

## Chapter 2

# Misconceptions of Law and Misguided Policy\*

Alfred P. Rubin

### I. Misconceptions of Law and Their Policy Effects

**W**hile misconceptions regarding international law are as common as misconceptions regarding economics or military affairs, there seems to be a pervasive feeling at policy levels that the misconceptions regarding international law are somehow less important. Most international lawyers are familiar with the bemused greeting at cocktail parties, when a new acquaintance first hears of their specialty: "International law? There is no such thing, is there?" One professor, the holder of a famous old Chair at the University of Cambridge in England, habitually gave the reply: "You are quite right; there is no such thing. That is why I teach it at Cambridge."

The implication that what is taught is somehow less important than what is done in "real life," and that famous old universities are the home of cranks and harmless theories, is so patently false that in the cocktail party game of one-upmanship this answer was always a winner. But in real life the downgrading of international law as a tool for action is not funny; it costs lives and fortunes.

Two examples may help illustrate the point. On the operational level, the assumption that NATO bases in Turkey or some expanded staging area on the Persian Gulf could be used to project American or NATO force into the Persian Gulf or Iran in an emergency flies in the face of the legal restrictions on our base rights. It assumes those legal rights could somehow be interpreted loosely by the United States in a time of tension and that under severe strain the government of Turkey or the host Emirate in the Gulf area would agree that its interests lies in supporting the United States or NATO action.

Nothing could be further from the truth. What we interpret loosely, they are likely to interpret restrictively; what we see as a quick reaction, they will see as an aggression against Muslim solidarity in an area in which they live and we are visitors. It is the technical terms of the base rights agreements that must mark the limit of American power projection possibilities in that area, not great plans laid

\* Reprinted from the Naval War College Review November-December 1982.

## 20 Readings on International Law

on the basis of military needs and capabilities that do not take account of likely arm's length host-country reactions.

On another level, plans that envisage the use of nuclear weapons in circumstances short of those in which suicide is a rational act seem to assume that that use is legal or, if illegal, not likely to raise significant political opposition.<sup>1</sup> But it is already clear in the United States that there is opposition, and that the opposition is based at least in part on legal objections to the proposed uses. When town meetings in Vermont vote for a nuclear freeze, Senators from Vermont are concerned; when Senators from Vermont are concerned, entire congressional delegations from New England, the North Middle West, and the Northwest must be concerned. Have we forgotten that it was a congressional refusal to supply the money that forced us out of Indo-China and made intervention in Angola impossible? Are plans realistic when they disregard the apprehension of those on whose cooperation the realization of those plans depends?

These examples are not hypothetical, they are real and in their way reflect the kinds of interests that must be of concern to lawyers and wise planners. There is no rational dispute about the importance of having general constituency support for operational plans that affect that constituency, and in the United States the constituency of the military is the entire U.S. population and many foreign countries. Thus, there can be no rational dispute between planners and lawyers, including international lawyers, who raise questions about foreign constituencies' and national constituencies' reactions to the implementation of various plans. Lawyers' objections reflect the crystallized experience of the society whose law is involved. That is a very good indication of the likely reactions of those affected by the realization of the plan. To fail to take account of lawyers' problems, then, is to fail to take account of a vital element of the real world; plans made in disregard of the real world are doomed to fail.

I make these comments out of the deepest concern for U.S. national defense interests. The use of American bases in Thailand to support a strike against Kampuchea during the *Mayaguez* crisis resulted in Thailand being forced by its own constituencies to speed the timetable for American withdrawal in the aftermath of Vietnam: The apparent misuse of the bases as the Thai interpreted the base rights agreements did not help any significant American interest, it hurt. Plans that might envisage manned bomber or low-flying missile transits of neutral territory en route to Soviet targets force neutrals to consider defending themselves from the American incursions into their territory, thus reducing the reliability of those plans as a deterrent to Soviet actions and as a credible threat, as well as forcing the neutrals involved to consider their broader relations with the United States in the light of what they must perceive as our threat to their neutrality. What a distorted position for the United States, the major upholder of national sovereignty and freedom of choice, to be in!

