

FOR OFFICIAL USE ONLY

# NAVAL WAR COLLEGE REVIEW

Vol. IX No. 1 January, 1957

SIMS BRANCH LIBRARY

## CONTENTS

JURISDICTION . . . . .	1
<i>Professor Myres S. McDougal</i>	
STATUS OF ARMED FORCES ABROAD . . . . .	25
<i>Captain Wilfred A. Hearn, U. S. N.</i>	
THE LAW OF WAR . . . . .	39
<i>Mr. Richard R. Baxter</i>	
SPECIAL ASPECTS OF JURISDICTION AT SEA . . . . .	59
<i>Professor Brunson MacChesney</i>	
RECOMMENDED READING . . . . .	79



## **SPECIAL ATTENTION TO THE READER**

**The material contained herein is furnished to the individual addressee for his private information and education only. The frank remarks and personal opinions of many Naval War College guest lecturers are presented with the understanding that they will not be quoted; you are enjoined to respect their privacy. Under no circumstances will this material be republished or quoted publicly, as a whole or in part, without specific clearance in each instance with both the author and the Naval War College.**

**NAVAL WAR COLLEGE REVIEW** was established in 1948 by the Chief of Naval Personnel in order that officers of the service might receive some of the educational benefits of the resident students at the Naval War College. Distribution is in accordance with BUPERS Instruction 1552.5 of 23 June 1954. It must be kept in the possession of the subscriber, or other officers eligible for subscription, and should be destroyed by burning when no longer required.

**The thoughts and opinions expressed in this publication are those of the author, and are not necessarily those of the Navy Department or of the Naval War College.**

**NAVAL WAR COLLEGE  
REVIEW**

**Issued Monthly  
U. S. Naval War College  
Newport, R. I.**

## JURISDICTION

A lecture delivered  
at the Naval War College  
on 11 September 1956 by  
*Professor Myres S. McDougal*

Mr. Chairman and Gentlemen:

The subject assigned to me, as has been indicated, is that of *Jurisdiction*. The more specific task suggested to me by my good friend, Professor MacChesney, is that of establishing a comprehensive framework of principles within which others may more effectively discuss particular problems. It is important in the beginning, therefore, that we mutually understand what we mean by the word "jurisdiction" and hence what our subject, most broadly conceived, comprehends.

In public and private international law, the word "jurisdiction" — in etymological origin, speaking the law — is used to refer to the *competence* of a state — the *authority* of a state as recognized by international decision-makers and by other states — to make law for, and to apply law to, *particular* events or particular controversies. I emphasize the word *particular* in order to distinguish, as will be seen below, the claims to authority with which we are here concerned from other and more comprehensive claims of state officials to *continuous* control over bases of power, such as territory and people.

It is in this sense — in the sense of competence or authority to prescribe and apply law to particular events — that the subject of *Jurisdiction* is important to Naval Officers and it is in this sense that, with your permission, I propose to explore the subject. It needs no emphasis to this audience that the Naval Officer is both the agent of the authority of one state and a possible object of the application of authority of other states. The authority of any particular officer may not be coextensive with that of his state,

depending upon the hierarchy of command and degrees of delegation, but for determining the lawfulness of a controverted exercise of authority by or upon an officer in events involving other states, it is commonly necessary to consider the comprehensive authority of a state as against other states.

It has probably already been sensed that this common use of the term "jurisdiction," which I suggest we adopt, is not simple. The term does in fact refer to certain reciprocal processes of *claim* and of *decision*, of assertions of authority by one state against other states and of responding acceptance or rejection by international decision-makers or other states, which may become quite complex.

In parenthesis, and by way of apology, may I say that in order to be both comprehensive and brief I must of necessity make my remarks somewhat abstract. The facts of the controversies with which we deal are, however, often most dramatic. A citizen of the United States shoots a citizen of Brazil on board a Swiss plane in flight from Shannon to Gander. A citizen of the United States seeks to levy upon a warship of Napoleon anchored in an American harbor, claiming the ship as his private property formerly seized by violence. Canadian officials invade New York State and set an American barge adrift over Niagara Falls. The United States shoots an artificial satellite into outer space, which traverses the air space of the Soviet Union as it departs or returns. A beautiful lady from the Soviet Union leaps from an upper floor of the Soviet Consulate in New York City into the waiting arms of a New York policeman. A soldier of the United States commits all the crimes in the book while on holiday in France. A ship flying the French flag rams a Turkish ship in the Sea of Marmora, killing citizens of various nationalities. The wife of the Chinese delegate to the United Nations sues him for divorce and alimony in New York City. The United States tests a nuclear weapon in the Pacific, and creates a molten inferno where once there was an inhabited tropical paradise — and so on. May I ask you to recall, as I talk, cases

such as these and perhaps other cases from your experience as an officer, or from our directive, in order to give flesh and blood to the very bare remarks I must make?

For the purpose of attempting to subdue the complexity of our subject, I propose that we organize our inquiry into three main, though not equally extensive, parts:

First, and briefly, an examination of the *factual* process in which states assert, as against each other, claims to exercise authority with respect to particular events.

Next, and in somewhat more detail, an exploration of the processes of decision by which the lawfulness of claims, with some being accepted and some rejected, is determined.

Finally, and as fully as our time will permit, an examination of the more important trends in decision and established policies with respect to claims relating to the various spatial domains: land, waters, air space, and outer space. This latter inquiry may enable us to identify some of the explanatory factors which have conditioned different decisions and policies with respect to the different spatial domains and, hence, *cautiously* to project certain possible developments into the future.

We begin with brief reference to the factual process in which claims to jurisdiction are asserted. This process includes certain *claimants* making, as against each other, certain *claims* to the exercise of authority, with respect to events occurring within different *spatial domains*, by differing *methods*, for various general and specific *objectives*, and under greatly varying *conditions*.

The *claimants*, who assert as against each other claims to jurisdiction, are the officials of nation-states, of territorially organized communities. As such officials, they have at their disposal certain bases of power, including certain continuous, but varying, control over resources, over people, and over community value processes.

The *claims* to exercise authority we have already described as claims to competence to make and apply law. In conventional terms such competence is sometimes described as legislative, executive, judicial, and administrative. Such conventional terms refer, however, more precisely to institutions rather than to competences or functions. A more comprehensive and scientific description might make reference to intelligence, recommending, prescribing, invoking, applying, appraising and terminating functions. For our immediate purposes, purposes relevant to the more important concerns of the Naval Officer, a focus upon the prescribing and applying functions, the making and execution of law, will perhaps suffice. It is, however, important to keep clearly in mind the distinction alluded to above between the comprehensive claims by state officials to those continuous controls over resources, people, and value processes which constitute their general and enduring bases of power and the more particular claims to exercise authority with respect to occasional, episodic events which are ordinarily described as claims of jurisdiction. The former claims insist that "this is my territory" or "this is my national" or "these are my value processes" for *all* purposes; the latter claims insist only that, because of certain factors of spatial location or of nationality or of impact upon national interest and so on, the claimant can make law for or apply law to a particular event in controversy. These very different factual claims are governed by very different technical rules which seek quite different policies.

The particular events with respect to which jurisdiction is claimed may, of course, occur in any one of the spatial domains: upon the territory of the claimant state or of another state, upon the high seas, within the air space over the claimant state or another state or the high seas, or in outer space. The complexity in institutional detail and range of spatial impact of such particular events may, as was seen in the cases alluded to above, vary greatly. The actors in such events may be official or non-official, individual or group, corporate or non-corporate, national or non-national,

civilian or military. The values at stake in the interaction may embrace security, power, wealth, enlightenment, respect, rectitude, or others. The changes being contested may have taken place by agreement or by deprivation, by consent or by coercion. The territorial range of the impacts of the significant events may extend to one or several states and may or may not include the state of the claimant. Resources affected may vary from land to ships and aircraft or spacecraft or other movables, and may be variously located. States other than that of the claimant may or may not have engaged in "acts of state" with respect to the same contested value changes and, where such acts of state are asserted, they may be legislative, executive, or judicial. The state whose prior acts of state are invoked may or may not have been recognized by the claimant or other states, and so on.

The *methods* by which claims are asserted are commonly diplomatic in form, ranging from unilateral assertions by a single state through the multiple variations of group or multi-lateral claim. Omnipresent behind the diplomatic forms, and employed in varying combinations and with differing degrees of intensity and overtness are, however, and of course, the other familiar instruments of policy: ideological, economic, and military.

The *objectives* for which officials assert claims to jurisdiction embrace all the objectives characteristic of the nation-state: in the most abstract form, the protection and enhancement of the bases of power of self and of allies, the weakening and disintegration of the bases of power of enemies and potential enemies, and the effective employment of all available bases of power for maximization of all the values of the territorial body politic.

The *conditions* under which claims are asserted include, again in most abstract statement, all the variables of a global power process, of a world arena in which the territorially organized communities which we call states, and other participants such as transnational political parties, pressure groups, and business as-

sociations, continuously engage each other with all instruments of policy. Among the variables, or factors, of greatest significance for our immediate purposes, purposes of accounting for past or projecting future decisions about jurisdiction may be mentioned: the number, spatial location, and relative strength of the participants in the arena; the state of technological development for purposes of communication, transport, production, and destruction; and the degrees of intensity of the participants' expectations of violence.

With this brief orientation in the factual process of claim, let us now turn to the other and reciprocal process, the process of *decision* by which the lawfulness of asserted claims is determined. This second process includes, in comprehensive formulation, certain established *decision-makers*, seeking certain shared *objectives*, by the elaboration and application of certain authoritative *principles*, under certain *conditions*.

The *decision-makers* established by the authoritative perspectives of the participants in the world arena include, of course, the officials of international tribunals and organizations and of specially constituted arbitral tribunals. But by far the most important decision-makers, important both in the quantitative terms of the number of decisions made and in the qualitative terms of the significance of the issues determined, are those same nation-state officials who in another capacity are mere claimants. The decisions of these officials are taken in countless interactions in foreign offices, special conferences, national courts, national legislatures, and so on. It may perhaps bear emphasis, because so much misconception prevails upon the point, that this does not mean that there are no *objective* decision-makers for questions of jurisdiction, or of international law generally. Though any particular official of a state may on occasion be a claimant for his state, on multiple other occasions he is among the officials of the seventy-nine odd states who in a given instance are passing upon the lawfulness of the claims of the officials

of the eightieth state. In this latter capacity the state official may be just as objective, and just as much moved by perspectives shared in the whole community of states, as a municipal decision-maker upon internal problems is objective and is moved by perspectives shared in the territorial community which he represents. The duality in function of nation-state officials does not represent a lack of internationalization and objectivity in function, but rather a lack of specialization and of centralization.

The shared *objectives* of the established decision-makers of the world arena include, of course, the characteristic objectives of nation-states mentioned above, both of protecting bases of power and of promoting employment of such bases in the maximum production of all values. Beyond these, however, are certain other objectives which are a function of the fact that a *number* of such territorially organized communities must interact in a common world arena. Among the objectives of this second type perhaps the most important is that of creating a certain *stability* in the expectations of all decision-makers that the aggregate flow of cases will be handled in certain agreed ways, with a minimum assertion of raw, effective power — a stability of expectation of uniformity in decision which will, in other words, permit rational power and other value calculations with a minimum disruption from unrestrained coercion and violence. Still another such objective is that of promoting efficiency not only in the disposition of controversies but also in all value interactions across boundaries and in the exploitation of world resources best enjoyed in common. It may be recalled that in the *Hydrogen Bomb* article the major policy purpose which we found to inspire the whole regime of the law of the sea was “not merely the negation of restrictions upon navigation and fishing but also the promotion of the most advantageous — that is, the most conserving and fully utilizing — peaceful use and development by all peoples of a great common resource covering two-thirds of the world’s surface, for all contemporary values.”

The *principles* which established decision-makers elaborate and apply, for achievement of all these shared objectives, are of manifold reference and varying degrees of generality. For brief indication, they may be described as of three different types. The first type is composed of those principles sometimes called the "bases" of jurisdiction — the principle of territoriality, the principle of nationality, the protective theory, the principle of passive personality, and the principle of universality in the name of which a state, which has acquired some effective control over persons or resources, asserts its authority and is in fact authorized by external decision-makers to exercise such authority to make and apply its law to certain particular events in which such persons or resources have been involved. The second type of principle is composed of those principles by which a state, though it has acquired such effective control over persons or resources, decides, or is required to decide, that it will yield its effective power in deference to the "acts of state" or the "immunities" of another state and permit that state to make and apply its law to the events in question. The third type of principle is constituted by those principles which individualize both sets of complementary principles indicated above, both those embodying the primary assertions of authority and those embodying deferences to others, to take into account the special characteristics of the various spatial domains: territory, the high seas, air space, and outer space.

The point which commonly requires most emphasis to non-lawyers is that these various principles are not designed as precise and rigid commands, arbitrarily dictating preordained conclusions, but rather as flexible and malleable guides to rational and reasonable decision. A little work with the actual decisions quickly makes it clear, first, that the major principles, asserting authority and yielding deference, are complementary in form, permitting decision in any direction; and, secondly, that within any one set of principles the major concepts are so vaguely defined as to permit the ascription of an infinite variety of concrete

meaning, and, hence, the justification of a considerable number of alternatives in decision. The function of the various principles is, accordingly, not dogmatically to dictate decision but rather to focus the attention of the decision-maker upon all the significant features of a context in controversy, and, hence, to assist the decision-maker in assessing the relevance of such features in relation to each other. Thus, the territoriality principle points to the *locus* of events in controversy, and the range of their territorial impact, and emphasizes the importance of the resource base in the community process in which people apply institutions to resources for the production of values. The "territorial" principle is, in other words, but an elliptical expression of a "community" principle. Similarly, the nationality principle points to the primary community allegiance of the actors in an event and emphasizes the importance of manpower and membership in community value processes. The protective principle, similarly, in authorizing a state to take measures against direct attack upon its security and other values, though the events occur abroad, constitutes an explicit recognition of the major policy framework which we have suggested for the whole subject of jurisdiction. The passive personality theory that the state of the nationality of an injured party has jurisdiction wherever events occur, and equivalent theories permitting the diplomatic protection of citizens abroad, again emphasizes the importance of community membership. The universality principle, similarly, emphasizes the common interest of all states in repressing unauthorized violence upon the high seas, war crimes, slave trading, and comparable deprivations of human dignity. The doctrine of deference to the "acts of state" of another government, to turn to some of the complementary principles, is a clear expression of the recognized need for reciprocal tolerance and of the sanctioning fear of retaliation. The principles embodying immunity for state officials and organs, for ambassadors and warships, are, finally, expressions of concession to mutual dignity and efficiency in indispensable intercourse. The function of all such principles might perhaps be said, in sum,

to be to authorize the decision-makers of the state most affected by any particular events to decide the law for that event, upon condition that it take into account the degrees of involvement of the values of other states in such, and other comparable, events.

The *conditions* in the context of which established decision-makers must operate are, in most general formulation, of course, the same as for claimants. Among the factors most significant for trend in decision may be mentioned, however, both the degree of interdependence in fact between states for the achievement of demanded values and the degree to which decision-makers have knowledge of whatever interdependence in fact exists. Such factors may vitally affect both trends in decision and the sanctions which are available for making decisions effective.

With orientation now in both the factual process of claim and the authoritative process of decision, let us turn, finally, to the promised examination of the more important trends in decision and established policies with respect to the various spatial domains.

