Comment

The Seizure and Recovery of the Mayaguez

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_The impact ought to be to make clear that there are limits beyond which the United States cannot be pushed_ . . . .

With this candid remark, Secretary of State Kissinger summarized the lesson of the Mayaguez incident. One cannot really disagree with this statement, but the import of the incident for international lawyers may lie elsewhere, beyond the confines of _realpolitik_.

This Comment addresses the international legal implications of the United States recovery of the Mayaguez and her crew after they had been captured by Cambodia in claimed Cambodian territorial waters and detained for questioning for some 53 hours. After providing a summary of the facts surrounding the seizure and recovery of the Mayaguez, the Comment analyzes the right of a coastal state to seize and search merchant vessels, and applies the conclusions developed to the factual context of the Mayaguez seizure. The Comment then shifts its focus from the scope of Cambodia's rights to the obligations of the United States to use peaceful means to settle international disputes. The final section considers the role of legal advisers in the Ford Administration's decisionmaking process and the "precedent" which may have been set by the conduct of the United States in the Mayaguez incident.

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1. Secretary of State Kissinger, as reported in the N.Y. Times, May 17, 1975, at 1, col. 8.
2. The crew were only interrogated for a few hours. They did not actually return to the Mayaguez for approximately 64 hours after the initial seizure; but there was some delay due to the decision of the captain to wait until dawn. The United States effort to recover the ship, however, began after the crew had been detained for about 53 hours.
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I. Factual Background

A. *The Seizure of the Mayaguez*

The merchant ship *Mayaguez* was seized some six-and-one-half miles off the Poulo Wai Islands,\(^3\) in an area claimed by Cambodia to be within its territorial waters, at 3:18 a.m. (Washington, D.C. time) on May 12, 1975.\(^4\) The United States Departments of State and Defense were informed of the seizure some two hours later (5:30 a.m.), but President Ford was not informed until more than four hours after the seizure (7:40 a.m.).\(^5\)

The Cambodian government later claimed that at least two or three ships operating as fishing vessels had been “entering our territorial waters daily” since the Khmer Rouge had “liberated Phnom Penh,” that these vessels had engaged in espionage activities, and that some had “secretly landed Thai and Cambodian nationals to contact [United States] espionage agents on the Cambodian mainland.”\(^6\) It further stated:

> Some ships carry dozens of kilograms of plastic bombs and several radio-communication sets with which they try to arm their agents to sabotage and destroy our factories, ports, and economic, strategic, and military positions. These persons have successively confessed to us that they are C.I.A. agents based in Thailand and that they entered Cambodia’s territorial waters through Thai waters.\(^7\)

For at least 10 days prior to the seizure of the *Mayaguez*, the Cambodians had fired on or captured 25 ships and fishing boats in the same area.\(^8\) On May 4, eight days prior to the seizure, the Cambodians challenged a South Korean vessel, and immediately thereafter “the South Korean Transportation Ministry put out a warning to ships in the area.”\(^9\)

Then, on May 7, five days before the seizure of the *Mayaguez*, the

3. The Poulo Wai Islands are small rocky islands about 60 miles off the Cambodian coast and 30 miles from the Cambodian island of Koh Tang. *See, e.g.*, N.Y. Times, May 14, 1975, at 18, col. 3; *id.*, May 15, 1975, at 1, col. 5.
4. *Id.*, May 16, 1975, at 14, col. 2. Cambodian time is 11 hours later than Washington, D.C. time. For convenience, Washington time will be used in subsequent discussion unless otherwise indicated.
5. *Id*.
7. *Id*.
9. Wash. Post, May 14, 1975, at A10, col. 5. At least one crewman had known that vessels were being seized in the area long before the *Mayaguez* approached those waters.
Cambodians seized a merchant ship flying a Panamanian flag and carrying a mixed crew of Thais, Americans, Filipinos, and Taiwanese.\textsuperscript{10} The crew members were questioned, and, after 36 hours of detention, the ship and crew were released. News of this seizure was relayed by United States government officials to marine insurance companies, but Secretary of State Kissinger later claimed that “the information did not reach high enough levels of government for an actual [government] warning to be issued.”\textsuperscript{11} By the time of the first National Security Council meeting following the seizure of the \textit{Mayaguez}, however, the President had been informed of the seizure of the Panamanian ship and the previous challenge of the South Korean vessel.\textsuperscript{12}

Amidst this rash of seizures, releases, and warnings, the \textit{Mayaguez} proceeded calmly toward the Gulf of Thailand. On May 12 the vessel was spotted heading toward claimed Cambodian waters. The Cambodians described the incident thus:

[The \textit{Mayaguez}] continued to intrude deeper into our waters, passing the Wai Islands eastward to a point four or five kilometers beyond the islands. Seeing that this ship intentionally violated our waters, our patrol then stopped it in order to examine and question it and report back to our higher authorities . . . .

. . . . [W]e have no intention of detaining it permanently . . . . We only wanted to know the reason for its coming and to warn it against violating our waters again. This is why our coast guard seized this ship. Their goal was to examine it, question it and make a report to higher authorities who would then report to the Royal Government . . . .

. . . . [W]e will release this ship, but we will not allow the U.S. imperialists to violate our territorial waters, conduct espionage in our territorial waters, provoke incidents in our territorial waters or force us to release their ships whenever they want, by applying threats.\textsuperscript{14}

\begin{footnotesize}
\textsuperscript{10} See Text of Cambodian Communique, \textit{supra} note 6; \textit{N.Y. Times}, May 13, 1975, at 1, col. 8.
\textsuperscript{11} Houston Post, May 17, 1975, at 8, col. 1.
\textsuperscript{12} \textit{Id.}
\textsuperscript{13} \textit{Id.}
\textsuperscript{14} \textit{Id.}
\end{footnotesize}

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These stated objectives of the Cambodian seizure were confirmed by the captain of the *Mayaguez*, Charles Miller, during an interview:

"The first man to speak English shook our hands and welcomed us to Cambodia. There was nothing violent. They took us all ashore, explained our situation, and at this point started to negotiate.

"He wanted to know whether we were CIA or FBI, how heavily armed our ship was, how much military cargo—arms, ammunition, bombs—we carried.

"... I insisted ... that we had no military cargo whatsoever....

"Finally this man was convinced....

"After several hours conversation he asked us what we'd like to eat....

"... [After dinner] he got on the American-made field pack walkie talkie and talked to the first commander of military forces stationed in Kompong Som.

"... After an hour or so we got word back from his first commander that he would talk to the supreme commander in Phnom Penh and that we would probably be returned to our ship the following morning at 0600."

Meanwhile, President Ford was aware of the following message from the ship, received in Indonesia: "Have been fired upon and boarded by Cambodian armed forces. Ship being towed to unknown Cambodian port."

Some United States officials thought at the time that the Cambodians "were simply kicking sand in the American faces. Others suggested that the Cambodians were reinforcing their claim to the Wai Islands...."

At noon on May 12, President Ford had a 45-minute meeting with the National Security Council to discuss the seizure of the *Mayaguez*. Later that afternoon Press Secretary Nessen issued the following statement:

We have been informed that a Cambodian naval vessel has seized an American merchant ship on the high seas and forced it to the port of Kompong Som. The President has met with the National

15. Houston Post, May 18, 1975, at 1A, col. 1. This interrogation took place on May 13, some 30-36 hours after the seizure.
Security Council. He considers the seizure an act of piracy. He has instructed the State Department to demand the immediate release of the ship. Failure to do so would have the most serious consequences.\textsuperscript{18}

At the same time Nessen also admitted that the United States had known about the seizure of the Panamanian vessel on May 7, and "State Department lawyers" told the news media that a South Korean freighter had been challenged the week before in the same area.\textsuperscript{19} In addition, the United States was aware that Cambodia had claimed a 12-mile territorial sea limit since 1969, when Prince Sihanouk was first in power.\textsuperscript{20} In fact, "State Department lawyers" told the media that "the term [piracy] was not legally correct. . . . [U]nder international law, the term 'piracy' was reserved for private vessels not flying a national flag."\textsuperscript{21} Indeed, some "department lawyers acknowledged that the seizure might be open to controversy because of the proximity of the ship to the small island . . . ."\textsuperscript{22} It was the last time government lawyers openly admitted that President Ford's decision could be questioned under international law.

B. \textit{Diplomatic Efforts (May 12 and May 14) and the First Attack (May 13)}

1. \textit{May 12}

Diplomatic effort to gain release of the \textit{Mayaguez} began with Press Secretary Nessen's announcement of President Ford's demand for the "immediate release of the ship" and his warning that "most serious consequences" could follow if the demand went unheeded.\textsuperscript{23} Later that day (May 12), Ambassador Huang Chen, head of the Chinese liaison office in Washington, went to the office of Deputy Secretary of State Robert Ingersoll, at Ingersoll's request. There he was given a diplomatic note conveying a 24-hour ultimatum from the United States for communication to the Cambodians.\textsuperscript{24} A similar message was...
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delivered in Peking by the American delegation there. Apparently, however, no reply to either of the notes was ever received. No further diplomatic messages are known to have been transmitted to Cambodia before the use of force by the United States to stop the transport of the crew of the *Mayaguez* to the Cambodian mainland. Apparently some government officials believed that the Cambodians would not respond to any diplomatic initiative, while others thought that media releases would be at least as effective as diplomatic notes, since the United States and Cambodia did not have normal diplomatic relations. Media releases were used to convey some messages to the Cambodians.

