THE UNITED STATES NAVAL WAR COLLEGE

SOVIET INTERPRETATION AND APPLICATION OF INTERNATIONAL LAW

A lecture delivered
at the Naval War College
on 25 February 1955

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Admiral McCormick, Gentlemen:

Soviet lawyers did not begin thinking about international law until the year 1922. The Minister of Justice in that year gave a speech to all of the lawyers in the capital at Moscow, outlining the tasks of Soviet legal research, and he put first among those tasks the study of International Law. He recommended to the law professors who were there before him (most of them professors from before the Revolution, who had continued on after the Revolution) that they study the two volumes of treaties which the Ministry of Foreign Affairs had already published, in which he said there were seventy-two documents, and that they try to draw some generalizations from this experience. He also said that he thought the two volumes would be found to open a great many new perspectives and that they might provide some truly practical directives for Soviet foreign policy. In short he told the law professors before him that he, as Commissar of Justice, thought there were to be found in international law some practical advantages for Soviet

foreign policy. He came out, then, for the pragmatic approach: International Law was to be useful to Soviet politics.

Why the year 1922--why did this not happen earlier? As you all know, the Revolution was in the fall of 1917. The Soviet lawyers were very scornful of international law in the years between 1917 and 1922. In accordance with their Marxist training, they felt that law was an instrument of policy--whether it be domestic law (what we call 'municipal law') or international law. They said: "Look at who the people are on the scene today who are using international law. They are the great capitalist powers." Therefore, since international law in their way of thinking was an instrument of policy it must be capitalist in its purposes; it must be designed to achieve capitalist ends, which they said were certainly not Soviet ends (Soviet ends being opposed to capitalist ends and heading towards Socialist, and, ultimately, Communist ends). So they felt this was an instrument not for them. It was an instrument, if you will, which had been created by enemies, was being used by enemies and was something which they should leave alone.

The spring of 1918 provided something of a test because the German Army kept marching into Russia, as you well remember. The question was: How should they stop the German Army? The first approach of the Bolshevik-Communist leadership was appeal to world public opinion. They sent Trotsky and a group of

workers and peasants--very simple people, indeed--out to Brest Litovsk to talk with the Germans and to appeal, over the heads of the Germans, to the people of the world. They hoped that through this propaganda barrage they might be able to stop the Germans--but they did not stop them. The Germans continued to march. So Lenin, with considerable opposition in his own party, reached the conclusion that the only way to stop the Germans was to sign a peace treaty with them. In other words, he utilized one of the basic institutions in international law--namely, a peace treaty--to stop the Germans. He did that and they stopped! He had found that by using international law in this simple fashion he had achieved an end which he thought important to Soviet Russia.

In 1921, some years later, recognition was accorded the new Soviet government by a great many countries of Western Europe, and naturally, in the course of recognition, agreements were necessary to regulate the relationships between the States which had recognized Russia. Then commercial trade began. It became necessary to have a good many commercial treaties. It was in this fashion that the seventy-two treaties found their way into the two volumes which the Commissar of Justice said in 1922 should be studied. In effect he was saying: "We have acted--now find out what we have done." This is a well-known approach to life, as some of you who are philosophers know, and one that might be called 'pragmatism.' You

act and then you try to find out the philosophical basis for your action. So the Commissar was saying: "Let us do this because we may, in so doing, discover how to utilize this new body of principles to our advantage."

I think that in these first years it is obvious that the Soviet policy makers had reached the conclusion that international law, at least in some of its aspects, offered means of furthering Soviet interests. Soviet scholars were therefore asked to study the origin of all of the rules of international law for the purpose of deciding which of them might be considered useful in the future and also which of them might be considered dangerous and therefore should be disavowed or ignored.

This attitude which appeared in 1922 has remained the basic attitude of Soviet scholars and Soviet diplomats to the present day. It has been very simply stated--so simply stated that I think they have created a disadvantage for themselves in putting it into such words. Their Professor Feodore I. Kozhevnikov, who is now the Soviet judge on the International Court of Justice at The Hague, wrote in his book in 1948 this brief explanation of the Soviet attitude towards international law:

> "Those institutions in international law which can facilitate the execution of the stated tasks of the U.S.S.R. are recognized and applied by the U.S.S.R., and those institutions which conflict in any manner with these purposes are rejected by the U.S.S.R."

