NAVAL WAR COLLEGE REVIEW

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INTERNATIONAL LAW ISSUE

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NAVAL WAR COLLEGE REVIEW

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JURISDICTION

A lecture delivered
at the Naval War College
on 13 September 1955 by
Professor Philip C. Jessup

I think in approaching the subject of *Jurisdiction* it is pertinent to note that anyone exercising authority of the United States Government is from time to time necessarily concerned with problems of jurisdiction. Within the limits of authority entrusted to you, where can you exercise that authority, over whom, with respect to what actions or events? And, reciprocally, what are the limits of the power and rightful authority of the representative, or officer, of another government with respect to you, your ship, or personnel under your command?

I think that we are concerned particularly with the exercise of power, or authority, or jurisdiction at sea, and over ships and persons on ships. But, first, we need to get some general propositions in mind. I think it may be convenient for you if I suggest the order in which I intend to take up various topics.

First, some general observations on the nature of jurisdiction and what that means; second, the international law limits on jurisdiction; third, the general bases of jurisdiction which are accepted in international law; fourth, passing from there, to exceptions or immunities to normal jurisdiction; fifth, taking up specifically jurisdiction over persons; and, sixth, jurisdiction over places. Our consideration of jurisdiction over places leads us to a consideration of territorial waters and jurisdiction on the high seas — including, particularly, the problems arising in contiguous waters, including the continental shelf. Then, I shall pass back to some specific considerations of jurisdiction over ships — including ships in port, in territorial waters, and on the high seas. Finally, I shall deal with the question of jurisdiction within the air space.

First, then, as to a general idea of the nature of jurisdiction, or what it means. It has frequently been explained as "the power to speak the law," to tell what the law is, what law or rule applies to whom, in what place, and in regard to what acts or events. We have the same problem within our domestic organizational systems. We have problems of jurisdiction at to the Town of Newport, State of Rhode Island, and the Federal authorities in regard to various events which may happen in this immediate community.

I think, also, that you may look at jurisdiction in terms of the three branches of Government which exercise it. *First*, one speaks of *legislative* jurisdiction, which is the power of the Congress to lay down a rule. For instance, Congress passed a law prohibiting the transportation of liquor in American territory during the era of the Eighteenth Amendment. *Second*, you have *judicial* jurisdiction, which is the power of the court to determine what are the rights or liabilities. For instance, the court entertains a libel of a ship seized for bootlegging and imposes a fine, or other penalty, if it finds that the statute has been violated. In the *third* place you have *executive* jurisdiction; that is, the power of the Executive Branch of the Government to carry out the law and to provide its impact upon the individual or thing. For example — here, again, keeping within the realm of the prohibition laws for a convenient example — the Coast Guard seizes a ship hovering off the United States' coast with intent to smuggle alchoholic liquors into the United States.

Granted that these three branches of Government may exercise jurisdiction, international law has developed principles which limit the power. I think the reason that has been true, historically, is that nations have recognized it is convenient for every government to act on the same matter at the same time, although we will see that in many instances jurisdictions do overlap. This means that if a state exercises its power — that is, takes jurisdiction — under circumstances which international law considers proper, other states have no right to protest. If they do

protest and the matter is submitted to international adjudication, an international court will hold that no damages are due.

One might point out, as an illustration here, a case which I will have occasion to refer to again in other connections, one which has become a very famous case, the Steamship LOTUS. The French ship LOTUS collided negligently with the Turkish ship BOZKOURT on the high seas in the Mediterranean. LOTUS, the French ship, later put in to a Turkish port. The Turks arrested the mate in command of the French ship at the time the collision took place and were going to try him for the death of the Turkish citizens who were killed in the collision. The French protested that the Turks had no jurisdiction in such a situation, and the two countries agreed to refer it to the Permanent Court of International Justice, to answer the specific question: Did Turkey violate any of the rules of international law regarding the proper exercise of jurisdiction by a state when it asserted its authority to try Lieutenant Demons for the alleged crime of killing the Turkish citizens on this ship?

In addition to these general principles of international law governing jurisdiction, you have also many particular treaties which define jurisdiction, as in the old days we had special treaties providing for our extraterritorial jurisdiction in China, and under the capitulations in Turkey and elsewhere. We have special treaty agreements which will be discussed with you later in regard to jurisdiction governing our forces stationed abroad under the Status of Forces Agreements, or our arrangements in particular bases which we have leased from other countries.

Granted that you have this domestic power to exercise your jurisdiction, and granted that you have certain rules of international law which determine the proper limits of the exercise of that power when questions are raised in our courts — that is, in American national courts — where the issue is posed that the jurisdiction exercised by the United States is in violation of a rule of international law, the American courts must follow the legislative

command if the Congress has laid down clearly a rule which is to be applied. But the courts have developed the principle that they will always assume that Congress did not intend to violate international law, and, therefore, if the statute can be reconciled with the international principle the courts will adopt the interpretation which is in accord with international law.

For example, in a case a few years ago before the Supreme Court the Court was concerned with a case involving a statute which in general terms provided that any seaman suffering certain accidents, and so on, would have certain remedies. The question was whether a Danish seaman serving on a Danish ship while that ship was in the Havana harbor could take advantage of that statute when the ship later called at New York. Then the Supreme Court said: "No. Congress clearly did not intend when it said 'any seaman' to mean any seaman on any ship anywhere in the world. They had in mind the normal limitations which have developed in the historical evolution of maritime law." So they placed an interpretation on the statute to bring it into accord with international law.

It is also true that the executive has in certain circumstances the authority under our Constitutional form of government to make the action of the United States comply with the international rule, even though the original law enforcement officer is quite properly acting within the authority of the jurisdictional power laid down by Congress.

For example — again, in the prohibition cases — the Coast Guard arrested several foreign ships which were smuggling, or intending to smuggle, liquor into the United States. They were authorizd to do so under the Act of Congress. But the foreign governments protested and said: "You can not seize our ships in that place under those circumstances." The President, exercising his executive authority, ordered the Attorney General not to prosecute the ships, but to release them. Therefore, there was no further enforcement of the laws against those particular ships.

Similarly where, under our draft laws, aliens were drafted into the Army and where under the statute the draft board had no option but to force the aliens into the Armed Forces — when the foreign governments protested on particular grounds, the President discharged the individuals from the Armed Forces.

So you get a reconciliation at times — not always — between the power of the United States to exercise jurisdiction in its territory and the rule of international law, which places certain limits on that power.

In international practice several legal bases of jurisdiction have been developed. The first of these is clearly accepted by everybody: that is the territorial basis of jursidiction, which is the simple proposition that the United States' laws apply in the United States. This is universally accepted throughout the world and it is the basic system adopted in the law of the United States, of England, and of many other countries.

Next, there is the personal theory of jurisdiction: the theory that you may exercise your power over your own citizens. It is based on nationality, or the links between the individual and the state. This is universally recognized in international law as a proper basis for the exercise of jurisdiction. Some of the laws of the United States apply to American citizens abroad, but it is the secondary basis in our law; in other countries it is the primary basis. In Italy, for instance, the personal theory of jurisdiction is preferred as the basic system over even the territorial system.

Third, there is what is known as the protective theory of jurisdiction, which I think is clearly accepted in international law but which has a limited scope. What that means is that a state may exercise its jurisdiction even over a person who is not a citizen, and even though the act is not committed in the United States, if the act is one directed against and affecting particular interests of the United States. For instance: we have a statute

which punishes any alien who commits perjury in applying for a visa before an American consular officer in a foreign country. Here is a situation of a Frenchman, we will say, in France committing an act before an American consul. The basis of our jurisdiction is the fact that our interest in having our documents properly issued is affected. Many other countries apply that principle even more widely.

There is also the so-called "passive personality theory." This is not universally accepted in international law and has always been challenged by the United States. The theory here is that you exercise your jurisdiction on the basis of the nationality of the person who is injured — not the nationality of the criminal, but the nationality of the victim. For example, under the Turkish law if anyone injures a Turkish citizen anywhere in the world Turkey asserts the right to punish that individual for having injured a Turk. In the LOTUS case, for example, while this was a subsidiary question in the Permanent Court of International Justice, one element in the case was the Turkish criminal statute which said: "We may punish anyone who injures a Turk. This master of the French ship has injured a Turk on the high seas; therefore, we may punish him." That was one of the bases on which they alleged their right to exercise jurisdiction. The court decided the case on other grounds, but it was brought up in that case.

Then there is a very famous earlier case in United States history of a conflict with Mexico, where Mexico had a similar criminal statute authorizing the punishment of anyone who injured a Mexican. In this case they tried and prosecuted an American citizen who had published a libel, defaming a Mexican citizen. I need not go into the various complexities of the case, but in that situation the United States strongly resisted the Mexican claim that they could exercise jurisdiction over an alien for an act performed outside of Mexican territory solely on the ground that the individual affected was a Mexican citizen.

Finally, there is what is called the "universality theory," which, again, is of limited acceptance in international law. I think that the only clear case of its application is in connection with piracy; that is, that any nation is privilcged to try, prosecute, and punish a person guilty of piracy. But you do find some countries — again, Italy as an examle — who take the position that if a crime has been committed anywhere in the world, anyone who catches the offender ought to be able to punish him so as to be sure that he does not escape justice. In most countries where that theory is accepted, it is hedged around with various limitations: such as the fact that no other country wishes to exercise a jurisdiction on the territorial principle, or on the personal principle, or on the protective principle, or any other principles; and that this is merely a catchall to prevent the possibility of a criminal escaping trial. The theory of it is that it is based merely on the custody of the offender; if you have him within your physical power, you ought to be able to try him.

In addition to piracy, perhaps this theory has a useful application in those relatively restricted areas of the earth's surface now which are not under the sovereignty of any state — for instance, in Antarctica. But actually there, if it became a question of the application of some jurisdictional principle, a case could probably be handled on the basis of the personal theory of jurisdiction.

There are one or two special applications of the territorial principle which I want to mention. First, where an act is performed outside of the territory and takes effect inside the territory; for instance, if a Mexican standing on the Mexican side of our frontier shoots across the border and kills an American in the United States, we assert the right to exercise our jurisdiction on the territorial principle. Although the murderer was not in the United States, nevertheless his act takes effect in the United States. Again, that was one of the bases of the decision of the International Court in the LOTUS case; namely, that the act set in motion on the French

ship through negligent navigation took effect on the Turkish ship, resulting in the injury to Turks on the Turkish ship. As we will see, a ship is for certain purposes assimilated to territory; therefore, the Turks said that even on the territorial principle they were entitled to take jurisdiction because the act took effect on their ship, which was assimilated to their territory.

Just as a footnote on that, the maritime community did not at all like the principle that the officer of a ship causing a collision of this kind should be tried in any port where his ship later came in. They felt that jurisdiction should be exercised only by the flag state; that is, by the state whose flag the vessel was flying of which the officer was in command. In 1952, a number of maritime states drew up a treaty at Brussels, providing that in the future they would agree that in such collision cases jurisdiction would be exercised only by the flag state. That rule in the Brussels Convention is now recommended by the International Law Commission of the United Nations for universal adoption, but this is a matter for treaty agreement.

The second special application of the territorial principle is merely the reverse situation: where a person inside the territory puts into motion a force which results in injury outside the territory. For example, Brazil punished a man who put a time bomb on a British ship when that ship was in a Brazilian port, although the time bomb did not go off until the ship was on the high seas. But the Brazilians said: "The putting of the bomb on the ship in our territory, though the act took effect outside, gives us jurisdiction on the territorial theory."

Along with these general bases of jurisdiction, there are certain exceptions, or immunities. For instance, our laws are not enforced against foreign ambassadors, or in a foreign embassy, or in the headquarters of the United Nations. Our laws are not enforced against a foreign warship in a United States port. These are exceptions stemming from international law. Similarly, our

laws are not enforced against a foreign state, or against its instrumentality, subject to certain exceptions which I shall not go into.

A further exception found in international law is the exception of distress. When a vessel comes into territorial waters or into a foreign port in distress, being forced in by damaged machinery, a shortage of provisions or water, or various things of that kind, the local state is not entitled under international law to exercise the jurisdiction which would normally be attached. As we shall see in more detail later, when a ship is passing in innocent passage through foreign territorial waters the jurisdiction of the local state which normally attaches is limited.

Now a word on what is included in the territory over which a state has jurisdiction. For instance, in regard to the United States — what are the places where the United States exercises this power without valid international objection? Clearly, all the land area of the United States and the islands belonging to it, its inland waters, lakes, and rivers within our frontiers; the territorial waters along our coast (we will define these later); the air space above this land and these waters; similarly, now, by a special arrangement, the trust territories which are placed under our control and bases over which we exercise jurisdiction under certain treaties; and then, as I have indicated, by a fiction, international law accepts the idea that every state exercises what is called "territorial jurisdiction" over its ships, wherever they may be. Courts do not like that fiction — they would rather explain the rule in different ways. For instance: the Supreme Court said that the national Prohibition Act, which forbids the carrying of liquors in American territory, was not applicable to the carriage of liquors on an American ship on the high seas — they would not push the fiction of territoriality that far. Then another court pointed out, to reduce it to an absurdity, that no one contended as a ship sailed across the high seas it was surrounded by a belt of territorial waters as it moved from one continent to another. But it has

a limited utility — in history, at least — in extending jurisdiction over ships.

Who are included in the persons over whom we have jurisdiction when they are not in our territory? Under our law this is limited to our citizens, or the nationals of the United States; to American corporations; and, in some cases, to seamen serving on American ships, even where they do not have American nationality.

Clearly, as I suggested before, there are cases of proper dual or multiple jurisdiction. For instance: if an Italian commits murder in the United States, the United States has jurisdiction on the territorial theory and Italy has jurisdiction on the personal theory. You can multiply the complexities. If the murderer has dual nationality — for instance, he may be both an Italian and a Greek — you may add another state which has jurisdiction on the personal theory. Similarly, if a crime is committed on a United States ship in a British port there is a duality of territory, so to speak: it being in a British port, the British have jurisdiction under the territorial theory; it being on an American ship, the United States may validly exercise its jurisdiction on the theory of the act being committed on the American ship.

In general in these cases of dual jurisdiction you can say that he who has, gets; that is, where the man is caught is the place where he will probably be tried. That state will have precedence because the police of one state can not exercise their authority in another state. On the other hand, in certain situations the criminal may be transferred from the state where he is apprehended to another state which has a basis for trying him through the process known as "extradition." We might just note in passing that where the individual is not in your territory and you do not actually have him in your physical power, you can nevertheless proceed against him and exercise your jurisdiction on the personal theory by controlling his property. So under one of our statutes a man named Blackmer, who was wanted in the United States

under a statute requiring people to testify in certain government proceedings — and where he refused to come — was fined by the American courts $60,000, which was collected out of his property in the United States. So even though you do not have the man in your power there are ways in which you can punish him and influence his conduct.

I have been talking generally about criminal jurisdiction. The problem of civil jurisdiction is one in which international law leaves to each state a much wider and freer choice. For instance, our courts may deal with the contracts made between two Frenchmen in France in regard to conduct to be performed in France. Under our law, the question of our civil jurisdiction depends usually on the service of a summons or the attachment of property which is completed within our jurisdiction. In the admiralty field in suits against a ship, you can follow the ship all over the world and wherever the ship comes in you may proceed in a civil suit against that particular vessel. Without going into more of the details on those questions of civil jurisdiction, let me return to the problem of territorial jurisdiction to point out one other aspect of the situation.

In general there is no problem in determining which land territory is subject to which state, but you do have disputed frontiers. Therefore, you may have a border area in which it is not clear which state exercises jurisdiction lawfully under international law. We are seeing that at the moment in the new flare-up of the border dispute between Ecuador and Peru. Many other cases will occur to you. Even in recent times there are disputes as to the fundamental title to a particular territory. These titles are frequently adjudicated in international courts, as we adjudicated with the Netherlands the sovereignty over, or title to, the small Island of Palmas in the Philippine Archipelago; as Norway and Denmark arbitrated sovereignty over eastern Greenland; and, just recently, as France and England have submitted to the International Court jurisdiction over some small islands in the English Channel, which the court decided belonged to England. At present,

the main area of disputed sovereignty is Antarctica, where the United States does not recognize any of the numerous claims which have been asserted by a group of states.

But the real problem in determining what is the territorial jurisdiction comes up when you get to territorial waters. The problem of territorial waters arises, historically, at a period back in the sixteenth and seventeenth centuries when nations were claiming vast areas of the high seas and saying: "These are ours" — and this claim was being resisted. Gradually, it narrowed down to the idea that it was perfectly reasonable to have a certain belt of water around our coast for the purpose of protecting our interests, even though we now admit that the high seas are free and common to everybody. So, developing in the seventeenth and eighteenth centuries, there began to crystallize the rule of territorial waters.

It has long been asserted that the three-mile rule — which is the rule that the United States now supports and has always supported — was based on the range of cannon in the eighteenth century, when the three-mile rule began to take shape. I think that recent historical searches have shown that that was not the origin. But in any case this proved to be a reasonable limit, and so it came to have a very general acceptance for a time. One thing was clear — and still is clear — that everyone agrees, all countries agree, that there is really a territorial sea and that this territorial sea is part of your territory just as much as your land area. But there is much disagreement now as to where the territorial sea ends and the high seas begin. Since the national frontier, or boundary, ends not on the low-water mark of the coast but at some point out in the sea, at the edge of your territorial waters, and since the boundaries of territorial waters are now in dispute, you have in a sense a disputed frontier for every maritime state because not everyone agrees as to the point at which that frontier is to be drawn on the high seas parallel to the coast.

Before discussing the exact nature of the boundaries, we should note that not all jurisdiction stops at this maritime frontier

— that is, at the edge of territorial waters — the way it stops at a land frontier. It is clear when you go to the Canadian or Mexican boundaries that you have ended the territory of the United States, gotten into another territory, and that territorial jurisdiction stops. But when you get out to the edge of territorial waters and get on the high seas, international law does not say that all your jurisdiction stops because it is agreed that there are certain types of jurisdiction which you may exercise on the high seas. We will see that the state may have a larger claim to jurisdiction in the high seas adjacent to its territorial waters, although outside of them.

Going back to this question of the boundaries between territorial waters and the high seas, the United States has from the beginning of its history accepted the three-mile rule. So has England and a very large portion of the great maritime powers. The logic of the United States' argument, today, is clear because as you go out from shore you get out one mile and say: "Under international law is this clearly U. S. territory?" — and everybody says: "Yes."

You go out two miles and say: "Is this U. S. territory?" — and everybody says: "Yes."

You go out 2.9 miles and say: "Is this U. S. territory?" — again, universal agreement: "Yes."