And even with regard to our closest allies, plans lose touch with reality when they envisage the possible use of tactical nuclear weapons with the permission of the territorial sovereign, but disregard the possibility that the policies of free countries are subject to change at the whim of an electorate accustomed to open debate, and that have in their territories significant groups of political activists ready to sacrifice themselves for the principle of no nuclear weapons use. Is France the only country that can suddenly withdraw from NATO military cooperation agreements? Is the United States in the climatic days of the struggle over Vietnam the only country that can raise political activists able to elect representatives to positions where they can control the purse strings?

It follows that the first, and most serious, misconception about international law is the misconception that it is a minor specialty of importance only to learning how to read treaties that don't count when real interests begin to play. No. The essence of international law as a consideration in high policy is its crystallization of the basic rules of society; the fact that it contains the constitutional rules by which international society lives. That constitution is written in documents of more or less persuasiveness and practices of more or less antiquity supporting a pattern of expectations on the basis of which statesmen and their constituents, real people, behave. It is closely comparable to the unwritten British constitution. Non-lawyers, or those lawyers who act as mere technicians of the law, may have trouble perceiving the strength of the web of law in which we are all enmeshed, but they are caught in it nonetheless, just as President Nixon was caught in the web of American Constitutional Law when he was forced to resign the Presidency, not by policemen but by the political forces that came into play to enforce the law. His apparent failure to perceive that the process was essentially one of law enforcement did not save him; it removed him from reality and made his loss inevitable.

The second misconception flows from this. International law is not a system that lacks enforcement. Most criminal law in the United States comes closer to fitting that description, since most criminals escape justice in the United States. On the contrary, international law is almost a self-enforcing system. But the enforcement process is political. It depends on the perceptions of States and individuals that the law is being violated and that it is in their interest to react to the violation. That perception is fairly high in some countries; not very high in the United States. Thus the moral prestige of some Scandinavian countries, Switzerland, and some others gives them a voice in international affairs far beyond their military and economic power.

The United States, which habitually in recent years reacts as if the law did not exist, as if only power politics exists, seems to have lost moral power. The result is a loss of the ability to influence events. That loss is no longer compensated by our military and economic power relative to the rest of the world. Fortunately, the Soviet Union has been almost as blind to the importance of moral force as

## 22 Readings on International Law

we, and has lost prestige and the ability to influence events at about the same speed. Indeed, partly because their sensitivity to the law has been greater than ours from time to time, it has taken a few egregious violations of the law by the Soviet Union, like their invasion of Afghanistan, to even the balance of moral degradation, while our losses have in the main been achieved by many small increments through ignorance, without the open display of brutality.

Examples unfortunately abound:

- The major users of the Panama Canal watched with dismay as we yielded practical control of the Canal to a small country with no real national interests in nondiscriminatory use. We agreed to terms that would make us appear a Yankee aggressor if we ever have to intervene to secure to the British the rights of passage we had guaranteed them, and all third countries, in the Hay-Pauncefote Treaty of 1901.<sup>2</sup>

- We yielded in principle on historic rights of straits passage at the start of the United Nations Law of the Sea Conference, regaining those rights through elaborate negotiations as if a concession by straits and archipelagic States and in terms that seem sufficiently clear only to those actually involved in the negotiations<sup>3</sup> instead of withholding our concession in principle to the end.

- By conceding that the activities of the *Pueblo* off North Korea would have been illegal if conducted within twelve miles of North Korean territory, and asserting the applicability of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone to the situation, we conceded a twelve-mile territorial sea in part through misunderstanding the law involved.<sup>4</sup>

- We lost freedom of scientific research at sea in part through failure to consider the legal consequences of the cover story we used in the *Glomar Explorer's* venture.<sup>5</sup>

- In 1976 we legislated against "sovereign immunity" in a way that could, if our own rules were applied against us, result in the arrest of a Navy ship in a foreign court at the demand of a foreign commercial tort or contract claimant.<sup>6</sup>

- We negotiated for some three months with Iran over the release of our hostages there after it became clear that Iran was willing to let them go, because our own Iranian assets freeze regulations made it impossible to return to the legal position that had existed before the seizure and we had destroyed the credibility of the United Nations and the International Court of Justice as third party mediators.<sup>7</sup>

The list is potentially endless.<sup>8</sup> These losses are not negligible individually and are tragic taken together. And with regard to all listed here but the last, it is possible to suggest that a more alert eye to legal aspects of our national security interests by the Navy would have helped limit, if not entirely avoid, the losses.