2. *May 13—the First Attack*

During the first evening (local time), the crew had slept on the open decks of a Thai fishing boat just off Koh Tang Island, having been brought to Koh Tang and transferred to the fishing vessel. It was May 13 at 7:00 p.m. (dawn local time, May 14) when the crew awoke and the fishing boat proceeded from Tang to the mainland of Cambodia. The journey lasted about four hours and proved to be a harrowing experience for the crew. Fearing that it would be difficult to get the crew back once they reached the Cambodian mainland, the United States launched an air attack on the Cambodian naval vessels escorting the crew of the *Mayaguez* to the mainland. The Pentagon news release was cryptic:

*After giving warning, U.S. aircraft began efforts to block this movement [of the fishing boat carrying the crew of the *Mayaguez*]. Three Cambodian patrol craft were destroyed, about four others were damaged and immobilized. One boat succeeded in reaching Kompong Som.*

Far more descriptive was the recollection of this attack by the captain of the *Mayaguez*:

"They did everything that was possible without blowing us out of the water to try to get this boat to turn around and take us back to the ship.

"If we were strafed or bombed once, we were bombed a hun-

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28. *See, e.g., N.Y. Times*, May 15, 1975, at 1, col. 8 (“As you know, we [the United States] have seized the ship.”)
29. *Id.* All available evidence suggests that the U.S. knew that the crew was on the boat and that the boat had reached the mainland. *See* p. 780 & note 120 *infra.*
dred times by our jets. Ten foot forward of our bow light. Rockets and machine gun fire. When they saw that was not going to work, two jets overflew the boat from bow to stern approximately 70 feet above us and they tear gassed us.

"After a half hour passed and we were still going we were gassed a second time. I don't know whether it was tear gas or nausea gas but everybody on the ship vomited, skin was burning, a couple of men were struck by shrapnel.

"After we got in close to Kompong Som the jets left us alone and they put the recon plane on top of us again."

3. **May 14—14 hours after the First Attack**

In their first raid, United States aircraft sunk three Cambodian patrol boats, damaged and immobilized four other patrol boats, bombed and strafed the waters around Koh Tang Island and the Cambodian mainland, but failed to divert one vessel (known to be carrying "Caucasians") from reaching the Cambodian mainland, despite four hours of bombing and strafing runs near the ship and two gas attacks. Some 14 hours after the raid, on May 14, the United States turned for the first time to the existing United Nations machinery for handling international disputes. Two days after the seizure of the **Mayaguez**, Ambassador John Scali handed a letter to United Nations Secretary General Waldheim which asked him to help obtain the release of the crew and ship. The Secretary General responded by offering his good offices and appealed to the United States and Cambodia to "refrain from further acts of force in order to facilitate the process of peaceful settlement." The letter delivered by Ambassador Scali claimed that the Cambodian seizure was illegal and posed a threat to international peace. It also "reserved" the right to take "such measures as may be necessary to protect the lives of American citizens and property, including appropriate measures of self-defense under Article 51 of the United Nations Charter."

30. Houston Post, May 18, 1975, at 1, col. 1; see Newsweek, May 26, 1975, at 20-21; R. Rowan, supra note 9, at 140-47. With regard to injuries to the crew from the U.S. attack, see id. at 134-36.

31. N.Y. Times, May 18, 1975, at 1, col. 2.

32. Id., May 16, 1975, at 14, col. 3. It is interesting to note that this resort to the U.N. occurred two hours after the Administration announced the attack on the gunboats to the public.

33. Id., May 15, 1975, at 18, col. 3.

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Three hours after this contact with the Secretary General, the fourth National Security Council meeting on the Mayaguez incident began. As the meeting started, "all were convinced" that diplomatic effort was "getting nowhere." In addition, as the Secretary of State would later admit to reporters, the Ford Administration already had resolved not to engage in "humiliating" negotiations.

C. The Second Attack (May 14)

At 4:45 p.m. President Ford decided to send in the Marines. At 5:45 the order left the Pentagon. The President met with certain congressional leaders at 6:40. Independently of these events, the crew of the Mayaguez left the mainland to return to the ship (7:00 p.m. Washington time; 6:00 a.m. Cambodian time) and the Cambodians began to broadcast on local radio that the crew and ship were being released (7:07). At 7:20 the Marine assault force landed on Tang Island under heavy fire. Meanwhile, American planes bombed Ream airport on the Cambodian mainland near Sihanoukville and an unused oil refinery, also on the mainland.

This second attack, then, began just as the crew was to be released. The previous evening, the Cambodian interrogator had tried to get the captain of the Mayaguez and a few of the crew back to the ship to radio the news that they would be released the next morning (Cambodian time), but it was late (8:30 p.m. Cambodian time) and the captain had feared that if they left then they would have risked being killed by United States aircraft in an attack like the earlier attempt to stop their movement to the mainland. Instead, they had delayed departing for another 10½ hours, until just before the Marine assault began.

II. Coastal States’ Competence and The Right of Innocent Passage

The Mayaguez was seized about six-and-one-half miles off the Poulo Wai Islands. Since the seizure, much attention has been focused on whether the Mayaguez was in "international" or "Cambodian" waters. I believe the emphasis on territoriality in this simplistic sense to be misplaced. Because of the attention that the territoriality issue has received in the media, however, and because of the use and misuse

of the issue by the two governments involved, the discussion that follows is divided into two sections: the first analyzes whether the Mayaguez was in Cambodian waters, and the second analyzes the legality of Cambodia's actions, whether they took place in territorial waters or on the high sea.

A. The Breadth of the Cambodian Territorial Sea

One of the major points of contention between the United States and Cambodia concerns the propriety of the Cambodian claim to a 12-mile territorial sea. Since 1969, Cambodia has claimed a 12-mile territorial sea, but the United States still claims only a three-mile territorial limit for itself and apparently maintains that Cambodia, and every other state, is bound to follow the United States standard.

Nearly every state except the United States, however, claims at least a 12-mile belt, and the 1958 Convention on the Territorial Sea and the Contiguous Zone does not restrict the breadth of the territorial sea of any state to three miles. Indeed, there is consensus that if any restriction exists, it is merely that the breadth of a claimed territorial sea may not extend beyond 12 miles.

Apparently even the United States is ready to accept the inclusion of a 12-mile territorial sea in a new treaty on the law of the sea.

John R. Stevenson, Special Representative of President Ford for the Law of the Sea Conference, and Bernard H. Oxman, Assistant Legal

40. See N.Y. Times, May 16, 1975, at 15, col. 1 (text of President Ford's report to Congress); Wash. Post, May 15, 1975, at A1, col. 1 (quoting Press Secretary Nessen); cf. id., May 15, 1975, at A17, col. 1 (referring to the Pueblo incident in 1968); Harlow, Freedom of Navigation, in The Law of the Sea 188 (L. Alexander ed. 1967). It should be noted, however, that the U.S. considered the "closest point of approach" to the Cambodian coast, even during the attack on patrol boats, to be 12 miles. R. RowAN, supra note 9, at 151.
41. See II New Directions in the Law of the Sea, supra note 39, at 835-54.
42. [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as 1958 Convention]. The U.S. and Cambodia are both parties to this treaty.
Adviser for Oceans, Environment and Scientific Affairs, have written that during the recent Caracas session of the ongoing Law of the Sea Conference "[a]greement on a 12-mile territorial sea [was] so widespread that there were virtually no references to any other limit in the public debate . . ." Furthermore, given the fact that the United States already claims a 12-mile fishing zone and frequently enforces that claim by seizing, searching, and arresting ships within those waters—even as the Mayaguez incident was being concluded—the United States position that Cambodia must not seize and search vessels more than three miles from its shores would hardly seem credible or consistent. The position is weakened still further because Cambodia relied, in claiming a 12-mile limit, upon asserted vital national security interests, interests which generally are of considerably greater import than the fishing interest used by the United States to justify seizure of foreign vessels. As recognized by Professors McDougal and Burke:

The exclusive interest of particular states in the territorial sea arises principally from the fact that this area, like internal waters, affords an important means of access to coastal land masses. In the recent past this factor of facilitating access to the state has had a very considerable weight for the coastal state, since the oceans have served as a most convenient, and sometimes necessary, highway over which attacks and threats of attack could be launched by rival states. . . . Threats . . . involving possible penetration into the marginal belt, are still frequently perceived by coastal states . . .