That is a perfectly frank statement. I think that since 1948 they may have regretted that they let Professor Kozhevnikov publish the statement for it has not appeared in the more recent books in quite such precise terms, although the attitude is certainly present; that is, the Soviet Union takes what is useful and discards that which is not useful. They do not accept, then, the whole garment; they tear it into pieces, take the pieces that meet their needs and throw the rest in the basket. If we understand that this is the principle on which they operate--that international law has some real value to them, not all of it but part of it (which is certainly no longer the principle with which they started that no part of international law was of any value), we are prepared to move on to some of the details which, I think, will indicate how they have utilized some of the institutions of international law and how they have rejected others because they do not

think that they meet their purposes.

Let us approach, first, the question of the delineation of frontiers on land, on sea, and in the air. There is no frontier of the Soviet Union today which is not delineated by some document in international law (the reason that I have the map here is so that you may see the U.S.S.R. right before you). This does not mean that the Soviet officials themselves have written the treaties, although they have been very active in negotiating treaties which establish frontiers. Some of the frontiers--particularly the one with China--the great one running from the Afghan frontier to the Pacific--rest on Czarist international treaties, the first treaty being that of 1727 and there being a good many since that time. The Soviet authors say very definitely in their books that this is an example of a situation in which international law, established by a Czarist treaty, has met their purposes. So they rely upon international law to establish their frontier with China.

On the western side they did not have an established frontier becsuse there had been a great deal of change after the First World War and a series of little wars. So in 1921 they set about to establish frontiers with the Baltic Republics, with Poland, and then with the countries in the Near and Middle East. Here, then, they have utilized international law, some of it antedating the Revolution, to establish their land frontiers.

Of course after the last war they reestablished those western frontiers through another series of treaties for a very conventional and international law approach to the establishment of frontiers.

The treaties have been less numerous on the seas. There are some examples, such as the treaty with England of 1930, which had to do in the main with English fishing vessels' rights in waters of the Arctic. The treaty provided that the English fishing boats might fish to within three miles of the low-water mark along the northern coast of the Soviet Union. In establishing this three-mile limit for the English in this treaty, the Soviet government stated that it retained for itself freedom of action to claim whatever frontier it might wish generally under international law. In most of their dealings since that time Soviet officials have maintained a twelve-mile limit.

In the Soviet statute, which is only a domestic statute but which establishes the regime to be applied within the twelve-mile limit, they do not claim that they own as their own territory the maritime belt to a twelve-mile width. They do, however, claim that any ship that enters that twelve-mile belt is subject to examination of her documents. Also, if she has any Soviet citizens on board who are leaving the country without permission, these citizens may be removed.

In a way the U.S.S.R. has shown her very practical approach by not saying whether she does or does not consider this her territory. The one thing which she does say for all the world to read is that if you come within that twelve-mile limit you are going to be searched, and if the searchers find Soviet citizens on board, they are going to be taken off. That is very practical and I suppose that from the Soviet point of view that is enough, for they have made clear their intent. They have also provided that within that twelve-mile limit their own border patrol ships may run without lights at night.

On the sea again, but now in territory where they cannot claim exclusive control--for example, the Caspian Sea, the Black Sea and the Baltic Sea--they have made an effort to negotiate treaties which would close those seas to all powers except the nations surrounding them; i.e., except the so-called "Littoral States." In 1935, they made a treaty with Iran concerning the Caspian Sea. This provided that no vessels except those of the Iranian and Soviet States might sail upon that sea. Of course they have never been quite so successful in closing the Baltic and Black Seas, but they have asserted constantly in their books that in their opinion these should be closed seas. All those who know anything about the Soviet position are now waiting to see what you people will do this summer when you sail your ships into the Black Sea to visit the Turkish ports on the north shores

of Turkey. When I read about the summer plan in The New York Times, I concluded that our Navy has been reading the Soviet textbooks, as I am doing, and has thought it desirable to try out the Soviet attitude on the Black Sea. For some of you on board those ships it may be an interesting summer. It is clear what the Soviets would like to do because they tried to induce Turkey to permit a Soviet fortress at the mouth of the Black Sea, which was to "aid" Turkey in controlling the Straits. You can imagine how the Soviet forces would aid Turkey! The Straits would have been closed completely to warships of non-Littoral States. The Soviet request was never granted by the Turks, but it does indicate the Soviet attitude: The U.S.S.R. would, if it could, close to Naval forces the two accesses to the sea frontiers of their country through the Black and Baltic Seas. They have already effectively closed the Caspian Sea in permitting only Persian ships, in addition to their own, to sail it.

In the air, the Soviet claim has been the established international law principle that the air space over a territory is the property of the power that owns the territory. They have absolutely refused to consider the proposal of the International Civil Aviation Organization to establish the five air freedoms which would permit a relaxation of that rigid principle. So, again, this aspect of international law meets their needs, and it is espoused.

