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REVIEW
VOL 82

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MILITARY LAW REVIEW

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AN INTERNATIONAL LAW SYMPOSIUM: PART I

INTRODUCTION

In this volume and the next, the *Military Law Review* continues the series of symposia on specialized branches of law of interest to military lawyers which began with volume 80.

Volume 82 opens with an edited transcript of a panel discussion on new developments in the law of war which was held at The Judge Advocate General's School during the spring of 1978. The panelists were Professor Telford Taylor, Professor W. Thomas Mallison, and Major General Walter D. Reed, USAF. They discussed the two recently completed protocols to the four Geneva conventions of 1949. Explanations for some of the provisions are suggested, and the possibility and desirability of further changes is considered.

The leading article in this volume is Major Thomas Behuniak's paper on legal justifications for United States action during the Mayaguez incident in 1975. This lengthy article, like the symposium itself, is in two parts and will be concluded in volume 83.

The Mayaguez incident, in which the Cambodian government seized a United States merchant vessel, and in which United States forces took back the vessel and its American crew by force, has already receded into history in the minds of many. This fact makes all the more necessary the publication of an article like that of Major Behuniak, so that the precedential value of the action may not be lost. After all, it is from events such as this one, as well as full-scale wars, that diplomatic conferences such as that discussed by the law of war panel receive their impetus.

The last article in volume **82** deals with a topic which admittedly is historical. It is important that a reference tool such as the *Military Law Review* have depth as well as breadth. Legal history is all too often slighted by the busy practitioner immersed in dealing with practical day-to-day problems. Yet legal history is the foundation upon which law develops. This is perhaps especially true of international law.

Captain George Coil has produced an article which examines the practices and attitudes of British and American commanders during the American Revolution toward subordinates who committed offenses against prisoners and civilians. He concludes that the practice of treating such offenses as crimes was well developed by that time.

Volume 82 concludes with a review of Professor Michael Walzer's book *Just and Unjust Wars* by Major Norman Cooper and Major James Burger. They examine the book from their positions, respectively, as defense counsel in the My Lai cases, and as an international lawyer interested particularly in the law of war. Both reviewers find much of interest in the book.

This symposium will continue in volume **83**, with the transcript of a lecture by Professor John Hazard, the second part of Major Behuniak's article, and other writings on international law.

PERCIVAL D. PARK
Major, JAGC
Editor, *Military Law Review*

LAW OF WAR PANEL: DIRECTIONS IN THE DEVELOPMENT OF THE LAW OF WAR

On 6 April 1978, a panel of three experts on the law of war was convened at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. Discussing new developments in this area of law were Professor Telford Taylor of Yeshiva University and Harvard Law School; Professor W. Thomas Mallison of George Washington University; and Major General Walter D. Reed, Judge Advocate General of the U.S. Air Force. Their dialogue provides many insights into the development of the new Geneva Protocols.

Introductory Remarks	Colonel Barney L. Brannen, Commandant
Introduction of the Panelists and Procedures to be Followed	Major James A. Burger, Chief, International Law Division, TJAGSA, and Moderator of the Panel
1st Presentation	Major General Walter D. Reed, Judge Advocate General, U.S. Air Force
Comment	Professor Taylor
Comment	Professor Mallison
2d Presentation	Professor Telford Taylor, Professor of Law at the Benjamin Cardozo School of Law of Yeshiva University, now Visiting Professor at Harvard Law School
Comment	Professor Mallison
Comment	Major General Reed
3d Presentation	Professor W. Thomas Mallison, Director of the International and Comparative Law Program at George Washington University Law Center
Comment	Major General Reed
Comment	Professor Taylor

Questions by Audience

Final Remarks	Major General Reed
Final Remarks	Professor Mallison
Final Remarks	Professor Taylor
Summation	Major Burger

I. INTRODUCTORY REMARKS: COLONEL BARNEY
L. BRANNEN, COMMANDMANT

I welcome all of you to the school, our own students and our staff and faculty, and our distinguished University of Virginia colleagues, and those students who are here for other classes but are willing to come in and hear this panel. It is very definitely a high point in our school's calendar for this year.

Our panel today will examine Directions In the Development of the Law of War and its impact on military operations and planning. Our focus upon directions and developments at this time is particularly appropriate since the rules of armed conflict are presently undergoing their first comprehensive adjustments since the advent of the 1949 Geneva Conventions. I say "adjustments" because this update and expansion of the law of armed conflict in the form of the protocols additional to the 1949 Geneva Conventions, recently adopted at the diplomatic conference in Geneva, is an attempt by nations to bring legal regulation into line with modern conditions of warfare. The job has been most complex, ranging from proposed norms applicable, on the one hand, to the highest plane of technological struggle, including, for example, environmental warfare, to the norms, on the other hand, applicable to the hard issues of guerilla warfare.

Our panelists are eminently qualified to survey the situation and assess the direction of the developments in the law of war for the future. General Reed, Professor Mallison, and Professor Taylor are highly respected, critical authorities on the law of armed conflict and upon the relationship and practice between legal expectations and state practice during armed conflict.

Major Jim Burger, who is our Chief of International Law Division, will more particularly introduce the panelists and describe for you the procedural rules applicable to this discussion.

**11. INTRODUCTION OF THE PANELISTS
AND PROCEDURES TO BE FOLLOWED:
MAJOR JAMES A. BURGER, CHIEF,
INTERNATIONAL LAW DIVISION, TJAGSA,
AND MODERATOR OF THE PANEL**

Thank you, Colonel Brannen, I join with you in welcoming our students, the members of our faculty and staff, and the many distinguished guests who are with us here today. I want to add that it is particularly pleasing to the members of the International Law Division that now, as this academic year for the advanced class draws near to an end, and as we have spent so much time during this past year discussing the laws of armed conflict, that we are able, at this point, to look toward the future and try to discern in what directions these rules of armed conflict will take us.

I am very pleased that we have such a distinguished panel here with us today, and I will just spend a few minutes introducing them. What I will say is only a summary of a few of the many accomplishments and contributions that they have made during their careers, especially to the law of armed conflict.

Sitting in the center of the panel is Major General Walter D. Reed, the Judge Advocate General of the United States Air Force. General Reed entered the Army Air Corps in 1943, was trained in aviation, and was assigned to the B-29 Bombardment Group in Solina, Kansas. After the war, he was released from duty and entered Drake University where he received his law degree. He was recalled to active duty during the Korean Conflict, and then served as SJA with the 18th Fighter Bomber Wing. His career with the Air Force since that time has developed his special expertise in the area of international law. Early in his career he assisted in the formulation of implementing procedure to the international agreement establishing the long-range proving ground. He served with USAFE, in Europe, and was there involved in the negotiation of implementing arrangements for NATO bases in Italy and Turkey. He attended the Hague Academy of International Law and received a Master of

Laws degree in Aerospace Law from McGill University in Canada. He served afterwards as legal advisor to the U.S. ambassador in Thailand, and as Chief of the International Law Division for the Judge Advocate General of the U.S. Air Force. He served as a member of the U.S. delegation to the diplomatic conference on the Reaffirmation and Development of the Law of Armed Conflict, and was vice-chairman of the U.S. delegation during the final session ending in June of 1977. He was appointed Judge Advocate General of the U.S. Air Force in October of 1977. General Reed has written extensively on air and space law and on the law of armed conflict. He has been Chairman of the American Bar Association Committee on Lawyers in the Armed Forces, and is a member of the Advisory Counsel to the International Law Section of the American Bar Association.

Seated to General Reed's left is Professor Telford Taylor, who teaches at the Benjamin Cardozo School of Law of Yeshiva University, and is presently a Visiting Professor at Harvard Law School. After graduating from Harvard Law School in 1932, Professor Taylor was admitted to the District of Columbia and New York bars. He served in a number of different capacities prior to World War II: as Assistant Solicitor with the Department of Interior, as Senior Attorney for the Department of Agriculture, Associate Counsel with the Interstate Commerce Commission, Special Assistant to the Attorney General, and then as General Counsel with the Federal Commerce Commission. Then, from 1942 to 1949, Professor Taylor, now Brigadier General Taylor, served with the Judge Advocate General Corps of the United States Army. He became deeply involved with the prosecution of War Crimes Trials following World War II, serving as Associate Prosecution Counsel of major Nazi war criminals before the International Military Tribunal at Nurnberg, and as Chief Prosecutor for the United States under the charge of the International Military Tribunal. He also acted as Chief Counsel for war crimes during the subsequent proceedings conducted by the United States. Since that time, Professor Taylor has not ceased his involvement in the law of armed conflict. He has written extensively about his experiences at Nurnberg. He has been active in commenting on the use of military force by the United States in Vietnam, and, most recently, has published a book on his experience in filing of briefs on behalf of immigration applications in the Soviet Union. He was able to do this because of his professional contacts during the Nurnberg period with the now Soviet Prosecutor General.

To General Reed's right is Professor W. Thomas Mallison, who is Director of the International and Comparative Law Program at George Washington University Law Center. Professor Mallison served with the United States Navy during World War II. After working for a time in private practice, Professor Mallison entered the teaching field, teaching at Ohio State University College of Law, at Yale University Law School, [from which) he holds a JSD degree, and at George Washington University. He has twice held the Charles H. Stocken Chair of International Law at the U.S. Naval War College, and has worked for the U.S. Atomic Energy Commission as Chief of the Asian-African Branch and as chief negotiator of various atomic Atoms for Peace agreements, including the United States-Japan Comprehensive Atomic Energy Agreement of 1958. Professor Mallison has also written extensively, on, just to cite a few topics, the status of irregular combatants, naval blockade, and the subject of international terrorism. He also attended, as an observer, the diplomatic convention on the Reaffirmation and Development of Humanitarian Law of Armed Conflict. I might mention that we are honored to have with us, in the audience today, Mrs. Sally Mallison, who is a research associate at George Washington University, and has published on her own, and with her husband, [on] a number of international law and law of war topics.

All our panelists are eminently qualified, and with this introduction, I would just like to quickly move now to the procedures that we will follow this morning. We have approximately two hours, and to allow as much interchange as possible among the panelists, and also audience participation, we are placing the discussion on a strict time schedule. I would ask each panelist to make a short presentation on the directions of [the law of] armed conflict for about ten to fifteen minutes. Then we will allow the other two panelists to comment upon, if they choose, what the panelist giving the presentation has said. We will start with General Reed, followed by Professor Taylor, and then Professor Mallison. This should take us about an hour and fifteen minutes, and then we'll have a half hour for questions by our audience, and we will finish up the morning [with] final comments and remarks by our three panelists. Our objective is to look into the directions and the development of the law of armed conflict, where we have been, and where we might be going in the future.

General Reed, I will now ask you to lead off our presentation.

111. FIRST PRESENTATION: MAJOR GENERAL
WALTER D. REED,
JUDGE ADVOCATE GENERAL, U.S AIR FORCE

Colonel Brannen, Major Burger, ladies and gentlemen. It's a pleasure for me to be here and participate in this panel. It's probably fitting that I lead off because, in general, I think the practice is that the military forces move out and engage in an operation, and then the professors come along and tell us what we did wrong—even if we won.

It is often said that military personnel, during peacetime, plan and prepare for the war that they just finished, and maybe that's true as well for those who engage in attempting to develop laws applicable to armed conflict. I'm not so sure that that isn't good, because what we are dealing with is an effort to protect civilians, prisoners of war, the sick and wounded, and other innocent victims from unnecessary suffering and violence, and, at the same time, assure fundamental human rights for all participants. If that's what we are trying to do, then whether or not we are looking at what happened in the past, or trying to prepare rules for application in the future, I think we are still looking to the same objective.

It's true that World War II, the Korean War, and the Vietnam Conflict had a definite impact on the current developments in the law of armed conflict. One area which has, as a result, received particular emphasis is the applicability of the law of armed conflict to aerial operations. An important recent development in this area was the Air Force's publication, a little over a year ago, of Air Force Pamphlet 110-31.¹ I think it is one of the first major publications that relates to the law of aerial warfare. But of course the most important development in recent times is the Diplomatic Conference on Humanitarian Law Applicable to Armed Conflict, which concluded in June of last year. It's with some trepidation that I even bring it up with such eminent experts as Wally Solf and Jim Miles, who have worked [on] this problem more extensively and more recently than I have.

This conference was divided into several committees. one of which

¹U.S. Dep't of the Air Force, Pamphlet No. 110-31, International Law—The Conduct of Armed Conflict and Air Operations (1976).

dealt both with methods of warfare and protection for civilians. There is definite overlap between those topics. You can't talk about protection for civilians and the civilian population without talking about methods and means of warfare, and, by the same token, it's difficult to talk about methods and means without at least touching on the problem of protection for the civilian population.

The roots of this conference began several years ago, back in 1965 or before, and the actual preparatory work began in 1971. Well, if you recall, in 1971 we were in the middle of the Vietnam war, and we had to look very carefully at the objectives of the United States with respect to participation in the conference. It would have been very easy for the conference to become a sounding board to discuss, solely, the United States' activities in Vietnam and, in fact, there was some effort in that direction.

We entered the conference with a couple of objectives. One was to improve the implementation of and compliance with the law of war as it existed. We were specifically concerned about treatment of prisoners of war and about the appointment of protecting powers. Our second objective was to be practical, to have rules that could be applied in actual combat situations. We didn't want just idealistic rules which sounded good and satisfied a lot of people, but which were worthless in practical situations.

So, with those objectives, we entered the preliminary discussions back in 1971, and participated in the diplomatic conference which convened in 1974. Four sessions later, in 1977, the conference concluded with the adoption of the Final Act and two proposed Protocols, one dealing with international conflicts and a second dealing with noninternational conflicts. I will talk only about the Protocol on international conflicts and, more particularly, about the provisions relating to protection of civilians and the application of PW status to all members of the armed forces, including guerrillas and irregular combatants.

At the outset of the conference, there were a lot of problems we knew we were going to have to address: the problem of prisoner of war status for guerrillas, the problem of adequate protection of civilians with respect to aerial bombardment, and, in that regard, the meaning of "indiscriminate" attacks with respect to aerial bombardment or bombardment from naval vessels or long-range artil-

lery. There were also some new problems that we didn't anticipate, and that's always a challenge. There were special interest groups who wanted to secure special protection for such things as oil refineries and oil fields. It is very popular to talk about protection of the natural environment, and this conference was no exception, so it was proposed that we do nothing in warfare that would harm the environment. There were also countries with high dams who wanted some protection for them, and those with nuclear generating plants wanted protection for those. All of these were new problems that had to be addressed. Some of them, we thought, were rather impractical. I don't know how, in modern warfare, we could provide special protection for oil refineries, fields, and pipelines, when they form the very heart of a modern military machine and are essential to carry out military operations.

Our problems were particularly difficult because when you combine humanitarian limitations on combat operations with protection for the civilian population in a single committee you often have opposed interests, and you have to find a balance between them. So dealing with both the Hague Regulations and the Geneva Conventions and combining them into a single discussion proved to be very difficult.

We did accomplish a good bit, and the overall results are very satisfying. I think the main accomplishment of our committee was that we were able to agree upon a standard that could be applied, a standard that was written down, that could be used for training purposes, and at least formed a common point of departure. I don't want to suggest that all of the ambiguities were eliminated. There are still a lot of problems, but at least there was substantial agreement on some of these very difficult problems, and I think the area of concurrence is such that these proposed agreements will prove a sound basis for settling disputes that may arise in future conflict.

As I said, the conference was one for reaffirmation and the development of law, and, in our view, there is not much in those Protocols that represents new rules. There are a few things, but at least this committee started out with reaffirmation of the existing rules in the Hague Regulations regarding unnecessary suffering and that the methods and means of warfare are not unlimited.

Then we took up an article on perfidy as a reaffirmation and de-

velopment of the old Hague Regulation on prohibition of treachery. I think this was an important development because it related treachery or perfidy to international obligations. When you claim protections under international law which you are not entitled to, then perfidy may well be in existence for which punishment can take place. The most significant thing about the article, I think, is the inclusion of illustrative examples. The most important of these states that the feigning of civilian or noncombatant status while engaged in combat is an act of perfidy.

There is clarification on what constitutes a noncombatant, and when an individual is out of the fight. When you're in the hands of the enemy, you are already noncombatant and entitled to protection.

There is also guidance regarding what to do with people who are under your control, as prisoners, when you can no longer provide for their protection or take them with you back to prisoner of war camps. A paragraph in this article specifically covers it: you release them. There shouldn't have been any doubt of that, but there were those who claimed that under the 1949 Conventions you had no choice but to attack these prisoners, since you would be in violation if you abandoned them.

One of the articles that was particularly interesting to me was the article on protection for descending airmen. We had always claimed that the customary law provided such protection, but in the Conference we found this wasn't necessarily so. There were those who claimed that descending airmen were subject to attack, especially if they were landing in friendly territory. It was a little difficult for us to understand how their protection would be tied to where they were going to land, but there were those, particularly some Middle Eastern countries, who felt that where the battle lines were sufficiently closely drawn people descending in parachutes could maneuver their vehicles so that they could avoid capture and should therefore be subject to attack. The Protocol, however, reaffirms our view that descending airmen are always protected.

Another important achievement of the Conference dealt with protection of the civilian population, and recognition of the customary immunity that civilians have if they do not engage in acts of conflict or combatant activities. It codified several of the rules, the most

important being the rule of proportionality. You know, words can be discredited, and at the conference the word “proportionality” was felt to be discredited. The reason it was discredited was because, in testimony before a congressional committee, the Department of Defense General Counsel said that everything the United States forces did in Vietnam was in full compliance with the rule of proportionality. There were those at the Conference who said if that’s true, then we don’t need a rule of proportionality. So we had to find a new word, and you’ll find in Article 57 of the Protocol a description of the rule of proportionality in terms of “excessive damage in relation to the concrete and definite military advantages to be gained.” I think it’s essentially the same rule, but the word itself was discredited.

Another area that was discussed, and, I think, clarified, is in Article 59, on open cities, or what are termed “demilitarized zones”. There was some confusion under Article 25 of the Hague Regulations as to what constitutes an “open city” and whether or not aerial operations could attack a city, even though military objectives were there, if there were no defenses for that city. I think the historical research will definitely show that that is permissible. Nonetheless, there was considerable confusion, so Article 25 was clarified to require that an “open city” be subject to occupation by enemy forces without resistance.

One other area of interest was the human rights article. We thought that we had effectively neutralized the Russians’ and Communists’ reservation to Article 85 of the Third Convention, because under Article 75 of the Protocol everybody was entitled to at least the traditional guarantees and minimum standards of humane treatment. At the final session, however, and after the Russians had agreed to all these provisions, they got up and said:

As the Soviet delegation understands Article [75], its effects do not extend to war criminals and spies. National legislation should apply to this category of persons, and they should not enjoy international protection. We should like to recall, in this connection, the reservation which the Soviet Union made to Article 85 of the 1949 Convention on the treatment of prisoners of war.²

²Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Summary Records of Plenary Meetings, Doc. No. CDDH/SR. 43/A20 (1977).

In effect, they reserved everything they had before, notwithstanding all the nice words and articles we had in this Protocol. It was a great disappointment to use because we thought we had successfully managed an “end run” around the Russians’ reservation.

Major Burger: Now we will have comments by Professor Taylor and then Professor Mallison.

A. COMMENT BY PROFESSOR TAYLOR

Before undertaking to comment, I think that in candor, I must disavow qualifications which Major Burger innocently but erroneously conferred on me. I have never, at any time, served in the Judge Advocate General’s Corps. No doubt if I had, I would be able to make a much better presentation than I’m probably going to make, but the fact is that my war-time assignments were exclusively in the field of intelligence, and at no time have I had the experience of Judge Advocate General service. So, with that disclaimer, may I say that I have very little quarrel, if it is up to professors to point out errors made by generals, I have very little quarrel with anything that General Reed has said this morning. He’s given us a very lucid synopsis of the 1977 Protocols, and I guess whatever questions I have are not so much directed to what he said, but to the document he is actually talking about.

The one question, which I think, at this point, that I would like to put to him, concerns a matter that he adverted [to] concerning *hors de combat* as applied to aircraft and descending parachutists from distressed aircraft, which is covered in Article 42, with a categorical rule, that no person parachuting from an aircraft in distress should be made the object of attack during his descent. I quite agree with all General Reed said about necessity for realism in these matters and consequently I find myself coming out on what might be called the “hard-boiled” side of the question. I am afraid that I’m quite dubious about the realism of the proposed rule. In discussing it this morning, General Reed talked about the objections from certain Middle Eastern countries which, apparently, concerned the situation where a parachutist is close enough to the lines, so that by maneuvering the parachute, he might be able to descend into friendly rather than enemy territory. I don’t really think that’s the focus of the problem.

The focus of the problem, it seems to me, is a situation such as the German Lufwaffe confronted in the Battle of Britain, where the bulk of the combat was over Britain, and where the point of the whole effort was to knock out the RAF, and where that depended largely upon diminishing, if not destroying, the Royal Air Force fighter command, and where, in a great many cases, if the descending aviator was spared, within a matter of two or three hours, he would be back up in his plane shooting down Luftwaffe aircraft. The same thing, in another dimension, occurred over the Eastern Front later on. I would like to put to General Reed whether, given a situation like that, where the re-emergence of pilots who have bailed out as active combatants is a reality, and a very important factor in the course of the battle, whether it is realistic to expect that the rule will be observed. Contrary to what he said, I think it makes a great deal of difference whether the descending aviators are landing in friendly territory or in hostile territory, and I query whether, confronted with a situation like the one I've described, whether that rule will, in practice, prove a practical one. I will save the rest of my comments or questions until my own presentation.

Major Burger: Professor Mallison.

B. COMMENT BY PROFESSOR MALLISON

I certainly want to, very briefly, re-emphasize the crucial importance of one of General Reed's major points on realism.

The hard fact is, no matter how much professors or anyone else may argue to the contrary, that rules of law that are a frank compromise between humanity and military necessity, and laws which can be enforced in combat situations are much more effective in protecting human values than those which are based upon the principle of humanitarianism alone and which cannot be enforced in combat situations.

Major Burger: We will now have the second presentation. Professor Taylor.

IV. SECOND PRESENTATION: PROFESSOR
TELFORD TAYLOR, PROFESSOR OF LAW AT THE
BENJAMIN CARDOZO SCHOOL OF LAW OF
YESHIVA UNIVERSITY, NOW VISITING
PROFESSOR AT HARVARD LAW SCHOOL

Now, I'm afraid that, after General Reed's presentation, mine is going to sound pretty diffuse. He has focused on the 1977 Protocols. I would like, if time permits, to do basically two things. One is to make a few comments and queries about both Air Force Pamphlet 110-31 and the Geneva Protocols, focusing on matters that lie in the dimension of aerial warfare primarily, and then if there is any time left, which I am beginning to doubt, to make some comments about enforcement problems. If there isn't time, I will hope to say something about that when we come to questions.

Now, as to Air Force Pamphlet 110-31, I'd like to say, at the outset, that I think it is a remarkable and valuable document. The literature and codification in this field has previously been much scantier on the air side than on the ground side, and to have a comprehensive document of this kind with footnotes and references is, I think, a great contribution to clarity in this area. Outside of the particulars here, and, of course, many of the particulars are duplicated in the 1977 Protocols, I think my main criticism is in the use of history as illustration of the rules here. I have the feeling that there either should have been a great deal more, or a good deal less of it, than what we actually find in the document. I say that with full awareness that to put in a document, an official document like this, analyses of past operations by the United States or its allies, which might come to a critical conclusion, is an undertaking which is unwelcome and may indeed be unwise. At the same time, it seems to me that in parts of this, and I'm referring specifically to the discussion of World War II and Vietnam, pages 5-4 and 5-7, that the draft is both overly bland and considerably misleading in comparisons drawn between ourselves, our allies, and the enemy. After a rehearsal of the events concerning the bombing of London and Berlin, we find the statement

As a result of the bombing, some major cities in Europe and Asia were substantially destroyed, including traditional military targets in areas of civilian housing and activity. The allies did not regard civilian populations and

their housing as proper military targets, and generally preferred to seek to destroy only the military aspects of the cities. . . .

Well, with some reservations, I would accept that as not too inaccurate a description of American bombing practices during World War II, but I find it impossible to recognize anything sufficiently resembling British heavy night-time bombing policies, practices, and intentions in World War II. I think we know, in fact, that the intentions were, in many cases, to regard the civilian population of cities as a major objective.

Then we come, with the development of atomic weapons, to this: "The United States regarded two entire cities as appropriate targets and destroyed large portions of two Japanese cities on which atomic weapons were dropped. The U.S. justified the use of the weapons on the basis that the two cities destroyed were involved in war production" Well, of course, if that's a sufficient reason, most cities were involved in war production, and it rather belies all that goes before about restraints that we were supposed to be showing. Now, of course, when we come to nuclear weapons, we're in another and very deep field, but I've always understood that the real justification, whether one accepts it as sufficient, or not, for the nuclear bomb drops, was not the immediate effect on those two particular cities, but the *in terrorem* effect on the Japanese government and the expectation of using this as a lever to produce peace negotiations more rapidly and more suitably from our standpoints.

Then finally, in this section, "The general pattern," and that's referring back to the restraint shown by the American Air Force, we are told that it was modified somewhat in the air war over Japan because of problems unique to the Pacific, including the highly dispersed nature of Japanese war industry. Well, again, if that is a description of the great raid on Tokyo, with the result in that city and the loss of life, it seems to me the description of it is so bland as to be misleading and unsatisfactory.

One comment on a later part: there is a very brief reference in this to Vietnam. It would seem to me, since it was the most recent, and, perhaps, the sort of operation most likely to occur in other areas, of course, in varied forms, that it would have been wise to pay much more attention to it. Since there are many officers still

serving who were there, the problems are not yet dated. It says that, "There was little dispute in either Vietnam or Korea over which objectives could properly be attacked. Instead, controversy centered on whether those objectives were being attacked. That as a description of the situation in North Vietnam seems to be accurate enough, but, certainly, highly inaccurate as a description of the aircraft operations in South Vietnam. Without attempting any conclusions as to whether the conduct of operations in South Vietnam was, or was not, permissible, it certainly has been highly controversial; many substantial criticisms have been leveled.

Now, on that score, just one more word, and now I'd like to go to the Protocols, rather than the Air Force manual. I refer to the definition of "indiscriminate" in Article 51, paragraphs 4 and 5. I do not, now, mean to be critical of the definition itself, it's an exceedingly difficult thing to tackle, and I'm far from saying that I, or anyone I know, could have come up with a better resolution of this. On the other hand, by necessity, these standards are phrased very generally, and in that sense General Reed is right; they can be used for indoctrination and applied, but the question is, given actual situations, how do you construe them? Let me take as an example the so-called Christmas bombing of Hanoi in 1972, which, for various reasons, irrelevant at the moment, I was privileged to view from Hanoi as part of the target area. One definition of an indiscriminate attack is to use those means which employ a method or means of combat which cannot be directed at any specific military objective. Well, take a B-52 dropping bombs from heights into the 30,000's and the area which a bomb load from a flight of B-52's covers. That may possibly be directed accurately at certain very large military objectives, but of course it can't be contended that this is precision bombing if one is talking about smaller targets. Does that mean that the use of B-52's in close proximity to Hanoi violated this? Or to take another standard later, any attack which may be expected to cause incidental loss of civilian life, injuries to civilians, etc., which would be excessive in relation to the concrete and direct military advantage anticipated. This, I take it, is the standard of "proportionality," and I agree with General Reed that, although some may have been satisfied, there wasn't much change in the meaning of that.

However that may be, I'm sure most of you know that a couple of years ago Hamilton DeSaussure and Robert Glasser wrote a consid-

erable piece on this problem in which they concluded that it was unlawful because the motivation was wrong. That is to say, the object was not a military one, but a political one, forcing the North Vietnamese back to the conference table. I should say, at the outset, that I heartily disagree with the view taken in the DeSaussure article, in that most war does have political objectives, and I see nothing which warrants their view of it. However, the reply to it by Thornton Miles seems to me to miss the point I'm try to make, which is that when one comes to proportionality, and these standards here, conclusions can very easily differ about whether these standards are met in a situation such as I've described in December 1972. The bombing was largely accomplished by means which are inherently imprecise in close proximity to a city.

Now, I think I will just take two minutes more, to say very briefly the core of what I planned to say about enforcement problems, which are a bit separate. Without going into any detail, it seems to me, looking at the course of events in civil law at the present time, and the occasions in which war crimes trials have been used as a primary means of imposing sanctions on violations of laws of war, that that record of over a century now has to be looked on as a pretty poor one. By the nature of things, these trials take place either when one has captured enemy personnel, maybe in the course of combat, maybe, as with Germany, when you've totally occupied and overrun a country and pick up whomever you please, or they are trials of one's own troops. Both of these lend themselves to great difficulty in unfair application. If it's the former, the cry is that this is victory's justice; if it's the latter, we encounter many of the same problems that you have with self-policing of a police force against police brutality, and that kind of thing. The *esprit de corps* that military or police service rightly engenders puts great obstacles in the way of effective enforcement through trials.

Now, I'm not saying that they are without value, but they are chiefly of symbolic value, and they are only of symbolic value if the symbols turn out the right way. If we look, in fact, at the efforts to apply sanctions in the case of the My Lai massacre, that seems to be a case where the symbol turned out the wrong way. Efforts to apply sanctions generally proved ineffective and distressingly so. For that reason, I have come to the conclusion that, if we are to talk seriously about observance of the laws of war, then it must be primarily a matter of discipline and training, that they will not be observed

unless the troops can be made to see that, essentially, it is advantageous to follow these rules, and in many situations that is difficult to perceive.

I should add just one other thought. A great deal of education from books and lectures, [made available] a considerable time in advance of entering the field of operations, is very easily forgotten under the stress of the actualities of combat. Therefore, once again, the indoctrination and the emphasis on these things cannot be solely a rear-area matter. It must be a forward matter also, otherwise the lessons which were learned earlier very rapidly peter out.

Major Burger: Thank you. There now may be comments by Professor Mallison and General Reed.

A. COMMENT BY PROFESSOR MALLISON

I would like to comment briefly that, as lawyers, we have a particular obligation. If we are going to serve our clients, and in the case of most of us who are still in uniform, our military commanders, we have to look at the practical results of some of the practices that have been referred to. Civilian populations being objects of massive aerial bombardment in a situation which has existed in World War II in both Europe and the Far East, again in the Vietnam war, and, most recently, and indeed on a continuing basis, in the Middle East. The result has always been uniform. That is, to increase the loyalty of the surviving civilian objects of attack to the existing governmental structure or other authority, perhaps a public body, under which they are operating. If you have any doubts as to the reality of massive aerial bombardment of civilians as reinforcing civilian loyalty, look at the U.S. Strategic Bombing Surveys for Europe and the Pacific, which emphasize the fact situation there very clearly. In addition, looking at it from the standpoint of military necessity, the existence of precision guided munitions wipes out any possibility of a military necessity argument in favor of massive bombardment of civilians. The existence of the PGM's was indeed what made it possible to have the substantially improved protection of civilians in Protocol I which has been referred to. The developed countries have lost any military necessity argument in view of the existence of PGM's, whereas the underdeveloped countries, who tend to think of themselves as the bombees rather than

the bombers, were very gracious about giving up the right of their civilian populations to be bombed from the air.

B. COMMENT BY MAJOR GENERAL REED

I didn't realize that we had a "bombee" or a recipient of the B-52 attack on Hanoi with us today.

First, let me say that there can always be questions about the scope of an attack and what is required to assure target destruction, neutralization, or capture. That is always a problem when you're engaged in conflict: how much force is required to assure destruction, while at the same time complying with your obligation to minimize incidental losses and incidental damages? It's the plague of a commander and an operations officer, always. With respect to the bombing of Hanoi, I would say that there were specific military objectives that were the object of attack, in all cases. Certainly the main objective was to force the enemy to the conference table, which is the ultimate objective in any hostility. The immediate military objective, however, was to reduce military stores and the ability of the enemy to resupply those stores through attacks on communications, lines of communication, transport, and other military objectives which are essential for the enemy to engage in and carry on military operations.

So I would defend the Christmas bombing and the B-52 attacks on Hanoi as being consistent with the definition of military objectives and consistent with the prohibition on indiscriminate attack as defined in the Protocol.

Regarding the criticism of the Air Force pamphlet, I recognize that there are problems. Any time you attempt to write an official government publication you will find that there must be compromises. The first problem we had in the publication of this one was obtaining permission to even write it, which took several years. Certainly those of us who are involved in this subject should also recognize that when you attempt to take the present law and try to justify conduct that occurred 25 or 30 years ago, attitudes towards human rights and the weapons involved have all changed a great deal since that time.

So, I accept the criticism of the pamphlet, I don't think it detracts from its usefulness, and I appreciate the generosity of the comment that he was not disagreeing with the technical accuracy of some of the sentences, but questions whether or not they are useful in the context.

Thank you.

Major Burger: Professor Mallison, your presentation.

V. THIRD PRESENTATION: PROFESSOR W.
THOMAS MALLISON, DIRECTOR OF THE
INTERNATIONAL AND COMPARATIVE LAW
PROGRAM AT GEORGE WASHINGTON
UNIVERSITY LAW CENTER

Colonel Brannen, Major Burger, ladies and gentlemen, it is a particular pleasure for me, a former Navy line officer, to be with such a distinguished panel here at this fine institution. My comments will deal with the applications of two of our four Geneva Conventions of 1949: the POW and Civilian Conventions.

The international humanitarian law status of irregular combatants is a crucial aspect of the Third Convention concerning POW's, as clarified and refined by the First Protocol of 1977; and the status of Israeli settlements in occupied territory under international law, my other topic, is a practical application of some of the specifics of the Geneva Convention for the Protection of Civilian Persons in Time of War.

Turning first to irregulars, I think we ought to bear in mind the points of reciprocity and mutuality as sanctions making it very necessary, if those sanctions are going to operate, to bring all combatants who act for a public purpose within the ambit of the law.³ We must make it important to such irregular combatants to adhere to the laws and customs of war to insure their own status as com-

³ A more comprehensive analysis of the law applicable to irregulars is in W. T. Mallison and Sally V. Mallison, *The Juridicial Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 Case W. Res. J. Int'l. L. 39 (1977).

batants and as POW's. The four criteria with which we are familiar were first enunciated at the Brussels Conference in 1874. As we all know, reliable historians tell us that the Prussians won the Franco-Prussian war, but they certainly lost the Brussels declaration that laid down four criteria for irregulars but also rejected the Prussian government's argument that irregulars must be under state or government control. These well-known criteria are, of course, military command, fixed distinctive badge, open arms, and, most important, adherence to the laws and customs of war. These are the same requirements repeated in the Hague Convention No. IV, Article 1 of the Annexed Regulations, a multilateral convention still in force.

The Nazi and the Japanese militarists' practices in the Second World War showed that more needed to be done to protect irregulars, so we have the Geneva Conventions of 1949 including, particularly, Article 4A(2) of the POW Convention. This article extends POW status to irregulars, described as "organized resistance movements," which meet the specified four requirements of Brussels and Hague, and which operate either in or outside their own territory, even if this territory is occupied. The introductory wording to the article adds two implicit criteria to the four traditional ones. The first is, "being organized." Certainly being organized is essential to facilitate compliance with the four substantive requirements of Article 4A(2). The other introductory wording, "belonging to a party to the conflict," does not refer to being under state control. This argument was rejected at Brussels, and of course, the Brussels Declaration, although unratified, was accepted as customary law and written into the Hague Convention where the matter of state control wasn't even raised. This is a codification of the customary law in the Second World War, allowing the organized resistance movement itself to be a party to the conflict, based upon the model of Marshal Tito's partisans. As you know, from the history of that period, these partisans were not created by any government; indeed, following the successful conclusion of the war, the irregulars created the present Yugoslavian state and government.

Let's just look very briefly at the importance of the four traditional criteria. Being under responsible command, of course, goes back to the crucial matter of complying with the laws of war. Wearing a fixed distinctive sign, for the irregular, is analogous to the uniform of the regular. Carrying arms openly is a crucial matter

to distinguish between combatants and civilians. The I.C.R.C. Commentary states that this requirement simply means that the enemy must be able to recognize partisans as combatants and not as civilians. Complying with the laws and customs of war is the most crucial of the requirements and prevents the degeneration of hostilities to a pathological destruction of human and material values without regard to any rational political or military purpose. In Vietnam, the U.S. Army, in MACV Directive 381-46, went beyond the requirements of Article 4A(2) of the POW Convention and classified captured personnel as entitled to POW status even though they did not meet the requirements of Article 4A(2).

It was a very clear view at Geneva, in the formulation of the 1977 Protocols that more had to be done to bring irregulars into the system. Article 43 of Protocol I deals with the rights and status of armed forces and spells out an entitlement to POW status in a broad conception which is specifically not limited to state parties. Article 44 is an attempt to bring more irregulars into the system by taking account of current military realities. It embodies, first, a general obligation to distinguish the irregular combatant from the civilian population, and adds that such combatant must carry arms openly during the military engagement, and prior to it while involved in military deployment. It clarifies the requirement of compliance with the rules of armed conflict by stating that the failure of an individual to so comply may constitute a war crime, but does not remove his right to POW status.

Now, let us turn to a practical application of the Geneva Civilians Convention with equal brevity. This subject was considered by a subcommittee of the Senate Judiciary Committee last fall, and I had the pleasure of appearing there, along with Professor Yehuda Blu, one of the principal legal advisers to Prime Minister Menachem Begin and now the new Israeli Ambassador to the U.N.⁴ There was certainly a wide consensus, as we've seen in the mass-media, that the Israeli settlements in occupied territories are in violation of the Civilians Convention. This has been manifested in various ways, including a unanimous statement at the United Nations Security Council, participated in by the United States Government, and a

⁴The diverse analyses of Professors Blum and Mallison appear in *The Colonization of the West Bank Territories by Israel, Hearings Before the Subcomm. on Immigration and Naturalization of the Senate Judiciary Comm.*, 95th Cong., 1st Sess. (Oct. 17 and 18, 1977).

series of overwhelming votes in the General Assembly of the United Nations. It's particularly important that the United States Government has continuously and consistently maintained the illegality of these settlements since the intensive hostilities of June 1967. The problem that the Government of Israel is confronted with is that Article 158 of the Civilians Convention prevents a state from denouncing the Convention until after peace has been concluded and until all protected persons have been accorded their full rights under the Convention. In view of this impossibility of a direct denunciation, the Government of Israel has had to use other arguments, and it has used two main approaches. The first category might be called "title claims." The basic presupposition here, for the application of the entire law of belligerent occupation, and particularly Article 49 of the Civilians Convention, is that the belligerent occupant took the territory from the legitimate sovereign. According to the Government of Israel, Jordan and Egypt were not such legitimate sovereigns in the West Bank and Gaza Strip, respectively, since they were there as a result of alleged acts of aggression. The Israeli argument recognizes that Article 2 of the Convention provides that the Convention "shall also apply to all cases of partial or total occupation of the territory of a high contracting party," but assumes the word "territory" must be narrowly construed as including only territory over which the displaced government had *de jure* title, or complete formal sovereignty. In contending that the titles of the Arab sovereigns are deficient in one way or another, the Government of Israel claims to have the better title, as it is in the territories as a result of something quite new in international law, called "defensive conquest." The Government of Israel uses an obscure method of treaty interpretation which is not known in international law. The term "legitimate sovereign," which is the keystone of the whole argument, appears nowhere in the Convention. If you look at the Proceedings of the Geneva Convention of 1949,⁵ you will not find a word or a sentence in the negotiating history to support the positron. In order for the law to be applied according to the Israeli view, the occupying government must recognize the displaced government as having the title of the legitimate sovereign. This, as you will recognize immediately, is an up-to-date application of the thoroughly discredited "just war" concept. The question of just war may be relevant to determining aggression versus self-

⁵ The *Proceedings* comprise four volumes numbered I, IIA, IIB, and III published by the Federal Political Department of the Swiss Government.

defense, but it has no relevance whatsoever to the application of the humanitarian law. This argument changes the Civilians Convention from what its Preamble states it to be, a convention to protect civilian persons, to a convention designed to protect governmental rights to claim territory. If it were such a convention, it would seem to me that it might have been suggested somewhere, either in the text or negotiating history, that this is so.

The next category of claim, quite inconsistent with the first one used by the Government of Israel, is what might be called an "avoidance claim." It conceives the applicability of the Civilians Convention in general, and then focuses on Article 49(6), which states, and I'm quoting in full, "The occupying power shall not deport or transfer parts of its own population into the territory it occupies." This is a broad prohibition without any exceptions to it. But the Government of Israel argues that its settlements are not covered because negotiating history (the first and only time they mention the negotiating history) shows that the purpose of the provision is to protect indigenous civilian populations from deportation and displacement. They point out that this was the Nazi practice, and they claim that it is not the purpose of the Israeli settlements. This, of course, is completely inconsistent with the title claims arguing the irrelevance of the Civilians Convention. The negotiating history as well as the broad language of Article 49, paragraph 6, indicate a broad prohibition without regard to the purpose, and the particular Nazi practice was only one of the many practices prohibited. The critics of the Government of Israel point out that, if we look into purpose, the Israelis, very much like the Nazis, are trying to create facts in occupied territory which facilitate the acquisition of territory. Israelis concerned with Israeli legitimate national interest, rather than the Zionist plans for territorial expansion, are well aware of the protective function of the humanitarian law for Israelis as well as Palestinians and other Arabs. Among them is Professor of International Law Emeritus Nathan Feinberg of the Hebrew University of Jerusalem, who, writing in *Ha'Aretz* newspaper, has decisively rejected the legal arguments of the present Government of Israel as fundamentally inconsistent with Israeli national interests as well as international law.⁶ I agree with Professor Feinberg that the Civilians Convention is applicable and that Arti-

⁶ *Ha' Aretz*, Oct. 9, 1977, translated in 4 SWASIA (published by the National Council of Churches, New York) No. 27, Nov. 11, 1977, pp. 6,7.

cle 49, paragraph 6, a treaty of the United States, and of every one of the states involved in the recurring military hostilities in the Middle East, prohibits the Israeli settlements.

In concluding, it is clear that we're going to have more guerrilla-type warfare in the future. Let us hope that it is limited warfare. Perhaps this is bringing coals to Newcastle, because the United States Army is such an outstanding practitioner of guerrilla warfare. Just as one example, after the surrender at Corregidor and Bataan, United States Army officers led a very well organized and militarily efficient guerrilla movement in the Philippine Islands which continued to operate until the landing of the U.S. Army.'

In order to secure protection for civilians, it is necessary to bring irregular combatants into the legal system. That is why we have these new Protocols. In order to have any meaningful humanitarian law, it is necessary to lay aside ingenious arguments designed to avoid application of the humanitarian law for the benefit of all parties on a nondiscriminatory basis. A good way to implement this is for all governments to take very seriously their obligations in the common Article 2 of the Geneva Conventions of 1949 to not only respect, but also to ensure respect for the conventions.

Thank you.

Major Burger: Comments by General Reed and Professor Taylor.

A. COMMENT BY MAJOR GENERAL REED

I certainly concur with what Professor Mallison has said regarding mutuality of entitlements and sanctions for all combatants, whether they are regular, or reserve, or militia, or guerillas, or other irregular forces. The United States particularly sought to eliminate these distinctions because in Vietnam we saw the criteria for prisoner of war status used to deny that status to some of our forces after they were captured. In particular, it was alleged that air crews were not entitled to prisoner of war status because the Air Force was supposedly violating the laws of war and, therefore, our

⁷See the comment of BG Donald Blackburn, USA (Ret.), on U.S. Army guerilla warfare in 70 Proc. Am. So. Int'l L. 155 (1976).

people were war criminals and not prisoners of war. So the Protocol does eliminate that distinction between regular and irregular forces, and provides a general rule that all members of the armed forces are entitled to prisoner of war status as set out in Article 4 of the Third Convention, even though they may be accused of violation of the law of armed conflict and be guilty of war crimes. Those things are dealt with, of course, while they are within prisoner of war status in accordance with the Third Convention and, except for the Communist reservation that we mentioned earlier, I think that we can expect to see far better humanitarian treatment for all prisoners and all participants in combat because of the Protocols.

I think that's all I need to comment on. Thank you.

B. COMMENT BY PROFESSOR TAYLOR

Major Burger, I have a good view of the clock, and in view of the desirability of involving the audience, and since, I believe, each of us is to have five minutes by way of conclusion, I think I'll withhold any comment at this time.

Major Burger: At this time, we will now accept questions from the audience.

VI. QUESTIONS BY AUDIENCE

Q. Sir, a question for Professor Taylor—

You said earlier that our court-martial efforts in regard to Vietnam had a wrong result. This, presumably, suggests that there exists a right result. **How**, in your view, could we have reached a right result in individual acts or kinds of patterns of conduct which you perceive to have been war crimes in Vietnam?

A. *By Professor Taylor.*

Yes. I should say that as far as the My Lai massacre is concerned, I'm certainly not the only one to perceive that it can be called a war crime. Your question is a difficult one, as to how it could have been

done better, and what changes in organization, and so forth, might have led to a different result.

One reason I think why no convictions, other than the Calley conviction, were obtained was partly due to that gap which protected a number of people because they had left the service. That is to say, under a decision of the Supreme Court, if you committed a crime outside the country while you were in service, you could be court-martialed when you came back, as long as you remained in the service, but not if you were out of the service. But at many of these trials, some of the participants at My Lai who had attained this immunity appeared to testify against those who were unlucky enough to be still in the service. Well, I think any lawyer would recognize that kind of situation, psychologically, is practically a built-in guarantee of acquittal. The spectacle of one who is immune because he has left, and another one who is not because he is still in uniform, is one which is not conducive to conviction. Incidentally, that gap in jurisdiction has lasted since the time of the Philippine insurrection, and it's never been remedied by a new jurisdictional statute, although the War Department has offered legislation to remedy it. Beyond that, of course, there are many explanations. I think that, with the distance of time, I would feel free to say that Lieutenant Calley was poorly defended and ably prosecuted, whereas Captain Medina was ably defended and poorly prosecuted. An instruction was given by the judge in the Medina case which was quite indefensible under the military manual. The result, of course, of the acquittal of Medina was practically an automatic guarantee that those at any higher level, in rank, I mean, if you couldn't convict Medina, who was within a few yards of the place, and was the company commander, it would be much more difficult to convict anybody at a higher level. The recommendations of the Peers Committee, with respect to the handling of it, were, of course, carried out only in small part. I don't know. This is one reason why I came to the somewhat pessimistic conclusion that I announced before. Given an episode which all of us know pretty well was beyond any doubt about whether it was legal or not, an episode widely witnessed, and with a great many participants, and people collaterally involved, [and that] the criminal process by court-martial produced . . . , that is, virtually nothing, that's precisely why, it seems to me, the training and discipline must be the main reliance.

Major Burger: Captain Lopombo.

Q. According to the provisions of paragraph 1, foreign troops which are presently in some countries of Africa are not considered as mercenaries because they have been sent by the government to fight. Now what would happen if this—in a case where these troops were to violate the rules and customs of war concerning the obligations of ensuring against the states' violations? Should these violations engage the responsibility of the sending states or those of the receiving states?

Major Burger: Is that directed to any particular member of the panel?

Q. Yes, to Professor Mallison.

A. Professor Mallison.

As I understand Article 47 of Protocol I, dealing with mercenaries, and its very interesting negotiating history, any competent combatant who has a good lawyer doesn't need to be a mercenary. The definition of "mercenary" is so narrow, and there are so many exceptions to it, that only a very incompetent combatant, with a wholly incompetent lawyer, or perhaps not one at all, is going to come within this narrow conception. Look at all of the exceptions: is not a member of the armed forces; has not, and this is the exception that you've just raised, Captain, in Article 47, paragraph 2, has not been sent by a state which is not a party to the conflict on official duty as a member of his armed forces. It seems to me, that the most important part of this, is Article 47, para. 2(c). Pirates at sea and marauders on land, acting for personal purposes of private gain, have always been unlawful combatants. So Article 47 para. 2(c), simply continues that, by stressing the public purpose criteria. We have not had any application of Article 47 yet, or, indeed, of the Protocols. It has not yet come into effect as a referendum international agreement. Of course, if it is never ratified, and we think it is going to be ratified by the United States and other states, but if it's never ratified, and is accepted into the customary laws as the Brussels Declaration was, it can be just as important unratified as it is ratified. But until we have application of it, it's going to be very hard to answer very specific questions on it. I would say that we should keep in mind the pre-existing customary law and the exception of the illegal combatant who acts for private gain in interpreting the article.

Q. I think, though, when a combatant has been sent by his government, he is not to be considered as a mercenary.

A. *By Professor Mallison.*

That is correct, Sir. So it's very important that you advise your combatants to be sent by their governments.

Q. You mean, in this case, in the case of violations of law of war committed by this combatant, the sending state is responsible?

A. *By Professor Mallison.*

No, it seems to me that the whole problem with mercenaries has not been treated as what the mercenary does; it's just that the mercenary, like the historical pirate or marauder, is regarded as a very bad person for being in the status of a mercenary. It's not so much what he does, it's what he is.

Major Burger: I think we'll move on to another question [indicating a member of the audience].

Q. Professor Mallison, I would like to ask you something. If we consider the PLO as being regular troops, and we try to afford them the convention and protection of POW's, what happens if they commit an act in a third country and they are apprehended in a third country? In that instance, should they be prosecuted under the laws of the country where the act has been committed, or should they be treated under the POW conventions?

A. *By Professor Mallison.*

In responding to your question, I would emphasize, at the outset, that acts of terrorism, whether committed by governmental forces, regular armed forces, by irregulars which are members of an organized resistance movement like the PLO, or committed by individuals, are criminal acts, whether under the municipal law of most countries, or under international law. I don't know any exception to that situation. So, if you assume the PLO commits an act of terrorism in a third country not directly involved in the conflict, I suppose that, under the laws of most countries, that would be a violation of municipal criminal law. If we treat it as coming under the

international law of armed conflict, an act of terrorism is clearly a violation of the central requirement, both in the background law of Brussels-Hague-Geneva, and in the new Protocols, of adherence to the laws and customs of war. So, whether under international law or municipal law, an act of terrorism is a very basic violation of the law.

Q. Sir, your emphasis on the necessity for reality in formulating international law, and the more or less given reality that the political value of terrorism is, in fact, terror, what chance do you see that international terrorists are going to want to abide by the fourth substantive principle, of reciprocity and mutuality? Why would a terrorist, whose only value is terror, give up that in order to be protected by international law?

A. *By Professor Mallison.*

Well, it seems to me—is this question addressed to me? I'll make a point, then I'd like to give others an opportunity to do the same.

It seems to me that one of the problems the United States government is having in dealing with terrorism, while talking it up and always saying they are against it, is that they've been very, very uneven in their interpretation of it. They get very psyched up about organized resistance movement terrorism, and just sort of blank out or overlook governmental terrorism, and even in the field of governmental terrorism, the U.S. government has had a double standard. Witness the great anguish on the part of the U.S. government when an Israeli civil airliner was shot down by trigger-happy Bulgarian fighter pilots in 1954, which could have been explained on the grounds of inadequate instructions and quick reaction, and the entirely different reaction of the U.S. government when a Libyan airliner was shot down after a thirty-minute incursion into Israeli air space, when it was about to get back to the safety of the Suez Canal area. It seems to me that the U.S. government, if it really means to be against terrorism, has to be against all terrorism, whether committed by governments or by groups or individuals. You can no more be against a little bit of terrorism by the bad guys, than you can be against a little bit of murder by the bad guys, and condone it as long as the good guys do it.

Dealing particularly with your question, your question points out

that terrorism is very, very successful in certain instances. We have all sorts of examples of that. I think that, among the terrorists in the third world, there is a great deal of admiration for Prime Minister Menachem Begin, and his record in the field during the civil war in Palestine in 1947 and 1948. Jews, as opposed to Zionists, claim that he killed more Jews in his massive terror tactics, than did the Palestinian resistance. It seems to me that the way to deal with the problem you raise is to make terror not pay. If terror does pay, the problem you raise is going to be very hard to deal with, and to make it not pay, you have to make it not pay across the board, with no exceptions.

Major Burger.: General Reed, I would like to pose a question to you, if I may. From what we've discussed this morning about the new protocols and their emphasis on requiring nations to discriminate in the use of force, I wonder to what extent does a developed nation, such as the United States, have an obligation to develop and to utilize precision guided weapons, and does this put a nation, like our own, under disadvantage, because the lesser developed nations would not have to do this?