Cambodia could lawfully claim a 12-mile territorial sea, but whether that claim extends to a territorial sea belt around the Poulo Wai Islands is a more difficult question. A coastal state can measure a territorial sea belt around each of its islands, of course, so long as the

46. *Id.* at 13.
47. See, e.g., *Houston Post*, May 19, 1975, at 7, col. 3; *id.*, May 20, 1975, at 7, col. 4 (reporting United States Coast Guard seizure of Polish fishing vessel *Kalmar* for fishing within United States 12-mile fishing zone).
48. Permissible zones for fishing are not necessarily of the same width as permissible zones of territorial waters. In fact, claimed fishing zones sometimes extend further from land, although they are often the same. However, since the United States seizes and searches vessels in a 12-mile zone for fishing violations, it cannot rationally deny other states the right, under some circumstances, to seize and search vessels in a 12-mile zone for national security violations. The sovereign’s permitted control over a 12-mile wide fishing zone is far more limited in nature than permitted control over territorial waters. *See* M. McDougal & W. Burke, *The Public Order of the Ocean* 549 (1962); *cf.* 16 U.S.C. §§ 1091-1094 (1970) (establishing fisheries zone as the nine nautical miles contiguous to the territorial sea of the United States).
islands are above water at high tide. The issue unique to this case is whether Cambodia had a viable claim to sovereignty over the Poulo Wai Islands.

Sovereignty over the Poulo Wai Islands was claimed by three states: Cambodia, Vietnam and Thailand. Although it seems appropriate to consider “sovereignty” to have been “in dispute,” one can at least make two general conclusions for purposes of this Comment: (1) Cambodia had a viable claim to sovereignty over the islands, if not the best claim, and was enforcing that claim; and (2) the United States had no claim to sovereignty over the islands. These conclusions are significant because they refute the assertion made by President Ford that the Mayaguez was in international waters at the time of its seizure. Vietnam and Thailand, like Cambodia, both claim a 12-mile territorial sea; thus, regardless of which of the three states has the best claim to the islands, the waters six and one-half miles offshore from the islands could not be “international.”

51. See Time, May 26, 1975, at 9, 10; N.Y. Times, May 13, 1975, at 1, col. 8.
52. Cambodia not only claimed the islands, but is the closest state to them. Moreover, Koh Tang, the closest island to those in dispute, is Cambodian. Cambodia had geographical proximity, intention to control, and effective exercise of control—three of the primary factors for deciding issues of territorial sovereignty. See The Fisheries Case, (U.K. v. Norway), [1951] I.C.J. 116 (also discussing relevant economic and security interests as factors to be considered); J. Briery, The Law of Nations 162-71 (6th ed. 1963); I Oppenheim’s International Law 554-63 (H. Lauterpacht 8th ed. 1955) [hereinafter cited as I Oppenheim]; I. Brownlie, Principles of Public International Law 141-48 (2d ed. 1973). The new Cambodian regime had occupied the Wai Islands a week after taking over the capital of Cambodia on April 17. See R. Rowan, supra note 9, at 199. Nearly four weeks after the recovery of the Mayaguez, however, Vietnamese troops fought Cambodian troops on the Wai Islands and were victorious. N.Y. Times, June 14, 1975, at 1, col. 4.
54. For Thai and Vietnamese assertions of a 12-mile territorial sea, see II New Directions in the Law of the Sea, supra note 39, at 839.

The most significant fact when analyzing the nationality of the islands is that Cambodia exercised control over the islands at the same time that it made a claim of ownership. Further, nonrecognition of title to territory by other states is seldom relevant. H. Bruns, The Law of Nations 230-32 (2d ed. 1992). In this case, there were three claims to ownership and an exercise of control by one state coupled with its claim of ownership (Cambodia). These facts are not only sufficient to refute “international” status of the territory but are also sufficient to establish Cambodia’s territorial sovereignty. See note 52 supra: The Minquiers & Ecrehos Case (France v. U.K.), [1953] I.C.J. 47; Johnson, The Minquiers and Ecrehos Case, 3 Int’l & Comp. L.Q. 189, 214-15 (1954). J. Briery, supra note 52, at 164, adds that “a relatively slight exercise of authority will suffice when no state can show a superior claim.”
B. *The Seizure of the Mayaguez and
Established International Law*

Whether the seizure occurred in territorial waters might seem
determinative to the layman, but is not to the international lawyer. As
Professors McDougal and Burke recognize, the important consideration
is whether the exclusive interests of a coastal state in exercising limited
power in an area reasonably outweigh the inclusive interests of the
world community in free access to that area, regardless of actual “sov-
ereignty” or “ownership.”55 In other words, the claim by Cambodia
to exercise control over access to and transit through the area sur-
rounding the Wai Islands must be weighed against the claim of other
states, including the United States, to free access to the area for in-
ocent passage of merchant vessels. The major factors relevant to a
realistic analysis of this conflict “include the consequentiality and
range of the interests sought to be protected by the coastal state, the
scope of authority claimed, the importance of the area affected for
inclusive use, the intensity of the impact upon coastal interests, and
the alternative sanctions available for coastal protection.”56 In addi-
tion, we must consider the range of interests sought to be protected by
the United States and alternatives available for their protection.

1. *Legal Norms*

The most relevant prescriptive tools for analyzing the scope of Cam-
bodia’s claimed exclusive interest are articles 14 through 16 of the
1958 Convention on the Territorial Sea and the Contiguous Zone.
These articles set out the complementary rights, on the one hand,
of ships of all states to “enjoy the right of innocent passage through
the territorial sea”57 and, on the other, of each coastal state to “take
the necessary steps in its territorial sea to prevent passage which is
not innocent”58 or to “suspend temporarily in specified areas of its
territorial sea the innocent passage of foreign ships if such suspension

55. See M. McDougAL & W. Burke, supra note 48, at 9-12, 29-34, 184-87, 228-29. Indeed,
the recognition of “sovereignty” is merely a conclusion that at least some aspects of the
overall Cambodian security claims are permissible. Whether one phrases the issue as a
question of the width of the territorial sea or as the right of innocent passage, ultimately
one discovers that precisely the same policy issues are raised by each of these forms of
initial categorization. The question does not hinge upon “ownership,” but upon the
policy issues which underlie each of these forms of expressing the identical claim.
56. Id. at 229. Cf. id. at 1-2, 9-14, 29-34.
U.N.T.S. 205.
58. Id. art. 16(1); cf. id. art. 19 (claimed crimes of espionage, subversion, and illegal
intervention).
is essential for the protection of its security." Supplementing these prescriptions is the recognition in judicial and arbitral decisions that a coastal state may regulate passage which is not innocent.

We must focus, of course, on what constitutes "innocent" passage under the circumstances of the Mayaguez incident. The only guidance provided by the 1958 Convention seems to defer to coastal states' characterization of passage as innocent. Article 14(4) states that passage is innocent "so long as it is not prejudicial to the peace, good order or security of the coastal state." Coastal state "security" has been a long-recognized interest, and although the three criteria (peace, good order, security) enumerated in article 14(4) are broad and imprecise, "the continuing, general unwillingness to agree upon terms of high precision indicates a fundamental consensus that coastal states ought to have a measure of discretion in deciding what particular interests require protection against prejudicial effects of passage in the territorial sea."

Article 14(4) provides some guidance for determining when a coastal state may act to protect its interests. It does not help, however, in determining the permissible scope of a coastal state's action. That scope must depend on what Professors McDougal and Feliciano have labeled "reasonable necessity": "a requirement that responding coercion be limited in intensity and magnitude to what is reasonably

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59. Id. art. 16(3).
61. See M. McDougal & W. Burke, supra note 48, at 261; I Oppenheim, supra note 52, at 493, 495. See generally 71 U.S. Dep't State Bull. 409, 410 (1974) (statement by J.N. Moore that the right of transit is "not a right to engage in activities inimical to the security" of a coastal state); H.A. Smith, THE LAW AND CUSTOM OF THE SEA 47 (3d ed. 1959); J. Hackworth, DIGEST OF INTERNATIONAL LAW 546 (1940).
62. M. McDougal & W. Burke, supra note 48, at 262. See H. D. O'Connell, INTERNATIONAL LAW 639 (2d ed. 1970); H.A. Smith, supra note 61, at 47 ("[action] as [coastal state] may judge to be necessary").

A coastal state's competence to define the scope of its own power is not unlimited, however. First, the three criteria contained in article 14(4) impose at least some level of restraint. M. McDougal & W. Burke, supra at 262. Second, the coastal state determination is not final, but is merely a preliminary determination which is subject to community review. Id. at 263; cf. id. at 489-98 (on the limited competence of the coastal state to determine the width of its territorial sea); The Fisheries Case (U.K. v. Norway), [1951] I.C.J. 116; Gross, The Geneva Conference on the Law of the Sea and the Right of Innocent Passage Through the Gulf of Aqaba, 53 Am. J. Int'l L. 564, 578, 584-85 (1959). See also DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 271-72 (A. Rovine ed. 1973) (statement of J.N. Moore): The burden of proof is on the coastal state, and it is probably not an easy one to meet: Assuming demonstration of an interest of requisite importance [such as coastal state security], the coastal state, further, should also bear the burden of showing that passage had, or reasonably might have been expected to have, sufficient impact thereon to constitute a deprivation of considerable import. Contra, Viet-Nam Decree on Sea Surveillance, supra note 49, discussed at note 72 infra.

