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John Norton Moore and Robert F. Turner

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## FOREWORD

The International Law Studies “Blue Book” series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. This, the sixty-eighth volume of the series, consists of writings on international law which have appeared in the Naval War College Review during the period 1978–1994.

This compilation of articles, essays and reviews follows an earlier two-volume work published in 1980 which comprised readings appearing in the Review from 1947 to 1977. Those two volumes, 61 and 62 of this “Blue Book” series, were edited by Professor John Norton Moore (who had recently served as U.S. Ambassador to the Third United Nations Conference on the Law of the Sea) and Professor Richard Lillich (a former Charles H. Stockton Professor of International Law at the Naval War College), both of the University of Virginia School of Law. Professors Moore and Lillich compiled those readings in a cogent and readily accessible format for use by students and practitioners of international law.

Volume 68 continues in that tradition, bringing together some of the best writings on international law from the Naval War College Review in the intervening seventeen years. Professor Moore again serves as coeditor for this volume and is once more joined in that effort by a University of Virginia colleague—Professor Robert F. Turner—also of the School of Law. Professor Turner occupied the Stockton Chair of International Law at the Naval War College during the 1994–95 academic year.

The readings in Volume 68 reflect an era of profound change, both in international law and in the world community; and the important field of oceans law has perhaps typified that trend. Indeed, as the articles in Part Two will demonstrate, the clarification and codification of the law of the sea during this period has proceeded more rapidly than during any comparable period in history. Considerable progress has also been made in the struggle against terrorism, in the law of war, and in other areas addressed in the material which follows.

The articles are conveniently arranged under general headings in six Parts (although several articles address more than one subject and have been assigned by our editors to the one thought most appropriate); and in order to give the reader a sense of the evolutionary process that has occurred in several of these areas, they are arranged chronologically within each Part. Particularly in the law of the sea area, some of the earlier articles may seem dated today—but they reflect important thinking that will be of interest to readers seeking to understand the profound geopolitical dynamics that have occasioned recent changes in the law.

The Naval War College takes pride in its commitment to academic freedom. Writings that have appeared in the Naval War College Review and the “Blue Book” series hew to no official policy agenda. Indeed, the value of an article or essay may reside particularly in its articulation of positions quite at odds with the conventional wisdom. As a consequence, it should be understood that while the opinions expressed in this volume are those of the individual authors and not necessarily those of the United States Navy nor the Naval War College, they collectively provide a valuable contribution to the study of international law.

On behalf of the Secretary of the Navy, the Chief of Naval Operations and Commandant of the Marine Corps, I extend to the editors and the contributing authors of this informative and provocative compilation our gratitude and thanks.

James R. Stark  
Rear Admiral, U.S. Navy  
President, Naval War College

## PREFACE

By coincidence, today marks the 110th anniversary of the beginning of the first class of students at the Naval War College in 1885. As the small group gathered in a structure originally designed to serve as Newport's poorhouse and "deaf and dumb asylum," lacking money—not only for books and furniture, but even for heat and light—Acting Rear Admiral Stephen B. Luce noted that the building would at least provide "shelter" and declared: "Poor little poorhouse, I christen thee the United States Naval War College."<sup>1</sup> It was the austere beginning of something very important—an event of landmark significance for the profession of international law.

### The Naval War College's Contribution to International Law

Rear Admiral Stark notes in his foreword that international law has long played a central role in the Naval War College curriculum. But, with characteristic modesty, he neglects to make the corollary observation that the Naval War College has played a very important role in the development both of substantive international law and the teaching thereof. From our perspective, such a conclusion is clearly warranted. Some brief history may be useful to illustrate that observation.

Lacking funds in its infancy, the War College was dependent upon visiting lecturers who would volunteer to travel to Newport at their own expense to teach the first class of students. The first such lectures were by Professor James Soley—then the Librarian in the Department of the Navy, but soon to become Assistant Secretary of the Navy—who addressed the important topic of international law.

According to the centennial history of the Naval War College,<sup>2</sup> by 1894 the curriculum had expanded to include seven parts, the very first of which included "lectures on professional subjects, including international law." This series of twenty-two international law lectures was delivered by Professor Freeman Snow, of Harvard Law School, who brought with him the "case method" of study which he was helping to pioneer at Harvard at the time—an approach that was later to become a standard tool of legal education in America.

When Professor Snow passed away during the 1894 War College term, Rear Admiral Henry C. Taylor entrusted Commander Charles H. Stockton with the task of editing and expanding Professor Snow's lectures into a text on international law. Published in 1895, it was to be the first of many War College books on the subject. Along with Professor Snow's 1893 *Cases on International Law*, the new War College volume provided an important teaching tool for law schools around the country.

In 1898, Stockton had risen to the rank of Captain and was named Naval War College President. The following year he was charged by the Secretary of the Navy with drafting a Code of the Law and Usages of War at Sea—a document that served as an early effort to codify the law of the sea. Captain Stockton represented the United States at the Hague Peace Conference of 1907, which played an important role in the development of conventional law governing armed conflict.

In 1901 the study of international law at the Naval War College was under the direction of the legendary John Bassett Moore (no relation to the undersigned) of Columbia University, who went on to become a judge of the Permanent Court of International Justice and is viewed by many as perhaps the finest international lawyer ever produced by the United States. One of Professor Moore's many contributions was to initiate the series of "Blue Books," of which the present volume is the sixty-eighth. Moore was succeeded by Professor George Grafton Wilson, one of the co-founders of the American Society of International Law, who divided his efforts between teaching at the War College and at Brown (and later at Harvard) University. Under Professor Wilson's guidance, another 7,000-pages of "Blue Books" were produced by 1937.

Another enhancement to the Naval War College's international law program occurred following World War I, when Admiral William B. Sims—an internationally-acclaimed war hero who was expected to receive his choice of any senior position in the Navy—requested instead to return to the presidency of the War College. Because of his great prestige, Admiral Sims was able to secure increased funding to attract "leading authorities on international law" to the War College. Many of the nation's foremost scholars in the field were drawn to Newport during the years which followed, including Professor Manley O. Hudson of Harvard (who also served as a World Court judge).

Up until that point, however, distinguished scholars like John Bassett Moore and Manley Hudson would divide their time between their War College responsibilities and teaching at leading universities in the region such as Harvard, Columbia, and Brown. In July, 1951, Professor Hudson was succeeded by Professor Hans Kelsen, of the University of California at Berkeley, who became the first full-time occupant of what in 1967 was to become known as the Charles H. Stockton Chair of International Law. It remains the oldest and is widely viewed as the most prestigious chair at the Naval War College.

While Admiral Stark is certainly correct in noting the importance placed on international law in the curriculum of the College, one can only add that during its proud history the Naval War College has attracted some of the Nation's foremost scholars of international law—and those of us in the profession today are deeply indebted to the Naval War College for the contributions its scholars have made over the years. To give just one contemporary example, *The Commander's Handbook on the Law of Naval Operations (NWP 9)*, produced

under the leadership of Professor Jack Grunawalt, Director of the Oceans Law and Policy Department, remains the seminal work on the subject and has been translated into several other languages for use by foreign navies.

Today, there are more international lawyers assigned to the Naval War College than during any period in its history. In addition to the Stockton chairholder and Professor Grunawalt, the Oceans Law and Policy Department includes uniformed international/operational lawyers from the Navy, Army, Marine Corps and Coast Guard. An Air Force representative will join the Department next year. Still another full-time international lawyer is assigned to the Joint Military Operations Department, as the holder of the Howard S. Levie Chair of Operational Law. The Naval War College clearly remains committed to this distinguished tradition of furthering the teaching and development of international law, and we commend Admiral Stark and his colleagues for the College's many important contributions over the years.

### Readings from the Naval War College Review

In 1948 the Naval War College began publishing the Naval War College Review as a forum for discussion of public policy matters of interest to the maritime services. The Review has provided yet another vehicle for the dissemination of information and ideas concerning international law. Indeed, over the years a number of landmark articles on the subject have appeared in the Review.

In 1980, volumes 61 and 62 of the Blue Book series were devoted to Readings in International Law from the Naval War College Review 1947-1977. Edited by former Stockton chairholder (1968-69) Richard B. Lillich and John Norton Moore (one of the current editors), these two volumes compiled a wealth of valuable material on oceans law, the use of force, international human rights, and a number of other important topics.

The present volume is a sequel to those Blue Books, bringing together under one cover the most important contributions on international law published in the Review between 1978 and 1994. It also includes one short monograph of particular importance that was originally published by the Naval War College as part of its "Newport Papers" series.

The articles are organized chronologically under six headings. Part I addresses the role of law in the international system. We would in particular call the reader's attention to the contribution entitled "Contemporary International Law: Relevant to Today's World?," by Rear Admiral Horace B. Robertson, Jr., JAGC, USN (Ret.) from the Summer 1992 issue of the Review. After his retirement as Judge Advocate General of the Navy, Admiral Robertson distinguished himself as an educator on the law faculty of Duke University. In 1990-91, he occupied the Stockton Chair at the Naval War College. It should

be noted that Professor Alfred P. Rubin, of the Fletcher School of Law and Diplomacy at Tufts University, who has authored two articles to Part I, is also a former Stockton chairholder (1981-82).

Part II brings together articles on oceans law, a field of obvious interest to the Naval War College. The period during which these articles were written was one of great transition in connection with the 1982 United Nations Convention on the Law of the Sea. Some of the articles written before the treaty was concluded may seem somewhat dated, but we have included them because they provided valuable insight into the important debates that produced the landmark treaty. This section concludes with Admiral Robertson's "Newport Paper," which provides a very useful overview of "The 'New' Law of the Sea and the Law of Armed Conflict at Sea."

Part III examines "use of force" law (*jus ad bellum*), and focuses primarily upon a series of "case studies" ranging from Grenada and Libya to Panama. Of particular interest may be the contribution by former Secretary of the Navy James H. Webb, Jr., from the Winter 1988 issue of the Review, which, while not primarily a "legal" analysis, provides an interesting insight of senior service leadership on when and how force should be used combined with recollections of the frustrations faced by an Infantry officer in Vietnam in the 1960s. Originally delivered as a lecture to the War College's 1987 Current Strategy Forum, we thought the piece likely to be of sufficient interest to the international law community as to warrant inclusion despite its lack of "legal" focus.

Part IV looks at terrorism. The eight articles making up this section could have been included in parts III or V, but given the interest in this problem reflected by the number of articles published on the subject in the Review, we thought it better to group them together. Particularly noteworthy, perhaps, in this section are the overview of United Nations efforts to respond effectively to international terrorism by the late Professor L.F.E. (Fred) Goldie, a former Stockton chairholder (1970-1971), and the concluding article on "An Appraisal of Lawful Military Response to State-Sponsored Terrorism," by Colonel James P. Terry, USMC—who retired earlier this year after serving three years as Legal Adviser to the Chairman of the Joint Chiefs of Staff.

Part V consists of articles on the law of war (*jus in bello*). It begins with an analysis of the 1977 Protocols to the 1949 Geneva Conventions written by W. Hays Parks, a former Stockton Professor (1984-1985), followed by an excellent discussion of rules of engagement by J. Ashley Roach (now with the Office of the Legal Adviser to the Department of State). This section concludes with a discussion of international environmental law and Operation Desert Storm by Colonel Terry, and a piece on "The Obligation to Accept Surrender" by Admiral Robertson.

Finally, part VI collects three additional articles which we believed warranted inclusion in this volume but which did not fit conveniently under any of the

earlier headings. Two of these deal with treaty relationships—the U.S.-Japan alliance and the impact of the INF Treaty on European security.

A concluding note may be in order. In writing the introduction to volume 61 of the Blue Book series in March, 1979, one of us (Professor Moore) lamented that “international law frequently is not significantly considered in key national security decision,” noting that “[t]here continues to be no international legal expert as such on the NSC staff . . .” He had made this point writing earlier in the January 1973 issue of *Foreign Affairs*. We are pleased to note that considerable progress has been made toward assuring that international and other legal issues will be considered at the highest levels of the policy process by the establishment in 1982 of a Legal Adviser on the National Security Council staff.

If the recent past is any guide, the years ahead will produce still further advances and developments in international law; and many of these will be of great importance to the Naval War College and the military officer. For a period of nearly half-a-century, the *Naval War College Review* has made an invaluable contribution to the development and understanding of international law that has left all of us in its debt. We are honored to be able to bring some of these articles to a wider audience, and we look forward to a continuation of this tradition of excellence in the years ahead.

John Norton Moore

Robert F. Turner

Charlottesville, Virginia

4 September 1995

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### Notes

1. For an excellent history of the War College, see JOHN B. HATTENDORF, B. MITCHELL SIMPSON, III, & JOHN R. WADLEIGH, *SAILORS AND SCHOLARS: THE CENTENNIAL HISTORY OF THE U.S. NAVAL WAR COLLEGE* (1984).

2. *Id.*



**PART ONE**

**THE ROLE OF LAW IN THE  
INTERNATIONAL SYSTEM**



# Chapter 1

## Contemporary International Law: Relevant to Today's World?\*

Horace B. Robertson, Jr.

**T**o introduce the subject of international law to a readership made up in large part of U.S. armed forces officers, whose education, background, and training condition them to be skeptics and pragmatists, is a daunting task. I hope, however, in a brief space to convey at least that there is such a thing as international law and that it has some relevance not only to the ordering of our international system of sovereign nations but also to the decisions one may be called upon to make in positions of responsibility in the United States government.

This overview addresses, first, the role of international law in today's international system; second, its nature, origins, sources, and functions; and finally, the current trends in international law (as I see them) and where they may lead us during the next few decades.

In the latter section I shall briefly address the role of the United Nations in its peace-keeping function and the impact it has had on the law relating to the use of force.

### A Few Cautionary Statements

One of the most distinguished American international law scholars of this century, Judge Richard R. Baxter (who before his untimely death was the American judge on the International Court of Justice), stated in a talk to the Naval War College while he was a Professor at Harvard Law School that "International law suffers both from its friends and enemies. Its enemies include the geopoliticians, who hear nothing but the surge and crash of great international forces; the Kennanites, who rebel against a 'legalistic' approach to international affairs; and the specialists in international relations, who, not knowing very much about the subject, lump international law, as conceived by Hugo Grotius, with the League of Nations, the United Nations, and the control of the white slave trade. The similarity between some of the friends of international law and most of its enemies is that they overstate the pretended case *for* international law. It is

\* Reprinted from the Naval War College Review Summer 1992.

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then all too easy to demonstrate that, despite the claims made for international law, the world is still in a deplorable state.”<sup>1</sup>

The “enemies” have three basic criticisms: the lack of a central law-giving or legislative body, the lack of an independent third-party dispute-settlement mechanism, and the lack of effective sanctions against lawbreakers.

Let us take a commonplace example to illustrate that these deficiencies need not hamstring the functioning of the system. Consider the simple act of mailing a letter from the United States to a foreign address. What makes such a transaction possible? Take, for example, the case of a letter from Newport, Rhode Island, addressed to a person in Geneva, Switzerland. It takes some fairly sophisticated procedures, involving the postal officials of at least two (and perhaps several more) countries, to get the letter to its destination. One buys a United States stamp from a U.S. post office and pays for it in U.S. currency. En route to Switzerland the letter may cross the territory of Canada, Great Britain, and France (and perhaps Belgium and Ireland as well). The postal authorities of some of these countries undoubtedly assist in speeding the letter on its way. Two questions arise:

- What authority or arrangement permits the letter to cross borders of various countries?
- Do the postal authorities of the other countries receive monetary reimbursement from our postmaster general for their help in delivering the letter from the United States? If so, how much?

The answers are provided by *international law*—here in the form of a series of multilateral postal treaties setting up a Universal Postal Union and establishing detailed regulations governing international postal affairs.<sup>2</sup> These treaties, to which some 170 nation-states are parties, were “legislated” in several international conferences.

All very well, but what if one nation violates the treaty? There is no court with compulsory jurisdiction to adjudicate the matter and no sanctioning body to impose penalties. In fact, however, the Convention is almost universally observed—not out of fear of sanctions but because it is in the mutual interest of the parties to observe it. The “law” creates expectations among states as to how other States will behave. If a State repeatedly or continually fails to fulfill its obligations, other States will eventually terminate postal relations with it.

To illustrate, take a second commonplace example, from domestic law: highway traffic rules. In the United States the law requires all vehicles to travel on the right-hand half of the road under ordinary circumstances. It imposes criminal penalties on those drivers who violate that law. But is it the fear of criminal penalties that causes us to stay to the right in the face of oncoming traffic? Obviously not. It is rather our expectation that approaching drivers will keep their vehicles to the right (as they also expect of us) and that we will be able to pass safely. Granted, there is a criminal penalty if one violates the law, but the

principal motivating force behind obedience to it is the mutual well-being of the members of the society. The same is true among the members of the international society, the nation-states that make up the international community. Naval and aerial navigators know that there are similar binding traffic rules for ships and aircraft in both domestic and international waters and air space.

At this point a skeptic might be tempted to object that though this may be true, we have used only everyday examples far from the central issues of international relations—issues of war and peace, survival of nations, protection of basic human rights, and so forth. Indeed, the ultimate objective of international law is to create an international order in which nations and peoples can live in peace and justice. Like domestic law, however, international law is still an imperfect system. To quote Judge Baxter again, “It is quite clear that man has not been able to legislate war and aggression into defeat or even into retreat, although the institutions which the international community has developed exercise some restraints on the use of force. [International] law cannot cope adequately with the need for peaceful change. If a nation needs more territory or larger markets, the law cannot provide them. It cannot make unhappy people happy; it cannot turn arid desert into a flowering paradise; it cannot bring international tranquility and understanding where discord reigned before. Indeed, it might be safe to say that international law has been most successful in dealing with minor matters and with slighter causes of international friction. Probably it shows a greater facility in preserving the status quo than in doing justice.”<sup>3</sup>

This is not surprising. While we would hope that a perfect system of justice would deal with such matters and operate best in times of high tension or crisis, we can note that domestic systems suffer from the same imperfections.

### The Nature, Origins, and Sources of International Law

Accepting for the moment the fact that there is a system called “international law” that functions in the international community (though admittedly in an incomplete and imperfect way), let us turn to a brief examination of its nature, origin, and sources.

To this point we have not tried to define “international law.” No single, simple definition is possible, but at the risk of oversimplification, let us state one as follows: “International law is that body of rules or norms that are considered legally binding by states in their intercourse with each other.” Note several things about this definition:

- It uses the phrase “rules or norms.” In some cases the term “norms” is more appropriate than “rules,” since the latter implies more specificity than in fact exists in many situations.

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- These rules or norms are “legally binding.” That is, States comply with them because they are legally obligated to do so, not because they want to or are merely morally obligated to do so.

- They apply to States—that is, sovereign, independent States. Traditionally and historically these rules have not applied to individuals, or to corporations, or any institutions other than States. (As we shall see, however, the categories of persons and institutions that are governed by international law have been expanding. In some areas, international law can now be said to apply to persons and institutions as well as States.)

*Where Did This System Originate?* To quote a distinguished former holder of the Stockton Chair of International Law at the Naval War College, Judge Manley O. Hudson of the World Court, “Our system of international law has been developed over a period of more than three centuries. It is distinctly Western and European in origin. In tracing its growth, we usually refer to the Spanish jurist-theologians of the sixteenth century, but we ascribe first place to Hugo Grotius whose great book on ‘The Law of War and Peace’ was first published in 1625. For a long period, international law was conceived to be not only European, but also Christian, and its application was limited to Christian States. In the course of the nineteenth century, however, we broke ourselves free from such limitations, and in the words of the World Court, the principles of international law ‘are in force between all independent nations’ and ‘apply equally’ to all of them.”<sup>4</sup>

As we shall see, the fact that the roots of international law are European has created problems within recent decades as newly emerging nations assert that many principles of international law were proclaimed by European imperialist powers primarily for the purpose of keeping the colonial States in their state of subjugation.

*What Are Its Modern Sources?* Since the subjects of international law are States, which are sovereign, independent, and equal, it is obvious that the law’s ultimate source (practically as well as philosophically) must be the consent of the States to be governed by it. This consent may be found either in *treaties* to which a State is a party (that is, explicit consent) or in *customary practices* so general as to have become in effect obligatory (and to which a State, as a member of the community of nations, may therefore be said to have tacitly consented).

In addition to these two primary sources of international law, the Statute of the International Court of Justice (itself a treaty) gives three secondary sources to which the Court may turn to determine the law.<sup>5</sup> They are, first, the *general principles of law* recognized by civilized nations; second, *judicial decision*; and third, the *teachings* of the most highly qualified publicists (scholars) of the various nations. Let us examine each of these sources, primary and secondary, in order.

To make a loose analogy, *treaties* (or conventions, or compacts, or international agreements, by whatever name they are called) are the international counterpart of national legislation. Unlike national legislation, however, which binds even those who dissent from it, treaties are only binding on those States which consent to become parties to them. In this respect they are more like contracts than statutes. But there are some situations in which they may be regarded as binding on non-parties. For example, some parts of the United Nations Charter purport to bind non-parties, and some treaties are declarative of customary international law. The latter may be looked upon as evidence of the customary law and as therefore binding on non-parties as well as parties.

In general, however, *customary law* is created by State practice. To be sure, many authorities argue that even long-continued and consistent practice does not alone create customary international law, but that something more is required: a State's belief that the practice is obligatory. Nonetheless, a long-continued practice acquiesced in by other States may create customary international law irrespective of the intent of States that acquiesce.

Customary international law results from a process in which one State makes a claim and another State accommodates it; if the process is repeated often enough, a customary rule is created. That is why, in international practice, we find frequent resort to "diplomatic protests"; they serve to keep claims by other States from ripening into legal rights. Paper protests, however, may not be sufficient to sustain a position in the face of long-continued practice to the contrary. This is the principle underlying the U.S. Navy's "Freedom of Navigation" program, under which the Navy conducts routine air or sea operations (usually transits) through areas that a foreign State claims as territorial seas or exclusion zones but are not recognized as such by the United States government.

Since customary international law is "unwritten," where do we find evidence of what it is? We look to diplomatic history, to collections of diplomatic documents, and to writings of scholars on these matters.

The *general principles of law* recognized by civilized nations are recognized as a source of international law by the Statute of the International Court of Justice. The effect of this provision is to allow resort to national legal systems. This device is necessary because international law is not as complete and well-developed a body of law as that of most nations; use of these general principles permit the gaps in the international system to be filled by principles of law that have attained near universality in national legal systems—such principles as, for example, that one shall honor his contractual obligations, or that one should compensate for unjustified injury caused to another. In a recent decision, a United States court of appeals faced with a decision involving international law looked to the laws of a number of nations to aid its determination that torture of a citizen by governmental authorities was contrary to international law.<sup>6</sup>

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The most important *judicial decisions* are judgments of the International Court of Justice, sitting at The Hague, and its predecessor, the Permanent Court of International Justice. The decisions of arbitral tribunals also constitute judicial decisions in this sense, inasmuch as these bodies are in fact judicial institutions and render their decisions on the basis of law and not as attempted compromises of conflicting claims. In addition, the opinions of national courts on questions of international law are entitled to considerable weight, even though one might expect them to take a somewhat more one-sided view of the law than would a truly international tribunal.

The *teachings*, or scholarly writings, of the most highly qualified publicists of the various nations perform a valuable service. Not only do they criticize and clarify ambiguities in the law, they also synthesize vast amounts of treaty law, State practice, and judicial decisions and reduce them to manageable proportions. However, one must exercise a degree of caution in using such material. Scholars may be subject to personal as well as national biases, and in their works it is often difficult to be sure whether they are talking about what the law *ought* to be or what it *is*. I personally prefer to consider this fifth “source” as not really a source at all but rather *evidence* of what the law is.

### Contemporary Trends in International Law

With this much as background, let us now turn to some of the current developments and trends in international law.

***The Expanding “Reach” of International Law.*** Our definition of international law stated that it is a body of rules or norms governing the legal relationships between *States*. The emphasis on States as such is certainly consistent with the environment in which the body of rules originally developed. That world was made up of independent, equal, and sovereign States, the only actors in the international arena. In the international arena, unlike in domestic societies, individuals (unless representatives of States) had no role to play and no standing to assert a legal right. An individual obtained rights only derivatively, by virtue of the protection afforded him or her by nationality.

As an example, one of the firmly established rules of international law is that an alien residing in a foreign State is entitled to the protection of the State where he or she resides. If that State fails to live up to its obligations (as, for example, by arbitrary seizure of property or imprisonment without a fair trial), then it has violated this international norm, and the State of nationality has a right to bring a claim for reparation. But it is the State, technically, that does so, not the individual; under the international legal system, it is the State of nationality that has been wronged, not the individual. Thus the State of nationality has absolute

control over the claim, and it may if it chooses refuse to assert the claim, or dismiss it, or compromise it—all without the consent of the individual.

One of the contemporary developments in international law is a gradual recognition that individuals themselves may, under certain circumstances, be “subjects” of international law; that is, they may have rights (and obligations) flowing directly from international law and not merely derivatively from their State of nationality. This recognition probably began between the world wars with the establishment of the International Labor Organization and its constitution, recognizing that working persons have certain minimum rights with respect to working conditions. The concept received a major thrust forward at the end of World War II with the adoption of the United Nations Charter and its emphasis on the rights of human beings. At the same time, the acceptance of the so-called Nuremberg principles recognized that individual Nazi leaders, not just the Nazi State, were criminally responsible for war crimes, crimes against humanity, and crimes against peace, and could be tried by an international tribunal convened by the allied States. The crimes for which they were tried, including atrocities against nationals of their own states, were considered to be international crimes.

The ideas of individual rights under international law and of individual obligations flowing from it have developed gradually. The principal impetus has been the United Nations General Assembly—first in the Charter itself, then in the Universal Declaration of Human Rights of 1948, then in a series of treaties adopted over the past several decades. The latter included the Covenant on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discriminations, as well as a number of regional conventions of similar content and intent.

A corollary to this idea of individual rights under international law is the elimination of the view that how a State treats its own nationals is not an international concern but merely a domestic matter. As late as 1957, a preeminent international law scholar could write chillingly in a leading English treatise on international law that how a State treated its own nationals was a matter of “discretion.”<sup>7</sup> It is no longer possible to make this statement. A United States court of appeals has held, for example, that the torture of a Paraguayan citizen in Paraguay by an official of the Paraguayan government created a right of redress in the courts of the United States under a statute allowing such actions for violation of the “law of nations.”<sup>8</sup>

Another aspect of the expanding reach of international law is the extension of international law to international bodies, such as the United Nations, the International Civil Aviation Organization, the European Community, the International Maritime Organization, and many others. For certain purposes these

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institutions are regarded as international “persons,” as are certain non-governmental organizations (commonly call NGOs). There is even some indication that certain intergovernmental consortia and transnational corporations have some characteristics of international persons; this idea, however, is still in its infancy.

***The Codification of International Law.*** A second major trend in contemporary international law is codification, i.e., rendering unwritten law into formal written form.

As noted, one of the two primary sources of international law is custom (the other being treaties). Customary law is just as valid and binding as treaty law, but it suffers from a number of difficulties and ambiguities. For one, customary practices are often difficult to prove. Also, is a practice, however uniform and long-standing, followed out of obligation (thereby becoming law) or merely from non-binding habit? Further, a general principle may be firmly established by custom, but the details of its contents may be incomplete or fuzzy around the fringes. Only a written treaty text can fill in the particulars. These issues have created an impetus to convert customary practices into treaties, thus making them explicit, stable, and definite obligations.

This movement was given additional momentum by the creation by the United Nations, soon after its founding, of the International Law Commission. This Commission, which is made up of legal experts acting in their individual capacities and not as representatives of their States, has as its mission the codification and progressive development of international law. In the more than forty years of its existence it has prepared draft texts in a number of areas that previously had been governed only by customary international law. A number of these draft texts have been submitted to international conferences for negotiation as multilateral treaties, and many have entered into force. The four treaties on the law of the sea adopted in 1958 by the First Geneva Conference on the Law of the Sea are products of this process. Likewise, the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, and several others have resulted from the same approach.

Codification has also proceeded in other ways. The United Nations Conference on the Law of the Sea, which adopted the 1982 U.N. Convention on the Law of the Sea—perhaps the most ambitious undertaking in codification and development of international law ever undertaken—did not originate with the International Law Commission. It resulted from a series of U.N. General Assembly resolutions creating a Seabed Committee that served as a preparatory committee for the Third United Nations Conference on the Law of the Sea.

Another factor behind the movement toward codification is the desire of Latin American, African, and Asian States to have a voice in shaping international law.

As stated earlier, international law is principally of European origin. The newly emerging States, mainly former African and Asian colonies of the European powers, have found it difficult to accept a system that they had no part in creating, and particularly one that, in the view of many of them, was shaped in such a way as to keep them in a position of inequality. They see the codification process as a means of influencing contemporary international law in a way more favorable to their interests. Newly emerging States have formed themselves into the so-called "Group of 77" (now with over a hundred members), which uses its large bloc-voting strength in the United Nations General Assembly and international conferences to exercise enormous influence.

*The Institutionalization of International Law.* A third current trend is the proliferation of intergovernmental (international) institutions. Not only are they instrumental in creating and implementing broad segments of international law, but also they have spawned a special body of international law—the law of international institutions. This consists of the constitutions and internal regulations of those bodies as well as of the treaties and agreements that provide the framework for their relations with host governments and with other States in whose territory they operate.

The preeminent international institution, of course, is the United Nations. Its functions are so broad and the reach of its activities is so all-encompassing that a whole new body of international law has grown up around its practices and procedures. It is not, however, the only international institution that affects the growth of international law. A whole host of international organizations create their own bodies of specialized law. Some of these entities are functional, such as the International Maritime Organization (instrumental in developing international rules and regulations governing safety at sea, ship construction standards, and the protection of the marine environment from pollution from ships) and the International Civil Aviation Organization, which is even more pervasive within its functional field.

Other international organizations are regional, such as the European Community, established by the Treaty of Rome. The E.C. has its own legislative, executive, and judicial branches, which in some cases have the authority to override national decisions. The activities of this organization are so pervasive with respect to member States that some international scholars are beginning to wonder when it will have assumed so many aspects of Statehood that its members can no longer be considered States and the Community itself will have become one super-State.

*The Enforcement of International Law.* At the outset we observed that one of the principal criticisms of international law is that there is no means of enforcing sanctions against those who breach it. Without retreating from the rejoinder

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offered earlier—that for the most part international law is obeyed and that even in domestic legal systems the principal motivating force for obedience is not the fear of sanctions—we may note nevertheless that some small steps are being taken toward creating and making use both of third-party adjudicative mechanisms for international disputes and of means for enforcing their judgments. In so noting them I do not mean to overemphasize the role of third-party dispute settlement in the international arena, since the traditional methods of diplomatic negotiation, good offices, conciliation, and mediation remain the cornerstone of peaceful settlement of disputes between States.

Nevertheless, the hope following World War I was that the newly created Permanent Court of International Justice would serve as a judicial forum to which States would take their international disputes. This, unfortunately, proved a false hope. In the entire life of that court and of its successor, the International Court of Justice, only a handful of cases has been submitted and most of these have involved matters of little consequence. The principal reason, of course, is that a nation cannot be brought before the court without its consent, and States are reluctant to submit matters of great national significance to third-party adjudication. Additionally, proceedings before the Court are long and tedious, which is not very helpful when speedy resolution of a controversy is needed. The Court has recently revised its rules to make it somewhat easier for States to submit cases and receive relatively quick decisions. Whether as a result of this change or because of other factors, the Court now has on its docket a record number of cases awaiting decision.

A number of initiatives have been taken in other areas to create mechanisms for peaceful settlement of disputes:

- The European Community has a well-developed court system, whose decrees are enforced in the courts of member States.
- The World Bank has negotiated a treaty providing a process for arbitration of international investment disputes.<sup>9</sup> This treaty has gained wide acceptance and adherence both among capital-importing and capital-exporting States. A unique aspect of the treaty is that it elevates disputes between States and private investors (usually multinational corporations) to the international plane, giving the latter equal status with States before this international arbitral tribunal. In addition, its judgments are enforceable in the domestic courts of any States that are parties to the Convention.
- The United Nations has sponsored a multilateral treaty that obligates member States to enforce other international arbitral awards in their domestic courts.<sup>10</sup> This treaty has enabled some American foreign investors to enforce international arbitral awards against foreign States even when the State has refused to participate in the arbitration.
- Some recent multilateral law-making treaties contain dispute settlement provisions. A leading example is the 1982 United Nations Convention on the

Law of the Sea, which contains extensive provisions for compulsory conciliation, arbitration, or ultimately adjudication.<sup>11</sup> This was a real breakthrough because it marked the first time that the Soviet Union was willing to accept any form of third-party dispute settlement.

- Finally, there is the United Nations Security Council, which has the authority, if all other methods fail, to impose sanctions, including the use of armed force, on a wrong-doing State whose actions it believes constitute a threat to peace, a breach of peace, or an act of aggression.

As all are aware, until recently effective action by the Security Council in such situations was prevented by the “veto”—that is, the requirement for unanimity among the five permanent members of the Council (China, France, the United Kingdom, the former U.S.S.R., and the United States).<sup>12</sup> With recent events (including replacement of the Soviet Union by Russia) making unanimity possible under certain circumstances (as, for example, the recent Iraqi invasion of Kuwait), it is appropriate that we address the methods the Security Council may employ and the procedures it may follow in adopting them. We shall also examine a State’s right of self-defense and how this doctrine fits in with any enforcement action that may be taken by the Security Council. A caveat is in order, however: the latter issue is a complicated subject and one about which there is great disagreement among international lawyers. In discussing it in this small space a great deal of over-simplification is necessary.

### Self-Defense and the Role of the United Nations Security Council

The Security Council’s principal powers with respect to the settlement of disputes and dealing with threats to peace are stated in Chapters VI and VII of the United Nations Charter. Chapter VI deals with the pacific settlement of disputes and empowers the Security Council to investigate any international dispute or “situation which might lead to friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.” It can do this either on its own initiative or at the request of one of the parties to the dispute. If it determines that a dispute or “situation” (as characterized above) exists, the Security Council may under Chapter VI recommend either a method of resolution or specific terms of settlement.

Chapter VII comes into play only if the Security Council determines that there exists a threat to peace, a breach of the peace, or an act of aggression. If so, the Council may either make recommendations to the parties or take “measures . . . to maintain or restore international peace and security.” Such measures might not involve the use of armed force; such options include “complete or partial interruption of economic relations and of rail, sea, air, postal,

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telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” If such non-forcible means are inadequate, the Council may “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”

As originally envisaged by the Charter, armed action under the authority of the Security Council would be taken by national armed forces made available in advance to the Council. Overall direction of the employment of these forces was to have been exercised by a Military Staff Committee consisting of the chiefs of staff (or their representatives) of the armed forces of the five permanent members. Since this Military Staff Committee has never really functioned as intended, the Security Council has been forced to adopt ad hoc arrangements in the only two instances in which it has taken armed enforcement measures. In the Korean War, the United States was asked to designate a commander of U.N. forces. In Operations Desert Shield and Storm, the Security Council (in resolution 665) used the device of calling “upon those Member States cooperating with the government of Kuwait which are deploying maritime forces to the area” to use such measures as were necessary to enforce the maritime embargo previously declared by Resolution 661. The Council used the same approach when, in Resolution 678, it authorized offensive action against Iraq. There it authorized “Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) [the initial resolution calling on Iraq to withdraw from Kuwait] and all subsequent relevant resolutions and to restore international peace and security in the area.”

What we had then was less a *de jure* U.N. Security Council enforcement action than a Security Council imprimatur on a collective self-defense operation by States coming to the aid of Kuwait. If this interpretation is correct (and not all international lawyers would agree with it), then this brings into play Articles 2(4) and 51 of the United Nations Charter.

Article 2, paragraph 4, provides that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” The most generally agreed exceptions to the prohibition on the use of force in Article 2(4) are actions authorized by or in implementation of a decision of the Security Council, humanitarian interventions for the rescue of nationals (a right disputed by some), and individual or collective self-defense.

Self-defense is the subject of Article 51, which provides in part that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” The important concepts here are that: the right of self-defense is not created by the Charter but is inherent, a sovereign right of States,

the right may be individual or collective; and armed attack must have occurred; and self-defense measures can continue only as long as the Security Council has not taken the action necessary to maintain peace and security.

Let us briefly address each of these concepts. First, the "inherent right" is based on the fundamental principle that a State has a right of self-preservation. This right pre-existed the U.N. Charter, although the Charter may have put limits on how it may be exercised, it did not take away the right itself. Second, this provision recognizes that a State is not required to rely on its own resources alone in repelling an attack. It may call upon other States to come to its assistance to repel the attack and maintain or regain its security. Our own whole web of mutual security arrangements with other States is based on this principle.

Third, the attack must "occur." This is perhaps the most controversial part of the article. Does it mean that the victim State must absorb the first blow before it can respond? If so, the right to respond would be an empty one; in this age of missiles and weapons of mass destruction, the first blow may be fatal. Nevertheless, some respected authorities have argued for this position. Others have pointed out the unreality of such a position and have argued for the right of anticipatory self-defense, pre-emptive attack, or preventive war. This too has its dangers, perhaps inviting all manner of pre-emptive assaults on the mere suspicion of an intent to attack. There is a middle ground, espoused by, among others, an eminent Israeli publicist, Yoram Dinstein, who suggests that an attack "occurs" when one party "embarks upon an irreversible course of action, thereby crossing the Rubicon."<sup>13</sup> He calls this type of self-defense "interceptive" rather than anticipatory or pre-emptive. Under his theory, the United States would have been properly exercising the right of self-defense had it detected and attacked the Japanese fleet en route to Pearl Harbor in December 1941.

Fourth, when does the right to self-defense end? Does Article 51 mean that if the Security Council passes any resolution at all, the State or States exercising the right of self-defense must desist? As preposterous as this seems, some noted publicists have argued so. A more sensible interpretation is that the measures must be both "necessary" and "sufficient" to restore or maintain international security. Who then is to decide whether the measures are sufficient? Is it the Security Council itself, or the State that believes itself a victim of aggression? The Charter is silent. Most publicists argue for the Security Council, and I would agree, but only if the Security Council makes an explicit finding that the measures it has taken are sufficient to restore international peace and security and directs the State or States exercising the right of self-defense to desist from further armed action. Under the rule of unanimity of the five permanent members of the Security Council, the rights of a victim State would seem to be adequately protected by this interpretation. Under it, measures adopted by the Security Council and actions of States in the exercise of their rights of individual or collective self-defense can proceed concurrently, at least until the Security

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Council passes a definitive resolution requiring hostilities to cease. That is the situation that existed in Operation Desert Storm.

The International Court of Justice has recently addressed certain aspects of the right of individual and collective self-defense in the case of *Nicaragua v. United States*.<sup>14</sup> Some of the views expressed in the majority opinion take an extremely narrow approach to this right and have caused concern among some international lawyers who view the right as an important bulwark against aggression, particularly in a situation in which the United Nations Security Council fails to take effective action to protect a victim State. Among the holdings of the Court that I find troubling are the following:

- Although the term “armed attack” includes attacks by irregular forces or guerrillas from foreign territory under certain circumstances, the term does not include assistance to rebels in the form of weapons or logistic support.

- The exercise of the right of “collective” self-defense depends upon a declaration by the victim State that it is the subject of an armed attack and an explicit request for help to the assisting State. An assisting State cannot make this determination on its own, even if it is a party to a treaty with the victim State containing a clause stating that an attack on one is an attack upon all.

- Under Article 51 of the Charter, the failure by a State to report measures it is taking in self-defense to the Security Council contradicts that State’s claim that it is exercising the right of collective self-defense.

Although the judgments of the International Court of Justice are not binding precedents in the same way that our domestic court decisions create law to be applied in similar cases in the future, the Court is the most prestigious judicial body in the international system. Its statements will have persuasive effect in shaping the further development of the international law of self-defense.

**T**he period since World War II has seen greater growth and change in international law than in any comparable period of history. There were many stimuli for these changes—the total victory by Allied forces in World War II, the creation of the United Nations and the other organizations it spawned, the emergence of the Cold War, the decolonization movement of the 1960s and 1970s, the recognition of the concept of internationally protected human rights, and many more. With the end of the Cold War, the breakup of the Soviet empire and the hoped-for emergence of democratic States in its place, the growth of the international environmental movement, and many other events we can not currently perceive, the next half-century will probably bring even more dramatic changes in international law. For like domestic law, international law is not a static body of rules but rather a living creature, continually forged and shaped to serve the needs of an international community that itself is constantly changing.

Rear Admiral Robertson retired from the Navy in 1976 following an assignment as the Judge Advocate General of the Navy. He was serving as the Charles H. Stockton Professor of International Law at the Naval War College at the time this article was written.

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### Notes

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9. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965, 17 UST 1270, TIAS 6090, 575 UNTS 159.
10. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 21 UST 2517, TIAS 6997, 330 UNTS 3. This convention has over eighty parties.
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## Chapter 2

# Misconceptions of Law and Misguided Policy\*

Alfred P. Rubin

### I. Misconceptions of Law and Their Policy Effects

**W**hile misconceptions regarding international law are as common as misconceptions regarding economics or military affairs, there seems to be a pervasive feeling at policy levels that the misconceptions regarding international law are somehow less important. Most international lawyers are familiar with the bemused greeting at cocktail parties, when a new acquaintance first hears of their specialty: "International law? There is no such thing, is there?" One professor, the holder of a famous old Chair at the University of Cambridge in England, habitually gave the reply: "You are quite right; there is no such thing. That is why I teach it at Cambridge."

The implication that what is taught is somehow less important than what is done in "real life," and that famous old universities are the home of cranks and harmless theories, is so patently false that in the cocktail party game of one-upmanship this answer was always a winner. But in real life the downgrading of international law as a tool for action is not funny; it costs lives and fortunes.

Two examples may help illustrate the point. On the operational level, the assumption that NATO bases in Turkey or some expanded staging area on the Persian Gulf could be used to project American or NATO force into the Persian Gulf or Iran in an emergency flies in the face of the legal restrictions on our base rights. It assumes those legal rights could somehow be interpreted loosely by the United States in a time of tension and that under severe strain the government of Turkey or the host Emirate in the Gulf area would agree that its interests lies in supporting the United States or NATO action.

Nothing could be further from the truth. What we interpret loosely, they are likely to interpret restrictively; what we see as a quick reaction, they will see as an aggression against Muslim solidarity in an area in which they live and we are visitors. It is the technical terms of the base rights agreements that must mark the limit of American power projection possibilities in that area, not great plans laid

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on the basis of military needs and capabilities that do not take account of likely arm's length host-country reactions.

On another level, plans that envisage the use of nuclear weapons in circumstances short of those in which suicide is a rational act seem to assume that that use is legal or, if illegal, not likely to raise significant political opposition.<sup>1</sup> But it is already clear in the United States that there is opposition, and that the opposition is based at least in part on legal objections to the proposed uses. When town meetings in Vermont vote for a nuclear freeze, Senators from Vermont are concerned; when Senators from Vermont are concerned, entire congressional delegations from New England, the North Middle West, and the Northwest must be concerned. Have we forgotten that it was a congressional refusal to supply the money that forced us out of Indo-China and made intervention in Angola impossible? Are plans realistic when they disregard the apprehension of those on whose cooperation the realization of those plans depends?

These examples are not hypothetical, they are real and in their way reflect the kinds of interests that must be of concern to lawyers and wise planners. There is no rational dispute about the importance of having general constituency support for operational plans that affect that constituency, and in the United States the constituency of the military is the entire U.S. population and many foreign countries. Thus, there can be no rational dispute between planners and lawyers, including international lawyers, who raise questions about foreign constituencies' and national constituencies' reactions to the implementation of various plans. Lawyers' objections reflect the crystallized experience of the society whose law is involved. That is a very good indication of the likely reactions of those affected by the realization of the plan. To fail to take account of lawyers' problems, then, is to fail to take account of a vital element of the real world; plans made in disregard of the real world are doomed to fail.

I make these comments out of the deepest concern for U.S. national defense interests. The use of American bases in Thailand to support a strike against Kampuchea during the *Mayagüez* crisis resulted in Thailand being forced by its own constituencies to speed the timetable for American withdrawal in the aftermath of Vietnam: The apparent misuse of the bases as the Thai interpreted the base rights agreements did not help any significant American interest, it hurt. Plans that might envisage manned bomber or low-flying missile transits of neutral territory en route to Soviet targets force neutrals to consider defending themselves from the American incursions into their territory, thus reducing the reliability of those plans as a deterrent to Soviet actions and as a credible threat, as well as forcing the neutrals involved to consider their broader relations with the United States in the light of what they must perceive as our threat to their neutrality. What a distorted position for the United States, the major upholder of national sovereignty and freedom of choice, to be in!

And even with regard to our closest allies, plans lose touch with reality when they envisage the possible use of tactical nuclear weapons with the permission of the territorial sovereign, but disregard the possibility that the policies of free countries are subject to change at the whim of an electorate accustomed to open debate, and that have in their territories significant groups of political activists ready to sacrifice themselves for the principle of no nuclear weapons use. Is France the only country that can suddenly withdraw from NATO military cooperation agreements? Is the United States in the climatic days of the struggle over Vietnam the only country that can raise political activists able to elect representatives to positions where they can control the purse strings?

It follows that the first, and most serious, misconception about international law is the misconception that it is a minor specialty of importance only to learning how to read treaties that don't count when real interests begin to play. No. The essence of international law as a consideration in high policy is its crystallization of the basic rules of society; the fact that it contains the constitutional rules by which international society lives. That constitution is written in documents of more or less persuasiveness and practices of more or less antiquity supporting a pattern of expectations on the basis of which statesmen and their constituents, real people, behave. It is closely comparable to the unwritten British constitution. Non-lawyers, or those lawyers who act as mere technicians of the law, may have trouble perceiving the strength of the web of law in which we are all enmeshed, but they are caught in it nonetheless, just as President Nixon was caught in the web of American Constitutional Law when he was forced to resign the Presidency, not by policemen but by the political forces that came into play to enforce the law. His apparent failure to perceive that the process was essentially one of law enforcement did not save him; it removed him from reality and made his loss inevitable.

The second misconception flows from this. International law is not a system that lacks enforcement. Most criminal law in the United States comes closer to fitting that description, since most criminals escape justice in the United States. On the contrary, international law is almost a self-enforcing system. But the enforcement process is political. It depends on the perceptions of States and individuals that the law is being violated and that it is in their interest to react to the violation. That perception is fairly high in some countries; not very high in the United States. Thus the moral prestige of some Scandinavian countries, Switzerland, and some others gives them a voice in international affairs far beyond their military and economic power.

The United States, which habitually in recent years reacts as if the law did not exist, as if only power politics exists, seems to have lost moral power. The result is a loss of the ability to influence events. That loss is no longer compensated by our military and economic power relative to the rest of the world. Fortunately, the Soviet Union has been almost as blind to the importance of moral force as

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we, and has lost prestige and the ability to influence events at about the same speed. Indeed, partly because their sensitivity to the law has been greater than ours from time to time, it has taken a few egregious violations of the law by the Soviet Union, like their invasion of Afghanistan, to even the balance of moral degradation, while our losses have in the main been achieved by many small increments through ignorance, without the open display of brutality.

Examples unfortunately abound:

- The major users of the Panama Canal watched with dismay as we yielded practical control of the Canal to a small country with no real national interests in nondiscriminatory use. We agreed to terms that would make us appear a Yankee aggressor if we ever have to intervene to secure to the British the rights of passage we had guaranteed them, and all third countries, in the Hay-Pauncefote Treaty of 1901.<sup>2</sup>

- We yielded in principle on historic rights of straits passage at the start of the United Nations Law of the Sea Conference, regaining those rights through elaborate negotiations as if a concession by straits and archipelagic States and in terms that seem sufficiently clear only to those actually involved in the negotiations<sup>3</sup> instead of withholding our concession in principle to the end.

- By conceding that the activities of the *Pueblo* off North Korea would have been illegal if conducted within twelve miles of North Korean territory, and asserting the applicability of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone to the situation, we conceded a twelve-mile territorial sea in part through misunderstanding the law involved.<sup>4</sup>

- We lost freedom of scientific research at sea in part through failure to consider the legal consequences of the cover story we used in the *Glomar Explorer's* venture.<sup>5</sup>

- In 1976 we legislated against "sovereign immunity" in a way that could, if our own rules were applied against us, result in the arrest of a Navy ship in a foreign court at the demand of a foreign commercial tort or contract claimant.<sup>6</sup>

- We negotiated for some three months with Iran over the release of our hostages there after it became clear that Iran was willing to let them go, because our own Iranian assets freeze regulations made it impossible to return to the legal position that had existed before the seizure and we had destroyed the credibility of the United Nations and the International Court of Justice as third party mediators.<sup>7</sup>

The list is potentially endless.<sup>8</sup> These losses are not negligible individually and are tragic taken together. And with regard to all listed here but the last, it is possible to suggest that a more alert eye to legal aspects of our national security interests by the Navy would have helped limit, if not entirely avoid, the losses.

Even with regard to technicalities of the law of interest to the Navy, there are misconceptions that might have tragic consequences for individuals who should know better. I have heard one officer at the Naval War College remark that

“Victors are never tried for war crimes, therefore it is much more important to win than to fight legally.” Aside from the deeper personal questions about the sort of action that is a “war crime” and the sort of person who would knowingly commit an atrocity, on the most superficial level the statement is untrue. Victors’ tribunals of the sort we set up in Nuremberg and Tokyo are the exception, not the rule; the normal enforcement of the laws of war is by each country’s national tribunals and through the discipline of its own forces. What might be called a war crime in international correspondence is called murder or rape or some such under the national criminal law applied to military personnel to discharge the State’s international obligation to seek out and punish those individuals who violate the laws and customs of war. Despite some notable lapses, the record of the United States in this is pretty good; and all countries suffer lapses in wartime. The famous trials are, in the main, show pieces for the edification of blood-thirsty constituents and where, as in the case of the Nuremberg tribunal, some of the decisions become landmarks of legal reasoning, they survive as politically influential ideas despite the weaknesses of the legal process that produced them. Where history deals less kindly with the legal reasoning, they are suppressed in our memories or reinterpreted to change the facts to fit our self-image.<sup>9</sup>

In one sense, however, the assertion that victors are never tried is true. The “new” Nuremberg crimes involving planning “aggressive” war seem weakly based in tradition and legal logic despite the overblown rhetoric of the time. Only one defendant at Nuremberg was convicted of these “crimes” alone, Rudolph Hess; all the others convicted on this count were also convicted of traditional war crimes or their peacetime equivalent, “Crimes against humanity.” The victors’ tribunals may thus, to the degree they held to the traditional views of law, be seen as actually a political necessity with regard to countries, Germany and Japan, which had failed in their own international responsibility to seek out and punish “ordinary” war criminals.<sup>10</sup> Insofar as they took off in a new direction, their precedent is unlikely to survive.

Another common misconception is that as long as the other side is the aggressor there is no legal restraint in the law of self-defense. That is simply not true. The laws and customs of war do not saddle the victims of war with moral or any other responsibility for the acts of their governments; little Nazi or Communist babies are not legitimate targets of military operations no matter how vicious their governments. Indeed, it is one of the strange twists of mind that international lawyers worry about when we read of “hostage” proposals to destroy a Soviet city in retaliation for some act of the Soviet government elsewhere. The laws and customs of war do not permit the bombardment of undefended cities or the destruction of lives or property not related to military necessity. Those laws and customs codify the experience and conscience of mankind and to ignore that experience and conscience, or the documents, to

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which the United States had pledged its honor, that contain the translation of these concepts into binding words is itself monstrous.

These legal and moral conclusions are, of course, reflections of reality more than the "realism" of those who ignore them. Is there any deterrent in threatening to destroy a Soviet city whose support of the Soviet leadership is unimportant to that leadership? Is a demonstration of our own disregard of civilian casualties in the Soviet Union likely to encourage the Russian people to abandon the war effort and overthrow their government; or will it serve instead to unite them behind a leadership that purports to protect them from Americans who do not care about innocent lives?

In fact, each side always regards itself as the defender against foreign aggressions; even the Nazis defined their own role as protecting ethnic Germans from various (nonexistent) ethnic threats. The law of war has been consciously designed to facilitate the return to peace, and by doing so has since at least 1863<sup>11</sup> carefully avoided permitting combatants in a "just" cause legal advantages over combatants in an "unjust" cause. To the extent that spokesmen for various causes have tried to change this fundamental orientation of the law, they have either failed, or achieved verbal successes that have disappeared in the heat of later events. An example of this sort of thing is visible in the routine United Nations General Assembly condemnations of Israel for actions analogous to those which Syria takes in Lebanon and others take elsewhere without equivalent condemnations. It is noteworthy that the polemics against Israel seem unconvincing, hysterical, and political rather than legal. The result has not been great pressure on Israel to mend its ways, but the political insulation of Israel and its disregard of the criticism. This is not a defeat for the law, but a victory for the law and a defeat for those who would twist its impartiality to omit momentary political purposes.

### II. The Problem of Bureaucracy and Non-Cures

Once it is conceded that a stronger legal component is needed in defense policy from operations to the highest planning levels, the problem becomes one of implementation. The normal bureaucratic answer is simply to appoint a specialist in the needed specialty, and amend the job descriptions of those above him in the chain of decision to require them to take account of the new input. But in bureaucracies the job description does not reflect the expertise of the job-holder; rather the formal expertise of the job-holder is whatever it says in his job description. Thus a senior official wishing to avoid the kinds of considerations in policy that an international law expert would bring to his attention need merely appoint a technician or non-lawyer to the post, or a very junior person without experience in making his expertise felt in the bureaucratic mix. Thus, the normal paper solution is no solution. What is needed is a realization on the

part of the highest officials that the expertise of an international lawyer capable of perceiving the system is vital to the proper discharge of their own functions.

This problem is frequently encountered by international lawyers within the system by their senior decision makers constantly reminding them that the law is only one of many (implication: one *very minor* among many *major*) inputs to wise policy. The lawyer who takes his expertise seriously and feels his public responsibilities quickly learns to make his contribution a matter of written record, forcing the superior to face bureaucratic consequences if it is ignored and the policy made in disregard of the legal factors turns out badly. This does not increase the popularity of the lawyer, but if popularity were the game there would be no reason for the public to pay our salaries.

The reasons why this sort of situation is especially tense for lawyers is difficult to unearth. My own speculation is that many policy makers and planners are frightened of the law because they do not understand it, and feel secure if they can assure themselves that it does not really matter. If they take it seriously and still don't understand it, they face the alternative of handing over too great a portion of decision-making to their lawyer, whose judgement as to the many other factors that must be reflected in wise policy may be faulty or ill-informed. The real cure is, of course, greater education and familiarity with international law by non-lawyers, who make policy, and the selection of legal advisers who can explain their views in terms comprehensible to an intelligent decision maker. That is what makes the problem so difficult. Lawyers who can explain their insights in simple language are as rare as economists who can—and just as important; decision makers who can open their minds to the subtleties of the law without losing touch with reality are even more rare than lawyers who can express themselves clearly. The worst resolution is the one so frequently attempted: The appointment of lawyers to policy positions. That “resolution” normally confuses the expertise of successful corporation or claims lawyers with the expertise of international lawyers, and gives to policy the all-or-nothing, episodic, crisis-management approaches that lawyers are accustomed to, in place of the measure-of-risk, continuing-relationship approaches that wise policy demands.<sup>12</sup>

The problem is probably unsolvable; it is a problem that affects the entire bureaucracy, not merely the military portion of it or that part that involves lawyers. But to recognize it is already to alleviate it. It is possible that nothing more can be done. If that is so, it places a great burden on lawyers in positions to affect policy to press their views with the same vigor that economists and military specialists press theirs. It also places a great burden on policy makers to seek out legal opinions on all matters, and to decide on the weight to be given the legal input only after the best available input has been received and explained. Failure to shoulder those burdens can involve failure to discharge our public duty.

### III. The Link with Reality; United States Policy and the Falklands/Malvinas Islands Dispute

By now the military outcome of the confrontation between the United Kingdom and Argentina over the Falkland/Malvinas Islands has long been clear. Now it is time to begin the sort of detailed analysis of the miscalculations and successes of each actor in the international arena that will surely fill the professional journals of many specialties in the months to come. The outline of the legal problems is already clear. It differs so radically from the popular impressions that it may be useful to set some ideas forward as illustrative of the uses of the law in decision-making.

The pre-19th century bases for British and Argentine claims to the islands interlock in a pattern that gives neither side much of an advantage over the other.<sup>13</sup>

Obviously, Papal donations and treaties among Spain, Portugal, and France are not significant to defeating any British claim; nor are British discoveries and self-serving assertions a significant obstacle to Spanish claims resting on their own assertions of right. A British occupation begun in 1766 was followed by a British abandonment in 1774. The British considered their abandonment of 1774 did not end the underlying British claim, only the open display of it. The British do not seem to have protested the Spanish settlement there, which began in 1764 and was abandoned in 1811. At the time Argentina achieved its independence from Spain in 1816, it could say it had inherited a Spanish claim not translated into a form that would withstand a British counterclaim; and Great Britain had maintained a claim that could not withstand an Argentine action to consolidate its adverse claim. The law cannot resolve such situations to anybody's satisfaction. An arbitrary determination that the party with the slightly better claim (51 percent) gets all of the prerequisites of the sovereign (100 percent) and the part with the slightly less persuasive argument gets nothing, is not a reflection of the real world. The wise policy maker would be advised of this legal situation and avoid judicial resolutions or too loud assertions of either country's supposed rights.

In 1823, Argentina assumed full control of the Islands and in 1826 installed an effective administration. In 1830 the United States was opposed to any effective government in the Islands. American fishing and whaling interests, and others, apparently wanted anarchy there. In 1831 an American naval expedition ousted the Argentine administration. Argentine protests were rejected. In 1833 a British administration was installed, which the United States did not protest despite the opposition to European colonies in the Western Hemisphere made formal American policy in the Monroe Doctrine of 1823 and loudly reiterated ever since. Argentine protests were rejected again. The Argentine national sense of grievance against both the United States and Great Britain thus has strong roots.

Argentina never made any secret of its national determination to get the Islands “back” and to right the “wrong” of 1831–1833. There was never the acquiescence impliable by silence that enabled various international tribunals to resolve similar disputes among other countries;<sup>14</sup> neither was there an Argentine failure to perfect its claim before the critical date of 1833;<sup>15</sup> nor was there an incorporation of the territory into a stable allocation of sovereign rights that could be accepted by all parties.<sup>16</sup> On the other hand, over the years after 1833 the British did maintain a stable administration supported by the fleet, and did bring the Islands into the world economy by establishing a productive colony.

By 1945 it seems likely that the British could have maintained the stronger case before a tribunal, but the British case did not address the issues on the basis of which Argentine national feelings festered. To Argentina, the British consolidations of its legal position seemed to pile insult and injury on top of the insult and injury suffered in the 1830s.

At this point a wise lawyer and policy maker would pause and the policy maker would likely determine that the paths of the law would be too all-or-nothing-ish for reality; that some sort of purchase-and-sale agreement would be useful; and that the Argentine sense of grievance and British sense of propriety were both so well-based that a moment of sanity should be seized if ever it appeared that a formal settlement was possible. But it did not happen.

In 1945, at the close of a war in which Britain fought for its life while Argentina tried to avoid entanglement, the states of the world, including both Great Britain and Argentina, decided that it was time to change the rules of the game. They negotiated the United Nations Charter as a treaty, and formally agreed to abide by its terms. Among those terms was article 2(3), which provides that “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” There is no exception for preexisting claims, to permit wars as before when the quarrel has ancient roots. Indeed, such an idea seems wholly out of keeping with the open intention of the framers of the Charter. Nor is there any indication that the framers intended to eviscerate their handiwork by inserting the words “and justice.” In accordance with the normal rules of international law, such words are interpreted not by each party with effects valid against all the others, which is a prescription for conflict; such words are interpreted by the collectivity in accordance with their more natural apparent intent: To forbid the use of force in those cases in which “justice” is endangered by that use, even if that use is so small in scale and short-lived that international peace and security are not threatened by it. It was aimed at forbidding such foreseeable strikes as Israel’s against the Osirak reactor in Iraq (to the extent that strike was not justifiable in self-defense under other of the Charter’s provisions), not to justify the use of force.

Argentina, whose international lawyers stand among the most sophisticated in the world, knew of this interpretation and never indicated any dissent from it. Under normal international law rules of treaty interpretation they are not excused from the generally accepted interpretation of a treaty's terms by some secret and strained interpretation which their ingenuity might devise for their own purposes.

An international lawyer pausing at this point would advise his policy maker that Argentina had formally renounced the use of force to "liberate" the Falkland/Malvinas Islands and to right ancient wrongs, but would remain free to use other tools. If the other tools proved ineffective, the solution of the tensions would have to await a calmer day. The world is filled with such situations.

The United Nations Charter also contains a provision binding as a treaty on both Argentina and Great Britain that requires that the interests of the inhabitants of any non-self-governing territory be taken into consideration, including their political, economic, social, and educational advancement.<sup>17</sup> Thus, even if the Argentine claim to the Islands were entirely valid, a substantial legal question would exist as to the degree to which Argentina could maintain any garrison or system of law in the Islands which would inhibit the population, however it got there, in expressing its own desires for its own future, even if that future involved a separation from Argentina and a joining with Great Britain. A solution to the Argentine grievances which did not take account of the wishes of the inhabitants of the Islands would place Argentina, and possibly even Great Britain if it agreed to such a solution, in apparent violation of this treaty commitment. The fact that those inhabitants or their ancestors came to the Islands as a result of British aggression in 1833, if that is the case, seems legally irrelevant to the humane concern for them as human beings with an interest in their own governance and well-being. It is this provision which is central to the anticolonial arguments in the United Nations regarding the well-being of the ethnic African and Indian majority in South Africa regardless of the prior establishment of Dutch rule there and the evolution of that rule into the current government of South Africa.

In light of these legal considerations, and regardless of whatever negotiations might have gone on between 1945 and 1982 between Argentina and Great Britain, the Argentine use of force to oust the British garrison in April 1982, and the Argentine disregard of the wishes of the inhabitants of the Islands; place Argentina squarely in the position of violating its treaty commitments not only to Great Britain but to the entire world that accepts the United Nations Charter as the basis for the current international legal order.

Nothing in the Charter or defense treaties related to the Organization of American States detracts from these provisions.

From this point of view, the Argentine military action of April 1982 was a matter of interest to the entire world; it threatened the integrity of the treaties on which we all rely for such stability as exists in the world today. The fact that

other States may have violated their commitments under the United Nations Charter is legally irrelevant, just as the fact that the criminal law is flouted in many major cities of the United States is irrelevant to the trial of an accused criminal. For the same reasons we insist on the integrity of the criminal law regardless of its violations by others, it is in the interest of the world to insist on the integrity of the United Nations Charter.

The British reaction to the Argentine use of force was entirely consistent with this analysis. An appeal was made immediately to the Security Council of the United Nations, which responded with a formal Resolution demanding that Argentina withdraw. The only State voting against the Resolution was Panama, an ironic vote in view of the importance of maintaining the continued legal effect of the essay in imperial adventure by the United States in 1903 on which Panama relies for its independence from Colombia.

Instead of immediately acting in support of the United Nations Charter and the integrity of Latin American borders through the Organization of American States, the United States took the formal position that it was the friend of both parties. This choice, to accept the confrontational mode adopted by Argentina in its search for "justice" as defined by itself in disregard of its treaties, and to regard the struggle as one between two states only instead of it being Argentina against the world, seems unaccountable. It could not have been taken by a policy maker alert to the legal implications of the situation.

The result of this choice in the real world was a confusion of major proportions. When ultimately the United States expressly supported the British counteraction in the name of the integrity of the United Nations system, it was too late to convince our Latin American neighbors, who are all well aware of the role of the United States in the transaction of 1831-1833, that we were not acting in support of an old and trusted ally against a Latin American state seeking "justice." Our position was made to appear politically expedient, not a matter of principle. The repercussion on our Latin American policy and on the United Nations and Organization of American States system will be immense, and it is hard to see how the long-range interests of the United States are served.

Other implications, obvious to international lawyers but apparently overlooked by policy makers, included the confusion between support of British military action in support of principle and treaty commitments with support of British claims to sovereignty in the Falklands/Malvinas Islands. While the British might have had a stronger legal claim to sovereignty than Argentina, as noted above a legal approach is not compelled by the law or appropriate to the true situation. In the absence of detailed argumentation presented by both sides and evaluated calmly, it was not only beyond the practical capacity of the United States to determine which claim is the stronger, but whatever our conclusion it must have been legally unpersuasive to the other side and its allies and might have inhibited the sort of negotiation needed to end the confrontation. And for

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the United States to appear to oppose our Latin American neighbors or our British allies in this was unnecessary and destabilizing to both NATO and Latin America. Thus a narrow legal memorandum that did not focus on the entire legal order was distorting. A policy maker would have been better off knowing no law than that isolated bit of it.

The importance of a full legal evaluation of the entire situation was also evident in considering the degree of support the United States should have been giving to Great Britain. It follows from the analysis above that the British response to the Argentine taking of the Falkland/Malvinas Islands was a response to an illegal Argentine action that directly affected British interests. The British undoubtedly had "standing" to act; they were not acting as world policemen to support the law, as we would have been if we were to have acted directly against Argentina, but as a party injured by the Argentine action. The British position was not one of "self-defense." To call it self-defense implies British sovereignty in the Islands; otherwise the Islands could not be part of the "self" the British are defending. "Self-defense" also assumed an immediacy that became less and less evident as time went on.<sup>18</sup>

The British rationale, carefully preserved in Prime Minister Thatcher's public statements, was the need of states with the legal standing to act to preserve the system. That was the American rationale in Korea in 1950 also. We were bound to support the British action because we were and are bound to support the integrity of the system. Thus, to the degree the British action exceeded what is justifiable in support of the collective security system set up in the Charter, our support for it must have been very questionable. It could be given as a matter of policy, but should not have been given unless its legal implications were understood.

It is this restriction on British legal rights that made the British sinking of the Argentine cruiser *General Belgrano* early in May outside the zone proclaimed by the British as the "exclusion" zone for Argentine ships so significant. Despite British arguments that they could have made the zone larger, that the declaration did not limit British rights to strike at Argentine vessels elsewhere, and that the sinking was necessary in self-defense of the British forces within the zone, the expansion of the zone of combat beyond what was clearly necessary to counter only the Argentine taking of the Falkland/Malvinas Islands undercut the world order rationale for the British action. These doubts were reflected in the world's reaction to the British sinking; the pulling back of the European Economic Community partners from further support of the British embargo of Argentina and the estrangement of those Latin American countries that might have more vigorously supported the system if convinced that it was the system they were supporting and not British colonial interests.

To consider these important hesitations merely a triumph of petty self-interest by European and Latin American States over the interests of stability is to ignore

the common interest of all in the integrity of the system and help to destroy it. If it is in America's interest to support the system and to find a common language with which to discuss it with the other states interested, we must be aware of it and the limits it places on British action. Even if others are less convinced than we of the virtues of stability and collective enforcement of the law through political and military pressures, it is difficult to see how we can convince them of their ultimate interest if we lose sight of it ourselves. That would leave the field open to Soviet and other spokesmen to undermine the very basis of the interest structure on which we rely, much more than our overt alliances, to oppose the destabilizing actions of the Soviet Union and various revolutionary groups that seize on national grievances to support local movements seeking to identify their particular local aims with xenophobic anti-Americanism.

In sum, the world is a subtle and complicated place in which the tools of international law provide a framework for helping to evaluate national interest that can substantially change the policy evaluations of decision makers to the long-range favor of the United States. Failure to use those tools places us in a simpler world in which our leadership position is threatened by the misperceptions of others. If we suffer the same misperceptions we seriously undercut our ability to influence events and we bring the horrors of war and economic dislocation closer. And we fail in our duty to help safeguard the national security of the United States.

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Professor Rubin was serving as the Charles H. Stockton Professor of International Law at the Naval War College when this article was first published.

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### Notes

1. Rand Corp., *The International Law of Armed Conflict: Implication for the Concept of Assured Destruction* (R-2804-FF January 1982).
2. Rubin, *The Panama Canal Treaties: Locks on the Barn Door*, 1981 Y.B. World Aff. 181.
3. Reisman, *The Regime of Straits and National Security: An Appraisal of International Law Making*, Am. J. Int'l L. 18 (January 1980).
4. Rubin, *Some Legal Implications of the Pueblo Incident*, Int'l & Comp L.Q. 961 October 1969).
5. Rubin, *Sunken Soviet Submarines and Central Intelligence; Laws of Property and the Agency*, Am. Int'l L. 855 (October 1975).
6. The Foreign Sovereign Immunities Act of 1976, U.S.C. §§1330, 1602, provide that a foreign State shall not be immune from the jurisdiction of courts of the United States in any case in which the action is based on "an act outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere and that act causes a direct effect in the United States" (28 U.S.C. §1605 a (2)). It also provides that a foreign State shall not be immune "in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign State, which maritime lien is based upon a commercial activity of the foreign State" (28 U.S.C. §1605b). "Commercial activity" is defined in the Act to include "a particular commercial transaction" and says further that "The commercial character of an activity shall be determined by reference to the nature of the . . . particular transaction or act, rather than by reference to its purpose" (28 U.S.C. §1603A(d)). Legal questions of interpretation are only now beginning to make their way to the Supreme Court. But foreign governments in their own courts are not bound to hold to American interpretations of an American statute. We have probably lost our ability to protest effectively a foreign arrest of an American Navy vessel in Admiralty under a lien alleged to have been created in a dispute arising out of

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the purchase of, for example, ships stores; we lost when the principle was breached of according sovereign immunity for the acts of direct agents of the sovereign whose sole source of funding is the public purse. Perhaps it was inevitable in light of the difficulties in law in distinguishing between a private corporation, which is, after all, merely a creature of the law and thus an extrusion of the State, and a direct government activity operating under statutes and accountability procedures almost as effectively cutting it off from political control in its procurement and sales operations. The legal distinctions are too complex to reduce to a simple principle universally applicable. But there is very little evidence that the problem was even perceived as serious when the statute was drafted.

7. Rubin, *The Hostages Incident: The United States and Iran*, 1982 Y.B. World Aff. 213.

8. Many more dismal examples are given in FISHER, POINTS OF CHOICE (1978).

9. TAYLOR, A TRIAL OF GENERALS (1981), for what seems an overly "revisionist" view. Generals Homma and Yamashita were convicted by American military commissions for not restraining the troops under their command during the Bataan Death March in 1942 and the destruction of Manila in 1945. The impact of these convictions on the law is not entirely clear.

10. It may be hoped that the United States will never fail in its international responsibility in the same way. But it is possible to speculate in the light of opinions expressed from time to time that President Truman might have been guilty of an "ordinary war crime" in ordering at least the second nuclear bomb to be dropped in Japan in 1945. It is likely that a Japanese court would have held so. But whether an impartial tribunal correctly evaluating the legal situation in 1945 would have agreed is doubtful. See Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 Am. J. Int'l L. 759 (1965); Rubin, *The Neutron Bomb Again*, 21 Va. J. Int'l L. 805 (1981), and works cited there.

11. General Order 100 of 24 April 1863, instructions for the Government of Armies of the United States in the Field (the Lieber Code), art. 29.

12. This is not to say that all lawyers are poor at policy-making or all non-lawyers avoid the pitfalls. Harold Nicolson, while warning against "missionaries, fanatics and lawyers," specifically exempts international law experts from his list. NICOLSON, DIPLOMACY 16-17, 24 (1963). Nicolson, a non-lawyer, also writes: "My own practical experience, and the years of study which I have devoted to this subject, have left me with the profound conviction that 'moral' diplomacy is ultimately the most effective, and that 'immoral' diplomacy defeats its own purposes," p. 23.

13. The only known scholarly book giving what appears to be an unbiased and more or less complete history is GOEBEL, THE STRUGGLE OVER THE FALKLAND ISLANDS (1971).

14. Cf. *The Island of Palmas (Miangas) Arbitration*, 2 R.I.A.A., 829 (1929).

15. Cf. *The Clipperton Island Arbitration*, 2 R.I.A.A. 1109 (1931).

16. The *Ecrehos and Minquiers Case*, United Kingdom v. France, 1953 I.C.J. 47.

17. The Charter is explicit on this: "Members of the United Nations which have . . . responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation . . . to ensure . . . their political, economic, social and educational advancement. . . ." U.N. Charter art. 73.

18. The classical legal formulation regarding "self-defense" first uttered by Daniel Webster when Secretary of State in 1842, deals with situations where the necessity for action is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." MOORE, DIGEST OF INTERNATIONAL LAW 414 (1906); Jennings, *The Caroline and Maclod Cases*, 32 Am. J. Int'l L. 82 (1938). It is difficult to see how that situation obtained in the Falklands/Malvinas Islands after the Argentine forces had removed the British garrison and all shooting had stopped in the Islands. "National security" as a concept would justify anything anywhere. Its meaning is solely political; it justifies nothing in international law because it would justify all counteractions to the very action it purports to justify. It would also justify executive counteractions, and then the counteractions to those counteractions, and so on *ad infinitum*. The use of the phrase by non-lawyers, and occasionally by adversary-minded lawyers, sometimes approaches silliness.

## Chapter 3

# Rules of Thumb for Gut Decisions: International Law in Emergencies\*

Alfred P. Rubin

**I**n my personal library there is a rather tattered and stained, leather-bound book published in 1741 by the British Admiralty and issued to Navy commanders. It is titled, *Extracts from the Several Treaties Subsisting Between Great Britain and Other Kingdoms and States of such Articles and Clauses as Relate to the Duty and Conduct of the Commanders of the King of Great Britain's Ships of War*. It is 264 pages long and contains in elegant print the pertinent articles of all the treaties with France, Spain, the Netherlands, Belgium (then called the Austrian Netherlands), Portugal, Russia, Sweden, Denmark, Savoy (now expanded to a united Italy), Turkey, Morocco, Algiers, Tripoli (now called Libya), and Tunis. The oldest is with the Austrian Netherlands, and dates to 1495. The compilation is current as of 1741. Some of the articles deal with the rights of merchants as neutrals when the other treaty party is exercising belligerent rights, such as blockade, against a third State, some with the incidents of peaceful seaborne trade, some with belligerent rights as between the treaty partners themselves, such as provisions dealing with contraband and prize court proceedings. Such a compilation was not only useful but a practical necessity in 1741 if Great Britain were to give her navy the job of protecting British commerce at sea.

It would be both undesirable and impossible to compose an equivalent compilation for our naval commanders today. It is impossible to furnish our naval commanders with the compilation of all the treaty articles that might pertain to their duties because of the growth of the international community and the proliferation of treaties and executive agreements pertinent to seaborne commerce and the laws of war, and other matters of possible immediate concern to naval commanders, like individuals' rights to political asylum. To serve a function equivalent to the 1741 compilation a current volume would have to be huge, cross-indexed, and accompanied by interpretive legal memoranda and philosophical analyses of the impact of treaty commitments on third parties, the implication of inconsistent obligations owed to the same party, different parties, international organizations, and parties with reservations or qualifying interpretations to multilateral documents. And it would quickly be realized by the naval

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commanders that this set of volumes (which is what it would turn out to be) would be incomprehensible without more study than time and energy would permit. Besides, it would probably be useless in an emergency not squarely envisaged in some pertinent treaty. Since emergencies are never squarely envisaged, since it is never clear that any particular treaty is pertinent to the exclusion of others, and since questions of interpretation arise over the simplest legal language, a modern compilation could not serve the function of the 1741 compilation.

It would also be undesirable. It is no longer true that the rules of international law are codified in documents that make sense to an intelligent and experienced person who has not devoted considerable time and effort to their study. Scan simply the 1958 Geneva Convention on the High Seas<sup>1</sup> and consider that any American compilation like the 1741 book would not include the current version of the draft Convention of the Third United Nations Conference on the Law of the Sea (UNCLOS III)<sup>2</sup> because that draft is not yet (and, indeed, may never be) a treaty ratified by the United States. But to conclude from that fact that the rules of 1958 still bind the United States and the flag States of all the other parties' vessels our Navy ships might encounter on the high seas would be totally wrong. The new draft embodies practices and interpretations accepted as proper, even if not formally binding, and the burden would be on the State relying on the 1958 Convention's formulation in case of doubt to show that it had not been changed by universal acquiescence in some new practice as evidenced by the current draft. Indeed, the extension by the United States itself of an exclusive fisheries zone reaching two hundred miles from our coasts was accomplished not by a revision of the 1958 Convention but by legislation against the advice of the State Department.<sup>3</sup> Moreover, not all maritime States are parties to the 1958 Convention, and the relationship of that attempt to codify the law of the sea to states who rejected the codification, for whatever reason, is complex and cannot easily or quickly be summarized. And what is true for that single Convention is true for many.

When I contemplated this situation, it occurred to me that a general rule existed which all seagoing officers learn sooner or later: On questions of treaty interpretation, only Washington is capable of giving guidance. The naval officer who tries to act as his own lawyer, like the lawyer who tries to handle his own case, treads dangerous ground and will probably hang his client.

And what is true for treaty interpretation is true for all other questions of international law; perhaps even more so when there is no definitive text at all to refer to, or only a text like a statute, or a UN General Assembly resolution, or a draft unratified treaty, that is written for other purposes and aimed at other people. It is not rational to assign a competent international lawyer to each ship, not because there is a great shortage of competent international lawyers—and the calibre of military lawyers is at least as high as the calibre of lawyers in our society

in general, including its academics—but because a competent international lawyer himself will know that at the root of every legal question is not an answer but a doubt. A learned analysis of the precise legal risks of alternative courses of conduct in an emergency is not only useless in practice, it is impossible.

This is not to say that guidance, even elaborate and detailed guidance, should not be attempted, but that the utility of complex rules of engagement and equivalently detailed orders is limited to the circumstances in which the naval commander has the time and opportunity to use them. They may fill a gap between an emergency situation where quick and decisive action (or a decision not to act) is imperative to save life, protect a command, or assert a major national interest, and the situation in which there is time and opportunity to seek the guidance of a headquarters equipped to give it. But they cannot themselves guide a naval commander who must make a quick decision.

What is needed is not definitive guidance, then, but a few, easily grasped, rules of thumb; guidance for guts when a gut decision must be made.

Gut decisions by naval commanders are usually well based in their experience and general knowledge of American interests and policies, but cannot serve without rules of thumb when legal interests are at play. Our guts frequently deceive us. An anecdote, slightly inapropos, may be worth preserving:

In 1965 I was the lawyer in the Office of the Secretary of Defense charged with responsibility for legal aspects of our Southeast Asian operations. My principal client was John McNaughton, a native of Pekin, Illinois, then Assistant Secretary of Defense (International Security Affairs), who in private life had been a professor of law (but not international law) at the Harvard Law School. At a meeting in his office he asked for the views of his staff, including myself as his lawyer, on a proposal that had been referred to Secretary McNamara by President Johnson: Should we mine Haiphong harbor? As was typical in those days, we had not been given advance notice of the subject of the meeting, thus I had not checked the SEATO Treaty or other documents when I was suddenly asked whether it was legally required that the United States notify its allies before undertaking the operation. McNaughton's view was that it was undesirable as a matter of policy to notify our allies. Notice was tantamount to asking for objections; they might object and raise political problems even if legally we would be justified in the mining. Confronting them with a *fait accompli* would be easier for them to accept and explain to their own constituents than what might appear to be a concurrence construed out of their failure to object.

I disagreed. My view was that the risks to their merchant ships in Haiphong, which might be delayed there past the moment our mines were armed even if our notice were given before then, were significant, and that our failure to notify them before the mines were laid would, if they then objected, either result in our delaying the arming of the mines (in which case we might as well have given them prior notice), or create serious political problems ultimately resulting in

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their drawing back from supporting us in Vietnam, which at that time was still considered possible and desirable. I thought that the consultation provisions of the SEATO Treaty might apply, but without the text to check and no time to do the necessary legal research into the negotiating history of the Treaty and the terms on which it was submitted to our Senate for advice and consent, I could not be sure of my view of the law.

“Is it just your guts then, Rubin?” he asked.

“Yes sir,” I admitted.

“Well, then” he replied (and I will probably always remember his precise words), “your guts and my guts just disagree on this one.” The serious meeting ended in laughter.

In retrospect, I don’t know whose guts were closer attuned to political and legal realities; I think mine were, but that opinion rests on later research and knowledge of what in fact happened in Vietnam, including our allies’ increasing mistrust of our military and political judgment there, things that neither of us could know at the time. It was my impression that the decision then not to mine Haiphong harbor was made on other bases, possibly wrongly, and I don’t know what impact advance notice to our allies might have had. McNaughton is, tragically, dead and cannot give us his version of the anecdote.

The point is the need for some rules of thumb to help guide our guts; to help focus the issues and give us a handle on the legal and policy implications of military action. With this in mind, I suggest the following fundamental principles as possibly useful to naval commanders.

1. *Reciprocity.* A fundamental rule of the international legal order is the equality of all States, big and small, before the law. Great strength may give us great political responsibilities, and possibly even some legal rights and powers not available to lesser States, but in general, and as a matter of basic principle, rights we assert for ourselves in the absence of agreement by others are rights that all other States can assert against us. If an American naval commander insists on sending a boarding party to a Peruvian gunboat suspected of harboring an American fugitive, a Peruvian commander (indeed the commander of a legally equal Ecuadorian vessel) will sooner or later be asserting the same right against an American naval vessel. To argue then that we have rights against our legally equal Latin American neighbors that they do not have against us is almost certain to have major political implications of the utmost gravity. The fact that we are bigger and stronger than our Latin neighbors will not prevent them from expropriating American property, or even, as in the case of the *Pueblo* off North Korea, seizing an American military vessel. Collective political action through the Organization of American States might be their non-military response. Remembering the rule of reciprocity would dampen down the understandable enthusiasm of an American naval commander unduly intent on accomplishing a law-enforcement mission.

