The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. Government, the U.S. Department of the Navy or the Naval War College.
CHAPTER IV

ECONOMIC WARFARE AS A PRIMARY POLICY DEVICE

INTRODUCTION

This Chapter illustrates economic warfare used "offensively" as a primary policy instrument. Major reliance is placed upon economic warfare in Situations 5 and 6 to attain policy goals. The offensive role of economic warfare in Situation 5 is to interrupt supply by one of our allies of insurgents in another state. The employment of intense forms of violence for this purpose is inadmissible because a basis for friendship of the target of economic action must be retained.

The offensive role of economic warfare in Situation 6 is to counter and upset a planned attack upon the United States with biological weapons. In Situation 6 naval and other military force is deployed to "quarantine" or "interdict" biological munitions and the means for their delivery.

Situation 5 concentrates upon basic elements of the "economic sortie." Difficulties in manipulating foreign aid as an economic warfare measure are illustrated. National and international commodity controls are discussed and suggestions offered how economic sorties can be developed within the legal structure established for commodity trade and control.

Situation 6 illustrates "economic sortie" techniques using naval force in offensive economic warfare. Self-Defense and Collective Self-Defense arguments under Article 51 are examined and a scheme suggested for a standard of permissive coercive action in view of Articles 2(4) and 51 of the United Nations Charter.

The reader will find it helpful to review the discussion of "intervention" in Situation 3, Chapter III. The analysis of permissive coercion suggested is framed in the broader standard of permissive intervention developed in Chapter III.

Situation 6 contains a discussion of legal problems in the Cuban Quarantine of 1962. Selected comments upon legal features of the Quarantine are analyzed and discussed.
A. PLANNING THE ECONOMIC SORTIE: CONSIDERATIONS OF LEGAL STRATEGY

Situation 5

Twelve hours after delivery of the Nuevan ultimatum to the Antiokan foreign secretary, Nuevan intelligence officers report withdrawal of the Antiokan marines from the southwest coast of Nueva. The marines have been replaced by PDS units. These units are now removing supplies from the beaches and have landed other supplies from unidentified surface vessels, submarines or aircraft.

Supplies identified as Antiokan are food, medical supplies and equipment, and small arms ammunition. Containers of small arms, antitank and antipersonnel mines, and light artillery ammunition have been observed. There are a number of uncrated light antiaircraft missiles. These missiles bear ordnance markings of the Peoples Republic of Scythia. No Scythian surface vessels, submarines or aircraft in the area have been identified.

Our Minister to Nueva, now at his post, has persuaded Cortez to request a meeting of the Organ of Consultation (Council of Foreign Ministers) of the Organization of American States. Both Nueva and Antioka are members of the Organization.

Cortez has declared, however, that Antioka must cease supplying Salvaje or he will stop the supplies by force. He is gratified that Antiokan marines have been withdrawn, is prepared to accept this act as a partial response to his ultimatum, and will refrain from military action for a short time to determine whether Antioka will cease its “intervention.”

The United States Minister reports Cortez is under heavy pressure by chauvinistic members of his cabinet to commence hostilities against Antioka immediately. He believes Cortez is anxious to avoid this diversion of his military strength. Both Cortez and the United States Minister are alarmed by reports that persons wearing the PDS armband but speaking Scythian are taking an active part in arming and training PDS personnel in the Luna Mountains.

Our Minister has recommended to the Department of State that action be taken to stop the flow of supplies from Antioka to Salvaje pending consideration of the Nuevan complaint by the Organ of Consultation of the OAS. While he acknowledges this may increase reliance by Salvaje on Scythia, he believes it important to bring Scythian support of Salvaje into the open as early as possible and to force Salvaje to requisition food from farmers in the Luna Mountain area. Since food supplies are short because of an extreme drought, he thinks this will alienate the farmers from Salvaje and favor the Cortez government.
After receiving this recommendation from our Minister to Nueva, the Department of State has instructed our Minister to Antioka to discuss the Nuevan charge with Marshal Gondomar, President of the Republic. Gondomar states if aid is being sent to Salvaje, this aid supports the Monroe Doctrine since it encourages Salvaje not to rely on aid from outside the Hemisphere.

In any event, the Marshal states, any aid Salvaje receives from Antioka comes from private sources. He cannot interfere with these because the Antiokan constitution, "one of the most liberal in the world" provides for absolute freedom in domestic and foreign trade.

Our Antiokan Minister reports most of the supplies to Salvaje are furnished by REVARMCO, an Antiokan corporation. Marshal Gondomar and his two sons own 75% of the common stock. The supplies are purchased by REVARMCO from Antiokan arsenals and depots on credit. They are then sold to Salvaje for gold.

The Minister believes Gondomar can quickly bring this trade to an end if he desires. Gondomar is regarded as friendly to the United States and has usually supported the United States in debates in the OAS.

You are commander of the United States Naval Base at Coloso, Antioka. The United States Minister to Antioka is now meeting with you and the heads of the Army, Navy and Air Force assistance missions to Antioka. The Minister wishes to analyze the situation and obtain your observations with a view to further talks with Marshal Gondomar and his report to the State Department.

You and the other consultants are aware that under the International Peace and Security Act of 1961 the United States expended $10,000,000 in Antioka during the past fiscal year. It will expend an equal amount during the current fiscal year. These amounts include the cost of major items of military equipment, such as tanks and antiaircraft guns, as well as the cost of spare parts, maintenance and training of personnel.

A loan of $12,000,000 has been made from the Development Loan Fund to assist in the resettlement of workers, presently employed in the tin mining and smelting industry, into agriculture and various light industries. No development grants have been made for the current fiscal year, but a grant is under consideration for agricultural training in the public schools.

Tin concentrates and refined tin metal have been the major Antiokan exports since colonial days. During the past ten years, the

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United States has purchased approximately 60% of the total Antiokan production of tin concentrates per annum.

About 40% of this total production has been purchased in dollars. The remaining 20% has been obtained by barter pursuant to the Commodity Credit Corporation Charter and the Agricultural Trade and Assistance Act of 1954 as amended.

Bolivia is the only other source of United States tin supply in the Western Hemisphere. The United States domestic production of tin concentrates is negligible; and tin is a strategic metal for which there is no adequate substitute in the construction of heavy-duty bearings.

The United States National or "strategic" stockpile now contains 341,000 long tons of tin ingot. Eight thousand long tons are in the Commodity Credit Corporation "Pipeline" stockpile. These amounts are 164,000 long tons in excess of projected strategic needs of the United States. The Congress has therefore authorized disposition of 50,000 long tons of tin ingot from the National stockpile.

None of this tin has been sold as of the time of the conference with the Minister. However, the projected sale has generated much publicity and has caused domestic and international concern among those interested in the tin market. The President of the United States has assured the President of Bolivia that tin dispositions authorized by Congress will be made in a manner which will not injure the Bolivian economy. Similar assurances have not been made to Marshal Gondomar.

Tin mining in Antioka is on a high-cost basis. The mines have not been mechanized appreciably. The three mining corporations, controlling 7/10ths of the Antiokan tin production, are controlled by Marshal Gondomar and his two sons through majority stock ownership.

Antioka has purchased most of its wheat and wheat flour from the United States and has bartered wheat for tin with the Commodity Credit Corporation. During the past year the United States exported to Antioka 900,000 tons of wheat out of a total export of 12,066,000 tons. Antioka also looks to the United States for most of its hard goods and textiles. Trade in these items amounted to about $15,000,000 during the past year.

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Antioka is a party to the International Tin Agreement of 1960. The United States is not a party. Both the United States and Antioka are parties to the International Wheat Agreement of 1962. The United States, Antioka and Nueva are members of the Organization of American States and are parties to the various treaties upon which this Organization is based. All are also parties to GATT and members of the United Nations Organization.

Our Minister to Antioka tells you he believes the National Security Council may recommend to the President economic action to secure cooperation by Marshal Gondomar in ending Antiokan aid to Salvaje. Due to your extensive service in the area and familiarity with Antiokan politics and economic affairs, the Minister solicits your recommendations concerning possible courses of action by the United States to bring to an end Antiokan intervention in Nuevan internal affairs. The Minister is especially interested in economic action, although other types of action will be considered during your conference. What course or courses of economic action will you recommend?

Discussion: Situation 5

1. Tentative Analysis of Facts and Possible Techniques

a. INTELLIGENCE BARRIER

The "intelligence barrier" is the major obstacle to be surmounted before an adequate plan of economic action can be formulated. The end to be sought is amply clear. The United States desires Antioka to police the commercial transactions in which persons within its territory play a part to insure trade with Salvaje ceases. The end desired is a condition of "no contact." This requires positive action by Antiokan authorities. The overall strategy of the United States resembles a reconnaissance in force directed against one enemy area to induce revelation of the enemy strength in another area not under attack.

An effort is to be made to preserve peace between Antioka and Nueva pending consideration of the Nuevan complaint by the Organ of Consultation of the Organization of American States. By the time of this consideration, it is also expected the magnitude of Scythian aid to Salvaje will be revealed.

None of these things can be accomplished with the speed and

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7 TIAS 5115 (1962).
finesse required to avoid a major disturbance of relations between
Antioka and the United States unless United States policy makers
know precisely: (1) who can make the decisions in Antioka re-
quired to produce and sustain the desired condition of “no contact”
with Salvaje; and (2) the values to which these decision makers
are likely to respond.

b. SELECTING THE WEALTH WEAPON

Once these facts are known, and our intelligence at this stage
indicates Marshal Gondomar as the official who can make the basic
“guideline” or “directory” decision to interrupt the contact with
Salvaje through his control over his sons and REVARMCO, we
will probably employ the technique described earlier in this book as
an “economic sortie.”

Although we are relatively sure economic warfare by “protracted
harassment” will not be attempted, it is possible a wealth weapon
will not be used. There is evidence Gondomar responds significantly
to manipulations of the wealth value (he likes money); but we
cannot be certain upon the information we now have about the
form this response is likely to take.

Will he resist or will he accept our demand? This we cannot
calculate with any acceptable accuracy until we know more about
Marshal Gondomar—his history, his current control over his political
following, the other values at stake as Marshall Gondomar probably
views them.

Before, during and after our economic sortie, we must depend
upon a constant and accurate flow of intelligence. Without this flow
and a reasonable expectation of its continuance, a wealth weapon
should not be used because of the chance of catastrophic misdirec-
tion.

Assuming we can rely upon the facts we have—and obtain addi-
tional facts—our problem is to induce in Marshal Gondomar
psychical disequilibrium or “a sense of being trapped.” He must
feel he has no alternative but to accept our demand.

This we will do by bringing clearly before the Marshal the decision
we desire and indicating the probable points of our operations
against his economic position. We will then proceed rapidly in our
operations against the point at which he apprehends major injury
and feels least able to defend.

It is not what he can do, but what he thinks he can do that counts
in economic warfare by economic sortie. We must thus take full
advantage of any existing apprehensions of detriment with which
the Marshal is troubled. These apprehensions should indicate the most remunerative points of attack.

It is not the shock of the unexpected which produces disequilibrium, as in applications of military force, but the rapid development of an anticipated event which enhances the intuitive pessimism of the individual concerned. The point demanded is conceded by the target upon the assumption that by doing this he can stabilize his position. The “intermediate” object in both economic and military warfare is a “psychological condition” of a critical decision maker. The ultimate object is acceptance of the victor’s demand.

Four areas of possible economic action appear in the facts before the Conference:

(1) The military and general economic aid program is substantial. A withdrawal, increase or redirection of this aid may be possible and would be adaptable to the “economic sortie.”

(2) Operations might be conducted against the Antiokan tin industry in which Marshal Gondomar has a direct and personal interest.

(3) Antioka has been relying upon wheat obtained by purchase and barter from the United States. Perhaps this supply could be cut off if other sources could be blocked.

(4) There is substantial trade in hard goods and textiles that may be interrupted or increased.

In addition to the possibilities for economic warfare mentioned in the facts there is an indefinite range of other possibilities. These might include interference with loans sought by Antioka; action against Antiokan assets in the United States; or a naval surface, subsurface and air blockade of Antioka or Nueva. With modifications in technique and an adequate flow of information, any of these devices can be shaped to an “economic sortie.”

There are two criteria which an acceptable economic weapon must satisfy: (1) The weapon must be supportable by other techniques ranging from persuasive diplomatic devices to physical force (Sustentive Range). (2) Collateral repercussions through use of the wealth weapon must be suppressible (Ambit of Arrest). These criteria, in many instances, overlap. Both are aspects of the major desideratum of economy of force.

c. **SUSTENTIVE RANGE—AMBIT OF ARREST**

A wealth weapon, used as a primary policy device in economic warfare, is not an exclusive policy device. Once a basic “guideline” or “directory” decision is obtained by pressure upon Gondomar,
this decision becomes meaningful only when supported by "executorial" decisions for the period desired. In effect, the decision maker must be locked upon his course. Supporting the decision maker in obtaining the required executorial decisions is a vital part of this continuing direction.

The policy devices to secure this continuing direction can be tentatively projected at the time the primary wealth weapon is selected. When conditions produced by the use of the wealth weapon are analyzed, further action by the use of wealth or other weapons can then be determined precisely.

But care must be taken that the wealth weapon selected for initial use does not preclude supporting action to obtain the requisite executorial decisions or further guideline decisions. For example, if wealth pressure upon Gondonmar results in resistance to him by his own party or a major political group within the country, he may be forced into a position in which he cannot call upon the United States for help without seriously disturbing his domestic political support.


A difficulty of this kind arose during the Marshall Mission to China in 1946. Although extensive American aid was necessary in China to rebuild its economy, and for this reason could not be delayed indefinitely, both President Truman and General Marshall held out economic assistance to the Generalissimo as an inducement both to reforms within the Kuomintang and to cooperation by the Nationalists in a viable truce with the Chinese Communists.

General Marshall considered no stable Nationalist Government possible without substantial popular support. This support he thought might be developed most rapidly by reforms within the Kuomintang. The General's instructions authorized him to state that a China disunited and torn by civil strife was not a proper place for American economic assistance or military aid.

Extensive aid was given the Nationalist Government under Lend-Lease and commitments were honored to transport Nationalist troops by air following the Japanese surrender. UNRRA, to which the

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8 "Executorial" is used in the sense of any decision required to execute a policy and therefore described an area broader than that of the "administrative" decision, including judicial decisions as well as decisions in informal groups affected by the basic decision.

9 See 15 Department of State Bulletin, 34 (1946).

10 United States Relations with China, 132 (Department of State Publication 3573) (1949).
United States was the major contributor, gave substantial aid to the Chinese in 1945 and 1946. But General Marshall opposed credits by the Export-Import Bank. He did not recommend these until, by early 1946, the outlook for a peaceful settlement of the Nationalist-Communist conflict appeared promising.\footnote{Ibid., 226.}

The Export-Import Bank ultimately granted $82,800,000 in credits to the Nationalists. Upon the further recommendation of General Marshall, the Bank earmarked $500,000,000 of its funds for China, although implementing agreements were never made.

In the Lend-Lease Pipeline Agreement, the United States permitted delivery to the Nationalist Government on long-term credits of civilian-type equipment and supplies contracted under the Lend-Lease program but undelivered on V-J Day. Fifty-one million seven hundred thousand dollars in equipment and supplies were covered. There was also minor technical collaboration in agriculture and forestry.

An aid program of even this limited scope could be played upon both by Communists and Kuomintang extremists to obstruct the efforts of General Marshall. Both sides could cultivate the xenophobic and antiwestern bias of large segments of the Chinese to block both reforms in the Kuomintang and reciprocal concessions by Nationalists and Communists to implement the truce. As stated by the Department of State: \footnote{Ibid., 170-171.}

The Chinese Communists professed to regard measures of aid to China and official statements in Washington as proving their contention that American economic and military support to the Chinese Government would continue to be given irrespective of whether the National Government offered the Communists a fair and reasonable basis for settlement of military and political differences. The Communists maintained that new legislation intended to aid China, which was then under consideration by the United States Congress, was reinforcing the National Government’s tendency to deal with the Communists by force and was thus contributing to all-out civil war. ** (The legislation concerned a military advisory group to act in accordance with the military reorganization agreement of 25 February 1946) **

At the same time some reactionary Kuomintang elements in inner government circles were utilizing American measures as a basis for pressing the Generalissimo to push forward with a plan of extermination against the Communists. Yet these and
other Kuomintang extremists appeared to be joining in anti-American agitation on the grounds that American economic pressure was causing American imports to displace Chinese products, bankrupt Chinese industrialists and prevent Chinese recovery.

These Kuomintang groups were also antagonistic to the restraint exercised by General Marshall and his assistants on the National Government with regard to an anti-Communist military campaign and were even using the Communist line against American intervention in pursuance of their aim to free the National Government from any American impediment to drastic anti-Communist action. The agitation and propaganda resulting from the activity of the different factions was being manifested in mass demonstrations, press campaigns and mob actions. * * *

On July 7 the Chinese Communist Party issued a manifesto containing a bitter attack on American policy toward China and a protest against what the Communist termed American military and financial aid to the National Government, which encouraged the civil-war policy of the Kuomintang. General Marshall had previously refrained from comment on such propaganda attacks, but the coincidence of events led him to inform General Chou En-lai of the serious blow to the negotiations such propaganda attacks represented, paralleling as they did similar propaganda releases from Moscow, and of the impossibility of his serving any useful purpose in mediation and in the termination of hostilities while such attacks continued. * * *

As General Marshall, in this hostile environment, attempted to hold together his disintegrating truce arrangement, the Communists meanwhile assuming a more aggressive posture by attacks upon American military personnel, his position was seriously jeopardized by the Sino-U.S. Surplus Property Agreement of 30 August 1946.

The Surplus Property Agreement was concluded in Shanghai between Mr. T. V. Soong, President of the Executive Yuan and Mr. Thomas B. McCabe, Special Assistant to the Secretary of State and Foreign Liquidation Commissioner. The United States agreed to sell to the Nationalists for $205,000,000 small naval craft; communications, construction, electrical, medical and chemical equipment and supplies; shop and industrial machinery; vehicles of all types; and air force items. The property had a procurement value
of $900,000,000 and was said to cover only items with a civilian end-use potential.\textsuperscript{13}

Against the consideration of $205,000,000 was set off $150,000,000 due by the United States to China for supplies furnished United States forces during World War II. The remaining $55,000,000 was to be paid in Chinese currency on a long-term basis. Twenty million dollars was to be used by the United States in cultural and educational activities in China. The balance of $35,000,000 was to be used for acquisition of real property and other United States expenses in China. The United States also established a fund of $30,000,000 to be used for shipping the surplus and technical services arising out of the transfer.

It is improbable that the Surplus Property Agreement was intended as an “economic sortie”—unless this was the Nationalist view of the matter. The surplus was located in India, China and upon numerous Pacific Islands where both storage facilities and adequate maintenance crews were lacking. Unless the surplus could be utilized promptly, it would be destroyed by the tropical climate and exposure.

A feeble effort appears to have been made to turn this exigency to diplomatic advantage. President Truman emphasized in an exchange of letters with the Generalissimo between August 10th and August 31st the necessity that Chinese internal problems be settled peacefully before extensive American aid could commence.\textsuperscript{14} Whether the exchange was initiated to coincide with the Agreement, or the Agreement signed to coincide with the exchange, cannot be determined from published materials. Although the Chinese were given 22 months within which to remove the surplus, there would be a sufficient logistical lag to prevent use of the property in any immediate assault against the Communists. At the same time the transfer would indicate to the Generalissimo the quality and quantity of the remaining “carrots” in the American bin. This was “weak fare” for “warfare”; but the Agreement, “sortie” or not, both blocked the truce negotiations and tended to neutralize the political impact of all American aid extended thereafter to the Nationalists until they were driven from the mainland in 1949.

As “economic warfare” the Agreement lacked sustentive range because it provided apparently definitive proof of a Communist

\textsuperscript{13} The writer has not had access to a verbatim copy of the Agreement. A fairly detailed summary of the provisions appears in 15\ Department of State Bulletin, 548 (1946).

\textsuperscript{14} United States Relations With China, 652–654 (Department of State Publication 3573) (1949).
charge, difficult to refute in the minds of Chinese—the minds that counted, that the Generalissimo was entirely dependent upon American support and could never be more than a "puppet of American imperialists." The Agreement also provided an apparent foundation for the charge that the United States actually had no interest in a viable truce but was buying time to build up Nationalist strength.

Typical of this propaganda, as it reached a fever pitch, was the passage in a speech by Chou En-lai, broadcast from Yenan in January 1947: 15

The people of the whole nation were welcoming President Truman's statement on China and General Marshall's mediation efforts in China a year ago, but not before long the true nature of the China policy of the American imperialists was exposed, and the high treason diplomacy of Chiang Kai-shek's regime was also fully unmasked.

Since then, from tens of thousands of students to the broad masses of residents in big cities all over China have been shouting these slogans: 'U.S. Army quit China,' 'oppose American intervention in China's internal affairs,' 'oppose Quisling style diplomacy,' 'oppose the Sino-American trade treaty'; and the like ***

And the Central Committee of the Chinese Communist Party stated in February 1947: 16

*** Since January 10, 1946, however, Chinese Kuomintang government has not only enacted many arbitrary domestic measures but also has many times singly conducted diplomatic negotiations of a serious nature with certain foreign governments. In the course of understandings, both oral and written, secret and open, without these agreements and understandings having been passed by the Political Consultative Conference or consulting opinion of this party and other parties and groups participating in Political Consultative Conference.

These diplomatic negotiations include loans from foreign governments, continuation of Lend-Lease, buying and accepting of munitions and surplus war materials, forming of treaties regarding special rights in commerce, navigation, aviation and other economic and legal special rights.

These negotiations and agreements request or permit foreign land, sea and naval forces to be stationed in or operate on the seas, waterways, territories, and in the air of the country, and

15 Ibid., 707.
16 Ibid., 719.
to enter or occupy and jointly construct or make use of military bases and points strategic to the national defense. They furthermore request or permit foreign military and other personnel to participate in organization, training, transportation and military operations of land, air and naval forces of the country, and to become conversant with military and other state secrets of the country. They also permit such serious matters as foreign intervention in internal affairs.

These measures of the Chinese Kuomintang government are completely contrary to the will of the Chinese people and they have plunged and will continue to plunge China into civil war, reaction, national disgrace, loss of national rights, colonization and crisis of chaos and collapse. In order to rescue the motherland from this calamity, to protect national rights and interests and the dignity of the Political Consultative Conference, the Chinese Communist Party solemnly states: This party will not either now nor in the future recognize any foreign loans, any treaties which disgrace the country and strip away its rights, and any of the above mentioned agreements and understandings established by the Kuomintang government after January 10, 1946, nor will it recognize any future diplomatic negotiation of the same character which have not been passed by Political Consultative Conference or which have not obtained agreement of this party and other parties and groups participating in the Political Consultative Conference. * * *

A similar mixture of half truth and falsity was prepared and spread to embarrass General Marshall during the negotiations for the August 30th Agreement and thereafter. His position was made doubly difficult because on 29 July 1946 munitions exports had been embargoed from the United States to China and also in mid-August from the Pacific bases. This action was taken, apparently, to buttress General Marshall's neutral position as mediator, rather than as a form of pressure upon the Generalissimo and the Kuomintang leaders. The Surplus Property Agreement then gave the Communists a new propaganda foothold.