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necessary promptly to secure the permissible objectives of self-defense.”63 Previous decisions and authoritative writings demonstrate that if a coastal state reasonably fears a threat to peace, good order, or security, it has the right to “use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port . . . [a] suspected vessel.”64 In such a case, the search of suspected vessels might constitute precisely the sort of realistic and policy-serving response that would be permissible under article 51 of the United Nations Charter, which recognizes a right of states to engage in reasonably necessary and proportionate measures of self-defense in response to substantial threats to major state interests.65 This approach to the balancing of competing state and world community interests is also well supported in pre-Charter law. Indeed, in a letter by Secretary of State Fish to Spain during the Virginius incident (an 1873 Spanish seizure of a United States vessel carrying arms for the use of insurgents in Cuba), the Secretary wrote that if a vessel is “on its way to land troops and arms for aid in a civil war,” then “[i]n such a case self-defense authorizes search, and possibly seizure, whether such a vessel is found on the high seas or within the waters of the injured state. Of this the case of the Virginius, which is in some respects like that of the Caroline, is perhaps the most noticeable illus-


It is also “universally admitted” that a belligerent has a right, when acting reasonably, to search a neutral vessel even on the high seas. Church v. Hubbart, supra at 234. See also I Oppenheim, supra note 52, at 331; II Oppenheim’s International Law 799-804, 814-15, 823-79 (H. Lauterpacht 7th ed. 1952) [hereinafter cited as II Oppenheim]; H.A. Smith, supra note 61, at 106-12; Mallison, supra at 347-54; McDougal & Schlei, supra at 675-77, analyzing the Virginius case, discussed below.

65. See M. McDougal & F. Feliciano, supra note 63, at 217-44; cf. C. Colombos, supra note 49, at 230-51 (analysis of the propriety of the British action in the Caroline incident). However, the use of force in seizing and searching a ship, or bringing it into port for search, may be so minimal as to relate only indirectly to the overall import of article 51 of the Charter. See M. McDougal & W. Burke, supra note 48, at 265; cf. I Oppenheim, supra note 52, at 303; McDougal, supra note 64; Mallison, supra note 64, at 344-64; Wash. Post, May 20, 1972, at A14, col. 3 (remarks of J.N. Moore).
tration in recent times." Continuing, Secretary Fish stated that questionable ownership "would suggest delay and sequestration of the vessel until the facts could be established."

Some commentators on the 1958 Convention also assert that the carriage of weapons to a state helping guerrillas operating against the coastal state may be regulated since the passage is not "innocent." But whether or not such passage is "innocent" under the 1958 Convention, it seems clear under customary international law that ships reasonably suspected of carrying arms and ammunition to be used against the state can be searched, whether in territorial or international waters. Thus, under any reasonable interpretation of the word "innocent," it seems perfectly proper to regard the transport of weapons that are likely to be used against a coastal state as thwarting the security interests of that state to such an extent that the passage cannot be considered to be "innocent." In addition, commentators are nearly unanimous in asserting that spying activities are not entitled to protection under the doctrine of innocent passage.

Moreover, the common practice of several of Cambodia's neighbors, with significant American participation and approval, affirms a coastal state's right to visit and search vessels that are "not clearly engaged in innocent passage" or vessels thought to be carrying "suspect"

66. II J.B. Moore, A Digest of International Law 980, 981 (1906) (emphasis added). The report of the case adds: "A country the peace of which is threatened . . . may in an emergency search and capture such vessels and arrest the persons on board . . . ." Id. at 982. See also id. at 903, 983-84.
67. Id. at 982.
68. Compare authorities cited in I. Brownlie, supra note 52, at 205 n.5, with those cited in id. at 189 nn.3, 4. Cf. 4 M. Whiteman, supra note 71, at 382-83, 386; Christol & Davis, supra note 64, at 527; Gross, supra note 62, at 565 (statement of Egyptian representative that passage of war contraband through the national and territorial waters of Egypt to Israel is not a case of innocent passage).
70. This conclusion seems particularly apt when one remembers that contraband of war directly or ultimately destined for an "enemy" can be seized within or outside of the territorial sea. See note 64 supra and sources cited therein. Moreover, it seems reasonable that such activity will run afoul of norms prohibiting unlawful intervention of one state in the territory of another. For a statement of these norms, see, e.g., U.N. Charter arts. 1 & 2; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations, 25 U.N. GAOR Supp. 28, at 122, U.N. Doc. A/8028 (1970) [hereinafter cited as Declaration Concerning Friendly Relations]; Declaration on Inadmissibility of Intervention Into the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131, 20 U.N. GAOR, Annexes, Agenda Item No. 107, at 10-11, U.N. Doc. A/6014 (1965); Moore, The Control of Foreign Intervention in Internal Conflict, 9 Va. J. Int'l L. 205 (1969). See also Informal Single Negotiating Text, U.N. Doc. A/CONF.62/WP.9, pt. II, art. 16 (1975) (Text of Second Committee), reprinted in 14 Int'l Legal Mat. 682, 714 (Am. Soc'y of Int'l Law 1975) (disclosing that activity which violates article 2(4) of the U.N. Charter is also considered non-innocent).
71. See note 77 infra.
The Seizure and Recovery of the Mayaguez cargoes of "weapons, ammunition, electrical and communications equipment" within a 12-mile zone.2 This right was justified at the time as a response to "a constant and increasing infiltration by sea into the Republic of Vietnam of Viet Cong personnel, arms, ammunition and various war supplies."23—precisely the same sort of claim raised by Cambodia in this instance.74 In a similar manner, the United States enforced a maritime quarantine on Cuba from October 24 to November 20, 1962. During this period, "55 merchant ships passed through the quarantine after their cargoes had been determined to contain no prohibited material."75 So, too, at present the United States frequently stops, boards and searches vessels within 12 miles of its coasts, if not beyond.76

Adding to accepted international practice, scholarly inquiry into problems posed by the North Korean seizure of the United States Navy Ship Pueblo on January 23, 1968, has generated much analysis of the legal issues raised by the seizure of military and other vessels engaged in espionage activities off the coast of another state.77

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72. Viet-Nam Decree on Sea Surveillance, supra note 49. The text continues: "The Government of the Republic of Vietnam has requested and obtained the assistance of the Government of the U.S.A. for the full cooperation of the U.S. Navy with the Naval Forces of the Republic of Vietnam to enforce the new security and defense measures . . . ." The standard of proof is significant; the vessel must be "clearly engaged" in innocent passage. Thus, under this approach the burden of proof shifts to the vessel—a test of clear innocence versus a test of reasonable coastal state suspicion.

73. Id.

74. Text of Cambodian Communique, supra note 6.

75. See Mallison, supra note 64, at 392 n.229, quoting a United States Department of Defense News Release. The United States position during the Cuban missile crisis is summarized in id. at 387-92. The papers and cargo of merchant ships flying various flags were searched. Id. at 390-92. As in the United States-South Vietnam case, note 72 supra, the United States boarded and searched vessels on the high seas or in territorial waters that were suspected by U.S. authorities of having committed an impermissible act. See Boarding and Inspection by U.S. Naval Vessel of Soviet Trawler, 53 U.S. NAVAL WAR COLLE, INT'L LAW STUDIES 1959-1960, at 159 (1961), reprinted in N. LEECH, C. OLIVER & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 45-47 (1973).


77. See II OPPENHEIM, supra note 64, at 750-51; H.A. SMITH, supra note 61, at 47-48, 164-65; Butler, The Pueblo Crisis: Some Critical Reflections, 1969 Proc. Am. Soc'y INT'L LAW 7, 10; Panel: The Pueblo Seizure: Facts, Law, Policy, id. at 14 (remarks of G.H. Aldrich). See generally Harlow, supra note 40, at 193; Wright, Legal Aspects of the U-2 Incident, 54 AM. J. INT'L L. 836 (1960); S. LAY & H. TAUBENFELD, THE LAW RELATING TO ACTIVITIES OF MAN IN SPACE 39-51 (1970); U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 106-07 (1901); R. ELLIS, supra note 64, at 152, 155; Informal Single Negotiating Text, art. 16(2)(c), supra note 70 ("any act aimed at collecting information to the prejudice of the defense or security of the coastal State").
ing a panel session on the *Pueblo* seizure, Mr. William Butler stated that "if it is assumed that the *Pueblo* did enter North Korean territorial waters . . . seizure of the *Pueblo* in territorial waters would not appear to be an excessive coastal state reaction, considering that the vessel might have been attacked without warning." He concluded by suggesting that the "principles of self-defense and freedom of the seas acquired a new dimension as a result of the Cuban crisis. North Korea's situation is indeed different, yet the threat to its defense establishment perceived by North Korea in the operations of the *Pueblo* and similar vessels may have been as imminent as the Cuban threat was to us." Thus, it appears entirely consistent with both customary international law and the 1958 Geneva Convention on the Territorial Sea for a state to prohibit passage through its territorial sea by merchant vessels engaged in espionage activity, especially when the activity is directed against a relatively small, powerless coastal state. To give that prohibition some effect, it is necessary to

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78. Butler, *supra* note 77, at 10, 12-13. He also pointed out:

[C]oastal states cannot be blamed if they view offshore [high seas] electronic intelligence operations as a substantially new phenomenon in international life. A vessel such as the *Pueblo* not only carries away visual impressions of the external appearance of a country along the coast; it pierces the very interstices of the defense establishment by monitoring inland communications . . . . Under such circumstances, it is hardly unexpected for small coastal countries to question the appropriateness of granting absolute immunity to electronics intelligence vessels . . . .