We begin with the land-base of a state, and will talk of "territory," though territory is a legalistic concept which embraces, as is well known, not merely land but certain waters and air space as well.

It is a commonplace, today, of both public and private international law that the territorial principle of jurisdiction remains the most basic organizing principle in a world order constituted primarily of, and by, territorially organized states. It is this principle which, first, authorizes the decision-makers of any particular territorial community in which resources are located and events occur, as representatives of the community most concerned with such resources and most affected by such events, to prescribe and apply law with respect to such resources and

events; and, second, permits the decision-makers of all such territorial communities, considered as a larger global community, to order, by the process of mutual deference and tolerance indicated above in application of this principle, the larger affairs transcending the boundaries of any single community with the highest degree of economy and fairness and the highest degree of stability in common expectation.

One of the clearest expositions of this principle, with indication of its roots and function, is that of Professor Alf Ross of Denmark. I quote:

“It is a historical fact that the various states are separated from each other and bounded territorially. This of course is not fortuitous but deeply rooted in the nature of the case. The states are primarily an organization of power. Each of them claims to be, within a certain territory separated from others, the supreme power in relation to its subjects (a self-governing community). The simplest principle, almost a matter of course, for the individualization and separation of these competing instruments of power is the spacial or territorial.”

(Ross, *A Textbook of International Law*, 137, 1947).

Professor Ross adds:

“In conformity herewith the *fundamental international legal norm of the distribution of competence* is to the effect that every state is competent, and exclusively competent, within its own territory to perform acts which — actually or potentially — consist in the working of the compulsory apparatus of the state (the maxim of territorial supremacy).”  
(Ibid at 138).

The most important aspect, the hallmark, of this principle is, as Professor Ross indicates, in its prescription of *exclusivity*

for the territorial sovereign. The principle serves not merely as an expression of the comprehensive power of the territorial sovereign to exercise its authority over all resources, persons, and activities located, acting, or occurring within its domain but also as a prohibition addressed to the officials of all other states requiring them to keep hands off and out. It is, further, by this principle that the territorial sovereign is authorized to subordinate to its effective power all the various functional groups, parties, pressure groups, and private associations, domestic or foreign, which operate within its boundaries. This notion of the supremacy of the territorial sovereign over all non-territorial representatives is, indeed, basic to the very conception of the territorially organized state and its emergence was undoubtedly conditioned by the same factors which conditioned the emergence of the nation-state. In days when the strategy of attack was by horizontal encirclement and with primitive weapons, spatial contiguity, walls, and moats, and fixed boundaries were perhaps found to be an indispensable asset in defense; and security and the greater production of demanded values were found to depend upon the monopolization of territorial authority and control and not in its common enjoyment with functional or other non-territorial competitors.

It is familiar learning that certain internal waters, a still debated extent of air space, and in certain measure a narrow belt of the oceans, called the "territorial sea," are universally comprehended within the concept of "territory" for purposes of jurisdiction. The degree of exclusivity in authority which is claimed with respect to internal waters and the territorial sea is, however, commonly somewhat less than with respect to land. The officials of states other than the territorial state are under certain conditions permitted to exercise authority with respect to events occurring upon ships which fly their flag even when such ships are in internal waters. Still greater generosity is commonly accorded when such ships are traversing the territorial sea; this

generosity is, of course, summed up in the much discussed right of innocent passage.

The broad scope of the jurisdiction which state officials claim under the territorial principle of jurisdiction may perhaps best be demonstrated by reference to one subordinate application of the principle which is known as the doctrine of "impact territoriality." The tenor of this doctrine is that even though certain events occur beyond the boundaries of the claimant state, perhaps even within the domain of another state, if such events have important consequences to the value processes of the claimant state, the latter may lawfully apply whatever effective control it may have over the actors in such events, or the resources of such actors, for the reasonable protection of its interests. Thus, the United States has, under this doctrine, justified the application of its anti-trust statutes to agreements, made abroad between non-nationals, and contemplating performance only abroad, when such agreements were clearly intended to affect prices and production within the United States. Some other states, as well as a number of American lawyers, have contested this application by the United States of the doctrine of impact territoriality, contending that the doctrine is only applicable to such simple matters as the shooting of guns across boundaries, but the practice of the United States would seem to be well within the compass of a broad policy authorizing decision by the territorial community most importantly affected by particular events.

For purposes of dispelling a common misconception, it may be desirable to mention also a doctrine converse to that of impact territoriality. The import of this doctrine is that when a state exercises its jurisdiction by application of its authority to persons or resources actually physically present within its territorial domain — that is, controlling persons or resources located within the spatial sphere of its exclusive sovereignty — the mere fact that the exercise of such jurisdiction may have factual consequences, factual effects, beyond the boundaries of the acting state, whether

upon the high seas or in the domain of another state, is legally irrelevant. In our contemporary interdependent world, in which everybody's activities affect those of everybody else, no other conclusion could be tolerable. If a state's laws were invalid merely because their application has effects upon the interests and activities of people beyond its boundaries, government could not go on. The application by the United States of its anti-trust laws, for example, to persons within its domain obviously affects business activities over all the world; and what is true of anti-trust laws is no less true of commercial laws generally, immigration laws, maritime laws, monetary controls, and so on.

It is, of course, from their territorial base that state officials project all the controls they assert over their nationals abroad and over non-nationals, through the protective, passive personality, and universality theories, for activities beyond the territorial domain of the claimant state. The details of all these important claims to authority, fully sanctioned in most part by international law, we must perforce leave to others or for another day. It may, however, be noted that the nationality principle extends not only to individuals but also to ships, aircraft and corporations, and perhaps even to spacecraft, and that under the nationality principle the United States has asserted authority to control its citizens in almost every aspect of life, from taxes through the gamut of crime and regulation of business activity to death for treason.

It should be remembered, also, in final consideration of the territorial principle, that state officials, even when they have effective control over persons and resources, may on occasion be required by certain principles of "act of state" and "immunity," completely complementary to the various principles which we have been considering, to forego the exercise of their own authority and to yield control to others. The details of these principles ramify through various requirements with respect to what constitutes appropriate legislative, executive, and judicial acts of state which must be honored by other states, and through a lot

of relatively uninteresting, though not entirely unimportant, niceties with respect to the various exemptions of heads of state, diplomats, public ships, and public corporations and agencies.

From dull, dry land, let us now turn, after much too long, to the oceans of the world. Here, as you all know, we find a completely different development. Because of various historical conditions, including most notably perhaps the fact of a multipolar arena, exhibiting a number of relatively equal participants, and a state of technological and industrial development in which nobody was able to chase everybody else off, emphasis in the law of the sea for some centuries has not been upon *exclusivity* in use but upon *use in common*. The experience of 150 years at least has shown that the oceans of the world can be used concurrently by all, without any special injury to any one, for the great common advantage. By that elaborate set of complementary doctrines, known as the customary law of the sea, it has been possible effectively to internationalize the oceans of the world, without the establishment of much special international machinery. One set of these doctrines, generally referred to under the label of "freedom of the seas," was formulated, and is commonly invoked, to protect unilateral claims to navigation, fishing, flying over the oceans, cable-laying, and other similar uses. The other set of doctrines includes prescriptions summed up in a wide variety of technical terms such as "territorial sea," "contiguous zone," "jurisdiction," "continental shelf," "self-defense," and so on, protecting such other interests as security, enforcement of health, neutrality and customs regulations, conservation or monopolization of fisheries, exploitation of the sedentary fisheries and mineral resources of the seabed, and the conducting of naval manoeuvres, military exercises, and other peacetime defensive activities, and so on.

The most important elements in the total structure are, of course:

1. The confining the territorial belt to relatively narrow limits;

2. The honoring of contiguous zones for all important national purposes, in the absence of unreasonable interference with others;
3. The common use of the broader expanses of the oceans for the great variety of purposes indicated above;
4. The notions of the nationality of ships and of the national responsibility of states for their ships; and
5. The law of piracy for the repression of unauthorized violence.

The details of this structure are perhaps already too familiar to you and may be discussed by others. What I should like to emphasize is the high degree of flexibility and adaptability in the whole structure, with reference especially to the overriding principle of common interest and the omnipresent specific test, whatever its verbal formulation, of *reasonableness*. Some of the conventional presentations of the law of the sea seem to me, quite unfortunately, to approach caricature of the actual process of decision. The most recent report, the 1956 report, of the United Nations International Law Commission, with all deference to the distinguished jurists who did the work, does not, I fear, entirely escape misconception. Its most grievous defect resides in a somewhat mechanical overrigidification of many technical concepts, including both the notions of the freedom of the seas and of contiguous zones. In Article 66, for example, only *one* contiguous zone is provided for, and it is confined to the protection of customs, fiscal and sanitary measures. No mention is made of security. Some of you will undoubtedly share with me, too, misgivings that the ambiguity in Article 3 of the provision with respect to the territorial sea rule continues to encourage expansionist claims. From

an accurate description of past practice, it may, of course, be seen that there is not simply *one* contiguous zone, but multiple contiguous zones for all important national interests, and that security is one of the interests which has been most honored in prior practice. Freedom of the seas, similarly, has been in practice regarded as no more of an absolute than any of the other doctrines protecting unilateral assertions of authority. The fact is that in appropriate contexts all important interests, reasonably asserted, have achieved protection.

From all this, the answer to the question as to the legality of defensive zones, is not difficult. The answer depends upon whether in context the claim is reasonable. How high is the expectation of violence? How important and how large is the area claimed? What is the extent and the duration of interference with others? And so on.

Let us turn now from the oceans of the world back to the air space above land. With respect to this spatial domain, it is familiar history how *exclusivity* once again prevailed over common use. Despite a number of demands at the beginning of this century for a freedom of airspace comparable to the freedom of the seas, it soon became clear that vertical power could control horizontal and that sovereignty over land and territorial sea could not be protected without sovereignty over air space, and the conclusion was certain. The history of this development has been recounted many times, and before this college by the distinguished authority, Professor John C. Cooper. I will not repeat it. The essential point is that universal national practice, as consolidated, for examples, in the Paris Convention of 1919 and the Chicago Convention of 1944, has established that same *exclusivity* of jurisdiction of the territorial sovereign for overlying airspace as for underlying land. With the elaborate qualifications to this exclusivity created by various conventions in the interest of international commerce, we need not now concern ourselves. The customary doctrine does

not recognize even such right of innocent passage as qualifies the territorial sea.

Finally, we reach that domain of most contemporary speculative interest, the outer spaces. To pose the problem, it is convenient to quote a few remarks from a column by Roscoe Drummond entitled "The Blue Wild Yonder":

"Soon this will be no theoretical matter. The United States, the Soviet Union and Britain have announced that they are building satellites to revolve 200 to 300 miles above the earth's surface and are planning to dispatch a few high-altitude rockets beyond the earth's atmospheric coat. The scientists foresee manned space stations coasting in the earth's orbit for indefinite periods, useful for refueling space ships and for astronomical and physical research. Next step: experimental flights to the moon; scheduled flights later.

The lawyers are just beginning to get a slippery grip on the legal aspects of outer space, issues of overhead sovereignty and freedom of passage."  
(New York Herald Tribune, May 3, 1956).

Turning to this slippery grip of the lawyers, I would refer to the remarks of two very distinguished commentators on international law. The first are those of Mr. Wilfred Jenks, who perhaps is one of the two or three most eminent writers in the field of international law today, which appeared in the *International and Comparative Law Quarterly* of January, 1956. Mr. Jenks concludes that air space beyond the atmosphere of the earth is a *res extra commercium* incapable by its nature of appropriation on behalf of any particular sovereignty based on a fraction of the earth's surface. He argues in justification that "Space beyond the atmosphere of the earth presents a much closer analogy to the high seas than to the air space above the territory of a state"

and that "the projection of the territorial sovereignty of a state beyond the atmosphere above its territory would be so wholly out of relation to the scale of the universe as to be ridiculous; it would be rather like the island of St. Helena claiming jurisdiction over the Atlantic." He notes that such a projection of sovereignty "would give us a series of adjacent irregular shaped cones with a constantly changing content" and that celestial bodies would move in and out of the zones all the time. He concludes that "in these circumstances the concept of a space cone of sovereignty is a meaningless and dangerous abstraction."

The most obvious defect in Mr. Jenks' analysis is that it does not go far enough. Because of certain technological considerations outlined by Mr. Jenks, it is of course impossible for all nation-states to project exclusive claims to control indefinitely into outer space. There is little point to seeking territorial location for either threats from outer space or the assertions of effective power to cope with such threats. The important problems will relate to the reconciliation of multiple assertions of effective control in spaces accessible to all and, hence, common to all in the absence of territorial nexus individualized to any one state.

Building upon Mr. Jenks, Professor Cooper, who previously had taken a position emphasizing the importance of potentialities of effective control in resolving these issues, now offers some very curious suggestions based upon a misconception of the law of the sea. Professor Cooper first argues in great detail that previous agreements are irrelevant with respect to the question of outer space and he includes much detail on prior definitions of "air space" and "aircraft," all of which would appear unnecessary. The reasons these previous agreements are irrelevant is that neither the major purposes nor the detailed expectations of the parties who negotiated and ratified them included the present problem of outer space.

There is, of course, as yet no customary law of outer space. The recommendations which Professor Cooper derives from the

public international law of the high seas would appear further to be quite unsound and improbable. He recommends that we establish a regime of outer space which he regards as comparable to the law of the sea. He suggests that nation-states affirm by agreement that the subjacent state has full sovereignty over the relatively narrow belt of atmospheric space above it. Next, the "sovereignty of the subjacent state" would extend upward to include a "contiguous space" of 300 miles, with a right of transit through it for all non-military craft when ascending or descending. Finally, he recommends acceptance of the principle "that all space above 'contiguous space' is free for the passage of all instrumentalities."

Among several observations which might be made upon Professor Cooper's thesis, the primary one is that it completely misconceives the law of the sea. An accurate portrayal of the law of the sea does not show us a nice set of boundaries — three miles of territorial sea, a single contiguous zone, and absolute freedom of use beyond. It shows a continual demand to increase the width of the territorial sea, a great variety of contiguous zones, not one but a dozen or more, and many examples of power being asserted unilaterally on the oceans of the world for all kinds of national purposes. The great variety of contiguous zones and unilateral assertions of competence are today honored in authoritative prescription.

We might observe also that Professor Cooper's notions are built upon the existing state of technology with respect to the distances to which effective control from land surfaces is presently possible. But one cannot assume that this technology is static and that we will not later have even more effective control of objects at an even greater distance in space.

To come to any practical recommendations upon this problem would require a great deal of information concerning factual conditions and probable future developments, much of which information is of course not now available. It is, however, my

understanding that, at the moment, neither Russia nor the United States is technologically capable of shooting down objects launched into outer space and also that neither can even control such an object after it reaches outer space. One would also gather that it would be impossible for either state to launch a satellite without traversing the air space above the other, which traversing would of course be a technical infringement of the exclusive zone claimed by each. It is my understanding, further, that there is not even one chance in a million of any damage being done to the surface by the falling of one of the presently contemplated satellites.

The apparent immediate uses of the proposed satellites will be to photograph various parts of the earth's surface, to fix the location of cities much more precisely than has been possible in the past, and to obtain information about atmospheric densities and temperatures above certain heights. The use of this information for various purposes, including the obvious military utility, would probably emerge from some later stage of development built around the knowledge gained by these initial experimental flights.

