THE FUNCTIONS OF LAW IN
INTERNATIONAL CRISIS

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ABSTRACT

Post-World War II international politics have been measured in terms of crises. There have been scores of disputes among nations in this thirty-year era which have pressed the international community dangerously close to a Third World War. With the emergence of nuclear weaponry, another conflagration has become, if not unthinkable, at least, as a matter of priority, a circumstance to be avoided.

A number of variables have been involved in all crises of this period, among which international law has prominently figured. For a variety of reasons, nations engaged in crisis have turned to law to justify actions and to explain policies. Frequently, the attempt to invoke legal arguments has been over-shadowed by the magnitude and intensity of the crisis. Legal analysis has been content to weigh the strengths and weaknesses of a nation's legal case without investigating the positive contribution of law in resolving the disputes inherent in a crisis. The objective of this dissertation is to examine how international law functions in critical situations to prevent violence, or how law functions to terminate violence once initiated.
To help fulfill this objective, this dissertation presents a functional framework of international law. The purpose of the framework is to conceptualize the functions of law in preventing and/or limiting violence in crisis. There are three separate but inter-related functions of international law suggested: communications, providing-alternatives-to-violence, and defining-of-boundaries-of-crisis. The argument is that in any crisis situation these functions can be observed, and furthermore, that they serve to prevent and/or limit violence.

To demonstrate the utility of this conceptual framework, two post-War crises will be examined: the Suez Canal crisis of 1956 and the Cuban missile crisis of 1962. Each of these episodes will be approached from three perspectives: an historical sketch to indicate the nature of the crisis, a traditional legal analysis of the issues involved, and an analysis of the role of law from the functional viewpoint.

Because every contemporary conflict risks the potential of escalation, the importance of any effort to conceptualize methods of conflict resolution is undeniable. This dissertation will demonstrate the significance of the functions of international law in preventing and/or limiting violence in international crisis.
INTRODUCTION

The law of nations has historically been the concern of theologians, diplomats, philosophers, and lawyers. In the present century the social scientists have joined with the international lawyer to add the techniques of economics, sociology, and political science to the study of international law. Many of the questions raised by the earlier treatises on the subject remain pertinent today: What is the basis of international law? Is it positive or natural law? What are the legitimate sources and evidences of international law? These questions, and many others, have been at the center of the study of international law for several centuries.

In addition to engaging in such weighty and important philosophical matters, the scholars of

international law have also managed to synthesize a formidable body of substantive law. A perusal of any popular textbook indicates the breadth and depth of the corpus of legal norms regulating international relations on such topics as territoriality, state responsibility, jurisdiction, nationality, the legal and illegal use of force, and so on.²

As the social scientist, and particularly the political scientist, entered the field, international law was studied as it related to the environment in which it operated. Or, in the contemporary jargon, law was examined in the context of the international system.³ Scholars became interested in some of the dynamic aspects of international law: how it changes, develops, and adapts to the fluctuating international milieu.

Thus, based upon this long and distinguished study of law in the international community, the interested student can acquire an understanding of the substance of

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international law. Through the methodological rigor of the past few decades he can learn why the law has developed the way it has. But if the material exists concerning the "what" and the "why" of international law, the "how" has yet to be fully explored. The objective of this study is to examine how international law works to prevent and/or limit violence during international crisis.

Given the nature of contemporary international politics, any crisis is potentially, and actually, dangerous. As one international scholar has noted: "the whole basis of our modern sense of crisis is that very few, and possibly only one outbreak of nuclear warfare will spell the end of civilization, and virtually the physical end of man." And, as the late Adlai Stevenson observed in the United Nations Security Council debate concerning India's seizure of Goa: "When acts of violence take place in this dangerous world no matter where they occur or for what, there is reason for alarm."\(^4\)

Furthermore, the tragic and senseless conflict in Southeast Asia interposed a frightening new word into the vocabulary of international relations: escalation. Any small, localized disturbance can develop into a major


\(^5\) Quoted in Richard A. Falk, Law, Morality, and War in the Contemporary World (New York: Praeger, 1967).
conflict of unsuspected proportions; every crisis is perilous. Consequently, any knowledge concerning the prevention or limitation of violence is valuable to those who share the concern for peace in the international community.

**Approaches and Methods**

International relations and law, like the other disciplines and sub-disciplines within the social sciences, have recently been the subject of a methodological debate. The most frequent characterization of the opposing sides in this debate has been the "traditional" or "classical" approaches and methods versus the "behavioral" approaches and methods. Generally, the former approaches are

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identified by their historical and descriptive nature, while the behavioral approaches and methods involve some sort of quantitative analysis. The following study is neither totally traditional nor totally behavioral. While it is not a narrative nor description, it also is not quantitative. The general approach can best be characterized as analytical.

As it relates to this inquiry, analysis connotes a dissection of each of the two crisis situations selected (this selection will be discussed below), into their constituent parts; each part will be closely examined. This systematic process should assure logical consistency and lucidity in the explanation of the role of law in international crisis. On the other hand, this study will be historical, since both of the crises selected occurred in the past. The primary sources of data will be historical accounts of the two cases, and the analyses of the crises by observers.

In addition, this project is intended to be systemic. An important element of this inquiry is the development of a rudimentary conceptual framework for the


study of international law as it functions in crisis situations. To the degree that the functional framework is useful in explaining the role of law in the two cases selected for investigation, the framework should be applicable to other crisis situations, and thus be of assistance in explaining one of the myriad relationships in international relations.  

The particular methodological technique will be the case study. 11 This technique has both advantages and disadvantages. It affords the investigator the opportunity to scrutinize a delineated time/space situation, and it allows for the identification and classification of the most significant variables within the defined area.


On the other hand, since each case is unique, the ability to generalize is severely limited. While this major limitation cannot be overlooked, two factors in the present inquiry should mitigate its impact. First, two different cases will be examined, which should add to the depth and breadth of any general conclusions. Second, the conceptual framework which will be applied to both case studies should supply sufficient commonality to make generalizations plausible.

One final point should be made in regard to approaches and methods. Below, in the development of the framework, some consideration is given to the functionalist approach to the study of social phenomena. As will be indicated there, there is some confusion in regard to functionalism. Nevertheless, to the degree that this study will suggest in an elementary fashion how international law "functions" in crisis, it can be labeled a functionalist analysis, without precisely defining the term here. The

12. To many readers, this may seem a casual and cavalier treatment of an important point. I have spend a good deal of time investigating the notion of functionalism, and as of yet have not uncovered a definitive treatment of the subject. Even those who label themselves functionalists have not come to grips with a satisfactory definition of the term. An excellent treatment of the subject in a short, comprehensible format, is Don Martindale (ed.), Functionalism in the Social Sciences: The Strengths and Limits of Functionalism in Anthropology, Economics, Political Science and Sociology (Philadelphia: American Academy of Political and Social Science, 1965). Given the terminological imprecision over the terms of functionalism, there is no need at this time to enter into the methodological fray. The
objective in constructing this functionalist framework is to conceptualize the functions of law in a manner useful for future investigations. To formulate the framework, it will be necessary to examine the recent literature of international law and of functionalism in the social sciences.

Any attempt to devise a conceptual framework generates additional problems. One of the most conspicuous of these problems is the proclivity of the researcher to impose the framework upon the data with which he is working. The researcher also risks the possibility of selectively interpreting the data to fit his framework. By intentionally keeping the framework flexible and open-ended, these problems can be avoided. Some students of methodology might argue that the framework constructed here cannot be classified a conceptual framework, since it will not provide parameters of constraint nor bases for prediction. But the intentions for this framework are simply to suggest and to illustrate how international law functions to prevent or limit violence in international crisis.13

A common-sense connotation of the term function is sufficient for now: a function is the characteristic activity undertaken by an institution or organism, i.e., how an institution or organism works. Here, the interest is with how international law works in crisis to prevent or limit violence.

Scope of Study

This study focuses on the post-World War II era. There have been innumerable disputes, conflicts, and crises in this period, all deserving of analysis. On the basis of logical choice, rather than quantitatively verifiable reasons, two crises have been selected over others: the Suez Canal crisis of 1956, and the Cuban missile crisis of 1962.

Both of these disputes satisfy the situational definition of crisis developed below. Each of them brought the international community perilously close to general conflict. Thus, partly due to their intensity, these two crises deserve attention.

Different international actors were involved in each of the crises, although the so-called super-powers were entangled in both. This difference in composition may lend support to any generalizations, since the policies of an individual nation-state will not be a constant. Through analysis of crises involving different actors, it should be possible to determine whether or not law functions to prevent or limit violence irrespective of the nations involved in the disputes.

Scope and Methods of Political Science; An Introduction to the Methodology of Political Inquiry (Homewood, Ill.: Dorsey, 1969), pp. 150-154, is a bit skeptical of this perception of conceptual schemes, noting that they are "more important for their suggestiveness than their explanatory power," p. 152.
Each of the crises raises different legal questions. In Suez, the major issues were: the right of Egypt to nationalize the Canal Company, the legality of the Israeli and the Anglo-French invasions, and the legality of United Nations intervention in the crisis. In the Cuban case, the legal problems were: the rights and obligations of mutual assistance, the nature of the concept of self-defense, and the legality of the so-called quarantine. By examining these different issues the validity of the framework in explaining the functions of international law in crisis should be established.

A final justification for selecting these crises over others is that in each, a different level of violence was attained. In the Suez crisis, there was wide-spread violence, although the conflict was confined primarily due to pressure from the international community. In the missile crisis, violence was avoided, but at the cost of general and intense anxiety in the international community concerning the possibility of a nuclear exchange between the United States and the Soviet Union.

Operational Definitions

There are two terms which require brief consideration as they relate to this study, even though both are common in the vocabulary of international politics: violence and crisis.
According to one student of international relations, violence is not "easy to define... However, a definition does not have to be clear to be important, and, at some point, there is a common-sense dividing line between procedural and violent conflict."\textsuperscript{14} Here, such a common-sense dividing line is posited: violence is the use of military or para-military force by a group or groups of individuals in which weapons are discharged with the intent of doing physical harm to other individuals or groups.

The word crisis originates with the Greek krinein, to separate. One way to define the term is as a turning point, a definition common to medical usage.\textsuperscript{15} Another way to define crisis, or at least approximate a definition, is to identify and list various characteristics of obviously critical situations.\textsuperscript{16} Both of these definitions have limitations. Crisis conceived of as a turning point does not explain what a crisis is, but when a situation becomes critical. By listing traits common to crisis, the result is likely to be a set of if-then propositions, i.e.,

\begin{itemize}
  \item \textsuperscript{16} For example, see Herman Kahn and A. J. Wiener, \textit{Crisis and Arms Control} (New York: Hudson Institute, 1962), pp. 10-13.
\end{itemize}
hypotheses. For purposes of this inquiry, crisis is defined by three situational attributes: the goals of a nation-state as perceived and acted upon by its decision-makers, are threatened by another nation(s); time available to react by the leaders of the threatened nation is limited, or perceived to be so; and the threatened nation's leaders have been surprised by the action which they perceive has threatened them. This is a static definition which will only be used to identify a crisis. No attempt will be made to operationalize this definition. Nevertheless, since crises are by nature dynamic, it is assumed that failure to resolve conflicts inherent within crises may result in dangerous escalation.

**International Law: A Framework**

In developing the framework, it will be helpful to discuss some of the relevant aspects of law as a field of study. This cannot be a thorough treatment of international law, for such is the subject of volumes. For now, it will be sufficient simply to make a few observations about the traditional perceptions of international law, and of the roles ascribed to law by students of international relations.


18. This conceptualization is closely related to that developed in *ibid.*, p. 29.
Before chronicling these observations, however, two related factors have to be noted and briefly examined. First, international law is closely related to, if not dependent upon, the international political system. Second, due to this relationship, international law cannot, and should not, be too closely compared to domestic law, because of the decentralized nature of the international system.

The first point is argued by Stanley Hoffmann:

International law can be studied as a product of the international system and as a repository of normative theory . . . :

1) It reflects the structure of the world.

2) International law reflects the forces which cut across national units . . . .

3) . . . International law has always reflected the patterns of power and the political cultures of the main actors.

4) Finally, international law reflects the relations among the units of the international system . . . 19

Another student of international law agrees: "International law in particular is not a self-contained abstraction, or even a distant star for nations to steer by. It affords a framework, a pattern, a fabric of international society . . . its influence can be understood only in the context of other forces governing the behavior of nations and their

governments." Thus, international law reflects the dominant characteristics of the international political system.

The most significant attribute of the international system, at least as it relates to law, is the nature of the distribution of power. No analysis of international politics can ignore that the present system is composed of separate nations which jealously guard their individual sovereignties. There are some scholars who question the traditional definition of sovereignty in the contemporary international context. Nevertheless, at present the concept dominates, and no nation appears willing to sacrifice its sovereignty and national power by subjugating itself to higher authority.

This characteristic of the international system is the basis for a major distinction between international and


21. See John Herz, International Politics in the Atomic Age (New York: Columbia, 1959). Herz argues that weapons technology has made international frontiers "permeable." Boulding, Conflict and Defense, agrees, terming the achievement of a level of nuclear stalemate "conditional viability," i.e., each nation depends on some other for its existence. William D. Coplin, "International Law and Assumptions about the State System," World Politics, 17 (July, 1965), p. 631, makes a related observation: "Contemporary international legal practice . . . is developing along the lines which represent a threat not only to traditional international law but also to the assumptions of the state system." Compare these views to W. J. Stankiewicz (ed.), In Defense of Sovereignty (New York; Oxford, 1969).
municipal law. As noted by one source:

To rely upon a domestic model to appraise the working of law and organization at the international level neglects the distinctive features of a decentralized legal system, and overlooks the fact that transplanting centralized institutional practices to a decentralized setting is not likely to improve the quality of international order.22

William Coplin asserts that one of the difficulties in understanding the "confusing picture" offered by international law and the international system is that "the international system is not a political system in which patterns of state activity are arranged in a hierarchical order."23

The same, or at least a similar, point is made by distinguishing between two legal order systems: vertical and horizontal.24 The vertical system is one in which there are centralized socio-political institutions with the authority to make legal rules or norms which will be passed downward to the political system and to the society. Thus, in a vertical system, authority is centralized and hierarchical. The municipal legal orders of individual nations are examples of vertical legal systems.


In a horizontal system, on the other hand, authority is widely distributed. The making of legal rules and norms depends upon consensus (either explicit or implicit), among the authority-holding units. Legal norms are binding only to the degree that consensus is maintained. Authority in a horizontal system is, then, decentralized and non-hierarchical. The international system is the example here, where authority is distributed among juridically equal nations, and therefore not hierarchically ordered. Consequently, it should be kept in mind that these two elements—the relationship between law and the international system and the effect of the decentralized nature of that

25. The same distinction is made in Kaplan and Katzenbach, The Political Foundations of International Law, Chapter 1. This analytical distinction between vertical and horizontal legal orders is at the center of one of the many continuing controversies in international law. A frequent argument of the "realist" school of international relations, discussed below, is that the international system has no institutions to enforce international law, and thus international law is not law at all, at least in the positivist sense. Yet as this study will show, nations are concerned about adhering to international law. The reasons for this adherence, or attempted adherence, are manifold, not the least of which is expediency. The questions of whether or not nations obey international law, and why, are examined in Anthony Parel, "The Relevance of Contemporary International Legal Theories to World Politics" (Mimeographed paper presented to the American Political Science Association, Chicago, 1967), and Anthony A. D'Amato, "Classical Theories of Jurisprudence and their Relevance to World Politics" (Mimeographed paper presented to the American Political Science Association, Chicago, 1967). See also, Roger Fisher, "Bringing Law to Bear on Governments," in Richard A. Falk and Saul Mendlovitz (eds.), The Strategy of World Order, Vol. II (New York: World Law Fund, 1966).
system on law—will affect any consideration of international law.

Modifications of the Traditional Definition of International Law

James L. Brierly defined international law "as the body of rules and principles of action which are binding upon civilized states in their relations with one another." This definition reflects the built-in Western orientation of law. In fact, the law of nations has even been linked to the development of international Christian morality. In the twentieth century, five forces have emerged to challenge the Western rule/norm orientation of law, for many nations perceive that the law has not kept pace with the developments within the international system.

First, the last half-century has witnessed a tremendous influx of new sovereign states into the international community, most of which are members of the "third world," i.e., non-white and non-Western. The addition of these states has put pressure on the international legal system, since the new nations reacted by rejecting, or at least distrusting, a body of legal norms they did not help


to develop. Revolutionary socialist nations have raised similar questions regarding the applicability and acceptability of international law. By and large, however, both the third world and socialist nations have accepted the existence of a body of law since these nations desire to insure relatively harmonious relations with other members of the international community. Nevertheless, there continues to be some dispute over the substance of the law.

The second factor which has had serious consequences on the international legal system is the growth of technology. The development of communications and transportation systems has demanded a parallel development in law. With the increased sophistication of methods of natural resource extraction, and the related development of the tools of production, there are an increasing number of conflicts, claims, and counter-claims made, making demands on the substance and procedures of international law.

Third, international organizations are assuming a larger role in the international legal system. The expanded


role of the United Nations in international relations, through the specialized agencies and the political organs, has had a tremendous impact on law.  

Fourth, and related to both the development of technology and the increased importance of international organizations, is the destructive potential of nuclear weapons. As never before, international law and organization must work to prevent the outbreak of war, and to protect the peace.  

The fifth, and final challenge to the traditional concept of international law is reflected in the propensity of international jurists, tribunals, and courts to treat individuals as subjects, rather than objects, of the law. Historically, individual responsibility, obligation, and privilege have been inseparably linked to nationality. That is, international law dealt with relations between governments and nations, not between individuals. In order for


an individual to find redress for a grievance, his government would have to bring suit in his behalf.

Recently, however, the role of the individual in international law has fundamentally changed. The most obvious example of this change is the responsibility of individuals for violations of the laws of war. The Nuremburg principle established that individuals, acting in their individual capacity and not as representatives of their governments, were responsible for their own actions under international law. Individuals could violate international norms, and be held accountable for the violations. Other examples of the growing tendency to give individuals greater privilege and responsibility in international law

34. The Nuremburg trials did not set a universally accepted precedent. It has been persuasively argued that they were a post-facto imposition of the victors on the vanquished, with little foundation in law. See William Benton (ed.), German Views of the War Trials (Dallas: SMU Press, 1955), and Robert Woetzel, The Nuremburg Trials in International Law (New York: Praeger, 1960). For the view that the war crimes trials did establish some precedent, by leading to the codification of norms extant in civilized custom, see Robert Jackson, The Case Against the Nazi War Criminals (New York: Knopf, 1946), and the same author's The Nuremburg Case (New York: Knopf, 1949).

35. The degree to which war crimes are violations of international law as opposed to violations of domestic law is ambiguous. A recent case in point was the trial of William Calley and others by the United States military legal structure. This demonstrated that war crimes are punishable under domestic legal codes. Theoretically, however, if Calley had not been tried by a Military Courts Martial, he could have been subject to a trial for violation of international law, if any tribunal would accept jurisdiction. See Telford Taylor, Nuremburg and Vietnam: An American Tragedy (New York: Bantam, 1970).
is evidenced by the increased concern in the international community in the general area of human rights. 36

If law is to remain relevant in relation to these five forces, it must adapt. As one legal scholar noted: law is "not an autonomous instrument of social control, but depends for its effectiveness and character upon suitable implementation and upon a capacity to adapt to a highly dynamic environment." 37 Therefore, international law can no longer be conceived of as "norms binding on civilized nations in their relations." It must reflect the international society in which it operates. As Henkin pointed out:

. . . law includes the structure of society, its institutions, forms, procedures . . . the assumptions on which the society is founded and the concepts which permeate it, the status, rights, responsibilities, obligations of the nations which comprise that society, the various relations between them, and the effects of those relations. 38

Thus, international law is developing law. It reflects, and is reflected in, the relations among nation-states. The


norms and principles of law are defined and created by consensus among nations as they operate within the international system. Legal norms are constantly being codified and developed. Because the international system is characterized by decentralization, international law remains at a primitive level. This conception of the nature of law affects both the perception and the substance of international law. It should be kept in mind in the development of the functional framework below.

39. See Irvin L. White, "A Framework for Analyzing International Law-in-Action: A Preliminary Proposal," International Studies Quarterly, 13 (March, 1969), pp. 46-69. White develops empirical measures of consensus based upon a "modified majority rule" principle. This important aspect of law is being grossly under-emphasized in this presentation. The role of consensus in the development of international law, especially in customary law, is important. As will be demonstrated below, however, the foundation and development of norms of law is not central to the framework to be constructed. If the legitimacy of the foundation of any legal claim in the case studies is questioned by virtue of its standing as a valid source or evidence of law, it will be discussed as it arises.

40. The term primitive represents a state of development, and is not a comment on the nature of legal norms. Since the international system is primitive, i.e., it has achieved only a modicum of organizational structure, the legal system is likewise primitive. As Henkin, How Nations Behave, p. 107, notes: "In large part, international law has survived because it is still primitive, because it is not a complex network of developed norms governing all relations among nations. What law there is consists of fundamentals which all nations alike cherish. . . ."
Traditional Roles of International Law in International Relations

Broadly conceived, there have been two distinct roles attributed to law in the literature of international relations and politics. First, law has been characterized as an instrument of foreign policy rationalization. Secondly, it has been regarded as the moral/legal framework which should guide, or at least provide guidelines for, the relations among nations. These positions can be labeled realist and idealist, respectively.\footnote{Those familiar with the literature of international relations may question the use of these terms. Nevertheless, a dichotomization between realism and idealism is legitimate. See, for example, E. H. Carr, Twenty Years' Crisis: An Introduction to the Study of International Relations (London: Macmillan, 1958). For purposes here, the realist position concerning the role of international law is that advocated by scholars who are considered representative of the "realist school" of international relations, e.g., Morgenthau, Stoessinger, Schwarzenberger, and others. The idealist position is that assumed by those scholars labeled idealists: Clark and Sohn, Jenks, and so on. While the problems in making the distinctions on this basis are recognized, care has been taken to select those who are clearly identifiable. See Stanley Hoffmann, "International Relations: The Long Road to Theory," World Politics, 11 (April, 1959); John W. Burton, International Relations: A General Theory (Cambridge: Cambridge, 1967); and K. J. Holsti, "The Concept of Power in the Study of International Relations," Background, 8 (February, 1964). As the dichotomy relates to law, see Herbert J. Spiro, World Politics: The Global System (Homewood, Ill.: Dorsey, 1966), Chapter 6, "Law and Politics."}

The realist argument is this: international politics is the pursuit of power by nation-states; power is defined in terms of national interest. Power is the means, as well
as the ends, of international politics. Morality, like law, becomes a pragmatic consideration: that which serves in the acquisition of power is moral, i.e., right or good.

In this context, international law is relegated to a secondary role in international relations at best. It is, for the realist, only a rationalization for foreign policy. Every policy decision is determined on the basis of what best augments a nation's power position. Then, the policy is justified in terms of international law. Such attempts to justify action in terms of law are intended to satisfy the international community of the nation's respect for the rule of law, and to satisfy world opinion. In short, international law is an instrument of foreign policy, and not a very important instrument at that.

The idealist, on the other hand, perceives international law as an essential consideration of foreign policy. Law provides a fabric of norms under which a nation


43. See Georg Schwarzenberger, The Inductive Approach to International Law (London: Stevens and Sons, 1965). Schwarzenberger does not portray law as cynically as suggested here, but argues from a positivist position that the only way to know what law is, is to see how it is used.
should guide its actions. Most idealists tend to be prescriptive, and suggest how future developments can be implemented to insure peace, and a more just international society. Often, the arguments of the idealists are framed in terms of "world law." Idealists are, furthermore, inclined to discuss the law in terms of the law of peace, and to appeal to a sense of international morality. Thus, the idealist argues that international law should play a role in the formulation of foreign policy, and in the exercise of power within the international system. Law should also play the leading role in settling disputes when they arise, with each nation-state assisting in the

44. Most idealists approach this position implicitly, see Philip C. Jessup, The Use of International Law (Ann Arbor: Michigan, 1959), especially pp. 1-8.


46. See ibid. See also C. Wilfred Jenks, The Common Law of Mankind (New York: Praeger, 1958). Jenks defines the common law of mankind as "the law of an organized world community, constituted on the basis of states, but discharging its community functions increasingly through a complex set of international and regional institutions . . . , and placing obligations upon the individual citizen, and confronted with a wide range of problems, calling for uniform regulation on an international basis, . . . ," p. 8.

47. See Falk, Law, Morality and War, pp. 9-11, 83. Falk is not an idealist as the term is used here, but he investigates the central idealist positions in this work.
development of new and more effective law. As implied earlier, the realist would maintain that international law cannot, indeed, should not, be expected to play such a role. The settlement of disputes, like other aspects of international politics, is a power consideration, and should be resolved at best, through negotiation and diplomacy.

Many contemporary scholars of international law do not fit precisely into either of these categories. They represent a position somewhere between the two extremes. These moderates, for lack of a better label, argue that the existence of—indeed, the controversy surrounding the role of—international law is sufficient to establish the proposition that law is important in international relations. As one moderate noted: "If law affects what nations do, it will influence also what they say. . . . When a nation claims to observe international law to create an image of itself . . . , it is significant that this is the image which nations value." For the moderate,

49. Obviously, international law can be expected to be involved in negotiation and diplomacy, even for the realist. Here, however, it is a question of emphasis. For the realist law is an instrument of rationalization, not a guideline for action. Realists are not opposed to using legal procedures, but they are to be manipulated, not developed for their intrinsic value. Realists are not concerned with the positive development of the legal system.
international law is but one element, and perhaps a modest one, in the complex relations among states. The moderates do not perceive law cynically, as do the realists who argue that international law exists to be exploited. Nor do the moderates argue that international law is the way to an utopian international society. They consider law-as-it-exists; law-in-action.

In this study, a new role for law will be suggested: law as an independent element which provides channels through which conflict can be directed, to prevent or limit violence during international crisis. These channels are identified as the "functions" of international law.

But before turning to the functions of law, some attention should be directed toward an unsolved conceptual problem: the relationship between law and politics.

James Brierly early recognized a fundamental problem restricting the role of law in the international system:

"... states possess power. The legal control of power is always difficult, and it is not only for international law

51. See Falk and Hanreider, *International Law and Organizations*, p. 9, where they contend that the role of law and organization will be understood as "modest and marginal" as long as "national power and sovereign animus dominate the international scene."

that it constitutes a problem." This problem remains even if one does not define international politics exclusively as the pursuit of power, as do the realists.

Above, substantive international law was identified in terms of norms and principles which in some way regulate the actions of nation-states. But an elemental comprehension of the workings of the international system will convince the observer that there are norms and principles influencing actions which cannot be construed as legal. Consequently, there appears to be a distinction between a legal norm and a political norm (as well, perhaps, as a non-legal, non-political norm). But the distinction is not readily observable. The relationship between a norm as a habit or a custom, and a norm of international law is tenuous. And the political basis of legal norms is also


55. See Falk, Law, Morality and War, p. 72; and Anthony A. D'Amato, "The Concept of Special Custom in International Law," AJIL, 63 (April, 1969), pp. 211-223. This is precisely the relationship that White, "A Framework," is attempting to identify.
a vague area. In other words, the differences between legal and political have never been satisfactorily conceptualized. Eventually, it may be necessary to analytically determine the parameters of this distinction. For now, however, it is only important to be able to identify the legal issues in a crisis situation. For this identification, it will suffice to rely upon the perceptions of policymakers, and scholarly observers, of the crises.

The Functions of International Law

The contention that international law performs certain functions in international relations is certainly not novel. For example, according to Quincy Wright: "the functions of international law are to assist in the maintenance of order and in the administration of justice."56 Others also argue that the primary function of law is to establish or maintain a system of order.57 Related to this conceptualization, is the function of law in settling international disputes. As one source indicates: "To avoid irrelevance and legalism on the level of vital


57. E.g., Coplin, Functions of International Law, p. 3, states: "For the purpose of classification, we will assume that the essential function of law is to preserve order. . . ." See also Cyril C. Black, "Challenge to an Evolving Legal Order," in Richard A. Falk and Cyril C. Black (eds.), The Future of the International Legal Order (Princeton, N.J.: Princeton, 1969), pp. 16ff.
contacts, international law and organization must envision their role as one of blunting the stark confrontations that arise among international actors. Many analyses of international law have focused on this aspect, generally referred to as pacific settlement of disputes.

These traditionally conceived functions of international law are both teleological and normative. They explicitly or implicitly envisage an orderly and structured international community in which conflicts can and will be resolved without resort to force or self-help. These functions are value statements at best, and ethno-centric preferences at worst, reflecting again the Western-liberal perception of law. In addition, these functions are supra-systemic, for they posit both the final structural goal of the international system, that is the system into which the present one will be eventually transformed, as well as the dominant processes and procedures of that future system.

While these functions of international law are broad and vague, some scholars have begun to outline the functions of law within the international system. William Coplin is a notable example.

Although Coplin argues that the primary function of law is "the establishment of a system of order," he conceives of several "subsidiary functions." That is, international

law functions to (1) allocate "legal competences"; (2) "restrain behavior which society considers undesirable"; (3) promote "the 'health' of the society by instituting long-range programs for the public welfare"; and (4) act as "an authoritative institution for the communication and development of a consensus on the nature of society."\(^{59}\)

Stanley Hoffmann has also been concerned with the functions of law within the international system.\(^{60}\) Hoffmann postulates that international law has two dimensions: first, it serves as a guide for policy-makers, and second, it provides a potential foundation for world order.\(^{61}\) He argues that the relationship between law as an element of policy-making and as a contributor to world order is ambivalent, for the use of law by the policy-maker may be dysfunctional to creating a system of order.

59. Coplin, The Functions of International Law, pp. 5-6, 25.


61. Hoffmann is certainly not an idealist in the sense of the term defined above. His notion of a system of world order is one "in which traditional self-help will at least be modified by procedures and rules made even more indisputable by the proliferation both of states and weapons..." Ibid., p. xi. In this introduction, Hoffmann is trying to briefly outline the interest of political scientists in international law. He contends that the role of law in decision-making deserves additional study. His projected goal of limited world order is developed in his State of War (New York: Praeger, 1965), Chapters 5 and 6.
Given this dual role of law in international relations, however, Hoffmann identifies four categories of functions or roles of international law: those functions which "constitute assets both for the policy-maker and from the viewpoint of world order"; those which are useful in the "policy process, which however do not ipso facto contribute to world order"; and "those which may be detrimental to world order and thereby counterproductive for the states that use such" legal arguments. Finally, there is a category of negative functions, that is, international law may function by not being used, "when the resort to it would hamper that state's interest as defined by the policy-makers." Within each of these categories, Hoffmann cites examples to support his classification. For the framework below, the most relevant category is the first, functions which contribute assets for the policy-maker and for world order. In this category, Hoffmann conceives of law as an "instrument of communications," and as a means of


63. It should be noted that a goal of future world order is not posited in the present inquiry. The intention here is simply to examine the functions of law in crisis in preventing or limiting violence. Hoffmann would disagree that law would play such a role in contemporary international politics. On the contrary, he contends that in international relations, law "has a modest role, principally outside the realm of force," Deutsch and Hoffmann, The Relevance of International Law, p. 48.
"channeling conflict." The importance of Hoffmann's conception will become clear as the framework is developed.

Even these last two authors, Coplin and Hoffmann, to whom this study owes a sizeable debt, have failed to identify clearly the practical, pragmatic functions of international law. Their focus was on the abstract functional level. Given their perception of the functions of law, it is difficult to distinguish between how law works, and the objectives law aspires to attain. Part of the failure to arrive at a definitive perception of functional international law has been due, no doubt, to the lack of clarity regarding the crucial concept function.

Functionalism, as a methodological approach to the study of social phenomena, has been most widely employed in the discipline of sociology. An important variation, structural-functionalism, has had significant impact on political science, especially comparative politics.

64. Hoffmann, "Introduction," pp. xii-xiii.


Another branch of functionalism is found in the area of international organization, and has added substantially to the understanding of international integration. Each of these strains of functionalism has made a contribution to the substance and methodology of its respective discipline. The purpose in introducing them here, however, is not to engage in a treatise of broad methodological scope, but to extrapolate a relevant interpretation of the concept function which will have utility in the formulation of a framework of international law in crisis.

In nearly all considerations of functionalism, there are at least two concomitant concepts: structure and system. In its simplest conceptualization, a function is the activity undertaken by a structure within the boundaries of a system. In terms of a definition of


67. See David Mitrany, A Working Peace System (London: Institute of International Affairs, 1943); and Haas, Beyond the Nation-State.

function, this smacks of tautology: "function y is what structure x does in system z; therefore, structure x performs function y." In order to partially eliminate this logical impasse, the structural-functionalists reversed the formulation, and posited that in any political system certain functions must be performed. The focus then became: "in any political system, say z, function y must be performed. What structure performs it?" Here, the functions are individually identified, but the concept function is not adequately examined. In the field of international organization, a function is the result of any organizational activity which has purposeful systemic consequences, specifically, which culminates in movement toward international integration.

Even after this brief discussion of the nature of function the essential ambiguity of the term remains. As one source notes: "...the large assembly of words used

69. See Merton, Social Theory and Social Structure, pp. 70-80. Robert E. Dowse is very critical of the tautological nature of functionalism in his article, "Functionalist Logic," World Politics, 18 (July, 1966), pp. 607-622.

70. See Almond and Powell, Comparative Politics, pp. 27-33.

71. See Haas, Beyond the Nation-State, pp. 77-80. The basic premise of the international functionalist is that integration is more likely to occur through encouraging the resolution of non-political problems. By developing functional international organizations which are task-oriented, the possibility of expanding the responsibilities of the organization is enhanced, thus leading to eventual political integration.
indifferently and almost synonymously with function presently includes use, utility, purpose, motive, intention, aim, consequences."\(^{72}\)

Therefore, if only for purposes of the present inquiry, it will be necessary to adopt a more precise description of function. Perhaps the most useful formulation of the term can be taken from Talcott Parsons' sociology.

According to Parsons, "the functional categories of social systems concern . . . those factors in terms of which systematically ordered modes of adjustment operate in the changing relations between a given set of patterns of institutionally established structures in the system and a given set of properties of the relevant environing system."\(^{73}\) What Parsons asserts here is that functions are those special activities which mediate between the needs of a particular system and external exigencies. Based upon this conceptualization, Parsons suggests four functional

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\(^{72}\) Merton, Social Theory and Social Structure, p. 23. Fred M. Frohock, The Nature of Political Inquiry (Homewood, Ill.: Dorsey, 1967), p. 64, notes: "No concept suffers from more definitional ambiguity than function." Young, Systems of Political Science, p. 29, adds: "There is a good deal of terminological confusion around this concept . . . [caused] by efforts to pin down the nature of function alternatively as an objective, a process or a result."

"imperatives" or "requisites": pattern-maintenance, integration, goal-attainment, and adaptation. Following the Parsonian argument, a function would be any activity which satisfies in whole or in part, any one (or more), of the systemic imperatives. This will serve as the basis for the perception of function in this study, but it will be applied to the field of international law.

Initially, it will be necessary to identify a system, since, as indicated above, function implies system. The relevant system here, is the international system. The international system is the pattern of relationships among nation-states (and other international actors). Among these relationships are legal relationships, so it is possible to conceive of a sub-system, the legal system. The legal system may be defined as the pattern of relationships among

74. Ibid., p. 38.

75. See Gerhart Niemeyer, Law Without Force: The Function of Politics in International Law (Princeton, N.J.; Princeton, 1941). Niemeyer tried to develop a more "realistic" perception of international law, one not necessarily based upon treaties and conventions, but upon the functions of social institutions, especially the state. He notes: "A functional law thus has to aim primarily at producing a consciousness of the ends of social relationships rather than knowledge of means along," p. 274. This work is an attempt to conceptualize a substantive functional international law, and deserves note; it does not contribute a great deal to the framework developed here.

76. There has been much scholarly attention devoted to the concept of system in international relations, especially following the publication of Morton A. Kaplan, System and Process in International Politics (New York: Wiley, 1957).
international actors dominated, regulated or affected by, international law. The legal system in this case is broadly and vaguely identified, and obviously overlaps with other sub-systems of the international system, e.g., with the economic system. While this conception of the international legal system can be criticized for its lack of analytical clarity, the point intended is simply that such a sub-system does indeed exist.

