive force in anticipation of an imminent attack.[2]

Another important controversy concerning the right to use force has ensued over the meaning and application of the provisions of Article 53 of the Charter. Article 53 permits the use of force by regional organizations upon the approval of the Security Council for the purpose of maintaining the peace. Each power, however, has used force under the authority of regional organizations to enforce the peace in regions in which it was politically dominant without the prior explicit approval of the Security Council. In practice the requirement of prior Security Council authorization has not been recognized. The term authorization has been "stretched" by the United States to include failure to disapprove.[3] At the same time, the United States has challenged the Soviet claim that the Warsaw Pact is a regional organization entitled to undertake such regional enforcement measures.[4]

While the two powers have verbally challenged each other's claims to act in self-defense or to conduct regional enforcement

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[2] *See, e.g.*, McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963); D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 187-192 (1958); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *Recueil Des Cours*, Vol. II, 455, 495-499 (1952); *cf.* L. HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 233-236 (1968); Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546 (1963); and P. JESSUP, A MODERN LAW OF NATIONS 165-166 (1948). *See also* U.S. DEP'T OF STATE, PUB. NO. 2737, FIRST REPORT OF THE UNITED NATIONS ATOMIC ENERGY COMMISSION TO THE SECURITY COUNCIL 22 (1946); U.S. DEP'T OF STATE, PUB. NO. 2702, INTERNATIONAL CONTROL OF ATOMIC ENERGY: GROWTH OF A POLICY 106, 164 (1946); R. FALK, LEGAL ORDER IN A VIOLENT WORLD 425-435 (1968).

[3] *See* A. CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 61 (1974).

The United States also asserted that the Cuban Quarantine did not constitute "enforcement action" within the meaning of Article 53. *See* Department of State Memorandum: Legal Basis for the Quarantine of Cuba, 23 Oct. 1962, reprinted in A. CHAYES, *supra* at 146.

See also Claude, *The OAS, the U.N. and the United States*, INTERNATIONAL CONCILIATION, No. 547 (March, 1964); Franck, *supra* note 1, at 822-35; Moore, *The Role of Regional Arrangements in the Maintenance of World Order*, in 3 C. BLACK & R. FALK, THE FUTURE OF THE INTERNATIONAL LEGAL ORDER (1971); Henkin, *Comment*, in A. CHAYES, *supra* note 3, at 152.

[4] *See* Reis, *Legal Aspects of the Invasion and Occupation of Czechoslovakia*, 59 DEP'T STATE BULL. 394, 396 (1968).

operations without the authorization of the Security Council, effective opposition to the exercise of these claims has been absent. The fear of policymakers of each power, that opposition to the other's use of force in defense of asserted security interests would lead to a general conflagration, has led to speculation concerning the tacit acceptance by the two Superpowers of spheres of influence in which each power grants to the other expanded discretion with respect to the use of force.[5] The impact on the legal order of the effective exercise of claims to use force in collective self-defense and under the authority of regional organizations is presently problematic.[6]

There can be no doubt that the progressive development of international legal order requires formal clarification of the circumstances in which the invocation of the right of self-defense is generally accepted as lawful,[7] as well as agreement on the circumstances under which force can be used under the authority of regional organizations. An effective legal order, as McDougal and Feliciano correctly argue, must permit policies designed to meet or otherwise deter or rebuff unlawful coercion.[8] This includes recognition of the right of individual and collective self-defense in circumstances in which community institutions are unable to act to prevent major violations of political independence and territorial integrity. It also includes recognition of the right to use force under the authority of regional organization in the case of threats to the peace even if it is not possible to obtain prior approval by the Security Council. At the same time, however, it must be recognized that policies which have been characterized as a defensive reaction to unlawful coercion or as otherwise necessary to remove threats to the peace by one Superpower have had the effect of increasing tensions and confirming images, held by decision makers of the opposing bloc, of that state as an expansionist power. These larger consequences cannot be ignored. It is a desirable objective of an international legal order that the reasonableness of the exercise of the right of individual or collective self-defense, or the necessity of regional enforcement

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[5] *See, e.g.*, T. FRANCK & E. WEISBAND, *supra* note 1, at 114-17.

[6] See U.S. Dep't of State, Press Release No. 196, United States Statement on Spheres of Influence, 23 Aug. 1968, reprinted in 7 INT'L LEGAL MATERIALS 1299 (1968).

[7] *See* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION ch. 3 (1961); *see also* D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW (1958); Brownlie, *The Use of Force in Self-Defense*, 37 BRITISH YEARBOOK OF INT'L L. 183 (1961).

[8] M. MCDOUGAL & F. FELICIANO, *supra* note 7, at 130; *see also* McDougal, *supra* note 2.

measures, in any given circumstance be apparent to the international community. Moreover, a use of force by either Superpower, no matter how justified, which does not appear to the decisionmakers and policy-influential elites of the other to be a reasonable application of an agreed rule will have a destabilizing effect on *détente*.

