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Role of International Law and an Evolving Ocean Law
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THE ROLE OF INTERNATIONAL LAW IN THE WORLD COMMUNITY

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In effect, I am being offered to your salivating fangs as a proponent of what some have labeled a big, blooming, buzzing confusion—international law. I'm reminded that the philosopher Hobbes had told us that man is the only beast that preys on its own kind. Now, this morning, in order to present the narrowest possible target to your combined attacks—80 percent of the world's fighting power is represented here this morning in the persons of the U.S. Armed Forces and those 31 friendly nations—I wish to define the terms used in the topic for today's lecture which is "The Role of International Law in the World Community."

I do so because it is important in this introductory lecture to the course on international law that we proceed directly to the ultimate fundamentals. Let me, therefore, turn first to the two words "world community" and suggest to you that as a lawyer for whom international law has long been a source of livelihood, I have some doubts whether one can profitably use this term "world community." The political scientist, the economist, the sociologist —all can accept this expression with greater ease than can the lawyer who must compete in a world of adversaries. I would propose that for today we substitute for this phrase the words "world arena." The expression "world community" implies a plurality of states and nations drawn by common interests into collaborative and structural relationships to each other promoted by international organizations. In fact, reality is much closer to a scenario in which highly autonomous and competitive states seek aggressively to advance and defensively to protect what each deems to be its national objectives through reciprocity rather than communion of interests. In this arena the actors are states, with international organizations largely reduced to the role of disapproving spectators.

Let me go into this matter a little more thoroughly, yet briefly, I hope. I suggest that if we look at the United Nations, a moment's reflection would reveal that the General Assembly can take no decisions in this world scenario apart from internal housekeeping arrangements. It can make only recommendations. You will recall that recently Israel was severely reproved at the General Assembly for declaring that she would refuse to recognize the resolutions on Jerusalem voted in June of this year. But the criticism emerged precisely from those states that 20 years ago had adopted exactly the same position declaring that they utterly rejected the United Nations resolutions relating to the admission of Israel. The U.S.S.R. has adopted a similar attitude on other questions as had indeed, on occasion, the United States itself.

Now, with regard to the Security Council you are aware of the veto power, and certainly the United States is bound by nothing in substance at the Security Council which we do not wish to be bound by.

You may say, "Let us leave this problem aside; is it not a fact that the United Nations operates as a world community? How about these U.N. Forces in the Congo, Cyprus, Yemen, et cetera?" However, if we look at the present structure of the United Nations we can see that here the contributions are on a state-to-state basis. The U.N. operations in Yemen and Cyprus are supported not by the United Nations but individually and voluntarily only by those states which choose to participate.

"Well," you may say, "how about the International Court of Justice?" I would suggest that the same conclusion obtains. No state may be bound or hauled before it without its consent. Now it is true that under article 36 of the Statute of the Court the United States has recognized the so-called compulsory jurisdiction of that tribunal. But it is also true that we have adopted what is called the Connolly Amendment which reserves to the United States the sole determination as to what is a domestic matter, which means that the United States alone decides whether it should submit to the jurisdiction of that Court. This again is a form of veto not unlike that which we enjoy in the Security Council. This formula has proved so attractive to the rest of the world that where it has not been literally adopted elsewhere it has been extended by the Court through reciprocity. The result is that, with but two exceptions at this moment, there are no cases before the Court.

"Well," you may say, "how about other areas? How about the European Economic Community and its International Court?" Again the same conclusion probably obtains. The cases are still not convincing that the Court of the European Community enjoys the right to pronounce judgments binding on the member states. I am prepared to admit that in the *Van Gand* case some argument could be advanced to that effect. But, by and large, this is not the case. Much has been made of the European Court of Human Rights and the right of an individual to bring there a complaint against one's own government for violation of human rights. However, article 25 of the Treaty establishing that Court requires the advance consent of the state to get a case there.