Within the international legal system, it is possible to posit a number of goals, the most encompassing of which can be labeled conflict resolution. International law has been historically relied upon to resolve international disputes. Therefore, recalling that goal attainment was a functional imperative, any activity which is

77. This statement can certainly be faulted for its lack of terminological precision. An attempt to develop a more comprehensive notion of the legal system would be interesting and worthwhile. See Gould and Barkun, International Law and the Social Sciences, pp. 52-57, for a discussion of the potential of systems theory to international law. The purpose here is merely to suggest the existence of a legal system, not to identify its boundaries.

78. It may be recalled that pacific settlement of disputes was identified earlier as a traditional "function" of international law, and rejected. As a goal, rather than a function, it can accept the charge of being "normative and teleological," which was the basis for its previous rejection.
directed toward the resolution of conflict in the international legal system is a function of that system.\(^79\)

The objective of this brief foray into the definitional morass surrounding the concept function has been to achieve an acceptable understanding of the term to be applied to a conceptual framework of international law in crisis. According to one political scientist, if a functionally oriented conceptual framework is to have validity as an explanatory device, it requires:

\[ \ldots \text{the explicit statement or the implicit assumption (1) of a preferred goal state which characterizes the system, (2) that some conditions or traits are necessary or necessary and sufficient or sufficient but not necessary for the maintenance of that state, and (3) of a range of values within which conditions or trait variations will be compensated for, and outside of which the system will fail to attain or display the state description identified as preferred.} \]

\[^80\]

For this study, the purpose of the framework is to explain how international law functions in crisis situations. If a goal of law is to resolve conflicts generally, in critical situations the goal is to resolve conflict which leads to

\(^79\) Clearly, these would not be the only functions of the legal system, since conflict resolution may not be the only goal of the system. Moreover, goal-attainment is but one of the four functional imperatives.

crisis, or results from it. It is asserted that the preferred goal state is the resolution of conflict without resort to violence, or failing that, the limitation and termination of violence once it has been initiated. The conditions or traits necessary and/or sufficient to maintain this goal state can be characterized as functions of international law, and will be introduced below. The final criterion, stating "a range of values . . ." is the most difficult, since it essentially demands a testability scale for the framework. Here, testability will be unsophisticated, and will depend simply upon the determination of whether or not the functions of law in crisis were operating, and if so, whether or not the preferred goal state was attained.

In regard to the conceptual framework developed in this inquiry, there are three functions performed by

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81. While this is a reasonable assertion, it must be noted that it does not exclude alternative preferred goal states. For example, international law has also been regarded traditionally as a mechanism for regulating the use of violence, viz. the "laws of war."

82. This immediately raises the question of causality. This is intentionally vague, lest I place myself squarely in the middle of the "Humean dilemma" by claiming a certain cause-effect relationship. The interest is simply to establish that a correlation exists between the functions of law and the prevention or limitation of violence. The degree to which the latter is necessarily dependent upon the former requires a more sophisticated empirical and operational application than I am prepared to offer now. See Frohock, The Nature of Political Inquiry, "Function and Causality in the Social Sciences," pp, 65-73.
international law in crisis, that is, three ways law works to prevent or limit violence in the resolution of conflict in critical situations: first, by serving as a medium of communications; second, by providing alternatives to violence; and third, by defining the boundaries of the crisis. Before presenting a more detailed explanation of these functions, it might be helpful to clarify the objective of this conceptualization of international law.

First, this functional perception of law is intended to objectify the traditional notion of the role of law in the international community. These functions of law, it is argued, operate independently of the foreign policies of the actors involved in a crisis. Regardless of the motives of policy-makers in nations involved in a critical situation, the potential utility of these functions exists, and they may operate without the conscious intent of the policy-makers to rely upon them. In other words, international law may serve to prevent or limit violence in the resolution of conflict in crises irrespective of the motivation of the decision-makers of the nation-states involved.  

Secondly, the nature of the legal issue(s) in a crisis is incidental to the existence and relevance of the

83. This perception of function is similar to that of Merton, Social Theory and Social Structure, pp. 71-82, where he distinguishes between "latent" and "manifest" functions. Also see Haas, Beyond the Nation-State, pp. 81-85, for his explication of "unintentional" functional consequences.
functions of international law. Regardless of the substance of the legal issue(s), the functions exist, and can operate to prevent or limit violence in crises. On the other hand, the legal issue may influence the functions of international law, most importantly by affecting the relative significance of each of them. That is, the nature of the legal issue(s) may determine which of the functions will be the most effective in preventing or limiting violence in a crisis situation.

Communications. Communications, as a process, has been receiving increased attention in the literature of international relations. Moreover, it has been the subject of consideration in international law. According to Coplin: "international law functions . . . as an institutional device for communicating to the policy-makers of various states a consensus on the nature of the international system."

This overall cultural view of the communications role of law has been noted by others. In this sense,

84. For a discussion of communications theory, see McClelland, Theory, Chapter 5. Also see Karl W. Deutsch, "Communications Theory and Political Integration," in Philip E. Jacob and James V. Toscano, The Integration of Political Communities (New York: Lippincott, 1964).


international law is consigned a socializing role within the international system. It defines and identifies the shared attitudes and values of nation-states, and consequently imposes an aura of predictability within the system. For example, if two nations adhere to the same legal system, i.e., they both accept the same substantive legal principles, then they can expect certain types of responses in situations in which legal issues are involved. At least each can expect that the responses of the other will fall within a range of possible responses. Furthermore, communications in this sense facilitates the relations among nations by identifying the dimensions of the system. To quote Coplin again: "... international law does express a set of ideas about the nature of the international system generally held throughout the system ... a basic set of ideas concerning the values and pattern of the international system is communicated to the members of the system."

While this formulation of the communications aspect of international law is not disputed, it is contended here that there is a more specific function of communications, evident especially in time of crisis. In critical situations, international law is used to "present one's claims in


legal terms, . . . one, to signal one's partner or opponent which 'basic conduct norms' . . . one considers relevant, and two, to indicate which procedures one intends to follow and would like the other side to follow."89 If in crisis, communications are couched in the legal vernacular, according to Falk, "such communication . . . discourages over-response and lessens the prospects for unlimited emotional involvement associated with the protection of vital interests and the receipt of wounds to national honor."90 To paraphrase a recent political—yet somehow relevant—slogan: when the action is hot, keep the rhetoric cool.

When international law and legal language are used during crisis, the communications function is operating. The degree to which this function is effective in preventing or limiting violence is dependent upon the degree to which the language of international law is used. This function can also be said to be operating when the dialogue among policy-makers of nations in crisis involves law in an attempt to transmit signals, both to allies and to opponents, regarding relevant "conduct norms" and proposed procedures.

89. Hoffmann, "Introduction." p. xii.

Once opposing actors in a crisis begin to use the language of political interests, national interests, national honor, and so on, the communications function of international law becomes less important.

**Providing Alternatives to Violence.** The second function of international law is providing-alternatives-to-violence. Traditionally, this function has been conceptualized as meaning that international law provides machinery for the pacific settlement of disputes. This machinery has been in the form of arbitration, adjudication, good offices, mediation, and conciliation. In addition, international organizations are playing an increased role in the settlement of disputes. Each of these instruments has been treated as a method of pacific settlement, and thus as an alternative to violence.

As a function of international law, the degree to which such machinery is used is of primary concern. As Coplin indicates: "... international law and organization have provided a set of vicarious substitutes for the violence inherent in international conflict." Henkin


agrees: "Law provides . . . mechanisms, forms, and procedures by which nations maintain their relations, carry on trade and other forms of intercourse, and resolve differences and disputes." 93

There is a second element to the providing-alternatives function: the extent to which a "nation is able to shape its moves in such a way as to leave to the other side full responsibility for a first use of force, and to avoid the kind of frontal collision with the other side's legal claim that could have obliged the opponent to resort to force in order not to lose power or face." 94 This implies that there are legal strategies formulated, explicitly or implicitly manifested, employed by opposing actors in crises. Through the process of developing a strategy intended to leave opponents with the responsibility of resorting to force, national decision-makers indicate a desire to avoid initiating conflict. The development of such a strategy should not be construed as an invitation to the other side to use force, but instead, as a method to avoid "frontal collision" by encouraging opponents to seek alternatives to the use of force. Thus, by developing a successful strategy, a nation's policy-makers can channel conflict into the legal arena, and thereby provide an

alternative to violent confrontation in critical situations. The degree to which such strategies can be identified indicates the degree to which this aspect of the function is effective. Note that this element of the providing-alternatives function is closely related to the communications function. But where communications is partly a manifestation of the type of language used, providing-alternatives-to-violence depends upon the existence of an identifiable legal strategy.

Therefore, the second function of law can be characterized as operating when international law provides procedures or machinery which is employed to resolve conflict before violence is initiated and/or when law is shaped into strategies which leave the opposing side responsibility for the resort to force and to avoid frontal collisions. It can also be considered operating and effective if the procedures or strategies are relied upon after violence has been initiated, and as a consequence, is limited or terminated.

Defining of Boundaries of Crisis. Generally, the legal issue is only one dimension of a crisis. There are other issues involved: economic, political, and so on. But when a core issue of a crisis is a legal one, another function of international law is involved: defining-of-boundaries of the crisis. As Richard Falk observed: "it is
desirable to objectify policy commitments so that all national actors may perceive the boundaries of impermissible coercion and avoid unintentional breakdowns of . . . equilibrium." The identification of a legal issue as a "core" issue raises some problems, especially those of empirical verification. Here, it will be necessary to rely upon the statements of policy-makers of the nations involved, and upon the conclusions of observers, as sources for the identification of the central issues.

By defining-of-boundaries of the crisis, international law functions to keep the situation within manageable limits. Moreover, if law defines the boundaries of the conflict, nations are more likely to rely upon the communications function of international law.

The extent to which law defines the boundaries of the conflict is also related to the probability of the utilization of the providing-alternatives function. In the defining-of-boundaries, the existence and applicability of procedures and machinery for pacific settlement of disputes is important, not the actual use of the procedures and machinery.

The involvement of procedures and machinery of pacific settlement in two functions of international law is no doubt confusing, but it is unavoidable. In regard to

95. Falk, Law, Morality, and War, p. 51.
the providing-alternatives function, the use of the procedures and machinery in avoiding violence is the important aspect. In the defining-of-boundaries function, the availability of procedures and machinery of pacific settlement is relevant. In the latter case, the procedures serve to contain the crisis, and thus provide, or attempt to provide, a partial boundary to the crisis. When the procedures and machinery are used, the defining-of-boundaries function has led to the providing-alternatives function.

Thus, when it can be determined that a "core" issue of a crisis is legal, and that the resolution of this legal issue would lessen the intensity of the crisis, this function, defining-of-boundaries, is effectively operating. Moreover, if in any crisis situation there exist procedures and machinery for the peaceful settling of disputes, this function is also operating.

Objectives and Hypotheses

As indicated earlier, the objective of this inquiry is to determine how international law works in crisis. This involves an examination of each of the crises from the different perspectives noted in the following paragraphs. The dominant assumption upon which this endeavor is founded, is obvious: international law has an important role in international relations and politics. It should not be necessary
to belabor this point since it has been admirably argued many times. But what should be kept in mind is that it is essential that scholars of international relations expand their knowledge of crisis. This study will add to that knowledge by emphasizing the importance of international law.

In regard to the functional framework, the underlying hypothesis has been clear throughout this introduction: in international crisis situations, international law functions to prevent or limit violence. There are three corollaries to this proposition corresponding to the three functions of law, i.e., that each of the functions, communications, providing-alternatives-to-violence, and defining-of-boundaries of crisis, can be observed in critical situations serving the systemic objective of resolving conflict. Moreover, the framework itself suggests a quasi-hypothesis, for another objective of this inquiry is to determine whether or not this framework is helpful in understanding the way international law works in crisis.

Organization of the Study and Operationalizing the Framework

Having postulated the functions of law in international crisis, the task remains: the application of the framework to actual crises. As noted earlier, the two cases selected are the Suez Canal crisis of 1956 and the
Cuban missile crisis of 1962. Each of these crises will be approached from three perspectives.

First, there will be an historical sketch of each case in order to identify the dimensions of the crisis: the nations involved, the historical setting, the development of the crisis, and whether or not violence erupted, and if so, how extensive the violence was. Secondly, there will be a traditional legal analysis of each of the cases. In this section, a number of important questions will be posed: what were the legal issues raised in the crisis? What were the legal arguments articulated by the opposing nations? Was there more than one argument? If so, was one argument favored over the other(s)? And, of great importance, can it be determined whether or not one of the opposing sides had a stronger legal case? And, if so, what impact did this have on the crisis?

In both case studies, there are a number of different legal issues involved. It would be possible to justify this inquiry on the basis of the historical sketch and traditional legal analysis, though it would be somewhat redundant. The expectation is, however, that the historical sketch and legal analysis will shed little light on how law functions in crisis. As frequently happens with the legalist approach, the result of a study simply indicates which of the opposing sides had the stronger case in law,
without determining whether or not international law was of benefit in resolving the conflict inherent in the crisis.

Consequently, the third perspective from which the cases will be examined will involve operationalizing the functional framework by posing the following questions: in regard to the communications function, is international law used to signal an opponent in regard to what rules, norms, principles, or goals the nation considers vital? Does law indicate procedures which a nation intends to follow and wishes the other side to follow? Does international law indicate to a nation's opponent the justification for the nation's action, and does it suggest the degree to which a nation's goals will be pursued? And, finally, is the dialogue between the opponents couched in the legal idiom?

Another series of questions will be asked to determine if the providing-alternatives-to-violence function is operating: are the procedures provided by international law for pacific settlement being used? Does international law permit a nation to develop strategies which leave the responsibility for the first use of force with the other side, while avoiding a frontal collision with the opponent?

Concerning the efficacy of the defining-of-boundaries function, these are the pertinent questions: does international law identify the basic nature of the conflict, or is it simply one of many elements in the crisis? Is the core issue a legal consideration? And, do legal
procedures and machinery exist to help prevent the outbreak of violence, or to limit and/or terminate violence once it has been initiated?

The following two chapters will be an examination of the Suez crisis and the Cuban missile crisis respectively, from the three perspectives outlined above. The fourth, and final chapter, will be a summary and a conclusion of the findings of the case studies, and an evaluation of the utility of the functional framework of international law.
CHAPTER 2

THE SUEZ CANAL CRISIS OF 1956

On July 26, 1956, Egyptian President Gamal A. Nasser issued "Egyptian Decree Law Number 285," nationalizing the Suez Canal Company.\(^1\) The nationalization was ostensibly undertaken to raise revenues to construct a high dam at Aswan, a major goal of Nasser's domestic policy.\(^2\)

Background to the Crisis

The nationalization decree created a diplomatic shockwave. From the West came near unanimous agreement that the seizure of the Canal Company was illegal, a breach of international concessions and agreements. In the Arab world, Nasser's action was heartily acclaimed, and it

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2. \text{Money originally allocated to construct the high dam at Aswan had recently been withdrawn by the United States by direction of Secretary of State John Foster Dulles. Because additional assistance was contingent upon United States funds, Great Britain and the World Bank also withdrew their respective offers. There were many reasons for the withholding of the funds, mostly political, and related to the perceived encooachment of the Soviet Union into Egypt. See Herman Finer, Dulles over Suez; The Theory and Practice of His Diplomacy (Chicago: Quadrangle, 1964), pp. 37-44; Anthony Eden, Full Circle (Boston: Houghton-Mifflin, 1960), p. 468; and Herbert Feis, "Suez Scenario: A Lamentable Tale," Foreign Affairs, 38 (July, 1960), pp. 598ff.}\\
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greatly enhanced the Egyptian president's prestige in Arab nationalist politics.³ Much of the remainder of the third world sympathized with the nationalization. The Soviet Union, which had been cultivating friendly relations with Nasser's Egypt, considered the seizure just and legal.⁴

Great Britain was the most vociferously opposed to the nationalization. Prime Minister Anthony Eden announced: "No arrangements for the future of this great international waterway could be acceptable to Her Majesty's Government which would leave it in the unfettered control of a single power."⁵ Britain, like other European nations, depended upon the Canal for the supply of crude oil. Britain was particularly vulnerable to interference with the oil traffic, since it acquired at least sixty per cent of its oil through the Canal.⁶ Many felt that the nationalization


brought the issue of European energy needs to the fore. As one observer noted: "The Canal Crisis has demonstrated that this is not something that can be left to the commercial oil companies and the local governments any longer." Thus, due to economic reasons, as well perhaps because of a legacy of recently lost military presence in the Canal zone, the leaders of Great Britain regarded the nationalization of the Suez Canal Company an affront upon British strategic interests.

France also reacted negatively to the seizure. First, of course, because of the potential loss of oil supplies. But France had additional reasons to oppose nationalization, the primary of which was a desire to cripple the Nasser regime, if not to eliminate it altogether. Nasser, it was feared, was assisting the rebels in Algeria.


8. Following the dismemberment of the Ottoman Empire after the first World War, Egypt had become a de facto British protectorate. Through a series of treaties and agreements, Britain gradually relinquished its hold on Egypt, as Egyptian nationalism grew. In 1954, the last agreement was signed, which set a withdrawal date for British forces from the Canal zone, but retaining some privileges for Britain. The last troops left on June 14, 1956, and Nasser announced that Egypt had kept "a rendezvous with destiny when it saw the last remnants of the foreign invaders sneak out..." Quoted in William E. Benton, "United Nations Action in the Suez Crisis," in Tulane Studies in Political Science, International Law in the Middle East Crisis (New Orleans: Tulane, 1957); and see Leon C. Epstein, British Politics in the Suez Crisis (Urbana: Illinois, 1964), pp. 19-26.
in their fight against French imperialism. According to one observer: "Many Frenchmen regarded the nationalization . . . as less a disaster than an unexpectedly good chance to justify the use of force against Nasser. For [Prime Minister Guy] Mollet, the supreme objective was to win the war in Algeria."\(^9\)

There was one further reason compelling Britain and France to involve themselves in the impending Suez crisis: the Suez Canal Company, it was alleged, had a unique international status. It was simultaneously an Egyptian corporation and a French corporation, with offices in Paris. This aspect will be considered in the legal analysis, but here it should be noted that a majority of the stockholders of the Canal Company were British and French (with the British government in control of over forty per cent of the shares). Consequently, the governments of Britain and France were concerned with the interests of the Company's stockholders, even though Nasser had promised compensation at July 26th prices.

The United States response was more cautious. Although President Dwight D. Eisenhower and Secretary of State John F. Dulles made it clear that they did not approve of Egypt's nationalization, they urged Great Britain and

\(^9\) Thomas, *Suez*, p. 47.
France not to consider the use of force against Egypt.\footnote{10} The American leaders argued that the British and French legal position was precarious, and that the use of military force would aggravate the situation, possibly leading to unforeseen escalation.\footnote{11} There were several reasons for the United States opposition to the use of force. First, the American secretary of state claimed that his government was committed to the rule of law, and to the proper utilization of international organization.\footnote{12} Second, the United States had no desire to make the Middle East another battleground of the cold war.\footnote{13} Third, the vital interests of the United
\[\text{\footnote{12. Finer, Dulles over Suez, pp. 93-94.}}\]
\[\text{\footnote{13. In 1950, the United States, Great Britain and France issued a "Tripartite Declaration," calling for the international community to refrain from selling arms to Middle Eastern nations. The three powers also implied that they would be unofficial guarantors of the borders established by the armistice agreements which had concluded the Arab-Israeli conflict of 1948-1949. See Safram, From War to War, p. 48.}}\]
States were not overly dependent upon the flow of supplies through the Canal since it had domestic sources of oil, and a large fleet of tankers; it could afford to be cautious. Fourth, the United States had an international canal of its own through the Isthmus of Panama, and the American leaders realized that by pressing the Suez issue they could put themselves in an embarrassing, hypocritical position. Finally, as one source indicated, 1956 was an election year: "Eisenhower, who at sixty-six had recovered from his bad heart attack in 1955 and an intestinal operation that June, was standing for re-election in November, and as the Prince of Peace." 

The Israeli leadership's reaction to the nationalization will be the last considered here. The nationalization of the Canal Company did not alter the Israeli policy toward Egypt, since Israel's shipping through the Canal had been prohibited since 1949, although the blockade was extended to third-party ships in 1956. Nevertheless, Israeli Prime Minister David Ben-Gurion continued to maintain that the blockade was illegal. More important to Israel was the status of the port city Eilat, on the Gulf

14. See Merril Rippy, "Panama and Suez," Nation, 183 (September 26, 1956), pp. 260-261. This article compares the two canals, emphasizing the moral obligations of the United States in Panama following Egyptian nationalization.

15. Thomas, Suez, pp. 48-49.
of Aqaba. In 1953, the Egyptians had fortified Sharm el-Sheikh at the mouth of the Gulf, as well as the Tiran Islands in the Straits of Tiran which serve the entrance to the Gulf. In 1955, Egypt blockaded the Gulf of Aqaba, and extended the blockade to third-party vessels bound for Israel. Because Eilat offered the only remaining outlet to East Africa and to Asia, it was crucial to Israel. According to journalist/author Theodore Draper: Israel's leaders "were prepared to deal with the Suez blockade diplomatically, but Eilat was always something else." Another element in the conflict between Israel and Egypt was the fedayeen, or self-sacrifice guerillas, which operated primarily from the Gaza Strip in the Sinai desert, an area controlled by Egypt. The fedayeen were Palestinian refugees who were unemployed, and hated Israelis. Most observers of the Suez situation agreed that the Egyptians supplied the fedayeen, and permitted them to use Gaza. At any rate, the continued raids of the guerillas into Israel, and the retaliation by Israeli forces into Gaza and Jordan, the other major fedayeen base, did much to aggravate

16. Safram, From War to War, pp. 43-44.


the tensions in the Middle East. Ben-Gurion's recently elected "action-oriented" government began to assert that the continued raids by the fedayeen were unprovoked attacks upon Israel's sovereignty, and the Prime Minister hinted that some self-defense measures might be taken.

Thus, the nationalization of the Suez Canal Company initiated a series of events which eventually culminated in the Israeli and Anglo-French invasions of Egypt. The events between nationalization in July, and invasion in late October demonstrated two points: first, the Israelis, and the British and French, were serious about using force; and second, an overwhelming majority of the remainder of the international community—as reflected in the United Nations—was committed to preventing open conflict.

Impending Crisis; August to October

Immediately following the news of the nationalization, Great Britain and France began preparing to use force.

19. According to Safram, From War to War, p. 46: "The fedayeen raids were not the only reason prompting Israel to launch the Sinai campaign, but they were an important consideration, since all other measures to deal with the terrorists had proved ineffective." Lest anyone think that terrorism was a uniquely Arab policy, it should be noted that Israel practiced its own terrorist tactics. Even Israelophile Eisenhower mentioned that Israel responded "with what seemed merciless severity" to raids. See Eisenhower, Waging Peace, pp. 24-25, p. 24 footnote.

20. See Barker, Suez, p. 69.
against Egypt. The operation, as conceived by Eden and Mollet and their respective advisors, was to be a joint undertaking.\textsuperscript{21} The British and French decision-makers did not expect the United States to participate in the intervention, but they did contemplate American assistance in two ways: first, they expected American protection against possible Soviet responses, if the Soviet Union threatened the use of nuclear weapons. Eden purportedly told Eisenhower's envoy in London, Deputy Under Secretary of State Robert Murphy: "you will take care of the bear." Second, France and Britain expected the United States to maintain an adequate supply of oil and other materials if the traffic through the Canal was disrupted.\textsuperscript{22}

Eden had originally considered appealing to the United Nations, but was reluctant to do so because of an earlier experience with the Organization concerning the nationalization of British oil holdings in Iran.\textsuperscript{23} Moreover, Dulles indicated that the United States did not favor taking the question to the United Nations.

\begin{itemize}
\item \textsuperscript{21} Barker, \textit{Suez}, pp. 33ff.
\item \textsuperscript{22} Thomas, \textit{Suez}, pp. 52-53.
\item \textsuperscript{23} Harold Greer, "Suez at the UN," \textit{Nation}, 183 (September 29, 1956), pp. 258-259, and Finer, \textit{Dulles over Suez}, pp. 135-137. See also Eden, \textit{Full Circle}, pp. 196-197, where he indicated that he feared that any proposed action at the United Nations would be stymied by a Soviet veto.
\end{itemize}
In any event, in early August, Great Britain and France joined the United States in an alternative venture, convening a conference of Canal users to consider the nationalization. Twenty-four nations were invited to attend the conference, including all nine signatories of the Convention of Constantinople (the basic legal document governing the Canal), and fifteen other nations which most heavily depended upon the Canal for supplies. Greece and Egypt declined to attend, with the latter government arguing that such a conference had no right, legal or moral, to consider a question which was inherently a subject of Egyptian sovereignty. On August 16, however, the First London Conference met. After less than a week of deliberations, a United States draft proposal, somewhat modified, was adopted by a majority vote (eighteen to four). It was emphasized by several smaller nations that this could not be considered a "majority decision," since only international organizations had authority to make such decisions.24

The intent of the Eighteen Power proposal, as it came to be labeled, was that the Suez Canal should be administered by a board of supervisors, upon which Egypt was guaranteed a seat. The Canal would be free to all shipping, and Egypt would receive all fees, minus operating

costs. Australian Prime Minister Robert Menzies was dispatched to Egypt at the head of a five nation delegation, the so-called Menzies Mission, to confer with President Nasser.  

Nasser listened to the proposal, and promised to consider it. In early September, Nasser communicated to Menzies his rejection of the Eighteen Power proposal, claiming that it was unfriendly to Egypt, that it transgressed Egyptian sovereignty, and that it was an instrument of "collective domination." Nevertheless, Nasser declared that Egypt would abide by the Convention of Constantinople, and would keep the Canal free from domestic politics.

The failure of the Menzies Mission was not unexpected, but it had offered a peaceful alternative to the impending violence.


27. According to Thomas, Suez, the failure of the Menzies Mission could be partly attributed to Eisenhower. Menzies made it a point to "scold" the president on his return to Australia for an intemperate remark made by the U. S. leader on September 1. The remark was: "I [Eisenhower] am very hopeful that this particular proposal will be accepted, but in any event, [we should] not give up even if we run into obstacles." According to Menzies, as reported by Thomas, this seemingly innocuous remark convinced Nasser that the United States would never condone the use of force
As an option to the Eighteen Power proposal, Secretary of State Dulles suggested a plan for a Suez Canal Users Association (SCUA), which would establish a control facility to collect fees and operate the Canal, and to compensate Egypt according to a plan to be developed.\(^{28}\) The SCUA had little, if any, chance to succeed. But the United States, through the efforts of Dulles and Eisenhower, finally persuaded the leaders of France and Britain to accept the proposal as an alternative to the use of force. Eden and Mollet reluctantly agreed to attempt to develop the Association.

The SCUA plan was the basis for convening the Second London Conference, which met September 19. In reality, the concept was already obsolete. Egypt would not accept it, the Soviet Union would not permit it to be imposed upon Nasser, and Britain and France were at best luke-warm to the scheme. Furthermore, one of the basic assumptions of the SCUA was that Egypt could not properly operate the Canal, but by September 16, according to Hugh Thomas: "the Egyptians had shown that they could cope. This therefore further undermined the SCUA which had assumed that they could not."\(^{29}\)

against Egypt, thus making the Eighteen Power proposal less persuasive.

\(^{28}\) Finer, *Dulles over Suez*, pp. 207-208.

\(^{29}\) Thomas, *Suez*, p. 83.
During the planning of the SCUA, Great Britain and France had been taking other action concerning the Canal problem. First, they continued to build up military forces in the Mediterranean around the British base on Cyprus, which naturally caused some concern for the Egyptian government. Eden and Mollet decided to appeal to the United Nations, and on September 23, jointly submitted a letter to the president of the Security Council charging that Egypt had illegally nationalized the Canal Company.30 The Nasser regime immediately countercharged Britain and France with threatening the peace and security of the international community through their military activities.31 The Council agreed to hear both complaints.

The Security Council met on the Suez question from October 5, 1956, intermittently until mid-1957. Progress, in terms of finding a peaceful alternative to force, was slow. But while the debate raged on in the Council, the foreign ministers of Egypt, Britain, and France, assisted by the good offices of Secretary General Dag Hammarskjold, were continuously conducting negotiations. By October 12, a draft resolution was agreed to. It included the "six principles" which were to become the basis for much of the

31. Ibid.
ensuing debate on the Suez crisis in the United Nations. Because of the importance of this resolution, it bears reproduction:

... any settlement of the Suez question should meet the following requirements:

1. There should be free and open transit through the Canal without discrimination, overt or covert . . . ;

2. The sovereignty of Egypt should be respected;

3. The operation of the Canal should be insulated from the politics of any country;

4. The manner of fixing tolls should be insulated from the politics of any country;

5. A fair proportion of fixing tolls and charges should be decided by agreements between Egypt and the users;

6. In cases of disputes, unresolved affairs between the Suez Canal Company and the Egyptian Government should be settled by arbitration with the suitable terms of reference and suitable provisions for the payment of funds found to be due. 32

The clause that would enact these principles followed. It called for the implementation of the principles in similar terms to the recommendations of the Eighteen Power proposal of the First London Conference. This enacting segment was vetoed by the Soviet Union.

32. Ibid., 742nd, and 743rd meetings; see also UN Doc. Suppl. (1956), S/3675. For an analysis of the legality of United Nations action in Suez, see the Legal Analysis below.
Thus, by mid-October, some progress had been made. Nevertheless, Great Britain and France did not discontinue military preparations in the Mediterranean. And, Israel began to mobilize its forces along the Jordanian border.

By the last week of October, Israeli action against Jordan appeared imminent. An Egyptian ship, allegedly carrying arms to Algeria, was seized by the French navy. The United Nations had not moved on the Middle East question officially since the six principles resolution. Then, on October 29, Israel struck, but against Egypt in the Sinai, in a multi-pronged attacked aimed at the fedayeen bases in the Gaza Strip, at Sharm el-Sheikh and the mouth of the Gulf of Aqaba in the south (toward the Straits of Tiran), and across the Sinai Peninsula toward the Suez Canal.

33. This charge was made by the French, and given some credence by Barker, Suez, p. 67, but it was an allegation only alluded to in most sources, and never completely substantiated.

34. The mobilization along the Jordanian border had been part of the Israeli strategy. See Moshe Dayan, Diary of the Sinai Campaign (London: Weidenfield and Nicolson, 1966). It appears that the British were not fully informed of Israel's plan, although as will be shown they were aware of the eventual attack on Egypt. Briefly, however, the Israeli mobilization allowed some black comedic relief: Israel was preparing with Britain and France to invade Egypt on the one hand. On the other, Israel was threatening a conflict with Jordan, which was tied to Britain through a mutual defense treaty. Thus, Britain faced the prospect of being ally and enemy to Israel simultaneously.
The Suez Crisis

By this time, a crisis in the sense of the term used in this inquiry existed. Nasser and the other Egyptian decision-makers perceived a threat; they were surprised; and the time to respond was short. The Israeli army was rapidly pushing through the Sinai desert, meeting little resistance.

A possible explanation of the failure on the part of Egypt to mount a sustained defensive action against the invaders was that Nasser had finally realized the possibility of British-French intervention, and therefore he ordered his troops back to protect Alexandria and Cairo.35 One of the factors that convinced Nasser of the seriousness of Anglo-French threats was the ultimatum issued by the two governments on October 30. The intent of the ultimatum was simple: Egyptian and Israeli forces were to effect an immediate cease-fire, and to withdraw all forces ten miles from the Canal zone. If these conditions were not met, British and French military forces would move to enforce them.36

Since the Israeli invasion served as a partial justification for subsequent British-French intervention in

35. This is an argument made by Thomas, Suez, p. 130.
36. Epstein, British Politics in the Suez Crisis, pp. 35-36.
Suez, the popular contention that Britain and France arranged the Israeli attack deserves attention. Even though Eden denied in the House of Commons that he, or any member of his government, knew of the Israeli plans of invasion, there was clear evidence that the three governments shared military plans. In fact, there is some evidence that representatives of the three governments met in late October at Sevres, France, and drew up a "declaration of intent" which committed them to the events to follow. Thus, there was ample evidence of collusion among the three invaders. Yet, the British and French used the Israeli invasion as a justification to enter the Canal zone; an example of international Machievellinism that greatly damaged British, French, and Israeli credibility.

Returning to the Anglo-French ultimatum: Nasser rejected it immediately, arguing that no nation had the authority to request his government to sacrifice its

37. Two pamphlets condemning British-French policy are: Penel Johnson, The Suez War (London: Greenberg, 1957), and Michael Foote and Mervyn Jones, Guilty Men, 1957: Suez and Cyprus (London: Rinehart, 1957). Both of these political treatises score the British and French leadership for cynically pre-planning an invasion, while outwardly maintaining non-interventionist postures.

38. Epstein, British Politics in the Suez Crisis, p. 35.

39. See Finer, Dulles over Suez, where he devotes a chapter to "Collusion Brings a Hot War," pp. 324-366.

sovereignty over Egyptian territory. On October 31, the British air force began bombing Egyptian airfields and other strategic areas in preparation for the landing of Anglo-French ground forces. The effect of the bombing, however, was to rally the Egyptian population behind President Nasser. Furthermore, the bombing quickly mobilized world opinion to the side of the Egyptians in almost universal condemnation of Britain, France, and Israel.

The crisis was immediately taken to the United Nations, primarily at the insistence of the United States. A resolution essentially condemning Israel of aggression was vetoed by Britain and France in the Security Council. It was obvious that, due to the veto of these two permanent members, convincing the Council to act would be difficult, if not impossible. Therefore, the Yugoslavian representative introduced a proposal to bring the Suez question before a special session of the General Assembly, under the "Uniting for Peace" resolution of 1950. A resolution

41. Barker, Suez, pp. 97ff.
42. Ibid., p. 98. Another aspect of the Anglo-French operation was a psychological warfare technique of dropping leaflets and making radio broadcasts to the effect that Egypt "had sinned by placing [its] faith in Nasser." Thomas, Suez, p. 131. This technique also failed, and resulted in increased prestige for Nasser.

43. The Uniting for Peace resolution was adopted at the Fifth Session of the General Assembly (Res. 377a, 1950). Also known as the "Acheson Plan," it was an instrument utilized in the Korean conflict. In essence, the resolution permitted the General Assembly to assume.
requesting action under Uniting for Peace is procedural, not substantive, and thus not subject to the veto. Consequently, the Yugoslavian proposal was adopted over the strenuous objections of the British and French representatives, who maintained that the action was unjust and illegal. 44

The First Emergency Special Session of the General Assembly was convened on November 1, and immediately called for a cease-fire in the Middle East. The resolution was ignored. Through the next several days, a series of resolutions were adopted which eventually led to a cease-fire on November 6, and established the United Nations Emergency Force (UNEF).

It should be noted that the cease-fire was effected only one day after Anglo-French forces actually landed on Egyptian soil. British and French troops penetrated the area along the Canal, specifically to Port Said and Faid. They did not press on to Alexandria as originally planned,

responsibility for some Council Security functions when the latter body was unable to act due to "lack of unanimity among the Permanent Members." The use of the Uniting for Peace procedures will be analyzed below, but see Keith S. Peterson, "The Uses of the Uniting for Peace Resolution Since 1950," in Richard A. Falk and Saul Mendlovitz (eds.), The Strategy of World Order, Vol. III (New York: World Law Fund, 1966), pp. 255-268.

44. See SCOR, 11th year, 750th and 751st meetings.
but were content with consolidating their positions in the two population centers in the Zone.\textsuperscript{45}

The UNEF and the End of the Crisis

The full duties of the UNEF evolved through implementation, but Secretary General Hammarskjold outlined several principles or conditions concerning the Force: first, the UNEF was not to include troops from interested parties or from permanent members of the Security Council. Secondly, the Force should not attempt to effect a political solution to the problems in the area. Thirdly, arms were to be used by the Force only in self-defense. Finally, the Force could not be stationed in any nation without its consent.\textsuperscript{46}

Initially, the command and troops for the UNEF were drawn from the existing United Nations Truce Supervision Organization (UNTSO), which had been in the Middle East since the 1948-1949 conflict, with Major General E. L. M. Burns named Chief-of-Command. Although it was soon recognized that the responsibilities of the UNEF were enormous, its relationships to the UNTSO, to the two Arab-Israeli

\textsuperscript{45} See Barker, \textit{Suez}, pp. 186-194.

