

**NO MAN'S LAND: INTERNATIONAL LEGAL
REGULATION OF COERCIVE
RESPONSES TO PROTRACTED
AND LOW LEVEL
CONFLICT***

*Michael Reisman***

I appreciate the opportunity to speak to this scholarly audience about the international legal regulation of responses to protracted and low-level conflict emanating from other states. The subject involves the question of the right and the contingencies to use force unilaterally in contemporary international politics: the so-called *jus ad bellum*, which is to be distinguished from the actual law of armed conflict, the *jus in bello*. Professor Halberstam has inventoried a large number of instances in which Israel claimed this right. Some of them fit easily into the customary law framework and would be lawful under traditional tests of the precipitating event and the necessity and proportionality of the response, even allowing for the in clarity of some of the traditional terms. Other cases, certainly the Lebanese invasion of 1982, would not pass the traditional test. I do not intend to focus only on those cases since I believe the problem goes far beyond the Middle East. Even after the Israeli-Palestinian conflict is finally treated as political, and not military, and is resolved in an equitable fashion, the problem we are considering here will continue because it is deeply rooted in the divergence of world-view and value and the divergence of effective power and formal authority that characterize contemporary international politics.

From some perspectives, this problem seems very simple. Under customary international law, states may mount coercive operations if there is military necessity and the means chosen are proportional. The operations may extend to foreign territory if peaceful protests have not availed and/or if the foreign state is unwilling or unable to prevent the noxious activities. If this view is taken, then many of the coercive responses by Israel against Palestinian regular, quasi-regular or irregular forces are lawful and criticisms and condemnations of Israel are only politically motivated. But, to conclude that these condemnations are

* Prepared for Delivery to the Association of American Professors for Peace in the Middle East, Biltmore Hotel, Los Angeles, California, January 5, 1987, 8 p.m.

** Hohfeld Professor of Jurisprudence, Yale Law School.

only political would miss a point which is too often missed: the international law-making process has itself undergone change and has subtly, but steadily, sought to change international law with regard to certain unilateral uses of force. While it has not totally succeeded, it has accomplished enough to have made expectations of who and how the law is made and what the law *is* less certain than in the past. As a result, international legal appraisal has become a camera which always takes double exposures. In each case, in this area of the law, opinions are rather like a double exposed photograph in which one discerns two discongruent pictures of what appears to be the same phenomenon.

* * *

First, let us look at trends in international law with regard to the right to use military force unilaterally. Many scholars believe that the question was settled once and for all in 1945. I disagree, and have urged less fixation on texts and more empirical examination of elite expectations. In trying to examine these expectations, one will find that a complex code on the right to use force unilaterally has emerged.

Until this century, the unilateral use of force in international politics was lawful. As late as 1922, Charles Cheney Hyde of Columbia University wrote "it always lies within the power of a state to gain political or other advantage over another, not merely by the employment of force, but also by direct recourse to war." States could use force, from reprisals to full war, as of right. After the rise of democratic politics and the development of mass industrial war, it might have been useful, for purposes of internal mobilization, to legitimize the use of force in various ways; but that was unnecessary as an international legal matter.

Many recognized this as a morally unsatisfactory regime. From the middle of the 19th century, one tracks many efforts, official and non-official, to temper and restrict the previously unlimited contingencies for the lawful, unilateral initiation of force. But even the most far-reaching of these efforts did not amount to an absolute bar on the use of force. Even the International Military Tribunal in Nuremberg after World War II did not, and indeed could not, condemn all unilateral resort to force. What it held in its judgment was that "To initiate a war of *aggression* is therefore not only an international crime; it is the supreme international crime . . ." [*italics supplied.*] Note that the Tribunal speaks in terms of a war of *aggression*, and not of war per se or the use of force for non-aggressive purposes.

All of these efforts were dramatically unsuccessful, but not for want of diligence and intelligence. Law is perforce a system of authorized coercion, and it can neither be conceived of nor operate without a supportive political system or power process. In the absence of a centralization

of authoritative force and an effective monopoly over who can use it to maintain community order and values, individual actors must look to their own resources.

This structural problem was addressed directly, though timidly, in the League of Nations, and, more boldly and explicitly, in the Charter of the United Nations. The United Nations Charter provided a centralized system in which unauthorized uses of force by any state were dealt with by the Security Council. It was to have, under the Charter conception, access to the military assets necessary to restore peace. The language of the Charter was quite conservative. The contingencies to which the Security Council was to react, "threat to the peace, breach of the peace, or act of aggression," were all coercive efforts to change the status quo and all were presumptively unlawful.

