Questions & Answers

NOTES

Stan Turner

Q: – Nicaragua Mining
Contras

A: – Moore — Response to on-going armed attack sponsored by Cuba/Nicaragua in Central America –

Self-Def. — Overt/Covert response does not matter

Phil Hyman (former Asst. Atty Gen. Crim. Div.)

Q:

# N O T E S

# N O T E S

Panel on New Approaches to Dealing with Terrorism

# The National Conference on Law in Relationship to Terrorism

June 7

10:30 - 12:00 noon — Panel on New Approaches to Dealing with Terrorism

Moderator: John Murphy

Alfred P. Rubin
Professor of International Law
Fletcher School of Law and Diplomacy
Tufts University

Panelists:

1. Professor Yoram Dinstein
   Professor of International Law
   Tel-Aviv University
   Visiting Professor at N.Y.U. Law School

2. Dr. Robert H. Kupperman
   Senior Adviser
   Center for Strategic and International Studies

3. The Honorable Charles N. Brower
   Judge, Iran-United States Claims Tribunal
   The Hague, The Netherlands

# ALFRED P. RUBIN

Alfred P. Rubin is a Professor of International Law at the Fletcher School of Law and Diplomacy at Tufts University.

Professor Rubin received his B.A. and J.D. from Columbia University and his M.Litt. from the University of Cambridge (England). He worked in the Office of the Assistant General Counsel (International Affairs) in the Department of Defense from 1961 to 1966. From 1966 to 1967, he served as Director of Trade Control under the Assistant Secretary of Defense (International Security Affairs). He was Professor of Law at the University of Oregon School of Law from 1967 until 1973. He has been Professor of International Law at the Fletcher School of Law and Diplomacy since 1973, with a one year break (1981-82) to fill the Stockton Chair of International Law at the Naval College, Newport, Rhode Island.

Professor Rubin is currently Chairman of the International Law Association's Committee on Extradition (Terrorists), and a member of the Executive Committee of the American Branch of the International Law Association.

He has published two books on legal aspects of British imperialism in Southeast Asia and over fifty articles on a wide variety of legal and historical topics in such journals as the

Prof. Rubin

- Shift response from Milit. to legal response.

New Arp. - 1. Civil law

2. Municipal Crim. Law
   - preparation / attempt
   - extradition

3. Int'l Law
   - Claims law
     (Civil War - Ala. case)
     - does not have to see a war.
     - failure to stop ter. from being used by govt. parties
     - due diligence to prevent injury
   - Treaty law
     - piracy
     - Un. Portal Sec. Agree.

- Law of War

American Journal of International Law, the International and Comparative Law Quarterly, the Year Book of World Affairs, China Quarterly, The Naval War College Review, and many others. He has frequently published columns and letters in the New York Times, Christian Science Monitor, Boston Herald and other newspapers, and appeared occasionally in Boston area television news broadcasts commenting on legal aspects of American foreign policy.

Following is an article by Professor Rubin
from The Boston Herald - April 1, 1986 entitled
**"U.S. Policy in Nicaragua, Libya Misguided"**

**U.S. Cannot Abuse Concepts of International Law to Justify These Incursions Into Territory Not Our Own**

In an outburst of the most extraordinary rhetoric, the Reagan administration has suddenly discovered in the rules of international law a justification for everything that it has wanted to do but lacked the political backing to try.

In both the Gulf of Sidra and in the border skirmish between Nicaragua and Honduras, the U.S. has taken direct action to safeguard what are asserted to be our legal rights. Unfortunately, or perhaps fortunately, the Reagan administration is hopelessly wrong in nearly all its legal arguments.

The result of pursuing policies based on false legal premises is likely to be disastrous as was demonstrated in Lebanon, when our wishfully attributing to President Gemayel a legal authority to invite our Marines in as "peacekeepers" resulted predictably in an ignominious withdrawal.

It is impossible to refute all possible misconceptions of law, but some of the more notorious can be pointed out simply.

First, to the Nicaraguan border incursion into Honduras, it appears to have been forgotten that the doctrine of "hot pursuit" on land was most vigorously asserted in the 20th century by the United States. General Pershing's pursuit of Pancho Villa into Mexican territory in 1916 seems an almost perfect precedent for the Sandinista action pursuing Contras into Honduras.

Our rationale was "hot pursuit" after Villa and his men had raided a village in New Mexico. More recently, in the Vietnam War, we asserted rights to pursue Viet Cong and North Vietnamese banks into Laos and Cambodia. Neither the Mexican nor the Vietnamese cases involved declared wars, and in the Vietnamese cases, it is even doubtful that the pursuit was very hot.