Mixed Armistice Commissions, as well as to the invading armies, were never clearly established. The role of the Force became more clearly identified in the months following its creation, as it grew to approximately 6,000 troops and officers. Given the conditions demanded by the Secretary General, the most significant contribution the UNEF could make was to separate the combatants. It was also finally agreed that the UNEF should take up the supervision of the armistice lines.

The major role of the UNEF was to facilitate the withdrawal of the Anglo-French and Israeli forces. The governments of the invading armies had agreed to withdraw, in principle, by mid-November, but each of the delegates of Britain, France, and Israel made it clear that a

47. The MACs were established following the 1948-1949 conflict to supervise armistice lines. The MACs were small units composed of members of the two parties involved, e.g., Egypt and Israel, with additional members selected by the Chief-of-Command of the UNTSO. They were intended to insulate the armistice lines from all attacks, but were never very successful. See Jacob C. Hurewitz, "The Israeli-Syrian Crisis in the Light of the Arab-Israeli Armistice System," International Organization, 5 (Summer, 1956), pp. 459-479, especially pp. 462-465.

48. Herbert G. Nicholas, "UN Peace Forces and the Changing Globe: The Lessons of Suez and Congo," International Organization, 17 (Spring, 1963), pp. 321-337. Nicholas notes that few members in the United Nations wanted the UNEF to have military freedom: "Once this was recognized, it followed inevitably that . . . the force would only have the function of facilitating the invaders' withdrawal, of maintaining a modicum of order . . . ; and finally, of keeping the local combatants . . . at arms length. Its role was pacific and passive," p. 326.
precondition for the removal of his country's troops was the presence of an effective UNEF. On December 22, the Anglo-French forces vacated the Canal zone, with the UNEF acting as a buffer between them and the Egyptians.

While the removal of the British and French troops was accomplished in a relatively short time, it required several months to pressure Israel into relinquishing the territories it had captured during the crisis. The Israelis rapidly withdrew their troops to positions along the Gulf of Aqaba and the Gaza Strip, but they refused to pull back their forces further. The General Assembly, which had reconvened in its eleventh regular session, passed a series of resolutions deploring Israel's refusal to accede to the Assembly's request for withdrawal, and it further requested the removal of all Israeli troops from Egyptian territory as defined by the General Armistice Agreement between Egypt and Israel. The Israeli representative to the Assembly continued to refuse to remove the troops from Gaza and Aqaba.

49. GAOR, First Emergency Special Session, 591st 592, and 593rd meetings.

50. See Gabriella Rosner, The United Nations Emergency Force (New York: Columbia, 1963), pp. 76-97. This is a very thorough and well documented examination of the principles, legalities, and problems of the UNEF.

51. See GAOR, 11th year, 592nd-594th, 63 th-642nd, and 652nd meetings, and UN Doc. A/3572.
The Israeli case was argued by Foreign Minister Golda Meir.\textsuperscript{52} First, she argued that Gaza was not Egyptian territory under the original Armistice Agreement, but was part of the Palestinian territory administered by Egyptian military authorities, and thus Israel was not obliged to return to Egypt that which did not belong to it. Secondly, she contended that since many of the fedayeen raids were launched against Israel from the Strip, it would be contrary to Israel's national interest to return it to Egyptian control. The Egyptian position, supported by a majority of the Assembly, was that regardless of the status of Gaza prior to October 31, it had been illegally occupied by Israel. Eventually, the government of Israel agreed to withdraw and to turn over the supervision of the Gaza Strip to the UNEF, which would take precautions to prevent further raids into Israel.\textsuperscript{53}

The refusal to pull back from Sharm el-Sheikh overlooking the Straits of Tiran was due to the Israeli desire to prevent the instituting of an effective blockade of Aqaba. Israel contended that the Egyptian blockade had been illegal,  

\textsuperscript{52} The following arguments are paraphrases of Israel's arguments made in \textit{ibid.}, 638th meeting.

\textsuperscript{53} The UNEF never had an opportunity to consolidate administrative authority in Gaza. Although the Force officially replaced the withdrawing Israeli forces, Egyptian authorities moved back in immediately. See Hamilton Fish Armstrong, "U.N. Experiences in Gaza," \textit{Foreign Affairs}, 35 (July, 1957), pp. 600-619.
and that Israel had the right to insure against future obstacles to its shipping. Again, after gaining an "understanding" that a blockade would be prohibited, Israel finally agreed to remove its forces from the mouth of the Gulf of Aqaba.54

The avowed primary goal of British-French invasionary forces, i.e., to keep the Suez Canal open and functioning, was not achieved. Prior to the joint intervention, Nasser had ordered that ships be sunk in the Canal, which blocked all traffic through it.

Although Israel gained some advantage from the crisis, a temporary cessation of fedayeen raids, and the opening of the Gulf of Aqaba, the conflict was not a success for any of the nations involved. The Canal was closed; British, French and Israeli prestige in the international community suffered considerably; while few objectives were attained. World opinion had been focused unfavorably upon

54. The actual circumstances which led to this "understanding," as well as the one concerning the prevention of fedayeen raids from Gaza, are complex. Hammarskjold did not feel that he could make any guarantees, since to do so would suggest that the UNEF had enforcement powers. The Secretary General's position was this: the UNEF would be used to facilitate the withdrawal of the invading forces, and to keep the combatants apart. Then, the legal and political problems in the area could be resolved. Thus, when Hammarskjold failed to make the necessary guarantees, Eisenhower diplomatically intervened, and pressured Israel to withdraw by implying that the United States would see to it that Israeli demands were satisfied. See "Letter to Prime Minister Ben-Gurion from President Eisenhower," in U. S. Department of State, The Suez Canal Problem, pp. 332-333.
the three invading nations, and they stood condemned in the United Nations, even by their allies. Nasser's government, even given the humiliating defeat by a superior Israeli army, emerged in a more powerful position than at the initiation of hostilities. And, importantly, Egypt retained control of the Suez Canal. Only the United Nations seemed to gain substantially from this crisis.

Furthermore, all this was occasioned by a high level of violence. The invading forces lost a number of soldiers, and Egypt suffered even greater losses, both of personnel and of military materials. Still, the violence and losses could have been more severe. International law and organization, as will be shown, played important roles in limiting violence in Suez.

**Legal Analysis**

Although there were some legal issues involved in the Middle East which pre-dated the Suez crisis, they will only be considered when they indirectly relate to the 1956 dispute. In this analysis, the crucial legal issues are: (1) the status of the Suez Canal, which involves two related questions, (a) the legality of the nationalization of the

55. Thomas, *Suez*, p. 151, puts the losses at: fatalities: Britain, 22; France, 10; Israel, 200; and Egypt, 2650-3000. It was impossible, he claimed, to determine the respective losses of materials and supplies, although Egypt suffered more than the others combined.
Suez Canal Company, and (b) the blockade of Israeli shipping through the Canal; (2) the right of Egypt to blockade the Straits of Tiran; (3) the legality of the Israeli and Anglo-French invasions; and (4) the legality of the United Nations actions and of the UNEF.

Status of the Suez Canal

The original legal status of the Suez Canal eminates from several concessions made by the Viceroy of Egypt, from a firman (decree) from the Sultinate of the Ottoman Empire, and from a convention signed at Constantinople in 1888. These concessions, declarations, and the treaty, were issued and signed over the span of three decades, from 1854 to 1888.

In the mid-nineteenth century, Ferdinand de Lessups first indicated an interest in building a canal across the Isthmus of Suez, from the Red Sea to the Mediterranean. De Lessups approached Said Pash, the Viceroy of Egypt, and in 1854 received a Concession to construct a canal. Two years later, the Concession was enlarged. The new Concession of 1856 remained the basic legal document governing the construction of the canal, and its operation, for the following thirty-two years.


The Concession provided for the establishment of the Suez Canal Company (Compagnie Universelle du Canal Maritime de Suez), with de Lessups as president, and conceded the right of exploitation of the Canal to that Company in compensation for constructing the Canal.\(^{58}\) It granted these rights to the Canal Company for ninety-nine years, dating from the completion of the Canal.\(^{59}\) The Concession, then, had the effect of limiting Egyptian sovereignty over the isthmus through granting privileges to the Company. At the same time, however, the Concession provided that the Company, even if it established its headquarters outside Egypt, would still be subject to Egyptian corporate law.\(^{60}\) Thus, since the Company founded offices in Paris, it had an unusual status, subject to both French and Egyptian municipal corporate law.

Article XIV of the Concession had an important bearing on the future status of the Suez Canal. It noted:

> We solemnly declare . . . that the great maritime canal . . . shall be open forever, as neutral passages to every merchant vessel crossing from one sea to the other, without any distinction, exclusion, or preference . . . .\(^{61}\)

\(^{58}\) Act of Concession, 1856, Articles XX and XVIII, reproduced in \textit{ibid.}, pp. 3-7.

\(^{59}\) \textit{Ibid.}, Article XVI.

\(^{60}\) \textit{Ibid.}, Article IX.

\(^{61}\) \textit{Ibid.}, Article XIV.
Therefore, through a unilateral declaration by the Egyptian government, freedom of passage through the Canal was guaranteed. This guarantee was enlarged upon in the later treaty. 62

The Concession of 1856 was not final, however, since Egypt was then part of the Ottoman Empire. In order to become effective, the consent of the Sultan of Turkey was required. For political reasons, Britain at the time of the Concession of 1856 (and a later Concession in 1863, which reaffirmed the earlier declaration), was opposed to the construction of the Canal. Through the offices of the Sultan, negotiations finally led to consent by the powers interested in the area, and a firman was issued by the Sultan in 1866, which operationalized the concessions, and permitted de Lessups to complete construction of the Canal. 63

62. The impact of a unilateral declaration on the body of international law is not at all clear, especially in regard to whether or not it is binding. It is generally recognized, however, that such a declaration is binding on at least the nation that issues it, even if it is oral and unofficially given. See The Eastern Greenland Case, Permanent Court of International Justice, Ser. A/B 53, 3 Hudson, World Court Reports, 148 (1928), in William W. Bishop, Jr. (ed.), International Law: Cases and Materials (2nd ed.; Boston: Little, Brown, 1962), pp. 107-109. See also J. W. Garner, "The International Binding Force of Unilateral Oral Declarations," AJIL, 27 (July, 1933), pp. 493-497, for an analysis of The Eastern Greenland Case.

63. Obieta, The International Status of the Suez Canal, pp. 6-7. The firman incorporated all concessions made before 1866. See also U. S. Department of State, The Suez Canal Problem, p. 15.
The Canal was finished in 1869. The Suez Canal Company began operating it that year, and its concessions would expire in 1968, at which time all property would revert to the Egyptian government, with compensation paid for materials and supplies. Thus, by his firman, the Sultan, the sovereign, made the Viceroy's concessions his own.

In the ensuing two decades, world political conditions changed considerably. Great Britain had acquired a sizeable portion of stock in the Canal Company, and had become a primary user of the Canal. By 1882, Egypt was a de facto British protectorate. Britain, France, and other European nations were determined to prevent interference with the traffic through the Canal, so a conference was called in Constantinople in 1887, to consider the question of freedom of passage. The conference was concluded with the Convention of Constantinople of 1888, Respecting the Free Navigation of the Suez Maritime Canal. The expressed purpose of the Convention was to establish "... by a

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64. Act of Concession, 1856, Articles XVI and XVII, in U. S. Department of State, The Suez Canal Problem.


66. Hereafter referred to as the Convention of 1888. The text of the Convention is reproduced in U. S. Department of State, The Suez Canal Problem, pp. 16-20. Great Britain attached a reservation to the Convention, which precluded it from coming into effect until 1904, although allowing it to stand as the basic legal document governing the operation of the Canal.
Conventional Act, a definitive system intended to guarantee at all times, and to all powers, the free use of the Suez Maritime Canal, and this to complete the system under which the navigation of this Canal has been placed by the Firman of his Imperial Majesty the Sultan, ... sanctioning the Concessions of his Highness the Khedive [Viceroy] of Egypt ...

Because the Convention of 1888 served as the legal justification of the Egyptian nationalization, as well as the basis of British, French and other Western nations' arguments against nationalization, it must be closely examined.

The tenor of the Convention was set by its first article:

The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

Consequently, the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace.

Nevertheless, the rights of belligerants were restricted to passage, except in special circumstances. The Egyptian government, to the degree that it was capable, was responsible for enforcing the Convention, with the assistance of

67. Ibid., Preamble.
68. Ibid., Article I.
69. Ibid., Articles IV, V, and VII.
the Ottoman government and in consultation with the other
signatories, if necessary.

The Ottoman and Egyptian governments, moreover, were
not denied the right to "assure by their own forces the
defense of Egypt and the maintenance of public order,"
although any measures taken "should not interfere with the
free use of the Canal." 70

This brief summary of the Convention of 1888 is
essential in the determination of the status of the Canal.
It remained the central document governing the operation of
the Canal from 1888 to 1956, and, according to the Egyptian
government, it continued in force after nationalization.
The question is: under the Convention did Egypt have the
legal right to nationalize the Suez Canal Company?

There has been heated controversy over this question,
with scholarly opinion found on both sides. 71 Since this is

70. Ibid., Articles X and XI. This appears to be
paradoxical. If such a case should arise, what would be
Egypt's rights if free passage through the Canal threatened
the defense of Egypt, and/or the Egyptian public order? In
such a case, would the right of self-defense supercede
Article XI? The question is not altogether rhetorical, for
the blockade of Israeli shipping through the Canal was based
on an affirmative response to the latter question.

71. Of those who contend that Nasser and Egypt
acted within the confines of international law, see Quincy
271ff; Quincy Wright, "Legal Aspects of the Middle East
Situation," in John W. Halderman (ed.), The Middle-East
Crisis: Test of International Law (Dobbs Ferry, N. Y.: Oceana, 1969); Robert Delson, "Egypt's Seizure of Suez--A
Lawyer's View," Reporter, 16 (June 27, 1957), pp. 23-26;
Ralph Solvenko, "Nationalization and Nasser," in Tulane
Studies in Political Science, International Law in the
such a crucial question to the present inquiry, it must now be examined in some depth.

The right of a sovereign nation to expropriate and nationalize properties under its jurisdiction, with the assurance of "prompt, adequate, and effective compensation," has traditionally been recognized in international law, although the necessity of the payment of compensation is often denied by third-world nations. Generally, nationalization and expropriation are permissible when a

Middle East Crisis (New Orleans: Tulane, 1957), pp. 79-93; Obieta, The International Status of the Suez Canal; and even an editorial in Life, 41 (September 24, 1956), entitled "Law, Wealth and Suez," which grudgingly admits the legality of the nationalization, while deploiring its consequences. Further pro-Egyptian arguments can be found in the statements of the Egyptian and Soviet representatives to the Security Council in SCOR, 11th year, 736th, 737th, and 378th meetings. Finally, see the statements by the Egyptian and Indian representatives to the General Assembly, in GAOR, First Emergency Special Session, 561st-563rd meetings.

For the opinion that the nationalization was contrary to international law, see Thomas Huang, "Some International and Legal Aspects of the Suez Question," AJIL, 51 (April, 1957), pp. 277-307; George A. Finch, "Post-Mortem on the Suez Debacle," AJIL, 51 (April, 1957), pp. 376-380; and Austin Foster, "An Unanswered Legal Problem Raised by the Suez and Iranian Controversies," in Tulane Studies in Political Science, International Law in the Middle East Crisis (New Orleans: Tulane, 1957), pp. 63-78. See also the statements of the British and French representatives to the Security Council and the General Assembly in the meetings cited above in this footnote.


treaty is not violated, when the action serves the public interest, and if the action is not designed to discriminate against aliens. Furthermore, implicit in the so-called Act of State Doctrine is the right of a sovereign government to determine the validity of its own acts, including presumably, expropriation and nationalization under its own laws. Thus, since Egypt had promised compensation for the

74. See The Chorzow Factory Case, Judgements and Orders, Permanent Court of International Justice (1928), Ser. A, No. 17, in Tung, International Law in an Organizing World, p. 141. An earlier case of the same title (1926), had established the right of plaintiff, Germany, to bring a case before an international tribunal, and is frequently cited concerning jurisdiction of international courts.

75. Ibid. See also, "United States and Mexico, Discussion on Expropriation," 3 Hackworth, International Law (1942), pp. 655-665, reproduced in Bishop, International Law, pp. 677-690. In this exchange between the United States and Mexican governments, the following conclusions were arrived at: expropriations are legal if: (1) the act did not violate the rights of aliens to the benefit of nationals; (2) the proceeds from the act were to benefit the public welfare; and (3) prompt and adequate compensation was paid. These have been accepted by most of the Western developed nations as minimum criteria which must be met by an expropriating power. Not all nations, as noted above, feel compelled to satisfy them, e.g., Peru in the nationalization of the International Petroleum Company and Chile's original nationalization of the United States owned copper industry.

76. The Act of State Doctrine specifically refers to the question of jurisdiction. The Doctrine is succinctly stated in Underhill vs. Hernandez, 168 US Reports, 259 (1897), quoted in Magnone, The Elements of International Law, p. 379, by Chief Justice Fuller of the United States Supreme Court: "... the Courts of one country will not sit in judgement on the acts of another done within its own territory." Nevertheless, this doctrine has particular relevance to expropriation and nationalization cases. See, e.g., Salimoff and Co. vs Standard Oil Co. of New York, New York Court of Appeals (1937), 262 N.Y. 220, in Bishop,
Canal Company at market value, and since the benefits of the action would accrue to the Egyptian public interest (i.e., the construction of the Aswan High Dam), and since Egypt was apparently acting within its rights as a sovereign entity, the nationalization would seem to have been legal. Unfortunately, the issue is not so easily resolvable.

The opponents of nationalization had an interesting argument concerning the legality of the action. It was, essentially, that the Suez Canal Company had an international status which precluded expropriation by a single power. This argument was founded on two contentions: (1) the concessions and the Convention of 1888 granted such a status to the Company, and (2) the Company had acquired this status by custom in international law, and/or by virtue of, as one source noted, "surrounding international factors, such as

International Law, pp. 318-319, where the Court upheld the right of the Soviet government to expropriate property of the plaintiffs and assign concessions to the defendants even though the United States did not recognize the Soviet regime. In Berstein vs. Van Heyghen Freres, S.A., 163 F. 2nd 246, quoted in Magnone, The Elements of International Law, p. 380, a U. S. Circuit Court of Appeals upheld an expropriation of the Nazi government of Germany, even though the United States had gone to war against it. In a more recent case, which could not have applied to Suez, but casts light on the Act of State Doctrine, the U. S. Supreme Court held that the "Judicial Branch will not examine the validity of the taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of the suit . . . ." Banco Nacional de Cuba vs. Sabbatino, 376 US 398, 1964, reprinted in Edward Collins, Jr. (ed.), International Law in a Changing World; Cases, Documents and Readings (New York: Random, 1970), pp. 272-273. The Sabbatino Case was later partly overruled, due to political dissatisfaction with the holding.
the international composition of the shareholders of the Company, personnel, and the manner of the operation of the Suez Canal, which rendered an international public service to the world community. An important point should be noted here, although it has been implicit throughout the treatment of the Suez crisis. The nationalization controversy concerned the Canal Company, not the Canal per se, nor its physical properties. There was little disagreement that the territory of a canal, if it passes exclusively through the territory of a single nation, was under the jurisdiction of that nation, and subject to any number of legal occupation and seizure measures.

Thus, in light of the brief discussion of nationalization and expropriation above, the validity of this complex argument can be determined by an examination of the following question: was the Suez Canal Company subject at the time of nationalization to Egyptian law, or, was it subject to the laws of some other nation or to public

77. Huang, "Some International and Legal Aspects of the Suez Question," p. 278.

78. See Luke T. Lee, "Legal Aspects of Internationalization of Inter-oceanic Canals," in John W. Halderman (ed.), The Middle-East Crisis: Test of International Law (Dobbs Ferry, N.Y.: Oceana, 1969), pp. 159-160. The question of whether an interoceanic canal is subject to riparian law, to the law of international straits, or to some other element of public international law is important, as evidenced by the treatment of the subject in Obieta, The International Status of the Suez Canal, pp. 22-47. Nevertheless, the concern here is with the Company, so it will not be necessary to pursue this point.
international law? To answer this question, it is necessary to briefly return to the concessions and the Convention of 1888.

The Concession of 1856 (upon which the latter Concessions were based), clearly implies that the act of granting authority to the Seuz Canal Company was of a limited nature, i.e., concessionary rights were granted for ninety-nine years, after which the Company would revert to the Egyptian government unless the concessions were extended. The right to exploit the Canal was granted to de Lessups and his company, as compensation for construction. That is, it was an agreement to build the Canal and to be paid for it. Thus, the Concession was similar to a contract, issued by a sovereign power (following authorization by the Sultan), to a corporation. The legal status of such concession agreements is, like much of international law, ambiguous, but the weight of opinion is that they are similar to other governmental contracts and are therefore subject to the law of the sovereign nation granting the concession. Furthermore, de Lessups and the Viceroy of Egypt apparently believed that the


80. Ibid., Articles X and XVII.

Company was to be subject to Egyptian corporate law, for they included regulatory stipulations in the Concession regarding stock issuance. Also, it was noted in the agreement, administrative headquarters could be established outside Egypt, for de Lessups clearly preferred Paris, but in such an instance, a "superior agent" of the Company vested with "all powers necessary," was to represent the Company in Egypt to assure "the proper functioning of the service and the Company's relations with the [Egyptian] government." It appears, then, that the Egyptian government was concerned with retaining supervisory and legal control over the Suez Canal Company, and that the Concession did not ipso facto grant an international legal status to the Company. Moreover, in the firmans issued by the Sultan of Turkey, which operationalized the earlier Concessions, was the following categorical statement:

In as much as the Company is Egyptian, it is governed by the laws and customs of that country; however, as regards to its constitution as a corporation and the relations of its partners with one another, it is [also] . . . governed by the laws which, in France, govern joint stock companies.

82. Act of Concession, 1856, Article XXI, in U. S. Department of State, The Suez Canal Problem.

83. Ibid., Article IX.

84. The firmans is reproduced in ibid., p. 15.
The Convention of 1888 was designed, as indicated above, "to complete the system under which the navigation of the Canal had been placed . . . ."\textsuperscript{85} A good deal was made of this choice of words when the British and French delegates argued their respective cases before the United Nations Security Council.\textsuperscript{86} Their position was this: the Concessions and the firman had provided that the authority to operate the Canal had been exclusively granted to the Suez Canal Company. By "completing the system," it was the intent of the framers of the Convention to incorporate the Concessions into the treaty itself, resulting in the de jure internationalization of the Company. Brief perusal of the Convention establishes the tenuous nature of the underpinnings of this contention.

First, the parties to the Convention recognized the "engagements" undertaken by the Viceroy in regard to the Company under the Concessions.\textsuperscript{87} This act of cognition, with no overt attempt to incorporate, implied that the Concessions were separate from, but relied upon, in terms of the treaty. Secondly, even if the Convention of 1888

\textsuperscript{85} Convention of 1888, Preamble, in ibid.

\textsuperscript{86} SCOR, 11th year, 734th and 735th meetings. The paragraphs following are a paraphrase of the British/French argument.

\textsuperscript{87} Convention of 1888, Article II, in U. S. Department of State, The Suez Canal Problem, The specific reference here is to the Concession of 1863, which was essentially a restatement of the 1856 agreement.
intended to incorporate the Concessions and the firman, the objective of the treaty was obviously to insure freedom of passage through the Canal, and it was not primarily concerned with the operational authority of the Canal. In other words, as far as the signatories to the Convention were concerned, it made no difference what organization operated the Canal—the Company, the Egyptian government, or the Ottoman government—the Canal was to remain free and open to all shipping. Furthermore, by suggesting that the Egyptian and Ottoman governments enforce the Convention, and by recognizing the right of Egypt to its self-defense, the implication was clear that the sovereign power was to remain with Egypt and its suzerain, the Ottoman Empire. Therefore, the basic legal documents concerning the Suez Canal Company, the Concessions, the firman, and the Convention of 1888, offered no evidence to substantiate the British and French claim that the Company had an international status.

The second element of the argument was that the Company had acquired international status by custom, or by virtue of its corporate and administrative composition (i.e., the shareholders and administrative officials of the Company were dominantly non-Egyptian).

88. Ibid., Articles VIII, IX, and X.
The custom argument was based on the following reasoning: historically, the Canal had been open to all merchant vessels, and after the Convention of 1888 freedom of passage had been guaranteed to ships of war as well. Thus, through custom, the Canal was open to the vessels of every nation for all time, and could not be nationalized and subjected to the control of any single nation. This contention, however, suffers from the same weakness as did the one based upon the legal documents. Custom did not internationalize the Canal Company, but protected the right of free navigation through the Canal.

89. The relationship between conventional and customary law, in regard to the British/French argument, is very fine. For while freedom of passage was a conventional right, its acceptance had led to the "custom" of an international public service providing the right. There are additional problems with the custom argument, which will be dealt with below. But a few points should be made here. First, the effect of treaties on third-party states is not clear. In the Free Zones of Upper Savoy and the District of Gex Case, World Court Reports 508 (1935), partially reproduced in Bishop, International Law, pp. 137-139, the International Court held that even though Switzerland was not a signatory to the Treaty of Versailles, it was legally entitled to receive benefits from the stipulations therein. Then, in the Suez case, since all states had, by custom, been granted freedom of passage through the Canal, makes the question of third-party states relation to the convention moot.

Nevertheless, as will be discussed below, the custom of freedom of passage may never have been consumated, since Britain had the Canal closed to its enemies during wartime. While this is an important question, it should not be necessary to pursue it further here. In regard to the role of custom as a source of law generally, see G. I. Tunkin, "Remarks on the Juridicial Nature of Customary Norms of International Law," California Law Review, 49 (September, 1961), pp. 421-430, where the author emphasizes the complicated nature of customary law.
Because the administrative offices were in Paris, and therefore the Company was subject to French, as well as Egyptian, corporate law, this made it peculiar, but it did not make the Company French, nor did this circumstance grant the Company an international status. The most important feature of the Canal Company was that it was chartered under Egyptian municipal code, and had to live up to its obligations under Egyptian law. In a sense, corporations resemble individuals in the international legal system, in that they acquire a "nationality" of the nation under which they are incorporated. And, as "nationals," corporations are subject to the laws of their sovereign.

In some instances, the nationality of the stockholders of a company is important, for example to determine enemy character in war time. Nevertheless, the determination of control of a corporation has little bearing on

90. This position is contested by some European nations. According to Bishop, International Law, p. 395, however, "international practice appears to be increasingly in accord with the Anglo-American rule that the nationality of a corporation is determined by the laws under which it is incorporated, though support may be found for the idea that the nationality of a corporation is determined by its home office (siegé social), and some states regard as most important the place of principal operations and business." It is the contention here that the Suez Canal Company is Egyptian, on the basis of two of the three tests suggested by Bishop. That is, the Company was incorporated under Egyptian law, and Egypt is the place of "principal operations," Even the question of home office introduces some semantic controversy, for there were offices in both Paris and Alexandria.

91. Ibid., p. 396, see especially footnote 3, where Bishop cites evidence to support this point.
its nationality. That is, even if British shareholders had owned a majority of the Suez Canal Company, that would not have made it British. Similarly, because a majority of the stockholders were non-Egyptian did not make it an international company. Foreign ownership of stock simply means that governments can represent their respective nationals in any arbitration or adjudication. Thus, according to a leading authority: "the act of incorporation is considered as clothing the artificial person thereby created with the nationality of its creator, without regard to the citizenship of the individuals by whom the securities of the company may be owned."

The question of the nationalities of the administrative personnel is irrelevant here, for it was the legal nature of the Company that was crucial. That is, even though many of the administrative officials of the Company

92. And even here, any claim made by a nation on behalf of its nationals in an international forum should come only after all local remedies have been exhausted. See El Triunfo Company (United States vs. Salvador), Arbitration before Strong, C. J. (Canada), Dickinson (United States), and Pacas (Salvador), 1902 US Foreign Rel. 859, in Bishop, International Law, pp. 672-675. In this case the United States was permitted to interpose before local remedies had been exhausted, but it is an excellent treatment of the principle.

93. John Basset Moore, Digest of International Law, Vol. VI, pp. 641-642, quoted in ibid., p. 727. See also United States (Agency of Canadian Car and Foundry Company) vs. Germany, Mixed Claims Commission, United States and Germany, 1939, 5 Hackworth, Int. Law, 833 (1943), also in ibid., pp. 724-727.
were non-Egyptian that did not alter the nationality of the Company. The non-Egyptians were merely employees, with their individual nationalities having no bearing on the status of the Company. 94

Therefore, it is the conclusion here that the Suez Canal Company did not acquire any sort of international status, neither by the granting of such status by the legal documents which underlay it, nor by custom or surrounding international factors. The Company was Egyptian, and consequently subject to expropriation and nationalization by the Egyptian government. The only stipulation that could have been imposed upon such action was that the Canal must remain open. This stipulation was agreed to, with the exception of Israel, in the Egyptian nationalization decree.

Before turning to the legality of the blockade of Israeli shipping through the Canal, one final point should be raised concerning nationalization. Technically, Egypt might have argued its right to nationalize and expropriate the Canal Company, and to blockade the Canal, in opposition to the Convention of 1888 on the principle of clausula rebus sic stantibus, which is that treaties cease to be binding upon nations when the condition upon which they were

94. Except, of course, in cases of jurisdictional disputes, which is obviously beyond the scope of this inquiry.
founded have substantially changed. This has become an increasingly popular argument among nations of the third world, as well as among socialist nations. Based on this principle, Egypt might have contended that conditions of world politics had changed considerably since the Concessions and the Convention. Similarly, Egypt might have argued that it was no longer bound by a treaty made under the auspices of the Ottoman Empire. As a succeeding sovereign, it may not have been responsible for the obligations undertaken by another government. There are no clear rules regarding *rebus sic stantibus* and the obligations of succeeding states, but arguments could have been developed. Throughout the debates, however, Egypt expressed its intention of adhering to the Concessions and the Convention, thereby embracing the principle *pacta sunt servanda* (that treaties are to be kept and executed in good faith), the basis of conventional international law.

The question of the Egyptian blockade of the Canal appears deceptively simple. Under the Concessions, the Convention and by custom, such a blockade would be illegal.


96. See Bishop, *International Law*, pp. 204-209.

Nonetheless, a return to the legal documents discussed above, a brief look at the history of the Canal from 1900 to 1956, and a consideration of the question of whether or not a state of war existed between Israel and Egypt, will obscure this facile conclusion.

By the Concession of 1856, the government of Egypt was only committed to free navigation through the Canal for merchant vessels, and by implication, only in times of peace. That there was no consideration given the rights of ships of belligerents in time of war, nor the rights of war ships, was among the reasons for calling the conference which resulted in the Convention of 1888. Consequently, the Concessions alone did not provide for the de jure right of freedom of passage of ships of belligerant nations, through the Canal.

The Convention addressed this omission directly, by stating: "The Suez Maritime Canal shall always be open and free in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag." Although this seemed unambiguous, the matter was complicated by further stipulations in the treaty. Specifically, the Egyptian and Ottoman governments were given permission to undertake actions they "might find necessary to take to

98. Act of Concession, 1856, Article XVI, in U. S. Department of State, The Suez Canal Problem.

assure by their own forces the defense of Egypt and the maintenance of public order." The right, however, was modified by the provision that such actions "should not interfere with the free use of the Canal." The question that remained, then, was this: could Egypt establish a limited, selective blockade of the Canal if such action was necessary to defend its sovereignty? According to Articles I and XI, the answer would be no; under Article X, however, an affirmative response was possible.

The argument that custom supported freedom of passage is historically misleading. While Egypt was a de facto protectorate of Great Britain, belligerants were permitted through the Canal in those instances when Britain was not a party to the conflict. Specifically, warships were granted free passage in the Spanish-American War (1898), the Russo-Japanese War (1904), and the Italo-Turkish War (1911-12). Even then, however, the ships of war were closely watched and regulated. On the other hand, during the two World Wars, the Canal was closed to the Central and Axis powers, i.e., it was closed to the enemies of Great Britain.

100. Ibid., Article X.
101. Ibid., Article XI.
and its allies. These closures, though contrary to the Convention of 1888, were apparently accepted by the international community. Since these actions were officially undertaken by the Egyptian government in concert with its allies, even though the blockades were obviously primarily effected and maintained by British naval forces, the argument could be made that this was sufficient to establish the custom that Egypt had the right to close the Canal to those with which it was at war, especially since the Convention of 1888 and the Concessions which underlay it were ambiguous concerning Egyptian rights in such cases.

Therefore, if Egypt could establish that a state of war existed between itself and Israel in the 1949-1956 period, it could argue that it had the right to close the Canal to Israeli shipping.

The question of the existence of a state of war is also complicated. The first Arab-Israeli conflict in 1948-1949, was not concluded with a treaty of peace, but with a series of armistice agreements between Israel and its hostile neighbors. Accordingly, both sides apparently regarded themselves engaged in a continuous state of war.

103. Ibid., pp. 80-84. See also Epstein, British Politics in the Suez Crisis, pp. 22-25.

104. The question of the Egyptian blockade was originally debated in the Security Council in 1951. At that time the Council unanimously demanded that Egypt end the blockade, a decision that was ignored by the Egyptian government. See SCOR, 6th year, 555th meeting.
with one another. This mutual perception of hostilities, however, was affected by the Charter of the United Nations, to which both Egypt and Israel had acceded.


Another problem regarding the Charter is: is it a self-executing or non-self-executing treaty? In Sei Fujii vs. California, Supreme Court of California, 242 P 2nd 617, in Magnone, The Elements of International Law, pp. 101-103, the California Court held, inter alia, that part of the Charter is self-executing, and part is not: "In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument,..."
by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest . . . ."107 In the first chapter, the United Nations is committed to the maintenance of "international peace and security," and all members are instructed to "settle their disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."108 It might be argued that these are non-self-executing provisions. But Article 2, paragraph 4, leaves no doubt as to the legal status of the use of force, and in such language as to require no legislative enactment of its intent: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." Only two conditions justify the use of force: matters necessitating collective action under the direction of the Security Council, and measures of collective or individual self-defense, used to repel an armed attack.109


108. Ibid., Article 1, paragraph 1, and Article 2, paragraph 3.

109. Ibid., Articles 42, 43, and 44, and Article 51.
There is an assumed semantic correlation here, between prohibiting the use of force, and outlawing the resort to war. It is contended that the framers of the Charter intended to outlaw war, but at the same time did not choose to employ the term war due to its inherent vagueness, and to the interpretational problems encountered by the League of Nations.\textsuperscript{110} But the effect was the same. The United Nations Charter outlawed a legal state of war altogether.\textsuperscript{111}

Since both Israel and Egypt are members of the United Nations, neither can claim the existence, at least


\textsuperscript{111} Quincy Wright, "The Outlawry of War and the State of War," AJIL, 47 (July, 1953), pp. 365-369. There is another semantic problem suggested here. What is the permissible use of force, say in self-defense, labeled, if not war? The question is important, but perhaps unanswerable. The point is that the Charter puts such stringent limitations on the use of force even in self-defense, e.g., such actions must be immediately reported to the Security Council, "and shall not in any way affect the authority and responsibility of the Security Council" (Article 51), that war in the traditional sense is prohibited. That is, if the definition of war suggested by the renowned historian of war, Karl von Clausewitz as "an act of violence intended to compel our opponent to fulfill our will," is accepted, the use of force in self-defense is of a different genre. For in the latter case, force is an instrument of national preservation, not one of an extension of national will. For a discussion of von Clausewitz's definition of war, see Raymond Aron, Peace and War: A Theory of International Relations (New York: Praeger, 1967), Chapter I.
the *de jure* existence, of a state of war. As long as Egypt was a member of the United Nations, and it was during the crisis of 1956 and remains so, it could not claim the right to close the Canal by virtue of the need to protect itself from a belligerent. Under international law, no war existed.  

