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U.S. NAVY REGULATIONS, INTERNATIONAL LAW, AND THE ORGANIZATION OF AMERICAN STATES

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INTRODUCTION

Since 1893, U.S. Navy Regulations have tasked naval officers with the responsibility of exercising their independent judgment in the application of force to protect the lives and property of U.S. citizens on foreign soil against actual or impending arbitrary violence. These regulations were written at a time when international law recognized the principle of applied force to protect the lives and property of nationals in foreign states when the foreign state was unable or unwilling to protect them.

The purpose of this paper is to examine these regulations in the light of the changes that have taken place in international law—in the 76 years since they were drafted—in order to establish whether they have any utility in today's world. Noting that the majority of instances in which the United States has used force for the protection of its citizens abroad have taken place in Latin America and also that the restraints imposed by international treaty are particularly meaningful in this area, Latin America has been chosen as the background locale.

I—THE NAVAL OFFICER AND INTERNATIONAL LAW

> The naval admiral or captain . . . in international law, as in strategy and tactics . . . must know the doctrine of his country. In emergencies, not infrequently, he has had to act for his superior, without orders, in the spirit and manner his superior would desire . . . Injudicious action may precipitate hostilities; or injudicious inaction may permit infringement of American rights, of persons or of property.[1]

Today, the officers and men of all branches of the service are living and

operating in all areas of the world in furtherance of our Nation's objectives. The responsibilities necessarily attending these operations create frequent direct relations with foreign governments, both allied and neutral. In these relations it is incumbent that our Nation's representatives be guided by "the principles and rules of conduct... which states feel themselves bound to observe, and, therefore, do commonly observe in their relations with each other."[2] The Navy, because of the necessity of conducting operations beyond the continental limits of the United States, has always stressed the study of international law for its officers. To further the education of the naval officer in the field of international law, the Naval War College inaugurated the "Blue Book" program in 1894, 10 years after the founding of the Naval War College itself, to disseminate pertinent educational and informational material in the field of international law to all naval officers.[3]

U.S. Navy Regulations, which are in the nature of general orders to all members of the naval service, place particular emphasis on international law. Article 1214, U.S. Navy Regulations, 1948, provides that "all persons in the naval service, in their relations with foreign nations, and with the government or agents thereof, shall conform to international law and to the precedents established by the United States in such relations," while article 0505 makes it mandatory for a commanding officer to observe and require his command to observe the "principles of international law." Among the principles of international law are those found in articles 0613 and 0614 concerning the protection of the lives and property of U.S. citizens on foreign territory.

These articles provide:

Article 0613. Violations of International Law and Treaties.

On occasions where injury to the United States or to citizens thereof is committed or threatened, in violation of the principles of international law or treaty rights, the senior officer present shall consult with the diplomatic or consular representatives of the United States, if possible, and shall take such action as the gravity of the situation demands. The responsibility for any action taken by a naval force, however, rests wholly upon the senior officer present. He shall immediately report all the facts to the Secretary of the Navy.

Article 0614. Use of Force Against a Friendly State.

1. The use of force by United States naval personnel against a friendly foreign state, or against anyone within the territories thereof, is illegal.

2. The right of self-preservation, however, is a right which belongs to states as well as to individuals, and in the case of states it includes the protection of the state, its honor, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the state or its citizens may suffer irreparable injury. The conditions calling for the application of the right of self-preservation cannot be defined beforehand, but must be left to the sound judgment of responsible officers, who are to perform their duties in this respect with all possible care and forebearance. In no case shall force be exercised in time of peace otherwise than as an application of the right of self-preservation as above defined. It must be used only as a last resort, and then only to the extent which is absolutely necessary to accom-

plish the end required. It can never be exercised with a view to inflicting punishment for the acts already committed.

3. Whenever, in the application of the above-mentioned principles, it shall become necessary to land an armed force in a foreign territory on occasions of political disturbance where the local authorities are unable to give adequate protection of life and property, the assent of such authorities, or of some of them, shall first be obtained, if it can be done without prejudice to the interests involved.

It is interesting to note that these articles have remained virtually unchanged since 1893 when they were first drafted and incorporated in the Regulations for the Government of the Navy of the United States as paragraphs 285, 286, and 287, section 4, chapter V, and when principles of international law permitted a state to use force for the protection of its citizens and their property in a foreign state.[4] From a mere perusal of these articles it seems that the enforcement of duties under international law is left largely to the discretion of the commanding officer. In fact, prior to 1928 this was largely so. In recounting 76 instances where armed forces of the United States operated on foreign soil or engaged in actual hostilities with another nation on her soil under the guise of protecting U.S. citizens or their property abroad, Milton Offutt states:

> What has generally happened . . . is that naval officers commanding ships or squadrons on foreign stations have taken such action as they believed necessary for the protection of American lives and property, and have reported their action to the Secretary of the Navy after their government has been committed to their procedures.[5]

These cases covered a timespan from 1813 to 1926, and on only one occasion did the Government refuse to approve the decision of a commanding officer of sending a landing party ashore.[6]

There have been many changes since the drafting of these regulations, both in our foreign policy and in the accepted principles of international law, yet the regulations still remain. Some of the language as well as the concepts appear dated. For instance, the regulations address themselves to the 19th century concept of "self-preservation," generally conceded as broadening the principle of "self-defense" to the point where it was quite inadmissible. Waldock quotes Hall as saying "in the last resort almost the whole of the duties of states are subordinated to the right of self-preservation,"[7] while himself maintaining that "such a doctrine would destroy the imperative character of any system of law in which it was applied, for it makes all obligation to obey the law merely conditional; and there is hardly an act of international lawlessness which it might not be claimed to excuse."[8]

Of far greater significance is the prohibition of the use of force against the political independence and territorial integrity of states set forth in the United Nations Charter and also embodied in the charters of regional organizations and security alliances. As most instances involving the use of force to protect lives and property of our nationals abroad occurred in Latin America, an understanding of the impact made by Latin American regionalism with its strong attitudes of nonintervention, state sovereignty, self-determination, and exclusive competence on this traditional right of international law is crucial when evaluating the utility of these provisions of U.S. Navy Regulations which imposed upon the naval officer the duty to exercise his inde-

pendent judgment when the lives or property of U.S. nationals are in jeopardy.

