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The Pueblo: A Legal Speculation

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Dear Mr. Nolte,

Recent years have seen a growing tendency to minimize the role of law in a discussion of those events which are critical to the maintenance of international order. In part, probably, a result of the disappointment which followed earlier failure to achieve a stable world order through the legal processes of the United Nations, in part tne consequence of a healthy realism in political science which looks to events rather than doctrines alone, the tendency is usually one of emphasis. Few would deny that ultimately a stable order, if it is to be achieved at all, must be based on rules of some sort. Indeed, some "behaviourist" political scientists have devoted considerable efforts to discovering and elucidating new "ground rules" for peaceful coexistence in the nuclear era of international politics, (examples would be the ex post facto rationalizations of the Cuba crisis) while some lawyers torment themselves with doubts about the "realism" of their traditional learning on the law of nations (see, for example, the current scholarly dispute in the United States about the propriety of various aspects of the Vietnam war).

At first sight, the crisis brought about by the seizure of the U.S.S. Pueblo by warships of the Democratic Republic of Korea may have appeared to be one of those situations in which the traditional rules of international law not only were disregarded by at least one of the parties, but also seemed themselves inapplicable to a chaotic world in which ships fish for intelligence and well-established governments go unrecognized for years. Force alone, it seemed, might provide the determinant factor. As the "facts" unfold, however, or more precisely, as it becomes possible to draw reasonable inferences from the facts stated by the two parties, and as such powers as China and the USSR refuse to be drawn into the arena, the dispute between the United States and North Korea appears more and more likely to turn on the application of quite traditional and well-established rules of international law, a thought which tempts me away from my series of Newsletters on the recent history of Hong Kong to speculate in this direction.

It is always very rash for a lawyer to express any sort of an opinion on a particular situation before the full facts are known - a rule which most lawyers at some time learn the hard way. In international affairs the dangers of jumping to conclusions unwarranted by the facts as they finally emerge (in their often baffling complexity) are particularly great. A reading of any of the international judgments or arbitral awards that have largely turned on complicated issues of fact will illustrate how difficult it is even for an impartial tribunal, with all its resources, to find out with reasonable

certainty what actually happened in a given situation. Yet it is in the field of international affairs more than any other that it is often necessary to disregard this rule of caution if there is to be any public discussion of the legal issues involved, for the factual details of international relations, if they ever become known at all, often remain hidden for many years. Although the length of time within which the facts of international life are revealed is being gradually shortened by improvements in reporting and communication, the situation has in some ways been made worse by the increasingly efficient techniques for manipulating public opinion that are now employed by all governments. Yet the quickening pace of international events does not diminish the need to try to examine the legal issues involved, and it is in this spirit that the present Newsletter is written, on the basis of such facts as have become available to a reader in Japan. (Indeed, there is something to be said for following the Pueblo case through the columns of a press which has tried to preserve an embarrassed neutrality throughout.)

The first announcement of the incident from Washington was made in a Pentagon press release on Tuesday, 24th January. According to this statement, the Pueblo, described as a modified auxiliary light cargo ship used by the U.S. Navy for "intelligence collection," was challenged at 10:00 p.m. the previous evening by a North Korean warship on patrol. The warship requested the Pueblo's identity, to which she replied that she was an American ship. The North Korean vessel thereupon signalled: "Heave to or I will open fire on you," to which the Pueblo refused, asserting that she was in international waters. It was not said what action the Pueblo then took, but it must be presumed that she steamed away. (Her maximum speed was given as 12.5 knots.) The North Korean ship did not open fire, but evidently summoned assistance, for within an hour the Pueblo observed three additional patrol boats and two MIG fighters. The four men-of-war surrounded the American ship, and one of them began "backing toward the bow of the Pueblo with fenders rigged. An armed boarding party was standing on the bow" - (presumably of the Korean vessel, for she was said to be going astern at the time). "The Pueblo radioed at 11:45 p.m. that she was being boarded by North Koreans. At 12:10 a.m. the Pueblo reported that she had been requested to follow the North Korean ships into Wonsan and that she had not used any weapons." At 12:32 the Pueblo reported that she had come to "all stop" and was going off the air.

