

AUTHORITY TO USE FORCE ON THE HIGH SEAS

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I propose to organize my remarks in this way: First, we will consider an appropriate delimitation or clarification of the general problem before us. I begin this way because I don't trust my civilian predecessors: I'm not quite sure that they have properly clarified international law, the law of the sea, aggression, self-defense, and so forth for you. After this clarification of the general problem, we will devote ourselves to four major types of specific problems. The first involves simply the military use or enjoyment of the oceans in times of peace. The second will relate to the maintenance of order upon the oceans in times of peace — the implementation of claims to jurisdiction. The third will relate to extraordinary measures in self-help for the protection of national interests. The fourth will relate to self-defense of national territorial integrity and political independence.

You will observe that the latter two types of problems are very closely related. Self-defense is merely a dramatic form of self-help. The latter two types of problems, taken together, differ sharply from the first two in that their occasion is a prior unlawful use of force by somebody other than the party claiming to employ force in self-help. The first two types of problems are independent of anybody's unlawful use of force. The latter two are dependent upon somebody else's unlawful use of force. The reason I organize the prob-

lems in this way is to attempt to clarify the fundamental community policies that are at stake in each type of problem. The common interest of peoples differs considerably about these different types of problems.

Now let's proceed to our first task, the more precise delimitation of the general problem with which we are concerned. This does call for a realistic understanding of international law in general and of the law of the sea in particular.

If we look about us on a global scale today, I think we can all see that all peoples are caught in a world process of effective power. The interdeterminations, the interdependences of peoples are such that we today have a power process, an effective power process, which is global in its reach. The decisions that are taken in Peking affect what's done in Washington or Moscow and vice versa. No state has complete freedom of effective choice today. We are all scorpions in the same bottle.

When we look more closely at these effective power decisions I think we can see that they are of two different kinds. There are some choices that are made and enforced by simple naked power or by calculations of expediency. There are, however, other decisions that are taken from perspectives of authority. By this I mean that they are made by the people who are expected

to make them; that they're made in accordance with community expectations about how they should be made; that they're taken in structure of authority, courts, or legislatures, or interactions between foreign offices; that the people who make such decisions have enough effective power to put them into practice in a consequential number of instances; that the decisions are taken by employment of authorized procedures; and that the different types of decisions taken embrace the whole gamut necessary to ordering the larger community in which we live.

It is these latter decisions, those that are taken from perspectives of authority, that we appropriately call international law. International law is something more than the words that you read in all these books. It's not simply, as in the traditional definition, a body of rules that governs the relations of states. It is much more. It is the process of actual decision by which the affairs of the world are ordered in an effort to clarify and implement the common interests of the peoples of the world.

If, further, we look more closely at these decisions taken from perspectives of authority, as contrasted with those taken by naked power. I think that we can see that they too are composed of two different kinds of decisions. The first we call the constitutive or "constitutional decisions—the decisions which establish the process of authoritative decision. These are the decisions which determine who the authorized decision-makers are; what the appropriate basic community policies are; what the established structures of authority are; what far-reaching decisions are authorized procedures; what bases of power are to be put at the disposal of decisionmakers for the enforcement of their choice; and so on.

The second type of decision we call the public order decisions. These are

the decisions which establish the protected features of all value processes other than power — which affect the production and distribution of wealth, the sharing of enlightenment, respect (civil liberties, human rights), health, freedom of association, and so on through all the values we cherish in contemporary society. These are the decisions which establish the protection that the nation-states — or international governmental organizations, or private business associations, or the individual human being — get out of the larger constitutive process. Similarly, they are the decisions which determine the protection afforded peoples in the use of resources — the landmasses, the ocean areas of the world, the airspace over the ocean, outer space, and the polar areas. In these terms, you see, the law of the sea — is simply a part of the larger global public order protected by world constitutive process.

If I had time I would spell out for you some of the principal features of this world constitutive process. It parallels, and is entirely comparable to, that which prevails in our more mature nation-states. For the moment, there are just a few points I would emphasize. The first is that the principal authorized decisionmakers in this process are in the first instance the officials of nation-states, and these even include naval officers. There is, of course, a great range of authorized decisionmakers, including the officials of international governmental organizations as well as nation-state officials of many different types and degrees, but for our present purposes this range is not important.