A. By Major General Reed.

Well that's—all these questions are difficult, of course. Certainly, you have an obligation to do what you can in the circumstances, and you can't ignore the availability of techniques, technology, and systems which would accomplish the purposes of [the] protocols. I think each nation has to do what is practicable and feasible within its power, balancing that, of course, against the military reality of the conflict. In doing that, you are always subject to criticism that you have the ability to do more, and the lesser developed countries can claim that you have ignored some of these devices and systems which would achieve a military objective and be—result in less collateral damage, and claim that they do not have the obligation. I think they do have the same obligation, maybe not necessarily to acquire sophisticated weapons, which are beyond their economic and other means, but they have to do what they can, within their means, to avoid the collateral damages that many result.

Additional comment was given by Professor Taylor.

I'd like to add just another thought to that. I quite agree with the reply General Reed gave, but I don't think it's anything we need to

get too worried about, really. I mean, if we have the means of greater precision, presumably we will reap from that very direct military benefits because precision bombing is supposed to be much more effective than imprecise bombing. Furthermore, the technological development has enabled us to defend ourselves against bombing much better, so that, although your question is conceptually valid, it does seem to me that, as a practical matter, it's not going to present a serious problem.

Major Burger: Are there any other questions? Yes.

Q. I guess this is to you, General Reed. Concerning descending parachutists, I look at descending parachutists the same way as I do someone who is lost at sea, or in a military hospital, or a POW camp. I would imagine that people who draw a fine line about descending airmen have never felt the nakedness of coming down in a parachute. I would imagine this could be related to a time-out in a football game. Regardless of whether or not the man is going to get on the ground and get into another aircraft or not, I think they should all be considered together.

A. *By Major General Reed.* You've forced me to use my term early. In discussing this problem, it was described by several people as being the shipwrecked of the air. Essentially, that's exactly the way it was looked at by many. Perhaps not time-out at a football game, because we kind of avoid referring to war as a game in which there has to be some sort of balance on each side or it's not a fair fight. But by the same token, it is a period in which an individual is incapable of defending himself, or capable, through no particularly direct act of his own, of being caught in the open without any means to surrender or otherwise defend himself. It is like [being] shipwrecked at sea, it's like temporarily—people are temporarily wounded in a very minor way, they can return to the fight, they do not—you don't bomb frontline dispensaries—I avoid using the word "hospitals," because generally you don't have severely sick and wounded in them, because those individuals may be patched up and return to the fight.

The rationale you give is exact.

Additional comment was given by Professor Taylor.

I'm afraid I think that your analogy to the football field portrays what I can only describe as a sentimental attitude toward warfare.

Warfare is not a football game. Nor do I think the analogy to the ship-wrecked at sea is good either. This is not the case of—we're not talking about people who are traveling from place to place, and then some kind of disaster afflicts the aircraft, we're talking about people who, in the example I gave, have been engaged in mortal combat with your own forces, bombing your country, and shooting down your own pilots.

The argument in this little pamphlet called "Conduct in Combat," which I got hold of, does use [an] analogous argument, the parachutist is helpless, and, of course, that's true, but that will apply equally to paratroops. In the period when they are coming down, they are indeed helpless. So I don't think that that's a point of distinction, because the rule here does say that you can shoot at paratroops who are coming down, and they're helpless as long as they're in the air.

I don't quite see this idea that there should be time-out. We don't spare any troops who are fleeing. They're not surrendering. Why should a parachutist have an immune period from combat coming down, if he's coming down into friendly territory, so that he could fly again in a matter of hours? I don't think it's a thin line. I don't think it's a thin line between where you're coming down, whether it's friendly or hostile territory. It may be in some cases, where the parachuting is near the front lines, but in the case of the battle of Britain and the war in Russia, it was not that at all. It was quite apparent that any pilot shot down—any British pilot shot down—was going to come down in British territory.

I don't deny the humanitarian purpose of the rule, and my question was whether it really would be a matter that one could expect to be observed in conditions where the stakes are high, as in my two illustrations. I think I might argue that.

Major Burger: I think that at this point we can call upon our panelists to make their final remarks, and again we would like to start off with General Reed.

VII. FINAL REMARKS: MAJOR GENERAL REED

I can't leave descending airmen without conceding that in situations where there is a close relationship between the time of the

individual descending and his immediate return to the affray, and that represents a major or a significant part of the overall conflict, then that does raise the element of practicality, which I think we have to recognize.

I would think that the most important development represented by the Protocol is that we now have written standards. Because they are written, it gives us an opportunity to expect greater compliance. I wholeheartedly agree with my colleagues that sanctions imposed against states and trials for criminal conduct have not [been] and will not be effective in enforcing compliance. I think what will be effective is having better trained forces, and having procedures whereby violations can be identified by those forces. This will result in a much greater awareness of the law on the part of commanders, on the part of operations officers, and on the part of the planners. The factor of protection for the innocent victims can then be built in during the peacetime planning and peacetime training, which will result in greater compliance during the pressures and emergencies of combat.

So, it is with that expectation that we are moving ahead with the Protocols and with the development of the Department of Defense's program requiring that all military forces receive training in the law of armed conflict. I think all the armed forces have been directing greater emphasis and greater time on this subject to avoid some of the lapses that have occurred in prior wars.

I would just want to make one other comment. I think that there is a need for us, as part of our training program, to perhaps develop a separate code applicable to combat violations. We are using a Uniform Code of Military Justice which is primarily designed to cover conduct in peacetime. It is not directed at the combat situation. When you talk about murder, when you talk about assault, most people do not think about the combat situation, they think about the individual who has held up a gas station or committed an offense in the civilian community in peacetime. This is an entirely different kind of circumstance from the type of violation of law that you would have in war time, and I would suggest that in the future we may want to look at development of a separate code dealing with combat offenses as a device for better training on the law of armed

conflict, separate from training in the Uniform Code of Military Justice.

Thank you.

Major Burger: Professor Mallison.

VIII. FINAL REMARKS: PROFESSOR MALLISON

In my concluding remarks, I would like to draw on an idea suggested by French Prime Minister Clemenceau of World War I fame. He was accused of interfering with military matters. He laid it down flatly, "War is too important to leave to the generals." In the same way, I would suggest to you that the international humanitarian law is much too important to leave to the lawyers. As lawyers, we have a special obligation to carry it to others, to our clients, to our consumers. To carry it to military commanders, we have to show that it is entirely consistent with military necessity and, indeed, has taken factors of military necessity into account. Let's also get the line officers in the act. As a retired Navy line officer, I feel I'm sitting on both sides of the table on this one. The only other work I've ever done than be an international lawyer is to be a line officer in the Navy. We've got to carry this to the line people. General Reed has done it very well. One of his principal associates in teaching the law of war in the Air Force was General Doherty, the Commander in Chief of SAC, until his recent retirement. Of course, we only have a limited number of four star generals and four star admirals, and they do have other minor, collateral duties in addition to the law of war, although we don't want to minimize the importance of that role, and neither has General Reed.

We must carry the word to the people who are the clients and the consumers. I would like to just give you a brief example of the way we did this in World War II, but I want to point out that you have on this panel three veterans of World War II. We are a diminishing group, and you're not always going to have the opportunity to hear stories of the type that I'm about to tell you first hand.

Imagine battleships and cruisers in, first, Leyte Gulf and then in Lingoyen Gulf, taking a pretty bad battering from Kamakaze attacks, and the ships burning after the attacks, with many killed and

wounded topside and all over the deck area. Then imagine a few of the Kamakaze who didn't quite carry out their instructions. You know that each of them attended his own ceremonial funeral, and perhaps the survivors were those who were really the chief mourners at their ceremonial funerals and didn't see any point in giving up the benefits of the funeral by actually going to their death. There was a great temptation to say, "Look at our shipmates who are killed and who are dying, look at the damage done to our ships, let's keep on shooting." But this wasn't done. The shooting stopped, these people were picked up, and they were treated in a manner consistent with the humanitarian requirements, which utterly astonished them because they had been told that they were going to be subjected to cruel and unusual punishments. They told everything they knew about Japanese military operations and they greatly facilitated our future military operations. They didn't have to be encouraged to talk, they were so glad and so surprised to be alive, that they wanted to talk. It was a very significant military advantage to give them POW status.

In this context and in other contexts, we as lawyers must point out the practical military advantages involved in this branch of law.

Thank you.

Major Burger: Professor Taylor.

IX. FINAL REMARKS: PROFESSOR TAYLOR

My agreement with Professor Mallison's conclusion is so complete that I say anything more with some hesitation. But I'd like to do just two things: one in clarifying, and the other by way of possible suggestion.

My discussion of the bombing of Hanoi was not directed to the proposition that the bombing was, in fact, invalid, whether under the law in effect at that time, or under these protocols. That's a question on which I remain in doubt to this day, despite my closeup view of the consequences.

During the first two or three days of it, I was in doubt, but hav-

ing observed the weight of bombs dropped, and the amount of damage outside of Hanoi, in comparison to the small amount of damage inside, I became very rapidly convinced that there was no effort being made to destroy Hanoi. However, later on, when I saw two large residential areas, closely settled, both very large areas, blown to bits with heavy loss of life, and the ruins of a big hospital complex blown to ruins, with, fortunately, very little loss of life, then, naturally, questions arose in my mind as to what was going on. Returning home, I was able to pretty well satisfy myself with what I thought all along that these were not intentional targets, that these were the result of either jettison by disabled bombers or misses from close-by targets. I haven't any doubt that General Reed is quite right when he says that all of these missions had military selected targets. But, of course, under the protocols, that's still not a sufficient answer. Under the standard that attacks must be directed against military targets, if the losses are going to be excessive in relation to the advantages [,that] is a disqualification. Therefore, simply to say that military targets were there in every case does not satisfy the protocols. And my point really is that if we're to study the problem and conduct educational exercises in this area, the examination of the Christmas bombing, on an objective basis, [is needed,] with more knowledge than I possess of the military necessity for using B-52's, maybe there was one, I don't know. But it's the kind of thing, which as a field of study, seems to me most illuminating in testing the workability of principles like this. Now, the difficulty of doing it in an official pamphlet is obvious. I made the point and General Reed made the point that it's not a vehicle which is well adapted to probing objective analysis of controversial episodes. He, I think a little unhappily, said that there were difficulties in trying to justify what had happened. I don't think we ought to do that. It does not seem to me the purpose of the pamphlet should be to try to justify the past. What we want is commentary that would be helpful in application of the standards there. I'm wondering, since it's so difficult to do, and I agree that it is difficult to do in an official pamphlet, whether having to resort to some technique such as Congress sometimes uses in getting studies of controversial problems by the Congressional Library, which, I guess, you can't do, but getting outside entities qualified to do it—to put together material that would not have an official flavor to it, might not be a better vehicle for educational use. As far as the official pamphlet goes, it seems to me, in short, it would have been better not to assay the commentaries which were inhibited the way

they have to be, but to try that sort of thing separately, and in some other context where you can be more open about it.

X. SUMMATION BY MAJOR BURGER

Well, thank you, General Reed, Professor Taylor, and Professor Mallison. I think that we have had a bit more discussion on the law of armed conflict in this short period this morning than could ever have been expected. We have drawn from your experience, your expertise, but most especially, I think, from your judgment and foresight on the future of the law of armed conflict. As military lawyers and practitioners interested in the law of armed conflict, I cannot thank you enough for what you have done here this morning. I would like to express the sincere appreciation of The Judge Advocate General's School, of our 26th Advanced Class, of the staff and faculty, and all the other people here in the audience this morning. I hope that you all may return here again in the future. Thank you.

THE SEIZURE AND RECOVERY OF THE S.S. MAYAGUEZ: A LEGAL ANALYSIS OF UNITED STATES CLAIMS*

by Major Thomas E. Behuniak**

PART 1

In this two-part article, Major Behuniak examines at length the legal basis for United States actions taken in response to the 1975 seizure by the Cambodian government of the American flag merchant vessel Mayaguez.

The first part, appearing in this volume, sets forth the facts of the case and analyzes three of four major legal claims or arguments advanced by the United States. In the first claim, the seizure of the ship is characterized as an act of piracy. The second claim, closely related to the first, asserts that the seizure contravened international law because it took place on the high seas, not in Cambodian territorial waters. The third claim asserts that the ship was entitled to enjoy the right of, and was engaging in innocent passage.

*This article is an adaptation of a thesis submitted to the faculty of the National Law Center of the George Washington University in partial satisfaction of the requirements for the degree Master of Laws. The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, United States Army or any other governmental agency.

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The second part, which will appear in volume 83, discusses the fourth major claim, that of self-defense. In this claim the United States asserts the right to protect its nationals and their property abroad.

Major Behuniak concludes his first part with the observation that the claims of piracy and seizure on the high seas are invalid, while the claim of innocent passage is valid. As for protection of nationals abroad, he will show in part 2 that this claim is valid. Although there is some authority for the proposition that protection of nationals abroad is no longer an acceptable rationale because of the danger of its abuse, this right of protection continues to be needed in the absence of effective international machinery to protect human rights.

Although the Mayaguez incident occurred in 1975, it continues to have importance as a precedent for use in other situations which have arisen subsequently. These situations, involving armed foreign intervention to protect human rights, include the Israeli raid on Entebbe in 1976, the German commando raid in Somalia in 1977, and the ill-fated Egyptian raid on Cyprus in 1978. There is no reason to doubt that other similar incidents will arise in the future.

The Mayaguez case raises also significant questions concerning the legal regime of the seas, questions which have been debated during the United Nations Conference on the Law of the Sea.

Both parts 1 and 8 are followed by appendices reproducing certain documents useful in understanding the Mayaguez case.

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I. INTRODUCTION

On April 16, 1975, the United States-supported¹ Government of the Khmer Republic surrendered to Khmer Rouge rebel forces of the so-called Government of the National Union of Cambodia in

¹The United States threw its full support behind the Lon Nol government after Lon Nol and his followers overthrew Prince Norodom Sihanouk. During the five years of hostilities with the Khmer Rouge forces, United States aid supported the war effort of the Lon Nol government. *See* U.S. Dep't of Army, Pamphlet No. 550-50, Area Handbook for the Khmer Republic (Cambodia), chs. 8-10, 14 (1973); D. Kirk, *Wider War* 103-36 (1971); S. Grant, L. Moss, & J. Unger, eds., *Cambodia, The Widening War in Indochina* pt. 3 (1971). *See also* the 1974 statement by United Nations Ambassador Scali to the United Nations General Assembly voicing United States objection to moves to change representation of Cambodia in 72 Dep't State Bull. 50-52 (1975); statement by Ass't Secretary of State Habib made before the Subcomm. on Gov't Operations of the House Comm. on Approps. on Feb. 3, 1975, discussing a request for supplemental appropriations for military assistance to Cambodia, in 72 Dep't State Bull. 255-58 (1975); and an additional statement by Ass't. Secretary Habib on the same subject made before the Special Subcomm. on Investigations of the House Comm. on Foreign Affairs on Mar. 5, 1975, in 72 Dep't State Bull. 407, 409 (1975).

It was not until the period February through April 1975 when Congress failed to act on Administration requests for an additional \$222 million in military and economic aid for the embattled country that United States materiel support began to diminish. *See* 35 Facts on File 34 (1975); *id.* at 113; at 154; President Ford's Jan. 28 message to Congress for additional funds for assistance to Cambodia and Vietnam, 72 Dep't State Bull. 229, 231 (1975).

A final compromise proposal was approved by the Senate Foreign Relations Committee that provided \$82.5 million in supplemental military aid for Cambodia. This would have required an end to such aid after June 30, 1975. The proposal was rejected by President Ford. 35 Facts on File 153, 175 (1975). *See also id.*, No. 1796, Apr. 12, 1975.

The Khmer Rouge rebel forces received their support from North Vietnam in the form of materiel and advisory assistance in combat operations. North Vietnam also had several military bases in Northeastern Cambodia. *See* the two statements of Ass't. Secretary Habib *supra*.

Phnom Penh, the capital of Cambodia and the last stronghold of the Government of the Khmer Republic. This ended a five-year-old war between these opposing factions. This war began shortly after a coup led by General Lon Nol deposed Prince Norodom Sihanouk as head of state and installed a republic on March 18, 1970.²

On April 17, the new government established its headquarters at the Interior Ministry in the capital and invited all ministers and generals of the former government to help draw up measures to restore order in the country. An official of the new government stated at a news conference in Paris that the government would pursue a policy of neutrality and nonalignment.³

Despite previous reports of scattered fighting between the Khmer Rouge and remnants of the former government's army in parts of the country, the new government announced on April 22 that it was "governing in Phnom Penh and the entire country."⁴ At its first national congress, held on April 26-28 and attended by 311 delegates, the new government reaffirmed "the policy of independence, peace, neutrality and nonalignment, absolutely prohibiting any country from establishing bases in Cambodia, and struggling against all forms of foreign interference in Cambodia's internal affair~." ~

On May 12, less than a month after the Khmer Rouge seized power in Phnom Penh, the new government found itself embroiled in a dispute with the Government of the United States over the seizure of an American cargo vessel, the S.S. Mayaguez, and its crew by a Cambodian gunboat in the Gulf of Siam (Thailand).⁶ After some two and one-half days of diplomatic efforts to gain the release of the ship and its crew failed to draw any response from authorities in Phnom Penh, the U.S. resorted to armed force and launched a military rescue operation against Cambodian territory. The ship

²35 Facts on File 245 (1975). The United States embassy in Phnom Pehn closed on April 12. Remaining United States personnel and their dependents were evacuated by helicopters, which were flown in with some 100 Marines aboard who secured a landing area near the embassy grounds. *Id.*, at 246.

³*Id.* at 245.

⁴*Id.* at 272.

⁵*Id.* at 294.

⁶Washinton Post, May 13, 1975, at A-1 [hereinafter cited as Post].

was retaken by a boarding party of U.S. Marines, and the crew was released by the Cambodians. The four-day incident was over.⁷

Although pleased with the execution of the rescue mission, President Ford ordered a review of the four days of events to determine what lessons, if any, were to be learned from the incident.⁸ Later, twenty-nine Democratic members of Congress joined in a statement urging the House of Representatives to send the President a formal request for an account of the events surrounding the rescue mission. The joint statement said, in part:

The United States reaction to the ship's seizure resulted in a number of combat casualties and left a great many questions as to the timing, nature and scope of the rescue operation. . . . We believe that Congress should look closely at this incident, not only to clear up confusion as to what happened, but to evaluate the decision-making process and to determine how such situations might be handled better in the future.⁹

The purpose of this paper is to identify some of the questions of law and policy raised by the events of the incident and to inquire into their impact on the international legal order. In doing so, this study will examine the following three areas: first, the facts and circumstances of the incident; second, certain claims made by a major participant in the dispute—the United States; and third, the validity of its claims and actions under relevant norms of customary international law, applicable conventional law, and contemporary practice.

It is hoped that, in the end, this inquiry and the conclusions and recommendations to be drawn therefrom will provide a foundation upon which other studies can build.

11. FACTUAL SITUATION

A. MONDAY, MAY 12

During the early afternoon, in the Gulf of Thailand, the S.S. Mayaguez, a U.S. merchant ship, plodded northwest across the

⁷See generally, *id.*, May 15, 1975, at A-1 & A-16.

⁸Time Magazine, May 26, 1975, at 18, col. 2 [hereinafter cited as Time].

⁹Post, June 12, 1975, at A-2, col. 6.

Gulfs waters at 12.5 knots.¹⁰ The vessel, a 31-year-old, 10,485-ton, 480-foot, container-type cargo ship, left its home port of Hong Kong on May 8 with a mixed cargo and was bound for Sattahip, Thailand, and then on to Singapore.¹¹ The ship had a top speed of 15 knots and was manned by forty American seamen.¹² She had been assigned to Asian waters since January 1975, when she was transferred from the Caribbean by her owner, Sea-land Service, Inc., of Menlo Park, N.J., a subsidiary of the tobacco conglomerate, R. J. Reynolds Industries, Inc., of Winston-Salem, N.C.¹³

On board the vessel were 274 very large containers, insured for \$5 million. Ninety were empty. One hundred and seven contained commercial freight bound for Singapore. Seventy-seven contained post exchange and commissary supplies, office equipment, spare automotive parts and mail consigned from Oakland, California, to Utapao Air Base in Thailand for U.S. servicemembers, embassy personnel, and their dependents stationed in Thailand.¹⁴ The Mayaguez carried no weapons, ammunition, explosives, munitions or military equipment, and it was unarmed,¹⁵ except for a mace gun, which the skipper possessed for use in the event "a crew member ran amok."¹⁶

¹⁰ Post, May 13, 1975, at A-1, cols. 1-6 & A-13, col. 1; R. Rowan, *The Four Days of Mayaguez 15* (1975). Rowan's account of the events surrounding the four days of crisis is cited extensively in this paper. His book is the most detailed account of the incident to date. After comparison of the book with the several daily accounts of the incident in articles in the Washington Post and N.Y. Times during the period 13-31 May 1975, and further, with articles in the May 26, 1975 issues of Time, Newsweek and U.S. News & World Report magazines, Rowan's book is considered by this writer to be the most accurate.

¹¹ R. Rowan, *supra* note 10, at 37; Post, May 13, 1975, at A-13, col. 1; May 16, 1975, at A-10, cols. 3-6; May 18, 1975, at A-20, col. 1; N.Y. Times, May 24, 1975, at 2, col. 1; Time, May 26, 1975, at 10, col. 1.

¹² *Id.*; Post, May 13, 1975, at A-1, col. 1.

¹³ Time, May 26, 1975, at 10, col. 1.

¹⁴ *Id.*; Post, May 16, 1975, at A-10, cols. 3-6; N.Y. Times, May 24, 1975, at 2, col. 1; R. Rowan, *supra* note 10, at 163. The 27 containers (35 to 40 feet in length) bound for Thailand included two of mail; three of foodstuffs including refrigerated meat and fruit; eight of commissary supplies, such as soap and shaving cream; 26 of spare automotive parts and office equipment; and 38 of PX items, such as soft drinks, beer and liquor. *Id.*, Post, May 13, 1975, at A-13, col. 2.

¹⁵ *Supra*; R. Rowan, *supra* note 10 at 19. On May 23, 1975, when the Mayaguez reached Hong Kong after its rescue, officials of Sea-Land Service volunteered to open all the sealed cargo containers for inspection by newsmen. When newsmen learned that the process would take 10 hours, they decided to inspect only six containers. The six selected at random by the newsmen contained automobile parts, fertilizer, butane gas, paint, office equipment and toilet paper. Times, May 24, 1975, at 2, cols. 1 & 2.

¹⁶ R. Rowan, *supra* note 10, at 19. Instead of revolvers, most skippers today carry mace guns for this purpose.

It was 2:18 p.m. (Cambodian time) when the third mate, who was on watch, took the ship's bearing.¹⁷ Her trackline was 323 degrees. However, she had been running a little inside, so the third mate changed her course five degrees to the left to keep well off the island of Poulo Wai, which the ship was about to pass.¹⁸ Poulo Wai is roughly one mile long and about half that size in width, and is one of two tropical islands lying some fifty-four miles off the Cambodian mainland.¹⁹ Both islands, designated as the Wai Islands, are claimed by both Cambodia and South Vietnam, and have been the subject of dispute between them for several years.²⁰

Because Poulo Wai was in clear view, the third mate did not use his sextant to take his bearing. Instead he used an azimuth circle to take a tangent bearing on the island.²¹ The Mayaguez was some six and one-half miles southeast of Poulo Wai in a widely used international shipping lane.²² During his sighting, the third mate noticed what appeared to be a launch with a red flag coming at the Mayaguez from Poulo Wai. The captain, who was in his cabin sorting money for crewmen who had elected to draw funds for port call in Suttahip, Thailand the next morning, was informed of the oncoming launch and reported to the wheelhouse. It was 2:20 p.m.²³

Through his binoculars, the captain saw a gunboat about a mile away, rapidly closing in on the Mayaguez. He then heard a burst of fifteen to twenty rounds of machine-gun fire and saw tracers from the gunboat cross the ship's bow. The captain immediately gave the order for the Mayaguez to stop. A second burst of gunfire erupted, followed by a third burst. Then the blur of a dark object hurtled over the bow and exploded close to the Mayaguez. It was a rocket.²⁴

¹⁷*Id.*, at 17

¹⁸*Id.*

¹⁹See maps, *infra*, Appendix A, depicting area of seizure and recovery of the Mayaguez. The maps are reproductions of maps in the frontispiece of R. Rowan, *supra* note 10. See also, *id.*, at 17, 24-25, 47; Post, May 18, 1975, at A-10, col. 2; Time, May 26, 1975, 10, 11, 17. The Cambodians call Poulo Wai Island, Koh Ach Seh, which translates as Horseshit Island. *Id.* at 10.

²⁰See Post, May 18, 1975, at A-20, col. 1; May 16, 1975, at A-20, col. 1; Time, May 26, 1975, at 10, col. 2; 35 Facts on File 320 (1975).

²¹R. Rowan, *supra* note 10, at 17-18.

²²Post, May 16, 1975, at A-10, col. 1; May 18, 1975 at A-20, col. 1; Time, May 26, 1975, at 10, col. 2.

²³Time, May 26, 1975, at 11, col. 1 and 18-20.

²⁴R. Rowan, *supra* note 10, at 20-22, 24; Post, May 18, 1975, at A-20, cols. 1 and 2; Newsweek Magazine, May 26, 1975, at 18-19 [hereinafter cited as Newsweek].

The reactions of the crew are vividly portrayed in Ray Rowan's work. They ranged from surprise and bewilderment through indignation and anxiety to fear for their lives. These feelings were also to remain with the crew in varying degrees of intensity, throughout their ordeal.²⁵

The gunboat, an American-built craft called a swiftboat, made a taunting sweep in front of the Mayaguez and then came alongside. Her twin fifty-calibre machine gun was trained on the ship. A single-barrel anti-aircraft gun and a rocket-launcher, both of which were mounted on the ship's afterdeck, were manned, though their barrels pointed skyward.²⁶ A ladder was put over the side of the Mayaguez, and seven Cambodians clad in black pajamas, headbands, and sandals scrambled aboard. They were armed with AK-47 rifles, a grenade launcher and a U.S. Army fieldpack radio.²⁷

Several members of the boarding party entered the wheelhouse, and one member who apparently was in charge of the party began inspecting the radar, telemotor, gyro-pilot and other pieces of standard navigational equipment. During the inspection, the ship's captain asked the leader if he spoke English or French. The man just shook his head, indicating "no." Finally, the leader pointed to the chartroom and motioned for the skipper to go in.²⁸ Glancing at a map in the room, the leader said, "Cambodge. Baie de Ream," and immediately pointed to Paulo Wai. He then picked up a pencil and drew an anchor at a point close to Poulo Wai, indicating where he wanted the Mayaguez to go. In an attempt to determine the nature of the measurements of the depths on the chart, the leader asked, "fathoms or meters?", revealing that he knew at least a smattering of English. The skipper answered that the depths were in meters,

²⁵See R. Rowan, *supra* note 10, ch. 11 et seq. "They are shooting at us," and "We're being captured" echoed loudly throughout the Mayaguez. *Id.* at ch. 11

²⁶*Id.* at 34, 36; Post, May 18, 1975, at A-20, col. 1; see also *id.*, May 13, 1975, at A-1, col. 1; May 16, 1975, at A-10, col. 1; Newsweek, May 26, 1975, at 19.

²⁷R. Rowan, *supra* note 10, at 38-39; Post, May 18, 1975, at A-20, col. 2; Newsweek, May 26, 1975, at 19. On the light side, it is reported that one of the boarding party, a boy, who was carrying the grenade launcher, found it cumbersome and could not make it all the way up the ladder. One of the ship's crewman, an ex-bellhop, went over the side and carried the heavy weapon up for him. Immediately thereafter, the seaman thought, "Now why did I do that"? . . . "I should have let him drop it in the water." R. Rowan *supra* note 10, at 39.

²⁸*Id.* at 39-40.

though, in fact, they were in fathoms. The captain thought that, if the Cambodian believed him, he would have an excuse for staying further offshore. It worked.²⁹

As they returned to the wheelhouse, the gunboat was already moving towards Poulo Wai. The leader pointed at the gunboat, indicating that he wanted the Mayaguez to follow it. The Mayaguez followed, though the captain kept her moving as slowly as possible, hoping someone would come to their aid.³⁰ While she was being fired upon, the ship's radio operator managed to get out an s.o.s.³¹ In addition, a mayday call was being transmitted while the ship was being moved to Poulo Wai. The distress call was picked up by both a Philippine and an Australian vessel before the Cambodians found and silenced the ship's radio shack.³²

As the ship's crew was being rounded up and herded onto the starboard deck, the Mayaguez rounded the western tip of Poulo Wai.³³ Then a debate took place between the captain and the leader, whose rank the captain finally concluded was ensign, over the spot on the chart where the ensign wanted the Mayaguez to drop anchor. The captain claimed it was too shallow. After some give and take between them, the captain ordered the anchor to be lowered slowly.³⁴ The Mayaguez, while not as near to the island as the ensign wanted her to be, was fairly close.³⁵

As the anchor lowered, the ensign, in an apparent change of mind, ordered, "Go Ream. Go Ream, Wharf Number 2." The captain, not wanting to go to the mainland, argued that it would be too dangerous to negotiate the harbor since it would be dark and his radar was broken. Both points were true. The radar had broken down that morning, and the evening was approaching fast. The captain flipped on the radar, which showed a blank screen, in an effort to demonstrate to the ensign his point.

²⁹*Id.* at 40.

³⁰*Id.*; Post, May 18, 1976, at A-20, col. 2.

³¹*Id.*; R. Rowan, *supra* note 10, at 34.

³²*Id.* at 43-46.

³³*Id.*, at 46-47.

³⁴*Id.* at 55.

³⁵*Id.* Dense vegetation, a lookout tower, and a jetty protruding from the beach could be seen from the Mayaguez.

The ensign did not appear convinced, and began to get agitated. He drew the captain's attention to his AK-47 and then pointed to the containers on the forward deck, indicating the obvious. The captain stated that he did not have any weapons, ammunition, or electronic equipment on the ship, but only general cargo. As the verbal exchange over going to the port of Ream continued, the ensign became increasingly impatient. Noticing this, the skipper gave the order to hoist the anchor. A last attempt to convince the ensign of the danger of proceeding further succeeded, however, and the Mayaguez dropped anchor. It was 4:55 p.m.³⁶

Some twenty additional armed guards were shuttled out to the Mayaguez to watch over the crew, which spent a very restless night off Poulo Wai.³⁷

At 7:40 a.m. (Washington time) President Ford was first made aware of the incident at an intelligence briefing.³⁸ An Indonesian listening post in Jakarta had picked up the Mayaguez's mayday. After attempts to contact the ship failed, the post had telephoned the message: "Have been fired upon and boarded by Cambodian armed forces at 9 degrees 48 minutes north and 102 degrees 53 minutes east," to the United States Embassy in Jakarta. From there it was relayed to Washington.³⁹

At the intelligence briefing, only sketchy details were available about the ship and the incident. It could only be reported that a United States merchant ship had been fired upon and boarded by Cambodian forces, and that the ship was being taken to Kompong Som. Two previous incidents in the same area during the past eight days were mentioned also. On May 4, a South Korean vessel had been chased, fired on and damaged by a Cambodian gunboat. On May 7, a Panamanian vessel had been fired on, seized, held for 24 hours and then released by the Cambodians. The President's feeling was that "if they are going to take control not only of the ship, but of the personnel, it is a serious matter."⁴⁰

³⁶*Id.* at 56-57.

³⁷*Id.* at 57.

³⁸Newsweek, May 26, 1975, at 19, col. 2.

³⁹*Id.*; R. Rowan, *supra* note 10, at 66-67.

⁴⁰*Id.* at 67; Newsweek, May 26, 1975, at 19, col. 2; Time, May 26, 1975, at 10, col. 3; Post, May 13, 1975, at A-1, col. 6 and A-13, col. 2. The Panamanian vessel was

The President called for a meeting of the National Security Council at noon. From the outset, the question foremost in the minds of these decision-makers was how to gain the release of the ship and its crew. It was reported that there was "an authentic concern for the safety of the captive crewmen in the hands of Cambodia's xenophobic new Khmer Rouge government."⁴¹ There was also the question of what action to take to prevent or at least deter similar incidents from occurring in the future.⁴² The seizure also had be-

thought to be named "Unid." Later it was discovered that "Unid" was the Navy abbreviation for "unidentified." To date, the name and owner of this ship remains unidentified. It has been suggested that the ship might belong to one of those marginal overseas companies which operate under foreign flags and prefer to keep their business operations as secret as possible. *See* Post, June 15, 1975, at A-5, cols. 1 and 2.

The day following the incident involving the South Korean vessel, its government warned its merchant vessels to stay out of the area. *Times*, May 20, 1975, at 14, col. 3.

The question has arisen as to why no prompt warning was issued by the proper United States authorities to its merchant ships to avoid the troubled waters off of Cambodia, considering that the incidents involving the South Korean and Panamanian vessels were known to United States intelligence gathering sources several days prior to the Mayaguez incident. *See Times*, May 20, 1975, at 14, col. 3. According to one source, it was not the custom of the United States Defense Mapping Agency to issue special warnings to mariners on "anything so minor as this . . ." "Only forty-five such Special Warnings to Mariners have been issued, since the days of John Paul Jones. The last such Warning was issued at the time Haiphong harbor was mined." *See* R. Rowan, *supra* note 10, at 50-51.

A special warning was issued the day after the Mayaguez seizure, stating:

Shipping is advised until further notice to remain more than 35 nautical miles off the coast of Cambodia and more than 20 nautical miles off the coast of Vietnam including off lying islands. Recent incidents have been reported of firing on, stopping and detention of ships, within waters claimed by Cambodia, particularly in the vicinity of Poulo Wai Island. This warning in no way should be construed as United States recognition of Cambodian or Vietnamese territorial sea claims or as derogation of the right of innocent passage for United States flag vessels, or derogation of the freedom of the high seas.

72 Dep't State Bull. 719-20 (1975).

⁴¹*See* Post, May 17, 1975, at A-17, col. 1; A-1, cols. 4 and 5; May 13, 1975, at A-13, col. 3; *Newsweek*, May 26, 1975, at 17, col. 1. *See also* comments of Secretary of State Kissinger at a news conference on May 16, 1975, reported in 72 Dep't State Bull. 753, 755 (1975). This concern was heightened by a faulty initial intelligence report that the Mayaguez had been taken to the mainland. *Newsweek*, May 26, 1975, at 17, col. 1 and 20, vol. 1.

⁴²Post, May 17, 1975, at 17, col. 1, A-1, cols. 4 and 5; *U.S. News & World Report*, May 26, 1975, at 24, col. 1; *Time*, at 12, col. 1; R. Rowan, *supra* note 10, at 68.

come entangled in questions confronting United States foreign policy in Asia and other parts of the international arena.⁴³

Secretary of State Henry Kissinger argued that what was at stake went far beyond the seizure of a U.S. cargo ship and its crew, and called for a swift and decisive response.⁴⁴ Secretary of Defense Arthur Schlesinger is alleged, on the other hand, to have urged that "the U.S. move cautiously to avoid over-reacting, and should use only the minimum force necessary to get back the ship and crew."⁴⁵

The Pueblo incident of 1968, in which the North Koreans seized a U.S. intelligence ship and moved its crewmen inland beyond rescue, was also discussed.⁴⁶ Fearing the possible consequences the United

⁴³*Id.* U.S. News & World Report, May 26, 1975, at 19-22; Newsweek, May 26, 1975, at 16, col. 2 and 19, cols. 2-3; Time, May 26, 1975, at 9, and 12, col. 1. In Thailand, the Philippines and in South Korea, the United States had already been criticized for a lack of resolve following withdrawals from Phnom Penh, Cambodia, and Saigon, South Vietnam. R. Rowan, *supra* note 10, at 68. Also, after the fall of Saigon, North Korea began to make aggressive overtures toward South Korea. See U.S. News & World Report, May 26, 1975, at 20, cols. 1 and 2; Time, May 26, 1975, at 12, col. 1. In recent meetings with the Prime Ministers of Britain, Holland, Australia, New Zealand and Singapore, President Ford stated that the events in Indo-China "in no way weakened U.S. resolve to stand by its friends in Asia and elsewhere." A similar message would be delivered to a NATO summit conference in Brussels on May 28-29 and to the Prime Minister of Japan soon thereafter. U.S. News & World Report, May 26, 1975, at 20, col. 3, and 21, col. 1. See also Newsweek May 26, 1975, at 17, col. 1.

⁴⁴It is reported that Secretary Kissinger argued that the incident was an opportunity for the United States to restore its faded credibility with a decisive military show of force. Newsweek, May 26, 1975, at 17, col. 2, and 19, cols. 2-3; Time, May 26, 1975, at 12, col. 1. See also Newsweek, May 26, 1975, at 16, col. 2, where it is reported that the Secretary told the National Security Council that the lives of the crewman "must unfortunately be a secondary consideration." (Kissinger denied the quotation.)

⁴⁵Time, May 26, 1975, at 12, col. 1.

⁴⁶*Id.*; Newsweek, May 26, 1975, at 17, col. 1; R. Rowan, *supra* note 10, at 68. The Pueblo was captured by North Korean torpedo boats and a subchaser off the port of Wonsan on Jan. 23, 1968, after North Korea broadcast warnings that it would not tolerate any ships in its territorial waters. One of the Pueblo's 38-man crew was killed in the capture. They were held for 11 months, tortured, and forced to sign false confessions that they had been spying for the CIA. To gain release of the crew, the United States had to apologize to the North Koreans for "grave acts of espionage," though the United States immediately repudiated the statement after the crew's release. The North Koreans claimed that the Pueblo had intruded into its territorial waters. North Korea claimed a 12-mile limit. The United States disputed this claim and also the assertion that the Pueblo was within the claimed 12-mile limit. *Id.* See also Post, May 15, 1975, at A-12, cols. 2-3; Rubin, *Some Legal Implications of the Pueblo Incident*, 18 Int'l L. & Comp. L.Q. 961 (1969); McClain, *The Pueblo Seizure In A Better Ordered World*, 31 Pitt. L.J. 255 (1969).

States would have to face if the crew was not returned, and believing that "the Khmer Rouge was capable of brutal and irrational actions," President Ford was reported to have been of the opinion that "under no circumstances . . . , would he allow the Cambodians to hold American hostages for months."⁴⁷

The prior incidents involving the South Korean and Panamanian vessels were also mentioned,⁴⁸ as well as the question of why the Cambodians had seized the *Mayaguez*.⁴⁹

President Ford made several decisions at the NSC meeting. He instructed Secretary Kissinger to seek diplomatic assistance from

⁴⁷See *Time*, May 26, 1975, at 12, cols. 1 and 2. At a news conference on May 16, 1975, Secretary Kissinger said: "We believed that we had to draw a line against illegal actions, and secondly, against situations where the United States might be forced into a humiliating discussion about the ransom of innocent seamen for a very extended period of time." *Post*, May 17, 1975, at A-1, col. 5.

After Cambodia had warned American ships to stay out of its part of the Mekong River, a United States patrol boat sailed into Cambodian river waters on July 17, 1968. The boat and crew were seized by Cambodian authorities. The United States claimed the intrusion was inadvertent and apologized to Cambodia. However, Cambodia rejected the United States version of the incident and warned that unless the United States offered a tractor or bulldozer for the return of each seized man, the 11 Americans held would be tried "according to Cambodian law." *Post*, May 15, 1975, at A-12, col. 3; 28 Facts on File 293 (1978).

For reports of claimed Khmer Rouge actions of brutality and irrationality, see Secretary of State Kissinger's comments and opinion expressed at his May 12 news conference. He spoke of evidence of atrocities of major proportions taken against civilian and military officials of the former government of Lon Nol and their wives, and against the population at large. The government of Lon Nol surrendered to the Khmer Rouge on April 16, 1975. 72 Dep't State Bull. 725 (1975). Similar reports can be found in 35 Facts on File 272, 309 (1975); *Post*, May 16, 1975, at A-16, cols. 1-3 and A-27, cols. 1-4; July 13, 1975, at A-1, col. 4; and July 21, 1975, A-14, cols. 6-8. On NBC's "Today Show" in May, Secretary Kissinger said: ". . . we know that in Cambodia very tragic and inhuman and barbarous things are going on. We don't regret not having recognized Cambodia [Khmer Rouge government] immediately." 72 Dep't State Bull. 667 (1975).

⁴⁸See *supra* note 40; N.Y. Daily News, May 21, 1975, at C-7, col. 1.

⁴⁹*Post*, May 13, 1975, At A-1, col. 6; *Time*, May 26, 1975, at 10, col. 3. Some officials guessed that, fresh from their conquest of the country, the new Khmer Rouge government was simply kicking sand in the face of America. Others speculated that they were just reinforcing their claim to the Wai Islands, where geologists believe oil may lie under the surrounding sea bottom. Still others feared that the ship had been seized in order to use it as a bargaining chip against the United States over weapons with which soldiers of the former government had fled to Thailand. *Id.*

the People's Republic of China in an effort to persuade the Cambodians to release the crew and the ship.⁵⁰ The Chief of the Chinese Liaison Office in Washington was summoned to the State Department and given a message, with a request to relay it to Phnom Penh. In addition, instructions to deliver a message to the Cambodian Embassy in Peking and to enlist Chinese assistance were transmitted to the U.S. liaison chief in Peking.⁵¹

Contingency plans were set into motion, for use in the event diplomatic initiatives were unsuccessful. Secretary of Defense Schlesinger was directed to start the movement of ships and troops, to undertake aerial surveillance, and to determine the location of the ship and its crew.⁵² Accordingly, the Third Marine Division on Okinawa was alerted, and a 1,100-man amphibious brigade was ordered flown to Utapao Air Base in Thailand.⁵³ Moreover, six ships

⁵⁰The United States had not extended any recognition to the Khmer Rouge government, and therefore had no diplomatic relations with them as such. *See* Secretary Kissinger's statement, *supra* note 47; Post, May 15, 1975, at A-1, col. 4.

China was the only nation to turn to as a messenger. The Khmer Rouge were believed to have had diplomatic relations with China, North Vietnam, and North Korea. The United States had no relations with the latter two States. *See* Post, May 16, 1975, at A-16, col. 6. The new government, however, was recognized jointly April 14, 1975, by the Association of Southeast Asian Nations, composed of the Philippines, Indonesia, Thailand, Malaysia and Singapore. Japan also announced on April 18 that it would extend recognition at an early date. Though recognized by ASEAN, it does not appear that any of the members had relations with the Khmer Rouge at the time of the Mayaguez's seizure. *See* 35 Facts on File, No. 1799 (1975). In any event, it is apparent that China was the only country that appeared to have any influence with the Khmer Rouge. *See* Post, May 17, 1976, at A-10, cols. 5-6; May 15, 1975, at A-16, cols. 6-8; 72 Dep't State Bull. 757 (1975).

⁵¹*See* R. Rowan, *supra* note 10, at 69; Post, May 17, 1975, at A-10, cols. 5-6; May 15, 1975, at A-16, cols. 6-8; 72 Dep't State Bull. 754, 757 (1975).

⁵²R. Rowan, *supra* note 10, at 69; Post, May 17, 1975, at A-10, col. 1; Time, May 26, 1975, at 11, cols. 1-2.

⁵³On May 14, Thailand delivered a note to the United States vigorously protesting the troop movement, which was made without its consent, consultation, or knowledge, and the use of its territory for United States operations involving the Mayaguez. The note stated that Thailand "does not wish to become involved in the dispute between the United States and Cambodia over the ship." It further stated that "Thailand will not permit her territory to be used in connection with any action that might be taken by the United States against Cambodia," and that the dispatch of United States Marines to Thailand was "not consistent with the goodwill existing between Thailand and the United States." It added that these relations "would be exposed to serious and damaging consequences" unless the United States forces were "withdrawn immediately." Post, May 15, 1975, at A-12; May

already in the Pacific—the destroyer escort Holt; the guided-missile destroyer Wilson; and the aircraft carrier Coral Sea, with her three destroyer escorts—were ordered to head for the Gulf of Thailand. Finally, three P3 Orion anti-submarine reconnaissance planes based

16, 1975, at A-20; May 17, 1975, at A-1, col. 1, and A-11, col. 1. The marines were withdrawn from Thailand in less than 24 hours after delivery of the note of protest, but not before elements of the force were used in the recovery of the Mayaguez and its crew. See *Time*, May 26, 1975, at 14, col. 3.

In addition to the marines, reconnaissance aircraft involved in the operation also used Utapao Air Base. Moreover, it is believed that some fighter bombers based at Korat Air Base in Thailand were used in the United States attacks on the Cambodian gunboats on May 14. See *Post*, May 17, 1975, at A-1, col. 1 and A-11, col. 1. Finally, eighty U.S. air police stationed at Nakhon Phanom Royal Thai Air Base in Thailand and specially trained in assault tactics were helicoptered to Utapao Air Base. This was part of a tentative plan to drop them on the Mayaguez by chopper and retake it by force. Eighteen air police aboard and five crewmen on one helicopter perished in a crash en route to Utapao. R. Rowan, *supra* note 10, at 90; *Times*, May 22, 1975, at 1, cols. 3 and 4.

At his news conference on May 16, 1975, Secretary Kissinger stated:

In so far as we have caused any embarrassment to the Thai Government, we regret those actions. At the same time, it is clear that any relationship between us and another country must be based on mutual interest. And we, I believe, have reason, or have a right, to expect that those countries that have an alliance relationship with us look with some sympathy on matters that concern the United States profoundly.

72 *Dep't State Bull.* 753 (1975). Commenting further on the recall of the Thai ambassador to the United States and on the Thai Prime Minister's announcement of a complete review of all treaties and agreements between the United States and Thailand, see *Post*, May 17, 1975, at A-1, col. 1, the Secretary said:

The Thai Government finds itself in general, in a complicated position after the events in Indochina, quite independent of this recent operation. We had prior to this recent operation, made it clear that we are prepared to discuss with the Thai Government its conception of its requirements, or of the necessary adjustments in the present period. We are still prepared to do this, and we recognize that the Thai Government is under some strains and under some public necessities. And they have to understand, however, that we too, have our necessities.

Id. at 754. In answer to a question concerning why an effort was not made at least to consult with the Thais prior to the movement of marines, the Secretary stated:

Well, the assumption was that we were in an emergency situation, in which, on occasion, we have acted without having had a full opportunity for consultation, and it was therefore thought that within the traditional relationship it would be a measure that would be understood. In any event, it would have presented massive problems either way.

Id. at 755.

On May 17, Thailand demanded an apology from the United States for

in the Philippines were ordered airborne to locate the Mayaguez and keep it under constant surveillance.⁵⁴

The NSC decisions were not publicly disclosed. Instead, the White House issued the following brief statement:

We have been informed that a Cambodian naval vessel has seized an American merchant ship on the high seas and forced it into the Port of Kompong Som. The President has met with the National Security Council. He considers the seizure an act of piracy. He has instructed the State Department to demand the immediate release of the ship. Failure to do so would have the most serious consequences ~ . ~ ~

At 10:30 p.m. (Cambodian time) one of the P3 Orions located the Mayaguez off Poulo Wai on its radar. The plane drew anti-aircraft gunfire from the island. Tuesday, in the early morning hours, the P3 Orion dropped para-flares and made a visual sighting of the ship.⁵⁶

B. TUESDAY, MAY 13

A crewman was informed by one of the Cambodian guards, who appeared to be a radio operator also, that the Mayaguez would be taken to Sihanoukville (Kompong Som, as the Khmer Rouge now call it) as soon as it got light.⁵⁷ Since early morning, the Cambodians had been blasting away at the P3 Orion surveillance plane from the island, the gunboats, and the Mayaguez, with small arms

the unauthorized use of its territory by the United States in military operations to free the Mayaguez and its crew. Post, May 18, 1975, at A-20. The United States offered apologies and on May 19 Thailand accepted. Times, May 20, 1975, at 1. In its note of apology the United States observed: "It is clear that by its action the United States was able to counter a common danger, to all nations and to the world's commerce presented by this illegal and unwarranted interference with international shipping routes in the Gulf of Thailand." *Id.* at 15, cols. 2-3.

⁵⁴ R. Rowan, *supra* note 10, at 69; Time, May 26, 1975, at 11, cols. 1-2.

⁵⁵ 72 Dep't. State Bull. 719 (1975); Post, May 13, 1975, at A-1.

⁵⁶ R. Rowan, *supra* note 10, at 72.

⁵⁷ *Id.* at 80, 82. See also map, *infra*, Appendix A.

and 50-calibre machine-guns. The plane was hit and had to return to its base, though the damage sustained was described as minimal.⁵⁸

At 8:30 a.m., the Cambodian ensign ordered the *Mayaguez* to weigh anchor. Led by a gunboat, the ship headed for Kompong Som.⁵⁹ As the ship was underway, a member of the crew picked up the Voice of America on his shortwave radio and heard the May 12 White House press release regarding the seizure and the President's demand for the release of the ship and its crew.⁶⁰ This news, as well as a feeling of hope, circulated quickly amongst the crew.⁶¹

At 1:18 p.m. it was realized that the ship was not headed for the mainland. Instead, the Cambodians ordered her anchored in 100 feet of water about one mile north of Koh Tang, a three-by-two mile jungle island, thirty-four miles southeast of Kompong Som.⁶² Soon thereafter, five or six United States jet fighters appeared and strafed in front and back of the *Mayaguez*.⁶³ The planes kept a constant vigil over the *Mayaguez* during the afternoon, while the Cambodians blasted away at them with small arms and machine-gun fire.⁶⁴

Toward evening, the crew was taken off the *Mayaguez* and herded onto two fishing boats. A member of the gunboat crew addressed the captain of the *Mayaguez* in "halting English": "No worry. Cambodians no hurt you. Go back to ship in morning."⁶⁵

During the evening hours, the Cambodians questioned what was inside the locked rooms (the crew's quarters) on the ship. The skipper replied that there were no guns or ammunition in the rooms, but only clothes and personal belongings. The captain offered to go back to the ship and unlock the rooms. The Cambodians agreed, and,

⁵⁸ See R. Rowan, *supra* note 10, at 82, 89; President Ford's letter to the Congress, dated May 15, in 72 Dep't State Bull. 721 (1975); Post, May 16, 1975, at A-17, col. 1. The contents of this letter are set forth *infra*, Appendix D.

⁵⁹ R. Rowan, *supra* note 10, at 82.

⁶⁰ *Id.*, text at note 55.

⁶¹ R. Rowan, *supra* note 10, at 62-83.

⁶² *Id.* at 83, 89; Post, May 18, 1975, at A-20, col. 3. See also map, *infra*, Appendix A. All the way to Koh Tang the ensign had been ordering, "Go Ream! Go Ream, wharf number two." R. Rowan, *supra* note 10, at 83.

⁶³ *Id.*

⁶⁴ *Id.* at 87.

⁶⁵ *Id.* at 94-95.

after collecting all the crew's keys and having the crew transferred to one of the two fishing boats, the Cambodians, the skipper and one other crew member set out for the Mayaguez in the vacated fishing boat.⁶⁶

As the party boarded the ship, which was guarded by Cambodians, a P3 Orion dropped a para-flare to take an aerial photograph. This apparently panicked the Cambodians, although they had been blazing away at the plane all evening. In any case, they appeared to lose interest in the crew's quarters and ordered the skipper to abandon the ship.⁶⁷ The party returned to the other fishing boat. The crew spent the rest of the night on the boats, while above, the P3 Orion kept its all-night vigil.⁶⁸

It was 2:21 a.m., Tuesday morning (Washington time), when President Ford got the message that the Mayaguez had left Poulo Wai and was heading to Kompong Som. However, by 6:22 a.m., the President was informed that the ship was anchored off Koh Tang Island.⁶⁹ He was also advised that the P3 Orions drew heavy gunfire from both the island and the ship, and further, that one P3 was hit but returned to its base safely.⁷⁰

During the morning, the National Security Council met for the second time.⁷¹ Acting on the concern that the crew might be moved out of the area—a movement that would severely complicate the recovery operation—the President ordered that boats between Koh Tang and the mainland, as well as between the Mayaguez and the mainland, be intercepted with minimal force.⁷²

After the meeting, the President telephoned Secretary Kissinger, who was in Missouri addressing a meeting of the International Relations Council,⁷³ to discuss the possibility of setting a deadline for

⁶⁶ *Id.* at 96-97; Post, May 18, 1975, at col. 3.