2. *Minimal Force.* It is fundamental to the international law of war, as well as to wise management, that unnecessary suffering and destruction is improper. Whether a use of force to “teach a lesson” is justifiable as “reprisal” or on some other basis must rest on particulars. It is a potentially difficult legal question to which the answer normally would be no. The international law of self-defense, which was definitively formulated by Daniel Webster in diplomatic correspondence with Lord Ashburton, the British Minister in Washington, in 1842<sup>4</sup> justifies only the minimum force when the necessity is “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>5</sup> International law, like the law of many states in the United States, requires a threatened party to retreat before the threat as long as retreat is safe before using force in self-defense. This is not to say that there are no circumstances in which a naval commander may use force beyond the minimum necessary to safeguard his command, only that as a rule of thumb he should not; if he does he is likely to involve the United States in serious complications, an escalating use of force by others, and will find his superiors, to their dismay, forced to apologize for action he thought was justifiable.

3. *Effectiveness.* In the long run, legal relationships flow from the facts, not from the technical labels we frequently use to disguise unpleasant reality. Thus, if a rebel group that has control of a foreign vessel is labeled a “pirate” or “terrorist” group by the recognized government against which it is fighting, and the United States does not recognize the legitimacy of the rebel government or its legal capacity to commission naval vessels, to the degree the labels represent a political ideal of the defending government or the United States and not the facts, it is the labels that will ultimately be changed. An American naval commander capturing a Chinese Communist gunboat in 1970, when the United States recognized the Chinese Nationalist Government in Taiwan as the sole Government of China, and the Government called the Peking authorities mere bandits, would create legal and political complications that might help clarify the law, but at the cost of his reputation for common sense. The reality of Communist control of the mainland of China actually determined American relations with Peking as early as 1949, and we accorded Chinese Communist “volunteers” the privileges of legal belligerents in Korea from the first days of their entry into that conflict in 1951, despite maintaining for political reasons a set of legal labels that made that status inconsistent with our public legal position. This is not to say that there are no legal effects to unreal labels, only that as a rule of thumb, in the absence of express guidance from above, naval commanders should rest their evaluations on reality itself, not on subtle and complex political and legal considerations that may require the formal use of deceptive legal labels for a time.

4. *Legal labels and “Autointerpretation.”* Legal words are almost always deceptive even to lawyers. President Ford is a lawyer, and he called the Kampuchean naval force that seized the *Mayaguez* “pirates.” The State Department quickly

“clarified” the situation denying that the President had intended “piracy” in the sense of the 1958 Geneva Convention in the High Seas, thus denying that the legal results of the label should flow. In fact, there is ample historical and legal basis for President Ford’s use of the word,<sup>6</sup> but that use is not the one purportedly codified in the 1958 Geneva Convention on the High Seas.<sup>7</sup> There seem to be at least six quite different conceptions of “piracy” that have been used from time to time by international lawyers to justify suppressive action, some of them wholly outdated, merely political, or simply irrelevant to the situations to which their legal implications are occasionally sought to be applied; President Ford was apparently using the word without a clear idea of which sense was intended. As a rule of thumb, then, naval commanders should beware of drawing legal results from labels used by newspapers, staff lawyers, or even the President of the United States.

The unwisdom of acting on the basis of labels rather than on the basis of facts is reflected in a deeper conception familiar to international lawyers: Autointerpretation. Since all States are equal before the law, and there is no formal legislative body and only a very limited judicial competence in the international legal order, the legal classification of facts on the basis of which action is taken by States must always in the first instance rest on “autointerpretation”: The classification made by the acting State’s responsible officials for their own purposes. But autointerpretation is *not* a definitive legal determination of the true relationships and their legal results.<sup>8</sup> States have apologized for acts taken pursuant to self-serving autointerpretations which in retrospect seemed more like mere adversary briefs than convincing analyses. The final determinations are made by the political pressures of the entire international community and by history. Thus naval commanders, like international lawyers, should approach the most convincing legal arguments with a certain degree of skepticism. A firm position stated by a Soviet vessel that the United States has no legal right to retain custody of a fleeing Soviet sailor reaching an American vessel on the high seas cannot legally be more than a Soviet autointerpretation of the law. It cannot in theory or practice be a determination of the law however persuasively argued. And, similarly, in the absence of an order absolving an American naval commander of responsibility for his action, even a legal position uttered by the United States Government is a shaky basis for action. Wise policy must be influenced by legal perceptions, just as it must reflect economic interests and military interests, but the self-serving legal briefs of only one party are not a solid basis for decisionmaking, even in legal theory.

5. *Supremacy of the Law.* It may seem odd after this analysis to refer to the law as supreme, but it is necessary. The final determinations made by politics and history are devastating. To ignore the inherent weakness of autointerpretations and adversary briefs before the glare of publicity, counterargument and the many legal and political actions that States take to keep each other in line would be

foolish indeed. But to ignore the obvious fact that the final determinations of the law made by the world community and by history deal severely with those who ignore the law is to be blind indeed. The guidelines of reciprocity, minimal force, and the ultimate effectiveness of facts, coupled with a healthy skepticism about glib legal labels and an appreciation of the inherent doubts that underlie all legal argument until history has had a chance to deliver its judgment, seem appropriate. They lead to caution in action, which is all to the good when real lives and property are at stake, but do not inhibit necessary action in a true emergency.

So far, we have been addressing international law at such a basic level that the degree of generality may obscure the practical utility of the law. It is possible to be more specific.

6. *Territoriality.* The prehistoric basis for our nation-state system probably rests on religious and ethnic-family and tribal feelings rooted in our deepest inheritance; part of our wiring rather than our software programming. It is also possible that to some degree our emphasis on territorial integrity is built into the system. International law takes account of both in allowing states to make rules for their nationals wherever they may be, and to make rules for everybody, foreigners as well as nationals, within the territory politically dominated by the rule-making and rule-enforcing authority, the government. The system is more complex than it seems; there are territory-less rule-making and rule-enforcing organizations, like churches; there are exemptions from territorial enforcement for transiting diplomats and others; there are overlaps and underlaps. Fundamentally, however, the territorial sovereign is supreme in his territory, and his territory includes his internal waters, territorial seas and, for some purposes, wide belts of fisheries and other exploitation zones. When a vessel of another State appears in any of those zones, even if there is no treaty governing the situation, as is in fact the case regarding extended fisheries zones today, and even if for some purposes the zone is labeled part of the high seas, an overlap of sovereignty occurs. The flag State of a vessel has the jurisdiction in that vessel necessary to allow the master to exercise the authority he needs without fear of a claim against him for false imprisonment or assault when he disciplines a crewman or passenger. Indeed, from earliest days vessels on the high seas and in foreign ports were conceived as part of the territory of their country of origin for purposes of internal discipline and property rights. But a vessel is not a part of the flag State's territory; the analogy loses its persuasiveness quickly when contemplating air space above the vessel and the routine exercise of port-state customs and immigration authority on boarding visiting private vessels. The extension of territorial jurisdiction is built on a fiction, limited by the principle of effectiveness, and yields in general to the prescriptions of the territorial waters or ports. Even though warships, by long usage and mutual acquiescence, are normally considered immune from the territorial sovereign's enforcement authority, in case of conflict their only recourse is to leave the territorial waters. In general, in these days of

rising international claims to law-making and law-enforcing authority for special purposes in large areas of what formerly were considered to be the high seas, claims which the United States makes also, principles of reciprocity would normally require an intruding military vessel to leave rather than contest any assertion of right based on the extension of territorial jurisdiction seaward. There may be cases in which passage is forced, but those must be dictated by higher authority, which will presumably have considered the impact of reciprocity, minimal force, and effectiveness, as well as the relative persuasiveness of the autointerpretations of all States concerned, before issuing the orders. But as a rule of thumb, a naval commander can no longer confidently oppose territorially based claims with assertions of historical rights based on glib labels like "high seas" and "freedom of navigation" or even "innocent passage."

7. *"Functional" Sovereign and Diplomatic Immunities.* Traditional perceptions of the immunities of diplomats and of arms of the sovereign, including naval vessels, have been rapidly changing in the past few years. While there can be no doubt of the illegality of the Iranian seizure of American diplomatic and consular personnel and even private American nationals in Teheran in 1979, the 1961 Vienna Convention on Diplomatic Relations ended whatever had remained of theories of absolute diplomatic immunities and replaced it, to the extent developing conceptions of law outside the treaty framework had not already done so, with a conception of "functional immunities": Immunity from host-State territorial jurisdiction limited to what was necessary for the accomplishment of the diplomatic mission. Old catch-phrases, like "train of the Ambassador," and the idea that an embassy is a little bit of foreign territory enclaved in the host State, to the extent they had lived till then, died. The United States agrees with the changes, and it would do us no good to resist them. Thus, when a foreigner seeks asylum from his own government in an American embassy, the right of the United States to grant that asylum is severely limited. Occasionally, heart-wrenching circumstances, as with Soviet religious dissidents in Moscow, or Cardinal Mindszenty in Budapest, lead the United States to permit an asylum situation to arise where there is really very little legal basis for our position. But those are rare and decided at the highest political levels in the United States. A naval commander faced with a fleeing foreigner may be in a somewhat better practical position if he can leave the territorial waters of the host State, but his legal position is also weak. As with embassies, he has no legal immunity from the actual prescription; he must rest on his functional immunity from local enforcement action. He may violate international law by not paying due regard to the law of the coastal State.

This is not to say that, as a rule of thumb, asylum should always be denied. There are humanitarian concerns that permit it. But the naval commander must be aware that his immunities are limited and grave difficulties may result if he cannot defend his command before the fury of a host State convinced that its

jurisdiction and hospitality have been abused. Of course, if the asylum incident occurs on the high seas or within American waters, no such conflict of jurisdiction exists and rescue operations and asylums are governed by American law alone in the first instance.

Another modern trend is the increasing restriction on the immunities of foreign States acting in a commercial capacity. The fact of a ship being designated a naval vessel by the law of its flag State represents today only an autointerpretation of facts that a foreign State or its national court might well want to look at from a different point of view. The United States has been in the forefront of States denying sovereign immunity from law suits based on the commercial activities of foreign governments, and the concept of "commercial" is held to rest on the nature of the operation, not its purpose. Combat operations and legislation are regarded as in their nature governmental; routine navigation and local activities that are typical of any ships, not just public vessels, are regarded as in their nature commercial. Thus, buying ships' stores even for a warship is regarded in the United States as a "buying," not as a governmental activity in support of combat operations, and a common law suit can be brought against the purchaser to enforce the purchase contract. It has not yet reached the point of permitting the arrest of a war ship in an admiralty proceeding to enforce a lien, but the trend is heavily in that direction. The fact that the United States might stop short of setting such a precedent is not necessarily an indication that foreign countries, which have watched the American initiative with some apprehension, will stop at the same point we do when they evaluate their own interests and come to their own autointerpretation of the law.<sup>9</sup>

8. *Humanitarianism.* There is a serious question in the minds of international lawyers whether humanitarian principles, whatever they may be, form part of the legal obligations of States. Strong arguments can be made both ways. As a rule of thumb it is probably true that things done in derogation of a foreign sovereign's jurisdiction in the interest of saving life are not likely to raise serious problem, but that derogation to save property are. The British historically raised the issue over slavery: a right to life issue to them and a right to property issue to the Portuguese, Americans and others. The result was a victory in theory for property, and a victory in practice for the British, who marshalled public support and political pressures until slave trading States agreed to change their laws and to permit, by treaty, the British to enforce antislave-trade rules on their vessels. There are, of course, times when equivalent problems arise today, for example over the right of a foreign national to flee oppression not linked to life-threatening mob action but to his own government's abusive exercise of its jurisdiction. In those cases, the intervention of American vessels to help the fleeing foreigners is frequently viewed as an interference in the foreign State's internal affairs—its territorial integrity and the ancient link a State has with its nationals wherever they may be. In general, the greater the political motivation for the flight, and

the less the immediate life-threatening emergency, the more dubious the justifiability for American actions, even as a passive receiver of fleeing persons. If there is any rule of thumb in this area, it would seem to be equivalent to the rule we all apply when we see our neighbors quarreling or beating each other and their children; we don't interfere unless the situation becomes shocking to the point that we cannot simply stand by and watch. At that point, regardless of the law the risks seem worth it.

9. *Mind Your Own Business.* One of the most profound rules of the international legal order, so much so that it has a Latin phrase to go with it, *res inter alios acta*, is that a quarrel between others is legally of no concern to us. There is no basis for an international claim unless a legal interest of the claimant is violated; there is no basis for diplomatic or military action unless that basis can be found in the law. In international law, phrases like "honest broker" and "friend to all" have no force. The institutional arrangements for community action rest on the consent of the States to whom the complaint or military action is addressed. That consent has been given in the adherence of nearly all States to the Charter of the United Nations, but that consent extends only to collective action using the organs of the United Nations and to individual States deriving their authority from United Nations legal action, as the United States and other States did in Korea in 1950. Regional organizations, like the Organization of American States, have a role to play in resolving international disputes and occasionally authorize military action. The quarantine of Cuba in 1962 was authorized by the Organization of American States, thus it was possible indirectly to construe the entire action as occurring with Cuban consent, Cuba being still a member of the Organization. There were, and are, doubts as to the legal power of the Organization to take enforcement action. The Soviet Union is not a member, yet the quarantine involved interference with Soviet vessels. Moreover, enforcement action is the exclusive prerogative of the Security Council of the United Nations under the Charter to which all members of the organization of American States are also parties. But those doubts are subtle, and technical, and were unnecessary to resolve once it was clear that the United States had a legal position that assured it of the support of its Latin American neighbors in the action against Cuba and the Soviet Union in the Western Hemisphere. In that case, the rule of thumb may have worked better than a more technical and detailed analysis of the law would have permitted. The rules of thumb thus, that require naval commanders to mind their own business and limit self-defense actions to true emergencies, do not operate to prevent collective action instead of individual action when a quarrel between others threatens general community interests. They withhold from any single State, including the United States, the legal power to act as a universal policeman, and strengthen the collective mechanisms that disperse responsibility for keeping the peace among all the members of the community and limit the risks of confrontation.

The foregoing listing of rules of thumb for gut decisions is not exhaustive, but I hope they hit the major points and will be useful to operating naval commanders.

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Professor Rubin was serving as the Charles H. Stockton Professor of International Law at the Naval War College when this article was first published.

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### Notes

1. T.I.A.S. 5200, 13 U.S.T. 2312, 450 U.N.T.S. 82.
2. U.N. Doc. A/CONF. 62/WP.10/Rev.3.
3. The Fisheries Conservation and Management Act of 1976, Pub. L. No. 94-265. The contrary advice of the State Department may be studied in U.S. House of Representatives, Hearings before the Subcommittee on Fisheries, Wildlife Conservation and the Environment, of the Committee on Merchant Marine and Fisheries, 94th Cong., 1st Sess. 47-50, 86-154 (1975).
4. Jennings, *The Caroline and MacLeod Case*, 32 Am. J. Int' L. 82 (1938).
5. MOORE, DIGEST OF INTERNATIONAL LAW 414 (1906).
6. For some historical instances in which the British labeled as "pirates" the military arm of some Malay Sultanates which they were treating in other ways as States in the international legal order, see Rubin, *The Use of Piracy in Malayan Waters* 1968, Grotian Society Papers at 111 (1970). In 1828 Commodore Sir Thomas Staines burned or captured eleven "piratical vessels" in Grabusa Harbor (Ionian Islands, now part of Greece) whose depredations had been committed while they flew the Ionian flag and had privateer licenses from the British-protected government of the Ionian Island. Naval Records Society, *Piracy in the Levant, 1827-8, Selected from the Papers of Admiral Sir Edward Codrington*, v. 72 K.C.B., at 42-52, 67-70, 246-248 (1934). The same perception colored European treatment of the Barbary States in the early 19th century. See Mössner, *The Barbary Powers in International Law*, Grotian Society Papers 197 (1972).
7. On the hopelessly confusing codification of 1958 see Rubin, *Is Piracy Illegal?* Am. J. Int'l L. 92 (1976). Distressingly, the 1958 codification is repeated more or less verbatim in the current draft before UNCLOS III cited above at n. 2.
8. The leading article on this is Leo Gross, *States as Organs of International Law and the Problem of Autointerpretation*, in LAW AND POLITICS IN THE WORLD COMMUNITY 59-88 (Lipsky ed. 1953). Professor Gross first popularized the word "autointerpretation" to label this complex but fundamental conception.
9. The Foreign Sovereign Immunities Act of 1976, 28 U.S. Code Secs. 1330, 1602 sq. provides that the State itself shall not be immune from the jurisdiction of courts of the United States in any case in which the action is based on "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States" (Sec. 1605(a)(2)). It also provides that a foreign State shall not be immune "in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign State, which maritime lien is based upon a commercial activity of the foreign State" (Sec. 1605(b)). "Commercial activity" is defined in the act to include "a particular commercial transaction" and says further that "The commercial character of an activity shall be determined by reference to the nature of the . . . particular transaction or act, rather than by reference to its purpose." (Sec. 1603(A)(d)). Legal questions about the constitutionality and precise meaning of these provisions are only now beginning to be decided by American courts. Foreign countries enacting their equivalent statutes are not bound by the American Constitution or American interpretation of the American statute.



**PART TWO**

**OCEANS LAW \_**



## Chapter 4

# Sea Power and the Law of the Sea: The Need for a Contextual Approach\*

George K. Walker

**T**he beginnings of the U.S. Navy's third century may have signalled a rethinking of navies' roles in the international power process and ultimately in all aspects of international interaction. Ken Booth's *Navies and Foreign Policy* appeared in 1976, following D.P. O'Connell's *Influence of Law on Sea Power* (1975), Edward Luttwak's *Political Uses of Sea Power* (1974) and James Cable's *Gunboat Diplomacy* (1971). And, for the Soviets, Adm. S.G. Gorshkov has produced his "summa of naval power," *Sea Power and the State*, said to be "dense, rich, logical and almost overpowering in breadth."<sup>1</sup>

The latest American study on the relationship of military power at sea to international law as the flow or process of authoritative and controlling decision is Mark W. Janis' *Sea Power and the Law of the Sea*.<sup>2</sup> His theme is well stated in the introduction and his final chapter:

The law of the sea is the creature of international order, reflecting patterns of compromise and consensus, insofar as they exist, among the competing and complementary interests of states. Since security interests are vital to every country, it is only reasonable to expect that States will consider sea power when devising ocean policy. It would be remarkable if a workable legal order for the oceans did not accommodate national naval interests.

Sea power influences the development of the law of the sea not only by imposing the need to reconcile naval interests in international negotiations, but when naval force is used to advance national claims to international law of the sea. . . . Navies often [have] a role in this process of . . . law making. . . .

International society, like any society, needs a more complex legal system when more actors relate in more ways. The steadily increasing number of ocean users and uses means that a more detailed ocean law is inevitable. Navies will be ensnared in this new complexity. But the new ocean order will not only impede the accomplishment of some naval missions, it will facilitate others. Remembrance and reverence of the old ocean order will not be enough. Navies must reexamine their relationships to the law of the sea and their preferences for legal rules keeping the emerging ocean order in mind.

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\* Reprinted from the Naval War College Review Spring 1978.

He acknowledges that “the new ocean order is bound to create some difficulties for naval operations,” noting that the old ocean order was ideally suited for the mobility of powerful navies, whereas the emerging new consensus “will impose restraints on ocean use where before there were none.”

This article will first review Janis’ exposition of these themes. Second, his book will be examined in context of those other recent publications noted in my first paragraph. Third, his monograph will be examined in the context of international law to illustrate the breadth of sources that must be considered when a naval operation is being planned or when situations develop in the ocean environment. Finally, the article will illustrate the utility of the contextual method of problem solving through decision theory, particularly the policy science approach. While *Sea Power* has certain shortcomings, whether viewed from the perspective of a traditional lawyer or from the policy science vantage point, the book is a very commendable first effort by an outstanding young scholar with real promise.

The first four chapters focus on the four major naval powers—the United States, the Soviet Union, Great Britain, France—and these States’ interests in law of the sea (LOS) issues, each nation’s domestic interests in “ocean policy processes,” and the reflection of naval interests in each country’s ocean policy. Chapter five primarily analyzes the coastal navy States’ interests in the main law of the sea issues. Each of the first four chapters begins with the major powers’ conceptions of their navies’ missions or roles as seen by the head of its navy or by an authoritative decisionmaker in the equivalent of the U.S. Department of Defense, in the sub-chapter on naval interests in law of the sea issues. The subchapter continues by analyzing the strategic deterrent forces and those vessels that would carry out conventional missions. The reader is referred to standard sources such as *Jane’s Fighting Ships* for descriptions of each country’s navy, but Janis might also have considered the heightened power of combinations such as NATO, the Rio Pact, the Warsaw Pact, or other published alliances. Chapter 1 analyzes the principal legal issues in present law of the sea negotiations that affect the U.S. Navy: right of passage through straits, including analysis of straits crucial to American naval interests; transit along coasts, and therefore the issue of the territorial sea; and military use of the deep seabed. This theme is repeated in succeeding chapters to demonstrate that the Soviet Union, Britain and France have positions similar to the United States on straits and the territorial sea, although the British and French stance is less clear and may be subject to change in the future. The United States and the U.S.S.R. differ on the issue of military uses of the seabed, the United States favoring a regime permitting implantation of listening services, while the Soviet Union has desired complete demilitarization of the seabed. Janis sees this difference as resulting from “scientific lag” or perhaps from propaganda intents, and notes third-world support for total demilitarization.

The bulk of the fifth chapter recounts the differences between the naval powers and the coastal States on the straits issues and the general consensus for a 12-mile territorial sea except for questions related to economic resources. The discussion of naval interests in law of the sea issues in the first five chapters cites standard references relating to naval missions and naval forces. Janis relies on treaties and standard works on the law of the sea in laying the groundwork for his analysis of recent international negotiations relating to the law of the sea issues. He frequently cites the *Informal Single Negotiating Text* (ISNT), the *Revised Single Negotiating Text* (RSNT), or individual States' positions relating to the negotiations, and cites U.N. General Assembly resolutions in point.

Janis' summary of the United States internal decisionmaking process for formulating a coherent oceans policy reveals the bewildering complexity, or morass, of governmental agencies that have an input, or finger in the pie, for these issues. While the corresponding subchapters on the role of British and French naval interests in the ocean policy process also discuss the internal governmental decisionmaking processes, some attention is paid to the strength of private shipping interests and public opinion. Except for indirect references to pressures on Congress, and a summary of commercial interests, and non-governmental organizations, there is little discussion of the great influences these groups can bring (and have brought) to bear on official decisionmaking. The U.S.S.R. Navy's role in its ocean policy process is, as with most things Soviet, still much of "a riddle wrapped in a mystery inside an enigma." However, certain externalities of Soviet national interests, such as its growing merchant fleet, and the composition of the U.S.S.R. delegation to the law of the sea conference give some keys to its internal decision process, as Janis suggests. One egregious omission from the analysis in the chapter on coastal navy States is any discussion of the pressures that shipping interests of countries such as Japan and the Pan-libhon nations (Panama, Liberia, Honduras) may have exerted on the negotiations or the national decision process.<sup>3</sup> Similarly, there is little mention of the interest of states that are great consumers of fish and other marine resources.

Janis sees these crucial interests of the world's navies in ocean policy: the breadth of the territorial sea, conditions for the right of transit through international straits for warships, and the use of the deep seabed for military purposes. In each chapter he relates the legal position of the major naval powers and the coastal States to the available stated positions of their navies' decisionmakers. As with the Soviets in other aspects of the book, concrete information is scarce. The coastal States' positions vary and perforce are only summarized.

The sixth chapter, "Navies and the Development of the Law of the Sea," examines naval interests' influence on the development of the law of the sea, or the "process [of] authoritative decision [that] generates [the] law of the sea both by custom and by convention," referring to the work by Professors Burke and McDougal.<sup>4</sup> The sub-chapter on naval power's influence on the development

of customary law of the sea notes the beginnings of customary international law in the last two centuries, then plunges abruptly into the 1972-73 cod war between the United Kingdom and Iceland. While the latter conflict makes the point, a more complete historical discussion might have mentioned the evolution of the cannon-shot rule into the 3-mile limit, the developing practice or custom of collecting debts by gunboat diplomacy in the 19th century, or the Corfu Channel Case of 1947. These customs have since been vindicated or repudiated by international convention. Introduction of such paradigms would have provided a natural transition to the subchapter on "Naval Interests and the Law of the Sea Negotiations." The influence of naval action on international custom and custom's impact on national courts was not discussed, nor did the author discuss the reciprocal effect of customary international law on seapower, a theme of O'Connell's study and a factor perceived by Cable. Janis' study of the interplay of naval interests and the development of international agreements to govern the regime of the oceans is primarily concerned with the recent Law of the Sea Conference negotiations. The naval input into the development of treaty norms is old; for example, Matthew Fontaine Maury, and therefore the U.S. Navy, was a major force in early conferences on weather problems. Similarly, the opposition of naval interests as articulated by Alfred Thayer Mahan to arbitration,<sup>5</sup> which perforce requires a treaty, must have had its influence. As O'Connell has pointed out, treaty law has also had an influence on the employment of naval force.

The final chapter, "Navies and the New Ocean Order," concludes that the new ocean order—whether based on convention or consensus through new customary norms—"is bound to create some difficulties for naval operations." The old regime was based on freedom of the seas "suited for the mobility of powerful navies." The new norms for the oceans will follow a theme of restricted use. "The navies of the world will not only be called upon to respect new national regional and international maritime laws, but sometimes [will be] expected to help establish rules in times of conflict and uncertainty." Janis views the United States and the Soviet Union, more than the lesser naval powers, as facing the great dilemma (or frustration) of possessing relatively overwhelming naval force in an era of decreased high seas mobility due to the new restrictive international norms. O'Connell would agree with Janis that "the law of the sea . . . dictates the practicalities of [the] deployment of sea power," and that the professional insights of the naval officer who is aware of the law, and the lawyer who understands what goes on inside warships, must be the result of a continuing dialogue.<sup>6</sup> O'Connell would also inject the developing technology of navies as an active factor in self-defense, permitted under international law, contrasted with Janis' apparent conclusion that the new norms may serve as only a cramp on the style of the mobile navy. More importantly, O'Connell would urge the world's naval staffs (and, this writer would add, decisionmakers at the national policy level) to take the predicted trends that have been postulated and plan

accordingly, including “machinery . . . for rapid appreciation of the legal issues and equally rapid reaction if the theory of self-defense is to be effectively translated into terms of sea power.”<sup>7</sup>

**A Comprehensive Approach to the Law of the Sea and Seapower.** Janis’ monograph is an excellent linear study of the relationship of seapower and the law of the sea, particularly in the situation of peacetime norms. However, a law-oriented study of the problem would demand a more comprehensive approach, both as to sources for norms and the theoretical foundations of international law.

While his fifth chapter does justice to two traditional sources of international law, treaties and custom, inexplicably he omits reference to general principles of law recognized by civilized nations, and the subsidiary sources of judicial decisions and the “teachings of the most highly qualified publicists of the various nations.” To be sure, these sources may not be as clear-cut or as persuasive as treaties or custom, but such national court decisions as *Pacquet Habana*<sup>8</sup> or *Schooner Exchange v. McFadden*<sup>9</sup> have had great influence on the development of international law.

Similarly, writers such as Hugo Grotius, John Bassett Moore, Myres S. McDougal, or Grigori Ivanovich Tunkin, are frequently cited. Janis often refers to these writers, but he does not list them as a source. The perspective of any author in international law should be considered as well; compare the widely varying approaches of Professor Ian Brownlie or Lord McNair,<sup>10</sup> representing the traditional British and European school in style or in thought; the views of jurists from emerging nations such as Judge Roy,<sup>11</sup> who see a larger community of law and legal institutions; the input of great regional scholars such as Judge Alvarez and Carlos Calvo,<sup>12</sup> who reflect the perspectives of Latin America; the Soviet approach to international law issues, as, for example, G.I. Tunkin’s concept of the relationship of law and the Communist revolution;<sup>13</sup> or the policy science approach of Professor Myres S. McDougal. Janis has treated Soviet perspectives on international law elsewhere, with specific reference to Admiral Gorshkov’s works,<sup>14</sup> but articulation of these perspectives might have explained the theory behind the pronouncements.

Janis’ monograph relies heavily on conventions among states, the preparatory work for such treaties, the debates of international organizations and conferences (which may or may not be part of the *travaux préparatoires*—preparatory work, or “legislative history” as American lawyers would put it—of treaties), and customary international law. However, nowhere does the author note the important distinction between treaties among nations and binding as to them and the important use of families of treaties as general evidence of customary international law. The great division of authority on the proper use of *travaux préparatoires* is not developed. The importance of the Truman Proclamation,

asserting jurisdiction over the continental shelf adjacent to the United States, and the Latin American States' claims for a wide fishing zone, could have been tied to a generally recognized source for customary international law that he would urge for the world's navies, namely, practice among nations. Some discussion of national attitudes about law and sources of the law would have been a useful addition to the study.

A comprehensive examination of law of the sea issues should also explore the problem in its total context. Viewed in its largest geographic scope, the law of the sea includes the land, the sea and its tributary waters, the seabed, airspace and outer space. Each of these geographic features is interrelated with the others, and the legal regime of the sea and the seabed cannot be properly considered without a thought for the other geographic arenas. For example, what does it profit a nation to demand a 3, 6 or 12-mile limit for purposes of coastline security if its adversary can collect all the data it needs by reconnaissance satellite in violation of the Convention on Peaceful Uses for Outer Space? The naval commander's judge advocate must have an appreciation of the circumstances that would permit destruction of such satellites. Air operations are a major factor in naval power today, yet there was little integration of what rules there are for air warfare and for peaceful use of airspace. Janis' scope is peacetime use of the oceans; however, the law of armed conflict—also a part of international law—has important norms binding on nations, particularly in a projection context:<sup>15</sup> rights of fishing vessels, rights of merchant ships, submarine cable protection, mine warfare and blockade, the rights of belligerent vessels in neutral ports, hospital ships, the rights of disadvantaged persons involved in naval operations (the wounded and shipwrecked at sea, civilians, and prisoners of war), and so on. Janis might have mentioned the Nuclear Non-Proliferation Treaty, the Antarctic Treaty, or the Latin American nuclear free zone both for their possible impact on oceanic law problems and as part of the trend relative to peaceful uses of the deep seabed.

Janis has recognized the connection between the peacetime uses of the sea, the usual context the LOS negotiations contemplate, and the different factors at work during war,<sup>16</sup> but he does not so state in *Sea Power*. Assuming that the scope is to be limited to peacetime naval operations, or to cold war confrontations, discussion of the United States-U.S.S.R. Agreement on Incidents at Sea, conventions on the international rules of the road, mercantile agreements that indicate policy shifts as important as those in the LOS negotiations, and the welter of environmental treaties and national legislation,<sup>17</sup> would have placed the evolving oceanic law in deeper perspective. Finally, the naval officer—be he line commander or judge advocate—must be aware of the ever-present factors of national criminal statutes that limit or prescribe conduct on the oceans, his own code for military discipline, and his navy's general regulations that may have the force of law. To be sure, these sources are usually considered in the context of individual responsibilities, but fleet commanders also risk indictment or charges

preferred for participation in piracy, hazarding vessels, or disobedience of lawful regulations and orders, for example.

Thus while his study is valuable as written for a monograph on the role of naval power and current trends in the Law of the Sea Conference negotiations, a broader perspective would have resulted in a more comprehensive analysis. The product would have been a weightier, and therefore perhaps less attractive book for many readers. Sea lawyers will be happier with *Sea Power* as it is, to be sure. For the professional military man who is not a lawyer, these comments are not published to denigrate a fine monograph, but to apprise him of the need to probe more deeply, perhaps with the aid of his judge advocate, for more definitive answers to very complex issues.

Time will provide an additional gap in the coverage of *Sea Power* as the law of the sea continues to develop along certain established lines and perhaps with some of the new inputs discussed above. Already, the *Informal Consolidated Negotiating Text* has emerged from the Law of the Sea Conference to supplant the *Revised Single Negotiating Text* relied on by Janis. The accelerating pace of legal developments should prompt text publishers in this area, as in others, to adopt the military services' use of looseleaf, ring-binder formats for easy insertion of changes rather than the traditional hard-cover binding.

**A Policy Science Approach to Problems of the Law of the Sea.** At least one great configurative, multidimensional policy science study of the law of the sea has been written,<sup>18</sup> and others are no doubt on the way or in print. McDougal and his Yale associates took over a thousand pages to consider *The Public Order of the Oceans* under this method, compared with the 109 pages of *Sea Power*. Even explanations of the policy science approach to problem solving have been lengthy. The scholarship in this field has been extensive. The policy science approach is, of course, not the only school of jurisprudence,<sup>19</sup> but it may be unique in its theory about law in the social process, as distinguished from theories of law as an entity unto itself, to be studied in a vacuum. The policy science model is, of course, not the only relatively new method for examining complicated issues and is only one of many innovative processes of informed decision-making. Among the more familiar for the military commander are systems analysis and game theory, often based on economics or numbers. Others include economic analysis, decision analysis, and cost-benefit analysis, often computer-supported. Even as such models may "offer the basis for an improved explanation of happenings in international politics,"<sup>20</sup> the policy-science schema may help the decisionmaker in placing law and its role in context. These complex analytical tools are not necessary for simple decisions, and there are the problems of keeping the study realistic and the terminology understandable. However, use of a new or metalanguage, as with the employment of Latin terms by doctors or lawyers by providing agreed meanings, may promote clarity.

**Effective Power Process.** This part of the article will sketch the policy science model and will place Janis' book, and other recent studies related to oceanic law, in that context to illustrate how the system works and its potential usefulness for the naval decisionmaker, be he professional military man or legal specialist. Concentration will be made on the effective power process, as distinguished from the larger social process model. References, except to the recent studies reviewed in this article and occasionally, to policy science materials, will be minimal, but the reader's attention is invited to the more comprehensive analyses available elsewhere, upon which this section of the article is based.<sup>21</sup>

**Social Process.** Policy scientists begin their consideration of problems in the context of the social process, that ongoing interaction of persons and other participants (nations, navies, etc.) in an increasingly interdependent series of communities, starting with a world community and working down through a series of the interlocked, interdependent and interacting communities (regional organizations such as NATO, the EEC, etc.; nations, state and local governments) to the smallest (the family or the tribe). The social process may be divided into eight value processes: power, the giving and receiving of support in government, politics, and law; wealth, the production and distribution of goods and services, and consumption; enlightenment, the gathering, processing and dissemination of information; skill, the opportunity to acquire and exercise capability in vocation, professions and other social activities; well-being, synonymous with safety, health and comfort; affection, personal intimacy, friendship and loyalty; respect, personal or ascriptive recognition or worth; rectitude, participation in forming and applying norms or responsible conduct. Through the methodology of claim, participants (individuals, navies, nations) act in various ways to optimize these values as goals through various institutions that affect resources (often known as "base values," "base" being employed in the same sense of source of resources as the original connotation of "naval base"). These eight value processes "have no magical quality and are chosen for their convenience in [the] analysis of [the] social process."<sup>22</sup> To put theory into realities for the naval commander: Morale is a constant problem and a sought-after goal aboard ship. Examined in the policy-science context, values for enhancing morale might include: proper administrative or disciplinary measures to punish shipboard theft as corrosive of morale (power); encouragement of advancement through successful completion of rate examinations, thereby increasing sailors' pay and prestige (wealth, enlightenment, respect); ordering men to leadership school (enlightenment, skill, rectitude); encouraging leave and liberty, commensurate with the needs of the service (well-being in the sense of improved mental health from a "change of pace"); affection, developed, through renewal of shoreside friendships.

These goals are, of course, achieved through a continuum of time, space and other dimensions known to policy scientists as phase analysis, which will be

reviewed later in this article. Law, as part of the effective power process (as distinguished from naked power, or the assertion of authority by sheer expediency or brute force), is seen as the flow of authoritative and controlling decision. Put other ways, law is the comprehensive process of authoritative decision, or the constitutive process, in which rules are continuously made and remade. The functions of rules of law are to communicate the perspectives (demands, identifications and expectations) of people in communities about this comprehensive process of decision. The rational application of these rules in particular instances requires their interpretation, as with any other communication, in terms of who is using them, with respect to whom, for what purposes, and in which contexts. Law is seen, then, as the proper result of the power process; but to a policy scientist law must be viewed in the broader context of other values—for example, law (as commonly understood by laymen) must be considered in relation to the “laws” of wealth or economics (also as commonly understood by the layman). Furthermore, the functioning of the effective power process, or law, must be considered against a background of interdependent nations and other communities. “No State has complete freedom of effective choice today. We are all scorpions in the same bottle.”<sup>23</sup>

Janis’ study does not explicitly adopt a policy science approach. He does recognize this interactive process indirectly by his reference to McDougal and Burke’s *Public Order of the Oceans* in Chapter 6, and in his introductory declaration that “[t]he law of the sea is in the midst of turmoil.” Regrettably, he does not postulate a definition of “the law of the sea,” although he is careful to define seapower as “force and threat of force on the oceans.” It would appear, however, from close examination of the book and its sources that he goes at least halfway toward the policy scientist’s contextual treatment of law within the social process. Citation of U.N. General Assembly resolutions (not considered “law” by traditional writers), preparatory works of conventions (not approved by some scholars as bases for interpretation of treaties except in specific circumstances), and the inclusion of various pressure groups’ attitudes, i.e., the U.S. maritime industries’ positions on law of the sea issues), point toward Janis’ unarticulated employment of policy scientists’ phase analysis.

**Phase Analysis.** Phase analysis is a breakdown of law as the comprehensive process of authoritative decision into component elements and sequences, even as the careful military commander plans an operation with explicit reference to timing, units of friendly and enemy forces involved, and so on. The policy scientist’s phase analysis includes six or seven descriptive reference points: (1) participants (who interacts, from individuals through nations and the world community as a whole); (2) perspectives (how a participant views a problem, i.e., as a neutral, detached observer or as an advocate of a point); (3) situations (the physical circumstances of an interaction, which include geographic features (a

river being a more perceptible boundary, for example, than the territorial sea's limit); the place of the interaction on a time continuum; institutionalization, or the degree of organization in which interactions occur (the current "turmoil" over the law of the sea perhaps being an example); and crisis level, which may generate different expectations under varying intensities of crisis;<sup>24</sup> (4) base or resource values—power, skill, enlightenment, wealth, respect, rectitude, affection, and well-being—that participants have at their command for achievement of desired ends in the legal process; (5) strategies—coercive or persuasive modalities through diplomacy, ideology, economics, or military force—for the manipulation of base values to achieve denied goals; (6) outcomes and (7) effects, short and long-term results of the process of interaction.

Janis obliquely employs a similar but not as comprehensive analysis. With respect to his chapter on the United States, for example, he lists the almost bewildering cast of actors involved in decisions on the ocean policy process: the executive branch, Congress, non-governmental institutions, and their components. Curiously, reference to the federal judiciary with its capacity to fashion a federal common law to promote uniform international law norms,<sup>25</sup> or to interpret the U.S. Constitution and the federal statutes and treaties that are the supreme law of the land,<sup>26</sup> was omitted. Perspectives of the actors—from what viewpoints the participants speak—are indicated by inference, particularly in the chapter on the U.S. Navy. In this regard, Booth's more general analysis of the "players" and their characteristic perspectives should also be consulted. The geographic situations at stake—straits passage, width of the territorial sea, and deep seabed interests—are one of the central themes of the book. However, as indicated above, discussion of other dimensions of the geographic planes of the oceans as embedded in international law norms other than the law of the sea negotiations is limited. Power resources—particularly the strengths of the world's navies and equivalent of the U.S. Coast Guard—are given careful attention by Janis, but he does not discuss other important power variables such as the impact on deterrence decisionmaking of the other two legs of the Triad, land-based ICBMs and the Strategic Air Command, not to mention Army and Marine Corps forces that would be involved in the projection phase of any naval operation. The important factors of national wealth and the levels of readiness (skills) and training (enlightenment) are mentioned, but there is little attention given to those often untangible, but nevertheless real, resources of respect, affection, etc.<sup>27</sup>

The strategy of military coercion or suasion is a great theme of *Sea Power*, which recognizes by implication strategies of diplomacy, (the LOS negotiations), economics (claims of the U.S. fishing industry), and ideology (implicit in Adm. S.G. Gorshkov's description of the U.S. Navy as "an instrument of imperialist policy"). The distinction between coercive strategy using military force, and persuasive military strategies, recognized by Cable and Luttwak, albeit with different terminology, would have sharpened the focus of inquiry. A similar

demarcation between coercive and persuasive economic, diplomatic and ideological strategies would have been helpful. Booth's chapter on "The Function of Navies," with its triangular diagram of navies' diplomatic, military and policing roles, is perhaps the best illustration of the use of naval power (a resource) as a diplomatic or military instrument. His policy objectives of prestige, and standing demonstrations of naval power in distant waters as part of the manipulation objective, would be seen as ideological strategies by the policy scientist. He says little about navies' use in economic strategy, except under the policing policy objectives of resource enjoyment and contribution to internal development. If Booth had not limited his work to navies and naval affairs, doubtless he would have expanded on economic aspects of maritime strategy. His succeeding chapters develop these strategies and their interrelationships. There is a big difference, for example, between a persuasive economic strategy founded on subsidizing the U.S. merchant marine so that it can compete with foreign rivals and civil penalties, criminal fines and forfeitures, or restrictions on fishing and importation of illegally caught fish under the Fishery Conservation and Management Act of 1976. Outcomes and effects, the results of the interactive process, are of course dependent on the quality of treatment of the phases that precede them. Although not articulated as such, *Sea Power* does recognize that the oceans decision process has products—e.g., the Fishery Conservation and Management Act, or the demise of the 3-mile limit—that are the result of this complex interrelated and interdependent process.

**Authority Functions.** The policy scientist also perceives the threads of seven authority functions within the legal process:

intelligence-gathering, the obtaining and supplying of information to the decision maker; promotion, the recommendations of policy; prescription, the promulgation of norms—as in legislation; invocation, the provisional application of a prescription—as by a grand jury indictment; application, the final application of a prescription—as by an appellate decision; termination, the ending of a prescription; and appraisal, the evaluation of the degree of policy realization achieved.<sup>28</sup>

The Fishery Conservation and Management Act is an apt illustration. Regional fishery management councils, established by the Act, must prepare fishery management plans that must contain descriptive data and may contain catch limits and permit requirements. This illustrates the intelligence-gathering function. The promotion function begins when the Secretary of Commerce reviews and approves the plan, thereby promoting its policies. The prescription function is completed when the Secretary publishes the plan in the *Federal Register*, the official daily gazette of the U.S. Government. Invocation would occur when an authorized officer issues a citation, arrests anyone, or seizes fishing vessels or fish, subject to later trial of the case. The application function would occur when the

federal district courts try the case subject to appeal. Termination of a prescribed rule under the Act might occur when a new law of the sea treaty is ratified by the United States. The appraisal function of the Act includes reports by the Secretary of Commerce to Congress and the President, research, and reports by the fisheries councils to the Secretary. *Sea Power* was not written in a law-science-policy format, and hence has little explicit reference to the authority functions. Primary attention has been given to the intelligence, promotion, prescription and appraisal functions as Janis describes the background and development of the LOS negotiations.

**The Decision Process.** Having completed this comprehensive matrix for describing the interaction of values in the context of phase analysis and authority functions, the policy scientist would proceed to the decision process, consisting of five steps or “intellectual tasks”: (1) clarification of goals; (2) description of past trends; (3) analysis of conditions affecting those past trends; (4) projection of future trends, and (5) evaluation of policy alternatives. As Professor Moore has correctly observed, “These tasks are performed by all of us, implicitly or explicitly, when we make any decision.”<sup>29</sup> With addition of feedback loops, this general process is found in all decisionmaking models. The basic military planning process employs similar methodology. *Sea Power* does state the goals or missions of the world’s principal navies as articulated by their admirals. Should these be goals for the law of the sea as a whole, and should not a broader goal—national as coinciding with the general international ideals of the U.N. Charter perhaps reduced to a preference for human dignity—have been stated as the core ideal from which other subgoals descend and depend? Nearly all nations mentioned in *Sea Power* are parties to the U.N. Charter and therefore must be held accountable to its principles and purposes. Even if the analysis considers only the goals of armed forces or navies as the relevant focus, a generalized classification such as that employed by Booth might have been more comprehensive:

- (1) Projection of force functions
  - (i) General war
  - (ii) Conventional wars
  - (iii) Limited wars and interventions
  - (iv) Guerrilla wars
- (2) Balance of power functions
  - (v) Strategic nuclear deterrence
  - (vi) Conventional deterrence and defence
  - (vii) Extended deterrence and defence
  - (viii) International order
- (3) Diplomatic functions
  - (ix) Negotiating from strength
  - (x) Manipulation

- (xi) International prestige
- (4) Domestic functions
  - (xii) Border/coastguard responsibilities
  - (xiii) Nation-building

As Booth points out, such a classification “can only provide a guide and perspective for the specific analyses[,] . . . the ultimate aim when assessing such a subjective and contextual concept as utility.”<sup>30</sup> These goals, or value preferences, are usually socially derived and are therefore strongly influenced by current conventional values. It would therefore behoove the military decisionmaker to attempt to approximate widely accepted societal ideas, beliefs, and goals (often crystallized with positive law or statements such as the U.N. Charter Preamble) as he postulates his goals and subgoals within the military decision process. Perhaps this is one reason why the Vietnam War “went wrong,” in the view of some.

Immediate past trends, and conditions affecting those trends, are described by Janis in the context of the 1958 law of the sea treaties and developments through 1975. A look at deep-rooted past trends, such as those behind the traditional 3-mile limit, and reasons for such trends, might have underscored his thesis as to the role navies and naval power may play in developing the law of the sea. Janis projects certain future trends, recites policy alternatives, and evaluates these alternatives in the light of their impact on the world’s principal navies. Courses are charted “for the reconciliation of naval interests in the new international ocean order,” but his preferred choice is not stated.

**Conclusions.** As Professor Knight has observed, there are at least three schools of thought on the role of international law in national security policymaking:

International law is a “pious fraud” and should have no effect whatever on the making of national security policy.

International law should be considered as one among many relevant factors in determining national security policy.

International law should be regarded as absolutely binding on the United states and determinative of all national security policy decisions.<sup>31</sup>

None of the authorities reviewed in this article, and particularly Janis’ fine monograph, would adhere to the “pious fraud” view. The difference between the “absolutely binding” approach and the “among factors” theory is an issue of perspective and breadth of approach. Any good lawyer will say that you must obey the law. Janis would not quarrel with this; he is concerned with how some of the law of the sea came to be, the influencing factors on this law, and factors that can (or should) influence its development. He does omit certain sources and substantive parts of the law, and both the lawyer and the professional military man should be aware of this book’s lack of a configurative legal approach. To

have done so would have required a treatise at least the size of Colombos' *International Law of the Sea* (over 850 pages of text). The policy scientist, and those engaged in other broad-based, multidisciplinary examinations of the problem of ocean space, would assert that international law is but one influential factor in the oceans policy process. The policy scientist would say that international law is but the outcome of the effective power process, only one aspect of the total social process. The policy scientist would therefore include those holding international law to be "absolutely binding" as part of a larger, more complex, configurative matrix. Booth recognizes the complex relationship between navies and foreign policy; the policy scientist insists that there is an equally complex relationship between policy, one outcome of which is law (a factor that must also be considered) and naval force, one aspect of military strategy, which has as its alternatives diplomacy, economics and ideology. Booth has carefully limited his book to a focus on navies and naval affairs and not maritime affairs. *Sea Power* would supply part of the mosaic for effective decisionmaking under this concept, and thus represents a valuable increment to the field from the policy science viewpoint.

Even with these limitations, Janis has produced a fine book that should be of immediate assistance to the naval officer or the military lawyer who grapples with these complex problems of the law of the sea. Its quality gives promise of excellent contributions to future scholarship from the author. It would be hoped, however, that this article has reemphasized the complex nature of the "troubled common" of the altered ocean environment, whether seen from the aspect of the military commander, the lawyer, or the policy scientist. Not many military commanders can or should make policy or practice law; not many lawyers can or should make policy or wage war; not many policy scientists or decision theorists wage war or practice law. All three disciplines, and other professions as well can, however, learn from the processes of the others and appreciate the multifaceted issues of seapower and ocean law in the United States' third century. It is hoped, however, that the lawyers, analysts, policy scientists and concerned military officers will pool resources to assist governments in evolving a workable law of the sea, based on sound policies, for the new order of the oceans.

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### Notes

1. Kenney, *A Primer on S.G. Gorshkov's Sea Power of the State*, *Naval War College Review* 94 (Spring 1977).
2. Mr. Janis, a Princeton graduate and a Rhodes Scholar at Oxford University where he received the B.A. and M.A. in jurisprudence, taught international law and relations at the Naval Postgraduate School as a Naval Reserve officer, received his J.D. degree at the Harvard Law School and is now an associate of the New York law firm of Sullivan & Cromwell.
3. To be sure, the distinction between passage of merchant ships and warships through straits was drawn, but there is no comparison of size of major maritime carriers as was done for the four great powers.
4. MCDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS* (1962).

5. WESTCOTT, MAHAN ON NAVAL WARFARE 285-90 (1941). Mahan's opponent was Elihu Root, prominent New York lawyer, Secretary of State, and a founder of the American Society of International Law.
6. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 189 (1975).
7. *Id.*
8. 175 U.S. 677 (1900). (International custom)
9. 11 U.S. (5 Cranch) 116 (1812). (Sovereign immunity)
10. BROWNLE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2nd ed. 1973) and THE LAW OF TREATIES (1961).
11. Roy, *Is the Law of Responsibility of States for Inquiries to Aliens a Part of Universal International Law?* Am. J. Int'l L. 863, 881-83 (1961).
12. See the dissenting opinion of Judge Alvarez in the Asylum Case (Colombia v. Peru), [1951] 1 C.J. Report, pp. 266, 290. The "Calvo Clause," frequently found in international concession agreements with Latin American nations, states that a foreigner doing business there is entitled only to nondiscriminatory treatment; he consents to be treated only as the host state's nationals are treated. The foreign investor agrees not to seek the diplomatic protection of his own nation and submits questions arising from the agreement to local jurisdiction.
13. TUNKIN, THEORY OF INTERNATIONAL LAW (Butler trans. 1974). For a historical perspective on Russian attitudes toward international law, see BUTLER, THE SOVIET UNION AND THE LAW OF THE SEA 3-16 (1971).
14. Janis, *The Soviet Navy and Ocean Law*, Naval War College Review 52 (March-April 1974).
15. Ken Booth recognizes this role of navies, albeit in a foreign policy/naval affairs, nonlaw context.
16. See Janis, *Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception*, 4, no. 1, Ocean Devel. & Int'l L. 51.
17. Three collections of treaties and national legislation and regulations in this vast and rapidly expanding field are: Bureau of National Affairs, *International Environment Guide* (1975). BARROS & JOHNSTON, THE INTERNATIONAL LAW OF POLLUTION (1974), and BENEDICT, THE AMERICAN ADMIRALTY: ITS JURISDICTION AND PRACTICE (7th ed. 1973), the last containing treaties and legislation related to all maritime matters.
18. *Supra* n. 4.
19. The major schools of jurisprudence see law as: a positive command ("Positivism") from the sovereign, a prevailing concept in Anglo-American legal philosophy developed in the 19th century by John Austin, a former British Army officer; natural law, which viewed law as pointing to an ideal for the future, and which still finds currency among scholars, although it was in popular vogue in the 18th century and influenced internationalists such as Hugo Grotius or thinkers such as Thomas Jefferson, principal author of the United States' Declaration of Independence; legal realism or sociological jurisprudence, developed in this century to attempt to explain law in the context of the social sciences, a familiar exponent being Justice Oliver Wendell Holmes; the historical school, seeing law in the context of the historical development of a people, a philosophy primarily advanced by German thinkers; the Communist approach. This brief sketch is a vast overgeneralization, but is included to note the variety of theories involving law, even as there are many, and often conflicting, theories about military strategy and policy or military operations.
20. BOOTH, NAVIES AND FOREIGN POLICY 136 (1977).
21. Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 Yale Studies in World Public Order 3, note 1 and p. 5, note 2 (1974); Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 Va. L. Rev. (1968), 186, p. 664, note 3 and p. 665, note 4.
22. Moore, *supra* n. 21 at 669.
23. McDougal, *Authority to Use Force on the High Seas*, 20 Naval War College Review (December 1967).
24. See Bathurst, *Crisis Mentality: A Problem in Cultural Relativity*, Naval War College Review 55 (January-February 1974) and Piersall, *An Analysis of Crisis Decision-Making* (Center for Naval Analyses Professional Paper No. 41, 1970).
25. See WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 281 (3rd ed. 1976).
26. U.S. Constitution, art. VI, section. For the classic example of how a treaty may validly regulate activity that an act of Congress may not, see *Missouri v. Holland*, 252 U.S. 416 (1920).
27. Compare Booth's recognition of the "interconnectedness" of land, sea and air forces. Booth, *supra* n. 20 at 188-189.
28. Moore, *supra* n. 21 at 671.
29. *Id.* at 672.
30. BOOTH, *supra* n. 20 at 224.
31. Knight, *The Law of the Sea and Naval Missions*, U.S. Nav. Inst. Proc. 32 (June 1977). The article is a good survey of current law of the sea problems, arranged by legal issue, and urges that the United States "take all measures necessary to ensure that future legal developments concerning the use of ocean shore do not unacceptably retard [its] ability to carry out traditional and prospective missions of [its] naval forces," including setting precedents for rights of navigation before a crisis arises.



# Chapter 5

## Law of the Sea\*

Elliot L. Richardson

(From an address to the students of the Naval War College, February 16, 1979.)

**T**his presentation is intended to discuss where the Law of the Sea Conference now stands. Because your bases of information are so varied, some basic background is in order. The United Nations Conference on the Law of the Sea that is now underway began in 1974. It is the third U.N. Conference on the Law of the Sea; the first in 1958 developed several conventions, one of the most important of which is the Convention on the Continental Shelf; the second one in 1960 attempted to deal with the high seas and territorial waters, and ended in failure when agreement on a 12-mile territorial sea failed by one vote. The present one began out of the realization that there needed to be comprehensive extension and revision of customary international law to accommodate a series of developments that had been emerging and gaining force over a decade or more.

There were in the first place a number of technological developments that had to be recognized; for one thing, the advancement of technology involved in drilling in deep water in the Continental Shelf. This presented a problem, partly because the Continental Shelf Convention of 1958 adopted an exploitability test to define the outer limits of national jurisdiction. A nation's jurisdiction over the shelf under that convention extends as far as technological capacity permits the exploitation of the resources of the shelf. And that, of course, has meant that the boundary has been extending progressively seaward as technological capacity has evolved. But in the meanwhile it also had become apparent that it was only a matter of time until the capacity would also exist to mine the resources of the deep seabed. These are, for the foreseeable future, resources of manganese nodules originally discovered by H.M.S. *Challenger* over 100 years ago. These black, potato-sized objects, found at depths of 14,000 feet to over 20,000 feet on the bottom of the ocean around most of the world, are valuable because they contain significant quantities of nickel, copper, cobalt, and manganese. Devices were under development that could pick nodules up from the sediment where they lay, pump them to the surface, and extract the minerals.

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Because the question of management and control of these resources requires definition of the area in which such control would be exercised, it became necessary to define the boundary between national jurisdiction over the shelf and international jurisdiction over the seabed. In the meanwhile there had been increasing pressure on the ocean environment with the threat that unless effective international cooperation could be achieved, the living resources of the ocean could be subject to irreparable damage.

Coastal states in various ways were beginning to feel pressure on the protein resources within their coastal waters, and there is no more dramatic example of this than the virtual destruction of some fishery stocks on Georges Bank off Cape Cod as the result of overfishing, largely by Soviet vessels. But other countries also felt that the need for some form of management and control over these fishery stocks required the extension of coastal States' jurisdiction. As much as 30 years ago a few countries in South America proclaimed coastal State jurisdiction through the extension of the territorial sea out to 200 miles. From the standpoint of freedom of navigation and overflight there was the risk that other countries would follow suit, thereby, if not denying, at least creating very serious complications for freedom of navigation and overflight within the 200-mile zone. There was agreement that control over the problems of pollution as well as fisheries required the updating of the ancient definition of the territorial sea by extending it from 3 miles to 12. A consequence of this, in turn, would be that some 115 straits around the world would be overlapped by territorial seas.

As is commonly known, the legal provisions governing navigation and overflight over a territorial sea are defined in terms of "innocent passage." Innocent passage means, in effect, that vessels transiting the territorial sea must do so expeditiously and without engaging in any such activity as military exercises or fishing. But innocent passage does not embrace the submerged passage of submarines nor does it include any right of overflight. The overlapping of straits, therefore, could result in the denial of any legal right for a submerged submarine to enter the Mediterranean through the Strait of Gibraltar or to travel submerged through any other major strait, like the Strait of Malacca or the Strait of Lombok. Some 30 percent of the ocean area could be denied freedom of navigation and overflight if jurisdiction over the 200-mile zone for the protection of fisheries and other resources also carried with it the legal consequence that such waters were regarded as territorial waters rather than waters subject to high-seas freedoms. This extension of coastal State jurisdiction also could present problems for the free conduct of maritime scientific research, and that has in fact been one of the concerns of the Conference.

It was recognized that because of the problems that would inevitably arise in the application of broad new regimes, there needed to be established a system of binding dispute settlement. The text now before the Conference would, if

adopted, be the first major treaty to incorporate a comprehensive system of such settlement.

We now have before us, following the Seventh Session of the Conference, which took place in two stages during 1978 (8 weeks in Geneva and 4 weeks in New York), a document known as the Informal Composite Negotiating Text (ICNT). It is called a *negotiating* text because it has never been formally negotiated. It is called a *composite* negotiating text because at the end of the Sixth Session, in 1977, the separate negotiating texts that had up to that point been developed by the committee chairmen were brought together in a single document. It is called *informal* because all of the negotiations that have taken place up to now have sought consensus; there have been no formal proceedings of the Conference and no votes under the rule calling for affirmative action by a two-thirds majority vote. And it will only be when the Informal Composite Negotiating Text has gone through a new edition and has then been adopted as a draft treaty that we will for the first time begin to proceed formally.

It remains to be seen whether the Conference will ever achieve that stage. On the one side, the overwhelming majority of all issues has been resolved. Perhaps 90 percent of the some 400 articles and 200 pages of text are now the subject of broad consensus. Within that consensus are almost all of the provisions that vitally affect navigation and overflight. But before discussing those provisions, some of the unresolved issues should be mentioned.

Putting aside for the moment the problem of deep-seabed mining, four major issues have been the subject of negotiation in specially constituted negotiating groups since the spring of 1978. One group has been charged with the question of how to accommodate the interests of the landlocked and geographically disadvantaged States (LL/GDS) that have been excluded from participation in fisheries beyond 3 miles and inside 200 miles by the achievement of consensus on the establishment of 200-mile economic zones or fishery zones. The landlocked among the LL/GDS also have had concerns with transit over the territory of States lying between themselves and the sea. These questions have now come close to the point of as good an accommodation as it is reasonable to hope for between the competing interests of the LL/GDS on the one side and the coastal States on the other.

A second negotiating group has been concerned with problems of dispute settlement with respect to access to fisheries in the exclusive economic zone by third countries; issues, for example, with respect to the fairness and the substantiality of the basis upon which coastal States have determined what is the optimum sustainable yield of a particular fisheries stock. On that, in turn, depends the share of the fishery that the coastal State itself can exploit effectively and thus the surplus that is available for allocation among other countries.

A third negotiating group has been concerned with an issue I've touched on already—the definition of the outer limits of the Continental Shelf. Here we

have three competing options: one, put forward mainly by the Arab countries, would limit coastal States' jurisdiction to the same boundary as the exclusive economic zone—that is, 200 miles. A second, proposed by the Soviet Union, would establish a fixed mileage limitation of 300 miles, or perhaps more, from the baseline near the shore, but in any case, some definite and relatively easy ascertainable limit. The third approach is one advocated by the broad-margin States, mainly Great Britain, Ireland, Norway, Canada, Australia, New Zealand, India, and Argentina—the so-called Irish formula. Under the Irish formula there would be applied a sediment test—that is, a measurement of the depth of the sediment overlying the rock stratum beneath. The Irish formula, believe it or not, provides that the limit of a coastal States' jurisdiction is the point at which the depth of the sediment is 1 percent of the distance from the foot of the continental slope! And on the determination of this point, of course, turns jurisdiction over many billions of dollars worth of hydrocarbons.

The fourth of these four nonseabed mining negotiating groups is concerned with dispute settlement with respect to the boundaries of the exclusive economic zone and the Continental Shelf between opposite and adjacent States. Here the main competing doctrines are those of equidistance and the recognition of so-called "equitable principles." For every country that benefits from the application of the principle of equidistance, there is an equal and opposite country that would benefit from equitable principles. For example, equidistance applied without qualification would give Canada quite a lot of Georges Bank, although Georges Bank lies east and somewhat south of Cape Cod. It came as a great surprise to the fishermen of New Bedford that grounds they have traditionally fished upon might turn out to belong in considerable part to Canada. So at least with respect to that dispute, the United States is an advocate of equitable principles.

There were, as of early 1978, two other major concerns not embraced within these four negotiating groups in which the United States has a particular interest: one is in protection against marine pollution, and we were able to gain some significant improvements in those provisions of the text in the two negotiating sessions in 1978 (with the help in part of the *Amoco Cadiz* disaster, which once again illustrates the proposition that it's an ill wind that doesn't blow some good). The other major outstanding concern for the United States not embraced in any present negotiating group, but falling within the jurisdiction of Committee Three of the Conference, is the text on marine scientific research. There we are trying to offset some of the negative effects of a text that establishes a consent regime for the conduct of scientific research within the 200-mile zone and the coastal State's jurisdiction over the Continental Shelf. We have, in the meanwhile, worked hard for some improvement of the language dealing with the protection of marine mammals.

Turning now to seabed mining, we have a host of difficult and unresolved issues. Whereas in the case of navigation, overflight, innocent passage, transit through straits, etc., the Conference has been dealing with the codification, evolution, and adaptation of customary international law, in the case of seabed mining we have been seeking to draft a constitution for a new kind of international organization. This organization would have responsibility for access to and management and control over the resources represented by the manganese nodules. This management and control would be exercised by an International Seabed Authority with two governing bodies: an Assembly in which all members would be represented on a one-nation, one-vote basis and a Council, a smaller body, in which there would be representation of such particularly concerned interests as the seabed miners, major consumers of the metals involved, and the land-based producers of those metals who are concerned by the potential damage to their economies resulting from competition by seabed mining.

We still face exceedingly difficult problems with respect to how these interests will be represented and how votes will be taken in the Council. There are problems with respect to the creation of an operating entity for the International Seabed Authority that will be called "The Enterprise." The Enterprise will in effect be an international corporation created to conduct seabed mining. There have been problems of how it would be financed and how it would acquire the necessary technology to engage in seabed mining. The land-based producers have been able to persuade the Conference that they need the protection of a production ceiling on seabed mining, and that leads to a number of problems with respect to the availability of a sufficient number of contracts for seabed mining for member countries, and their State-sponsored entities, including private companies.

There are problems of how to fix the schedule of payments to be made by companies to the Authority in the form of initial fees, royalties, and profit-sharing. There are a great many other problems also raised by the necessity of creating a structure that can deal with all aspects of an entirely new, risky, and very expensive industry. It is estimated that a single seabed mining project will cost up to a billion dollars, including the costs of prospecting, exploration, and technological development as well as the construction of seabed-mining ships, transportation vessels, and shore-based processing facilities.

Here, more clearly than anywhere else in the Conference, we have a cleavage between north and south, developed and developing countries. The Group of 77, representing the developing countries, is seeking a maximum role for The Enterprise, and the industrial countries are insisting upon maximum opportunities for their companies to obtain contracts with the Authority and security of tenure under those contracts. The seabed-mining provisions of the treaty have tended to dominate public attention in the United States recently, although they

are only a part of the whole, and this part needs to be looked at in the context of the other interests at stake.

Because many of you are concerned with freedom of navigation for commercial and naval vessels and with freedom for aircraft to fly over straits and economic zones, I'd like now to describe more fully where the Conference stands on these subjects. With minor qualifications, these aspects of the proposed comprehensive treaty have been brought to the point of substantial consensus. In the case, for example, of the territorial sea, it has been agreed that it will be extended to 12 miles and that the problem of overlapping straits will be dealt with through a new regime of transit passage. This regime, in effect, will preserve the principal legal aspects of the high-seas passage that exists where there remains a high-seas lane between the 3-mile territorial seas on each side of the straits.

In the summer of 1977 we had intense negotiations over the issues of freedom of navigation and overflight in the 200-mile economic zone, and we now have a text which makes clear that the freedoms of navigation and overflight that apply within the 200-mile economic zone are the same freedoms of navigation and overflight that apply to the high seas beyond the 200-mile economic zone.

One more new concept that emerged early in the Conference is that of "archipelagic waters." Its meaning is that countries comprising a group of islands, such as the Philippines or Indonesia, would be allowed, in effect, to declare that the waters embraced by these islands are the equivalent of territorial seas. This, of course, would raise the same problems of freedom of navigation and overflight that the extension of territorial waters over straits would raise. Here it has been agreed that lanes open to free navigation and overflight will be established and defined by courses and distances from point to point through the archipelagic waters, with a permitted deviation of a certain number of miles on each side of the axis thus established.

The interests of the coastal States in establishing and enforcing marine environmental-protection measures have been carefully balanced against maritime interests in preventing the harassment of navigation. It has also been agreed that the application of binding dispute-settlement procedures would be subject to a military exception.

In general, the world has a vital interest in establishing the rule of law in all these respects, and observance of the rule of law has no greater importance for any affected group than it does for those of us who are charged with responsibility for the preservation of navigational freedoms. When it comes to the question of where ships and airplanes can legally go, it is important to have clear rules and thus be able to avoid the conflicts that could otherwise arise. The potential for conflict does more than poison good relations with the countries affected. It could also compel the allocation of resources to vindicate asserted rights in ways that would impair the availability of these resources for their primary purposes.

Besides that, I think we see today that the community of nations has reached a point at which the sense of independence and autonomy felt by many countries, perhaps all countries, is such that simply to be big and strong does not confer the power to act in disregard of the interests of smaller States. We no longer live in a world in which gunboat diplomacy is tolerated, and the establishment of a clear and accepted regime of the ocean that includes adequate recognition of maritime interests can help us to escape the necessity of choosing between accepting the undesirable restriction of navigational freedoms or asserting them only at the cost of the destruction of good relations and the charge of behaving like a bully.

It is, I think, impossible now to be confident that the Conference will succeed in resolving the remaining issues before it. I hope it can. Like most participants, I believe that the success of the Conference would make a major contribution to the rule of law. We also believe that this, perhaps the most ambitious negotiating effort ever undertaken by the world community, would, if successful, enormously strengthen confidence that complex problems cutting across national lines are capable of negotiated solutions. Conversely, the failure of the Conference would be a serious setback to this hope.

After a 3-week intersessional meeting early this year, negotiations resumed on 19 March. Many countries are increasingly feeling the strain of allocating top-level people to the Conference. The prospect that the United States and a few other countries may go forward with unilateral seabed mining legislation has also contributed to a sense of urgency toward bringing the work of the Conference to the earliest possible close. And though the intersessional meeting scored no dramatic gains, it was successful, nevertheless, in the somewhat ironic sense that it sharpened the remaining divergencies in a way that exposed the underlying economic realities with a minimum of ideological and political rhetoric. We have, in a sense, positioned ourselves for a major effort to see whether we can close the remaining gaps. I hope we can, and yet I cannot confidently predict it. For my own part, I find the effort exceedingly difficult, demanding, complex, and often frustrating, but I can assure you that it is never boring.

**Because the answers to questions following Ambassador Richardson's presentation cover points not raised in the address, they are included here.**

*Do you have any plans to go ahead with a treaty, to get it signed and to get agreement on 90 percent of the issues, even if you can't achieve consensus for such things as seabed mining and a few other points?*

From the standpoint of the United States and other major maritime countries, it would be of great benefit to be able to consolidate in a treaty the matters that

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I have already identified as subject to broad agreement. But the problem is that from the outset it was conceived that this Conference would seek to negotiate a package deal in which maritime interests were balanced against resource interests. Insofar as the developing countries, represented in the Group of 77, considered navigational interests as mainly of concern to the developed maritime and naval powers, they have continued to insist that their compensation for these concessions would have to take the form of agreement on a seabed-mining regime in which all countries would be represented and in which all countries would share. As a practical matter, it is virtually impossible to visualize any document coming into force that deals with the navigational issues without also comprehending the resolution of these resource-related problems. So, while it's conceivable that if the Conference failed, there might be an interval in which the world community paused and regrouped and then tried again on a basis drawing on pieces of the present effort, it's certainly not possible that we can simply lop off seabed mining, for example, and then get enough ratifications to bring a treaty into force dealing with the remaining issues.

### *What is the U.S. position on deep-sea mining?*

The U.S. position on deep-sea mining is that our companies must have assured opportunity to engage in seabed mining under reasonable terms and conditions, including security of tenure under their contracts with the International Seabed Authority, and a fair chance to recover their investment and achieve a fair return. The access that we will have, of course, is dependent upon negotiating a regime that is capable of attracting the necessary investment. Nobody is now prepared to put any money into seabed mining except four multinational consortia and one French group—the four are multinational consortia headed by the U.S. Steel Company, Kennecott, Lockheed, and the International Nickel Company of Canada. Each of these consortia includes components belonging to other industrial countries—Japan, Great Britain, Germany, the Netherlands, and Belgium, in varying combinations. The heart of the problem is designing a regime that will justify risking up to a billion dollars in a single seabed-mining project. Our constant effort is to convince the developing countries that it is in their interest, as well, to agree on a seabed-mining regime that can attract investment. I don't know how I have failed thus far even to mention "the common heritage of mankind." This phrase goes back to a speech in 1967 by Arvid Pardo, then the Permanent Representative of Malta to the United Nations, which led to the adoption in 1970 of a U.N. Resolution containing a declaration of principles designed to govern seabed mining, including the declaration that the resources of the deep seabed constitute the common heritage of mankind. Our message is essentially that the common heritage of mankind will remain indefinitely without use to humanity in the vast depths and enormous pressure and cold of the ocean

floor unless the seabed-mining regime that emerges from this Conference is capable of giving reasonable confidence to investors. Our task in Geneva will be to get agreement on the basis of the understanding that that confidence is a precondition for breathing life into the concept of the common heritage.

*Do you feel that if we moved ahead to exploit unilaterally the seabed resources under the guarantee of the U.S. Government that that would perhaps spur an agreement among the Group of 77 for a more universal enterprise for the exploitation of those resources?*

It is hard to tell what effect the final passage of seabed-mining legislation by the United States would have on the Conference. There are those who warn that it would have a highly destructive effect and trigger the assertion of unilateral national claims to the seabed itself. On the other hand, the U.S. legislation now pending, which almost passed the Congress in 1978 only to be hung up at the last moment in the Senate, is designed to be consistent with the general approach of the ICNT and provides for the setting aside of payments by the mining companies recognizing the legitimacy of the claims of other countries to share in the proceeds. The legislation would be superseded by a treaty, and because seabed mining cannot now get underway on a commercial scale before 1985 at the earliest, that would allow a treaty to be negotiated well before that date. So far as the effect on the negotiations is concerned, I think that the awareness that seabed mining must be regarded as inevitable (if not under a universal convention, at least under reciprocal national legislation) has served to make the participants in the Conference aware that time is not necessarily on their side. And I think this has contributed to the sense of urgency that now exists.

*Enforcement of these laws seems to be a major problem. To what extent does the role of national navies enter in your discussion as far as enforcing certain laws that you are proposing?*

I think the role of navies needs to be looked at primarily in terms of the exercise of nationally claimed rights, including rights that the countries to which those navies belong believe to rest upon a solid foundation of international law. In the absence of a treaty (and even under the treaty) it is also important to deliver clear and unmistakable protests against national claims inconsistent with international law, whether that law belongs to the body of customary international law or has been made part of a universal convention. Such protests must be backed up by the consistent exercise of the internationally recognized right, and in a situation in which the exercise of a right is subject to challenge, there would need to be the readiness to go forward nevertheless. This would necessitate appropriate preparation to meet the possibility of any such challenges. Beyond that, of course, there is the potential for bringing to bear various forms of international proceedings

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including, even in the absence of the treaty, an international court of justice or arbitration. Under the treaty there would be a whole array of legal means to vindicate these rights. I think, therefore, that if firmness, intelligence, and consistency is applied to the assertion of rights that do rest upon a broad basis of international law, it follows that there should be minimal occasion to have to resort to any form of police action in their enforcement.

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Address by Ambassador at Large Elliot L. Richardson to the classes of the Naval War College on 16 February 1979.

# Chapter 6

## Law and Conflict at Sea\*

Lieutenant Roger D. Wiegley  
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*Whether or not the negotiating texts of the Law of the Sea Conference result in a "new" law of the sea, it is becoming clear the "the potential for conflict between developing coastal states and the naval powers is significant enough that the latter should begin to develop policies for meeting challenges to their military uses of the oceans." This paper reviews some of the areas of potential conflict and suggests several points to be considered in the development of policy.*

There is a burgeoning literature that deals with military implications of the new law of the sea regime. Within that literature, the range of predictions could hardly be wider. One author has argued that the rules emerging from the Third United Nations' Conference on the Law of the Sea (UNCLOS III) signal the exclusion of naval forces from all but friendly waters.<sup>1</sup> But another knowledgeable writer has hypothesized that naval diplomacy will become *more* effective because deployed forces will be able to cross new symbolic "borders."<sup>2</sup> Despite the disparate conclusions, however, the analysts have with few exceptions projected a new era in which "freedom of the seas" will be a concept under ever-increasing challenge.<sup>3</sup>

Ironically, the negotiating texts produced at UNCLOS III do not themselves bode ill for the naval powers. In the latest text, the *Revised Informal Composite Negotiating Text* (RICNT),<sup>4</sup> only two provisions are clearly restrictive from the perspective of the naval strategist: the 12-mile territorial sea and the recognition of a special status for waters lying between the islands of archipelagoes. Yet even before the RICNT, the 12-mile territorial sea was becoming, if it was not in fact, a custom of international law,<sup>5</sup> and the concept of "archipelagic waters" was also gaining support.<sup>6</sup>

**Naval Concerns.** What, then, has caused so much concern to the proponents of unrestricted mobility for naval forces? Two things: first, that a convention similar to the RICNT, if adopted, would become a source of *dispute* rather than an established order and second, that a new convention would simply be the first in a progressive series of demands by developing coastal States.<sup>7</sup> Whether such

\* Reprinted from the Naval War College Review January-February 1980.

pessimism is warranted remains to be seen but the picture has probably been overdrawn. Undoubtedly there will be disputes and adjustments in the new order, just as there were prior to UNCLOS III, but predictions of frequent challenges to the movement of naval forces exaggerate the importance of international law. Developing coastal states are not likely to provoke a confrontation with one or more naval powers merely because the law of the sea permits a new range of coastal state demands. The relative importance of legal rules, particularly those that are new or open to interpretation, diminishes as the risk of confrontation increases. Nonetheless, conflicts *will* occur and international law will affect the way the conflicts are perceived by both participants and non-participants. It is important, therefore, to consider some of the areas in which coastal state claims may lead to disputes with naval powers.

***International Straits. Innocent Passage.*** The law of the sea development that has aroused the most comment is the effect on international straits of broadening territorial seas from 3 to 12 miles. There are approximately 116 straits not currently overlapped by 3-mile territorial seas that would be spanned by 12-mile territorial seas.<sup>8</sup>

Obviously, straits are significant in naval planning. They frequently offer the only expeditious route to an area of political or military crisis, and even in situations of less import their use is often an important cost consideration.

As mentioned earlier, the 12-mile territorial sea was gaining currency even before UNCLOS III. Hence the problem of transit through international straits is not a product of the current law of the sea negotiations, except to the extent that those negotiations have accelerated an inevitable problem. What the negotiations have done is attempt to clarify the rights of straits' users, particularly foreign naval units, as well as the rights of straits' States. Prior to UNCLOS III, the rule of law applicable to territorial seas—including territorial seas within straits—was that of *innocent* passage, i.e., the coastal State cannot interfere with passage that poses no threat to its "peace, good order, or security."<sup>9</sup>

While the principle of innocent passage creates a general expectation of unimpeded transit through territorial seas, a number of facts qualify the right of innocent passage for warships. First, submarines must transit on the surface and show their flag. Second, there is no right of overflight for aircraft. Third, the coastal State decides when its "peace, good order, or security" has been threatened<sup>10</sup> and it can take steps to prevent passage that is not innocent.<sup>11</sup> Moreover, the coastal State, if it determines that its security is threatened, can temporarily suspend the right of innocent passage<sup>12</sup> although it cannot suspend the right of innocent passage through international straits.<sup>13</sup> Finally, a small but growing number of States now require notification or permission as a prerequisite for innocent passage of foreign warships.<sup>14</sup>

If transiting naval forces wish to avoid the restrictions inherent in innocent passage, they can do so simply by remaining outside territorial seas—a measure that usually has no effect on mission objectives. Of course, the option of avoiding territorial seas is not available where the latter enclose international straits, and absent that option the potential for conflict increases significantly.

*Transit Passage.* The issue of passage through international straits was tentatively compromised at UNCLOS III through the creation of the concept of *transit passage*.<sup>15</sup> Under this concept, submarines are not required to surface within straits and aircraft are permitted to fly over straits without first obtaining the permission of the coastal State. In addition, the RICNT specifies that the right of transit passage cannot be suspended.

Two questions become relevant at this point. First, what will govern passage through straits if UNCLOS III fails to produce a convention? And second, is the concept of transit passage adequate to prevent confrontation over the use of straits by naval forces?

If UNCLOS III does not result in a law of the sea convention, a number of States probably will assert claims that they feel are justified by the majority view reached during the Conference negotiations. For example, some States may claim a 12-mile territorial sea and a 200-mile economic zone on the basis of the tentative Conference agreement on those two issues. If such claims are in fact made, it will be because the final UNCLOS III negotiating text has more legitimacy than the law it was designed to replace, even though the former would have been created for negotiating purposes only. It is admittedly incongruous to say that a new legal rule can be justified by reference to unsuccessful negotiations, but in the situation postulated logic may have to accede to events. Should that happen, the areas of broadest agreement at UNCLOS III will become a new source of international law, at least to the extent of explaining the impetus and general acceptance of post-Conference developments.

Given, then, the possibility of unilateral claims arising from UNCLOS III that affect international straits, the naval powers can look to the same source of law to justify adherence to the rules of transit passage. The latter, after all, represents a fundamental compromise accepted by the coastal States in exchange for the recognition of important prerogatives in the area of ocean resource exploitation.<sup>16</sup> To be sure, the new rules give maritime states large economic zones of their own, larger than those of developing coastal States, but overall the maritime States stand to lose more economically than they gain given the technology gap and the realities of ocean use prior to UNCLOS III. Thus, if developing coastal States pursue the advantages offered by a regime modeled after the RICNT, the naval powers are entitled to recognition of their interests as well, particularly transit passage through international straits.

The second question raised by the concept of transit passage is whether the rules embodied in the RICNT are adequate to prevent confrontation over the use of straits by naval powers. The problem here is that transit passage is, by definition, transit through *territorial seas* within straits. As stated earlier, there is a growing trend among coastal States to require warships to give advance notification before entering their territorial seas. The RICNT is silent on the issue of advance notification. Presumably, some coastal States may attempt to impose a notification requirement for passage of military vessels through territorial seas within international straits. Such a requirement would clearly be objectionable to the naval powers; it would defeat the purpose of submerged passage for submarines and it could also result in the disclosure of sensitive deployment data to unfriendly forces. Perhaps more importantly, advance notification *implies* a measure of control by the coastal State, inasmuch as notification makes little sense except as a form of requesting permission, and an acceptance of the implication could lead to an attempted exercise of *actual* control by the coastal State. Despite the RICNT, then, the problem of advance notification is lurking in the background, and it threatens to become a source of disagreement whatever the outcome of UNCLOS III.

**Economic Zones.** In addition to the general problem of passage through straits, the new law of the sea regime could witness disputes over foreign military activities within a nation's 200-mile economic zone. Seventy-six nations, including the United States and the Soviet Union, have announced a 200-mile economic zone or a 200-mile fishing zone, and the coastal States that have not yet proclaimed a 200-mile zone will probably do so if UNCLOS III fails to produce a convention.<sup>17</sup>

At one time there was considerable disagreement over whether coastal States would attempt to aggrandize their limited jurisdiction in the economic zone into claims of full sovereignty. This so-called "creeping jurisdiction" is now a generally accepted proposition among writers on ocean affairs,<sup>18</sup> although the nature and timing of the "creep" are too uncertain to permit useful speculation. In the abstract, it is possible to describe three factors that could lead to claims of sovereignty over economic zones. First, economic advantages tend to generate protectionist demands, leading ultimately to the conclusion that the whole range of direct and indirect threats can be adequately dealt with only if the sovereign has the broadest possible discretionary power. Second, as coastal States develop their navies to provide enforcement capabilities, there may be a growing presumption that control is proof of sovereignty. And third, claims of sovereignty may be perceived as a convenient vehicle by which developing States can overcome political frustration and a sense of impotence in international affairs.