II–THE INTER-AMERICAN SYSTEM: AN OVERVIEW

Historical Experience. The present Charter of the Organization of American States, dated 2 May 1948, must be looked at in the perspective of history. Its evolution has been described as a "transition from an unwritten to a written constitution."[1] As early as 1826, Simon Bolivar recognized the weakness of American Republics and called for a general American congress to convene in Panama for the purpose of signing treaties of alliance. Although attended by only four countries, Colombia, Peru, Central America, and Mexico,[2] the Congress of Panama may be said to have laid the cornerstone for future hemispheric solidarity and understanding. The charter's origins may also be traced to the Monroe Doctrine, enunciated in a Presidential message of 2 December 1823, which proclaimed nonintervention of Europe in the governments of the Western Hemisphere. Both the Monroe Doctrine and the Panama Treaty were directed primarily toward the problem of defending the sovereignty of states in the Western Hemisphere, but unlike the Monroe Doctrine, which was a unilateral proclamation by the United States, the Panama Treaty envisioned binding all member states to mutual defense.

There were a series of inter-American conferences between 1826 and 1889, having as their principal object common defense and mutual protection of participating states, but there was no true hemispheric representation until 1889 when the United States took its first positive step toward creating a hemispheric organization by calling for the First International Conference of American States to meet in Washington, D.C. There, in 1890, with all the countries of the Western Hemisphere represented, except the Dominican Republic, were laid the bases for the Pan American movement by the creation of a permanent inter-American organization, the Commercial Bureau of the American Republics, later designated the Pan American Union.

History indicates that the United States was motivated more by a desire to establish economic relations than a desire to insure the maintenance of political and social stability within the framework of the Pan American Union. The reason why is evident. The United States, by this time a world power, saw little need for mutual defense arrangements with her neighbors to the south who were characterized by political instability and economic backwardness. In the years following the foundation of what Latin American governments must have hoped was a true international organization, as envisioned by Simon Bolivar in 1826, the United States assumed not only the role of protector of the Western Hemisphere, but also that of mentor. Under the Roosevelt corollary to the Monroe Doctrine, the United States asserted the right to intervene in Latin American countries in order to prevent the intervention of European powers in circumstances of political or economic chaos. European intervention at this time was quite common and deemed justified to collect overdue debts. Such intervention might have given European powers a pretext for reestablishing bases in the Western Hemisphere and thereby weaken national security. If Latin American countries did not exercise their sovereign powers responsibly enough to avoid giving European powers a just cause for intervention, the United States, to protect itself from harm, stepped in. Using this rationale, the United States intervened in the Dominican Republic, Haiti, and Nicaragua and used its power to gain strategic objectives in Cuba, Puerto Rico, and Panama. Instead of ushering

in an era of understanding and international cooperation, the creation of the Pan American Union was a prelude to an era of frank and deliberate military intervention in Latin America under the pretext of upholding the Monroe Doctrine. *The Department of State Bulletin* lists 35 examples of U.S. intervention in the affairs of Latin America from 1812 to 1926.[3]

Fight for a Concept. It is small wonder then that the development of the inter-American system during the years 1890-1933 was characterized by Latin American efforts to secure principles of nonintervention that would govern relations among member states of the Pan American Union or that these principles loom so large in the present Charter of the Organization of American States. On the other hand, the U.S. position on intervention was not without merit and had a strong basis in then existing international law. The United States was particularly concerned with protecting its nationals and their property from violence in Latin American countries when the local authorities were unable or unwilling to protect them. The views of the U.S. Government on this right of intervention were very clearly expressed by Charles Evans Hughes, American delegate at the Havana Conference in 1928, in resisting the principle advocated by the Latin American countries that no state had the right to intervene in the internal or external affairs of another.

> What are we to do when governments break down and American citizens are in danger of their lives? . . . I am not speaking of sporadic acts of violence, or of the rising of mobs, or of those distressing incidents, which may occur in any country however well administered. I am speaking of the occasions where [sic] government itself is unable to function for a time because of difficulties which confront it and which it is impossible for it to surmount.
>
> Now it is a principal [sic] of international law that in such a case a government is fully justified in taking action—I would call it interposition of a temporary character—for the purpose of protecting the lives and property of its nationals. I could say that that is not intervention . . . Of course the United States cannot forego its right to protect its citizens.[4]

However, by 1928 it also had become clear to the United States that any meaningful regional association in the Western Hemisphere would depend on a shift from its position of unilateral intervention, and that year saw the abandonment of the Roosevelt corollary to the Monroe Doctrine in the Clark Memorandum. Thereafter, military interventions in Haiti and Nicaragua[5] were liquidated; the Platt amendment under which the United States was given the right to intervene in Cuba was abrogated in 1934, and a new treaty was negotiated with Panama concerning the Panama Canal in 1936. In 1933 the United States, at the Seventh Inter-American Conference, accepted in principle the doctrine of nonintervention and then embraced it totally in 1936 at the Buenos Aires Conference for the Maintenance of Peace. By signing an Additional Protocol relative to nonintervention,[6] the United States was generally regarded as unequivocally renouncing the principle of intervention for the protection of the lives and property of nationals.[7]

If any doubt remained regarding the view of the United States, it was dispelled in 1958 when Secretary of State Dulles, addressing himself to the civil strife in Lebanon, said:

> Now what we would do if American life and property was [sic] endangered would depend, of course, in the first instance upon what we were requested to do by the Government of Lebanon. We do not introduce American forces into foreign countries except on the invitation of the lawful government of the State concerned.[8]

This change of policy on the part of the United States was occasioned not only by a realization that its past policy of unilateralism and intervention had failed to establish strong viable governments and had evoked deep resentment, but also by a realization that hemispheric solidarity offered the best security against the subversive activities of the European powers with their large communities in Latin America.[9] This hemispheric solidarity manifested itself in an inter-American security system with two focal points: consultation if peace were threatened (Buenos Aires, 1936) and collective action to repel or prevent aggression (Havana, 1940).

