

1950

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Recommended Citation

Russell, George L. (1950) "Current International Law Problems," *Naval War College Review*: Vol. 3 : No. 5 , Article 3.
Available at: <https://digital-commons.usnwc.edu/nwc-review/vol3/iss5/3>

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CURRENT INTERNATIONAL LAW PROBLEMS

A lecture delivered by
Rear Admiral George L. Russell, U. S. N.
at the Naval War College
on April 11, 1950

It is a distinct pleasure for me to have the opportunity of addressing members of the Naval War College this morning. Some months ago I received the invitation from Admiral Beary, who suggested that an appropriate topic would be "Recent Decisions in International Law". In the time which is allotted to me I will do well to do more than hit some of the high spots.

I am aware of the fact that the Naval War College conducts a correspondence course in International Law. I plead guilty to not having taken it myself, but it is my belief that those who have been fortunate enough to have had the course will be more likely to get the right answers should they find themselves in a position where it will fall to them to apply the principles of International Law to a given situation. To the extent that the correspondence courses and that portion of the curriculum at the College may be supplemented by up-to-date decisions, I propose to discuss a few of the cases that have come to me for opinion during the last couple of years. In addition, I shall take the liberty of expanding the subject matter to cover not only recent decisions but also recent international activities which have a bearing on it.

International Law is probably most unsatisfactory to those of us who have a leaning towards such exact subjects as mathematics. For that matter, all law is an inexact subject. International Law is particularly baffling to those who must rely on a written set of rules and regulations. The fact remains that the

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field is very broad indeed and that some phases of it have been reduced to such rules and regulations. The frustrating part of that is that it seems at times that there are no teeth in those rules, no way to enforce them, and that therefore they are of little or no effect. This is not entirely true. We have, of course, seen numerous examples of nations which paid no attention to the solemn obligations of a treaty, and as of today, Soviet Russia and her satellites appear to ignore, among other things, the provisions of that branch of international law regarding prisoners of war.

Notwithstanding the difficulties of establishing and administering a body of rules for international conduct, some 49 nations were represented at a conference at Stockholm, Sweden, to formulate new rules regarding the treatment of Prisoners of War and civilians during time of war. Soviet Russia was invited to the Stockholm conference but declined to participate. When a subsequent conference was held at Geneva last summer, however, Russia appeared and made the fiftieth nation to take part in the proceedings, thereby indicating that Russia is not so insensitive to world opinion as we have every right to deduce from the activities of the Kremlin. The Geneva Conference resulted in the adoption of four treaties based on the drafts drawn up at Stockholm. These treaties were:

1. For the Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field.
2. Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of armed forces at Sea.
3. Treatment of Prisoners of War.
4. Protection of Civilian Persons in Time of War.

The United States signed all four treaties. However, these treaties have not yet received the advice and consent of the Senate.

As you know, a milestone of international law was passed in 1949 upon the ratification of the North Atlantic Treaty. The basic purpose of the treaty is to maintain peace and security. It is a collective measure within the framework of the U. N. Charter to safeguard the inherent right of self-defense in the event of an armed attack upon any of the signatories of the treaty. Twelve nations signed the treaty. The new obligations undertaken by the United States in the treaty are:

1. To maintain and develop, separately and jointly and by means of continuous and effective self-help and mutual aid, the individual and collective capacity of the parties to resist armed attack (Art. 3)
2. To consult whenever in the opinion of any of the parties, the territorial integrity, political independence, or security of any of them is threatened. (Art. 4)
3. To consider an armed attack upon any of the parties in the *North Atlantic Area* an attack against them all (Art. 5), and
4. In the event of such an attack, to take forthwith, individually and in concert with the other parties, such action as the United States deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic Area (Art. 5).

The treaty expressly provides that all of its provisions must be carried out in accordance with the respective constitutional processes of the parties, which means that our Congress still retains its power to declare war. However, the plenary power of the President to make use of armed forces is likewise retained. The provision of the United Nations Charter, wherever applicable, control every activity undertaken under the treaty.

