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Pueblo and Mayaguez: A Legal Analysis

*by Stephan B. Finch, Jr.**

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I. PROLOGUE

THE OBJECT of the international law decision-making process is to secure for the nations of the world the widest possible distribution of shared values, or preferred events, through the peaceful balancing of competing interests. The distillation of value-conserving decisions from particular confrontations hinges on the ability and willingness of policy makers to scrutinize the factual contexts giving rise to the opposing claims and to apply, on a case-by-case basis, the continuously evolving and necessarily flexible prescriptions of customary and treaty law. This must be done in such a fashion as to promote simultaneously, and to the greatest degree possible, both the inclusive interests of mankind as a whole and the exclusive interests of individual claimants. To the extent that exclusive claims are asserted irrespective of or against common inclusive interests, they must be rejected.¹

On those relatively infrequent occasions when confrontation between conflicting interests assumes crisis proportions, any number of factors such as nationalistic pride, public reaction, and fear of imminent and uncontrollable violence may conspire to impair the effectiveness of the decision-making process. Such was the case in both the *Pueblo* and *Mayaguez* affairs. Although the outcome of the decision-making process in each instance cannot be reversed, it is hoped that a legal analysis of the similar sets of claims and counterclaims surrounding the two incidents will highlight the mistakes made and suggest a need to modify, in certain respects, the management of post-Vietnam crisis diplomacy.

II. THE FACT SITUATIONS COMPARED AND CONTRASTED

A. Location

The unexpected seizures of the *Pueblo* and *Mayaguez*, although frequently denounced as examples of piracy, were in fact sanctioned by the Communist regimes in North Korea and Cambodia and therefore do not fit the accepted definition of piracy as acts of private violence on the high seas by persons seeking to rob and murder for their own ends.² Nonetheless, attempts to characterize these seizures as piracy reflect a significant feature common to the two incidents: Both occurred on waters presumed by the rest

¹ M. McDougal & W. Burke, *THE PUBLIC ORDER OF THE OCEANS* 37 (1962) [hereinafter cited as McDougal & Burke].

² *Id.* at 806.

of the world to be part of the high seas. When the *Pueblo* was captured at 2:30 p.m. local time, on January 23, 1968, she was on station 16 miles from the Korean coast. Similarly, the *Mayaguez*, when fired upon and boarded on May 12, 1975, was steaming in regular commercial shipping channels, 60 miles southwest of Cambodia and 7 miles from the tiny, uninhabited Wai Islands, claimed by Thailand, South Vietnam, and Cambodia. There can be no doubt that the major factor which led to these crisis-producing confrontations was the sudden collapse of a premise which had been assumed at every level of responsibility and upon which all plans for both voyages had been based — that of freedom of the high seas.³

B. *Ship Profile and Mission*

The *Pueblo* was a Navy Electronics Intelligence (ELINT) ship, a 24-year old converted cargo hauler equipped with the latest in radar and radio gear and designed for the sole purpose of eavesdropping on the Communists. Her armament consisted merely of two 50-caliber machine guns.⁴ The information obtained by such a “snoop” ship provides the strategists of the Defense Intelligence Agency and other federally-controlled think-tanks with the details necessary to anticipate and react to Communist maneuvers around the world. It was just such information gathered by ELINT vessels in the Caribbean that alerted the United States to Russian efforts to install missiles in Cuba.⁵

By contrast, the *Mayaguez* was not a U. S. man-of-war but a 31-year old container ship owned by Sea-Land Service, Incorporated, of Menlo Park, New Jersey.⁶ Completely unarmed, she was en route from Hong Kong to Thailand with a cargo of commercial goods and supplies for U. S. servicemen when seized by a Cambodian gunboat. Confronted with machine gun blasts and rocket fire, she could do little but assent to the gestured commands of those who boarded her.

C. *Prior Warnings Issued by Captors*

Perhaps the greatest irony inherent in the facts surrounding

³ Statement of Secretary of the Navy John H. Chafee on *Pueblo* Court of Inquiry, May 6, 1969, in D. GALLERY, *THE PUEBLO INCIDENT* 173 (1970) [hereinafter cited as GALLERY].

⁴ GALLERY, *supra* note 3, at 2.

⁵ *Id.*

⁶ TIME, May 26, 1975, at 10.

the two seizures concerns prior Communist threats which failed to reach the commanding officers of the *Pueblo* and *Mayaguez*. Just before the *Pueblo* sailed on her last voyage, the North Koreans broadcast a radio message to the effect that they would take drastic action against any snoopers sighted near their coast. In response to this thinly-veiled threat of attack, the National Security Agency sent a recommendation to the Joint Chiefs-of-Staff, urging a re-evaluation of the "minimal risk" classification that had been placed upon the *Pueblo's* mission. The communication circulated through the lower staff levels of the JCS before it was rerouted to the Chief of Naval Operations and to the Commander in Chief, Pacific Command.⁷ However, it never penetrated that protective cordon of lower-echelon red tape which occasionally insulates the "brass" all too effectively, keeping from our military commanders matters, such as this, that may weigh heavily on the safety of U. S. operating units. The *Pueblo's* mission thus retained its "minimal risk" status because of a thoroughly predictable breakdown in communications. Consequently, her crew was unprepared to take effective countermeasures against the Korean attack. Not only were the men incapable of resistance, but their efforts to scuttle ELINT gear and records were largely unsuccessful.⁸

During the month prior to the capture of the *Mayaguez*, similar rumblings were heard from the recently-installed Communist government of Cambodia.⁹ For reasons which remain unclear to this day, neither the owners nor the captain of the *Mayaguez* ever received word that the Cambodians had fired on, captured, and presumably released 25 ships and fishing boats steaming in the very lanes through which the container ship would pass. Had this information been publicized by the Federal Government, it seems plausible that American shipping interests would have demanded and received at least token naval protection in that area until such time as the world community forced the Cambodians to cease their depredations on international commerce. Instead, a wholly avoidable confrontation ensued, costing lives and property on both sides.

D. *The Communist Rationale*

As evidenced by their radioed threats against U. S. ELINT

⁷ GALLERY, *supra* note 3, at 12.

⁸ *Id.* at 39.

⁹ *Supra* note 6.

vessels, the Koreans were at least superficially concerned with protecting their coastal security, even if this meant attacking the *Pueblo* in international waters and subsequently trying to camouflage the illegality of their aggression by extorting from the United States an admission that the spy-ship had invaded the Korean 12-mile territorial sea. The irony of this rationale is that, after escorting the *Pueblo* to Wonsan, the Koreans demonstrated no interest in the top secret information and electronic equipment contained aboard their prize. Instead of concerning themselves with whatever data had been collected by the "snoop" ship, they simply turned the whole thing over to the Chinese Communists, presumably because the latter possessed the technology necessary to interpret the information and utilize the gear left undestroyed by the Americans. The Koreans then devoted most of the following year to extracting confessions from their captives, which they used for propaganda purposes.¹⁰

Although subsequent legal analysis will deal with the validity of the Korean claim to authority based on national security, it seems fair to conclude at this point that the casual manner in which the *Pueblo's* captors disposed of her and the purposes for which they detained her crew completely destroy the *credibility* of the rationale asserted by the Communists as justification for their action.

When the *Mayaguez* was captured, the world community could only speculate as to what rationale would be offered by the Cambodians. In some circles, the seizure was seen as an attempt by the new Communist-backed regime to kick sand at the United States, the last of whose combat troops had abandoned the deposed Lon Nol government just a few weeks earlier. Those of a more legal, and perhaps less skeptical, bent theorized that the Cambodians were claiming possession of the uninhabited Wai Islands and any oil deposits that might exist thereunder. Finally, after several days, Cambodian Information Minister Hon Nim announced that his government had considered the *Mayaguez* part of a complex CIA spy operation and had seized her on suspicion of transporting arms to anti-Communist factions in Southeast Asia.¹¹ Of course the legal validity of the Cambodian claim to authority, which included the right to remove the crew from the ship and transport them to the mainland, collapses along with the credibil-

¹⁰ *Hearings Before the Special Subcommittee on the USS Pueblo of the House Comm. on Armed Services*, 91st Cong., 1st Sess. 946 (1969) [hereinafter cited as *Hearings*].

¹¹ *Supra* note 6.

ity of Hon Nim's proffered rationale when it is recalled that a search of the ship disclosed only commercial goods in cargo lockers. Knowing the contents of the containers, the Cambodians nonetheless removed the ship from commercial channels and ferried the crew to Kompong Som.

E. *The U. S. Responses*

To understand the seemingly irreconcilable disparity between the official American responses in the *Pueblo* and *Mayaguez* incidents, it is necessary to examine the major factors contributing to each response. These factors include the degree to which command control was effectively centralized in each instance, the prevailing U. S. political climate at the time of each seizure, and the extent to which fear of escalation may have influenced the decision-makers in Washington, D. C.