The New Instruments. The changeover from a policy of unilateral intervention to one of collective responsibility for hemispheric solidarity is embodied in the two documents that are the foundations of the Organization of American States: the Inter-American Treaty of Reciprocal Assistance of 1947 (called the Rio Treaty) and the Charter of the Organization of American States signed in 1948. Although both of these documents postdated the United Nations Charter, the basic principles contained in them were firmly fixed at the time of the signing of the Charter in San Francisco in 1945. The Latin American States, having won from the United States recognition of the principle of nonintervention, were anxious to prevent any impotency to their regional organization, particularly in the area of intervention by non-American powers in the maintenance of peace and security among American States. Largely as a result of their insistence in maintaining the integrity of their regional security system, provisions were incorporated in the United Nations Charter assuring the continued viability of regional organizations in areas relating to the maintenance of international peace and security.

The Charter of the Organization of American States, signed in 1948, is "an amazing composit [sic] of rules, agreements, principles, and aspirations,"[10] none of which are new but merely the codification, concentration, and reconstruction of what had transpired in the inter-American system since 1826.[11] That nonintervention continued to be the fundamental principle of inter-American solidarity is clear from the language of the charter. According to article 15:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

And article 17:

> The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

The principle of nonintervention is

extended further by article 16, which affirms:

> No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

Thus extended in articles 15 through 17, the principle of nonintervention had to be reconciled with that of collective security, already recognized in the Rio Treaty and the United Nations Charter. Article 19 of the charter thus provides:

> Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 15 and 17.

III—INTERVENTION—SOME EXAMPLES OF CONTEMPORARY POLICY

> Intervention is a word which is often used quite generally to denote almost any act of interference by one state in the affairs of another; but in a more special sense it means dictatorial interference in the domestic or foreign affairs of another state which impairs that state's independence.[1]

While all nations agree on the broad principle that intervention is unlawful, there is less agreement on just what is encompassed by the term "intervention." The traditional doctrine of relating intervention to the use of or threat to use force does not conform to the language of article 15 of the charter, but if intervention is carried to the ultimate and impractical extreme insisted upon by the drafters of the charter to cover all acts that may be viewed as pressure, it becomes nebulous. Some act of every nation may send its reverberations everywhere. The United States, by the exercise of its economic and political policies, whether they be foreign or domestic, exercised through action or inaction, may intervene in Latin American affairs as effectively as did the sending of Marines in earlier times. It has often been said, in more than jest, that if the economy of the United States sneezes, the countries of Latin America catch pneumonia. Will not, then, the participation of the United States in the Alliance for Progress inevitably lead to an accusation of intervention?[2] By its very presence, the United States affects the internal affairs of its neighbors to the south. Thus, by painting with such a broad brush, the drafters of the charter may have defeated the very purpose of the prohibition. If one becomes enamored by the all-encompassing euphonic concept of nonintervention advocated by these Latin American jurists, one is left with a concept that is bound to fail as incompatible with the realities of international politics.

It is hard to condemn prohibitions on intervention for they are certainly part of a quest for an ideal seen as the equal sovereignty and independence of all nations. However, a more realistic approach than that adopted at Bogota is expressed by the United Kingdom in the report of the Special Committee on Principles of International Laws Concerning Friendly Relations and Cooperation Among States:

> . . . it would be recognized that in an interdependent world, it is inevitable and desirable that states will be concerned with and seek to influence the actions and policies of other states, and the objective of international law is not to prevent such activity, but rather to insure that it is compatible with the sovereign equality of states and self-determination of their peoples.[3]

Nice sounding words, but what of the objectivity of international law if the onus is to be placed there? If there is lack of agreement on lawful intervention when economic issues are involved, the problem becomes indeed chaotic when examining areas where political issues are paramount. The interventions in Greece, Lebanon, Algeria, the Congo, the Suez Canal, and Vietnam are examples of cases where conflicting political interests of parties concerned produced not only conflicting statements of facts, but also incompatible legal analyses.[4] In our own hemisphere we can find examples in Guatemala (1954) and the Dominican Republic (1965).

Guatemala. The Guatemalan crisis of 1954 is cited as confirming the greater fear Latin Americans have of U.S. intervention than of intervention from outside the Western Hemisphere.[5] In March 1951, Col. Jacobo Arbenz Guzman assumed the Presidency of Guatemala. His government quickly took on a decided Communist overtone.[6] The American-owned United Fruit Company was informed in February 1953 that 234,000 of its 300,000 acres on the Pacific coast would be expropriated under agrarian reform legislation enacted in 1953. Compensation offered by the Guatemalan Government amounted to $600,000 in bonds, although the United Fruit Company estimated its value at $4,000,000. Later that same year, the Guatemalan Government expropriated the 174,000 acres owned by United Fruit on the Caribbean coast. The expropriated land was distributed to landless peasants.[7]

On 17 May 1954, the U.S. State Department announced that a shipment of arms had been landed in Guatemala after having been shipped from Communist Poland. This caused the United States to ship arms supplies to Honduras and Nicaragua pursuant to military assistance pacts concluded on 20 May and 23 April. Shortly thereafter, on 18 June Guatemalan insurgent forces under the command of Col. Carlos Castillo Armas (a Guatemalan Army officer who had been in political exile since 1951) crossed the frontier from Honduras and advanced into Guatemala at several points.[8] President Arbenz Guzman charged Honduras and Nicaragua with open aggression in conjunction with the United States and called for an immediate meeting of the United Nations Security Council.[9]

Article 20 of the Charter of the Organization of American States provides that "all international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Charter, before being referred to the Security Council of the United Nations." In the same vein, article 2 of the Rio Treaty obligates the parties "to submit every controversy that may arise between them to methods of peaceful settlement and to endeavor to settle any such controversy among themselves by means of procedures in force in the Inter-American System before referring it to the General Assembly or the Security Council of the United Nations." When the Guatemalan charge came to the Security Council, the United States and the two Latin American members of the Security Council maintained that the complaint should be referred to the Organization of American States. By refusing to take substantive action on Guatemala's appeals, the Security Council "implicitly adopted the view that a member of the Organization of American States should, in fulfillment of its regional obligations and in the spirit of the United Nations Charter, seek to have the case resolved in the regional organization before bringing it to the Security Council."[10]