. . . Given these considerations, small coastal states might very well resort to a territorially-based response by establishing broad "security" zones in which electronic intelligence activities by foreign vessels would be prohibited.

Security zones have been employed in the past to cope with technological change and have received legal sanction. They are now a constituent part of air law; they have been invoked to close areas of the high seas for missile or nuclear tests; the Soviet Union created such a zone in 1928 to prohibit wireless radio broadcasting from ships within ten miles of Soviet coasts. . . . After the *Pueblo* incident, Soviet intelligence vessels were seized by coastal authorities off Latin America on at least two separate occasions. . . .

. . . In two cases prior to the *Pueblo*, United States destroyers conducting electronics intelligence in the Gulf of Tonkin off North Viet-Nam and a U.S. intelligence vessel on the high seas off Israel were allegedly attacked without warning by the aggrieved coastal state.

*Id.* at 8-9.

In addition, see Evans, *Letter*, 69 AM. J. INT'L L. 859 (1975); McDiarmid, *Reply*, *id.* at 859-60, both stating that if a belligerent merchant vessel reports activities of an enemy ship to its navy it becomes part of the intelligence system of its armed forces and may be attacked without warning (in the context of war). Evans added: "[T]he radio officer was the most potent weapon the Allies had against submarines attacking ships sailing independently . . . . [T]he merchant vessel [was, then,] an indisputable and effective extension of the armed force of the state." H.A. SMITH, *supra* note 61, at 134-35, also points out that the transmission by radio on the high seas of military intelligence for the immediate use of an enemy was considered by all to be nonneutral activity and subject to appropriate response.

allow the search of vessels reasonably suspected of carrying espionage equipment.

While it is true that the 1958 Geneva Convention is limited by its terms to action undertaken within a coastal state's territorial waters, the above analysis is not really dependent upon a ship's location in territorial waters or on the high seas. The test of reasonableness outlined above must be applied in either case. Thus, under international law a coastal state may seize and search vessels on the high seas whenever coastal state interests reasonably outweigh world community interests in free transit, or, of course, when coastal state and world community interests are identical. The United States has not only recognized this right since the days of the *Virginius* incident, but has continuously exercised it as well. Two examples are the declared zones of seizure and search beyond the Vietnamese territorial sea during the Vietnam conflict and beyond the United States territorial sea during the Cuban missile crisis. Presumably, then, the only legitimate United States complaint about Cambodian claims to exercise similar powers in the interests of national security must be based on the reasonableness of the exercise of that power in particular circumstances. Customary international law would permit a small coastal state to seize vessels on the high seas that are reasonably suspected of espionage activities posing a substantial threat to coastal state security, or to seize vessels actually carrying war materiel. The threat by a spy ship, however, would have to be serious enough to outweigh the interest of the flag state in free use of the high seas for transit—a demonstration more easily made in those cases noted above involving actual or suspected threats to coastal state security posed by transfer of insurgents, conventional arms and ammunition, or nuclear missiles in the context of armed violence and serious international tension.

80. See Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804) (declaring that a coastal state's "power to secure itself from injury . . . may certainly be exercised beyond the limits of its territory" and that "the right of a belligerent to search a neutral vessel on the high seas for contraband of war . . . is universally admitted"); M. McDougal & W. Burke, supra note 48, at 81 n.177, 106-07, 623-24, 885-93; cf. Case of the *Virginius*, II J.B. Moore, supra note 66, at 895, 980-83; C. Hyde, International Law 804-07 (2d ed. 1945); McDougal & Schlei, supra note 64, at 648; Harvard Law School Research in International Law, Nationality, Responsibility of States, Territorial Waters, 23 Am. J. Int'l L., Apr. 1, 1929, at 333-35 (Spec. Supp.).

81. See p. 788 supra.

82. Cf. Informal Single Negotiating Text, supra note 70, art. 16(2)(c).

83. Cf. 19 U.S.C. §§ 1701-1711 (1970); 14 U.S.C. § 89 (1970). I would not accept on its face the claim by a coastal state to create a broad security zone of, for example, 100 miles, which would prohibit any passage of electronic intelligence vessels. See note 78 supra. One must consider such a claim in the context of the particular facts and policies at stake, instead of authorizing use of a broad security zone in all cases.
2. Application of Law to Fact

Cambodia had a lawful right to stop vessels in its territorial waters or on the high seas and to search them if it was reasonable in its fear that those vessels were supporting armed intervention or engaged in espionage. Whether Cambodia’s fear was reasonable is, of course, a factual question.

The Khmer Rouge took control of Cambodia by armed revolution only a few weeks before the seizure of the Mayaguez. It claimed to have experienced armed intervention by Thai and other vessels and personnel on a daily basis, including attempts at sabotage, espionage, and subversion.84 It also claimed that subversive forces had “accosted Cambodian islands and landed at these islands,” such as “Pring, Pres, Tang and other islands.”85 To the extent that such claims were true, the new regime might reasonably have expected that its security interests were seriously threatened by vessels operating off the mainland and its islands. One of the islands which had been the scene of previous commando raids was Tang Island. The Cambodians reasonably could have believed that the Mayaguez, some 30 miles away from Tang, was on a subversive mission, since it did not appear to be headed toward Thailand, but toward Tang.86

In view of the regime’s recent accession to power and the ongoing threats to its security, the seizure and search of suspected vessels seems a reasonable, necessary, and proportionate response to the threat of non-innocent passage by a merchant vessel. Seizure and search allowed the demonstration of innocence of passage, while at the same time interfering only minimally with international shipping. Search is but a temporary inconvenience and has long been recognized as a reasonable, lawful response to reasonably suspected security threats. As far as I am aware, the propriety of this type of response was never questioned from the days of the Virginius until President Ford described the Cambodian detention of the Mayaguez as an act of piracy. Indeed, as demonstrated by the American seizure of the Polish trawler Kalmar on May 18,87 four days after the United States attack on Tang Island, the United States does not question the propriety of seizure and search when its own security or economic interests are threatened, nor does it refer to these acts as “piracy.”

At the time the Mayaguez was seized, relations between Cambodia and the United States were, at best, not friendly. The United States

84. See p. 775 supra.
85. Text of Cambodian Communiqué, supra note 6.
87. See note 47 supra.
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was an ally of Thailand, which was engaged in periodic border clashes with Cambodia and was alleged by Cambodia to be engaging in espionage, sabotage, and subversive activities along Cambodian coasts. The United States also had supported the prior regime in Cambodia, recently defeated by the Khmer Rouge, and had supported the South Vietnamese intervention in the Cambodian civil war. Under the circumstances, it does not appear unreasonable for the Cambodians to have been suspicious of a large American vessel traveling through its claimed territorial waters close to troop locations and to islands whose ownership was disputed by Cambodia and a United States ally, Thailand, in a time of recognizable international tension.

That the *Mayaguez* was an aging container ship, rather than, for example, a Navy destroyer, does not alter the reasonableness of the Cambodians' fear. A container ship the size of the *Mayaguez* (over 10,400 tons) could carry many containers of arms and ammunition for use by armed enemies of the Cambodian regime and could pose a serious threat to the security of the new government.\(^8\) It would be necessary to stop the *Mayaguez* and search its containers in order to make sure that it did not carry such a cargo. Even Secretary of State Kissinger confessed that he could not be sure that the *Mayaguez* was not carrying weapons.\(^9\) The *Pueblo*, for example, was a much smaller vessel than the *Mayaguez*, and its outward appearance gave no hint of the highly sophisticated electronic equipment with which it was loaded. For many weeks the Cambodians had been seizing innocent-looking fishing boats in the general area, and on many of those boats had found armed insurgents, ammunition, and other military equipment.\(^9\) A vessel does not have to be part of a foreign navy, as in the case of the *Pueblo*, to be suspect. What is far more important than naval or merchant status is the context surrounding the seizure and search of the vessel.\(^9\) At the time of the Cuban missile crisis, for

\(^8\) The *Mayaguez* is actually larger than the United States Navy destroyer escort *Holt*. See photographs in *Newsweek*, May 26, 1975, at 18; N.Y. Times, May 13, 1975, at 1, col. 5.