With a centralized system, like that conceived in the Charter, there was no longer any need for unilateral resort to force by self-help. Hence, the prescription of Article 2(4) of the Charter was not only morally elevated, but politically feasible and responsible. "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."

The Charter regime may be compared with customary international law at the time. Even after the prohibition of aggression, customary law allowed the use of force for self-defense as well as for "self-help": the protection and realization of other international rights. Charter law, in contrast, prohibited the unilateral use of force for any reason other than for self-defense; and that right depended, not on a prior *unlawful* act or even a concrete territorial incursion, but on a prior act of *aggression*. That was a technical concept which the UN apparatus would have to illuminate.

Some might be inclined to assume that in terms of outcomes, there should have been no difference between Charter law and customary law, since rights which states would formerly have had to protect by their own force under customary law would now be protected by the Security Council under the Charter. If the Charter worked, customary rights to resort to coercion would not only have been rendered unlawful, they would have been rendered superfluous. But this is a serious error and arises from reading Article 2(4) in isolation from the rest of the Charter and without regard to the new institutional structures established to police, authorize and use force. Article 2(4) may have prohibited states henceforth from using force in circumstances they thought appropriate or compelling; *but it did not prohibit the UN from prescribing how force*

could be used. The point of emphasis is that a uniquely structured organization, composed of a Security Council and a General Assembly, now had the competence to interpret the words in the Charter. The way in which that competence has been used is of direct relevance to the question we are addressing and accounts, as will be shown, for the double exposure.

* * *

It is no secret that the structural change which the Charter sought to install was frustrated early in the history of the United Nations. The Security Council required the fundamental agreement of its Permanent Members to operate. That agreement ended between the Soviet Union and the other Permanent Members, if it ever existed, shortly after the ink on the document was dry. Slowly, and then with the admission of many new states as members, the General Assembly began to take a bolder and different direction in shaping the law in this area. The infra-organizational constitutional changes by which this was accomplished need not be recited here. Increasingly, the Assembly got into the law-making business and, increasingly, many members of the Assembly began taking for granted the notion that when a majority of the states of the world got together in a conference forum, what they *said* was, if not international law, then at least evidence of international law. After 1975, the International Court, for related, political and constitutional reasons, tended to support that idea.

Article 2(4) of the Charter notwithstanding, the question of the legality of particular uses of force continued to present itself. Both the Charter and customary conceptions of international law with regard to the use of the military instrument rested on a set of inherited assumptions about how military conflict is conducted: conflict is territorial, between organized communities; conducted by certain types of specialists in violence or "regular forces" who are clearly identified; they concentrate their efforts against each other in a war zone; the conflict itself is preceded by formal notification, suspended by some formal arrangement, and terminated in an explicit and often ceremonialized fashion.

Changes in military technology and political dynamics obsolesced many of the key assumptions upon which rested the basic rules about when and how force was to be used. On the one hand, the nuclear balance has reduced the profitability and, to some extent, the likelihood of conventional warfare between the two major antagonists, but it did not reduce the conflict itself. Instead, a variety of nonconventional methods have been developed, some conducted by proxies, with careful concealment of the identity and activities of the principal. Many of these methods were associated with the independence or changed governments of

the new states and underwent mythicization. Developments in communications and transportation have enhanced the possibilities of infiltration and subversion, of protracted low-level conflict by well-supplied proxies, of preprogrammed "popular" uprisings, followed by "invitations" from local inhabitants and so on. International politics includes many nonstate categories of actors, many of whom increasingly seek to use nonconventional methods of coercion as a way of achieving their political objectives. The ease of communications, the relative miniaturization of weapons of increasing destructiveness, and refinements in methods of pursuing general objectives of mass terror, have permitted many groups, some with aspirations to become states, others with anarchist objectives, to become involved in military activity.

