Review Essay

The Use of Force in the Law of Nations


Jeane J. Kirkpatrick

Senator Daniel Patrick Moynihan, Democrat from New York, former Harvard professor, former bureaucrat, former U.S. Ambassador to the United Nations, writes most often about events and problems with which he and we are currently involved. Repeatedly it seems that by the time a policy question reaches center stage, Moynihan has written a book on the subject. On the Law of Nations appeared last fall in time for the Gulf crisis, and the new U.N. role, the new world order (i.e., in time for this season’s discussions of international law and the use of force). But the opinions expressed in this book are not as fashionable as they seemed before the Gulf War.

On the Law of Nations is simultaneously a harsh, partisan attack that seeks to criminalize the actions of the Reagan administration actions of which Moynihan disapproves, and a sweeping commentary on international law and organizations. Moynihan moves easily about in American history, noting this or that president’s attitude toward this or that matter of constitutional or international law. He comments on so many subjects so briefly, that it is difficult to describe the book without making more of the parts and less of the whole than it merits.

On the Law of Nations is a slim but ambitious book with a thesis foreshadowed in Moynihan’s previous book, Loyalties.² This thesis, simply stated, is that international law was once cherished and respected by Americans, but by 1990 had become largely ignored. Moynihan looks back with nostalgia to the beginning of this century, when -- he says -- Americans shared a prevailing western belief in a world ruled by law, a belief that Woodrow Wilson translated into a plan for a world organization, the League of Nations. "No man in the history of the world -- and certainly none other in our century -- so engaged the passions and the hopes of mankind as Wilson did in those months of 1918 and 1919."³ Since then, Moynihan writes, American governments have abandoned the Wilsonian vision of a world ruled by law, and the United States has become a scofflaw. Moynihan writes, "[i]n the annals of forgetful-

† United States Senator (D. New York).
‡ Leavey University Professor, Georgetown University; Senior Fellow, American Enterprise Institute; former United States Permanent Representative to the United Nations.
1. D. MOYNIHAN, ON THE LAW OF NATIONS (1990) [hereinafter cited by page number only].
ness there is nothing quite to compare with the fading from the American mind of the idea of the law of nations. In the beginning this law was set forth as the foundation of our national existence."\(^4\)

As Moynihan sees it, the American decline into lawlessness did not happen all at once. The Cold War took its toll on world order, idealism, optimism, and eventually on the American commitment to international law. But the trouble began even earlier. Franklin D. Roosevelt deliberately violated the Neutrality Act and was thus "clearly subject to impeachment."\(^5\) Similarly, John F. Kennedy sponsored the Bay of Pigs landing. Lyndon Johnson offended some with his duplicitous Gulf of Tonkin resolution, Gerald Ford with the Mayaguez incident, and Jimmy Carter with his abortive effort to rescue American hostages in Iran.

The situation had deteriorated so far that in February 1979 -- before the Ayatollah Khomeini had come to power or had taken American hostages, before the Soviet Union had invaded and occupied Afghanistan, before Ronald Reagan had become the republican nominee for president -- Moynihan said in an address to the Council on Foreign Relations, "the current disorientation in American foreign policy derives from our having abandoned, for all practical purposes, the concept that international relations (and also to a degree the internal conduct of governments) can and should be governed by a regime of public international law."\(^6\)

Regrettable as they were, the offenses of other presidents and administrations paled beside the "lawbreaking" committed during the Reagan years. By the time he wrote *On the Law of Nations*, Moynihan had developed a deep-seated contempt for the Reagan administration, viewing it as addled in its conception of history, alarmist in its hostility toward communism, violent in its proclivities, lawless in its practices, and irresponsible in its use of American power. He writes:

> In the 1980s, indifference, on occasion hostility, to international law led the executive branch of the national government to take significant risks with our position in the world and, far more important, to put in jeopardy our own constitutional arrangements. In particular, the mining of Nicaragua's harbors early in 1984 set in motion a chain of events, the Iran-Contra Affair, that brought us to the verge of a crisis of the regime.\(^7\)

Paranoia and misunderstanding of history and law, Moynihan asserts, drove the Reagan administration to commit serious offenses against law -- both domestic and international. Several White House aides were guilty of treason. Ronald Reagan should have been impeached as a result of this "offensive" behavior. Imagining that the communist threat was growing and encouraged by something called the "Kirkpatrick Rule," the administration, in the mistaken

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5. P. 72.
7. P. 120.
belief that it was right to fight fire with fire, adopted Soviet methods to combat
Soviet initiatives -- at least that is how the Democratic Senator from New York
sees it.