The second point I would emphasize is that this process of authoritative decision, this constitutive process, is established and maintained by people who dispose of effective power in order

to clarify and implement their common interests and to reject all claims of special interest against the community. In other words, international law is, as suggested above, a process by which the effective elites of the world clarify and implement their common interests. We will build on this in the description of the law of the sea.

Another feature of constitutive process which could be emphasized is the tremendous proliferation today of structures of authorities, the growth of international organizations and of arbitral tribunals, and the increase of interaction from foreign office to foreign office. We could also note the gradual putting into the hands of all these decisionmakers of enough effective bases of power to put their decisions into effect. In view of the shortness of the time, we should perhaps, however, turn immediately to the law of the sea.

The law of the sea is, as we have emphasized, an important part of the public order that is protected by the larger global processes of constitutive decision. If we had a sharp focus on all the ocean areas of the world as in Admiral Hearn's famous map illustrating all the various zones, we would begin with the internal waters, the harbors and inland waters, and find that the authority of the nation-state is fully comparable to what it is on the land-masses, with relatively arbitrary control over access. Even here, however, we could observe that there is a shared competence, a shared authority — with the state of the flag being accorded a certain competence over events on board these vessels, and with government ships, military vessels in particular, being largely immune from coastal assertion. Moving outward to the territorial sea, we note that the competence of the coastal state is slightly less: It no longer has any right to preclude access; it may assert its authority to

make and apply law to ships within this area, to events occurring within the area, but in practice it concedes a still larger competence to the flag ship. When we move out further into contiguous zones, we find that the coastal state may assert its authority to make and apply laws to the ships of other states, but here it has to show good cause, it has to have good reasons in the protection of its internal community processes. Within the territorial sea, the application by the coastal state of its law, if it demands such, is relatively automatic. Beyond the territorial sea, out in the high seas, we're supposed to have a domain of shared competence. This competence is established and maintained by the application of a few very simple rules, and we need these before us if we're to understand what comes after.

The first rule is that every state is entitled to the enjoyment of this great sharable resource. It can send its ships out without interference by other states. It can make and apply law to its own ships for interactions within the shared domain. The negative counterpart rules are that no state may preclude another state from sending its ships out, and that no state may make and apply law to the ships of other states except for violations of the law of the claimant state and for violations of international law. This whole structure, for protecting relatively unorganized but shared enjoyment, is held together by another linchpin principle, that of the nationality of ships: No state may question the competence of another state to confer its nationality upon a ship. This is, of course, especially true with respect to military vessels.

As emphasized above, this structure of decision, this great inheritance of the law at sea in the time of peace, continues to be maintained because experience has demonstrated to the effective

elites of the world that it is by this kind of shared use that they can best maximize the interests and values of all peoples. Only the willfully blind could fail to see that the production and distribution of goods and services and the movements of people about the world have been tremendously facilitated by the cooperative pooling of capital and the specialization in skills that the historic freedom in the enjoyment of a great sharable resource has afforded.

Thus far we have been speaking of the law of the sea in time of peace. In time of war, of course, the rules and practices are very different. As I indicated when I accepted this assignment, I thought that I would be talking to you about the use of force in time of war. The assignment actually made to me is, however, in what is commonly called the "gray area," beginning in time of peace and coming on to time of war. It is commonly called "gray area" because peace and war are highly ambiguous terms. The word "war" in particular has no stable, factual reference. It's rather a legalistic term to describe certain consequences of intense coercion between states on certain types of problems. If we talked in terms of facts, we would talk in terms of varying expectations of violence and of varying applications of the military instrument with differing degrees of intensity in coercion from the most modest to the roughest. It is only the very rough extremes of coercion, and not in all instances of such rough extremes, that we get this word "war" applied.

Our assignment today is, hence, to consider when it is lawful for a state to employ force on the oceans in contexts short of the state of extreme violence to which the word "war" may be appended and in contexts of extreme violence when the word "war," for various reasons, is not appended. It has already

been suggested that there are four major types of circumstances or problems under which this question of the application of force may become an issue. Let's examine each of these. Because of the shortness of time I will pass over rather quickly the problems that are relatively noncontroversial.

