

FORCIBLE SELF-HELP IN INTERNATIONAL LAW

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INTRODUCTION

The Problem of Force in International Relations. The proper use of force has historically been a preeminent concern of mankind. In the domestic environment the progress of centuries has evidenced the development of a highly structured order for the appropriate application of this means of coercion. Societies, bound together by common heritage and a community of interest, have, under the central authority of the state, developed regulations for the use of force covering a broad spectrum of situational hypotheses.

But even in domestic society, significant debate has arisen as to the proper application of force. Thus, in the cur-

rent milieu in the United States, we have witnessed discussions on the morality of capital punishment and the legitimacy of measures of private coercion such as sit-ins and mass demonstrations.

If domestic societies can still debate the appropriate application of force internally, how much more difficult is the solution of problems surrounding the use of force in the international community. With a multiplicity of sovereign nation-states prosecuting their separate national interests and with no central authority to manage the expression of these frequently competing interests, it is perhaps a testament to the basic rationality of the human species that man has not long since destroyed himself.

And yet he has not. Through centuries of cataclysm and accommodation, states have managed, although sometimes just barely, to preserve at least a semblance of order, even in circumstances of great disorder, by developing minimum standards for the proper application of force.¹ This essentially neutral energy has been all-pervasive in international relations and very frequently misused, but concern for its utilization has always been present, and it is this concern which prevails as a bulwark against the challenge of chaos.

The Current Conundrum. The experience of the last 50 years has greatly heightened the preoccupation of nations with the application of force. World Wars I and II have seemingly convinced men and nations that at least the unilateral use of armed force by states should be foresworn; that its application should be surrendered to a central authority whose dispassion and objectivity, hopefully, could be counted on to at once reduce the chances that force would be resorted to and carefully circumscribe the mode of its application when required.

At both Versailles and San Francisco, men of goodwill attempted to create such an authority: in the latter case with an even greater sense of urgency than in the former. By 1945 the nations of the world had witnessed the horror of two World Wars and the advent of atomic power, and they were fully convinced that the control of force had become a *sine qua non* for the continued existence of mankind.

Viewed from the perspective of 1972, however, it can be stated that in large measure the United Nations has failed to minimize the use of armed force. It is true that in the past 27 years there has been no worldwide conflagration; but there have been many lesser but very bloody conflicts and, by and large, only the residual horror remaining from 1945 and the universal fear of an

apocalypse of thermonuclear power have kept leashed the dogs of world war.

The reasons for the failure of the United Nations to control the use of force are to be found both in the environment of its birth and the character of its principal legislative instrument. The U.N. was created during a period of temporary consensus as a reflection of the chaotic upheaval of World War II. As a result there was enacted in its charter a body of aspirational international law which depended for its effectiveness on the continued consensus of the Great Powers of the world. The United Nations had *en esse* arrogated to itself the competence to use armed force to redress wrongs; but when the Great Power consensus evaporated, this competence became a nullity.²

This is the conundrum that has plagued the nations of the world ever since: the riddle of an organization with authority and no power; the paradox of a world where states have rights but have ostensibly foresworn their remedies to an institution that, by and large, can insure no redress for wrongs; the need to honor an instrument which has become, for many states, the supreme law of the land while at the same time recognizing that full honor and complete compliance with the spirit and even the letter of that instrument are beyond the capability of sovereign states with conflicting and often selfish national interests.

State Response. Construing their actions most charitably, it can be stated that in the face of this dilemma the several states of the United Nations have done the best they could to strike an accommodation between the mandates of the charter and the requirements of their own national interests. By and large, they have adhered to the principle that armed force can no longer be justified simply as an instrument of national policy and that armed aggres-

sion, whatever its precise meaning,³ is a criminal act. However, states have continued, in practice, to resort to the use of armed force. They have employed traditional measures of forcible self-help short of war and have attempted to justify this action on the basis of the charter, and too often this has become purely a game of semantics.⁴

Such a *modus operandi* would not necessarily bode ill for the creation of a body of regulations for the realistic management of international force. It could even be envisaged as a development somewhat parallel to that experienced in the United States and Great Britain where common law evolved both under and together with constitutional instruments. However, with no central authority for enforcement and no compulsory jurisdiction to achieve objective interpretation, a distinct pattern of developing legitimate/illegitimate state practice is difficult to discern. If a body of international law on forcible self-help is emerging under the charter, it is more a random happenstance than a considered development by dispassionate and objective judicial ratiocination.

Result of State Response. The state response of employing measures of forcible self-help and then attempting to rationalize them under the charter has led to considerable confusion. Tortuous legal reasoning has been applied to justify actions clearly beyond the pale of the charter.⁵ Inconsistent Security Council reaction has elaborated the confusion,⁶ and finally, the dearth of judicial pronouncements has compounded matters even further by precluding any real development of authoritative precedent.⁷

As a consequence, frustration and cynicism have grown apace. Both decisionmakers and scholars have frequently fallen victim to one or the other of these twin devils. It has been contended that the use of force is an area beyond the competence of international

law, that in the absence of a true international consensus the control of force must remain in a legal no man's land.⁸ It has even been advanced that the function of international law in the control of force is simply to provide the best possible justification for political acts and in no way is it relevant as a consideration in the development of policy.⁹

Along with these counsels of despair, however, there is in evidence a growing realism concerning the appropriate function of the law in the application of force by states under the charter: a realism which neither admits of irrelevancy nor pretends to omnipotence but rather seeks the middle ground between "the Charybdis of subservience to state ambitions and the Scylla of excessive pretensions of restraint."¹⁰

This school of realism views the world as seeking at least a minimum public order and conservation of human values and perceives the function of the law as a process of decisionmaking to the achievement of this end.¹¹ Rigid concepts of legality and illegality in the application of force, particularly in the absence of compulsory jurisdiction, are viewed as distinctly unhelpful. Rather, empirical norms are sought which will provide at least a modest body of consensual regulation, and as the habit of consensus grows, so will the law. It is contended that state conduct should be justified or condemned on the basis of its rationality and restraint under all the circumstances, rather than on the basis of how said conduct comports with an arbitrary standard of legality which does not possess consensual content.

The net result of this approach does not afford the law as exalted a position in the order of international hierarchy as some might desire, but its proponents would contend that vis-a-vis the use of force, international society is primitive at best, and if the law is to thrive in such an environment it must not aspire to more than it can achieve.¹²

Purpose of This Essay. With this concept in mind, the present essay will consider that mode of force to which states have frequently resorted since 1945, i.e., forcible self-help, and attempt to elucidate some practical criteria which decisionmakers might apply in a situational context to determine whether a proposed use of force is legitimate. To do this it will be helpful to first examine the customary law of forcible self-help as it existed prior to the U.N. Charter. Next, the proscriptions and prescriptions of the charter will be considered and, subsequently, state practice under the charter, Security Council actions in response to the use of force, such judicial decisions as exist, and authoritative commentary in the area.

Hopefully, from this analysis it will be possible to indicate certain state conduct which is clearly legitimate and other activity which is equally clearly subject to condemnation. Between these poles there will obviously be a broad gray area, but it is in this area that certain inchoate normative conduct may be discernible which can provide a suggested pattern for decisionmaking with a high order of probability that the use of force in a given instance can be legitimated.

It should be noted that the emphasis throughout is on measures of forcible self-help, forcible in the sense that armed force is applied or threatened. The numerous other means of coercion utilized in international relations, while of considerable significance in international law, must of necessity be relegated to a position of incidental reference in the current undertaking.

Whether the effort to enunciate practical guidelines will be successful remains to be seen, but it is considered a most necessary endeavor. There has been much too much of the frustration and cynicism referred to above. Decisionmakers have, with considerable justification, frequently thrown up their

hands after attempts to assay what guidance the law offers in this area and have fallen back on *post-factum* rationalization. And yet even this cynical approach is a response to an intuitive appreciation that the awesome power which force can exhibit demands great circumspection in its application. For as Richard Falk has eloquently noted: "Among the most profound quests of a moral man is knowledge about the proper use of force in human relations, for force entails a wide range of claims over life and death. As such it expresses the limiting condition of mortality."¹³

THE CUSTOMARY INTERNATIONAL LAW OF FORCIBLE SELF-HELP

The General Nature of Forcible Self-Help. Forcible self-help as a means of coercion short of war is an ancient and obvious principle to which societal communities have had frequent recourse in the conduct of international relations. As long ago as 431 B.C. a treaty between the Mediterranean city-states of Oeantheia and Chalaeum attempted to regulate resort to this mode of conduct.¹⁴

Self-help is, of course, the creature of a decentralized society, be it national or international. In the course of history, resort to self-help has waxed and waned in relationship to the degree to which society was integrated or diffused. Thus the establishment of the Roman Empire seems to have eliminated practices of self-help in the territory under Roman rule; again after the dissolution of the Holy Roman Empire and the diminution of the power of the Pope self-help flourished.¹⁵ In more recent times, the full flowering of the nation-state system with its accent on sovereign independence created a condition in international relations in which measures of self-help were vital to the protection of state interests.

Across this historical spectrum, while the legitimacy of self-help was clearly

recognized so were its inherent dangers, and, accordingly, attempts to regulate the means and methods of self-help have been as consistently in evidence as the instances of a recourse to the device.¹⁶ Out of this effort has developed a body of international law which, with varying degrees of success, has categorized and defined legitimate measures of forcible self-help and prescribed rules for their utilization. Under the classical system of international law, these measures could be divided into three main legal categories: (a) self-defense, (b) reprisals, and (c) intervention.¹⁷

Self-Defense. A state's right of self-defense was considered paramount under customary international law. And yet a precise definition of this right is difficult to discover. In the 19th century, statesmen and writers frequently equated the right with a "right" of self-preservation.¹⁸ Yet it has been noted that such a definition is so extensive as to destroy the imperative character of any system of law by making all obligation to obey the law conditional. It has been suggested that rather than equating self-defense with self-preservation, it should be recognized that self-preservation for both states and individuals is an instinct rather than a legal right. While in a given situation the instinct might prevail over a legal duty not to do violence to others, a society espousing any kind of order ought not to admit that it is lawful for it to do so.¹⁹

The foregoing suggests that, in customary law, self-defense became recognized as a more limited right than that enunciated in the 19th century. This view is generally borne out by the practice of states. At least after 1920 legitimate self-defense typically appears in the context of the threat or use of force. It was considered as a reaction to imminent or actual violence rather than as justified by *any violation* of the legal rights of a state or of its subjects.²⁰

Probably the best statement of the conditions for the exercise of self-defense in customary international law is the definition formulated even earlier by Secretary of State Daniel Webster in the *Caroline* incident.²¹

In 1837 during an insurrection in Canada, the steamer *Caroline* was being used to transport to Canada men and materials for the rebels from American territory across the Niagara River. The Government of the United States was not preventing this activity, and, accordingly, a body of Canadian militia crossed the Niagara into U.S. territory and after a scuffle, in which some American citizens were killed, sent the *Caroline* over the falls. In the contention which followed, the issue was raised as to whether the conditions for the exercise of the right of self-defense had been met. Webster formulated a test which has since met with general acceptance. He noted that self-defense must arise out of an instant and overwhelming necessity, leaving no choice of means and no moment for deliberation. Additionally, 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."²²

The rule of the *Caroline* case was subjected to some criticism on grounds, *inter alia*, that the conditions it pronounced were somewhat vague. Be that as it may, the case is generally recognized as an authoritative pronouncement of customary international law,²³ and if state practice is taken together with the *Caroline* case, a reasonably clear basis for the exercise of the customary right of self-defense emerges:

- Its exercise must be in response to actual or threatened violence.
- The actual or threatened violence must be of such a nature as to create an instant and overwhelming necessity to respond, and
- The response taken must not be

excessive or unreasonable in relation to the violence being inflicted or threatened.