Although one cannot at the moment really anticipate the contributions that might be made to scientific knowledge from satellites, it would seem probable that in the future, as in the past, considerations of security will be the dominant concern of nation-state officials. If it is considered that security is endangered by the movement of space satellites above the state, and if the technological capability exists to do so, then such satellites will be destroyed, and this eventuality seems highly likely to come about by mutual tolerance even if a contiguous space for security is not established through international agreement.

The development just described with respect to security interests, which is closely analogous to the way in which the law of the sea has evolved, might also be expected to emerge with respect to other problems once the security interest is protected. Apart from the security aspect, the question is whether

all the decision-makers of all the nation-states have sufficient interest in the various other purposes served by space travel — scientific inquiry, commercial, health, etc. — that a mutual tolerance in freedom of use will evolve. Since there would appear to be a strong common interest in promoting productive use of the outer spaces, the emergence of such mutual tolerance would seem highly probable. On the other hand, as with security, reasonable unilateral assertions of authority to protect the interests of particular states could be accommodated within the structure of prescription, assuring freedom of use for all.

In sum, the probable developments with respect to outer spaces will include both the assertions of effective power from the land base that has characterized territorial jurisdiction and some features of the common enjoyment and mutual toleration that have characterized the customary international law of the sea.

May I, in conclusion, simply say that it will have been obvious to you that what I have attempted in this lecture is the outlining of a method of analysis which might not merely facilitate the accurate description of past decisions and explanatory factors but also assist in the clarification of our national policies and in the projection of probable decisions into the future. If anything I have said may serve to stimulate any of you, who have had a richer experience, to further thought and study, I shall feel deeply rewarded. It has been a very great honor and pleasure to have been your guest.

## BIOGRAPHIC SKETCH

### Professor Myres S. McDougal

Professor McDougal received his A. B., A. M., and LL. B. degrees from the University of Mississippi, his B. A. and B. C. L. degrees from the University of Oxford, his J. S. D. degree from Yale University, and, in 1954, an honorary degree of Doctor of Humane Letters from Columbia University.

From 1931 to 1934 he was Assistant Professor of Law at the University of Illinois. Since that time Professor McDougal has been at Yale University as Associate Professor of Law (1934-39), Professor of Law (1939-1944), and the William K. Townsend Professor of Law since 1944. In 1942, he was an attorney and Assistant General Counsel in the Lend-Lease Administration and the following year General Counsel in the Office of Foreign Relief and Rehabilitation Operations, Department of State.

Professor McDougal is a member of the Editorial Board for *The American Journal of International Law* and *The American Journal of Comparative Law*. He is Vice President of the American Society of International Law (1956), and was Counsel to the Royal Government of Saudi Arabia in the Aramco Arbitration at Geneva this summer.

Professor McDougal is the author of several law books, including *Lectures on International Law, Power and Policy: A Contemporary Conception* (Hague Academy of International Law, 82 Recueil des Cours 137-258 (1953)), and has contributed articles to various legal journals.

## **STATUS OF ARMED FORCES ABROAD**

A lecture delivered  
at the Naval War College  
on 12 September 1956 by  
*Captain Wilfred A. Hearn, U. S. N.*

The United States long ago recognized the fact that the only true security in the world today is collective security. In furtherance of this concept, the United States has entered into many alliances with other nations of the free world in order to protect itself as well as assist in the protection of these friendly countries. One such alliance is the North Atlantic Treaty Organization. And, as a part of our contribution to this partnership, we have stationed a sizable number of our military forces in Europe. In other friendly countries throughout the world our armed forces are assigned in more limited numbers. This is the first time in history that in time of peace military forces of the United States have been assigned to foreign areas for an indefinite period of time.

The understanding with each country in which our forces are stationed includes specific arrangements with respect to jurisdiction over these forces. All told, there are approximately 60 countries with which the United States has some type of jurisdictional arrangement regarding American servicemen stationed within their borders.

It is my purpose to consider the provision of these agreements which relates to the authority of the host state and the military authorities of the sending state to exercise jurisdiction over offenses committed by members of the visiting force within the territory of the host state. This phase of the relationship between our forces and the host state is the most controversial. It has received the greatest amount of publicity and is of prime interest to commanding officers.

Before considering the division of jurisdictional authority established by these agreements, however, it may be helpful first to see what would be the status of our service personnel abroad in the absence of any agreements.

A sovereign nation exercises absolute and exclusive jurisdiction within its own territory. If the commander of a visiting friendly military force convenes a court-martial to try a subordinate for some purely military offense, such as failure to obey the lawful order of a superior officer, the commander impinges upon the exclusive jurisdiction of the sovereign.

Yet, the maintenance of discipline within a military force is recognized as the inherent responsibility and duty of the commander. In order to overcome this impasse, and at the same time preserve the integrity of both of these principles, International Law recognized the further proposition that where a sovereign permits a friendly foreign military force to enter his territory, he implicitly waives jurisdiction over the force with respect to matters of military discipline. This implied immunity is strictly construed and extends only to the right to discipline and punish as may be required for the government of the force. Whatever may be their acceptance in many law texts, however, the hard fact of today's international situation is that such broader exceptions are not accepted in our world of rising nationalistic feelings.

This state of the law may come as a surprise to some who recall that during World War II we exercised exclusive jurisdiction over our armed forces wherever they were situated. In point of fact, we exercised exclusive jurisdiction during the war years solely as the result of wartime agreements that reflected wartime requirements and the relative circumstances of the parties at the time of negotiation.

Most of the agreements in force today were negotiated in time of peace to meet peacetime requirements. They vary all the

way from granting exclusive jurisdiction to the United States in a few instances, such as in Korea, Greenland, and Ethiopia, to the establishment of a system of concurrent jurisdiction, such as in Bermuda, the Bahamas, and the NATO countries. By and large, the type of jurisdiction which is granted to the United States is largely dependent upon the mission of the force assigned, its size, the laws of the host country and the willingness of the host country to waive its jurisdiction in favor of the United States. There are no agreements by which a foreign state exercises exclusive jurisdiction over our forces.

Under the circumstances, it would be error to say that in completing these jurisdictional arrangements the United States Government has surrendered any rights of the American serviceman who is stationed abroad. On the other hand, it can be said that every agreement which has been negotiated amounts to a specific gain for our service personnel abroad.

In many countries there may be more than one category of our forces, each category being present by virtue of a different agreement and, therefore, each being in a different jurisdictional status.

Under the mutual defense assistance agreements, the personnel assigned to the MAAG units enjoy the same immunity as embassy personnel of corresponding rank.

The agreements that establish the various military and naval missions provide that personnel assigned to this duty will remain subject to United States military law and only in some instances subject to local jurisdiction.

Personnel serving in the Ryukyus are under the exclusive jurisdiction of the United States, due to the fact that we exercise control over the area.

Most of our forces stationed abroad are a part of the NATO Defensive Organization and are serving in the various countries

which are members of the NATO alliance. The status of these forces is controlled by the Status of Forces Agreement, a multi-lateral convention entered into by all of the signatories of the NATO alliance with the exception of Iceland, which does not maintain an armed force of its own. This agreement was negotiated in 1951, and ratified by the Senate of the United States in 1953. It is by far the most important convention relating to the status of our forces abroad.

This convention superseded many bilateral agreements which had previously controlled the status of forces among the NATO countries. It establishes uniformity in relations between the member of a force, the civilian components, and their dependents, with the authorities of the receiving state, and it clarifies and broadens the right of the sending state to exercise jurisdiction over its own forces.

The major concept of this arrangement is the establishment of concurrent jurisdiction with a scheme designed to divide the exercise of jurisdiction between the authorities of the sending state and the host state, based upon the principle of primary interest.

The military authorities of the sending state are given the primary right to exercise jurisdiction over a member of a force or civilian component when the offense involves the property of the sending state or the person or property of a member of the force, a civilian component of the sending state or a dependent, or the offense arises out of the performance of official duties. In all other cases the receiving state has primary jurisdiction.

It may be appropriate at this point to invite your attention to the status of dependents under this jurisdictional arrangement. While the Uniform Code of Military Justice places dependents within the category of persons who are subject to military law when accompanying our forces abroad and the status of forces agreement gives to the military authorities of the sending state the

authority to exercise all criminal and disciplinary jurisdiction authorized by the laws of their own state, the agreement reserves to the host state primary jurisdiction over offenses committed by dependents.

One of the important features of the status of forces arrangement is the official duty determination, which controls in a great many cases whether the military commander or the authorities of the host state shall have primary jurisdiction. Two aspects of this provision are worthy of note: namely, what is to be the definition of official duty, and who will make the decision. The agreement answers neither question, although it would appear from the working papers of those who drafted the agreement that it was intended that the military authorities of the sending state make the decision. This is the position urged by the United States, although it has not been accepted by all of the signatories. For instance, in the United Kingdom, British Courts make the final decision in official duty questions. Substantially the same practices are followed in Japan and Turkey. In all other NATO countries, however, the determination of the official duty question by the authorities of the visiting force appears to be final.

You may be interested in a recent development in Turkey. The Turkish courts have been construing the phrase "In performance of official duty" far stricter than United States authorities, with the result that Turkey was prosecuting cases which our military commanders considered to be official duty cases. The difficulty was found to lie in the fact that in translating this phrase into Turkish it acquired a more limited meaning. As a solution, Turkey enacted a law authorizing an interpretation which would include an offense committed "In connection with the performance of official duty." One of the immediate results of this change was the release to the Army for trial by court-martial of a sergeant, who was being held for trial for a traffic death which occurred while he was driving a government vehicle on temporary duty.

Another important feature of the agreement provides that the state having the primary right to exercise jurisdiction shall give sympathetic consideration to a request from the authorities of the other state that jurisdiction be waived in its favor. It is the policy of the United States to request a waiver in every case in which it does not have primary jurisdiction. Also, it is the policy of the United States not to waive jurisdiction in any case in which it has primary jurisdiction. Our military authorities have been successful in securing a waiver by the host state of primary right in a great number of cases. It may be said that in most instances the host state is willing to waive its right except where the offense is one which arouses public indignation or grossly offends morals or national pride.

In a supplemental exchange of notes with the Netherlands, that state agreed to waive primary jurisdiction except where it is determined that an offense is of particular importance to the Netherlands authorities. Under this arrangement, we are given the right to act in substantially all cases involving persons subject to military law. This is known as the "Netherlands Formula," and has been adopted with respect to our forces in other countries.

The right to request a waiver is particularly important in the case of dependents. As noted earlier, the primary right to exercise jurisdiction over dependents rests with the host state. Thus, a dependent is in somewhat the same status as a tourist, and upon the commission of an offense will be tried by the courts of the receiving state unless jurisdiction is waived. It might be added in passing that service personnel and members of civilian components are also in the status of tourists when in a leave status in a country other than the one in which they are stationed unless there is some special understanding with that country.

Whether a case involves the question of official duty or the waiver of primary jurisdiction by the host state, the administrative steps required to protect the interests of the accused must

be promptly and effectively pursued, beginning with the immediate commanding officer and extending all the way to the highest authority who deals with the foreign office on the government level. Our experience in gaining the right to try such a large number of cases in which the receiving states have had the primary right is due to effective administration at all levels and the general feeling of mutual respect and fair dealing that typifies the relations between our forces and the officials of the host countries. I do not believe that the importance of maintaining such amiable relationship can be overemphasized.

Without attempting to burden you with statistics, let me indicate the degree of success we are having by giving you a few figures just received from Japan. For the six months' period ending 1 June 1956, there were 2,675 offenses committed by United States personnel subject to Japanese jurisdiction. A waiver was received in 2,610 cases — of the remaining, 44 have been tried — 16 were sentenced to confinement, but only 4 were sentenced to confinement unsuspended.

The NATO countries have agreed that the authorities of both the sending and the receiving states shall assist each other in arresting members of a force, civilian component or dependents in the territory of the receiving state, and in handing them over to the authority which is to exercise jurisdiction.

This provision is of particular interest to the Navy, since a ship when in a port of a foreign country physically is within the territory of that country, notwithstanding the fiction of extra-territoriality which is traditionally applied to men-of-war when visiting foreign ports. Normally, treaty provisions prevail over general principles of International Law, and we find this rule to apply in this case.

Thus, where a naval ship is in the port of a NATO country and a member of the crew is charged by local authorities with the commission of an offense over which they have the right to

exercise primary jurisdiction, the commanding officer, upon the request of local authorities, may be required by the agreement to deliver up the accused. In other words, such a case would be handled in the same fashion as though the accused were based ashore.

In contrast with the requirement in NATO ports, let us consider the status of a crew member of a vessel of war in the port of a country not a member of NATO. In accordance with the ex-territorial status of the ship a member of the crew when he returns to his ship becomes immune from arrest by local authorities so long as he remains on board; and his commanding officer is not authorized to alter this status. If the foreign authorities desire custody of such a crew member, they must proceed through diplomatic channels.

Now let us consider an actual case involving this question.

Within the past year a destroyer made a recreational visit to an island belonging to a friendly power. There was no agreement between the United States and this power relative to the surrender of personnel and there was concurrent jurisdiction over any offenses committed ashore by members of the crew. John Doe, a member of the destroyer's crew, was alleged to have assaulted one of the local uniformed customs officials. The next day, amid considerable confusion and local pressures brought about by an acute local political situation, the commanding officer turned John Doe over to the local authorities with the understanding that it was solely for the purposes of identification and questioning and that Doe would be returned to his ship on completion of the interview. But Doe ended up behind the bars of the local jail, the local officials refused to surrender custody, and the ship was required to sail leaving Doe behind. There were no United States military activities in the island.

Three weeks later, and after some two dozen messages, the employment of two local attorneys; the return to the island of two

officers and seven enlisted men from the ship on TAD to testify for the defense; two trials; a six-month sentence to confinement, which was reduced to a \$126 fine; the expenditure of some \$1,200 in Doe's defense, which was raised from among the American residents in the island; the fine was paid; and John Doe was returned to the United States by commercial air at government expense. Subsequently, the Navy Department reimbursed all who had contributed to the defense fund. And now for the final chapter of this story. According to the investigation conducted by the ship, it was actually a case of mistaken identity.

In view of the importance of this jurisdictional question and the many different situations that may be encountered due to differing treaty provisions in some instances, and the absence of treaty arrangements in others, with the risk of being a bit repetitious, let me quickly restate the general guidelines on this point.

In countries where we do have a treaty or agreement pertaining to criminal jurisdiction over personnel of the naval forces, such as a status of forces agreement, an obligation may exist which will require a commanding officer to turn a suspected serviceman over to local authorities for possible prosecution in the foreign courts.

In countries where we do not have treaties or agreements regarding the exercise of criminal jurisdiction over personnel in our naval forces, the general rule of International Law applies. That law specifies that where personnel are ashore for liberty or recreation they come under the jurisdiction of the foreign country, and they can therefore be tried in local courts. However, such jurisdiction can only be exercised when the foreign country also has custody or physical control over the suspected person.

Where we do not have treaty commitments and an offense has been committed within the foreign territory but the suspect has returned to his ship, the situation is different. In this case,

if the foreign state desires to exercise its jurisdiction it must press its claim for delivery of the suspect through diplomatic channels.