The Summit Agreements and the Resolution of Controversy

In two important agreements reached at the 1972 and 1973 summit meetings, the United States and the Soviet Union addressed the subject of the control of force and the maintenance of peace. At the Moscow Summit in May, 1972, the two powers concluded a declaration of Basic Principles of Relations. This entire document reflects the remarkable progress of *détente*. For the purpose of this comment, however, the first three "principles" are most important insofar as they bear directly on the problem of achieving agreement on the regulation of the use of force. The declaration reads:

> The United States of America and the Union of Soviet Socialist Republics, . . .
>
> Have agreed as follows:
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> *First.* They will proceed from the common determination that in the nuclear age there is no alternative to conducting their mutual relations on the basis of peaceful coexistence. Differences in ideology and in the social systems of the USA and the USSR are not obstacles to the bilateral development of normal relations based on the principles of sovereignty, equality, non-interference in internal affairs and mutual advantage.
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> *Second.* The USA and the USSR attach major importance to preventing the development of situations capable of causing a dangerous exacerbation of their relations. Therefore, they will do their utmost to avoid military confrontations and to prevent the outbreak of nuclear war. They will always exercise restraint in their mutual relations, and will be prepared to negotiate and settle differences by peaceful means. Discussions and negotiations on outstanding issues will be conducted in a spirit of reciprocity, mutual accommodation and mutual benefit.
>
> Both sides recognize that efforts to obtain unilateral advantage at the expense of the other, directly or indirectly, are inconsistent with these objectives. The prerequisites for maintaining and strengthening peaceful relations between the USA and the USSR are the recognition of the security interests of the Parties based on the principle of equality and the renunciation of the use or threat of force.
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> *Third.* The USA and the USSR have a special responsibility, as do other countries which are permanent members of the United Nations Security Council, to do everything in their power so that conflicts or situations will not arise which would serve to increase international tensions. Accordingly, they will seek to promote con-

> ditions in which all countries will live in peace and security and will not be subject to outside interference in their internal affairs.[9]

The following year at the Washington Summit, the United States and the Soviet Union concluded the Agreement on the Prevention of Nuclear War, in which they agreed: to act so as to avoid dangerous exacerbations of their relations and so as to "exclude" the outbreak of nuclear war between themselves or between either and other states; "to proceed from the premise that each Party will refrain from the threat or the use of force against the other Party, against the allies of the other Party and against other countries in circumstances which may endanger international peace and security;" and to consult with each other and to make every effort to avert the risk of nuclear war should such a risk appear between the two or between either and a third party.[10]

Considerable importance has been attached to these agreements by ranking policy-makers in both Washington and Moscow as measures which add stability to *détente*.[11] Although the Parties represent the Agreements as proceeding from their obligations under the Charter, and hence profess no incompatibility between the requirements of stabilizing *détente* as defined by the Superpowers and the obligations of the powers under the Charter, the real effect of these instruments on the Charter regime depends upon the interpretations the Parties place on the major provisions. Several aspects of these agreements and their possible implications for the development of the legal order will be considered here.

The Charter Regime, the Summit Agreements and the Legal Control of the Use of Force

In their agreement on Basic Principles the United States and the Soviet Union declare that they "make no claims for themselves and would not recognize the claims of anyone else to any special rights or advantages in world affairs."[12] This provision caused at

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[9] Basic Principles of Relations Between the United States of America and the Union of Soviet Socialist Republics, 29 May 1973, in 11 INT'L LEGAL MATERIALS 756 (1972).

[10] The Agreement entered into force upon conclusion. The official English text of the Agreement may be found in 12 INT'L LEGAL MATERIALS 896 (1973). A copy of the Russian text appears in Pravda, 23 June 1973, at 1. An interesting general discussion of the significance of the Agreement may be found in a news conference held by the President's National Security Advisor, Dr. Henry Kissinger, on 23 June 1973. The transcript of the conference is reprinted in 69 DEP'T STATE BULL. 141 (1973).

[11] *See* Kissinger, *supra* note 10, at 143, *see also* G. Arbatov in *Kommunist*, No. 3 (Feb., 1973), at 101-113.

[12] Basic Principles of Relations, Eleventh.

least one legal scholar to conclude that the Soviet Union appeared to have renounced the Brezhnev Doctrine. Yet, G. Arbatov, a prominent Soviet scholar, director of the America Institute and participant in the recent series of summit meetings, writing in *Kommunist*, concluded that the Basic Principles of Relations is significant because it represents U.S. acceptance of the principle of peaceful coexistence.[13] In the Soviet view, the Brezhnev Doctrine, it will be recalled, was not incompatible with "peaceful coexistence."

