Naval War College Review

Volume 10
Number 1 *January*

Article 2

1957

Jurisdiction

Myres S. McDougal

SPECIAL ATTENTION TO THE READER

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

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

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

NAVAL WAR COLLEGE REVIEW

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

JURISDICTION

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

Mr. Chairman and Gentlemen:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "It is a historical fact that the various states are separated from each other and bounded territorially. This of course is not fortuitous but deeply rooted in the nature of the case. The states are primarily an organization of power. Each of them claims to be, within a certain territory separated from others, the supreme power in relation to its subjects (a self-governing community). The simplest principle, almost a matter of course, for the individualization and separation of these competing instruments of power is the spacial or territorial."
> (Ross, *A Textbook of International Law*, 137, 1947).

Professor Ross adds:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The honoring of contiguous zones for all important national purposes, in the absence of unreasonable interference with others;

3. The common use of the broader expanses of the oceans for the great variety of purposes indicated above;

4. The notions of the nationality of ships and of the national responsibility of states for their ships; and

5. The law of piracy for the repression of unauthorized violence.

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

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

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

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

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

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

> "Soon this will be no theoretical matter. The United States, the Soviet Union and Britain have announced that they are building satellites to revolve 200 to 300 miles above the earth's surface and are planning to dispatch a few high-altitude rockets beyond the earth's atmospheric coat. The scientists foresee manned space stations coasting in the earth's orbit for indefinite periods, useful for refueling space ships and for astronomical and physical research. Next step: experimental flights to the moon; scheduled flights later.
>
> The lawyers are just beginning to get a slippery grip on the legal aspects of outer space, issues of overhead sovereignty and freedom of passage."
> (New York Herald Tribune, May 3, 1956).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BIOGRAPHIC SKETCH

Professor Myres S. McDougal

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

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

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

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