Whatever its origin, the phenomenon of creeping jurisdiction is likely to occur, although it will probably manifest itself differently in various parts of the

world. Some economic zone restrictions, because of their location, will impinge upon naval operations more than others, thereby creating the prospect of confrontation in one zone while other, more restrictive, zones are ignored by the naval powers.

**Restrictions.** It is unlikely that a coastal State would attempt to restrict passage *through* an economic zone. Such a radical position would create a very high risk of confrontation with little chance of support from any but the most extreme elements of the international community. By contrast, limited restrictions may offer coastal States an opportunity for political visibility without a corresponding loss of credibility. For example, any of the following naval activities could be challenged in a foreign economic zone on the basis of general principles reflected in the RICNT: weapons testing, military oceanography, intelligence collection, submarine patrols, or maneuvers designed to influence the political affairs of the coastal State.<sup>19</sup> The challenge could take the form of an official pronouncement directed to the government of the unwelcome vessels or a warning issued directly to the offending warships.

There are other restrictive claims that would also increase the potential for conflict at sea but, like creeping jurisdiction, the possibilities are too uncertain to permit more than a brief mention. Such claims as special military zones,<sup>20</sup> "closed" seas,<sup>21</sup> unique baselines for territorial seas,<sup>22</sup> and enclosure of wide bays have all been announced in the past by various coastal States,<sup>23</sup> and there is no reason to believe that a new law of the sea convention would either cause the old claims to be rescinded or eliminate the prospect of new ones.

In the aggregate, the potential for conflict between developing coastal States and the naval powers is significant enough that the latter should begin to develop policies for meeting challenges to their military uses of the oceans. Detailed legal analysis will have to await the actual challenges, but it is not too soon to consider some of the legal dimensions of various responses. At stake is more than unrestricted mobility for naval vessels. Equally important is the moral credibility of the naval powers involved, particularly if the threat or use of force becomes the final arbiter of a dispute.

**Conflict Resolution.** The numerous articles dealing with problems of naval mobility in the new ocean regime have generally attempted to deal with potential *causes* of dispute, but scant attention has been paid to the problems of dispute settlement. In this area writers have seemed content to draw obvious conclusions about the need for greater diplomacy and the importance of negotiated agreements. The difficult questions remain—the questions that arise when diplomacy and negotiations fail.

The settlement of disputes has not been ignored at UNCLOS III. A significant portion of the RICNT deals with dispute settlement, even though the drafters

could have left the problems of adjustment to such existing mechanisms as the International Court of Justice (I.C.J.) or to *ad hoc* arbitration techniques agreeable to the parties involved. One of the factors motivating Conference negotiators to address problems of dispute settlement may have been the unwillingness of nations to submit disputes to the I.C.J. for resolution. The I.C.J. hears few cases of real significance,<sup>24</sup> and there is no reason to believe that law of the sea problems would become an exception to that pattern. Perhaps as a consequence the RICNT contains a number of provisions designed to compel signatory nations to submit irresolvable disputes to one of the third-party settlement mechanisms enumerated in the text. Significantly, however, there are a few optional exceptions to the requirement for compulsory settlement of disputes. One such exception would permit signatory nations to withhold from compulsory settlement disputes involving military activities.<sup>25</sup> While that may seem to be an exception larger than the rule, it expresses an important reality of international politics: nations will not entrust their military options to third-party tribunals because of the risks, however small, of rulings adverse to their own perceptions of their national security.

One author has suggested that the United States should not support or adopt the "military activities" exception in the RICNT because, while ostensibly favorable to the naval powers, it could be used by coastal States to avoid judicial review of restrictive jurisdictional claims.<sup>26</sup> According to this view, compulsory settlement of disputes involving naval activities would result in recognition of the rights of the naval powers because the strongest legal position is one that follows from the literal interpretation of an international convention. While that might be true in an impartial context, it cannot be assumed that a third-party tribunal will render decisions free from the vicissitudes of international politics. The military activities of any highly developed State reflect, among other things, that State's assessment of its own security interests; it is unrealistic to expect that such interests would be delegated to a decision-making body with possible biases against powerful or affluent States.

Naval power is a highly visible and effective expression of national strength. As such, it symbolizes for some nations the inequities in world power which, in their view, are no more justifiable than the colonial empires that were built on naval supremacy. It is important to recognize, however, that whatever the advantages of naval power in bygone eras, it is still an important element in the overall balance of world forces. Any change in the availability of the oceans for military purposes would inevitably affect some navies more than others, and it would thereby alter the level of tension known as "world order." One can say, of course, that international decision-making bodies should be allowed to decide what is in the best interests of world order, but such bodies cannot contain the unpredictable imbalances that they might engender.

If naval powers choose not to submit to compulsory settlement of disputes involving military activities, they may indeed lose the opportunity to have their prerogatives recognized by an international tribunal. Consequently there may be restrictive coastal State claims that are never "adjudicated," thereby adding an element of uncertainty to the legality of any response by a naval power. Such uncertainty is a small problem, however, compared with the risks of third-party decisions affecting the military capabilities of the superpowers. And, as a practical matter, legal uncertainty always accompanies conflict, even in the face of relevant judicial decisions—distinguishing factual situations is the lawyer's forte. Thus the naval powers have little to gain, and much to lose, by submitting military activities to the compulsory settlement of disputes.

Assuming, then, that third-party settlement mechanisms will play a limited role in disputes involving naval activities, it becomes even more likely that the use of force will be the means by which competing interests are reconciled. That is not to say that the naval powers can always be expected to use their fleets in response to restrictive coastal state claims. To the contrary, the naval powers face considerable political restraints in their dealings with developing states. For a powerful nation concerned about its world image, it is not an easy decision to alter the character of a legal dispute by introducing the realities of comparative military strength. Opposing *legal* claims represent a disagreement between two independent political entities. Opposing force, on the other hand, requires one party to surrender some of its political autonomy. When a superior force is used to compel a settlement or capitulation, the dominating party risks the loss of its credibility unless it is apparent that legal considerations had to be subordinated to practical necessity. Of course, the nature of the underlying dispute is an important element in the overall assessment. It would hardly be unlawful to use measured force to advance a legal position that all nations supported. By contrast, situations that involve opposing but reasonable legal arguments, or that polarize large segments of the international community, do not permit any one party to use force solely on the strength of its legal claims. Under such circumstances force is justified, if at all, only by reference to factors that nations generally regard as capable of rendering international law irrelevant. For example, no nation would consider legal principles binding, or even applicable, if adherence to them meant sacrificing national security or independence. The same reasoning applies when immediate political considerations substantially alter the balance of costs and benefits that have given rise to the abstract legal principles governing the use of force by one nation against another. It is because of such political considerations that the judgement of the international community regarding the *legitimacy* of a nation's use of force comprehends more than generally accepted principles of *law*.

***New Policies. Protests vs. Force.*** The problem for each naval power will be to develop policies that will enable it to respond to challenges at sea while minimizing the adverse effects on its world image. The utility of force in international relations is certainly not a new problem, but factors militating in favor of restraint have been fostered by UNCLOS III. In particular, the prestige and political recognition of developing States in the new ocean regime have become as important as the bargained-for economic rights. Any naval power cast in the role of a hegemonic reactionary with no regard for the political integrity of smaller States could lose a considerable amount of influence and respect. That risk must be weighted against the advantages of using or threatening force to preserve military or political options in any given situation.

It is problematic to describe situations in which a naval power would be justified in using force in opposition to restrictive coastal State claims. The use of force in general is prohibited by international law, except as a legitimate exercise of self-defense. Exceptions to that general prohibition can be found, but there are no categorical exceptions that would apply to claims of jurisdiction over a particular area of ocean. As to the latter, any justification for the use of force would arise from unique political and military circumstances. Hypotheses do not offer much assistance because, in order to be realistic, they must be so descriptive and esoteric as to have virtually no argumentative value. Consequently, the only useful methodology is one that recognizes that the use of force may be necessary under certain circumstances but examines the limits on such use in both legal and practical terms.

One limiting principle is that restrictive coastal State claims that do not actually interfere with naval operations should not be met by a demonstration of force solely as a means of protest. Suppose, for example, that a State were to declare that advance notice was required prior to passage of foreign warships through its economic zone. If the economic zone in question were not actually on a transit route for warships, there would be no need to detour an announced naval force through the zone to demonstrate rejection of the claim. That is not to say that naval powers should acquiesce in the claim. To the contrary, they should assert their position through diplomatic protests and public pronouncements on appropriate occasions. What should be avoided is the show of force merely for the sake of argument, and it should be avoided precisely because it would serve no useful purpose. A coastal State that decides to assert a restrictive claim is not likely to withdraw the claim simply because superior forces are ignoring it; in fact, violations of the claim might serve a coastal State objective of gaining political visibility.

Of course, *any* challenge to naval mobility would generate a certain amount of support within the naval power for forceful intervention. The arguments would be, first, that ignoring such claims might invite more like them, and second, that nonintervention might allow the claim to “ripen” into international

law. The first argument is unpersuasive because there is no reason to suppose that a demonstration of force by a naval power would deter other coastal States with ambitions similar to those of the original claimant. After all, no real loss is involved for the coastal state. As for the second argument, it is an overstatement of the general proposition that general acceptance of a unilateral claim may, overtime, legitimize that claim. International law does not require a display of force to establish a record for nonacceptance. Diplomatic protests alone can evidence a nation's legal position,<sup>27</sup> and for that reason official objections should be used to the maximum extent practicable in lieu of demonstrations of force.

As a corollary to the rule just stated, a naval power faced with a challenge to its use of an ocean area should consider the advantages of temporarily yielding to the challenge. If, for example, a nuclear-powered warship were denied passage through a particular strait, it might be advisable to take an alternate route or to delay passage, depending upon cost considerations and mission requirements. Such an approach would allow time for diplomatic inquiries *before* national prestige is put at stake. If no accommodation could be reached, it would certainly not be too late to route the same vessel through the strait at the next opportunity. Should a confrontation then occur, the strait user would be in a position to show that it tried to accomplish its objectives without the threat of force. Another advantage of yielding to the first challenge, if practicable, would be to eliminate the factual misunderstandings that often lead to, and occur during, incidents at sea. A diplomatic exchange would frame the legal issues involved, thereby presenting the effects of world opinion from being diluted by irresolvable factual disagreements.

Two exceptions to the rule of conflict avoidance should be added here. First, avoiding a challenge at sea is quite distinct from submitting to some form of detention or similar loss of authority. Under the latter circumstances, the law favors an *immediate* use of force as opposed to a retaliatory strike at some later time. The seizure of the *U.S.S. Pueblo* by the Democratic People's Republic of Korea in 1968 illustrates the consequences of delay—after the surrender, the prospect of retaliation by the United States quickly lost its practicality, and consequently, its legal justification.

A second exception to the rule of conflict avoidance would arise if a coastal State challenge were related to an immediate geopolitical development. At such times a temporary acceptance of the restrictive coastal State claim might have short-term effects of greater importance than the legal issues in dispute. The advantages of deferring confrontation would then become irrelevant, and the focus of international attention would then be on the attempted exploitation of law, not on legal principles.

The problem of avoiding confrontation has yet another dimension, but here the issue of political allegiance comes into play. A naval power should not undermine its credibility by showing tolerance for the restrictive claims of

friendly States simply because it enjoys a *de facto* exemption. All claims that are considered illegal should be protested through diplomatic channels regardless of source, even though the effects of a particular claim may only be felt by other, nonfriendly, naval powers. Such uniformity would emphasize the legal aspects of the problem, and it would enable the protesting naval power to avoid the charge of invoking the law only when it was advantageous to do so. Moreover, a consistent approach to coastal State claims would discourage what might otherwise become a problem of comparability—two opposing groups of coastal States making restrictive claims with the promise or expectation of support from a superpower.

**Self-Defense.** There remains the difficult question of actual initiation of force during an incident at sea. One of the underlying problems in this area is that the concept of self-defense has never been adequately translated into the language of seapower. To be sure, it is a well-established rule of international law that a warship cannot be attacked, seized or otherwise coerced by a foreign State.<sup>28</sup> And whatever else may be said about recent changes in the law of the sea, there has been no suggestion that the sovereign immunity of warships is less secure than before. But sovereign immunity has never been absolute. A State has the right to arrest a foreign warship if the latter is posing an actual and imminent threat to the arresting State's security.<sup>29</sup> Hence, either the general principle or the exception just stated provides at least a colorable argument for any State otherwise predisposed to defend its interests with force.

If one accepts as a starting point that it is unlawful to *initiate* the use of force at sea,<sup>30</sup> except in the face of imminent attack, there arise two conceptual problems. First, how should "force" be defined, e.g., would it be an exercise of force to maintain course and speed against coastal State vessels trying to block what the latter considered an unlawful passage? And second, how can a coastal State protect its interests, that force at sea is usually an interference with, not the exercise of, rights of transit? What good is the right to prevent or suspend noninnocent passage if there is no concomitant right to take action against violating warships? What if foreign military vessels simply ignore the warnings and demands of the coastal State?

International law does not provide satisfactory answers to the questions of conflict at sea during peacetime except in very general terms. Consequently, the naval powers cannot expect the strength of their legal arguments to prevent actual confrontations or to provide overwhelming support for their use of force to defend legal rights. If force becomes the arbiter of last resort, international law will provide language for debate and rhetoric but little substance for a definitive assessment of the naval power's actions. Regarding the latter, the actual necessity for force will be critical as will the reputation of the naval power in terms of its overall policies for minimizing conflicts in the new law of the sea regime.

Lieutenant Wiegley was assigned to the Naval Legal Services Office, Pearl Harbor and an International Law of Sea Scholar at the University of Hawaii at the time this article was first published.

## Notes

1. Young, *New Laws for Old Navies: Military Implications of the Law of the Sea*, Survival 262 (November/December 1974).
2. Booth, *Military Implications of the Changing Law of the Sea*, in GAMBLE, *LAW OF THE SEA: NEGLECTED ISSUES, PROCEEDINGS OF THE TWELFTH ANNUAL CONFERENCE ON THE LAW OF THE SEA* 363 (1979).
3. See, e.g., Ashmore, *The Possible Effects on Maritime Operations of Any Future Convention of the Law of the Sea*, Naval War College Review 3 (Fall 1976); Knight, *The Law of the Sea and Naval Missions*, U.S. Nav. Inst. Proc. 32 (June 1977); O'Connell, *The Influence of Modern Operations at Sea*, U.S. Nav. Inst. Proc. 157 (May 1977).
4. *Informal Composite Negotiating Text/Revision 1*, U.N. Doc. No. A/CONF. 62/WP. 10/Rev. 1, 28 April 1979.
5. Consider the following trend:
 

	1962	1979
Number of independent coastal States	109	131
Three-mile territorial sea claims	36	19
Twelve-mile territorial sea claims	39	76
Between 3 and 12 miles	23	8
Claims in excess of 12 miles	7	25
Other (irregular or unspecified)	4	4
6. Draper, *The Indonesian Archipelagic State Doctrine and Law of the Sea*, The International Lawyer 143 (Winter 1977).
7. O'Connell, *supra* n. 3 at 158.
8. There is some disagreement on the number. One hundred sixteen (116) is the official U.S. Government figure although 121 are listed on a chart prepared by the Geographer of the State Department for a 1958 Conference entitled "World Straits Affected by a Twelve Mile Territorial Sea." The State Department also produced a pamphlet entitled "Sovereignty of the Sea" (Geographic Bulletin No. 3, Rev. October 1969) which shows 94 straits as being between 7 and 24 miles.
9. U.N. Conference on the Law of the Sea, 1st 1958, *Official Records*, U.N. Doc. No. A/CONF. 13/L52, 1958; Convention on the Territorial Sea and the Contiguous Zone, done 29 April 1958 (1964) 15 U.S.T. 1606, T.I.A.S., No. 5639, 516 U.N.T.S. 205, Article 14(4).
10. Walker, *What is Innocent Passage*, Naval War College Review 58 (January 1969).
11. Convention on the Territorial Sea and the Contiguous Zone, Article 16(1).
12. *Id.*, Article 16(3).
13. *Id.*, Article 16(4); see also Corfu Channel Case (1949) I.C.J. 28.
14. According to CIA Map 503784 (May 1978), there are 22 coastal States that require notification or permission before warships can enter their territorial seas. The United States does not honor these requirements.
15. Articles 37-44.
16. Dawson, *The North Pacific Project* at 101, Institute for Marine Studies Publication Series IMS-UW-77-1, University of Washington, Seattle, (July 1977).
17. Johnson & Gold, *The Economic Zone in the Law of the Sea: Survey, Analysis and Appraisal of Current Trends*. Occasional Paper No. 10, Law of the Sea Institute, 28 (June 1973).
18. O'Connell, *supra* n. 3 at 164; Booth, *supra* n. 3 at 345.
19. International Institute of Strategic Studies, *Strategic Survey* at 20 (London, 1976).
20. CIA Map 503783 5-78 (May 1978) depicts 34 such zones. For a discussion of one zone, see Choon-ho Park, *The 50-Mile Military Boundary Zone of North Korea*, Am. J. Int'l L. (October 1978). The United States does not recognize any of the 34 zones shown on the CIA map.
21. E.g., BUTLER, *THE LAW OF SOVIET TERRITORIAL WATERS* 19-27 (1967).
22. E.g., International Boundary Study, Series A, Limits in the Seas, No. 43, "Straight Baselines: People's Republic of China," Office of the Geographer, July 1972.
23. E.g., SAUNDERS, *THE SOVIET NAVY* 250 (1958) for a discussion of Peter the Great Bay which was declared internal waters of the Soviet government in 1957.
24. GAMBLE & FISHER, *THE INTERNATIONAL COURT OF JUSTICE: AN ANALYSIS OF THE FAILURE* 84 (1976).

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25. Article 298.1(b).
26. Janis, *Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception*, v. 4, no. 1 *Ocean Devel. Int'l L.* 51 (1977).
27. MacGibbon, *Some Observations on the Part of Protest in International Law*, Br. Y.B. Int'l L. 310 (1953) and Johnson, *Acquisitive Prescription in International Law*, Br. Y.B. Int'l L. 341 (1950).
28. BUTLER, *THE SOVIET UNION AND THE LAW OF THE SEA* 178 (1971).
29. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 314 (6th ed. 1967).
30. There are a few minor exceptions not relevant here (e.g., suppression of piracy and slave trade). See Wiegley, *The Recovered Sunken Warship: Raising a Legal Question*, U.S. Nav. Inst. Proc. 28 (January 1979).

# Chapter 7

## Regionalism and the Law of the Sea: The Persian Gulf Perspective\*

Charles G. MacDonald

*The Persian Gulf presents, in microcosm, the major issues in the international law of the sea. This paper focuses on the general approaches of two developing States, Iran and Saudi Arabia, to the changing law of the sea. The relationship between legal development and regional context is explored with a view to understanding the approaches of Iran and Saudi Arabia to the law of the sea, their role at the third United Nations Conference on the Law of the Sea, and the probable direction of future claims.*

**Legal Development: Factual Background.** The Persian Gulf is a semi-enclosed sea situated between the Arabian peninsula and Iran. It is roughly one-tenth the size of the Gulf of Mexico and is 97 percent bounded by land.<sup>1</sup> The Gulf's only outlet is the Strait of Hormuz, 20.75 miles across at its narrowest. The Gulf is a relatively shallow basin with an average depth of only 40 meters and a maximum depth of about 100 meters.<sup>2</sup> Numerous islands are scattered throughout the Gulf, but particularly along the Arabian shore. Deeper waters run along the Iranian coast and off the tip of the Musandam peninsula.

Seven States make up the Gulf littoral, and one insular State, Bahrain, lies within the Gulf. The coastlines of the Gulf States vary from 635 nautical miles for Iran and 296 nautical miles for Saudi Arabia to only about 10 nautical miles for Iraq.<sup>3</sup>

Although eight States have their borders touching the Gulf, legal development in the Gulf has been based primarily upon the precedents set by the two largest Gulf States, Iran and Saudi Arabia. The claims and agreements of Iran and Saudi Arabia have effectively established certain international legal norms that are not only complied with by other littoral States, but are also reflected in their respective claims.<sup>4</sup>

### National Claims

*Territorial Sea Claims.* In 1934 Iran defined its initial claim to Persian "territorial waters." In its Act of 19 July 1934 relating to the Breadth of the Territorial Waters

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and Zone of Supervision, Iran claimed territorial waters extending to 6 miles and claimed that its islands also had 6-mile territorial waters.<sup>5</sup> Iran implicitly used straight baselines in that islands forming an archipelago were deemed to form a single island.

Saudi Arabia, in its Decree No. 6/4/5/3711 defining the Territorial Waters of the Kingdom, 28 May 1949,<sup>6</sup> also claimed 6-mile territorial waters, specifically its coastal sea, as extending 6 miles from its coast. Saudi Arabia also claimed the use of straight baselines for areas having offshore islands and recognized the right of innocent passage.

Saudi Arabia redefined its territorial waters in its Decree No. 33 of 16 February 1958.<sup>7</sup> It replaced the broader term "territorial waters" with the term "territorial sea," and expanded its claim to 12 miles. It also dropped its specific reference to "innocent passage."

Iran followed the Saudi example and claimed a 12-mile territorial sea in its Act of 12 April 1959, amending the 1934 Act relating to the Breadth of the Territorial Sea and Contiguous Zone of Iran.<sup>8</sup>

*Resource Claims.* Saudi Arabia, in its Royal Pronouncement with Respect to the Subsoil and Sea Bed of Areas in the Persian Gulf contiguous to the Coasts of the Kingdom of Saudi Arabia, 28 May 1949, established its first claim to submarine resources.<sup>9</sup> Saudi Arabia claimed that "the subsoil and sea bed of those areas in the Persian Gulf seaward from the coastal sea," but contiguous to its coasts "appertain to the Kingdom of Saudi Arabia" and are "subject to its jurisdiction and control." Saudi Arabia provided that the boundaries of the subsoil and seabed contiguous to its coasts would be "determined in accordance with equitable principles" by the Saudi Government "in agreement with other States having jurisdiction and control over the subsoil and seabed of adjoining areas."

Iran had a bill defining its claim to the Persian Gulf subsea resources submitted to its Majlis on 19 May 1949,<sup>10</sup> but did not enact its "continental shelf" claim into law until 1955. In its Law of 19 June that year Iran claimed that "the area and the natural resources of the seabed and the subsoil thereof to the limits of the continental shelf . . . in the Persian Gulf and Gulf of Oman, belong to the Iranian Government."<sup>11</sup> Iran also provided that "where the continental shelf . . . extends to the coast of another or coincides with that of a neighboring country, and if disputes arise concerning the limits of Iran's continental shelf, such disputes shall be settled in conformity with the rules of equity." (In its original 1949 bill the limits were to be fixed equitably with respect to the natural resources of the continental shelf.)

In other claims relating to offshore resources, Iran, in its Proclamation of 30 October 1973, claimed that its exclusive fishing zone would extend to the outer limits of the superjacent waters of its continental shelf in the Persian Gulf and 50 nautical miles in the Gulf of Oman.<sup>12</sup> Saudi Arabia made a similar claim to fishing resources in the Gulf in its Proclamation of 30 April 1974.

***Bilateral Agreements.*** Numerous bilateral agreements delimiting offshore jurisdiction in the Gulf have been reached. These are commonly called continental shelf boundaries even though no shelf as such exists within the Gulf. They are all based upon equitable principles, but are flexible in their application of such principles. The first agreement, the Saudi Arabia-Bahrain Agreement of 22 February 1958, established a central boundary line between the two States based on equidistance.<sup>13</sup> Also included in the treaty was the establishment of a hexagonal area under Saudi jurisdiction, but with half of the net income derived from the area to go to Bahrain. The Saudi Arabia-Kuwait Agreement of 7 July 1965 provided for joint ownership of mineral rights in the offshore neutral zone and joint exploitation unless otherwise agreed.<sup>14</sup>

Perhaps the most significant agreement reached in the Gulf was between Saudi Arabia and Iran on 24 October 1968.<sup>15</sup> It delimited the boundary line separating the submarine areas between the two States. The agreement, reached only after difficult negotiations, provided for a boundary having three distinct parts. Again the flexible application of equitable principles was necessary. The lower portion of the boundary essentially represented a median line. The central portion included two disputed islands. One island went to each State, with territorial seas recognized for both. The upper section of the boundary proved to be the most difficult. One compromise resulted in Kharg Island being given "half-effect." Also, the boundary line was drawn irregularly to divide equally the resources of an oilfield discovered after negotiations had begun.

Other boundary agreements were also reached between Iran and Qatar in 1969; Iran and Bahrain in 1971; Iran and Sharjah in 1971; Iran and Oman in 1974; and Iran and Dubai in 1974. Nevertheless, a number of boundaries remain in dispute, especially in the extreme northern and southern parts of the Gulf.

***Multilateral Agreements.*** The only legal development in the Gulf based on multilateral action has involved the protection of the environment. First, the International Convention for the Prevention of Pollution from Ships signed in London on 2 November 1973 provided for the designation of "special areas" that required more stringent protective measures for the preservation of the marine environment.<sup>16</sup> The Persian Gulf was one such area.

Subsequently, in April 1978, the Gulf States convened the Kuwait Regional Conference on the Protection and Development of the Marine Environment. At the conference the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution was signed. Also a Protocol, providing for joint cooperation in the case of a major oilspill or other marine emergencies, was signed.<sup>17</sup>

***Legal Development: Regional Context.*** When placed in a broader regional context, the substance and timing of the various national claims, bilateral agreements, and

multilateral actions can be better understood. Examining these claims and agreements in terms of the underlying national interests that exist within a given region can offer insights into the nature of legal development and its relationship to the regional context.

### National Claims

*Territorial Sea Claims.* Iran's territorial sea claims were directly tied to the Gulf context. The 1934 claim to 6-mile territorial waters and the implicit use of straight baselines (made after Iran's participation in the 1930 Hague Conference) was tied not only to the geographical characteristics of the Gulf, but also to Iran's security interests and to its efforts to avoid becoming entangled in the ongoing European rivalries in the Gulf. Its subsequent claim to a 12-mile territorial sea in 1959 was directly tied to political developments in the Gulf and to Iran's security interests. Two days after Iraq's President Kassem called for Iraq "to restore" a 5-kilometer stretch of the Shatt-al-Arab River that had previously been granted to Iran, Iran extended its territorial sea from 6 to 12 miles for security reasons. The Iranian claim presaged the Shatt-al-Arab crisis.

Saudi Arabia's initial territorial sea claims were closely tied to regional developments, specifically to Aramco's interest in exploiting offshore oil. Saudi Arabia, at the recommendation of Aramco, hired Judge Manley O. Hudson and Richard Young of Harvard Law School to draw up its offshore claims to insure that its offshore oil exploitation could succeed in a "sound legal environment." Upon the recommendation of Judge Hudson, Saudi Arabia accepted a "package deal." It provided for Saudi claims to: (1) territorial waters; (2) resources of the seabed and subsoil of areas contiguous to the coasts; (3) claims to certain offshore islands. Mr. Young, who participated in the writing of the claims, indicated that the 6-mile claim was based upon "regional precedent," dating back to the 1914 claim of the Sublime Porte of the Ottoman Empire that claimed 6-mile territorial waters in the Gulf. Moreover, the use of "straight baselines" was tied to the geographical configuration of the Gulf and based on the Norwegian legislation that was being considered by the International Court of Justice in the Anglo-Norwegian Fisheries Case.

The expansion of Saudi Arabia's territorial sea to 12 miles in 1958 was directly tied to Saudi Arabia's security interests. Of primary importance in this regard was the presence of Israeli warships in the Gulf of Aqaba.

*Resource Claims.* The Iranian and Saudi offshore resource claims were closely related to developments within the Gulf. Iran's "continental shelf" claim, as put forth in 1949, was not enacted until 1955 because of the Anglo-Iranian oil relationships. Also of importance were the results of the Qatar Case of 1950 and the Abu Dhabi Case of 1951 which indicated that prior concessions did not

include the seabed and subsoil of those areas contiguous to the territorial waters of the states involved.

According to Richard Young, the Saudi claim to the resources of the seabed and subsoil was directly based on the Truman Proclamation. The claim was altered, however, to conform with the geographical characteristics of the Gulf. Because the Gulf was essentially a basin and had no shelf as such, the Saudi claim was based upon the "principle of contiguity." (Iran's claim was to the continental shelf, but Iran does have a shelf extending into the Gulf of Oman.)

The fishing claims of Iran and Saudi Arabia supported two specific interests in the Gulf. First, the claims were in response to the presence of foreign fishing vessels, especially those of Japan. Thus an economic interest in the fishery resources was supported. Second, apart from conserving fishery resources, security interests were served. Foreign vessels, supposedly fishing, could no longer move freely in the areas contiguous to the territorial sea but became subject to regulation. This could limit subversive activities and foreign intelligence operations.

*Bilateral Agreements.* The Iranian and Saudi agreements delimiting offshore resource boundaries are closely tied to the Gulf context, both in terms of its geographical features and political developments. First the agreements were influenced fundamentally by the physical features of the Gulf, especially by the presence of islands and "known" fields of petroleum. Boundary lines were often adjusted to allocate resources in an equitable manner and to take into account certain islands, such as Kharg Island. Disputed islands often delayed and sometimes have prevented the delimitation of certain offshore areas. The dispute over Abu Musa and the two Tunbs has complicated boundary delimitation in the south. Similarly, the competing claims to Warbah and Bubiyan islands complicate boundary delimitations in the north.

Political developments have played a significant part in motivating States to seek agreements. For example, Iran and Saudi Arabia negotiated for years on their offshore boundary, but were able to reach a final agreement only after the British announced their withdrawal from the Gulf. Interests in regional stability led Iran and Saudi Arabia to move to resolve other lingering territorial disputes with their neighbors.

*Multilateral Agreements.* The Gulf efforts to protect the environment are also tied to both geographical and political considerations within the region. The danger of pollution in the Gulf is not only associated with the heavy tanker traffic, but also with the relatively slow interchange of water between the Persian Gulf and Indian Ocean. Moreover, the threat to the environment has direct political overtones within the region in light of the professed threats of terrorist attacks. In the summer of 1979 the United States warned its ships traveling through the

Strait of Hormuz to be on the alert for possible terrorists activities. Lloyds of London identified the Gulf as a "war zone" requiring additional insurance.

The success of pollution control efforts and the Action Plan of the Kuwait Regional Conference are directly tied to the cloud of uncertainty hanging over the Gulf following the Iranian Revolution.

*General Approaches to the Law of the Sea.* While the relationship between legal developments and regional context is important, insights into the Iranian and Saudi approaches to the law of the sea can be realized by exploring the nature of their participation in the United Nations conferences on the law of the sea. Iran and Saudi Arabia have participated at all three U.N. law of the sea conferences. Their policy statements are revealing.

At the 1958 conference the Saudi delegate, Mr. Shukairi, suggested that certain rules of international law were outmoded and generally reflected the interests of only a few states. He indicated that international law should reflect "the collective will of all States participating as sovereign States and possessing sovereign equality," with the developing States also taking an active part in the progressive development and codification of the law of the sea.<sup>18</sup> The Saudi delegate asserted that "it was only after the remnants of the antiquated rules of international law had been swept away that progressive development of that law could take place."<sup>19</sup> Mr. Shukairi maintained that the "vital interests" of all States must be "reflected in whatever code" was adopted.

Although Saudi Arabia identified itself as a developing State and charged that some laws were "antiquated" and based on the "customs and usage" of only a few States, it did not challenge the basis of modern international law. Rather, Saudi Arabia maintained that the very foundations of international law must be considered, and that the origin of such concepts as "territorial sea" must be reviewed.<sup>20</sup> Saudi Arabia went to great lengths to indicate that its actions were "in conformity with modern trends and practice as well as with the (International Law) Commission's conclusions."<sup>21</sup>

At the 1958 and 1960 conferences Saudi Arabia often challenged the positions assumed by the United States and Britain, two maritime powers. Saudi Arabia, however, did not challenge their "Western" law, but rather the American and British interpretations of it. Saudi Arabia often cited American and British precedents and quoted Western jurists, such as Philip Jessup, to support its position.<sup>22</sup>

Iran's general approach toward the law of the sea as expressed at the 1958 and 1960 conferences was not unlike that of Saudi Arabia. Iran recognized a basic cleavage between the interests of developing States and those of maritime powers. Iran called attention to certain inequalities that resulted in "obsolete customs and practices" that were "enshrined in conventions to which most of the states of Asia and Africa were not parties."<sup>23</sup> Iran opposed certain prescriptive rights

included in an American proposal on fishing and charged that the proposal "sought to perpetuate an unjust practice which many under-developed or former non-self-governing countries had been unable to combat."<sup>24</sup> In its opposition to the American proposal for a 3-mile limit, Iran not only stated that a 3-mile limit would exclusively serve the interests of the maritime powers, but charged that "in fact, they were laying claim to hegemony of the high seas."<sup>25</sup> Furthermore, Iran claimed that many States were "under-developed" because of "the policy of colonialism followed by the States which benefited from the freedom of the seas."<sup>26</sup>

Iran, in pointing out inequalities that have developed through time, nevertheless indicated that "a new era had begun" and that "the under-developed States of Asia and Africa, including all those which had recently become independent, were ready to cooperate in all honesty and without bitterness with the great maritime States if they showed understanding."<sup>27</sup> Iran called for the progressive development of international law to be achieved through "compromise in a spirit of progressive realism."<sup>28</sup> Iran recognized that inequalities existed and that maritime powers were pursuing their own interests, but called for the interests of the developing States to be recognized as well.

Iran, while noting that "unjust practices and customs" did exist, did not condemn international law. Instead, Iran called for its progressive development. In opposing the positions assumed by the maritime powers, Iran employed traditional international legal principles and cited American precedents and the work of the International Law Commission.<sup>29</sup>

Iran and Saudi Arabia did participate in the 1958 United Nations Conference on the Law of the Sea, but the law of the sea in the Persian Gulf is not directly tied to the 1958 law of the sea conventions. Iran did sign the four conventions, with certain reservations, but did not ratify any of them because of its Gulf neighbors' opposition to the conventions. Saudi Arabia and the other Arab Gulf States refused to sign the 1958 conventions because of the single article providing for Israeli access through the Gulf of Aqaba and Strait of Tiran. In other words, despite Iranian and Saudi participation and negotiations, their law of the sea claims were primarily determined by the regional context.

*The Third United Nations Conference on the Law of the Sea.* At the Third United Nations Conference on the Law of the Seas (UNCLOS III) Iran and Saudi Arabia have each actively participated as they did in the first two United Nations conferences. Each has assumed what might be termed a Third World stance on such representative issues as the breadth of the territorial sea, marine scientific research, and the implementation of the concept of "the common heritage of mankind." The Iranian delegate, for example, called for a strong International Sea-Bed Authority with its powers being "as wide as possible."<sup>30</sup>

While many of the issues are of interest but do not affect the Gulf States directly because of the relatively small size of the Gulf, two issues have been especially important to Iran and Saudi Arabia—the status of the straits used for international navigation and the preservation of the marine environment. At the heart of the two issues are two fundamental tensions confronting conference participants. First is the tension between the interests of a coastal State in regulating its adjacent sea and those of the international community in freedom of the high seas. The second is the tension between the particular needs of “special areas” and the attempt to establish general rules that would be universally applicable.

The question of transit through straits has been especially important to both parties. Iran has maintained that “the sovereignty of the coastal State was subject only to the exercise of the right of innocent passage of ships,” and that “passage through straits used for international navigation must not affect the legal status of the territorial sea when the straits were situated within the territorial sea of one or more States.”<sup>31</sup> Iran, bordering on the strategic Strait of Hormuz, is especially interested in “regulating” passage through the strait. Free transit or innocent passage would exist as long as pertinent regulations were complied with.

Saudi Arabia “supported free passage in international straits connecting different parts of the high seas” and contended that a distinction should be made between straits.<sup>32</sup> A Kuwaiti delegate, speaking for six Arab States including Saudi Arabia, stated that “the term ‘straits used for international navigation’ should be strictly confined to straits which connected two parts of the high seas.”<sup>33</sup> He further indicated that “the Governments on whose behalf he was speaking had not acceded to the Convention on the Territorial Sea and Contiguous Zone of 1958” because it “treated all straits alike.”<sup>34</sup> Thus, Saudi Arabia and others continue to show a security concern for any Israeli transit through the Gulf of Aqaba and Strait of Tiran.

Related to Iran’s policy on straits has been Iran’s concern for the special characteristics of the Persian Gulf as a semienclosed sea. In 1974 Iran called for a special status for semienclosed seas to be recognized. The Iranian representative, Mr. Kazemi, pointed out special problems of semienclosed seas, especially regarding the preservation of the marine environment, resource management, and international navigation, and asserted that their particular status constituted “an exception to the general rule.”<sup>35</sup> Mr. Kazemi indicated that “his delegation attached great importance to the protection of the marine environment and to the struggle against the pollution of the seas.”<sup>36</sup> Mr. Parsi, in the Second Committee, stated that “enclosed or semi-enclosed seas represented more acute problems which could not be solved by global norms applicable to all oceans,” and that “they formed an intrinsic geophysical and ecological entity and were vulnerable to pollution and overfishing.”<sup>37</sup>

Because of the Iranian interest in the preservation of the marine environment and special consideration for semienclosed seas, Iran came to promote a “zonal

approach to the marine environment." Subsequently, Iran stressed that "primary jurisdiction should rest with the coastal State," which should have "enforcement powers."<sup>38</sup>

Saudi Arabia also addressed the marine pollution problem. In the seventh session in 1978, Saudi Arabia, along with other Arab States, expressed a serious concern for establishing "responsibility and liability" for any damage to the marine environment.<sup>39</sup>

*Future Legal Developments and the Regional Context: A Conclusion.* When future possibilities in the Persian Gulf are considered with a view to previous experience, it is apparent that the regional concerns of the Gulf States would continue to predominate over the international law being developed at UNCLOS III. While Iran and Saudi Arabia have participated in the United Nations law of the sea conferences and have relied on "Western" sources and principles to support their claims, they have based their legal positions on their own national interests that have run counter to those of the maritime powers. Moreover, the political and geographic circumstances in the Gulf, the regional context, have proved to be the final determining factors in the substance and timing of their legal claims (and in their refusal to accept the 1958 law of the sea conventions).

With future developments tied to their interests within the Gulf, their real legal focus is probably going to be on the achievements of the Kuwait Regional Conference and the preliminary efforts to form a permanent regional organization for the control of pollution in the Gulf, rather than on how the final UNCLOS III treaty will deal with pollution control or the preservation of the marine environment. Furthermore, the security interests of the Gulf States in light of their mutually expressed desire to avoid any superpower presence within the Gulf will be more fundamental to the establishment of a special regional regime than any agreement at UNCLOS III. Whether the Persian Gulf will lose its previous status as high seas and actually become a "closed sea," will be determined by the interests within the region. The Persian Gulf perspective on the law of the sea is essentially a regional perspective determined by the geographic peculiarities and factors and forces within the Gulf.

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## Notes

1. U.S. Dept. of State, Bureau of Intelligence and Research, *Sovereignty of the Sea*, Geographic Bulletin No. 3, rev. ed. (Washington: U.S. Govt. Print. Off., 1969), at 18-27.

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2. Depths up to 146 meters have been reported off the Musandam Peninsula. For a detailed geographic and hydrographic description of the Gulf see U.S. Defense Mapping Agency, Hydrographic Center, *Sailing Directions for the Persian Gulf*, Pub 62, 5th rev. ed. (Washington: 1975).

3. U.S. Dept. of State, at 19-21.

4. See MacDonald, *The Roles of Iran and Saudi Arabia in the Development of the Law of the Sea*, *Journal of South Asian and Middle Eastern Studies* 3-10 (Spring 1978).

5. For text see United Nations, *Law and Regulations on the Regime of the Territorial Sea*, United Nations Legislative Series, (ST/LEG/SER.B/6) (New York: 1957), at 24-25.

6. For text see 43, Supplement to the Am. J. Int'l L. 154 (1949).

7. For text see United Nations, *Supplement to Laws and Regulations on the Regime of the High Seas and concerning the Nationality of Ships*, United Nations Legislative Series, (ST/LEG/SER.B/Suppl.) (New York: 1957), at 29-30.

8. For text see United Nations, *Second United Nations Conference on the Law of the Sea*, A/CONF.19/5 (Geneva: 1960), at 15.

9. For text see 43, Supplement to the Am. J. Int'l 156 (1949).

10. For text see *Revue Égyptienne de Droit International*, v. 5, 1949, at 347.

11. For text see CHURCHILL, VOL. 1 NEW DIRECTIONS IN THE LAW OF THE SEA 307-308 (1973).

12. For text see United Nations, *National Legislation and Treaties Relating to the Law of the Sea*, United Nations Legislative Series (ST/LEG/SER.B/18) (New York: 1957), pp. 334-335.

13. For text see U.S. Dept. of State, *Continental Shelf Boundary: Bahrain-Saudi Arabia, International Boundary Study Series A—Limits in the Seas*, No. 12, 10 March 1970.

14. For text see 60 Am. J. Int'l L. 744 (1966).

15. For text see 8 I.L.M. 493 (1969).

16. For text see 12 I.L.M. 1319 (1973).

17. For conference documents see I.L.M. 501 (1978).

18. See United Nations, *United Nations Conference on the Law of the Sea*, A/CONF.13/39 (Geneva: 1958), v. III, at 3.

19. *Id.*

20. *Id.* at 36.

21. *Id.*

22. *Id.* at 130.

23. *Id.*, v. IV, at 23-24.

24. *Id.*, v. II, at 41.

25. *Id.*, c. IV, at 23.

26. *Id.*

27. *Id.*

28. *Id.* at 24.

29. See U.N. *Second Conference on the Law of the Sea*, p. 103.

30. United Nations, *Third Conference on the Law of the Sea*, A/CONF.62/SR-51 (New York: 1975), v.1, at 72.

31. *Id.*, v. II, at 123.

32. *Id.*, v. I, at 144.

33. *Id.*, v. II, at 139.

34. *Id.*

35. *Id.*, at 273.

36. *Id.*, v. 1, at 73.

37. *Id.*, v. II, at 115-116.

38. *Id.*, v. IV, at 90.

39. *Id.*, v. X, at 185-186, 188.

## Chapter 8

# Law and Strategy in Northern Waters\*

Ken Booth

*Whatever the prospects for UNCLOS III, history shows that norms will change and will bring about changes in the law of the sea. Of immediate concern in this paper is the issue of "creeping jurisdiction" and its effects on naval diplomacy and arms control. A proposal for control of strategic ASW is presented.*

**A**lmost all law of the sea (LOS) issues have had a good airing in the recent past, and in most respects the market place for papers is well past saturation point. There is little scope for new ideas. Nevertheless, a further look at the relatively neglected strategic aspects of the subject will provide an opportunity to check the validity of old ideas, and see whether changing circumstances are likely to affect the desirability or undesirability of various possibilities.

This discussion of the relationship between law and strategy in northern waters falls into two main parts. The first examines "the immediate future," that is, the military implications (mainly the lack of them) of the law of the sea as it seems likely to emerge from UNCLOS III. This subject has been widely if not deeply discussed. There has been general agreement about the prospects, and the main conclusions do not require challenging. The second part is more speculative. It examines the "longer term" implications of the changing regime at sea, that is, the possibilities that might emerge after the dust has settled from UNCLOS III, or in the event of it not settling. The setting for these possibilities is the drift towards creeping jurisdiction.

**The Strategic Significance of Northern Waters.** Northern waters have been the area of major sustained naval confrontation since World War II. A useful distinction can be made between the North Atlantic as an *arena* and as a *source* of international conflict.<sup>1</sup> Throughout the postwar period the strategic significance of these waters has been as an arena of conflict. This will be the case in future, but not so exclusively.

In broad terms the strategic significance of northern waters can be seen from four different points of view:

NATO Europe. The success of NATO rests on the ability of its members to use the sea in peace and war: it is an alliance cemented by seawater. In peacetime,

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NATO Europe is heavily dependent upon maritime transport for trade, energy, and raw materials. In addition, the North and Norwegian Seas and Arctic waters have become increasingly important as actual and potential sources of economic wealth, especially in the energy field. In wartime the Atlantic would provide access between NATO Europe and the linchpin of the alliance, the United States. The bulk of the reinforcements upon which the successful prosecution of a long war would depend would have to move by sea. The Norwegian Sea and the Greenland-Iceland-United Kingdom (GIUK) gap would be areas in which major battles would be fought for both sea denial and sea control purposes. NATO forces would seek to minimize the Soviet submarine threat and create the conditions for the provision of reinforcements and the projection of force. Important battles would take place for the control of northern Norway, the Baltic exits, and Iceland, for these would be immediate Soviet targets. Because of the critical importance of the reinforcement of NATO Europe in the event of war, it is politically important that the European allies have confidence that the United States has both the will and capability to carry out the task. Conversely, the undermining of this confidence in peacetime is a tactic by which the Soviet Union might hope to weaken the bonds of the alliance.

*NATO North America.* In peacetime, the North Atlantic provides access for a wide variety of imports and exports, and is an increasingly significant actual and potential source of energy. The North Atlantic provides a major deployment area for U.S. SSBNs and aircraft carriers targeted against the Soviet Union; it is also a vital area for the deployment of U.S. antisubmarine and antisurface surveillance efforts. In wartime, the main sea line of communication (SLOC) for the bulk of (mainly U.S.) reinforcements to all parts of the alliance would pass through northern waters; these SLOCs would therefore be the scene of critical battles.

*The Soviet Union.* In both peace and war the northeast Atlantic provides ingress and egress for the main Soviet Fleet and its associated air forces based on the Kola Peninsula. The Soviet Northern Fleet contains about two-thirds of the Soviet Navy's SSBNs, cruise missile submarines and missile-armed maritime aircraft. The western Atlantic and the Barents Sea are deployment areas for Soviet SSBNs. Extensive U.S. nuclear power is targeted at the U.S.S.R. from northern waters, and so the northeast Atlantic provides access for Soviet attempts to counter this threat. Since the mid-1960s the Soviet Navy has moved forward to meet its various threats, and so has pushed out its area defense responsibilities in northern waters. But in one respect, the submarine threat to western SLOCs, extensive areas of the North Atlantic have long been of interest to the Soviet Navy. The Baltic is of significance because it provides access to the Leningrad area and the coasts of important Warsaw Pact allies. Apart from fishing, the economic value of northern waters to the Soviet Union is potential rather than actual, but it is interested in resource exploitation in NATO-controlled areas both because of

the restrictions that it might entail to their own naval mobility and because of its potentiality for causing disputes within the alliance.

*The neutrals.* Northern waters are militarily significant for Sweden and Finland not mainly because they are littoral States, but because these waters play decisive roles in both Soviet and U.S. global strategies. Any Soviet-American confrontation in these waters would affect the security of the neutrals. At present, the latter's chief fear is not of a "direct" Soviet attack but rather fear of the spillover of a superpower conflict.

Because NATO is an alliance held together by the sea, it follows that the Soviet Union can use this dependence to weaken the alliance in peace, and contribute to its defeat in war. For both adversaries, therefore, continued ability to use the sea is crucial, for preventive and positive reasons. If any war in Europe proves to be "long," the battle of the Atlantic will, for the third time, be decisive for the outcome. In the recent past, northern waters have witnessed two main trends: an increasingly dangerous Soviet naval challenge to NATO naval power, and the growth of economic and political problems that have produced a recognition that the significance of these waters has been increasing from all standpoints. We can expect to see more trouble in the future than we have been accustomed to face in the past in these waters. In large part this is because we have become accustomed to expect so little. Now the North Atlantic is an area in which many of the changing economic and military uses of the sea intermix in a peculiarly complex, if not particularly dangerous, fashion.

From this brief discussion of the strategic significance of northern waters it is evident that they will become a new, albeit limited, source of international conflict, while still remaining the arena for the major concentration of contemporary naval power.

**Short-Term Implications: Life After UNCLOS III.** As a result of the session at Geneva in the summer of 1980, UNCLOS III produced a Draft Convention (Informal Text), and a feeling of confidence that a treaty will finally be signed in 1981. The treaty will enter into force when a specified number of States have ratified it, a process that may be neither smooth nor short. There remains some uncertainty about the precise character of the post-UNCLOS III maritime regime, but about the military aspects there seems to be relatively little doubt. The status quo will be maintained. The present text is satisfactory for the naval powers: for the time being it assuages their fears about a more restrictive regime.

From a military point of view, reading the latest UNCLOS text is like watching Hamlet without the ghost. Strategic considerations played an important part in the negotiating of the text, but they are most noteworthy in the end-product by their absence. The latest text gives more restrictive powers to coastal States, but leaves the military aspects of the exercise largely unaffected.

These can be stated briefly. The 12-mile territorial sea, which extends the innocent passage provision, has no major military significance. Its main meaning was in relation to the possible nationalizing of hitherto international straits. However, the text provides for essentially unimpeded passage for ships, submarines, and aircraft through or over straits. The proposed transit rights are equivalent to high-seas passage. The Baltic Straits are the only important straits for the present discussion, and their regime is unaffected as a result of Article 35(c) concerning those straits regulated by "long-standing international conventions in force." More significant than changing straits-regimes in northern waters is the problem of the seabed. In the past, some have argued in favor of the complete demilitarization of the seabed but it has not proved possible to go beyond the Seabed Treaty; this entered into force in 1970 and prohibits the emplacement of nuclear weapons and other weapons of mass destruction. UNCLOS III has agreed that the deep seabed be reserved for "peaceful purposes," a form of wording that the naval powers see as perfectly consistent with their projected military activities. There has been some disagreement whether "military" listening devices are peaceful, and there is scope for disagreement about what is "scientific" research, for much scientific research in the oceans has military implications. For the present, seabed military activities remain intact, if not unchallenged.

A major innovation of UNCLOS III is the 200-mile exclusive economic zone (EEZ), in which coastal nations have specified rights over fish, oil and gas, environmental protection, and the conduct of marine scientific research. The UNCLOS text has circumvented disputes about military activities in EEZs by adopting a tactic of silence. Behind this silence has been hidden a number of rights for navies.<sup>2</sup> What is not prohibited is permitted. UNCLOS III has not spoken any last rites over naval strategy.

From this brief discussion it would appear that there are no major strategic implications in northern waters arising out of the military provisions (or lack of them) of the Draft Convention of UNCLOS III. There have been some minor implications, but these could have been expected regardless of UNCLOS III. Pollution, economic exploitation, increased traffic control and other considerations have combined to draw new attention to the policing or constabulary task of navies in coastal waters, and threaten some restriction on naval movement. Changing international regulations are not self-enforcing: warships and aircraft act as badges of sovereignty and agents of enforcement. In addition to new constabulary tasks, military power is necessary for more serious possibilities. In areas of disputed jurisdiction, nations that do not want to lose them will have to show a willingness to defend their patches of water. Their claims will normally require naval support as well as legal arguments. In these circumstances small powers trying to assert their rights in the face of stronger neighbors will be given additional confidence if their claims are supported by a unified alliance. Displays

of aggressive determination will have their part. Although the circumstances were peculiar, it should be remembered that Iceland gained considerable diplomatic leverage by the vigorous use of its handful of gunboats during its mid-1970s fishing dispute with Britain. Naval forces will have an important role in the process of regime change. The process will be neither speedy nor free of problems, and naval forces will help determine the resolution of jurisdictional questions, and the development of particular norms.

The changes in naval strategy and technology that have been and are occurring in northern waters are for the most part the result of factors other than changes in the law of the sea. They are much more the result of the interplay between domestic politics in the countries concerned, the momentum of technical innovation, and the dialectic of the strategic relationship with the adversary. But the law of the sea does have some direct implications for the area as a source of conflict, both within NATO and between various NATO allies and the Soviet Union.

A major regime change can always be expected to cause disputes and conflicts, especially where security and resource issues are involved. Disputes in northern waters can be expected over boundaries and conflicting ocean use, but among the NATO allies it is unlikely that there will be any dispute serious enough to involve military manifestations, even at a low level. Such disputes as might arise should be amenable to settlement by other means: they have several characteristics that lead one to expect that they will be settled in an orderly fashion.<sup>3</sup> However, if any dispute should become prolonged, it could help exacerbate outstanding problems and so contribute to a loosening of the bonds of the alliance. Disagreements over fishing in the North Sea and between the United States and Canada are the most relevant disputes at present, but they have no strategic significance.<sup>4</sup> The incentives for agreement among the allies are strong, but experience shows that this is never a guarantee that trouble will be avoided. Among other things, domestic pressures can upset rational foreign policy calculations.

Not all disputes in the region are free of danger. Between one NATO ally and the Soviet Union there are two worrying issues, Svalbard and the delimitation of the Barents Sea. The two issues prompt some different responses among the allies, but both derive their strategic significance from the importance of the Barents Sea for Soviet security. The origins and character of the issues have been thoroughly discussed elsewhere, and do not need repeating. It is merely necessary to note that they have three main military features. In the first place, Soviet naval interests (especially the desire to minimize external involvement across the traffic-ways of the Northern Fleet) will significantly affect the Soviet stance on all jurisdictional questions in the area. If the past is any guide, security issues are those on which the Soviet Union is most obdurate and highly sensitive. Secondly, it is thought unlikely that Svalbard would be the target of bolt-from-the-blue

Soviet aggression. Instead, as an outpost of an adversary alliance, it can be expected that Svalbard will be squeezed occasionally by the Soviet Union, in order to test Norway's resolve. In this sense it will play the role of a northern Berlin. The Soviet Union can hope to engage Norway on a non-NATO basis, and hope to weaken its ties with the alliance. Thirdly, this means that the allies should do whatever is possible (which presumably means what Norway thinks is desirable) to give Norway the confidence to stand up to the Soviet Union, without actually provoking it. It is important that Soviet policymakers believe that the NATO allies support Norway's position.

In the short term, naval developments in northern waters will be shaped more importantly and more directly by political, economic, and technical developments unrelated to changes in the law of the sea. These developments will primarily affect northern waters as an arena of conflict. The changes that will emerge, clearly or messily, from UNCLOS III will primarily affect northern waters as a source of conflict, to the extent that they exacerbate political relations between the NATO allies and provide an occasion for disputes between the Soviet Union and Norway.

**Long-Term Implications: Living with Creeping Jurisdiction.** The long-term military implications of the changing law of the sea arise from the possibility—perhaps the likelihood—that some aspects of UNCLOS III will not have a long lifetime. The law of the sea has fluctuated in the past, and will undoubtedly continue to do so in the future. One cannot predict how long it may take before changing norms will threaten the rules to be established in UNCLOS III, but it is well to remember that UNCLOS I (1958) started to be superseded within 10 years, and its provisions will formally be changed after 23 years. Who expected the rapid reversal of policy by the traditional maritime powers on a 200-mile EEZ? Who would have thought an International Seabed Authority probable 10 years ago, or the relatively easy codification of the 12-mile territorial sea? Conservative expectations about the future might be just as fragile as were these ideas in the recent past. In international politics, norms invariably outrun the law.

Norms will change, and will bring about changes in the law of the sea. For the present discussion the most important feature of change is the phenomenon of "creeping jurisdiction" (over and under the ocean, in straits, coastal zones, the seabed, and what was formerly the high seas). Creeping jurisdiction is of evident concern for those governments wishing to operate warships and carry out other military tasks under and over the sea. It threatens the mobility of warships, and hence their military essence. The doctrine of the "common heritage of mankind" has already been described as containing the germ of the progressive neutralization of the oceans.<sup>5</sup> We are a long way from that, but we are also a long way from that navalist Eden when the seas were free and resources were plentiful, at

least for those with the will and power to exploit that situation. In the 1970s the traditional maritime regime fell back before the advancement of national claims that were given legitimacy by the international community. It is unlikely that this process will stop: it will only slow down. The result will be that large areas of the sea will be filled out with denser patterns of national administration. In the troubled common, the unilateralist impulse will be powerful in a world in which the belief is growing that there is not enough for everyone.

As a result of the unilateralist impulse, the sea is becoming "territorialized." National administration over the land is extending seaward on matters of good order, the exploitation of resources, and the exercise of sovereignty. *Territoriality* is a politically relevant term, although international lawyers might quibble with its implications. In ethology, territoriality refers to an area over which one group is dominant: the group regards that area as its own private property and will resist intrusion by others. Increasingly, national groups are having such feelings about parts of the sea. Icelandic protection of "its" fishing grounds in the mid-1970s was a good illustration of such attitudes. The most salient aspect of the dispute was Icelandic feelings about ownership, not the actual state of the law of the sea.

Creeping jurisdiction is here to stay. The natural tendency will be for governments to push out regulations into the EEZ, and in some cases even beyond. The impulse to govern efficiently will encourage such a trend, and economic and pollution problems will create plenty of incentives. All nations bordering on northern waters will want a bigger say in their own maritime backyards, areas that were formerly the unclaimed "blue water" of naval powers. It is from the rubbing together of these two interests and perspectives—coastal state management and blue-water naval strategy—that the longer-term naval implications of the changing law of the sea will derive.

The implications of a more restrictive regime can be usefully discussed in relation to the main types of ocean area affected, namely, straits, the seabed, and EEZs.

*Straits.* The only strategically important strait in northern waters is that leading into and out of the Baltic. Restrictions for warships were unilaterally imposed by Denmark in 1857, and were embodied in the 1958 convention. No more than three warships at a time can pass without special permission, and submarines have to pass on the surface. These restrictions present some problems for the Soviet Union, and at times it has indicated its misgivings; but to date it has followed the rules, at least as well as other nations. Vessels other than warships are governed by the right of innocent passage.

Rights of transit through straits have been one of the major issues in UNCLOS III. It is a bone of contention on which there is still plenty to chew in the future. For the Baltic this might involve the passage of fewer ships at a time, the need for more advance warning, restrictions on the size and type of warships allowed, the prohibition of nuclear-powered ships, and so on. The opportunity to apply

such rules leniently or to the letter would give straits States important discretion over the passage of foreign warships. It would thereby enhance the strategic significance of those countries at the "chokepoints."

Clearly, a more restrictive regime for the Baltic Straits would affect the Soviet Navy more than NATO, but a more restrictive Baltic regime is one with which both superpowers could live. However, their main opposition to such a trend would be concern about the extension of such principles to straits elsewhere that are of more importance to their national security.

A major NATO interest in the Baltic is in showing that the sea is not a Soviet lake. This is thought desirable in order to reassure both allies and neutrals. NATO forces therefore occasionally exercise in the Baltic, mainly in the southern portion. In addition, ships are occasionally sent in on a non-NATO basis in order to demonstrate their right to be there. Soviet and other Warsaw Pact maritime activity is monitored by aircraft and naval vessels. These activities could still be maintained under a more restrictive regime but a change would imply, though not demand, that a greater responsibility for NATO maritime activity should fall on the shoulders of the local allies, West Germany and Denmark. Accepting such a burden would be a useful signifier of the international character of alliance responsibilities.

For the Soviet Union a more restrictive Baltic regime would impede the activities of the Baltic Fleet, because its major chokepoint would be supervised by unfriendly (if not always uncooperative) States. Despite this disadvantage there are some countervailing considerations. The Soviet Union might welcome more restrictions on (nonlittoral) NATO activity in the Baltic. Furthermore, the areas to which the Baltic gives access can already be served by the Northern Fleet, which is bigger and more capable. Nor do restrictions on straits necessarily hamper either the buildup or diplomatic salience of naval forces. The success and visibility of Soviet naval activity in the Mediterranean since the mid-1960s, despite the Montreux Convention, is instructive in this respect. Finally, it is important to note that the Soviet Union, up to the late 1960s, periodically tried to get the Baltic, along with the Black Sea, declared a regional sea, effectively closed to nonlittoral States. Strategically the prospect of a more restrictive regime for the Baltic would not be unthinkable from the Soviet perspective. In practice, Soviet opposition to such a development would derive from its concern about the general principle of passage through straits, rather than this particular case. Movement toward more restricted naval activity in the Baltic, if it were ever thought desirable, would have to come from some version of a "sea of peace" idea, rather than from a change in the law of the sea as such.

If a more restrictive regime were put into operation it would entail a variety of political problems with possible strategic implications. A more restrictive regime would increase the potentiality for disputes and conflicts between the straits States and military users; most importantly, this would involve the Soviet

Union and Sweden and Denmark, the former being neutral and the latter being one of NATO's smallest members. For naval considerations the Soviet Union would have an interest in increasing its influence over these states, by a mixture of carrot and stick, in order to encourage a favorable interpretation of the rules of passage. This might cause embarrassment for the straits States. A failure to agree with the Soviet Union, or the objection to the passage of a particular ship, might be regarded as an "unfriendly" act, and so cause important political repercussions. Alternatively, constant giving way on marginal cases would be an admission of weakness and lack of confidence.

In sum, both superpowers could accept a more restrictive regime for the Baltic Straits without seriously degrading their overall strategy, but they are not likely to accept it as a change in the law of the sea because it might set precedents for strategically more important straits. It would therefore have to come about as a version of an arms control (disengagement) proposal, but even here the superpowers might fear precedents. In addition, the neutrals and NATO allies do not favor any move toward the idea of the Baltic becoming a closed sea dominated by the Soviet Union: and it is this factor rather than any purely military consideration that should govern NATO's attitude.

*The seabed.* A more restrictive regime would attempt to define with more precision what was "military" and therefore presumably not "peaceful." This would be a frustrating exercise: even if any agreement were reached, there would be room for ambiguity. Despite such problems, calls for restrictions on the military use of the seabed can be expected, especially in the areas over which coastal States already have rights, and believe that they should have more. This means continental shelves and the seabed below the EEZ.

There have already been harbingers of what might happen. In its adherence to the Seabed Treaty in 1973 India announced that there could be no restriction on its sovereign right to verify, inspect, remove or destroy any weapon, device, structure, installation or facility that might be emplaced on or beneath its continental shelf by any other country. The position of the United States was that the rights of coastal States were restricted to the exploration and exploitation of natural resources, and therefore were not concerned with military equipment. Further out, on the deep seabed, UNCLOS agreed that it be reserved exclusively for "peaceful purposes." The U.S. Navy, not surprisingly, has chosen to define seabed listening devices as falling under this heading. Some would disagree. The Soviet Union has similarly taken a permissive (conservative) attitude toward this problem, arguing that states have the same rights on the continental shelf as on the high seas.

Because of the naval traffic patterns of both alliances in the northeast Atlantic, it is an area that is impregnated with listening devices. The U.S. SOSUS system has attracted most attention.<sup>6</sup> If there were to be pressure for more restrictions on seabed military use, the major naval powers would object, because restrictions

would degrade their surveillance capabilities. In practice, it is difficult for nonspecialists to make evaluations about this problem because of the secrecy of the subject and hence the impossibility of being able to determine the significance of seabed sensors in the overall sum of the naval confrontation. To what extent will the next battle of the Atlantic depend on the information gathered from seabed listening devices? Specialists are divided about the capabilities of ASW in the foreseeable future. All one can say with confidence is that technical developments will lead to steady improvements in whatever capability already exists. But will countermeasures improve commensurately, or even more quickly? In any case, the potential value of such devices in the event of war has to be set against the widespread belief that major war is unlikely. If this is the case, it might be argued that seabed listening capabilities might be sacrificed for political bargains in other aspects of the development of the law of the sea.

The question of seabed listening devices raises the issue of the very desirability of tracking the adversary's SSBNs. If it is a superpower's intention to maintain an invulnerable second-strike capability, then it should be solicitous about its adversary's retaliatory force. Attempting to track an adversary's SSBNs will decrease his confidence in his second-strike potential, and as such will be "destabilizing" in the Western theory of mutual deterrence. From this point of view, strategic ASW is not only costly, but also strategically undesirable. But for NATO, ASW is not merely a matter of strategic deterrence: it is also concerned with protecting vital allied SLOCs. Monitoring Soviet submarine activity through the GIUK gap is at least as important in relation to tactical ASW (concerned with the potential defense of convoys) as it is with strategic ASW (concerned with countering the adversary's nuclear-strike potential).

If pressures mount for a more restrictive regime that will affect seabed listening devices, we can expect opposition from both superpowers. The United States will be at the fore because of its reputed advantages in the "state of the art" and the special interest of NATO in tactical ASW. Nevertheless, some of the arguments above suggest that restrictions on seabed use could be accepted; this would obviously be the case if there were to be some technical developments that decreased the relative significance of seabed sensors. A more restrictive seabed regime would generally favor NATO because of its possession of the "waterfront real estate." As long as the northern members of NATO remain bound together, seabed military use in critical areas could continue: presumably even sensitive allies could allow such out-of-sight, out-of-mind activities. A more restrictive regime would increase the strategic significance of those countries with the relevant waterfront, Norway, Denmark (Greenland), the U.K., and Iceland. These countries would become even more important to the United States. In the case of the smaller countries, the increased significance of their location would give them increased intra-alliance bargaining power.

Because of the relative advantages presently and foreseeably envisaged for the United States in ASW techniques, the Soviet Union might be expected to see some advantages in a more restrictive seabed regime. But the problem for the Soviet Union in this respect is geographical rather than legal. Again, its chief objections, seabed restrictions in the north might derive from wider considerations, particularly the boost such a development would give to creeping jurisdiction elsewhere. However, any restrictions on NATO activity in northern waters would be attractive to some Soviet naval strategists.

*The EEZs.* Although UNCLOS III was particularly concerned about restrictions on naval movement through straits, a more serious long-term concern for the naval powers is the possibility of restrictions on the passage of warships through EEZs. This would threaten naval activity in extensive areas that were formerly "high seas" and so "free" for transit and demonstration. For the immediate future warships have transit and other rights (by default, not designation) but it can be expected that constraints will accumulate because of territorial impulses on the part of coastal powers, beginning in the reasonable guise of traffic and pollution control. Some coastal States have already shown their sensitivity to foreign warships and intelligence gatherers.

Various restrictions can be envisaged. They include a requirement for prior notification, limitations on numbers in passage at any one time, a ban on certain types (intelligence gatherers or nuclear-powered ships), movement in designated sealanes or restrictions on "military" activities while in passage (no exercises, or ASW activity, or aircraft flights). Restrictions on the passage of submarines in EEZs would be difficult to inspect and enforce, but claims to restrict them might nevertheless be made. If this were to become widespread, it could be embarrassing for the naval powers to ignore them. The discovery of a foreign submarine through accident or other means in areas claimed by the coastal State would entail diplomatic costs. Other possible restrictions include a maritime version of air defense identification zones. Pollution-conscious Canada has already taken steps in this direction for the control of merchant ships.<sup>7</sup> Such procedures will probably spread. Will they also come to encompass warships?

The possibility of the growth of restrictions such as those suggested above would threaten the mobility of warships and therefore would appear to undermine their usefulness as instruments of foreign policy in peacetime. Normal deployment patterns would be interrupted, crisis deployments would be hindered, and some scientific work with military value might be prohibited.

Because of the configuration of the lands and seas in northern waters, such changes would affect the Soviet Union more than NATO. There is a "NATO" EEZ barrier across the access routes of the Soviet Northern Fleet. In contrast, U.S. and other NATO forces would have unrestricted access to most normal operating areas, with the exception of parts of the Barents Sea. A more restrictive EEZ regime would be a major impediment for the Soviet Union's oceanic navy.

Soviet authorities would therefore attempt to stand out against any drift in this direction, though some of its objections might not be as strong as otherwise might be expected if those analysts are correct who have argued that the anti-SLOC mission has a low priority in the Soviet naval mission structure.<sup>8</sup>

International norms will change, regardless of Soviet preferences. Territorial impulses on the part of coastal States seem likely to be especially strong in northern waters, bounded as they are by States that are technologically advanced, energy-short, maritime-minded, and administratively competent. If restrictions are to grow in the north it would seriously complicate Soviet naval behavior. The United States, on the other hand, could more easily operate within a more restrictive regime, inasmuch as its allies control the important coastal waterfront. This condition would not be present in most other parts of the world, and so the United States would be concerned about endorsing the general principle of the extension of territorial control. As a result, both superpowers would share a common and hostile attitude toward restrictions on the passage of warships through EEZs.

Should a large section of the international community decide in favor of increased restrictions on foreign warships in EEZs, both superpowers would have to consider a variety of possible regional military implications. It would mean that if the U.S. Navy is to continue to have a free run of the northeast Atlantic, then it would be imperative to maintain the loyalty of the allies. The withdrawal from the alliance of any one of the northern flank allies would be even more serious than at present. This in turn would give those states increased bargaining power over the United States. On the Soviet side, the potential use of its navy for crisis deployments in the North Atlantic would be seriously challenged, but so far this role has been very limited. To overcome some of its problems the Soviet Union might attempt to negotiate special arrangements with particular coastal countries in order to ensure continuing naval access; rejecting such a proposal might be politically embarrassing for any coastal country. If, in the event of a more restrictive regime being claimed, the Soviet Union felt it had to disregard the wishes of a coastal State in a particularly urgent case, this could create a difficult diplomatic situation, but not one the Soviet Union would avoid if its "vital interests" were affected. Soviet leaders might be willing to pay the diplomatic price involved or, alternatively, might attempt to circumvent the problem by keeping more forces fully deployed forward, in order to avoid any delay in reaction time in a crisis. This would put a premium on strategically placed countries for the use of their bases and facilities. The Caribbean and West Africa would be the likely areas of increased Soviet interest. This requirement would complicate Soviet foreign policy, but it would also add a new direction of threat to NATO shipping in the event of war.

It should be evident that it would not be impossible for either superpower to live with a more restricted regime in northern waters, but it also should be evident

that neither would welcome such a development because of its naval implications both regionally and further afield. Regionally the difficulties would be much more serious for the Soviet Union, but the rights being questioned are those that the United States would particularly not wish to concede elsewhere. Consequently, the superpowers will resist change. Although they would hold out strongly on issues affecting national security, it should be remembered how quickly their positions changed on the 200-mile zone when faced by the bulk of the international community. Norms that do not have the support of the most powerful will always be shaky, and their codification into law might prove impossible, but one should not underestimate the capacity of the more powerful to adjust in the face of changing circumstances. In this case naval interests could be overcome by economic or political arguments and lobbies. If, as was suggested earlier, the territorialization of coastal zones becomes irresistible (and restricting the activities of foreign warships might well prove a very popular step), this trend would become an international reality that it would be difficult for the superpowers to ignore.

**Naval Diplomacy and Arms Control: The Effects of Creeping Jurisdiction.** Assuming an irresistible drift towards a more restrictive regime, we should now examine the implications for naval diplomacy (the use of warships in support of foreign policy) and for the increasingly confused and maligned concept of arms control.

*Naval diplomacy.* The almost unanimous opinion in naval circles is that a more restrictive LOS regime would seriously hamper naval mobility, and hence would be undesirable. In contrast, it can be argued that while a more restrictive regime would certainly pose many new problems for major navies, it would also provide new challenges and opportunities.<sup>9</sup> Indeed, it can be argued that a new and more sensitive patchwork of maritime jurisdiction would not hobble naval diplomacy but would in fact rescue it from some of its difficulties in recent years, where it seems to have suffered somewhat as a signaling device.

Jurisdictional changes will open up new diplomatic possibilities for warships. Opportunities will be present for both supportive and coercive signaling, and all the gradations between. Naval displays in friendly waters will take on more significance because of the increased "national" feeling about such waters, and so this traditional usage will be enhanced. Similarly, there will also be more scope for coercive uses. There will be new boundaries to cross, and these will entail political, legal, economic, and diplomatic costs, not to mention the possibility of facing physical opposition. The territorialization of the sea will bring about new restrictions, but this very development will enhance the importance of naval diplomacy. Naval diplomacy will be used less, but it will be more visible.

In future, the problem will not be whether opportunities will exist for a renewal of naval diplomacy, but whether and how they can be exploited. We

can expect that they will be exploited in northern waters, and for three main reasons. First, the hardware is in existence, and there will be an impulse to find employment for expensive assets. Secondly, it is unlikely that there will be any basic change in the NATO-Warsaw Pact confrontation in the foreseeable future. The need will remain for the countries involved to reassure allies, and to deter or coerce adversaries by military means. Finally, signaling by military means is particularly important and subtle in the North Atlantic region. It has a very receptive audience.

The signals of naval diplomacy are already carefully scrutinized. The Soviet Union has for over 30 years been sensitive to NATO naval activity, and recently Soviet naval behavior has received the same attention in the West. So far the Soviet Navy has had limited diplomatic scope in the North Atlantic but, within limits, its general-purpose naval forces have been an active instrument of political influence in the region.<sup>10</sup> This tendency would be increased rather than decreased by creeping jurisdiction. The Soviet Union would use naval diplomacy to maintain rights of presence against the development of restrictive norms. In addition, the politicostrategic importance of the area, together with the new boundaries, will give the Soviet Navy the opportunity to send signals with high political visibility (but also with the opportunity to withdraw with relative ease). There have been harbingers of such possibilities. The new sensitivity toward maritime affairs, and also the scope for manipulating this sensitivity by displays of "power in evidence," has been seen in the anxiety shown by North Sea states at the presence and evident interest of Soviet warships in oil rigs and other installations. Soviet behavior has been legal, but it has raised Western temperatures. Related Soviet behavior can be expected in future, for so much of the international politics of the region is conducted by the manipulation of psychological processes. Discussion of the international politics of the region is characterized by words and phrases such as *deterrence*, *reassurance*, *looming power*, *military overhang*, *provocation*, and *confidence building*. It is a region in which the vocabulary of psychostrategic confrontation can be fully employed: it is, after all, the home of the much used and often criticized, but well understood concept of "finlandization," the idea of political accommodation to predominant military power. In such an area, new boundaries, and the significance of crossing them for either supportive or coercive purposes, will add to the vocabulary of psychostrategic signaling.

There is developing what Hedley Bull has called "a maritime territorial imperative," involving feelings about the sea that are much closer to those that nations have previously had only about their sovereignty over the land.<sup>11</sup> Nevertheless, the new boundaries at sea will obviously remain less clear, less immediately sensitive and further from national nerve-endings than those on land. For this reason, nations will never be as sensitive to warships passing through their seas as they always have been, for obvious reasons, to armies tramping over

their national homelands. But the more feelings about the ownership of the sea grow, the more will the two sensitivities converge. Together, relative freedom of movement across the sea and growing national sensitivities about the sea will provide future opportunities for dramatic naval diplomacy.

*Arms control.* The immediate future is not propitious for the development of arms control, given the present chilly relations between the superpowers and the widespread belief that the next 5 years are likely to be more dangerous than any period since 1962. The prospects would seem to be particularly bleak in northern waters, for even examinations of the subject in calmer times concluded that there was little promise of mutually agreeable schemes.<sup>12</sup>

Despite such gloomy but realistic prognostications, the present might be a good time to start rethinking one form of naval arms control, namely strategic ASW. First, it will be argued that creeping jurisdiction together with various economic and strategic considerations makes this a more promising idea than hitherto. Secondly, experience suggests that when a chilly period gives way to a relaxation of tensions, then this may be a productive time for arms control proposals, and new ideas might be more effective than warmed-up old ones. Thirdly, it is important from all points of view to try to slow down the arms race, and it is not too soon to be working to head off decisions that might be made around 1990 for the weapons of the next century. Among these decisions, those affecting strategic deterrence will remain paramount.

Controlling ASW would be a tricky business. It has been discussed occasionally in the past, but has made no practical progress. It remains a topic on the arms control agenda, but a low priority. In its latest manifestation it was suggested as a possible subject for SALT III, if SALT II comes to pass. Despite present problems and prognostications there are some positive aspects to the control of strategic ASW. It is an idea whose time might yet come, for it is an idea in which arms control and long-term law of the sea developments overlap and promise to enhance the stability of deterrence.

Support for controlling strategic ASW has been based on two main arguments. First, it is sometimes claimed that ASW is "destabilizing." Strategic ASW threatens the invulnerability of ballistic-missile firing submarines, and it is undesirable if either adversary believes that any element of its second-strike forces could be neutralized by a preemptive attack. Such a belief encourages worst-case analysts to credit the adversary with first-strike intentions. This generates anxieties that in a crisis might produce pressure to move first, in order to preempt the putative preempter. Secondly, the control of strategic ASW has been thought desirable because its steady progress fuels continued research and development to improve submarines and their missile systems. This produces a costly and self-defeating spiral, which results in no more security, only greater weapons sophistication, cost, and political suspicion. For these reasons, control of strategic ASW should slow down the arms race and enhance mutual deterrence.

Superficially, the attractions of controlling strategic ASW are considerable. But most arms control proposals are like icebergs, with most of their obstacles hidden from immediate view. This is the case with strategic ASW. It has made no practical progress. The idea has floundered on the difficulty of distinguishing between so-called tactical and so-called strategic ASW. NATO has a continuing interest in improving ASW techniques in order to protect convoys.

No progress in this form of arms control is foreseeable as long as the problem is conceived as a matter of making distinctions between tactical and strategic ASW. In ASW the systems, techniques, and ideas developed for one are transferable to the other. But there is one possible way forward, and that is through distinctions based on geography rather than missions. An ASW *disengagement* scheme faces many obstacles, but this approach offers more promise than other schemes. The ASW disengagement scheme proposed below is based on the idea of prohibiting ASW in the EEZs of the superpowers (ASWEEZ for short). The scheme would effectively demilitarize the EEZs of the superpowers for all but their own and allied naval activity. To be effective it would therefore require a big conceptual jump, especially on the part of naval establishments.

Before discussing other obstacles facing ASWEEZ, it is necessary to identify the factors that make it worth serious consideration:

*The potential for Soviet interest in ASWEEZ:* The Soviet Navy has become increasingly worried about the development of U.S. ASW capabilities. In recent years an important element of Soviet naval activity has been devoted to protecting its SSBN force in the Barents Sea. With the *Delta*-class submarine, and its associated missiles (the SS-N-8 and SS-N-18), the Soviet Union can hit all the U.S. homeland from the Barents Sea. It is therefore unnecessary for this type of submarine to leave the EEZ in order to discharge its strategic mission. In time the *Yankee*-class submarine will be progressively replaced by classes with longer-range missiles (the *Yankee's* SS-N-6 and SS-NX-17 have ranges of 1,750 nm and 3,000+ nm respectively). This will mean that it will not be necessary for any Soviet submarines to leave the Barents Sea in order to be in a suitable firing position.

A scheme to prohibit U.S. strategic ASW in the Barents Sea might therefore be welcomed by Soviet strategists because this threat has grown and helped shape Soviet naval developments since the late 1960s.<sup>13</sup> The codification of a Barents Sea "sanctuary" or "bastion" would be in line with the direction of present doctrine, with its SSBN protection mission. The main disadvantages for the Soviet Union in such a scheme would appear to be the relative geographical concentration of its SSBN potential and the relative shallowness of the Barents Sea. These need not be insurmountable obstacles given the huge area enclosed by the Soviet 200-mile zone (an area that makes the MX racetrack look like a sitting duck). In addition, these marginal disadvantages would have to be set

against the advantage that U.S. ASW forces would no longer be able to search for Soviet SSBNs in large expanses of ocean.

*The potential for U.S. interest in ASWEEZ:* If Soviet ASW efforts were prohibited within 200 miles of the U.S. coast, this would significantly decrease the threat of Soviet tracking of U.S. SSBNs as they leave their U.S. bases. The scheme would not inhibit NATO's tactical ASW efforts, as only the Barents Sea would be excluded from Western ASW activity. Unlike the last war, this is an area in which allied convoys are least likely to operate. The scheme would still allow SSBNs to leave their 200-mile sanctuaries. However, cost, maintainability, crew comfort, and the maintenance of relative invulnerability would be strong incentives to restrict patrols to one's coastal zones, where the adversary's ASW threat would be minimal.

From the U.S. point of view the ASWEEZ approach is in line with the thinking of the advocates of small strategic submarines. The advocates of SUM (Shallow Underwater Mobiles) favor buying invulnerability by investing in the missile rather than in the launch vehicle; they argue that a greater number of smaller, less costly and less sophisticated submarines operating near U.S. coasts represents a better option, strategically, financially, and environmentally, to systems such as *Trident* or the MX. In addition, if it were eventually to lead to the deployment of all the deterrent at sea, it would have the considerable benefit of separating people and the primary targets of a first-strike attack, namely one's retaliatory force.

A scheme to prohibit Soviet strategic ASW off the U.S. coasts might therefore be welcomed by at least some U.S. strategists on the grounds that it promises a more secure and less costly means of strategic strike than those presently foreseen. It might play some part in slowing the arms race (by diminishing the pressure to improve submarines) and it would also enhance mutual deterrence. Opposition to ASWEEZ would be minimized because the scheme would not interfere with the free-ranging assets of existing SSBNs, and it would not interfere with tactical ASW.

The scheme suggested is a logical extension of, but in important ways different from, a combination of ideas that have been mooted in the past. In particular, it is an extension of Michael MccGwire's proposal for a mutual limitation of SSN forces together with the transferring of the SLBM inventory from the *Trident* SSBN to a "spartan diesel submarine force" operating in coastal waters. MccGwire's scheme was offered in the interests of slowing down the arms race and stabilizing mutual deterrence.<sup>14</sup> ASWEEZ overcomes some of the difficulties of the MccGwire scheme, but has problems of its own. The main difference between the two schemes is simple: whereas MccGwire's scheme concentrates on keeping SSBNs operationally tethered to home waters, ASWEEZ concentrates on keeping adversary ASW efforts out of those waters. As a result, in the MccGwire scheme, distant-water strategic ASW is supposed to wither away;

in the ASWEEZ scheme stopping such behavior is mandatory. A final difference is that the MccGwire scheme awaits the building of SUMs, or a major decision to concentrate the seaborne deterrent in such vehicles. ASWEEZ does not depend upon such decisions. SUMs would be a possible consequence, not a necessary precondition for ASWEEZ.

ASWEEZ has several additional advantages over other ideas that have sought to control strategic ASW:

- It should be easier to negotiate. There is no actual disarmament. There need be no wrangle over numbers, one of the familiar stumbling blocks in arms control negotiations. Definitional problems are present, but by the standards of the day should be relatively small.