The Pentagon announcement further said that the Pueblo reported her position at the time of boarding as being 127 degrees 53 minutes 3 seconds East by 39 degrees 25 minutes North, and made the comment that this position was within international waters 17 miles off the North Korean coast at its nearest point.

The North Korean announcement of the seizure, reportedly broadcast the same day by Radio Pyongyang, did not controvert the Defense Department's version: "Today naval vessels of our People's Army captured an armed spy boat of U.S. imperialist aggressor forces which intruded ... into the territorial waters of the Republic and was carrying out hostile activities." There was no mention of the actual place of capture.

Later on the same day a meeting was called at the White House, and it was revealed that moves had already been made (they were to prove unsuccessful) to get the U.S.S.R. to use its good offices to persuade the North Korean Government to order the release of the Pueblo and her crew. Later, Secretary of State Rusk characterized the seizure (which he said occurred in the Sea of Japan 25 miles off the Korean coast) as "a matter of utmost gravity" and called for the vessel's immediate release. Government spokesmen in Washington linked the incident to the numerous incidents in recent months on the Korean Armistice Line, while several congressmen used such expressions as "a very severe breach of international law that almost amounts to an act of war" (Senator Russell) and "a dastardly act of piracy" (Representative Bates). At the same time the Pentagon, while refusing to give details of the Pueblo's mission, conceded that the ship was equipped with highly sensitive electronic monitoring equipment; the intelligence value of the captured ship to North Korea began to be stressed.

On Wednesday, the 24th, there was a meeting of the Korean Armistice Truce Commission at Panmunjon. Rear-Admiral John V. Smith, the United Nations representative (apparently speaking on behalf of the United States alone), demanded the immediate return of the Pueblo and her crew, together with an apology. In rejecting this demand, the North Korean delegate, Major General Chung Kuk Pak, reiterated that the Pueblo had committed "intolerable provocations" by "illegally" intruding into North Korean waters on an espionage mission. General Pak said that the seizure took place at 127 degrees 46 minutes East by 39 degrees 17 minutes North, and he also accused the Pueblo of firing on the Korean men-of-war, which the Pentagon had denied, although it was common ground that four American seamen had been wounded in the incident and it later emerged that one had been killed. The North Koreans demanded severe punishment for those responsible for the aggressive act, as well as an apology by the United States Government.

The same day Radio Pyongyang broadcast a statement of apology which it said had been made by Commander Bucher, captain of the Pueblo, in which it was allegedly admitted that the ship was 7.6 miles off the Korean coast when intercepted, and that it was engaged in "criminal espionage activities." This stimulated a Pentagon rejoinder that (a) the ship was under orders to stay not less than 13 miles from the North Korean coast throughout her mission, and (b) there was plenty of evidence from both the Pueblo's broadcasts and from the transmissions of the North Korean vessels (which had been picked up and recorded by United States forces) to show that the Pueblo's position when first intercepted was on the high seas. The statement made by the North Koreans themselves had given a position; in the words of a spokesman, "these two reported positions are within a mile with one another and both show conclusively that the Pueblo was in international waters."

The Rodong Shinmoon, official newspaper of the North Korean Communist Party, elaborated the North Korean position slightly in an article on the 26th of January. It said that the intrusion of the Pueblo into North Korean territorial waters was "an unpardonable act of aggression infringing on the sacred sovereignty of the Democratic People's Public of Korea, and an act intended to provoke a war." It continued: "The step taken by the Navy of our People's Army against the armed spy ship of the U.S. imperialist aggressor forces which was committing criminal acts of aggression after intruding into the

coastal waters of our side, was a proper measure of self-defence and an entirely rightful measure, for the prevention of U.S. imperialist activities designed to ignite a war." The paper said that the United States was trying to mislead world opinion by calling the seizure a violation of international law.