The status of forces agreement has been criticized in some quarters for allegedly doing away with the constitutional protection which our service personnel have in this country. Such an approach seems to be in step with the proposition that the constitution follows the flag — a view no longer considered tenable. As a matter of fact, this agreement introduced for the first time provisions whereby the receiving state undertook to guarantee to members of the visiting forces certain specific rights, when accused of an offense before a foreign court. These guaranteed rights are: The right to a prompt and speedy trial; the right to be informed in advance of trial of the specific charges against him; the right to have compulsory process for obtaining witnesses; the right to be confronted with the witnesses against him; the right to have legal representation of his own choice, and the services of an interpreter; and the right to communicate with a representative of his own government.

Steps have been taken to insure that these rights are made available to service personnel. The resolution of the Senate of the United States, in ratifying the status of forces agreement, imposed upon the armed services specific responsibilities aimed at insuring fully to each serviceman subject to foreign trial all of the rights guaranteed him by the agreement.

It is required that a "designated" commanding officer be appointed for each country where a force is stationed, whose duty it is to supervise the operation of this jurisdictional arrangement within his area; to complete a study of local criminal law and procedure; and, when a serviceman is an accused before a foreign court, to request through diplomatic channels a waiver of jurisdiction or release from custody in any case where it is considered that he will not receive a fair trial, or fair treatment before or after trial.

He must designate an observer to attend the trial of each accused. This observer must be a lawyer in all but minor cases, and he must submit a written report to the designated commanding officer and the Judge Advocate General of the accused's service.

Legislation passed at the last session of Congress authorized the military departments to employ counsel, pay counsel fees, court costs, and to furnish bail in any case where a person subject to military law is an accused before a foreign court.

Resolving questions relating to the exercise of criminal jurisdiction is not all that is involved in the relationship between service personnel and the host state. The very presence of a visiting force in a foreign state, in many cases with accompanying dependents and for indefinite periods, has an impact upon the economic, social and cultural pattern of the local population. The result is somewhat the same as that experienced in communities within the United States when military or naval activities are established within their midst for the first time.

The status of forces agreement has undertaken to meet these circumstances by providing the members of the visiting force with immunity from local laws, taxation and customs regulations in keeping with their temporary status, and by imposing upon the members of the force a civil responsibility in keeping with the needs of the local community.

A great number of the non-military offenses committed by our personnel abroad involve incidents in which personal injury or property damage is sustained by third persons. A speedy and fair settlement of claims growing out of such incidents gives great assistance to our efforts to obtain a waiver of jurisdiction by the host state. All too often the determination of the local authorities to exercise their jurisdiction may be traced to the pressure brought to bear on behalf of an injured claimant, who is unhappy over an apparent delay in making restitution for the wrong he has suffered. Such a claim may be one for which the

sending state has a legal responsibility, as when the injury was caused by a member of the force while in the performance of an official duty. Or, the claim may be one for which there is no legal responsibility and which is considered and settled gratuitously by the sending state. Claims of the first category are investigated and paid by the host state on the basis of the law of the host state. The cost of such settlement is borne 75 per cent by the sending state and 25 per cent by the host state. In the latter category of claims the host state investigates and evaluates the claim and then informs the sending state of the amount it considers appropriate should the sending state desire to make an *ex gratia* settlement.

It is true that from the military or naval Commander's point of view the ideal jurisdictional arrangement would be to have complete and exclusive jurisdiction over all personnel attached to and accompanying his command overseas. From a practical point of view, however, this is impossible. We have seen that International Law gives no such right to a military commander in the absence of an agreement to that effect with the host nation. We are therefore required to rely upon concessions obtained by agreements with the nations where our forces are stationed or may otherwise be present.

The NATO Status of Forces Agreement is the key agreement in this respect. Its terms were agreed to only after lengthy and careful negotiation, and represent the maximum concessions in jurisdiction that NATO receiving states were willing to surrender to sending states in a multilateral treaty. Its provisions govern the status of larger members of our military personnel more than any other single agreement, and its terms have been stated to represent the minimum jurisdictional standards which are acceptable to the Congress and Department of Defense. The problem has not been laid to rest, however, for our military and diplomatic officials consistently have sought wherever possible, by additional bilateral agreements and by informal working arrangements, to obtain even greater jurisdictional concessions.

As a result of these arrangements, the jurisdiction exercised in actual practice by United States military authorities is in excess of that to be found in the basic NATO SOF Formula in practically every country in which we have forces assigned. In reporting to the Senate on the experience of our armed forces under the Status of Forces Agreement, Senator Ervin stated, the jurisdiction arrangements regarding our forces abroad have not adversely effected morale and discipline of our personnel nor have they interfered with the accomplishment of our military missions in those countries. This success may be credited to the recognition by the authorities of the United States and the host nations of a mutual responsibility in this undertaking and to our interest in the military man as an individual and our dedication to the protection and preservation of his rights to the best of our ability.

## **BIOGRAPHIC SKETCH**

**Captain Wilfred A. Hearn, U. S. N.**

Captain Hearn attended the University of Maryland, and, later, received his LL. B. degree from George Washington University. He is a member of the legal bars of the District of Columbia and the state of Tennessee.

Prior to entering the Naval service in 1942, Captain Hearn was engaged in the private practice of law. He served throughout World War II as an aviation ground officer. During this period, he attended the United States Navy School of Military Government at Princeton University.

In 1946, Captain Hearn transferred to the Regular Navy as a law specialist, and since that time has been engaged primarily in legal duties. He has served as Chief Tax Officer in the Office of the Judge Advocate General, Director of the General Law Division and Administrative Officer. From 1950 to 1952, he was Legal Officer of the FOURTEENTH Naval District.

Recently, Captain Hearn was graduated from the Advance Course of the Army's Judge Advocate General School at the University of Virginia, and since that time he has served as Director of the newly created International Law Division in the Navy Judge Advocate General Office.

## THE LAW OF WAR

A lecture delivered  
at the Naval War College  
on 13 September 1956 by  
*Mr. Richard R. Baxter*

I regret that I must begin these remarks by saying that a great many international lawyers hold the view that if we do not notice war it will go away.

Their reasons for this view are along the following lines: The Kellogg-Briand pact brought about the renunciation of war as "an instrument of national policy." The United Nations Charter makes unlawful the use of armed forces except on behalf of the United Nations or in the exercise of "the inherent right of individual or collective self-defense." Therefore, war as an institution recognized by international law no longer exists. It has, for example, been the consistent position of Israel in its hostilities with Egypt and the other Arab states that the legal institution of war has been suspended by the United Nations Charter, and that even when a state is acting in self-defense the hostilities are not war for the purposes of international law. It seems to me that only a primitive confidence in the magic power of words can explain this taboo on the use of the word "war." We apparently are to derive comfort from the thought that there have been no wars since the adoption of the United Nations Charter — only armed hostilities.

This comfortable confidence in the efficacy of legal prohibitions is belied by the facts. There has probably not been a minute since the signature of the Kellogg-Briand pact in 1928 when there has not been a war in progress somewhere in the world. Consider, if you will, the number of instances of armed hostilities of an internal or international character there have been since the adoption of the Charter — civil war in Greece and in China,

the rebellion of Indonesia, the hostilities in Korea, the continuing contention between Israel on the one hand and Egypt and the other Arab states on the other. The United States was in a technical state of war from 1941 until 1952, at which time the war with Germany and Japan finally came to an end. If we follow the orthodox view that an armistice only suspends hostilities, the United States may still be in a state of undeclared war as regards Korea.

It was, of course, contemplated that the United Nations would have at its disposal sufficient military strength to enable it to deal with the unlawful use of armed force. The scheme envisaged by the United Nations Charter was that national military, naval and air contingents would be made available to the United Nations by agreement with all of the members of the organization. However, no such agreement was ever signed, and the United Nations Armed Forces have consequently never come into being. The Korean action, although called a United Nations action by journalists and politicians, was not a United Nations action for legal purposes. You will recall that the lead in repelling North Korean aggression was taken by the United States. The resolution of the Security Council which gave its blessing to this aid by the United States merely "recommended" that states "providing military forces and other assistance . . . make such forces and other assistance available to a unified command under the United States." In strict law, the action was one by the United States aided by other forces which states had made available to the Unified Command at the recommendation of the Security Council. The Unified Command was, in turn, the field force of the United Nations Command. With the breakdown of the enforcement machinery which was contemplated by the Charter, it becomes even more difficult to say that war has ceased to exist. Our own eyes tell us that it does exist, and that there is no military force representing the international community which has the power to prevent or stop it.

A concomitant to the view that war has ceased to exist is the easy assumption that neutrality also is a thing of the past. A superficial examination of the power situation in the world may lead to the conclusion that everyone must and does choose up sides in war. The legally-minded may say that the United Nations Charter has made it impossible for a state to be neutral. To adopt either of these views is, however, to overlook the plain fact that there are states which are dedicated to the principle that neutrality is possible and indeed desirable. In the first place several states within and outside the United Nations have plainly shown that in any conflict they would wish their position as neutrals to be respected. I need mention only Switzerland, Sweden, Austria, and India as examples. Moreover, members of the United Nations could very well be under a duty to preserve a position of neutrality. Article 48 of the Charter provides that actions required to carry out decisions of the Security Council may be taken by all of the members of the United Nations or by some of them, as determined by the Security Council. It is quite possible to conceive a situation in which the United Nations had required the taking of action by only two or three members of that organization. The other members of the organization would be under an obligation not to pitch into the fray if they had not been invited to do so by the Security Council. Those nations which are not members of the United Nations are not obliged to take part in hostilities on behalf of the United Nations, and may remain neutral. The requirement of paragraph 6 of Article 2 of the Charter that the organization ensure that non-members act in accordance with the basic principles set forth in that article cannot be carried so far as to demand the taking of military measures by non-members against their will. The fact that the military arrangements specified by the Charter have never been carried into effect indicates that future hostilities are likely to fall in the category of individual or collective self-defense under Article 51 of the Charter. In such circumstances, those who choose not to ally themselves with the state which is attacked will be under an obligation to perform

their neutral duties as regards both parties to the hostilities and may claim respect for their neutral rights.

So long as one state can and does remain neutral, the institution of neutrality will remain of consequence. Violation of the air space of a neutral state, or an altogether accidental bombing of its territory, will make the state which is responsible for these acts accountable in damages and oblige it to punish those who have been responsible for this conduct. This was the basis upon which damages were paid to Switzerland for the accidental bombing of its territory during World War II. The lawyer describes the liability in such cases as "absolute"; that is, as meaning that responsibility exists even if there has been no wrongful intent or negligence. A state which chooses to remain neutral will also be entitled to claim respect for its territorial sea — perhaps even a territorial sea which it has consistently, with the recent practice of nations, extended out a considerable distance into the high seas.

If you will agree with me that these old-fashioned institutions of war and neutrality exist in the modern world, we can then proceed to a consideration of what connection law has with war. I submit as my major proposition that law can have a most important effect on the conduct of war in certain respects and absolutely none in others. As a matter both of the logic of force and of experience, law cannot control certain aspects of warfare. The law of war has had virtually no effect on the use of weapons. It has, of course, been a traditional, but unavailing, response to almost every new weapon to contend that it violates international law. You may recall from naval history accusations of this kind about chain and heated shot.

The weapons which are of concern to us today are those which could, until comparatively recently, have been referred to as the ABC weapons — atomic, bacteriological, and chemical. To these unhappy three must now be added a fourth — the hydrogen device. There is no specific prohibition of the use of any of these weapons in any treaty to which the United States is a party.

The Treaty of Washington of 1922, prohibiting the use in war of poisonous gases, was signed by the United States but never came into force. The Geneva Protocol of 1925, which prohibited the use in war of "asphyxiating, poisonous, or other gases, and of bacteriological methods of warfare," was likewise signed by the United States. The United States, however, never ratified this protocol, and it is accordingly not binding on this country. It has nevertheless been signed or acceded to by most of the other nations of the world, including, interestingly enough, Soviet Russia. There are those who would contend that the wide-spread acceptance of this agreement, the prohibitions of international law against the use of poisoned weapons, and customary international law itself forbid the use of gas. However, the failure of belligerents to use this weapon on any large scale is probably a consequence of its military ineffectiveness and of the probability of retaliation by the enemy rather than of the force of international law. The weapon was, as you know, employed to a limited degree by the Italians against the Ethiopians and by the Japanese against the Chinese. The latter instance resulted in prosecutions of the responsible persons by the Soviet Union.

The Hague Regulations of 1907, regarding the laws and customs of war on land, to which the United States is a party, speak only in the most general terms of the use of weapons. Article 23 prohibits the employment of "poison or poisoned weapons" and of "arms, projectiles, or material calculated to cause unnecessary suffering." I think you will agree with me that these provisions, which are in any case of doubtful applicability to aerial warfare, do not place any definite prohibition on the use of what we must call the ABC and H weapons. If a weapon confers a clear-cut military advantage when directed against enemy forces or military objectives, it is difficult to say that the suffering which it causes is unnecessary.

If the international law of war cannot control the use of weapons, what, then, can be its function? I would submit to you

that the law of war can have great effectiveness in dealing with the relationships of individuals, whether they be members of the armed forces or civilians. The reason for this is that international law can regulate these matters without imperiling the ultimate military success of the belligerent which adheres to the law. If the law really attempted to regulate the use of weapons, the lawless belligerent would have an overwhelming military advantage over the law-abiding belligerent. If, on the other hand, the force of international law were such as to foreclose the use of the most powerful weapons of war, it is not unreasonable to suppose that international law would have sufficient strength to bring an end to war itself.

For this reason, the law of land warfare is probably more effective than what little law exists about aerial and naval warfare, for it is in dealing with prisoners of war, with the wounded and the sick, and with civilians that the law comes into its own in the protection of human beings. A belligerent will in all likelihood find that its attainment of its military objective in time of war and of its long-range ends after the restoration of peace is actually aided by the fair, decent, and chivalrous treatment of enemy and neutral personnel with whom it comes in contact.

The objection which is often made to the recognition of legal safeguards for individuals in the international law of war is that "war is all so terrible anyway." If hundreds of thousands are being killed in the course of hostilities, so the argument runs, why should we concern ourselves about single persons? The reason for the application of law in this area is to be found in a fundamental human response to warfare and human misery. We realize that even though millions may be suffering, this offers no justification to add one more person to that group if injury to him can be avoided. To find the basis for this, you must go back to the respect for human dignity and for the worth of the individual, which is the foundation of civilization itself.

The infliction of suffering is an inevitable part of war. At the same time, it is quite clear that the infliction of certain types of suffering creates no real military advantage at all. It is, of course, always possible to invent a reason for injury to even the most innocent amongst enemy persons. One might, for example, contend that bayoneting children is militarily necessary in that it affords practice to the troops and accustoms them to the sight of blood. But we do recognize that many acts create suffering out of all proportion to any military advantage to be gained. It is these very acts which international law prohibits, because international law concerns itself with minimizing suffering in warfare and equally in creating the conditions under which the making of peace becomes possible. Unbridled license in warfare or violation of military compacts once made can only have the effect of making more difficult the creation of peace, which must be in all cases the end of every war.