General Marshall appears to have taken rapid action in an effort to offset this propaganda opening given to the Reds. In the words of the State Department: 18

In view of continued Chinese Communist propaganda attacks on the surplus property agreement of August 30, 1946, General Marshall gave a very detailed explanation of this transaction

17 Ibid., 355.
18 Ibid., 180.
to the Communist Party representative. He pointed out that this transaction had been under discussion since the beginning of 1946 and had been almost settled at the time of General Marshall's departure for the United States in March. During his visit to the United States he had ironed out most of the difficulties involved and the failure to reach an agreement on this transaction in February had resulted from Chinese Government efforts to improve the terms. The alternative to completing an agreement with China for the sale of this surplus property was the immediate disposal of the property to other governments in the Far East or dumping it in the ocean, courses of action which would have deprived China of material of considerable importance in the economic rehabilitation of the country.

General Marshall continued that Chinese Communist propaganda had imputed to this transaction every evil purpose possible and that great harm had thus been done. He concluded that while he accepted this propaganda as inevitable, he was greatly disturbed when a proposal such as that for the informal Five-Man Committee was being destroyed as a result of such propaganda.

The Chinese Communist Party representatives, however, continued to be critical of the surplus property agreement on the grounds that items such as trucks, communications equipment and army rations and uniforms would be used for civil war purposes and other items would be sold on the market and the proceeds thereof expended for military purposes. **

The Agreement thus provided the Communists with a ready answer to resist influence by persuasive diplomatic techniques. Their punch in fact had been "telegraphed" by Stalin in his discussions with Secretary Byrnes in Moscow in December 1945. Stalin suggested that Chiang Kai-shek "would lose his influence if the Chinese people got the impression that he was depending on foreign troops." 19

The United States, after demobilization, lacked adequate military forces to affect the issue in China decisively. Its remaining weapons were advice and economic aid. The advice was difficult to give and poorly received because of chauvinistic sentiment within the Kuomintang. The economic aid, massive as it later became, was considered by no one likely to affect the Nationalist-Communist contest. The battle at this time was one for the loyalties of the Chinese. This loyalty was either unaffected or repelled by the American assistance. There were no rational alternatives open to the United States

other than extending aid. But the effect of this aid had been effectively precluded by the antiforeign gambit placed in the hands of the Communists by the Surplus Property Agreement.

In testifying before an executive session of the Senate Foreign Relations Committee, General Marshall, then Secretary of State, discussing the proposed China Aid Act of 1948, put the matter succinctly: 20

We must be prepared to face the possibility that the present Chinese Government may not be successful in maintaining itself against the Communist forces or other opposition that may arise in China. Yet, from the foregoing, it can only be concluded that the present Government evidently cannot reduce the Chinese Communists to a completely negligible factor in China.

To achieve that objective in the immediate future it would be necessary for the United States to underwrite the Chinese Government’s military effort, on a wide and probably constantly increasing scale, as well as the Chinese economy. The U.S. would have to be prepared virtually to take over the Chinese Government and administer its economic, military and governmental affairs.

Strong Chinese sensibilities regarding infringement of China’s sovereignty, the intense feeling of nationalism among all Chinese and the unavailability of qualified American personnel in the large numbers required argue strongly against attempting any such solution.

It would be impossible to estimate the final cost of a course of action of this magnitude. It certainly would be a continuing operation for a long time to come. It would involve this Government in a continuing commitment from which it would be practically impossible to withdraw, and it would very probably involve grave consequences to this nation by making of China an arena of international conflict. An attempt to underwrite the Chinese economy and the Chinese Government’s military effort represents a burden on the U.S. economy and a military responsibility which I cannot recommend as a course of action for this Government.

On the other hand we in the Executive Branch of the Government have an intense desire to help China. As a matter of fact, I have struggled and puzzled over the situation continuously since my return. Our trouble has been to find a course which we

20 United States Relations With China, 382 (Department of State Publication 3573) (1949).
could reasonably justify before Congress on other than emo-
tional grounds. * * *

Present developments make it unlikely, as previously in-
dicated, that any amount of U.S. military or economic aid
could make the present Chinese Government capable of re-
establishing and then maintaining its control throughout all
of China. * * *

Peruvian Coup d'etat:
Ambit of Arrest

As important as the criterion that a wealth weapon have sustentive
range, which the Surplus Property Agreement lacked, is the closely
related criterion that side effects of the weapon be suppressible.
This, as noted previously, is described as the "ambit of arrest" of
effects of the weapon. These side effects are notoriously difficult to
foresee in economic warfare.

All interaction stimulated by economic warfare is not susceptible
to control. It is critical, however, that conditions precluding ac-
complishment of the goal of use of the wealth weapon be subject
to influence.

An example of the difficulty in dealing with the ambit of arrest
of an economic weapon is illustrated by the United States response
to the Peruvian coup d'etat of 18 July 1962. Within a few hours
after President Prado's overthrow was announced, the United
States broke diplomatic relations with Peru and terminated all aid
except a school lunch program. Within a month, on 17 August 1962,
diplomatic relations were resumed and aid, other than the military
programs, was restored. By this date the military regime was firmly
in control, having survived a general strike and broken the voting
power of the opposition APRA party.

No doubt motivated by a desire to regain the goodwill of the
United States, the Junta gave President Prado his freedom when
his term of office expired. Impartial presidential elections were
promised in 1963 under a revised electoral law.

These were liberal gestures, but the Junta had declared these
policies in substance shortly after it seized power. Economic pres-
sure may have produced an unequivocal statement of these policies.
But there seems little reason to suppose that the Junta ever intended
to do other than carry out its original commitments.

The purposes sought by the United States in terminating aid to
Peru were never stated with clarity in official press releases. News
commentators were in some confusion concerning the matter.

Probably two objectives were sought: (1) Weakening the Junta
to permit its overthrow by the APRA general strike and (2) Demonstrating United States disapproval of military coups d'etat directed against civilian governments elected by democratic processes.

No doubt the latter objective was partially achieved. However, a wholly convincing expression of disapproval would require withholding aid while the Junta held power, since a few months earlier aid had been restored to a civilian government supported by military officers who had overthrown President Frondizi of Argentina. The net psychological effect upon prospective military rebels seems to have been that of a precautionary rap upon the knuckles. But the first objective, if in fact overthrow of the Junta was an objective, was unattainable because the United States had no effective method to control side effects of the withdrawal of aid. There was no ambit of arrest of these effects.

These side effects stemmed principally from resistance within Peru to intrusion by the United States into its internal affairs. There was support to this resistance by leading Latin American states, including Argentina, Brazil and Mexico.

To carry through its Peruvian policy to the goal of overthrow of the Junta by nonviolent means would require moves by the United States against a substantial number of other Latin American countries. These moves might be by economic or other sanctions. In all likelihood such moves would have been inconsistent with the principles of the Alliance for Progress and probably also in conflict with the nonintervention provisions of treaties to which the United States is a party. Pragmatically, and legally as well, the United States was barred from containing the forces which its withdrawal of aid set in motion.

The prospect of military interference in the Peruvian elections of June 1962 had been evident for months before results of the elections were known. Military members of President Prado's cabinet had warned that the elections would be vitiated by fraud.

The facts upon which this apprehension of fraud rested, or the findings of fraud alleged by the military after the elections, were never publicized in the United States. It is reasonable to surmise, however, that the underlying difficulty was total incompatibility between the Peruvian military elite and the leaders of the APRA party.

APRA had been founded by Dr. Haya de la Torre, its presidential candidate in the elections of 1962. The party controlled the Peruvian Confederation of Labor.

In its early years, APRA had been dominated by Communists. It had engaged in two armed clashes with the Peruvian Army and
Navy, once at Trujillo in 1932, where a number of Army officers had been killed, and thereafter at Callao in 1948, where it fomented a naval mutiny. Although APRA at the time of the coup d'état in 1962 was reputed to be mildly socialistic and strongly anticommmunist, the old leaders, such as Haya de la Torre, remained. The latter, in particular, was anathema to the generals and admirals of the Peruvian Armed Services.

There was little that the United States could do about this great gulf between APRA and the military services. However, United States policy makers appear to have been convinced that APRA was supported by a popular majority and would provide the best guarantee against a communist foothold in Peru. From press releases, it appears that Ambassador Loeb had informed certain Peruvian military leaders that a coup d'état would be opposed by United States sanctions.

When the votes were tallied some three weeks after the election, Dr. Haya de la Torre was found to have prevailed by about 14,000 votes over his nearest opponent, Belaunde, who had been supported by a number of influential military leaders. A third party, led by former President Odria, polled sufficient votes to swing the balance for or against APRA in the presidential election.

Under the Peruvian Constitution no presidential candidate was elected unless he polled more than one third of the votes cast. If no candidate polled the necessary one third, the election was thrown into the Peruvian Congress. There APRA could prevail unless Belaunde and Odria combined.

The center of power thus shifted to Odria, a retired general, who had outlawed APRA and bottled up Haya de la Torre for five years in the Colombian embassy in Lima during his earlier term in office as President. Surprisingly, although Odria’s Social Christian Party had substantial support from certain labor unions, discussions commenced between Odria and APRA leaders with a view to withdrawal of Haya de la Torre and a substitution of Odria for the Presidency.

Influential military leaders opposed this alliance. For this and other reasons the discussions broke down.

The Odria-APRA discussions were the last clear chance to avoid a coup d'état. On 11 July the National Electoral Board rejected a petition by Belaunde to set aside the vote in critical La Libertad Department. The Board refused credence to military reports of irregularities in this Department in registration and voting.

When President Prado refused to set the elections aside, since he had no constitutional power to do this, the military Junta seized
control. The response of the United States followed within hours. The withdrawal of aid came as a shock to the Junta, most of whom were well disposed towards the United States. There is no indication that a withdrawal of aid deflected them from their course in any way.

The Junta took steps to mend its breached relations with the United States. But because the Junta controlled communications within Peru, the military communications net extending into the most primitive communities, the withdrawal of aid could be turned to the advantage of the Junta.

Odria, who had advocated a constitutional approach to solve the election difficulty, now denounced the American intervention. He gave his tacit blessing to provisional government by the Junta, and played no small part by withdrawal of union support from APRA in breaking the general strike called against the Junta on 21 July.

By the end of July the nationalistic reaction had been such that APRA's voting power was temporarily broken. Business was returning to normal. Argentina and Brazil made gestures of support for the Junta; although other Latin American states, such as Venezuela and Chile, had broken diplomatic relations.

In the early days of August, the facts gradually became clear that the Junta did control Peru. The Junta was accepted by most Peruvians, was willing to honor its international obligations and planned to return the country to a civilian government after reforms in the election laws. Further economic pressure would be likely to push the military leaders into a form of Andean "Nasserism." Peru would be encouraged to seek trade outlets other than its traditional markets in the United States.

For these reasons, and perhaps others undisclosed, there was no effort to bring pressure by removal of the premium on Peruvian sugar sold in the United States market. This technique had been used earlier with good effect against General Trujillo of the Dominican Republic.

The motive underlying action by the United States was laudable. The election had been a fair one by Peruvian standards. The polling places were supervised by the military. The allegations of fraud were considered by a presumably unbiased constitutional Electoral Board and rejected.

But apart from the propriety of the object, or the prospect for its attainment by other means, the wealth technique used precluded attainment of the goal. Forces not subject to control by the United States generated by wealth pressure strengthened rather than weakened the regime assaulted.
2. Choice of a Wealth Weapon to be Used Against Antioka

a. MANIPULATION OF ECONOMIC AND MILITARY ASSISTANCE

Economic and Military Aid Programs

The economic and military aid to Antioka may be manipulated as a wealth weapon. Ten million dollars currently is being expended in Antioka as military assistance. A loan of $12,000,000 has been made from the Development Loan Fund. How much of these amounts remain unexpended is unknown at the time of the Conference. A Development Grant is under consideration.

The domestic law of the United States permits the President to suspend or terminate economic and military foreign aid in his discretion. Under the Foreign Assistance Act of 1961 as amended, the President controls the terms and conditions of Development Loans, Development Grants and Military Assistance.

With respect to Development Loans and Grants, including assistance rendered under the Alliance for Progress, the President's authority clearly includes the power to determine the consistency of the aid activity with other development activities planned. He may also determine the extent to which the recipient government is responsive to the vital economic, political and social concerns of its people.

The Congress has stipulated Military Assistance will be furnished solely for the internal security of the country concerned; for its legitimate self-defense; to permit the recipient country to participate in regional or collective measures consistent with the Charter of the United Nations or collective measures requested by the United Nations to maintain or restore international peace and

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21 Foreign Assistance Act of 1961, 75 Stat. 424, 444 (1961) section 617: "Assistance under any provision of this Act may, unless sooner terminated by the President, be terminated by concurrent resolution. * * *"
23 75 Stat. 426 (1961) section 201(b).
26 The Alliance for Progress appears as an amendment to the Act for International Development of 1961 (Part 1 of the Foreign Assistance Act of 1961) in the Foreign Assistance Act of 1962, 76 Stat. 255, 257 (1962). The powers of the President with respect to assistance under the Alliance for Progress are as extensive as under the other aid laws.
27 E.g., 75 Stat. 426 (1961) section 201(b) (4) (5).
security. Defense articles cannot be furnished on a grant basis to any country at a cost in excess of $3,000,000 per fiscal year unless the President determines, among other things, that the country conforms to the principles and purposes of the United Nations and the defense articles will be utilized by the country to maintain its own defensive strength and the defensive strength of the free world.

In each executive agreement made with a foreign state for Military Assistance, the Congress has required stipulations concerning the use and disposition of defense articles. For example, the Agreement between the United States and El Salvador contains the following clauses:

1. * * * The defense articles and defense services referred to above shall be used for internal security purposes and for the Defense of the Western Hemisphere in accordance with the Charter of the United Nations and the Inter-American Treaty of Reciprocal Assistance.

2. * * * El Salvador will not permit any use of defense articles and defense services furnished under this Agreement by anyone not an officer, employee or agent of the Government of the Republic of El Salvador.

3. * * * El Salvador will not transfer, or permit any officer, employee or agent of that country to transfer such defense articles and defense services by gift or otherwise.

4. * * * El Salvador will not, without the consent of the United States, use or permit the use of such defense articles and defense services for purposes other than those for which furnished.

5. * * * El Salvador will maintain the security of such defense articles and defense services, and will provide substantially the same degree of security protection afforded to such articles by the United States Government.

6. * * * El Salvador will, as the United States may require, permit continuous observation and review by, and furnish necessary information to, representatives of the United States with regard to the use of such defense articles and defense services.

The General Agreement for Economic, Technical and Related

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30 TIAS 5040 (1962).
Assistance between El Salvador and the United States, also a fair example of the agreements negotiated by the United States for nonmilitary economic assistance, states in Article VI(2):

All or any part of the program of assistance provided hereunder may, except as may otherwise be provided in arrangements agreed upon pursuant to Article I hereof, be terminated by either Government if that Government determines that because of changed conditions the continuation of such assistance is unnecessary or undesirable. The termination of such assistance under this provision may include the termination of deliveries of any commodities hereunder not yet delivered. * * * 31

A clause similar to this has been inserted in current agreements made pursuant to the Alliance for Progress. 32

In addition to his power to withdraw economic or military aid conferred by domestic law and reserved in the aid agreements, the military aid agreements being expressly subject to the provisions of the Foreign Assistance Act of 1961, the President has inherent power in the conduct of the foreign affairs of the United States, pursuant to Article II, section 2(2) of the United States Constitution, to terminate any aid program when proper management of the foreign affairs of the United States requires it.

The discretion in the President to increase economic or military aid to Antioka is not so plenary as his power of suspension or termination. He is certainly limited by the amounts appropriated by the Congress for foreign aid. Specific limits for certain classes of aid may also be imposed. For example, a limit of $57,500,000 per fiscal year has been imposed by the Congress upon the total value of defense articles transferred by grant to all American Republics. 33

Apart from an absolute prohibition of assistance to the "present" government of Cuba * * */the Castro-Communist government/* * *, a matter not relevant to the considerations of the Conference, in Situation 5, there are only three absolute barriers to an increase in aid in the discretion of the President.

Aid cannot be given to a country unless the President determines the country is not dominated or controlled by the international Communist movement. 34

If a country is taken over by Communists, aid cannot be increased

31 TIAS 4971 (1961).
32 E.g., Agreement Between United States and Dominican Republic, TIAS 4936 (1962) Art. VII (2).
but must be terminated, no matter what the potential of a wealth weapon involving an increase in aid may be.

Aid is sharply restricted if a country receiving assistance under the *Foreign Assistance Act of 1961* nationalizes, expropriates or seizes property owned by a United States citizen or by a corporation, association or partnership in which a United States citizen has at least 50% beneficial ownership; or expropriates indirectly by methods such as discriminatory taxation; and then fails to take steps within six months to offer relief to the United States citizen suffering loss. The President must suspend the aid program to the country concerned until he is satisfied appropriate steps by the country to give relief to the citizen are being taken.\(^{35}\) If he must suspend aid, he cannot increase or restore the aid until the requisite facts can be found.

Also no *monetary* assistance can be given to a government which will use the money to compensate owners of expropriated or nationalized property. If the President finds money diverted for this purpose, *no further aid* can be given under the *Foreign Assistance Act of 1961* until the amount diverted is refunded to the United States.\(^{36}\)

Other barriers in domestic law to an increase in aid are partial only and may be avoided if the President finds the increase in the national interest or necessary for the national security. Thus if the President determines that a Communist country is not controlled by the “international Communist conspiracy” and reports this to the Congress; and also finds and reports: (1) the assistance is vital to the security of the United States; and (2) the assistance will promote the independence of the recipient country from international communism; aid may be extended under the *Foreign Assistance Act of 1961*.

A country which furnishes assistance to the “present” \(^*\)*/Castro-Communist/\(^*\)* government of Cuba may receive aid, and thus an increase in aid if necessary, if the President “determines that such assistance is in the national interest of the United States.”\(^ {38}\)

If a country is indebted to any United States citizen or person for goods or services furnished, the indebtedness arising under an unconditional guaranty of payment given by the government or its

\(^{35}\) 76 Stat. 260 (1962) section 301(3) (new subsection “(e)” to section 620 of the *Foreign Assistance Act of 1961*).

\(^{36}\) *Ibid.*, (new subsection “(g)” to section 620 of the *Foreign Assistance Act of 1961*).

\(^{37}\) *Ibid.*, (new subsection “(f)” to section 620 of the *Foreign Assistance Act of 1961*).

predecessor, the indebtedness not being denied, and the creditor having exhausted his legal remedies, including arbitration, the President can nevertheless extend aid if he finds that a denial of aid would be “contrary to the national security.”

Possible Uses of Economic and Military Aid Programs in Economic Warfare

It is a fair assumption that aid agreements with Antioka have clauses similar to those in the economic and military aid agreements with El Salvador. There would thus seem no obstacle in either domestic or international law to a suspension, reduction or termination of any feature of the current aid program.

The economic aid agreement is terminable. The military aid agreement is subject to the terms of the Foreign Assistance Act of 1961. Furthermore, our intelligence services may discover Gondomar has delivered to Salvaje defense articles received from the United States in violation of the Agreement.

Also, if an increase in aid to Antioka should appear a desirable method for interrupting aid to Salvaje by Antioka, there is nothing except a limit on appropriations by Congress to prevent this increase. Antioka is not controlled by the international Communist movement. It has not nationalized or expropriated property of United States citizens nor has it refused to pay guaranteed debts to them based upon goods and services rendered.

Rewards to Antioka for violations of international law by intervening in Nuevan internal affairs may place a premium on legal "waywardness" by Gondomar and the members of his government. For this reason, an increase in aid is not a desirable course under the circumstances but cannot be excluded completely as an alternative.

Manipulating economic or military aid or both appears superficially as the most desirable method for pressure to interrupt the trade with Salvaje. The "legal" latitude for action, both in domestic and international law is broad. The aid program is amenable to rapid change. Quite certainly any change in the Program would have substantial impact upon Antiokan internal affairs. Some of the requisites for an effective "economic sortie" are met. But certain major requisites are missing.

Inability to Direct Manipulations of Foreign Aid: Delayed Reaction

The first requisite missing is susceptibility to direction. If our
estimates of Gondomar’s power to interrupt the aid to Salvaje are correct, our economic action should be “aimed” at Gondomar.

An “economic sortie” cannot be directed as one would aim a rifle or lay artillery. The direction of an economic sortie, to the extent that any analogy can be made to a weapon, resembles the direction by target stimulus, employed in the heat, light or noise seeking projectile or missile. The point of impact of the heat, light or noise seeking weapon depends upon configuration of the target area and activity within it.

In economic warfare, the impact point of the force developed by an economic weapon depends upon the value configuration of the target area or value structure of the group within which influence is sought. A wealth weapon must be chosen which will follow the value “channels” or create the kind of interaction that will result in psychical impact upon the target. This capability, like the missile directed by target stimulus, depends upon the weapon chosen. Choice of the weapon is the key to direction.

Within six months or a year, manipulation of the aid program might induce Gondomar to cut off assistance to Salvaje. No immediate response by Gondomar should be anticipated because the impact upon him would be secondary. The primary impact would be upon military personnel, businessmen, agricultural workers or miners within Antioka. These persons might then bring their influence to bear upon Gondomar to act as the United States demands in order to obtain restoration of the withheld aid. How quickly these indigenous influences could be brought to bear upon Gondomar depends upon the influence channels in Antioka through which pressure may be exerted; obstructions in these channels which Gondomar might place; and supporting measures, by economic measures or otherwise, which the United States might develop.

If Gondomar’s political position is a strong one, his reaction to a withdrawal of aid is likely to be slow even though the pressure upon his people is great. Time is of the essence if Salvaje’s military effort is to be weakened or Scythian support of Salvaje brought into the open before the meeting of the Organ of Consultation of the Organization of American States. More time might be expended in manipulating foreign aid than can be spared under the circumstances.

Even if a United States policy maker is prepared to wait until the secondary effect occurs, the intensity of impact is speculative because of difficulty in directing the thrust of the weapon. The impact might be slight if persons within Antioka are injured who have little influence upon Gondomar. A value loss to Antioka might
be produced without a compensating decision advantageous to hemisphere defense and security of the general community. It is also possible that once influence is brought to bear upon Gondomar, his political position will be so shaken by its intensity that any decision he makes in response to the United States demand will be rendered illusory.

**Limited Ambit of Arrest and Sustentive Range in Foreign Aid Manipulations**

Manipulation of the aid program also suffers as an effective economic weapon from a limited ambit of arrest of side effects and a lack of sustentive range. These features, as previously indicated, are closely related.

Several questions should be considered concerning the ambit of arrest of side effects. Gondomar is now friendly toward the United States. Other problems between Antioka and the United States, perhaps more serious than the one now presented, will arise in the future.

To facilitate the solution of these problems, assuming Gondomar continues in power, a policy should be avoided which reduces the intensity of his expectations of indulgences to be derived from continued friendship with the United States. If Gondomar looks elsewhere for aid, what avenues for influence by Scythia in Antioka may be presented and what devices might the United States employ to close these avenues?

Will opportunities be presented to Communists or other indigenous radicals to aggrandize their power if economic and social distress within Antioka is increased by a suspension or termination of aid? If radical shifts of power occur within Antioka by a suspension or termination of aid, the United States may find itself in such a situation that the only technique available to moderate the rate of internal change is additional aid. Additional aid may accentuate existing political cleavages in Antioka. A powerful but increasingly isolated and economically dependent elite may be created upon which the policies of the United States must then be oriented.

The restricted sustentive range of manipulations of foreign aid in economic warfare is especially marked. This is due to the state of the domestic law concerning foreign aid; “reciprocal controls” which a recipient state can exert; and a “folk-way” expectation of economic aid flowing from centers of great productivity, such as the United States, the Soviet Union and the countries of Western Europe. This folk-way expectation has emerged as a postulate of an obligation to supply the “needs of the needy” upon which foreign
aid reasoning in both donor and recipient states tends to be founded.