Of more direct interest to you in this connection is the description of the North Atlantic Area. The word "area" is intended to cover the general region, rather than merely the North Atlantic Ocean in a narrow sense, and includes the western part of the Mediterranean as well as the North Sea and most of the Gulf of Mexico. The term North Atlantic Area is general in description, and this choice of words appears to have been deliberate. From our standpoint such general language appears preferable. I say this because it would seem inconsistent with the spirit of the treaty to provide that Article 5 would come into operation in the event of an attack, for example, upon ships or aircraft at a given point but not if the attack occurred a few miles away. If there should be any doubt as to whether or not an armed attack has taken place within the area specified in the treaty, each party would decide for itself, in the light of the facts surrounding the particular situation and the significance of the attack.

Time does not permit further discussion of this important treaty of which I have discussed but a few of the high points. As I indicated before, Article 3 of the Treaty embodies the principle of "continuous and effective self-help and mutual aid," which is the principle that forms the basis of the European recovery program. It was felt by the Congress that the implementation of this principle would not only help to deter aggression, but would go far, in the event all the efforts of the parties for peace should fail, to assure the successful defense of the United States and the collective strength essential for victory. And indeed shortly after the coming into force of the North Atlantic Treaty, Congress passed the Mutual Defense Assistance Act of 1949. Briefly, this Act authorizes the President to furnish military assistance to nations who are parties to the North Atlantic Treaty and who have requested such assistance. The Act further requires that the assistance must be furnished in furtherance of the common defense of the North At-

lantic area and to further the development of unified defense plans in order to realize unified direction and effort.

In addition, military assistance is authorized to be furnished to Iran, Korea, and the Philippines. The law further permits assistance to be furnished without payment except as may be provided in agreements concluded with nations to whom assistance is furnished. Assistance may take the form of procurement from any source and transfer of any equipment, materials, or services. No materials however, may be transferred out of military stocks, if the Secretary of Defense, after consultation with the Joint Chiefs of Staff, determines that such transfer would be detrimental to the national security. The President is directed to enter into agreements with nations receiving aid. Such agreements must contain provisions (a) that the use of the assistance will be in furtherance of the purposes of the Act; (b) that the recipient nation will not transfer the equipment or materials, information, or services received without the President's consent; (c) for the security of any article, service or information furnished; and (d) that the recipient nation will furnish reciprocal aid to the United States or other nations consistent with the United Nations Charter to further the purposes of the Act.

The President must terminate assistance when (a) the recipient nation requests it be terminated, (b) if the President determines it would be inconsistent with the United States national interest or security of the United States or the purposes of the Act, or (c) if the President finds that the continuation of assistance would be inconsistent with any United States obligation under the United Nations Charter, or if the General Assembly of the United Nations finds continuance undesirable, or it may be terminated by Congress.

Among other things, the Act allows personnel of the armed

services to be detailed to non-combatant duty abroad, or to any agency, for the purposes of the Act. In carrying out the purposes of the Act, the Secretary of Defense has designated a Director of the Office of Military Assistance in his own office and has designated a U. S. Military Representative for Military Assistance in Europe. The Secretary of Defense has established two basic guiding principles in this program. First, that Military Assistance activities will be accounted for separately from other activities of the Department of Defense, and second, except for the specific relationships established for overseas operations, by the agreements between the Department of Defense and the Department of State, all dealings with other Departments in this program will be to and through the office of the Secretary of Defense.

I can say that as of today the program is developing rapidly and many officers from the three services have been detailed to Europe to assist the program.