- Verification should not be a major problem. The superpowers can have some confidence in verifying whether adversary ASW efforts are taking place within their EEZs. In contrast, they cannot feel confident that the adversary's SSBNs will necessarily remain close to home, as is expected in the MccGwire scheme. Existing SSBNs are big investments and are unlikely to be scrapped, and any transformation to a spartan diesel force might take many years.

- ASWEEZ should be politically acceptable to third parties. The scheme is tied to the generally accepted 200-mile line rather than any other sanctuary demarcation line. Other lines might leave Norway stranded behind an advanced Soviet maritime frontier. In ASWEEZ, Norway's geopolitical position remains unchanged. Nor need the other neighbors of the Soviet Union fear that Soviet warships are being left supreme in any but legally accepted Soviet waters.

- ASWEEZ maintains SSBN flexibility. The scheme envisages that SSBNs in existence will retain their present flexibility to go wherever their planners think desirable. This would minimize the domestic opposition that would face the idea of imposing strict geographical limitations on their use; such limitations would negate what has been one of the chief selling points of SSBNs over the last 20 years. In practice, the existing SSBN forces may choose to stay in well-protected coastal waters, and may in time wither on the vine into MccGwire's spartan force, but under an ASWEEZ regime this would be a matter of choice, not necessity. The choice might well be made because of the advantages of staying in well-protected coastal waters from which adversary ASW forces are excluded.<sup>15</sup>

- ASWEEZ does not demand any major shift in nuclear doctrine. The MccGwire scheme in part rests on a belief that stability is best served by mutually assured destruction rather than a more explicit fighting strategy. Unfortunately for this scheme, there has been a convergence of superpower strategies toward the latter. ASWEEZ does not require a change in strategic doctrine, apart from a willingness to trade a loss in damage-limitation capability for a gain in assured destruction. This should enhance deterrence. However, by leaving SSBNs to roam free, ASWEEZ still leaves open the option (for good or ill) of using the

SSBNs in a counterforce role (by operating them at short range against time-sensitive targets).

In addition to these points of difference with the MccGwire scheme, some common advantages are shared. Both schemes aim at "confidence-building." If SSBNs were to be kept in home waters, and especially if they had no capability to go further, this would limit their potential as first-strike weapons. In the sense that strategic ASW is a first line of defense (or possibly offense), the pulling back of these forces should contribute to enhanced confidence in one's own retaliatory forces. This is especially important in the years ahead, when nuclear nerves are likely to be less calm than in the last decade. Given their fear of the spillover of a superpower conflict, this should be some comfort to the Nordic countries. Both schemes promise to stop arms competition and enhance mutual deterrence.

As with other arms control schemes, ASWEEZ faces important problems and obstacles. ASWEEZ would give a big boost to creeping jurisdiction. The international significance of the EEZ would be greatly enhanced: the superpowers would appear to be conceding the important principle of keeping their warships out of the EEZs of other countries. In practice, ASW forces would probably have to be defined as all adversary warships (a concept that could cause some definitional problems). Clearly, scientific research vessels could covertly engage in ASW. Definition and regulation would have to be strict. But this might be a problem time will solve, as creeping jurisdiction leads to increasing state control over all "research" activities in adjacent EEZs. Verification would be a difficult problem. As with SALT, reliance would have to be placed on national means and there would be scope for cheating. In the event of the latter, the only sanction, as with other arms control treaties would be the threat of abrogation. Uncertainties about the verification of subsurface activity would be a strong inhibition, especially as governments would be reluctant to reveal in any detail the quality of their ASW detection. As with other arms control schemes, ASWEEZ might rechannel arms competition into other areas. In particular, ASW efforts would be channeled into space. There would be opposition from those who would argue on strategic grounds (or from vested interests) against concentrating strategic strike at sea and, within that, concentrating the SSBN force in smaller areas. Finally, there would be criticism from those opposing any arms control that threatens to reduce one's ability to engage in damage limitation, as ASWEEZ would degrade strategic ASW in the event of war. If the present counterforce trend continues, such an argument will have powerful backers.

At present, the prospects for ASWEEZ are very poor. But as the costs of submarines escalate, and as steady progress continues with the multidirectional efforts at ASW, the attractiveness of SSBN sanctuaries will grow. When that time arrives the Soviet Union will no longer need to send any SSBNs out into the Atlantic in order to hit their targets. It might also be a time when governments in an ameliorating international atmosphere are looking for signals of reassurance.

It might be a time for conceptual jumps and diplomatic trading. At that moment, the law of the sea, arms control, and naval strategy might walk hand in hand.

**Conclusion.** The emphasis in public LOS discussions to date has been on resource rather than strategic questions. Military considerations have played an important part in the policies of some delegations, but the prudence of the participants has helped UNCLOS III to avoid disagreements on military issues from interfering with generally constructive efforts in other spheres. In the post-UNCLOS III period there will be less cause for such silence, especially if important Afro-Asian countries become seriously worried by the new dangers of superpower rivalry in the Third World, and if the projection of naval power looks like playing an important role in this competition. Once resource issues become more settled with the completion of UNCLOS III, there is some expectation that issues of national security will come to the fore. Significantly, some Third World spokesmen have already claimed that the support of the naval powers for a narrow territorial sea represented not so much a defense of the internationality of the oceans, but more a tactic by which they could legally place their warships as close as possible to the shores of coastal states.<sup>16</sup> Whatever the details of the final treaty, the maritime world will be different after UNCLOS III: UNCLOS III has helped to create a new image of the oceans, and hence a new reality. Preeminently, this reality includes the legitimization of the idea that coastal states can and should have greater control over their own newly extended maritime backyards. The future is merely a matter of settling the details of size, shape, and degree of control.

For the ill-defined "short-term," this paper has argued that there are no new important strategic implications for northern waters arising out of UNCLOS III. A possible but unlikely exception arises out of the scope for disunity in NATO that might result from the process of applying the new rules. A more important danger arises from the Soviet interest in the future of Svalbard and its surrounding waters, and the problems this will entail for Norway. In this issue, and in other matters of regime change, stability at sea requires that the law be supported both by generally agreed norms and by visible naval and air policemen. This new emphasis on constabulary tasks will affect the plans and operations of all the navies of the region, but it is obviously the smaller ones that will be the most preoccupied by law of the sea concerns.

In the ill-defined "longer term," creeping jurisdiction seems irresistible. This will have major military implications in northern waters, especially for the Soviet Union. A more restrictive regime will seriously threaten Soviet naval access to strategic waterways, an access already hindered by geographical disadvantages. Not surprisingly, therefore, Soviet attitudes to LOS issues have always been very political and have generally been conservative.<sup>17</sup>

Because of their control of the relevant waterfront, the NATO allies would be in a strong position relative to the Soviet Union in the event of a more restrictive maritime regime, though both adversaries would find the restrictions inconvenient. For reasons to do with the desire to maximize their global maritime mobility, both superpowers could be expected to resist trends toward restriction. Naval establishments in particular would be hostile to such developments. But it has been argued that both major navies could live with a more restrictive regime and still make their basic contribution to their country's foreign policies and wartime strategies. Indeed, the new boundaries and new sensitivities would give the exponents of naval diplomacy additional opportunities to signal either displeasure or support. In this respect the Soviet Union would have opportunities for exploiting what some see as an isolated and vulnerable flank of the alliance. The details of Soviet naval behavior are already monitored very closely, and this will undoubtedly increase in the future, for the Western defense community has a growing corps of teachers and interpreters of naval sign language.

Although Western naval establishments are opposed to a more restrictive LOS regime, naval interests and overall foreign policy interests are not necessarily identical. One implication of this paper is that if there are political, economic or other reasons for Western States moving towards a more restrictive regime, then the naval situation in northern waters need not inhibit such a move. NATO naval activity would not be hobbled, and it would have a relative advantage. The problems facing maritime mobility would lie in areas outside northern waters. There is a tendency in the West to invest any status quo with moral authority, and to see change as being for the worse. This is not always so. States can and do use changes in the LOS as a continuation of political, economic, and strategic interests. This paper has argued that the Western allies can accept a more restrictive regime in northern waters without detracting from the value of their naval sign language.

The ultimate in naval sign language, of course, is the business of strategic nuclear deterrence. Ensuring that this business is successful will be a more pressing imperative in the decade ahead than it was in the decade just passed. Growing fears of instability and imbalance, between the superpowers and regionally, draws renewed attention to the importance of managing the central balance effectively. Nothing is more nightmarish than the prospect of a general nuclear barrage: it would represent the omega of unstrategic competition. Therefore the most challenging problem for strategists and policymakers in the years ahead is to develop ideas and programs that promise to strengthen deterrence, restrain arms competition, and do whatever possible to limit the loss of life in the event of war.

The ASWEEZ scheme is offered as one possibility worth serious consideration, difficult though it might presently be to conceive and implement. If it could be agreed, ASWEEZ promises to strengthen deterrence and slow down an

important sector of the arms race. Because of its evident benefits it might lead—it would be desirable if it did—to a transfer of all nuclear deterrent forces to sea. What would be lost in terms of the diversity of systems present in the triad concept would be more than compensated by the increased invulnerability of the submarine system remaining, and by the release of financial and other assets in the other services for increasing nonnuclear deterrence, strengthening diplomatic potential, and applying power in theater roles. In order to overcome the bureaucratic obstacles to an all-maritime deterrent in the United States, it might be necessary to create a new and separate strategic deterrent branch of the armed services.

The advantages of ASWEEZ extend into war. Although the scheme would entail a degradation of strategic ASW, and therefore some loss in damage limitation, this marginal loss would be more than compensated by the physical separation of population centers and retaliatory systems if all the deterrent force was put to sea. Under ASWEEZ, not only would a disabling first-strike attack on retaliatory systems be less likely (because success would be more difficult), but in the event of it occurring it would not be an attack against the “homeland” as such, and therefore it would not be as likely to trigger an act of punishment against the enemy’s population. In short, ASWEEZ could be the key to opening a number of locks which within 20 years could offer more stable deterrence, less risk of a first-strike strategy, fewer casualties in the event of war, and the release of greater military (and therefore diplomatic) potential for the more thinkable contingencies that lie around the corner.

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### Notes

1. See Holst, *Prospects for Conflict, Management, and Arms Control in the North Atlantic*, in BERTRAM & HOLST, *NEW STRATEGIC FACTORS IN THE NORTH ATLANTIC* 120 (1977).

2. For an earlier discussion, see Young, *Jurisdiction at Sea*, *World Today* 200 (June 1978).

3. Buzan, *A Sea of Troubles? Sources of Dispute in the New Ocean Regime*, no. 143 *Adelphi Papers*, at 45-48 (London: International Institute for Strategic Studies, Spring 1978).

4. *Id.* at 20-24.

5. O’Connell, *Resource Exploitation, the Law of the Sea and Security Implications*, in *supra* n. 1.

6. A speculative discussion of this system in Friedman, *SOSUS and U.S. ASW Tactics*, *U.S. Nav. Inst. Proc.* 120-123 (March 1980).

7. Under the Eastern Canadian Traffic Regulations System (ECAREG) all ships over 500 g.r.t. entering the ECAREG traffic zone are required to request clearance 24 hours in advance. The stated objective of the regulations was to reduce the danger of pollution and increase traffic safety. The system may well extend to 200 miles. The system is discussed by Gold and Johnson, *Ship-Generated Maritime Pollution: The Creator of Regulated Navigation*, (a paper presented at the 13th Annual Conference of the Law of the Sea Institute, Mexico City, October 1979).

8. For recent discussions of Soviet naval mission priorities see, among others, GEORGE, *PROBLEMS OF SEA POWER AS WE APPROACH THE TWENTY-FIRST CENTURY* at 43-44, 70-79, 83-84, 201-206; (1978);

MURPHY, NAVAL POWER IN SOVIET POLICY at 8-9, 52-54, 163-166, 227-229; (1978); a range of possible countermeasures is discussed in NITZE & SULLIVAN, SECURING THE SEAS (1979).

9. This and some other of the general problems in this paper are discussed in Booth, *The Military Implications of the Changing Law of the Sea*, in GAMBLE, LAW OF THE SEA: NEGLECTED ISSUES (1979). A revised and much expanded version of these arguments is in preparation and will be published under the title LAW, FORCE, AND DIPLOMACY AT SEA by ALLEN & UNWIN.

10. For example, Weinland, *The State and Future of the Soviet Navy in the North Atlantic*, supra n. 1 at 53-73.

11. Bull, *Sea Power and Political Influence, Power at Sea I*, no. 122 Adelpi Papers 8 (London: International Institute for Strategic Studies, Spring 1976).

12. *Supra* n. 1 at 135.

13. MccGwire, *The Rationale for the Development of Seapower*, U.S. Nav. Inst. Proc. 166-167 (May 1980).

14. MccGwire, *Soviet-American Arms Control*, Prepared for the United Nations Association Soviet-American Parallel Studies Program at 50 (November 1978).

15. *Id.* at 71-72.

16. JANIS, SEA POWER AND THE LAW OF THE SEA 69-70 (1976).

17. On the Soviet use of ocean law to further policy see Young and Sebek, *Red Seas and Blue Seas: Soviet Uses of Ocean Law*, Survival 255-262 (November/December 1978).



## Chapter 9

# The Marine Environment and Maritime Security in Southeast Asia: Controlling Oil Tanker Traffic in the Strait of Malacca\*

Daniel P. Finn

**T**he Straits of Malacca and Singapore (“Straits of Malacca”) which lie between the southern Malay Peninsula, Singapore, and the island of Sumatra, have historically been a major international maritime route between the South China Sea and the Indian Ocean.<sup>1</sup> In the post-World War II period the Straits have become especially important internationally owing to the passage of oil tankers from the Gulf States of the Middle East to the rapidly growing economies of East Asia, especially Japan,<sup>2</sup> and to naval deployments, including those of the United States and the Soviet Union, in the Pacific and Indian Oceans.<sup>3</sup> Following the “oil shock” of 1973-74, which revealed the extent of the dependency of the economies of the industrialized democracies on Middle East Oil, the tanker routes from the Gulf, through the Strait of Hormuz and around the Horn and Cape of Africa through Southeast Asia—became a focus of international concern over energy security. Both the growing impatience of certain coastal States with the pollution caused by passing tankers and their security concerns with passing warships, as well as the possibility of naval action involving the tanker routes during times of crisis, posed important questions about the security of these routes. In Southeast Asia, the concern of the coastal States of the Straits of Malacca—Indonesia, Malaysia, and Singapore—with tanker and warship traffic in the Straits threatened, in the early 1970s, to affect this important maritime route.

*The Threat of Jurisdictional Conflict Over Vessel Traffic in the Straits.* During the early 1970s many coastal States formally claimed a 12-nautical mile territorial sea. As a result of these claims, many important straits traditionally used for international navigation (“international straits”) would be incorporated within the territorial seas of their coastal States. Although the United States has historically

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recognized only 3 miles as a valid territorial claim, international disagreement on this point had prevented the first United Nations Conference on the Law of the Sea (UNCLOS) from including a uniform standard on the permissible breadth of the territorial sea in the 1958 Geneva convention on the territorial sea.<sup>4</sup> UNCLOS III, in session since 1973, would recognize the validity of the 12-mile territorial claim as part of a comprehensive diplomatic package that would also protect maritime passage through international straits, prescribe the offshore jurisdiction of coastal States (including their jurisdiction over the continental shelf and a newly created 200-mile exclusive economic zone or EEZ), establish an international regime for deep seabed mining, and help define the rights and obligations of States with respect to pollution of the marine environment.<sup>5</sup> With respect to passage through international straits, UNCLOS III would create a regime of “transit passage”—a set of special rules for international navigation through straits the waters of which would otherwise have become subject to the rules applicable within territorial seas.<sup>6</sup>

In November 1971 the Governments of Indonesia, Malaysia, and Singapore issued a joint declaration that, if implemented, could have significantly affected the legal status of the Straits of Malacca.<sup>7</sup>

- The three Governments agreed the safety of navigation in the Straits of Malacca and Singapore is the responsibility of the coastal states concerned;
- The three Governments agreed that a body for cooperation to coordinate efforts for the safety of navigation in the Straits . . . be established as soon as possible and that such body should be composed of only the three coastal States;
- The Governments of Indonesia and Malaysia agreed that the Straits . . . are not international straits, while fully recognizing their use for international shipping in accordance with the principle of innocent passage;
- The Government of Singapore took note of the position of the Governments of the Republic of Indonesia and Malaysia in this point.

In this declaration, the three Governments announced their intention to assume competence over controlling international vessel traffic in the Straits. The Governments of Indonesia and Malaysia would have gone further and declared that passage through those parts of the Straits within their territorial waters was fully subject to the ordinary principle applicable in such waters—“innocent passage”—and not to any special principles applicable in international straits. (Under the 1958 Geneva convention on the territorial sea, foreign vessels passing through a territorial sea are allowed to proceed freely if they are in innocent passage; innocent passage may not be “hampered” by a coastal State, except for temporary suspension for security reasons. In straits used for international navigation, however, through passage may not be suspended. Passage through a territorial sea is presumed innocent unless it is “prejudicial to the peace, good order or security of the coastal State.”)<sup>8</sup> If international passage through the Straits had become subject to the rule of innocent passage, the operations of oil tankers

and naval vessels could have been affected, inasmuch as at the time of the joint declaration coastal states had begun to question the “innocence” of operations by such vessels and to claim some jurisdiction over them. This was true especially for oil tankers, in the aftermath of several serious tanker casualties that polluted coastal waters. This article will examine the background and significance of the joint declaration and its resolution to date through international legal and political means. The history of regulation of oil tanker traffic in the Straits of Malacca provides an excellent example of the significance of marine environmental concerns and the role of international law and organization in safeguarding maritime security.

*The Background of Jurisdictional Conflict Over Navigation in the Straits of Malacca.* The efforts of the three coastal States to obtain greater control over the Straits, through their joint declaration and other actions, was based on a complex of factors including the pollution and safety risks associated with large tanker traffic, as well as regional security concerns. But these factors affected each of the three States somewhat differently, and the formulation of an integrated regional response to the environmental and security issues was impeded by the divergence of local interests.

As the size and number of tankers to serve the needs of Japan and other East Asian countries rapidly increased in the period prior to 1973, their navigation through the Straits presented increasingly obvious safety problems.<sup>9</sup> In 1967 *Tokyo Maru*, a 151,288 deadweight ton (dwt) vessel, scraped bottom and released about 1,000 tons (T) of crude oil. A similar incident occurred to *Idemitsu Maru* in 1968, and in 1971 two tankers over 200,000 dwt, *Arabian* and *Eugenie Niarchos*, ran aground. Several more serious or well-known accidents, such as that of *Showa Maru* (1975), happened only later, when coastal State efforts were already focused on controlling oil tanker traffic.

A combination of factors account for the maritime hazards of the Straits.<sup>10</sup> Traffic in the Straits is dense and is composed of vessels of various classes, speeds, and destinations. This causes considerable crossing and overtaking in the main shipping lanes. The shipping lanes themselves become very narrow, especially at critically crowded points and in areas in which surrounding depths constrain the maneuvering of larger vessels. In the past, charts were deficient and aids to navigation insufficient or incompletely maintained; even contemporary charts cannot account fully for changing bottom conditions resulting from sand waves, however. The Straits are also subject to significant tides and currents, and rain squalls often reduce visibility.

About a fifth of all the oil shipped across national borders in the world is moved by tanker through Southeast Asia. It has been calculated that in order to supply Japanese needs alone, 1,627 tanker trips with a mean capacity of 150,000 dwt would be required, or over 3,200 trips both ways. Assuming this capacity were

to move through the Straits of Malacca, approximately five very large crude carriers (VLCCs—tank vessels in excess of 175,000 dwt) would transit the Straits loaded each day and five such vessels would return through the Straits in ballast.<sup>11</sup> But tankers, including the larger tankers, are not even the major component of shipping in the Straits. A traffic survey, based on visual sightings and radio contact, was conducted by the Port of Singapore Authority in 1976; the study reported about 150 vessels passing per day, of which 90 were general cargo vessels and 40 were tankers.<sup>12</sup> Even if it is assumed that this number of vessels were distributed evenly and traveling in equal numbers in both main directions, vessels would pass each other while traveling in opposite directions approximately every 9 minutes.<sup>13</sup> But this simplifying assumption does not, of course, account for crisscrossing, random grouping, overtaking, and other factors.

Bottom conditions also create safety problems, especially for large vessels.<sup>14</sup> While the Straits themselves narrow to a width of 3.2 nautical miles (n. mi.) off Singapore, the deep channels are considerably narrower, as little as 1,000 meters (m) in parts of the Singapore Strait and only 600m near the One Fathom Bank near the western entrance to the Straits of Malacca. In addition to their narrowness, the deepwater areas are discontinuous and irregular and require large vessels to maneuver to stay in deep water. In several places, vessels have to maneuver through areas of less than 23m average depth in order to traverse shallow spots between deeper channels. These maneuvers would be difficult for large tankers even if crowded traffic conditions did not constrain their movements or occasionally even compel them to take evasive action.

The navigational problems of the Straits have led to numerous vessel casualties, especially involving tankers.<sup>15</sup> Although strandings of tankers declined during the 1970s as a result of improvements to aids to navigation,<sup>16</sup> there was a high rate of collisions involving tankers. In 1974, while only one reported tanker stranding took place in the Straits out of about 100 worldwide, fully 10 out of a world total of 77 collisions occurred there; in 1975 two of 77 strandings occurred in the Straits, but nine out of 51 collisions. Serious or potentially serious casualties occurred throughout the 1970s. *Showa Maru*, a 237,000-dwt vessel, stranded in 1975 and released about 1,000T of oil, and several other vessels in the same class grounded and spilled oil. Several collisions also occurred; for example, *Diego Silang* collided with two other vessels (one a tanker) and spilled 6,000T of oil. There were several total losses: *Oswego Merchant*, carrying jet fuel, burned and sank after a collision with another tanker; *Tosa Maru*, which was in ballast, collided with another tanker and broke up, caught fire, and sank.

Regardless of the undeniable safety problems of commercial traffic in the Straits, the coastal states found it difficult to arrive at a unified position on regulation of navigation.<sup>17</sup> This is evident from the language of their joint declaration, in which the Singapore authorities would not go as far as Indonesia and Malaysia in asserting regional authority over traffic in the Straits. It is thought

that Indonesia had several motivations in moving for regional control of maritime activities in the Straits.<sup>18</sup> Indonesia, because of its colonial legacy and history of internal and external threats to its national cohesion, has been especially sensitive to the operations of vessels in waters within and adjacent to the Indonesian archipelago.<sup>19</sup> Indeed, Indonesia has asserted, since 1957, its territorial jurisdiction of the waters within the archipelago;<sup>20</sup> Indonesia's claim, along with similar claims by the Philippines and Fiji, have been important at UNCLOS III as the Conference has moved to define the rights and obligations of such archipelagic states with respect to foreign vessels.<sup>21</sup> (Indonesia was the first to act on the issue of tanker safety in the Straits, declaring in 1972, with Malaysian "agreement in principle," that it would ban passage by vessels over 200,000-dwt capacity.)<sup>22</sup> It is also thought, however, that Indonesia, in moving aggressively on the issue of traffic in the Straits of Malacca, may have sought to divert some traffic from the Straits through Indonesia where such traffic could potentially provide some benefit to its national ports and refineries and perhaps become subject to some form of regulation in the sealanes and the straits within the Indonesian archipelago that had traditionally been used for international navigation.<sup>23</sup> Malaysia, while thought to be somewhat differently motivated, could reach a similar position on the issue of vessel traffic in the Straits of Malacca; local control of traffic in the Straits could help alleviate coastal environmental problems, especially harmful to its small-scale fisheries, and also help to neutralize the region from the influence of major outside powers.<sup>24</sup> But Singapore, while it could hardly deny the significance of the environmental and safety problems caused by tanker traffic, was concerned lest assertion of coastal state authority by Indonesia and Malaysia affect its access to world trade and the benefits of tanker operations, including drydocking and other port services provided there.<sup>25</sup>

It is in examining these motivations that the relationship between the environmental and safety concerns and security considerations becomes apparent. Indonesia's assertive posture may be attributed to its traditional concerns with domestic autonomy over developments in and around the archipelago; in the postcolonial period the Republic of Indonesia had moved aggressively to consolidate its internal situation and assert its claim to leadership in the politics in the region based on its large population and natural resource base.<sup>26</sup> Malaysia had sought in the same period to insulate itself from outside forces and prevent the region from becoming a focus of great power confrontation after the withdrawal of British forces, as well as to shield itself from the early regional aspirations of Indonesia.<sup>27</sup> Malaysia's extraregional concerns have included support by the People's Republic of China for indigenous Communist movements and the possibility of countervailing U.S. and Soviet buildings in the area, which aside from its intrinsic importance in terms of geographical location, population, and natural resources, also provided an essential link between the Pacific and Indian Ocean theaters of military operations.<sup>28</sup> The Singapore

Government, on the other hand, tended to welcome outside participation in the region's economy and friendly links with the West.<sup>29</sup> Such connections could help protect it from insurgency and military deployments by Communist forces and shield it against pressures for regional influence exerted by its neighbors. These complex security factors caused concern to the United States and the Soviet Union, which both undertook various diplomatic initiatives and naval activities in response to them. In the month after the joint declaration was issued, both the United States and the Soviet Union undertook naval operations in the Straits.<sup>30</sup> And while the United States apparently did not respond in a formal manner to the joint declaration, the Soviet Union the following year received the Malaysian Prime Minister in Moscow, made contacts in Tokyo with the Japanese Government, and sent a diplomatic mission to Jakarta.<sup>31</sup>

Japanese actions were perhaps most influential in motivating the coastal States to declare regional autonomy over navigation through the Straits.<sup>32</sup> In 1968 private interests in Japan formed the Malacca Straits Council as a nongovernmental organization affiliated with the Japanese *Keidanren* (Federation of Economic Association). Atop the natural regional reaction to such a title being assumed by Japanese interests, the Japanese press began playing up the idea of the Straits as Japan's "lifeline"; concepts of Japanese naval defense of the Straits even appeared. A Japanese delegation visited the region in 1970, acting, it was alleged, as if it were an "equal partner" in managing the navigational situation in the Straits; hydrographic surveys have been sponsored by Japanese organizations since 1969, although they have been occasionally impeded by local reaction to such Japanese initiatives. These disturbing activities were capped off in July 1971 with a formal proposal by the Japanese representatives to the Intergovernmental Maritime Consultative Organization (IMCO) that a traffic separation scheme (TSS) be established in the Straits under IMCO auspices.

*Development of a Regulatory Regime for Oil Tankers Transiting the Straits of Malacca.* After issuance of the joint declaration, political difficulties both within and outside the region impeded further cooperative action, although various informal actions were taken by the coastal States, outside powers, and industry.<sup>33</sup> Several radical proposals surfaced—one by Indonesia to ban vessels in excess of 200,000 dwt and another by the head of Malaysia's state oil company to impose user fees on passing vessels.<sup>34</sup> A strict prohibition based on vessel size would have had serious effects on the economics of oil transportation between the Middle and Far East; vessels over 200,000 dwt, of which there were a substantial number, would be forced to proceed through the Straits of Lombok and Makassar in the Indonesia archipelago as an alternative to the Malacca route. The Lombok route would involve over a thousand nautical miles—3 days—extra travel. Thus transport by the larger VLCCs would have tended to become uneconomical at the same time that there was significant capacity in this range, and the imminent

downturn in the rate of growth of oil consumption after 1973 soon made continued construction of larger vessels (ultralarge crude carriers, ULCCs—vessels in excess of 350,000 dwt) unlikely. The extension of the tanker route for the largest VLCCs would also have required additional transportation capacity.<sup>35</sup>

The *Showa Maru* accident in January 1975 led to a renewed call for action in the region and in February the Prime Ministers of the coastal States held talks on the tanker issue while at a meeting of the Association of Southeast Asian Nations (ASEAN).<sup>36</sup> The Prime Ministers agreed upon the concept of “underkeel clearance” (UKC) as a basis for regulation for tankers, called for development of a TSS for the Straits, and initiated technical consultations on these and related issues. Technical and other difficulties again slowed the results of consultation in the following years, which were punctured by the collision of *Diego Silang*. At a second conference of their Prime Ministers in February 1977, again at an ASEAN meeting, the three governments finally agreed to a regulatory regime based on a required UKC of 3.5m throughout passage; establishment of special deep-water routes (DWR) for vessels of 15m draught, in which no overtaking by them would be allowed; adoption of TSS (separated traffic lanes in each main direction) in three critical areas—at the One Fathom Bank, the Singapore Main Strait, and the Phillip Channel (in the eastern part of the Singapore Strait, where the Straits open out into the South China Sea); and operational recommendations, including maximum vessel speed in critical areas (12 knots).

The coastal States’ adoption of UKC as the basis for limiting the passage of larger vessels marked a significant turning point in mediating the divergent interests among the coastal States themselves and between the region and outside users.<sup>37</sup> A capacity limitation, such as that earlier advocated by Indonesia, would have rigidly excluded certain vessels regardless of their operating characteristics; furthermore it could have been enforced relatively easily as vessel capacity is fairly well known through shipping registers and the like. UKC is neither as clear in concept nor as straightforward in application. First, there is disagreement over the very meaning of the term UKC, *i.e.*, whether UKC should be calculated so as to make allowance for various errors and safety considerations and for vessel “squat”—the tendency of a large vessel’s draught to increase with speed. Second, actual UKC is responsive to vessel design, load, trim, speed, and tidal fluctuations—none of which are easily observable during passage or readily determinable from published sources.

Aside from some technical concern about the proposed vessel routes (that were submitted to the coastal States for further development<sup>38</sup>), the regional proposal was well received by IMCO and in November 1977 IMCO’s Assembly formally approved the TSSs and other rules for passage in the Straits.<sup>39</sup> The action of the coastal States will have significant positive effects on the safety of navigation through the Straits by establishing well-defined and universal vessel routes, including special DWRs, and recommending operational practices that will help

vessel masters ensure a safer voyage. It is unlikely for several reasons, nevertheless, that the vessel lanes and operational rules will completely resolve the safety and environmental concerns associated with large-scale use of the Straits for oil transshipment. First, the Straits are narrow and crowded and larger vessels are constrained in their maneuvering by depth limitations, occasionally poor visibility and the reduction of their speed for overall safety and also, for the largest vessels allowed to operate in the Straits, to reduce their squat. Second, although adoption of navigational rules by IMCO accords them definite international recognition, they remain voluntary in many respects;<sup>40</sup> in the case of the operational rules approved by IMCO to supplement the TSSs and DWR, in addition, there is considerable nonauthoritative language, *e.g.*, the use of such phrases as “as far as practicable” (avoidance of the DWRs by non-deep draught vessels); “as possible” (maintenance of steady course within the TSSs); and “advised to” (use of the DWRs, maximum 12-knot speed, participation in a voluntary ships’ reporting system).

The “accommodation”<sup>41</sup> among regional and external interests that is represented by the IMCO-approved rules for tankers and other vessels in the Straits at once illustrates the difficulty of arriving at significant substantive regulation on an international level and the role of international law in resolving such differences. The IMCO rules address only one aspect of the safety and environmental problems associated with transit oil tanker traffic in the Straits—vessel routes and operating practices. They do not provide in any way for operational restrictions (such as no-discharge zones) or safety standards in excess of universal standards, that would be desirable in such a constrained and heavily used waterway. They do not establish any special provisions on vessel liability or requirements for contingency capability or the establishment of funds to defray or compensate the costs to the coastal States of having such heavy traffic in their waters.<sup>42</sup> To a certain extent, these issues can be resolved through informal and voluntary arrangements between the coastal States and outside users—both other governments and private interests. The Japanese, for example, largely operating within the framework of private associations, the Malacca Straits Council in particular, have made significant contributions to hydrographic surveying and construction of aids to navigation.<sup>43</sup> The accommodation also, as has been noted, makes enforcement difficult and it does not necessarily provide a sound basis for further regulation. Specifically, reporting of vessel passage—including information on characteristics, speed, and time of passage prior to entry into the Straits—remains voluntary. Further regulation of vessel traffic, such as establishment of a vessel traffic system (VTS) with comprehensive command and control capacity, would require such information as well as an extensive shoreside communication and administrative capability. Aside from questions about the practicality of VTS in such heavily and diversely trafficked and strategic waters, the necessary reporting of the movements and characteristics of vessels would

also inform the coastal States of the full extent of maritime operations and possibly inflame local feelings, especially if further accidents or military tensions occur.

Regardless of these substantive shortcomings, the process by which the IMCO rules were adopted illustrates the successful working of international law in such a situation. After announcing that they would proceed on a regional basis, and even threatening to seek a change in the international juridical status of the Straits, the coastal States proceeded to develop a broadly acceptable regulatory regime on a regional basis and to refer it to IMCO for international approval prior to its implementation. IMCO's adoption of the regime accords it significant international recognition and, for navigational practices affecting the TSSs, international enforceability through general international agreements on navigation.<sup>44</sup> Such a procedure, by which States may forward proposed systems of traffic regulation to IMCO for approval, will probably be adopted formally if UNCLOS III concludes successfully and a new treaty on the law of the sea is adopted. Under the Draft Convention on the Law of the Sea ("Draft LOS Convention") under consideration at UNCLOS III:<sup>45</sup>

States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.

Before designating . . . sea lanes or prescribing . . . traffic separation schemes, States bordering straits will refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate . . . them.

It would appear that the coordinated actions of the Government of Indonesia, Malaysia and Singapore taken after their joint declaration of 1971, have not only followed international law as it existed prior to UNCLOS III, but have by their example exercised considerable influence on the progressive development of international law in this field, specifically the above article of the Draft LOS Convention under consideration by UNCLOS III.<sup>46</sup> The procedure codified by UNCLOS III, for traffic regulation as well as other matters affecting international straits and other critical or sensitive water bodies, may help to regularize the process by which these and other coastal states may seek international recognition of the special needs of such waters.<sup>47</sup> But referral to international organizations of such questions, or their reference to separate agreements among the parties concerned, may not always provide a substantively satisfactory answer and also may lead to procedural frustration when international support for such measures is not forthcoming, for commercial or strategic reasons.<sup>48</sup> Nevertheless, the establishment of a procedural framework through which such disagreements can be resolved could help to make these conflicts more manageable.

The recent development of navigational rules for the Straits of Malacca illustrates the resolution of conflicting interests about the use of international straits through international consultations. The procedures followed by the coastal States in this case could be applied elsewhere and would be codified in the Draft LOS Convention under consideration at UNCLOS III. Such international procedures, whether conducted on the basis of traditional law of the sea or specifically authorized in a general LOS convention, will not, however, likely prove fully satisfactory to coastal States in achieving effective substantive regulation. Extensive local regulation of maritime activities in international straits would necessarily interfere with important interests of outside users in commercial transportation and naval operations. The Malacca Straits case also illustrates, however, the importance of local environmental and security concerns to coastal States and their potential effect on outside users. Continued progress should be made on such regional issues to prevent further conflict between coastal States and major users and to achieve maximum maritime security in such areas.

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### Notes

1. LEIFER, MALACCA, SINGAPORE, AND INDONESIA 6-31 (1978).
2. FINN, OIL POLLUTION FROM TANKERS IN THE STRAITS OF MALACCA: A POLICY AND LEGAL ANALYSIS 5-11 (East West Center, 1979).
3. *Supra* n. 1 at 105-127.
4. Convention on the Territorial Sea and the Contiguous Zone, done 29 April 1958, entered into force 10 September 1964, 15 U.S.T. 1606, T.I.A.S. 5639.
5. The results of UNCLOS III to date may be found in its Draft Convention on the Law of the Sea (Informal Text) (hereinafter "Draft LOS Convention"), U.N. Doc. A/CONF.62/WP.10/Rev. 3, 27 August 1980.
6. *Id.*, Arts. 34-45. Richardson, *Power, Mobility and the Law of the Sea*, Foreign Affairs 902 (Spring 1980) (emphasizing significance of the results of UNCLOS III for naval and other maritime activities).
7. The full text of the joint declaration is reprinted in LEIFER, *supra* at 204; the operative paragraphs are also quoted in FINN, *supra* at 76-77.
8. Convention on the Territorial Sea and the Contiguous Zone, Arts. 14-17.
9. The evolution of tanker size and resulting operational characteristics relevant to Southeast Asian waters are discussed in length in FINN, *supra* at 124-128. A detailed summary of tanker casualties and loss trends in the region is given in *supra* n. 2 at 11-18.
10. Geographical data on the marine environment in the Straits area, and detailed information on bottom conditions, is given in *supra* n. 2 at 20-30.
11. *Id.* at 5.
12. *Id.* at 5, 6.
13. *Id.* at 11.
14. The hydrographic characteristics of the Straits are discussed in *id.* at 20-30.
15. Casualty data and trends are presented in *id.*, at 11, 18.
16. *Id.* at 77, 84.
17. *Supra* n. 1 at 25-50; *supra* n. 2 at 76-99.
18. *Supra* n. 1 at 105-107; *supra* n. 2 at 77.
19. *Supra* n. 1 at 14-27.
20. Indonesia's 1957 Cabinet declaration, and Act No. 4 of 1960, to this effect, are reprinted in *supra* n. 1 at 201-203.

21. *Supra* n. 1 at 100-105; Draft LOS Convention, Arts. 46-54 (regime of archipelagoes).
22. *Supra* n. 1 at 78; *supra* n. 2 at 66.
23. *Supra* n. 1 at 105-107; *supra* n. 2 at 77.
24. *Supra* n. 1 at 27-31; *supra* n. 2 at 77.
25. *Supra* n. 1 at 119-120; *supra* n. 2 at 77.
26. *Supra* n. 1 at 14-27.
27. *Id.* at 10-31.
28. *Id.*
29. *Id.* at 106-107; *supra* n. 2 at 77.
30. *Supra* n. 1 at 114.
31. *Id.* at 107-121.
32. For narratives of the relationship between Japanese actions and the development of a regional response to navigational problems, see generally FINN, at 78-80; Leifer, at 42-45.
33. For discussions of the period between 1971 and 1975, see FINN, at 77-78; LEIFER, at 113-121.
34. The imposition of user fees based on passage through a territorial sea is prohibited by Art. 18 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, which reads:
  1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.
  2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.
35. The comparative economies of the Malacca and Lombok routes are extensively analyzed in FINN, et al., pp. 124-129.
36. Post-*Showa* developments are described in *id.* at 78-79; LEIFER, at 66-76, 132-148.
37. *Supra* n. 2 at 81-83.
38. LEIFER, at 75. The regional proposal to the Maritime Safety Committee of IMCO had also contained a clause, "All tankers and large vessels navigating through the Straits shall be adequately covered by insurance and compensation schemes." This was bracketed by the Committee, and deleted by the Assembly, on grounds of lack of jurisdiction. *Supra* n. 2 at 86.
39. The Assembly's resolution of 14 November 1977 is reprinted in *supra* n. 2 at 206-208; the operative terms of the resolution are included in Intergovernmental Maritime Consultative Organization, (SHIP'S ROUTING at B-V/1-5 (4th ed. 1978)).
40. IMCO-approved TSSs are per se voluntary; certain aspects of IMCO-adopted regulations may become mandatory by virtue of other authority, however, specifically the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS 72), entered into force 15 July 1977, reprinted in U.S. Coast Guard, *Navigation Rules* (Washington: 1 May 1977), No. CG-169. Rule 10 of COLREGS 72 requires vessels in the vicinity of a TSS to conform their operations to the traffic lanes; it does not speak directly to compliance with such supplemental rules as have been adopted for the Strait of Malacca.
41. *Supra* n. 1 at 147-148.
42. The *Showa Maur* accident, for example, led to claims of \$3.6 million by Singapore, of which \$1.5 million in cleanup costs were paid, leaving about \$2 million in private claims outstanding. Indonesia claimed \$24.7 million and received \$1.2 million; Malaysia claimed \$9 million and received \$0.5 million. FINN, at 114.
43. *Supra* n. 2 at 77, 84.
44. *Supra* n. 40.
45. Draft LOS Convention, Art. 41; Art. 42(1)(a) (general right of coastal States to regulate safety of navigation and marine traffic in international straits, subject to Art. 41).
46. Compare *supra* n. 1 at 127-148 (effect of views of the three coastal States on the regime of straits used for international navigation under consideration at UNCLOS III).
47. The ability of coastal States to seek international recognition of the special needs of such marine areas is not limited to the regulation of maritime traffic but would also include other antipollution measures, under Art. 211(6) of the Draft LOS Convention. But in many respects such a provision would only codify practices which are already available under other international conventions, for example, the International Convention on the Pollution of the Sea by Oil and Other Substances (MARPOL). Art. III of the 1962 amendments to MARPOL, done 11 April 1962, entered into force 28 June 1967, 17 U.S.T. 1522, TIAS 6109, 600 U.N.T.S. 322, provides for the designation of "no-discharge" zones in addition to those otherwise provided for in the Convention (waters within 50 n. mi., of shore generally and the vicinity of the Great Barrier Reef), by amendment to Annex A of the Convention. 211 (6) of the Draft LOS Convention, which would generalize such procedures, reads:
 

Where international rules and standards . . . are inadequate to meet special circumstances and where coastal States have grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where, for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources, and the particular

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character of its traffic, the adoption of special mandatory measures for the prevention of pollution from vessels is required, coastal States, after appropriate consultations through the competent international organization with any other States concerned, may for that area, direct a communication to the competent international organization, submitting scientific and technical evidence in support. . . . If the organization [agrees], the coastal State may, for that area, adopt laws and regulations for the prevention, reduction and control of pollution from vessels, implementing such international rules and standards or navigational practices as are made applicable through the competent international organization for special areas. Such additional laws and regulations may relate to discharges or navigational practices but shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards. . . .

48. The Draft LOS Convention would simply refer the provision of navigational aids and other general safety and environmental issues connected with the use of straits for international navigation to cooperative agreements among Coastal and user States. To date, this is how hydrographic surveys, navigational aids, and compensation of pollution costs have been handled in the case of the Malacca Strait and other areas. *Supra* n. 2 at 114, 77, 84. Art. 43 of the Draft Convention provides:

User States and States bordering a strait should by agreement cooperate:

- (a) In the establishment and maintenance in a strait of necessary navigation and safety aids or other improvements in aid of international navigation; and
- (b) For the prevention, reduction and control of pollution from ships.

## Chapter 10

# The Cordon Sanitaire—Is It Useful? Is It Practical?\*

Lieutenant Commander Stanley F. Gilchrist, U.S. Navy

**T**hat Soviet naval units shadow U.S. aircraft carrier battle groups is common knowledge, but no less dangerous for that. Those tattletales provide the Soviet Navy with continuous, accurate information on the position of our carriers—the repositories of most of the conventional striking power of the U.S. Navy. The tremendous concentration of power in only twelve carriers makes them extremely lucrative targets in wartime.

Soviet leaders have clearly recognized the advantage to be gained by placing the carriers out of action in the first minutes of hostilities before carrier air power could be brought to bear on the ships of the Soviet Navy and targets ashore. Soviet surface combatants, submarines, and aircraft carry extremely capable antiship missiles, and the Soviet Navy frequently conducts anticarrier exercises during which the forces practice coordinated attacks.<sup>1</sup> A coordinated preemptive strike with antiship cruise missiles using precise targeting data provided by a tattletale could overwhelm a battle group's air defenses and destroy or cripple the carrier's striking power before it could be used.

The presence of a Soviet ship or perhaps several ships in company with a U.S. carrier battle group has become accepted as routine during normal peacetime operations, but such shadowing in a crisis situation on the "edge of war" would be an intolerable risk. Clearly, in crisis the United States needs some means of denying the Soviets this tattletale capability without precipitating hostilities. Although right now serious political and legal problems would inhibit its use, the concept of the cordon sanitaire offers great promise as a means to solve this dangerous problem.

As early as the 17th century, the French term, *cordon sanitaire* (sanitary zone), was used to describe the establishment of a perimeter around an area infected with contagious disease to effect a quarantine. Gradually its usage spread to connote military perimeters enclosing safe areas. Later, the system of alliances instituted by France in post-World War I Europe that stretched from Finland to the Balkans was also referred to as a cordon sanitaire. It completely ringed

\* Reprinted from the Naval War College Review May-June 1982.

Germany and sealed off Russia from Western Europe, thereby isolating the two politically "diseased" nations of Europe.

The use of the term *cordon sanitaire* in a strictly maritime context originated in the late 1960s with Vice Adm. Isaac C. Kidd, Commander U.S. Sixth Fleet, as he attempted to devise a means of eliminating the Soviet tattletale problem in the Mediterranean. The term has gained acceptance but relatively little has been written on the subject. Maritime *cordon sanitaire* may be described in general terms, as follows: an area relative to U.S. Naval Forces, defined by either geographic boundaries or a circle centered on the formation in which the presence of units of a potential enemy would be considered a hostile act, making such units subject to military action.

One must first recognize that the decision to implement a *cordon sanitaire* would be made only by the President and National Security Council. There are many political and legal implications and risks associated with such action which would preclude any lower authority from declaring a *cordon sanitaire*. Secondly, it is clear that the use of *cordon sanitaire* would be limited to highly tense situations barely short of war, when the threat posed by tattletales would become intolerable. Once hostilities had opened, *cordon sanitaire* would have little, if any, usefulness. Thirdly, a *cordon sanitaire* must be applied to all the potential enemy's surface, air, and submarine units in order to be effective. Since any ship or aircraft belonging to the foe can gather and transmit information, all Soviet ships and aircraft of whatever description, civil as well as military, would have to be subject to the *cordon sanitaire* restrictions. Fourthly, a U.S. *cordon sanitaire* would be selective. That is, neutral and allied units, both military and civil, could be permitted within the *cordon sanitaire*. Only Soviet and Warsaw Pact units, together with those of any other nation or nations deemed to pose a threat, would be excluded from the area.

Even though the use of *cordon sanitaire* can be contemplated for the protection of any group of ships, such as a convoy or an amphibious task group, the term "battle group" will serve our purpose here. Likewise, the term "Soviet" will be used to cover the units of any country associated with the Soviet Union.

There are no historical examples of the use of a maritime *cordon sanitaire*, but the concept has been used in war games. The results have been mixed. In Admiral Kidd's experience, war games in which Blue used a *cordon sanitaire* generally ended more favorably for Blue than those in which it was not attempted.<sup>2</sup> Another veteran of many war games, Capt. S.D. Landersman of the Naval War College's Strategic Studies Group, says that *cordon sanitaire* had no discernible effect on the outcome of the war games he has observed; if anything the imposition of a *cordon sanitaire* seemed to precipitate rather than delay hostilities.<sup>3</sup>

However, war game experience concerning *cordon sanitaire* is useful only up to a point since, in the minds of those playing the national command authorities,

the political and legal aspects of managing the "edge of war" crisis inevitably are subordinate to military factors. Since the primary purpose of war games is to test strategy and tactics in war, there is an artificial feeling of the inevitability of (or even impatience for) the commencement of hostilities that in real life would not be present. Further, the reactions to a cordon sanitaire declaration by those playing the parts of major Soviet officials undoubtedly would not precisely match those of their real life counterparts.

### Determining the Cordon Sanitaire Size

Many factors affect the size of the area around a battle group that should be included in a cordon sanitaire. Probably the most obvious of these are the ranges

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#### Ranges of Major Soviet Antiship Cruise Missiles

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		Range	Platforms
<b>AIR-TO-SURFACE MISSILES</b>			
AS-2	KIPPER	About 100nm	BADGER C/G
AS-3	KANGAROO	200-300 nm	BEAR B/C
AS-4	KITCHEN	150-250 nm	BLINDER B, BACKFIRE
AS-5	KELT	About 100 nm	BADGER
AS-6	KINGFISH	150-250nm	BADGER C/G
<b>SUBMARINE LAUNCHED ANTI-SHIP MISSILES</b>			
SS-N-3c	SHADDOCK	About 250 nm	ECHO I/II, JULIETT, WHISKEY CONVERSION
SS-N-7		About 30 nm	CHARLIE I
SS-N-9	SIREN	About 60 nm	CHARLIE II, PAPA
SS-N-12		About 300 nm	ECHO II
<b>SURFACE-TO-SURFACE MISSILES</b>			
SS-N-1	SCRUBBER	About 100 nm	KILDIN KRUPNYI
SS-N-2	STYX	About 25 nm	OSA I, KOMAR, NANUCHKA II
SS-N-2	STYX (Improved)	About 40 nm	OSA II, MOD KASHIN, MOD KILDIN, MATKA, TARANTUL
SS-N-3b	SEPAL	About 250 nm	KRESTA I, KYNDA
SS-N-9	SIREN	About 60 nm	NANUCHKA, SARANCHA
SS-N-12		About 300 nm	KIEV

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Source: Office of the Chief of Naval Operations, *Understanding Soviet Naval Developments* (Washington: U.S. Govt. Print. Off., 1981), pp. 131-132.

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of Soviet antiship cruise missiles. Ideally, a cordon sanitaire would be large enough to keep all Soviet units outside their maximum effective missile ranges. From the missile ranges shown in the table, it is apparent that a cordon sanitaire with a radius of about 300 nautical miles against aircraft, surface ships, and submarines would be necessary to provide full protection from the longest range Soviet antiship missiles.

So large an area would be impractical for at least two reasons. First, a battle group's surveillance resources would almost certainly be inadequate to patrol such a huge area against intruders, particularly submarines and surface ships. If the battle group were operating near heavily traveled sea lanes and air routes, the need to investigate large numbers of innocent air and surface units would reduce even further the effective surveillance area. These and other factors, such as weather and hydrographic conditions, which affect the ability of the battle group to detect intruders, must weigh heavily in the planning of the size of a cordon sanitaire. Second, an extremely large cordon sanitaire would be harder for the Soviet Union to accept than a smaller area, and the reactions of Third World nations would likely be more favorable with a smaller cordon sanitaire. The need for political acceptability, then, requires that the cordon sanitaire be no larger than militarily necessary.

Since targeting information from external sources is generally required for cruise missiles more than 30 to 50 miles from the potential targets, a cordon sanitaire could still be effective with air, surface, and subsurface radii considerably less than 300 miles. By keeping targeting platforms (such as surface tattletales, Bear D aircraft, or submarines) outside of their effective targeting ranges, a cordon sanitaire could make the longer range Soviet antiship missiles largely ineffective. Thus the main objective of a cordon sanitaire would be to deny the Soviets accurate targeting data with which to launch a coordinated attack on the battle group.

Based on the factors discussed here, the radii of a cordon sanitaire (in the absence of other external constraints) should measure about 100 nm from the center of the U.S. formation against surface and submarine units and about 200 nm against aircraft. These distances provide a margin of safety in which to intercept and turn away intruders before they could obtain accurate targeting information. And, depending on the exact composition of the battle group, these distances form the approximate maximum area that could be patrolled effectively. While some Soviet missile platforms could be within striking range even though outside a cordon sanitaire of this size, without the external targeting information which the cordon sanitaire would deny, they would be ineffective.

## Cordon Sanitaire and International Law

**Arguments Against Cordon Sanitaire:** Freedom of the high seas is the overriding principle of law arguing against the legality of cordon sanitaire. Article II of the 1958 Geneva Convention on the High Seas, to which the United States is a party, states in part:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas . . . comprises, *inter alia*, both for coastal and non-coastal states:

(1) Freedom of navigation [surface and subsurface]. . . .

(4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interest of other States in their exercise of the freedom of the high seas.<sup>4</sup>

The establishment of a cordon sanitaire on the high seas would clearly interfere with the Soviet Union's freedoms of navigation and overflight. As such, a Soviet protest to such actions would be on solid legal grounds, and most of the international community would likely agree with the Soviet position.

A further legal complication regarding cordon sanitaire pertains to its enforcement once it is declared. If the Soviet Union refused to evacuate the declared zone, virtually any measure used by the United States to force compliance would violate the bilateral U.S.-Soviet Agreement for the Prevention of Incidents On and Over the High Seas, signed in 1972. This agreement specifically prohibits such aggressive actions as shouldering, illumination, buzzing by aircraft, training of weapons, etc.<sup>5</sup> Thus, a U.S. effort to enforce a cordon sanitaire through any of the above methods, or even more drastic action would probably entail a violation of the bilateral agreement.

**Arguments For:** Customary international law recognizes a nation's rights of self-defense in the face of an imminent threat to its security. Within the constraints of the dual requirements of necessity and proportionality in relation to the severity of the threat, a State may take action to preserve its security. It could be argued that the threat to the security of the United States (that is, the possible loss of a carrier battle group) embodied by the presence of a Soviet tattleale or group of combatants would justify the imposition of a cordon sanitaire and the use of force, if necessary, to enforce it. Indeed, a cordon sanitaire would satisfy the test of proportionality much better than an attack without warning to forcibly remove a tattleale.

The United States has used the principle of self-defense on several occasions to exert limited jurisdiction over areas of the high seas. Before direct U.S. involvement in World War II, President Roosevelt established "Maritime Control Areas" outside U.S. territorial waters. Since that time several "defensive

sea areas” have been established, usually during crises, in which the United States has exercised limited jurisdiction over foreign vessels.<sup>6</sup> Probably the most famous defensive measure taken by the United States in peacetime on the high seas was the quarantine imposed under the auspices of the Organization of American States during the Cuban Missile Crisis in 1962. While the quarantine would have been condemned by a strict interpretation of the Geneva Convention, the clear defensive need for such action justified the O.A.S. action in the eyes of most nations of the world.

Another useful precedent is the fairly routine establishment of warning areas by many navies to conduct naval exercises, missile or gun firings, or potentially dangerous experiments at sea. Notices to Mariners are promulgated which specify the area and duration of the dangerous activity. This peacetime abrogation of the normal freedom of the sea is accepted as the reasonable exercise of high seas freedoms, since such areas usually are severely limited in time and space.<sup>7</sup> It should be noted, though, that while all ships are warned of the danger area, they are not *prohibited* from entering at their own risk.

*Summary of Legal Consideration.* There is little doubt that if a cordon sanitaire were declared today, without prior diplomatic and legal groundwork being laid, the vast majority of the world community would condemn the action as a clear violation of the freedom of the seas. However, the principle of self-defense and the precedents established by sea control zones, the Cuban quarantine, and the accepted practice of declaring warning areas, indicate that cordon sanitaire could be viewed as a reasonable and proportionate response to an imminent threat. Negotiations in international forums would be required, however, to ensure the acceptance of such a view in the world community.

### Potential Benefits of Cordon Sanitaire

*Removal of Tattletales.* If the cordon were accepted and observed by the Soviets, they would remove their targeting and antiship missile platforms from the immediate vicinity of the carrier battle group. Although satellites, HF/DF nets, and other elements of the Soviet Ocean Surveillance System could presumably still track the battle group to some extent, the removal of the tattletale would decrease the accuracy of the targeting information available to the Soviets. Also, the removal of the combatants would provide a buffer area in which to intercept incoming missiles. Thus, with a cordon sanitaire in effect, a Soviet preemptive strike would be less accurate and would also allow more reaction time for battle group missile defenses to detect, track, and destroy the incoming missiles. Both factors would increase the survivability of the aircraft carriers.

*Stabilization Through Separation of Forces.* The high speed, accuracy, and lethality of modern naval surface-to-surface missiles greatly complicates the interaction between opposing surface combatants in close proximity during periods of crisis. As tensions escalate, it becomes increasingly likely that minor provocations or strictly defensive actions will be interpreted by the opposing tactical commander as an indication of an imminent attack, thereby triggering a defensive preemptive strike on his part. The initiation of hostilities, then, would not be controlled by the national command authorities of either side, but would result from the paranoia engendered by two opposing weapon systems operating within close range of each other in a volatile, edge-of-war situation. A cordon sanitaire, by separating opposing forces at sea, would help stabilize tensions by reducing the chance of hostilities commencing inadvertently through misinterpretation of actions by an opposing ship.

### Drawbacks and Dangers of Cordon Sanitaire

*It Invites Preemption.* Argument Against Cordon Sanitaire: The declaration of a cordon sanitaire may be viewed as an ultimatum by the Soviet Union, analogous to the U.S. quarantine during the Cuban Missile Crisis. It is generally acknowledged that the Soviet capitulation to the demands of the United States at that time contributed to the downfall of Premier Khrushchev and accelerated the tremendous growth of the Soviet Navy. Undoubtedly the Soviet leadership would find anything resembling an ultimatum to vacate a cordon sanitaire around a carrier battle group most distasteful, and would agree to observe such a zone only if it was in their own best interest or if no reasonable alternative was available. The potential loss of face could be devastating for the Soviet oligarchy, both internationally and domestically. Backed into a corner by a cordon sanitaire ultimatum, Soviet leaders would unquestionably consider very seriously launching a preemptive attack on the battle group sometime before the cordon sanitaire became effective, while accurate targeting information remained available and missile platforms were within range.

Counter Argument: Even if the danger is very great that the declaration of a cordon sanitaire might provoke the preemptive attack it was designed to prevent, at some point, as tensions rise to the brink of war, cordon sanitaire could still be militarily attractive. If intelligence revealed a massing of Soviet naval units which could be the prelude to a coordinated strike, the declaration of a cordon sanitaire to take effect before the majority of the strike platforms were within missile range of the battle groups could force the Soviets to launch a less-than-optimum strike or else abide by the cordon sanitaire. Though a peak defensive posture could not reasonably be maintained for the days or weeks that a period of high tensions could last, the battle group could maintain peak defensive readiness during the 24 hours or so between declaration and the time the cordon sanitaire went into

effect, thereby minimizing its vulnerability to a preemptive attack during the period of highest threat.

It seems obvious that the less prepared the Soviets are to launch a preemptive strike against the battle group, the less likely it is that they would do so in response to a U.S. declaration of a cordon sanitaire. As Admiral Kidd pointed out in a conversation with this author, if insufficient numbers of surface and submarine antiship missile platforms were in position to participate in the strike, or if too few Backfire or Badger aircraft could be brought to bear (due to availability or range limitations), the Soviet Union would be reluctant to preempt through a hastily coordinated strike with what their historically cautious civil leadership would consider insufficient forces. Also, although there is not necessarily a direct connection between a war ashore and one at sea, Soviet leaders would probably be reluctant to commence hostilities by preempting naval targets until they were fully ready to launch their land campaign. Thus, through proper timing based on accurate intelligence of Soviet land, sea, and air activity, a U.S. cordon sanitaire declaration could catch the Soviets not optimally prepared to attack, and thereby increase the likelihood of their acceptance of the cordon sanitaire.

Another means of reducing the likelihood of Soviet preemption after the declaration of a cordon sanitaire is to make the conditions of the cordon sanitaire appeal to the Soviets' own interests as much as possible. In the declaration message to the Soviets, stress should be laid on the advantages to both sides to be gained from the stabilizing effects of the separation of forces entailed in the cordon sanitaire. If the geography involved in the specific situation permits and the immediate mission of the battle group can still be accomplished, the cordon sanitaire could take the form of a "demilitarized zone" between the opposing forces, thereby making the declaration appear less one-sided and arbitrary. To have a reasonable hope of Soviet acceptance, the United States should indicate its willingness to abide by a similar restriction around Soviet battle groups. The implications of this will be discussed separately below. While the tone of the message declaring the cordon sanitaire must not be belligerent or threatening, the message must still convey the intent of the United States to protect the battle group against the unacceptable situation with force, if necessary. An overly conciliatory declaration would invite the Soviets to ignore the cordon sanitaire. An overly threatening tone could increase the likelihood of preemption by the Soviets.

In summary, the declaration of cordon sanitaire is a provocative action and should be done with great care. Proper timing of the declaration based on intelligence data to maximize the U.S. tactical advantage, and careful wording of the declaration could combine to significantly reduce the danger.

***Enforcement Dilemma.*** Argument Against Cordon Sanitaire: It is almost certain that the Soviets would protest a U.S. declaration of cordon sanitaire as a violation

of the Geneva Convention and accepted international law. If they were not yet ready to attack the battle group, or for whatever reason did not desire to do so, the Soviets might rely on their strong legal position and remain within the cordon sanitaire in defiance of the U.S. declaration. Such a course of action would place the United States in a difficult situation. If the United States backed away from its declaration, the nation would obviously lose credibility and expose itself to greater Soviet pressure. Enforcing the cordon sanitaire by firing on offending units would damage world opinion of the United States and would likely produce Soviet retaliation—perhaps a massive strike. Clearly, both of these outcomes are undesirable.

**Counter Arguments:** The first option, backing away from the cordon sanitaire if the Soviets do not abide by it, should be discarded. The negative aspects of such a course of action, especially in a high tension crisis, would be devastating to U.S. interests. For this reason, the United States should never declare a cordon sanitaire without being fully resolved and capable of enforcing it. However, the consequences of sinking a Soviet ship within a designated cordon sanitaire, even after full warning, could also be very dangerous. An escalation ladder for enforcing the cordon sanitaire should be developed and used to ensure that excessive force is not used, thereby limiting the danger of Soviet retaliation. Below are examples of possible escalation ladders to compel Soviet surface, air and submarine units to vacate a cordon sanitaire.

— Against surface units:

1. Use radio messages and light signals to warn the Soviet unit to leave the area.
2. Attempt to overpower radio transmissions from the Soviet unit through jamming.
3. Use shouldering to prevent the Soviet unit from following the battle group.
4. Energize fire control radars.
5. Buzz the Soviet unit with aircraft.
6. Fire warning shots near the unit.
7. Attempt to disable the Soviet unit's rudder or propeller with lines or explosives.
8. Attempt to disable communications and/or radar antennas with helicopters and grappling hooks or other available means.
9. Seize the unit forcibly.
10. Hit the Soviet unit with a single round of the least damaging weapon available.
11. Continue to fire single weapons at the unit at short intervals until it is disabled or departs the area.

— Against air units:

1. Intercept the intruder with fighter aircraft.
2. Warn the Soviet aircraft via radio and/or hand signals to leave the area.
3. Fire warning burst of gunfire.
4. Shoot the Soviet aircraft down, if necessary, to prevent it from obtaining effective targeting data on the battle group.

— Against submarines:

1. Track the unfriendly submarine with active sonar.
2. Use “Uncle Joe” procedures with underwater devices to signal the submarine to surface.
3. Attack with torpedoes.

These examples only suggest some possible actions which could be included in an enforcement ladder. The point is, specific enforcement instructions from the national command authorities should be promulgated to the battle group commander when the cordon sanitaire is declared. Escalation along the ladder, however, should be closely controlled by the NCA in view of the extreme sensitivity of the operation. The object, of course, is to use the minimum amount of force necessary to compel the Soviets to vacate the cordoned area, in order to minimize the risk of escalatory retaliation.

*Promulgation of PIM.* Argument Against Cordon Sanitaire: Establishing a cordon sanitaire around a moving battle group would require providing the group’s PIM to the Soviets. This would, of course, provide them with valuable targeting data by itself, depending on the size of the declared cordon sanitaire. While the exact position of the carrier within the cordon sanitaire could not be precisely pinpointed (as would be the case with a tattletale), the general movements of the battle group would be known days, at least hours, in advance. This intelligence would allow the Soviets many possibilities to plan a preemptive strike. Based on the PIM information Soviet Ocean Surveillance System (SOSS) satellite sensors could be positioned to maintain general locating data on the battle group. Also, submarines could be positioned ahead of the cordon sanitaire and quietly let the battle group steam past, by their slow speed greatly increasing their chances of remaining undetected. Targeting data on the carrier could be broadcast by the subs when obtained, and a coordinated strike could then be launched.

Counter Arguments: While the intelligence value of PIM information provided to the Soviets is significant, it certainly could not compare with the continuous stream of extremely accurate position information that would be provided by a tattletale unit in the absence of a cordon sanitaire. In the example discussed above, Soviet submarines would have to penetrate the battle group ASW screen to be able to provide accurate targeting data on the carrier. The submarines would also have to break radio silence to transmit the targeting information, making them very vulnerable to detection and prosecution as intruders.

The PIM information could also be used as a deception device by the United States. The battle group could operate in a relatively small portion of the cordon sanitaire area furthest from the major threat axis. Or, the battle group could

operate partially or completely outside the cordon area if needed or desired. With cooperative cloud cover, deceptive formations, and EMCON, the battle group could possibly elude SOSS sensors for several days. It seems obvious, then, that while providing the Soviets with battle group PIM information is a significant drawback of cordon sanitaire, it would still be much better than tolerating a tattletale within the battle group formations. False PIM information, coupled with other deceptive tactics, could be very helpful to the United States in certain situations.

**Reciprocity.** *Argument Against Cordon Sanitaire:* As discussed in a preceding section, to soften the impact of the cordon sanitaire declaration the United States would have to be willing to abide by similar restrictions around Soviet task groups, or restrict in some other manner the movements of its naval units. The less unilateral and arbitrary the cordon sanitaire declaration is, the greater are its chances of success. The loss of intelligence to the United States caused by abiding by a Soviet cordon sanitaire could be important. Also, the Soviets could conceivably declare a large cordon sanitaire around many small surface groups in an effort to limit U.S. access to key areas of the high seas. For example, multiple Soviet cordons sanitaire in the North Atlantic approaches to Europe could delay the arrival of critical military supplies and reinforcements there. Depending on the specific scenario, there are many relatively restricted bodies of water where both navies would legitimately want to operate—for instance, the Eastern Mediterranean or Northern Arabian Sea. The existence of cordon sanitaire on both sides in such restricted, yet important areas would probably require some type of partitioning or demilitarized zone. Such an arrangement would be difficult to negotiate during times of crisis, and even under the best of situations would restrict to some degree U.S. movements within a strategic area.

Another related danger is the possible proliferation of the use of cordon sanitaire beyond NATO and the Warsaw Pact. Its widespread use by small Third World nations, following a precedent set by the superpowers, could severely hamper free navigation, particularly along littorals.

**Counter Arguments:** The loss of intelligence to the United States caused by abiding by a Soviet cordon sanitaire, while significant, would probably not be critical. U.S. satellite and standoff aircraft sensors are generally acknowledged to be superior to those of the Soviet Union. Also, since the U.S. objective is not a preemptive strike, it could presumably absorb this degradation of intelligence capability much more readily than the Soviets.

Careful planning should be done in devising the initial cordon sanitaire area to ensure that Soviet naval or air units would not be totally blocked by the cordoned zone from access to their legitimate areas of concern. Such a precedent in the initial U.S. declaration, together with careful enunciation of the limits to which the United States would abide by Soviet cordons, would reduce the

likelihood of Soviet distortion of the concept that could severely disrupt critical allied shipping or naval operations.

The problems of negotiating the partition of strategic bodies of water with the Soviets during periods of extreme tension, and the risk of troublesome proliferation of the use of cordon sanitaire by Third World nations could both be ameliorated through negotiations during peacetime. Bilateral talks with the Soviet Union concerning the full range of issues surrounding the concept of cordon sanitaire and the unique danger posed by tattletale targeting units could lead to a formal agreement or understanding which would spell out limits and procedures governing the use of cordon sanitaire and the partitioning of restricted areas of dual interest. Ideally, such an agreement would prohibit the shadowing of combatant units even in peacetime, making specific cordon sanitaire declarations unnecessary.

It is perhaps too optimistic to expect the Soviet Union to agree formally to (or even seriously to discuss) the concept of cordon sanitaire, since the loss of their tattletales would greatly reduce their preemptive strike capability. However, even if no agreement were reached, the Soviets would be aware of the U.S. intention to use cordon sanitaire, and this awareness would be a stabilizing influence, reducing the chance of misunderstanding when a U.S. cordon sanitaire is, in fact, declared.

The United States should also push for legal recognition of cordon sanitaire as a necessary defensive measure in international forums, such as Law of the Sea Conferences and the United Nations. By stressing the intolerable threat posed by even an unarmed tattletale in this age of long-range, high-speed, extremely destructive missiles, together with the already acknowledged right of a nation to defend itself against an imminent threat, the United States could make a convincing case for the formal legalization or recognition of this concept. Such formalization would undoubtedly place specific conditions and restrictions on the legal use of cordon sanitaire, thereby reducing the potential for abuse by the Soviet Union and Third World nations.

**Surveillance Requirements.** Argument against Cordon Sanitaire: Very strict surveillance in all three media—surface, subsurface, and air—would be necessary to prevent Soviet intrusion into the cordoned area even after it was established. Surveillance requirements in areas of extremely dense air and surface traffic could quickly overwhelm the assets available. Sufficient numbers of E-2C (for air and surface surveillance), F-14 (for intercepting unidentified air contacts), and S-3 (for ASW search) aircraft to enforce the cordon sanitaire in such areas would probably be beyond the capability of a single carrier. The battle group would be particularly vulnerable to intrusion at night by surface units using deceptive lighting and other devices.

Counter Arguments: While surveillance requirements of a cordon sanitaire would be very high, it is not obvious that they would be reduced in the absence of the cordon sanitaire, given the common context of high tensions. With a tattletale in company, battle group surveillance efforts would be, if anything, intensified in order to locate all missile platforms within range of the battle group, which could be up to 300 miles. Surveillance requirements, since they would actually be greater without a cordon sanitaire, argue in favor of declaring a cordon sanitaire.

*World Opinion.* Argument Against Cordon Sanitaire: Established international law, as previously noted, argues predominantly against the legality of a cordon sanitaire. A U.S. declaration of a cordon sanitaire under the present system of international law would probably be viewed negatively by most Third World nations. It would also provide the Soviet Union valuable propaganda material with which to sway world opinion in its favor during the crisis. Any NATO nations with conflicting interests in the East-West crisis which might be persuaded to withhold their forces or support facilities in the event of hostilities would be particularly valuable targets of such a propaganda campaign. Exploiting any lack of political cohesiveness in the NATO Alliance would be a high priority for the Soviets, particularly during a rising crisis, and a U.S. cordon sanitaire widely viewed as illegal could provide the USSR with a very useful wedge with which to split or weaken NATO solidarity.

Counter Arguments: This is probably the most convincing argument against the feasibility of the concept of cordon sanitaire. At present, the political and diplomatic risks involved in declaring a cordon sanitaire would very likely dissuade the national command authorities from implementing the concept. Even if all military factors clearly favored establishing a cordon sanitaire in a given crisis situation, the overriding political concern for maintaining the strongest possible relations with allies and key Third World nations would probably preclude its use.

Several steps could and should be taken now to win international acceptance of the concept of cordon sanitaire as a legal defensive measure, in order to make its use more viable in a crisis situation. First, the United States should present to our NATO allies and other key friendly nations (at both the military and diplomatic level) the advantages and legal arguments in favor of the cordon sanitaire concept. The purpose would be to build support for the concept, or, at the very least, assuage as much as possible any negative responses of friendly nations. After achieving a semblance of allied unity, the United States, bolstered by other nations favoring the concept, should press for formal legalization of cordon sanitaire in truly international forums such as the United Nations and Law of the Sea Conferences. Such a process would doubtless be long and, perhaps, ultimately unsuccessful (at least in terms of formal recognition of cordon

sanitaire as a legal defensive measure). Even so, U.S. arguments indicating our desire and intention to use a form of cordon sanitaire when necessary would serve to condition the international community to expect such a move. This would remove much of the shock and outrage from the reactions of the world community and make the implementation of a cordon sanitaire by the United States much less destabilizing politically, both within NATO and throughout the Third World.

### What to Do

There are some actions which can both reduce the military and political risks associated with cordon sanitaire and enhance its attractiveness to the national command authorities as a means of protecting our naval striking power from preemptive attacks. These actions are not risky, not expensive, and should be begun without delay.

The Joint Chiefs of Staff should:

- Enhance U.S. intelligence capabilities to assess and to report rapidly on Soviet readiness and possible strike indications.
- Develop clear and logical rules of engagement for the enforcement of a cordon sanitaire to ensure compliance by Soviet units while using the absolute minimum force necessary in the process.
- Impress upon the national civilian leaders the seriousness of the threat posed by Soviet tattletales during crisis situations, and press for the diplomatic action listed below.

The national civilian leaders should:

- Fully recognize the unacceptable risk embodied in a Soviet tattletale and the potential benefits of a cordon sanitaire.
- Begin talks with allies and other friendly nations to gain support for the concept of cordon sanitaire as a legal defensive measure in times of extreme crisis.
- Bring the issue of formal recognition and legalization of cordon sanitaire before future Law of the Sea Conferences and the United Nations.
- Negotiate bilaterally with the USSR (or within a NATO/Warsaw Pact framework) for an agreement concerning tattletales and cordon sanitaire.

If these recommendations are implemented, cordon sanitaire could be transformed from an esoteric idea into a truly viable and extremely valuable measure to reduce significantly the vulnerability of U.S. aircraft carriers to preemptive attacks. Even if ultimately they proved unsuccessful, the diplomatic initiatives suggested above would still serve to make cordon sanitaire more politically attractive. If, during formal negotiations, the United States publicly states its intention to use cordon sanitaire and specifies clearly and logically why it is necessary, the Soviet Union and Third World nations would not be surprised by

its use during some future crisis, and their reactions, even if unfavorable, would be more reasoned and restrained.

Cordon sanitaire has tremendous potential as a means to reduce the vulnerability of U.S. aircraft carriers. The problems currently limiting its practical application are solvable, but many of the solutions require a peaceful diplomatic environment and considerable time to implement. It is therefore important to begin the diplomatic actions recommended above as soon as possible. The fate of many of our aircraft carriers may well depend on it.

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Lieutenant Commander Gilchrist was assigned as a naval aviator with Patrol Squadron 30 at the time this article was first published.

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### Notes

1. Lehman, *Aircraft Carriers: The Real Choices*, 6, No. 52 *The Washington Papers* 39 (1978).
2. Telephone Interview with Admiral Isaac Kidd, USN (Ret.), Washington, D.C. (January 23, 1982).
3. Interview with Captain Stuart D. Landersman, USN, Naval War College Strategic Studies Group, Newport, R.I. (January 12, 1982).
4. U.S. Treaties, etc., "Law of the Sea: Convention on the High Seas," *United States Treaties and Other International Agreements*, TIAS 5200 (Washington: U.S. Dept. of State, 1962), v. 13, pt. 2, at 2314.
5. U.S. Treaties, etc., "Prevention of Incidents On and Over the High Seas," *United States Treaties and Other International Agreements*, TIAS 7379 (Washington: U.S. Dept. of State, 1972), v. 23, pt. 1, at 1168-1173.
6. Office of the Chief of Naval Operations, *Law of Naval Warfare* (Washington: U.S. Govt. Print. Off., 1974), pp. 4-12a, 4-13.
7. Interview with Colonel Joseph D. Ruane, USMC, Naval War College Strategic Studies Group, Newport, R.I. (January 12, 1982).



# Chapter 11

## Marine Technology Transfer and the Law of the Sea\*

Lieutenant Commander James Stavridis, U.S. Navy

On 10 December 1982, the signing ceremony was held for the United Nations Convention on the Law of the Sea (UNCLOS) in Montego Bay, Jamaica. The comprehensive Law of the Sea Treaty was signed by delegates from 117 countries, and the document represented over nine years of difficult negotiations conducted by nearly 3,000 delegates. The Treaty is a comprehensive effort to regulate the world's oceans, and includes provisions on a wide range of issues, including: territorial seas, the continental shelf, the high seas, marine scientific research, exploitation of the deep seabed, straits passage (for commercial shipping and warships), fishing rights, and technology transfer. The United States refused to sign the Treaty, along with 22 other countries. In describing U.S. objections to the document, chief delegate Thomas Clingan said, "no nation should be asked to sacrifice fundamental national interests."<sup>1</sup> One primary area of concern for the United States is that portion of the Treaty that creates an International Seabed Authority (ISA or the "Authority") to regulate the mining of strategic minerals from the deep seabed—the floor of the ocean under the high seas.<sup>2</sup> Within the deep seabed mining sections of the Treaty, one particular issue of fundamental concern to U.S. negotiators is the mandatory transfer of marine technology. Of special concern and sensitivity is the closely held technology that would be required to mine the floor of the deep ocean for the rich lodes of nickel, copper, cobalt, and manganese, found in the "manganese nodules" throughout the ocean floor.<sup>3</sup>

The associated technology (which would involve the prospecting, collecting, surfacing, transporting, and processing of the manganese nodules) covers a wide range of equipments and techniques in the marine environment. In addition to the deep seabed mining technology, which would be available for mandatory transfer, the Treaty further establishes regional centers to encourage other forms of technology transfer. The issue of marine technology transfer in the context of the Law of the Sea Treaty is an emotional one. It is colored by: overtones of the entire North-South debate, questions of the free market and competitive

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development of technology, and the issue of the deep seabed as the “common heritage of all mankind,” versus the principle of freedom of the high seas.

Technology transfer as a process is a straightforward matter. It is the concept of passing scientific knowledge and technology from one State or organization to another. In the Law of the Sea Treaty, the heart of the matter is contained in Article 144, *Transfer of Technology*. The article states:<sup>4</sup>

1. The Authority (the international organization established to regulate the deep seabed) shall take measures in accordance with this Convention (the Treaty):
  - (a) to acquire technology and scientific knowledge relating to activities in the Area (the deep seabed); and
  - (b) to promote and encourage the transfer to developing States of such technology and scientific knowledge so that all States Parties benefit therefrom.

The broad principles of Article 144 are specified in Annex III to the Treaty, which deals with basic conditions of prospecting, exploring and exploiting the deep seabed. In Article 5 of Annex III, also entitled *Transfer of Technology*, very detailed instructions are listed dealing with mandatory transfer of marine technology. Article 5 specifies that:<sup>5</sup>

- Applicants (Private corporations or state-run companies) will provide the Authority with a general description of equipment and methods pertaining to their specific mining project.
- Applicants and operators will inform the Authority whenever “substantial technological change or innovation” is introduced.
- Operators will make technology available to the Enterprise (the mining arm of the Authority) “on fair and reasonable commercial terms and conditions.”
- Such technology could be transferred to the developing States by the Enterprise/Authority in cases where the developing State had applied for the right to participate in the deep seabed mining operation.
- Technology transfer provisions would be in force for the first 10 years after the Enterprise begins commercial production of minerals from the resources of the deep seabed.
- Technology is defined very broadly, to include specialized equipment and technical know-how, including manuals, designs, operating instructions, training, and technical advice and assistance necessary to assemble, maintain, and operate a viable system and the legal right to use these items for that purpose on a nonexclusive basis.

### Marine Technology

The stakes involved in the issue are enormous. The strategic importance of the technology is immense, particularly since it represents the ability to assure a nation a stable, virtually inexhaustible supply of cobalt (jet engines and other

high-tech applications), manganese (steel production), copper, and nickel. The United States currently imports over 97 percent of its cobalt and manganese, as well as 70 percent of its nickel. The land-based producers of U.S. cobalt and manganese are not politically stable (Zaire and South Africa, for example), and the prices of the minerals have been extremely volatile. The deep seabed mining technology that could be transferred under the mandatory portions of the Law of the Sea Treaty could include the machinery and technology necessary to: prospect (undersea vehicles, surface ship navigation and positioning systems, sonic searchers), harvest the manganese nodules (mining vehicles capable of operating at the 14,000-18,000-foot depths of the deep seabed), lift (conveyors, pneumatic lift devices), transport (ships, loading systems), and process (artificial islands and ports, chemical processing equipment, refining, mineral/metal transport). Many of the technologies involved in deep seabed mining are extremely sensitive, representing proprietary knowledge developed by private corporations. In addition to the innate value of the innovative technology, the value of the deep seabed mining technologies must be measured against the opportunity it affords for exploiting the vast hoard of minerals on the deep seabed. Clearly, the value of the technology is enormous. Some analysts place its worth in the billions of dollars.<sup>6</sup>

The Treaty allows for *mandatory* transfer of deep seabed mining technology. It also strongly encourages the transfer of other marine technologies, although it does not provide for any other mandated transfers. The value of the other marine technologies is also considerable. One of the strongest sections of the Treaty encourages the exchange and transfer of information and technology involved with fishing. Many new techniques have been developed over the past decades, yet virtually all of the world's fishing is still done with primitive methods. "Major innovations include nylon nets, new devices and techniques for fish location, sonars, echo sounders, long distance processing factory ships, and sophisticated trawling."<sup>7</sup> The development of sea farming and aquaculture are also being explored.

Other interesting advances are being made in the technology of artificial islands. This involves recovering land areas from the ocean and using them in a variety of high technology and agricultural ways, including nuclear power sites, defense installations, toxic waste processing, storage, refining, and other factory uses. The technology involved here could also lead to great improvements in harbor capabilities. The artificial islands technology could be liable for mandatory transfer if such stations were used specifically for the processing of the deep seabed mining minerals, which is a good possibility because of environmental and ecological considerations.<sup>8</sup>

Offshore hydrocarbon installations are a part of marine technology that is constantly improving. There are more than 700 active rigs operating in the world today, and more are being constructed, using extremely advanced technology at

costs in excess of \$1 billion per rig. Many experts believe that the source for over 50 percent of the world's hydrocarbons (oil and natural gas) will be the oceans by 1990. The developing countries are naturally desirous of obtaining this complex technology for exploitation around their own shores.<sup>9</sup>

Other advances associated with marine technology include the areas of shipbuilding, tidal/current power production, ocean thermal energy projects, and the extraction of minerals and chemicals from seawater, muds, polymetallic sulfides, etc. The precedent of the deep seabed as the "common heritage of all mankind" could conceivably be applied in many other areas. The Treaty already provides a framework for the systematic transfer of marine technology from the industrial world to the developing countries, although it is *mandatory* only in the area of deep seabed mining at the present. However, it is important to bear in mind the wide range of marine technologies that are subsumed in the category of "seabed mining."

Overall, it is clear that marine technology will have an increasingly important impact on the standard of living and the economic welfare of many countries. The issue of the transfer of such technology will continue to be a key concern in the North-South dialogue in general and in the Law of the Sea Treaty in particular.