What about other areas? Let me just mention one other point, and with this I return to the United Nations. One of the most fundamental articles, if not the most fundamental article of the Charter, is article 51—self-defense. And as you know, in national law (we international lawyers frequently call it municipal law) self-defense is a privilege reserved clearly in its first stage to the personal and subjective assessment by the individual that his life is imminently threatened. True, the courts may ultimately, in a second stage, decide that there was no legitimate basis for sensing such a threat. However, in the case of states and self-defense under article 51 of the Charter there is, practically speaking, no such second stage. Just as with the individual, the state, according to article 51, clearly has the initial determination as to whether or not it may act in self-defense. And where is the second stage, that of adjudication? Adjudication is made, not by the International Court of Justice, but by the Security Council. The right of self-defense as determined by the individual state under article 51 remains in force until the Security Council takes a decision one way or the other. Yet, once again the veto comes into play. The five great powers will invariably exercise the veto privilege either in their own behalf or that of their clients, and so a decision will never be taken on this point, and the original unilateral determination will remain in force.

Aside from custom, what about specific international legislation in the form of multilateral treaties? Let me, for lack of time, dredge up multilateral conventions in maritime matters such as the North Sea Fisheries, the North Atlantic Fisheries, the Northwest Pacific Fisheries, the Safety of Life at Sea, Rules of the Road, and the Pollution Conventions. What happens here? In every case the execution and administration are reserved, not for international organizations, but for the states themselves. Thus, in the face of sovereign states we are confronted in ultimate analysis with a world arena rather than a world community.

What I am trying to say up to this point is that we still have to deal essentially with an adversative system of autonomous states, and with such a scenario it is hard to talk about an international community except in respect of the slow accretion of custom which, by and large, is more concerned with generalities than with hard precision. It is easier to talk about an international arena.

In this situation, what can we conclude? Well, before we decide anything I would suggest that we ask ourselves why we have a situation of this sort. Partly it is, of course, an inheritance from the past when there were few international organizations. I do not deny that important international organizations exist, but what I am suggesting is that from the point of view of international law they remain peripheral to state enforcement. I say this despite the fact that, as undoubtedly many of you, I have myself spent many years at the United Nations.

There are, however, two more fundamental explanations of the situation linked to the nuclear era in which we are living. The first is a situation so familiar to all of you that I need not belabor it—namely, that the great world powers are locked in a nuclear stalemate. Now a nuclear stalemate means that from the point of view of organizing an international community, of organizing security, we are not prepared, we are psychologically as well as militarily unprepared, to commit our very existence to a legal obligation. As former Secretary of State Acheson has observed, "The survival of states is not a matter of law." Now, if this is the case, is it not difficult to move into an era of effective, indeed, even legally valid alliances? I would suggest that it is, and if we do not have alliances, how again can we talk of an international community? Talk of arena? Yes.

Let me illustrate this briefly, first by the Vietnam situation. Here we—that is to say, sometimes the Government, sometimes the press, sometimes public groups—have frequently said, "We are in Vietnam in execution of our SEATO obligations." I suggest that we are not in Vietnam in execution of our SEATO obligations. I referred a moment ago to article 51, the gut article of the Charter, I would propose that we are in Vietnam on other grounds including that of collective self-defense. However that may be, let us look at the essential article of SEATO, which is article 4. Article 4 says this: "Each party recognizes that aggression by means of an armed attack in the treaty area... would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes." Is that an obligation? Most certainly it is not! Again, in the world arena of adversative states we have carefully reserved to ourselves freedom of ultimate unilateral decision. This language exposes the nuclear stalemate. This is not an alliance, it is a declaration of independence.

Let me mention another aspect of the same problem. In the days of the League, enormous importance was attached to the concept of collective security which is the automatic obligation to apply force upon a call for the

same by the collective organization. This was the contribution of the League of Nations to world peace. From my experience at the United Nations, dating from the San Francisco Conference itself, I can testify as well to the frequency with which this concept was discussed in the first decade of the United Nations. But today, gentlemen, do we hear about collective security? I would suggest we do not. It was none other than Adlai Stevenson, our distinguished Representative for so many years at the United Nations, who, a few months before his death, said this: "The truth is that the best hope for peace with justice does not lie in the United Nations. Indeed the truth is almost exactly the reverse. . . . Until the international community"—you can see he let me down—"is ready to rescue the victims, there is no alternative to national power."

