International Law Studies - Volume 61
Role of International Law and an Evolving Ocean Law
Richard B. Lillich & John Norton Moore (editors)

JURISDICTION

Philip C. Jessup

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

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

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

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

I think, also, that you may look at jurisdiction in terms of the three branches of Government which exercise it. *First,* one speaks of *legislative* jurisdiction, which is the power of the Congress to lay down a rule. For instance, Congress passed a law prohibiting the transportation of liquor in American territory during the era of the Eighteenth Amendment. *Second,* you have *judicial* jurisdiction, which is the power of the court to determine what

are the rights or liabilities. For instance, the court entertains a libel of a ship seized for bootlegging and imposes a fine, or other penalty, if it finds that the statute has been violated. In the *third* place you have *executive* jurisdiction; that is, the power of the Executive Branch of the Government to carry out the law and to provide its impact upon the individual or thing. For example—here, again, keeping within the realm of the prohibition laws for a convenient example—the Coast Guard seizes a ship hovering off the United States coast with intent to smuggle alcoholic liquors into the United States.

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

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

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

Granted that you have this domestic power to exercise your jurisdiction, and granted that you have certain rules of international law which determine the proper limits of the exercise of that power when questions are raised in our courts—that is, in American national courts—where the issue is posed that the jurisdiction exercised by the United States is in violation of a rule of international law, the American courts must follow the legislative command if the Congress has laid down clearly a rule which is to be applied. But the courts have developed the principle that they will always assume that Congress did not intend to violate international law, and, therefore, if the statute can be reconciled with the international principle the courts will adopt the interpretation which is in accord with international law.

For example, a few years ago a case before the Supreme Court involved a statute which in general terms provided that any seaman suffering certain accidents, would have certain remedies. The question was whether a Danish seaman

serving on a Danish ship while that ship was in the Havana harbor could take advantage of that statute when the ship later called at New York. Then the Supreme Court said: "No, Congress clearly did not intend when it said 'any seaman' to mean any seaman on any ship anywhere in the world. They had in mind the normal limitations which have developed in the historical evolution of maritime law." So they placed an interpretation on the statute to bring it into accord with international law.

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

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

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

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

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

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

Third, there is what is known as the protective theory of jurisdiction, which I think is clearly accepted in international law but which has a limited scope. What that means is that a state may exercise its jurisdiction even over a person who is not a citizen, and even though the act is not committed in the United States, if the act is one directed against and affecting particular interests of the United States. For instance: we have a statute which punishes any alien who commits perjury in applying for a visa before an American consular officer in a foreign country. Here is a situation of a Frenchman, we will say, in France committing an act before an American consul. The basis of our jurisdiction is the fact that our interest in having our documents properly issued is affected. Many other countries apply that principle even more widely.

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

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

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

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

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

assimilated to territory; therefore, the Turks said that even on the territorial principle they were entitled to take jurisdiction because the act took effect on their ship, which was assimilated to their territory.

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

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

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

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

Now a word on what is included in the territory over which a state has jurisdiction. For instance, in regard to the United States—what are the places where the United States exercises this power without valid international objection? Clearly, all the land area of the United States and the islands belonging to it, its inland waters, lakes, and rivers within our frontiers; the territorial waters along our coast (we will define these later); the air space above this land and these waters; similarly, now, by a special arrangement, the trust territories which are placed under our control and bases over which we exercise jurisdiction under certain treaties; and then, as I have indicated, by a fiction, international law accepts the idea that every state exercises what is called "territorial jurisdiction" over its ships, wherever they may be. Courts do not like that fiction—they would rather explain the rule in different ways. For instance: the Supreme Court said that the national Prohibition Act, which forbids the carrying of liquors in American territory, was not applicable to the carriage of liquors on an American ship on the high seas—they would not push the fiction of territoriality that far. Then another court pointed out, to reduce it

to an absurdity, that no one contended as a ship sailed across the high seas it was surrounded by a belt of territorial waters as it moved from one continent to another. The "territorial jurisdiction" theory has a limited utility—in history, at least—in extending jurisdiction over ships.

