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**NAVAL WAR COLLEGE
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INTRODUCTION TO INTERNATIONAL LAW

A staff presentation delivered
at the Naval War College
on 24 February 1955 by
Dr. Leo Gross

Captain Foley, Gentlemen:

At the outset, I shall talk a little bit about what we might call the "cultural setting" of international law, which I think is sometimes overlooked nowadays. In doing so, I will try to avoid extremes. I will not be overoptimistic and I will not be overpessimistic. I will try to avoid those who are very great friends of international law and do tremendous harm by overstating what international law can do or has done and those pessimists who say that international law can do nothing at all which is of any significance to international relations.

If you look back a little bit at the history of international law to see how it developed (of course you might go back to antiquity, which I will not do this morning) — if you look back over the last three hundred years or so you will find that there developed in Western Europe a body of thought, of literature, that has come to be known as international law, or the law of nations. It is very interesting that at the beginning of this development, as in other subsequent major stages in the development of international law, there was a major war — a major convulsion, you might say — which endangered the very survival of Western civilization.

One of the first major wars was the Thirty Years' War, from 1618-1648. That experience inspired many people and inspired many governments to think in terms of alternatives, of more rational alternatives to this kind of thing which they had just gone through.

One of the first writers on international law was a Spanish monk, a Dominican, by the name of Francisco Vitoria, who, in the sixteenth century, wrote a very interesting treatise, which, translated, was entitled "The Indians Recently Discovered." He tries to analyze what should be the relations between the Catholic Powers of Spain and Portugal and the pagan Indians in the New World.

In discussing this problem, he developed certain ideas which are still with us. For instance, Vitoria was certainly one of the very first — if not *the* first one — to develop the doctrine now called 'free trade.' He advocated free trade on the basis of complete reciprocity. In other words, the Spaniards had the right to go to the free world and trade, and of course the Indians were welcome to come to Spain and trade with the Spaniards on a footing of equality. Actually, there was a certain inequality, because the Spaniards could travel to the Indians but the Indians did not have means to travel to the Spaniards. Vitoria was not very much worried about this aspect of reciprocity but, basically, his ideas were very sound and very fruitful.

Then there was another Spanish monk, a Jesuit named Francisco Suarez, who, a little later, wrote a book on an extremely interesting problem which still sets, in a sense, the keynote to international law. The Latin title was: *De Legibus ac Deo Legislatore*; that is, *On Laws and God as Legislator*. I emphasize this title because this title, and of course the contents of the book, bring out very clearly what is the root of international law, culturally and philosophically speaking. It is a concept of an objective order, which the older people called "Natural Law," "Divine Law," or some such term, and what we call today positive international law. And yet one always has to remember that in its beginning international law was conceived as something very fundamental — something so fundamental that it related individuals directly to the highest authority, to God, or at least to natural law, which in turn was perhaps inspired by Divine Law.

During the Thirty Years' War there was a shift to another sort of approach, which was represented by a Dutchman, Hugo Grotius, who wrote a book in 1625 on the very realistic topic, "On War and Peace." He had been through the Thirty Years' War and the religious strife preceding it, and he was more or less a victim of its religious intolerance. He was a Dutchman and he belonged to one of the small Protestant sects. For being sort of heretic, he was placed in jail, from which he was rescued by his very faithful wife. He was in the habit of reading voraciously and one day his wife brought him a large case of books. Having emptied it of books, he entered the case and was carried out to freedom arriving in Paris shortly afterward to write his treatise on the subject of war and peace.

Grotius's treatise, which is remarkable for its learning, its humanitarian thought, and its comprehensiveness, provided the inspiration for the development of international law both as a science and as a code for guidance of states. In this work we find many ideas which acquired a renewed significance in modern times: such as the concepts of just war and the proposition that individuals are directly obligated by natural law, which he regards as superior to municipal law. Grotius taught that municipal law cannot require individuals to do things which are prohibited by natural law. Along with the law of reason or of nature, Grotius elaborated what is now called positive international law — which is derived from the common consent of states. However, it is natural law, regarded as the higher law, which makes this common consent binding. While Grotius acknowledged that States have the right to resort to war in exceptional circumstances in order to enforce international law, he was on the whole more concerned with the formulation of restraints upon the conduct of States. He abhorred the license practiced in the religious wars and advocated tolerance and restraint, even in the conduct of war itself.

What were the sources from which international law was derived at that time? It would be rather interesting if you would

take two minutes and go to the Library and take a book like Grotius's into your hands. You would be astounded to see what he considered to be the sources of international law. Of course he quotes the Bible very frequently; he quotes from Greek and Roman history; he quotes dramatic and poets; and he quotes, above all, the Roman law — the *ius civile*, which by that time had acquired the dignity of being *ius gentium* itself. International law owes a great deal to that inspiration which was derived from the system of Roman law. From Grotius on, in an unbroken chain, writers continued to develop international law either along the lines of natural law or along the lines of what is called "positive law," which derives the rules from the practice of States. What the States actually do and feel bound to do is international law for the positivists. Some writers, like Grotius himself, combined both approaches.

One of the most popular writers in that vein was a Swiss, Emmerich de Vattel. Vattel's book, *The Law of Nations*, which was written around the middle of the eighteenth century, was for a long time what you might call the bible of foreign offices and of courts. One of our distinguished international lawyers checked up on Supreme Court decisions in the formative stage of the Republic and found that Vattel was more often quoted as an authority than any other writer. Similarly, in diplomatic correspondence Vattel was very often referred to as *the* authority on international law. What makes Vattel such a conspicuous authority in international law? The answer is simple. Vattel tried to combine the different strands in international law in a fashion which made it acceptable to the governments by stressing the liberty of States. When he came to a crucial question, such as: Is War Permissible or Is It Not Permissible? — a question which has always bothered all writers and statesmen, and continues to bother them — he would say: "Well, yes and no." Those are the kind of answers which diplomats love because, depending upon the case they are arguing, they will say 'yes' or they will say 'no.' Vattel was a master in always giving the possibility to say 'yes' or 'no.'

He would say 'yes,' if you appealed to natural law. He would say: "Yes, natural law prohibits war except when you have a just cause." But if you appealed to positive international law, a different answer would be given.

He would say: "Whether or not the war is just can only be determined by the sovereign — not by the adversary — because, after all, States are sovereign and therefore, although each sovereign is constantly bound by that natural law, in his conscience he is not bound by natural law in relation to the other sovereign." So he had a perfectly good argument there. You can use it one way or the other, depending upon which side of the case you want to argue. Generally, Vattel inclined to the view that States were reasonably free in their relations with other States.

In the nineteenth century, the prevailing trend has been to look merely at what governments actually do and to leave aside, or to brush aside, this natural law speculation which somebody has said is something like "writing in the sky" — nobody knows exactly where or what it is. There are many schools and many writers of natural law but it varies with time and circumstances, and so on. The only firm thing which we have is the practice of States and we must stick very closely to that — which is perfectly all right as far as it goes, but it doesn't go very far. This sort of approach was perhaps not indefensible in the nineteenth century because by and large there was a liberal sort of government which prevailed in Western Europe until the turn of the century. Such governments were not very much inclined to wage great wars or unlimited wars. Europe exhausted itself in the wars with Napoleon, and after 1814 there was a period of relative peace so it did not matter very much what the writers wrote on international law. Governments engaged from time to time in minor wars in Africa or in Asia, generally on the periphery of the cultural center, which Europe still was. The wars in Europe were strictly for limited purposes and as soon as this limited objective was achieved the war came to an end and peace was made.

The First World War again stimulated some speculation on the place of war in international law and we know that the answer was the League of Nations. The Second World War brought about the United Nations, and we are, today, still discussing the question of War and Peace.

Looking back at this history, and looking at the situation as it exists today, I would suggest that there are basically two schools concerning international law. According to one school — and that school is a very important one — international law is not really law. When it comes to this crucial question of whether international law is really law, there is a large number of writers today who would say flatly: No, international law is not law.

Why is it not law? Well, we have a certain prototype of law. There is the law of the different States, the law of the United States, of Great Britain, of Russia, et cetera, which have certain characteristics in common. According to this prototype, law is a command, whether issued by a legislature or by a dictator — it does not matter by whom — and this command is backed by superior force. If you do not obey the law, you go to jail.

If you carry this sort of yardstick to international law, international law is not law. The rules of international law are not commands of an authority superior to the States and there is no superior force behind it, and if a State violates international law it does not go to jail. While writers of this school firmly maintain that international law is not law, they do not altogether dismiss international law. They do not deny that it has a certain usefulness; it has some usefulness, they say, in diplomatic negotiations and intercourse, and so on. But they say that a scholar should not accent the proposition that international law is law. He should try to discover the actual patterns of state conduct. In other words, if you open a book on international law what you should find there is not how governments *ought* to behave, but you should find there an exposition of how governments actually

do behave. In other words, it is a sort of anthropological and descriptive approach to international law.

Of course what this school overlooks is that even anthropologists, in studying primitive cultures, distinguish between descriptive patterns of conduct and normative patterns of conduct. In other words, even in the primitive tribes in Africa or in Australia (or wherever they are — I don't know where they are nowadays), there is distinction made between what the people of the tribe actually do and the type of conduct that is frowned upon. In other words, even primitive peoples do not allow *any* kind of conduct. Some kind of conduct is permitted and another kind of behavior is punished. I think this is overlooked by this very modern, empirical school, which would like to reduce international law to a description of patterns of state conduct.

There is a further difficulty. If, for instance, you would accept the proposition that international law is only that which actually describes how governments behave, which government's behavior would you place into this sort of book? The United States behaved in a certain fashion under certain circumstances; the Soviet Union, China and Indonesia may behave in a different sort of pattern. Which is the pattern to which you would give the name of 'international law?' Would you choose the United States? Would you try to weigh or perhaps make some quantitative studies and say that the majority of States behave in this fashion and other States behave in another fashion? I am not sure, and the writers, of course, are rather inconsistent. Once they have satisfied themselves and have argued that international law is not law, they fail to come up with any useful and acceptable alternative.

The other school, of course, is grounded in the history to which I referred very briefly before: that is, that international law is basically a normative system; that it consists of certain precepts (it does not matter from where they are derived, Roman law or natural law), which address themselves to governments,

the content of which is: A government ought to do this or ought not to do something else. In other words, this school believes that international law *is* law; that it partakes of the basic character of all law — namely, that it is a group or a body of sentences which are in the nature of: “You ought to do this, or you ought not to do that.”

We are not very much worried (although some are very worried) about its enforcement, about the idea that a command must be backed by superior force. Vitoria and Suarez — and even Grotius and others — were not worried about this enforcement, for, after all, natural law is binding upon the individual; and, of course, he must behave as he is supposed to behave if he accepts (and of course he accepts) this body of natural law.

But some of the more modern positivists did worry, and still do worry, about the question of enforcement. They say that international law has its own procedures for enforcement. What are those special procedures? Well, those special procedures are *reprisals* and *war*. They say that if a government violates its obligation under international law, the injured state may take some action against the state which disregards international law. This action may take any form — it may even take the form of force. For instance, in olden times cities were bombed and burned by governments on some occasions to enforce behavior in conformity with international law.

Which of those two schools would you say is the realistic school? In other words, which school is really closer to what we call the “realities of international relations?” You, of course, may make up your own minds — and I have made up my mind. I think that the realistic approach is that which takes its cue from what the states concede international law to be, and states do not accept the descriptive approach. The states and governments (and that includes the governments on the other side of the Iron Curtain) do regard international law as a normative system of rules which

authorize the governments to behave in a certain fashion. Therefore, if you would ask me which of the two schools (which I described before) is the one which comes closer to what is international reality, I would say it is that school which regards international law as a body of normative rules, requiring governments to behave in a certain fashion. I admit, of course, that the question of 'enforcement' has to this very day not yet been solved very successfully. But, mind you, it is one thing to enforce domestic law and it is another thing to enforce international law. The two things really do not mean the same thing. But I do not want to go into that very much at this point because this really belongs to a very substantial extent to "International Organizations," which I am going to discuss next week.

Having discussed the different schools, I would like to discuss now a little bit what we might call the "basic characteristics of international law." I have argued that international law *is* law — that it is a body of normative rules. But I am not saying that it is exactly the same kind of law as our domestic national law. There are many and very important differences.

Considering the characteristics of international law, and taking municipal or domestic law as a standard or as a prototype of law, there are certain salient differences. The first and very obvious difference is that international law does not always address itself to individuals. International law deals with states and with individuals usually through the medium of the states. Very closely connected with this first difference is that international law as a rule creates obligations only for the state, and if the rule of international law is violated action may be taken against that state. This is what we call "collective responsibility," which is very different from what happens in domestic law. If I break a contract, or if I assault somebody, action is taken against me — not against the group to which I belong, not against my family, or against the community in which I live. International law is different. The head of the state, the President, or the King, may give orders to

break international law, but no action is taken against that particular person; the action is taken against the state. In other words, there is a *collective* responsibility in international law as against *individual* responsibility in our domestic law. Of course domestic law has collective responsibility to some extent, but that is not my concern today.

There are other differences. For instance, one difference upon which Professor Jessup insisted very much in one of his recent publications is that international law has more of the character of private law or common law than of criminal law. What is the difference which he has in mind? This is rather important. Suppose that State A violated a rule of international law. State B would normally then ask for reparation; in other words, it would ask for a payment in money, or in kind, as compensation for the injury which it had suffered through the unlawful action of State A. We will distinguish this from domestic law: if I break a contract, I do not go to jail—at least, not in modern systems. A hundred years ago or so, if you broke a contract, you could be sent to jail since it was a criminal offense—but not nowadays. However, if you defraud a person or libel a person, that involves a criminal action and the judgment may mean a money fine, but it may also mean jail that is depriving you of your personal liberty; ultimately, it might deprive the defendant of his very personal life. So in domestic law there is a distinction between a violation of private or common law and a violation of criminal law. The sanction, or punishment as we call it, is attached to criminal law; but there is no punishment in private law. While your property might even be sold at auction, you do not go to jail.

Professor Jessup argues that a violation of international law is very much like the violation of a contract—you can be made to pay damages, but you cannot be sent to jail. Well, it is very hard to send a state to jail—I'll admit that. However, during the last few years I think there has been a discernible

trend to introduce into the body of international law the criminal law concept. This comes from the Nuremberg Trials, to which I shall refer very shortly. Basically, I think it is correct to say that violations of international law have more of the character of a tort or injury than of a crime.

Then, of course, there is another difference which has been very much dwelt upon: namely, that in our domestic law if you commit a certain wrong, the punishment is more or less attuned to the gravity of the crime; there is distinction between felonies and various other offenses. We have a very finely-developed system of punishments to fit the crime. This is not so in international law. International law seems to be rather undeveloped in that respect. A government may commit a very simple violation of international law and yet expose itself to the most ruthless kind of reaction on the part of another state. This, at any rate, was true in the past. Although in this respect there have been some courts which have had occasion to deal with the question of the use of force (there were not very many), rarely have they come before an international tribunal for adjudication. In the one or two cases where they did, the tribunal did say that there must be a certain relationship or certain proportionality between the offense and what you might call in broad terms "punishment." However, by and large, this idea of proportionality has not yet been developed into any kind of coherent system.

Then, of course, we come to a well-known difference: in domestic law we generally have legislation or legislature and we have an executive and a judiciary. But we do not have very much of that in international law, although there is a method for creating international law, there is a method for adjudicating international law questions, and there is a method (not a very highly-developed method — and it does not work too well) for the enforcement of international law.

Now these differences are very simple and I do not need to take up your time further on them. However, there is one im-

portant consequence which flows not from the absence of a legislature and not from the absence of an executive, but from the absence of a judiciary in international law. That is, that in the absence of some judiciary, some tribunal, or some court to decide disputed questions of international law, such as which state is right and which state is wrong, each state determines for itself what are its rights and obligations under international law. Therefore, you will very often find in books the misleading statement that a state is a judge of its own obligations under international law.

What this really means is something very fundamental: as long as states have not accepted any authority or any organization which would determine for them what is the law — that is to say, what are the rights and the wrongs of a particular case — we really have not the institutional device to carry forth into practice what is really the root of international law; namely, its objective reality. Because this objective reality is not implemented in state practice — this supposedly objective international law is interpreted subjectively by the seventy or more states which exist today. I have called this, in an article which some of you may have seen, “the institution of autointerpretation”; each state interprets for itself what are its rights and its obligations and, over and above that, each state really determines for itself what are the facts which lead to an international controversy.

To give you an example: There was an incident in the China Sea recently which resulted in our shooting down a number of Communist aeroplanes and also their shooting down some of ours. What is the situation here? We say that our aeroplanes were over international waters, where they have a right to be. This may be true; but the Chinese, of course, say the opposite. Now, which of the two statements is correct? Under this principle of autointerpretation we are not bound to accept the Chinese version of the incident; but, under that same principle, the Chinese are not bound to accept our version.

Furthermore, there may be some doubt — not merely about the facts, but about the law. If the aeroplanes were over international waters, was it proper for the other side to shoot them down? We may say 'no.' As far as we are concerned, our interpretation may be the very best international law. But the Chinese may say: "Oh, that is very bad international law. There is no such thing. If an aeroplane flies close to our coast, although over international waters, we still perhaps have the right to shoot it down. Maybe we ought not to have shot it down — perhaps we should have taken some other action. But, really, what you say is international law is not our conception of international law."

Often if you find the right kind of book, you will find something to support your point of view. In other words, you have here a combination of rather basic institutions in international law. What I have been really talking about is quite familiar to you — in fact, it is quite familiar to anybody who has spent an hour reading international law. This generally is discussed in the books under the heading of "equality in international law," or "the fundamental right to equality." This is precisely what it means, but it is never fully realized that if there develops an argument as to the facts, or as to the law applicable to the facts, each state has, under international law, the same right to say what the facts or what the applicable law appear to be. Presumably, one of the two is wrong — either concerning the facts of the law. But these two states have not accepted a procedure which will be as objective as is the law which both of them invoke in order to resolve the issues.

What would be an objective procedure? The objective procedure would be for the two states to submit this controversy to an international tribunal. In this case, the two states delegate their power to a third party — to a tribunal — and that tribunal applies international law authoritatively, which the individual government cannot do under international law because governments are all equal and not subordinated to one another. Therefore,

one state cannot alone adjudicate an issue, for to do so would amount to depriving the other of its sovereignty by subordinating it to its own sovereignty.