\(^9\) See pp. 785-87 *supra*. It should be noted that earlier United States-Vietnamese practice, as outlined in note 72 *supra*, stands as precedent for the contention that a search does not have to be reasonable under the circumstances in order to be permissible; in its decree, Vietnam claimed the right to search any vessel that was not "clearly" innocent. For evidence of a parallel practice in United States domestic law, see United States v. Guzman, 482 F.2d 272 (9th Cir. 1972), cert. denied, 414 U.S. 911 (1974); United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969).

It should also be noted that although the news media were allowed to view the *Mayaguez* in Hong Kong on May 23, some eight days after the crew returned to the ship, a container of espionage equipment or arms and ammunition, for example, could have been transferred to U.S. naval vessels or dumped at sea long before the public.
example, the United States stopped merchant vessels of several nationalities.\(^9\)

On their face, the statements of the Cambodian regime and Captain Miller of the \textit{Mayaguez} suggest that the Cambodians made a reasonable and concerted effort to get the crew to an interrogator who could speak English and investigate the propriety of the captain's claims. The earlier incident in which Cambodia detained the Panamanian crew for 36 hours and then released them after interrogation—an incident of which the United States was aware—suggests that Cambodia would have made every effort to search and release the \textit{Mayaguez} promptly. As it happened, the heavy bombardment during the trip to the mainland, difficulties in locating an English-speaking interrogator, and the poor communications between Phnom Penh and Cambodian island commands made the investigation process more time-consuming.\(^9\)

Considering the alternative measures available for coastal state protection, Cambodia did not have any option more reasonable and proportionate to the threat. In balancing the interests of the flag state (the United States), there does not appear to have been \textit{any} need \textit{whatsoever} for the \textit{Mayaguez} to have proceeded to within six-and-one-half miles of the Poulo Wai Islands, especially in view of prior reported seizures.\(^9\) The \textit{Mayaguez} could have proceeded around the area; and

inspection in Hong Kong. \textit{See} \textit{N.Y. Times}, May 24, 1975, at 2, col. 1. In Hong Kong, only six of the 77 containers were opened because it would have taken some 10 hours to open all of them. Rowan states that there were 274 containers weighing 25 tons each. \textit{R. ROWAN, supra} note 9, at 17, 37, 56. The Cambodians were never able to fully inspect the containers (see, e.g., \textit{Newsweek}, May 26, 1975, at 20, col. 3), but to this day they claim that their armed forces knew that the \textit{Mayaguez} was being "operated for information-gathering." \textit{See}, e.g., \textit{N.Y. Times}, Sept. 9, 1975, at 13, col. 1.

With regard to the possibility of espionage equipment and secret cargo, it seems significant that the \textit{Mayaguez} left Saigon nine days before the capital fell on April 30, that the captain destroyed at least one secret code, that there was an $800 mini-computer on board in addition to radar and radio equipment, that most of the crew were former military, and that one crew member called for U.S. government help even though the radio operator had already sent out the SOS. \textit{See} \textit{R. ROWAN, supra} note 9, at 29, 35, 42, 45, 47, 50, 80.

92. \textit{See} p. 775 & note 75 \textit{supra}.


94. Alternative routes for the \textit{Mayaguez} would have been: (1) between the Poulo Wai Islands and Koh Tang Island, but within the corridor of sea that was not within 12 miles of either island (a corridor that was approximately six miles wide); and (2) around the whole island group and to the southeast of the Poulo Wai Islands, keeping at least 12 miles away from the Poulo Wai Islands.

One of the crew members of the \textit{Mayaguez} has since brought a class action suit, on behalf of himself and his fellow crewmen, against the captain and the owner of the \textit{Mayaguez}, on the theory that the owner (Sea-Land, Inc.) had been warned prior to the seizure of the ship of the hazards of sailing through the area where the seizure
passage between the Wai and Tang Islands, outside claimed territorial belts, would not be inconvenient for community shipping. Thus the United States interest in the speedy and safe passage of its merchant vessels on their way to Thailand did not conflict at all with Cambodia's interests in maintaining control of a territorial belt around the Wai Islands and guarding against suspected security threats, because several convenient alternative routes existed outside claimed Cambodian waters. The Mayaguez incident was the result of the unnecessary incursion by the Mayaguez into claimed Cambodian waters. No legitimate United States interest was served by this incursion, while vital Cambodian interests could have been threatened had the Mayaguez been on a surreptitious mission. Under such circumstances, it is difficult not to conclude that Cambodia acted reasonably—and hence lawfully—in its seizure and search of the Mayaguez.

As indicated above, this conclusion ought not to be affected by a decision as to whether or not the Mayaguez was seized in Cambodian territorial waters. The threat to Cambodian security posed by the Mayaguez was the same regardless of the "ownership" of the waters in question, and hence so was the reasonableness of the seizure.

III. The Peaceful Settlement of Disputes

Until this point, I have focused primarily on the lawfulness of Cambodia's seizure of the Mayaguez. Whether or not Cambodia's seizure of the Mayaguez was lawful, however, another issue must be analyzed: the lawfulness of the response of the United States.

A. Legal Norms

1. The United Nations Charter

When confronted with what it considered to be an illegal seizure of a United States merchant vessel, the Ford Administration was bound to respond in accordance with the basic commands of the United Nations Charter. Article 2(3) of the Charter states:

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

occurred. Id., May 25, 1975, at 5, col. 1. According to R. Rowan, supra note 9, at 30, at least one crewman (not the plaintiff in the class action) was aware of earlier Cambodian Navy attacks on Thai fishing vessels.

95. P. 791 supra.
Article 33(1) of the Charter adds:

The parties to any dispute . . . shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or other peaceful means of their choice.

No state may threaten to or use force for the settlement of a dispute. The 1970 United Nations Declaration of Principles of International Law Concerning Friendly Relations and Co-operation adds:

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means [see Charter, art. 33], to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

2. Prior Cases

Traditionally, states challenging the legality of the seizure and search of merchant vessels either in coastal waters or on the high seas have presented their challenges through peaceful settlement processes. In *Church v. Hubbart*, claim and counterclaim were raised before a national court. The case of the *Virginius* was settled by diplomatic process, the case of the *I'm Alone* by international arbitration, and the *Corfu Channel* case by the International Court.

The United States has been a party to many peaceful settlements of such disputes. Indeed, the United States has actively sought peaceful solutions to disputes involving conflicting claims for access to

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96. U.N. CHARTER art. 2, para. 4; cf. art. 1, paras. 1 & 2; Declaration Concerning Friendly Relations, supra note 70; Faust & Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 Am. J. Int'l L. 410 (1974). Cambodia and the United States are members of the United Nations. Even if Cambodia had not been a member, article 2, para. 4, requires members to refrain from impermissible threats or uses of force against "any state," i.e., any member state or nonmember state, recognized or not. See, e.g., M. McDougal & F. Feliciano, *supra* note 63, at 220-22; J.N. Moore, *Law and the Indo-China War* 359-66 (1972); Declaration Concerning Friendly Relations, *supra*. Further, since article 2, para. 6, of the U.N. Charter requires the U.N. to ensure that "states which are not members of the United Nations act in accordance with" the principles contained in article 2, it is arguable that a concomitant obligation that members follow the same principles with respect to nonmembers is implied. Cf. P. Jessup, *A Modern Law of Nations* 132-35, 168 (1949); I OPPENHEIM, *supra* note 52, at 407.

97. Declaration Concerning Friendly Relations, *supra* note 70.

98. 6 U.S. (2 Cranch) 187 (1804).