Take the enormous Arctic frontier. What is their attitude on this? Here, they have been a little ingenious, although they hasten to add that they are following Canadian practice--that this is not their idea, but Canadian. It is true that, chronologically, one Canadian senator suggested the idea first in the Canadian Parliament and that it was later adopted in principle by the Canadian Parliament. The U.S.S.R. has declared that all land already discovered and to be discovered within the Arctic sector would be Soviet territory, the Arctic sector being that part of the Arctic which lies between a line drawn from the Bering Straits on the eastern end and the border of Norway on the western end to the North Pole. Any land within that area, even if not discovered, would, under this Soviet declaration, be claimed as Soviet territory. Likewise, of course, they are prepared to permit Norway, Canada, Denmark (to the extent that she controls Greenland), and so on, to have their little sectors within which the Soviet Union would not interfere. The rejection of this doctrine for the Antarctic is one of the subjects which I want to discuss with some of you in the Seminar this afternoon, so I will not draw the contrast in this lecture.

Take another area in which Soviet policy makers have been interested in international law; namely, in the treatment of prisoners of war. When the war with Germany

began, they found themselves in a difficult position because they had never reaffirmed the Czarist signature upon the Hague Convention relating to prisoners of war. They had no formal position in international law under which they could claim protection for their soldiers when prisoners of war of the enemy. But Professor Eugene A. Korovine, who wrote the standard Red Army Manual on International Law, claimed that even though the Soviet government had not taken the trouble (as it did with the frontier with China) to reaffirm the Czarist signature and claim that it was expecting all rights which might exist under the Hague Convention, it now claimed that the principles of the Hague Convention had become so well established in international law that the Soviet Union could rely upon them to demand protection for its own soldiers and sailors when captured by the enemy. By this method, the U.S.S.R. adopted a treaty which it had not previously taken into its arsenal as something on which it wished to rely.

After the war, when the matter was renegotiated in the famous Geneva Conventions of 1949, the U.S.S.R. sent a vigorous delegation under a general as well as delegations from the Ukraine and Bielorussia. In their textbooks Soviet authors now claim that the Geneva Convention of 1949 is largely the work of their own people and that it was achieved in the face of opposition from what they call "the Anglo-American block."

Not having been at Geneva and not having studied this matter in detail, I am not able to give you material to refute this charge. Whatever its foundation, the fact that it is made indicates that Soviet policy makers are very proud of the Geneva Conventions and seem to feel that they establish principles of law to which the Soviet government wishes to adhere. It is to be noted, however, that the U.S.S.R. signed the Geneva Conventions with a reservation that no prisoner of war who had violated the principles of the Nuremberg Trial could claim protection under the Conventions.

Take the question of guerrilla warfare. This is one in which Soviet authors profess to see a class interest. They have been very unhappy about the lack of protection in the Hague Convention of guerrillas who are found operating behind enemy lines without a uniform well after the enemy has rolled over the territory. Their argument is that this lack of protection was established by the German Imperial Staff years ago because it facilitated the German type of warfare--namely, warfare by troops in uniform under rigid discipline--and that the Germans were by no means going to have irregulars shooting at them from the rear in this fashion. Therefore, after this last war Soviet authors asked in their legal periodicals for a revision of the law relating to guerrillas, or 'partisans' as they always call them, so that the law would protect partisans even when wearing no uniforms and long after the front lines had passed

beyond their little villages. The Soviet authors said that the capitalist powers had refused to move in the direction of protection because it was through partisans, or guerrillas, that revolutionary movements were conducted in Malaya and in the Philippines. On the basis of that charge, the Soviet lawyers claimed that a change in international law was desirable from their point of view because it would further the interests of world revolution.

Take, now, diplomatic intercourse. This has been very difficult for the Soviet government because so little of the law relating to diplomatic intercourse is to be found in treaties. It is largely customary, except, of course, for the ranking of diplomats in the Treaty of Vienna of 1815. The question in this field in Soviet minds has always been: Is there a disadvantage to the U.S.S.R. lurking in the customary law relating to diplomatic intercourse? They have directed their scholars to do research in this area to try and determine what disadvantage might be found if such and such principles were accepted. Generally, their attitude has been one of acceptance.

In 1927, they enacted a statute saying that they would grant to representatives of foreign powers all diplomatic privileges under international law if their diplomats were granted the same privileges in the countries from which these representatives came. They have, however, from time to time

permitted a series of what we consider violations of the general principles of international law relating to diplomatic intercourse. They have also tried a few experiments. For example, they said that they saw no reason for having ambassadors on the one hand and ministers on the other hand; they said 'let's make everybody equal.' They called their ambassadors and ministers by a single generic term. The difficulty with this was that everyone said: "Well, this does not conform to the Code of the Congress of Vienna. We do not know what these things are. So at any dinner party they must sit at the foot of the table because they have no rank." Thus, in any general relationships in the diplomatic community the Soviet diplomats were always last. Of course, this was the very last thing the Soviet government wanted, so they then conformed to the international practice of designating their representatives as 'ambassadors' or as 'ministers.' In this particular case international law has moved on for there is hardly a State left where there is not an ambassador. In effect the equality of diplomats which the Soviet government originally espoused is little by little coming about.