Even with regard to technicalities of the law of interest to the Navy, there are misconceptions that might have tragic consequences for individuals who should know better. I have heard one officer at the Naval War College remark that

“Victors are never tried for war crimes, therefore it is much more important to win than to fight legally.” Aside from the deeper personal questions about the sort of action that is a “war crime” and the sort of person who would knowingly commit an atrocity, on the most superficial level the statement is untrue. Victors’ tribunals of the sort we set up in Nuremberg and Tokyo are the exception, not the rule; the normal enforcement of the laws of war is by each country’s national tribunals and through the discipline of its own forces. What might be called a war crime in international correspondence is called murder or rape or some such under the national criminal law applied to military personnel to discharge the State’s international obligation to seek out and punish those individuals who violate the laws and customs of war. Despite some notable lapses, the record of the United States in this is pretty good; and all countries suffer lapses in wartime. The famous trials are, in the main, show pieces for the edification of blood-thirsty constituents and where, as in the case of the Nuremberg tribunal, some of the decisions become landmarks of legal reasoning, they survive as politically influential ideas despite the weaknesses of the legal process that produced them. Where history deals less kindly with the legal reasoning, they are suppressed in our memories or reinterpreted to change the facts to fit our self-image.<sup>9</sup>

In one sense, however, the assertion that victors are never tried is true. The “new” Nuremberg crimes involving planning “aggressive” war seem weakly based in tradition and legal logic despite the overblown rhetoric of the time. Only one defendant at Nuremberg was convicted of these “crimes” alone, Rudolph Hess; all the others convicted on this count were also convicted of traditional war crimes or their peacetime equivalent, “Crimes against humanity.” The victors’ tribunals may thus, to the degree they held to the traditional views of law, be seen as actually a political necessity with regard to countries, Germany and Japan, which had failed in their own international responsibility to seek out and punish “ordinary” war criminals.<sup>10</sup> Insofar as they took off in a new direction, their precedent is unlikely to survive.

Another common misconception is that as long as the other side is the aggressor there is no legal restraint in the law of self-defense. That is simply not true. The laws and customs of war do not saddle the victims of war with moral or any other responsibility for the acts of their governments; little Nazi or Communist babies are not legitimate targets of military operations no matter how vicious their governments. Indeed, it is one of the strange twists of mind that international lawyers worry about when we read of “hostage” proposals to destroy a Soviet city in retaliation for some act of the Soviet government elsewhere. The laws and customs of war do not permit the bombardment of undefended cities or the destruction of lives or property not related to military necessity. Those laws and customs codify the experience and conscience of mankind and to ignore that experience and conscience, or the documents, to

## 24 Readings on International Law

which the United States had pledged its honor, that contain the translation of these concepts into binding words is itself monstrous.

These legal and moral conclusions are, of course, reflections of reality more than the “realism” of those who ignore them. Is there any deterrent in threatening to destroy a Soviet city whose support of the Soviet leadership is unimportant to that leadership? Is a demonstration of our own disregard of civilian casualties in the Soviet Union likely to encourage the Russian people to abandon the war effort and overthrow their government; or will it serve instead to unite them behind a leadership that purports to protect them from Americans who do not care about innocent lives?

In fact, each side always regards itself as the defender against foreign aggressions; even the Nazis defined their own role as protecting ethnic Germans from various (nonexistent) ethnic threats. The law of war has been consciously designed to facilitate the return to peace, and by doing so has since at least 1863<sup>11</sup> carefully avoided permitting combatants in a “just” cause legal advantages over combatants in an “unjust” cause. To the extent that spokesmen for various causes have tried to change this fundamental orientation of the law, they have either failed, or achieved verbal successes that have disappeared in the heat of later events. An example of this sort of thing is visible in the routine United Nations General Assembly condemnations of Israel for actions analogous to those which Syria takes in Lebanon and others take elsewhere without equivalent condemnations. It is noteworthy that the polemics against Israel seem unconvincing, hysterical, and political rather than legal. The result has not been great pressure on Israel to mend its ways, but the political insulation of Israel and its disregard of the criticism. This is not a defeat for the law, but a victory for the law and a defeat for those who would twist its impartiality to omit momentary political purposes.