Reprisals. While self-defense in customary international law can be viewed as a reaction by states to violence being inflicted or threatened by another state, reprisal is a means of forcible self-help to redress wrongs already inflicted. Self-defense as a means of self-help is recognized in both international and domestic law. Reprisal is not. At least in modern times, reprisal is unique to the international arena. In domestic society central authority is frequently unavailable to forestall the immediate threat of force, and hence the doctrine of self-defense has prevailed; but in the absence of immediacy there are institutions and methods in modern domestic society to peacefully redress wrong, and hence retaliatory self-help is not endorsed.²⁴

The first legal doctrine to emerge was one involving *private* reprisals. In English practice acts of private reprisal first made a significant appearance in the late 13th century. They were characterized, typically, by the seizure of goods and property on the high seas. By the late 15th and the 16th centuries, reprisals by private seizure had become a generally recognized method of forcible self-help.²⁵

Private reprisals prevailed until the 18th century. During their existence they had certain unchanging characteristics. They were authorized by the sovereign of an individual against whom an alleged crime had been committed (generally robbery or failure to pay a debt) by a subject or agent of another state. Additionally, the legal right to pursue reprisals rested upon the pre-existence of a denial of justice. By this was meant that redress had been sought from the sovereign of the injuring party but to no avail. Finally, retaliation was to be had against the property and people of the offending state for an amount susceptible of expression in

pecuniary terms and equivalent to loss plus reasonable costs.²⁶

In general, the practice of private reprisals acquired a high degree of uniformity in international law. Regulation, both local and by treaty, carefully channelized the evolving doctrine into a fairly structured method of achieving redress of certain amounts under controlled conditions.²⁷ Thus the potential abuses of the system were kept reasonably in check. Occasionally, however, when reprisals were used for political purposes, as in wars of reprisal, they departed from established norms and became unpredictable. This unpredictability was the chief characteristic of *public* reprisals, which superseded private reprisals in the 18th century.

The distinguishing aspect of public reprisals was the authorization of seizures as a *punishment* of the offending state. They were carried out by states, as opposed to individuals, and although based on the notion of denial of justice for a wrong committed, the wrong did not have to be against any individual person nor were the seizures limited by any notions of *loss plus costs*.²⁸

Measures of reprisal commonly used included: (a) embargo of the offending state's ships found in the waters of the wronged state, (b) seizure of the injuring state's ships on the high seas, and (c) pacific blockade of the coasts of the offending state against the ships of that state.²⁹

In the *Naulilaa* arbitration of 1928³⁰ there appears the most authoritative statement of the customary law of reprisal. In October 1914, while Portugal was still neutral, a party from German Southwest Africa entered Portuguese African territory. A misunderstanding arose due to the incompetence of the German interpreter; shots were fired, and a German official and two of his officers were killed. By way of reprisal, the Governor of German Southwest Africa sent a punitive force into Portuguese territory. The force attacked

several frontier posts and drove out the garrison from Naulilaa. In the evacuated area a native uprising occurred, the suppression of which necessitated a considerable expedition by the Portuguese.

A special arbitral tribunal considered Germany's responsibility for all that had ensued. Germany contended that her action was a legitimate reprisal. The arbitrators rejected this plea. In so doing they noted:

Reprisals are acts of self-help by the injured State, acts in retaliation for acts contrary to international law on the part of the offending State, which have remained unredressed after a demand for amends. In consequence of such measures, the observance of this or that rule of international law is temporarily suspended in the relations between two States. They are limited by considerations of humanity and the rules of good faith, applicable in the relations between States. They are illegal unless they are based upon a previous act contrary to international law. They seek to impose on the offending State reparation for the offence, the return to legality and the avoidance of new offences.³¹

From this statement three conditions for the legitimacy of reprisals in customary law can be discerned:

- There must have been an illegal act on the part of the target state.
- Demand for redress must be made and redress not provided, and
- The measures taken must not be excessive, i.e., out of all proportion to the act which motivated them.

Quite obviously, the foregoing conditions did not provide a sure and certain blueprint for taking legitimate reprisals in any given case. There were questions as to whether demand for redress must always be made, even when it was obvious that none would be afforded and when effective retaliation made

time of the essence. Likewise, there were learned debates on what in any given context amounted to proportional response. Finally, there was contention as to what state acts were illegal in international law so as to permit taking reprisals in the first place.³² Nevertheless, as a general proposition, the rule of the Naulilaa incident fulfilled the task of enunciating concepts, with a consensus in state practice, which served to provide decisionmakers with useful standards against which to measure their policies and consequently preserve at least minimum conditions of order and restraint in the use of force.

Intervention. This final category of self-help is the most amorphous of the three, being more a method of applying force than a conceptual basis or justification for its use. The legitimacy of intervention is, by and large, to be found in other categories of self-help. Thus in customary law there were interventions in the affairs of other states by way of reprisal (as in the Naulilaa incident) or for purposes of self-defense (as in the *Caroline* case).

But interventions also occurred when neither of these bases was present. It has been noted that on many occasions in the 19th century the Great Powers intervened in the affairs of other states in order to impose the settlement of a question which threatened the peace of Europe. This type of intervention was a dictatorial interference with the independence of other states. It was only justified if it was authorized by treaty or was undertaken to protect nationals of the intervening state abroad. Beyond this intervention was based on sheer power rather than law.³³

Additionally, there was some support for the notion that states could intervene in a foreign state for humanitarian purposes, i.e., to prevent a state from committing atrocities against its own subjects, but such support was far from unanimous. The prevailing view was that

a state's treatment of its own subjects was a matter exclusively within its own jurisdiction.³⁴ Humanitarian intervention in this context cannot truly be conceded therefore as a part of positive customary international law. State practice would seem to have cynically relegated the application of this principle to those areas of the world considered un-Christian and uncivilized.³⁵

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This then was the state of the law of forcible self-help at the time of the creation of the League of Nations after World War I. Nor was the law significantly affected by the League. While this organization aspired to shift the competence to use force to a corporate body rather than leaving it with individual states, the focus of the League was on precluding war rather than forcible measures short of war, and consequently no prohibition against reprisals or interventions or limited actions in self-defense appear in the covenant.

It may well have been that resort to force, at least by way of intervention or reprisal, was inimical to the express obligation in the covenant to settle disputes by peaceful means. Indeed, distinguished authority has made this exact point.³⁶ But the fact remains that there were no express prohibitions in the covenant, and in the only case on this point submitted by the Council of the League to judicial review, forcible self-help was not prohibited.

The case involved a situation wherein Italy in 1923 bombarded and occupied the island of Corfu off the coast of Greece, claiming that the action was a legitimate reprisal for the murder of an Italian general by Greek extremists. The general had been acting as chairman of the Greek-Albanian boundary commission. The League Council presented to a committee of jurists the following question:

Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in those articles?

The jurists replied:

Coercive measures which are not intended to constitute acts of war *may or may not* be consistent with the provisions of Articles 12 to 15 of the Covenant and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures. [Emphasis supplied.]³⁷

The delphic nature of this reply provided solace for all concerned. It was interpreted both as prohibiting forcible reprisals and as not prohibiting them. Objectively, however, the most that can be said is that the customary law in regard to forcible self-help may have been stripped of some of its old security by the reply, but it was not changed. Accordingly, while incidents of forcible self-help diminished between World War I and World War II, the law was not significantly altered from 1900 until the creation of the U.N. Charter in June 1945.³⁸

THE U.N. CHARTER AND FORCIBLE SELF-HELP

Force Prohibited. While the League Covenant did not significantly affect the right of states to resort to forcible measures of self-help short of war, it did, as noted in previous discussion, signal a significant shift in the perspective of nations vis-a-vis the application

of force generally.³⁹ A central corporate authority was viewed as being better able to insure that the use of armed force was kept to a minimum. Unilateral state action was recognized as rarely based on real objectivity and frequently subject to national myopia and even personal whim.

The League of Nations, of course, died for a variety of reasons not pertinent to this essay, but the notion that competence to apply armed force should reside in a central authority did not die with it. The idea persisted and found expression again, after World War II, in the Charter of the United Nations.⁴⁰

The drafters of the U.N. Charter, unlike the drafters of the League Covenant, did not make the mistake of limiting their specific proscriptions to a condition of war. They chose rather to proscribe the threat or use of force. Accordingly, to the extent that proscriptions exist, forcible measures of self-help are not excepted, at least not by any narrow process of definition as was the case under the League Covenant.

Charter Proscriptions. Article 2, paragraph 3, of the charter provides that, "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered."⁴¹ Having made this positive pronouncement, paragraph 4 then states the negative corollary: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁴²

The third relevant provision with respect to the use of force by states is found in article 51 of the charter. This article prescribes the conditions for the use of force in self-defense. It provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁴³

Taken together, it can be argued that these three provisions present a clear and straightforward statement with respect to the use of armed force by states in international relations. Its use is prohibited except in the face of an armed attack, and then the use of force is permitted only until the Security Council acts.⁴⁴

The charter then goes on to establish in the Security Council the competence and capability to employ armed force to counteract threats to the peace, breaches of the peace, and acts of aggression. Article 42 provides that when economic, diplomatic, and other nonforcible sanctions fail, the Security Council "may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security."⁴⁵ Article 43 in turn provides that the member nations will make forces and facilities available to the Council for this purpose.⁴⁶ Article 47 even creates a Military Staff Committee to advise and assist the Security Council and be responsible under the Council for the strategic direction of armed forces placed at its disposal.

In chapter VIII the charter then

provides an alternate methodology for preserving the peace. It recognizes the existence of regional arrangements and agencies and notes that these agencies have competence to deal with "matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."⁴⁷ In addition, regional agencies may even take enforcement action, but not without authorization from the Security Council.⁴⁸

Thus the charter has set up a complete scheme for the transfer of the competence to apply armed force from individual states to a central supranational authority. When its provisions are considered *in vacuo*, there are few instances where forcible measures of self-help by individual states can be legitimated. Use of force is prohibited, therefore forcible reprisals and interventions are prohibited. Self-defense is permitted until the Council acts, but only in the face of an armed attack; although when this occurs the party attacked may be assisted by its allies, since collective self-defense is recognized.

In short, it has been advanced that the customary law in regard to forcible measures of self-help has been virtually abrogated by the treaty provisions of the charter.⁴⁹ This view finds support in a recent resolution of the U.N. General Assembly.