Commander Lloyd Bucher of the *Pueblo*, facing 57 millimeter cannon fire from a North Korean submarine chaser as well as the prospect of having his ship strafed by MiG fighters overhead, decided not to use his machine guns to resist the boarders. Instead, his strategy was to proceed as slowly as possible astern of the Wonsan-bound sub chaser and await what he thought would be the swift retaliatory deployment of American air power in response to his SOS. Although the planes of the USS *Enterprise* were only an hour's flying time away, none of the officers in the chain of command linking the *Enterprise's* task group with the headquarters of Commander in Chief, Pacific Command (CINCPAC), ordered any countermeasures. The reason for this is two-fold. First, the *Pueblo* transmitted only two official messages on the afternoon of her capture and neither indicated anything more serious than the usual harassment to which American vessels are generally subjected by Korean fishing boats. The rest of the news from *Pueblo*, including her SOS, was transmitted as unofficial chatter between radio operators.¹² Naturally none of the higher-ups was willing, on the basis of unofficial operator chatter, to do anything more than relay word of what was happening up the chain of command to Washington, D. C. Second, the *Pueblo*, like other intelligence-gathering ships, was subject to the direct operational control of the Secretary of Defense and the Pentagon.¹³ The military command structure, from CNO through CINCPAC

¹² GALLERY, *supra* note 3, at 62.

¹³ *Id.* at 6. It is interesting to note that the lieutenant in charge of *Pueblo's* ELINT gear had a direct line to Washington, D.C. Orders from the Pentagon

down to Commander Naval Forces, Japan (Bucher's immediate superior), merely supplied *Pueblo* with logistic support, not military direction. Thus, upon receiving word of her predicament, all commands felt obliged to look to Washington, where responsibility for the *Pueblo* presumably rested, before assuming the risk of retaliation. Doubtless, had the *Pueblo* been assigned to the *Enterprise's* task group, the officer in charge there would have taken immediate action to rescue her; but no one was willing to stick his neck out for an unknown vessel, not even assigned to the Seventh Fleet, and controlled directly by the Pentagon.

Certainly the *Pueblo* affair highlights the problems caused by division of responsibility in crisis situations. Although she was a Navy ship and as such deserved naval protection, the fact that the Pentagon exercised direct and exclusive operational control over her prevented local commands from reacting without first seeking approval from Washington. Consequently, nothing was done during the 6 hours *Pueblo* remained at sea after the boarding. When she reached Wonsan, U. S. policy-makers decided that any attempts to retrieve her would smack of retaliation and could lead to a second Korean War.¹⁴ They decided to refer the matter to the U. N. Security Council.

By contrast, control over the *Mayaguez* affair was immediately and effectively centralized in the office of the President. Throughout the crisis, State Department spokesman Robert Funseth reiterated to reporters that management of the situation was "a Presidential action."¹⁵ Certainly this swift and undivided assumption of responsibility at the highest level figured prominently in the release of the *Mayaguez* and her crew.

The prevailing U. S. political climate at the time of the *Pueblo* incident reflected mounting dissatisfaction with the Vietnam conflict and a concomitant aversion to any further entanglement in Southeast Asia. Naturally, once the spy ship was inside Wonsan Harbor, few would countenance the introduction of military forces into Korea for the purpose of retrieving her. The mistaken hope was that by referring the matter to the U. N. Security Council the United States could pressure the North Koreans into releasing the ship and crew.

actually by-passed Bucher, who was informed of their content only on a "need-to-know" basis.

¹⁴ See statement of Adm. Ulysses Sharp before The Special Subcommittee on the USS *Pueblo* of the House Committee on Armed Services, Mar. 17, 1969, in *Hearings*, *supra* note 10, at 797.

¹⁵ *Supra* note 6, at 12.

On the other hand, the *Mayaguez* rescue took place at a time when many Americans, although relieved by the withdrawal of troops from Southeast Asia, were nonetheless depressed and bitter over the totality of the American defeat in Cambodia. The President, no doubt aware that circumstances had presented him with a unique opportunity to revitalize the spirit of the nation, to discredit those who had labelled him a "do-nothing" Chief Executive, and to restore the international credibility of the country, used military force to obtain the release of the *Mayaguez*. His action by and large met with public approval. As James Reston explained in the *New York Times*, "the main thing that has happened is that Uncle Sam went out of Cambodia and slammed the door."¹⁶ Thus, while the political climate of the country in 1968 made any forceful efforts to retrieve *Pueblo* unthinkable, the popular mood in 1974 fairly demanded a swift military response.

A final point must be made on the extent to which fear of escalation might have in part determined the nature of the American responses to the *Pueblo* and *Mayaguez* seizures. As Admiral Sharp's testimony before the Armed Services Committee¹⁷ indicated, the prevailing view in Washington was that once the *Pueblo* entered Wonsan Harbor any U. S. countermeasures would greatly increase the probability of a major military confrontation with Korea. Although this contention is a serious one, it is difficult to see how the North Koreans could have escalated in such fashion as to pose a significant threat to the United States.¹⁸ Had America chosen to retrieve the *Pueblo* by force after diplomatic negotiations had failed, the action would have involved relatively few troops and would have consumed less than a day. The Russians could have been expected not to intervene for the same reason that the United States refrained from acting when the Soviet Union invaded Hungary and Czechoslovakia — fear of atomic war.¹⁹ Lacking Russian military support, the Koreans in all likelihood would have decided to release the *Pueblo* and her crew without a fight. Nevertheless, at least during the *Pueblo* crisis, fear of escalation coupled with popular anti-war sentiments served to quash any plans to recapture the spy ship.

The President's decision to obtain release of the *Mayaguez* by

¹⁶ Quoted in Morris, *What to Make of Mayaguez*, *NEW REPUBLIC*, June 14, 1975, at 9.

¹⁷ *Hearings*, *supra* note 10, at 797.

¹⁸ *GALLERY*, *supra* note 3, at 64.

¹⁹ *Id.*

force following Cambodia's apparent rejection of American diplomatic efforts reflects not so much a cavaliness on his part with respect to the possibility of escalation as it does a determination to avoid another *Pueblo* fiasco. Recalling the cruelty with which the Koreans had treated Bucher and his men, the President announced that a slight over-response to the *Mayaguez* seizure was a risk worth taking in light of his belief that the Khmer Rouge was equally capable of inflicting brutality on foreign captives.²⁰ Thus, although the President could not be certain that a minor military confrontation in this instance would not lead to all-out war, the ghost of *Pueblo* compelled him to action irrespective of the fear of escalation that had paralyzed the decision-makers in 1968. Subsequent events upheld the reasoning of those who would have forcibly retrieved *Pueblo* from Wonsan 6 years earlier — deployment of amphibious assault units and selective bombing of mainland targets did not result in escalation, although it is questionable, as will be demonstrated later, whether these measures in fact effected the release of the *Mayaguez* crew.

III. THE CENTRAL LEGAL ISSUES

The *Pueblo* and *Mayaguez* incidents together reflect three major legal issues. First, are the seizures justified as reasonable assertions of authority beyond the territorial sea, necessary to protect exclusive coastal interests and not unduly restrictive of inclusive use of the high seas? Assessment of the reasonableness of the Communist actions involves balancing those concrete factors supporting the particular claim to exclusive authority against other factors traditionally used to uphold the inclusive interest of the world community in free access to the high seas. This balancing process requires a case-by-case approach that fully utilizes the factual contexts in which particular claims arise and avoids the rigid application of abstract principles to concrete situations. Factors relevant to a determination of the reasonableness of the Communist claims might include: The significance of the coastal interest sought to be protected, the relationship between the authority claimed and the interest at stake, the types of inclusive activities affected, the frequency of their occurrence, the significance of such activities for the general community, the modality and degree of interference with these activities, and the duration of the interference.²¹

²⁰ *Supra* note 6, at 12.

²¹ McDougal & Burke, *supra* note 1, at 765.

The second legal issue common to both the *Pueblo* and *Mayaguez* seizures is whether or not the Communists complied with the requirements of international law relevant to the use of military coercion. Discussion will focus on the theory of anticipatory self-defense as a rationale for the Communist actions.

The third legal issue concerns the validity, under international law, of the responding coercion effected by the United States following the capture of the *Mayaguez*. Resolution of this question will facilitate an overall evaluation of the U. S. responses to the *Pueblo* and *Mayaguez* takings.

IV. ASSESSMENT OF THE COMPETING U. S. AND COMMUNIST CLAIMS TO AUTHORITY IN TERMS OF THE APPLICABLE LAW OF THE SEA

A. *The Development in International Law of the Concept of a Contiguous Zone Adjacent to the Territorial Sea*

The Communist seizures of the *Pueblo* and *Mayaguez* represented efforts to apply exclusive authority²² in areas beyond the 12-mile territorial sea publicly claimed by both North Korea and Cambodia at the time of each incident.²³ That the breadth of the territorial sea asserted by these countries was and remains 12 miles and therefore does not encompass the areas of capture serves to focus legal analysis upon claims to apply authority *outside* the territorial sea and not upon claims to determine the width of the territorial sea.²⁴ Had either North Korea or Cambodia announced an expansion of its territorial waters beyond the breadth asserted at the time of each taking, an examination of claims relevant to a unilateral determination of the width of the territorial sea would have been necessary in evaluating the validity of the Communist actions.

1. *The Historical Basis and Underlying Rationale of the Contiguous Zone Concept.* The concept of a contiguous zone of indeterminate breadth immediately outside the territorial sea has evolved in response to the continual conflict between two opposing, yet complementary principles — territorial sovereignty and freedom of the

²² The distinction drawn by McDougal and Burke between the competence to "prescribe" policy and the competence to "apply" policy is irrelevant here. A showing that the competence to "apply" was unlawful will obviously nullify the practical validity of the claimed competence to "prescribe."

²³ 2 LAY, CHURCHILL & NORDQUIST, *NEW DIRECTIONS IN THE LAW OF THE SEA* 838-39 (1973) [hereinafter cited as CHURCHILL]. The breadth of the territorial sea claimed by Cambodia is presumed to be the width asserted in her last public announcement on the subject, made in 1969 by the Lon Nol regime.

