

Correspondence

Mayaguez

To the Editors:

Jordan Paust's Comment, *The Seizure and Recovery of the Mayaguez*,¹ demonstrates convincingly that careful scholarship and legal argument are not equivalent. Relying on incomplete press reports and apparent preconceptions, Paust presents a tinted vision of the *Mayaguez* crisis and some rather bizarre legal conclusions. The many false steps and wrong turns need to be enumerated before they become accepted through repetition.

1. Paust begins by pinning the location of the *Mayaguez*, when the Cambodians seized it, at 61½ miles off the Poulo Wai Islands in an area claimed by Cambodia to be within its territorial waters. In a footnote we learn that these islands were small and rocky and 60 miles off the Cambodian coast.² Later in the Comment it is noted that the islands were claimed by two other countries, and that four weeks after the *Mayaguez* crisis the islands were captured by one of the claimants, Vietnam.³ But no mention at all is made of a significant detail—that the seizure took place in an area well-traveled by international shipping and in the most direct sea lane between Hong Kong and Thailand (the route taken by the *Mayaguez*).⁴

2. Paust tilts the balance further in his second paragraph of facts. There he quotes a Cambodian statement about some unidentified ships that allegedly had carried saboteurs, CIA agents, and related threats. But Paust cites no evidence that any commercial ships had actually carried arms or espionage equipment in Cambodian territorial waters after the Khmer Rouge took over the government of Cambodia. Although it was an unarmed merchant ship heading toward Thailand,⁵ Paust would like us to believe that the Cambodians had reason to perceive some menace in the *S.S. Mayaguez*.

3. This tilt in emphasis is used to bolster a conclusion that it was reasonable for Cambodia to stop and search the *Mayaguez*. Even if it was in the territorial waters of islands claimed by Cambodia, the *Mayaguez* had a

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

2. *Id.* at 775 n.3.

3. *Id.* at 784 & n.52.

4. *Seizure of the Mayaguez: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations*, 94th Cong., 1st Sess., pt. III, at 265, 267 (1975) [hereinafter cited as *Mayaguez Hearings*]. At the time the *Mayaguez* was seized, there were approximately 10 to 12 ships passing through that very area off the Poulo Wai Islands each day. *Id.*

5. See SUBCOMM. ON INTERNATIONAL POLITICAL AND MILITARY AFFAIRS OF THE HOUSE COMM. ON INTERNATIONAL RELATIONS, 94TH CONG., 2D SESS., REPORTS OF THE COMPTROLLER GENERAL ON THE SEIZURE OF THE MAYAGUEZ 61-62, 127 (Comm. Print 1976) [hereinafter cited as *MAYAGUEZ REPORT*]. The report also refutes Paust's assumption that the *Mayaguez* was heading toward the Cambodian island of Koh Tang. *Id.* at 64.

right of innocent passage—*i.e.*, a right to pass through Cambodian waters for the purpose of proceeding from one port to another. Cambodia, as a coastal state, could inspect the *Mayaguez* if there was a *reasonable* basis to suspect that the vessel's passage was not innocent. This is, so far, consistent with Articles 14(4) and 16(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone.⁶ But from there, Paust seemingly leaps to the conclusion that reasonableness is to be determined subjectively—that although there was no objective basis to suspect the *Mayaguez* of noninnocent behavior,⁷ Cambodian perceptions of some external threat made a suspicion of the *Mayaguez* “reasonable.” At the very least, Paust believes that international law accords coastal states broad discretion to stop and search ships in the territorial sea. Yet Paust avoids discussion of Article 15(1) of the 1958 Convention, which says that the coastal state “must not hamper innocent passage through the territorial sea.” Use of an expansive term like “hamper” must place some objective limitations on a coastal state's right to stop ships. It is incomprehensible that one would take up the Cambodians' banner without coming to grips with this Article 15(1) language.