While the Security Council maintained a hands-off policy, the Inter-American Peace Commission (an agency of the Organization of American States) appointed a factfinding committee to

visit Guatemala, Honduras, and Nicaragua. However, on 27 June 1954, President Arbenz Guzman had resigned, and after negotiations with his successors a five-man junta was set up to rule Guatemala with Colonel Armas as President. The new Guatemalan Government was officially recognized by the United States on 13 July 1954. Subsequently, at the request of the new administration, the entire matter was withdrawn from the Organization of American States and the Security Council.[11] On 29 December 1954, an agreement was reached between the new government and the United Fruit Company by which all the lands expropriated under the land reform legislation were restored.[12]

The Dominican Republic. On 28 April 1965, U.S. Marines landed in the Dominican Republic for the express purpose of protecting and evacuating U.S. citizens and other foreign nationals and to protect the U.S. Embassy in Santo Domingo. This action was occasioned by assertions that American lives were in danger and that local authorities were no longer able to guarantee the safety of U.S. citizens[13] following a virtual civil war uprising pitting the leftist supporters of ex-President Juan Bosch and rightwing elements led by Brig. Gen. Elias Wessin y Wessin. Initially, only 405 Marines were landed.[14] By 30 April, about 2,500 of the estimated 3,000 U.S. nationals in the Dominican Republic had been evacuated together with other foreign nationals,[15] yet on 1 May, the United States increased its troop strength to 6,200.[16] On 2 May, President Johnson announced that he had committed a total of 14,000 troops to the Dominican Republic and stated their mission as protecting lives and preventing "another Communist State in this Hemisphere." The President alleged that what had begun as a popular democratic revolution had been taken over by a band of Communist conspirators.[17]

The United States had made an immediate appeal to the Organization of American States for assistance in carrying out her self-appointed task. Many Latin American countries were highly critical of the U.S. military intervention, contending that it contravened article 17 of the Charter of the Organization of American States, which holds the territory of a state inviolable and states that it may not be the object of even temporary military occupation for any reason whatsoever.[18] The United States pressed for the formation of an inter-American peace force to multilateralize the intervention at the Tenth Meeting of Consultation convened on 1 May. Opponents worried that a dangerous precedent would be established in the sanctioning of "collective intervention" but undoubtedly hoped that the establishment of the peace force would bring the intervention to an end and salvage the prestige of the inter-American system. Supporters, on the other hand, were probably anxious to cover up the U.S. intervention with collective measures.[19] An inter-American peace force was formed on 6 May to operate under the authority of the Tenth Meeting, but the participation by Latin American countries was symbolic only.[20]

Aftermath. The implications of the Guatemalan incident in 1954 were serious for Latin America. Not only was the precedent established that a member of the Organization of American States would have to seek resolution of its case in the regional organization before bringing it before the Security Council, but also the vast imbalance of power in the Western Hemisphere indicated that very little could be accomplished within the regional organization on behalf of a member state opposing the United States or its interests. There was little doubt in the minds of many Latin Americans that the United States, in collaboration with Honduras and

Nicaragua (two of the smaller and least significant Latin American states), had directly intervened in the affairs of Guatemala. Miguel Ydigoras Fuentes, who assumed the Presidency of Guatemala in 1958, has indicated that the overthrow of the Arbenz Guzman government was masterminded by the U.S. Ambassador to Guatemala, John E. Peurifoy, and implied further that Colonel Armas was in the employ of the United Fruit Company.[21]

If "the case of Guatemala had somewhat stained the shining armor of the OAS,"[22] U.S. intervention in the Dominican Republic did far more, seemingly treating the Organization as a rubber stamp. The United States maintained that if time had permitted the entire matter would have been initially referred to the Organization of American States[23] and that its own unilateral action was only a necessary prelude to multilateral collective action and participation by the Organization of American States.[24] There is no doubt that, given the intense pathological fear of intervention prevalent in Latin America, a multilateral, inter-American intervention would be far less repugnant to world opinion and acceptable to the state intervened than would unilateral action by the United States. While as Wright observes, "intervention does not gain in legality under customary international law by being collective rather than individual,"[25] as pointed out by Lillich, "in humanitarian situations, the fact that more than one state has participated in the decision to intervene lessens the chance that the intervention will be used for reasons of self-interest."[26]

It must be pointed out, however, that the intervention in the Dominican Republic helped to produce stability, allowing a free election in which all candidates had an equally fair chance to win. Neither of the two major candidates demanded withdrawal of forces, and while neither was overly enthusiastic about the presence of foreign forces on Dominican soil, neither reacted "with the typical outrage of nation-state leaders to the presence" of the troops.[27]

IV—INTERVENTION: WHEN AND HOW

As intervention was recognized to be contrary to international law, attempts were made to justify acts of intervention as legitimate cases of protection of nationals abroad or of self-defense. In this regard, "intervention was not so much a right as a sanction against a wrong or threatened wrong."[1]

Protection of Lives and Property. A state's use of force to protect the lives and property of its nationals abroad was universally accepted as lawful by the jurists of the 19th and early 20th centuries.[2] The justification for this concept was founded on the principle that international law's protection of sovereignty had a corollary duty imposed on a state to accord protection to foreign nationals. If international law prohibited foreign intervention of a forceful or coercive character, it is because it imposed a corresponding duty on the state not to create or tolerate conditions that justified such interventions.[3] Thus, every state must afford protection to aliens on her soil in conformity with civilized minimum standards, and because individuals were viewed in international law as objects and therefore an extension of their domiciliary state, any injury done an alien was an injury to his home state who then had a legal right to seek redress.[4] As private property and human freedom were interrelated, it followed that there was an equal international law principle affording a home state the right to protect the private property of her nationals in a foreign state.[5] Today's utility of this principle has been drastically changed, particularly in Latin America.

