

THE NEW WORLD ORDER AND THE RULE OF LAW

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I. INTRODUCTION

"Out of these troubled times," President Bush told a joint session of Congress in September 1990, "a new world order can emerge, a new era, freer from the threat of terror, stronger in the pursuit of justice, and more secure in the quest for peace. An era in which the nations of the world, east and west, north and south, can prosper and live in harmony."¹

Bush spoke against the backdrop of the military confrontation in the Persian Gulf. The concerted United Nations (U.N.) action, the opposition to aggression, he said, heralded an era in which international conflicts could be managed, and in which aggression would no longer be feasible. The international community, free of the scourge of war, could address itself to other serious problems confronting the planet. It would be, Bush said, "a world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the

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1. *Transcript of President's Address to Joint Session of Congress*, N.Y. TIMES, Sept. 12, 1990, at A20. See also *Excerpts from President's News Conference on Gulf Crisis*, N.Y. TIMES, Aug. 31, 1990, at A11 (Bush stating, "as I look at the countries that are chipping in here now, I think we do have a chance at a new world order").

strong respect the rights of the weak." Bush said that "America and the world must support the rule of law. And," he promised, "we will."²

Bush's view of the Persian Gulf situation was not universally shared. Some regarded the United States' outrage over Iraq's invasion of Kuwait as selective. They pointed to other situations in which the United States had condoned or perpetrated aggression. The United States, they said, manipulated the United Nations, taking advantage of the Soviet Union's internal weakness. From this perspective, the Persian Gulf situation bespoke not a new era of harmony but a continuation of United States dominance over Third World resources, backed by the use or threat of military force. It was anything but a harbinger of a bright future. These critics also pointed to the United States' 1989 invasion of Panama, which was widely condemned as aggression, as further evidence that a new era of harmony was but a distant dream.

If a new world order is to emerge, it must, as President Bush said, be based on the rule of law in the world community. A prerequisite to the emergence of a new world order is adherence to the rule of law by the United States, the only functioning superpower. A critical question, therefore, is the United States' commitment to the rule of law.

This article reviews the United States' recent practices, both executive and congressional, to assess whether they bespeak an adherence to the rule of law. The article explores two aspects of United States practice: the extent to which the United States works cooperatively through international organizations, and the frequency with which it resorts to use of armed force.

II. THE UNITED STATES IN INTERNATIONAL ORGANIZATIONS

A major postulate of the new world order, as expounded by President Bush, is cooperation through international institutions to solve world problems. The Reagan Administration did not look to international organizations as a forum in which to resolve major issues. For the most part, it "avoid[ed] multilateral institutions and accountabilities."³ To the extent that it worked through international organiza-

2. Transcript of President's Address to Joint Session of Congress, N.Y. TIMES, Sept. 12, 1990, at A20. See also Excerpts from President's News Conference on Gulf Crisis, N.Y. TIMES, Aug. 31, 1990, at A11.

3. Burns H. Weston, *Lawyers and the Search for Alternatives to Nuclear Deterrence*, 54 U. CIN. L. REV. 451, 464 (1985). See also Burns H. Weston, *The Reagan Administration Versus International Law*, 19 CASE W. RES. J. INT'L L. 295 (1987).

tions, the Reagan Administration adopted a confrontational approach. This approach, said analysts, involved a "radical new theory about international law and institutions,"⁴ and "a dramatic break with past administrations."⁵

In the early years of the U.N. and the Organization of American States (O.A.S.), the United States found most other members prepared to follow its lead. With the end of colonialism in the 1960s and 1970s, however, the voices of the formerly dispossessed peoples were heard. In the United Nations, emancipated colonies promoted new principles. Meanwhile, in the O.A.S., the Latin states began to assert themselves. The Reagan Administration's adversarial approach was a reaction against a loss of control.

In international organizations, the Reagan Administration sought less to reconcile conflicting interests than to advance its own agenda. Ambassador Alan L. Keyes, Assistant Secretary of State for International Organization Affairs, explained, "[w]e must create in the United Nations and in other international organizations a political environment that is conducive to the pursuit of well-articulated and carefully defined U.S. foreign policy goals and objectives."⁶

That statement alone might not have been objectionable, since each state pursues its own objectives. The Reagan Administration, however, carried this approach to an extreme. Secretary of State George Shultz criticized prior administrations for being too conciliatory at the U.N. "While other[] [states] worked hard to organize and influence voting blocs to further *their* interests and promote *their* ideologies," he complained, "the United States did not make similar exertions on behalf of *our* values and *our* ideals."⁷ In the U.N. General Assembly, the Administration's promotion of its own agenda increasingly put it in a small minority when voting on resolutions. In the Security Council, the Administration increasingly resorted to use of its veto power.

The Reagan Administration pressured states that opposed its positions. For example, the General Assembly's decolonization committee expressed doubts that Puerto Rico was self-governing and asked

4. Thomas M. Franck & Jerome M. Lehrman, *Messianism and Chauvinism in America's Commitment to Peace Through Law*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 3 (Lori Fisler Damrosch ed., 1987).

5. *Id.* at 5.

6. FY 1987 Assistance Requests for Organizations and Programs, DEP'T ST. BULL., Aug. 1986, at 80.

7. The United Nations After 40 Years: Idealism and Realism, DEP'T. ST. BULL., Aug. 1985, at 18, 20 (emphasis in original).

the Assembly to "examine the question of Puerto Rico."⁸ In response, the Administration threatened to cut aid to developing states that appeared likely to vote in the Assembly to take up the Puerto Rico issue.⁹ The Administration took the position that Puerto Rico had achieved self-determination and did not want the Assembly to study that question.¹⁰ The Assembly succumbed to this pressure and voted to keep the issue off its agenda.¹¹

Resisting a strong international consensus, the Reagan Administration opposed the United Nation's Convention on the Law of the Sea, probably the most important multilateral treaty of the era. Although the United States played a key role in negotiating the treaty in the 1970s, the Administration voted against its final text.¹² It opposed the Convention's provisions to establish an international authority over mineral mining in the deep seabed, viewing these provisions as overly restrictive of U.S. mining companies.¹³ The Administration insisted on a view, rejected by most other states, that deep seabed mining was protected by the concept of freedom of the seas.¹⁴ The Administration's position on the Law of the Sea Convention set back efforts to achieve universally accepted norms to regulate the seas. On a similar rationale, the Reagan Administration opposed the General Assembly's Moon Treaty, which called for international control of the moon's mineral resources.¹⁵

The above-mentioned policy statements and positions are evidence of the Reagan Administration's low regard for working in a

8. *Puerto Rico: Action by the Committee on Colonial Countries*, 1981 U.N.Y.B. 1113 (Vote: 11 - 2 - 11), U.N. Doc. A/AC.109/677 (1981).

9. Michael J. Berlin, *U.S. Wins U.N. Vote on Puerto Rico*, WASH. POST, Sept. 25, 1982, at A1 (quoting U.S. Deputy Representative Kenneth Adelman that U.S. mission had indicated to states considering abstention that abstention "would be unfavorably met in bilateral relations and on Capitol Hill").

10. John Quigley, *The Legality of Military Bases in Non-Self-Governing Territory: The Case of United States Bases in Puerto Rico*, 16 DEN. J. INT'L L. & POL'Y 323, 343 - 44 (1988).

11. See *Puerto Rico: Action by the Committee on Colonial Countries*, 1982 U.N.Y.B. 1276; Michael J. Berlin, *U.S. Wins U.N. Vote on Puerto Rico*, WASH. POST, Sept. 25, 1982, at A1 (a vote against inclusion of Puerto Rico question on Assembly agenda Sept. 24, 1982, carried 70 - 30 - 43); *Allocation of Agenda Items*, U.N. GAOR, 37th Sess., Supp. No. 51, at 1, U.N. Doc. A/37/51 (1983).

12. U.S. Votes Against Law of the Sea Treaty, DEP'T ST. BULL., Aug. 1982, at 71 (statement by President Reagan on July 9, 1982).

13. See HOUSE SUB. COMM. ON OCEANOGRAPHY, DEEP SEABED MINING, H.R. 3350 and H.R. 4582, 95th Cong., 1st Sess., at 135, 191, 205, 228, 311, 345 (1977)(statements of corporate representatives).

14. James L. Malone, *Freedom and Opportunities: Foundation for a Dynamic Oceans Policy*, DEP'T ST. BULL., Dec. 1984, at 76.

15. See Elliot L. Richardson, *In Pursuit of a Law of the Sea*, WASH. POST, Mar. 24, 1980, at A22.

collaborative fashion with other states over issues of mutual concern. One major mechanism for international collaboration to which the Administration gave low priority was adjudicatory processes.

A. *International Adjudication*

If the rule of law is to prevail in the world community, states must resolve their disputes in accordance with internationally accepted principles. A primary mechanism for achieving this end is international adjudication.

The Reagan Administration limited international cooperation in the resolution of disputes by adjudication. The Administration, as the International Court of Justice (ICJ) later determined, committed aggression against Nicaragua in the early 1980s.¹⁶ But in 1984, when Nicaragua was about to sue the United States over that aggression, the Administration filed with the Court a new exception to the United States' 1946 acceptance of the Court's jurisdiction. The new exception was that the United States would not submit itself to the Court's jurisdiction for two years, regarding "disputes with any Central American State or arising out of or related to events in Central America."¹⁷ Since acceptance of the Court's compulsory jurisdiction is based on consent,¹⁸ the new document was intended to prevent the Court from hearing Nicaragua's complaint.

After Nicaragua filed, however, the Court decided that the United States was bound by a clause in its 1946 acceptance that promised it would not withdraw the acceptance without giving six months notice. The Court found that the Administration violated that undertaking by trying to avoid Nicaragua's suit.¹⁹

As an additional objection to Nicaragua's suit, the Administration argued that only the Security Council may handle ongoing military conflict.²⁰ Although the conflict was ongoing, the acts of aggression alleged by Nicaragua had already occurred. The fact that the conflict continued was no obstacle to a determination of Nicaragua's claim. The United States' position, if accepted, would have

16. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 22 (Nov. 26) [hereinafter *Nicaragua Case*].

17. 39 I.C.J.Y.B. 100 (1984) (letter of Secretary of State George Shultz).

18. Statute of the International Court of Justice, art. 36, appended to U.N. CHARTER, 59 Stat. 1031, T.S. No. 993 (1945) [hereinafter *ICJ Statute*].

19. *Nicaragua Case*, *supra* note 16, at 419, 431 (Report of Judgements).

20. *Id.* at 434 (International Court of Justice, Counter-Memorial submitted by the United States) [hereinafter *U.S. Counter-Memorial*]. See also, Isaak I. Dore, *The United States, Self-Defense and the U.N. Charter: A Comment on Principle and Expediency in Legal Reasoning*, 24 STAN. J. INT'L L. 1, 15 (1987).

meant that an aggressor could escape judicial condemnation by continuing to commit aggression. Rejecting this position, the Court found Nicaragua's application admissible.²¹ The United States position would have dealt a serious blow to the resolution of international disputes by adjudication, for it would have deprived the Court of the ability to hear disputes involving the most serious international issue, armed conflict.