In the process of accusing the Reagan administration of unprecedented,
repeated violations of law, Moynihan interprets the U.N. Charter in such a
fashion as to obliterate its distinction between permissible and impermissible
force.

I believe that Moynihan's charges and his interpretation of international
law are mistaken. I believe that the Reagan Doctrine was consistent with U.S.
practices and the U.S. understanding of the U.N. Charter held since its
adoption.8

I. BREAKING THE LAW

Daniel Patrick Moynihan accuses the Reagan administration less of mistak-
en policy than of criminal offenses -- violations of international and U.S. law
so serious that they threaten constitutional democracy. The "invasion" of
Grenada, the bombing of Libya, the mining of Nicaraguan harbors, support
for the Contras -- all of these actions appear manifestly illegal to the Senator.

A. Grenada

Moynihan calls the U.S. liberation of Grenada an "invasion"9 -- an "ele-
mental violation of the [U.N.] Charter"10 and "the clearest possible violation
of Article 18 of the Charter of the Organization of American States."11 "This
is not a matter of opinion." He declares that "[m]ost things are, no doubt; but
not all things."12

He quotes Louis Henkin as supporting his view: "[o]ne cannot justify the
U.S. action in Grenada or support for-the contras and condemn the Soviet
Union's role in Czechoslovakia."13 The U.S. "invasion" was made worse
by the grave possibility that Deputy Secretary of State Kenneth Dam -- an
international lawyer and law school professor -- "simply didn't care whether
the invasion of Grenada did or did not comply with the U.N. Charter or the
Rio Treaty or whatever."14

8. For a different view of these issues, see Reisman, Old Wine in New Bottles: The Reagan and
For a review of this record, see Kirkpatrick & Gerson, The Reagan Doctrine, Human Rights and Interna-
9. P. 129.
10. Id.
12. P. 128 (emphasis in original).
13. Id.
Moynihan can write this because he clearly has the ability to read minds. He knows what Ken Dam thought, just as he knows the Reagan administration's reasons for acting in Grenada. Ignoring the breakdown of law in Grenada and the Reagan administration's explanations for the Grenada landing, he simply asserts that the U.S. invaded Grenada in furtherance of the Reagan Doctrine policy "that there must be no more defections to Communism among the nations of the world." But this claim could not have been true since a Marxist regime already existed in Grenada when Reagan came to power, and yet he did not move against it.

The U.S. took action in Grenada only after the stable Marxist government headed by Maurice Bishop had been overthrown and Bishop himself, five of his ministers, and a dozen other members of his government had been murdered by a group of thugs calling themselves the Revolutionary Military Council. This group inaugurated a true reign of terror, imposing a twenty-four hour, shoot-on-sight curfew, closing the airport (thereby trapping approximately 1,000 U.S. citizens and making each a potential hostage), unleashing a violent purge, and forcing into hiding Grenada's Governor General, Sir Paul Scoon.

Moynihan ignores this context of violence and anarchy, and ignores also the requests for intervention by Governor General Scoon and by the Organization of Eastern Caribbean States (OECS). When the U.S. and other friendly states responded, they did so under the authorization of the collective self-defense provision of the OECS Treaty. Governor General Scoon told the BBC, "[w]e were very, very grateful that these other countries came to our rescue and they came just in time." American students kissed the ground on their return to the U.S. In public polls taken after the liberation, more than ninety percent of Grenadians expressed support, gratitude, and relief for this

15. P. 128.
17. The relevant provisions of the OECS Treaty states:
The Defence and Security Committee shall have responsibility for coordinating the efforts of Member States for collective defence and the preservation of peace and security against external aggression and for the development of close ties among the Member States of the Organisation in matters of external defence and security, including measures to combat the activities of mercenaries, operating with or without the support of internal or national elements, in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations. Treaty Establishing the Organisation of Eastern Caribbean States, June 18, 1981, art. 8, para. 4, reprinted in 20 I.L.M. 1166, 1170
action. Still, Moynihan calls it an "invasion," without denying the serious nature of the threat to life and liberty at the time of the U.S. landing.

It is hardly necessary to note that the Soviet Union made no collective self-defense claims in crushing the Czech reforms of 1968. The Soviets offered only the Brezhnev Doctrine, which asserted a right to intervene to preserve socialism.

Moynihan also ignores the fact that less than two weeks after the military action in Grenada began, Governor General Scoon had begun to lay the groundwork for free elections and the return to constitutional government. In stark contrast, Czechoslovaks had to wait twenty-one years after Soviet tanks had crushed the Prague Spring before they could enjoy free elections. Moreover, U.S. forces were reduced from 3,000 to 300 in a few weeks, while 125,000 Soviet troops were maintained in Czechoslovakia until 1991.

