# Peking story (American prisoners in China) - correspondence, letters and ca...

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Dag Hammarskjölds saml.

Peking story - 1955

7 Feb. - 19 Feb.

a) Waldock, Humphrey (Prof., All Souls College, Oxford, England)

- 1 letter to D.H.
- 1 encl. (Prof. Waldock's Conclusions Concerning the Case of the 11 U.S. Airmen Convicted of Espionage in China)

b) 1 letter from D.H., 19 Feb.

ALL SOULS COLLEGE,
OXFORD.

Feb: 1st

My dear Hammarskjöld,

I greatly appreciated your letter of 25 January both for the kind things which you said about me and for the insight which you gave me into recent developments and your own ideas on the question of the 11 fliers. I think that you are right in the significance which you attach to the absence of any reference to our talks from the Chinese side, despite the hullabaloo now in progress. One small — and now outdated — point has occurred to me about our talks which may also perhaps have been in your mind. When Chou was developing the Chinese case about Formosa and the islands, I was just sufficiently struck by the vigour with which he stated the Chinese intention to liberate them to record that as a fact in the back of my mind. At the time I wrote it off as

simply the Chinese "line" and a tribute to the pressure of some of Chou's backroom colleagues. But I have since wondered whether Chou, conscious that an attack on the Tachen islands was being mounted by the Chinese staff, was warning you that he was going to act tough about the islands soon and asking you not to misunderstand his tough action in the context of the "relaxation of international tension" while you were both discussing. At any rate, he must almost certainly have known that early action was planned by the Chinese military staff.

I enclose the memorandum which I said that I would prepare on the case of the 11, in case it should serve any purpose. I have tried to write it still in the judicial, polite terms that would be adopted by an international tribunal adjudicating upon the actions of States, though it is expressed as an opinion rather than as a judgment. If any occasion should arise when you might wish to make use of it, please

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treat it as a draft and amend, cut, or supplement it as you think it to suit the nuances of the occasion for its use. Or, time permitting, send me your views and I will make the alterations — I am sure that our ideas are not far apart. I have on the principle of inserting everything that might be of use in the context of our talks in Peking, leaving it to you to cut out anything that seemed delicate or inappropriate for the purpose in hand.

There is nothing much in the draft that will be new to you, though it includes some points which, for very good reasons, were not made in Peking. You will see that I have used the published version of the judgment of the Chinese Tribunal to support our own conclusions and to fix the Chinese to some extent by the findings or absence of findings on critical points in the judgment. I think it works, though the ~~place~~ of admissions in the judgment has to be looked at fairly carefully. One point, in paragraph 10, I have assumed x and it would need

checking, namely, the absence of a routine casualty report by the U.N. Command in the case of Dorsey and Fecteau similar to that covering the loss of the 11.

Assuming that we are right about the facts, I have little doubt that the U.S. staff could provide additional evidence to support the U.N. character of the operation. On the other hand, as you yourself have observed, the U.S. – U.N. version of the facts hangs very much on the truth of the assertion that the 581st Air Wing had as its normal tasks those ascribed to it in an brief. The case would have to be argued very differently if that point broke down.

I have also had a letter and enclosure from Cordier. I very much appreciate the generous nature of the enclosure and the kind thought which inspired it.

Yours sincerely

Humphrey Wardrop

19 February 1955

My dear Waldock,

First of all warm thanks for your valuable summary of your views on the fliers case as a legal issue. I am happy to see that your later considerations have only served to confirm our basic approach in Peking.

.... Enclosed you will find a letter to Eden and, what pro-
.... bably is of particular interest to you, a copy of a letter to Mr. Chou En-lai which I just have sent. I think that this step in relation to Peking is entirely in line with your thinking.

One of these days I will send you a copy of Per Lind's and my combined notes on the talks in Peking. I would be grateful if you would check them against your own notes as I want to have a text which to the best of our understanding (yours, Per Lind's and mine, as Bokhari did not take any notes) give an exact although not quite complete picture of what happened.

Encl.

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Professor C.H.M. Waldock's Conclusions Concerning
The Case Of The 11 United States Airmen Convicted
Of Espionage in China

1. On returning to Oxford I have reflected further concerning the case of the 11 United States airmen in the light of the information given to us by Mr Chou-En-lai during the talks in Peking. You may like to have the results of these reflections, which represent my considered conclusions on the case after weighing carefully the evidence presented by both sides.