In 1970 the General Assembly received a report of a Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States. The report was approved and issued as a "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations."⁵⁰

The text of the declaration is quite lengthy, but a careful reading leads to the inescapable conclusion that the

General Assembly is unquestionably of the view that the unilateral use of force by states is limited, under the charter, to the narrowest possible circumstances. It is noted that the threat or use of force "constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues."⁵¹ There follows, by way of illustration, a variety of specific situations wherein states are charged not to resort to force. In the course of these illustrations specific reference is made to reprisals and intervention. The declaration notes: "States have a duty to refrain from acts of reprisal involving the use of force."⁵² With respect to intervention, it is provided:

No State or group of States has the right to intervene directly or indirectly for any reason whatever in the internal or external affairs of any other State. Consequently armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law.⁵³

Despite the pronouncements of the charter and the resolution of the General Assembly, however, if international law is properly defined as those rules for the conduct of interstate relations to which states bind themselves in their activities,⁵⁴ then the best that can be said for the charter provisions, in light of state practice since 1945, is that they represent what the world community believed the law ought to be rather than what it is. It is submitted that the members of the United Nations have agreed to be bound by the strict charter limitations only to the extent that the central authority is capable of filling the gap left by a state's renunciation of the right to use force in its own interest.⁵⁵ Beyond this, while the charter provisions remain as a moral proscription

against the use of force, they cannot be said, in actuality, to provide a real test of its legitimate application in any particular case.⁵⁶

We must look elsewhere to find what, if any, real tests exist for the legitimate use of forcible measures of self-help. It will be the purpose of the next section to attempt to elucidate what that test might be.

FORCIBLE SELF-HELP SINCE THE CHARTER

The Effect of the Charter. Although the charter does not provide a realistic statement of what forcible measures of self-help are presently legitimate, we cannot simply harken back to the customary rules of international law and proclaim that these still provide the appropriate measure, for the charter has left its mark. Although nations still employ force against each other, the *thou shalt not* philosophy of the charter has had the effect of negating, to some extent, general acceptance of the customary law rules. With this in mind it will be useful to reexamine the classical categories of forcible self-help in an effort to determine what state conduct is still generally considered legitimate.

Self-Defense. There is some justification for the contention that since 1945 the right of self-defense which has received general acceptance has a content identical with the right as expressed in article 51 of the U.N. Charter, i.e., that it is limited to being exercised only in the case of armed attack.⁵⁷ The terms of article 51, or very similar terms, have appeared in several important multilateral treaties and draft instruments. Article 3 of the Inter-American Treaty of Reciprocal Assistance of 1947 provided for individual or collective self-defense in case of an *armed attack*.⁵⁸ Again, in the Japanese Peace Treaty, article 51 of the U.N. Charter is referred to expressly.⁵⁹ Also, the Draft Declara-

tion on Rights and Duties of States adopted by the International Law Commission in 1949 provided in article 12 that every state has the right of individual or collective self-defense against *armed attack*.⁶⁰

Authoritative publicists also have expressed the view that the right of self-defense is thus narrowly limited. They have argued that despite the problems inherent in the restricted view of this right, to permit any more latitude than is contained in the wording of article 51 would be to open the door to so many abuses as to impose an unacceptable strain on the requirement of international order.⁶¹

At the other end of the spectrum there is, however, contention that forcible measures may be legitimately taken in self-defense whenever national security is threatened, whether it be by specific armed attack, threat of attack, or any other direct or indirect aggression. In this connection Israel has frequently proclaimed that her entire posture is one of self-defense and that all forcible actions taken are taken on that basis. In 1966 before the Security Council, the Israeli Representative noted that: "Whatever we do, whatever our government decides to do, it is done in order to defend and protect our national independence and our national security."⁶² Again in a Security Council debate in March 1969 it was stated by the Israeli Representative: "Yesterday's Israeli action was an act of self-defense. . . . Israel has been in a state of self-defense since 1948. It will so remain until the Arab Governments agree to end the war waged against Israel and conclude peace."⁶³

Also, in the recent India-Pakistan conflict one of the claims made by India was that her incursion into East Pakistan was in self-defense. Yet it was obvious that no attack against Indian territory was occurring nor was one threatened. In her view, her security was imperiled by the conditions existing in

East Pakistan and particularly by the great influx of Bengali refugees into Indian territory which was depleting her slender food reserves.⁶⁴

Additionally, certain publicists have been interpreted as supporting this broad view of the right of self-defense. In contending that all or at least some of a state's "legal rights" may be defended by force, it has been argued, rightly or wrongly, that these writers are really once again equating the right of self-defense with the *right* of self-preservation.

Security Council response to claims that various resorts to force have been in self-defense has not been particularly helpful in carving out currently acceptable conditions for the exercise of this right. It would seem, however, that the Council, in general, adopts a restrictive view.⁶⁵ In numerous cases it has denounced Israeli action taken ostensibly in self-defense but where no specific attack was occurring.⁶⁶ Likewise the Council condemned the actions of the British against Yemen in 1964. In that instance the British had carried out air attacks against Yemen after Yemen had made a series of attacks on the South Arabian Federation. The British argued before the Security Council that its actions had been in self-defense, but the Council declined to accept this plea and condemned the British action as "incompatible with the purposes and principles of the United Nations."⁶⁷

In between the two extreme positions discussed above, argument has raged pro and con across the entire spectrum of possible limitations on the right of self-defense, and it is exceedingly difficult to pick a point and say "here is where the line can safely be drawn." It is submitted, however, that wherever the line should be drawn a considerable body of opinion would argue that the test of the *Caroline* case still presents a generally acceptable set of limiting conditions for exercising the right of self-defense.⁶⁸

Under this test a nation is permitted to use force in self-defense in the face of either an *actual* armed attack or in *anticipation* of such an attack, provided there is an instant and overwhelming necessity to respond. The argument in support of at least this much self-defense takes the position that it is generally consistent with state practice and that to limit self-defense short of the *anticipatory* phase at this time is to create a condition which is both inadequate and totally unrealistic.

The proponents of this position also argue that article 51 of the charter, properly interpreted, permits anticipatory self-defense. Article 51 states that nothing shall impair the "*inherent right* of individual or collective self-defense" [emphasis supplied], and, the argument goes, since the inherent right always included anticipatory self-defense, it remains legitimate under the charter. In answer to the contention that the phrase "if an armed attack occurs" limits the right, it is argued that this phrase is merely descriptive of a particular category of self-defense; that it was desired to underline that the right of individual, and more especially of collective, self-defense had not been taken away in the process of conferring power on the Security Council to take preventive and enforcement measures for the maintenance of peace.⁶⁹

But whether article 51 permits anticipatory self-defense or not, states have consistently acted on this basis. Moreover, to limit self-defense to an armed attack scenario seriously underestimates the potential of contemporary weapons systems⁷⁰ and also discounts even the possibility that nonmilitary aggression could achieve a level of coercion comparable in intensity and proportion to an armed attack.⁷¹

Reprisals. Of the three categories of forcible self-help under discussion, the law of reprisals has probably been most severely limited since the adoption of

the U.N. Charter. It has been widely conceded that this method of self-help is now generally unacceptable.⁷² Thus states have rarely attempted to justify their use of force on the grounds of reprisal. In the Gulf of Tonkin incident the United States argued that its actions were taken in self-defense.⁷³ This was also the contention of the British in the Yemen raid. Also, Israel has argued that her forays against the Arabs were actions in self-defense, although there is little doubt that in the precharter era many of them would have been characterized as simply reprisal actions.

Notwithstanding that reprisal is not generally accepted as a legitimate basis for employing forcible measures of self-help, there is some indication that retaliatory action can still be legitimate under certain circumstances. One illustration is to be found in the Corfu Channel case.⁷⁴

In May 1946 Albanian shore batteries fired without warning on two British cruisers making passage through Albanian territorial waters in the North Corfu Strait. The United Kingdom, claiming a right of innocent passage, subsequently (in October of the same year) sent two British cruisers and two destroyers through the strait to assert this right. The crews were at action stations with instructions to fire back if attacked. The two destroyers were mined with a heavy loss of life. Thereafter, the British sent a large minesweeping force into Albanian waters and found a number of newly laid mines.

Subsequently, the case was referred to the International Court of Justice. Albania claimed *inter alia* that the British had violated her sovereignty in steaming through the strait in October. The court on this issue held for the United Kingdom. It stated that the British mission was designed to affirm a right which had been unjustly denied, and having carried out the action in a manner consistent with the requirements of international law, the legality

of the measure taken could not be disputed.

It has been argued that this decision suggests the proposition that what is in reality a reprisal action (i.e., a non-innocent passage of an armed force through territorial waters) may be legitimate if its purpose is to affirm a legal right against an expected unlawful attempt to prevent its exercise.⁷⁵ It appears clear from the Court's condemnation of the British for violating Albanian territorial waters to search for mines after the destroyers were sunk, that retaliation simply to obtain redress for rights already violated cannot be condoned.⁷⁶ Nevertheless, the case would seem to imply that, at least exceptionally, a state may be legitimately able to use force in other than self-defense and without reference to the United Nations in order to secure the exercise of certain legal rights.

Intervention. In discussing the customary international law with regard to intervention, it was noted that in many cases this measure of self-help was legitimate not by virtue of any intrinsic justification, but rather because it was simply a method of effecting a legitimate reprisal or of acting in self-defense. Therefore, insofar as interventions are premised on these justifications, they are of necessity limited since the charter in the same way and to the same extent that reprisals and self-defense have been limited.

Beyond this, while states have made extravagant claims for the legitimacy of intervention utilizing a variety of justifications, it would seem that there are only three circumstances where this type of activity has been generally accepted: To protect nationals where intervention is requested in the face of an external threat and in certain special cases.⁷⁷

The U.S. intervention in the Dominican Republic in 1965 is illustrative of the first of these circumstances. In that

case, during the course of a rebellion, the Dominican authorities stated that they "could no longer control the situation, that American and foreign lives were in desperate danger and that outside forces were required."⁷⁸ In response to an urgent appeal from the U.S. Ambassador, 400 U.S. Marines were put ashore, in the words of President Johnson "... in order to give protection to hundreds of Americans who are still in the Dominican Republic and to escort them safely back to this country."⁷⁹

The United States was subject to severe criticism for retaining its troops in the Dominican Republic long after any necessity existed for the protection of nationals, but its initial actions were considered justified by many as a matter of urgent necessity in order to protect the lives of U.S. nationals.⁸⁰ Protection of nationals was one of the legitimate grounds for intervention in customary international law. It is submitted, notwithstanding the sentiments of the General Assembly that states have no "right to intervene directly or indirectly for any reason whatever in the internal or external affairs of any other state,"⁸¹ that intervention for this purpose in the future would be hard to fault.⁸²

The United States and British actions in Lebanon and Jordan provide illustrations of the second circumstance in which intervention would probably be generally acceptable. In both cases the respective governments had requested United States and British help to assist in repelling attempts at subversion directed from a neighboring state. While the United Nations was uneasy about the activity, neither the United States nor the United Kingdom was condemned for its actions. By way of contrast, the Soviet Union was soundly condemned for its armed intervention in Hungary in 1956 for the purpose of suppressing a popular internal uprising.⁸³

It would seem, therefore, that where the threat is external and a state requests assistance a third state may legitimately intervene in its behalf.⁸⁴ The question of whether the threat is external, however, can prove in itself to be highly controversial. Thus there was considerable, albeit unjustified, criticism of the U.S. intervention in Vietnam on the grounds that, like Hungary, Vietnam was a case of popular internal uprising rather than external threat.⁸⁵ Even this criticism implies, however, that if in fact the threat is external, intervention may be legitimately undertaken.

The third type of circumstance wherein it would seem states could legitimately intervene within the territory of another state are the special cases of necessity.