²⁴ See generally, MCDUGAL & BURKE, chs. 5 & 6.

high seas.²⁵ Although in modern times, a policy fostering unrestricted access to the high seas is preferred because of its beneficial effect on world-wide transportation and communication, such has not always been the case. Prior to the 19th century, many European States asserted proprietary claims over large areas of the high seas in order to further their own recognized policy interests. James I of England applied the doctrine of *mare clausum* in 1674 to exclude the Dutch from the North Sea fisheries.²⁶ Denmark claimed sovereign rights in all northern seas between Norway, Ireland, and Greenland.²⁷ In the Mediterranean, competing sovereign claims by the Italian States seeking to monopolize foreign trade resulted in the total abolition of the policy of freedom of the sea between the 11th and 16th centuries.²⁸ Colombos notes, "Up to the end of the eighteenth century there was no part of the seas surrounding Europe free from the claims of proprietary rights by individual powers, nor were there any seas over which such rights were not exercised in varying degrees."²⁹

From the beginning of the 19th century, Britain, whose maritime economy obviously depended on the extent of its free access to all the oceans of the world, took the lead in pursuing and furthering the modern policy of freedom of the seas.³⁰ Thus, in 1821, she supported the fledgling United States against Russia's claim to exclude all foreign shipping from a 100-mile belt of ocean around Alaska, but opposed the United States 65 years later when America attempted to extend its jurisdiction over the seal fishery in the Bering Sea.³¹ In this century, the United States, as one of the two modern maritime powers, has perpetuated the British policy of free access.

Two interrelated aspects of the foregoing historical sketch of the policy of freedom of the seas deserve to be emphasized. First, the notion of free access to the oceans of the world is usually wielded as an ideological tool when the national interest of its proponent so requires.³² Hence, freedom of the seas is to be advocated by, for example, Great Britain when it allows that country

²⁵ Brown, *Maritime Zones: A Survey of Claims*, 3 CHURCHILL 157 (1973).

²⁶ C. J. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 55 (1967).

²⁷ *Id.* at 49.

²⁸ *Id.*

²⁹ *Id.* at 48.

³⁰ Brown, *supra* note 25, at 158.

³¹ *Id.*

³² *Id.*

to reject Russian or American claims to exclusive competence in the Bering Sea; however, it is to be ignored as a principle of international law when James I wants to protect North Sea fisheries from the Dutch. Second, it frequently happens that when State A, under the banner of freedom of the seas, asserts competence to use for some purpose the waters off the coast of State B, the latter may wish to protect what it considers its own sovereign interests by challenging State A's claim to authority. Conversely, when State B seeks to exercise exclusive competence within its coastal waters under the principle of territorial sovereignty, State A will object, asserting freedom of the seas. History therefore indicates that: (a) The same State will support on one occasion the principle of territorial sovereignty and, on another, freedom of the seas, depending on where lies its national interest; and (b) disputes giving rise to confrontations between these two principles will likely occur within the territorial sea of one of the States, or in the waters adjacent thereto. The whole situation resembles a tug-o'-war contest with States switching sides as the prize is changed.

From this background of conflict has evolved the useful concept of the contiguous zone to serve as a flexible buffer between, on the one hand, the territorial sea and the principle of state sovereignty which predominates therein and, on the other, the high seas and the principle of free access, which limits, and in turn is limited by, assertions of territorial sovereignty. On the landward side of a particular contiguous zone, that is, within the territorial sea, the coastal State may, under compelling circumstances and in accordance with the standard of reasonableness,³³ control or deny access to foreign ships whose activities are realistically perceived to affect adversely its exclusive interests.³⁴ Thus, a coastal State may, subject to the right of innocent passage afforded ships of all other nations, exercise protective sovereignty over its own territorial waters.³⁵ By contrast, on the opposite side of a contiguous zone, that is, on the high seas, the coastal state may exercise plenary authority only over its own vessels³⁶ — those flying its flag. Here, the principle of freedom of the seas prohibits all other claims to sovereignty. The contiguous zone

³³ McDUGAL & BURKE 765.

³⁴ *Id.* ch. 3.

³⁵ Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1607, T.I.A.S. No. 5639, at art. 14.

³⁶ McDUGAL & BURKE 750.

concept accommodates conflicting claims based on both principles in an area, adjacent to the territorial sea, whose breadth will vary on a situational basis in accordance with the extent to which the disputed activities may be realistically perceived to have a unique — though not necessarily adverse — impact on the social processes of the coastal State.³⁷ Claims arising from activities so demonstrated to have occurred in a contiguous zone will be evaluated in accordance with the standard of reasonableness and the balancing process described at the beginning of Section III. The object of such evaluation should be to promote simultaneously, and to the greatest degree possible, both the inclusive interests of the world community and the exclusive interests of individual claimants.

2. *The Practical Effect of the Contiguous Zone Concept.* The overall effect of the contiguous zone concept has clearly been to allow coastal States in certain instances to assert claims of *limited* competence beyond the territorial sea. More precisely, the historic function of the contiguous zone concept has been that of authorizing coastal States to secure unilaterally the reasonable protection of certain exclusive interests without permitting them to indulge in an expansion of that *comprehensive* competence which is associated with their control of the territorial sea and internal waters.³⁸ Thus, reasonableness might, for example, dictate that a State be allowed to exert within a zone contiguous to its territorial waters whatever control necessary for the limited purpose of preventing infringement of its customs regulations. Other examples of legally recognized claims to competence in the contiguous zone will comprise part of the following evaluation of Communist actions during the *Pueblo* and *Mayaguez* affairs.

B. *The Communist Claims to Authority in Ocean Areas
Adjacent to the Territorial Sea*

1. *Examples of Coastal State Claims to Authority in the Contiguous Zone Recognized in International Law.* As Professors McDougal and Burke point out,³⁹ in order to preserve the inclusive interest of the world community in maintaining free access to the high seas and to prevent the recurrence of multiple unilateral claims to exclusive authority over vast ocean areas,⁴⁰ it is necessary to place

³⁷ *Id.* at 565.

³⁸ *Id.* at 578.

³⁹ *Id.* at 575.

⁴⁰ COLOMBOS, *supra* note 26, at 55.

a rational limit on the width of a territorial sea which may be claimed by coastal States. This in turn requires that those States be allowed to claim certain limited authority for special purposes beyond the territorial sea, in order that they may exercise such reasonable competence as their special interests demand without having to widen the territorial sea to satisfy their purposes. Thus, the extent to which reasonable claims to authority in the contiguous zone have been legally recognized reflects both a demonstration of the relationship between those claims and the interests sought to be protected as well as a realization that the preservation of freedom of the high seas depends on allowing such claims.

Article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone provides a convenient starting point for a brief survey of legally recognized claims to authority in the contiguous zone. Although, as will be demonstrated, clumsy drafting prevents the article from accurately reflecting the intent of a majority of the negotiators,⁴¹ it nevertheless codifies the major types of contiguous zone claims sanctioned by law.

In a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to:

- (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
- (b) Punish infringement of the above regulations committed within its territory or territorial sea.

The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.⁴²

The Article has been criticized on two grounds as being too restrictive in its effect on the competence of coastal States. First, the specification of four permissible types of claims and the placing of a 12-mile limit on the width of the contiguous zone are viewed as bearing no relation either to the flexibilities in widths honored in previous practice or to the myriad new oceanic interests that States may be expected to acquire as a result of developments in technology.⁴³ Second, a literal reading of the Article indicates that the authority of the coastal State is restricted to the prevention and punishment of infringements of regulations *committed within its territory or territorial sea*. The State thus has no competence to prevent or punish such activities occurring in the

⁴¹ McDUGAL & BURKE 619.

⁴² Convention, *supra* note 35, at 210.

⁴³ McDUGAL & BURKE 607.

contiguous zone; rather its authority appears to be limited to implementing measures of surveillance and inquiry which would enable it to forecast and prevent violations within the territorial sea.⁴⁴ Interestingly, an attempt was made, in the form of the following proposal by Poland, to give the coastal State the power to apply its regulations in the contiguous zone:

In a zone of the high seas contiguous to its territorial sea, the coastal state may take measures necessary to prevent and punish infringements of its customs, fiscal or sanitary regulations, and violations of its security.⁴⁵

This proposal received a majority of the votes but not the two-thirds necessary for adoption,⁴⁶ perhaps because of the addition of security regulations as a basis for extending competence. Nonetheless, as McDougal and Burke indicate,⁴⁷ Article 24, if it is to correspond with general community policy, should be creatively interpreted to bestow upon coastal States the occasional power to "prevent or punish" within the contiguous zone. Otherwise, the severe limitations imposed by a literal reading of the provision will only serve to encourage unilateral extensions of that continuing plenary competence normally associated with the territorial sea. Such acts of expansion would in turn undermine the policy of free access, whose preservation has been shown to be the major objective of allowing occasional claims to authority in the contiguous zone.

Legal recognition of occasional claims to limited authority in the contiguous zone is clearly necessary to perpetuate the policy of freedom of the seas. Before such claims are entitled to legal recognition, however, they must be adjudged reasonable in light of the factual contexts in which they arise. Customary law, upon which the 1958 Convention was grounded, provides a number of historical examples of contiguous zone claims held by the community of nations to meet the standard of reasonableness. General recognition of such claims is evidenced by the familiar pattern of mutual demand and reciprocal tolerance,⁴⁸ through which customary international law has traditionally developed. Inasmuch as the Communist claims in the *Pueblo* and *Mayaguez* cases re-

⁴⁴ *Id.* at 618.