2. The following basic facts appear to be undisputed -

(1) The aircraft was a B.29 aircraft of the United States Air Force which, although camouflaged for night operations, carried other standard markings of United States military aircraft.

(2) The aircraft, when shot down, was operating as a unit of the 581st Air Resupply and Communications Wing of the United States Air Force.

(3) The men belonged to the United States Air Force and when shot down and captured were wearing the standard uniform of United States airmen engaged on active service.

(4) The indicated task for the aircraft on the flight in question was leaflet dropping over North Korea. The Chinese allege that this leaflet dropping task was given to the crew merely as cover for an espionage operation within Chinese air space beyond the Korean-Chinese boundary. They have not, however, contested that the indicated task for the crew was leaflet dropping over North Korea.

(5) The aircraft on the flight in question departed from a United States air-base in Japan and proceeded northwards over the Korean peninsula before being shot down.

(6) The aircraft, when shot down, landed at no great distance from the Korean-Chinese boundary. The United Nations Command assert that it probably fell on the Korean side of the boundary. Mr Chou En-lai states that it definitely fell within Chinese territory. On either version of the facts the aircraft fell within what may properly be called the frontier area.

Beginning from the above facts, which appear to be common ground, I shall examine in turn the cases presented on either side.

3. The facts adduced by the United States and United Nations as proving that the 11 men, when captured, were engaged on a lawful military operation of the Korean war are as follows -

(1) The 581st Air Resupply and Communications Wing, to which the aircraft belonged, had previously been placed to the fullest extent under the orders of the United Nations Command for operations in the Korean conflict.

(2) The particular leaflet dropping operation on 12 January 1953, in the ~~cause~~ course of which the aircraft was shot down, was specifically ordered by the United Nations Command for ~~operations~~ the support of in North Korea. The orders given to the aircraft designated in the most precise terms the targets at which it was to direct its leaflets and all these targets were definitely within North Korea.

(3) In addition to its special orders limiting its operations on 12 January 1953 to North Korea, the aircraft operated under a stringent general order of the United Nations Command which categorically prohibited operations beyond the Korean-Chinese boundary.

(4) Radar stations operated by forces of the United Nations Command recorded the flight of the aircraft on 12 January 1953, registering its presence in the vicinity of one of the designated targets, namely Souchon, and then an attack upon it by 12 fighters.

(5) Six minutes later, United Nations radio stations recorded the receipt of a distress signal from the aircraft reporting that it was out of control and was being abandoned.

(6) On the following day, the 13th January, and again on the 16th January, 1953, before any question had been raised as to the legitimacy of the operation, routine casualty reports were issued by the United Nations Command indicating that the aircraft and crew had been lost during the operation ordered by the United Nations Command and on the course over North Korea prescribed in the orders issued to the aircraft.

These facts are in accord with each other and with the undisputed facts. They relate directly to the actual operation on which the 11 men were captured and are of a circumstantial character. Taken together with the undisputed facts they point inevitably and irresistibly to the conclusion that the 11 men, when captured, were engaged on a lawful military operation of the Korean war. Clearly, this conclusion must hold good unless the evidence adduced by the United States and

United Nations is contradicted in some material particular by other evidence presented by the Chinese Government.

4. The case presented by the Chinese Government during the Peking talks ran as follows -

(1) United States aircraft between July 1950 and September 1954 frequently intruded into Chinese air space and dropped a considerable number of agents equipped with wireless transmitters and receivers. Aircraft concerned in such activities included the types C 47 and B 29.

(2) The 581st Air Resupply and Communication Wing served the United States Central Intelligence Agency.

(3) There is an intrinsic connexion or at least a parallelism between the case of Downey and Fecteau, and the case of the 11 men. Downey and Fecteau were shot down and captured while attempting to pick up a special agent and the espionage character of their operation has not been contested by the United States.

(4) Downey and Fecteau were attached to the 581st Air Resupply and Communication Wing. So also were the 11 men.

(5) Downey and Fecteau on 29 November 1952, having left a United States air base in Japan, proceeded to Seoul in Korea and thence northwards over the Korean peninsula, intruded into Chinese air space and were shot down by Chinese ground defences. So it was also in the case of the 11 men on 12 January 1953 except that they proceeded directly from Japan without making a stop at Seoul.