The U.S.S.R. has also introduced into the field of diplomatic intercourse another point which it claims to be an innovation, and that is the demand that there be diplomatic immunity accorded commercial representatives of the Soviet

type States. If you study your international law, you will find that in general (although it is not absolutely certain) if a diplomat engages in commerce, he is not immune from suit on his contracts (one of the historic examples was when the Persian ambassador sold rugs at the back door of his Washington home). Diplomats are only immune as to their diplomatic activities and not as to any commercial activities which they may conduct. Yet, the Soviet government was in the position of conducting all of its commerce, because of its Socialist attitude which took the form of the monopoly of State trade, through agents of the State. Under international law these agents were to be treated differently from the ambassadors of the Soviet Union, yet the Soviet government felt that it was desirable that its representatives be treated exactly alike. Probably this desire for protection arose partly because, as we have since found out, the diplomatic agents and commercial agents had been engaged in a good many other things other than representation of their States. Commercial agents seem to have been particularly suited for espionage work because of the type of travel that they do in conducting commercial affairs.

Most of the States of the world refused to give diplomatic immunity to Soviet commercial agents, at least under law other than that established by a treaty. If States have been able to get something in return which they thought worthwhile, they have granted diplomatic immunity to Soviet

commercial agents. These States have said: "Well, we will give your commercial agents diplomatic immunity. But in any event we will hold the Soviet commercial mission responsible in the courts of our country on any contract which it may make if the contract is broken. So the individual is free from arrest--that is, he is not put in jail or he is not personally sued but his mission may be sued."

You will find treaties relating to this subject varying in accordance with the distance from Moscow of the country concerned. The countries closest have had to accept the most, while the ones farthest away (that includes the United States, of course) have accepted none of it whatever. We give no diplomatic immunity of any kind to the commercial agents of the Soviet States. On the contrary, we have refused to let them establish commercial missions in the United States, except during the war, and they have to conduct their commercial affairs through an American corporation, The Amtorg Trading Corporation, established under the laws of the State of New York, and therefore subject to all of the rules of an ordinary domestic corporation.

As to official secrets, what is the Soviet attitude in international law on this subject? I think that here we find the reflection of both Russian history and Soviet political theory. I am one of those who think that Professor Toynbee of

England is probably right when he says that we cannot overlook the influence upon Russian mentality of the long history of Russia, during which Russia has been invaded frequently. Russians seem to think that every foreigner is the advance guard of an invasion--particularly if he happens to be a German or a Japanese. This is one of the things which I believe explains present attitudes. Soviet leaders are out of all reason frightened of German rearmament because of this long history. Professor Toynbee says that we cannot overlook that fact. Together with the influence of history there is the influence of Soviet political theory. This theory teaches that as the capitalist powers see the Soviet Union (a Socialist power) develop and become strong, they will conclude that the U.S.S.R. cannot be permitted to advance to a position of strength. The capitalist powers are expected to fight a preventive war to reduce the Soviet system to impotency.

Because of these two influences--one historical and one based upon political theory--Soviet policy makers seem to see capitalists under the bed far more than any rational person would think possible. This position has been evidenced in the Soviet attitude towards the international law relating to communications between representatives of foreign states and their own people. This question of communication reached an important point for the United States in 1933, when we recognized the

U.S.S.R. We were going to send a great many engineers to the U.S.S.R. to conduct the work, for example, of building the great dam across the Dnieper River and to do other commercial tasks. Mr. Roosevelt was very worried lest the Soviet attitude on official secrets put some of these American engineers in jail when they showed normal American curiosity about the operations of the plants in which they were working. So he turned to Mr. Litvinov, when Mr. Litvinov came from the U.S.S.R. to seek recognition, and said: "I must have some sort of guarantee that Americans, in the normal course of ferreting out information about which they are naturally curious--if they find some and communicate it to their employers or even to the American government--will not be prosecuted as spies." So we do have in our exchange of letters between Mr. Litvinov and President Roosevelt the paragraph that says as follows:

> "The right to obtain economic information is limited in the U.S.S.R., as in other countries, only in the case of business and production secrets and in the case of the employment of forbidden methods; i.e., bribery, theft, fraud, etc., to obtain such information."