4. Even if there was a reasonable basis justifying a search of the *Mayaguez*, it does not follow that the Cambodians had any right to *seize* the vessel and its crew. Paust assumes that a search and seizure are parts of a single right. However, a coastal state has the right to take a vessel into custody *only* if, upon inspection, there is concrete evidence that the vessel's passage is not innocent—*i.e.*, if the ship has violated the coastal state's domestic laws or security.⁸ The Cambodians never found any such evidence, because there was none. Moreover, the Cambodians never bothered to inspect any of the containers on board the *Mayaguez*, either before or after seizing it.⁹

5. In an attempt at irony that fades with repetition, Paust compares the *Mayaguez* seizure with a contemporaneous seizure by the United States of a Polish fishing trawler, the *Kalmar*. Again, Paust ignores critical differences. Unlike the *Mayaguez*, the *Kalmar* was observed fishing, its trawling net in the water, within the United States Contiguous Fishing Zone, 10 miles from the California coast. Consistent with customary international law, the United States in 1966 had established an exclusive contiguous fishing zone extending 12 miles from its coast.¹⁰ It was beyond question

6. [1964] 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205.

7. As mentioned earlier, the *Mayaguez* was heading toward Thailand, not Cambodia. It was not doing anything suspicious. There was no evidence that other ships in that area, 60 miles from the Cambodian coast, were acting in a noninnocent way. So one is left with some disproportionate Cambodian fear of an old container ship which, like other merchant ships, was not flying any national flag when at sea. *Mayaguez Hearings*, *supra* note 4, pt. II, at 208.

8. Seizure of a merchant ship without verification of suspected wrongdoing does not simply *hamper* innocent passage contrary to Article 15(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone; it effectively denies the very right of innocent passage. See M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 231-33 (1962).

9. *MAYAGUEZ REPORT*, *supra* note 5, at 127.

10. 16 U.S.C. §§ 1091, 1092 (1970). An issue left unresolved in the 1958 Convention on the Territorial Sea and the Contiguous Zone was whether a coastal state could establish

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that the *Kalmar* was engaged, not in innocent passage, but in an activity (fishing) in violation of an internationally accepted form of domestic regulation. After stopping the *Kalmar*, the Coast Guard, unlike the captors of the *Mayaguez*, made an examination of the ship and observed further evidence that the vessel had been fishing in violation of domestic law. Also in stark contrast to the Cambodians, the Coast Guard permitted the master of the *Kalmar* to use his radio in an attempt to contact Polish authorities and arranged for the Polish consul to meet the *Kalmar* and its crew when they arrived at the Coast Guard dock in San Francisco.¹¹ In short, a linking of the *Mayaguez* and *Kalmar* seizures is ludicrous.

6. Paust's edifice of argument totters further when he claims that the Cambodians' right to search and seize a ship for security purposes does not depend on the "ship's location in territorial waters or on the high seas."¹² Paust assumes that there is some inherent right to search ships for security reasons on the high seas, but he overlooks the fact that ships enjoy greater rights on the high seas than in territorial waters: a right of "freedom of navigation" on the high seas versus the innocent passage of the territorial sea. The instances in which a merchant ship may be boarded on the high seas are limited to those specified in Article 22 of the 1958 Convention on the High Seas¹³ (which Paust fails to discuss). One of these limited exceptions is where a search is based on authority conferred by treaty. That exception, and not any inherent right, was asserted as the basis for stopping ships in the two examples cited by Paust—the U.S. quarantine of Cuba during the Cuban missile crisis and the search of vessels outside the territorial sea of South Vietnam during the Vietnam war. The quarantine during the Cuban missile crisis was undertaken as a regional collective enforcement action of the Organization of American States, under Article 53 of the United Nations Charter.¹⁴ As for the Vietnam example, South Vietnam in 1965 announced that it would strictly enforce, within a 12-mile contiguous zone, its wartime immigration and customs regulations prohibiting the entry of arms, supplies, and persons into South Vietnam except through prescribed routes; ships in the contiguous zone heading toward South Vietnam outside prescribed routes were subject to search. The treaty authority relied on was Article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone. Such examples, in my view, provide little support for Paust's perception of an inherent right to search and seize vessels on the high seas, based on a coastal state's balancing of its interests against those of the world community.

7. Paust concedes that international law recognizes a state's use of force when "necessary" to protect the lives of its nationals and "proportionate" to that end. But of the *Mayaguez* seizure, Paust says that there "was never

a contiguous exclusive fisheries zone. By the time the United States established its 12-mile fisheries zone in 1966, 60 other coastal states had already established similar zones. See H.R. REP. NO. 2086, 89th Cong., 2d Sess. 5-8 (1966).