A serious danger to the territory of a state may arise either as a result of a natural catastrophe in another state or as a result of the other state deliberately or negligently employing its natural resources to the detriment of the intervening state.⁸⁶ For example, the reservoirs of State A on the upper reaches of a river might be damaged by natural forces posing a threat of flooding to State B on the lower reaches. Again, State A might negligently or wantonly flood the territory of State B. In either case, even publicists who take a limited view of a state's right to use force have conceded that intervention would be acceptable provided the injuring state has not provided a timely remedy and the Security Council is immediately advised.⁸⁷

In the foregoing discussion the attempt has been made to present a conservative estimate of the extent to which classic measures of forcible self-help are still generally acceptable in the world community. This estimate, however, hardly represents the full spectrum of situations in which states have felt required to use forcible self-help. Accordingly, it becomes necessary for

decisionmakers to know what, if any, *general* criteria exist which can be used to evaluate the legitimacy of the use of force in the many instances which do not fit neatly into one of the established patterns.

SUGGESTIONS FOR DECISIONMAKERS

The Falk Criteria. In light of the reaction of the Security Council to specific claims and the General Assembly's Declaration on Principles of International Law and in view of the general thrust of most authoritative commentary, it is doubtful that state resort to force will be endorsed in any situation other than those discussed previously. This is not to say, however, that all other resorts to force will be condemned. On the contrary, there is substantial evidence to suggest that state resort to force in a variety of circumstances, if not applauded, will at least not be indicted.⁸⁸ The question for consideration then becomes, under what specific conditions can resort to force by states be rendered tolerable?

The one word answer to this question is "reasonableness." But it is not terribly helpful for decisionmakers to be told that their conduct will be tolerated if reasonable. The term is intuitively acceptable as a measure of conduct, but it is also extremely vague with reference to any given circumstances. It becomes necessary, therefore, to determine what are the criteria for reasonable state conduct with respect to the use of force.

Considerable work has been done by legal scholars in an effort to delineate these criteria. One effort in particular is worthy of evaluation here. Richard A. Falk has developed a number of criteria which would seem to be relevant.⁸⁹ They provide that the burden of persuasion to legitimate the use of force is on the user; that it must connect its use of force to the protection of territorial,

national, or political integrity; that a substantial link must exist between the provocation and the claim of retaliation; that a diligent effort must be made to seek pacific settlement, including recourse to international organizations; that the use of force must be proportional to the provocation and calculated to avoid its repetition; that the force must be directed primarily at military targets; that the user should make a prompt explanation of its conduct before the international community; that the use of force must clearly demonstrate to the target government what constituted the provocation; that the user cannot achieve its purpose by acting within its own domain; that a search for pacific settlement should be made, recognizing the interests of the target state; and that a disposition to respect the will of the international community must be evident.

These criteria in general furnish an excellent summary of practical conditions for legitimately employing forcible self-help. Some criticism is indicated however. The fourth criterion requires that diligent efforts be made initially to obtain satisfaction by pacific means. It is submitted that this criterion should explicitly state that peaceful solution must be attempted, if possible. Without specifically indicating this, the impression is left that peaceful settlement must always be attempted. In given circumstances such a requirement would be completely unrealistic.

A more serious criticism of Falk's effort, however, arises from a consideration of his second criterion. The use of force is limited only by the requirement that there be a connection between it and the protection of territorial, national, or political integrity. It is submitted that requiring nothing more than a connection raises the distinct possibility that force could be used in such a way as to be indistinguishable from the polar position of completely uninhibited behavior.⁹⁰ There is always

some link which can be established between a desired use of force and the broad concepts of national, political, and territorial integrity. It is necessary that decisionmakers operate under more substantial restraints. Accordingly, it is suggested that resort to force must presuppose the existence of an imminent and significant threat to the continued existence of a nation's political independence and territorial integrity. In a word, there must be a clear and present danger that unless forcible action is taken, the independence or integrity of the acting state will be seriously compromised.

With these modifications, it is submitted that Falk has enunciated a useful framework within which decisionmakers can both evaluate a prospective use of force and develop methodologies for its application. It has been argued that this approach completely ignores the prescriptions of the charter law,⁹¹ but this contention, however, ignores the fact that international law, to be law, requires consensus and that the only consensus with respect to the charter provisions that can be observed from state pronouncement and practice is that they represent aspirational principles rather than realistic norms by which states are presently willing to abide.

Saying this does not derogate the U.N. Charter provisions. They are useful as a fundamental restraint in the sense that all applications of force start from the philosophical premise that they are suspect. However, if it is insisted that articles 2(3), 2(4), and 51 represent the "whole law and the prophets" with respect to the use of force, the result could be complete lack of inhibition on the part of states and total abrogation of even minimum conditions of public order. Insisting on everything would probably result in achieving precisely nothing.

One question remains: Granted that Falk's criteria, as modified, appear to

provide a framework for evaluating and managing the use of force, are they in fact illustrative of actual state practice which has been accepted by the world community? Before turning to a consideration of this issue it will be helpful to summarize and reorder the criteria.

The use of force by states may be acceptable provided:

- That acts of provocation by the target state have raised an imminent and significant threat to the continued existence of a nation's political independence and/or territorial integrity.

- That, if possible, a diligent effort has been made to obtain satisfaction by pacific means.

- That recourse to international organizations is had as practicable.

- That a state accepts the burden of persuasion and makes a prompt explanation of its conduct before the relevant organ of community review, showing a disposition to accord respect to its will.

- That the acting state's purpose cannot be achieved by acting within its own territory.

- That the use of force is proportional to the provocation and directed against military and paramilitary targets and clearly indicates the contours of the unacceptable provocation.

- That the user of force continues to seek a pacific settlement of the underlying dispute on reasonable terms.

The Cuban Quarantine. The interdiction by the United States of the introduction of Soviet nuclear missiles into Cuba provides an outstanding example of a state using coercion in a manner generally acceptable to a world community notwithstanding that its use did not properly qualify as either self-defense, reprisal, or intervention.⁹²

It is true that the U.S. actions have subsequently been criticized by some publicists.⁹³ However, in the world community, objection to the U.S. endeavor at the time was minimal—at least in the states beyond the sphere of

Soviet influence.⁹⁴ Moreover, the United Nations itself in no way condemned the United States and many states specifically affirmed the quarantine.⁹⁵

With Falk's modified criteria in mind, it will be useful to examine the U.S. action.

At the outset the United States amassed a body of incontrovertible evidence that the Soviets were in the process of establishing offensive missile bases in Cuba. The missiles were capable of massive destruction throughout the Western Hemisphere. It was evident that the Soviet effort was a deliberate attempt to significantly alter the status quo and could have serious consequences for national and hemispheric security.⁹⁶

With the evidence in hand and in the face of a bland assurance from the Soviet Union that they would never place offensive weapons in Cuba, the United States developed a carefully orchestrated response.⁹⁷ First it was determined that the response would take the form of a naval "quarantine" rather than a military attack. The strongest argument against armed attack was that it would erode, if not destroy, the moral position of the United States throughout the world.⁹⁸ The quarantine would have some of the incidents of a blockade⁹⁹ but would be limited initially to interdicting the shipment of offensive military equipment to Cuba. It was hoped that this limited coercive force would produce the desired results.¹⁰⁰

Having decided on a course of action, the United States then sought the support of the Organization of American States. The OAS was apprised of the circumstances of the threat and encouraged to support and cooperate in the U.S. action. The response was a unanimous affirmation of the U.S. position, and the OAS resolved to take all measures necessary to terminate the

threat to the peace and security of the hemisphere.¹⁰¹

The OAS resolution was immediately conveyed to the United Nations. The President of the United States almost simultaneously issued the Quarantine Proclamation and indicated that the quarantine would go into effect on the following day. This delay was provided, *inter alia*, to allow some time for the Soviets to divert vessels already at sea which were carrying prohibited cargoes. The United States also requested an urgent meeting of the U.N. Security Council.¹⁰²

The backing of world powers was solicited and obtained. The OAS of course approved the effort, and the British, French, and West Germans announced their support. While Soviet satellite states joined with the Kremlin in denouncing the U.S. action as piracy, world opinion generally ratified the U.S. stand.¹⁰³

The quarantine was prosecuted in a forceful but carefully controlled manner. The Navy deployed 180 ships into the Caribbean. The Strategic Air Command was dispersed to civilian landing fields around the country to lessen its vulnerability in case of attack. Missile crews were placed on maximum alert, and troops were moved into the southeastern part of the United States.¹⁰⁴ Warnings were broadcast at regular intervals by the U.S. Navy. These indicated that the Windward Passage, Yucatan Channel, and Florida Straits might become dangerous waters.¹⁰⁵

The United States also announced a "Clearcert" plan. Shippers could obtain, in advance, a clearance certificate to send cargoes through the quarantine area. The purpose of this measure was to minimize interference with non-offensive shipping. Concurrently, additional pressures were developed. Major maritime insurers ceased handling policies for the Cuban trade. Also, Soviet shipments by air were curtailed when

nations refused to grant refueling privileges.¹⁰⁶

The interception of vessels by the Navy was to be handled in a most circumspect manner. If a vessel refused to stop, the Navy was to shoot at its rudders and propellers in an effort to disable the vessel but avoid any loss of life or the sinking of the ship.¹⁰⁷ The first vessel stopped and boarded was personally selected by the President. It was the S.S. *Marula*, Panamanian owned and under Soviet charter. The United States was demonstrating to the Soviets that it was going to enforce the quarantine, and yet because *Marula* was not Soviet owned the boarding did not represent a direct affront requiring a response.¹⁰⁸

Along with the foregoing measures, the United States maintained constant communication both with Soviet diplomats and directly with Nikita Khrushchev. The reason for the American action, its limits, and the conditions for its termination were made crystal clear. Efforts were also continued in the United Nations. Every opportunity was given the Russians to find a peaceful solution which would neither diminish their national security nor be a public humiliation.¹⁰⁹

As is well known, the interdiction was successful. The missiles were removed and the quarantine was terminated. A serious threat to the peace of the Western Hemisphere had been removed by the collective application of force by the United States and the other nations of the regional alliance in such a manner as to be acceptable to world opinion.

Evaluation. Falk's modified criteria reflect almost precisely the methodology employed by the United States in the Cuban incident. Objective evidence of provocative acts was amassed, and it became clear that the acts constituted a significant threat both to the political independence and territorial integrity of

the United States.¹¹⁰ Efforts were made to peacefully resolve the matter with the Russians, but these proved unavailing in the face of their bald assertions that they were not introducing missiles or other offensive weapons into Cuba.¹¹¹ Having determined to use force, the United States obtained the cooperation of its regional organization. Moreover, both the United States and the OAS immediately informed the United Nations, accepted the burden of persuasion, and clearly indicated a disposition to accord respect to its will.¹¹²

Obviously the United States could not achieve its purpose simply by acting within its own territory, but its interference was not within the territory of any other nation but rather on the high seas. Moreover, the response was carefully circumscribed to meet the concept of proportionality and clearly indicated that the missile buildup constituted the unacceptable provocation.¹¹³

In this connection, the contours of the provocation were carefully explained to the Soviets. In a letter to Khrushchev immediately after the quarantine had been imposed, President Kennedy stated:

In early September I indicated very plainly that the United States would regard any shipment of offensive weapons as presenting the gravest of issues. After that time, this Government received the most explicit assurance from your Government and its representatives, both publicly and privately that no offensive weapons were being sent to Cuba. . . . In reliance on these solemn assurances I urged restraint upon those in this country who were urging action in this matter at that time. And then I learned beyond doubt what you have not denied—namely that all those public assurances were false and that your military people had set out re-

cently to establish a set of missile bases in Cuba. . . . These activities in Cuba required the responses I have announced.