### II. The Problem of Bureaucracy and Non-Cures

Once it is conceded that a stronger legal component is needed in defense policy from operations to the highest planning levels, the problem becomes one of implementation. The normal bureaucratic answer is simply to appoint a specialist in the needed specialty, and amend the job descriptions of those above him in the chain of decision to require them to take account of the new input. But in bureaucracies the job description does not reflect the expertise of the job-holder; rather the formal expertise of the job-holder is whatever it says in his job description. Thus a senior official wishing to avoid the kinds of considerations in policy that an international law expert would bring to his attention need merely appoint a technician or non-lawyer to the post, or a very junior person without experience in making his expertise felt in the bureaucratic mix. Thus, the normal paper solution is no solution. What is needed is a realization on the

part of the highest officials that the expertise of an international lawyer capable of perceiving the system is vital to the proper discharge of their own functions.

This problem is frequently encountered by international lawyers within the system by their senior decision makers constantly reminding them that the law is only one of many (implication: one *very minor* among many *major*) inputs to wise policy. The lawyer who takes his expertise seriously and feels his public responsibilities quickly learns to make his contribution a matter of written record, forcing the superior to face bureaucratic consequences if it is ignored and the policy made in disregard of the legal factors turns out badly. This does not increase the popularity of the lawyer, but if popularity were the game there would be no reason for the public to pay our salaries.

The reasons why this sort of situation is especially tense for lawyers is difficult to unearth. My own speculation is that many policy makers and planners are frightened of the law because they do not understand it, and feel secure if they can assure themselves that it does not really matter. If they take it seriously and still don't understand it, they face the alternative of handing over too great a portion of decision-making to their lawyer, whose judgement as to the many other factors that must be reflected in wise policy may be faulty or ill-informed. The real cure is, of course, greater education and familiarity with international law by non-lawyers, who make policy, and the selection of legal advisers who can explain their views in terms comprehensible to an intelligent decision maker. That is what makes the problem so difficult. Lawyers who can explain their insights in simple language are as rare as economists who can—and just as important; decision makers who can open their minds to the subtleties of the law without losing touch with reality are even more rare than lawyers who can express themselves clearly. The worst resolution is the one so frequently attempted: The appointment of lawyers to policy positions. That “resolution” normally confuses the expertise of successful corporation or claims lawyers with the expertise of international lawyers, and gives to policy the all-or-nothing, episodic, crisis-management approaches that lawyers are accustomed to, in place of the measure-of-risk, continuing-relationship approaches that wise policy demands.<sup>12</sup>

The problem is probably unsolvable; it is a problem that affects the entire bureaucracy, not merely the military portion of it or that part that involves lawyers. But to recognize it is already to alleviate it. It is possible that nothing more can be done. If that is so, it places a great burden on lawyers in positions to affect policy to press their views with the same vigor that economists and military specialists press theirs. It also places a great burden on policy makers to seek out legal opinions on all matters, and to decide on the weight to be given the legal input only after the best available input has been received and explained. Failure to shoulder those burdens can involve failure to discharge our public duty.

## 26 Readings on International Law

### III. The Link with Reality; United States Policy and the Falklands/Malvinas Islands Dispute

By now the military outcome of the confrontation between the United Kingdom and Argentina over the Falkland/Malvinas Islands has long been clear. Now it is time to begin the sort of detailed analysis of the miscalculations and successes of each actor in the international arena that will surely fill the professional journals of many specialties in the months to come. The outline of the legal problems is already clear. It differs so radically from the popular impressions that it may be useful to set some ideas forward as illustrative of the uses of the law in decision-making.

The pre-19th century bases for British and Argentine claims to the islands interlock in a pattern that gives neither side much of an advantage over the other.<sup>13</sup>

Obviously, Papal donations and treaties among Spain, Portugal, and France are not significant to defeating any British claim; nor are British discoveries and self-serving assertions a significant obstacle to Spanish claims resting on their own assertions of right. A British occupation begun in 1766 was followed by a British abandonment in 1774. The British considered their abandonment of 1774 did not end the underlying British claim, only the open display of it. The British do not seem to have protested the Spanish settlement there, which began in 1764 and was abandoned in 1811. At the time Argentina achieved its independence from Spain in 1816, it could say it had inherited a Spanish claim not translated into a form that would withstand a British counterclaim; and Great Britain had maintained a claim that could not withstand an Argentine action to consolidate its adverse claim. The law cannot resolve such situations to anybody's satisfaction. An arbitrary determination that the party with the slightly better claim (51 percent) gets all of the prerequisites of the sovereign (100 percent) and the part with the slightly less persuasive argument gets nothing, is not a reflection of the real world. The wise policy maker would be advised of this legal situation and avoid judicial resolutions or too loud assertions of either country's supposed rights.