It is Article II of the Agreement on the Prevention of Nuclear War which deals most directly with the subject of the control of force. Some questions may be raised over the meaning of this article. While the obligation to refrain from the threat or the use of force contained in Article 2, paragraph 4 of the Charter is qualified by the phrases "in their international relations," "against the territorial integrity or political independence of any state" and "in any manner inconsistent with the purposes of the United Nations," Article II of the Agreement on the Prevention of Nuclear War provides only that the parties refrain from the threat or use of force "against the other Party, against the allies of the other Party and against other countries in circumstances which may endanger international peace and security." According to Dr. Kissinger, Article II of the Agreement "does not apply to the situation in Cambodia (*i.e.*, the situation as of June 1973 which included U.S. bombing in support of the Lon Nol Government) inasmuch as that situation was in force at the time of the conclusion of the agreement."[14] In the U.S. view, however, "The movement into sovereign countries of *large* forces would not be consistent with the *spirit* of the agreement."[15] Whether or not the Soviet Union shares these interpretations of the Agreement is not clear. The nature of the understanding surrounding this provision, however, is of some significance to the development of the legal order. It is unclear whether Article II is intended to effect a narrowing or a confirmation of the discre-

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[13] Schwebel, *The Brezhnev Doctrine Repealed and Peaceful Coexistence Enacted*, 66 AM. J. INT'L L. 816 (1972). For an interesting commentary on the agreement on Basic Principles of Relations by a Soviet scholar, see the analysis of U.S.-Soviet relations by G. Arbatov, *supra* note 11. Arbatov concludes that the significance of the agreement on Basic Principles of Relations is that it represents the acceptance by the U.S. of peaceful coexistence as "the main contractual principle governing the relation of the two Powers." Acceptance of this principle by the U.S., in Arbatov's view, represents an important shift in U.S. policy.

[14] Kissinger news conference, *supra* note 10, at 143.

[15] *Id.* at 144. [Emphasis added.]

tion, in certain circumstances, of the United States and the Soviet Union to interpret Articles 51 as well as 53.

Other provisions of the Summit Agreements, however, do establish a clear and less controversial basis for the supplementation of the Charter regime. The commitment of the Superpowers to control policies capable of causing a dangerous exacerbation of relations expressed in the Second Principle of the Basic Principles of Relations, and in Article I of the Agreement on the Prevention of Nuclear War, establishes a useful, and conceptually novel, juridical basis for approaching the control of force and can provide a legal point of departure for the supplementation of the Charter regime. This obligation to refrain from acts which exacerbate relations can be extended to cover acts not covered by the Charter, such as the deployment of new weapons systems or the transfer or sale of arms to legitimate governments. It can provide a juridical basis for the solution of a problem described by Stanley Hoffmann vis-à-vis the regulation of situations in which the crisis provoking act, while perfectly legal by prevailing standards, tends to perform a transformation in the distribution of power which requires one of the major powers to act in self-defense.[16]

The commitment to consult in the event of the "appearance of a risk" of nuclear war contained in Article IV of the Agreement on the Prevention of Nuclear War is a step in the direction of dealing with the problems posed in the regulation of the use of force in anticipatory self-defense in the nuclear age. While the Agreement does not explicitly address itself to the question of anticipatory attacks, it clarifies an obligation between the Parties to consult in the event either detects the "appearance of a risk" of nuclear war and to make every effort to avert such risks. The Agreement is deficient, however, insofar as it does not clarify the obligations of either power vis-à-vis third parties who may be involved in the nuclear risk situation. Presumably, the peaceful settlement obligations of the Parties under the Charter require either Party concerned over the "appearance" of a risk of nuclear war to enter into direct discussions with the other Government(s) involved. Such nuclear risk situations, however, present special difficulties which may not be susceptible to resolution in the absence of effective corollary arms control measures.

One cannot yet conclude that the Soviet Union has repudiated

[16] Hoffmann, *International Law and the Control of Force*, in S. HOFFMANN & K. DEUTSCH, THE RELEVANCE OF INTERNATIONAL LAW 31 (1968).

the Brezhnev Doctrine or, for that matter, that either Superpower has forsworn the possibility of defining under certain circumstances the threat of a change of regime precipitated with limited external intervention as a threat justifying the use of force in self-defense. Nor can one conclude that the problems surrounding the regulation of the use of force in anticipatory self-defense have been resolved. While the Superpowers are in the process of elaborating the legal basis of their relations, the character of this elaboration is not yet fully apparent. The impact of these agreements on the pattern of expectations regarding the use of force prevailing between national security bureaucracies of the United States and the Soviet Union is difficult to assess. If shared understandings exist regarding the interpretation of the provisions of these agreements, these understandings extend only to a limited inner circle of policy-makers. Such understandings would be jeopardized by any changes in Government or governing personnel. Progress on development of the legal order certainly requires a more explicit and specific characterization of lawful and unlawful uses of force as well as the more specific characterization of and agreement upon policies which have the effect of exacerbating relations between the two powers. Progress also requires a recognition of the fact that policies characterized as permissible under Articles 51 and 53 of the Charter have had the effect of increasing tensions between the United States and the Soviet Union. In order to exert a significant impact on policy, law between the two powers must achieve greater specificity and precision than has thus far been achieved at the summits. Moreover, in order to exert a lasting impact, there must be widely shared understanding of the concrete meaning of such agreements for the conduct of policy. Agreements supplemented by understandings to which only a limited circle of decisionmakers are privy are by their nature likely to be of only ephemeral significance.

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