⁶⁷ *Id.*; R. Rowan, *supra* note 10, at 99-103.

⁶⁸ *Id.* at 101.

⁶⁹ *Id.* at 88-89. See also May 13 statement of White House Press Secretary in 72 Dep't State Bull. 719 (1975)

⁷⁰ *Id.* at 89.

⁷¹ Post, May 17, 1975, at A-10, col. 1.

⁷² *Id.*; R. Rowan, *supra* note 10, at 90. Aircraft from Utapao Air Base, Thailand, were used in implementing the order. *Id.*

⁷³ 72 Dep't State Bull. 723 (1975); R. Rowan, *supra* note 10, at 90, 92. Secretary Kissinger's absence from the second National Security Council meeting is reported

the Cambodians to release the Mayaguez. The idea was eventually rejected. As Kissinger later revealed, "We did not give a time limit. We were considering at various times whether we should give a time limit. Every time we considered it we came to the conclusion that the risk of giving it to any military operation that might be contemplated and to the crewmembers was greater than the benefits to be achieved by giving a specific time limit—since most of those benefits were really domestic, so that we could say that we had given warning."⁷⁴ It was also thought that an ultimatum might have hardened the Cambodians' attitude even more.⁷⁵

While Secretary Kissinger was pounding the podium at his news conference in Kansas City, proclaiming: "The United States will not accept harrassment of its ships on international sea lanes,"⁷⁶ Thailand's Prime Minister Kukrit was expressing outrage over the use of Thai territory as a staging area for the 1,100 Marines flown in from Okinawa. Publicly, at least, Thailand did not want to take sides in the dispute. The Prime Minister gave the U.S. twenty-four hours to get the Marines out of its territory.⁷⁷

In the late afternoon, White House congressional liaison aides began telephoning leaders of Congress to inform them of the President's decision "to use force, if necessary," to recover the Mayaguez and its crew. They were not told specifically that bombing and roc-

to have been taken as an indication that the President had personally taken command in the crisis, which he did not want publicly perceived as serious enough to warrant the Secretary to interrupt his trip. *Time*, May 26, 1975, at 12, col. 2.

⁷⁴ R. Rowan, *supra* at 92; 72 Dep't State Bull. 759 (1975). The Secretary further stated:

So by constantly increasing the severity of our requests we tried to convey an increasing sense of urgency, and therefore we approached the Secretary General. First of all, a number of public statements were made. Secondly, we approached on Wednesday the Secretary General of the United Nations with a letter, which was made public, indicating very clearly that we were going to invoke article 51 of the U.N. Charter, the right of self-defense, of the U.N. Charter. And therefore we felt we had in effect given an ultimatum without giving a specific time.

Id.

⁷⁵ See R. Rowan, *supra* note 1, at 92.

⁷⁶ *Id.*; 72 Dep't State Bull. M-29 (1975).

⁷⁷ R. Rowan, *supra* note 10, at 92; *Time*, May 26, 1975, at 13, col. 3; *supra* note 53. It is said that "privately, though, Thailand had given its concurrence in bringing in the Marines. . . ." R. Rowan, *supra* note 10, at 92. See also *Post*, May 16, 1975, at A-10, col. 1; May 17, 1975, at A-11; May 18, 1975, at C-7, col. 3.

keting of gunboats were contemplated.⁷⁸ They were, however, informed that messages were sent to the new Cambodian government through the Chinese government, demanding that the ship and the

⁷⁸ Post, May 15, 1975, at A-1, col. 7; A-16, cols. 1-3. Several of the congressmen who were informed merely thanked White House aides for the information. Others specifically indorsed the decision. *Id.* During and after the crisis, questions arose as to whether the Congressional War Powers Resolution was applicable to the rescue operation. Further, it was asked whether the President had complied with its provisions, particularly those relating to his obligation to consult with Congress before introducing United States forces into situations where hostilities are imminent. See Secretary Kissinger's question and answer session following his May 13th address at Kansas City, in 72 Dep't State Bull. 728 (1975); Post, May 17, 1975, at A-1, col. 7 and A-16, cols. 1-8; Time, May 26, 1975, at 17, col. 3; Newsweek, May 26, 1975, at 18, col. 2; Times, May 22, 1975, at 4, cols. 1-3; May 23, 1975, at 37; 35 Facts on File 330, 331, and 332 (1975).

The War Powers Resolution states, in part,

the President in every possible instance shall consult with Congress before introducing United States armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States armed forces are no longer engaged in hostilities or have been removed from such situations.

35 Facts on File 330 (1975). These questions of domestic law are beyond the scope of this paper. It is submitted that such questions have little or no effect on the validity of the claims analyzed in this inquiry. Nevertheless, a few brief observations are in order.

As for presidential authority to initiate military action, administration officials were asserting that the President had acted under his constitutional executive power, his authority as Commander-in-Chief of the United States armed forces, and under his inherent power to protect American lives and property when they are threatened. See Secretary Kissinger's comments, *supra*; Times, May 23, 1975, at 37, col. 1; Facts on File 331 (1975); President Ford's letter to the Congress, *infra*, Appendix D.

Among Congressional leaders, Senator Robert Byrd noted that the War Powers Resolution did not, in his opinion, require the President to "consult" with Congress in advance of a contemplated military action. See R. Rowan, *supra* note 10, at 179. Senator Kennedy is reported to have stated that in the case of the Mayaguez, the President had "a unique responsibility for the protection of American lives." *Id.*, at 175. Finally, the vast majority of senators and representatives from both parties applauded the President's Decision. See Post, May 15, 1975, at A-1; Time, May 26, 1975, at 17, col. 3, and 18, col. 2; 35 Facts on File 331-32 (1975).

It is also significant to note that, on May 21, Senator Thomas Eagleton introduced an amendment to the War Powers Resolution that would add the rescue of nationals to situations cited as reasons for the President to commit United States forces without prior approval of Congress. The amendment would also require the President to determine that the nationals were being held involuntarily with the consent of the foreign government; that there was a real threat to their lives; that the foreign government would not protect them; and that minimum force would be used in the rescue operation. Times, May 22, 1975, at 37, cols. 1-2.

Senator Mike Mansfield was most critical of the administration's actions in consulting with Congress. While praising the President for making a "very difficult decision," which he thought was the right one, he denied that there had been meaningful consultation. "I was not briefed," he said, "nor was I consulted before the fact. I was notified after the fact about what the administration had already decided to do. I did not give my approval or disapproval." Rather he said, "we were informed, not consulted. I repeat, informed, not consulted." Post, May 15, 1975, at A-16, cols. 3-5; Time, May 26, 1975, at 17, col. 3.

Other leaders took a different view. For instance, Senator John Sparkman, Chairman of the Foreign Relations Committee, called administration briefings "a pretty good degree of consultation." Post, May 15, 1975, at A-16, cols. 1-3. Two Senate sponsors of the War Powers Resolution, Senator Frank Church and Senator Jacob Javits, believed the President had complied with the Resolution. Senator Church stated: "I really don't know what more a President can do in a situation that requires fast action." Time, May 26, 1975, at 17, col. 3. The Senate Foreign Relations Committee, after a 3-hour briefing on May 14 by administration officials, unanimously approved a resolution condemning the seizure of the Mayaguez and supporting the President's right to use force under the constitution to retrieve the ship and its crew "albeit within the limits imposed by the War Powers Act." Post, May 15, 1975, at A-1, col. 7.

It is stated that the difference between the two views regarding consultation lies in how one interprets the word "consult." To some, it means to get prior advice of Congress, ask its opinion and "pay it some real attention in formulating a decision." To others, it means simply to keep Congress informed. *Id.* at A-16, col. 5.

One commentary stated that

President Ford did go much further than several of his recent predecessors in letting Congress know what he intended to do. But it also seems clear that the basic decisions for action been taken before the congressional leaders were contacted and probably only would have been reversed had there been total and unremitting opposition from all the congressional leaders.

Id. at cols. 5-8. A White House staffer is reported to have said, "Some things can't be decided by a committee. That's why you've got a President. He's President and they aren't." Newsweek, May 26, 1975, at 18, col. 1.

A second amendment introduced by Senator Eagleton on May 21 would require the President to seek "the advice and counsel of Congress" before committing United States forces into a hostile situation. Times, May 22, 1975, at 37, cols. 2-3.

A presidential report to Congress within 48 hours of initiation of the commitment of United States forces to hostilities, as required by the War Powers Resolution, was effected in the form of a letter dispatched about 2:30 a.m., May 15, to House Speaker Carl Albert and Senator Eastland, president pro tempore of the Senate. The notification period extended until 6:20 a.m., or 48 hours after United States planes fired across the bow of the Mayaguez to prevent it from being moved to the mainland. Post, May 16, 1975, at A-1, and A-16, col. 1; *supra* note 63; President's Letter to Congress, *infra*, Appendix D.

For a thorough treatment of the War Powers Resolution in all its varied aspects, see Cruden, *The War-Making Process*, 69 Mil. L. Rev. 35 (1975), and Spong, *The War Powers Resolution Revisited. Historical Accomplishment or Surrender?*, 16 Wm. & Mary L. Rev. 823 (1975). In both articles the War Powers Resolution is discussed in terms of the Mayaguez incident.

crew be released, and notifying the Cambodians not to move the ship or the crew from where they were at the time.⁷⁹

After spending a restless night on the two fishing boats lashed together off of Koh Tang Island, the captain of the Mayaguez could hardly wait to return to the ship as the Cambodians stated the previous evening would happen that morning.⁸⁰ At 8:00 a.m., the Cambodians herded the crew on the forward deck of one of the fishing boats and set out in the direction of the Mayaguez. Two gunboats ranged out ahead of the fishing boat.

Suddenly, the fishing boat veered starboard and set a new course along with the gunboats, heading northeast towards the mainland.⁸¹ Six United States jet fighters appeared and attempted to turn the gunboats around—first, by visual signals, and then, after that failed, by strafing and rocketing off the bow of the vessels. The gunboats returned the fire. Failing to stop them, the jets attacked the gunboats and sank them.⁸² During the interdiction operation, ordered by President Ford,⁸³ another gunboat was sunk off Koh Tang Island and four others were strafed and damaged in the vicinity of the island.⁸⁴ A United States helicopter attempted to pick up survivors during the operation, but was forced away by Cambodian gunfire.⁸⁵

Similar attempts were made to try to turn the fishing boat around. The jet fighters, streaking at 1,000 miles per hour, machine gunned and rocketed off the boat's bow, coming closer with each pass. At one point, the planes fired so close that shrapnel flew on deck, wounding three crewmen of the Mayaguez.⁸⁶ The pilot of the

⁷⁹R. Rowan, *supra* note 10, at 93; *supra* note 51; Time, May 26, 1975, at 12, col. 3. Attempts to engage Prince Norodom Sihanouk in an effort to secure the release of the Mayaguez and its crew were also undertaken by United States diplomats in Peking, where the Prince resided and administered his government in exile. The Prince failed to respond to requests for the ship's prompt release. Post, May 15, 1975, at A-16, cols. 6-8.

⁸⁰R. Rowan, *supra* note 10, at 130-31.

⁸¹*Id.* 131. See also map, Appendix A.

⁸²Time, May 26, 1975, at 12, col. 3, and 13, col. 1; R. Rowan, *supra* note 10, at 132.

⁸³See note 72 *supra*.

⁸⁴R. Rowan, *supra* note 10, at 141; Post, May 17, 1975, at A-10, col. 1. See also Air Force photo of sunken gunboat 30 meters east of Koh Tang Island in R. Rowan *supra* note 10, at 114.

⁸⁵*Id.* at 141; Time, May 26, 1975, at 13.

⁸⁶R. Rowan *supra* note 10, at 133-37; Post, May 18, 1975, at A-20, cols. 4-5.

fishing boat, who was a Thai and had been captured by the Cambodians five months earlier on a charge that he had been fishing in Cambodian waters,⁸⁷ made several attempts to turn around, but the Cambodian guards forced him at gunpoint to proceed forward.⁸⁸

The attempt to turn the fishing boat around began about 8:30 a.m.⁸⁹ At approximately 9:35 a.m., one of the United States pilots reported that he believed he saw Caucasian faces on the fishing boat.⁹⁰ This information was quickly relayed to the White House, with a request for instructions as to how to proceed against the boat.⁹¹

President Ford was informed of the details of the interdiction operation shortly before he convened a third National Security Council meeting late Tuesday night (Washington time).⁹² Two further incidents of prior Cambodian interference with shipping were reported to him, also. A Thai freighter had been seized and held for two hours at Poulo Panjang, 40 miles east of Poulo Wai, and a Swedish motor ship had been fired on off the same island, but had succeeded in outrunning her attackers.⁹³

At the Council meeting, the President believed that the situation, as developed, called for forceful and swift action. The major question was how much force to use and when to use it. "The President was concerned that once the decision to use force was made, it be sufficient to assure the military success of the operation. He felt a strong personal desire not to err on the side of using too little force."⁹⁴

⁸⁷R. Rowan, *supra* note 10, at 168.

⁸⁸*Id.* at 136; Post, May 18, 1975, at A-20, cols. 4-5.

⁸⁹R. Rowan, *supra* note 10, at 132.

⁹⁰*Id.* at 138.

⁹¹*Id.*, at 143.

⁹²*Id.*, at 141; Time, May 26, 1975, at 13.

⁹³R. Rowan, *supra* note 10, at 140; Post, May 17, 1975, at A-10, cols. 5-6.

⁹⁴R. Rowan, *supra* note 10, at 142; Newsweek, May 26, 1975, at 21, col. 2. The President is reported to have said:

Subjectively, I was having thoughts like this: If it failed and I did nothing, the consequences would be very, very bad, not only in failing to meet that problem, but the implications on a broader international scale. To do something was at least an expression of effort so I felt it would be far better to take strong action even though the odds might be against us. It was far better than failing and doing nothing.

R. Rowan, *supra* note 10, at 142.

The decision was made to mount a rescue mission. Two Marine units were to be used. One unit would assault Koh Tang, and the other would board the Mayaguez. The two-pronged attack would also involve air support, including the bombing of selected targets on the mainland.⁹⁵

It was also decided that the operation be delayed for a day. The debate over delaying the operation centered around the availability of the aircraft carrier Coral Sea, which was being slowed by strong headwinds. The possible importance of the carrier in the rescue of the crew was the overriding factor in the decision to postpone the mission.⁹⁶

During the meeting, the report that a United States pilot, engaged in the interdiction operation, observed what he believed to be some Caucasian faces on the fishing boat, reached the Cabinet Room with a request for instructions. The President was reported to have

⁹⁵Time, May 26, 1975, at 13; R. Rowan, *supra* note 10, at 142; Post, May 17, 1975, at A-1, cols. 4-5 and A-10. The article in the latter source leads one to believe that the basic strategy for the rescue and recovery operation was developed at the fourth National Security Council meeting held on Wednesday. A similar account is reported in Newsweek, May 26, 1975, at 21, col. 2. While it appears that final decisions were made and orders were issued at the fourth National Security Council meeting, the basic strategy seems to have been developed beforehand. See Post, May 16, 1975, at A-16, col. 2.

Five different military options were presented by General David C. Jones, the acting chairman of the Joint Chiefs of Staff. The plan chosen by the President was "option four." Post, May 17, 1975, at A-10.

At the meeting the decision-makers knew when the destroyers Holt and Wilson would arrive on the scene. However, they did not know whether the carrier Coral Sea would be close enough to lend support, because strong headwinds were slowing it. R. Rowan, *supra* note 10, at 142, 173. The option of using B-52 bombers against the selected targets on the mainland was thus considered as an alternative if the Coral Sea were unavailable. The option became academic after headwinds subsided, assuring the availability of the carrier in the operation. Times, May 19, 1975, at 1, col. 2, and 8, col. 3; R. Rowan, *supra* note 10, at 173. It is further reported that Secretary Kissinger raised the possibility of bombing Cambodian cities with B-52's. It was asserted that Vice President Rockefeller, also on the National Security Council, thought it was a feasible suggestion. But the President, Secretary of Defense Schlesinger and the Joint Chiefs of Staff quickly discarded the idea. The latter members were concerned over the danger of hitting third-country ships if a port like Kompong Som was bombed. There also was concern over bombing population centers. See Parade Magazine, The Washington Post, June 22, 1975, at 5, col. 3.

⁹⁶R. Rowan, *supra* note 10, at 142-143; note 85 *supra*.

said: "I had to assume that if this fishing boat, with those crew members, got ashore, that the odds were against us in getting them back. But I was torn with the other side of the coin. If we told the pilot to strafe the boat or sink the boat, that might be losing everything. So it looked like the better decision was to let it proceed, and I issued the order that the pilot should not sink the boat or strafe it."⁹⁷

Before the meeting ended the President further ordered that the Navy, Marines and Air Force in the Pacific be put on full alert and be capable of moving out in one hour's time.⁹⁸ The meeting adjourned after midnight.⁹⁹

In a final attempt to turn the fishing boat around, United States planes gassed the vessel with a burning-choking chemical. The attempt failed.¹⁰⁰ The fishing boat entered Kompong Som Harbor at 10:00 a.m. (Cambodian time).¹⁰¹

Five hundred grim-looking Cambodians met the fishing boat as it docked in port. There were men, women, and children, and almost all were armed. Within 15 minutes, the crowd doubled in size.¹⁰² Then a gunboat came alongside the fishing boat, and, after an exchange between the guards on the fishing boat and the gunboat crew the fishing boat pulled away from port and proceeded southeast along the coast. It anchored near what appeared to be a prison compound.¹⁰³ After a short period of time, the same gunboat that had come alongside the fishing boat in port reappeared. After another exchange between the Cambodians, both boats proceeded in

⁹⁷R. Rowan, *supra* note 10, at 143.

⁹⁸Time, May 26, 1975, at 13, col. 1; Post, May 17, 1975, at A-10, col. 1.

⁹⁹U.S. News & World Report, May 26, 1975, at 20, col. 2; R. Rowan, *supra* note 10, at 144.

¹⁰⁰*Id.* at 145-152; Post, May 18, 1975, at A-20, col. 4. One crewman of the Mayaguez had a heart condition and passed out from the gas attack. R. Rowan, *supra* note 10, at 150.

¹⁰¹*Id.* at 152; Post, May 18, 1975, at A-20, col. 4. *See also* map, *infra*, Appendix A. It is claimed that the attack on the fishing boat in an attempt to turn it around lasted 4-hours. *See id.*; Newsweek, May 26, 1975, at 20, col. 3; U.S. News & World Report, May 26, 1975, at 20; Times, May 20, 1975, at 14, col. 4. However, according to the time sequence set out in the text above (*see also* note 79 *supra*), it seems that the attack lasted only 1½ hours.

¹⁰²Post, May 18, 1975, at A-20, col. 4; R. Rowan, *supra* note 10, at 153-55.

¹⁰³*Id.* at 155-56.

a westerly direction and docked at a military compound on the Koh Rong Sam Lem, a jungle island west of Kompong Som and some 12 miles from the mainland.¹⁰⁴

An English-speaking interpreter for the compound commander, who was second in command of Kompong Som, greeted the skipper of the Mayaguez and welcomed him to Cambodia.¹⁰⁵

Shortly thereafter, the interpreter interrogated the ship's captain. First, the captain was asked whether any of the crew worked for the Central Intelligence Agency or the Federal Bureau of Investigation. "No," the captain replied, "We're all merchant sailors. Nobody works for the United States Government."¹⁰⁶ Second, the captain was asked if he had any electronic equipment on the ship. "Only our radar," the skipper said. "All American merchant vessels are equipped with radar. It is standard equipment. Only ours is broken."¹⁰⁷ Third, he was asked what was in his cargo. The captain answered, "General cargo. Cabbages, apples, oranges, frozen chicken and beef, cotton shirts, socks and toothpaste. The kind of cargo that merchants buy in ports like Bangkok and Singapore to sell to the general public."¹⁰⁸ "Then he explained how the Mayaguez served only as a feeder vessel in Asia, that it never went back to the United States to load, and, as a matter of course, carried no guns, ammunition or electronic equipment."¹⁰⁹ Later, the captain stated that the interpreter seemed to be convinced he was telling the truth.¹¹⁰

Suddenly, the subject matter of the interrogation changed. The interpreter asked if the captain could communicate with the United States aircraft. "No," replied the captain. "We can only talk to commercial radio stations and to other ships." Then the interpreter questioned why so many planes had come. The captain did not divulge the distress signals that had been sent out by the Mayaguez on Monday but stated: "You have to understand the Mayaguez was

¹⁰⁴*Id.* at 158-159, 161; Post, May 18, 1975, at A-20, cols. 4-5. See also map, *infra*, Appendix A.

¹⁰⁵Post, May 18, 1975, at A-20, cols. 5-6; R. Rowan, *supra* note 10, at 161, 164, 166.

¹⁰⁶*Id.* at 161-62.

¹⁰⁷*Id.*

¹⁰⁸*Id.* at 162-63.

¹⁰⁹*Id.* at 163.

¹¹⁰*Id.*; Post, May 18, 1975, at A-20, col. 7.

scheduled to reach Thailand at nine o'clock yesterday morning. When the ship failed to arrive, naturally they sent planes out to look for it."

Again the interpreter wanted to know if there was any possible way to contact the American planes, indicating a concern for the bombing and strafing that occurred that day. The skipper explained that if the ship, having been shut down, were to get up steam again, and the generators started to provide electricity, then his company's office in Bangkok could be contacted and a message relayed to United States authorities. The captain decided not to mention that the ship carried emergency batteries for its single sideband transmitter. The interpreter then asked how many men would be needed to start the ship, and how long it would take to start it, contact the Bangkok office and stop the United States planes."

After the interrogation and while the crew was served a meal consisting of rice, chicken broth and what appeared to be pickled eggplant, the compound commander arrived and immediately began asking if the captain had the ability to contact U.S. aircraft to stop the bombing.¹¹² One of the crewmen finally asked the interpreter how long they were going to be held prisoner. "Two months, possibly," the interpreter was reported to have said. "First we will take you to Kompong Som. They will decide. But you must first stop the bombing before they will let you go."¹¹³

Toward evening, the Cambodians announced that the captain and three crewmen would return to the Mayaguez to get steam up, start the generators and contact Bangkok to stop any further bombing by U.S. planes. After some discussion over the number of men needed to start the ship up, it was agreed that nine crewmen plus the captain would go to the Mayaguez. A gunboat was provided to take the party to the ship. However, one crew member, fearing that such a boat would surely be attacked by United States aircraft, declined to go. Thereafter the interpreter advised the crewman that he could wait and that a fishing boat would be along in half an hour to take him to the ship. The skipper then explained the dangers of proceeding with any type of boat since it would be dark long before

¹¹¹R. Rowan, *supra* note 10, at 163-64.

¹¹²*Id.*, at 166.

¹¹³*Id.*, at 167.

they reached the ship.¹¹⁴ Unexpectedly, the interpreter suggested that they wait until the morning. "Then you can all go," he was reported to have stated. The plan was dropped.¹¹⁵

That night, the crew slept in a hut under armed guard, with a warning that "nobody was to go outside or he might be shot."¹¹⁶

At his Wednesday morning intelligence briefing, the President was informed that the headwinds which had been slowing the aircraft carrier Coral Sea had subsided, and thus the carrier would be available for the rescue mission.¹¹⁷ Also during the morning, White House liaison officials telephoned congressional leaders to inform them of the results of the interdiction operation off of Koh Tang.¹¹⁸

At 1:00 p.m., the United States Ambassador to the United Nations, John Scali, presented a letter to the Secretary General of the United Nations, requesting him to take any steps within his ability to effect the immediate release of the Mayaguez and its crew. In establishing a public record of its position, the United States drew the Secretary General's attention to "the threat to international peace which has been posed by the illegal and unprovoked seizure by Cambodian authorities of the United States merchant vessel, Mayaguez, in international waters."

The letter further stated that the ship was unarmed and had a crew of about forty American citizens. Further, the letter warned that: "In the absence of a positive response to our appeals through diplomatic channels for early action by the Cambodian authorities, my Government reserves the right to take such measures as may be necessary to protect the lives of American citizens and property,

¹¹⁴*Id.*, at 168-69.

¹¹⁵*Id.*, at 169. It is reported that the captain wondered if the interpreter meant by his statement that the whole crew would return to the ship.

¹¹⁶*Id.*, at 171. An interesting sidelight was the fact that one member of the crew helped the Cambodians douse a fire which had started in a shed by joining in on a bucket brigade. In addition, this same crewman, an ex-marine, noticed a sentry carrying an M-79 rocket launcher, with a cracked bore. He stopped this sentry, and using sign language, brought the danger to his attention. *Id.*, at 169.

¹¹⁷*Id.*, at 173.

¹¹⁸*Id.*, at 173-74. Previously, congressional leaders had been advised only that attempts would be made to intercept any gunboats moving in either direction between the Mayaguez and the mainland and not that bombing was specifically contemplated. *See supra* note 78 and text thereat.

including appropriate measures of self-defense under Article 51 of the United Nations Charter."¹¹⁹

The Secretary General, in turn, contacted the Chinese mission to the United Nations in an attempt to solicit their assistance, and further, sent an "open letter" to Phnom Penh, urging that the problem be solved by peaceful means. In addition, he offered his "good offices" to both parties in the dispute. However, according to one United Nations official, this presented a problem because it was difficult to determine whom to deal with on the Cambodian side. Diplomats in the United Nations and in Washington also admitted that there were few diplomatic channels open to the United States. The Secretary General's efforts drew no response.¹²⁰ The United States also failed to receive any response to the diplomatic overtures initiated on Monday.¹²¹

¹¹⁹ Post, May 15, 1975, at A-1 and A-16, col. 2. The United States letter to the United Nations Secretary General is reproduced *infra*, Appendix B, from 72 Dep't State Bull. 720 (1975).

¹²⁰ Post, May 15, 1975, at A-1, and A-16, col. 2; R. Rowan, *supra* note 10, at 174

¹²¹ See Post, May 17, 1975, at A-1, cols. 5-6; May 1976, at A-16, cols. 6-8; *supra* note 79 and text thereat and notes 50, 51. At his May 16 news conference, Secretary of State Kissinger stated:

there was no chance during this crisis to resolve it diplomatically. That is to say, we never received a communication, proposition that would have enabled us to explore a diplomatic solution, and it was by Wednesday evening we had not yet received any reply that the President ordered the military operations to begin.

Later the Secretary said:

[I]f any communication had been received back either from Cambodia or from any other source, then we would have had a subject matter of diplomacy on which to act. On the other hand, this did not happen, and when we had received no communication whatsoever, we had to balance the risk that would occur if they tried to move the ship. Since we didn't know whether any of the crew was left on the ship or whether a Cambodian crew might have been put on the ship, we had to balance the risks if they tried to move the ship, the pressures we were under in neighboring countries, the difficulties that would arise. We therefore decided, after some 60 hours of diplomatic efforts, to try to seize the ship. It was a balance that had to be struck. We thought the risks of waiting another 24 to 48 hours in the absence of any communication whatsoever from any government were greater than the risks of going ahead.

72 Dep't State Bull. 354-56 (1975).

The American note that was given to the chief of the Chinese Liaison Office in Washington was returned by the liaison office in Washington, ostensibly undelivered. However, it is believed that the message was received by the Cambodians in

The fourth and most critical National Security Council meeting was convened in the afternoon at 2:52 p.m. The final timing and details of the operation were discussed.¹²² An option to use B-52's to strike the Cambodian mainland was debated. However, once the aircraft carrier Coral Sea was known to be in striking distance, the decision against their use became unanimous. Nevertheless, the B-52's were kept on the line ready for take-off.¹²³

Although the decision-makers studied different approaches to the operation during their discussion of the various options that were available to them, there was agreement on the use of force once they were convinced that diplomatic measures were getting nowhere.¹²⁴ Finally, the President issued orders for one Marine assault force to land on Koh Tang Island to rescue any crew members thereon, and for another force, which was first to be placed on board the destroyer Holt, to board and seize the Mayaguez. He then ordered U.S. aircraft to protect and support the operations.¹²⁵ The military operation was already twenty-eight minutes underway when the Council meeting adjourned at 5:40 p.m., Washington time.¹²⁶

In implementing the President's orders, eight helicopters, with 179 Marines aboard, were directed to Koh Tang, and three others, with forty Marines aboard, were directed to the destroyer Holt for boarding the Mayaguez. Six demolition experts, eight Navy civilians who could operate the Mayaguez, and one Army captain who spoke Cambodian were also in the helicopters destined for the Holt. United States aircraft from both the Coral Sea and Utapao Air Base

Phnom Penh. Post, May 17, 1975, at col. 67; 72 Dep't State Bull. 754 (1975); R. Rowan, *supra* note 1, at 175. By formally returning the note, Secretary Kissinger said that China was indicating that "it was not responsible for the content of the note." "But," he added, "I am assuming the Chinese Xerox machines can reproduce it within 24 hours." He further felt that the significance of China's action was a formal disassociation from the diplomatic process and the demand made on the Cambodians. *Id.*, at 754; Post, May 17, 1975, at A-10, cols. 5-6.

¹²² Post, May 17, 1975, at A-10, col. 1; Time, May 26, 1975, at 13, col. 3; R. Rowan, *supra* note 10, at 175.

¹²³ Times, May 19, 1975, at 1, cols. 3 and 8; R. Rowan, *supra* note 10, at 176; Post, May 17, 1975, at A-10, col. 1. *See also* note 94, *supra*.

¹²⁴ Post, May 17, 1975, at A-10, cols. 1-2.

¹²⁵ *Id.*, at 23; *id.*, May 16, 1975, at A-10; Newsweek, May 26, 1975, at 21, cols. 23; R. Rowan, *supra* note 10, at 186. *See also* President Ford's letter to the congress and the May 5th statement by the White House Press Secretary in 72 Dep't State Bull. 721 (1975), reproduced *infra*, Appendix D.

¹²⁶ R. Rowan, *supra* note 10, at 177.

were ordered to support the airlift, landing, and boarding operations. Commander in Chief, Pacific issued orders to initiate supporting air strikes against a fuel storage area and the Ream Naval Base in the Port of Kompong Som, where some **2,400** Cambodian troops and several gunboats were believed to be stationed, and against Ream Airfield, where reconnaissance detected the presence of a number of small planes (American-made T-28 trainers).¹²⁷

At 6:30 p.m., the President briefed Congressional leaders at the White House. For thirty minutes he reviewed the crisis, including the ship's seizure, the lack of response to diplomatic initiatives, the interdiction operation, and the possibility that some of the crew might have been moved to the mainland. He cautioned that surveillance specialists were not certain where most of the crew might be located, but it was thought that there was a good chance that they were either on the ship, on Koh Tang Island or in the immediate area.¹²⁸

Following the briefing, the President invited questions from the congressmen. Senator Mike Mansfield questioned the order for the bombing of the Kompong Som area, especially if some members of the crew were believed to be there. The President conceded that some crew members might have been on board the fishing vessel that was permitted to reach the mainland. Nevertheless, he strongly believed that the order to bomb specific military targets on the mainland was necessary to prevent any attack by the estimated **2,400** Cambodian troops believed to be stationed in these target areas or by the planes at Ream Air Base. "I am not going to risk the life of one Marine," said the President. "I'd never forgive myself. If the Cambodians attacked the Marines, it would be too great a risk not to have this supportive action on the mainland."¹²⁹ While indicating that there would be no "excessive" use of force on the mainland, the President stated that "he would rather err on the side of

¹²⁷ Post, May 16, 1975, at A-10; Time, May 26, 1975, at 13, col. 3, and *id.*, 14, cols. 1-2; R. Rowan, *supra* note 10, at 176-77, 179, 199; N.Y. Daily News, May 21, 1975, at 3. See also map, *infra*, Appendix A. The United States had given the T-28's to the former government of Lon Nol. Time, *supra*.

¹²⁸ Post, May 15, 1975, at A-10, cols. 2-3; *zd.*, May 16, 1975, at A-10, cols. 1-2; *id.*, May 17, 1975, at A-10, col. 4; Newsweek, May 26, 1975, at 21, col. 3, and 25, col. 1; R. Rowan, *supra* note 10, at 177-80.

¹²⁹ *Id.*, at 179; Post, May 16, 1975, at A-16, cols. 1-2; Newsweek, May 26, 1975, at 21, col. 3, and 25, col. 1. See also President's interview with N.Y. Daily News reporters on May 20, 1975, in N.Y. Daily News, May 21, 1975, at 3, 6-7.

using too much force than too little.”¹³⁰ House Speaker Carl Albert asked the President “if he couldn’t have waited a bit longer before using force.” The President replied, “We waited as long as we could.”¹³¹ The briefing ended about 7:30 p.m.¹³²

Shortly thereafter, a statement of the military measures the President had ordered in an effort to recover the Mayaguez and its crew was released to the press by the White House.¹³³ At about the same time, a second letter was delivered to the United Nations. This one was addressed to the Security Council.¹³⁴ It was about this time that the United Nations Secretary General appealed to both parties “to refrain from further acts of force,” and, further, directed their attention to the provisions of the United Nations Charter calling for the peaceful settlement of disputes.¹³⁵

¹³⁰ Post, May 16, 1975, at cols. 1–2.

¹³¹ Newsweek, May 26, 1975, at 21; R. Rowan, *supra* note 10, at 180. In his interview with newsmen on May 20th, (*see* note 120, *supra*), the President stated: “There was a 60-hour interval between the sending of the message, a diplomatic message to the Cambodian government, and before we took any military action. I think that was ample time.” N.Y. Daily News, May 21, 1975, at 3, col. 3; *id.*, 7, col. 2.

Senator James Eastland, the president pro tempore of the Senate, while taking little part in the discussions at the briefing, is reported to have “sat slouched in his chair throughout the meeting, mumbling several times to himself ‘Blow the hell out of ‘em.’” Newsweek, May 26, 1975, at 25, col. 1; R. Rowan, *supra* note 10, at 180.

¹³² R. Rowan, *supra* note 10, at 201; Post, May 16, 1975, at A-16, col. 2.

¹³³ *See* Statement by White House Press Secretary, May 14, 1975, reproduced *infra*, Appendix D, from 72 Dep’t State Bull. 721 (1975).

¹³⁴ Post, May 15, 1975, at A-1, col. 6; May 16, 1975, at A-10, col. 2. The United States Letter to the United Nations Secretary Council President, May 14, is reproduced *infra*, Appendix B, from 72 Dep’t State Bull. 720–21 (1975). It is reported that, in ordering the two letters to be sent to the United Nations, “the President knew that the chances of effective United Nations action was nil. Previous communications from the Secretary General to the new Cambodian government had received no response” (see note 120, *supra* and text thereat).

It is further reported that the President realized that at the time these letters were being delivered to the United Nations, military operations to recover the Mayaguez and its crew were ready to be implemented. It is stated that the President knew that this “last-minute appeal. . . would cause criticism, rather than dispel it. The letters might be construed as a maneuver to combat subsequent charges that the United States failed to exhaust all diplomatic channels before taking military action.” R. Rowan, *supra* note 10, at 174–75.

¹³⁵ Post, May 15, 1975, at A-1, col. 6; *id.*, A-16, cols. 2–6; *id.*, May 16, 1975, at A-10, col. 2. It is reported that United Nations officials declined to comment on

In its letter to the Security Council, the United States recapitulated the details of the ship's seizure and called the incident a "grave and dangerous situation brought about by the illegal and unprovoked seizure by Cambodian authorities of a United States merchant vessel . . . in international waters . . ." The United States claimed the vessel "was on the high seas, in international shipping lanes commonly used by ships calling at various ports of Southeast Asia." It further claimed that: "Even if, in the view of others, the ship were considered to be within Cambodian territorial waters, it would clearly have been engaged in innocent passage to the port of another country. Hence, its seizure was unlawful and involved a clear-cut illegal use of force."

After indicating that United States diplomatic initiatives had received no response, the United States reported that: "In the circumstances the United States Government has taken certain appropriate measures under Article 51 of the United Nations Charter whose purpose it is to achieve the release of the vessel and its crew."¹³⁶

D. THURSDAY, MAY 15

At 6:20 a.m., Cambodian time, or 7:20 p.m. Wednesday, Washington time, United States Marines landed on Koh Tang. They met surprisingly stiff resistance. Of the first wave of helicopters to approach the island, three were hit by Cambodian gunfire. One crash-landed on the island with Marines aboard. Another, though making it to the island, got hit taking off and crashed in the water about a mile from the island. A third got shot out of the sky and also crashed in the sea about a mile from the island. Aboard were twenty-six Marines, including three Cambodian-language experts with bullhorns who were to have announced to the islanders that the Marines would leave peacefully if the Cambodians would simply release the crew held captive by them. The destroyer Wilson picked up thirteen survivors from the latter crash. A fourth chopper was

the suggestion that the United States gave them no time to act, because in the words of one official, "it was all too obvious." However, it was further stated that the Cambodians were not "ready for diplomacy" and that enough time was provided. *Id.* See also notes 119-21, *supra.* and text thereat.

¹³⁶ See letter, *infra*, Appendix B.

hit so badly it could not land and had to limp back to Utapao with its Marine passengers. A fifth chopper was damaged but completed its mission.¹³⁷

On the island, the fighting was heavy and close-quartered. It was estimated that the Cambodians had a force of between 150 to 300 men on the island. United States intelligence had predicted a force of about one-third that size. Eventually, the Marines established a beachhead, but the operation appeared to be in trouble from the beginning.¹³⁸

At 7:28 a.m., the U.S.S. Holt pulled alongside the Mayaguez, and Marines boarded her pirate-style. The ship had been abandoned shortly before the Marines boarded her. At 8:30 a.m., the Mayaguez was secured, the American flag raised over her, and operations initiated to tow her from the area. By 10:45 a.m., the Mayaguez was in tow. At 3:30 p.m., the tow line was cut and the Mayaguez was under her own power.¹³⁹

At 6:07 a.m. (7:07 p.m. Wednesday, Washington time), the new Cambodian government delivered a nineteen minute broadcast from

¹³⁷ Post, May 16, 1975, at A-10; *id.*, May 17, 1975, at A-10; Times, May 19, 1975, at 1, col. 3; *id.*, 4, col. 4; Newsweek, May 26, 1975, at 25; Time, May 26, 1975, at 14; R. Rowan, *supra* note 10, at 201, 211.

¹³⁸ Post, May 16, 1975, at A-10; *id.*, May 17, 1975, at A-1 and A-10; Times, May 20, 1975, at 15, col. 1; Time, *supra* note 136; Newsweek, *supra* note 136; U.S. News & World Report, June 2, 1975, at 29; R. Rowan, *supra*, at 16. According to the commander of the landing party, the engagements were so close that "there were many instances when in fact the enemy threw hand grenades and our forces picked them up and threw them back." Times, May 20, 1975, at 15, col. 1.

It is claimed that, due to the belief that the crew was on Koh Tang, the military held off softening up the island before landing. U.S. News & World Report, June 2, 1975, at 29, col. 1. Although it appears that there was no bombardment beforehand, some air strikes are reported to have been made against the landing areas prior to the marine assault. See R. Rowan, *supra* note 10, at 194, and generally *id.*, at 16.

¹³⁹ See *id.*; R. Rowan, *supra* note 10, at 194, 198, 221, 223. See also map, *infra*, Appendix A. Six armed Cambodians had been observed on the Mayaguez 40 minutes before the marines boarded here. Also, warm bowls of rice and cups of tea were found on the ship. *Id.*, at 194, 198.

The Mayaguez is reported not to have been flying a national flag when she was seized. Apparently she hardly ever flew a flag in the South China Sea, because the wind in the area would rip it to pieces. *Id.*, at 198.

Phnom Penh, setting forth its version of the events of the past four days and its reasons for seizing the Mayaguez. The broadcast also accused the United States of committing several illegal acts against either the new government, or the state of Cambodia, its people, and its territory, both before and during the events of the previous four days. Shortly after countering the United States claim that the seizure was an "act of piracy," the broadcast concluded, "Wishing to provoke no one or to make trouble, adhering to the stand of peace and neutrality, we will release the ship, but we will not allow the United States imperialists to violate our territorial waters, conduct espionage in our territorial waters, provoke incidents in our territorial waters, or force us to release their ships whenever they want, by applying threats."¹⁴⁰

The broadcast was monitored in Bangkok by the Foreign Broadcast Information Service [FBIS], an independent United States government agency funded by the Central Intelligence Agency. By 8:00 p.m., Washington time, a rushed translation was put on the FBIS wire, and by 8:15 p.m. a one-page summary of the rough version of the broadcast was presented to Secretary of State Kissinger. This was the first communication of any sort that the United States had received from Cambodia regarding the seizure of the Mayaguez. Since the broadcast did not specifically mention that the Cambodians would release the crew, alluding only to the possibility that some of them might have been killed by United States planes,¹⁴¹ Secretary Kissinger was still determined to continue with military operations.¹⁴²

At 8:30 p.m., Secretary Kissinger called President Ford and informed him of the broadcast. In recalling his conversation with the

¹⁴⁰ *Id.*, at 202–204; Post, May 15, 1975, at A-1, col. 3; May 16, 1975, at A-1, col. 6, A-12, col. 1, and A-13, col. 8. Appendix C, from 37 Facts on File 331 (1975).

¹⁴¹ See *supra*, text at note 130, and *infra*, Appendix C, at cols. 2 and 3.

¹⁴² R. Rowan, *supra* note 10, at 201–02, 204; Time, at 14, col. 1; Newsweek, May 26, 1975, at 27, col. 1. Secretary Kissinger said after:

The Phnom Penh radio broadcast was received in Washington—it was received in the White House at about 8:16 that evening. At that time, we had 150 marines pinned down on the island, and we had the Holt approaching the ship. At that point, to stop all operations on the basis of a radio broadcast that had not been confirmed, whose precise text we did not at that moment have—all we had was a one-page summary of what it said—a broadcast, moreover, that did not say anything about the crew and referred only to the ship, it seemed to us it was too dangerous for the troops that had already been landed to stop the operation.

News Conference of May 16, 72 Dep't State Bull. 756 (1975).

Secretary, the President said: "The Secretary told me that the word has come that they were releasing the ship." (This was academic since the President had already been informed that the ship had been retaken. Yet it was not until 8:57 p.m. that the President received word that no crew members were found aboard the ship.)¹⁴³ "And I said to the Secretary, 'They don't mention the crew' and apparently in the information Henry had, he had not been told or the announcement didn't include the crew. So I said to him, 'Proceed as we had agreed, with the air strikes, and the full operation.'"¹⁴⁴ It was further agreed to respond to the broadcast immediately. The problem was how to get the response to Phnom Penh swiftly. Since the United States had no relations with Cambodia, it was decided that the best possible way to respond was through the press, particularly the Agence France Presse [AFP].¹⁴⁵

At 8:41 p.m., White House Press Secretary Ron Nesson read to newsmen the following statement addressed to the Cambodian government:

We have heard a radio broadcast that you are prepared to release the S.S. Mayaguez. We welcome this development, if true. As you know, we have seized the ship. As soon as you issue a statement that you are prepared to release the crew members that you hold, unconditionally and immediately, we will promptly cease military operations.¹⁴⁶

The press secretary then told newsmen, "Go file."¹⁴⁷

At 6:30 a.m., or 7:30 p.m., Wednesday, Washington time, the crew of the Mayaguez was informed by the Cambodians that they could return to the ship. However, the Cambodians first insisted that a written statement be prepared, which they called the "manifest." The content of the statement was dictated to the skipper of

¹⁴³ R. Rowan, *supra* note 10, at 204, 215. Rowan indicates that the President did not really expect that the crew would be found aboard the Mayaguez. *Id.*, at 215.

¹⁴⁴ *Id.*, at 204-05.

¹⁴⁵ *Id.*; Post, May 15, 1975, at A-1, col. 4; May 16, 1975, at A-16, cols. 3-5.

¹⁴⁶ *Supra*. Text of statement is reproduced, *infra*, Appendix D, from 72 Dep't State Bull. 721 (1975).

¹⁴⁷ Newsweek, May 26, 1975, at 27.

the Mayaguez, who, in turn, wrote it down.¹⁴⁸ The skipper was instructed to sign the document which was then given to him to keep. Next, the crew was required to take a vote, signifying their approval or disapproval of the document. The Cambodians insisted that the "manifest," as they called it, be unanimous. After some tense moments, the Cambodians apparently were satisfied with a 39 to 1 vote in favor of the document.¹⁴⁹

Around 7:30 a.m., as United States Marines were storming the Mayaguez, the crew left Koh Rong Sam Lem Island in a fishing boat, manned by a Thai crew and some Cambodian guards. It was followed by another fishing boat, with additional armed guards. The Mayaguez was some twenty-four miles away. As the boats pulled away from the dock, the Cambodian interpreter reminded the skipper to contact his government when he reached the ship and "tell them to stop the jets."¹⁵⁰

As they reached the open sea, the second boat suddenly pulled alongside the first and ordered it to stop. After a brief ship-to-shore exchange by walkie-talkie, the ensign in charge of the party had the guards on the crew's boat transferred to the second vessel. The second boat then peeled off and started back to Koh Rong Sam Lem.¹⁵¹

At approximately 9:30 a.m., a United States reconnaissance plane spotted the fishing boat.⁹ The pilot reported seeing about thirty Caucasians in the bow, waving white flags.¹⁵² The U.S.S. Wilson,

¹⁴⁸ R. Rowan, *supra* note 10, at 187-90. The statement included the names and positions of the compound commander and his interpreter and the following remarks: that four Cambodian ships were destroyed and 100 "friendly" Cambodians wounded; that the crew was treated well and not harmed; that the crew was responsible for the damage, injury and destruction suffered by Cambodia and its people; that the Cambodian high command had brought the above circumstances to the attention of the crew and international community; that the crew was friendly to the Cambodians; and that Cambodians did not like war and wanted peace and many friends in the international community.

¹⁴⁹ *Id.*, at 191-93. One member vigorously voiced his disapproval, believing he was given his approval to a confession. *Id.* Later, after calming down, he realized that other members voted in favor of the document only to prevent further delay in their release. *Id.*, at 207.

¹⁵⁰ *Id.*, at 207; Newsweek, *supra* note 25, col. 2: Post, May 16, 1975, at A-1, col. 4. See also map, *infra*, Appendix A.

¹⁵¹ R. Rowan, *supra* note 10, at 208-09.

¹⁵² *Id.*, at 210-12.

which was ordered to intercept the vessel, picked up the crew around 10:07 a.m. (11:08 p.m. Wednesday, Washington time). Immediately thereafter, the skipper of the Mayaguez informed the commander of the Wilson that all of his crew was aboard and safe.¹⁵³ He also relayed the Cambodian request to stop the bombing. The commander replied it was too late, as air strikes had already commenced against targets around Kompong Som.¹⁵⁴

At 9:57 a.m. (10:51 p.m. Wednesday, Washington time), U.S. planes from the aircraft carrier Coral Sea bombed Ream Airfield, destroying seventeen T-28 trainers and a hangar. The planes had originally been launched at 7:45 a.m., but had returned to the carrier after making only passes over military targets in the Kompong Som area.¹⁵⁵

At 11:08 p.m. (10:08 a.m. Cambodian time), Secretary Schlesinger phoned the President and informed him of the unexpected pick-up of the crew by the U.S.S. Wilson. He reported, however, that only thirty crew members were on the fishing boat. Seven minutes later, though, after receiving a corrected head-count, Secretary Schlesinger informed the President that the whole crew was safely aboard the Wilson.¹⁵⁶ At 11:16 p.m., the President issued the order

¹⁵³ *Id.*, at 213-14; Time, May 26, 1975, at 14, col. 2; Post, May 16, 1975, at A-1, col. 6; *id.*, A-10, col. 1. See also map, *infra*, Appendix A. Upon observing the fishing boat with its American passengers approaching the U.S.S. Wilson, the commander said:

[U]p until two minutes ago I would have bet anything that the crew of the Mayaguez was on the island. It was so logical, with only 1,500 to 1,600 yards of water separating the ship and the island. In this strange Cambodian chess game why would Phnom Penh move all their pawns to the mainland? [The commander was a chess expert.] It didn't make sense. Not unless they were going to keep them on the mainland.

R. Rowan, *supra* note 10, at 213.

¹⁵⁴ R. Rowan, *supra* note 10, at 217.

¹⁵⁵ *Id.*, at 199, 215-16; Time, May 26, 1975, at 14, cols. 1-2; map, *infra*, Appendix A; Post, May 16, 1975, at A-1, col. 6 and A-10, col. 5; May 16, 1975, at A-1, cols. 2-3 and A-10, col. 2. In the latter source, the chronology of the air strikes and the release of the crew are stated in Cambodian time. After comparing other sources, it seems clear that this time reference is incorrect. If the stated times were changed to read p.m., Washington time sequence, it would reflect a fairly accurate chronology. The 11-hour difference in time between Washington and the Gulf of Thailand no doubt has contributed significantly to the discrepancies found in news articles reporting the events or certain aspects thereof.

¹⁵⁶ *Id.*, at 216; Post, May 17, 1975, at A-10, col. 4; Time, May 26, 1975, at 14, cols. 2-3. See also chronology of United States moves during the last day of the incident in 35 Facts on File 330 (1975).

to cease all military operations, "except those that were judged to be immediately necessary" for the protection of Marines still fighting on Koh Tang, and to withdraw.¹⁵⁷

It was at 11:50 p.m. (10:50 a.m. Cambodian time) that a second strike launched from the Coral Sea hit an oil depot in the port of Kompong Som. It was claimed that this attack was carried out in support of the Marines who were still engaged in fierce fighting on Koh Tang. As noted above, the Cambodians were believed to have 2,400 troops and several boats in the target area.¹⁵⁸

At 12:27. p.m., President Ford announced to the nation over television that:

At my direction, the United States forces tonight boarded the American merchant ship S.S. Mayaguez and landed at the island of Koh Tang for the purpose of rescuing the crew and the ship, which had been illegally seized by Cambodian forces. They also conducted supporting strikes against nearby military installations. I have now received information that the vessel has been recovered intact and the entire crew has been rescued. The forces that have successfully accomplished this mission are still under hostile fire but are preparing to disengage¹⁵⁹

It was approximately four hours after the Marines landed that the order was given for them to withdraw. However, the evacuation

It was reported that somehow the original report of the P3 Orion observation of approximately thirty Caucasians (see text *supra*, at note 42) had been erroneously fed back to the Pentagon as the actual head-count of those rescued. R. Rowan. *supra* note 10, at 199.

¹⁵⁷ R. Rowan, *supra* note 10, at 217; 35 Facts on File 330 (1975); Time, May 26, 1975, at 14, cols. 2-3; Post, May 17, 1975, at A-10, col. 2. The quoted portion of the text is taken from Secretary Kissinger's remarks on the subject at his May 16 news conference. 72 Dep't State Bull. 756 (1975).

¹⁵⁸ R. Rowan, *supra* note 10, at 219; Post, May 17, 1976, at A-11, col. 6, and A-10, col. 1; Time, May 26, 1976, at 14, col. 2; N.Y. Daily News, May 21, 1975, at 3; text at notes 126, 128 *supra*; map, *infra*, Appendix A.

¹⁵⁹ Post, May 17, 1975, at A-10, col. 4; 72 Dep't State Bull. 721 (1975). See full text of announcement, *infra*, Appendix D.

was significantly hampered by heavy Cambodian gunfire, which repeatedly drove off helicopters trying to land on the island. United States planes and the destroyers Holt and Wilson joined in laying down a rain of suppressive fire on suspected Cambodian positions, and a C-130 gunship from Thailand dropped America's largest conventional bomb—a 15,000 pounder—on the island, either to clear an alternate landing area for the choppers or to create panic and divert the attention of the Cambodians at a time when the evacuation efforts were in trouble. The commander of the assault force even called for additional reserves to help get his men out. As darkness drew over the island, evacuation efforts met with more success, and by 9:15 p.m., the last of the Marines were off the island.¹⁶⁰

The final casualty count was 15 killed in action, 3 missing in action and presumed dead, and 50 wounded in action.¹⁶¹ An additional 21 men were not included in the list of wounded because their injuries were claimed to be superficial.¹⁶²

The incident was over but not the analyses.¹⁶³

In September, several months after the incident, Cambodia's Deputy Premier and Foreign Minister Ieng Sary, who was in New York to attend a U.N. General Assembly meeting, admitted that the Mayaguez was seized by a local commander without the knowledge of the Phnom Penh government, and further that the first word the central authorities had of the incident came from American broadcasts monitored in Phnom Penh. In addition, he claimed that the local commander, who was stationed in Sihanoukville, was summoned to Phnom Penh to explain the seizure.