The first set of problems is the easiest. These relate simply to the military use or enjoyment of the oceans. With respect to any of the great sharable resources — the oceans, the airspace, outer space — there are certain basic, recurrent types of claims. There are claims to access for use and enjoyment; there are claims to jurisdiction, to make and apply law with respect to activities in use and enjoyment; and there are claims to the appropriation of particular resources found in the domain of shared enjoyment. Here we are concerned only with the first two of these recurrent types of claims. And for the moment only with access for use and enjoyment.

You will remember that the basic policy of the law of the sea is to promote the utmost use and enjoyment of the oceans for the benefit of all peoples. Now think for a moment. This use couldn't possibly go on securely, with protection of the stable expectations necessary to initiative and development, without the use of the military instrument. Mankind has never yet been able to organize cooperative activity on a grand scale without some threat of force, some potentiality of force, in the background. The seas are no different from the landmasses in this respect. International law is no different from national law. Hence, it's not surprising that the military use of the oceans, the ordinary use of the oceans for military purposes, is one that's very highly honored in international law.

This commonsense policy is carried still further. Even the preparation for military use is highly honored. For centuries fleets have been given a special right of way. States have been permitted to set aside areas of the ocean for military maneuvers and exercises. Vast areas of the ocean are sometimes roped off for this purpose. There are no great difficulties about this. I'm sure that you're familiar with those procedures by which these uses are established and protected, and force is authorized and may be used to protect these uses. Former Assistant Attorney General Norbert Schlei, when he was one of your correspondent students, and I wrote an article on this in the *Yale Law Journal*. It's in the collection of essays we call "Studies in World Public Order" and collects the authorities on this in very great detail.

This article with Mr. Schlei, as a whole, is addressed to our next assigned problem, which cuts a little deeper. This problem involves setting aside of areas of the oceans for weapons test purposes. The main issues were raised very acutely by our Bikini and Eniwetok tests. In this instance we set aside a large area of the ocean for nuclear tests. There was a tremendous cry from many quarters that this was unlawful. What Mr. Schlei and I set out to do in our article was to establish the lawfulness of these tests, and we proceeded in this way. We pointed out that the basic rules, the basic policies of the law of the sea, like those employed on the landmasses in any national community, travel in pairs of complementary opposites. This must always be true in a pluralistic society in which there are many claimants and many interests and a democratic preference for sharing and accommodation. Thus, there is one set of principles which protects the inclusive interests of people — the shared enjoyment in transportation, communi-

cation, cable laying, flying, and so forth comprising the "freedom" of the seas. Contraposed, there is another set of principles, mentioned earlier, that protects the exclusive interests of all people — their interests in their internal waters, the territorial sea, the contiguous zone, and the continental shelf. These exclusive interests are, of course, equally the common interests of all people. Though no two states have precisely the same internal waters, or precisely the same territorial sea or contiguous zone requirements, all states need to protect the activities on their landmasses from threats and dangers from the oceans. Hence, it is not surprising that we have a set of principles which honors and protects these exclusive interests which are entirely complementary to the principles designed to protect inclusive interests. The function of a decisionmaker in any particular instance in which these interests have come into conflict can only be to accommodate and reconcile them in a way best to promote the long-term, common interests of the whole of mankind. We concluded, therefore, that the people who asserted that freedom of the seas was an absolute were simply deluding themselves. There are no absolutes in international law or any other law, at least in a democratic free society. In this instance the rational legal task was patiently to identify what exclusive interests the United States was trying to protect and what inclusive interests were being damaged by its activity. We found, of course, that practically no inclusive interests were being injured in the slightest by the United States tests. Ships would have to go 200 miles out of the way to get into the area. It was well off any of the beaten tracks for both navigation and flying. It would interfere with only an infinitesimal fraction of Japanese fishing. The exclusive interest of

the United States, on the other hand, was to prepare weapons that could be used for the defense, not only of the United States but also of its allies — of what we chose to call the whole free world. From these perspectives we urged that our use of the ocean was clearly lawful within the compass of the inherited principles of international law.

I now think that we made an over-kill. In putting our activities under the label of anticipatory self-defense, we made perhaps a stronger argument than we needed to make. As my studies deepened I discovered that the concept of self-defense is not necessary for this purpose. The concept of self-defense is more appropriately used with respect to an enemy who is immediate and specific, directly threatening with military force. In the Pacific tests the activity of the United States was not directed against any particular enemy. There was no threat to use the military instrument against any other particular state. It was an effort simply to make an exclusive use of the ocean area for a particular purpose not explicitly forbidden by any inherited principle.