But you get out to 3.5 miles and say: "Is this U. S. territory?" —immediately, you get a divergence of opinion among the governments of the world.

So up to three miles it is universally agreed that you are in territorial waters. When you pass beyond the three-mile limit, you begin to get into an area of disagreement. This disagreement goes back a long way. For instance, the Russian twelve-mile claim goes back to about 1911, and was vigorously opposed in the early period by Japan and the United Kingdom particularly. In 1921, for

instance, a British trawler was seized by the Russians ten miles out from the Russian coast. A British warship was sent to the waters off Archangel. According to a statement by the British Government in the House of Commons, it was sent there for fishery protection duties — "Our orders are to prevent interference with British vessels outside the three-mile limit, using force if necessary." The Soviet Government has had an agreement with Great Britain, a treaty agreement, allowing British ships to fish up to three miles from the Russian coast — but the Soviets have now given notice that they are not going to continue that agreement.

You have many of these disputes. You have the dispute currently between Japan and Korea, where Korea has drawn the so-called "Syngman Rhee Line," extending in many cases one hundred miles off the Korean coast. By the end of 1953, the official Japanese report was that the Koreans had arrested 142 Japanese fishing vessels and 1,788 Japanese fishermen for trespassing on what the Koreans assert are Korean waters and which the Japanese, following our same rule of the three-mile limit, insist are the high seas.

The International Law Commission of the United Nations has been trying to grapple with this problem and see if they could find an agreement. They have finally come up this year with the suggestion that international law does not require recognition more than three miles out, but that any state (they suggest) should be privileged to set its territorial waters as far out as twelve miles. This is frankly advanced still as a matter of suggestion, without any assurance of agreement.

Meanwhile you will find, for instance, that on the west coast of South America, Chile, Peru and Ecuador have all adopted rules claiming two hundred miles off their coasts, and they have concluded a treaty among themselves agreeing that they will maintain this rule.

The Scandinavian countries have a special situation, in which they traditionally claim four miles. But, here, one might note that there is in the literature a good deal of confusion about the length of a mile. For instance, the Norwegian order of 1906 speaks of the ordinary sea mile as 7,529 meters, or 4.065 mean nautical miles, or .468 statute miles. A good deal of the confusion about the Scandinavian claims has been due to a different terminology. We find, however, that Norway (and I shall show you this on a slide in a few moments) has set up a special claim to the measurement of waters, based on the particular configuration of its coast.

In general, it is the big maritime powers that have stuck by the three-mile limit. They are the ones that control the high seas in a sense, and, therefore, the wider the high seas the larger the area in which they exercise a certain control through their maritime power; whereas the weak maritime powers are naturally interested in having the widest possible belt of territorial waters in which their national authority will be recognized.

This issue has been particularly acute in connection with fisheries. Here, the United States has a mixed interest. We have important fisheries off our own coasts from which we want to exclude foreigners. But we also have important fishing interests off foreign coasts — off Mexico, off Peru, and off Canada — and we are interested in having our fishermen get as close as possible to those coasts. The answer in international practice is frequently through special treaty agreements.

But fisheries are not the only interest for which you need the rule of territorial waters. You must protect yourself against smuggling, against hostile forces, and, in earlier days — and particularly in the historical development of the United States — the emphasis was upon the enforcement of our neutrality laws and our neutral duties in time of war.

We will also see later that since the territorial claim includes the air over territorial waters, we now need to consider whether

three miles of air space off our coast is satisfactory. I think that the situation, generally, is one in which an old rule for a long time met the needs of the international community, and does not seem to do so now. I am inclined to think that if the question went to the International Court of Justice in a broad form today that they would be inclined to uphold a claim of six, ten, or twelve miles if that claim had been asserted over a reasonable period of time. But I doubt very much if they would support the two-hundred-mile claim of the countries on the west coast of South America.

The State Department, however, is still very clear in maintaining its insistence on the three-mile limit. They asserted this very emphatically, for instance, to the Soviet government when, in 1953, the Soviets shot down a B-50 off Cape Povorotny. We insisted that the three-mile limit was the only limit that we were bound to accept, although we were warning our aviators to stay at least twelve miles off the Soviet coast.

But, in any case, let me repeat, somewhere there is a line between territorial waters and the high seas. I have been talking about the difficulty of measuring the boundary between the territorial waters and the high seas themselves. There is another problem of measuring the point at which you begin, and I think that we can perhaps see that by looking at a couple of slides.

The general agreement has been in the past that you start at a low-water mark and that you carry your three-mile limit

(SEE PLATE ONE)

in a line parallel to the low-water mark — in our case, three miles from the coast. While we have the slide here, I am going to anticipate something to call your attention to the fact that we have the twelve-mile limit of customs waters; we have the air zone (which I shall come to later); and then we have the further sixty-to-ninety-mile customs enforcement zone. Our general position had been to draw the three-mile limit parallel to the coast.

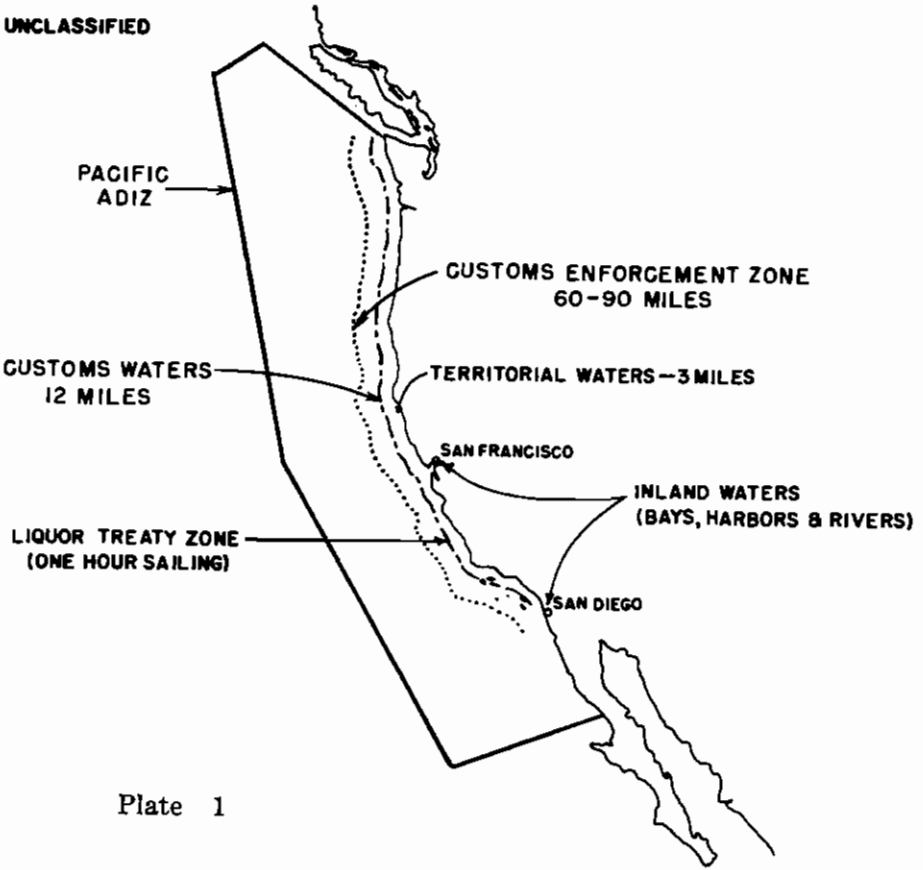

UNCLASSIFIED
PACIFIC ADIZ
CUSTOMS ENFORCEMENT ZONE 60-90 MILES
CUSTOMS WATERS 12 MILES
TERRITORIAL WATERS—3 MILES
SAN FRANCISCO
INLAND WATERS (BAYS, HARBORS & RIVERS)
LIQUOR TREATY ZONE (ONE HOUR SAILING)
SAN DIEGO

Plate 1

On the other hand in Norway, where there was a peculiar configuration of many little rocky islets and deep fjords indenting the coast, the Norwegians insisted that you could not have a line

(SEE PLATE TWO)

which moved in and out from all of these little minute points; that they were entitled to draw a general base line, connecting the points shown by the dotted line there. Then you measure your territorial waters four miles out from the base line (in their case, under their historic claim, four rather than three miles) rather than from the low-water mark. The Norwegian claim was contested by England and submitted to the International Court of Justice, which decided that under the particular circumstances of the case the Norwegian claim was sound in international law.

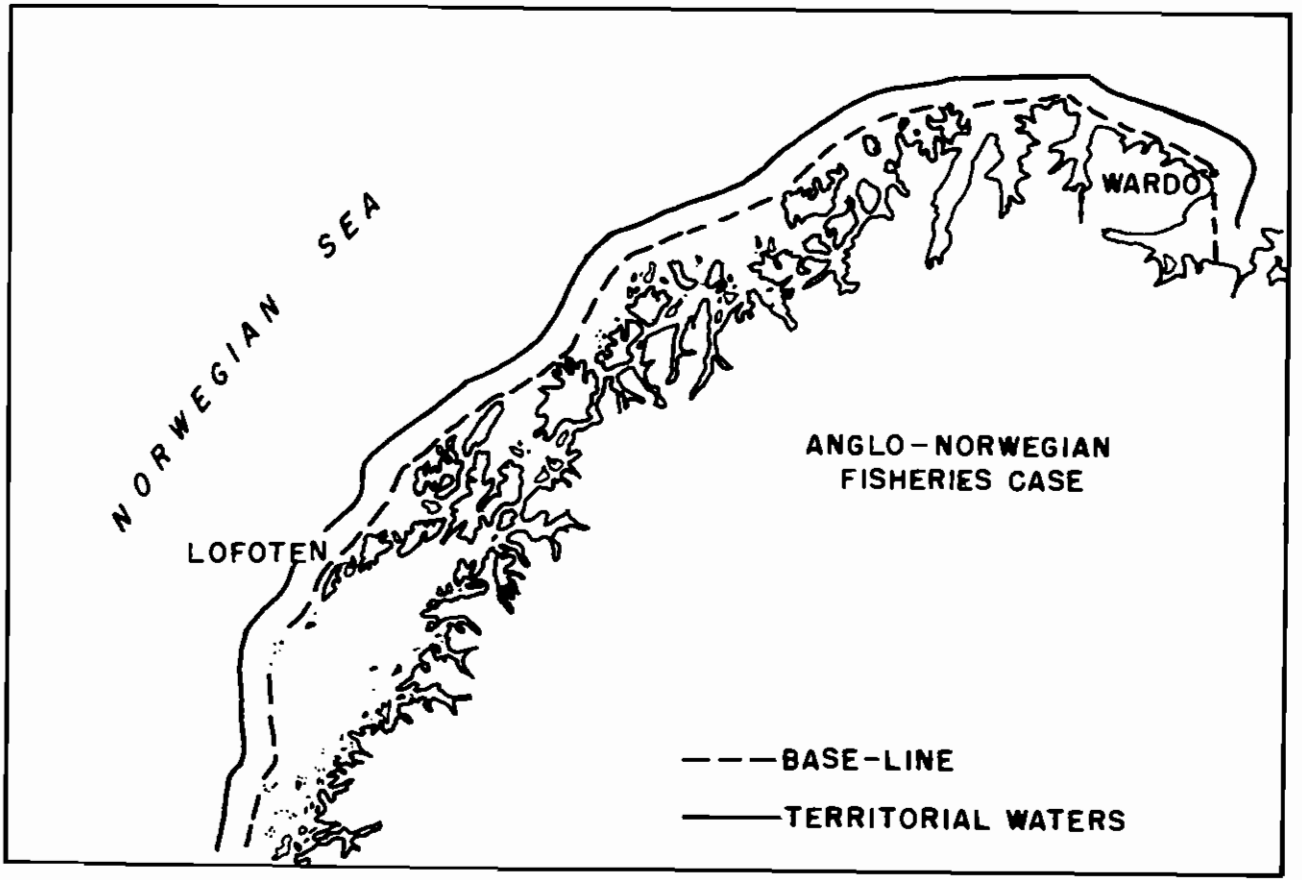
Iceland, which has had a long, tough struggle to preserve its fishing industry — particularly against the intrusion of British fishermen — trying to take advantage of the decision of the Court

(SEE PLATE THREE)

in the Norwegian case, has similarly adopted the idea of base lines; but, here, extending over rather wide indentations of the coast — squaring off the coast, so to speak — and then drawing their limit of national waters within which fishery is an Icelandic monopoly three miles out from that base line.

So we actually have, at the moment, no complete agreement as to how this line is to be measured in all cases. The International Law Commission, again, has approved the rule suggested in the decision of the Court in the Norwegian case.

The United States, in terms of our basic rule of measuring the line three miles from low-water mark, has preferred the method of measurement of arcs and circles; that is, the intersecting arcs of all circles drawn with the same radius from all points of the base line. The advantage of this is that a ship can determine easily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TERRITORIAL WATERS

Plate 2

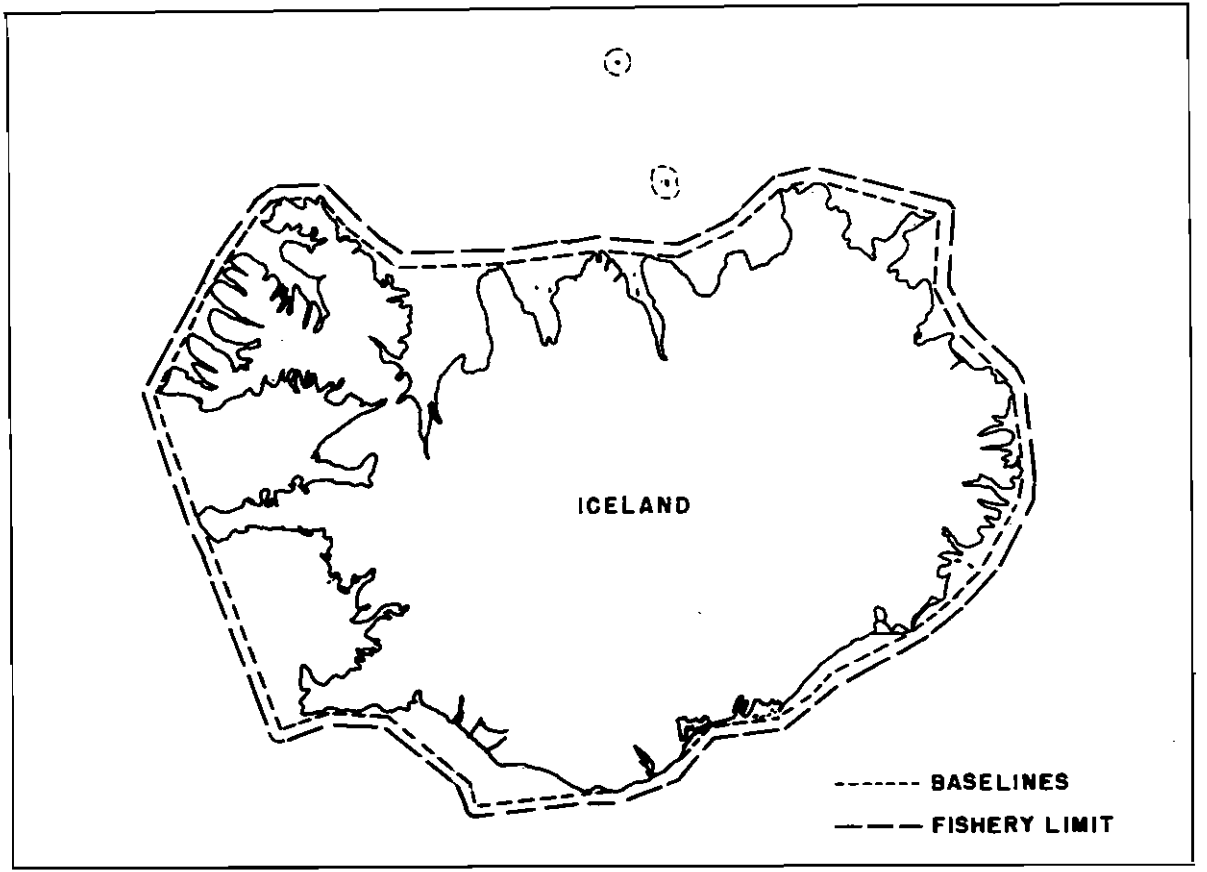

Plate 3

whether it is in territorial waters. If the ship is in the center, you draw a circle of a given radius; if the circle at any point touches the land, you are within territorial waters — if not, you are outside on the high seas. But the International Court of Justice did not admit that this method was established in international law.

As other minor points in the measurement question, each island has its own territorial waters. The International Law Commission has taken the position, with some justification, that a lighthouse built on rocks — artificially built up above high water — does not constitute an island with its own belt of territorial waters. We are having to consider now the problem of our radar platforms off the American coast and the oil-drilling platforms which are also being set up on the high seas. As far as I know, we are not making any claim that those are islands which have their own territorial waters around them. I will refer later to the special problem that arises there.

There is a similar argument in the measurement of territorial waters in bays, on which no general agreement has been reached. An attempt has been made to get a ten-mile rule; that is, if the bay is not more than ten miles wide at the mouth it is a territorial bay. The International Law Commission has suggested, here, a twenty-five mile rule. Then, again, there are "historic bays," so-called — bays like the Chesapeake — where a country for over a long period of time has asserted that this is national waters and where others have consented.

So much for details on the question of measurement. Let's go on to the problem of what kind of jurisdiction a state is entitled to exercise on the high seas outside the territorial waters.

The general principle was laid down by Chief Justice Marshall in a case as long ago as 1804, where he said that a state's power is not confined to its territory but it can protect itself by

exercising certain authority outside. If what it does is reasonable, other states will consent; if it is unreasonable, they will object. This was an expression of a general right of self-defense, but it has become a rather classic statement in this connection. We have acted on this since the earliest days of our history by the customs enforcement zone, which you saw on that chart. We applied this twelve miles out from shore but, under our earlier legislation, only for ships bound for the United States. In prohibition days, we included all ships — whether bound for our ports or not. Foreign governments were objecting, so we finally concluded treaties with a large number of them providing that ships could be seized if they were within one hour's sail as measured by their own speed or the speed of their small boats from our coast. This was adopted because the British did not want to agree on any mileage limit which might weaken the three-mile principle. Then, in 1935, we passed the Anti-Smuggling Act, which authorizes the President in certain cases to establish customs enforcement areas as much as sixty-two miles off the coast.

A great many other countries have similar laws providing for the enforcement of custom laws within an extended zone of the high seas — usually, around twelve miles.