Meanwhile, a large number of the new states in the General Assembly who are relatively weaker than those in the Soviet and Western blocs, but whose numerical majority, in certain organized structures, has permitted them to put their own aspirations into law, have sought to use international politics as a way of accelerating their own development and advancing their distinctive political goals. The disintegration in the last forty years of all but one of the European empires has been accompanied by the establishment of more than one hundred of these new states, most of which share the common experience of colonialism and underdevelopment. Nor should it be surprising that the current period is marked by greater heterogeneity which promises, if anything, to increase. Different identifications, different demands for future production and distribution of values, and different expectations of past and future mean radically different and frequently contradictory appraisals of the lawfulness of contemporary events. This is nowhere more dramatically evident than in the Arab-Israeli conflict; however, it also extends to virtually every one of the major international conflicts of the past decades. It is significant that even in the Falklands War, which seemed to many to be a clear case of aggression, the Security Council refrained from characterizing Argentina's precipitating acts as aggression. The Council treated the situation as a "breach of the peace."

All of this has increased attempts to change almost all the law regarding the techniques by which states influence each other. These technologies include *ideological methods*, the so-called new international information order; *economic methods*, the so-called new international economic order; *military methods*, most comprehensively in the 1977 Protocols Additional to the 1949 Geneva Conventions; and in a number of other multilateral conventions to which we will return.

Because the grouping of new states is composed essentially of have-

nots who are seeking to use law to bring about changes, it is not surprising that they are more open to some uses of force to accelerate the achievement of what they have expressed as legal objectives. Thus, the general restraints on the use of force which have been expressed in constitutive documents since 1945 have often been effectively suspended when matters such as self-determination or decolonization were concerned. Indeed, as we will see, language has now been prescribed that provides even broader exceptions.

These various changes have all synergized with an essentially unresolved feature of the Charter conception. The Charter is simultaneously statist-oriented and oriented to policies that transcend state claims, such as human rights and, preeminently, self-determination. One consequence is that substantive international law, which was marked in the past largely by static and conserving norms, is now marked by an increasing demand for change. Indeed, it is replete with norms retroactively characterizing existing, formally legal situations as unlawful and pathological. Many of these "aspirational" and "appraisal" norms are accompanied by general obligations to behave in ways likely to aid in their realization, or they require continuing judgments about situations in terms of an international standard with an accompanying obligation to act to correct the situations if they depart from that standard.

The transformation of the Charter regime, the changing international military environment, the pressure arising from aspirational and appraisal norms, the tension between them and the static statist norms and, of course, the heterogeneity of views have contributed to an anomalous situation to which the international law-making process has responded. While formal international law, dating from 1945, has established a norm prohibiting "the threat or use of force against the territorial integrity or political independence of any state," new corollaries have established an asymmetrical regime in which certain uses of force by certain groups for certain purposes are legitimate even though they involve use of coercion against the territorial integrity or political independence of another targeted state. Conversely, coercive responses by those targeted states which were formerly considered self-defense are now characterized by this lawmaking process as themselves unlawful uses of force. First, the aspirational or change norms which are essentially produced in the United Nations are used to characterize some situations as unlawful. Second, the United Nations, using the Charter dialectic of "aggression-self-defense" as the criterion for unilateral use of force under the Charter, now interprets contingencies for which it will be lawful.

Consider first the General Assembly's Declaration on Principles of

International Law Concerning Friendly Relations (1970), a document which the United States supported, and which has frequently been presented by states and the International Court of Justice as a codification of contemporary international law. The Declaration provides in pertinent part:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

The operational implications of this right are spelled out later in this paper.

Every state has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence. *In their actions against and resistance to such forcible action in pursuit of the exercise of self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.* [italics supplied.]

Note here the beginning of an attempt at inverting customary law. "Peoples" have the right to "resist" when a state forcibly impedes their right to "self-determination" and "freedom and independence." The state against which these groups are struggling must refrain from any action which impedes the struggle, (*i.e.*, must refrain from actions that could otherwise be characterized as self-defense). Third states are obliged to help the struggling groups, but cannot be held legally responsible by the targeted state.

This "inversion" is not limited to a few historical atavisms. While decolonization may have had a historically specific reference for some drafters and been limited to South Africa and Portuguese territories, terms such as "self-determination" and, even more, "freedom and independence," are open-ended and can be applied to any group that a majority of the General Assembly wishes.

The Convention against the Taking of Hostages of 1979 is even more explicit in setting out the implication of the inversion. Article 1(1) defines the offense prohibited by the Convention as follows:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party,

namely a State, an international intergovernmental organization, a natural or juridical person or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offense of taking of hostages (hostage taking) within the meaning of this Convention.