⁴⁵ 3 U.N. Conference on the Law of the Sea, *Official Records* 232, U.N. Doc. A/Conf. 13 (1958).

⁴⁶ *Id.* at 181.

⁴⁷ McDougal & Burke 621.

⁴⁸ *Id.* at 585.

flected concern over the security interests of the coastal State involved in each seizure, discussion of historical examples of legally recognized claims to competence in the contiguous zone will focus on situations involving the security of claimant States.

During the 19th century, nations asserted claims to authority in the contiguous zone usually to protect against the effects of belligerent activities.⁴⁹ The confrontation between the USS *Kearsarge* and the Confederate ship *Alabama* during the American Civil War illustrates what John Bassett Moore calls "the distinction . . . between the exercise by a nation of its protective power and the claim of exclusive possession and jurisdiction . . ."⁵⁰ The *Kearsarge* trapped the *Alabama* in Cherbourg Harbor and waited to attack as soon as the Confederate ship cleared the 3-mile limit on her way out to sea. The French, however, recognizing that the range of both batteries was greater than 3 miles, demanded that the battle take place farther from the coast. The *Kearsarge* acquiesced; and the encounter occurred between 7 and 9 miles from land, the U. S. ship destroying her adversary.⁵¹ Officials in Washington at first denied the validity of French interference with an American ship beyond the 3-mile territorial limit but later admitted that, under the particular circumstances, France had acted reasonably to protect her security interests.⁵²

A more recent example of a unilateral assertion of authority beyond the territorial sea for the purpose of protecting neutral States from the hostile acts of belligerents may be found in the Panama Declaration of 1939. Therein the 21 American States proclaimed their neutrality and established a contiguous zone, ranging from 300 to 1,200 miles in width, within which hostile acts by non-American belligerents would be prohibited.⁵³ The Declaration placed special emphasis on the perceived necessity of preserving inter-American lines of communication and transportation. Although the European belligerents protested the legality of the zone and several times perpetrated hostilities within it, the Declaration has received overwhelming approval⁵⁴ as a reasonable exercise of self-protection by the American States.

⁴⁹ *Id.* at 589.

⁵⁰ I. MOORE, DIGEST OF INTERNATIONAL LAW 723 (1906).

⁵¹ *Id.* at 723-24.

⁵² I. WHARTON, DIGEST OF INTERNATIONAL LAW 108-09 (2d ed. 1887).

⁵³ *International Conferences of American States 1933-40*, at 334 (1st Supp. 1940), reprinted in 34 AM. J. INT'L L. Supp. 17 (1940).

⁵⁴ MCDUGAL & BURKE 591 n. 73.

Other assertions of control over access to the contiguous zone for the specific purpose of national security are not limited, as was the Panama Declaration, to periods of active violence. The Dominican Republic, for example, forbids access without authorization to a specified portion of ocean adjacent to its military operations area.⁵⁵ Likewise, the United States has long made it a practice to declare off-limits, at least temporarily, certain parts of the high seas used for military exercises.⁵⁶ However, these locations are generally not extensive in area and are judiciously selected so as to avoid undue interference with other uses.⁵⁷ Finally, both the United States and Canada regulate access of aircraft to contiguous airspace by requiring the filing of position reports in accordance with promulgated guidelines.⁵⁸

Consensus opinion affirms the right of States to make reasonable assertions of competence within contiguous zones in order to protect national security. Professor Philip M. Brown summarizes:

. . . [T]he principle of protective jurisdiction enunciated in the Declaration of Panama has never been repudiated in international law and practice. On the contrary, the consensus of opinion, as well as practice, overwhelmingly sustains the right of every nation to defend its laws and security from threatened violations, under varying circumstances, in the waters contiguous to the conventional three-mile limit, within which municipal law is supreme.⁵⁹

Given the right to occasional assertions of limited competence within the contiguous zone, claimant States must nevertheless exercise this right in such fashion as to meet the test of reasonableness. Indeed, most objections to coastal State claims in the contiguous zone question the reasonableness of particular attempts to assert an authority that is generally recognized in principle.

The historical examples of legally recognized claims set forth in this section clearly conform to the standard of reasonableness. They succeed in protecting the exclusive interests of the coastal States without significantly impairing the inclusive interests of the general community. In fact, both the *Kearsarge* and Panama Declaration *promote* the inclusive interest of the world community

⁵⁵ *Id.* at 591.

⁵⁶ McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 *YALE L.J.* 648 (1955).

⁵⁷ McDougal & Burke 593.

⁵⁸ *Id.*

⁵⁹ Brown, *Protective Jurisdiction*, 34 *AM. J. INT'L L.* 112 (1940).

in maintaining free access to the shipping routes of the high seas. The control of access to military areas exercised by the Dominican Republic and the United States reflects sincere and successful efforts to minimize interference with free use of the high seas. On the one hand, the Dominican Republic will authorize requesting ships to pass through the restricted zone; on the other, the United States attempts to utilize areas removed from commercial shipping lanes and often restricts access only temporarily. Finally, U. S.-Canadian regulation of aircraft entering contiguous airspace merely requires the filing of position reports by approaching planes. This cannot be considered an undue restriction on the general community of nations in light of the interest intended to be protected — the security of the North American continent.

2. *Evaluation of the Instant Communist Claims to Authority in the Contiguous Zone.* Recognition has been accorded the right of coastal states to assert occasional claims of limited competence in the contiguous zone for the purpose of self-protection. Evaluation of the instant Communist claims will focus on the issue of whether or not the actions taken conform to the standard of reasonableness by which all similar claims are judged. Resolution of this issue will involve balancing those factors supporting the Communist claims to exclusive authority against other factors which may, in the context of the particular incidents, tend to uphold the inclusive interest of the world community in maintaining freedom of the seas. Relevant factors will include: The significance of the coastal interest sought to be protected, the relationship between the authority claimed and the interest at stake, the types of inclusive activities affected, the frequency of their occurrence, the significance of such activities for the general community, the modality and degree of interference with these activities, and the duration of the interference.⁶⁰ Reference to previously cited, legally recognized claims to contiguous zone authority may provide a basis for proposing reasonable alternative courses of action which might have been available to the Communists at the time of each seizure.

Even assuming the sincerity of the Communist belief that both the *Pueblo* and *Mayaguez* constituted grave threats to the security of Korea and Cambodia,⁶¹ a thoughtful observer will conclude that neither claim to competence meets the standard of reasonableness. Although the interest allegedly sought to be pro-

⁶⁰ McDougal & Burke 765.

⁶¹ *Supra* note 6.

tected is significant from the point of view of the coastal States involved, it bears virtually no relationship to the authority asserted — that is, the competence to shell, board, and remove a foreign vessel from international waters and to transport captured crew members to the mainland for the purposes of imprisonment and torture. Neither can it be argued reasonably that the types of activity conducted by the *Pueblo* and *Mayaguez* justified the authority asserted by the Communists. The surveillance carried on by the *Pueblo* is precisely the sort of intelligence-gathering operation that is internationally accepted as a necessity of the cold-war era.⁶² The United States recognizes that the large fleets of Russian trawlers operating just outside its 12-mile exclusive fishing zone⁶³ contain “snooper” ships similar to the *Pueblo*; similarly, the Soviet Union knows it is constantly being surveyed by American ELINT vessels. Nonetheless, each of the world’s major powers has elected to tolerate such activities, for to do otherwise would doubtless obstruct the interest of the general community in maintaining freedom of the high seas and could lead to a suicidal round of retaliatory maneuvers. If the activities conducted on the open seas by the *Pueblo*, when viewed in the context of the cold-war era, cannot justify the authority claimed by North Korea, then *a fortiori* the transportation of commercial supplies by the *Mayaguez* cannot support the Cambodian claim to competence.

The activities of both the *Pueblo* and *Mayaguez* are such as are carried on 24 hours a day throughout the world. The significance of such activities for the general community obviously cannot be overrated. The transoceanic transportation of goods is an economic and political necessity, and the electronic gathering of intelligence protects the inclusive security interest of the free world community. The States of the world, and especially the United States as protector of a democratic society, had every right to regard as unreasonable the instant Communist claims to authority, whose modality was that of force and whose duration could only be seen as open-ended.

Had the Koreans and Cambodians been sincerely concerned with the protection of their national security just prior to their confrontations with the United States, they could have upheld their exclusive interests through alternative courses of action that would have minimized interference with the inclusive interests of

⁶² See GALLERY 9-10.

⁶³ 2 CHURCHILL 838.

the general community. Anything short of the measures actually taken might have been deemed reasonable, but certainly in the case of the *Mayaguez* a cursory inspection of the ship's papers and cargo would have sufficed to protect the security interests of Cambodia. Similarly, a response more reasonable than firing on and abducting the *Pueblo* 16 miles off Korea would have been to demand that she leave the area. Failing this, the North Koreans should have communicated directly with the U. S. government. Had they done so, they would have doubtless learned that their claim to exclude *Pueblo* from the high seas contiguous to their territorial waters could not be recognized by either Russia or the United States. In all likelihood the matter would have ended then and there.

C. *The United States Claims to the Inviolability of the High Seas*

It will be recalled that, with respect to the *Pueblo* and *Mayaguez* seizures, the burden of meeting the test of reasonableness was placed upon the North Koreans and Cambodians. This reflects the heavy priority accorded the principle of free access to the high seas.⁶⁴ Although the Communist claims to competence in the contiguous zone have already been shown to constitute unreasonable interferences with the inclusive community interest in maintaining the freedom of the seas, it will be nonetheless useful to examine briefly the foundations of this principle as reflecting the basis and content of the U. S. claims.