Of the many problems of international character handled by my office, the problems of jurisdiction are the most frequent. Due to the sending of thousands of our forces to foreign countries, the problem of jurisdiction is bound to be a recurring one. I will discuss the problem of civil jurisdiction as distinguished from criminal jurisdiction first. As you know, we naturally prefer to maintain exclusive jurisdiction over our forces abroad, but exclusive jurisdiction in civil proceedings is a right that is very hard for us to claim on the basis of international precedent. Criminal jurisdiction has a logical basis in the assertion that if it is exercised by the sovereign of the territories visited, it might interfere with the personal freedom of the visiting sovereign's forces. This is not inherent in civil jurisdiction and therefore, although we claim it, we are on much poorer ground. The fundamental basis why foreign countries have been loathe to yield their nationals' rights to bring suit in

civil proceedings against our people has been that where damage is done with intent or by negligence, the people who have had damage done to their property should have some recourse.

We recognized this finally by our Foreign Claims Act of 2 January 1942, as amended (31 U. S. C. 224d), with which all of you should be familiar, because it may give you a way out in some such case. Under this Act where the loss of or damage or destruction to public or private property is caused by or incident to non-combat activities of military and naval personnel, it may be adjudicated.

The Congress contemplated the settlement of two types of claims under the provision of the Foreign Claims Act, namely, (1) claims based on acts or omissions involving a lack of reasonable care on the part of United States military personnel involved; and (2) claims arising out of authorized activities of United States forces which are peculiarly military activities having little parallel in civilian pursuits.

The Foreign Claims Act affords a ready means of promptly settling claims of inhabitants of foreign countries, grounded on damage to their persons or property which is caused by Army, Navy, or Marine Corps forces. It is a statute which can be of great assistance to commanding officers of occupation or visiting units in friendly foreign countries. The speedy, on the spot, settlement of such claims, if within the purview of the Foreign Claims Act, will do much to improve relations during and after the occupation or visit.

An example of what may happen when the Foreign Claims Act is not invoked is a case which arose in Lisbon where a couple of our sailors from a destroyer during a "good will" visit of an American naval squadron took a private automobile without the consent of the owner. While operating the car on a "joyride" they

collided with another privately owned automobile. They were arrested and later turned over to their commanding officer on the promise that the resulting damages would be made good. The commanding officer effected a settlement of the claims with the assistance of the Naval Attache by paying the claims out of the ship's welfare and recreation fund. When the claim for reimbursement of the ship's fund finally drifted into the Navy Department for payment under the Foreign Claims Act, we had to inform the Naval Attache that he, as well as any commanding officer had authority to convene a foreign claims commission and that it was his duty to do so in order that meritorious claims might be promptly settled and friendly relations engendered thereby. In order to give wide dissemination to the existence and purpose of the Act, this case was reported in the Advance Copy of Court Martial Order No. 18 of 25 August 1948.

We have paid a variety of foreign claims under the authority granted by this Act. A brief summary of some of the claims paid will help you to visualize the wide range of the provisions of the Act. For instance, the claim for destruction by fire of a Chinese godown while occupied by units of the Marine Corps was paid even though the cause of the fire was undetermined. Injuries received as the result of unprovoked assaults and as a result of negligent operation of motor vehicles form the basis for payment in a large number of cases. The visits of our task forces to Australia seem to generate what we call "the Case of the Missing Cameras." The camera is checked by an Australian visitor as he boards one of our men-of-war and cannot be located when he is ready to depart. Such cases could be processed at once by a commission convened by the commanding officer.

The Foreign Claims Act is available not only to the Army, but also through the Unification Act to the Air Force. The Army

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and the Air Force, however, administer the Act through standing foreign claims commissions appointed by the Army and Air Force commanders in the field. Since the Navy moves around frequently, this procedure cannot be followed, but a foreign claims commission must be appointed by a commanding officer in the area where the injury occurs or in the locality where the claim is presented, depending upon the expediciencies of the situations. Since unification, the three services are attempting, with marked success, a coordination of policy in the handling and treatment of this class of claims.

The point I wish to stress is that since Congress has provided a simple and efficient machinery for the prompt settlement of claims of this type, every effort should be made by the service concerned to employ the Foreign Claims Act whenever applicable in order to contribute to the promotion and maintenance of friendly relations in foreign countries. The prompt and proper employment of the Act will increase the prestige of the nation, the branch of the service and particular unit involved.