The Grenada action was a particularly clear example of the use of force to liberate U.S. nationals, restore sovereignty, liberate a terrorized population, and create the preconditions for self-government. But these justifications were not good enough for Daniel Patrick Moynihan -- who cites the Charter of the Organization of American States (OAS) as prohibiting intervention by a state in the affairs of another "for any reason whatsoever." In this interpretation Moynihan ignores not only customary law and other relevant passages of the OAS Charter, but also ignores the provisions of the U.N. Charter -- the provisions of which for self-defense and collective self-defense are broader than those of the OAS -- even though the Charter explicitly takes precedence over contrary provisions of regional associations.

19. On November 3, 1983, CBS News polled 304 Grenadians, of whom 91% said they were "glad the United States troops came to Grenada," and 85% said they had felt threatened when General Hudson Austin, leader of the group that overthrew Bishop, was in power. FACTS ON FILE, Nov. 18, 1983, at 871.

20. LOYALTIES, supra note 2, at 93 (emphasis added). Moynihan seems to be referring to article 15 of the OAS Charter:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.


21. For example, the OAS Charter states:

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an armed attack or by an act of aggression that is not an armed attack, or by an extra-continental conflict, or by a conflict between two or more American States, or by any other fact or situation that might endanger the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject.

OAS Charter, supra note 20, at art. 25.

22. See U.N. CHARTER art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.")
B. Nicaragua

According to Moynihan, mining Nicaraguan harbors was also "an act of aggression"23 aimed at overthrowing a government. In Moynihan's view the Reagan administration was guilty of multiple violations of the letter and spirit of the law in its Central American policy — in mining the harbors, in supporting the Contras, in denying the jurisdiction of the International Court of Justice (ICJ), in failing to inform the Congress, and in flouting its will.

Moynihan takes no more account of the legal case for U.S. policy toward Nicaragua than he does of the U.S. policy toward Grenada. He knows the U.S. government was engaged in an effort to overthrow the Nicaraguan government (which the Reagan administration denied, insisting instead that its aim was to interdict the flow of arms to El Salvador). He is simply not concerned with whether Nicaragua was working to overthrow the governments of Honduras and El Salvador — as the presidents of both countries believed — or whether Nicaragua's secret war against neighboring states violated prohibitions in the U.N. and in the OAS Charter against the aggressive use of force, and gave rise to a right to self-defense and collective self-defense on the part of El Salvador. He is not interested in evidence of Nicaragua's covert military support for the FMLN, though evidence was available to him. His concern begins and ends with the U.S. government's use of force.24

By ignoring evidence of Nicaragua's indirect aggression, Moynihan misses the critical feature in the mining case, a feature which bears on the questions which concerned the ICJ in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua [hereinafter Nicaragua Case],25 questions regarding permissible force, self-defense, and collective self-defense.

When the ICJ found the U.S. guilty of mining Nicaraguan harbors, arming the Nicaraguan resistance, attacking oil installations, ports, and shipping, and allowing distribution of a manual on techniques of guerrilla warfare (including on the assassination), the ICJ did not deny that Nicaragua was engaged in acts of aggression against El Salvador. Instead, it denied that those acts of aggression triggered a right of collective self-defense. The Court thereby imposed new limits on rights of self-defense and collective self-defense under article 23. P. 134.

23. P. 134.
24. Moynihan's position in this regard resembles that of Israel's critics in the U.S., who ignore PLO shelling of Israel from Lebanon, but condemn Israeli reprisals as breaches of the peace.
limits not explicit in the U.N. Charter and not previously invoked by any court, though endorsed by Moynihan, Abraham Chayes, and Henkin.

Many international law scholars disagreed with the ICJ’s interpretation of article 51. For example, recognizing that the Nicaraguan action did not meet the classical standard of invading armies crossing national boundaries, John Norton Moore writes, "there is no doubt that Article 51 applies to secret or 'indirect' armed attacks as well as to open invasion." He notes that the ICJ did not deny the right of effective defense to the state under attack, but constrained its right to seek help. Moore comments, "[n]othing could more quickly doom the Charter to irrelevance than to limit defensive options against serious armed attack solely to those of the least military and political effectiveness."