(6) In the Downey and Fecteau case there was material proof of espionage in special pick-up equipment used for recovering agents. Similarly in the case of the 11 men there was material proof of espionage in a U.R.C. 4 Type portable radio transmitter, a type of radio transmitter which had been found on some captured agents.

(7) One of the 11, Benjamin, had received special training at the same training establishment in the United States as Downey.

(8) The crew of 14, of whom 3 were killed, was abnormally large, there being an extra pilot and radar operator.

(9) It is true that the 11 men were in United States uniform when captured; but so also were Downey and Fecteau.

(10) If the United Nations Command at the time reported that the 11 had been lost on a leaflet operation of the Korean war, equally the Chinese Government at that time stated in a broadcast that the men had been captured when intruding into China's air space for espionage.

(11) At the Geneva Conference in July of last year the

United States handed to the Chinese a list of United States personnel detained in China. The Chinese pointed out certain errors in the list and the United States then submitted a revised list of 66 names. The Chinese Government explained to the United States the policy which it would apply in dealing with the persons on the list, indicating that the 11 were under investigation. The United States did not then challenge the right of the Chinese to investigate the 11 or claim that they were prisoners of the Korean war.

The Chinese case thus consists in part of matters relating directly to the 11 and in part of matters relating to the activities of other United States aircraft, especially the aircraft of Downey and Fecteau. In substance, the Chinese contention is that the 11 took advantage of the existence of the Korean war to carry out independent espionage in China on behalf of the United States and that leaflet dropping was a mere pretence to provide cover for ~~the~~ espionage in China.

5. Under generally recognised principles of criminal law an individual is chargeable only with offences which he has himself committed or for which he is responsible. Moreover, as we pointed out in the Peking talks, the principle of individual responsibility is carried to such lengths in international law that in the laws of war a person is not chargeable with previous acts of espionage but only with acts of espionage on the operation in the course of which he is apprehended. This rule, which is incorporated in Article 31 of the Hague Rules of Land Warfare, is well settled and is fully accepted by Soviet authorities on international law. Accordingly, the facts presented by the Chinese Government are relevant only to the extent that they tend to show that the 11 men on the particular operation on 12 January 1953 were not engaged on a lawful military operation of the Korean war but on independent espionage for the United States.

6. Two circumstances are relied upon by the Chinese as showing directly that the 11 on the particular flight in

question were engaged in espionage (1) the finding of the U.R.C. 4 Type portable radio and (2) the extra members of the crew. But, as we pointed out in Peking, both these circumstances are capable of innocent explanation ~~and are said by the other side to have these innocent explanations~~. As to the radio, the U.R.C. 4 Type is a standard part of the survival equipment of all United States military aircraft of a size comparable to the B 29, which normally carry several of these radios when on military operations. Consequently, even if the Chinese have found this type of radio on some captured agents, the fact of its discovery on the B 29 in question cannot by itself be regarded as evidence of espionage. It would have been very surprising if the aircraft had not carried a U.R.C. 4 Type radio and this fact is therefore completely "neutral" as evidence of espionage or no espionage. As to the extra members of the crew, they are explained, it is said, by the fact that the flight in question was Colonel Arnold's first operation over Korea and the pilot and radar operator were duplicated for instructional purposes. Consequently this ~~fact~~ point also must be regarded as inconclusive on the ~~point~~ question of espionage or no espionage. This conclusion ~~as~~ is confirmed by the fact that no weight was given to ~~it~~ the point in the judgment of the Chinese Military Tribunal.

7. Clearly, the Chinese statistics of alleged United States espionage operations over China are equally inconclusive as to the nature of the particular operation on 12 January 1953, having regard to the fact that during the period in question United States aircraft under United Nations Command were undoubtedly making numerous sorties over North Korea in support of United Nations operations. Mr Chou En-lai himself recognised that the Chinese statistics only had relevance as background to the case.