Limitations Imposed By Domestic Law

Under the Foreign Assistance Act of 1961 and its amendments there is danger in exerting intense pressure, by economic means or otherwise, upon a state, particularly a small one. A later extension or resumption of aid to the state may then be foreclosed unless the Congress expressly grants to the President the authority to extend or resume economic aid.

Withdrawals of foreign aid tend to exert much pressure upon a recipient state. The response of a small state threatened with economic pressure by a larger and more powerful antagonist tends to be a defense by wealth weapons. Those most conveniently at hand are devices, such as confiscation or discriminatory taxation, to deprive nationals of the larger and more powerful antagonist of their local assets. This was one response of the Castro Government in the early phases of the “Sugar Encounter” described in Chapter II.

By Section 620(e) of the Foreign Assistance Act of 1961, as amended in 1962, if the small state is forced to the extreme of expropriation as a defensive measure, the flexibility of the President in using foreign aid for further pressure is limited. The President cannot renew the aid until the expropriating state takes appropriate steps to discharge its obligations under international law to the injured United States citizen. He will have to go to Congress for the appropriate authority.

A similar problem arises concerning the statutory prohibition of aid to the government of a country dominated or controlled by the international Communist movement. If pressure forces a state into the Communist orbit because the ambit of arrest of the side effects of a wealth weapon is restricted, efforts to retrieve the state as a free-world member by cajoling its government with foreign aid are precluded.

The President in such a case must use funds other than those appropriated in the Foreign Assistance Act of 1961 as amended. Alternatively he might go to the Congress for increased authority; rely upon a wealth weapon other than foreign aid; utilize some other coercive or persuasive device; or simply write off the state as a member of the free world and the property of United States citizens in that state with it.

A technique offering a degree of sustentive range in the manipulation of foreign aid is to “lead” with an “indulgence” or aid increase. The aid increase can then be coupled by a withdrawal of the aid to secure the desired decision. A lack of sustentive range appears with the withdrawal. A “lead” with an increase in foreign aid to Antioka would appear unwise if Gondomar in fact is the decision maker to be influenced.

Reciprocal Control in Foreign Aid

The element of “reciprocal control,” which reduces the sustentive range of withdrawals of foreign aid, has been considered by Professor George Liska.\(^{41}\) Professor Liska views foreign aid as a contest between the Soviet Union and the United States for the allegiance of uncommitted countries by influencing the processes controlling the future institutions of the target states.\(^{42}\) This perspective is widely shared.

An ideal foreign aid relationship, as Professor Liska sees it, is one in which “the needs and demands of donor and recipient are neutralized whenever the caliber of their interests are comparable.\(^{43}\) This balance, he thinks, is not maintained because the controls exercised by the recipient states often tend to be more effective than the controls maintained by the United States.

The reciprocal controls by the recipient, as described by Liska, are usually conscious maximizations of the side effects of a wealth weapon used against the recipient. In Antioka Gondomar might point to the undesirable alternatives if his power is weakened by a withdrawal of foreign aid. Castro-Communist elements almost certainly are active in his country. Weakening Gondomar may enhance the relative strength of the Castro-Communists.

He may, as did the Peruvian leaders in 1962, suggest reorientation of Antiokan trade. His country now relies upon the United States for wheat, textiles and hard goods. These can be obtained elsewhere. A flow of dollars to Antioka means a flow of dollars to United States agriculture and industry so long as this trade pattern is maintained.

Perhaps Gondomar might threaten recourse to Scythia as a substitute for discontinued aid from the United States. While consumer goods furnished by Scythia may be below the standard maintained by the United States, its military hardware may be as


\(^{42}\) Ibid., 4-5.

\(^{43}\) Ibid., 32.
satisfactory and its military advisors as good as those the United States can provide.

Counterpressures of this sort have critical political force in the United States. Foreign aid cannot be interrupted without publicity; and counterpublicity of threatened countermeasures may prevent supporting action of any sort because of activity by stimulated pressure groups within the United States.

Folk-Way Expectation of Aid: "Neofeudalism"

The folk-way expectation of aid flowing from centers of great productivity, discussed in Chapter I of this book, cannot be said to have reached a threshold of expression as a protolegal international institution. That it may cross this threshold within the present century is a distinct possibility.

There are not many instances, whether in the family, private charitable relationships, public charitable relationships, or extended foreign aid programs, in which constant repetition of an indulgence is not eventually regarded as a matter of right by the donee and an obligation of the donor. With respect to foreign aid, the process is much the same as that observed in domestic systems of law when a legal prescription becomes supported by nonlegal conduct patterns. Ethical norms are as easily created by law as law is developed in response to changing ethical norms.

An extensive prolongation of aid to a state produces institutions and conduct patterns based upon the flow of assistance. Especially when aid has been extended to encourage the creation of nonviable states, by the prevailing judgment in the Free World it appears "ethically" wrong to interrupt this aid suddenly. This judgment may well have molded attitudes concerning the interruption of aid to a viable state as well.

While the donor of aid is legally free to withdraw it for coercion or convenience, it is not ethically free to do so. The consequences of the ethical breach must be considered. These consequences may range from attriting domestic support for an economic warfare program to a total lack of foreign support from other states.

Withdrawning United States aid to Peru in 1962 initially had domestic approval. This approval diffused as press reports emphasized the suddenness and force of the withdrawal and the surprise of the military leaders at termination of the aid. The Western Hemisphere states supporting the United States were those which apprehended military coups d'état and hoped to avert these by insuring the success of the United States action. Other states of the Free World were neutral or watched for an opportunity
to divert Peruvian trade from the United States. The Communist
dominated political parties of Peru hoped to benefit by economic and
social distress which termination of the aid might produce; and
no doubt would have done so with the assistance of Castro-Com­
munist Cuba or the Soviet Union had pressure by the United States
been maintained.

Whether further action by the United States against the Junta
would have received general political support in the United States
in August 1962 is debatable. That few allies of the United States
could be induced to join in punitive action against the Junta is
evident.

3. Exploitation of Trade in Tin, Wheat, Textiles and Hard Goods

Perhaps the most fruitful approach to force a decision by Gon­
domar to interrupt trade with Salvaje is to exploit the trade pattern
of Antioka with the United States or with other countries. The
most effective point of attack appears to be upon the tin industry
of Antioka because an advantage or detriment offered here will
affect Gondomar directly due to his personal interest in the produc­
tion and sale of Antiokan tin.

While tin appears to be the only major export from Antioka
to the United States, there is no significant trade advantage to be
offered with respect to this commodity other than a premium or
subsidy above the world price. This premium or subsidy would
require action by Congress. The time available precludes the delay
Congressional action would require.

There is a tendency to overproduce tin in the world market. This
is due principally to the mechanization of tin mining. There is
not, however, the same tendency to fluctuations in production en­
countered in agricultural commodities.

There is a marked fluctuation in the consumption of tin. Tin
consumption is highly sensitive to changes in the level of business
activity. The consumption of tin is closely linked to steel con­
sumption. Both metals are used in all important tin applications.

Tin is also price "inelastic." Fluctuating prices in tin have little
effect on the consumption rate, although the consumption rate
affects the price of tin.

Due to the demand for price stability in the world tin market,
there has developed, as in the case of sugar, an international com­
modity agreement, the latest being the International Tin Agreement
of 1960.44 An International Tin Council established under this
agreement, with its seat in London, revises floor and ceiling prices

32/5, p. 25.
established initially in the agreement, determines exportable quantities of tin from producing countries, and maintains a buffer stock for the contribution and withdrawal of tin to maintain a stable market price. The Manager of the buffer stock buys, sells and maintains stocks of tin in accordance with detailed criteria stated in the agreement.

United States refined tin imports are fairly constant. The imports fluctuate because of interruptions in steel production, such as those caused by strikes. Secondary tin, recovered from scrap, accounts for about one third of the tin consumption in the United States. This use of secondary tin, coupled with a trend to the use of paper and plastic packaging suitable for deep freeze storage, will probably maintain a constant level.

The demand for refined tin may increase. In a military emergency, large quantities of tin are consumed. The United States has only one tin smelter, at Texas City, Texas, once owned and operated by the United States Government but now in the hands of private owners. This smelter accounts for imports of cassiterite or tin ore into the United States.

While tin can be stored easily, United States manufacturers do not stockpile large quantities of tin because of its relatively high cost. Tin ingot and cassiterite are already on the “free” customs list. No tariff reduction is possible under the Trade Expansion Act of 1962. 45 Such a tariff reduction would require in any event an expenditure of more time than could be allowed to obtain the desired decision from Gondomar. Trade negotiations, the advice of the Tariff Commission and Executive Departments and a public hearing would be required before a reduction upon appropriate items could be put into effect.

Perhaps technical assistance or economic aid could be furnished to enable Gondomar to lower the cost of production of tin and thus operate on the world market with an advantageous profit margin. Mechanizing the mines would reduce the labor force and increase the problem of unemployment. Such a policy would have to be reconciled with the policy supporting the Development Loan of $12,000,000 to assist in resettlement of the tin workers. This loan might have to be increased.

Purchases of tin for dollars or barter by the Commodity Credit Corporation of wheat or some other agricultural product for tin at an increased rate for the national stockpiles currently seem out of the question. The stockpiles now contain a substantial surplus.

of tin ingot and have been under close Congressional scrutiny. An increase of these holdings is excluded.

On the other hand, the stockpiled tin might be used to place pressure on Gondomar by dumping part of the surplus to restrict his market either in the United States or in other countries. This might be done to the extent that it does not conflict with treaties, executive agreements, or other international obligations of the United States and does not damage the economy of the United States or a country to which the United States is friendly.

Stockpiling Policy

The United States maintains four stockpiles or "inventories" of reserved strategic and critical materials deposited in various warehouses and depots throughout the country. As of 31 December 1961, the acquisition cost of these materials was $8,708,672,700 and the estimated market value was $7,720,001,400.

The materials are in the custody of the General Services Administration. Basic policies concerning acquisition and disposition of the materials are made pursuant to acts of Congress by other offices and agencies.

Two of the stockpiles are subject to the policy control of the Office of Emergency Planning of the Executive Office of the President. These are the "National" or "Strategic" stockpile, the larger of the two, and the Defense Production Act (DPA) stockpile.

The National Stockpile is assembled and maintained pursuant to the Strategic and Critical Materials Stockpiling Act of 1946. This stockpile is intended to obviate dependence by the United States upon overseas foreign sources for strategic or critical supplies during a limited or general war. A minimum stockpile objective is established for each stockpiled item upon the assumption that some imports will be available from overseas sources during a war. A maximum objective for each item is also established upon the assumption that overseas supplies are cut off but access exists to some supplies from nearby foreign sources. Military, atomic energy, defense support and critical civilian needs are included in the estimate. An emergency of three years is assumed.

46 A fifth inventory, consisting wholly of tin, the remaining stock of tin refined while the United States operated the Texas City smelter, and held by the Federal Facilities Corporation, was liquidated in January 1962, and is not included in the estimates in this book.

47 60 Stat. 496 (1946). This law superseded the earlier stockpiling act passed in 1939.

48 Until 1958 the estimated emergency was 5 years.
The Defense Production Act Stockpile (DPA Stockpile) is accumulated pursuant to the Defense Production Act of 1950.\textsuperscript{49} While materials may be transferred from the DPA Stockpile to the National Stockpile if the President deems this action necessary in the public interest, the dominant Congressional intention in establishing the stockpile was to provide an incentive for the expansion of industrial capacity and raw materials sources through the purchase of materials.

Policies for the National and DPA Stockpiles are established by the Office of Emergency Planning in Defense Mobilization Order V-7. The policies set forth in this Order, and any future policy changes, are formulated with the advice of interested government agencies channeled through an Interdepartmental Material Advisory Committee (IMAC).

The Departments of Defense, State, Agriculture, Commerce and Interior, the General Services Administration, Agency for International Development and the National Aeronautics and Space Administration have representatives on IMAC. Observers attend from the Bureau of the Budget, the Atomic Energy Commission and the Small Business Administration. The Chairman of IMAC is from the Office of Emergency Planning.

Purchases for the National and DPA Stockpiles are made by the General Services Administration in accordance with plans of the Office of Emergency Planning. For the National Stockpile purchase program, the items and amounts are stated in detail in the plan, with an indication of the amounts to be purchased in each fiscal year, the total amount to be purchased and the number of years required. Defense Production Act Program directives are less specific, indicating only the funds available for a resource expansion program and criteria for purchases.

Withdrawals of materials from the National and DPA Stockpiles are also by the General Services Administration. The procedures are complex and are set forth both by Acts of Congress and in Defense Mobilization Order V-7 issued by the Office of Emergency Planning.

The President may order withdrawals from the National Stockpile when, in his judgment, this is necessary for the "common defense" or "in time of war or during a national emergency with respect to common defense proclaimed by the President." These withdrawals may be for use, sale, "or other disposition."\textsuperscript{50}

\textsuperscript{49} 65 Stat. 801 (1950).
\textsuperscript{50} 60 Stat. 598 (1946) section 5.
This authority has been delegated by the President to the Office of Emergency Planning, to be exercised by the Director of the Office in releasing materials "in such quantities, for such uses, and on such terms and conditions" as the Director determines "to be necessary in the interests of national defense." The Attorney General has ruled that this power does not include authority to release gem diamonds in exchange for industrial diamonds on economic grounds alone when the common defense is not involved.

Materials can be removed, however, to be upgraded or rotated with substituted materials to prevent loss through deterioration.

When material in the National Stockpile is determined to be excess because of a revised determination of projected need, there can be no disposition until the Office of Emergency Planning gives it approval. The operating plans for disposition are then prepared by the General Services Administration. Defense Mobilization Order V-7, paragraph 14, states that the Director of the Office of Emergency Planning will authorize the disposition when there can be avoided: serious disruption of the usual markets of producers, processors and consumers; adverse effects on the international interests of the United States or upon domestic employment and labor disputes; and loss to the United States.

If the removal from the stockpile is for a purpose other than direct use of a government agency, the Departments of Interior, Commerce, State, Agriculture, Defense, Labor and other government agencies and private industries concerned must be consulted. The Departments of State and Interior may be able to block the disposition if, within thirty days after consultation, they object to the plan. The disposition is halted if the Director of the Office of Emergency Planning concurs in the objection. If the Director does not concur, the matter must be referred to the President for decision.

When the Office of Emergency Planning directs disposition of excess property from the National Stockpile, notice must be published in the Federal Register and notice must also be given to the Congress and to the Armed Services Committees of each House. The notices must state the reason for the revised determination, the item and amount to be released, the plan for disposition and the date upon which the material will become available for sale or transfer. No disposition can be made until six months after the date of each notice; and then not until the Congress by joint resolution has consented to the disposition.

51 20 Federal Register 7637 (Oct. 11, 1955); 23 Federal Register 5061 (July 1, 1958); 23 Federal Register 6971 (Sept. 8, 1958).
Congressional consent is not required if the revised determination is because the material to be released is obsolescent, is of no further usefulness or has deteriorated. The other requirements, such as notices and time intervals, are retained.53

Dispositions from the Defense Production Act Stockpile require no notice in the Federal Register or notice to the Congress. The consent of Congress is unnecessary and there is no waiting period. Public notice of the disposition is required by Defense Mobilization Order V-7, paragraph 15. This requirement is satisfied by a press release.

Other requirements are the same as for dispositions from the National Stockpile. If the materials are resold, rather than used by the government agencies which look to the DPA stockpile for critical and strategic materials which they consume directly, the materials cannot be sold for less than the current domestic market price.54

A third inventory, the “Supplemental Stockpile” is controlled by the Department of Agriculture and the Office of Emergency Planning jointly. The Department of Agriculture determines the materials which go into the stockpile. These materials are obtained by the use of foreign currency acquired through the sale of surplus agricultural commodities pursuant to Section 104(b) of the Agricultural Trade Development and Assistance Act of 1954,55 or by barter of surplus agricultural commodities pursuant to the Agricultural Act of 1956.56

Strategic or other materials acquired for barter must be placed in the Supplemental Stockpile “unless acquired for the National stockpile * * * or for ‘other purpose’.” The “other purposes” are defined as “foreign economic or military aid or assistance programs, * * * offshore construction programs, or * * * the requirements of Government agencies.”

Approximately 90% of the strategic and other materials acquired by the Department of Agriculture have been by barter. The Department is assisted in selecting the materials and in determining prices by a Supplemental Stockpile Advisory Committee, having representatives from the Office of Emergency Planning, Departments

53 A convenient exposition of these procedures with a collection of most of the relevant statutes and regulations may be found in Inquiry into the Strategic and Critical Material Stockpiles of the United States (Hearings before the National Stockpile and Naval Petroleum Reserves Subcommittee of the Committee on Armed Services, U.S. Senate, 87th Cong., 2d Sess. Part 1, 1962).
54 64 Stat. 801 (1950) section 303; 65 Stat. 133 (1951) section 103(a).
56 70 Stat. 200 (1956) section 207.
of the Interior, Commerce, Treasury and State, the General Services Administration, Bureau of the Budget and Agency for International Development. The Department of Defense and Atomic Energy Commission have observers.

Removals of materials from the Supplementary Stockpile are subject to the same limitations as removals from the National Stockpile. No statute expressly authorizes the President to order transfers of materials from the Supplemental Stockpile to the National Stockpile, although this authority may be implied from Section 4(h) of the Charter of the Commodity Credit Corporation as amended in 1949.57

This may be the only method of removal from the Supplemental Stockpile except for items determined obsolescent or obsolete.

Section 3(e) of the Strategic and Critical Materials Stockpiling Act 58 has been interpreted to prevent authorizations by the Office of Emergency Planning for the disposition of materials determined to be in excess of needs. Section 3(e) refers to a "revised" determination. By the administrative view there can be no "revised" determination by the Office of Emergency Planning because the Department of Agriculture makes the initial determination to place the material in the stockpile.59 Until this section is amended by the Congress or more liberally interpreted by the Office of Emergency Planning the Supplemental Stockpile appears to be a dead end for strategic and critical materials unless these are released by the President or the Office of Emergency Planning pursuant to the emergency power.

Until strategic or critical materials obtained by the Department of Agriculture reach the National or Supplemental Stockpiles, the items are carried in a fourth inventory, described as the Commodity Credit Corporation or "Pipeline" Stockpile. The Commodity Credit Corporation is a corporate agency within the Department of Agriculture and subject to the general supervision of the Secretary of Agriculture through a corporate board of directors and officers.

The powers conferred upon the Corporation to dispose of its property, including strategic and critical materials, are quite general. Critical and strategic materials acquired by the Corporation

\[^{57}\text{63 Stat. 154 (1949) section 2 (amending section 4(h) of Commodity Credit Corporation Charter Act).}\]

\[^{58}\text{60 Stat. 496 (1946). This law superseded the earlier stockpiling act passed in 1939.}\]

\[^{59}\text{See Inquiry into the Strategic and Critical Materials Stockpiles of the United States (Hearings Before the National Stockpile and Naval Petroleum Reserves Subcommittee of the Committee on Armed Services, U.S. Senate, 87th Cong., 2d Sess. Part 4, 1962), 1014–1015; 1351–1352.}\]
by barter must be for the National Stockpile, the Supplemental Stockpile, for foreign economic or military aid or assistance programs, for offshore construction programs, or "to meet the requirements of government agencies." 60

There seems no legal obstacle to a release of items held in the "Pipeline" Stockpile upon Presidential order or simply when a "government agency" needs the materials and can reimburse the Commodity Credit Corporation. No Congressional action or waiting period need be involved nor need there be public notice of the release.

Currently available from the stockpiles are 58,000 long tons of refined tin ingot. The Congress has authorized disposition of 50,000 long tons of this amount from the National Stockpile.

With respect to tin from this stockpile, however, the President is committed not only to consultations with Bolivia and other tin producing countries before sale but also to a scheme of sale which will avoid depressing the international market price of tin. 61 There is no similar commitment concerning the 8,000 long tons of refined


61 See 45 Department of State Bulletin, 772 (1961). The President's message to the President of Bolivia states in part:

* * * The course of action which we have suggested is the sale of small lots of tin over a period of several years. This tin would come from the 50,000 tons which we now have in excess of our strategic requirements. We do not intend to depress the price of tin through these sales; they would be initiated at a time of world-wide shortage and would have the effect of discouraging tin consumers from substituting other materials for their normal tin consumption. In this way we can protect the long-run stability and continued prosperity of the tin market. * * *

The United States commenced a trial plan for the disposition of a maximum 200 tons per week in September 1962. About 30 tons of this was used in foreign aid programs and about 10 tons for use by U.S. Government agencies.

In the disposition of the remaining weekly quota, GSA accepted only bids reasonably consistent with prevailing market prices and regulated sales to avoid depressing the market prices. After consultation with a delegation of the International Tin Council and major tin producing states the interim program was extended during the first quarter of 1963. See 47 Department of State Bulletin, 386 (1962); 47 Department of State Bulletin, 1012 (1962); 48 Department of State Bulletin, 182 (1963).
ingot in the Pipeline Stockpile. In a disposition of this surplus tin the Bolivian economy would have to be safeguarded.

**Dumping Tin in Antiokan Markets**

It is therefore possible to take advantage of the publicity and state of apprehension of tin producers stemming from the Congressional authorization for disposition of the 50,000 long tons of refined tin ingot in the National Stockpile by proposing to Gondomar that unless he ceases his supply of Salvaje all or part of the tin in the Pipeline Stockpile will be dumped in Antiokan tin markets. A proposal to dump this surplus tin only in the United States markets of Antioka should place sufficient pressure upon Gondomar to obtain the decision desired.

An unpublicized statement of intention, coupled with disclosure to Gondomar of the speed of action possible under United States law, are desirable for maximum effect. If the plan proposed to Gondomar must be executed to apply the requisite pressure, collateral action will then be necessary to protect the Bolivian economy and to avoid damage to the tin miners of Antioka.

The advantages in a plan of economic warfare involving dumping refined tin ingot from the Pipeline Stockpile are: (1) Speed, domestic law requiring no appreciable delay; (2) Direction, Gondomar’s personal financial interests in the Antiokan tin industry being at stake; (3) Adequate ambit of arrest, the side effects of the sortie being subject to offset by the use of foreign aid; and (4) Adequate sustentive range, there being no apparent obstacle to further action which might be taken against Gondomar if the action contemplated proves ineffective.

Although the United States has cooperated with the International Tin Council in maintaining tin prices, the United States is not a party to the International Tin Agreement of 1960. In the “Sugar Encounter” with Cuba, discussed in Chapter II, freedom of action by the United States was restricted because of its participation in the International Sugar Agreement of 1948.

For example, if the United States were a party to the International Tin Agreement of 1960, it would be required to give six months’ public notice before it disposed of a noncommercial stock of tin. The requirement is to protect consumers and producers from avoidable disruption of their usual markets. A provision similar to this

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63 10 TIAS 2189 (1959).
64 The Tin Council may consent to reduction of the notice period.
is incorporated in the United States domestic law for dispositions from the National Stockpile; but the United States has assumed no general international obligation to avoid rapid dispositions or to give advance notice of transfers of tin from all of its stockpiles. Had such an obligation been assumed, the speed required for an effective economic sortie against Gondomar probably could not be developed.