I think this is the correct version of the law: unless governments submit to an objective procedure, there is no objective determination of the law. At least, I say I hope this is right. In order to get an objective determination, an objective tribunal would have to adjudicate this question.

I will give you an example, from the history of the United States, which I think is one of the most amusing incidents in international relations. It shows how a dispute arises between two states and how, when it is put to the test of an objective authority, there is nothing really to it. Probably all of you have read in American history the famous controversy with Great Britain over seals in the nineteenth century. Now, fur seals, of course, are very important. If they are very good furs, ladies love them and they fetch a good price on the market. There were a lot of seals in the Bering Sea. Canadian fishing vessels went out to hunt for these seals. We did not like it because it interfered with Americans who were fishing for the same seals. So our Coast Guard cutters arrested a number of British vessels and for several decades the British Foreign Office protested to our State Department and the State Department at length replied to the Foreign Office, explaining its point of view.

What was the point of view of the United States concerning the problem? The United States claimed jurisdiction in the Bering Sea — about a hundred miles from shore. It claimed, further, the protection of property in the fur seals frequenting the islands of the United States in the Bering Sea, even when the seals were found outside the three-mile limit. We claimed that the seal herds used the Pribilof Islands, which are under the United States sovereignty, as breeding grounds; therefore, we claimed ownership in the herds and the right of their protection

in the open waters after those seal herds departed from American territories, which were the Pribilof Islands. All that the Congress would have had to do was to amend our Nationality Act and say that all natural-born persons and fur seals born in the territories of the United States were American citizens, and therefore entitled to American protection!

However, this the Congress did not do. Eventually, in the late nineteenth century — 1890, or so — we consented to submit this dispute to an Anglo-American tribunal, and our case was thrown out. We had no leg to stand on, to say it colloquially. And, yet, the State Department, with a perfectly straight face, repeatedly had for years its argument that we had a property right in and a right of protection of the fur seals simply because they used American territory as breeding grounds. I assure you, gentlemen, that many present-day international conflicts would be settled with ease if they were submitted to an international tribunal for adjudication. However, some governments are very careful not to go to international tribunals because it might be shown that what they claim to be crystal-clear international law is not international law at all.

This leads me to another rather interesting aspect of international law, which I shall not develop, but which refers to this principle of 'equality.' One other application of this principle is that no state may sit in judgment over the acts of another state. That sounds rather "highfalutin," but what it really means is that since all states are equal, we will not exercise any jurisdiction over a foreign sovereign or his property.

How do these things come up in a court? One of the oldest American cases is *The Schooner Exchange v. McFaddon*. The *Exchange* was originally an American ship which was captured by the French in 1810, during what I think was called an "undeclared war." In 1812, she came into Philadelphia as a French man-of-war and the former owners asked the court to attack

the ship for restoration. Chief Justice Marshall then had this question to deal with: Could this ship be arrested and restored to its former owners? The Chief Justice started from the principle that the "perfect equality and absolute independence of sovereigns" has given rise to "a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive jurisdiction" which is an attribute of every nation. Thus, a visiting sovereign, his ministers or ambassadors, and his troops passing through the dominions of another sovereign are exempted from jurisdiction. The Chief Justice concluded that "national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction." Of course, a visiting foreign sovereign would be expected to respect our laws but he would not be subjected to our procedures for enforcing that law.

You may have noticed in the newspapers some weeks ago a report about a foreign sovereign (I am not sure of what state he was the sovereign). Anyway, he was one of those potentates who still believe in having more than one wife. Of course we do not allow polygamy under our laws. The question was: Could he come to the United States with more than one wife, as he apparently planned to do for the visit? Eventually, he did not come — although I think he was probably mistaken as to the law. Once he has permission to come here, he can bring as many wives as he pleases. In other words, our law would not apply to him; or, to put it in a more sophisticated fashion, he is bound by our laws, but we cannot enforce the laws against him. This leads to all kinds of complications.

Take the case which arose in England some years ago and which involved an Indian potentate, the Sultan of Johore. The Sultan of Johore came to England incognito — in other words he did not present himself as the Sultan of Johore, but as a Mr. Baker. As Mr. Baker, he met a young woman by the name of Miss Mighell; hence, the case is known as *Mighell v. the Sultan*

of Johore. The sultan promised marriage to Miss Mighell. Then the sultan decided to go home, or to change his allegiance — I am not sure which it was — and Miss Mighell claimed that Mr. Baker had committed a breach of promise of marriage. Normally, of course, the action was right. But in this case the British courts, after consulting the Colonial Office, said they could not take any action because the Sultan of Johore was a foreign sovereign and it would be contrary to law for a British court to sit in judgment over the Sultan of Johore. Well, that left the lady in a very difficult position because, as far as she was concerned, she did not know the Sultan of Johore — all she knew was Mr. Baker.

It was contended, on behalf of Miss Mighell, that by taking an assumed name and acting as a private individual, the sultan had divested himself of his immunity as a foreign sovereign, and was amenable to British jurisdiction. The court, after quoting from Vattel, whose work and influence I mentioned before, rejected this argument as immaterial: a foreign sovereign is a sovereign even if he travels incognito and is entitled to immunity from jurisdiction as soon as he makes himself known.

So you have there, again, an application of the rule that a state will not sit in judgment over the acts of another state, not over its warships and not over its instrumentality.

Well, I could go on discussing some of those basic principles of international law, but I would like to go into one other aspect which is really concretely a very troublesome problem in international law: that is, it is very difficult to determine sometimes what is really the rule of international law. There are hundreds of books, but we have very few really dependable sources of international law. In other words, how does one collect evidence as to what the rule of international law really is? On that, one can hardly offer a very definite guidance. There are many evidences of what international law is. Personally, I would give the first place to a judgment of an international tribunal. I certainly think

that the judgments of an international arbitral tribunal or of an international court are the highest authority for what international law is. So if you have any particular question — and there is a pertinent judgment — I would say this is really the best evidence of what international law is.

Then the next best, of course, is what the governments believe is international law — but that is very difficult to find because governments do not let you see their papers. There is one exception — the United States Government. The United States Government is the only government in the world which has published consistently over nearly the last hundred years its state papers — not all of them, perhaps, for we could not do that because, after all, they are papers concerning other governments and it is the other governments which very often do not give us permission to publish these papers. It is not our government that is secretive — it is the other governments.

What is more, I wish when you go to the Library you would look at a collection of eight (8) volumes of the *Digest of International Law* by Mr. Hackworth, who was formerly the legal adviser in the Department of State. This *Digest of International Law* is the third which the Department of State has published. It is a wonderful and unique collection of the official views of the Government of the United States on questions of international law. There is at least one volume on the Laws of Warfare (including Naval and Air Warfare). It is a source of international law of the greatest possible significance. Foreign governments, incidentally, use this Digest because it is the only digest published (its predecessor was prepared by John Bassett Moore) and it has become really a unique source of international law. Some of the modern “realists,” you know, have criticized the Department of State for publishing this digest. They say: “Why do you do this? It is so foolish. All a foreign government has to do is to pick up the digest and quote it against you.” Of course this can happen — and it has happened.

Then we have a variety of textbooks on international law — but textbooks must be taken with quite a few grains of salt. You see, the writers are either German, English, or Chinese, and it is very difficult for them not to reflect the point of view of the government of which they are nationals. Again, there is one American writer whom I think has been more candid than anyone else, and that is the late Charles C. Hyde, whose three (3) volumes of international law we have in the Library, because he put as subtitle, "International Law as Interpreted by the United States of America." Even though he claims to do nothing more than to present international law as interpreted by the United States, this book enjoys a world-wide reputation for its objectivity and for its attention to details. Again, Hyde is a very great help in finding international law.

Then, of course, we have the decisions of American, British and other courts on questions of international law, such as the one to which I referred, the Schooner *Exchange*, and, again, *Mig-hell v. the Sultan of Johore*. These domestic tribunals have many cases involving questions of international law. You would be surprised how many cases there are almost daily before American courts involving one or another aspect of international law — it may be recognition, treaties, or something else. Domestic courts very often write excellent opinions. The opinion such as the one by Chief Justice Marshall in the Schooner *Exchange* is quoted everywhere as the authority for the principle that ships of war are immune from the jurisdiction of the state which they happen to be visiting.

To make things a little bit better, there have been efforts made to codify international law; in other words, to reduce this enormous mass of international law to some kind of a systematic body of rules which could be ascertained easily and simply. But codification so far has been very largely unsuccessful. We do have some codification of laws of war upon land and sea, and some codification of laws of neutrality, which are all very helpful but

which I think need to be revised. I am not sure whether they will be changed very much, but there may be some needful changes here and there. Governments are very reluctant to undertake this sort of job because if it does not succeed it may do more harm than good.

However, the United Nations has established a commission, the International Law Commission as it is called, of fifteen (15) jurists, elected by the General Assembly of the United Nations. This body of jurists, the International Law Commission, has undertaken the task of codification or of codifying international law. It has already produced some very valuable drafts. There is a draft on the Rights and Duties of States. Some of the drafts you will be reading in connection with our problems: for instance, the draft of the Nuremberg Principles — that is, the principles of international law which underlie the Nuremberg judgment and the Charter of the Tribunal.

You will also be using another draft made by the International Law Commission: namely, the draft Code of Offenses Against the Peace and Security of Mankind. I also think they have done a very good job on drafting the law concerning the High Seas and Territorial Waters, and a very interesting draft on the Continental Shelf. The work is not as of as high a calibre as might be perhaps desired but then, of course, the Commission is not working full time on these drafts. There are only a few international lawyers and they cannot give too much time to it — they are not being paid for it. However, I think that slowly we shall have a body — not necessarily of a very official kind, but a body of reasonable authoritative statements of at least certain branches of international law — such as on the status of the High Seas in international law, and so on.

I want to say a word before I conclude on the Nuremberg Trials. As I indicated before, there are some differences between municipal law and international law; there is the difference be-

tween individual and collective responsibility, the difference between crimes and torts, and so on, and I think that in many ways the Nuremberg Trials are perhaps the beginning of a new development in international law inspired by analogies to municipal law. I know that you have your doubts — and I have my doubts — about some aspects of the Nuremberg Trials. But I would like to invite your attention to a very general, or what you might almost call a philosophical, aspect of the Nuremberg Trials. That is why I find them so very fascinating and why I think, no matter what we say about them, they will not be forgotten easily. To go back again to what I said at the beginning: international law has its roots in the conception of an objectively binding law, which is called by different terms by different men — Divine Law, Natural Law, and so on. As essential to their conception of this, all of the earlier writers — Grotius, Vitoria, and others — have considered that international law is directly binding upon the individual — not through the intermediary of the state, but that it is related directly to the individual. It is extremely interesting that in this respect the principles of the Nuremberg Trials go back to the early stages in the development of international law. What is the basis of the Nuremberg principles? It is the concept that the individual is related directly to a higher law. The very essence of the London Charter which set up the International Military Tribunal is, in the judgment of that Tribunal, “that individuals have international duties which transcend the national obligations of obedience, of obedience imposed by the individual state.”

It is interesting that this restatement of the old principles of the naturalists should have come from this Tribunal. What was the Second World War about? It was a war between the Free States, as we call them, against Fascism — in which we had the help of the Soviet Union; however, it was a war against Fascism and for the rights of individuals. What distinguished Fascism, as we thought of it at that time, was that it was a totalitarian system which tried to subject the individual in all of his aspects to the control of the state. This is where the individual is utterly

submerged by the collectivity. While there is even in democratic countries today a tendency toward what you might call "nationalization of truth," and while there is a tremendous pressure towards conformity and uniformity at this moment, international law reminds itself of its early origin. It says: "This must stop; this trend towards conformity and collectivism has a limit." It has its limits in the relation which each individual, regardless of his nationality, has to a higher law — the law which is international law. So that in a sense, after 400 years, we have come back to where we started from — the idea of an objectively binding law, a law which binds directly the individuals, regardless of what the state law or Constitution may say. Individuals are once more related directly to a higher idea, to a higher value.

Thank you very much.

BIOGRAPHIC SKETCH

Professor Leo Gross

Professor Gross occupies the Chair of International Law at the Naval War College. He is currently on leave from the Fletcher School of Law and Diplomacy, Tufts College, where he has been Professor of International Law and Organization since 1944.

He was born in Krosno, Austria, on 6 April 1903. He holds degrees from the University of Vienna (Doctor Rerum Politicum) and from Harvard University (Scientiae Juridicae Doctor).

In 1947 and in 1951-1952, Professor Gross was a visiting lecturer at Harvard University. He was visiting professor at the New School of Social Research in 1948 and at Yale University in 1949. In 1948-1949, he served as Consultant to the Legal Department, United Nations, and was Consultant to the Legal Counsel, U.N.R.R.A., in 1944-1945. He is a member of the Society of International Law and the Political Science Association.

THE LAW OF WAR

A lecture delivered
at the Naval War College
on 3 March 1955 by
Dr. Robert W. Tucker

Any realistic discussion of the present status of the law of war must begin by taking note of the skepticism with which this law is generally regarded today. In view of the experience of the two great wars of this century there are many who doubt the possibility that future wars can be subject to effective legal restraints. Even more, there are many who question the continued validity today of the rules which have governed the conduct of hostilities heretofore. In the remarks to follow, I would like to examine some of the reasons for this present attitude of skepticism; to indicate some of the effects upon the traditional laws of war of what we have come to call 'total war.' In so doing it may appear that I, too am skeptical of the continued utility of a law regulating the conduct of warfare. In order to avoid possible misunderstanding, I should like to make quite clear that I consider the traditional law of war one of the most worthwhile achievements of the 18th and 19th centuries, and am convinced that the recent trend of belligerents in abandoning the traditional restraints upon war has led — directly or indirectly — to many of the seemingly intractable problems of contemporary world politics. At the same time, I do not believe that it would serve a useful purpose if we failed to recognize the very dangerous situation we face in the methods and practices of total war. However necessary a change from the present trend may be — and I consider such a change to be an urgent necessity — the fact remains that we must begin with as clear a view as is possible of where we are today and where we will most likely go if this present trend is not altered in some way.

On first consideration, it is rather curious that the present attitude of disbelief in the utility of the law of war has not been substantially dissipated either by the war crimes trials that followed World War II or by the conclusion of the 1949 Geneva Conventions For The Protection of War Victims. Still, the war crimes trials were an unparalleled event in the modern period of international relations. The jurisprudence resulting from the trials has been considerable. In addition, it is no exaggeration to say that the 1949 Geneva Conventions constitute the most ambitious endeavor in international legislation on the regulation of war since the 1907 Hague Conventions.

Despite these recent events, the conviction persists that in a future war, especially one characterized by deep ideological schisms, even the most elementary prohibitions of the law of war will be abandoned. One reason for this would appear to stem from the fact that the vast majority of the war crimes trials dealt primarily with charges of mistreatment of prisoners of war and of civilians in occupied territory. The trials provide little guidance on the legitimate weapons and methods for the actual conduct of hostilities. For example, there is not a single significant judgment dealing with the present legal limitations, if any, on aerial bombardment. Hence, there is the feeling that the war crimes trials and the 1949 Geneva Conventions, while clarifying and contributing to the rules of war governing the treatment of individuals who fall under the control of a belligerent, have contributed very little to the law governing the actions a belligerent may take against individuals — whether combatants or non-combatants — who have not fallen under his control. And, considering recent developments in weapons of mass destruction, some have questioned the relevance of further effort directed only toward the better protection of war victims. The rather facetious suggestion has been made that the real problem remaining to be solved concerns the possible means of becoming a war victim.

More serious, however, is the suggestion that the effectiveness of rules whose purpose is to restrain belligerents in their

treatment of war victims may be dependent in large measure upon the possibility of retaining some restraints upon the actual conduct of hostilities. It is argued that where these latter restraints are absent, the likelihood that belligerents will abide by the law governing the treatment of war victims is accordingly diminished. Whether and to what extent this argument is sound is difficult to say, though I am of the opinion that it should not be ignored. It is indeed difficult to believe that, on the one hand, belligerents will continue to cast off all remaining restraints on the actual conduct of hostilities and, on the other hand, scrupulously meet their obligations to provide humane treatment to the victims of war.

In any event, it is certainly true that at present there is a marked discrepancy between efforts to insure protection to victims of war and the virtual abandonment of any further effort to regulate the actual conduct of hostilities. While not minimizing the importance of the former rules, our principal concern in this lecture is with the latter rules; i. e., the rules that traditionally have regulated the actual conduct of hostilities between belligerents, as well as with the traditional rules regulating the relations between belligerents and neutrals.¹

The first problem that arises in the attempt to assess the present status of this law concerns the effects of the two world wars. Although exaggerated accounts of the lawlessness of the belligerents frequently have been given, there is no denying the fact that both wars witnessed the widespread violation of many of the traditional rules. It is important to observe that reference is not made here to occasional violations of the rules of war, since such occasional violations do not substantially affect the binding force of law. However, the continuous violation of certain rules is clearly a different matter. Do rules of war, whether

1. The term "traditional rules" refers, in the main, to the customary and conventional law as it stood at the outbreak of World War I. The customary law of war, particularly the customary law of naval warfare, is largely the result of nineteenth and early twentieth century practice. The conventional law refers, on the whole, to the rules established by the Hague Conventions of 1864 and 1907.

customary or conventional, cease to be valid (binding) for the reason that over a given period of time they are neither obeyed nor applied by belligerents?

As a general, and rather theoretical, proposition it is easy enough to say that the validity, or binding quality, of law must depend upon a minimum degree of effectiveness. The difficulty occurs when one descends from the abstract proposition to the concrete case and asks: has this specific rule of warfare ceased to be valid for the reason that over a certain period of time it has been ineffective, on the whole, in regulating belligerent behavior? I am afraid that I am unable to concur with the attitude of some writers who consider the traditional law, despite the experience of two World Wars, either as unchanged in content or as in a temporary state of suspension — awaiting the end of what is considered to be the present period of lawlessness. In particular, it does not seem possible to consider the laws of naval warfare valid prior to World War I as remaining unchanged today, in view of the practice of the naval belligerents during the two World Wars. Unfortunately, however, there is no easy and reliable method of determining the extent to which the traditional law of naval warfare has been invalidated by recent practices, if for no other reason than the fact that in international law there is no one competent agency, no superior organ standing above the various states, to which we may turn for an authoritative answer. Instead, we must usually undertake the laborious task of examining the actual practices of states, the occasional opinions expressed by governments, the scattered — and perhaps not always enlightening — decisions of military courts and tribunals, and the opinions — for what they may be worth — of international jurists.