Daniel Patrick Moynihan does not worry about the legal or political questions raised by the ICJ decision; neither is he concerned about whether the ICJ could or should render an unprecedented verdict on so political a question as the mining of Nicaraguan harbors. He is interested in the use of force only as it applies to the U.S., and in the question of jurisdiction only as it applies to the U.S. decision to deny comprehensive, compulsory jurisdiction to the ICJ. Though that decision was consistent with the rules of the ICJ and the practice of other states, Moynihan sees the U.S. position as further proof of the Reagan administration’s indifference to international law. In his view, this "pusillanimous act" was the product of a mistaken policy that led eventually to an effort by the executive branch not only to break international law, but U.S. law as well.

With regard to U.S. law, Moynihan is not particularly concerned about the actual facts of the case. That there was no U.S. law forbidding a president

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26. Article 51 of the U.N. Charter provides:

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, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority or responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.


28. *Id.* at 97. Richard Gardner commented recently:

I agree with Larry Hargrove, John Norton Moore and others who feel that the World Court judgment in Nicaragua really did a great disservice to international law. I cannot understand why a systematic effort (which I believe was the case) of Nicaragua to destroy the sovereignty of its neighbor by logistic and armed support to an insurrection — why that is not an armed attack giving rights to individual and collective self-defense — why the victim state is left to its own devices and cannot call a stronger friend in need to deal with an indirect aggression, which can be just as devastating to its independence and sovereignty as marching an army with flags flying and bugles blowing across the border.


29. P. 144.
from seeking financing from another country for the Contras does not affect his conclusion that it was illegal to do so. If there was no law, there should have been one.\textsuperscript{30} It is manifestly illegal -- he assumes -- for a republican president to use all available constitutional means at his disposal to implement a policy blocked by a democratic Congress. The struggle between the president and Congress over the control of foreign policy, a struggle Edward S. Corwin sees as purposefully placed into the Constitution,\textsuperscript{31} is viewed by Moynihan as a manifestation of executive misbehavior.

Though he sees himself as an advocate of "black letter" law, Moynihan is not satisfied with the Reagan administration's compliance with the "black letter" laws pertaining to executive-legislative relations. It was the duty of the executive to defer to the will of the Congress and to end support for the Contras -- even if there was no constitutional requirement to do so.

It was also -- in his view -- the duty of the executive not merely to inform the designated intelligence committee representatives of administration actions but also to make sure they understood them. CIA director William Casey consistently maintained until his death that he had informed both Moynihan and Barry Goldwater, then ranking members of the Senate intelligence oversight committee, in advance about the intention to mine Nicaraguan harbors.\textsuperscript{32} Moynihan further asserts that impeachable offenses were committed in funding the Contras. "There were men whose conduct came very near to treason."\textsuperscript{33} Most seriously, "[t]he plain fact is that the president did invite and almost certainly did deserve impeachment."\textsuperscript{34}

For a man passionately concerned with law and decency, Moynihan is curiously uninterested in documenting these extremely serious charges. He ignores the arguments surrounding the dubious interpretations of the U.N. Charter on which his indictment of the Reagan administration rests. He takes no notice of the arguments of international lawyers who hold views different than his about what article 2(4) of the U.N. Charter forbids, what article 51 permits, and what the obligations of nations are with respect to the ICJ. He states his case as if it had already been proved, as if there existed overwhelming evidence and a clear consensus of the "international law community" on the one side and the lawless ideologues of the Reagan administration on the other. He writes as if unaware that his reading of the U.N. Charter is, at best,
just one possible interpretation of the law and the events that transpired, as if
the moral and legal illegitimacy of the U.S. landing on Grenada were manifest,
and as if all law-abiding persons agreed with him and Louis Henkin. But not
everyone agrees with them, and not everyone who disagrees with Moynihan
and Henkin is a scofflaw, an ideologue, or a fool.

II. THE "KIRKPATRICK RULE"

Moynihan describes the Reagan administration as obsessed by an exagger-
ated view of the dangers of communist expansion, claiming special preroga-
tives to violate the prohibitions of international law against the use of force,
violating U.S. law in support of the Contras, and justifying these violations
in terms of something he calls the "Kirkpatrick Rule." 35

The Kirkpatrick Rule -- he charges -- grew out of a mistaken belief --
widespread in neoconservative circles -- that the Soviet Union and communism
had entered a new more dangerous phase and had created a need for redoubled
efforts to halt its spread. The Kirkpatrick Rule let the Soviet Union set stan-
dards of conduct for the United States. "The Soviets don't, so why should
we?" 36 "Where the spread of 'the virus' of Marxism was concerned [the
Reagan team] no longer felt bound by the Charter." 37 Instead, they enunciated
the Kirkpatrick Rule, which claimed that communist lawlessness exempted the
U.S. from the Charter's requirements on the use of force.