To summarize the status of the Suez Canal, then, the following preliminary conclusions are offered: Egypt had the legal right to expropriate and nationalize the Suez Canal Company, but it remained bound, and it recognized its obligations, to respect the Convention of 1888. Furthermore, even if the right to close the Canal in time of war, as was the custom when the Canal was under *de facto* British control, could be substantiated legally, no state of war existed.  

112. The argument could be made, no doubt, that this is unnecessary legalistic quibbling. The role of war and force in international relations is still evident, regardless of the Charter. See Quincy Wright, *A Study of War* (2nd ed.; Chicago: Quadrangle, 1965), and the same author's *The Role of International Law in the Elimination of War*. Here, however, the concern is with legal justifications. And, based upon this analysis, the legal justification for the closure of the Canal is unacceptable.
existed between Egypt and Israel.\textsuperscript{113} Therefore, Egypt's blockade of the Canal was illegal.\textsuperscript{114}

Blockade of the Gulf of Aqaba

The next legal issue requiring examination is the Egyptian claim to the right of blockade of the Straits of Tiran at the mouth of the Gulf of Aqaba. Egypt claimed this right on two grounds: (1) Israel had no legal claim to any territory on the Gulf of Aqaba, i.e., Israel had seized the port of Eilat and environs after the Armistice Agreements of 1949; and (2) the blockade was a legal right of a belligerant at war.\textsuperscript{115}

In regard to the contention that Israel had no territorial claim on the Gulf, several points were relevant. According to the original partition resolution adopted by

\textsuperscript{113}. The two instances of closure, World Wars I and II, may not have been sufficient to establish a customary norm, even though such actions were acquiesced to by all nations, save perhaps by the Central and Axis powers respectively. Nonetheless, this particular Egyptian claim can be granted without effecting the conclusion of the analysis.

\textsuperscript{114}. This conclusion was supported by the Security Council's action in 1951. See SCOR, 6th year, 553rd, 554th, and 555th meetings. For the text of the resolution demanding the blockade be lifted, see UN Doc. S/2298, 1 Sept. 1952.

the United Nations General Assembly on the date of the termination of the British mandate over Palestine, the area along the Gulf of Aqaba, including Eilat, was to be under Jewish control, although much of what later became Israel was to be under Arab control.\textsuperscript{116} The United Nations partition resolution was greeted with intense Arab hostility, which led to the Arab-Israeli conflict of 1948-49, and resulted in Jewish occupation of all of the former Palestine mandate. It was Egypt's contention, however, that Israel had not effected control over Eilat (or, Um Reshresh, in the Arab nomenclature), until after the signing of the Egyptian-Israeli Armistice Agreement. Consequently, Israel's occupation of Eilat and other areas in the vicinity of the Gulf constituted a violation of the agreement, and was thus illegal.\textsuperscript{117}

The persuasiveness of the Egyptian argument on this score was limited by other considerations. First, the Israeli-Egyptian Armistice Agreement was concluded in regard to the "western front," i.e., to the borders between

\textsuperscript{116} For a discussion of the United Nations involvement in, and the partition plans considered for, the mandate of Palestine, see William R. Polk, Davis S. Stanler, and Edmond Asfour, The Backdrop to Tragedy: The Struggle for Palestine (Boston: Beacon, 1957), pp. 110-126.

\textsuperscript{117} See SCOR, 5th year, 517th and 518th meetings. See also, "Position of the United Arab Republic," a statement made before the Security Council in 1967 by the Egyptian representative, in Collins, International Law in a Changing World, pp. 204-207.
the two nations, adjacent to Gaza and through the northern Sinai. The Aqaba littoral was geographically a concern of Jordan and Israel. The Israeli-Jordanian Armistice Agreement was not at all precise about the borders between the two nations, but it conceded that at least part of the Aqaba coast was under Israeli sovereignty.118

Secondly, there is no question about "effective and continuous" control of the Eilat area by Israel. These criteria are generally sufficient to establish legal title to territory.119 If an argument is to be made on this basis, the method of original acquisition may be important, for seizure, if protested, may not provide the foundation for such a prescriptive claim.120 The area in question

118. See Leo Gross, "Passage through the Straits of Tiran and in the Gulf of Aqaba," in John W. Halderman (ed.), The Middle-East Crisis: Test of International Law (Dobbs Ferry, N.Y.: Oceana, 1969), p. 131, where he concludes after a careful examination of the confusing Armistice Agreements that "there can be no question . . . of any 'illegal occupation of the Aqaba territory.'"

119. See Collins, International Law in a Changing World, pp. 130-133, for a brief discussion of methods of acquiring title to territory. Also see The Island of Palmas Case (United States and the Netherlands), Permanent Court of Arbitration, 1928, Scott, Hague Court Reports, Second Series, 83 (1932), in Bishop, International Law, pp. 345-351, in which the Netherlands claim to title was upheld on the basis of continuous exercise of dominion over an island claimed by the United States by virtue of cession.

120. This contention is the basis of the so-called "Stimson Doctrine," relied upon by the Egyptian representative in "Position of the United Arab Republic," in Collins, International Law in a Changing World. For a statement of the Stimson Doctrine, see "Manchuko," 1 Hackworth Digest of International Law, 333-338 (1940), in Bishop, International Law, pp. 296-297.
here, however, was recognized as part of Palestine prior to 1948-49, and consequently, it was not territory acquired through conquest in the general sense of the term. Moreover, when Israel announced its withdrawal from Bir Qattar to the west of Eilat, the Egyptians ceased to press claim, leaving the question of the remaining territory to the Israeli-Jordanian deliberations.\(^{121}\) The latter Armistice Agreement, as noted above, recognized Israel's claim to an Aqaba littoral.\(^{122}\) Therefore, the Egyptian contention that Israel had no territorial claim to the port of Eilat was unsound.\(^{123}\)

\(^{121}\) It should be noted, however, that the 1967 statement referred to in \textit{ibid.}, claimed that "Bir Qattar includes the vicinity of Om Reshresh . . .," i.e., Eilat.

\(^{122}\) See Gross, "Passage through the Straits of Tiran and in the Gulf of Aqaba," pp. 129-131. An additional point concerning the Egyptian claim should be made. In an exchange of notes between Britain and Egypt following the firing on a British ship passing through the Straits of Tiran, Egypt maintained that the Straits comprised Egyptian territorial waters. See Swift, \textit{International Law}, p. 235, footnote 34. This is the only place this Egyptian argument was encountered, but it does not affect the right of passage through the Straits, even if the Straits were within Egypt's waters. Ships have the right of passage from one international water to another, even if such passage necessitates crossing another state's national seas. See The Corfu Channel Case, United Kingdom-Albania, \textit{International Court of Justice}, April 9, 1949, ICJ Reports 1949, in \textit{ibid.}, pp. 234-245.

\(^{123}\) Furthermore, even if the argument was substantiated that Israel had no \textit{de jure} claim to a littoral access, but was simply exercising \textit{de facto} authority over Eilat, the use of a blockade would still have been unjustifiable without the authorization of the other coastal states, Saudi Arabia and Jordan, to make the Gulf a \textit{mare clausum}. Some time after 1956, such authorization was granted, which led
The second argument employed by Egypt to justify closing Aqaba, the right to blockade due to the existence of a state of war, was legally more appealing. The right to blockade the ships of an enemy during times of belligerency is clearly established in the laws regulating the use of force. Nevertheless, the legality of a blockade, even in war time, is dependent upon the blockading power's ability to enforce it. There is evidence that Egypt's ability to maintain the blockade was contingent upon the Israeli reluctance to violate it. In other words, Israel could run the blockade at will, thereby rendering it ineffective. Nevertheless, it is really not necessary to speculate on the effectiveness of the Egyptian policy, since the right of blockade is limited to states of belligerence. As demonstrated above, legally a state of war did not exist, to the claim that Aqaba was an historic gulf, and thus not subject to the law of international waterways. On this basis, the Gulf was blockaded again in 1967.

124. See Marvin F. Parmelee, Blockade and Sea Power (New York: Crowell, 1924), and Tung, International Law in an Organizing World, pp. 469-472. See also the discussion of the American quarantine/blockade in the following chapter.

125. See Declaration of Paris, April 15, 1856, reproduced in Bishop, International Law, pp. 877-878, especially Article 4, p. 878, where it states: "Blockades, in order to be binding, must be effective; that is, maintained by a force sufficient really to prevent access to the coasts of an enemy."
making the Egyptian argument for blockade extremely tenuous. 126

Therefore, concerning the blockade of the Gulf of Aqaba, the conclusion is that Egypt had no legal basis for instituting the policy, i.e., its actions were illegal. 127

Legality of Israeli and Anglo-French Invasions

As noted earlier, Israel attacked Egypt on October 29, 1956, thus initiating the crisis as defined in this study. On October 31, Britain and France began aerial and naval bombardment of Egypt; they landed troops in the Canal zone on November 5.

126. As indicated earlier, after 1957, Egypt and other coastal states on the Gulf argued that Aqaba was an historic gulf, and could be sealed-off. This contention has been rejected by most scholars, after the Geneva Conference on the Law of the Seas, since the Gulf by definition, comprises international waters, and the Straits of Tiran are defined as international straits. See Gross, "Passage through the Straits of Tiran and in the Gulf of Aqaba."


One final point should be raised concerning the Aqaba blockade. In international law, there exists a class of actions which would usually be considered illegal, but may be relied upon to redress unsatisfied grievances. These are called reprisals, and will be discussed shortly. One type of reprisal is the "pacific blockade," which is examined at length in the chapter on the Cuban missile crisis. Egypt never attempted to justify the blockade of Aqaba in terms of pacific blockade, and even if it had, the nature of the blockade did not satisfy the requirements of such an act.
Israeli Justifications. Israel's justification for the attack on Egypt was based on the following arguments:

(1) it was an invasion in self-defense, required due to frequent raids by guerillas, launched from Egyptian-controlled territory, specifically from the Gaza Strip;

(2) it was an action taken by the Israeli government in retaliation against the illegal blockades instituted by Egypt in the Suez Canal and in the Straits of Tiran; and

(3) it was a security action taken to protect Israel's borders due to the existence of a state of war.\textsuperscript{128}

Under the Charter of the United Nations, there are only two justifications for the resort to force by a member state: collective action under the auspices of the Security Council, and individual or collective self-defense measures. It was upon Article 51, self-defense, that Israel relied. Article 51 states:

\begin{quote}
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 and 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.\textsuperscript{129}
\end{quote}

\textsuperscript{128} See Wright, "Intervention, 1956," pp. 271-273.

\textsuperscript{129} Office of Public Information, Charter.
A central problem here is deriving an acceptable definition of the term "armed attack," a problem which closely parallels the attempt to define aggression. Even if a universally accepted definition of armed attack is not forthcoming, however, it is possible to determine circumstances which do not justify the use of self-defense as a rationale for the use of force. For example, anticipatory self-defense is not within the meaning of Article 51. Thus, Israel could not invade Egypt on the grounds that it had expected an armed attack from Egypt. Nonetheless, since self-defense is an inherent right, that is, it is not a contractual right or treaty right created by the Charter, it is necessary to explore a more traditional concept of self-defense in international law.

According to a noted student of the law: self-defense "must be strictly limited to the needs of defense, and may not be converted into reprisals or punitive


131. Tung, International Law in an Organizing World, p. 418.

132. Note that this point also tends to refute the third part of the Israeli argument, i.e., that a state of war existed, and that therefore Israel preemptorily needed to attack. The anticipatory attack argument was never fully articulated in the 1956 Suez crisis; it was much more important in the 1967 clash between Israel and its neighbors.
sanctions . . . "133 As a basic expression of the right of self-defense, scholars of international law often turn to the Caroline Case of 1837.134 In this case, an American ship (the Caroline), was destroyed by Canadians under British orders. The British justified the action on the basis of self-defense; for the Caroline had been used, it was alleged, to transport arms to Canadian separatists. In a diplomatic exchange, United States Secretary of State Daniel Webster stated, inter alia, that if an act of war was to be justified in terms of self-defense, the government undertaking that act must "show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."135

The invasion of the Sinai was not an instant response, undertaken without moment for deliberation. It was a well planned, carefully developed strategy of attack, Furthermore, the Israeli armed forces did not take the action as a temporary response to Egyptian armed attack while awaiting for Security Council action, a requirement of Article 51. The Israeli invasion was a unilateral action, eventually brought to the Council by other parties.

135. Ibid., p. 336. See also Bishop, International Law, pp. 777-779.
Therefore, in light of the Charter obligations, as well as additional limitations of international law, the Israeli justification in terms of self-defense was unacceptable.

The second Israeli argument, that it undertook the invasion of the illegal blockade policies of Egypt, was also weak. As noted previously, the Egyptian policies were not legal, but the resort to armed invasion to redress Israel's grievances was a clear case of over-response.

The right of reprisal is plainly established in traditional international law, although this right has been substantially modified by the Charter of the United Nations. A reprisal is the use of force by one state against another when the second state has violated an international norms vis-a-vis the first state. In other words, a state can legally resort to force under self-help measures when its actions are undertaken as a response to an initial breach of international law by another state.\footnote{136. On reprisals generally, see Bishop, International Law, pp. 744-746, Tung, International Law in an Organizing World, pp. 382-383, and Swift, International Law, pp. 479-485.}

The classic statement of the right of reprisal is in the Naulilaa Case.\footnote{137. Naulilaa Case, Portuguese-German Arbitral Tribunal, 1928, 8 Rec. des decis, des. trib. arb. mixtes 409, reprinted in Bishop, International Law, pp. 747-748.} In this case, an arbitration tribunal held, inter alia, that "reprisals are an act of self-help
(Selbsthilfehandlung) on the part of the injured state, responding after an unsatisfied demand to an act contrary to international law on the part of the offending state."  

Applying this case to the Suez crisis, it would seem that Israel did have the right of reprisal against illegal Egyptian blockade policies. Yet, there is also a test of proportion which must be applied, although the degree of proportionality is not at all clear. According to the Naulilaa arbitration: "even if one admitted that international law does not require that the reprisal be approximately measured by the offense, one should certainly consider as excessive, and thus illegal, reprisals out of all proportion with the act that motivated them."  

Unquestionably, the invasion of Egypt exceeded the damage caused by the original illegal act, the blockade of the Suez Canal and of Aqaba.

Furthermore, the traditional right of reprisal is partly curtailed by the United Nations Charter, which clearly states that actions which breach the peace, or may lead to breaches of the peace, are to be suppressed. More to the point, the Charter notes: "All Members shall settle their disputes by peaceful means in such a manner


139. Ibid., p. 748.

140. Office of Public Information, Charter, Article 1, paragraph 1.
that international peace and security, and justice, are not endangered."\textsuperscript{141} Thus, the Charter limits, if only implicitly, the right to rely upon reprisals, which would preclude the use of reprisal as a justification by Israel, especially as an initial action. In any case, the invasion of Egypt was certainly excessive in terms of the proportion test suggested by the \textit{Nautilae Case}, so rendering this Israeli justification unsound.

Finally, Israel based its arguments on the existence of a state of war with its neighbors. In the analysis above, it was concluded that Egypt could not blockade the Suez Canal nor the Straits of Tiran on these grounds. Quite simply, it was contended, a state of war did not legally exist. This same analysis is applicable here, to the Israeli argument. That is, Israel could not rely upon the argument that it invaded Egypt because it was at war with Egypt, because under the Charter of the United Nations, to which Israel was a signatory, such a state of war was illegal.\textsuperscript{142}

\footnotesize{\textsuperscript{141} Ibid., Article 2, paragraph 3.}

\footnotesize{\textsuperscript{142} Again, this may seem undue semantic haggling. But it must be re-emphasized that this study is concerned with legal arguments and justifications. This is not a withdrawal into legal vagaries. It might very well be that Israel could offer an argument for its invasion in terms of self-defense pragmatically, though that too might be hard to defend. But this would be a military or political justification, which is beyond the scope of this study.}
The conclusion of the examination of the Israeli arguments to justify its invasion of Egypt is that the arguments were all unsound. That is, Israel's actions were illegal.

**Anglo-French Justifications.** The British and French justified their involvement in the Suez crisis on a variety of grounds: (1) to separate Egyptian and Israeli forces; (2) to protect their (British and French) respective national interests; (3) to maintain their historic interests in the area; (4) to prevent the proliferation of Soviet influence in the Middle East; and (5) to issue a reprisal to Egypt for its alleged support of the Algerian rebels, a justification mainly for France. Of these five, only three can be considered legal, and these are stretching the definition of "legal" to the straining point.

First, the argument that the Anglo-French force was to separate the combatants was, in a sense, a legal justification. The mainstay of this contention was that it was necessary to have a speedy, mobile force in the Suez region to protect the international peace and security as a temporary measure in the stead of the United Nations. In

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143. There was one other argument raised in the British Parliament concerning intervention: the right to protect British nationals in the area. This argument was never pressed internationally, since it was extremely weak to begin with, since there were so few nationals in Suez. For a thorough refutation of this argument, see Friedmann and Collins, "The Suez Crisis of 1956," pp. 113-115.
other words, the invading allies were undertaking the Security Council's function until that body could organize a response.\textsuperscript{144} According to Prime Minister Eden: "Our intervention was ... in no way aimed at the sovereignty or territorial integrity of Egypt, ... Owing to persistent Russian opposition the United Nations had never been equipped with an armed force of its own which would see to it that the resolutions of the Security Council were observed. The absence of such a force had made Anglo-French actions essential."\textsuperscript{145}

This argument was, legally, ludicrous. In order to act for the Security Council, nations must be authorized by the Council to do so.\textsuperscript{146} Member states cannot intervene as representatives of the United Nations on their own initiative. Furthermore, the evidence suggests that there had been collusion among Great Britain, France, and Israel, which would render this argument hypocritical at best. To arrange a conflict in order to stop it clearly exceeded the boundaries of the international legal system.

\textsuperscript{144} See the remarks of the British representative in SCOR, 11th year, 749th and 750th meetings. See also Epstein, British Politics in the Suez Crisis, pp. 73ff, where the author summarizes the debate in the House of Commons regarding British justifications for invading Suez.

\textsuperscript{145} Eden, \underline{Full Circle}, p. 593.

\textsuperscript{146} Office of Public Information, \underline{Charter}, Article 48, paragraph 1.
The second Anglo-French argument which raised legal questions was that the allied invasion was to protect the British and French national interests. The contention was that an illegal act by the Egyptian government, the nationalization, threatened the security of the two nations. This justification presupposed the inability of Egypt to operate the Canal, and/or the proclivity of Egypt to use the Canal for political purposes. That is, the British and French policy-makers assumed that oil, and other essential commodities, would not continue to flow through the Canal, due either to inefficiency or design. Nasser's government, however, stated emphatically that the Canal would remain open, and that Egypt would continue to be bound by all international agreements regulating shipping through the Canal. Additionally, Egypt soon demonstrated that it was capable of effectively operating the Canal. Finally, the above analysis demonstrated that the nationalization and expropriation of the Canal was legal, which seriously undercut this justification.

147. The term "national interest" is an integral part of the vocabulary of the realist school of international politics, and will thus surprise some readers that it has found its way into a legal analysis of a crisis. Yet, the national interests of Britain and France were threatened in Suez not by a "power" move, but by a legal action, nationalization.

It should be noted here that there is a related aspect of the national interest argument: that the interests of the stockholders of the Suez Canal Company were also violated, a majority of whom were non-Egyptian. This argument was never too seriously pressed, probably because in terms of justifying an invasion, it was extremely shaky.

While it is a right of long standing in international law for a nation to intervene, or interpose, for its nationals, there are restrictions on interposition. First, aliens seeking redress for wrongs committed against them must exhaust local remedies before requesting their government to intervene. Secondly, formal interposition, as opposed to informal diplomatic contact, should be based upon a "denial of justice" to the nationals of a government bringing claim in their favor. Thus, even if the shareholders of the Suez Canal Company could have established that there had been a denial of justice, the proper procedure would have been to take their case to the Egyptian government. See "Exhaustion of Local Remedies," Hackworth, Digest of International Law, 5, pp. 501-502, 5111 (1943), in Bishop, International Law, pp. 704-705. See also Panevezys-Saldutiskis Railway Case, Estonia vs. Lithuania, P.C.I.J., Ser. A/B, No. 76, 4 Hudson, World Court Reports, 341 (1941), in the same volume, pp. 707-709, where the Court held that Estonia could not represent the railway company against Lithuania because the latter's "objection regarding the non-exhaustion of the remedies afforded by [Lithuanian] municipal law is well founded . . . ."

For a consideration of the concept "denial of justice," see the El Triunfho Company Case (United States vs. Salvador), in ibid., pp. 674-675.
courts. Having exhausted local remedies, they could have then requested their government to interpose in their behalf in further litigation, but they could not request of their government to use force to give them redress.\textsuperscript{151} For Britain and France to have pursued the claims of their respective nationals, as well as those of the British government itself, through armed intervention, was in clear violation of international law.

The final argument proposed by Britain and France which could be construed as legal, was that the invasion was a reprisal against Nasser's regime, for its support of the Algerian rebels. It would appear that most of the support offered by the Egyptian president to the Algerians was ideological, although as noted earlier, it was alleged that an Egyptian ship carrying military supplies was seized on its way to Algeria. No doubt France had the right,

\textsuperscript{151} The controversial Calvo Clause could also be relevant here. According to this principle, which has not been universally subscribed to, a government may insist in a contract with alien companies on a clause which prohibits those companies from requesting their governments to interpose. For the definitive case concerning the Calvo Clause, but hardly a definitive holding, see United States (North American Dredging Company of Texas) vs. United Mexican States, General Claims Commission, 1926, Opinions 21 (1927), in Bishop, International Law, pp. 710-716. For a full treatment of the Calvo Clause, see Donald R. Shea, The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy (Minneapolis: Minnesota, 1955). Also, according to the so-called Drago Doctrine, a nation cannot use force to intervene for its nationals against another nation, even to collect sizeable debts. See Arthur P. Whitaker, The Western Hemisphere Idea: Its Rise and Decline (Ithaca, N.Y.: Cornell, 1954), pp. 86-107.
legally, to confiscate such a shipment, but to invade Egyptian territory in reprisal certainly violated the proportionality provisions of the Naulilaa arbitration cited above.

In sum, there was no justification for the British and French invasion, nor the continued military harassment by these nations, of Egypt.

Legality of United Nations Actions in Suez

The United Nations played a dominant role in the Suez crisis. The legal analysis of the Organization's actions will focus on three elements: the responsibilities and actions of the Security Council and General Assembly prior to the creation of the UNEF, the role of the Secretary General throughout the crisis, and the legitimacy of the UNEF itself.

Although the Security Council and the United Nations had a long history of involvement in the Middle East, the Council's involvement in the 1956 crisis began on September 23, with the receipt of letters from Britain and France, and Egypt. Given the nature of the international political climate, the legality of the Council's jurisdiction in the matter could not be seriously questioned.

All the parties concerned were members of the United Nations, the Charter of which grants to the Security Council

152. SCOR, 11th year, 734th meeting.
primary responsibility for matters of peace and security. Situations threatening international peace and security may be brought to the Council by any nation, whether or not a member of the United Nations or whether or not a party to the dispute, by the Secretary General, or by an investigation of the Council itself. Moreover, nations involved in a dispute, but not members of the Council at the time, may be invited to participate without vote in the deliberations of the Council. Such invitations were extended to Israel and Egypt. Therefore, since the events in the Middle East visibly threatened international peace and security, and since the Council was operating under its procedural guidelines, the Security Council was legally seized of the Suez issue.

Once the Council had taken up the dispute, there were a number of options available to it. These can be classified roughly into two categories: pacific settlement or enforcement actions. Under the former category, the Council could recommend that the parties involved "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, . . . or other means of

154. Ibid., Articles 35, 99, and 34, respectively.
155. Ibid., Article 32.
156. Ibid., Chapters VI and VII.
their own choice."\textsuperscript{157} Failing voluntary compliance to any recommendation of the Council, it may actually engage in the pacific settlement process.\textsuperscript{158} It was under Chapter VI, pacific settlement of disputes, that the Security Council was operating throughout late September and into October.

In this period, the Council provided a forum for debate. The representatives of all concerned parties were able to present their positions to a world audience. Also during this period, the representatives of Great Britain, France, and Egypt availed themselves of the good offices of Secretary General Hammarskjold. It was partly through the efforts of Hammarskjold that the Council was able to take action, limited as it was.

The role played by the Secretary General was clearly within the prerogatives of his office.\textsuperscript{159} In 1956, Secretary General Hammarskjold was instrumental in developing consensus over the "six principles" which were later embodied in the resolution adopted by the Security Council (see above, pp. 66-67). Again, Hammarskjold's activities were perfectly within the legal competence of his office.\textsuperscript{160}

\textsuperscript{157} Ibid., Articles 33 and 36.

\textsuperscript{158} Ibid., Articles 37 and 38.


\textsuperscript{160} Benton, "United Nations Action in the Suez Crisis," p. 11.
It was with the adoption of the six principles resolution in mid-October that progress in the Security Council ended. It will be recalled that while the Council endorsed the six principles, it failed to take the necessary action to enforce them, because the Soviet Union vetoed the enacting clause. Yet, the importance of the six principles resolution should not be underemphasized. The Security Council was exercising its legal responsibilities under Chapter VI of the Charter by calling for a peaceful resolution to the dispute.

Following the Israeli invasion, the Council renewed its activities in the Suez matter. Acting upon proposals submitted by the United States and the Soviet Union, the Council moved to establish a cease-fire, and to censor Israel's actions. Both draft resolutions were defeated by British and French vetoes. Following the ultimatum issued by Britain and France to Israel and Egypt, the Council placed in its agenda another item, a letter

161. The enacting clause was also unacceptable to Egypt, for which the Soviet Union cast its veto, since it was little more than a restatement of the Eighteen Power proposal of the First London Conference.

162. See SCOR, 11th year, 749th and 750th meetings, and UN Doc. S/3710 and S/3713. The American draft proposal did not condemn Israeli aggression outright, but called on members of the United Nations to deny assistance to Israel, thus implying aggression. The Soviet proposal did not recommend that Israel be isolated, but was opposed by the United States because it left open the door for non-United Nations intervention.
transmitted by Egypt, charging Britain and France with aggression. The Security Council in this period was operating under Chapter VII of the Charter, by attempting to establish a cease-fire and avoid further transgressions against international peace and security. It was clear, however, that the Council would not be able to take any action due to the British and French vetoes. Consequently, on October 31, the Yugoslavian delegate introduced the resolution to take the Suez problem to the General Assembly under the Uniting for Peace Resolution of 1950. Eventually, the Yugoslavian proposal was accepted, and the First Emergency Special Session of the General Assembly was convened.

Although the Assembly passed a number of resolutions calling for a cease-fire, most were ignored by Britain, France, and Israel. On the initiative of the Canadian representative, Lester Pearson, the Assembly accepted a proposal requesting:

163. Ibid., 750th meeting, and UN Doc, S/3712.

164. Very clearly, however, the resolutions of the Assembly had an impact on the three invaders, for they had few supporters in the United Nations. See GAOR, First Emergency Special Session, 561st-563rd meetings. Even the nations which abstained on several votes, e.g., Belgium, Canada, and Australia, did not subscribe to the Anglo-French position. Although the pressure of the international community as expressed in the United Nations was not the only reason for eventual Anglo-French withdrawal, it did play a role. See Eden, Full Circle, pp. 628-650.
as a matter of priority, the Secretary-General to submit within forty-eight hours a plan for the setting-up, with the consent of the nations concerned, of an emergency international United Nations Force, to secure and supervise the cessation of hostilities in accordance with the terms of [an earlier cease-fire resolution].

This proposal was adopted on November 4, with another resolution granting additional authority to the Secretary General. Hammarskjold moved quickly, and soon had forces in the field, which became the UNEF. Before examining the legality of the UNEF, the actions of the General Assembly must be analyzed.

The first consideration here is the legality of the Uniting for Peace Resolution, since it was under its auspices that the Assembly took action. This also suggests the second, closely related question: does the Assembly have the authority to take peace and security measures at all? Some have argued that the Uniting for Peace Resolution is a violation of the Charter, because it led to the usurpation by the General Assembly of the prerogatives of the Security Council. These two questions will be considered together.

165. GAOR, ibid., 563rd meeting. This was not the first time Pearson had suggested the idea for a United Nations force, he had mentioned it in earlier debates concerning the Assembly's actions in Suez.

166. Ibid., and UN Doc. A/3354, where the Secretary General is instructed to "immediately . . . arrange with the parties concerned, for the implementation of the cease-fire and the halting of military forces into the area . . . ."
The Uniting for Peace Resolution, adopted during the Korean crisis, originated as the "Acheson plan." Its intent was clear: when the Security Council failed to perform its responsibilities in cases where international peace and security were threatened "due to lack of permanent member unanimity," the Assembly can assume some jurisdiction. Obviously, Charter interpretation becomes important here.

Some scholars have argued that the assumption of security functions by the Assembly under the Resolution does not violate the Charter, but that the Resolution makes explicit powers of the Assembly which are only implicit in the Charter. The Charter, it is asserted, does give the Security Council "primary responsibility for the maintenance of peace and security," but it also gives the Assembly the power "to discuss any questions or any matters within the scope of the present Charter . . . ." Furthermore, the General Assembly "may consider general principles of cooperation in the maintenance of international peace and


security." The Charter does limit the General Assembly in its peace and security responsibilities by stipulating that it cannot consider any situation which is being examined by the Security Council, and by stating that if the Assembly considers that "action is necessary," the matter should be referred to the Council.

Articles 10 and 11, then, give the Assembly some concurrent responsibility in maintaining peace and security. But since that is primarily the obligation of the Security Council it follows that it is a secondary responsibility of the General Assembly, and should only be exercised, the wording of the Charter implies, when the Council cannot or will not take action. The latitude available to the Assembly in such matters is not clear. The enforcement actions conceived by the Charter in Chapter VII are apparently beyond the scope of Assembly actions. When the General Assembly is considering matters of peace and security, it can only make recommendations for enforcement. The Uniting for Peace Resolution embodies this limitation.

169. Office of Public Information, Charter, Articles 36, 10, and 11, respectively.

170. Ibid., Articles 12 and 11, paragraph 2.

where it states: "the General Assembly shall consider the matter [which threatens the peace, but remains in the Council due to the veto] immediately with a view to making appropriate recommendations to members for collective measures . . . ". Therefore, since the General Assembly is only making recommendations, and not decisions, the actions it takes are not binding. Under the Uniting for Peace Resolution, then, the Assembly can, either by a majority vote therein or a procedural majority of the Security Council, take a case from the Council when action on the case has been stymied by the exercise of the veto. Once the Assembly is seized of the case, however, its power to take enforcement action is limited, and the decisions it makes are not binding, but must be voluntarily complied with.


173. Whether or not the General Assembly can make binding decisions on its membership when it is operating under Uniting for Peace, or at any time, is an interesting topic, but it is not germane to this inquiry. The actions of the Assembly in the Suez crisis, including the establishment of the UNEF, were recommendatory, and were consequently non-binding.

174. This presentation is over-simplified. It should be pointed out that some have argued that under Uniting for Peace procedures, enforcement action can be taken by the Assembly, e.g., see Andrassy, "Uniting for Peace." An interesting case is made by Julius Stone, Legal Control of International Conflict (New York: Rinehart, 1954), pp. 272-278, that the legality of the Resolution should be based on Article 51 of the Charter (self-defense), rather than on Articles 10, 11, and 12. His position leads him to accept the authority of the Assembly to take enforcement actions.
The next question regarding the legality of the UNEF is: was the Uniting for Peace Resolution legally invoked?

When the Yugoslav delegate to the Council introduced the proposal relying on the Resolution, there were two substantive items on the Council's agenda: the British and French letter, under which the United States and the Soviet Union had offered their respective resolutions, and the Egyptian letter, which had been received later. The British and French representatives to the Council protested that the Yugoslavia proposal was out of order since it was unclear in identifying the basis for invoking the Uniting for Peace Resolution. Their argument deserves attention.175

The British delegate, Sir Pierson Dixon, argued that to take a Security Council matter to the General Assembly under Uniting for Peace procedures, the Council must be prevented from taking action because of the veto in a specific case.176 Since the American and Soviet draft proposals were considered under the second agenda item, the British and French letter, the proper procedure was to go on to the third item on the Council's agenda, the Egyptian letter of October 30. Since no resolutions on this item had been offered, a veto could not have prohibited action by the Council. Therefore, reasoned Dixon, the invocation of the

175. See SCOR, 11th year, 751st meeting.

Uniting for Peace Resolution was premature, and not legal. The Yugoslavian representative rebutted that the substance of the third item was included in the second, i.e., both letters were about the same case, and since proposals under the second agenda item had been vetoed, it was reasonable to expect that resolutions pertaining to the Egyptian letter would also be vetoed. This, to Dixon, violated the rules of the Security Council.

The delegate from the Republic of China argued that since it seemed to be the will of the Council to take the matter to the Assembly, such a maneuver could be simply accomplished by submitting a resolution under the third agenda item, and then, when it was vetoed, thereby satisfying the requirements of the Uniting for Peace Resolution, the question could be taken up by the General Assembly. The response by the French representative was this: if such a draft resolution was submitted, the British and French, as well as the Belgian and Australian, delegates could all abstain,\(^{177}\) thus leaving it to one of the other permanent members to cast a negative vote. In such a case, however, the resolution would not fail because of the veto, but because it lacked the necessary majority of the Council.

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\(^{177}\) Australia had abstained on both the American and Soviet draft resolutions; Belgium had abstained on the United States proposal, but had supported the Soviet resolution.
(seven affirmative votes, of the then eleven members). This would preclude the applicability of the Uniting for Peace Resolution.

At issue here, was the meaning of the word "case," since under the Uniting for Peace Resolution, matters may be taken to the Assembly "in any case" where the Council fails to operate because of the veto. By case did the Resolution imply a particular agenda item, or did it mean to denote a general situation of which the Council was seized? In the Suez crisis, British-French action in the Council clearly indicated that no decision would be forthcoming due to their veto, if the veto was necessary. Logic compels that this be construed as a case obstructed by lack of permanent member unanimity. Consequently, the Uniting for Peace Resolution was correctly invoked, and the Assembly was legally seized of the Suez issue.

The final legal question concerning United Nations actions in Suez is: did the Secretary General and the UNEF, in their respective duties and functions, exceed the

178. Peterson, "The Uses of the Uniting for Peace Resolution Since 1950," agrees that in the Suez debates the crucial term was "case," but he disagrees with the conclusion here. He contends that "procedural accuracy had been sacrificed to political expedience" in Suez, p. 263.

179. Uniting for Peace in the Council is a procedural question, and as indicated above, not subject to the veto. The Yugoslavian proposal to invoke Uniting for Peace machinery barely passed the requisite majority; the vote was 7-2-2.
authority which could be assigned to them by the General Assembly and/or the Charter?

In regard to Hammarskjold, once again he acted entirely within the scope of his office. The Secretary General is the chief administrative officer of the United Nations, and as such, is charged to "perform such other functions as are entrusted to him" by the major organs of the Organization.\(^{180}\) The resolutions granting authority to Hammarskjold clearly stipulated that he was to be responsible for the establishment and leadership of the Force.\(^ {181}\) The resolutions were vague and ambiguous, however, concerning the powers and functions of the UNEF. Although the General Assembly reserved the right to make final judgments, it left the primary responsibility for the particulars to Hammarskjold and an Advisory Committee.\(^ {182}\) Thus, even though granted great latitude in the operation of the Force,

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\(^{180}\) Excluding the International Court of Justice, Office of Public Information, Charter, Articles 97 and 98.

\(^{181}\) See GAOR, First Emergency Special Session, 565th meeting, Res. 1000 (ES1), UN Doc. A/3354; 567th meeting, Res. 1001 (ES1), UN Doc. A/3354. Hammarskjold was not passive in his role; he contributed a good deal to the form and substance of the Force. See Joseph P. Lash, *Dag Hammarskjold; Custodian of the Brushfire Peace* (London: Cassell, 1962), pp. 80-93, the chapter entitled: "Back from the Brink."

\(^{182}\) The Advisory Committee, by Res. 1001 (ES1), in GAOR, was composed of "one representative from each of the following countries: Brazil, Canada, Ceylon, Colombia, India, Norway and Pakistan," with Hammarskjold serving as chairman.
Secretary General Hammarskjold was legally fulfilling his responsibilities as an agent of the General Assembly. Yet, the question remains: did the Assembly have the authority to delegate such responsibility to the Secretary General?