It is possible, of course, that if the United States were a party to the International Tin Agreement of 1960 an exception might be found to permit action with the necessary speed. Article XVI(1)(b) of the Tin Agreement, for example, permits a participating country to take any action “singly or with other countries” which it considers necessary to protect its essential security interests when such action “relates to traffic in arms, ammunition or implements of war. * * *”

In this instance action by the United States is to interrupt trade in military supplies between Antioka and an insurgent in Nueva by bringing pressure upon Gondomar who is the person who can make the decision to bring the traffic to an end. A strong argument may also be offered that the traffic in arms affects the essential security interests of the United States and other countries of the Western Hemisphere.

The existence of a viable International Tin Agreement, on the other hand, creates a market environment which favors action by the United States against Gondomar. The impact of action by the United States upon Gondomar may be reduced to a degree because if the action affects the world-market price to such an extent that the price falls within “the lower sector of the range between the floor and ceiling prices” established by the Agreement, the Manager of the buffer stock may buy cash tin on the London Metal Exchange.65 The Tin Council can also establish “control periods” during which maximum export amounts are established in order to maintain prices.66

Action of this nature pursuant to the Agreement may work to the advantage of Gondomar. At the same time, action by the United States is favored because the existence and effective operation of a price control regime will tend to damper price repercussions other than in the United States markets of Antioka. The Agreement is a “cushion” which tends to extend the ambit of arrest of the side effects of manipulations of the tin trade in economic warfare.

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65 Second International Tin Agreement, Art. IX(2) (d). If the price is in the “middle sector of the range” as defined by the Agreement, the Manager cannot buy unless the Tin Council makes the decision.

66 Ibid., Art. VII(2) (a).
The GATT does not appear to limit action by the United States to restrict the Antiokan tin market by disposing of all or part of the surplus tin in the Pipeline Stockpile. Currently there is no tariff or tax on tin, although if a discriminatory tax or tariff should be proposed as a measure to be taken against Gondomar, this action would have to be justified under one of the exceptions which GATT provides.

The only GATT provision concerning dumping commodities from a National Stockpile is contained in Article XX(11)(c). This provision is applicable to stockpile surpluses accumulated as a result of World War II, a deadline of January 1, 1951, being established for liquidation of these holdings, with a stipulation for extension of the time in certain cases. Tin accumulated during World War II is held in the National Stockpile; but the tin in the Pipeline Stockpile was acquired after World War II by the barter of surplus commodities.

The action which the United States, as a party to GATT, might take against the Marshall bears an analogy to the routine contemporary market operations of the "state trader." A state trader enjoys a competitive advantage over private rivals in foreign trade because of its ability to undersell.

Article XVII of GATT is the provision aimed at state trading enterprises. This obligates the state trader to "act in a manner consistent with the general principles of nondiscriminatory treatment" prescribed in the Agreement "for governmental measures affecting imports or exports by private traders." The state trader must also "make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase of sale, and shall afford the enterprises of any other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."

The Interpretative Notes state marketing boards engaged in purchasing or selling are subject to the provisions of Article XVII. Paragraph 2 of Article XVII states, however, that restrictions in the Article do not apply to imports of products for immediate or ultimate consumption in governmental use and not for resale or for use in the production of goods for sale.

Two criteria thus appear to condition application of Article XVII: (1) Is the state actively engaged in competition with private enter-

68 Ibid., Art. XX (General Exceptions); Art. XXI (Security Exceptions).
prise in the trade in question? (2) Was the commodity in question obtained to place it on the market in competition with private entrepreneurs? With respect to activity of the Commodity Credit Corporation in obtaining tin by barter for the Pipeline Stockpile, both questions must be answered in the negative. The tin in question was imported for governmental use, the bulk being received in barter for other commodities. The tin has become available for disposition only after a bona fide redetermination of the strategic requirements of the United States for this metal.

If GATT should be construed to apply to the measures contemplated against Gondomar, the United States might invoke the security exception upon which the exception in the International Tin Agreement was substantially modeled. This exception permits a contracting party to take action which it considers necessary for the protection of its essential security interests "* * * relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment * * *." 70

If the United States proposes action to disrupt Gondomar's market for tin in the United States, or undertakes this action with a view to interrupting the arms trade with Salvaje, there appears to be no violation of the Charter of the Organization of American States or of the Charter of the United Nations. Neither charter precludes all economic action of a coercive nature.

Although Article 16 of the OAS Charter prohibits the use of coercive measures of an economic character to force the will of another state, this "forcing" is prohibited only when "unilateral advantages" of any kind are sought. There is no prohibition of economic action to frustrate an intervention of the type prohibited in Article 15; and Gondomar is intervening in Nuevan internal affairs in violation of this Article.

A constriction of the market for Antiokan tin in the United States is a "peaceful" means of action, analogous as previously indicated to practices habitually employed by the "state trader." The United

70 61 Stat. Part 5, A-63 (1947) Art. XXI. Other security demands excepted relate to fissionable materials or the materials from which they are derived, action taken in time of war or other emergency in international relations, and action taken pursuant to the obligations of a state under the UN Charter for the maintenance of international peace and security. It is possible that action by the United States against Gondomar might also be justified under the latter two exceptions. The "military establishment" mentioned in Article XXI (ii) is not further elaborated in the interpretative notes. There is nothing in the Article which clearly restricts the words to the "military establishment" of the state which takes action otherwise in violation of the GATT but permissible under the exception.
States action proposed against Gondomar is to secure "international peace, security and justice" rather than to endanger these aspirations as mentioned in Article 2(3) of the United Nations Charter. No threat or use of force is made against the territorial integrity or political independence of Antioka as mentioned in Article 2(4); and it is consistent with the purposes of the United Nations to maintain the status quo politically until a dispute of a peculiarly dangerous nature can be considered by the Organ of Consultation of the Organization of American States.

Manipulation of Trade in Wheat, Textiles and Hard Goods

In contrast to the proposed manipulation of the Antiokan tin market in the United States, manipulations of the trade with Antioka in wheat, textiles and hard goods are subject to several of the difficulties observed in manipulations of foreign aid in economic warfare. The effect upon the critical decision maker (Gondomar) may be indirect, the ultimate effect upon the Marshal requiring more time than can be reasonably considered for expenditure under the circumstances. A reduction in exports of wheat to Antioka, and possibly an embargo on other shipments as well, are likely to strike at consumer groups within Antioka lacking access to political channels through which Gondomar can be influenced.

A reduction in exports of textiles or hard goods might affect industrial interests in Antioka. The persons affected by this reduction would be likely to have more influence upon Gondomar than would agricultural, mining or industrial workers deprived of wheat. Gondomar might be affected personally by blocking trade in textiles or hard goods. But the impact of trade restrictions upon these articles clearly will have a delayed effect which manipulations of the Antiokan tin trade will avoid.

The ambit of arrest of the side effects of manipulations of the trade in wheat, textiles and hard goods also will be limited. No wave of sympathy is ever generated, and positive hostility is usually provoked, by denials of food to people who need it. When economic warfare is used as a secondary policy device (supporting the use of physical violence) denials of food to persons by means of a blockade or preemption of supplies are sometimes grudgingly tolerated. These food denials, on the other hand, are almost never forgotten and tend to taint interstate relations for generations.

When economic warfare is used as a primary policy device, the flow of food and medical supplies to a target state should not be manipulated. Humanitarian considerations are a sufficient justifica-
tion. But if a policy maker is not swayed by these, he may be persuaded by the threat of the future communications barrier which food denials tend to erect.

The side effects of manipulations of the trade in textiles and hard goods are likely to be paramount within the industrial establishment of the exporting state. While reductions in wheat exports may be compensated in the United States by government purchases of wheat surpluses, the impacts upon textile and hard goods industries when a foreign market is disturbed are likely to be severe.

It is difficult to maintain an internal stable price and income structure and regularly paced production when the government concerned does not also seek to avoid violent gyrations in foreign trade. The internal effect of violent external economic disturbance can be lessened when the internal economy is fully state controlled as in the Soviet Union. But where state control is partial, as in the United States, external economic disturbances, whether intended or not, disturb the internal economy of the acting state.

The sustentive range of economic action by manipulations of the trade in wheat, textiles and hard goods is also limited. If the trade in wheat is interrupted, Antioka may turn to the International Wheat Council for supplies of wheat pursuant to Article 11(1) of the International Wheat Agreement of 1962. This demand could be satisfied unless there was a significant international wheat shortage, although there might be a supply hiatus due to the shipment time from sources other than the United States. The wheat reserves in Antioka might be sufficient to bridge this time gap.

Antioka also might turn to the Soviet Union or Scythia for its trade in textiles and hard goods and ultimately reorient its markets. Gondomar could certainly bring pressure to bear upon American manufacturers denied access to Antiokan markets; and these persons in turn could bring force to bear upon the Executive Branch and Congress to erode an economic warfare policy designed to disrupt Gondomar’s trade with Salvaje. Additional supporting action which appeared necessary against Gondomar might prove awkward because of this reciprocal pressure.

From a legal viewpoint, there are no domestic objections to manipulations of the trade in wheat, textiles or hard goods. This trade can be interrupted under the Export Control Act of 1949 or under Section 5(b) of the Trading With the Enemy Act of 1917. But the

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71 TIAS 5115 (1962).
72 63 Stat. 7 (1949).
73 40 Stat. 411 (1917); 54 Stat. 179 (1940). The Export Control and Trading With the Enemy Acts were discussed in detail in Chapter II.
United States may encounter an international legal obstacle in manipulating the trade in wheat.

Under the International Wheat Agreement of 1962,\(^4\) to which the United States and Antioka are parties, datum quantities of wheat are established for each crop year by the International Wheat Council for each exporting state (the United States) with respect to all importing countries (Antioka). The International Wheat Council may, in its discretion, require exporting and importing countries to cooperate to insure the availability for purchase by importing countries after January 31st of each crop year of an amount of wheat equal to not less than 10% of the datum quantities of exporting countries for any crop year. Although the United States has votes as a member of the Council, it is not a free agent in manipulating its exports of wheat.

There is no security exception in the International Wheat Agreement of 1962 similar to the exception in the International Tin Agreement of 1960. The only provision relative to security permits an exporting or importing state to withdraw from the Agreement if it "considers its national security to be endangered by the outbreak of hostilities."\(^5\) The state concerned must give thirty days written notice of its withdrawal to the United States or must apply to the International Wheat Council for a suspension of its obligations under the Agreement. The United States is depository state for ratifications, accessions and withdrawals.

The combined defects of indirection, limited ambit of arrest and limited sustentive range suggest manipulations of the trade with Antioka in wheat, textiles and hard goods may mature into a fruitless policy of protracted harassment. A policy of protracted harassment would induce no decision of the nature which Gondomar is desired to make; would expend too much time; might drive Antioka to other sources of supply; and might prove injurious to the economy of the United States. These alternatives on the whole appear less desirable than manipulations of foreign aid, and certainly appear less desirable than operations against the Antiokan tin market in the United States.

**Suggested Solution: Situation 5**

There should be no assumption that a wealth weapon is the most desirable policy device to induce Gondomar to interrupt his trade with Salvaje. But if a wealth weapon is selected, the first United States move should relate to the Antiokan tin market.

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\(^4\) *TIAS* 5115 (1962), Art. 17(5).

This appears to be the only area for wealth pressure in which the effect upon Marshal Gondomar will be immediate rather than indirect. A quick impact can therefore be anticipated. The existence of the Buffer Stock maintained pursuant to the International Tin Agreement of 1960 will insure a degree of price stability in the world market and provide an acceptable ambit of arrest of the side effects of use of the weapon contemplated. The sustentive range seems adequate, foreign aid manipulations in particular being available to follow-up action upon the tin market if supporting action becomes necessary.

As a first step in the program of economic warfare, Gondomar should be informed privately that his tin market in the United States will be disrupted unless he ceases his assistance to Salvaje. Facts should be placed before him to insure that he appreciates these features of his environment: (1) The current conditions of the world tin market; (2) The importance to him of his United States market; and (3) The speed with which United States officials can move to disturb his market under domestic and international law.

It is probable that Gondomar will cease his support of Saváje when he appreciates the directness and speed with which the United States is prepared to move. If, however, the Marshal does not make the desired decision promptly, refined tin ingot should be withdrawn from the Pipeline Stockpile and sold to his United States customers at prices below any the Marshal can offer.

The United States must be prepared to cease these withdrawals and sales on short notice and to support the economies of friendly countries injured by these sales. In aid to Antioka care should be taken to avoid compensating aid to Gondomar. Payments to the Commodity Credit Corporation for the tin withdrawn should be made from unearmarked funds appropriated for foreign aid and other purposes.

B. NAVAL INTERDICTION OF SUPPLY LINES IN SUPPORT OF DIPLOMATIC ACTION

Situation 6

After the conference in Situation 5, in which our Naval Commander at Coloso participated, our Minister to Antioka submitted his report and recommendation to the Department of State. Thereafter the Minister was instructed to request an immediate meeting with Marshal Gondomar.

On the day following this meeting, REVARMCO was dissolved by its stockholders. Its assets were sold by sealed bids. The Antiokan Government was sole bidder.
At its meeting requested by Cortez, the Council of the Organization of American States, acting provisionally as an Organ of Consultation, appointed an investigating committee for an inspection on the spot.

Members of this Committee and its staff were excluded by Salvaje from Luna Mountain areas occupied by the PDS Army. Based upon the only observations possible, the Committee reported no further activity by Gondomar in Nueva.

The Committee estimated Scythian personnel supporting PDS forces at approximately 1,000. Scythia was said to have placed much equipment, including 14 trawlers manned by Scythian personnel, at Salvaje’s disposal.

During the Committee investigation, and while military action in Nueva was at a standstill, Cortez, in a radio and television address from Dolores, announced he and his Cabinet had resigned for the welfare of the people of Nueva and to avoid further internal conflict. He urged his listeners not to resist movement of the PDS forces to Dolores.

On the next day Salvaje flew to Dolores and took office as Provisional President. He promised future popular elections. Cortez and his Cabinet were arrested. Numerous officers of the Nuevan armed services have been dismissed.

Due to the puzzling circumstances of the Cortez collapse, our Minister to Nueva was recalled for consultation. He has presented to the National Security Council the following facts.

On 25 November, shortly before the resignation of Cortez, General Valens, a Nuevan national, recently returned from Scythia and now Chief of Staff of the PDS Army, met with the Nuevan Ministers of Defense and Health under a flag of truce. Valens informed these officials that Scythian biological warfare units supporting the PDS Army would commence action against Nuevan Armed Forces and the civilian population controlled by the Cortez Government. If Cortez and his Cabinet resigned by midnight, 27 November, and supported Salvaje’s assumption of office as Provisional President no biological warfare would be commenced.

The two Ministers accompanied Valens to the Luna Mountain area. There they observed aerosolizing equipment emplaced in bomb-proof shelters and mounted on Scythian trawlers in adjacent waters; stockpiles of aerosolized pneumonic plague bacilli, sulfadiazine, respirators and protective clothing; and prisoners from the jail at Patricio, who had been exposed to aerosolized pneumonic plague bacilli.

The Ministers reported to Cortez. At a meeting of Cortez and his
Cabinet with the commanders of the Nuevan Armed Forces it was concluded that air strikes with conventional explosives could not destroy sufficient biological warfare munitions to forestall the threatened attack. Nuclear weapons were not available.

The weather forecast for three weeks favored a biological attack launched by aerosols from the Luna Mountains or adjacent coastal areas in the direction of Dolores. Supplies of sulfadiazine could not be obtained and distributed, nor could an immunization program be completed, in time to avoid massive casualties.

Under these circumstances, President Cortez and his Cabinet decided to capitulate and resign.

During this meeting with the United States Minister to Nueva, the National Security Council considered also these intelligence items derived from reliable sources.

(1) In return for support given him by Scythia, Salvaje has agreed to Scythian use of Farrago Island, a Nuevan possession fifteen miles off its coast, as a proving ground for biological munitions. He has also agreed to permit Scythia to stockpile biological munitions useful in economic warfare (against livestock and crops) in the Luna Mountains. These stockpiles are to remain under Scythian control.

(2) Experiments are being conducted by Scythia on Farrago with an aerosolized yellow fever virus. The aerosol technique bypasses the mosquito as a vector and permits effective use of the munition in temperate or cold climates in any season.

(3) Seven Scythian trawlers, equipped with aerosolizing nozzles, have been observed by naval air and submarine patrols conducting attack delivery maneuvers at ranges of from 250 to 300 miles off the Virginia and Maryland coasts. It is estimated that Scythia can deliver biological warfare materials in aerosols with favorable winds at ranges of from 500 to 600 miles.

(4) On 8 December, experiments were conducted by a Scythian trawler off Farrago with aerosolized Melioidosis-B. Melioidosis, caused by the bacillus *malleomyces pseudomallei*, is similar to glanders but has a higher fatality rate. Melioidosis was first observed in the Orient and approximately 400 cases have been reported since the disease was identified.

Melioidosis-B, a mutant of Melioidosis, was developed by Scythia for use against livestock in economic warfare. The 50% lethal dose (LD$_{50}$) is believed to be 23.5 bacilli. Death results in approximately six hours after infection.

The trawler delivered Melioidosis-B from an average range of five miles during a run of approximately ten miles. All sheep on Farrago, placed there for the experiment, received a lethal dose. Although Scythia had considered the lethal effect of Melioidosis-B limited to
livestock, one hundred and thirty Amerindians, the only humans on
the Island, also died.

Aerosol delivered by the trawler was wind borne over parts of
Nueva, Cases of Melioidosis-B in humans and livestock have been
reported unofficially, although Salvaje has attempted to suppress this
information. Antioka, also in the aerosol path, has reported several
suspected cases of Melioidosis-B in humans and livestock to the Pan
American Sanitary Bureau and the World Health Organization.
Cultures taken from these suspected cases are being examined in the
Pan American Zoonoses Center in Azul, Argentina.

Based on these facts, the President alerted the United States
Public Health Service and the Department of Agriculture and or­
dered close naval surveillance of Scythian trawlers operating in the
Caribbean and in waters off the eastern coast of the United States
within biological striking range by wind-borne aerosols (600 miles).

During the month following this meeting of the National Security
Council, United States intelligence agencies reported a regular and
heavy flow of biological warfare equipment and personnel from
Scythia to Nueva by sea and air. These shipments included pneu­
monic plague and Melioidosis-B biological warfare munitions.

Aerosolized yellow fever virus has been perfected by Scythia in
Nueva and is now being stockpiled there. The Scythian biological
warfare stockpiles, have been dispersed in caves and underground
shelters and probably are secure against nuclear attack. These stock­
piles remain under Scythian control. Forty-six Scythian trawlers,
carrying aerosolizing equipment, now operate out of Nuevan ports.

On 16 May, Marshal Gondomar, President of Antioka, informed
the Chairman of the Council of the Organization of American States
that on the night of 10 May units of the Nuevan Navy, supported
by Scythian biological warfare specialists, commenced biological war­
fare against Antioka by dispensing contaminated aerosols from sur­
face vessels. Pneumonic plague, Melioidosis-B and yellow fever have
thus far been unidentified. The presence of Nuevan vessels was
detected by radar. No defensive action was taken because the attack
was not discovered until massive outbreaks of the diseases occurred.

At the time of his message to the Chairman of the Council,
Marshal Gondomar ordered the Antiokan air force to sink all
Nuevan naval craft and Scythian trawlers within striking range by
aerosols (600 miles) of Antioka. He requested the assistance of
members of the Organization of American States to meet an armed
attack pursuant to Article 3(2) of the Inter-American Treaty of
Reciprocal Assistance (Rio Pact). He also requested an immediate
meeting of the Organ of Consultation pursuant to Articles 3(2) and
6 of this Treaty.
The Council of the Organization of American States, acting provisionally as an Organ of Consultation, debated Marshal Gondomar's charge for six days. Salvaje has denied any attack with biological weapons was launched. Gondomar's charge has been confirmed by reports from Coloso, and Nuevan troops and landing craft have assembled in Nuevan ports.

Influential members of the Organization of American States believe the outbreaks of disease in Antioka may be due to Scythian experiments at Farrago or to Marshal Gondomar's own experiments, which he is believed to have undertaken. For this reason the Organ is not prepared to approve unilateral measures of military support for Antioka or collective measures under Article 2(2) of the Rio Pact.

The Organ also has failed to conclude under Article 6 that an aggression "which is not an armed attack" has occurred. A situation which might endanger the peace of America has been found. The Organ is thus prepared to call upon "the contending states to suspend hostilities and restore the status quo ante bellum."

Hostilities, in fact, are in a stalemate since all of the Antiokan aircraft which sortied against Nuevan naval units and Scythian trawlers have been destroyed. Marshal Gondomar is unwilling to risk his surface vessels and single submarine. Medical teams and supplies have been sent to Antioka by the United States and other members of the Organization of American States.

Under these circumstances, the President of the United States has received a letter from the President of Scythia, which states that Scythia, supporting Salvaje's demand for abandonment by the United States of its Naval Base at Coloso, is restraining with difficulty the Nuevan Navy from attacks upon the continental United States. Scythia cannot guarantee the effectiveness of these restraints so long as the threat to Nuevan security posed by the United States Naval Base at Coloso continues.

It is known Salvaje desires abandonment of the base at Coloso to insure the success of any attack which he launches against Antioka. The only threat which the Nuevan Navy could offer to the continental United States is a threat to attack with biological weapons. These weapons can be obtained only from Scythian personnel and can be delivered in substantial quantities only with Scythian equipment.

On 22 May, a Scythian dispatch to the senior Scythian officer in Nueva was disclosed to United States intelligence personnel. This message stated: "Execute Plan CHOLERA 022400 June." Plan CHOLERA is known to embrace release to Nuevan control of biological warfare materials together with trawlers and aircraft.
equipped to deliver these materials in aerosols. The Plan also includes provision of Scythian biological warfare personnel to act under Nuevan orders.

The National Security Council has grounds for believing Scythia is encouraging Salvaje to make a biological warfare attack upon the eastern coast of the United States. If such an attack is delivered by a small number of vessels at night, it is likely to be approximately one week before medical diagnostic procedures can verify an attack has occurred.

Scythia can then place pressure upon the United States to give up the Base at Coloso by offering to withhold biological warfare materials from Nueva in return for this concession; or can force the United States into an attack upon Nueva at a time when the Organ of Consultation of American States is not convinced that the outbreaks of disease are due to intentional biological attacks.

To forestall the necessity for an attack upon the biological stockpiles and delivery means in Nueva with ultradecisive weapons, the National Security Council will recommend to the President that naval action be taken to interdict the traffic to and from Nueva in biological warfare munitions and equipment and to exclude the movement from and into Nuevan territorial waters and airspace of vessels or aircraft equipped for dispensing contaminated aerosols. This draft proclamation is now being considered.