Then Mr. Litvinov goes on and says:

> "The category of business and production secrets naturally include the official economic plans in so far as they have not been made public, but not individual reports concerning the production conditions and the general conditions of individual enterprises."

This would, then (and it did), permit American engineers to show an interest in what was going on in the factory in which they were working and getting all of the information necessary for their participation without being treated as having violated the Official Secrets Act of the Soviet Union.

That was in 1933. Since that time there has been a considerable tightening-up of the situation. In 1947, right after the war, the Soviet government enacted a law in which it listed the matters which it considered 'State secrets.' The act of any Soviet citizen giving information of this kind was punishable under the Criminal Code. When you read that list you will find that it goes beyond anything you have ever imagined as a secret. There is, of course, included military information, but the list goes on from that to other areas that are new: industrial production figures for the whole or a part of the U.S.S.R. (in other words, it cannot be told how many

shoes are produced without violating the Official Secrets Act); agricultural production figures (there can be no telling of the sugar beet production); information on domestic trade (it cannot be told how much butter is sold, for example, in the city of Gorki during the month of January); information on foreign trade (it cannot be told how much yak wool the Soviets buy from Afghanistan); information on technical improvements not yet released.

The very next day after listing the types of information to be kept secret there was added a second statute (I do not know why it was separate) which said that if any of this information happened to be in documents which were lost by a Soviet citizen through negligence, he could be prosecuted for violation of the Official Secrets Act. You can see from these laws that Soviet policy makers have become very severe about disclosure of information relating to their economy. Of course, it is not a violation of the law to communicate something which has already been in the newspapers and which their domestic censorship has already passed, but it is a violation to communicate something which their censorship has not already passed. In order to make this restriction effective, it was provided in 1947 that no Soviet citizen might communicate economic information destined for foreigners to anyone except the Ministry of Foreign Trade, which then in turn would give such parts of it

as were desirable to the foreign government or the foreign business man concerned. So if you go to the U.S.S.R. seeking a contract, and you are, for example, The General Electric Company, you cannot ask for this information from one of the plant managers without violating the statute--you get the information only from the Ministry of Foreign Trade.

I think that this attitude toward official secrets is an explanation of Soviet feeling about the scheme for atomic energy control which has been proposed in the United Nations. I believe that Soviet policy makers think of atomic energy not only as a war potential, but as a very important ultimate source of power--particularly in the great desert area of their country where there is no other source of energy. Lenin said early in the 1920's that the key to the economy of the Soviet Union as of that time was electrical energy, and I think that this attitude is carried over to today. Soviet leaders feel that the key to an understanding of their economy, which they are going to protect in every possible way by making it a crime to divulge secrets about it, is the amount and location of this new source of power. Hence, any scheme for a control of atomic energy which involves inspection is important--not alone because it might disclose where the bombs are being made, but it might tell where the power stations are located as well as their capacity. From the Soviet point of view the location and capacity of a power station is important--perhaps almost as important as the

location of the manufacture of bombs. This concept of secrecy of power resources is a completely foreign one to us, as you well know, because we can read in American magazines where all of the power stations of the United States are located and just exactly what their production is.

There is another matter of concern to international law, the Soviet espousal of absolute sovereignty. 'Sovereignty' is a very popular word in international law. In fact it was--and probably still is--indicative of one of the basic principles of international law during the last century and in the 20th century. I suppose no slogan has been more popular before the bar of public opinion throughout the world than the preservation of sovereignty. In the main it was the principle of international law on which the Little Powers relied in their struggle with Great Britain during the last century and on which the Latin American countries relied in opposing us. It provided the basis for a very powerful argument. It meant that little countries must be left free to conduct their affairs without having the big countries interfere in those affairs; hence, letting them preserve sovereignty. We in the United States have been one of the strongest supporters of this principle, as you well know. We even refused to enter the League of Nations after the last war because we thought this would be a threat to our independence, and, hence, to our sovereignty. We even now are reluctant to go before the World Court in all situations. We have a provision

that we will accept the jurisdiction of the International Court of Justice, or World Court, only if we in our own opinion consider that the case before it does not concern a matter of our own domestic affairs. So we are for sovereignty, too. Yet, we have reached the conclusion that we must abandon sovereignty in some measure in order to unite and to find greater strength in cooperation against aggression. We who are also for sovereignty say that there are some circumstances when nations must delegate their sovereignty to an international agency. They must unite in order to protect themselves and, therefore, to preserve their sovereignty. This, then, provides a little background for consideration of the Soviet position.