So far I have been speaking of the nuclear stalemate of the great world powers. This is the first of the two more deeply fundamental reasons why we are living in a world arena rather than a world community. Let me now turn to the second cause, and at this point I am talking about the midde-sized and the small states. Here we encounter another phenomenon of the nuclear era, a development which, for lack of a better way of tagging it, I choose to call "the inversion of power." Now, what do I mean? I mean simply what the Prime Minister of the United Kingdom remarked several years ago, namely, that the nuclear stalemate between the great powers implies added freedom of action on the part of the middle-ranking and small states. Because of the reluctance of the great powers to intervene, the smaller states have obtained an impunity for their actions that had not previously been possible. This has greatly increased the proliferation of aggressions and conflicts among the small and particularly the developing states of the world. I would suggest that if we look at the world scene this conclusion rather authoritatively imposes itself. How about 1956 and the Suez crisis? How about the Suez crisis of today? How, indeed, about the Vietnam conflict? Does not this conflict constitute an illustration of both the nuclear stalemate and the inversion of power?

There is another area in which I would suggest that this inversion of power is manifested. The 19th century saw the progressive disappearance of independent states; for example, the Kingdoms of Burma and Madagascar were both conquered and disappeared as independent states. Today they have reappeared on the world scene. I do not suggest that the inversion of power is solely responsible for this reappearance, but I do submit that it has made it far easier for the renascent and newly emerged states to maintain their independence and freedom of maneuver. This independence is accompanied by a great sensitivity to all that concerns sovereignty and freedom of choice. So we have, on the one hand, the great powers of the world locked in nuclear stalemate and the middle and small states, thanks to inversion of power, profiting from a freedom of action that previously had not been available. The combined effect of the nuclear stalemate and the inversion of power has been to prevent the nuclear powers from ignoring the small states and to afford the latter freedom of maneuver far beyond the limits of their actual physical power. Thus the world becomes an arena rather than a community, an arena crowded with giant, middle-sized, and dwarf states, all competitive if not combative, with international organizations playing largely the role of mostly disapproving spectators.

At the same time we cannot ignore the almost stupendous disparity between the real physical strengths of the nuclear giants and those of the reemerged and emerging states. There is,

in consequence, a deep-seated and all-pervasive cleavage of interests and claims as between the great and the small states—a dichotomy to which it will be necessary to return.

So much, then, for the first part of my remarks—it is the world arena of competitive and combative states rather than a world community that constitutes one of the ultimate fundamentals of our problem.

I now come to the term "international law." How can we confidently assert that in such a world arena international law could play any role?

We are, of course, faced with the initial question as to what is law. Saint Augustine is alleged to have said that if he were asked what "time" is he would reply, "Yes, I *know* perfectly well what 'time' is, but I can't *tell* you what it is." Do we not have this question with law? What, then, is law?

There are many criteria one might try to apply. Let me briefly suggest some of them. Many say that it is the command of the sovereign, and since international law can reveal no such sovereign command, it is not law. Well, this does not help us in the final analysis. In terms of our national law, we arrive ultimately at the Constitution. It is the sovereign, whether a king or the people, that grants the Constitution, and what is the Constitution? It is essentially a series of restrictions on the freedom of that sovereign. How, then, can the sovereign command a limitation upon himself? Yet that is exactly what we—the people who are the sovereign in the United States—are doing with the first 10, the 14th, and other amendments to the Constitution, are we not? So I do not think that the concept of command is extremely helpful to us in proving that international law is not law.

Now, it is said that since international law has neither legislature nor the threat of compulsory recourse to courts that characterize national law, it cannot be considered law. I am going to pass over the question of legislature. I do so, in part, because the answer is here more or less apparent, and, secondly, because I do think that democratic processes or participation in law-making is largely irrelevant as a criterion of any law, be it national or international.

Let us turn then to the judiciary. I suppose if we come back to the fundamentals the requirement of resort to courts is not helpful to us in determining whether or not legal norms are involved. Professor Chayes reminds us of the situation that arose in the closing months of the Eisenhower Administration. You will perhaps recall that Congress at that time called upon the White House to deliver over certain highly secret documents, and the President refused to transfer those documents. Could Congress have cited President Eisenhower before the Supreme or any other Court? There is no remedy between the branches of the Government for accomplishing any thing of the sort. One branch may not sue another branch.