Turning now to the matter of criminal jurisdiction over our forces abroad, I can say that it is a very legal and technical problem. Nevertheless I discuss it with you here because it is a question which will arise in the career of almost every officer and particularly, in command or staff functions. You will have questions of legal jurisdiction to decide, and some background for them is necessary. These jurisdictional questions are a natural result of two principles of international law that very clearly conflict. The first principle is the theory of sovereignty which gives to a state exclusive jurisdiction over all persons within its boundary. The second principle is the rule that a state has exclusive jurisdiction over its armed forces. During the course of World War II we had stationed large contingents of our armed forces in foreign countries and it should be quite clear to all of you what a clash automatically occurs between these two principles in any such

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case as that. The theories have been attempted to be reconciled by the general rule of international law that a sovereign, in permitting armed forces of another sovereign to come into its territory, thereby automatically waived jurisdiction and granted jurisdiction to the visiting sovereign over its own forces.

This view was set forth for the purpose of international law and for the purpose of American law in the well known case of *Schooner Exchange v. McFadden*. That case is a landmark of the law and is a fine example of Chief Justice Marshall's leadership in that particular field. Although the Schooner Exchange case involved a French warship which was libeled in the port of Philadelphia, the basis for the various questions of jurisdiction and the American view on the subject came from a remark he made in the course of his opinion to the effect that "a case in which the sovereign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his domain." That case became the precedent for a good many other cases, which I could cite to you for several minutes at least.

The British wouldn't go along with that view. It is interesting to note that one of the reasons undoubtedly has been that in most cases we haven't had visiting forces. We have had our forces visiting and for that reason we have always insisted that jurisdiction should lie with us. Whereas, in the case of the British, they are much more likely visited and therefore they have attempted to cut down some of the jurisdiction of the visiting sovereign who in the past war particularly, has been the United States.

The British, before the last war, held that jurisdiction only extended in the quarters that were assigned to the visiting forces, for example, where we had a base. Within that base we could exercise exclusive jurisdiction over our people. Outside the base, if

they got into trouble, they were subject to the British civil and criminal law. Finally, in order to minimize difficulties between Great Britain and the United States during the past war, Great Britain agreed without prejudice to yield to the American view. They did that by a statute known as the United States of America Visiting Forces Act, passed by Parliament on 27 July 1942, which denied all jurisdiction to British Courts to try members of the United States armed forces. This question is still a live issue and some of you may very rapidly come in contact with it. A memorandum of the Secretary of State of the United States, dated February 5th, 1946, in reply to an Aide Memoire (which is a diplomatic letter) from the British Embassy, points out the clear conflict between the British and the American theories of jurisdiction and amends the American view (and this, I might add, is something which is important as stating our present position), in that, "Pending further experience, this government did not object to the exercise by British courts of jurisdiction of civil proceedings involving members of the armed forces of the United States provided no attempt was made to exercise any control over their persons and provided further that judgment was not rendered against them when they were prevented by official duties from defending the action". About two years ago the British government raised the question of repealing the Visiting Forces Act on the grounds that there were not enough United States armed forces personnel in England to warrant retention of the Act. Due, however, to the recent increase in military personnel, particularly Air Force personnel, in England, the Secretary of Defense strongly urged the retention of the Act, and no doubt in these critical days, no further attempt will be made to repeal it.

The question of jurisdiction is sharply pointed up in the British colonies where leased bases are located. As you know, we obtained 99 year leases to establish bases in certain British colonies

in return for the transfer of 50 destroyers to the British several months prior to our entry into World War II. All questions of jurisdiction were supposed to be settled by Article IV of the Leased Bases Agreement which provides for American jurisdiction in the first instance over military offenses committed by members of our forces either within or without the leased areas. It provides for American jurisdiction in the first instance of offenses committed by British nationals where the offense is committed and the offender apprehended within the leased area, and American jurisdiction in the first instance in the case of nationals of other countries where the offense is committed in the leased area regardless of where the offender is apprehended.