The UNEF certainly did not exceed the spirit of the Uniting for Peace Resolution under which the Assembly was operating, for Section C of that document provided for the establishment of an enforcement force. Nevertheless, Hammarskjold intended to forestall opposition to the UNEF by carefully circumscribing its activities so that it could not be construed as an enforcement agency, but as one bent only on protecting the peace. Thus, the UNEF was never authorized to carry on strictly military activities, but was charged with simply separating the combatants and facilitating the withdrawal of British, French and Israeli forces. It was at all times dependent upon voluntary compliance, regarding its composition, regarding the implementation of its responsibilities, and regarding its very presence on Egyptian soil. Therefore, the UNEF did not violate the secondary responsibilities reposed in the General Assembly by the Charter in the area of maintenance.

183. See "Report of the Secretary General of January 24, 1957," GAOR, 11th year, UN Doc. A/3512. Hammarskjold was obviously aware of the subtle distinction between enforcement and protection.

of peace and security. It was a recommendatory action. In sum, the UNEF was legally established by the General Assembly, and as a subsidiary organ of the United Nations, was engaged in activities which did not supercede the legitimate and legal competence of the Organization.\textsuperscript{185}

By mid-March 1957, the UNEF had substantially satisfied its major objectives. It had succeeded in policing a cease-fire; it had overseen the withdrawal of the invading forces; and it had returned the Middle East to a position of \textit{status juris ante bellum}.\textsuperscript{186} It should also be noted that the UNEF helped to clear the Suez Canal of debris, and the United Nations representatives helped to create an acceptable governing procedure for the operation of the Canal after the crisis.\textsuperscript{187}

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185. Although Rosner, \textit{ibid.}, pp. 42-43, makes a distinction between the UNEF as a subsidiary organ of the United Nations, as opposed to a subsidiary organ of the Assembly, the distinction is too fine to require additional analysis in this inquiry.

186. The term \textit{status juris ante bellum} was Hammarskjold's; he used it in his "Report... January 24, 1957." It refers, apparently, to the "return to the rule of law," but in practical terms it is nearly synonymous to the term \textit{status quo ante bellum}. See Stanley Hoffmann, "Sisyphus and the Avalanche; The United Nations, Egypt and Hungary," \textit{International Organization}, 11 (Summer, 1957), pp. 456-469. Hoffmann is not totally critical of the UNEF, but he argues that the Force, and the United Nations, took stop-gap measures which would eventually lead to failure. He contends that what was needed was not a return to the \textit{status juris}, or the \textit{status quo}, but machinery to settle the problems in the Middle East permanently.

187. The Canal was sufficiently clear by March 9, to permit the passage of the first vessel. Moreover, a
Two final, yet incidental, points should be raised in regard to the UNEF in Suez. The Force had a two-fold consequence on the United Nations. On the one hand, it greatly enhanced the stature of the Organization in general, and the Secretary General in particular. On the other hand, the UNEF was an important factor in a series of events which nearly destroyed the United Nations.

The UNEF was hailed by many as a bold, positive step in the protection and preservation of international peace. And given its limited objectives, it is the conclusion of this analysis that it did play an instrumental role in the Suez crisis. Moreover, from a purely institutional perspective, the creation and operation of the UNEF greatly enhanced the role and prestige of the Secretary General in international politics. And, it introduced a new word into

"Declaration on the Suez Canal" was deposited with the Secretariat on April 24, 1957. It provided for the operation of the Canal, and for the procedures to settle further disputes. See Rosner, The United Nations Emergency Force, pp. 75-76.

the vocabulary of international politics: preventive
diplomacy. 189

On the debit side of the ledger, as indicated above, the UNEF nearly destroyed the United Nations. In 1962, following the creation of the United Nations Force in the Congo (ONUC), the Soviet Union and other nations, notably France, refused to pay for peace-keeping operations undertaken by the General Assembly, and a sizeable debt from 1956-57, and continuing UNEF expenditures were among the expenses involved. This precipitated the so-called financial crisis, or the Article 19 crisis in the United Nations. 190 The Soviet position was that peace-keeping operations could only be undertaken by the Security Council, and that if such activities were conducted under the auspices of the Assembly, they could not be financed out of the regular assessments to the United Nations budget. It was also the Soviet position that the aggressors should pay all costs of peace forces. 191 Even after an advisory

189. A phrase used by Hammarskjold to mean that conflict had been isolated from the cold war context. See, "Annual Report of the Secretary General," GAOR, 15th year, UN Doc. A/4390/Add. 2. See also Lash, Dag Hammarskjold, pp. 137-146.

190. Article 19 of the Charter calls for the suspension and/or expulsion of members which are in serious arrears in their contributions.

opinion of the International Court of Justice which stated that UNEF and ONUC "constituted 'expenses of the Organization' within the meaning of Article 17(2)," of the Charter and could therefore be apportioned by the General Assembly in the normal fashion, the Soviet Union and France refused to pay.\(^{192}\) The United States pursued the case to the point of nearly scuttling the Organization, and only last minute compromise averted catastrophe.

These problems were unforeseen in March, 1957. The assessment at that time was that the UNEF was crucial in relieving the violence begotten by the Israeli and Anglo-French invasions the preceding Fall.

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**The Suez Crisis and the Functional Framework of Law**

In the Suez crisis, international law was clearly an important factor. Although violence was not prevented, law was instrumental in terminating hostilities and in partially resolving the conflicts that had led to violence. Yet, from the foregoing analysis, it is difficult to accurately assess the precise role law played. Any attempt to determine who "won" the legal battles would be

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necessarily weakened by qualifications. The investigation of the legal issues posed above, resulted in these conclusions: Egypt's nationalization of the Suez Canal Company was legal, but the blockade of Israeli shipping through the Canal was not. Moreover, the blockade of the Gulf of Aqaba exceeded Egypt's legal rights. But, perhaps more important, there was no legal justification for the Israeli and Anglo-French invasions of Egypt. Finally, the United Nations and its Secretary General acted within their respective legal competences in their actions in Suez in 1956. So, if the contention in the sentence beginning this paragraph—that international law was important—is to be substantiated, the role of law must be examined from another perspective, i.e., in functional terms.

Communications

International law had been a major medium of communications throughout the turbulent post-War history of the Middle East. In 1956, it was frequently relied upon as an instrument of the parties involved to signal one another regarding vital principles and goals.

As argued throughout this analysis, the nationalization issue was at the heart of the crisis. Beginning with the Nationalization Decree of July 26, the use of the language of the law was clearly established. In that proclamation, Nasser's government was careful to recognize
the obligations of a nationalizing power. The Decree noted that the action was undertaken without discrimination and in the public interest (to build the Aswan High Dam), and that compensation would be paid at market value of the stocks. By thus explicitly abiding by the prescriptions of international law, Egypt intended to avoid charges of political manipulation of the Canal Company.

Likewise, the response of other concerned actors was couched in the legal idiom. The original British and French arguments against nationalization were legal in nature, although there were important political undercurrents. As the pressure in the area mounted, Britain and France continued to rely upon legal arguments to press their claims. While it cannot be maintained that either of these powers used the language of the law to indicate the final procedures they intended to resort to, i.e., invasion, both justified and explained their increasing displeasure in legal terms, directly to Egypt and to the United Nations. They charged Egypt with the violation of international agreements, and with interference with the sovereignty of France in Algeria. Moreover, they claimed that the nationalization was an illegal usurpation of the rights and obligations of an international public utility, and of their respective nationals.

In addition, the initial reaction of the international community was fundamentally legal. The efforts of
the United States and other parties were directly related to the issue of nationalization. The two London Conferences indicated the desire to successfully conclude an acceptable legal solution to the expropriation, first through the Eighteen Power proposal for the Canal, and second, through the attempted development of the Suez Canal User's Association. While neither of these proposals was acceptable to Egypt, they evidenced a strong desire in the international community to rely upon legal process. As indicated earlier, Anglo-French plans for intervention were held in abeyance during the London Conferences in the hope that they would succeed in resolving the nationalization issue. Initially, then, legal communications helped forestall invasion.

International law as a medium of communication was evident in regard to other issues in 1956. Based upon the legal rights of a belligerent, Egypt justified the closure of the Suez Canal, and the blockade of the Gulf of Aqaba. Even though the legal fact of a state of war could not be established, the importance of legal communications should not be disparaged. In this instance, legal language was employed to signal Israel and other nations, procedures Egypt intended to follow, as well as the goals (economic and military isolation of Israel), it was pursuing. While Egypt's case was unsound, this was an example of the importance of the communications function irrespective of
the legal case. The announcement and establishment of the blockades were clear indications of Egyptian intentions.

While it might be argued that here communications did not prevent violence, but indeed, may have precipitated it, this argument should be undertaken with caution. Given the illegal nature of the blockade, Israel may have invoked the right of reprisal, or even, perhaps, some limited action in self-defense, since the blockades were acts of war. More to the point, however, these actions provided Israel with legal arguments of its own, which were articulated in a variety of forums. Ideally, redress to Israel's grievances should have been attained through international legal machinery without the resort to force, and thus violence might have been prevented.¹⁹³

For Israel, initially, the communications function of international law was also important. Throughout the deteriorating conditions of the early 1950's, characterized by raids and counter-raids, Israel continually relied upon legal arguments to protest, arguments phrased in terms of defense of Israeli sovereignty. Israel's goals, communicated to its neighbors, were the protection of its

¹⁹³. The reader should be aware that I am cognizant of the dangers of speculative hindsight. The point here is a simple one: the communications function of international law was operating, and could have prevented violence, although it did not. Nevertheless, it cannot be argued that the communications aspect of law caused the eventual outbreak of hostilities.
boundaries, and freedom of passage into the Gulf of Aqaba and through the Suez Canal. Through legal claims, Israel clearly indicated the importance of these objectives, and even suggested that failure to achieve them legally or diplomatically, might lead to the use of force.

Thus, through the summer and early fall of 1956, international law was used as an important vehicle of communications. The positions of the parties most deeply involved were established. While some of the procedures signaled fell outside legal parameters, nations developed justifications for their eventual actions.

Following the outbreak of hostilities occasioned by the Israeli invasion of the Sinai, legal communications intensified. Israel continued to rely upon legal arguments to justify its policies, while Egypt defended itself by invoking its sovereign rights. Moreover, the ultimatum issued by Great Britain and France which set the stage for their military intervention was based upon legal claims: the right to protect an existing treaty, and the right to provide a "collective security" force of sorts, under the Charter of the United Nations.

Finally, the Suez controversy became the dominant issue before the United Nations, both in the Security Council and in the General Assembly. The communications function of law was operating in both organs. Much of the debate in the Organization relied upon the vocabulary of the
international legal system. Basic to all decisions and recommendations made by United Nations bodies, was the contention that the actions of Israel, Britain, and France were violations of Egyptian rights. The face of solidarity, especially between the superpowers, put forward by the Organization was partly predicated on the weakness of the invading allies' legal position. Most members of the United Nations recognized the legal nature of the disputes in Suez, and consistently demonstrated a propensity to rely upon legal solutions to the disputes. The eventual responses of the United Nations, including the creation of the UNEF, were a legal, as well as a practical, contribution to the resolution of the crisis, since they were founded upon the Organization's rights and obligations under the Charter.

Therefore, before and throughout the crisis in Suez, the communications function of international law was operating. Unfortunately, this function was not sufficient to prevent the initiation of violence. Yet, after the invasions, the parties directly involved in the conflict, as well as other members of the international community, continued to rely upon the language of the law to communicate with each other, attempting thereby to discourage further over-response by any nation, and to keep the rhetoric of the debate at a manageable level. This cooling-down aspect of international law should not be overlooked, for it
insured that a reasonable legal solution to the crisis was possible, a solution which was eventually attained. It is obvious that not all exchanges among the nations involved in the Suez crisis were legal. The crisis did not transpire in a vacuum. The hostilities of Britain and France toward Nasser's Egypt pre-dated nationalization, and transcended international legal concerns. Admittedly, the cold war context of the crisis was important, as was the breakdown of the wartime alliance between the United States and its European allies. Nonetheless, to the question of whether or not international law served as a medium of communications in 1956, there is only one possible response: yes.

Providing Alternatives-to-Violence

In the framework developed in Chapter 1, there were two aspects to this function. First, international law provides alternatives to violence through the use of existing legal machinery for the pacific settlement of disputes (mediation, arbitration, good offices, international organizations, and so on). Secondly, this function was said to be operating if legal strategies could be determined whereby the responsibility for the resort to force was placed on an opponent in a conflict situation, and thus forcing the opponent to develop legal strategies to avoid direct frontal collision. In the Suez crisis, both of these elements were evident.
Clearly, the organs and agencies of the United Nations were critical in terminating the violence in Suez. But even before the UNEF was established under the authority of the General Assembly, the processes of pacific settlement were being relied upon.

Mediation had a long history in the Middle East, dating back to the Armistice Agreements concluding the conflict of 1948-49. These agreements were primarily the product of the work of the United Nations Secretariat. In addition, in the period prior to 1956, several international agencies, the UNTSO and the MACs, were responsible for observing the uneasy peace in the area, although their operations can hardly be termed an unqualified success. The point is, however, that they existed, and that they were attempting to manage the developing violence.

Following the nationalization decree, which added considerably to the tensions in the Middle East, the intervention of the Secretary General, functioning well within his prerogatives, was instrumental in delaying hostilities. Hammarskjold's role in developing the "six principles" concerning the Canal question was noted. The importance of the acceptance of these principles is evidenced by noting that following the termination of the crisis, they remained in force regarding the re-opening of the Suez Canal. Although this use of the good offices of the Secretary General was not finally successful in preventing violence,
it must be recalled that immediately after the adoption of
the six principles resolution many nations in the United
Nations believed that violence could be avoided.

But it was after the invasion of the Sinai and the
Canal zone that the legal machinery for conflict resolution
came the crucial element in the crisis. The Security
Council seized itself of the issue, and endeavored to
effect a settlement. Due to permanent member disharmony,
the Council was unable to exercise its primary respon­sibility for maintaining international peace and security,
which led the Organization's members to invoke the Uniting
for Peace Resolution, which permitted the General Assembly
to exercise its secondary responsibilities in this vital
area. As indicated in the legal analysis, this reliance
on the General Assembly's authority raised questions of
legal propriety, but the conclusion there was that the
Uniting for Peace procedures were legally invoked, and the
nature of the Assembly's response was entirely within its
legal competence.

The importance of the UNEF in Suez cannot be dis­puted. The eventual withdrawal of the invading armies was
predicated upon the ability of the Force to maintain the
independence of the Canal, and to separate the combatants.
The effectiveness of the UNEF is indicated by noting that
it succeeded in facilitating the pull-back of Anglo-French
and Israeli forces, and in maintaining the peace in the area
for nearly ten years. One of the most significant consequences of the 1956 crisis was that it demonstrated the flexibility of the United Nations to respond to such dangerous conflicts. It was a display of political competence, as well as a unique contribution to the legal authority of the General Assembly to involve itself in peace-keeping activities. It certainly established an important future role of the United Nations, summed up by the term "collective diplomacy."

It was also obvious that the nations directly involved in the crisis were careful to construct legal strategies which were meant to leave the onus of resorting to force on an opponent. The Egyptian strategy was to substantiate its claim for nationalization by adhering to recognized legal principles. By refusing to participate in either of the London Conferences, Egypt maintained the position that its actions were those of a sovereign whose rights could not be infringed upon by other members of the international community. Moreover, Egyptian decision-makers early agreed to take the dispute to the United Nations. It was apparently their hope that the Organization could help diffuse the potential explosiveness of the situation. The importance of the United Nations for the Egyptian strategy was indicated by Egypt's willingness to accept the six principles resolution adopted by the Security Council. This action demonstrated Egypt's inclination to
compromise. Taken together, these two elements of the Egyptian position were evidence of a sophisticated legal strategy which put the burden of taking further action squarely on other nations.

On the other hand, Britain and France were cognizant of the need to develop a legal strategy, which in part would lead to the acceptance of their eventual actions in Suez. The two nations consistently maintained that the illegal nature of the Egyptian seizure of the Canal Company could lead to serious consequences. The governments of Eden and Mollet had reluctantly participated in the London Conferences, partially because they wished to demonstrate that they were willing to explore any legal or diplomatic measure to resolve the Canal issue. Dulles, the United States spokesman, hoped that the London Conferences would forestall violence, and he imposed upon Britain and France to participate. The London Conferences were a significant tactic in the Anglo-French strategy. Britain and France also relied upon the United Nations in their initial strategy, when they worked together with the Secretary General and Egypt in the development of the six principles.

194. Eden implies that he realized before the Conferences were convened that they would fail, but he felt that if Britain and France showed good faith by participating, after the failure they could rely upon American support for the intervention. See Eden, Full Circle, pp. 528-534.
The Anglo-French strategy was not as successfully articulated as the Egyptian, in terms of the providing-alternatives function of law. Their arguments could be reduced to: "Egypt must alter its policies or we will intervene." Thus, they could not adequately shift the responsibility for resorting to force, unless they could establish that their position was totally defensible, which as indicated above, they could not do. Egypt, however, was in the position of displaying a justification for its action which was minimally acceptable, since any decision to use force would necessarily be made by other nations.

The import of this strategic element of the providing-alternatives function was this: Egypt's success in developing a sound legal strategy forced Britain and France to attempt to develop a rebutting strategy. For several months, violence was avoided, as the British and French decision-makers sought to articulate an acceptable counter to the Egyptian position. By placing the burden of resorting to force on the European nations, Egyptian policy-makers were initially able to avoid direct confrontation with their opponents.

So far, the consideration of the providing-alternatives function has ignored the other elements of the Suez crisis, i.e., the blockade of Israeli shipping through the Canal and the Straits of Tiran, and the Israeli
invasion. The reason these issues have been ignored is simple: the legal strategies of both Egypt and Israel on these issues were contingent upon the existence of a continuing state of war, which was legally untenable. But even here, Egypt took a position, blockade, which was less than a physical use of force (though an act of war, and therefore in the same category), which left Israel the onus of resorting to violence. The point is, though, that the legal strategies of the two nations on these issues, were not sufficiently developed and presented to leave the other side the full responsibility for relying on force of arms.

The providing-alternatives-to-violence function of international law was effectively operating in Suez in 1956. The Egyptian strategy was so devised that the reliance upon force, as a last option, was left to the invaders. The effectiveness of the Egyptian legal strategy is reflected in the near unanimous condemnation of Anglo-French and Israeli policies by the world community, in the debates of the United Nations Security Council and General Assembly. Most members of the Organization were convinced that the actions of the invaders were over-responses to the legal issues of the crisis. In addition, the reliance upon the legal machinery for settlement of disputes delayed the original outbreak of hostilities, though violence was not avoided. But, following the initiation of violence, the legal machinery provided by international organizations
rapidly developed, and it was through the efforts of an agency of the United Nations, the UNEF, and of the Organization's Secretariat, that violent conflict was relatively quickly terminated. This clearly was an example of functioning, developing, and adapting international law.

Defining-of-Boundaries of Crisis

There were also two aspects to the third function of international law, defining-of-boundaries: the existence and applicability of processes for settlement of disputes, and the centrality of a legal issue to the crisis. Once again, both of these elements were present in Suez.

The importance of the legal machinery for settling disputes in the crisis was indicated above. Here, it is important to note how the existence of those implements defined the boundaries of the conflict, and thereby helped to keep it within manageable limits.

The groundwork for United Nations participation in the Middle East was well laid. The Secretariat had been involved as mediator and provider of good offices for many years. It was almost inevitable that Hammarskjold should play a large part in the development of the six principles proposal, given the work accomplished by his predecessor, Trygve Lie. That the Secretary General could be trusted and relied upon was in large part due to the good faith that had been established in the earlier years. Secretary
General Hammarskjold's efforts throughout the crisis were based upon his concern that the conflict should spread no further. The concept of preventive diplomacy itself is evidence of the attempt to use existing machinery to keep the crisis within manageable limits.

After the October invasion, there already existed in the field forces which could be drawn upon to insure rapid implementation of a peace-keeping force. This point can be made by recalling that the commander and the officer corps of the UNEF were selected from the UNTSO. The availability of this group was essential in assuring the immediate deployment of trained personnel into the conflict area. And, as noted at several places in the foregoing analysis, the efforts of the UNEF in preventing the widening of the conflict, and in facilitating the withdrawal of the invading forces was decisive.

It is also apparent that at the "core" of the Suez crisis was a legal issue, with several subsidiary legal issues also importantly involved. Nationalization was at the center of the conflict in 1956, and it was to the question of nationalization that all concerned nations addressed themselves. Due to the importance of the nationalization issue, the nations involved were forced to prepare justifications for any anticipated actions based on the law of expropriation and nationalization. This had the effect of objectifying policy commitments, since there
was common ground for intercourse. Since all were forced to at least recognize the nationalization question, the time spent on preparing their respective cases served to delay the reliance upon force for some months. Because the international community was aware of the legal nature of the Suez crisis, the resort to force was also an unattractive alternative to those who contemplated the military solution. Britain and France especially were compelled to seek alternatives to violence as long as such alternatives were avoidable (e.g., the London Conferences and the United Nations). Even after all attempts to resolve the nationalization issue diplomatically and legally failed, the reliance upon force of arms was resolutely condemned by the international community. Members of the United Nations refused to accept a solution by violence. Thus, the centrality of this legal issue set boundaries of permissible action, or legal constraints, on the nations involved. When these constraints were violated, the response of the international community was to immediately move to terminate excessive coercive policies by those who had exceeded acceptable boundaries of restraint.

Moreover, there were other legal considerations in Suez. The Israeli invasion was partly justified as a reaction to fedayeen raids, and to the blockade policies of Egypt. There was some support for the Israeli position that such Egyptian policies were illegal. Nevertheless, sympathy
for the Israeli position did not extend to the support of
the policy of resorting to armed intervention. The argu-
ments offered by Israel in the Special Session of the
General Assembly of the right to pre-emptory self-defense
were resoundly rejected. The attitude of most members of
the international community was that these problems, serious
as they were, were the subject of negotiation, diplomacy,
and mediation, within the United Nations. The nature of
the issues was such that there were limits placed on
policies, limits which if transgressed, would weaken
Israel's position vis-à-vis its supporters internationally,
including in 1956, when Israel resorted to force, the loss
of its staunchist defender, the United States.

Thus, it is the argument here, that the centrality
of the legal issues, and the availability of machinery of
international conflict resolution, established broad yet
distinct parameters circumscribing acceptable actions.
Although none denied the seriousness of the events during
the developing crisis, all were convinced that the resort
to violence should be avoided. Once the boundaries of
legitimate response were over-stepped by the invaders, the
reaction of the international community was near unanimous.
The policies and justifications of the invaders were
rejected and condemned, and international commitment
supplemented individual involvement.
The Functions of Law in Crisis

From the foregoing discussion, it is obvious that the functions of international law are inter-related. The effectiveness of each is dependent upon the operation of the others. Thus, following the nationalization decree, it was clear that a crisis situation was imminent. The legal nature of the nationalization action, however, insured that the debate over Suez would be conducted with the vocabulary of international law (i.e., the defining-of-boundaries function assured the importance of the communications function). Throughout the early stages of the crisis, the exchanges remained essentially legal, while all avenues for a solution were explored. The international machinery for conflict resolution which was available (defining-of-boundaries), was resorted to, in order to forestall the outbreak of violence (providing-alternatives). Also early in the crisis, international law was used by those nations involved to signal one another, and others in the international community, concerning objectives they intended to pursue, as well as procedures upon which they intended to rely (communications). Legal strategies were adopted in attempts to place the burden of resorting to force on other nations, and thereby assure that still additional options to arms would be examined (providing-alternatives). Nevertheless, the preferred goal state of the international legal system, non-violent settlement of disputes, was not
maintained. In the early fall of 1956, violence of a general nature erupted.

Through the violence of Suez, the functions of international law were operating. Nations involved in the conflict continued to use the language of the law to justify their positions, and to communicate with each other. The available international tools of conflict resolution were immediately pressed into service, and when they began to fail, international organizations responded by taking bold, decisive action, through establishing the UNEF (providing-alternatives). The invasions of Britain and France, and Israel, were soundly criticized by the international community, partly because the policies of the invaders were excessive reactions to essentially legal issues (defining-of-boundaries).

Perhaps the most important function of international law in the Suez crisis was the providing-alternatives-to-violence function. For it was through the efforts of the Secretary General of the United Nations, and of the Organization itself, that the hostilities were finally terminated. Unquestionably, the UNEF represented a practical and political response, as well as a legal one, to the crisis. Yet, the Organization relied upon its legal capacities and authority to create the Force, and Secretary General Hammarskjold was careful to act within
his, and the Organization's, legal competences during the operation.

An objective of this analysis was been to rebut the general contention that the role of international law in a crisis like Suez is minimal. The underemphasis of law has been the result of misdirected focus upon the soundness of legal positions, rather than upon the dynamic aspects of functioning international law. There were, to be sure, numerous non-legal variables which facilitated the termination of violence in Suez. Law as a factor has been accentuated here to encourage a new approach to analyzing law-in-action. Without doubt, the preeminence of the legal system in resolving international disputes has not been established, and it would be folly to suggest that Suez was an indication of the proclivity to rely solely upon law to resolve conflicts. But, the conclusion that law was an instrumental factor in the Suez crisis remains; international law served to resolve conflict, and to terminate violence once it had been initiated,
CHAPTER 3

THE CUBAN MISSILE CRISIS OF 1962

The crisis following the introduction of Soviet strategic weapons into Cuba in the fall of 1962 was foreshadowed by events which took place the preceding summer. But two incidents which pre-dated that hectic summer should be noted.

Background to the Crisis

Since Fidel Castro had assumed power in Cuba following the revolution of 1956-58, United States-Cuban relations had continuously deteriorated. This corrosion of historically close associations was characterized by North American economic policies pressuring the Cuban regime, including an embargo, which culminated in the severance of diplomatic relations by President Dwight D. Eisenhower in January, 1961.¹ Much of the United States dissatisfaction with Castro's Cuba was due to the regime's increasing

reliance upon assistance from the Soviet Union, although with the economic pressures applied by the United States, the Soviet Union seemed a logical ally for Castro.

Cuba had been a major issue of the 1960 presidential campaign, with each of the candidates blaming his opponent's party for the sell-out of Cuba. When John F. Kennedy won the election, he acquired more than the responsibility for administering the United States government, he inherited a Central Intelligence Agency (CIA) plan to support a group of Cuban exiles to invade Cuba at Playa Giron, or the Bay of Pigs. This ill-fated scheme was implemented three months after Kennedy took office. It was an unmitigated disaster.\(^2\) When the American president accepted full responsibility for the fiasco, it did not help to alleviate the tremendous additional tension the invasion had generated. Although it is not necessary to establish a direct relationship between the Bay of Pigs debacle and the missile crisis, the 1961 invasion certainly affected the international climate. According to one critical biographer of the late president,\(^2\)

\(^2\) Some Kennedy historians claim that the president never totally endorsed the invasion plan. See Theodore C. Sorensen, *Kennedy* (New York: Harper and Row, 1965), pp. 305-308; and Roger Hilsman, *To Move a Nation: The Politics of Foreign Policy in the Administration of John F. Kennedy* (Garden City, N.Y.: Doubleday, 1967), pp. 30-33. But, according to Hugh Sidey, *John F. Kennedy, President* (New York: Random, 1965), p. 124, the Bay of Pigs "was a bold plan, the kind that appealed to the Kennedy spirit. The kind of action, the Kennedy brothers felt, fitted the New Frontier. It was full of chance, certainly, but it was audacious, glamorous, and new. It was irresistible,"
there was, however, a direct connection: "Kennedy's appologists have written that although the Bay of Pigs was a disaster, it prepared him for triumph in the Cuban missile crisis. . . . One cannot blame such writers for trying to protect their friend, but the hard fact is that the Bay of Pigs was the major cause of the Cuban missile crisis."³

The second factor of importance preceding the summer of 1962 was the expulsion of Cuba from the inter-American security system early that year. Cuba had been the subject of a number of meetings of the Organization of American States (OAS), since Castro had seized power.⁴ The Eighth Meeting of Consultation in Punta del Este, Uruguay, held in January, 1962, was conducted in the shadow of the Bay of Pigs fiasco. Nevertheless, the United States and its staunchist hemispheric allies were fully committed to have the Organization take action on the "Cuban situation."

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Through behind-the-scenes negotiations, and some diplomatic arm-twisting, a resolution favorable to the United States was procured. The title of Resolution VI of the Punta del Este meeting was indicative of the North American success: "Exclusion of the Present Government of Cuba from Participation in the Inter-American System." While the exclusion did not relieve Cuba from certain obligations in the inter-American system, one point should be made here. At best, this action was legally questionable, since there were no provisions in the Charter of the OAS for exclusion or expulsion. It may be that the Organization overstepped its authority. This question, however, is beyond the scope of the present inquiry. It is sufficient to note that in January, 1962, the Castro regime was "excluded" from the inter-American system.

Impending Crisis: The Summer of 1962

Although Castro had considered the Bay of Pigs a personal victory, in mid-1962, he began to express anxiety

5. See Inter-American Institute of International Legal Studies, The Inter-American System, pp. 159-161. The basis of the exclusion decision was ideological, i.e., "adherence by any member of the Organization of American States to Marxism-Leninism is incompatible with the inter-American system . . . ."

about a repetition of the invasion. 7 In July and August, two Cuban emissaries, Raul Castro (Fidel's brother), and Erensto "Che" Guevara, respectively, were dispatched to Moscow. It was at this time, apparently, that arrangements for the construction of missile sites in Cuba were made. 8

The month of September, 1962, was marked by public exchanges between the leaders of the United States and the Soviet Union. Although Kennedy's administration was concerned about charges being made by Republicans in regard to growing evidence of Soviet war materials and troops in Cuba, the official North American position was that all weapons were defensive. The missiles reported to be in Cuba were of the surface-to-air (SAM) variety, which were tolerable to the United States. President Kennedy had been assured through a conversation between Soviet Ambassador


8. Michael Tatu, Power in the Kremlin; From Khrushchev to Kosygin (New York: Viking, 1969), pp. 233-234. Tatu indicates, as do others, that there is some controversy over whether it was the Soviet Union or Cuba which initiated the action of placing missiles in Cuba. While Khrushchev stated in a speech to the Supreme Soviet that the Cubans had requested the missiles, Castro claimed to Le Monde correspondent Claude Julien that the Soviet Union had offered the missiles, although he, Castro, was considering asking for them; ibid., p. 230. In Strobe Talbott (ed.), Khrushchev Remembers (Boston: Little, Brown, 1970), p. 493 (this is Khrushchev's autobiography), the former Soviet leader tells a different story: "It was during my visit to Bulgaria that I had the idea of installing missiles . . . in Cuba without letting the United States find out . . . ."
Anatoloy Dobrynin and the United States Attorney General, Robert Kennedy, that the Soviet Union would not undertake any policy in Cuba which would embarrass the president in the November Congressional elections. President Kennedy was not altogether convinced, apparently, for he released a statement through his press secretary to the effect that his government was carefully watching the Cuban situation. He noted that there was no evidence of offensive weapons in Cuba, but he added the warning: "Were it to be otherwise, the gravest issues would arise."

The Soviet Union responded by issuing a public statement, the most important aspect of which was the argument that the Soviet Union was able to protect itself sufficiently without exporting offensive weapons to any of its allies. This method of communicating through the media continued. On September 13, Kennedy stated: "If at any time the Communist build-up in Cuba were to endanger or interfere with our security in any way, . . . or if Cuba . . . should ever become an offensive military base of significant capacity for the Soviet Union,


then this country will do whatever is necessary to protect its own security and that of its allies."\textsuperscript{12}

Throughout this public dialogue, the Soviet Union had been sending Medium Range Ballistic Missiles (MRBMs), Inter-Mediate Range Ballistic Missiles (IRBMs), and strategic bombers to Cuba. That such a maneuver caught the United States by surprise has been attributed to a failure in the American intelligence community.\textsuperscript{13} There had been a number of signs to indicate that regardless of public denials, the Soviet Union was sending missiles. Besides the traditional methods of surveillance, informers, refugees and spies, there was photographic evidence showing SAM sites in late August. The existence of SAMs suggested to John McConne, director of the CIA, that the Soviets were considering offensive weapons, to be protected by the SAMs.\textsuperscript{14} Yet none of the evidence was conclusive to the majority of the intelligence agencies, nor to the president. A frequent explanation of this failure to early recognize that MRBMs and IRBMs were being transported to Cuba was that such a

\begin{itemize}
  \item \textsuperscript{12} Quoted in Sorensen, \textit{Kennedy}, p. 671.
  \item \textsuperscript{13} See Hanson W. Baldwin, "The Growing Rules of Bureaucratic Intelligence," \textit{Reporter}, 29 (August 15, 1963), pp. 48-52. Baldwin's complaint is that the intelligence community has become concerned with a standardized bureaucratic product.
\end{itemize}
Soviet policy did not conform to the expectations of the American policy-makers. That is, Kennedy and his intelligence advisors did not believe that the Soviet Union would risk such an adventure given all the warnings Kennedy had transmitted.\(^{15}\)

October 1962: The Missile Crisis

With Congressional criticism mounting, and a good many questions being raised within his administration, President Kennedy authorized additional U-2 spy-plane reconnaissance overflights of Cuba on October 4, although weather conditions prevented the mission until the 15th.\(^{16}\)

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15. This point is developed at some length in Roberta Wohlstetter, "Cuba and Pearl Harbor: Hindsight and Foresight," Foreign Affairs, 43 (July, 1965), pp. 691-707. Wohlstetter states that if the intelligence community receives information which contradicts its set ideas, "it is always possible ... to 'save' a theory or hypothesis by altering some other of the set of beliefs that connects it with any given observation," Klaus Knorr largely agrees with Wohlstetter in "Failures in National Intelligence Estimates: The Case of the Cuban Missiles," World Politics, 16 (April, 1964), pp. 455-467. On the other hand, the intelligence officer of the state department, Roger Hilsman, did not regard the missile crisis as a failure at all: "If a criticism is to be made of the intelligence effort, it is that even though American intelligence won a victory, it had been a . . . little lazy." Hilsman, To Move a Nation, p. 191.

16. There had been earlier U-2 overflights; the October 4 decision related to the eastern portion of Cuba, where the SAMs were located. The area had been avoided for fear of losing a plan, following the downing of a U-2 in the Peoples' Republic of China on September 9. See Hilsman, ibid., pp. 174-175; and Elie Abel, The Cuban Missile Crisis (New York: Bantam, 1966), pp. 12-16.
It was this mission which resulted in producing the hard evidence that strategic bombers, MRBMs and IRBMs had been sent to Cuba. The photographs were given to McGeorge Bundy, Special Assistant to the President for National Security Affairs, the following day. On Tuesday, Bundy passed the information to President Kennedy. It was on this day that the crisis, in terms of the definition established in this study, began. United States policymakers perceived a threat; they felt pressed for time in making a response to the perceived threat; and the emplacement of the missiles had been a surprise to them.

There are a number of studies which deal with the thirteen day crisis chronologically. Here, it will be necessary only to raise the most important elements relating to the strategies and policies of the nations involved.

One of these elements was the motivation of the Soviet leaders, since the American response was dependent upon United States perception of that motivation. In one

17. Bundy delayed reporting to Kennedy to give the president "a quiet evening and a night of sleep" to prepare for what he "would face in the days ahead." See "Memo to the President, March 4, 1963," quoted in Abel, The Cuban Missile Crisis, p. 20, footnote.

scholarly study of the missile crisis, the following motivations are suggested: first, the missiles were sent to give the Soviet Union bargaining strength, to be used in a summit conference or a United Nations confrontation, perhaps to have United States missiles in Turkey or Italy removed, or to be used to achieve a solution to the "Berlin problem." Second, Cuba could be used as a "lightning rod" to force the United States to take action there, and thus immobilize it, permitting the Soviet Union to resolve the Berlin problem with a Hungary-style invasion. Third, since the Soviet Union had already committed itself to the defense of Cuba, missiles were the simplest, most rapidly deployable method of assuring against North American intervention. Fourth, the missiles were merely a tactical maneuver in the cold war. The presence of nuclear missiles near the United States, and the inability of the latter to do anything about it, would give the Soviet Union a tremendous psychological and propaganda victory. Fifth, and finally, missiles in Cuba would greatly improve the

19. Graham T. Allison, Essence of Decision: Explaining the Cuban Missile Crisis (Boston: Little, Brown, 1971), pp. 43-56. This book is primarily concerned with developing conceptual models for the study of foreign policy, but it is an excellent treatment of the crisis itself.

