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International Law and the Use of Force: Reflections on the Need for Reform

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I. Introduction

The international law to control the use of force, as it currently exists, is incomplete, out of date, and should be changed. It is the purpose of this comment to stimulate intelligent public and expert discussion of this question. Recent events, such as those involving Nicaragua and El Salvador, Grenada[1] and Lebanon as well as events stretching back through the Falkland Islands, activities in Southern Africa, Afghanistan, the Dominican Republic in 1965 and the earlier Cuban missile crisis, reveal this inadequacy in international law. It has in truth been very difficult to square actions of many states including those of the United States on several occasions,[2] with the current U.N. Charter and international law system. The case of *Nicaragua v. United States of America* filed in the International Court of Justice on April 9, 1984,[3] has also brought some of this to a head.

It is this inadequacy in the law that probably led some to equate what the United States did in Grenada—which I would characterize as intervention that can be finished quickly, which meets with popular support, restoration

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1. *See*, Gordon, Bilder, Rovine & Wallace, *International Law and the United States Action in Grenada: A Report*, 18 INT'L LAW. 331 (1984) (hereinafter cited as "Report").

2. *E.g.*, *id.* at 380.

3. See case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1984 I.C.J. 169 (Provisional Measure, Order of May 10); Judgment of 26 November 1984 (jurisdiction of Court and admissibility of the application).

of domestic order, provision of economic assistance and departure (now almost complete)—with what the Soviet Union has done in Afghanistan, Czechoslovakia, and elsewhere in the name of the Brezhnev Doctrine.[4] There is something wrong with a law that cannot distinguish Grenada from Afghanistan.

II. The Existing Law and Its Inadequacy

The international law that developed in earlier centuries to deal with the legitimacy of the use of force, either as between countries or within countries, had a good deal of muddle, confusion and imprecision.[5] The League of Nations, and then the United Nations, represented something of a break with the earlier situation by attempting to impose more precise rules and also international machinery to enforce those rules.[6] To be sure, the world has changed greatly since 1945 when the United Nations, the arch of the present international legal system, was created. In fact, the United Nations has not eliminated the earlier muddle; it has merely changed it.[7]

The need for a healthy international law, and one with which effective United States and Western policy can co-exist, remains. The apparent lack of synchronization between effective policy and international law was reflected, on the occasion of the dispatch of American troops to Grenada, by the confusion on the part of American law professors and others. Some of the events in Nicaragua have created similiar confusion.[8]

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4. As originally reported in Pravda on September 26, 1968, this doctrine states that, "There is no doubt that the peoples of the socialist countries and the Communist Parties have and must have freedom to determine their countries' path of development. Any decision of theirs, however, must damage neither socialism in their own country nor the fundamental interests of the other socialist countries nor the worldwide workers movement, which is waging a struggle for socialism. This means that every Communist Party is responsible not only to its own people but also to all the socialist countries and to the entire Communist movement. Whoever forgets this in placing sole emphasis on the autonomy and independence of Communist Parties lapses into onesidedness, shirking his internationalist obligations." Reprinted in *The Current Digest of the Soviet Press* (1968), XX(39), p. 10.

5. H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW (7th ed., 1952), Volume II, at 152.

6. W. BISHOP, INTERNATIONAL LAW 173 (1954).

7. J. MURPHY, THE U.N. AND THE CONTROL OF INTERNATIONAL VIOLENCE 16 (1982).

8. Thus, in the case of Grenada, the reactions tended to fall into three groups:
(i) those who simply applied the law to the facts, found the action illegal and condemned it, *e.g.*, Abram Chayes, "Grenada Was Illegally Invaded," New York Times, November 15, 1983, p. A35;
(ii) those who considered the wisdom of our actions so overriding as to almost dismiss the relevance of the law, *e.g.*, Eugene Rostow, "Law 'Is Not a Suicide Pact,'" New York Times, November 15, 1983, p. A35; and
(iii) those who fit the facts into the law and thus suggested our actions might be legal, *e.g.*, Anthony D'Amato, letter to editor, New York Times, October 30, 1983, p. E19, (many presumably did this because they believed our actions wise, some of these sounded like official apologists).

When the United Nations was created in 1945, many believed, or at least hoped, that the United Nations Security Council could cope with all postwar security problems. In fact, the United Nations Charter[9] creates a monopoly of control of the legal use of force in the Security Council. Thus, in Article 24 of the Charter, the members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security." The almost complete stultification of the Security Council, because of the veto, was presumably not anticipated.

