DISCUSSION ON THE LAW OF INDIVIDUAL AND COLLECTIVE SELF-DEFENSE

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REMARKS OF MR. YATES

It appears that the two papers we have heard arrive at essentially the same conclusion: The use of the term "collective self-defense" or "collective security" has become an integral part of post-World War II international politics and has been used to justify situations such as the bloc situations discussed by Professor Oglesby yesterday. Nations tend to use this concept to justify actions taken in their own self-interest. This point is especially true as far as the United States and the Soviet Union are concerned, a situation where a predominance of power exists.

Yet, at the same time, Mr. Schou seems to adhere to a more classical concept of collective security, as perhaps evidenced by the notion that an attack on one is an attack on all. He attempts to show that there is no justification at all in referring to collective security if one accepts his premise that there must exist among the nations of the world some minimal level of interdependence. Logically, this means that one must be able to demonstrate some sort of minimal level of interdependence on a universal plane. I am not certain how this minimal level could be identified or examined, or how the necessary factors or indicators could be evolved. In any event, this problem may be beyond the scope of our discussion here. Mr. Schou appears to arrive at the conclusion that without the demonstration of such a minimal level of interdependence the concept of collective self-defense and collective security can be applied logically and justifiably only to a regional organization which founds its regional character solely upon some type of geographic contiguity.

I find both of these gentlemen somewhat pessimistic about the role of collective self-defense and collective security in international relations—especially as far as the ideals themselves are concerned. I suppose that I actually do agree with this pessimism, but I am not sure that I would accept the argument that a norm of international law with respect to collective security exists. I submit that the idea of collective security is, in reality, jargon used in international politics without regard to the strict definition of the term. Thus I cannot present an optimistic

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view in rebuttal to these two speakers, since I agree that a norm of international law with respect to collective security does not exist.

What may exist is a positivistic norm emerging from state action, if one accepts the bloc situation as put forth by Professor Oglesby and illustrated by the three types of internal wars that he discussed yesterday with respect to the Johnson and Brezhnev Doctrines. In other words, the major bloc actor operates to preserve the structure of the bloc by retaining orbit nations within the bloc. In this situation it appears that when one refers to collective security, one actually refers to justification solely for the conduct of actors within this type of bloc situation.

REMARKS OF MR. BACK

I think that Mr. Frolick has described the historical approach to collective security quite adequately, and I agree with his conclusions. I would like to make one suggestion regarding his paper. Perhaps he could have included a definition of collective security as an introduction. Since this term is ambiguous, this discussion should undertake its definition.

Hans Morgenthau in his *Politics Among Nations* has said:

> It is the purpose of collective security to make war impossible by marshalling in defense of the status quo such overwhelming strength that no nation will dare to resort to force in order to change the status quo.[1]

This statement tells us what collective security is, and better enables us to understand the historical perspective. As an alternative approach to such an introduction, collective security could have been related to the provisions of the United Nations Charter.

As for the conclusions of Mr. Frolick, I think that collective security as a legal approach is relativistic. Collective security is what each bloc, each country, or each regional organization says it is, because we have no alternative approach.

RESPONSE OF MR. FROLICK

I should like to say in response that I attempted to touch on the issue which Mr. Back raised when I cited what is considered to be the ideal collective security situation. I attempted to show in my paper that when the United Nations Charter came into existence it was hoped that article 51 and the inclusion of the self-defense provisions would limit the use of military force to that particular situation, and thereby eliminate a

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[1]H. MORGENTHAU, POLITICS AMONG NATIONS 334 (1948).

number of other areas in which states would resort to military force in order to attain a goal. Now it seems to me that self-defense has remained relatively undefined, as has aggression. There are no criteria by which to judge what is self-defense or what is aggression. Therefore, as was pointed out, I reached the conclusion that a definition of self-defense becomes a wholly individual undertaking. Each state is free to determine what is and what is not self-defense for its own purpose.

DISCUSSION FROM THE FLOOR

MR. PALACE:

I would like to comment on the statements of the last two speakers that we can allow states to determine for themselves what is legal or illegal. I disagree with that, and I think, in view of the development of the international legal courts, and in view of the flux in the definitions of self-defense and aggression, that we simply cannot send off words to do battle by themselves. We must not be "conclusionary." Rather, we must attempt to derive some meaning for these terms and perhaps define criteria for an intellectual determination. This is our responsibility as international lawyers. I think the community expects of the law and of its lawyers something more than conclusionary or self-interest justifying statements.