At that point the United States withdrew from the case, refusing to take part in further proceedings.²² Then it withdrew entirely its 1946 acceptance of the Court's compulsory jurisdiction,²³ giving as its reason the Court's finding in the Nicaragua case. It called the ruling on admissibility a threat to U.S. security:

For the United States to recognize that the ICJ has authority to define and adjudicate with respect to our right of self-defense, therefore, is effectively to surrender to that body the power to pass on our efforts to guarantee the safety and security of this nation and of its allies.²⁴

Although a state using force determines that it is being invaded, it does not have the final word on whether its invocation of self-defense was proper. "The question of the legality of self-defense loses its essential meaning," wrote one analyst, "if the answer is left solely to the judgment of the state purporting to exercise that right."²⁵ Although the Security Council has competence under the Charter regarding breaches of the peace,²⁶ that competence is not exclusive of the jurisdiction of the Court,²⁷ which has accepted cases involving aggression.²⁸

Unfortunately, the United States' turn away from the Court came as the U.S.S.R., which had never accepted the Court's compulsory jurisdiction,²⁹ was contemplating doing so. Soviet President

21. Nicaragua Case, *supra* note 16, at 435, 440, 441.

22. United States: Statement on U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, *reprinted in* 24 I.L.M., 246, 248 (1985).

23. U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction, DEP'T ST. BULL., Jan. 1986, at 67 (text of Oct. 7, 1985, letter from Secretary of State George Shultz to U.N. Secretary General giving six months notice to terminate).

24. *Id.* at 70.

25. Oscar Schachter, *Disputes Involving the Use of Force, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 223, 230 (Lori Fisler Damrosch ed. 1987).

26. U.N. CHARTER art. 39.

27. Schachter, *supra* note 25, at 231.

28. *Id.* at 223, 224 (discussing Corfu Channel case).

29. Zigurds L. Zile, *A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy*, 58 AM. J. INT'L L. 359, 364, 365, 366 (1964).

Mikhail Gorbachev urged that the five permanent members of the Security Council agree on common criteria under which to accept the Court's jurisdiction.³⁰ The United States did not respond to this initiative.

Former U.S. Permanent Representative to the U.N. Donald McHenry, reflecting on President Reagan's first term in office, observed that the administration was pursuing:

a broad attack on the U.N. system and on the concept of U.S. participation in any institution which the United States does not dominate. It is an attempt to sail against the current of interdependence and a rejection of the idealistic notion that our long-term interests are best served by the rule of law and by the nurturing of institutions which attempt to improve relations among nations.³¹

Ambassador McHenry said that the United States was joining "the ranks of the lawless" and ignoring criticism, not only by traditional adversaries, but also by close allies.³²

The administration's retreat on international adjudication represented a significant withdrawal from a rule of law policy by the United States. It reduced the range of problems that might be resolved through adjudication and increased the number that might cause serious friction.

B. *Dues in International Organizations*

If the new world order is to be based on the rule of law, states must work collaboratively to make international organizations function. Those organizations operate on the basis of dues contributed by member states. The United States, because of its economic status, is a major financial contributor. The past decade, however, witnessed a reluctance on the part of the United States to make payments, as a result of its objections to certain aspects of the activity of the organizations. In one important instance, it withdrew from membership.

During the 1980s, the United States had a major confrontation with members of the United Nations over the payment of its assessed dues. Both the Administration and Congress took the initiative in objecting to paying for U.N. programs.

30. Mikhail Gorbachev, *Real'nost' i garantii bezopasnogo mira* [Reality and Guarantees of a Secure World], PRAVDA, Sept. 17, 1987, at 1.

31. Donald McHenry, Address given at the Annual Dinner held during the 78th Annual Meeting of the American Society of International Law, 1984 reprinted in AM. SOC'Y INT'L L. PROC. 318, 319 (1984).

32. *Id.*

In the early years of the U.N., when the U.S. was not seriously challenged, it paid its due assessments for the U.N. as a whole, and for its specialized agencies. In the 1970s, however, Congress began to balk at the assessments as Third World states increasingly opposed U.S. policy at the U.N.³³

In the early 1980s, for the first time the President began to take the lead in withholding payments to object to U.N. programs of which he disapproved, and Congress became more active as well. Beginning in 1982, President Reagan refused to pay the United States' assessed expenses for the Law of the Sea Preparatory Commission.³⁴ In 1983, Congress called for a withholding of 25% of the United States' assessment for programs connected with the Committee on the Exercise of the Inalienable Rights of the Palestinian People and the Special Unit on Palestinian Rights, and for projects that would benefit either the Palestine Liberation Organization (PLO) or the South West Africa People's Organization (S.W.A.P.O.).³⁵

In 1985, Congress ordered a 25% withholding for funds that would be used for the Second Decade to Combat Racism and Racial Discrimination, for the construction of a headquarters of the Economic Commission for Africa, and for any implementation of the General Assembly resolution that equated Zionism with racism.³⁶

These Congressionally-ordered payment reductions violated the

33. By way of exception, it should be noted that in 1972 Congress reduced the U.S. share of total assessments in U.N. and specialized agencies (exceptions for the International Atomic Energy Agency, the International Civil Aviation Organization, and peacekeeping operations). P.L. 92 - 544, Title I, § 101, 86 Stat. 1110, amended by P.L. 94 - 141, Title II, § 203, 89 Stat. 762. This led to a reduction of the United States assessment to 25%. See Richard W. Nelson, *International Law and U.S. Withholding of Payments to International Organizations*, 80 AM. J. INT'L L. 973, 978 (1986). From 1974 to 1976, Congress withheld payments to UNESCO after UNESCO refused to permit Israel to join its European regional group and criticized Israel for altering historic sites in Jerusalem. See Leo Gross, *On the Degradation of the Constitutional Environment of the United Nations*, 77 AM. J. INT'L L. 569, 573 (1983).

34. Statement of President Ronald Reagan, 2 PUB. PAPERS 1652 (Dec. 30, 1982). See also Patrick J. Hynes, Note, *United Nations Financing of the Law of the Sea Preparatory Commission: May the United States Withhold Payment?*, 6 FORDHAM INT'L L. J. 472 (1985); Nelson, *supra* note 33, at 974.

35. Department of State Authorization Act, Fiscal Years 1984 and 1985, § 114(a), Pub. L. No. 98 - 164, Title I, § 114, 97 Stat. 1017, 1020, amended by Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99 - 93, Title I, § 144, 99 Stat. 424 and by Pub. L. No. 100 - 204, Title VII, § 705, 101 Stat. 1390 (codified as 22 U.S.C. § 287(e) note).

36. Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99 - 93, Title I, § 144, 99 Stat. 405, 424 - 425 (codified as 22 U.S.C. § 287e note) (Supp. III 1985). See G.A. Res. 3379, U.N. GAOR, 30th Sess., Supp. No. 34, at 83, U.N. Doc. A/10034 (1975) (The Assembly had given no indication that it contemplated any expenditure of funds to implement the resolution.).

budget provisions of the U.N. Charter.³⁷ Every member state does not find every United Nations program to its liking, but a state must contribute to the budget as assessed. It may not pick and choose. After several states refused to contribute assessed monies to programs of which they disapproved, the ICJ ruled that U.N. member states must contribute for all assessed expenditures.³⁸

In 1985, the United States began to withhold partial payments of assessments to object to U.N. budget procedures. The United States felt the procedures gave smaller states too great a role. Congress adopted the Kassebaum amendment, which called for a 20% reduction in U.S. payment of its assessments to the U.N. and its specialized agencies, until those organizations allowed member states to vote in proportion to their contributions in setting the budget.³⁹

The Kassebaum amendment violated the United States' obligations to the U.N. The Charter of the U.N. and the constitutions of its specialized agencies do not contemplate consensus procedures to set budgets.⁴⁰ For the United Nations, the annual budget is fixed by the General Assembly,⁴¹ which then determines the shares to be paid by each state.⁴² On both the issue of adopting a budget and of allocating the dues obligation among member states, the Assembly operates on a two-thirds majority vote.⁴³ By ratifying the United Nations Charter,⁴⁴ the United States agreed to these budget provisions and to make payments as assessed.⁴⁵ The 1985 act violated these provisions, since its call for voting on budget-setting in proportion to assessments was inconsistent with the two-thirds majority procedure.⁴⁶ In 1987, in response to the U.S. objections, the General Assembly took steps to in-

37. U.N. CHARTER, art. 19. See *infra* note 46.

38. Certain Expenses of the United Nations (Article 17, para. 2, of the U.N. Charter) (adv. op.), 1962 I.C.J. 151, 168 (July 26). See also Nelson, *supra* note 33, at 978 - 79 (noting that both the State Department and Congress approved the Court's approach).

39. Pub. L. No. 99 - 93, *supra* note 36, Title I, § 143.

40. *Id.* at 633 (as to U.N.).

41. U.N. CHARTER art. 17(1).

42. U.N. CHARTER art. 17(2). Nelson, *supra* note 33, at 977 - 78.

43. U.N. CHARTER art. 18(2). Nelson, *supra* note 33, at 974.

44. ICJ Statute, *supra* note 18.

45. U.N. CHARTER art. 19.

46. See 131 CONG. REC. S7794 (daily ed. June 7, 1985) (statement of Sen. Mathias that the provision would put the United States in violation of its Charter obligations); Nelson, *supra* note 33, at 974 (noting that the U.N. budget procedure called for by the 1985 act would require an amendment of Charter art. 18); Thomas M. Franck, *Unnecessary U.N.-Bashing Should Stop*, 80 AM. J. INT'L L. 336 (1986) ("Across-the-board unilateral cuts in the U.S. contribution to the United Nations are a violation of Article 17 of the UN Charter and, thus, of a cardinal U.S. treaty commitment."); EEC: Memorandum to the United States Concerning the Financial Situation of the United Nations, Mar. 14, 1986, reprinted in 25 I.L.M. 482 (1986)

volve member states more fully in the budget process,⁴⁷ but the Assembly did not deviate from the Charter procedures for voting on the budget.⁴⁸

By 1990, the United States was in danger of losing its vote in the Food and Agriculture Organization (F.A.O.).⁴⁹ The U.S. arrears totaled nearly two years of its dues.⁵⁰ The arrears built up from non-payment attributable to the Kassebaum amendment.⁵¹

In 1988, the United States began a modest reversal on the U.N. dues issue. It resumed full payment of current United Nations dues.⁵² In 1989, it began payments on its arrears which totaled nearly \$1 billion. By late 1990, it still owed \$296 million.⁵³ In 1990, Congress softened its language on budget procedures, requiring the President to try to get the United Nations and its specialized agencies to set budgets through "consensus-based decision-making procedures" that "assure that sufficient attention is paid to the views of the United States and other member states who are major financial contributors to such assessed budgets."⁵⁴ The 1990 language differed from prior language in that it did not require that voting on the budget be based on contributions. However, the "consensus-based" procedures it contemplated still varied from the Charter procedures. The 1990 act also used a different formula for reducing the United States payment, putting the

(stating that implementation of Kassebaum amendment would put U.S. in violation of U.N. Charter art. 17).

47. G.A. Res. 41/213, 41 U.N. GAOR, 41st Sess., Supp. No. 53 at 57, U.N. Doc. A/41/53 (1987), incorporating recommendations made in *Report of the Group of High-Level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations*, 41 U.N. GAOR, 41st Sess., Supp. No. 49, U.N. Doc. A/41/49 (1986). With regard to the Group of Experts, see Nelson, *supra* note 33, at 975.

48. Elisabeth Zoller, *The "Corporate Will" of the United Nations and the Rights of the Minority*, 81 AM. J. INT'L L. 610, 634 (1987).

49. FOOD AGRIC. ORG. CONST., 12 U.S.T. 980 (as amended 1959).

50. Paul Lewis, *U.S. and U.N. Food Agency Head for a Clash*, N.Y. TIMES, July 12, 1990, at A10. See FOOD AGRIC. ORG. CONST., *supra* note 49, art. 18(2) ("Each Member Nation undertakes to contribute annually to the Organization its share of the budget, as apportioned by the Conference."), art. 3(4) (providing for loss of voting right if a state is two years behind in dues payments).