The United States has always emphasized the fact that our claim here is a claim to certain jurisdiction on the high seas for our protection, and that this is not a claim to territorial waters. The failure to understand that basic point, and to accept it in other countries, has been at the root of a great deal of the trouble and of the disagreement.

Similarly, in time of war, countries have set up special zones for their protection under war conditions and for the defense of neutrality. Your Law Instructions for Naval Warfare point out some of these cases. The most extreme case is the Declaration of Panama in 1939, in which the Latin American Republics joined with us in setting up a zone which extended some three

hundred miles off the tip of South America and some twelve hundred miles off Florida. The belligerents did not accept it, and it was never really enforced.

In 1945, the United States started a movement which has had unexpected repercussions. In that year, the President issued two Executive Orders. The first was an order on the continental shelf. The continental shelf, of course, is the sloping projection beyond the coast, which goes until it falls into the deep of the sea. There have been old cases involving pearl fisheries, sponge fisheries, and even coal mines extending out under the bed of the sea. But it was only recently that it was found that it was possible to exploit petroleum resources by drilling in the continental shelf, a considerable number of miles out.

So we issued these decrees, or executive orders, and we said that every state had a right to exploit its natural resources in the continental shelf. We said that these natural resources appertained to the United States and were subject to its jurisdiction and control. But we also said that this was not a claim to extending territorial waters; that the character of the waters on top is high seas, free to navigation, and so on, of all and remained unaffected.

That was immediately followed by other states who misinterpreted our proclaimation. They said we had claimed sovereignty over all of the waters over the continental shelf; therefore, they claimed sovereignty. The Argentines were the first to follow this, and it was rapidly followed by a lot of Latin American States. It has now been followed by states on the Persian Gulf, where the geophysical formation is quite different. You now have a welter of claims based on this idea of the claim to the continental shelf.

Here, the International Law Commission has been trying to grapple with the definition by setting the boundary according to the depth of the water on the continental shelf. They have been

talking about a depth of two hundred meters, which would define the limits within which you could exercise this jurisdiction. We may note that the Syngman Rhee Line, established by the Korean Proclamation of 1952, specifically says their claim is irrespective of the depth of the water. This is a very real problem.

Our oil companies are now building drilling platforms as much as thirty miles out in the Gulf of Mexico. We claim that they have a right to do that, but we do not claim that as our territory. Other countries are going to be following suit in the Persian Gulf and elsewhere, so you have opened up a vast area here in which the rules still need to be worked out in the international community. But I think that the general proposition of the right to exploit the resources in the continental shelf is firmly established — I think everybody agrees to that. The difference is between the claim to exercise a limited jurisdiction on what is still recognized to be high seas, or under high seas, as against the extreme Peruvian, Chilean and Ecuadorian claims that the territory of the states extends out two hundred miles over this continental shelf.

There are various other special rights in the adjacent seas, but I haven't time to go into them in detail. I merely mention particularly the right of hot pursuit — where, if you begin pursuing a ship in your territorial water, and follow it out on the high seas, you may complete the capture on the high seas.

Let me turn now to the question of jurisdiction over ships; first, foreign merchant ships in port. Here, there is supposed to be a disagreement between the Anglo-American theory and the Continental Europe theory. Our theory is that when a foreign merchant ship comes into one of our ports it is completely subject to our jurisdiction. But, we say we will not bother to exercise that jurisdiction in minor matters, such as disciplinary measures taken by the captain in the case of the crew. On the other hand the Continental theory has said the ships are immune, but the local state

may exercise jurisdiction if the peace of the port is affected, or if the act affects the persons on shore, on another ship, or if the captain of the ship asks for help.

Practically, the result is the same in most cases. But it seems to me that the American theory of complete jurisdiction over a foreign merchant ship in port is sound in international law. You will also find that many treaties have been concluded to allow the local consular officers to take jurisdiction over wage disputes among the crew, for example. However, as I have noted, you do have concurrent jurisdiction in cases where events take place on a foreign merchant ship in port — both the local state where the port is located has jurisdiction and so has the state of the ship in question. In these cases the warship, as I have noted, is immune from local jurisdiction.

As you get out from a port itself into the territorial waters the interest of local state is less, but this is the territory of the state — and the state is still entitled to exercise its jurisdiction. The International Law Commission has suggested some limitation there in line with the traditional European theory about the peace of the port and the effect on other ships or persons.

There is one particular right which we ought to note in connection with ships in territorial waters, and that is the right of innocent passage. Traditionally, I think it has always been thought of as the case of a ship sailing from State *A* to State *B*, which, in the course of normal navigation, passes through the waters of State *C*. This old right to pass in the normal channels of navigation has been recognized in international law. The coastal state can not deny this right of innocent passage — that is clear. The only question is this: What authority may the state exercise over a ship in course of innocent passage? I think that the International Law Commission in its suggestions goes rather far in authorizing this jurisdiction over these vessels. It seems to me that the sound rule is to leave them as free as possible, and for

the local state to exercise jurisdiction only where its interests are really vitally effected.

Another question in connection with innocent passage is whether a warship has the right to exercise innocent passage. The old American rule, as stated by Secretary of State Elihu Root, was that "merchant ships may pass because they do not threaten; warships may not pass because they do threaten." The International Law Commission, however, says that warships do have a right of innocent passage. The question came up in the International Court in the Corfu Channel case, but the Court confined itself to saying that warships have the right of passage through an international strait, and did not pass on the British claim that they had a general right of innocent passage.

In connection with maritime law, I want to deal with one particular set of problems which is important now on the high seas. We have noted that, generally, a state has jurisdiction over its ships and it has jurisdiction in its contiguous waters for its own protection; that in general there is no authority over a foreign ship on the high seas except in cases of piracy or under special treaties. We have recently found that this issue has involved the question of a real authority exercised by the United States over large areas of the high seas.

For instance, in 1950 we made an agreement with Great Britain for the Bahamas Long-Range Proving Ground for the testing of guided missiles. The launching area is in Florida and the zone, as defined in the treaty, goes southeast through the Bahamas down to a point opposite Haiti. The agreement elaborately provides, in regard to the rights of the United States in the use of it, that the United States agrees to compensate those who are injured through its use of the zone. It says that it will not unreasonably exercise its rights so as to interfere with, or prejudice, safety of navigation, aviation, or communication within the flight-testing range. This has been in existence now for five years, and was

amplified somewhat by an agreement in 1953. So far as I know, no foreign state has objected.

Then came the question of the Proving Grounds for atomic bombs, and, later, for hydrogen bombs in the Pacific. In your readings there is a suggestion of an interesting spirited defense of the right of the United States here by McDougal and Schlei in the *Yale Law Journal.* As they point out, the first tests here were conducted in 1946 — and 180,000 square miles of seas with islands in them were defined as an area that people had to keep out of because it was a danger zone. The area has varied in the warnings issued since that time until, in the test of the H-bomb in March, 1954, the warning area covered 400,000 square miles.

It is to be noted that all of the orders were withdrawn after fifty-seven days; in other words, we were not permanently closing this area. It is also to be noted that there are not main navigation routes through this area, nor is there any particular fishery of importance within the area. Nevertheless, as you know, through certain miscalculations in the fall-out and in the winds, Japanese fishermen (in one vessel in particular) suffered from radioactive effects, the fish were alleged to be affected, and the United States paid two million dollars to Japan — not with any admission of liability, but in order to settle it. Comparable to our claim is the Australian Proclamation of 1953, which set up a prohibited area of 6,000 square miles surrounding the Monte Bello Islands. I noticed in the *New York Times* this morning that further tests are to be carried out there.

These claims of controlling people on the high seas are very extensive and there are very little precedents for them. It seems to me that McDougal is right in stressing the element of reasonableness and going back to the old test which Marshall advanced in another connection in 1804. I do not think that you can generalize about them — you have got to study the particular situation; then test it on the ground of reasonableness, the in-

terests of the country utilizing this area, and the interests of others adversely affected thereby.

Finally, one or two moments on the question of jurisdiction in air space. Prior to 1914, there was little governmental interest in this; it was largely left to scholars. They had a lovely time speculating about who owned the air space. They finally came out, by analogy to the high seas, by saying: "Of course the air is free, but everybody has a belt of territorial space. This belt is as much as you need for protection. All you need is the height of your highest building."

At the time these talks went on the Eiffel Tower was the tallest building, so they took that height. They said that everybody could build or control the air spaces as high above the ground as the Eiffel Tower. Above that, the air was free. World War I changed all of that with the development of the use of aircraft. Immediately after the end of the war all the states, with remarkable unanimity and speed, agreed that every state is sovereign over its air space, and, as the phrase went, "up to the skies." Nobody stopped or bothered at that time to define where the skies ended or where they began.

Nowadays, we are getting into more discussion of the ionosphere, and people are beginning to worry about jurisdiction over satellites floating around the earth. All that I can say is: if you find yourself in command of a satellite in the ionosphere and you encounter a Soviet satellite, you had better send back for instructions because the law books will not help you any.

You will find, in general, that air law has developed by analogy from the maritime law. For instance: just as you have the principle of the nationality of ships in jurisdiction over ships, you have nationality of aircraft. On the other hand, the principle of innocent passage, which developed in maritime law for rather clear reasons, was denied in connection with air law — that is not established, so that the right of entry, landing, or overflight

depends entirely upon treaties. I think that one can say, as Professor Lissitzyn argues, that there is a right of entry in distress, as argued by the United States in our claims against Yugoslavia when they shot down American planes. Perhaps we find another example in the recent Bulgarian incident in the shooting down of the Israeli craft — although that may have been merely a confession of error.

This air space, then, is now generally conceived to be part of the territory of the state just as much as the land or the territorial waters; it extends up above the territory and it extends above the territorial waters. But, just as in the case of territorial waters and further jurisdiction on the high seas, so we find that states are asserting jurisdiction in the air space adjacent to their boundaries but out over the high seas. The United States and Canada have met this by the Proclamation of the A.D.I.Z., (the Air Defense Identification Zones). The hour is a little late, so I am not going to put the slide on again, but you will remember that on the slide of the U. S. coast there was a far line away out. Our A.D.I.Z. line extends some hundreds of miles off our coast in some places, and the Canadian line is somewhat closer.

All aircraft entering these zones are required to report and to comply with certain rules and instructions, but we do not forbid foreign aircraft to fly into these zones. The C.A.A. has stated in a letter that foreign aircraft bound, for example, from Havana to Halifax, not approaching the United States, do not need to comply with the regulations in the zone. But, query whether we would tolerate Soviet military aircraft flying within ten or twelve miles of our coast — although we would admit they are flying over the high seas. We insist that our airmen have the right to fly up to within three miles of the Soviet coast, although as a practical matter we tell them to keep twelve miles out. Is this a situation where the United States, as a great air power following its tradition of the narrow belt of territorial waters, is also seeking to establish the rule of the narrow belt of air space over territorial

waters, and a limited right of authority in air space out over the high seas? I suggest that this is a problem which needs very serious consideration in the American Government: as to whether the interests of the United States are still to be promoted by an insistence on the three-mile rule of territorial waters and by insistence on very restricted rights in the super-adjacent air space over the high seas off our maritime frontiers.

I think that one will find that with the increased compactness of the world, the speed of communication, and the rapidity with which these problems are advancing, the development of the law in these respects will probably be more rapid in the future than in the past.

Thank you!

BIOGRAPHIC SKETCH

Professor Phillip C. Jessup

Professor Jessup received a B. A. degree from Hamilton College, LL. B. degree from Yale University, and M. A. and Ph. D. degrees from Columbia University. In addition, he has received an LL. B. degree from several universities — including Hamilton College, Western Reserve University, Brown University, Seoul National University, Rutgers University and Middlebury College — J. D. degree from Oslo University, Doc. Hon. Causa from the Universtiy of Paris, as well as several other honorary degrees.

He has taught International Law at Columbia University since 1925 and has been the Hamilton Fish Professor of International Law and Diplomacy since 1946.

In 1929, Professor Jessup was a lecturer at the Academy of International Law at The Hague, Netherlands. In the same year, he was Assistant to Elihu Root at the Conference of Jurists on the Permanent Court of International Justice at Geneva. In 1943, he was Chief of the Division of Personnel and Training, Office of Foreign Relief and Rehabilitation Operations, Department of State, and the Secretary of the Council and Assistant Secretary General of the First Council Session of United Nations Relief and Rehabilitation Administration. The following year, he was Assistant Secretary General of the United National Monetary and Financial Conference at Bretton Woods. During the period between 1942 and 1944, he was also Associate Director of the Naval School of Military Government and Administration.

Professor Jessup had a leave of absence from Columbia University from 1948 to 1953. On January 5, 1948, he was appointed Deputy United States Representative in the Interim Committee of the General Assembly of the United Nations. From 1948 to 1953, he was Representative of the United States to the Second Special Session and to the Third, Fourth, Sixth and Seventh Regular Sessions of the General Assembly of the United Nations.

SOVIET INTERPRETATION AND APPLICATION OF INTERNATIONAL LAW

A lecture delivered
at the Naval War College
on 12 September 1955 by
Professor Oliver J. Lissitzyn

When some five years after the Russian Revolution an attempt was being made at a conference at the Hague to settle some of the issues between the Soviets and the Western European countries, and arbitration was suggested, Litvinov, the Soviet representative, was reported to have said:

> "Commander Hilton Young had asked whether it would be impossible to find a single impartial judge in the whole world. It was necessary to face the fact that there was not one world but two — a Soviet world and a non-Soviet world. Because there was no third world to arbitrate, he anticipated difficulties . . . The division he had mentioned existed, and with it existed a bias and a hatred, for which the Russian Government must decline the responsibility. Only an angel could be unbiased in judging Russian affairs . . ."

This statement reflects one aspect of Communist ideology which has colored the Soviet attitude toward international law — the concept of two worlds between which there is hatred — the Soviet and the non-Soviet. In the Soviet Union, ideology has been closely related to policy. Let us look at the Soviet ideology and its implications for international law.

The Communists profess to interpret history in terms of the class struggle. On one side are the exploiters, the capitalists, those who own the means of production. On the other side are the toilers, the proletariat, those through whose labor the exploiters

make profits for themselves. These two classes are antagonistic in their interests, and, consequently, hostile to each other. In their struggle, no holds are barred. In the capitalist states, government, law, religion and morality are all weapons by which the capitalists protect their property interests and keep the workers in subjection. But, the Communists say, historical development inexorably dooms capitalism. Beset by its own inner contradictions, capitalism is bound to be overthrown by the workers in a not too distant future. The Russian Revolution, in which the workers for the first time in history succeeded in overthrowing capitalistic rule, marks the beginning of the end. When the workers are finally victorious everywhere, they will completely destroy the capitalist system of government, law and morality. Eventually there will be a world commonwealth of labor in which government and law will become unnecessary and fade away, since there will no longer be any antagonistic classes struggling with each other. But before this comes to pass, there is bound to be a period of transition, a period of struggle, since capitalism will not willingly give way to Communism. During this period, the workers, wherever they are victorious, as in Russia, will set up a dictatorship of the proletariat to crush capitalist resistance; they will seize and use the machinery of government in their own interests.

In its struggle against capitalism, the proletariat must not be handicapped by moral scruples. Lenin said that at this stage of history morality "is completely subordinated to the interests of the class struggle of the proletariat." Recent Soviet writings leave little doubt that the advancement of Communism still remains the supreme criterion of morality in Soviet ideology. Hatred of the class enemy — of capitalists as a class — continues to be regarded as one of the components of Soviet morality.

Law is regarded by the Communists as an instrument by which the ruling class imposes its will on the community. Vyshinsky, for instance, has defined law as "the sum total of rules of

conduct expressing the will of the ruling class" which are enforced "in order to protect, consolidate and develop such social relations and institutions as are advantageous and agreeable to the ruling class." In a United Nations debate in 1948, he said that law is nothing but an instrument of policy; that law and policy cannot be contrasted.

The law of a state ruled by the capitalists is bound to be quite different from the law of a state such as the Soviet Union, in which the will of the workers prevails. One is an instrument of capitalist policy; the other an instrument of the anti-capitalist policy of the working class. The Communists profess to find support for their conception of law in the actual practices of capitalist governments; they claim that law is cynically manipulated by capitalists to suit their own purposes.

At this point, I should admit that my presentation of Communist philosophy has been sketchy and oversimplified. I think, however, that I have presented enough of the basic ideas to draw the necessary implications. Let us look at the matter from the standpoint of a Communist who takes his idology seriously.

First, there is no room for any genuine and lasting community of interest between the Communist and the non-Communist worlds, since there is bound to be implacable hostility between them. This does not mean, of course, that there will be open warfare all the time; but the periods of relaxation are merely uneasy truces. Neither side can truly reconcile itself to the continuing successful existence of the other. If a genuine community interest among nations is to be regarded as one of the foundations of international law, this foundation would seem to be lacking in the relations between the Communist and the non-Communist states.

Second, the period of transition — that is, the period of coexistence of the Communist and non-Communist worlds — is bound to be a limited one. It will end in a not too distant future

with the complete triumph of Communism. This means that Communists have little reason to attach much value to the long-range advantages of the observance of international law in good faith. If expectations of stability and permanence are one of the foundations of international law, this foundation, too, would seem to be lacking in the relations between the Communist and the non-Communist worlds.

Third, since Communists reject capitalist morality and are told that the advancement of Communism is the supreme moral imperative, morality in the traditional sense plays little or no part in Communist ideology as a basis for the observance of international law.

Furthermore, law is for the Communists nothing but an instrument of the policy of the ruling class. In its modern form, international law has grown up among capitalist states; it must, therefore, be an instrument of capitalist policies. Why should a state controlled by a class hostile to capitalism have anything to do with it? Indeed, if law always expresses the will of a ruling class and is enforced by it in its own interest, how can there be any law in the relations between states ruled by different and mutually hostile classes? The will of which of these classes would it express? Or, is each of the classes to apply international law only to the extent and in the way that suits its own interests and policies?

It is clear that the Communist conception of law as an instrument of policy makes for a highly practical and flexible approach. Rules of law are not absolutes that must be obeyed regardless of consequences; they cannot control policy; they are merely the means of producing desired results and should be interpreted and applied accordingly.

It might be expected that since international law was difficult to fit into Communist ideology it would be declared nonexistant, unreal. Far from it. Soviet writers, with official blessing,

unanimously uphold the reality of international law. They refer to it as an attribute of culture and civilization, and as an essential condition of modern international relations. Those in the West who deny or doubt the reality of international law are attacked as nihilists. Soviet leaders from time to time call for more study of international law. International law is often invoked in official Soviet documents and speeches. In short, the Soviets profess to recognize international law and even to lay stress on it. The philosophical difficulties of fitting international law into the Communist scheme of things have not been completely resolved; they still trouble Soviet writers; but they are not permitted to stand in the way of professed acceptance of international law by the Soviet State.