I repeat my regret that these events should cause a deterioration in our relations. I hope that your Government will take the necessary action to permit a restoration of the earlier situation.¹¹⁴

Finally, throughout the course of the quarantine the United States continued its efforts to achieve a peaceful solution which would be sensitive to the needs of its adversary.¹¹⁵ The emphasis was on a settlement which would enable the Soviets to retreat with grace. This finally was achieved by accepting the Soviets' proposal that they would withdraw the missiles if we would guarantee not to invade Cuba.¹¹⁶

The Falk modified criteria, then, represent not just a theoretical offering, but a real and substantial framework for decisionmaking, one which has been employed successfully and generally accepted by the world community. Conversely, where these criteria have been largely ignored, the use of force by states has been subject to heavy criticism. Witness the condemnation of Russia for her intervention in Czechoslovakia,¹¹⁷ the criticism of the U.S. retention of forces in the Dominican Republic, and most recently the Indian invasion of East Pakistan and the overwhelming number of Members of the United Nations who voted that she should withdraw.¹¹⁸

CONCLUSIONS

As indicated at the outset, the effort of this essay has been directed toward those charged with the awesome responsibility of managing the use of armed force. The need for restraint has been emphasized, and yet recognition has been given to the demonstrable fact that in many situations if a state is going to preserve its national interests, it must

use force and do so unilaterally or in concert with its allies, but without reliance on the generally ineffective competence of the United Nations.

Accordingly, in fulfillment of what is considered the legitimate legal function of enunciating rules of behavior having a consensual basis, some acceptable remnants of the specific customary laws of self-help have been discussed and some general criteria for a rational employment of armed force have been evaluated. It is submitted that these rules and criteria strike a favorable balance between the need for minimum public order and the requirement for national security and therefore have found general acceptance in international relations.

Quite obviously, however, they serve neither public order nor national security to the extent that many might wish. Nationalists will perceive a need for fewer legal inhibitions, and internationalists will generally demand greater restraints on national power. Interestingly enough, upon occasion the converse will also be true. Situations have arisen, and will continue to arise, where considerations of humanity will lead many to demand forcible and even unilateral intervention in the affairs of a state, while national self-interest will perceive no necessity for action and hence employ the argument that to intervene would be unjustifiable.

It is this diversity of perception both in general and in specific situational hypotheses that makes any attempt to prescribe rules of behavior hazardous at best. Is it right or moral or just that the repression in East Pakistan or the genocide in Biafra should be permitted to continue simply because it is an internal affair and the United Nations is powerless to act? Is it reasonable that a state should stand by and turn the other cheek to provocateurs bent on diluting its national security or threatening its national interests as in the Dominican

Republic? Or, for that matter, Hungary and Czechoslovakia?

The provisions of the U.N. Charter would seem to answer with a resounding "yes," if the alternative is the use of armed force, and it is doubtful whether even the more liberal criteria which have been enunciated in this essay would admit to resort to force under these circumstances. By way of conclusion, it might be useful therefore to reflect for a moment on why this must be so.

Particularly for the powerful nations of the world, the use of force, unrestrained by law or regulation, can become addictive as a method of settling disputes. It is simpler and much quicker than the frequently tortuous routes of negotiation and arbitration, and in the short run, it is more productive. For these reasons the use of force, while initially resorted to for only the most legitimate of reasons, can rather quickly become the primary option for the resolution of any difficulty, whether it be a reasonable option or not. The resultant disorder, even putting aside the current possibility of escalation to nuclear catastrophe, does not, it is submitted, in the long run confer a net benefit on the user of force. The discord and animosity created by the aggressive behavior cannot help but prejudice a state's international relations and long-range interests. Restraint must therefore be exercised, if only for pragmatic reasons.

Furthermore, restraint must be exercised in the face of, at least from the perspective of the prospective user of force, rather severe provocations. Since it is impossible to draw lines which will clearly separate reasonable and unreasonable resort to force in all situations, the law must err on one side or the other. Here considerations of morality should come into play. Since the use of armed force necessarily entails the possibility of loss of life, it is submitted that the rule of law and the conduct of nations should clearly sup-

port the view "when in doubt, don't." Stated more precisely, force should be resorted to only when it is clearly reasonable, and even then the quantum should be strictly proportionate to the need.

In a way, it is strange that nations have been so resistant to this conceptualization. Nations are, after all, made up of individuals, and these individuals have extensive domestic conditioning in a rule of law which, by and large, imposes severe limitations on individual resort to force. True, there are well-known and enforceable sanctions for domestic violations, but it is clearly evident that the majority of the people obey the law out of a conviction that it represents an appropriate course of conduct rather than from fear of retribution. And yet when action is translated to the international scene, this conditioning has tended to evaporate in favor of the notion of sovereign independence knowing no law other than national interest.

Merely stating this paradox, however, suggests a solution. It is submitted that the bulwark of domestic adherence to the rule of law is the sense of community that a nation has developed over time. From common history and language and experience there has evolved a sense of unity which supports accommodation to the needs of others and restraint in the expression of individual preferences. Conversely, although the U.N. Charter reflects a legal posture which presupposes the existence of such a sense of community among nations, it, in fact, does not as yet exist.

With respect to the use of force, the embryonic international sense of community only admits of the restraints suggested in this essay, and then not always. Beyond this, regulation must proceed at a measured pace, stride for stride with a developing sense of international community. Decisionmakers can hardly be expected to assume a condition of international accom-

modation which does not exist, but if resort to force is ever to be eliminated, they must always be actively aware of the degree of consensus which has been achieved. And as

progress is made toward more effective organization and centralization in the world arena, the hope that may be held out is that

the set of policies embodying the restraint of coercion and the promotion of humanitarianism may rise in the balance and that the scope of permissible coercion may gradually be attenuated and more exacting standards of humanity formulated and applied.¹¹⁹

FOOTNOTES

1. The Hague and Geneva Conventions governing land warfare are illustrative: Hague Convention No. IV of 1907 *Respecting the Laws and Customs of War on Land* and the annex thereto; Hague Convention No. V of 1907 *Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*; the Geneva Conventions of 1949 concerning the amelioration of the condition of the sick and wounded, the treatment of prisoners of war, and the protection of civilian persons in time of war. Copies of these documents are contained in U.S. Dept. of the Army, *Treaties Governing Land Warfare* Pamphlet no. 21-1 (Washington: U.S. Govt. Print. Off., 1956).

2. See Richard A. Falk, "The Beirut Raid and the International Law of Retaliation," *American Journal of International Law*, July 1969, p. 430.

3. The problem of defining aggression has been a continuing one for the United Nations since its inception; to date no success has been achieved. For an extended discussion of the subject see generally, Julius Stone, *Aggression and World Order* (Berkeley: University of California Press, 1958). See also, Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven: Yale University Press, 1967), p. 61 *et seq.*

4. Both Israel and the Arab States have attempted to justify their resorts to armed force on the basis of art. 51 of the U.N. Charter which deals with permissible self-defense. For an extensive discussion of these efforts see Derek Bowett, "Reprisals Involving Recourse to Armed Force," *American Journal of International Law*, January 1972, p. 1.

5. A classic example of this can be found in the argumentation with respect to the competence of regional organizations to use force without the prior authorization of the Security Council. It has been contended that art. 53 of the charter prohibits enforcement action without Security Council authorization but not preventive action. For an excellent discussion of the argumentation, including illustrative examples, see William O. Miller, "Collective Intervention and the Law of the Charter," Unpublished Thesis, U.S. Naval War College, Newport, R.I.: 1969, p. 31 *et seq.*

6. See Bowett.

7. The only decision of the International Court of Justice to date on the issue of the legitimate use of forcible self-help is the Corfu Channel case, *The Hague, International Court of Justice, Reports of Judgments, Advisory Opinions and Orders* (Leyden: Sijthoff, 1949), p. 4.

8. See Stanley Hoffman, "International Law and the Control of Force," Karl W. Deutsch and Stanley Hoffman, eds., *The Relevance of International Law* (Cambridge, Mass.: Schenkman, 1968), p. 35.

9. In this connection, former Secretary of State Dean Acheson, himself a lawyer, made the following remarks in discussing the Cuban quarantine:

I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty. . . . No law can destroy the state creating the law. The survival of states is not a matter of law.

Remarks by the Honorable Dean Acheson, *American Society of International Law, Proceedings of the American Society of International Law at Its Fifty-Seventh Annual Meeting* (Washington: 1963), p. 14.

10. Hoffman, p. 44.

11. See McDougal and Feliciano; Richard A. Falk, "The Legal Control of Force in the International Community," Saul H. Mendlovitz, ed., *Legal and Political Problems of World Order* (New York: Fund for Education Concerning World Peace Through World Law, 1962), p. 143.

12. John Norton Moore makes the point that "Efforts to overuse international law, whether by way of support or criticism of rational action, serve only to obscure the vital role that an international legal perspective should play." John N. Moore, "Legal Dimensions of the Decision to Intercede in Cambodia," *American Journal of International Law*, January 1971, p. 38.

13. Falk, "Legal Control of Force," p. 143.

14. This treaty provided for the total discontinuance of reprisal seizures on land and in seaports, confined the practice to the open seas, and called for the payment of a fine in the event of unlawful seizures. See, Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (London: Macmillan, 1911), v. II, p. 70, 71.

15. Evelyn S. Colbert, *Retaliation in International Law* (New York: King's Crown Press, 1948), p. 11.

16. Phillipson, v. II, p. 364.

17. J.L. Brierly, *The Law of Nations*, 6th ed. (New York and Oxford: Oxford University Press, 1962), p. 398. In categorizing measures of self-help, "retorsion" is frequently included as a fourth category. This is a measure, however, which involves *legal* action by states and does not generally involve the use of armed force. Since the present essay is concerned with the use of armed force which is not legal *per se*, a discussion of retorsion has not been included.

18. This confusion is epitomized by Westlake who, after remarking that the right of self-preservation is merely that of self-defense went on to state:

A State may defend itself, by preventive means if in its conscientious judgment necessary, against attack by another state, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended. . . . In attack we include all violations of the legal rights of itself or of its subjects, whether by the offending state or by its subjects without due repression by it, or ample compensation when the nature of the case admits compensation.

John Westlake, *International Law*, 1st ed. (Cambridge: University Press, 1904), v. I, p. 299; see also William E. Hall, *A Treatise on International Law*, 8th ed. (Oxford: Clarendon Press, 1924), p. 322.

19. Brierly, p. 405.

20. See Ian Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), p. 231 *et seq.*

21. This matter was not resolved judicially but precipitated diplomatic correspondence in the course of which Webster formulated his definition in a letter of 24 April 1841 to the British Ambassador in Washington, Fox, later incorporated in a note to Lord Ashburton of 27 July 1842. Cited in Robert Y. Jennings, "The Caroline and-McLeod Cases," *American Journal of International Law*, January 1938, p. 89.

22. Jennings, p. 89.

23. For a critique of the Caroline test, see Robert W. Tucker, "Legal Restraints on Coercion," *The United States in a Disarmed World* (Baltimore: Johns Hopkins Press, 1966), p. 148, n. 46.

24. While it is true that forcible self-help is still not *endorsed*, domestic society in the face of the recent efforts of minority groups and the youth movement may be coming to tolerate a greater degree of forcible self-help than ever before.

