Comment

Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice†

by W. Michael Reisman‡

In international law, the word “doctrine” is generally applied to a state’s successful claim to some special prerogative presented thereafter as a permanent part of the foreign policy of the state evincing the doctrine. Such claims are made constantly in international politics as part of the continuous process of claim, counter-claim, testing of relative resources and intensity of demand, and, finally, decision by accommodation, compromise, or imposition. Claimants often try to anticipate success by immediately labelling their claims a doctrine. But names are not decisive. Many such claims are characterized by others as unlawful and successfully resisted. However, when the intensity of interest and effective power of the claiming state are such that, whatever the general reaction, it is plain that its claim will be made into controlling practice, the assertion can no longer simply be dismissed as unlawful by others. Rather, it is widely accorded the more ambiguous quasi-legal term of “doctrine.” This reaction is not an abnegation of law, but is part of the tendency of the international legal system to remain minimally relevant by accommodating to the unyielding realities of effective power.

Several claims that the United States has openly pressed at the international level since 1981 have come to be known as the “Reagan doctrine.” Labelling them as Ronald Reagan’s handiwork suggests that they are genuine innovations in national policy and international law. In fact, each of the components of the Reagan doctrine has long been a part of U.S. practice and at least one of them had long before Reagan acquired a measure of international authority. Moreover, each finds at least an ap-

† Substantial portions of this paper were delivered at the Annual Meeting of the American Society of International Law, April 11, 1987, in Boston, Massachusetts. An abbreviated version will be published in the Proceedings of the American Society of International Law.
‡ Wesley Newcomb Hohfeld Professor of Jurisprudence, Yale Law School.

171
proximate counterpart in the coordinate repertory of practice of the
other major superpower: the so-called "Brezhnev doctrine."

The persistent continuity of the Reagan and Brezhnev doctrines is im-
portant. If the components of these doctrines were novel or idiosyncratic
or a momentary national aberration, one could assume that the knotty
issue of their lawfulness would soon be rendered moot, thanks to the
recent change of personnel in Moscow and the impending change of per-
sonnel and perhaps party in Washington. Instead, precisely because
these are claims that the United States and the Soviet Union have long
made on the international community and because each can be viewed as
a deeply rooted national policy, questions about their status as interna-
tional law and their soundness as rational and inclusively beneficial inter-
national policy will be as urgent in 1989 as they were in 1981.

Both the Reagan and the Brezhnev doctrines claim special national
prerogatives with regard to two distinct matters: that of policing the alli-
ance and alignment of states within a designated defensive perimeter, and
that of overtly supporting unilaterally selected insurgents in states be-
eyond the perimeter. Though there is a significant interstimulation be-
 tween these components, each may be considered separately.

I. Exclusive Claims to "Protect" Geographical Areas

A. Origins

A primary component of the Reagan doctrine has been the claim that
the United States would resist, by unilateral use of force if necessary, the
direct or proxy penetration of Soviet power in predesignated geographical
areas. It has become increasingly common to use the term "sphere of
influence" to describe the right to such actions. But a sphere of influ-
ence, as a term of art, does not really approximate the current practice.
A sphere of influence is not only a claim to bar efforts by other states to
establish dominant influence within the designated geographical area, but
also an option asserted erga omnes to annex some or all of the territory in
the area in the future. The Reagan claim might be better described as a
"critical defense zone," with primary emphasis on excluding the intro-
duction of dominant influence by the adversary into the zone, while
preventing the defection from alliance or alignment of states already
within it. It differs from a multilateral defense treaty in that the state
within the defense zone need not and often does not feel in need of de-
fense nor need it agree with the arrangement.

Reagan and Brezhnev Doctrines

This is not a claim unique to the United States and it is not without basis in superpower agreement. The deal that established defense zones between the United States and the Soviet Union was cut near the end of the Second World War. A set of agreements, generally attributed to meetings at Yalta but actually concluded before, established understandings about what were tantamount to spheres of influence within Europe. Churchill recounts a comparable understanding with regard to the Balkans. The understandings appear to have been reconfirmed, in part, in the Nixon-Brezhnev détente agreements and in the Helsinki Accords.

These understandings have not been easy or consistently cordial. The allocation of at least supervisory control over specific geographic zones was implicitly recognized through the Truman period by the very term the President and his Secretary of State Dean Acheson chose to describe their policy: “containment.” A major war in Asia was fought in its name and vigorous support was given to one side in a very nasty civil war in the Balkans to effect the policy.

The Eisenhower Administration came into office criticizing containment as immoral, because it permitted communism to operate in those places where it had seized control. Instead of containment, Eisenhower's Secretary of State John Foster Dulles promised “Operation Rollback.” But when Hungary revolted against Soviet rule in 1956 and waited for Rollback, Eisenhower and Dulles did nothing, effectively confirming their acceptance, if not endorsement, of the Soviet-claimed zone.

B. Soviet Claims

When the Soviet Union intervened in Hungary, Nikita Khruschev’s justification was quite crude. He stated:

We understood that we might be reproached for allegedly interfering in the internal affairs of Hungary. But, recognizing our international duty, we decided that a Socialist country with the strength and opportunity to aid another fraternal country could not stand aside, while workers, working

5. For a discussion of Czarian precursors to the Brezhnev Doctrine, see Valenta, From Prague to Kabul: The Soviet Style of Invasion, 5 INT’L SEC. 114, 119 (1980) (“Russian Czars and Soviet leaders alike have traditionally been sensitive about the security of nearby countries. They have used force to restore stability and maintain or bring into power friendly pro-Russian or pro-Soviet regimes.”).
peasants and communists were being hanged and shot by Horthyites and other counter-revolutionary scum.6

When, a decade later, the Soviets intervened in Czechoslovakia, they developed a more sophisticated justification, this time replete with selected symbols of international law. Though published under the name of Kovalev, this new justification is generally referred to as the “Brezhnev doctrine.” The statement, published in Pravda on September 26, 1968,7 acknowledged that “it is impossible to ignore the allegations being heard in some places that the actions of the five Socialist countries contradict the Marxist-Leninist principle of sovereignty and the right of nations to self-determination.”8 These allegations ignored “basic principles,” which Kovalev proceeded to set out:

[T]he peoples of the socialist countries and the Communist Parties have and must have freedom to determine their country’s path of development. However, any decision of theirs must damage neither socialism in their own country nor the fundamental interests of the other socialist countries nor the world wide workers’ movement . . . .