This acceptance, however, is not complete. For example, Kojevnikov, a leading Soviet jurist who is now the Soviet judge on the International Court of Justice, wrote in 1948:

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

Yet Soviet writers, generally speaking, are cold to the idea that there are two completely distinct bodies of international law, one Soviet and the other capitalist. In this sense, there is no special Soviet international law. What it boils down to is that the Soviets accept international law to the extent that it suits their purposes. Indeed, the Soviet leaders are in a somewhat difficult position. On the one hand, they want to use international law to serve their own purposes. For this reason, they must admit its reality and even try to build it up. On the other hand, they do not want international law to be used against them. The Soviet position is, therefore, ambiguous and highly flexible. Vyshinsky has defined

international law as "the sum total of the norms regulating relations between states in the process of their struggle and cooperation, expressing the will of the ruling classes of these states and secured by coercion exercised by states individually or collectively." Note that "struggle" is put ahead of "cooperation."

What are the Soviet needs served by international law? Let us take our cue from Vyshinsky's reference to struggle and cooperation — in that order.

After a very brief initial period of confident expectation that the workers of the rest of the world would follow the Russian example and put an end to capitalism right away, the Soviet leaders realized that the Soviet and the non-Soviet worlds would coexist for some time to come. The Soviet State found itself in what they call "the capitalist encirclement." The capitalist world was, for the time being, stronger than the Soviet world. There was little or no open warfare between the two — except in part for World War II — but there was a continuing struggle, a struggle for the minds of men, and an expectation of greater struggles to come. The Soviet world, being the weaker of the two, needed time — time to strengthen itself and to weaken the opposition. Under these conditions, the Soviet leaders turned to international law. Weak as it was, it had enough appeal, enough power to influence people, to be a useful instrument of Soviet policy.

First and foremost in the minds of the Soviet leaders was the danger of intervention from abroad against the weak Soviet State. Such intervention, in fact, did take place in the first few years after the Revolution when civil war still raged in Russia. Although the Soviet regime survived, any repetition might be disastrous. Moreover, the Soviet political and economic system was so different from the capitalist system that the Soviet leaders saw danger in any tendency for the capitalist states to have a voice in how the Soviet system should be run. Naturally enough, the Soviets appealed to the time-honored principles of sovereignty,

non-intervention and equality of states. These principles would help them run their own country without outside interference, and, despite their weakness, hold themselves equal to any other state in the world. The Soviets also emphasized their opposition to forcible annexation of foreign territory.

The principles of sovereignty and non-intervention continue to serve the purposes of the Soviet policy to this day. For example, when the United States recently brought up for discussion the problem of the Soviet satellites in Europe, the Russians said that such discussion would amount to intervention in the affairs of sovereign states. The principle of non-intervention has been appealed to again and again — for example, during the Spanish Civil War, to mobilize public opinion against the German and Italian help to Franco; and, more recently, in denunciations of the help given by the United States to the foes of Communism in China, Korea, Guatemala and other countries.

The need of the Soviet leaders to protect themselves against capitalist interference is also reflected in various corollaries of the principle of sovereignty. For example, the Soviets like to stress treaties rather than custom as the chief source of international law. A treaty is not binding on them unless they choose to ratify or otherwise accept it, while a custom — which may have been formed long before the Russian Revolution — might be held binding on the Soviet Union even if it did not manifest its acceptance. Similarly, the Soviets take a generally negative attitude toward any device whereby any decision binding on them could be made without their specific consent. They oppose all proposals to give any international organization the power to make decisions on any matter of importance by a majority vote, unless they retain a veto power, as in the United Nations Security Council. As suggested by the quotation from Litvinov, with which I opened my talk, the Soviets are skeptical of the value of arbitration in the settlement of their disputes with other states, although in all fairness it must be pointed out that they offered to arbitrate

two disputes with the British in 1923 and 1924, and that the offer was ignored. Although the Soviet Union is a party to the Statute of the International Court of Justice, and a Soviet national is one of the judges, the Soviets have not agreed to accept the compulsory jurisdiction of the Court under Article 36 of the Statute and have invariably declined all offers to submit their disputes with other countries to the Court. In fact, they take pains to attach to multilateral treaties to which they are parties reservations against the submission of disputes arising under those treaties to the International Court. The specific reasons for this attitude are not hard to find. True to their conception of law, the Soviets do not regard the Court as standing above politics, but rather as a body in which the interests of the capitalist states — from which most of the judges come — are bound to prevail. Soviet writers, in fact, do not hesitate to impute political motives to the judges, and often speak of an Anglo-American majority on the Court. In short, the Soviets are generally not willing to submit themselves to majority or third-party decisions lest such decisions be used by the capitalists to the detriment of the Soviet State.

Basically, for the same reason, the Soviets oppose proposals to give to individuals any effective rights in international law. Soviet writers, in fact, refuse to recognize individuals as subjects of international law. If individuals had such standing, the capitalist states would have a pretext for interfering with the control which the Soviet leaders exercise over their own people.

The Soviets like to exercise their territorial sovereignty with as few restrictions as possible. They deny, for instance, that foreign warships have a right of innocent passage through territorial waters — a point still unsettled in the West — and refuse to enter into any general agreements permitting foreign aircraft to fly over Soviet territory.

Another international law principle which the Soviets have stressed as a means of self-protection is the principle of nonaggression. Before World War II, the Soviet Union negotiated

a number of treaties with neighboring states defining and forbidding aggression. In the League of Nations, the Soviet representatives were loud in their denunciations of the aggressions committed by the Japanese, the Italians, and the Germans, and in the protestations of the peaceful intentions of the Soviet Union. This policy produced considerable goodwill for the Soviets in the democratic countries at that time. Since World War II, the Soviets have participated in the trials of the major German and Japanese war criminals, and have been recently insisting on the adoption by the United Nations of a definition of *aggression.*

The interest of the Soviet leaders in the protective function of international law is also reflected in the laws of war. Two distinctive Soviet positions may be mentioned here: (1) the Soviet espousal of the lawfulness of guerrilla warfare behind the lines, and (2) the denunciation of weapons of mass destruction such as atom bombs and germ warfare. So far as guerrilla warfare is concerned, the Soviets appear to be conscious of its usefulness in case of a foreign invasion of the Soviet Union, which was in fact demonstrated in World War II, as well as in civil wars and anti-colonial revolts in other countries. We all know the success with which the Communists have used guerrillas in China, Vietnam, and other places. The Soviet writers maintain that guerrillas are lawful belligerents, apparently drawing the conclusion that they are entitled to be treated as prisoners of war. The Soviet denunciations of the weapons of mass destruction may be attributed in part to consciousness of the fact that at this time the use of such weapons would not be to the advantage of the Soviet Union and its allies, but they also serve an important propaganda purpose. These denunciations appeal powerfully to the natural revulsion of people everywhere against such horrible weapons as the H-bombs and disease germs, and, particularly, to the weaker or more exposed countries.

This brings me to another point. The Soviets use the slogans of international law only to help prevent measures which threaten

their own security or freedom from outside interference. They use them to stir up resentment against their opponents and to attract support. We all recall the great propaganda campaign against the alleged American resort to bacteriological warfare in Korea. The principles of sovereignty, non-intervention and equality of states have been constantly invoked by Soviet spokesmen and propagandists in their attacks against the United States. For example, the Marshall Plan, NATO, and American bases abroad have all been denounced as violations of the principles of sovereignty and equality, and as devices through which the United States interferes in the affairs of other states. Furthermore, Soviet writers and spokesmen invoke the principle of self-determination as if it were an accepted principle of international law to stir up colonial and minority peoples against their rulers — and, in so doing, undoubtedly gain the sympathy of many such peoples. The laws of war are appealed to in denunciations of alleged atrocities by troops fighting against the Communists, as in Korea. The use of international law slogans as a psychological weapon became particularly intense at the height of the cold war, during the conflict in Korea. Since the death of Stalin and the end of the Korean conflict the tone of Soviet propaganda has moderated, but international law is still drawn upon heavily.

You may ask whether the espousal by the Soviets of such principles as sovereignty, non-intervention, non-aggression and self-determination does not hamper the Soviets themselves in the achievement of their aims. But it is clear that the Soviets, who regard international law as an instrument of policy and who recognize it because it suits their purposes, would not let it stand in the way of achievement of important policy aims. Soviet officials, it is true, never openly deny that international law exists or that it is binding on the Soviet Union. There are several ways, however, of preventing international law from interfering with Soviet policy. One way, as I have already indicated, is to reject explicitly certain of the rules as unacceptable to the Soviet State and to insist on certain new rules. There are other, and probably

more effective, ways. Many of the rules of international law are vague and uncertain, leaving much room for interpretation. Not infrequently there are contradictory precedents and authorities to choose from. As Professor Hazard says, "Soviet authors and statesmen pick and choose among the precedents to meet their needs, and they do so quite openly." The Soviet approach to international law, it must be repeated, is very flexible. Kojevnikov, in his 1948 book, emphasizes that international law must not be interpreted in an "abstract dogmatic" fashion. In fact, the principles the Soviets profess to espouse do not deter them from pursuing policies in apparent conflict with these principles. The principle of non-intervention, for example, has not prevented the Soviets from giving aid to subversive movements and Communist guerrillas abroad. Or, take the matter of non-aggression. As I have already pointed out, the Soviets profess to be unalterably opposed to aggression; they make non-aggression pacts; they are also said to oppose annexations and to favor self-determination. When the time came, however, this did not stop them from taking aggressive action against their neighbors, such as Poland, the Baltic States and Finland, with all of whom they had non-aggression pacts.

The principle of non-aggression, furthermore, should be compared with the definition of just and unjust wars laid down in 1938 by Stalin himself and faithfully repeated by Soviet writers. Listen carefully to this definition: "Just wars — wars that are not wars of conquest but wars of liberation, waged to defend the people from foreign attack and from attempts to enslave them, *or to liberate the people from capitalist slavery*, or, lastly, *to liberate colonies and dependent countries from the yoke of imperialism*, and Unjust wars — wars of conquest, waged to conquer and enslave foreign countries and foreign nations." It is hardly open to doubt that this Stalinist doctrine of just war will be used to justify any war the Soviet leaders choose to wage. Furthermore, there are indications in Soviet literature that only those who are fighting a so-called just war will be regarded as entitled to the

full benefits of the laws of war. For instance, guerrilla warfare seems to be regarded as lawful only when waged as part of a just war. This is an important point to remember. In fact, the doctrine of just war may be the key to the full understanding of the Soviet conception of international law. It takes us back to the Communist conception of morality. Only he who wages a *just* war, or a *just* struggle, has any rights. And the Communists regard their struggle against capitalism — whether or not it takes the form of open war — as just. Therefore, anything goes in the struggle against capitalism.

Soviet spokesmen and writers never tire of proclaiming that the Soviet Union faithfully observes all treaties concluded by it on a basis of freedom, equality and reciprocity. That the Soviets do attach some importance to the observance of treaties would seem to be indicated by the fact that they frequently take pains to protect legally their freedom of action on particular points by making express reservations. In other words, the Soviet leaders prefer to avoid situations in which their treaty obligations might come in obvious conflict with their policies. It has also been noted that the more specific and clear the treaty obligation is, the less room there is for divergent interpretations — the less likely are the Soviets to violate it. Yet, the record of observance by the Soviets of their treaty obligations, particularly in matters of political importance, has not been such as to inspire general confidence. Even allowing for reasonable differences in interpretation and for the uncertainty of the rules of international law concerning termination of treaties, the behavior of the Soviet Union has given the impression that its promises are not to be trusted. I have already referred to the non-aggression pacts which did not prevent the Soviets from invading or coercing certain of its neighbors. Certainly the failure to withdraw troops from Iran after the end of hostilities in World War II was a clear violation of a treaty obligation. The Soviets have failed to keep many promises not to support subversive activities abroad. The United

States felt compelled to protest in 1935 against the Soviet violation of such a promise less than two years after it had been given. Soviet behavior in Eastern and Central Europe after World War II has been generally regarded in the West as not in conformity with the agreements at Yalta and Potsdam. Many other examples could be given.

There is still another device which helps the Soviet Union to get around international law and which cannot be left out of any realistic account of Soviet behavior. This device is misrepresentation of the facts. This seems to be the standard device, for example, in justifying the Soviet role in border incidents. It is always the American or other foreign airplane that invades Soviet territory and starts shooting. And you may recall the Soviet version of how the conflict in Korea started in 1950 — it was the South Koreans who attacked first. This device is also frequently used when the Soviets are charged with promoting subversion abroad. The facts are simply denied.

So far, I have talked primarily of the use of international law in Soviet policy as a weapon in the struggle against the so-called capitalist encirclement. The picture is not encouraging. You will recall that Vyshinsky in his definition of international law mentioned cooperation as well as struggle. The Soviet leaders recognize that a period of coexistence with the capitalist encirclement may last for some time to come. During this period of relatively peaceful relations it may be, and often has been, to the advantage of the Soviet State to cooperate with the capitalist states for various purposes. In fact, the building up of the economic and military power of the Soviet State, particularly in the early days, required commercial and other economic relations with the outside world, and the avoidance of excessive friction which might lead to open warfare. Participation in international organizations of political, as well as technical, character has also been deemed necessary in the interests of the Soviet State. Finally, on occasion the Soviet State found itself allied with some capitalist

states against common enemies, as was the case during World War II. International law has been recognized by the Soviet leaders as a useful device for the facilitation of peaceful and cooperative relations with the outside world when Soviet policy calls for them.

As a matter of fact, there has been a considerable measure of routine observance of international law by the Soviets. For example, aside from certain claims to territorial waters, about which I shall speak later, the Soviets have by and large respected the principle of the freedom of the seas. Despite occasional incidents involving foreign diplomatic personnel in Moscow, the Soviets have observed the generally recognized rules of diplomatic privileges and immunities sufficiently well to enable them to maintain diplomatic relations with most capitalist states. Before World War II, thousands of foreign technicians worked in the Soviet Union, helping to develop Soviet industry. Again, with some exceptions, the Soviets treated these foreigners in accordance with recognized international standards. The Soviet record of observance of non-political commitments — for example, commercial agreements and technical arrangements — has been appreciably better than their record with respect to political treaties, such as non-aggression pacts. During World War II, the Soviets generally honored their strictly military commitments to their allies. All of this indicates that the Soviet Union is perfectly capable of observing international law when its leaders believe it to be in their interest.

Yet, it must be noted that Soviet writers have on occasion stated that cooperation with the capitalist world is itself a form of struggle.

At this point, I should like to mention some distinctive factors other than Communist ideology that enter into the Soviet interpretation and application of international law.

First, the nature of the Soviet political and economic system. This system, to be sure, is in large part an outgrowth of Soviet

ideology; but, once established, it acquired a life of its own and its own needs which may persist even if the ideology is changed or no longer taken seriously.

One of the features of the Soviet system is the totalitarian control of the population by the government. This control, for full effectiveness, requires a limitation on the contacts of the Soviet population with the outside world; it requires a monopoly of the information which is allowed to reach the people. This is an important source of the restrictions placed on the travel of Soviet citizens abroad and of foreigners in the Soviet Union, as well as such devices as the jamming of foreign broadcasts. It also accounts in part for the refusal to recognize individuals as having rights in international law, and the reluctance of the Soviets to enter into any agreement whereby they would be required to permit free entry to foreign nationals or officials. It has possibly entered into the Soviet coolness toward disarmament control plans which involve wide travel in the Soviet Union by foreign inspectors. The totalitarian controls and the restrictions on contacts with foreigners tend to distort even the information available to the leaders themselves; they prevent full understanding of the reactions to Soviet policies abroad; and they interfere with the development of any non-official concensus between Soviet citizens and foreigners even on the professional level of international law. The complete governmental control of all economic activity, particularly that involving foreign trade and shipping, means the absence of private economic interest groups which in the West have had a lot to do with the development and enforcement of certain international law standards and institutions. All of this tends to set the Soviets apart from the main stream of world thinking and feeling, and accentuates the peculiarities of the Soviet approach to international law.

The Soviet state monopoly of foreign trade and shipping has, indeed, direct effects on the Soviet interpretation of international law. Since all Soviet trade is conducted by government

agencies, the Soviets steadfastly uphold the traditional principle that governments and their property are immune from the jurisdiction of foreign courts even when engaged in ordinary commercial activities abroad. This principle is being increasingly questioned and modified in the non-Soviet world. The Soviets also insist that their trade representatives abroad are entitled to diplomatic immunities. As suggested by Professor Hazard, this may have other than a commercial objective, since immunity facilitates espionage and subversive activities; nevertheless, a number of European and other non-Soviet states have agreed to accord immunity to such representatives, since Soviet foreign trade is a state monopoly, and foreigners, if they want to do business with the Soviets, have no choice but to deal with official Soviet agencies.

Another distinctive factor is the geographical position of the Soviet Union. Russia has always been primarily a land power. Its maritime power has been handicapped by the absence of good outlets on the open ocean and the fact that entrances to the seas bordering it are largely controlled by other nations. Naval power has more often figured in history as a means of attack on Russia rather than as an instrument of aggression on Russia's part. There are, furthermore, valuable fisheries off the coasts of Russia. All of this makes it natural for Russia to try to extend its territorial waters as far as possible through various devices, and to gain control of the entrances to the seas bordering it. A tendency to extend the Russian territorial waters to twelve miles, instead of the three miles favored by the major maritime powers, appeared already before the Revolution, although it was manifested in the form of claims of jurisdiction for customs and fishery control rather than in terms of outright sovereignty. The Soviets inherited and strengthened this tendency. Although Soviet statutes do not seem flatly to assert Soviet sovereignty in a zone twelve miles wide — speaking rather in terms of control for security and other purposes — there can be little doubt that the Soviet Union does claim today a 12-mile zone of territorial waters. In all fairness, it should be noted that this claim seems modest in comparison with

the 200-mile claims recently made by some Latin American States. Nevertheless, it has been a cause of frequent controversies with other powers, including the United States, the United Kingdom, Japan and the Scandinavians. The Soviet Union maintains that each state may fix the width of its territorial waters in the light of all the attendant circumstances.

A further example of the tendency to extend Soviet territorial waters may be seen in the statements of Soviet writers that four seas bordering the Soviet Union on the north — the Kara, Laptev, East Siberian and Chukot (or Chukchi) — are in reality territorial bays; that is, a part of Soviet inland waters, rather than high seas. There is a hint that the same principle may apply to the Sea of Okhotsk. As yet, there seems to have been no occasion on which the Soviet government made such claims officially. The White Sea, however, is definitely treated as a part of Soviet inland waters.