25. Colbert, p. 15.

26. *Ibid.*

27. *Ibid.*, p. 27.

28. *Ibid.*, p. 54.

29. Brierly, p. 399. Cf. Lassa F.L. Oppenheim, *International Law*, 7th ed., H. Lauterpacht, ed. (London: Longmans, Green, 1952), v. II, p. 132 *et seq.*

30. 8 *Recueil des Decisions des Tribunaux Arbitraux Mixtes*, p. 409, 422-425.

31. *Ibid.*

32. Oppenheim, p. 141, n. 1; see also Brownlie, p. 220.

33. Brierly, p. 403.

34. *Ibid.*

35. Humanitarian interventions by European powers occurred several times in the Turkish Empire during the 19th century. See Brierly, p. 403.

36. *Ibid.*, p. 412.

37. League of Nations, *League of Nations Official Journal* 1924, p. 524.

38. The Second Hague Convention of 1907 prohibited the employment of force for the recovery of contract debts. But this prohibition was itself limited. It did not apply when the debtor state refused or neglected to reply to an offer of arbitration or after accepting the offer

rendered settlement of the *compromis* impossible or, after the arbitration, failed to submit to the award.

39. See Brierly, p. 408.

40. The concept that the unilateral use of force should be foresworn also became embodied in the Pact of Paris of 1928—the Briand-Kellogg Pact, signed by a great many of the members of the international community. This pact did not perish with the League but remains in effect today, being fully consistent with the provisions of the U.N. Charter. War as a solution for international controversies and as an instrument of national policy was condemned. Peaceful settlement of all disputes was required. Recourse to war in self-defense, however, was not forbidden. On 20 June 1928 Kellogg stated, as the position of the United States, that “. . . the right of self-defense is inherent in every sovereign state and implicit in every treaty.” U.S. Dept. of State, *Foreign Relations of the United States, 1928* (Washington: U.S. Govt. Print. Off., 1942), v. I, p. 91.

41. United Nations, *Yearbook of the United Nations 1968* (New York: Office of Public Information, United Nations), v. XXII, app. II.

42. *Ibid.*

43. *Ibid.*

44. See Oppenheim, p. 152 *et seq.*

45. United Nations, *Yearbook 1968*.

46. *Ibid.*

47. *Ibid.*, art. 52, para. 1.

48. *Ibid.*, art. 53, para. 1.

49. See Brownlie, p. 431 *et seq.*

50. United Nations, General Assembly, *Official Records, Resolution no. 2625 (XXV)*, 25th sess., supp. 28, A8028 (New York: 1971), p. 121 *et seq.*

51. *Ibid.*, p. 122.

52. *Ibid.*

53. *Ibid.*, p. 123.

54. See Brierly, p. 1.

55. See Stone, p. 96.

56. See McDougal and Feliciano, p. 5. Their entire thesis argues that the U.N. Charter does not tell us what is lawful in any given situation. This is arrived at by measuring actions against certain realistic judgmental criteria. In this connection see particularly p. 63 of their work.

57. See Brownlie, p. 280.

58. United Nations, “Inter-American Treaty of Reciprocal Assistance and Final Act of the Inter-American Conference for the Maintenance of Continental Peace and Security,” *Treaty Series* (New York: 1948), v. XXI, no. 324, p. 77.

59. United Nations, “Treaty of Peace with Japan,” *Treaty Series* (New York: 1952), v. CXXXVI, no. 1832, art. 5, p. 46.

60. United Nations, General Assembly, *Official Records, Report of the International Law Commission*, 4th sess. supp. no. 10 (A/925) (Lake Success, N.Y.: 1949). See also, United Nations, “Treaty of Alliance, United Kingdom and Jordan,” *Treaty Series* (New York: 1947), v. VI, no. 74, art. 5, p. 145; “Treaty of Alliance and Mutual Assistance, United Kingdom and France,” *Treaty Series* (New York: 1947), v. IX, no. 132, art. 2, p. 190.

61. See Oppenheim, v. II, p. 154; Dr. D. Nincic in Georg Schwarzenberger, *Report on Some Aspects of the Principle of Self-Defense in the Charter of the United Nations and the Topics Covered by the Dubrovnik Resolution* (New York: International Law Association, New York University Conference (1958) Committee on the Charter of the United Nations: 1958), p. 68.

62. United Nations, Security Council, *Official Records* 21st yr., 1321st mtg., 16 November 1966, S/PV 1321 (New York: 1966), p. 17.

63. United Nations, Security Council, *Official Records*, 24th yr., 1466th mtg., 27 March 1969, S/PV 1466 (New York: 1969), p. 48; United Nations, Security Council, *Official Records*, 24th yr., 1468th mtg., 1 April 1969, S/PV 1468 (New York: 1969), p. 21.

64. See “Mrs. Gandhi Said to Set Terms for Visits by Observer Teams,” *The New York Times*, 17 November 1971, p. 16:7; Sidney H. Schanberg, “India and Pakistan: Short of War,” *The New York Times*, 18 November 1971, p. 2:3; “Mrs. Gandhi Rejects Thant Proposal,” *The New York Times*, 19 November 1971, p. 16:6; “No Reaction So Far,” *The New York Times*, 30 November 1971, p. 3:5.

65. See Bowett, p. 4 *et seq.*; see also Brierly, p. 431.

66. Bowett, p. 4 *et seq.*

67. United Nations, Security Council, *Official Records, Supplement for April, May and June 1964*, 111th mtg., 9 April 1964, S/5650 (New York: 1965), p. 9.

68. See Brierly, p. 420. This view is also shared by a number of other publicists including Stone, Bowett, Waldock, and McDougal.

69. Brierly, p. 418.

70. At least one adherent of the restrictive view of self-defense has attempted to accommodate this position to the potential of nuclear weapons. Dr. M. Nagendra Singh would not require that self-defense wait on a physical violation of the territory of a state. *Armed attack* in his view includes those last proximate acts necessary to initiate an attack, e.g., aircraft being launched or submarines leaving their territorial waters. For McDougal's critical commentary on this accommodation, see McDougal and Feliciano, p. 239.

71. *Ibid.*, p. 238 *et seq.*

72. Bowett, p. 1, and authorities cited therein.

73. While initial U.S. statements indicated that the air attacks following the incident were retaliatory in nature, in the U.N. the U.S. Representative argued that in the face of military aggression his Government had decided, in self-defense, to take "positive but limited and relevant measures to secure its naval units against further aggression." United Nations, Security Council, *Official Records*, 19th yr., 1140th mtg., 5 August 1964, S/PV 1140 (New York: 1964), p. 2. This view represents a broad view of self-defense commonly called the *cumulation of events doctrine*, and there is little difference between it and precharter reprisals.

74. The Hague, International Court of Justice, p. 4.

75. See Brierly, p. 421 *et seq.*; see also 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. 501.

76. See Brierly, p. 425 *et seq.*

77. Some publicists would also include humanitarian intervention as a legitimate basis for the use of force. The most eminent of these has been the editor of the recent editions of Oppenheim, Sir Hersch Lauterpacht. The eighth edition of Oppenheim states that intervention is 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 rights and to shock the conscience of mankind." Lassa F.L. Oppenheim, *International Law*, 8th ed., H. Lauterpacht, ed. (London: Longmans, Green, 1955), v. I, p. 312-13. There is still some question, however, as to whether this type of interference in the internal affairs of another state is acceptable and therefore in this reasonably conservative estimate of the measures of forcible self-help which are legitimate, humanitarian intervention has not been included. It is suggested that intervention of this type may better be left to the United Nations rather than individual states.

78. See statement of Secretary of State Dean Rusk as quoted in Jay Mallin, *Caribbean Crisis* (Garden City, N.Y.: Doubleday, 1965), p. 58.

79. White House Press Release, 28 April 1965, *Documents on American Foreign Relations*, 1965 (New York: Harper, 1966), p. 234.

80. See Miller, p. 54.

81. United Nations, General Assembly, *Resolution no. 2625*, p. 123.

82. Even Brownlie, who adopts a very strict view of what force can legitimately be applied in modern law concedes that

... the protection of nationals presents particular difficulties and . . . a government faced with a deliberate massacre of a considerable number of nationals in a foreign state would have cogent reasons of humanity for acting . . . The possible risks of denying the legality of action in a case of such urgency . . . must be weighed against the more calculable dangers of providing legal pretexts for the commission of breaches of the peace in pursuit of national rather than humanitarian interests. Brownlie, p. 301.

83. Brierly, p. 431.

84. *Ibid.*

85. The United States has always taken the position and amply demonstrated that its intervention in Vietnam only occurred after it had been clearly determined that the subversion of South Vietnam was being directed from North Vietnam.

86. While the argument was never made, it might be contended with some justification that India's intervention in Pakistan falls in the category of a special case; that the flow of Bengali refugees into India was similar to the negligent use by Pakistan of its natural resources. It is submitted, however, that this argument probably stretches the limited "special cases of necessity" beyond acceptable limits.

87. Brownlie, p. 376.

88. See generally Bowett; see also Miller.

89. See Falk, "Beirut Raid," p. 441; cf. Yehuda Z. Blum, "The Beirut Raid and the International Double Standard. A Reply to Professor Richard A. Falk," *American Journal of International Law*, January 1970, p. 73.

90. Cf. N.G. Onuf, "The Current Legal Status of Reprisals," Unpublished Manuscript submitted to the American Society of International Law, Panel on Reprisals and Retaliation in International Law: 1971, p. 19.

91. *Ibid.*

92. No attack against the United States was imminent, hence self-defense under the *Caroline* case test was not a legitimate basis for the quarantine. Likewise, no acknowledged right was being denied to establish a "Corfu Channel" type reprisal action. Finally, neither protection of nationals, requested intervention against an external threat, nor a "special case of necessity" was present so as to justify the intervention. Professor Carl Q. Christol has stated that the Cuban action constructed a new rule of international law. Carl Q. Christol and Charles R. Davis, "Maritime Quarantine: the Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962," *American Journal of International Law* July 1963, p. 525.

93. See Quincy Wright, "The Cuban Quarantine," *American Journal of International Law*, July 1963, p. 546, and authorities cited therein.

94. Russia and her satellites condemned the action as piracy and contended that the United States was engaged in unprecedented aggressive action. See Christol and Davis, p. 528.

95. Although a resolution condemning the quarantine was presented to the Security Council by the Soviet Union, the Council by general consent refrained from acting upon it. It has even been argued that the failure to condemn and the Council's encouragement of negotiations to resolve the matter indicates *ex post facto* authorization by the Security Council. See Leonard C. Meeker, "Defensive Quarantine and the Law," *American Journal of International Law*, July 1968, p. 515.

96. See Christol and Davis, p. 526.

97. Andrei Gromyko personally gave these assurances to President Kennedy, although the President knew at the time that offensive missiles were being installed. Some weeks previously Ambassador Dobrynin had assured Robert Kennedy that there would be no ground-to-ground missiles or offensive weapons placed in Cuba. See Robert F. Kennedy, *Thirteen Days*, (New York: Norton, 1969), p. 25, 41.

98. *Ibid.*, p. 49.

99. See Wright, p. 554; see also Kennedy, p. 48.

100. See Christol and Davis, p. 527.

101. *Ibid.*, p. 528; see also Kennedy, p. 51.

102. "U.S. Request for Meeting of Security Council," *The Department of State Bulletin*, 12 November 1962, p. 724.