. . . . The weakening of any link in the world socialist system has a direct effect on all the socialist countries, which cannot be indifferent to this. Thus, the antisocialist forces in Czechoslovakia were in essence using talk about the right to self-determination to cover up demands for so-called neutrality [and Czechoslovakia’s] withdrawal from the socialist commonwealth. But implementation of such “self-determination,” i.e., Czechoslovakia’s separation from the socialist commonwealth, would run counter to Czechoslovakia’s fundamental interests and would harm the other socialist countries. Such “self-determination,” as a result of which NATO troops might approach Soviet borders and the Commonwealth of European socialist countries would be dismembered, in fact infringes on the vital interests of these countries’ peoples, and fundamentally contradicts the right of these peoples to socialist self-determination. The Soviet Union and other socialist states, in fulfilling their internationalist duty to the fraternal peoples of Czechoslovakia and defending their own socialist gains, had to act and did act in resolute opposition to the antisocialist forces in Czechoslovakia.9

The Soviets do not view this as a purely political doctrine. Instead, they believe it to be established international law. Professor Tunkin, the foremost Soviet international lawyer, explains that:

6. 10 CURRENT DIG. SOVIET PRESS 6 (1958) [hereinafter CDSP].
8. Id. at 10.
9. Id.
Reagan and Brezhnev Doctrines

The Soviet state, as the “oldest” socialist state whose historic fate has been the most difficult task of paving the way for a new socioeconomic formation, always precisely fulfills its duties arising from the principle of socialist internationalism. A vivid manifestation of this policy is the assistance of the Soviet Union to the Hungarian people in 1956 and the assistance, together with other socialist countries, to the people of Czechoslovakia in 1968 in protecting socialist gains and, ultimately, in defending their sovereignty and independence from sudden swoops of imperialism . . . .

Afghanistan, as the Soviets would explain it, was protected from one of those “swoops of imperialism” in 1979. On December 27, Soviet troops entered Afghanistan, overthrew and killed President Amin, and placed Babrak Karmal in power. The Soviets claimed that they had done this at the request of Babrak Karmal. That could well have been the case. The only problem with proposing this as an international legal justification was that Karmal held no post in the Afghanistan government at the time. He had been in Moscow, but was apparently transferred to Tashkent, where he issued the requisite invitation. At the Twenty-sixth Party Congress in 1981, Brezhnev, more to the point, explained that “[I]mperialism unleashed a real undeclared war against the Afghan revolution. This created a direct threat to the security of our southern border. The situation compelled us to provide the military assistance that this friendly country asked for.” One-third of the Afghan population has since fled its country and now comprises over half of the world’s refugee population. The Afghan resistance continues to fight the Soviet intervention in a vicious and remarkably underreported war.

C. U.S. Claims

The United States’ claim to a special security responsibility in the Western hemisphere evolved from the Monroe Doctrine—which self-authorized the United States to resist the reintroduction of European power in the New World in the nineteenth century—to an explicit doctrine against communist penetration in the western hemisphere in the twentieth. The Rio Treaty had been designed to respond to direct territorial

11. For background information on the circumstances surrounding the Soviet invasion of Afghanistan, see A. Arnold, AFGHANISTAN: THE SOVIET INVASION IN PERSPECTIVE (rev. ed. 1985).

175
aggression. As it became clear that overt military aggression was no longer the probable mode of Soviet intervention, the United States initiated other norms that were established both regionally and domestically by independent executive and congressional actions. At the Eighth Meeting of Consultation of Ministers of Foreign Affairs, the Organization of American States resolved:

In order to achieve their subversive purposes and hide their true intentions, the communist governments and their agents exploit the legitimate needs of the less-favored sectors of the population and the just national aspirations of the various peoples. With the pretext of defending popular interests, freedom is suppressed, democratic institutions are destroyed, human rights are violated and the individual is subjected to materialistic ways of life imposed by the dictatorship of the single party. Under the slogan of “anti-imperialism” they try to establish an oppressive, aggressive, imperialism, which subordinates the subjugated nations to the militaristic and aggressive interests of extracontinental powers. By maliciously utilizing the very principles of the inter-American system, they attempt to undermine democratic institutions and to strengthen and protect political penetration and aggression. . . . The principles of communism are incompatible with the principles of the inter-American system.15

The special role that the United States arrogated for itself in implementing this policy had already been expressed by President Kennedy in April 1961. In remarks following the abortive U.S. invasion of Cuba, 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!16

In intervening in the Dominican Republic in 1965, President Johnson said:

We are not the aggressor in the Dominican Republic. Forces came in there and overthrew that government and became aligned [sic] with evil persons who had been trained in overthrowing governments and in seizing governments and establishing Communist control, and we have resisted that con-

Reagan and Brezhnev Doctrines

trol and we have sought to protect our citizens against what would have taken place.\textsuperscript{17}

In the same year, the House of Representatives resolved that

(1) any [international communist] subversive domination or threat of it violates the principles of the Monroe Doctrine, and of collective security as set forth in the acts and resolutions heretofore adopted by the American Republics; and

(2) in any such situation any one or more of the high contracting parties to the Inter-American Treaty of Reciprocal Assistance may, in the exercise of individual or collective self-defense, which could go so far as resort to armed force, and in accordance with the declarations and principles above stated, take steps to forestall or combat intervention, domination, control and colonization of whatever form, by the subversive forces known as international communism and its agencies in the Western hemisphere.\textsuperscript{18}

D. \textit{Comparisons}

Even this brief review of the Soviet and U.S. doctrines reveals certain common features and differences. Both doctrines are based in part on security and allegedly defensive strategic considerations. Each expresses the view that the approach by an adversary into its own buffer areas would pose an unacceptable security risk, a risk so great that it would require the threatened state to resort to an anticipatory action that would be unlawful in other circumstances and, in particular, had it been taken by other actors. The Brezhnev doctrine, it will be recalled, states that Czech "‘self-determination,’ as a result of which NATO troops might approach Soviet borders and the commonwealth of European socialist countries would be dismembered, in fact infringes on the vital interests of these countries’ peoples . . . ."\textsuperscript{19} With regard to the justification for Soviet competence over Poland, Pravda reported with approval a statement by Gustav Husak on April 7, 1981, to the effect that “Poland’s continued existence as a strong link in the socialist commonwealth is an important factor making for stability in European and world politics.”\textsuperscript{20} With regard to Afghanistan, an editorial in Pravda in January 1980 asserted that “it was not an imaginary but a real threat to the security interests of the

\textsuperscript{17} 52 DEp'T St. Bull., 822 (1965); see also id. at 744 (The United States made “a constant effort to restore peace” and “had no desire to interfere in the affairs of a sister Republic.”); id. at 858 (“The ultimate goal of the Organization of American States” is “to promote the establishment of democratic institutions in the sister Republic.”).