In 1823, Argentina assumed full control of the Islands and in 1826 installed an effective administration. In 1830 the United States was opposed to any effective government in the Islands. American fishing and whaling interests, and others, apparently wanted anarchy there. In 1831 an American naval expedition ousted the Argentine administration. Argentine protests were rejected. In 1833 a British administration was installed, which the United States did not protest despite the opposition to European colonies in the Western Hemisphere made formal American policy in the Monroe Doctrine of 1823 and loudly reiterated ever since. Argentine protests were rejected again. The Argentine national sense of grievance against both the United States and Great Britain thus has strong roots.

Argentina never made any secret of its national determination to get the Islands “back” and to right the “wrong” of 1831–1833. There was never the acquiescence impliable by silence that enabled various international tribunals to resolve similar disputes among other countries;<sup>14</sup> neither was there an Argentine failure to perfect its claim before the critical date of 1833;<sup>15</sup> nor was there an incorporation of the territory into a stable allocation of sovereign rights that could be accepted by all parties.<sup>16</sup> On the other hand, over the years after 1833 the British did maintain a stable administration supported by the fleet, and did bring the Islands into the world economy by establishing a productive colony.

By 1945 it seems likely that the British could have maintained the stronger case before a tribunal, but the British case did not address the issues on the basis of which Argentine national feelings festered. To Argentina, the British consolidations of its legal position seemed to pile insult and injury on top of the insult and injury suffered in the 1830s.

At this point a wise lawyer and policy maker would pause and the policy maker would likely determine that the paths of the law would be too all-or-nothing-ish for reality; that some sort of purchase-and-sale agreement would be useful; and that the Argentine sense of grievance and British sense of propriety were both so well-based that a moment of sanity should be seized if ever it appeared that a formal settlement was possible. But it did not happen.

In 1945, at the close of a war in which Britain fought for its life while Argentina tried to avoid entanglement, the states of the world, including both Great Britain and Argentina, decided that it was time to change the rules of the game. They negotiated the United Nations Charter as a treaty, and formally agreed to abide by its terms. Among those terms was article 2(3), which provides that “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” There is no exception for preexisting claims, to permit wars as before when the quarrel has ancient roots. Indeed, such an idea seems wholly out of keeping with the open intention of the framers of the Charter. Nor is there any indication that the framers intended to eviscerate their handiwork by inserting the words “and justice.” In accordance with the normal rules of international law, such words are interpreted not by each party with effects valid against all the others, which is a prescription for conflict; such words are interpreted by the collectivity in accordance with their more natural apparent intendment: To forbid the use of force in those cases in which “justice” is endangered by that use, even if that use is so small in scale and short-lived that international peace and security are not threatened by it. It was aimed at forbidding such foreseeable strikes as Israel’s against the Osirak reactor in Iraq (to the extent that strike was not justifiable in self-defense under other of the Charter’s provisions), not to justify the use of force.

## 28 Readings on International Law

Argentina, whose international lawyers stand among the most sophisticated in the world, knew of this interpretation and never indicated any dissent from it. Under normal international law rules of treaty interpretation they are not excused from the generally accepted interpretation of a treaty's terms by some secret and strained interpretation which their ingenuity might devise for their own purposes.

An international lawyer pausing at this point would advise his policy maker that Argentina had formally renounced the use of force to "liberate" the Falkland/Malvinas Islands and to right ancient wrongs, but would remain free to use other tools. If the other tools proved ineffective, the solution of the tensions would have to await a calmer day. The world is filled with such situations.