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

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

In general in these cases of dual jurisdiction you can say that he who has, gets; that is, the man will probably be tried where he is caught. That state will have precedence because the police of one state can not exercise their authority in another state. On the other hand, in certain situations the criminal may be transferred from the state where he is apprehended to another state which has a basis for trying him through the process known as "extradition." We might just note in passing that where the individual is not in your territory and you do not actually have him in your physical power, you can nevertheless proceed against him and exercise your jurisdiction on the personal theory by controlling his property. So under one of our statutes a man named Blackmer, who was wanted in the United States under a statute requiring people to testify in certain government proceedings—and where he refused to come—was fined by the American courts $60,000, which was collected out of his property in the United States. So even though you do not have the man, in your power there are ways in which you can punish him and influence his conduct.

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

In general there is no problem in determining which land territory is subject to which state, but you do have disputed frontiers. Therefore, you may have a border area in which it is not clear which state exercises jurisdiction lawfully under international law. We are seeing that at the moment in the new flare-up of the border dispute between

Ecuador and Peru. Many other cases will occur to you. Even in recent times there are disputes as to the fundamental title to a particular territory. These titles are frequently adjudicated in international courts, as we adjudicated with the Netherlands the sovereignty over, or title to, the small island of Palmas in the Philippine Archipelago; as Norway and Denmark arbitrated sovereignty over eastern Greenland; and, just recently, as France and England have submitted to the International Court jurisdiction over some small islands in the English Channel, which the court decided belonged to England. At present, the main area of disputed sovereignty is Antarctica, where the United States does not recognize any of the numerous claims which have been asserted by a group of states.

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

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

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

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

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

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

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

So up to three miles it is universally agreed that you are in territorial waters. When you pass beyond the three-mile limit, you begin to get into an area of disagreement. This disagreement goes back a long way. For instance, the Russian twelve-mile claim goes back to about 1911, and was vigorously opposed in the early period by Japan and the United Kingdom particularly. In 1921, for instance, a British trawler was seized by the Russians ten miles out from the Russian coast. A British warship was sent to the waters off Archangel. According to a statement by the British Government in the House of Commons, it was sent there for fishery protection duties—"Our orders are to prevent interference with British vessels outside the three-mile limit, using force if necessary." The Soviet Government has had an agreement with Great Britain, a treaty agreement, allowing British ships to fish up to three miles from the Russian coast—but the Soviets have now given notice that they are not going to continue that agreement.

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

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

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

The Scandinavian countries have a special situation, in which they traditionally claim four miles. But, here, one might note that there is in the literature a good deal of confusion about the length of a mile. For instance, the Norwegian order of 1906 speaks of the ordinary sea mile as 7,529 meters, or 4,065 mean nautical miles, or .468 statute miles. A good deal of the confusion about the Scandinavian claims has been due to a different terminology. We find, however, that Norway has set up a special claim to the measurement of waters, based on the particular configuration of its coast.

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

This issue has been particularly acute in connection with fisheries. Here, the

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

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

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

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

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

The general agreement has been in the past that you start at a low-water mark and that you carry your three-mile limit in a line parallel to the low-water mark—in our case, three miles from the coast. I am going to call your attention to the fact that we have the twelve-mile limit of customs waters; we have the air zone (which I shall come to later); and then we have the further sixty-to-ninety-mile customs enforcement zone. Our general position had been to draw the three-mile limit parallel to the coast. (See plate one)

On the other hand in Norway, where there was a peculiar configuration of many little rocky islets and deep fjords indenting the coast, the Norwegian insisted that you could not have a line which moved in and out from all of these little minute points; that they were entitled to draw a general base line, connecting the points shown by the dotted line there. Then you measure your territorial waters four miles out from the base line (in their case, under their historic claim, four rather than three miles) rather than from the low-water mark. The Norwegian claim was contested by England and submitted to the International Court of Justice, which decided that under the particular circumstances of the case the Norwegian claim was sound in international law. (See plate two)