A PROCLAMATION

Whereas the peace of the world and the security of the United States are threatened by the establishment in Nueva by Scythia of stockpiles of biological warfare munitions and facilities for their clandestine delivery;

Whereas these munitions have been used against Antioka by Nueva in violation of the obligations of Nueva assumed under the Charter of the United Nations, the Charter of the Organization of American States and the Inter-American Treaty of Reciprocal Assistance; and by Scythia in violation of its obligations assumed under the Charter of the United Nations; and by both Nueva and Scythia in violation of minimum standards of humanitarian conduct accepted by civilized nations;

Whereas on this date the Government of the United States has placed before the Security Council of the United Nations its complaint that Nueva and Scythia have threatened a breach of the peace and contemplate an armed attack with biological weapons to coerce the United States to terminate its viable treaty with Antioka, providing for United States naval facilities at Coloso, Antioka;
Whereas an attack by unknown biological munitions cannot be met by conventional defensive measures of the type contemplated by Article 51 of the United Nations Charter;

Whereas it is necessary to preserve the status quo of biological warfare munitions and means for their delivery in Nueva pending a peaceful resolution of the issue presented in the complaint of the United States by the Security Council or other organs of the United Nations or by other diplomatic processes;

Whereas it is also necessary to procure current information required for peaceful settlement of this dispute pending reception, free access to information and effective functioning of a United Nations Commission of Inquiry or other independent commission of inquiry within the territory of Nueva;

Now, Therefore I ________________, President of the United States of America, acting pursuant to authority conferred upon me by the Constitution and statutes of the United States, in accordance with obligations assumed by the United States as a party to the Charter of the United Nations, the Charter of the Organization of American States and the Inter-American Treaty of Reciprocal Assistance, and to defend the security of the United States, do hereby proclaim that all forces under my command are ordered, beginning at Greenwich time, June ___ 19___, to establish a zone of surveillance on the high seas and superjacent airspace in the region defined by Article 4 of the Inter-American Treaty of Reciprocal Assistance, and to interdict within this zone such biological warfare munitions and facilities for their delivery as shall be defined by the Secretary of Defense and transmitted by the Secretary of State to all nations maintaining sea or air transport services or both.

The Secretary of Defense shall take appropriate measures to interdict prohibited material and equipment, employing the land, sea and air forces of the United States in cooperation with any forces made available by members of the United Nations.

The Secretary of Defense may make such regulations and issue such directives as he deems necessary to ensure the effectiveness of this order, including the designation of special restricted zones and routes for surface, subsurface or air transit within the zone herein indicated.

Any vessel, surface or subsurface, or aircraft within the zone herein indicated, as further defined by the Secretary of Defense, may be intercepted, required to identify itself and disclose its cargo, equipment, stores and ports of call and may also be required to stop, lie to, surface, land and submit to visit and search. Vessels or aircraft may be diverted for visit and search to such reasonable places
at which an effective health quarantine can be established as may be designated by the Secretary of Defense.

In carrying out this order, force shall not be used except for self-defense and to require compliance with my directions herein or with the regulations or directives of the Secretary of Defense issued hereunder after reasonable efforts have been made to communicate them to the vessel or aircraft. Force shall be used in any case only to the extent necessary.

The United States, Scythia, Antioka and Nueva are members of the United Nations and the World Health Organization. The United States, Nueva and Antioka are also members of the Organization of American States, parties to the Inter-American Treaty of Reciprocal Assistance and to other general treaties and agreements forming the Inter-American System, including the Pan American Sanitary Code of 1924 and the Pan American Health Organization.

You are examining the draft proclamation with a view to suggesting changes to insure its effective execution by naval forces. As part of this examination you are considering the legality of action by naval forces in international law pursuant to the proclamation and regulations and directives of the Secretary likely to be issued thereunder. Do you think the draft proclamation requires revision? If revision is required, what revisions would you suggest and why?

Discussion: Situation 6

1. Law and Biological Warfare: Tentative Analysis of Facts

Although the United States, the Soviet Union and other major powers are equipped to wage biological warfare, and states with modest physical resources can marshal a host of germs and germ carriers to be used for military purposes, the legal problems attending future widespread uses of biological weapons are conjectural.

No great attention until the past decade has been given to the law of biological warfare. This has been due in part to a tendency to confuse biological with chemical weapons.

These devices have different physical characteristics, techniques of employment and incidence of general risk. It has been tacitly assumed that legal problems arising from the use of chemical weapons will arise from the use of biological weapons as well. Effective military biological weapons also are recent innovations.

Past uses of biological weapons have been sporadic, usually by imaginative and resourceful local commanders, who could perceive advantages provided by nature, such as smallpox or plague victims

to be directed into the camp of a susceptible enemy. Opportunities for advance planning to employ biological weapons against an attacker or defender were slight, although these opportunities are now provided by development of militarily effective mutations of biological pathogens. Furthermore, so great were the problems of a commander with disease in his own ranks, that before development of effective immunization techniques and antibiotics, the "blow-back" hazard in biological weapons made their general employment awkward.

It has also been difficult in the past, although it is becoming less difficult in the light of modern warfare conventions, to draw sharp moral or ethical distinctions between situations in which a force awaits debilitation of its enemy by epidemic or endemic diseases before assault; in which the force accentuates the physical problems of its enemy by compounding the work of epidemic or endemic diseases by denying medical personnel, supplies or equipment or by refusing to exchange prisoners or permit civilians in enemy territory to emigrate; and in which the force deliberately infects enemy personnel with debilitating or fatal diseases.

Nineteenth and early 20th century lawmakers and their advisers were unable to make to their satisfaction, in an era prior to the staging of total wars and the mechanical socialization of military risk, moral or ethical distinctions between these transactions. This inability weighed against any intensive consideration of biological warfare in the early arms conferences.

Only two international conventions dealing with techniques of warfare contain provisions related or reasonably applicable to biological warfare. The Geneva Gas Protocol of 1925 prohibits the "use of bacteriological methods of warfare."\(^77\) Article 23(a) of the Regulations annexed to Hague Convention No. IV forbids the use of poisons or poisoned weapons and perhaps can be construed to extend to biological toxins.\(^78\)

There has been no integration of these provisions for administration and enforcement into the international health regime, The international health regime is based upon a series of sanitary conventions.\(^79\) The earliest of these was in 1851. The policies expressed in these conventions, keyed to modern medical knowledge and techniques, adjusted to contemporary world political organization, and applied to existing means of transport and communication, now

\(^77\) 94 L.N.T.S. 65, 69 (1929).
\(^78\) Naval War College, International Law Situations, 1908, 180.
\(^79\) A summary of the Sanitary Conventions from 1851 through 1951 may be found in Goodman, International Health Organizations, 49–79 (1952).
appear in the Charter of the World Health Organization \(^80\) and the Sanitary Regulations which this Organization issues.\(^{81}\) Regional health organizations operate under the general aegis of the world body.

There are no international legal restraints upon the development of biological munitions except to the extent that testing of the munitions is limited. Tests upon unwilling human subjects may be precluded by international law and limitations may exist upon the preemption or indefinite contamination of certain testing areas.

Restrictions upon biological weapons in conventional warfare are uncertain and there is even greater ambiguity when these weapons are considered for use in various forms of unconventional warfare. Frequent condemnations of alleged biological warfare, when these condemnations are for the purpose of propaganda or to obscure preparations for biological warfare, meet no current legal impediment.\(^{82}\)

Threatening an attack with biological weapons and clandestine deployment of these weapons to provide a coercive edge to diplomatic action may be reasonably expected to elicit a violent response from the threatened opponent. An attack with biological weapons may be difficult to detect until much time after the attack has been delivered. This time lag may range from a few hours to several weeks.

There also may be no passive defensive measures against some biological munitions. Such munitions might be mutants of biological pathogens little known in the country attacked or threatened.\(^{83}\)

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\(^{80}\) Yearbook of the United Nations (1946-47), 793.

\(^{81}\) For the current WHO Regulations No. 2 see 37 Official Records of the World Health Organization, 335 (1952). The International Sanitary Regulations are prepared and placed in force by an unusual treaty process. Draft regulations are prepared by an appropriate body of the World Health Organization and laid before the Health Assembly for discussion and adoption. Upon adoption, the Regulations are notified by the Director General to Governments and after the expiration of a time fixed in the notice are binding upon a member state which does not notify its rejection of them. See Constitution, World Health Organization, Articles 21, 22, Yearbook of the United Nations (1946-47), 796.

\(^{82}\) Aspects of the exchanges between the United States, the Soviet Union and Red China based upon biological warfare charges by the latter may be found in 26, 27 and 28 Department of State Bulletin (1951, 1952, 1953) passim and Bechhoefer, Postwar Negotiations for Arms Control, 194-201 (1961).

\(^{83}\) "If the agents adaptable to biological warfare were limited to those that cause known diseases, the problems of defense would be less complex. But we know that there is a possibility that an enemy could develop mutant types of diseases for which there would be no known defenses. * * *" Stubbs, The
The only defense in this case is an attack upon sources of supply of the munition and upon delivery agencies.

The National Security Council has chosen to rely upon diplomacy to eliminate the threat of biological attack confronting the United States. But the risk of failure of diplomatic processes is unacceptable in this case. The Nuevan-Scythian Concert must be given no opportunity to deliver their biological munitions while negotiations are under way. United States forces must be placed in a position from which the threat can be quickly eliminated if negotiations fail.

The Situation has features in common with the Cuban Quarantine of 1962. Naval operations are to be conducted upon the high seas and in superjacent airspace. Air reconnaissance may be conducted over Nuevan territory. The naval action contemplated is of an economic nature. The flow of certain military supplies is to be interrupted without stimulating major coercive exchanges which might bring into operation the various treaties and customs incident to belligerency.

There are also major distinctions. The danger of immediate attack is probably greater than in the Quarantine of 1962. Biological weapons are maneuvered actively to apply pressure upon the United States. These weapons can be employed at sea for maximum flexibility and can be delivered without likelihood of immediate detection.

The Organization of American States appears unwilling to support the action of the United States. Once action by the United States commences, Scythian disengagement, unlike Soviet disengagement in the Quarantine of 1962, will be difficult because shipments out of Nueva of the prohibited materials and equipment also will be interdicted.

The features in common with the Quarantine of 1962 mean that many of the legal problems present there will be involved also in the situation presently considered. Accordingly, legal aspects of naval participation in the Quarantine will first be examined. Its lessons will then be applied to the threat of biological warfare by Scythia and Nueva.

2. Analysis of the Quarantine in Four Phases

Former Secretary of State Dean Acheson, a distinguished lawyer, public servant and counsellor to the President in the Crisis of October 1962, has remarked that survival of a state is not a matter

of law and the propriety of the Cuban Quarantine is not a legal issue. Mr. Acheson does not suggest that law was irrelevant to the decision to quarantine but ascribed greater importance in such a decision to judgments by the President and his advisers concerning the timing of action and the generation of power to force a desired response from an opponent.

Few persons consider the Executive Committee advising the President in October 1962, deduced its advice from international law, could have done this if it had tried, or confined its survey of alternatives to courses of action which international law clearly permitted. No rational decision maker is likely to analyze a problem in this way.

The decision maker should forecast the likelihood of volitional acceptance, both of the end sought and the means considered, by persons whose values are affected significantly by the action proposed. There should be a preference for repetitive action, when surprise of the opponent is not critical, to secure coordination of the response in situations in which a response amenable to coordination might reasonably be predicted. Adequate machinery and standards for guiding subordinates in executing the decision should be provided.

But despite the accuracy of Mr. Acheson’s observation when related to the high level of decision he was considering, as problems were defined or particularized on lower levels of decision as the Quarantine was planned and executed, law—in its conventional sense—became increasingly relevant. As concrete cases were presented, law was needed to coordinate action, persuade opponents and allies and guide subordinates.

Many decisions were involved in the Quarantine, each in a slightly different context, and each of which could raise distinct legal issues.

Rational judgments applying law to the Quarantine require consideration of the basic decision by the President with the many other decisions by the President and other officials and private persons involved in the conflict. These include the President’s decision to coordinate action by the United States with the mediating efforts of the Secretary General, the President’s decision to terminate the Quarantine, the decisions of his executive officers and the decisions of officers of international organizations and other states drawn into the conflict.

The dimensions of conflict in the Quarantine changed as new demands by new participants were asserted. The shape of inter-

action among the participants varied from a high degree of intensity of coercion in the beginning to a high intensity of persuasion in the end. As new advisors to new decision makers joined the contest, differing concepts of the function of law and the requirements of a legal order were injected into the policy exchanges.

To develop a perspective of the mesh of decisions involved in the Quarantine, it is convenient to consider the Quarantine as having developed in four phases. The phase lines selected are laid at points at which key or critical policies were exposed by their maker. "Exposure" of a policy means that the policy maker has temporarily crystallized his position vis-à-vis his own subordinates or superiors or with respect to the target of his policy.

The policy maker exposes his policy when he reaches either a point of "no return" or a point at which a return to the status quo ante would be so awkward that serious consideration of this return is precluded. Execution of the policy need not necessarily have commenced for these situations to arise.

a. CUBAN QUARANTINE: PHASE 1

The first phase of the Quarantine began with the President’s receipt of information concerning the presence of offensive weapons with crews in Cuba. The phase ended with delivery of the President’s proposed public address on the crisis to Ambassador Dobrynin at about 6:00 P.M., E.S.T., 22 October 1962. This phase covers the secret planning of the Quarantine.

The most detailed accounts of the conferences of the President’s “Executive Committee” have been offered by Mr Sorensen, Special Counsel to the President and by Mr. Abel.85 However, it is probable that the details of the conferences have been incompletely disclosed and are likely to remain so until security restrictions are lifted and the recollections of additional participants and their staffs can be probed. Any current analysis of the role of law in this decision-making process must necessarily be provisional.

All commentators dealing with this first phase of the Quarantine recognize the planning as unilateral by the United States. Allies of the United States were informed of the decision before the

85 Sorensen, Kennedy, 674–718 (1965); Abel, The Missile Crisis (1966). For similar detail see Schlesinger, A Thousand Days, 801–819 (1965). All accounts suggest legal considerations were involved in formulating the “quarantine” policy but figured in a subordinate role. Accounts, which are less detailed and no doubt less accurate since the writers lacked first-hand knowledge of the proceedings, may be found in the controversial article by Alsop and Bartlett, “In Time of Crisis,” Saturday Evening Post, 8 December 1962, 15 and in Daniel and Hubbell, Strike in the West (1963).
announcement to the American public. They were not, however, consulted in its formulation.

It is unlikely the legal foundations of any demands these allies might make were considered in any detail by the Executive Committee advising the President. Treaty obligations of the United States and international legal doctrine bearing upon “intervention” do appear to have been considered.

The presence of Ambassador Stevenson as a member of the Executive Committee and reports of his extensive participation suggest careful attention to the alternatives open to the United States as a member of the United Nations. Treaties of the Inter-American system appear to have been discussed and weighed. Rapid action by the United States in bringing its case before the United Nations and the Organization of American States suggests responsibilities of membership in these organizations were carefully assessed.

The selection of naval force as the major policy instrument indicates consideration and appreciation of the legal features of the impending conflict. Naval units—surface, subsurface and air—can apply a broad range of coercive and persuasive policies. Naval force is the flexible armed instrument for national action.

The Quarantine may have been among the least coercive of the alternatives open to the United States in the October crisis. But naval forces, in executing the Quarantine, could also apply maximum coercion to destroy the missiles and their sites if this proved necessary.

Furthermore, the operations of surface craft in situations such as those developed in the Quarantine have long been familiar. The “pacific blockades” discussed by publicists in the late 19th and early 20th centuries may not have hurdled a generation of controversy to become settled international legal custom. But as minimum exercises of coercion in situations in which maximum exercises of coercion might reasonably have been expected, pacific blockades have had virtues as convenient short circuits for applications of coercive power.

Moreover, by adopting a pattern of naval action similar to pacific blockade, United States policy makers were working at the threshold of law—where the coordinating features of law were present although the persuasive features of unresisted repeated practice were lacking. The examples of pacific blockade were few and records of voluntary agreement to their use even fewer.

Pacific blockade records, few as they were, provided a basis for Soviet predictions concerning the probable direction of development of American action. The Soviets could read between the lines of
the various executive statements concerning Quarantine operations. A standard was provided for estimating the degree of violence which United States naval forces were likely to apply.

In war a policy hewing to this predictable pattern might spell disaster for the United States. In the Quarantine, communications were improved and the chances of accomplishing the objects of United States policies were enhanced.

The coordinating element of law was present in adoption by the United States of a "pacific contraband" pattern for action—a minor variant of the "pacific blockade." The United States did not rely on "pacific blockade" doctrine to persuade its allies or opponents. Nor would the Soviets have admitted the "legality" of naval interference with their shipping.

**Pacific Blockade**

Pacific blockade is founded upon the sharp war-peace dichotomy characterizing 19th century legal thought. A few instances of pacific blockade, such as the French blockades of Formosa in 1884–1885 and of Siam in 1893, are described as "pacific" principally because the blockaded state could offer no resistance. In other cases, such as the Chilean blockade of Bolivia in 1879, the conflict was a war in the nineteenth century legal sense, but was too limited to stimulate declarations of neutrality by nonparticipants. Still other cases involve uses of naval power to collect debts from recalcitrant debtors. The pacific blockades of Portugal (1831); Carthagena (1834); Mexico (1838); and San Salvador (1842) by France; New Granada (1837); Nicaragua (1842 and 1844); Greece (1850); and Brazil (1862–1863) by Great Britain; and the joint blockade of Venezuela by British, German and Italian units in 1902–1903; fall within this category. Today these actions clearly would be inconsistent with treaty obligations of the blockaders.

Several pacific blockade cases involved peace maintenance efforts in joint operation by naval powers. These cases occurred before the
development of multinational security organizations, such as the League of Nations and the United Nations.

Thus Great Britain, Russia and France agreed in 1827 to act together to restore peace in Greece. The powers established a blockade of the Morea to prevent egress of the Turkish fleet from Navarino; and, without a rupture of diplomatic relations with the Porte, ultimately destroyed the Turkish fleet in a major naval action. 98

Anglo-French naval forces blockaded the Netherlands in 1832–1833 to require the latter to execute the treaty of 1831 for the independence of Belgium. 99 French naval units blockaded Uruguay to cut off supplies from Argentina to the Oribe forces; 100 and this blockade was revived in 1845–1850 by Anglo-French vessels. 101

The blockades directed by Great Britain, Austria, Germany, Italy and Russia against Greece in 1886; 102 and by the same powers with the addition of France against the Greeks in Crete in 1897; 103 have been regarded by most commentators as actions taken with a principal motive to reduce disorder and facilitate negotiations to restore peace.

When peace enforcement or restoration of peace has been the principal object of naval action, the form of interference with shipping has been analogous to a wartime imposition of contraband controls rather than to a “close” blockade as understood prior to World War I. In the Greek blockade of 1827, the blockading force appears to have denied only weapons and reinforcements to the Turkish army. 104 The blockade of Crete in 1897, while applying to all Greek vessels, was applied only to supplies destined for Greek insurgents when carried on vessels of other states. 105 The French blockade of Uruguay in 1838–1840 seemed intended to deny arms and troops to Oribe, although the joint Anglo-French blockade of 1845–1850 seems to have extended to all dutiable merchandise. 106

There has been no express formulation by writers on the subject or in the judgments of courts of a theory of “pacific contraband”

98 Ibid., 73.
99 Ibid., 80.
100 Ibid., 88.
101 Ibid., 98.
102 Ibid., 126.
103 Ibid., 142.
104 Ibid., 74, 75.
105 Ibid., 144, 49.
106 Ibid., 89. Note, however, the official notice to the British Foreign Office seemed to extend to “any merchandise subject to custom house duties” as was in fact the ambit of the later Anglo-French blockade of 1840–1850. Ibid., 161.
as distinguished from "pacific blockade." In *Le Comte de Thomar*, decided by the French Prize Court, a Brazilian merchantman which had received no notice of the French blockade of Uruguay was seized while carrying powder and lead to the Oribe forces. Under the French prize practice, the vessel could not be condemned for breach of blockade because it had no notice.

It was then sought to condemn its cargo as contraband. This the court held could not be done because there could be contraband only in time of war and only a belligerent could seize it.

Yet, despite *Le Comte de Thomar*, the pacific contraband aspect of pacific blockade, described by some writers as a "selective blockade"; and a nonwarrtime practice related to unneutral service, which might be described as "unlawful destination, detention or service"; when divorced from the rubric of pacific blockade and the obsolete practice by which debts are collected through the use of naval power, may suggest the nature of future nonbelligerent applications of naval force involving minimum violence.

The British and German pacific blockade of Zanzibar in 1888–1889, to interrupt the trade in arms is a typical early example of application of pacific contraband rules; or to the extent directed to interruption of the traffic in slaves, as application of doctrine concerning "unlawful destination, detention, or service." Yet, despite *Le Comte de Thomar*, the pacific contraband aspect of pacific blockade, described by some writers as a "selective blockade"; and a nonwarrtime practice related to unneutral service, which might be described as "unlawful destination, detention or service"; when divorced from the rubric of pacific blockade and the obsolete practice by which debts are collected through the use of naval power, may suggest the nature of future nonbelligerent applications of naval force involving minimum violence.

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British visit and search of vessels upon the high seas suspected of carrying illegal immigrants; escort of vessels found to be carrying illegal immigrants within Palestinian territorial waters; and seizure of the vessels there with an orderly disembarkation and temporary detention of their passengers seemed acceptable to most of the maritime nations.

Practices of "pacific contraband" and "unlawful detention, destination or service," for which no general acceptance by states can presently be claimed, merge into the relatively well settled practices by which a state enforces its revenue and quarantine laws against vessels "hovering" off its coast or its trade restrictions imposed upon persons within its territorial waters. A hovering theory will support French naval action to intercept arms shipments to Algeria. "Self-defense," as in the "Quarantine," also is a strong argument.

Dutch naval operations in the Indonesian area prior to Indonesian independence appear to have been almost, if not entirely, within Indonesian territorial waters and aimed at smuggling, the arms trade, and shipments of nationalized property.\(^{111}\) The Egyptian naval action against shipping to Israel commenced as a blockade \textit{jure belli} confined, however, largely to interdiction in the Suez Canal and its approaches.\(^{112}\)

While there is not general acquiescence in any of these practices by the states affected, upon which a positivistic claim of law developed by consent can be founded, it has become almost routine to tolerate naval interferences with shipping in areas in which tensions are great, as in the Formosa Straits or Caribbean, with little more than token protests. Policy makers of states have been conditioned to accept naval interference with shipping without a routine violent response although protests may be filed. The response is much the same as that of the usual private citizen to police officers serving his community.

This general attitude seems based upon four factors: (1) The close control maintained by a state over its naval forces and the high degree of discipline of officers and men which the efficient conduct of naval affairs requires; (2) The usual familiarity of naval officers with international law pertaining to their duties; (3) The lack of an adequate system of international police upon the high seas;

\(^{111}\) See \textit{S.S. Martin Behrman, 16 Department of State Bulletin}, 720 (1947).

\(^{112}\) A summary of decisions of the Egyptian Prize Court may be found in \textit{44 A.J.I.L.}, 774 (1950). Continuation of the Egyptian action since the Armistice, which has been described by several writers as a form of pacific blockade, is considered in detail in Gross, "Passage Through the Suez Canal of Israel Bound Cargo and Israel Ships," \textit{51 A.J.I.L.}, 530 (1957).
(4) The range of persuasion and coercion of which a naval force is capable.

The choice of the naval service as the major executive agency in the Quarantine suggests the Executive Committee weighed the flexibility in law and power of this service in its recommendation to the President. While the Navy was a logical and efficient choice to interdict sea carriage of ballistic missiles, their supporting equipment and unassembled aircraft, interdiction by sea action was by no means the quickest method to exclude the offensive arms from Cuban soil.

A violent response to seizures of Cuban ports of destination or launching sites for the missiles by airborne units or to destruction of these by ultradecisive weapons might reasonably be predicted. Policy makers are conditioned to accept without violent responsive action the accustomed and easily controlled types of intervention.

The “justification” for prompt action by the United States to interfere with installation of the Soviet missiles and their supporting equipment and the importation into Cuba and assembly there of jet bombers was considerable. As summarized in the President’s public address of 22 October 1962 and as derived from other public sources, these facts were before the Executive Committee:

1. Medium range ballistic missiles with an effective nuclear armed range of 1,000 nautical miles were installed in Cuba and operational. Sites for intermediate range ballistic missiles were under construction.