International law seeks to secure the widest possible distribution of preferred events among the nations of the world through the peaceful balancing of competing interests. Exclusive and inclusive claims must be accommodated through the legal process in such fashion as to produce the largest total output of community values at the least cost.⁶⁵ Quite obviously, if, with respect to the use of the oceans of the world, each coastal State were allowed to assert its exclusive interests at will, no legal accommodation of inclusive and exclusive claims would occur and the distribution of preferred events would be controlled by — and limited to — those nations possessing the greatest military power. Hence, the special importance of maintaining inclusive decision in the constitutive processes of authority controlling enjoyment of the high seas.⁶⁶

⁶⁴ MCDUGAL & BURKE 765.

⁶⁵ *Id.* at 52 n. 128.

⁶⁶ *Id.* at 748.

Inclusive decision-making prevents oligarchic control of the high seas and allows participation by all States in the allocation of access to the oceans. Keeping in mind (1) the goal of securing the greatest possible *dissemination* of shared values among the nations of the world, (2) the necessity of inclusive decision-making to prevent *concentration* of preferred events within the most powerful of these nations, and (3) the physical vastness and immeasurable potential of the oceans as a *value source*, a reasonable observer is likely to conclude that an allocation of access placing the greater weight on inclusive use of the high seas would seem most appropriate for promoting a cooperative enjoyment of the oceans from which all nations can benefit. Inclusivity of use will not only assure dissemination of shared values but will also encourage the pooling of technological information relevant to a fuller development of the oceans as a value source. Thus, it may be seen that the principle of freedom of the seas permits shared use and provides new uses to be shared.

Of all the inclusive purposes for which the oceans are utilized, transportation and communication appear *least* likely to be outweighed by unilateral assertions of exclusive interests. According to Professor McDougal:

A policy of virtually unrestricted access to the oceans for certain consequential purposes, such as transport and communication, is to be preferred because these purposes involve only the largely noncompetitive use of the positional or spatial characteristics of the sea. In major degree the most valuable characteristic of the sea is that it is a large and empty space which can be simultaneously employed by all participants for movement of persons and goods and for communications. All that is needed for successful cooperative exploitation are the relatively minor accommodations required for avoiding physical interference. No other important limits, countervailing the desirability of largely unrestricted access to the oceans as a spatial resource, have been suggested from perspectives of common interest.⁶⁷

Application of this policy to the facts surrounding the taking of the *Mayaguez* fully supports the U. S. claim to free access of the high seas. The *Mayaguez* was transporting commercial goods in established shipping lanes and was therefore beholden only to the United States as flag nation. Although the factual context of the incident indicates that the Cambodians might have had some initial basis for exercising limited competence on the high seas,

⁶⁷ *Id.* at 749.

as soon as they ascertained that the *Mayaguez* posed no security threat and was merely serving the purpose of commercial transportation they became bound under international law to release her. Such an outcome would have been in accord with community policy promoting free access, especially as that policy relates to the noncompetitive uses of transportation and communication.

The particularized application of the general policy of freedom of the seas to the uses of transportation and communication is rivaled, in terms of universality of acceptance, only by a similar application of the general policy to a particular class of ship — the men-of-war of all nation-states. Simply stated, the relevant policy is that “warships on the high seas are wholly immune from applications of authority by another state.”⁶⁸ This reflects the *inclusive* interest of all nations in *exclusive* control over instruments essential to their security. That the North Koreans fired on and captured during peacetime a U. S. warship whose activities were sanctioned by mutual acceptance on the part of the major powers of the world can only be regarded as a derogation of the general principle of freedom of the seas. Just as the *Mayaguez* was legally protected by the rule of free access as applied to the transportation of goods, so also was the *Pueblo*, legally, if not practically, protected by the same rule in its specific application to warships.

In sum, the U. S. claim to inviolability of the high seas appears to be supported in both cases by accepted community policy and by the failure of the Communists to conform to the standard of reasonableness in their assertions of competence.

V. ASSESSMENT OF THE U. S. AND COMMUNIST ACTIONS IN TERMS OF THE LAW RELEVANT TO REGULATION OF COERCION

A. *The Communist Claims: Initiating Coercion as an Exercise of Reasonable Anticipatory Self-Defense*

It will be recalled that both the Koreans and Cambodians attempted to justify their coercive actions as reasonable responses to perceived threats to national security. The tendency on the part of the general community to sanction, at least tacitly, unilateral assertions of authority made in the name of self-defense⁶⁹ com-

⁶⁸ *Id.* at 750 n. 58; see Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2313, T.I.A.S. No. 5200, at art. 8.

⁶⁹ McDougal & Schlei, *supra* note 56, at 674. According to the authors, “In the absence of a centralized authority capable of maintaining public order, nation-states have always demanded for themselves and accorded to others a wide

pels a comparison of the instant Communist actions with legally-recognized claims grounded on the rationale of anticipatory self-defense.

1. *Examples of Anticipatory Self-Defense Claims Recognized in International Law.* In the famous case of the *Virginius*,⁷⁰ Spanish forces captured on the high seas an American ship transporting arms to insurgents on the island of Cuba. They proceeded to execute in summary fashion a number of American citizens and British subjects on board. Great Britain sought reparations for what it considered a criminal overreaction by the Spanish to the presence of British subjects on the *Virginius* but nonetheless conceded the legality of the seizure itself under the circumstances of the case.⁷¹ The United States, after withdrawing its initial protest, adopted the British position recognizing the right of Spain to utilize self-defense measures on behalf of national security.⁷²

On other occasions, the principle of anticipatory self-defense has justified actual invasions of foreign territory. In the *Caroline* case,⁷³ Canadian troops crossed the Niagara River in order to seek out and destroy an American vessel which had been used to ferry supplies from the United States to Canadian rebels on Navy Island. After gaining the American side of the river, the loyalist troops engaged in a skirmish with United States nationals, killed two of them, and then set the *Caroline* adrift to plummet to her destruction over the Falls. In the subsequent debate over the legality of this invasion of U. S. soil, Great Britain justified its action on the grounds of self-defense, having anticipated that the *Caroline* would be used in an impending attack against Canada.⁷⁴ Although the United States initially denied the validity of the British claim as applied to the particular fact situation, it eventually accepted a diplomatic apology from England without pressing its contention that Great Britain should be held legally responsible for the deaths of the two American nationals. Thus, tacit recognition was accorded the British rationale of anticipatory self-defense.

Great Britain reasserted its right to act in defense of national

measure of freedom in unilateral action for maintaining their own security against external dictation by unlawful violence or threats of violence."

⁷⁰ *Id.* at 675. The incident occurred in 1873.

⁷¹ 2 MOORE, *supra* note 50, at 983.

⁷² McDougal & Schlei, *supra* note 56, at 676.

⁷³ Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. at 347 (1962).

⁷⁴ McDougal & Schlei, *supra* note 56, at 676.

security when, at the start of World War II, it destroyed most of the French fleet at Oran.⁷⁵ The danger that the French Navy would fall into the hands of Nazi Germany following the Vichy government's armistice with Hitler in June of 1940 spurred the British into serving an ultimatum upon the French naval commanders at Oran, Alexandria, and Martinique.⁷⁶ The commander at Oran refused to comply with any of the alternative courses of action listed in the ultimatum, each of which would have prevented the incorporation of his ships into the German Navy. Thereupon the British used air and naval forces to attack and destroy most of the Oran fleet, justifying this apparently drastic action by invoking the principle of anticipatory self-defense. The circumstances surrounding the incident compel recognition of the validity of this assertion, especially when it is recalled that in 1940 Great Britain stood alone in the face of the Nazi onslaught. The United States would not enter the war for 18 months, the Germans were bombing London nightly, and Hitler had not yet decided to leave England to the Luftwaffe and concentrate his forces on the Russian front. The British had every reason to expect that, had the Germans captured the French fleet intact, they would have deployed it against England. Hence the destruction of the French warships at Oran was not only justified but mandated by the facts as they existed in July 1940.

The extent to which *conventional* international law has recognized national self-defense claims can be demonstrated by reference to the Kellogg-Briand Pact of 1928.⁷⁷ By this treaty, most of the nations of the world renounced "war as an instrument of national policy" and, significantly, chose to omit from the text any express reservation of the right of self-defense.⁷⁸ That right was considered so well grounded in international law as to preclude any need of citing it in the Pact. Indeed, the United States regarded the right as "inherent in every sovereign state and . . . implicit in every treaty."⁷⁹

2. *The Requirements of Anticipatory Self-Defense in International Law.* The foregoing illustrations of national self-defense claims recognized in customary international law all reflect the two legal

⁷⁵ Mallison, *supra* note 73, at 349.

⁷⁶ *Id.* n. 74a.

⁷⁷ 3 HYDE, INTERNATIONAL LAW 1682-85 (2d ed. 1945).

⁷⁸ *Id.* at 1683.