11. *Fish and Wildlife Miscellaneous—Part 1: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 156-58 (1975).

12. Paust, *supra* note 1, at 791.

13. [1962] 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82.

14. See A. CHAYES, *THE CUBAN MISSILE CRISIS* 57-62 (1974).

any showing that the lives of the crew were in danger, nor were there any reasonable grounds for believing that they were."¹⁵ Paust has either ignored or failed to research relevant information. It has been reported that thousands of human beings were killed following the Khmer Rouge takeover in Cambodia; that summary executions had been carried out by local Cambodian commanders; that the Khmer government was extremely antagonistic to the United States.¹⁶ The Deputy Secretary of State testified that, "[i]n view of the Khmer authorities' hostility toward the United States, the probable conduct of the Cambodians toward the captured Americans was unpredictable."¹⁷ In this context, there may have been (and I believe there was) legal significance in Cambodia's failure to give assurances regarding the crew's safety in the first 60 hours following their arrest. In support of his contrary view (that it was unreasonable to believe the crew to be in danger), Paust assumes that American decisionmakers had information that the Cambodians had previously released unharmed a Panamanian crew that included Americans. But a claim that there were American crew members on the Panamanian ship seems first to have been made by the Cambodians themselves a week after the *Mayaguez* incident.¹⁸

8. Paust says that the "Administration did not fear execution [of the crew members], but lengthy detention and negotiations."¹⁹ This suggests an interesting point, but Paust shifts the focus of inquiry to the "negotiations" (can the prospect of humiliating negotiations justify the use of force?) and away from the "detention" (can the prospect of a lengthy detention of innocent merchant seamen justify the use of force?). In my view, detaining innocent seamen for diplomatic ransom constitutes a violation of human rights. The task for a sensitive scholar would be to relate the prospect of such a detention to the countervailing considerations of seeking a peaceful settlement of the dispute.

9. Paust criticizes the air attacks that occurred after the safety of the *Mayaguez* crew was assured—attacks against an airfield and unused oil refinery on the Cambodian mainland. Paust terms the attacks as unnecessary and disproportionate, but makes no mention of the justification presented by the Administration—that the attacks were designed to reduce the ability of Cambodian forces on the mainland to threaten U.S. Marines then withdrawing from Koh Tang Island. Paust should have considered (a) the international law consequences of a use of force to protect soldiers engaged in an otherwise justified military action, and (b) whether the U.S. air attacks were necessary and proportionate to the protection of the withdrawing Marines.

10. Paust concludes by discussing the "precedential value" of what he considers an illegal use of force by the United States. A more challenging

15. Paust, *supra* note 1, at 800.

16. See TIME, Apr. 26, 1976, at 8-11 (Asian ed.); N.Y. Times, May 6, 1975, at 1, col. 4; *id.*, May 9, 1975, at 1, col. 7; *id.*, July 9, 1975, at 36, col. 2; *Mayaguez Hearings*, *supra* note 4, pt. II, at 233-35.

17. *Mayaguez Hearings*, *supra* note 4, pt. III, at 257.

18. *Id.*, pt. II, at 233.

19. Paust, *supra* note 1, at 801.

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approach would be to assume that the use of force was legally justified, but to inquire whether the world community perceived it in a way that limits or expands the precedent. In other words, will the *Mayaguez* incident have a conditioning effect on the future use of force in the world community? The question suggests a dynamic quality to the international legal process which should be considered in an analysis of the *Mayaguez* case. But it is a delicate point, one which is swamped in the passion of Paust's argument.

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Author's Reply:

By way of introduction, Michael Sandler reminds us that press reports are sometimes "incomplete." Now I am not an ardent defender of the media, but in this case the media provided accurate detail that has, if anything, been supplemented by the GAO Reports, not disproven. At the time of the writing of my commentary, moreover, media coverage provided the only indicia of fact made available to the public outside of published government statements and Mr. Rowan's useful book.¹

I did not rely merely on press reports; but that is a minor point. What is significant about Mr. Sandler's remark is an apparent belief that one who bases inquiry on public data (press reports, published government statements, and books) is not engaging in objective, "careful," and useful inquiry into decisionmaking by governmental officials. Exploring the import of his remark further, one might imagine that since most of the members of Congress received information about the *Mayaguez* affair from public news sources,² their thoughts about executive conduct are equally tainted, especially since many of the relevant factors are still classified and unavailable to the Congress, the public at large, and scholars.³

When the Reports of the Comptroller General were finally released to the public last month, the executive criticism echoed a familiar ring. Conclusions reached concerning the failure adequately to use several channels of diplomatic input and peaceful settlement and the unnecessary, excessive use of force were dismissed by the President and the Secretary of State as

† The views expressed are those of the author and not necessarily those of the Department of State.