Such authorities on Latin America and the Organization of American States as the husband and wife team of A.J. Thomas and Ann Van Wynen Thomas note that:

> In view of the prohibition of the use or threat of force against the territorial integrity of a state set forth in the United Nations Charter, the strong language prohibiting intervention in the Charter of the Organization of American States, and the prohibition against military occupation of a state or the use of other measures of force against a state, also in the Charter of the Organization of American States, it can be said that armed intervention by a state on behalf of its nationals who have suffered injury and a denial of justice at the hands of another government in order to enforce reparation, to punish and prevent future repetition, i.e., to impose sanctions in the form of reprisals, has been made illegal.[6]

The Thomases maintain that the legality of protection of nationals by means of intervention must therefore rest on some "primary right which is excluded from the non-intervention ban."[7] Such a primary right is the right of self-defense reserved in the United Nations Charter, article 51; the Charter of the Organization of American States, articles 18 and 19; and the Rio Treaty, article 3. This right, a strictly limited one, must be determined by reference to customary international law.[8]

Self-Defense. The best statement of the conditions for the exercise of this right of self-defense is found in the principles laid down by Secretary of State Daniel Webster in the Caroline incident of 1837. There must be, he said, "a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation" and further, the action taken must involve "nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it."[9] The conditions under which a state may be entitled, as an aspect of self-defense, to intervene in another state, in order to protect its nationals from injury, were formulated by Professor Waldock in 1952 as follows: "There must be (1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereignty to protect them, and (3) measures of protection strictly confined to the subject of protecting them against injury."[10]

Using these guidelines, the original limited intervention in the disorders of the Dominican Republic on 28 April 1965 to protect U.S. citizens from imminent danger in a situation of anarchy did not violate standards of customary international law. The United States chose, however, not to rest its case on the principle of self-defense. Indeed, both the United States and later the Organization of American States carefully avoided the use of the term "self-defense," relying instead on maintaining that its actions were sanctioned by the recognized principle of humanitarian intervention.[11] The reason why is clear. Any careful reading of article 51 of the United Nations Charter indicates that both individual states and regional organizations must report to and take orders from the United Nations for action taken under the guise of the "inherent right" of self-defense.

Humanitarian Intervention. Traditional international law recognized the principle of humanitarian intervention when a state abused its right of sovereignty by permitting within its territory the treatment of its own nationals or foreigners in a manner violative of all universal standards of humanity.[12]

Some maintain that the strict principles of modern multilateral treaty law may have completely abolished this right, particularly the absolute ban on intervention of the Charter of the Organization of American States,[13] while others have continued to assert the legality of humanitarian intervention. Of these latter, the most eminent is Sir Hersch Lauterpacht, who finds intervention to be legally permissible "when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human right and to shock the conscience of mankind,"[14] the rationale being that a decent respect for human rights and human dignity transcends the doctrine of absolute sovereignty insulating a state from interference by the international community.[15] An even more meaningful justification is that of necessity, for there is no remedy except that of prevention.

Some Conclusions on Intervention.

> It is not inevitable that men should ask whether it is morally right to intervene in the internal affairs of other nations. To some, it has obviously become a mere question of posture—how to keep a straight face while intervening, how to smile piously when discovered, and how to win converts during the moral upsurge that should accompany the exposure of others in the great game of intervention.[16]

Certainly it is difficult to equate international law and the concepts of domestic law with which we are all familiar. In a domestic court the law seems clear, and it is usually quite enough to persuade the presiding judge of what the law is. The question, ought the court to follow the law, seldom arises. If sound policy dictates a change in existing law, constitutional provisions are provided to seek such a change. International law, on the other hand, has no international legislature to make the rules of the game for all to accept and follow. It has no system of courts and no police force. Moreover, the rules of international law are far from being precise. There is often a gap between what looks legal and what looks reasonable. This gap is most often closed by asserting that what looks reasonable must be legal.

A far better view would be to make an objective determination of what the rule of international law is and then seek to follow it. As Fisher points out:

> Rules of law must be related not only to the policies they are designed to serve, but also to the means by which compliance with the rules is to be sought. For the foreseeable future the basic means by which compliance with international law may be obtained is through the enlightened self-interest of the various governments. If this is so, we must be prepared to argue that respect for international rules does in fact serve the interest of each government. The most fruitful perspective from which to discuss a question of international law may, therefore, be the one which seeks to persuade a government official of what a government ought to do.[17]

Instead of taking the position that there is no rule of international law to deal with certain situations that are bound to arise when dealing with the prohibition of resort to force and nonintervention principles contained in the United Nations Charter and the Charter of the Organization of American States, and therefore the proper course is to proceed with whatever practical actions will most advance the general interests of the United States, would it not be better to ask if our Nation's interests

would be better served by making an honest and determined effort to develop international law and live by it?

Applying this concept, it is considered very doubtful that interventions solely for the protection of property of nationals on foreign soil have any basis in the modern law. Although the Suez crisis of 1956 is generally regarded as sounding the death knell of this concept, we can look to our own Government in our own hemisphere for another example. In May 1959 the Agrarian Reform Law in Cuba provided for expropriation of properties owned by U.S. citizens. The basis of evaluation was universally conceded to be unfairly low, and compensation was in the form of low interest Cuban bonds redeemable in 20 years. Under this law, property was confiscated without court orders and in some cases without written authorization. No inventories were taken and no receipts given. The U.S. Government did not question the expropriation law but stated that it expected compensation in accordance with accepted rules of international law. Within 1 year, $900,000,000 worth of U.S. citizens' investments were appropriated. Cuba then took the position that any duty to compensate would impose undue hardships on the Cuban Government.[18] By doing nothing, the U.S. Government is seen as abrogating any right she may have maintained existed for interventions of this type, for international law, as domestic law, is made through the actions of governments and the precedents they create.