103. Theodore C. Sorenson, *Kennedy* (New York: Harper & Row, 1965), p. 706; see also Arthur M. Schlesinger, Jr., *A Thousand Days* (Boston: Houghton Mifflin, 1965), p. 815.

104. Kennedy, p. 52.

105. See Department of the Navy, Oceanographic Office, *Notice to Mariners*, No. 47 (Washington: 1962), p. 2547-48; see also Jack Raymond, "Navy Tells Ships of Danger Areas," *The New York Times*, 25 October 1962, p. 20:6.

106. In this connection the United States received support from African countries that had been considered antagonistic. Guinea, Senegal, and Algeria refused to permit Soviet aircraft to land or refuel. Kennedy, p. 122; see also Schlesinger, p. 815.

107. Kennedy, p. 61.

108. *Ibid.*, p. 82.

109. *Ibid.*, p. 124.

110. See the Falk modified criteria as summarized and reordered in previous discussion, first item.

111. *Ibid.*, second item.

112. *Ibid.*, third and fourth items.

113. *Ibid.*, fifth and sixth items.

114. Kennedy, p. 80.

115. See Falk's modified criteria, seventh item.

116. Kennedy, p. 103.

117. In addition to other countries, almost all the Members of the Security Council condemned as illegal the action of the Soviet Union. See "Situation in Czechoslovakia: Security Council Considers Item," *UN Monthly Chronicle*, August-September 1968, p. 34 et seq.

118. Eric Pace, "U.N. Vote Follows Pleas for Action," *The New York Times*, 8 December 1971, p. 1:5.

119. McDougal and Feliciano, p. 59.

BELLIGERENCY AND LIMITED WAR

William O. Miller

When I was asked if I would give this presentation, I wondered if the title, "Belligerency and Limited War," was cast in technical legal terms--that is, does it mean belligerency in its generally accepted legal sense--and does it mean "war" in its generally accepted legal sense--or does it mean a situation where there is no technical state of war but, nevertheless, where there is a large-scale armed conflict raging.

This is an extremely important consideration, for the technical existence of a state of war, in the traditional law, has been a prerequisite for the legitimacy, in a legal sense, of certain types of actions. For example, the term "blockade" is a term unknown in the law except as it connotes a belligerent blockade in time of war.

This has always seemed to me to be a somewhat less than adequate manner of viewing the problem. The real problem, it seems to me, is the need to determine what degree of force, applied in what manner, against what targets, may states reasonably expect acceptance by the majority of other states.

But until just recently this entire problem has been approached by almost all of our international law publicists--and, indeed, by the states themselves--from the two polar extremes--there was a "law of peace" and there was a "law of war." Almost all of the major works in the international law field are divided into two parts--one on war, the other on peace.

What I think we should ask ourselves in any study of this topic is how much real utility does the dichotomy of a law of war and law of peace provide to us, and I think we will come up with the answer that in a contemporary situation it provides little utility at all.

Let's take a look just for a minute at the situation in Vietnam. War or peace? Or does it really matter from a legal standpoint?

As a factual matter, what we have there is a conflict of major proportions. But, as we are all aware, there is no technical state of war in existence. You have read the memorandum from the Defense Department to the Senate Armed Services Committee in which it was stated that the present situation imposes no obstacles on us in the pursuance of our objectives in Vietnam, and I have no doubt that this is true. But what if our objectives should broaden and it was considered necessary to restrict the inflow of goods into North Vietnam? I know you have often heard it said that we cannot blockade Hai-phong because it is not legal, because blockade is legal only in time of war. I have also heard it said that the present coastal surveillance measures by the South Vietnamese cannot extend beyond 12 miles from their coast--beyond their contiguous zone--because it is illegal, except in unusual circumstances in time of peace, to exercise control over the ships of another state beyond that limit. The effect of these statements is

simply that the Republic of Vietnam/United States cannot insist on belligerent rights because a state of war does not exist.

The converse may have been true in the United Arab Republic's blockade of the Israeli port of Elath. Was this "blockade" legal or illegal? It depends on what law you apply—the law of war or the law of peace. Clearly, I think that if the U.A.R. possessed belligerent rights—that is if a state of war existed between Israel and the U.A.R.—their actions were legal. It would be to the contrary, however, if they did not possess belligerent rights. The basic position of the United States on this point was that belligerent rights did not exist because of a 1953 Security Council Resolution which stated the prior armistice had ended the war and that neither side could legitimately claim belligerent rights. Hence, it was said, the 1958 Geneva Convention providing for free passage through international straits was the controlling rule. The Egyptians, on the other hand, based their position essentially on the fact that there was, indeed, a state of war existing, that it had merely been suspended for a time by the armistice, and that they considered it necessary for their security to prevent influx of strategic goods. Also, they very pointedly noted that the 1958 Geneva Conventions were intended to regulate peacetime, and not wartime, relations.

The point here is that there are such things as belligerent rights, rights which exist only in a technical state of war. Many today contend that this state of the law does not satisfactorily treat the contemporary situation where we don't really have "war" in its traditional and technical sense, and where we don't really have "peace," but where we must deal with something in between. I have also heard it said that this war/peace dichotomy does not really or effectively prescribe a norm of conduct for a state. If one's actions are illegal when placed

in the "peace" cubbyhole, legality can be bestowed on them by designating the situation in which they occur as "war."

While the thrust of this statement may be true to some degree, it is, of course, by no means true that the designation of a conflict as "war" is a step to be taken merely to legalize some act; for when one party to a conflict considers whether it should insist on belligerent rights, it must also consider a host of other factors, not the least of which are the treaty relations of its opponent which the existence of a state of war may bring into play, and most important by that the exercise of belligerent rights will impose reciprocal restrictions upon neutrals, restrictions which those neutrals may be loath to accept. Hence, the importance, power, and inclinations of so-called neutral powers and the effect that belligerent restrictions on their normal rights will have are extremely important considerations.

This can be illustrated by the traditional law of war as it relates to the belligerent right to embargo sea commerce to and from its enemy—to stop the flow of goods, both inward and outward, which enhances the enemy's warmaking effort.

The particular method for accomplishing this purpose, which I want to discuss, is the traditional or the belligerent blockade.

Blockade was originally conceived and executed as the maritime counterpart of siege. It was the total prohibition of maritime communication, inward or outward, with a designated portion of the enemy's coastline. Its focus was, and is, on ships, unlike the law of contraband where the focus is on cargo. Blockade is defined as the belligerent right to prevent vessels of all states from entering or leaving specified ports or coastal areas which are under the sovereignty, occupation, or control of the enemy. This could include the whole of the enemy coastline, as indeed

it did during the American Civil War when the Union forces maintained a blockade of the entire Confederate coast.

Blockade, by its nature, involves not only interference with vessels flying the enemy's flag, but also with vessels flying the flag of neutral states. One of the most fundamental considerations in blockade is that it applies to belligerent and neutral vessels alike; hence, one of the restrictions of neutrals which I mentioned a moment ago, restrictions on a state's otherwise legally unrestricted right to trade with whomsoever it wishes. Neutral states, therefore, traditionally insisted that the enforcement of a blockade must be in accordance with strict and clear rules, the first of which being that the blockade must be enforced impartially against ships of all states. If ships of some states are permitted through and those of others are not, then a blockade in its legal sense may not be said to exist. The United States used this point as basis for its strenuous objections in the British blockade of Germany in World War I which significantly interfered with U.S. trade to German ports but did not restrict Scandinavian trade to these same ports.

The blockading state must commence the blockade with notification to all nations as to when the operation is to begin and the area to be affected. In this latter regard the blockade must not be so designed as to bar access to, or departure from, neutral ports or coastlines. This was intended to ensure that the blockade does not interfere with strictly neutral trade.

Next, the blockade must be effective. That is, it must be maintained by sufficient force to make blockade running hazardous, and it must involve a high degree of risk. The blockade of the Confederate coast, which I mentioned, was contested on this ground by some neutral states whose vessels were apprehended. The blockaded coastline was

about 3,000 miles in length, and there were only about 45 Union ships patrolling the area. As a consequence, many blockade runners managed to get through. Nevertheless, the U.S. Supreme Court had little difficulty in determining that the blockade was effective, so as to make legal the condemnation in prize of the ships which were captured.

Breach of a blockade occurs when a vessel, having knowledge of the blockade, passes through or attempts to pass through it en route to or from the blockaded area.

The penalty for breach, or attempted breach, is the confiscation of both the ship and its cargo, whether contraband or not.

I emphasize here that the liability of the blockade runner is to capture, and condemnation is the prize. The blockade runner could not be destroyed unless she resisted or fled, and unless destruction was necessary.

What I have just described is the traditional, or close-in, blockade. This does not mean that the blockade force must be disposed close-in to the enemy coastline or port, but it does mean that the blockading force must be so deployed that neutral vessels bound for neutral ports will not have to pass through the blockade line, and thus subject themselves to being boarded and searched, and possibly seized for a blockade breach. This highlights one of the basic problems of the traditional blockade in modern times--the deployment of the blockading force close-in to the blockaded area may be impossible from an operational viewpoint, and geographical considerations make it impossible, in most regions, to blockade further at sea and not interfere with innocent neutral shipping or bar access to neutral ports.

Accordingly, we have seen in modern warfare the almost total disuse of the traditional blockade. While there were some minor close-in blockades during World War I, none were of any real

significance; and World War II reported only one incident of its use--the Soviet blockade of the Finnish coast in 1940.

There were, of course, blockades of a type during both World War I and World War II, but these were not blockades in the traditional sense, and they were never sought to be justified as such. They were frequently referred to as long-distance blockades since they involved closing and patrolling large areas of the high seas, hundreds of miles from the enemy's coastline. In both wars the British blockades of Germany consisted principally of controlling the northern and southern approaches of the North Sea, thereby restricting access to some neutral ports as well as German ports. And the Germans, as you know, by the use of war zones blockaded the whole of the British Isles. Both sides employed new weapons for the enforcement of these long-distance blockades. Where in prior wars the surface man-of-war was the weapon utilized for commerce control, belligerents now supplemented the surface fleets with the submarine, the aircraft, and the mine. War zones were established by all belligerents through which passage was prohibited or restricted and made extremely dangerous by a combination of these weapons. Thus, large areas of the seas were mined by the British, Germans, and later by the United States; and neutral shipping was cautioned to stay out and were told that if they desired to pass through the area on an innocent voyage, to funnel through certain designated areas where inspection of their cargo could be facilitated.

As another method of control, the British established a system of issuing "navicerts" to neutral vessels transiting the blockaded area en route to neutral ports. Under this system a vessel, legitimately engaged in neutral trade, could obtain a navicert at its port of last loading which attested to the innocence of its cargo and destination. Upon reaching the blockaded area, the neutral

vessel would be allowed to pass unhindered. Similarly, a neutral ship outbound from a neutral port from within the blockaded area could obtain a navicert attesting to the nonenemy origin of its cargo. This system had the effect of greatly facilitating the enforcement of the British blockade and, at the same time, minimizing delays in such neutral trade as the British were willing to permit.

Let me just summarize the three principal departures from the traditional rules which characterized the blockades of both sides in both World War I and World War II:

1. Establishment of war zones in large areas of the high seas, restricting access to neutral ports and making transit through these zones dangerous by the use of mines, submarines, and aircraft: weapons systems which were unable to exercise the traditional method of blockade control--capture of the blockade runner.