We come now to what I'm sure you're all thinking of—sanctions. Law is an order backed by the threat of force, and if international law has no sanction it is not law. Well, I am going to suggest that international law does have sanctions, and indeed a very important sanction which ties in directly with this concept that I have been laying before you—the adversative autonomy of states. But more of this later. First, let us look at sanction as a threat of force. It is by no means certain that such a sanction is a criteria of law. All of you gentlemen belong to a highly sophisticated and integrated community—the military community. Now I would ask you: How many of you respect military law because of the threat of force? I would suggest you obey it because of your respect for authority within the community and of your demand that your own authority be respected by those subordinate to you. Moreover, a

great deal of our own municipal law, our national law, is irrelevant in terms of any sanction. Much of our law, perhaps most of it, is concerned with determining privileges and procedures. For example, to what extent would you say that sanction is important to Medicare legislation? I would think only to a very minor degree. Viewed in terms of actual application of sanctions, international law fares no worse than do other branches of the law. Are we today in position to declare that the pandemic of violence in the urban centers of the United States, as indeed abroad, and as evidenced by the President's recent appeal to abandon and disorder, signifies that national state, and municipal law do not exist?

Finally, it is said that international law is not law because so much of it is dominated by politics. Yet, would you be prepared to assert that the laws enacted by our Congressmen and Senators are not transcendently dominated by politics? Could one assert that military science and doctrine are unimportant in the war in Vietnam because political considerations play no small role in decisions as to strategy, tactics, and deployments including bombing?

If we may then take it that international law can and should be considered as fulfilling the requirements and criteria of law, the next question is: "Why, in this world arena of adversary states, should we use law at all instead of force and threats of force? Are not the latter far more effective and therefore more economical than efforts to apply rules of law? Why should we not shoot our way through problems?" Is not this logical?

Well here, gentlemen, I must confess that I would like to introduce another model. I have talked about the world arena rather than a world community. A second model, for my part, is what Wohlstetter and others have called the "Great World" concept, as distinguished from that of the "Small World." Some of you may remember that a decade ago there was a great deal of talk of the small world. Sophistication of transportation and communications had shrunk the world. I would suggest, on the contrary, that these capabilities and this array of resources and equipment have, within the context of application of military strength and other measures of force, had the effect of expanding rather than reducing the apparent world. Far be it from me, a civilian, to suggest to you, technicians and professionals, that distance is unimportant today in solving problems of missile firing or logistics. If so, why is it that orbiting satellites and hundreds of military and scientific personnel are constantly engaged in the excruciatingly precise computations required for refining down in the last foot the exact distances that separate missile launching sites from possible targets? With regard to logistics, possibly 20 years ago we might not have been able to meet the logistic challenges of a Vietnam operation which still remain of herculean proportions and of staggering costs. So, even today it is not always feasible to shoot our way through. There are also the political considerations. Reflect, for example, on the Congo airdrops of 1963 and 1967. Can we say that these were useful or highly effective operations?

I was in the Middle East in 1956 at the time of the first Suez crisis and recall that those elements of the Egyptian population that were the most articulate in their opposition to the French and British landings were not the Egyptians, but precisely the French and the British residents. They knew perfectly well what they were faced with. No matter how swiftly their own national forces moved, they could not arrive in time to protect them or their properties.

Given this great world model, we cannot go around shooting our way through problems. Even a gangster state

has at some point to establish rules if only to economize the costs of the shooting it would otherwise have to resort to. At some stage the virtues of predictability and orderliness become imperative. We have to have our Status of Armed Forces Agreements, otherwise overseas operations would be out of the question. We have to go on the basis that we must know, for example, when you are sent abroad that you are not going to be subjected by a foreign government to an income tax every time you set foot on its soil. We have to have some rules established on a basis of reasonable expectations—the expectations that states can obtain, regularly, recognition from others of their claims under international law. Such claims as do receive recognition are called rights. There is also the counterpart, namely, an acknowledgment by other states that if such rights are denied the injured state may take action to enforce them.