Although no date was given, Mr. Sary stated that the officer arrived around 2 p.m. and that, after some three hours of discussions, the officer was sent back to Sihanoukville with instructions to release the Mayaguez immediately. Mr. Sary claimed that, before the

¹⁶⁰ Post, May 16, 1975, at A-10, cols. 3-4; May 17, 1975, at A-10, col. 3; Newsweek, May 26, 1975, at 27, col. 1; R. Rowan, *supra* note 10, at 220-23. After the last of the marines were lifted off Koh Tang, the two destroyers continued to cruise the island using bullhorns to alert and evacuate any marines still possibly stranded on the island or in its offshore waters. *Id.*, at 222-23.

¹⁶¹ Times, May 21, 1975, at 16.

¹⁶² *Id.*, May 20, 1975, at 1, col. 3. Nor were 23 air police included in the casualty report. See note 53 *supra*.

¹⁶³ See notes 8 and 9 *supra*.

order could be carried out, American troops attacked Koh Tang and bombed the mainland. Finally, he defended the seizure, claiming the vessel was in Cambodian territorial waters.¹⁶⁴

111. U.S. CLAIMS EXAMINED

The United States as a major participant in the dispute made claims which varied according to the audience and the occasion. One claim made in the early stages of the crisis period was not emphasized in its later stages. Other claims, though appearing to be inconsistent with each other, were made in the alternative and in anticipation of potential counterclaims. Furthermore, both during and after the crisis, the focus on particular claims seemed to shift with what appeared to be a change in U.S. objectives.

The United States claims to be studied in this first part of the article are broadly categorized as follows:

1. Claim to characterize the vessel's seizure as an "act of piracy."
2. Claim to characterize locus of the seizure as the high seas.
3. Claim to the right of and actual engagement in innocent passage.¹⁶⁵

These claims, together with related legal issues narrower in scope, will now be examined seriatim.

¹⁶⁴ Times, Sept. 14, 1975, at E-4; Post, Sept. 8, 1975, at A-1, and A-16. Though dates were not given, it can be reasonably assumed from Mr. Sary's remarks that the Cambodian leaders learned of the seizure the day the ship was taken. Because dates were not specified, it is also difficult to determine when the local commander was ordered to Phnom Penh and when the leadership initially ordered the ship's release. Mr. Sary's remarks, however, would tend to indicate that the order to release was given shortly before military operations commenced against Koh Tang and the Cambodian mainland. That was more than two days after the ship's seizure was presumably brought to the attention of Cambodia's leadership.

¹⁶⁵ These and other claims are taken from official pronouncements of United States decision-makers. The primary source used is 72 Dep't State Bull. 719-22 and 753-60 (1975). A more detailed account of these claims and their analysis is provided in the sections to follow and in Part II of this article.

IV. CLAIM TO CHARACTERIZE SEIZURE AS AN “ACT OF PIRACY”

A. *THE CLAIM*

The audience for this claim was, in general, the world at large, and more specifically, public opinion on the homefront, and the authorities in Phnom Penh.

On May 12, after having been informed that a Cambodian naval vessel had seized an American merchant vessel and had forced it into port, President Ford publicly pronounced the seizure to be an “act of piracy.”¹⁶⁶ At a news conference the next day, Secretary of State Kissinger said: “Well, I think that the President’s statement speaks for itself. He called the action an act of piracy. . . .” At a question and answer session following the conference, the Secretary stated: “With respect to the ship, we have called it an act of piracy.” Later in the session he remarked: “. . . the words of the White House statement yesterday were carefully chosen, and they have been reiterated since.”¹⁶⁷

B. *TRENDS IN DECISION*

In his work on the custom and law of the sea, Professor H.A. Smith notes that:

The basic principle of the law is that the high seas, although not subject to any national law, must not be allowed to become an area of anarchy or crime. The ordinary policing of the sea in time of peace is sufficiently ensured by the rule which gives every state jurisdiction over its own ships, and in recent times this general provision has been supplemented by treaties dealing with vari-

¹⁶⁶ Note 55 *supra* and text thereat. Press Secretary Ron Nesson read the White House statement at a news briefing at 6:54 a.m., 72 Dep’t State Bull. 719, n.1. (1975).

¹⁶⁷ 72 Dep’t State Bull. 723, 727 (1975).

Senators James L. Buckley and Jacob K. Javits agreed with the President’s description of the seizure as an act of piracy, as did the president of the National Maritime Union, Shannon J. Wall. Post, May 13, 1975, at A-13, cols. 4-6.

ous matters in which experience has shown the need for additional measures of control. But the normal system presumes that all the ships concerned are regularly registered under the law of some State and amenable to its authority. It cannot provide by itself for ships manned and operated by gangs of criminals in defiance of all law. The gap thus left is filled by the principle of law which makes the repression of piracy the common responsibility of civilized mankind.¹⁶⁸

Piracy, according to the law of nations, which will be discussed below, must not be confused with the conception of piracy according to different municipal laws. States frequently define and punish acts of piracy not included within the international-law definition of piracy.¹⁶⁹ Both British and United States laws treat as pirates their respective subjects or citizens who, under color of authority of a foreign State, commit acts of hostility upon the high seas against their own States or fellow subjects or citizens.¹⁷⁰

However, it is generally agreed that the status of persons as pirates under international law depends on their conduct and objectives measured by international law standards rather than by municipal law.¹⁷¹ There is also agreement that municipal law characterizations of conduct as piracy apply to all persons only within the target State's territory, and outside that territory only to its own ships and nationals.¹⁷² Thus, a State cannot treat foreigners either on the high seas or in another State's territorial jurisdiction as pirates, unless they are characterized as such according to international law.¹⁷³

The international law doctrine of piracy evolved in an age when the international community felt genuinely threatened by piratical

¹⁶⁸ H. Smith, *The Law and Custom of the Sea* 65-66 (3d ed. 1959).

¹⁶⁹ I. Oppenheim-Lauterpacht, *International Law* § 280 (8th ed. 1955); C. Colombos, *The International Law of the Sea* § 463 (6th rev. ed. 1967).

¹⁷⁰ *Id.*: 18 U.S.C. § 1652 (1976).

¹⁷¹ I. Oppenheim, *supra* note 169; C. Colombos, *supra* note 169; H. Smith, *supra* note 168, at 65; C. Hyde, *International Law* § 233 (2d rev. ed. 1945); G. Hackworth, *Digest of International Law* § 204 (1941); J. Moore, *A Digest of International Law* § 331 (1906).

¹⁷² I. Oppenheim, *supra* note 169; C. Colombos, *supra* note 169.

¹⁷³ I. Oppenheim, *supra* note 169.

conduct.¹⁷⁴ Piracy has been classified as a so-called "international crime," and the pirate has been treated as an outlaw and a general enemy of mankind. The offense is essentially a continuous crime, and a vessel which is operated for the purpose of committing acts of piracy is a pirate vessel at every moment of her voyage.¹⁷⁵

The fundamental policy underlying international law prescriptions on piracy is "to secure and maintain the safety and order of activities on the high seas from deprivations imposed by persons acting without authorization and responsibility of a state. (Where a state has authorized deprivations, there is ample recourse to the responsibility of the state and the policies and prescriptions are wholly different.)"¹⁷⁶ In implementing this policy, international law has traditionally prohibited certain acts on the high seas when committed by certain persons. For enforcing this prohibition, there is general concurrence that any State is competent to capture a pirate and his vessel, and to subject both to the sanctioning process of that State.¹⁷⁷

International law thus seeks to specify, if unclearly, the kinds of operative events or conduct which may be called piracy, to indicate the persons chargeable with the offense, to prescribe the area within which the offense may be committed, to denominate the objectives which must characterize conduct if it is to be regarded as piracy, and to prescribe the measures that may be taken to apply these prescriptions.¹⁷⁸

This law also authorizes the use of force by the vessels of each State to enforce these prescriptions.¹⁷⁹ This universal authority to enforce these prescriptions and apply sanctions to conduct characterized as piracy under international law is, however, strictly limited to such conduct. Extensions of this authority can seriously affect a State's

¹⁷⁴ See generally *id.*; M. McDougal & W. Burke, *The Public Order of the Oceans* 806-86. H. Smith, *supra* note 168, at 65-66.

¹⁷⁵ *Id.*, at 65, 66; C. Colombos, *supra* note 169, at § 457; I. Oppenheim, *supra* note 167, at 609.

¹⁷⁶ M. McDougal & W. Burke, *supra* note 174, at 808.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

power represented by its exclusive authority over its flag vessels for most purposes.¹⁸⁰

Considering the relative importance in this study of the United States claim to characterize Cambodian behavior as acts of piracy, no attempt will be made to recapitulate the whole past experience relating to piracy. Instead, this inquiry will focus on recent recommendations and actions for establishing a general consensus on some important aspects of the contemporary law of piracy.¹⁸¹ As an aid in this effort, a similarly worded framework developed by Professors McDougal and Burke in their discussion of the trends in decision in claims relating to the characterization of acts as piracy will be adopted.¹⁸²

1. *Conduct Characterized as Piracy*

In its traditional and strict conception, piracy has been defined as "every unauthorized act of violence committed by a private vessel on the high seas against another vessel with intent to plunder."¹⁸³ Oppenheim defines piracy as "every unauthorized act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or passengers against their own vessel."¹⁸⁴ Colombos states that piracy consists of "acts of violence done on the high seas without recognized authority and outside the jurisdiction of any civilized State."¹⁸⁵ The traditional conception of a pirate portrays him as:

a professional robber who sails the sea in a pirate ship to attack and plunder other ships or communities which can

¹⁸⁰ See generally authorities cited at note 169, *supra*. See also Gehring, *Defense Against Insurgents on the High Seas: The Lyla Express and Johnny Express*, 15 JAG J. 317, 322 (1973).

Because the offense brought into play not only the principle of universal jurisdiction but also the right of visit and search on the high seas in time of peace, States "have shown the strongest repugnance to extending the scope of the offense." The S.S. Lotus [1927] P.C.I.J., ser. A, No. 9, at 65, 70.

¹⁸¹ For a detailed discussion of piracy in contemporary international law, see Fitzmaurice, *Piracy in Modern International Law*, 43 Transactions of the Grotius Soc'y 63 (1957) [hereinafter cited as Fitzmaurice, *Piracy*].

¹⁸² M. McDougal & W. Burke, *supra* note 174, at 809, 813, 816.

¹⁸³ I. Oppenheim, *supra* note 169, at 608.

¹⁸⁴ *Id.*, at 609.

¹⁸⁵ C. Colombos, *supra* note 169, at 444.

be reached from the sea. At least if they do not discriminate between nationalities in choosing ships or settlements to attack, such pirates are a menace to the interests of every state which has access to the sea, and therefore this traditional conception seems to justify in favor of all such states a common legal right, and perhaps reciprocal duties, to prevent piracies and to punish pirates This simple method of comprehension is inadequate. . . . There are many practical and technical problems in the field of piracy which it does not touch at all.¹⁸⁶

The traditional conception does emphasize the pirate's pursuit of private gain and his general independence from the supervision of any State. It has been observed that:

Piracy includes acts differing much from each other in kind and in moral value; but one thing they all have in common: they are done under conditions which render it impossible or unfair to hold any state responsible for their commission. A pirate either belongs to no state or organized political society, or by the nature of his act, he has shown his intention and his power to reject the authority of that to which he is properly subject.¹⁸⁷

Article 3 of the Harvard Research¹⁸⁸ Draft Convention on Piracy describes piratical conduct as follows:

1. Any act of violence or of deprivation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without a bona fide purpose of asserting a claim of right, provided that the act is connected with an

¹⁸⁶ Harvard Research in International Law, *Draft Convention on Piracy*, with comment, 26 Am. J. Int'l L. Supp. 739 (1932), and comment on art. 3, at 769 [hereinafter cited as Harvard Research, *Piracy*].

¹⁸⁷ W. Hail., International Law 310 (8th ed. by Higgin 1924).

¹⁸⁸ By far the most comprehensive effort towards constructing a contemporary law of piracy to cope with more modern problems in the area was undertaken by the Harvard Research. It was from this study that the International Law Commission made its recommendations, which were later adopted by the 1958 Conference on the Law of the Sea and incorporated in the Convention on the High Seas.

attack on or from the sea or in or from the air. If the act is connected with an attack ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.¹⁸⁹

This formulation was later altered by the International Law Commission [hereinafter abbreviated as ILC], for undeclared reasons, to appear as Article 39 of the final draft in the following form:

Piracy consists of any of the following acts: Any illegal act of violence, detention or any act of depredation¹⁹⁰

The commission explained in its commentary on Article 39 that the intention to rob was not a necessary element of piracy and that other motives, such as hatred or revenge, were within the scope of its provision.¹⁹¹

The High Seas Convention describes piratical conduct with the following language:

1. Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

a. On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

b. Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.¹⁹²

During consideration of the convention committee, the representative of Greece proposed an amendment to strike the curious term "illegal" from the draft article.¹⁹³ The proposal was rejected, leav-

¹⁸⁹ Harvard Research, *Piracy*, *supra* note 186, at 743.

¹⁹⁰ [1957] Report 28, quoted in M. McDougal & W. Burke, *supra* note 174, at 811.

¹⁹¹ [1956] Report, art. 39, commentary para. 1(i), *id.*

¹⁹² Convention on the High Seas, April 29, 1958 (1965), art. 15, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82. Both Cambodia and the United States are parties to the Convention.

¹⁹³ U.N. Doc. A/Conf. 13/L.62. For a discussion of this term, *see* Forman, *International Law of Piracy and the Santa Maria Incident*, 15 JAG J. 143, 148, 166, 168 (1961).

ing a purported legal definition which incorporated an undefined concept of illegality.¹⁹⁴ No reason is given in the official records for the rejection. However, the Greek delegation was of the opinion that illegality must be qualified by some legal system, and in the absence of international regulations on the matter, there would be no other interpretation of illegality than that covered by national law. It was concluded that the resulting legal confusion that would arise might make it impossible to punish a vessel which had engaged in piracy.¹⁹⁵

McDougal and Burke are of the opinion that, while use of the term does seem to be bootstrapping, the technicality does not necessarily obscure the kind of act to which the article is addressed. They feel it is most doubtful and highly undesirable, "if the determination of illegality were intended to be made with reference to some undisclosed system of national law."¹⁹⁶ Nothing in the commission deliberations or conference discussions even remotely suggests such an interpretation or other requirements that, as a condition to a finding of piracy, it must be shown that the acts committed were also a crime according to the law of a particular state. It is reasoned that the apparent purpose for the inclusion of the term was to ensure that the scope of the provision encompassed a broad range of types of coercive behavior.¹⁹⁷

Another writer has pointed out that it could be assumed that the term means "without the authority of any State."¹⁹⁸ It is proposed that this strict construction may be expanded to mean "without the authority of any politically organized community." If one accepts this interpretation, then a twofold test for determining piratical conduct is emphasized. The following comment of Sir Gerald Fitzmaurice is of interest in this regard:

In [Hall's] view piratical acts are acts done by persons not acting under the authority of any politically organized community (8th ed., p. 314). It is arguable that it would be better to emphasize the lack of due authority as the essence of piracy rather than, as does the Interna-

¹⁹⁴ Convention on the High Seas, 4 Official Rec. 84, para. 5.

¹⁹⁵ *Id.*, at 83-84, para. 3.

¹⁹⁶ M. McDougal & W. Burke, *supra* note 174, at 811.

¹⁹⁷ *Id.*, at 812.

¹⁹⁸ Forman, *supra* note 193, at 177.

tional Law Commission, the fact that piracy is a crime committed "for private ends." The former test is probably capable of more objective application than the latter, which may necessitate difficult inquiries into motives. Hall points out, however, that it would not be possible to replace the "private ends" test entirely by the "without due authority" test. The reason is that the only way in which politically organized societies which are not yet recognized (as such) can establish their claim to recognition may well be through the commission of acts which, for want of such recognition at the time they are committed, would be technically piratical unless the "without due authority" test were supplemented by the "private ends" test. As Hall succinctly puts it, "though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends."¹⁹⁹

The scope of the conception of piracy is further underlined by incorporating a definition of a pirate ship or aircraft. Article 17 declares:

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.²⁰⁰

A distinction is made between two types of pirate ships. First, there are those intended to be used in commission of acts of piracy. Secondly, there are those which have already been used to commit such acts. "Such ships can be considered as pirate ships so long as they remain under the control of the persons who have committed those acts."²⁰¹ The object in the latter case is to capture those per-

¹⁹⁹ Fitzmaurice, *Piracy*, *supra* note 181, at 77, n. 21, commenting and quoting from W. Hall, *supra* note 187, at 312.

²⁰⁰ Convention on the High Seas, *supra* note 192.

²⁰¹ [1956] Report 28. Commentary is quoted in M. McDougal & W. Burke, *supra* note 174, at 813.

sons and ships that previously committed piracy but no longer intend to do so.²⁰²

2. *Locus of Activity*

The principle characteristic of the traditional law of piracy was that the acts constituting piracy occurred on the high seas beyond the exclusive authority of states.²⁰³ Some writers, however, include acts such as those which followed an attack from the sea on a coastal village by marauders. Such acts were common in the early practice of piracy.²⁰⁴ The traditional concession of a universal jurisdiction to all states over piracy was based on the proposition that the crime occurs outside the territorial jurisdiction of every state.²⁰⁵ This traditional view was carried forward by the Harvard Research in International Law by specifying that piratical acts involved those "committed in a place not within the territorial jurisdiction of any

²⁰² *Id.* The convention does not cover attempts to commit acts of piracy within the proscribed conduct. An amendment to include such attempts in I.L.C. draft article 39 was rejected. See Convention on the High Seas, 4 Official Rec. 84, para. 5. In the English case *In Re Piracy jure gentium*, the Judicial Committee of the Privy Council held such attempts to be acts of piracy. [1934] A.C. 586 (P.C.). It is also significant to note that the commentary to article 3(2) of the Harvard Draft Convention states that, among other purposes, the provision extends to "piratical roving" prior to an attack and that "in this phase it will be useful . . . as a basis for international notice [for] prevention of attacks. . . ." Harvard Research, *Piracy*, *supra* note 186, at 820.

One object of the provision was to add to the acts which are proscribed as piracy. This provision was incorporated by the I.L.C., without recorded discussion, as article 39(2) of its 1956 draft. It appears as article 15(2) of the Convention on the High Seas. It specifies that piracy includes "any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship." Convention on the High Seas, *supra* note 192. The opinion is held that, in view of a declaration incorporating by reference the commentary in the Harvard Research (*see* Francois, Sixth Report on the Regime of the High Seas 26-27 (U.N. Doc. No. A/CN.4/79) (1954)), it would be "safe to assume that the absence of discussion or difference in the commission and in the Conference may be taken as implicit approval of the explanations there made." M. McDougal & W. Burke, *supra* at 812.

Article 15(3) of the Convention on the High Seas also derives from the Harvard Research. It specifies that piracy includes "any act of inciting or of internationally facilitating an act described in subparagraph 1 or sub-paragraph 2 of this article." Convention on the High Seas, *supra* note 192.

²⁰³ I. Oppenheim, *supra* note 169, at 608; Harvard Research, *Piracy*, *supra* note 186, at 760, 781-82.

²⁰⁴ *E.g.*, W. Hall, *supra* note 187, at 313-14; H. Smith, *supra* note 168, at 66.

²⁰⁵ Harvard Research, *Piracy*, *supra* note 186, at 781-82. *See also* C. Colombos, *supra* note 169 at 444; text *supra* at note 190.

state.” The formulation included both the air and land regions as well as the sea, and it excluded acts committed within the territorial sea and airspace or on land territory of a particular State.²⁰⁶

The International Law Commission adopted the Harvard Research recommendation that piracy be defined to include acts beyond the territorial jurisdiction of any State, and rejected a proposal to include acts committed within the land or sea territory of a particular State.²⁰⁷

The High Seas Convention also specifies the locus of the impact of the acts declared to be piracy. Article 15(1) refers to “illegal” acts “directed”: “(a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.”²⁰⁸ Thus not only is provision made for definition of the locus of the precipitating events—“on the high seas” and “in a place outside the jurisdiction of any State”—but also it is provided that, on the high seas, the acts must be directed from persons on one ship against those on another. The purpose here was to exclude acts inflicted by persons on a vessel on others on the same vessel.²⁰⁹ Paragraph 1(b) refers to acts committed by a vessel or aircraft on an island constituting *terra nullius* or on unoccupied coastal territory.²¹⁰

3. Actors and Objectives of Piracy

Most of the controversy connected with the contemporary law of piracy has centered upon the contention that piracy includes actions by warships and other public vessels, and by persons seeking political objectives. The specific events creating this controversy were several incidents in the Formosa Strait in which vessels of the government of the Republic of China intercepted merchant vessels of various nations, including Soviet and western bloc states. These

²⁰⁶ Harvard Research, *Piracy*, *supra* note 186, at 788. It is stated that in the case of an attack from the sea a coastal state would have jurisdiction, as well as perhaps other states. *Id.*, at 789.

²⁰⁷ [1955] 3 Y.B. Int'l L. Comm'n 51-53.

²⁰⁸ *Supra* note 192 at 2317.

²⁰⁹ See M. McDougal & W. Burke. *supra* note 174, at 814.

²¹⁰ *Id.*, at 814-15. For a discussion of the possibilities of piracy by aircraft see *id.*, at 815-16.

vessels were sailing for ports of the People's Democratic Republic of China, and were forced into Formosan ports for condemnation of their cargoes as contraband.

After unsuccessful use of several means of protest, recourse was had to the United Nations where Soviet bloc nations charged that Chinese nationalist vessels had committed piracy in seizing the ships, crews, and cargoes of Soviet and Polish ships. The Chinese nationalists, on the other hand, claimed that they were exercising the right of self-defense in preventing the Chinese communists from acquiring strategic materials. The nationalists added that they had no intention of interfering with legitimate neutral trade, and further that they "had never refused to enter into negotiations in connection with incidents involving bona fide neutral merchant vessels."

After several days of debate in the Ad Hoc Political Committee, a proposal was adopted transmitting a draft resolution containing references to principles of the law of the sea and the record of discussions of the Committee to the International Law Commission for its consideration in connection with freedom of navigation. The focus of debate in the Commission centered on the questions of whether warships could be seized as pirate vessels, and of whether piratical conduct extends to acts done for political ends. In drafting a proposed article defining piracy, several Soviet bloc states offered amendments to a proposal submitted to the Commission covering these questions.²¹¹

Article 1 of the Harvard Research Draft Convention defines "ship" as "any water craft or air craft of whatever size."²¹² This provision could be interpreted to include warships without much difficulty. But Article 3 of the draft limits piracy to acts committed "for private ends."²¹³ As a net result, it could be argued that warships are excluded from the proscriptive provisions of the draft except in a very limited case. The Comment to Article 3 states that, "If the forces or employees of any state or government mutiny or otherwise should seize a ship and use it to plunder on or over the

²¹¹ The above factual description is taken from an account of the controversy in M. McDougal & W. Burke, *supra* note 174, at 816-17, 819.

²¹² Harvard Research, *Piracy*, *supra* note 186, art. 1(5), 767, 768.

²¹³ *Id.*, at 768-69.

high seas on their own account, this, of course, would be piracy and fall under the common jurisdiction."²¹⁴

The Harvard Research Draft seemed to be most concerned over the status of unrecognized insurgents, but, in excluding their acts from the definition of piracy, it made clear that in other respects the rights of a State under international law to protect its vessels against interference on the high seas remained unaffected. In taking this position, it was noted that some writers held the view that illegal attacks on foreign commerce by an unrecognized insurgent are acts of piracy "in the international law sense." It was further noted that "there was even judicial authority to this effect."²¹⁵ Though

²¹⁴*Id.*, at 798. See also I. Oppenheim, *supra* note 169, at 610.

²¹⁵Harvard Research, *Piracy*, *supra* note 186, at 857. See also C. Colombos, *supra* note 169, at 445, 446, 450-51; I. Oppenheim, *supra* note 169, at 612.

In the case of the *Ambrose Light*, 25 F. 408 (S.D.N.Y. 1885), summarized in C. Colombos, *supra* note 169, at § 466, the vessel *Ambrose Light*, sailing under a commission of a Columbian insurgent leader, was seized by a United States warship and brought into the port of New York for adjudication as a pirate. The court declared her a pirate, even though no act of violence against the United States, its ships, or even against the Columbian government was proved. However, the court freed the vessel after finding that the United States government had recognized the insurgents as belligerents by implication, thus conferring on it the right to visit and search vessels on the high seas. The court's conclusion that any insurgent vessel can be treated as a pirate simply because the insurgents had not been recognized as belligerents was specifically rejected by the United States State Department in a letter of August 16, 1929, quoted in II G. Hackworth, *Digest of International Law* § 204, at 697 (1941).

It has been observed that recognized governments which become the target of insurgency have repeatedly characterized the acts of rebel vessels as piracy. See H. Smith, *supra* note 168, at 67. However, it has been proposed that there is a presumption of the nonpiratical character of insurgent vessels. The basis for this presumption is the principle of noninterference in the domestic affairs of other States. This principle, it is claimed, "cannot be maintained unless foreign states are free to disregard the decrees of established governments declaring insurgent vessels as pirates." T. Chen, *The International Law of Recognition* 402-04 (L. Green ed., 1951). Chen further claims: "This position has always been taken by foreign states and is upheld by the majority of writers." *Id.* at 404.

Chen further points out, however, that the case (under customary practice) is somewhat different where the depredations are upon ships of foreign states, noting that British and American practice has been to regard such acts as piratical. Yet he declares that "the treatment meted out to the insurgents is usually less drastic than would have been the case with real pirates. The claims of States to resist and suppress acts of violence against their ships are often not limited to those committed by unrecognized insurgents. This being the case, the fact that insurgent ships committing depredations upon foreign ships are resisted and

this view was rejected by the Harvard Research, it was emphasized that the offended State still retained other means of recourse.²¹⁶

The debate over the Chinese nationalist seizures in the ILC appeared to assume that warships per se must be acting for a State or at least for a "de facto political authority," and for political purpose. Members of the Soviet bloc, on the other hand, based their arguments on the Nyon Agreement of 1937, contending that, since then, it was proper to treat warships as capable of committing piracy, and that limiting objectives to private ends was no longer required.²¹⁸

The Nyon Agreement was concluded among a number of great powers in an effort to protect shipping in the Mediterranean from attacks by unidentified submarines assumed to be operating for the opposing factions in the Spanish Civil War. The signatories declared that the sinking of merchant vessels under the circumstances was in violation of the rules of international law and contrary to the most fundamental dictates of humanity, and, consequently, should be treated as an act of piracy.²¹⁹

Members of the Soviet bloc pointed out that, even if the agreement was no longer valid and had already been denounced by some signatories, "it contained the seeds of a new principle to which due weight should be given."²²⁰

punished does not necessarily mean that the stigma of piracy is attached for the sole reason of their insurgency. It is, therefore, generally correct to say that foreign states usually take notice of the fact of insurgency in order to discriminate insurgent ships from ordinary pirates." *Id.*, at 404-06.

In an insurgency situation, it has also been pointed out that since it would be unfair to hold the established government responsible for the actions of those rebelling against it, the conduct of the insurgents is therefore without any State authority or endorsement, at least by the State whose government they are seeking to change or overthrow. Gehring, *supra* note 180, at 327. However, it does not necessarily follow that the acts of insurgents are piracy, for such conduct is usually calculated to further political objectives, which are not commonly thought of as "private ends."

²¹⁶ Harvard Research, *Piracy*, *supra* note 186.

²¹⁷ M. McDougal & W. Burke, *supra* note 174, at 818.

²¹⁸ [1955] Y. B. Int'l L. Comm'n, I, 43, paras. 64-65, 71-72; 55, paras. 17-18; 56, para. 19, as cited in M. McDougal & W. Burke, *supra* note 174.

²¹⁹ The above facts are taken from accounts in Finch, *Piracy in the Mediterranean*, 31 Am. J. Int'l L. 659 (1937); C. Colombos, *supra* note 167, at § 472; M. McDougal & W. Burke, *supra* note 174.

²²⁰ [1955] Y. B. Int'l L. Comm'n, I, 55, para. 17, as cited in M. McDougal & W. Burke, *supra* note 174, at 819.

This plea was countered with the argument that, "As no government admitted responsibility, it had been possible to assume that the submarines had been pursuing their private ends without any authority from their government. If he was right in arguing that the Nyon Agreement had been based on that fact, the Special Rapporteur's point that piracy was essentially a crime committed by private individuals not in the performance of a public or authorized duty was reinforced."²²¹

It was further argued that, since acts of violence by warships might constitute aggression, provision for imposition of responsibility for such acts was made in other international prescriptions, including those contained in the United Nations Charter.

Finally, it was reasoned that seizing a warship for piracy might give rise to a highly embarrassing and even dangerous situation, which could have the most serious consequences.²²²

In the end, the terms "private vessel" and "for private ends" in Article 39 of the Commission's Draft were retained by a large majority of votes.²²³ In its comments to Article 39, the Commission explained that the seizure of a warship for piracy could have the "gravest consequences" and that "to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community."

In language rejecting the amendments offered by Soviet bloc members and perhaps indirectly referring to the Formosa Strait controversy, the Commission's commentary on Article 39 further explained that

the questions arising in connexion with acts committed by warships in the service of rival governments engaged in civil war are too complex to make it seem necessary for the safe-guarding of order and security on the high seas that all States should have a general right, let alone an obligation, to repress as piracy acts perpetrated by the warships of the parties in question.²²⁴

²²¹ *Id.*, at 43-44, para. 80, as quoted in M. McDougal & W. Burke, *supra* note 174.

²²² *Id.*

²²³ *Id.*, at 819 & n. 264.

²²⁴ Int'l L. Comm'n commentary on article 39 of the 1956 draft, quoted in 4 M. Whiteman, *Digest of International Law* 658-59 (1965).

It would also seem fair to conclude from the above comments that the question of piracy does not turn upon whether a government has or has not been recognized by the governments of other States, provisionally or otherwise.²²⁵

One instance in which a warship could be seized as a pirate was clarified further by the Commission in Article 40 of its draft, which reads: "The acts of piracy, as defined in Article 39, committed by a government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts

²²⁵ See H. Smith, *supra* note 168, at 67-69. Of interest is the not too recent case of the *Helena*. This was a British ship, seized by an Algerian corsair while on a voyage from Saffee to Lisbon, taken to the Barbary States, and there sold to a Spanish merchant by the Dey of Algiers. The ship was then sold to a British merchant. The ship returned to the port of London, and, while it was there, its former British owner applied for a warrant of its arrest and recovery. In dismissing the case, Sir W. Scott observed that it was argued:

[T]he Algerines are to be considered in this act as pirates, and that no legal conversion of property can be derived from their piratical seizure. Certain it is that the African States were so considered many years ago, but they have long required the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states. So long ago, as the time of Charles 2^d, Molloy speaks of them in language, which though sufficiently quaint, expresses the true character in which they were considered in his time. "Pirates that have reduced themselves into a government or state, as those of Algier, Sally, Tripoli, Tunis, and the like, some do conceive ought not to obtain the rights or solemnities of war, as other towns or places: for though they acknowledge the supremacy of the Porte, yet all the power of it cannot impose on them more than their own wills voluntarily consent to Notwithstanding this, Tunis and Tripoli and their sister Algier do at this day (though nests of pirates) obtain the right of legation. So that now (though indeed pirates) yet having acquired the reputation of a government, they cannot be properly esteemed as pirates, but enemies." Molloy 33, § iv.

Sir W. Scott further noted:

That the act of capture and condemnation was not a mere private act of depredation, is evident from this circumstance, that the Dey himself appears to have been the owner of the capturing vessel; at least he intervenes to guarantee the transfer of the ship in question to the Spanish purchaser.

The *Helena*, 4 Ch. Rob. 3 (1801), quoted, in part, in W. Bishop, *International Law: Cases and Materials* 301-303 (3d ed. 1971).

In the *Pueblo* Incident of 1968 (*see* note 46, *supra*), though the United States did not recognize the government of North Korea and vigorously condemned the seizure as a violation of international law and an act of war, no United States decision-maker characterized the seizure as an act of piracy. *See* 28 Facts on File 17, 25-28, 51-52, 66-67, and 549 (1968).

committed by a private vessel.”²²⁶ The High Seas Convention adds the term “warship” to make it perfectly clear that this type of vessel was included.²²⁷ Article 8 of the convention defines “warship” to mean “a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.”²²⁸

At this juncture, it should be recalled that, although it is widely accepted that warships and government ships cannot commit acts of piracy except in very limited instances (when such ships are likened to private vessels), this does not mean that such ships cannot commit acts which are unlawful and in violation of international law.²²⁹

At the 1958 Conference on the Law of the Sea, the words “private ship” and “for private ends” were adopted and included in Article 15(1) of the High Seas Convention,²³⁰ thus emphasizing that it was primarily this criterion of private character which was to be applied in determining piratical conduct.

In practice, the idea that piracy does not include acts of violence committed for political objectives is portrayed by two fairly recent cases, the Santa Maria incident of January 1961 and the Lyla Express and the Johnny Express incidents of December 1971.

In the Santa Maria incident, a group of passengers headed by Captain Galvao seized the Portuguese liner Santa Maria on the high seas in the Caribbean through violence, resulting in the death of one of the ship’s officers and in the wounding of a crewman. Portugal immediately branded the incident as an act of piracy and appealed for help in retaking the ship from the alleged pirates. Holland, England and the United States participated in a search for the vessel. U.S. officials announced that the vessel would be pursued and boarded under the international rules governing piracy and ship-board insurrection.

²²⁶ Quoted in 4 M. Whiteman, *supra* note 224, at 660. See also note 209 *supra*.

²²⁷ Art. 16, Convention on the High Seas, *supra* note 192.

²²⁸ *Id.*, art. 8.

²²⁹ U.N. Doc. A/3520, para. 45, quoted in Fitzmaurice, *Piracy*, *supra* note 181, at 64.

²³⁰ See text at note 192, *supra*.

Subsequent information revealed, however, that the seizure had been planned and executed by the Portuguese National Independent Movement, an exile group opposing the government of Portugal. As this information became available, United States spokesmen became less certain as to whether the conduct in question was piratical.

The vessel was located after several days of searching and kept under surveillance while parties negotiated for the safe debarkation of the 560 passengers aboard the Santa Maria. The rebels eventually brought the ship to a Brazilian port, where the passengers and crew were released. The 30 rebels who seized the liner were granted asylum by Brazil, after handing over the ship to the Brazilian government. The latter returned the vessel to the Portuguese government, which returned it to its private owners.²³¹

The significance of the incident was that several interested States, except for Portugal and probably Spain, eventually recognized that the seizure by violence was not a case of piracy because of the identity of the actors and, more importantly, their political objective. It is reported that:

The United States completely dropped its earlier stated goal of seizing the Santa Maria, and its subsequent operations seem wholly inconsistent with the view that the seizure constituted piracy. It was obviously agreed on all sides that the seizure and subsequent actions of the rebels were not undertaken for their own private gain but were solely directed at achieving political effects in both Portugal and Spain.²³³

In the Lyla Express and Johnny Express incidents, two ships owned by the Bahamas Lines, a corporation organized under the laws of Florida and wholly owned by the Babun Brothers, Cuban exiles then residing in Miami, were attacked by a Cuban naval gunboat, seized, and taken to Cuba. The Lyla Express was seized on the high seas in the Caribbean. Two weeks later the Johnny Ex-

²³¹The above factual description is taken from accounts of the incident in Forman, *supra* note 193, at 143; Gehring, *supra* note 180, at 329; M. McDougal & W. Burke, *supra* note 174, at 821-22.

²³²See M. McDougal & W. Burke, *supra* note 174, at 822; Forman, *supra* note 191, at 167; Gehring, *supra* note 180.

²³³M. McDougal & W. Burke, *supra* note 174.

press was attacked while in the territorial waters of the Bahama Islands. Its captain was wounded during the attack. Both crews were eventually released to the Government of Panama, but the skipper of the Johnny Express was held for trial, reportedly having confessed to being an agent for the CIA.

Cuba declared both vessels to be pirate ships engaged in counter-revolutionary activities. A Panamanian commission subsequently sent to Cuba to investigate the seizures reported that the ships' logs corroborated the Cuban charges that both ships had participated in the landing of insurgents on Cuban territory.²³⁴ One case study of these incidents concludes:

[W]hen acts of violence and depredation are committed to attain political objectives, then they may not be characterized as piracy. This is particularly true if the acts are limited to a single target State and its ships, because there is missing any generalized threat to the international community as a whole. Since any raids by the Johnny Express and the Lyla Express were for political ends—the overthrow of the present Cuban Government—they cannot be characterized as piracy under international law.²³⁵

C. VALIDITY AND APPRAISAL.

Though the claim to characterize the seizure of the *Mayaguez* as an "act of piracy" was initially made on May 12th, the day of the ship's seizure,²³⁶ the United States seemed to deemphasize the claim soon thereafter. On May 13th, the only U.S. official to raise the piracy claim was Secretary Kissinger. However, he phrased the claim in the past tense, stating, "We have called it an act of piracy."²³⁷ In all subsequent United States pronouncements on the matter, the claim of piracy was conspicuously absent.²³⁸

²³⁴The factual account is taken from Gehring, *supra* note 180, at 317–18, 324.

²³⁵*Id.*, at 334.

²³⁶See text at notes 166 and 167 *supra*.

²³⁷See text at note 167.

²³⁸See for example, United States letters to the Secretary General and the Security Council, Appendix B, *infra*, and President Ford's letter to Congress, Appendix D, *infra*.

In response to the claim, the Cambodian communique of May 15th exclaimed that “the charge leveled by the U.S. imperialists— that we are sea pirates— is too much.”²³⁹

The significance of this deemphasis by the United States becomes apparent as the legal criteria previously developed for the contemporary law of piracy are applied to the factual situation under consideration.

Since the captors in this case were foreigners and because the incident occurred either on the high seas or in the territorial waters of a foreign State,²⁴⁰ the United States cannot treat the actors as pirates, unless they are characterized as such under international law standards.²⁴¹

Applying these standards, it seems quite clear that the firing upon and seizure of the *Mayaguez* and its crew by the Cambodian patrol boat was at least an act of detention.²⁴² The conduct would further seem sufficiently violent to meet the criterion of violence.²⁴³ However, if piratical conduct is viewed as acts done by persons not acting under the general authority, responsibility, or supervision of any State or other politically organized community,²⁴⁴ then conduct off Pulo Wai Island can hardly be considered piratical.

Though the seizure was carried out pursuant to the orders of a local commander and, apparently without the knowledge of central authorities in Phnom Penh,²⁴⁵ it seems certain that the persons involved were acting under the general authority and supervision of the State of Cambodia and its new government. Support for this observation can be found in the May 15th Cambodian communique offering to release the *Mayaguez*,²⁴⁶ in the subsequent remarks of Deputy Premier and Foreign Minister Sary further explaining the capture,²⁴⁷ and in the manner in which the captors conducted themselves during the course of the ship's detention. With respect to the

²³⁹ Appendix C, col. 3, *infra*.

²⁴⁰ See text at notes 10–29, *supra*.

²⁴¹ Text at notes 170–73, 180, *supra*.

²⁴² Text at note 192, *supra*.

²⁴³ *Id.*

²⁴⁴ Text at notes 174, 187, 198, and 199, *supra*.

²⁴⁵ See text at note 164, *supra*.

²⁴⁶ See Appendix C, *infra*.

²⁴⁷ Note 164, *supra* and text thereat.

latter, it would be extremely difficult to argue that the captors were acting independently of any state authority, on their own, and in their own capacity. The frequent ship-to-shore contacts with higher authorities to determine what disposition was to be made of the detainees during the course of the ship's detention militates against this argument.

The acts in question were, in addition, committed under conditions which did not render it impossible or unfair to hold any State or other organized political society responsible for their commission. The political authority responsible for seizing the *Mayaguez* and its crew was fully identifiable and admitted responsibility for such actions. Although the United States had not extended formal recognition to Cambodia's new government, it certainly recognized, acknowledged and placed responsibility for the seizure squarely on the State of Cambodia and its new government in its demands for the release of the *Mayaguez* and its crew, in its diplomatic efforts to secure each release, and in its official pronouncements concerning the seizure.²⁴⁸ Lack of formal recognition, standing alone, should not enable the United States to characterize acts of the Phnom Penh government as piratical.²⁴⁹

It is also significant that the seizing vessel, a naval patrol boat, can be labelled a "warship" under the provisions of Article 8 of the High Seas Convention.²⁵⁰ Accordingly, any unlawful acts committed by that vessel would not normally be assimilated to acts of piracy.²⁵¹ Nor is it a case in which acts committed by a warship can be likened to acts of piracy under Article 16 of the High Seas Convention. There is no evidence of mutiny or other rejection of the authority to which the captors were properly subject.

Finally, applying the "private ends" test of Article 15(1) of the High Seas Convention to the factual situation described in Section I, it seems certain that, although the captors may not have had sufficient justification for their actions, they do not appear to have been

²⁴⁸For example. *see* letters and statements, Appendices B and D, *infra*; White House statement. test, note 55, *supra*; note 69, *supra*; test at note 79, *supra*; note 121, *supra*

²⁴⁹*See* notes 224 and 225, *supra* and text thereat. *See also* discussion of cases in test at notes 231-35, *supra*.

²⁵⁰Text at note 228, *supra*.

²⁵¹*See generally* test at notes 212-39, *supra*

in pursuit of private personal gain, plunder, or profit. On the contrary, it is apparent that the captors were pursuing public or political objectives, such as protecting alleged coastal security interests, reaffirming and consolidating specific territorial claims, policing alleged violations of territorial waters, attaining political leverage or gain, protecting against alleged threats to the stability of the new regime, or a combination of the above. Though which of these motives were operative in this case may be difficult to determine at this time, the general nature of all these motives points to public or political goals as opposed to purely private ends or objectives.

The conclusions reached in applying the above criteria to the factual situation not only reveal the invalidity of the United States' claim to characterize the seizure of the *Mayaguez* as an act of piracy, but also provide ample justification for the claim's subsequent deemphasis by the U.S. Moreover, the impression is gained that the claim was both prematurely stated and made without first obtaining a legal opinion.²⁵²

An additional criterion pertaining to the locus of the alleged piratical conduct remains to be applied to the factual situation. As explained above,²⁵³ piratical acts include those committed on the high seas or beyond the jurisdiction of any State. It does not include acts committed within territorial waters, territorial airspace, or on land territory of a particular State. What must therefore be determined in the present case is whether the seizure occurred on the high seas or within territorial waters. However, since this question also forms the basis of a separate claim put forward by the United States, it will be dealt with in the analysis of this other claim to which we now direct our attention.

V. CLAIM TO CHARACTERIZE LOCUS OF SEIZURE AS THE HIGH SEAS

A. THE CLAIM

Unlike the piracy claim, the claim that the *Mayaguez* was seized on the high seas was stressed by United States decision-makers in

²⁵² Whether or not it was in the minds of United States decision-makers, the piracy claim did provide an avenue for Cambodia to disclaim diplomatically any responsibility for the seizure and thus avoid any future embarrassment, while taking prompt action to have the ship and its crew released.

²⁵³ Text, § III(2), *supra*.

their demands and other pronouncements throughout the crisis. On May 12th, the White House announced that "a Cambodian naval vessel (had) seized an American ship on the high seas . . ." ²⁵⁴ The same day, Presidential Press Secretary Ron Nesson informed reporters that "no matter what Cambodia claims as its territorial waters, we consider the ship to have been in international waters." ²⁵⁵ The next day, Secretary of State Kissinger reiterated the claim, stating, ". . . therefore we are dealing with it as the seizure of an American merchant ship on peaceful trade in international waters." This position was reaffirmed on May 14th in letters to the United Nations Secretary General and the Security Council President, ²⁵⁷ and again on May 15th in President Ford's report to the Congress. ²⁵⁸ In the letter to the United Nations Security Council, the United States was very specific in claiming that "the vessel was on the high seas, in international shipping lanes commonly used by ships calling at various ports of Southeast Asia." ²⁵⁹

On the other hand, the Khmer Rouge government counterclaimed that the Mayaguez was within their territorial waters in the vicinity of Poulo Wai Island. ²⁶⁰ While Cambodia claims a territorial sea twelve miles wide, the United States, officially at least, does not recognize claims beyond a 3-mile limit. ²⁶¹

²⁵⁴ See text at note 55, *supra*. See also Post, May 13, 1975, at A-1, col. 6

²⁵⁵ *Id.*, at A-13, col. 3.

²⁵⁶ 72 Dep't State Bull. 735 (1975).

²⁵⁷ Appendix B, *infra*.

²⁵⁸ Appendix D, *infra*. As a sidelight, the Soviet Union's newspaper "Pravda" is reported also to have emphasized that the seizure was well within international waters. U.S. News & World Report, May 26, 1975, at 37. This is a surprising reaction coming from a United States adversary, although Moscow has not been on the best of terms with Cambodia in recent years. Also considering that the seizure took place approximately six miles off Poulo Wai Island, Pravda's reaction is somewhat intriguing since the Soviet Union has been a proponent of a 12-mile territorial sea for a long period of time. See M. McDougal & W. Burke, *supra* note 174, at 536.

²⁵⁹ *Supra* note 257.

²⁶⁰ See Cambodian Communique of May 15 at Appendix C, *infra*; Post, May 16, 1975, at A-1, col. 6, and A-12, col. 1. See also statements of Cambodian Deputy Premier and Foreign Minister Sary further explaining the seizure some months after. Post, Sept. 8, 1975, at A-1 and A-16.

²⁶¹ Post, May 12, 1975, at A-1, cols. 3-6.

B. TRENDS IN DECISION

1. Background.

The extent of national control in offshore waters involves, inter alia, the delimitation of four zones: (1) national or international waters; (2) the territorial sea; (3) the contiguous zone; and (4) the high seas.²⁶²

²⁶²For excellent discussions of the general regimes of these zones, see H. Smith, *supra* note 168; M. McDougal & W. Burke, *supra* note 174; C. Colombos, *supra* note 169. See also S. Swartrauber, *The Three-Mile Limit of the Territorial Seas* 3-6 (1972); D. Bowett, *The Law of the Sea* (1967); Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 Int'l & Comp. L.Q. 75 (1959) [hereinafter cited as Fitzmaurice, *Geneva Conference*].

National or internal waters over which national sovereignty is absolute consist generally of a State's harbors, posts and roadsteads, and of its internal gulfs, bays, straits, lakes and rivers. C. Colombos, *supra* note 169, §§ A80-82; S. Swartrauber, *supra*, at 4-6.

The territorial sea has been defined as that belt of offshore waters adjacent to the coasts of a State beyond its land territory and its internal or national waters, over which the sovereignty of the State extends, subject to the limited right of innocent passage. See S. Swartrauber, *supra* at 3; C. Colombos, *supra*, note 169, §§ 144-45. The right of innocent passage is examined *infra*, in the second part of this article.

The contiguous zone is a belt of water adjacent to and extending seaward beyond the territorial sea, in which the coastal State exercises special jurisdiction to prevent and punish violations of certain of its laws and regulations, such as customs, immigration, navigation, and sanitation. Although this zone is considered part of the high seas, it is measured from the baseline on the coast in the same manner as is the territorial sea. See article 24 of the Convention on the Territorial Sea and the Contiguous Zone, Sept. 15, 1958 (1964) 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as the Territorial Sea Convention]; Fitzmaurice, *Geneva Conference*, *supra* at 108-18. The United States and Cambodia are parties to this Convention.

The 1958 Geneva Conference set the maximum limit of the contiguous zone at 12 miles measured from the same baseline used to delimit the territorial sea. Thus, a contiguous zone may overlap a territorial sea, depending upon the breadth claimed by a state for both zones. For example, in a state claiming a 3-mile limit to its territorial sea and a contiguous zone of 12 miles, the contiguous zone would overlap the territorial sea by 3 miles and extend seaward an additional 9 miles. For a discussion of the concept of the contiguous zone, see Shigen Oda, *The Concept of the Contiguous Zone*, 11 Int'l. & Comp. L.Q. 131 (1962).

Article 1 of the Convention on the High Seas, *supra* note 192, states: "The term 'high seas' means all parts of the sea that are not included in the internal waters of a state." Article 2 further provides:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is

In this section, attention will be directed to the second and fourth zones mentioned above, and in particular to the juridical status of the width of the territorial sea. Ultimately, freedom of navigation on the high seas may depend on this boundary between territorial waters and the high seas.

Today no unanimity of position exists concerning the extent of a coastal State's exclusive jurisdiction over off-shore waters. The problem lies in the failure of the law to provide a definitive answer regarding the correct breadth of the territorial sea. More specifically, there exists no international convention governing disputes over the width of the territorial waters.²⁶³ The result of this controversy is clearly illustrated by the *Mayaguez* incident.

Like the piracy claim discussed above, no attempt will be made to recount the whole past experience relating to the extent of the territorial waters. Instead this inquiry will examine briefly trends in State practice, recent recommendations and studies, and other international evidences, with a view toward discovering a general consensus on the extent of the territorial sea.

2. *General policy considerations.*

The general policy problem in determining the breadth of the territorial sea is that of achieving, through shared competence, an economic balance in the effective protection of the inclusive interests of all States and the exclusive interests of particular States.²⁶⁴ It is not only desirable but even necessary to strike a workable balance

exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and noncoastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

The proposition that no State may subject any part of the high seas to its sovereignty was proclaimed long ago in antiquity. *See* U.N. Doc. A/CN.4/17 (1950).

²⁶³P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 115 (1927).

²⁶⁴M. McDougal & W. Burke, *supra* note 174, at 51-56, 488.

between exclusive State interests in the use of the seas.²⁶⁵ In seeking this accommodation, the test of reasonableness should be applied in the context of particular conflicting claims.²⁶⁶ The determination of reasonableness within the international community requires description of past expectations and of trends in prediction of and decisions about probable future conduct.

3. *Origins and early developments.*

Whatever the present limit of the territorial seas, it is of comparatively recent origin. It was not until the 17th or 18th centuries that national pretensions to vast expanses of the oceans met with objection and ultimate abandonment. For two or three hundred years prior, nations were accustomed to the idea that a coastal State might properly claim a special interest in the waters adjacent to its shores.²⁶⁷ Beginning with the Roman law concept that the oceans were free to all peoples, nations later began to encroach upon that freedom.²⁶⁸ Off-shore claims of varying intensity and breadth developed, to the extent that no part of the ocean seemed too vast to evade exclusive national control thereof.²⁶⁹

According to Jessup, it was this state of affairs that prompted Grotius to come forth with his concept of "mare liberum," which was later answered by Sheldon's "mare clausum." Grotius, whose influence was great, eventually won this so-called "battle of the books."²⁷⁰ The general development was summed up as follows:

Those vague and unfounded claims (of the 18th, 17th and earlier centuries) disappeared entirely, and there was nothing of them left The sea became, in general, as free internationally as it was under Roman law. But the new principle of freedom, when it approached the shore, met with another principle, the principle of protection, not a residuum of the old claim, but a new independent basis and reason for modification, near the shore, of the principle of freedom. The sovereign of the land washed by

²⁶⁵ See generally C. Colombos, *supra* note 169, at 332-353.

²⁶⁶ M. McDougal & W. Burke, *supra* note 174 at 57, 73.

²⁶⁷ P. Jessup, *supra* note 263, at 3.

²⁶⁸ *Id.*, at 3-4.

²⁶⁹ *Id.*, at 4.