### Industrial Countries

By far the majority of the marine technology in the world today is held by the industrial countries, including primarily the United States, Western Europe, and Japan. The position of the Western nations on the issue of technology transfer in the Law of the Sea context is not unified. The United States, particularly under the highly free-enterprise oriented Reagan administration, is strongly opposed to the mandatory transfer of any marine technology. On 29 January 1982, President Reagan released a statement announcing that the United States would return to the Law of the Sea negotiations after a hiatus of nearly a year. He voiced six key areas of concern with the Treaty, most of which were involved in one way or another with the deep seabed mining portion of the accord. He said, ". . . the Convention should not contain provisions for the mandatory transfer of private technology."<sup>10</sup> Ambassador James Malone, the Special Representative of the President for the Law of the Sea negotiations, echoed the same thought in testimony before the House Merchant Marine and Fisheries Committee on 23 February 1982: "There is a deeply held view in our Congress that one of America's greatest assets is its capacity for innovation and invention and its ability to produce advanced technology. It is therefore understandable, that a Treaty would be unacceptable to many Americans if it required the United States, or more particularly private companies, to transfer that asset in a forced sale."<sup>11</sup> Other Western nations are not so vocal in their opposition to the technology

transfer provisions of the Treaty, but many are sympathetic to the U.S. position, especially Great Britain and West Germany, neither of whom have signed the Treaty to date. On the other hand, some of the Western countries with advanced marine technology seem willing to let the mandatory technology provisions stand, notably France and Japan, both of whom signed the agreement.<sup>12</sup> It is also important to note that *within* the industrialized countries, a wide diversity of opinion exists on the concept of mandatory transfer of technology, ranging from the strong opposition of most corporations to support from many journalists and academics. Overall, the industrial countries accept the concept that *some* technology transfer is an acceptable political and philosophical idea, but they are unwilling to see the technology transferred via mandatory controls of the Authority. The preference is for joint ventures, with the industrial corporations holding the technology for some specified period of time and gradually transferring it to the developing countries. While some of the industrial countries are willing to accept the mandatory technology transfer provisions of the Treaty, the influence and attitude of the United States toward the document remains a significant block to the emerging ocean regime in general and marine technology transfer in particular.<sup>13</sup>

### Developing Countries

The developing countries see the issue of technology transfer as one of the key ingredients of the New International Economic Order (NIEO), with the Law of the Sea Treaty and its provisions for mandatory transfer as being on the cutting edge of that movement. From a philosophical standpoint, the developing countries are strongly in favor of increasing the flow of technology, via mandatory regulation if necessary, to their economies; and they are also avid supporters of the concept of the deep seabed as the "common heritage of all mankind."<sup>14</sup> They see the mandatory technology transfer provisions as part of their opportunity to share in the wealth, prosperity, and property that has accrued to the West.

The developing countries perceive the distribution of the world's wealth as unequal, and they seek to correct it via a political process, of which marine technology transfer is part of the current agenda. From a pragmatic standpoint, on the other hand, most developing countries are not yet ready for a large and sudden influx of advanced marine technology. They have neither the trained personnel nor the capital or infrastructure to effectively utilize it. The Law of the Sea Treaty does establish a principle or precedent for mandatory transfer, and it is therefore considered of critical importance by much of the developing world. Specifically, the developing countries are calling for:<sup>15</sup>

- Mandatory transfer of marine technology
- More information from the multinational corporations operating in the developing countries and on the high seas

- Better training for users of the technology (in the developing world)
- An equal chance to exploit the seabed (“the common heritage principle”)

The developing countries are quick to point out that they do not claim any right to technology that is used *only* in the industrial countries and not on the high seas or deep seabed. They admit that such equipment and knowledge is clearly “private property.” Their concern is directed toward technology that is used to exploit the ocean, “the common heritage of all mankind.” They argue that since the marine technology is used in what is, in effect, a global common, the returns should be shared with the entire global community. They see mandatory technology transfer as one keystone of this program. Finally, the developing countries believe that they were the victims of exploitation by the Western powers throughout the colonial period. Implicit in many of their declarations and proposals is the idea that they are “due” their share in global mineral wealth and advanced technology in return for decades of exploitation.

### Corporations

Most of the marine technology that is held by Western countries is in the hands of a collection of large corporations. As a rule, the Western companies are opposed to the mandatory transfer of marine technology. The U.S. Chamber of Commerce, which represents 187,000 firms and individuals in business, is particularly opposed to the concept.<sup>16</sup> In a position paper of 5 August 1981, the Chamber’s spokesperson commented, “Privately owned technology in this country is not the ‘common heritage of mankind.’”<sup>17</sup> The position paper points out that the technology in the United States has been developed because of the “American economic system,” which “encourages and protects the development of technology.” The paper goes on to comment that lack of full protection, i.e., technology transfer as outlined in the Law of the Sea Treaty, will only act as a major obstacle to the development and utilization of important minerals and hydrocarbon recovery technology. This, again according to the Chamber, will ultimately be detrimental to the companies, the developing countries, and the industrial nations alike.<sup>18</sup>

The basic attitude of most corporations is that technology transfer is a fine idea, but it must be profitable for both the transferor *and* the transferee. If the incentives inherent in the United States and other Western patent systems are altered by the Authority, less and less new technology will be developed. George W. Whitney, President of the American Patent Law Association, commented before the Committee on Foreign Relations of the U.S. Senate:<sup>19</sup>

“High technology products, machines, and processes are assets acquired at high costs and considerable risks. Their development requires long term expenditures of money and manpower. To efficiently mine the sea, not only will existing technology and experience have to be greatly advanced, but whole

new technologies will have to be developed. We cannot conceive that any American industry will undertake this major endeavor, knowing that what it invents and brings into being will immediately be transferred to its competitors. We as their advisors could not in good faith recommend such action.”

The influence of powerful lobbying groups such as the Chamber of Commerce and large individual corporations is immense. In particular, four major consortia of large, multinational corporations have already staked a claim in the deep seabed as “pioneer investors.” These include:<sup>20</sup>

*Kennecott Consortium:* Sohio, Rio Tinto-Zinc, BP, Noranda Mines, Mitsubishi, Kennecott.

*Ocean Mining Associates:* US Steel, Union Minere, Sun Chemicals, Ente Nazionale Idrocarburi.

*Ocean Management, Inc.:* INCO, Metallgesellschaft, Preussag, Salzgitter, SEDCO, Deep Ocean Mining.

*Ocean Minerals Co.:* Standard Oil, Lockheed, Billiton (Shell) BKW Ocean Minerals.

Such large, multinational groups have brought considerable pressure to bear in the various Western countries opposed to the marine technology transfer provisions of the Law of the Sea Treaty. They will continue to oppose the process even if their individual governments sign the Treaty.

### Problem

The problem with instituting marine technology transfer via the Law of the Sea Treaty is obvious—the Western countries and multinational corporations that currently hold the technology have little desire to share it with the developing countries, at least as part of a mandated transfer. On the other hand, the industrial countries and the companies do want the formal, legal protection offered under the aegis of a widely supported Law of the Sea Treaty. Additionally, the West is very interested in other parts of the Treaty that guarantee vessel (commercial and warship) passage rights, define coastal boundaries, establish exclusive economic zones, and ensure overflight above strategic straits. Finally, from a philosophical standpoint, the West is in favor of technology transfer in order to promote general global advancement and raise the standard of living in many developing countries, so long as the transfer of technology is accomplished by an “orderly and efficient” means. The developing countries are strongly in favor of the transfer process as outlined in the Law of the Sea Treaty since they are the prime beneficiaries of the system. Both sides agree that the fundamental question of technology transfer is a key element in North-South relations, and most of the countries involved believe that the United Nations is an acceptable forum for working toward a solution.

### Proposed Solution

The problem of marine technology transfer is not the only stumbling block to universal acceptance of the United Nations Law of the Sea Treaty. Most of the industrial countries have additional grievances with the deep seabed mining-Authority system. Negotiations broke down completely between the major contending blocs at the eleventh and final meeting of the Convention in New York in March-April 1982 over several other issues, and the gulf between the countries willing to sign the Treaty and those who refuse seems wide today.<sup>21</sup> "We have been the whipping boys here," commented Thomas Clingan, the U.S. delegate to the Jamaican signing ceremony.<sup>22</sup> There are rumblings of retaliation, protectionism, nationalization of overseas assets, and the like from disgruntled developing countries. Paul B. Engo of Cameroon said at the ceremony that the United States "cannot now afford the discomforts of isolation," and Ambassador Clingan acknowledged that the U.S. position was "bound to harden North-South feelings."<sup>23</sup> Although the problems with the Law of the Sea Treaty will not be quickly solved, it seems that on the issue of marine technology transfer at least, there is room for maneuver. The following proposals are designed only to mention a few ideas that might provide a starting point if further negotiations are undertaken. The proposals can easily be criticized from both sides, but some compromise by both the industrial countries and the developing countries will be necessary if an agreement on international marine technology transfer is to ever attain global importance and acceptance. As an opening agenda for discussion, the following points are suggested:

- Continue using the United Nations as a forum for discussion. While criticized by many in the industrialized countries for its highly politicized atmosphere, the United Nations still remains the only organization that brings together delegates from virtually every country in the world in some semblance of orderly debate on a regular basis. It is clearly the right organization for establishing a system for marine technology transfer.

- Using a separately established commission of U.N. delegates from key industrial and developing countries, work toward modifications in procedure or additional agreements that could make the technology transfer process, as so outlined in the treaty, acceptable to the industrial countries. Specifically, work for an agreement on a patent system for marine technology as outlined below.

- Develop a patent system that would apply directly to marine technology and that would be eligible for transfer under the terms of the Law of the Sea Treaty. Some period of patent protection could be established. This could be a fairly short period, something less than the amount of time allowed under most Western patent systems, but still long enough to provide the inventor with an incentive to develop the technology through some equitable recapture of investment costs. A period of around 5 years might be acceptable to the

corporations, the industrial countries, and the developing countries. The exact length of time could be tailored to the specific technology by a board composed of representatives from business, the home country government, and a mixed group from the industrial and the developing countries. During the period of time the patent is in force, an extra tax could be levied by the Authority, the funds from which could be used to sponsor educational benefits for the developing country students in Western educational institutions.

- Recognize and utilize the value of Western educational institutions in the technology transfer process. It seems that many of the negotiators are overly concerned with the hardware side of the technology transfer process. It is easy to overlook the fact that thousands of college and graduate students are intimately and constantly involved in very fundamental technology transfer every day in Western universities and colleges. No hardware is useful for a developing country without the personal expertise to make it work. In the United States, for example, some major universities have a foreign student contingent as high as 17 percent. There are currently in excess of 175,000 foreign students enrolled in the United States alone. As the "baby boom" generation moves out of college age, many educational institutions are scrambling for students. It seems that it would be possible to use some of the profits from the advanced marine exploitation to sponsor students of the developing world at American and other Western universities. This would take the place of outright mandatory transfer of technology. The industrial countries would enrich their university systems, spread their cultural influence, and satisfy developing world demands. The developing countries would gain needed background technical skill to handle the technology that would eventually be available in their countries.

- Utilize joint ventures to effect the gradual transfer of marine technology. Rather than instituting a program that would mandate technology transfer to the developing countries, it seems more effective in the long run to encourage joint ventures on the part of the industrial corporations and the developing countries. This would ensure a mutually profitable flow of technology to the developing world, while still providing some protection to proprietary technology holders. While Deep seabed mining will be beyond the capability of developing countries for some time to come, joint ventures in fishing, artificial island construction, ocean energy projects, and the like, seem plausible and mutually profitable.

- Allow strict government prohibition of all security-sensitive marine technology transfers. Much discussion has taken place over the possibility of security leaks as a result of the technology transfer process. These worries seem overdrawn in the area of marine technology, particularly since the Treaty specifically allows any government to shield sensitive technology for security purposes. However, this protection must be respected if the industrial nations will agree to the concept of marine technology transfer in the future.

## Conclusions

The issue of marine technology transfer in the Law of the Sea context is an issue with a relatively low profile. The general public is unaware of the problem, and "public opinion" on the issue, such as it exists today, is manufactured by a small handful of lobbyists for business interests, competing segments of the U.S. government, journalists, academics, and publicists. Yet it is important to remember that the Law of the Sea Treaty in general and, marine technology transfer in particular, represent the cutting edge of what will be the great conflict of the 21st century—the competition for the allocation of dwindling resources among a growing world population. This is a competition that may not be a centerpiece in East-West ideological debate, but will rather be concerned with issues of survival, wealth, and poverty, as they apply to mankind as a whole. Access to strategic minerals at the bottom of the ocean is one early manifestation of this conflict, and it will come to include the exploitation of protein, hydrocarbons, energy (thermal, current, tidal, and salinity gradient), fresh water, and other resources from the sea. It will be paralleled by conflict over the two other "global commons," Antarctica and space. In the final analysis, the issue of mandatory transfer of marine technology is at the forefront of the much larger issue of deciding what truly is the common heritage of all mankind. The question becomes one of drawing complex lines across emotional issues that impact on national survival, a delicate process indeed. All mankind does have a stake in the exploitation of the open ocean and the deep seabed but it must be undertaken carefully and with due concern for all parties, including the corporations of the West (and their millions of stockholders) as well as the rights of the developing countries. The objective of a lasting global accord on the management of the world's oceans is a good one; but in order to achieve a legitimate universal consensus, further discussion and negotiation will be required. The current Law of the Sea Treaty is a beginning, but additional modification on technology transfer, and other issues, will be required before the United States and other Western countries will enter into the agreement. This analysis has been offered as a contribution toward that process of negotiation, and it is hoped that the suggestions contained in this brief paper will offer a point of departure in the search for compromise.

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Lieutenant Commander Stavridis was attending The Fletcher School of Law and Diplomacy of Tufts University when this article was first published.

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## Notes

1. *117 Nations Sign Sea Treaty, U.S. Refuses*, The Boston Globe, 11 December 1982, p. 4. The Treaty will come into effect one year from the date of deposit of an instrument of ratification by the 60th country,

which means sometime in 1984, according to most observers. [The treaty actually entered into force on 16 November 1994.]

2. Bernard D. Nossiter, *Soviet and the U.S. Clash on Sea Law*, *The New York Times*, 10 December 1982, p. A10.

3. Ronald Reagan, *Presidential Statement*, issued in Washington, D.C., 8 July 1982. Also mentioned in this statement as U.S. problems with the Law of the Sea Treaty were deep seabed mining provisions in general, the treaty's decision-making process, and the application procedure for deep seabed miners.

4. *Convention on the Law of the Sea and Resolutions I-IV*, Third UN Conference on the Law of the Sea, reproduced by the Office of Ocean Law and Policy, Department of State, Washington, D.C., June 1982, Article 144, at 64.

5. *Id.*, Annex III, Article 5, at 162-164.

6. MOORE, JANE'S OCEAN TECHNOLOGY 1981/82 750-755 (1981).

7. Boczek, *The Transfer of Marine Technology to Developing Nations in International Law*. Paper presented at the 22nd Annual Convention of International Studies Association, Philadelphia, 18-20 March 1981, at 32-33.

8. A. Slingerland and P. Wilmot, ed., *Technology Assessment and the Ocean*, Proceedings of the International Conference on Technology Assessment, Naval War College Library, Newport, R.I., at 20-30, based on conference held in Monaco, October 1975.

9. EARNEY, PETROLEUM & HARD MINERALS FROM THE SEA 36 (1980). For cost of construction, see recent issues of *Offshore Magazine* or the *Oil & Gas Journal*.

10. Ronald Reagan, *Presidential Statement*, issued in Washington, D.C., 20 January 1982, at 1.

11. James Malone, *Statement before the House Merchant Marine and Fisheries Committee* (Washington, D.C., 23 February 1982), at 1.

12. *Supra* n. 1.

13. See for example, interview with Marne Dubs, director of corporate technology at Kennecott Corporation, *Deep Seabed Mining: Where Do We Go From Here?*, *E&MJ Magazine*, September 1981, at 125, for representative corporate reaction to the mandatory transfer process. The *Boston Globe* and *The New York Times*, on the other hand, have favored signing the treaty in editorials in 1982.

14. *Convention on the Law of the Sea and Resolution I-IV*, Article 136, p. 61. The concept of "the common heritage" also appears in many U.N. documents and resolutions, including *U.N. General Assembly Resolution 2749 (XXV)*, 1970, "Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction," 25 G.A.O.R. Supp. 28 (A/8028), 17 December 1970, at 24.

15. These demands are voiced in a wide variety of fora and discussion, including General Assembly resolutions; statements from meetings of other world organizations like the OAS, OAU, or OPEC; conferences such as the law of the sea meetings or north-south summits, etc. A good summary from the broad position of the third world can be found in Grubel, *The Case Against the New International Order*, *THE CONTEMPORARY INTERNATIONAL ECONOMY: A READER* 484-490 (Adams ed. 1979).

16. *Position Paper on Technology Transfer*, Technology Transfer Task Force, Chamber of Commerce of the United States of America, Washington, D.C., 5 August 1981, at 1-8.

17. *Id.* at 1.

18. *Id.* at 1-8.

19. *Id.* at 5-6.

20. *Sea Law—A Rendezvous with History*, *U.N. Chronicle* 14 (June 1982).

21. In fact, the United States was one of only four countries to vote against the current draft of the Law of the Sea Treaty. The entire course of the often stormy eleventh session of the UN Conference, March-April 1982, is well documented in many articles. See especially the series of articles by Bernard Nossiter in *The New York Times*, the U.N. press releases (issued daily) on the entire session, or *supra* n. 20.

22. Bernard Nossiter, *U.S. Is Said to Be Isolated in Its Opposition to Sea-Law Treaty*, *The New York Times*, 9 December 1982, at A11.

23. *Id.*

In addition to the sources mentioned above, two government documents that present the entire Law of the Sea issue, especially in regard to the U.S. position are:

Hearings before the Subcommittee and the Committee on Merchant Marine and Fisheries, *House of Representatives*, 97th Congress, on The Law of the Sea, 22 October 1981, 23 February, 20, 27 July 1982, Serial Number 97-29.

Hearings before the Committee on Foreign Affairs, *House of Representatives*, 97th Congress, Second Session, 17 June, 12 August, and 16 September 1982, U.S. Foreign Policy and the Law of the Sea.



# Chapter 12

## Law of the Sea—What Now?\*

Jon L. Jacobson

**O**n 30 April 1982, following nearly fifteen years of preparations and formal deliberations, The Third United Nations Conference on the Law of the Sea (UNCLOS III) finally adopted a new, comprehensive treaty on the Law of the Sea. The vote was 130 nations in favor, 4 opposed, and 17 abstentions. The United States cast one of the four negative votes.

On 10 December 1982, the new treaty, officially known as the 1982 Convention on the Law of the Sea,<sup>1</sup> was opened for signature in Montego Bay, Jamaica. On that first day (of a two-year signature period), 117 nations signed. Signers included most of the Third World, several Western European countries, and the Soviet bloc.

The United States refused to sign. So did 23 or so other nations, but the United States was the only nation to announce that it would never sign or ratify or otherwise participate in the treaty. Japan and several other countries have since signed, although ratifications (the formal indications of intent to be bound by the treaty) have been slow in coming.

The United States' objections to the 1982 Convention are leveled solely at the treaty provisions that would establish and define an International Seabed Authority to oversee mining of the deep seabed beyond national jurisdiction. Yet—as President Reagan conceded in his 9 July 1982 statement rejecting the treaty<sup>2</sup>—the non-seabed portions of the treaty are more than acceptable to the United States. In fact, its provisions on transit passage through international straits and on preservation of navigation and overflight freedoms within 200-mile offshore zones are quite favorable to the United States as a global naval power.

So the question arises: is the United States, in rejecting the treaty, tossing out the baby with the bathwater, or, in this case, throwing out the sea with the seabed? The answer to that question, and to the question of where we go from here, might be assisted by an initial inquiry: how did we get into this situation? And to approach this question, we need to examine recent trends in the international law of the sea and some of the causes for these trends.

The crucial date is 1945. For approximately 300 years prior to 1945, the world ocean was considered (at least by the dominant Western colonial powers) to be

\* Reprinted from the Naval War College Review March-April 1984.

divided into basically two zones: (1) The vast majority of the ocean was deemed *high seas*, where “freedom of the seas” reigned. That is, the high seas were not subjectable to any nation’s sovereignty. Each nation was free to use the world ocean for vessel (and, in this century, aircraft) navigation and its “inexhaustible” resources (usually fish) without interference or regulation by any other nation. (2) The other zone of ocean space was the *territorial sea*, a narrow border of ocean along the shores of each coastal nation within which that nation could exercise a sovereignty almost as absolute as it exercised over its land territory and its internal waters. The only real exception to absolute sovereignty was the right of every other nation’s surface vessels to “innocent passage” through the territorial sea. Passage was “innocent” so long as it was not prejudicial to the peace, good order, or security of the coastal nation. Until nearly the mid-20th century, moreover, the maximum allowable breadth of the territorial sea was generally considered to be three nautical miles, as a matter of customary international law.

This two-zone concept—combining an almost unimaginably large area of free-navigation space with narrow areas of innocent passage space—was, of course, a very convenient setup for any naval or maritime power. So thought the United States in 1945 as it emerged from World War II as the global naval power. Unfortunately for the United States and other maritime nations, 1945 is the year that the old two-zone setup began to change: the fingers of coastal nation sovereignty began to reach seaward. What happened to cause this new development?

The first thing that happened was that President Truman issued two proclamations that had been in the works since the early presidential years of Franklin Roosevelt. The first Truman Proclamation<sup>3</sup> claimed for the United States sovereign rights to the natural resources of the continental shelves adjacent to U.S. shores. This meant that the United States was staking a unilateral claim to valuable resources, oil and gas in particular, beyond its three-mile territorial sea out to an average distance from shore of 40–50 miles. The second Proclamation,<sup>4</sup> issued the same day in September of 1945, seemed to assert U.S. regulatory authority over fisheries in the high seas beyond the U.S. territorial sea; actually it did not do so, but what was important was the perception by others of yet another unilateral extraterritorial claim. Both Truman proclamations made a special point of reaffirming freedom of high seas navigation in the waters beyond the three-mile limit.

The international response to the claims of the 1945 Truman proclamations, especially to the continental shelf claim was extremely favorable: coastal nations thought it a good idea, and many followed suit. Others, apparently reasoning that there is no good idea that cannot be made better, asserted broader and more inclusive jurisdictions over sea and seabed areas off their shores. In 1947, Chile made the first claim to a 200-mile resource zone—principally to protect the Chilean whaling industry. Also in 1947, Peru asserted what is now viewed as a

200-mile *territorial sea*. Other Latin American countries followed the lead of Chile and Peru, claiming either 200-mile resource zones or territorial seas out to 200 miles from shore. Meanwhile, twelve-mile territorial seas and extraterritorial fishing zones were becoming increasingly popular around the globe.

In the midst of this expansionist trend, in the mid-1950s, the UN's International Law Commission—a group of international law specialists charged with the codification and progressive development of international law—began preparing draft treaties on the law of the sea. The result: the First United Nations Conference on the Law of the Sea (UNCLOS I), held in Geneva in 1958. The Conference adopted four new treaties, widely viewed at the time as “codifications” or restatements of the customary law of the sea. Figure 1 presents a profile view of the basic jurisdictional scheme drawn by that package of treaties. The United States is a party to each of the Geneva Conventions of the Law of the Sea. Certain aspects of these treaties are significant to the present discussion.

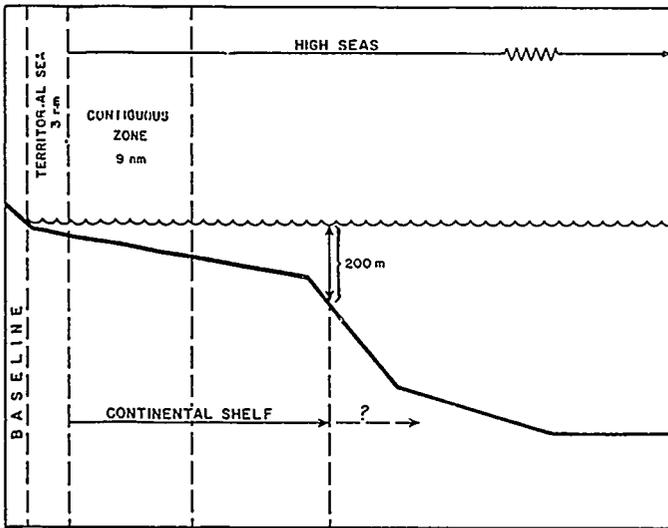


Figure 1

The *Territorial Sea and Contiguous Zone Convention*<sup>5</sup> reaffirmed the concept that coastal nations have sovereignty over their territorial seas, subject to the innocent passage doctrine. Passage of foreign submarines, however, is not “innocent” unless the submarine is on the surface and flying its flag. Furthermore, passage of aircraft over the territorial sea is never considered innocent passage. Thus, special permission from the territorial sea sovereign is required for overflight or submerged passage.

The delegations to UNCLOS I were unable to agree on a maximum breadth for the territorial sea. Naval and maritime powers preferred a narrow, three-nautical-mile limit in order to allow the greatest degree of mobility for vessels

and aircraft on, under and over the ocean. Coastal nations, emphasizing offshore resource management, preferred broader limits. The impasse in 1958 led to the Second UN Conference on the Law of the Sea (UNCLOS II), which met in Geneva in 1960. Again, the delegations failed, albeit narrowly, to agree on a maximum breadth for the territorial sea. The 1958 Convention on the Territorial Sea and Contiguous Zone<sup>6</sup> avoids the maximum breadth issue, saying nothing at all about it.<sup>7</sup>

The *High Seas Convention*,<sup>8</sup> another of the four treaties adopted in Geneva in 1958, spelled out the “freedoms of the high seas.” After defining “high seas” essentially as all waters seaward of the territorial sea, the High Seas Convention lists four specific high seas freedoms: (1) freedom of vessel navigation (including submerged navigation); (2) freedom of overflight; (3) freedom to fish; and (4) freedom to lay submarine cables and pipelines. The High Seas Convention makes it clear, however, that international law might recognize other high seas freedoms in addition to the listed four. The best candidate in 1958 for a “fifth freedom” was the freedom of scientific research. The High Seas Convention also contains several rules on such matters as flag-state jurisdiction, piracy, etc.

The *Continental Shelf Convention*<sup>9</sup> codified the principle sparked by the first Truman Proclamation in 1945, that coastal nations had sovereign rights over the natural resources of their adjacent continental shelves.<sup>10</sup> However, this treaty also reaffirmed that the waters above the continental shelves would not be affected and, therefore, such freedoms as navigation and overflight continued to exist in high seas above the continental shelves.

The fourth 1958 Geneva Convention on the Law of the Sea was the *Convention on Fishing and Conservation of the Living Resources of the High Seas*,<sup>11</sup> or the Fishing Convention. This treaty was designed both to preserve important high seas freedoms and to respond to at least a part of the concern of many coastal nations about foreign fishing outside their territorial seas. It provided that, under carefully delineated circumstances, a coastal nation could unilaterally adopt temporary, nondiscriminatory conservation regulations for endangered fisheries in adjacent areas of the high seas, pending agreed-upon or arbitrated international conservation rules. Although this treaty was not exactly a failure—it was adopted in Geneva by a two-thirds majority and did receive enough ratifications to enter into force for those who ratified—it was never a success. First of all, the major distant-water fishing nations, such as Japan and the Soviet Union, never became parties and were thus never bound. Second, the Fishing Convention did not really respond well to all the reasons for the trend toward broader coastal nation jurisdiction.

Through clear hindsight, we can now see that UNCLOS I and II were, in many respects, nonsuccesses. The failure of UNCLOS II to establish a maximum breadth for the territorial sea was indicative of the more general failure of the International Law Commission and the two conferences to

consider the significance and staying power of the trend toward coastal nation expansionism. The 1958 treaties were, as it turned out, too backward-looking.

**I**n the 1960s and '70s, despite the existence of the Geneva Conventions, the trend favoring broader coastal nation jurisdiction continued, and pressures for a new oceanic order mounted. The sources of these pressures are several:

- New ocean technologies have meant that more people have been engaged in more new and different activities farther from shore—e.g., drilling for oil and gas; fishing in large modern fleets thousands of miles from home and, significantly, very close to the shores of other nations; transporting huge quantities of crude oil in enormous, thin-skinned tankers that only roughly resemble traditional ships. These new-technology-supported activities have caused coastal nations to become more aware of the opportunities, controversies, and dangers that were developing in their offshore waters.
- Who were these coastal nations? In the wake of global decolonization, they were, more and more frequently, new nations, part of the “population boom” in the Global Village. They were nations basically poor, with sea boundaries but no great global navies, merchant fleets, or distant-water fishing fleets. They were, and are, nations of the Third World.
- These nations have been participants in the quest for a *New International Economic Order* (NIEO), which seeks a redistribution of resources and wealth on the planet. This search for a NIEO found coastal nation expansionism—especially the claims by poor nations to nearby ocean resources and uses that otherwise might be grabbed by the few technologically rich nations—to be consistent with NIEO goals.
- The mid-1960s revelation that the manganese nodules of the deep seabed contained such valuable minerals as nickel, cobalt, and copper—together with the growing technological capability for their commercial recovery—provided the final incentive for a new approach to the international law of the sea. The miners needed a security-of-tenure system as a prerequisite to profitable mining, and the Third World nations saw an opportunity for an equitable allocation of a new source of wealth.

The call for a new United Nations Conference on the Law of the Sea—the third conference—came in the late 1960s and was triggered by a series of General Assembly resolutions and declarations. These proclaimed the deep seabed beyond nation jurisdiction as “the common heritage of mankind,”<sup>12</sup> purported to establish a moratorium on seabed mining while a new international conference established a mining regime,<sup>13</sup> and set 1973 as the target year for the new conference to begin.<sup>14</sup>

The conference, UNCLOS III, did begin in December 1973, after several years of preparatory meetings of a special UN Seabed Committee, and finally adopted its new treaty in April 1982.

It has been something to behold! UNCLOS III can justifiably lay claim to having been the most significant attempt at truly global cooperation ever. Its task was awesome. Three numbers—150, 85, and 70—set the challenge: more than 150 nations (virtually the entire world community) gathered together to address 85 agenda items,<sup>15</sup> with a view to negotiating a comprehensive set of legal principles to govern nearly every aspect of use of 70 percent of the planet's surface. Perhaps most astounding of all, the entire set of 85 issues had to be negotiated as a package.

The outcome: a comprehensive, very complex treaty of 440 provisions, covering 200 single-spaced pages, resulting—until the April 1982 adoption of the final text—entirely from consensus. Not a single vote was taken until the vote on the adoption of the treaty as a whole. (Whether the new treaty ever becomes binding international law or not, students of international politics and diplomacy will be studying UNCLOS III's process for decades.)

Figure 2 shows a cross-section of the new oceanic order embodied in the 1982 Convention of the Law of the Sea. A comparison of this figure with Figure 1 will demonstrate that the most striking development in the past 25 years has been the recognition of vastly extended coastal-nation competence to regulate and affect ocean activities in broad offshore zones.

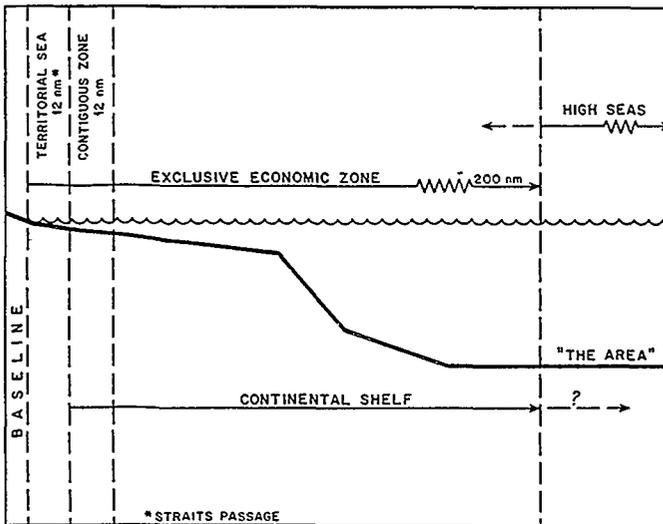


Figure 2

The *Exclusive Economic Zone* (EEZ)<sup>16</sup> is a new concept, based on the original Latin American 200-mile claims. Within its EEZ, each coastal country has, in the phrase of the new treaty, “sovereign rights” over all resources, living and mineral. It is also allowed extensive jurisdictional authority over scientific research and is granted certain controls over marine pollution. The EEZ extends

beyond the territorial sea to a maximum of 200 nautical miles from shore. Since most islands, as well as the continents, can form the bases for EEZs, worldwide EEZs will blanket about forty percent of the world ocean.

But, given the proper geological circumstances, a coastal nation's resource jurisdiction can extend even further seaward: the new treaty's legal definition of *continental shelf*<sup>17</sup> covers the entire geological continental *margin* (with some extreme outer limits), which means that some nations will have jurisdiction over natural resources of the seabed one hundred or more miles beyond the outer edge of the EEZ. However, the 1982 Convention also explicitly guarantees freedom of navigation and overflight within EEZs and in the waters above the "continental shelf."

Unlike the 1958 Convention on the Territorial Sea and the Contiguous Zone, the UNCLOS III treaty does set a maximum breadth for the *territorial sea*:<sup>18</sup> twelve nautical miles. Within this zone, innocent passage (defined at considerable length in the new treaty) by foreign vessels is allowed. Again, as in 1958, submerged passage and overflight are noninnocent. The impact on maritime nations of these rules is crucial. Universal recognition of twelve-mile territorial seas would mean that more than 100 straits—several of them such vital chokepoints as Gibraltar and Malacca—will be subject to the innocent passage regime; submarines would be required to surface and show their flags and aircraft could not overfly without permission of at least one of the states bordering the strait. The 1982 treaty, however, recognizes important exceptional *rules for straits*,<sup>19</sup> including Gibraltar and Malacca, that are "used for international navigation." For these straits, the treaty would establish transit passage rights for foreign traffic. These rights, which the treaty balances against the interests of the strait-bordering nations, would include the right of submerged transit and of overflight.

A similar accommodation of international and local interests was accomplished by UNCLOS III for archipelago nations. These States, composed entirely of island groupings, prefer to draw baselines around the outer edges of their outermost islands and claim the waters thus enclosed as internal waters. The 1982 Convention creates the concept of *archipelagic waters*<sup>20</sup> for these areas. The archipelagic state will have sovereignty over its enclosed waters, but foreign vessels and aircraft will be allowed transit rights (termed the "right of archipelagic sealanes passage") nearly identical to the rights of transit passage through straits used for international navigation.

The *high seas*, shrunken in the 1982 treaty to a mere 60 percent of its early 20th-century existence, continues to exhibit its traditional characteristics—at least in the water column above the seafloor. Beyond the territorial sea, beyond the EEZ, beyond the legally defined continental shelf and beneath the planet's deep waters, lies *The Area*.<sup>21</sup> This is the deep seabed beyond national jurisdiction, the vast submerged realm that, according to the 1982 Convention of the Law of the Sea, is the "common heritage of mankind." The new treaty would establish

a virtual government for this realm. It would be known as the International Sea-Bed Authority (ISA). Like many governments, the ISA would be composed of a sort of legislative branch (the one-nation-one-vote-Assembly), an executive branch (the Council, with weighted representation), a judicial branch (the Sea-Bed Chamber of the International Tribunal for the Law of the Sea), and a bureaucracy. The ISA would also include a controversial operating arm to be known as “the Enterprise.”

The primary purpose of the ISA, as envisioned early in the Conference, would be management of manganese-nodule mining on the deep seabed. The ISA would grant exploratory and production licenses to miners, collect royalties and other fees, and make disbursements of revenue to the poorer members of the world community, in accordance with the common-heritage principle.<sup>22</sup>

**W**hen President Reagan announced his decision to reject the 1982 Convention, he cited as the reasons for rejection only aspects of the treaty that dealt with the ISA and deep seabed mining. The significant reasons for rejection include the following:

- Access to seabed minerals by private mining companies of the United States and other industrialized countries would be hampered by the treaty’s so-called “parallel system.” Each private applicant would be required to submit two mine sites of similar value. The ISA would be allowed to choose one of the two sites for its “bank” and could allow the private applicant to mine the other site. The “banked” mine site would be available for mining by the ISA’s operating arm, the Enterprise, or by a developing country. The U.S. miners and the Reagan administration thus viewed the Enterprise, with some justification, as a favored competitor in the fledgling seabed business.

- To ensure that the Enterprise and any developing-nation miners have the necessary technology for mining their shares of the seabed, the 1982 Convention would require that private applicants, who have spent years developing seabed technology sell their know-how to the ISA on fair terms. This mandatory transfer-of-technology provision is especially irksome to the Reagan people.

- Another galling requirement in the seabed part of the new treaty concerns financing the Enterprise’s operations. Obviously, even with a promising mine site and equipped with seabed technology, the Enterprise will not be able to conduct mining operations without sufficient financial backing to cover the enormous costs involved (now estimated to be nearly two billion dollars per mine site). The new treaty would require that the richer, industrialized nations provide loans on easy terms, with each lending nation’s obligations proportional to its share of the UN budget. Thus, the United States’ loan share, at 25 percent, would be the highest if the United States were to become a party to the treaty.

- The 1982 Convention also places production ceilings on seabed minerals, another feature the Reagan administration found objectionable. The limits were

placed in the treaty at the instigation of those countries, mostly of the Third World, who are currently producing the same minerals from land-based sources and who thus feel threatened by the prospective seabed competition. As it turned out, the negotiations led to very high production limits that do not pose serious restrictions on seabed miners; nevertheless, the United States objects in principle to production ceilings.

- Another cited reason for U.S. rejection of the UNCLOS III treaty was the failure to guarantee to the United States a seat on the ISA's Council. This was especially irritating in light of the treaty's guarantee of three Council seats to states from "the Eastern European (Socialist) region," all of whom would probably be controlled by the Soviet Union. Actually, a last-minute change in the draft treaty led to a provision that now guarantees a Council seat to the "the largest consumer [of seabed minerals]," a phrase understood to refer euphemistically to the United States.

- One of the most serious U.S. objections to the 1982 treaty concerns amendment of the seabed mining provisions. The treaty provides for a Review Conference 15 years after the start of commercial operations, and a three-fourths majority vote can eventually be used to change the structure of the seabed regime. Since the seabed regime could thereby be amended without U.S. concurrence, much less with Senate advice and consent, the procedure raises U.S. constitutional questions in addition to international political questions. A U.S. fear is that these amendment procedures will be used in the future to change the "parallel system"—in which private miners are granted some access to seabed minerals—to an ISA-Enterprise monopoly dominated by Third World interests. Although other analysts argue that this fear is exaggerated or unwarranted, it remains a primary basis for U.S. rejection of the treaty.<sup>23</sup>

At base, the Reagan rejection of the 1982 Convention on the Law of the Sea rests on ideological underpinnings, principally a fervent belief in the free market system. It is felt, with clear justification, that the deep seabed provisions of the new treaty not only fail to uphold the free-enterprise philosophy in its rules for the seabed mining industry, but are also part of a general Third World, NEIO-inspired attack on that philosophy.<sup>24</sup>

This list of principal U.S. objections to the new treaty—if viewed in isolation from the rest of the treaty—clearly demonstrates to many, even most Americans, that the treaty is indeed flawed in light of U.S. seabed interests. If, however, the treaty is so flawed, so objectionable from a U.S. perspective, we should ask the obvious next question: how did we get into this mess? The United States has not been standing on the Conference sidelines, gaping in horror as the eventual treaty materialized. We have been a primary "mover and shaker" in UNCLOS III. What were we doing all this time?

To a large extent, we have been busy creating the very treaty we now reject. Let's look at the U.S. record during the emergence of the new law of the sea picture.<sup>25</sup>

**1945**—The Truman proclamations on the continental shelf and on fisheries (conceived in pre-WWII days but issued at the beginning of U.S. tenure as a global naval superpower) instigate, or at least accelerate, coastal nation expansionism.

**Mid-1960s**—The trend toward seaward expansionism of coastal-state sovereignty and jurisdiction so concerns the United States as a global ocean power that it enters into discussions with the other global naval power—the USSR—on what to do about the impending threat to free navigation, especially through straits. The two superpowers determine that international agreement with coastal nations is the best means to approach the problem. Offshore fisheries jurisdiction was to be the trade-off for coastal nations. However, the interest in deep seabed minerals enters the picture as a new bargaining chip.

**1970**—President Richard Nixon presents a detailed proposal for an International Sea-Bed Resource Authority, based on the “common heritage” concept. The Nixon proposal is such a generous concession to landlocked and Third World states that, had it been accepted and adopted outright, it would have been considerably more objectionable to the current U.S. administration.<sup>26</sup> In any case, the proposal is rejected by the Third World nations, largely because it is a U.S. proposal. Again, the United States is willing at this time to make such a large concession in the interest of preserving unrestricted rights of vessel navigation and overflight in the face of expanding jurisdictional claims by coastal nations. Although the Nixon proposal is rejected, it thereafter provides the framework for negotiations on a seabed mining regime.

**1976**—By now, UNCLOS III is well under way. Favorable navigation and overflight rights, including straits passage rights for aircraft and submerged submarines, are part of the package thus far negotiated, but the Conference is bogged down on the deep seabed mining regime. Basically, the nations representing private miners—the United States and a few other industrialized states—want relatively unrestricted access to seabed minerals by private miners. The Group of 77, a bloc of about 120 nations of the Third World, prefers a new International Sea-Bed Authority that would *itself* mine the seabed. A third, but overlapping group—producers of minerals from land-based sources—want the treaty to protect them from competition from seabed minerals.

Enter Henry Kissinger, U.S. Secretary of State, who wants the Conference to move through its seabed-regime impasse and adopt a new treaty so that the United States can feel more secure about its crucial national security interest in wide freedoms of navigation and overflight. Here is what Secretary Kissinger proposes in 1976 at UNCLOS III:

- A “parallel” system of mining, whereby private-miner applicants would present two substantially identical mine sites to the International Seabed Authority. The ISA would keep one for itself, to be mined by its operating arm “the Enterprise” or by a developing country.

- The Enterprise would be financed by loans, with easy terms, from the industrialized countries.

- The developed, industrialized countries and their private miners would be encouraged to transfer the necessary technology to the Enterprise and developing-State miners.

- Production limits would be set on behalf of those States whose land-based miners would suffer competition from the production of seabed minerals.

- Periodic review conferences should be held to amend the seabed mining regime as necessary or appropriate.

1976—a big year—over the objections of the United States UNCLOS III negotiators, the U.S. Congress finally adopts its own 200-mile zone—limited to fisheries management jurisdiction.<sup>27</sup> This is quickly followed by the proclamation of a similar Soviet zone and, after a time, by a Japanese 200-mile zone. Many other nations also follow suit, thereby solidifying the 200-mile zone concept as a *fait accompli* of customary international law<sup>28</sup> and depriving the U.S. UNCLOS III negotiators of an important bargaining chip.

1980—Congress again steps in, this time with the acquiescence of the U.S. negotiators, and passes the Deep Seabed Hard Mineral Resources Act.<sup>29</sup> This law purports to be interim legislation designed to license U.S. miners to mine the deep seabed and to encourage other mining countries (such as Japan, the United Kingdom, West Germany, Belgium, the Netherlands, and Italy) to do the same and to reciprocate, pending adoption of an UNCLOS treaty. Our negotiators acquiesce because the Conference is again deadlocked and it is felt that the congressional initiative will get it moving again. It does, and consensus agreement on virtually all aspects is achieved in the Conference’s 1980 Geneva session. One more session in early 1982 is all that is needed to wrap up the few remaining details.

January 1981—The presidential administration of Ronald Reagan comes to Washington. At the instigation of the new president’s UNCLOS appointees, the Conference is put on hold while the draft treaty is subjected to a year-long policy review. When the United States returns to the bargaining table in early 1982, its demands that substantive parts of the already-negotiated package be reopened and its perceived unwillingness to bend on hardly any point lead to the adoption of the new treaty over U.S. objections and its negative vote.<sup>30</sup>

Thus it is clear that U.S. actions have been, in large measure, responsible for the new shape of the international law of the sea, and for the structure of the 1982 Convention as well. Many of the now-objectionable parts of the new treaty began as concessions by U.S. negotiators, who, until 1981, were primarily

concerned with the adverse national security implications inherent in the perceived global trend toward inhibiting freedom of ocean navigation and overflight.

**T**he United States does indeed have a national interest in access to seabed minerals; it also has an important interest in preserving freedoms of the high seas in as broad an area as possible. In fact, the United States has important national interests in virtually every aspect of ocean use. It is not only a major maritime power, but it is also one of the most important coastal nations and thus shares with all coastal nations the interests and concerns regarding use of the seas off its coasts. A scorecard that lists all U.S. interests in the seas, one that does not focus on the deep seabed regime to the virtual exclusion of other ocean interests, shows that the United States would not fare badly at all as a party to the 1982 treaty:

- Living and nonliving resources off U.S. coasts are vast and valuable. The new treaty's EEZ would confirm U.S. sovereign rights to those resources in the largest EEZ space, more than 2.2 million square nautical miles, assigned to any single nation. (The recent Presidential Proclamation of a U.S. EEZ attempts to lay claim to these resources unilaterally,<sup>31</sup> but other nations assert that the United States cannot claim the benefits of the new treaty without becoming a treaty party and recognizing the negotiated concessions.)

- Significant environmental protections are granted by the new treaty to coastal nations, and the United States, as a major port state and importer of shipborne oil, could benefit a great deal from these.

- Freedom of navigation and overflight is, for all practical purposes, guaranteed beyond twelve miles everywhere, and rights of passage through international straits, including submerged passage and overflight, are allowed even within twelve-mile territorial seas. Similar passage rights are also allowed through archipelagic sea lanes.

- Freedom of scientific research, clearly in the U.S. national interest, is seriously impeded within EEZs under the 1982 treaty's provisions. Our oceanographers, however, generally prefer the treaty to the alternative, which they rightly feel will soon be (or is now) a customary law of absolute exclusion.<sup>32</sup>

- Dispute settlement mechanisms for nearly all types of future ocean controversies are part of the 1982 treaty, largely due to U.S. efforts. Even the Soviet Union, for one of the first times in its negotiating history, went along with the consensus of the conference that most ocean law disputes should be submitted to compulsory dispute settlement before a special International Tribunal for the Law of the Sea, or the International Court of Justice, or an arbitration board.

- International legal stability would, of course, be enhanced by a successful, widely ratified Law of the Sea Treaty, and the United States, with the greatest

interest in the many uses of the world ocean and as a traditional adherent to the rule of law, would benefit from such stability in ocean law.

- The deep seabed mining regime, the focus of current U.S. objections to the treaty, is a minus on any U.S.-interests scoreboard. All the reasons for rejecting *that regime* cited by the Reagan administration are *valid*. But one might question whether these reasons are sufficiently serious that they outweigh the clear advantages for the United States in the rest of the treaty. Those who still urge the United States to retract its rejection of the treaty point out that, because of inflation and the present and projected state of global metals markets, commercial seabed mining is not likely to occur until well into the next century. They also note that because of UNCLOS III's eleventh-hour adoption of a Pioneer Investors Protection Resolution (the PIP Resolution), U.S. miners and those of the other industrialized countries would be likely to enjoy a virtual seabed mining monopoly under the new treaty for several decades.

Despite these arguments and others that emphasize the treaty's net benefits for the United States, it probably must be admitted that the United States is committed to nonparticipation in the treaty. Certainly the Reagan administration is adamant in its rejection. True, a future president could sign the 1982 treaty and submit it to the Senate for its advice and consent to ratification. But the Senate, which must approve by a two-thirds majority, is considered unlikely to consent to ratification.

So, where do we go from here? The United States still has the whole array of national interests and concerns regarding uses of the seas by us and by others. How do we protect those interests in the current state of confusion?

First, we should remind ourselves that the ocean-use problems that instigated UNCLOS III still exist and that international rules concerning uses of the sea also exist and will continue to develop, in one way or another. By rejecting the UNCLOS III treaty, the United States has simply rejected a previously selected means for controlling the rule-development.

Second, we should remember that rules of international law come about in essentially two ways: (1) By State practice—the national claims and responses to claims and the many other expressions of international practice that reflect relatively uniform recognition of proper norms for behavior of nation States—which is referred to as customary law. (2) By international agreement, or treaty, which creates contractual rules binding only on treaty parties. The international legal system recognizes no legislature but sometimes, as in the case of UNCLOS III, something like legislation is attempted through the device of a treaty or set of treaties. In these instances, broad consensus by those to be governed by the rules is obviously necessary for their effectiveness.

Because of its objections to the 1982 UNCLOS III treaty, the United States has determined to upset the broad consensus that had been developing in that Conference, to thus cause the new treaty to fail and, presumable, to adopt a new

strategy for controlling the development of ocean law rules. The thrusts of this new strategy appear to be twofold: (1) To influence or direct the present understanding of customary law and its future course. (2) To enter into discussions and negotiations with appropriate nations with a view toward achieving agreements or understandings favorable to U.S. ocean interests. Let's briefly examine some aspects of these two approaches.

**Control of customary law:** The United States continues to assert that: The deep seabed beyond national jurisdiction is "free high seas" as a matter of customary international law; thus, deep seabed minerals are free for the taking by any nation which does not bind itself contractually to the 1982 treaty's deep seabed regime. (Third World nations, and some others, disagree, relying principally upon the UN General Assembly Resolutions declaring the deep seabed the "common heritage of mankind" and purporting to impose a ban on mining the seabed outside the international system now described in the new treaty.)

Freedom of navigation and overflight for all vessels and aircraft—including military vehicles and submerged submarines—is recognized by custom everywhere beyond the territorial sea, even within 200-mile zones. The United States will continue to assert this principle by words and deeds. On 10 March 1983, President Reagan proclaimed an Exclusive Economic Zone for the United States and used the occasion also to proclaim, in no uncertain terms, the U.S. view that customary international law—as reflected and articulated, but not created, in the 1982 treaty—includes the rule of freedom of navigation and overflight everywhere seaward of territorial seas.<sup>33</sup> (Some nations, exemplified by Brazil,<sup>34</sup> disagree.)

Rights of transit passage for submerged submarines and for aircraft through and over straits, even those blanketed by territorial seas, exist as a matter of historical practice, which customary law recognizes and which, again, is articulated but not established in the UNCLOS III treaty. (Many nations, and not just Third World countries, disagree.)

Similar rights of transit passage are recognized through and over the waters of archipelagic states. (Some nations disagree.)

**Discussions and negotiations:** While it tries to affect customary law trends, the United States will also continue to conduct talks and negotiations with other states regarding various American ocean interests.

As to deep seabed mining, the United States is not only attempting to ensure that the 1982 treaty fails, but that the mining nations enter into their own "mini-treaty" to establish a deep seabed mining regime more compatible with free enterprise precepts. Since several of these mining nations have signed (but not yet ratified) the 1982 Convention, chances for U.S. success in this venture remain questionable.

As to the other major U.S. ocean interest—navigation and overflight—the United States is trying to achieve understandings with such important straits states as Spain and Indonesia (also an archipelagic state) concerning U.S. positions on customary law and on rights of passage.

Other U.S. interests will be pursued along similar paths, although it appears likely that, for these interests, the United States will be careful to make sure its positions track the 1982 treaty's provisions as closely as possible. Thus, for example, the President's EEZ proclamation and its accompanying policy statement indicate that the United States will abide by assertions of jurisdiction over scientific research by other nations in the EEZs, if such jurisdictional claims comply with the "customary" rules articulated in the UNCLOS III treaty.<sup>35</sup>

What does all this confusion and maneuvering mean for the Navy? First of all, it should be apparent that "freedom of the high seas"—an international-law citadel that has stood for centuries—is under siege. In the absence of the 1982 treaty, or something like it, the 200-mile zone concept is likely to continue to evolve in directions that will impose further restrictions on navigation and overflight, and this will be especially true for military vessels and aircraft. The simple fact is that most nations are coastal nations who have no global navies and therefore no perceived interest in keeping their offshore waters free for passage and military maneuvers by superpower forces. Indeed, the 200-mile "barrier" could soon be breached.

Passage through straits less than 24 miles wide (i.e., those covered by one or more nations' twelve-mile territorial seas) could be increasingly hampered by legal objections of the straits States and by others anxious to make sure that the United States, in remaining outside the 1982 treaty, is deprived of the "benefits" of the UNCLOS III package deal. Similar challenges could meet American attempts to exercise transit passage rights through and over archipelagic waters.

Second, the defense of the free-seas citadel could be costly in several ways. Costs of achieving understandings or agreements with other nations could be significant. For example, it is not unlikely that Spain will place U.S. overtures regarding passage through the Strait of Gibraltar in a package with U.S. concerns on Spain's relationship to NATO and the renegotiation of U.S. bases agreements.

The United States could, of course, play the tough guy and simply go it alone—do what it wants to do anywhere in the ocean—without obtaining the consent of other affected and objecting nations. This approach, however, could be costly in several ways:

- It could mean incurring the ill will of allies, friends and nonaligneds.
- It would certainly further alienate Third World nations.
- It could precipitate an acceleration of the pendulum swing toward further coastal nation expansionism, making the job that much more difficult.

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- It would mean taking military risks—for example, in challenging assertions of coastal-nation restrictions on offshore naval movement, or in protecting U.S. seabed miners.
- There would certainly be legal challenges in the International Court of Justice.

The impact of these uncertainties will fall, in the first instance, on those charged with planning the movement of military ships and aircraft on, under, and over the sea. There will be added political and, perhaps, military risks in, e.g., sending aircraft or submerged submarines through straits bordered by one or more states that object to such passage on a legal ground or in carrying out maneuvers within 200 nautical miles of those coastal nations who might challenge freedom of navigation in their EEZs. While these risks will, in some cases, suggest that alternative routes or sea areas be selected, in other cases the planners might well decide to challenge the assertions of illegality by doing just the opposite: that is, by sending ships and aircraft into the disputed areas to prevent the perception of acquiescence in the claims of the coastal States.

For the officers on the bridges and in the cockpits, the present and future uncertainties concerning the military uses of the seas will translate into a somewhat greater risk of challenge and confrontation in disputed straits, archipelagic waters, and EEZs. These officers, as representatives of the U.S. Government, will be on the cutting edge of the further development of ocean law rules. Their missions should be carefully planned and executed so that, in concert with ongoing diplomatic efforts, their actions will help to ensure that the broadest possible freedom of ocean navigation and overflight will continue to be part of the fabric of the international law of the sea for decades to come.

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### Notes

1. United Nations Convention on the Law of the Sea, opened for signature at Montego Bay, Jamaica, on 10 December 1982, U.N. Doc. A/CONF. 62/122(1982) [hereinafter cited as 1982 Convention].
2. *Department of State Bulletin*, August 1982, p. 71.
3. Proclamation No. 2667, 10 Fed. Reg. 12, 303 (1945).
4. Proclamation No. 2668, 10 Fed. Reg. 12, 304 (1945).
5. Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.
6. The "contiguous zone" to which the treaty's title refers is a zone of special jurisdiction beyond a coastal State's territorial sea. Article 24, in the zone, the coastal State is authorized to prevent and punish violation of its regulations concerning customs, immigrations, fiscal matters, and sanitary measures. The maximum limit for the contiguous zone is twelve nautical miles from shore.

7. The Territorial Sea and Contiguous Zone Convention also includes several complex provisions on establishing baselines from which the territorial sea and other zones are measured and rules for setting boundaries between the seas of opposite and adjacent States.

8. Convention on the High Seas, 29 April 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

9. Convention on the Continental Shelf, 29 April 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

10. See *North Sea Continental Shelf Cases*, [1969] I.C.J. 4, 23.

11. 29 April 1958, 17 U.S.T. 138, T.I.A.S. No. 5959, 559 U.N.T.S. 285.

12. G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28), at 24, U.N. Doc. A/8028 (1970).

13. G.A. Res. 2574D, 24 U.N. GAOR Supp. (No. 30), at 11, U.N. Doc. A/7630 (1969).

14. G.A. Res. 2750C, 25 GAOR Supp. (No. 28), at 26, U.N. Doc. A/8028 (1970).

15. Although the official agenda of the Third Conference lists only 25 major items, the major items are further subdivided. The total number of items thus listed is approximately 85.

16. See arts. 55-75 of the 1982 Convention.

17. See arts. 76-85 of the 1982 Convention.

18. See arts. 2-32 of the 1982 Convention.

19. See arts. 34-45 of the 1982 Convention.

20. See arts. 46-54 of the 1982 Convention.

21. See arts. 133-191 of the 1982 Convention and Annexes III & IV.

22. The 1982 Convention, an extraordinarily complete document, also contains detailed provisions on several topics not mentioned in the text of the article—*e.g.*, marine pollution, scientific research at sea, the status of islands, marine mammals, access by landlocked nations, settlement of ocean disputes, etc.

23. The United States also charges that the common-heritage proceeds of seabed mining might be distributed to such objectionable recipients as the PLO and other national liberation groups.

24. The counterargument points out that U.S. companies frequently put up with even more restrictive, antifree enterprise schemes in resource-extraction deal with Third World countries. See Katz, *A Method for Evaluating the Deep Seabed Mining Provisions of the Law of the Sea Treaty*, Yale J. World Pub Order 114 (1980).

25. The historical record is set forth with great clarity in HOLLICK, UNITED STATES FOREIGN POLICY AND THE LAW OF THE SEA (1981).

26. For example, the Nixon proposal would have designated all seabed space seaward of the 200-meter isobath (depth line) as common heritage space. See Comment, *The Nixon Proposal for an International Seabed Authority*, 50 Or. L. Rev. 599 (1971).

27. Fishery Conservation and Management Act of 1976, 16 U.S.C. §1801-1802.

28. But arguably only for the common-core assertion of fisheries management jurisdiction.

29. U.S.C. §1401-1473.

30. Ratiner, *The Law of the Sea: A Crossroads for American Foreign Policy*, Foreign Affairs 1006 (Summer 1982).

31. Proclamation 5030, 48 Fed. Reg. 10,605 (Mar. 14, 1983). A policy statement by the President accompanied the EEZ Proclamation and can be found in *Weekly Comp. Pres. Docs.*, 14 March 1983, at 383.

32. See Wooster, *Research in Troubled Waters: U.S. Research Vessel Clearance Experience, 1972-1978*, in *Science, Technology, and Ocean Development*, 9 Ocean Dev. Int'l L. 219 (Jacobson ed. 1981).

33. *Supra* n. 31.

34. Ambassador Thompson Flores of Brazil recently stated that, according to his country's interpretation, the 1982 Convention on the Law of the Sea [does] not authorize other States to carry out military maneuvers within the exclusive economic zone, particularly when these activities involve the use of weapons or explosives, without the prior knowledge and consent of the coastal State."

35. *Supra* n. 31.



## Chapter 13

# A Framework for Small Navy Theory: The 1982 U.N. Law of the Sea Convention\*

Nien-Tsu Alfred Hu and James K. Oliver

**M**ost existing naval theory has been developed and written by naval practitioners and scholars from the perspective of major or global naval powers and deals with large navies. In the last decade the emphasis of this literature has shifted from concern with warfighting missions to the political use of navies. Moreover, such analysis has inevitably focused more upon the exercise of global presence by navies and thus their political, military, and diplomatic uses within a global context. This perspective is of limited use for most navies in the world. Smaller navies are limited in their operating areas and geographic reach and, therefore, cannot seriously consider global tasks or missions. They need a naval theory derived from their own perspective, and with the advent of the new ocean regime after 1982, this need has become even more pressing.

The new accretion of immense maritime zones bestows tangible and intangible interests upon a coastal State. These include the acquisition of living and nonliving resources and the legitimate control of maritime activities under national jurisdiction within the zones. In addition, these newly acquired maritime interests expand significantly a coastal State's sense of national interests. Clearly, navies will play a major role in upholding and protecting these national maritime interests. Nevertheless, these forces face a new context in which political, diplomatic, and legal emphases outweigh the conventional warfighting role in terms of naval planning and policymaking. This situation manifests the underdevelopment of naval theory vis-à-vis small navies in general, and the role of navies in fisheries and other maritime resources issues in particular.

What would be useful, and what this paper seeks to provide, is a theoretical framework—based on the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention)—which provides small navy planners with a clear objective in formulating a State's naval policy. Such a framework will provide naval planners with a rationale for the protection of all national maritime interests within the national 200-mile exclusive economic zone and, at the same time, furnish national maritime policymakers with an understanding of the importance and necessity of including naval forces in their plans.

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## Classification of Naval Powers

*Limits of Measuring Power by Aggregated Physical Resources.* Almost a decade ago, David Baldwin, summarizing a long and rich literature in political science and international relations, cogently critiqued the measurement of power in terms of capability inventories. Among military and naval analysts, Robert Art, Ken Booth, and James Cable have emphasized the necessity of thinking of power in terms of political and military objectives achieved rather than aggregates of capability.<sup>1</sup>

Mark Janis provides a good example of this classifying of naval powers/naval forces in his *Sea Power and the Law of the Sea*.<sup>2</sup> Here Janis categorizes all the world's navies into five different classes, using data in *Jane's Fighting Ships 1974-1975*. The first class of navies are those of the United States and the Soviet Union, and the second class includes Great Britain and France. These four navies are categorized as "major, blue water, SSBN navies." The remaining navies of the world are grouped together as "coastal navies," wherein another three classes are distinguished. Twenty-one third-class navies are counted, having more than ten major surface combatants (cruisers, destroyers, and frigates), usually some submarines, and occasionally between 80 and 250 vessels in all. Next are 29 fourth-class navies which have at least one, but no more than ten major surface combatants, no aircraft carriers, rarely a cruiser, and number about 50 vessels in all. Seventy-two fifth-class navies have no major surface combatants and rarely more than a dozen vessels overall.<sup>3</sup>

Janis' ship-counting scheme offers an interesting picture of the striking diversity of navies in terms of their physical assets and shows that a majority of the navies in the world are coastal navies as defined by Janis. It tells us nothing, however, regarding the actualized power associated with these navies in the context of international disputes. The implicit analytical weakness of this approach is evident since the potential power of a navy does not always correspond to actual outcomes of disputes involving the application of naval power. For example, in the major international fisheries disputes involving the use of naval forces since World War II, those States successfully asserting their maritime rights and protecting their national fisheries interests were usually those ranked as "lower-class" navies.<sup>4</sup>

Rear Admiral J. R. Hill recognizes these problems: "power is a diverse, sometimes ill-defined, often unquantifiable thing" and "the search for classes or categories of power is most unlikely to end in a statistical table."<sup>5</sup> However, since it is not entirely illogical to begin with one, Hill goes on to classify states into superpowers, medium powers, and small powers, using indicators such as population, gross domestic product, per capita income, exports, men under arms, armies, major warships, combat aircraft, and defense budgets. Hill then discusses the components of maritime power, i.e., trade and access, shipbuilding, exploitation of natural resources (fish catch), and military power at sea. He further tries

to quantify the sea dependence of a State by employing these maritime power components/factors in equation to generate a rating for sea dependence. After going through all these complexities, Hill ends up, however, with no clear definition for medium maritime powers other than those powers that lie between the self-sufficient and the insufficient.<sup>6</sup>

Both Janis and Hill's efforts vindicate Cable's observation that measuring power by the aggregation of resources tells us little about the essence of power. The central weakness of these approaches, then, is that they more often than not classify navies/naval powers using quantitative or descriptive terminologies which convey little basis for the assessment of actualized naval power in a political context. For example, Janis' "coastal navies" include three different classes. In reality, some of these navies possess power projection capabilities. However, the term "coastal" suggests they are tightly attached to their coastlines with minimal projection capabilities. In addition, Hill's classification of "super," "medium," and "small maritime powers" suggests that upper-class powers can readily defeat lower-class powers. However, the outcome of the major fisheries disputes of the postwar era demonstrates that this common sense impression does not stand up under examination.

A different approach is therefore needed in order to understand naval power across the full spectrum of the world's navies. This new approach can be termed a "functional analysis"—i.e., understanding the nature of different naval powers from the scope of the functions which they have the capacity to attain. Ken Booth has argued for the advantages of taking such a functional or mission approach:

- Concentration on policy objectives should encourage the rational selection of the resources to be allocated to naval force.
- A mission approach should help [with] the problem of establishing tactical and financial priorities.
- It should assist the optimum selection of weapons systems.
- It should ensure that the members of a navy focus on the whole rather than on one of its parts.
- Finally, by clarifying why navies might exist for any particular country, one can discuss more sensibly the array of strategies and tactics they adopt.<sup>7</sup>

Booth also argues that before asking "What is their naval strategy?" one should ask, "What is their interest in the use of the sea?"<sup>8</sup> By the same token, the competence and power of a navy should not be judged simply by its physical capability, i.e., the size or the weaponry. Rather, they should be scaled against the context in which a navy is operating. In other words, if a navy is able to fulfill and meet the functional needs required by the environment or circumstance in which it serves, it is a powerful navy regardless of its physical size.

***Functional Classification of Naval Powers.*** Ken Booth conceives three basic functions that navies can perform—diplomatic, policing, and military. Booth also details the main aims and subsidiary policy objectives of these three functions. In terms of geographic reach, Booth further divides navies into four categories: coastal, contiguous-sea, oceangoing, and global navies. This classification of navies could be viewed as a kind of coding for naval power. A State having so-called global interests needs a global navy, with capability for naval presence and projection of power, to define and to defend those national interests. Otherwise, a State will merely require a navy that is capable of meeting a set of relatively limited national interests in a limited area. Moreover, clearly defined national interests allow a state to have better visualization for the purposes of its naval planning and naval strategy.<sup>9</sup> With Booth's characterization of navies in mind, the relationship between naval power and naval functions can be conceived as correlated. In other words, there should be a correlation between the physical capabilities, the reach of the navies, and their functions.

Perhaps the most vital missions for most small-navy States are the basic policing function, a portion of the military function, and/or a portion of the diplomatic function. The basic policing function includes the missions of the coast guard of national sovereignty, resource enjoyment within the exclusive economic zone (EEZ), and maintenance of good order in these waters as well as contributing to internal stability and development. Performance of a military and/or diplomatic function by small navies is, however, heavily dependent on naval hardware capability, the political volition of the coastal navy States, and the perception of the political leaders of the object States. Thus, the diplomatic function represents the threshold that separates oceangoing and global navies from the contiguous-sea and coastal navies. A navy that can effectively perform more missions than policing, conventional deterrence and defense, and the diplomatic functions must have capability beyond that of contiguous-sea and coastal navies. Therefore, a small navy can be a contiguous-sea navy or a coastal navy as defined by Booth. The term "small," however, does not imply a navy's weakness or inferiority compared to an oceangoing or a global navy. Rather, the power or competence of a navy must be judged contextually.

An oceangoing navy, as defined by Booth according to the criterion of physical reach, may be equated to Hill's medium-power navy, which has "interests generally extend[ing] far beyond the 200-mile limit of the economic zone."<sup>10</sup> Booth's global navies may also be equated to Hill's superpower navies since they characteristically enjoy the capability of global deployment. Booth states that most navies of the world, about 60 percent, fall into the category of contiguous-sea navies while another 35 percent are coastal navies. These navies have the capability to execute the conventional deterrence and defense missions which include: preparing for wartime tasks, deterring hostile intrusion across maritime frontiers, contributing to local maritime stability, protecting national claims in

contiguous seas, and extending national claims in contiguous seas, along with a certain portion of the diplomatic mission which includes negotiating from strength, manipulating situations and atmosphere, and demonstrating national prestige.<sup>11</sup>

With this functional approach small navies can, therefore, be tentatively defined as those navies that are capable of performing a part or all of the policing, conventional deterrence and defense functions, as well as some degree of naval diplomatic functions with limited geographical and maneuvering reach within coastal and/or contiguous-sea waters. It will be shown below that these functions are precisely those required by the 1982 LOS Convention for a coastal State to protect its national maritime interests within its 200-mile exclusive economic zone. Of course, this definition of small navies, based on the correlation between naval power and naval functions, has its own conceptual limitation—a limitation deriving from the advances of contemporary technology. Nevertheless, the value of this definition is that it conceptually ties the physical capabilities of a navy with the potential functions it might perform.

### The 1982 LOS Convention and the Uses of Naval Forces

Since the Third United Nations Conferences on the Law of the Sea convened in 1973, scholars have argued endlessly about the nature of the 200-mile exclusive economic zone—one of the most profound new elements formulated and incorporated in the resulting Convention.

D. P. O'Connell noted that "the EEZ is essentially an area of high seas which has now become subject to certain limited jurisdictional rights 'which are in the nature of police rights rather than sovereignty' . . . [and] the EEZ is 'high seas, and superimposed on that you have certain coastal State rights with respect to [the] enjoyment and protection of marine resources' . . . the residual character of the EEZ is high seas."<sup>12</sup> While arguing that "the EEZ concept has been appropriately described as 'a zone *sui generis*,' since it is neither high sea nor territorial sea as normally understood," Booth views the EEZ as possessing the "emerging character of territorial sea"<sup>13</sup> and characterizes the legal and practical evolution of the EEZ concept as "creeping jurisdiction," "ocean enclosure movement," or "territorialization."<sup>14</sup>

Some argue that 32 percent of the world's oceans falling into national jurisdiction due to the EEZ establishment will inevitably confine the maneuverability of global navies and, thus, their strategic and diplomatic missions.<sup>15</sup> Booth, on the other hand, argues that this restriction arising from the law of the sea regime is only a necessary, not a sufficient, condition for a more strained maritime environment for global navies. He further claims that global navy States, more often than not, enjoy a stronger position, both diplomatically and politically, over other coastal states; moreover, the "psycho-legal" boundaries

of EEZs may prove beneficial to naval powers exercising naval diplomacy.<sup>16</sup> Regardless of the pros and cons, the 1982 LOS Convention does force all coastal States, both maritime powers and others, to rethink their naval forces and the roles and missions the navies will play as well as the interaction and implications of naval planning with other national policies and postures.

From the perspective of global naval powers, Booth feels that “the 1982 Convention imposes no interference on military activities in EEZs”<sup>17</sup> and “naval diplomacy would not in fact come to an end: it would only become more complicated.”<sup>18</sup> But he also warns that “apprehension is justified in the longer term” if the sense of territoriality among coastal States grows towards their EEZs, and this sense is expressed in demands for greater control over foreign shipping, including naval vessels, accompanied with demonstrations of political and military muscle.<sup>19</sup> Booth’s warning or apprehension is clearly supported by analyses of fisheries disputes both before and after the 1982 LOS Convention. These disputes reflect a growing sense of property rights over the natural resources within the EEZ and a nationalistic view of the protection of EEZs.<sup>20</sup>

To most small-navy States, however, the new rights and the resulting responsibilities over immense ocean areas and the natural resources deriving from the 1982 LOS Convention have not only created new tasks and requirements but also sensitized them to the need and/or perception of protecting their newly accrued territory and property. “Governments will have to show that they intend to defend their rights in what they regard as their own patches of sea, if not beyond, and there is no more effective way of doing this than by deploying warships. Warships are gadgets of sovereignty.”<sup>21</sup> The functions or missions of warships in relation to the law of the sea include: new EEZs to be patrolled, good order to be maintained, and badge of maritime sovereignty to be displayed. For global navies or naval powers, the effect of the 1982 LOS Convention might mean only a change of emphasis as argued by Booth.<sup>22</sup> To small navies, however, these functions or missions can well be new in both a conceptual and physical sense. While global navies are familiar with highly political exercises in sensitive foreign waters and the possible diplomatic implications these exercises carry, a small-navy State may find it very uncomfortable or even difficult to contemplate and plan a naval maneuver in its own waters so as to perform a constabulary mission and also send a political message to potential foreign intruders. The force structure of a small-navy State might not be capable of performing the kind of mission its political leaders contemplate. Or, the small-navy State may not have the right combination of forces to conduct certain delicate missions in its waters when the situation requires.

The new ocean regime definitely gives coastal States some benefits in both economic and political forms. It also brings the coastal States new tasks and requirements that cannot be fulfilled or met simply by a change of priority or emphasis. To most coastal States, this means the refit or overhaul of their existing

philosophy and attitude towards their navies and naval planning. Small-navy States have to rethink the relationship of their naval maneuvers and their political, diplomatic, economic, and marine-legal effects. Thus, although these navies might be small in a physical and material sense, their political effects may become quite large within their EEZs.

### Small Navies in the Context of 1982 LOS Convention

In a recent review of Ken Booth's *Law, Force and Diplomacy at Sea*, James Cable's *Diplomacy at Sea*, and Rear Admiral J. R. Hill's *Maritime Strategy for Medium Powers*, Donald C. Watt wrote: "They have learnt from reflecting on the course of events since 1965 that low-level conflicts, or as Admiral Hill calls them 'low intensity' conflicts, are the norm and a nuclear conflict at sea the exception. This has led them to argue that concentration on the possible role of navies in the ultimate Armageddon is a grave misuse of time and introduces a great distortion into the course of naval policy and naval construction. Secondly, they all wrote *before* the conjunction of Mr. Knott's defence budget and the Falkland/Malvinas conflict provided graphic support for their arguments of the near folly of the dominant Ministry of Defence doctrine. . . . Thirdly, all have written under the shadow of the ten-year long International Conference on the Law of the Sea and the 1982 Convention which concluded it. This convention, in part at least, updated, for the years of guided ship-to-ship or air-to-sea missiles, a doctrine of national sovereignty at sea which was outdated in the mid-19th century with the disappearance from naval warfare of muzzle-loading cannon firing solid shot. But it came on a wave of concern about the living and non-living resources of the sea which took its origins with President Truman's 1945 proclamation on the mineral and fisheries resources of the U.S. Continental Shelf."<sup>23</sup>

Preparation for nuclear or subnuclear all-out war is simply inappropriate planning for most small navies; near or low-intensity conflicts resulting from contention surrounding national maritime zones and/or maritime interests are the essence of day-to-day maritime politics. Post-World War II fisheries conflicts between the United States and Latin American States, Britain and Iceland, Argentina and Britain, Argentina and the Republic of China (ROC), and the ROC and the Philippines, all verify this conclusion. With the codification of the 12-mile territorial sea and the 200-mile EEZ in the 1982 LOS Convention and the introduction of new naval weaponry, coastal States with small navies now have not only the legitimate incentive but can possess the physical capability to uphold their national rights or sovereignty at sea.

The late Robert E. Osgood identified six new sources of conflict arising in this new ocean politics era. They include disputes over economic zones, maritime boundaries delimitation, straits passage, national security measures in maritime

zones, superpower naval interests in certain waters, and utilization of the deep seabed.<sup>24</sup> Barry Buzan has done a thorough study of the same issue with two different approaches: one legal and technical and the other from a geographical or regional perspective. From the legal point of view, Buzan classifies the sources of dispute as contention over: national boundaries, rights within national boundaries, rights in the ocean beyond national jurisdiction, and disputes arising from non-ocean sources.<sup>25</sup> An international maritime dispute can also stem from several sources, which is indicative of why these disputes are often so complicated and difficult to resolve. For example, the Sino-Philippine dispute that has stretched over the last ten or more years deals with contentious issues over delimitation of mutually exclusive boundaries, rights pertaining to islands, delimitation of the outer limits of national jurisdiction, fishing, and nonmilitary navigation.<sup>26</sup> The Sino-Argentine incident of 1986 was the result of a tripartite contention over ownership or rights pertaining to islands, fishing, and rights in the ocean beyond national jurisdiction.<sup>27</sup>

Although these sources of conflict, by their nature, are by no means new to many coastal States, the new ocean regime has undoubtedly intensified them by legalizing and enshrining coastal States' national rights in a detailed and comprehensive international treaty. When looking into the sources of these disputes, we should not lose sight of the fact that the roots of disputes or conflicts are the different national views and interpretations of the same clauses and phrases written in the Convention which give states the rights they hold dear. Thus, the same national rights enshrined in the Convention can be the sources of international disputes on the one hand while also serving as guidelines for both naval development and constraints on naval operations. The Convention, in short, provides not only the possible sources of disputes and conflicts arising from it, but also the context within which a navy performs its duties to uphold and protect national rights.

The codification of the 1982 LOS Convention stemmed from the presumption that "with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment" would be established.<sup>28</sup> Thus the Convention emerges as a multi-purpose treaty concentrating on all human uses of the seas and oceans. However, national sovereignty is still the bottom line. Thus, "peace, good order or security of the coastal States,"<sup>29</sup> "[to] refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States,"<sup>30</sup> and "the protection of its [coastal State's] security"<sup>31</sup> are the dicta for all ocean-user States.

Most coastal States do not have the capability to explore or utilize the resources *in situ* in the Area, or the seabed and ocean floor and subsoil beyond the limits

of national jurisdiction. For this majority of coastal States, therefore, attention will thus, naturally, focus on the seas within the 200-mile EEZ where it is more likely for them to contemplate the enjoyment of national sovereignty as well as the natural resources therein. The rights, jurisdiction, and duties of coastal States within these 200-mile limits constitute the essence of the national maritime interests that coastal States should attempt to maximize or optimize. It follows that coastal States can plan their naval forces according to the rights, jurisdiction, and duties established in the Convention for the upholding and protection of their national rights within the 200-mile limit waters.<sup>32</sup>

### A Definition of Small Navies and Their Functions

The governmental practice and enforcement of these legislative and jurisdictional rights falls on the coastal State's naval force. Basically, this is a constabulary task to make sure that foreign ships within these waters comply with all the laws and regulations of the coastal State for the maintenance of peace, good order and security, for the enjoyment of its own natural resources, and for the protection of sovereignty—a task defined by Ken Booth as a policing function for the coast guard responsibilities and nation-building. A navy for this constabulary task needs a convincing physical capability to deter misbehavior of foreign ships and to arrest them if necessary. The conventional deterrence and defense function of a navy as defined by Booth is: to prepare for wartime tasks, to deter hostile intrusion into maritime frontiers, to contribute to local maritime stability, to protect national claims in contiguous seas, and to extend national claims in contiguous seas. Since the enforcement of national rights is, by its nature, against foreign activities within national (economic) waters, it is, therefore, inevitably, involved with international relations and diplomacy.

Such activities are also undertaken for political and diplomatic purposes, such as to improve bargaining strength, to threaten force from the sea to support policy, to improve one's ability to affect the course of specific diplomatic negotiations, or to create some kind of national prestige at home and abroad. This diplomatic function has been generally and mistakenly regarded to be a minor or indistinct role for small navies. The traditional sense of naval diplomacy involves the use of warships in support of a State's general bargaining position, particular negotiating stances and influence-building tactics, as well as representational tasks of various kinds.<sup>33</sup> Both in conventional wisdom and in practice, this implies and entails the application of naval forces at great distance; a function beyond the capability of small navies. However, inasmuch as these naval functions are linked to the provisions of the 1982 LOS Convention, small navies are now placed into a new context in terms of naval diplomacy—new in the sense that the application of naval forces and the implementation of diplomatic functions

occur within a geographically limited and specific area: the 200-mile national (economic) waters. Thus a small navy can now be defined as:

*a navy which is primarily designed, planned, prepared, and constructed to protect and enforce the national rights, as conferred by the 1982 United Nations Law of the Sea Convention, within the 200-mile limit national (economic) waters.*

Insofar as a coastal State's national rights within its 200-mile waters becomes the baseline for the design, planning, preparation, and construction of its navy, the notion of a small navy takes on greater functional specificity. When a coastal State contemplates a navy that will be obligated not only to fulfill the needs and requirements of national rights, jurisdiction, and duties of the coastal State within the 200-mile limits as stipulated by the 1982 LOS Convention, but also to extend its force beyond the 200-mile limits, then an oceangoing navy is required. The British Navy is a good example of such an oceangoing navy. It does not have the capability to deploy its force globally or readily deal with two or more crises simultaneously, however, it can cope with a single contingency beyond its 200-mile waters. The Anglo-Argentine Falklands war of 1982 best characterizes the nature and capability of such an oceangoing navy. If, however, a coastal State intends to deploy its navy globally to protect simultaneously its many global interests, it asks for a global navy, e.g., the U.S. Navy or the Soviet Navy.

With this functionally oriented definition or classification of navies, navy planners and governmental policymakers will have a clear picture in mind of what to look for as guidelines and how to plan a navy their State really needs in support of their national rights within the 200-mile limits of ocean territory. This small-navy theory provides naval theorists with a conceptual standard or criterion to qualify and compare different navies without the confusion and ambiguity that previously plagued these analyses.

**T**he definition of a small navy has been conceptually derived from the interrelationship of naval functions and naval powers. The categorization of naval powers, in turn, has been based upon the physical capacity of navies, i.e., naval reach, a term defined by Rear Admiral J. R. Hill "as the distance from home bases at which [naval] operations can be carried out."<sup>34</sup> Insofar as the scope and character of naval operations can be defined, combined with the recognition of naval reach capability, the functions or missions that a navy can contemplate and fulfill will be clearly specified. One can, thus, apprehend the appropriate planning and force structure for a navy.<sup>35</sup> Moreover, such conceptual clarification or specification allows for a more objective evaluation of naval power and its utility. That is, one is no longer constrained by vague notions of power based upon ship counting or force structure description.

Small navies are, therefore, defined as those navies operating primarily within a reach of 200-miles, or within national EEZ limits. Accordingly, the functions

of small navies can be confined by and so defined within the context of the 1982 United Nations Law of the Sea Convention. The national rights codified within the Convention and conferred upon the coastal States can be used as guidelines for political leaders and naval planners alike to design, plan, prepare, and construct their navies. Theoretically and analytically, this approach offers a clear framework since it is built upon two practical and tangible elements: the physical capacity or reach of the navy and a written international treaty. Political objectives and military planning are consolidated and orchestrated toward the same purpose—the upholding and protection of national (maritime) interests within the 200-mile limits of ocean territory.