Even after painstaking search, no clear and reliable answer may emerge. Who can say today with any real assurance that the rule forbidding the destruction of enemy merchant vessels without first placing passengers and crew in a place of safety remains binding upon belligerents? Throughout World War II,

Germany in the Atlantic and the United States in the Pacific resorted to unrestricted submarine warfare against enemy merchant vessels; the latter were attacked and destroyed without warning and without prior attempt to place passengers and crew in a place of safety. Great Britain also resorted to the practice of destroying enemy merchant shipping on sight, though it made the effort to limit this practice as far as possible. Although the attempt was made by most belligerents to base the measures taken against enemy merchant shipping upon the right of reprisal, research has failed to indicate any effort on the part of the United States to provide legal justification for waging unrestricted submarine warfare in the Pacific.

A survey of the war crimes trials fails to turn up any cases in which defendants were charged with waging unrestricted submarine warfare against enemy merchant shipping, the one exception being the charge brought against Admiral Doenitz before the International Military Tribunal at Nuremberg. Admiral Doenitz was acquitted by the Tribunal of giving the order to wage unrestricted submarine warfare against British merchant vessels, for the reasons that shortly after the outbreak of war the British Admiralty "armed its merchant vessels, in many cases convoyed them with armed escort, gave orders to send position reports upon sighting submarines, thus integrating merchant vessels into the warning network of naval intelligence. On 1 October, the British Admiralty announced that British merchant ships had been ordered to ram U-boats if possible."² It should be noted, however, that the Tribunal *did not* state that the prohibition against sinking enemy merchant vessels without warning and without having first placed passengers and crew in a place of safety was no longer valid. On the contrary, the most reasonable inference is that the Tribunal did regard the prohibition as remaining binding upon belligerents, though it acquitted Doenitz of the charge in view of the circumstances already noted.

2. U. S. Naval War College, *International Law Documents*, v946-47, (1948), p. 229.

If we turn to the opinions of writers, we find that a majority still appear to assume that the law forbids unrestricted warfare against enemy merchant shipping. H. A. Smith is representative of these international jurists when he writes that "Notwithstanding the experience of the Second World War, it must be emphasized that the principle thus laid down (i.e., forbidding unrestricted warfare against enemy merchant shipping) is a binding rule of the law of nations."³ However, a minority of writers seriously question the continued validity of the prohibition under discussion.⁴

This uncertainty over the present status of much of the traditional law of naval warfare is increased when we consider that during both World Wars the major naval belligerents deemed it necessary, almost from the opening stages of hostilities, to resort to measures whose legal justification — as judged by the traditional law — could rest only upon the belligerent right of reprisal. The declaration of operational (war) zones within which enemy and neutral shipping alike were either banned entirely or were subject to special hazards, the abolition — in fact — of the traditional law of blockade and contraband, the indiscriminate laying of mines — these and many other measures were based for the most part on the right of reprisal. We are not so much concerned here with the question as to whether in a specific instance the resort to reprisals was justified, particularly when such reprisals operated in the main against neutral shipping. Nor are we concerned in this context with the question of ultimate responsibility for the initiation of this endless series of reprisals — a difficult and controversial matter. We are concerned with the fact that the constant resort to reprisals in naval warfare provided a method for evading the restrictions imposed by the traditional law, and, perhaps, for effecting changes in this law.

3. H. A. Smith, *Toward Custom of the Sea* (2d. ed., 1950), p. 164.

4. For example, Julius Stone writes: "The immediate task is to regulate the future of naval warfare in which submarines and aircraft will join in the attack on enemy commerce; for it is regrettably clear that no rule purporting to exclude them from this role, however well-grounded in humanity, will be brooked." *Legal Controls of International Conflict* (1954), p. 607.

The explanation of this frequent disregard of the law, either openly or — more often — under the guise of reprisals, is to be found in the far-reaching transformation of the environment in which the traditional law operated and from which it derived much of its meaning and significance. For the traditional rules of warfare, and particularly the rules regulating warfare at sea, were largely a product of the nineteenth century. This traditional law presupposed a certain type of state and a certain type of war. The conception of the state was not necessarily democratic, but it was a state with limited powers. It presupposed economic liberalism, with a clear distinction to be drawn between the activities of the state and the activities of the private individual. The nineteenth century conception of war was that of a limited war, limited not only in terms of the number of belligerents involved in any conflict, but also limited in terms of the fraction of each belligerent's population which participated in and closely identified itself with the war effort. Finally, and most important, this conception of war presupposed limited war aims on the part of the belligerents. These limited war aims allowed, in turn, the introduction of restraints upon the methods by which these aims might be pursued.

The general nature of the transformation from the nineteenth century environment to the contemporary environment has been too frequently, and too thoroughly, analyzed to warrant any detailed comment here. It is sufficient for our purposes simply to note that almost all of the conditions presupposed by the traditional law have either been swept away or have been placed in serious question. The effects of this radically changed environment on the traditional law should be examined not only in relation to the numerous specific rules regulating war's conduct but, first and foremost, in relation to the *general principles* of the law of war; that is, in relation to those general principles that have always been considered as forming the bases of, and as giving meaning to, the more specific and detailed rules.

Perhaps the most important of these general principles is that principle which distinguishes between combatants and non-combatants. That the non-combatant population is not to be made the object of direct attack and — so far as military necessity permits — is to be spared in person and property during hostilities, has long been considered the outstanding achievement and the vital principle of the law of war. In 1923, the American proposals relating to the legitimate limits to aerial bombardment were introduced by the following statement:

“Among the elementary principles which the development of modern rules of warfare, running through several centuries, has been designed to establish and confirm, the principle most fundamental in character, the observance of which the detailed regulations have largely been designed to assure, is the distinction between combatants and non-combatants, and the protection of non-combatants against injuries not incidental to military operations against combatants.”⁵

In the preceding year, 1922, the General Board of the U. S. Navy had laid strong emphasis upon the same principle in concluding that the use of gases in warfare was illegal.⁶ The chairman of this General Board was Admiral W. L. Rodgers, previously a President of the Naval War College. Yet it is indicative of the growing skepticism in the possibility of maintaining this distinction between combatants and non-combatants during hostilities that sixteen years later, on the eve of the Second World War, Admiral Rodgers asserted that “if belligerents in the future think that success will be brought about by attack upon the hostile people in general, instead of on military forces only, the plea for im-

5. The statement was made by John Basset Moore. See: John Basset Moore, *International Law and Some Current Illusions* (1924), p. 200.

6. The report of the General Board was submitted to the Washington Conference on the Limitations on Armaments, by the American delegation. See: U. S. Naval War College, *International Law Situation, 1935* (1936), p. 99-100.

munity of non-combatants in the name of humanity will be secondary Our cry for humanity merely betrays an instinctive revulsion from the accompaniments of war which amounts to little after hostilities have begun and passions have been aroused.”⁷

Admiral Rodgers went on to prophesy the use of gas, and although future events proved him wrong in this respect, his basic contention proved very nearly accurate. At sea, the total character of warfare led to the relative ineffectiveness of the principle distinguishing between combatants and non-combatants. As a result many of the traditional rules, which presupposed and were based upon this distinction, were rendered inoperative. In varying degree, belligerent merchant shipping was placed under control of the state. The arming of belligerent merchant vessels, sailing under convoy, and the incorporation of merchant vessels into the intelligence system of the belligerent, were common practices. Under these circumstances it became increasingly difficult to distinguish between combatants and non-combatants in warfare at sea. Given this difficulty, the rule forbidding the attack and destruction of enemy merchant vessels was made equally difficult to observe.

In addition, the stringent control exercised by belligerents over imports, coupled with the achievements of modern science which have rendered the most unlikely articles of possible use in war, led to the abandonment of the traditional law of contraband. Belligerents came to treat as conditional contraband almost all goods formerly regarded as free; i. e., as immune from seizure by a belligerent. More important, the distinction between absolute and conditional contraband, although formally adhered to by most of the belligerents, came to have little, if any, real significance. The possibility of distinguishing between absolute and conditional contraband is closely related to the possibility of distinguishing between combatants and non-combatants. Goods consti-

7. W. L. Rodgers, "Future International Laws of War," *American Journal of International Law*, Vol. 33 (1939), p. 442.

tuting absolute contraband are always liable to capture by a belligerent if destined to territory belonging to or occupied by an enemy. The nature of absolute contraband makes it highly probable that a belligerent will appropriate such goods as long as they are anywhere within his jurisdiction. In the case of conditional contraband, capture has been considered justified only if the goods were shown to be destined for the use of an enemy government or its armed forces. The ambiguous character of conditional contraband, which is equally susceptible for peaceful or warlike purposes, is resolved when it is established that such goods are intended for military use by an enemy. But the controls exercised by belligerents over imports during both World Wars did not allow, in practice, a clear distinction to be made between goods destined to an enemy government, or its armed forces, and goods destined to the civilian population. The test of enemy distinction, formerly applied only to a restricted number of articles constituting absolute contraband, came to be applied to all goods susceptible of use in war. In effect, this development led to the belligerent claim to have the right to seize all goods ultimately destined for an enemy state.

In the final analysis, though, it is aerial warfare that most seriously threatens the distinction between combatants and non-combatants, so far as this distinction relates to the actual conduct of hostilities. It would serve little purpose to review the many attempts to establish some practical and effective limitations upon aerial bombardment. As matters now stand, the generally admitted test for determining the legality of aerial bombardment is the criterion of the "legitimate military objective." The only difficulty with this test is that there is no general agreement today upon what may constitute a legitimate military objective. The only statement that may be safely made on this point is that, given the character of modern warfare, the concept of a legitimate military objective has constantly expanded.

Perhaps some semblance of the principle distinguishing between combatants and non-combatants may be preserved in relation

to aerial bombardment by applying to this method of warfare certain restrictions which have been held to apply to hostilities wherever conducted. These restrictions are that non-combatants must never be made the object of *direct attack*, if such attack is unrelated to a military objective, and that attack for the sole purpose of terrorizing the civilian population is forbidden. These restrictions assume, of course, that the non-combatant population *as such* cannot constitute a legitimate military objective. They further assume that not even the practices of total war have rendered legitimate the terrorization and disorganization of the civilian population. It must be admitted that these assumptions are being seriously questioned today, although many who do question them are unwilling to see that if they are finally — and openly — abandoned we will have given up even the pretense that war can be subject to some regulation.

On the other hand, realism requires that the practical significance of these restrictions, as they apply to aerial bombardment, not be overestimated. Whereas in land warfare it is frequently possible to determine when the civilian population is made the object of a direct attack, unrelated to military objectives, in aerial warfare the difficulties involved in reaching a similar determination are very great. The presence of non-combatants in the vicinity of military objectives does not render such objectives immune from bombardment for the reason that it is impossible to destroy these objectives without indirectly causing injury to the lives and destruction of the property of non-combatants. Even under the traditional law the immunity of non-combatants from the effects of hostilities was never considered to be absolute. In land warfare, the measures permitted against a besieged locality, or the bombardment permitted in a zone of military operations, afforded little protection to the civilian population situated within these areas. Nevertheless, these areas were considered as legitimate military objectives, simply because of the presence of non-combatants. The same reasoning, when applied to the circumstances of aerial warfare, and given a sufficiently elastic definition of legitimate

military objective, transforms an exceptional situation into a normal condition. The result is that in practice it has proven next to impossible to determine in aerial warfare when non-combatants have been made the object of direct attack unrelated to a military objective.

In the absence, therefore, of any rules of customary or conventional law which specifically regulate the limits of aerial bombardment, and given the difficulties in applying to this method of warfare the principle which distinguishes between combatants and non-combatants, we are forced to fall back upon the general principles of military necessity and humanity. The principle of military necessity may be defined as permitting a belligerent to apply only that kind and degree of force necessary for the purpose(s) of war, and which is not otherwise expressly prohibited by the customary or conventional law of war. The principle of humanity forbids the employment of any kind or degree of force not actually necessary for the purpose(s) of war; that is, force which needlessly or unnecessarily causes or aggravates human suffering or physical destruction. As applied to aerial bombardment, these principles forbid the wanton destruction of cities, towns, or villages, or any devastation not justified by military necessity.

The opinion is frequently expressed that these principles of necessity and humanity contradict one another, that they serve opposing purposes, and that it is the task of a military commander in a concrete situation to endeavor to balance considerations of necessity against the demands of humanity. However, this opinion would seem misplaced. The principle of humanity, in forbidding the employment of force unnecessary or superfluous to the purposes of war, implies the principle of necessity. The principle of necessity, in permitting only that kind or degree of force necessary for the purposes of war, clearly implies the principle of humanity.

In addition, the principle of military necessity should not be interpreted as being superior to, and thereby restricting the

operation of, other rules of warfare, either conventional or customary. On the contrary, it is the principle of military necessity that may be, and occasionally is, restricted by certain rules established by custom and convention. Not everything necessary to the purpose of war is allowed by the law of war. It has been the opinion of military tribunals, having occasion to pass upon this question, that where the prohibition contained by a positive rule of the law of war is absolute, military necessity cannot be used as a plea. Thus, military necessity has not been considered as justifying the killing of prisoners of war. The latter prohibition is regarded as absolute, and tribunals have held that it cannot be deviated from even for reasons of self-preservation. Military necessity may serve to justify deviation from a given prohibition only where the rule in question itself provides, in the event of necessity, for such deviation. In these latter instances, tribunals have held that it is not essential to establish that the conditions required for invoking the plea of military necessity — i. e., self-preservation or the success of a military operation — were objectively present in a given situation. It has been considered sufficient to establish only that the individual putting forth the plea of military necessity honestly believed these conditions to be present at the time of action.⁸

The principles of military necessity and humanity are not to be considered only in their relation to existing rules of warfare. It is equally important to consider them in their application to weapons and methods not already expressly regulated by law. Indeed, the primary purpose of these principles has generally been considered to be their usefulness in providing general criteria for determining the legality or illegality of novel weapons and methods for conducting warfare. It is largely from this latter

8. See: *The Hostages Trial (Trial of Wilhelm List and Others)*, Law Reports of Trial of War Criminals, Vol. 8 (1948), pp. 66-69; *The German High Command Trial (Trial of Wilhelm von Leeb and Thirteen Others)*, Law Reports Vol. 12 (1949), pp. 85, 93-94, 123-127; *Trial of Gunther Thiele and Georg Steinert*, Law Reports Vol. 3 (1948), pp. 56-59; and *Trial of Helmuth von Ruchtschell*, Law Reports Vol. 9 (1949), p. 89.

point of view that we must judge the usefulness of the principles of necessity and humanity. What is their application to aerial bombardment, to nuclear weapons, to bacteriological warfare, et cetera?

The obvious difficulty involved in the attempt to apply the principles of humanity and necessity to novel methods and weapons for conducting war is that these principles depend for their effective operation upon standards that are neither self-evident nor immutable. The legality of any new weapon or method must be judged in terms of its necessity; and the necessity must be determined by the purpose — or purposes — of war. Even assuming that the purposes of war remain constant, it has never been easy in practice to determine whether a specific weapon or method does cause unnecessary destruction or human suffering. The provision of the Hague Regulations (No. IV, 1907), that forbids belligerents to employ "arms, projectiles, or material calculated to cause unnecessary suffering," has been largely without any real effect, and for the simple reason that it does not specify the weapons calculated to cause unnecessary suffering — hence, forbidden. It is sometimes said that in order to determine the application of the principle of humanity to specific weapons we must look to the practice of states, and that it is from this practice that we may determine whether a particular weapon has the effect of causing unnecessary suffering or destruction. Undoubtedly it is true that the practice of states may determine the illegality of a specific weapon, particularly if we identify practice with custom. But then the source of the prohibition is the customary practice of states, and it is merely superfluous to cite the principle of humanity.

In short, rules which depend upon vague criteria can have only a limited utility; and this is especially true when such rules must be applied in a legal system in which the principal subjects of the law (states) themselves apply this law. The criterion of "necessity," hence the principle of humanity, has always suffered

from the fact that its application to novel weapons and methods depended upon the possibility that states would agree upon its meaning in specific instances. Such agreement has always been relatively limited. This is especially so in a period marked by rapid and important developments in the methods and weapons of war.

These difficulties are increased by the fact that the purpose of war has not remained constant. A war fought for the limited purpose of obtaining a more defensible frontier is something quite different from a war whose purpose is the total defeat and unconditional surrender of the enemy. But if the purposes of war are varied, then the measures necessary to achieve these purposes are equally varied. The truth is, it would seem, that as long as men considered the purposes of war limited in character, the application of the principles of humanity and necessity was at least a possibility, however restricted. In a war that is total, both in its conduct and in its aims, the application of these principles to novel weapons and methods has either a radically changed meaning or — perhaps — no meaning at all.

In view of the preceding remarks, a brief comment may be made at this point concerning the legal position of nuclear weapons. Although there are no specific rules of conventional international law regulating the use of nuclear weapons, it has been suggested that the use of these weapons must nevertheless be considered as subject to certain restrictions that already regulate war's conduct. These restrictions are: Article 23a of the 1907 Hague Regulations forbidding the use of poison or poisoned weapons; the provisions of the 1925 Protocol of Geneva forbidding the use of poisonous or other gases and of "analogous liquids, materials or devices"; Article 23c of the 1907 Hague Regulations prohibiting the use of weapons calculated to cause unnecessary suffering; and, finally, the rule distinguishing between combatants and non-combatants and forbidding direct attacks upon non-combatants, such attacks being unrelated to military objectives.