2. Jet bombers capable of transporting and delivering nuclear weapons were in Cuba and being assembled. Bases for them were in preparation.

3. Soviet crews to man these weapons systems were in Cuba.

4. Additional missiles, fuel, supporting equipment, planes and crews were in transit by sea to Cuba.

5. In the usual military sense, undistorted for deception or propaganda, the missiles and aircraft in Cuba sent by the Soviet Union were designed principally as “initiative” or “offensive” weapons. The President had made clear to Soviet representatives that weapons of this type were regarded as “offensive weapons” by the United States.

6. Missiles fired from Cuba against targets in the United States would bypass the long-range warning system. The reaction time which this long-range warning system could provide would be eliminated. This reduced the deterrent effect of United States missiles and aircraft. Furthermore, bringing all parts of the United States

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within range of Soviet medium-range and intermediate-range missiles eliminated the advantage of the United States in effective intercontinental (long-range) ballistic missiles. The power equilibrium between the free and closed worlds was significantly upset.

(7) Shipment and installation of the Soviet weapons systems were rapid and clandestine. Public and private assurances of representatives of the Soviet Union were violated. These features suggested Soviet intentions of (1) surprise attack or (2) surprise diplomatic action. Although failure to camouflage the bases with care suggests surprise diplomatic action as the immediate Soviet intention, surprise attack could not be excluded in view of the tension between the United States and the Soviet Union.

While the existence of "justification" for action does not mean that the action was necessarily "legal" or necessarily "illegal," features other than subjective judgments by an actor being relevant in community judgments within a legal order, the continuing effort to find facts before the decision to Quarantine was made and as the Quarantine was executed, coupled with the element of "necessity" for action which these facts disclosed, do bear upon community judgments of legality.

During the deliberations of the Executive Committee and thereafter during conduct of the Quarantine, except for a short time during the visit of Acting Secretary General U Thant to Cuba, intensive efforts to assemble facts were made by air reconnaissance and other means. Although no decision maker constitutionally responsible for the security of his state against foreign armed attack is expected to exhaust the fact-finding resources at his disposal—in the sense that a court or legislative committee might be expected to delay decisions pending availability of important witnesses or documents—diligence in seeking facts before his decision and during execution of his policy is an element of the legal standard of "reasonableness" by which his action may be measured.

Naval force was used to stabilize Soviet power in Cuba at its pre-Quarantine level pending a clarification of Soviet objectives. The impact of naval action in producing a disclosure of Soviet intentions, an important part of the fact-finding process, was as important as the impact of naval action in preserving the status quo. Stability and information were joined to permit the working of persuasive processes.

The intense effort to acquire facts upon which a sound decision might be based; the apparent care and reflection by the Executive Committee in formulating the advice considered by the President; the President's decision to use minimum coercion; his selection of
naval force as the coercive instrument; the limitations placed upon employment of the naval force—both in the Proclamation and in directives of the Secretary of Defense; and the immediate recourse both to the Organization of American States and the United Nations; all suggest the decisive role played by domestic and international law in channeling the President's decision. A more effective working of law in the development of human affairs is difficult to conceive—and the case for legality of the first phase of the Quarantine was established before any Quarantining vessel was on station.114

b. CUBAN QUARANTINE: PHASE 2

The second phase of the Quarantine extends from delivery of the Dobrynin letter on 22 October until publication of the Soviet order to its vessels transporting prohibited weapons, equipment or supplies to avoid the area of American naval interdiction. This order was issued at an undisclosed time on the morning of 24 October. The President's Quarantine Proclamation had become effective at 10:00 A.M., E.S.T., on that date.

The period of unconcerted confrontation of the Soviet Union by the United States was limited to this second phase. The only contact, however, between the Soviet units and the quarantining force was audiovisual. This contact included sonar tracking of submarines and air reconnaissance of Soviet shipping by Navy and Air Force units.

Overwhelming force was coupled with concomitant recourse by the United States to processes for negotiation. The case of the United States was placed promptly before the Security Council of the United Nations.115 The United States obtained the support

114 An impressive array of legal skills were available to the President in his Executive Committee—the Attorney General, Ambassador Stevenson, Mr. Acheson and Mr. Ball performing advisory functions.

Professor Mallison lists the Judge Advocate General of the Navy, the Deputy Judge Advocate General, the Assistant Navy Judge Advocate General for Administrative and International Law and the Director of the Navy International Law Division as having worked on the President's Proclamation.

Civilian consultants included the Deputy Attorney General, the Legal Adviser of the Department of State, the General Counsel of the Department of Defense, and Mr. Yarmolinsky, Special Assistant to the Secretary of Defense. See Mallison, "Limited Naval Blockade or Quarantine Interdiction: National and Collective Defense Claims Valid Under International Law," 31 Geo. Wash. L. Rev., 335, 336 n. 196 (1962).

A detailed identification of Executive Committee members appears in Sorensen, Kennedy, 674-675 (1965).

115 For the text of Ambassador Stevenson's letter to President Zorin of the
of the Organization of American States, formalized in the Resolution of the Provisional Organ of Consultation.\textsuperscript{116} Correspondence was exchanged between the President and Chairman Khrushchev.\textsuperscript{117} As the phase ended, the conciliatory tone of the Khrushchev letter to Lord Russell signalled Soviet recognition of a margin of United States naval supremacy in the Caribbean which precluded rational challenge.\textsuperscript{118}

Security Council and the text of the appended draft resolution, see \textit{47 Department of State Bulletin}, 724 (1962).

The draft resolution called for immediate dismantling and withdrawal from Cuba of all missiles and other offensive weapons, for the dispatch to Cuba of a United Nations observer corps to see that this was done, and for termination of the Quarantine upon United Nations certification of compliance with the order to dismantle and withdraw the missiles and other offensive weapons.

Paragraph 4 of the draft resolution urged the United States and the Soviet Union to confer promptly on measures to remove the existing threat to the security of the Western Hemisphere and report thereon to the Security Council. The text of Ambassador Stevenson's statement to the Security Council on October 23, 1962, appears at \textit{47 Department of State Bulletin}, 723 (1962).

\textsuperscript{116} See \textit{47 Department of State Bulletin}, 722 (1962). After a preamble, the Council resolves: (1) To call for the immediate dismantling and withdrawal from Cuba of all missiles and other weapons with any offensive capability; (2) To recommend that the member states, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed forces which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent; (3) To inform the Security Council of the United Nations of this Resolution in accordance with Article 54 of the Charter of the United Nations and to express the hope that the Security Council will, in accordance with the draft Resolution introduced by the United States, dispatch United Nations observers to Cuba at the earliest moment; (4) To continue to serve provisionally as Organ of Consultation and to request the member states to keep the Organ of Consultation duly informed of measures taken by them in accordance with paragraph two of this Resolution.

The Resolution was approved unanimously by the Council. As the Resolution suggests, the case of the United States was before the Security Council before the Resolution was passed. The President's Proclamation of Quarantine was delayed until the Council of the Organization of American States had acted. The Proclamation of Quarantine appears at \textit{27 Federal Register} 10401 (No. 3504) and also at \textit{47 Department of State Bulletin}, 717 (1962).

\textsuperscript{117} See \textit{N.Y. Times}, Oct. 25, 1962, p. 22, col. 2. The text of this letter has never been published. The secret letter paraphrased in Abel, \textit{The Missile Crisis}, 178-181 (1966) appears to be of a later date. Delivered to the President apparently on October 24, it was said "to be in the same inconclusive vein as the Kremlin's public statements thus far."

\textsuperscript{118} See \textit{N.Y. Times}, Oct. 25, 1962, p. 22, col. 2. The letter was published five
Although the problem remained to secure the removal of missiles and other offensive weapons from Cuba, an increase of the threat to the United States by the introduction of additional missiles or aircraft was blocked by the mere display of naval force. Once determination to use this force was demonstrated, the United States and the Soviet Union resolved on a settlement of the issues by negotiation rather than by violence.

c. CUBAN QUARANTINE: PHASE 3

During the third phase of the Quarantine, extending from publication of the diversion order by the Soviet Union to its transports to publication of the Khrushchev letter of 28 October, announcing his order for dismantling and return to the Soviet Union of missiles, offensive aircraft and their supporting equipment in Cuba, Acting Secretary General U Thant became active in attempting to resolve the conflict. Seeking a voluntary suspension of both arms shipments from the Soviet Union and the Quarantine by the United States, the Acting Secretary General secured an informal understanding on 26 October, stated in the words of the President:

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* * * /I/ if the Soviet Union accepts and abides by your request 'that the Soviet ships already on their way to Cuba stay away from the interception area' for the limited time required for preliminary discussion, you may be assured that this Government will accept and abide by your request that our vessels in the Caribbean 'do everything possible to avoid direct confrontation with Soviet ships in the next few days in order to minimize the risk of an untoward incident' ** *
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Chairman Khrushchev, having diverted Soviet vessels because he was powerless to prevent their seizure and could not hazard capture of their secret tackle and cargo, replied to the Acting Secretary General:

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* * * /W/e therefore accept your proposal, and have ordered the masters of Soviet vessels bound for Cuba but not yet within the area of the American warships' piratical activities to stay out of the interception area as you recommend.
Any substantial chance of a violent encounter between United
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hours after the Quarantine went into effect. While Daniel and Hubbell state that the State Department decided to "ignore this maneuver because Lord Russell was "so discredited a figure," the letter suggested summit talks and was the first public suggestion that the Soviet Union would not attempt to break the Quarantine. See Daniel and Hubbell, *Strike in the West*, 139 (1963).

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120 N.Y. Times, Oct. 27, 1962, p. 8; col. 4.
States naval forces and Soviet surface craft was thus eliminated. A watch was maintained by United States naval units, a few Soviet trawlers were shadowed and Soviet and unidentified submarines were harassed.\(^{122}\)

Prior to this informal agreement secured by the Acting Secretary General, United States naval personnel from two ships boarded and searched Marucla, a Soviet chartered Lebanese merchantman, about 180 miles northwest of Nassau. The master cooperated in the visit and search. No prohibited items were found.\(^{123}\) Two Soviet tankers, Vinnitiza and Bucharest, and an East German passenger ship, Voelkerfreund, traversed the interception area without being boarded. The master of Bucharest and the captain of the intercepting destroyer exchanged messages.\(^{124}\) Vinnitiza and Voelkerfreund appear to have been hailed, but no further details of the encounters are reported.\(^{125}\)

The disturbance of sea commerce of states other than the Soviet Union during the third phase of the Quarantine was at a minimum. Special warnings that reactions to the Quarantine might render hazardous transit of the Yucatan Channel, Florida Straits and Windward Passage, were broadcast at regular intervals by the Navy. A “Clearcert” system, similar to the British Navicert system of World War II, was announced on 27 October.\(^{126}\) Many of the certificates were issued.

A clearance certificate could be obtained from United States customs authorities for a vessel departing without contraband from a United States port—whether bound for Cuba or merely transiting the interception zone. For vessels departing from foreign ports, a Notice of Transit could be filed with the American consulate at the last port of departure if the vessel was only to cross the interception


\(^{124}\) *N.Y. Times*, Oct. 26, 1962, p. 1, col. 2. The encounter occurred 22 hours after the effective time of the Proclamation. The master appeared uncooperative, but from an inspection without boarding, naval personnel decided only petroleum products were aboard.

\(^{125}\) Vinnitiza was the first Soviet vessel to pass the Quarantine and reach Cuba. See *N.Y. Times*, Oct. 27, 1962, p. 6, col. 4. She may have cleared the interception area before the Quarantine was fully established. Bucharest and Voelkerfreund were allowed to pass without boarding by Presidential order that sufficient time be allowed for each ship to obtain Soviet instructions. See Abel, *The Missile Crisis*, 158–159 (1966); Sokolow, *Kennedy*, 710 (1965).

zone. If bound for a Cuban port with no contraband, a clearance certificate could be obtained from the American consulate.\textsuperscript{127}

There was minor interference with shipping. The depressing effect of the Quarantine upon trade in the Caribbean was noted in the Greek merchant marine.\textsuperscript{128} The Holland-American and Swedish-American Lines rerouted their vessels to avoid the Windward Passage.\textsuperscript{129} British marine underwriters invoked the fourteen day war risk clause in insurance contracts upon vessels engaging in the Cuban trade and rates for the excluded area had to be established by special agreement.\textsuperscript{130} Air traffic into Cuba and across the interception zone was reduced by Cuban security restrictions on air transit and denial of landing privileges by many states to the Soviet Union.\textsuperscript{131} Although the Quarantine Proclamation applied to aircraft, no effort appears to have been made by the United States to use Quarantining units to intercept or divert them.

The coercive exchanges of the second phase of the Quarantine, as a result of which no physical damage was inflicted, were re-shaped by negotiation during the third phase into mutual postures in which persuasive rather than coercive techniques were paramount. This position was attained by reliance both by the United States and the Soviet Union upon processes of mediation and negotiation which the United States could provide, coupled with reasonable cooperation by the President in a period of stress and anxiety with the peacemaking efforts of the Acting Secretary General.

d. \textit{THE CUBAN QUARANTINE: PHASE 4}

During the fourth phase of the Quarantine, which might be described as a "peeping tom blockade," naval action by the United States was concerted with action by the Soviets. Apart from the continued harassment of submarines,\textsuperscript{132} there were no coercive features.

\textsuperscript{127} See \textit{47 Department of State Bulletin}, 747 (1962). The vessel could be boarded and searched even if it possessed the clearance certificate or had filed the notice of transit. This interference was unlikely and an expeditious clearance was possible.

\textsuperscript{128} See \textit{N.Y. Times}, Oct. 26, 1962, p. 18, col. 3. Two hundred Greek vessels were said to be laid up with about 100 more affected in their use by restrictions on the Cuban trade.

\textsuperscript{129} \textit{N.Y. Times}, Oct. 25, 1962, p. 21, col. 2.

\textsuperscript{130} \textit{N.Y. Times}, Oct. 25, 1962, p. 21, col. 4. United States insurers had ceased coverage with the embargo upon American shipments to Cuba.


\textsuperscript{132} Submarines were warned to surface by underwater explosion of four or five harmless charges accompanied by the international code signal "I.D.K.C.A.,"
Eight Soviet vessels outward bound from Cuba were visually inspected without boarding. The visual inspections were conducted from ships alongside the Soviet transports and from helicopters. Masters of the Soviet vessels were cooperative in almost every instance. Some of them ordered removal of the covers of crates on deck. The vessels transported a total of forty-two crates which appeared to contain missiles and deck cargo which appeared to be missile launching equipment.

The Quarantine was suspended for two days (30 and 31 October) while the Acting Secretary General was in Cuba. The Quarantine was terminated on 21 November 1962 after the President was assured by Chairman Khrushchev that Soviet jet bombers would be withdrawn within thirty days.\(^{133}\)

3. Selected Legal Analyses of the Quarantine: Applications to the Threat of Biological Attack

Writing shortly after termination of the Quarantine, Professor Mallison of the George Washington Law School developed effective self-defense and collective self-defense arguments supporting the United States action.\(^{134}\) Basing his analysis upon the framework developed by Professor McDougal and Dr. Feliciano,\(^{135}\) Professor Mallison examines the objectives of the claimants; the proportion of the response by the United States to the initiating coercion of the Soviet Union; and the reasonableness of the expectation of necessity in the responding action.

He finds the Quarantine a form of coercion permitted under Articles 51 and 2(4) of the United Nations Charter. The weight of a collective judgment of necessity when action is pursuant to the authority of the Organization of American States is stressed.

meaning “rise to the surface.” Submarines were then to surface on an easterly course.

Contact by United States naval forces with Soviet and unidentified submarines was said by Admiral George W. Anderson, U.S.N., Chief of Naval Operations during the Quarantine, to have provided “perhaps the best opportunity since World War II” to perfect the skills of United States antisubmarine warfare forces. See Christol and Davis, “Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962.” 57 A.J.I.L., 525, note 26 at 530 (1963).


\(^{134}\) McDougal and Feliciano, Law and Minimum World Public Order (1961).
Summarizing his conclusions concerning legality of the Quarantine, Professor Mallison writes: 136

* * * /T/he limited coercion involved in the quarantine-interdiction was used in response to the initiating coercion of the Soviet Union. This initiating coercion has been appraised factually as posing a threat to the very survival of the United States. * * * It has been appraised legally as inconsistent with the legal obligations assumed by member states of the United Nations. In this context, the formulation and implementation of the naval quarantine-interdiction amount to the least possible use of the military instrument. Any lesser use would have amounted to abandonment of the military instrument and exclusive reliance upon noncoercive procedures which would almost certainly have been ineffective without supporting military power. The quarantine-interdiction * * * meets the requirements of reasonable necessity in its most stringent form. In the same way, the proportionality requirement in its most extreme form is met easily. The conclusion of validity under international law follows. If it did not, the consequence would be that the inherent right of national and collective self-defense, and its recognition as /a/ primary right in the United Nations Charter, would be destroyed.

The Mallison self-defense and collective self-defense position received support by Professors Fenwick, 137 MacChesney 138 and McDougal 139 in editorial comments written about six months after termination of the Quarantine. The Mallison position tends to be supported by other commentators even though the latter may offer some other ground for validity of the United States action.

The official position of the Department of State concerning legality of the Quarantine, offered to the press and set forth in detail in articles by Legal Adviser Chayes 140 and Deputy Legal Adviser Meeker, 141 pivots upon the Resolution of 23 October 1962 by the Council of the Organization of American States. Acting provisionally as an Organ of Consultation, the Council recommended individual

136 Mallison, supra, note 134 at 392.
and collective action by member states, including armed force, which these states deemed necessary to:

* * * ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent.142

The State Department law officers argue under Article 52(1) of the United Nations Charter,143 the Organization of American States, while still subordinate to the World Organization, may use force in cases other than those involving armed attacks when this use is to maintain peace and security in the Hemisphere. This action may be taken without prior authorization by the Security Council.

The action is stated to be consistent with Article 2(4) of the United Nations Charter144 as a measure adopted by a regional organization in conformity to the provisions of Chapter VIII. The purposes of the Organization of American States and its activities are consistent with the purposes and principles of the United Nations as required by Article 52(1).

Prior authorization by the Security Council is said by the State Department officials to be unnecessary under Article 53(1) because the Organ of Consultation recommended rather than ordered a use of force. Language of the Charter, an advisory opinion of the World Court,145 and records of the practice of the Security Council are

142 See 47 Department of State Bulletin, 723 (1962).

143 Article 52(1) provides: "Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

144 Article 2(4) provides: "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."


Article 53(1) provides: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies 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. * * *" (Measures against an "enemy" state as defined in paragraph 2 of the Article are excepted.)
offered to support the proposition that enforcement action is a response to an order to act.

The spokesmen also argue prior authorization is not required by Article 53(1) and subsequent authorization is sufficient if an authorization of any sort is necessary. A subsequent authorization, they contend, was given impliedly by the Security Council when it considered and did not forbid the proposed Quarantine before action was taken by the Organization of American States.

Deputy Legal Adviser Meeker urges, as part of his case for the United States, that extrahemispheric countries "such as the U.S.S.R. are not in a position to attack the organization's activities within the region" because the purposes and activities of the Organization are in conformity with the relevant provisions of the United Nations Charter. He may suggest in this context that the Organization of American States enjoys exclusive competence, subject of course to intervention by the Security Council or recommendations by the General Assembly, to recommend and guide applications of force by its members within the geographical area defined by Article 4 of the Inter-American Treaty of Reciprocal Assistance (the Rio Pact).

With respect to Cuba, the State Department case is strong. Cuba, however, was involved in the Quarantine principally as a potential, although receptive, launching pad for Soviet missiles: and the State Department arguments do not develop with clarity a theory to support applications of force against Soviet vessels upon the high seas.

Deputy Legal Adviser Meeker points to the anomaly which would exist if the United States could destroy the missiles in Cuba by an air strike or invasion but could not use less violent means upon the high seas to interfere with the introduction of missiles into Cuba. This anomaly would exist if the United States did have authority for an air strike or invasion based upon the Council Resolution of 23 October.

It is by no means certain, however, that an application of force of this magnitude could be supported under the Resolution without a more acute threat of attack upon the United States from the Cuban bases. The Resolution of 23 October should be construed in the light of changing circumstances and cannot reasonably be taken as carte blanche for any degree of violent action however unnecessary and imprudent such action might be. The legality of such action, fortunately, was never put to the test.

An argument is offered by Captain McDevitt, writing in the Navy

146 See Meeker, ibid., p. 518.
147 62 Stat. 1681 (1947); TIAS No. 1838.
J.A.G. Journal, for an application of force to Soviet vessels based upon a broad construction of the "local disputes" clause appearing in Article 52(2) of the United Nations Charter. Captain McDevitt contends it may be reasonable to construe a "local dispute" as one arising within the geographical area over which a regional agency exercises authority even though states not members of the Organization are involved. This would bring the activities of the Soviet Union in the region described in Article 4 of the Rio Pact within reach of the regional agency.

He also argues that the Quarantine may be considered a measure for "pacific" settlement of the dispute and not the "enforcement action" described in Article 53(1) of the Charter. Captain McDevitt does not suggest a possible extension of the activities of the regional agency under Article 52(2) beyond the geographical area described in Article 4 of the Rio Pact.

It may be urged, however, that power in a regional security organization to resolve a dispute by pacific means should include competence to deal with active elements of the dispute in any area in which the influence of its members can be applied. Permissive exercises of power (through recommendations and coordination) by the Organization of American States over nonmembers in areas beyond those described in Article 4 of the Rio Pact may perhaps be sustained on the theory that the local origin of the dispute confers this authority.

There is a suggestion in the writings of Legal Adviser Chayes and Deputy Legal Adviser Meeker that this may be the direction of development of the analysis of the State Department in cases of this type. Mr. Chayes, for example, refers to the role of regional security agencies as increasingly important due to the creeping paralysis of the Security Council brought on by the veto.

If, as a matter of constitutional development in world security organization, regional agencies will assume much the same function in regional disputes as the General Assembly and Secretary General have assumed in disputes of a global nature, it may be reasonable to

148 McDevitt, "The U.N. Charter and the Cuban Quarantine," 72 JAG J., 71 (1963). Captain McDevitt also offers an argument based upon collective self-defense. Article 52(2) provides: "The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council."

149 Captain McDevitt argues that under Security Council practice a measure is not enforcement action when armed force is not used—and emphasizes the presence of force without its use or direct application during the Quarantine.
view the reach of the regional organization in resolving local disputes by pacific processes as coextensive with that of the United Nations. The proposition is administratively sound. Whether the proposition will gain appreciable support is another matter, although sooner or later legal-constitutional developments tend to follow the path of administrative convenience.

Professor Christol and Commander Davis find in the experience of the Quarantine the emergence of a "lusty new rule" providing an "additional and unique option within the continuum of 'Force in Peace'," allowing an "option of restrained coercion" which will avoid the drastic procedures and consequences built around the concept of "'blockade' " and also "the strictures and uncertainties" of the pacific blockade. In addition to the self-defense formula, Christol and Davis offer an argument resting upon the affirmative duty of states to maintain international peace and security by acting collectively as a regional security organization.

While not divorced from a theory of collective self-defense, the Christol-Davis argument seems founded principally upon a duty to "police" violent international power exchanges. This duty may be institutionalized in Chapter I of the United Nations Charter. The inquiry has current importance because of the egregious failures of the Security Council as a peace enforcement institution.