Moynihan believes that the Reagan administration claimed exemption from
the normal requirements of international law, especially the prohibition against
the use of force in the U.N. Charter. He believes that the administration saw
international law as "optional," 38 so that "the United States was free to abide
or not to abide by it according to its assessment as to whether others were
doing so. The Russians, the Chinese, the Bhutanese, whomever." 39

As the Kirkpatrick to whom he refers, I can attest that I believed no such
thing. Moreover, I stated no such position in the speech to the American
Society of International Law from which Moynihan purports to derive the
noxious doctrine. The speech I delivered to the American Society of Interna-
tional Law, though hurried in composition, was the product of a good deal of
reflection on these problems and consultations with Allan Gerson, Carl Gersh-
man, the late Arthur Goldberg, and Myres McDougal. It is not a model of
clarity. Still, I think a reasonable reading of the speech makes clear that in
defending the right of self-defense against armed attack, it does not take the

35. P. 140. The "Kirkpatrick Rule" is purportedly derived from a speech I delivered at the seventy-
eighth annual meeting of the American Society of International Law, April 12, 1984.
37. P. 129.
38. P. 134 (emphasis in original).
39. Id.
U.N. Charter or international law lightly, nor does it suggest that they are "optional." Rather, it argues that acts of aggression trigger a right of self-defense, and that to condemn the use of force in self-defense and not the original act of aggression undermines the effort to restrain aggression. In the speech, I discussed some problems created by the clash of two contending orders of law — the democratic order that is embodied in the U.N. Charter and the Soviet order, which saw international law as subordinate to the class struggle and Marxist "laws" of social development. I argued that the Soviet bloc's doctrine of limited sovereignty for nonsocialists and absolute, irreversible sovereignty for socialist governments made a mockery of earnest efforts to apply the U.N. Charter's prohibitions and permissions concerning the use of force.40

Nicaragua's suit against the U.S., filed before the ICJ, provided a clear example of a "socialist" government (Nicaragua) simultaneously claiming the right to intervene in the affairs of another government (El Salvador), and the right to be helped against intervention by another government (U.S.), which was trying to interdict the socialist government's aid to armed rebellion in the second country (El Salvador).

The fact that Nicaragua, the party that initiated intervention in the internal affairs of a neighboring state, claimed a right to be free of intervention, seemed to me outrageous cynicism. But my poor opinion of the government of Nicaragua and its recourse to the ICJ did not cause me to attack international law. Instead, I argued, "if international law is to have relevance in the contemporary world, it must be protected against those who would subvert its fundamental purposes by using it as an instrument to legitimize aggressive violence and to delegitimate the use of force as self-defense."41 Moynihan writes:

If one state violates international law — as surely the Soviet Union has repeatedly done -- this in no way releases other states from their obligations under law. ... If the Soviets "renounce" international law by, let us say, invading Afghanistan, the United States is not free to respond by invading Grenada.42

I, of course, do not believe the Soviet invasion of Afghanistan gave the U.S. "permission" to do anything, as I do not believe the struggle against communism justifies violating the U.N. Charter and international law. I do not believe that law is optional. I do, however, believe that it is contextual. An armed attack by the USSR -- or anyone for that matter -- does not mean it is permissible for the U.S. to undertake an armed attack. But it does change the context of U.S. policy toward Afghanistan, justifying a proportionate act of

40. The problems are greatly exacerbated when Western scholars like Chayes and Moynihan ignore barely veiled acts of aggression from a socialist state (Nicaragua) and attack -- as acts of aggression -- efforts of targeted states at self-defense and collective self-defense.
41. From my speech given to the American Society of International Law, April 12, 1984.
42. P. 134.
self-defense or collective self-defense. The Soviet attack on Afghanistan created a justification and a need for American and international support for the indigenous forces fighting Soviet invasion and occupation. The Soviet invasion was a crucial element of the context in which the U.S. acted in Afghanistan. Here, as is usually the case, the context and consequences of an act are essential to allow us to distinguish between permissible and impermissible force.\footnote{43. On the critical role of context in defining aggression, see especially M. McDougal \& F. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion 151-53 (1961); see also Sofaer, International Law and the Use of Force, 13 Nat'l Interest 53 (1988).}

To see the U.S. landing in Grenada as parallel to the Soviet Union's invasion of Czechoslovakia, it is necessary to believe either that the motives, circumstances, and consequences of the two events were essentially the same in all significant respects -- which they were not -- or that the causes, circumstances, and consequences did not affect the legality of the act because the U.N. Charter absolutely forbids all military interventions by one country into another -- which it does not. This reading of the Charter is manifestly incompatible with the understanding of its authors, who in explaining and applying the Charter distinguished between permissible and impermissible force.