8. I now turn to the alleged connexion or parallelism between the case of Downey and Fecteau and the case of the 11. The inconclusiveness of the U.R.C. 4 Type portable radio as material proof of espionage has already been mentioned. Two of the other suggested points of parallelism are completely inconclusive as evidence of espionage by the 11. First, the fact that both aircraft proceeded northwards from bases in Japan across the Korean Peninsula until they crashed into China proves nothing, having regard to the evidence that the B 29 was first attacked some miles to the south of the Korean-Chinese boundary. Any long range aircraft of the United Nations Command engaged on offensive operations would inevitably follow much the same course as the B 29. Secondly, the fact that the men were in United States uniform in both cases is completely "neutral". United States airmen engaged on United Nations operations would necessarily be in United States uniform and no suspicion can possibly attach to that fact. It would be paradoxical indeed if the 11 were suspected of being spies because they were captured in the uniform of the armed force to which they belonged.

9. The main point on which the Chinese base a connexion between the two cases is, however, attachment to the 581st Air Resupply and Communications Wing. This point would obviously tell heavily against the 11 if, but only if, the exclusive or normal task of the Wing had been espionage. But the evidence is that its principal and normal tasks were Communications, supply of military units and psychological warfare, as seems indeed to have been recognised in a Peking radio broadcast on 21st January 1953. Accordingly, even if the Wing sometimes may have served the United States Central Intelligence Agency and even if it actually were to have done so in the case of Downey and Fecteau, it would not ~~does~~ not at all follow that the operation of the

11 on 12 January 1953 was also of this clandestine nature. This point - the common attachment to the 581st Air Wing - is not so completely "neutral" as the other facts relied upon by the Chinese. But it is still, in my opinion, quite inconclusive as proof that the particular operation undertaken by the 11 was an independent espionage operation for the United States and not a leaflet dropping operation for the United Nations in the Korean war such as was frequently carried out by the United States Air Force and by the 581st Air Wing, in particular. The same comment applies to the Chinese statement that Benjamin, one of the 11, had at one time attended the same training school as Downey. Even if correct, it would prove nothing as to the operation on 12 January 1953

10. Once it is established that the principal and regular tasks of the 581st Air Wing - whatever other tasks it may have also performed - were communications, supply of military units and psychological warfare, the alleged connexion or parallelism between the case of the 11 and the case of Downey and Fecteau becomes quite inconclusive as proof of espionage by the 11. For the fact that an aircraft of 581st Air Wing, according to the Chinese account, was used for espionage in the case of Downey and Fecteau then proves no more than the possibility that the B 29 aircraft manned by the 11 might have been used for the same purpose. And apart from the fact of common attachment to the 581st Air Wing, the alleged connexion or parallelism between the two cases is not really ~~far from~~ very impressive. There are as many differences as there are similarities. Thus Downey and Fecteau's aircraft was a C 47 while that of the 11 was a B 29. Again Downey and Fecteau took off from Seoul in Korea on the flight on which they were shot down while the 11 proceeded direct from a base in Japan. Downey and Fecteau wore the uniform of civilians attached to the United States

forces whereas the 11 wore the military uniform of combatant members of the United States Air Force. The aircraft of Downey and Fecteau, according to the judgment of the Chinese Military Tribunal, carried inter alia equipment for dropping special agents, forged safe-conducts, certificates and passes, gold and paper currency and other equipment for espionage. The aircraft of the 11, according to the judgment of the Chinese Military Tribunal, carried no more than a portable radio, arms, documents and other equipment to enable the defendants to live in the woods, which is a fair description of survival equipment. Other points of difference exist, for example, in the routine casualty reports issued by the United Nations for the loss of the 11 but not for Downey and Fecteau. It may be that these and other differences between the two cases do not by themselves actually prove the innocent nature of the operation of the 11 on 12 January 1953. But they go a long way towards negativing the alleged connexion or parallelism between the case of Downey and Fecteau and the case of the 11.

11. There remains the failure of the United States to object to the inclusion of the 11 in the Geneva list of United States nationals detained in China. The Chinese, in effect, state that the lack of any claim by the United States at the Geneva Conference, that the 11 ought to be treated as prisoners of war and not as detained persons under investigation in China, confirmed the Chinese in their suspicions that the 11 were not ordinary prisoners of the Korean war. This fact, if unexplained, might tend to throw a more sinister light on some of the other facts which, as I have shown, are in themselves quite inconclusive as to the 11 having been engaged in espionage on 12 January 1953. The explanation which has been given is that at Geneva the United States took up the question of the release of Americans detained in China not as part of the general proceedings of the conference in regard to Korea, but in special