Another claim made by Soviet writers and apparently espoused by the government is that certain seas bordering Russia are closed seas, because they do not constitute waterways used for navigation other than that to and from the littoral states and, therefore, navigation on them is of concern only to the latter, which are entitled to regulate it in their own interests even to the point of forbidding access to outsiders. This concept of the closed seas, which should be distinguished from that of territorial waters, is novel in modern international law. The Black Sea and the Baltic Sea, as well as the landlocked Caspian Sea, are regarded by Soviet writers as closed seas. Recent reports indicate that the Soviet Union has proposed to Japan that the Sea of Japan should be declared a closed sea, on which navigation by warships of outside powers would not be allowed. The Sea of Okhotsk, if not claimed by the Soviets as a territorial bay, might also be regarded as a closed area.

As yet, the Soviet concept of the closed sea does not seem to have had much practical effect. Russia, however, has always

been interested in the control of the Turkish Straits leading to the Black Sea. Although the Soviets are a party to the Montreux Convention of 1936 on the Regime of the Turkish Straits, they have not been entirely satisfied with it, since it does not completely bar the Black Sea to the warships of outside powers and places some restrictions on the passage of warships of the Black Sea powers, entrusting Turkey with the enforcement of its provisions. The Soviet Union would like to amend the convention to remove these objectionable features. It would also like to control the Straits itself. At present, three of the four Black Sea powers — the Soviet Union itself, Rumania and Bulgaria — belong to the Soviet block. Soviet proposals to give the control of the Straits and of the navigation of the Black Sea to the Black Sea powers would, therefore, give the Straits the preponderant influence.

Another consequence of Russia's geographical position is her espousal of the so-called sector principle in the Arctic. This principle, invoked by the Russian government before the Revolution, would permit Russia to claim all the islands in the Arctic Ocean up to the North Pole, including those not yet discovered or possessed, within the limits of a sector — like a slice of a pie — defined by the meridians at the two opposite extremities of the Russian territory bordering on the Arctic. Canada also favors the sector principle, although it has maintained it less bluntly. You can easily see why both Russia and Canada are in favor of it. Although the sector principle cannot be said to have obtained general recognition, the Soviet Union does in fact control virtually all of the islands claimed by it. Since there seems to be no additional land to be discovered, the sector principle has ceased to be much of an issue so far as lands in the Arctic are concerned. There has been a tentative suggestion in the Soviet literature, however, that the sector principle should be extended to cover not only land but water and the air space as well, making the Arctic Ocean all the way to the Pole a part of Soviet territory. Some Soviet writers have also claimed ice fields within the sector. There

is no definite indication as yet that the Soviet government is preparing to make such claims official.

Although the Soviets favor the sector principle in the Arctic, Soviet writers deny that it applies in the Antarctic, citing the differences in the geographical situation. The Soviet Union has made no formal claims to any territory in the Antarctic, but has insisted that Russian discoveries in that region in 1819-1821 entitle it to a voice in any general settlement of the problem of the control of the Antarctic, and has protested against the claims of some other states.

Although the Soviet interest in the extension of territorial waters, the concept of the closed seas, the sector principle in the Arctic, and related matters, is largely determined by the geographical position of Russia, and is a traditional Russian interest not related to Communist dogma, it is heightened by the Soviet ideology of hostility to the outside world and the needs of totalitarian controls. The Soviet position on these matters is obviously related to the security of the Soviet State, living in a hostile environment, against any attack or interference from the outside. Should Soviet ideology be eliminated, it may be expected that any government of Russia will continue to favor the twelve-mile zone and the sector principle, but possibly with less vehemence.

Under what conditions may we expect the Soviet Union to observe international law? And what of the future?

Before attempting to suggest any answers to these questions, I should like to compare briefly the Soviet attitude toward international law with the attitudes in the non-Soviet world. This will give us a better perspective.

Many aspects of the Soviet attitude find a counterpart in the non-Soviet world. Surely it would be ridiculous to assert that in the non-Soviet world international law is observed with perfect regularity; that treaties are always kept; that expediency never

enters into the interpretation and application of international law; that international law is never used for propaganda purposes; or that facts are never misrepresented. Indeed, there is a strain in Western thought, going back at least to Machiavelli, which would make expediency the sole basis for the observance of international obligations. As you may recall, Machiavelli said that a prince should not honor his promises if it is to his disadvantage to do so. In more recent times, the same kind of attitude has given rise to the idea that raison d'etat, necessity or self-preservation — often very broadly interpreted — justifies a state in doing anything. Furthermore, there is a school of thought in the West that advocates flexible interpretation and application of international law, pointing out that rules of law are not absolutes that have to be obeyed for their own sake; that they are means to some end, instruments of policy, and that they should be so interpreted and applied as best to achieve desirable results. In the absence of universal agreement on the values and goals to be served by the rules of law, this idea, meritorious though it may be in principle, often means that a decision-maker feels free to interpret international law flexibly to serve the purposes he happens to favor. There are also people who deny the reality of international law.

Am I trying to say there is *no* difference between the Soviet and the non-Soviet attitudes toward international law? Not at all; there are very important differences, but we should understand their nature and sources.

First of all, in the non-totalitarian West, side by side with the idea that the observance of law is a matter of expediency, there has always been another idea — that observance of the law is a moral obligation, that law and morality have objective validity, and that they lie at the very foundation of civilized existence. There is a tradition of respect for law that carries over into international affairs. The overall Western attitude toward international law is a composite, a blend in varying proportions, of these two principles — the principle of expediency and the principle of moral

obligation. Communist ideology, on the other hand, leaves no room for a feeling of moral obligation to observe the law when its observance is not expedient for the Soviet State. In fact, the very existence of objective and universally binding moral principles is denied. This difference is accentuated by the absence in most of the non-Soviet world of totalitarian controls and forced conformity to any single ideology. In the Soviet State, ideas contrary to those favored by the leaders cannot be publicly expressed; on the surface, Communist ideology, the ideology of expediency in international relations, reigns supreme.

Probably even more important is another difference. As I have previously indicated, Communist ideology means that the Soviet Union regards all of the non-Soviet states as basically its enemies. Peaceful cooperation is bound to be temporary and for limited purposes only. It is expected that eventually Communism will prevail over all its enemies and so-called peaceful coexistence will come to an end. It is this sense of basic hostility and the temporary nature of any accommodation that distinguishes most profoundly the underlying Soviet attitude toward international relations, including international law. Without it, incidentally, there would be less incentive for the Communists to reject universal, reciprocally binding, moral principles. In the non-Soviet world, no such feeling of ineluctable and lasting hostility normally enters into relations between different states. In fact, most of the states of the world have an expectation of friendly and lasting coexistence with most of the other states. This is often true even when they go to war with each other — the war is regarded as a temporary condition which does not necessarily mean undying hostility between the two nations. In the relations between non-Soviet states, therefore, even though expediency be the underlying principle, much greater value is apt to be put on reasonably faithful observance of international law as a condition of stability and orderly coexistence. The long-range value of good faith is apt to be better appreciated.

Differences between the Soviet and the non-Soviet economic systems are another factor. They reduce still further the element of a community of interest as a foundation of international law.

In the light of the foregoing, under what conditions can we expect the Soviets to observe international law?

The obvious answer is that the Soviets will observe international law when it is to their advantage to do so. The question, then, is *when* is it to their advantage? I have already given some partial answers to this question. Immediate advantages do flow to the Soviets from the observance of international law on their part in a variety of situations.

First of all, unless the Soviets are prepared to go to all-out war with the rest of the world, it is to their advantage to observe international law to the extent necessary to avoid excessive friction with other nations. Here is where the rules of territorial sovereignty, jurisdiction, freedom of the seas, treatment of aliens, and the like — as well as treaties dealing with these matters — come in. The Soviet Union normally does observe fairly well many of these rules.

Second, reciprocity and retaliation play a part in the observance of international law. To the extent that limited coopration with non-Soviet countries is desired by the Soviet Union, it is likely to observe reasonably well the rules governing such cooperation. There is no guarantee, however, that a shift in Soviet policy may not at any time put an end to the Soviet interest in the observance of any of these rules. Fear of retaliation is another factor which may be expected to induce the Soviet Union to observe international law. This may be true, for instance, with regard to the laws of war.

Third, the Communist leaders are by no means unmindful of world public opinion — or of public opinion in the countries with which they want to deal. A striking confirmation of this

fact can be seen in the recent agreement of the Bulgarian Communist government to pay damages for the shooting down of an Israeli airliner and to punish those responsible for it. Many observers have noted that the Soviets are less likely to violate a treaty if it is specific and unambiguous. This is another confirmation of the value of public opinion. The Soviets try to avoid committing clear violations which would shock public opinion.

These factors may be called the short-range advantages to the Soviets of the observance of international law. To the extent such factors work, international law does make a difference, even though we cannot rely on the Soviets carrying out their obligations in good faith. The treatment of the prisoners taken by the Communists in Korea, bad as it was, might have been even worse if there had been no international standards at all.

Communist ideology, as I have indicated, minimizes the long-range value of the observance of international law, since Communists do not believe in lasting coexistence between the Soviet and the non-Soviet worlds. Yet, it is not inconceivable that this may change. If Soviet leaders become convinced that the so-called capitalist world is here to stay, they may come to appreciate the advantages of stability and good faith. Such an evolution may be helped along by greater contacts with the outside world. In short, Soviet leaders may come to redefine their interests. Communist ideology will certainly hamper such a reappraisal of the Soviet position in the world; but it may not prove to be an insuperable obstacle. The doctrine of the implacable hostility of the two worlds may be reinterpreted or quietly given up as an effective guide to policy. Perhaps it has already been given up in Yugoslavia by the Tito Communists. As Toynbee has pointed out, this has happened to the Moslem doctrine of the holy war against the infidels, which no longer stands in the way of peaceful relations between Moslem and Christian nations. Reinterpretation of ideology is not new in Communist history.

Indeed, although I have stressed ideology as an important factor in Soviet policy, the precise role of Soviet ideology has long been a subject of controversy in the West. Some observers are inclined to believe that ideology is an instrument rather than a determinant of Soviet policy. I happen to believe that ideology *has* exerted a substantial influence on Soviet policy. But it may not be the decisive factor. When we deal with human emotions and motivations, we are pretty much in the dark. The personality factor should not be discounted. Stalin ruled as a dictator for some twenty-five years, and Soviet policy could not but reflect his personality. We cannot tell as yet what influence ideology will have on the policies of the new generation of Soviet leaders now coming to power. Should the idea of lasting hostility between the two worlds be given up, fairly stable relations under international law may be established even if the principle of expediency continues to prevail, provided that the interests of the Soviet State are defined moderately and intelligently.

If there is any hope at all that the Soviet leaders, present or future, may develop a more constructive attitude toward international law, what policies of the non-Soviet world are likely to assist in this process?

First, the Soviets must be continually impressed with the strength and stability of the so-called capitalistic world. This means that we — i.e., the whole non-Soviet world, not just the United States — must not only remain strong militarily, but must have a rate of economic development and general progress at least equal to that of the Soviet bloc. At the same time, we must continue to make it plain that we are men of peace and that we are *not* opposed to genuine peaceful coexistence with the Soviet bloc if the Soviet leaders make it possible. We should also try to break down the intellectual isolation of the Soviet countries by encouraging their contacts with the non-Soviet world.

Second, our agreements with the Soviet Union and its allies should be so designed that it will be to their own continuous

advantage to keep them. Indeed, this is a good principle to be followed in all international negotiations. As Professor Briggs has well said, "the treaties most likely to be observed are those which recognize and develop within a legal framework a positive mutuality of interests." The making of such treaties obviously requires much wisdom and skill. It is also wise to make all agreements with the Soviets in writing, and as clear and specific as possible.

Third, it should be our normal policy to interpret international law fairly and to apply it in good faith. Indeed, if the non-Soviet nations should cease to take international law seriously and get into the habit of manipulating it for immediate advantage, why should the Soviets behave differently? Such behavior will merely confirm their belief that law is an instrument of policy cynically used by the capitalists for their own gain. The only way to teach the Soviet leaders the value of international law is for us to practice it. If, by way of exception and for our self-preservation, we are compelled to depart from law, we should make it clear that the behavior of our adversaries leaves us no choice.

Fourth, we must react firmly and vigorously against all clear violations of international law to our detriment. International law itself provides for measures of retaliation and reprisal — not necessarily armed reprisals — against its violations. We should use all suitable means to prove that violations of international law do not pay; and that good faith does pay.

BIOGRAPHIC SKETCH

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Professor Lissitzyn attended Columbia University, where he received his B. A., LL. B. and Ph. D. degrees. Prior to World War II, he was Assistant Reporter on the Law of Neutrality, Harvard Research in International Law (1937-1939). He was also a Research Fellow, Council on Foreign Relations, from 1939 to 1940.

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Professor Lissitzyn is a member of the board of Editors, *American Journal of International Law;* Executive Committee, American Branch, International Law Association; Honorary Fellow and Vice President, Consular Law Society; Editorial Advisory Board, *Journal of Air Law and Commerce.* He is the author of *International Air Transport and National Policy* and *The International Court of Justice.*

THE GENEVA CONVENTIONS OF 1949

A lecture delivered
at the Naval War College
on 16 September 1955 by
Mr. Richard R. Baxter

The Geneva Conventions of 1949,[1] like other treaties concerning warfare, are grounded in the concept of a hard, clean war. In 1863, Lieber wrote in General Orders No. 100, the first modern codification of the law of war, "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief." I venture to suggest that this express statement, which was inserted in a code of the law of war drafted over ninety years ago, continues to be one of the implied assumptions of the modern law of war.

The law of war is itself a compromise between unbridled license on the one hand and, on the other, the absolute demands of humanity, which, if carried to a logical extreme, would proscribe war altogether. Stated in other terms, the law seeks to limit the measures of war to those which are necessary and to curb those activities which produce suffering out of all proportion to the military advantage to be gained. The Geneva Conventions, which comprise, at least in land warfare, the most important segment of the law relating to the conduct of war, have drawn the line between necessary measures of war and unnecessary suffering in terms of people. The Conventions are designated, as you have seen from the copies you have read, as being "for the Protection of War Victims." The victims who are protected are the wounded and sick in land warfare, the wounded, sick, and shipwrecked in warfare at sea, prisoners of war, and civilians. These four categories share one essential characteristic: they all consist of persons who have been put out of action or who, as noncombatants, do not take part in hostilities. Those who have been put out of action are the wounded, the sick, the shipwrecked, and

the soldiers, sailors, and airmen taken as prisoners. The noncombatants are the medical personnel and the chaplains in the armed forces and the civilian population, or at least that portion of it which takes no part in active hostilities. The four classes of persons protected by the four Conventions also possess the common characteristic of being individuals with whom the enemy comes face to face, as the line of battle moves on. Fundamentally, the Conventions deal with the safeguarding of people, not in the heat of battle, but as conditions become somewhat more stabilized — when territory is occupied, when soldiers are taken as prisoners and put in prisoner of war camps, when the wounded are picked up and evacuated to hospitals. The Conventions contain no provisions about the types of weapons which may be employed or the use which may be made of them; they make no reference to nuclear weapons, to bacteriological warfare, or to chemical warfare. They say nothing about the waging of hostilities against the enemy forces. Of course, in order to take care of these victims of war, the Conventions must have application to certain situations while combat is still in progress, but the overwhelming majority of their provisions relates to conditions which, if not necessarily tranquil, are considerably more ordered than those of the battlefield. The compromise between decimation and absolute humanity, to which I referred a few moments ago, is, we can now observe, based on the considerations that the mistreatment of those who do not or cannot longer take part in hostilities confers no real military advantage and the humane treatment of these individuals will not stand in the way of an aggressive pursuit of victory. Indeed, the fair treatment of victims of war may in itself be militarily advantageous.

The Geneva Conventions of 1949 are at once old and new. They are old in the sense that they are outgrowths of earlier treaties dealing with the same subjects. The United States was in 1949 already a party to Convention No. IV of the Hague of 1907[2] regarding the conduct of warfare on land, which contains provisions relating to prisoners of war, the wounded and sick, and

civilians in occupied territory. We were also parties to the 1929 Geneva Wounded and Sick and Prisoners of War Conventions and to Convention No. X of The Hague of 1907 for the adaption to maritime warfare of the principles of the Geneva Convention of 1906,[3] the predecessor of the 1929 Wounded and Sick Convention. These Conventions had their antecedents in General Orders No. 100, Regulations for the Government of Armies of the United States in the Field, which were promulgated by the United States during the Civil War. This was the first modern codification of the law of war, and the international treaties subsequently adopted owe a considerable indebtedness to this early effort. Historically, the United States has pursued a policy of strict adherence to these international agreements, despite the fact that individuals have from time to time attempted to substitute their judgment of the wisdom of the Conventions for that of their Government. It is important to remember about these earlier treaties, as it is about the Geneva Conventions of 1949 as well, that they are in large measure codifications of customary international law — the common law of war — by which this country would be bound even if it were not a party to the treaties.[4]

Even before the outbreak of the Second World War, it had been recognized, however, that the older treaties were in need of revision in order to accommodate them to changed conditions. These new circumstances were the result not only of changed techniques in the waging of war but also, and perhaps the more important reason, of increased efficiency and ingenuity in the oppression of the victims of war. The events of World War II did no more than confirm these suspicions that the Conventions required tighter drafting, greater precision, changes, and additions in order to spell out a useful code for the conduct of belligerents. In particular, the few provisions regarding civilians in occupied territory which appeared in the Hague Regulations of 1907 and the attempted application of the Prisoners of War Convention of 1929 to civilian internees by analogy seemed altogether inadequate as safeguards for civilians in wartime. Although we have

since lived through the Korean conflict, I think it is fair to say that the problems concerning prisoners of war and civilians which we encountered in these hostilities were merely the counterparts of similar problems faced during the Second World War itself. The mistreatment of prisoners was not invented by the North Koreans in 1950.

While the fighting was still going on in 1945, the International Red Cross had initiated studies of the revision of the older Conventions. Technical meetings were held in that year and in 1946, and a meeting of government experts was convened in 1947. In 1948, the proposed new Conventions were considered by the International Red Cross Conference at Stockholm, and the final stage of the process was the convening of a Diplomatic Conference at Geneva in 1949. The Conference met from April to August of that year and gave the most careful attention to the roughly 400 articles of the four Conventions.[5] The United States had participated in all of the preliminary stages of the drafting and was represented at the Conference by an able delegation, which included a Navy officer. Two of the other members of the delegation, General Parker and General Dillon, subsequently served as Provost Marshals General of the Army and Air Force respectively.