Interventions for purely humanitarian reasons are also suspect. In the Dominican Republic, prior to the overthrow of Trujillo, years of flagrant and widespread violations of the human rights of Dominican citizens were ignored. Following recognition of the Castro government in Cuba, a wave of political executions sickened the United States, but our Government, in line with the general rule of refraining from pressing foreign governments to treat their own citizens humanely, remained silent. When the concept of humanitarian intervention was resurrected in April of 1965 as justification for our initial intervention in the Dominican Republic, it was done to avoid reliance on the available legal basis of self-defense which would have occasioned involvement with the United Nations. This is not to condemn the right of humanitarian intervention within the collective framework of the United Nations or the Organization of American States. The latter organization is particularly unique in the stress it lays on the use of international law in matters dealing with the international concern for fundamental human rights,[19] although the already discussed sensitivity of Latin American States with respect to intervention has enhanced the difficulty of devising effective international measures for the protection of human rights. The Inter-American Commission on Human Rights created in 1951 is authorized to consider individual complaints of violations of certain basic rights, among them the right to life and liberty, but can only act in examining and reporting on conditions in the various states. Thus far, this Commission has proved unable to "break the crust of the entrenched thinking on intervention."[20]

In any treatment of the subject of intervention, mention must be made of the views of those who maintain that it is policy and not law that determines the actions of states in their dealings with one another. Foremost among these is former Secretary of State Dean Acheson who, in commenting on the legal position of the United States in the Cuban missile crisis, stated that "principles, certainly legal principles, do not decide concrete cases," and that international law "simply does not deal with questions of ultimate power."[21] Although this position is unsatisfactory as an appraisal of international law, it is,

unfortunately, a realistic assessment of the manner in which states approach the conduct of international affairs.

Self-defense, within the narrow confines of the Webster definition with added emphasis on the principle of proportionality in measures limited to reasonably repelling the danger, may, in the final analysis, be the only legally acceptable grounds for intervention. To send 405 troops into the Dominican Republic to evacuate U.S. citizens and other foreign nationals meets this test. To build up to 22,289 troops[22] does not. To declare, as did President Johnson in his speech of 2 May 1965, in support of the massive involvement, that the United States would not tolerate another Communist government in the Western Hemisphere[23] is to imply that the United States reserves the right to determine whether or not there is sufficient Communist involvement in an internal revolution in the Western Hemisphere to be regarded as dangerous by the United States, and, if so, the right to intervene to prevent a Communist takeover. This, in turn, implies possible intervention in any of the Latin American States.[24] Bearing in mind that "the shape of things to come is in no small way determined by the actions of great powers,"[25] was there any reason for us to be shocked by the language of the "Brezhnev Doctrine" when Russia intervened in Czechoslovakia in August 1968?

"In a world built upon national sovereignties and jurisdictions and the equality of independent states, any state that intervenes in the internal affairs of another undermines the institutional and legal foundations on which its own existence rests."[26] Until there is an effective international organization to cope with the nuances of power politics, the only hope for peace and an orderly society lies in the major powers' realization that restraint and dedicated adherence to established and accepted principles of international law are paramount in the interest of survival.

V—ANALYSIS AND CONCLUSIONS

That the United States used force to protect its nationals and their property in the Latin American States in the 19th and early 20th centuries is a matter of documented fact. It is also clear that whatever the posture of the United States prior to World War II, its legal obligations have since changed considerably, particularly in view of its participation in the United Nations and the Organization of American States. While a commanding officer may have acted with impunity in the early 20th century with regard to protecting U.S. citizens on foreign soil, such is not the case today. The fact remains, however, that although customary international law has changed and treaty obligations impose restraint, the problem of protecting nationals can hardly be termed obsolete. That the United States must protect its citizens when a local government is unable or unwilling to protect them is as true today as it was in 1928 when Secretary Hughes addressed this problem to the Sixth Conference of Inter-American States.

Recognizing that prevention is the only real remedy and that a state still has a duty, if not a right, to protect its citizens, how then is this protection to be afforded? If action is taken unilaterally, a plea of safety of nationals or even humanitarian intervention may, unfortunately, be a pretext for intervention having nationalistic or other ulterior aims. While most of the examples of use of force cited by Offutt were confined to the purpose avowed—the protection of nationals—many possessed unavoidable political significance. Such significance would be inescapable today. Certainly there is no country in Latin America in which we do not have strong political and economic interest.

Inter-American collective intervention through the auspices of the

Organization of American States would solve many of the problems inherent in unilateral action.[1] A permanent Inter-American Peace Force would provide a partial answer to the practical problem of devising a system capable of swift action in future emergencies similar to the Dominican Republic crisis of 1965. The United States favors the creation of such a force, and at the Second Inter-American Conference at Rio de Janeiro in November 1965 tried to interest the Latin American nations in just that.[2] Most Latin American States opposed the idea. Their view was forcefully stated in Chilean Foreign Minister Gabriel Valdes' speech, when he said: "The inter-American force would give our regional system a negative and dangerous ideological connotation, it would destroy the fundamental principle of non-intervention and would threaten to divide us into irreconcilable blocs."[3] Professor Plank suggests that Latin Americans would consider that any such force would be collective in name only; that the dominant position of the United States would mean that any intervention would have to be acceptable to and dominated by it.[4] At any rate, the U.S. intervention in the Dominican Republic will leave lasting scars, and it is doubtful that such a force will ever be created.

Thus politically undesirable as it may be, unilateral intervention would appear to be the only answer. As discussed supra, to be lawful such intervention would have to be encompassed within the concept of self-defense. It would have to meet the test of necessity, and, above all, it would have to meet the standard of proportionality. As pointed out by Professor Alford, "military action taken to acquire territory, supersede a government, obtain special concessions or to secure various political advantages, seems easily distinguishable from limited action to protect . . . citizens which is terminated when the persons are withdrawn or are otherwise secured."[5]

In today's politically oriented world, any decision to intervene under the principle of self-defense for the protection of the lives of U.S. citizens should, ideally, be made at the highest Government level, leaving to the naval commander only the task of implementing this decision. However, since, in the final analysis, prevention is the only remedy and timeliness is essential to prevention, it is not difficult to envision a situation where, despite modern communication techniques, the commanding officer must be prepared to determine the best course of action under the circumstances and then implement his own decision.

Authority for such a decision exists, as it has since 1893, in articles 0613 and 0614 of U.S. Navy Regulations. It remains only to update article 0614 to conform to modern standards of customary international law. It is suggested that this can be accomplished by the simple expediency of deleting any reference to "property" and substituting the words "self-defense" for the outmoded language "self-preservation" wherever the latter appears. Additionally, bearing in mind the serious international consequences that an application of force could entail, it is suggested that specific operation orders be written with a view toward giving commanding officers definitive guidance in the enforcement of this right, emphasizing the concept of evacuation over all other means of protection.