A. ARTICLE 2(4)

The legal use of force is denied the nation-state members of the United Nations. In the words of Article 2(4) of the Charter, "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 references to "international relations" and the apparent limitation of the prohibition of the use of force as "against" a state leave open the question of whether a state may itself request another state to help it with force to suppress domestic rebellion. The inadequate treatment of this question by international law is one of the roots of our problems.[10]

Article 2(7) of the United Nations Charter provides that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State. . . ." To be sure, the situation is not quite so simple. Thus the United Nations has on a number of occasions suggested that practices such as apartheid in South Africa, which might in an earlier era have been deemed "domestic" are of interest to the international community and, indeed, in the view of some may threaten the "international peace and security." Yet, it is fair to say, although not all will like to hear this, that the realities of the current nation-state system still give to the internal activities of nation-states, however defined, a large immunity from international involvement.

There is, however, one exception to Article 2(4)'s simple norm against the use of national force in international affairs: Article 51 of the United Nations Charter, which permits the temporary use of national force. In addition, the Security Council may itself *authorize* the use of force on *its* behalf ("Security Council action") under Article 53 of the United Nations Charter. There is also a *de minimis* footnote dealing with "humanitarian intervention" or more accurately "protection of nationals."

9. 59 Stat. 1031, JS No. 933, 3 Bevans 1153, done at San Francisco, June 26, 1945.
10. STOWELL, ELLERY, INTERVENTION IN INTERNATIONAL LAW 348 (1922).

B. Article 51

Given the sweeping proscription of Article 2(4), Article 51 has always been the key. And yet Article 51 has always been insufficient. Article 51 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. . . ." Article 51 contemplates only the *temporary* use of nation-state force. In the words of the Article, national action shall be "immediately reported to the Security Council and shall not in any way affect the authority and the responsibility of the Security Council. . . ," and such national action may only continue "until the Security Council has taken the [necessary] measures. . . ."

Two important aspects of Article 51 should be noted: the high threshold of an "armed attack" that must be surmounted before a nation may resort to force (the term "aggression," which is found in Article 1(1) and 39 of the United Nations Charter, is a broader term that is applied to the use of force by the Security Council, and not by nation-states under Article 51)[11] and the principles of "necessity and proportionality," which, while not explicitly mentioned in Article 51, are deeply rooted in the concept of self-defense. Thus, force, as controlled by Articles 2(4) and 51, may only be used by a nation if necessary and only proportionately, that is, to the extent necessary—what we might call the principle of "tit for tat." This basic notion of contemporary international law with respect to the use of force, namely that it is to be used as late as possible and as little as possible, is reflected throughout the structure of the Charter of the United Nations.[12]

Armed attack has been narrowly defined by almost all legal authorities and governments.[13] There have been exceptions. Thus in 1949, the Senate Committee on Foreign Relations, reporting out the North Atlantic Treaty (setting up NATO), while observing that "obviously, purely internal disorders or revolutions would not be considered 'armed attacks' within the meaning of Article 5 (of the Treaty)" went on to say "however, if a revolution were aided and abetted by an outside power such assistance might possibly be considered an armed attack."[14] But "armed attack" has not widely been deemed to cover externally-supported internal subversion.[15] This, in fact, is one of the key problems with the current system.

Armed attack, in the widely held view, is a simple concept, possibly too

11. Definition of Aggression, U.N.G.A. Res. 3379 (XXX), Nov. 18, 1975, 30 U.N. GAOR, Supp. (No. 34) 83, U.N. Doc. A/10023 (1976).
12. *E.g.*, Chapters VI–VIII.
13. Bishop, *supra* note 6, at 560.
14. S. Ex. Rep. No. 8, 81st Cong., 1st Sess. 13 (1949).
15. Murphy, *supra* note 7, at 172.

simple. Classic examples would be the invasions by Hitler of Poland, Belgium and The Netherlands in 1939, and the Argentine invasion of the Falkland Islands in 1982.