\textsuperscript{18} H.R. Res. 560, 89th Cong., 1st Sess., 111 Cong. Rec. 24,347 (1965) (the vote was 312 to 52, with 3 not present and 65 not voting).

\textsuperscript{19} See supra note 9.

Soviet state that was created on its southern [sic] border.” 21 On the other side of the planet, the OAS Resolution, using symmetrical arguments, viewed communist takeovers of American states as not only undermining democratic institutions but also providing a cover for “political penetration and aggression.”22

There are also significant differences between the U.S. and Soviet formulas. All of the unilateral American doctrines considered up to now are territorially specific: they relate to the western hemisphere, as they have done since the Monroe doctrine. Exercises beyond that hemisphere, as, for example, in Korea and Vietnam, had treaty bases, unequivocal invitations from governments, and a measure of multilateral if not international support. The Brezhnev doctrine, in contrast, manages to convey a certain regional redolence, but in fact it is drafted in terms of a potential worldwide jurisdiction: any state that becomes a member of the socialist commonwealth comes permanently under the Brezhnev doctrine. Thus, from the perspective of strict Soviet interpretation of Brezhnev, the Soviet military presence in Afghanistan is of a piece with the various programs of diplomacy and military action in East Germany, Hungary, Czechoslovakia, and Poland. Here one encounters the interactive, rather than the conclusory unilateral character of doctrines in international law.

The United States and the majority of members of the United Nations have essentially accommodated themselves to all of these cases, except for Afghanistan;23 expectations are still fluid with respect to this most recent expansive application of the Brezhnev doctrine.

This particular imbalance in the Soviet and American claims was partially redressed on January 23, 1980, when Jimmy Carter issued what was promptly named the “Carter doctrine”:

Let our position be absolutely clear: An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the

21. On the U.S. President’s Message, Pravda, Jan. 29, 1980, at 4, trans. in 32 CDSP, No. 4, at 1, 3. Whether or not one accepts that assertion at face value it is plain that the Soviet Union does not automatically act in areas in which the Brezhnev doctrine self-authorizes. As Valenta notes, the Soviet Union came close but did not intervene in Yugoslavia, did not intervene in China, and did not act directly in Poland in the upheavals of 1956 and 1970. Valenta, supra note 5, at 119.

22. OAS Eighth Meeting, supra note 15, at 604.

Reagan and Brezhnev Doctrines

vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force.24

The Carter doctrine extends beyond the Western hemisphere but still, in many ways, differs from the Brezhnev doctrine. It is essentially negative and excluysey, in that it is primarily aimed at preventing the forcible entry of another power into an area comprised of independent states. In that respect, it may be deemed consistent with principles established in the U.N. Charter, for it tries to insure the independence of the governments within the region covered by an anticipatory, prophylactic, and area-specific public commitment to use military force for that purpose. But the Carter doctrine does begin to approximate one of the Brezhnev doctrine's characteristics in that it is no longer limited to the Western hemisphere.

On October 1, 1981, President Reagan issued statements that the White House immediately characterized as the “Reagan codicil to the Carter doctrine.” In response to a question, the President emphatically stated that the United States will not permit Saudi Arabia to “be an Iran.”25 In clarification, the President added that “in Iran I think the United States has to take some responsibility for what happened.”26 Immediately afterwards, a White House aide explained to the New York Times that “the President was now pleading to support the Saudi monarchy against internal as well as external threats.”27

The Reagan codicil was obviously animated by the same security concern that had motivated President Carter: the vital importance of the Persian Gulf area to NATO and, more generally, to the political and economic systems that support it. The difference between Carter and Reagan is neither in conception of national interest nor in expression of national commitment, but rather entirely in contingency: in the anticipated method of incursion. The Carter doctrine contemplates an essentially classical military seizure by overt attack. The Reagan codicil addresses itself to the equally if not more likely method of infiltration and subversion, followed by a coup, the invitation of a foreign government to provide assistance, and so on. It is thus not original but essentially arithmetical, for it does little more than add 1961 Kennedy to 1979 Carter.

The Carter declaration was extremely important, both as a development, or at least publication, of American strategic conceptions and as a

27. Smith, supra note 25, at A1, col. 5.
new claim on international law. It should be emphasized, however, that neither the Carter doctrine nor the Reagan codicil has really been relevant to the more recent Reagan administration posture in the Caribbean and Central America. On March 1, 1985, President Reagan said:

The Soviet attempt to give legitimacy to its tyranny is expressed in the infamous Brezhnev doctrine, which contends that once a country has fallen into Communist darkness, it can never again be allowed to see the light of freedom.

Well, it occurs to me that history has already begun to repeal that doctrine. It started one day in Grenada. We only did our duty, as a responsible neighbor and a lover of peace, the day we went in and returned the government to the people and rescued our own students. We restored that island to liberty. Yes, it's only a small island, but that's what the world is made of—small islands yearning for freedom.28

Rhetorical idiosyncrasies aside, it could have been Kennedy or Johnson: Ronald Reagan can claim no innovation here. U.S. actions in that theater are consistent with the United States' conception of its interests and its behavior for decades. If one sought a specific declaration by a U.S. president that expressed Ronald Reagan's conception of present U.S. regional objectives and rights, it could certainly be Kennedy's manifesto of April 1961.

E. New Stresses

Durable grandes ententes usually rest on symmetrical claims and acquiescences. The understanding traced back to Yalta now seems to be challenged by a lack of congruence in conceptions of what constitutes an acceptable defense zone. The Soviets are inexorably following the logic of Brezhnev as they see it: a continuously expanding "defensive" perimeter, each new territory added to the zone then being coercively reshaped into a communist and totalitarian state, becoming an indispensable link in the chain of the Socialist commonwealth, thereafter permanently assured of Soviet maintenance of its soi disant revolution. Afghanistan, in the Soviet view, is as appropriate an application of the doctrine as is Poland or Nicaragua. In a speech delivered on April 17, 1980, in the presence of Babrak Karmal, then Prime Minister of Afghanistan, Brezhnev stated that "[t]he revolutionary process in Afghanistan is irreversible. The Afghan people and their government have on their side the support and

Reagan and Brezhnev Doctrines

solidarity of the Soviet Union and the other socialist states and of progressive forces the world over.”

Each of these putative extensions of the Brezhnev doctrine has goaded a different American administration into a severe response. President Carter imposed sanctions and President Reagan has openly supported the _contras_ and the _mujaheddin_. And in 1985, in a single remark in anticipation of the full-blown Reagan doctrine, the President said that the United States should accept neither the legitimacy nor the finality of Soviet control of central Europe. That remark, not surprisingly, occasioned a very sharp and nervous response from Moscow.