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Dr. Hu was a fellow of the East-West Center at Honolulu, Hawaii and Dr. Oliver was professor and chairperson of the Department of Political Science and College of Marine Sciences at the University of Delaware, at the time this article was first published.

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### Notes

1. Art, *To What Ends Military Power?* International Security 3-35 (Spring 1980); Baldwin, *Power Analysis and World Politics: New Trends Versus Old Tendencies*, World Politics 161-194 (January 1979); and BOOTH, NAVIES AND FOREIGN POLICY (1979), *passim*; CABLE, DIPLOMACY AT SEA 36 (1985).
2. See JANIS, SEA POWER AND THE LAW OF THE SEA (1976).
3. *Id.* at 63-64.
4. See Hu, "Fishing Boats and Gunboats: The Convergence of Fisheries and Naval Policy," (Ph.D. diss., Univ. of Delaware, May 1987). The four cases examined include: the "Tuna Wars" between the United States and Peru and Ecuador, the Anglo-Icelandic "Cod Wars," the "Squid War" of 1986 between the Republic of China (ROC) and Argentina, and the protracted fisheries disputes between the ROC and the Philippines.
5. HILL, MARITIME STRATEGY FOR MEDIUM POWERS 14 (1986).
6. *Id.* at 14-17, 20, 30-36, 40-44, 46-48. Hill also quoted Moineville's version of the definition of medium powers in his book: "they certainly cannot be prepared for all events but . . . they have . . . enough resources to have options to choose from. . . ." *Id.* at 195.
7. BOOTH, *supra* n. 1 at 24.
8. *Id.*
9. *Id.* at 16, 17-24, 120-121, 270-271.
10. HILL, *supra* n. 5 at 20.
11. BOOTH, *supra* n. 1 at 18-20, 121.
12. Cited in BOOTH, LAW, FORCE AND DIPLOMACY AT SEA 43 (1985). Texts within single quotes are Booth's quotation from O'Connell while texts within double quotes are Booth's argument.
13. *Id.*
14. *Id.* at 38-40.
15. For example, see Knight, *The Law of the Sea and Naval Missions*, U.S. Nav. Inst. Proc. 32-39 (June 1977).
16. BOOTH, *supra* n. 12 esp. chap. 7.
17. *Id.* at 139.
18. *Id.* at 168.
19. *Id.* at 139.
20. See Hu, *supra* n. 4; and Hu, *The Sino-Argentine 'Squid War' of 1986: Its Implications for the Fisheries Policy Making*, Marine Policy, 133-142 (April 1987).
21. BOOTH, *supra* n. 12 at 179.
22. *Id.* at 190-192.
23. *New Realism in Discussions of Seapower*, Marine Policy 83 (January 1987).
24. Osgood, *Military Implications of the New Ocean Politics*, in ALFORD, SEA POWER AND INFLUENCE: OLD ISSUES AND NEW CHALLENGES, THE ADELPHI LIBRARY 2 at 12-14 (1980).
25. Buzan, *A Sea of Troubles: Sources of Dispute in the New Ocean Regime*, in ALFORD, *supra* n. 24 at 160.

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26. See Hu, *supra* n. 4, esp. chaps. 5 and 6.
27. See Hu, *supra* n. 20.
28. See the Preamble of the 1982 United Nations Law of the Sea Convention (1982 LOS Convention).
29. See Article 19, Paragraph 1 of the 1982 LOS Convention.
30. See Article 39, Paragraph 1 (b) of the 1982 LOS Convention.
31. See Article 52, Paragraph 2 of the 1982 LOS Convention.
32. For an elaboration of these rights see the following articles in the 1982 LOS Convention, in particular: Article 19, Paragraph 2; Article 21, Paragraph 1; Article 33, Paragraph 1; Article 40; Article 41, Paragraphs 1, 2, and 7; Article 42, Paragraphs 1 and 4; Article 49, Paragraphs 1 and 2; Article 53, Paragraphs 1, 6, 7, and 11; Article 54; Article 56, Paragraph 1; Article 60, Paragraphs 1, 2, 4, 5, and 6; Articles 61 and 62; Article 73, Paragraph 1; Article 77; Articles 78, 80, and 81.
33. BOOTH, *supra* n. 1 at 26.
34. HILL, *supra* n. 5 at 87 or 149.
35. Admiral Hill argues “the type or types of operation for which reach is required, if they can be defined, will clearly help to govern and limit the forces to be provided.” *Id.* at 150.

## Chapter 14

# The Right of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union\*

Lieutenant Commander Ronald D. Neubauer, JAGC, U.S. Navy

**F**ive years have elapsed since the United Nations Convention on the Law of the Sea (1982 LOS Convention) was opened for signature in Jamaica on 10 December 1982.<sup>1</sup> Currently, over 150 nations have signed the 1982 LOS Convention, and over 30 nations have ratified it. The Convention will enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession with the Secretary-General of the United Nations.

U.S. policy regarding the 1982 LOS Convention was announced by President Reagan in his 10 March 1983 Ocean Policy Statement. The United States would not sign the 1982 LOS convention "because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries."<sup>2</sup> Nevertheless, the non-seabed mining provisions of the Convention reflect customary international law, and the President committed the United States to recognize "the rights of other [coastal] States so long as the rights and freedoms of the United States and others under international law are recognized. Moreover, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight. . . ."<sup>3</sup>

During the Third Nations Conference on the Law of the Sea (UNCLOS III) negotiating process, the United States and the Soviet Union pursued common interests and goals regarding freedom of navigation, including maintaining the right of innocent passage in the territorial sea. International commentators widely noted that our shared goals were realized in the regime for innocent passage reflected in the 1982 LOS Convention. However, notable Soviet naval writers have recently published positions with a strong bias towards coastal State security

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of the “Motherland,” at the expense of the maritime mobility contemplated during UNCLOS III.

This article will address the proposition put forward in the new Soviet writings on innocent passage in the territorial sea, that coastal States are entitled to limit warship innocent passage to “traditional” or other navigation routes designated by the coastal State. The analysis will begin with the innocent passage regime as reflected in the text of the 1982 LOS Convention. It will then consider the view of Soviet naval publicists, the negotiating history and general background of the innocent passage regime, and policy implications.

### Text

In order to place the issue in context, we must first comprehend the basic provisions that comprise the regime of innocent passage. Article 17\* recites the fundamental doctrine that “ships of all States . . . enjoy the right of innocent passage through the territorial sea.” Article 18 defines “passage” as “continuous and expeditious” navigation through the territorial sea. Passage may include stopping and anchoring, but one incidental to ordinary navigation or because of *force majeure*, distress, or rendering assistance to those in danger or distress.

Article 19 defines the meaning of “innocent passage.” First, “[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.” This formulation creates a presumption that passage is innocent unless otherwise demonstrated. Next follows a list of *objectively defined activities* which, if engaged in, shall be considered to be “prejudicial to the peace, good order or security of the coastal state,” in other words, non-innocent:

- any threat or use of force against the coastal State;
- any exercise or practice with weapons;
- collection of information to the prejudice of the defense or security of the coastal State;
- any act of propaganda;
- launching, landing, or taking on board any aircraft or military device;
- “loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State”;
- willful and serious pollution;
- any fishing activity;
- any research or survey activity;
- interfering with communications or other facilities; and
- “any other activity not having a direct bearing on passage.”

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\* Unless otherwise specified, references to “Articles” refer to the articles of the 1982 LOS Convention.

Article 21 specifies matters as to which the coastal State “may adopt laws and regulations . . . relating to innocent passage. . . .” Among these are “the safety of navigation and the regulation of maritime traffic.” Foreign ships exercising the right of innocent passage are required to comply with such coastal State laws and regulations and with generally accepted international regulations relating to the prevention of collisions at sea. Article 22 authorizes a coastal State to, “*where necessary having regard to the safety of navigation*, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.” (Emphasis added.)

Article 24 provides that the “coastal State shall not hamper the innocent passage of foreign ships through the territorial sea” or “impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage” or “discriminate in form or in fact against the ships of any State. . . .”

Under Article 25, the “coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.” Additionally, the coastal State may, “without discrimination in form or in fact among foreign ships, suspend *temporarily* in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. . . .” (emphasis added.)

Finally, Article 30 provides that, “[i]f any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.”

Thus, except for sea-lanes and traffic separation schemes *necessary* to the safety of navigation, the text of the 1982 LOS Convention does not authorize coastal States to limit the passage of ships, whether warships or merchantmen, to traditional or other specifically designated navigation routes. It is also important to note that the innocent passage regime does not authorize coastal States to condition innocent passage for warships on any type of prior notification or permission.

### Position of Soviet Naval Writers

The current thinking of some Soviet writers is reflected in a recent article by Captain 1st Rank R. Sorokin, *Innocent Passage of Warships Through Territorial Waters*.<sup>4</sup> Captain Sorokin repeats the generally accepted view that the regime of innocent passage is intended to strike a balance between the need for maritime mobility and the need for coastal State security. He rejects an interpretation that would permit coastal States to require prior notification or authorization for warships but argues that warships may be restricted to selected routes.

Perhaps because it lacks a sound basis in either practice or the 1982 LOS Convention text, Captain Sorokin's rationale in support of a right of the coastal State to restrict innocent passage to designated routes is a bit difficult to follow. In a nutshell, however, he seems to argue that since innocent passage exists solely to enable passage through the territorial sea, the coastal State may require that such passage, particularly for warships, take place only along the most direct routes that have traditionally been used for international navigation. He then argues further that by conforming to the designated routes within the territorial sea, foreign warships may unequivocally demonstrate that their passage is "innocent."

These arguments, however, lack legal foundation. Nowhere does the 1982 LOS Convention declare that innocent passage must be limited to the shortest possible routes. Furthermore, as noted above, Articles 21 and 22 give the coastal State the authority to establish sea-lanes and traffic separation schemes in its territorial sea only insofar as necessary to ensure navigational safety. The coastal State is *not* empowered to establish sea-lanes solely under the guise of "security."

From the proposition that a ship conforming to designated routes "confirms that she is engaged in innocent passage and has not intruded into territorial waters,"<sup>5</sup> Captain Sorokin then leaps to his fundamental conclusion: "Thus the innocent passage of warships through territorial waters can be viewed as a traversing of territorial waters of the coastal State over the shortest traditional international shipping lanes or over routes established by the coastal State (along recommended courses, lanes, or traffic separation schemes) especially designated for the innocent passage of foreign ships, while complying with legislation of the coastal State and provisions of the 1982 UN Convention on the Law of the Sea."<sup>6</sup>

It is not entirely clear whether Captain Sorokin believes that, as a matter of international law, warship innocent passage can only occur along the shortest international routes or specifically designated routes, or whether he believes that the coastal State may lawfully restrict warship innocent passage to such routes. Whatever the precise rationale, he clearly argues that where a coastal State has designated such routes, a warship may not exercise innocent passage outside them.

The U.S.S.R. has enacted domestic law consistent with this position. Article 13 of the Law of the Union of Soviet Socialist Republics on the State Frontier of the U.S.S.R. of 24 November 1982 provides: "Foreign warships and underwater vehicle shall enjoy the right of innocent passage through the territorial waters (territorial sea) of the USSR in accordance with the procedure to be established by the Council of Ministers of the USSR."<sup>7</sup>

The Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters (Territorial Sea) and Internal Waters and Ports of the U.S.S.R., approved by the U.S.S.R. Council of Ministers decree of 28 April 1983, enumerates the routes permitted for warships not entering internal waters and ports of the

U.S.S.R. Article 12.1 of those Rules provides: "The innocent passage of foreign warships through the territorial waters (territorial sea) of the USSR for the purpose of traversing the territorial waters (territorial sea) of the USSR without entering internal waters and ports of the USSR shall be permitted along routes ordinarily used for international navigation:

- in the Baltic Sea: according to the traffic separation systems in the area of Kypu Peninsula (Hiiumaa Island) and in the area of the Porkkala Lighthouse;
- in the Sea of Okhotsk: according to the traffic separation schemes in the areas of the Cape Aniva (Sakhalin Island) and the Fourth Kurile Strait; (Paramushir and Makanrushi Islands);
- in the sea of Japan: according to the traffic separation system in the area in Cape Kril'on (Sakhalin Island)."<sup>8</sup>

Thus, along the enormous Soviet coastline, only these several areas are open to innocent passage for warships.

### Negotiating History

There is no rule of customary international law to the effect that coastal States may limit innocent passage of warships to traditional or other designated navigation routes. The 1958 Convention on the Territorial Sea and the Contiguous Zone contains no such provision.<sup>9</sup> None of the Official Drafts preceding the 1982 LOS Convention had a rule to that effect. Even the Soviet Draft Articles on the Territorial Sea (Soviet Draft) did not include such a rule. In fact, the Soviet Draft articles on innocent passage were nearly identical in structure and substance to those finally adopted in the Convention.<sup>10</sup>

Like the 1982 LOS Convention, the Soviet Draft provided that coastal States may adopt laws and regulations for safety of navigation (Soviet Draft, Article 20) and, where *navigational conditions* make it desirable, establish traffic separation schemes (Soviet Draft, Article 21). The Soviet Draft also contained the provision that coastal States "shall not hamper innocent passage through the territorial sea or discriminate amongst foreign ships in respect of such passage." (Soviet Draft, Article 18).

The notion that coastal States should have the right to limit warship passage to traditional or other designated navigation routes was contained within a proposal advanced by Mr. Roe, a representative of the Republic of Korea, at an UNCLOS III committee meeting on innocent passage in the territorial sea. Mr. Roe stated: "[T]he passage of warships through a territorial sea which did not constitute a necessary and important route for international navigation should be differentiated from the passage of other types of vessel[sic]. A coastal State should have the right to require foreign warships passing through its territorial sea to give prior notification of that passage or to obtain prior authorization for it."<sup>11</sup> The proposal regarding warship passage through "necessary and important

routes" received little discussion and was of no consequence at UNCLOS III. However, there was intermittent discussion of the larger issue as to whether a coastal State could require prior notification for warship innocent passage. Due largely to opposition from the United States *and the Soviet Union*, however, no provision to that effect found its way into the 1982 LOS Convention or any of the preceding Official Drafts.

A final germane point from the negotiating history was made by Mr. Olszowska, representing Poland, which was a cosponsor of the Soviet Draft. At a meeting on innocent passage Mr. Olszowska stated that "all the acts which were to be incompatible with the right of innocent passage were specified in Article 16, paragraph 2 [subsequently numbered Article 19.2]."<sup>12</sup> This view, which coincides with that of the United States, supports the interpretation of the 1982 LOS Convention that not all conduct in violation of coastal State law or regulation is non-innocent; to be non-innocent, the activity must be proscribed in Article 19. Further, it confirms that the determination under international law of whether passage is "innocent" depends entirely upon the activities of the vessel, *not* upon its status (e.g., warships) nor whether its route happens to be one ordinarily used for international navigational.

### Policy Implications

The principal policy task for UNCLOS III regarding the territorial sea regime was to achieve a reasonable balance between two legitimate and vital competing needs: freedom of navigation, an inclusive community interest; and coastal State security, an exclusive community interest. The Conference produced a workable compromise between these interests, which was accepted, in the form of the innocent passage rules, by international consensus. Fidelity to international law, such as the law of the sea, promotes peaceful and orderly relations between States. Accordingly, peace and order are imperiled when nations take actions or impose regulations that are inconsistent with the internationally accepted norms. This is especially so where, as here, the rule unilaterally imposed by the Soviet Union has only recently been rejected by international consensus, and the circumstances in which the rule was rejected have not materially changed.

A major goal of the innocent passage regime, as with any rule of international law, is to minimize the potential for dispute. Accordingly, the rules for innocent passage were designed to be objective, written in language resistant to divergent interpretations. The regime of innocent passage in the 1982 LOS Convention embodies the policy that all passage, including that of warships, is presumed to be innocent. The burden is on the coastal State to show non-innocence in accordance with the relatively specific, objective criteria in Article 19. The finite list of activities in Article 19 makes certain the categories of non-innocent activity. A warship may only be required to leave the territorial sea if her passage

is non-innocent under Article 19, thus preventing coastal States from using violation of any variety of law or regulation as an excuse to require warships to leave the territorial sea. To further minimize the potential for conflict, coastal States may not hamper innocent passage, impose requirements that have the practical effect of denying or impairing innocent passage, or administer innocent passage in a discriminatory manner.

### Evaluation and Conclusion

The essential characteristic of the territorial sea regime is that "ships of all States . . . enjoy the right of innocent passage through the territorial sea."<sup>13</sup> The Soviet view—where there are no designated routes there is no innocent passage for warships—has no basis in customary international law, and is a gross departure from the principles supported by the United States and the Soviet Union and accepted by UNCLOS III. Attempts to restrict foreign warships to a few designated routes unlawfully hamper—indeed, can all but preclude—innocent passage. Exercise of the right of innocent passage reflected in the 1982 LOS Convention by sailing outside Soviet-designated routes does not render the passage non-innocent, and would not, therefore, justify an order to the vessel to leave the territorial sea.

The device of restricting warship innocent passage in the territorial sea to a few designated routes is a transparent effort to circumvent the balance achieved during UNCLOS III between coastal State security and freedom of navigation. It is disturbing that Soviet writers are advocating a position contrary to this balance of interests which was supported by the Soviet Union throughout UNCLOS III. The precedential effect of this position should not be ignored. It would provide incentive to other States in their attempts to impose precisely the kind of prior notification or authorization requirements which were rejected at UNCLOS III. As was so aptly put by Professor John Norton Moore, a prominent international law authority: "[T]he costs associated with any failure to recognize freedom of navigation . . . will not necessarily be immediately manifest. Initial challenges may be subtle, plausible, and limited. Through time, however, the common interest will be eroded by unwarranted restrictions on transit, discrimination among users, uncertainty of transit rights, inefficient and inconsistent regulations, efforts at political or economic gain in return for passage, increased political tensions, and perhaps even an occasional military confrontation. . . ."<sup>14</sup>

Although purporting to penetrate the mentality of Soviet writers may be risky business, in this instance their motivation appears plain: to curtail general access of foreign warships to the Motherlands' territorial sea. The Soviet publicists are attempting to construct an argument which will enable them to reap the benefits of the navigational principles enshrined in the 1982 LOS Convention for the Motherland's blue-water navy, while severely restricting navigational rights for

foreign warships in the Motherland's territorial sea. This continued Soviet insistence upon coastline principles at home and navigationalist principles abroad carries with it the potential for confrontation that does not bode well for the international regime of the oceans.

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### Notes

1. Opened for signature 10 December 1982, reprinted in United Nations Conference on the Law of the Sea, *United Nations Convention on the Law of the Sea*, U.N. pub. sales no. E83 V.5 (1983).
2. U.S. President, *Statement on United States Ocean Policy*, *Weekly Compilation of Presidential Documents*, no. 383 (10 March 1983).
3. *Id.*
4. Sorokin, *Innocent Passage of Warships Through Territorial Waters*, *Morskoi sbornik*, no. 3 (1986).
5. *Id.* at 75.
6. *Id.*
7. *Vedomosti S.S.S.R.*, no. 48, 1982, item 891, in COLLECTED LEGISLATION OF THE USSR AND CONSTITUENT UNION REPUBLICS (Butler trans. 1979), and BUTLER, *THE USSR, EASTERN EUROPE, AND THE DEVELOPMENT OF THE LAW OF THE SEA* (1983); for a detailed analysis of Soviet law relating to innocent passage in the territorial sea, see William E. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 *Am. J. Int'l L.* 331 (1987); for an examination of the development of Soviet law of the sea policy, including innocent passage in the territorial sea, see Allison, *The Soviet Union and UNCLOS III: Pragmatism and Policy Evolution*, 16 *Ocean Dev. & Int'l L.* 109 (1986).
8. 24 *I.L.M.* 1715, 1717 (1985).
9. U.S. Treaties, etc., "Convention on the Territorial Sea and the Contiguous Zone," done 29 April 1958, v. 15, UST 1606, TIAS 5639.
10. United Nations Third Conference on the Law of the Sea, Vol. 3, U.N. Doc. A/C.62/C.2/L.26, U.N. pub. sales no. E.75.V.5 (1975), at 203.
11. United Nations Third Conference on the Law of the Sea, Vol. 2, U.N. pub. sales no. E.75.V.4 (1975), p. 110.
12. *Id.* at 290.
13. 1982 United Nations Convention on the Law of the Sea, Article 17, U.N. pub. sales no. E.83.V.5 (1983).
14. Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 *Am. J. Int'l L.* 77, 79 (1980).

## Chapter 15

# Troubled Waters off the Land of the Morning Calm: A Job for the Fleet\*

Lieutenant Commander James R. Boma, U.S. Naval Reserve

**I**t is early Sunday morning, 4 February 1990. A South Korean ferry, accompanied by a lone Republic of Korea (ROK) Navy Sea Hawk fast-attack gunboat, proceeds slowly in choppy seas on a routine resupply run toward the island of Paengnyong Do, one of the five precariously situated Northwest Islands.

*By authority of the 1953 Armistice Agreement, these remote islands, which lie north of a straight seaward extension of the demilitarized zone (DMZ) and perilously close to the North Korean mainland, are controlled by the United Nations Command and hence are under South Korean administration. Supported by armed-escorts, resupply missions have been conducted without incident since 1953.*

*During 1988, the Seoul Summer Olympics were a resounding international public relations success for the South, and the North's boycott of the event served to heighten the stark contrasts between the two systems. While the North's economy, on an essentially wartime footing for nearly four decades, is stagnant and seemingly able to subsist only through massive infusions of economic and military aid from communist allies, the South's is robust and booming.*

*In addition to the ideological incompatibilities of the two governments, Kim Il-sung, the aging patriarch of the North who has ruled that government since its inception, is beset by political problems resulting from his attempt to transfer the reins of power to his son and heir apparent, Kim Jong Il—doctrinal heresy to a dedicated Marxist-Leninist. Increasingly strident calls for forceful reunification, a lifelong promise of the elder Kim, have been emanating from P'yongyang and were capped on 1 January 1990 by a communique renewing earlier demands that the "puppet regime in the South" must obtain permission from the North prior to entering the disputed waters adjacent to the Northwest Islands. As always, the South Koreans ignored this verbal barrage and have continued to maintain the tenuous, but vital, logistics lifeline to these isolated outposts.*

The skipper of the Sea Hawk is alarmed when his radar operator reports contact on four high-speed surface craft, believed to be North Korean Osa or Komar missile boats, closing rapidly from the north. After radioing a frantic warning to the captain of the supply vessel, the Sea Hawk is struck topside by

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Styx missiles which explode, cutting the craft in two and killing all aboard, long before its crew is able to bring their largely defensive guns to bear.

The supply vessel immediately executes a turn to the south, but soon is overtaken by the North Korean boats which rake it from bow to stern with machine-gun and small-arms fire, killing three crewmen and seriously wounding the captain, who manages to radio a "Mayday" to the ROK Navy sector commander. A ROK Air Force F-5 fighter is scrambled immediately and reports that the supply vessel is under tow and appears to be heading for the North Korean port of Nampo.

Meanwhile, in Seoul, a North Korean defector reports that his reserve motorized rifle division has been mobilized for war. Overhead reconnaissance confirms this, showing massive troop movements southward and increased activity along the DMZ. Receiving this unwelcome news, the Commander in Chief, Combined Forces Command (CINC/CFC),\* a four-star U.S. Army general, alerts his U.S. and ROK forces and begins to increase their readiness for the expected North Korean thrust south across the DMZ.

In Pusan, a port on the southeastern coast of the Republic, the captain of the U.S.S. *Bunker Hill* (CG-53), an Aegis-class cruiser, is recalled from a port visit and ordered to proceed at "best speed" with two U.S. ships in company—the guided missile frigate *Rodney M. Davis* (FFG-60) and the destroyer *Fife* (DD 991)—to an operating area 40 miles due east of the North Korean east coast port of Wonsan to rendezvous with a carrier battle group proceeding to that area.

Arriving early on the morning of 6 February, the *Bunker Hill's* captain is troubled by a report from the pilot of the ship's helicopter that the flight crew has spotted the periscope of one submarine and confirmed the presence of another, classified as probable Romeo and Whiskey-class and believed to be North Korean. Both have submerged and appear to be closing the group's position. Requesting permission to "neutralize" this threat, the pilot asks that additional helicopters be dispatched to prosecute these contacts and search for others. Just then, the cruiser's air-search radar operator reports six fast-moving "bogies"—unidentified and presumed hostile aircraft—closing their position.

The Captain, feeling that old familiar knot in his stomach, calmly orders "General Quarters!" breathes deeply and picks up the secure encrypted red radio handset to inform his boss, Commander Task Group 75.1, who is embarked in his flagship, of the rapidly deteriorating situation and of his intent to engage the North Korean forces.

**W**hile the picture just painted is not comforting, it is, unfortunately, all too plausible a scenario which might be confronted in this region of

\* This commander is many-hatted, serving not only as CINC/CFC, but also as Commander in Chief, United Nations Command; Commander, U.S. Forces Korea; and Commander, Eighth U.S. Army, Korea.

unrelieved tension. It serves as an example of the very situation in which the mettle of the U.S. maritime strategy and our national resolve will be tested. "Freedom of the Seas" is not a mere slogan designed to arouse public passion and facilitate funding for a 600-ship navy. Rather, it forms the cornerstone of our ability to defend our vital interests, and those of our allies, in this "era of violent peace."<sup>1</sup>

High-seas navigational freedoms and overflight rights have been increasingly burdened by the encroachments of numerous coastal states. With the advent of the Freedom of Navigation (FON) Program in 1979, as subsequently reaffirmed by President Reagan in 1983, the United States has assumed the mantle of guardian and enforcer, where needed, of the international community's interests in the maritime common. One claim which appears to have exceeded recognized international peacetime norms is the 50-mile "military boundary zone," proclaimed by the People's Democratic Republic of Korea (North Korea) in 1977.

### The Freedom of Navigation Program

In his ocean policy statement of 10 March 1983, President Reagan emphasized the role of the United States as a leader in developing customary and conventional law of the sea. Broadly stated, the U.S. objective, both for reasons of self-interest and for interests common to all nations, is to "facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of resources."<sup>2</sup>

Though earlier, mainly because of its deep seabed mining regimen, President Reagan had announced that the United States would not sign the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention), on this occasion he stated that because the Convention's provisions dealing with the traditional uses of the oceans, including navigation and overflight rights, were in consonance with and represented customary practices, these rights would be recognized. But this recognition was expressly conditioned by the following important caveat: "so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States."<sup>3</sup> Further, the President went on to state that the United States, as a matter of national policy: "will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention . . . [but will not] . . . acquiesce in unilateral acts of other States which are designed to restrict these recognized rights and freedoms."<sup>4</sup>

As stated earlier, this was not a new development. Since the Carter administration initiated the program during March 1979, the United States has successfully conducted a systematic Freedom of Navigation Program to protect U.S. and

international navigation and overflight interests on and over the seas against excessive maritime claims.

Several key terms and concepts, which have gained the force of international law through custom, past and present practices, with some codified in conventions and treaties such as the recent comprehensive 1982 LOS Convention, need to be discussed briefly to put the issues in context.

The territorial sea is a "belt of ocean which generally is measured seaward from the baseline on the coastal or island nation and subject to its sovereignty."<sup>5</sup> (Unless special rules apply, the baseline is the low-water line along the coast as marked on that nation's official large-scale charts.) The United States maintained its traditional 3-nautical mile territorial sea until 28 December 1988 when President Reagan proclaimed a 12-nautical mile territorial sea. As in the past, the United States continues to respect other nations' territorial sea claims up to a maximum breadth of 12 nautical miles.<sup>6</sup> However, the United States has made it clear that it will not recognize aspects of such a claim which do not "accord to the U.S. its full rights in the territorial sea under international law."<sup>7</sup> One such important traditional right is that of "innocent passage" on the surface through a nation's territorial sea.<sup>8</sup>

Also, a contiguous zone of up to an additional 12 nautical miles, or a maximum of 24 nautical miles from properly drawn baselines, may be established for the limited purposes of preventing infringement of a coastal State's "customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea."<sup>9</sup>

Finally, under the 1982 LOS Convention, a coastal nation may establish an exclusive economic zone (EEZ) of up to 200 miles from the baseline. In the EEZ, a state may regulate the exploration of natural resources, the production of energy from the water, currents and wind, maritime scientific research, the establishment of artificial islands, and other similar resource-related activities.<sup>10</sup> However, with the exception of these purpose-oriented, express extensions of control into the contiguous zone and the EEZ, traditional high seas freedoms of unrestricted navigation and overflight endure.<sup>11</sup>

In other words, the degree of control exercised by the coastal nation is inversely proportional to the distance from its shores. While the vessels of other nations have only the limited rights of innocent passage, including use of force only in self-defense, within the limits of a proper territorial sea, the rights of vessels and aircraft in the contiguous zone and EEZ are minimally regulated by the adjacent coastal nation. It is important to emphasize the unhampered nature of the right of innocent passage. There is no recognition under the 1982 LOS Convention nor by the United States of any right of a coastal nation to impose a precondition of permission or notice prior to the exercise of this fundamental right.

There are several other passage regimes which merit an explanation: archipelagic sea lanes passage and transit passage through international straits.

An archipelagic nation is constituted wholly of one or more groups of islands, e.g., the Republic of the Philippines. Within the limits specified by the 1982 LOS Convention, such nations may draw straight baselines joining the outermost points of their outermost islands. The waters enclosed within these baselines are called archipelagic waters. These archipelagic baselines are also the baselines from which the archipelagic nation measures seaward for its territorial sea, contiguous zone and exclusive economic zone. The United States recognizes the right of an archipelagic nation to establish archipelagic waters, provided that the baselines are drawn in conformity with the 1982 LOS Convention and the United States is accorded navigation and overflight rights and freedoms under international law in the enclosed archipelagic and adjacent waters.<sup>12</sup>

Two means are available to preserve archipelagic sea lanes passage. First, archipelagic nations may designate archipelagic sea lanes through their archipelagic waters suitable for "continuous and expeditious passage of ships and aircraft." All normal routes customarily used for international navigation and overflight are to be included in this scheme. If the archipelagic nation does not designate such sea lanes, the routes normally used for navigation and overflight, nonetheless, remain available to all nations for archipelagic sea lanes passage.

The right of archipelagic sea lanes passage is defined as "the exercise of the freedom of navigation and overflight for the sole purpose of continuous and expeditious transit through archipelagic waters, in the normal modes of operation, by the ships and aircraft involved."<sup>13</sup> This right of archipelagic sea lanes passage cannot be impeded nor suspended by the archipelagic nation for any reason.

With regard to international straits, two situations exist. The first involves international straits overlapped by territorial seas, i.e., where the territorial seas of the adjacent coastal nations leave no high-seas corridor. In this instance, the ships and aircraft of all nations, including warships and military aircraft enjoy the right of unimpeded transit passage through such straits. Transit passage is the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit in the normal modes of operation utilized by ships and aircraft for such passage. "Normal modes of operation" means that submarines may transit submerged, and surface warships, consistent with sound navigational practices and security of own force considerations, may transit in formation, and launch and recover aircraft.

Transit passage through international straits cannot be suspended by the coastal or island nation for any purpose during peacetime. This principle of international law also applies to transiting warships of nations at peace with the bordering coastal or island nation, but involved in armed conflict with another nation. However, consistent with generally accepted international standards and to

promote navigational safety, the coastal or island nation may designate sea lanes and traffic separation schemes which ships in transit must respect.<sup>14</sup>

With respect to the second category of international straits, those not completely overlapped by territorial seas and, in archipelagic waters outside archipelagic sea lanes, all surface ships enjoy the more limited right of innocent passage. Submarines must transit on the surface; launching and recovery of aircraft are not permitted; and weapons exercises may not be conducted. Innocent passage through such straits may not be suspended. Temporary suspension of innocent passage through archipelagic waters outside archipelagic sea lanes is permitted in specified areas when essential to the archipelagic nation's security, but only after prior promulgation of its intentions to do so, and the temporary suspension must be applied in a nondiscriminatory manner.<sup>15</sup>

A special status accrues to warships and military aircraft which, as mobile extensions of their sovereign, enjoy general immunity under custom, past practice and the provisions of the 1982 LOS Convention.<sup>16</sup> Their government may be ultimately held liable for damages, but the only self-help measure immediately available to the coastal state in the event of an alleged violation of applicable rules is to require that the offending ship leave its territorial sea.

Many coastal nations have established what the United States and others deem to be excessive maritime claims, which are either too broad in extent, or seek to ban or place impermissible preconditions on the exercise of innocent passage, transit passage, or archipelagic sea lanes passage. These claims, whether asserted by friends or potential adversaries, are inimical to the interests of the United States and any other seafaring sovereign. These restrictions imperil the unrestricted movement of commerce and resources in the global market and are detrimental to the essential mobility of U.S. defense forces.

They are, therefore, susceptible to peaceful challenge under the FON Program.

### Nature of the North Korean Claims

On 22 June 1977, North Korea promulgated a 200-mile exclusive economic sea zone which was to take effect on 1 August 1977.<sup>17</sup> The language of this pronouncement was unobjectionable except for the practical consequences of its attempted establishment off the west coast of North Korea, where only approximately 100 miles of Yellow Sea separates the peninsula from its behemoth neighbor, the People's Republic of China. However, not wishing to press the issue with their sometimes fraternal comrades, the North Koreans have indicated through their subsequent enforcement practices that they will assent to a midline delineation of the EEZ in the Yellow Sea, which approximate a 50-mile zone.<sup>18</sup>

**Military Boundary Zone.** Following closely upon the heels of the announcement to establish the EEZ came the unexpected announcement of a 50-mile wide “military boundary zone,” which was to take effect simultaneously on 1 August 1977. (See figure 1.) Purportedly to safeguard the newly promulgated EEZ and to “firmly defend militarily the national interests and sovereignty” of North Korea, the communique of the Supreme Command of the Korean People’s Army provided, in relevant part, as follows: “The military boundary is up to 50 miles from the starting line of the territorial waters in the east sea [Sea of Japan] and to the boundary line of the economic sea zone in the west [Yellow] sea.

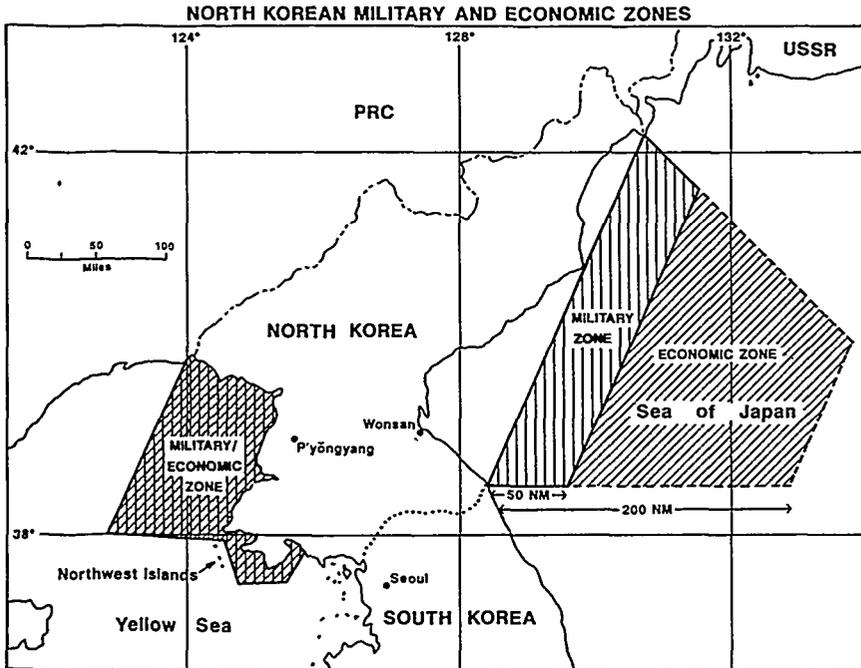


Figure 1

“In the military boundary (on the sea, in the sea and in the sky) acts of foreigners, foreign military vessels and foreign military planes are prohibited, and civilian ships and civilian planes (excluding fishing boats) are allowed to navigate or fly only with appropriate prior agreement or approval.”

“In the military boundary (on the sea, in the sea and in the sky) civilian vessels and civilian planes shall not conduct acts for military purposes or acts impinging upon the economic interests.”<sup>19</sup>

While a plain reading of the text would appear to exclude fishing boats from the category of civilian ships which required prior approval for entry, Japanese officials, during the course of subsequent unofficial fishing negotiations, were shocked to learn that North Korea actually intended that foreign fishing within the military zone was “out of the question from the beginning.”<sup>20</sup>

## Problems with the North Korean Claims

Several ambiguities in the language of the announcement, when coupled with earlier imprecise language and erratic enforcement practices, have further ruffled these troubled waters.

*Improperly Drawn Baselines and Unrecognized Historic Bay Claims.* One problem which pervades the North Korean claims is the vagueness of their pronouncements. Their baselines, from which all other claims are derived, i.e., territorial sea, contiguous and exclusive economic zones, have not been promulgated. The presumed baselines have been gleaned from the unofficial contacts referenced between North Korean officials and Japanese envoys. A recent *Notice to Mariners* captured this uncertainty in describing the North Korean east coast straight baselines in the following fashion: "Baseline is hypothetically calculated by State Department Geographer as straight line across Sea of Japan which joins seaward terminus of Korean Military Demarcation Line and PDRK boundary with the Soviet Union."<sup>21</sup> (See figure 2.)

Under the applicable provisions of the 1982 LOS Convention, which reflects customary international practices, baselines, as outlined above, are normally drawn by following the low-water marks along the coast.<sup>22</sup> An exception to this general rule allows straight baselines only where the coast is deeply indented, which would result in a correspondingly untenable, serrated line at sea,<sup>23</sup> or where there is a fringe of islands along the coast in its immediate vicinity.<sup>24</sup> A glance at a chart will confirm that the North Korean coastal geography admits to neither limited exception to the general rule of coastally conforming baselines.

Also, the North Korean baselines conveniently encompass several supposed, although unarticulated, "historic bays," which have not been recognized by the international community at large. Similar claims have been advanced by the Soviets (Peter the Great Bay), and the infamous "line of death" which Libya announced was an unsuccessful attempt to enclose the Gulf of Sidra.<sup>25</sup>

However, the North Korean bays do not meet the generally accepted norms codified in the 1982 LOS Convention, which provide that a bay is a "well-marked indentation in such proportion to the width of its mouth as to contain land-locked waters and constitutes more than a mere curvature of the coast."<sup>26</sup> The Convention then sets forth technical tests for gauging the validity of a bay claim.

At this point, the "operator" reader may be thinking: "So what? Let the lawyers and cartographers immerse themselves in the excruciating minutiae of this line drawing evolution. Of what practical importance is this dispute?" Two important consequences flow from this baseline demarcation.

First, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.<sup>27</sup> Internal waters are, as a practical matter, as subject to the sovereignty of the coastal nation as its drier real estate and,

## NORTH KOREAN BASELINES, AND SOVIET LINE ENCLOSING PETER THE GREAT BAY

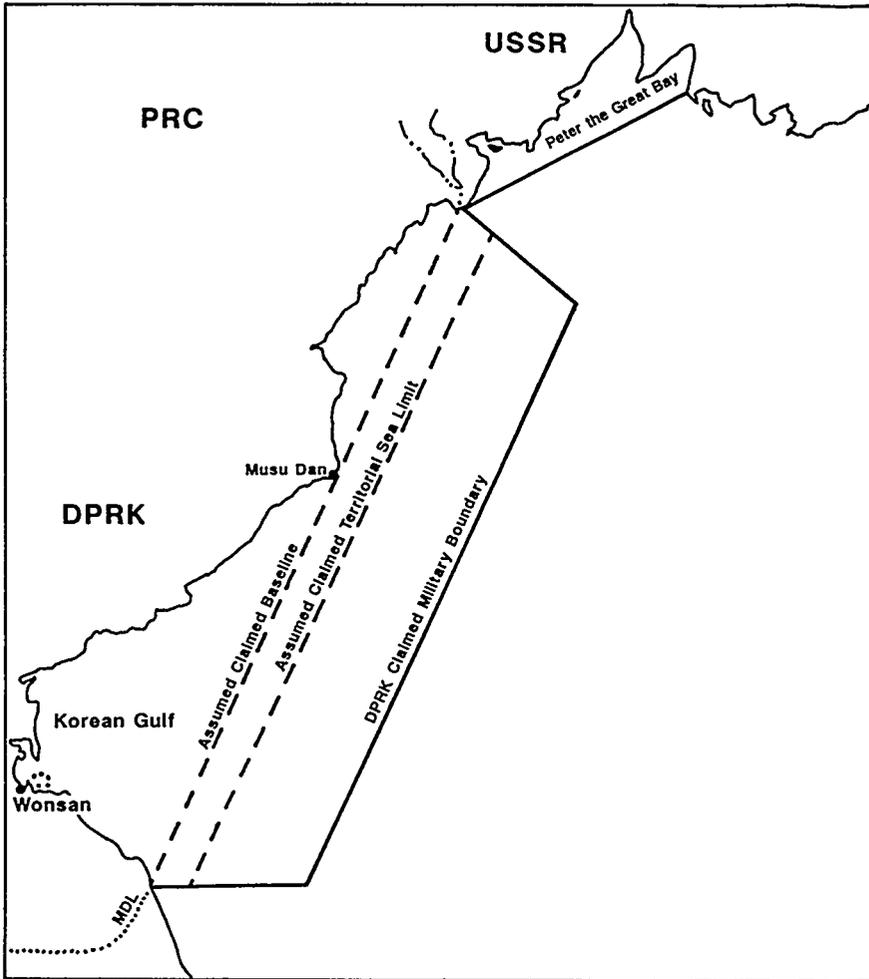


Figure 2

consequently, as inviolate. In other words, no innocent passage or nonemergency transit of any kind is permitted without the prior permission of the coastal nation.

Second, and of possibly greater significance, the baselines, as has been previously mentioned, set the inner boundary which determines the seaward extent of the territorial sea, and the contiguous and exclusive economic zones. For example, off the North Korean east coast city of Wonsan, straight baselines extend internal waters 50 nautical miles seaward. Thus, impermissibly drawn baselines, while aesthetically pleasing on a chart, allow the coastal nation to exercise increased control over expanded internal waters, while their claims encroach seaward at the expense of the maritime common owned by all.

*Uncertainty of Territorial Sea Claims.* As was indicated, the North Koreans have established the breadth of their EEZ and military boundary zones, but not the

precise coordinates of each. Although a 12-nautical mile territorial sea claim from the indicated baselines is presumed (as a result of their actions in the Pueblo incident of 1968), this has not been formally announced.<sup>28</sup> Additional corroboration of a nominal 12-mile territorial sea claim might be inferred from North Korea's signing, but not ratification, of the 1982 LOS Convention when it opened for signature during December 1982.<sup>29</sup> But again, this is conjecture and, in light of consistently erratic and violent North Korean behavior, probably unwarranted.

**Military Boundary Zone.** The ambiguity regarding the precise coordinates of any of the North Korean claims logically extends to its 50-mile military boundary zone. While the Department of Defense *Maritime Claims Reference Manual* indicates that the military boundary zone extends beyond the presumed territorial sea of 12 miles, or for a total of 62 miles from the baseline,<sup>30</sup> "plain reading" of the express language of the announcement would seem to indicate that the breadth of the security zone off the east coast is 50 miles from the baselines, as appears to be the interpretation of one commentator.<sup>31</sup> The military boundary zone off the west coast is generally agreed to be coextensive with the economic sea zone, which is 50 miles, abutting China's similar "military warning zone."<sup>32</sup>

In any event, although North Korea has signed the 1982 LOS Convention, the 50-mile security zone clearly exceeds the maximum combined limits of a permissible territorial sea and contiguous zone (24 miles from baseline). Further, the absolute prohibition against foreign warships transiting this zone denies innocent passage in the territorial sea. Finally, high seas surface passage and unimpeded overflight rights in the contiguous zone and beyond to 50 miles are extinguished by this unilateral declaration. While the 1982 LOS Convention recognizes the right of a coastal State, after notification, to temporarily suspend innocent passage within its territorial sea for security reasons, bans on warships and prior permission regimes are neither authorized nor accepted international practice.<sup>33</sup>

In effect, the North Koreans are attempting to assert a degree of control not recognized under the Convention or past practices in a peacetime regime, except within a nation's internal waters.<sup>34</sup>

Diplomatic protests greeted this surprise announcement. As might be expected, South Korea vehemently opposed the North Korean claim as "unprecedented under international law."<sup>35</sup> The Commander in Chief, United Nations Command, speaking for that command as well as in his role as senior U.S. commander in the Republic, Commander, U.S. Forces Korea, registered a vigorous protest. The Japanese voiced disapproval, but in a somewhat muted fashion due to the economic reality that Japanese fishermen were then catching over 80,000 tons of fish annually in those waters off North Korea which were now encompassed within the EEZ and military boundary zone.<sup>36</sup> The Soviets,

a growing blue water naval power, increasingly aware of the benefits accruing from unimpeded high seas freedoms, curiously, were content merely to report the North Korean announcement and Japan's disapproval.<sup>37</sup> China, perhaps due to the existence of its own indistinguishable military warning zone, issued no statement regarding the announcement.<sup>38</sup>

*Ambiguity Regarding Legal Impact of 1953 Armistice.* Although not yet advanced directly in support of its military boundary zone, North Korea might plausibly argue that the Armistice signed at P'anmunjom in 1953 was legally and, in fact, merely a ceasefire and that, technically, a state of war still exists on the peninsula. Also, there is ample historical precedent for such an argument. Many other countries, including the United States, have established in the past, or presently maintain, maritime defense or war zones. However, there are several salient characteristics of the North Korean zone which distinguish this from other such zones and would, therefore, tend to undermine any significant reliance on historical analogies.

Maritime security or warning zones find their modern origins in the sea defense zones promulgated by Japan during the Russo-Japanese War of 1904.<sup>39</sup> The Japanese zones and those adopted by the United States during World War II extended well beyond the limits of their respective territorial seas. However, they primarily imposed limits on the transit of foreign vessels during certain hours or in particular areas without imposing a total ban on such passage. Also, these zones were generally established at the outset of hostilities and terminated promptly at the conflict's end.

A more recent example would be the Maritime Exclusion Zone established around the Falkland Islands by British naval, primarily submarine, forces during the 1982 war. Unlike the North Korean claim, the British announced, in advance, the exact position of the zone and initially limited its application to Argentinian warships and aircraft which were deemed a threat to British forces in the area of operations. Subsequently, the British prohibited all such operations with the imposition of a Total Exclusion Zone. However, this zone was imposed only during the actual conduct of military operations, and was lifted at the conflict's end, with the exception of a ban on Argentine military traffic within 150 nautical miles of the Islands (the Falkland Islands Protection Zone).<sup>40</sup> Further, pending a permanent settlement of the conflict, a "prior permission" regime remains in effect for Argentine civilian vessels or aircraft within the Zone.

Whatever the reasonable limits are as to scope, notice and duration of such an arguably permissible zone, the North Korean claim was announced 24 years after the cessation of open hostilities, and the degree of control envisioned is surely beyond the reasonable spectrum of legitimate measures which might be undertaken by a State which no longer faces imminent or actual hostilities. Moreover,

such vague "security" interests lend themselves to abuses which could significantly erode traditional high-seas freedom if allowed to go unchecked.

Other nonhostilities-related sea defense zones are peacetime geographic demarcations which are primarily designed to provide a division of military effort between contiguous allies to meet armed attacks. In other words, they establish areas of anticipated naval operations or areas of respective responsibility in the event of hostilities and are contingent upon such an occurrence.<sup>41</sup> In contrast, the North Korean east and west coast military boundary zones go far beyond this in attempting to enforce routine restrictions which should not be permitted in peacetime, even in an "era of violent peace."

The situation in this instance is further aggravated by the precarious status of the Northwest Islands. As previously indicated, although these islands are under South Korean administration, and the Armistice Agreement specifically prohibits the blockade, by sea or air, of the areas under the control of the other side, no sea lanes or aerial routes were provided to reach these outposts which lie well within 12 miles of the North Korean coast.<sup>42</sup>

### Analysis of U.S. Options

**General Considerations.** It is unclear under international law whether diplomatic protests alone are sufficient to thwart the unilateral actions of a coastal nation attempting to encroach upon the rights of all maritime nations to the unencumbered usage of the high seas. These troubling "creeping" claims through which nations attempted to dramatically expand their territorial seas, or to exercise previously unrecognized sovereign rights in offshore regions, were a key impetus to the convening of the conference which ultimately produced the 1982 LOS Convention. The drafters of the Convention sought to legitimize and codify the growing international consensus in favor of expanding territorial seas from the traditional "cannon shot range" of 3 miles to 12 miles, but to cap the gradual drift seaward at this limit.

Likewise, the provision of a contiguous zone extending an additional 12 miles beyond the seaward edge of the territorial sea provided recognition of limited law enforcement and territorial integrity concerns, while balancing these with the traditional high-seas freedom of navigation and overflight in those waters. Finally, the provisions providing for the establishment of an exclusive economic zone permitted States to exploit and capture maritime resources within an expansive area, extending as far as 200 nautical miles from the baseline. Prior to the development of this novel concept, the only legal mechanism available to establish such control was the attempted exercise of the sovereignty associated with territorial seas by extending these claims seaward. The carefully considered EEZ regime again attempted to achieve the delicate balance between the coastal

nation's resource needs and the interests of the remainder of States in minimal interference with the maritime common.

Security zones, such as the North Korean variant, are particularly troubling for they do not recognize even the limited, surface "innocent passage" rights in the territorial sea, but rather seek to ban foreign warships entirely. They also attempt to impose a permissive passage regime for nonmilitary vessels and aircraft. Not only this, but the *de facto* recognition afforded if these claims are not physically challenged would have precedential effect and, over time, might spur other, perhaps, even more expansive claims of this sort. This would undermine the careful compromises and balancing of interests which the 1982 LOS Convention represents and lead to the proliferation of the very evils which the Convention seeks to avoid.

*The U.S. Role in the Assertion of Navigational Freedoms.* The United States is a maritime power which presently depends, both for its own security and that of its interdependent allies around the world, upon the flexibility and speed of its forward deployed maritime and air forces. And, this dependence is not likely to lessen appreciably in the future. In the January 1988 report of the blue-ribbon Commission on Integrated Long-Term Strategy, *Discriminate Deterrence*, the authors stressed that for at least the next 20 years we will have an urgent need for "versatile, mobile forces, minimally dependent on overseas bases, that can deliver precisely controlled strikes against distant military targets."<sup>43</sup> Further, an identified long-term trend which bodes ill for such a strategy is "our diminishing ability to gain agreement for timely access, including bases and overflight rights, to areas threatened by Soviet aggression."<sup>44</sup> Thus, preservation of navigational and overflight rights is imperative to the rapid employment of our forward deployed forces which, in turn, ensure our very survival.

Likewise, in peacetime, the economic lifeblood of the Free World flows through the straits and waters of the world's seas on a daily basis. Further inroads into the freedoms of navigation and overflight could have the direst of consequences for ourselves and our allies.

Given the proven irascibility of the North Koreans, as pointedly demonstrated by the 1968 *Pueblo* incident and the downing of a U.S. Navy EC-121 aircraft the following year,<sup>45</sup> as well as the reality that alternative merchant routes and fishing grounds are readily available and more prudently used by commercial vessels, it is incumbent upon the United States, as the preeminent maritime power, to consistently and patiently ply these troubled waters in order to establish actual usage and to show peaceful contempt for the apparent North Korean "annexation" of international waters and airspace.

Further, as will be discussed below, it is this author's opinion that the objectives of the Freedom of Navigation Program will not be met by one-time transits.

Rather, these rights should be continuously asserted on a regular basis if they are not to atrophy and ultimately disappear.

*Adverse Possession of the Maritime Common.* The concepts of expanding territorial seas and the potentially more ominous unilateral restrictions on, or prohibition of, navigation and overflight are attempts to trespass upon the historically recognized rights of all nations to the high seas. An analogy in U.S. domestic law is the concept of "adverse possession," where, under specified circumstances, long-continued possession of land may result in the acquisition of title, by a trespasser, that is good even against the rightful owner of the property. An essential element of the claim is that the possession be adverse to the true owner. In the domestic context, statutes govern the period of time in which the rightful owner must act to recover his land.<sup>46</sup>

The social policy which appears to justify the rather severe consequences for the true owner is premised upon the societal utility in seeing that an asset is being used in a productive manner which benefits the larger society as a whole.

However, in order for the trespasser to obtain the recognized property interest, it is necessary that his possession be open, notorious and contrary to the interests of the rightful owner. In other words, if the occupation is permissive, as under a lease or easement or, by analogy, conferred by a treaty or agreement, it is not contrary to the ownership rights of the true owner and, thus, has no legal effect.

Of course, in the international system, there is no statutory delineation of the period of adverse maritime encroachment, nor an effective tribunal where the matter might be conclusively resolved. However, this concept might offer some useful insights in defending against excessive maritime claims. The observed practices in defending against such claims appear to have striking parallels.

First, diplomatic protests are initiated to publicly disabuse the offending coastal state of any notion that acquiescence by default will be conceded. By thus opposing the claim as adverse to the maritime interests of the community of nations, it is next incumbent upon the true owner of the rights being infringed upon, that same community, to exercise and demonstrate the continuing utility of, and resolve associated with, this universal interest.

And because custom and practice have such major impacts in the international legal system, especially in the absence of governing treaty provisions to the contrary, this exercise is particularly important. Otherwise, new customs and practices may evolve and be legitimized in the dynamic international legal system, thereby further eroding existing rights.

In the international community, the responsibility for the assertion of these rights falls squarely upon the shoulders of the leading maritime power, the United States, which, in effect, serves as a trustee for their effective enforcement.

## Hypothetical Regimen for Assertion of Navigational Rights

*Assessment of Korean Situation.* Before structuring forces which might be employed to assert navigational freedoms in the face of the North Korean claims, a brief summary of the contemporary Korean political situation and North Korean forces will be provided.

As anyone who has had the opportunity to visit the Korean village of P'anmunjom will readily attest, although there has been a ceasefire in effect for 35 years, tensions remain very high and volatile between the two sides. Attempts at reconciliation and reunification have been pursued in earnest by the South Korean government, but the only solution which the North seems willing to explore is capitulation by the South to P'yongyang's "enlightened" leadership. Unfortunately, prospects for compromise between these two polar regimes are not hopeful.

Although the factual setting of the opening scenario was hypothetical, the North's unsettling internal pressures are all too real. Given the characteristic unpredictability and demonstrated irritability of the North, extreme caution is warranted in planning an operation of this type if a conflagration is to be avoided.

Also, the potential military capabilities of the North should not be underestimated. North Korea possesses a very large army, a respectable air force and a formidable coastal naval punch. Further, these forces are tied together by an effective command, control and communications (C<sup>3</sup>) network, and capable of being triggered by an impressive indicators and warning (I&W) system. If they so desire, the North Koreans are fully able to conduct a spirited defense of their coastal waters, including the full extent of their military boundary zone.

*Structuring of Forces.* In selecting the forces needed to accomplish the FON objectives in this area, it is important to keep firmly in mind that the purpose of this program is the peaceful assertion of navigational rights, and not unnecessary provocation. However, while the intention of the United States is to conduct peaceful transits through the disputed areas, the reaction, particularly in the case of North Korea, may provide a very warm reception. Therefore, it is essential that unit and national self-defense considerations be incorporated into all aspects of the planning process.

At first view, it might seem that a combined ROK-U.S. naval force would be best suited for these operations. However, in this writer's opinion, this would be viewed as highly provocative, in and of itself, to the North. It appears that it would be better under these circumstances to conduct a separate, coordinated program, with the ROK Navy responsible for maintaining the vital sea lanes to the Northwest Islands within the west coast zone, while the U.S. Navy assumes responsibility for the challenge of the east coast military boundary zone.

Because the South already conducts these resupply missions on a routine basis, the real question which needs to be addressed is the proper composition of the U.S. forces which might be employed.

Use of a carrier battle group, or multicarrier battle force, might seem very appealing from a self-defense perspective, especially in light of the considerable threat posed by North Korea. But, in this writer's view, this is not a viable option due to the general perception of the carrier-centered forces as offensively oriented strike assets. The high-speed, short reaction aerial threat posed to the North Koreans by this sort of force would seem dangerously likely to elicit an attack, which might escalate, at worst, to renewed hostilities on the peninsula itself. A contrary view might hold that because these assets are so dear to the United States, and inherently capable of exacting a terrible price for such a misstep, the North would not challenge their presence. However, this assumes a rational decision-making model, and past North Korean conduct would not warrant this optimism.

In this author's opinion, aerial flights alone are insufficient for a meaningful challenge. First, the use of high-performance naval or air force aircraft would be perceived as a threat. Further, aircraft, by their very nature, are transitory and incapable of providing the duration of operations necessary to demonstrate credible resolve. Finally, the North Korean zone contains surface prohibitions as well, which must be contested. If overflight rights are to be asserted, it is recommended that this be accomplished independently of, but in a closely coordinated fashion with, the surface navigational exercises.

The clandestine warriors of the deep—submarines—are similarly rejected as an appropriate platform for this assertion proposal. Their effectiveness and very survival is predicated upon their "invisible invincibility." Surface transits by submarines in this area are rejected out of hand as both unnecessary and foolhardy. The conclusion drawn is that a surface force is essential, as well as best suited, for this mission, as possibly complemented by the referenced independent, coordinated overflight program.

Next, what units might comprise this SaG (surface assertion, vice action, group)? The recommended disposition would be centered around the impressive capabilities of an Aegis-class cruiser (CG-47), as supplemented by a *Perry*-class frigate (FFG-7), and a *Spruance*-class destroyer (DD-963). The Aegis' SPY-1A/B system possesses a substantial antiair warfare capability, as well as ample command, control and communications and early warning performance.

To counter the significant North Korean submarine threat, a *Spruance*-class ship would provide adequate antisubmarine warfare protection for the group. To back up the other ships in the event of casualties, or to provide an additional level of force protection, the ASW and AAW capabilities of the *Perry*-class frigate make it an excellent candidate for this role.

In this force mix, the Harpoon missile-equipped ships would provide long range, antisurface warfare protection against the potent North Korean missile and torpedo-firing fast-patrol boats. Additionally, all three ships are capable of carrying and supporting LAMPS helicopters, which would add critical airborne early warning and stand-off ASW capability to the force. With the exception of the exercise of “innocent passage” within a territorial sea,<sup>47</sup> such aerial reconnaissance is fully consistent with high seas freedom of operations and in keeping with the desired defensive posture.

In the alternative, should greater capability be desired, a larger force might be readily found in the form of a battleship surface assertion group (BBSaG). This would provide additional punch to the group, especially in the area of ASUW. However, with the advent and proliferation of stand-off, antiship cruise missiles, the additional capabilities of this grouping are not necessarily decisive. Nevertheless, from a psychological viewpoint, the BBSaG would give greater pause for reflection and might intimidate would-be aggressors.

Air cover for the group would be optimally provided by a carrier battle group operating in associated support in waters well clear of the disputed area. The second choice would be to provide USAF, USN or USMC aircraft cover from nearby Japanese bases, although political and diplomatic considerations might preclude this. As a last resort, USAF or ROKAF assets from the Republic of Korea could furnish this protection, but the perceived escalatory potential of this option would seem to militate strongly against its adoption.

**Concept of Operations.** Once formed, the hypothetical SaG should transit the area in such a fashion so that the planned intended movement (PIM) of the formation is on a course which opens the North Korean coast as it transits through the military boundary zone. For example, the ships might get underway from Pusan and proceed north remaining within 25–40 miles of the South Korean coast. Upon entering the military boundary zone, the formation could turn northeast and proceed through the area until reaching the boundary of the zone. If the ships entered from the north, the initial track would be slightly southeasterly so that a gradual opening of the range to the coast could be achieved. The initial transits might be initiated at a range of 40–50 miles from the North Korean coast to provide the force with ample “sea room” in which to acquire and engage any detected threat. Further, this would minimize the provocational potential of the initial transit. Assuming that initial operations were successful, and relying upon gradual desensitization to these operations, successive transits might gradually close the coast.

However, under no circumstances is it recommended that these forces enter the claimed 12-mile territorial sea in order to assert “innocent passage” rights. In this writer’s opinion, such an attempt would virtually guarantee an engagement. The legal justification for this nonassertion of the rights of innocent passage

would be couched in terms of the recognition of the state of belligerency existent between the North and the United Nations Command in the South. Diplomatic protests of the excessive baseline claims should expressly reserve the rights of innocent passage through the territorial sea. However, operational realities dictate that, as a practical matter, these rights have been suspended, but not extinguished, by the prolonged state of belligerency which the Armistice secured. Further, with the concurrence of South Korea, their Northwest Island resupply missions should be retroactively reported on a regular basis to document innocent passage transits on the west coast. To avoid the appearance of inconsistency, it may be pointed out that these transits are provided for within the implied terms of the Armistice Agreement.

The timing of these FON assertion exercises is a critical factor which warrants careful consideration by the operational planner. Obviously, these adversarial, but not purposely provocative, operations cannot take place in a vacuum. A propitious time to initiate the limited, hypothetical FON operations outlined, so as to minimize unexpected North Korean reaction, is to make it a part of regularly scheduled U.S. operations in the area, such as the annual "Team Spirit" exercise. This appearance of U.S. naval forces is a routine event which would not arouse undue apprehension on the part of the North, and it appears that FON Program goals are compatible with exercise objectives.

***Risk/Benefit Analysis.*** It is clear that the risk in conducting these operations would be substantial, but the steps recommended, if implemented, should ameliorate any legitimate perceptions of provocation on the part of the North Koreans. In light of the sensitivity of this area, the political decision to proceed with this assertion of navigational rights operation would be very difficult. However, in this author's opinion, there are compelling reasons which would justify the risks entailed.

One important reason why the North Korean claims need to be resisted through physical assertion operations is to maintain the integrity and credibility of the FON Program. In light of the high risk/significant threat scenario outlined, it is hoped that North Korean claims would not be relegated to the "too hard" category. It is one thing to challenge the 200-mile territorial sea claim of a relatively benign South American neighbor, for instance, and quite another to face the unpredictable consequences of an encounter with the consistently erratic, aggressively minded North Koreans. This is not meant to imply that all FON operations undertaken to date have been "milk runs." Quite to the contrary, the recent Black Sea confrontation, the ongoing dangerous Persian Gulf operations, and the repeated forays below the Sidra "line of death" would quickly dispel any such notion. However, it is essential that all excessive claims be routinely challenged in a deliberate, albeit cautious, manner. The adoption of this proposal would pay handsome dividends in the critical Northeast Asian area.

In this instance, a close ally's rights are directly threatened by the North Korean claims. The North Korean military boundary zone represents renewed pressure on the South's efforts to maintain the lifeline to the Northwest Islands and could ultimately serve as a pretext for an attack upon the resupply vessels and the islands themselves.

While not particularly significant in terms of population, natural resources or potential economic development, these islands are of incalculable political significance to both countries. These outposts are the exposed nerves of South Korean sovereignty and territorial integrity.<sup>48</sup> By asserting navigational freedoms within the North Korean east coast military boundary zone, we not only uphold important international principles which are essential to our own security, but also voluntarily shoulder the burden with our steadfast friends in the South, who must, of necessity, regularly run the gauntlet on the west coast. This should alleviate significant pressure on the South. Similarly, Japan has chafed at the North Korean actions and would undoubtedly welcome reasonable efforts to check the bullying thrust of these claims, the effects of which fall heavily on them. The reaction from the mainland is difficult to gauge, but China is unlikely to protest this effort, due to estrangement from Kim Il-Sung's regime. While no reaction is the expected and desirable response, the Chinese will see this as a sign of renewed U.S. resolve in the region. The Soviets would probably align verbally with P'yongyang.

### General Recommendations Regarding the FON Program

In this writer's opinion, the following issues dealing with the general conduct of the FON Program should be addressed to ensure the continuing vitality of this essential component of national defense.

***Emphasis on Assertion vice Provocation.*** The purpose of the Freedom of Navigation Program is to conduct peaceful challenges to unlawful encroachments upon the maritime commons by coastal nations and to stem the attempted seaward expansion of national sovereignty. While these challenges, of necessity, normally involve Department of Defense vessels or aircraft in most instances, it is essential that operational planners understand and maintain the true innocent and unprovocative nature of these operations.

Prevailing domestic and international public perceptions of the FON Program seem to be that the program is usually employed as a subterfuge for setting up engagement scenarios with nations that have aroused our ire over unrelated matters. Although understandable, these conclusions are dead wrong and entirely at odds with the true spirit and nature of this program.

**FON Program Results Should be Declassified and Published.** The records of actual FON assertion operations are presently classified. While prospective FON projects need this protection for obvious security of own forces considerations, the same case cannot be made for past operations.

If one accepts the adverse possession analogy that is proffered, the actual successful challenge of an excessive claim is of little practical use if the international community and, conceivably, even the nation challenged are not aware of it. FON activities are not aimed simply at our adversaries, but are asserted worldwide against friend and foe alike. Unfortunately, because of the classification level, the only public knowledge of these activities focuses on those instances where a state chooses to respond in a hostile manner and the media pick up the trail.

While the annual publication of FON results might annoy our friends and further antagonize our foes, it would serve several very positive, important functions. First, it would demonstrate the evenhanded implementation of this program. Also, it would publicly document actual usage of the disputed areas, thereby demonstrating active nonacquiescence in the face of an excessive claim. The inherent balance and peaceful intentions of the program would be evident and avoid the “confrontational only” reporting bias, for which the media cannot be blamed in light of the security restrictions.

**Public Education.** Naval officers, and others with expertise in this field, need to shoulder the responsibility of educating the public and policymakers on the important issues at stake in this arena and on the FON Program’s peaceful aims in the face of these excessive and illegal maritime claims. The release of historical FON assertion data would contribute immeasurably to this process, which would hopefully culminate in public understanding, appreciation and support of this vital program.

A recent example is illustrative of the present problems in this area. In a front-page article reporting the February 1988 “bumping incident” in the Black Sea, a respected reporter commented: “The United States destroyer *Caron* and cruiser *Yorktown*, sailing 7 to 10 miles off the Crimean peninsula Friday, had entered the 12-mile limit claimed by the Soviet Union. The Pentagon said the exercise was part of a Navy policy of asserting the right of passage in waters exceeding the 3-mile territorial limit [sic] recognized by the United States.

“When the American ships failed to respond to an order to leave, they were scraped by Soviet warships. . . .”<sup>49</sup>

Several problems leap out of this text. First, this is not a Navy, but a national program ordered by the President. Second, although the United States then had a 3-mile territorial sea, we recognize the right of a nation to establish up to a 12-mile territorial sea. That is not the issue! What was being asserted here was “innocent passage,” which is preserved within the confines of a nation’s territorial

sea. In fairness to the reporter, it cannot be determined whether the errors emanated from him or from the Pentagon briefer. In any event, the message was garbled in transmission, and this probably served to reinforce public perceptions that the FON Program is merely a convenient vehicle for antagonizing the Soviets. If nothing else, it highlights the need for better dissemination of information about this program and the need for a concerted public education effort.

Although there is substantial risk involved, the United States as trustee for the rightful owners of the maritime commons, the members of the international community of nations, should conduct physical, peaceful challenges to the excessive maritime claims represented by the North Korean military boundary zones. By patiently, but firmly, asserting these rights, we serve our national strategy, which is built upon three pillars; deterrence, forward defense, and alliance solidarity.<sup>50</sup> We thus defend ourselves and our allies, while also ensuring that the interests of all nations in unencumbered access to these waters and the airspace above are safeguarded.

To build long-term public confidence in and support for the overall goals of the FON Program, it is recommended that historical FON assertion data be published and that both uniformed members and the general public be educated as to the critical role which this program serves in carrying out our maritime strategy and, consequently, our national military strategy.

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Commander Boma was on the staff of the Naval War Colleges Center for Naval Warfare Studies at the time this article was first published.

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## Notes

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3. *Id.*
4. *Id.*
5. U.S. Navy Dept., *The Commander's Handbook on the Law of Naval Operations*, Naval Warfare Publication 9 (hereinafter NWP 9) (formerly NWIP 10-2), para. 1.4.2, at 1-5.
6. U.S. President, Proclamation of 27 December 1988, "Territorial Sea of the United States," *Weekly Compilation of Presidential Documents* 1661 (2 January 1989).
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9. *Id.*, Art. 33, at 11.
10. *Id.*, Arts. 55-75, at 18-27.
11. *Id.*, Art. 87, at 30-31.
12. NWP 9, paras 1.4.3-1.4.3.1, at 1-8, and 1982 LOS Convention, Arts. 46-54, at 15-18.
13. *Id.*, para. 2.3.4.1, p. 2-4, and 1982 LOS Convention, Art. 53, at 17.
14. *Id.*, para. 2.3.3.1, pp. 2-3 to 2-4, and 1982 LOS convention, Art. 52, pp. 16-17.
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19. FBIS, *supra* n. 2, at 5-6.

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22. 1982 LOS Convention, Art. 5, at 3.

23. *Id.*, Art. 7(1), at 4.

24. *Id.*

25. *Notice to Mariners 39/86*, at III-2.32.

26. 1982 LOS Convention, Art. 10, at 4-5.

27. *Id.*, Art. 8, at 5.

28. Park, *supra* n. 20 at 867, n. 3.

29. *Maritime Claims Reference Manual*, at 2-252 and 1982 LOS Convention, Art. 3, at 3. (Provided for a 12-nautical mile territorial sea drawn "in accordance with this convention.")

30. *Id.*

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43. U.S. Dept. of Defense, Report of the Commission on Integrated Long-Term Strategy, *Discriminate Deterrence* (Washington: U.S. Govt. Print. Off., January 1988), at 3.

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45. Park, *supra* n. 20 at 869.

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49. Taubman, *Moscow Blames U.S. for Incident Between Warships in Black Sea*, The New York Times, (14 February 1988), at I:4-5.

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## Chapter 16

# America's Maritime Boundary With the Soviet Union\*

John H. McNeill

**D**uring last year's Washington Summit meetings between President Bush and Soviet President Gorbachev, a historic agreement was signed by which, for the first time, the United States and the Soviet Union registered their mutual accord on a maritime boundary.<sup>1</sup>

This new agreement was signed on 1 June 1990 by Secretary of State Baker and Soviet Foreign Minister Shevardnadze, and both signatories have been fully applying its provisions since 15 June 1990.<sup>2</sup>

Accordingly, the two nations have now established a maritime boundary for all purposes. The new boundary extends from the North Pacific Ocean through the Bering Sea and Straits into the Chukchi Sea, and terminates in the Arctic Ocean after traversing a distance of some 1,800 nautical miles, making this the world's longest maritime border.<sup>3</sup>

The successful conclusion of negotiations between the two parties was roughly contemporaneous with the widening of contacts and cooperation between them in the region; examples of this are the recent agreement on cooperation in maritime search and rescue, the agreement establishing a Joint Regional Commission for the Bering Straits area, and the agreement concerning mutual visits by inhabitants of the Bering Straits region.<sup>4</sup> However, the maritime boundary agreement, unlike the others, was brought to fruition as the result of discussions between the neighboring governments that began almost ten years ago—during the difficult years of the Brezhnev era.

As every American schoolchild knows, Alaska was purchased by the United States from Czar Alexander II in 1867. "Seward's Folly," as the \$7,200,000 acquisition was once derisively known, has long since been recognized as a remarkable coup by the United States. What is not often remembered, however, is that the 1867 Convention of Cession itself contained no provisions relating to establishment of a boundary *per se*. Instead, that agreement explicitly provided only for the cession by Russia to the United States of all territory and dominion possessed by the Czar "on the continent of America and in the adjacent islands,"

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and specifically established geographical limits solely with respect to the territory ceded.<sup>5</sup>

Even though the western limit of Alaska as defined in the 1867 Convention was not clearly identified as a boundary line, at least one authoritative commentator so described it just after the turn of the century;<sup>6</sup> at a minimum, it certainly performed the pragmatic function of a line of allocation, a cartographic device used to simplify description of the territory conveyed: i.e., Russia ceded to the United States everything it had east of the line and nothing west of the line.<sup>7</sup> Since in 1867 the concept of dominion over adjacent continental shelf and seas beyond one marine league from the appurtenant coast was not recognized by international law, it is not surprising that no provision for a maritime boundary was made in the original Convention of Cession.

During the ensuing years, and especially in recent decades, the line of allocation came, perhaps inevitably, to be understood by many as the practical equivalent of a boundary, i.e., as a line of division for maritime jurisdiction as well as land territory. Indeed, by the time the negotiations leading to the recent agreement were underway, the U.S. had come to regard the 1867 Convention line as the maritime boundary, and with respect to fisheries matters sought Soviet agreement to this position.<sup>8</sup> Prior to the 1970s, the question of whether there existed a maritime boundary was principally of theoretical significance, since up to that time both the U.S. and U.S.S.R. had claimed only the customary three nautical mile territorial sea (with twelve nautical mile fishing jurisdiction from 1964), and the U.S.S.R. had claimed a territorial sea out to twelve nautical miles. But in that decade, following the lengthy negotiations which resulted in the 1982 United Nations Convention on the Law of the Sea, the world community recognized as a new principle of international law the concept of the Exclusive Economic Zone (EEZ). The Soviet Union initiated the regulation of a two hundred nautical mile fisheries zone in 1978 (and of its EEZ in 1976, pursuant to which it assumed the right to regulate fishing, marine scientific research, marine pollution, and certain other activities within its zone, which extends seaward as far as two hundred nautical miles beyond its territorial sea). The United States established a two hundred nautical mile fisheries management zone in 1977 (declaring its EEZ in 1983, and its own twelve nautical mile territorial sea in 1988). As a result of both nations having established these opposed fisheries regimes, it became evident that in a number of places the zone claimed by one side overlapped that claimed by the other. Consequently, the two governments agreed to discuss the exact location of the 1867 line. Thus, it was the immediate problem of fisheries enforcement that led in the late 1970s to the convening of negotiations which ultimately resulted in the 1990 Agreement on the Maritime Boundary.<sup>9</sup>

Early in these discussions it became apparent that the two sides had traditionally employed different cartographic techniques to depict the 1867 Convention line.

U.S. practice had been to use orthodromic lines, arcs of great circles (which best approximate the shortest distance between points on the surface of the earth). Orthodromic lines appear straight on a conic projection of the Earth. Conversely, Soviet practice had been to use the rhumb line, or loxodromic curve, which is a line of constant compass bearing that appears straight on a mercator projection. In addition to these technical differences, there was disagreement over the geographic location of one of the points described in the 1867 Convention that is a basis of reference for drawing the Convention line. These differences resulted in assertions by each side that a certain chord-shaped area in the Bering Sea covering some 18,000 square nautical miles of ocean was on *its* side of the Convention line.<sup>10</sup>

As a predictable result of these overlaps, the fisheries authorities of both governments became involved, attempting to enforce their respective regulatory regimes throughout the entirety of what they conceived to be their own EEZ—including overlap areas. Indeed, some portions of the Soviet EEZ extended across the 1867 line, although it had appeared in 1977 that both sides were intending to use that line as the outer limit of their respective fisheries enforcement jurisdiction, at least with regard to areas lying within two hundred nautical miles of both sides' coasts.<sup>11</sup>

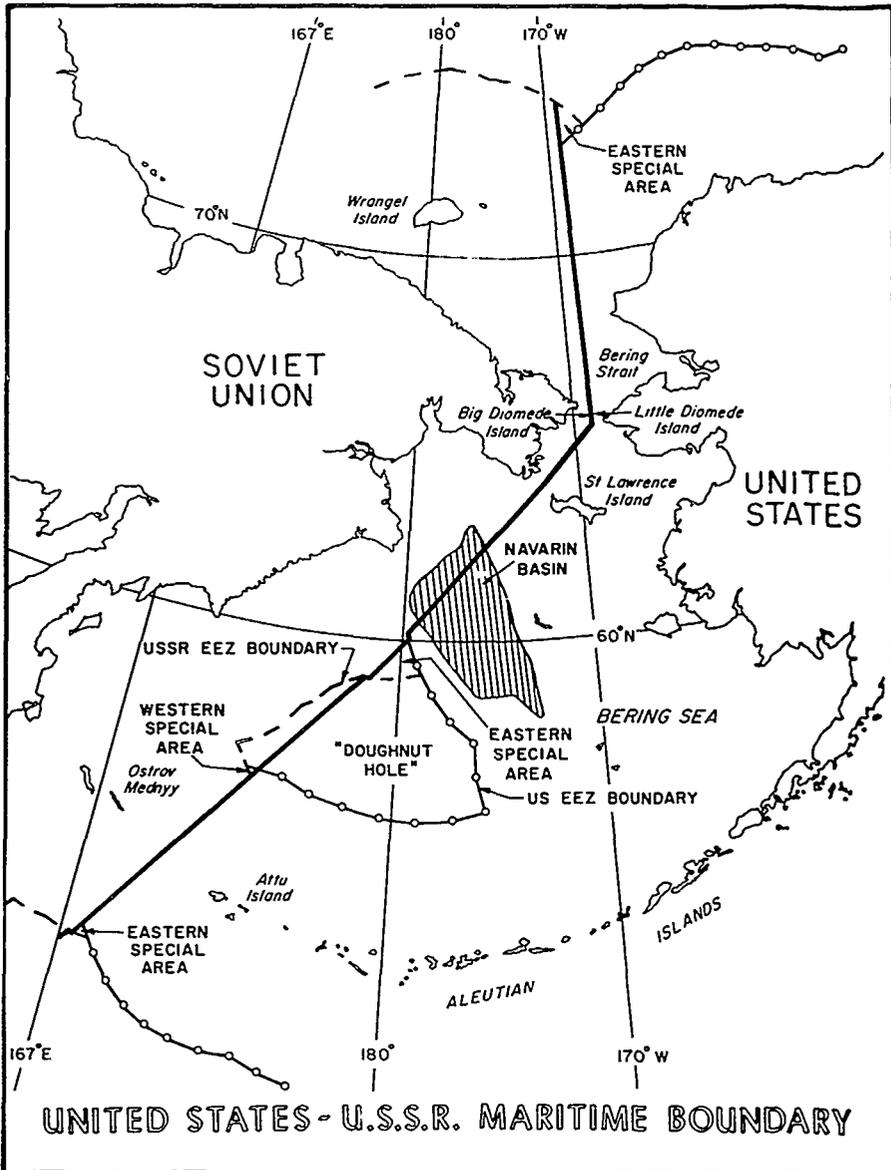
Tensions were inevitably created, an example of which is an incident in August 1986. At that time, two Soviet ships threatened and tried to stop the Seattle-based fishing boats *Katie K* and *Aleutian Mariner* in the Bering Sea, in an area of EEZ overlap some 160 miles west of St. Matthew Island. The two U.S.-flag vessels fled the area, which contains rich Tanner crab fishing grounds, leaving behind expensive gear including some 150 crab pots worth perhaps \$45,000; they were followed by the Soviet vessels for a reported one hour and forty minutes before the chase ended. In response, the 378-foot U.S. Coast Guard cutter *Midgett*—armed with two .50 caliber machine guns, a bow-mounted five-inch gun, and carrying an HH-52 helicopter—was assigned to reenter the disputed area and escort the *Katie K* and *Aleutian Mariner* back to collect their equipment, a task accomplished without further trouble.<sup>12</sup>

Several confrontations of this kind have occurred in recent years and threatened to become serious irritants in the relationship between the U.S. and U.S.S.R. Now, however, both sides have agreed on a fundamentally logical basis for fishing rights and responsibilities in the area. This represents a welcome advance, and reinforces the progress reflected in the recent Governing International Fishery Agreement signed by the two governments on 22 June 1988 and approved by Act of Congress later the same year.<sup>13</sup>

Separate issues are generated by the existence of an area of high seas in the central Bering Sea that is literally surrounded by the EEZs of the United States and Soviet Union but is included in neither, and is known as the "Doughnut Hole." This area, in the heart of the world's most productive fishing grounds,

contains vast but declining stocks of valuable bottomfish, especially pollock. The annual pollock yield of the Doughnut Hole, two million metric tons, is equal to that from U.S. Bering Sea EEZ waters in their entirety.<sup>14</sup> The degree to which coastal states may protect migratory species such as pollock from third-party fishing on the high seas—such as by Japan and Poland in the Doughnut Hole—is as yet unresolved as a matter of international law.<sup>15</sup>

Another important factor for both governments was the need to delimit clearly those areas of their respective continental shelves lying beyond two hundred



nautical miles from the coasts of either of them. The continental shelf in the Bering sea is the largest such area on Earth, and in addition to being unusually rich in crab and shellfish is also believed to be a potentially important area for hydrocarbon exploitation.