51. Paul Lewis, *U.S. and U.N. Food Agency Head for a Clash*, N.Y. TIMES, July 12, 1990, at A10. The United States cited as an additional reason for non-payment a plan by the F.A.O. to consult the Palestine Liberation Organization about F.A.O. work to help Palestinian farmers in the Israeli-occupied West Bank and Gaza Strip. *Id.*

52. Richard S. Williamson, *Developments in the UN System*, DEP'T ST. BULL., Sept. 1988, at 62, 64.

53. John M. Goshko, *U.N. Vote Authorizes Use of Force Against Iraq*, WASH. POST, Nov. 30, 1990, at A1.

54. An Act to authorize appropriations for fiscal years 1990 and 1991 for the Department of State, and for other purposes, Pub. L. No. 101-246, § 405(b), 104 Stat. 15 (1990) [hereinafter An Act to authorize appropriations].

onus on the President to determine whether appropriate procedures were being used. It specified that the President must withhold 20% of the funds appropriated by Congress to the United Nations, or a specialized agency, until he determines that it used "consensus-based decision-making procedures" as defined in the act.⁵⁵

In specialized agencies, as in the United Nations itself, the United States used its financial clout to block programs it opposed. In the World Health Organization (W.H.O.),⁵⁶ the U.S. threatened to withhold its dues if Palestine were admitted as a member state.⁵⁷ Yasir Arafat, the Chairman of the PLO, called the threat "blackmail," as the U.S. then contributed one fourth of W.H.O.'s budget.⁵⁸ The W.H.O. Director General, fearful over the loss of revenue, asked the PLO to withdraw its application.⁵⁹ Ultimately the W.H.O. voted to postpone the application, primarily because of the United States pressure.⁶⁰

Such withholding would have violated the W.H.O. Constitution, which requires payment of dues as apportioned by W.H.O.⁶¹ Regardless of the merits of the Palestinian application, the admission of Palestine would not have amounted to a material breach of the Constitution.⁶² Even if it had been a breach, the withholding of such a large share of the W.H.O. budget would have been a disproportionate response.⁶³

Beyond withholding dues, the United States began to use withdrawal as a weapon against international organizations whose policies

55. *Id.*, § 405(c). The President must certify to Congress that such procedures are being used. *Id.*

56. WORLD HEALTH ORG. CONST., 14 U.N.T.S. 185, 62 Stat. 2679, T.I.A.S. No. 1808.

57. See Paul Lewis, *U.N. Health Agency Seeks Compromise on P.L.O.*, N.Y. TIMES, May 7, 1989, at A5; *U.S. Warns WHO on Admitting PLO*, L.A. TIMES, May 1, 1989, at A1 (statement of State Dept. spokesperson Margaret Tutwiler); Adam Pertman, *US Vows Cutoff in WHO Funds if PLO Joins*, BOSTON GLOBE, May 2, 1989, at A1 (statement of Secretary of State Baker of U.S. plan to end funding to W.H.O. if Palestine were admitted). Congress has also threatened to terminate dues payments to the United Nations if Israel is expelled. See Pub. L. No. 99 - 93 § 142, *supra* note 36.

58. Jonathan C. Randal, *PLO Defeated in Bid to Join World Health Organization*, WASH. POST, May 13, 1989, at A1.

59. Norman Kempster, *PLO Urged to Drop Bid to U.N. Unit; U.S. Warns It Would Withhold Money for Health Agency*, L.A. TIMES, May 3, 1989, at A9.

60. Jonathan C. Randal, *PLO Defeated in Bid to Join World Health Organization*, WASH. POST, May 13, 1989, at A1; Burton Bollag, *U.N. Health Agency Defers P.L.O. Application to 1990*, N.Y. TIMES, May 13, 1989, at A3 (Vote: 83 - 47).

61. WORLD HEALTH ORG. CONST., *supra* note 56, arts. 7, 56.

62. Frederic L. Kirgis, Jr., *Admission of "Palestine" as a Member of a Specialized Agency and Withholding the Payment of Assessments in Response*, 84 AM. J. INT'L L. 218, 223 - 25 (1990).

63. *Id.* at 226 - 27.

it found inappropriate. It threatened to withdraw from, or suspend financial contributions to, specialized agencies when Arab states moved to expel Israel from such agencies.⁶⁴ In 1984, citing political issues, the Reagan Administration withdrew the United States from the U.N. Economic, Social and Cultural Organization (UNESCO).⁶⁵ The Administration said that UNESCO promoted Third World views directed against the West,⁶⁶ particularly on the issue of control of the activities of Western news media in Third World states.⁶⁷ "UNESCO policies," explained Gregory J. Newell, Assistant Secretary of State for International Organizations, "have served anti-U.S. political ends."⁶⁸ In addition to concern over press freedom, Newell mentioned "collectivist" trends in UNESCO, such as its espousal of the New International Economic Order, whereby Third World states sought to re-order their economic relations with the West to compensate for the profit the West gained during the colonial period.⁶⁹

64. *U.S. Warns Arabs on Postal Ouster of Israel*, N.Y. TIMES, June 15, 1984, at A9 (Universal Postal Union, 1984; International Atomic Energy Agency, 1982; International Telecommunications Union, 1982; International Labor Organization, 1977). The United States withdrew from the I.L.O. in 1977, returning in 1980. See Leo Gross, *On the Degradation of the Constitutional Environment of the United Nations*, 77 AM. J. INT'L L. 569, 573-74 (1983). See generally, WALTER GALENSON, *THE INTERNATIONAL LABOR ORGANIZATION: AN AMERICAN VIEW* (1981); Burton Bollag, *U.N. Health Agency Defers P.L.O. Application to 1990*, N.Y. TIMES, May 13, 1989, at A3 (refers to a standing U.S. threat to withdraw from any specialized agency that admits Palestine as member).

65. See *U.S. Practice*, 78 AM. J. INT'L L. 427 (1984).

66. Heather A. Wilson, *The Evolving Antarctic Legal Regime: The Rights of Peoples*, 83 AM. J. INT'L L. 670 (1989) (book review).

67. See Bernard Gwertzman, *U.S. Is Quitting UNESCO, Affirms Backing for U.N.*, N.Y. TIMES, Dec. 30, 1983, at A4 (Alan Romberg, Dept. of State spokesperson, cited UNESCO's "hostility toward . . . a free press" as a principal reason for withdrawal.). See also An Act to authorize appropriations *supra* note 54, § 408(a)(2) (stating that U.S. withdrew in 1984 because of problems in UNESCO and that "chief among these problems" was "the assault on the free flow of information" and "the pervasive ideological conflict fomented by the alliance between totalitarian and developing nations"). UNESCO is the principal international organization for cultural issues, including scientific research, copyright relations, fine arts, education, library exchanges, and preservation of cultural and historical monuments. See U.N. EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORG. CONST., Nov. 16, 1945, 4 U.N.T.S. 275, 61 Stat. 2495, T.I.A.S. No. 1580, 3 Bevans 1311. See generally WALTER H. C. LAVES & CHARLES A. THOMSON, *UNESCO: PURPOSE, PROGRESS, PROSPECTS* (1957).

68. Bernard Gwertzman, *U.S. In Quitting UNESCO, Affirms Backing for U.N.*, N.Y. TIMES, Dec. 30, 1983, at A1.

69. *Id.* See also Declaration on the Establishment of a New International Economic Order, May 1, 1974, G.A. Res. 3201, 6 (Special) U.N. GAOR, 28th Sess., Supp. No. 1 at 3, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715 (1974); CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975), reprinted in 14 I.L.M. 251 (1975).

The Bush Administration continued the UNESCO boycott.⁷⁰ In 1990, however, Congress said that some of the United States' concerns about UNESCO had been answered⁷¹ and asked the Secretary of State to work with the UNESCO leadership "to promote the progress necessary to justify United States consideration of reentry into UNESCO."⁷²

The practice reflected in the United States' policy towards international organizations in the Reagan and Bush Administrations has been to exert strong financial pressure on them to make them act in ways the Administrations considered appropriate, and to withdraw funding or participation if the organizations did not comply. This approach is at odds with the establishment of a world community based on the rule of law. If international organizations are to function effectively, they must be supported by member states, even when the organizations undertake policies to which some member states dissent. With more than one hundred states in the major international organizations, all policy decisions will engender dissent from some members. If the dissenters withhold funding, the organizations will not be able to carry out policy. International organizations are a key element of the rule of law, yet the Reagan and Bush Administrations have not shown a willingness to abide by majority approaches.

C. Access to the United Nations

If the United Nations is to function effectively, it must be able to invite to its proceedings the parties involved in international disputes. With the United Nations headquarters located in New York, this imposes a special obligation on the United States.

In 1987, for the first time, the United States took action limiting the access of accredited delegates to the U.N. headquarters in New York.⁷³ Congress passed legislation to close the Palestine Liberation Organization mission at the United Nations,⁷⁴ which had granted the PLO observer status.⁷⁵ The General Assembly resolved that the action would violate the United States' obligations to the U.N.⁷⁶ Under

70. Don Shannon, *Next Step: U.N. Rides High After Cold War*, L.A. TIMES, Aug. 14, 1990, at H1.

71. An Act to authorize appropriations, *supra* note 54, § 408(a).

72. *Id.*, § 408(b).

73. John Quigley, *Congress and the P.L.O. and Conflicts Between Statutes and Treaties*, 35 WAYNE L. REV. 83 (1988).

74. Anti-Terrorism Act of 1987, Pub. L. No. 100 - 204, 101 Stat. 1406, 1407 (1988).

75. U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974).

76. G.A. Res. 42/210B, U.N. GAOR, 42d Sess., 98th plen. mtg. (1988), reported in 22 U.N.L. REP. 53 (1988)(Vote: 145 - 1). See also *U.S. Seeks to Keep P.L.O. Office Open*, N.Y.

the Headquarters Agreement between the United States and the United Nations, the United States was not to "impose any impediments to transit to or from the headquarters district" by "persons invited to the headquarters district by the United Nations . . . on official business."⁷⁷

Deciding that a dispute existed between the United States and the U.N. under the Headquarters Agreement,⁷⁸ the General Assembly asked the ICJ for an advisory opinion on whether, under an arbitration provision of the Headquarters Agreement, the United States must arbitrate this dispute with the U.N.⁷⁹ Rather than wait for an answer, the U.S. Department of Justice ordered the PLO to close its U.N. mission in New York,⁸⁰ and when it did not, filed suit in the United States District Court for the Southern District of New York.

The ICJ ruled that the United States was obliged to arbitrate its dispute with the U.N.⁸¹ The United States refused. That issue became moot, however, when the District Court ruled against the Justice Department. The court said that the 1987 Act did not expressly state that it was to prevail over the Headquarters Agreement, and, therefore, that the Agreement took precedence.⁸² After the State Department expressed concern over the issue, the Justice Department did not appeal this ruling.⁸³

The following year the State Department refused a visa to PLO Chairman Yassir Arafat, who had been invited to speak at a General

TIMES, Dec. 24, 1987, at A3. See Agreement Regarding the Headquarters of the United Nations, June 26, 1947, U.S.-U.N., 61 Stat. 3416, T.I.A.S. No. 1676 [hereinafter Headquarters Agreement].

77. Headquarters Agreement, *supra* note 76, art. IV § 11.

78. G.A. Res. 42/229A (1988), reported in 22 U.N.L. REP. 62 (1988) (Vote: 143 - 1).

79. G.A. Res. 42/229B, 42d Sess., U.N. Doc. A/42/PV.104 (1988) at 58, reported in 22 U.N.L. REP. 62 (1988) (Vote: unanimous (Israel and U.S.A. not participating)).