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

2. See SUBCOMM. ON INTERNATIONAL POLITICAL AND MILITARY AFFAIRS OF THE HOUSE COMM. ON INTERNATIONAL RELATIONS, 94TH CONG., 2D SESS., *REPORTS OF THE COMPTROLLER GENERAL ON THE SEIZURE OF THE MAYAGUEZ* 133, 141 (Comm. Print 1976) [hereinafter cited as *MAYAGUEZ REPORT*].

3. *Id.* at vi, 58-59, 62-63, 67-69, 98, 106-07, 115 (GAO "unable to confirm").

biased, tainted "second guessing" and "Monday morning quarterbacking." Similar criticism had been expressed by high-ranking officials in the Departments of State and Defense through letters to the GAO in March 1976.⁴ The Deputy Under Secretary of State for Management added: "[I]t is time we—all of us—put a stop to this wholly senseless and highly destructive tendency constantly to find fault with everything our Government does."⁵

"Second guessing" and "Monday morning quarterbacking," we are to believe, are appropriate labels for serious inquiry into the legality of presidential decisions that were, presumably, made during a four-day "crisis." These labels seem to serve two functions: (1) to dismiss any criticism from those outside the circle of "the few" as "unrealistic" (*i.e.*, "you weren't there"), and (2) to justify, in Machiavellian fashion, the errors of princes and prince-followers. Upon close inspection, however, such claims amount either to an implicit admission of error or a blatantly elitist attempt to avoid criticism and the necessary public scrutiny of public officials and their public deeds. This seems all the more evident when disagreement and criticism occurred *within* the federal government both at the time of the seizure⁶ and afterward.⁷

In my opinion, trite phrases lifted from the idiom of sports are hardly appropriate to debate about presidential decisionmaking, the use of military force, or the propriety of action taken in view of relevant constitutional and international law. If we are interested in assuring a democratic governmental process, criticism must be allowed, even encouraged.⁸ The alternative, fostered by claims to secrecy and a denial of public inquiry after the fact, is nothing less than an unconstitutional dictatorship.

How cute, at first blush, such phrases appear. But to me, they smack of an elitism that is ultimately unrealistic (because only self-deception seems ultimately to be served) and unauthoritative. The President and his advisers are *not* beyond criticism,⁹ nor are they beyond the law or legal inquiry.¹⁰ As the Supreme Court declared in *United States v. Lee*:

4. *Id.* at 108-11 ("inadequate and misleading," "*ex post facto* diplomacy by amateurs," "second-guess," "hindsight," "realities," "after-the-fact analysis," "physical and fiscal facts of life").

5. *Id.* at 109. The statement of the Deputy Under Secretary demonstrates the nefarious notion of authority and a separation of a people from their government that Richard Nixon proposed to the U.S. Supreme Court. See Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 242-43 (1975). Mr. Sandler is so confused on this point that he equates my own criticism of an executive decision with the taking up of Communist Cambodia's "banner." M. Sandler, Letter, at p. 204 *supra*.

6. See Paust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774, 778. See also MAYAGUEZ REPORT, *supra* note 2, at 69.

7. See MAYAGUEZ REPORT, *supra* note 2.

8. See *New York Times v. United States*, 403 U.S. 713, 715-17, 728 (1971) (Black, Stewart, JJ., concurring respectively); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., dissenting), *overruled*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See also *New York Times v. Sullivan*, 376 U.S. 354 (1964).

9. Cf. *New York Times v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (role of press to expose deception in government).

10. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *United States v. Lee*, 106 U.S. 196, 219-20 (1882).