Unquestionably, the old understanding between Roosevelt, Churchill, and Stalin has been under great stress in recent years. In an important speech on February 22, 1985, in which U.S. attitudes toward the Brezhnev doctrine were significantly modulated, Secretary of State Shultz seemed to be implying that the reason for that understanding’s deterioration was its consistent violation by the Soviet Union. Shultz explained:

When Soviet Politburo member Gorbachev was in London recently, he affirmed that Nicaragua had gained independence only with the Sandinista takeover. The Soviets and their proxies thus proceed on the theory that any country not Marxist-Leninist is not truly independent, and, therefore, the supply of money, arms, and training to overthrow its government is legitimate. Again: “What’s mine is mine. What’s yours is up for grabs.” This is the Brezhnev doctrine.

Part of the more developed U.S. response amplifying this view will be considered below with regard to the second aspect of the Reagan and Brezhnev doctrines.

F. _International Legal Evaluation_

Thus far, we have discussed the development of a reciprocally beneficial superpower arrangement expressed in symmetrical doctrines. Are any of these doctrines, however, lawful under contemporary international law?

Unquestionably, a claim for an exclusive competence to exercise political supervision over otherwise sovereign states in certain designated regions attenuates _pro tanto_ the political independence and right of self-

---

determination of the supervised states. If an evaluation of the international lawfulness of a particular activity is based only on its congruence with some authoritative text, one need proceed no further. Under textual inquiry neither the Brezhnev nor the Reagan doctrine is lawful. But if an assessment of lawfulness includes an examination of the probable consequences of the activity and of its feasible alternatives in terms of the maintenance of minimum order in the international community and their contribution to other authorized goals, then such an inquiry has perforce only begun. The widest military and political context must be examined as well as the minimum and more general goals of the community concerned in order to ascertain what positive or negative contributions the Reagan and Brezhnev doctrines make to them.

Contemporary international politics cannot be comprehended without reference to the nuclear balance established between the superpowers. That balance prevents a catastrophic war which could well render this planet uninhabitable and destroy our species. Given the resources involved, the superpowers ultimately have the exclusive control necessary to avoid this catastrophe. Every sane person has an interest in seeing that balance maintained. Even those who accept, or even participate in, the superpower competition expect and demand that each superpower comport itself so as to avoid any direct conflict with a potential for nuclear escalation.

These unyielding realities of power virtually compel a daily, implicit world plebiscite that authorizes the two superpowers to avoid a global war through a complex and coordinated system of explicit and tacit mutual deterrents, and to see to it that local conflicts do not spread and threaten global conflagration. Implicitly and inexorably, a degree of authority is added to that control. This means that, legal formula and democratic theory notwithstanding, one indispensable level of international lawmaking is essentially assigned to a club of two. There may be relative differences between the superpowers with regard to their dependence on their allies, the extent to which they share power with them, or the extent to which they are open to influence by or dialogue with them. There is no question, however, about where the ultimate power rests on either side. Nor can there be any question about the fact that this special two-player process will be inconsistent, procedurally and, sometimes, even in terms of substantive results, with criteria prescribed in the formal texts of international law.

We have no name for this essentially diadic superpower process of making and applying basic survival norms. In the eighteenth century, scholars and diplomats referred to the “public law of Europe,” as distinct
Reagan and Brezhnev Doctrines

from the droit des gens or law of nations. Nor is this process completely unknown in contemporary international law. In the 1950 phase of the South West Africa case, Lord McNair, in a separate opinion, observed that:

[F]rom time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international regime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence. 32

The diadic process referred to herein cannot properly be called international constitutional law, for there is a world constitutive process in many sectors in which there is very wide participation. Instead, it is but one part of the world constitutive process. Perhaps the term “rules of the game” might be appropriate to designate these diacically established survival norms. However labelled, they and the processes by which they are shaped are, I submit, international law—indeed, a very special type of international law. Because the avoidance of nuclear war is the conditio sine qua non of contemporary international law, these particular international prescriptions are so important as to preempt other norms that may prove to be inconsistent with them.

Some may disagree with this position. If one adheres to the belief that law is a permanently closed, textual system, then this process of making and applying the basic norms of survival by the superpowers is per se unlawful. Conversely, if one dismisses law as no more than a convenient camouflage for those who have effective power, then the unlawfulness or the unlawfulness of these arrangements suddenly becomes an irrelevant question. If one accepts, however, the self-evident proposition that law is a human artifact, created and maintained by people to facilitate their lives together, then it is obvious that law must always be grounded in reality. And these survival norms or “rules of the game” are not only grounded in the reality we inhabit, but are also the condition of its continuation.

Precisely because survival norms advanced by the Reagan and Brezhnev doctrines are law, it is appropriate here to explore whether, within the bounds of possibility, there are other arrangements that can better achieve the common survival objective. This requires criteria for evaluation. Obviously, the criteria that must be deployed in this appraisal cannot be those of the formal system alone. The primary criterion of evaluation must instead be whether the “rule” in question contributes to the maintenance of minimum order between the powers.

Second, if the answer to that question is in the affirmative, one must address whether that particular objective is accomplished in ways that minimize the violation of the norms of the formal system. If the answer to the second question is also in the affirmative, then these “rules of the game” would appear to be lawful. If, on the other hand, the answer is negative, it is incumbent on the scholar, who sees his role not only as a describer but also as a contributor to the enhanced performance of law, to explore alternative methods for achieving the larger security objective with less violence to the norms of the formal system.

I submit that the basic critical defense zone claims made by the United States and the Soviet Union are lawful, precisely because they are indispensible to the avoidance of serious conflict. Conflicts may erupt from mistakes and misperceptions. Because of the speed, total destructiveness, and irrevocability of the contemporary instruments of violence, minimum world order requires that states communicate to their adversaries, clearly and in advance, exactly which parts of the planet they deem indispensible to their security and, hence, which expansive political or military changes initiated by or enuring to the benefit of an adversary will be unacceptable and likely to lead to war. It is important that these communications be clearly received and that, through tacit or explicit bargaining, they succeed in establishing clear and plausible expectations about where and for what purposes the lines are drawn.

These claimed zones, however, can be deemed lawful only insofar as they relate directly and plausibly to superpower defense, no further. The exclusion of an adversary’s influence may be justified in terms of the maintenance of world order, but aggressive realignments of unaffiliated states and interventions in the internal public order of states within critical defense zones cannot be thus justified. Precisely because inclusive security is the justification for the exclusion of the adversary and the attenuation of other states’ rights, nothing but exclusion can be demanded in the name of the Reagan and Brezhnev doctrines.