The United Nations Charter also contains a provision binding as a treaty on both Argentina and Great Britain that requires that the interests of the inhabitants of any non-self-governing territory be taken into consideration, including their political, economic, social, and educational advancement.<sup>17</sup> Thus, even if the Argentine claim to the Islands were entirely valid, a substantial legal question would exist as to the degree to which Argentina could maintain any garrison or system of law in the Islands which would inhibit the population, however it got there, in expressing its own desires for its own future, even if that future involved a separation from Argentina and a joining with Great Britain. A solution to the Argentine grievances which did not take account of the wishes of the inhabitants of the Islands would place Argentina, and possibly even Great Britain if it agreed to such a solution, in apparent violation of this treaty commitment. The fact that those inhabitants or their ancestors came to the Islands as a result of British aggression in 1833, if that is the case, seems legally irrelevant to the humane concern for them as human beings with an interest in their own governance and well-being. It is this provision which is central to the anticolonial arguments in the United Nations regarding the well-being of the ethnic African and Indian majority in South Africa regardless of the prior establishment of Dutch rule there and the evolution of that rule into the current government of South Africa.

In light of these legal considerations, and regardless of whatever negotiations might have gone on between 1945 and 1982 between Argentina and Great Britain, the Argentine use of force to oust the British garrison in April 1982, and the Argentine disregard of the wishes of the inhabitants of the Islands; place Argentina squarely in the position of violating its treaty commitments not only to Great Britain but to the entire world that accepts the United Nations Charter as the basis for the current international legal order.

Nothing in the Charter or defense treaties related to the Organization of American States detracts from these provisions.

From this point of view, the Argentine military action of April 1982 was a matter of interest to the entire world; it threatened the integrity of the treaties on which we all rely for such stability as exists in the world today. The fact that

other States may have violated their commitments under the United Nations Charter is legally irrelevant, just as the fact that the criminal law is flouted in many major cities of the United States is irrelevant to the trial of an accused criminal. For the same reasons we insist on the integrity of the criminal law regardless of its violations by others, it is in the interest of the world to insist on the integrity of the United Nations Charter.

The British reaction to the Argentine use of force was entirely consistent with this analysis. An appeal was made immediately to the Security Council of the United Nations, which responded with a formal Resolution demanding that Argentina withdraw. The only State voting against the Resolution was Panama, an ironic vote in view of the importance of maintaining the continued legal effect of the essay in imperial adventure by the United States in 1903 on which Panama relies for its independence from Colombia.

Instead of immediately acting in support of the United Nations Charter and the integrity of Latin American borders through the Organization of American States, the United States took the formal position that it was the friend of both parties. This choice, to accept the confrontational mode adopted by Argentina in its search for "justice" as defined by itself in disregard of its treaties, and to regard the struggle as one between two states only instead of it being Argentina against the world, seems unaccountable. It could not have been taken by a policy maker alert to the legal implications of the situation.

The result of this choice in the real world was a confusion of major proportions. When ultimately the United States expressly supported the British counteraction in the name of the integrity of the United Nations system, it was too late to convince our Latin American neighbors, who are all well aware of the role of the United States in the transaction of 1831-1833, that we were not acting in support of an old and trusted ally against a Latin American state seeking "justice." Our position was made to appear politically expedient, not a matter of principle. The repercussion on our Latin American policy and on the United Nations and Organization of American States system will be immense, and it is hard to see how the long-range interests of the United States are served.

Other implications, obvious to international lawyers but apparently overlooked by policy makers, included the confusion between support of British military action in support of principle and treaty commitments with support of British claims to sovereignty in the Falklands/Malvinas Islands. While the British might have had a stronger legal claim to sovereignty than Argentina, as noted above a legal approach is not compelled by the law or appropriate to the true situation. In the absence of detailed argumentation presented by both sides and evaluated calmly, it was not only beyond the practical capacity of the United States to determine which claim is the stronger, but whatever our conclusion it must have been legally unpersuasive to the other side and its allies and might have inhibited the sort of negotiation needed to end the confrontation. And for

### 30 Readings on International Law

the United States to appear to oppose our Latin American neighbors or our British allies in this was unnecessary and destabilizing to both NATO and Latin America. Thus a narrow legal memorandum that did not focus on the entire legal order was distorting. A policy maker would have been better off knowing no law than that isolated bit of it.