But the possible weakness of the American rationale does not mean either that the Sandinista rationale is as weak, or that the Sandinistas are acting illegally in basing themselves on what we have loudly and publicly asserted to be the law.

As to the Gulf of Sidra, the Libyan claim to "historic" title may not be strong, but it is not negligible either. The definitions of bays in the 1958 Geneva Convention (to which Libya is not a party) and the 1982 United Nations Convention on

the Law of the Sea (to which the United States is not a party) are not only artificial and not necessarily reflective of any "natural law" principles, but are irrelevant to historic claims.

Worse, while naval maneuvers are certainly a legitimate use of the "high seas" and freedom of those seas includes overflight of them, those rules do not supersede inherent rights of self-defense. It is significant in law that the missiles fired at us in the gulf were not fired on naval vessels but on aircraft that had the capability of darting in to destroy Libyan property in Libyan territory.

The U.S., too, claims the right to defend itself from high performance aircraft flying over the high seas, and has even proclaimed Air Defense Identification Zones out to about 200 miles from our coasts, requiring civil aircraft to submit to our control for some purposes.

Occasionally the U.S. even intercepts them.

The U.S. reaction to unidentified or identified foreign military aircraft is even more sensitive and not restricted even to 200 mile zones. To argue that Libya should not have felt threatened by the aircraft involved in our manuevers is to

say that our government's vigorous assertions of the last month or two about retaliating against the states supporting "terrorists" and our orders to all Americans to evacuate Libya should not have been taken seriously by Libya. That seems an astounding position to take, implying that our word is meaningless in international affairs, and that our actions are also not to be interpredted in full context. The mind boggles.

Worse, sending military forces into a disputed area does not clarify the legal issue, it supersedes the legal issue with questions of self-defense, our possible violation of article 2(3) of the United Nations Charter -- a treaty provision under which we undertook to settle our international disputes by peaceful means -- and seems irrelevant to the legal point that has been asserted to be the basis for our action.

How could the law have guided action? Easily. There are probably innumerable instances of disputes being resolved without crises or force, but they rarely leave exciting paper records behind. I happen to have been involved personally in two which can illustrate the significance of quiet victories.

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In the early 1960s the Soviets were building up a claim to "internal waters" that would close the Sea of Okhotsk to foreign ships. The United States Navy believed -- properly in my opinion -- that an issue of principle was involved, and proposed to send a carrier task force in to the area. Discussions in the Defense Department resulted in keeping the carriers on the Pacific side of the Kurile Islands precisely to avoid mixing issues of self-defense and the use of force into the legal question. Instead a research vessel was sent in. The Soviets backed down and non-threatening American ships today routinely travel in the Sea of Okhotsk.

Even more to the point, in 1964 President Sukarno claimed that all the waters of the Indonesian archipelago were "internal" waters, blocking American and other passage in a vital part of the seas. The Navy proposed sending a heavily armed cruiser through the claimed Indonesian waters in order to preserve our legal position.

The counter-argument was that as a matter of law paper claims could be effectively negated by paper actions and that as a matter of policy the result of using unnecessary force would be to strengthen Sukarno by unifying Indonesia in an anti-American spasm. Secretary of the Navy Paul Nitze vetoed the military

plan. It was later the following summer that Sukarno was overthrown after he had unsuccessfully tried to impose a communist system.

His successor was not obliged to prove his nationalist credentials by being more anti-American than Sukarno, and Sukarno's appeal to xenophobia, which struck a very responsive chord in Islamic Indonesia, worked itself out in a bloody massacre of Chinese. There is no legal or moral excuse for the massacre, but by using the law wisely at least we had avoided being manipulated by a local megalomaniac into being its longer range victims. In Libya now, we have fallen into the trap.

For those who think international law is a weak criminal law system with the U.S. as its policemen, the precedents might be worth pondering.

Following is an article by Professor Rubin from

THE CHRISTIAN SCIENCE MONITOR - May 13, 1986 entitled

**"Alternatives to the Libya Bombing"**

It is said that the United States raid on Libya had at least the useful result of waking up the U.S.'s European allies to the need to tighten their internal security, particularly at airports, and expelling the Libyans in their countries who might be involved in further violence.

But there has always been a much more direct, less costly, and simpler way: presenting an international claim to those allies through routine diplomatic correspondence.