One region of the Bering Sea continental shelf is of particular note and can serve to illustrate the complications for hydrocarbon exploration that have been generated by the boundary dispute: the Navarin Basin of the Bering Sea, a continental shelf zone roughly the size of Ohio. Lying some 250-300 miles off the Alaskan coast, it contains an EEZ overlap area roughly twenty-five miles wide and 225 miles long. This previously disputed zone lies on the western side of a 43,000 square-mile tract believed to contain significant oil and gas deposits. Water depths in the area range from 230 to 7,900 feet, although most of the shelf lies under less than six hundred feet of water.<sup>16</sup>

In March 1984, interest in the hydrocarbon potential of the basin was heightened by the discovery of a plume of natural gas spewing from the ocean floor almost in the middle of the then-disputed western portion of the tract.<sup>17</sup> Soviet interest in oil in the region remained considerable, as had been demonstrated in an unusual manner during the summer of 1983 when a Soviet TU-95 "Bear" aircraft buzzed a test well some seventy-five miles east of the U.S.-claimed line and comfortably within the U.S. EEZ.<sup>18</sup>

In 1984, the U.S. Department of the Interior requested bids for potentially lucrative oil leases in the Navarin Basin tract. The U.S. Geological Survey had identified three geologic structures in the sale area that might contain oil. Estimates of reserves in the twenty-eight million acre tract had indicated that the Navarin held 1.9 billion barrels of oil under waters less than two hundred meters in depth, and also 7.5 trillion cubic feet of natural gas in similar water depths<sup>19</sup>—substantial by "lower forty-eight" standards but still only a fraction of the Prudhoe Bay reserves on Alaska's North Slope. Because of the boundary dispute, the Interior Department placed in escrow the bids received for blocks of the tract lying in the disputed area, and no exploration was permitted to take place in that part of the Navarin. Finally, in December 1988, Interior returned some \$30 million in escrowed funds to Shell, ARCO, and AMOCO, at their request, because leases for the seventeen blocks in the disputed area for which bids were received had not been issued, due in part to continued uncertainty about the boundary.<sup>20</sup>

Now that a boundary settlement has been achieved, prospects have improved for U.S. and Soviet joint ventures in oil exploration and, later, exploitation in the Bering and Chukchi Seas. The Navarin Basin is again expected to become the focus of interest, although no commercial discoveries have as yet been made.<sup>21</sup>

Offshore drilling in the outer continental shelf off Alaska is not affected by the Bush Administration's decision in June 1990 to postpone offshore drilling in

much of the rest of the U.S. continental shelf for up to ten years,<sup>22</sup> and as a result it appears inevitable that U.S. oil exploration will become increasingly active in the North. Yet, as noted above, the Bering Sea is one of the world's most productive fishing grounds, attracting commercial salmon, pollock, and crab fishermen. The fear of environmental damage from oil spills has created concerns in Alaska and elsewhere in the region that these resources could be seriously damaged. Indeed, the Interior Department's program for leasing oil and gas tracts off the Alaskan coast—including outer continental shelf areas of the Navarin Basin—was enjoined for a time by a federal court on the grounds that the sale of such leases could result in interference with native Alaskan hunting and fishing rights. However, the U.S. Supreme Court disagreed with lower federal courts and in 1987 removed these legal barriers to the sale of leases, deciding that state protection of such native rights did not apply to the outer continental shelf.<sup>23</sup>

The dramatic development of the international law of the sea during the post-World War II era has resulted in the establishment of national rights to EEZs and the continental shelf. The first clear assertion of the principle that the contiguous continental shelf belongs to the coastal State was made by President Truman's Proclamation of 28 September 1945.<sup>24</sup> This was followed by a number of similar claims on the part of many other nations. By 1958, the international community confirmed, in the Convention on the Continental Shelf, the concept that coastal states enjoy certain rights over their contiguous shelves.<sup>25</sup> By 1969, the International Court of Justice was able to describe these coastal State rights as "inherent," in its decision in the *North Sea Continental Shelf Cases*.<sup>26</sup>

The 1982 United Nations Convention on the Law of the Sea also indicates that the coastal state enjoys sovereign rights over all natural resources of its EEZ, including sea-bed resources.<sup>27</sup> However, the well-known fact that the United States is not a party to that agreement does not in any way create a difficulty for the U.S. in asserting rights to its contiguous continental shelf. This is because the "inherent" rights recognized by the International Court of Justice is part of customary international law and as such can be claimed by every nation without regard to the Law of the Sea Convention—which in any case is not yet in force since it has not yet attracted the number of ratifications required. A second basis for its shelf claim is available to the United States in that the EEZ is also understood by the U.S. to be a right recognized under customary international law. As such, it exists separately and apart from the Law of the Sea Convention in the same way that the U.S. views many other important provisions of that convention, such as those relating to navigational matters, the twelve-mile breadth of the territorial sea, and the right to exploit mineral resources of areas of the sea bed beyond the limits of national jurisdiction.<sup>28</sup>

As a result, the U.S. and the U.S.S.R. have now agreed, as between themselves, that neither will make any claim to the continental shelf in the area beyond its maritime boundary with the other; that is, each side's shelf will be

delimited by that boundary. Although the more usual practice in settling maritime boundaries of opposite States has been to agree upon the median line, i.e., a line equidistant from the nearest points of the opposing States' shores, this has not been a consistent international practice. For example, the 1974 Agreement between India and Sri Lanka on the Boundary in Historic Waters employed a modified median line to take into account "historical" factors. Equitable principles are always relevant, whether for territorial waters, EEZ, or continental shelf. However, the primary rule of international law is simply that delimitation should be made by agreement between the involved nations.<sup>29</sup> U.S. policy mirrors these considerations: delimitations should be accomplished by agreement in accordance with equitable principles.<sup>30</sup>

As we shall see, in the 1990 U.S.-U.S.S.R. Agreement the parties did not choose to draw an altogether new maritime boundary. Instead, they elected to confirm the basic and historic division set out in the 1867 Convention, and to employ that basic line (with some relatively slight geographic diversions) as their maritime boundary for all purposes, including delimitations between themselves of the continental shelf and EEZ.

Lurking in the background of the economic issues which arose from the overlapping claims in the Bering Sea, strategic questions have always been present. Certainly, access to the Bering Straits has for some time been an important strategic requirement for the navies of both the U.S. and U.S.S.R. Of course, the lack of an agreed maritime boundary in the area did not serve as a major disincentive to otherwise necessary operational activities (e.g., the U.S.-Allied PACEX '89 exercise in nearby North Pacific waters, the largest series of joint-combined exercises in the area since World War II),<sup>31</sup> if only because, beyond the territorial sea, delimitation has no effect upon navigational rights and freedoms. Nevertheless, it is clear that the confirmation of the location of the boundary has the effect of enhancing strategic stability between neighbors, and creating the conditions necessary to strengthen that relationship. As Robert Frost has well noted, "good fences make good neighbors."

The U.S.S.R. had some additional reasons why it wanted to resolve the boundary question. The Soviets were reportedly quite concerned about establishing negative precedents which might affect the outcome of similar negotiations with the Norwegian government involving a disputed portion of the Barents Sea, which controls routes to some of the most important and largest naval bases in the Soviet Union.<sup>32</sup> The Kola and White Sea coasts are currently the best basing areas for Soviet SSBNs, and the adjacent Arctic waters constitute the optimal operational concealment and launching stations for these strategic forces. Thus a majority of Soviet SSBNs, some sixty percent of the total force, are based here.<sup>33</sup>

Intimately related to this capability is the reality that among the most important Soviet naval objectives in any future world conflict would be the seizure of lines

of communication linking the Arctic Basin with the North Pacific. Such control would enable Soviet Northern Fleet and Pacific Fleet submarines to reinforce each other without interference along interior lines of operation.<sup>34</sup> Soviet naval literature, such as the influential *Morskoy sbornik*, emphasizes the key importance of controlling access to chokepoints such as the Bering Straits.<sup>35</sup> Soviet capabilities to project naval forces through this region are undoubted.<sup>36</sup> Moreover, modern Soviet SSBNs no longer need to run the gauntlet of U.S. or NATO antisubmarine warfare barriers, since those in the Northern and Pacific Fleets have long-range SLBMs which permit them to patrol in bastions close to the Soviet northern coasts.

Arctic bastions, of course, offer the additional protection of shallow waters, reducing the advantage enjoyed by U.S. SSNs, as well as of partial ice cover, which limits antisubmarine warfare operations by aircraft or surface vessels.<sup>37</sup> The ice pack also provides some protection from sea surveillance, and its ambient noise and currents interfere with detection by underwater electronics (sonar), acoustics (sound), and magnetic anomalies. The *Typhoon* class SSBN was designed specifically for operation in ice-covered waters.<sup>38</sup> This capability is now challengeable by the newer-production *Los Angeles*-class attack submarines starting with the USS *Chicago* (SSN-721), commissioned in 1986 and fitted with bow-mounted retractable diving planes and other features for under-ice operations.<sup>39</sup>

The new boundary agreement confirms that the U.S. has succeeded in maintaining uneroded access to the Bering Straits and preserving its freedoms to operate in the Bering and Chukchi Seas, as well as in the North Pacific and Arctic Oceans. This reinforces standing U.S. Arctic policy, which lists as a primary requirement the protection of essential U.S. security interests in the Arctic region.<sup>40</sup> Indeed, the Arctic Research and Policy Act of 1984 makes clear that, in the view of Congress, "as the Nation's only common border with the Soviet Union, the Arctic is critical to national defense."<sup>41</sup> In conformity with this principle, the U.S. was mindful that no precedent be set in the negotiations that would support the unilateral claims advanced by Soviet theorists to a "sector" of the Arctic stretching from their northern coasts to the pole itself. Although it is unclear whether the Soviet Union has ever officially embraced this theory,<sup>42</sup> the U.S. has consistently taken care to oppose all such claims, including those made by allies such as Canada. It need hardly be emphasized that high seas freedoms to operate on, over, and under the ocean areas of the Arctic are of paramount importance to the U.S. strategic posture, whether for deployment of SSBNs or for overflight by B-52s and other U.S. strategic forces.

What does the new agreement specifically provide? First, it makes clear that the new boundary will generally follow the course of the 1867 line of division, pursuant to the desire of the parties to "split-the-difference" between their competing projections of the 1867 line in the Bering Sea and the consequent

overlaps of EEZ areas.<sup>43</sup> Adoption of such an equitable and pragmatic approach led to results that have been welcomed by observers such as the chairman of the American Section of the International North Pacific Fisheries Commission, Mr. Clement Tillion, who observed, “neither side can say they beat anybody out of anything. It’s a very nice agreement.”<sup>44</sup>

The new agreement defines the limits within which each signatory may exercise territorial sea or EEZ jurisdiction in those areas where its claimed twelve nautical mile territorial seas or two hundred nautical mile EEZ would otherwise overlap the other’s or remain in dispute. It also delimits, as between the parties, the continental shelf jurisdiction beyond two hundred nautical miles from their respective coasts that they may exercise in accordance with international law, in the Arctic Ocean, Bering, and Chukchi Seas, and a portion of the North Pacific Ocean.<sup>45</sup>

As President Bush stated in his letter transmitting the new agreement to the Senate for its advice and consent to ratification: “I believe the agreement to be fully in the United States interest. It reflects the view of the United States that the maritime boundary should follow the 1867 Convention line.”<sup>46</sup>

Indeed, this is made clear in Article 1 of the agreement. Article 1 also contains the explicit statement that each party is to respect the boundary as limiting its coastal state jurisdiction. This means of course that neither side will attempt to manage offshore resources in areas on the opposite side of the boundary.

Article 2 of the agreement contains the legal description of the boundary. It is essentially the same as the line of allocation set forth in the 1867 Convention. Thus, the boundary proceeds from the point in the Bering Strait midway between Big (U.S.S.R.) and Little (U.S.) Diomed Islands due north as far as permitted under international law—for example, the U.S. EEZ terminates in the Arctic Ocean at about seventy-four degrees north latitude, close to the southern edge of permanent pack ice. (U.S. continental shelf jurisdiction may extend further north: see map.) South of the Bering Strait, the boundary extends generally southwestward to 167 degrees east longitude, terminating southwest of the Aleutian Island chain at a point lying slightly over two hundred nautical miles from both Soviet and U.S. territory.

Article 3 is a novel provision, and the first example known of the technique employed: the transfer by each party to the other of the right to exercise EEZ-derived sovereign rights and jurisdiction (which only the transferor would otherwise have been entitled to exercise) in “Special Areas” established by the agreement. Why was this done?—to avoid enlarging the high seas area of the “Doughnut Hole.” This would have been the outcome had the parties failed to take into account those cases in which either of them had (or could have) asserted EEZ-derived rights across the 1867 line in locations where there were no overlaps with the EEZ of the other party. The result would have been the cutting off or

prevention of EEZ claims in these areas, thus placing the fisheries resources therein outside the jurisdiction of both parties.

The map shows that of the Special Areas created, several, designated "Eastern," involve Soviet-origin areas and one, designated "Western," involves an area of U.S. origin. It is clear that the transfer of such rights and jurisdiction is complete for the duration of the agreement. Moreover, in effecting such transfer, neither side is ceding any part of its EEZ to the other, nor is either side extending its own EEZ. To emphasize the non-EEZ nature of the Special Areas, each administering party will be obliged to ensure that its laws, legislation, and charts distinguish such areas from its EEZ.

Of final note, Article 6 calls for any dispute over interpretation of the agreement to be resolved by negotiation or other peaceful means agreed between the parties. This represents a step forward in terms of the willingness of the two nations to contemplate various means of dispute settlement. In most modern U.S.-Soviet agreements—for example, those in the sphere of arms control—disputes have been confined to bilateral diplomatic channels, usually within a consultative body established for the specific purpose. The mutual willingness shown in the boundary agreement to give consideration to the full range of mechanisms available to deal effectively with disputes (including, at least in theory, both arbitration and judicial settlement) is a positive development.

What happens next? To complete the process, each side must ratify the agreement through its own constitutional requirements. For the U.S., this will involve the advice and consent of the Senate;<sup>47</sup> for the U.S.S.R., the Supreme Soviet must signify its assent. During the interim, however, the agreement will remain in force provisionally, perhaps for many years, pursuant to the Baker-Shevardnadze Exchange of Notes. Meanwhile, the world's longest maritime boundary can be expected to gain recognition as powerful, practical evidence of the strengthened stability that results from the positive application of international law by the U.S. and U.S.S.R. to the solution of mutual problems.

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Mr. McNeill held the Charles H. Stockton Chair of International Law at the Naval War College during the 1990-91 academic year when this article was first published.

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## Notes

1. Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, with Annex, signed at Washington, June 1, 1990. U.S. Senate, 101st Cong., 2d Sess., Treaty Doc. 101-22. Reproduced in I.L.M. 942-945 (July 1990), (hereinafter cited as Treaty Doc. 101-22).

2. Exchange of Notes between Soviet Foreign Minister Shevardnadze and Secretary of State Baker dated June 1, 1990 (unpublished). The agreement has been submitted for advice and consent of the Senate to its ratification (but see also note 47, below). The Exchange of Notes establishing interim application is consistent U.S. practice, e.g., with regard to the maritime boundary agreements with Cuba, signed 16 December (and subsequent Exchange of Notes, 26 December 1989), and also with Mexico, signed 4 May 1978.

3. See map.

4. Agreement Between the United States of America and the Union of Soviet Republics Concerning the Bering Straits Regional Commission, signed at Jackson Hole, Wyoming, September 23, 1989, I.L.M. 1429-1433 (November 1989). Agreement between the United States of America and the Union of Soviet Socialist Republics concerning Mutual Visits by Inhabitants of the Bering Straits Region, signed at Jackson Hole, Wyoming, September 23, 1989, I.L.M. 1424-1428 (November 1989). Agreement Between the United States of America and the Union of Soviet Socialist Republics Concerning Maritime Search and Rescue, signed at Moscow, U.S.S.R., May 31, 1988 (unpublished).

5. Article II states: "The western limit within which the territories and dominion conveyed, are contained, passes through a point in Behring's straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern of Ignalook, and the Island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly southwest, through Behring's straits and Behring's sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two degrees west longitude; thence, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper island of the Kormandorski couplet or group in the North Pacific ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian islands east of that meridian." Convention Between the United States of America and His Majesty the Emperor of all the Russias Concerning the Cession of Alaska, signed at Washington, March 20, 1867. 11 BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 1216-1219 (1984).

6. 1 MOORE, A DIGEST OF INTERNATIONAL LAW 475 (1906).

7. The Alaska cession treaty is a classic example of this technique: *Delimitation of Seaward Areas Under National Jurisdiction*, Am J. Int'l L. 240 n.2 (April 1951).

8. Secretary of State Baker's Letter of Submittal, Treaty Doc. 101-22, at v. For further background on this point, see Antinori, *The Bering Sea: A Maritime Delimitation Dispute between the United States and the Soviet Union*, 1 Ocean Dev. & Int'l L. 24-26 (1987).

9. Treaty Doc. 101-22, at 5.

10. *Id.* at vi.

11. Smith, *The Maritime Boundaries of the United States*, The Geographic Review 405 (October 1981).

12. Associated Press, 9 August 1986; United Press International, 10 August 1986; Alaska Bear, (July-September 1986) (published by the USCG Seventeenth District).

13. Submitted to Congress pursuant to the requirements of the Magnuson Fishery Conservation and Management Act, Public Law 94-265, Title II, sec. 203; the agreement was approved by sec. 1 of Public Law 100-629, 7 November 1988. The agreement provides opportunities for fishermen from each country to conduct fisheries activities on a reciprocal basis in the other country's waters: see President Reagan's Message to Congress transmitting the U.S.-Soviet Fishery Agreement, *Weekly Compilation of Presidential Documents*, 846 (22 June 1988).

14. Holmes, *Ship to Shore*, Alaska Business Monthly 54 (March 1990).

15. See U.S. House of Representatives, Committee on Foreign Affairs, Subcommittees on Human Rights and International Organizations and on International Economic Policy and Trade, 100th Cong., 2d Sess., *Hearing on Oversight of the U.S. and U.S.S.R. Fisheries Agreement*, 29 June 1988, pp. 1-2. See also Miles & Burke, *Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks*, 4 Ocean Dev. & Int'l L. 343-357 (1989). The U.S. Government reportedly rejected a call for unilateral extension of jurisdiction beyond two hundred nautical miles to permit management of such stocks (Miles & Burke at 349).

16. *MMS issues draft EIS for Navarin Area*, Oil & Gas Journal 27 (18 June 1990).

17. MacLeod, *Oil lease offering in U.S.-Soviet disputed waters*, United Press International (16 April 1984).

18. *Id.*

19. PRESCOTT, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD 250 (1985). The current estimate of the Minerals Mining Service, Department of the Interior, has been revised downward, indicating that the basin's resource potential is about 1.1 billion barrels. (Letter from Mr. George Carpenter, MMS, to the author, 5 June 1991.)

20. Oil & Gas Journal 4 (16 July 1990).

21. Anderson, "No ordinary voyage—U.S., Soviet scientists working on pact to explore Arctic seas for new oil deposits," Seattle Times, (1 July 1990), p. E1. Interest persists despite the fact that during winter most of the Bering Sea shelf is ice-covered. Sharma, *Geological Oceanography of the Bering Shelf*, in HERMAN, MARINE GEOLOGY AND OCEANOGRAPHY OF THE ARCTIC SEAS 141 (1974).

22. Oil & Gas Journal 26 (2 July 1990).

23. *Amoco Production Co., et al v. Village of Gambell, et al.*, 480 U.S. 531; 107 S. Ct. 1396; 94 L. Ed. 2d 542 (1987).

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24. Proclamation No. 2667, *Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, Code of Federal Regulations, Title 3, 67-68 (1943-48 Compilation).
25. 15 U.S.T. 471; T.I.A.S. 5578; 499 U.N.T.S. 311.
26. International Court of Justice, *Reports 1969*, p. 23, (Judgment of 20 February 1969; *Fed. Rep. of Germany v. Denmark*, *Fed. Rep. of Germany v. Netherlands*).
27. 1982 LOS Convention Art. 56.1(a). See also CHURCHILL & LÖWE, *THE LAW OF THE SEA* 137-140 (1988).
28. See Proclamation 5928 of 27 December 1988, *Territorial Sea of the United States of America*, 54 Fed. Reg. 777, (9 January 1989).
29. CHURCHILL & LOWE, *supra* n. 27 at 154-158.
30. Smith, *supra* n. 11 at 410.
31. Horiguchi, *Big US Show of Strength*, *Pacific Defense Reporter* 43 (February 1990); *Air Force Magazine* 81 (May 1990).
32. The Severodvinsk shipyard currently builds the DELTA-IV SSBIN and OSCAR-II SSGN nuclear-powered submarines. U.S. Nav. Inst. Proc. 126 (January 1991).
33. Ries, "Soviet Military Strategy and Northern Waters," in ARCHER, *THE SOVIET UNION AND NORTHERN WATERS* 91 (1988). The Northern Fleet headquarters at Severomorsk is currently thought to be responsible for some sixty-four SSBNs and SSGNs and perhaps eighty more general-purpose submarines. (International Institute for Strategic Studies 39 *The Military Balance 1990-1991* (1990).
34. Petersen, *Soviet Military Objectives in the Arctic Theater*, *Naval War College Review* 3 (Autumn 1987).
35. *Id.* at 8, quoting Morozov & Krivinskiy, *The Role of Straits in the Modern War*, *Morskoy sbornik* [Naval Digest] (August 1982).
36. See, e.g., Egan & Orr, *Sea Control in the Arctic: A Soviet Perspective*, 76 *Naval War College Review* (Winter 1988).
37. Lindsey, *Arctic Perspectives From Different NATO Viewpoints*, *NATO's Sixteen Nations*, 54 (November 1988).
38. Larson, *United States Interests in the Arctic Region*, 2 *Ocean Dev. & Int'l L.* 170, 190.
39. Atkeson, *Fighting Subs Under the Ice*, U.S. Naval Institute Proceedings 83 (September 1987); SHARPE, *JANE'S FIGHTING SHIPS, 1990-91*, 724 (1991).
40. *Report of the Interagency Arctic Policy Group*, Dept. of State Bulletin 89 (July 1983).
41. Public Law 98-373, sec. 102(a)(2).
42. BUTLER, *NORTHEAST ARCTIC PASSAGE* 71-75 (1978).
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# Chapter 17

## The Kuriles: Passage or Obstruction to Regional Peace?\*

Lieutenant Commander Rex M. Takahashi, U.S. Coast Guard

**T**here is much talk these days about a new world order and the post-Cold War era. In the relationship between the economic superpower Japan and the military superpower Soviet Union, however, not much has changed. This past April President Gorbachev visited Japan for three days of talks with Prime Minister Kaifu. Fifteen agreements were signed. These covered subjects ranging from trade fairs and cultural centers to air rights and fisheries accords.<sup>1</sup> As to the basic political and military relationship, however, a peace treaty formally ending World War II between the two countries remains unsigned.

At the respective national strategy levels of the Soviet Union and Japan, a mutual coldness persists. While a great deal of geopolitical change has occurred in central Europe over the past two years, the same is not true in Asia. The forces of the traditional superpowers, as represented in the Soviet Far East TVD (Theater of Military Operations) and in the U.S. Pacific Command, remain in their adversarial posture. The size of forces may change in accordance with "indications and warning" assessments, but the geopolitical relationships remain the same between the U.S.S.R., Japan, and the United States. It is, in an odd way of thinking, a comfortably stable condition in which all the country-actors know their roles.

Product, symbol, and possible catalyst for change in the affairs of the three countries are the Kurile Islands—or "Northern Territories," as the southern four islands are referred to in Japan. The dialogue on sovereignty over these islands is between the Soviet Union and Japan, but any change will dramatically alter the military strategic picture for the United States as well.

### Where Are the Kuriles?

The Kuriles form a chain of thirty-two islands stretching between Hokkaido and the Kamchatka Peninsula. David Rees, in his book on the Soviet seizure of the Kuriles, states that postwar Japan considered its lost Northern Territories to consist of the entire Kurile chain and geographically separate south Sakhalin.

\* Reprinted from the Naval War College Review Autumn 1991.

However, since the 1960s the Japanese government has limited its definition of the North Territories (*Hoppo Ryodo*) to comprise only four islands: Kunashiri Island, Etorofu Island, Shikotan Island, and Habomai (actually the Habomai group of smaller islands).<sup>2</sup>

Unless otherwise stated, the term Kuriles in this article refers to the entire island chain, while Northern Territories will be used to refer to the islands involved in the present Soviet-Japanese sovereignty issue.

Rajan Menon and Daniel Abele describe the Kurile archipelago as a Soviet “protective barrier fencing off the Sea of Okhotsk from the Pacific Ocean,” which in the hands of an adversary “is a restrictive cordon sanitaire with the potential to complicate further the adverse climatic and geographical circumstances faced by the Pacific Fleet based in Vladivostok.”<sup>3</sup>

The Kuriles have the appearance of a terrestrial version of Orion’s shield. Research by Michael Thompson has found the archipelago to be described by Soviet writers as a “1000 kilometer Cossack saber” and a Russian “screen of steel.”<sup>4</sup> Presently the Kurile Islands and Sakhalin form an administrative district (*oblast’*) of the Soviet Far East Region of the Russian Soviet Federative Socialist Republic. Militarily, they lie in the Soviet Far East TVD.

Ten miles of water separate the southernmost island, Kunashiri, from Cape Notsuke on Hokkaido. The Kuriles have excellent harbors from which to stage naval operations, as indeed Admiral Nagumo did at Etorofu in preparation for the 7 December attack on Pearl Harbor, and as General Gnechko did in completing the Soviet occupation of the Kuriles four years later in September 1945.

### The Soviet-Japanese Gap in Thinking

**Historical Resentment.** The Kuriles have been the scene of clashing interests between these nations for two centuries. John Stephan in his history of Sakhalin writes, when “the expanding frontiers of Russia and Japan met in Sakhalin and in the Kurile Islands at the beginning of the nineteenth century, the ‘island country’ Japan faced the problem of a contiguous land frontier with a foreign power (moreover a European power) for the first time in her history.”<sup>5</sup> Japan, Stephan writes, met this challenge by exploring, colonizing, and economically developing Hokkaido, the southern Kuriles, and southern Sakhalin.

“Japanese historiography of the Kuriles sometimes resembles a mirror image of the Soviet view,” writes David Rees.<sup>6</sup> Soviets speak of “age-old” rights threatened by Japanese intrusion. Japanese authors claim the Northern Territories to be “inalienable” Japanese lands that are historically, legally, and culturally part of Japan.

Russia renounced its claim to the Kuriles in the 1875 St. Petersburg Treaty in exchange for the cession of Japanese rights on Sakhalin. The Treaty of

Portsmouth of 1905, which concluded the Russo-Japanese War, gave the southern half of Sakhalin, below the fiftieth parallel, to Japan. Fishing concessions off the Kamchatkan coast were included as well. As David Rees observes, for “the next forty years Japan’s tenure of the Kuriles and South Sakhalin was unchallenged.”<sup>7</sup>

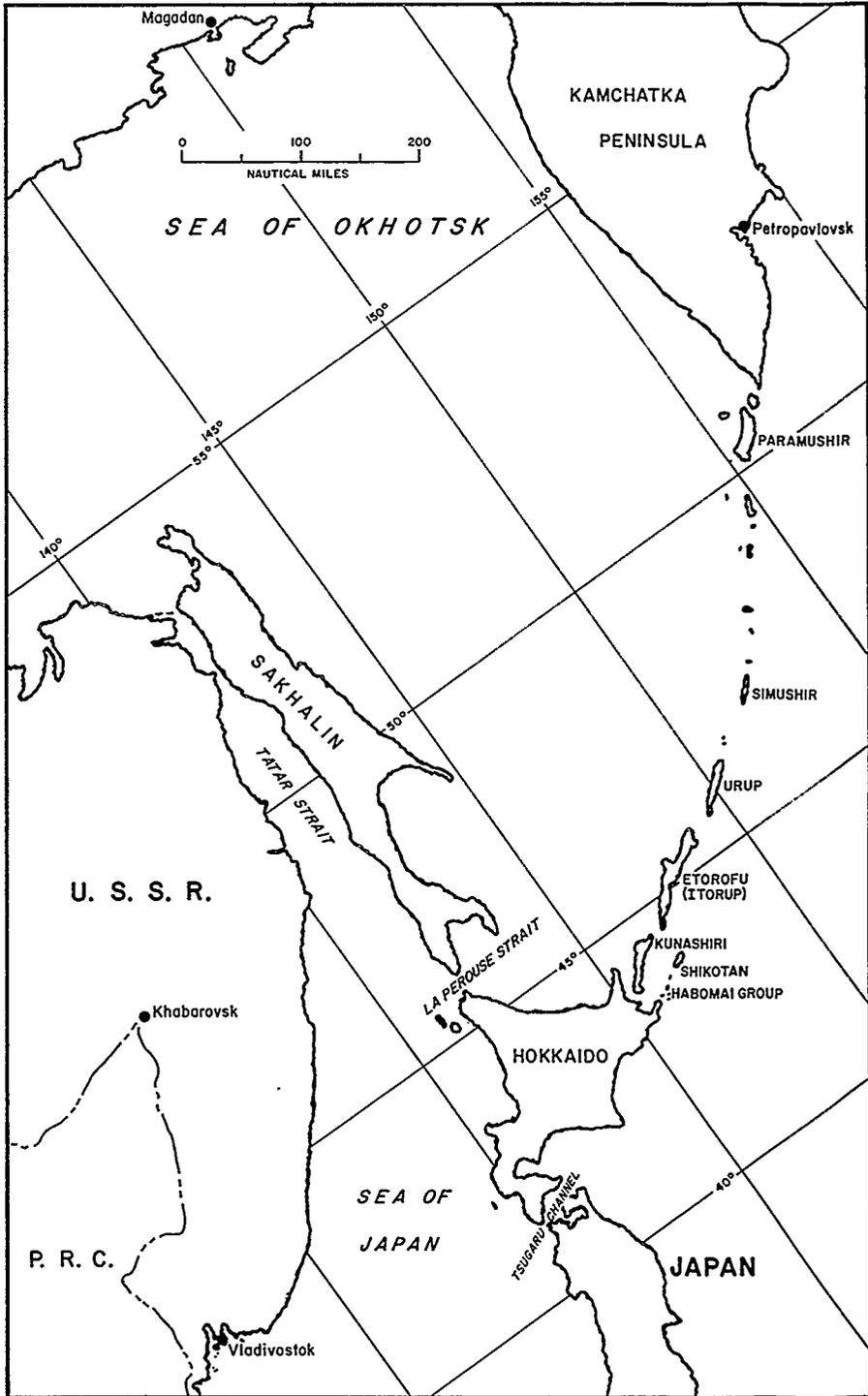
For Russia, the Japanese victory of 1905 was an insult to national dignity, and, as Mari Kuraishi Horne points out, the “paradox of the situation lay in the fact that until then Russia could assuage her own sense of inferiority vis-à-vis Western Europe with the certainty of her ‘superiority’ over the Asiatic nations, but it had been an ‘Asiatic’ fleet which had decimated the Imperial Navy at Tsushima.”<sup>8</sup>

World War II brought a reversal in sovereignty over the Kuriles. Over and above the territorial dispute, however, there now runs a current of Japanese distrust and antipathy because of the manner in which that acquisition took place. At Yalta, Sakhalin and the Kuriles were made part of the agreement which resulted in Soviet entry into the war against Japan, though some historians contend that the United States stated only that it would support Soviet claims at a peace conference. Mari Kuraishi Horne points out that the “Japanese may well feel that the Soviets did not deserve to be called victors” as they had achieved victory only indirectly, as a by-product of the war in Europe.<sup>9</sup> In any event, the Soviet Union militarily occupied the Kuriles by August 1945, and for them, it was a matter of conquest.<sup>10</sup>

Following the Japanese defeat, 570,000 Japanese prisoners of war were used as slave laborers in Siberia in the late 1940s, in what Bruce Stokes calls “an internment that violated international agreements and cost thousands their lives” and alienated an entire generation.<sup>11</sup>

The Japanese talk of Soviet treachery with regard to the loss of the Kuriles; the Soviets view the events as a reversal of the treachery inflicted upon Russia in the 1904 surprise attack on Port Arthur and the ultimate Russian defeat in 1905. The Soviet Union takes the position that the Kuriles are a natural extension into the Pacific of its territory. The attitude is, as Stalin noted in his victory address to the Soviet people on 2 September 1945, that southern Sakhalin and the Kurile Islands would henceforth serve not “as a means to cut off the Soviet Union from the ocean or as a base for a Japanese attack on our Far East, but as a means to link the Soviet Union with the ocean and as a defensive base against Japanese aggression.”<sup>12</sup>

*Ideology vs. Economic Pragmatism.* In most commentaries on Soviet-Japanese relations, historical antipathy is cited as the primary block to better relations. Countries, however, interact at various levels. Thus, while actions may actually be rooted in the national psyche, justification must often be built on a different, logical, basis. A country’s nationalistic feelings undergo a metamorphosis in an attempt to provide the world, or at least itself, a rational explanation.



THE KURILES

Jerry Lamothe

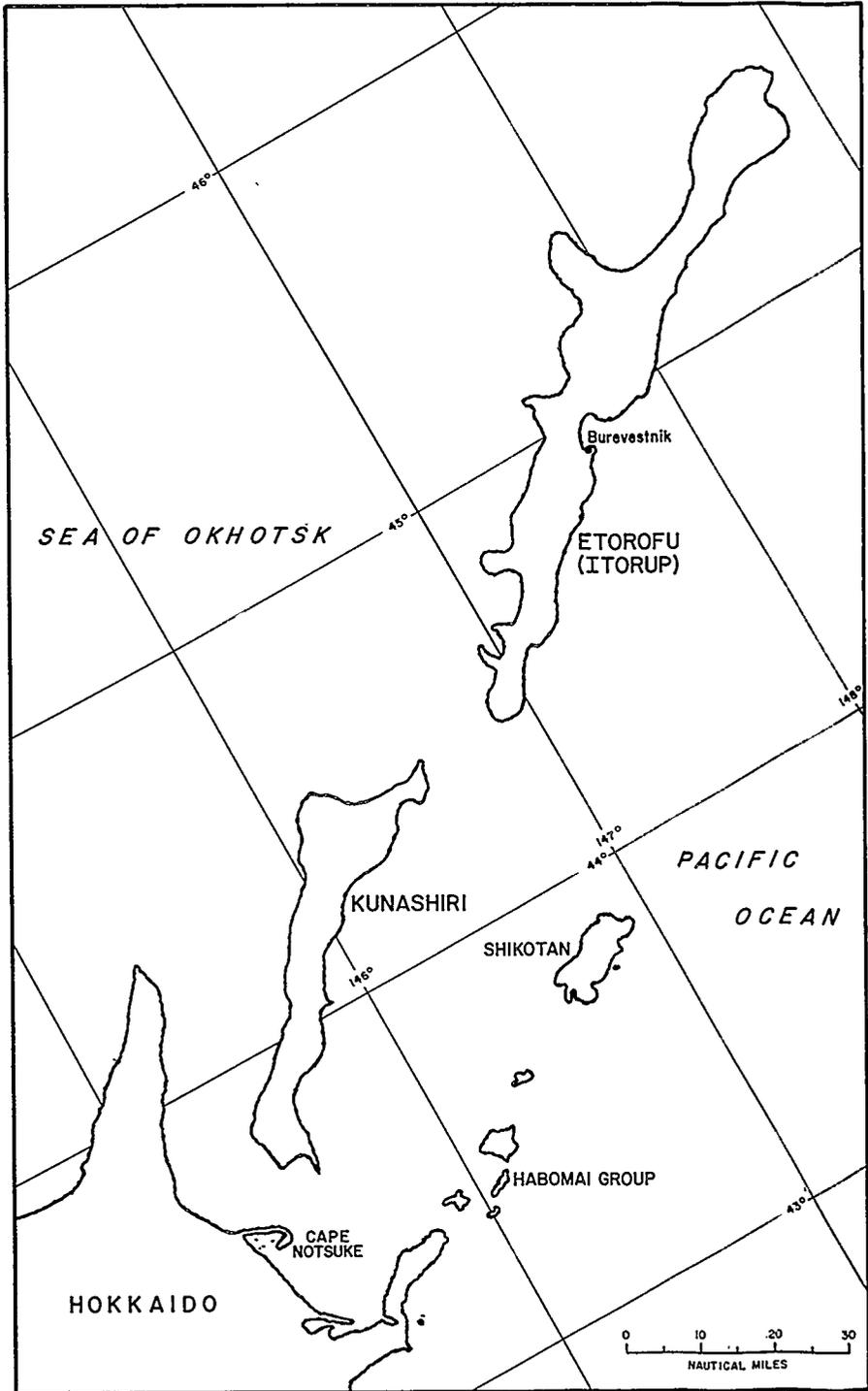
Thus the Soviet Union's most basic ideological view of Japan, as noted by Myles Robertson, has traditionally been that it is a "member of a capitalist bloc wracked by continual contradictions between the growth rates of mutually dependent states and the necessity to co-ordinate economic policies on the one hand and the antagonism of state monopoly to the limitation and regulation of economics on the other."<sup>13</sup> Robertson further comments that while the Soviet Union views the Japanese economy as a special point of friction between capitalist nations, the need to maintain the unity of imperialism's political-military bloc limits that friction. Soviet political theorists debate whether Japan is victim or accomplice of American imperialism in the Far East. Nevertheless, the basic view is that the relationship endures despite the friction.

Just as the Soviet Union has trade relations with the countries of the capitalist west, it likewise conducts trade with Japan, some of it of long standing. In recent years this commerce "has revolved around the trading of energy resources of oil and coal, and timber in exchange for technology most directly required for the economic development of Siberia and the Soviet Far East."<sup>14</sup> Robertson notes that the Soviets have kept their demands and positions free from obvious influences of ideology, have pursued negotiations in a businesslike manner, and have steered a pragmatic course.

Indeed, David Rees notes that in the late 1970s Japan was the U.S.S.R.'s second most important trading partner in the non-communist world, albeit in volumes accounting for only three or four percent of Japan's foreign trade. It should be noted that the 1970s was also the decade when the Japanese business community felt itself burned by certain investments in Siberia, which prevented any further swelling of fiscal optimism for the area.

One has to question whether an expansion of the trade relationship is actually more stymied by asymmetrical levels of economic development or by political recalcitrance, which would of course bring us back to the Northern Territories issue. Prime Minister Kaifu, in an interview in the Soviet periodical *New Times* a year before the April summit, certainly gave the impression that the great stumbling block was the latter. Kaifu talked of problems to be settled in a significant order: the Northern Territories; concluding a peace treaty; normalizing bilateral relations; and supporting *perestroika* and the introduction of a market economy.<sup>15</sup>

The Soviet Union does, however, desperately seek to improve its economy. Prime Minister Kaifu addressed in the same interview the role of cooperation and economic prosperity in East Asia as the basis of regional political stability. At present, the Soviet Union needs an improved economy not only to join in that regional prospect but for its own domestic stability as well. The Northern Territories issue is the negotiating point that holds out the possibility for economic cooperation with Japan and broader economic participation in the



THE NORTHERN TERRITORIES

Jerry Lamotte

region—but that same issue also determines the military position of the Soviet Union in Northeast Asia.

*Strategic Importance of the Kuriles.* The Kuriles is the gate protecting the Sea of Okhotsk. For the Soviet Pacific Fleet, the Sea of Okhotsk is the bastion for its Delta IIIs and other SSBNs, the sea sanctuary for units deployed at Petropavlosk, and the passageway to and from the major military port of Vladivostok. For the U.S. Pacific Fleet, the Kuriles is the gate through which to launch an anti-SSBN campaign in this bastion. As Michael Thompson states, “the naval value of the Kuriles is found as much in the twenty navigable straits as in the islands themselves, linking the Sea of Okhotsk, Sakhalin Island, and the Pacific Ocean.”<sup>16</sup>

Japan, of course, living under the protective umbrella of the U.S.-Japanese Security Treaty, sees its military interests as integral with those of the United States. The Japanese Self-Defense Forces (JSDF) can view the Kuriles as a two-way gate. Closure of the Kuriles by the JSDF can bottle up elements of the Soviet fleet in the Sea of Japan, making them vulnerable to allied destruction. On the other hand, closure of the Kuriles by Soviet forces would be part of a strategic option, as David Rees notes, of “enveloping and interdicting the sea lanes which sustain Japan and connect that country with its sources of energy and raw materials in the Middle East and North America.”<sup>17</sup>

The Kuriles fall within the Soviet “sea control” zone—an area which the Soviets will seek to dominate in wartime. According to the 1989 Department of Defense (DoD) annual report, *Soviet Military Power*, sea control in the Sea of Okhotsk and the Sea of Japan “represents the Soviets’ highest priority regional objective.”<sup>18</sup>

Soviet ground forces in the Far East TVD are expected to be reduced in coming years, but not in the areas opposite Japan, in the Northern Territories, on Sakhalin Island, or on the Kamchatka Peninsula. According to the 1990 DoD annual report, the Soviet Pacific Fleet will remain relatively constant in the 1990s, but its amphibious lift capability will continue to grow.<sup>19</sup> Michael Thompson notes that the Kuriles could become an excellent platform for staging an assault on Hokkaido by “amphibious assault, parachute drop, heliborne assault, or a mechanized thrust across the 17 kilometer frozen channel (winter only) separating Kunashir from Point Notsuke.”<sup>20</sup>

The Japanese Defense Agency 1989 White Paper estimates the combined troop strength in the Northern Territories to be the equivalent of a division.<sup>21</sup> A permanent military base exists on Itorup Island (Etorofu in Japanese) where MIG-23 Flogger aircraft are deployed; Shikotan has facilities for handling assault helicopters. The White Paper states, the “Soviet Union has brought into these islands not only weapons that are normally possessed by its divisions, such as tanks, APCs, various artillery pieces, anti-aircraft missiles and MI-24 Hind attack

helicopters, but also 130-mm cannons which usually do not belong to the equipment of a Soviet division.”

Facing this force on Hokkaido are four of the thirteen divisions of the Japanese Ground Self Defense Force. Behind this force stand the Japanese defense budget, which in 1990 amounted to a massive \$29.7 billion, less only than those of the United States and the Soviet Union. In such a situation, an attempt to cross forces from the Kuriles appears highly unlikely, at least in the initial stages of hostilities.

Soviet sovereignty over the Kuriles implies control of the gateway between Hokkaido and Kamchatka. One must, however, keep in view the prospect that combined U.S. and Japanese naval and air forces will wrest control of the Kuriles from the Soviet Union at the outbreak of hostilities. Additionally, the archipelago, being of such great length, can not be made impenetrable to submarines attacking into the Sea of Okhotsk bastion. To give up the segment of the Kurile chain represented by the Northern Territories would undoubtedly weaken the Soviet defensive capability; the Soviets must weight for themselves the peacetime benefits that a compromise may provide compared to the advantages that an intact island barrier will bring in the event of a putative future war.

### Meeting at the Crossroads, Status Quo Preferred

President Mikhail Gorbachev was the first Soviet head of state to visit Japan. The results were predictable. The summit meeting paved the way for further high level cooperation on minor matters, but did little to solve the issue of the Northern Territories or arrive at a peace treaty now forty-five years past due. Since December 1988, there has existed at the vice-foreign minister level a working group on the peace treaty. Progress on the territorial problem, however, has always been blocked. Gorbachev and Kaifu played out at the summit roles carved deep in the pasts of their respective nations.

That the Soviet Union has at least acknowledged the existence of a territorial dispute, however, is viewed as a positive sign. Prime Minister Kaifu stated last year in the *New Times* interview that it looked as if the Soviets would foist acceptance of “postwar realities” on the Japanese, but he recognized that different opinions, previously impossible to state publicly, had appeared in the Soviet Union.

In this year of the Soviet-Japanese summit, Gorbachev has been regarded as the representative of the emerging “different opinions;” it came as no surprise that he could announce to the world that a territorial dispute did exist. That, however, was about as far as new thinking would emerge. In the Soviet Union, resurgent hard-liners opposed return of the islands. Among the reformers, Boris Yeltsin was reported as saying the Russians would not “do another Alaska” over the islands.<sup>22</sup> Soviet Defense Minister Yazov is reported to have insisted that all

four islands are vital to Soviet national security and can not be exchanged for Japanese economic aid.<sup>23</sup> The implication is that the Soviet Union, though it has declared a military doctrine of “defensive sufficiency” that applies to Asia as well as Europe, notwithstanding does not intend to compromise its military super-power status in the East as it has in the West.

Hiroshi Kimura observes that Soviet scholars who are realistic enough to consider the territorial issue an obstacle in improving Soviet-Japanese relations have been unofficially proposing compromise formulae. All the proposals revolve around Japan being allowed to use the territories jointly or unilaterally but with the Soviet Union retaining sovereignty.<sup>24</sup> Kimura says such proposals are really meant to shelve the problem.

The alternative to shelving the problem is to achieve an acceptable solution—and for the Japanese there is only one solution, the return of all four islands of the Northern Territories. What is to be seriously discussed is the terms of the return. As early as 1956 Japan was offered a compromise package for the return of the Habomai group and Shikotan, which together constitute seven percent of the disputed area. The proposal was turned down then, and was declined again in 1991 by a Japanese nation now even more confident of its place in the international arena.

Kimura speculates that the Soviet Union will eventually decide to return all four islands to Japan. In 1988 Soviet spokesman Mikhail Titarenko had proposed the return of two islands upon conclusion of a peace treaty and agreement to postpone decision on the remaining two for the next generation. Though the Japanese found that idea unacceptable, what may be acceptable to Japan is return of the four islands on condition of demilitarization, using a Hong Kong-type formula in which two islands would be “returned upon the conclusion of a peace treaty” and “the remaining two by a definite deadline, say 1999.”<sup>25</sup> Kimura states further that Japan would have to take into account the time and expense involved in evacuating Soviet civilians and withdrawing military bases from the islands, and that Japan, in cooperation with the United States, would work toward seeing that the strategic security of the Soviet Union in the Sea of Okhotsk would not become threatened. During the summit, no such large scheme was evident. Gorbachev only went so far as to propose as part of the joint declaration a “partial” reduction of Soviet military presence on the four islands.<sup>26</sup>

The crucial question is: why would the Soviet Union agree to return the Northern Territories? Observers form around two poles, economic and military. Kimura believes that what the “Soviet Union wants from Japan is more than the signing of a legal document, but rather a fundamental change among the Japanese in their attitude toward the Soviet Union” that in concrete terms would lead to “a long term, cheap-interest bank loan from the Japan Export-Import Bank, more active participation in joint enterprises and the ‘special economic zone’ in the Soviet Far East by huge Japanese corporations, Tokyo’s endorsement of the

USSR's entry in the Pacific Economic Cooperation Committee (PECC), and so on."<sup>27</sup>

At the summit, Kaifu did not even mention an expected aid package of \$450 million to finance repayment of overdue Soviet debts to Japanese creditors; this would have wiped clean the debt slate and presumably would have instilled confidence for future Japanese investment. Even that \$450 million pales in comparison to the \$26 billion that some believed would be offered by Japan for retrocession of the islands.<sup>28</sup>

If a deal had been concluded, the next question would have been: what effect would retrocession of the islands have for the U.S.-Japanese alliance? Denis Warner, prior to the summit, had put forth the scenario that the threat of nuclear war has receded and that the extra security provided at the southern end of the Kuriles is no longer a strategic imperative for the Soviet Union. A deal with Japan, he foresaw, could create pressure against increased Japanese military budgets and give renewed emphasis to Japanese anti-Americanism, which would in turn challenge continued U.S. military presence and U.S. military bases. Warner, however, saw that scenario and any such resolution of the Northern Territories issue as highly unlikely, since to the Soviet Union "it would be tantamount to an acceptance that the world is no longer divided into two social adversary systems and that nothing should ever be done to lower the Soviet Union's guard."<sup>29</sup>

The converse to the "break Japan from the U.S." scenario is the "military abandonment by the U.S.," which the Japanese fear may occur as the Soviet threat further recedes with abandonment of the southern Kuriles. In this view, the Soviet threat to U.S. regional interests would disappear in the eyes of a majority of Americans, and, amidst American clamor over unfair trade arrangements and Japanese failure to carry their military fair share, Japan would lose the protective U.S. umbrella and find itself isolated.

Suffice to say, the 1991 Soviet-Japanese bilateral talks ended without a Kuriles resolution; any illusions that the alliance between the United States and Japan would not remain "a centerpiece of our security policy and an important anchor of stability" should have quickly evaporated.<sup>30</sup> The Kuriles stalemate has kept alive the regional *status quo ante*, and a cold relationship maintains itself in this corner of the post-Cold War world. A peace treaty with the Soviet Union remains unsigned. Soviet forces remain off Hokkaido. The submarine bastion's archipelagic shield remains intact under Soviet sovereignty. The sea passages between the islands remain subject to penetration by U.S. and allied attack submarines.

Non-resolution of the Kuriles issue at the April summit was predictable; in a long-term perspective, however, it may not have been regrettable. As it is, the security alliance between the United States and Japan remains unchallenged by political aberrations that may have resulted on either side of the Pacific, from the

return of the Kuriles. The Soviet Union, for its part, did not commit itself to a cash deal that its population for the most part opposed and which, in future years with a different Soviet leadership, could have resulted in increased resentment.<sup>31</sup> The search for an end to the Kuriles dispute can at least continue now in a region marked by stability and where the political doors now opening offer the promise of a lasting peace.

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Lieutenant Commander Takahashi was serving as the Executive Officer of the U.S. Coast Guard Cutter Mackinaw when this article was first published.

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### Notes

1. Weisman, *Japan-Soviet Pact on Islands Elusive*, The New York Times, (19 April 1991), p. A1.
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3. Menon and Abele, *Security Dimensions of Soviet Territorial Disputes with China and Japan*, Journal of Northeast Asian Studies 12 (Spring 1989).
4. Thompson, *The Northern Territories: Case Study in Japanese-Soviet Relations*, 26 (Unpublished Master's Thesis, Naval Postgraduate School, Monterey, Calif.: 1982).
5. STEPHAN, *SAKHALIM: A HISTORY* 5 (1971).
6. *Supra* n. 2 at 5.
7. *Id.* at 23.
8. Horne, *The Northern Territories: Source or Symptom?* Journal of Northeast Asian Studies 65 (Winter 1989).
9. *Id.* at 68.
10. *Supra* n. 2 at 82.
11. Stokes, *Making Eyes at Moscow*, National Journal 112 (20 January 1990).
12. STEPHAN, *THE KURIL ISLANDS: RUSSO-JAPANESE FRONTIER IN THE PACIFIC* 170 (1974).
13. ROBERTSON, *SOVIET POLICY TOWARDS JAPAN: AN ANALYSIS OF TRENDS IN THE 1970'S AND 1980'S* at 185. (1988).
14. *Id.* at 153, 187.
15. Ignatenko, *Looking Back from the Year 2001: Perestroika and Prospects of Soviet-Japanese Relations*, New York Times, (8-14 May 1990), 7-8.
16. *Supra* n. 4 at 27-28.
17. *Supra* n. 2 at 145.
18. U.S. Department of Defense, *Soviet Military Power 1989* 114 (1989).
19. U.S. Department of Defense, *Soviet Military Power 1990* 98 (1990).
20. *Supra* n. 4 at 29.
21. Japanese Defense Agency, *White Paper: Defense of Japan, 1989*; reprint, The Japan Times, Ltd.
22. *A Visit Dashed against the Rocks*, 31 The Economist (20 April 1991).
23. Delfs and Rowley, *Far Eastern Economic Review* 12 (2 May 1991).
24. Kimura, *The Soviet-Japanese Territorial Dispute*, 7 The Harriman Institute Forum (June 1989).
25. *Id.* at 8.
26. Dahlburg and Helm, *Soviets, Japan Both Fail to Get What They Want*, Los Angeles Times, (19 April 1991) A12.
27. *Supra* n. 24 at 7.
28. *Japan, Gorbachev and The Price of Peace*, The Economist 33 (30 March 1991).
29. Warner, *Chinese Card Today - the Japan Card Tomorrow?* Pacific Defense Reporter 48 (May 1989).
30. The phrase "a centerpiece of our security policy and an important anchor of stability" comes from the White House, 1990 National Security Strategy of the United States.
31. A similar statement was made by Kazuo Chiba, former ambassador to the United Kingdom, in a 7 December 1990 interview in London. He stated: "We don't want to get back those islands and then create a lasting dispute that is exploited by successive leaderships. We only want a deal if both sides realize that it is a good deal. If the Soviet Union disintegrates into chaos then the Slavs might think we have taken their land and we do not want that kind of festering dispute. We want whoever is the ruler of Russia to give back the islands in a lasting way." (See *Japan and the New World Order*, 4, no. 1, The Pacific Review 1-4 (1991).



# Chapter 18

## Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea\*

William J. Aceves

On 12 February 1988 the Commander in Chief of United States Naval Forces in Europe (CincUsNavEur) received the following message from the USS *Yorktown*. At the time, the *Yorktown* and the USS *Caron* were conducting Freedom of Navigation operations in the Black Sea off the Crimean coast of the Soviet Union. “While conducting innocent passage south of Crimean Peninsula *Yorktown* was deliberately shouldered by Soviet Krivak I FFG-0811 (*Bezzavetnyi*). Minor damage sustained to hull, no holing or risk of flooding. Two Harpoon missiles on port fantail launcher are damaged and unusable. CasRep [casualty report] follows. Amplifying info to follow.”<sup>1</sup>

The *Caron* transmitted the following account of the incident to CincUsNavEur: “IncSea [incident at sea] violation. Mirka class FFL hull number 824 collided with *Caron* port side aft with no damage to ship or personnel at 0801Z [10:01 A.M. local]. Prior to collision, Mirka passed to *Caron* on channel 16 VHF [very-high-frequency voice radio] ‘Do not violate State borders of the Soviet Union, I am authorized to strike.’ USS *Yorktown* in company received similar warnings and has been struck by Stenka class patrol boat. Indications are that either or both units may be rammed again. *Caron* will maneuver to attempt to avoid further damage while maintaining Freedom of Navigation track.”<sup>2</sup>

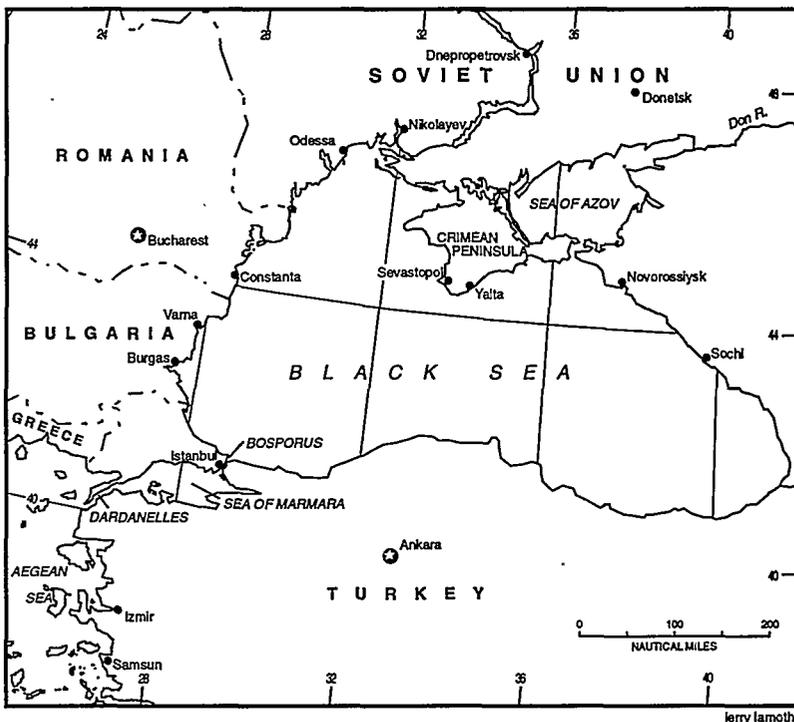
While neither U.S. vessel was severely damaged, the incident graphically displayed the dangers to American warships involved in those years in the U.S. Freedom of Navigation (FON) program. More importantly, it raised a variety of issues relating to the character and objective of these maritime exercises. The purpose of this study is to examine the development and execution of the Freedom of Navigation program in the Black Sea.<sup>3</sup>

\* Reprinted from the Naval War College Review Spring 1993.

## The Freedom of Navigation Program

Following World War II, the United States began implementing an informal program to protect and promote the “rights and freedoms of navigation and overflight guaranteed to all nations under international law.” Objectionable maritime claims worldwide included unrecognized assertions of historic waters, improperly drawn baselines for measuring maritime claims, excessive territorial sea demands imposing impermissible restrictions on the innocent passage of military and commercial vessels, and other maritime claims excessive or improper under international law.<sup>4</sup> In 1979, the Carter administration formally established the Freedom of Navigation program, and it soon became an integral part of American foreign policy.

According to a 1979 communication from the Commander in Chief, U.S. Atlantic Command (CinLant) to naval units of that fleet, the Freedom of Navigation program was initiated because the U.S. government was concerned that many countries were beginning to assert jurisdictional boundaries that far exceeded traditional claims.<sup>5</sup> The FON program was a way of letting these countries know that the United States would not tolerate claims having an adverse impact on maritime freedom of movement. The memorandum noted that “in the future, there will be planned exercises, transits and overflights by Naval and Air Forces for the purposes of asserting U.S. rights in the face of excessive claims.” U.S. maritime policy would now:



- Protest all territorial sea claims in excess of twelve nautical miles and some greater than three, especially those overlapping an international navigation strait.
- Protest all claims inhibiting navigation over waters that the United States viewed as a high seas corridor.
- Protest all claims requiring advance notification for warships or restricting warship passage in any way.
- Protest rules for “innocent passage” through the territorial sea which were substantially different from established provisions.
- Protest assertions of jurisdiction over navigation and overflight beyond the territorial sea.

The memorandum noted that if the United States did not protest what it believed to be illegal violations of its maritime rights, such inaction would imply ratification through acquiescence. It was subsequently noted by government officials that the FON program was specifically undertaken because diplomatic protests seemed ineffective.<sup>6</sup>

Thus, the Freedom of Navigation program was based on the legal position that a state may lose its rights under international law if it does not maintain a consistent maritime policy and protest what it perceives to be excessive claims. For example, if a state were to assert an excessive maritime claim and the United States avoided operating its ships and aircraft in the disputed area, the U.S. inaction would eventually contribute to the formation of new customary international law. However, such a development can be averted successfully by states who continuously object to it.

The importance of maintaining a consistent policy was exemplified in 1982 during an evaluation of proposed FON operations that were to be conducted from 1 October 1982 through 31 March 1983. In reviewing the proposed navigation and overflight program that was to be conducted in the Black Sea, Rear Admiral S.H. Packer, acting Deputy Chief of Naval Operations, argued that in order to maintain a uniform policy the United States should not challenge Bulgaria’s excessive maritime claims unless it challenged the Soviet Union’s as well.<sup>7</sup> According to Admiral Packer, the Navy firmly adhered to the view that a challenge to Bulgaria’s warship notification regime without challenging the identical Soviet claim in the Black Sea would be counterproductive and undermine the appearance of U.S. resolve in the face of illegal initiatives. Such passivity would suggest reluctance to challenge the illegal maritime arrogations of powerful adversaries, which in turn could well be construed as acquiescence to such claims. Admiral Packer noted that “although the Navy is committed to the proposition that eventually all excessive maritime claims must be challenged, no challenge can be either considered or executed in isolation from all pertinent political, military, geographic or juridical factors.” In this case, those factors substantially outweighed the benefit that might be gained by challenging Bulgaria’s claims alone.

Perhaps the most authoritative statement on the Freedom of Navigation program was presented by President Ronald Reagan in 1983. In his evaluation of U.S. maritime policy, President Reagan stated that the "United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 Law of the Sea Convention]. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses."<sup>8</sup>

The influence of international law on U.S. maritime policy was reiterated in 1986 by the Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, John Negroponte, when he noted that the "exercise of rights—the freedom to navigate on the world's oceans—is not meant to be a provocative act. Rather, in the framework of customary international law, it is a legitimate, peaceful assertion of a legal position and nothing more. If the United States and other maritime states do not assert international rights in the face of claims by others that do not conform with the present status of the law, they will be said to acquiesce in those claims to their disadvantage. What is particularly difficult in this situation is to understand that the more aggressive and unreasonable and provocative and threatening a claim may be, the more important it is to exercise one's rights in the face of the claim. The world community can't allow itself to be coerced—coerced into lethargy in the protection of the freedom of the seas."<sup>9</sup>

### Freedom of Navigation Challenges

The Freedom of Navigation program combines both diplomatic and operational challenges to objectionable maritime claims. Under the program, the United States undertakes diplomatic action at several levels to preserve its rights under international law. It conducts bilateral consultations with many coastal States, stressing the need for all states to adhere to the rules and practices reflected in the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention). When appropriate, the State Department files a formal diplomatic protest addressing specific claims.<sup>10</sup> Since 1948 the United States has diplomatically protested over 150 excessive claims, including more than 110 since the FON program began in 1979.<sup>11</sup>

In conjunction with diplomatic action, the Defense Department conducts operational challenges to objectionable claims. In the State Department view, operational assertions tangibly manifest U.S. determination not to acquiesce in excessive maritime demands by other countries. Operational challenges are conducted under strict regulation; peacetime rules of engagement are applicable throughout FON operations. In particularly sensitive cases, approval must be

received from the Joint Chiefs of Staff or the President. Since 1979, the U.S. military has operationally protested the objectionable claims of over thirty-five States at the rate of approximately thirty or forty per year.<sup>12</sup>

### The Black Sea Challenges

Though the FON program was implemented worldwide, confrontations with the Soviet Union produced some of the most contentious incidents. According to the Pentagon, the United States has conducted maritime operations in the Black Sea since 1960, and by the 1980s American warships were passing through the Turkish straits from the Mediterranean into the Black Sea two or three times a year to “show the flag” and to exercise the right of innocent passage in the territorial seas of littoral states.<sup>13</sup>

The presence of U.S. warships in the Black Sea served three purposes. First, the United States sent warships through the Turkish straits to uphold its rights under the 1936 Montreux Convention.<sup>14</sup> According to a U.S. government official, “The Dardanelles and the Bosphorus form an international waterway. Passage is covered by the 1936 Montreux Convention. If you don’t periodically reaffirm your rights you find that they’re hard to revive.”<sup>15</sup> Second, the U.S. conducted Freedom of Navigation exercises in the Black Sea to affirm the right of innocent passage in Soviet territorial waters. Third, naval operations in the Black Sea demonstrated that waters outside territorial seas are international waters, where every State enjoys the high-seas freedoms of navigation and overflight.

The Soviet Union considered U.S. operations in the Black Sea unacceptable. Thus, the Soviets routinely dispatched their naval vessels and aircraft to monitor U.S. warships there. Specifically, the Soviets criticized U.S. operations on three grounds. First, the Soviets claimed that the American maneuvers violated the Montreux Convention because the caliber of the U.S. antisubmarine rocket launcher (Asroc) exceeded the 203mm Convention limit.<sup>16</sup> The United States responded that Asroc was not a gun and was therefore not covered by the Convention.

Second, the Soviets criticized the maneuvers as both provocative and dangerous and asserted that there was no justification for the maintenance by the United States of a presence in the Black Sea.<sup>17</sup> In 1968, *Izvestiya* commentator A. Sharifov noted that “the provocative visit by American ships to the Black Sea is aimed at troubling the clear waters of the good neighbor relations of the Black Sea countries.”<sup>18</sup> In the 1980s, the Soviets criticized Freedom of Navigation exercises in the Black Sea as an attempt to undermine improving Soviet-American relations.

Third, the Soviet Union protested U.S. operations in Soviet territorial waters because they violated Soviet maritime regulation. Since World War II the Soviet

position on innocent passage in their territorial sea had been to require prior notification and authorization for warship transit. For example, the Soviet Union entered a reservation to the 1958 Convention on the Territorial Sea and the Contiguous Zone that declared that the coastal State “has the right to establish a procedure of authorization for the passage of foreign warships through its territorial waters.”<sup>19</sup> Subsequently the Soviets established authorization procedures in their 1960 State border regulations.

Although the Soviets appeared to relax their position on innocent passage during the UNCLOS III negotiations, they eventually promulgated internal legislation that significantly restricted the right of innocent passage. On 28 April 1983 the Soviet Council of Ministers enacted the “Rules of Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the U.S.S.R.”<sup>20</sup> The Rules limited the transit of foreign warships through the territorial waters of the Soviet Union. Specifically, the Soviet regulations stated that innocent passage through Soviet territorial waters was to be permitted only along routes ordinarily used for international navigation. The Rules set out “traffic separation schemes” through which warships could travel in the Baltic Sea, the Sea of Okhotsk, and the Sea of Japan.<sup>21</sup> There were no routes available for innocent passage in the Black Sea.

Freedom of Navigation operations in the Black Sea resulted in numerous confrontations between U.S. and Soviet forces. In fact, the Soviet response to the U.S. presence in the Black Sea gradually developed from one of diplomatic protest to armed response.

- On 9 December 1968, the destroyers USS *Dyess* and *Turner* of the Sixth Fleet sailed into the Black Sea, where they cruised for three days off the coasts of Turkey and the Soviet Union, closely shadowed by Soviet vessels. The Soviets charged that the maneuvers were a “provocative sortie”; *Pravda* asked, “Why do the Americans need to take such a stroll in the Black Sea?”<sup>22</sup>

- In August 1979, as the destroyers USS *Caron* and *Farragut* were conducting “show the flag” maneuvers in the Black Sea, Soviet warplanes staged more than thirty mock missile attacks against them. According to Pentagon officials, the Soviets sent out a variety of bombers, including the modern, supersonic TU-22M Backfire, to join reconnaissance planes in tracking the U.S. destroyers after they sailed into the Black Sea on 1 August.<sup>23</sup>

- On 18 February 1984, the destroyer USS *David R. Ray* was conducting FON exercises in the Black Sea near Novorossiysk when Soviet aircraft fired cannon rounds into the ship’s wake and a Soviet helicopter taking photographs of the destroyer swooped within thirty feet of its deck.<sup>24</sup> U.S. officials considered the Soviet action a violation of the spirit of the Incidents at Sea Agreement.

Given the escalation taking place in the Black Sea, it was evident that the United States and the Soviet Union were rapidly approaching a confrontation.

On 10 March 1986, the guided missile cruiser USS *Yorktown* and the destroyer *Caron* entered the Black Sea.<sup>25</sup> At 11:11 A.M. on 13 March the *Yorktown* and the destroyer *Caron* entered Soviet territorial waters near the southern Crimean Peninsula and passed within six miles of the Soviet coast, where they were soon confronted by a Soviet warship. The commander of the Soviet frigate *Ladnyi* notified the U.S. warships that they had violated the territorial waters of the Soviet Union and requested that they depart immediately. The U.S. vessels acknowledged receipt of the warning but did not change course. The Soviet command placed its Black Sea air and naval forces on combat readiness and dispatched border guard vessels and naval aircraft to intercept the U.S. warships.<sup>26</sup> The *Yorktown* and *Caron* stayed in Soviet territorial waters for approximately two hours and departed at 1:12 P.M.

The Soviet Union was quick to condemn the U.S. maneuvers. The U.S. chargé d'affaires, Richard Combs, was summoned to the Soviet foreign ministry in Moscow to receive the Soviet protest.<sup>27</sup> The Soviets stated that the American violation of its territorial waters "was of a demonstrative, defiant nature and pursued clearly provocative aims." According to the protest note, it was not the first time that U.S. warships had deliberately failed to comply with Soviet laws regarding its territorial waters and that such violations can have serious consequences, the responsibility for which will be wholly on the U.S."<sup>28</sup> In fact, the commander in chief of the Soviet navy, Fleet Admiral V.N. Chernavin, suggested that the U.S. ships might have been attacked had they remained longer in Soviet waters.<sup>29</sup> Similarly, Georgi Arbatov, Director of the Institute of the U.S.A. and Canada, stated that the U.S. operations represented an attempted to test the Soviet Union and warned that Soviet forces would shoot the next time it happened.<sup>30</sup>

Specifically, the Soviet Union based its protest to the American maneuvers on the notion that the right of innocent passage for warships was not absolute in Soviet territorial waters. According to Admiral Chernavin: "The innocent passage of foreign warships through the territorial waters of the USSR is permitted only in specially authorized coastal areas which have been announced by the Soviet Government [and] there are no such areas in the Black Sea off the coast of the Soviet Union."<sup>31</sup> Thus, opposition to the U.S. exercises was apparently not based on any activities that the *Yorktown* or *Caron* may have undertaken during their transit through Soviet territorial waters. Rather, it was the act of crossing into Soviet waters and the subsequent presence in the area that constituted the alleged violation.<sup>32</sup>

However, in its protest note the Soviet Union also charged that the U.S. actions were "a clear violation of Soviet borders for the purpose of conducting espionage."<sup>33</sup> Similarly, the Soviet news agency Novosti accused the U.S. of conducting a dangerous espionage operation against Soviet southern defenses using two naval ships and a military satellite.<sup>34</sup> Novosti asserted that the *Caron* and *Yorktown* entered Soviet territorial waters while an American reconnaissance

satellite made three passes over the Black Sea.<sup>35</sup> It added that the approach of the U.S. vessels was intended to activate Soviet defenses and disclose their location and nature to the orbiting satellite.<sup>36</sup>

According to *The New York Times*, the two American warships were equipped with electronic sensors and entered Soviet territorial waters not only to assert the right of innocent passage but also to test Soviet defenses and to gather intelligence.<sup>37</sup> The charges were based on the fact that both the *Caron* and the *Yorktown* had intelligence-gathering capacity.<sup>38</sup> The Navy has denied that the passage was in any way inconsistent with international law.

Pentagon officials admitted that the *Caron* had been loaded with additional equipment during the Black Sea operations. In fact, it was apparently standard procedure on such exercises to use electronic gear in order to determine whether new radars had been deployed on shore and to verify the state of readiness of Soviet forces.<sup>39</sup> According to one analyst, "What you want is to provoke a response." Soviet naval units operated with shore-based aircraft and submarines; collecting data on how these forces coordinated and deployed was a major American intelligence goal.

If while in the Soviet territorial sea the *Yorktown* and *Caron* were engaged in collection of information or any other activity not having a direct bearing on passage, it would be in violation of the 1982 LOS Convention provisions relating to innocent passage. According to Article 19(1), passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State. In addition, Article 19(2)(c) states that "any act aimed at collecting information to the prejudice of the defence or security of the coastal State" is not considered innocent passage. Thus, a transit of the territorial sea undertaken expressly to test coastal State defenses, even passively, would fall under the 19(2)(c) prohibition. Such activity would also fall under the Article 19(2)(1) prohibition on "any other activity not having a direct bearing on passage."

In response to the Soviet charges, the United States asserted that the entry of the warships into Soviet waters "was simply an exercise of the right of innocent passage."<sup>40</sup> White House spokesman Edward Djerejian added that the maneuvers were routine and not intended to be provocative or defiant.<sup>41</sup> The Department of State released a statement emphasizing that the purpose of the Freedom of Navigation program was to uphold the exercise and preservation of navigation and overflight rights and freedoms around the world. The statement noted that in fulfillment of the objectives of that program, U.S. ships and aircraft exercised rights and freedoms under international law off the coasts of many countries.<sup>42</sup>

It is likely that the *Yorktown* and *Caron* were conducting intelligence gathering operations during their high seas transit off the coast of the Soviet Union; this would be permissible under international law. While the warships may have ceased active intelligence gathering operations during their passage through the

Soviet territorial sea, they probably continued to monitor Soviet activity through their defensive collection systems (e.g., radar and sonar).

In February 1988 a more serious incident occurred between U.S. and Soviet naval forces in the Black Sea. On 10 February, two ships, again the *Caron* and *Yorktown*, entered the Black Sea. The U.S. warships were soon approached by three Soviet vessels, a Krivak-class frigate, a Mirka-class frigate, and a smaller intelligence gathering ship.<sup>43</sup> The Soviet vessels shadowed the U.S. warships throughout their Black Sea transit.

On 12 February, the *Caron* and *Yorktown* entered Soviet territorial waters near Sevastopol and headed eastward, skirting the Crimean Coast.<sup>44</sup> Within minutes, the U.S. warships were intercepted by additional Soviet vessels. The *Caron* was contacted by the Mirka-class frigate *SKR-6*. Three minutes later, the *Yorktown* was approached by the Krivak-class frigate *Bezzavetnyi*.

The *Caron* transmitted the following to CincUsNavEur at 11:20 A.M. Greenwich ("Z") time, or 1:20 P.M. local, from 44° 10 min. north latitude and 34° 39 min. east longitude: "While conducting FON . . . track south of Crimean peninsula at 0746Z [9:46 A.M. local] 12 February 1988 *Caron* was informed on channel 16 VHF by Krivak-I FFG 811, 'Soviet ships have orders to prevent violation of territorial waters, extreme measure is to strike your ship with one of ours.' *Caron's* reply was 'I am engaged in innocent passage consistent with international law.' *Caron* was located twelve nautical miles from the Soviet landmass. *Caron* continued on [planned track] and at 0802Z [10:02 A.M. local] at 44° 15.2 min. north latitude and 33° 35.4 min. east longitude, 10.5 nautical miles from the coast, Mirka FFL 824 contacted *Caron's* port side aft at frame 466 [about sixty feet from the stern]. There was no damage to *Caron* other than superficial scraping of paint and no personnel injuries. *Caron* continued transit and exited territorial waters at 0950Z [11:50 A.M.] 12 February 1988 without further incident. Closest point of approach to the Crimean peninsula was 7.5 nautical miles at 0830Z [10:30 A.M.]. Data photos and video tape have been collected and will be forwarded in accordance with applicable instructions."<sup>45</sup>

The *Yorktown* sent the following message: "While conducting transit south of Crimean peninsula (closest point of approach 10.6 nautical miles from Soviet land mass) *Yorktown* was contacted at 0756Z [9:56] 12 February 1988 by Krivak 0811 via channel 16 . . . and told to leave Soviet territorial waters or 'our ship is going to strike on yours.' Krivak 0811 then came alongside *Yorktown's* port side at 0803Z [10:03] at a distance of less than fifty feet and subsequently shouldered *Yorktown* by turning into ship. Krivak 0811 starboard anchor was torn away and *Yorktown* sustained minor hull damage. Two Harpoon [surface-to-surface missile] canisters (port launcher) sustained damage when Krivak bullnose [forwardmost extremity of the bow] passed down port quarter. Krivak 0811 then cleared to port and took station 300 yards off *Yorktown* port beam. At 0805Z [10:05] Krivak 0811 again contacted *Yorktown* via channel 16 and stated 'We will strike you as

before if you do not clear our waters.' This transmission was not acknowledged. Krivak 0811 maintained station off port beam at 300 yards. *Yorktown* continued transit and exited territorial waters at 0926Z [11:26] without further incident."<sup>46</sup>

Interestingly, the Soviet version of the incident downplayed the severity of the collision. Interviews with Soviet officers aboard the *Bezzavnyi* produced these comments: "There was not thought of using weapons. It was the same with Lieutenant Commander Petrov on board the *SKR-6*. . . . To be honest, no one in the in the command center [i.e., on the bridge] put on his lifejacket, although the order had been given. . . . Many members of the crew of *Yorktown* were on the upper deck, smiling and waving, taking pictures of us with cameras and videocameras. And the commanding officer of *Yorktown*, for example, appeared on the bridge in parade uniform. In a word, the Americans behaved as if they were participating in a show for entertainment."<sup>47</sup>

Following the incident, Undersecretary of State for Political Affairs Michael Armacost called in Soviet ambassador Yuri Dubinin to lodge the U.S. protest, which declared that the incident occurred as the *Caron* and *Yorktown* were lawfully exercising the right of innocent passage.<sup>48</sup> In testimony before the Senate Armed Services Committee, Secretary of Defense Frank C. Carlucci stated that the U.S. operations in the Black Sea involved a routine trial of the Freedom of Navigation program. "This particular test was not a test of their territorial waters, but of the right of innocent passage. We did such a test 2 years ago. Under international law, they had no right to attempt to impede our ships or to use force. Force is only warranted when there is a threat, and these ships were clearly engaged in innocent passage. Our view is that unless you exercise the right of freedom of navigation, inevitably you lose it. You can always find reasons for not doing it at some particular point in time, but if we start backing off we will eventually lose some of the rights that are absolutely essential for our freedom of navigation."<sup>49</sup>

The U.S. protest added that the United States was especially troubled by the fact that the incident was preceded by threats from the Soviet ships that they had been authorized to strike. These warnings made it clear the incident was deliberate.<sup>50</sup> In fact, according to the Central Intelligence Agency, "The reaction of Soviet naval forces to two U.S. warships conducting Freedom-of-Navigation operations in the Black Sea off the Crimea yesterday probably was decided at the highest political level. . . . This challenge to U.S. operations almost certainly was approved by the Soviet political leadership which may have reasoned that minor collisions would be viewed as a firm but measured response. The Soviets claim, and have sought to enforce, a 12-nautical-mile limit for their territorial waters . . . . The incident yesterday probably was designed to demonstrate a resolve to defend Soviet borders after such failures as the Cessna landing [by West German Mathias Rust] in Red Square last month. The naval leadership has come under criticism for its inability to prevent U.S. ships from operating in

Soviet-claimed territorial waters in the Black Sea and in the Far East."<sup>51</sup> Similarly, Secretary Carlucci noted that the Soviet vessels had received authorization to engage the United States and that the decision to bump the U.S. warships was a political one.<sup>52</sup>

Soviet reaction to the incident was equally vociferous. The U.S. ambassador to the Soviet Union, Jack Matlock, was summoned to the foreign ministry to receive the formal Soviet protest. The protest note stated that "the American ships did not react to signals given by a Soviet border guard ship in advance to warn them of their approaching the state border of the U.S.S.R. and did not make suggested changes in their course."<sup>53</sup> It added that "a considerable distance inside Soviet territorial waters, the American naval ships executed dangerous maneuvering which led to a collision with Soviet naval ships. . . . Responsibility for the provocation which has been made, which led to the collision of the warships of the two nations, lies entirely and fully on the American side."<sup>54</sup>

The bases for the Soviet protest were similar to those of their protest following the 1986 incident. First, the Soviets argued that the purpose of the FON operations was to undermine the "nascent process of improvements in Soviet-American relations and heightening international relation." In response, Secretary of State George Shultz noted that "the Freedom of Navigation Program protects basic freedoms of the seas and skies and is completely consistent with international law. If we are to retain our rights of navigation, we must periodically exercise those rights in areas subject to illegal and excessive territorial claims. These activities are fully coordinated within the Executive Branch and have the support of the President and his Cabinet. Given our sensitive political relationship with the Soviet Union, proposed operations in Soviet waters are subjected to particularly rigorous scrutiny, prior to their approval, and while they are underway. But we cannot exempt the Soviets from this program—to do so would accede to their illegal maritime claims. This we do not intend to do."<sup>55</sup>

Second, the Soviets accused the United States of conducting intelligence operations in Soviet territorial waters. Although vehemently denied by the U.S. government, unidentified Pentagon officials stated that one purpose of the operations was to collect intelligence information on Soviet defenses.<sup>56</sup> Interestingly, the following testimony before the Senate Armed Services Committee by Admiral William J. Crowe, then Chairman of the Joint Chiefs of Staff, and by Secretary Carlucci suggests that U.S. policy permitted some form of intelligence collection within the territorial sea:

*Chairman Nunn: Secretary Carlucci, following Senator [Dan] Quayle's question on that right of innocent passage, I assume that we acknowledge that right of ships in our territorial waters, is that correct?*

*Secretary Carlucci: That is correct,*

*Nunn: So we are not asking the Soviet Union to do anything we do not do ourselves?*

*Carlucci: Absolutely not. As you are well aware, they have intelligence collection ships*

*sitting just three miles outside our shores, just outside what we claim is territorial waters. In fairness to the Soviets, they claim twelve miles.*

*Nunn: What about the intelligence function? Can innocent passage include intelligence gathering under international law?*

*Carlucci: We had better ask the lawyers. All ships have intelligence capability on them, so I do not see how you could avoid it.*

*Nunn: In other words, if the Soviets pull intelligence ships up right next. . . .*

*Carlucci: The purpose of innocent passage has to be transit.*

*Nunn: It is not loitering?*

*Carlucci: I would not think you could go back and forth.*

*Nunn: Innocent passage is a means of getting from one place to the other?*

*Admiral Crowe: That is exactly right. If you gather intelligence in the process, all right. But you cannot do anything unusual in order to gather intelligence while you are engaged in innocent passage. In fact, you cannot do anything to operate out of the ordinary pattern except to go. That is it.*

*Nunn: So the point is it is reciprocal. We accord nations the same right that we demand, is that right?*

*Crowe: Yes, sir, we do.<sup>57</sup>*

Perhaps the most basic point of contention between the United States and the Soviet Union involved a fundamental disagreement over the right of the coastal state to limit innocent passage in the territorial sea.<sup>58</sup> According to the State Department, the 1982 LOS Convention limits the right of the coastal state to impose restrictions on innocent passage. The English text of Article 22, paragraph 1, reads as follows: "The coastal State may, *where necessary having regard to the safety of navigation*, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships." (Emphasis added.) In other words, a state can impose sea lane restrictions that limit innocent passage only if they are based on navigational safety considerations. The State Department noted that the Soviet maritime regulations violated the provisions of the 1982 LOS Convention by completely prohibiting the exercise of innocent passage in the Black Sea.

However, the Soviets indicated that the Russian text of the law of the Sea Convention did not limit the coastal state to such restrictions. A subsequent analysis conducted by the Department of States discovered that the Russian-language text of Article 22, paragraph 1, allows the coastal state to regulate the right of innocent passage whenever necessary.<sup>59</sup> The relevant Russian text, translated into English, reads as follows: "The coastal state, *in the event of necessity and with regard to the safety of navigation*, may require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes. . . ."<sup>60</sup> (Emphasis added.)

Thus, a critical issue concerned the scope of Article 22, paragraph 1, of the Convention: specifically, does the 1982 LOS Convention allow coastal states to limit innocent passage only for navigational safety considerations, or may sea lane

restrictions be imposed when necessary for other purposes, e.g., to protect national security?<sup>61</sup>

Following the February 1988 incident, the Soviet Union expressed a strong desire to reach some form of accommodation with the United States on the issue of innocent passage in Soviet territorial waters.<sup>62</sup> Similarly, Secretary Carlucci suggested that the U.S. and the Soviet Union should try to set better guidelines for reducing dangerous incidents such as the confrontations in the Black Sea. According to Secretary Carlucci, "You could lay out some principles such as: you don't use violence, you don't ram ships, you don't fly too close to airplanes. We need to get one another's perspective . . . [and] find a way to deal with dangerous military activities and hear about their [Soviet] doctrine." As a result, the United States and Soviet Union began a series of bilateral consultations in an attempt to resolve the issues raised by the bumping incident. The negotiations involved two distinct matters: the avoidance of dangerous military activities, and the right of innocent passage.