80. See Robert Pear, *Washington Talk P.L.O. Told to Shut Mission in 10 Days*, N.Y. TIMES, Mar. 12, 1988, at §§ 1 & 4 (City ed.); *U.S. Reluctantly Orders PLO to Close U.N. Mission as New Law Requires*, WASH. POST, Mar. 12, 1988, at A21. The Act was adopted Dec. 22, 1987, to take effect 90 days later. The Attorney General gave the mission notice Mar. 11, 1988, to close by Mar. 21, 1988. See *U.S. Seeks to Keep P.L.O. Office Open*, N.Y. TIMES, Dec. 24, 1987, at A3.

81. Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (U.N. v. U.S.A.), 1988 I.C.J. 12 (Apr. 26) (adv. op), no. 77.

82. See *United States v. Palestine Liberation Organization*, 690 F. Supp. 1243, 1243 - 60 (S.D.N.Y. 1988) (stating that under the Supremacy Clause of the U.S. Constitution, a subsequent act of Congress prevails over a treaty obligation, as a matter of U.S. domestic law, only if the act evidences an explicit intent to override the treaty obligation).

83. *U.S. Will Allow P.L.O. to Maintain Its Office at U.N.*, N.Y. TIMES, Aug. 30, 1988, at A1 ("It was decided, in light of foreign policy considerations, including the U.S. role as host to the United Nations organization, not to appeal in this instance.").

Assembly session in New York.⁸⁴ The Department gave as its reason terrorist acts committed by the PLO.⁸⁵ Because the PLO was accredited as an observer, however, the refusal to admit Arafat violated the Headquarters Agreement.⁸⁶ The General Assembly moved its session to Geneva to hear Arafat. In 1989, Arab states asked the General Assembly to change the status of the PLO from an observer organization to a non-member state, after the PLO declared statehood in 1988. The State Department threatened to withhold its U.N. dues if the resolution were adopted, and the proponents backed off. Secretary General Javier Perez de Cuellar said that any withholding of dues by the United States would violate its dues obligations under the Charter.⁸⁷

The spat over access to U.N. headquarters for the PLO and Arafat represented a serious violation by the United States of its obligation to host the organization. The U.N. must have the ability to invite and receive necessary parties if it is to fulfill its mission. That mission is crucial if the rule of law is to prevail in the world community. If the United States seeks to promote the rule of law, it must let the U.N. invite whom it chooses.

D. U.N. Voting Records of Other States

If international organizations are to function effectively, the member states must be free to voice their views. Stronger states, however, have an ability to influence weaker states. The United States, as a strong state, undertook a policy during the 1980s to pressure weaker states.

Congress reacted to the United States' loss of control in the U.N. In addition to passing a law to keep the PLO away from the U.N., it ordered the Secretary of State to submit annual reports "with respect to each foreign country member of the United Nations, [and] the voting practices of the governments of such countries at the United Nations."⁸⁸ The reports were to "evaluate [the] General Assembly and Security Council actions and the responsiveness of those governments to United States' policy on issues of special importance to the United

84. Robert Pear, *U.S. Denies Arafat Entry for Speech to Session of U.N.*, N.Y. TIMES, Nov. 27, 1988, at A1.

85. *U.S. Dept. of State Statement on the Visa Application of Yassir Arafat*, reprinted in 83 AM. J. INT'L L. 253, 254 (1989).

86. See Headquarters Agreement, *supra* note 76, art. IV, § 11. See also W. Michael Reisman, *The Arafat Visa Affair: Exceeding the Bounds of Host State Discretion*, 83 AM. J. INT'L L. 519, 527 (1989).

87. Paul Lewis, *Arabs at U.N. Relax Stand on P.L.O.*, N.Y. TIMES, Dec. 6, 1989, at A3.

88. An Act to authorize appropriations, *supra* note 54, § 406(a).

States.”⁸⁹ They were to analyze “the extent to which member countries supported United States’ policy objectives at the United Nations,”⁹⁰ and provide a country-by-country breakdown for every plenary vote in the General Assembly “on issues which directly affected important United States interests and on which the United States lobbied extensively.”⁹¹

For U.N. plenary session votes on all issues, the reports were to provide “a comparison of the votes cast by each member country with the vote cast by the United States.”⁹² They were also to analyze “the extent to which other members supported United States’ policy objectives in the Security Council” and give “a separate listing of all Security Council votes of each member country in comparison with the United States.”⁹³

The Secretary of State was “to inform United States diplomatic missions of the United Nations General Assembly and Security Council activities.”⁹⁴ The obvious, though unstated, intention was to enable ambassadors to pressure the host government. This practice compromised the spirit of free and genuine participation that is necessary for the U.N. to operate as an effective institution.

E. Panama and Iraq

One of the most important aspects of the work of the United Nations is to cope with armed conflict. Yet in two situations the Bush Administration itself resorted to armed force, acting alone, rather than seeking a U.N. approach.

The Bush Administration paid little regard to international procedure in its 1989 military action in Panama. It had urged the O.A.S. to pressure Gen. Manuel Noriega to resign from office as de facto leader of Panama, and the O.A.S. did so.⁹⁵ But when this pressure did not produce prompt results, the United States invaded and over-

89. *Id.*, § 406(a).

90. *Id.*, § 406(b)(1).

91. *Id.*, § 406(b)(3)(a).

92. An Act to authorize appropriations, *supra* note 54, § 406 (b)(4).

93. *Id.*, § 406(b)(5).

94. *Id.*, § 406(d).

95. See Larry Rohter, *O.A.S. Draws Latin Fire for Stand on Panama*, N.Y. TIMES, June 4, 1989, at A10; Robert Pear, *Latin Envoys Report No Progress in Their Effort to Dislodge Noriega*, N.Y. TIMES, June 20, 1989, at A6; Robert Pear, *Diplomats Urge Noriega to Resign by Sept. 1*, N.Y. TIMES, July 20, 1989, at A6; *Diplomacy: Haunting Noriega issue stirs great hope and low expectation as O.A.S. meets again*, N.Y. TIMES, Aug. 22, 1989, at A20.

threw Gen. Noriega.⁹⁶ Then the O.A.S., with the United States casting the lone negative vote,⁹⁷ "deeply deplored" the invasion and called on the United States to withdraw immediately, stating that withdrawal was necessary to protect "the right of the Panamanian people to self-determination without outside interference."⁹⁸ The U.N. General Assembly also condemned the invasion and demanded an immediate U.S. withdrawal from Panama.⁹⁹

In the 1980s, the U.S.S.R. called for a stronger role for the Security Council in resolving international crises. The United States did not respond to these proposals. President Mikhail Gorbachev suggested that a U.N. mechanism be devised to monitor arms reduction treaties, crisis situations, and even a state's military preparations that seemed directed at aggression.¹⁰⁰ Military observers, he said, should be sent more frequently as observers in conflict situations.¹⁰¹ When Iraq invaded Kuwait in 1990, the U.S.S.R. proposed that the long dormant Military Staff Committee of the Security Council, composed of its five permanent members, coordinate whatever military action might be taken by other states against Iraq or its shipping.¹⁰² As a result of its proposal, the Security Council's resolution on enforcement of the commercial blockade of Iraq asked member states to coordinate their vessel-searching activity through the Committee.¹⁰³

96. Andrew Rosenthal, *U.S. Troops Gain Wide Control in Panama; New Leaders Put In, But Noriega Gets Away*, N.Y. TIMES, Dec. 21, 1989, at A1.

97. See *O.A.S., American Nations Assail U.S. Action*, N.Y. TIMES, Dec. 23, 1989, at A15; *O.A.S. Votes to Censure U.S. for Intervention*, WASH. POST, Dec. 23, 1989, at A7.

98. *O.A.S., American Nations Assail U.S. Action*, N.Y. TIMES, Dec. 23, 1989, at A15. *La OEA deplora la invasión y exige un cese del fuego* [The O.A.S. Deplores the Invasion and Demands a Ceasefire], LA PRENSA (Buenos Aires), Dec. 23, 1989, at 4.

99. G.A. Res. 44/240, 44th Sess., U.N. Doc. A/RES/44/240 (1989), reported in *U.N. Assembly Condemns Invasion Calls for Troop Pullout*, WASH. POST, Dec. 30, 1989, at A17. In the Security Council, a majority voted to condemn the invasion, but three permanent members of the Council (France, the United Kingdom, and the United States) vetoed the draft resolution. U.N. SCOR, 44th Sess., 2902d mtg., at 18 - 20, U.N. Doc. S/PV. 2902 (1989), reported in *Two Delegates Vying to Be the Voice of the New Government*, N.Y. TIMES, Dec. 29, 1989, at A12.

100. Gorbachev, *supra* note 30.

101. *Id.*

102. See *Shevardnadze and Dumas at Press Conference*, TASS DISPATCH, Aug. 26, 1990; Paul Lewis, *U.S. Seeks to Revive Panel that Enforces U.N. Decrees*, N.Y. TIMES, Aug. 15, 1990, at A19 (U.S., reacting to Soviet proposal of previous week, recommends role for Military Staff Committee in goods interdiction program).

103. S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg., U.N. Doc. S/RES/665 (1990). See Eric Pace, *Confrontation in the Gulf*, N.Y. TIMES, Aug. 26, 1990, at A1 ("To make Soviet agreement possible, the United States eliminated the phrase 'minimum force' and met a Soviet request that any military actions be coordinated 'as appropriate' through a moribund United Nations body, the Military Staff Committee.").

With Iraq's invasion of Kuwait, however, the United States pursued a unilateral approach, seeking international endorsement only after the fact. It sent troops to Saudi Arabia without seeking U.N. endorsement.¹⁰⁴ It instituted military interdiction of Iraqi shipping unilaterally and then asked the Security Council to endorse that course of conduct.¹⁰⁵ Only after building up its forces in Saudi Arabia to a level adequate to invade Iraq did it ask the Security Council to endorse an invasion.¹⁰⁶

The endorsement it sought and received, moreover, was not for the kind of U.N. action contemplated by the U.N. Charter.¹⁰⁷ Chapter VII of the Charter calls for force organized and directed by the Military Staff Committee.¹⁰⁸ The resolution on Iraq did not mention the Military Staff Committee, but authorized any member state to take unilateral action against Iraq.¹⁰⁹

The resolution authorized states to use "all necessary means" to get Iraq out of Kuwait. Although the resolution did not expressly mention the use of military force, it impliedly authorized it, but only if such force was "necessary," meaning that other efforts had failed. But economic sanctions were then in place against Iraq, and a strategy of negotiation based on the pressure created by those sanctions held a prospect of success. Nevertheless, the Bush Administration avoided negotiations with Iraq over issues whose resolution might have led Iraq to withdraw from Kuwait.¹¹⁰

The Bush Administration used military force for purposes that went beyond getting Iraq out of Kuwait. By the time it began a ground war against Iraq, the U.S.S.R. was close to an agreement with Iraq for its pullout from Kuwait. Since there was a reasonable pros-

104. Andrew Rosenthal, *Bush Sends U.S. Force to Saudi Arabia as Kingdom Agrees to Confront Iraq*, N.Y. TIMES, Aug. 8, 1990, at A1.