To be sure, it has been recognized that the simple concept of "armed attack" can give rise to complicated problems. Thus, for example, the Charter preserves the "inherent" right of self-defense, and it has been suggested that, based on history, self-defense against "armed attack" may be anticipatory.[16] In a nuclear age the most narrow possible interpretation of "anticipatory" seems desirable. It would be hard to fit the "anticipatory" strike by Israel against the Iraqi nuclear reactor and the Iraqi invasion against Iran within existing rules. It may also be hard to fit aspects of the Honduras- and Costa Rica-based attacks of the Nicaraguan *contras* into Nicaragua (or assistance to the Afghan rebels) into the existing norms. And this, whether such attacks are said to be merely a necessary and proportional response to Nicaraguan assistance to guerillas in El Salvador, or in anticipation of a Nicaraguan "attack" on El Salvador.

C. Security Council Action: Article 53

As noted, Article 24 of the U.N. Charter gives the monopoly of the control of the legal use of force to the Security Council. The Security Council may authorize others to use that force on behalf of the United Nations. Article 53 provides that, "The Security Council shall . . . utilize . . . regional arrangements or agencies [*e.g.*, the OAS] for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the *authorization* of the Security Council. . . ." (Reference to OAS and italics added.) The United States fitted its response in the 1962 Cuban missile crisis, and also its dispatch of troops in 1965 to the Dominican Republic, into this mold.[17] Thus, after the number of U.S. Marines in the Dominican Republic was substantially increased for the purpose of bringing what amounted to a civil war to an end and restoring "democratic order," this was ratified by the OAS, and the U.S. maintained that this action was, in turn, "authorized" by the Security Council. The authorization, in fact, consisted of Security Council "non-objection" to OAS notification of its action.[18] Today, as Grenada

16. Secretary of State Daniel Webster in 1842, after British forces in Canada had destroyed an American steamer, *The Caroline*, while it was still in an American port on the Great Lakes and had yet to attack Canada, protested and indicated that such anticipatory self-defense was only legitimate where the "necessity . . . [was] instant, overwhelming, and leaves no choice of means and no moment for deliberation, and must be limited by that necessity and kept clearly within it." See *Report*, *supra* note 1, at 367 *et seq.*

17. Chayes, Ehrlich, Lowenfeld, International Legal Process 27 (1965).

18. *Id.* at 44.

revealed, the United States can no longer always obtain affirmative votes in the General Assembly, the U.N. Security Council or the OAS.[19]

D. Protection of Nationals

The *de minimis* footnote to the United Nations Charter concerns "humanitarian intervention" and "protection of nationals," although the Charter does not provide for either concept. Under the concept of "protection of nationals," a country temporarily goes into another to take out its nationals and possibly other foreigners. Examples may include the dispatch of paratroops into Zaire some years ago to rescue missionaries, the Israeli raid at Entebbe, President Carter's attempted Iranian rescue raid, and the early phases of the Dominican Republic and Grenada interventions.[20] This protection of nationals is to be distinguished from the humanitarian intervention occasionally practiced in the nineteenth century by a state intervening into the affairs of another to protect the latter state's nationals.[21] As for the narrower concept of "protection of nationals," it is *de minimis* in the sense that it may be, and has been, argued that it does not violate Article 2(4) of the United Nations Charter or the "territorial integrity or political independence of any state."[22]

E. Pressures on Articles 53 and 51

The United States, confronted by the deadlock in the Security Council and the inadequacy of the U.N. system and wishing to rationalize its activities by law, has leaned to a strained use of Article 53 and regional organizations. On the other hand, we have resisted pressure to broaden Article 51, which as broadened might thus be available to provide legal justification for our actions in situations such as El Salvador, if not Grenada.

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19. *Report*, *supra* note 1, at 333.

20. *Id.* at 331 *et seq.* (Grenada) and 378 (Entebbe); Letter of President Carter to the Speaker of the House and President Pro Tempore of the Senate, Reporting on the Operation, April 26, 1980 (Iran).

21. There were a number of such foreign "protections" of various groups within the Ottoman Empire. Indeed, a treaty between Great Britain, France and Russia, dated July 6, 1827, provided for such intervention at the invitation and on behalf of the Greeks, a subject people within the Ottoman Empire. H. Lauterpacht, Oppenheim's International Law (8th ed., 1955), Volume I at 312.

22. Of course, technically, it does clearly violate territorial integrity. While various "humanitarian" notions may slowly be seeping into international law, the nineteenth century practice of "humanitarian intervention" clearly is not part of the international law enshrined in the United Nations Charter, and there is much that would *not* be allowed. Current law does not permit one nation, for example Vietnam, to intervene with force in another, *e.g.*, Kampuchea (Cambodia), to protect the citizens (Cambodians) of that state. It does not permit one nation to intervene in another, *e.g.*, South Africa, to protect South African blacks who are victims of apartheid. Current law would not have permitted another nation to intervene in Nazi Germany, to assist the Jews and other German victims of the Nazis. See Murphy, *supra* note 7, at 18.