I would like to make one additional comment concerning Mr. Schou, who seems to have quoted Derrick Bowden for the theory that collective defense is justified only if there exists some type of self-interest affectation whereby each nation becomes involved in the situation. I believe even Derrick Bowden might be more expansive in his definition of self-interest affectation. In other words, he might give a restrictive definition of self-defense and then proceed to expand the entire concept by an idea of what is in the interest of one state when another state is attacked. I think that should be added, as it points to the crux of the matter of defining self-defense.

I do not believe we should depart from quotations from certain people, such as Derrick Bowden, and adopt them as legal principles providing a basis for a new theory that may not even be accepted by the legal writers who supposedly proposed it. I think our main focus should consider the context out of which the concept of collective security arose: World War II expansion. Nations were "picked off" one after another. I believe there is a legitimate state interest in halting this type of aggression. I think even Derrick Bowden would agree that the nation-state is affected when one state after another has been "picked off."

MR. SILVERBURG:

I have a question for Mr. Frolick. What do you consider to be the role of preemptory strikes in collective security, considering that you are positive that states ultimately will use military force to protect their territorial integrity and national sovereignty?

Mr. FROLICK:

I feel that one is bound by what has been considered to be a tradition in law, both internationally and domestically, that one should exhaust all possible means of remedy before one resorts to the type of attack which is termed preemptive. As you probably well know, in the Cuban missile crisis the question of the preemptive strike was discussed on numerous occasions and was discarded, not only because of the possible consequences of such action but also because of the questionable capability of carrying out such action. I think that, considering modern day weaponry and the kinds of wars with which we are presently faced, a preemptive operation might not be self-serving.

Mr. GHIDONI:

Although I generally agree with Mr. Frolick's paper, I would voice one exception to it concerning the Gulf of Tonkin Resolution. President Johnson in essence viewed the Gulf of Tonkin Resolution as an open-ended declaration of war by Congress. I think this discounts an assertion of self-defense; therefore, in that instance, self-defense became individually defined.

Mr. FROLICK:

I agree with the statement of Mr. Ghidoni, and I am sure the former Secretary of State would agree also. Mr. Ghidoni's assertion is common knowledge. However, when one examines the Legal Advisor's first and second briefs for the Department of State, one sees that additional reasons were given. I cited a number of these reasons in my paper.

Mr. MALLERNEE:

I do not want to criticize the scholastic value of the papers which were presented today, but I do perhaps question their operational value. What effect would flow from the conclusions espoused by you gentlemen on our policy of combating the spread of global communism?

Mr. FROLICK:

I believe I had two purposes behind my discussion. One was to suggest

that the United Nations Charter, although providing for regional defense in article 52, specifies that solution of local disputes involving the interests of a region should be undertaken by regional arrangements or agencies. Such disputes are then to be referred to the Security Council if necessary. I think that many of these matters could be handled by the United Nations, although in practice this may be difficult. However, such a system would remove the United States from direct confrontation with the communist bloc by allowing the use of another form of collective self-defense.

An example of this would be our Vietnamization program. We are supplying people who are involved in a conflict so that they can take care of themselves.

Mr. MALLERNEE:

Do you feel that your statement is realistic in the light of history? Could the United States have validly dealt with the problems it has had with the Soviet Union in the context of the United Nations?

Mr. FROLICK:

No, but I would like to see more attempts made and greater faith in the United Nations exhibited. I agree with the implication of your question. I do not think the United States had any alternative at that particular time, considering its apparent inability to induce the Soviet Union to cooperate in any meaningful way. The problem appears to be that although these matters were well thought through at the time and were looked upon then as the most expedient means of stopping the spread of communism, the focus has now come to bear upon a reinterpretation of these provisions.

I am more concerned about the security that is guaranteed to smaller nations that are members of these organizations, not only as regards the danger from communism but also the danger from their very neighbors—neighbors who might be their allies one day and their enemies the next. I think that precedents do not bear good tidings for the future. There are many developing states in Africa and Asia which when created were faced with arbitrary territorial claims and wars over which they had no control. The rise of a powerful state, such as Nigeria, with a large standing army, gives that state the potential military might to take unilateral actions of importance to its security, while facing little or no formidable opposition. I find this situation disturbing.

Mr. CLUTE:

I think it is somewhat surprising that we have not referred to one of

the principal failures of the United Nations in the area of collective security. This failure is the lack of implementation of military force, a failure which I believe places the power of the United Nations in a much different situation than was originally envisioned at the San Francisco Conference. We might also examine the Uniting for Peace Resolution,[2] which resolves that member nations, by a majority vote, will take such action as will place nations in the same positions they held prior to the East-West collective security arrangements. If we accept Mr. Schou's definition requiring that a nation be directly affected, we have run full circle. Is a nation directly affected by virtue of a majority vote in the General Assembly via the Uniting for Peace Resolution? Is this really what the drafters of the United Nations Charter originally envisioned? I think this is a point worthy of consideration.