20. A famous quote in the crisis was one attributed to Khrushchev by poet Robert Frost when the latter interviewed the chairman in September. According to Frost, Khrushchev said: "Democracies are too liberal to fight." See Sorensen, Kennedy, p. 669.
balance of forces, since the missile gap myth had long been exploded, and it was generally conceded that the United States had a superior nuclear arsenal. These were the alternative motivations considered by Kennedy and his advisors in devising a response to the Soviet action.

These were not, of course, mutually exclusive. There were a number of different views regarding which of them was of greatest importance. According to Kennedy's friendliest biographers, the president decided that the basic reason for the emplacement of the missiles was to improve the Soviet Union's cold war position, although Cuban defense and improvement in the missile balance were also considered important. On the other hand, Khrushchev

21. This was suggested by Castro when he said that Cuba had accepted the missiles to "reinforce the socialist camp the world over . . . ." Allison, Essence of Decision, p. 53.

22. These motivations are listed, with a less exhaustive treatment and in different order than in Allison, in Sorensen, Kennedy, pp. 666-667. See also Arnold L. Horelick, "The Cuban Missile Crisis: An Analysis of Soviet Calculations and Behavior," World Politics, 16 (April, 1964), pp. 663-689. Horelick concludes that improvement of the "world-wide strategic position" of the Soviet Union was the primary motivation, one which in some part includes all the motivations listed above.

23. Sorensen, Kennedy, p. 678, and Hilsman, To Move a Nation, pp. 201-202, although Hilsman seems to disregard a Cuban defense argument. Allison, Essence of Decision, pp. 102-117, argues that all the motivations were probably important, but he adds that once the decision had been made, the bureaucracies in the Soviet Union developed a kind of momentum of their own. Thus, to fully understand and explain the rationale of the emplacement decision, it might
claimed that the principal motivation was the defense of Cuba: "We had to think of some way of confronting America with more than words. We had to establish a tangible and effective deterrent to American interference in the Caribbean. . . . The logical answer was missiles."\(^{24}\)

Although there remains some controversy over this point, it will be sufficient for purposes here to accept the three motivations most frequently agreed upon: Cuban defense, improvement of the Soviet Union's cold war position, and closing the missile gap.\(^{25}\)

The governmental structure Kennedy chose to rely upon to respond to the missiles was the so-called EXCOM (Executive Committee of the National Security Council), composed of a number of high ranking officials. The

be better to look at the organizational machinery of the Soviet military and political system,

\(^{24}\) Talbott, Khrushchev Remembers, p. 493. Khrushchev also indicates that Soviet "prestige" was involved. Tatu, Power in the Kremlin, pp. 240-241, agrees that Cuban defense and Soviet prestige were important, but he notes that there were undoubtedly a number of subtle influences on the decision, especially perhaps, the question of Berlin.

\(^{25}\) Walton, Cold War and Counterrevolution, p. 121, argues for the Cuban defense case. In typical cold war rhetoric, Daniel and Hubbell, Strike in the West, pp. 53-54, claim that the Soviet Union was trying to upset the power balance. Abel, The Cuban Missile Crisis, agrees with the latter position, but with a more rational argument. He claims that the missiles were an inexpensive method for the Soviet Union to improve its strategic position, as opposed to developing a new generation of nuclear missiles. See also Philip Van Slyck, Peace: The Control of National Power (Boston: Beacon, 1964), pp. 3-4.
EXCOM met almost continuously throughout the crisis. The EXCOM eventually considered six possible responses to the missiles in Cuba: first, do nothing, but inform the Soviet leaders that action was being considered. Second, send an emissary immediately to Khrushchev to inform him that the United States was aware of the missiles, and to try to work out an agreement with him. Third, rely upon traditional diplomatic channels, specifically, bring the question before the United Nations Security Council. Fourth, clamp an embargo on all military shipments to Cuba, and enforce the embargo with a naval blockade. Fifth, launch a surprise attack on the missile sites through "pin-point bombing raids." Finally, prepare a full-scale invasion to not only eliminate the missiles, but the Castro regime as well.  

Soon, the discussion boiled down to three of these alternatives: negotiations, a position advocated primarily by United Nations Ambassador Adlai Stevenson; a blockade-embargo, ardently supported by Secretary of Defense Robert McNamara, Attorney General Kennedy, and eventually, the president; and a military strike, the alternative pressed for by the military representatives to the EXCOM.

By October 19, a decision had been made: it was to be a blockade, or, in order to avoid "legal difficulties," a

quarantine. Negotiations were considered to be too slow, and the Security Council could be stymied by a Soviet veto. The use of military force was ruled out because it would invite a belligerent response from the Soviet Union, since even if pin-point bombing was feasible, a number of Soviet personnel would be inevitably killed.

The quarantine/blockade was the most attractive option available to the president and the EXCOM for a variety of reasons, foremost among which was that it afforded maximum flexibility. That is, it could be considered a first step, with further, more forceful measures at the president's disposal if the quarantine/blockade failed. Secondly, the plan precluded the use of armed force initially, placing much of the responsibility for resorting to force on the Soviet leadership; they could choose to run the blockade or not. Therefore, so the president and his advisors calculated, violence would result from Soviet actions, not American. Furthermore, the logistics of the quarantine/blockade permitted the Soviet leaders a maximum amount of time to ponder their moves. It

27. The change in terminology did not dispose of the legal problems, but it was hoped that the term quarantine would transmit a less bellicose attitude. See ibid., pp. 73-75.

28. Robert Kennedy introduced the so-called "Pearl Harbor" analogy: "to launch a surprise attack on any nation, especially a small, third-world nation, would be contrary to the morals and traditions of the United States." Kennedy, Thirteen Days, pp. 38-39, 49.
would not invite a hasty, impulsive response. Kennedy was preoccupied throughout the crisis with trying to put himself in Khrushchev's position in an attempt to conceptualize the available alternatives of the Soviet leader.

Additionally, the United States policy-makers believed that the quarantine/blockade could be "legalized" if the OAS could be convinced of its necessity. As one source put it: "the Russians were impressed by legalities. . . . If . . . the Organization of American States should pass a resolution endorsing the blockade, Moscow might be inclined to take it seriously."29 Finally, and perhaps encompassing all these rationalizations, many EXCOM members believed that this policy would keep the initiative with President Kennedy, that is, keep him in the "driver's seat."30

29. Abel, The Cuban Missile Crisis, p. 73.

30. The above is a paraphrase of the United States rationale found in Sorensen, Kennedy, pp. 692-694, and Kennedy, Thirteen Days, pp. 33-53. An excellent treatment of the American decision is Allison, Essence of Decision, pp. 193-210. This author adds another dimension to the decision-making process, the political dynamic of the EXCOM as a group. One final point should be made concerning the quarantine/blockade decision: it was only a month before national Congressional elections. Walton, Cold War and Counterrevolution, pp. 108, 115-116, argues that Kennedy was "supremely political," and suffered from a slight "macho complex"; the Soviet missiles provided him an excellent opportunity to show the American electorate how determined an anti-communist he was.
Kennedy announced the quarantine/blockade on October 22, in a televised speech. Other actions were also announced then. First, a letter was dispatched to the United Nations Security Council over the signature of Ambassador Stevenson, requesting an "urgent meeting . . . to deal with the dangerous threat to the peace and security of the world caused by the Union of Soviet Socialist Republics launching bases and the installation of long-range ballistic missiles capable of carrying thermonuclear warheads to most of North and South America." The United States also called for the immediate convening of the Organ of Consultation of the OAS on the following day, "to consider the threat to hemispheric security, and to invoke Articles 6 and 8 of the Rio Treaty in support of all necessary action.

The roles of the OAS and of the United Nations will be considered in some detail below, but one point should be made here. On the first day it met, the Organ of Consultation adopted a resolution supporting the quarantine/blockade,


33. This statement was in Kennedy's "The Soviet Threat to the Americas."
and transmitted the information to the United Nations Security Council. While it is obvious that the quarantine/blockade was primarily a United States policy, it was agreed to by the OAS, and will be considered a collective action.

The ensuing five days, October 23-28, were critical. Risking a charge of over-dramatization, it can be said that the international community held its collective breath awaiting the Soviet response to the quarantine/blockade. The president of the United States was adamant in pressing for the removal of "offensive" weapons from Cuba, even if it necessitated the commencement of a nuclear exchange. His own assessment of the chances of nuclear war were "somewhere between one out of three and even." 35

Throughout the crisis, American policy was directed toward the Soviet Union, almost to the total neglect of Castro and Cuba. This was reflected in Kennedy's October 22 speech in what was perhaps its most chilling sentence: "It shall be the policy of this nation to regard any nuclear missile launched from Cuba against any nation in the Western

34. The vote on the OAS resolution was unanimous, though it took an additional day for the Uruguayan delegate to receive instructions. Secretary of State Dean Rusk participated in the proceeding, and made an address. See Dean Rusk, "American Republics Act to Halt Soviet Threat to the Hemisphere," USDSB, 47 (November 12, 1962), pp. 720-723.

35. Sorensen, Kennedy, p. 705.
Hemisphere as an attack by the Soviet Union on the United States, requiring full retaliatory response upon the Soviet Union."  

The quarantine/blockade went into effect two days after the presidential proclamation, on October 24. It was established at a five-hundred mile arc drawn from Cuba, and maintained primarily by United States destroyers, air-craft and support ordinance. President Kennedy made it clear that he was to be informed of the mechanics of the operation, and that no direct confrontation was permitted without his personal authorization.

Even before the quarantine/blockade was implemented, the Soviet Union had communicated its perception of the operation. In a statement issued on the 23rd, the Soviet government questioned the legality of a naval blockade in peacetime. The Soviets considered the quarantine/blockade "unprecedented aggressive action," and a severe threat to the peace. In this statement, the Soviet Union authorized, publicly, its representative to the United States as an attack by the Soviet Union on the United States, requiring full retaliatory response upon the Soviet Union."

36. Kennedy, "The Soviet Threat to the Americas."


39. Ibid.
Nations to introduce a resolution to the Security Council calling for an immediate examination of the "violation of the Charter of the United Nations and the threat to the peace by the United States of America." Furthermore, Khrushchev indicated through an American businessman, William Knox, that he considered the quarantine/blockade to be international piracy, and he was reported to have told Knox that if American ships attempted to stop Soviet vessels on the high seas, Soviet submarine commanders would be instructed to sink the blockading ships, actions which could usher in the third world war.

In the first day of the quarantine/blockade, twenty-five Soviet ships continued to steam toward Cuba. Late in the afternoon, however, intelligence experts learned that eighteen of the ships—those riding high in the water, and with wide deck hatches, supposedly signs of missile carrying vessels—had stopped. Nevertheless, the quarantine/blockade had not been tested, and not all ships bound for Cuba had stopped or changed course.

On Friday morning, the first and only ship was boarded. It was the "American made, Panama-owned, "

40. See the text of the resolution in SCOR, 17th year, UN Doc. S/5186.

41. Abel, The Cuban Missile Crisis, pp. 132-133, reports on the conversation between Khrushchev and Knox.

42. Ibid., p. 134, and Hilsman, To Move a Nation, p. 215.
Lebanese-registered freighter under charter of the Soviet Union," the Marcula. After assuring themselves that the vessel contained no quarantined contraband, the boarding officers permitted the Marcula to pass on to Cuba. The Marcula was obviously carefully selected to demonstrate American perseverance at the least possible cost to Soviet prestige.

At any rate, by late Friday, it was generally agreed that the quarantine/blockade had held. No new Soviet missiles had been introduced into Cuba, and the ships that had earlier stopped, turned back to the Soviet Union. The crisis, however, was far from over. The building of the missile sites on Cuba was proceeding apace.

At this point, it will be instructive to return to the day the quarantine/blockade was instituted. On Wednesday, October 24, the Secretariat of the United Nations intervened in the crisis. U Thant, Acting Secretary General of the Organization, sent identical messages to Premier Khrushchev and to President Kennedy. In the letters, U

43. Sorensen, Kennedy, p. 710. Allison, Essence of Decision, pp. 130-131, indicates an interesting side-light to this episode. The Marcula was boarded approximately five hundred miles from Cuba, even though the blockading forces had been ordered closer in to Cuba in order to give the Soviet leaders more time. Allison notes that the failure to implement the president's later order was an example of bureaucratic decision-making through inertia.

44. Reproduced in Foreign Policy Association, "Cuba Quarantined," pp. 63-64.
Thant asked: "on the one hand the voluntary suspension of all arms shipments to Cuba, and also the voluntary suspension of the quarantine measures involving the searching of ships bound for Cuba."\(^{45}\) He further offered his good offices for purposes of settling the dispute pacifically. And, finally, he offered the suggestion that a previous statement made to the General Assembly by the President of Cuba be used as a "basis for discussion," where the Cuban government had requested that the United States give "proof by word and deed, that it would not carry out aggression" against Cuba.\(^{46}\)

Khrushchev quickly responded. After noting that he, too, considered the "situation as highly dangerous and requiring immediate interference by the United Nations," his answer was directly to the point: "I am informing you that I agree with your proposal which meets the interests of peace."\(^{47}\) The United States response, to employ an understatement, was more cautious. Kennedy stated that the Soviet Union had caused the crisis, and that no solution was possible until the Soviet Union removed its missiles from Cuba. The president was not prepared to negotiate.\(^{48}\)

45. Ibid.

46. Ibid.


48. Several authors argue that the Soviet Union was interested in U Thant's initiatives only to set a trap for
On the following day, October 25, Secretary General U Thant sent further messages to Khrushchev and Kennedy, asking the Soviet leader to avoid the quarantine/blockade, and the American president to instruct his ships to "avoid direct confrontation with Soviet ships in the next few days in order to minimize the risk of any untoward incident."\(^4^9\)

In his response Kennedy noted that he shared U Thant's concern, but restated his own about the presence of missiles in Cuba, and about the ships still proceeding toward Cuba. \(^5^0\)

Khrushchev's response was more conciliatory. He stated: "We accept . . . your proposal, and have ordered the masters of Soviet vessels bound for Cuba, but not within the area of the American warships' piratical activities to stay out of the United States, that is, to slow down Kennedy's actions so that the Soviets could regain the offensive. For example, see Daniel and Hubbell, Strike in the West, pp. 139-140. Even Sorensen, Kennedy, p. 709, contends that Khrushchev was having some domestic problems and was attempting to stall for time. Interestingly, also on the 24th, Lord Bertrand Russell had sent telegrams to Khrushchev and Kennedy asking for negotiations and an end to the blockade. Khrushchev had been amenable, but noted that the Americas' action was piratical, and could lead to war. Kennedy's response to Russell was terse, ending with: "I think your attention might well be directed toward the burglars rather than those who have caught the burglars." Quoted in Abel, The Cuban Missile Crisis, p. 126. Walton, Cold War and Counterrevolution, pp. 128-132, contends that in response both to U Thant and to Russell, Kennedy was unnecessarily and dangerously intransigent.

\(^4^9\). "U Thant to President Kennedy, October 25," in Foreign Policy Association, "Cuba Quarantined," p. 66.

\(^5^0\). "Kennedy to U Thant," ibid., p. 60.
the interception area, as you recommend.\textsuperscript{51} As indicated above, the Soviet ships did stop, and eventually returned to Soviet ports. This brief flash-back has been presented here to suggest that the Secretary General of the United Nations played a role in resolving the missile crisis, the importance of which it is admittedly difficult to determine.\textsuperscript{52}

Throughout the crisis, a number of different channels of communications were used. Many have been noted or alluded to: public announcements through various media; the Security Council of the United Nations; traditional diplomatic channels, i.e., the ambassadors in each of the capitals; an American businessman in Moscow; and the Secretariat of the United Nations. One method of communication which deserves special attention is the private (and occasionally public), direct exchanges between Khrushchev and Kennedy. According to Robert Kennedy, Khrushchev and the president were in almost constant contact by

\begin{itemize}
\item \textsuperscript{51} "Premier Khrushchev to U Thant," \textit{ibid.}, p. 69.
\item \textsuperscript{52} Many observers argue that U Thant's appeals served only as a way for Khrushchev to back down gracefully. See, e.g., Tatu, Power in the Kremlin, pp. 264-265. Walton, \textit{Cold War and Counterrevolution}, pp. 131-132, analyzes the situation differently: "Whether U Thant's appeal was the reason or only the occasion for Khrushchev's not forcing the blockade, the Acting Secretary General is responsible for the breathing space that avoided confrontation at sea--and possible escalation into nuclear war. American writers have generally underestimated Thant's crucial contribution to the settlement of the missile crisis."
\end{itemize}
correspondence since the announcement of the quarantine/blockade. Until Friday, October 26, this exchange had involved only the stating and restating of the positions taken by the two governments. That is, the Soviet Union through Khrushchev continued to claim that the quarantine/blockade was illegal, unwise, and dangerous. Kennedy's responses were equally consistent: the "offensive" missiles in Cuba had to be removed, and no others introduced. On Friday, however, the nature of the correspondence changed, and the interpretations of the new notes, the decisions based upon them, had important bearing on the eventual reduction of tension.

On that Friday, Kennedy received a long, detailed (and as yet, unpublished) letter from Khrushchev through the state department. The letter was personal in tone, and clearly bore the stamp of the Premier's style. This letter suggested a possible basis for a solution to the crisis: the Soviet Union would dismantle and withdraw its

53. Kennedy, Thirteen Days, pp. 79-84. See also Hilsman, To Move a Nation, pp. 216-217, for a treatment of the different methods of communication.

54. Sorensen, Kennedy, p. 712, called the letter "long, meandering, full of polemics but in essence appearing to contain the germs of a reasonable settlement . . . ." According to Kennedy, Thirteen Days, pp. 86-87: "There was no question that the letter had been written by [Khrushchev] personally. It was very long and emotional, But it was not incoherent, and the emotion was directed at the death and destruction and anarchy that nuclear war would bring to his people and all mankind."
missiles if the American government would formally pledge not to invade Cuba. Given that one of the accepted motivations for the original decision to send missiles to Cuba was the latter's defense, this suggestion could not have been totally unexpected.

Similar suggestions had, in fact, been made earlier. Indeed, such a solution was offered before there was a crisis over the missiles. On October 8, 1962, President Osvaldo Dorticos of Cuba had addressed the United Nations General Assembly. In his speech, Dorticos said:

> We have sufficient means with which to defend ourselves. We have, indeed, our inevitable weapons, the weapons which we would have preferred not to acquire and which we do not wish to use. . . . Were the United States able to give us proof, by word and deed, that it would not carry out aggression against our country, then, we declare solemnly . . . our weapons would be unnecessary.55

But more germane to the crisis itself, there was additional information that indicated that a guarantee of non-invasion would lead to withdrawal of the missiles. For on Friday morning, before Khrushchev's letter arrived, the American Broadcasting Company's diplomatic correspondent, John Scali, had been approached by Soviet Embassy Counselor Aleksander

55. This was the speech to which U Thant had referred in his first message to Khrushchev and Kennedy, see above p. 179. This address was an obvious forewarning that Cuba had obtained missiles. The speech and other relevant documents can be found in David L. Larson (ed.), The Cuban Crisis of 1962 (Boston: Houghton-Mifflin, 1963), p. 103.
Fomin, and given the outline of the same "deal." Scali delivered the plan to Secretary of State Dean Rusk, and was instructed to return to Fomin and indicate that the United States was interested in the proposal.

But before the EXCOM and the president could take any action, another letter from Khrushchev arrived, this one through public channels. In the second letter, the Soviet Union asked for more than a guarantee of non-invasion, it requested a quid pro quo exchange: Soviet missiles in Cuba for American missiles in Turkey. As with the first deal, this suggestion had been published before. Columnist Walter Lipmann had suggested such a trade-off in an article in the Washington Post. Moreover, it was generally well known that Kennedy favored the removal of the Jupiter missiles from Turkey, as recommended by Defense Secretary McNamara in 1961. This type of exchange had been supported by Ambassador Stevenson when he had been participating in the deliberations of the EXCOM, though he had met with little success. Both earlier, and on Friday, the president considered that such an exchange would weaken the United States....

56. Abel, The Cuban Missile Crisis, pp. 155-158; Allison, Essence of Decision, p. 220. See also Roger Hilsman's melodramatic article, "The Cuban Missile Crisis: How Close We Were to War," Look, 28 (August 28, 1964), pp. 17-21, for a complete treatment of the Scali-Fomin interviews, though for reasons of diplomatic tact, Fomin was referred to as "Mr. X."

States position. In short, he refused to remove the missiles from Turkey under pressure.

The two letters left the EXCOM in a predicament. Although the missile-carrying ships had returned to the Soviet Union, construction on the sites in Cuba was nearing completion; operational missiles were what the EXCOM feared most. The tact adopted by the EXCOM to respond to Khrushchev was innovative, but dangerous. Primarily upon the insistence of Robert Kennedy, they decided to answer the first letter, which had asked for a pledge of non-invasion, and ignore the second letter altogether. This came to be called the "Trollope ploy." The EXCOM set to drafting a response agreeing to the first proposal: a pledge that the United States would not invade Cuba and would remove the quarantine/blockade, while the Soviet Union would dismantle the missiles in Cuba under United Nations supervision.

58. The label came from the novelist Anthony Trollope, who wrote of a marriage-happy woman who took the slightest gesture as an implicit proposal of marriage. See Allison, Essence of Decision, p. 227, and Henry M. Pachter, Collision Course: The Cuban Missile Crisis and Coexistence (New York: Praeger, 1963), pp. 53-56.

59. See "President Kennedy to Premier Khrushchev, October 27," in Foreign Policy Association, "Cuba Quarantined," pp. 77-79. Although there is no way to know for sure, Khrushchev's first letter probably did not mention United Nations supervision for the removal of the missiles. It was apparently Kennedy's idea.
The message was transmitted to the Soviet Union on Saturday. It was on that day that the tension in the EXCOM was the most intense. No one was sure how the communique would be received, and the American policy-makers were preparing contingency plans in the event that it was ignored. According to Theodore Sorensen: "the pressure for [an invasion and/or an air-strike] on the following Tuesday were rapidly and irresistably growing, strongly supported by a minority in our roup and increasingly necessitated by a deterioration in the situation." To add to the pressure, an American U-2 was shot down on Saturday, resulting in the only casualty of the crisis.

On the following morning, Sunday, October 28, a public broadcast was transmitted from Moscow. After noting that Cuba had been the target of repeated aggression from the United States, Khrushchev's statement continued:

The Soviet Government decided to render assistance to Cuba with means of defense against aggression—only with means for defense purposes. We have supplied the defense means which you describe as offensive means. We have supplied them to prevent an attack on Cuba— to prevent rash acts.

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60. Sorensen, Kennedy, p. 716.

61. Earlier in the week, the EXCOM had decided that in the event that a U-2 was brought down, retaliation against SAM sites would be launched. Kennedy, however, revoked the decision, given the sensitive stage of the negotiations. See Sorensen, Kennedy, p. 716, and Kennedy, Thirteen Days, pp. 97-99.
I regard with respect and trust the statement you made in your message of 27 October 1962 [the "Trollope ploy"] that there would be no attack, no invasion of Cuba, and not only on the part of the United States, but also on the part of other nations on the Western Hemisphere, as you said in your message. Thus, the motives which induced us to render assistance of such a kind to Cuba disappear.

It is for this reason that we instructed our officers . . . to take appropriate measures to discontinue construction of the aforementioned facilities, to dismantle them, and to return them to the Soviet Union. Thus, in view of the assurances you have given and our instructions on dismantling, there is every condition for the elimination of the present conflict.62

With this broadcast and Kennedy's reciprocal acceptance, the crisis ended, although there remained some disagreement over the particulars.63

The reasoning behind the Soviet decision to withdraw the missiles remains obscure. A common assessment was that Khrushchev's big gamble simply did not pay off,64 Another explanation was that the crisis was the cause of, or a factor in, an internal struggle within the decision-making councils.

62. Quoted in Kennedy, Thirteen Days, p. 175.

63. For example, the strategic bombers were not considered part of the deal by the Soviet Union, though they, too, were eventually withdrawn. Moreover, Castro refused to submit to United Nations supervision, a point conceded by the United States, since it had effective methods of surveillance. See Abel, The Cuban Missile Crisis, pp. 187-189.

64. This is the conclusion of Horelick, "The Cuban Missile Crisis," and of Daniel and Hubbell, Strike in the West.
of the Kremlin which the soft-liners eventually won. A novel reason is offered in Khrushchev's memoirs. According to the late Soviet leader, Ambassador Dobrynin's last conversation with Robert Kennedy (on October 28), had led Khrushchev to believe that if the crisis was not settled along the lines requested by the United States, there would be a military coup, and the Soviet premier had no desire to deal with an American military regime.

Obviously, the motivations that one ascribes to the Soviet leadership in withdrawing the missiles is closely related to one's assessment of the motives which had led to the decision to transport the missiles to Cuba. Since this study accepted Cuban defense, improvement of the Soviet Union's cold war position, and an attempt to close the missile gap, as the original Soviet motives, it can consequently be accepted that the rationale for withdrawal was: the needs for Cuban defense had been met; and the

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65. This is Tatu's, Power in the Kremlin, pp. 271-283, conclusion.

66. This is Khrushchev's paraphrase of Kennedy's conversation with Dobrynin: "Even though the president is very much against starting a war over Cuba, an irresistible chain of events could occur against his will. That is why the president is appealing to Chairman Khrushchev for his help in liquidating this conflict. If the situation continues much longer, the president is not sure that the military will not overthrow him and seize power," Talbott, Khrushchev Remembers, p. 498. Needless to say, Robert Kennedy's recollection of this meeting is different, Thirteen Days, pp. 107-109.
improvement of the international position, and closing the missile gap were not worth the risk of a nuclear confrontation.

It is difficult to make a final assessment of the missile crisis, even after more than ten years. On the cover of one of the most thorough examinations of the October crisis are the words: "John F. Kennedy's finest hour." Indeed, many historians of the missile crisis regard it a Kennedy victory. Others, however, applaud Khrushchev and the Soviet leadership for remarkable restraint in a difficult era, and credit the Kremlin with saving the peace. One thing is certain: the missile crisis was a serious one, and it was resolved without resort to violence, as defined in this inquiry. One of the contributing factors to the non-violent resolution, and a factor which has not received adequate attention, was international law.

**Legal Analysis**

In the Cuban missile crisis, there were three important legal issues: the right of Cuba and the Soviet Union to establish missile bases on Cuban territory; the legality of the quarantine/blockade established by the United States and the Organization of American States; and the legality of the intervention of the Secretary General of the United Nations. While these are the broad
issues, there are numerous related legal questions which will be investigated.

Justification of the Emplacement of the Missiles

The justification of both the Soviet Union and of Cuba in introducing the missiles into Cuba was that of the inherent right of self-defense. The Charter of the United Nations provides for measures to be undertaken in self-defense: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member. . . ." The intent of this article was to permit the use of force to repel aggression. If this is a right, however, the implication is that a state has the concomitant right to prepare to repel an aggressor, otherwise it would be a right with no practical means of implementation. In other words, if a state has the right to invoke self-defense, it follows that it has the right to prepare for the exercise of self-defense.

Even the most ambitious of the agreements designed to eliminate, or at least regulate, the use of force in

67. See the arguments of the Soviet and Cuban representatives to the Security Council in SCOR, 17th year, 1025th meeting. Also see the Romanian delegate's remarks in SCOR, 17th year, 1023rd meeting.

68. Office of Public Information, Charter, Article 51.
international relations have recognized that nations have the right to rely upon self-defense if attacked. For example, in the drafting of the Kellog-Briand Pact of 1928, the American delegation stipulated: "There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in any sovereign state and is implicit in every treaty." In order to prepare for measures of self-defense, the pre-World War I period was marked by a number of alliances, which gave rise to the international system labeled balance of power. "Regional understandings," not in conflict with the Covenant, were also permitted in the inter-war period under the League of Nations system. The intent of these understandings was to create areas of mutual defense.

The post-World War II era has also been characterized by a number of alliances established to guarantee the mutual defense of the signatories. The common denominator of such organizations as the OAS, the North Atlantic Treaty Organization (NATO), the Warsaw Treaty Organization, the South-East Asia Treaty Organization (SEATO), the Central Treaty Organization (CENTO), and

others, was a basic mutual defense convention.\textsuperscript{70} An example of the kind of activities to be undertaken by these mutual defense arrangements can be found in the NATO Treaty: "In order to more effectively achieve the objectives of this treaty, the parties separately and jointly, by means of continuous self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack."\textsuperscript{71} As a noted student of international law has observed:

In principle, a sovereign state is free to take, within its territory, measures which it deems necessary for its defense, unless some obligation of international law or treaty forbids, and other states are free to assist in such defense. This is well recognized by the United States in making large contributions of money, material, and personnel to its allies to assist in their defense.\textsuperscript{72}

Thus, a reading of the United Nations Charter taken in conjunction with these post-war mutual defense treaties, leads to a preliminary conclusion: while there may be limits to the exercise of the right to self-defense, there are no explicit limitations to the preparations that might be taken to exercise that right.

\textsuperscript{70} See Tung, \textit{International Law in an Organizing World}, pp. 415-420.


If the right to prepare for self-defense is generally recognized in international law, it was specifically recognized by the United States in relation to Cuba. When the Soviet Union and Cuba announced in early September, 1952: "As long as [imperialist quarters] continue to threaten Cuba, the Cuban Republic has every justification for taking increasing measures to insure its security and safeguard its sovereignty and independence, while all Cuba's true friends have every right to respond to this legitimate request," the American response was that such arrangements were acceptable, though the measures would have to be defensive.

Nevertheless, this traditional right does have some implicit limitations. For example, the Charter of the United Nations states that nations should avoid "the threat or use of force" in their relations with one another. Thus, if the build-up of the defenses of one state is construed by another to be a threat to use force, a position held by the United States and the OAS in 1962, perhaps a case based upon the Charter that missiles in Cuba were illegal could be made. But there seems to be no


74. "Statement of President Kennedy, September 4," ibid., pp. 4-5.

75. Office of Public Information, Charter, Article 2, emphasis added.
international norm prohibiting a show of force per se. As Quincy Wright noted: "Dangerous as they are, customary international law did not consider . . . 'displays of force' illegal so long as they remained on the high seas or on a state's own territory, unless there was evidence of an immediate intention to use them for attack."^76

There appears to be a conflict between traditional international law, and law under the Charter of the United Nations, at least regarding the right to prepare for self-defense. In Cuba, this conflict posed a dilemma: were the missiles sent to Cuba by the Soviet Union offensive or defensive? If they were offensive, as they were considered to be by the quarantine/blockading nations, they might be construed as a threat of the use of force. If they were defensive, there can be little doubt that their emplacement was justifiable under international law.77

No agreement on what constitutes an inherently offensive or defensive weapon has been achieved, but according to Wright: "general international law, following the opinion of most strategists, has regarded the offensive or defensive character of weapons as dependent on their

77. A good discussion and presentation of this dilemma can be found in the Irish representative's remarks to the Security Council in SCOR, 17th year, 1023rd meeting.
intended use." 78 At one point in the crisis, Khrushchev invoked this analogy: "If I point a pistol at you . . . in order to attack you, the pistol is an offensive weapon. But if I aim to keep you from shooting me, it is defensive, no?" 79

In this case, like most others, the intentions of the nations involved were extremely difficult to determine. As another scholar of international relations and law observed:

... it is as impossible to distinguish between offensive and defensive nuclear missiles and aircraft as between offensive and defensive walking-sticks. The offensive or defensive character never lies in the weapon, but in its use. To maintain that while, by definition, weapons under exclusive United States control in countries neighboring on the Soviet Union or aboard United States fleets and polaris submarines are defensive, Russian-controlled weapons in the Caribbean are offensive, is a remarkable feat of special pleading. 80

Here, it will have to suffice to note that different observers regarded the nature of the weapons differently. 81

79. This was in the discussion with businessman Knox, quoted in Abel, The Cuban Missile Crisis, p. 133.
81. For a sampling of those who thought the weapons essentially defensive, and therefore within the legitimate scope of Cuban defense arrangements, see Wright, "The Cuban Quarantine," pp. 550-552; Walton, Cold War and Counter-revolution, pp. 188-189; and the following remarks made to the Security Council; Garcia Inchaustegui (Cuba), Zorin
But regardless of whether or not the missiles were offensive, there were limits to the actions that could be taken in retaliation to their presence in Cuba.

The relevance of the Inter-American Treaty of Reciprocal Assistance of 1947 (the Rio Treaty), and the Charter of the OAS will be investigated at some length below, in relation to the quarantine/blockade. These documents will be examined very briefly here, however, to determine whether or not the introduction of the missiles into Cuba violated either of them.  

(USSR), Malitza (Romania), and Riad (UAR), in SCOR, 17th year, 1022nd and 1023rd meetings.

There were also many who considered the missiles inherently offensive, especially Americans. For example, see any of the friendly Kennedy biographers cited above. Additionally, many legal analysts were of the same opinion, among them see Abram Chayes, "Law and the Quarantine of Cuba," Foreign Affairs, 41 (April, 1963), pp. 550-557; the same author's "The Legal Case for U.S. Action on Cuba," USDDB, 47 (November 19, 1962), pp. 763-765 (Chayes was the legal advisor to the state department); Carl O. Christol and Charles R. Davis, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962," AJIL, 57 (July, 1963), pp. 525-543; and the following remarks to the Security Council: Stevenson (USA), Dean (U.K.), and Seydoux (France), in SCOR, 17th year, 1023rd and 1024th meetings.

82. As William P. Gerberding, "International Law and the Cuban Missile Crisis," in Lawrence Scheinman and David Wilkinson (eds.), International Law and Political Crisis (Boston: Little, Brown, 1968), p. 177, notes: "The point at which a multilateral agreement acquires authoritative legal status for non-signatory states [i.e., the Soviet Union] is, quite obviously, a debatable matter." Yet, even if the Soviet Union was not bound by the Rio Treaty, Cuba was.
The Preamble of the Rio Treaty provides that "in order to assure peace through adequate means, signatories may provide for effective reciprocal assistance to meet armed attacks against any American State, and in order to deal with threats of aggression against any of them." 83 Clearly, the mutual assistance envisioned was to be inter-American, but the right to develop means to resist threats of aggression was established. The Treaty is also cognizant of the "inherent right of collective or individual self-defense recognized by Article 51 of the Charter of the United Nations." 84

It is in regard to Article 6 of the Treaty that the question of Soviet missiles in Cuba became confused. There, it is noted that if "any fact or situation" should "endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures ... which should be taken for the common defense and for the maintenance of the peace and security of the continent." 85


84. Ibid., Article 3, paragraph 1.

85. Ibid., Article 6. It was under Article 6 that Cuba had been excluded from the inter-American system, because "adherence to Marxism-Leninism was incompatible" with that system. See Connell-Smith, The Inter-American System, p. 252. At that time, apparently, the existence of a disagreeable ideology was sufficient to create a threat to the hemisphere.
Thus, the argument was made that the introduction of the missiles constituted a threat to the peace of the hemisphere, and therefore violated the Rio Treaty. Yet, again, this alleged violation hinges on the judgment that the missiles in Cuba were offensive. For, if they were solely for Cuban protection, their existence did not violate the Rio Treaty. Cuba argued that because of the hostility manifested by the action of the inter-American system in excluding it, and through the continuing inimical relations with the United States, the procurement of the missiles was justifiable for defense purposes.

The Charter of the OAS is quite specific about the rights of states in the western hemisphere. That document also recognizes the right to resort to force in self-defense. More explicitly, the OAS Charter stated:

... the state has the right to defend its integrity and independence, and to provide for its preservation and prosperity, and consequently to organize itself as it sees fit.

86. It should be emphasized that Cuba was still bound by the Rio Treaty and the OAS Charter, even though it could not participate in the deliberations of the inter-American system. Article 4 of the Rio Treaty geographically delineates the area covered by the convention.