²⁷⁰ *Id.*

the sea asserted a new right to protect his subjects and citizens against attack, against invasion, against interference and injury, to protect them against attack threatening their peace, to protect their revenues, to protect their health, to protect their industries. This is the basis and the sole basis on which is established the territorial zone that is recognized in the international law of today. . . .²⁷¹

At the turn of the 18th century, the Dutch jurist Bynkershoek translated this idea into a maxim, from which he formulated the “cannon-shot” rule, declaring that the territorial domain of the State extended as far as projectiles could be thrown from cannon on the shore.²⁷² This rule was practical for purposes of maritime neutrality in time of war and did not set forth a doctrine of a uniform territorial sea along the entire coastline of a State. Its application further did not result in a continuous maritime belt of uniform width, but rather an undulating line dependent upon the location and range of cannon positioned on the shore.²⁷³

While Holland and several of the Mediterranean countries adopted the “cannon-shot” rule, the Scandinavian States of Denmark, Norway, and Sweden developed the practice of a 4-mile zone (marine league) of territorial jurisdiction within a measured distance from their coasts.²⁷⁴ This practice can be traced as far back as the 18th century and is perhaps the oldest assertion of a definite territorial belt.²⁷⁵ Also, this development took place without any reference whatever to the “cannon-shot” rule. Instead, its evolution was based primarily on economic considerations such as coastal fishing and trade.²⁷⁶ Today, the Scandinavian claims have acquired a prescriptive character and are accepted in practice.²⁷⁷

²⁷¹Argument of Elihu Root in XI Proceedings, North Atlantic Fisheries Arbitration 2006, quoted in P. Jessup, *supra* note 263, at 5.

²⁷²For an excellent discussion of the origins and development of the cannon-shot rule, see S. Swartztrauber, *supra* note 262, at c. 2.

²⁷³Walker, *Territorial Waters: The Cannon Shot Rule*, 22 Brit. Y.B. Int'l L. 210, 213 (1945).

²⁷⁴Kent, *The Historical Origins of the Three-Mile Limit*, 48 Am. J. Int'l L. 537 (1954).

²⁷⁵H. Smith, *supra* note 168, at 25.

²⁷⁶Walker, *supra* note 273, at 228. See also S. Swartztrauber, *supra* note 262, at ch. 4.

²⁷⁷*Id.*; P. Jessup, *supra* note 263, at 35, 63, and, generally, 31-41.

At the close of the 18th century, the scope of the "cannon-shot" rule closely resembled the limits of the uniform maritime belt developed by the Scandinavian countries, with each eventually being treated as equivalent.²⁷⁸ Apparently it was the Italian jurist Galiani who first put forward the statement that the range of guns was equivalent to three miles.²⁷⁹ But it was in America that Galiani's assertion was first formally stated by a nation in a state paper.

4. *Development of the 3-mile rule.*

The 3-mile limit was explicitly adopted in the first American neutrality proclamation in 1793, nearly a century after the adoption and acceptance of the "cannon-shot" rule.²⁸⁰ No further executive declarations during the 19th century were contrary to this assertion. When the question arose again, the 3-mile limit appeared to be established as the American position on the extent of territorial waters.²⁸¹ This alternative to the "cannon-shot" rule was then an approximate equivalent, and once introduced, it received constantly increasing recognition into the early 20th century as a convenient compromise between conflicting interests.²⁸²

The U.S. remained the champion of the 3-mile limit until at least 1960, when in a reversal of its traditional insistence on a 3-mile territorial sea,²⁸³ it co-sponsored a proposal for a 6-mile fishing zone beyond a 6-mile belt of territorial sea.²⁸⁴

Of the States which supported the 3-mile limit during the early 20th century, the most important were the United Kingdom, Australia, South Africa, India, Germany, Japan, Argentina, Chile, Equador, and the United States.²⁸⁵ The Netherlands, Panama, Cuba, and apparently Brazil all abided by the 3-mile limit but were

²⁷⁸ Walker, *supra* note 273, at 230.

²⁷⁹ P. Jessup, *supra* note 263, at 6.

²⁸⁰ I. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 455 (2d ed. 1945). In making the announcement, then Secretary of State Thomas Jefferson further acknowledged the disparity of the then existing claims to territorial waters. *Id.*, at 455, n.1.

²⁸¹ P. Jessup, *supra* note 263, at 51.

²⁸² *Id.*, at 6-7. See also generally, S. Swartztrauber, *supra* note 262.

²⁸³ See for instance, the official statement of the United States position in 32 Dep't State Bull. 699-700 (1955).

²⁸⁴ U.N. Doc. A/Conf. 19/C.1/L.3 (1960).

²⁸⁵ H. Smith, *supra* note 168, at 22; P. Jessup, *supra* note 263, at 62-63.

not particularly active in its defense.²⁸⁶ A large number of States, including France, qualified their general acceptance of the 3-mile rule by claiming certain extensions for varying purposes.²⁸⁷ Among those States claiming wider minimum limits were the following: the Scandinavian countries (4 miles), Iceland (4), Austria (4), Uruguay (5), Italy (6), Spain (6), Portugal (6), Turkey (6), Yugoslavia (6), Greece (6), Egypt (6), Mexico (9), and Russia (12).

From this brief survey, it can be observed that the 3-mile limit was supported primarily by the principle maritime powers of the early 20th century, but that a significant number of States favored a wider zone. Further complicating matters was the fact that a very large number of States maintained that the general limit, whatever it may be, could be extended for certain special purposes.

Nevertheless, another writer has concluded that the years of greatest general acceptance of the 3-mile limit were those from 1876 to 1926. During this period, "the rule grew steadily and surely, overcoming virtually all opposition and competition," and, "if domestic legislation, international instruments, court decisions, and the writings of publicists are a fair measure, then by 1926, the three-mile limit was in every sense a rule of international law."²⁸⁸

However, it should be noted also that during the period in question, a great weight of authoritative opinion developed in a different direction. For example, Westlake concluded that the agreement on the 3-mile limit as a minimum was universal, but as a maximum, "the agreement is not universal, and it may be doubted whether it is so nearly such as to make it a rule of international law, while the reason for it is quite obsolete."²⁸⁹ In an address, de Martens stated: "The books talk about the three-mile limit as if it were an incontestable principle. It is nothing of the sort."²⁹⁰ Similar views were expressed by several other distinguished scholars, including Hall, Fulton and Bishop.²⁹¹

²⁸⁶P. Jessup, *supra* note 263, at 23.

²⁸⁷H. Smith, *supra* note 168, at 23.

²⁸⁸S. Saaztrauber, *supra* note 262, at 130. For Saaztrauber's supportive material, see *id.*, ch. 8. Jessup comes to a similar conclusion. See P. Jessup, *supra* note 263, at 64.

²⁸⁹1 Westlake, *International Law* 184 (1907).

²⁹⁰[1894] *Annuaire de l'Institut de Droit International* 288. quoted in P. Jessup, *supra* note 263, at 65.

²⁹¹See P. Jessup, *supra* note 263, at 64-65, and accompanying footnotes.

5. *The interwar period.*

During the interwar period, the controversy over the extent of territorial waters intensified. This period, which witnessed the concurrent growth of nationalism on one hand and internationalism on the other, also reportedly brought forth the decline of the 3-mile rule.²⁹² In his work on the origins, development and juridical status of the 3-mile limit, Swaztrauber declares:

This concurrent growth of nationalism and internationalism had its impact upon the three-mile limit: young states wished to assert their independence from the old system, and in some instances, from its rules, and the old states—the great powers—agreed to invite them into their councils and hear them out. Previously, many rules of international law, such as the three-mile limit, had essentially been dictated through the consensus of the great powers. But to illustrate how rapidly this “international democracy” grew following World War I, at the Hague Conference of 1930, a new nonmaritime, landlocked state—Czechoslovakia—was given an equal voice in the attempt to codify the international law of the territorial sea. As a result, the Hague Conference opened up a previously fairly well-settled issue of the extent of territorial seas like Pandora’s box, and served as the first of five major developments that contributed directly and substantially to the demise of the three-mile rule.²⁹³

Other writers profess similar views and it seems sufficient to concede that the breakdown of the 3-mile limit became evident following the failure of the 1930 Hague codification effort on the extent of the territorial seas.²⁹⁴

At the 1930 Conference, the delegates dealt only with the question concerning the proper breadth of the territorial seas. The ques-

²⁹²S. Swaztrauber, *supra* note 262. at c. 9.

²⁹³*Id.*, at 132.

²⁹⁴For example, see Gormley, *The Unilateral Extension of Territorial Waters: The Failure of the United Nations to Protect Freedom of the Seas*. 43 U. Det. L.J. 695, 700–06 (1966); Nanda, *Some Legal Questions On The Peaceful Uses of Ocean Space*, 9 Va. J. Int’l L. 343, 351 (1969); Waldock, *International Law and the New Maritime Claims*, 1 Int’l Rel. 163 (1956).

tion was debated so vigorously and with so little concurrence of opinion that no resolution proposing an appropriate width was ever put to a vote. Suggestions for the breadth ranged from three miles to several hundred miles, but none was adopted. And although more States continued to conform to the 3-mile limit than any other, they did not constitute a majority of the international community.²⁹⁵

Even though some experts continued to advocate that the 3-mile standard remained unchanged on the theory that no new criteria had been agreed upon,²⁹⁶ it is certain that the failure of the 1930 Hague Conference to determine the limits of the territorial seas resulted in the weakening of the 3-mile rule.

Despite the failure of the 1930 Conference, it is claimed:

There was still a desire on the part of the League of Nations to resolve the problem. However, with the rise of Hitler in Europe, the Japanese invasion of Manchuria and the Italian attack on Ethiopia, the efforts by leading statesmen of that period were channeled away from the "codification of international law" toward the more pressing need to preserve peace. In the tense atmosphere following Hitler's march into Austria, the Munich Conference, and Russia's attack on Finland in 1939, little support could be found for holding an international conference to fix the limits of [the territorial seas]. Thus, as the

²⁹⁵ See Reaves, *The Codification of the Law of Territorial Waters*, 24 Am. J. Int'l L. 486 (1930). Twenty of the 38 coastal States attending the Conference would have asserted either the 3-mile limit alone, or this limit with an extended contiguous zone. *Id.* at 492.

²⁹⁶ For example, see Harvard Law School Research, *Draft Convention on the Law of Territorial Waters*, 23 Am. J. Int'l L. Spec. Supp. 243 (1929). Prepared prior to the convening of the conference, the Harvard draft served as a basis for further study. Following the 1930 conference, the draft became recognized as the primary defense of the 3-mile limit, and the restatement of United States law on the subject. Article 2 provides: "The marginal sea of a state is that part of the sea within three miles. . . of its shore measured outward from the mean low water mark." *Id.* at 251. Comment 2, article 2, notes:

The practice of states reveals no general acquiescence in the inclusion of a belt of more than three miles in width.

Any examination of the practice of states reveals frequent instances of acts of authority performed by the littoral state outside the three-mile limit. It would seem to be impossible to adopt the three-mile limit for the

threat of hostilities became a reality, the codification of sea law could not receive very much attention.²⁹⁷

6. *Post-war developments.*

Since the establishment of the United Nations in 1945, the task of codifying the law of territorial waters has been delegated to the United Nations International Law Commission.²⁹⁸ The Commission's work involved precise formulations and systemization of the international rules of the sea, particularly the regime of territorial waters. Its final report on the law of the sea was completed in 1956,²⁹⁹ and in article 3 of its draft the following provisions were set forth:

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.

2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.

3. The Commission, without making any decision as to the breadth of the territorial sea up to that limit, notes on the one hand that many states have fixed a breadth greater than three miles and, on the other hand, that many states do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.³⁰⁰

The Commission noted that the power to fix the limit of the territorial sea at three miles was not disputed, and while it did not suggest

extent of the marginal sea and to deny the possibility of the exercise of any authority on the adjacent high seas. This idea would not be in accord with existing international usage and it would not represent a desirable modification of the present law.

Id.

²⁹⁷Gormley, *supra* note 294 at 706. Bracketed words in quote are author's.

²⁹⁸G.A. Res. 174, U.N. Doc. Ai504 (1947).

²⁹⁹Int'l L. Comm'n, Report, 2 U.N. GAOR, Supp. No. 9 U.N. Doc. Ai3159 (1956).

³⁰⁰*Id.* at 3.

any particular extension of that width, it did conclude that any claim of more than twelve miles was not permissible. The Commission did not, however, explicitly approve a 12-mile limit, and since many States claimed a breadth of between three and twelve miles, it suggested that an international conference should settle the question.³⁰¹

At least one writer is of the opinion that the Commission's "re-statement" of the law of the sea "is the most important single document in this field . . .," and that the failure of later Geneva Conferences renders it "the primary authority on the subject."³⁰² The writer further submits that this codification effort "will increase in stature with the passage of time and will be relied on to an even greater extent as 'the correct international legal standard,' because of the inability of later conferences to carry the work forward."³⁰³

The Commission's work product constituted the point of departure for the 1958 Law of the Sea Conference, convened at Geneva, and served as the basis for further negotiations among the delegates. The Conference, however, failed to reach agreement on the width of the territorial sea. It is significant, though, that the rule fixing the breadth of the territorial sea at three miles was not supported by a majority of the participating States, and further, that a diversity of opinion was evident:

Several proposals were made. . . . Some members were of the opinion that it was for each State. . . to fix the breadth of its territorial sea. They considered that in all cases where the delimitation of the territorial sea was justified by the real needs of the coastal State, the breadth of the territorial sea was in conformity with international law. . . . Another opinion was that the Commission should recognize that international practice was not uniform as regards limitation of the territorial sea to

³⁰¹ See commentary to article III, *id.* at 12.

³⁰² Gormley, *supra* note 294, at 1706-07.

³⁰³ *Id.* at 707. The author further believes the document to be presently of much greater importance than the old Harvard Research or even the new Restatement (Second). Foreign Relations Law of the United States (1965), because it has been prepared by an international public agency rather than a private national group. *Id.*, n. 35.

³⁰⁴ G.A. Res. 1105, 4 U.N. GAOR Supp. 16.17, at 52, U.N. Doc A13572 (1958).

three miles, but would not authorize an extension of the territorial sea beyond twelve miles. On the other hand every State would have a right to extend its jurisdiction up to twelve miles. A third opinion was that the Commission should recognize that every coastal State was entitled to a territorial sea of a breadth of at least three, but not exceeding twelve miles. . . . A fourth opinion was . . . that the breadth of the territorial sea could be determined by the coastal State in accordance with its economic and strategic needs with the limits of three and twelve miles, subject to recognition by States maintaining a narrower belt. According to the fifth opinion . . . the breadth of the territorial sea would be three miles, but a greater breadth should be recognized if based on customary law.³⁰⁵

The United States proposed the 3-mile limit, which it argued was simply an attempt to have codified the traditional United States practice and the recognized standard from classical international law.³⁰⁶ The U.S. position was dictated primarily by national interests, particularly during the cold war, requiring maximum freedom of movement for both warships and merchant vessels over the ocean's surface. The United States delegation was strongly supported by the delegates of Great Britain, Japan, The Netherlands, and France.³⁰⁷ It is alleged that "the primary reason for the defeat of the U.S. position is to be found in the fact that the spirit of the cold war dominated. Aside from Soviet agitation, the Latin American and African nations refused to permit any encroachment on the twelve-mile option contained in the ILC Draft Articles."³⁰⁸

After it had become evident that the 3-mile limit would never be sanctioned, several alternatives were suggested in order to head off the advocates of the 12-mile limit, who were continuing to gain considerable strength.³⁰⁹ As the Conference progressed, however, it

³⁰⁵ Int'l L. Comm'n, Report, 2 U.N. GAOR, Supp. No. 9, at 13, U.N. Doc. Ai3159 (1956).

³⁰⁶ See address by Arthur H. Dean, reprint at 39 Dep't State Bull. 574 (1958).

³⁰⁷ See Dean, *Freedom of the Seas*, 37 Foreign Affairs 83 (1956). *Accord*: Yalem, *The International Legal Status of the Territorial Sea*, 5 Vill. L. Rev. 206, 208-14 (1959); Lawrence, *Military-Legal Considerations in the Extension of Territorial Seas*, 29 Mil. L. Rev. 47 (1965).

³⁰⁸ Gormley, *supra* note 294, at 712.

³⁰⁹ *Id.*, at 713-15.

became apparent that neither the three- nor the twelve-mile limit could secure sufficient votes (two-thirds of the entire conference) for the adoption of their respective positions. The draft articles of the ILC also could not muster the necessary two-thirds majority vote. Several compromise proposals were then considered.³¹⁰ For example, Great Britain offered a plan by which States would have been granted the right to a 6-mile territorial sea, plus an additional 6-mile contiguous zone for exclusive fishing. This proposal received strong support from the U.S. but failed to obtain the necessary vote for adoption. Other schemes also met the same fate.³¹¹

In the end, the Conference contented itself with the conclusion set forth in the Convention on the Territorial Sea and the Contiguous Zone:³¹² "The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the sea."³¹³

The Conference's failure to fix a specific limit to territorial waters caused the major seafaring nations to take the position that no modification of prior international law resulted from the Conference. Arthur H. Dean, chairman of the United States delegation, declared:

Our offer to agree on a six-mile breadth of the territorial sea, provided agreement could be reached on such a breadth under certain conditions, was simply an offer and nothing more. Its non-acceptance leaves the pre-existing situation intact.

We have made it clear from the beginning that in our view the three-mile rule is and will continue to be established international law to which we adhere. It is the only breadth of the territorial sea in which there has ever been anything like common agreement. Unilateral acts of States claiming greater territorial seas are not only not sanctioned by any principle of international law, but are

³¹⁰ P. Jessup, *The United Nations Conference on the Law of the Sea*, 59 Colum. L. Rev. 234, 264 (1959) [hereinafter cited as Jessup, *1958 Conference*].

³¹¹ See Gormley, *supra*, note 294, at 715-16, and accompanying footnotes.

³¹² Territorial Sea Convention, *supra* note 262.

³¹³ *Id.*, at 1609, 516 U.N.T.S. at 210.

indeed in conflict with the principle of freedom of the seas.³¹⁴

To date, the United States has refused, officially at least, to retreat from this position,³¹⁵ which is based on the principle that only a ratified international convention can “repeal” customary international law.³¹⁶ Realistically, though, it must be admitted that uncertainty resulted from the 1958 Law of the Sea Conference. Certainly a substantial majority of States favored a distance greater than three miles. Arguably, this majority of the international community has by its actions rejected the 3-mile limit, in spite of the lack of agreement on a specific breadth of the territorial sea. Following the Conference, Jessup concluded:

The disagreement over the width of the territorial sea was not born at Geneva or created by the debate there; it is of long standing. The Geneva Conference may have hardened the lines of division, however, because the vehement advocacy of a position in an international gathering tends to make it difficult for most governments to reverse themselves. On the other hand, the debates may well have weakened the extreme position and strengthened an intermediate position. Both the standard three-mile limit and the extravagant Chile-Ecuador-Peru 200 mile claim have emerged in a somewhat battered state. Whether or not the International Court of Justice would today uphold the three mile limit as the existing rule of international law (which the present writer believes it should but thinks it would not), it is perfectly clear as a matter of international realities that this limit will not prevail on all shores of the oceans. The United States, Japan, and others may continue to maintain it for

³¹⁴ Address by Arthur H. Dean, cited in Yingling, *Geneva Conference on the Law of the Sea*, 2 Bull. A.B.A. Sec. Int'l & Comp. L. 10, 13-14 (1958).

³¹⁵ See statement by John N. Moore, Chairman of the National Security Council Interagency Task Force on the Law of the Sea and Deputy Special Representative for the 1974 Law of the Sea Conference, in U.S. Dep't State, *Law of the Sea Conference: Third United Nations Conference (1974)*, reprinted from 70 Dep't State Bull. 397 (1974) [hereinafter cited as Third U.N. conference].

³¹⁶ Yalem, *The International Legal Status of the Territorial Seas*. 5 Vill. L. Rev. 206 (1959).

themselves — from which they gain no special advantage — but they will not be in a position to compel other States to follow suit.³¹⁷

Other observers, taking a similar view, concede that the position of the U.S. as stated above by Arthur Dean is unrealistic and can only lead to serious international disputes.³¹⁸

It has also been observed that, while the 1958 Conference failed to reach agreement on the limits of the territorial sea, it did adopt a proposal which perhaps could be read to measure the width of territorial waters restrictively rather than defining it in affirmative terms. That is to say:

Article 24(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone provides a coastal state limited jurisdiction over the high seas contiguous to its territorial sea by granting the control necessary to:

“(a) prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; (b) punish infringements of the above regulations committed within its territory or territorial sea.” This zone “may not extend beyond twelve miles from the baseline from which the breadth of the sea is measured.”

Although Article 24 does not guarantee coastal states the same specified rights in the contiguous zones as they enjoy in their territorial waters,⁴² it does impliedly limit the coastal states’ right to exercise those essential rights beyond the twelve mile limit. The convention thus precludes a coastal state’s claiming territorial waters beyond twelve miles.³¹⁹

In a renewed effort to reach an agreement on the breadth of the territorial sea, the United Nations summoned a second conference in 1960.³²⁰ This conference also failed to produce an agreed solution

³¹⁷Jessup, 1958 *Conference*, *supra* note 310, at 264.

³¹⁸Gormley, *supra* note 294, at 717; Nanda, *supra* note 294, at 352.

³¹⁹Nanda, *supra* note 294, at 351-52.

³²⁰G.A. Res. 1307. 5 U.N. GAOR Supp. No. 18, at 54 U.N. Doc. Ai4090 (1959).

to the territorial sea question. The only proposal on the specific limits on width of territorial waters that came close to adoption was a U.S.-Canadian proposal for a 6-mile fishing zone beyond a 6-mile territorial sea.³²¹ The conference closed with no plans for a third attempt to reach an agreeable solution, and thus for the third time since 1930 the international community failed to delineate the extent of the marginal sea. Reportedly, "the cumulative debilitating effect of the two conferences on the three-mile limit is considered. . . to [be another major development] leading to the demise of the three-mile rule."³²²

If the continuity of practice and its extent as to the number of States that conform to it is indicative of international custom,³²³ then the evidence gleaned from recent practice of the 3-mile rule points out that this continuity has not remained unbroken and that there is a significant trend away from the 3-mile limit. In fact, the specific territorial claims of members of the international community reveal a pronounced trend toward 12-mile territorial seas. Table 1, below, illustrates this trend.³²⁴

Moreover, the frequency of extensions of national sovereignty up to twelve miles continued to increase during the 1960's.³²⁵ In his thesis on the law of the sea, Bouett concludes that in light of state practice "it is scarcely likely that any international tribunal will hold that a (12-mile) claim is illegal per se in international law."³²⁶

It thus seems apparent that to define the 3-mile limit as an existing rule of international law is more difficult at this point in history.

³²¹ See U.N. Doc. A/Conf. 19/C.1/L. 10 (1960). The proposal fell short of a two-thirds majority of States by just one vote. See U.N. Doc. A/Conf. 19/SR. 13, at 8 (1960).

³²² S. Swarztrauber, *supra* note 262, at 217-18. Bracketed words are author's.

³²³ For an analysis of international customs in general, see Note, *The Three-Mile Limit: Its Juridical Status*, 6 Val. U.L. Rev. 172 (1971) [hereinafter cited as *The Three-Mile Limit: Juridical Status*].

³²⁴ The source of this table is U.N. Doc. A/Conf. 1918, compiled by the 1960 Geneva Conference on the Law of the Sea. It was reprinted also as an annex to U.N. Doc. AIAC. 135/11, June 1968, prepared by the Secretariat General for the second session of the ad hoc committee to study the peaceful uses of the sea bed and the ocean floor beyond the limits of national jurisdiction.

³²⁵ For examples, see Gormley, *supra* note 294, at n.82.

³²⁶ D. Bowett, *The Law of the Territorial Sea* 13 (1967). Bracketed words in quote are author's.

TABLE 1

Claims by Coastal States on Territorial Waters

Breadth Claims	Number of States	Percentage
3-mile limit	26	25%
4-mile limit	3	
5-mile limit	1	
6-mile limit	16	15.5%
9-mile limit	1	
10-mile limit	2	
12-mile limit	34	33%
More than 12-mile limit	9	
Unspecified limits or no information	11	
TOTAL	103	

Admittedly, no unilateral extension of the width of territorial waters by any State is valid under international law unless recognized by other States. Such recognition must be by the express or tacit consent of an overwhelming majority of States.³²⁷ It therefore seems safe to conclude that the 3-mile rule as a maximum was not universally recognized by the 1960's and thus could not be invoked by a State as a customary rule of international law. At a minimum, it raised no controversy.

7. *Recent changes in United States policy*

As previously stated,³²⁸ the United States has always reserved its position on three miles being the maximum extent of legally sanctioned territorial waters. However, it has been observed that the American Government, for the first time, acquiesced in a 12-mile territorial sea claim during the Pueblo incident of 1968. It is noted that when that issue was joined in the early phases of the negotiations between the U.S. and North Korea, the question was limited to one of fact, with sides disagreeing on whether there was an intrusion into the territorial sea claimed by North Korea. Later statements of governmental officials explaining the United States position regarding the incident also focused on this limited question, thus impliedly acknowledging North Korea's 12-mile claim.³²⁹

As further evidence of a change in the U.S. position on the extent of offshore waters, it may be recalled that, during the 1958 Geneva Conference on the Law of the Sea, the United States supported a

³²⁷ With respect to state claims to discretionary authority to fix the width of the territorial sea, the International Court of Justice in the Anglo-Norwegian Fisheries case declared:

The delimitation of sea areas has always been an international law aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

Fisheries Case Judgment, [1951] I.C.J. 116. at 132.

³²⁸ See text at notes 314-15, *supra*.

³²⁹ See Rubin, *Some Legal Implications of the Pueblo Incident*, 18 Int'l & Comp. L.Q. 961, 966 (1969). The Pueblo incident involved the capture by North Korea of the U.S.S. Pueblo, an American navy vessel allegedly engaged in electronic "eavesdropping" off the coast of North Korea, on January 23, 1968. The crew was released on December 22, 1968, eleven months after. 28 Facts on File 17 (1968).

British proposal calling for a 6-mile territorial sea and an additional 6-mile contiguous zone, and co-sponsored a similar proposal during the 1960 conference.³³⁰ It should also be noted that, in 1966, the United States extended its fishing zone to 12 miles.³³¹ Furthermore, the stipulation of a 12-mile coastal zone in the seabed treaty signed by the United States in 1971³³² further reflects "an awareness of the trend toward extended territorial seas, if not a tacit recognition of the twelve-mile outer limit by the United States as a signatory power."³³³

By the time the Third Geneva Conference convened in June of 1974, the United States was willing to accept a 12-mile territorial sea, provided unimpeded navigation through and over international straits was guaranteed.³³⁴ This attitude was maintained at the Conference's second session in 1975 and continues to be the position of the United States.³³⁵ Consensus on the 12-mile rule may be inevitable in the long run. There were hopes that general agreement on this point could be reached at the next session of the Conference, scheduled for March 1976, provided agreement could be reached on international straits.³³⁶

³³⁰ See text at notes 311 and 321, *supra*

³³¹ Act to Establish a Contiguous Fishery Zone Beyond the Territorial Sea of the United States, Pub. L. No. 89-658, 80 Stat. 908 (1966). This was formerly codified at 16 U.S.C. §§ 1091-94 (1970).

On Jan. 28, 1976, the United States Senate voted to broaden the United States fishing jurisdiction to a distance of 200 miles beginning in 1977. The President signed the bill. *Times*, Jan. 29, 1976, at 1. This is presently codified at 16 U.S.C. § 1811 (1976).

³³² 8 Int'l Legal Materials 667-68 (1969).

³³³ See *Three-Mile Limit: Juridical Status*, *supra* note 323, at 182-83.

³³⁴ See Third U.N. Conference, *supra* note 315, at 4-5. In his March 14th statement, Mr. Moore said:

Because of the importance of straits as avenues for international navigation, the United States has coupled its willingness to agree to a 12-mile territorial sea with recognition of a treaty right of unimpeded transit through and over straits used for international navigation. Without clear recognition of such right of unimpeded transit, it might be possible to assert that only the right of innocent passage would apply even in such strategically important straits as Gibraltar.

Id., at 4.

³³⁵ See speech delivered by Secretary Kissinger on Aug. 11, 1975, before the A.B.A. Annual Convention in The Secretary of State, Aug. 11, 1975, at 2-6. See also *Post*, Aug. 12, 1975, at A-1 and A-6; U.S. Dep't. of State, Special Report: U.N. Law of the Sea Conference 1975, No. 1 (rev.) at 1-4.

³³⁶ *Post*, Aug. 12, 1975, at A-6, col. 3.

8. *Island formations and territorial seas*

In view of the fact that the Mayaguez was seized in close proximity to an island, attention must be given to the role in which these offshore formations generally play in the delineation of territorial waters before concluding this phase of the study.

Article 10 of the Convention on the Territorial Sea and the Contiguous Zone states:

1. An island is a naturally-formed area of land surrounded by water, which is above water at high tide.
2. The territorial sea of an island is measured in accordance with the provisions of these articles.³³⁷

In the absence of any special agreement to the contrary, any natural formation (even a rock), if permanently visible at all states of the tide, generates a territorial sea. This is true regardless of its location, size, shape or habitability.³³⁸ Two criteria alone determine whether the offshore formation is, in the legal sense, an island: (1) the formation must be a natural and not an artificial one (not, for example, an installation erected on the bed of the sea); and (2) the formation must be always above sea-level and visible at all states of the tide.³³⁹ Other marine formations which are not islands do not generate any territorial sea.³⁴⁰

C. *VALIDITY AND APPRAISAL,*

As noted previously,³⁴¹ the seizure occurred some sixty miles off the Cambodian mainland. This distance is well beyond any reason-

³³⁷ Territorial Sea Convention, *supra* note 262.

³³⁸ Fitzmaurice, *Geneva Conference*, *supra* note 262, at 85.

³³⁹ *Id.*

Permanently submerged reefs, banks or shoals obviously cannot generate territorial waters. Formations that are only visible at low-tide, known as driving rocks (banks, shoals, etc.), or as "low-tide elevation," are wholly submerged for varying periods out of the twenty-four hours, depending on the extent of their elevation but always for a time, twice in a day and night, and possibly for periods aggregating . . . twelve hours in the twenty-four. They too (apart from the exception to be noticed presently) clearly cannot generate a territorial sea.

Id.

³⁴⁰ *Id.*

able claim to a territorial sea, including the U.S. 3-mile limit and Cambodia's 12-mile claim.³⁴² However, it is also noted that the seizure took place some six miles from an island mass which is claimed and was then occupied by Cambodia.³⁴³ The island, Poulo Wai, has of course a surrounding territorial sea,³⁴⁴ and the Cambodians claimed that the Mayaguez was in their territorial waters as measured from Poulo Wai.³⁴⁵ If Cambodia's 12-mile claim to territorial waters is determined to be reasonable, the United States claim that the seizure occurred on the high seas cannot survive.

It should initially be noted that, although ownership of Poulo Wai had been the subject of a long-standing dispute between Cambodia and South Vietnam,³⁴⁶ the United States did not contest the validity of Cambodia's claim to the island but, instead, based its claim solely on the proposition that the seizure occurred on the high seas and not in territorial waters. Thus, the United States seems to have rested its claim and hopes on the strength of the 3-mile limit rule.

The above brief examination of trends in State practice, recent studies, recommendations, actions, and other international evidences establishing a general consensus on the reasonable extent of territorial waters reveals that national claims of territorial seas up to twelve miles are reasonable in the eyes of the international community, despite the continued opposition of a few major maritime nations.

Although the 3-mile limit had its heyday, it seems sufficient to concede that its decline in acceptance within the international arena

³⁴²Text at notes 18-22, *supra*.

³⁴³Text at note 261 *supra*.

³⁴⁴Text at notes 22 and 58, *supra*.

³⁴⁵See text at notes 33740, *supra*.

³⁴⁶Post, June 14, 1975, at A-10, col. 3.

³⁴⁶*Id.*, at cols. 34; Deadline Data on World Affairs, South Vietnam, Aug. 29, 1974, at 420; *id.*, Cambodia, Jan. 8, 1971, at 96; July 2, 1971, at 100; Sept. 5, 1974, at 120. The dispute over ownership has intensified because of the possibility of oil deposits beneath the Gulf of Siam. Negotiations have been undertaken from time to time, but without much success. For further details of the dispute, see Leifer, Cambodia: The Search for Security 95-97 (1967); Dep't of the Army, Pamphlet No. 550-50, Area Handbook for the Khmer Republic (Cambodia) 209-12 (1973); R. Smith, Cambodia's Foreign Policy 158-60 (1965).

In the latest episode, South Vietnamese forces landed on Poulo Wai on June 10, 1975 and, after several days of fighting, seized the island from the Cambodians. Post, June 14, 1975, at A-10, cols. 3-4.

became evident following the 1930 Hague Codification Conference. Since then, this trend has become so pronounced that it seems safe to conclude that, while the 3-mile rule is a reasonable minimum standard, the present international standard recognized or at least tolerated by the vast majority of States is that nations may extend their territorial seas up to but not beyond twelve miles.

Though such standards may prove to be harmful to the international community in an attempt to secure a maximum utilization of the oceans and their resources, it is, nevertheless, a realistic appraisal of contemporary community expectations of acceptable and probable future conduct. And though certain States may continue to adhere to the 3-mile limit, it is patently clear that they are not in a position either to compel others to follow suit,³⁴⁷ or to defend the 3-mile limit as an existing customary rule of international law.

A change in the United States position on the extent of offshore waters has already been noted.³⁴⁸ During the Mayaguez crisis, also, the United States was not quick to discount the trends evident in the international community and in State practice. Although insisting that the Mayaguez was on the high seas and in commonly used international shipping lanes when seized, the United States at least impliedly acknowledged that other observers could consider the ship to be within Cambodian territorial waters at the time it was seized.³⁴⁹ Upon review of all the evidence, this writer would have to be one of those other observers and conclude that the United States claim of seizure on the high seas cannot be sustained under contemporary international law and practice. Likewise, the United States claim of piracy discussed in the previous section must fail, due, in part, to the determination that the seizure of the Mayaguez occurred within Cambodian territorial waters.³⁵⁰

V. CLAIM TO THE RIGHT OF AND ACTUAL ENGAGEMENT IN INNOCENT PASSAGE

A. THE CLAIM

Apparently recognizing the potential difficulties in defending its high seas seizure claim, the United States stated in its May 14th

³⁴⁷Jessup, *The U.N. Conference on the Law of the Sea*, 59 Colum. L. Rev. 234, 264 (1959).

³⁴⁸Text at notes 328-36, *supra*.

³⁴⁹See United States letter to United Nations Security Council President, May 14, Appendix B, col. 2, *infra*.

³⁵⁰See text following note 253, *supra*.

letter to the United Nations Security Council President that: "Even if, in the view of others, the ship were considered to be within Cambodian territorial water, it would clearly have been engaged in innocent passage to the port of another country."³⁵¹ In defending the United States recovery operation, Secretary of Defense James R. Schlesinger reportedly stated that the American action was necessary to protect freedom of the seas and of innocent passage, both of which were viewed by the Secretary as long-term United States objectives.³⁵²

The Khmer Rouge, however, viewed the passage of the Mayaguez differently. They claimed that it was evident that the Mayaguez had come to violate their territorial waters, conduct espionage and "provoke incidents to create pretexts or mislead the opinion of the world people, the American people, the American politicians, pretending that the Cambodian nation and the people are the provocateurs while feigning innocence on their part."³⁵³ It was further alleged that, in view of the international violation, their patrol stopped the Mayaguez in order to examine and question it and then report back to higher authorities for instructions regarding further disposition of the ship.³⁵⁴ In their communique offering to release the Mayaguez, it is stated:

Regarding the Mayaguez ship, we have no intention of detaining it permanently and we have no desire to stage provocations. We only wanted to know the reason for its coming and to warn it against violating our waters again. This is why our coast guard seized this ship. Their goal was to examine it, question it and make a report to the Royal Government so that the Royal Government could itself decide to order it to withdraw from Cambodia's territorial waters and to warn it against conducting further espionage and provocative activities.³⁵⁵

B. TRENDS IN DECISION

1. The concept.

The concept of innocent passage is dependent on the legal status of offshore water of coastal States. More specifically, the concept

³⁵¹ Appendix B, col. 2, *infra*.

³⁵² U.S. News & World Report, May 26, 1975, at 24, col. 1.

³⁵³ See Cambodian communique, Appendix C, col. 3, *infra*.

³⁵⁴ *Id.*, at col. 2.

³⁵⁵ *Id.*, at col. 3.

forms a part of the legal regime of the territorial sea. In practical terms, a coastal State has in its territorial sea rights and duties inherent in sovereignty.³⁵⁶ Historically, however, the question of sovereignty in the marginal waters has been disputed.

One school, relying on the Roman and Grotian concepts that the oceans are incapable of appropriation, professed that all the oceans constitute the high seas and that a coastal State had only limited claims in its marginal waters. The opposing school held that the marginal waters were as much the property of the littoral State as its land territory, and therefore, fully subject to its sovereignty (i.e., the exclusive power and authority to control and regulate).³⁵⁷ Developments during the 20th century have, however, resolved the dispute. The 1930 Codification Conference on the Law of the Sea, and the International Law Commission's work preparatory to the 1958 Conference on the Law of the Sea, as well as the papers of the latter Conference itself, together have produced a statement expressive of customary international law.³⁵⁸ Article 1 of the Convention on the Territorial Sea and the Contiguous Zone states:

1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.³⁵⁹

It is thus apparent that the sovereignty of a coastal State in its territorial waters is not absolute. Rather, it is subject to certain limitations imposed by the international community by means of international law. One of these limitations is the right of innocent passage, which ensures access to territorial waters by ships of other States and can be characterized as a universal servitude or qualification on a littoral State's jurisdiction and sovereignty in these waters.³⁶⁰

³⁵⁶I. Brownlie, *Principles of Public International Law* (2d ed) 204 (1973).

³⁵⁷P. Jessup, *supra* note 263, at 115-119.

³⁵⁸H. Smith, *supra* note 168, at 46; I. Oppenheim, *supra* note 169, at 487.

³⁵⁹Territorial Sea Convention, art. 1, *supra* note 262.

³⁶⁰Fitzmaurice, *Geneva Conference*, *supra* note 262, at 91-92; McNess, *Freedom of Transit Through International Straits*, 2 Am. Mar. Cases 175, 180, 182 (1975).

The balance of this section will explore the origins, status and recent developments in international law of the concept of innocent passage. To determine the specific legal attributes of innocent passage, this examination will focus primarily upon the most recent authoritative pronouncement of international law on the matter, the 1958 Convention on the Territorial Sea and the Contiguous Zone, to which, it may be recalled, the principal participants in the present case are parties.³⁶¹

2. *Origins, purpose and application.*

The principle of innocent passage of foreign ships through the territorial seas of a coastal State is one of the oldest and most universally recognized rules of public international law. Jessup, in his work on territorial waters and maritime jurisdiction, states that, "as a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law."³⁶²

Grotius considered that the principle of innocent passage related to the "most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable," to wit: "Every nation is free to travel to every other nation and to trade with it."³⁶³ Grotius premises the principle on the general right of freedom of navigation in international waters and as an adjunct to the right to trade.³⁶⁴

Other scholars claim that the concept had a broader basis. According to Hyde's interpretation, government vessels and even warships would be entitled to engage in innocent passage.³⁶⁵ Smith remarks that the purpose of this principle "lies in the fact that the whole world has a legitimate and necessary interest in being able to use the seas for the purposes of normal intercourse."³⁶⁶ As a policy question, innocent passage is a reasonable form of accommodation between the necessities of sea travel and communication and the national interests of coastal States. It has been pointed out that "it

³⁶¹ See Territorial Sea Convention, *supra* note 262, at 41 and 66.

³⁶² P. Jessup, *supra* note 263, at 120.

³⁶³ H. Grotius, *Mare Liberum* 7 (Magoffin transl. 1916).

³⁶⁴ *Id.*

³⁶⁵ 1 C. Hyde, *International Law* 516 (2d ed. 1945)

³⁶⁶ H. Smith, *supra* note 168, at 46.

avails little to be free to sail the seas, unless there is also a right of arrival at a destination, and a right to pass through such waters as are necessary or convenient for the purpose."³⁶⁷

Although the draft articles presented to the 1930 Law of the Sea Codification Conference did not characterize innocent passage as a right, the accompanying commentary did.³⁶⁸ The draft articles produced by the 1930 Conference also characterized innocent passage as a right.³⁶⁹ Whatever doubt remained, the 1958 Law of the Sea Conference made it perfectly clear that innocent passage was indeed a right enjoyed by the ships of all States. This position finds expression in paragraph 1 of Article 14 of the Convention on the Territorial Sea and the Contiguous Zone, which states that, subject to its provisions, "ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea."³⁷⁰ This provision is followed in paragraph 1 of Article 15 by a specific injunction that "the coastal State may not hamper innocent passage through the territorial sea."³⁷¹

The 1958 Convention, however, fails to state whether the right of innocent passage is applicable in both wartime and peacetime situations. The International Law Commission's commentary on its draft convention did, however, state that the draft articles were applicable only in time of peace.³⁷² One noted delegate has observed: "Without suggesting that such a right does not equally exist in time of war, it may be mentioned here that the International Law Commission only purported to do a draft of the international maritime law of peace; and the Conference proceeded on the same basis. This is not to say that many (indeed most) of the articles would not be equally applicable in time of war. But the Conference did not attempt to deal with that question one way or the other."³⁷³

In practice, the question whether the right of innocent passage exists during times of strained relations, or where a state of affairs exists which is less than what one would call peaceable but yet not

³⁶⁷ Fitzmaurice, *Geneva Conference*, *supra* note 262, at 91.

³⁶⁸ Note, *The Law of Territorial Waters*, Am. J. Int'l L. Special Supp., 294 (1929).

³⁶⁹ Conference for the Codification of International Law, *Report of the Second Committee on the Territorial Sea, Annex I*, Am. J. Int'l L. Supp. 240 (1930).

³⁷⁰ Territorial Sea Convention, *supra* note 262.

³⁷¹ *Id.*

³⁷² [1956] 2 Y.B. Int'l L. Comm'n 256.

³⁷³ Fitzmaurice, *Geneva Conference*, *supra* note 262, at footnote 63.

amounting to a state of formal belligerency,³⁷⁴ has arisen in at least two notable cases.

The question was debated before the United Nations Security Council in May 1967 after the United Arab Republic announced it would prevent Israeli ships and other ships carrying strategic cargo from transiting the Straits of Tiran at the entrance of the Gulf of Aquaba.³⁷⁵ The action provoked consternation and protest from maritime nations and other segments of the international community. Such condemnation was based primarily on the denial of the right of innocent passage through an international strait.³⁷⁶

With reference to the Corfu Channel case, it has been pointed out that Albania and Greece were de facto in a state of hostility at the time of the incident, with British sympathies resting with Greece. Therefore, the case could conceivably have application to the claim of the right of innocent passage through territorial waters for ships of third States in time of war as well as in time of peace.³⁷⁷

3. *Legal attributes*

The definition of innocent passage presents difficulty in respect to stating with precision the conditions of innocence, and further, with regard to the presumption in favor of either the flag or the coastal State in case of doubt. The root of the difficulty lies in the need to reconcile the reasonable requirements of navigation with the legitimate interests of the littoral State in protecting its security and in preventing violations of its customs, immigration and sanitary laws.³⁷⁸

Codifiers of international law have attempted to accommodate these interests by balancing the articles defining innocent passage

³⁷⁴With respect to the passage rights of belligerents, *inter se*, a belligerent is entitled, as a matter of customary international law, to prevent the passage of an opposing belligerent's ships or of cargo destined for him. R. Baxter, *The Law of International Waterways* 205 (1964). For further discussion of passage in wartime. see Lawrence, *supra* note 307, at 86-92; Walker, *supra* note 273, at 64-65.

³⁷⁵22 U.N. SCOR debates of 24 May 1967, U.N. Doc. S/PV. 1341—S/PV. 1345 (1967).

³⁷⁶For an analysis of the case, and the ensuing U.N. debates, see Walker, *supra* note 273, at 66-69, 71-73.

³⁷⁷R. Baxter, *supra* note 374, at 164 (1964).

³⁷⁸Note 367 and text thereat. *supra*; I Brownlie, *supra* note 356, at 204.

and the duties of the coastal State in respect of it with other provisions obliging passing vessels to respect the laws of the coastal State and giving the latter certain rights for its protection. For purposes of this discussion, innocent passage will be broken down into four aspects: (a) passage, (b) the innocence of passage, (c) duties of vessels, and (d) rights, duties, and jurisdiction of coastal states.

a. Passage

Paragraphs 2 and 3 of Article 14 of the Convention on the Territorial Sea and the Contiguous Zone (hereinafter referred to as the Convention) define passage as follows:

2. Passage means navigation through the territorial sea for the purpose of traversing that sea without entering internal waters or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

Reading these provisions together, it follows that, although passage involves entry into the territorial sea, it is entry only for certain purposes. These purposes are, first, to pass right through territorial waters without proceeding to a port or other shore locality, or second, to proceed to a port, or third, to pass from a port.

Paragraph 2 rejects an earlier view that the aims of a foreign vessel entering the territorial sea for the purpose of proceeding to internal waters are inconsistent with the basis of innocent passage because the status of the entering vessel was deemed to be assimilated to that of a vessel in port where the coastal State's jurisdiction is not subject to restriction.³⁷⁹ The extension of innocent passage to a vessel transiting the territorial sea after leaving internal waters also rejects earlier views holding that such transit was inconsistent with innocent passage for substantially the same reasons that applied to inbound vessels.³⁸⁰

³⁷⁹ P. Jessup, *supra* note 263, at 120, 123.

³⁸⁰ Note, *supra* note 368, at 295.

Although to enter territorial waters for purposes other than those mentioned above may be legitimate, depending on the circumstances, it is not passage as defined in the Convention and, therefore, its jurisdiction must derive from other authority and cannot be based on the right of innocent passage.³⁸¹ Anchoring or "hoovering"³⁸² in the territorial sea for other purposes, however, breaks innocent passage and subjects the vessel to the jurisdiction of the coastal State.³⁸³

In short, to make the operation one of passage, it must be for the sole purpose of traversing territorial waters. Thus, the basic criterion for passage is movement, and to this extent, Article 14(2) of the Convention reflects customary international law.³⁸⁴ And while the Convention does not explicitly state that navigation must be by direct routes, the reasonable implication of Article 14(2) is that the vessel must take a route which will accomplish the passage without undue time spent in doing it.³⁸⁵

b. The innocence of passage.

Paragraph 4 of Article 14 of the Convention provides: ³⁸⁶

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

In view of the quoted provision, the above description of passage as movement renders the concept of "innocence" relatively unimportant in practice insofar as it concerns noninnocent activity that involves action by a vessel within the territorial sea contrary to the peace, good order or security of the coastal State.³⁸⁷ In most instances, such action will involve the use of territorial waters for purposes other than mere passage, or for a traversing of such waters which will not be or will at some point cease to be exclusively

³⁸¹ Fitzmaurice, *Geneva Conference*, *supra* note 262, at 93.

³⁸² *Id.*

³⁸³ P. Jessup, *supra* note 263, at 123.

³⁸⁴ H. Smith, *supra* note 168, at 46.

³⁸⁵ This conclusion is strengthened by article 14(3) of the convention.

³⁸⁶ Territorial Sea Convention, *supra* note 262.

³⁸⁷ See Fitzmaurice, *Geneva Conference*, *supra* note 262, at 93-94.

for the objectives mentioned in paragraph 2 of Article 14 of the Convention.³⁸⁸

As originally submitted to the 1958 Conference, the International Law Commission's draft article on the innocence of passage stated that:

Passage is innocent so long as a ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law.³⁸⁹

Certain delegates to the Conference objected that, as worded, this text could be interpreted to permit vessels within the territorial sea to use such waters for purposes in addition to mere passage, provided their actions were not prejudicial to the coastal State.³⁹⁰

Further objection was taken to the draft's terms "or contrary to the present rules," for the ILC's draft proposal, like that of the Convention on the Territorial Sea and the Contiguous Zone, contains a provision providing in effect that vessels in passage must comply with the laws and regulations of the coastal State, particularly those regarding transport and navigation.³⁹¹

Under the ILC definition of innocent passage, the effect would have been to make noninnocent any passage, in the course of which any contravention of local regulations, however technical, was committed. Thus, ignoring a navigation signal or passing a buoy or ship on the wrong side could render the passage noninnocent.³⁹² Accordingly, such noninnocent passage could, under paragraph 1 of Article 16 of the Territorial Sea Convention, be prevented or denied entirely by the coastal State.³⁹³

³⁸⁸ *Id.*

³⁸⁹ U.N. Doc. A/CN.4/Ser. A/1956/Add. 1, [1956] 2 Y.B. Int'l L. Comm'n 72.

³⁹⁰ See Slonim, *The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea*, 5 Colum. J. Transnat'l L. 96, 100-02 (1966); Walker, *What is Innocent Passage?*, 21 Naval War Coll. Rev. 53, 58, and sources cited thereat (1969); Fitzmaurice, *Geneva Conference*, *supra* note 262, at 94.

³⁹¹ [1956] 2 Y.B. Int'l. L. Comm'n. 274; article 17, Territorial Sea Convention, *supra* note 362.

³⁹² Fitzmaurice, *Geneva Conference*, *supra* note 362, at 94.

³⁹³ Art. 16(1), Territorial Sea Convention, *supra* note 362, which will be considered in more detail later, states: "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent."

Certain delegates to the 1958 Conference thought that such consequences would be too harsh and would interfere unreasonably with free navigation and sea communications. Thus, they sought to disassociate the question of noninnocence of passage from violations of local laws and regulations.³⁹⁴

Eventually the Conference split the ILC's originally proposed single sentence provision into two sentences in paragraph 4 of Article 14 of the Territorial Sea Convention. The purpose of this splitting was to deal separately with two issues: (1) the conditions to be fulfilled for innocent passage, and (2) the extent of jurisdiction of the coastal State.³⁹⁵ It follows then that, although a vessel which infringes a coastal State's laws or regulations may be liable for payment of a fine, or subject to other penalty, her passage does not cease to be innocent merely on that account. The vessel must, of course, make arrangements to satisfy the penalty, but must then be allowed to proceed on her voyage.³⁹⁶

According to Fitzmaurice —

to render a passage non-innocent, there must be something more than a mere infringement of a local law or regulation. There must be something going beyond the mere existence of local laws and regulations as such—something that could be considered as tainting the passage even if there happened not to be any specific domestic law or regulation under which it was locally illegal.³⁹⁷

It seems, therefore, that it can be safely concluded that the innocence of passage is not determined by a vessel's compliance with *all* applicable provisions of international law.

In the final analysis, the convention's provision on the innocence of passage differs from the ILC's proposal in three important respects: ~ ~ ~

First, the Convention provides that passage must take place in conformity with its articles — consequently, with the laws and reg-

³⁹⁴ Slonim, *supra* note 390, at 104–07; 13 U.N. GAOR, First Conference on the Law of the Sea, U.N. Doc. A/Conf. 13/C.1/L.23, at 85 (1958).

³⁹⁵ *Id.*

³⁹⁶ *Id.*; Walker, *supra* note 390, at 59; Fitzmaurice, *supra* note 362, at 94.

³⁹⁷ *Id.*, at 94–95.

³⁹⁸ See *id.*, 95–96.

ulations of the coastal State as provided in Article 17 of the Convention—and with general rules of international law. However, the convention does not state or have the intended effect of rendering passage noninnocent in the event of failure to comply with those laws or regulations. And even though such a violation may cause the passage to become noninnocent, this result is determined wholly in accordance with the elements listed in the first sentence of paragraph 4. The second sentence is solely intended to ensure that innocent passage as such affords no basis on which a vessel can claim to be exempt or excused from its duty to comply with laws and regulations of the coastal state. These laws and regulations must, of course, be in conformity with the provisions of the Convention and other rules of international law.

Second, the innocence of a vessel's passage is not solely a matter of what it does when actually in the territorial sea. There may be instances when the passage is thought, or appears, to be prejudicial to the coastal State, but not because of any activity actually occurring in its territorial sea. "In other words, passage may be considered prejudicial to the peace, good order or the security of a coastal State even though the particular ship involved raises no such threat either in its cargo or in its manner of sailing."³⁹⁹ In such cases, the passage can be treated as noninnocent.

The Convention changes the emphasis from particular to general passage and gives added importance to the object of passage.⁴⁰⁰ In this regard, it has been argued that this provision creates new law which is inconsistent with existing international law in the sense that "no previous convention or judicial authority had claimed this to be the governing international law."⁴⁰¹ More particularly, it is argued that the provision appears to go beyond, and is difficult to reconcile with the definition of innocence laid down by the International Court of Justice in the Corfu Channel case.⁴⁰² In that case, the court seemed to place more emphasis and importance on the manner of passage than on its object.⁴⁰³ Nevertheless, the prejudice

³⁹⁹ Slonim, *supra* note 390, at 100.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*, at 100–02.