Undoubtedly the last two principles constitute the more general, and more significant, grounds for questioning the legality of using nuclear weapons in war; and there is a substantial number of authorities who do so question the legality of nuclear weapons on these grounds. I find it difficult to share their opinion. The objection that the use of nuclear weapons must cause unnecessary suffering (and destruction) is gravely handicapped in view of the very vagueness of the criteria to be applied. As already pointed out, the question of whether or not a particular weapon is to be considered as causing unnecessary suffering, hence inhumane, is one that can be answered only by examining the practice of states. In the case of poisonous gases, for example, it would appear that the practice of states does point to the existence of a rule of universal validity forbidding the use of poisonous gases as an inhumane weapon. (Even here, however, the United States recently has expressed strong doubt as to the existence of any universal rule forbidding the use of poisonous gases). In the case of nuclear weapons the matter is otherwise. The present attitude of most of the major powers is clearly not that of considering the suffering caused by nuclear weapons as unnecessary, when judged by the military purposes these weapons are designed to serve.

It is equally difficult to accept the objection that nuclear weapons are necessarily illegal for the reason that their use must lead to the complete obliteration of the rule distinguishing between combatants and non-combatants. In the first place, this objection is not necessarily relevant to a consideration of the legality *per se* of nuclear weapons. To the extent that nuclear weapons are used exclusively against military forces in the field or naval forces at sea, they escape this objection. It is only when such weapons are used against military objectives in the proximity of the non-combatant population that this argument warrants serious consideration. There should be little doubt that, as judged by the traditional meaning given to the principle distinguishing combatants from non-combatants, the use of nuclear weapons against cities containing military objectives must be deemed illegal. However,

the same judgment would have to be made in considering the practices of aerial bombardment followed by belligerents during World War II, though very few writers have condemned these recent practices as illegal and no records of war crimes trials are known in which allegations were made of illegal conduct in aerial warfare. Nuclear weapons have hastened a development that has been readily apparent for some time, and, if used against cities of an enemy, will provide the final blow to the once fundamental distinction made between combatants and non-combatants. Yet it is not easy to refute Professor Lauterpacht's opinion that "the total elimination or limitation, as a matter of law, of the use of the atomic weapon cannot be accomplished by way of a restatement of an existing rule of law. Such a restatement denying the legality of the use of the atomic weapon must, of necessity, be based on controversial deductions from supposedly fundamental principles established in conditions vastly different from those obtaining in modern — total and scientific — warfare."⁹

In considering the present status of the law regulating the actual conduct of hostilities between belligerents, we have had occasion to touch upon certain problems that involve neutral-belligerent relations as well. However, neutral-belligerent relations have been considered largely from the viewpoint of inter-belligerent relations. This presupposes the predominance of belligerent interests over neutral interests. So far as naval warfare is concerned the method followed in this lecture is a reversal of the customary procedure, which considered inter-belligerent relations from the standpoint of neutral-belligerent relations. In fact, the rules regulating inter-belligerent relations during warfare at sea traditionally have been considered as a kind of by-product of neutral-belligerent relations. The customary procedure assumed that neutral interests were to be considered, at the very least, as equal to belligerent interests. This assumption of students accurately reflected the assumption underlying the traditional law. H. A. Smith has observed that "the assumption underlying the traditional law

9. H. Lauterpacht, "The Revision of the Law of War," p. 371.

(of naval warfare) is that the greater part of the world is at peace, that war is a temporary and local disturbance of the general order, and that the chief function of law is to keep war from spreading, and to minimize its impact upon the normal life of the world." He continues by stating "All the states which are directly engaged (in nineteenth century wars) were most anxious to secure the sympathy of neutrals, and the danger of provoking neutral intervention on the enemy side provided a very real sanction for the observance of the laws of war at sea.¹⁰

After what has already been said in earlier comments it need hardly be pointed out that these traditional assumptions did not correspond to the conditions under which the two World Wars were fought. The equality of neutral interests and belligerent interests depends, in the first instance, upon an equality of power; where neutrals do not possess this equality of power their interests, and hence their legal rights, will suffer accordingly. This has always been true, even in the nineteenth century. It is especially true when war is conducted for unlimited aims and when the emotional fervor evoked by total war leads belligerents to equate neutrality with immorality.

During the nineteenth century a rough balance between the conflicting claims and interests of neutrals and belligerents was largely achieved. If anything, the traditional law as it stood at the outbreak of World War I inclined in favor of neutral interests. It soon became clear that if there is always a latent conflict between belligerent and neutral interests, even in a war fought for limited aims, the conflict between these interests in total warfare becomes almost irreconcilable. On the one hand, a primary aim of maritime warfare in both World Wars was the complete shutting off of enemy trade, the destruction or capture of all imports to and exports from enemy territory, without regard to whether this trade was carried in enemy or neutral bottoms. On the other hand, the effect of the traditional law was to insure that the maritime measures

10. H. A. Smith, *Law and Custom of the Sea* (2d ed., 1950), p. 75.

a belligerent could bring to bear against an enemy's economy would play only a limited role in the final decision of the war.¹¹

Given these circumstances, the outcome was hardly unexpected. On the German side, the measures resorted to are well known. Lacking adequate surface naval power even to attempt to exercise the controls over neutral shipping allowed to belligerents by the traditional law, Germany resorted to indiscriminate mine-laying and unrestricted submarine and aerial warfare. Immense tracts of the high seas were declared "operational" or "barred" zones, and in these areas neutral shipping was forbidden to enter upon pain of destruction.

The measures taken by Great Britain were varied and complex, and far less destructive in terms of neutral lives and shipping. The contraband list was expanded to include almost all articles. New meanings of enemy destination were adopted, which had the effect of wiping out the traditional distinction between absolute and conditional contraband. The traditional rule of prize law that obligated the captor to prove the enemy ownership or destination of captured cargoes was abandoned. Instead, neutrals had to establish the genuinely neutral ownership or destination of vessels and cargoes in order to avoid their condemnation. Since the belligerent right of interception at sea proved insufficient to shut off the enemy's trade, Great Britain resorted to novel methods of contraband control. The two major techniques of contraband control were *navicerting* and *rationing*. The important feature of the navicert system is that it permitted cargo examinations to be conducted in neutral ports, instead of at sea or in the ports of the belligerent. In fact, one of the principal purposes of the new techniques of contraband control devised by Great Britain was to control contraband at its source. In the end, however, the measures resorted to against the enemy's trade were based upon the right of reprisal. The most

11. ". . . . assuming that neutral power is sufficient to enforce observance of the rules, the probability is that economic pressure at sea will only play a relatively minor part in the decision of the war." Smith, *Law and Custom of the Sea*, p. 139. By "the rules," Smith refers to the traditional rules.

far-reaching of these reprisal orders, the British "blockade" announcement of 30 July 1940 decreed that any vessel sailing for a European port was required to obtain navicerts for all items of cargo and, in addition, a ship navicert at the last loading. Any consignment not navicerted and any shipment without a ship navicert was liable to seizure. The same rules applied to outgoing trade. All vessels sailing from European ports had to have certificates of non-enemy origin for all items of their cargoes. Any vessel whose cargo was not fully certificated was liable to seizure. Although these measures of reprisal have been termed "blockades," they neither resembled in their operation, nor did they conform in certain respects to the rules governing, the traditional blockade.

It has been suggested that as far as neutral-belligerent relations are concerned a distinction should be made between great wars and small wars. In great wars neutral rights, particularly at sea, will probably suffer the same fate that they did in the two World Wars. In small wars we may expect some degree of adherence to the traditional law.

It is rather difficult to judge the merit of this distinction between great and small wars. Many will contend that the possibility of limited wars is so small, that any speculation as to how these wars may be fought represents wasted effort. There are further considerations which serve to suggest the limited operation of the traditional law of neutrality, even if it is assumed that future conflicts may be limited in their scope and in their number of participants (and the experience of Korea does suggest this possibility). The traditional rules of neutrality were based not only upon the non-participation of many states in any given conflict but also upon the principle of strict impartiality of the non-participating states toward the belligerents. In addition, the traditional law assumes throughout that a clear distinction can and will be made between the neutral state and the private neutral citizen — the neutral trader. Hence, the performance of acts of partiality on the part of the neutral citizen — carrying contraband, breaking

blockade, performing "unneutral services" — does not affect the impartiality of the neutral state.

These assumptions of the traditional law of neutrality must be seriously questioned today. The control belligerents now exercise over their merchant shipping differs only in degree from the control neutrals exercise over their merchant shipping. In practice, the distinction between neutral state and neutral trader has become increasingly difficult to make. More important, perhaps, is the obvious incompatibility between the principle of strict impartiality and the obligations states incur within a system of collective security. The Charter of the United Nations obliges the member states to assist the organization in the event of a threat to or breach of the peace. Such assistance may not necessarily involve actual participation in hostilities but it does obligate member states to abandon the position of strict impartiality toward the belligerents. The conclusion of regional and collective self defense arrangements operates to place similar restrictions upon the contracting parties, and to limit further the future application of the traditional law of neutrality. Finally, mention must be made of the recent tendency of states to distinguish between a neutral status which implies strict impartiality and a status of qualified neutrality. The essential feature of a status of qualified neutrality is that it does not preclude a certain measure of discrimination in favor of one belligerent or group of belligerents, short of actual participation in hostilities. But what the rules which govern this status of qualified or discriminating neutrality are, if there are any rules, is impossible to determine at present. Still, it would be premature to conclude that neutrality, in its traditional form, is a thing of the past. We must consider the possibility that in a future conflict there will be states that will seek to ensure their non-participation in hostilities. Despite the difficulties involved in applying today the traditional rules of neutrality, characterized by the rule of strict impartiality, these rules still provide the only *established* legal regime for states to follow who desire to abstain from becoming involved in war. For

these reasons, we must continue to study the traditional rules of neutrality in warfare at sea.

At the beginning of this lecture, reference was made to the widespread skepticism with which the law of war is regarded today. Enough has been said to indicate that there is a sound basis for this disbelief that future wars can be subject to effective restraints in the conduct of hostilities. Unless the trend of the last forty years is reversed, we must consider the prospect of hostilities conducted with even less restraint than was the case in World War II. However, despite the practices of belligerents in recent wars, and the very perilous situation to which these practices have led, there is strong opposition to any suggestion of a revision of the law of war — particularly a revision of the rules governing the actual conduct of hostilities.

Perhaps the most influential of these arguments centers in the contention that the phenomenon of total war is merely a consequence of scientific and technological developments, against which it is useless to devise rules intended to control the purposes these developments should serve and the use to which they may be put. However, total war is not a technological or scientific necessity, but primarily a social and political phenomenon. It is not even altogether correct to say that it is technological developments which now make total war a possibility, since this possibility has always existed. Total war is no innovation of the twentieth century. It is rather a revival of a very ancient method of waging war. Hence, the recurrence of total war in our time is not due primarily to these developments, though advances in science and technology no doubt contribute a great deal to the ease by which total war may be waged. Fundamentally, it is the willingness of men to use these innovations for unlimited destruction that has once again given rise to total war.

There is considerably more truth in the related argument that restraints upon the conduct of war can only be effective

to the degree that they reflect the common interests of the belligerents. In part, of course, this latter argument is a rather laborious attempt to state the obvious. Nevertheless, it does have the merit of recognizing that the conduct of war depends upon interests, upon human desires, and is not merely a reflection of some necessity imposed upon men by the instruments of war. Its objectionable feature consists in considering these common interests of belligerents somehow foreordained and immutable. More often than not, it serves to justify any given situation. The truth would seem, however, that the interests, even the common interests, of belligerents are far from fixed, that they are in fact subject to considerable variation.

Opposition to any further consideration of the law of war is frequently offered for the reason that it is illogical to endeavor to eliminate war and, at the same time, to attempt to regulate the conduct of war if it does occur. Yet there is nothing illogical or contradictory about this. It is not true that in view of the Charter of the United Nations "war" as such has been abolished, and therefore the law of war has suffered the same fate. The Charter of the United Nations, even assuming its effective operation, certainly does not rule out the possibility of international armed conflict. Whether or not we call this conflict war is of little importance in this connection, since it does not substantially affect the question of the applicability of rules whose purpose is to regulate the conduct of hostilities. Nor has the general legal transformation in the status of war affected the applicability of the law of war between belligerents, despite recent suggestions to the contrary. The growing conviction that the resort to armed force must be considered as unlawful, except when undertaken as a measure of defense, has led many to conclude that a law equally applicable to the aggressor as well as to the victim is somehow incongruous and even immoral. This view assumes that the law of war is a product of the period in which war — i. e., the resort to war — was looked upon with indifference, and that the law of war also a product of the same indifference toward war. It must be emphasized that

the rules of warfare did not have their origin and justification simply in a cynically indifferent attitude toward the legal and moral character of war itself. The final justification for a law of war has always been, and must remain, the conviction that whatever the interpretation given to war itself there *should be* rules for the regulation, and mitigation, of war's conduct.

In this task of improving the methods by which wars are to be conducted, the military commander must play a leading role. Some 60 years ago a great scholar observed, in considering the possible improvement of the laws of war, that "the best hope for the further mitigation of war lies in a high standard of character being maintained among soldiers. In peace considerations of law and justice may be acted on by nations, and the action taken on such grounds will in its turn help to mould the character. In war the stress is such that no considerations can be relied on for determining action but those which are already incorporated in the character. The determination of action in war lies practically with two classes, commanders by land and sea and statesmen: the people, once excited enough for war to have broken out, will approve of any measures which their commanders and statesmen recommend for carrying it on, and of these two classes the commanders are much more the important for our present purpose, because their opinion of what necessity requires will influence the statesmen"12

The foregoing observation is as true today as when first written. The military commander cannot avoid the fact that during a period of war he must bear a special responsibility for the decisions made concerning the methods by which war will be waged. If we are to hope for a reversal of the trends of two World Wars, if we are to return to the sound concept of subordinating the methods of warfare to the requirements of a more stable and durable peace, one of the first steps must be a clear realization by military commanders that they must play a decisive role in this process.

12. John Westlake, *Collected Papers* (1914), pp. 277-278.

BIOGRAPHIC SKETCH

Professor Robert W. Tucker

Professor Tucker was graduated from the U. S. Naval Academy and he received his M. A. and Ph. D. degrees from the University of California.

He has taught at Washington State College and at Stanford University. He was a member of the staff at the Naval War College from 1952-1954.

Since leaving the Naval War College, he has acted as an academic consultant. At present, he is Professor in the Department of Political Science at Johns Hopkins University.

SOVIET INTERPRETATION AND APPLICATION OF INTERNATIONAL LAW

A lecture delivered
at the Naval War College
on 25 February 1955 by
Dr. John N. Hazard

Admiral McCormick, Gentlemen :

Soviet lawyers did not begin thinking about international law until the year 1922. The Minister of Justice in that year gave a speech to all of the lawyers in the capital at Moscow, outlining the tasks of Soviet legal research, and he put first among those tasks the study of International Law. He recommended to the law professors who were there before him (most of them professors from before the Revolution, who had continued on after the Revolution) that they study the two volumes of treaties which the Ministry of Foreign Affairs had already published, in which he said there were seventy-two documents, and that they try to draw some generalizations from this experience. He also said that he thought the two volumes would be found to open a great many new perspectives and that they might provide some truly practical directives for Soviet foreign policy. In short he told the law professors before him that he, as Commissar of Justice, thought there were to be found in international law some practical advantages for Soviet foreign policy. He came out, then, for the pragmatic approach: International Law was to be useful to Soviet politics.

Why the year 1922 — why did this not happen earlier? As you all know, the Revolution was in the fall of 1917. The Soviet lawyers were very scornful of international law in the years between 1917 and 1922. In accordance with their Marxist training, they felt that law was an instrument of policy — whether it be domestic law (what we call ‘municipal law’) or international law. They said: “Look at who the people are on the scene today who are

using international law. They are the great capitalist powers." Therefore, since international law in their way of thinking was an instrument of policy it must be capitalist in its purposes; it must be designed to achieve capitalist ends, which they said were certainly not Soviet ends (Soviet ends being opposed to capitalist ends and heading towards Socialist, and, ultimately, Communist ends). So they felt this was an instrument not for them. It was an instrument, if you will, which had been created by enemies, was being used by enemies and was something which they should leave alone.

The spring of 1918 provided something of a test because the German Army kept marching into Russia, as you well remember. The question was: How should they stop the German Army? The first approach of the Bolshevik-Communist leadership was appeal to world public opinion. They sent Trotsky and a group of workers and peasants — very simple people, indeed — out to Brest Litovsk to talk with the Germans and to appeal, over the heads of the Germans, to the people of the world. They hoped that through this propaganda barrage they might be able to stop the Germans — but they did not stop them. The Germans continued to march. So Lenin, with considerable opposition in his own party, reached the conclusion that the only way to stop the Germans was to sign a peace treaty with them. In other words, he utilized one of the basic institutions in international law — namely, a peace treaty — to stop the Germans. He did that and they stopped! He had found that by using international law in this simple fashion he had achieved an end which he thought important to Soviet Russia.

In 1921, some years later, recognition was accorded the new Soviet government by a great many countries of Western Europe, and naturally, in the course of recognition, agreements were necessary to regulate the relationships between the States which had recognized Russia. Then commercial trade began. It became necessary to have a good many commercial treaties. It was in this fashion that the seventy-two treaties found their way into the two volumes

which the Commissar of Justice said in 1922 should be studied. In effect he was saying: "We have acted — now find out what we have done." This is a well-known approach to life, as some of you who are philosophers know, and one that might be called 'pragmatism.' You act and then you try to find out the philosophical basis for your action. So the Commissar was saying: "Let us do this because we may, in so doing, discover how to utilize this new body of principles to our advantage."

I think that in these first years it is obvious that the Soviet policy makers had reached the conclusion that international law, at least in some of its aspects, offered means of furthering Soviet interests. Soviet scholars were therefore asked to study the origin of all of the rules of international law for the purpose of deciding which of them might be considered useful in the future and also which of them might be considered dangerous and therefore should be disavowed or ignored.

This attitude which appeared in 1922 has remained the basic attitude of Soviet scholars and Soviet diplomats to the present day. It has been very simply stated — so simply stated that I think they have created a disadvantage for themselves in putting it into such words. Their Professor Feodore I. Kozhevnikov, who is now the Soviet judge on the International Court of Justice at The Hague, wrote in his book in 1948 this brief explanation of the Soviet attitude towards international law:

"Those institutions in international law which can facilitate the execution of the stated tasks of the U.S.S.R. are recognized and applied by the U.S.S.R., and those institutions which conflict in any manner with these purposes are rejected by the U.S.S.R."