Three points should be noted with regard to cases pertaining to jurisdictional questions as a matter of practical policy for the officer in the field: (1) The first one is the Military Establishment's policy of adherence to the American doctrine of extraterritoriality for our forces unless modified by agreement with the nation concerned, and, only in such case in strict adherence to the terms of the modifying agreement. (2) The second point is that where proper authority exists, the implementation of existing international instruments by working arrangements with local authorities, may be approved as long as you don't fly in the face of international rules and policies of the Military Establishment. It makes for smooth working out of local affairs. (3) The third point is the necessity that, in a case of any implementation, the Department concerned be kept fully advised in the matter, particularly if the questions are, as they are apt to be, eventually referred to them.

Now with regard to jurisdiction in *other* countries. Our military jurisdiction within base areas, our own bases or our own ships, has been universally conceded as long as we are in the area or on the ships. The main problem always involves jurisdiction over non-military criminal offenses committed outside of our bases

and ships. This is especially true where there is damage done to nationals of a foreign country, either physical injury or property damage. Negotiations to meet these various problems are constantly being conducted.

Following the Confederation of Newfoundland and Canada on March 31, 1949, the Canadian Government requested changes in the Leased Base Agreement with Newfoundland with respect to its taxation, customs exemptions, postal services, and jurisdiction provisions. Negotiations are still proceeding on the requested revisions. Of primary interest are the negotiations pertaining to the jurisdiction provision of the Leased Base Agreement with Newfoundland. In the view of the Canadian Government this provision was undesirable because it gave to U. S. courts jurisdiction over Canadian citizens and did not adequately protect the position of Canadian civil courts. Our position has been that while the provision does give U. S. service courts some jurisdiction over British or Canadian nationals, it requires that the trial of such persons must be before a United States *civil* court sitting in the leased area. Since we have never maintained such courts within any of the leased areas and since there is no present intention of maintaining such courts, the result is that no Canadian nationals have been tried, nor is there any likelihood that any would be.

Another point of difference is that the Agreement was thought to deal with civil as well as with criminal jurisdiction and the Canadian Government had the impression that our service personnel had immunity from the civil jurisdiction of the Territory. Our position is that the provision deals exclusively with criminal jurisdiction. The Canadian Government also requested revision of the jurisdiction provision of the Agreement because it conferred exclusive jurisdiction upon U. S. authorities in some respects. Our position is that from the words "The United States shall have the absolute right in the first instance" to take jurisdiction does not

preclude the local courts from exercising jurisdiction subsequently in certain specified types of offenses. All of which is to say that our Government takes the position that all jurisdiction is concurrent, although in certain indicated cases the United States has the right to exercise jurisdiction in the first instance. We can all watch with interest the final result of these negotiations.

We now have exclusive criminal jurisdiction over naval and military personnel in Brazil, and in Uruguay, recognized by the Supreme Courts of the particular countries involved. In Egypt and with the China Nationalist regime, we have similar exclusive jurisdiction by agreements which have been reached through diplomatic channels. With some countries, we have agreements like the one with Denmark for the defense of Greenland by which we exercise exclusive jurisdiction over any acts by personnel, that are concerned directly with the defense of the bases there.

The problem is somewhat different in the Philippines. The Philippine Islands were given their independence on July 4, 1946, and the Republic of the Philippines is now, as you know, an independent nation. The Philippines present no exception to the adolescent experience of all states in that, when first embarking upon an independent career, they experienced severe growing pains and their national passions ran high. Shortly after the Philippines achieved their independence, a military bases agreement was negotiated with the Philippine Government. The Military Bases Agreement of March 14, 1947 grants to the United States the right to retain the use of certain bases listed in the agreement for a period of 99 years. Some of these bases, such as the naval reservations at Subic Bay and Sangley Point, were reserved to the United States by an executive order of the President issued sometime before World War II, and the Navy Department has consistently maintained that title thereto was never relinquished to the Philippine Government by