⁴⁰² Fitzmaurice, *Geneva Conference*, *supra* note 362, at 96.

⁴⁰³ Corfu Channel Case (Merits), [1949] I.C.J. 30–31 et seq. The facts of the case are as follows: On 22 October 1946, two British destroyers and two cruisers left

must be against the coastal State. It has been reasoned that "the fact that it may be prejudicial to some third State does not affect its status as innocent passage in relation to the State whose waters are being traversed."⁴⁰⁴

Third, in addition to passage which is prejudicial to the security of the coastal State, the Convention views as noninnocent passage

the port of Corfu, and proceeded northward through a channel in the North Corfu Strait. One destroyer struck a mine, sustaining heavy damage and casualties. The other destroyer likewise struck a mine while assisting the damaged vessel. On 13 November 1946, the British found a minefield in Albanian territorial waters.. where its ships had been damaged earlier, and swept it. Earlier, on 15 May 1946, two British cruisers had journeyed through the strait, and Albanian shore guns fired on them.

The legal issues before the court were whether the British warships could traverse the strait lying in Albanian territorial waters in innocent passage and without the permission of Albania; whether the fact of the passage prejudiced Albania's security; what was the duty of Albania to give notice of the navigational hazard (the minefield) in the strait; and whether the United Kingdom violated Albania's sovereignty by resorting to self-help in clearing the minefield without Albanian consent. *Id.*, at 4.

The court decided that the "North Corfu Channel should be considered as falling under the category of international maritime thoroughfares, through which passage cannot be prohibited in time of peace by a coastal State." The court held that Albania could not restrict the passage through such a strait connecting two portions of the high seas. *Id.* at 29.

Regarding the 22 October passage, the evidence showed that one of its purposes was to test Albania's peaceableness. Ensuing correspondence had revealed Albania's view that warships could not traverse her territorial waters without prior notification. (Albania and Britain were not on the best of terms, for the latter supported Greece in her hostilities with Albania.)

The court analyzed the manner in which the passage was performed. Although the warships' guns had been placed in their normal stowage position, personnel were at action stations. Finding that such precautions were reasonable under the circumstances, the court held that the United Kingdom did not violate Albania's sovereignty by sending her warships through her territorial waters on 22 October. *Id.*, at 32.

However, the court found that the British self-help measures of 13 November against the expressed will of Albania could not be justified. Further, the court found that the show of force and the evidence-gathering operation could not be considered innocent passage, and that these actions therefore violated Albanian sovereignty. *Id.*, at 34.

Initially, although Albania disclaimed any knowledge of the mining, the court found constructive knowledge. Accordingly, the court held Albania in breach of a coastal State's duty to warn of a known navigational hazard. *Id.* at 38.

⁴⁰⁴Fitzmaurice, *Geneva Conference*, *supra* note 362, at 96

which is prejudicial to the peace and good order of the coastal State. These additions are significant, for they broaden the scope of what may be considered noninnocent, and are capable of affording a variety of plausible pretexts for preventing or impeding passage.⁴⁰⁵ The question also remains as to who will define these terms in less obvious or doubtful cases. In the final analysis, the initial determination rests with the coastal State, or, if an international decision is required, that State's determination will at least be given great weight.⁴⁰⁶

The following observation is noteworthy in view of the drafting of Article 14(4) of the Convention:

It is therefore all the more necessary to insist that, however it arises, a clear and direct prejudice to the coastal State itself must be demonstrated; and to construe that idea strictly and even somewhat narrowly. Otherwise, for instance, passage could be refused on the ground that the coastal State disapproved generally of the object of the voyage, or that the voyage might lead to consequences, or might start a chain of events, that might have repercussions that would be prejudicial to, or might indirectly effect, the coastal State. On that basis little would be left of the right of innocent passage.⁴⁰⁷

The First Committee of the United Nations Third Conference on the Law of the Sea has attempted to specify certain activities that would be considered prejudicial to a coastal State if engaged in by a

⁴⁰⁵ See Lawrence, *supra* note 307, at 73

⁴⁰⁶ *Id.*; Slonim, *supm* note 390, at 100-01. The following footnote appears in Lawrence, *supra* note 307, at 73 n.111:

See McDougal and Burke, *op. cit. supra* note 96, at 66 [*supra* note 1721, where it is stated that "the authority accorded a coastal State in the territorial sea, is and must be, very comprehensive indeed, extending even to a substantial measure of discretion in determining the innocent character of a particular passage" These authors also see in art. 14(4) of the Convention on the Territorial Sea and the Contiguous Zone considerable authority [for the coastal state] to qualify passage as non-innocent. *Id.*, at 67. At the 1958 Geneva Conference, Mr. Yingling voiced the United States position that in the first instance, the determination as to whether a passage was innocent or not was up to the coastal state. 3 Off. Rec. U.N. Conf. on the Law of the Sea 84 (A/Conf. 13/39) (1958).

⁴⁰⁷ Fitzmaurice, *Geneva Conference, supra* note 362, at 96-97.

foreign ship within its territorial waters. These efforts can be viewed as indicative of an international trend or consensus on such matters. The following is taken from Article 16(2) and (3) of the First Committee's informal single negotiating text:⁴⁰⁸

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State, if in the territorial sea it engages in any of the following activities:

(a) any threat or use of force against the territorial integrity or political independence of the coastal State or in any other manner in violation of the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(d) any act of propaganda aimed at affecting the defence or security of the coastal State;

(e) the launching, landing, or taking on board of any aircraft;

(f) the launching, landing, or taking on board of any military device;

(g) the embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal or sanitary regulations of the coastal State;

(h) any act of willful pollution, contrary to the provisions of the present Convention;

(i) the carrying on of research or survey activities of any kind;

(j) any act aimed at interfering with any systems of communication of the coastal or any other State;

(k) any act aimed at interfering with any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage.

3. The provisions of paragraph 2 shall not apply to any activities carried out with the prior authorization of the

⁴⁰⁸ 14 Int'l Legal Materials 714-15 (1975).

coastal State or in the case of any of the activities referred to in sub-paragraphs (e) or (l), as are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. In such cases the foreign ship shall, as appropriate, inform the authorities of the coastal State as promptly as possible of the action taken.

The following observation has been made of the above quoted provisions in a memorandum for the chairman of the U.S. Defense Advisory Group on the Law of the Sea:⁴⁰⁹

a. Innocent Passage: The articles on innocent passage are in general quite favorable to U.S. interests. In particular, the formulation of Art. 16 appears to be a distinct improvement over the analogous provision in the 1958 Convention on the Territorial Sea (Art. 14(4)). The provision in the 1958 Convention which is identical to par. 1 of Art. 16 did not indicate with any clarity the criteria which were to be used in determining whether passage was prejudicial to the peace, good order or security of the coastal state. Art. 16 of the informal text, however, contains a second paragraph which seems best read as establishing an exclusive list of activities that "shall be considered prejudicial." The activities in this list focus on *acts* of foreign ships while in passage through the territorial sea. Thus even if the list is not construed to be exclusive, the focus on the acts of ships in passage as a criteria for determining the innocence of passage rather than on the nature of the passage itself, reinforces the broad view of innocent passage which the U.S. has advocated and tends to confirm the approach taken by the ICJ in the Corfu Channel Case. So long as this interpretation is not seriously undercut by an adverse negotiating history, it will serve to discredit some of the broad criteria which certain coastal states have claimed were relevant to a determination of innocence (*e.g.*, nature of substance transported, destination, etc.).

⁴⁰⁹Memorandum for the Chairman, Defense Advisory Group on the Law of the Sea, subject: Informal Single Negotiating Text, DAJA-IA 197511047 (9 June 1975).

c. Duties of vessels.

Article 17 of the Convention on the Territorial Sea and the Contiguous Zone restates pre-existing international law in requiring vessels engaged in innocent passage to comply with the laws and regulations enacted by the coastal State.⁴¹⁰ The provision states: "Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law, and, in particular, with such laws and regulations relating to transport and navigation."⁴¹¹

At the 1958 Conference, conflict developed over whether the phrase "in conformity with these articles and other rules of international law" modified the phrase "the laws and regulations of the coastal State" or the phrase "foreign ships exercising the right of innocent passage." If it modified the former phrase, then foreign vessels would need only to observe those laws and regulations of the coastal State that were in conformity with international law. If it modified the latter, then there would seem to be no resulting limitation on a coastal State's authority to prescribe within its territorial waters.⁴¹²

The intent of the ILC text, which clearly placed the limitation on the coastal State, was eventually adopted by the Conference,⁴¹³ thus reflecting a balance between the interests of the flag and the coastal States. Accordingly, the coastal State cannot apply whatever laws or regulations it pleases. More particularly, it cannot require compliance with laws and regulations that are destructive of the right of innocent passage or that restrict such passage beyond the limits that may result from the Convention.⁴¹⁴

⁴¹⁰[1956] 2 Y.B. Int'l. L. Comm'n 274.

⁴¹¹Territorial Sea Convention, *supra* note 362.

⁴¹²See Slonim, *supra* note 390, at 105-107.

⁴¹³*Id.*, at 105; ILC Y.B., *supra* note 389, at 274; Fitzmaurice, *Geneva Conference*, *supra* note 362, at 99.

⁴¹⁴*Id.* Other requirements relating to fishing vessels, warships, including submarines, and other governmental or public vessels are provided by the Convention. See, for example, articles 14(5) & (6), 21-31. However, they are believed to be irrelevant to the discussions herein, and therefore will not be dealt with.

d. Rights, duties and jurisdiction of coastal States.

(1) Rights.

The Territorial Sea Convention sets forth the rights of the coastal State in Article 16. The first two paragraphs recognize a coastal State's power to "take the necessary steps in its territorial sea to prevent passage which is 'not innocent' and, [i]n the case of ships proceeding to internal waters, . . . to prevent any breach of the conditions to which admission of those ships to those waters is subject.'"⁴¹⁵ Although these paragraphs did not give rise to much controversy at the 1958 Conference, the remaining two paragraphs provoked differences of opinion as to what the law should be with respect to a coastal State's right to suspend innocent passage in its territorial sea, generally, and in straits, in particular.⁴¹⁶ Article 16(3) provides:⁴¹⁷

Subject to the provisions of paragraph 4 [international straits],⁴¹⁸ the coastal State may, without discrimination amongst foreign ships suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published.

As originally submitted to the 1958 Conference, the ILC draft read: "The coastal State may suspend . . . the right of passage *if it should deem such suspension* essential for the protection of the rights referred to in paragraph 1."⁴¹⁹ This was changed at the

⁴¹⁵Territorial Sea Convention, *supra* note 362.

⁴¹⁶See Slonim, *supra* note 390, at 102–05. Questions relating to straits are considered irrelevant to and beyond the scope of this paper. Nevertheless, paragraph 4 of article 16 of the Territorial Sea Convention provides as follows: "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." Territorial Sea Convention, *supra* note 362. For detailed discussion of transit through straits, see R. Baxter, *supra* note 374, and McNees, *Freedom of Transit Through International Straits*, 6 Am. Mar. Cases 175 (1975).

⁴¹⁷Territorial Sea Convention, *supra* note 362.

⁴¹⁸Author's brackets.

⁴¹⁹11 U.N. GAOR, Supp. No. 9, at 6, U.N. Doc. Ai3159 (1956).

Conference to read, "if such suspension is essential for the protection of its security." This change reduced the opportunity for strictly subjective exercise of power by the coastal state, which might view anything as a threat to its security. It substituted therefor a more objective standard, which allowed suspension of innocent passage only if such suspension was necessary for the protection of the coastal State's security.⁴²⁰

In this respect, the changed provision conformed to the intent of a similar provision in the 1930 Hague Conference Draft, which also required objective criteria.⁴²¹ Commenting on the ILC draft, the United Kingdom considered that "this paragraph should make it clear the burden of proving that the passage is prejudicial, etc. is one which must be discharged according to the criteria of international law, rather than the law of the coastal State."⁴²² Whether or not one agrees that Article 16(3) goes so far in establishing objective criteria, it seems clear that the paragraph requires the threat to security to be actual and not merely one "deemed" so by the coastal State.

The word "security" in paragraph 3 of Article 16 also generated debate at the Conference. For example, one delegation considered that the term covered more than mere military security.⁴²³ Others concluded that the coastal State had rights in the territorial sea which went beyond mere protection of its security and that this view was consistent with State practice and the opinions of scholars. An amendment was introduced to make a threat to "the interests" of a coastal State the equivalent of a threat to its security.⁴²⁵

The maritime States voiced objection to the amendment, claiming that the reference to "the interests" of the coastal State so widened the whole range of possible restrictions that it would make the right of innocent passage mean less and thus allow for the indiscriminate interference with its free exercise.⁴²⁶ The amendment was rejected,

⁴²⁰ See Slonim, *supra* note 390, at 103 and n.28.

⁴²¹ The Hague Draft allowed suspension only where acts prejudicial to the coastal State's security had been committed. See 24 Am. J. Int'l L. Supp. 185 (1930).

⁴²² 11 U.N. GAOR, U.N. Doc. No. A/CN.4/Add. 1, 53, 68 (1956).

⁴²³ 13 U.N. GAOR, U.N. Conference on the Law of the Sea, U.N. Doc. No. A/Conf. 13/L.52 (1958), at 83 [hereinafter cited as First conference].

⁴²⁴ *Id.*, at 83, 85.

⁴²⁵ *Id.*, at 85.

⁴²⁶ *Id.*, at 85, 88.

and the protection of specific fiscal interests, such as customs and immigration, was reportedly to be inferred from the general tenor of Article 14 of the Convention, particularly the phrase “other rules of international law.”⁴²⁷

The right of suspension provided by Article 16 is subject to eight qualifications: (i) it is subject to the provisions of paragraph 4 of the Article (international straits); (ii) it must not discriminate between foreign vessels; (iii) it must be temporary; (iv) the areas in question must be specified; (v) it must be for the protection of security interests and not for some lesser purpose; (vi) it must be essential for that purpose and not merely desirable or convenient; (vii) due notification of it must be given and published; and (viii) it can only be effected after publication and not before.

(2) *Duties.*

The negotiating efforts of the 1958 Conference can be viewed as a successful attempt to limit a coastal State’s liability in certain respects. Article 15 declares that:

1. The coastal State must not hamper innocent passage through the territorial sea.

2. The coastal State is required to give appropriate publicity to any dangers to navigation of which it has knowledge, within its territorial sea.⁴²⁸

The ILC’s draft proposal which attempted to codify customary international law would have required the coastal State, in part, to “ensure respect for innocent passage through the territorial sea and . . . not allow the said area to be used for acts contrary to the rights of other states.”⁴²⁹ This provision was viewed as placing on the coastal State the duty to police its territorial sea so that one foreign State would not impinge upon the rights of another foreign State, and further, to remove obstacles to innocent passage. The ILC believed that the draft reflected the holdings of the International Court of Justice in the *Corfu Channel Case*.⁴³⁰

⁴²⁷ *Id.*, at 98.

⁴²⁸ Territorial Sea Convention, *supra* note 362

⁴²⁹ [1956] 2 *Y.B. Int’l L. Comm’n* 273.

⁴³⁰ First Conference, *supra* note 423, at 77–78.

Certain delegates, however, feared that the ILC draft introduced a notion of absolute liability and would impose on the coastal State an undue economic burden.⁴³¹ Moreover, the United States sought to deny the binding authority of the court's ruling on the matter in the Corfu Case by classifying it as *obiter dictum*, not intended to state a codifiable rule of law.⁴³²

Paragraph 2 of Article 15 as proposed by the ILC required the coastal State "to give due publicity to any danger to navigation of which it has knowledge."⁴³³ The Conference was concerned that this requirement also was too broad and imposed too great a duty on the coastal State, for it provided that notice be given of dangers regardless of their location. Such a burden was thought to be inordinate and therefore the limitation "within its territorial sea" was added to the final text.⁴³⁴

In adopting the final text of Article 15 the delegates recognized that their formulation differed from that of the court in the Corfu Channel Case but rested their case on practical and economic considerations, and reverted to a more conservative standard of duty for the coastal State, "in order to ensure that the greater duty, which was designed to promote the freedom of innocent passage, should not operate seriously to hinder it."⁴³⁵ The text as adopted also meant that the coastal State was not bound to take affirmative measures to ensure the right of innocent passage. It merely required such State to give appropriate publicity to anything which might affect the safe navigation of foreign vessels within its territorial waters.

The latest effort of the international community to define a coastal State's duties has resulted in the following draft article:⁴³⁶

Article 21

1. The coastal State shall not interrupt or hamper the innocent passage of foreign ships through the territorial

⁴³¹ *Id.*

⁴³² *Id.*, at 78.

⁴³³ *Id.*, at 218.

⁴³⁴ *Id.*

⁴³⁵ Slonim, *supra* note 390, at 111; First Conference, *supra* note 423, at 77-78.

⁴³⁶ 14 Int'l Legal Materials 716 (1975).

sea, and, in particular, in the application of these articles or of any laws or regulations made under the provisions of these articles shall not:

(a) impose requirements on foreign ships which have the practical effect of denying or prejudicing the right of innocent passage; or

(b) discriminate in form or in fact against ships of any State or against ships carrying cargoes to, from or on behalf of any State.

2. The coastal State is required to give appropriate publicity to any dangers in navigation, of which it has knowledge, within its territorial sea.

The above requirements attempted to clarify further a coastal State's duties toward ships engaged in innocent passage, and, if adopted, would place additional requirements on the coastal State to ensure that the right of and policy behind innocent passage are respected. This additional guidance as to the conduct of the coastal State would certainly be a welcomed development in an area of law where existing pronouncements are all too brief, general and incomplete.

The policy that coastal States not interfere with ships in innocent passage is also emphasized in Article 18 of the Territorial Sea Convention. This provision prohibits the coastal State from levying charges on vessels engaged in innocent passage, except for, and on a nondiscriminatory basis, services actually rendered. The provision is identical with the analogous draft article of the 1930 Hague Codification Conference.⁴³⁷ The current provision again acknowledges the economic and commercial importance of the right of innocent passage.

(3) Jurisdiction.

The 1930 Codification Conference and subsequently the ILC sought to avoid promulgating specific rules relating to criminal and civil jurisdiction of the coastal State. They hoped thereby to settle

⁴³⁷Conference for the Codification of International Law, Report of the Second Committee, *Am. J. Int'l L. Supp.* 243 (1930).

the conflict between the inherent jurisdiction of the coastal State over its territorial sea, and the jurisdiction of the flag State over its vessels while in transit over foreign territorial waters. Instead, an attempt was made to establish rules for the coastal states' guidance. The general gist of the drafts provided that the coastal State should, as a general rule, refrain from exercising criminal jurisdiction over passing foreign merchant vessels unless the impact of any crime affected the coastal State or disturbed its peace, good order and tranquility, or unless its assistance was requested by a ship's captain or consul of the flag State. Provision was also made for the suppression of drug traffic.

The drafts further provided that a coastal State *should not*, but still *may* stop or arrest foreign merchant vessels except for civil obligations which attached to the current voyage or in cases of ships leaving internal waters or lying in the territorial sea.⁴³⁸ Government civilian vessels in commercial service were assimilated to the status of merchant vessels and subjected to the jurisdiction rules applicable to merchant ships in general. However, because of the general jurisdictional immunity which attaches to public vessels not operated for commercial purposes and to warships, separate rules were promulgated governing the jurisdictional authority of the coastal State, or lack thereof, over such ships.⁴³⁹

In summary, the codification efforts of the 1930 Hague Conference and the work of the ILC recognized the customary power of the coastal State to exercise its jurisdiction within its territorial waters. Except in cases involving certain categories of public vessels, the Conference and the ILC restricted such power only by exhorting coastal States not to exercise it. Thus, they emphasized that the right of innocent passage is paramount, unless the impact of a crime or civil liability affected the coastal State in some significant manner.

The 1958 Conference adopted the philosophy of its predecessors and recognized the jurisdiction of the coastal State over merchant vessels in its territorial sea. Consistent with the need for accommodation between the claims of that power and the need for free ocean navigation, the Conference documents do not forbid the coastal

⁴³⁸ See generally Walker, *supra* note 390, at 64; First Conference, *supra* note 423, at 87-88.

⁴³⁹ See Lawrence, *supra* note 307, at 74-84, and sources cited thereat.

State to exercise its jurisdiction, but only exhort it to do so in accordance with stated guidelines.

The exercise of criminal jurisdiction on board or in respect to merchant ships or commercially operated government vessels in passage is covered by Articles 19 and 21 of the Territorial Sea Convention.⁴⁴⁰ Obviously, its exercise cannot arise in connection with warships and noncommercial government vessels due to their total immunity from any local jurisdiction.⁴⁴¹ Paragraph 1 of article 19 declares:⁴⁴²

The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

(a) If the consequences of the crime extend to the coastal State; or

(b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; or

(c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or

(d) If it is necessary for the suppression of illicit traffic in narcotic drugs.

Again, the term "should" is inserted in the provision and reflects the fact that the rule enunciated represents contemporary international practice rather than law. Practice rather than law is also reflected in sub-sections (a), (b) and (c) in that, in general, matters affecting primarily the internal discipline and order of a vessel, and not affecting the coastal State or its territorial waters, should not

⁴⁴⁰The increasing tendency of some governments to own and operate vessels for commercial purposes would otherwise render a large portion of commercial shipping immune from local jurisdiction. Because of this, the 1958 Conference proposed to assimilate the status of such vessels to that of privately owned merchant vessels. Article 21 therefore provides: "The rules in sub-sections A and B shall also apply to government ships operated for commercial purposes." Territorial Sea Convention, *supra* note 262.

⁴⁴¹See Fitzmaurice, *Geneva Conference*, *supra* note 262, at 103.

⁴⁴²Territorial Sea Convention, *supra* note 262.

be made a basis for stopping, arresting or otherwise interfering with a foreign ship in mere passage.⁴⁴³ The fact situations outlined in these sub-sections also reflect instances in which the crime or a situation calling for interference will, in all probability, be known to the authorities of the coastal State. In all or most other cases, it is unlikely that coastal authorities will have knowledge of such matters from the fact of mere passage, unless their attention is specifically drawn to them.⁴⁴⁴ Sub-section (a) represents a new addition which reflects a growing international concern and practice.

Paragraph 2 of Article 19 provides, "The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters."⁴⁴⁵ In the vast majority of these cases, interference by a coastal State will likely be connected with events occurring while the ship was in port or in internal waters.

Paragraph 3 of Article 19 in effect provides that, if a ship's captain so requests, coastal authorities must notify the flag State's local consular authority before taking any steps in cases mentioned in paragraphs 1 and 2, except that, in an emergency situation, such steps may be taken simultaneously with the notification. The provision further requires the coastal State to facilitate contact between the vessel's crew and the consular authorities.⁴⁴⁶

Paragraph 4 of Article 19 states that, "In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation."⁴⁴⁷ It is unfortunate that the provision, while emphasizing the importance attached to the freedom of navigation and the right of innocent passage, does not set forth a specific standard for coastal States to follow in considering whether an arrest should be made. That is, should the decision be based on "probable cause," "mere suspicion" or some other similar standard? For that matter, the Convention is also silent as to whether an investigation should be conducted or search made on board a ship in passage, or whether the ship should be detained or otherwise interfered with.

⁴⁴³ See Fitzmaurice. *Geneva Conference*, *supra* note 262, at 104.

⁴⁴⁴ *Id.*, at 104-05.

⁴⁴⁵ Territorial Sea Convention. *supra* note 262.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

It is further submitted that customary law, which is supposedly reflected by the Convention, is also silent in this regard. This is unlike the legal regime of the high seas, where standards such as "reasonable grounds for suspecting,"⁴⁴⁸ "on suspicion,"⁴⁴⁹ and "good reason to believe"⁴⁵⁰ can be found.

It would seem, therefore, that the local governing law must be consulted for such standards in cases arising in the territorial sea. This is due in part to the fact that a coastal State retains inherent sovereignty within its territorial waters, and thus the general power and authority to administer these waters as it sees fit. It follows, then, that its laws have general application within this maritime belt. Yet there are those instances where local laws are either lacking, inadequate or suppressive of international rights and law. In these instances, there is a need for international guidance.

Surely no one would contend that a coastal State may act in an arbitrary and capricious manner with respect to ships in passage. This may be inferred from the general tenor of the Convention on the Territorial Sea and the Contiguous Zone and is ingrained in the concept of innocent passage. It would seem to follow then that any significant interference with a ship in passage should only be undertaken if, at a minimum, there exists some reasonable ground for suspecting that the ship either is not engaged in innocent passage or has attempted or is attempting to violate local laws or regulations. This minimum standard of suspicion is evident in the practice of States⁴⁵¹ and serves to deter arbitrary and abusive conduct.

The final paragraph of Article 19 prohibits a coastal State from taking any measures on board a foreign vessel passing through its territorial sea to arrest a person or conduct an investigation in connection with a crime committed before the ship entered its territo-

⁴⁴⁸ For example, see art. 22, Convention on the High Seas, *supra* note 192, which deals with the interference of merchant ships on the high seas. See also H. Smith, *supra* note 168, at 64-65.

⁴⁴⁹ See art. 20, Convention on the High Seas, *supra* note 192, dealing with the suppression of piracy. See also H. Smith, *supra* note 168, at 64-63.

⁴⁵⁰ See art. 23, Convention on the High Seas, *supra* note 192, dealing with "hot pursuit."

⁴⁵¹ For example, see H. Smith, *supra* note 168, at 26; Vattel's comment in C. Colombos, *supra* note 169, at 114; *id.*, at 123; National Legislation and Treaties Relating to the Law of the Sea, U.N.L.S. at 123, 144, (1964); notes 448-50, *supra*, and text thereat; and, generally, P. Jessup, *supra* note 263, at 211-279.

rial waters. This prohibition is effective provided the vessel entered such waters from a foreign port and is only passing through those waters without entering the internal waters of the coastal State.⁴⁵²

With regard to the exercise of civil jurisdiction over ships in passage, the convention deals with two types of cases: (i) jurisdiction over persons on board the ship; and (ii) jurisdiction over the ship itself. Paragraph 1 of Article 20 provides that the coastal State "should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship."⁴⁵³ The word "should" is again inserted, and for the same reason as given for the exercise of criminal jurisdiction.⁴⁵⁴

Paragraphs 2 and 3 of Article 20 provide that except in the case of a vessel lying at anchor in a coastal State's territorial waters, or passing through such waters after leaving internal waters, a ship in passage may not be arrested or execution levied against it. An exception is made for enforcement of obligations assumed or liabilities incurred explicitly for the purpose or in the course of traversing the territorial sea.⁴⁵⁵

C. VALIDITY AND APPRAISAL

The concept of innocent passage of foreign ships through the territorial sea of a coastal State has application in the Mayaguez incident. Without question, a foreign ship (a United States merchant vessel) was seized by a coastal State (Cambodia) while in transit in the Gulf of Thailand (Siam).⁴⁵⁶ In addition, considering contemporary international law and practice, it is clear that the seizure occurred within the territorial waters of Cambodia.⁴⁵⁷

Some may contend the right of innocent passage is not applicable on the grounds that it applies only in time of peace, and that in the present case the existing state of affairs was less than peaceable.⁴⁵⁸

⁴⁵² Territorial Sea Convention, *supra* note 262.

⁴⁵³ *Id.*

⁴⁵⁴ See text at note 443, *supra*.

⁴⁵⁵ Territorial Sea Convention, *supra* note 262.

⁴⁵⁶ See text at notes 10-37 *supra*.

⁴⁵⁷ Text at § V.C. of this article, *supra*.

⁴⁵⁸ See text at note 372, *supra*.

It may be recalled, though, that the 1958 Conference on the Law of the Sea did not attempt to deal with the question "one way or the other," and the Territorial Sea Convention itself is silent in this regard.⁴⁵⁹ Furthermore, judicial authority in the Corfu Channel Case not only applied the principle of innocent passage in a less than peaceable atmosphere, but found the right to exist in a rather hostile environment.⁴⁶⁰

It is also significant to note some similarities between the Corfu and Mayaguez incidents. In the former, Great Britain's warships were found to be in innocent passage through Albanian territorial waters in one instance. This finding was reached notwithstanding the fact that the British were making a show of force to test Albania's peaceableness. Great Britain supported Greece in its hostilities against Albania.⁴⁶¹ In the latter case, the United States had supported the former government of Cambodia in its hostilities with the present government.⁴⁶²

The principle of innocent passage also found application in the United Nations debates following Egypt's announcement that it would prevent Israeli ships and other vessels carrying strategic cargo to Israel from transiting the Straits of Tiran at the entrance of the Gulf of Aquaba.⁴⁶³ Here also, the two principle participants were at least *de facto* in a state of hostility.

Admittedly, the conditions at the time of the Mayaguez seizure were less than peaceable. The civil war in Cambodia had climaxed less than a month prior to the seizure, with the surrender of the United States supported government of Lon Nol.⁴⁶⁴ Pockets of resistance reportedly continued to present a problem for the new government.⁴⁶⁵ Harsh measures of control, reconstruction, and consolidation were then being implemented by the new regime upon the civilian population and its former enemies.⁴⁶⁶ Sporadic border clashes had erupted between Cambodia and its neighbors, Thailand

⁴⁵⁹Text at note 373, *supra*.

⁴⁶⁰See note 377, *supra* and text thereat.

⁴⁶¹*Id.*

⁴⁶²See note 1, *supra* and text thereat.

⁴⁶³Text at note 375-76, *supra*.

⁴⁶⁴See text at notes 1-5, *supra*.

⁴⁶⁵Post, Aug. 21, 1975, at A-3.

⁴⁶⁶See 72 Dep't State Bull. 725 (1975); Post, June 25, 1975, at A-26; The Daily Progress, Charlottesville, Va. May 4, 1976, at A-11; *supra* note 47.

and Vietnam, over disputed claims to offshore islands and frontier and sea boundaries.⁴⁶⁷ Finally, "outsiders" were prevented from observing or reporting the conditions and state of affairs then existing inside Cambodia.⁴⁶⁸

Yet, no *de facto* state of belligerency existed, or was claimed to exist, in Cambodia's foreign relations.⁴⁶⁹ Cambodian authorities, while alleging that the United States had committed certain unlawful acts within and against its territory, adhered "to a stand of peace and neutrality" in the dispute.⁴⁷⁰ Furthermore, the general nature of the United States claims clearly indicates that it also chose to treat the incident as a peacetime situation.⁴⁷¹

In the final analysis, it is apparent that the exclusive peacetime application argument of innocent passage must yield to others which promote, preserve and protect, rather than restrict, the right of innocent passage. This right includes the underlying inclusive interests commonly shared by the international community. Otherwise the potential would exist for success of claims based on political expedience, convenience, or desirability.

To further appraise the validity of the United States claim to the right of and actual engagement in innocent passage, it will be necessary to compare the four aspects of innocent passage discussed above against the factual situation laid out previously in section 1.

Concerning the question of passage, there is no evidence to indicate that the Mayaguez entered Cambodian territorial waters for purposes other than to pass through such waters en route to a port in Thailand.⁴⁷² The ship was also traversing a recognized international shipping lane.⁴⁷³ Considering that ships often use land marks for navigational purposes, it is also understandable, in view of its position in the Gulf of Thailand, that the Mayaguez was in close

⁴⁶⁷ See Post, June 25, 1975, at A-26, col. 1-2; June 24, 1975, at A-13; Aug. 14, 1975, at A-14.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Supra* note 50; *infra* Appendix C.

⁴⁷⁰ *Id.* See also Cambodian Foreign Minister Sary's comments in Post. Sept. 8, 1975, at A-16, col. 1.

⁴⁷¹ Text, *supra* at § III of this article; United States letters protesting the seizure to the United Nations, Appendix B, *infra*.

⁴⁷² Text at notes 10-22 *supra*.

⁴⁷³ See map, World Shipping Lanes, No. 564371. U.S. Dep't of State, Office of the Geographer, Dec. 1974.

proximity to the island of Poulo Wai.⁴⁷⁴ Finally, the route taken by the *Mayaguez* to accomplish passage to Cambodia's territorial sea does not appear to be one which required an undue amount of time to traverse.⁴⁷⁵

After having determined that the *Mayaguez* entered Cambodian territorial waters for purposes of mere passage, it would hardly be possible to maintain that the conduct or character of its passage was non-innocent, if such claim is based solely on the ship's activity within such waters. In most instances, activity of a character contrary to the peace, good order or security of the coastal State will involve the use of the territorial sea for purposes other than mere passage.

Cambodia's claim that the ship entered its territorial waters for the purpose of conducting espionage and "provoking incidents" lacks any evidentiary support, and consequently must be regarded as pure speculation.⁴⁷⁶ The fact that the claim was speculative can be gleaned from Cambodia's May 15th communique offering to release the *Mayaguez*, which states in part, "what was the intention, the reason, for this ship entering our territorial waters? We are convinced that this American ship did not lose its way, because the Americans have radar, electronic and other most sophisticated scientific instruments." (The ship's radar had in fact broken down.)⁴⁷⁷ "It is therefore evident that this ship came to violate our waters, conduct espionage and provoke incidents. . . ." ^{478, 479}

Yet this entry by itself does not demonstrate conduct prejudicial to the peace, good order or security of Cambodia.⁴⁸⁰ In fact, there is no indication that Cambodian authorities ever directed their attention to the matter or used the absence of a display of national colors

⁴⁷⁴ See map, Appendix A, *infra*; text at notes 17-23, *supra*.

⁴⁷⁵ See map, *supra*; text at note 385 *supra*.

⁴⁷⁶ See text of Cambodian communique, Appendix C, *infra*. No evidence could be found in this writer's investigation of the facts and circumstances surrounding the incident to lend support to Cambodia's claim of espionage. See § II of this article, *supra*.

⁴⁷⁷ Text at note 36, *supra*.

⁴⁷⁸ Appendix C, *infra*. For another example of such speculation, see second to last paragraph.

⁴⁷⁹ See note 139, *supra*.

⁴⁸⁰ See text at notes 394-98 *supra*.

as a basis for any of their actions relating to the seizure of the Mayaguez. In any case, any such infraction would be viewed as falling within the provision of the second sentence of paragraph 4 of Article 14 of the Territorial Sea Convention. This provision does not render passage non-innocent without showing something beyond the mere infraction which could be considered to taint the passage even if there happened not to be any specific domestic law or regulation under which such act was illegal.⁴⁸¹

Inquiry has focused on the nature of the cargo or other items aboard the Mayaguez which might reasonably be considered to affect the innocence of its passage.⁴⁸² Yet, except for a mace gun which the ship's captain possessed for use in the event members of his crew got out of hand, the Mayaguez was not found to have been carrying any weapons, ammunition, explosive, surveillance equipment or other items which might be reasonably characterized as instruments of war or espionage, and, therefore, arguably prejudicial to the peace, good order or security of Cambodia. Instead, the cargo and other items on board consisted of equipment, material and supplies ordinarily found on merchant ships engaged in peacetime commerce.

The only military-related connection of some of the cargo was that it was destined for United States government personnel stationed in Thailand.⁴⁸³ Cambodian authorities seemed however not to be concerned with this fact, but only with whether the ship contained a cache of weapons, ammunition or explosives, regardless of their intended destination.⁴⁸⁴

It may be concluded that the Mayaguez presented no threat to Cambodia either in its cargo or other items on board, in its manner of sailing, or in its activities within Cambodian territorial waters. However, the question remains whether its passage may still be considered prejudicial to the peace, good order or security of Cambodia for reasons that are not based on any of the ship's activities actually occurring within its territorial waters. It may be recalled that this aspect places emphasis on the object of passage rather

⁴⁸¹ See text at notes 396-98 *supra*.

⁴⁸² For instance, see text at notes 28, 36, 66, 106-09, 148-49, *supra*; 72 Dep't State Bull. 736 (1976).

⁴⁸³ See notes 14-16, *supra* and text thereat.

⁴⁸⁴ See note 482. *supra*.

than on its manner.⁴⁸⁵ In the case at hand, the object of the passage was merely to engage in lawful commerce.⁴⁸⁶ This would hardly seem prejudicial to Cambodia's peace, good order or security, either under existing law or under the draft provisions of Article 16(2) of the negotiating text for a new United Nations convention relating to the law of the territorial sea and the contiguous zone. These documents attempt to specify activities which may be deemed prejudicial to essential interests of a coastal State.⁴⁸⁷

It has already been determined in respect to the obligation of the Mayaguez to comply with the laws and regulations of Cambodia that no infraction occurred which would affect innocent passage. Yet Cambodia claimed that the ship violated its territorial waters.⁴⁸⁸ This claim can be interpreted in at least two ways. First, it might refer to Cambodia's claim of espionage, which has already been determined to be without merit. Second, it can mean that the Mayaguez had trespassed on Cambodia's territorial sea, which presupposes that Cambodia had considered these waters closed to navigation, either in general or on a discriminatory basis.

In the latter instance, it is obvious that any such closing would be destructive of the right of innocent passage of foreign ships through Cambodia's territorial sea. Therefore, such a closing is prohibited by both conventional and customary international law.⁴⁸⁹

Closing would not be prohibited if it could be shown that such a closing was a properly exercised suspension of the right of innocent passage.⁴⁹⁰ In this case, however, any claimed suspension would not have been valid. Assuming for the sake of argument that the other qualifications to which the right of suspension is subject are met,⁴⁹¹ the suspension can only be effected after due notification of it has been given, including specific reference to the areas suspended. In

⁴⁸⁵ See text at notes 399-402, *supra*.

⁴⁸⁶ Text at notes 10-16, *supra*.

⁴⁸⁷ Text at notes 399-404, *supra*.

⁴⁸⁸ See Cambodian communique, Appendix C, cols. 2 & 3, *infra*.

⁴⁸⁹ See text at notes 412-14, 428, 436, *supra*.

⁴⁹⁰ See generally, text at notes 417-27, *supra*. The comments of Cambodian Foreign Minister Sary, which attempt to shift responsibility for the seizure to local authorities, also impliedly discount any claim that Cambodia had exercised its right to suspend innocent passage. See text at note 164, *supra*.

⁴⁹¹ See text following note 427, *supra*.

the present case, Cambodia had not made any such publication either before or after the seizure.⁴⁹²

The final aspect of innocent passage is the exercise of jurisdiction on board or in respect of foreign merchant ships in passage. It is clear in this case that no crime or civil liability arose in respect to the *Mayaguez* which would justify the actions taken by Cambodia against the ship and its crew. Nor does it appear from the nature of the ship's sailing activities that there was any reason to suspect any crime or civil liability.

If read carefully, the Cambodian communique offering to release the *Mayaguez* also lends support to this finding. If the propaganda and unfounded allegations of espionage, provocative activities, and trespass are disregarded, the statement then reflects that the measures taken by Cambodia were merely exploratory in nature. To put it in other terms, the statement indicates that the local authorities were solely on a so-called "fishing expedition."⁴⁹³ Even Cambodia's leaders in Phnom Pehn questioned the seizure upon learning of it and subsequently ordered the ship's immediate release.⁴⁹⁴

It may be argued that the rather unstable and tense atmosphere then existing in the Gulf of Thailand called for reasonable security measures on the part of Cambodia.⁴⁹⁵ Such measures could include the boarding of passing vessels to confirm their character, determine their destination, and examine their cargo manifests. Nevertheless, the initial inquiry did not produce at least some reasonable grounds for suspecting conduct prejudicial to the security interests of Cambodia.⁴⁹⁶ Consequently, any further measures restricting passage must be considered arbitrary and capricious, abusive of the right of innocent passage, and clearly, an unlawful use of force.⁴⁹⁷

Since the facts fit each of the various attributes of innocent passage, it follows that the claim of the United States to the right of and actual engagement in innocent passage must stand as valid.

⁴⁹² *Id.*

⁴⁹³ See Appendix C.

⁴⁹⁴ Text at note 164, *supra*.

⁴⁹⁵ See text at notes 464–68, *supra*; note 378, *supra*, and text thereat.

⁴⁹⁶ Text at notes 28–36 *supra*.

⁴⁹⁷ See text at notes 447–51. *supra*.

VII. CONCLUSION TO PART I

In part I of this case study, an account has been given of the seizure of the United States merchant vessel *Mayaguez* and its recovery. An effort has been made to describe, analyze, and determine the validity of a series of claims or arguments made by the United States to justify its recovery of the *Mayaguez* by force from the Cambodian authorities. The result of this effort is set forth below.

First, the assertion that the seizure of the *Mayaguez* was an act of piracy is invalid. As Article 15 of the 1958 Convention on the High Seas makes clear, piracy consists of illegal acts of violence committed "on the high seas" for "private ends" by the crew of a "private ship"—not by a governmental vessel, for a governmental purpose, in claimed territorial waters. The failure to consult and rely on international lawyers, as well as the political basis for the assertion, is apparent from the analysis of this claim.

Second, the claim that the *Mayaguez* was seized on the high seas likewise cannot stand in light of past trends and the present practice of the international community of States. If any rule regarding the extent of territorial seas exists today, it is a 12-mile rule, which would bring the *Mayaguez* within claimed Cambodian territorial waters at the time of the seizure. The analysis of this claim further indicates a need for the international community to agree by way of an international convention on the extent of territorial waters for all nations in order to prevent disputes of this nature from arising in the future.

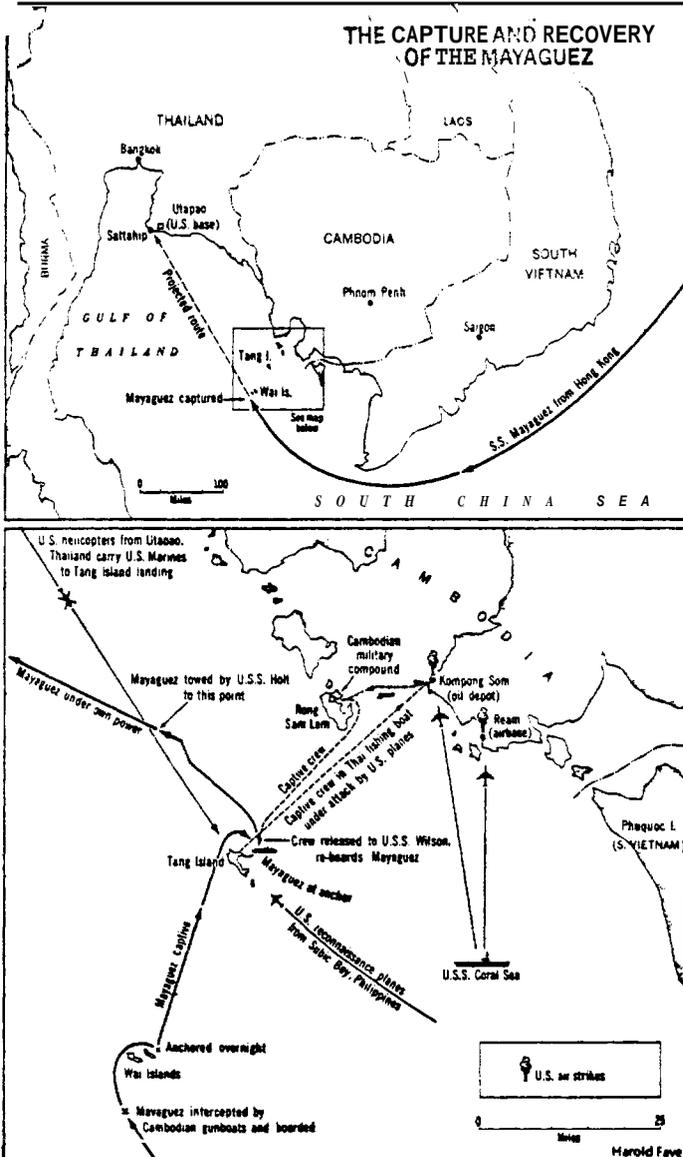
Third, the validity of the United States claim to the right of an actual engagement in innocent passage is apparent from the analysis, as is the unlawful and serious conduct of the Cambodian authorities in infringing upon this right. In addition, the treatment of this claim points up the present generalities of the law on the subject of innocent passage and the need to further clarify the character of innocent passage, as well as the rights and obligations of both the coastal and flag State in respect to it.

Part II of this study will examine additional United States claims and justifications. The use of armed force to rescue the crew and recover the *Mayaguez* will be considered. Specifically, attention will

be focussed first on the claim of the United States that it acted in self-defense to protect its nationals and their property. Next, the study will discuss the propriety under international law of the particular measures used by the United States in both the interdiction and the rescue and recovery operations.

APPENDIX A

(This map was originally published as the frontispiece to Roy Rowan, Four Days of Mayaguez (1975). It is reproduced here with Mr. Rowan's kind permission.)



APPENDIX B

[74 Dep't of State Bull. 720 (1975)]

U.S. LETTER TO U.N. SECRETARY GENERAL. MAY 14

USUN press release 40 dated May 14:

Dear Mr. Secretary General: The United States Government wishes to draw urgently to your attention the threat to international peace which has been posed by the illegal and unprovoked seizure by Cambodian authorities of the U.S. merchant vessel, *Mayaguez*, in international waters.

This unarmed merchant ship has a crew of about forty American citizens.

As you are no doubt aware, my Government has already initiated certain steps through diplomatic channels, insisting on immediate release of the vessel and crew. We also request you to take any steps within your ability to contribute to this objective.

In the absence of a positive response to our appeals through diplomatic channels for early action by the Cambodian authorities, my Government reserves the right to take such measures as may be necessary to protect the lives of American citizens and property, including appropriate measures of self-defense under Article 51 of the United Nations Charter.

Accept, Mr. Secretary General, the assurances of my highest consideration.

Sincerely,

JOHN SCALI

[*U.S. Representative to the United Nations*]

U.S. LETTER TO U.N. SECURITY COUNCIL
PRESIDENT, MAY 14

My Government has instructed me to inform you and the Members of the Security Council of the grave and dangerous situation

brought about by the illegal and unprovoked seizure by Cambodian authorities of a United States merchant vessel, the S.S. Mayaguez, in international waters in the Gulf of Siam.

The S.S. Mayaguez, an unarmed commercial vessel owned by the Sea-Land Corporation of Menlo Park, New Jersey, was fired upon and halted by Cambodian gunboats and forcibly boarded at 9:16 p.m. (Eastern Daylight Time) on May 12. The boarding took place at 09 degrees, 48 minutes north latitude, 102 degrees, 58 minutes east longitude. The vessel has a crew of about 40, all of whom are United States citizens. At the time of seizure, the S.S. Mayaguez was en route from Hong Kong to Thailand and was some 52 nautical miles from the Cambodian coast. It was some 7 nautical miles from the Islands of Poulo Wai which, my Government understands, are claimed by both Cambodia and South Viet-Nam.

The vessel was on the high seas, in international shipping lanes commonly used by ships calling at the various ports of Southeast Asia. Even if, in the view of others, the ship were considered to be within Cambodian territorial waters, it would clearly have been engaged in innocent passage to the port of another country. Hence, its seizure was unlawful and involved a clearcut illegal use of force.

The United States Government understands that at present the S.S. Mayaguez is being held by Cambodian naval forces at Koh Tang Island approximately 15 nautical miles off the Cambodian coast.

The United States Government immediately took steps through diplomatic channels to recover the vessel and arrange the return of the crew. It earnestly sought the urgent cooperation of all concerned to this end, but no response has been forthcoming. In the circumstances the United States Government has taken certain appropriate measures under Article 51 of the UN Charter whose purpose it is to achieve the release of the vessel and its crews.

I request that this letter be circulated as an official document of the Security Council.

Sincerely,

JOHN SCALI

[U.S. Representative to the United Nations]

APPENDIX C

*35 Facts on File 331 (1975)*MAY 15 CAMBODIAN COMMUNIQUE OFFERING
TO RELEASE THE MAYAGUEZ

Since we liberated Phnom Penh and the entire country, U.S. imperialism has conducted repeated, successive intelligence and espionage activities with a view to committing subversion, sabotage, and provocation against the newly liberated New Cambodia in an apparent desire to deny the Cambodian nation and people, who have suffered all manner of hardships and grief for more than five years because of the U.S. imperialist war of aggression, the right to survive, to resolve the problems of their economy and build their country on the basis of independence and initiative as an independent, powerful, neutral and nonaligned nation. Secondly, the U.S. imperialists have tried to block our sea routes and ports as part of the above-mentioned strategic goal.

In the air, U.S. imperialist planes have been conducting daily espionage flights over Cambodia, especially over Phnom Penh, Sihanoukville, Sihanoukville port and Cambodia's territorial waters. They even resorted to an insolent show of force, trying to intimidate the Cambodian people. On the ground, U.S. imperialism has planted its strategic forces to conduct subversive, sabotage and destructive activities in various cities by setting fire to our economic, strategic and military positions and so forth.

On the sea, it has engaged in many espionage activities. U.S. imperialist spy ships have entered Cambodia's territorial waters and engaged in espionage activities there almost daily, especially in the areas of Sihanoukville port, from Pring Tang and Wai Island, to Pres Island, south of Sihanoukville.

These ships have been operating as fishing vessels. There have been two or three of them entering our territorial waters daily. They have secretly landed Thai and Cambodian nationals to contact their espionage agents on the mainland. Those who were captured have confessed all of this to us.

Some ships carry dozens of kilograms of plastic bombs and several radio-communication sets with which they try to arm their agents to

sabotage and destroy our factories, ports, and economic, strategic and military positions. These persons have successively confessed to us that they are CIA agents based in Thailand and that they entered Cambodia's territorial waters through Thai waters.

On May 11, 1975, our naval patrol captured one ship near Prince Island facing Sihanoukville port. This ship, disguised as a fishing boat, was manned by a crew of seven heavily armed Thais carrying, among other things, two 12.7-mm machine guns and a quantity of plastic bombs, grenades and mines. At the same time, we found a powerful U.S.-built radio-teletype set capable of maintaining communications from one country to another.

These people have admitted that they are CIA agents sent out to conduct sabotage activities and to make contact with the forces set up and planted by U.S. imperialism before it withdrew from Cambodia. Later on, at dawn on 12 May, another ship manned by seven Thai nationals and disguised as a fishing vessel reached Pres Island near Sihanoukville port with the same intention as the previous ships. These ships were operating in the territorial waters of Cambodia. At certain points they moved within only four or five kilometers from the coast, at other times they even accosted Cambodian islands and landed at these islands. Such was the case at Pring, Pres, Teng and other islands.

This is a definite encroachment on Cambodia's sovereignty—an encroachment they dare to make because they are strong and because Cambodia is a small and poor country with a small population that has just emerged from the U.S. imperialist war of aggression lacking all and needing everything. The Cambodian nation and people, though just emerging from [the] U.S. imperialist war of aggression and needy as they are, are determined to defend their territorial waters, national sovereignty and national honor in accordance with the resolutions of the N.U.F.C. (National United Front of Cambodia) and of the successive national congresses. Accordingly, Cambodia's coast guard has never ceased its relentless patrols inside Cambodia's territorial waters.

As part of the U.S. imperialists' espionage activities in our territorial waters, on May 7, 1975, a large vessel in the form of a merchant ship flying the Panamanian flag entered deeply into Cambodian territorial waters between Wai and Tang Islands and intruded

about 50 kilometers past Wai Island coastward. Seeing that this ship had intruded too deeply into Cambodian territorial waters, our patrol then detained it in order to examine and question the crew and then report to higher authorities, who would in turn refer the matter to the R.G.N.U.C. (Royal Government of the National Union of Cambodia) for a decision. We did not even bother to inquire about the ship's cargo.

The crew was composed of Thais, Taiwanese, Filipinos and Americans. It was evident that this ship, having intentionally violated Cambodian territorial waters, had only two possible goals: either to conduct espionage or to provoke incidents. It certainly did not lose its way. If it did it would not have entered our waters so deeply. However, the R.G.N.U.C. has decided to allow this ship to continue its route out of Cambodia's territorial waters. This is clear proof of our goodwill. Though this ship had come to provoke us inside our territorial waters we still showed our goodwill.