So, in effect, we are saying that international law is like national law. You go to your lawyer to find out what you can claim—indeed get away with—and what you cannot claim, and what will be the consequences, often totally unperceived by the layman, of pressing legal or illegal claims. Thus international law, as all law, is concerned with ascertaining and demonstrating in the light of practice those claims which can be pressed as rights without violating expectations established in the international arena and those which could be pressed only against the expectations of adversary states. Where a threat or an attempt is made in the international arena to deny a right, a secondary right arises for the injured state to undertake the enforcement of the primary right. This we did during the recent threat to freedom of navigation in the Red Sea by sending a CVA through after the generation of the threat.

Thus international law, the law of this world arena of adversary states, like all law has its sanctions, sanctions at times more efficacious than those enjoyed by national law. What is more, in this arena of relentless struggle, just as within the state itself, law is a condition of continued survival and a system for reconciling sharply competitive claims.

I thus arrive at the core of the topic for this morning. If international law concerns the determination of those claims which, on the basis of expectations in the international arena, have become enforceable rights and those claims which, because of failure to propagate effective expectations, cannot yet be enforced as rights, then the ultimate question must be: What are the fundamental claims and rights which international law enforces in the world arena?

Now claims are meaningless unless attached to interests of which they constitute the authoritative representation. But where claims have received recognition by generating expectations in the international arena, it must be that reciprocity of interests have produced these expectations. Reciprocity, therefore, lies at the base of sanctions and state enforcement of international law. In consequence, our problem becomes, in turn, that of identifying the reciprocal interests generating expectations as to claims.

It is at this point that I return to the first portion of my remarks where I stressed the deep-seated and all-pervasive dichotomy of claims and interests as between the great and the small states. At the same time we must remain aware of the inversion of power which effectively prevents the great powers from dismissing the interests and claims of the small states. The vast strength of the great powers alone suffices to propagate throughout the world arena expectations and recognition of their claims. On the other hand, inversion of power provides fertile soil for the growth of expectations among great and small alike and recognition in

the world arena of the claims of the small states.

It is obvious that the interests and claims which, for convenience, we may call the objectives of the great and of the small states in this vast dichotomy must be divergent. Yet, because of the inversion of power, divergence of objectives must be accepted in this world arena.

What, then, are the respective objectives of the great and the small states?

There are those who assert that objectives of all states constitute a vast spectrum running from "power," "wealth," "enlightenment," and "health," to "human dignity," "rectitude," and "affection," whatever these terms could mean. Others talk of the "protective principle," "passive personality," etc. However again, I think it important that we persist in getting down to ultimates within the context of this vast dichotomy. I would suggest, on the one hand, the interests and claims of the great powers proceed from an objective or goal which is that of freedom of communications. These are interests and claims which, by and large, are mutually shared among them, which have propagated expectations in the international arena even on the part of the small states and which have, therefore, become rights under international law. On the other hand, the interest and claims of the small states proceed from an opposed objective or goal which is that of national security. These interests and claims and this objective are, by and large, mutually shared among the small states and through the inversion of power have received recognition in the international arena even on the part of the great powers. Indeed, the great powers themselves share this objective to a lesser degree. These interests, claims, and objectives have likewise become rights under international law.

We are, therefore, faced in international law, as in national law, with a dichotomy or polarity as between the objectives of the great and the small states. Professor McDougal has lucidly pointed to this pervasive polarity to which he assigns the term "complementarity," and which he illustrates by the polarity or complementarity in our own constitutional law between Federal and State rights. The rights of the Federal and the State Governments, although basically opposed, are, nevertheless, both accepted in the national arena of competing rights and are, hence, complementary. In fact, they overlap to a degree. We have the same type of problem in the international arena, and, in fact, there is, as in national law, a shared complementarity.

Let me start first with the middle-sized and small states and their concern with national security. They have few nationals abroad. They have few ships flying their flags on the high seas or in foreign ports. They have fewer national airlines operating abroad. Far from seeking additional air traffic rights abroad, they are primarily concerned with restricting the demands of foreign carriers to operate into and out of their national territories. Freedom of travel and communication is not their principal preoccupation.