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No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.¹¹

Further, there can be no exception to the authority of law merely because decisions are made in time of "crisis."¹² As the Chairman of the House Subcommittee on International Political and Military Affairs wrote upon release of the GAO Reports and House Subcommittee material: "[T]he reestablishment of mutual confidence . . . between the Government and the people" can "only be accomplished by in-depth congressional exploration of the handling of the *Mayaguez* crisis and by the public disclosure of as much information as possible relating to the conduct of the public's business."¹³

Mr. Sandler sharpens debate, however, by addressing specific points of contention. Here, I will respond to his 10 criticisms with 10 counterpoints.

1. Yes, the *Mayaguez* was 6½ miles off the Poulo Wai Islands in claimed territorial waters. No, the *Mayaguez* was not within a well-traveled international shipping lane when it was seized. The *Mayaguez* had traveled off course,¹⁴ and ships did *not* normally pass within 6½ miles of the islands.¹⁵ Further, the United States knew that Cambodia claimed a 12-mile territorial sea.¹⁶

2. I suggest that a distinction between fishing or other private vessels and "commercial" vessels is of no legal relevance here. Cambodia claimed that numerous vessels had engaged in harmful military and espionage activities.¹⁷

3. I disagree. There were "objective" bases for reasonable suspicion of noninnocent passage, and I documented these in my commentary. These included: location of the vessel, size, and context.¹⁸ Mr. Sandler adds another: the *Mayaguez* was not flying *any* national flag.¹⁹ Further, I did not avoid discussion of Article 15(1) and the problem posed by textual and customary distinction between "innocent" and "noninnocent" passage and

11. 106 U.S. 196, 220 (1882).

12. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *In re Yamashita*, 327 U.S. 1 (1946); *United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1871).

13. MAYAGUEZ REPORT, *supra* note 2, at v.

14. R. ROWAN, *supra* note 1, at 17.

15. See *id.* at 25.

16. See Paust, *supra* note 6, at 778, 782-84; MAYAGUEZ REPORT, *supra* note 2, at 16. See also *id.* at 72, 117 (U.S. aircraft restricted to outside 12-mile zone).

17. See Paust, *supra* note 6, at 792-93.

18. *Id.* at 775-77, 792-95. And why were merchant ships principal targets when U.S. aircraft struck? See MAYAGUEZ REPORT, *supra* note 2, at 96, 97.

19. See M. Sandler, Letter, at p. 204 n.7 *supra*.

the reasonableness of coastal state actions in various cases.²⁰ My analysis, in fact, stands in sharp contrast to a textualist reliance on the phrase "hamper innocent" which ultimately begs the very question to be addressed: whether a given passage, under the circumstances, is "innocent." This is especially so in view of the textual dichotomy posed by Article 16(1) of the Convention. I note also that Mr. Sandler did not address the specific examples used in my analysis of coastal state inspection, especially the claim of South Vietnam—approved by the United States—to visit and search vessels that were "not clearly engaged in innocent" passage.²¹

4. There is no law requiring the search of 274 35-foot containers and a 10,000-ton vessel to be made only at the very spot of seizure. Precedents exist to the contrary; and no rule is cited by Mr. Sandler for his rigid position. Furthermore, as pointed out in my commentary, there is no evidence that the Cambodians seized the *Mayaguez* for any purpose other than to search the ship.²² The "inspection" was not completed because of the interference by American military force. Indeed, one can hardly "inspect" a ship while being shot at! The "evidence," Mr. Sandler, may very well have existed. Your assertions to the contrary are not convincing.²³

Readers of the *Yale Law Journal* need not be reminded that when Mr. Sandler writes: "not innocent—i.e., if the ship has violated the coastal state's domestic laws or security," his examples do not exhaust relevant criteria for decision about innocence. But just to avoid any misconception, Article 14(4) of the Convention²⁴ provides that passage is innocent "so long as it is not prejudicial to the peace, good order or security of the coastal state" and, apparently, where it is also consistent with "other rules of international law" (such as the showing of one's flag).