The Soviet government has constantly maintained in its speeches in the United Nations, and in the law articles which its professors publish, that it is for sovereignty, the basic principle of international law, much more than is the United States and that the U.S.S.R. is not prepared to see international law developed to a point where any aspect of sovereignty shall be relinquished. There is a long line of steps which the Soviet government has taken, indicating how in a practical way it will refuse to accept any change in international law on this subject. For example, it has refused to accept the compulsory jurisdiction of the International Court of Justice under any circumstances; it will bring a case before

the Court if it wishes, but it will not permit itself to be required to do so. It has refused to permit the International Court of Justice to interpret the Charter of the United Nations, saying that this is a matter for political agencies to interpret. It has refused to accept the binding force of a majority decision in the Little Assembly of the United Nations. It has refused to permit the establishment of an International Court of Human Rights, which would decide when the covenant of human rights has been violated, saying that this is a matter for each country to decide for itself. It has refused to submit to arbitration, as we understand it, although it claims that it submits to arbitration; however, when you study the arbitration treaties which it has, there is never a third impartial person as the arbiter--there are just the two sides--and that in our parlance is not arbitration. So, all along the way the U.S.S.R. has reserved for itself its freedom to decide what aspects of international law it will accept and what aspects it will not accept--and it will do this through the interpretive process; it is not going to have any outsiders sit in judgment upon its interpretation but is reserving, as it says, its complete right of sovereignty.

W. W. Kulsky in his article, which is on my reading list, says that the Soviet Union has preferred 'old-fashioned international law' because of its emphasis upon the importance of sovereignty, whereas we, on the other hand, are moving away

from this concept to the extent that we find it desirable to save our sovereignty, if you will, to protect ourselves against aggression. As a result of this difference of opinion, the gulf is widening between us and the Soviet policy makers--we moving towards collective security and they maintaining a rigid position, which was the position popular in the nineteenth century.

I have now concluded my discussion of the circumstances in which the Soviet Union has been maintaining the old law to meet its needs of self-protection.

Let us turn to the aspects of international law, as Soviet authors see them, which can advance Soviet interests beyond its frontiers. In this connection, I want to point out what you all know: it is a very great dream of all Soviet policy makers that the Soviet system, or what they call the "world revolution," shall extend around the world. You know of these dreams of expansion. How do Soviet authors think that international law can help realization of these dreams? It is interesting that they look to the body of international law doctrine as an instrument in their arsenal of expansion--not only as an instrument in protecting themselves, as we see in the last part of what I have just said by reference to old-established principles of sovereignty, but also as a means of expanding. Some of the areas in which they have done thinking in this sphere are particularly newsworthy today. Take Korea,

for example. The Soviet Union wanted to try and keep the United Nations out of that conflict. How were they to do it in a way which sounded as though it were required by international law? Their argument was simply that both halves of Korea are to be found on opposite sides of what is only an armistice line--the 38th parallel. They say it is one country and when the north starts fighting the south, there is created the same problem which Abraham Lincoln faced: it is just a civil war. In a civil war, as happened in our Civil War, we said to everybody: "You keep out" (the British included). When the British tried to get in, we succeeded eventually in getting some reparations out of them. So the doctrine is well established that foreign nations cannot legally intervene in a civil war--and particularly so under the Charter of the United Nations, which says that the United Nations shall not intervene in a matter of domestic concern. The Soviet position has been very simple: Korea is one unit; the north is fighting the south; the United Nations has come in and is violating the Charter and international law, generally, because it is intervening in a civil war. Soviet lawyers have absolutely refused to take into consideration the statement of the legal adviser to the United Nations, Mr. A. H. Feller (in the seminar group this afternoon we shall look at this further) to the effect that the 38th parallel became a <u>de facto</u> frontier; i.e., it was no longer just an armistice line, the reasons for which we will go into this afternoon.

Hence, since it was a State frontier, when the north marched south it started not a civil war but a war between separate States; thus, it was something with which the United Nations could concern itself without violating its own Charter.

One of the things which I want to ask this afternoon is: Does the same doctrine apply in Germany--should the two halves of Germany start fighting today? Does it apply between Formosa and the rest of China? Does it apply between the north and south half of Vietnam? In other words, can we expect this same argument to be used in those three situations, all of which may within a relatively short time come into the news again?

There is another direction in which Soviet authors have moved in which they think international law is to their advantage: they think it can be used to open the door to military aid to native revolt. On the one hand they seek to exclude the United Nations from participating in the war in Korea; yet, on the other hand, they want in some way or another to be able to participate in that war without violating the very law that they are claiming on their side in opposing the United Nations. How are they going to do this? Just consider the international lawyers sitting down in the Soviet Foreign Office with their pencils and writing out the brief for the field commanders.