99. See notes 60, 95 *supra*; cf. notes 44, 52 *supra* (the 1951 and 1974 Fisheries cases); the *Naulilaa* case (Portugal v. Germany), *reported in* H. BRIGGS, *supra* note 54, at 951.
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ocean resources and conflicting claims concerning state security interests and freedom of the seas.\(^\text{100}\) Through the last five administrations, the United States has never used armed force to obtain the release of any of the numerous captured crews from fishing vessels seized off the coasts of Latin American states. Indeed, Congress and the State Department regularly have approved the expenditure of public funds for the payment of fines in such cases.\(^\text{101}\) And the United States, in turn, seizes vessels caught fishing within claimed fishing zones and imposes fines of up to several hundred thousand dollars for each incident.\(^\text{102}\)

3. *New United States Proposals*

At the 1974 Caracas session of the Law of the Sea Conference, the United States recognized the necessity for “compulsory third-party settlement of disputes,” which “is in the end perhaps the most significant justification for the accommodations we are all being asked to make.”\(^\text{103}\) Alternative *A* of the United States proposal presented at the Conference endorsed the settlement of disputes “through the peaceful means indicated in Article 33 of the Charter,” and offered several alternative proposals in a quest to arrive at useful mechanisms for peaceful settlement.\(^\text{104}\) Ambassador Stevenson, in an address before the Senate Committee on Foreign Relations, noted that the Conference demonstrated a strong international consensus in favor of the broad outlines of such a proposal.\(^\text{105}\)

B. *The United States Response to the Seizure of the Mayaguez*

When President Ford presented the Cambodian regime with a 24-hour ultimatum and a demand for the immediate release of the *Mayaguez*...
guéz and crew, he left no room for negotiation for a release of the crew and detention of the ship, for a reasonable questioning of the crew, or for a search of the ship. Nor did the ultimatum allow adequate time to communicate with a new regime, with which the United States did not have normal diplomatic relations. Such an ultimatum was not in reasonable conformity with articles 2(3) and 33(1) of the United Nations Charter; nor was it consistent with previous United States practice when American ships and crews were detained. Finally, the ultimatum was inconsistent with the United States’ subsequent detention of the Polish vessel Kalmar and her crew for over a week.106

The American ultimatum was not simply inconsistent with accepted standards of international law; it was, in reality, a hollow gesture without substance. Some seven hours before the ultimatum was returned unanswered, American planes had fired warning shots across the bow of the Mayaguez, then in Cambodian territorial waters off Tang Island, and President Ford had ordered “the United States armed forces to isolate the island and interdict any movement between the ship or the island and the mainland, and to prevent movement of the ship itself . . . .”107 These actions, in addition to the terms of the ultimatum itself, were hardly conducive to the peaceful settlement of a dispute about the propriety of the detention of the Mayaguez.108

The use by the United States of United Nations machinery after the destruction of six or more Cambodian patrol boats and after a four-hour bombing of Cambodian seas seems hardly more than an afterthought. Within four hours after notifying the Secretary General and receiving his appeal to “refrain from further acts of force in order to facilitate the process of peaceful settlement,”109 United States decisionmakers abandoned all hopes of peaceful settlement and decided to send in the Marines. It seems incredible that even at this late stage, peace was given only four hours!

Apparently, the Secretary General was not even informed of the decision (made at 4:45 p.m.) to abandon attempts to reach a peaceful settlement or of the order mobilizing the Marines which left the

106. See note 47 supra.
108. President Ford further stated: “We gave the Cambodians clear orders . . . . They disregarded them.” R. Rowan, supra note 9, at 178. It is also relevant that, as Rowan writes, “Kissinger was emphatic on the use of force,” id. at 141, and that options for earlier attacks were cancelled for operational reasons—not to ensure a peaceful settlement of the dispute. Id. at 143.
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Pentagon one hour later. The President did meet with certain congressional leaders to tell them of his plan to land the Marines on Tang Island, about two hours after the Pentagon's order had been sent, but still there was no effort to inform the Secretary General. It is apparent that the Secretary of State was correct—the United States would not engage in “humiliating” negotiations.

Cambodia was not the only victim of the premature decision by the Ford Administration to abandon any effort to reach a peaceful resolution of the dispute. The United States completely disregarded the request of Thailand, one of its last allies in Southeast Asia, to respect Thai sovereignty by refraining from the use of Thai air bases—action which led to a formal diplomatic protest by Thailand, domestic pressure on the Thai government, and the “summoning home” of the Thai Ambassador. Secretary Kissinger went even further and reprimanded Thailand for its refusal as an American ally, to “look with some sympathy at matters that concern the United States profoundly.”

Defending this threat to Thailand’s political stability and affront to Thai sovereignty, the Secretary said: “[T]he assumption was that we were in an emergency situation [and on occasions in the past] we have acted without consultation . . . in any event, [consulting or not consulting] would have caused problems either way.”

At one time during the turmoil, a New York Times editorial asked: “Did the White House . . . exhaust all orderly diplomatic alternatives before moving in to recover the Mayaguez and crew by force? At some early date, the Administration should make available to Con-

110. In fact, a letter from the Secretary General’s office, in response to a question about United States contact with the Secretary General, states:

[Except for the reference to Article 51 in Ambassador Scali’s letter . . . there had been no other indication in advance from the United States to the Secretary-General that force would be used in this situation.

Although the only public reference that the Secretary-General has made to this specific matter [was not specific], the Secretary-General has frequently stated his general conviction that the United Nations could often be more useful if a request was made at the beginning of a problem rather than at a later stage.

Letter to author from Georg Hennig, Deputy Executive Ass’t, Office of the Secretary General, July 11, 1975, at 2 (on file with the Yale Law Journal). R. Rowan, supra note 9, at 174, alleges that the President did not turn to the U.N. Secretary General earlier because the new Cambodian regime had never communicated with the Secretary General before. Surely, however, this previous taciturnity cannot excuse the United States from at least making a bona fide attempt to communicate with the Cambodians, given the gravity of the crisis.

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112. Wash. Post, May 17, 1975, at A1, col. 5. See note 108 supra. If the Cambodian seizure was illegal, of course, the United States had a perfect case to present to the world community.

113. N.Y. Times, May 17, 1975, at 1, col. 8; id., May 15, 1975, at 1, col. 5.

gress all the relevant diplomatic messages of the past days.” Congress has not yet seen all the messages, but their publication does not seem necessary in order to answer the newspaper’s question.

C. The Use of Force

Article 2(4) of the United Nations Charter prohibits “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.” In contrast, article 51 recognizes the inherent right of states to engage in necessary and proportionate measures of self-defense. Many writers recognize a right of self-help for sanctioning violations of international law when other remedies are ineffective, the action is otherwise necessary and proportionate, and intended targets are not otherwise immune.

In this case, the Ford Administration has argued that armed force was necessary “to protect the lives of American citizens and property, including appropriate measures of self-defense under Article 51 of the United Nations Charter.” If legal advisers had been contacted, however, it would have been known that the United States could not use force to protect the property of United States citizens. The only possible argument—that armed force was necessary to protect American lives and was a proportionate response to a claimed Cambodian violation of international law—does not appear to be any more plausible. There was never any showing that the lives of the crew were in danger, nor were there any reasonable grounds for believing that they were; after all, the crew of the Panamanian vessel seized by Cambodia a few days previously had been released unharmed. Since United States citizens were part of that Panamanian crew, it would not seem reasonable for any United States decisionmaker to assume that the crew of the Mayaguez would be physically harmed.

It is true that no word had been received from the crew at the time the United States sent in the Marines, but all evidence points to the fact that the Administration knew that the crew had reached

116. See M. McDougall & F. Feliciano, supra note 63, at 207-44.
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the Cambodian mainland. Such information could not have led by itself to a rational fear that the crew was to be beheaded, even though some of the crew members expected that to be their fate. The Administration did not fear execution, but lengthy detention and negotiations; there was general concern that the crew would stay in Cambodia as long as the crew of the Pueblo had stayed in North Korea.

In reality, the transfer of the crew to the mainland meant that armed force could have been used to recover the ship, but that only an invasion of the mainland could have provided any hope of saving the crew had their lives genuinely been in danger. As Secretary Kissinger was reported to have stated, and would later deny having said, the lives of the crew “must unfortunately be a secondary consideration.” Armed intervention by the United States surely presented a more objective threat to the safety of the crew than did the Khmer Rouge:

Senator Mike Mansfield asked why [the President] had ordered the bombing of the Kompong Som area, especially if some members of the crew were believed to be there . . . . The President conceded that some of the crew might have been onboard the boat that was permitted to reach the mainland. But he insisted that the order to bomb those specific mainland targets was necessary to prevent an attack . . . [by Cambodian soldiers on the United States forces engaged in combat at Koh Tang].

If armed intervention was not necessary to save the lives of the Mayaguez crew, it was also not a proportionate response to the Cambodian detention of the crew. A disproportionate response can be just as illegal as an unnecessary response. As Professors McDougal and Feliciano have written:

Coercion that is grossly in excess of what, in a particular context, may be reasonably required for conservation of values against a particular attack, or that is obviously irrelevant or unrelated to this purpose, itself constitutes an unlawful initiation of coercive or violent change.