Not unexpectedly (in view of the United Nations' quite explicitly and legally partial posture in the Korean war) neither the North Koreans nor the U.S.S.R. accepted United Nations competence in the case, and the two days of debate in the Security Council, while giving a valuable chance to the parties to "cool off" as regards military measures, did little for the actual settlement of the affair beyond giving an opportunity for the U.S.S.R. to record its public espousal of the Korean position. Only the United Kingdom went so far as to accept entirely the factual correctness of the American version of the incident; Lord Caradon, indeed, described the Pueblo as engaged in "peacefully carrying out a legitimate purpose," comparing it to the activities of Russian vessels around the British coast.

On Friday, 2nd February, the first of a series of secret meetings was held at Panmunjom, evidently outside the framework of the Korean Armistice Truce Commission meetings (a tacit confirmation that the United States was acting on behalf of itself alone rather than in the capacity of agent for the United Nations in Korea). These meetings have continued to date, without producing any apparent concrete result. At first, persistent rumours in Seoul appear to suggest an agreement whereby the North Koreans would release the wounded members of the Pueblo's crew, together with the body or bodies of the dead, in exchange for an American admission that the vessel was in territorial waters at or before the time of seizure. However, the formula was evidently not as simple as that, judging by the course of the negotiations. Indeed, South Korean hostility to the meetings suggests that the rumour may have been designed chiefly to complicate matters.

Meanwhile, in a television interview on Sunday, 4th February, Mr. Rusk and Mr. McNamara conceded that the Pueblo might conceivably have violated North Korea's territorial waters. Reports of the interview reaching Tokyo did not make it clear whether this concession referred to the period immediately before the vessel's arrest. The United States Ambassador in Japan (one of those most embarrassed by the Rusk-McNamara admission, as was the Japanese Government which had accepted his earlier assurances to the contrary) reiterated again that the seizure took place on the high seas. As a negotiating position, at least, the same view was maintained in Washington as the meetings continued.

The North Korean Government has placed less emphasis on adducing circumstantial evidence than on bringing forward self-incriminatory or self-accusatory statements apparently made both individually and jointly by various members of the crew. It is no part of my purpose to debate whether these statements, variously described as "confessions" or "apologies" are authentic or not: they have been doubted by the United States Government. However, the question is not really material to the point at issue. The nature and purpose of such confessional statements in cases of this kind is open to such wide misunderstanding in the West that I shall try to deal with some of the issues raised in a subsequent Newsletter. For present purposes I shall consider them only to the extent they purport to reveal the facts surrounding the seizure of the Pueblo.

The North Korean Government's position, based on the statements it has released and also on such information as it has made available from the logs and recording instruments seized on board the ship itself, appears to be that the Pueblo, in furtherance of her information gathering mission, on several occasions before she was intercepted, violated the territorial waters of the Democratic Republic of Korea, committing "criminal actions" therein. It has not been made clear what the exact nature of the alleged criminality was - i.e., whether it consisted simply in the actual unauthorized entry or whether it also involved the violation of the specific laws designed to protect the security of North Korea; by North Korean notions, the latter could be violated by aliens even outside North Korean territory (see below). It would in any case be difficult to deny the power of a state to frame legislation for the control of foreign ships in its territorial waters, subject always to the internationally recognized right of innocent passage by foreign merchantmen.

In the earliest North Korean statements, it was said that the seizure took place in territorial waters, but this allegation does not appear to have been repeated, or at least emphasized, since the American disclosure of the navigational position recorded by the Pueblo at the time of seizure; later North Korean statements have simply stated that the ship "was in territorial waters," leaving it open to inference that the incursion took place at some time previous to the seizure. It may be that this point has been tacitly conceded by North Korea, though of course there has been no concession of the major position that the seizure was legally justified.

It is somewhat difficult to estimate from the North Korean statements which I have seen just what legal principles are relied on by the North Koreans. One clue, consistent with a concession that the seizure was on the high seas, is provided by the statement quoted above from Rodong Shinmoon to the effect that the seizure was "a proper measure of self-defence and an entirely rightful measure for the prevention of U.S. imperialist activities designed to ignite a war."