bilateral negotiations between the two Governments. In short, the Geneva list was not prepared in the context of a release of prisoners of the Korean war but in the context of a general request for the release of all United States nationals detained in China. In this context there was not the same occasion to emphasise the status of the 11 as prisoners of the Korean war. While the United States might have been well advised, for the purposes of keeping the record straight, to specify the 11 as prisoners of war, the foregoing explanation of the formulation of the Geneva list appears to be in accord with the facts. Moreover, other established facts clearly indicate that the United States both before and after the Geneva Conference did consider the 11 to be prisoners of the Korean war; such facts are the form of the routine casualty reports and the inclusion of the 11 in the lists submitted to the Armistice Commission. It is also relevant that the United States dealt with the 11 quite differently from Downey and Fecteau in drawing up the Geneva list. Whereas the 11 were included, Downey and Fecteau, although not yet tried by the Chinese Military Tribunal, were not included. Accordingly, while I recognise that the Geneva negotiations may have led to some misunderstanding on the Chinese side, I feel bound, in the light of all the evidence, to find that the Geneva list ~~did~~ is not ~~constitute any~~ any indication of an admission by the United States that the 11 were other than ordinary prisoners of the Korean war.

12. ~~Receiving~~ Reviewing all the evidence that has been put before us, I find nothing in the evidence presented on the Chinese side which contradicts in any material particular the evidence presented on the United States and United Nations side. It is a striking feature of this case that the facts asserted by the Chinese are in all material particulars consistent with

the facts asserted by the United States and by the United Nations Command. The main point of difference is in the two accounts of the shooting down of the aircraft and more especially as to the place where the aircraft crashed. But even on this point there is nothing in the Chinese account which is actually inconsistent with the account given by the United Nations Command. The Chinese assert that the aircraft crashed on Chinese territory; the United States and United Nations think that the probabilities are that it fell in North Korea. The real difference between the two sides is as to the interpretation of the facts and it is essentially a difference of point of view.

13. Looking only at the evidence presented by the Chinese, I do not find that it provides proof that the particular operation in question on 12 January 1953 was an independent espionage operation of the United States instead of the lawful leaflet dropping operation which the United States and United Nations Command claim it to have been. The Chinese evidence shows at most some circumstances which tended to create some suspicion of espionage, especially when viewed from the Chinese angle. The Chinese Military Tribunal, in putting an unfavourable rather than an innocent construction on these circumstances appears to have been considerably influenced by a general suspicion of United States espionage in China derived from other incidents involving alleged United States agents, including the case of Downey and Fecteau. For the Tribunal began its judgment with a general reference to alleged United States espionage and subversion in China. Bearing in mind the neutral or inconclusive character of the facts relied on by the Chinese (see paragraphs 6 – 10 above), the Tribunal's judgment does not at any point, in my opinion, carry the case against the 11 beyond suspicion into proof of espionage on the

occasion of the operation of 12 January 1953. And, when the evidence presented by both sides is read together I find it impossible to arrive at any other conclusion than that the Chinese case against the 11 ~~was~~ is not proven. Indeed, having regard to the general concordance of the facts presented on the United States and United Nations side with those presented on the Chinese side, the evidence taken as a whole points definitely to the conclusion that the 11, when shot down and captured, were engaged on a lawful military operation of the United Nations Command in the Korean war.

14. In stating the above conclusions I do not wish to be understood as questioning the good faith of the Chinese Military Tribunal. Nor, in referring to the reliance placed by the Tribunal upon the evidence of espionage in the Downey-Fecteau case (together with other cases), am I to be understood as endorsing the view that the Tribunal confused the evidence in the two cases and convicted the 11 on the basis of evidence of espionage found in the Downey and Fecteau aircraft. On the contrary, the Tribunal in its judgment clearly distinguished and scrupulously kept separate the facts in the two cases. The respective findings of fact by the Tribunal in the two cases, as I have indicated in paragraph 10 above, differ significantly on crucial points and ~~its findings in the case of the 11~~ some of those differences, when interpreted in the light of all the evidence from both sides, actually support a conclusion favourable to the 11. Accordingly the impression in some quarters that the facts of the two cases were run together by the Tribunal and that the 11 were convicted on evidence relating to the Downey-Fecteau aircraft finds no confirmation in the judgment on the 11. On the other hand, it is a little to be regretted in the particular circumstances of the two cases that the case of the 11 and the case of Downey and Fecteau were tried

consecutively by the same Tribunal with the result that it had its judgments in the two cases under consideration at the same time - both judgments bear the same date, 23 November 1954. For this fact would, in the nature of things, tend to incline the Tribunal to adopt the more sinister rather than the more innocent of the possible interpretations of critical points in the case against the 11 and may have turned the scale against them.