Then on 12 May 1975 at 1400 our patrol sighted another large vessel steaming toward our waters. We took no action at first. This ship continued to intrude deeper into our waters, passing the Wai Islands eastward to a point four or five kilometers beyond the islands. Seeing that this ship intentionally violated our waters, our patrol then stopped it in order to examine and question it and report back to our higher authorities so that the latter could report to the Royal Government. This vessel sails in the form of a merchant ship code-named *Mayaguez*, flying American flags and manned by an American crew.

While we were questioning the ship, two American F-105 aircraft kept circling over the ship and over the Wai and Tang Islands until evening. From dawn on 13 May between four and six American F-105's and F-111's took turns for 24 hours savagely strafing and bombing around the ship, the Wai and Tang Islands and Sihanoukville port area. At 0530 on 14 May six U.S. F-105 and F-111 aircraft resumed taking turns strafing and bombing. According to a preliminary report, two of our patrol vessels were sunk. We still have had no precise idea of the extent of the damage done or the number killed among our patrolmen and the American crewmen.

What was the intention, the reason, for this ship entering our territorial waters? We are convinced that this American ship did not

lose its way, because the Americans have radar, electronic and other most sophisticated scientific instruments. It is therefore evident that this ship came to violate our waters, conduct espionage and provoke incidents to create pretexts or mislead the opinion of the world people, the American people and the American politicians, pretending that the Cambodian nation and people are the provocateurs while feigning innocence on their part.

The world peoples, the American people and the American politicians have already seen the U.S. imperialists successfully bullying the peoples of small countries who refused to bow to their will. The U.S. imperialists used to bully Russia in the past. Cuba, China, North Korea, North Vietnam and other countries having independence and honor were also bullied by them. Now they have created the incident in Cambodian territorial waters to create a pretext for attacking the Cambodian nation and people. However, we are confident that the world peoples, as well as the American people, youth and politicians who love peace and justice will clearly see that the Cambodian people—a small, poor and needy people just emerging from the U.S. imperialist war of aggression—have no intention and no wherewithal, no possibility of capturing an American ship crossing the open seas at large. We were able to capture it only because it had violated our territorial waters too flagrantly, and had come too close to our nose.

Therefore, the charge leveled by the U.S. imperialists—that we are sea pirates—is too much. On the contrary, it is the U.S. imperialists who are the sea pirates who came to provoke the Cambodian nation and people in Cambodian territorial waters, just as they had only formented subversion in our country, staged a coup d'état destroying independent, peaceful and neutral Cambodia, and committed aggression against Cambodia causing much destruction and suffering. Now they are looking for pretexts to deceive world opinion and that of the American people and politicians so as to destroy a country which refuses to bow to their will. We are confident in the good sense of the world peoples and the American people, youth and politicians who love peace and justice.

Regarding the Mayaguez ship, we have no intention of detaining it permanently and we have no desire to stage provocations. We only wanted to know the reason for its coming and to warn it against violating our waters again. This is why our coast guard

seized this ship. Their goal was to examine it, question it and make a report to higher authorities who would then report to the Royal Government so that the Royal Government could itself decide to order it to withdraw from Cambodia's territorial waters and warn it against conducting further espionage and provocative activities. This applies to this Mayaguez ship and to any other vessels like the ship flying Panama flags that we released on May 7, 1975.

Wishing to provoke no one or to make trouble, adhering to the stand of peace and neutrality, we will release this ship, but we will not allow the U.S. imperialists to violate our territorial waters, conduct espionage in our territorial waters, provoke incidents in our territorial waters or force us to release their ships whenever they want, by applying threats.

Hu Nim
R.G.N.U.C. Information and
Propaganda Minister

APPENDIX D

[74 Dep't of State Bull. 721-22 (1975)]

STATEMENT BY WHITE HOUSE PRESS
SECRETARY, MAY 14

White House press release dated May 14:

In further pursuit of our efforts to obtain the release of the S.S. *Mayaguez* and its crew, the President has directed the following military measures, starting this evening Washington time:

—U.S. marines to board the S.S. *Mayaguez*.

—U.S. marines to land on Koh Tang Island in order to rescue any crew members as may be on the island.

— Aircraft from the carrier *Coral Sea* to undertake associated military operations in the area in order to protect and support the operations to regain the vessel and members of the crew.

MESSAGE TO THE CAMBODIAN AUTHORITIES FROM THE
U.S. GOVERNMENT, MAY 14

White House press release dated May 14:

We have heard radio broadcast that you are prepared to release the S.S. *Mayaguez*. We welcome this development, if true.

As you know, we have seized the ship. As soon as you issue a statement that you are prepared to release the crew members you hold unconditionally and immediately, we will promptly cease military operations.

STATEMENT BY PRESIDENT FORD, MAY 15

[Made in the press briefing room at the White House at 12:27 a.m. e.d.t., broadcast live on television and radio. Text is from the White House press release.]

At my direction, United States forces tonight boarded the American merchant ship S.S. *Mayaguez* and landed at the Island of Koh Tang for the purpose of rescuing the crew and the ship, which had been illegally seized by Cambodian forces. They also conducted supporting strikes against nearby military installations.

I have now received information that the vessel has been recovered intact and the entire crew has been rescued. The forces that have successfully accomplished this mission are still under hostile fire but are preparing to disengage.

I wish to express my deep appreciation and that of the entire nation to the units and the men who participated in these operations for their valor and for their sacrifice.

PRESIDENT FORD'S LETTER TO THE CONGRESS, MAY 15

[Identical letters were sent to the Speaker of the House and the President pro tempore of the Senate. Text is from the White House press release.]

May 15, 1975

DEAR MR. SPEAKER: (DEAR MR. PRESIDENT PRO TEM:)

On 12 May 1975, I was advised that the S.S. *Mayaguez*, a merchant vessel of United States registry en route from Hong Kong to Thailand with a U.S. citizen crew, was fired upon, stopped, boarded, and seized by Cambodian naval patrol boats of the Armed Forces of Cambodia in international waters in the vicinity of Poulou Wai Island. The seized vessel was then forced to proceed to Koh Tang Island where it was required to anchor. This hostile act was in clear violation of international law.

In view of this illegal and dangerous act, I ordered, as you have been previously advised, United States military forces to conduct the necessary reconnaissance and to be ready to respond if diplomatic efforts to secure the return of the vessel and its personnel were

not successful. Two United States reconnaissance aircraft in the course of locating the Mayaguez sustained minimal damage from small firearms. Appropriate demands for the return of the Mayaguez and its crew were made, both publicly and privately, without success.

In accordance with my desire that the Congress be informed on this matter and taking note of Section 4(a)(1) of the War Powers Resolution, I wish to report to you that at about 6:20 a.m., **13** May, pursuant to my instructions to prevent the movement of the Mayaguez into a mainland port, U.S. aircraft fired warning shots across the bow of the ship and gave visual signals to small craft approaching the ship. Subsequently, in order to stabilize the situation and in an attempt to preclude removal of the American crew of the Mayaguez to the mainland, where their rescue would be more difficult, I directed the United States Armed Forces to isolate the island and interdict any movement between the ship or the island and the mainland, and to prevent movement of the ship itself, while still taking all possible care to prevent loss of life or injury to the U.S. captives. During the evening of **13** May, a Cambodian patrol boat attempting to leave the island disregarded aircraft warnings and was sunk. Thereafter, two other Cambodian patrol craft were destroyed and four others were damaged and immobilized. One boat, suspected of having some U.S. captives aboard, succeeded in reaching Kompong Som after efforts to turn it around without injury to the passengers failed.

Our continued objective in this operation was the rescue of the captured American crew along with the retaking of the ship Mayaguez. For that purpose, I ordered late this afternoon [May 14] an assault by United States Marines on the island of Koh Tang to search out and rescue such Americans as might still be held there, and I ordered retaking of the Mayaguez by other marines boarding from the destroyer escort HOLT. In addition to continued fighter and gunship coverage of the Koh Tang area, these marine activities were supported by tactical aircraft from the CORAL SEA, striking the military airfield at Ream and other military targets in the area of Kompong Som in order to prevent reinforcement or support from the mainland of the Cambodian forces detaining the American vessel and crew.

At approximately 9:00 P.M. EDT on **14** May, the Mayaguez was

retaken by United States forces. At approximately 11:30 P.M., the entire crew of the Mayaguez was taken aboard the WILSON. U.S. forces have begun the process of disengagement and withdrawal.

This operation was ordered and conducted pursuant to the President's constitutional Executive power and his authority as Commander-in-Chief of the United States Armed Forces.

Sincerely,
GERALD R. FORD

WAR CRIMES OF THE AMERICAN REVOLUTION*

Captain George L. Coil**

In this article on a topic of legal history, Captain Coil has presented the results of original research into the attitudes and practices of various British and American commanders during the American revolution when confronted with actions of their subordinates against prisoners of war and enemy civilians. Surprisingly, such actions were regarded as crimes, and were often punished, sometimes quite severely.

But does such behavior on the part of commanders show that they felt a legal obligation to protect the lives and property of prisoners and enemy civilians under their control? Is it not possible that they were interested more in maintaining discipline?

The situation was somewhat complex. Certainly, concepts of the law of war were far less well developed and far more informal than they had become by, for example, the first World War, not to mention the mushrooming of international law in all its branches today. But, at the same time, practices of the late eighteenth century, whether grounded in law or mere custom, were far too consistent and far too frequently repeated not to have some significance beyond internal control of one's own troops.

I. INTRODUCTION

Active hostilities of the American Revolution are usually considered to have begun with the battles of Lexington and Concord

*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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fought on April 19, 1775. Reports of war crimes began with these engagements. Earl Percy, the commander of the British relief force, asserted that some of the British soldiers at Concord had been scalped by the Americans.' At the outset of this paper, however, it is proper to define what a "war crime" is.

Without question, much conduct that would otherwise be considered criminal is privileged for combatants. In this sense, a "war crime" is a contradiction in terms since it is an act not allowed by the laws of war. It is clear, however, that the term does not extend to every act contrary to the laws of war.

Traditionally, war crimes have had an international character. They have generally been committed by a member of the armed forces of one party, a nation-state, against either the armed forces or the civilian population of the other party, also a nation-state. In the case of the American Revolution, it is not realistic to exclude most offenses against civilians by either army. It was a civil war in a large sense and both parties could realistically claim allegiance from many members of the civilian community. Therefore a relationship of opposition between military forces and at least some civilian nationals was almost always present.²

It should also be noted that there are even offenses arguably contrary to the law of war committed between belligerents that do not fulfill the traditional concept of war crimes. Though spies were properly hanged, we do not regard them as war criminals. Indeed, the act of spying itself is not condemned as is demonstrated by the rule that spies who return to their own lines are not subject to punishment on recapture. For this reason, spies will not be discussed except as they may have committed other offenses. The offense of spying is unique in that the gravamen of the crime is not in

¹ *E. Forbes, Paul Revere and the World He Lived In* 476, note 33 (1942). According to Forbes, this case may have been solved by Nathaniel Hawthorne, who claimed that he had once been told the following story: A young boy found two British privates left behind at the bridge at Concord, one dead and the other wounded. As the wounded private raised himself up, the boy became frightened and struck him a fatal blow on the head with an ax. *Id.* Earl Percy commented that the Americans had scalped soldiers. *H. Percy, Letters of Hugh, Earl Percy, From Boston and New York* (C. Bolton ed. 1932).

² In developing a list of offenses to be considered as war crimes, the author has been guided largely by *T. Taylor, Nuremberg and Vietnam: An American Tragedy* 30-32 (1970).

the activity proscribed and discouraged, but rather in being apprehended.³

11. VIOLATIONS COMMITTED AGAINST CIVILIANS

The most frequently occurring type of violation committed by military forces during the Revolution consisted of offenses against the persons and property of civilian inhabitants. The following entry in the orderly book of Brigadier General George Weedon of the American Army, dated 26 August 1777, at camp near Wilmington, Delaware, is typical:

The Genl observes with the utmost concern that notwithstanding his repeated orders not to destroy fences or other property, that disgraceful practice is still continued. He therefore Enjoins all the Officers once more as they should regard their own reputation & that of the Soldiers to be always active in preventing it—The Officer of the Day will consider it as forming a part of his Duty to punish every Soldier who shall either quit his rank on a march for the purpose of Pillaging, or when halted, dare to do it. This order is to be read to the men every Saturday, that they may no longer plead ignorance as an excuse for such Misconduct.⁴

This order, which was repeated by General Weedon on 4 September of the same year with the assurance that the commander-in-chief would have no mercy on any offenders, was typical of those entered in orderly books by other commanders. Lieutenant Abraham Chittenden of the 7th Connecticut Regiment entered similar orders in the regimental orderly book for the dates of 21 August, 7 September, and 18 September of 1776, while on the other side of the contest similar entries were being made by Generals Howe and Burgoyne and the loyalist General DeLancey.⁵ It is highly signifi-

³*Id.*, at 31. See also *U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare* 33 (1956).

⁴*G. Weedon, Valley Forge Orderly Book of General George Weedon 21-22 (1971).*

⁵*A. Chittenden, Orderly Book of Lieutenant Abraham Chittenden, Adjutant, 7th Connecticut Regiment, August 16, 1776 to September 29, 1776* at 15, 30-31, 37-38 (1922); *W. Howe, Sir William Howe's Orderly Book at Charlestown, Boston, and*

cant that frequent repetition of these orders was necessary. This was clearly recognized by Major General Muhlenberg of the Continental Army, as shown by the following entry:

Officers should consider that a repetition of orders is the highest reflection upon those who are the cause of it. An orderly book is a record in the hands of thousands of the transactions of the Army and consequently the disgrace of those whose insensibility of the obligations they are under and want of a manly emulation of temper oblige the Commander-in-Chief to publish their misconduct by repeating his calls upon them to discharge their duty. The General appeals to the understanding of every officer and earnestly recommends serious consideration of these matters. Their engagement with the public, their own honor, and salvation of their country demand it.

This entry, dated June 7, 1777, was repeated on June 10 and June 13, and frequently thereafter.⁶

The commanders did not pass these matters off without attention. Preventive measures were taken: General Washington's army issued a series of orders designed to reduce offenses by, first, forbidding officers below field grade or below regimental commanders from issuing passes to enlisted men of all ranks; second, forbidding noncommissioned officers from carrying arms except when on duty; third, punishing all noncommissioned officers and soldiers found outside the limits of the camp without a pass; and fourth, calling the rolls frequently.⁷

In Canada, General Phillips issued orders that patrols were to be sent to the cantonments of the Sorel River to stop violent acts against the inhabitants.⁸ General DeLancey issued orders that in his

Halifax, June 17, 1775 to May 26, 1776, to Which is Added the Official Abridgement of General Howe's Correspondence With the English Government During the Siege of Boston and Some Military Returns 109 (B. Stevens ed. 1890); J. Hadden, *Hadden's Journal and Orderly Books* 305 (1884); and O. DeLancey, *Orderly Book of the Three Battalions of Loyalists* 8-9 (1917).

⁶Muhlenberg, *Orderly Book. 26 March - 20 December 1777*, 37 *Pa. Magazine of Hist. & Biog.* 456, 461 (1917).

⁷G. Weedon, *supra* note 4, at 168-169.

⁸J. Hadden's *Journal and Orderly Books* 231 (1884).

brigade no officer or private was to depart from camp or quarters without leave from the commanding officer.⁹ Lieutenant Chittenden noted in the orderly book of the 7th Connecticut Regiment that any plunderers found, of whatever regiment, were to be taken and whipped on the spot.¹⁰ And General Howe of the British army ordered that the provost was to be accompanied on his rounds by the executioner, and that the first person found tearing down a house or a fence was to be hanged without waiting for further proof by trial.¹¹

The offenders continued their depredations despite the above. Exhortations were having little effect, and the armies found the punishments available through courts-martial more effective.

American army offenders against the persons of civilians were dealt with in much the same way and with the traditional punishments that had been used in the British army. Thus, Lieutenant Oakly, convicted of beating over the head with a stick one Sally Patterson, an "inhabitant," was sentenced to be cashiered for the offense and to have twenty dollars of his pay stopped for damages to Sally Patterson (if so much was due him).¹² Frederick Roach, an artillery mattsoss, had assaulted civilians on Long Island and in May 1776 was sentenced to receive thirty-nine lashes on his bare back.²³ Richard Perce and John Pillar, two men who had attempted to commit rape "upon a ould woman near four score," were sentenced to receive one hundred lashes and thirty-nine lashes respectively.* A Sergeant Cain and a Private Davis, having demanded that a young woman who was nursing a sick woman be given to them for immoral purposes, were sentenced to receive fifty and one hundred lashes respectively, and Sergeant Cain was to be reduced to the ranks.¹⁵ And one Dennis Maana was so rash as to contest his

⁹O. DeLancey, *Orderly Book of the Three Loyalist Battalions* 307-08 (1917).

¹⁰A. Chittenden, *Orderly Book of Lieutenant Abraham Chittenden, Adjutant, 7th Connecticut Regiment, August 17, 1776 to September 29, 1776* at 37-38 (1884).

¹¹W. Howe, *Sir William Howe's Orderly Book at Charlestown, Boston, and Halifax, June 17, 1775 to May 26, 1776. to Which is Added the Official Abridgment of General Howe's Correspondence with the English Government During the Seige of Boston and Some Military Returns* 160 (B. Stevens ed. 1890).

¹²W. Henshaw, *The Orderly Book of Colonel William Henshaw* 155-56 (1877).

¹³*Id.*, at 118.

¹⁴I. Angell, *The Diary of Colonel Israel Angell* 27 (1971).

¹⁵R. Kirkwood, *The Journal and Order Book of Captain Robert Kirkwood* 151-53 (J. Turner ed. 1910).

guilt at his court-martial for stealing a "handkff" from a young girl. He was sentenced to receive seventy-five lashes for the crime of theft and twenty-five lashes for the offense of lying about it to the court.¹⁶

British soldiers convicted of similar crimes fared worse as a whole. General Burgoyne approved sentences of one thousand lashes each for two privates of the 47th Regiment convicted of robbing one Mr. William Johnson.¹⁷ General Howe approved a sentence of a thousand lashes for a private of the 59th Regiment convicted of having beaten a Mrs. Moore of Boston "almost to her death."¹⁸ And General DeLancey approved a sentence for two of his soldiers convicted of robbery, murder, and rape, to be "hanged and gibbeted on the spot where the murder was committed."¹⁹

Offenses against property again reveal a general trend in which British punishments were more severe. Although General Muhlenberg entered in his orderly book that two soldiers of General Sullivan's division had been condemned and one actually executed,²⁰ and Colonel Israel Angell reported that a soldier of Colonel Stewart's battalion was hanged for plundering,²¹ extreme sentences seem to have been unusual. More typical were the sentences received by Privates Henly and Patterson. They were sentenced to run the gauntlet through a detachment of fifty men of the Brigade of Horse for plundering. Also typical was the one hundred lashes given to Private Rice for the same offense.²² An artilleryman of the 7th Connecticut Regiment received thirty-nine lashes, while in the Delaware Regiment five men received fifty lashes for plundering a civilian's house. Again, one of the latter was given an additional twenty-five lashes for lying to the court in maintaining his innocence. The defendants were also sentenced to lose half a month's pay. The money thus forfeited was to be used for the benefit of the sick soldiers of the regiment.²³

¹⁶*Id.*, at 142-43.

¹⁷*J. Burgoyne, Orderly Book of Lieutenant General John Burgoyne* 73-74 (E. Callaghan ed. 1850).

¹⁸*W. Howe, supra* note 11, at 188.

¹⁹*O. DeLancey, supra* note 9, at 86.

²⁰*Muhlenberg, "Orderly Book,"* 34 *Pa. Magazine of Hist. & Biog.* 186-87 (1910).

²¹*I. Angell, supra* note 14, at 115-16.

²²*G. Weedon, supra* note 4, at 111-12, 213-14.

²³*A. Chittenden, supra* note 10, at 62; *R. Kirkwood, supra* note 15, at 87-88.

It is worth noting that military jurisdiction also extended to camp followers. For example, Colonel Angell ordered a soldier's wife, who was apprehended for theft, to be drummed out of the regiment, using the regiment's drums and fifes, in much the same style as if she had been a soldier.²⁴

The British punishments seem to have been more harsh. In his journal, Major Andre reported that two British soldiers were executed at Lord Cornwallis' camp for plundering. General DeLancey also approved, with clemency, the sentences of four men who had left a redoubt to plunder a house. Three of them received five hundred lashes each, and the fourth was sentenced to death.²⁵ The British sentences tended to be much heavier than the American punishments in noncapital cases as well, with the maximum number of American lashes rarely equalling the lightest British numbers.

In part this was probably due to the low opinion held by the British officers of their enlisted men. The Deputy Judge Advocate General of the British army for North America later wrote a treatise on courts-martial, in which he found occasion to comment on the quality of many British enlisted men:

Too many among the lower ranks of the soldiery are, I am sorry to say, of very exceptional character, owing chiefly to the modern method of recruiting our armies, by enlisting every one who offers himself, provided he be of a certain make, age, and stature, without paying the least attention to his former character and way of life, and sometimes by even draining the public goals of the kingdom. What justice then can be expected from such wretches, who will scarcely punish others for crimes which, from being daily guilty of themselves, they do not appear to regard as such?²⁶

The British officer corps regarded its men as ungentlemanly creatures, held in control only by brutal discipline. For the duration, American ideas were of another mold. Many of the colonial soldiers were militiamen, and whatever their value as soldiers, they had

²⁴I. Angell, *supra* note 14, at 99.

²⁵J. Andre, *Major Andre's Journal* 47 (1930); O. DeLancey, *supra* note 9, at 66-67.

²⁷Adye, *A Treatise on Courts-Martial* 42-43 (1786).

frequently been solid citizens in their home communities. This factor alone is enough to account for much of the difference in punishments.

One of the difficulties faced by eighteenth century commanders in controlling the practices of plundering and pillaging was that these activities were not readily distinguished from the military concept of foraging. The eighteenth century had made good progress toward showing respect for the property of enemy nationals. Previously, the standard view had been that every citizen of the enemy state was an enemy, and that the property of every enemy was subject to seizure. By the time of the Revolution, the doctrine had undergone a progressive development until the doctrine of contributions had developed. According to this doctrine, the power conducting a war would have the right to require the subjects of the enemy to contribute towards its costs of conducting the war. In exchange for such contributions, they would be protected against pillage, and the country would be preserved.²⁷ This was a realistic doctrine. It recognized that an army of the eighteenth century would necessarily have to live off the land to some extent. At the same time, the doctrine prescribed that the process by which such an army should acquire its provisions be an orderly one, under control of the proper authorities, and without deprivations beyond those necessary.

The armies of the Revolution did attempt to maintain control over their foraging. Commanders received complaints that foraging parties were taking such amounts from civilians that the latter were left without enough for their subsistence. In response, orders were issued by the Continental Army that no forage be taken except by order of the forage master. If formal protection was given to specified civilians by the commissary general of forage, the soldiers were to take no more from the person holding the protection. Finally, warning was given that insults directed to and abuse of civilians were to be punished with the utmost severity.²⁸ At the same time, orders prescribed proper means of distributing the rewards for property properly taken from the enemy. The property was to be taken to the commander and then posted for auction. Once sold, the proceeds were to be divided among the officers and men who captured it.²⁹ There were relatively standard procedures, used by both sides.

²⁷ E. de Vattel, *The Law of Nations*, §§ 65-74, 160-65 (1752).

²⁸ G. Weedon, *supra* note 4, at 173-74.

²⁹ W. Henshaw, *supra* note 12, entry for 3 August 1775.

Unfortunately, the system did not work as well in practice as it did in theory. Lieutenant von Krafft, a Hessian, has left an interesting account of his efforts to operate within the system. He appeared to have made some sense of it by observing that he and his men were not forbidden to get provisions, but were very strictly admonished not to take anything from people within their houses. He also noted that he had paid for what he had taken. Later, however, he described having entered a house full of soldiers, and he made the observation that he had taken only some milk and butter, but that he could have taken much had he gone there with bad intention ~ . ~ ~

General DeLancey had some insight into the reasons for the difficulties. He reported that four of his men had received a sentence of a thousand lashes each for stealing two oxen and one cow—which General Clinton had generously reduced to five hundred each. At the same time, General DeLancey also published a notice that all the names of those who had participated in a recent expedition into “Jersey” were to be reported to the adjutant general so that they could receive their shares of the sale of the “rebel cattle,” one dollar.³¹ The proceeds of proper behavior were simply not comparable to the gains from foraging for oneself.

The war also offered opportunities for some civilians to get the military forces to carry out their private vengeance ‘for them. George Rogers Clark, in his memoirs, noted that on his arrival at Kaskaskia, he had been advised that one Jean Gabriel Cerre was “one of our most inveterate enemies.” Clark realized that Cerre was an eminent man in the community. He suspected that most of his accusers were in debt to Cerre and that they desired to ruin him or at least escape payment of their debts to him. This assessment proved relatively accurate.³²

Not all offenses against civilians involved their lives or property. Considerable consternation was caused by the alleged public indecency of the troops, in particular their habit of bathing in ponds often without great concern that they were in view of the local women. Some had “. . . come out of the Water and run to the

³⁰J. Van Krafft, *Journals of John Charles Philip von Krafft*, 42-44, 61, 64 (1968).

³¹O. DeLancey, *supra* note 9, at 32-33, 52.

³²G. Clark, *The Conquest of the Illinois* 43 (M. Quaife ed. 1920).

Houses naked with a design to insult and wound the modesty of female decency."³³ The commander therefore ordered that guards be posted at the mill pond to prevent the soldiers from bathing there. It was made clear that the bathing was not offensive, but rather the doing so in public places.³⁴ A year later, however, the guards had to be moved to Howell's Mill for the same reason. Wherever the army would go this problem seemed to arise.³⁵

Finally, there were instances in which the Americans failed to show respect for the religion of civilian inhabitants. In particular, during the expedition into Canada some soldiers were unable to contain their anti-Catholic sentiments. While the Americans were soliciting the friendship of the Canadians, some of the troops participated in festivities celebrating Guy Fawkes Day in which an effigy of the pope was burned.³⁶ During the expedition itself, according to a British account, the Americans turned a convent into a hospital for wounded and then turned their attentions to the nuns themselves. Anburey asserts that it was more offensive to their religion than to their personal desires; he states that ". . . several of the nuns proved capable of in some measure making up for the ravages of war by producing what may in the future become the strength and support of their country."³⁷ The British, including writers such as Anburey, were not always charitably disposed towards the religion of their Canadian subjects.

In general, towns were spared from destruction in the absence of military necessity, although fires occasionally did get out of control. Such was apparently the case at New London, Connecticut, when it was attacked by Benedict Arnold's British forces. However, the American forces did not feel that they were compelled to observe such restraints against Indian villages. Indeed, General Sullivan's expedition of 1779 seemed to have had as its objective the destruction of the Indian villages in order to prevent the Indians from operating out of them. Major Fogg noted at the end of the campaign, which had produced very little actual fighting, that ". . . the nests are destroyed, but the birds are still on the wing."³⁸

³³W. Henshaw, *supra* note 12, at 131.

³⁴*Id.*

³⁵Stewart, "Orderly Book of the Pennsylvania State Regiment of Foot, May 10 to August 16, 1777," 22 *Pa. Magazine of Hist. & Biog.* 197 (1899).

³⁶W. Henshaw, *supra* note 12, at 40-41.

³⁷T. Anburey, *With Burgoyne From Quebec* 43 (1963).

³⁸J. Fogg, *The Journal of Major Jeremiah Fogg* 3-4 (1879).

It was in this setting that militia forces under Colonel David Williamson seized a community of approximately ninety Indians who had returned to the former Moravian mission communities. After considering what to do with them for about three days, Colonel Williamson apparently left it to his men to decide what to do with them. All were massacred with the exception of two boys who escaped. General Irvine reported the massacre to General Washington. However, no report of any disciplinary proceedings was included, as none had taken place.³⁹

In a sense, the “Gnadenhuetten Massacre” is illustrative of a major element in many crimes. A racist motive may compel men with inadequate discipline to commit violations of the laws of war. Even though the Indians involved here were apparently friendly and even Christian, they remained Indians—a people of another race. And Major Fogg’s journal illustrates that even educated men held uncharitable attitudes toward the original inhabitants of America:

Whether the God of nature ever designed that so noble a part of his creation should remain uncultivated, in consequence of an unprincipled and brutal part of it, is one of those arcana, yet hidden from human intelligence. However, had I any influence in the councils of America, I should not think it an affront to the Divine will, to lay some effectual plan, either to civilize, or totally extirpate, the race. Counting their friendship is not only a disagreeable task, but impracticable; and obtaining it is of no longer duration than while we are in prosperity and the impending rod threatens their destruction. To starve them is equally impracticable for they feed on air and drink the morning dew.⁴⁰

111. BATTLEFIELD VIOLATIONS

Hostilities had not been long in progress before the two sides discovered that they had certain philosophical differences concerning

³⁹W. Irvine & G. Washington, *Washington-Irvine Correspondence* 99-103, 236-39 (1882).

⁴⁰T. Fogg, *supra* note 38, at 15. Major Fogg was a graduate of Harvard, class of 1767.

the proper manner of conducting war. Some of the British were offended by the American practice of picking officers as targets. They even accused the Americans of lurking in the woods to assassinate individual officers such as General Gordon.⁴¹ At the same time, the British were also understandably upset by the fact that some American units would pretend to surrender in order to get within close range. This violation would normally be punished on the spot with some efficiency by the surviving "victims."⁴²

However, reports of these violations seem to be characteristic chiefly of the early part of the war. The introduction of discipline into the Continental Army led to the elimination of such an individualistic and ineffective approach to warfare. It should be noted that some complaints arose from a misunderstanding. When the Americans bombarded General Fraser's funeral at the Battle of Saratoga, the British were irked. In fact, the Americans did not know what the event was and ceased the bombardment as soon as they were informed.⁴³

Americans were generally newcomers to the art of war. If their lapses of attention to its laws were not to be forgiven, they might in some cases have been understandable. However, the British were professionals, and some of their violations were not so easily understood. One of the most frequent complaints of the Americans concerned the British practice of refusing to accept surrender. It was recognized by the international law of the time that, once an enemy had ceased to offer resistance, he could not rightfully be killed, and that quarter was to be given to those surrendering.⁴⁴

Quite a few British commanders seem to have forgotten this rule. At Fort Clinton, on 6 October 1777, Colonel Campbell demanded an unconditional surrender and, on the garrison's refusal, gave orders to spare none. Fortunately, he was himself killed in the assault and his successor, Colonel Tunbull, offered "good quarters." These terms were accepted, although the Americans asserted that they were robbed immediately by the British troops, whom Tunbull could not restrain. Clinton here asserts that the British treated the Americans with great humanity.⁴⁵

⁴¹J. Hadden, *supra* note 8, at 236-37.

⁴²T. Anburey, *supra* note 37, at 141.

⁴³*Id.*

⁴⁴A Leggett, *The Narrative of Abraham Leggett* 17 (1971).

⁴⁵B. Tarleton, *A History of the Campaigns of 1780 and 1781* at 30-32, 78 (1968)

One of the most famous refusals to accept a surrender was that of Colonel Tarleton at the Battle of Waxhaws. The Americans were furious that no quarter had been given, and that rather Tarleton had allowed his men to slaughter at will until 113 Americans had been killed, 150 wounded, and only 53 captured.⁴⁶ Tarleton later attempted to put himself in a better light by ascribing the losses of the Americans to the fact that many of his men had thought that he had been killed. This supposedly stimulated them to a vindictiveness not easily restrained. However, in his ultimatum to Colonel Buford before the battle, Tarleton had warned that, if his terms were not accepted in their entirety, “. . . the blood be upon your head.”⁴⁷ Other British officers noted that the proportion of wounded was disproportionately small.⁴⁸

One of the most serious failures to accept a surrender occurred at Fort Griswold, Connecticut. This fort was held by Americans under Colonel Ledyard through three assaults by British troops under General Arnold. When the British entered the fort, Colonel Ledyard attempted to surrender. He delivered his sword to a British officer who, according to accounts, stabbed him with it, after which the slaughter continued. General Heath, who was not present, states that of the seventy to eighty men who were killed, only three were killed before the enemy had entered the fort and the garrison surrendered.

Subsequent British explanations were that resistance continued in one part of the fort, and that a flagstaff had broken, causing the troops to think that a surrender was being made. When resistance continued, they were allegedly under the impression that they were the victims of an American false surrender.

General Heath does absolve the troops to some degree. He argues that, during an assault, troops are worked up to a state of fury and madness which is not easily curtailed when the assaulted submit. In this way, he states, many are slain in a manner that cool bystanders would call wanton and the perpetrators themselves would condemn when the rage has subsided. This situation scarcely has a remedy, due to the nature of human passions in warfare. It is noted that

⁴⁶H. Peckham, *The War for Independence* 138 (1958).

⁴⁷B. Tarleton, *supra* note 45, at 78.

⁴⁸A. Robertson, *Archibald Robertson, His Diaries and Sketches in America, 1762-1780* at 230 (1971).

none of the British explanations were made at the time. Further, the fact that resistance continued in one part of the fort would not justify killing those surrendering in another part. A more plausible explanation for the lack of control over the troops lies in the fact that a number of their senior officers were killed in the assault and the normal chain of command had been disrupted.⁴⁹

A serious area of violations concerned firing on flags of truce. Obviously this practice could have serious consequences. In one instance at the battle of Germantown, an American lieutenant, William Smith, went forward to demand the surrender of the Chew house under a flag of truce but was fatally shot notwithstanding. Major Andre's journal contains no record of any disciplinary action taken because of this infraction.⁵⁰ The British also were victims of this practice at times: Sir Henry Clinton reports that when a ship was sent with a summons to surrender to Fort Constitution, it was fired on by the rebels.⁵¹

One problem with flags of truce was that there were many private flags of truce under which private business might be conducted. These were not employed for communication between opposing commanders. Admiral Rodney of the British navy frequently complained to his French counterparts of the abuse of these flags which allowed the enemy to observe the dispositions. He even went so far as to describe the practice as treasonable. At last, General De-Bouille, the French commander, agreed that "I shall send no more. In the future the interpreters of our sentiments shall be our cannon."⁵²

Perhaps the most famous actual punishment of a violation of a flag of truce was that of Major Andre, who had come to West Point to negotiate with General Arnold for the surrender of the place to the British. This would have been treasonable of Arnold. Although it was initially characterized as a violation of the flag of truce, in fact the court of inquiry which condemned Andre did not find it to have

⁴⁹F. Caulkins, *History of New London, Connecticut* (1852); W. Henfh. *Memoirs of Major General William Heath* 283-84 (W. Abbott ed. 1901).

⁵⁰J. Trussell, *The Baffle of Germantown, Historic Pennsylvania Leaflet No. 38*, at 3 (1974); J. Andre, *supra* note 25.

⁵¹H. Clinton, *The American Rebellion* 76-7 (W. Willcox ed. 1971).

⁵²G. Mundy, *The Life and Correspondence of the Late Admiral Lord Rodney* 74-88 (1972). This correspondence seems ungrateful of Rodney, who spent the first three years of the war in France, beyond the reach of his creditors in England.

been one. The basis for this conclusion was that Andre had come on shore from the Vulture "in a private and secret manner."⁵³

IV. VIOLATIONS AGAINST PRISONERS OF WAR

By the middle of the eighteenth century, a consensus concerning the rights of and obligations toward prisoners of war was reasonably well developed. Prisoners were not to be killed under any circumstances, with the exception of persons properly adjudged to be war criminals. Although prisoners could be secured to the extent necessary, they were to be treated kindly, and harsh treatment was forbidden. The custom was well established that officers were to be allowed release on parole so that they could pass the time of their imprisonment in comfortable circumstances. The capturing power could rest as secure of them as if it had detained them itself.⁵⁴

If a civil war were to produce two independent parties, the better view was that the rules of war applied between them.⁵⁵ For this reason, it was to the advantage of the United States to treat British prisoners as prisoners of war, for by so doing it extended its credibility as a sovereign.

British policy on that point was conspicuous by its absence. Treatment of captured Americans varied among individual commanders from extension of full rights as prisoners of war, to regarding them as perpetrators of domestic disorder. Ethan Allen encountered this phenomenon. On being taken prisoner he was alternately confined in irons on board ship, then treated as a gentleman. During the latter phase he was even invited by Captain Littlejohn of the British forces to serve as his second in a duel. Allen experienced alternation between treatment as a gentleman and treatment as a common criminal literally across the ocean and back, as he was sent to England and back encountering a different regime each time his custody changed hands.⁵⁶

⁵³*I. Angell, supra* note 14, at 126; *Anon., Minutes of a Court of Inquiry Upon the Case of Major John Andre* 21-23 (1865).

⁵⁴*E. de Vattel, supra* note 27, §§ 141, 148-50.

⁵⁵*Id.*, §§ 293-94.

⁵⁶*E. Allen, The Narrative of Colonel Ethan Allen* 20-31, 70-81 (1961). It should be noted that the British observed that Allen's militia had replaced him with Seth Warner when electing officers, and also that he had been considered by New York as an outlaw during the land titles disputes concerning the "Hampshire Grants."

British commanders generally were left to devise for themselves whatever theories they felt necessary to justify showing respect for the rules. Sir Guy Carleton, for example, found that if the prisoners were serving under the proper authority of the colony, he could apply the rules. He went so far as to parole enlisted prisoners as well, a practice which the Americans would not allow for other reasons. If the British posture seems uncoordinated and inconsistent, it should be remembered that the British war effort in general was one in which a unified authority over the army and navy scarcely existed. Even within the army itself, General Burgoyne would be trapped eventually because no one bothered to order General Howe to cooperate with him.

Commanders of the British army did take pains to issue proper instructions to their forces to treat correctly persons offering to surrender. General Burgoyne forbade molestation or stealing from such persons. General DeLancey ordered that prisoners were to be respected not only concerning their persons but also their effects. At the same time he found it necessary to offer a reward of two guineas to anyone who would bring to light the person guilty of pilfering the pockets of a prisoner.⁵⁸ It was apparent that, at the point of capture, the prisoner was in substantial danger. Ethan Allen asserted that the Indians with the British that captured him had tried to kill him. Other prisoners reported that their extra clothes were taken, or that some of the capturing soldiers had urged their slaughter, or that they were forced into cold weather half-dressed and forced to watch their houses burned.

A Frenchman noted without disgust that his ship had captured a British vessel, and that, thinking it a spy ship, the captain of the French ship “. . . by means of fifty lashes, or a severe cudgelling, . . . extorted the truth from the captain.”⁵⁹ The British were obviously not the only party to the conflict capable of misbehavior. Archibald Robertson, however, reported that hostilities often did cease properly, and that within ten minutes of the fighting, Hes-

⁵⁷W. Heath, *supra* note 49, at 316.

⁵⁸J. Burgoyne, *supra* note 17, at 30. O. DeLancey, *supra* note 9, at 42-43.

⁵⁹A. Leggett, *supra* note 44, at 18-20; C. Herbert, *A Relic of the Revolution* 18 (1968); A. Graydon, *Memoirs of His Own Times* 205-06 (J. Littlell ed. 1846); J. Hollister, *The Journal of Josiah Hollister, a Soldier of the American Revolution and a Prisoner of War in Canada* 21-24 (1920); and G. Deux-Ponts, *My Campaigns in America* 85-86 (1968).

sians, guards, and rebels were seen together drinking the rum found on the "rebel" works about the fort.⁶⁰

In general, officers expected and received paroles. Such paroles were within specified limits and usually were to exempt military works from their limits.⁶¹ Paroles were not always limited to areas within the lines of the capturing parties. It was not uncommon for a prisoner to go home on parole and to remain there until notified later that he had been exchanged. Generally, officers on parole made their own lodging arrangements with the consent of the authorities,⁶²

For enlisted men, the situation was not so fortunate. They were usually confined. Most of the American officers believed that enlisted prisoners in the hands of the British were poorly fed, badly clothed, and destitute of proper fuel in cold weather.⁶³ Often too many persons were confined in inadequate space. Objection was made to quartering prisoners of war in the public jails, where they were not on all occasions properly separated from common criminals.

Prison ships employed by the British were universally condemned, though it should be mentioned that these were not permanent quarters. Also, in New York, where the "infamous" ship "Jersey" was operated, lodgings had been somewhat scarce since the fire which destroyed much of the city following the British occupation.⁶⁵

Private subscriptions were taken up for the benefit of prisoners and were used to supply clothing, food, and bedding for them. However, certain prisoner accounts mention that some prisoners sold the clothes that had been purchased for them.⁶⁶ Prisoners could oc-

⁶⁰A. Robertson, *supra* note 48, at 112.

⁶¹W. Ford, *Orderly Books of the American Revolution* 13 (1890).

⁶²A. Graydon, *supra* note 59, at 269-309; A. Leggett, *supra* note 44, at 22-24; J. Fitch, *The New York Diary of Lieutenant Jabez Fitch* 90 (1971).

⁶³A. Graydon, *supra* note 59, at 232.

⁶⁴J. Blatchford, *The Narrative of John Blatchford* 10 (1971); J. Fitch, *supra* note 62, at 89; and A. Leggett, *supra* note 44, at 24.

⁶⁵J. Fitch, *supra* note 62, at 54; J. Blatchford, *supra* note 64, at 44; O. Barck, *New York City During the War for Independence* 81-82 (1931).

⁶⁶J. Fitch, *supra* note 62, at 93; C. Herbert, *supra* note 59, at 25, 108.

asionally work, and some earned reasonably good wages, as well as the enjoyment of working “without” the limits.⁶⁷

Still, on the whole, conditions were bad enough for the Americans that the officer prisoners felt it necessary to protest to General Howe. He in turn proposed that the best relief would be to exchange prisoners—a goal that held definite military advantage for him.⁶⁸ The American Commissary of Prisoners, Elias Boudinot, did visit the prisoners in British hands. He took complaints to General Robertson, who promised to take remedial action and was able to satisfy Mr. Boudinot in that respect.⁶⁹

Not all the complaints regarding prisoner treatment were valid. Several of the allegations made in an affidavit by Lieutenant Troup are easily answered. His charge that Captain Davis of the *Mentor* was overcharging prisoners at the rate of fifteen coppers for a loaf seems met by accounts indicating that fifteen coppers was the price of bread in New York. Likewise, his assertion that prisoners could not be visited or given food is clearly false, as Lieutenant Fitch in fact did visit them, whereas Lieutenant Troup does not assert in his affidavit that he even tried to.⁷⁰

Although the British probably could have done more to secure healthy living conditions for their prisoners, it is also clear that part of the problem rested with the Congress. The American Congress had chosen to maintain an army based on short-term enlistments. Therefore, when exchanged, the British soldier would return to his forces for duty, while the American’s enlistment would have expired. It was therefore to American advantage not to exchange enlisted prisoners.⁷¹

Treatment of the sick and wounded seems to have varied. While Archibald Robertson reported that after the Battle of Brandywine the American wounded had been furnished with their own surgeons to attend them, Tarleton at the Waxhaws simply paroled them, and it is unclear that medical attention was fully provided.⁷² Charles

⁶⁷C. Herberf, *supra* note 59, at 27-29, 45, 51, 130; A. Leggetf. *supra* note 44. at 22-24.

⁶⁸A. Graydon, *supra* note 59, at 235, 244.

⁶⁹E. Boudinot. *Journal of Elias Boudinot* 12-19 (1894).

⁷⁰J. Fitch, *supra* note 62, at 83-84.

⁷¹A. Graydon, *supra* note 59, at 234.

⁷²A. Robertson, *supra* note 48, at 147; B. Tarleton, *supra* note 45, at 31.

Herbert found that hospital treatment was extremely kind when he had smallpox while he was a British prisoner. He mentions that the British even attempted to avoid further spread of the disease by inoculation of those prisoners who had not already had it. However, he later reported that the death of the chief doctor would not worsen things, so it is clear that the quality of treatment varied with time and place.⁷³

Prisoners of war occasionally could commit an offense peculiar to themselves by violating their paroles. Lieutenant Fitch reported that two prisoners admitted to parole had escaped. They were captured and confined by General Washington prior to being returned. Washington condemned parole violation, which resulted from the want of money and supplies in too many cases. In fact, it frequently resulted from another cause also: there were not many actually punished for violating parole. Lieutenant Fitch reported that one Ensign Hender, who had escaped while on parole, had returned and had again been admitted to parole.⁷⁴ Lemuel Roberts was with a group that escaped but was recaptured. At this time, they told their British "hosts" that they were not officers and, therefore, not bound by their paroles. The British commander considered that nothing criminal had been done, and he admitted them to parole again on their personal word of honor, as opposed to that of officers, not to escape until spring. After spring, all his companions again escaped.⁷⁵

Since there was much criticism of British treatment of their prisoners of war, it is perhaps useful to consider two of the men involved. Without doubt, the sharpest invectives were heaped on Provost Marshal Cunningham and on the Commissary of Prisoners, Joshua Loring. Ethan Allen described Cunningham as the greatest rascal of whom the British army could boast, except for Loring, whom he described as a monster whom hell itself was anxious to devour.⁷⁶

Perhaps the most famous description of Loring was that rendered by Thomas Jones:

A Commissary of Prisoners was therefore appointed, and one Joshua Loring, a Bostonian, was commissioned to the

⁷³C. Herbert, *supra* note 59, at 37, 41, 52, 131.

⁷⁴J. Fitch, *supra* note 62, at 170.

⁷⁵L. Roberts, *Memoirs of Captain Lemuel Roberts* 69-93 (1969).

⁷⁶E. Allen, *supra* note 56, at 106-07.

office, with a guinea a day and rations of all kinds, for himself and family. In his appointment there was reciprocity. Joshua had a handsome wife. The General, Sir William Howe, was fond of her. Joshua made no objections. He fingered the cash, the General enjoyed madam. Everybody supposing the next campaign . . . would put a final period to the rebellion, Loring was determined to make the most of his commission, and by appropriating to his own use nearly two-thirds of the rations allowed to the prisoners, he actually starved to death about 300 of the poor wretches before an exchange took place, which was not till February, 1777⁷⁷

It may be remarked that while Loring was not totally attentive to all aspects of his business, some of Judge Jones' remarks may be overstating the case. First, housing was short in New York and some of the discomforts were not his fault. The delay in making exchanges was due to the Congressional desire not to be harmed by its short enlistment policy.

Finally, there are accounts that present a different picture of Loring. Lieutenant Fitch, a sober observer, noted that Loring allowed Lieutenant Gillet to live with friends while he was sick and even lifted the regulations to allow two sergeants to take up quarters with the officers. Fitch observed that Loring treated the officers with courtesy and consideration. It is also worth noting that Fitch's diary was written with writing materials allowed him by Loring.⁷⁸ Elias Boudinot, allowing Loring to have been civil, did make an investigation of the allegations of prisoner mistreatment. Though his account references many reports of the cruelty of the Provost Marshal Cunningham, none of the complaints mentioned Loring.⁷⁹

Cunningham does not seem to have as much to be said for him. However, it should be noted that the same ill fortune with which American prisoners were met was likely also to befall regular soldiers in the British army. For years after, senior British officers were paid allowances for food and clothing for their men, and many

⁷⁷T. Jones, *History of New York During the Revolutionary War* 351 (E. DeLancey ed. 1879).

⁷⁸J. Fitch, *supra* note 62, at 84.

⁷⁹E. Boudinot, *supra* note 69, at 12-19.

illicit gains were made by them through pocketing money instead of providing the full issue of food or clothing.⁸⁰

Military justice, then as now, was the proper means of correcting abuses against prisoners of war'. And in fact it did function properly at least on one occasion. Josiah Hollister reported in his journal that a tory captain named McGulpin took command of prisoners at Cote Du Lac in February 1782. Captain McGulpin proceeded to beat the prisoners and kept them confined in a cold ash house with no food, drink, or heat. Even complaints of the sergeant of the guard brought no relief. However, the surgeon, a Doctor Connor, examined a prisoner by the name of Allbright who had been beaten, looked into the whole affair, and then reported it to the commanding general. Trial by court-martial then followed and Captain McGulpin was found guilty and cashiered.⁸¹

A serious incident involving American mistreatment of captured troops from General Burgoyne's army came to light in January 1778 when an American officer, Colonel David Henley, was charged with intentional murder of one of the prisoners. General Burgoyne demanded in a letter of 9 January 1778 that Colonel Henley be tried for the offense. A court of inquiry was convened and recommended that a court-martial be convened to consider the charges. Lieutenant Colonel Tudor acted as the judge advocate while General Burgoyne was allowed to act as a prosecutor. Colonel Henley was acquitted of the charges and restored to his former duties.⁸²

Perhaps the most glaring case of mistreatment of a prisoner of war involved an American held by British loyalists, Joshua Huddy. Huddy was one of three prisoners taken charge of by Captain Richard Lippincott, a company commander of the Associated Loyalists, for the stated purpose of exchanging them for American-held prisoners in Monmouth County, New Jersey. Rather than being exchanged, Huddy was hanged there by the Associated

⁸⁰C. Woodham-Smith, *The Reason Why* 37-38 (1953).

⁸¹J. Hollister, *supra* note 59, at 27-28.

⁸²W. Heath, *supra* note 49, at 137-43. Colonel William Tudor, 1750-1819, was the first judge advocate general of the United States Army. He held that post from 29 July 1775 until 10 April 1777. The Henley (also spelled *Hensley*) court martial was his most celebrated case. For brief sketches of Colonel Tudor's life, see 22 Mil. L. Rev. iii (1963); U.S. Dep't of Army, *The Army Lawyer: A History of the Judge Advocate General's Corps. 1775-1975*, at 7 (1975).

Loyalists under Lippincott. Upon the news of his death, General Washington warned the British commander, Sir Henry Clinton, that he would retaliate by hanging a British officer of equal rank unless the murderer was delivered to him unconditionally.

A drawing of lots was held and the officer selected was Lieutenant Asgill of the Guards. This left General Washington in a difficult position since Lieutenant Asgill had been included in the protections of the capitulation at Yorktown and was not legally available for reprisal. After a long delay, Asgill's mother managed to persuade the French government to intervene. The request of the French that Asgill be spared was granted, to the relief of all concerned. In the meantime, the British commander, General Clinton, had passed the case along to his successor, General Carleton.⁸³

Lippincott was referred to trial by Carleton and was acquitted. However, the court's acquittal was based upon the fact that he had been following the orders of William Franklin, the royal governor of New Jersey, President of the Board of Associated Loyalists, and natural son of Benjamin Franklin.⁸⁴ Carleton took action to dissolve the Associated Loyalists and issued further orders to prevent a repetition of the affair.⁸⁵ The Americans, though not avenging Huddy, did at least gain the assurance that future incidents would not occur. General Heath ascribed this success to General Washington's firmness and willingness to use reprisals, as well as to General Carleton's natural disposition to treat prisoners properly.⁸⁶

One other aspect of the case is important, the relationship between lack of discipline and the commission of war crimes. At his trial, Captain Lippincott presented the defense that he was in fact not a soldier at all, and that there was, therefore, no military jurisdiction over him, a rather surprising defense which, judging from the final verdict, was rejected by the court-martial. But the mere use of such a defense does suggest a lack of discipline.

⁸³F. Weiner, *Civilians Under Military Justice, The British Practice Since 1689, Especially in North America* 114-20 (1967). France was willing to intervene because she was a party to the Yorktown surrender agreement.

⁸⁴R. Lamb, *Journal of Occurrences During the Late American War* 426 (1968).

⁸⁵F. Weiner, *supra* note 83, at 120.

⁸⁶W. Heath, *supra* note 49, at 315-16.

V. COMMAND RESPONSIBILITY FOR WAR CRIMES

The Lippincott verdict suggest that the concept of command responsibility for war crimes was developing. If Lippincott were not be accountable because he acted under the orders of Governor Franklin, then it would logically follow that Governor Franklin should have been held responsible. But Governor Franklin was in England and not available for trial of the issue. The most serious attempt during the Revolution to hold a commander responsible for the acts of persons acting under his direction arose in another case. This was the case of Lieutenant Governor Henry Hamilton, during the Indian warfare on the frontiers.

The use of Indians as a supplementary force was justified on grounds of expediency.⁸⁷ The military opinion of their value was not high. They were viewed as necessary only because the other side would otherwise use them, but their loyalty was considered unpredictable. In general it was believed that they would remain loyal only as long as presents were heaped upon them, and no longer.⁸⁸ British commanders did attempt to give directions to the Indians to conform with civilized concepts of warfare, but even the British were somewhat surprised whenever they actually conducted themselves properly.⁸⁹

The Indians were allowed to take scalps on the theory that, according to their customs, this was not dishonoring the fallen,⁹⁰ and that to enforce civilized requirements on them was inviting them to desert.⁹¹ General Carleton, recognizing that Indians could not be controlled, insisted that they be used only for “defensive purposes, lest the innocent suffer with the guilty.” The mere attempt to control the Indians carried with it the connotation that one might be responsible for their actions.