But Article 12 of the same Convention provides in pertinent part:

The present Convention shall not apply to an act of hostage-taking committed in the course of armed conflict as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in Article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

These instruments are cited to make clear that a conception of international law as it relates to the use of the military instrument was emerging from the institutions of formal international law-making over a period of time. That conception was straying quite far from customary international law. Indeed, a new type of *just war* was being created. A parallel development can be found with regard to the way just wars are to be fought: the law of conflict, the *jus in bello*.

* * *

The new pattern of application of these particular norms can be gained from an examination of recent decisions by the political organs of the United Nations and judgments of the International Court. Middle Eastern examples will not be dealt with for the moment; instead, one from Southern Africa will be discussed where the overlap mentioned earlier can be found—it derives from claims based on extant statehood (South Africa's) and claims based on transnational values (racism and egregious human rights violations).***

Consider the international response to the South African incursions in a neighboring African state on May 19, 1986. On that day, South African troops attacked African National Congress (ANC) installations in downtown Harare, Zimbabwe, mounted helicopter and ground attacks near Gaborone and Mogaditshane, Botswana, and mounted air attacks on housing settlements and refugee centers in Makeni, near Lusaka, Zambia. There was ample evidence that the ANC operated from those

*** I rely here on the excellent research of Edward Kwakwa.

places and that the ANC was mounting incursions of forces, whether regular or irregular, and directing irregular activities within metropolitan South Africa.

The South African representative at the Security Council, Mr. Von Schirnding, defended his government's action as follows: (I am concerned here only with the essential international legal claim made by his government.)

South Africa will not tolerate activities endangering our security . . . we will not hesitate to take whatever action may be appropriate for defense and security of our own people and for the elimination of terrorist elements who are intent on sowing death and destruction in our country and in our region. We will not allow ourselves to be attacked with impunity. We shall take whatever steps are appropriate to defend ourselves.

The converse claim, basic African formula for the lawfulness of what groups like the ANC are doing, may be taken from an Organization of African Unity (OAU) resolution about Southwest African People's Organization (SWAPO) in 1979; the OAU "calls upon all progressive and peace-loving countries to render increased and sustained support in material, financial and military and other assistance to SWAPO . . . to facilitate the intensification of its legitimate armed struggle for the liberation of the people of Namibia." There you have double exposure, caused by an inversion of customary international law. One version of asserted international law vindicates one side, the other version vindicates its opponent.

The international reaction in this case is very instructive. The United States condemned the attacks, distinguishing them from the Libyan raid which the United States had just mounted and which South Africa invoked as a justifying precedent. The United States characterized the ANC indirectly, not as terrorists, but as "some dissident groups." The United States expelled the South African military attaché in Washington and recalled its military attaché in Pretoria. The United Kingdom (UK) and the European Economic Community (EEC) also condemned the raid. Canada temporarily recalled its Ambassador from Pretoria. Argentina broke diplomatic relations. But a draft resolution prepared in the Security Council was vetoed by the United States and the United Kingdom.

This incident is instructive in that it confirms the inversion of the traditional formula of international law for matters such as these. The irregular forces with sanctuary in a neighboring state who episodically invade the target state are engaged in a lawful activity. The target states' responses, involving "going to the source," are unlawful.

Cases and incidents like these involve two innovations. First, it is quite clear that the aspirational norm is being used to recharacterize retroactively a lawful situation as unlawful. The state defending itself from change is per se the law-breaker. The effect of this change is to shift the law in favor of the party which the United Nations chooses to view as struggling for "freedom and independence." Second, but only by implication, the content of the Charter conception of aggression and self-defense is being changed to preclude incursive responses by the victim into the territory in which the attacker has found haven. The effect of this innovation is to allow the low-level and protracted belligerent to operate with impunity outside the target state, while the target state is permitted to apprehend its adversary only *within* its own territory.

The second change, the revision of the formal theory of self-defense which underlies cases such as the South African incursions of May, 1986, developed over a period of time. I would now like to turn your attention to it.

The focus of change was the contingency for lawful self-defense in the Charter conception, the technical term being "armed attack." Since so much rests on the meaning of the term "armed attack," which is the alleged contingency for Charter-lawful self-defense, it is not surprising that considerable effort has been devoted to clarifying it. Article 3(g) of the Definition of Aggression prepared by the United Nations General Assembly in Resolution 3314 (XXIX) establishes what initially appears to be a quantitative threshold for the right of self-defense. Thus, an armed attack includes: "The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state *of such gravity as to amount to [inter alia an actual armed attack conducted by regular forces, Article 3(a)] or its substantial involvement therein.*" [italics supplied.]