When Daniel Patrick Moynihan says of the Grenada action "there is no ground in law for what we did," he proves not that the act was unlawful, but that his conception of international law is so formal and so abstract that it bears little relation to the real issues and problems of international politics.

One might think that all persons interested in world order would be concerned with self-defense since it remains true that "the constant danger to world public order is not that police action may be precipitously taken in circumstances of actually inadequate necessity, but that it may not be taken at all."\footnote{44. M. McDougal \& F. Feliciano, supra note 43, at 258.} Moynihan, however, evinces little interest in the crucial distinction between permissible and impermissible force. Instead, like Henkin, he takes the position that the U.N. Charter prohibits the use of force in nearly absolute terms. Moynihan draws so heavily on Henkin that it may be useful to quote Henkin's own words -- which are very clear. The Charter, Henkin writes, "outlaws war for any reason, for any purpose, in any circumstances."\footnote{45. Henkin, Use of Force: Law and U.S. Policy, in Right v. Might: International Law and the Use of Force 37, 40 (1989).} "Peace was more important than progress and more important than justice. The purposes of the United Nations could not in fact be achieved by war."\footnote{46. Id. at 38-39.} Henkin knows that peace is not the only value of the Charter:

The Charter and the organization were dedicated to realizing other values as well - - self determination, respect for human rights, economic and social development, justice, and a just international order. But those purposes could not justify the use
of force between states to achieve them; they would have to be pursued by other means.\(^{47}\)

Henkin writes: "[w]ith respect to the use of force, the Charter is neutral between democracy and totalitarianism."\(^{48}\) But how can this be true? Should not the prohibition against the use of force be read in the context of the whole Charter, which identifies the Charter with democracy and human rights. Should it not -- like any law -- be read in light of the intentions of its authors?

In postulating this near-absolute prohibition on the use of force, Moynihan offers an interpretation of the U.N. Charter that is not consistent with the intentions of its framers, nor with long-standing practice, nor with the requirements of world order.

Moynihan's views (and Henkin's) on this matter require a highly selective reading of the U.N. Charter and the Rio Treaty. True, article 2(4) of the Charter enjoins all members to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." But this prohibition is part of a Charter that also affirms guarantees of human rights and explicitly states that neither article 2(4) nor any other part of the Charter is to be seen as diminishing an inherent right to individual and collective self-defense. The Charter makes clear that the prohibition of force in article 2(4) of the Charter is not intended to stand alone, but is meant to complement article 51 and all the other provisions of the Charter that require that member states be peace-loving, committed to the maintenance of peace, and respectful of self-determination and human rights. The U.N. Charter was not intended to protect repressive dictatorships or empires. The purpose of the Charter is not only to discourage the use of force in international affairs; it is also to promote a world order based on democratic values and practices.\(^{49}\)

President Harry Truman said of the U.N. Charter, "[t]he Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere -- without regard to race, language or religion -- we cannot have permanent peace and security."\(^{50}\) Other statements and policies of Presidents Franklin Roosevelt, Harry Truman, Dwight Eisenhower, John Kennedy, Lyndon Johnson, Richard Nixon, Gerald Ford, Jimmy Carter, and George Bush establish that they too read the permissions and prohibitions of the U.N.

\(^{47}\) Id. at 38.  
\(^{48}\) Id. at 62-63.  
\(^{49}\) The OAS Charter makes parallel assumptions. It is clear that "the solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy." OAS Charter, supra note 20, at art. 5(d).  
\(^{50}\) H. TRUMAN, 1 MEMOIRS OF HARRY S. TRUMAN: YEAR OF DECISIONS 292 (1955). Compare the Truman comment with one made by Henkin, who is quoted by Moynihan as saying, that: "[i]t is not permissible under the Charter to use force to impose or secure democracy."
III. WHAT DOES ARTICLE 51 OF THE CHARTER PERMIT?