How far the right of self-defence can or ought to cover the case of intelligence ships is one of the many legal problems which arise from the relative novelty of such operations. As classically defined, self-defence should only be invoked in cases where there are present the ingredients of necessity and urgency (in the sense that delay would endanger the state excercising the right). Measures of self-defence should be proportionate to the threat. These principles were accepted by the International War Crimes Tribunal at Nuremburg, and are generally taken to have been incorporated into Article 51 of the United Nations Charter, which authorizes states to take action in self-defence pending action for the preservation of peace by the Organization itself.

The whole subject of self-defence is, needless to say, much more complex than might appear. Had the Pueblo been a warship in the ordinary sense, which was about to make some sort of attack on North Korean territory or on a North Korean ship, the propriety of measures of self-defence would be incontrovertible. However, as both the Nuremburg judgment and the Assembly's endorsement of the report of the Commission of Inquiry of the League of Nations into the

Sino-Japanese conflict of 1931 and 1932 made clear, the question whether self-defence is justifiable in any given case is not absolutely within the discretion of each state; it must satisfy the objective standards already referred to. Relevant questions for the present purpose, then, are whether North Korea might reasonably anticipate the danger of an American attack, or whether (and it is unlikely that this would be accepted by many states) the collection of intelligence is in itself an act of "force" such as would justify action in self-defence. A further difficulty in the way of a justification of the North Korean action on the ground of self-defence is that the seizure took place after the Pueblo had been cruising for some weeks, and after the North Korean Government, by its own admission, had already been aware of the ship's activities. This would seem to negate the element of urgency which is crucial to the classic definition of self-defence; by this standard, unless there was a degree of urgency, North Korea should have found other means of preventing what she would regard as the illegal acts of the ship;(as a matter of politics, though, it is of course of great significance that North Korea is for all practical purposes debarred from the benefits of United Nations action in such a matter as this; she can hardly be expected in present circumstances to go the Security Council).

If self-defence does not, on the face of it, look like a very promising line of argument for North Korea to adopt, it is by no means the only possible justification for her action. Three other major legal points seem to me to be potentially important in the Pueblo situation, though their precise relevance would, of course, turn ultimately on the actual, rather than merely the reported, facts. These concern the measurement and the extent of North Korean territorial waters, the legality of the Pueblo's possible presence there, and possible justifications other than self-defence, for the seizure of a vessel on the high seas. A lawyer engaging in apologetics for the American (or the South Korean) position might point to other issues -- for example, the question whether North Korea, unrecognized by the majority of states in the world and unadmitted to the United Nations, can be considered a state at all for the purposes of international law. Such a point can have little value in a resolutive, rather than inflammatory, discussion of the legal issues, and it seems unimportant in the present context. (It is perhaps worth noting, though, that it might be argued that the United States Government, by negotiating directly with the North Korean authorities -- thus sidestepping its negotiations on behalf of the United Nations, in which the North Koreans are usually said to be recognized only as "belligerents" -- as well as by its implicit acceptance of North Korea's control of her territorial waters, has extended a tacit recognition to the Democratic Republic which would preclude it from asserting - e.g., before an international tribunal - that North Korea was not a state).

The extent of North Korean territorial waters at any given point may be difficult to determine for legal purposes even on a map or chart (it goes without saying that the difficulty is compounded for the master of a moving ship at sea) for two main reasons. The question of the actual width of the belt of territorial sea round the coast, though a vexed issue in international law as a whole, is relatively simple as it applies to the Pueblo situation. There has for many years been a difference of opinion among nations as to the proper width of the territorial sea. Even the "classical" standard of three