In its affirmative part, this definition says that the mere fact that armed bands emanate from another state and engage in military activities in your state does not constitute "armed attack," the contingency which would justify your going into the other state's territory after them. If you do, your action will be aggressive. Only when the attack by irregulars is of such gravity as to amount to an actual armed attack may you respond. Only when this unspecified threshold is exceeded is the victim state entitled to take measures of self-defense. This is a formula favorable to what has come to be called "protracted low-level conflict," which by definition does not reach the level of "armed attack."

The implications of this innovation were made explicit and carried to their next logical phase by the International Court of Justice in its judgment on the merits in the *Nicaragua* case (June 27, 1986). There, the

International Court takes the Charter definition and transforms it into customary law and vice-versa, thereby excluding, it would seem, the old customary rights, including the general right of reprisal. Consider the Court's statement at paragraph 181:

However, so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the Customary [sic] international law flow from a common fundamental principle outlawing the use of force in international relations

.....

This merger, as it were, purports to exclude any unilateral rights to the use of force which derived from customary law and to superordinate the Charter regime and the Charter apparatus for its illumination. What then is the Charter conception of the contingency for the right of self-defense?

The Court narrows even more the General Assembly's conception. It excludes from "armed attack", and hence from the right of self-defense, many of the methods of low-level, protracted conflict. First, the Court insists that acts of armed bands must "occur on a significant scale." Second, the Court excludes *by definition* from the category of armed attack "assistance to rebels in the form of the provision of weapons or logistical or other support." The language of the Court here is instructive. "Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states." These are all matters which bring into operation a contingent competence of the United Nations. But they are not armed attacks and hence do not warrant any response which can be characterized as self-defense: They preclude unilateral action. If a state responds to these low-level activities by force, its action itself is apparently a violation of international law.

The legal theory that has emerged here is thus one that is tolerant of different forms of protracted and low-intensity conflict. While that conflict may be internationally unlawful and may give rise to a variety of protests, it does not, according to the theory developed by the Court, permit the victim-state to resort to levels of coercion contemplated in the right of self-defense. Moreover, the asymmetry that has been established here is one that, *pace* the Court, is identical in both conventional international law (the Charter) and customary international law.

Many of these developments have presented new strategic problems because states that *have* are concerned with conserving what they have, and hence view themselves as largely in a defensive posture. On the one hand, such states are likely to be those most committed to the status quo and, hence, to limiting the unilateral use of force to bring about authoritatively approved, if not authorized, changes. The law they wish is the "inherent" right of self-defense that they believed was incorporated in the Charter.

But the change vector in contemporary international law has undermined the inherent conservatism of the older legal order. In many circumstances, states committed to the changes sought by those engaged in non-conventional warfare have been willing to provide certain types of aid to those engaged in unconventional activities. This aid includes base camps, military supplies and logistics, intelligence support and sanctuary.

It is no surprise, then, that states which have been the targets of attack emanating from such sanctuary areas have sought to establish a norm or corollary permitting them to go to the source of the attacks on them, even if that meant a physical intervention in the territory and jurisdiction of another state. The claim is substantially the same, whether it is made by Israel, with regard to Palestine Liberation Organization (PLO) bases in Lebanon or Tunisia; by South Africa, with regard to ANC bases in Swaziland, Botswana, Zimbabwe, Mozambique or Angola; by the Soviet Union against Afghan resistance concentrations in Pakistan; by the United States against Nicaragua; or by Nicaragua against Contra formations in Honduras. The claim has been based on either broader conceptions of the law of the Charter, which we have considered earlier, or on the revival, or as some have contended, the *survival* of customary international law.

It is interesting that the Soviet Union, which was the first dissenter to a comprehensive conception of Article 2(4), with its doctrine of wars of national liberation, now finds that it is itself a target for this kind of action. It has, one would assume, begun to reappraise and to take a more critical view of at least some unconventional warfare. On a number of occasions, Soviet or Afghan army forces have crossed the border between Afghanistan and Pakistan. Conversely, the United States, with its new support of "Freedom Fighters" hither and yon, is itself taking advantage of the new international law. It is still too early to say whether this is an aberration, an abortive experiment or a new pattern involving a bizarre reversal of international roles formerly played by the United States and USSR respectively.