1. *Pressure on Article 53*

On a sound analysis and as noted, Article 53 must be considered under the rubric of Security Council action. Although the Security Council has ceased to be effective, we have tried, honorably enough, to hang the use of force on the "legal fictions" that the Security Council continues to act, or that its non-action is proper under the Charter. Thus we have been inclined to permit regional organizations to act to maintain international peace and security, to overcome the problem of the Security Council veto and deadlock. We believed that such action was better than the unilateral use of force by a single nation, including the United States itself.

It is against this background that the broadened Article 53 developed. Article 53 and related articles of the United Nations Charter refer to regional organizations, of which the OAS is an example. Again, the OAS Charter repeats the U.N. proscription against one state's "pushing another one around."[23] It is suggested that in a situation of domestic chaos or disorder, such as the Dominican Republic and it was alleged Grenada, there is no government or "personality" of the state to push around. Thus when regional organizations use force in such a situation, it will be consistent with the U.N. Charter system. Ambassador Kirkpatrick at the U.N., for example, characterized our action in Grenada as "collective regional" action.[24]

The route of legal rationalization by regional organization is unsatisfactory. As a practical matter, it is hard to get approval from regional organizations, such as the OAS—*viz.*, Grenada.[25] As a political matter, when we do gain approval from it, as we did with respect to the Dominican Republic in 1965, many remain cynical and think, in my view wrongly, we have manipulated the OAS and that it is not much better than the Warsaw Pact.

2. *Pressure on Article 51*

Although the United States has been reluctant even to invoke Article 51, I would submit that developments since 1945 suggest that there is basis in state practice for giving Article 51 a broader interpretation, or possibly for the further development of customary international law to supplement Article 51. The principal gap in Article 51—as the world has evolved since

23. Article 18 (originally Article 15), states:
"No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements." 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, entered into force for the United States Dec. 13, 1951, as amended by Protocol of Amendment, 21 U.S.T. 607, T.I.A.S. No. 6847, entered into force for the United States Feb. 27, 1970.

24. United States Mission to the United Nations, Press Release USUN 120-(83), November 2, 1983.

25. *Supra* note 1, at 360.

1945, and as the controversy surrounding Nicaragua and El Salvador has recently demonstrated—relates to externally-supported internal rebellion and how to cope with this as a matter of international law.[26] The support that Nicaragua is said to give the guerillas in El Salvador is an example; the support that North Vietnam gave to the Vietcong in South Vietnam was another; the support we give to the *contras* of Nicaragua (at least insofar as it exceeds mere resistance to support for the El Salvador rebels) and the Afghan rebels are yet others. The various examples of external military support for internal rebels in several territories in southern Africa also come to mind.

Presumably, purely internal conflict, if it does not affect the "maintenance of international peace and security," with which the United Nations and the Security Council are charged, is beyond the purview of the United Nations. What is the relationship between Article 51's "inherent" right to self-defense and the matter of external assistance with respect to internal conflict? Pre-United Nations international law was not clear as to whether one state might request another state to assist it in putting down a purely domestic rebellion.[27]

With respect to Article 2(4) of the United Nations Charter, this may be a lacuna. Are we threatening the territorial integrity or political independence of a state if it requests us to suppress domestic rebellion? Maybe not. On the other hand, if the rebellion is widespread, it would seem to fall within the U.N. Charter support for popular self-determination, and external help for its suppression would seem wrong. Further, it is clear that the Article 51 reference to the "inherent right of individual or collective self-defense" cannot be deemed to permit "collective" self-defense of a state against purely domestic rebellion. A domestic uprising is not an "armed attack" in the narrow sense of armed forces moving across borders. It is for these reasons that the Soviet suppression of Czechoslovakia in 1968 and the current suppression in Afghanistan is so deeply troubling to us.[28]

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26. MURPHY, *supra* note 7, at 172.