The importance of a full legal evaluation of the entire situation was also evident in considering the degree of support the United States should have been giving to Great Britain. It follows from the analysis above that the British response to the Argentine taking of the Falkland/Malvinas Islands was a response to an illegal Argentine action that directly affected British interests. The British undoubtedly had "standing" to act; they were not acting as world policemen to support the law, as we would have been if we were to have acted directly against Argentina, but as a party injured by the Argentine action. The British position was not one of "self-defense." To call it self-defense implies British sovereignty in the Islands; otherwise the Islands could not be part of the "self" the British are defending. "Self-defense" also assumed an immediacy that became less and less evident as time went on.<sup>18</sup>

The British rationale, carefully preserved in Prime Minister Thatcher's public statements, was the need of states with the legal standing to act to preserve the system. That was the American rationale in Korea in 1950 also. We were bound to support the British action because we were and are bound to support the integrity of the system. Thus, to the degree the British action exceeded what is justifiable in support of the collective security system set up in the Charter, our support for it must have been very questionable. It could be given as a matter of policy, but should not have been given unless its legal implications were understood.

It is this restriction on British legal rights that made the British sinking of the Argentine cruiser *General Belgrano* early in May outside the zone proclaimed by the British as the "exclusion" zone for Argentine ships so significant. Despite British arguments that they could have made the zone larger, that the declaration did not limit British rights to strike at Argentine vessels elsewhere, and that the sinking was necessary in self-defense of the British forces within the zone, the expansion of the zone of combat beyond what was clearly necessary to counter only the Argentine taking of the Falkland/Malvinas Islands undercut the world order rationale for the British action. These doubts were reflected in the world's reaction to the British sinking; the pulling back of the European Economic Community partners from further support of the British embargo of Argentina and the estrangement of those Latin American countries that might have more vigorously supported the system if convinced that it was the system they were supporting and not British colonial interests.

To consider these important hesitations merely a triumph of petty self-interest by European and Latin American States over the interests of stability is to ignore

the common interest of all in the integrity of the system and help to destroy it. If it is in America's interest to support the system and to find a common language with which to discuss it with the other states interested, we must be aware of it and the limits it places on British action. Even if others are less convinced than we of the virtues of stability and collective enforcement of the law through political and military pressures, it is difficult to see how we can convince them of their ultimate interest if we lose sight of it ourselves. That would leave the field open to Soviet and other spokesmen to undermine the very basis of the interest structure on which we rely, much more than our overt alliances, to oppose the destabilizing actions of the Soviet Union and various revolutionary groups that seize on national grievances to support local movements seeking to identify their particular local aims with xenophobic anti-Americanism.

In sum, the world is a subtle and complicated place in which the tools of international law provide a framework for helping to evaluate national interest that can substantially change the policy evaluations of decision makers to the long-range favor of the United States. Failure to use those tools places us in a simpler world in which our leadership position is threatened by the misperceptions of others. If we suffer the same misperceptions we seriously undercut our ability to influence events and we bring the horrors of war and economic dislocation closer. And we fail in our duty to help safeguard the national security of the United States.

---

Professor Rubin was serving as the Charles H. Stockton Professor of International Law at the Naval War College when this article was first published.

---

### Notes

1. Rand Corp., *The International Law of Armed Conflict: Implication for the Concept of Assured Destruction* (R-2804-FF January 1982).
2. Rubin, *The Panama Canal Treaties: Locks on the Barn Door*, 1981 Y.B. World Aff. 181.
3. Reisman, *The Regime of Straits and National Security: An Appraisal of International Law Making*, Am. J. Int'l L. 18 (January 1980).
4. Rubin, *Some Legal Implications of the Pueblo Incident*, Int'l & Comp L.Q. 961 October 1969).
5. Rubin, *Sunken Soviet Submarines and Central Intelligence; Laws of Property and the Agency*, Am. Int'l L. 855 (October 1975).
6. The Foreign Sovereign Immunities Act of 1976, U.S.C. §§1330, 1602, provide that a foreign State shall not be immune from the jurisdiction of courts of the United States in any case in which the action is based on "an act outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere and that act causes a direct effect in the United States" (28 U.S.C. §1605 a (2)). It also provides that a foreign State shall not be immune "in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign State, which maritime lien is based upon a commercial activity of the foreign State" (28 U.S.C. §1605b). "Commercial activity" is defined in the Act to include "a particular commercial transaction" and says further that "The commercial character of an activity shall be determined by reference to the nature of the . . . particular transaction or act, rather than by reference to its purpose" (28 U.S.C. §1603A(d)). Legal questions of interpretation are only now beginning to make their way to the Supreme Court. But foreign governments in their own courts are not bound to hold to American interpretations of an American statute. We have probably lost our ability to protest effectively a foreign arrest of an American Navy vessel in Admiralty under a lien alleged to have been created in a dispute arising out of