5. I never alleged or hinted at the possibility that the *Mayaguez* was engaged in fishing. However, I do admit that the *Mayaguez* and the *Kalmar* were within a 12-mile zone when spotted and, further, that "objective" evidence existed in both cases to support a reasonable belief that the vessel was not engaged in "innocent" passage or activity. Contrary to the implication that the "captors of the *Mayaguez*" made no examination of the ship to observe "further evidence," the Cambodians did board the *Mayaguez* in an initial attempt at investigation.²⁵ The failure to communicate, locked doors, and numerous containers posed problems to be sure. But the investigation of "further evidence" was interrupted by American military actions. What is "ludicrous," I aver, is the circular reasoning that since American military action interfered with examination of the *Mayaguez* but Polish military action did not interfere with examination of the *Kalmar*,

20. See Paust, *supra* note 6, at 785-91. For discussion of the subjective nature of the distinction, see Knight, *Issues Before the Third United Nations Conference on the Law of the Sea*, 34 LA. L. REV. 155, 183-84 (1974); Comment, *The Mayaguez: The Right of Innocent Passage and the Legality of Reprisal*, 13 SAN DIEGO L. REV. 765, 772-73 (1976).

21. *Id.* at 789 n.72; MAYAGUEZ REPORT, *supra* note 2, at 10, 28-31.

22. See Paust, *supra* note 6, at 777, 793-94.

23. See *id.* at 793 & n.91; MAYAGUEZ REPORT, *supra* note 2, at 127; R. ROWAN, *supra* note 1, at 42-43, 96, 100.

24. Convention on the Territorial Sea and the Contiguous Zone, [1964] 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205.

25. R. ROWAN, *supra* note 1, at 42-43, 52-64, 81-84, 96, 100.

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the discovery of impropriety by the *Kalmar* was a basis for the legality of an American response, but the failure of the Cambodians to carry out an investigation was a basis for a purported illegality on their part. Here again is an attempt to beg a fundamental question.

6. Please, Mr. Sandler, I did *not* "assume" that a customary right to search ships for security reasons on the high seas exists, I documented such a customary expectation.²⁶ Moreover, this right was analyzed in the alternative.

There is room for disagreement whether Article 22 of the High Seas Convention is dispositive of law, especially in view of the preamble to that Convention. However, since the customary right at stake relates to self-defense,²⁷ there is apparent agreement that Article 22 of the High Seas Convention incorporates, at least, Article 51 of the U.N. Charter, which itself partly implements the customary right to self-defense.²⁸ I remind Mr. Sandler that the contiguous zone, in the case of South Vietnam, was a zone of the "high seas" contiguous to South Vietnam's territorial sea, within the meaning of Article 24 of the Convention. Thus, the Vietnam example is relevant to claims made to engage in certain action on the high seas. Moreover, all admit that the U.S. quarantine activity during the Cuban missile crisis took place on the high seas.

7. With regard to a "fear" that the lives of the crew were in imminent danger, it seems significant to add that recently disclosed facts now demonstrate that the message from the American Embassy to the White House, CIA, NSA, DIA, NMCC, and concerned commands on May 12th (the day of the seizure) disclosed: "no casualties; crew does not feel to be in immediate danger; troops on board do not speak English, crew standing by for any instructions."²⁹ In view of this new information, I find my statements strengthened.³⁰

With regard to the statement that a claim that there were American crew members on the Panamanian ship first came from the Cambodians "a week after the *Mayaguez* incident," a careful reading of the *New York Times* discloses that this was public information at least by May 15th.³¹ How much sooner it was known by U.S. intelligence agencies has not been published.

8. In my view, a sensitive scholar would not conclude that military force can be used to save Americans from a postulated prospect of "lengthy detention" when, after the passage of only three days, peaceful settlement had not been exhausted. In this regard I note that not only was the Israeli rescue in Uganda more skillful, but it was clearly more necessary and proportionate.

26. Paust, *supra* note 6, at 791.

27. *See id.*

28. *See id.* at 787. On the dimensions of the right to self-defense, see the sources cited in *id.* at 787 nn.64, 65—especially McDougal & Schlei, *Hydrogen Bomb Tests in Perspective*, 64 *YALE L.J.* 648, 674-76 (1955).

29. *MAYAGUEZ REPORT*, *supra* note 2, at 32, 116.

30. *See Paust, supra* note 6, at 800-01. The Deputy Secretary stated only that the "probable conduct" was "unpredictable." Actually, the U.S. was uncertain about any intention or likelihood. *See MAYAGUEZ REPORT, supra* note 2, at 100.

31. *N.Y. Times*, May 16, 1975, at 15, col. 7.