nautical miles was never accepted universally. The situation became a good deal more complex after the United Nations' Conference on the Law of the Sea (held at Geneva in 1958) failed to reach agreement on this vital question, which was left unsettled by the otherwise fairly comprehensive conventions which were established by the Conference. A second conference convened for this specific purpose at Geneva two years later also failed to reach agreement. Since that time there has been a considerable variation in the practice of states. Some states with a preoccupation for their security and the defence of coastal fishing interests have unilaterally extended their territorial waters, to six or twelve miles usually (twelve nautical miles being a distance claimed, long before 1917, by Russia), though the West coast of South America has been subject to claims for as much as two hundred miles. Other states, either because of their unwillingness to lend countenance to a disorganized scramble for claims, or because of their specific interest in open coastal waters (e.g., for fishing), have refused to recognize these claims. Into the former category fall several of the states which were not invited to participate in the Geneva deliberations, including China and North Korea, both of which laid claim to a twelve-mile wide belt of territorial seas around their coasts.

In principle, the United States is one of the countries which have steadfastly refused to recognize the unilateral proclamations of the states which have sought to extend their territorial waters in this way, in default of general agreement. The states which have taken this view have, however, found it necessary to acquiesce (while formally maintaining their rights) in the claims of the "expansionists" for all practical purposes. It would seem that this has been the case with respect to North Korea; not only does it appear that in the sailing instructions of such ships as the Pueblo it was specified that a distance of over twelve nautical miles from the North Korean coast line should be maintained, but American official statements subsequent to the seizure have apparently assumed that the twelve-mile limit would be critical.

Accordingly, while we cannot expect the United States to forego its classically justifiable legal position with regard to the width of the territorial waters in the world as a whole on the basis of such ad hoc statements (particularly inasmuch as the Democratic Republic of Korea is not even expressly recognized as such by the United States), we may reasonably assume that for the purposes of the Pueblo incident the American Government has acquiesced tacitly in the North Korean claim to a twelve-mile belt.

A conclusion, for present purposes, as to the width of the territorial sea does not resolve all the difficulties which exist with regard to territorial waters. A far more complex (and logically prior) question is from what "base-line" the distance of twelve miles is to be measured. The base-line problem is one which has complicated the law of the sea for centuries. In essence it can be stated thus: when a coast line is more or less straight, there is no problem in measuring the extent of the belt of the territorial sea from the low watermark. In that case the base-line is the shore line itself. However, when there are indentations in the cost line, the question arises

whether the waters which they partly enclose should be part of the internal waters of the state, so that the belt is measured from a line which is drawn from the two points of entrance to the inlet, or whether the base line should follow the indentation. If the inlet is less than six miles across at its mouth (assuming a belt of territorial sea of the traditional three miles) there is again no difficulty. There has for centuries been controversy over the problem raised by larger bays, however; for example, Britain, and subsequently Canada, have always claimed that Hudson's Bay (entrance 50 miles wide) had the character of internal waters; this claim was never recognized by the United States, which nonetheless claimed a similar status for Chesapeake Bay (12 miles wide at the mouth). Disputes are even more likely to develop where there are offshore islands, particularly if these form a cohesive chain (the Norwegian Fisheries Case, decided by the International Court of Justice in 1951, turned on such a question).

The Geneva Convention on the Territorial Sea and Contiguous Zone (1958) laid down a number of fairly precise rules setting out circumstances in which it would be permissible for a state to draw base lines across water so as to enclose an area of internal waters behind the belt of territorial sea. Based in part on customary law (including the somewhat controversial findings on customary law by the Court in the Norwegian Fisheries Case), partly on the proposals of the International Law Commission, and partly on newly agreed principles, the rules laid down by the Convention in general follow "hard" geographical criteria. (There is room for liberal interpretation by self-indulgent states, however, in the provisions relating to areas of water "enclosed" by what the Convention terms "a fringe of islands" or where the coast line is "deeply indented or cut into" and also where there are claims based on historic economic use by a particular state).

There are even greater possibilities for self-indulgence, of course, where states are not parties to the Convention at all (as is the case with North Korea) for such states can, in practice, select the more liberal principles adopted at Geneva, while maintaining or extending claims based on "customary" law. It may well be, therefore, that the question of base-lines is a matter which should be taken into account in trying to establish the extent of the territorial waters off that part of the Korean coast where the Pueblo was seized.