27. Distinctions were made between isolated assaults, sporadic civil disruptions, and full-fledged and widespread rebellion that might give rise to so-called "belligerent" status. A more basic difficulty was political, and the European and American view were quite different. The nineteenth century Concert of Europe not only enshrined the nation-state but to an only slightly lesser degree the existing regime within each nation-state. Thus, Europeans believed it legitimate for Russia to respond to the request of Austria-Hungary in 1849 to put down the Hungarian rebellion. H. LAUTERPACHT, *supra* note 21, at 305. On the other hand, a prominent American law professor, Quincy Wright, once justified the Hungarian exercise of the "right of revolution." Deep down most of us would not think it right for another nation-state to call us in to suppress a purely domestic rebellion. If we believed that a government might call us in to suppress a purely domestic rebellion, we would not constantly reach for the gnat of finding external assistance to the rebels, as we did in the Dominican Republic in 1965, and to some extent in Grenada.

28. By contrast, pre-United Nations norms of even the United States would have permitted a request by a government in power in the face of rebellion (such as that of Austria-Hungary in

Conversely, if one accepts the nation-state system, one cannot accept a legal justification for the use of force on the side of wars of national liberation or the rebels. This is so notwithstanding the fact that the United Nations has taken the vague notion of "self-determination" (where the unit, whether geographic region, tribe, or otherwise whose "self" may be determined, is not precisely defined) and by resolutions suggested that it may be furthered by "all means available"—presumably including external force. Indeed, the governments of many newly independent nations, in Africa and elsewhere, condemn the justification of wars of national liberation as a threat not only to the regimes in power but the very states that they govern.[29]

III. Quo Vadis?

Writing in *Newsweek* on November 7, 1983, columnist George F. Will wrote that Americans, unlike others, do not ask of an event like Grenada, "Was that the right thing to do?", but rather "Did we have a right to do that?" In his view, we take an "inappropriately juridical approach to problems with other nations."[30] But in the words of Senator Sam Nunn, "The American people will not tolerate continuous illegal conduct," and are not prepared to have their government violate international law.[31] Indeed, the state of our public opinion is one of the principal reasons why international law must be clarified and reformed.

It may be useful to remember that many of our public values and attitudes, whether juridical or moral, developed when the United States was not at the center of power to the degree that it is today. Today, we find it difficult intellectually to relate our superpower status and our more legalist and idealist notions. Machiavelli once distinguished the order of *private* morality from the order of *public* morality, which was the world of his Prince.[32] For Americans, however, our order of *public* morality has two parts: (i) "the juridical," to which we might also add morals and ideas; and (ii) effectiveness and the order of the Prince. We, and others too, judge ourselves by our adherence to law (and ideals). But, at the same time, we are judged by our effectiveness—by our ability to cope, as the protecting superpower of the world, with the Soviets and with an assortment of problems, whether in Grenada, Lebanon, Central America, or elsewhere. The

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1849) for foreign forces to aid the state if there had been external assistance for the rebellion. *Id.* Volume I, at 305. To be sure the requested aid, to counter the prior external assistance, would have had to be subject to the principles of necessity and proportionality.

29. MURPHY, *supra* note 7.
30. George Will, "The Price of Power," Newsweek, November 7, 1983, p. 142.
31. Sam Nunn, *Remarks*, University of Georgia, Law Day, April 14, 1984.
32. MACHIAVELLI, THE PRINCE AND THE DISCOURSES 378 (1940).

result is a dilemma: We need exercisable force and power, which we must be prepared to use if it is ultimately to be effective; but even as we must have such force and power, there is a need to civilize it.

The two orders, law and political effectiveness, do not seem to be in "sync" at this time. More deeply, not only is the law not in "sync" with political effectiveness, but it fails in the eyes of many to meet the underlying requirements of all law—justice and common sense.

Americans do not need to have the right to initiate the use of force in a situation such as El Salvador. But I believe that we must have the right to respond with counterforce, for example, by assisting El Salvador, to the minimum extent necessary, if it wishes us to assist, against Nicaraguan support for El Salvadoran rebels, assuming such support to be the fact. (A common objection to the use of American or other external force is that it is usually difficult to establish the facts to everyone's satisfaction, but this is unavoidable in the current international system, and we cannot allow this difficulty to eliminate entirely the possibility of using force.) Grenada, of course, did not involve a counterforce situation but something more difficult.

The use of force is required by the breakdown of the Security Council and, to all intents and purposes, the ability to use regional organizations in a way that is both effective and consistent with the United Nations Charter. Furthermore, the absence of accepted rules of law permitting the use of force paralyzes the "juridical" side of the American mind, which does not wish to act *without* the authority of law. (I hasten to add that I do not urge the use of force but only that there should not be improper legal obstacles to its use).