When an American child [Natasha Simpson, 11 years old] is killed at the Rome airport [Dec. 27, 1985] for lack of Italian "due diligence" (to use the legal phrase) to protect the lives of foreigners, Italy is internationally liable. The modern law on such liability dates back to a rather exaggerated British claim against Greece in 1847 growing out of the Greek government's failure to divert the then habitual Easter pogrom in Athens from invading the house of Don Pacifico, a Gibraltar-born British subject.

There is really very little doubt about the substance of the law today: A money claim and possibly the freezing of an Italian or Austrian government bank account in the United

ALFRED P. RUBIN

States would have done more to wake up friends of the United States than bombing Libya and thus destroying the United States position, in the eyes of the European populace, as a supporter of reason and law.

The international law of self-defense requires that all other avenues be exhausted before force is used.

So the United States military action was not only unnecessary, but illegal to the degree that its objective was to achieve the only positive thing it did in fact achieve.

After establishing that the rule of law -- and not advantage and empty symbolism -- is the objective, it would have been easy to talk about economic and other possible sanctions against Libya as a multilateral effort.

Is nobody considering the long-term advantages to the United States (1) of placing respect for law as the bottom line in U.S. foreign policy, instead of imitating the Soviet Union's emphasis on respect for force and (2) of seeking to pull states together in their common interests intead of seeking to polorize them into ignorant armies that clash by night?

Following is an article by Professor Rubin entitled

**"Extradition for IRA Terrorists?"**

In the wake of British permission to use American bases in England to bomb Kaddafi's Libya, the Thatcher Government is arguing that an appropriate quid pro quo would be quick American ratification of a Supplemental Extradition Treaty. The proposed new treaty would abolish the "political offense" exception to the current British-American extradition treaty in the case of "murder," thus requiring the extradition of IRA political "murderers" on British request. The British and Reagan Administration people seem to believe that the principal opposition comes from an Irish-American ethnic lobby.

It is hard to follow either argument. The struggle against Kaddafi's thugs and his monetary support for the IRA would seem to be as much a British as American problem, so it is very hard to see voluntary British support for the raid, however, ill-conceived the raid might have been as a matter of international law and policy, as anything other than a British action taken in British national interest. Ethnic comments, such as references to the difficulty of a Senator whose last name is Kerry voting against what his constituents might perceive to be IRA interest, seem to insult those constituents and to misunderstand the American political process. The

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United States has many voters descended from failed European revolutionaries called criminals by their suppressive nineteenth century governments, and most are not Irish.

In fact, the biggest problem with the new treaty proposal is legal. The supplemental treaty, if ratified as the British and the Reagan Administration propose, is probably unconstitutional and certainly would not work if it had effects any greater than the current extradition treaty.

Extradition involves the meshing of two entirely distinct legal orders. The law of "murder" in England and Ireland is not the same as the law of "murder" in the United States. The differences are not mere technical quibbles resulting from fitting some "natural law" conception to local circumstances. The law in each country is the product of its own legislation, pursuant to its own constitution, satisfying to its own constituents, and administered by its own courts. Each legislature might have had some supposedly universal "natural law" model in mind when it passed the necessary statute defining "murder," but there is no reason to suppose that the model was the same in both legislatures, or that all the legislators in either shared it. Legislation is the result of compromise and policy, in which perceptions of "natural law" might or might not have a role.

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In neither the United States nor in Northern Ireland are all killings "murder." There are exceptions for self-defense, which might or might not involve defense or relatives and property or even strangers and strangers' property. In some circumstances soldiers have a "privilege" to kill the enemy, and policemen have similar privileges with regard to some criminals. Those circumstances are defined by law. The policeman's privilege is usually restricted by local law to those killings necessary to the performance of a duty defined by that law; and international law restricts military killing to what is necessary to achieve a military objective defined by that law and to prevent the slaughter of people who are victims more than participants in the struggle.

Extradition is achieved under the usual form of extradition treaty only when the constitutionally authorized officials of both the concerned legal orders agree that the act actually done would be a crime in both jurisdictions whatever it might be called in either, and when the country responding to a request for extradition does not find the act to fall within some legal privilege. There lies the dispute.