105. S.C. Res. 665, U.N. SCOR, 2938th mtg., U.N. Doc. S/RES/665 (1990).

106. S.C. Res. 678, U.N. SCOR, 2963d mtg., U.N. Doc. S/RES/678 (29 Nov. 1990).

107. *Id.*

108. U.N. CHARTER art. 46.

109. S.C. Res. 678, U.N. SCOR, 2963d mtg. U.N. Doc. S/RES/678 (29 Nov. 1990).

110. Such issues included Iraq - Kuwait financial disputes arising out of loans Kuwait made to Iraq during the Iraq - Iran war, a dispute over a pool of oil under the two states' border, and Iraqi access to the Persian Gulf. They also included an international conference on the Palestinian - Israeli question. Most states in the Security Council favored such a conference in principle and advocated speedy action on it as an inducement for Iraq to leave Kuwait. But the U.S. administration refused to deal with that issue while Iraq occupied Kuwait. By threat of veto, it prevented the Council from calling for a Palestinian - Israeli peace conference at an early and definite date. S.C. Res. 681, U.N. SCOR, 2970th mtg., U.N. Doc. S/RES/681 (1990) (see appended statement of Council president indicating that the permanent members could not agree on an "appropriate time for such a conference").

pect of Iraqi withdrawal, further force against Iraq was not a "necessary means." A few days after the ground war began, the U.S.S.R. secured a firm commitment from Iraq to begin an immediate withdrawal from Kuwait.¹¹¹ Yet the Administration continued operations several more days, for the apparent purpose of reducing Iraqi military capability for the future.

In attacking Iraq, the United States did not adhere to the laws of war, particularly in its aerial bombardment. Under the humanitarian law, only military targets may be bombed.¹¹² The bombing in Baghdad, Basra, and other cities in Iraq hit public services such as electric power plants, water pumping stations, and government office buildings. While these targets had some military significance, their primary purpose was civilian. A team from the U.N. investigated the damage in Iraq and concluded that life in Iraq had been reduced to a "pre-industrial age."¹¹³ The bombing was largely responsible.

The record of U.S. participation in and support for international organizations reflects a rejection of multilateral approaches and a readiness to use heavy-handed methods by the Reagan and Bush Administration to get their way in these organizations. Even the United States' handling of the Persian Gulf situation in 1990-91, cited by the Bush Administration as an instance of multilateralism, involved primarily a unilateral approach by the United States. The symbolism was not lost on the U.N. when Secretary of State Baker submitted with one hand the draft resolution to authorize military force against Iraq and with the other hand a partial payment on U.S. arrears.¹¹⁴

The Bush Administration has not yet shown that it is prepared to work with international organizations rather than to use them for its own purposes. It has not yet indicated that it will comply with international organizations that try to restrain it from pursuing United States policy objectives. If the rule of law is to prevail, the United

111. Patrick E. Tyler, *Iraq Orders Troops to Leave Kuwait But U.S. Pursues Battlefield Gains*, N.Y. TIMES, Feb. 26, 1991, at A1; Paul Lewis, *A Diplomatic Flurry at U.N. Falls Short of Deal on Iraq*, N.Y. TIMES, Feb. 26, 1991, at A12.

112. Protocol I Additional to the Geneva Conventions of 12 August 1949 (Int'l Comm. Red Cross, 1977), art. 52 ("military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage"). See also *id.*, art. 54 (prohibiting attack on drinking water installations).

113. *Excerpts from U.N. Report on Need for Humanitarian Assistance in Iraq*, N.Y. TIMES, Mar. 23, 1991, at A5.

114. John M. Goshko, *U.N. Vote Authorizes Use of Force Against Iraq*, WASH. POST, Nov. 30, 1990, at A1.

States, as a major power, must follow a more clearly multilateral approach.

III. NATIONAL INTEREST AND THE USE OF FORCE

The Panama and Iraq crises saw the United States using military force abroad. Resort to armed force is perhaps the most difficult situation for the international community to regulate in its pursuit of the rule of law. States may deem their interests so vital as to override their regard for international processes. In recent years, the United States has developed new rationales to justify the use of force. These rationales must be explored to determine whether they are compatible with the rule of law.

The shift in the United States' international practice in the 1980s, as reflected in its participation in international organizations, was in part a product of the Reagan Administration's highly ideological approach to international relations. President Reagan's characterization of the Soviet Union as an "evil empire" lent an East-West element to issues that had little to do with superpower politics.

Prior post-War administrations, to be sure, had viewed the East-West confrontation as the overriding factor in international relations and had injected it in situations where it played little role.¹¹⁵ Prior administrations, as they intervened militarily abroad, had typically either lied about what they were doing or skewed the facts to make it appear that they were acting within some accepted international-law principle.¹¹⁶ But the Reagan Administration developed a theory that asserted the lawfulness of providing material aid to insurgencies that represent "democratic forces" against "totalitarian governments."¹¹⁷ The accepted view is that, in a civil war, an outside state must keep hands off, at least if no other state has aided one of the contending parties.¹¹⁸

115. See, e.g., *A Case Study of the Effect of International Law on Foreign Policy Decision-making: The United States Intervention in the Dominican Republic in 1965*, 24 TEXAS J. INT'L L. 463, 477 - 78, 483 - 84 (1989) (the handling by President Lyndon Johnson of the Dominican Republic civil strife in 1965).

116. See generally JOHN QUIGLEY, *THE RUSES OF WAR: PRETEXT IN AMERICA'S DECISIONS TO FIGHT* (forthcoming 1992) (on file with author).

117. Franck & Lehrman, *supra* note 4, at 3 - 4.

118. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1642 (1984); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970); Nicaragua case, *supra* note 16, at 109 - 10 (Merits) (aid to insurgency prohibited by customary law).

A. Military Intervention

The Reagan Administration's willingness to resort to armed force was dramatically displayed in its policy towards Nicaragua. Opposing Nicaragua on ideological grounds, the Reagan Administration went well beyond simply aiding a contending party. It fomented and organized an insurgency to bring down the government of Nicaragua.¹¹⁹ It set up and financed an external opposition and directed its efforts. Keeping "the democratic resistance [contras] alive in Nicaragua," President Reagan said, was necessary to "prevent[] the Soviets from establishing a beachhead in Central America. . . . [T]hose who govern in Nicaragua chose to turn their country over to the Soviet Union to be a base for communist expansion on the American mainland."¹²⁰ The Administration set mines in the waters of Nicaragua's major port and attacked oil depots at that port.¹²¹ The ICJ found that the mining, the attacks, and the organization of an insurgent force constituted aggression.¹²²

The Reagan Administration also encouraged neighboring states to oppose Nicaragua.¹²³ It militarized Honduras as a counterweight to Nicaragua.¹²⁴ It set up contra training bases in Panama¹²⁵ and convinced Costa Rica to forego its traditional policy of not maintaining

119. See Joel Brinkley, *Rebel Asserts C.I.A. Pledged Help in War Against Sandinistas*, N.Y. TIMES, Nov. 1, 1984, at A1 (citing statement of former contra leader Edgar Chamorro); Edgar Chamorro, *Confessions of a 'Contra'*, NEW REPUBLIC, Aug. 5, 1985, at 18, 18 - 19.

120. President Ronald Reagan, *Iran-Contra Controversy and President's Goals*, (Aug. 12, 1987), reprinted in DEP'T ST. BULL., Oct. 1987, at 4 - 5 (excerpts of Reagan's address to the nation).

121. Nicaragua Case, *supra* note 16, at 50 - 51.

122. *Id.* at 128.

123. BOB WOODWARD, *THE VEIL: THE SECRET WARS OF THE CIA 1981-1987*, 233 (1987).

124. See James LeMoyne, *Army Games Due with Hondurans*, N.Y. TIMES, Mar. 27, 1985, at A6 (7000 GIs took part in military exercises in Honduras; use of pilotless aircraft for reconnaissance missions over El Salvador); *Nicaragua Protests War Games*, N.Y. TIMES, Mar. 30, 1985, at A3 (U.S. troop presence in Honduras "increases tension and unrest in the region"); Gerald M. Boyd, *Honduras Is Told U.S. Will Defend It*, N.Y. TIMES, May 22, 1985, at A5 (Reagan promises to defend Honduras "against communist aggression"); Richard Halloran, *G.I. Training: Build a Road in Honduras*, N.Y. TIMES, Aug. 30, 1985, at A4 (construction of roads, airstrips; exercises a show of force to caution Nicaragua); WOODWARD, *supra* note 123, at 312 (Honduras exercises "gunboat diplomacy to scare neighboring Nicaragua").

125. See WOODWARD, *supra* note 123, at 229, 233; Stephen Engelberg, *U.S. Aides Say Panama General Proposed Sabotage in Nicaragua*, N.Y. TIMES, Nov. 19, 1987, at A1 (Administration officials said Gen. Noriega offered to undertake sabotage, possibly in Nicaragua, and that Adm. John Poindexter decided to run sabotage operations.); JONATHAN MARSHALL ET AL., *THE IRAN CONNECTION: SECRET TEAMS AND COVERT OPERATIONS IN THE REAGAN ERA* 99 (1987) (Panama channeling aid to "contras" in Costa Rica).

armed forces.¹²⁶

In 1987, Guatemala, Nicaragua, Honduras, Costa Rica, and El Salvador called for a withdrawal of outside military aid and a negotiated end to all insurgencies in the region. The Administration ignored the request and continued military aid to the contras and to the government of El Salvador, which was involved in a major civil war.¹²⁷ It justified this aid as necessary to pressure Nicaragua and the Salvadoran insurgents to negotiate, although most other states involved thought the aid prolonged the hostilities.¹²⁸ The Reagan Administration violated a ceasefire that had been arranged between the contras and the Nicaraguan government by giving direct cash aid to the contras and by encouraging the contras to refuse to negotiate.¹²⁹

B. Opposition to Self-Determination

The Reagan Administration's opposition to self-determination was demonstrated by its policies in the Middle East, Africa and elsewhere. In the Middle East, the Reagan Administration also followed a path that put it at odds with the rule of law. It rejected the demand for statehood of the Palestinian Arab people. It provided substantial military and economic aid to Israel, which Israel used to maintain its occupation of the Arab territory it occupied in 1967. That occupation was viewed by the U.N. Security Council as unlawful.¹³⁰ Given the fact that Israel used either the funds directly coming from the U.S. or other funds thereby available to it to maintain the unlawful occupation, the provision of this aid by the U.S. was unlawful.¹³¹ The U.N.

126. See Joel Brinkley, *U.S. Military Advisers to Train Costa Rican Police*, N.Y. TIMES, May 7, 1985, at A17 (training in counter-insurgency to cope with perceived threat from Nicaragua); Joel Brinkley, *Costa Ricans at Odds over U.S. Army Advisers*, N.Y. TIMES, May 19, 1985, at A16 (neutrality hard to maintain because of dependence on U.S. economic aid; some Costa Ricans oppose U.S. effort to militarize country; U.S. military aid to Costa Rica began in 1981).

127. Neil A. Lewis, *U.S. Envoys told to Convey Doubt Over Latin Plan*, N.Y. TIMES, Aug. 18, 1987, at A1.

128. Neil A. Lewis, *Contra Aid a Key, U.S. Official Says*, N.Y. TIMES, Aug. 19, 1987, at A9; Peter Ford, *Central American Peace Summit: Recriminations or Renewed Resolve?*, CHRISTIAN SCIENCE MONITOR, Jan. 15, 1988, at 7 (International Verification and Follow-up Commission of the peace plan, consisting of five Central American and eight other Latin American governments, plus the U.N. and O.A.S., which reported in Jan. 1988 that "the definitive end" of U.S. aid to the contras "continues to be an indispensable requirement for the success of peace efforts").