It is time once again to seek to reform international law as has been done before, at the foundation of the League of Nations and again when the United Nations was established. It must be done by means that are subject to implementation and in a way that will, if not initially, at least eventually, achieve wide acceptance. Given the current degree of divergence of opinion among the nations of the world, at least in public forums, it will obviously not be possible to negotiate a universal treaty like the United Nations Charter or indeed to amend the Charter. The Security Council is subject to the veto,[33] and the General Assembly is not suitable. The General Assembly is not a legislature and cannot create law in the way that Congress does.[34] While its resolutions can have an impact on the development of customary international law,[35] it is highly unlikely, as a political matter, that the

33. United Nations Charter, *supra* note 9, at Article 27.
34. United Nations Charter, *supra* note 9, Articles 10–15.
35. Restatement of the Law, Foreign Relations Law of the United States, Tentative Draft No. 1 as revised, § 103 (1984).

General Assembly would accept an approach such as that called for here. Given the intellectual orthodoxies of our time, the developing countries are not likely to acknowledge explicitly the problems of the post-colonial world order, the security needs of the large powers, the need for "counterintervention" by force where the norms with respect to force are violated and the Security Council cannot act, or the occasional need for actions such as those in Grenada, even where the developing countries themselves may be the principal beneficiaries of such actions. Indeed, the differences between the Soviet Union and the United States, while of transcendental importance to each and to the world, are seen by many, not only in the developing countries, as unique to the superpowers and as irrelevant or irritating to others—especially those in developing countries preoccupied as they are with their own economic and social development and problems within their own regions.

We must for the foreseeable future assume a world in which the Security Council does not function properly. We must also acknowledge that the current situation with respect to "regional organizations" is unsatisfactory. On the one hand, they do not work very well (either for us or for others, *e.g.*, the OAS). To the extent that they do work, however, their approval of the use of force by the United States (or by the Soviet Union under the Warsaw Pact) does not seem to satisfy the basic moral and normative desire that force be only legitimately used. To be specific, Americans do not really believe that the OAS works for the American benefit. Yet when we finally persuade it to work, foreigners think it no different from the Warsaw Pact.

A. Proposed Approach to Reform

What should the United States realistically do to move things forward at this time? I suggest a unilateral declaration, such as President Truman produced with respect to the Continental Shelf.[36] It would be built on a careful assessment of state practice since 1945 and, if need be, nudge it forward somewhat. Such a declaration should be very honestly, intelligently and carefully drafted and be reviewed with our allies in advance. I would not see it as necessarily unacceptable to the Soviet Union.

While true rules of international law cannot be limited merely to making the world safe for American-style democracy, possibly the rules can be designed to prevent others from interfering in nations that strive for democratic order. After all, the United Nations includes among its purposes individual rights, freedom, democracy, and, properly understood, self-determination. I would also invoke the thrust of the Monroe Doctrine. I

36. Truman Proclamation, 59 Stat. 885; 10 Fed. Reg. 12303 (September 28, 1945).

submit that the purpose of the Monroe Doctrine was not to create a sphere of influence but, rather, to create a sphere of non-influence by European powers (that is to say to exclude "influence" imposed by force). This strikes me as an American norm that by analogy can be combined with the forward thrust of the Charter to suggest the content of our declaration.

The rules declared must be simple, realistic and workable. While they may restrain and shape existing and potential state behavior, it would be naive to believe that they can radically transform it, or indeed deal with all of our problems. They must reinforce certain existing international disciplines, such as the balance of power. What we want is some world order, some restraint to the prospect of nuclear war. To do so, we must have rules of law that the United States can obey, and which we can plausibly insist the Soviet Union and others obey.

B. Three Proposed Reforms

I suggest three rules: (1) an expanded interpretation of the Article 51 right to self-defense; (2) enunciation of a new concept of regionalism; and (3) a statement with respect to the nuclear and strategic balance between the United States and the Soviet Union, in such a way as to contain realistically the operation of the balance of power. This last norm is included for the sake of completeness. To some extent, it is an elaboration of the notion of self-defense with each bloc wishing to justify its ability to defend itself in order to maintain the overall strategic balance with the other bloc. The maintenance of the strategic balance does appear to be the background and pre-condition to all other interstate relations for the foreseeable future. As a doctrine of strategic balance, it is not currently encompassed by the United Nations Charter.