It is maintained by some that with recognition of the unlawfulness of aggressive war and with the creation of forces purporting to act on behalf of the United Nations there should be one law of war applicable to those acting on behalf of the international community and another body of law having application to the nation which violates international law by resorting to force or the threat of force. If, as I have indicated, the purpose of the law of war is fundamentally humanitarian, it is hard to see what justification there can be for a double standard. There can certainly be no reason for two separate systems of law in the case of prisoners of war, civilian victims of war, and the wounded and sick. There may be some reason for making a distinction in the law applicable with regard to the rights and duties of a belligerent respecting neutral commerce. However, if the customary rules of war regarding this subject are considered to be an attempt to place a limitation on violence and upon the spread of war, it may be desirable to have the same rules applied to both belligerents. If there is not a mutuality of legal requirements, there is every probability that the unlawful belligerent will feel

bound by no restrictions whatsoever in its conduct of warfare. We cannot hope for a really sophisticated approach to this problem until such time as true international police forces are created and there exists a strong probability that all unlawful resorts to war will be repressed by the international community. Until that time arrives, there is every reason for caution in making changes in a body of law which takes war as it is and attempts to place some reasonable limits upon it.

The law of war is essentially prohibitive law, and it is therefore inevitable that it should — to your distress — tell you what you cannot do. The law of war is essentially a limitation on violence, on that violence which is the very essence of war. Accordingly, there is no “right” to injure the enemy, only a limitation on the way that violence can be employed. You will find in the *Law of Naval Warfare* a reference to a basic principle of “military necessity.” This principle never allows a belligerent to resort to measures which are prohibited by international law. To the plea of “military necessity,” made by great numbers of persons accused of war crimes after World War II, military tribunals were unanimous in responding that this so-called “principle,” to which the Germans in particular attached great importance, authorized no departure from the law of war, even though adherence to the law might cause the loss of a battle or even of a war. There are, of course, articles in the treaties relating to the law of war in which specific reference is made to the fact that military necessity may authorize a departure from the rules laid down in the particular article. These are the only cases in which the law of war allows military necessity to dictate the extent of the legal duties resting upon a belligerent.

The complaint most often made by laymen against international law is that it lacks an effective sanction. There are three sanctions for the violation of the law of war which are important for our purposes. The first of these is the possibility of reprisals against the enemy. By this, I mean the taking of measures which

would otherwise be unlawful as a response to the unlawful conduct of the enemy. It is quite obvious that the institution of reprisals offers an easy way out of the restraints imposed by law, for an allegation of misconduct can be claimed as a basis for the throwing off of all legal restraints by the other belligerent. Because reprisals have in practice been the subject of abuse, the new Geneva Conventions of 1949 contain express prohibitions on reprisals and collective punishments against prisoners of war, the wounded and sick, and civilians in occupied territory. The scope which is left for the application of reprisals seems now to be the civilian population in territory not yet occupied and the armed forces of the enemy before they have been taken prisoner.

A second possible sanction for violation of the law of war is the requirement that the offending belligerent pay damages for the injuries which it has caused. This requirement has usually proved ineffective since a defeated belligerent which has resorted to unlawful measures is not normally in a financial position to pay for all of its wrongdoings. When damages are paid, they normally form part of reparations payments.

This leaves as the third possible sanction the punishment of the individuals who are responsible for violations of international law. If the international law of war is to accomplish anything, if real restraints are to be placed upon violence in warfare, the wrongdoer must be held criminally accountable for violations of the law.

You cannot both reproach international law for lack of an effective sanction and at the same time complain that individuals may be tried for violation of the law of nations. I know that the usual reply to this is, "How would you like to be tried by the Russians as a war criminal?" The response to this is, I think, that in the absence of any legal restraints, you would be entirely at the mercy of an enemy. What the law of war crimes does is to attempt to put legal safeguards about persons accused of such

crimes and to place limits on the measures the enemy may take. It thus places restraints on the enemy where there were none before.

It is unfortunate that there is no true international tribunal for the trial of such persons. No neutral was willing to assume the function after World War II, and it was unthinkable that the Axis powers should have tried their own personnel. The Germans were conceded this responsibility after World War I, and made an abject failure of the whole job. This left only the victors to do the job after the Second World War. "Victor's justice" is not ideal, but for the time being there is no alternative.

The offenses for which Axis personnel were tried after World War II were of three types. These were crimes against peace, crimes against humanity, and war crimes. Crimes against peace were defined by the Nurnberg and Tokyo Charters as consisting in the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances." This offense has relevance to the inception of war rather than the conduct of war, and I shall therefore say nothing further about it. War crimes consisted plainly and simply in "violations of the laws or customs of war." Indeed, any violation of the international law of war is a war crime. The United States has tried enemy personnel for these acts throughout its history. Why there should be a separate category of crimes against humanity, I have never quite understood. Essentially, crimes against humanity consist of war crimes committed wholesale against the civilian population, with a somewhat wider jurisdiction granted to the tribunal. Conventional war crimes, in the sense of violations of the laws and customs of war, therefore remain as the most important single category of criminal acts in warfare.

The usual defense which was made by a German or Japanese member of the armed forces who was accused of a war crime was that he was ordered to commit the offense by his superior. In

a rigidly hierarchical system, such as that of the German Reich, it was quite easy to trace all responsibility directly back to Adolph Hitler, who was by this time providentially dead. Now the fact is that in most systems of military law, indeed even in the German one, the circumstance that an unlawful act was ordered by a superior is not a complete defense to the criminal charge against the individual who actually performed the unlawful act. You will, for example, find in the Uniform Code of Military Justice that the only time a person may be punished for disobeying an order is when that order is a "lawful command" or a "lawful order." It would be strange if one could be punished for carrying out an unlawful order in military law, but could not under international law.

There are various statements of the principle regarding superior orders, but I think all of them boil down to something about like this: The fact that a rule of warfare has been violated in pursuance of an order by a superior authority, whether military or civil, does not deprive an act of its character as a war crime, unless the individual did not know and could not reasonably have been expected to know that the act ordered was unlawful. To this must be added the caveat that the court must take into account the fact that obedience is a cardinal principle of military command, that soldiers cannot debate the legal merits of the acts which they are ordered to perform, and that war is essentially a state of confusion. But there are cases, unfortunately a great number, in which the individual quite clearly knew, or ought to have known, that the act which he was ordered to perform was unlawful. Officers of the Einsatzgruppen, who were ordered to liquidate the Jews, gypsies, Communists, "Asiatic inferiors," and the insane in areas occupied by the German forces, must have known their acts were contrary to international law. The same holds true of the noncommissioned officer who is awakened in the dead of night and told to assemble several soldiers for the quiet execution of an enemy aviator in the deepest part of the forest. I think an

examination of the war crimes trials in which the plea of superior orders was denied would remove any doubt from your mind about the type of cases in which there were convictions. An examination of German military history also teaches us that unlawful orders were seldom, if ever, delivered with a pistol to the head of the person ordered to perform the acts; that they could be, and were by some, circumvented; and that in those cases in which the individual had enough courage to resist an unlawful order, he was not severely punished, or even punished at all, for his violation of the order. Duress may, if properly proved, be an appropriate defense, but the duress must be such as to justify the commission of the unlawful act. The threat of an immediate court-martial may not justify the execution of a thousand innocent victims of war within gas chambers. In essence, however, the supposed conflict between the demands of international law and of a man's own military law has seldom, in practice, proved to be a real one.

It is a concomitant of the principle of superior orders that a military commander who knowingly allows war crimes to be committed by members of his forces is responsible for their acts. This principle recognizes that a military commander has a responsibility, as well as a right, to control the activities of the forces which he commands. You will recall that General Yamashita was found guilty on this basis and that the United States Supreme Court refused to reverse the decision of the military commission which tried him. While we may disagree on the facts about the guilt of General Yamashita, there is no reasonable argument which can be made against the principle that a military commander is accountable for the conduct of his troops.

What I have been saying about individual responsibility in the law of war represents the customary or unwritten international law on the subject. The law which defines the actual duties of members of the armed forces and civilians in warfare is precise in its terms and reduced to written form. The treaties

to which one must primarily look concerning air and land warfare are the Regulations annexed to Convention No. IV of the Hague of 1907 and the new Geneva Conventions of 1949. There are four of these last-named treaties, and they relate to the wounded and sick in land warfare, the wounded, sick and shipwrecked in naval warfare, prisoners of war, and civilians. They are the product of much thought before and during the Second World War and of four years of negotiations in which members of the armed forces took a prominent part. The United States and more than fifty other states, including U. S. S. R., are parties to the Geneva Conventions of 1949. A similarly large group of states are parties to the Hague Regulations of 1907, which have, in any event, been held by war crimes tribunals to be declaratory of customary international law and thus binding on nations which are not parties. These treaties have exactly the same standing as any law of the United States. You and I are thus as firmly bound by these agreements as we are by the Uniform Code of Military Justice and by federal criminal laws.

At the time of the adoption of the new Code of Conduct for the armed forces, there was much thought given to the question of the legal protection placed about prisoners by the Geneva Prisoners of War Convention of 1949. While the Convention does not specifically refer to brainwashing, it does deal in more general terms with the question of coercion directed against prisoners of war. There is, of course, the well-known article which states that a prisoner of war is required to give only his name, date of birth (this is new), and serial number. Beyond this, he is not required to furnish any military information, and the Convention precludes physical or mental torture and other forms of coercion in order to secure information from the prisoner. It also provides that prisoners of war refuse to give information may not be "threatened, insulted, or exposed to unpleasant or disadvantageous treatment." The Prisoners of War Convention establishes minimum standards for the detention of prisoners of war, particularly as regards their quarters, food, clothing, medical attention, and religious

and intellectual facilities. While the Convention requires the Detaining Power to encourage intellectual and educational pursuits, this provision cannot be regarded as a justification for compulsory indoctrination of prisoners.

On the other hand, the Convention pays due deference to the need of the Detaining Power to maintain order in the camps. There are elaborate provisions in the Convention regarding the penalties which may be imposed on prisoners of war for misconduct. The Convention prohibits adverse distinctions based on "race, nationality, religious belief or political opinions." It would be reasonable to interpret this provision as meaning that the mere party affiliation of a prisoner of war does not justify segregating him or treating him adversely. However, if political opinion ripens into overt acts, the Convention interposes no obstacle to the segregation of the troublemakers. Prisoners may not be separated from others belonging to the same armed forces, except with their consent.

Another major problem which is likely to be encountered in a future war is guerilla and resistance activity by civilians in the face of the forces and behind the lines. The Geneva Civilians Convention protects the inhabitants of occupied territory against arbitrary and unfair acts by the occupant by requiring a system for the administration of justice which resembles that prevailing in most civilized countries. Thus, before a civilian who has been guilty of hostile conduct in an occupied area may be punished, the offense must have been defined in a directive which was published prior to the commission of the crime. If guerilla activities are conducted by civilians, it is necessary that these individuals be screened by administrative proceedings from peaceful civilians and those entitled to prisoner-of-war treatment before they may be tried and executed for their belligerency. The requirement of treating individuals in arms as prisoners of war applies only to members of the regular armed forces and to members of resistance movements who are commanded by a responsible person,

wear a fixed distinctive sign, carry arms openly, and conduct their operations in accordance with the law of war.

Each war has seemingly found the United States unprepared to exploit the labor potential represented by prisoners of war who are in our hands. We have learned through disorders in prisoner-of-war camps in Korea that Satan is still capable of finding mischief for idle hands to do. The Geneva Prisoners of War Convention contains an article on the work in which prisoners of war may be employed and also prohibits the employment of prisoners in unhealthy or dangerous work, unless they volunteer for it. The limitation which is placed on many types of prisoner-of-war labor is that it must have no "military character or purpose," and it can be anticipated that there may be some difficulty in interpreting what is meant by this particular expression. However, it seems to have been the understanding of the draftsmen of this article that no real change from the standards of the old 1929 Convention was involved. Accordingly, one may suppose that the type of work in which prisoners may be employed is roughly the same as it has been in the past, but it would probably be wise to consult your lawyer if you are faced with the problem of employing prisoners.

In becoming a party to the Geneva Conventions of 1949, the United States reiterated that it adhered to its interpretation of Article 118, regarding the repatriation of prisoners of war. It is the position both of the United Nations, as expressed in a resolution of the General Assembly, and of the United States that this article does not require the forced repatriation of prisoners of war who do not desire to return to their own country, provided the Detaining Power is willing to grant asylum. Consistently with this principle, thousands of North Korean and Chinese Communist soldiers held as prisoners who did not desire repatriation to North Korea were permitted to remain in South Korea or to migrate to other lands.

The Geneva Conventions contain provisions regarding the trial of war criminals. Certain serious violations of the Conventions are defined as "grave breaches," and the treaties require the parties to take measures against these grave breaches, whether committed by their own or by enemy personnel. The Prisoners of War Convention also contains a requirement that prisoners who are convicted of war crimes continue to receive the protection of that Convention, even after they have been convicted. This represents, I might add, a departure from what has hitherto been the practice of the United States. To this article of the Convention Soviet Russia made a reservation, stating that it would not be under any obligation to extend the benefits of the Prisoners of War Convention to convicted war criminals. In ratifying the Convention, the United States refused to accept this Russian reservation, but the legal situation created by this statement of the United States is clouded and I would prefer not to discuss it in detail.

There are virtually no restraints imposed by law on the conduct of aerial warfare. According to traditional international law only military objectives might be attacked from the air and the bombardment of undefended places was forbidden. With the mobilization of the entire industrial base of a country for war, and the enhanced importance of communications facilities, the list of legitimate military objectives has become of immense length. We have likewise increased the power of weapons to a degree which would have seemed fantastic two decades ago. And, finally, the mobility of land and sea forces and the omnipresence of aerial activity makes it difficult to say that any spot is actually undefended. The rule itself may not have changed, but military objectives have so increased and undefended places so diminished that there is virtually no room for the operation of the rule.

The one major exception which may perhaps be made to this generalization relates to "open cities," which are immune to bombardment. These are cities in which all military activities have ceased, including the manufacture of military supplies and

the passage of transport, and which are about to fall into the hands of the enemy. The purpose of these arrangements is to preclude the bombardment of cities which are undefended and open to enemy occupation. There have been a number of instances of such open cities in recent wars, notably in the cases of Paris, Rome, and Manila, and those of us who are interested in mitigating the severities of warfare see in this institution some hope of protecting large segments of the civilian population. The Hague Regulations, as I have mentioned, contain a prohibition on the attack or bombardment "by whatsoever means" of towns and villages which are undefended. This provision has, of course, an obvious relevance to the open city question.

There is one area of the law about which I shall say very little, because the law on this subject is adequately laid out in NWIP 10-2 and in the standard treatises on the law of war. I need only mention that agreements between belligerents must be scrupulously adhered to, whether they relate to the suspension of hostilities or to the surrender of forces. Violations of these agreements by individuals may be, and, indeed, customarily have been, punished by the opposing belligerent. Several German naval officers who ordered the scuttling of submarines after the surrender of the German forces in World War II were convicted of a violation of the law of war in that they failed to comply with the terms of unconditional surrender.