Examining the international lawfulness of these parts of the two doctrines in terms of the functioning of common survival norms, it would appear that the United States may demand an appropriately neutral stance by the Nicaraguan government, but may not, in the absence of other international authority, insist that Nicaragua rearrange its internal order in ways that cater to Washington’s ideological proclivities. Eden Pastora Gomez reports a conversation between Assistant Secretary of

33. See Reisman, supra note 1, at 589-90.
Reagan and Brezhnev Doctrines

State Thomas Enders and Nicaraguan President Daniel Ortega in August, 1981, which puts the matter in unequivocal and brutal terms:

Enders had told Daniel [Ortega] that the Nicaraguans could do whatever they wished—that . . . they could take over La Prensa, they could expropriate private property, they could suit themselves—but they must not continue meddling in El Salvador, dragging Nicaragua into an East-West confrontation, and if they continued along these lines, Enders said, they would be smashed.34

By the same standards, the Soviet Union may insist on a non-aligned and, at least in terms of superpower rivalries, a relatively neutral Afghanistan, but it may not invade it in order to transform it coercively into a people’s republic after its own image. Some evidence of international support for the above restriction can be found in the overwhelming international revulsion at the brutal suppression of the Czech spring, a modest effort at liberalization in eerie anticipation of what one hopes is the purpose of General Secretary Gorbachev’s current campaign. It is quite significant in this regard that much international opinion simultaneously has been in favor of Solidarity but has not suggested that Poland should also be permitted to leave the Eastern bloc. Similarly, it is my impression that elite opinion has leaned toward the conception of a non-aligned Afghanistan, while simultaneously strongly condemning the Soviet invasion and broader presence there.35

In sum, there is a core in both the Brezhnev and Reagan doctrines that contributes, and indeed may be indispensable to, the maintenance of current minimum world order. Like any other legal conception, however, the doctrines contain the potential for abuse. When such abuse occurs, the extension of such doctrines exceeds lawfulness.

II. Logistical Support for “Freedom Fighters”

Far more controversial than President Reagan’s critical defense or sphere of influence doctrine has been his claim of a national competence to support selected insurgents against existing governments. These insurgents are dubbed “freedom fighters.” Not every insurgent group qualifies for this title. The Nicaraguan contras have, as have Savimbi’s UNITA and the Afghan mujahidin. But, to name only a few of the rejects, the

35. It should be noted in this regard that a recent General Assembly resolution on Afghanistan condemns the foreign intervention but also adopts as a goal that the “non-aligned character of Afghanistan is essential for a peaceful solution of the problem.” G.A. Res. 41/33, 41 U.N. GAOR Supp. (No. 53) at 24, U.N. Doc. A/41/L.12 and Add. 1 (1986) (adopted by a vote of 122 to 20 with 11 abstentions).
PLO and other active Palestinian fighting groups, the various Eritrean Liberation Fronts, and the Western Somali Liberation Front have not.

A. Reagan’s Freedom Fighter Corollary

The rhetoric for this part of the Reagan doctrine has been very distinctive, and both President Reagan and Secretary of State Shultz have sometimes been at pains to prove that it is also innovative. On March 1, 1985, in a much commented-upon speech, Reagan said, “Freedom movements arise and assert themselves. They’re doing so on almost every continent populated by man—in the hills of Afghanistan, in Angola, in Kampuchea, in Central America. . . . They are our brothers, these freedom fighters, and we owe them our help.”36 The operational aspects of this policy were spelled out by Secretary Shultz on February 22, 1985:

How should we act? What should America do to further both its security interests and the cause of freedom and democracy? A prudent strategy must combine different elements, suited to different circumstances. First, as a matter of fundamental principle, the United States supports human rights and peaceful democratic change throughout the world, including in noncommunist, pro-Western countries. . . . Second, we have a moral obligation to support friendly democratic governments by providing economic and security assistance against a variety of threats. . . . Third, we should support the forces of freedom in communist totalitarian states. . . . Fourth, and finally, our moral principles compel us to support those struggling against the imposition of communist tyranny. . . . The UN and OAS Charters reaffirm the inherent right of individual and collective self-defense against aggression—aggression of the kind committed by the Soviets in Afghanistan, by Nicaragua in Central America, and by Vietnam in Cambodia. Material assistance to those opposing such aggression can be a lawful form of collective self-defense. . . . Most of what we do to promote freedom is, and should continue to be, entirely open. Equally, there are efforts that are most effective when handled quietly.37

Distinctive rhetoric aside, is this really an innovation? Here, again, a closer look reveals that there is less novelty, in both general and specific practice, than meets the eye. The Reagan administration is hardly the first one to provide covert support to insurgencies against existing governments. The practice certainly was not unknown to Eisenhower, Kennedy, Johnson, Nixon, Ford, or Carter. Nor can President Reagan be credited entirely for his uncommon openness about intervention. Even since the Church Committee, an administration that wishes to indulge in this sort of thing cannot do so as covertly as before, for congressional

36. Conservative PAC Dinner, supra note 28, at 245.
37. Shultz, supra note 31, at 18-19 (emphasis omitted).
Reagan and Brezhnev Doctrines

notification and, to an extent, participation, is now required. Nor can President Reagan claim that he has selected all of his beneficiaries. Some of Reagan's freedom fighters were already being covertly supported by Carter. For example, U.S. aid began to go to the Afghan resistance before Reagan entered office. Finally, President Reagan cannot even claim that the Executive is leading the Congress in this area. Though Reagan's enthusiasm for some of his freedom fighters is not always matched by Congress, as is the case with the contras, Congress is out ahead of Reagan on others, the prime example being the Afghan resistance.

B. Brezhnev's Freedom Fighter Corollary

President Reagan is not only following his presidential predecessors; he is also following his adversary. The Soviet Union has long reserved the right to support those groups that it deems to be "progressive" forces. The Brezhnev doctrine, in its various manifestations, was never simply defensive and conservative. It was not designed solely to retain within the Socialist camp those states that had once opted for it but whose populations subsequently reconsidered and now wished to opt out. Kovalev wrote that any struggle for national liberation, anywhere in the world, must be supported by "genuine revolutionaries," an expansive dimension of the doctrine that found no explicit counterpart in U.S. claims until the Reagan Administration's formulations. According to Kovalev's explanation, Brezhnev explicitly endorsed pro-active support on behalf of groups struggling to establish communist governments in countries that were not communist.