the Treaty of General Relations of July 4, 1946. While some of the provisions of the Philippine Military Bases Agreement of March 14, 1947 are somewhat similar to those of the United Kingdom Leased Bases Agreement of March 27, 1941, the jurisdiction articles thereof differ in many respects. Under Article XIII of the Military Bases Agreement, the Philippine Government yielded to the United States jurisdiction over three classes of offenses: (a) those committed by any person within the base, except where the offender and offended parties are both Philippine citizens not members of the United States Armed Forces on active duty, or the offense is against the security of the Philippines and the offender is a Philippine citizen; (b) those committed outside the bases by a member of the United States Armed Forces and the offended party is also a member of the armed forces; and, (c) those committed outside the bases by a member of the United States Armed Forces against the security of the United States. The Philippine Government, however, reserved jurisdiction over all other offenses committed outside of the bases by any member of the United States Armed Forces.

Another problem which is active in the field of international law has to do with maritime jurisdiction and territorial waters. As you know, the United States has always asserted the "freedom of the seas" proposition, and has adhered to the three-mile limit as the maximum extent of territorial waters. However, other nations have in recent months sought to extend the limits of their territorial waters. For instance, Yugoslavia claims a six mile limit, Costa Rica extended its protection and control over a zone extending 200 nautical miles from the continental coasts including off-shore islands, and the Russians have asserted a 12 mile limit. During the war the United States by Executive Order created defensive sea areas, which extended more than three miles from shore, but these were never challenged, since it was considered legal to create such areas for our national security. And we have

been very careful to reiterate the general rule of international law that the defensive sea areas in no way had the effect of extending sovereignty over our territorial waters beyond the three mile limit.

Two or three years ago a diplomatic incident occurred between the United States and Russia involving international law and the Navy Department, which serves to illustrate one of the many problems of territorial waters. The Russians complained that their territorial waters had been violated by Navy planes in the Alaskan sector. You may recall from your history that when Alaska was purchased from Russia in 1867, a dividing line was drawn on the chart in the seas between Russia and Alaska. It was the intent of the treaty makers that all *land* to the eastward of this line should belong to the United States, and to the westward to Russia. An official protest was received from the Soviet government that a Navy plane had circled the Soviet ship TEMP in a position which they claimed plotted to the westward of this line and was therefore a violation of their territorial waters. The position, when plotted from information received from our aviators, turned out to be slightly to the eastward of the line and the Department of State submitted to the Navy Department a proposed reply to the Soviet government which stated that fact without more. The Navy Department took the position, however, that our retort should not be based on this premise, but rather on the fact that even the position given by the Soviet government was well outside the limit of territorial waters of the Soviet Union as recognized by established rules of international law. Accordingly, the official reply pointed out that since the position of the Soviet ship was 35 miles to the northeast of Cape Wellen it was upon the high seas and thus not subject to restriction. It was our fear that the Soviet government might construe the first dispatch to mean that we acknowledged that they had sovereignty

over all *waters* to the westward of this imaginary line of demarcation. The fact that the Soviet government had, in 1926, issued a decree that they intended to exercise sovereignty over all land areas in a sector to the northward of the Soviet Union and extending to the north pole influenced our decision. This Government has never recognized the sector theory of sovereignty of polar areas either in the Arctic or the Antarctic.