4. Law and the Draft Proclamation: Permissible and Impermissible Coercion

Professor McDougal and Dr. Feliciano, in their comprehensive effort to give "aggression," "self-defense" and similar descriptions of coercive levels and exchanges, meaning for decision makers, rely in part upon the "just war" concept of the Spanish theologians. They relate conceptions of permissible and impermissible coercion to a defined general community goal denying value reallocations by intense coercion or violence. This relation is accomplished by the use of detailed operational indices keyed to the current structure of global and regional security organization.

Assuming the element of coercion in the transaction is unquestionable, which will ordinarily be the case when major armed strength is deployed, the permissible-impermissible "coercion" spectrum affords a logical framework within which shifting facts can be fixed, appraised and rationally related. This analytical structure


is adaptable at decision-making levels normally associated with the execution of policies. At the same time, the system can be utilized by high-level policy makers, although its importance at this level, as suggested by Mr. Acheson, is to ensure a rational relation of observable facts and to induce insights into factual relationships.

Working within the general framework of contraposed initiating coercion-self-defense contentions, McDougal and Feliciano describe areas in which facts may be found and evaluated to inform a decision maker. These areas include: (1) characteristics of the participants; (2) their objectives, including the range and importance of values sought ("consequentiality"), and the degree of value sharing anticipated ("inclusiveness or exclusiveness"); (3) "modalities"—which might range from the application of armed violence to less coercive techniques—such as those associated with economic warfare; (4) the effects secured—the effects produced in the value and institutional structure of the State upon which the questioned coercion has been exerted and the relation of the intensity of the coercive act to the intensity pattern of coercive exchanges between the states involved; (5) the degree to which community procedures for resolution of the conflict have been utilized or resisted; and (6) the power which can be mobilized to sustain a decision of impermissible coercion.

Whether a self-defense claim for coercion is honored should depend, according to McDougal and Feliciano, upon the necessity and proportionality of the defensive action. The element of necessity turns upon the relative power of the states in conflict, the nature of their objectives, the importance of the values conserved and the reasonableness of the expectation of necessity. Proportionality, likewise, will be based on method, objectives, values conserved and effects of the action.

McDougal and Feliciano summarize coercive actions which they regard as "permissible." These fall into three categories.

The most important because of the high intensity of coercion usually involved and concomitant general risk to nonparticipants, are the self-defensive coercion against a third state, based on the argument of continuing coercion by a principal opponent. Also less critical are assertions of temporary limited authority upon the high seas for defensive purposes. Such temporary limited authority might be asserted in nuclear tests, satellite recoveries, or a "Quarantine."

In a second category are low-level intensity, nonself-defense coercive exchanges endemic in international relations.

Police measures applied by or under the authority of the organized community of states are in a third category.

To these categories might be added a fourth, perhaps embraced by McDougal and Feliciano within their third category. Within this fourth category are enforcement actions of an interim and stabilizing nature taken by member states pending the decision of an appropriate international organization. Such enforcement would be in voluntary discharge of the enforcer's obligations of membership. Action of this type has been discussed in Chapter III, Situation 3.

This action may not be of a defensive nature. It bears an analogy to the interim action of an equity court familiar in Anglo-American law.

Included also might be various servicing functions involving coercion, such as coercive gathering of evidence. This evidence might be for consideration by an international organization dealing with security matters\(^{154}\) or for the use of a state decision maker faced with a possible application of intense coercion.

a. **ELEMENTS TO BE CONSIDERED IN REVIEWING DRAFT PROCLAMATION**

Unlike an analysis of the Cuban Quarantine of 1962, which can be undertaken with the advantage of hindsight, an analysis of the Draft Proclamation (set forth in *Situation 6*) relating to naval interdiction of biological munitions and facilities for their delivery must be based upon certain assumptions concerning the nature of the decisions necessary as the Proclamation is executed. How "reasonable," for example, will be applications of naval force in the "zone of surveillance"?

A series of decisions will be involved—and any plan, no matter how carefully considered, can be executed illegally by officers who misunderstand or ignore it. In the Quarantine, the "persuasive" impact of United States policy was enhanced by moderate applications of power coupled with efforts to obtain agreement with the Soviet Union.

To the extent functions of "planning" and "operation" were not

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\(^{154}\) These actions, exemplified by the Anderson-Heyser U-2 sorties preceding the Quarantine, should be distinguished from the British effort to obtain evidence to support the Corfu Channel claim before the World Court, a "non-emergency" action not considered as "legal" under the circumstances by the Court. *Corfu Channel Case*, /1949/ I.C.J. Rep. 355 (1962).
performed by the President and his deputies, who maintained close control over the quarantining naval units, the legal burden rested principally upon the naval operator. Judicious use of law after the basic plan was formulated had much to do with the satisfactory result.

Assuming the Proclamation will be executed obediently and diligently, what questions should be considered with a view to its revision? Stated in functional terms, the areas for appraisal in which law plays a part are these:

1. Is the plan persuasive? The problem of persuasion will begin with the President and will continue with the executive officers who will execute the Proclamation, with the United States electorate, our allies, officials of international organizations, and officials of Scythia and Nueva. The “legitimacy” of an act is a product of persuasion—since the collection of values and institutions we describe as law are in a process constantly of reconstruction.

2. Does the plan provide adequate guidance for executive officers who will carry it out? The President is responsible nationally and internationally for establishing adequate guidelines and controls over administrative officials. Closely allied is the provision of adequate legal safeguards against personal liability of these administrative officials in the performance of their duties. Suppose a naval officer who executes the Proclamation falls into the hands of Scythian authorities. Does the Proclamation provide a basis for legal arguments in his defense?

3. Does the plan permit sufficient latitude of action for coordination of the United States economic thrust using naval force with reciprocating action by Scythia or Nueva? Interference with the shipment of biological munitions and means for their delivery is economic warfare employed as a primary policy device. There is no intention to overwhelm Scythia or Nueva by the use of armed force.

This being so, it is in the interest of the United States to permit Scythian and Nuevan officials to determine United States intentions with clarity and to provide avenues of withdrawal to these officials when withdrawals are consistent with United States policy. Coordination, likewise, is closely related to persuasion, mentioned as a first area of appraisal of the plan. These areas will now be considered in inverse order—roughly in the order of their importance.

**Coordination in the Proclamation**

The most essential requirement for coordination in economic action is action of a familiar and accustomed pattern. This enhances the
likelihood of a rational response by the opponent along predictable lines. Action to develop coordination is consistent with the concept of an “economic sortie.” An economic sortie is usually most effective when the target anticipates the point of attack but for geographical or other reasons cannot offer an effective defense.

The general plan of action in the Proclamation, just as the plan of action in the Quarantine of 1962, follows the accustomed outline of Pacific Blockade or “Pacific Contraband.” Preferences seem expressed for applications of naval force limited in diversity, limited geographically, and limited in intensity. Scythia probably will not imply from the Proclamation tacit directives for general attacks upon Scythian vessels and supply lines.

While Scythia cannot assume the President will be able to maintain effective control over his executive officers under all circumstances, this control probably can be maintained as in past transactions of this type. These judgments by Scythian officials may lead to a moderate rather than intense Scythian response.

The Proclamation also suggests the coordinating powers of the United Nations are being invoked. Information will be collected to enable the United Nations to perform this task by the use of commissions of inquiry or by use of other available agencies. The International Red Cross was proposed as a fact-finder to determine removal of the missiles from Cuba. This organization might prove acceptable to the United States, Nueva and Scythia, to investigate the storage, experimentation with and use of biological weapons.

It may be assumed the United States will furnish information concerning its activities and findings to the World Health Organization and the Pan American Health Organization as well as to the Organization of American States to bring the influence of these organizations to bear in shaping Scythian and Nuevan responses.

**Guidance in the Proclamation**

The Proclamation in *Situation 6* shares with the Proclamation issued in the Quarantine of 1962 minimum standards to guide executive officers. An executive officer must expect to engage in economic warfare under a plan assembled somewhat loosely by his superiors.

The Proclamation in *Situation 6*, repeating the wording of the Proclamation of 1962, directs the general method by which vessels of any nationality may be intercepted and searched. It limits the use of force to the extent necessary to secure compliance with the directions of the President and the regulations and directions of the Secretary of Defense.
Unlike the Proclamation of 1962, the proposed Proclamation provides for the diversion of vessels for visit and search to points designated by the Secretary of Defense. This will relieve the intercepting officers at sea from the burden and hazard of searching for easily concealed and dangerous material. It will also permit an investigation in port using impartial witnesses. The Proclamation makes clear that the intercepted vessels are not to be seized as prize but are to be released when biological munitions and equipment found aboard are surrendered to the United States.

While the proposed Proclamation relieves officers at sea from the necessity of action likely to stimulate conflict, it does not and cannot contain directions for all situations arising. Allowance must be made for: (1) lack of foresight by the policy maker; (2) misinterpretation of instructions by the executive officer; and (3) the development of emergencies permitting no time for instructions by superiors.

There is no way in which an executive officer can be excluded entirely as an effective decision maker. Facts are developed by an executive officer determining the direction of a later course of decisions by formal (legal) policy makers.

It is therefore desirable to develop, as an incident to any policy such as that presented in the draft Proclamation, grounds for projected legal defenses of the executive officers involved. The projected defenses, when known to the executive officer, serve indirectly as a form of guidance by providing principles of action to fill the interstices of the Proclamation and instructions issued thereunder.

The draft Proclamation provides desirable machinery by which immediate judgments concerning the action of an executive officer can be rendered. The institutional controls under which he functions normally can provide these judgments in part and will exist no matter what the Proclamation provides.

His naval superiors, for example, will appraise his action. His awareness of the predelictions of these officers serves as an effective guide.

The Proclamation also contemplates diversion of vessels and custody of prohibited materials by the United States under circumstances encouraging negotiation and the settlement of individual cases by agreement. Perhaps naval claims boards can be established to consider claims for economic loss occasioned by interceptions or diversions and provide opportunities for formal decisions concerning the conduct of executive officers in which persons other than naval decision makers can participate.

These formal contemporaneous decisions are desirable to protect
the executive officer because the facts reviewed will be substantially those available to him. The interception of *Trent* by Captain Wilkes, discussed earlier in this book,\footnote{155} illustrates disadvantages arising from failure to obtain immediate formal settlement of issues produced by naval interceptions.

To minimize the risk of exposure of an executive officer to delayed prosecutions, it is desirable to develop in a "pacific blockade" or "contraband" proclamation a basis for an argument for immunity against prosecution for acts done pursuant to it. The act of state doctrine has been argued unsuccessfully in cases of war crimes and crimes against humanity.

The only basis of immunity which appears available for development is that of an international official. The immunity of an international official is based upon agreement and not custom.\footnote{156}

Hence it is desirable in the Proclamation to relate the proposed action of the United States to action by the United Nations Organization. The Draft Proclamation does this in two ways. The Proclamation describes the action directed as of an *interim* nature pending action by the Security Council or other organs of the United Nations to preserve peace. Also emphasized is the intelligence function of the naval action—the collection of information for preliminary action by organs of the United Nations.

These interrelationships of United States policy with policies of the United Nations and the Organization of American States are discussed subsequently as they bear upon the element of *persuasion* in the Proclamation. They can, however, be used also as the basis for an argument for immunity of United States officers either under Section 22 of the Convention on the Privileges and Immunities of the United Nations\footnote{157} or under the functional immunity provisions of Article 105(2)\footnote{158} of the United Nations Charter.

The contention might be that the officer was a temporary official of the Organization performing its functions. The same argument can be offered if the officer acts pursuant to the instructions of a

\footnote{155} Chapter I, Fn. 29, *et seq.*


\footnote{157} See *Yearbook of the United Nations*, 100–103 (1946–47). Article 22 applies to "Experts * * * performing missions for the United Nations * * *." This will be the more difficult of the two provisions upon which to found an argument of immunity.

\footnote{158} Article 105(2) reads: "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."
regional organization with peace enforcement functions subject to the authority of the United Nations.

Several problems are evident: (1) Can an effective argument be made that an officer acting as an "interim" functionary without express authorization by the United Nations is an expert or official of the Organization? (2) Will acts of a possible criminal nature be held ultra vires and beyond the proper functions of a representative of the Organization? (3) To what extent will immunity be recognized by an international tribunal or by the courts of a state not a party to the convention or a nonmember of the United Nations? (4) Assuming functional immunity may be argued effectively under Article 105(2) how long will this immunity continue? The immunity based upon the Convention continues indefinitely. (5) Will the Secretary General waive immunity under the Convention? He apparently cannot waive immunity under the functional provisions of Article 105(2). 159

Difficulties in developing immunity arguments to protect officers causing injuries to persons or property while carrying out their orders pursuant to the Proclamation are obvious. The Proclamation, however, in view of experience with delayed criminal prosecutions since World War II, should lay the foundations for immunity arguments which might be offered.

*Persuasion in the Proclamation*

The most important feature of the Proclamation to which legal considerations are relevant is its persuasive impact. The major difficulty is to distinguish "justification," which tends to be retrospective and subjective, from the prospective and objective persuasive elements rendering legal institutions effective policy implements and policy guides.

Differing concepts of law and of the requirements of a legal order, as in all East-West conflicts, complicated the problem of persuasion in the Quarantine of 1962. Because the problem of persuasion was complicated, with many different audiences requiring different approaches in argument, Western spokesmen tended to fall back upon arguments urging the "necessity" and thus "justification" for the arms interdiction.

b. SELF-DEFENSE AND COLLECTIVE SELF-DEFENSE

The legal basis of the Quarantine of 1962 preferred by most commentators upon the subject appears to have been the necessity of self-defense or collective self-defense. As an abstract legal proposition, it has been generally accepted that a state may resist by employing force proportionate to an imminent threat to its territorial integrity or political independence. The decision to employ force must be reasonable under the circumstances attending the threat. Provisional or interim decisions to use force for defensive purposes seem admissible when the necessity is clear to the state officials responsible for acting and the decision made and executed conforms to the United Nations Charter.

The Draft Proclamation in Situation 6 suffers from the disadvantage that no Resolution of the Organization of American States can be used to support it. Quite probably, if the policy expressed in the Draft Proclamation is accepted by the President, efforts will continue to secure the support of that Organization.

But since the naval action proposed is intended in part to produce intelligence which might induce the Organization to act, it will be imprudent to delay action pending a resolution of support by the Organization as was done in the Quarantine of 1962.

This difficulty will limit the use of arguments such as those advanced by officials of the State Department to support the Quarantine. Required instead will be arguments to support initially unilateral action by the United States.

The Executive Committee advising the President concerning the Quarantine of 1962 was clearly persuaded to reach its judgment and render its advice by factors in addition to law. This should not obscure, however, the very significant function of law as an institution for persuasion. To the extent law does become relevant in decisions of this nature, in which values of a civilization are at stake, the persuasive function of law is its dominant function. This function dominates from the factual analysis and discussions preceding the authoritative or basic decision through the network of decisions involved in its execution.

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160 See Fns. 137-141, supra.
162 See Fns. 140, 141 supra.
At the basic policy-making level, for example, when the President makes his decision concerning the Draft Proclamation, the persuasive function of law is confined in the main to legal analytical method to be applied in selecting the appropriate means to attain the desired end. This end is maximum feasible preservation of the physical and other values of people with whom the decision maker identifies.

Acceptance of this end is coerced—both by formal allocations of responsibility in domestic constitutional provisions and by practical allocations of power within the political system.

The identification also is coerced, although an identification pattern is difficult to maintain due to diverse pressures upon the decision maker. The effective end and the formal identification are “nonnegotiable.”

In a selection of means the decision maker may be persuaded. It is convenient at this level of policy making to persuade in a contraposed initiating coercion-self-defense context such as that set forth by Professor McDougal and Dr. Feliciano.163

The difficulty arises as the policy is carried into execution. In this context, the arena in which legal processes of persuasion must be employed is broadened. Thirty years ago the reactions of one’s allies, acquaintances and enemies could be disregarded in action of the type carried out in the Quarantine of 1962 and contemplated in the Draft Proclamation. Today, favorable responses from the officials of these states may determine the success or failure of limited coercion.

Unhappily a paradox exists. The self-defense (or collective self-defense) formulae, meaningful in a formulation of the basic policy and in obtaining domestic support for it, are less persuasive to officials who consider themselves removed from the value dislocations in the conflict or who consider their values so implicated that a defense by the United States carries a direct physical threat to them. The problem is one of perspective—sometimes of abstraction or detachment—sometimes of involvement—but in each case an egocentric reaction.

It was difficult, for example, for some of the leaders of new states in the third or fourth rank of powers at the time of the Quarantine to accept the unwillingness of the United States to rely solely upon discussions before the United Nations to solve its problem of defense. If the United States, as its propaganda suggested, could batter Cuba into a necklace of smoking and toxic lagoons lying

generally between the Florida Straits and the Windward Channel, why provoke the Soviet Union by naval interference with its shipping?

The value placed by the United States upon human lives and the responsibility for avoiding nuclear war which rested upon its officials could not be appreciated fully by officials in other states in which the well-being of citizens beyond the official class was not a major value. These officials might view an enemy simply as an object for destruction. Their unverbalized concepts of "self-defense" might be narrow.

The unverbalized concept of self-defense presents a special problem—varying somewhat from culture to culture—depending upon the concept of the "self." The unverbalized concept of self-defense of the decision maker to be persuaded by legal "defense" arguments might be appraised and his response harmonized with the goal sought by a policy advocate by the play of relevant facts within his attention frame.

Where the unverbalized concepts of self-defense (the unstated ethical limits imposed upon action to preserve life) are mutual, defensive arguments are most effective. When Secretary Webster presented his well-known, and embarrassingly narrow, argument concerning permissible self-defense to Lord Ashburton in the Caroline, he simply refurbished an argument with which he had probably dealt in homicide cases as a trial lawyer a dozen times in the courts of New Hampshire and Massachusetts. He could be confident the British would accept his formula because the idea was derived from British common law. The differences that arose were in applying the formula to the facts.

It is easy for the official unwilling to support a state offering a self-defense argument to articulate reasons for rejecting it on factual grounds. All viable states seek values. In this sense they act offensively. Any viable state will maintain a positive or offensive front against all out-groups while seeking (defensively) to minimize internally the conflict this offensive action against out-groups produces.

This does not mean that a state assumes the offensive with all policies or that all offensive policies are coercive. No state com-

164 2 Moore, Digest, 217, at 412 (1906): "Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the 'necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation'."]
mands the values permitting coercive offensive action along its entire policy spectrum at any given time.

An active expenditure of values, the expenditure increasing with emphasis upon coercion, must be supported by policies tending to conserve values. Policies directed *principally*, although not necessarily *exclusively*, to the conservation of values, tend to be described as *defensive*. Policies directed *principally*, although not necessarily *exclusively*, to the acquisition or destruction of values possessed by another state tend to be described as *offensive*.

When this descriptive framework is used, no state, even the most lawless in its international relations, can be said to act wholly offensively or not in self-defense. To the unreceptive decision maker, the self-defense argument is a "rope of sand"—since this decision maker can always point to offensive features in actions primarily defensive.\(^{165}\)

\(^{165}\) A matter also to be considered, but one not disturbingly pressing at the present time, is the cyclic linkage of defense with virtue and offense with vice which can be observed in the history of Western Europe and America. The specialist in rectitude or other molders of opinion have at times put forward coercive aspects of offense as a virtue when either the value position of the actor is threatened or a goal to enhance that position attained effectively by coercion is offered or defined.

The refurbishing of offensive action to develop a patina of respectability affects profoundly the thinking of the masses these leaders influence. To cite the experience of the Roman Church in Western Europe—the virtues of defense or preservation of the *status quo* were preached as the Church struggled to consolidate its hold on values inherited from the ancient Roman State. The man of the medieval world was exhorted to bear his many afflictions, physical and political, with grace and fortitude in the hope of a more congenial spiritual future.

The rebel, the heretic, the challenger of convention—the "man on the offensive," found the doors of medieval society, dominated by the Church, closed to him.

Faced by internal political division and under the pressure of secular rulers, the Church later sponsored or encouraged a series of crusades in which offensive policies were dominant. The medieval misfits, the "men on the offensive," now often valued crusaders, found a temporary abode in the religious military establishment. This same offensive power was later directed to the internal ordering of the Church as the Crusades drew to a close with once valued crusading orders, such as the Templars, coercively liquidated.

There may now be in the making a reorientation of American opinion concerning offensive action. The general acceptance and support of the Quarantine of 1962 may be a manifestation of this changing viewpoint.

For over fifty years the people of the United States have enjoyed a preferred value position. Not only has this preferred value position inculcated in the electorate an abounding regard for the *status quo*, but mass communications, driving home to Americans their not entirely explicable position upon an island
This difficulty in the use of self-defense arguments in persuasion to implement the execution of a policy such as that proposed in the Draft Proclamation, suggests the need for coupling self-defense arguments (which are most persuasive when directed to the basic decision maker and the persons he represents) with arguments which appeal to “detached” or “involved” officials in other states.

Self-Defense and Collective Self-Defense Applied to the Draft Proclamation

Analyzing the Draft Proclamation and the facts stated in Situation 6 in a “self-defense” perspective, assuming action by the United States will be unilateral, and using the specific criteria related to “necessity” and “proportionality” described by McDougal and Feliciano,166 a stronger legal case can be made for the action contemplated in the Draft Proclamation than for the action conducted in the Quarantine of 1962.

Little data is presented in Situation 6 concerning the power of Scythia. Assuming Scythian power is comparable to that of the Soviet Union, and it has a thermonuclear as well as a biological warfare capability, the necessity of United States action is urgent. The proportion of its coercive response by naval force to the initiating coercion by Scythia is reasonable. While the area of zone of surveillance embraces Nueva, the naval action contemplated is against Scythian provision of biological munitions and the means for their delivery.

The action by the United States tends to conserve its values. Specifically and immediately the major value sought is physical

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of plenty amidst want, have stimulated guilt complexes of a type conducive to defensive psychology.

There are signs of a growing restlessness. An interest in offensive action increases as the value position of the United States in rectitude, respect, affection, power and even wealth is eroded by the effective implementation of demands in other areas of the world.

As specialists in violence, military and police, gain ascendancy, the importance of offensive military action, as contrasted with defensive-holding strategy, is likely to be promoted. It is a fair assumption that if changes of this sort occur both at the “grass roots” and also in influential political echelons, the changes will be reflected also in nonmilitary judgments such as in voter or judicial decisions concerning the “legality of offensive action.”

A trend of this type occurred in France prior to World War I when the offensive psychology, advocated in the military environment by Grandmaison and Foch, permeated beyond the military confines into French domestic politics and foreign policy.

well-being of its citizens. Due to the difficulty of containing the effects of biological weapons, demonstrated by Scythian experiments at Farrago and the apparent Nuevan attack upon Antioka, the United States action has an *inclusive* objective. The United States acts to conserve the values of peoples in the Caribbean area and perhaps an indefinite area beyond that designated for the operations of the United States naval forces.

Values of Scythia are unaffected in any appreciable sense by the United States action. The Scythian effort to extend its values, particularly power, may be frustrated by the United States action contemplated. But existing Scythian values are not diminished.

The action may work to the advantage of inhabitants of Nueva by limiting the introduction into that territory of biological weapons.

Although a biological attack by Nuevan units might not cripple the United States, in the sense that a thermonuclear attack could destroy vital population and communication centers, the precise impact of biological weapons cannot be estimated in advance. The physical well-being of its citizens is a major value sought through in the organization of any state. The obligation of a state to protect this value from erosion by disease, and the network of mutual obligations among states to limit the spread of communicable diseases, have been recognized since the 17th century. The obligation has been expressed in modern Sanitary Conventions since 1851.