As I stated at the beginning of this lecture, there is still room for the operation of the law of neutrality. It is therefore necessary to have occasional resort to the conventions relating to that subject. The treaty bearing on neutrality in land warfare is Convention No. V of The Hague of 1907. Among other things, this Convention requires a belligerent to respect the territory of neutral powers. Even the unintentional violation of such territory by way of the entrance of troops or of bombardment can subject the offending belligerent to heavy damages and to demands for the punishment of the responsible individuals. A neutral power, into

whose territory belligerent forces come, is required to intern them, and the provisions of the Geneva Prisoners of War Convention of 1949 are applicable to such persons. Individual escaped prisoners are, however, to be left at liberty. A non-belligerent is forbidden to allow the passage of enemy troops through its territory, except for convoys of the wounded and sick. The Swedish government violated its duties of neutrality in World War II by allowing certain German forces to pass through its territory, and Spain was at one time giving serious consideration to allowing German troops to cross the country in order to attack Gibraltar. One of the effects of the United Nations Charter may be to require a state not taking part in the hostilities to permit the passage of forces acting on behalf of the United Nations and to deny to that state the contention that its neutrality would thereby be compromised.

A neutral is not required to forbid the sale of arms and other munitions of war to the belligerents by its nationals, but it is forbidden, by orthodox law, to make such sales itself. The extent to which states now participate in trade, and the practice of nations, especially that of the United States, during recent years has made the distinction between sales by private persons and by governments anachronistic.

What I have had to say about the general principles of law of war and about the law of land and air warfare has necessarily been brief and very much condensed. I hope, in particular, that you will have given earnest and detailed consideration in your reading to the provisions of the Geneva Conventions of 1949, which hold great promise for alleviating some of the hardships of warfare. I think you will agree with me that one of the great objectives of the United States and of the West in the long-range struggle in which we are engaged is the establishment for the entire world of the rule of law. If we ourselves do not adhere to that standard and demand compliance with the rule of law by those who may be arrayed against us, we will have abandoned one of

the vital objectives we are bent upon attaining. The legal restraints which I have outlined for you combine a minimum of impediment to military action with a maximum of protection for those who are the victims of war. Indeed, our very adherence to the law of war will facilitate the conduct of warfare by convincing the enemy of our own regard for fairness and justice and by creating those conditions under which peace will once more be possible.

## BIOGRAPHIC SKETCH

### Mr. Richard R. Baxter

Mr. Baxter received his B. A. degree from Brown University and his LL. B. degree from Harvard University. He attended Cambridge University, where he received a diploma in International Law, and, later, received his L.L. M. degree from Georgetown University.

Mr. Baxter served in the Army for four years during World War II, and was a Regular Army officer from 1947 to 1954. He was Chief of the International Law Branch, Office of the Judge Advocate General, from 1935 to 1954. He served thereafter as an attorney in the Office of the General Counsel, Office of the Secretary of Defense, and has continued to serve as a consultant to that Office since returning to Harvard Law School.

At present, Mr. Baxter is an Assistant Professor of Law at the Harvard University Law School. He is a contributor to the *British Year Book of International Law*, the *Proceedings of the American Society of International Law*, the *American Journal of International Law*, and other journals.

## **SPECIAL ASPECTS OF JURISDICTION AT SEA**

A lecture delivered  
at the Naval War College  
on 12 September 1956 by  
*Professor Brunson MacChesney*

Admiral Robbins, Ladies and Gentlemen:

Before starting my talk, I would like to express my appreciation to the Naval War College for the year I spent here with the staff and those students that I had the opportunity and pleasure of knowing. I regret not being here during this year while the Foreign Naval Officers are here because I am sure that I would have found that an additional stimulus. If I make remarks this morning about the extent of territorial seas with reference to the countries of some of these foreign officers, I hope they will regard the conclusions as coming from a professor at Northwestern University and not as the views of the Naval War College.

Yesterday, Professor McDougal discussed the theoretical bases and principles of *Jurisdiction*. My talk this morning is designed to supply the details of some of these principles and to explore some of the important applications of them. My remarks will mainly be confined to the pressing problem of the measurement and width of the territorial sea, and I will only in passing refer to the allied problems of fisheries regulation and the continental shelf.

It is superfluous before a naval audience to emphasize the significance of the law of the sea. Certainly the developments on the continental shelf, fisheries, base lines, and the breadth of the territorial sea in recent years have been of tremendous importance. The 1956 Final Report of the International Law Commission on the Law of the Sea in Time of Peace, to which several of my colleagues have already referred, is the latest statement

on that subject and the Report is of great interest to our Government and Navy in the United States and to other navies and countries.

There have been many recent incidents, involving various aspects of conflict arising out of these developments, which will illustrate the kind of problems that are involved. There has already been some reference to the seizure some years ago by Peru of four or five whaling ships of Panamanian registry off the coast of Peru. This seizure enabled Peru to assess a judicial fine of 3 million dollars, which was paid to release the vessels from seizure, which Peru asserted was within their claimed 200-mile zone. In fact, some of the boats were seized under the doctrine of "hot pursuit" more than 200 miles out from the coast.

Off the coast of Ecuador, two American-registered merchant vessels were stopped and seized, with one American seaman being injured by gunfire. A fine of \$49,000 was imposed. Moreover, in a subsequent conference between Ecuador and the United States, Ecuador took the position that the privilege of innocent passage did not extend to fishing vessels. Numerous incidents involving the seizure of American vessels fishing for shrimp by Mexico in disputed waters have also been reported.

There have been other instances in many other areas. For example, Norway and the Soviet Union have been involved in controversy. Norway has seized various Soviet fishing boats inside her claimed limits and has fined them \$88,000 in one case this year, which is the largest single fine in Norwegian court history for this offense. Moreover, Sweden and Denmark are involved in a dispute with the Soviet Union over territorial water limits in the Baltic.

As many of you know, there have been frequent incidents in which Japanese fishing vessels have been seized by Korea, Communist China, Nationalist China and Russia. Since Japan, like Iceland, is largely dependent upon its fisheries, this has raised a

very serious problem for that country. The U. S. S. R., in addition, established unilaterally a conservation zone, which accentuated the difficulties. The two countries have subsequently changed this situation somewhat by temporary arrangements pending the conclusion of a peace treaty, which has now been signed. When it goes into effect, a long-range fishing agreement will also become effective. Furthermore, Australia and Japan are involved in a dispute over pearl fisheries off the coast of Australia, which may be submitted to the International Court of Justice for settlement.

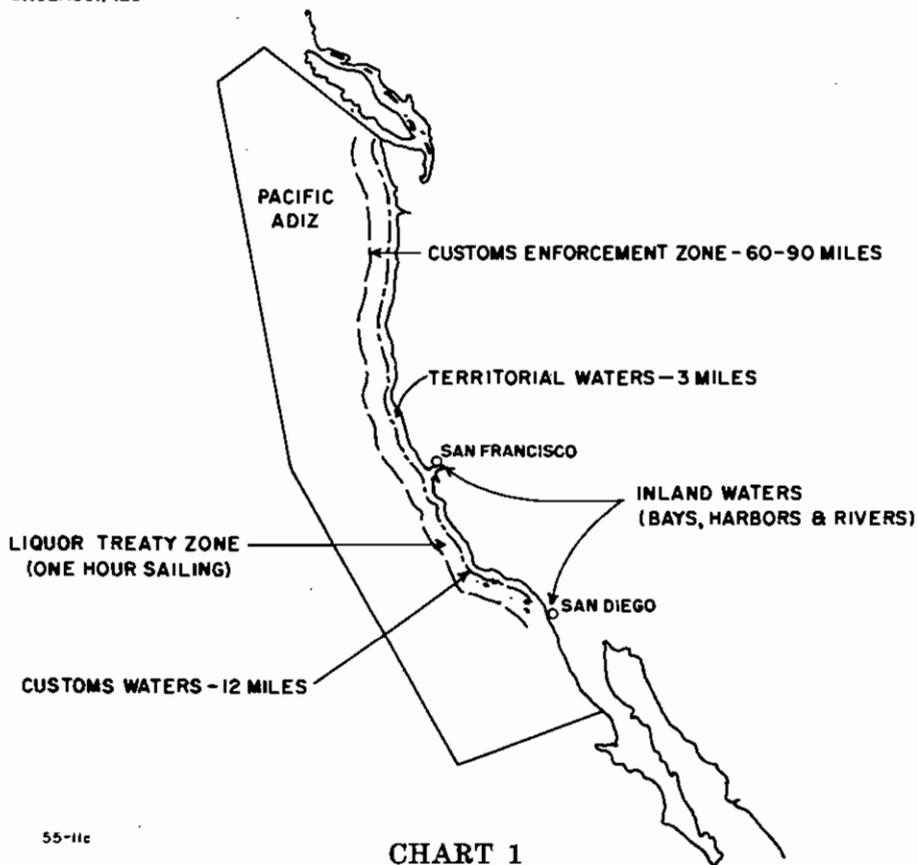
There have been many other significant developments which I will not be able to go into this morning. There is the growth of the continental shelf doctrine; there is the question of the status of radar ships and oil platforms off a coast; there is the use of testing areas, such as the hydrogen bomb area, and the proving grounds, which I will discuss later, for testing guided missiles and high-flying interception; there is the establishment of air defense identification zones by the United States and Canada; and, finally, there is the problem of legal control of outer space.

The main emphasis of my talk will be upon the problems of the breadth of the territorial sea and the measurement thereof. This is not the occasion to discuss the historical origin of the doctrine of the freedom of the seas and its general acceptance in the eighteenth and nineteenth centuries, which has already been referred to by Professor McDougal. But one contrast with that period which Mr. Phleger, the legal advisor of the State Department, has pointed out is that in those days it was the large, powerful maritime states that tried to close off the high seas. Today, it tends to be rather the smaller coastal states that are making such claims.

In order to make this subject more concrete, I am employing visual aids. With the exception of Latin America (for which no adequate slide was available), all the other major areas will be shown in the course of the discussion.

(SEE CHART 1)

UNCLASSIFIED



55-11c

This chart, which has been used in previous years at the Naval War College, indicates some of the zones that are claimed by states for various purposes:

1. The territorial limit of three miles;
2. The inland waters (bays, harbors, and rivers);
3. The customs enforcement zone;
4. The extent of the Pacific ADIZ;
5. The liquor treaty zone in the 20's; and
6. Special customs waters, and so on.

By and large, the high seas are divided into: (1) internal waters; generally speaking, the territorial states claim full sovereignty over these waters, subject, for example, to certain customary rules in ports; (2) the territorial waters; there is also a claim to sovereignty here, but this claim is subject to various customary rules of international law, such as the right of innocent passage, entry in distress, et cetera; (3) the contiguous zones; there are for this area special claims for specific purposes, including defense; and (4) the high seas; these are free to all, but they are subject to exceptional claims to suppress piracy, self-defense and hot pursuit.

Discussion of territorial waters in the past has frequently not distinguished very closely between the problem of how the territorial sea is measured and the extent of it. The Anglo-Norwegian Fisheries case in the World Court made this differentiation extremely clear, and I will come to that in a moment. First, a question of measurement — the location of the base lines, which divide the *internal* waters from the *territorial* waters, and serve as the base-point for measuring from land. There is general agreement that the low-water mark, as against the high-water mark, should be used where land is the measuring point. What points on the land and on islands and rocks that should be used as a base has, however, been the subject of vigorous controversy.

There is the so-called "coast line rule," defended by the United Kingdom and other maritime powers, and the so-called "straight line system" and the "headland theory," which other states have employed.

The system of measuring should also be distinguished from the question of what base-points should be used. I think that the method of determining this by arcs of circles was somewhat misunderstood in the Anglo-Norwegian argumentation, or at least appeared to be misunderstood. Such a method could be used no matter which base-point theory is employed for measuring the starting place. The question of bays is also important because, as you will see from this map, a bay is also an important factor in some cases in creating inland waters out of what were formerly high seas. One significant aspect of the measurement question lies in its possible impact on the creation of "inland waters" out of what was formerly territorial or open sea. If "internal waters" are thus created, and if the previous law as to internal waters is uncritically applied to these new expanded areas, the scope of the right of innocent passage will be very seriously affected. This emphasizes the importance of critically examining any automatic extension of the previous rules to these new problem areas.

*(SEE CHART 2)*

In the Anglo-Norwegian Fisheries case (which I will summarize briefly), the chart indicates the area in dispute, which starts at the Arctic Circle and goes all the way around to the Norwegian border. The Norwegian claim enclosed large areas of water hitherto regarded as high seas. The base line is this dotted line which marks the boundary of internal waters; the four miles beyond that are the claimed territorial waters. This was laid down in a 1935 decree of Norway, with a great deal of historical argument buttressing it. The effect of the decision upholding this system, instead of following the coast line more

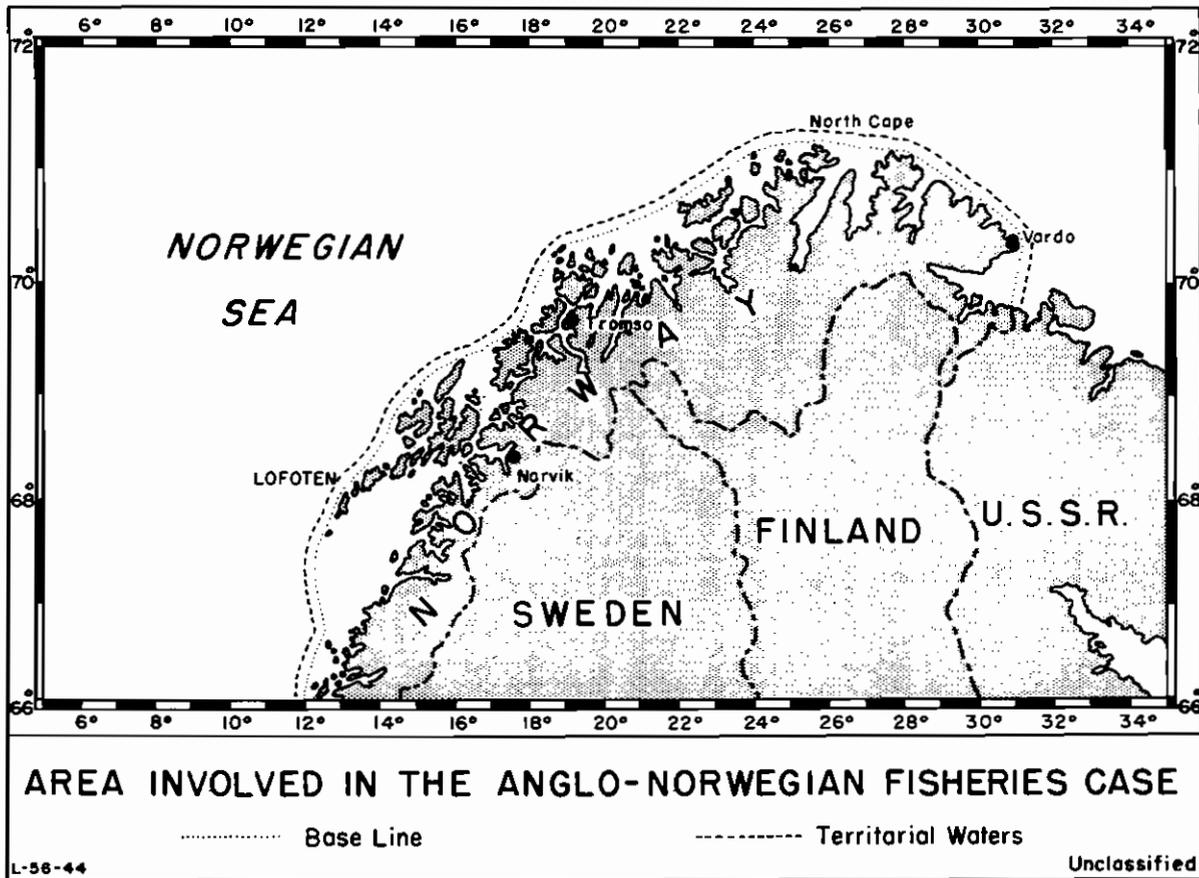


CHART 2

closely, is to enclose large areas of water not merely as territorial waters but as inland waters as well. Of course, the effect is to expand tremendously the area of sea generally reserved, including fishing rights, to the coastal state's exclusive control.

