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## Too Subtle for Russians?

# Mr. Nixon Avoids Use of 'Blockade'

By Abram Chayes

The morning-after headlines read "Nixon orders blockade of North Vietnam." But the president carefully avoided the term "blockade" in his speech. And so did the legions of briefers who followed in his wake.

There was also a curious passage in the speech that the action of U.S. forces would be confined "within the internal and claimed territorial waters of North Vietnam."

Although it is supposed to be a sign of softheadedness to talk about international law in the brinkman's world of national security decision making, these are items of

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international legal minds at work. They invite a more general review of the President's action from the perspective of international law.

What is a blockade? Why was the President unwilling to use this label? If the U.S. action is not a blockade, what is it? Is it a quarantine, like President Kennedy ordered in the Cuban missile crisis? And whatever it is, what if any is the legal basis for the U.S. action?

The traditional law of blockade, codified in the declaration of Paris in 1856 and the Declaration of London in 1909, is almost as much a museum piece as the uniforms of the Zouaves who guarded those conferences. But these declarations are the starting point for legal analysis of the President's action.

Before World War I, all nations acknowledged the principle of freedom of the seas for non-belligerent commerce during a time of war. The United States went to war with England in 1812 because of asserted British violations of this principle. And again, in 1917, the occasion of U.S. entry into World War I was the German policy of indiscriminate attack on our merchant vessels exercising their right to freedom of the seas. The Paris and London declarations defined two exceptions to the general rule that non-belligerents were free to trade with either side in wartime. First, contraband of war: any ship carrying actual weapons or munitions to one side could be seized by the other anywhere on the high seas and the cargo confiscated. Second, blockade: If a belligerent could station naval forces on the high seas around an enemy port, "sufficient really to prevent access to the enemy coastline", then it was entitled to intercept any ship that tried to get through, no matter what it was carrying.

It seems pretty clear that the U.S. action at Haiphong fit neither of these descriptions. It is not confined to ships carrying contraband of war but is applicable to all ships going to designated North Vietnamese ports. And it is not executed by naval action on the high seas, but by mines and in territorial waters.

Why the President went so far out of his way to avoid these well worn categories is a matter of speculation. It may be because of the equally well worn idea that a blockade is an act of war. But bombing the north is if anything even more an act of war, and the aspect has not deterred the President heretofore. Perhaps he was concerned that it would reactivate the issue of his constitutional power to act without a declaration of war by congress. But again, if he felt free to bomb without a declaration, he would presumably feel no constraints about a blockade either.

In any case, two World Wars have left their mark on the old rules. The U.N. charter—which ranks high among U.S. international commitments—prohibits the threat or use of force in international relations. And, whether or not it is a blockade, the action announced by the President is certainly a threat of force—and may turn out to be a use of force—against Russian and other ships supplying North Vietnam. The President seems to suggest otherwise. The mines, he says, are not directed at anyone. If a ship is sunk, it will be by its own action—not murder, but suicide. The distinction may be too subtle for the USSR to grasp.

Again, there are two exceptions to the U.N. charter prohibition. The first is the use of force by the authorization of the U.N. or some other competent international body. In the Cuban missile crisis, the U.S. admitted that the quarantine was a threat of force, but contended that it was properly authorized by the OAS and so came within this exception, also, as it should be remembered that the quarantine was confined to vessels carrying a strictly limited list of offensive strategic weapons. It was not an indiscriminate interdiction of all shipping.

The second exception is the use of force in the exercise of the inherent right of self defense. The President's lawyers are apparently relying on this exception. The letter of Ambassador Bush to the U.N. described the U.S. action as "measures of collective self defense." The validity of the argument depends on whether one believes that the safety of the U.S. force in South Vietnam is immediately threatened and that direct confrontation with Soviet shipping in the waters of North Vietnam is necessary to save them.

The "self defense" rationalization neatly slips over the question of whether the threat to U.S. troops in South Vietnam can provide the basis for a threat of force against a state that is not a party to the conflict, especially an indiscriminate threat, and especially in view of the heavy risk of enlarged and more dangerous conflict. The measures taken would not have been permissible under the old law of blockade. It is hard to argue that they are available under the U.S. charter, which was designed to limit further the use of force.

In fact, what the President has ordered is not so different from indiscriminate attack on non-belligerent shipping. Perhaps there is a difference from what German U-boat commanders did in 1917, but only if the impersonality of dropping mines is somehow cleaner than firing torpedoes. Again, the distinction is likely to be too subtle for the Russians.

We are a long way from 1812 or 1917.

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