The latest territorial waters problem has given us considerable trouble in the Far East. On June 25, 1949, the Chinese Nationalist Government proclaimed a "port closure" of certain Chinese ports including Shanghai. The United States and Great Britain refused to recognize the port closure on the grounds that it was illegal since the Nationalists were trying to close ports over which they had no effective control. However, the presence of Nationalist war vessels in the Yangtze Estuary demonstrated that it was able to effectively control the egress and ingress of vessels operating in the Communist held port of Shanghai. Apparently our own State Department people reasoned that to recognize the port closure would be tantamount to recognizing a "blockade", although there is a distinct difference. In any event, if our nation had recognized it as a blockade, it would have meant recognition of a belligerent status, with the attending rights of belligerency on both the Red Government and the Nationalist Government—something that our country is not yet ready to accord. Following our Government's protest to the Nationalist Government, the Department of State issued a notice to American shipping lines that to enter Shanghai or certain other Chinese ports would be at their own risk. All American shipping lines, except one, refrained from entering Shanghai. The one line who refused to accede to the admonition of the State Department was the Isbrandtsen Company. That particular company, as you read in the papers, continued to send its

ships up the Yangtze Estuary. Eventually, some of these ships were intercepted and fired upon. Meanwhile the Isbrandtsen Company flooded the State Department and Navy Department with telegrams and letters demanding naval protection to their vessels. They argued that since the Government refused to recognize the port closure, they were within their rights in taking their ships into Shanghai. Moreover, they insisted that in accordance with Navy Regulations, the Navy had the mandatory duty of furnishing protection to their vessels. The Navy regulations specifically invoked are the following:

Article 0620, which reads as follows:

"So far as lies within his power, acting in conformity with international law and treaty obligations, the senior officer present shall protect all commercial vessels and aircraft of the United States in their lawful occupation, and shall advance the commercial interests of this country."

Article 0614 provides that:

"1. The use of force by United States naval personnel against a friendly foreign state, or against anyone within the territories thereof, is illegal.

2. The right of self-preservation, however, is a right which belongs to states as well as to individuals, and in the case of states it includes the protection of the state, its honor, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the state or its citizens may suffer irreparable injury. The conditions calling for the application of the right of self-preservation cannot be defined beforehand, but must be left to the sound judgment of responsible officers, who are to perform their duties in this respect with all possible care and forbearance. In no case shall force be exercised in time of peace otherwise than as an application of the

right of self-preservation as above defined. It must be used only as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required. It can never be exercised with a view to inflicting punishment for acts already committed.

3. Whenever, in the application of the above-mentioned principles, it shall become necessary to land an armed force in a foreign territory on occasions of political disturbance where the local authorities are unable to give adequate protection to life and property, the assent of such authorities, or of some one of them, shall first be obtained, if it can be done without prejudice to the interests involved."

The Isbrandtsen Company, not satisfied with the replies obtained from the Secretary of the Navy, carried its campaign to the press, and bought several full-page ads in the New York Times and Washington Post insisting that a mandatory duty lay upon the Navy to protect its vessels in that situation. This was followed by a letter to the President accusing Admiral Berkey and the 7th Fleet of lapping up all the whiskey in Manila instead of performing their duties to the Isbrandtsen ships, and demanded the punishment of the Secretary of the Navy and the officers responsible by General Court Martial. Finally, it appeared that some of the attacks on the Isbrandtsen ships took place on the high seas, and Admiral Berkey then set up a patrol and drew an arbitrary line westward of which our vessels would not offer protection. This line was well outside of Chinese territorial waters, and was not meant to be definitive of Chinese territorial waters, but simply for patrol purposes. Since the establishment of the patrol there have been no further incidents, probably because Isbrandtsen has elected to unload its cargoes at Tsingtao and Taku Bar rather than at Shanghai.

The Navy position, while never publicly expressed, has simply

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been that the duty to protect the lawful commerce of the United States is a discretionary and *not* a mandatory duty as insisted upon by the Isbrandtsen Company. This position is clear from the language of the Regulations wherein the words "the conditions calling for the application of the right of self-preservation . . . must be left to the sound judgment of responsible officers . . ." I could go at length into the merits and demerits of the Isbrandtsen position, our own position and that of the Chinese Nationalist Government. However, time does not permit. But I do want to get over to you the point of discretionary duty as distinguished from mandatory duty, which is a practical distinction which everyone of you should understand.