That is a perfectly frank statement. I think that since 1948 they may have regretted that they let Professor Kozhevnikov publish the statement for it has not appeared in the more recent books

in quite such precise terms, although the attitude is certainly present; that is, the Soviet Union takes what is useful and discards that which is not useful. They do not accept, then, the whole garment; they tear it into pieces, take the pieces that meet their needs and throw the rest in the basket. If we understand that this is the principle on which they operate — that international law has some real value to them, not all of it but part of it (which is certainly no longer the principle with which they started that no part of international law was of any value), we are prepared to move on to some of the details which, I think, will indicate how they have utilized some of the institutions of international law and how they have rejected others because they do not think that they meet their purposes.

Let us approach, first, the question of the delineation of frontiers on land, on sea, and in the air. There is no frontier of the Soviet Union today which is not delineated by some document in international law (the reason that I have the map here is so that you may see the U.S.S.R. right before you). This does not mean that the Soviet officials themselves have written the treaties, although they have been very active in negotiating treaties which establish frontiers. Some of the frontiers — particularly the one with China — the great one running from the Afghan frontier to the Pacific — rest on Czarist international treaties, the first treaty being that of 1727 and there being a good many since that time. The Soviet authors say very definitely in their books that this is an example of a situation in which international law, established by a Czarist treaty, has met their purposes. So they rely upon international law to establish their frontier with China.

On the western side they did not have an established frontier because there had been a great deal of change after the First World War and a series of little wars. So in 1921 they set about to establish frontiers with the Baltic Republics, with Poland, and then with the countries in the Near and Middle East. Here, then, they have utilized international law, some of it ante-

dating the Revolution, to establish their land frontiers. Of course after the last war they reestablished those western frontiers through another series of treaties for a very conventional and international law approach to the establishment of frontiers.

The treaties have been less numerous on the seas. There are some examples, such as the treaty with England of 1930, which had to do in the main with English fishing vessels' rights in waters of the Arctic. The treaty provided that the English fishing boats might fish to within three miles of the low-water mark along the northern coast of the Soviet Union. In establishing this three-mile limit for the English in this treaty, the Soviet government stated that it retained for itself freedom of action to claim whatever frontier it might wish generally under international law. In most of their dealings since that time Soviet officials have maintained a twelve-mile limit.

In the Soviet statute, which is only a domestic statute but which establishes the regime to be applied within the twelve-mile limit, they do not claim that they own as their own territory the maritime belt to a twelve-mile width. They do, however, claim that any ship that enters that twelve-mile belt is subject to examination of her documents. Also, if she has any Soviet citizens on board who are leaving the country without permission, these citizens may be removed. In a way the U.S.S.R. has shown her very practical approach by not saying whether she does or does not consider this her territory. The one thing which she does say for all the world to read is that if you come within that twelve-mile limit you are going to be searched, and if the searchers find Soviet citizens on board, they are going to be taken off. That is very practical and I suppose that from the Soviet point of view that is enough, for they have made clear their intent. They have also provided that within that twelve-mile limit their own border patrol ships may run without lights at night.

On the sea again, but now in territory where they cannot claim exclusive control — for example, the Caspian Sea, the Black

Sea and the Baltic Sea — they have made an effort to negotiate treaties which would close those seas to all powers except the nations surrounding them; i. e., except the so-called "Littoral States." In 1935, they made a treaty with Iran concerning the Caspian Sea. This provided that no vessels except those of the Iranian and Soviet States might sail upon that sea. Of course they have never been quite so successful in closing the Baltic and Black Seas, but they have asserted constantly in their books that in their opinion these should be closed seas. All those who know anything about the Soviet position are now waiting to see what you people will do this summer when you sail your ships into the Black Sea to visit the Turkish ports on the north shores of Turkey. When I read about the summer plan in *The New York Times*, I concluded that our Navy has been reading the Soviet textbooks, as I am doing, and has thought it desirable to try out the Soviet attitude on the Black Sea. For some of you on board those ships it may be an interesting summer. It is clear what the Soviets would like to do because they tried to induce Turkey to permit a Soviet fortress at the mouth of the Black Sea, which was to "aid" Turkey in controlling the Straits. You can imagine how the Soviet forces would aid Turkey! The Straits would have been closed completely to warships of non-Littoral States. The Soviet request was never granted by the Turks, but it does indicate the Soviet attitude: The U.S.S.R. would if it could, close to Naval forces the two accesses to the sea frontiers of their country through the Black and Baltic Seas. They have already effectively closed the Caspian Sea in permitting only Persian ships, in addition to their own, to sail it.

In the air, the Soviet claim has been the established international law principle that the air space over a territory is the property of the power that owns the territory. They have absolutely refused to consider the proposal of the International Civil Aviation Organization to establish the five air freedoms which

would permit a relaxation of that rigid principle. So, again, this aspect of international law meets their needs, and it is espoused.

Take the enormous Arctic frontier. What is their attitude on this? Here, they have been a little ingenious, although they hasten to add that they are following Canadian practice — that this is not their idea, but Canadian. It is true that, chronologically, one Canadian senator suggested the idea first in the Canadian Parliament and that it was later adopted in principle by the Canadian Parliament. The U.S.S.R. has declared that all land already discovered and to be discovered within the Arctic sector would be Soviet territory, the Arctic sector being that part of the Arctic which lies between a line drawn from the Bering Straits on the eastern end and the border of Norway on the western end to the North Pole. Any land within that area, even if not discovered, would, under this Soviet declaration, be claimed as Soviet territory. Likewise, of course, they are prepared to permit Norway, Canada, Denmark (to the extent that she controls Greenland), and so on, to have their little sectors within which the Soviet Union would not interfere. The rejection of this doctrine for the Antarctic is one of the subjects which I want to discuss with some of you in the Seminar this afternoon, so I will not draw the contrast in this lecture.

Take another area in which Soviet policy makers have been interested in international law; namely, in the treatment of prisoners of war. When the war with Germany began, they found themselves in a difficult position because they had never reaffirmed the Czarist signature upon the Hague Convention relating to prisoners of war. They had no formal position in international law under which they could claim protection for their soldiers when prisoners of war of the enemy. But Professor Eugene A. Korovine, who wrote the standard Red Army Manual on International Law, claimed that even though the Soviet government had not taken the trouble (as it did with the frontier with China) to reaffirm the Czarist signature and claim that it was expecting all rights which

might exist under the Hague Convention, it now claimed that the principles of the Hague Convention had become so well established in international law that the Soviet Union could rely upon them to demand protection for its own soldiers and sailors when captured by the enemy. By this method, the U.S.S.R. adopted a treaty which it had not previously taken into its arsenal as something on which it wished to rely.

After the war, when the matter was renegotiated in the famous Geneva Conventions of 1949, the U.S.S.R. sent a vigorous delegation under a general as well as delegations from the Ukraine and Bielorussia. In their textbooks Soviet authors now claim that the Geneva Convention of 1949 is largely the work of their own people and that it was achieved in the face of opposition from what they call "the Anglo-American block." Not having been at Geneva and not having studied this matter in detail, I am not able to give you material to refute this charge. Whatever its foundation, the fact it is made indicates that Soviet policy makers are very proud of the Geneva Conventions and seem to feel that they established principles of law to which the Soviet government wishes to adhere. It is to be noted, however, that the U.S.S.R. signed the Geneva Conventions with a reservation that no prisoner of war who had violated the principles of the Nuremberg Trial could claim protection under the Conventions.

Take the question of guerilla warfare. This is one in which Soviet authors profess to see a class interest. They have been very unhappy about the lack of protection in the Hague Convention of guerillas who are found operating behind enemy lines without a uniform well after the enemy has rolled over the territory. Their argument is that this lack of protection was established by the German Imperial Staff years ago because it facilitated the German type of warfare — namely, warfare by troops in uniform under rigid discipline — and that the Germans were by no means going to have irregulars shooting at them from the rear in this fashion. Therefore, after this last war Soviet authors asked in

their legal periodicals for a revision of the law relating to guerillas, or 'partisans' as they always call them, so that the law would protect partisans even when wearing no uniforms and long after the front lines had passed beyond their little villages. The Soviet authors said that the capitalist powers had refused to move in the direction of protection because it was through partisans, or guerillas, that revolutionary movements were conducted in Malaya and in the Philippines. On the basis of that charge, the Soviet lawyers claimed that a change in international law was desirable from their point of view because it would further the interests of world revolution.

Take, now, diplomatic intercourse. This has been very difficult for the Soviet government because so little of the law relating to diplomatic intercourse is to be found in treaties. It is largely customary, except, of course, for the ranking of diplomats in the Treaty of Vienna of 1815. The question in this field in Soviet minds has always been: Is there a disadvantage to the U.S.S.R. lurking in the customary law relating to diplomatic intercourse? They have directed their scholars to do research in this area to try and determine what disadvantage might be found if such and such principles were accepted. Generally, their attitude has been one of acceptance.

In 1927, they enacted a statute saying that they would grant to representatives of foreign powers all diplomatic privileges under international law if their diplomats were granted the same privileges in the countries from which these representatives came. They have, however, from time to time permitted a series of what we consider violations of the general principles of international law relating to diplomatic intercourse. They have also tried a few experiments. For example, they said that they saw no reason for having ambassadors on the one hand and ministers on the other hand; they said 'let's make everybody equal.' They called their ambassadors and ministers by a single generic term. The difficulty with this was that everyone said: "Well, this does not conform

to the Code of the Congress of Vienna. We do not know what these things are. So at any dinner party they must sit at the foot of the table because they have no rank." Thus, in any general relationships in the diplomatic community the Soviet diplomats were always last. Of course, this was the very last thing the Soviet government wanted, so they then conformed to the international practice of designating their representatives as 'ambassadors' or as 'ministers.' In this particular case international law has moved on for there is hardly a State left where there is not an ambassador. In effect the equality of diplomats which the Soviet government originally espoused is little by little coming about.

The U.S.S.R. has also introduced into the field of diplomatic intercourse another point which it claims to be an innovation, and that is the demand that there be diplomatic immunity accorded commercial representatives of the Soviet type States. If you study your international law, you will find that in general (although it is not absolutely certain) if a diplomat engages in commerce, he is not immune from suit on his contracts (one of the historic examples was when the Persian ambassador sold rugs at the back door of his Washington home). Diplomats are only immune as to their diplomatic activities and not as to any commercial activities which they may conduct. Yet, the Soviet government was in the position of conducting all of its commerce, because of its Socialist attitude which took the form of the monopoly of State trade, through agents of the State. Under international law these agents were to be treated differently from the ambassadors of the Soviet Union, yet the Soviet government felt that it was desirable that its representatives be treated exactly alike. Probably this desire for protection arose partly because, as we have since found out, the diplomatic agents and commercial agents had been engaged in a good many other things other than representation of their States. Commercial agents seem to have been particularly suited for espionage work because of the type of travel that they do in conducting commercial affairs.

Most of the States of the world refused to give diplomatic immunity to Soviet commercial agents, at least under law other than that established by a treaty. If States have been able to get something in return which they thought worthwhile, they have granted diplomatic immunity to Soviet commercial agents. These States have said: "Well, we will give your commercial agents diplomatic immunity. But in any event we will hold the Soviet commercial mission responsible in the courts of our country on any contract which it may make if the contract is broken. So the individual is free from arrest — that is, he is not put in jail or he is not personally sued but his mission may be sued."

You will find treaties relating to this subject varying in accordance with the distance from Moscow of the country concerned. The countries closest have had to accept the most, while the ones farthest away (that includes the United States, of course) have accepted none of it whatever. We give no diplomatic immunity of any kind to the commercial agents of the Soviet States. On the contrary, we have refused to let them establish commercial missions in the United States, except during the war, and they have to conduct their commercial affairs through an American corporation, The Amtorg Trading Corporation, established under the laws of the State of New York, and therefore subject to all of the rules of an ordinary domestic corporation.

As to official secrets, what is the Soviet attitude in international law on this subject? I think that here we find the reflection of both Russian history and Soviet political theory. I am one of those who think that Professor Toynbee of England is probably right when he says that we cannot overlook the influence upon Russian mentality of the long history of Russia, during which Russia has been invaded frequently. Russians seem to think that every foreigner is the advance guard of an invasion — particularly if he happens to be a German or a Japanese. This is one of the things which I believe explains present attitudes. Soviet leaders are out of all reason frightened of German rearmament because

of this long history. Professor Toynbee says that we cannot overlook that fact. Together with the influence of history there is the influence of Soviet political theory. This theory teaches that as the capitalist powers see the Soviet Union (a Socialist power) develop and become strong, they will conclude that the U.S.S.R. cannot be permitted to advance to a position of strength. The capitalist powers are expected to fight a preventive war to reduce the Soviet system to impotency.

Because of these two influences — one historical and one based upon political theory — Soviet policy makers seem to see capitalists under the bed far more than any rational person would think possible. This position has been evidenced in the Soviet attitude towards the international law relating to communications between representatives of foreign states and their own people. This question of communication reached an important point for the United States in 1933, when we recognized the U.S.S.R. We were going to send a great many engineers to the U.S.S.R. to conduct the work, for example, of building the great dam across the Dnieper River and to do other commercial tasks. Mr. Roosevelt was very worried lest the Soviet attitude on official secrets put some of these American engineers in jail when they showed normal American curiosity about the operations of the plants in which they were working. So he turned to Mr. Litvinov, when Mr. Litvinov came from the U.S.S.R. to seek recognition, and said; "I must have some sort of guarantee that Americans, in the normal course of ferreting out information about which they are naturally curious — if they find some and communicate it to their employers or even to the American government — will not be prosecuted as spies." So we do have in our exchange of letters between Mr. Litvinov and President Roosevelt the paragraph that says as follows:

"The right to obtain economic information is limited in the U.S.S.R., as in other countries, only in the case of business and production secrets and

in the case of the employment of forbidden methods; i. e., bribery, theft, fraud, etc., to obtain such information."

Then Mr. Litvinov goes on and says:

"The category of business and production secrets naturally include the official economic plans in so far as they have not been made public, but not individual reports concerning the production conditions and the general conditions of individual enterprises."

This would, then (and it did), permit American engineers to show an interest in what was going on in the factory in which they were working and getting all of the information necessary for their participation without being treated as having violated the Official Secrets Act of the Soviet Union.

That was in 1933. Since that time there has been a considerable tightening-up of the situation. In 1947, right after the war, the Soviet government enacted a law in which it listed the matters which it considered 'State secrets.' The act of any Soviet citizen giving information of this kind was punishable under the Criminal Code. When you read that list you will find that it goes beyond anything you have ever imagined as a secret. There is, of course, included military information, but the list goes on from that to other areas that are new: industrial production figures for the whole or a part of the U.S.S.R. (in other words, it cannot be told how many shoes are produced without violating the Official Secrets Act); agricultural production figures (there can be no telling of the sugar beet production); information on domestic trade (it cannot be told how much butter is sold, for example, in the city of Gorki during the month of January); information on foreign trade (it cannot be told how much yak wool the Soviets buy from Afghanistan); information on technical improvements not yet released.

The very next day after listing the types of information to be kept secret there was added a second statute (I do not know why it was separate) which said that if any of this information happened to be in documents which were lost by a Soviet citizen through negligence, he could be prosecuted for violation of the Official Secrets Act. You can see from these laws that Soviet policy makers have become very severe about disclosure of information relating to their economy. Of course, it is not a violation of the law to communicate something which has already been in the newspapers and which their domestic censorship has already passed, but it is a violation to communicate something which their censorship has not already passed. In order to make this restriction effective, it was provided in 1947 that no Soviet citizen might communicate economic information destined for foreigners to anyone except the Ministry of Foreign Trade, which then in turn would give such parts of it as were desirable to the foreign government or the foreign business man concerned. So if you go to the U.S.S.R. seeking a contract, and you are, for example, The General Electric Company, you cannot ask for this information from one of the plant managers without violating the statute — you get the information only from the Ministry of Foreign Trade.

I think that this attitude toward official secrets is an explanation of Soviet feeling about the scheme for atomic energy control which has been proposed in the United Nations. I believe that Soviet policy makers think of atomic energy not only as a war potential, but as a very important ultimate source of power — particularly in the great desert area of their country where there is no other source of energy. Lenin said early in the 1920's that the key to the economy of the Soviet Union as of that time was electrical energy, and I think that this attitude is carried over to today. Soviet leaders feel that the key to an understanding of their economy, which they are going to protect in every possible way by making it a crime to divulge secrets about it, is the amount and location of this new source of power. Hence, any scheme for a control of atomic energy which involves inspection

is important — not alone because it might disclose where the bombs are being made, but it might tell where the power stations are located as well as their capacity. From the Soviet point of view the location and capacity of a power station is important — perhaps almost as important as the location of the manufacture of bombs. This concept of secrecy of power resources is a completely foreign one to us, as you well know, because we can read in American magazines where all of the power stations of the United States are located and just exactly what their production is.

There is another matter of concern to international law, the Soviet espousal of absolute sovereignty. 'Sovereignty' is a very popular word in international law. In fact it was — and probably still is — indicative of one of the basic principles of international law during the last century and in the 20th century. I suppose no slogan has been more popular before the bar of public opinion throughout the world than the preservation of sovereignty. In the main it was the principle of international law on which the Little Powers relied in their struggle with Great Britain during the last century and on which the Latin American countries relied in opposing us. It provided the basis for a very powerful argument. It meant that little countries must be left free to conduct their affairs without having the big countries interfere in those affairs; hence, letting them preserve sovereignty. We in the United States have been one of the strongest supporters of this principle, as you well know. We even refused to enter the League of Nations after the last war because we thought this would be a threat to our independence, and, hence, to our sovereignty. We even now are reluctant to go before the World Court in all situations. We have a provision that we will accept the jurisdiction of the International Court of Justice, or World Court, only if we in our own opinion consider that the case before it does not concern a matter of our own domestic affairs. So we are for sovereignty, too. Yet, we have reached the conclusion that we must abandon sovereignty in some measure in order to unite and to find greater strength in cooperation against aggression. We who are also for sovereignty say that there

are some circumstances when nations must delegate their sovereignty to an international agency. They must unite in order to protect themselves and, therefore, to preserve their sovereignty. This, then, provides a little background for consideration of the Soviet position.