Those who speak of the "illegality" of the allied socialist countries' actions in Czechoslovakia forget that in a class society there is and can be no such thing as non-class law. Laws and the norms of law are subordinated to the laws of class struggle and the laws of social development. These laws are clearly formulated in the documents jointly adopted by the Communist and Workers' Parties. . . . Genuine revolutionaries, as internationalists, cannot fail to support progressive forces in all countries in their just struggle for national and social liberation.

There is no indication of any moderation of this stance. Gorbachev, it will be recalled, implied, according to Secretary Schultz, that governments became independent only when they became socialist.

40. Kovalev, supra note 7, at 12.
41. See supra note 31 and accompanying text.
The Soviet claim was and continues to be that, the U.N. Charter notwithstanding, the Soviet Union maintains the right to support those struggling against existing governments if their struggle is consistent with historical laws, of which the Soviet government is the exclusively authorized interpreter. If the groups succeed, the Soviet Union has the additional right and obligation to make sure that their members and constituents do not change their minds in the future. A scholar of no less stature than Professor Tunkin has sanctified the doctrine as a *jus cogens*.  

C. The United Nations’ Freedom Fighter Corollary

These particular Soviet and American claims are certainly inconsistent with the black letter of the U.N. Charter. But they now find parallels in the contemporary practice of the General Assembly and the International Court of Justice, two important custodians of this basic instrument. Hence the assessment of their lawfulness is necessarily more complex. To appreciate this fully, one must consider the structural changes that have taken place in the process of international law-making over the last forty years.

In 1945, the victors of World War II, then the unchallengeably dominant actors in world politics, turned their attention explicitly to the creation of international political and legal structures that might perform certain delegated political functions. The scheme, hammered out at Yalta and formally installed in San Francisco, essentially codified key aspects of the prevailing political situation. Effective power was reposed in the Security Council, where each of the Permanent Members was endowed with a veto.  

High-sounding promises in the Charter notwithstanding, the other forty-five or so Charter members were given relatively little power.

Not surprisingly, these other states were dissatisfied and began to agitate for a greater share from the very inception of the organization. After 1949, the United States found it to its advantage to encourage this “democratizing” trend. Indeed it was the United States that initiated the “Uniting for Peace” Resolution, which established a contingent competence in the security area for the General Assembly when the Security Council was blocked. The Soviet Union opposed the change, as the As-

42. G. Tunkin, *supra* note 10, at 444.
43. U.N. CHARTER art. 27, para. 3.

188
Reagan and Brezhnev Doctrines

Assembly was likely, given its composition at that time, to vote as the United States wished.

The politics of international organizations changed rapidly. By the early 1960's, as the process of decolonization accelerated and more and more new states entered the General Assembly, member states began to form a relatively independent force in world politics. Increasingly, they sought to use the powers of the General Assembly to further their political objectives by trying to transform the Assembly into a legislature. The conception of the Assembly and, more generally, of international organizations, as parliamentary law-making bodies was, if controversial, certainly not preposterous. There had already been a fair amount of doctrinal speculation on the matter. Moreover, the U.N. Charter itself, in articles 2(6) and 13, suggested certain bases for this development. When it served their purposes, the United States and some of its European allies had seemed to support the “parliamentary” conception through the 1950’s. The International Court, for its part, had also given some encouragement to the idea.

This emerging conception of law-making was plainly inconsistent with the older principles, which had been based largely on consent and power. The new arrangement also enfranchised a large number of weak states by creating a specially designed arena that permitted them to use their numbers against the effective power of the larger states. The full implications of these changes seem to have been overlooked by the old “haves” for a number of reasons. Apparently it was felt that the weaker states needed the stronger states and could not go too far without them. Conversely, the stronger often needed the weaker in parliamentary arenas as well as in other junctures of interdependence in world politics. And inevitably, some of the innovations were favorable to one or the other superpower.

It is astonishing how comprehensive the General Assembly’s efforts to re-legislate international law have been. It has created many new organizations and entities within the U.N. system and major projects on the oceans, diplomacy, and treaties. More important, General Assembly or Assembly-inspired initiatives have included efforts to revise basic interna-


46. See, e.g., Uniting for Peace, supra note 44, at 10. See also Conditions of Admission of a State to the United Nations, 1948 I.C.J. 57 (Advisory Opinion of May 28, 1948).

tional economic law under the rubric of the New International Economic Order, to revise the systems of transfer of information under the rubric of the New International Information Order, and, of course, to change prescriptions regarding the use of force.

The *modus operandi* in these new arenas also merits mention. In a relatively short period of time, majority votes of comprehensive conferences such as the General Assembly were deemed to be, if not international law, then at least strong evidence of international law. By 1975, the International Court of Justice, which had become increasingly oriented toward the General Assembly, also adopted this position.

Now plainly, the “First” and “Second” Worlds, if one may employ convenient though often-abused terms, were not always happy about these efforts to bring about major and consequential changes in international constitutive and substantive law. The First World may not have had the votes, but international politics also involves effective control, which it had in abundance. Increasingly, the outcomes of the conference arenas of the 1960’s and early 1970’s were characterized by the First World as “irresponsible,” yet its protestations were ignored. Thus, on paper, the resolutions of UNCTAD and the General Assembly reformed world politics and economics. In practice, however, they effected little change.

Belatedly, the political leadership of the Third World acknowledged the problem. Because it stood to gain more from formal institutions than from informal and non-structured international lawmaking, it collaborated in exploring ways of tempering the illusory power of big numbers. “Consensus” emerged as a term of art signifying a general agreement to ignore the formalities of voting where there were automatic majorities inconsistent with the actual power necessary for making effective legislation. Decisions came to be shaped through consultations, taking account of the interests of those who had effective power but who were often, in a particular structured arena, a numerical minority. Only after such consultations could an agreement become “endorsed” by a formal vote.

Consensus was a creative response but it could only do so much. The sheer weight of numbers in organized arenas is inevitably felt in the very decision to hold a conference; in the establishment of its agendas, timetables, and staffing policies; and in procedural matters. And once a parlia-

---

Reagan and Brezhnev Doctrines

mentary conference is underway, one of the superpowers may determine that its interests are furthered by the projet and support both the projet itself and, by implication, the modality by which it is being prescribed. However, even in the absence of such support, some matters are of such passionate conviction that compromise via consensus is scarcely possible. And, even with consensus, this new putative version of international law has proven unacceptable to key states who are politically strong in objective terms, but politically weak in parliamentary terms.