Without access, at present, to large-scale maps or charts, it is difficult to make any meaningful assessment of the potentialities for the manipulation of base-lines in the coastal area off Wonsan, though from a small-scale map it would seem that the coast line offers fewer opportunities for such manipulation than does the fjord-like configuration of the western coast of the Korean peninsula, with its chains of small islands. However, there may well be small offshore islands in the Wonsan area that would enable a case to be made out for extension. I am, therefore, unable to say what the probabilities are that the base-lines from which the North Koreans measured the twelve-mile belt of territorial sea are themselves drawn across water, so as to enlarge that belt where there are indentations in the coast line. (Nor have I been able to plot on a chart the position given for the Pueblo at the time of seizure.) Accordingly my suggestion that there may be cause for confusion, even on the map, over the exact extent of North Korean territorial waters must remain regrettably theoretical, though nonetheless not improbable.

It is, however, worth noting that even in the absence of any doubt at all as to the extent of territorial waters on the map in a given case, to fix with certainty the position of a moving ship with regard to a line drawn across water twelve or more miles from land is no easy thing to do, as any mariner would acknowledge. Using conventional visual instruments with bearings off geographical features there is a considerable risk of error. The percentage of error, moreover, increases with the distance from the points on which bearings are taken, so that using the same two points for a fix, it is substantially more difficult to say with certainty whether the ship is twelve or thirteen miles from the shore than whether it is three or four miles away. To what extent electronic navigational aids may have changed this situation I have not been able to find out. Unless they were known to make a substantial reduction in margin of error, it would be hard to escape the conclusion that the instructions said to have been given to the commander of the Pueblo, not to go closer than thirteen miles to the coast, allowed a rather small margin for navigational inaccuracies.

Supposing that the exact extent of North Korean waters could be accurately established, we may next ask how far it would have been justifiable for the Pueblo to venture into those waters, and what her legal status would have been when she was there. As already mentioned, there is a long established right in customary international law for merchantmen, in time of peace, to make innocent passage through the territorial waters of foreign states. As soon as a vessel falls outside the category of merchantman, however, the rule of customary law is much less clear. In bygone days it was easy to classify ships either as merchantmen or as men-of-war, it being reasonably assumed that the former would be privately owned, the latter the property of a state; and a rule grew up that the men-of-war of one state, being the property of the sovereign, were immune from the jurisdiction of other states. How far this immunity enabled warships to enter as of right the territorial waters of foreign states in the course of innocent passage was always a matter of some doubt among the jurists. It became further complicated with the gradual increase in recent times in the number of state-owned ships which were not warships - some being used for ordinary commerce, others for such non-commercial purposes as oceanographic surveys, cable-laying, etc. How far did such vessels fall into the public, i.e., man-of-war, sector?

For the great majority of states, these questions were at last resolved by the provisions of the Convention on Territorial Waters and the Contiguous Zone concluded at Geneva in 1958, but for those states which were not parties to the Convention there remains the option of electing to be bound by the customary rules alone, and it is into this category that North Korea must fall. Even under the definitions contained in the Convention, the status of an intelligence gathering vessel would be somewhat ambiguous; would it be a warship, or a non-military, non-commercial, publicly owned vessel? Outside the terms of the Convention, the whole question is even more uncertain. If it were argued that the Pueblo was a warship, it would be open for the Koreans to argue that even innocent passage by such a ship required authorization, but it would also be open for the United States to regard any action against the ship beyond a command that she leave North Korean waters as a violation of her sovereign immunity. Were the Pueblo's status

lower in the social scale than that of warship then it would be open to the North Koreans to argue that they were entitled to full police powers over the vessel while she was in their waters, insofar as her actions affected North Korea, by customary law. It is worth noting that, while foreign diplomats in North Korea are specifically accorded immunity from the criminal law in North Korea, no such express exception is made with regard to foreign public ships.