15. I should perhaps say that, in reaching a conclusion on the evidence different from that reached by the Chinese Military Tribunal I have not overlooked the so-called "admissions" by the 11 or by some of the 11. These admissions were not put before us in Peking nor was their substance explained to us. They were not included in the main statement of the Chinese case in Peking and were only referred to in the briefest and most incidental manner so that no particular weight appeared to be attached to them on the Chinese side. If these admissions had contained conclusive evidence of the espionage character of the operation on 12 January 1953, they could hardly fail to have been given a prominent place in the presentation of the Chinese case during our talks. That any admissions made by the 11 were inconclusive concerning the espionage character of the particular operation on 12 January 1953 is also borne out by the judgment of the Chinese Military Tribunal. The judgment refers only to an alleged admission by Colonel Arnold that the 581st Air Wing served the United States Central Intelligence Agency in work connected with special agents and to an alleged admission by Major Baumer that he had on other occasions conducted reconnaissance over China. The judgment does not mention any admission as to the espionage character of the operation on 12 January 1953 nor does it, in fact, anywhere state what was the actual espionage operation on which the men

were alleged to have been engaged on that date. Proof of the espionage character of the particular operation on which the 11 were engaged on 12 January 1953 was the crucial point in the case and, if any admissions by any of the 11 had constituted clear and reliable evidence as to the espionage character of that operation, it is inconceivable that the Tribunal should not have explained and emphasised that fact. Accordingly, in the light of the Peking talks and of the judgment of the Tribunal, I am bound to find that the conclusions resulting from the remainder of the evidence are unaffected by any so-called admissions. This being so, I need not dilate upon the reserve with which the probative value of admissions is regarded in many systems of law.

16. The evidence therefore leaves me with the firm opinion that the operation on 12 January 1953 was a lawful military operation of the Korean war. If this view is accepted the right of the 11 to be released is, I think, clear whether they were captured in North Korea or in China. If they were captured in North Korea, they were clearly prisoners of war falling within the repatriation provisions of the Korean Armistice. If they fell and were captured over the boundary and within China, there is still, in my opinion, a very strong case for holding that they were prisoners of war. The character and size of the Chinese armed forces fighting in Korea, the part played by the Government of the People's Republic of China in the negotiations for the armistice and other circumstances strongly suggest that there was de facto a state of hostilities - "an armed conflict" - between the People's Republic of China and the United Nations Command. Moreover, the province in which the men are claimed by the Chinese to have been captured was immediately adjacent to the battle zone. In these circumstances it would be logical and

in accord with the intent of Article 2 paragraph 1 of the Geneva Convention of 1949 to treat the 11 as prisoners of war captured in an "armed conflict" which was terminated by the Korean Armistice. But, even if the 11 were to be regarded as having been detained by a "neutral" or, in modern parlance, a "non-belligerent", they would still be entitled to be released upon the termination of hostilities. Not only has it been the invariable practice of neutrals in the past to release at the conclusion of hostilities any members of the belligerent forces interned during the conflict but Article 4 paragraph B (2) of the Geneva Convention of 1949 expressly enjoins a neutral or non-belligerent State to treat interned members of the belligerent armed forces as prisoners of war. I should add that the People's Republic of China do not appear to have denied the right of the men to be released, if they were engaged on a lawful operation of the United Nations Command in the Korean war. The Chinese standpoint in the Peking talks was exclusively that the 11 were not so engaged but were taking part in an independent United States operation for espionage. This is a question of fact on which for the reasons given in this memorandum I do not think that the Chinese case against the 11 is made out.