⁷⁹ *Hearings on the North Atlantic Treaty Before the Senate Comm. on Foreign Relations*, 91st Cong., 1st Sess., exec. L, pt. 1, at 102 (1949).

requisites with which such claims must comply in order to be deemed lawful: Those of necessity and proportionality.⁸⁰ Both principles flow from the basic objective of international law set out at the beginning of this paper: That is, the goal of securing the widest possible distribution of shared values among the people of the world. In the absence of a centralized authority capable of securing and upholding an optimum public order dedicated to the peaceful achievement of all values,⁸¹ the maintenance of a minimum public order for the purpose of conserving shared values may at times require that individual states utilize force in responding to reasonably perceived threats to their security. However, in order to minimize the destruction of values occasioned by the use of coercive measures, a nation-state may not lawfully inflict upon its adversaries such harm as is disproportionate to "the legitimate defensive requirements of the state."⁸² Simply put, a nation can justify coercive action in terms of self-defense only when, in light of the surrounding circumstances, it may be deemed to have acted out of reasonably perceived necessity and in proportion to the demands placed on its security by the initiating coercion or perceived threat.

3. *Evaluation of the Communist Claims by a Comparative Application of the Basic Legal Requirements of Self-Defense to the Instant Claims and to the Legally Recognized Claim of the British at Oran.* Professor McDougal and Mr. Feliciano have posited several factors which are particularly relevant to appraising self-defense claims in terms of the requirements of necessity and proportionality.⁸³ These criteria will be applied to the facts surrounding the Communist seizures of the *Pueblo* and *Mayaguez*, after which appropriate distinctions will be drawn in terms of these factors between the instant Communist actions and the self-defense measures carried out by the British at Oran.

a. *Application of Specific Criteria to the Communist Actions*

(1) *Characteristics of the Participants*

When North Korea and Cambodia accomplished their respective captures of American vessels on the high seas, each be-

⁸⁰ Mallison, *supra* note 73, at 355.

⁸¹ McDougal & Schlei, *supra* note 56, at 674.

⁸² 1 HYDE, *supra* note 77, at 237.

⁸³ M. MCDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 220 (1961) [hereinafter cited as MCDUGAL & FELICIANO].

longed to a group of small-to-medium-sized Communist satellite nations whose military and civilian technologies can only be described as underdeveloped and largely dependent on gratuitous hand-outs from Russia and/or Red China. By contrast, the United States was and remains one of the two major powers in the world. The question is, however, to what extent did this obvious disparity in size, power, and technology in fact *preclude* America from providing any realistic threat to the national security of the claimant States. The very fact that the Koreans and Cambodians gambled their small forces on the probability that they could attack American ships with impunity undermines the credibility of any Communist attempts to justify the seizures as necessitated by realistically perceived threats. They recognized what many U. S. officials and scientists had surmised all along, that America's power may be too big to use. At least in the case of the *Pueblo*, the Communists guessed correctly that the fear of starting a nuclear holocaust with Russia would prevent the United States from sending in the military to rescue the spy ship. Thus, it may be concluded that America's vast superiority in size, power, and technology posed no threat under the circumstances to Cambodia or North Korea; on the contrary, it actually enabled the Communists to "kick sand" at the giant without fear.

(2) *Objectives of the Claimants*

The objectives of the participants claiming self-defense may be evaluated in terms of factors such as extension or conservation of values, consequentiality of values conserved, and inclusivity or exclusivity of the objectives.⁸⁴

(a) *Conservation or Extension of Values*

The legitimate goal of self-defense is conservation of the *status quo*. According to Professor McDougal:

The very conception of self-defense implies that the purpose of the defender is to conserve its values rather than to extend them through acquiring or destroying values held by the opposing participant.⁸⁵

It is difficult to see how the seizures of the *Pueblo* and *Mayaguez* served merely to protect and maintain existing values in Korea and Cambodia. Had the Koreans been truly concerned with the main-

⁸⁴ *Id.* at 222.

⁸⁵ *Id.*

tenance of national security, they would never have dared attack an American warship in the first place, particularly since the use of such snooperships had for years been tacitly sanctioned by the two major powers of the world. As noted above, the Koreans gambled that fear of escalation would prevent the U. S. from retaliating. This gamble, irrational as it seems, paid off. The subsequent extortions of confessions from the *Pueblo's* crew and an apology from the United States clearly effectuated the extension — as opposed to conservation — of Communist values.

Similarly, the Cambodian capture of the *Mayaguez* and removal of her crew to the mainland cannot reasonably be viewed as actions taken to protect the *status quo*. In light of the then recent Communist takeover in Cambodia and the outcome of the infamous *Pueblo* incident, the United States had every reason to believe that history was about to repeat itself and that retaliation would be warranted. Had the Cambodians really been concerned with the conservation of values, they would have anticipated the aggressive attitude taken by American officials and not gambled irrationally that lightning would strike twice for the Third World. Although the ultimate purposes for which the Communists transported the crew of the *Mayaguez* to the mainland will remain unknown, it seems safe to assume that the conservation of Cambodian values was not one of them.

(b) *Consequentiality of Values Conserved*

Three factors already mentioned preclude reference to this criterion in evaluating the Communist objectives. First, the use of coerced confessions for propaganda purposes by the captors of the *Pueblo* effectively eliminates the possibility that they were acting solely to conserve consequential values. Likewise, the absence of any relationship between the removal of the *Mayaguez* crew to Kompong Som and the protection of Cambodian security rather clearly indicates an attempted extension of values, thereby moot-ing the question of consequentiality of values conserved. Finally, the irrationality of both seizures compels the conclusion that these were out-and-out gambles taken by irresponsible leaders more interested in risking national security for the sake of obtaining propaganda and embarrassing the United States than in protecting the values of their countrymen.

(c) *Inclusivity or Exclusivity of the Objectives*

The claims of the North Koreans and Cambodians are inclusive in one aberrational sense only: They can be said to benefit

the cause of all totalitarian Communist governments by adversely affecting the international credibility of the United States. Obviously, inclusivity in this respect does not further the peaceful distribution of shared values and freedom from coercion, which the legal requirements of necessity and proportionality are intended to promote.

(3) *Methods Employed by the Claimants*

The methods utilized by the nation-state claiming self-defense relate directly to a determination of the proportionality of the response.⁸⁶ Even assuming, factual contexts notwithstanding, that the Koreans and Cambodians were acting to protect national security, the use of machine guns and rocket fire against an unarmed merchant vessel and the deployment of MiG fighters against a radar ship whose two machine guns were visibly inoperable⁸⁷ and unmanned cannot be held to meet even the broadest formulation of the proportionality test. It goes without saying that the removal of both crews to the mainland and the incarceration and torture of the men of the *Pueblo* render even less tenable the Korean claim to proportionality in the exercise of self-defense.

(4) *Conditions and the Expectation of Necessity*

Assessment of self-defense claims in terms of the requirement of necessity must involve an estimate of the overall nature of the threat to which the claimant State is responding. In other words, a determination that necessity warranting self-defense does or does not exist in a particular context depends on a consideration of conditions such as "the relative size and power of the participant charged, the nature and consequentiality of its objectives, the character of its internal institutional structures, the kind of world public order it demands, the intensity and magnitude of [the threat posed, and] expectations about effective community intervention."⁸⁸

Prior discussion of the characteristics of the participants indicated that the relative size and power of the United States posed no threat, under the particular circumstances surrounding the seizures of the *Pueblo* and *Mayaguez*, to either Korea or Cambodia. Furthermore, the American objectives were: (a) in the case of the

⁸⁶ *Id.* at 228-29, 241-44.

⁸⁷ *Hearings*, *supra* note 10, at 757. The gun covers were caked with ice and not easily removable.

⁸⁸ McDUGAL & FELICIANO *supra* note 83, at 230.

Mayaguez, commercial in nature and supportive of inclusive community policy relating to the use of the high seas for transportation and communication, and (b) in the case of the *Pueblo*, sanctioned by the major powers and supportive of the inclusive interests of the free world. Inasmuch as the institutions and public order advocated by the United States reflect a national objective of protecting existing values,⁸⁹ the Koreans and Cambodians would appear to have little basis for forecasting such imminent danger to their national security as would necessitate military assault on two hopelessly vulnerable vessels. Perhaps the clearest indication of the extent to which the *Pueblo* and *Mayaguez* could reasonably be considered threats to the security of the respective claimants lies in the fact that no other Southeast Asian States supported the charges of the captors. Absent any collective claim to self-defense by neighboring countries in response to the presence of the *Mayaguez* and *Pueblo* in Asian waters, the unilateral assertions of necessity by the Koreans and Cambodians lose whatever credibility they may have otherwise had.⁹⁰

b. *The Communist Claim Distinguished from the Legally-Recognized British Claim at Oran*

Application of the criteria of *characteristics, objectives, methods, and conditions* to the instant claims of self-defense has demonstrated the untenability of the Communist position regarding necessity and proportionality. By contrast, an appraisal of the British actions at Oran in terms of these criteria clearly validates the destruction of the French fleet as a proportional response necessitated by the surrounding circumstances. Assessment of the *characteristics* of Germany and England in 1940 reveals, on the one hand, a militaristic oligarchy in the process of subjugating Europe to the command of a maniacal fascist leader and, on the other, an island sovereignty whose freedom hinged precariously on a 25-mile stretch of open sea which separated it from the rest of Europe. The ships of the Oran fleet in German hands could have been used to transport German soldiers across that channel.

⁸⁹ Mallison, *supra* note 73, at 358.

⁹⁰ An example of a collective response in support of a unilateral assertion of self-defense can be found in the Resolution of the Provisional Organ of Consultation of the Organization of American States, promulgated during the 1962 Cuban Missile Crisis. The Resolution recommended that member-states "take all measures . . . including the use of armed force" to prevent the introduction of Soviet offensive weapons into Cuba. 47 DEP'T STATE BULL. 720-23 (Nov. 12, 1962).