129. Kenneth E. Sharpe, *Did U.S. Contras Sabotage the Peace Talks?*, COLUMBUS DISPATCH, Aug. 7, 1988 at E1.

130. S.C. Res. 476, U.N. SCOR, 35th Sess., Supp. No. 35, at 13, U.N. Doc. S/INF/36 (1980).

131. John Quigley, *United States Complicity in Israel's Violations of Palestinian Rights*,

Security Council called on states not to provide Israel with assistance to establish settlements of its own citizens in the occupied territories, because it found such settlements illegal.¹³²

The Reagan Administration also set up roadblocks to self-determination in southern Africa. It increased cooperation with the government of South Africa by letting it buy commodities with military application.¹³³ This violated Security Council resolutions aimed at pressuring South Africa to end apartheid.¹³⁴ When bills were introduced in Congress to limit United States investment in South Africa, the Administration opposed them.¹³⁵ When Congress passed a sanctions bill, it had to overcome a presidential veto to implement its plan.¹³⁶ The Administration continued to oppose sanctions.¹³⁷

To justify its weak stand on self-determination, the Reagan Administration characterized the African National Congress, the major opposition group, as "Soviet-armed guerrillas"¹³⁸ that used "calculated terror,"¹³⁹ and whose goals reflected "continuing close ties via the South African Communist Party to its Soviet counterpart."¹⁴⁰ As in Central America, it was inserting an ideological element into an issue where that was at best a marginal factor.

On the related issue of Namibia, the Administration thwarted a

PALESTINE Y.B. INT'L L. 95-120 (1984). See generally John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y.B. INT'L L. 77 (1986).

132. S.C. Res. 465, U.N. SCOR, 35th Sess., Supp. No. 35, at 5, Res. & Decs. U.N. Doc. S/INF/36 (1980).

133. Kenneth S. Zinn, *US-SA: A Fusion of Interests*, SOUTHERN AFRICA, Sept. 1982, at 13.

134. S.C. Res. 418, U.N. SCOR, 32nd Sess., Supp. No. 32, at 5, U.N. Doc. S/INF/33 (1978), reprinted in 16 I.L.M. 1548 (1977).

135. Jonathan Fuerbinger, *House Votes Sanctions Against South Africa*, N.Y. TIMES, June 6, 1985, at A1; Jonathan Fuerbinger, *Senate Approves Economic Moves Against S. Africa*, N.Y. TIMES, July 12, 1985, at A1; *President's News Conference on Foreign and Domestic Issues*, N.Y. TIMES, Aug. 6, 1985, at B8 (opposes sanctions legislation); Bernard Gwertzman & Bernard Weinraub, *Reagan, in Reversal, Orders Sanctions Against South Africa; Move Causes Split in Senate*, N.Y. TIMES, Sept. 10, 1985, at A1.

136. Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C.A. § 5001 (West 1990 & Supp. 1991), Pub. L. No. 99 - 440, 100 Stat. 1086 (Presidential veto overridden by 100 Stat. 1116).

137. *United States Policy Options Toward South Africa, 1988: Hearings on S. 2378 before the Subcomm. on African Affairs of the Senate Committee on Foreign Relations*, 100th Cong., 1st Sess. 84 (1988)(statement of John C. Whitehead, Deputy Secretary of State).

138. President Ronald Reagan, *Ending Apartheid in South Africa*, Address Before World Affairs Council and Foreign Policy Association (July 22, 1986), reprinted in DEP'T ST. BULL., Sept. 1986, at 1, 4.

139. *Id.* at 2.

140. *Misconceptions About U.S. Policy Toward South Africa*, DEP'T ST. BULL., Sept. 1986, at 15.

process that could have achieved independence in the early 1980s. South Africa, as the administering power in Namibia since World War I, introduced apartheid in Namibia, in violation of its obligation to promote self-determination.¹⁴¹ The U.N. General Assembly and Security Council both called on South Africa to withdraw, but it refused.¹⁴² In 1978, the Security Council established a process to lead to independence.¹⁴³ A "contact group" of five Western states (including the United States) negotiated with South Africa and by 1982 was close to an agreement for early elections in Namibia.

In 1982, however, South Africa stated that it would not withdraw from Namibia so long as Cuba maintained troops in Angola, where the Administration covertly provided material aid to the National Union for the Total Independence of Angola (U.N.I.T.A.), a South Africa-supported insurgency.¹⁴⁴ The Administration backed South Africa's linking of the issue of Cuban troops in Angola with that of independence for Namibia and stopped urging South Africa to hold the Namibia elections.¹⁴⁵

The Administration took up the issue again only in 1988, chairing talks with Angola, South Africa, and Cuba. As a result, a ceasefire was declared, South Africa withdrew its troops from Angola and South Africa let Namibia hold elections that led to its independence.¹⁴⁶ But the Reagan Administration declared that it would continue to aid U.N.I.T.A.¹⁴⁷ The Bush Administration also continued

141. For Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 57.

142. S.C. Res. 276, U.N. SCOR, 25th Sess., 1529th mtg., *Res. & Decs.* at 1 - 2, U.N. Doc. S/INF/25 (1970). G.A. Res. 2145, U.N. GAOR, 21st Sess., Supp. No. 16, at 2 - 3, U.N. Doc. A/6316 (1966).

143. S.C. Res. 435, U.N. SCOR, 33d Sess., 2087th mtg., *Res. & Decs.*, at 13, U.N. Doc. S/INF/34 (1979).

144. Bernard Gwertzman, *President Decides to Send Weapons to Angola Rebels*, N.Y. TIMES, Feb. 19, 1986, at A1; James Brooke, *C.I.A. Said to Send Weapons via Zaire to Angola Rebels*, N.Y. TIMES, Feb. 1, 1987, at A1; WOODWARD, *supra* note 123, at 426.

145. ISAAK I. DORE, THE INTERNATIONAL MANDATE SYSTEM AND NAMIBIA 169 (1985); *Negotiations: SWAPO Denounces Western Stalling*, SOUTHERN AFRICA, Oct. 1982, at 4 - 5; Bernard Gwertzman, *President Decides to Send Weapons to Angola Rebels*, N.Y. TIMES, Feb. 19, 1986, at A3; George Shultz, Southern Africa: Toward an American Consensus, Address Before National Press Club (Apr. 16, 1985), in DEP'T ST. BULL., June 1985, at 22; Francis A. Boyle, *Creating the State of Palestine*, 4 PALESTINE Y.B. INT'L L. 15, 27 (1987 - 88)(on Administration actions that obstructed Namibia independence).

146. Christopher S. Wren, *Election in Namibia Worries Whites*, N.Y. TIMES, Nov. 13, 1989, at A3.

147. John D. Battersby, *Pretoria Finishes Its Angola Pullout*, N.Y. TIMES, Aug. 31, 1988, at A3; Robert Pear, *4 Nations Agree on Cuban Pullout from Angola War*, N.Y. TIMES, Oct. 10, 1988, at A1.

that aid.¹⁴⁸

By impeding self-determination in South Africa and Namibia, the Reagan Administration blocked the effectuation of the legal rights of the populations of those states. By aiding U.N.I.T.A., it unlawfully intervened in a civil conflict in Angola.

If the rule of law is to prevail, the United States must take a stricter view of the permissible use of armed force. At the same time, it must support the effectuation of self-determination and must not interfere financially or militarily to block self-determination.

C. Terrorism

One aspect of international life that led to the formulation by the United States of new rationales for use of armed force was terrorism. As the cold war diminished, so too did the use of anti-communism as a rationale for military intervention. "Notwithstanding the alteration in the Soviet threat," President Bush said, "the world remains a dangerous place with serious threats to important U.S. interests wholly unrelated to the earlier patterns of the U.S.-Soviet relationship."¹⁴⁹ General A. M. Gray, Commandant of the Marine Corps, said:

If we are to have stability in these regions, maintain access to their resources, protect our citizens abroad, defend our vital installations, and deter conflict, we must maintain within our active force structure a credible military power projection capability with the flexibility to respond to conflict across the spectrum of violence throughout the globe.¹⁵⁰

General Carl Vuono, Army Chief of Staff, said that "because the United States is a global power with vital interests that must be protected throughout an increasingly turbulent world, we must look beyond the European continent and consider other threats to our national security."¹⁵¹

The insertion of a military force in Saudi Arabia in 1990 showed that President Bush was willing to take action on this line of thinking. The ideology of intervention was shifting from anti-communism to one of maintaining the U.S. predominance in the Third World, primarily to ensure access to natural resources. That ideology, like anti-

148. Michael Clough, *U.S. Administration Keeps Cold War Hot in Angola*, L.A. TIMES, Nov. 18, 1990, at M2.

149. Maureen Dowd, *Backing Pentagon, Bush Says Military Can Be Cut 25% in 5 Years*, N.Y. TIMES, Aug. 3, 1990, at A13.

150. Michael Klare, *Policing the Gulf—and the World*, NATION, Oct. 15, 1990, at 420.

151. *Id.* at 418.

communism, put the United States at odds with international legality, which prohibits intervention to enhance a state's financial or material position.¹⁵²

One aspect of the ideology of the Reagan and Bush Administrations has been a strong emphasis on opposing terrorism. To the extent that actual terrorism is targeted, there is, to be sure, nothing objectionable. However, the two Administrations have defined terrorism broadly, to give themselves latitude to use force in situations in which it is not justifiable.

This emphasis on terrorism grew out of President Reagan's effective political use of the Carter Administration's inability to get U.S. personnel out of Iran. The Reagan Administration used an anti-terrorist rationale to justify actions it took on ideological grounds.¹⁵³ It commissioned, from the Central Intelligence Agency, a study of the frequency of terrorist acts. The Agency concluded that terrorist attacks against United States citizens were declining.¹⁵⁴ Since that finding did not suit the Administration's planned use of the anti-terrorism rationale, it asked the Agency to re-do the study using a broader definition of terrorism. The second study showed terrorist attacks against United States citizens to be increasing.¹⁵⁵

When it invaded Grenada, the Reagan Administration's motive was to overthrow a government allied with Cuba.¹⁵⁶ President Reagan gave, however, as one of several justifications, that Grenada was "being readied as a major military bastion to export terror and undermine democracy. We got there just in time," he said.¹⁵⁷ The Administration also cited its supposed concern that the government of Grenada might take United States' citizens resident in Grenada as hostages.¹⁵⁸ An Administration official, referring to undisclosed doc-

152. U.N. CHARTER art. 2, para. 4.

153. See John Quigley, *Eliminating Terrorism: A Law and Justice Approach*, 3 CONN. J. INT'L L. 47, 53 - 55 (1987); Robert Charvin, *La Doctrine Américaine de la "Souveraineté Limitée"* [The American Doctrine of Limited Sovereignty], 20 REVUE BELGE DE DROIT INT'L 5, 20 - 22 (1987).

154. Francis A. Boyle, *The Law Is An Ass*, AFRICAN EVENTS, May-June 1986, at 51, 53.

155. *Id.*

156. Dore, *supra* note 20, at 12; John Quigley, *The United States Invasion of Grenada: Stranger than Fiction*, 18 INTER-AM. L. REV. 271, 316 - 17 (1987).

157. Ronald Reagan, *America's Commitment to Peace*, Address to the Nation (Oct. 27, 1983), reprinted in DEP'T ST. BULL., Dec. 1983, at 1, 4.

158. Grenada: Collective Action by the Caribbean Peace Force, DEP'T ST. BULL., Dec. 1983, at 75 (statement of Jeane Kirkpatrick, Ambassador to United Nations). See also, Statement of Deputy Secretary of State Kenneth Dam, *id.* at 80. *U.S. Military Actions in Grenada: Implications for U.S. Policy in the Eastern Caribbean*, Hearing before the Subcommittees on International Security and Scientific Affairs and on Western Hemisphere Affairs of the House

uments, said:

It is clear from these documents and other information we now have that serious consideration was being given to seizing Americans as hostages and holding them for reasons that are not entirely clear, but seem to involve an effort to embarrass the United States and, more immediately, to forestall American military action in Grenada.¹⁵⁹

The Administration did not make public these or any other documents to substantiate its claim of a possible hostage-taking. When the United States invaded, Grenadian officials treated United States citizens courteously, even during the combat that led to their removal and arrest.¹⁶⁰ It seems probable that the Administration invented the specter of a hostage-taking as a pretext for its invasion.