87. See the Cuban representative's remarks in SCOR, 17th year, 1022nd meeting.

The right of each state to protect itself and to live its own life does not authorize it to commit unjust acts against another state.89

The only limitation that the OAS Charter places on self-defense actions, then, is that such actions cannot lead to the commission of unjust acts against others. This seems to go further in providing that a state can arm itself than the Rio Treaty, because of the implication that an aggressive act must occur rather than be merely threatened, thereby eliminating the need to determine intentions.90

The conclusion here, although it is offered tentatively given the ambiguities in the evidence, is that the introduction of the missiles into Cuba did not, ipso facto, violate international law. That the missiles were construed to be a threat to hemispheric peace and security rested on the subjective analysis of American governmental officials (both North and South).91 But, to the degree that

89. Ibid., Articles 9 and 11.

90. Nevertheless, in ibid., Article 25 does provide that actions can be taken "for acts of aggression which are not armed attacks," or "any other fact or situation that might endanger the peace of America . . . ." This is a restatement of Article 6 of the Rio Treaty. Obviously enough, the OAS has transgressed the above principles, but this should not detract from the principles themselves. For a discussion of OAS actions, see John C. Drier, The Organization of American States and the Hemisphere Crisis (New York: Harper and Row, 1962), pp. 42-67.

91. One observer noted the following concerning the American argument that Soviet-Cuban actions constituted a threat to use force: "there is no article in the Charter authorizing a nation to be the sole judge of which weapons,
Cuba considered itself the subject of possible aggression, it had the legal right to request and to receive military assistance, including nuclear missiles, for its defense.\textsuperscript{92}

A final aspect of the Soviet-Cuban action needs to be examined: the method by which the missiles were introduced. A great deal of criticism was leveled at the action because the missiles were sent to Cuba clandestinely. There seems to be no international requirement, however, to publicize activities undertaken by sovereign states. There is, of course, an obligation under the United Nations Charter to register treaties and "international agreements."\textsuperscript{93} The primary limitation there is that no party can use a non-registered agreement before an organ of the United Nations. Yet, it has long been the custom of nations to engage in agreements which are less than treaties, but still considered binding, at least upon the regime which enters into them. In fact, one of the foremost users of the less-than-treaty international agreement, is the United States. Through the president, the United States in its opinion, constitute a 'threat of force.'" Raymond Aron, "International Law--Reality and Fiction," \textit{The New Republic}, 147 (December 1, 1962), p. 13.

\textsuperscript{92} Obviously, the Cuban case also rests on a subjective assessment, but one which much evidence, including the Bay of Pigs invasion and the 1962 exclusion action, supported.

\textsuperscript{93} Office of Public Information, \textit{Charter}, Article 102, paragraph 1.
has frequently made arrangements with other nations by "executive agreement." Executive agreements have somewhat less impact on domestic law than treaties, and they generally should not be used in cases which are properly the subject of treaties, but a president can bind the United States to such agreements, including those related to defense matters, under his constitutional prerogatives as commander-in-chief.

In short, there is no evidence that the secret nature of the missile arrangement between the Soviet Union and Cuba violated any norm of international law. On the


95. The proper scope of executive agreements has engendered some dispute among legal scholars. Thus, while many maintain that there is a distinction between subjects which can be covered by a treaty and an executive agreement, one source states: "the President, acting with Congress, where simple majorities prevail, can in the manner of international acts, legally accomplish under the Constitution, anything that can be legally accomplished by the treaty-making power . . . ." McClune, International Executive Agreements (1941), in Bishop, International Law, p. 102. For a discussion of the legal nature of executive agreements generally, see Bishop, International Law, pp. 94-105 and Collins, International Law in a Changing World, pp. 290-291. The point here is a simple one: the president does have the authority to engage, in some circumstances, in binding arrangements with other nations, and further, these arrangements may be secretly derived.

96. Also on this point, see Wright, "The Cuban Quarantine," pp. 551-552.
other hand, the political sagacity of the maneuver can certainly be questioned. No doubt the American policymakers regarded the clandestine introduction of the missiles as devious, and threatening, which added to the tension of the crisis. In fact, the Cuban crisis may have solidified the principle of "no surprise" into the growing structure of "cold war rules" of international relations.97 But regardless of the wisdom of Soviet-Cuban methods, these two nations had the legal right to conduct their defense arrangements in private.98

Legality of the Quarantine/Blockade

There are several legal elements in the arguments used to justify the quarantine/blockade, some explicit and some implicit.

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97. For a discussion of this in relation to other "cold war rules of the game," see McWhinney, "Soviet and Western International Law and the Cold War in an Era of Bipolarity," especially pp. 230-232.

98. Part of the offensive/defensive controversy was involved here. The American argument was that if the weapons were defensive, there would have been no need to sneak them into Cuba. See Kennedy, Thirteen Days, pp. 23-29. Khrushchev realized that ground-to-ground missiles would cause problems; his explanation for secrecy was simple: "if we installed the missiles secretly, and the United States discovered them after they were poised and ready to strike, the Americans would think twice before trying to liquidate our installations by military means. . . . The main thing was that the installation of our missiles in Cuba would, I thought, restrain the United States from precipitous action against Castro's government." Talbott, Khrushchev Remembers, pp. 493-494.
In his October address to the nation, President Kennedy offered the following analysis: the introduction of Soviet missiles into Cuba "constitutes an explicit threat to the peace and security of all the Americas." In announcing the quarantine/blockade policy, he invoked Articles 6 and 8 of the Rio Treaty, and Articles 52, 53, and 54 of the Charter of the United Nations. By calling for a meeting of the Organ of Consultation, he invoked the OAS Charter as well. Kennedy avoided relying upon Article 51 of the United Nations Charter—individual or collective self-defense—as a justification. Nevertheless, others have referred to Article 51 in support of the American policy, so it, too, will be considered below. But before turning to the analysis, the nature of the action itself should be examined.

It is clear that the term "quarantine" was selected for a purpose, apparently to imply a pacific blockade as


100. Chayes, "Law and the Quarantine of Cuba," pp. 553-554, indicates Kennedy could have used Article 51. In his "The Legal Case for U.S. Action in Cuba," p. 764, Chayes makes a stronger case for the relevance of self-defense. Christol and Davis, Maritime Quarantine, pp. 533-539, rest their case heavily on the issue of self-defense in justifying the quarantine/blockade,
opposed to a traditional blockade. The distinction between the two terms is critical, for while a pacific blockade is a term used to signify a resort to force short of war, a blockade is an act of war.

As noted in the previous chapter, a pacific blockade is a form of reprisal. According to one legal scholar:

"[the pacific blockade] has well been described as 'an historic accident, arising from the application to one form of reprisals injudicious analogies from the Law of War,' and was merely a special form of reprisal. As a legal institution it had several inner contradictions."

Any reprisal, by definition, must be a form of redress directed toward a state which has violated some international legal norm vis-a-vis the state enacting the reprisal. Therefore, it was essential that the United

101. Although the term pacific blockade was not used by the president nor his spokesmen, Charles G. Fenwick, "Quarantine Against Cuba: Legal or Illegal?", AJIL, 57 (July, 1963), p. 592, states: the quarantine "is a striking instance of resort by the United States to pacific blockade." And, as indicated by Clifton E. Wilson, "The Use and Abuse of International Law," in Neal D. Houghton (ed.), Struggle Against History: US Foreign Policy in an Age of Revolution (New York: Washington Square, 1968), p. 236, where Wilson quotes Fenwick's statement: "The action, not the label, must be judged."


103. See the Naulilaa Incident Arbitration, Portuguese-German Arbitral Tribunal, 1928, 8 Rec, des decis. trib, arb, mixtes 409, in Bishop, International Law, pp. 747-748.
States and the OAS establish their claim that the Soviet Union and Cuba had violated international law, which these enacting parties never did. Moreover, there are other conditions for this specific type of reprisal, to wit:

The establishment of a blockade outside a state of war is not permissible by international law except under the following conditions: (1) Ships under a foreign flag may enter freely notwithstanding the blockade; (2) the pacific blockade must be officially declared and notified, and maintained by a sufficient force; (3) the ships of the blockaded power may be sequestered, but must be restored.\(^{104}\)

In the United States-OAS quarantine/blockade, the first of these criteria was ignored. In many cases, Cuban ships, i.e., ships of the blockaded power, were not affected, the quarantine/blockade was directed exclusively against third-party shipping.\(^{105}\)

Traditionally, reprisals of all sorts have been used by great powers against lesser powers, usually for the collection of debts. While there can hardly be an international norm to this effect, the application of a reprisal, including pacific blockade, by one great power against another may encounter difficulty. As one source noted: "If forcible reprisals were taken against a state which was

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105. And, as Wilson, "The Use and Abuse of International Law," p. 237, especially footnote 12, notes: the United States "has consistently opposed the halting of American vessels" on the high seas in peacetime.
prepared to regard the action as creating a formal state of war they failed in their object and might lead to serious conflict."  

In addition, any reprisal is subject to the test of proportionality outlined in the Naulilaa arbitration: "one should certainly consider as excessive, and thus illegal, reprisals out of all proportion with the act which motivated them." Disruption of maritime traffic on international seas is a serious measure, which suggests that the violation which led to the action must also be a serious one.

Now, admittedly, the United States and the OAS considered the missiles in Cuba to be a threat, but reprisal is a legal action which would require a serious violation of international law by the nation against which the reprisal was taken.

106. Brownlie, International Law and the Use of Force by States, p. 220. See also Bishop, International Law, p. 746, where he states: "reprisals taken against a state of equal or greater power than the acting state would in all probability be regarded as the initiation of war."


108. Christol and Davis, Maritime Quarantine, pp. 540-541, attempt to make the case that the quarantine/blockade did satisfy the Naulilaa test of proportionality.

109. The United States-OAS leaders did believe they had a legal case. Nevertheless, the conclusion earlier was that the Soviet Union and Cuba did not violate international law. Consequently, it is asserted here that a reprisal was not justified. Also, the quarantine/blockade did not satisfy the legal definition of a pacific blockade, which
Furthermore, reprisals and pacific blockades are severely restricted by the Charter of the United Nations, specifically where it calls on nations to refrain from the use of force in their international relations. The Charter also plainly states in Chapter VI, Pacific Settlement of Disputes, that: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." This Charter obligation implies that even if a reprisal measure was justified, it could only be invoked after other means to secure redress of a grievance had been attempted. As noted above, the quarantine/blockade was an initial response, and did not follow attempts to settle the dispute pacifically.

Finally, in relation to the United Nations Charter, the act of blockade, pacific or otherwise, is an enforcement has been noted. Finally, as will be indicated below, the quarantine/blockade was in violation of the Charter of the United Nations.

110. See Office of Public Information, Charter, Article 1, paragraph 1, and Article 2, paragraph 3.

111. Note that this is in relation to pacific settlement, and does not authorize enforcement action by regional agencies.
action. Consequently, it should only be effected collectively, i.e., under the auspices of the Security Council.\textsuperscript{112} This obligation denies the use of a blockade to any nation or group of nations acting independently of the United Nations.\textsuperscript{113}

Therefore, because of the nature of the quarantine/blockade, and because of the limitations on pacific blockade in traditional international law and the law under the United Nations Charter, the United States-OAS action could not be considered a pacific blockade in its usual sense.

Some, however, believed that while the quarantine/blockade may not have conformed to the traditional pacific blockade, since conditions had changed from the nineteenth century, so had notions about reprisals and blockade.\textsuperscript{114} This position was expressed by the department of state legal advisor where he stated:

> The rules of blockade and contraband evolved, like most law, out of the interaction between moral precept experience and changing political necessity. . . . International law addresses different problems today and there is different legal machinery to deal with them. The

\textsuperscript{112} See Office of Public Information, \textit{Charter}, Chapter VII generally, Article 42 specifically.

\textsuperscript{113} Such is the conclusion of Colombos, \textit{The International Law of the Sea}, pp. 469-470.

The over-riding object of international law is not to regulate the conduct of war, but to keep and defend the peace.115

The essence of this argument, then, was this: while the nineteenth century concept of pacific blockade as a form of reprisal was intended to deal with relatively low level violations of international law, the threat to international peace and security constituted by the presence of thermo-nuclear weapons had never been envisioned. As weapons technology developed, the nineteenth century concept had to be adapted to new circumstances. Perceived in this light, the quarantine/blockade was a new application of pacific blockade.116 Without denying the general principle that international law does indeed evolve and adapt to changing international conditions, it is the position here that the quarantine/blockade was not an example of this evolution and adaptation. The entire concept of reprisal has been so modified by the precepts of the United Nations Charter that to invoke the right of reprisal is extremely difficult.117 It would necessitate a far sounder, much more direct legal


116. Legal advisor Chayes claims that his common law training leads him to accept this evolutionary perception of international law. See Chayes, "The Legal Case for U.S. Action in Cuba," and see also Covey Oliver, "International Law and the Quarantine of Cuba: A Helpful Prescription for Legal Writing," AJIL, 57 (April, 1963), pp. 373-377.

117. See Tung, International Law in an Organizing World, p. 383.
argument than that offered by the United States and the OAS in 1962. Therefore, in support of the conclusion a few paragraphs above, the legal nature of the United States-OAS quarantine/blockade could not be construed as an application of a legal pacific blockade.\textsuperscript{118}

Since the quarantine/blockade could not rest on the concept of pacific blockade, its legal justification must be sought elsewhere. It should be recalled, that pacific blockade was never an integral part of the United States-OAS case; it was implicitly relied upon.

The cornerstone of the Americas' policy in Cuba was that the Soviet missiles violated hemispheric security. As will be noted below, there are a number of provisions relating to security in the Charter of the OAS and in the Rio Treaty. But before turning to these documents, another instrument should be examined: the Monroe Doctrine.

The Monroe Doctrine was proclaimed in 1823. Its purpose was obvious and unambiguous: it was meant to prevent foreign (European) intervention in the western hemisphere while at the same time to guarantee that the new world would not become involved in the politics of Europe.\textsuperscript{119} Several

\textsuperscript{118} This is also the conclusion of Quincy Wright, "The Cuban Question," Proceedings of the Society of International Law, 57th Meeting (Washington: Society of International Law, 1963), pp. 9-10.

points need to be made regarding the Doctrine as it applied to the missile crisis.

First, as a unilateral policy declaration, the Monroe Doctrine had little claim to any international legal stature. It was not a convention entered into by concerned parties, and, in fact, it was often resented by Latin Americans. Secondly, while supposedly enunciating the principle of non-intervention in the western hemisphere, the Monroe Doctrine served as the pretext for frequent United States intervention into the affairs of Latin American nations, and it has consequently been repudiated.

Thirdly, one of the continuing threads in the history of inter-American relations has been the effort to eliminate the unilateral nature of the Monroe Doctrine, in order to make non-intervention a multilateral policy. This has been partly accomplished through the Rio Treaty and the OAS Charter. Therefore, the Monroe Doctrine could not


122. See Whitaker, The Western Hemisphere Idea.
provide a legal justification for involvement in Cuba, by blockade or otherwise.123

The legal case for the United States-OAS quarantine/blockade rested primarily on the Rio Treaty, and the Charters of the OAS and United Nations. Since the Rio Treaty was incorporated into the OAS Charter, these two conventions will be considered together.

The specific articles of the Rio Treaty upon which the American states relied, were Articles 6 and 8:

If the inviability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by aggression which is not an armed attack or by an extracontinental or intercontinental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately to agree . . . on the measures which shall be taken for the maintenance of the peace and security of the continent.

For purposes of this Treaty, the measures on which the Organ of Consultation may agree will comprise one or more of the following: recall of chiefs of diplomatic missions; breaking of diplomatic relations; partial or complete

123. Although the Monroe Doctrine was never mentioned by label, Kennedy in his October 22, speech referred to "the traditions of this nation and hemisphere . . .," which appears to be a reference to the Doctrine. The Doctrine had been invoked in Congressional debate in September. Senator Thomas Dodd (D., Conn.) said: "As . . . [an] immediate measure--in anticipation of action by the Organization of American States--I believe we should invoke the Monroe Doctrine to proclaim a total embargo on shipments of Communist military materials and military personnel to Cuba." Reprinted in Dozer, The Monroe Doctrine, p. 189.
There are both procedural and substantive implications suggested by the invocation of these articles.

First, Article 6 obligates the signatories of the Treaty to take any action collectively, under the auspices of the Organ of Consultation. The Organ of Consultation can be convened at the request of any member of the OAS to the Council of the Organization. The latter body is composed of the permanent representatives of the OAS, whose headquarters are in Washington. By a majority vote, the Council can agree to sit as the Organ of Consultation, "to consider problems of an urgent nature and of common interest to the American States . . . ." This procedure was followed, as provided for in President Kennedy's October 22 address. The Organ of Consultation was legally convened on October 23, to consider the Cuban crisis.

The United States delegation was chaired by Secretary of State Dean Rusk, who addressed the Organ of Consultation, and submitted a resolution which was adopted unanimously.


125. OAS Charter, in Ball, The OAS in Transition; Articles 39, 40, and 43. These, and other provisions of the OAS Charter were modified in 1967. The changes went into effect in 1970.

The most significant portion of the resolution bears reproduction:

The Council of the Organization of American States acting provisionally as the Organ of Consultation RESOLVES: To recommend that member states . . . take all measures, individually and collectively, including the use of force, which they may deem necessary to insure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the continent and to prevent the missiles in Cuba with offensive capabilities from ever becoming an active threat to the peace and security of the continent.127

By all appearances, the Organ of Consultation proceeded according to its Charter obligations. It is the substance of the action taken—and its source, the Rio Treaty—which raised serious legal questions.128

Although Article 8 of the Rio Treaty permitted the use of force under OAS direction, this permission is

127. Ibid.

128. The question of whether or not the OAS action truly multilateralized the quarantine/blockade is interesting, but not crucial. The decision to implement the quarantine/blockade was obviously made by the United States. Nevertheless, the United States contention that it became a collective OAS action can be granted, without unduly affecting the conclusions of the present analysis. But as one student of the OAS noted: the acceptance of the resolution "meant complete freedom of action for the United States, since the OAS Council merely accepted a fait accompli." And, moreover, "the other members of the inter-American system 'had no significant voice in the formulation or execution of the policy at all,' they accepted United States policy and acted on this occasion, as the 'rubber stamp' the critics have always described the OAS as being." Connell-Smith, The Inter-American System, pp. 314, 288-289.
contradicted by other provisions in the OAS Charter:

Article 15: No State or group of States has the right to intervene directly or indirectly, for any reason whatsoever, 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 threats against the personality of the State or against its economic, political, or cultural elements.

Article 16: No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

Article 17: The territory of the State is inviolable; it may not be the object, even temporarily, of military occupation or any other measures of force taken by any other State, directly or indirectly, on any grounds whatever. 129

These treaty obligations seem quite plainly to prohibit the use of force against any nation in the western hemisphere. Unfortunately, the following modifying provisions are also in the Charter of the OAS:

Article 18: The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.

Article 19: Measures adopted for the maintenance of peace and security in accordance with the existing treaties do not constitute a violation of the principles set forth in Articles 15 and 17. 130

129. OAS Charter, in Ball, The OAS in Transition.

130. Ibid.
Thus, the OAS Charter does authorize the use of force in the western hemisphere in two special circumstances: self-defense and maintenance of peace and security. As noted earlier, the United States did not rely on self-defense in regard to the Charter of the United Nations. Yet, by citing the OAS Charter, the question of self-defense was inevitably raised, and will be briefly appraised here.

According to one source, the United States-OAS action "was a sui generis way of exercising self-defense."\(^{131}\) The limitations of this type of argument were noted in the analysis of the Suez crisis. It cannot be denied that the right to resort to the use of force for self-defense measures, individually or collectively, is long standing in international law. To briefly review what has been noted before, the classic statement of the traditional right to self-defense was made by Secretary of State Daniel Webster in the Caroline Case: if an act of war is to be justified in terms of self-defense, the acting state must "show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation."\(^{132}\) The quarantine/blockade decision was the result of long deliberation, and was one among many alternatives

\[^{131}\] Inter-American Institute of International Legal Studies, *The Inter-American System*, p. 165.

considered. It certainly exceeds the requirements of self-defense stipulated in Caroline. Moreover, limitations on self-defense measures are contained in the United Nations Charter. Article 51 imposes strict obligations on self-defense activities, the most important of which is that all actions are to be reported to the Security Council so that body may assume jurisdiction if it chooses. Several of the writers who supported the United States-OAS in Cuba, however, relied upon a self-defense argument. According to one of them, the action "was in fact anticipatory individual and collective self-defense permitted by" Article 51 of the Charter. 133 Others have argued that weapons technology has altered the requirements of a nation invoking a self-defense argument for anticipatory actions. 134 Nevertheless, it is generally conceded that under the contemporary legal system, self-defense measures can only be invoked as redress to attack; they cannot be invoked as anticipatory action. 135


135. See generally, Tung, International Law in an Organizing World, pp. 417-419; Brownlie, International Law and the Use of Force by States, pp. 278-279, and Falk, Legal Order in a Violent World, p. 205. In regard to the Cuban case specifically, see Wilson, "The Use and Abuse of
Since the other basis for the use of force in the inter-American system was in response to "any situation that might endanger the peace of America," the problem remains to determine if the presence of missiles in Cuba constituted such a threat. At the risk of undue repetition, it must be acknowledged that the Americas' policy-makers perceived such a threat, while the Cuban and Soviet leaders did not. But it is asserted here that regardless of whether or not the missiles threatened the peace, the United States and the OAS were circumscribed in regard to the measures they could take. To validate this assertion, it will be necessary to examine the Rio Treaty and the OAS Charter in the context of the United Nations Charter.

The basis of justification of the quarantine/blockade in regard to the United Nations Charter was Chapter VIII, Regional Arrangements:

Article 52: 1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of internal peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. 136

Among the purposes and principles referred to, are that "all Members shall settle their disputes by peaceful means," and


that all "Members shall refrain from the threat or use of force" in their international relations. The quarantine/blockade was a resort to the use of force, and as such, was implicitly denied under Article 52.

Article 52 of the Charter continues by obliging member nations to rely upon regional agencies to settle disputes pacifically before reporting them to the Security Council. This provision clearly envisions that the reliance upon organizations of a regional character should be primarily for settling disputes peacefully, and does not permit de jure enforcement actions—uses of force—by such agencies. Article 52 further obligates states to report any action taken in self-defense to the Security Council.

The following article in Chapter VII is even more explicit regarding the rights and duties of regional agencies: "The Security Council shall, where appropriate, utilize such regional arrangements and agencies for enforcement actions under its authority. But no enforcement action shall be taken under regional arrangements or regional agencies without the authorization of the Security Council . . . ." This language is clear, and binding on member

137. Ibid., Article 2, paragraphs 3 and 4.

138. Ibid., Article 52, paragraph 2. This conforms to Article 33, paragraph 1, in Chapter VI, Pacific Settlement of Disputes.

139. Ibid., Article 53, paragraph 1, emphasis added.
nations of the United Nations. Therefore, it is evident that no enforcement action could be taken by the OAS without Council authorization, and no such authorization was obtained.

At one point, however, a representative of the department of state contended that the quarantine/blockade was not in violation of the United Nations Charter because it was not technically an enforcement action. The distinction between an enforcement action, which presumably would require Security Council authorization, and an action which could legitimately be undertaken by a regional arrangement, rested on the voluntary nature of such an action. That is, the quarantine/blockade was an action recommended by the Organ of Consultation, undertaken voluntarily, and consequently was analogous to the actions taken by the General Assembly of the United Nations in the Suez crisis, and in the Congo crisis, which the International Court of Justice held were not enforcement actions under the Charter. This argument is specious, for its validity rests on the assumption that all the parties involved in the crisis accepted the United States-OAS


141. Ibid., p. 521.
action, while Cuba and the Soviet Union certainly did not.\textsuperscript{142} The quarantine/blockade was patently an enforcement action, as envisioned under Article 42 of the United Nations Charter, and consequently required Security Council authorization.

The United States-OAS leaders further argued that because the quarantine/blockade was a collective policy under the Rio Treaty, it was legal.\textsuperscript{143} Yet, enforcement actions taken unilaterally or collectively, are strictly limited by the Charter of the United Nations. Obviously, there was some conflict between the obligations outlined in the United Nations Charter and the rights delegated by the conventions of the inter-American system. In such cases, there could be no doubt about which document should be predominant. The language of Articles 52 and 53 of the United Nations Charter quoted above make the point clearly: the United Nations is the only organization which can take enforcement actions, except in cases of self-defense. The Charter of the OAS recognizes the preeminence of the universal organization, where it states: "None of the provisions of this Charter shall be construed as impairing

\textsuperscript{142} See the argument of Wilson, "The Use and Abuse of International Law," pp. 241-243, on this point, especially where he quotes G. S. Windlass to the effect that the United States was not "interpreting" Article 53, but "destroying it."

the rights and obligations of the Member States under the Charter of the United Nations."^144 Thus, the Americas' policy should have been subordinate to the United Nations, a point recognized by the department of state legal advisor when he noted: "Regional organizations, of course, remain subject to check even where, as in this case, they employ agreed procedures and processes. They are subordinate to the U.N. by the terms of the Charter, and in the case of the OAS, by the terms of the relevant inter-American treaties themselves."^145 The conclusion, then, is that since authorization from the United Nations Security Council was not forthcoming in October, 1962, the United States and the OAS exceeded their rights in instituting the quarantine/blockade. That is, the quarantine/blockade violated international law.

144. OAS Charter, in Ball, The OAS in Transition, Article 102. See also Office of Public Information, Charter, Article 103, which states: "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, the obligations under the present Charter shall prevail."

See also Connell-Smith, The Inter-American System, pp. 214-215, where he notes: "the fields in which the United Nations is concerned include the vital one of international peace and security. Here, too, the United Nations has priority, . . . ."

Legality of the Secretary General's Intervention

As noted earlier, the intervention of Acting Secretary General U Thant was considered by some to be important. The question here is: did he have the legal right to intervene in Cuba at all? And, furthermore, did he exceed his legal responsibility in his method of intervention?

There can be no doubt that the drafters of the United Nations Charter envisioned an expanded role for the Secretariat from that enjoyed by the analogous organ in the League of Nations. From a purely administrative role in the League, the Secretary General was assigned some political responsibilities under the Charter. This expanded mandate can best be understood by reading Chapter VI, Pacific Settlement of Disputes, in the context of Chapter XV, the Secretariat, of the Charter.

In Chapter XV, the Secretary General is granted the following prerogatives: "He shall be the chief administrative officer of the Organization," he "shall perform such other functions as are entrusted to him by" the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council; and he "may bring to

the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security."\textsuperscript{147} Thus, the Secretary General is charged with broad discretionary responsibilities relating to his authority in the international community and his interpretation of events therein.\textsuperscript{148} When he perceives a threat to the peace, he may report it, and he can receive instructions from the various organs on how to proceed. Implicit in these provisions is the involvement of the Organization at the behest of the Secretary General.

Article 33 of Chapter VI states: "The parties to any ... dispute shall first of all, seek solutions by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement ... or other peaceful means of their choice."\textsuperscript{149} An interpretation of this article in light of the responsibilities of the Secretary General suggests that the latter could intervene, as a representative of the United Nations, in the pacific settlement of disputes.\textsuperscript{150}

\textsuperscript{147} Office of Public Information, \textit{Charter}, Articles 97, 98, and 99.

\textsuperscript{148} Leon Gordenker, \textit{The UN Secretary-General and the Maintenance of Peace} (New York: Columbia, 1967), Chapter 7, "The Secretary-General and His 'Special Right,'" pp. 137-158.

\textsuperscript{149} Office of Public Information, \textit{Charter}, Article 33, paragraph 1.

Obviously, however, the Secretary General's powers in this case are carefully circumscribed. He cannot make binding decisions in regard to Chapter VI, but can only assist member governments. At the most, the Secretary General's participation in disputes is limited to making recommendations, for the only organ which can do more is the Security Council. On the other hand, the involvement of the Secretary General in extending his good offices can be extremely beneficial in peacefully settling international disputes.¹⁵¹

U Thant's involvement in the Cuban missile crisis was cautious, and not at all innovative. He undertook to represent a "number of member governments of the UN," in that "critical situation."¹⁵² The Secretary General perceived his role as one of establishing basic negotiating principles that would serve the interests of the parties concerned, as well as the interest of peace in the international community. U Thant attempted to create a channel consideration of the first Secretary General's concept of his role in negotiation and mediation. See also Lash, Dag Hammarskjold, pp. 58-65, for a discussion of Hammarskjold's negotiations for the release of United States airmen from the Peoples' Republic of China in 1955.


of communications within the United Nations through which messages of the parties involved in the crisis could pass. He did not attempt to make decisions regarding the dispute, nor did he seek to formalize his mediating role by securing instructions from the Security Council or the General Assembly. 153 His primary concern throughout the crisis was to assist the parties to the dispute arrive at the "modalities" of negotiation. Consequently, he did not exceed his authority, and he acted entirely within the constraints of the Charter and of the international legal system. 154

The following, then, are the conclusions of the traditional legal analysis of the Cuban missile crisis: the introduction of the missiles into Cuba by the Soviet Union did not, ipso facto, constitute a violation of international law. That the governments of the Americas perceived that such weapons provided a threat to the peace and security of the hemisphere obscured the issue, since such a threat may controvene provisions of the inter-American security system. Yet, even if such a threat did exist, the quarantine/blockade, a resort to the use of force, exceeded the

153. He did, however, make an appeal to the members of the Council. See "U Thant before the Security Council," in ibid., p. 64.

154. See Gordenker, The UN Secretary-General and the Maintenance of Peace, pp. 173-174, for a brief discussion of U Thant's role in Cuba from an institutional perspective.
authority of the regional arrangement, the OAS, which could not undertake such a measure without the authorization of the Security Council of the United Nations. Consequently, the quarantine/blockade was illegal. Finally, the actions of the Acting Secretary General of the United Nations, U Thant, were clearly within the prerogatives of his office as established by the Charter of the United Nations.

The Cuban Missile Crisis and the Functional Framework of Law

Again, this analysis has not cast much light upon the importance of law in the crisis. According to one scholar, the missile crisis was "a real triumph for the lawyer and his role in decision-making. . . . The lawyer in this crisis has not been a mere nay-sayer. It is perfectly obvious to anyone who knows anything about the legal issues involved, that they were carefully considered and that plans were made in this crisis with the legal situation in mind."

But to fully appreciate this "triumph," it will be helpful to examine the Cuban crisis from the functional perspective.

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Throughout the thirteen day crisis, international law was relied upon as a medium of communications in the functional sense. The original Soviet-Cuban legal justification for the emplacement of the MRBMs and the IRBMs was to protect the Republic of Cuba's independence and political integrity, and to guarantee Cuba's inherent right to self-defense. This goal of Cuban preservation remained, ostensibly, throughout the crisis, as a crucial element of the Soviet Union's position, and when the goal was satisfied by the American pledge of non-intervention, the crisis subsided, and the missiles were eventually withdrawn from Cuba.

Upon discovering the missiles in Cuba, the original United States private response was far from legal. President Kennedy and his advisors apparently construed the emplacement of the missiles as a power move by the Soviet Union, in an attempt by the latter to close the missile gap and to improve the Soviet position in the cold war, as well as to protect Cuba. The United States reaction was conceived of as a counter to these motivations. Nevertheless, the initial public response by Kennedy was carefully phrased in the legal vernacular, partly, it was asserted, because the Soviet Union was impressed with "legalities." In his October 22 speech, Kennedy invoked the Charters of the United Nations and of the OAS as legal
foundation for the western hemisphere's reaction to the missile bases. Through his speech, he signalled Moscow that the removal of the weapons was of vital necessity to the United States and its American allies. Simultaneously, the president indicated the procedures he intended to follow: he would call for the convening of the Organ of Consultation of the OAS; he would have Ambassador Stevenson take the case to the Security Council; and he would press for the multilateralization of the United States decision to quarantine Soviet arms shipments to Cuba. The care with which the United States-OAS response was developed was evident from the remarks made by the department of state legal advisor, Abram Chayes: "from the outset the Secretary of State, the President, and the Attorney General were extraordinarily aware of the relation of our legal position and the legal elements in the decision to the success of any action that would be taken."

Following the ratification by the OAS of the quarantine/blockade scheme, the Soviet-Cuban response was also couched in the legal idiom. Throughout the exchange

156. Chayes, "The Cuban Crisis as Precedent," p. 56. Chayes' Deputy, Lenard Meeker, added: "The planning for U.S. action . . . was conducted with continuing reference to the legal position and rights of the United States and the view which the world would take of our actions. The course followed, and the sequence of actions taken were framed in relation to just these considerations." "Role of Law in Political Aspects of World Affairs," USDSB, 48 (January 21, 1963), p. 87.
of notes and the debates in the Security Council, the quarantine/blockade was labeled piratical; a serious violation of the freedom of the seas. The Soviet Union considered the disruption of maritime traffic so severe an action, that at one point it threatened to take reprisal actions, indicating that its submarine commanders had been instructed to sink any ship interfering with the Soviet fleet's right to ply the high seas. During the entire crisis, the Soviet Union and Cuba signalled their major legal objectives: the protection and self-defense of Cuba. The Soviet Union and Cuba also used law as a medium of communications by indicating which procedures they intended to follow, and wished the American nations to follow. The dialogue, they suggested, should be conducted under international auspices, and in a forum in which all parties could participate. The Soviet Union and Cuba argued for consideration in the Security Council, and against consideration by the Organ of Consultation of the OAS.

Clearly, in the Cuban missile crisis, the legal arguments were only part of the exchange among the nations involved. Both sides were fully aware of the political and military ramifications of their actions. And, all parties were cognizant of the perils of the situation. Nevertheless, as noted earlier, the reliance upon the lexicon of law in the exchanges among the nations aided in keeping the debate within manageable limits. International law helped
to objectify and clarify the positions of the rival nations. Thus, the communications function of international law was operating.

Providing Alternatives to Violence

Both elements of this function, utilization of international machinery for conflict resolution and the development of legal strategies which leave the opposing side the responsibility of resorting to force, were evident in the missile crisis.

First of all, the United States decision to collectivize the quarantine/blockade scheme through the OAS was an attempt to provide an alternative to unilateral action. In the legal analysis above, it was contended that the quarantine/blockade was beyond the scope of measures the OAS could legally undertake. But the United States position was that the Organization could legitimize such an action. The language of the United Nations Charter makes it clear that regional arrangements are acceptable methods for settling disputes. That the OAS overstepped its prerogatives by taking an unauthorized enforcement action is important, but the significance of the reliance upon this international institution should not be overlooked.

Secondly, all parties to the dispute relied upon the Security Council of the United Nations, at least as a forum in which each represented its position. Although
political realities precluded the Council from taking the actions the framers of the Charter had intended for it, the debates within the Organization did provide a public meeting-ground for the opposing nations. It is fair to say that the role of the Council in resolving the missile crisis was minimal, since the critical decisions were made outside that body. Nevertheless, the dialogue there assured that the entire international community would be informed of the unfolding drama of the crisis.

Finally, in regard to the first element of the providing-alternatives function, the role of the Secretary General in the 1962 conflict must not be underemphasized. As noted above, one source claims: "American writers have generally underestimated Thant's crucial contribution to the settlement of the missile crisis." The Acting Secretary General provided his good offices in an attempt to forestall military confrontation by serving as a conduit of diplomatic communications. His correspondence was seized upon by Soviet leaders as the basis of the eventual resolution to the conflict which had led to the crisis. Whether the Secretary General's overtures were the reason for, or only the occasion of, a settlement is not necessarily vital. His efforts to establish the modalities of a compromise were successful to the extent that they eventually served as the

basis for the settlement. To argue that without U Thant's intervention the crisis would not have been resolved in the fashion it was, would be empirically unwarranted. On the other hand, to overlook the importance of the Secretary General's timely contribution would likewise be unjustified. In this instance, the role played by Acting Secretary General U Thant must be accorded significance if for no other reason than that the actions and responses of Khrushchev made it important. U Thant acted entirely within his legal competence, and his activities served the cause of peace.