The divergence between the two versions of international law is particularly dramatic with regard to the law of war. The textual universe of the Charter diverges from inherited customary international law in a number of ways. In the world that it was designed to effect, unilateral force is no longer lawful and no longer necessary thanks to the Security Council, which undertakes responsibility for peace and security and is assigned the military resources that enable it to make that responsibility effective.52 The contingencies that justify Council action—"threat to the peace, breach of the peace, or act of aggression"53—are all apparently violations of the status quo. Even the right of self-defense is verbally limited to response to an "armed attack," the term of art for the precipitating event of an act of aggression. And self-defense is permissible only until the Security Council itself decides how to act (if at all).54

On paper, this is an essentially conserving and non-discriminatory regime, structured to protect the territorial integrity and political independence of states against coercive change. There are, of course, other themes in the Charter, expressed in appraisal, aspirational, and change norms that transcend national jurisdiction, such as human rights and the right to self-determination. But the security regime appeared, at least textually, to have been compartmentalized and insulated from these invocations for change.

The aforementioned emerging international parliamentary arenas have introduced many changes in this regime. Consider, first, the 1970 General Assembly Declaration on Principles of International Law Concerning Friendly Relations,55 a document supported by the United States and frequently presented by states and by the International Court of Justice as a codification of contemporary international law. The Declaration provides in pertinent part:

54. U.N. CHARTER art. 51.
By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.  

The operational implications of this right are spelled out three paragraphs later:  

Every state has the duty to refrain from any forcible action which deprives peoples...of their right to self-determination and freedom and independence.  In their actions against and resistance to such forcible action in pursuit of the exercise of self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.  

By drawing upon the divergent themes in the Charter, the beginning of an attempt at inverting customary law may be noted. “Peoples” have the right to “resist” when a “state” forcibly impedes their right to “self-determination” and “freedom and independence.” The state against which groups who have won the title of “people” are struggling may constitute, by its very obturacy, a “threat to the peace” within the meaning of the Charter—a legal refinement for which Professor McDougal and I are, in part, responsible. Rather than defend itself, that state must refrain from any action that impedes the struggle, that is, it must refrain from action that could otherwise be characterized as self-defense. Third states are obliged to help the struggling groups, and cannot be held legally responsible by the targeted state for that help.  

This “inversion” is not limited to a few historical atavisms. While decolonization may have had a historically specific reference for some of the drafters in 1970 and been limited to Portuguese territories and to the continuing human rights abominations in South Africa, some drafters surely were thinking of Israel, while others were likely thinking of groups like the Sandinistas, Sentero Luminoso, the IRA, the Moro Liberation Front, or even the Red Brigade. Certainly the final draft favors those who wish the broader conception. Terms such as “self-determination” or “freedom and independence” are open-ended and can be applied to any group that a majority, or possibly only a substantial number, of members of the General Assembly wishes.  

56. Id. at 123.  
57. Id. at 124 (emphasis added).  
Reagan and Brezhnev Doctrines

Additional Protocol I of 1977\(^59\) reinforces this trend in Article 1(4). By internationalizing the struggles endorsed in the Declaration, it facilitates the fulfillment of the international obligation of assistance established in the Declaration. Contemporaneous statements by delegates confirm this intention.\(^60\) Articles 43 and 44 further discriminate in favor of guerillas, the preferred form of warriors of national liberation, by discharging them from the fixed insignia requirement of customary international law and the need to comply with that law, while still giving them the law's benefits. Yet the Protocol prohibits reprisals\(^61\) and more generally bars the use of the military instrument for political objectives.\(^62\)

The 1979 International Convention against the Taking of Hostages\(^63\) is even more explicit in setting out some of the operational implications of this inversion. Article 1(1) defines the prohibited offense as follows:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage taking") within the meaning of this Convention.

But Article 12 of the same Convention provides in pertinent part:

[The present Convention shall not apply to an act of hostage-taking committed in the course of armed conflict as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.]\(^64\)

These examples are cited to clarify that a very distinctive version of international law as it relates to the use of the military instrument was emerging from the institutions of formal international law-making over an extended period of time. That conception was straying quite far from customary international law. Indeed, a new type of "just war" was being created.

\(^{61}\) Geneva Additional Protocol I, supra note 50, art. 51, para. 6.
\(^{62}\) Id. art. 52, para. 2.
\(^{64}\) Id. art. 12, para. 12.
The new pattern of application of these particular legal norms can be seen by examining recent decisions by the political organs of the United Nations and recent judgments of the I.C.J.\textsuperscript{65} In all these cases and incidents, one finds two innovations. First, a hitherto unimplemented aspirational norm is now being used to recharacterize, retroactively, a hitherto lawful situation as unlawful. The state defending itself from change is now \emph{per se} the law-breaker. This development shifts international law, which formerly had been largely \emph{status quo}-oriented and would have leaned in favor of the existing state, toward a new posture in favor of the party that significant groups in the United Nations choose to view as struggling for “freedom and independence.” Second, and more subtle, the \emph{content} of the Charter conception of aggression and self-defense is being changed to preclude incursive responses by the target state into the territory of another state in which the attacker has found haven. The customary right of self-defense is being redefined more restrictively and with different contingencies. The effect of this innovation is to allow the internationally-approved, low-level, and protracted belligerent to operate with impunity outside the target state, while the target state is permitted to apprehend its adversary only \emph{within} its own territory.

This revision of the formal theory of self-defense developed over a period of time. There has been much discussion of whether the Charter merely acknowledges the continuing legal effect of the customary right of self-defense or establishes an entirely new Charter-based “right.” The issue is not theoretical or abstract, for suppression of the customary doctrine would also limit the competence of a state contemplating self-defense as to contingencies and circumstances of a lawful self-defense. The U.N. General Assembly has assumed the competence to define the exclusive contingency for lawful Charter-based self-defense. The technical term for that contingency is “armed attack.” Article 3(g) of the Definition of Aggression, adopted by the General Assembly in Resolution 3314 (XXIX),\textsuperscript{66} establishes what initially appears to be a quantitative threshold for the right of self-defense. Thus, an armed attack includes:

\begin{quote}
[The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to \textit{inter alia} an actual armed attack conducted by regular forces, Article 3(a)] . . . or its substantial involvement therein.\textsuperscript{67}
\end{quote}


\textsuperscript{67} \textit{Id.} (emphasis added).

194
Reagan and Brezhnev Doctrines

In its affirmative part, this definition says that the mere fact that armed bands emanate from one state and engage in military activities in another state does not constitute “armed attack,” the contingency that would presumably justify the Charter-based privilege to respond to the incursions wherever they might be unfolding. Should the attacked state nonetheless fight back, its action will be considered aggressive. Only when the attack by irregulars is of such gravity as to amount to an actual armed attack may the attacked state respond in self-defense. In other words, only when this unspecified threshold is exceeded is the victim state entitled under this new theory to take measures of self-defense. Obviously, this is a formula favorable to what has come to be called “protracted low-level conflict,” which by definition does not reach the level of “armed attack.”