This reminds me of a conversation with a citizen of

a certain state, who said that his country always had an international lawyer on the bridge of every flagship so that the lawyer could support the admiral's commands with a good brief before the action was finished. Whether this was actually done I do not know, but there is somewhat of a temptation to do just that. Of course, we international lawyers think it would be the wrong approach--we would like to see it the other way around. But I do not want to conceal from you people who are going to be on the bridges that there is the possibility of making use of an international law professor on the bridge.

What are the Soviet authorities doing to open the door for their participation in native revolts while keeping the Americans and the United Nations out? Well, they have expanded the concept of volunteers to the point that we in the United States have thought ridiculous. It happens that in international law there is no rule which requires a State to prevent her Nationals from enlisting in the army of another State. Certainly this audience knows well that a great many Americans enlisted under the banner of King George VI in the last war, either in Canada or directly in England; some also enlisted in the French Army. So there is a well-accepted principle of international law that an individual may join anybody's army that he wishes without violating international law. If he takes an oath to the sovereign of that other army, he may lose his citizenship.

However, that is not a problem of international law but a problem of domestic law.

In Korea, whole armies with their own officers appeared from China on the Korean side as volunteers. Right up to the end Arthur Dean, when he negotiated with the northern half in the tent at Panmunjom, negotiated with a Chinese general who was not there as a general of anything but a volunteer army. He made it very clear that he was not there representing the Chinese government or the Chinese army but he was there representing this army of volunteers. This is perfectly ridiculous to us. Yet, under international law, unfortunately, there is not anything that says that volunteers should be ten, twenty, one hundred, or a hundred thousand, or that at some point you have something other than volunteers because of sheer numbers.

I remember sitting in some groups of international lawyers at the time in New York who said: "Should we not go into the United Nations and try to start the preparation of a treaty which would define 'volunteers,' at least quantitatively, so that at some point too many volunteers change to an army of the government from which they have volunteered?" That is one of the doors that Soviet policy makers are trying to keep open for their participation in the kind of civil war situation which they think they have seen.

There is another area which Soviet lawyers have tried to utilize: the possibility of opening the door to revolutionary subversion; i.e., the undercover participation of foreign agents in stirring up revolt rather than the formal participation in an army as a volunteer in the actual fighting. In the early years, the Soviet government was very worried lest she be subverted, although she also had her Communist International which she was utilizing to try to subvert others. She drafted a proposed definition that one of the forms of aggression would be the undercover type of subversion by agents of foreign countries seeking to enter, or perhaps actually entering, the Soviet Union for that purpose. She wanted to call this 'aggression,' and therefore declare it illegal under international law. This was before the war when she was the weaker country.

After the war, at the time of the Nuremberg Trial, when the charter was being drafted, the Soviet Union refused to accept that very definition which she had previously drafted when Mr. Justice Jackson from the United States suggested that subversion be one of the elements of aggression in measuring the guilt of the Nazis. It began to look at this point as if the shoe had been put on the other foot and that the Soviet Union was now so strong that she did not want to be excluded from the legal use of subversion, as she had previously wanted to exclude England and France from the legal use of subversion in her own country. You see that with a change in power relationships

a change in attitudes toward principles of international law comes about.

But what happened then? We put 100 million dollars in our budget for the purpose of helping refugees from Eastern Europe. I was not on the inside and therefore I do not know what those refugees were supposed to do. But the Soviet Union thought that they were going to be trained to subvert her country. So her attitude then changed. She went back to the United Nations and said: "We want to press for the definition of aggression, which will include this kind of work as aggression, and therefore make it illegal." So, within a short span of years we see her moving in one direction and then reversing her field as the power situation changed.

What about participation in international agencies? From the start the U.S.S.R. has been in the United Nations, as you well know. Most recently she has entered the International Labor Organization and also UNESCO, the cultural organization. What has she gained from doing this? It seems to me that she has obtained a platform for propaganda and the spread of her ideas. Senator Lodge, our representative in the United Nations, spoke recently in New York to a group. He said that he was convinced that the United Nations was the greatest sounding board in the world and that he thought the United States could--and did--use the United Nations to great advantage as a sounding

board. He said: "I can say one thing on an afternoon in the United Nations and it will be heard around the world, whereas if we sent out mimeographed press releases to a lot of different countries nobody would print it at all. Further, when the remark is made by the Soviet delegation I can respond within five minutes and the denial goes out on the same wire as the allegation, which would also be impossible if we were just passing around notes through the press service of the world."