The role of the Security Council in the right of self-defense under article 51 has become the central issue in the ongoing debate about what constitutes permissible force. In On the Law of Nations, Moynihan advocates maximum restrictions on the rights of nations to self-defense and collective self-defense. He tells us that President Carter should not have undertaken the mission to release the Americans held hostage by the Ayatollah Khomeini. Carter should have gone to the ICJ, and acted only with its authorization. Moynihan's

51. Postwar U.S. presidents have viewed the U.N. Charter's prohibition of the use of force within the context of the entire U.N. Charter, which affirms the inherent right of self-defense and other human rights, including democratic freedoms. In signing the Atlantic Charter in August 1941, President Roosevelt made clear that the values of individual liberty would guide the postwar world that the Allied leaders hoped would emerge. The Atlantic Charter called for "a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want." Atlantic Charter, Aug. 14, 1941, 55 Stat. 1600, 1603, E.A.S. 236, 3 Bevans 686. In his massage to Congress on March 12, 1947, President Truman stated that "it must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures." PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, 1947, at 178-79 (1963). When President Eisenhower sent U.S. Marines into Lebanon in 1958, Secretary of State Dulles explained: "we do not think that the words 'armed attack' preclude treating as such an armed revolution which is fomented from abroad, aided and assisted from abroad." Quoted in Sofaer, supra note 43, at 55. Following the failed Bay of Pigs invasion, President Kennedy stated:

[should it ever appear that the inter-American doctrine of non-interference merely conceals or excuses a policy of nonaction — if the nations of this Hemisphere should fail to meet their commitments against outside Communist penetration — then I want it clearly understood that this Government will not hesitate in meeting its primary obligations, which are to the security of our Nation!]

Address by President John F. Kennedy to American Society of Newspaper Editors (Apr. 20, 1961), quoted in Reisman, supra note 8, at 176. In justifying the 1965 Dominican operation, President Johnson distinguished between aggressive and permissible intervention, stating:

[we are not the aggressor in the Dominican Republic. Forces came in there and overthrew that government and became allied [sic] with evil persons who had been trained in overthrowing governments and in seizing governments and establishing Communist control, and we have resisted that control and we have sought to protect our citizens against what would have taken place.

Quoted in Reisman, supra note 8, at 176-77. During the Vietnam War, the State Department legal adviser’s office found the U.S. intervention to assist South Vietnam legally justified under the doctrine of collective self-defense. See Sofaer, supra note 43, at 56. President Ford relied on the U.N. Charter in ordering U.S. troops to attack Cambodian naval assets to secure release of the U.S. merchant ship Mayaguez and its crew, whose seizure the U.S. considered "a clear-cut illegal use of force." Id. In announcing the "Carter Doctrine" on January 23, 1980, President Carter clearly implied a distinction between permissible and impermissible force under the U.N. Charter in stating: "[a]n attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force." 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER, 1980-81, at 197 (1981).

Commenting on Ronald Reagan’s explanation of Grenada, Professor Reisman writes, "It could have been Kennedy or Johnson." Reisman, supra note 8, at 180. See also Sofaer, supra note 43, 55-57; Cutler, The Right to Intervene, 64 FOREIGN AFF. 96 (1985).
position during the Gulf crisis made still clearer that he construes rights of self-defense under article 51 as available only to the immediate victims of armed attack and conditioned on pending action by the Security Council. He does not see article 51 as permitting self-defense against all types of armed attacks involving the use of force -- including terrorism, hostage-taking, and violent subversion. It may have permitted Israel to extricate hostages at Entebbe. It did not permit the U.S. to rescue students in Grenada or hostages in Teheran, or to attack Libya in retaliation for terrorist assaults, or to intercept fleeing terrorists after the hijacking of the Achille Lauro.

The Gulf War provided the opportunity to see the consequences of construing the prohibitions in article 2(4) as broadly as possible and the permission in article 51 as narrowly as possible. The chief consequence of this interpretation is to deprive a victim of an effective and customary right of self-defense and to transfer authority to make a decision concerning the use of force from the state that is the victim of the armed attack to an international body.

IV. WHO SHOULD DECIDE WHAT THE LAW IS?

The Moynihan Doctrine seems to be that the law is whatever the U.N. Security Council or ICJ says it is. In On the Law of Nations, Moynihan joins Abraham Chayes, Louis Henkin, among others in delegating the last word on what is legitimate to the temporary majorities of the General Assembly, Secretary Council, ICJ, and other United Nations institutions. This notion -- that the law is what the General Assembly, Security Council, and ICJ say it is -- is especially troubling in view of the composition and the record of those bodies.