The decision by the International Court of Justice in the Anglo-Norwegian Fisheries case in 1951 was mainly concerned with the question of the starting point for the base lines. For the purposes of that case the United Kingdom did not contest the four-mile breadth against the three-mile breadth of the actual territorial belt. The Court emphasized the historical background and the lack of protest (as they saw it) and purported to find acquiescence on the part of other states in this Norwegian system.

It is important to remember that while Norway won the case, the World Court made it very clear that base lines, the extent of the territorial sea, and the status of waters are all governed by international law. Even though they adopted a more flexible approach than the rather technical rules which were advocated by the United Kingdom, they certainly gave no warrant to an interpretation that the coastal state is free to fix their base lines and the limit of their sea at will. I do not want to go much further in this case, except to indicate that it has also been criticized partly because the Court gave a good deal of weight to the so-called "economic factors," tying them in, however, rather closely with the alleged unique character of the Norwegian coast.

Although this decision is not technically a precedent, other states have taken advantage of the decision, so to speak, as a springboard for an extension of their claims in a similar manner. This is part of the practice of states which must be taken account of in determining the rule of international law on the subject. Egypt and Yugoslavia have laws built to some extent on the decisions from the point of view of the method of measurement. Canada recently announced an important change of position in the course of a debate in Parliament, saying that at the

next General Assembly they would urge the applicability of the Norwegian base-line system to their coast line, and would also espouse the twelve-mile limit for their territorial belt. Other states have also acted on this decision in varying ways, but I think it is quite clear that there is nothing in the case which justifies the 200-mile claim made by several Latin American States.

(SEE CHART 3)

One of the states which has acted upon this, and which was acting upon it even before the decision came down, is Iceland. You can see from this chart the way in which they have also drawn their lines around the headlands and then added four miles as their territorial belt. With regard to the question of the width of the territorial belt, which was discussed to some extent by previous speakers, I have already mentioned the fact that the three-mile rule was historically the rule developed in recent centuries, so I will not go into further details. The United Kingdom and the United States have generally adhered to this rule and defended it, as have other leading maritime powers.

On the other hand, there have been other limits historically advanced in the Baltic. The Scandinavian States have usually claimed four miles as the extent of their territorial sea, while six miles has been a quite common claim in the Mediterranean. This map is not particularly drawn for this purpose, but it suggests what I am going to comment upon briefly later on: namely, the effect that an extension of the territorial belt could well have on maritime interests in a sea such as the Mediterranean.

Some states have claimed the twelve-mile limit. Professor Lissitzyn has discussed the Russian practice with you, and the fact that they base their claim now on their law of 1927. There are certain gaps in the continuity and extent of their practice in this respect, but they and certain other states have claimed this limit in the past and more states are now beginning to claim this limit. I have already mentioned the intent of Canada.

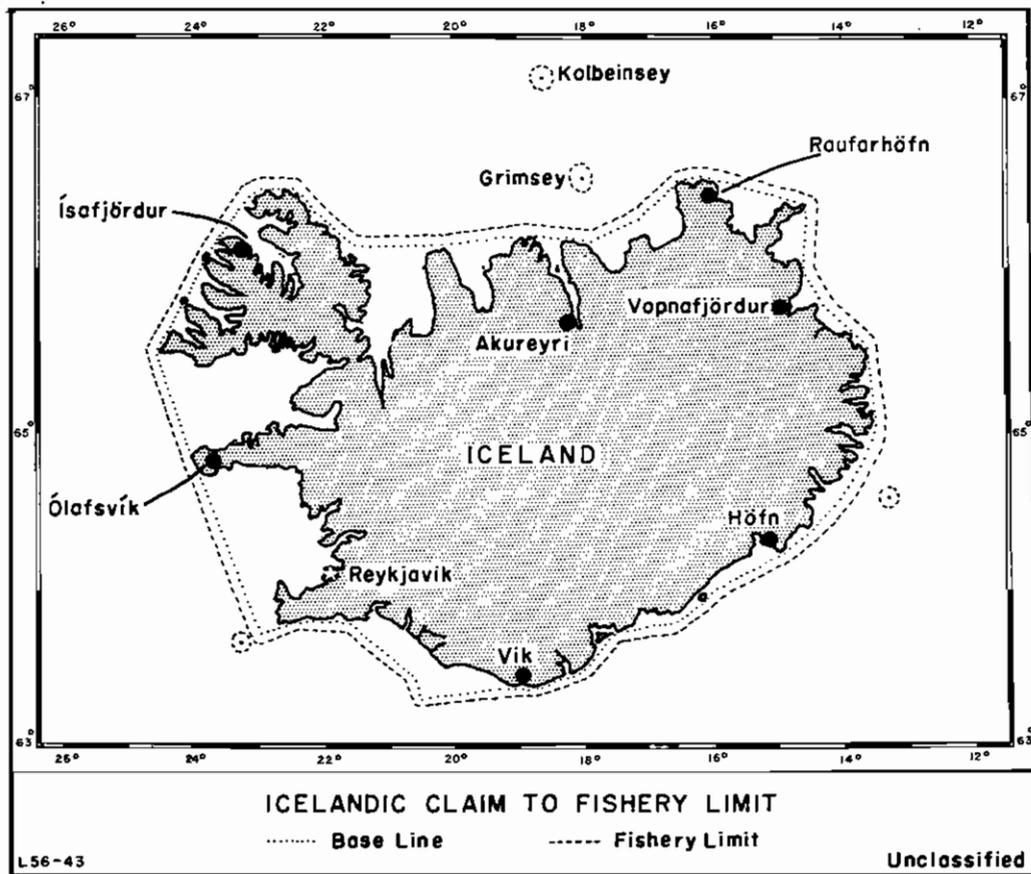


CHART 3

There are existing laws by Ethiopia and some other countries which now explicitly claim the twelve-mile limit. Turkey, for example, has stated to the International Law Commission that it believes twelve miles is the established limit, although I have seen no official document which makes that claim. In the western Pacific, the fishing zone has been used in effect to extend territorial waters, just as they have done in Latin America. Many of the Latin American States have, as you know, claimed two-hundred-mile limits, including exclusive exploitation of fisheries, and purportedly based their claims on American proclamations and the practice of other states. In some cases they have gone way beyond any continental shelf, which they may have, and have attempted to set up a two-hundred-mile maritime zone on the basis of continental shelf precedents. Chile, Ecuador, Peru, Costa Rica, and many others have made these claims despite the fact that the United States and United Kingdom shelf proclamations expressly deny any claim to exclusive fisheries and preserve the right of free navigation over the superjacent waters.

(SEE CHART 4)

This is not as detailed a map of the western Pacific as I would have liked to have shown you, but there is the so-called "Rhee Line" set up by Korea, and the fishing zone restrictions by the Russians (which were set out unilaterally at first). There is also a good deal of evidence that the Philippines may be attempting to claim sovereignty over the Sulu Sea and certain other waters that are so-called "internal seas", although this claim has not been formerly incorporated in any instrument.

Very briefly, this problem has been debated at many international conferences. My fellow professors are familiar (as are many of you also, I am sure) with the failure to reach agreement at the 1930 Hague Conference. There have been a series of conferences within the Inter-American system in the past few years. At Rio de Janeiro, in 1953, the Inter-American Juridical

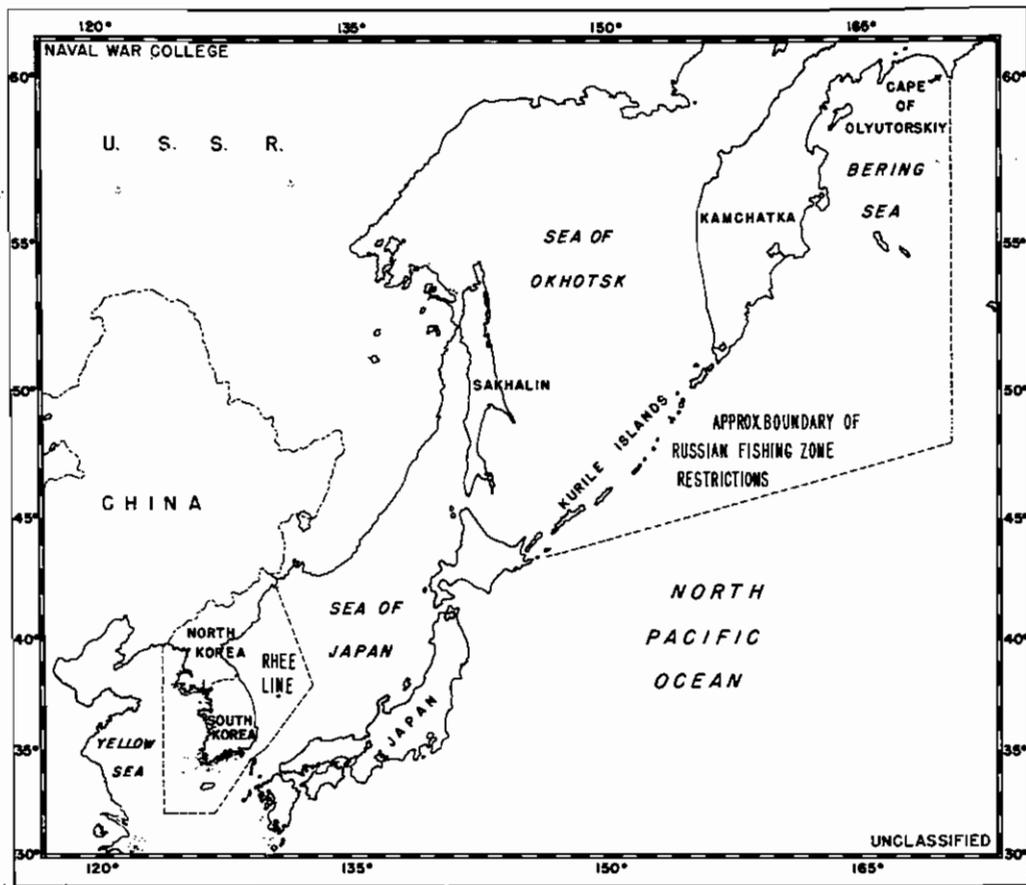


CHART 4

Committee, a subsidiary technical organ, by a divided vote of four to three, made some very broad pronouncements with respect to the right of the coastal state to claim extensive areas of sea.

More recently, in Mexico City, the Inter-American Council of Jurists, a more authoritative and policy-making body, voted fifteen to one to approve the so-called "Declaration of Mexico" (the one vote being that of the United States), which, in general terms, pretty much took the position that the coastal state is free under international law to develop extensive sea zones in the protection of its economic and other interests.

Still more recently there was a specialized conference of the Organization of American States itself at Ciudad Trujillo, which produced a more balanced statement on the question. It indicated the differences of opinion and made clear there was no agreed international law upholding these extensive Latin-American claims.

Similarly, the United States has held conferences with Chile, Ecuador and Peru in an attempt to resolve our differences with them on the two-hundred-mile claim made by those countries. Thus far, there has been no effective result. Those countries rejected the offer of the United States to refer their differences to the International Court of Justice for decision. Such an attitude is no service to the orderly development of international law on this question.

The positions taken in the International Law Commission's Final Report, previously referred to, will be summarized briefly. In effect, they have said that the three-mile rule is not a uniform rule of practice, but that international law does not permit more than a twelve-mile limit. They also say, without taking a decision, that some states claim more than three miles and other states do not recognize claims for more than this amount. They then suggest that a diplomatic conference be called to handle the whole problem.

On the question of measurement, they have attempted to restate the holding of the Anglo-Norwegian case. One interesting by-product of that restatement is that they have inserted in Article 5, concerning the "straight base line system," that wherever the use of that system creates internal waters out of areas that were formerly high seas and which were normally used for international navigation, the right of innocent passage through such waters should be preserved. With respect to this last Report, there was no noted dissent by the representative of the United States. The United Kingdom, Russia and Czechoslovak representatives made reservations to a number of these provisions, however.

On the question of contiguous zones, I will merely attempt to indicate some of the areas in which, for various reasons, we have exercised these claims — particularly in the realm of defensive sea areas in effect, mostly outside the Continental United States and mostly covering territorial waters only. Like many other states, we have an effective order which closes certain ports to foreign vessels — again, mostly in ports outside the United States. We established a closed area in the Marshall Islands for hydrogen bomb tests. There are still twenty-four airspace reservations in effect, both inside and outside of the country and in many cases overlapping the defensive sea areas.

The United States has established Air Defense Identification Zones, as has Canada (shown on Chart 1). This includes *internal* air defense identification zones and coastal air defense identification zones. There was a discussion yesterday of a possible submarine defense identification zone, which would raise different considerations as to practicability and legality.

On the question of proving grounds, I will not deal with the hydrogen bomb tests, which Professor McDougal has covered in the assigned article. But we have entered into an extensive series of arrangements concerning proving grounds with the United Kingdom for setting up test range areas and providing

for interflight-interceptor practice. These agreements with them have gradually been extended, the latest one going as far as Ascension Island in the southeastern Atlantic. We have also made collateral agreements of a similar character with Puerto Rico, the Dominican Republic, and a rather closely allied — but not strictly the same — agreement with Haiti.

In general, these agreements on proving grounds are elaborate and complex, as are the *Status of Armed Forces Agreements*, which is the subject Captain Hearn is going to discuss. They cover a wide range of activities with respect to jurisdiction, taxation, and the like. But with respect to the possible question of damage, which was discussed by Professor McDougal, these agreements had a specific provision in the basic Agreement of 1950 between the United Kingdom and the United States, and this same provision has been repeated in the subsequent agreements to a large extent.

One article, Article 2, paragraph 6, provides that “both governments agree to take reasonable precautions to avoid danger and damage.” Article 22 provides that the United States agrees “to pay adequate compensation not less than the law of the Bahama Islands requires, and to indemnify the governments of the United Kingdom and the Bahama Islands for damage, for death, or injury to any person in the area except people employed by the United Kingdom on the project itself.” It also provides for “property damage,” and for “acquisition of property,” and so on. One interesting feature is that it provides that the laws in force in the Bahama Islands are those referred to as the laws at the time of the signing of the treaty, unless agreed otherwise.

The International Law Commission, in their article on the contiguous zones, did not even mention defense as one of the purposes in setting up an exact limit of twelve miles. I think that the inconsistency of that, along with the needs and practices, were made clear yesterday by Professor McDougal.

In conclusion, omitting fisheries and the continental shelf, a brief word may be in order on the International Law Commission. As you know, the Commission is composed of so-called "experts," and not governmental representatives. They purport to engage in the codification and progressive development of international law. In their Final Report on the Law of the Sea, they have admitted, at least in that instance, that it is impossible to differentiate the provisions with respect to those two theoretically different objectives. Their work can either be merely published or an international conference can be called as a means of reaching a binding agreement. It can only be binding on governments by agreement. But, nevertheless, it is influential; it is an important subject for study; it certainly has an influence on doctrine and practice, as I have tried to suggest this morning; and it seems to me that it is particularly important to naval officers, not only of the United States but also of its allies in the Free World.