Mr. ANDERSON:

I would like to comment upon the seeming pessimism of the papers presented here. Both papers appear to have neglected the fact that when minor states enter into a collective alliance with a super power they know full well that the super power is entering the agreement in order to protect its own interests as well as those of the minor states. For example, I do not agree with the author of the paper who seems to feel that the United States first reacted during the Cuban missile crisis and then searched for a legal justification for the action. I think the United States reaction was the subject of much conscientious consideration in terms of the legality of using a quarantine, and in terms of establishing self-protection within the hemisphere. States join organizations such as the Organization of American States and sign pacts with nations such as the United States, the Soviet Union, and China in order to guarantee their own security, and they do so with the understanding that the major power is the party that will take the necessary action, often based upon the data it has received prior to consultation with the smaller states. I think it is unrealistic to aver that these nations expect that they will assume a coequal status with the major powers when in fact they occupy a position of complete dependence upon the major powers.

Mr. GHIDONI:

I would like to take exception to Professor Clute's remarks. I find it difficult to believe that either United States or Soviet representatives at the San Francisco Conference could possibly have been so naive as to

[2]G.A. Res. 377, 5 U.N. GAOR Supp. 20, at 10, U.N. Doc. A/1775 (1950).

believe that the United States, which had at that time the most powerful military force on the face of the earth, would subjugate itself to a force beyond its control. Secondly, I find it hard to believe that the Soviet Union, in spite of United States influence, would even consider the possibility of forming a force having more legal precedence than itself.

Mr. CLUTE:

Perhaps your comments show our age gap, but I would remind you of the many fiascoes which we engaged in during that period. Certainly this period immediately after World War II was not one of great diplomatic moves by the United States. Although the diplomatic creations of this period were perhaps imprudent, due to haste in arriving at an agreement, they were probably acceptable. It is true that these creations have never been implemented and that many individuals at that time questioned whether they would ever be implemented. This situation created a big gap which I believe greatly changed the ability of the United Nations to act upon subsequent events.

Mr. RUSK:

I just want to make one observation and put a question to Mr. Frolick on his subject. I question whether you have to be attacked yourself before you can engage in collective self-defense. I think article 16 of the League of Nations Covenant proclaimed that an act of aggression against any member of the League is an act of war against all, and article 1 of the United Nations Charter calls for effective political action against acts of aggression against the peace. It is hard for me to see that either one of these principles of those two great documents could be doing anything else but proclaiming a general interest in resisting acts of aggression. I would suppose that any nation which is the victim of aggression has a right under international law to seek the assistance of others who are willing to assist, and that the general interest in suppressing acts of aggression and breaches of the peace is a sufficient interest to support this relationship. At any rate, I suspect that this is a point that needs further investigation, because there seems to be an increased amount of literature to the effect that somehow collective self-defense requires *each* party be attacked before the presumption of collective self-defense can become activated. I have some grave doubts about that.

Let me ask Mr. Frolick a question on another matter. North Vietnam at the present time has troops in Laos, troops in South Vietnam, and troops in Cambodia. Also, North Vietnamese-trained guerillas are operating in Thailand. Is it your view, Mr. Frolick, that somehow interna-

tional law provides protection in these areas so that they are free to conduct these operations?

Mr. FROLICK:

I would like first of all to comment on your original remark. I agree with what you said, and to an extent I agree with some of the issues that were raised during the Cuban missile crisis concerning the technological warfare problem of whether a state, being faced with a fait accompli, has to wait until all the legal norms that could possibly be put against it are in place. I think that this raises important issues which call for revision of contemporary international law. On your second point, as I said, I do not think that international law does offer the North Vietnamese or the Viet Cong protection, but I do think it relates to the problem of the credibility gap. There are many people who are "doubters" about some of the original statements that were made, and about the original statistics and data which were put out when we first got involved in South Vietnam. I feel that the onus of legitimacy, proving the existence of these violations of international law, is on the country that is placed somewhat in the defensive position. I have read most of your statements to the Foreign Relations Committee and most of the hearings concerning Southeast Asia. I know what your feelings are, and the only thing I can say is that I do not think international law does offer protection to their conduct. But I also think, as you are well aware, that there is a problem of laying new groundwork and new definitions for this kind of guerilla warfare. Exactly what are the rights and duties of the respective parties? Are the people that are nation-states bound by old rules, whereas the people who are the aggressors and the guerillas are not bound by the law at all? Are they free to do what they want? There is increasing academic interest in this area, and as far as I am concerned the matter is still somewhat unresolved.