I think that the Soviet Union has appreciated the possibility--just as we do--that the United Nations performs a great function to her as a propaganda platform. She does, however, withdraw from those agencies which seem to be meddling in her domestic affairs too much. For example, the World Health Organization: she pulled out of that because she had to hand in reports on the state of her health. This, you see, runs into the question of the economic condition of her country (because health is also an economic matter), to which the Official Secrets Act refers. So she removed herself from that agency. She seems to have thought that the International Labor Organization is so valuable that she is willing to violate one of her long-standing principles in joining it. She has consented--on a compulsory basis, after having been required to do so if she wanted to get into it--to having any disputes within the ILO referred to the World Court. Here, then, the value of the propaganda platform

was apparently so great that she was prepared to withdraw from one of the fixed principles of her policy: namely, never, never to find herself in a position where someone else decides the international law of a question.

What can we do to meet the challenge? In the light of the Soviet attitude can the democracies take steps in the international law field to improve their position? I think that they can. I think that we can do these things. I think we can press for clarification of international law through the International Law Commission, which meets annually in Geneva under the auspices of the United Nations, so that the elements of international law will be written down as part of a whole fabric and the Russians make clear to the world that they do or do not take the whole fabric. In other words expose the Soviet position, which the U.S.S.R. claims is a thoroughly international law position. This will occur when Soviet representatives refuse to accept principles in the codification process. They could not thereafter claim effectively to be the protector of international law. I know that the British opposed codification, just as the Russians have been reluctant to accept it so far, the British feeling that if you sit down and write out the law, a great deal of customary international law will be lost. Therefore, the British would prefer writing diplomatic notes with references to events of the past which they believe establish customary

international law and support their position rather than having to look at a code in which those very positions may have been eliminated as a result of a majority vote. I understand the difficulties and dangers, but in balancing them it would seem to me that the democracies could press for further codification, get the Russians to expose their hand, and, where possible, obtain their signature on a code so that thereafter one could say to them: "You cannot exclude that principle for it is Article 32 of that particular code and you adopted it. So there can be no question whatever. It is in black and white, it is yours, and you are on the document." Codification, therefore, would be one of my recommendations.

Another recommendation: I think we should utilize occasions presented, as that of the Nuremberg Trial, to put the Soviet Union on record as accepting principles of international law. You remember that Mr. Justice Jackson said that the principal reason why he consented to leave the Supreme Court bench of the United States and go over to Germany was just that. He said, in effect: "I wanted to establish in law and I wanted to get the Soviet judge on the document to the effect that aggression is a crime. I felt that if I could do that I had something to cite if they eventually threatened war. I could say: 'Here is your Soviet judge saying aggression is a crime--now try and face that.'" So it seems to me that if it is

possible to bring the U.S.S.R. into situations that do present themselves from time to time in getting the U.S.S.R. to adopt a principle which will keep the peace, by all means do so.

Thirdly, I think that we should tell the world that we also want the benefits provided by the recognition of sovereignty in international law, just as the Soviets claim they do; that is, we believe that the States should be permitted to do domestically what they wish. Yet, on the other hand, I think we ought to make it very clear that as we see the world, and as we suggest the rest should see the world, this right to do what we want to do cannot be maintained in the face of the dangers from the Soviet Bloc. Hence, we believe in collective security, which does inevitably mean a certain loss of severeignty so that one can save his sovereignty. I do not know whether that argument is too complicated for some of the peasants in Asia, but it is one which I think we should attempt.

Then, finally, I think we should appeal to world public opinion on the new role of international law as the protector of the individual. We were asked (and we had a chance) in connection with the Cardinal Mindszenty case in Hungary to appeal to the principles of international law written into the treaty after the war with Hungary and the other Eastern States, in which it was provided that these States would accord to their citizens the enjoyment of human rights. There was set up an

elaborate procedure under which any disputes in connection with the treaty obligations would be settled through arbitration. The Hungarian and Bulgarian governments (the Bulgarians had their Kostov case) refused to appoint their arbiters and the case went to the World Court to see whether the Secretary-General of the United Nations could not appoint the third man, as he was permitted to do, when the parties could not agree on an arbiter. You remember that the World Court said: "No, if the Bulgarians and Hungarians will not appoint their arbiters so that we have two (one from the United States and one from Bulgaria), we cannot have a third." So we had no possibility of pressing that point. But it seems to me that opportunities may develop in the future and that we should utilize them to the fullest extent.

Therefore, in my opinion we have no reason whatever to be discouraged. We have long been supporters of international law and it seems to me that before the bar of world public opinion we can hold high our heads. I encourage all of you in your activities to remember the bar of public opinion and to utilize the principles of international law as frequently as you can because, in my mind at least, the world craves legality. Much of the Neutralist Bloc, on which we rely in the last analysis for ultimate victory, is going to respond to those who argue in terms of legality rather than without it.