I have dealt with the position thus far without touching on the question of "innocence" of passage. While not every breach of the littoral state's laws (e.g. of a navigation regulation) would be sufficiently heinous to vitiate the innocence of a ship's passage through territorial waters, it seems fairly clear that if the Pueblo was in North Korean waters for the purpose for which she was fitted, namely intelligence collection, she would almost certainly have to be regarded as having lost any pretension to innocence; as defined in the Convention (which for this purpose may fairly be regarded as embodying the generally recognized customary rule):-

> "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State..." (Article 14.4).

It might also be argued that a ship which enters territorial waters for intelligence collection is not in fact using the waters for "passage" at all - in fact as between signatories of the Convention this argument would have much force, for passage is defined in the text as "navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters." There is no reason why a similar argument could not be based on customary international law, for the position of the Pueblo, had she entered North Korean waters, would have borne a striking resemblance to that of the racing correspondent who was found to have trespassed on a right of way which he rode up and down, not as a wayfarer, but for the purpose of watching the landowner's horses in training; it was an abuse of right. It might be argued, too, that any unauthorized entry into territorial waters by the naval vessel (whether armed or unarmed) of an unfriendly power might be presumed not to be innocent unless the contrary could be shown.

As a matter of North Korean law, acts detrimental to the military security of the state committed outside North Korea by aliens are considered criminal, and once the alien enters the national territory he will be subject to the criminal jurisdiction, regardless of the place where he committed the crime. Article 4 of the Criminal Law of the Korean Democratic People's Republic (taken from a translation into Chinese)provides:

> "This law shall take effect with regard to aliens found in Korean territory in respect of criminal acts committed outside Korean territory which are detrimental to the foundations of the State institutions or to the military effectiveness of the Korean Democratic People's Republic."

The probability is, therefore, that even previous intelligence gathering on the high seas by the Pueblo or by her crew members as individuals would be regarded by the North Koreans as putting the ship and her crew technically within the range of the domestic criminal law once they entered territorial waters.

The propriety of legislation with regard to the activities of aliens outside the state is certainly questionable, but practically every state in the world has adopted such legislation at some time to protect what it considers as vital interests (the United States included). Such legislation, usually said to be based on the "protective principle" of jurisdiction, has been resorted to in the West principally to safeguard specific economic interests (for example, national currencies, anti-trust rules, fisheries, etc.); "blanket" provisions in respect of state security in general have been a feature chiefly of the socialist states, the U.S.S.R. having adopted similar legislation at an early stage of its existence, and their propriety from the point of view of international law has been disputed by Western countries.

Although the North Korean legislation would apply the domestic law to persons found in North Korean territory, it does not purport to empower the seizure of aliens outside that territory for the purposes of subjecting them to the criminal jurisdiction. It may be that it can be established affirmatively that the Pueblo, wherever she might have been previously, was, at the time of actual arrest, by North Korean as well as by American standards, on the high seas. The point which then arises is whether there are ever circumstances which in the contemplation of international law would justify such an arrest.

In peace time, exceptions to the rule of inviolability of ships on the high seas are few and specific. (Technically, no legal state of war exists or existed between the members of the United Nations and North Korea as a result of the events of 1950). One of the best known of such exceptions, of course, relates to pirates, who as a matter of very long standing customary law, may be seized by the ships of any nation on the high seas. Similar exceptions have been made by treaty as between some states with respect to ships engaged in the slave trade. Warships of any nation also have the right to call upon suspicious or unidentified vessels to declare their nationality, and the warships of any particular state may arrest a vessel suspected of wrongfully wearing the flag of that state. None of these exceptions seem applicable to the case of Pueblo, but it may well be a different matter with the right of pursuit.

The right of pursuit can hardly be better described than in the words of a leading authority on international law, Oppenheim:

> "It is a universally recognized customary rule that men-of-war of a littoral State can pursue into the open sea, seize, and bring back into a port for trial, any foreign merchantman that has violated the law whilst in the territorial waters of that State. But such pursuit into the open sea is permissible only if commenced while the merchantman is still within those territorial waters or has only just escaped thence, and the pursuit must stop as soon as the merchantman passes into the maritime belt of another state."