The implications of this innovation were made explicit and developed logically by the I.C.J. in its judgment on the merits in the *Nicaragua* case. The present exposition is not aimed at examining the accuracy of the Court’s holding. The holding contained many problems, and most of the Court’s assertions of customary international law are based on nothing other than its *ipse dixit*. Rather, the present analysis simply traces the Court’s development of the above trend.

In *Nicaragua*, the I.C.J. superordinated the Assembly’s definition of use of force by attempting to transform it into customary law and vice-versa. It thereby excluded, it would seem, the old customary rights, including the general right of reprisal. Consider the Court’s statement at paragraph 181:

However, so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. . . .

Thus, the Court’s merger would exclude any unilateral rights to the use of force that derived from customary law and would superordinate the Assembly’s regime and the Assembly’s apparatus for its illumination. What, then, is this new conception of the lawful contingency for the right of self-defense?

68. *See supra* note 34.
69. *Id.* at 96-97.
The Court narrows even further the General Assembly’s already attenuated conception of the contingencies for self-defense. It excludes from “armed attack,” and hence from the right of self-defense, many of the methods of low-level, protracted conflict. First, the Court insists that acts of armed bands must “occur on a significant scale.” Second, the Court excludes by definition from the category of armed attack “assistance to rebels in the form of the provision of weapons or logistical or other support.” The language of the Court here is instructive: “Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.” However, the Court holds that these are Charter terms of art that do not authorize self-defense by the target state but only actuate a contingent competence of the Security Council. If the target state thinks it can secure assistance from the Council, it can repair there—assuming that the Council agrees, is not vetoed, and has the ability to restrain the party “threatening” or “using” force.

If the Council is completely unable to act, the target state can theoretically repair to the General Assembly. But this would avail it only if the Assembly decides that the group attacking or assisting the military action in the target state is not “struggling for its freedom and independence.” The critical point is that what the group initiating the cross-border violence is doing does not, by definition, amount to an armed attack, and hence never warrants in response unilateral use of force characterized as self-defense. If the target state does respond to low-level activities by force, its action itself is by definition a violation of international law.

Thus, the new theory in the final analysis prevents the target state from doing anything effective, for according to the I.C.J., low-level attacks do not permit the victim state to resort to levels of coercion contemplated in the right of self-defense. In the most common form of contemporary conflict, the I.C.J. issues one of the parties round after round of blanks. Moreover, the new theory trumps the older theory of customary rights of self-defense, for the asymmetry that has been established here is one that, pace the Court, is identical in both conventional international law (the Charter) and customary international law.

70. Id. at 104.
71. Id.
72. Id.
73. U.N. CHARTER art. 35 (allowing a member or a non-member, under certain conditions, to bring any dispute to the attention of the Security Council or of the General Assembly).
Reagan and Brezhnev Doctrines

In short, the strand of international law that is championed by major international institutions has come to facilitate the expansive components of the Brezhnev and Reagan doctrines, for it renders lawful and endorses support of insurgencies against established governments. Rather than that support being delictual, it is the resistance (heretofore known as the self-defense) of the targeted government that is delictual, for it is conducted with the aim of preventing “self-determination and freedom and independence.”

D. Superpower Adaptations

The purpose of this rather complex review is to show that in the context of international legal developments, President Reagan is blazing no new trails. The expansive component of the Reagan doctrine merely tracks the Brezhnev doctrine and builds on an international legal version that has been developed and illuminated by the U.N. General Assembly and the I.C.J. Apparently Reagan’s advisers assume that if this is the way the game is to be played by others, then it is surely the way the United States will play. If the Soviet Union reserves the privilege of selective meddling in other countries’ affairs, then the United States will claim the same privilege. If the Brezhnev doctrine is internationally lawful in this regard, then the Reagan doctrine is, at the least, entitled to try to establish its own lawfulness.

The evaluation of this démarche strictly in terms of effective and beneficial national policy will depend on assessments of whether, among the marginally effective governments of the world, governments favorable to the United States can withstand such meddling by others, while governments hostile to the United States cannot, thus adjusting internal arrangements or external alignments in ways deemed more favorable to the United States. It is not possible to make such an appraisal in any systematic fashion here but I would suggest that, for many reasons, Western democracies, compared to their totalitarian counterparts, are remarkably ill-equipped to play this meddling game. This year marks the twentieth anniversary of the Brezhnev doctrine, suggesting that the Soviet Union still believes that its gains under the doctrine outweigh its losses. To be sure, General Secretary Gorbachev said on November 2, 1987, that “all the Communist parties are fully and irreversibly self-governing. . . . The period of the Comintern, Cominform, and even of binding international consultation has passed.”74 We will only know if this is a genuine

Gorbachev Doctrine fully repealing Brezhnev when the next popular uprising occurs in Central Europe. In the meantime, no Soviet garrisons have been withdrawn anywhere. Until they are, it would be sensible to heed Adam Ulam's observation that Gorbachev "has not become the general secretary to preside over the liquidation of the Communist empire."75

E. International Legal Evaluation

From the standpoint of international policy, the erosion of the norm of non-intervention in favor of more latitude for interventions for national purposes is plainly destructive of the common interests in minimum order. Unlike the defensive dimensions of the Brezhnev and Reagan doctrines, their corresponding expansive dimensions do not contribute to the maintenance of minimum order. Instead, they are lamentable, and must be viewed as part of the general deterioration of the collective security system as originally contemplated by the U.N. Charter. Alas, however, that deterioration appears irreversible, with both the General Assembly and now the International Court providing direction, approval, and acceleration. Short of a new superpower accord requiring each to abjure the expansive part of its respective doctrine, these types of actions will continue.

Can the lawfulness of such actions still be appraised in terms of international law? Plainly, the effort must be made if it is assumed that the pattern will persist: to refuse to appraise lawfulness will simply reward the successful law-breaker. The evaluation of the lawfulness of such uses of force is not impossible. Force per se is not unlawful; indeed, it is inseparable from law. What is unlawful is force that is used for illicit ends. The critical question, then, in a decentralized system is not whether coercion has been applied, but whether it has been applied in support of or against community order and basic policies, and whether it has been applied in ways whose net consequences include increased congruence with community goals and minimum order. In these terms, Grenada can hardly be placed in the same category as Afghanistan. In terms of consequences for a world order of human dignity, the Brezhnev and Reagan doctrines may prove to be quite different from each other indeed.

75. Id.

198