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

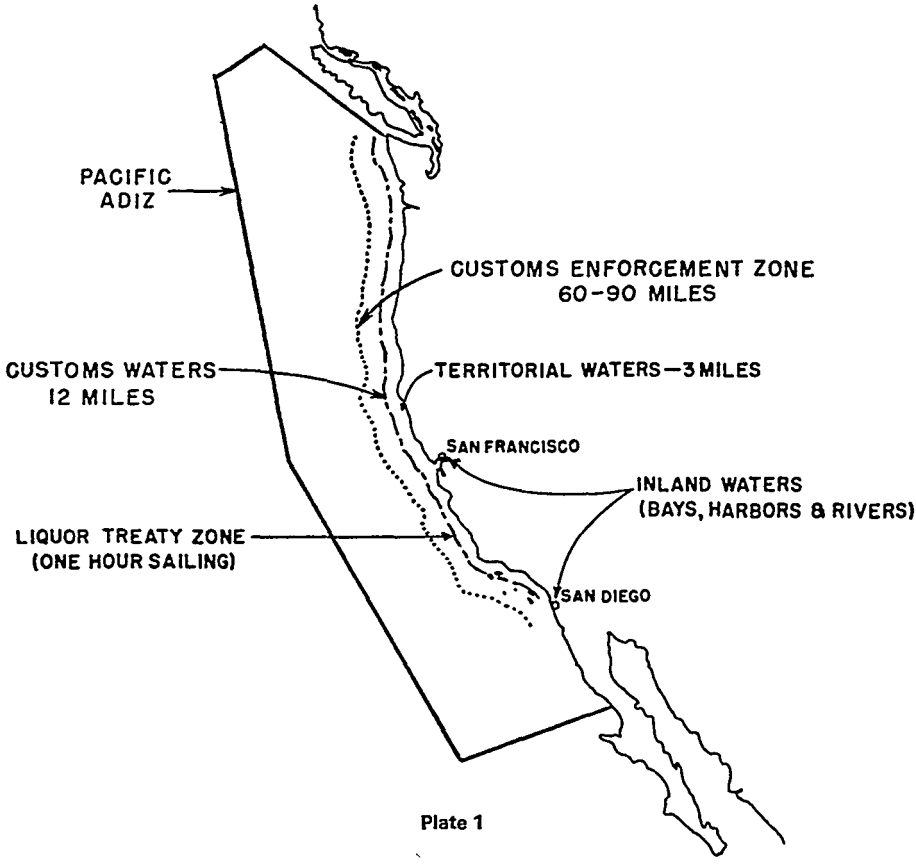

Plate 1

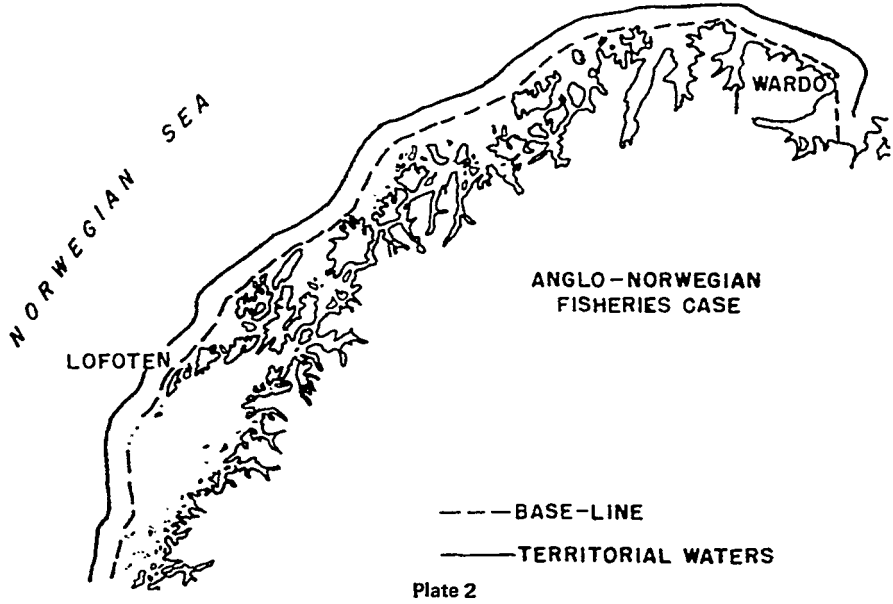

Plate 2

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

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

The United States, in terms of our basic rule of measuring the line three miles from low-water mark, has preferred the method of measurement of arcs and circles; that is, the intersecting arcs of all circles drawn with the same radius from all points of the base line. The advantage of this is that a ship can determine easily whether it is in territorial waters. If the ship is in the center, you draw a circle of a given radius; if the circle at any point touches the land, you are within territorial waters—if not, you are outside on the high seas. But the International Court of Justice did not admit that this method was established in international law.

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

There is a similar argument in the measurement of territorial waters in bays, on which no general agreement has been reached. An attempt has been made to get a ten-mile rule; that is, if the bay is not more than ten miles wide at the mouth it is a territorial bay. The International Law Commission has suggested, here, a twenty-five mile rule.

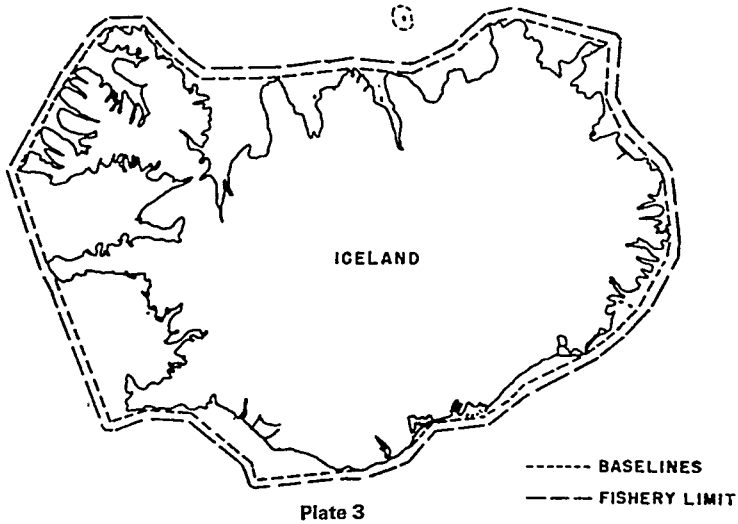

Plate 3

Then, again, there are "historic bays," so-called—bays like the Chesapeake—where over a long period of time, a country has asserted that these are national waters, and where others have consented.

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

The general principle was laid down by Chief Justice Marshall in a case as long ago as 1804, where he said that a state's power is not confined to its territory and that it can protect itself by exercising certain authority outside. If what it does is reasonable, other states will consent; if it is unreasonable, they will object. This was an expression of a general right of self-defense, but it has become a rather classic statement in this connection. We have acted on this since the earliest days of our history by the customs enforcement zone, which you saw on that chart. We applied this twelve miles out from shore but, under our earlier legislation, only for ships bound for the United States. In prohibition days, we included all ships—whether bound for our ports or not. Foreign governments were objecting, so we finally concluded treaties with a large number of them providing that ships could be seized if they were within one hour's sail as measured by their own speed or the speed of their small boats from our coast. This was adopted because the British did not want to agree on any mileage limit which might weaken the three-mile principle. Then, in 1935, we passed the Anti-Smuggling Act, which authorizes the President in certain cases to establish customs enforcement areas as much as sixty-two miles off the coast.