Given their limited resources, their concern is largely with preserving their own territorial integrity, particularly those states which have just entered the world arena. And so to translate this phrase "national security" into another term more conveniently manageable by us throughout the course, we can talk about the objective (which includes the interests and claims) of "territorial jurisdiction." National security, in effect, can in most cases be squared to territorial jurisdiction. We will see that the states that do make such claims are largely concerned with three things: territorial integrity, including sanctity of frontiers; exclusive jurisdiction over all foreign nationals and interests on their territories; and political independence. In essence this means that the

objectives of national security cause these states to stress repeatedly the concept of "nonintervention." They do not care too much about what happens abroad. Having few nationals, ships, airlines, and other interests overseas, they are inevitably less upset with what happens to them than are the great powers who, on the contrary, have, relatively speaking, many nationals and interests subject to and hostages of the territorial jurisdiction of the small states.

We see this concern with territorial jurisdiction reflected in many ways. The states newly emerged from colonial empires accept without protest inequitable and unrealistic frontiers inherited from the colonial era lest they impair their own territorial integrity by seeming to redefine them. All the emerging states have come out for the principle of self-determination at the United Nations in terms of the achievement of independence. But once they have obtained their independence, they are quite as resolutely opposed to that same principle. They protest that it flies in the face of their own territorial integrity. Look at the declared position of the newly emerged African states, Congo and Nigeria in particular, and of the Organization of African Unity when confronted by secession movements based on local internal self-determination.

Territorial jurisdiction finds perhaps its most striking manifestation when applied to the territorial or marginal seas. By and large, an inverse ratio is involved. The smaller the navy of a state, the smaller its merchant marine, the wider its territorial water claims—in some cases in excess of 200 miles. This claim of territorial jurisdiction runs counter to the objective of the great powers which is freedom of communications, including freedom of navigation. As I will have occasion later to point out, the 3-mile limit is not an obsolete concept despite its venerable origins—far from it. Quite obviously, extension of territorial waters can only be at the expense of freedom of navigation, particularly in those nearly 200 critical areas of the world constituted by international straits. Were the 3-mile limit doubled to 6 miles, over three-fourths of those straits would become territorial waters, and were that distance, in turn, doubled to 12 miles, as is the claims of many states today including the Soviet Union, all of the international straits would become territorial waters. The recent Vilkitski Straits incident involving two U.S. icebreakers demonstrates a dimension of the problem. In this situation the only right under international law left to protect the objective of freedom of communication is that of innocent passage, and yet innocent passage is itself subject to the objectives of national security and territorial jurisdiction. Article 14 of the Geneva Convention of 1958 on Territorial Waters declares that passage is not innocent if it is prejudicial to the security of the coastal state. This is, of course, an illustration of the objective of national security and the principle of territorial jursdiction.

But let us not delude ourselves. In certain respects, to the extent that they too have their areas of vulnerability, even the great powers are concerned with territorial jurisdiction. For example, the Soviet Union, whose navy and merchant marine have only in recent years attained considerable proportions and which, outside the satellite states, has few nationals or interests abroad, has long espoused the territorial jurisdiction approach, including a claim for wide territorial waters. Specifically, Khrushchev, in the famous 31 December 1960 speech, and Kosygin, in his 19 June address of this year at the United Nations, came out for territorial integrity and sacredness of frontiers with specific application to the frontiers of East Germany and the satellite countries. Kosygin is also concerned at defending the immutability of the

frontiers with China established under the Tsarist Regime.

And the United States. We have also areas of vulnerability where we invoke territorial jurisdiction—for example, Berlin. We cannot conceivably resort to a nuclear exchange with the Soviets over Berlin. Consequently, we have anchored our position on territorial jurisdiction—specifically our territorial rights as an occupying power. Had we not had this legal argument available to us, we would have been subjected to even further applications of the "salami" tactics which have plagued our position with regard to access to Berlin. International law has been our shield in a scenario of nuclear stalemate.