Fifty-nine countries, including all of the major powers, signed the four Conventions at Geneva. Since 1949, forty-eight states have ratified the treaties or acceded to them, including nine of the members of the North Atlantic Treaty Organization. Last year, somewhat to the surprise of those who had been concerned with the Conventions, Soviet Russia and its satellites ratified the agreements, maintaining at that time their reservations, of which I shall have occasion to speak later. Communist China, which is not recognized by the majority of the nations of the world, is, I might add, not a party to the Conventions. The United States was shaken out of its lethargy by this measure, which, of course, may have been taken with a view to demonstrating to the world that

the U. S. S. R. was more willing to undertake humanitarian obligations in war than the United States. The Conventions were considered by the United States Senate in the spring of this year and received its advice and consent by a unanimous vote of 77-0 in July.[6] The United States deposited its instrument of ratification on 2 August. The treaties will come into force as to the United States six months thereafter, or in February of next year.

Our consideration of the contents of these four lengthy treaties is somewhat simplified by the fact that certain articles are common to all four of the Conventions. Two of these articles[7] describe in what instances the treaties are applicable. They apply to "all cases of declared war" or to "any other armed conflict," that is, to undeclared wars or to enforcement actions conducted on behalf of the United Nations, it being understood, of course, that the treaties bind only the states which are parties to them in their relationship with other states which are parties. Because of the possibility that the force displayed in aggression will be so overwhelming that actual resistance will be made impossible or that occupation will be brought about through duress, as happened in Czechoslovakia in World War II, the agreements apply to occupation of the territory of a party even if it meets with no armed resistance. The Geneva Conventions, with the exception of one common article, do not apply to civil war unless the parties to the conflict agree to invoke them. The one exception is a very brief listing in Article 3 of particularly inhumane acts which are prohibited in armed conflicts "not of an international character."

Another group of common articles[8] deals with the activities of the Protecting Power. The Protecting Power is a neutral state which, on an impartial basis, looks after the interests of protected persons — prisoners of war and civilian internees, for example — owing allegiance to one belligerent but within the power of the opposing belligerent. The Protecting Powers furnish, among other services, impartial inspectors and representatives — a type of function for which in these days it is admittedly difficult to

find qualified neutrals. Because, for one reason or another, prisoners often ceased to have the protection of a Protecting Power or one was not appointed by the country from whose armed forces the prisoners came, a provision has been inserted requiring a Detaining Power under such circumstances to obtain a Protecting Power or the services of a humanitarian organization, such as the International Committee of the Red Cross, to look after the interests of the prisoners and other protected persons.[9] To this common article the Soviet Bloc made a somewhat surprising reservation. They said that they would not accept the services of a Protecting Power or humanitarian organization to act on behalf of their personnel held by the enemy unless the designation was approved by them. While the institution of the Protecting Power also benefits the Detaining Power by making it possible to assure the world that prisoners are being treated in accordance with law, the Protecting Power acts primarily in the interest of prisoners and the power they serve. If, because of objections to the designated Protecting Power, the Communist states do not wish such protection for their soldiers in enemy hands, this is their business.

It may cheer some of you to hear that the Conventions make no reference to war crimes — by that name. There was much controversy about this point at the Conference in 1949, and the upshot of it was that each of the four Conventions contains an article specifying certain atrocious acts, such as the torturing of prisoners and civilians, as "grave breaches" of the Conventions.[10] Judicial safeguards are provided for persons charged with such acts.[11] Of course, these specific provisions do not affect the right of a belligerent, under customary international law, to try enemy personnel for war crimes other than "grave breaches" of the treaties.

Now as to the contents of the four Conventions. I shall pass over the first of these, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, which I suspect would not be of particular concern

to you. It contains the familiar stipulations, modified in some respects, about the respect and protection owed medical personnel and establishments, the wounded and sick, and the dead. The Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea is of more immediate importance to the majority of you. The old green and white markings of hospital ships have been replaced by white paint and red crosses on the hull and horizontal surfaces.[12] If hospital ships are to contiuue to receive the protection of the Convention at night, steps must be taken to make these distinctive markings visible, but there is no absolute requirement, for obvious reasons, that hospital ships be illuminated at night. Such ships may be controlled and searched by the parties to the conflict, and commissioners may be put on board to see that measures of control are carried out.[13] Ships carrying medical supplies and medical aircraft are required to be respected by the belligerents only when prior arrangements have been made about their routes.[14] The Convention provides great latitude in the control of these vessels, and I think you will find these provisions quite realistic. Coastal rescue craft were a real problem because of the possibility they would be the means of sending information back to the armed forces they serve. The requirements that such craft be respected and protected was therefore made subject to the limitation "so far as operational requirements permit," thus making it possible, in necessary cases, to take offensive or restrictive action against these boats.[15] The religious, medical, and hospital personnel of hospital ships are not held as prisoners of war but are to be sent back to their own forces at such time as the enemy commander considers it practicable.[16] The wounded, sick, and shipwrecked of a belligerent who fall into enemy hands are prisoners of war.[17] If forces are put ashore, they become subject to the Convention regarding the Wounded and Sick in Armed Forces in the Field,[18] and prisoners of war disembarked come directly under the protection of the Prisoners of War Convention.

Let us now turn to the Prisoners of War Convention. Thanks to the Korean conflict — I must be careful not to call it a war — we have had an oppurtunity to see this Convention in operation and to observe the extent to which it deals with a number of troublesome problems of current importance. Both parties to the hostilities declared that they would apply and abide by this treaty, and you will find specific references to it in the Armistice signed at Panmunjom in 1953.[19] There is thus no reason to doubt that the Geneva Prisoners of War Convention of 1949 was the law governing the treatment of prisoners during that period.

Professor Lissitzyn has already referred to guerrilla warfare as one aspect of the law to which Communists give much attention. A determined effort was made at the Geneva Conference to secure wider recognition for guerrillas, a recognition which would entitle them to be treated as prisoners of war upon capture. As you know, only members of the regular armed forces and of militia or volunteer corps fulfilling certain conditions were, under the law then existing, entitled to receive the protection of the Geneva Prisoners of War Convention of 1929 and other customary and treaty law on prisoners of war. The requirements laid on members of militias and volunteer corps were that they (1) be commanded by a person responsible for his subordinates, (2) wear a fixed distinctive sign, (3) carry arms openly, and (4) comply with the law of war. Those countries in particular which had been occupied during World War II, Communist and non-Communist alike, wished wider recognition of guerrilla forces, the underground, and resistance movements. Because of the obvious danger of the "farmer by day, assassin by night" type, this pressure was resisted by a number of the larger military powers, including the United States, and a comparatively innocuous provision found its way into the treaty. Despite some extravagant claims made for Article 4, it does little to increase the categories of persons who are, as "lawful belligerents," to come under the protection of the Prisoners of War Convention. Members of militias and

volunteer corps now, the new treaty, include members of organized resistance movements, but all of these persons must continue to comply with the four requirements I mentioned a moment ago. It seems improbable that most guerrilla forces or resistance movements will meet these four conditions, for by nature they do not, and indeed probably cannot, comply with the laws of war or even carry arms openly in all cases. Civilians who engage in hostilities will continue in practical effect to be subject to the same deterrent as before — the death penalty. Those who are not commanded by a responsible person, do not wear a distinctive sign, do not carry arms openly, and do not operate in conformity with law are not entitled to prisoner of war standing. Let me remind you, however, that another provision of the agreement requires that if there is any doubt about whether a person is a lawful belligerent who must be treated as a prisoner of war, he must continue to receive the protection of the Convention until his status is determined by a competent tribunal.[20] The Conventions, viewed in the perspective of the Korean experience, thus provide the means of dealing with a firm hand with irregular forces.

"Brainwashing" was a new term to come out of the Korean conflict, but prisoners have been tortured and mistreated before, either in order to gain information or to secure confessions of conduct which never took place. The only information a prisoner is required by law to give continues to be name, rank, and serial number, to which date of birth has now been added. The Secretary of Defense's Committee on Prisoners of War, which recently made its recommendations to Mr. Wilson in a report[21] redolent of the punchy prose of Madison Avenue, agreed, as a matter of policy, that this was the most that an American should say to the enemy. The Convention unequivocally prohibits measures to secure further information:

> "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of

> war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind."[22]

The provision that the Detaining Power is to encourage "the practice of intellectual, educational, and recreational pursuits"[23] certainly does not offer a carte blanche for the indoctrination of prisoners or for the compulsory singing of "Solidarity." You may have heard of the British officer who took the quiz after a Communist propaganda lecture and replied to the question, "What is the highest form of the class struggle?" by writing in, "The highest form of the class struggle is riding first class on a third class ticket."

Starvation of prisoners is, of course, completely out. The old standard was that prisoners had to be fed the same rations as base troops of the Detaining Power. Because of the difficulty American and British persons had with fish-head and rice diets, the duty is now that the prisoners be fed rations sufficient to keep them in good health, without loss of weight. Account is also taken of their habitual diet. Collective disciplinary measures affecting food are prohibited.[24] A provision that all prisoners are to be treated alike, without adverse distinction,[25] seems to me to raise a question about the legality of using adequate rations as an inducement to get prisoners to accept the political beliefs of their captors. The starvation of prisoners and the use of the carrot portion of the "carrot and stick" technique were both unlawful devices used by the Communists. Like the standard of feeding, the standard of housing for prisoners held by the Chinese and Sorth Koreans fell far below that set by law, even if account is taken of the primitive conditions of Korea. Such premises must conform to the housing of troops of the Detaining Power in the same region and must in addition not be damp or otherwise prejudicial to health.[26]

The difficulty which the United States had in getting lists of prisoners and of the dead from the Communists is familiar to you. The Prisoners of War Convention contains admirably detailed provisions on the procedure for getting this information back.[27] Until lists were exchanged in connection with the repatriation of prisoners, the North Koreans had supplied only two lists, covering in all 110 names.

Communist soldiers held by the forces of the Unified Command in Korea presented their problems to us. The unfortunate incident at Koje-do reminded the United Nations Command that it is desirable to maintain order in camps. The Convention provides the means of doing this. If the action which seems desirable is the segregation of the militant faction from the rest of the prisoners, this can be done. Two articles might, on hasty reading, be thought to lead to a contrary conclusion. One of these requires that there be no adverse distinction based on race, nationality, religious belief, or political opinions.[28] The second provides that prisoners must be assembled in camps or compounds according to their nationality, language, and customs and that prisoners are not to be separated from other persons belonging to the armed forces with which they were serving, except with their consent.[29] Now, segregation based solely on abstract political tenets, on whether a prisoner professes to be a Communist Party member or not, is improper, except if desired by one or the other group of prisoners. If belief, however, ripens into overt action — into coercion, physical violence, riots, or intimidation — the segregation which must be effected is not based on political opinions but on conduct and therefore does not fall within the prohibition of the Convention. In any case, it is doubtful whether mere segregation can be called "adverse distinction." The Detaining Power may, moreover, desire to punish certain individuals for violence against fellow prisoners. It may invoke either disciplinary or judicial proceedings, subject to a great range of procedural safeguards written into the Convention.[30] In short, the Geneva Conventions offer no excuse for the existence of disorder in camps.

On the important issue of repatriation of prisoners of war on the close of hostilities, the Senate, in connection with its consideration of the treaties, made it clear that there had been no change in the position of the United States originally taken during the Korean conflict. Article 118, requiring that prisoners "shall be released and repatriated without delay after the cessation of active hostilities" was construed as not precluding a Detaining Power from granting asylum to prisoners who do not desire to be repatriated. The positions taken by the Executive Branch, by the Senate Foreign Relations Committee, and by the Senate during the recent consideration of the treaties are at one in emphasizing that a grant of asylum is fully consistent with Article 118 and other provisions of the Prisoners of War Convention.[31] Since this same view is held by a majority of the members of the United Nations as well, there seems to be no doubt that the principle is fully established in the international law of the West, despite the vigorous dissents of the Communist states.

This brief survey of some of the legal problems of the Korean conflict and of the response of the Geneva Conventions of 1949 to these indicates that the agreements have dealt with the important questions of modern warfare, even modern warfare conducted by barbaric and cruel enemies, and that they have laid down standards on these matters which are reasonable, as well as advantageous to the United States. Let me mention now several further issues which are likely to assume some prominence in a future conflict, especially one with Communist states.

In addition to the Russian and Communist bloc reservation which was mentioned earlier, there are two further such reservations made by all the Communist states. The formula on responsibility for mistreatment of prisoners who had been transferred by one power to another state's custody which was worked out at Geneva was that the state to whom the persons in question were transferred also acquired legal responsibility for their proper treatment. The extent of the transferor's liability thereafter

is to call for compliance with the Convention and for the return of the prisoners if the transferee power then fails to abide by the treaty.[32] The Communist position, expressed in their reservation, is that the transferring state and the state assuming custody should be liable for violations of the Convention. This point is not of great moment, and the Russian position may, in any case, seem more reasonable to you than our own.

The real booby-trap is hidden in a third Communist reservation about war criminals. Here, I must pause for a word or so of explanation. After World War II, military personnel charged with war crimes were not tried under the procedural safeguards of the Geneva Prisoners of War Convention of 1929. You will recall that this question arose in connection with the trial of General Yamashita and that the Government's position in this regard was upheld by the Supreme Court.[33] The new Convention requires that a prisoner of war can be validly sentenced only if the sentence "has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power," which would in our case be the Uniform Code of Military Justice. Article 85 of the Convention stipulates:

> "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."

In short, a prisoner of war convicted of a war crime continues in a prisoner of war status after conviction. Regarding this, the U. S. S. R. and other Communist states stated that they would not consider themselves bound to extend the Convention to prisoners convicted "in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity" and that such persons would be treated like other common criminals. The implications of this statement are obvious. The Communist

states are very favorably disposed toward the doctrine of war criminality. During the Korean hostilities, the enemy informed people taken as prisoners that they were really war criminals but that a liberal policy would be pursued toward them so long as they acted properly. If persons are tried by the reserving states for war crimes and convicted, the reservation means that these individuals may disappear completely from sight. There will be no duty to account for them or to repatriate them. There will be no restriction on the conditions of their confinement, the labor they are required to perform, or on the brutalities to which the Detaining Power may expose them. Indeed, the very fact that conviction means oblivion may very well encourage such prosecutions.

While we are speaking of war crimes, we should note that the articles to which reference has just been made probably preclude new Nuremberg or Tokyo trials of military personnel held as prisoners of war by the United States and charged with war crimes. The reason for this is that if a captured officer, for example, must be tried under the same law and by the same tribunal as an officer of the United States Armed Forces, he must be tried under the Uniform Code of Military Justice. The Code provides no authorization for international trials of American personnel and, notably on questions of evidence, imposes more rigid standards than were applied in the war crimes cases. Whether this change in the law is wise or not I leave it to you to decide.

On the question of the employment of prisoners of war, the Convention contains a new formula which describes the work prisoners can be required to perform,[84] as contrasted with the statement in the 1929 Convention, which stated for what purposes prisoners cannot be used. The new tests are somewhat difficult and unwieldly to apply, since most of them require a determination whether a given type of work has "no military character or

purpose." While the new article seems to be much more restrictive than the old, there is evidence that the Geneva Conference was only attempting, with doubtful success, a more precise formulation of the old standard. Since there is very little guidance of a general nature I can give you on this article, a warning about this possible pitfall should probably suffice. See your lawyer.

Some consideration of the Geneva Civilians Convention really deserves no apology. The Navy has in the past had extensive responsibilities for civil affairs and military government, and many Navy officers have served with Army forces in administering occupied areas. Planners must be aware of our legal responsibilities to the civilian populations we encounter. Many Navy officers ashore, such as port captains, will have dealings with the life of an occupied area.

Prior to the adoption of the Geneva Civilians Convention of 1949, there was only a rudimentary body of law regarding the protection of civilians. There were some stipulations in the Hague Convention No. IV of 1907 regarding warfare on land, dealing with such matters as respect for family honor and rights and with the requisition and seizure of property from the civilian population. When civilians were interned in occupied areas, we considered ourselves under an obligation to apply to them by analogy the provisions of the Prisoners of War Convention of 1929. There was no international law at all about the treatment of aliens interned in the United States. All this is now changed.

The Civilians Convention contains five general sections, each dealing with a different group of people. The first deals with the general protection of populations against certain consequences of war.[35] A second contains provisions common to the territories of parties to the conflict and to occupied territories.[36] The third covers aliens in the territory of a party to the conflict — for example, enemy aliens who find themselves in the United States in time of war.[37] A fourth group of articles refers to occupied territories only,[38] and a fifth consists of regulations for

the treatment of internees, who may be either enemy aliens interned in the United States or civilians interned for security reasons in occupied areas.[39]

The section of the Convention dealing with the "General Protection of Populations Against Certain Consequences of War" might be described as a Wounded and Sick Convention within the Civilians Convention. Provisions are included which would permit the belligerents, by agreement, to establish hospital and safety zones in which the sick and wounded, certain women, and children may be accommodated.[40] Neutralized zones for the accommodation of civilians taking no part in the war may also be established by agreement.[41] This particular provision probably overlaps with the "open city" concept. For the first time civilian hospitals, civilian medical transports and aircraft, and civilian hospital personnel are protected by the Red Cross emblem, and they are granted protection from attack along the same lines as the provisions on military hospitals and medical personnel in the Wounded and Sick Convention.[42] Other stipulations cover the shipment of relief consignments, the care of children, and family correspondence.

The following section,[43] which has application to the territory of parties to the conflict and to occupied territory, is basically a bill of rights for enemy civilians in time of war. "Human rights" is, I realize, a dirty word these days, and I shall therefore refrain from characterizing these provisions as a human rights convention. To some degree, these articles echo the Hague Regulations of 1907. Protected persons are to be humanely treated, without distinction based on race, religion, or political opinion.[44] Coercion may not be used against them to obtain information.[45] Physical suffering, extermination, murder, torture, biological experiments — all familiar with World War II — are forbidden.[46] Collective punishments are forbidden. Pillage is prohibited. Reprisals may not be taken against protected persons and their property,

and the taking of hostages is forbidden also.[47] These curt prohibitions put an end to one of the questions which plagued war crimes tribunals after World War II; that is, whether hostages could be executed. The provision on reprisals, incidentally, has its counterpart in the Prisoners of War Convention.[48] While the prohibitions on reprisals take away one means of securing compliance with the law by the enemy, they likewise remove an excuse upon which belligerents had often relied in the past for flagrant violation of the law.