Mr. ANDERSON:

I question, in some respects, the requirement that the state which was going to respond to an act be the only state required to establish the legality of the situation. I think that this is part of the function of the international community, not necessarily just of the state that was reacting to a situation. For instance, I do not think it is totally a United States burden to prove that the North Vietnamese are in Cambodia. I believe that it is a burden of the international community. I fail to see why the United States must consistently prove that it is absolutely right. It is not the place of any one nation to have to be the sole source of legal information about any given situation.

MR. SILVERBURG:

I would like to respond to an idea implicit in Professor Rusk's statement and explicit in Mr. Anderson's statement that somehow there is an equality of legal, political, and force status between North Vietnam and the United States. The fact that North Vietnam has violated the neutrality status of Cambodia and Laos is an accepted fact. It is also a reality that neither Laos nor Cambodia could adequately cope with the situation because of the unstable nature of their regimes. Therefore, I think it is rather foolish to think that the United States can break international norms because an adversary is breaching those norms. The United States, as the strongest military power in the world, has a responsibility commensurate with this role and status in the international political and legal world.

Mr. EUBANKS:

I want to make an observation on what perhaps distinguishes the Cuban missile crisis from the situation in Vietnam. In the Cuban missile crisis the United States was backed unanimously by the O.A.S., and generally by the U.N.; therefore, Russia seemed unwilling to go to war against a united NATO, a united O.A.S. and a generally united world. However, in a situation such as Vietnam where there is no such clear-cut case, then you must return to the point where each nation is a judge of its own actions.

Mr. WILSON:

One point which Mr. Anderson raises and which was brought up in this conference on several occasions, is the double standard in the relations between the United States and the Soviet Union. Even admitting the existance of this double standard, in some cases I think it is a more serious matter when the United States does not make out a very good case or is not in a very credible position, because we are presuming to operate by law and trying to be more effective in influencing others to do the same. Our aspirations are quite different from those of the Soviet Union in terms of international law, since we are interested in the world rule of law. As a result, meeting fire with fire when the chips are down may cause us to fall short of our aspirations and may cause us to be termed "hypocritical" by another society which is a competitive witness and does not presume to act by the norms of international law.

Mr. GHIDONI:

Professor Rusk, how do you view the United Nations as it is today, in terms of original projections as to its future role?

Mr. RUSK:

Well, there is a great behind-the-scenes part of the United Nations made up of the committees of the General Assembly, the specialized agencies, and special funds, which involves an enormous amount of work but gets very little public attention. When I think of those political and military problems in which the Soviet Union and the United States have been nose to nose, the United Nations over the years has done a pretty good job in finding ways to bring conflict to an end and in preventing them from spreading to larger combat. For example, if you look at the accumulated agenda of the Security Council (the Security Council never drops anything from an agenda, so the Security Council's agenda now has on it about ninety items, which form a checklist of all the highly controversial and violent issues that have been before the Security Council since 1945), you will find that in many situations, in a kind of awkward and bungling sort of way, the United Nations has been able to take the fever out of situations, bring violence to an end, and open possibilities of peaceable settlement. So, although the United Nations has not been able to do what we hoped it would do when the Charter was created, my general view is that it has played an indispensable role in international affairs and is worth everybody's support.

With respect to a credibility gap, public officials are and ought to be held to the highest standard of integrity and credibility when they are carrying out their official responsibilities. Because they are held to those higher standards, my guess is that in the total output of statements made by public officials there is in fact a greater credibility than pertains to any other sector of our society. There is a legal doubt, for example, for the credibility of the press. They have a constitutionally guaranteed right to lie. And, there is no policing of credibility of the tens of thousands of professors around the country. They are protected by academic freedom. You do not criticize what ministers say; that is blasphemy. And, it never occurs to anyone to even worry about the credibility of advertisements that fall in upon us in all directions all the time, because we know the outcome. So let me just say, since I am now out and an alumnus of public office, that a public official ought to be held to the highest standards of credibility, and when he fails in that he should be severely criticized. Bear in mind that the public official is usually, particularly in foreign policy matters, speaking into the future, and that a judgment cannot be made in hindsight. In all of the press conferences I held for the eight years during which I was in the Cabinet, 85 percent of the question I got were about the future. Now you cannot sit there in front of television and before 600 reporters and answer 85 percent of your questions by saying, "Damned if I know." You have got to do your

best. Now, that is judged later on. If what you said turns out to be true, no one will ever kid you about it. If what you said turns out to be wrong, credibility ends.

Mr. HUGHES:

If there are no more questions or comments, we certainly have enjoyed having all of you visit the University of Georgia and thank you for your participation.