But the United States also in other areas finds itself vulnerable. For example: our fishing industry is far from being dominant in the world today. The result is that although we come out fully for the freedom of the seas and the narrowest possible territorial waters, we enacted, in November of last year, legislation extending to 12 miles the belt of waters reserved exclusively for U.S. fishing interests.

I now turn to the objectives, claims, and interests of the great powers.

The concept of territorial jurisdiction favored by the small states has been under increasing attack in recent years by those great powers who tend to favor the competing form of jurisdiction based on the objective of freedom of communication and which we can translate into the term "nationality jurisdiction." Jurisdiction based on nationality reflects the claims, interests, and objectives of those great powers which have many nationals abroad, many naval forces on the high seas, many merchant ships under their flags, many airlines and aircraft operating abroad under their jurisdiction, responsibility, and protection, as well as many investments abroad. To meet such responsibilities abroad, a continuing link of nationality is indispensable. These great powers extol less than do the small states the virtues of nonintervention and are more interested in protecting, under a jurisdiction based on nationality, the free movement of their nationals, ships, aircraft, and investments.

Let me offer you, first, an extreme example of this type of jurisdiction. It would seem normal that an American could go to Italy and conclude a contract with the Italian Government granting him exclusive rights in Italy for the marketing of American farm equipment. Yet, such is not the case. The U.S. Government would reach out through the arm of nationality to declare that the American, even abroad, would be violating our antitrust legislation and would be liable to criminal prosecution and penalties in the States.

This concern with the objective of freedom of communications and jurisdiction based on nationality finds its clearest expression in respect of freedom of navigation on the high seas. We demand the right to move throughout the world with the narrowest possible restrictions on freedom of the seas. Indeed, we even claim that freedom of communications is a form of national security for us. We find it advantageous that our surface vessels and our aircraft should be able to move for surveillance and other purposes, including national defense, up to the 3-mile limit rather than be held off at the 12-mile limit off the shores of other states as the RB-47 incident in the White Sea of a decade ago illustrated.

The United States is not alone in stressing freedom of communications and nationality jurisdiction. Of course a state like Japan, with its large fishing fleet and merchant marine, by and large, follows the same general approach to problems of international law. I would suggest, finally, on this point, that the Soviets with the growth in their seapower and merchant marine might possibly be evolving gradually from territorial jurisdiction based on the

objective of national security to nationality jurisdiction based on the objective of freedom of communications. Perhaps the word "communications" might eventually come to take on the additional meanings that strategists such as Professors Kissinger and Schelling impute to it within the context of communications between nuclear antagonists.

So this is the clash between the two forms of jurisdiction—the one pursued by the small states and based on territory, the other the objective of the great powers, namely, freedom of communication and based on nationality.

I wish, in the closing minutes of this introduction to international law, to illustrate this confrontation between and the complementarity of rights of the great and the small states under international law by turning to the current crisis in the Middle East.

You may remember that in 1957, after the 1956 crisis, the United Nations established two UNEF posts in U.A.R. territory at Sharm of Sheikh and at Ras Nasrani on the Sinai Peninsula near the Straits of Tiran and the Gulf of Aqaba at a distance of more than 90 miles from the frontier between the U.A.R. and Israel. The purpose was to dissuade the U.A.R. from reinstituting its blockade of the Straits of Tiran and the Gulf of Aqaba and to reaffirm the principles of freedom of the seas and of innocent passage. By so doing, the United Nations was demonstrating the importance which it attached to assuring freedom of communications and freedom of passage through the Straits of Tiran and the Gulf of Aqaba. The removal of these two U.N. posts at Nasser's insistence in May of this year constituted, therefore, an immediate and direct threat to the very principle of freedom of communications which had led to their establishment a decade ago. Accordingly, on the 26th of May, U-Thant delivered a memorandum to President Nasser pointing out that this demand would have the most destructive effect possible on peace in the Middle East.