120. See, e.g., N.Y. Times, May 16, 1975, at 15, col. 1 (President Ford’s letter to Congress); Time, May 26, 1975, at 13. Senator Goldwater declared in a speech in Atlanta on May 13 that some of the crew were “on shore” in Cambodia, and that he learned of this from the commander of the Pacific Fleet. Atlanta Const., May 14, 1975, at 1, col. 5.
121. See N.Y. Times, May 17, 1975, at 1, col. 8; id., May 16, 1975, at 14, col. 8; Wash. Post, May 17, 1975, at 1, col. 5. See also R. Rowan, supra note 9, at 88, 151. What the Administration did in fact, then, was to substitute military force for extended negotiations or, in the words of Secretary Kissinger, “humiliating” negotiations.
123. See R. Rowan, supra note 9, at 179.
Here, although communications between the President and the American task force were almost instantaneous, there were significant lapses in communication during the assault, which resulted in unnecessary armed attacks and disproportionate destruction and injury. For example, word was passed to Washington at 9:00 p.m. on the day of the assault that the Mayaguez was empty and at 10:45 that a small boat was approaching the destroyer Wilson with a white flag. Nevertheless, United States planes were not diverted from a 10:57 bombing run of Ream airport on the Cambodian mainland. At 11:14, the President knew for a certainty that the crew of the Mayaguez was safe. At 11:16, he ordered a halt to all offensive air strikes. Nonetheless, United States planes bombed an unused oil refinery on the mainland 35 minutes later, at 11:50 p.m. These attacks raise serious issues, not only of the United States failure in communications, but also of the purpose which could have been served by air strikes against Ream airport and an unused oil refinery, once the White House had received the Cambodian radio message that the crew was being released and word from United States forces in the area that a vessel was approaching with white flags waving.

The bombing of the Cambodian mainland and the landing of Marines on a Cambodian island were completely disproportionate responses to a dispute concerning the seizure of a merchant vessel and the detention of her crew. The most telling symbol of the degree to which the United States overreacted was the dropping of a 15,000-ton bomb—the largest conventional bomb in the United States arsenal—on a small Cambodian island.

The United States has an obligation to seek the peaceful settlement of disputes, including prompt and fair use of the United Nations machinery. The only two exceptions recognized by international law are, first, the necessary and proportionate use of self-help, when the United Nations machinery is inoperative, and, second, self-defense, as defined in article 51 of the United Nations Charter, when there is an actual or imminent attack. In this case, the response of the United States to the seizure of the Mayaguez was not only unnecessary to protect the lives of the Mayaguez crew; it actually endangered

125. See, e.g., N.Y. Times, May 16, 1975, at 1, col. 7.
126. Id. at 14, col. 2. This information was not passed on to the President until another 21 minutes had gone by. Id. Further, when the White House received the first word of the Cambodian radio broadcast message, Secretary Kissinger did not transmit the information to the President for some 14 minutes. Some of this delay may be attributable to the fact that Secretary Kissinger was in the shower when the message arrived and the message was badly garbled. See R. Rowan, supra note 9, at 201, 202, 204.
127. N.Y. Times, May 17, 1975, at 1, col. 7.
128. Id. at 11, col. 4. See also Newsweek, May 26, 1975, at 16-17, 19.
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them. In addition, the American response was wholly disproportionate to the Cambodian action—an action that was, moreover, lawful. I must therefore conclude that the American attacks on Tang Island and the Cambodian mainland represented a use of force in violation of article 2(4) of the Charter for which, in this case, no valid defense exists under either of the two above exceptions.129

IV. Implications for the Future

A. The Use of Legal Advisers

Professor Falk has written of the "dismissal of the relevance of international law" by the Ford Administration when it makes decisions on the use of force abroad or on intervention into the domestic affairs of other states.130 He has criticized Secretary Kissinger's fear of "legalistic" tendencies in the traditional foreign policy decisionmaking process, and President Ford's justification of United States actions taken to destabilize the Chilean government.131


131. Id. at 354-57. Professor Falk has suggested:

[P]art of the problem . . . is the failure of national leaders to appreciate the practical importance of international law advice. John Norton Moore has been the most eloquent advocate of easier and earlier access by professional international lawyers to policymakers. Professor Moore has written extensively about the "structural weakness in the national security process which impedes the consideration of international—and sometimes constitutional—legal components of policy." Moore argues that American policymakers have in the past "chosen a public justification blatantly in violation of international law . . . ."

Id. at 356 (citation omitted). Cf. LAW & CIVIL WAR IN THE MODERN WORLD xviii-xix, 548 (J.N. Moore ed. 1974). Beyond the practical or functional importance of international legal advice, however, is the President's constitutional obligation to execute the law faithfully. U.S. Const., arts. II, § 3, IV, § 2. Since treaty law and customary international law are part of the supreme law of the land, the President is required to execute treaty and customary obligations faithfully both at home and abroad. For recognition of the inclusion of customary obligation with treaty obligation, see, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900); Hilton v. Guyot, 159 U.S. 113 (1895); The Scotia, 81 U.S. (14 Wall.) 170, 187-88 (1871); The Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812); Talbot v. Jansen, 3 U.S. (3 Dallas) 133, 161 (1795) (Iredell, J., concurring); Republica v. De Longchamps, 1 U.S. (1 Dallas) 111, 114 (1784); Henfield's Case, 11 F. Cas. 1099, 1120 n.6 (No. 6360) (C.C.D. Pa. 1793). But see L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 221-22 (1972) (Constitution does not forbid presidential violation of international law); Note, Security Council Resolutions in United States Courts, 50 IND. L.J. 83, 109-110 (1974).

Professor Henkin recognizes, however, that there "are no clear Supreme Court holdings, or even explicit dicta, upholding" his approach. L. HENKIN, supra at 460 n.61. Indeed, Brown v. United States, 12 U.S. (3 Cranch) 110 (1814), on which Henkin relies,
Falk's views, which appeared shortly before the *Mayaguez* incident, seem to have gone unheeded. As far as I know, there were no international lawyers present at the National Security Council meetings which considered the options available to the President and guided his decision. The handling of the *Mayaguez* incident was in sharp contrast to President Kennedy's handling of the Cuban missile crisis, in which international law had "an immensely important message to convey."\(^{132}\) Similarly, the practice was in contrast to President Nixon's use of international legal advice in his decision to interdict the flow of supplies and weapons to North Vietnam.\(^{133}\)

President Ford's failure to consult and rely on international lawyers was apparent at every stage of the *Mayaguez* incident. First, his flat assertion that the seizure of the *Mayaguez* was an act of "piracy" was admitted to be incorrect by State Department lawyers the same day it was made.\(^{134}\) As article 15 of the 1958 Convention on the High
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Seas makes clear, piracy consists of illegal acts of violence committed "on the high seas" for "private ends" by the crew of a "private ship"—not by a governmental vessel, for a governmental purpose, in claimed territorial waters. Second, the President stated that the Mayaguez was seized in international waters, despite the fact that the United States knew Cambodia claimed a 12-mile territorial sea. Third, the President sought in part to justify the use of massive force as a measure to protect the property of American citizens, despite the fact that this rationale is no longer acceptable under international law. Fourth, the Administration unpardonably delayed seeking the aid of the United Nations Secretary General. Fifth, Administration decisionmakers appear to have been wholly unaware of the substantial legal support for Cambodia's right to search vessels off its coast. And sixth, no Administration official appears to have considered the fundamental inconsistencies between the Administration's handling of the Mayaguez incident and its seizure of the Polish vessel Kalmar and the United States proposals at Caracas for strengthening peaceful settlement procedures.

B. A Precedent?

A final issue is the precedential value of the United States recovery of the Mayaguez. Secretary Kissinger's "limits beyond which the United States cannot be pushed" are still ill-defined, especially since the United States later chose not to challenge the capture by the People's Republic of China of a United States pilot within 12 miles of its shore. Does the Mayaguez incident simply reflect what Prince Sihanouk later described as "combat between elephant . . . and ant"?

136. Even if the United States had refused to recognize the Khmer Rouge government, it is well settled that acts of a de facto government (or a belligerent in a civil war context) are not to be considered acts of pirates. See, e.g., G. von Glahn, supra note 44, at 330-31; H. Lauterpacht, Recognition in International Law 296-305 (1947). See also C. Colomos, supra note 49, at 454-55; M. McDougal & W. Burke, supra note 48, at 817-23; J. Paust & A. Blaustein, War Crimes Jurisdiction and Due Process: A Case Study of Bangladesh 9-12 (1974). With regard to insurgents who have not reached the status of belligerents, see N.D. Joyner, Aerial Hijacking as an International Crime 76, 106-13, 237 n.16 (1974). A policy-oriented approach to decision in such cases must also address "coercive interactions of territorially organized communities of consequential size, whatever the 'lawfulness' of their origin and whatever the prior niceties in the presence or absence of the ceremony of recognition." M. McDougal & F. Feliciano, supra note 63, at 221 n.227.
137. N.Y. Times, May 13, 1975, at 1, col. 8.
138. See notes 118, 119 supra.
139. See S. Swarztrauber, supra note 44, at 237.
140. N.Y. Times, May 23, 1975, at 14, col. 3.
Hopefully, the United States response to the Cambodian seizure of the *Mayaguez* will prove to be an exception to the customary means by which the United States seeks to resolve international disputes. Perhaps it will serve as a warning to the American people of the misuse or nonuse of international legal advice and to the international community of the sort of violent confrontations which can occur if the ongoing Law of the Sea Conference does not reach a useful consensus on several critical matters and develop adequate safeguards promptly.

I know of no better summary of the problems facing American foreign policy decisionmakers after the *Mayaguez* incident than an excerpt from a Washington newspaper editorial: “American honor is being tested. But so, after Vietnam, is American common sense.”