The section applying to "Aliens in the Territory of a Party to the Conflict"[49] relates to enemy aliens who might be in the United States during a war. Since civil agencies, such as the Department of Justice, are concerned with these questions, I shall pass to the portion of the Convention dealing with occupied territory, a section which is supplementary to the Hague Regulations.

An interesting provision of this section, which finds its source in the openhandedness of the United States as well as in the activities of the Axis occupants, is that requiring the occupying power to ensure the food and medical supplies of the population.[50] The article goes on to say:

> ". . . it (the occupant) should, in particular bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate."

This situation, which on the first reading makes logisticians turn pale, is qualified by the words "To the fullest extent of the means available to it . . .", which, I think you will agree, offers considerable latitude to the occupying power. Certainly the obligation is not an unqualified one, and the article does not require that Navy shipping be diverted from military uses to carry food to foreign civilians.

The provisions on the labor of civilians will be of concern to the Navy in port areas. Inhabitants of occupied territory may

be required to perform only "work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied territory."[51] This formula bears comparison with the provision on prisoner of war labor,[52] of which I have spoken, and a later stipulation on the labor of interned civilians.[53] Deportations and measures designed to induce civilians to work for the occupant are forbidden. So, also, is compelling such persons to serve in the armed forces or auxiliary forces of the occupant and pressure or propaganda to secure even voluntary enlistments.[54]

The occupant is placed under certain obligations concerning the operation of relief schemes for the civilian population.[55] The medical care of the population is to be ensured and maintained by the occupant; civilian hospitals may be requisitioned only temporarily and only in cases of urgent military necessity.[56]

A comprehensive system of judicial safeguards is provided for the occupied area. The occupant may, as customary law had previously recognized, lay down rules for the conduct of civilians, and this new legislation must be published and brought to the attention of the population.[57] There is a somewhat peculiar provision that breaches of these penal provisions may be prosecuted before "properly constituted, non-political military courts."[58] I do not know what a "political military court" would be, but the article does raise some question about the legality in the future of the civilian tribunals we operated in Germany. Imprisonment is the maximum punishment for offenses which are not serious. The death penalty may be inflicted for such acts as espionage or sabotage, "provided that such offenses were punishable by death under the law of the occupied territory in force before the occupation began."[59] The United States entered a reservation on this last provision, because it feared that the last thing a withdrawing sovereign might do, before being driven from its territory by United

States forces, would be to abolish the death penalty. We are therefore not subject to this limitation.

The final substantive section deals with "Regulations for the Treatment of Internees."[60] These are largely an adaption to the particular situation of civilians of the provisions of international law regarding prisoners of war. Despite this general similarity, the differences between the Civilians and Prisoners of War Conventions are sometimes quite striking, and one cannot rely on the general principle that civilian internees and prisoners of war are treated in the same way.

This summary of some of the salient features of the Geneva Conventions of 1949 leaves unsaid a vast amount about the contents of the agreements. It now remains to add a word or so about why the United States is a party to the agreements.

In the first place, the Conventions are largely but a restatement of what has hitherto been the policy of the United States and of what our current practice is. In preparing the Conventions for consideration by the Senate Foreign Relations Committee, we looked into United States practice on each article. In the vast majority of cases, no change in our arrangements seemed necessary. Even if we were to denounce these agreements, we would continue to act in the same way in almost all particulars.

Secondly, the Conventions are non-political, technical, and humanitarian. It is this circumstance that holds out some hope that the agreements will gain acceptance, not just on paper but in men's hearts, in both the Free World and the Communist World. This thought in turn points to the undesirability of trying to work political gimmicks with the Conventions. Here are four international agreements which should be played straight.

In the third place, the existence of an agreed international standard is important from a number of standpoints. We have now a fixed, objective standard against which to measure a possible

enemy's conduct. There can be a dispute about the facts, but there can be very little quibbling about what the law itself is. On the lowest level and from the position of greatest cynicism, we can say that the Conventions are an aid to psychological warfare because they may permit us to charge the enemy with violations of rules to which it has solemnly pledged its word. We might, of course, wish to have had greater certainty on the matters as to which the Communist states reserved. Two of these do not seem to be of major consequence, but the matter of post-conviction treatment of war criminals is very troublesome. Our reaction to these reservations was to propose to agree to disagree on these points, while entering into treaty relationships on all other provisions of the treaties.

It would be improper to hazard a guess about the probability that the Geneva Conventions will be complied with under *all* circumstances by *all* countries. As between the East and West, certain features of the Conventions are inducements to compliance, inducements of those types mentioned by Professor Lissitzyn in his lecture on Monday. The Conventions are precise; if they are complex, it is only because the draftsmen attempted to nail down every possible loose end. They confer benefits, on a basis of reciprocity and equality, on both belligerents. They are accepted specifically by the majority of civilized nations. They are, if administered in an honest fashion, above international politics. They do not, however, guarante compliance any more than do national laws, which may be ineffectual to curb a flood of violations.

If the enemy violates the Conventions, what recourse have we? Reprisals against protected persons are now prohibited, because, as we have seen, they promoted the complete disappearance of legal restraints in warfare, as well as penalized the innocent for the acts of the guilty. However, if the enemy adopts a strained interpretation of a provision in order to diminish the rights of prisoners, there seems to be no legal prohibition on our adopting a like construction. Widespread and flagrant disregard for the

express provisions of the treaties would require the United States to reconsider its position toward the Conventions. While denunciation of the Conventions by a belligerent during hostilities is forbidden,[61] this prohibition cannot grant a license to a belligerent to violate the law while demanding strict compliance from the enemy.

The Geneva Conventions of 1949 will come into force as to the United States early in February of next year,[62] six months after our instrument of ratification was deposited. They will, like other treaties, be as much a part of United States law as the Career Compensation Act or the Uniform Code of Military Justice. Violations of the Convention will be punishable as violations of the Uniform Code of Military Justice.

If respect for human life and the establishment of the rule of law are amongst our long-term objectives, the Geneva Conventions must constitute one step toward these goals, which we and the great majority of states hold in common. If, on the other hand, we reject an honest application of these treaties on the ground that the ends justify the means, we have taken the first step toward the acceptance of Communism and the desertion of our own institutions.[63]

FOOTNOTES

1. The four Conventions, adopted on 12 August 1949, are the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Geneva Convention relative to the Treatment of Prisoners of War, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War. They are re-printed in Department of State Publications 3938 (1950), in Executives D, E, F, and G, 82d Cong., 1st Sess. (1951), and as a Department of the Army

pamphlet. The texts are also reprinted, with some deletions, in 47 Naval War College, International Law Documents 81-218 (1950-51).

2. A condensed text appears in 47 Naval War College, International Law Documents 31-35 (1950-51), and a more complete one in Naval War College, International Law Situations, 1908, at 170-188.

3. Texts, with some omissions, in 47 Naval War College, International Law Documents 36-75 (1950-51), and in Naval War College, International Law Situations, 1908, at 201-210.

4. This was the view of the Nuernberg Tribunal. See Nazi Conspiracy and Aggression, Opinion and Judgment 83 (1947), 45 Naval War College, International Law Documents 281-2 (1946-47).

5. See 47 Naval War College, International Law Documents 5-7 (1950-51).

6. 101 Congressional Record 8537-8552 (daily ed., 6 July 1955).

7. Arts. 2|2|2|2 and 3|3|3|3 (articles common to the four Conventions are listed in this fashion, in the order in which the treaties are listed in note 1 above).

8. Arts. 8|8|8|9, 9|9|9|10, 10|10|10|11, and 11|11|11|12.

9. Art. 10|10|10|11.

10. Art. 50|51|130|147.

11. Art. 49|50|129|146.

12. Art. 43.

13. Art. 31.

14. Arts. 38 and 39.

15. Art. 27.

16. Arts. 36 and 37.

17. Art. 16.

18. Art. 4.

19. Terms of reference for Neutral Nations Repatriation Commission, United States Treaties and Other International Acts Series 2782.

20. Art. 5.

21. POW: The Fight Continues After the Battle 21-22 (1955).

22. Art. 17.

23. Art. 38.

24. Art. 26.

25. Art. 16.

26. Art. 22.

27. Arts. 122 and 123.

28. Art. 16.

29. Art. 22.

30. Arts. 82-108.

31. 101 Congressional Record 8548 (daily ed., 6 July 1955).

32. Art. 12. The corresponding article of the Civilians Convention is Art. 45.

33. In re Yamashita, 327 U. S. 1 (1946).

34. Arts. 50 and 52.

35. Part II.

36. Part III, Section I.

37. Part III, Section II.

38. Part III, Section III.

39. Part III, Section IV.

40. Art. 14.

41. Art. 15.

42. Arts. 18-22.

43. Part III, Section I.

44. Art. 27.

45. Art. 31.

46. Art. 32.

47. Arts. 33 and 34.

48. Art. 13 Prisoners of War Convention.

49. Part III, Section II.

50. Art. 51.

52. Arts. 50 and 52, Prisoners of War Convention.

53. Art. 95.

54. Art. 51.

55. Arts. 59-62.

56. Arts. 56 and 57.

57. Arts. 64 and 65.

58. Art. 66.

59. Art. 68.

60. Part III, Section IV.

61. Art. 63|62|142|158.

62. On 2 February 1956.

63. The literature on the Geneva Conventions of 1949 is already extensive. Two of the best and more readily available articles are Pictet, the New Geneva Conventions for the Protection of War Victims, 45 American Journal of International Law 462 (1951), and Yingling and Ginnane, the Geneva Conventions of 1949, 46 id. 393 (1952).

BIOGRAPHIC SKETCH

Mr. Richard R. Baxter

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

From 1942 until 1954, Mr. Baxter served with the United States Army. He was Chief of the International Law Branch, Office of the Judge Advocate General, from 1953 to 1954. The next year he was Attorney, Office of the General Counsel, Office of the Secretary of Defense. In 1955, he was a Consultant in the Office of the Secretary of Defense.

At the present time, Mr. Baxter is a lecturer on Law and a Research Associate at The Law School, Harvard University.

He is a contributor to the *British Year Book of International Law, Proceedings of the American Society of International Law* and *American Journal of International Law.*

THE STATUS OF ARMED FORCES ABROAD

A lecture delivered
at the Naval War College
on 13 September 1955 by
Lieutenant Colonel Robert C. Grabb, U. S. A.

Admiral McCormick, Gentlemen:

I would like to state at the outset that the speech by the Assistant Attorney General which I have asked to be distributed to you is, to scramble a Pentagon metaphor, a worm of a different color from those to be found in the can I propose to open before you in the next few moments. The paper which you have deals with the international law aspect of the status of forces problem and, inasmuch as this is a week dedicated to international law, I wanted you to have a full exposition of the Executive Branch position in this area. It may be an arguable position, and several Congressmen would be happy to debate it, but I am not going to argue about it. Rather, I'm going to attempt to give you a picture of our criminal jurisdictional situation overseas as it operates in practice. In fact, I'm under the most explicit instructions from your Captain Clay to eschew the theoretical. So —

The question of the status of armed forces abroad presents a problem to the United States only because this era has seen, for the first time, the stationing of our troops on foreign sovereign soil for lengthy periods — in peacetime. The impact of this situation is, of course, greater on the Army and Air Force than upon the Navy, which is more accustomed to sailing foreign seas, and which has fewer personnel ashore. Nevertheless, a multitude of problems confront *all* our forces in the wake of the policy of the United States that the interests of this country are best served with a security system of allied nations, each contributing toward common defense goals and each at the same time remaining politically and economically stable. Because of the independent

political stature of these nations, our armed forces stationed abroad must not be considered as occupying forces — although Communist "Ami, Go Home" propaganda would have the world think so. They are present with the consent of the local government and can legally remain there only with that consent. The rights and duties of our forces in these countries are normally spelled out in *agreements* of varying scope — and it is these status of forces arrangements which I will discuss, with emphasis on problems of jurisdiction.

Our military, air and naval forces are permanently stationed in foreign jurisdiction in several capacities:

First: the Mission groups most frequently found in South and Central America consisting of advisors who remain subject to United States military law and who are subject only in some instances to local jurisdiction. Their privileges and immunities are specified in the various Mission Agreements.

Second: MAAG personnel, functioning under our Mutual Defense Assistance Agreements, who enjoy full diplomatic immunity in some cases, and are subject to the concurrent jurisdiction of the United States and of the local jurisdiction of others. Generally, MAAG personnel are assigned to the United States Embassy and receive privileges of personnel of corresponding rank in the diplomatic mission.

Third: Members of the International Military Headquarters of NATO who receive privileges and immunities as specified in the applicable NATO Agreements, particularly the Headquarters Protocol.

Fourth: Forces in such places as the Ryukyu Islands, which, although *not* United States territory, are subject only to the jurisdictional control of the United States.

Fifth, and most important: Ordinary forces stationed in nations allied with the United States — performing garrison duty,

maintaining defense installations, or performing logistical tasks. The question of the legal status of this largest group — military personnel, civilian employees and dependents — and its relationship to the local authorities is the source of the problem I am to discuss today.

A demand for extraterritorial rights — that is, *complete* immunity from local jurisdiction — is often impossible in light of the extreme sensitivity of the host government towards such arrangements. However, we have been able to secure in some countries — such as the Philippines and Saudi Arabia — the right to use and occupy *specific areas* in a manner that is, in many ways, extraterritorial.

Rights as extensive as these, however, can not always be secured. The spectre of colonialism and imperialism is a frightening one to many of our allies and extraterritoriality is envisaged as a symbol of exploited peoples. *Agreements* guiding the relationship between our armed forces and the authorities of the receiving state are therefore indispensable. These arrangements differ in their details because of varying conditions in host countries. Account must be taken of the number of forces to be stationed, their composition, their particular mission, and the law of the host country. The situation in Italy is illustrative of the necessity for an agreement with the national government. Italy has not ratified the NATO Status of Forces Agreement. As a result, our forces there must operate with informal local agreements which have doubtful standing, and under the law miscreants can, in most instances, expect trial only in Italian courts.

The Status of Forces arrangements which bring some order into this seeming chaos have three principal purposes. They are designed to reduce to the fullest extent possible the administrative burden of the commanders of the forces by limiting local interference; second, to reduce the area of possible dispute with the host countries; and, thirdly, to protect the rights and property of

members of the forces and the inhabitants of the host country. Underlying these purposes is the principle that these agreements must enhance the mission of the forces in the regional arrangement concerned. For example, the forces must be free to move, when required, across national frontiers without undue restriction. This is particularly necessary, of course, in Europe.

Most of these agreements have been negotiated during a period of peace. During time of war, the mission of the forces is of such importance that rights normally considered basic can be surrendered or waived by the host country with no loss of national prestige. An example of this can be seen in the Korean conflict, where an exchange of notes on 12 July 1950 provided that United States courts-martial would exercise exclusive jurisdiction over all members of United States forces for all offenses.

The Status of Forces Agreement, on the other hand, negotiated among the NATO nations, is primarily designed as a peacetime agreement. It contains a provision that upon the outbreak of hostilities its claims provisions will not apply to war damage, and that with 60 days' notice *any* provision of the agreement can be suspended. The Agreement with Japan is similar. Some Forces Agreements include a provision that in the case of war, exclusive criminal jurisdiction for *all* offenses will rest in the United States.

Several jurisdictional agreements have been negotiated within the framework of the North Atlantic Treaty Organization. Three of these were submitted to, and have been ratified by, the Senate. One agreement gives the North Atlantic Treaty Organization a juridical personality and enumerates rights and privileges of the persons attached to the Organization. Generally, international representatives of the internal staff, most of whom are civilians, receive the same privileges as are accorded to similar persons in the United Nations and in the Organization of American States. The second NATO Agreement is the Headquarters Protocol to the Status of Forces Agreement, which gives international military

headquarters such as SHAPE and SACLANT and the Channel Command juridical personality and enumerates the rights and duties of its personnel. The Status of Forces Agreement (in shorthand — NATO SOF) is the third of these NATO subsidiary agreements, and it concerns itself with the rights and duties of the ordinary military forces, the civilian components, and their dependents, and contains extensive provisions guiding the jurisdictional prerogatives of both the sending and receiving states.

While these NATO agreements are more extensive than those which we have negotiated with other countries, they reflect the problems we meet around the world. In summary, the provisions of NATO SOF can be outlined as follows insofar as jurisdiction is concerned:

In a few rare cases the sending state — that is, the United States in the cases of our forces abroad — has exclusive criminal jurisdiction. For example, where an act is a violation of United States law but not of the law of the host country, the United States has exclusive jurisdiction. Conversely, the receiving state has exclusive jurisdiction in some instances. This is over acts which are offenses against the local law but not the law of the sending state. These are generally security offenses, espionage, et cetera.

For the most part, the Agreement provides a system of *concurrent* jurisdiction. This is the nub of the setup. If the offense is committed by a member of the visiting forces and is solely against the property or security of the sending state, or if the offense is solely against the person or property of another member of the force or civilian component or of a dependent of that state, or if the offense arises out of any act or omission done in the performance of official duty, then the jurisdiction of the sending state is deemed primary. They have the first right to try.

In all other cases the host or receiving state has the first right to try, and this category includes the ubiquitous breach of

peace and traffic offense. Once the accused is tried by one state, he can not be tried in the same country for the same offense by the other state. The authorities of the state having the primary right to exercise jurisdiction are required to give "sympathetic consideration" to requests for a waiver of jurisdiction by the other state, in important cases.

In trials before courts of the receiving state, definite rights must be accorded for the protection of the accused. He is entitled to a prompt and speedy trial; he must be informed in advance of the charges against him; he has the right to confront witnesses; he has the right to a competent interpreter and to legal counsel; and, finally, to communicate with his government. In every case arisen so far where a person subject to our military law has been tried in a foreign court, an observer from the armed forces — usually a lawyer — has been present to note the proceedings and render a report. If it is considered that a criminal proceeding has resulted in a denial of justice, or that a member of the forces has not received proper procedural treatment, diplomatic overtures will be made to secure redress. The Senate, in ratifying the Status of Forces Agreement, stated that a waiver of jurisdiction should be sought wherever there is a danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States. If the waiver is denied, the Senate has directed that the commanding officer shall request the Department of State to press the request through diplomatic channels. The Attorney General in the paper before you expresses the view that these criminal jurisdictional arrangements afford the soldier greater protection than he would enjoy without them.

Each of the services maintains an up-to-date record of the actual operation of these criminal jurisdictional arrangements, and reports thereon are rendered regularly to the Congress, which has shown great interest in these treaties and agreements.

There is nothing like a series of scintillating statistics to bring any audience to its knees. Realizing this, I am going to give you only five sets which point up our world-wide experience.