9. Whenever military force is used, it must meet the tests of necessity and proportionality.³² Attacks "designed to reduce" the ability of the Cambodians to engage in military countermeasures may not have been attacks that were *necessary* to reduce such an ability. And even if the attacks were necessary for that purpose, the question remains unanswered whether, under the circumstances, it was necessary to destroy that ability at all.

Congressman Riegle seemed aptly to express the question when he stated: "I haven't seen anything yet that assures me this kind of military action was necessary and appropriate. Maybe there is evidence that can support that, but if there is, it hasn't been presented before this committee."³³ Such evidence is still lacking.

Indeed, the GAO Report did not adequately address the issue. It merely noted that the Pentagon thought its actions "reasonable" and that the mainland was bombed because Cambodia had a "capability to interfere."³⁴ The GAO did not "question" such a purpose; but the legal question remains, especially in view of other important factual challenges made by the GAO.³⁵

10. Since neither I nor the "world community" as a whole seem to "assume" legal propriety, the basis for the unarticulated "delicate point" seems lacking.

Far from destroying the legal edifice, or even proving a "tilt," it is my opinion that this interchange strengthens the conclusions reached in the commentary on the seizure and recovery of the *Mayaguez*. Although Mr. Sandler did not mention significant GAO support for such analyses and outcomes, one can objectify the record further with recently published evidence of the extent of failure of the Ford Administration to pursue reasonably available diplomatic (*i.e.*, peaceful) alternatives to violence.

Indeed, the GAO study has revealed a most damaging piece of evidence to supplement the record of the Ford Administration's failure adequately to explore U.N. channels. At 4:56 A.M., May 14th, an American embassy in the Middle East sent a message to the Secretary of State that a foreign government (still undisclosed) was using its influence with Cambodia to seek an early release of the *Mayaguez* and expected the ship to be released soon.³⁶ A careful reading of the GAO study leads to a conclusion that the foreign government mentioned in the message as *still* using its influence

32. See Paust, *supra* note 6, at 800-01; U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, paras. 33, 39, 41 & 56 (Field Man. No. 27-10, 1956). For general discussions of limitations on the use of force, see LAW AND RESPONSIBILITY IN WARFARE 119-49 (P. TROOB-OFF ed. 1975); Paust, *Weapons Regulation, Military Necessity and Legal Standards: Are Contemporary Department of Defense "Practices" Inconsistent With Legal Norms?* 4 DEN. J. INT'L L. & POL. 229 (1974); Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99 (1972), and authorities cited therein. To beg the question again, regarding "otherwise justified" military action, is unhelpful. See M. Sandler, Letter, at p. 206 *supra*.

33. *Seizure of the Mayaguez: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations*, 94th Cong., 1st Sess., pt. II, at 169 (1975). See *id.* at 163, 165 (statement of Rep. Schroeder).

34. MAYAGUEZ REPORT, *supra* note 2, at 61. See *id.* at 111 (point 3).

35. See *id.* at 103. Other important facts appear in *id.* at 90-91, 94-97.

36. *Id.* at 60, 69, 114, 122. See *id.* at 67 (U.N. communication with Cambodians).

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and expecting a release *soon* was the People's Republic of China.³⁷ Such a significant diplomatic breakthrough should not have been ignored. This diplomatic contact also magnifies the importance of the Secretary General's announcement that *he* had communicated with the Cambodians and the importance of the Cambodian radio broadcast that the Cambodians were prepared to release the crew and ship.

On a related point, the GAO study noted that "several possibilities for communication with the new Cambodian Government were not attempted; contrary to Administration statements, GAO found no evidence that the United States broadcast directly into Cambodia."³⁸

I express my thanks to the editors of the *Yale Law Journal* for having initiated a useful vehicle to tighten point and counterpoint. Use of this forum should expand.

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37. *See id.* at 66-69. Since (1) the government involved had refused "in Washington to relay a message," *id.* at 69; (2) Huang Chen refused to accept a message in Washington, *id.* at 66; (3) the government involved was "using its influence with Cambodia," *id.* at 69; and (4) the Secretary apparently felt that "no government except Chinese" had such influence, *id.* at 68, it seems evident that the foreign government was the People's Republic.

38. *Id.* at 60. *See id.* at 68.