The Soviet government has constantly maintained in its speeches in the United Nations, and in the law articles which its professors publish, that it is for sovereignty, the basic principle of international law, much more than is the United States and that the U.S.S.R. is not prepared to see international law developed to a point where any aspect of sovereignty shall be relinquished. There is a long line of steps which the Soviet government has taken, indicating how in a practical way it will refuse to accept any change in international law on this subject. For example, it has refused to accept the compulsory jurisdiction of the International Court of Justice under any circumstances; it will bring a case before the Court if it wishes, but it will not permit itself to be required to do so. It has refused to permit the International Court of Justice to interpret the Charter of the United Nations, saying that this is a matter for political agencies to interpret. It has refused to accept the binding force of a majority decision in the Little Assembly of the United Nations. It has refused to permit the establishment of an International Court of Human Rights, which would decide when the covenant of human rights has been violated, saying that this is a matter for each country to decide for itself. It has refused to submit to arbitration, as we understand it, although it claims that it submits to arbitration; however, when you study the arbitration treaties which it has, there is never a third impartial person as the arbiter — there are just the two sides — and that in our parlance is not arbitration. So, all along the way the U.S.S.R. has reserved for itself its freedom to decide what aspects of international law it will accept and what aspects it will not accept — and it will do this through the interpretive process; it is not going to have any outsiders sit in

judgment upon its interpretation but is reserving, as it says, its complete right of sovereignty.

W. W. Kulsky in his article, which is on my reading list, says that the Soviet Union has preferred 'old-fashioned international law' because of its emphasis upon the importance of sovereignty, whereas we, on the other hand, are moving away from this concept to the extent that we find it desirable to save our sovereignty, if you will, to protect ourselves against aggression. As a result of this difference of opinion, the gulf is widening between us and the Soviet policy makers — we moving towards collective security and they maintaining a rigid position, which was the position popular in the nineteenth century.

I have now concluded my discussion of the circumstances in which the Soviet Union has been maintaining the old law to meet its needs of self-protection.

Let us turn to the aspects of international law, as Soviet authors see them, which can advance Soviet interests beyond its frontiers. In this connection, I want to point out what you all know: it is a very great dream of all Soviet policy makers that the Soviet system, or what they call the "world revolution," shall extend around the world. You know of these dreams of expansion. How do Soviet authors think that international law can help realization of these dreams? It is interesting that they look to the body of international law doctrine as an instrument in their arsenal of expansion — not only as an instrument in protecting themselves, as we see in the last part of what I have just said by reference to old-established principles of sovereignty, but also as a means of expanding. Some of the areas in which they have done thinking in this sphere are particularly newsworthy today. Take Korea, for example, The Soviet Union wanted to try and keep the United Nations out of that conflict. How were they to do it in a way which sounded as though it were required by international law? Their argument was simply that both halves of Korea are to be

found on opposite sides of what is only an armistice line — the 38th parallel. They say it is one country and when the north starts fighting the south, there is created the same problem which Abraham Lincoln faced: it is just a civil war. In a civil war, as happened in our Civil War, we said to everybody: "You keep out" (the British included). When the British tried to get in, we succeeded eventually in getting some reparations out of them. So the doctrine is well established that foreign nations cannot legally intervene in a civil war — and particularly so under the Charter of the United Nations, which says that the United Nations shall not intervene in a matter of domestic concern. The Soviet position has been very simple: Korea is one unit; the north is fighting the south; the United Nations has come in and is violating the Charter and international law, generally, because it is intervening in a civil war. Soviet lawyers have absolutely refused to take into consideration the statement of the legal adviser to the United Nations, Mr. A. H. Feller (in the seminar group this afternoon we shall look at this further) to the effect that the 38th parallel became a *de facto* frontier; i. e., it was no longer just an armistice line, the reasons for which we will go into this afternoon. Hence, since it was a State frontier, when the north marched south it started not a civil war but a war between separate States; thus, it was something with which the United Nations could concern itself without violating its own Charter.

One of the things which I want to ask this afternoon is: Does the same doctrine apply in Germany — should the two halves of Germany start fighting today? Does it apply between Formosa and the rest of China? Does it apply between the north and south half of Vietnam? In other words, can we expect this same argument to be used in those three situations, all of which may within a relatively short time come into the news again?

There is another direction in which Soviet authors have moved in which they think international law is to their advantage: they think it can be used to open the door to military aid to

native revolt. On the one hand they seek to exclude the United Nations from participating in the war in Korea; yet, on the other hand, they want in some way or another to be able to participate in that war without violating the very law that they are claiming on their side in opposing the United Nations. How are they going to do this? Just consider the international lawyers sitting down in the Soviet Foreign Office with their pencils and writing out the brief for the field commanders.

This reminds me of a conversation with a citizen of a certain state, who said that his country always had an international lawyer on the bridge of every flagship so that the lawyer could support the admiral's commands with a good brief before the action was finished. Whether this was actually done I do not know, but there is somewhat of a temptation to do just that. Of course, we international lawyers think it would be the wrong approach — we would like to see it the other way around. But I do not want to conceal from you people who are going to be on the bridges that there is the possibility of making use of an international law professor on the bridge.

What are the Soviet authorities doing to open the door for their participation in native revolts while keeping the Americans and the United Nations out? Well, they have expanded the concept of volunteers to the point that we in the United States have thought ridiculous. It happens that in international law there is no rule which requires a State to prevent her Nationals from enlisting in the army of another State. Certainly this audience knows well that a great many Americans enlisted under the banner of King George VI in the last war, either in Canada or directly in England; some also enlisted in the French Army. So there is a well-accepted principle of international law that an individual may join anybody's army that he wishes without violating international law. If he takes an oath to the sovereign of that other army, he may lose his citizenship. However, that is not a problem of international law but a problem of domestic law.

In Korea, whole armies with their own officers appeared from China on the Korean side as volunteers. Right up to the end Arthur Dean, when he negotiated with the northern half in the tent at Panmunjom, negotiated with a Chinese general who was not there as a general of anything but a volunteer army. He made it very clear that he was not there representing the Chinese government or the Chinese army but he was there representing this army of volunteers. This is perfectly ridiculous to us. Yet, under international law, unfortunately, there is not anything that says that volunteers should be ten, twenty, one hundred, or a hundred thousand, or that at some point you have something other than volunteers because of sheer numbers.

I remember sitting in some groups of international lawyers at the time in New York who said: "Should we not go into the United Nations and try to start the preparation of a treaty which would define 'volunteers,' at least quantitatively, so that at some point too many volunteers change to an army of the government from which they have volunteered?" That is one of the doors that Soviet policy makers are trying to keep open for their participation in the kind of civil war situation which they think they have seen.

There is another area which Soviet lawyers have tried to utilize: the possibility of opening the door to revolutionary subversion; i. e., the undercover participation of foreign agents in stirring up revolt rather than the formal participation in an army as a volunteer in the actual fighting. In the early years, the Soviet government was very worried lest she be subverted, although she also had her Communist International which she was utilizing to try to subvert others. She drafted a proposed definition that one of the forms of aggression would be the undercover type of subversion by agents of foreign countries seeking to enter, or perhaps actually entering, the Soviet Union for that purpose. She wanted to call this 'aggression,' and therefore declare it illegal under international law. This was before the war when she was the weaker country.

After the war, at the time of the Nuremberg Trial, when the charter was being drafted, the Soviet Union refused to accept that very definition which she had previously drafted when Mr. Justice Jackson from the United States suggested that subversion be one of the elements of aggression in measuring the guilt of the Nazis. It began to look at this point as if the shoe had been put on the other foot and that the Soviet Union was now so strong that she did not want to be excluded from the legal use of subversion, as she had previously wanted to exclude England and France from the legal use of subversion in her own country. You see that with a change in power relationships a change in attitudes toward principles of international law comes about.

But what happened then? We put 100 million dollars in our budget for the purpose of helping refugees from Eastern Europe. I was not on the inside and therefore I do not know what those refugees were supposed to do. But the Soviet Union thought that they were going to be trained to subvert her country. So her attitude then changed. She went back to the United Nations and said: "We want to press for the definition of aggression, which will include this kind of work as aggression, and therefore make it illegal." So, within a short span of years we see her moving in one direction and then reversing her field as the power situation changed.

What about participation in international agencies? From the start the U.S.S.R. has been in the United Nations, as you well know. Most recently she has entered the International Labor Organization and also UNESCO, the cultural organization. What has she gained from doing this? It seems to me that she has obtained a platform for propaganda and the spread of her ideas. Senator Lodge, our representative in the United Nations, spoke recently in New York to a group. He said that he was convinced that the United Nations was the greatest sounding board in the world and that he thought the United States could — and did — use the United Nations to a great advantage as a sounding board. He said:

"I can say one thing on an afternoon in the United Nations and it will be heard around the world, whereas if we sent out mimeographed press releases to a lot of different countries nobody would print it at all. Further, when the remark is made by the Soviet delegation I can respond within five minutes and the denial goes out on the same wire as the allegation, which would also be impossible if we were just passing around notes through the press service of the world."

I think that the Soviet Union has appreciated the possibility — just as we do — that the United Nations performs a great function to her as a propaganda platform. She does, however, withdraw from those agencies which seem to be meddling in her domestic affairs too much. For example, the World Health Organization: she pulled out of that because she had to hand in reports on the state of her health. This, you see, runs into the question of the economic condition of her country (because health is also an economic matter), to which the Official Secrets Act refers. So she removed herself from that agency. She seems to have thought that the International Labor Organization is so valuable that she is willing to violate one of her long-standing principles in joining it. She has consented — on a compulsory basis, after having been required to do so if she wanted to get into it — to having any disputes within the ILO referred to the World Court. Here, then, the value of the propaganda platform was apparently so great that she was prepared to withdraw from one of the fixed principles of her policy: namely, never, never to find herself in a position where someone else decides the international law of a question.

What can we do to meet the challenge? In the light of the Soviet attitude can the democracies take steps in the international law field to improve their position? I think that they can. I think that we can do these things. I think we can press for clarification of international law through the International Law Commission, which meets annually in Geneva under the auspices of the United

Nations, so that the elements of international law will be written down as part of a whole fabric and the Russians make clear to the world that they do or do not take the whole fabric. In other words expose the Soviet position, which the U.S.S.R. claims is a thoroughly international law position. This will occur when Soviet representatives refuse to accept principles in the codification process. They could not thereafter claim effectively to be the protector of international law. I know that the British opposed codification, just as the Russians have been reluctant to accept it so far, the British feeling that if you sit down and write out the law, a great deal of customary international law will be lost. Therefore, the British would prefer writing diplomatic notes with references to events of the past which they believe establish customary international law and support their position rather than having to look at a code in which those very positions may have been eliminated as a result of a majority vote. I understand the difficulties and dangers, but in balancing them it would seem to me that the democracies could press for further codification, get the Russians to expose their hand, and, where possible, obtain their signature on a code so that thereafter one could say to them: "You cannot exclude that principle for it is Article 32 of that particular code and you adopted it. So there can be no question whatever. It is in black and white, it is yours, and you are on the document." Codification, therefore, would be one of my recommendations.

Another recommendation: I think we should utilize occasions presented, as that of the Nuremberg Trial, to put the Soviet Union on record as accepting principles of international law. You remember that Mr. Justice Jackson said that the principal reason why he consented to leave the Supreme Court bench of the United States and go over to Germany was just that. He said, in effect: "I wanted to establish in law and I wanted to get the Soviet to judge on the document to the effect that aggression is a crime. I felt that if I could do that I had something to cite if they eventually threatened war. I could say: 'Here is your Soviet judge saying aggression is a crime — now try and face that.'" So it seems

to me that if it is possible to bring the U.S.S.R. into situations that do present themselves from time to time in getting the U.S.S.R. to adopt a principle which will keep the peace, by all means do so.

Thirdly, I think that we should tell the world that we also want the benefits provided by the recognition of sovereignty in international law, just as the Soviets claim they do; that is, we believe that the States should be permitted to do domestically what they wish. Yet, on the other hand, I think we ought to make it very clear that as we see the world, and as we suggest the rest should see the world, this right to do what we want to do cannot be maintained in the face of the dangers from the Soviet Bloc. Hence, we believe in collective security, which does inevitably mean a certain loss of sovereignty so that one can save his sovereignty. I do not know whether that argument is too complicated for some of the peasants in Asia, but it is one which I think we should attempt.

Then, finally, I think we should appeal to world public opinion on the new role of international law as the protector of the individual. We were asked (and we had a chance) in connection with the Cardinal Mindszenty case in Hungary to appeal to the principles of international law written into the treaty after the war with Hungary and the other Eastern States, in which it was provided that these States would accord to their citizens the enjoyment of human rights. There was set up an elaborate procedure under which any disputes in connection with the treaty obligations would be settled through arbitration. The Hungarian and Bulgarian governments (the Bulgarians had their Kostov case) refused to appoint their arbiters and the case went to the World Court to see whether the Secretary-General of the United Nations could not appoint the third man, as he was permitted to do, when the parties could not agree on an arbiter. You remember that the World Court said: "No, if the Bulgarians and Hungarians will not appoint their arbiters so that we have two (one from the United States

and one from Bulgaria), we cannot have a third." So we had no possibility of pressing that point. But it seems to me that opportunities may develop in the future and that we should utilize them to the fullest extent.

Therefore, in my opinion we have no reason whatever to be discouraged. We have long been supporters of international law and it seems to me that before the bar of world public opinion we can hold high our heads. I encourage all of you in your activities to remember the bar of public opinion and to utilize the principles of international law as frequently as you can because, in my mind at least, the world craves legality. Much of the Neutralist Bloc, on which we rely in the last analysis for ultimate victory, is going to respond to those who argue in terms of legality rather than without it.

BIOGRAPHIC SKETCH

Professor John N. Hazard

Professor Hazard was born in Syracuse, New York. He is a graduate of Yale University and the Harvard Law School. He was a Fellow of the Institute of Current World Affairs (of New York), assigned to the study of Soviet Law from 1934-1939; in this capacity, he attended the Moscow Juridical Institute for two and a half years.

Just prior to World War II, Professor Hazard was associated with the law firm, Baldwin, Todd and Young, in New York City. During the war, he was Deputy Director of the U.S.S.R. Division of the Foreign Economic Administration. In 1944, he accompanied Vice President Henry Wallace as a special assistant to U.S.S.R. and China. In the summer of 1945, Professor Hazard was the adviser on Soviet law to the U. S. Chief of Counsel for prosecution of Axis criminality.

In addition to being a lecturer on Soviet law and government at several universities, he has been a visiting professor of law at Yale University and University of Cambridge, London School of Economics. Doctor Hazard has been Professor of Public Law at Columbia University since 1946.

THE POSITION OF INDIVIDUALS IN INTERNATIONAL LAW

A lecture delivered
at the Naval War College
on 4 March 1955 by
Dr. Herbert W. Briggs

Admiral McCormick, Admiral Robbins, Captain Foley, Gentlemen:

In the PELEUS War Crimes Trial, the British judge advocate characterized 'customary international law' as: "nothing but a body of rules and customs, expressing the common sense of civilized nations." I would like to make my first parenthetical remark at this point by saying that I have been tremendously impressed by the common sense approach of the draft Law Instructions for Naval Warfare.

The PELEUS, a Greek tramp freighter of some 8,800 tons, with a crew of thirty-five British, Greek, Egyptian, Chinese, Chilean, Russian and Polish, was under British charter. She was torpedoed in the South Atlantic at about 7:00 P. M. on the evening of March 13, 1944, on the way from Freetown to Argentina. She was torpedoed by a German submarine, the U-852, with Captain Heinz Eck as commander, and she went down immediately.

A few survivors managed to get on rafts or wreckage. The sub was surfaced at all times and, after picking up the ship's third officer and a rating for questioning, returned them to a raft, steamed away about a thousand meters, and then returned and fired intermittently on the survivors with machine guns for a period of five hours, with some of the officers actually throwing hand grenades. Three men survived the attempt to exterminate them and were picked up on April 20, five or six weeks later, by a Portuguese freighter.

The submarine was later captured — on May 2, 1945 — after having been beached off Somaliland as a result of a British air attack. The U-boat's log, with German thoroughness, recorded the sinking of the PELEUS.

The captain, the first officer, the chief engineer, the ship's doctor (or the medical officer) and a rating were indicted before a British military tribunal sitting in Hamburg, Germany, in October, 1945. They were indicted on a charge not of unlawful sinking but of committing a war crime: namely, that in violation of the laws and usages of war they were concerned in the killing of members of the crew of the PELEUS, allied nationals, by firing and throwing grenades at them.

The captain did not plead the defense of "superior orders." Despite secret orders, which had been given to all U-boat commanders leaving Kiel after September, 1942 (and I quote a copy which was found): "rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews," it is ambiguous with reference to the treatment of surviving crewmen.

There was an attempt in the Dönitz trial, of the major Nuremberg criminals, to get the official text of this but the charge against Dönitz, based on this order, was dropped. I will read it again. The words are ambiguous. The instructions were given orally to all submarine commanders. The commander — and possibly the first officer — knew the content of the secret instructions and others were aware (according to the evidence that came out in the trial) that there were secret instructions, but they did not know their content. "Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews."

The captain's defense was 'operational necessity,' and a denial — in which all defendants joined — of trying to kill the survivors. It seemed that they were merely trying to destroy the

wreckage because four of Germany's newest, shiniest submarines had gone down in that area in the preceding months.

In remaining at the place of sinking, the submarine lost over five (5) hours. The testimony showed that she could go eighteen (18) knots on the surface at night. The captain, after having the members of the crew and officers fire on the wreckage for about five hours, got underway and then went below to broadcast to, as he testified, "a somewhat restive crew." He reminded them that allied aviators were bombing innocent German women and children — perhaps their wives and children. At the trial, he was asked why it was necessary to make this broadcast if he had only been firing at bits of wreckage.