The Administration exploited terrorism to get support for another ideologically motivated enterprise, its military operation against Nicaragua. In asking Congress to fund the operation, President Reagan referred to "[l]inks between the Sandinistas, the PLO and Libyans" and suggested that a refusal to finance the contras would make Nicaragua "a refuge and safe haven for terrorism" and would "result in the creation of another Libya on our doorstep."¹⁶¹ He said: "[g]athered in Nicaragua already are . . . all the elements of international terrorism—from the P.L.O. to Italy's Red Brigades."¹⁶² President Reagan did not substantiate these alleged linkages.

The Reagan Administration invoked its efforts against terrorism to justify two other legally suspect military actions against ideological opponents. In 1985 it forcibly diverted an Egyptian aircraft over international waters in the Mediterranean Sea, to detain persons on board whom it suspected of participation in the hijacking of the Achille Lauro cruise ship.¹⁶³ It justified the violation of international airspace on the grounds that the suspected hijackers, or perhaps other hijackers, might be planning terrorist attacks against United States' citizens in the future. President Reagan stated that his aim was to "sen[d] a message to terrorists everywhere, . . . [y]ou can run but you

Committee on Foreign Affairs, 98th Cong., 1st Sess. 32 (1983)(remarks of Deputy Secretary of State Kenneth Dam).

159. Philip Taubman, *U.S. Reports Evidence of Island Hostage Plan*, N.Y. TIMES, Oct. 28, 1983, at A14 (the official was identified as "senior" but was not named).

160. See Quigley, *supra* note 156, at 280.

161. Gerald Boyd, *Reagan Presses Hard for Contra Aid*, N.Y. TIMES, June 7, 1986, at A5.

162. *Transcript of the President's Speech*, N.Y. TIMES, Mar. 17, 1986, at A12.

163. Bernard Gwertzman, *U.S. Intercepts Jet Carrying Hijackers; Fighters Direct It to NATO Base in Italy; Gunmen Face Trial in Slaying of Hostage*, N.Y. TIMES, Oct. 11, 1985, at A1.

can't hide."¹⁶⁴ The Administration did not claim to possess evidence of specific future attacks, and there is no reason to believe that it had any.

In 1986, the Reagan Administration bombed Libya, causing deaths and property damage.¹⁶⁵ It asserted as one justification that Libya was likely to undertake future terrorist attacks.¹⁶⁶ It said that it had evidence about planned attacks on United States' facilities but did not make that evidence public.¹⁶⁷

Similarly, the Administration asserted a novel theory to justify the seizure of suspected terrorists abroad. It said that it is lawful to enter another state, without its consent, to capture suspected terrorists.¹⁶⁸ Under international law, however, police agents of one state are not permitted to operate in another state without that state's permission.¹⁶⁹ Specifically, they may not do so to seize suspects.¹⁷⁰ The Administration issued an instruction, however, that United States authorities should seize suspected terrorists in other states and bring them by force to the United States for trial, even if the other state did not give permission. It supported this instruction on a theory of self-defense, citing the possibility that the suspected terrorist might carry out a new terrorist attack in the future.¹⁷¹

This rationale stretched self-defense to the breaking point, however. The supposition that a person suspected of terrorism may carry out a future terrorist attack is hardly an "armed attack" under the U.N. Charter. The necessary degree of imminence is lacking, and the attack, presumably aimed at a citizen, is not in any event an act of aggression.

164. *Transcript of White House News Conference on the Hijacking*, N.Y. TIMES, Oct. 13, 1985, at A6.

165. Seymour Hersh, *Target Qaddafi*, N.Y. TIMES, Feb. 22, 1987, § 6, at 17.

166. Bernard Gwertzman, *Plots on Global Scale Charged*, N.Y. TIMES, Apr. 15, 1986, at A1.

167. *Id.*; *Announcement by Speakes*, N.Y. TIMES, Apr. 15, 1986, at A13.

168. John Quigley, *Government Vigilantes at Large: The Danger to Human Rights from Kidnapping of Suspected Terrorists*, 10 HUM. RTS. Q. 193 (1988).

169. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 433 (1987) (stating that "[l]aw enforcement officers of the United States" may "exercise their functions in the territory of another state only with . . . the consent of the other state").

170. *United States v. Toscanino*, 500 F.2d 267, 277 (2d Cir. 1974) (capture without consent of territorial state violates sovereignty of that state); S.C. Res. 138, 15 U.N. SCOR, 15th Sess., *Res. & Decs.*, at 4, U.N. Doc. A/INF/15/Rev.1 (1960) (unconsented intrusion by Israel into Argentina to capture Adolf Eichmann for trial on charges of crimes against humanity found to be unlawful).

171. John Walcott et al., *Reagan Ruling to Let CIA Kidnap Terrorists Overseas Is Dis-closed*, WALL ST. J., Feb. 20, 1987, at 1 (quoting Atty. Gen. Edwin Meese).

The Reagan Administration put the terrorism label on self-determination movements, like the Palestinian Liberation Organization, the African National Congress in South Africa, and South West African People's Organization in Namibia. It used that characterization as a basis for refusing to submit to the Senate, for its advice and consent, a treaty to protect the victims of war. Protocol I to the four 1949 Geneva humanitarian conventions expanded international protections for combatants and civilians in international armed conflict.¹⁷² Protocol I, which had been signed by President Carter, characterized as international those armed conflicts in which peoples fight against "colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."¹⁷³ President Reagan said that this provision promoted terrorism: "The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors."¹⁷⁴ The State Department's Legal Adviser termed the concept of self-determination a "justification for terrorist acts."¹⁷⁵ This position inaccurately equated terrorism and the pursuit of self-determination by military means.

Under the banner of anti-terrorism, the Reagan Administration proposed action against United States citizens who supported self-determination movements. It sought passage of a 1984 anti-terrorism bill to outlaw "logistical, mechanical, maintenance, or similar support services to the armed forces or any intelligence agency, or their agents" of a "terrorist group."¹⁷⁶ The State Department would have designated which organizations were "terrorist."¹⁷⁷ The proposal was rejected by Congress, where it was criticized for the broad power it would give the Administration.¹⁷⁸

The Administration used terrorism as a pretext to investigate

172. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature Dec. 12, 1977, entered into force Dec. 7, 1978, 16 I.L.M. 1391 (1977).

173. *Id.*, art. 1., para. 4.

174. Ronald Reagan, *Letter of Transmittal to the Senate of the United States*, 81 AM. J. INT'L L. 910, 912 (1987).

175. Abraham Sofaer, *Terrorism and the Law*, 64 FOR. AFF. 901, 904 (1986).

176. H.R. 5613, 98th Cong., 2d Sess., 130 CONG. REC. H3561 (1984); *Legislation to Combat International Terrorism: Hearings on H.R. 5613 Before the Comm. on Foreign Affairs*, 98th Cong., 2d Sess. 50-53 (1983)(statement of Willard A. DePree, Acting Under Secretary of State for Management)[hereinafter *Legislation to Combat International Terrorism*]; Leslie Gelb, *Administration Debating Antiterrorist Measures*, N.Y. TIMES, June 6, 1984, at A6.

177. H.R. 5613, *supra* note 176, ¶ 2.

178. *Legislation to Combat International Terrorism*, *supra*, note 176, at 55 - 56 (comments of Rep. Dan Mica), 57 - 63 (comments of Rep. Stephen Solarz).

United States citizens who opposed its policy of aiding the Salvadoran government in its civil war. In 1981, the Federal Bureau of Investigation (FBI) commenced surveillance of the Committee in Support of the People of El Salvador (C.I.S.P.E.S.). The FBI file on the investigation was headed "CISPES - International Terrorism,"¹⁷⁹ although the FBI had no basis for suspecting terrorism by C.I.S.P.E.S.¹⁸⁰ C.I.S.P.E.S., as the investigation disclosed, carried out only lawful activity. Despite the lack of evidence of criminal activity, the F.B.I. continued the investigation for five years.¹⁸¹

The Justice Department also used anti-terrorism as a pretext for a contingency plan it devised to expel aliens of Middle East origin from the United States. The Investigation Division of the Department's Immigration and Naturalization Service produced a document titled "Alien Terrorists and Undesirables: A Contingency Plan," that contemplated the possible incarceration and deportation of large numbers of Algerians, Libyans, Tunisians, Iranians, Jordanians, Syrians, Moroccans, and Lebanese,¹⁸² on the theory that nationals of these countries might be terrorists.¹⁸³

The Justice Department's Alien Border Control Committee established a "working group" charged with the "development of visa restrictions for aliens from certain countries or aliens of certain categories who are likely to be supportive of terrorist activity within the United States."¹⁸⁴ Another working group was charged with carrying out the "expulsion from the United States of alien activists who are not in conformity with their immigration status and expeditious deportation of aliens engaged in support of terrorism."¹⁸⁵

These plans were aimed less at terrorists than at supporters of self-determination movements. The Immigration and Naturalization Service employed a definition of "terrorism" that included the lawful use of force in support of self-determination. This overbroad defini-

179. Jonathan A. Bennett, *Webster Lied on CISPES Spying*, GUARDIAN (London), Feb. 10, 1988, at 1.

180. Jerry Berman, *FBI Spies on Central America Protesters*, CIVIL LIBERTIES (American Civil Liberties Union), Winter 1988, at 1.

181. Philip Shenon, *F.B.I. Papers Show Wide Surveillance of Reagan Critics*, N.Y. TIMES, Jan. 28, 1988, at A1 (The F.B.I. said that its investigation was based on reports of "alleged criminal activity," but it disclosed nothing more.)

182. Immigration & Naturalization Service, Investigation Division, *Alien Terrorists and Undesirables: A Contingency Plan 16* (May 1986) (unpublished government document on file with author).

183. *See id.* at 19, 24.

184. Robert J. Walsh, U.S. Dep't of Justice, *Alien Border Control Committee*, at 1 (unpublished government document on file with author).

185. *Id.* at 2.

tion was reflected in deportation proceedings it commenced against eight Palestinian aliens (citizens of Jordan) and one Kenyan, accusing them of membership in the Popular Front for the Liberation of Palestine. It acknowledged that it did not have evidence of plans to commit terrorist acts but alleged that the individuals had distributed brochures of the Popular Front.¹⁸⁶ These proceedings, in apparent conformity with the plans set in the quoted 1986 Department of Justice documents, threatened the status of resident aliens based on their nationality and support for self-determination movements.

While terrorism is a phenomenon that states must confront, they must not use it as a basis for inventing new and spurious rationales for the use of armed force. Just as in the domestic context the fight against crime must be kept within certain limits to preserve fundamental values, so in the international context the fight against terrorism must not encroach on other important values. For the rule of law to succeed, the United States must confine its anti-terrorist activities to appropriate channels.

D. New Approaches to the Law of Self-Defense

The primary justification for the use of armed force against another state is self-defense. States that use armed force in legally dubious circumstances typically depict their actions as defensive. Much controversy surrounds the definition of the outer limits of self-defense. If the rule of law is to prevail, self-defense must not become so large a category as to permit the use of force in situations in which the necessity for it is not actually present.

When called upon to justify the use of military force, the Reagan and Bush Administrations asserted views on the use of armed force that contradicted the U.N. Charter's strict prohibition. This posture posed a challenge to international legality, because the new positions asserted by the two administrations threatened to broaden permissible use of force to the point that the Charter would be seriously weakened.