During the period from 1 December 1954 to 31 May 1955, four thousand four hundred and fifty-eight (4,458) persons subject to United States military law were accused of offenses which fell under the jurisdiction of foreign courts. A waiver of jurisdiction was obtained from the foreign authorities in 66.2% of these cases. One thousand two hundred and fifty-eight (1,258) persons were tried by foreign tribunals during this six-months period, and of these only one hundred and forty-one (141) could be considered serious offenders. It is particularly interesting to note that sentences to confinement were actually imposed — not suspended — in only fifty-one (51) cases during this period.

Perhaps the most notorious case seized upon by the press is that of Privates Richard Keefe and Anthony Scaletti. Sad tales have been told of how these lads, engaging in a boyish prank, seized a taxi and went joyriding. For this they were reportedly sentenced to five years in solitary confinement in a small cell in France, where they have been ignored and forgotten by their countrymen.

The facts are somewhat different. Keefe and Scaletti, each of whom had an impressive record of courts-martial, met in a stockade in Germany. After being released from the guardhouse, they went AWOL again into France, got drunk in Orleans, and, deciding to go to Paris, hailed a taxi. Upon leaving Orleans, they stopped the cab and beat and choked the sixty-five year old driver, leaving him beside the road. His injuries were so severe that he was incapacitated for about a month. After this demonstration of boyish glee, Keefe and Scaletti, with the cab, went to Paris, where they were arrested several days later. The French refused our request to waive jurisdiction and Keefe and Scaletti were tried by the Assizes Court in Orleans on 27 October 1953. They were

charged with having stolen a vehicle, during the night, on a public highway, with violence. A French attorney was appointed by the French court to represent them, and they were tried jointly before a jury of seven persons. The French Penal Code provides that one who is guilty of theft under these circumstances may be punished at hard labor for life. Sentences against French persons for offenses similar to that committed by Keefe and Scaletti have ranged from ten years to life, and, even in the light of these sentences, French taxi drivers not long ago staged a nation-wide, one-hour protest strike because of the light sentences given to persons who robbed or attacked cab drivers. Although not required to testify, Keefe and Scaletti confessed their crimes before the French court and were sentenced to five years' imprisonment. This was later reduced by six months and they will be eligible for parole next month, two years later. The American observer at the trial stated that in his opinion the trial was fair and that no rights guaranteed by the NATO Status Forces Agreement, or usually enjoyed under American law, were denied them.

Keefe and Scaletti are presently confined in a French prison, where they are periodically visited by Army authorities. No reason for complaint has been found, and both men recently freely expressed satisfaction with their treatment.

This case had an impact in United States courts because Keefe's wife applied for a writ of habeas corpus. The courts denied release, holding that they had no jurisdiction. Although the courts did not decide on constitutional grounds, they did note that the French proceedings were reportedly fair. The Supreme Court recently denied certiorari.

Thus far, only one case has been reported in which the full formal procedure called for in the Senate Resolution has been invoked; i.e., report to Congress and diplomatic protest. This case arose in France and involved one Private First Class Jerry Baldwin, who was found guilty of an assault upon a French national

by a French court at Orleans on October 7, 1953 and sentenced to pay a fine of 6,000 francs, or about $18.00. In view of the fact that the accused had not been confronted with witnesses against him, as required by the Status of Forces Agreement a protest was made to the French Ministry of Justice. The Ministry accordingly directed that the sentence of the court be appealed by the Public Prosecutor. Baldwin appeared in person at the appeal, represented by a qualified French attorney. No witnesses appeared, and the evidence was presented in the same manner as at the trial; that is, by heresay. Private Baldwin reiterated his denial of the offense charged against him. The Prosecutor failed to advise the Appellate Court of the specific reason for the appeal by the Ministry of Justice, and, since as a rule such appeals are ordered by the Ministry *only* in cases where the sentence adjudged by the lower courts was considered inadequate, the Court of Appeals confirmed the lower court's conviction of Private Baldwin, and increased the fine to 12,000 francs. This bit of confusion thoroughly disconcerted everyone, and a new protest was made to the Ministry of Justice through the United States Embassy in Paris. The Ministry of Justice then remitted the fine against Private Baldwin and instructed the prosecutor to insure the avoidance of similar errors in the future. The French Foreign Office has expressed its regret for the repetition of error on the part of the Appellate Court. Private Baldwin, with his fine remitted, desired that no further appeal be taken.

The effect of a waiver of jurisdiction by the foreign authorities raises one thorny problem which still plagues us. In November, 1953, an Air Force officer was involved in an automobile accident in France and a Canadian officer, who was a passenger in the car, was killed. Pursuant to the request of the appropriate United States commander, French authorities waived their primary right to exercise jurisdiction in this case. Thereafter, following formal investigation under the provisions of Article 32 of the Uniform Code of Military Justice, the "senior officer present" in France delivered a written finding to the effect that there was insufficient

evidence to warrant court-martial action against the officer. Based on this finding, the Air Force officer's automibile insurance company refused the widow's demands for compensation. She thereupon initiated a personal action against the officer, *under the French Code,* which permits its courts to consider an action to adjudicate *both criminal and civil liability.*

The Air Force officer was tried and convicted of involuntary homicide and was sentenced to pay a fine and damages. During the trial, it was argued that France had waived its right to exercise jurisdiction. The court held, however, that the waiver by the public prosecutor did not deprive an individual of his rights under the French Constitution to initiate a personal action against another; that the court must entertain such action and determine both criminal and civil liability; and that waivers of jurisdiction are valid only in cases in which third persons would have no cause of action for civil and criminal redress.

With respect to the double jeopardy provision of the NATO Status of Forces Agreement, the court held that the considerations of the commanding officer and his decision not to court-martial were administrative determinations without judicial significance as they did not put a defendant in jeopardy, and, as such, did not preclude action on the offense by the court. International wrestling, in an effort to solve this dilemma, still continues.

The overall picture of these arrangements has, I believe, been obscured by an intense and generally uninformed concern over the criminal jurisdictional provisions. Criminal jurisdiction is a subject of only one article among twenty in the Status of Forces Agreement — just *one* of the questions which must be answered.

Matters of taxation are very complex. What local taxes may the visiting force legitimately be required to pay, and to what extent should members of the forces be required to pay taxes? The Status of Forces Agreement considers in some detail the tax

liability of individual members of the forces, civilian component and their dependents. Article X, for example, provides in effect that for purposes of taxation no member of the forces or civilian component shall be deemed a resident or domiciliary of the receiving state. This is quite clear, but difficulties arise because some taxes of the receiving state may fall upon persons whether they be residents or not. Generally, we can not complain when the tax is of the same general nature as those normally imposed upon service personnel while stationed in *this* country. Included are taxes imposed to supply services rendered to the forces, such as water supply, sewerage, street lighting, and electricity. But there are many other examples of taxes which it is clear our personnel should not pay. This includes income taxes, personal property taxes and inheritance taxes. In negotiating status arrangements with other countries, therefore — and you would be amazed how many military man hours go into this pastime (one day it may be you) — it is necessary to contemplate the type of taxes which our people should *not* be required to pay. There is no easy solution. Patient negotiation with the host country is almost invariably required, together with a careful examination of foreign tax laws.

Status of Forces arrangements must consider customs and duties. The host country is anxious to prevent so-called luxury goods from falling into the local economy, where they are likely to disrupt trade and encourage blackmarket operation. Controls are therefore necessary, as well as exemptions. Article XI meets some of these difficulties by providing an exemption upon personal effects, private vehicles, and other goods imported for the use of members of the forces and their dependents. These goods can be imported free of customs, but they can not be disposed of on the local market. Of course equipment, provisions and ordinary supplies for the use of the armed services themselves are imported free of duty.

Besides taxation and customs problems there arises the ever-present matter of claims. Compensation should be provided for

physical damage to property in the receiving state. However, since the visiting forces are present for mutual defense, the burden must be borne by both the sending and receiving state. Therefore, the Status of Forces Agreement provides that the receiving state shall waive smaller claims for damage to certain property. In questionable cases, the parties have agreed to abide by the decision of an arbitrator. A particularly interesting provision states that costs incurred in satisfying both public and private claims for damages caused by the forces of the sending state shall be chargeable 25% to the receiving state and 75% to the sending state. This arrangement, also found in the Agreement with Japan, is designed to discourage a multitude of specious claims. The claims arrangement. I might add, functions so smoothly we hardly know it is there.

Jurisdictional agreements must also contemplate many questions surrounding the use and employment of local labor, the extent to which the forces must comply with local labor legislation, processing of employment claims, status of employment of non-appropriated fund activities (are they members of the civilian component?) — all these are ever-present questions.

Other problems include the status of the non-appropriated fund activities themselves, non-governmental agencies such as the Red Cross, United States universities with troop educational programs, and like institutions. The Agreement touches visas, drivers' licenses, and currency control laws as well.

These Forces Agreements are an innovation for us, and their only true test is how they actually work. It has been the Army's position that by and large they are working well, although they have their growing pains and may have more. They do not provide answers for every problem, but they do constitute a base upon which to proceed. To make them work, good will and effort at the local level are required. It has been our experience that most foreign officials are as eager as we to eliminate sources of friction, especially in the inflammable field of criminal jurisdiction.

For example, at our request Japanese authorities have arranged to confine in one modern Tokyo jail all United States prisoners convicted in Japanese courts. In Luxembourg, where we have no troops but where many of our service people rent houses, local arrangements have been concluded by which these persons are treated as though members of the forces — not as tourists or itinerants. In Turkey, the primary jurisdiction of United States authorities has been extended to include all persons subject to United States military law, except United States contractors and Turkish residents.

Although statistics indicate that these status agreements are working well, we do not feel that we can be complacent. It is the duty of the services to assure to all personnel a fair trial and fair treatment. This must not be adversely affected by their being subjected to the jurisdiction of foreign courts.

If my remarks have had a tone about them which smacks of the defensive, I ask your indulgence. For the past several months, I have been a member of the Department of Defense team which has been opposing the plethora of bills in Congress (more than a dozen) which would call for our withdrawal from any treaty which permits American servicemen to be tried by a foreign court. Yet, these agreements are the basic charter under which we carry out our global strategy. Without them, our overseas bases could not exist. They are of utmost importance to the strategic and tactical programs which *you* must devise and implement. They are the law. We might wish they were more favorable to the United States, but they represent joint action by the allies. It is in our interest, as military men, to see that they work — that they provide an effective bridge with our allies, not a wall against them.

BIOGRAPHIC SKETCH

Lieutenant Colonel Robert C. Grabb, U. S. A.

Lieutenant Colonel Grabb received his B. A. degree from Brown University. He also attended Harvard Law School, where he received his LL. B. degree, and the Academy of International Law at The Hague, Netherlands, in 1950.

He has served with the United States Army since 1941. From 1951 to 1954, Colonel Grabb was Assistant Legal Advisor to the Zone Commander, Allied Military Government, Free Territory of Trieste. Since 1954, he has been Assistant Chief of the International Affairs Division, Office of the Judge Advocate General, Department of the Army.

RECOMMENDED READING

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

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

Many of these publications may be found in ship and station libraries. 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: *Intelligence Activities, A report to the Congress.* 76 p.

Author: Commission on Organization of the Executive Branch of the Government. Washington, U. S. Government Printing Office, 1955.

Evaluation: Report to Congress by the Commission on Organization of the Executive Branch of the Government (Hoover Commission), Government Printing Office, June, 1955. This is the unclassified task force report of the Intelligence activities of the United States. This report is in two parts. The book deals with the task force report and nine recommendations. It embraces studies of all Intelligence operations of the Federal Government. Recommendations for changes are offered to promote economy, efficiency and improved service in this field. Engaged in Intelligence in one form or another are at least twelve major departments or agencies of the Federal Government. Of interest is the explanation of the attache' sys-

tem and reference to "special duty only" officers. The relationship of all departments and agencies, including Counter-Intelligence, is well covered.

Title: *Democracy in World Politics.* 123 p.

Author: Pearson, Lester B.

Evaluation: A compilation of lectures given at Princeton University as the 1955 Stafford Little Lectures. The author forcefully blends his background as an historian and a practicing politician to show the significant role a statesman-politician must play in world events. He confronts our current problems as the age-old problems of the world, but on a grander scale, and cautions those who would seek solutions to recognize the elements of the problem and not be overwhelmed by the magnitude of the size involved. He presents interesting points of view regarding the use or non-use of atomic weapons in regard to security and international relations, and explores the various avenues of diplomacy that have been used and are currently being followed with an evaluation for practical improvement. Forever an optimist, nevertheless, Mr. Pearson is keenly aware of the realities and the ever-present dangers facing our civilization. He has purposely oriented his discussion to the major considerations affecting world peace and understanding.

Title: *Four Working Papers on Propaganda Theory.* 145 p.

Authors: Kumata, Hideya and Schramm, Wilbur. United States Information Agency and the Institute of Communications Research, University of Illinois, January, 1955.

Evaluation: The authors have presented **Four Working Papers on Propaganda Theory** in an excellent and concise manner. Although the papers on Japan and Nazi Germany pertain to an era past, those on the U. S. S. R and the British concepts are applicable today.

PERIODICALS

Title: *Trouble for U. S. on a Far Frontier.*

Publication: U. S. NEWS & WORLD REPORT, October 21, 1955, p. 55-58.

Annotation: An account of Russian assistance to Afghanistan, which is winning this strategically located nation to the Soviet orbit.

Title: *Peaceful Use of Atomic Energy: The Geneva Conference in Retrospect.*

Publication: UNITED NATIONS REVIEW, October, 1955, p. 28-37.

Annotation: A report on the first International Conference on the Peaceful Uses of Atomic Energy held at Geneva under United Nations' Sponsorship.

Title: *Trouble Ahead for Russia's Surplus Guns.*

Publication: U. S. NEWS & WORLD REPORT, October 14, 1955, p. 126 and 128.

Annotation: Extracts from an address by Allen W. Dulles, Director of the Central Intelligence Agency, before the International Association of Chiefs of Police at Philadelphia, October 3.

Title: *What Kind of Disarmament?*

Author: Finletter, Thomas K.

Publication: VITAL SPEECHES OF THE DAY, October 1, 1955, p. 1506-1509.

Annotation: This discussion by the former Secretary of the Air Force is followed by statements before the United Nations Subcommittee on Disarmament by Henry Cabot Lodge, Jr. and Anthony Nutting.

Title: *Is Western Alliance in Danger of Breaking Up?*

Publication: U. S. NEWS & WORLD REPORT, October 14, 1955, p. 114-115.

Annotation: Extracts from an address by General Gruenther before the American Bankers' Association in Chicago, September 28, 1955, entitled: **The Defense of Europe — a Progress Report.**

Title: *Global Strategic Views.*

Author: Jones Stephen B.

Publication: GEOGRAPHICAL REVIEW, October, 1955, p. 492-508.

Annotation: A paper prepared as a part of a study in national power, sponsored by Yale and ONR, examines the global strategic ideas of Mahan, Mackinder, Spykman and Seversky. (The first part of this study appeared in the July issue under the title of Views of the Political World).

Titles: *Peace and Strength.*

Author: Radford, Arthur, Admiral, U. S. N.

Publication: DEPT. OF DEENSE NEWS RELEASE NO. 902-55, September 23, 1955.

Annotation: An address by the Chairman of the Joint Chiefs of Staff before the Military Order of the World Wars, Chicago.

Title: *How the Tough Line Has Failed* and *How the New Line Has Paid Off.*

Authors: Wilson, Richard and Korry, Edward M.

Publication: LOOK, November 1, 1955, p. 40-41.

Annotation: Companion articles briefly note the failures of the old Russian policy and the successes of the new policy.

Title: *The American Scientist*: 1955 —.

Author: DuBridge, Lee A.

Publication: THE YALE REVIEW, Autumn, 1955, p. 1-16.

Annotation: The President of California Institute of Technology discusses some of the problems arising from the role of the scientist at the present time as a consequence of the importance of scientific research to national security.

Title: *A Review of United States Foreign Policy.*

Author: Deputy Under-Secretary Murphy.

Publication: THE DEPARTMENT OF STATE BULLETIN, September 26, 1955, p. 490-493.

Annotation: A brief survey of United States foreign relations with Russia, the situation in the Far East and Middle East, and plans for disarmament.

Title: *Text of Foreign Policy Speech by Dulles.*

Publications: THE NEW YORK TIMES, October 1, 1955, p. 14 and U. S. NEWS & WORLD REPORT, October 21, 1955, p. 128.

Annotation: The address of the Secretary of State before the American Legion in Miami, dealing with present issues in United States foreign relations.

Title: *Admiral Radford and Far Eastern Policy.*

Author: Bouscaren, Anthony Trawick.

Publication: AMERICAN MERCURY, November, 1955, p. 47-49.

Annotation: Comments favorably on the Far Eastern policy advocated by the Chairman of the Joint Chiefs of Staff.

Title: *The USS FORRESTAL.*

Publication: COLLIER'S, October 28, 1955, p. 28-29.

Annotation: A brief descriptive note and a full-page, color photograph of the first of the Navy's new class of aircraft carriers.

Title: *Armed Services Legislation, 84th Congress, 1st Session.*

Author: Blandford, John R.

Publication: UNITED STATES NAVAL INSTITUTE PROCEEDINGS, October, 1955, p. 1180-1185.

Annotation: Summarizes legislation pertaining to personnel in the Armed Forces.

Title: *Navy Sparrow in First Detailed Pictures.*

Publication: AVIATION WEEK, October 24, 1955, p. 21.

Annotation: Presents pictures of the Sperry Sparrow I, the Navy's latest air-to-air missile.

Title: *Electronics Design Influence on Aircraft Design.*

Author: Moore John R.

Publication: AERO DIGEST, October, 1955, p. 62-64.

Annotation: Describes the interrelationship of the electronic equipment components of the modern combat aircraft with airframe requirements. Lists the several areas in which electronic design affects airframe design. Shows how aircraft designs and electronic component engineers must solve the oftentimes conflicting requirements of their systems by scientific analyses of their relative importance.

Title: *A New Equation for Jet Age Logistics.*

Author: Rawlings, E. W., General, U. S. A. F.

Publication: AIR UNIVERSITY QUARTERLY REVIEW, Spring, 1955, p. 8-29.

Annotation: A review of the progress made in reducing "pipeline time" through automation — developments ranging from electronic computers to self-directing conveyor belts. (Illustrated.)

Title: *Communist Indoctrination Methods.*

Author: Henderson, Benedict A., Lieutenant Colonel, (ChC) U. S. A.

Publication: MILITARY REVIEW, November, 1955, p. 27-38.

Annotation: A comprehensive review of the Communist use of schools, youth organizations, terror, brainwashing techniques, et cetera, in selling their ideology and undermining that of the West.