Since that time, of course, the Russians have made a comparable use of the oceans. The French have also made their tests. It gave me great pleasure to see that one might be able to argue that the French tests were unlawful. If one balances all the various interests carefully, the way Mr. Schlei and I recommended, it might be possible to give General de Gaulle a pretty hard time on the reasonableness of his particular activities.

Hence, I think we can conclude, with respect to our first major type of problem, that the states of the world are accorded a very broad authority to enjoy and use the oceans with the military instrument. It is interesting to contrast attitudes toward the use of the

oceans with some attitudes toward the use of outer space. As a nonmilitary man I've wondered a little about this. People seem to get tremendously excited about the use of outer space for military purposes. You will remember that the Indian Government and a number of others tried to define the "peaceful" uses of outer space in a way to exclude the use of the military instrument. For a layman it seems just a little funny that people can get so excited about potential espionage and nuclear threats from space vehicles and yet pay very little attention to possible comparable threats from oceangoing vessels. Maybe some of you can explain the factors that make a difference.

Let's now turn to the second principal problem — the maintenance of order upon the oceans, the claims to jurisdiction. Had we spelled out the details of the world constitutive process mentioned earlier, one of its principal characteristics would have been observed to be its decentralization — the absence of centralized legislative, judicial, executive, and enforcement agencies. International law has depended largely upon the unorganized, unilateral making and enforcement of law by nation-states. The principal authorized agents of international law are the officials of nation-states. If, thus, order is to be maintained in the beneficent, but highly complex, use of the oceans, then it is the officials of nation-states who must maintain it.

As suggested earlier, no community in modern times has been able to maintain order without having in the background either the threat, or use, of force. It is not surprising, therefore, that the officials of nation-states have been authorized to assert force upon the oceans in the maintenance of order upon two different grounds: First for the protection of their exclusive inter-

ests, and secondly for the protection of their inclusive interests.

In our discussion above we saw that states are authorized by international law to make law for their internal waters — to regulate the use of these waters, to decide who can come in, who has to keep out, what they can do while they're in there. For protecting the community processes on their land-masses, states are similarly authorized to regulate the use of their territorial sea, to control passage and interactions with their shores. Though there is a right of innocent passage, it has to be innocent and is subject to regulation. When necessary and reasonable, states may protect themselves still further by extending contiguous zones out beyond the territorial sea. During World War II we had a contiguous zone for security that went out as far as 1,200 miles. It was not protested by anybody. Today we assert air identification zones that go out as far as 600 miles or beyond. In addition, there are the recent developments with respect to the continental shelf; the coastal state is entitled to the mineral resources of the shelf and certain fisheries.

The point to which I have been building up is this: The authority to prescribe law, to make law, if it is to have any meaning must carry with it the authority to apply the law, decide what it is in particular instances, and to enforce it. It would be utterly futile, of completely illusory consequence, if the coastal state were to be authorized to make law for all these areas and problems but be denied the competence to apply the law it makes. I say this with some vigor, because I think you have been misled by some of the writings to which you've been exposed. There is a suggestion, which stemmed originally from some unhistorical discussion in the International Law Commission, that states cannot employ force

to protect their contiguous zones. This suggestion was carried over into one of your Blue Books, apparently written by one of my former students, Professor Carl Franklin of the University of Southern California, that states are not authorized to use force to protect weapons test areas. I submit to you that such limitation is contrary to the practice of several centuries with respect to all kinds of areas of exclusive interest and makes no sense by any rational standard of clarification of reciprocal common interests. I won't go into this in detail, but Mr. Burke and I have collected the authorities on this for every type of area. It is our conclusion that you can be reasonably sure that states are authorized by international law to employ force when it is necessary to apply any law which they are authorized to make for the protection of their various exclusive interests.

A comparable competence is, similarly, established for the protection of the inclusive interests. You will remember that we found above that upon the high seas each state is authorized to apply law to its own ships for all purposes and to the ships of other states for violations of international law. There are a number of historic examples of this competence.