Changes are underway and they are nowhere more apparent than in

the vacillations of the United States Executive. In October, 1985, Israeli planes flew 1,500 miles to bomb PLO headquarters, south of Tunisia. The New York Times reported that between thirty and sixty people were killed. The initial White House response to the action was that it was "a legitimate response against terrorist attacks." The next day, Secretary of State Schultz defended the Israeli action, while the White House began to inch away. The subsequent White House statement characterized the raid as "understandable as an expression of self-defense," but added that the bombing "cannot be condoned." The Security Council condemned the Israeli action by a vote of fourteen to zero. The United States abstained, even though the language of the resolution still condemned Israel's "active armed aggression."

Within a week, the Achille Lauro was hijacked by members of the PLO. Two days later, the hijackers surrendered in Egypt as part of a deal which apparently was cut before the Egyptians knew that the hijackers had murdered an American national. The Security Council unanimously condemned the hijacking of the ship and a day later, United States planes diverted the Egyptian plane carrying the hijackers to Tunisia. The plane was forced to land in Italy where the PLO operatives involved in the hijacking were held for trial. The diversion, though not a territorial intervention, is still relevant to our discussion. It was criticized by the Egyptians and by many Arab governments but widely acclaimed in the United States and in Western Europe.

Some of you may interpret U.S. actions here as vacillation, cowboyism or both. I believe that they are a belated and groping response to a complex problem that will have to be addressed regardless of who is in the White House and whether or not the controversy concerns Israel. Events such as the Libyan raid by the United States and the diversion of the Egyptian plane carrying the hijackers of the Achille Lauro must be seen in two ways. On one hand, they may be viewed as episodic and opportunistic reactions to unconventional warfare methods. In a more profound, if not necessarily conscious sense, however, they represent an effort on the part of the United States to restructure the process of international lawmaking about the military instrument, shifting it away from organized arenas in which numerical majorities yield outcomes incompatible with U.S. interests, and moving it back to a customary law arena in which effective political power, rather than voting power triumphs. This effort at a constitutive shift of lawmaking is consistent with a number of other moves taken by the United States since the rejection of the Additional Geneva Protocols and the Law of the Sea Convention.

Given the structure of international politics, this American *démarche* will not be completely successful unless the Soviet Union joins it;

but that would not appear to serve Soviet interests, at least at the moment. There appears to be no reason to expect it. Hence, the United States and some of its allies will be pressing their own view of law against that established by a numerical majority of states. The USSR did this for more than 30 years with its doctrine of "wars of national liberation." That ambiguous symbol proved useful to many struggling groups and was ultimately adopted as their vision of law. The U.S. version may or may not undergo a comparable adoption. Regardless of what it does, the United States will confuse the process by which international law is made.

In addition to this constitutive shift, the United States is signaling a dissatisfaction with much of the content of the new law about the military instrument which has emerged. On a case-by-case and incident-by-incident basis, the United States is trying to lay the basis for a different international law in this regard. While this method circumvents the numerical majority whose policies are unacceptable, it lacks, like the spasmodic method in which anti-apartheid law was fashioned, a coherent conception of what we think the law should be for a wide variety of future factual situations. While our actions signal *eo ipso* that we believe that the old regime is no longer workable, they do not indicate what the new law in the new environment should be. This is dangerous, for current actions inevitably generate normative expectations; what serves our interests in the short-run may well disserve them in the long-run.

What the content of the new law with regard to military use will be is as yet unclear. But it now seems probable that the theory developed by the General Assembly and the International Court of Justice will be unacceptable to, at least, the United States. That fact alone, given the ineluctable relations between politics and law, will mean that this effort at law-making will be ineffective and possibly amended. Even if the revised prescriptions are closer to those contemplated in 1945, the demand for "exceptions" which benefit groups seeking to overturn governments and enjoying the support of large parts of the international community will continue to operate, for authority conceptions cannot help but be influenced by the United Nations. Thus, even revisions of law that are believed to redound to the benefit of the United States will leave Israeli actions in Lebanon and other parts of the Mediterranean arena, South African actions in nearby states, and United States supported actions in Central America readily available for moral judgments, but as far as international law is concerned, in a legal no man's land.