Another current problem pertaining to maritime jurisdiction is that of the submarines of a certain foreign power which persist in hovering off our coasts. In dealing with the problem it has been necessary to invoke certain principles of international law. Hovering foreign submarines are generally considered to be possible threats to our national security. We do not question the right of innocent passage of foreign submarines through our territorial waters. It is our position, however, that if a foreign submarine comes within our territorial sea, she must navigate on the surface and comply with our domestic regulations of navigation. Our requirement in this respect is supported by international law. Among other places, the expression of the principle may be found in the final Act of the Hague Codification Conference of 1930. It appears that where a foreign submarine hovers off our coasts, submerged or surfaced, international law recognizes this as a possible hostile threat to our security. Furthermore, international law recognizes the inherent right of self-defense of a nation whose security is threatened, which means that under the great doctrine of "reasonableness" a nation may take reasonable measures to protect its security and right of privacy. A noted authority has stated:

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“Justification of such defensive measures of prevention . . . rests generally upon the casual connection between acts sought to be thwarted and injury otherwise to be anticipated from them by the aggrieved State within its territory. As that connection may be found to exist at varying distances from the outer limits of territorial waters, the freedom of such a State is not on principle dependent upon the precise location of the spot where an offender may be apprehended, or upon the possession of the State of a special right of control over that spot.” (Hyde, *Int’l. Law*, Vol. I, P. 460)

This is to say that whether the submarine is within or without our territorial waters and there is reasonable belief that its actions constitute a threat to our security, we can take reasonable measures, including force, to repel that threat.

It is with hope and uncertainty that we are able to view the influence which international law may have on the conduct of war in the future. It was hoped through the war crimes trials that future wars of aggression would cease; it was hoped that prisoners of war in the wars of the future would receive more humane treatment by their captors. Today, we have Russia who has yet to repatriate all of the many prisoners of war she captured during World War II. It is known that many of the prisoners she still holds are suffering privations and are being used in slave labor battalions. We have seen in the past few years how Russia has taken over one nation after another. This has been most discouraging, particularly since the Russians have participated in the war crimes program themselves, and have condemned those acts which they continue to commit themselves. However, there is a bright ray of hope—as yet there is no shooting war, and the Russians are sensitive to world opinion. For that reason you find them using the United Nations as a forum to justify their position and acts before the

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world. As mentioned before, the Russians refused to participate in the Stockholm Prisoner of War Conference. However, they finally signed the Geneva Convention of 1949 when the chips were down. The standards set in these Conventions cannot help but have an improved effect on the treatment of Prisoners of War in the future. Strategic planners of all nations will most certainly take account of these facts. The one great fear I have is the world wide efforts of Russia to install communist regimes in all countries. It is foreseeable that with continued success they might in time control a majority of the votes in the United Nations and thus try to cloak their infamy with the aegis of legal authority. However remote, it is still a possibility unless we keep militarily strong, and assist the peace loving democracies back to economic stability.

Our lease base agreements with the United Kingdom still have 90 years to run before they expire. In the event of a future war these bases will become bastions of defense for this country. The international law that governs their use is found in treaty, the so-called lease base agreements

In the event of another war, the former Japanese, mandated islands of the Pacific, which are now being administered by the Trusteeship Agreement with the United Nations, having already been declared strategic areas, will be used as military and naval bases, subject to the rules set forth in the Trusteeship Agreement.

It is my own belief that international law has made rapid progress in its development during the past few years. Certainly, as of today this nation and the world stands in a far better position, insofar as international law is concerned, in the event of future war than it did in 1939. We now have on the public record certain standards of treatment of prisoners of war and civilians universally approved from the humanitarian standpoint. We have a United

Nations which is struggling to perpetuate peace, but which in the event of war, can exercise a strong moral force that will go far to restrain irresponsible conduct in the waging of a war. Lastly, we have the International Court of Justice, which if properly implemented, may one day be able to enforce standards of conduct which humanity insists must be maintained in the conduct of war.