The simplest example derives from the policy of guaranteeing the nationality of ships — of making certain that every ship on the ocean is responsible to some state and that such state is responsible for the conduct of that ship. As you all know, you do have limited rights of inquiry to ascertain the nationality of a ship, to see that it has a nationality. If it turns out that a ship has no nationality, it gets very little protection under international law today.

This plight of the ship without nationality is illustrated in the famous case, discussed in your materials, of the

Naim Molvan [1948 A.C. 351]. The British came upon the ship some miles off the coast of Palestine. It ran up several flags and ran them all down before the British warship could get to it, but when it was boarded, it was discovered that it had no nationality and was running refugees. It was held perfectly lawful for the British to treat the ship quite arbitrarily; it just got no protection from anybody.

This policy is carried out much more sharply with respect to pirates. The paramount policy in maintaining the public order of the oceans is that every ship must be responsible to some state which is in turn responsible for it. An implementing policy is that if a ship has no nationality it may be treated, as the *Naim Molvan* was treated, like a pirate ship which gets no protection. Anybody who catches pirates, people who are committing private depredation for private purposes upon the oceans, may apply force to them. There are conventions which extend the same policy to slave trading and a few other relatively minor activities.

The principal point I wish to make, for the moment, is that, by and large, the maintenance of order upon the oceans is a function of the application of force by the ships of nation-states. Just as we don't have an international police force, we have no organized, comprehensive, collective enforcement agency for international law. All we have is the unorganized, unilateral competence and responsibility of individual states. Anybody who undercuts this, who says that it doesn't exist for any of these important purposes, is really striking at the stability of the order that can be maintained upon the oceans. I don't think that this kind of a strike can succeed.

We come next to the third major type of problem, that of self-help in the

protection of national interests. To the facts that we have previously been considering we now add the new fact that some other state has already acted unlawfully toward the claimant state. Both self-help and its derivative, self-defense, are dependent for their legal characterization upon the prior fact that somebody else has acted unlawfully. With respect to these problems there have been, in recent years, great doctrinal developments and much contention among the doctors. Prior to the United Nations Charter, as you know, even major violence — war, aggression, breach of the peace — was not unlawful. By curious paradox, there grew up certain rules purporting to limit minor violence — minor coercion, reprisals, retaliations, retortions, et cetera. There are dozens of equivalent synonyms here. Self-help is perhaps the generic term that is more useful than any of the technical synonyms. For self-help, so generalized, the doctrine developed that it had to be necessary and proportional.

The limits, when spelled out, were cast essentially in the same terms that we will observe for self-defense. Before 1915 these limits didn't make much difference, because if one irritated the attacker enough, he'd simply declare war, and all limits would be off. Since states could easily transmute a minor coercion into a major coercion and escape the prescribed limits, the limits were relatively inconsequential.

In 1945, however, came the United Nations Charter with a series of new limitations upon the use of major coercion. Several clauses of the Charter are relevant. The principal clauses are articles 2(4) and 51. Article 2(4) reads this way: "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 pur-

poses of the United Nations." This is the principal prohibition.

The principal authorization of force is in article 51 which reads this way: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations"

It has been argued, in the light of these and other articles, that only two kinds of uses of force, transnational force, are now authorized. One is the self-defense that is authorized under article 51, the other is the collective police action of the organization which is authorized in chapter VII of the Charter. I'm ashamed to confess that at one time I lent my support to the suggestion that article 2(4) and the related articles did preclude the use of self-help less than self-defense. On reflection, I think that this was a very grave mistake, that article 2(4) and article 51 must be interpreted differently. There is some evidence that it was the intent of the framers of the Charter to achieve this prohibition. What are called the *travaux préparatoires* do contain some suggestion that self-defense and collective police action were intended to be exclusive, but the *travaux préparatoires* are not the only source of criteria for the interpretation of the Charter.

There are other principles of interpretation. One principle, perhaps the most honored among states, is that of interpretation in accordance with the major purposes of the parties, sometimes called the principle of effectiveness. Another principle is that of interpretation in accordance with subsequent conduct of the parties. It is not the preliminary negotiations, and not the words of the Charter only that create contemporary expectations about the prescriptions of the Charter, but the words of the Charter, the words

that preceded it, and the whole subsequent flow of words and interpretation by conduct which are relevant to the interpretation of what the law is today.