A further generally recognized requirement is that the pursuit should be "hot" (indeed the rule is generally referred to as "hot pursuit"). As the British Government put it in a note to the Government of Iceland some years ago,

> 'Her Majesty's Government do not recognize as valid in International Law the Icelandic claim to exercise jurisdiction ... save in respect of offences committed in internal waters or the territorial sea and only then when the right of hot pursuit has been properly exercised, that is to say when the pursuit was begun in accordance with the requirements of International Law within the outer limit of the territorial sea and the pursuit thereafter was continuous to the time of the arrest."

The view of the United States Government was well expressed in part of the diplomatic correspondence relating to the well-known incident of the I'm Alone, a yacht flying the Canadian flag which was engaged in liquor smuggling during the Prohibition period and which was sunk by an American Coast Guard cutter 70 miles out to sea:

> "In the estimation of this government, the correct principle underlying the doctrine of hot pursuit is that if the arrest would have been valid when the vessel was first hailed, but was made impossible through the illegal action of the pursued vessel in failing to stop when ordered to do so, then hot pursuit is justified and the locus of the arrest and the distance of pursuit are immaterial provided: (1) that it is without the territorial waters of any other state; (2) that the pursuit has been hot and continuous."

These passages also raise a point which was much in dispute before the conclusion of the Convention on the High Seas at the 1958 Geneva Conference - namely, whether the pursuit had to start while the quarry was within the territorial sea. The Convention (Article 23) permits a littoral state to start the pursuit also in the "contiguous zone" (beyond the territorial waters) which was established for the protection of certain interests by the Geneva Conventions, but only where those interests are being infringed; the interests protected are customs, fiscal, immigration and sanitary regulations, and are not material for the present purpose (the Conference in preliminary session refused to include "security" as such an interest on account of the vagueness of the term).

The somewhat tedious recital of only partially revealed facts in the earlier part of this letter suggests a hesitation on both sides about releasing details of the course steered by the Pueblo before she was first challenged - indeed a course between the point where she was first challenged and the point where she was seized is not absolutely clear. The admissions made by Mr. Rusk and Mr. McNamara on television will suggest to many people the possibility that she had been inside the North Korean waters various times prior to the incident. Was she inside those waters at the time when the North Korean vessels challenged her? Or, had she been continuously and "hotly" pursued out of the territorial waters up to that time?

The question is an engaging one, to which a particular twist is added by the curious series of exchanges in December and January between Washington and Phnompenh over the much more controversial right of "hot pursuit" across the land frontiers between Vietnam and Cambodia. This diplomatic skirmish ended when the United States reassured Prince Sihanouk in late January that it was not planning to violate Cambodian territory, but the categorical claim of the right of hot pursuit made a few days earlier by Mr. William Bundy, Assistant Secretary of State for Asia, remained, as it were, on the record. One can only speculate on the extent to which this exchange, which must be of a considerable importance to the North Vietnamese and Viet Cong side in the Vietnam war, may have influenced the negotiations over the Pueblo.

For the United States, having so recently advanced a very liberal and somewhat dubious interpretation of the rules of hot pursuit to cover a land situation, it would not be particularly easy to rebut with conviction an argument based on the much better defined right of hot pursuit at sea - assuming a case could be made out for its application by the North Koreans. For the Democratic Republic, on the other hand, to assert openly the right of hot pursuit (again, perhaps, with a somewhat liberal interpretation) at such a time might seriously embarrass its allies.

States usually do not invoke a narrowly legal characterization of their claims when corresponding or negotiating over a dispute, until, at least, a point of legal technicality is clearly reached. This applies even more, in general, to their public pronouncements on such questions. In the present case, they may each have stronger reasons than usual for not revealing just what happened in the night of the 23rd - 24th January, 1968.

Yours sincerely,

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