In September 1776, Lieutenant Governor Henry Hamilton had suggested that the employment of Indians along the frontiers of Virginia and Pennsylvania could weaken the main American army by

⁸⁷G. Brown, *The American Secretary, the Colonial Policy of Lord George Germain, 1775-1778* at 60-62 (1963).

⁸⁸T. Anburey, *supra* note 37, at 93.

⁸⁹*Id.*, at 124, 155.

⁹⁰*Id.*, at 124.

⁹¹*Id.*, at 156-57.

requiring it to withdraw forces to meet this danger. Lord Germain approved, and the conduct of affairs at Detroit was left to the judgment of Hamilton, who was believed to have had over a thousand warriors ready to overrun the frontiers.

In fairness to Hamilton, it must be allowed that the war parties were instructed to act humanely. But valid criticisms were forthcoming, including many from British officials other than Carleton. Chatham criticized the policy in the House of Lords, while Lieutenant Governor Abbot pointed out that the Indians would not attack people in arms, but rather the isolated, inoffensive families who sought to stay out of trouble, but who would be easy targets. It does seem that prices were paid for scalps and certainly the Americans believed that Hamilton had done so.

But it seems also that much of the reputation that Hamilton enjoyed arose not from what he did, but rather from what he did not do. For example, Major de Peyster, who succeeded to the command at Detroit, also paid for scalps, but paid more for living prisoners than for scalps. Captain Bird, a leader of British and Indian forces, was known to have offered the Wyandottes four hundred dollars if they would spare one prisoner. In many respects it seems that the failure of Hamilton to provide positive incentives for the Indians to avoid atrocities was the element that separated him from the other commanders.⁹²

Lieutenant Governor Hamilton fell into American hands when Colonel George Rogers Clark captured his garrison at Vincennes after a short engagement during which Clark's men put to death some captured Indian allies of the British in sight of the garrison.⁹³ In view of the later importance of the terms of the capitulation, it is worthwhile to examine the negotiations leading to the capitulation. Hamilton suggested terms which were rejected by Clark. They differed from the eventual terms largely in that they would have allowed for the troops of the garrison to retain their arms, though they would be considered prisoners of war.

At a meeting of the rival commanders, Clark insisted on an unconditional surrender, so that he would be privileged to do with

⁹²*G. Clark, George Rogers Clark Papers, 1771-1781* xxxv-xxxix (J. James ed. 1912).

⁹³*Id.*, at 188-90.

those of the garrison whom he considered responsible for Indian excesses as he wished. This was a debatable proposition of law in itself. Hamilton refused to surrender without honorable terms, and Clark, apparently impressed, suggested that he would give it some thought and send by a flag of truce a proposal such as that which Hamilton was still requesting. Clark consulted with his officers, and offered the terms eventually agreed on, under which the garrison were deemed prisoners of war. Hamilton accepted and the fort was surrendered on **25** February 1779. Clark added to his account that Hamilton had made a favorable impression on all the Americans, and never behaved other than as an officer and gentleman should in his situation during the time he was with Clark's forces.⁹⁴

Hamilton and four other officers were taken to Williamsburg *via* Richmond. At Richmond, Hamilton was informed that by order of Governor Jefferson, he was being confined in irons. Hamilton was speedily handcuffed for the journey to Williamsburg.

On 16 June 1779, Hamilton was indicted by the Commonwealth of Virginia for the crimes committed by the Indians in making war on noncombatants. It was alleged that he had given payments for scalps, but not for live prisoners. He was also accused of having mistreated one John Dodge.⁹⁵ Hamilton was confined in the public jail, in the same quarters as criminals. Notwithstanding his complaint that he was denied writing materials, he managed to write to the lieutenant governor of Virginia. Shortly afterwards others began to also take an interest in his case.⁹⁶

Major General Phillips, a British officer touring Virginia on parole, and a good friend of Jefferson, interceded with Jefferson by letter of **5** July 1779. Phillips raised two matters: First, if the treatment were a retaliation for the treatment given to American prisoners, it was a matter proper for the nation at large and possibly the Congress, rather than for Virginia. Second, Hamilton had surrendered subject to terms which had assured him that he would be treated as a prisoner of war.⁹⁷

Jefferson seems to have taken some note of this letter, for he wrote to Washington on 17 July that Phillips had raised the point of

⁹⁴G. Clark, *The Conquest of the Illinois* 144-51.

⁹⁵G. Clark, *supra* note 92, at 337-41.

⁹⁶*Id.*, at 198-200.

⁹⁷J. J. Boyd, *Thomas Jefferson, 18 June 1779 to 30 September 1780* at 25-28 (1951).

the protections of the capitulation.⁹⁸ To Sir Guy Carleton, on the 22d of the same month, he wrote a long reply stating that his treatment of Hamilton was justified as a reprisal for the treatment of American officers, including Colonel Ethan Allen. Becoming legalistic, he asserted that the terms of the convention provided that the garrison would be prisoners of war, but said nothing about their treatment.⁹⁹ Meanwhile, Hamilton continued to protest his treatment and to assert his innocence.¹⁰⁰

By this time, Washington, who at first had acquiesced in the treatment of Hamilton, was having second thoughts. On 6 August 1779 he wrote to Jefferson, "This subject, on more mature consideration, appears to be involved in greater difficulty than I apprehended." He stated that the concensus of the general officers was that the treatment of Hamilton as a criminal after the capitulation was improper.¹⁰¹

By 13 September Washington had additional cause for concern, as Commissary Loring had notified the American Commissary of Prisoners that the British intended to retaliate if Hamilton's treatment was not modified. He also advised Jefferson that the Virginia officers in captivity, the most likely targets for reprisals, urged clemency for Hamilton.¹⁰²

These warnings had their effect, and Jefferson tendered a parole to Hamilton on 9 October 1779. However, Hamilton refused to sign it, as he would have been obligated to submit all his correspondence to the County Lieutenant of Hanover County for inspection. As a further condition of the parole, he would not have been able to do or say anything to the prejudice of the United States. Because of this latter condition, Hamilton regarded the offered parole as a device to entrap him. The terms would have been impossible for him to ob-

⁹⁸*Id.*, at 40-41.

⁹⁹*G. Clark, supra* note 92, at 347-52. Perhaps Carleton remembered Allen's sufferings when within a year the "oppressed" Allen entered into secret negotiations with General Haldimand in which Allen hoped to obtain for Vermont a vaguely defined status as an "independent province of Canada." See *E. Hoyt, The Damndest Yankees* (1976).

¹⁰⁰*Boyd, supra* note 97, at 58-59.

¹⁰¹*Id.*, at 61

¹⁰²*Id.* at 86-87.

serve in all particulars, and the inspection would have provided evidence of breach of parole conditions.¹⁰³

Hamilton thereafter endured a winter in jail, though at least he and his companions were moved to an upper room in the jail. In April two of his companions escaped. A third committed suicide in June. Hamilton himself had been ill frequently in his confinement, and eventually was offered a parole without the offending language, which he accepted. Under the terms of this parole he returned to the British lines in New York. His exchange officially took place not long afterwards, on 4 March 1781.¹⁰⁴ With this occurrence, the episode may be considered to have ended.

It is noteworthy that the language of the indictment held that the acts of the Indians were the acts of Hamilton. He was considered personally liable for the acts of subordinates. Less modern in appearance was the fact that the board in passing its indictment considered indictment alone a sufficient basis for punishment. It was considered unnecessary to hold an actual trial at which he could contest his guilt, which more than once he declared himself able to do. Since no trial was ever held, the "verdict" of history as to his guilt or innocence has remained inconclusive.

VI. CONCLUSION

At the time of the American Revolution, the law regarding the conduct of armed forces was becoming remarkably well defined. Custom had defined the proper treatment of prisoners of war, while the proper conduct of forces towards the civilian population was also becoming well defined. In fact, both these subjects were becoming almost as well defined as the rules of battle themselves. Even the principle of personal accountability of commanders for the acts of subordinates had appeared. However, other doctrines which are rejected today, such as the defense of following orders, were still observed to some extent.

It was in the mechanics of administering justice to the offenders that the system may be seen to have operated with least efficiency. Where military advantage coincided with enforcement, such as

¹⁰³*G. Clark, supra* note 92, at 201-203.

¹⁰⁴*Id.* at 203-207.

punishment of military personnel guilty of offenses against the civilian population, punishments frequently accompanied the crimes. Where, however, the advantage was not so easily perceived, such as in the treatment of prisoners of war, violations were less efficiently punished.

Unfortunately, too often the threat of reprisals secured respect for the rules of war. However, many officers of good character, such as General Carleton, were reasonably successful in carrying out their duties in accordance with the laws of war.

The causes of these offenses are much too complex to admit of hasty generalizations. Economic motives were one factor, and personal antagonisms may have been another. But a man of law, Judge Jones, suggested that the lack of discipline was a prominent factor when he wrote that “. . . an indiscriminate universal plunder” was not only countenanced, but publicly and openly encouraged, and that officers participated with their men. The effects, again according to Jones, were that no conciliation could possibly be attained short of conquest, which almost all practical people of the time recognized as being impossible. The war crimes had, in Jones’ opinion, contributed materially to the defeat of Great Britain.¹⁰⁵

If there is a lesson to be learned from that war, it is that atrocities were counterproductive. This lesson had been taught to many by the time the peace treaty signed at Paris in 1783 officially put an end to the war crimes proceedings growing out of the conflict.

¹⁰⁵*T. Jones, supra* note 77, at 91.

BOOK REVIEW:

JUST AND UNJUST WARS: TWO VIEWS

Michael Walzer, *Just and Unjust Wars.* New York: Basic Books, Inc., 1977. Pp. xx, 361. Index. Cost: \$15.00

The subtitle of Professor Walzer's book is, "AMoral Argument with Historical Illustrations." Any effort to produce such a book is certain to stimulate discussion. We are fortunate in having the benefit of two complementary reviews of this book.

Major Norman Cooper reviews the book first, from his point of view as a former defense counsel in the My Lai cases. He observes that the book is thought provoking. However, Major Cooper notes that the work contains a number of misleading statements concerning the military justice system.

The second review was prepared by Major James Burger, who examines the book from the viewpoint of the international lawyer. He notes a certain glibness on the part of Professor Walzer in drawing sweeping conclusions concerning complex issues based on an arguably oversimplified presentation of the facts.

Review by Norman G. Cooper"

Jusf and Unjust Wars is a thoughtful and thought-provoking book about war and war making. Devised as a "moral argument with historical illustrations," it nonetheless makes interesting

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reading for lawyers as well as philosophers. Professor Walzer covers many historical cases in his examination of the morality of war and war making, but concedes that his anti-Vietnam war sentiments were the catalyst for his book. And perhaps his book should be judged in part upon his analysis of that war and the way it was fought.

Professor Walzer initially rejects the legitimacy of the American presence in Vietnam. He considers unsatisfactory any claim that the United States actions were those of counter-intervention to meet large scale terrorism, because the Saigon regime was, in effect, undeserving of such help. He perceives the conflict as a civil war in which the United States became increasingly involved until "finally it was an American war, fought for American purposes, in someone else's country."¹

Certainly Professor Walzer's view of the Vietnam war is subject to some dispute; depending upon what set of historical circumstances one accepts our role in Vietnam becomes "good" or "bad." Suffice it to say that Professor Walzer opts for the latter and ultimately concludes that the United States engaged in unjustified intervention in Vietnam, morally becoming the aggressor in that war.

One need not agree with Professor Walzer that the United States was morally wrong in its Vietnam war policies to recognize genuine issues of moral legitimacy in the conduct of that war. During the Vietnam conflict there were many prosecutions for so-called war crimes. It cannot be fairly said that the United States as a matter of policy ignored immoral conduct on the part of its soldiers. Yet Professor Walzer allows his anti-Vietnam war sentiments to interfere with otherwise persuasive historical cases illustrating his broader themes of right and wrong.

The My Lai massacre is the best known example of moral misconduct in the Vietnam conflict. In spite of the notoriety of the incident and the publicity surrounding the courts-martial of a number of soldiers involved, Professor Walzer makes some obvious historical misstatements, to wit: "The army's judicial system singled him (Calley) out for blame and punishment, though he claimed he was only doing what Medina had ordered him to do. The enlisted men who did what Calley ordered them to do were never charged."²*

¹ M. Walzer, *Just and Unjust Wars* 101 (1977).

² *Id.*, at 310-11.

“The army’s judicial system” did not place responsibility for My Lai on Calley’s head alone. Commanders, not judicial officials, exercise prosecutorial discretion as to cases.³ Walzer’s seeming acceptance of a Calley scapegoat theory is unfortunate because there is a moral lesson to be learned from the fact that the My Lai massacre was thoroughly investigated and those responsible who were subject to military jurisdiction prosecuted. That is, the United States Army does not condone the commission of war crimes, even if committed by its own soldiers in the cauldron of a guerilla war.

Just and Unjust Wars as a whole cannot, of course, be deemed critically deficient because of failings of particular facts with respect to the Vietnam conflict. Indeed, given Professor Walzer’s bias, which to his credit he places before the reader in his preface, his book has much to say about what is morally right and wrong about wars and war making. While one may not always agree with Professor Walzer’s conclusions, his examples are well drawn and his style pleasantly conversational and not overargumentative. All in all, *Just and Unjust Wars* should be read and reflected upon; its subject is that important.

³This is supported by many provisions of the Uniform Code of Military Justice, 10 U.S.C. §§ 801–940 (1976). In carrying out some of their functions, commanders may act as judges, but Professor Walzer’s phrase obscures the complexity of the commanders’ role.

*Review by James A. Burger**

The basic point of Professor Walzer's book is that a person must make moral judgments about the legality or illegality of war. This is valid, and something we may in the midst of arguments over legal subtleties sometimes tend to forget. However, it seems that Professor Walzer moves too easily from one point of view considering a war to be legal, to another considering a war to be illegal, and once the decision is made there is too clearly a right and a wrong side.

Major Cooper has already mentioned Professor Walzer's perception that what he called the "American" war in Vietnam was illegal and unjust. This may be understandable, but it is only one of many judgments on the legality of warfare made by the author of *Just and Unjust Wars*. Other judgments are a bit hard to take. While Professor Walzer's perception of World War II as an example of a just war for the Allies may also be acceptable, I find it difficult to agree with distinguishing British terror bombing in Europe, which the author finds to be legal, from the American bombing of Hiroshima which he finds to be illegal.¹ He also condemns the U.S. decision to cross the 38th Parallel during the Korean War.² Israeli soldiers in the Six Day War can make a moral decision and their war is just,³ but what about Egyptians and Palestinians?

Even more disturbing is the fact that Professor Walzer deals throughout his book with the legal terminology which countries and writers have been trying to apply to solve or limit the ravages of war. He treats in detail the difficult concept of "aggression." He talks about "military necessity," and "proportionality." He debates the meaning and effect of "command responsibility."

Yet, all these concepts seem to have little meaning once the moral decision is made. They are used to buttress Professor Walzer's

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¹ M. Walzer, *Just and Unjust Wars* 255 (on the British bombing of German cities) and 263 (on the U.S. decision to bomb Hiroshima) (1977).

² *Id.*, at 118.

³ *Id.*, at 304.

moral judgments rather than as a basis for them. I think this is a dangerous book if it is read by the novice in the area. The uninitiated are liable to take up the book, agree with moral determinations, and then apply all the legal terminology to moral judgments already made. Professor Walzer skips blithely through all the legal argumentation which went into the decision whether the U.S. really ought to be in Vietnam.*

Then, I cannot help but comment on the last chapter. Professor Walzer decided in the last chapter that the real answer to all of this is what he calls "nonviolent defense." Wars will eventually cease if the people of the world resist oppression in a truly nonviolent manner. Interesting, but impractical. I cannot imagine that wars will really cease based on such an effort, or that nonviolent resistance cannot be crushed by a determined use of force.

Professor Walzer seems to say that it will work because the people participating will know in their hearts that they are right. I doubt it. I would think that the more likely success will come from building upon the efforts to determine whether wars are just in the legal sense and to agree upon practical limitations upon suffering if wars occur. If I am too incredulous about Professor Walzer's moral beliefs, he is too incredulous about the legal efforts made to prevent and limit war.

⁴He dismisses the arguments supporting the legality of U.S. intervention in the Vietnam conflict as following the "legalist paradigm" although "unbelievable." For a full presentation of both sides, see the Falk series, Falk, *The Vietnam War and International Law* (Vols. I-IV, 1968-1976).

BOOKS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

With volume 80, the *Military Law Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after brief examination of the books discussed. The number of books received makes formal review of the great majority of them impossible.

The comments in these book notes are not intended to be interpreted as recommendations for or against the books listed, but only as information for the guidance of our readers who may want to examine the books further on their own initiative. However, description of a book in this section does not preclude simultaneous or subsequent review in the *Military Law Review*.

Book notes are set forth in Section IV, below, are arranged in alphabetical order by name of the first author or editor listed in the book, and are numbered accordingly. In Section II, Authors or Editors of Books Noted, and in Section III, Titles Noted, below, the number in parentheses following each entry is the number of the corresponding book note in Section IV.

II. AUTHORS OR EDITORS OF BOOKS NOTED

Adrian, Charles R., *State and Local Governments* (No. 1).

Association of American Law Schools, *Directory of Law Teachers 1978-79* (No. 2).

Braun, Aurel, *Romanian Foreign Policy Since 1965* (No. 3).

Dib, Albert, *Forms and Agreements for Architects, Engineers, and Contractors* (No. 4).

Eckert, William G., C.G. Tedeschi, and Luke G. Tedeschi, editors, *Forensic Medicine: A Study in Trauma and Environmental Hazards* (No. 24).

Federal Publications, Inc., *Construction Briefings* (No. 5).

Fidell, Eugene R., *Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals* (No. 6).

Fox, John C., and Gary E. Murg, *Labor Relations Law: Canada, Mexico and Western Europe* (No. 14).

Frederick, Calvin J., editor, *Dangerous Behavior: A problem in Law and Mental Health* (No. 7).

Gabriel, Richard A., and Paul L. Savage, *Crisis in Command: Mismanagement in the Army* (No. 8).

Hoiberg, Anne, editor, *Women as New "Manpower"* (No. 9).

Jones, Stephen W., and Diane Mackey, editors-in-chief, *University of Arkansas at Little Rock Law Journal* (No. 10).

Keijzer, Nico, *Military Obedience* (No. 11).

Kemp, Geoffrey, Uri Ra'anan, and Robert L. Pfaltzgraff, Jr., editors, *Arms Transfers to the Third World: The Military Buildup in Less-Industrial Countries* (No. 17).

Larkin, Murl A., and Joe H. Munster, Jr., *Military Evidence* (No. 13).

Last, Jack, *Everyday Law Made Simple* (No. 12).

Mackey, Diane, and Stephen W. Jones, editors-in-chief, *University of Arkansas at Little Rock Law Journal* (No. 10).

Munster, Joe H., Jr., and Murl A. Larkin, *Military Evidence* (No. 13).

Murg, Gary E., and John C. Fox, *Labor Relations Law: Canada, Mexico and Western Europe* (No. 14).

Norman, Albert, *The Panama Canal Treaties of 1977: A Political Evaluation* (No. 14).

Pfaltzgraff, Robert L., Jr., Geoffrey Kemp, and Uri Ra'anan, editors, *Arms Transfers to the Third World: The Military Buildup in Less Industrial Countries* (No. 17).

- Pickens, Judy E., Patricia Walsh Rao, and Linda Cook Roberts, editors, *Without Bias: A Guidebook for Nondiscriminatory Communication* (No. 16).
- Ra'anan, Uri, Robert L. Pfaltzgraff, Jr., and Geoffrey Kemp, editors, *Arms Transfers to the Third World: The Military Buildup in Less-Industrial Countries* (No. 17).
- Rao, Patricia Walsh, Judy E. Pickens, and Linda Cook Roberts, editors, *Without Bias: A Guidebook for Nondiscriminatory Communication* (No. 16).
- Roberts, Linda Cook, Judy E. Pickens, and Patricia Walsh Rao, editors, *Without Bias: A Guidebook for Nondiscriminatory Communication* (No. 16).
- Rosenblad, Esbjorn, *International Humanitarian Law of Armed Conflict* (No. 18).
- St. John's Law Review, *New York Rules of Citation* (No. 19).
- Savage, Paul L., and Richard A. Gabriel, *Crisis in Command: Mismanagement in the Army* (No. 8).
- Scaif, Robert A., editor, *Defense Law Journal*, volume 27 (No. 20).
- Soukhanov, Anne H., editor, *Webster's Legal Speller* (No. 21).
- Stockholm International Peace Research Institute, *Anti-Personnel Weapons* (No. 22).
- Stockholm International Peace Research Institute, *Tactical Nuclear Weapons: European Perspectives* (No. 23).
- Tedeschi, C.G., William G. Eckert, and Luke G. Tedeschi, editors, *Forensic Medicine: A Study in Trauma and Environmental Hazards* (No. 24).
- Tedeschi, Luke G., C.G. Tedeschi, and William G. Eckert, *Forensic Medicine: A Study in Trauma and Environmental Hazards* (No. 24).
- Whelan, John W., editor, *Yearbook of Procurement Articles*, volume 14 (No. 25).

111. TITLES NOTED

Arkansas, University of, at Little Rock Law Journal, *edited by Stephen W. Jones and Diane Mackey* (No. 10).

Anti-Personnel Weapons, *by Stockholm International Pence Research Institute* (No. 22).

Arms Transfers to the Third World: The Military Buildup in Less Industrial Countries, *edited by Uri Ra'anan, Robert L. Pfaltzgraff, Jr., and Geoffrey Kemp* (No. 17).

Construction Briefings, *by Federal Publications, Inc.* (No. 5).

Crisis in Command: Mismanagement in the Army, *by Richard A. Gabriel and Paul L. Savage* (No. 8).

Dangerous Behavior: A Problem in Law and Mental Health, *edited by Calvin J. Frederick* (No. 7).

Defense Law Journal, volume 27, *edited by Robert A Scalf* (No. 20).

Directory of Law Teachers, 1978–79, *Association of American Law Schools* (No. 2).

Everyday Law Made Simple, *by Jack Last* (No. 12).

Forensic Medicine: A Study in Trauma and Environmental Hazards, *edited by C.G. Tedeschi, William G. Eckert, and Luke G. Tedeschi* (No. 24).

Forms and Agreements for Architects, Engineers and Contractors, *by Albert Dib* (No. 4).

Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals, *by Eugene R. Fidell* (No. 6).

International Humanitarian Law of Armed Conflict, *by Esbjorn Rosenblad* (No. 18).

Labor Relations Law: Canada, Mexico and Western Europe, *by Gary E. Murg and John C. Fox* (No. 14).

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Military Evidence, by *Joe H. Munster, Jr., and Mud A. Larkin* (No. 13).

Military Obediance, by *Nico Keijzer* (No. 11).

New York Rules of Citation, by *St. John's Law Review* (No. 19).

Panama Canal Treaties of 1977: A Political Evaluation, by *Albert Norman* (No. 15).

Romanian Foreign Policy Since 1965, by *Aurel Braun* (No. 3).

State and Local Governments, by *Charles R. Adrian* (No. 1).

Tactical Nuclear Weapons: European Perspectives, by *Stockholm International Peace Research Institute* (No. 23).

University of Arkansas at Little Rock Law Journal, edited by *Stephen W. Jones and Diane Mackey* (No. 10).

Webster's Legal Speller, edited by *Anne H. Soukhanov* (No, 21).

Without Bias: A Guidebook for Nondiscriminatory Communication, edited by *Judy E. Pickens, Patricia Walsh Rao, and Linda Cook Roberts* (No. 16).

Women as New "Manpower", edited by *Anne Hoiberg* (No. 9).

Yearbook of Procurement Articles, volume 14, edited by *John W. Whelan* (No. 25).

IV. BOOK NOTES

1. Adrian, Charles R., *State and Local Governments*. New York, N.Y.: McGraw-Hill Book Co., 1976. Pp. vii, 416. Bibliography by states; subject matter index. Cost: \$14.95

This work is a basic college-level textbook in political science or government. It is not a lawbook or legal treatise. In this fourth edition, the author advises in his preface that he has added "materials in the opening chapters on the importance of cultural traditions to the diversity of the states." Further, he states that he has elimi-

nated "chapters on the functions of state and local governments", because in his experience this material is most readily expendable.

The fifteen chapters include titles such as, "The Nation We Live In," "Rules for Rule Making" (referring to state constitutions), "Intergroup Activity and Political Power," "Government in Metropolitan Areas," "Executive Officers," "Law and the Judiciary," "Revenues and Expenditures," and others.

The author, Charles R. Adrian, is a professor of political science at the University of California at Riverside. He published the first edition of *State and Local Governments* in 1960.

2. Association of American Law Schools, *Directory of Law Teachers 1978-79*. St. Paul, Minn.: West Publishing Co., 1979. Pp. xl, 982.

This directory, published annually since 1924, lists all full-time teachers and administrators on the staffs of law schools that are members of the Association of American Law Schools, or are on the American Bar Association's list of approved schools, or are operated by accredited universities but have not been in operation long enough to be accredited independently. Certain Canadian teachers are also listed.

The greater part of the book consists of the alphabetical list of teachers by name, with biographical information. Also included are lists of teachers by school, with telephone numbers, and of teachers by subject matter taught. There is also a directory of national legal education organizations, followed by extensive descriptions of organizations related to legal education.

The book includes short lists of Canadian teachers by name and by school. The *Directory* closes with a list of names and addresses of all eligible law schools in the United States and Canada.

The Judge Advocate General's School faculty is listed at page 73 of this edition of the *Directory*, with biographical information on subsequent pages.

The Association of American Law Schools seeks the improvement of the legal profession through education. It was founded in 1900, and now counts 134 of the 167 A.B.A.-approved law schools as its

members. The *Directory* is published by the A.A.L.S. with the assistance of the West Publishing Company and the Foundation Press, Inc.

3. Braun, Aurel, *Romanian Foreign Policy Since 1965*. New York, NY: Praeger Publishers, 1978. Pp. xiii, 217. Cost: \$18.95.

In 1965, Nicolae Ceausescu succeeded Gheorghe Gheorghiu-Dej as leader of Romania. Ceausescu has pursued a foreign policy which has frequently deviated from the foreign policy of the Soviet Union. In this book, Professor Braun tries to describe and analyze the political and military limitations within which Romania can deviate without Soviet intervention.

The book contains chapters on the political-ideological limits of autonomy; Romanian defenses in international law; Soviet interpretations of the strategic limits of Romanian policy deviations; Soviet military limitations on Romanian foreign policy challenges; and active Romanian military defenses of foreign policy autonomy. The work is supplemented by an extensive bibliography and an index.

Dr. Aurel Braun is assistant professor of international relations at the University of Western Ontario, and is a research associate of the Center for International Relations at Queen's University.

4. Dib, Albert, *Forms and Agreements for Architects, Engineers and Contractors*. New York, NY: Clark Boardman Co., Ltd., 1976. Two volumes. Cost: \$100.00. Looseleaf binders.

This two-volume work covers contracting procedures for design, engineering, and construction work in both public and private sectors, under the Defense Acquisition Regulation (formerly Armed Services Procurement Regulation) and other regulations, and under the Uniform Commercial Code.

Volume 1 of this treatise, in eight chapters containing numbered sections, includes discussion of the engineering-construction cycle, contract types, and contracts for engineering services and design services. Included in the text are sample contract forms and clauses. Chapter 4 includes numerous sample provisions and notices for use in bidding on solicitation documents. Many of the examples are taken from federal government contracts and procedures. There

is some discussion of procurement in general and also subcontracts. The first volume closes with a long discussion of purchasing procedures, chiefly those covered in the Uniform Commercial Code. Volume 1 contains its own index.

Volume 2 is devoted entirely to warranties and related remedies. A long section discusses warranties under the Uniform Commercial Code, including express and implied warranties, warranties of merchantability and fitness of purpose, and concepts of negligence and strict liability in the warranty area. Form exemplars are provided. A further section deals with service warranties, with emphasis on professional services. Volume 2 closes with a section on specifications, two appendices dealing with design and performance standards, and an index.

5. Federal Publications, Inc., *Construction Briefings*. Washington, DC: Federal Publications, Inc., 1978. Series issued bimonthly, each issue 6 to 20 pages. Annual subscription, \$84.00.

No. 78-1, June 1978—Subcontractor Miller Act Rights: Basic Principles and Guidelines, by John H. Tracy and John B. Tieder.

The Miller Act, 40 U.S.C. § 270a-d (1976), prescribes procedures and remedies available to insure that subcontractors and suppliers to prime contractors working under federal contracts will be paid what they have earned in the event their prime contractors fail to meet their obligations. The 12-page briefing paper provides a practical description of Miller Act provisions and an update on the state of the law in this area.

No. 78-2, July 1978—Construction Contracting Under Grants: Basic Principles and Guidelines, by Peter M. Kilcullen and William B. Barton.

The federal government regularly makes available large grants of money to state and local governments for every conceivable purpose. These state and local governments then enter contracts with commercial contractors to carry out the purposes of the grants. This 12-page briefing paper focuses on construction contracting under grants awarded by the Environmental Protection Agency chiefly for waste-water treatment facilities. The paper emphasizes that contractors should be aware that, although grant administration is

subject to federal requirements, the federal government is not a party to the contracts awarded by the state and local governments involved.

No. 783, August **1978**. **1977 Construction Bibliography**, by Judge William J. Ruberry, ASBCA.

This 6-page paper is an index of scholarly and practical articles, notes, and comments on construction contracting which have been published in a wide variety of law reviews and journals. Articles published in **1976** and **1977** are covered, together with a few from **1978**. A total of **87** articles are indexed. The heart of this paper is the subject index, which includes the following headings: arbitrators, architects & engineers, bonds, changes & changed conditions, construction financing, costs, delays, disputes, environmental law, foreign construction, general reference, grants, indemnification, inspection & warranty, labor relations, mechanics' liens, minimum wages, payment, performance, safety, subcontractors, and taxation. Also included are a list of authors and a list of the sources in which the articles are found. Most of the articles deal with state, local, and private construction; a few focus on federal construction.

No. 784, September **1978**. **Mistakes in Bids: Basic Principles and Guidelines**, by Philip L. Bruner.

Construction contractors generally have to prepare and submit their bids under severe time pressure. Because of this, the bids often contain errors which are often not discovered until after bids are opened and compared. Yet it is usual for owners and government agencies to require that bids submitted be firm and irrevocable. This 8-page paper reviews the problem from the point of view of the contractor who would like to correct his bid. Included is discussion of the doctrine of mistake, unilateral mistakes by the bidder, mutual mistakes, and types of relief available to the bidder.

No. 78-5, October **1978**. **Construction Arbitration Procedures: Basic Principles and Guidelines**, by Irv Richter and Jeffrey B. Kozek.

A variety of methods are available to owners and contractors to settle disputes that arise in connection with contract performance. Negotiation is generally the most preferred but may not be available at times. Litigation is a last resort, generally expensive and

time-consuming. Arbitration is often favored as a middle-ground approach. In arbitration, the parties voluntarily agree to submit their differences to a neutral third party for a binding decision. This method seems to be favored for claims of less than \$10,000.

The author of this 14-page paper discusses state law on the subject, especially the Uniform Arbitration Act. He mentions the Federal Arbitration Act, and the arbitration rules of the American Arbitration Association and the International Chamber of Commerce. Considered also are arbitrators, the arbitration demand, necessary parties to arbitration, hearing procedures, damages, awards, and judicial review.

No. 78-6, November 1978. Subcontract Risk Allocation: The Prime Contractor's Approach, by Harry L. Griffin, Robert D. Marshall, and John F. Elger.

This paper discusses some of the more significant business risks in the relationship between prime and subcontractors. Attention is given to identification of these risks, allocation or shifting of risks between the parties to subcontracts, and risk sharing. Emphasis is placed on careful drafting of subcontract provisions, including tailoring of standard form provisions. Examples of contract provisions are provided in the text of this 16-page paper. Consideration is given to definition of the subcontractor's scope of work, payment provisions, timeliness and damages for delay, breach of contract, disputes, and subcontractor financial stability. Brief mention is made of contracts with the federal government.

6. Fidell, Eugene R., *Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals*. Washington, DC: Public Law Education Institute, 1978. Pp. ix, 78. Cost: \$4.50, paperback.

Produced by the publishers of *Military Law Reporter*, this booklet sets forth the text of the rules promulgated effective 1 July 1977, with commentary and citations to case law and other authorities.

7. Frederick, Calvin J., editor, *Dangerous Behavior: A Problem in Law and Mental Health*. Rockville, Md.: U.S. Department of Health, Education and Welfare, 1978. Pp. vii, 191. Paperback. For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

This government publication is a collection of eleven essays dealing with various issues arising in the area of crime and delinquency. The essays were based upon papers and lectures given at a symposium sponsored in 1974 by the Center for Studies of Crime and Delinquency of the National Institute of Mental Health.

The book is organized into three parts. The first of these, "General Orientation to the Problems of Violent Behavior," is introductory in nature. The second, "Legal and Legislative Aspects," contains essays dealing with problems of developing concepts and definitions of dangerousness that are relevant to the mental health disciplines, and which at the same time can be written into law and used effectively in practice. The last part, "Policy, Treatment, and Social Implications," discusses post-institutional followup treatment, predicting dangerous behavior, the California mental health program, and various dilemmas of conception, perception, and policy.

The editor of this book, Dr. Frederick, is with the Division of Special Mental Health Programs of the National Institute of Mental Health. He served as moderator for the 1974 symposium. The essay writers include professors, practitioners, and researchers in the fields of law and mental health, and one California state senator.

8. Gabriel, Richard A., and Paul L. Savage, *Crisis in Command: Mismanagement in the Army*. New York, NY: Hill and Wang, a division of Farrar, Straus and Giroux, 1978. Pp. xii, 242. Index. cost: \$10.00.

The authors contend that the Army of today is weakened by the "managerial careerism" of its officer corps, by the tendency of officers to further their own careers at the expense of their units' missions and their subordinates' welfare. Return to a more rigorous and more selfless style of leadership is recommended. Charts and statistics are used in an attempt to show the adverse consequences of the careerist approach on the performance of the Army during the Vietnam war. Both authors are former Army officers, now college teachers.

9. Hoiberg, Anne, editor, *Women as New 'Manpower,'? special issue of Armed Forces and Society*, vol. 4, no. 4. Chicago, IL:

Inter-University Seminar on Armed Forces and Society, Summer 1978. Pp. 555 through 731.

Armed Forces and Society is a quarterly journal containing articles on military institutions, relations between the civilian and military sectors of society, conflict management, and the like. The emphasis is broadly interdisciplinary.

This special issue contains eleven articles dealing with the situation of women in the various military services, the service academies, and elsewhere, and with general policy considerations of sexual integration.

10. Jones, Stephen W., and Diane Mackey, editors-in-chief, et al., *University of Arkansas at Little Rock Law Journal*. Little Rock, Arkansas: Board of Trustees of the University of Arkansas, 1978. Volume 1, Number 1, pp. 1 to 276; Volume 1, Number 2, pp. 277-515. Published semiannually. Cost: \$9.00 per year, paperback.

This is a new publication. The School of Law of the University of Arkansas at Little Rock was founded in 1965 as the Little Rock Division of the University of Arkansas School of Law in Fayetteville. In 1975, the Little Rock Division was separated from the Fayetteville institution and became a law school in its own right. The new law school proposes to publish two issues of its *Journal* each year.

Volume 1, Number 1 contains the First Annual Survey of Arkansas Law, 1976-1977, at 1 UALR L. J. 117, written by the editors. Also included in this number is an article by Professor Fred W. Peel, Jr., *An Approach to Income Tax Simplification*, 1 UALR L. J. 1, two other articles, a comment, and four case notes.

Volume 1, Number 2 contains a special section on law and medicine, consisting of four articles and a note, as well as articles, a comment, notes, and a book review dealing with other areas of law. The second number closes with a general index to Volume 1, by subject matter, followed by a list of authors of the leading articles, and indices of the principal cases noted or surveyed and the statutes surveyed.

11. Keijzer, Nico, *Military Obediance*. Alphen aan den Rijn, The

Netherlands: Sijthoff & Noordhoff International Publishers B.V., 1978. Pp. xxxii, 312. Table of cases; list of abbreviations; bibliography; index of authors cited; subject index. Cost: \$45.00.

According to its author, this study examines the amount of freedom of choice and personal responsibility available to military personnel in the defense forces of six different countries. The author observes that the 19th century concept of "an army of human cogs, rigidly bound to unquestioning execution of superior orders," is no longer an accurate representation of reality.

Professor Keijzer states that he has written this book primarily for the individual soldier who may be unsure whether to obey certain orders in combat. The author's stated purpose is to outline for the soldier a "line of conduct" to follow in such cases. Emphasis is placed on "the question of how to act if one is not sure about the binding character of a particular order."

The book is divided into four parts. The first part, "Prolegomena: Acting on Orders," is a psychological and philosophical examination of action as a concept, and of the nature and force of orders. Part II, "Quid Facti: The Social Situation," discusses the nature of military organization, methods of social control, group therapy, and related concepts.

Part III, "Quid Juris: The Legal Duty to Obey," is the heart of the book, comprising about two-thirds of its bulk. In this section, Professor Keijzer discusses obedience to orders within the military services of six countries, the United States, the Soviet Union, France, the Federal Republic of Germany, the Netherlands, and Israel. He reviews briefly the statutory provisions on this subject in each of the countries, and then proceeds to an extensive discussion of orders, and of objective and subjective limitations on the duty to obey them. Among the subtopics considered are impossibility of carrying out an order, orders to commit illegal acts, changed circumstances, and contradictory orders, among others. The law of conscientious objection is briefly reviewed.

The fourth and last part, "Epilogue," contains a brief discussion of sociology and the law, with emphasis on the reflection of custom and social structure in the law, and social norms which deviate from the law.

The author served for a number of years in the Royal Netherlands Navy, and is an assistant professor of criminal law in the Faculty of Law at the Free University, Amsterdam, The Netherlands.

12. Last, Jack, *Eueryday Law Made Simple*. Revised by Douglas B. Oliver and Betsy B. McKenney. Garden City, NY: Doubleday & Company, Inc., 1978. Pp. xiv, 172. Cost: \$2.95.

A law book for nonlawyers, this work is intended to enable lay people not to dispense with the advice of attorneys but rather to recognize when attorneys' advice is needed. The book contains chapters dealing with a wide variety of business transactions, domestic relations matters, litigation, torts, and other subjects. There is some use of figures and tables, and the book contains a glossary of legal terms and an index.

13. Munster, Joe H., Jr., and Mural A. Larkin, *Military Evidence*, 2d ed., 1978. Charlottesville, VA: The Bobbs-Merrill Co., Inc. Pp. xiv, 540. Cost: \$35.00.

This textbook surveys military evidentiary procedures, burdens of proof, admissibility, relevancy, nontestimonial and testimonial evidence, hearsay, illegally obtained evidence, presumptions and inferences, and substitutes for evidence. The authors are law professors and retired Navy judge advocates.

14. Murg, Gary E., and John C. Fox, *Labor Relations Law; Canada, Mexico and Western Europe*. New York, NY: Practicing Law Institute, 1978. Two volumes. Vol. I, xxix, 738; Vol. II, ix, 695.

This two-volume work discusses labor law in Canada, Mexico, and six western European countries, the United Kingdom, Belgium, France, Italy, the Netherlands, and West Germany. A chapter on labor law of the European Community or Common Market is also included. Volume I opens with a general introductory essay supplemented by many pages of appendices containing labor statistics and other information. Each of the substantive chapters is also supplemented by appendices containing statistics and information about legislation in the country covered by the chapter. Volume II contains further lengthy appendices in which are reproduced statutes and documents pertaining to the labor law of Mexico, the

United Kingdom, and West Germany. The work provides a detailed table of contents at the beginning of each volume, and a subject-matter index at the close of volume 11.

Gary E. Murg is senior labor counsel for the Burroughs Corporation at Detroit, Michigan. John C. Fox is an associate of the law firm of Pepper, Hamilton & Scheetz, operating out of Washington, Philadelphia, and Los Angeles. Both authors have previously published articles on labor law.

15. Norman, Albert, *The Panama Canal Treaties of 1977: A Political Evaluation*. Northfield, VT: Albert Norman, 1978. Pp. 48. Cost: \$6.50, paperback.

This booklet contains a series of essays first published by the author in the Northfield News and Advertiser, a newspaper published in Northfield, Vermont. The author is a professor of history and international relations at Norwich University in Vermont.

Professor Norman describes briefly the history of relations between Panama and the United States concerning the Panama Canal, and discusses the new treaties which recognize Panamanian sovereignty over the Canal, guarantee the neutrality of the Canal for the future, and grant to the United States a leasehold interest until 1999.

Professor Norman states that, in his opinion, the new treaties do not enhance the security of the United States (p. 15). He considers that sovereignty over so important a piece of territory as the Canal may be an unreasonably heavy burden to place on so small a nation as Panama (p. 18). Professor Norman would rather see recognition of the special status of the Canal as a sort of "international public utility" under the protection of the United States or some other great power, or an international commission (p. 19).

The greater part of the booklet consists of two appendices containing the texts of the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal. A table of contents and an index are also provided.

16. Pickens, Judy E., Patricia Walsh Rao, and Linda Cook Roberts, editors, *Without Bias: A Guidebook for Nondiscriminatory Com-*

munication, San Francisco, CA: International Association of Business Communicators, 1977. Pp. 77. Cost: \$4.00, paperback.

This book discusses ways in which speech, writing, photography, and mass media in general are commonly misused to reflect bias on racial, ethnic, or sexual grounds, or against the handicapped. The editors show ways of eliminating such bias from communications, with emphasis on visual media, and on proper conduct of meetings, conferences, and workshops. Also included is a chapter on equal employment opportunity from the non-lawyer's point of view. The book closes with a description of a case study in communications affirmative action.

The International Association of Business Communicators describes itself as "a professional organization for writers, editors, and visual specialists, managers and others who specialize in business and organizational communication" (frontispiece). This book was prepared by the Association's Committee on Women in Business Communication, later renamed Special Interests Committee to reflect an organizational decision to broaden the scope of the committee's interests and also the book's coverage. The editors work in fields such as public relations, journalism, and employee communications.

17. Ra'anan, Uri, Robert L. Pfaltzgraff, Jr., and Geoffrey Kemp, editors. *Arms Transfers to the Third World: The **Military** Buildup in Less Industrial Countries*. Boulder, CO: Westview Press, Inc., 1979. Pp. xiv, 411. Cost: **\$23.75**.

In recent decades, sales and grants of weapons from the United States and various European countries have increased greatly in the developing countries of Asia, Africa, and Latin America. This book is a collection of sixteen essays dealing with the military and political implications of such weapons transfers for both the recipients and the transferors.

The sixteen essays are organized in eight parts. The first three deal primarily with military implications of arms transfers, in both strategic and methodological terms. Part 4 is entitled, "Arms Supplies and Political Leverage." Part 5 is the longest part, containing six of the essays. It is called, "Resource Constraints, Socioeconomic Effects, and Regional Impacts of Arms Transfers."

Part 6 deals with violence at the substate level; part 7, with procedures for and constraints on arms transfers. Finally, Part 8 concludes the book with a discussion of the implications of arms transfers for United States policy.

The book makes use of several dozen figures, tables, and maps scattered throughout the various parts. An index to these aids follows the table of contents.

All three editors are associated with the Fletcher School of Law and Diplomacy of Tufts University, at Medford, Massachusetts.

18. Rosenblad, Esbjorn, *International Humanitarian Law of Armed Conflict*. Geneva, Switzerland: Henry Dunant Institute, **1979**. Pp. x, 200. List of abbreviations; three appendices; bibliography; subject index. Paperback.

The abstract at the beginning of this work states that the author focuses attention primarily on "the principle of distinction." This principle is defined as "a belligerent's obligation at all times to observe a distinction between on the one hand combatants and military objectives and, on the other hand, the civilian population and civilian objects in order to spare civilians as much as possible." He discusses various legal problems to which the principle of distinction gives rise. Discussion of the Geneva protocols to the **1949** Conventions is provided.

The book includes chapters on a number of special problems, such as guerilla warfare, starvation as a method of warfare, and aerial bombardment. In his conclusion the author recommends certain changes to the Geneva protocols which he believes will enable state parties to adhere more closely to the principle of distinction.

The appendices include a table of cases referred to in the text, several tables listing a wide variety of armed conflicts, international and otherwise, which have taken place in this century, and certain new rules set forth in the Geneva protocols.

The author participated in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, in the first two sessions at Geneva in **1974** and **1975**. He also participated in two preceding Conferences of

Government Experts, arranged in 1971 and 1972 by the International Committee of the Red Cross, also at Geneva.

19. St. John's Law Review, *New York Rules of Citation*. Jamaica, N.Y.: St. John's Law Review, 1978. Pp. 32. Cost: \$2.50.

This booklet states, "Contrary to rule 10:4(b) of *A Uniform System of Citation* (12th ed. 1976), it is the policy of the *St. John's Law Review* to give as complete information as possible when citing New York judicial authority." To this end, detailed instructions are given not only for citations to the decisions of currently existing courts and currently published reporters, but also for dozens of discontinued courts and reporters. Charts showing current court structure are included, together with short sections dealing with citation to New York statutes, legislative materials, and administrative and other types of authorities.

St. John's Law Review is associated with the St. John's University School of Law and is now in its fiftieth year of publication.

20. Scaf, Robert A., editor, Volume 27, *Defense Law Journal*. Indianapolis, IN: The Allen Smith wcompany, 1978. Pp. viii, 543. Subject-matter index.

This annual publication is a compilation of the issues of a periodic service which focuses on civil litigation from the point of view of the defendant. Articles on new developments in tort law are included, together with numerous case notes accompanied by editorial comments and annotations.

The breadth of coverage of the *Journal* is suggested by the titles of the five lead articles, "Review of 1977 Tort Trends;" "Assessing the Impact of Future Taxes in Computing Lost Future Earnings: Practical, Legal and Equitable Considerations;" "Oral Contraceptives and Breach of Warranty Under the Uniform Commercial Code;" "The Ultimate Issue Rule in State and Federal Courts;" and "Injuries Arising Out of Amateur and Professional Sports: Viability of the Assumption of Risk Defense."

The case notes and comments are organized under the headings, "Practical Trial Suggestions," "Cases Won by the Defense," "Significant Court Decisions," and "Damage Awards."

The editor, Robert A. Scaff, was formerly an instructor at various minor law schools, and was a private practitioner for a number of years. The various members of the editorial board of the *Journal* and the various contributors include private practitioners, both corporation counsel and members of law firms, and also law professors.

21. Soukhanov, Anne H., editor, *Webster's Legal Speller*. Springfield, MA: G. & C. Merriam Co., 1978. Pp. xiii, 348. Cost: \$3.95, hardback.

This pocket-sized volume is a guidebook to the spelling and division into syllables of approximately 28,000 words commonly used in a legal context. It is not a dictionary, and contains no definitions. Words are arranged in three columns on the pages, and are taken from other dictionaries published by the Merriam Company.

The heart of the book is the A-Z word list, comprising about eighty percent of its bulk. This is followed by a dictionary of abbreviations, and explanation of punctuation marks and their uses, two pages of rules for use of italics, about three pages on rules of capitalization, and several more pages on forms of address for judges and other legal personnel. The book closes with a table of weights and measures, showing units commonly used in the United States, and their metric equivalents.

The book opens with an introductory essay explaining how to use it. The editor states, "This book is addressed primarily to the needs of American legal secretaries employed in offices concerned for the most part with the domestic practice of law but it is also adequate to confirm spellings and end-of-line divisions for most students of the law and legal writers" (p. vi).

22. Stockholm International Peace Research Institute, *Anti-Personnel Weapons*. London, U.K.: Taylor & Francis, Ltd., 1978. Pp. xv, 299. Appendices, bibliography, and index. Cost: UK£9.00.

The Stockholm International Peace Research Institute (SIPRI) has published a number of books containing essays and statistics describing trends in the development, proliferation, and control of weapons of all sorts among the world's governments.

The stated purposes of the book *Anti-Personnel Weapons* is to

describe “the development, uses and effects of conventional anti-personnel weapons such as rifles and machine-guns, grenades, bombs, shells and mines.” Further, “[i]t is intended as a contribution to the ongoing efforts to prohibit or restrict the use of some of the more inhumane and indiscriminate of these weapons.”

The book is organized into nine chapters, two of which are supplemented by appendices. Liberal use is made of tables of statistics and of figures showing the appearance, structure, and use of weapons discussed in the text.

The first two chapters are historical, tracing the rise of anti-personnel weapons from antiquity to the Vietnam war, with primary emphasis placed on that latter event. Chapter 3 discusses wounds; chapter 4, small arms and ammunition, with an appendix listing, by country, the principle manufacturers of these weapons. Fragmentation weapons are considered in chapter 5, and blast weapons in chapter 6. Chapter 7 considers delayed-action weapons, including the problem of unexploded duds. The very short chapter 8 mentions electric, acoustic, and electro-magnetic-wave weapons.

Perhaps of most interest to attorneys is chapter 9, concerning the development of the laws of war on anti-personnel weapons. This chapter is supplemented by four appendices. The first of these is a chronology of international diplomatic efforts between 1968 and 1977 to prohibit weapons considered inhumane and indiscriminate. The second is a list of United Nations General Assembly resolutions on the subject, and the third appendix provides a more detailed account of the more recent diplomatic events listed in the first appendix. The last appendix is a summary, analysis, and criticism of the rules of engagement used by the United States in Vietnam.

The Stockholm International Peace Research Institute describes itself as an “institute for research into problems of peace and conflict, with particular attention to the problems of disarmament and arms regulation.” The organization is financed by appropriations enacted by the Swedish Parliament, and was established in 1966 to commemorate Sweden’s 150 years of peace.

The book *Anti-Personnel Weapons* was written by Dr. Malvern Lumsden, a SIPRI Research Fellow, with assistance of others associated with SIPRI.

23. Stockholm International Peace Research Institute, *Tactical Nuclear Weapons: European Perspectives*. London: Taylor & Francis, Ltd., **1978**. Pp. xvi, **372**. Cost: £ 10.50.

This book is a collection of essays, accompanied by charts and graphs, reviewing the current state of nuclear weaponry within Europe. The development of smaller, more accurate nuclear weapons tends to blur the distinction between conventional and nuclear warfare. Several of the essays deal with this problem and attempt to present alternatives to the use of the new "mini-nukes" within Europe.

24. Tedeschi, C.G., William G. Eckert, and Luke G. Tedeschi, *Forensic Medicine: A Study in Trauma and Environmental Hazards*. Philadelphia, PA: W.B. Saunders Company, **1977**. Three volumes. Vol. I, Mechanical Trauma, pp. xxxii, **784**, plus index, **\$45.00**. Vol. II, Physical Trauma, pp. xxv, **785-1160**, plus index, \$30.00. Vol. III, Environmental Hazards, pp. xxvi, **1161-1680**, plus index, **\$35.00**. Set of three volumes, **\$98.00**.

A detailed and vividly illustrated textbook written by physicians for attorneys. Describes dozens of types of injuries in language intelligible to readers lacking medical training. Some use of charts and graphs, with extensive bibliography.

25. Whelan, John W., editor, Volume **14**, *Yearbook of Procurement Articles*. Washington, D.C.: Federal Publications, Inc. **1978**. Pp. xii, **1034**.

This annual volume is a collection of forty-six articles on the subject of federal government procurement, reprinted from various law reviews and journals. All were originally published in **1976** or **1977**. Included is a reprint of Kunzig, *Perspective: Government Contracts — Legal and Administrative Remedies*, **74** Mil. L. Rev. **1** (**1976**).

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This index follows the format of the vicennial cumulative index published as volume 81 of the *Military Law Review*. Future volumes will contain similar one-volume indices. The purposes of such one-volume indices are to identify the subject-matter headings under which the writings in the indexed volume are classifiable; to add new headings from time to time as needed; and to commence collection and organization of the entries which will eventually be used in another cumulative index.

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