The first officer had protested to the captain against the shooting and pointed out that it was a violation of international law. He went below, made out a report of interrogatories which he had had with the third officer of the sunken ship, came back up and found a seaman using a machine gun and firing at bits of wreckage. He grabbed the machine gun from the sailor and he, himself, fired.

He was asked at the trial why he did this. He said: "Well, this man had an illegitimate child and I did not want to see those people killed by a person of such a bad character."

So far as the doctor was concerned, he was asked if he did not know that this was contrary to the rules of naval warfare. He said: "Yes."

They then asked: "Why did you fire?"

The doctor replied: "Well, it was our first kill — and it was all very exciting."

For the benefit of a court, which included British and Greek naval officers, the British judge advocate summed up in part as follows:

"You should be in no way embarrassed or put out by the alleged complications of international law, which it has been suggested surround such a case as this. International law is nothing but a body of rules which have been expressed in treaties, or of customs and usages which express the common sense of civilized nations. All of those rules and usages are based upon the dictates of ordinary humanity. It is a fundamental usage of war that the killing of unarmed enemies is forbidden. It is forbidden as a result of the experience of civilized nations throughout many centuries. To fire so as to kill helpless survivors of a torpedoed ship is a grave breach against the law of nations. The right to punish persons who break such rules of war has equally been recognized for many years."

Defendants other than the captain pleaded the defense of "superior orders." On this point, the judge advocate said this:

"It is quite obvious that no sailor nor no soldier can carry with him a library of international law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. But members of the Armed Forces are bound to obey lawful orders only, and it must have been obvious to the most rudimentary intelligence that the carrying out of Captain Heinz Eck's commands involved the killing of helpless survivors and was, therefore, not a lawful command."

The court, basing its opinion somewhat upon the *Llandovery Castle* case — in which, during the First World War, a German Crimes Court, sitting in Leipzig after the war, had convicted an officer and a sailor of a German submarine for torpedoing a

hospital ship and then firing upon survivors in lifeboats (some of them did get away) — found all five (5) defendants guilty. The captain, the first officer and the medical officer were sentenced to death by shooting, which was carried out within three weeks. The chief engineer and the rating were sentenced to life imprisonment and to fifteen (15) years, respectively, the plea of “superior order” having been allowed in mitigation of sentence although not as a complete defense against responsibility for the crime.

I might point out that the fifteen (15) volumes of reported War Crimes Trials, which were published by the United Nations War Crimes Tribunal, stress this point in the concluding volume: that “superior orders” is not a defense, but may be considered in mitigation of sentence (the same as stated in your draft of Naval Instructions).

These applications of the law of nations, that is of the common sense of civilized nations, have sometimes appeared easier to perform in practice than the theory of the position of the individual in international law might suggest. Doctrinal disputes of almost bitter intensity have raged over the question of legal theory as to whether or not the individual human being is a subject of international law.

On the one hand it has been argued (and this is the orthodox view) that only collective entities, such as States or organizations of States (like the United Nations), can be subject to the rights and duties of international law. That is what we mean by ‘subject of international law’ — one is subject to the rights and the obligations of international law.

On the other hand it has been asserted that *all* law exists to regulate human conduct; that States and organizations of States can act only through individuals; and that, therefore, many of the rules of international law are designed to regulate the conduct of individuals — whether they are acting as individuals or as agents and officers of the States.

I am not too concerned about the doctrinal disputes. We all agree that much of international law is designed to require or prohibit certain behavior, or to further certain processes and procedures. Whether the principles and rules of international law bear directly on individuals or only indirectly — through the incorporation of these rules of international law into national naval or army regulations, for example — may appear important in legal theory. However, they may be immaterial in a practical sense if the purposes of the law are fulfilled.

For example: in the absence of treaties, international law establishes no right for the individual to leave his country of origin, to enter a foreign country, and to become naturalized there or to divest himself of his original nationality. This is only another way of saying that the individual has under international law, in the absence of treaties, no right of emigration, immigration, naturalization or expatriation. Nor would the individual necessarily have any one of these rights even if we labeled him a "subject of international law." Why? If he acquires any of these rights to change his nationality, to leave his country to enter another country, the rights comes to him either from the law of his domicile or from the law of his nationality; that is, he derives them directly from the place of residence or from the law of the nationality which he possesses.

It may be that the State of his domicile, as an alien, and the State of his nationality have concluded a treaty, stipulating benefits on his behalf as a citizen of one State and a resident of another. In such a case it makes little practical difference whether the treaty stipulations are referred to as the "treaty rights of aliens under international law," or as the "obligations of the State under international law to grant certain rights to aliens under national law." In civilized countries, the alien will have the procedural capacity to seek in the local courts the benefits which are stipulated in his behalf by the treaty.

The common sense of civilized nations finds comparable expression with reference to what is called the "delictual capacity of individuals under international law." For example, there is the liability of the individual for the commission of war crimes. You may agree with the dictum of the Nuremberg War Crimes Tribunal that crimes against international law are committed by men — not by abstract entities; or, you may plausibly argue that war crimes, and so-called "offenses against the law of nations," are in legal theory violations of national regulations which incorporate by reference the requirements of international law.

Support for this interpretation can be found in Hague Convention IV of 1907. By Article 2 of that treaty, the annexed Hague Regulations Respecting the Laws and Customs of War on Land apply "between Contracting Powers"; that is, they are legally binding on States. Article 1 requires that: "The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations"; that is, the States which are bound by the Hague Regulations as international law shall transform the provisions of those regulations into national regulations, binding upon individual members of the armed forces. Thus, whichever legal theory is adopted, international law and national laws and regulations are in agreement in stipulating that war crimes — that is, violations of the laws and customs of war — are acts entailing individual criminal liability. From the point of view of the individual member of the armed forces the practical position is that certain conduct is forbidden by the rules of warfare. He knows that the courts will have jurisdiction to try him — and even to impose the death penalty — for conviction of violating the laws and customs of war.

The fifteen (15) volumes of the United Nations War Crimes Trials, based upon decisions of the last war, indicate that the death penalty was given only in cases of murder and rape. There may have been one or two exceptions but in most cases, although it is possible to give the death penalty for any war crime upon con-

viction, the practice was to limit it to serious offenses. I have noticed that the draft regulations of both the Army and the Navy talk about "grave offenses" rather than any violation of the laws of war. Any violation of the laws of war might be considered an illegal act, but not all of them are considered of such a heinous character as to warrant the death penalty.

The courts before which the individual member of the armed forces can be tried may be national military courts or international military tribunals, set up as such through international agreement between States. Although procedural law will vary in different courts between different national courts, and as between international courts and national courts, the substantive content of the law which all of these courts (national and international) will apply will be quite the same: the traditionally accepted laws and customs of war.

The jurisdiction which international law permits States to exercise over persons charged with war crimes is broad and comprehensive. It has sometimes been stated as follows:

"International law obligates States to exercise jurisdiction over their own nationals for war crimes and authorizes them to try and punish certain enemy nations for violations of the laws of war.

However, such jurisdiction is not limited to nationals and enemy nationals.

Following the Second World War, the United States military courts tried and convicted Spanish, Dutch and Yugoslav citizens (the Spanish, at least, were neutrals) for violations of the laws of war. British military courts similarly convicted Swiss and Danish citizens. French military courts convicted Poles, Belgians, Italians, Luxembourgers, Frenchmen, and, of course, Germans.

An interesting situation arose in the Pacific. The transcript of the trial is not reported in these volumes but there is a summary, which I will quote:

“In the trial of one Shimio, of the Japanese Army, before a British military court sitting at Singapore, the accused was charged, found guilty, and sentenced to death by hanging by a court consisting of British officers only, for having unlawfully killed American prisoners of war in French Indo-China.”

In other words, the place where the crime was committed was French territory; the nationals injured were Americans; and the court was made up exclusively of British officers.

Mr. Willard B. Cowles, who is now the Assistant Legal Adviser of the Department of State, has concluded, after a study of jurisdiction over war crimes, that every independent State has jurisdiction to punish war criminals in its custody — regardless of the nationality of the victim, the nationality of the perpetrator, or the place where the offense was committed. Physical custody of the accused, rather than any principle of the territoriality of criminal law, seems to be the jurisdictional criterion. Of course some States have limited the jurisdiction of their own national courts so as not to take full benefit of this principle of universality.

There was a case of one Wagner, who was tried and acquitted before a French military court, where evidence showed that he had committed a war crime. But that war crime had not been one listed in the French Penal Code and the particular tribunal had been authorized to try persons only where there was a concordance between international law and French national law. So in this case he escaped on a technicality.

I have no reliable statistics, and I have not been able to get any, on the number of persons tried and convicted on charges

of war crimes. However, of the fifteen (15) volumes published by the United Nations War Crimes Commission, the last volume (published in 1949) states that the Commission had received the transcripts of 1,911 trial records — an admittedly incomplete list, since some States had not complied with the request for sending in transcripts. I understand that this figure may even be off by as much as 1,000. In other words, we know that there were 1,911 trials, but there may have been one thousand other war crimes trials following the Second World War in which transcripts were not sent to the Commission. It is important to note that these 1,911 trials dealt with war crimes in the traditional sense of the term: namely, violations of the laws and customs of war. The fifteen (15) volumes of Law Reports present a selected number of 89 trials and there are penetrating legal analyses of the cases which have been appended by Mr. George Brand, a British lawyer. If there is little novelty in the findings of these courts, it may be because, as one writer has said, "all the offenses of any importance which the term 'war crime' properly denotes are old and well known in the law of war." The facts may differ, but the offenses are not new. In any case, this collection provides a substantial body of new case law on traditional war crimes.

The novelty of the Nuremberg Trial of the major war criminals lay not in its proceedings and findings with reference to traditional war crimes, but in certain other features. Of the major war criminals convicted at Nuremberg, all except three were found guilty of traditional war crimes. Why, then, did it appear necessary or desirable to indict the major war criminals at Nuremberg and at Tokyo for crimes against peace and crimes against humanity? Most of the latter were subsumed under war crimes, anyway, and they were more often than not identical. The answer appears to lie in political rather than legal considerations.

A group of crusaders (this is a value-judgment and there are some people who feel strongly that that is not the term which should be used to describe them, but I am giving my own

opinion on it) set out to establish 'aggressive war' as a crime under international law and to establish individual criminal liability therefore *ex post facto*, which is also a conclusion that I am drawing. It was easy enough to secure agreement to the phrases in the Charter of the International Military Tribunal, which is annexed to the London Agreement of August 8, 1945. In Article 6, for example (you are familiar with this, but I will read it anyway): "The following acts, or any one of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual criminal responsibility." Then, they list the categories: "crimes against peace, war crimes, crimes against humanity, the common plan or conspiracy."

I would like to quote the first one — Crimes Against Peace — from paragraph (a) of Article VI of the London Charter:

"Crimes Against Peace; namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

I think that the evidence shows these provisions were rather hastily drafted. I think they may have been drafted with dangerous haste. Let me examine for a moment some of the words (I will leave out some of the words, but I will read only words which are incorporated in the provisions in order to give you an example).

You are engaged here in the planning and the preparation, not of a war of aggression, but of possible tactics and strategy in a situation against Country "X" or Country "Y." You are not planning a war of aggression; you are not planning a war in violation of a treaty. But suppose that we should get involved with Communist China in hostilities (we don't have to lose the war). One of you might be picked up and charged with the fol-

lowing, based on Paragraph (a) (Crimes Against Peace) : namely, that at the Naval War College, Newport, Rhode Island, you planned or prepared a war in violation of international assurances. The assurances might be one by Mr. Dulles saying that we are not going to attack them or it might be one by Mr. Walter Robertson. Of course, I am giving you a hypothetical case. I should add that the Nuremberg Tribunal did not apply these provisions in this way — they did not try to convict people merely on the ‘planning’ and ‘preparation.’ They went on to the ‘initiation’ of the war, which was one of the main points they tried to prove, and also the ‘waging of a war of aggression.’ What I am suggesting is that leaving on the books vague terms like the planning or preparation of a war in which you might happen to be a prisoner may lead your captors to say: “At the Naval War College did you not plan and did you not go to war in violation of assurances?” The words are twisted by your captors, but that is not the point.

Agreement to these terms was secured from twenty-three (23) States (the original draftors and nineteen (19) other States agreed to them) at London prior to the Nuremberg Trial. After the trial, Justice Robert H. Jackson, who had been the Chief Counsel for the United States in the prosecution of the major German war criminals, observed: “The Nuremberg Trial avoided wrangles over definitions and deals with the clean-cut challenge: Is it a crime to make a war of aggression?”

It was somewhat disconcerting to find Justice Jackson writing two pages later: “This question — whether it is a crime to conduct a war of aggression — is not technically an issue in the trial itself, having been foreclosed by the specific terms of the London Agreement.”

Two questions of at least possible interest to international lawyers were apparently not decided by the Court, namely: (1) whether aggressive war was an international crime prior to the London Agreement of 1945; and, (2), whether, if it was a crime

before 1945, there existed in law at the time the acts charged were committed individual criminal liability therefor on the part of agents of the aggressive State.

What do I mean by saying 'whether there existed in law?' It is obvious that there did not exist in German law any provisions making illegal the 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances' The question was: Was there any other system of law which applied? That threw the Court back to international law in an attempt to discover whether international law had made aggressive war a crime *at the time the acts were committed* — not later, but at the time the acts were committed.

However, the Tribunal consistently held, in its judgment of October 1, 1946, that it was bound by the London Charter, which "is decisive and binding upon the Tribunal" and "the law to be applied in the case." Although the court stated that it was not strictly necessary to consider whether, or to what extent, aggressive war was a crime before the London Agreement of 1945, the court sought *obiter dictum* — that is, it was unnecessary intellectual exercise; they sought to establish that aggressive war was not only illegal but criminal prior to the London Charter. The evidence was weak — a series of unratified draft treaties and declaratory or declamatory resolutions, some of which had been passed by the League of Nations, none of which laid down the law, none of which ever came into force, and none of which ever acquired any legal significance of a binding nature upon the behavior of States or of individuals.

There was left the Kellogg Pact, which, even if it made certain wars illegal — and people have asserted that it did make some wars illegal, but that, in my judgment, is doubtful because of the extensive right of self-defense as determined by the State employing it and the so-called 'reservations' which preceded its enactment — certainly contained no provisions establishing the cri-

minality of aggressive war or the individual liability of those who initiate or wage it.

The net result has been that the justifiable findings of the Nuremberg Tribunal on traditional crimes have been overshadowed by a polemical controversy as to what the Nuremberg Trial really established and as to its value as a precedent. Justice Jackson thought that certainly no future lawyer or nation, undertaking to prosecute crimes against the peace of the world, would have to face the argument that the effort was unprecedented. But Professor Hans Kelsen, one of the world's great jurists, has elaborately questioned whether in a legal sense the trial constitutes any precedent at all, since, as he says, it was a case in which a specially-created court applied specially-created law to a designated group of people, most of whom (happily for us) have now expired. The precedential value — that is, the value of Nuremberg as a precedent — can be left in abeyance and if States wish to establish the Nuremberg principles as the international law for future application they are entitled to do so, without proving that this was decided at Nuremberg.

Attempts to do this have been zealously pursued by representatives of certain States in the United Nations. The project has taken two forms: (1) the attempt to establish a permanent international criminal court; and, (2), the attempt to establish a body of international criminal law for that court to apply. Understandably, the attempts to create the law have preceded the attempts to set up a court to apply the law.

In a broad sense, the formulation of a body of international criminal law has been pursued along three related lines: (1) a code, formulating the principles of international law recognized in the Charter and judgment of the Nuremberg Tribunal of the major war criminals (that is printed in one of the notes to your draft instructions); (2) a code of offenses against the peace and security of mankind; and (3) the genocide convention, which entered into force (it is already in force) in 1951 — although not for the United

States. The genocide convention is not ordinarily included in this category, but what I am dealing with here is: (1) you are trying to set up a court; (2) you are trying to find a body of law for that court to apply — the body of law will include the formulation of the Nuremberg principles for the future and it will also include the draft code of offenses, if it ever goes into effect; (3) the genocide convention in effect dealt not with war crimes but with what was subsumed under the rubric of crimes against humanity, and is comparable to that. By the genocide convention the High Contracting Parties confirm that genocide is a crime under international law, which they undertake to prevent and punish. Whether persons committing it are constitutionally responsible rulers, public officials, or private individuals, they shall be tried by a competent tribunal of the State in the territory of which the act was committed; that is to say, if this had been in force twelve years ago the Germans would have tried Hitler for genocide. Or, if the Communists do not want to try Malenkov (maybe I had better leave him out and say Khrushchev and some of the others), there is another obligation: if you do not try your own Heads of States and rulers for this crime of genocide, then you are legally obligated to submit this man to an international court *if* there is such a court and *if* you have accepted the jurisdiction of that court. I am not distressed because the United States has not ratified the genocide convention because it seems to me, although it does establish a principle in Article 1 that genocide is an evil thing, that the other terms appear to be almost fraudulent. I shall say nothing more about this third category because it is established, a great many States have ratified this convention.

Still dealing with the establishment of a body of international criminal law, the formulation of the Nuremberg Principles was intended to establish principles of international criminal law for future application so as to avoid the charge made at Nuremberg that the application of these provisions was *ex post facto*, or, that it was not law and the people were not individually responsible under that non-existent law at the time of the Trial. The formu-

lation was entrusted to the United Nations International Law Commission, which, after some debate, declined to express any opinion as to the legal character of the Nuremberg judgment and principles; that is to say, they deliberately refused to decide or to express an opinion as to whether or not the Nuremberg Charter and judgment expressed preexisting law before 1945, whether it created new law as of 1945, or whether they had established a law for the future.

The Nuremberg Principles, formulated by the United Nations International Law Commission, consisted largely of a mere re-statement of principles found in the London Charter and the Nuremberg judgment. When the Second Report of the International Law Commission containing this formulation went to the General Assembly of the United Nations in 1950, doctrinal battles were reopened in the Legal Committee of the Assembly over the question as to whether the Nuremberg Principles accurately expressed existing international law. The General Assembly, without expressing any opinion on this question, invited the governments of Members of the United Nations to make observation on the International Law Commission's draft. They requested the Commission to take into account the governments' observations when it prepared its second code — the Draft Code of Offenses Against the Peace and Security of Mankind. Of sixty (60) governments requested to make observations on the International Law Commission's draft, only seven (7) had sufficient interest to reply. Of these seven, only the French and Lebanese replies contained detailed observations of any value. That is to say, fifty-three (53) States did not even reply and fifty eight (58) did not send in any comments of value.