FOOTNOTES

I—THE NAVAL OFFICER AND INTERNATIONAL LAW

1. Alfred T. Mahan, *Armaments and Arbitration* (New York: Harper, 1912), p. 216.

2. A definition of international law propounded by Charles C. Hyde, *International Law, Chiefly as Applied and Interpreted by the United States* (Boston: Little, Brown, 1945), v. I, p. 1.

3. Bernard L. Austin, "A Message from the President of the U.S. Naval War College," *JAG Journal*, October-November 1961, p. 138.

4. Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963), p. 289.

5. Milton Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (Baltimore: Johns Hopkins Press, 1928), p. 5-6.

6. *Ibid.*, p. 14-15. Offutt reports that Commodore David Porter appeared before a General Court Martial in July 1825 and was held to have exceeded his powers and suspended from the Navy for 6 months. Feeling his sentence unjust, he resigned his commission and accepted an offer to become an admiral in the service of Mexico at a reputed salary of $25,000 a year.

7. W.E. Hall quoted in James L. Brierly, *The Law of Nations*, 6th ed. (New York: Oxford University Press, 1963), p. 404.

8. *Ibid.*

II—THE INTER-AMERICAN SYSTEM: AN OVERVIEW

1. Charles G. Fenwick, "The Organization of American States: the Transition from an Unwritten to a Written Constitution," *The American Journal of International Law*, April 1965, p. 316.

2. The present-day republics of Ecuador, Panama, and Venezuela were embraced in Colombia, and Central America included Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. Thus, 11 of the present-day states were represented. The United States was invited and eventually accepted, but her delegates failed to arrive before the meeting adjourned. Charles G. Fenwick, "Pan-American Conferences," *Encyclopaedia Britannica*, 1966, v. XVII, p. 213.

3. "Authority for the President to Repel the Attack in Korea," *The Department of State Bulletin*, 31 July 1950, p. 177. It is interesting that this compilation of uses of land and naval forces of the United States, submitted as part of a Department of State memorandum justifying the President's use of armed forces to repel the North Korean attack on the Republic of Korea in June 1950, was submitted to the United Nations 15 years later, on 4 May 1965 by N. Fedorenko, Permanent Representative of the U.S.S.R. to the United Nations during discussion of the Dominican crisis. Upon its submission, Representative Fedorenko stated that it "enumerates the invasions by United States armed forces of the territory of the Dominican Republic and other countries of Latin America, Asia, and Africa for the purpose of intervening in the internal affairs of those countries." United Nations, Security Council, *Official Records, Twentieth Year*, Doc. No. S/6325 (New York: 1965), p. 82.

4. *Report of the Delegates of the United States of America to the Sixth International Conference of American States*, Washington: 1928, p. 14-15, quoted in Brownlie, p. 293.

5. Inman relates: "In 1912 United States intervention started in Nicaragua; it meant the maintenance of a marine guard in that country for twenty years, with the exception of a few months." Samuel G. Inman, *Latin America, Its Place in World Life* (Chicago: Willett, Clark, 1937), p. 126-127.

6. The Additional Protocol provided that intervention of any of the contracting parties, directly or indirectly, and for whatever reason, in the internal or external affairs of any other party was inadmissible. Additionally, it contained the provision that violation "shall give rise to mutual consultation with the object of exchanging views and seeking methods of peaceful adjustment." Carnegie Endowment for International Peace, Division of International Law, *The International Conferences of American States, First Supplement, 1933-1940* (Washington: 1940), p. 191.

7. Brownlie, p. 98-99.

8. "Secretary Dulles' News Conference of May 20," *The Department of State Bulletin*, 9 June 1958, p. 947.

9. John C. Dreier, *The Organization of American States and the Hemisphere Crisis* (New York: Harper & Row, 1962), p. 23.

10. *Ibid.*, p. 23.

11. O. Carlos Stoetzer, *The Organization of American States; an Introduction* (New York: Praeger, 1965), p. 11.

III—INTERVENTION—SOME EXAMPLES OF CONTEMPORARY POLICY

1. Brierly, p. 402.

2. The Inter-American Committee on the Alliance for Progress was set up in 1963 as a special and permanent body including the following objectives: to improve and strengthen democratic institutions and to accelerate the economic integration of Latin America. The United States undertook to provide a major part of the $20 billion that would be required for these purposes over the next 10 years. A.H. Robertson, "Revision of the Charter of the Organization of American States," *The International and Comparative Law Quarterly*, April 1968, p. 352.

3. United Nations, General Assembly, *Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States*, 19th Session, A/5746 (New York: 1964), p. 36.

4. F.B. Schick, "Some Reflections on the Legal Controversies concerning America's Involvement in Vietnam," *The International and Comparative Law Quarterly*, October 1968, p. 955.

5. Gordon Connell-Smith, "The Inter-American System: Problems of Peace and Security in the Western Hemisphere," Robert W. Gregg, ed., *International Organization in the Western Hemisphere* (Syracuse, N.Y.: Syracuse University Press, 1968), p. 67.

6. John D. Martz, *Communist Infiltration in Guatemala* (New York: Vantage Press, 1956).

7. "Expropriation of United Fruit Company Plantations," *Keesing's Contemporary Archives*, 13-20 March 1954, p. 13465.

8. "Invasion by Insurgent Forces under Colonel Castillo Armas," *Keesing's Contemporary Archives*, 17-24 July 1954, p. 13677-13678.

9. "Guatemalan Protest Sent to U.N. Security Council," *The New York Times*, 19 June 1954, p. 2:8.

10. Dreier, p. 57.

11. U.S. Department of State, *A Case History of Communist Penetration, Guatemala* (Washington: U.S. Govt. Print. Off., 1957), p. 58-59.

12. "United Fruit Signs Guatemala Accord," *The New York Times*, 28 December 1954, p. 3:5.

13. "President Sends Marines to Rescue Citizens of the U.S. from Dominican Fighting," *The New York Times*, 29 April 1965, p. 1:8.

14. "Dominican Revolt Fails after a Day of Savage Battle," *The New York Times*, 28 April 1965, p. 1:3.