Killing people outside of whatever struggle there might be in Northern Ireland, like blowing up a military band, a civilian department store, or a retired British Admiral on his yacht

with his grandson, would be a crime in all the jurisdictions concerned, and not protected by any privilege. No serious legal question arises about extradition for such acts, and they are extraditable under the current treaty between the United States and Great Britain regardless of political motivation under a "wanton crimes" limit the American courts have read in to the "political offense" privilege. They would also fall within American extradition obligations under the 1949 Geneva Conventions governing the laws of war, by which persons accused of "grave breaches" of any of the four Conventions must be sought out, then either tried for his crime or extradited for trial to another country concerned. "Murder," meaning a killing outside the soldier's privilege, is such a "grave breach." Thus the British and Reagan Administration's references to senseless killings of civilians do not illustrate the need to abolish the "political offense" exception, but illustrate cases that are currently extraditable regardless of that exception.

But where the killing is one that would be within a soldier's privilege the wanton crimes exception would not apply, and the "political offense" exception would shield the United States from any extradition obligation. It is that exception and that shield that the British and the Reagan Administration now want to remove.

That shield should not be removed, because to do so would amount to the United States accepting the British legal classification of the situation in northern Ireland as not an armed struggle to which the laws of war might apply. To accept the legal classification of another country in a matter of international law is to yield up an essential attribute of sovereignty: Our capacity at law to classify things according to our own view of the law and the facts. On a practical level reflecting the underlying point of law, it would have the United States side with one participant in an armed struggle that has two sides, thus to intervene in the internal affairs of a foreign country whose government is in some trouble and might not win on all points. Moreover, it would have us participate as an ally of the defending authorities in circumstances in which their own wisest policy might dictate a change in the legal labels. If the British decided to change the labels as a step towards peace in Northern Ireland, the proposed supplemental treaty would leave us either inhibiting a compromise peace by insisting that we not be embarrassed by a change in legal labeling by the British, or dangling in embarrassment as the person we extradited as a common criminal is greeted as an official in a new government in Northern Ireland. Stranger things have happened in the long course of British imperial history, but the wisest course for the United

States is to avoid involvement in the sort of political evolution in which we have no real interest and no legal standing to act.

The delicacy of the legal labeling process has roots not only in international law and the essential attributes of sovereignty, but also in American Constitutional law. Under our Constitution a treaty is binding on our courts as part of the law of the land if it is written in such a way as to be capable of being interpreted as a statute. But no treaty can be Constitutionally binding that conflicts with the fundamental distribution of legal authority contained in the Constitution; just as a statute can be held unconstitutional, so can a treaty. And a treaty that purported to accept a foreign government's legal classification "belligerency," seems to give to a foreign government authority lodged by the Constitution in the Federal officials of the United States. Even if that authority were sought by treaty to be switched wholly within the United States from the courts to the Executive Branch, it would be unconstitutional and was so held in 1795 with regard to an extradition commitment to France when the Washington Administration rebuffed in the Supreme Court for trying to dictate law to Judge Lawrence of New York. Attorney General Bradford argued that Lawrence was bound to order the surrender of an admitted French deserter to France under the Executive's

interpretation of the Treaty. Lawrence won, and the notion lost that the Executive Branch, even with the advice and consent of two-thirds of the Senate, could shift a judicial function by treaty from the courts to other branches of government.

In sum, in trying to tackle a public relations problem in Great Britain, the British Government and the Reagan Administration have come up with a treaty draft that reflects misunderstandings about the law and politics of alliances, and American traditions of ethnic politics and hospitality for failed revolutionaries. Much more seriously, the draft treaty is inconsistent with essential principles of international law and American Constitutional relations that have been unquestioned for almost two centuries. The Senate should reject the treaty.

ROBERT H. KUPPERMAN

Robert H. Kupperman is the Executive Director for Science and Technology and Senior Adviser at Georgetown University's Center for Strategic and International Studies. He is the President and principle investigator on national security and counterterrorism issues for Robert H. Kupperman and Associates, Inc.

Mr. Kupperman received his B.A. in Mathematics at New York University in 1956. He received his Ph.D. in Applied Mathematics from New York University in 1962.

From 1956 to 1959, Mr. Kupperman was an Instructor and Graduate Fellow at New York University (Courant Institute of Mathematical Science). From 1960 to 1962 he worked at the Jet Propulsion Laboratory at the California Institute for Technology. He was at the Institute for Defense Analysis from 1964 to 1967.

Mr. Kupperman served in the Executive Office of the President from 1967 to 1973. He served as Assistant Director for Government Preparedness in the Office of Emergency Preparedness and as Assistant to the Director. He also was the Deputy Executive Director of the President's Property Review Board.