Three days before that, President Johnson had made a statement on the same point, declaring the right of free innocent passage on the international waterways is a vital interest of the international community. (I see that others prefer the term "world community" to "world arena.") There emerged, in consequence, a confrontation between the demands of the U.A.R. for national security and those of the United States for freedom of navigation. The passage through the Straits was clearly within U.A.R. territorial waters since the only navigable channel, that between the Sinai Peninsula and the Island of Tiran, is but 1-mile wide. The sole exception to territorial jurisdiction here would be under the international law privilege of innocent passage. On this point the U.A.R. argued, among other things, that the passage of vessels through the Straits would, under article 14 of the Geneva Convention that I have mentioned, be prejudicial to the security of the coastal state.

The problem was raised before the Security Council, and after a preliminary period of sparring, the debate was initiated by none other than the U.A.R. Representative who delivered a searching legal analysis of the problem. This speech has been somewhat played down by the American press, fascinated and awed as it has been by the rhetoric and logic of the Israeli Foreign Minister, Abba Eban. But the entire address, many pages long, was a juridical analysis which, in turn, launched a juridical dispute that lasted for days.

It is true that this protracted dispute concerned freedom of navigation through straits through which passed only 7 percent of Israel's seaborne commerce. However, by the admissions of both sides, deeper issues and precedents of international law were involved—the confrontations between the

two legitimate objectives of national security, which U-Thant conceded to the U.A.R., and of freedom of communications. These issues could not be avoided. The United States was concerned lest a flagging in the resolve to defend the latter might comport serious precedents for other more important international straits. For example, just as the U.A.R. claims that the Gulf of Aqaba is an historic bay which can be closed to all but the coastal powers (from which it excludes Israel), so the Soviet Union argues that the Baltic should be considered a closed sea to which access can be had only through the mile-wide Straits of Skagerrak. Even without that claim the Soviet Union could bring pressure to bear in Denmark and Sweden to deny innocent passage on the grounds that such passage could be prejudicial to the security of the Soviet Union which, in turn, could cause them misgivings as to their own national security.

Following the outbreak of hostilities and the stalemate in the Security Council, the problem was handed over to the General Assembly. This time most of the debates turned on the highly legalistic claim of belligerency advanced by the U.A.R. which declared that since 1947 it had remained at war with Israel. The purpose of the claim was to justify the blockade of the Straits and the Gulf and to disclaim responsibility for any new aggression by such a blockade since the U.A.R. and Israel had, since 1947, been at war. It was even argued that the United States, which had "blockaded" Cuba in 1962 without claiming belligerency, was scarcely in a position to object to a blockade imposed by a state such as the U.A.R. which had been frank in invoking its rights under international law as a belligerent. Thus, in the Security Council the line of battle was drawn between the rules of international law relating to territorial integrity and those concerning freedom of the seas. In the General Assembly the ultimate issue was whether or not freedom of the seas was to be restricted by the rights of a belligerent under international law. As you may recall, that body failed to reach a solution precisely because of the demands of the Arab State to retain the rights of belligerents and the insistence of the Western World upon their rights under international law for freedom of the seas.

Now in this situation some of you may say, "Well, does not this all prove that international law is doing us a disservice in such a situation? Far from *providing* it has stultified a solution of the problem."

In response, I would remark, first, that you are possibly attributing a more decisive role to international law in that situation than do the lawyers themselves. It is doubtful that international law could claim so crucial an influence in frustrating a settlement, if, indeed, that was its objective. However, the fact that the vocabulary and the discussion of issues of international law clearly dominated all the debates at both the Security Council and the General Assembly validates two conclusions. One is the importance of becoming familiar with the sophisticated dialogue and terminology of international law, if one is to gain a comprehension of the critical events and movements on the world scene today. The other conclusion is that preoccupation with the legal issues demonstrated that international law is deeply concerned with the ultimate problems of our time, whereas, the proliferation of political issues—and there were many of them transpiercing this crisis—in the end tend to cancel each other out. Concerned as it is with the two equally valid objectives of national security and freedom of communications, international law can, in the end, offer a valid and sophisticated balance between competing national interests, claims, and objectives, not only in terms of the struggle between Israel and the Arab States, but also in its

implications for other areas of the world.

These, gentlemen, are some of the problems that in the course of the coming lectures we will be examining and pondering. It is my hope that you may come away from them with a sharper and, I would venture to suggest, deeper insight into some of the issues that are troubling our times.

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