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

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

Similarly, in time of war, countries have set up special zones for their protection under war conditions and for the defense of neutrality. Your Law Instructions for Naval Warfare point out some of these cases. The most extreme case is the Declaration of Panama in 1939, in which the Latin American Republics joined with us in setting up a zone which extended some three hundred miles off the tip of South America and some twelve hundred miles off Florida. The belligerents did not accept it, and it was never really enforced.

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

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

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

Here, the International Law Commission has been trying to grapple with the definition by setting the boundary according to the depth of the water on the continental shelf. They have been talking about a depth of two hundred meters, which would define the limits within which you could exercise this jurisdiction. We may note that the Syngman Rhee Line, established by the Korean Proclamation of 1952, specifically says their claim is irrespective of the depth of the water. This is a very real problem.

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

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

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

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

As you get out from a port itself into the territorial waters the interest of local state is less, but this is the territory of the state—and the state is still entitled to exercise its jurisdiction. The International Law Commission has

suggested some limitation there in line with the traditional European theory about the peace of the port and the effect on other ships or persons.

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

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

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

For instance, in 1950 we made an agreement with Great Britain for the Bahamas Long-Range Proving Ground for the testing of guided missiles. The launching area is in Florida and the zone, as defined in the treaty, goes southeast through the Bahamas down to a point opposite Haiti. The agreement elaborately provides, in regard to the rights of the United States in the use of it, that the United States agrees to compensate those who are injured through its use of the zone. It says that it will not unreasonably exercise its rights so as to interfere with, or prejudice, safety of navigation, aviation, or communication within the flight-testing range. This has been in existence now for five years, and was amplified somewhat by an agreement in 1953. So far as I know, no foreign state has objected.

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

It is to be noted that all of the orders were withdrawn after fifty-seven days; in other words, we were not permanently closing this area. It is also to be

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

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

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

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

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

You will find, in general, that air law has developed by analogy from the maritime law. For instance: just as you have the principle of the nationality of ships in jurisdiction over ships, you have nationality of aircraft. On the other hand, the principle of innocent passage, which developed in maritime law for rather clear reasons, was denied in connection with air law—that is not established, so that the right of entry, landing, or overflight depends entirely upon treaties. I think that one can say, as Professor Lissitzyn argues, that there is a right of entry in distress, as argued by the United States in our claims against Yugoslavia when they shot down American planes. Perhaps we find another example in the recent Bulgarian incident in the shooting down of the Israeli craft—although that may have been merely a confession of error.

This air space, then, is now generally conceived to be part of the territory of the state just as much as the land or the territorial waters; it extends up above the territory and it extends above the territorial waters. But, just as in the case of territorial waters and further jurisdiction on the high seas, so we find that

states are asserting jurisdiction in the air space adjacent to their boundaries but out over the high seas. The United States and Canada have met this by the Proclamation of the A.D.I.Z., (the Air Defense Identification Zones). You will remember that on the slide of the U.S. coast there was a far line a way out. Our A.D.I.Z. line extends some hundreds of miles off our coast in some places, and the Canadian line is somewhat closer.

All aircraft entering these zones are required to report and to comply with certain rules and instructions, but we do not forbid foreign aircraft to fly into these zones. The C.A.A. has stated in a letter that foreign aircraft bound, for example, from Havana to Halifax, not approaching the United States, do not need to comply with the regulations in the zone. But, query whether we would tolerate Soviet military aircraft flying within ten or twelve miles of our coast—although we would admit they are flying over the high seas. We insist that our airmen have the right to fly up to within three miles of the Soviet coast, although as a practical matter we tell them to keep twelve miles out. Is this a situation where the United States, as a great air power following its tradition of the narrow belt of territorial waters, is also seeking to establish the rule of the narrow belt of air space over territorial waters, and a limited right of authority in air space out over the high seas? I suggest that this is a problem which needs very serious consideration in the American Government: as to whether the interests of the United States are still to be promoted by an insistence on the three-mile rule of territorial waters and by insistence on very restricted rights in the super-adjacent air space over the high seas off our maritime frontiers.

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

Ψ