The two Administrations stretched the accepted doctrine in three respects: on the use of force in anticipation of force by an adversary, on the use of force to protect citizens, and on the permissible limits on the amount of force used in self-defense.

186. Mary Thornton & Howard Kurtz, *Rights Groups Question Arrest of Palestinians*, WASH. POST, Jan. 29, 1987, at A28. See also Lena Williams, *9 Aliens' Arrests Laid to Politics*, N.Y. TIMES, Jan. 29, 1987, at A10; *Editorial: McCarran-Walter Strikes Again*, N.Y. TIMES, March 21, 1987, at A26 (the individuals denied membership in the Popular Front).

Self-defense in anticipation of an attack is a disputed doctrine, because the U.N. Charter requires an "armed attack" for invocation of self-defense.¹⁸⁷ Publicists who support the doctrine, and states invoking it, have said that the force anticipated must be imminent.¹⁸⁸ The Reagan and Bush Administrations, however, routinely ignored the requirement of imminence in invoking self-defense. In the bombing of Libya and the invasions of Grenada and Panama, they did not claim that the attacks they purported to anticipate from those states would occur imminently. Further, the Reagan and Bush Administrations argued that an attack on a United States citizen abroad, at the instigation of a state, was an "armed attack" against the United States, under the Charter. On the basis of possible future attacks on United States citizens the invasion of Panama was justified.¹⁸⁹

This position represented a dangerous expansion of permissible force. The U.N. Charter prohibits "force against the territorial integrity or political independence" of a state.¹⁹⁰ The General Assembly's definition of aggression, which lists acts constituting aggression, does not mention attacks against citizens.¹⁹¹ A State's use of force against citizens of another state is not an attack on that state. It violates the rights of that state but is not aggression against it.¹⁹²

In the Nicaragua litigation, the Reagan Administration expanded the proportionality requirement, an accepted limitation on the force used in self-defense. A state acting in self-defense may use only such force as is necessary to repel an attack.¹⁹³ The proportionality rule does not limit a defending state to the use of force precisely equivalent to that used against it,¹⁹⁴ but it does discourage responsive force that is substantially greater.¹⁹⁵

187. See U.N. CHARTER art 51; PHILIP JESSUP, A MODERN LAW OF NATIONS 166 - 67 (1948); LOUIS HENKIN, HOW NATIONS BEHAVE 141 - 45 (1979).

188. DEREK BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 184 - 93 (1958) (imminence must be evident).

189. 136 CONG. REC. S12 (Daily ed. Jan. 23, 1990) (statement of Sen. Kennedy listing justifications put forward by the Administration on Panama and stating, "Nothing on the public record makes any of these justifications persuasive").

190. U.N. CHARTER art. 2, para. 4.

191. *Resolution on the Definition of Aggression*, art. 3, Dec. 14, 1974, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975), re-printed in 13 I.L.M. 710, 713 - 14 (1974).

192. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 504 - 34 (1973).

193. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 261 - 64 (1963) [hereinafter USE OF FORCE]; Schachter, *supra* note 118, at 1637 - 38; BOWETT, *supra* note 188, at 105 (as applied to force against another state to assist endangered nationals).

194. USE OF FORCE, *supra* note 193, at 264.

195. Schachter, *supra* note 118, at 1637.

The Administration said that it was justified in using force against Nicaragua on the grounds that Nicaragua had carried out an armed attack against El Salvador by providing logistical and material aid to an insurgency there.¹⁹⁶ The ICJ, however, found little evidence of material aid by Nicaragua to Salvadoran insurgents at the relevant time period and thus did not have to decide whether the United States' force was proportional.¹⁹⁷ But, even if Nicaragua had been aiding the Salvadoran insurgents, the United States exceeded proportionality by mining Nicaragua's harbors, blowing up its major oil storage depots¹⁹⁸ and by organizing and funding the contra insurgency.¹⁹⁹

In its invasion of Panama, the Bush Administration also asserted self-defense in a fashion that exceeded the bounds of proportionality. If Panama was about to attack United States citizens, as the Administration alleged, the level of force employed by the United States was excessive.²⁰⁰ It used 24,500 troops and overthrew Panama's government.²⁰¹ United States aircraft attacking the military headquarters in Panama City levelled several nearby city blocks.²⁰² The invasion resulted in deaths estimated in the thousands.²⁰³ Several thousand more were hospitalized for wounds.²⁰⁴

The United States' recent invocations of self-defense are not pro-

196. Nicaragua Case, *supra* note 16, at 117 - 24, paras. 189 - 202 (referring to U.S. Counter-Memorial).

197. *Id.* at 86 para. 160 (merits).

198. *Id.* at 50 - 51 para. 86.

199. *Id.* at 53 - 63 paras. 92 - 112.

200. Bill McAllister, *U.S. Cites Self-Defense; Legal Scholars Skeptical*, WASH. POST, Dec. 21, 1989, at A36 (quotes Prof. Oscar Schachter that invasion might well have violated requirement of proportionality); John Quigley, *The Legality of the United States Invasion of Panama*, 15 YALE J. INT'L L. 276, 296 (1990).

201. Molly Moore & Ann Devroy, *Officials Say Panama Taking More Time and Troops Than Expected*, WASH. POST, Dec. 23, 1989, at A6.

202. Brook Larmer, *With the Dictator Disabled, Panama Looks to Rebuild*, CHRISTIAN SCIENCE MONITOR, Dec. 27, 1989, at 1.

203. See Andrew Rosenthal, *No More Panamas, Bush Aides Predict*, N.Y. TIMES, Jan. 8, 1990, at A9 (estimate of 400 deaths by Deputy Secretary of State Lawrence Eagleburger, estimate of a minimum of 1000 deaths by former Attorney General Ramsey Clark); David E. Pitt, *The Invasion's Civilian Toll: Still No Official Count*, N.Y. TIMES, Jan. 10, 1990, at A9; *Panamá sumida en el caos y Noriega continúa prófugo*, LA PRENSA (Buenos Aires), Dec. 23, 1989, at 1 (representative of overthrown Panama government estimated 6000 to 7000 killed); *Acusan a EE.UU. de esconder una matanza*, LA PRENSA (Buenos Aires), Dec. 26, 1989, at 2 (Red Cross representative says "at least two thousand killed; the morgues of the hospitals are overflowing and there is no more room"); J. D. Gannon, *Invasion Took Its Toll in Deaths, Human Suffering*, CHRISTIAN SCIENCE MONITOR, Dec. 29, 1989, at 3 (estimate of 1000 civilians killed).

204. See Brook Larmer, *In Invasion's Wake, Disorder Reigns in Panamanian Capital*, CHRISTIAN SCIENCE MONITOR, Dec. 22, 1989, at 1 (over 1000 wounded); *US Military Intervention in Panama*, INT'L COMM. RED CROSS, *Bulletin* (No. 169), Feb. 1990, at 2 (hospitals in Panama City "inundated with civilian and military casualties," "[o]ver 800 people were

pitious from the standpoint of the rule of law in the world community. As the state most capable of bringing armed force to bear against others, the United States has a special responsibility to abide by the agreed rules. There is little hope for the rule of law if the United States does not accept international strictures.

IV. CONCLUSION

If a new world order is to emerge, it must be based on an adherence to legality by the United States, a principal player in that new order. The United States' recent record, however, gives little cause for optimism about its willingness to abide by international norms in its dealings with other states, particularly in regard to the Third World. As before, the United States enjoys a preponderance in economic clout and military force and has shown itself reluctant to refrain from using them when it is to their advantage.

Regrettably, the recent international practice of the United States has reflected a disregard for multilateral process and international law. One analyst said, "in a variety of unilateral maneuvers, such as the withdrawal from UNESCO, the operations in Grenada, the closure of the PLO liaison office at the United Nations, and the failure to pay full U.N. dues, the United States has largely isolated itself from world public and legal opinion."²⁰⁵ That assessment is, unfortunately, accurate. The Persian Gulf actions of 1990-91 have further isolated the United States from public opinion in that region.

The rationale for eschewing multilateral approaches was, supposedly, to promote the United States' national interests. However, a lawful foreign policy better serves national interests, because it can ensure the mutual respect necessary to inter-state cooperation.²⁰⁶ "The costs of continuing on a separatist course are various, ranging from its direct effect on foreign opinion, to its effect on the overall systemic consideration of the value of strengthening the rule of law internationally by allowing for judicial resolution of disputes."²⁰⁷ Only in a law-abiding world community can states and individuals be protected and work together to solve vital international problems.

treated during the first few days," "medicines and medical material were in short supply," I.C.R.C. brought in two planeloads of medical supplies to make up the shortfall).

205. Detlev Vagts, *Going to Court, Internationally*, 87 MICH. L. REV. 1712, 1717 (1989) (reviewing *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* (Lori Fisler Damrosch ed., 1987)).

206. Burns H. Weston, *The Reagan Administration Versus International Law*, 19 CASE W. RES. J. INT'L L. 295, 298 - 300 (1987).

207. Vagts, *supra* note 205, at 1717.

And only a law-abiding state has a moral base from which to call other states to account when they violate international law.

If the United States continues to use military force on legally dubious grounds, it is unlikely that the world will be, in President Bush's words, "freer from the threat of terror." To the extent that the United States is perceived as using force inappropriately, those who sympathize with the objects of that force will be encouraged to resort to terrorism, because it provides an available, even if ineffective response.

If the world is to be, in President Bush's words, "stronger in the pursuit of justice," the United States must change its attitude towards international adjudication and must not use military force in ways that violate the rights of other states and peoples.

If, in President Bush's words, the world is to be "more secure in the quest for peace," the United States must pursue non-forceful mechanisms more diligently.

Other states besides the United States, to be sure, must adhere to the rule of law if it is to succeed at the universal level. The United States cannot pursue a rule of law approach if others do not. However, the record of recent years is that the United States has been one of the more frequent lawbreakers. As a powerful state, the significance of that lawbreaking is magnified. If the United States as the state with the greatest military potential is not committed to the rule of law, prospects for its achievement are dim. The end of the cold war has opened the prospect for a higher level of law-adherence in world community relations.²⁰⁸ That opportunity must be seized.

For most of this century, unfortunately, the United States has shown itself willing to pursue economic and political interests in ways that violate the rights of other states. That is the background to the practices recounted above. The United States developed a pattern of military intervention in Latin America early in the century, when President Theodore Roosevelt claimed a right to intervene in countries that defaulted on their public debt.²⁰⁹ After World War II the pattern was extended to the rest of the Third World. The cold war provided a new impetus and rationale for intervention.

The creation of the United Nations, the Organization of Ameri-

208. John Quigley, *Law for a World Community*, 16 SYRACUSE J. INT'L L. & COM. 1 (1989).

209. Protocol Providing for the Collection and Disbursement of the Dominican Republic's Customs Revenues by the U.S., February 7, 1905, FOR. RELS. U.S. 1905 at 334 (Feb. 15, 1905).

can States, and other organizations, held a hope of curbing unilateral intervention. But if the rule of law at the universal level is to prevail, the United States must commit itself to follow multilateral processes. The Bush Administration, in comparison with the Reagan Administration, has made minor steps towards more harmonious inter-action with other states. It has begun to pay arrears to the United Nations. It is not operating on the prior cold war assumptions. However, it has created its own ideology that suggests a need to use military force to maintain dominance abroad. It has not distanced itself from the Reagan Administration's disregard of legality in the use of force. It has unlawfully used military force itself. It has not re-joined UNESCO.

The concept of a new order in which states interact harmoniously is a laudable ideal. All states should work to achieve this kind of world. Before it can gain a following on its initiative, however, the United States must demonstrate its willingness to comply with international norms more fully.