The second aspect of the providing-alternatives function is more difficult to conceptualize. There can be no doubt that the United States-OAS strategy was formulated in such a way that it was intended that the Soviet Union would be responsible for any decision to resort to force. Throughout the crisis, Kennedy was consumed by the notion that the Soviet leadership had to be given all the time possible to decide policy. In fact, Kennedy ordered the quarantine/blockade perimeter drawn back to provide additional time. Very clearly, the president wished to place the Soviet Union in the position of making the "ultimate" decision. The difficulty here is to determine the role of international law in this strategy.

It was argued above that the quarantine/blockade could not be legally justified. This should not deter from
the attempt to develop such a justification, however. From its inception, American decision-makers tried to found the quarantine/blockade on legal principles. It can be argued that the Americans perceived the quarantine/blockade as a legal maneuver, even though the soundness of that position is open to question. To the degree that American policy-makers conceived the action to be legal, it can be construed as part of their legal strategy. In other words, because the Soviet Union was preoccupied with legalities, the American policy-makers attempted to devise a legally justifiable response to the missiles in Cuba. This response took the form of the quarantine/blockade. A major benefit to this "legal" solution was that it left the responsibility for resorting to violence with the Soviet leadership. Therefore, it is the conclusion here that the legal strategy component of the providing-alternatives function of international law was working in the missile crisis.

The Soviet Union and Cuba were unable to devise a successful counter to the Americans' strategy. Although these two nations attempted to place responsibility on the western hemisphere states, i.e., the latters' threat to Cuban independence was the rationale for sending the missiles to Cuba, the Soviet Union was forced to recognize that additional actions rested with it. The alternatives available to the Soviet leaders were limited: run the
quarantine/blockade and confront American warships, or comply with American demands. The selection of the second option was a manifestation of the success of the American strategy, as well perhaps of the sound common-sense of Khrushchev and other Soviet leaders. Faced with the necessity of using force to violate the quarantine/blockade, the Soviet policy-makers chose to accede to American desires, that is, to discontinue shipments of nuclear weapons, and eventually to dismantle the missile bases within Cuba. This is a cogent example of international law functioning irrespective of the validity of a legal argument. It is clear that the providing-alternatives function of international law was important in the resolution of the Cuban missile crisis.

Defining-of-Boundaries of Crisis

In the Cuban situation, the legal issues were not originally the core ones. The basic issue in 1962 was the American perception of a threat to hemispheric security, and this threat transcended strictly legal concerns. Nevertheless, as the crisis unfolded, the debate between the opposing sides became frequently cast in terms of international law. Thus, after the crisis had begun, the questions of the limits of self-defense, the nature of the weapons in Cuba, and the legality of the quarantine/blockade evolved as crucial issues. This evolution partly established
boundaries for the Cuban conflict, and assured an important role for law in resolving the disputes manifested in the crisis.

The announced goal of the Soviet Union and Cuba in constructing the missile sites was essentially legal, however: the protection of the independence and security of Cuba. Central to the United States-OAS position was the argument that the MRBMs and IRBMs superceded Cuba's defense needs. This was evident in the offensive/defensive weapons controversy. Because much of the debate among the parties involved was directed toward this controversy, the dialogue was partly contained within manageable limits. Much of the exchange between the United States and the Soviet Union concerned this element of the crisis, since it was a clearly established principle of international law that a nation has the right to defend itself. Through focusing on the nature of the weapons, both parties refrained from expanding the issues of the crisis to global dimensions, and to overall security concerns.

Moreover, during the crisis, the Soviet Union and Cuba did attempt to confine the crisis within legal parameters. While these nations' leaders obviously recognized that the nations of the western hemisphere, and especially the United States, were far more concerned with the potential threat of nuclear weapons than they were in legal justification for their emplacement, Soviet and Cuban
spokesmen and their allies continued to defend their actions on the basis of law. In addition, the Soviet Union's consistent argument against the quarantine/blockade was legal: it was a disruption of maritime traffic on international waters, and was a serious violation of maritime law, constituting international piracy. In short, the Soviet Union's and Cuba's insistence on rebutting the Americas' policies on legal grounds was a significant restraining influence during the crisis.

The second aspect of the defining-of-boundaries function, the existence and availability of international machinery of conflict resolution, was perhaps even more important in the missile crisis than the first element of this function. In the initial United States reaction to the discovery of the missiles in Cuba, the existence of international methods for resolving disputes was recognized, since one of the original alternatives of the EXCOM was to take the question immediately to the United Nations Security Council. Moreover, in the announcement of the quarantine/blockade, Kennedy indicated the importance of the existing machinery by instructing that the United States case be taken to both the Council and to the OAS. The Soviet-Cuban response was also to take the matter to the Security Council. By recognizing that these international agencies existed, and were available, the opposing sides in the Cuban crisis were tacitly agreeing to impose
constraints on their individual actions. They were placing limits upon their potential policies. Once the parties to the conflict relied upon procedures provided by the international organizations, they had invoked alternatives to violence. This, then, was an example of the defining-of-boundaries function leading to another function, providing-alternatives, of international law.

The point here is not that the international agencies did—or could have—taken action, but that they were conceived of as important procedural alternatives to those involved, and that it was at least necessary for the parties concerned to argue their respective cases before international organizations.

The existence of the United Nations, and especially the OAS, had to be considered in any United States decision. More than merely satisfying the Soviet proclivity for legalities, United States decision-makers obviously realized the value of having their decisions collectively "legitimized." At the same time, by relying upon international agencies, the United States put limitations on its potential range of policies, at least at the beginning of the crisis.

Finally, the role of the United Nations Secretariat in this crisis situation must again be noted. Because the Secretary General of the Organization had long since established his competence to deal with international
emergency, it was to be expected that the good offices of U Thant would be available to the nations involved in the Cuban dispute. While this expectation was met, the initiative of the Secretary General should be acknowledged and applauded. His timely intervention, because he was available and took an active role, provided an admirable example of the creative use of the Secretary General's office in the international political arena.

The Functions of Law in Crisis

Once again, the inter-relationships of these three functions of law in crisis were evident. By invoking legal arguments in the various media of correspondence (communications), the parties to the missile crisis assured that some importance accrued to the legal issues involved (defining-of-boundaries). This relationship was reciprocal, since the nature of the issues insured that legal dialogue would be required. A central controversy in 1962 surrounded the respective perceptions of the concept of self-defense. In January, the United States president indicated that he could understand Cuba's desire for protection, and could tolerate a certain level of military assistance to Cuba from the Soviet Union. The problems arose over the definition of a defensive, as opposed to offensive, weapon. The centrality of this issue
(defining-of-boundaries) partly circumscribed the limits of the dialogue which ensued.

Again, it must be acknowledged that much of the communications among the concerned nations was not legal. After discovering the missile sites, much of the American, especially North American, position was formulated on the basis of national interests and hemispheric security. Nevertheless, the policy selected, the quarantine/blockade, was justified domestically and internationally, in terms of international law. And, the reaction to this policy by the Soviet Union was almost totally articulated in the legal idiom (communications).

An initial response of the United States to the discovery of the missile sites was to turn to an agency established in part to meet threats to the hemisphere, the OAS, to multilateralize its policy. The United States perception that this was an agency to rely upon (defining-of-boundaries), led to the attempt by the North Americans to explain its actions on a collective, regional arrangement, basis (providing-alternatives).

The United States-OAS policy of quarantine/blockade was devised in such a way to give the Soviet Union adequate time to prepare a response, but it was also designed to leave the Soviet leaders with the onus of first resorting to force, and therefore be encouraged to seek alternative courses of action (providing-alternatives). While there was
no strategic counter to this, the Soviet Union and Cuba, as well as the Americas, took their case to the United Nations Security Council (providing-alternatives), where the issues, legal and non-legal, were publicly debated (communications).

In sum, the conclusion here is that the role of international law was greater than generally acknowledged. Dynamic, functioning law has value, regardless of the validity or invalidity of a particular legal argument. To focus upon, or even to criticize, the soundness of a legal case obscures the point that law operates on a different, functional level; a level where the process as well as the principle, is valuable. In the Cuban missile crisis, the importance of international law has frequently been overlooked, perhaps because of the realization that few times in post-war history has the international community so seriously confronted the possibility of nuclear holocaust. Perhaps this analysis has indicated that although law may be pushed into the background by the actions of nations' leaders, it has a vitality and dynamic of its own, which insures that alternatives to violent confrontation exist, and can be relied upon regardless of the intensity of a crisis.
CHAPTER 4

SUMMARY AND CONCLUSIONS

This study was motivated by the assumption that international law has a more dynamic aspect than is generally ascribed to it through a traditional investigation of the legal elements in a critical situation. The objective has been to show how international law works in crisis to prevent and/or limit violence. The dynamic was conceptualized in terms of the "functions" of international law. The argument was, and is, that if the role of law is examined from the context of the functional viewpoint, a new and broader perspective of law in crisis will be attained.

In the Introduction, two traditional perceptions of the role of law were posited: the realist and the idealist. There, it was noted that for the realist, law existed to be exploited, to be used as a rationalization for foreign policy decisions. The realist has urged policy-makers to clothe their decisions in legalisms where possible, in order, apparently, to add to the persuasiveness of their case. The implication is that it is better to develop a sound legal argument than not to do so. A major weakness of the realist position is that it never fully explains why it is better to validate a foreign policy by invoking legal
principles and arguments. The idealist, on the other hand, has a substantial explanation on this point: it is incumbent upon national policy-makers to satisfy the obligations of the international legal system because of the moral strictures imposed by that system.

It seems clear that in both the Suez crisis and the Cuban missile crisis, national leaders were concerned with projecting an image of compliance with international law. They attempted this projection by arguing their legal cases in various forums: in mass communications media, in private and public direct exchanges among leaders, and in debates before international organizations. One ramification of the attempt to project the image of compliance was to accord international law importance in these crises, if for no other reason than that the leaders apparently believed their opponents and other members of the international community would be influenced by legalities. The focus of this study has been partly to illustrate the effects of this projection on the prevention and/or limitation of violence in these crises.

In the Canal crisis, legal issues were originally more important than in the Cuban episode. The 1956 dispute was triggered by a legal action, the nationalization of the Suez Canal Company in July. Through the summer and fall of 1956, officials of Egypt, Israel, Great Britain, and France continually invoked legal arguments to explain and justify
their policies. As the tension mounted, and the disputes in the Middle East began to assume crisis proportions, international law remained at the center of the controversy. At issue was whether or not the Egyptian seizure of the Canal Company was legal. Regardless of the position taken by representatives of the various nations, the major concern of the international community was to prevent the outbreak of open hostilities. Even in the closing days of October, when Israeli armed action was imminent, the effort to forestall violence preoccupied world leaders.

Following the invasion of the Sinai by Israel, and the attempted occupation of the Canal zone by Britain and France, the role of law was emphasized by the actions of the United Nations Organization and its Secretariat. Secretary General Hammarskjold's activities under the auspices of the Special Emergency Session of the General Assembly in establishing and directing the UNEF were instrumental in terminating the violence begotten by the invasions.

In the missile crisis, on the other hand, the essential nature of the crisis was not legal. In Cuba, the conflict was the result of a Western perception of a military threat. The discovery of ballistic missile sites on the Caribbean island convinced American policy-makers that Soviet influence in the western hemisphere had become intolerable. While the American nations could accept a Cuban argument for defense, they contended that MRBMs and IRBMs
exceeded Cuban needs. The resultant American policy of quarantine/blockade was instituted, then, not against what was conceived to be legitimate or legal Soviet-Cuban policies, but rather against what was construed to be a strategic-military maneuver.

Nevertheless, throughout the dramatic dialogue of the Cuban missile crisis, policy-makers, both Eastern and Western, continued to rely upon international legal principles. The United States and the OAS maintained that the quarantine/blockade was a legal response to the threat to the hemisphere, undertaken as prescribed by the Rio Treaty and the Charter of the OAS. The Soviet/Cuban position remained that their actions were solely directed toward the needs of Cuban self-defense, and that the interruption of maritime traffic on international waters was piracy.

Much of the public debate over the crisis was concentrated on the nature of the weapons in Cuba. The Americans regarded the missiles as offensive, strategic weapons, while Cuba and the Soviet Union maintained that they were defensive. Although this issue was never fully resolved, for Krushchev contended that the missiles were defensive even in his withdrawal proclamation, they were eventually dismantled and returned to the Soviet Union.

In both of the crises, international organizations, especially the United Nations, played a dynamic role. In Suez, the United Nations General Assembly and the Secretariat
were relied upon to devise a legally acceptable, and effective, response, an effort which was rewarded with the successful termination of hostilities. In Cuba, the intervention of Acting Secretary General U Thant was timely, and set the stage for arriving at the eventual modalities of a settlement. In both crises, the Security Council of the United Nations was involved. The Council provided a forum for debate, and an opportunity for the nations involved to publicize their positions. In addition, in the Cuban crisis, the OAS was relied upon by the United States as an alternative to unilateral action.

Yet, as important as the legal issues seemed to be in these crises, a substantive legal analysis does not produce a sufficient explanation of this importance, nor does it suggest the significance of the dynamic aspect of law in its role of limiting or preventing violence. It is possible to recapitulate the conclusions of the traditional legal analyses of the two crises very briefly: In Suez, the Egyptian nationalization of the Suez Canal Company was legal, since Egypt carefully followed the requirements of international law. The blockade of Israeli shipping through the Canal, however, exceeded Egyptian rights, mainly because the Egyptian contention that it was at war with Israel was legally untenable. Similarly, the blockade of shipping to and from Israel in the Straits of Tiran into the Gulf of Aqaba was not legally justifiable. On the other hand, there
were no acceptable legal justifications for the Israeli, and later the British and French, invasions of Egyptian sovereign territory. Finally, the actions of the United Nations and the Secretariat, including the invoking of the Uniting for Peace Resolution which took the Suez question to the General Assembly, and the exercise by the Assembly of its secondary responsibilities in the area of peace and security by establishing the UNEF, were entirely within the legal competence of the Organization and the respective organs.

In the Cuban missile crisis, the conclusions of the traditional legal analysis were: Cuba had the right to prepare for its protection, including the right to receive missiles from the Soviet Union even though the American nations, especially the United States, regarded the missiles as a violation of the Rio Treaty and OAS charter. Nevertheless, the United States-OAS policy of quarantine/blockade exceeded the scope of actions which could be legally undertaken by the OAS in the United Nations system, even if the American perception of the nature of the missiles could have been legally substantiated, since the quarantine/blockade was an enforcement action. Consequently, it was not a legal policy. Finally, the intervention by the Secretary General of the United Nations was clearly within the legal prerogatives of his office.

Thus, as noted in the two case studies, if the significance of the dynamic aspect of international law in
Crisis and the Functional Framework of Law

Before turning to the conclusions on the functions of law in crisis, a few points need to be restated. First, it should be recalled that the purpose of the functional framework was to establish that international law serves an objective and systemic goal of international politics. That is, a major presupposition of the framework was that law functions at a different level than that of simply providing principles and norms against which any crisis situation could be measured. Regardless of the nature of a crisis in contemporary international relations, law is in some way involved. The significance of law's role cannot be solely determined by analyzing the strengths and weaknesses of the legal arguments of the various nations involved in the crisis. Instead, it is necessary to go beyond the substance of the legal debate, and to examine the processes and methods of law. In other words, it is important to recognize the uses of law. The emphasis is upon the utilization of law to prevent and/or limit violence, irrespective of the intended manipulation of legal arguments.

Secondly, there are inherent methodological problems with developing a functional conceptual scheme of any kind in the social sciences. Many of these problems are apparent
in this study. One of the major problems, and one that is not peculiar to functional analysis, is that of developing measures of empirical validation. In many respects, the application of the framework amounts to little more than enlightened speculation. By focusing upon the functions of law which, it is contended, attempt to resolve conflict without resort to violence, the major intention is to suggest and illustrate a new perspective in the role of law; it is not the purpose of such a focus to "prove" that the law works a specific way. In other words, the attempt here has not been to argue that "law functions this way and only this way to prevent and/or limit violence," but instead to raise the question: "Is it possible that law functions this way? And, if so, how are the functions manifested?"

A closely related methodological problem, and perhaps a more serious one, is that of causality, a problem plaguing scientific inquiry at least since the time of Bishop Berkeley and David Hume. Early in this study, it was stated that: "Here, testability will be unsophisticated, and will depend simply on the determination of whether or not the functions of law in crisis were operating, and if so, whether or not" violence was prevented and/or limited. At the outset, it was hoped that this caveat would preclude a later allegation that unwarranted generalizations had been drawn from the analysis. On the contrary, however, this overly cautious approach imposed a major limitation on
the effectiveness of the framework, for the conclusions drawn from it and about it, must remain in the realm of hypothesis, rather than "fact," since no certain cause-effect relationship between the functions of international law and the preferred goal state of the international legal system can be inferred.

On the other hand, this limitation should not be allowed to overshadow the importance of the attempt to construct a functional conceptual framework. If this study were to deal with certainties, it would perforce be on some other subject. International law by its nature generally does not encourage certainty, but in most cases probability, a probability which in this inquiry remains suggestive rather than conclusive. It may be possible for one more quantitatively inclined than the present researcher to construct more precise, empirical measures of the functions of international law. Again, however, the concern here has been to develop a new perspective on the role of law in order to emphasize its dynamic, objective, and systemic impact on international crisis.

The Functions of International Law

Perhaps the most effective method of drawing conclusions about the functions of international law in crisis is to examine each of them in relation to both crises, and then to emphasize the interrelationships among them.
One relatively unexpected aspect of law is the initial importance of the defining-of-boundaries function. If both elements of this function, the centrality of legal issues and the availability of legal machinery of conflict resolution, are in evidence, the prospect for an important role for law is greatly enhanced. If the core issue of a crisis is legal, distinct, though intangible, constraints are placed on the methods to resolve the disputes inherent in the crisis. Activity is focused on a search for legal solutions, and the dialogue among nations involved is certain to be conducted in the lexicon of the law. And, when legal machinery of conflict resolution is available, this availability assures that such machinery will be invoked, which constrains unilateral action within predictable and identifiable parameters, thereby setting a boundary to the conflict.

In the Suez Canal crisis, the centrality of the legal issue of nationalization immediately set the stage for the ensuing dialogue among the nations involved. No nation which had an interest in the crisis could avoid addressing itself to the question of nationalization. And because this core issue was legal, its resolution necessarily demanded legal processes and methods. This demand was articulated by most members of the international community, including the super-powers, as reflected in the debates before the organs of the United Nations. Nevertheless, Israel,
Britain, and France were not constrained by the centrality of the legal nature of the dispute, and these nations took actions which transgressed the limitations imposed by the boundaries of the legal system. Their self-help measures, however, were resolutely opposed by the other members of the international community.

Moreover, the availability of legal machinery for conflict resolution was important in the Suez crisis. That the United Nations Secretariat had long played a dominant role in the Middle East insured that Secretary General Hammarskjold's office would be turned to in an attempt to resolve the disputes in the area, both before and during the crisis. There were also United Nations forces, in the form of the UNTSO, available in the field before the initiation of violence. Once the United Nations had legally seized itself of the Suez situation, and had decided to establish a peace-keeping authority, the existence of these forces facilitated the rapid deployment of the UNEF into the area of conflict, which was crucial in terminating the violence. Thus, the defining-of-boundaries function in Suez was extremely important. It insured a legal debate, and kept the developing crisis within limits that permitted the United Nations to organize a successful response to the outbreak of hostilities.

In the missile crisis, this function of international law was not as apparent. As noted above, the major
issue in Cuba was not legal, but a perceived military threat, although there were some legal issues (e.g., Cuban self-defense) involved from the beginning. It is important to recognize, however, that following the initiation of the crisis, several legal issues emerged which, while they cannot be considered the core issues, did have the impact of moving the debate partly from the political arena. That is, when the issues of offensive versus defensive weapons, and the legitimate scope of regional agency activity were raised, much of the more visceral and dangerous debate on strategy and national interest was avoided. More important in the missile crisis was the second element of the defining-of-boundaries function. Both sides to the Cuban crisis sought to place the situation before international agencies. The Soviet Union welcomed Secretary General U Thant’s intervention in the crisis, for Krushchev apparently perceived of the United Nations Secretariat, in this case, as a method to avoid direct military confrontation. The existence of an active and concerned Secretary General, then, at least from the Soviet perspective, served to partly contain the developing crisis. The United States regarded the OAS as the proper international organization to intervene in Cuba. While the legal analysis demonstrated that the OAS overstepped its authority by endorsing the quarantine/blockade, it is significant that the United States perceived the OAS machinery as a suitable procedure to respond to the missile
bases in Cuba. The important point here is not that the United States chose to manipulate the OAS to its own purposes, but that it chose to avoid going it alone in favor of regionalizing its policy. This was indicative of the availability of international machinery serving to put some constraints on potential unilateral actions. And, if it was true that the Soviet Union was impressed with legalities, the United States decision to take the Cuban matter to the OAS (although this in no sense legalized the actions of the United States), in order to justify its own policies, does indicate some desire to circumscribe the dispute within legal parameters.

Once the legal issues became important in both of the crises, and the existence and availability of machinery for legally settling the disputes had been recognized, the remaining two functions of international law developed added significance. As has been noted, the centrality of the nationalization issue in Suez insured that most of the dialogue of the crisis would be directed toward this issue. Much of the early debate, in all forums, was characterized by legal claims and counter-claims regarding Egyptian rights. Because the legal nature of the core issue assured this debate, law became a vital medium of the parties involved to signal one another in regard to objectives being pursued, and to processes through which those objectives could be pressed.
Great Britain and France relied upon the language of international law to indicate to Egypt, as well as to other members of the international community, how vital a free and open Canal was to their respective interests. The legal idiom was employed to call for special international conferences in London, as well as to take the Anglo-French case before various organs of the United Nations. Once the international agencies had agreed to consider the Suez question, the debate which transpired was characterized by its legal content.

The other issues in 1956, the blockade of Israeli shipping through the Canal and through the straits of Tiran, and the continual threat to Israel by fedayeen raids, also encouraged legal dialogue. The Egyptian blockade policies were justified legally, though the basis of that justification, the existence of a state of war, was rejected in the legal analysis. The important factor was not, however, that the legal argument was sound, but rather that it was made at all. The assumption is that the language of the law was used to objectify policy commitments and goals in a fashion recognizable to the opposing side. Here, Egypt clearly signalled Israel, and others, concerning its objectives and the processes it would use.

Likewise, Israel relied upon the law to oppose the blockades, charging that they were in violation of the Charter of the United Nations and other legal principles.
By relying upon legal exchange, the conflict was initially, it is argued, partly contained. Moreover, much of the debate regarding the fedayeen raids was couched in the legal idiom. Israel argued that the raids, and indeed the existence of fedayeen camps on its borders, were a threat to its national sovereignty. Israel communicated to Egypt that the termination of the blockades and the elimination of the raids was vital. And while the October invasion cannot be construed as an acceptable legal process to redress Israel's grievances, such an action was implicitly signalled to Egypt through legal dialogue.

Even after the invasions of Egypt, much of the debate over the crisis was of a legal nature. The invading nations invoked legal arguments to justify their actions, although as noted, these arguments were extremely weak. Moreover, once the United Nations had become involved in the crisis, much of the discussion there was conducted with the vocabulary of international law. The debate over relying upon the Uniting for Peace Resolution, and the establishing of the UNEF was marked by its legal content. This aspect of the crisis assisted the Organization's discussions by preventing the arguments from degenerating to unresolvable charges made in behalf of the national interests of the parties involved. Thus, in the Suez crisis, the communications function was continuously and consistently being relied upon. And, though thus function of international law
was not sufficient to prevent the initiation of violence, it was useful in prohibiting the crisis from escalating to the degree that no legal solution could be devised.

In the Cuban missile crisis, this function of law was also significant, although the language of the law was often inextricably intertwined with the language of political-military interests. The initial response by the United States to the discovery of the missile sites in Cuba contained reference both to the international legal system and to the threat to the strategic interests of the western hemisphere. Kennedy's announcement of the quarantine/blockade, later endorsed by the Organ of Consultation of the OAS, charged the Soviet Union and Cuba with violations of international legal principles, including those contained in the Rio Treaty and the Charters of the OAS and the United Nations. Through the invocation of these legal documents, the American nations signalled Moscow and Havana the primary goal of American policy: the removal of the missile bases from the Caribbean island. President Kennedy also took the occasion of his public address to indicate the legal procedures the United States intended to use: the Organ of Consultation of the OAS, and the Security Council of the United Nations.

Once the existence of the missile bases was made public, the Soviet and Cuban justification for the missiles was almost exclusively articulated in the vernacular of the
law. The doctrine of Cuban self-defense was the cornerstone of the Soviet-Cuban case, an inherent right in international law, and a right incorporated into the United Nations Charter. That this argument was important to the Soviet-Cuban case is indicated by recalling that once the pledge of non-intervention was made by the Americas, the missiles were withdrawn from Cuba. Moreover, the Soviet Union and Cuba used legal language to signal to others which procedures they wished to use, and desired the Western nations to use. It was clearly within the Soviet-Cuban interests to have the case argued before the United Nations Security Council, where they both could participate. As noted above, the Council did consider the Cuban situation, and provided a world-wide forum for the legal debate.

In addition, once the quarantine/blockade had been instituted, the parties involved in the missile crisis continued to employ the language of international law. On the part of the Americas, the quarantine/blockade was justified as a response legally undertaken by the OAS. Furthermore, it was implied that the action was justifiable as an act short of war, as a pacific blockade/reprisal. The Soviet Union and Cuba continually condemned the quarantine/blockade as a severe violation of the law of international seas. It was, they contended, piracy.

Finally, much of the exchange between the opposing sides in the missile crisis revolved around the nature of
the missiles themselves. This offensive versus defensive controversy was essentially and inherently legal, because the resolution of the argument was the basis for the opponents' respective justifications. That is, because the Soviet Union, Cuba, and their allies, regarded the missiles as defensive, they continued to argue that the emplacement was justifiable as a self-defense measure. The American position, however, was that the missiles were offensive weapons, and thereby constituted a threat to the hemisphere, which allowed that actions could be undertaken under the auspices of the Rio Treaty and the OAS Charter.

Consequently, it is the conclusion here that the communications function of international law in its various manifestations was also operating in the Cuban missile crisis. The contention is that partly because this level of legal debate was maintained by the opposing sides, and that law was used by the opponents in the crisis to signal one another, the arguments never deteriorated into the realm of conflicts of national and strategic interests. If the debate had been allowed to deteriorate, the chances for over-response by both sides would have been enhanced. Violence was avoided in Cuba in 1962, and it seems plausible to credit the communications function of law for facilitating this avoidance.

The final function of international law, providing alternatives-to-violence, involves two elements. First, the
use of legal machinery for conflict resolution, and second, the development of a legal strategy which leaves the responsibility for resorting to force with an opponent. Again, both elements were involved in the two crises.

In the Suez case, this was indisputably the most important function of international law. In regard to the strategy component, Egypt's nationalization action was devised in a fashion to conform to principles of law, and to provide Nasser's government with a sound legal case. Even the policies of blockade were constructed in such a manner to leave to the other side the responsibility of resorting to force, or of finding a non-violent method of confronting the blockade. The British, French, and Israeli invaders could not successfully articulate a strategy which could effectively counter Egypt's, but it is worth note that the attempt was made.

But by far the most important role of international law in the Suez crisis was the reliance upon international machinery for resolving the conflict. The initial intervention of Secretary General Hammarskjold's good offices was important to the postponement of violence. Moreover, as indicated earlier, the "six principles" resolution of the Security Council provided the eventual modalities of a compromise on the issue of nationalization.

In addition to the traditional role of the Secretariat in the crisis, Suez served as the example of the
development of ad hoc procedures of international legal machinery. First, there were the two London Conferences. These international consultations provided an additional forum for the legal debates, as well as a place where interested parties could convene to seek a non-violent settlement to the disputes inherent in the nationalization issue. Although the Conferences were not successful in preventing violence due to the Egyptian refusal to embrace the schemes developed by them, at least the meetings provided additional time, and served to reinforce the "six principles" resolution of the Security Council. They also evidenced a strong desire within the international community to rely upon non-violent processes for the resolution of conflict.

Finally, after the hostilities erupted, the United Nations Organization was resorted to as an arbitrator and active participant in the Middle East. The critical importance of the UNEF has been noted at several places in this analysis. It was instituted under the authority of the General Assembly after the Suez issue had been taken from the Security Council under Uniting for Peace procedures. The purpose of the Force was to separate the combatants, and to facilitate the withdrawal of the invading armies, a purpose which was successfully achieved under the direction of Secretary General Hammarskjold and the Command Staff of the UNEF. It is fair to conclude that without the timely, and
legally sound, intervention of the United Nations, the violence in Suez would have been prolonged and far more devastating, although the costs of the conflict in terms of human suffering and material loss should not be minimized.

Thus, the providing-alternatives function of international law, in both its forms, was operating in 1956. Furthermore, its importance in terminating violence, through the use of existing international machinery, was the most salient example of functioning, dynamic international law, in the Suez crisis.

In Cuba, as well, both elements of the providing-alternatives function were manifested. From the outset, it was clear that the United States and the OAS were attempting to devise a strategy which would leave the onus of resorting to force, or finding an alternative, with the Soviet Union and Cuba. The quarantine/blockade was justified on legal grounds, unsound as they were, in such a way as to leave Soviet policy-makers the responsibility of making the decision to rely upon force. Even though the quarantine/blockade policy exceeded the scope of legitimate OAS authority, it was carefully constructed, and according to some scholars, faced with the choice of resorting to force by running the blockade or backing away from the policy of developing operational missile bases, the Soviet Union selected the latter option, which resulted in the non-violent resolution of the conflict. Thus, the effectiveness
of this function of law was not predicated upon the soundness of the American legal position, but upon the ability to devise a legal strategy which was minimally acceptable.

Moreover, the role of international organizations in the missile crises was important. First, the United States chose to satisfy the Soviet Union's proclivity for legalities by multilateralizing its quarantine/blockade policy through the OAS. While the legal authority of the OAS was exceeded when the Organization agreed to the quarantine/blockade, the point is that the United States decision-makers perceived the OAS as an instrument of international action; i.e., as an agency which could legally undertake the policy. Apparently, this maneuver was not sufficient to legalize the quarantine/blockade to the Soviet Union, since the Soviet leaders continued to regard the action piratical. Nonetheless, the United States reliance upon the international agency indicated its desire to seek a non-violent confrontation, as opposed to its general inclination to operate unilaterally.

Secondly, the intervention of the Acting Secretary General provided the Soviet leadership an opportunity to avoid a military confrontation with the Western nations. U Thant's actions, legally incontrovertible, provided the necessary elements of a compromise; an American pledge of non-intervention in Cuban affairs in exchange for Soviet agreement to withdraw the missiles. The intervention of
the Secretariat, then, was an example of the latent importance of international machinery for the non-violent resolution of disputes.

Concluding Observations

This summary should provide a basis for drawing a few suggestive generalizations regarding the functions of international law in crisis. In no modern crisis, with the possible exception of India's seizure of the city-colony Goa, have legal arguments been ignored. Admittedly, many arguments have been of dubious validity, but the fact remains that they have been attempted. This suggests that international law's effect in international relations is pervasive, though often ambiguous. But once the ubiquity of international law is recognized, an attempt to conceptualize its importance is certainly warranted.

As the present chapter has indicated, there is a crucial relationship among the three functions of international law. These functions, communications, providing alternatives-to-violence, and defining-of-boundaries-of-crisis, do not operate independently of one another. The effectiveness of each rests in part with the performance of the others. This interrelationship further suggests a certain operational priority in the successful functioning of international law to prevent and/or limit violence in critical situations.
The degree to which the functions of law are important is directly related to its role in defining the boundaries of the crisis. In those situations, like Suez, in which the core issue is a legal one, the prospect for a positive contribution of law in preventing or limiting violence is greatly increased. The centrality of a legal issue insures that the dialogue among the nations involved will be mainly couched in the legal idiom, and that law will serve as the vehicle of signalling allies and opponents of goals and processes of each of the concerned nations. Moreover, the existence and availability of legal machinery for conflict resolution, the second aspect of the defining-of-boundaries function, enhances the prospect that such machinery will be relied upon. Therefore, it is suggested that the defining-of-boundaries function of international law is of initial and over-arching importance. To invoke an earlier, over-worked metaphor, it sets the stage for a continual and significant role of international law in international crisis.

Yet, even if international law does not successfully define the boundaries of a crisis, the other functions of law may still be important. Because international law is always an element in crisis, it can be relied upon as a medium of communications regardless of whether or not the core issue is legal. Such was the case in the Cuban missile crisis. Indeed, in Cuba, the communications function was
the important one, and it had a converse relationship with
the defining-of-boundaries function suggested above. That
is, since throughout the 1962 dispute much of the debate
was conducted within the vocabulary of international law,
many of the initially tangential legal issues became more
important. It seems clear that national leaders in crisis
situations with to objectify their policy commitments by
justifying their respective cases on the basis of law. The
impact of this attempt to objectify is to emphasize legal
issues even if originally they were not central to the
dispute. Thus, in the missile crisis, although American
decision-makers were primarily concerned with a perceived
military threat, the debate between East and West became
involved with the legal questions of legitimate measures of
self-defense, and with the legal authority of regional
international organizations. Therefore, the effectiveness
of relying on international law to communicate can lead to
a more important role of law in defining the boundaries of a
crisis, and in directing resolution of the conflict into
non-violent channels.

Similarly, the missile crisis demonstrated that the
providing-alternatives function can be important irrespec-
tive of the initial effectiveness of the defining-of-
boundaries function, although here the second element of the
defining-of-boundaries function, the existence and avail-
ability of procedures for resolving conflict, was present.
Legal alternatives to resolving conflict are attractive to national leaders even if the dominant issue in a crisis is not legal. The desire to avoid violent confrontation is so obvious in critical situations that to assert its significance requires no substantiation. Nonetheless, this aspect of international law is overlooked by analysts of international crisis frequently because the attempt to avoid violence by seeking alternatives is often unsuccessful, as in Suez. Yet, it is essential to recognize that international law does provide these alternatives, through international organizations, mediation, adjudication, and so on. That nations turn to these "vicarious substitutes" assures their importance. In the missile crisis, nations chose to rely upon international agencies as alternatives to unilateral action. The United States decision to take its case to the OAS was undoubtedly partly contingent upon the assessment by the United States that the Organization was predisposed to endorse North American policy. Nevertheless, a regional agency was relied upon, which demonstrates that even super-powers may forebear going it alone if an alternative is available. On the other hand, in Suez, the existence of legal machinery was early recognized by all parties to the dispute. This recognition, which was part of the defining-of-boundaries function, was manifested at a number of places. One notable result of the availability of the United Nations was the establishment and deployment of one
of the Organization's most effective peace-keeping operations, the UNEF. Thus, when legal machinery is available, it can be relied upon to provide innovative, and sometimes unique, alternatives to violence.

The operational priority mentioned above, then, is this: if international law is a central issue of a crisis, and/or if at the beginning of a crisis there exists and is available international machinery to which the parties involved can appeal to help resolve conflict (defining-of-boundaries), the parties are more likely to rely upon international law to communicate with one another, and to use international law to signal one another concerning vital goals and preferred processes (communications). Furthermore, nations are more likely to shape their legal arguments into strategies in an attempt to leave the other side the responsibility for either resorting to force or finding a non-violent alternative, and/or to use the available international machinery for conflict resolution (providing alternatives-to-violence).

On the other hand, even if international law does not effectively define the boundaries of the crisis, the communications and providing-alternatives functions of law can serve to bring the legal issues to the fore, thereby reinforcing the defining-of-boundaries function. But only rarely will the communications function be precluded from operating, and in almost every crisis, national leaders
will seek non-violent alternative procedures to settle conflict.

One comment must be added. At the beginning of this study, it was contended that the functional framework of international law "suggests a quasi-hypothesis, for another objective of this inquiry is to determine whether or not this framework—or perhaps a related alternative—is helpful in understanding the way international law works in crisis." Unfortunately, the validity of the framework, like its component parts, is not totally verifiable. In retrospect, however, the framework does provide for an additional perspective for the legal analysis of critical situations. It is hoped that the kind of functional analysis attempted here has illuminated a dynamic aspect of international law which is frequently overshadowed by other ingredients of crises. That this emphasis has been at the expense of other elements of crisis is not contested. Nevertheless, to the degree that this study has accented the importance of the functions of international law, the framework has indeed been helpful.
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