17. Finally, I think that I should mention the doubts which I myself entertain concerning the Chinese case on a point of law which does not appear to have been argued before the Chinese Military Tribunal because it is not dealt with in the judgment. The point of law is whether, even if the Chinese view of the facts were to be accepted as correct, it would be admissible in all the circumstances of the present case to classify the 11 as spies rather than as lawful combatants, having regard to the fact that they were captured in the uniform of a properly constituted armed force to which they

~~undoubtedly~~ unquestionably belonged. My doubts are based on two considerations. First, a strong case can be made out, along the lines indicated in my previous paragraph, that Antung Province ought for the purpose of applying the laws of war and neutrality to be regarded as implicated in the Korean conflict. As the Soviet writer Korovin says, it is the de facto situation rather than the de jure status which ordinarily determines whether a particular territory is to be regarded as a theatre of war. Secondly, it is extremely doubtful under the international laws of war whether men captured in the uniform of a properly constituted armed force to which they belong can ever be treated as spies rather than as lawful combatants. Admittedly, the English writer Spaight in his book, "Air Power and War Rights", suggested that arguments could be advanced for treating uniformed airmen engaged in assisting special agents on the same basis as the agents themselves. But the only arguments which he advanced were considerations of military expediency and he stated expressly that "under the hitherto accepted law and practice of land warfare, the wearing of uniform has always been held to protect, normally, an officer or soldier from a charge of espionage." He added that under the accepted law the only exception was where a flag of truce, or a Red Cross flag or a safe conduct had been abused and that "no similar abuse of a privileged position can be alleged against the pilot who lands a spy or other special agent." The Hague Regulations Respecting the Laws and Customs of War on Land, which codified the accepted customary law and which are universally recognised to be applicable to air warfare, lay down in Article 29 ~~(1)~~ (1) that a person can only be considered a spy when he seeks to obtain information acting clandestinely or on false pretences and (2) soldiers not wearing disguise are not to be considered spies. The general view has been that

under these provisions a soldier in uniform can only be treated as a spy when either the uniform is not one which he is entitled to wear and is therefore a false pretence or he fraudulently uses the protection of a flag of truce or other safe conduct for the purpose of obtaining military information. In the absence of one or other of these forms of fraud, the wearing of uniform is held by most authorities to be a protection, under Article 29 of the Hague Regulations, against a charge of espionage. The French Court of Cassation in a case in 1947 expressly decided that Article 29 precluded a Swiss, named Wuistaz, from being tried for espionage for Germany because he had gone about in the uniform of the Todt organisation to which he belonged. Precedents the other way can be found in Axis practice during the second world war but they evoked protests from the Allied Governments and cannot be relied on as having modified the established law. In my opinion, the modern law is clearly and accurately stated by the Soviet writer Korovin -

> "A military spy is a person who conceals his true identity and activities. On the other hand, a scout seeking to obtain information in the enemy's lines, even though this may be the same information as is sought by a spy, is not liable to punishment in the event of capture, because he operates openly, wears a uniform and does not conceal his membership in the armed forces of the enemy. The use of permissible ruses of war (the use of foliage for camouflage, the wearing of white overalls) does not convert the scout into a spy; he only has to be captured for his military status to be demonstrated."

Assuming the case to be - as I think it was - a case ~~arising~~ connected ~~out of~~ with the Korean conflict, Korovin's language would certainly seem to protect the 11 against a conviction for espionage even on the supposition that the Chinese interpretation of the facts was correct.

18. In the Peking talks we made only the briefest reference to our legal doubts about it being admissible in the

circumstances of the present case to treat United States airmen captured in uniform as spies, even if they were found to have been assisting agents, and merely reserved our position on the point. Considering, as we did, that the case against the 11 had not been made out on the facts, we did not press the legal points and did not, in turn, hear the Chinese arguments on this aspect of the case. I have not, therefore, thought it necessary or right in this memorandum to enter into a lengthy examination of all the relevant legal authorities and have merely indicated the basis of my doubts on the question of law.

19. I need not review the evidence concerning the case of the four jet-fighter pilots because Mr Chou En-lai at two points in our talks emphasised that, while these men had been under investigation, nothing had yet been discovered against them. On this basis, the only possible conclusion is that the jet-fighter pilots were captured when lawfully engaged on a military operation of the Korean war and that they are, in consequence, entitled to be released in accordance with the principles set out in paragraph 16 above. Having regard to the long time already occupied by their investigation and to the absence of any evidence against them, there seems to be a strong case for their very early release.