Clearly the *objectives* of Great Britain in destroying the French warships included the conservation of democratic values in Europe and the protection of the rest of the free world. England saw herself as acting in an inclusive, representative capacity. Even the French seem to have regarded as reasonable her *methods* of response to the German threat — the French naval commanders at Alexandria, Egypt, and Martinique, French West Indies, accepted the ultimatum rejected at Oran and disposed of their ships accordingly,⁹¹ doubtless recognizing the validity of the British claim of self-defense. Finally, England had every reason to consider the ominousness of the *conditions* then prevailing in Europe, as demonstrated by the extension of German military power throughout nations such as Poland, Belgium, and France and into Scandinavia. In contrast to the seizures of the *Pueblo* and *Mayaguez*, the British destruction of the Oran fleet, under the circumstances, "must be regarded as covered by the rigid legal requirements of action taken in self-preservation."⁹²

B. *The American Responses to Pueblo and Mayaguez*

To be recognized as lawful, responding coercion must meet the same requirements of necessity and proportionality applicable to an assessment of initiating coercion based on self-defense. The only difference between the two situations is a factual one: The initiating coercion based on self-defense constitutes a response to a reasonably perceived threat whereas the responding coercion, likewise grounded in terms of self-defense, is a reaction to the initiating coercion.

1. *Application of the Requirements of Necessity and Proportionality to the American Responses.* Factors contributing to America's weak response following the capture of the *Pueblo* included division of responsibility for the spy ship, the then prevailing U. S. political climate, and fear of escalation.⁹³ Referral of the matter to the U. N. Security Council was, by itself, so innocuous a response as to render meaningless any discussion of necessity and proportionality in the context of a self-defense claim. It is difficult to see how such action, without more, contributed to the preservation of community values.

By contrast, America's forceful response to the seizure of the *Mayaguez* demands an appraisal in terms of the legal require-

⁹¹ Mallison, *supra* note 73, at 349 n. 74a.

⁹² 1 L. OPPENHEIM, INTERNATIONAL LAW 303 (8th ed. H. Lauterpacht 1955).

⁹³ See § II-E *supra*.

ments of necessity and proportionality. It will be recalled that, following Cambodia's apparent rejection of U. S. diplomatic efforts, President Ford ordered a three-pronged attack on the captors, launching an amphibious assault on Tang Island where the crew was erroneously believed to have been taken, dispatching a marine boarding party to retrieve the *Mayaguez* anchored off Tang, and having U. S. planes bomb selected mainland targets at Kompong Som and Ream Airbase.⁹⁴ The cost of this 1-day operation in terms of American lives amounted to 15 marines killed on Tang, 3 missing and presumed dead, 50 wounded, and 23 others killed in a related helicopter crash in Utapao, Thailand.⁹⁵ Balanced against this loss of life was the fact that a failure to take decisive action would have provided further evidence of U. S. weakness overseas and an invitation to other adversaries to test American will.

a. *Application of Specific Criteria to the U. S. Actions
Against Cambodia*

(1) *Characteristics of the Participants*

Prior analysis has indicated that the disparity in size, power, and technology between America and Cambodia may have had an inhibiting effect on U. S. willingness to retaliate. However, the memory of *Pueblo*, the anger aroused by the seizure of the *Mayaguez* shortly after an inglorious American exit from Cambodia, and perhaps the realization that no threat of escalation existed helped overcome initial reticence about using force to retrieve the merchant ship.

(2) *Objectives of the Claimant*

The United States in recapturing the *Mayaguez* was acting to insure the survival of her crewmen, to uphold the inclusive community interest in freedom of the seas, and, most importantly, to protect a way of life, dedicated to the maintenance of existing values, from being eroded by the gradual extension of Communist power through use of military force. It is worth noting, with respect to the retaking of the *Mayaguez*, that in the hierarchy of American values the preservation of a way of life has always outranked the preservation of individual lives. Was this principle temporarily forgotten when, in the aftermath of the *Pueblo* crisis,

⁹⁴ *Supra* note 6, at 13.

⁹⁵ U.S. NEWS & WORLD REPORT, June 2, 1975, at 29.

the Pentagon stated that to send troops into Wonsan would have resulted in the death of Bucher and his men?⁹⁶

(3) *Conditions and the Expectation of Necessity*

The American resort to force following the capture of the *Mayaguez* was justifiable in light of then recent events tending to create a reasonable expectation of the necessity of forceful action. The Communist take-overs in Vietnam and Cambodia posed a serious threat to the remaining non-Communist nations in Southeast Asia, many of which depend on the United States to maintain some sort of equilibrium between itself and the Soviet Union in that part of the world. A *Pueblo*-like response on the part of the United States to the seizure of the *Mayaguez* would have been interpreted as yet another indication of America's growing inability to uphold the interests of the free world in the face of Communist aggression in Southeast Asia and could have spurred nations like Thailand to throw in their lot with the Communists for the sake of physical, if not spiritual, self-preservation. To some extent, then, the maintenance of existing values in the form of a rough equilibrium between the United States and Soviet Union in the Far East could reasonably be expected to depend on a swift and firm American response to the Cambodian action.

More importantly, the continued existence of the United States "as an effective participant in the world community process"⁹⁷ may be said to have required the use of force against Cambodia once — but *only* when — it had been conclusively determined that diplomatic efforts had failed. When an alleged "super power" surrenders two ships in a span of 7 years to a pair of fourth-rate navies, it may reasonably expect its credibility and status as an effective participant in the general community of nations to suffer. The severity of the situation is magnified when this nation happens to be the standardbearer of the free world, whose function is to implement a policy dedicated to the maintenance of existing values and to the distribution of these values throughout the earth. Any impairment of this nation's status as an effective participant in the general community process will adversely affect the distribution of preferred events which it seeks to accomplish and will abet the cause of totalitarian Communism. According to Professor Mallison,

⁹⁶ GALLERY, *supra* note 3, at 23.

⁹⁷ Mallison, *supra* note 73, at 360.

[A] target state is authorized to act unilaterally in self-defense when it reasonably expects that it must use the military instrument of national policy to preserve its . . . continued existence as an effective participant in the world community processes.⁹⁸

Resort to military power in self-defense is warranted *a fortiori* when the interests at stake include the very object of the international law decision-making process — that is, the world-wide distribution of shared values.

(4) *Methods Employed by the Claimant: A Question of Legality*

Although America's use of force in responding to the *Mayaguez* incident appears justifiable in terms of the criteria of *characteristics*, *objectives*, and *conditions*, the *methods* employed cast doubt on the ultimate validity of the overall pattern of response. It will be recalled that the initial American response to the seizure of the *Mayaguez* was to send notes requesting the crew's release to the Chinese government and the Cambodian Embassy in Peking.⁹⁹ This took place on the afternoon of May 12, 1975, within 12 hours of the capture. Although the notes were returned without response 24 hours later, neither the President nor Secretary of State Kissinger viewed this as a final rejection of diplomacy, the latter commenting, "It [the return] didn't mean anything. The Chinese have good Xerox machines."¹⁰⁰ Despite his belief that the Cambodian Embassy in Peking was relaying the message to its government, the President, on May 13, warned the Cambodians through the Chinese that he would give them only 24 hours to surrender the *Mayaguez* and her crew. When this period had elapsed, the President launched the U. S. attacks on Tang and the *Mayaguez* at 5 o'clock on the afternoon of May 14 (dawn on May 15, Cambodian time). Less than 2 hours later, Phnompenh broadcast a lengthy, propaganda-filled announcement ordering the *Mayaguez* to withdraw from "Cambodian waters," but mentioning nothing about the release of the crew, whereupon Ford announced that the assault would be stopped as soon as the crew was set free. An hour and a half passed; and, at 8:45 p.m. (7:45 a.m. Cambodian time), the planes of the USS *Coral Sea* took off to bomb selected mainland targets, including a

⁹⁸ *Id.*

⁹⁹ Morris, *supra* note 16, at 9.

¹⁰⁰ *Id.*

Kompong Som oil depot and Ream Airbase. At 10:45 p.m., the men of the USS *Wilson* observed the approach of a Thai fishing boat carrying the crew of the *Mayaguez*, and by 11:07 p.m., the crew had been picked up. The bombing of Ream Airbase commenced at 10:50 p.m., the attack on the oil depot at 11:50 p.m.

This rapid sequence of events raises two issues affecting the validity of the U. S. response in terms of the criterion of *methods used*. First, did the United States make full use of diplomatic channels, allowing for sufficient lag time in the communications process and avoiding resort to simultaneous military coercion when a diplomatic solution was already underway? Second, did the United States respond proportionally to conserve values, or punitively to destroy them?

With respect to the first of these questions, it appears from comments made by White House aides¹⁰¹ that the President had "no idea" whether the Cambodians had received his May 12 note. At the same time, however, Kissinger was asserting that the messages of May 12 and 13 had both gotten through and that the Chinese had "counseled restraint" by Cambodia.¹⁰² Whichever was the case, it seems clear that Washington reacted to the seizure of the *Mayaguez* with virtually no diplomatic feedback on the intentions of the new Cambodian government.