The International Law Commission, at the request of the General Assembly, has also formulated and reformulated a Draft Code of Offenses Against the Peace and Security of Mankind. The contents of this draft code are in part an elaboration of some of the Nuremberg Principles, but they go beyond the Nuremberg

Principles in treating genocide, certain forms of intervention by one State in the affairs of another State, certain terrorist activities fostered by one State against another, and illegal annexation of another State's territory, as crimes under international law for which the responsible individuals shall be punished.

Although delegates of some of the countries argue that this is already international law, there is an overwhelming expression of opinion in the United Nations' organs that these are not international law — that they could become such if enacted in a treaty and if the treaty were ratified. Some of them have argued that it is highly desirable that this should be done. But I would like to point out that some of these principles are not an expression of existing international law any more than the Nuremberg principles were.

At its Ninth Session, in 1954, the General Assembly decided to postpone further discussion of the draft code until after a special committee had reported on a more basic question, namely: How is aggression defined? There have been three (3) committees on this subject and there is a history that goes back to the days of the League of Nations. The best definition that I have ever seen of 'aggression' was one which Maxim Litvinoff, the Soviet Commissar for Foreign Affairs, introduced into the League of Nations before the Soviets invaded the Baltic States. It was about as good a definition as I think you can get.

Again, there has been quite a doctrinal debate as to how to go about the definition. Should one enumerate that the following things are aggression and list them: A, B, C, D, E, et cetera? Or, if that is done, will some new techniques of the 'cold war' be forgotten? Therefore, some people argue to set up a general formula which will say that acts of a certain kind in certain relationships are aggression, while others say that one cannot in advance formulate a hard-and-fast definition. But, pending another try by another committee (I believe it is the third) of the United Nations to formulate a definition of 'aggression,' they have laid on the

shelf the reformulation of Offenses Against the Peace and Security of Mankind.

Discussion of the establishment of a proposed International Criminal Court has likewise been postponed. There have been two Commissions of the United Nations dealing with this and they have come up with somewhat differing texts (some of you have read them). They are very elaborate, and, again, they are not an expression of existing law. They are an attempt to devise a court and deal with its jurisdiction. But that question has been postponed; the question of the Code on Offenses Against the Peace and Security of Mankind has been postponed; and the Nuremberg Principles are dormant, as far as immediate action is concerned, because States have not shown sufficient interest in their formulation.

Professor Jean Spiropoulos, the Greek member of the Sixth Committee, and a member also of the International Law Commission, may not have been far wrong when he observed that it will be "a long time" before the General Assembly takes up again the question of establishing an International Criminal Court.

Mr. G. G. Fitzmaurice, the Legal Adviser of the British Foreign Office and the British representative in the Sixth Committee, observed in the Committee that such a court (the proposed International Criminal Court) could consider only two types of crimes: (1) traditional war crimes; and, (2), the non-traditional Nuremberg offenses, or the Offenses Against Peace and Security. The former, traditional war crimes, will probably be dealt with in future wars by national or international military tribunals, just as we have done in the past. Possibly we might add neutral judges, but it seems unlikely that persons charged with traditional war crimes would be sent to this new court for it would be inconvenient—you would have to have a location somewhere and they would be tried all over the world, just as they have been. It was unfortunate, but the General Assembly should face realistically the fact that it would be possible to bring to justice after

a war only war criminals of defeated countries. Therefore, the proposed permanent International Criminal Court, in the British view, would be dealing only with the second category — Offenses Against the Peace of Mankind — which have not been clearly formulated and for which, moreover, governments would be unlikely to surrender persons to be tried unless the countries were defeated. The British view was, therefore, that it is all right to talk about the court — but they took a rather dim view of it.

Where, then, do we stand with regard to the position of the individual in international law? The prospects of establishing a permanent International Criminal Court, with adequate jurisdiction to try individuals for violations of international law, are remote; nor are the prospects for agreement upon a Code of International Criminal Law much healthier. Some of the provisions of the draft Code of Offenses Against Peace of Mankind are so far-fetched that they have not even been able to command the support of international lawyers, let alone governments. The formulation of the Nuremberg Principles is far from general acceptance as a statement of existing international law. In civilized countries, the individual will continue to benefit from the standards established by international law for his protection, and he will continue to be individually liable for traditional war crimes whether or not we confer upon him the label "subject of international law." In time, the common sense of civilized nations may come to establish more adequate covenants for the protection of human rights and it may come to establish individual responsibility for aggressive war.

The late Justice Oliver Wendell Holmes once transfixed a colleague of mine, Professor Carl Becker, and suddenly demanded: "What do you think of the prospects of the human race?"

Professor Becker, a gentle scholar, replied: "I wish them well, but I am not overly sanguine."

BIOGRAPHIC SKETCH

Professor Herbert N. Briggs

Professor Briggs was graduated from West Virginia University with an A. B. degree and he received his Ph. D. degree from Johns Hopkins University. He has studied international law at The Hague, Netherlands, Brussels, Belgium and at Geneva, Switzerland.

He was an instructor of Political Science at Johns Hopkins University from 1925-1926 and at Oberlin College he was associate professor of Political Science from 1928-1929. Doctor Briggs was assistant professor of Government at Cornell University from 1929-1937 and then was professor of Government until 1947.

He has been guest lecturer on International Law at The Turkish General Staff War College; the Universities of Istanbul and Ankara, Turkey; the University of Copenhagen, Denmark, and the University of Oslo, Norway. Since 1947, he has been professor of International Law at Cornell University. Among his books are: *The Doctrine of Continuous Voyage* and *The Law of Nations*.

RECOMMENDED READING

The evaluation of books listed below include those recommended to resident students of the Naval War College. Officers in the fleet and elsewhere may find these of interest.

The listings herein should not be construed as an endorsement by the Naval War College; they are indicated only on the basis of interesting reading matter.

Many of these publications may be found in ship and station libraries. Some of the publications not available from these sources may be obtained from the Bureau of Naval Personnel Auxiliary Library Service, where a collection of books is available for loan to individual officers. Requests for the loan of these books should be made by the individual to the nearest branch of the Chief of Naval Personnel. (See Article C-9604, Bureau of Naval Personnel Manual, 1948).

- Title:** *The Prospects for Communist China.* 379 p.
- Author:** Rostow, W. W. N. Y., John Wiley & Sons, 1954.
- Evaluation:** An important book, which pulls together the salient facts about Communist China, supplements these facts with informed guesses to narrow the area of the unknown, and attempts to reach basic conclusions on the present strengths and weaknesses of the Peking regime. It outlines in excellent review the path Mao Tse-tung has followed to power, and examines variables, such as "the interplay between the regime and the people, the Sino-Soviet alliance, and the Chinese economy." The economic problem is treated extensively, with indications that the economic sphere is likely to be decisive for the foreseeable future, due to the magnitude of the problem of achieving industrialization without excessive starvation of the population. The prospect that the human cost of present plans may be far greater than that paid by the U.S.S.R. in the 1930's indicates that the fate of the regime may well depend upon the reaction of the Chinese peasant to collectivization. This book is considered highly valuable for any consideration of American policy in the Far East.

Title: *Soviet Power and Policy.* 598 p.
Author: Huszar, George B. de. N. Y., Thomas Y. Crowell
Company, 1955.

Evaluation: Written by a number of co-authors from leading American universities and from the U. S. government, it is an attempt to present in one volume all major component factors of power of the U.S.S.R., as well as its aggrandizement in adjacent regions. The first part of the book deals with the success of the Kremlin policy from the nazi-Soviet Pact of 1939 to the present, including the mistakes of Western policies. The second part provides basic data on Soviet Russia's land, resources, population, education, economic development, industry, agriculture and transportation. It includes a chapter on political structure and one on communist parties and the Communist International. There are very complete chapters on the armed forces and Soviet ideology. Finally, there are chapters on the U.S.S.R. foreign trade and foreign policy. Part III describes Soviet expansion in Eurasia. This begins with a general discussion of how the Soviets operate and then includes chapters dealing specifically with Western Europe, the Near and Middle East, Southeast Asia, and Northeast Asia, describing these areas and showing the Soviet aims and techniques and the current situation in each. The last part, "The Soviet Union and the United States," deals with geopolitical theory, a brief discussion of land, sea, and air power, and, finally, a discussion of the respective strategic positions of the United States vis-a-vis the Soviet Union. Each chapter of this complete and comprehensive volume is fully substantiated with footnotes and extensive bibliography. No attempt has been made to verify the facts presented, but it is considered that it presents in a minimum of space, a well-rounded discussion of the important facts of Soviet Russia and the communist system.

Title: *Handbook for Discussion Leaders.* 153 p.
Authors: Auer, J. Jeffrey and Ewbank, Henry Lee, N. Y.,
Harper & Bros.

Evaluation: A study of various types and aspects of discussion groups, and purposes of each. It presents a thoughtful analysis of the value of group discussions, spelling out some of the do's and don'ts for a successful and fruitful discussion. A thorough treatment in readable textbook form. Recommended for anyone interested in group discussion procedure and of special interest to moderators.

Title: *European Peace Treaties After World War II.*
341 p.

Authors: Leiss, Amelia C., and Dennett, Raymond. Boston,
World Peace Foundation, 1954.

Evaluation: This volume is a supplement to the well-known series, "Documents on American Foreign Relations," Vol. VIII, 1945-1946, and Volume IX, 1947, published by the World Peace Foundation. It summarizes the main positions assumed by the United States, the Soviet Union and other powers in the protracted negotiations and drafting of the peace treaties with Italy, Bulgaria, Hungary, Rumania and Finland. The Italian Peace Treaty negotiations, which were largely concerned with the territory of Trieste, are given considerably more scope than others. Particularly helpful are three sections which deal analytically with the political, military and economic classes common to all five treaties. The official English text of the treaties is also included.

Title: *Modern German, Its History and Civilization.*
637 p.

Author: Pinson, Koppel S. N. Y., Macmillan, 1954.

Evaluation: The significance of this book is in the fact that even in the German language there is no general survey of the history of modern Germany from 1800 to the present. It is in the "history of ideas" pattern and is a survey of the political, economic and cultural development of modern Germany through 1954. Military aspects of German history are covered only to the extent of relating them with the political developments. Not everyone will agree with the author's conclusion that "the Nurenberg Trial will remain one of the truly great and constructive acts of the post-war period." (p. 541). Still, considering that the author was Educational Director for Jewish Displaced Persons in Germany and Austria in 1945-46 and must have had first-hand knowledge of one of the worst aspects of the Nazi regime, the study is remarkably objective. Very valuable for anyone who is interested in the rise of Germany from a loose confederation of feudal states and principalities to the great modern power of the twentieth century.

Title: *The United States and Argentina.* 272 p.

Author: Whitaker, Arthur P. Cambridge, Mass., Harvard University Press, 1954.

Evaluation: This short book is an authoritative account of the geo-

graphy, history, life and the revolutionary changes which have taken place in Argentina. It gives an answer to most of the questions which arise when trying to figure out what motivates and implements current Peron policies. By virtue of the author's long association with teaching and research in Latin American history and his extensive travels in the region, it is apparent that he was well prepared to write on the subject. He has included numerous footnotes referring to works that examine issues more fully.

PERIODICALS

- Title: *The Council of Europe.*
- Author: Woolrych, S. H. C.
- Publication: JOURNAL OF THE ROYAL UNITED SERVICE INSTITUTION, November, 1954, p. 524-533.
- Annotation: An excellent account of the development and current employment of the infrequently-reported-on Council of Europe. Briefly states its origin, current attitudes on federation, attitudes of Britain, the coal and steel community, European defence and political community, the London Agreement, influence of Strasbourg, and reasons why Britain should support the Council of Europe.
- Title: *Combatting Soviet Guerillas.*
- Author: von Dohnanyi, Ernst.
- Publication: MARINE CORPS GAZETTE, February, 1955, p. 50-61.
- Annotation: An account of the German experiences in fighting guerrilla bands during the Russian campaign and the lessons they hold for Western military planners.
- Title: *Helicopters versus Submarines.*
- Authors: Torry, John A. A., Commander, U.S.N., and Bradford, E. W., Lieutenant, U.S.N.
- Publication: NAVAL AVIATION NEWS, February, 1955, p. 1-5.
- Annotation: Outlines the role of the helicopter in anti-submarine warfare.

- Title:** *The Growing Interdependence Between International Law and International Organization.*
- Author:** Harley, J. Eugene.
- Publication:** WORLD AFFAIRS INTERPRETER, Winter, 1954-55, p. 391-413.
- Annotation:** An appraisal of the present-day status of international law and international organization in world affairs includes consideration of a new concept of collective security, the trial of war criminals and other aspects of this subject.
- Title:** *Neutralism: The Problem of Japan in East-West Relations.*
- Author:** Coons, Arthur G.
- Publication:** WORLD AFFAIRS INTERPRETER, Winter, 1954-55, p. 385-390.
- Annotation:** Considers Japan's future role, listing the factors that could lead to ties with China and the Soviet Union and outlining a policy which must be followed by the U. S. to keep Japan on the side of the free world.
- Title:** *Education and Leadership.*
- Author:** Carney, Robert B., Admiral, U.S.N.
- Publication:** CONGRESSIONAL RECORD, February 2, 1955, p. A567.
- Annotation:** An address by the Chief of Naval Operations at the Citadel, Charleston, S. C., January 24.
- Title:** *Mission for the Army: the Winning of World War III.*
- Publication:** THE ARMY COMBAT FORCES JOURNAL, February, 1955, p. 16-20.
- Annotation:** The authors call the Cold War, World War III, and claim that the Army is the service best suited to stop the "creeping aggression" of a Cold War. They suggest that the Army have sufficient combat divisions strategically deployed throughout the world so that they can immediately reinforce the trained, indigenous, combat divisions of any nation threatened by Communist aggression.

- Title:** *Russia's Foreign Policy.*
- Publication:** CURRENT HISTORY, February, 1955.
- Annotation:** Contains the following articles: The Russian Riddle; Russia, Scandinavia and the Baltic; Russia and the Slavs; Russia and the Near and Middle East; Russia's Relations with the West; Russia's Far Eastern Policy; Russia and the United States; The Foreign Policy of Russian Communism.
- Title:** *Mobile Sea Base Systems in Nuclear Warfare.*
- Author:** Smith, James H., Jr.
- Publication:** UNITED STATES NAVAL INSTITUTE PROCEEDINGS, February, 1955, p. 131-135.
- Annotation:** The Assistant Secretary of the Navy (Air) explains the role of sea power in nuclear warfare of the future. (Drawing: How the Mobile Sea Base System Could Function in Nuclear Warfare, p. XVIII).
- Title:** *Strategic Conditions for Effective Defense of the Free World.*
- Author:** Thomas, Charles S.
- Publication:** WORLD AFFAIRS INTERPRETER, Winter, 1954-55, p. 348-360.
- Annotation:** An address by the Secretary of the Navy at the Institute of World Affairs, Riverside, California, December 14, in which he examines conditions for the effective defense of the free world and outlines the Navy's role in modern warfare.
- Title:** *"We Give Military Advice Only."*
- Publication:** U. S. NEWS & WORLD REPORT, February 25, 1955, p. 42-50.
- Annotation:** An interview with Admiral Arthur W. Radford, Chairman, Joint Chiefs of Staff, in which he replies to questions concerning U. S. Defense policies and the role of the Joint Chiefs in defense planning.
- Title:** *War — Limited or Unlimited?*
- Author:** Saundby, Sir Robert, R.A.F. (Ret.).
- Publication:** AIR POWER, January, 1955, p. 100-102.
- Annotation.** Maintains that a study of the history of war shows that

wars fought for a limited object have been successful and those fought for an unlimited object, unsuccessful, and urges that any conflict with the Communist Bloc be confined to a limited object.

- Title:** *The Heavy Carrier.*
- Author:** Thomson, G. P., Rear Admiral, U.S.N.
- Publication:** THE NAVY, February, 1955, p. 31-32.
- Annotation:** Discusses the function of the heavy aircraft carrier and explains the difference in British and American views on the primary function of the heavy carrier.
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- Title:** *Letter from Washington.*
- Author:** Rovere, Richard H.
- Publication:** THE NEW YORKER, February 26, 1955, p. 86-94.
- Annotation:** An analysis of President Eisenhower's Formosa policy and the problems stemming from the Congressional Resolution on Formosa (Public Law 4) and the legal technicalities of the Mutual Defense Treaty.
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- Title:** *From Defence to Deterrence.*
- Publication:** THE ECONOMIST, February 26, 1955, p. 723-734.
- Annotation:** A review of Britain's strategic situation as it was set forth in the 1955 defence — white paper.
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- Title:** *What We're Doing in Indo-China.*
- Publication:** U. S. NEWS & WORLD REPORT, March 4, 1955, p. 82-88.
- Annotation:** General J. Lawton Collins, Head of U. S. Mission to Vietnam, describes, in an interview, U. S. efforts to keep this strategic area out of the hands of the Communists.
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- Title:** *Our Point of No Return.*
- Author:** Phillips, Thomas R., Brigadier General, U.S.A., (Ret.).
- Publication:** THE REPORTER, February 24, 1955, p. 14-18.
- Annotation:** Considers the dilemma faced by military planners as to whether our military establishment should be wholly nuclear or nuclear and conventional, and discusses the implications of total dependence upon atomic weapons.

- Title:** *The U. S. Navy.*
- Publication:** CONGRESSIONAL RECORD, February 22, 1955,
p. A1137-A1139.
- Annotation:** The Honorable Charles S. Thomas, Secretary of the Navy, reviews the Navy's defense program and the role of the Supply Corps on the occasion of the 160th anniversary of the Supply Corps.
- Title:** *Our Pipe Dream About Zhukov.*
- Authors:** Olshansky, Boris.
- Publication:** AMERICAN MERCURY, March, 1955, p.
111-115.
- Annotation:** A former Soviet officer reviews Marshal Zhukov's career to show there is no basis for the view that he would form a moderate military bloc to counter party zealots in the Soviet Government.