15. "Evacuation of U.S. and Other Foreign Nationals," *Keesing's Contemporary Archives*, 26 June-3 July 1965, p. 20813.

16. "G.I.'s Advance in Santo Domingo; Johnson Sends 2,000 More Troops; U.N. Talks Set at Soviet Request," *The New York Times*, 2 May 1965, p. 1:8.

17. "Johnson Charges Red Plotters Took Over Dominican Republic Uprising; Increases U.S. Forces to 14,000," *The New York Times*, 3 May 1965, p. 1:8.

18. "Latin American Reactions to U.S. Military Intervention," *Keesing's Contemporary Archives*, 26 June-3 July 1965, p. 20816.

19. Connell-Smith, p. 82.

20. On 3 July 1965 the Inter-American Peace Force was composed as follows: United States: 10,900 troops; Brazil: 1,115 troops and the commander, Gen. H.P. Alvim; Costa Rica: 20 policemen; El Salvador: three general staff officers; Honduras: 250 troops; Nicaragua: 164 troops; and Paraguay: 183 troops. *O IS Chronicle*, August 1965, p. 5.

21. Miguel Ydigoras Fuentes, *My War with Communism* (Englewood Cliffs, N.J.: Prentice Hall, 1963).

22. Dreier, p. 62.

23. Leonard C. Meeker, "The Dominican Situation in the Perspective of International Law," *The Department of State Bulletin*, 12 July 1965, p. 60.

24. "Q. and A. on Dominican Policy—Interview with Mann," *The New York Times*, 9 May 1965, sec. IV, p. 3:1.

25. Quincy Wright, "The Legality of Intervention under the United Nations Charter," American Society of International Law, *Proceedings, 1957* (Washington: 1958), p. 86.

26. Richard B. Lillich, "Forcible Self-Help by States to Protect Human Rights," *Iowa Law Review*, October 1967, p. 333.

27. Michael K. O'Leary, "The Nature of the Inter-American System," Robert W. Gregg, ed., *International Organization in the Western Hemisphere* (Syracuse, N.Y.: Syracuse University Press, 1968), p. 168.

IV—INTERVENTION: WHEN AND HOW

1. Brierly, p. 402.
2. Brownlie, p. 289.
3. Sir Gerald G. Fitzmaurice, "The General Principles of International Law," The Hague, Academy of International Law, *Recueil des Cours, 1957* (Leyden: Sijthoff, 1958), v. XLII, p. 172.
4. Lillich, p. 327.
5. Ann V. Thomas and Aaron J. Thomas, *Non-Intervention: the Law and Its Import in the Americas* (Dallas: Southern Methodist University Press, 1956), p. 332.
6. Ann V. Thomas and Aaron J. Thomas, "The Dominican Republic Crisis, 1965," *The Hammarskjöld Forum, 9th, 1966* (Dobbs Ferry, N.Y.: Oceana, 1967), p. 13.
7. *Ibid.*, p. 13.
8. See Brierly, p. 416-432, for a full discussion of the controversial scope of the right of self-defense.
9. Daniel Webster, quoted in Brownlie, p. 43.
10. Claud H. M. Waldock, "The Regulation of the Use of Force by Individual States in International Law," The Hague Academy of International Law, *Recueil des Cours, 1952* (Paris: Librairie du Recueil Sirey, 1953), v. LXXXI, p. 467.
11. Thomas and Thomas, "The Dominican Republic Crisis, 1965," p. 56.
12. *Ibid.*, p. 19.
13. *Ibid.*, p. 20.
14. Lassa F.L. Oppenheim, *International Law, a Treatise*, 8th ed. (London: Longmans, Green, 1955). p. 312.
15. Lillich, p. 333.
16. Manfred Halpern, "The Morality and Polities of Intervention," Richard A. Falk, ed., *The Vietnam War and International Law* (Princeton: Princeton University Press, 1968), p. 39.
17. Roger Fisher, "Intervention: Three Problems of Policy and Law," Falk, ed., p. 137.
18. Doris A. Graber, "United States Intervention in Latin America," *The Year Book of World Affairs, 1962* (New York: Praeger, 1962), p. 33.
19. Charter of the Organization of American States. Article 5. The American States reaffirm the following principles:

(a) International law is the standard of conduct of States in their reciprocal relations; (j) The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex.

20. Dreier, p. 132.
21. Dean G. Acheson, "The Cuban Quarantine: Remarks," American Society of International Law, *Proceedings, 1963* (Washington: 1963), p. 15.
22. John B. Martin, *Overtaken by Events* (Garden City, N.Y.: Doubleday, 1966), p. 706.
23. Lyndon B. Johnson, "U.S. Moves in the Conflict in the Dominican Republic," *The New York Times*, 3 May 1965, p. 10:4.
24. Wolfgang G. Friedmann, "United States Policy and the Crisis of International Law," *The American Journal of International Law*, October 1965, p. 867-868.
25. Leonard Meeker, "Viet-Nam and the International Law of Self-Defense," Falk, ed., p. 324.
26. Halpern, p. 40.

V—ANALYSIS AND CONCLUSIONS

1. Mr. N.T. Fedorenko, Soviet representative in the Security Council of the United Nations, quoted the *Wall Street Journal* as saying that the U.S. companies "have a stake in the Dominican Republic," implying that this may have been the real reason for the intervention there in 1965. U.S. capital in the Dominican Republic amounted to about $350 million at the time of the landing of troops. F. Parkinson, "Santo Domingo and After," *The Year Book of World Affairs, 1966* (New York: Praeger, 1966), p. 144-145. Considering the concern of the United States in Guatemala in 1951 and the $900 million lost in Cuba, this view was undoubtedly shared by others besides Mr. Fedorenko.
2. "U.S. and Latins," *The New York Times*, 21 November 1965, p. 1E:7.

3. "Johnson Pledges U.S. Aid to Latins Will Go into '70's," *The New York Times*, 23 November 1965, p. 1:1.

4. John N. Plank, "The Caribbean: Intervention, When and How," *Foreign Affairs*, October 1965, p. 37-48.

5. U.S. Naval War College, *International Law Studies 1963*, by Neill H. Alford, Jr. (Washington: U.S. Govt. Print. Off., 1967), p. 189.

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