A brief discussion of the numerous protests that have been made will indicate the reactions of other claimants as decision-makers. The United States and the United Kingdom have protested these extensive claims in Latin America and in other areas of the world. Similarly, other states have protested to indicate that they do not acquiesce in these claims. Many of these protests are not available for publication, but their existence is known. Others have been published. Many of them may be found in the written proceedings in the Anglo-Norwegian Fisheries Case.

In concluding, I want very briefly to suggest that while it may be currently fashionable in some circles to espouse a larger limit than three miles, and while the three-mile rule is certainly on the defensive, there are certain other considerations that may not have been given adequate consideration.

In time of peace, certainly fisheries are probably the element of most importance. With respect to fisheries alone, there

are many equities of the coastal state which arouse sympathetic consideration. In spite of that, any change from the three-mile rule to the twelve-mile rule should be given a great deal more thought than it has thus far received, and perhaps the security interests involved have not been adequately developed. A change from three miles to twelve miles would cut out the high seas approximately 3 million square miles of water, or 2% of the high seas of the world. According to the Hydrographic Office, only 20% of the lighthouses in the world reach twelve miles out, and the expense of dealing with that problem is something to contemplate.

As I have tried to suggest today, it is not merely the extent of the territorial waters but the effect of these baseline claims that is of very great importance for security. The test of reasonableness in the Anglo-Norwegian Fisheries case is a vague formula. If properly interpreted, it is not an unwise standard. But it poses the question of the validity of these more extensive claims. The fact that there is no compulsory way of resolving these disputes, although the recording of protests makes clear the lack of agreement, accentuates the difficulties of reaching an equitable and authoritative solution.

With respect to security, we might also think of the fact that unless international law differentiates more than it has in many of these rules, a zone for fishing purposes, which is ardently desired, means also a zone to patrol for neutrality purposes in time of war, thus tripling the patrol area. It would permit a neutral who is conniving with another belligerent more easily to disguise the cooperation. With reference to the submarine, it would make submersion within territorial waters much easier. I have already mentioned the effect on innocent passage. Of course there is also the important problem of the fact that it is generally agreed that there is no right of innocent passage through the air. The extension of the airspace over these claimed areas is another serious problem for air operations. There is also practically a con-

sidration that the extension of coastal state claims conceivably will hamper the freedom of navigation throughout the world through practical restrictions on pilotage, and so forth, as well as through the lack of adequate lights, which I have mentioned.

With respect to security, I cannot develop that aspect further now. But, as naval officers, I am sure you will realize the effect of extending from three miles to twelve miles the territorial claims in such seas as the Mediterranean, the Baltic, through the sea passages of the Philippines, the East China Sea, the Sea of Japan, and so on. So it should be borne in mind that it is not only the interests of the United States which are at stake and ought to be considered in this question, but the interests of all the Free World in the use of naval power to prevent aggression and to preserve peace.

It would be sanguine to predict that there will be agreement in the near future on these questions. I hope, however, these brief remarks will perhaps stimulate the staff and students at the College to give this very important matter further consideration.

Thank you very much.

## BIOGRAPHIC SKETCH

### Professor Brunson MacChesney

Professor MacChesney received his B. A. degree from Yale University and his Doctor of Jurisprudence degree from the University of Michigan.

He was an instructor in the Department of Government at Harvard University from 1935 to 1936 and during the next two years he was an associate professor of law at the University of California School of Jurisprudence. From 1938 to 1940, he was Special Assistant Attorney General of the United States Anti-Trust Division, and, in addition, was also acting Chief of the Wages and Hours Unit in the Department of Justice during 1939 and 1940.

During the period 1940 to 1946, Professor MacChesney was Associate Professor of Law at Northwestern University, where he has been Professor of Law since 1946. He was on leave of absence from 1941 to 1946 to serve in various governmental positions.

Professor MacChesney was Assistant General Counsel of the O. P. A. during 1941-43. He served as Special Assistant to the Ambassador in Paris during 1944-46, and the following year was a special consultant to the United States Select Committee on Foreign Aid. In 1950, he represented the United States in the German debt settlement negotiations in London. Professor MacChesney was on leave from Northwestern University Law School during 1955-56, serving as occupant of the Chair of International Law at the Naval War College.

The French Government awarded Professor MacChesney the decoration of Chevalier of the Legion of Honor in 1946.

## 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 them of interest.

The listing herein should not be construed as an endorsement by the Naval War College; they are indicated only on the basis of interesting, timely, and possibly useful reading matter.

Many of these publications may be found in ship and station libraries. Books on the list which are not available from these sources may be obtained from one of the Navy's Auxiliary Library Services Collections. These collections of books available for loan to individual officers are maintained in the Bureau of Naval Personnel; Headquarters ELEVENTH, FOURTEENTH, FIFTEENTH Naval Districts; and Commander Naval Forces, Marianas, Guam. Requests for the loan of these books should be made by the individual to the nearest Auxiliary Library Service Collection (See Article C9604, Bureau of Naval Personnel Manual, 1948).

- Title:** *Men in Arms.* 376. p.
- Author:** Preston, Richard, and others. New York, Frederick A. Praeger, Inc., 1956.
- Evaluation:** A concise history of the chronological development of warfare from the age of the phalanx and Roman legion through the centuries of conflict up to and including the cold war of today. It briefly portrays the evolution and relationship of military operations, organization, concepts of strategy and tactics, weapons development and use to the social, economic and technological environment. The resultant emphasis on the interrelationship of warfare and society and the centuries of time included within these pages precludes any particular concern with strategy and tactics or detailed consideration of any military campaign or battle.

**Title:** *Defense and Diplomacy.* 547 p.  
**Author:** Vagts, Alfred. New York, King's Crown Press, 1956.

**Evaluation:** A historical analysis of the soldier's role in the formulation and conduct of foreign relations, the first of a series of "Topical Studies in International Relations" organized by Dr. Grayson Kirk, President of Columbia University. The author has detected a void in diplomatic history and the more general literature of international relations which lies in the treatment accorded the boundary zones where diplomatic and military questions meet and penetrate. Dr. Vagts has accomplished in this work a rebalancing of military and diplomatic history by providing in historical outline a description of the ties between diplomacy and strategy, between diplomats and military men and their offices, their ideas, problems and practices, their unity and disunity.

**Title:** *Atomic Quest.* 370 p.  
**Author:** Compton, Arthur H. New York, Oxford University Press, 1956.

**Evaluation:** A personal narrative, presenting a detailed account of the development of the atomic bomb from the discovery of nuclear fission in Germany to the explosions at Hiroshima and Nagasaki in 1945. The reader is brought into intimate contact with the scientists, industrialists and government officials who were faced with the fateful decisions which had to be made. The reasons behind the decisions to make the bomb and the final one to use it are exposed in detail. The final chapter looks ahead to the human and social adjustments that must be made in the atomic age.

**Title:** *Heritage of the Desert* 311 p.  
**Author:** Ellis, Harry B. New York, Ronald Press, 1956.

**Evaluation:** Covers brief historical and religious backgrounds, economic and living conditions and political problems of these Near East countries: Lebanon, Syria, Iraq, Jordan, Israel, Egypt and Saudi Arabia. Iran, Turkey, Sudan and countries of the North African littoral are discussed only insofar as problems herein have affected the principal area of concentration. The author is a journalist who spent three years as a Near East correspondent of *The Christian Science Monitor*. It is apparently his

intention to give the reader a rather thorough orientation before grappling with the specific problems. At this he is at his best, since he does an expert job of capturing the historical past, local color, and sights of the Near East. Discussion of the intramural disputes among members of the Arab League is excellent. It dispels the notion that these countries can be regarded as an Arab "bloc" or as a potential third force. Mr. Ellis does not deal kindly with British policies over the years in the Near East, but his arguments are ones of compelling logic rather than those inspired by any vehemence. His discussion of some of the less fortunate repercussions of the Baghdad Pact are well worth reading. One is left to his own conclusions as respects the author's view on United States policies in this area, though the facts are discussed. The book was written before the United States repudiation of the Aswan Dam loan; therefore, the current Suez problem is not included, but this omission does not detract from the value of the work. Of special interest is the writer's theory on the possibility of Soviet intrusion into a possible power vacuum, resultant from an Israeli defeat of some of the Arab countries in any future conflict. *Heritage of the Desert* is not a reference work. Political problems are usually well covered, but economic problems (at least in concrete terms) are not. Excellent orientation reading in study of Near East problem.

## PERIODICALS

- Title: *Magazine of World Astronautics.*  
Publication: MISSILES AND ROCKETS, October, 1956.  
Annotation: The first issue of a new periodical covering the field of missiles, rockets, satellites and astronautics. Its contents include an article by Dr. Wernher von Braun, a report on Russian interest in rocket and satellite activities during the International Geophysical Year, and other news items and illustrated feature articles.
- Title: *Military Policy as a National Issue.*  
Author: Katzenbach, Edward L., Jr.  
Publication: CURRENT HISTORY, October, 1956, p. 193-198.  
Annotation: Deals with party attitudes towards matters of defense policy since World War II, and considers the problem of defense as an issue in the present political campaign. (Party Platforms on National Defense, p. 240).

- Title:** *No 'New Look' This Year.*
- Publication:** AIR FORCE, October, 1956, p. 37-38.
- Annotation:** Points out the difficulties in planning for the organization and employment of new weapons which currently face top-level planners in the defense establishment.
- Title:** *The High Level Conduct and Direction of World War II.*
- Author:** Jacob, Sir Ian, Lieutenant-General.
- Publication:** THE JOURNAL OF THE ROYAL UNITED SERVICE INSTITUTION, August, 1956, p. 364-375.
- Annotation:** Examines the manner in which the Second World War was conducted, bringing out the principles of organization and discussing their application to the successful conduct of war.
- Title:** *What's New with Red Air Power.*
- Publication:** AIR FORCE, November, 1956, p. 20.
- Annotation:** A summary of Soviet air intelligence information includes an excerpt from Zhukov's 20th Party Congress speech, containing the essence of Soviet military doctrine.
- Title:** *The Politics of Underdevelopment.*
- Author:** Brzezinski, Zbigniew.
- Publication:** WORLD POLITICS, October, 1956, p. 55-75.
- Annotation:** Discusses the political implications of the aspirations of the newly independent Asian peoples in the context of the existing global competition between the Communist world, specifically the USSR and China, and the non-Communist world — particularly, the United States.
- Title:** *Peace.*
- Author:** Plunkett-Erle-Drax, Sir R. A. R., Admiral.
- Publication:** ARMY QUARTERLY, October, 1956, p. 74-81.
- Annotation:** Points out the folly of disarmament in conventional weapons when power politics still dominate international relations.

- Title: *The Mediaeval Cultural Heritage of the Mid-European Area.*  
Author: Dvornik, Francis.  
Publication: REVIEW OF POLITICS, October, 1956, p. 487-507.  
Annotation: Presents the broad cultural foundation upon which the Russian satellites base their drive for independence and freedom. It gives a resume' of the cultural background which inspires national leaders of the satellites to fight oppression by foreign rulers.
- Title: *West Europe Today and Tomorrow.*  
Publication: CURRENT HISTORY, November, 1956.  
Annotation: This issue is devoted to a discussion of the nations of Western Europe in the light of changes affecting NATO countries.
- Title: *Our Brink-of-War Diplomacy in the Formosa Strait.*  
Author: Fleming, D. F.  
Publication: THE WESTERN POLITICAL QUARTERLY, September, 1956, p. 535-552.  
Annotation: A critical appraisal of American military and foreign policy in the crisis over Formosa in the early months of 1955.
- Title: *Geopolitical Aspects of the Satellites.*  
Author: Roucek, Joseph S.  
Publication: THE UKRANIAN QUARTERLY, September, 1956, p. 220-230.  
Annotation: Discusses the geopolitical importance of Central-Eastern-Balkan-Europe and the strength Soviet Russia has gained by domination of the satellite nations.
- Title: *South of the Suez.*  
Author: Weller, George.  
Publication: COLLIER'S, November 23, 1956, p. 38-42.  
Annotation: Points out the strategic importance of the Indian Ocean as a "back door" to the petroleum-producing Middle East nations.

- Title: *What "Little Wars" Will Mean to U. S.*  
 Publication: U. S. NEWS & WORLD REPORT, November 9, 1956, p. 25-28.  
 Annotation: Deals with the threat of limited war and the implications for U. S. military planners in view of commitments throughout the world. (U. S. Commitments Around the World, p. 27).
- Title: *U. S. Destiny in the Middle East.*  
 Author: Eller, E. M., Rear Admiral, U. S. N., (Ret.).  
 Publication: UNITED STATES NAVAL INSTITUTE PROCEEDINGS, November, 1956, p. 1161-1169.  
 Annotation: Points out the strategic importance of the Middle East to both the United States and the Soviet Union.
- Title: *Russia after Krushchev.*  
 Author: Labeledz, L.  
 Publication: REVIEW OF POLITICS, October, 1956, p. 473-486.  
 Annotation: An article of timely importance and current usefulness. It may be more of a reality than speculation. Interest is heightened by the possibility expressed in Western circles that the actual leadership of the USSR has already passed from Krushchev.
- Title: *The Twentieth CPSU Congress and the "New" Soviet Union.*  
 Author: Kenney, Charles D.  
 Publication: THE WESTERN POLITICAL QUARTERLY, September, 1956, p. 570-606.  
 Annotation: Describes the composition of the Congress and examines the policies of "collective leadership," de-Stalinization, and moderation both at home and abroad.
- Title: *Why Russian Seapower.*  
 Author: Hittle, J. D., Colonel, U. S. M. C.  
 Publication: MARINE CORPS GAZETTE, November 1956, p. 68-75.  
 Annotation: Russia, to be a world power, must try to become a first-class naval power because her major competitors on the

international stage are great naval powers. Neither her land armies nor her air forces will allow Russia to realize her ambition. Only a powerful navy can do that --- and the USSR knows it. In this timely and informative article, Colonel Hittle discusses the "why's" and "wherefore's" behind Russia's current accelerated ship-building program.

- Title:** *Sea-Borne Deterrent.*  
**Author:** Eliot, George Fielding.  
**Publication:** UNITED STATES NAVAL INSTITUTE PROCEEDINGS, November, 1956, p. 1143-1153.  
**Annotation:** Shows how the strategic use of the United States Navy's new striking power can be used as an interim deterrent to the use of the intermediate-range ballistic missile by the Soviet Union.

- Title:** *The Great Tanker Dilemma.*  
**Authors:** Murphy, Charles J. V.  
**Publication:** FORTUNE, November, 1956, p. 125-127, 266-272.  
**Annotation:** A report on the shortage of oil tankers, the problem it poses for the Western nations, and the possibility of a United States crash program to build tankers. (Map Chart: "Where tankers Trade and are Building," p. 127).

- Title:** *How Hitler Missed in the Middle East.*  
**Author:** Liddell-Hart, Captain B. H.  
**Publication:** MARINE CORPS GAZETTE, November, 1956, p. 50-54.  
**Annotation:** An interesting and important account of information that has lately come to hand, from both British and German sources, concerning the true facts of the warfare that was waged in the Western Desert.