2. Therefore, subjecting ships attempting to pass to destruction rather than capture and condemnation in prize, as the penalty for breach or attempted breach of the blockade; and

3. Almost total control of, instead of minimal interference with, bona fide neutral commerce.

I want to point out again that these actions were never supported, in a legal sense, under the traditional law of blockade. They were justified, rather, under the law of reprisals as actions which, although illegal, are rendered legal by virtue of a prior unlawful act of the enemy. Whatever the legal justification, the real significance of this action lies in the fact that these departures from the old rules were made not just on occasions but persistently throughout the major wars by all participants. Thus, I would say the old rules, by this course of conduct, were shown to have lost their validity as law, if we mean by law a standard of conduct to which we can expect general community adher-

ence. Many contend, however, that these departures from the old rules must be viewed strictly in their reprisal context and that as such they merely reflect the operation of sanctions for the illegal conduct of the opposing belligerent and that hence they can obtain no color of legality except as such.

Professor Lauterpacht, however, states what I think is the better view in this manner:

Measures regularly and uniformly repeated in successive wars in the form of reprisals and aiming at the economic isolation of the opposing belligerent, must be regarded as a development of the latent principle of blockade, namely that the belligerent who possesses effective command of the sea is entitled to deprive his opponent thereof for the purpose either of navigation by his own vessels or of conveying on neutral vessels such goods as are destined to or originate from him.

In other words, new conditions have demanded new laws, and they should have them. This was seen at the outset by Grand Admiral Tirpitz, who has been referred to as the father of German submarine warfare. He said this in his memoirs:

Had we dealt with the submarine campaign coolly and consistently, we should have prepared the ground for the view that the campaign was not merely justifiable as a reprisal against the starvation blockade (which, unfortunately, was the only argument put forward on our behalf), but that it was clearly and irrefutably justified by the maritime law created by the English themselves at the beginning of the war. The new weapon could not be bound by the rules made in the old sailing days of a century ago, but had a right to a new law. Does anyone seriously believe that in any future war a people fighting for its life will not use the submarine as we have used it in this war, even if the rules of international law forbid them to do so.

The point I want to make here, and, indeed, in this entire presentation, is that with the broadening scope of a belligerent's objectives--in both World

Wars, the total subjugation of the enemy--and with the development of new weapons through which these objectives can be sought, a new look is required at the legal framework by which the world community seeks to regulate the conflict. Given, then, a legitimate military objective--and certainly, in modern warfare, commerce which strengthens the enemy's war effort can be a legitimate military objective--we must expect those measures to be used which can effectively restrict that commerce and which the belligerent has at hand. Any legal system which does not adequately deal with the practicalities of the situation will be just as ineffective as the old blockade rules were in the two preceding major wars. These rules on blockade were simply not sufficiently realistic as to compel general adherence in either of these giant conflicts. So, it seems to me that in this context of all-out war, they were shown to have lost their status as law.

Now I do not mean that these principles have totally lost their usefulness for, perhaps, we can envision a situation where we could expect to see general adherence to them.

A small war, between smaller states, where political objectives remain well limited and where the geographical situation is appropriate may very well see an old traditional type blockade. As a matter of fact, we saw something akin to this in the Egyptian blockade of the Israeli port of Elath. I say "akin" to the traditional blockade because the U.A.R. emphasis was not on shipping but on strategic goods. That is to say, Egypt did not bar all shipping through the Straits of Tiran, but only barred items of strategic goods. She announced that all Israeli shipping, of course, would be fired upon, but that neutral shipping would be required to stop for inspection of their cargo and that any attempt by a neutral to ship strategic goods to Israel would be considered an unfriendly act against all Arab states.

There also was a traditional blockade by the United States against the North Korean coast during the Korean war where there was a favorable geographic situation and limited political objectives. This blockade, according to Messrs. Cagle and Manson, was successfully maintained for 3 years. And, yes, both Soviet and Chinese Communist vessels respected the blockade, although both governments denounced it and refused to recognize its legality or even its existence.

I would like now to discuss three other, but related, situations with you.

The first is the old 19th century concept of pacific blockade—a term which one hears bandied about from time to time. This action has been described as a measure short of war, i.e., where the blockading state does not wish to resort to war but, nevertheless, wishes to resort to some degree of force to obtain redress of a claimed wrong by the opposing state. Hence, pacific blockades arose as a form of reprisal used in a peacetime situation generally by larger states against those less powerful. It consisted of blockading access to or exit from a particular port or ports of the target state, of the vessels of that state. Only the shipping of the blockaded state was affected. Neutral ships, or ships of other nations, are permitted to come and go as they please. There are no recorded instances of this being used in this century, and there are no instances where it was ever used by the United States. I mention it here just so that you will be able to distinguish it from the belligerent type blockade if the need arises.

There are other measures short of war which bear some relevance to the use of seapower in a limited war situation. I refer to the basic right of every state to take such actions at sea as are reasonable and necessary to protect its security interest against the hostile acts of other states. The old case of the U.S. flag ship *Virginus* is frequently cited in

support of this proposition. This ship was seized by the Spanish authorities in 1873 while it was in the process of transporting arms to Cuban insurgents. The British ship *Deerhound* was seized by Spanish warships during the Spanish Civil War for the same reason. And during the Algerian War, French warships stopped at least two ships—one a British and one a Yugoslav, both of which were suspected of the same offense.

The current Market Time operations in Vietnam are also pertinent to our discussion. The Republic of Vietnam decree announcing this operation stated, essentially, that the entry into South Vietnam of goods or personnel through other than recognized ports is forbidden by the South Vietnamese customs and immigration regulations and that it was intended to enforce these regulations strictly. Accordingly, it provided that all vessels within the Republic of Vietnam contiguous zone were subject to visit and search, and arrest where appropriate, for violations of these regulations. It went a bit further and declared that even beyond their contiguous zone, ships suspected of being RVN, although flying another flag, would be stopped, searched, and seized if appropriate.

South Vietnam has done nothing here, of course, that a state cannot legally do in time of peace under the 1958 Geneva Conventions. These are strictly police measures designed to enforce the domestic laws of the RVN seaward throughout their sanitary, fiscal, and customs zone, or contiguous zone, and on the high seas against ships suspected of being their own although flying a foreign flag.

May I simply pose this question to you? Does the *Virginus* case, and the others I cited a moment ago, suggest a rationale for a possible extension of this surveillance?

A final blockade-type situation which compels our attention is the 1962 quarantine of strategic arms to Cuba.

This exercise of force at sea was designed by the United States as a response to the Soviet/Cuban missile threat and, certainly, as a measure which, it was hoped, could resolve the situation short of actual conflict.

I call this a blockade-type situation because it was not a blockade in any sense of the word--you will recall that I commenced my remarks with the notation that blockade deals with ships, solely, and not their cargo.

There was never any intention in the Cuban situation to prevent the ingress of ships. The entire thrust of the operation, of course, was on offensive missiles and their component parts. Ships were stopped, and those which were not transporting the prohibited items were permitted to continue their voyage, and a clearcert, or clearance certificate, system, modeled after the old navicert system was initiated to obviate even this inconvenience for ships carrying innocent cargo. This really bears a close resemblance to the prohibition of contraband, also a belligerent right under the traditional law of sea warfare. Bear in mind here that there never was any intention, on anybody's part, that a state of war should exist between the United States and Cuba, or the United States and the Soviet Union, although what has traditionally been a belligerent right was, in essence, exercised.

This, I think, demonstrates my thesis that changing conditions require changing rules and that a law of peace and law of war dichotomy is inadequate in such contemporary situations.

Clearly, the United States could have declared war on Cuba, established a blockade, or announced lists of contraband items; although, undoubtedly, many would have cried that the declaration of war, itself, was violative of article 2(4) of the U.N. Charter. But putting this argument aside for a moment, it certainly seems obvious that a formal state of war should not be required for a state to insist on certain

essential protective rights since such would have undoubtedly prejudiced the chances for a peaceful solution of the matter.

Of course, the lawyers have waxed long and hard on the legality of the quarantine. Some publicists, even some U.S. publicists, have branded it as an unlawful exercise of force under article 2(4) of the Charter. Others, and these are substantially in the preponderance, have argued for its legality, although not always using the same yardstick. The official U.S. position is that the action was legal as a collective action by the American states under articles 6 and 8 of the Rio Treaty in response to a situation endangering the peace of America. Others contend that it was a legitimate exercise of the right of collective self-defense under article 51 of the U.N. Charter.

These latter arguments seem to me to be the more realistic ones and, as such, to be a much more useful part of the continuing development of standards of conduct to which we can generally expect states to conform. To brand as illegal under present law every exercise of armed force, as some do, invites comments like those of former Secretary of State Dean Acheson to the American Society of International Law, shortly after the quarantine.

I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position, and prestige of the United States had been challenged by another state: and law simply does not deal with such questions of ultimate power--power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept destruction of our way of life. One would be surprised if practical men, trained in legal history and thought, had devised and brought to a state of general acceptance, a principle condemnatory of an action so essential to the continuation of preeminent power as that taken by the United States last October. Such a principle would be as harmful to the develop-

ment of restraining procedures as it would be futile. No law can destroy the state creating the law. The survival of states is not a matter of law.

Whether or not one agrees fully with these remarks, I do think one must agree that they do point out clearly that in order for restraining procedures to have any hope of effectiveness, they must be premised on a realistic appraisal of what states can be expected to do in particular circumstances.

Now, what is the relevance of all of this to my subject--the legality of the use of certain weapons in a limited war situation?

While we do have some rules of international law in sea warfare which appear definite and certain on their face, this is by no means the true situation. Most of these rules were developed in and for a totally different environment than we face today. While there are, and must be, restraints on the participants in a conflict, whether or not that conflict is characterized as a technical state of war, I think history teaches us that the degree of effective restraint will vary in inverse proportion to the nature of the objectives for which the conflict is being waged; that is, as the objectives become more unlimited, the fewer restraints we can expect the parties to impose upon themselves, and, hence, the fewer constraints the world community, in the form of law, can hope to impose.

The traditional blockade which we have been discussing provides a good example of this. When faced with a war where the total, organized resources of the enemy became a legitimate military objective, the old rules which sought to separate noncombatants from combatants at sea were not adequate. Nor were those which failed to make allow-

ances for the effect which otherwise normal neutral trade would have on the enemy's war effort. Thus the old 19th century law failed under the strict test of military necessity in a modern context.

But to get back to my subject, I will simply say that in limited war situations, where objectives are limited, there will be more self-imposed restraints and, hence, more constraints in the form of law that can hope to be imposed.

In the Vietnamese situation, for example, our self-imposed restraints are such that we make no effort at all to use force to interfere with the seaborne trade into North Vietnam.

This situation might very well be otherwise, however, if there were to be, for example, a massive invasion across the DMZ. It could very well be that the defense of South Vietnam would require interdiction of North Vietnamese strategic commerce. This situation did develop in Korea. It would not be unrealistic, therefore, to expect, given the right circumstances, something in the nature of a traditional blockade of the North Vietnamese coast.

In seeking to determine the legality of a proposed action, one should not only look to such rules as are found in such publications as *The Law of Naval Warfare*, but he must also study the history of these rules, i.e., the situation for which they were designed and the history of their application. He must also recognize that there are many situations which are simply not covered in the rule books--and it is here, particularly, where the practice of states, if it can be determined, will make possible a better and more meaningful appraisal. As Professor Morgenthau stated the other day, "We deal not with theory, but with experience."