The delineation of the rules that we should declare follow.

1. *Lower the "armed attack" threshold*

Article 51 should be expanded, to be sure cautiously, to permit individual and collective self-defense not only against armed attack but also against internal subversion supported from the outside by force. That is to say, one would slightly lower the threshold of offensive action that would justify self-defense under Article 51. This would probably be no more than an intelligent declaration of state practice as it has actually developed since World War II. The actionable outside support, which could be legitimately met by requested outside counterforce, would have to be by force against the consent of a recognized government. The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations gives

guidance as to what this actionable outside support by force would consist of: "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within [one's] territory directed towards the commission of such acts, when [such acts] . . . involve a threat or use of force."[37] In a word, external support for rebellion or "wars of national liberation," prohibited under Article 2(4), are actionable under Article 51. The assistance that Baron von Steuben gave to the American colonies would have been illegal under the United Nations Charter and remains so.

A key side benefit of lowering the threshold and broadening the definition of "armed attack" would be to make certain responses that are now deemed anticipatory no longer such and would allow them, so long as they are necessary and proportional. Thus, it would permit some actions against Nicaraguan support for El Salvador guerillas as long as this was necessary and proportional, on the assumption that Nicaragua was, in effect, engaged in an attack against El Salvador.

With an expanded definition of armed attack, would all matters still be taken to the Security Council? Presumably, yes. Yet in reality, the Security Council might not act. We might settle for non-objection by the Security Council. Article 51 stands for the grim realization that force is used, and the belief that only the use of counterforce or the threat of counterforce can realistically deter force. Given, in effect, a Security Council-less world, this may be truer than we wish to believe. The expanded norm, no less than the current Article 51, would not justify intervention, but only—and this is and must remain more than words—"counter-intervention." Necessity and proportionality would remain the rule.

This reformed Article 51 would not encompass the notions of "humanitarian intervention" asserted in the nineteenth century. State intervention, by force, to assist the Cambodians in Kampuchea, or in the 1930s for the victims of Nazi Germany, would remain illegal, as would such intervention to assist the victims of apartheid in South Africa, although apartheid has been condemned by the General Assembly as a threat to international peace and security.[38] Some may find this conclusion troublesome, but the fact is that Article 2(4) prohibits the use of force in international relations. There is no question that if the United States were to use force, for example, on the side of blacks in South Africa that that would represent the use of force against the state of South Africa, as prohibited by Article 2(4). Moreover, it

37. *See* 9 INT'L LEG. MAT. 1292 (1970).
38. MURPHY, *supra* note 7, at 93

is obvious that Article 2(4), indeed, the entire United Nations system, enshrines the nation-state system in which one state is not to use force against another, no matter how distasteful its internal conditions.

2. *Regionalism Revised*

The American use of troops in Grenada over a year ago does not come under the first norm, as there was not external attack on it by Cuba, *et al.* Let us accept that the existing situation with respect to regional organizations and their relationship to the Security Council is not satisfactory. Would a revised definition of regionalism cover the facts of Grenada? I would define regionalism, which I would not relate to regional organizations, to permit spheres of non-influence by others (which, as I have noted, is how I would characterize the principal thrust of the Monroe Doctrine) rather than spheres of influence as such. One would not, however, limit these spheres, in the case of the United States, to the Western Hemisphere: a situation such as Grenada may arise elsewhere. In a situation of genuine domestic chaos—and the facts in Grenada can more plausibly be read as coup and attempted establishment of government power by tough men, rather than chaos—where there is a request from an overwhelming preponderance of the neighbors, whether organized in a regional organization or not, and/or a request by the remnant of the legitimate duly constituted authority surviving the chaos (*e.g.*, Sir Paul Scoon),[39] I believe that the United States, or another nation, should be legally able to intervene to restore order if its intervention is temporary. I do not believe that a right of regional intervention would be limited to or automatically follow from a request by an elected—assuming at least that degree of democratic viability—government. International law is not built on mere popularity and polltaking. Some have justified our action in Grenada because of the "euphoria" that the Grenadans have shown, presumably based on their hope that we would provide more order, and certainly more economic assistance, than their leaders did. But in a situation of true chaos, there may not be anyone in authority to make a request; a request from an overwhelming preponderance of neighbors should suffice.