While some think of the General Assembly as a legislative body or a world parliament, it represents not people but governments, many of which are not representative of anyone except groups who govern by force. Though its friends and participants regularly deny it, the ICJ is a political as well as a legal body. Its judges are elected both by the Security Council and the General Assembly. Its members remain responsive to the constituencies that elect and reelect them. The judges "represent" different areas of the world and different legal philosophies and practices. They treat decisions of the General Assembly as law. But the General Assembly is a highly political body the decisions of which reflect its political composition. No one determines whether policies of the General Assembly are consistent with the U.N. Charter. Nonetheless, the ICJ accepts General Assembly resolutions in an ongoing process of authoritative reinterpretations.52

52. Professor W. Michael Reisman describes the incorporation of resolutions of the General Assembly into the decisions of the ICJ. See Reisman, supra note 8, at 189.
The General Assembly's wholly predictable decisions (e.g., on Grenada) reflect the balance of power among the blocs at a given time. ICJ decisions (e.g., on the mining of Nicaraguan harbors) also reflect the current balance of power in the General Assembly. This is why essentially political issues should not be brought before the ICJ. Presumably, Daniel Patrick Moynihan knows all of this. But if he does, then he should understand why almost all of the U.N. member states have filed reservations to the ICJ's jurisdiction, if they have accepted that jurisdiction at all, and why it was reasonable -- not pusillanimous -- for the U.S. to do likewise.  

V. THE GULF CRISIS

As the Gulf crisis developed, Moynihan saw Kuwait's right of self-defense under article 51 as being sharply limited. Before the United Nations Security Council had authorized the use of force, Moynihan told Charles Gibson on the television program "Good Morning America" that article 51 did not give the U.S. government the right unilaterally to use force in defense of the Kuwaitis. "The Charter says that you have the right until the Security Council has taken necessary steps. That the process has already moved to the point where...you can only act now in the context of a Security Council resolution."  
"[I]t's not for the President, by himself, to decide whether or not to go to war. He has to have the Congress with him; that is the law. And now, in the context of the Charter, he has to have the Security Council with him."

Once again, Daniel Patrick Moynihan denied the legitimacy of an American response to aggression. Once again he charged that the Cold War had caused

53. More than half of U.N. member states do not accept ICJ jurisdiction at all. Ironically, a majority of the judges on the Court are from these countries. See INTERNATIONAL COURT OF JUSTICE YEARBOOK, 1987-1988, at 62-97. Many international lawyers agreed that the United States was within its rights to reject the Court's compulsory jurisdiction in the Nicaragua Case. See Almond, World Court: Rulings on the Use of Force in the Context of a Global Power Struggle, WORLD AFF., Summer 1985, at 19; McDougall, Presentation Before the International Court of Justice: Nicaragua v. United States, WORLD AFF., Summer 1985, at 33; Rashkow, Fact Finding by the World Court, WORLD AFF., Summer 1985, at 47; Reflections of the State Department on the U.S. and the World Court, WORLD AFF., Summer 1985, at 61; Morrison, Reconsidering United States Acceptance of the Compulsory Jurisdiction of the International Court of Justice, WORLD AFF., Summer 1985, at 63.

The U.S. action limiting the ICJ's jurisdiction should have been criticized not for its substance, but for its timing. The reservation should have been filed much earlier. The manner in which the judges of the ICJ were reelected, and the political balance of power in the U.N. General Assembly (which elects judges) ensured that on issues which pitted the U.S. against Nicaragua, the ICJ would find in favor of Nicaragua -- or so I believed and argued within the Reagan administration. I did not hold this view of the ICJ's probable behavior because I am generally cynical about law, courts, or judges, but because I had participated in the election of judges to the ICJ and had seen first hand that the General Assembly and its delegates operated with respect to the selection of judges as it functioned with regard to other matters -- regional blocs and normal U.N. politics determined the outcome.

a U.S. president to behave irresponsibly -- perhaps unconstitutionally. While addressing Congress, he said:

Suddenly our institutions are acting as if to say, "Oh, my God, we missed World War III. Maybe we can have it now here. Not there but here." Mr. President, that borders on the edge of the disturbed. Dr. Strangelove, where are you now that we need you? Eugene Rostow, Abraham Sofaer, Richard Gardner, and others have emphasized that -- as Rostow puts it -- "[a] practice of subordinating the right of self-defense to a requirement of prior Security Council permission would be fatal to the right of states to defend themselves." It would also be fatal to hopes of a new world order.

Professor W. Michael Reisman writes of the ICJ decision in the Nicaragua Case: "the new theory in the final analysis prevents the target state from doing anything effective, for according to the ICJ, low-level attacks do not permit the victim state to resort to levels of coercion contemplated in the right of self-defense." But Professor Reisman -- unlike Moynihan -- believes that "force per se is not unlawful; indeed, it is inseparable from law. What is unlawful is force that is used for illicit ends." In Reisman's view, the "critical question" is whether "coercion . . . has been applied in support of or against community order and basic policies." This is not, however, Daniel Patrick Moynihan's question.

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57. Reisman, supra note 8, at 196.
58. Id. at 198.
59. Id. at 198.