## 32 Readings on International Law

the purchase of, for example, ships stores; we lost when the principle was breached of according sovereign immunity for the acts of direct agents of the sovereign whose sole source of funding is the public purse. Perhaps it was inevitable in light of the difficulties in law in distinguishing between a private corporation, which is, after all, merely a creature of the law and thus an extrusion of the State, and a direct government activity operating under statutes and accountability procedures almost as effectively cutting it off from political control in its procurement and sales operations. The legal distinctions are too complex to reduce to a simple principle universally applicable. But there is very little evidence that the problem was even perceived as serious when the statute was drafted.

7. Rubin, *The Hostages Incident: The United States and Iran*, 1982 Y.B. World Aff. 213.

8. Many more dismal examples are given in FISHER, *POINTS OF CHOICE* (1978).

9. TAYLOR, *A TRIAL OF GENERALS* (1981), for what seems an overly "revisionist" view. Generals Homma and Yamashita were convicted by American military commissions for not restraining the troops under their command during the Bataan Death March in 1942 and the destruction of Manila in 1945. The impact of these convictions on the law is not entirely clear.

10. It may be hoped that the United States will never fail in its international responsibility in the same way. But it is possible to speculate in the light of opinions expressed from time to time that President Truman might have been guilty of an "ordinary war crime" in ordering at least the second nuclear bomb to be dropped in Japan in 1945. It is likely that a Japanese court would have held so. But whether an impartial tribunal correctly evaluating the legal situation in 1945 would have agreed is doubtful. See Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 Am. J. Int'l L. 759 (1965); Rubin, *The Neutron Bomb Again*, 21 Va. J. Int'l L. 805 (1981), and works cited there.

11. General Order 100 of 24 April 1863, Instructions for the Government of Armies of the United States in the Field (the Lieber Code), art. 29.

12. This is not to say that all lawyers are poor at policy-making or all non-lawyers avoid the pitfalls. Harold Nicolson, while warning against "missionaries, fanatics and lawyers," specifically exempts international law experts from his list. NICOLSON, *DIPLOMACY* 16-17, 24 (1963). Nicolson, a non-lawyer, also writes: "My own practical experience, and the years of study which I have devoted to this subject, have left me with the profound conviction that 'moral' diplomacy is ultimately the most effective, and that 'immoral' diplomacy defeats its own purposes," p. 23.

13. The only known scholarly book giving what appears to be an unbiased and more or less complete history is GOEBEL, *THE STRUGGLE OVER THE FALKLAND ISLANDS* (1971).

14. Cf. *The Island of Palmas (Miangas) Arbitration*, 2 R.I.A.A., 829 (1929).

15. Cf. *The Clipperton Island Arbitration*, 2 R.I.A.A. 1109 (1931).

16. *The Ecrehos and Minquiers Case, United Kingdom v. France*, 1953 I.C.J. 47.

17. The Charter is explicit on this: "Members of the United Nations which have . . . responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation . . . to ensure . . . their political, economic, social and educational advancement. . . ." U.N. Charter art. 73.

18. The classical legal formulation regarding "self-defense" first uttered by Daniel Webster when Secretary of State in 1842, deals with situations where the necessity for action is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." MOORE, *DIGEST OF INTERNATIONAL LAW* 414 (1906); Jennings, *The Caroline and Macleod Cases*, 32 Am. J. Int'l L. 82 (1938). It is difficult to see how that situation obtained in the Falklands/Malvinas Islands after the Argentine forces had removed the British garrison and all shooting had stopped in the Islands. "National security" as a concept would justify anything anywhere. Its meaning is solely political; it justifies nothing in international law because it would justify all counteractions to the very action it purports to justify. It would also justify executive counteractions, and then the counteractions to those counteractions, and so on *ad infinitum*. The use of the phrase by non-lawyers, and occasionally by adversary-minded lawyers, sometimes approaches silliness.