The action contemplated by the United States is naval action with an economic objective—interrupting a flow of offensive material to and from Nueva. With a resort to pressure in diplomacy by posing a threat of biological attack, Scythia has injected an element of coercion which cannot be met in any effective sense without countercoercion.

Sea police or quarantining forces, typically coast guard or customs units, are used routinely in enforcing sanitary regulations. In this instance the breach of sanitary regulations threatened is massive and concerted. Using naval force on the high seas to meet this threat is the minimum exercise of a long settled and traditional right and obligation to repel disease.

The action, furthermore, is similar to pacific blockade or "pacific contraband." There is nothing deceptive in the interception of biological munitions and means for their delivery which might tend to provoke a major Scythian counterstroke. The pattern of United States action is settled and familiar—as was the naval interception in the Cuban Quarantine of 1962.

Tight control can be maintained over the naval units. The ship
and aircraft commanders will be familiar with international legal doctrine pertaining to their duties.

Alternatives to the action contemplated are direct diplomatic negotiations or negotiations through the United Nations. Attacks also may be made upon the biological munitions depots in Nueva or the trawlers by which the munitions are delivered or both. These attacks might be launched by Antiokan forces with United States logistical support or by units of United States Strike Command.

If the latter forces are employed, an assault might be made by airborne units upon the depots. This assault would have to be coupled with neutralization of Nuevan armed forces in the area. The trawlers can be destroyed by United States naval forces if necessary.

The difficulty of the Organization of American States in reaching a decision concerning Nuevan biological warfare suggests the limitations upon diplomatic negotiation under these circumstances. Probes other than by reconnaissance aircraft are needed to furnish information upon which negotiations can proceed.

There is no indication that economic pressures, such as trade restrictions, will have appreciable effect upon Salvaje.

The use of direct armed violence against the trawlers or against the munitions depots might bring a similarly violent response from Scythia. Such attacks by the United States are undesirable unless an attack upon the United States is imminent.

Interference with both the buildup of supplies of biological munitions in Nueva and the deployment of delivery means is the most effective means to lay the groundwork for settlement of the problem through negotiation. It is also the most moderate use of force to attain this end. Such action by the United States is proportionate to the initiating coercion.

The reasonableness of the expectation of necessity by United States decision makers will lend force to the persuasive element of law in the situation. Has the basic decision maker (the President in this case) considered and interrelated the facts bearing upon the confrontation? Will other decision makers conclude he has given the proper emphasis to the proper facts? Or will they conclude he had ignored or has not had access to facts which should have been considered? What deference has been given to legal institutions such as treaties to which the United States is a party and the obligations of international organizations of which the United States is a member? An initial decision concerning the necessity of the action by officials of a threatened state may be made; but this decision is subject to reappraisal in a general community perspective by other decision makers.
The National Security Council has reviewed the Scythian threat against a background of experimentation with and active use of biological weapons by Nueva and Scythia. Scythia may be subject to no international legal obligation to refrain from the use of biological weapons in actual warfare or the deployment of delivery means for diplomatic pressure. However, the use of these weapons, which Scythia may contemplate, is in direct conflict with the demand of the general community to limit the spread of disease. Certainly, Scythia and Nueva have violated their obligations under Article 2(4) of the United Nations Charter by a threat of force against the territorial integrity and political independence of the United States. Sufficient facts provide the basis for an estimate that biological weapons will be used by Scythia and Nueva against the United States if an opportunity is afforded.

**Article 51 of the United Nations Charter**

To what extent does Article 51 of the United Nations Charter (1) limit the defensive action which may be taken by a decision maker when the necessity is reasonably found to exist, or (2) qualify the degree of necessity which the decision maker must find before action is taken? Two approaches can be made in construing Article 51.

The intention of the parties to the Charter at the time of ratification may be sought. Guides in the search for this intention may include records of discussions as the Charter was prepared at Dumbarton Oaks and San Francisco and the wording of Article 51. Most lawyers and political scientists favor this traditional approach in construing Article 51—although these commentators differ in the context which they will consider in determining intent.

Alternatively, in a manner alien to the normal legal method in construing instruments, Article 51 can be construed to implement the work of the kind of institution the United Nations has become in the General Community. This current role is not one foreseen by the original members. A functional construction places little emphasis upon the intention of the parties in 1945 and relies instead upon the character of the current operations of the Organization.

Committee compromises and legislative statesmanship combined to produce in Article 51 general statements of the initiating and reciprocating coercion upon which the Article focused. The basic limitation on the use of force, keyed to objectives or ends denied when sought by forceful means, was established in Article 2(4) of the Charter.

Article 51 was introduced into the Dumbarton Oaks draft at
San Francisco to accommodate the demands of states without permanent membership on the Security Council. These apprehended embarrassment of their possible defensive measures by the veto. They wished to insure their ability to rely upon regional security arrangements such as those envisioned in the Act of Chapultepec and the Pact of the Arab League.

In 1945 the form which these regional security arrangements or nonregional alliances might take was speculative. Also no one could know whether the Security Council would or would not measure up to its peace preservation responsibilities. Consequently, ambiguity in Article 51 was then and is now a positive virtue. It was a type of shelter which would enable members to survive the wreckage of the Organization if this in fact occurred.

Most of the difficulty arising under Article 51 as applied to the United States action in the Cuban Quarantine of 1962 and as it might be applied to the action contemplated in the Draft Proclamation in Situation 6 derives from assumptions: (1) that all measures of self-defense or collective self-defense are keyed to “armed attacks” and (2) that “armed attack” has a limited or special meaning.

Professor Quincy Wright and several other commentators have construed the words “armed attack” narrowly to exclude the prior planning of an attack and the “threat” of force. Until the armed attack is “actual,” presumably when missiles are launched and armed forces are deployed and in motion, there can be no military response in self-defense or collective self-defense. Professor Wright seems to conclude that defensive measures not involving military action are permissible against threats of force less than armed attack.

The usual legal approach to the interpretation of any treaty, charter or statute, however, is that any word is “ambiguous.” The interpreter can look to an extent to the extrinsic circumstances to find its meaning.

As stated by McDougal and Feliciano:

* * *\footnote{\textit{International Law and the Use of Force By States}, 272-275 (1963) where the various arguments are spelled out in detail. Professor Brownlie concludes at page 275, somewhat equivocally, that "**Article 51 is not subject to the customary law of self-defense/ and that, even if it were, this customary right must be regarded in the light of state practice up to 1945."}either Article 51 nor any other word formula can have, apart from context, any single ‘clear and unambiguous’ or ‘popular, natural and ordinary meaning’ that predetermines decisions in infinitely varying particular controversies. All the relevant variables of the particular context should be considered.

Nothing will be found in the wording of Article 51 to indicate with clarity the meaning of “armed attack” or the corollary inherent right of individual or collective self-defense. Meanings assigned to these categories in a particular context must be derived from other provisions of the Charter, from events contemporaneous with the drafting and ratification of the Charter, and from supervening experience in interstate and international organizational relationships to the time of interpretation.

It has been argued that Article 2(4) of the Charter is an absolute prohibition on the use of force for any purpose, that any use of force was to be authorized by the Organization, and that the right of individual or collective self-defense is retained subject only to the permissive ambit of action permitted in Article 51. By this view, self-defense is now the exception, and its scope depends upon the interpretation of Article 51.\footnote{\textit{International Law and the Use of Force By States}, 272-275 (1963) where the various arguments are spelled out in detail. Professor Brownlie concludes at page 275, somewhat equivocally, that "**Article 51 is not subject to the customary law /of self-defense/ and that, even if it were, this customary right must be regarded in the light of state practice up to 1945."}

This position is derived from a misinterpretation of Article 2(4). This Article refers to initiating coercion-threats against the territorial integrity or political independence of a state or in a manner inconsistent with the Purposes of the United Nations or action by force to attain these prohibited ends.

A basic prerequisite to continuation of the Organization, as of any political group, is security of its members. This is expressed in Article 1(1) of the Charter. With a diminished right of individual or collective self-defense, the security of members of the Organization would be jeopardized.

The point is clarified when the obligations of members \textit{versus} nonmembers of the Organization are considered. Article 2(4) appears to extend to a threat or use of force against a nonmember. Article 51, on the other hand, does not apply to a nonmember; and it is difficult to construct a theory upon which parties to the Charter could limit the inherent right of self-defense of a nonmember.

In Article 35(2) there is an implication that obligations of pacific
settlement are not binding upon nonmembers unless these are accepted in advance for the purpose of a particular dispute brought before the Security Council. Could the draftsmen of the Charter or the ratifying states have intended to discriminate against a member by putting it to disadvantage in its security relations with a nonmember?

Consider the current position of the Soviet Union vis-à-vis Communist China or West Germany. It seems generally conceded that by the customary law under some circumstances there is an anticipatory right of self-defense—the right of a “preemptive strike.” A number of commentators have argued stoutly that no such anticipatory right exists under Article 51.173 If these commentators are correct can Article 51 be taken as the exclusive source of the “inherent” right of self-defense of a member? An affirmative answer would seem to derogate from a basic purpose of the Organization.

The rights of self-defense and collective self-defense of members and nonmembers must be the same for the rational administration of any system of peace enforcement. Members may agree to refrain from initiating coercion, as they have done in Article 2(4) while no such obligation is sought to be imposed by the Charter upon nonmembers.

Professor Bowett,174 McDougal and Feliciano,175 and others176 consider a customary right of self-defense to exist apart from Article 51. Professor Stone appears to share this view, although he doubts the existence of a collective self-defense doctrine as part of the customary rule.177

Indeed, differences as to the precise limits of the customary doctrine at any particular time complicate all interpretations of Article 51.178 Differences also exist as to the degree, if any, the provisions of Article 51 qualify the customary rules.

173 Ibid., 275–278.
178 Professor Brownlie, for example, takes the position that if an international legal custom of self-defense operates in conjunction with Article 51, this custom must be that which existed in 1945 rather than that existing in 1920 or earlier. Assuming clear distinctions can be made between elements of the custom at these various dates, it is somewhat curious to consider that the operation of
The records of preparatory work on the Charter concerning both Article 51 and Article 2(4) indicate an intention to retain the customary doctrine with no enhancement of the degree of necessity by the inclusion of Article 51. Furthermore, at the time of both the Dumbarton Oaks and San Francisco discussions an "armed attack" was generally understood as a process by which the initiative was seized by violent physical power applied by air, land or sea forces. The survival of the people attacked depended upon their ability to seize the initiative by an armed counterattack.

World War II demonstrated repeatedly at the Maginot Line, Bataan, Warsaw and Stalingrad that no defending force can hold a point indefinitely under the fire of modern weapons.

The "armed counterattack" was the key link in the problem of escalation—the major concern of the Security Council in preserving peace.

No Charter authority was necessary to authorize establishment of minefields or other obstacles to vessels, vehicles or personnel.

The likelihood is that the individual and collective measures mentioned in Article 51 were armed attacks which could be mounted only to counter an "armed attack." The customary principles of individual and collective self-defense continued to operate as to defensive measures, military or not, whether an armed attack was made or not.

There remained to the member states a spectrum of coercive acts to be applied for defense, whether military means were employed or not. There is no basis for an assumption that all defensive measures are keyed in Article 51 to "armed attacks"; that a military defensive response is by reason of its military aspect a defensive measure keyed to armed attack; or that an armed attack "occurs" only when missiles are launched or forces deployed and set in motion against an enemy.

In reconciling Article 51 with action taken in the Quarantine of 1962 and the action proposed in the Draft Proclamation, it is un-
necessary to rely upon a doctrine of anticipatory self-defense, although this element of the self-defense doctrine would appear to be preserved by Article 51 when an armed attack is recognized as a process (an interacting chain of events) rather than a single event. Such a construction seems mandatory in an era of missile, nuclear and biological warfare.

The naval action contemplated in the Draft Proclamation is not an armed counterattack. It is an application of power by military means to limit a threat of force and permit the working of persuasive processes. The fact that an application of military power is involved, far from infringing some unwritten prohibition in Article 51, insures instead close administrative control of the naval units and a consciously proportionate response. Neither the doctrine of necessity as relevant to the Draft Proclamation nor the naval means for executing the plan appear to be modified by Article 51.

The amount of conflict which has arisen concerning Articles 2(4) and 51 and their bearing upon self-defense and collective self-defense, suggests the weight of the burden resting upon lawyers who seek to develop meanings from words using techniques applied in the treatment of domestic commercial instruments, statutes and constitutions.

In the current and continuing state of flux in the power, efficiency and influence of global and regional security institutions, one cannot assume that canons or principles of construction (or even the premises underlying construction) can be applied rationally under conditions approaching constitutional chaos in the international arena.

It may be, for example, that the same techniques for construction should not be used for all articles of the United Nations Charter. Those dealing with trusteeships and economic and social problems might be treated differently from those dealing with peace maintenance.

This is not in keeping with the well-settled approach that construction of a statute, treaty or charter should seek intent and that the construction should be unitary—that is, the articles should be construed to stand together, in relation to each other, and the same principles of construction should be applied potentially to any article.

The argument for casting aside traditional techniques in dealing with the peace maintenance articles of the Charter is believed to rest upon two conditions.

First, is the shift in the peace-protecting functions of the United Nations from “policing” and “enforcement” to “rheostatic activity.”
The dominant peace preservation function, as understood in 1945, has been implemented by the subsidiary function of "intensity reduction" and not principally by the subsidiary functions of investigation, adjudication and enforcement. The latter three functions are by no means unimportant, particularly in uncommitted areas where efforts are made to avoid conflict among the major powers, as in the Congo. But even in these cases it seems quite clear that enforcement action by the global organization in no way approaches the potential efficiency of enforcement by a regional security organization in which a single powerful state may assume leadership.

A second condition is development of a skein of practice in almost a half century of experience with international security organizations which furnishes a basis for an accurate judgment of the degree of intensity in coercive exchanges which these international "rheostats" can accommodate. The basic problem is one of escalation of violence.

An element of myth inheres in discussions of escalation of violence by apprehensive commentators upon the perils of nuclear armament. Among major nuclear powers with modern military communications and adequate control over their military striking forces, the chance of an escalation of violence beyond a stage desired by the opposing decision makers is approximately zero. A major armed strike by one of these nuclear powers against the other, involving the delivery of major conventional or nuclear demolitions, will be met by an equally devastating response.

But the major problem involving escalation is presented among powers of the second or third range—for example, between Red China and India; Pakistan and India; the Arab States and Israel; Algeria and Morocco; and Indonesia and Malaysia. It is among these states that the significant peace enforcement problems of the United Nations and regional security organizations presently arise and will continue to arise in the foreseeable future.

A workable rough rule of thumb for permissible coercion under the United Nations Charter involves two features:

1. The first is an estimate of the concomitant ability of the world organization and the supporting regional security organizations to diffract the physical features of the coercive exchange and project the conflict on a verbal level. An accurate judgment can be rendered on this point by a decision maker with even modest intelligence resources.

2. The second is cooperation with the United Nations or regional security organizations in moderating the intensity of coercive ex-
changes and in altering the nature of the exchanges to develop persuasive features. Coercion is presumptively permissible when the first feature is satisfied and impermissible when not. The action following the decision to coerce, the second feature, is critical in supporting or rebutting the presumption raised.

Articles 2(4) and 51 when construed in the light of the functional approach suggested, set maximum and minimum limits upon increases and decreases in permissible coercion. Implicit in the formula is the proposition that reduction in the efficiency of the global and relevant regional security organizations as "coercive rheostats" reduces the ambit of permissible coercion. Increases in the efficiency of these organizations increase the permissive area for coercion.

Lewis Carroll would have been pleased with the idea of a municipal police system in which the gravity of crimes depended upon the efficiency of the police. This would throw personal liberties in any constitutional system into limbo—and confuse the police as well. If the police were weak, a parking ticket would be a heinous offense, although nothing much would be done about it—with a Gestapo, a murderer might be reprimanded.

With contemporary international security systems, however, we no longer deal principally with police or with crimes until we reach the "particularization" of law to the lower echelon decision maker. Instead, at the higher operating levels we deal principally with rheostats moderating coercion. An approach such as the one suggested, which would clearly create chaos in a well articulated legal order, may create order under conditions approaching chaos.

The formula also embraces a tacit double standard. Given the same degree of efficiency of the global and relevant regional organizations major nuclear powers will enjoy a greater range of permissive coercive practices than powers lacking the internal controls to prevent an escalation of violence. This treatment, however, is no more arbitrary than that current in some world circles. Violent seizures by ex-colonies of the territories of colonial powers are tolerated. Reprisals by the "losing" state are characterized as aggressions.

By the formula suggested a maximum limitation upon coercion is set by Article 2(4) of the United Nations Charter. Despite a decrease in the efficiency of global and regional organizations, or the operation of the double standard, force cannot be threatened or used against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the United Nations. Functionally, coercive exchanges meeting the test of the first feature of the formula would appear to be "peaceful"
means used as described in Article 2(3) "in such a manner that international peace and security and justice, are not endangered."

Despite an increase in the efficiency of these organizations, the self-defense safeguard, individual or collective, in Article 51, permits an adequate coercive reaction to meet an "armed attack."

Treatment of this sort does not, of course, eliminate the need for determining the meaning of "armed attack" in Article 51 when responsive action of a high intensity of coercion exceeds the "rheostatic efficiency" of the global and regional security organizations. The treatment simply resets the relevance of Articles 51 and 2(4) in the light of the currently dominant security function of the world and regional bodies.

Using this approach in construing Articles 2(4) and 51, the coercive action in the Quarantine of 1962 was well within the permissive range. The United Nations demonstrated its ability, largely through the office of the Acting Secretary General, to mediate the dispute and secure a resolution of the issues by persuasion. This result was facilitated by the close cooperation of the United States with the United Nations. Assuming moderation in executing the policies expressed in the Draft Proclamation, the Draft also is compatible with Articles 2(4) and 51.

The rule of thumb suggested places emphasis upon three of the several criteria offered by McDougal and Feliciano in their characterization of "aggression" and "self-defense." These are the "inclusiveness" or "exclusiveness" of the objectives of the participants and the willingness of the participants to accept community procedures for the settlement of their differences, both being emphasized in the second feature of the rule of thumb; and expectations about the effectiveness of community decisions, emphasized in the first feature.

Because of the speed in the making of decisions usually required to develop maximum coercive effect, a series of simple standards, if these play down the ultraindividualistic element in self-defense—although clearly falling short of a comprehensive analysis, may serve as an effective guide at a high-policy level. Perhaps the coordinating functions of the standards are superior to a more comprehensive statement of criteria in which multiple elements provide greater latitude for difference. With respect to decision makers who believe themselves removed from the threat calling for a coercive

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182 Ibid., 203.
183 Ibid., 206.
response, the *persuasive* function perhaps is performed more efficiently than when "self-defense is emphasized."

**WHO and the Health Regulations**

Apart from Articles 2(4) and 51 of the United Nations Charter, the only treaty provisions bearing upon the legal "persuasiveness" of the Proclamation policy are the WHO Health Regulations. These Regulations are unique treaty forms.

The World Health Assembly, consisting of representatives of members of the World Health Organization and meeting at regular intervals, considers International Health Regulations drafted by an appropriate body of WHO with the assistance of the Secretariat. Upon adoption by the Health Assembly, the Regulations are notified by the Director-General to the governments of the member states. After the expiration of a fixed period, three months in Health Regulations No. 2, now in force, the Regulations are binding upon a state which does not reject or file reservations to them. No reservation offered is valid unless accepted by the World Health Assembly.

Current Health Regulations No. 2 have three salient features:

1. The Regulations are aimed principally at a group of "quarantinable" diseases—plague, cholera, yellow fever, smallpox and typhus.
2. The quarantine measures set forth in the Regulations are the maximum which a state may apply.
3. The administration of the Regulations is decentralized to regional and national health administrations.

The Regulations have no specific security escape clause such as may be found in GATT. The sanitary measures specified are to be taken in the territory of the state which applied them. The Regulations state that sanitary measures shall be applied by a state to any ship which passes through its territorial waters without calling at a port or on the coast. There is no provision authorizing interference with vessels on the high seas for sanitary reasons.

Article 28 permits the health authority of a state to prevent the discharge or loading of cargoes or taking on food or water at a port or airport by a vessel or aircraft which is infected by an epidemic disease other than the "quarantinable" disease "in the case of an emergency constituting a grave danger to public health." It is possible that an argument of limited viability might be constructed upon this Article for interceptions of vessels upon the high seas.

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185 See Berkov, *The World Health Organization, A Study in Decentralized International Administration* (1957), passim.

186 *Health Regulations No. 2*, Art. 32(1).
with a purpose of shore contact. The argument would be similar to the “hovering” argument urged in cases of revenue and immigration enforcement.

The most satisfactory approach, however, is to argue the Regulations are developed to reconcile the demand for security and physical well-being unimpaired by the quarantinable diseases with the demand for a free flow of commerce. Trawlers prepared to deliver contaminated aerosols from a range of 600 miles are not commercial vessels within the purview of the Regulations or engaged on a commercial mission. The Regulations do not contemplate intentional initiations of epidemics; nor are mutants of quarantinable diseases developed for the purpose of warfare the quarantinable diseases to which the Regulations apply.

A self-defense exception seems readily implied in the Regulations when the difficulty of detection of attack is as great as in biological warfare and the opportunities are limited for successfully controlling epidemics produced by mutants once these epidemics are initiated.

It is quite probable that the Health Regulations, instead of presenting an obstacle to the policy contemplated in the Draft Proclamation, can be used to supplement the measures initiated by the United States in response to the Scythian and Nuevan threats. Notices concerning intelligence gathered during the proposed interception should be furnished to the World Health Organization pursuant to Part II of the Regulations. This epidemiological information will then be disseminated among the members.

Likewise, the World Health Organization may be used as a source of intelligence to aid in determining Scythian and Nuevan intentions. If Nueva can be designated as an infected local area, the quarantine provisions which then may be put into force against its vessels and aircraft and supplement to a limited extent the naval pressure exerted against shipments of biological weapons and the means for their delivery.

Interim Action to Preserve the Status Quo

As a persuasive device to be offered in addition to arguments keyed to self-defense or possibly collective self-defense, an argument presenting the action as an interim status quo preserving technique should be addressed to decision makers not involved directly in the conflict but who possess the power to embarrass execution of the United States policy. This argument has been developed in detail in Chapter III (Situation 3).

The interim action contemplated is narrower than the “policing” concept offered by Christol and Davis in their analysis of legal
problems in the Quarantine of 1962.187 The interim action suggested is noncompetitive with the peace maintenance functions of the United Nations and is progressively reduced as the influence of the world organization is brought to bear.

The concept is one of a power implied in every political or legal system—namely the use of force formally or informally organized to forestall intensive coercion until an authoritative community decision can be rendered. In this context, for example, the action of the United States in Lebanon and in the Quarantine of 1962, in both cases harmonized with the peace maintenance efforts of the United Nations and contributing to that effort, compares favorably with the Anglo-French action in Suez in 1956 during which Security Council action was blocked by a British veto.

Applying the interim action concept to the Draft Proclamation, the action taken will have to be keyed carefully to any action taken by the United Nations. Information obtained in intercepting vessels carrying biological weapons or equipment for their delivery will have to be supplied promptly to the Security Council or the General Assembly. The argument is one to be advanced as the Proclamation is executed and its effectiveness will hinge upon the prudence and moderation with which the policies of the Proclamation are carried out.

The Draft Proclamation requires no revision and the President may be advised to approve it.