Bob Kupperman

- Terrorism – is an effective means of low-level warfare
- Terrorism will continue to increase
- No Short-term solutions –

Responses: Diplomatic
Criminal
Military

- No Magic Solution –
- Involved in operations by inference not direct evidence –
  - Soviets are involved but no proof (Amt Pope Ass'n).
- Terrorists are attempting for response to undermine democratic soc.
- Response must be balanced w/ overall foreign policy.

Will see more recom attache

ROBERT H. KUPPERMAN

From 1973 to 1979, Mr. Kupperman served with the U.S. Arms Control and Disarmament Agency where he was Deputy Assistant Director for Military and Economic Affairs (1973-75) and then Chief Scientist (1975-79). From 1975 to 1976, he taught at the University of Maryland as a Visiting Professor of Government and Politics.

Mr. Kupperman was head of the transition-team for the Federal Emergency Management Agency in the Office of the President-Elect from 1980 to 1981.

He is a principal of ISI, Inc. (consultants on political terrorism) and a Laboratory Senior Fellow at Los Alamos National Laboratory. He has also been a personal consultant to the Director of U.S. Secret Service, the Deputy Secretary of Transportation and the Undersecretary of Defense for Policy, the Chief of Staff of the U.S. Army, the Secretary of the U.S. Army and a Member of the Defense Science Board's Panel on Ground Warfare.

From 1975 to 1978, Mr. Kupperman chaired the government-wide studies of U.S. counter-terrorism policies and objectives. He is currently a member of the U.S. Army Science Board, the Advisory Board of Titan Systems, Inc. and the Council on Foreign Relations. He is a Fellow at the New York Academy of

- Won't see diminution of state - sponsorship -

- Real Vulnerabilities
  - Elec. Power
  - Oil / Gas
  - Telecomm. nets. } easy targets
  - EFT nets

Response

- Need to tone down rhetoric
- Prepare U.S. for suffering

- Need to expand options
  - Share intelligence
- Covert Action -
- Don't confuse realism w/ Defeatism
  - Limit Damage.
  - Don't talk in terms of absolutes -

Sciences and at the Operations Research Society of America. He is on the Board of Editors of the International Journal of Group Tensions and a Contributing Editor for The Washington Quarterly.

# CHARLES N. BROWER

Charles N. Brower is a Member (Judge) of the Iran-United States Claims Tribunal in The Hague, The Netherlands.

Judge Brower graduated cum laude from Harvard College. He received a Fulbright Scholarship to Germany (Universities of Bonn and Berlin) and received his law degree from Harvard Law School.

Judge Brower was an associate and partner at the law firm of White & Case, New York City from 1961 to 1969. He served in the Department of State successively as Assistant Legal Adviser for European Affairs, Deputy Legal Adviser and Acting Legal Adviser and also as a member of the Joint U.S.-U.S.S.R. Commercial Commission, principal legal adviser to negotiations resulting in Four Power Agreement on Berlin, Chairman of the Inter-Agency Task Force on the Law of the Sea and chairman of various U.S. delegations.

From 1973 to 1984, he was a partner in the Washington, D.C. office of White & Case engaged in a wide ranging law practice with special emphasis on international arbitration of major disputes involving sovereigns and international litigation.

Judge Brower has also served as a Republican County Committeeman and was elected a municipal official in New Jersey (1965-67).

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Judge Brower

- Norms est. by the Int'l Comm.
- Limits on what the law can do.
- Educate - we must not be terrorized -

CHARLES N. BROWER

During the 1976 presidential campaign, he served as Special Counsel to the President Ford Committee and to Gerald R. Ford individually in campaign financing litigation. He was a member of the Republican National Committee's Advisory Council on National Security and International Affairs from 1977 to 1980. From November 1980 to January 1981, he was a member of the State Department Transition Team for the Office of President-Elect Reagan.

Judge Brower is the former chairman of the American Bar Association Section of International Law and Practice and a former member of the Executive Council of the American Society of International Law. He is presently a member of the Executive Committee of the American Branch of the International Law Association.

Judge Brower has been a member of the American Bar Association House of Delegates since 1984 and a member of the ABA Board of Governors since July 1985.

Judge Brower has authored and edited numerous legal publications and has frequently been a lecturer and panelist for continuing legal education programs in international law.

# Question & Answer

NOTES

Prof. Koh

Q: Does U.S. have to declare war -
to rely on law of war to
combat terrorism -

- Constitution
- War Powers

Rubin - Yes. Have applied laws of war
absent declaration of war.

- Prize cases

- War Powers is wrongly based
under Constitution -
That's why it doesn't report -

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Will be a transcript of proceedings -

N O T E S

Kuppersman — Discount financing —

# N O T E S