External involvement, whether Soviet, Cuban or similar, in the "chaos" would not be legally necessary. On the other hand, such involvement, or the threat thereof, might provide a realistic underlying policy rationale for the United States to exercise its rights under this rule of law—to assure the "non-influence" of others. A related policy rationale for this might be our belief that once the Soviets *do* become involved and establish a regime

39. *Supra* note 1, at 378.

firmly in power, like a ratchet, they do not get out (mere political alliances as in Egypt in the past or Syria in the present are not the same; the withdrawal in 1955 from an Austria committed to neutrality may be an exception), and slowly but surely the possibilities for self-determination by the pre-existing nation-state and/or its restoration wane. The Brezhnev Doctrine may be seen as the final confirmation of this.

The principle of the new norm is "non-influence (by force)." It is to prevent an external power from using force in a situation of chaos to impose itself. Under such a norm, the Soviet Union could presumably intervene in Eastern Europe to prevent external force from being imposed, if there is a request from legitimate internal authority, or possibly the neighboring East European states. But this is quite different from interfering to suppress a purely domestic uprising as certainly seems to have been the case in Czechoslovakia in 1968 and in Afghanistan today.

Who determines these spheres of non-influence and are they fixed geographically for all time? We have seen that ours is not. The answer to the question comes from the political definition of the sphere. If France has political influence and authority in its former African territories and is requested to come in temporarily to exclude external force, it may do so under the new norm.

What about support for the Afghan rebels? The facts would appear to show that Afghanistan is not, as a political matter, within the sphere of the Soviet Union, as Eastern Europe has been. Therefore, the Soviet Union would have no right to interfere to exclude external force in support of rebels. And the Soviet suppression of domestic rebellion is unjustifiable.

Under the proposed norm, we might contemplate a ratchet effect with the non-Soviet sphere growing so as to realize the universal democratic aspirations that we hold and which the United Nations Charter reflects for all the world, including the Soviet sphere. Again, this is a political matter to be further and carefully considered before the issuance of the declaration.

3. *Strategic Balance*

What rules would be established with respect to the U.S./U.S.S.R. strategic balance? The NATO declaration of December 19, 1983, provides a useful guide. It says of NATO that:

> "Our alliance threatens no one. None of our weapons will ever be used except in response to attack. We do not aspire to superiority, neither will we accept that others would be superior to us. We are determined to ensure security on the basis of a balance of forces at the lowest possible level. We extend to the Soviet Union and the other Warsaw Pact countries the offer to work together with us to bring about a long-term constructive and realistic relationship based on equilibrium,

moderation and reciprocity. For the benefit of mankind, we advocate an open, comprehensive political dialogue, as well as cooperation based on mutual advantage." This language might be tightened into a legal norm.

In the absence of a Security Council functioning as originally anticipated, a norm with respect to the strategic balance is important. Although the United Nations Charter does not articulate such a norm or any rules with respect to it, presumably the Security Council, if it had functioned as anticipated with respect to the "maintenance of international peace and security" could have acted with respect to violations of it, too.

As already noted, this is more a political norm. It is not expected to apply to something so specific as the installation of Pershing missiles in Germany. And, there would be no legal questions as to whether the United States had waived its rights against the Soviet Union because it did not take issue with the installation of the SS-20 missiles more quickly. So, too, the discussions in the Mutual and Balanced Force Reduction talks and the SALT and START talks cannot be subject to a strict legal rule.

IV. Conclusion

This comment is about future global behavior and, more specifically, American behavior and the relevance to that behavior of international law on the use of force. I believe, very strongly, that the United States must take a political initiative so that we will not in the future be subject to the intense criticism and questions, both at home and abroad, in some cases from people who do not wish us ill, as to the legal character of such events as Grenada and Nicaragua.

We must start now to reform international law on the use of force. The fact that American behavior, including the use of force, must be satisfactory to its own public opinion requires no less. Indeed, it may be that the opinion of the American public is the main forum in which international law is important, as Senator Nunn's remarks may suggest.[40]

One of America's strengths has been to seek to promote international justice and law. We do not have to cease to do so because we have become a superpower. To be sure, the task may be more difficult and require greater care and precision of us than in the past.

It is in our interest, and everyone else's to try to salvage and create from the present situation a sound international law system. To that end, we should press ahead with a declaration of a just and effective set of interna-

40. *Supra* note 3.

tional law rules to control the use of force. Only the United States can provide the sustained normative lead. We will be happier with ourselves if we do so and many others in the world will be happier with us also. We should seek the high ground.