From this perspective the first important fact is that the machinery for collective police action projected by the Charter has never been implemented. We don't have the police forces for the United Nations, the collective machinery that were expected to replace self-help. In other words, there has been a failure in certain of the major provisions for implementing the Charter.

If, in the light of this failure, we consider how we can now implement the principal purposes of minimizing coercion, of insuring that states do not profit by coercion and violence, I submit to you that it is simply to honor lawlessness to hold that the members of one state can, with impunity, attack the nationals -- individuals, ships, aircraft, or other assets -- of other states without any fear of response. In the absence of collective machinery to protect against attack and deprivation, I would suggest that the principle of major purposes requires an interpretation which would honor self-help against prior unlawfulness. The principle of subsequent conduct certainly confirms this. Many states of the world have used force in situations short of the requirements of self-defense to protect their national interests. I think it can be said also that the International Court of Justice has put its approval upon this practice. In the *Corfu Channel* case the Court did hold that it was unlawful for Great Britain to sweep the channel of mines, but it didn't put much of a penalty on Britain even for that. And it further held that it was perfectly lawful for Britain to assert its rights by force, to send its warships through the straits with the guns mounted and ready for action if necessary.

Hence, if I had the opportunity to

rewrite the book with Mr. Feliciano in which we mildly questioned the lawfulness of self-help less than self-defense, I think I would come out with a different conclusion, as many people have.

Such a conclusion would not mean that the use of force for self-help — to protect national interests, national ships, national individuals, and so forth against prior lawlessness — is without limits. Such use of force must be subject to limitations comparable to those that self-defense is subject to, with due allowance for the difference in context. It is subject to appropriate requirements of necessity and proportionality. One can find a great many historic examples for reading content into these requirements. One of the best recent expositions of this historic experience is by Professor and Mrs. A. J. Thomas of Southern Methodist University in their study on the Dominican crisis of 1965 for the Hammarskjöld Forum, published by the New York City Bar Association. This contains, I believe, the presentation that best reconciles the common interests of all mankind in the regulation of these matters of self-help.

For final discussion we turn to the difficult problem of self-defense. Self-defense, properly understood, is but the most dramatic example of self-help. It involves a demand to use the military instrument against an alleged attacker for the protection of territorial integrity and political independence. The test for lawfulness commonly applied is that the target state may employ the military instrument when it reasonably feels, as third states may ultimately appraise reasonableness, that it is faced with a threat to its territorial integrity or political independence so imminent that it must itself immediately resort to the unilateral use of the military instrument in order to protect itself. This test involves two emphases. First, the attacker must have the subjectivity to

attack the territorial integrity, the political independence, of the target. Secondly, it must engage in operations that are sufficiently consequential to put the target in reasonable apprehension of destruction.

Two of the cases upon which you have asked me to comment fall somewhere in the "gray area" between self-help, as indicated above, and self-defense, as now defined. Had we formulated for self-help the same kind of test that we have just formulated for self-defense, it would run something like this: If a state, an alleged target state, is subjected to a threat less intense than to its territorial integrity or political independence but to major exclusive interests — such as involving damage to its ships or other national assets — of such intensity that it reasonably thinks that it must employ the military instrument to protect such interests from destruction, it may do so as indicated. I believe this is the prescription which is achieving a contemporary customary consensus.

Before addressing ourselves to the Gulf of Tonkin incident, we might look quickly at Operation Market Time. The regulation projected here was, I gather, framed to meet the requirements of a contiguous zone. You will recall that the convention on contiguous zones which came out of the Geneva Conference in 1958 attempted to confine states to a contiguous zone of 12 miles only and to limit the purposes for which contiguous zones can be established only to the protection of immigration, customs, fiscal, and sanitary regulations. The Convention deliberately left out security. This again, I think, was hopeless confusion. Some participants in the Conference insisted that security should be left out because self-defense was enough to protect states: States didn't need contiguous zones for security. On the face of the matter, this is largely

nonsense. The requirement for establishing a contiguous zone for security, such as the one we had in World War II which went out 1,200 miles, has traditionally been only that the zone be reasonable. The requirements for self-defense are, as we have just seen, necessity and proportionality — much stricter requirements.