The dangers inherent in such circumstances are readily made apparent by reference to the events described in detail above. It will be recalled that the small fishing boat carrying the crew of the *Mayaguez* reached the destroyer *Wilson* less than 6 hours after the commencement of the assault on Tang, having sailed more than 30 miles from Rong Island just off Kompong Som. As it turned out, the Cambodians had placed the crew aboard the fishing vessel 1 hour *before* the commencement of the assault on Tang¹⁰³ — hence the strong probability that the Communists had released the crew not in response to Marine guns but rather as a diplomatic decision. In support of this likelihood are the lengthy and painstakingly propagandized contents of the Phnompenh broadcast ordering the *Mayaguez* to leave Cambodian waters. Although delivered 2 hours after Ford had initiated the assault on Tang, the message was obviously in writing prior to the U. S. attack.¹⁰⁴

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Supra* note 6, at 14.

¹⁰⁴ Morris, *supra* note 16, at 9.

If, then, as events seem to indicate, a diplomatic solution was in progress at the time of the Tang raid, the United States was indeed fortunate to recover the *Mayaguez* crew. Had these men not already been released, a Cambodian government that had previously decided to surrender them in response to communiques from Peking might well have reversed its decision under military coercion.¹⁰⁵ In such circumstances, failure to exhaust the diplomatic process or at least to make an informed determination as to the intentions of the Cambodian regime before resorting to military force would have greatly reduced the chances for a speedy recovery of the *Mayaguez* and her crew. Legally speaking, the result would have been an unjustifiable destruction of values, caused by ill-conceived responding coercion, implemented in haste and violative of the requirement of actual necessity.

The issue of whether the United States reacted in accordance with the legal requisite of proportionality in responding coercion must likewise be resolved by reference to the facts. At 11:07 p.m. (10:07 a.m. Cambodian time), the destroyer *Wilson* picked up the crew of the *Mayaguez* intact. Word reached the President at 11:08 p.m. that only 30 of the 39 crew members had been retrieved, but this report was corrected by 11:15 p.m. to indicate that all 39 men were safe. At 11:50 p.m., American planes bombed an oil depot near Kompong Som.¹⁰⁶

Government officials indicated later that the air raids on Ream Airbase (10:50 p.m.) and Kompong Som were intended to protect the Marines pinned down on Tang Island.¹⁰⁷ However, simple logic as well as military tactics would have demanded either a preventive strike coordinated with the amphibious landing several hours earlier or a simple surveillance of the Cambodian mainland to insure that no enemy planes or gunboats were launched. In this way, the United States could have acted to conserve values rather than destroy them needlessly. Unfortunately, the absence of coordination between the bombing strikes and the Marine landing at Tang as well as the fact that the oil depot raid occurred half an hour after the *Mayaguez* crew boarded the *Wilson* suggest that the bombing be viewed as punitive and therefore violative of the requirement of proportionality in responding coercion.

¹⁰⁵ *Id.*

¹⁰⁶ *Supra* note 6, at 14.

¹⁰⁷ Morris, *supra* note 16, at 10.

VI. IMPLICATIONS FOR AMERICAN CRISIS DIPLOMACY

In theory, crisis diplomacy should be governed by the contextually-oriented application of principles of international law to specific fact situations. Thoughtful action grounded on legal analysis will limit the destruction of shared values and facilitate the attainment of a maximum public order.

The foregoing legal evaluation of the *Pueblo* and *Mayaguez* incidents attempts to ascertain the validity or invalidity of the various claims asserted and actions taken by the participants to the disputes and, on the basis of the conclusions reached, to provide suggestions for the future conduct of crisis diplomacy in similar situations involving isolated aggression on the high seas. It has been shown that the Communist seizures were unlawful in terms of both the applicable law of the sea and the principles governing claims of self-defense. The conclusion reached with respect to the American assertions of inviolability of the high seas was that such claims were reasonable under the circumstances and supportive of established community policy. However, the responses of the United States in both instances have been criticized for failing to conserve inclusive community values.

The implications of *Pueblo* and *Mayaguez* for U. S. crisis diplomacy are clear. In order to protect and maintain existing shared values in the face of future isolated acts of aggression on the high seas, the United States must be prepared to implement measures of responding coercion intermediate in intensity to the two extremes reflected in the *Pueblo* and *Mayaguez* incidents. Such measures include the full use and, if necessary, the exhaustion of diplomatic channels; the avoidance of simultaneous military coercion once a diplomatic solution is in progress; the controlled application of force when diplomacy has clearly failed to protect values; and the refusal to inflict punitive damages (those that are not reasonably necessary to compel the adversary to terminate the condition which threatens inclusive community interests).¹⁰⁸ Failure to adopt a crisis-management policy which embodies these elements may well "present a future adversary with the prospect of a diplomacy he cannot trust and a military operation neither side can measure."¹⁰⁹ More than this, it would constitute an abdication of America's continuing responsibility to insure the maintenance of a minimum public order based on the tenets of international law.

¹⁰⁸ McDougal & Feliciano *supra* note 83, at 242.

¹⁰⁹ Morris, *supra* note 16, at 11.

APPENDIX

Rejection of View that Wai Islands Formed Part of Territory Belonging to Cambodia at Time of *Mayaguez* Incident

An assertion that the *Mayaguez*, when captured, was steaming in Cambodian territorial waters would necessitate a legal analysis grounded on the doctrine of innocent passage.¹¹⁰ This view, however, assumes that the 3½-week old Sihanouk regime had in fact reduced to its possession the Wai Islands, whose 12-mile marginal belt intersected the Hong Kong — to — Sattahip shipping lanes. Only if such sovereignty is shown to have been established can the summary seizure of the *Mayaguez* be recognized as a legitimate exercise of Cambodia's plenary authority to regulate passage within its territorial waters. If, on the other hand, sovereignty cannot be shown, the inclusive interest of the world community in safe and speedy transit between Hong Kong and Sattahip must be taken to limit Cambodia's attempt to exercise over extra-territorial waters that comprehensive competence generally associated with control of territorial and inland waters.

At the time of the *Mayaguez* incident, sovereignty over the Wai Islands was claimed by three states — Cambodia, Vietnam, and Thailand.¹¹¹ Professor Paust emphasizes that the existence of such claims, regardless of which one was the strongest, precludes characterization of the waters surrounding the islands as "international".¹¹² This conclusion, however, is of secondary importance to a determination of whether Cambodia itself could assert comprehensive sovereignty over the islands — and thus the waters — in question. Professor Paust concludes that it could lawfully do so because it "exercised control over the islands at the same time that it made a claim of ownership."¹¹³ (It is interesting, although not important for our purposes, to note here that, within four weeks of the recovery of the *Mayaguez*, Vietnamese troops had driven the Cambodians from the Wai Islands).¹¹⁴

Professor Paust thus intimates that the legal requisites necessary to establish territorial sovereignty over the islands in question could be and were in fact satisfied by the self-serving assertions of the Sihanouk government. That is, as long as Cambodia combined even temporary control over the territory with a claim of ownership, it established good title to the land and its coastal waters. This point of view, however, disregards an essential component of territoriality, namely the principle that "occupation, to constitute a claim to territorial sovereignty, must . . . offer certain guarantees to other states and their nationals."¹¹⁵ Certainly the most basic of these would be the guarantee

¹¹⁰ M. McDougal & W. Burke, *THE PUBLIC ORDER OF THE OCEANS* 37 (1962).

¹¹¹ *TIME*, May 26, 1975, at 9, 10.

¹¹² Paust, *The Seizure and Recovery of the Mayaguez*, 85 *YALE L.J.* 774, 784 (1976).

¹¹³ *Id.* at 784 n. 4.

¹¹⁴ *N.Y. Times*, June 14, 1975, at 1, col. 4.

¹¹⁵ *The Island of Palmas Case (U.S. v. Netherlands)*, Hague Court Reports 2d (Scott) 83, 101, 2 *U.N.R.I.A.A.* 829, 846 (Perm. Ct. Arb. 1928).

of protection, within the claimed territory, of the rights of other states, "in particular their right to integrity and inviolability . . . , together with the rights which each state may claim for its nationals in foreign territory", for a period at least "long enough to enable any Power who might have considered herself as possessing sovereignty over the (territory), or having a claim to sovereignty, to have . . . a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights."¹¹⁶

It cannot be seriously contended that the Cambodian regime, which had occupied the Wai Islands for the first time only 2½ weeks before seizing the *Mayaguez*,¹¹⁷ and had started seizing Thai fishing boats in the area as early as May 2,¹¹⁸ complied with this inclusive, community-oriented aspect of territoriality, essential to establishing the validity of any inchoate claim to sovereignty. Indeed, to support Cambodia in her premature assertion of comprehensive sovereignty over the Wai Islands is to vitiate the expectational function served by the concept of territoriality: namely, the promotion of predictability and orderliness in international relations which flows from a recognition by each state of the spatial limitations confining the exercise of exclusive competence by every other state. Because Cambodia's claim to comprehensive authority over the Wai Islands did not begin to comply with this basic element of the legal concept of territorial sovereignty, that claim must be considered defective; and subsequent analysis must proceed on the theory that the *Mayaguez* incident was not an innocent passage case.

¹¹⁶ *Id.* at 93, 127, 2 U.N.R.I.A.A. at 839, 867.

¹¹⁷ R. ROWAN, *THE FOUR DAYS OF THE MAYAGUEZ* 199 (1975).

¹¹⁸ G.A.O. REPORT TO THE SUBCOMM. ON INT'L POLITICAL & MILITARY AFFAIRS OF THE HOUSE COMM. ON INT'L RELATIONS, 94th Cong., 2d Sess., seizure of the *Mayaguez* Pt. IV 115 (Comm. Print 1976).