I do not believe that the states of the world can live with the contiguous zone provisions of the Geneva Convention. These provisions would repeal literally hundreds of statutes long regarded as of importance to national welfare, of the United States and of other states. Self-defense alone is not an adequate concept to serve the security needs of states in the contemporary world. Sooner or later we will wake up and get rid of these limiting restrictions on purpose and distance.

The Market Time provisions are the best demonstration of the unworkability of the Geneva Convention. Note first this fantastic limitation to 3 miles; then one can go out for a few more purposes to 12 miles. It is incredible to me that this operation could be effective if it stops at 12 miles. It would appear an utterly futile thing within such limits. Rather than trying to live within the sort of straitjacket exemplified in these regulations, it would have been openly to invoke the doctrine of self-defense for exercises anywhere on the ocean. The requirements of necessity and proportionality would appear easily met.

The Tonkin Gulf incident came in 1964, as I recall. As a layman I'm not as familiar with the fact here as you may be, but it is my understanding that two of our warships were attacked upon the high seas some 30 miles off the shores of North Vietnam by torpedo boats in fog or darkness and that we responded in two ways. First, we struck back at

the boats, the torpedo boats, and destroyed a number of them; secondly, we later bombarded certain parts of the North Vietnamese shore. All this was before we were as deeply involved in the hostilities as we now are. With respect to the immediate reaction to the torpedo boats, I don't think there can be the slightest doubt. This can be put under self-defense or even under self-help that we were discussing earlier. Here our assets, our bases of power are being attacked; hence, we can use such force as is necessary and proportional to protect them.

With respect to the bombardment of the shore, a question is raised comparable to that raised by the Israeli occupation of Syria: Whether in assertion of self-defense a state can go beyond the immediate repelling of the attack and prepare itself to prevent attacks in the future. I gather that our objective of bombarding the shore was simply to discourage future incidents of the same kind — to demonstrate our determination to be there, to assert our rights both to enjoy the oceans and to assist South Vietnam if we chose to. The important question is: Was the bombarding that we did reasonably proportional to these perfectly lawful purposes? Subsequent events would appear to have answered very definitely in the affirmative. At that time we did not know how deeply China was involved or how deeply Russia was involved. We didn't really know who the enemy was. Extreme measures could reasonably be said to be necessary to discourage whoever was engaging in these attacks. Since that time the North Vietnamese, of course, have openly attacked South Vietnam, and we have gone to the defense of South Vietnam. The mere fact that the attacks have continued and intensified gives us, I think, an appropriate verdict of both necessity and proportionality.

Let me say just one or two words about a clear self-defense type of situation, the Cuban quarantine. Remember that the test for lawfulness here is whether or not Russia had the subjectivities of attack and was engaging in operations which reasonably put us upon apprehension of danger to our territorial integrity and political independence. Fully to make such a case would require a careful contextual examination of all the facts: Who the parties were, what their objectives were, what the time and geographic features of the situation were, what bases of power the parties were bringing to bear, what strategies they were employing, the intensities in expectations of violence, and so forth. As I said, the threat came from Russia — a state fully as powerful as we. Russia was moving into an area traditionally one of our defense areas. The Monroe Doctrine had for decades asserted our special interest. Russia was moving with offensive weapons that would cut our reaction time down from 6 or 7 minutes to some 3 minutes. Her objectives were obviously expansive, not simply conservatory. This was an area in which she hadn't previously asserted a military presence of such magnitude. A disinterested observer could easily spell out the requirements for necessity

and proportionality. The response that we made was as limited as it could possibly have been and still have used the military instrument. The use of the military instrument upon the oceans is much less grievous than its use on the landmasses; it can be used upon the oceans with much less destruction of the bases of power of other states. Hence, many observers have had no difficulty in finding the Cuban quarantine lawful.

If time permitted I would apply the fundamental policies relating to self-defense and aggression to other instances such as in the Arab-Israeli conflict or Vietnam. I'm sure that you're deeply engaged in such study. Perhaps I should now simply reemphasize that the basic policies that control all four types of problems with which we have been concerned are the common interests of the people who hold effective power in the larger arena. All claims must be made with a promise of reciprocity and mutuality. From this perspective a very broad and comprehensive use of force for the unilateral maintenance of public order upon the oceans can be justified in the contemporary world — especially in the light of the failure of the United Nations adequately to centralize an effective collective peace force.