On 11 July 1988, Marshal Sergei F. Akhromeyev, then chief of the Soviet General Staff, and Admiral Crowe issued a joint statement in Washington indicating their intent to pursue policies and actions that would assist their respective armed forces in avoiding dangerous military activities.<sup>63</sup> They also announced plans to set up a joint military-to-military working group that would consider ways to avoid such unintended confrontations. It was stated that there was "no intention on their part to replace or derogate from existing agreements such as the 1972 Agreement on the Prevention of Incidents On and Over the High Seas or the 1947 Huebner-Malinin Agreement on military liaison missions."<sup>64</sup>

On 1 June 1989, the Agreement on the Prevention of Dangerous Military Activities was signed in Moscow by Admiral Crowe and Colonel General Mikhail Moiseyev, newly appointed chief of the General Staff. According to the Agreement, the parties were "guided by generally recognized principles and rules of international law."<sup>65</sup> The document noted that both sides were convinced of the need to prevent dangerous military activities and thereby reduce the possibility of incidents arising between their armed forces.

The Agreement, which took effect on 1 January 1990, identified the following activities of personnel and equipment of armed forces, when operating in proximity to the personnel and equipment of the armed forces of the other party during peacetime, as dangerous:

- Entry by personnel and equipment of the armed forces of one party into the national territory of the other owing to circumstances brought about by *force majeure* or as a result of unintentional actions by such personnel.
- Using a laser in such a manner that its radiation could cause harm to personnel or damage to equipment of the armed forces of the other party.

- Hampering the activities of the personnel and equipment of the armed forces of the other party in a “Special Caution Area” in a manner which could cause harm to personnel or damage to equipment.
- Interfering with command and control networks in a manner that could cause harm to personnel or damage to equipment of the armed forces of the other party.

In addition, the Agreement stated that the parties “shall exercise great caution and prudence while operating near the national territory of the other Party.” It allowed the parties to designate the above-mentioned “Special Caution Areas” inside which military personnel must establish and maintain communications and undertake measures to prevent dangerous military activities. Finally, the Agreement provided for the establishment of a Joint Military Commission to ensure compliance with the Agreement and consider ways to ensure a higher level of safety.

Reaction to the Agreement was positive on both sides. Admiral Crowe was pleased that it had been negotiated by military professionals. Similarly, Major General George Butler, chief of the American negotiating team, noted that the Agreement represented “a new level of trust” between the two nations’ military and civilian leaders. The Soviet press agency Tass stated that the signing was “an unprecedented event which would have been inconceivable two years ago.”<sup>66</sup>

However, the application of the Agreement to U.S. Freedom of Navigation exercises was unclear despite its apparent relevance to FON operations. Article VIII of the Agreement stated, “This Agreement shall not affect the rights and obligations of the Parties under other international agreements and arrangements in force between the Parties, and the rights of individual or collective self-defense and of navigation and overflight, in accordance with international law. Consistent with the foregoing, the Parties shall implement the provisions of this Agreement, taking into account the sovereign interests of both Parties.”<sup>67</sup> Moreover, supplemental Agreed Statements added, “As indicated in Article VIII . . . this Agreement does not affect rights of navigation under international law, including the right of warships to exercise innocent passage.”<sup>68</sup> Since the two sides had differing views on the right of navigation and overflight through the territorial sea, Article VIII and the accompanying Agreed Statements would appear to have precluded application of the Agreement to such issues.

The issue of innocent passage was resolved in a separate series of negotiations that took place between U.S. State and Defense Department law-of-the-sea representatives and Soviet officials, including Yuri Rybakov, head of the treaty and legal division of the Ministry of Foreign Affairs. Throughout these discussions, the Soviet representatives emphasized that the Soviet Union desired a diplomatic solution to the issue of innocent passage. In fact, “Rybakov intimated that the ongoing bilateral LOS channel would be the best forum through which to achieve such a solution because of its demonstrated problem solving record

and its non-polemic atmosphere.” The State Department shared Rybakov’s view “that the LOS bilateral consultative mechanism [had] proven itself useful in problem solving over the past two years and is the best forum in which to continue our mutual search for a satisfactory solution.”<sup>69</sup> The negotiations were concluded in August 1989 when the U.S. and Soviet negotiators prepared a joint statement setting out a mutually acceptable interpretation of the rules of international law applying to innocent passage throughout the territorial sea.

On 23 September 1989 at Jackson Hole, Wyoming, Secretary of State James Baker and Soviet Foreign Minister Eduard Shevardnadze signed the Uniform Interpretation of Rules of International Law Governing Innocent Passage. According to the Joint Statement that accompanied the Uniform Interpretation, both governments recognized that the provisions of the 1982 LOS Convention relating to traditional uses of the oceans “generally constitute international law and practice and balance fairly the interests of all States.”<sup>70</sup> Thus, the United States and the Soviet Union agreed to take the necessary steps to put their internal laws and regulations in conformance with their agreement. The Uniform Interpretation provided:

1. The relevant rules of international law governing innocent passage of ships in the territorial sea are stated in the 1982 United Nations Convention on the Law of the Sea (Convention of 1982), particularly in Part II, Section 3.

2. All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.

3. Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of these activities is in innocent passage.

4. A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.

5. Ships exercising the right of innocent passage shall comply with all laws and regulations of the coastal State adopted in conformity with relevant rules of international law as reflected in Articles 21, 22, 23 and 25 of the Convention of 1982. These include the laws and regulations requiring ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may prescribe where needed to protect safety of navigation. In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage.

6. Such laws and regulation of the coastal State may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Convention of 1982.

7. If a warship engages in conduct which violates such laws or regulations or renders its passage not innocent and does not take corrective action upon request,

the coastal State may require it to leave the territorial sea, as set forth in Article 30 of the Convention of 1982. In such cases the warship shall do so immediately.

8. Without prejudice to the exercise or rights of coastal and flag States, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed means.<sup>71</sup>

On 28 September 1989, the State Department notified all U.S. diplomatic posts that since Soviet border regulations had been brought into conformity with the 1982 LOS Convention, the U.S. government had assured the Soviet Union that the United States had no reason or intention to exercise its right of innocent passage under the Freedom of Navigation program in the Soviet territorial sea.<sup>72</sup> The State Department noted, however, that the warships of both countries retained the right to conduct innocent passage incidental to normal navigation in the territorial sea. Moreover, it added that the United States would continue to conduct routine operations in the Black Sea and that the U.S. retained its right to exercise innocent passage in any territorial sea in the world. Nevertheless, after the signing of the Uniform Interpretation, there were no further incursions by U.S. warships into Soviet territorial waters in the Black Sea.<sup>73</sup>

**T**his review of the Freedom of Navigation program reveals that the Black Sea operations were successful on several levels. First, FON operations pushed the Soviet Union into formal negotiations on the right of innocent passage. According to the State Department, "the Soviets entered into a serious effort to reconcile our divergent views of the right of innocent passage only after the February 1988 Black Sea FON operation."<sup>74</sup> As a result of these negotiations, the Soviet Union amended its internal regulations and rescinded its strict limitations on innocent passage.

The long-term implications of the Black Sea FON operations are even more significant. They affirmed the provisions of the 1982 LOS Convention relating to the traditional uses of the oceans, and as a result maximized the freedom of maritime movement.

At perhaps a more fundamental level, this review of U.S. Freedom of Navigation operations in the Black Sea has shown a compelling relationship between law and strategy. On the one hand, the influence of international law on U.S. foreign policy has been significant. The Freedom of Navigation program was established as a direct result of the legal constraints potentially imposed by international law. A State failing to realize the importance of the law of the sea can find its sea power severely restricted or rendered useless. Commerce, for example, is affected when trade routes are swallowed up by expanding territorial claims. Transit along littorals may be restricted by wary nations asserting their territorial sovereignty; key choke points can be closed to both commercial and military vessels; other straits may be so highly regulated that they no longer serve

the economic or military interests of the maritime State. Sea lines of communication could be interdicted, therefore, not by a hostile fleet but by the extension of coastal state sovereignty.

At the same time, the development of international law has been shaped and influenced by the diverse strategic concerns of the United States. Throughout its history, the United States has been aware of its heavy dependence on free and unimpeded passage through the world's oceans. America's geographic position, the location of its major allies, its dependence on international trade, and the importance of the oceans as sources of food, energy, and minerals provide a compelling rationale for this traditional reliance on the freedom of the seas.<sup>75</sup> This dynamic, whereby strategy dictates the formation and development of international law, is clearly evident in the Freedom of Navigation program—wherein the United States has closely guarded both navigation and overflight rights throughout the world's oceans under the rubric of the freedom of the seas.

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## Notes

1. Message from USS *Yorktown* to Commander in Chief United States Naval Forces Europe on 12 February 1988, declassified 16 January 1990. (Abbreviations expanded.)

The right of innocent passage was most recently codified in the Third United Nations Conference on the Law of the Sea (UNCLOS III), United Nations Convention on the Law of the Sea, A/CONF 62/122 (1982).

Article 17 of the Convention provides that ships of all States enjoy the right of innocent passage through the territorial sea. Article 18 defines passage as navigation through the territorial sea for the purpose of either traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters, or proceeding to or from internal waters or a call at such roadstead or port facility. It adds that such passage must be continuous and expeditious. Passage is considered innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State.

In order to distinguish between the final Convention and the U.N. negotiations which led to it, in this paper the actual instrument will be referred to as the "1982 LOS Convention" and the conference which produced it as "UNCLOS III."

2. Message from USS *Caron* to Commander in Chief United States Naval Forces Europe on 12 February 1988, declassified on 16 January 1990. (Slightly edited, abbreviations expanded.)

The U.S.-USSR Agreement on the Prevention of Incidents On and Over the High Seas was signed in 1972. This navy-to-navy agreement (popularly referred to as the Incidents at Sea or IncSea agreement) attempted to minimize the potential for harassing actions and navigational "one upmanship" between U.S. and Soviet units in the close proximity at sea. Although the agreement applied to warships and military aircraft operating on and over the high seas, it was understood to embrace such units operating in all international waters and international airspace. The IncSea agreement was amended in a 1973 protocol to extend certain provisions of the agreement to nonmilitary ships. See "Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas," T.I.A.S. 7379, 23 U.S.T. 1168; Department of the Navy, Office of the Chief of Naval Operations 2-10, 2-11 (1987).

3. The United States also conducted Freedom of Navigation operations in the Black Sea in the waters off Rumania and Bulgaria.

4. Department of State, Bureau of Public Affairs, *U.S. Freedom of Navigation Program* (Washington: December 1988), p. 1.

5. Dorsey, *U.S. To Challenge Sea Limits*, *The Ledger Star* (Norfolk, Va.), 7 August 1979, p. 1; *U.S. Will Challenge Coastal Sea Claims That Exceed Three Miles*, *The New York Times*, 10 August 1979, p. A1.

6. *Id.* *U.S. Will Challenge*, p. A1.

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7. Memorandum from Rear Admiral S.H. Packer to the Director, Joint Staff dated 28 October 1982, declassified 17 January 1991.

8. President Ronald Reagan, *United States Oceans Policy*, 10 March 1983.

9. Negroponte, *Who Will Protect Freedom of the Seas?* 855 *Current Policy* 3 (1986).

10. *Id.*

11. Roach, "Excessive Maritime Claims," remarks prepared for delivery at a panel meeting of the American Society of International Law, 20 March 1990, p. 7.

12. *U.S. Freedom of Navigation Program*, p. 2.

13. Department of the Navy message from the Office of Information to Commander in Chief United States Naval Forces Europe, London, 19 March 1986.

The United States also conducted Freedom of Navigation operations against the Soviet Union in Avacha Bay on the Kamchatka Peninsula, the Sea of Okhotsk, and the Sea of Japan.

This analysis should be compared with the outcome of what is known as the Vilkitsky Straits incident. In August 1967, two U.S. Coast Guard icebreakers were crossing the Arctic basin north of the Soviet Union, collecting oceanographic and other scientific data. Unable to find access through the ice, the vessels planned to transit through the twenty-two-mile-wide Vilkitsky Straits, above the Taimyr Peninsula at about 105° east longitude. On 27 August 1967, the Soviet Ministry of Foreign Affairs notified the American Embassy in Moscow that the passage "would be a violation of Soviet frontiers" and that the straits constituted Soviet territorial waters. Though the State Department issued a strong protest, claiming that the passage could not be prohibited, the icebreakers were ordered not to pass through the straits. See Ackley, *The Soviet Navy's Role in Foreign Policy*, *Naval War College Review* 53-55 (May 1972); and Pharand, *Soviet Union Warns United States Against Use of Northeast Passage*, 62 *Am. J. Int'l L.* 927 (1968).

14. The Montreux Convention was signed in 1936 and concerns the regulation of transit through the Turkish straits of the Bosphorus and Dardanelles; under it, exclusive Turkish sovereignty over the straits was guaranteed. Complete freedom of transit and navigation was granted to merchant vessels. However, transit by warships was significantly restricted. See 173 *LNTS* 213; RONZITTI, *THE LAW OF NAVAL WARFARE* 435-482 (1988).

15. Welles, *While Keeping the Flag Flying*, *The New York Times*, 15 December 1968, p. 3E.

16. Ackley, *supra* n. 13 at 55-56.

17. According to Igor Belyayev of *Pravda*, "The waters of the Black Sea are joined with the Mediterranean through the Bosphorus and Dardanelles. The striving of the Soviet Union to protect its vital State interests in the region is completely natural and lawful." See Belyayev, "International Review," *Pravda*, 7 December 1968; Ackley, *supra* n. 13 at 55.

18. Sharifov, *Provocateurs at Sea*, *Izvestiya* (8 December 1968).

19. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 *Am. J. Int'l L.* 333 (1987).

20. See "Rules for Navigation and Sojourn of Foreign Warships in the Territorial and Internal Waters and Ports of the U.S.S.R.," 28 *I.L.M.*, 1715 (1985), and Neubauer, *The Right of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union*, *Naval War College Review* 52 (Spring 1988).

21. 24 *I.L.M.* 1715-1717 (1985).

22. Welles, *supra* n. 15 at 3E.

23. *U.S. Ships Report Soviet Mock Attack*, *Los Angeles Times*, 11 August 1979, p. 5.

24. Atkinson, *High Seas Diplomacy Continuing*, *The Washington Post*, 27 July 1984, p. 1.

25. The *Caron* and *Yorktown* had earlier entered the Black Sea on 9 December 1985.

The *Yorktown* is a *Ticonderoga*-class cruiser equipped with Aegis, a computer-controlled, radar-directed defense system that transmits simultaneously in all directions and can track multiple targets, while selecting, aiming, and firing the weapons best suited to destroy each target. It can also engage an incoming missile while searching for and tracking additional missiles. The *Caron* is a *Spruance*-class destroyer.

Both the *Yorktown* and the *Caron* are capable of carrying nuclear weapons. The technology used by the *Caron* and *Yorktown* was considered so advanced that much of it was not even shared with U.S. allies. In fact, according to a Pentagon analyst, "Any effort to seize the *Caron* or the *Yorktown* and you'd see every U.S. or NATO fighter-bomber in the area hitting those Soviet ships. Nor would the navy captains go quietly. They'd broadside until they sank." See RICHELSON, *AMERICAN AND THE SOVIET TARGET* 165 (1987); Sale, *Analysts Believe Soviet Ramming Orders Came From Moscow*, *UPI*, 29 February 1988; and Arkin, *Spying in the Black Sea*, *Bulletin of the Atomic Scientists* 6 (May 1988).

26. According to Admiral Chermavin, "Taking into account the openly provocative nature of the actions of the U.S. ships, the command issued an order that the combat readiness of the strike force of the fleet be enhanced. Ships and planes were promptly prepared for performing a combat mission." See Jack Redden, *Soviets Go on Alert in Presence of U.S. Ships*, *UPI*, 22 March 1986; Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 *Am. J. Int'l L.* 344 (1987).

27. *To the Shores of Tripoli*, *Time*, 31 March 1986, p. 26.

28. Department of the Navy message from the Office of Information to the Commander in Chief United States Naval Forces Europe, 19 March 1986, declassified 9 August 1989.

29. Central Intelligence Agency telegram to the Department of State, 13 February 1988, declassified 28 November 1989.

30. *Id.*

31. Butler, *supra* n. 19 at 344.

32. *Id.* at 344-345.

33. *Supra* n. 27 at 26.

34. Ralph Boulton, *Soviet Agency Accuses U.S. of Espionage over Soviet Coast*, Reuters, 2 April 1986.

35. UPI, 22 March 1986. It would appear that space-based surveillance support for Freedom of Navigation operations does exist. In 1988 the United States Space Command at Peterson Air Force Base notified the various commanders in chief that a separate message "encouraged CinCs to work together regarding Freedom of Navigation (FON) scheduling and operations. Request [that] CinCs planning for the operations [inform] UsCincSpace/J3 on any requests which may potentially involve space based surveillance support." Message from Headquarters U.S. SpaceCom, Peterson Air Force Base, Colo., to UsCincLant, 7 June 1988, declassified 22 August 1989.

36. The Crimean Peninsula accommodates sensitive Soviet southern radar defenses as well as submarine bases.

The electronic reconnaissance program has been in existence since 1962. The purpose of the program is to establish the location of radar systems and determine their physical characteristics. With such information, electronic countermeasures can be designed to jam or negate those systems. Generally, the first priority of electronic reconnaissance with respect to radars is to establish the location of the radars. Next, attention is turned to identifying the function of the radar (early warning, aircraft control, gun-laying, antiaircraft, or active countermeasures). See RICHELSON, *AMERICAN ESPIONAGE AND THE SOVIET TARGET* 109 (1987).

Interestingly, the Soviets compared the use of satellites during the Black Sea operations with the 1983 downing of the Korean Airlines passenger jet. Moscow asserted that the Korean airliner had been on a pre-planned spying mission flown in conjunction with the electronic reconnaissance (or "Ferret") satellite. Novosti asserted that "this most recent use of the Ferret satellite in an outrageous provocation against the sovereignty and security of the Soviet Union will perhaps serve as a reminder of provocation staged not so long ago. . . . The outcome of some of these provocations was relatively harmless, while others spelled a tragic end for those who staged them." See Boulton, *supra* n. 34.

37. Halloran, 2 *U.S. Ships Enter Soviet Waters off Crimea to Gather Intelligence*, The New York Times, 19 March 1986, p. A1.

38. Since 1980 the *Caron* has been on at least twenty-four missions where her special equipment for collecting intelligence has been needed. For example, she has been involved in intelligence gathering off the coast of Nicaragua in 1982 and Lebanon in 1983-1984, and she played a part in the 1986 maneuvers in the Gulf of Sidra prior to the American raids on Tripoli. The *Caron* was the first U.S. Navy ship to arrive on station for Operation Urgent Fury against Grenada in 1983.

Against Soviet troops, the *Caron* has been engaged in intelligence gathering near several major Soviet naval bases, including Kaliningrad, Severomorsk, Sevastopol, and Polyarnyy. The *Caron* also provided surveillance of the Soviet *Kiev* aircraft carrier battle group in Operation Aggressive Knight in March 1980 and Operation Eagle Eye in July 1981. See Department of the Navy message from the Office of Information to the Commander in Chief United States Naval Forces Europe, 19 March 1986, declassified 9 August 1989; Cushman, 2 *Soviet Warships Reportedly Bump U.S. Navy Vessels*, The New York Times, 13 February 1988, p. A1; and Arkin, *supra* n. 25 at 6.

39. *Soviet Ships Shadowed U.S. Vessels' Transit*, The Washington Post, 20 March 1986, p. A33.

40. Department of the Navy message from the Office of Information to the Commander in Chief United States Naval Forces Europe, 12 March 1986, declassified 9 August 1989.

41. Halloran, *supra*, n. 37 at A1.

42. Department of State Bulletin, May 1986, p. 79.

43. Department of State telegram from CincUsNavEur to Commander in Chief European Command UsCincEur), 12 February 1988, declassified 23 February 1991.

44. Sevastopol is the headquarters of the Soviet Black Sea Fleet.

45. Department of State Telegram from CincUsNavEur to UsCincEur dated 12 February 1988, declassified 22 February 1991. (Slightly edited, abbreviations expanded.)

46. Message from the USS *Yorktown* to Commander in Chief United States Naval Forces Europe, 12 February 1988, declassified 16 January 1990. (Edited as for *Caron* message.)

47. Office of the Legal Adviser, Department of State, declassified 10 August 1989.

48. Similar protests were conducted by the Navy and the Defense Department. The naval protest was lodged pursuant to the Incidents at Sea (IncSea) Agreement. At the Defense Department, Secretary Carlucci stated that one of the issues he would like to discuss with Soviet Defense Minister Dmitri Yazov during their

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upcoming meeting in Switzerland the following month would be Soviet military practices that jeopardized American lives and property. See Department of State telegram, 13 February 1988, declassified 10 August 1989.

49. U.S. Congress, Senate, Committee on Armed Services, *Department of Defense Authorization for Appropriations for Fiscal Year 1989*, Hearings 97-98 (1988).

50. Department of State memorandum to Michael Armacost, 12 February 1988, declassified 10 August 1989.

51. Central Intelligence Agency telegram to the Department of State, 13 February 1988, declassified 28 November 1989.

52. Senate Armed Services Committee Hearing, p. 95

53. Office of the Legal Adviser, Department of State, declassified 10 August 1989.

54. *Id.*

55. Letter from Secretary of State George Shultz to Senator Alan Cranston, 21 March 1988, declassified 5 June 1990.

56. Cushman, *supra* n. 38 at A1.

57. Senate Armed Services Committee Hearings, pp. 97-98.

58. At a Moscow news conference, Admiral Nikolai Markov, citing Soviet law, stated that the Soviet Union did not recognize the right of innocent passage through its territorial waters in the Black Sea.

59. Interestingly, of the six official languages into which the Law of the Sea Convention was translated, only the Arabic text was identical to the English; discrepancies with the English version existed in the Chinese, French, Russian, and Spanish texts. For example, the French text of Article 22(1) reads, in a literal translation: "The coastal State may, when the security of negotiation so dictates. . . ." The Spanish text reads, "The Coastal State may, when necessary taking into account the safety of negotiation. . . ." Department of State memorandum, 12 September 1988, declassified 10 August 1989. (Emphasis added.)

60. *Id.*

61. Department of State memorandum, 31 August 1988, declassified 10 August 1989.

62. Action Memorandum to the Secretary of State, 5 September 1989, declassified 5 June 1990.

63. 28 I.L.M. 877 (1989).

64. The Huebner-Malinin agreement governed the operations of the U.S. military liaison mission in East Germany and of the Soviet mission in West Germany. See I.L.M. 877 (1989).

65. *Id.* at 879.

66. Clines, *U.S.-Soviet Accord Cuts Risk of War*, *The New York Times*, 13 June 1989, p. A12.

67. 28 I.L.M. 885 (1989).

68. *Id.* at 895.

69. Telegram from Secretary of State to American Embassy, Moscow, 1 August 1988, declassified 5 June 1990.

70. 28 I.L.M. 14445 (1989). The Joint Statement acknowledged the U.S. position that the 1982 LOS Convention constitutes international law and practice only as to traditional uses of the oceans. By limiting its recognition on the applicability of the Convention, the United States apparently maintained its objections to those provisions in the Convention relating to unconventional uses of the ocean, namely, the deep-sea mining provisions.

71. 28 I.L.M. 1444, 1445-1447 (1989). The flag state is the country whose flag the vessel is flying.

72. Specifically, Secretary Baker delivered a letter to Foreign Minister Shevardnadze which noted that "without prejudice to its rights to exercise innocent passage, the United States of America has no intentions to conduct innocent passage with its warships in the territorial sea of the Union of the Soviet-Socialist Republics in the Black Sea." Department of State Circ Tel. no. 311861, 28 September 1989, Carroll, *Peace Comes to the Black Sea*, *Arms Control Today*, 22 (July/August 1990).

73. International Law Division of the Soviet Ministry of Foreign Affairs, 11 July 1990.

74. Action Memorandum to the Secretary of State dated 5 September 1989, declassified 5 June 1990.

75. Truver, *The Law of the Sea and the Military Use of the Oceans in 2010*, 45 *Louisiana Law Review* 1227 (1985) 1227.

## Chapter 19

# The “New” Law of the Sea and The Law of Armed Conflict at Sea.<sup>1\*</sup>

Horace B. Robertson, Jr.

**T**HE UNITED NATIONS CONVENTION on the Law of the Sea,<sup>2</sup> adopted at the close of the Third United Nations Conference on the Law of the Sea (UNCLOS III) in 1982, created what many conferees and others regard as a new constitution for the oceans. Although it has not yet entered into force,<sup>3</sup> and no major maritime State has ratified it, it has nevertheless had a profound impact on the law of the sea. President Ronald Reagan, while announcing that the United States would neither sign nor become a party to the Convention because its provisions on the mining of the deep seabed were fatally flawed, at the same time stated that, “the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.”<sup>4</sup> The American Law Institute, in its authoritative Third Restatement of the Foreign Relations Law of the United States, went further, stating:

[B]y express or tacit agreement, accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions of the Convention, other than those addressing deep sea-bed mining, as customary law binding upon them apart from the Convention.<sup>5</sup>

The features of the Convention that have had the most impact on the practice of States are the new or expanded jurisdictional zones<sup>6</sup> recognized in the Convention. These include the twelve-nautical-mile territorial sea, the twenty-four-nautical-mile contiguous zone, the 200-nautical-mile exclusive economic zone (EEZ), the greatly expanded continental shelf, and archipelagic waters, all of which have in one way or another reduced the areas in which high seas freedoms may be exercised. A new regime for international straits—transit passage—is also an important development.

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Although, as will be developed below, the differentiation of an area of the ocean that is subject to the territorial sovereignty of the coastal state—the territorial sea—had its origin in the practices of States in time of war—specifically in their assertions as neutrals that acts of hostilities should not take place close to their shores—the jurisdictional areas that are a part of the current law of the sea have been developed primarily for the protection of peacetime interests and are regarded as basically a peacetime regime. Nevertheless, by defining the areas that are subject to coastal State sovereignty or the exercise of other forms of jurisdiction, this regime may have significant effect on the exercise of both belligerent and neutral rights during time of armed conflict.<sup>7</sup> As stated by Professor Bernard H. Oxman:

To the extent one continues to divide public international law into the two classic categories—the laws of war and the laws of peace—the Convention on the Law of the Sea would doubtlessly fall within the latter category. This is so in the sense that the rules of armed conflict and neutrality are not addressed by the Convention.

At the same time, the Convention does contain rules for dividing the oceans into different jurisdictional zones. Some of the rules of warfare and neutrality vary with the status of geographic areas. The integration of the new regimes of the law of the sea with the rules of naval and air warfare is accordingly a subject that merits attention. The classic dichotomy in the law of the sea between internal waters and the territorial sea on the one hand, and the high seas on the other, has yielded to new subtleties and modalities, particularly in the regimes of straits, archipelagic waters, the exclusive economic zone and the continental shelf.<sup>8</sup>

As suggested by Professor Oxman, the most significant effect of the new jurisdictional zones will be upon the rules of neutrality, where the relationship between neutrals and belligerents and the applicability of rules depends on the particular jurisdictional area in which hostile activities take place. For that reason, this paper concentrates principally on the effect that the establishment or recognition of new jurisdictional zones may have on the law of neutrality.

Although some publicists have questioned the continued viability of the concepts of belligerency and neutrality in light of the adoption of the United Nations Charter and the limitations it has placed on the use of armed force,<sup>9</sup> as experience in the two recent Persian Gulf conflicts demonstrate, there is no other body of law that deals adequately with the relationships between States that are party to the conflict and those that choose not to take part in it. As Professor Christopher Greenwood has stated:

[T]he law of neutrality still provides the only body of rules sufficiently precise and detailed to regulate such matters as rights to intercept shipping. The casualties amongst “neutral” shipping in the Gulf [Iraq-Iran] conflict illustrate the need for a detailed body of rules on this subject and the inadequacy of attempts to deal with such matters simply by reference to the broad principles of self-defence.<sup>10</sup>

Accordingly, I shall use the terms “belligerent” and “neutral” to describe respectively those States that are involved in an armed conflict and those that are not taking part in the armed conflict.

## II

### A Brief History of the Origins and Development of “Zones” in the Oceans<sup>11</sup>

The history of the law of the sea is a history of the tensions between coastal States seeking to exercise jurisdiction over or special interests in ocean waters lapping their shores and other States seeking to exercise freedoms of navigation, fishing, and other common interests in the oceans.<sup>12</sup>

Roman law recognized the doctrine of freedom of the seas, although it remains unclear whether the freedoms embraced in the doctrine applied to all or just to Roman citizens.<sup>13</sup> With the breakup of the Holy Roman Empire and the creation of numerous city-states and principalities in Europe, those bounding the seas laid claim to vast expanses of the oceans, asserting exclusive rights of navigation and fishing within them and exacting tribute from the ships of other States that wished to sail “their” waters.<sup>14</sup> The trend toward national claims over vast expanses of the oceans reached its apogee near the end of the fifteenth century when Pope Alexander VI, in 1493, divided the then-known oceans of the world between Spain and Portugal.<sup>15</sup> A year later, in the Treaty of Tordesillas, Spain and Portugal confirmed this arrangement, each claiming for itself a monopoly of navigation and commerce within its respective sphere.<sup>16</sup>

Even England, that later bastion of the freedom of the seas, laid claims to the seas that washed the British Isles during the reigns of the Plantagenet and Stuart monarchs, although the intervening Tudor Elizabeth actively opposed “the exclusive maritime sovereignty arrogated by Venice, Portugal, or Spain.”<sup>17</sup>

The shrinking of these expansive claims began with the great juridical debates about *mare liberum* and *mare clausum* that occurred in the early seventeenth century. The most influential voice in these debates was that of Grotius, who, in 1609, published *Mare Liberum*,<sup>18</sup> in which he argued for the right of the Dutch to trade in the East Indies, where the Portuguese claimed a monopoly on the right of trade and navigation flowing from the Papal Bull and Treaty of Tordesillas. Grotius’ arguments for the freedom of the seas and against the acquisition of property rights in the oceans were repeated and refined in his more extensive work, *The Law of War and Peace*,<sup>19</sup> published in 1625. Grotius’ books went unchallenged by Portuguese and Spanish publicists, against whose claims they were specifically directed, but they struck a nerve in England, where Welwood and later Selden undertook the defense of the Stuart monarchs’ pretensions to dominion over the “British seas” (the extent of which were never clearly defined), particularly with respect to the right to exclude Dutch fishermen

and the practice of requiring the striking of the flag to British men-of-war in those seas.<sup>20</sup>

England continued to assert its dominion over “British seas” during the Stuart monarchies (1603–1714) as well as during the Interregnum period of the Commonwealth and Protectorate (1649–1659). The Scandinavian States made similar claims to the waters of the Baltic and the western seas between the Scandinavian States and Iceland and Greenland. The main opponent of these extravagant claims was the United Provinces (the Dutch), whose international commerce and fishing fleets predominated during that period. Their resistance to British demands for the striking of topsails and flag in the presence of British men-of-war and their insistence on the right of their fishing fleet to fish in “British seas” precipitated three naval wars with England during the seventeenth century. At various times during these tumultuous times of shifting alliances the Dutch were joined by France and other continental powers.

During these same times, however, the embryo of the concept of a territorial sea<sup>21</sup> began to take shape. Grotius himself had addressed only the vast expanses of the oceans, and he recognized that some enclosed and narrow parts of the sea might be subjected to control from the adjacent land territory. Later, as stated by Fulton:

During the seventeenth and eighteenth centuries another principle was gradually evolved, and was ultimately accepted as furnishing such a natural basis, so that it may now be regarded as an established part of international law. It was, that the maritime dominion of a state ended where its power of asserting continuous possession ended. The belt of sea along the coast which could be commanded and controlled by artillery on shore thus came to be regarded as the territorial sea belonging to the contiguous state. Beyond the range of guns on shore the sea was common.<sup>22</sup>

The evolution of this principle owes its origins to the law of neutrality, where prize courts held that the prizes taken within the range of guns of a neutral fort were not “good prize” and were restored to their owners.<sup>23</sup> It was reinforced by the practice of vessels rendering a salute when they came within the range of the artillery of a foreign fort.<sup>24</sup> At the beginning of the eighteenth century, the Dutch jurist Cornelius van Bynkershoek “transferred in theory to all parts of a coast this decisive property of compulsion and dominion which, strictly speaking, only existed where forts or batteries were placed.”<sup>25</sup> Bynkershoek’s principle became known as the “cannon-shot rule,” and since the range of cannon in Bynkershoek’s era was about three nautical miles or one marine league, it became the equivalent of a three-nautical-mile territorial sea. Although Bynkershoek’s theory did not receive immediate universal acceptance, it did, over the next century, become “incorporated into international law as the rule for fixing the

boundary of the territorial waters."<sup>26</sup> The causes for this gradual acceptance of a narrow band of territorial sea along the coast were, according to Fulton, twofold:

One was the moral and material victory of the Dutch Republic in its long and persistent struggle against the exorbitant claims to maritime dominion, first of Spain and Portugal, and then of England and Denmark. The other was the great extension of commerce and navigation, in which England secured an ever-increasing share, so that in the [eighteenth] century we find her taking the part of Holland in opposition to the Danish claims to *mare clausum*. As maritime commerce extended and the security of the sea became established, it was felt more and more that claims to a hampering sovereignty and jurisdiction were incompatible with the general welfare of nations; and as the states interested in this commerce had the greatest power, the assertion of a wide dominion was gradually abandoned, surviving only in remote regions or in enclosed seas like the Baltic.<sup>27</sup>

For whatever reasons (and international-law scholars are not always in agreement as to what they are), by the end of the eighteenth century or early in the nineteenth century there was international acceptance of the idea that a nation's territorial sea was constituted by a uniform band along its coast, generally considered to be three nautical miles in width.<sup>28</sup> By the end of the nineteenth century, of course, the range of cannon greatly exceeded three nautical miles, but despite the assertions of many publicists as to the illogic of preservation of a principle whose underlying theoretical basis was outdated,<sup>29</sup> the principle remained essentially intact until the end of World War II. As stated by Jessup, "it remained because the nations found it a convenient compromise between conflicting interests."<sup>30</sup>

During this same period there developed also a legal regime of the territorial sea as well as a generally accepted rule as to its breadth. Despite varying theories that existed in the nineteenth century as to the nature of the territorial sea (sovereignty, jurisdiction, bundle of servitudes, etc.), by the early twentieth century, "scarcely any author took issue with the notion that the territorial sea is subject to sovereignty."<sup>31</sup> This theory of sovereignty was confirmed by national practice and codifications of the 1920s as well as the preparatory work for the Hague Codification Conference of 1930,<sup>32</sup> the International Law Commission's Draft Convention on the Law of the Sea,<sup>33</sup> and the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.<sup>34</sup> This principle is carried forward into the 1982 United Nations Convention on the Law of the Sea, which provides, *inter alia*, in article 2, that, "The sovereignty of a coastal State extends, beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea."<sup>35</sup>

The sovereignty exercised by the coastal State over its territorial sea is the same as for its land areas and internal waters save for the right of ships of other nationalities to pass through the territorial sea in the exercise of the right of innocent passage in time of peace.<sup>36</sup> Whether innocent passage includes the right

of warships to pass without prior notification or consent in time of peace, and the extent of permissible regulation or suspension of innocent passage in time of war, will be examined below.<sup>37</sup>

Concurrently with the development of the law of the territorial sea, a number of States also asserted certain rights more limited than full sovereignty in areas of the oceans beyond the narrow territorial sea. These took a number of forms and were extended to various distances from shore. Until all such acts were repealed in 1876, Great Britain had several laws (commonly referred to as “hovering acts”) extending jurisdiction for enforcement of customs and excise laws to as much as four leagues (twelve nautical miles) from shore.<sup>38</sup> As early as 1799 the United States had similar laws applicable to ships bound for United States ports, and in several cases the United States Supreme Court recognized the lawfulness of the enforcement of similar rights by other States beyond the limits of the territorial sea.<sup>39</sup> Russia, France, Belgium, Italy, and Spain had similar laws extending to varying distances beyond three miles, as did the Scandinavian States.<sup>40</sup> Several South American States adopted zones extending to twelve nautical miles for fiscal, revenue, and security purposes.<sup>41</sup> Great Britain, having repealed the last of its “hovering acts” in 1876, strongly contested the right of other States to enforce such laws. It was joined by a number of other States in protesting the United States’ pretensions to enforce its anti-liquor laws beyond the three-mile limit during the Prohibition Era.<sup>42</sup> For these reasons, as well as the lack of uniformity both as to the content and outer limits for zones of special jurisdiction, it is difficult to conclude that the right to establish such zones had become a part of customary international law, at least until 1958 when the Convention on the Territorial Sea and Contiguous Zone recognized the contiguous zone for the purposes of preventing infringements of a coastal State’s customs, fiscal, immigration, or sanitary regulations.<sup>43</sup>

Although a number of States at various times claimed the exclusive right to exploit the fishery resources off their shores beyond the territorial sea or at least to regulate their exploitation,<sup>44</sup> such a right was not recognized in customary international law,<sup>45</sup> even though as Fulton states, the three-mile limit “was selected, not on any grounds special to fisheries, but because it had been already recognised and put into force in connection with the rights of neutrals and belligerents in time of war. . . . [I]ts application to the right of fishing is accidental and arbitrary.”<sup>46</sup>

At the conclusion of the Second World War, then, the only area of the ocean as to which it might be said that a coastal State had an undisputed right under international law to exercise jurisdiction and control was the territorial sea. Any rights beyond that outer boundary were subject to dispute unless contained in a treaty. At that point in time, therefore, the oceans were divided into three distinct areas—(1) internal waters, that is, waters inside the baseline, (2) the territorial sea of a breadth of three nautical miles over which the coastal State exercised full

sovereignty except for the right of innocent passage by surface ships of other States, and (3) the high seas, which included all other waters of the oceans, in which all States were entitled to the freedoms of the high seas, which included, *inter alia*, the freedoms of navigation, fishing, scientific research, and laying of undersea cables and pipelines, and in time of war, the right of belligerents to conduct hostilities in accordance with the law of armed conflict at sea.

The event which triggered the demise of this tripartite division of the oceans and resulted ultimately in today's multiple and overlapping zones of coastal States jurisdiction was President Harry Truman's Proclamation of the United States's claim to jurisdiction and control over the natural resources of the seabed and subsoil of the continental shelf of the United States.<sup>47</sup> The outer boundary of the continental shelf was not defined in the Proclamation, but an accompanying White House Press release stated that generally the continental shelf extended to a point at which the depth of the water was 100 fathoms (600 feet).<sup>48</sup> Although the Proclamation carefully delimited the extent of the claim and explicitly affirmed that "[t]he free and unimpeded navigation of the high seas above the continental shelf and rights under international law with respect to free swimming fish are in no way thus affected," this unilateral claim by the then-preeminent maritime power and one of the leading exponents of the freedom of the high seas opened the door for wider and more comprehensive unilateral claims by other States. The broadest of these were claims by several Central and South American States to extend their territorial seas to a breadth of 200 nautical miles. The relative uniformity and tranquility which had existed for about 150 years with respect to the law of the sea began to erode. The era of "creeping jurisdiction" had begun.

Concurrently, the International Law Commission (ILC) began its studies leading ultimately to the development of a draft convention on the law of the sea. In its successive drafts of articles on the law of the sea prior to the convening of the First United Nations Conference on the Law of the Sea in 1958, the ILC was unable, however, to agree on a breadth of the territorial sea. In the articles produced at its Eighth Session, which served as the negotiating text for the 1958 Conference, the article on the breadth of the territorial sea provided as follows:

### Article 3

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.
2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.
3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.<sup>49</sup>

Although the first UN Conference on the Law of the Sea adopted four conventions on the law of the sea, one of which was the Convention on the Territorial Sea and Contiguous Zone,<sup>50</sup> the conferees were unable to agree on an article establishing the breadth of the territorial sea, primarily because of the wide disagreement as to whether States could exercise exclusive control over fisheries in a zone beyond the limits of the territorial sea. Consequently, in its next session, the United Nations General Assembly voted almost unanimously to convene a Second Conference in 1960 exclusively "for the purpose of considering further questions of the breadth of the territorial sea and fishery limits."<sup>51</sup> This Second Conference also failed to reach agreement on the breadth of the territorial sea, rejecting by a one-vote margin a compromise proposal sponsored jointly by the United States and Canada for a six-mile territorial sea with an additional six-mile exclusive fishery zone beyond that.<sup>52</sup>

The 1958 Conference did, however, succeed in reaching agreement on the contiguous zone which prior to the Conference had been disputed.<sup>53</sup> Article 24 of the Convention on the Territorial Sea and Contiguous Zone provides, *inter alia*, as follows:

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
  - (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
  - (b) Punish infringement of the above regulations committed within its territory or territorial sea.
2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

The article adopted by the Conference was identical to that proposed by the ILC in its final draft except for the addition of the word "immigration" in paragraph 1(a). The ILC's Commentary on its draft article includes the following comments:

- (1) International law accords States the right to exercise preventive or protective control for certain purposes over a belt of the high seas contiguous to their territorial sea. *It is, of course, understood that this power of control does not change the legal status of the waters over which it is exercised. These waters are and remain a part of the high seas and are not subject to the sovereignty of the coastal State, which can exercise over them only such rights as are conferred on it by the present draft or are derived from international treaties.*<sup>54</sup>

Significantly, the Commission added the following comment:

(4) The Commission did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term "security" would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State. In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations.<sup>55</sup>

The Convention on the Continental Shelf, which also was produced by the 1958 Conference, gave treaty recognition to the continental shelf doctrine, providing that coastal States exercise "sovereign rights" over the shelf for the purpose of "exploring it and exploiting its natural resources."<sup>56</sup> The outer limit was defined as the point at which the water depth reached "200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."<sup>57</sup>

Finally, the 1958 Convention on the Territorial Sea and Contiguous Zone incorporated into its provisions the principles enunciated by the *Anglo-Norwegian Fisheries* case<sup>58</sup> for the adoption of straight baselines for portions of the coast which are marked by deep indentations or a fringe of coastal islands. Although these provisions result in only modest expansions of the national waters of a coastal State when the criteria for their use are appropriately applied, the practice of States since 1958 demonstrates a constant increase in their application to coastlines that do not fit the criteria, as well as expansive abuses of the criteria in situations where they may arguably be applicable.<sup>59</sup> The result has been to incorporate large areas that were formerly high seas into the internal waters or territorial seas of coastal States. In some cases, the adoption of straight baselines results in the appropriation of much larger areas of the high seas than would an increase of the breadth of the territorial sea to twelve miles or more.

Following the failure of the Second UN Conference on the Law of the Sea, the three-mile territorial sea began to lose adherents. Figure 1 summarizes the status of the claims of States to various breadths of the territorial sea from 1945 to the present. By 1965, the three-mile claim had become a minority position with twelve miles being almost as common; by 1974, shortly after the opening of the Third United Nations Conference on the Law of the Sea (UNCLOS III), twelve-mile adherents outnumbered three-mile adherents almost 2 to 1. The erosion of consensus as to what was the proper breadth of the territorial sea was one of the motivating factors for calling the Third United Nations Conference on the Law of the Sea.

The Expansion of Territorial Sea Claims							
Claims National	1945	1958	1965	1974	1979	1983	1991
3 NM	46	45	32	28	23	25	9
4-11 NM	12	19	24	14	7	6	5
12 NM	2	9	26	54	76	78	112
OVER 12 NM	<u>0</u>	<u>2</u>	<u>3</u>	<u>20</u>	<u>25</u>	<u>30</u>	<u>19</u>
Number of Coastal or Island Nations	60	75	85	116	131	139	145

Figure 1

Source: U.S. Department of the Navy

### III The Status of Maritime Zones in the Current Law of the Sea

The Third United Nations Conference on the Law of the Sea (UNCLOS III) met from 1973 to 1982 and produced the United Nations Convention on the Law of the Sea. Although the Convention has not yet entered into force, its provisions concerning traditional uses of the oceans are widely considered as reflective of customary international law.<sup>60</sup> The provisions of the Convention which are most likely to have an impact on the law of armed conflict at sea are the following:

- States may establish the breadth of their territorial sea up to a limit not exceeding twelve nautical miles (article 3).
- States may draw straight baselines using the same criteria adopted in the 1958 Territorial Sea Convention (article 7).
- States may establish a contiguous zone beyond their territorial sea over which they exercise a limited jurisdiction for the prevention of infringement of their customs, fiscal, immigration or sanitary laws and regulations with an outer limit no more than twenty-four nautical miles from the baseline (article 33);
- States may establish an exclusive economic zone (EEZ) beyond and adjacent to the territorial sea out to a limit of 200 nautical miles from the baseline; in the EEZ they have "sovereign rights" for the purpose of exploring and exploiting, conserving and managing the living and non-living natural resources of the seabed and subsoil and superjacent waters; in the EEZ they also exercise jurisdiction as provided in other provisions of the Convention with regard to establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment (articles 55-57). Other States "enjoy" within the EEZ the freedoms of

navigation and overflight, laying of submarine cables and pipelines, “and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention” (article 58). Both the coastal State and other States are required, in exercising their rights in the EEZ, to have “due regard” for the rights of the other States and coastal States respectively (articles 56 and 58).

- The outer boundary of the continental shelf is extended to 200 nautical miles from the baseline for all States, and for States with continental margins wider than 200 miles, to the edge of the margin according to a formula provided in the Convention, but in no case more than 350 nautical miles from the baseline or 100 nautical miles from the 2,500 meter isobath (article 76).

- Straits embraced by the territorial sea of one or more States but used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ are governed by the right of “transit passage,” which permits “the freedom of navigation and overflight solely for the purpose of continuous and expeditious passage of the strait.” Such passage may not be suspended (article 44), and passage may be made in the ship or aircraft’s “normal mode” of operation (articles 37 and 38). Straits that have a ribbon of high seas or EEZ through them or are formed by an island and its mainland are not governed by the transit-passage regime if the high seas or EEZ route or the route seaward of the island is “of similar convenience with respect to navigational and hydrographical characteristics” (articles 36 and 37). The regime for these latter categories of straits, and for straits leading to the territorial sea of a foreign State, is innocent passage (non-suspendable in the cases of island-mainland straits and straits leading to the territorial sea of a foreign State)(article 45). In addition, the regimes for straits “regulated in whole or in part by long-standing international conventions in force specifically relating to such straits” are unaffected by the straits provisions of the Convention (article 35(c)).

- States which are comprised solely of islands or parts of islands, which form an intrinsic geographical, economic and political entity, and which meet certain criteria as to land-to-water ratio and distance of separation may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago (Articles 46 and 47). The waters inside the baselines become “archipelagic waters” (article 49), and the territorial sea, contiguous zone, exclusive economic zone and continental shelf are measured outward from these archipelagic baselines (article 48). The archipelagic State exercises sovereignty over archipelagic waters, their seabed and subsoil, and the airspace above, regardless of their depth or distance from the coast (article 49). All States have the right of “archipelagic sea lanes passage” (which is equivalent to “transit passage” through straits) through archipelagic sea-lanes designated by the archipelagic State or in the absence of such designation through the routes

normally used for international navigation. For other areas of archipelagic waters, the ships of all States have the right of innocent passage.

- The unrestricted freedoms of the high seas are exercised only from the outer limit of the exclusive economic zone rather than from the outer limit of the territorial sea (article 86). The area for the exercise of full high seas freedoms has thus been reduced by the subtraction of those areas that comprise the EEZ. If all coastal and island States claim an EEZ of 200 miles, this will reduce the area of the high seas by approximately one-third. As outlined above, however, the freedoms of navigation and overflight and the freedoms to lay cables and pipelines are preserved in the EEZ subject to the obligation of those exercising them to have “due regard” for the legitimate activities of the coastal State in its EEZ.

- The Convention creates an international seabed “Area,” which is defined as “the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction” (article 1). In effect, the “Area” comprises all of the seabed beyond the outer edge of the juridical continental shelf. Unlike the other zones discussed above, the “Area” is not subject to national jurisdiction or control but is regarded by the LOS Convention as the “common heritage of mankind” (article 135). Part XI of the Convention provides a regime and institutions for the purpose of exploration and exploitation of its mineral resources. Although Part XI has not been received into customary law as have the other Parts of the Convention, the “Area” will be briefly discussed in subsection V.G. below.

The effect of the adoption of the 1982 Convention and absorption into customary international law of many of its provisions is to replace the three-fold division of the ocean (internal waters, a narrow territorial sea, and the high seas) with a multiplicity of broad and overlapping coastal areas under varying measures of jurisdiction and control by the contiguous States and a much reduced area of high seas. These divisions of the ocean are depicted in Figure 2.

#### IV

### The Law of Armed Conflict at Sea and the Traditional Areas of the Oceans

In order to understand how the emergence of new maritime areas may affect the law of armed conflict at sea, which has traditionally been conducted in oceans which juridically consisted of only three divisions—internal waters, territorial waters (territorial sea), and high seas—it is necessary to understand how this trifold division of the oceans affected the conduct of operations before the manifold and overlapping divisions of the present era were created.

The essential overarching principles could be stated as follows:

- First, the areas within which belligerents could conduct hostile operations were the high seas (which, it is to be remembered, consisted of all parts of the

# Legal Regimes of Oceans and Airspace Areas

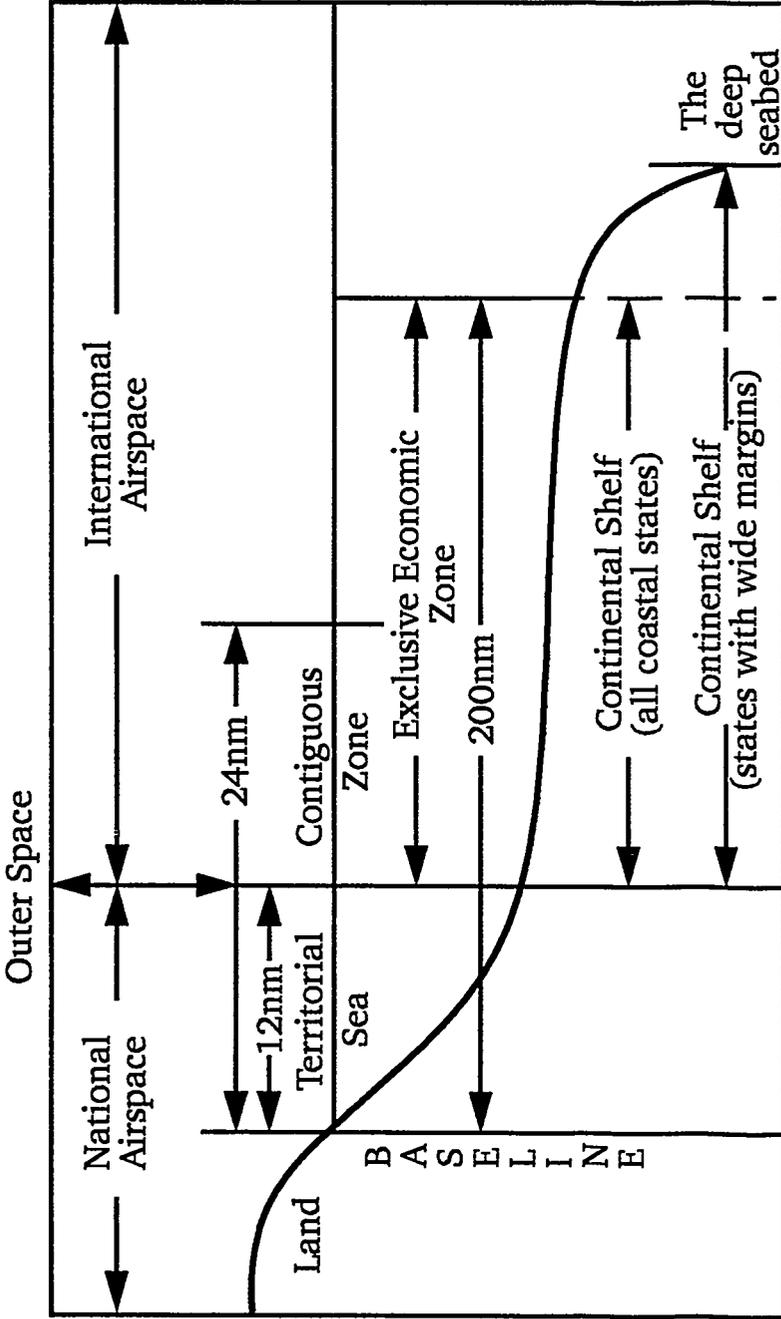


Figure 2

oceans beyond the territorial sea), the territorial sea and internal waters of belligerents, and the airspaces above these areas.

- Second, the obverse of the first principle—as a general rule, hostile operations could not be conducted in the internal waters or territorial sea of a neutral State, nor in the airspace above these divisions of the oceans.<sup>61</sup>

- Third, the neutral State is required to apply its neutrality regulations impartially to all belligerents engaged in the conflict.<sup>62</sup>

During the seventeenth and eighteenth centuries these general principles were fleshed out by the practice of States into a set of generally agreed upon and rather formal rules of conduct. Most of them were codified in the Second Hague Peace Conference as the 1907 Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War.<sup>63</sup> Although Hague XIII has not received universal ratification, and a number of important States, including the United Kingdom, have never ratified it, most of its provisions are considered to be declaratory of customary law.<sup>64</sup> In any event, it comprises the latest expression in treaty form of the respective rights and duties of neutrals and belligerents with respect to hostile activities within neutral “maritime territory” (that is, internal waters and the territorial sea) and may be used as a starting point for discussion of these issues.

The provisions of Hague XIII concerning the respective rights and obligations of belligerents and neutrals in neutral maritime territory that are most likely to be affected by the replacement of the singular coastal zone of the territorial sea with the multiplicity of coastal zones resulting from the 1982 United Nations Convention are outlined below. Since ports are normally within internal waters, which are unaffected by the creation of additional zones beyond the territorial sea, I have not included the provisions of Hague XIII dealing solely with ports. On the other hand, roadsteads may be within either internal waters or the territorial sea and thus may be affected by the extension of the breadth of the territorial sea to twelve miles or the drawing of straight baselines. Accordingly, those provisions of Hague XIII dealing with “roadsteads” are included. The significant provisions of the Convention are as follows:

Belligerents are required to respect the sovereign rights of neutral States and to abstain from acts that would constitute a violation of neutrality (article 1);

Any act of hostility, including visit, search and capture by a warship in the territorial sea of a neutral power is a violation of neutrality (article 2);

A neutral State must employ the “means at its disposal” to release a prize captured within its territorial sea (article 3);

A prize court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters (article 4);

Belligerents cannot use neutral ports or waters as a base of operations nor erect any apparatus to communicate with belligerent forces at sea (article 5);

A neutral Government must employ the “means at its disposal” to prevent the fitting out or arming of vessels within its jurisdiction which it believes are intended for cruising or engaging in hostile operations and to prevent departure from its jurisdiction of such vessels (article 8);

A neutral State must apply its rules and restrictions impartially to the belligerents and may forbid the entry of vessels which have violated its rules or its neutrality (article 9);

The “mere passage” of belligerent warships or prizes through a neutral’s territorial sea does not affect the neutral’s neutrality (article 10);

A neutral power may allow belligerent warships to employ its pilots (in its territorial waters<sup>65</sup>)(article 11);

Unless the neutral’s regulations provide otherwise, belligerent warships may remain in neutral ports, roadsteads or territorial waters no more than 24 hours (article 12);<sup>66</sup>

A neutral Power must notify a belligerent warship within its ports, roadsteads or territorial waters at the outbreak of hostilities to depart within 24 hours or such other period as required by the neutral’s regulations (article 13);

A belligerent warship may not prolong its stay in a neutral port except on account of damage or stress of weather and must depart as soon as the cause of delay is at an end (article 14);

In neutral ports and roadsteads belligerent warships may carry out only repairs that are necessary to make them seaworthy. The local authorities may decide what repairs are necessary (article 17);<sup>67</sup>

Belligerent warships may not use neutral ports, roadsteads, or territorial waters for replenishing their supplies of war material or armament or for completing their crews (article 18);

In neutral ports or roadsteads belligerent vessels may revictual only to the peacetime standard and receive fuel only in sufficient quantity to reach the nearest port of their own country or fill their bunkers, if the latter is the formula adopted in the neutral’s regulations (article 19). They may not make a repeat visit for refueling at the port of a neutral in any of whose ports they have refueled for the previous three months (article 20);

A neutral State must exercise such surveillance “as the means at its disposal allow” to prevent violation of its territorial waters (article 25); and

The exercise of its rights under the Convention by a neutral cannot be considered an unfriendly act by a belligerent (article 26).

To reemphasize a point already made, when the Convention uses the term “neutral waters” or waters “within its jurisdiction,” or similar terms, it is referring either to the internal waters or the territorial waters (territorial sea) of the neutral State, since those were the only areas of the oceans recognized at that time as being within the jurisdiction or sovereignty of the coastal State.

## V

## The Impact of Changes in Jurisdictional Zones upon the Law of Neutrality

*A. The Territorial Sea.* As developed above, the concept of the territorial sea originated with the claims of neutral States to prevent belligerent hostile activities from occurring close to their shores, and the breadth of the territorial sea was originally tied to the actual area that a coastal State could control from its shore, *i.e.*, the range of shore-based artillery or three nautical miles. Although the range of cannon soon exceeded this short distance, the rights and duties of neutral and belligerent States in the offshore areas bounding neutral coastal States remained tied to the three-mile breadth of the territorial sea. The series of compromises which resulted in the rules which eventually became embedded in the law of neutrality were thus based on the assumption that they would apply only in a very narrow coastal margin, measured from baselines which corresponded to the low-water line along the coast.

The territorial sea now has a breadth of up to twelve miles, and while the normal baseline is still the low-water line along the coast, many coastal States claim the right to draw straight baselines in a manner that extends the outer boundary of the territorial sea many miles more than twelve miles from the actual coast. (Although the waters inside these exaggerated baselines become internal waters, the right of innocent passage is preserved through them where they enclose areas which had previously not been considered as internal.)<sup>68</sup> The combined effect of increasing the breadth of the territorial sea and allowing the use of straight baselines is thus to more than quadruple the area of the waters subject to coastal state sovereignty. This in turn raises the question of the continued applicability of all the rules summarized above to this broader band along a neutral's coast.

Dr. Elmar Rauch, in his study of the issue, has no difficulty in concluding, without discussion, that the same rules apply in this expanded territorial sea that formerly applied in the narrow territorial sea. He states:

As a matter of principle belligerents are bound to respect the sovereignty of neutral powers and to abstain, in neutral territory or neutral waters [by which he means the territorial sea and internal waters] from any act of warfare. Any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral power, constitutes a violation of neutrality and is strictly forbidden.<sup>69</sup>

Dr. Rauch may well be correct that such a conclusion can be drawn without further analysis. His conclusion is bolstered by the recently published United States Navy operational law manual, which explicitly accepts the idea that

extension of the territorial sea to twelve nautical miles does not affect the application of the laws of neutrality, stating:

[T]he 12-nautical mile territorial sea is not, in and of itself, incompatible with the law of neutrality. Belligerents continue to be obliged to refrain from acts of hostility in neutral waters and remain forbidden to use the territorial sea of a neutral nation as a place of sanctuary from their enemies or as a base of operations.<sup>70</sup>

The Canadian<sup>71</sup> and German<sup>72</sup> draft manuals, both of which were prepared subsequent to the adoption of the twelve-mile territorial sea, state without comment that any hostile acts within neutral territorial seas are prohibited.

It, of course, goes without citation that internal waters and the territorial sea are subject to the sovereignty of the coastal State, save only for the right of innocent passage in the territorial sea, and that the cardinal principle of the law of neutrality is that belligerents may not conduct hostilities in neutral territory, land or sea. Nevertheless, one may question whether rules which were developed to apply to a narrow band of water along a neutral's coast should be applied automatically to a band that may be more than four times as wide. As outlined above, neutral States have an obligation to use the means at their disposal to conduct surveillance of their waters to ensure that belligerents do not violate their neutrality and to take preventive or corrective action if they detect such violations.<sup>73</sup> A broader territorial sea presents a greater burden of surveillance and enforcement for the neutral State as well as a greater temptation for belligerent naval forces, especially submarines, to use neutral waters as "safe corridors" for passage to or from legitimate areas of hostilities, for transit to or from home ports, or as safe havens for rendezvous with replenishment ships. If neutral States are unable or unwilling to carry out their obligations to prevent such activities, the opposing belligerent may legitimately take hostile action against the enemy forces that are unlawfully using the neutral's territorial sea.<sup>74</sup> Such actions would tend to embroil the neutral in the armed conflict rather than isolate it from such actions, which, of course, is the purpose of the law of neutrality. The passage of the *Altmark* through the Norwegian territorial sea in World War II,<sup>75</sup> as well as Great Britain's claim that German submarines were using the same sea as a thousand-mile-long "covered way" for passage of their submarines from home ports to operational areas in the open seas<sup>76</sup> are examples of how even a narrow territorial sea may tempt belligerents to test the limits of tolerance of both neutrals and opposing belligerents to the use of neutral territorial seas for safe havens from attack. Increasing the breadth of the territorial sea more than four-fold would undoubtedly vastly increase such temptations.

In time of peace, the ships of all States, including warships,<sup>77</sup> have the right of innocent passage through the territorial seas of all States. In time of war, neutrals may, if they choose, allow "mere passage" of belligerent warships through their territorial seas without jeopardizing their neutral status.<sup>78</sup> On the

other hand, neutrals may, if they choose, close their territorial seas except for those parts leading to an international strait to passage by belligerent warships.<sup>79</sup> The temptations for belligerents to ignore a neutral State's closure of its territorial sea to passage, and the greater burdens of surveillance and enforcement on neutrals will undoubtedly result in increased tensions in a broader territorial sea.

Professor Michael Reisman and William K. Lietzau have recently written that, "In addition to their important function in dissemination and transmission of international legal information, [military operational] manuals are an important mode for making international law as well as evidencing its existence."<sup>80</sup> In other words, the military manuals promulgated by States represent the practice of such States. The fact that the manuals of three major maritime States (United States, Canada, and Germany) have accepted the rules that were applicable to a three-mile territorial sea as equally applicable to a twelve-mile territorial sea strongly suggests that these principles are being incorporated into customary international law despite rather strong arguments that could be made that the factual and theoretical underpinnings for these rules have been undermined by a quadrupling of the breadth of the territorial sea.

**B. International Straits.** Although, as developed above, a neutral coastal State was permitted to close its territorial sea to all belligerent hostile activity, including "mere passage by belligerent warships" under the pre-1982 regime of the territorial sea, it was also generally accepted that this right did not apply to those parts of the territorial sea that comprised an international strait.<sup>81</sup> This view was reinforced by the *Corfu Channel* case,<sup>82</sup> which affirmed the right of British men-of-war to transit the strait between the Greek island of Corfu and the Albanian mainland which was a secondary passage between the Ionian and Adriatic Seas. In that case, the ICJ stated:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without previous authorization of a coastal State, provided the passage is innocent.<sup>83</sup>

This principle was codified in the 1958 Territorial Sea Convention as follows:

There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.<sup>84</sup>

As the number of adherents to territorial seas of twelve or more miles expanded in the 1960s, a number of maritime States became concerned that the regime of nonsuspendable innocent passage would provide insufficient protection for

undisputed transit rights through international straits. Not only did this increased breadth of the territorial sea bring the waters of dozens of important straits within the territorial seas of bordering States, some of these States gave a more restrictive meaning to the "innocent" half of the innocent passage definition than had been visualized by either the International Court of Justice in the *Corfu Channel* case or the negotiators of the 1958 Territorial Sea Convention. Some States based their determinations of innocence on such factors as ownership of vessels, cargo carried, or destination of voyage.<sup>85</sup> As a result, a number of States, following the initiative of the United States and the Soviet Union, began to discuss the possibility of a third U.N. conference on the law of the sea for the purpose of establishing general agreement on a twelve-mile territorial sea coupled with freedom of navigation for ships and aircraft through international straits. This movement coincided in time with Ambassador Pardo's initiative in the U.N. General Assembly for internationalization of the seabed beyond the limits of national jurisdiction. The confluence of these two movements eventually resulted in the convening of the Third United Nations Conference on the Law of the Sea (UNCLOS III), one of whose outcomes was the adoption of the doctrine of "transit passage" for ships and aircraft through straits used for international navigation between the high seas or an EEZ and another part of the high seas or EEZ.

The provisions of the LOS Convention concerning transit passage are contained in Part III of the Convention, "Straits Used for International Navigation." As previously stated, transit passage applies to all straits used for international navigation between the high seas or an EEZ and another part of the high seas or EEZ,<sup>86</sup> with three exceptions, as follows:

1. Straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits;<sup>87</sup>
2. Straits through which there exists a high seas or EEZ route "of similar convenience with respect to navigational and hydrographical characteristics;"<sup>88</sup> and
3. Straits formed by an island and mainland of the same State if there exists a high seas or EEZ route "of similar convenience with respect to the navigational and hydrographical characteristics" seaward of the island.<sup>89</sup>

For the first category, the governing regime is that which is provided in the "long-standing international convention" regulating passage through it. For the second, it is ordinary (*i.e.*, suspendable) innocent passage as codified in the territorial-sea Part of the Convention.<sup>90</sup> For the third, the regime is nonsuspendable innocent passage.<sup>91</sup>

By the terms of Part III of the LOS Convention, transit passage is more akin to the freedom of navigation exercised by ships and aircraft on the high seas than it is to innocent passage as codified in Part II of the Convention. Transit passage is defined as the exercise of the "freedom of navigation and overflight"<sup>92</sup> by ships

and aircraft in their “normal modes of continuous and expeditious transit.”<sup>93</sup> During transit passage ships and aircraft must proceed through the strait without delay, refrain from the threat or use of force against bordering States and other acts contrary to the U.N. Charter, and comply with other relevant provisions of Part III. In addition, ships must comply with generally accepted rules for safety at sea and for the prevention, reduction, and control of pollution from ships, and aircraft must observe the ICAO rules for air navigation<sup>94</sup> and monitor the appropriate radio frequencies. Although ships and aircraft in transit passage must comply with the laws and regulations of the States bordering straits, the content of such rules is confined to the safety of navigation, the prevention of fishing by fishing vessels, the prevention of customs, fiscal, immigration or sanitary offenses, and regulations which give effect to applicable international regulations for the control of pollution by oil and other noxious substances.<sup>95</sup> States bordering straits may not impede transit passage nor adopt laws or regulations “that discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage. . . .”<sup>96</sup> Even if the transiting ship or aircraft violates the laws or regulations of the States bordering a strait, these States may not deny or terminate the transit–passage rights of the ship or aircraft but must find their remedy in a civil suit if the offender is a merchant ship or civil aircraft or under the principles of State responsibility if it is a ship or aircraft entitled to sovereign immunity.<sup>97</sup>

If under the pre-existing regime for straits it was generally accepted that neutral States could not deny passage to belligerent ships, including warships, in time of war, then *a fortiori* it should follow that this rule should be preserved under the more liberal transit–passage regime. But this new regime has two elements not included in the older one of nonsuspendable innocent passage: (1) it applies to aircraft; and (2) ships and aircraft may transit in their “normal mode.” The second of these has been interpreted as including the submarines’ right to submerged transit.<sup>98</sup> Does it necessarily follow that submerged passage by submarines and overflight by belligerent aircraft should be allowed under the doctrine of transit passage in time of war? Adopting a teleological approach, Dr. Rauch answers yes. He states:

One of the advantages of the new transit passage concept is that it keeps the littoral States bordering straits with great strategic value out of the vicious circle of escalation in times of tension and crisis. If transit through such straits were subject to the discretion of the coastal States, they would unavoidably become involved, even if the discretionary power were to be exercised evenhandedly . . . . The ramifications of a refusal or of a permission of transit in whole or in part . . . could, albeit legally non-discriminatory, in fact be of quite different military and strategic value to the parties to the conflict. . . . The escalation-preventing quality of transit passage in times of tension and crisis—*i.e.*, in time of fragile peace—are even more important for neutral States in times of armed conflict.<sup>99</sup>

The United States naval manual asserts that the transit passage provisions of the LOS Convention are a part of customary international law and interprets them as providing very broad rights for passage of belligerent forces in time of war for straits bounded by neutral States, stating:

Customary international law as reflected in the 1982 Law of the Sea Convention provides that belligerent and neutral surface ships, submarines and aircraft have a right of transit passage through, over, and under all straits used for international navigation. Neutral nations cannot suspend, hamper, or otherwise impede this right of transit passage through international straits. Belligerent forces transiting through international straits overlapped by neutral waters must proceed without delay, must refrain from the threat or use of force against the neutral nation, and must otherwise refrain from acts of hostility and other activities not incident to their transit. Belligerent forces in transit may, however, take defensive measures consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerent forces may not use neutral straits as a place of sanctuary nor a base of operations, and belligerent warships may not exercise the belligerent right of visit and search in those waters.<sup>100</sup>

The Canadian draft manual has a similar, though less extensive provision, as follows:

Warships and military aircraft of a belligerent state may exercise the right of transit passage, that is, of essentially unimpeded passage or overflight in an appropriate state of readiness with appropriate sensors activated, through certain straits where the transit passage [regime?] applies. . . .<sup>101</sup>

The German draft manual does not address the issue of passage through neutral straits separately from the question of passage through the territorial sea generally. It is to be recalled that the German manual appears to be ambiguous as to whether the right of innocent passage for belligerent warships through the territorial sea of a neutral State may be suspended.<sup>102</sup>

Based on the foregoing, both logic and State practice lead to the conclusion that the peacetime regime of transit passage, as formulated in Part III of the LOS Convention, is equally applicable in time of armed conflict to the passage of belligerent warships (including submerged submarines) and aircraft through straits bounded by neutral States.

One further aspect of the straits question deserves at least brief mention before leaving this subject; that is, the issue of straits governed by treaty regimes. As will be recalled, Article 35 of the LOS Convention excepted from the transit passage regime, "straits in which passage is *regulated* in whole or in part by long-standing international conventions in force specifically relating to such straits."<sup>103</sup> During the course of the negotiations in UNCLOS III, various delegates suggested that this exception would apply to the Straits of the Dardanelles and Bosphorus

(Turkey),<sup>104</sup> the Strait of Magellan (Argentina and Chile),<sup>105</sup> the Belts and Sound (Sweden–Denmark),<sup>106</sup> and the Aaland Strait (Sweden–Finland).<sup>107</sup>

A detailed examination of each of these Conventions is beyond the scope of this paper. Dr. Rauch, however, raises the question in his monograph as to whether all of these straits are actually “regulated” by the Conventions referred to in the footnotes so as to qualify for exemption from the transit passage regime. Although acknowledging that at least two leading international authorities in the field disagree with him as to the Danish Straits and the Strait of Magellan, he concludes, based on the analysis therein as well as his prior works to which he refers, that except for the Turkish Straits, “would-be claimants to Art. 35(c) status simply fail to make a credible case.”<sup>108</sup> The United States’ manual, though not explicitly excluding other treaty-regime straits, mentions only the Turkish Straits as being entitled to this exception to the regime of transit passage.<sup>109</sup>

In the case of the Turkish Straits, in time of war, Turkey being a neutral, the Montreux Convention provides for freedom of transit for neutral warships but prohibits passage of belligerent warships except under certain exceptional circumstances delineated in the Convention. If Turkey is at war, Turkey has complete discretion as to the transit of warships.<sup>110</sup>

**C. *The Contiguous Zone.*** As discussed above,<sup>111</sup> the contiguous zone is an area of limited jurisdiction. The competence of the coastal State in this zone is limited to the exercise of the control necessary to prevent infringement of the coastal State’s customs, fiscal, immigration, and sanitary regulations within its territory or territorial sea.<sup>112</sup> The International Law Commission explicitly refused to recognize special security rights for the contiguous zone, and the 1958 and 1982 Conventions adopted the ILC’s formula.<sup>113</sup> The contiguous zone is, for all intents and purposes, the equivalent of the high seas insofar as the conduct of hostile operations by belligerents and the exercise of belligerent or neutral rights and obligations are concerned. Thus, the extension of the outer limit of the contiguous zone from its former distance of twelve miles from the baseline to twenty-four nautical miles as provided by article 33 of the 1982 LOS Convention should not be of any significance in the application of the law of armed conflict at sea.

The contiguous zone is, of course, overlapped by the exclusive economic zone and the continental shelf. Insofar as the rules of armed conflict may be affected by the creation of these latter juridical areas in the oceans, which will be discussed below, those same effects would be felt in the contiguous zone.

**D. *The Exclusive Economic Zone.*** The adoption of the concept of an exclusive economic zone (EEZ) in the 1982 Law of the Sea Convention represents the culmination of a long-continued effort by some segments of the international community to separate “jurisdiction” over the natural resources of offshore

waters from “sovereignty” manifest in the territorial sea. As stated earlier,<sup>114</sup> by virtue of the territorial sea owing its origin to the law of neutrality, its “application to the right of fishing is accidental.” In the words of Dr. Rauch, “[The EEZ] is the synthesis of the fisheries zone, epicontinental sea, patrimonial sea, and the continental shelf concept which started with the Truman Proclamation of 1945.”<sup>115</sup>

Although the coastal State exercises “sovereign rights” over the EEZ for the purpose of exploring and exploiting, managing and conserving its living and non-living resources and “jurisdiction” to the extent provided in the Convention with regard to the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment,<sup>116</sup> it is clear that the EEZ is not incorporated into the territorial regime of the coastal State as are internal waters and the territorial sea.<sup>117</sup> Reinforcing the distinction between the territorial sea and the exclusive economic zone is paragraph 2 of Article 58, which states, “Articles 88 to 115 [from the High Seas Part of the Convention] and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.” Article 89, which is among those articles so incorporated into the exclusive-economic-zone Part of the Convention, states, “No State may validly purport to subject any part of the high seas to its sovereignty.”

Whether one considers the EEZ as part of the high seas, as some authorities contend, or as an area that is *sui generis*, as contended by others,<sup>118</sup> it is clear that it is a zone that is neither territorial nor has wholly the characteristics of high seas. It is a zone in which competences are allocated to coastal States on the one hand and all other States on the other so as to balance the need of the coastal State to have sufficient authority to exploit and manage the economic resources (article 56 (1)) against the need of all other States to retain high seas navigation and communications freedoms and uses related to such freedoms (article 58 (1)). Article 58(1) describes these high-seas freedoms as follows:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

As stated by Elliot Richardson, the United States Ambassador to UNCLOS III:

In the group which negotiated this language it was understood that the freedoms in question . . . must be *qualitatively* and *quantitatively* the same as the traditional high-seas freedoms recognized by international law: they must be qualitatively the same in the sense that the nature and extent of the right is the same as the traditional high-seas freedoms; they must be quantitatively the same in the sense that the included uses of the sea must embrace a range no less complete—and allow for future uses no less inclusive—than traditional high-seas freedoms.<sup>119</sup>

Except for the freedom of fishing, freedom of scientific research, and freedom to construct artificial islands and other installations which are related to the exploration and exploitation of the resources of the EEZ, the freedoms are identical to those enumerated in article 87 as applicable in the high seas. Although article 58 is not open-ended, as is article 87 in which the enumeration of high seas freedoms is preceded by the term *inter alia*, the addition of the phrase “and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines” in article 58 seems to serve the same purpose.<sup>120</sup> The balance between the rights of coastal States and other States in the EEZ is also reflected in the paragraphs of articles 56 and 58 which require both coastal States (article 56(2)) and other States (article 58(3)) to have “due regard” to the rights and duties of “other” States and coastal States respectively.

In assessing this balance and applying it to the operations of warships in the exclusive economic zone, Professor Oxman concluded as follows:

[W]arships in principle enjoy freedom to carry out their military missions under the regime of the high seas subject to three basic obligations: (1) the duty to refrain from the unlawful threat or use of force; (2) the duty to have “due regard” to the rights of others to use the sea; and (3) the duty to observe applicable obligations under other treaties or rules of international law. The same requirements apply in the exclusive economic zone, with the addition of an obligation to have “due regard to the rights and duties of the coastal State” in the exclusive economic zone.<sup>121</sup>

Although Oxman was concerned explicitly only with peacetime rights, his conclusion is equally applicable in time of armed conflict as well. The juridical nature of the zone does not change with the transition from peace to war.<sup>122</sup> There is thus no basis for concluding that, except for the duty to have due regard to the rights of the coastal State for the exploitation of the economic resources of the zone, the conduct of hostilities by belligerent States in the exclusive economic zone of a neutral State is subject to greater restraints than is their conduct on the high seas. Clearly, there is no basis for concluding from the terms of the LOS Convention that the EEZ is to be equated to the territorial sea insofar as the application of the rules of neutrality are concerned.

Nevertheless, there have been suggestions from States and in the literature that some States may regard the regime of the EEZ as encompassing the right of coastal States to control military operations in the EEZ. The earliest suggestion to this effect which I have discovered was published anonymously in the official journal of the Swedish Navy in 1974, and is quoted in English translation in Dr. Rauch's monograph as follows:

For Sweden it is of great interest to prevent, that other States use our exclusive economic zone for the deployment of nuclear weapons. The coastal State has to make sure that this does not happen. . . . In times of war the neutral State has the obligation under the 1907 Convention to protect its merchant navy and those of other States against military operations. The neutral State is also obliged to prevent the use of its sea territory by a belligerent as a base for naval operations against the adverse party. The rights and duties layed upon the coastal States in the exclusive economic zone will also have to be fulfilled in situations where the coastal State remains neutral in a war between third powers. The protection of neutrality in this case is evidently—in whole or in part—*extended to the exclusive zone*.<sup>123</sup>

At several times during the negotiation of the Law of the Sea Convention, the delegate of Sweden made statements concerning the relevance of the Convention to the law of neutrality as expressed in Hague XIII.<sup>124</sup> Although the connection between the anonymous article and the official statements of the Government of Sweden is not readily apparent, Dr. Rauch raises them as a matter of concern.

Dr. Rauch analyzes several bases on which a claim might be made that the neutrality rules of Hague XIII applicable to the territorial sea were also applicable to the EEZ. One is the similarity of language in Hague XIII and the LOS Convention. While acknowledging that the French text of the LOS Convention uses the terms *droit souverain* and *jurisdiction* to describe the jurisdiction exercised by the coastal State in the EEZ, which are also the terms used in the French text of Hague XIII (the only authentic text), he does not conclude from this that "the new concept of the exclusive economic zone is *nunc pro tunc* to be included in the historical scope of application" of Hague XIII. In his view, it is clear that what was meant by the terms *droit souverain* and *jurisdiction* in Hague XIII was maritime areas subject to the sovereignty of the State—in modern terms, the territorial sea and internal waters.<sup>125</sup> But Rauch does not stop at that point; he argues that if a State may not subject the EEZ to its sovereignty in time of peace, citing article 89, it "amounts to a clear prohibition in time of war to attempt to subject the exclusive economic zone to principles of neutrality,"<sup>126</sup> since "[t]he starting point of the regulations ought to be the sovereignty of the neutral State."<sup>127</sup> He concludes that "acts of hostility between belligerents can be committed in the exclusive economic zones of neutral States as a legitimate exercise of traditional rights under the law of war."<sup>128</sup>

While Dr. Rauch's conclusion would appear to be irrefutable, at least one other thread tying the EEZ to territorialist theories has appeared. At the final

session of the Conference in Montego Bay, Jamaica, in 1982, Brazil declared on its signing of the Convention that its government “understands that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres within the exclusive economic zone, particularly when these activities involve the use of weapons or explosives, without the prior knowledge and consent of the coastal State.”<sup>129</sup> Similar statements have also been made by the governments of Cape Verde<sup>130</sup> and Uruguay.<sup>131</sup> These statements were contested by statements of the governments of Italy, France, and the United States, exercising the right of reply,<sup>132</sup> and have been rejected by Ambassador T.T.B. Koh, who was the President of UNCLOS III during the latter part of the Conference,<sup>133</sup> as well as by Barbara Kwiatkowska in her treatise on the EEZ.<sup>134</sup>

In addition to its assertions concerning military maneuvers in the EEZ, Brazil also requested the Legal Committee of ICAO to hold that the rules of overflight of the EEZ were the same as for those over land territory and the territorial sea. The Legal Committee rejected this request, holding that such a position was totally incompatible with the provisions of the LOS Convention, which equate the EEZ with the high seas insofar as freedom of overflight is concerned.<sup>135</sup>

Although the positions stated by Brazil, Cape Verde, and Uruguay were directed explicitly to a peacetime situation, one may infer that they might be asserted with respect to the conduct of hostilities and other military operations in their exclusive economic zones in time of war. As already developed, this position cannot be supported by the terms of the LOS Convention. Nor is it supported by the three military manuals that have been examined. The Canadian Draft Military Manual provides explicitly in paragraph 703 that, “The general area within which the naval forces of belligerents are permitted to conduct operations involving the use of force includes: the high seas (including exclusive economic zones). . . .”<sup>136</sup> The German Manual likewise provides, “[A]s a matter of principle acts of naval warfare may be performed as in the high seas also in the exclusive economic zones of neutral or non-belligerent states.”<sup>137</sup> Although the United States’s manual does not state the same proposition explicitly, it does so by negative implication by defining neutral territory as including only the neutral’s land, internal waters, territorial sea, and archipelagic waters (if any).<sup>138</sup>

From the foregoing analysis, it seems incontestable that, despite the assertions of a few States and publicists, the exclusive economic zone may be equated to the high seas insofar as the application of the law of neutrality is concerned.

Since the rights of the coastal State in the seabed of the EEZ are exercised in accordance with the continental-shelf Part of the LOS Convention,<sup>139</sup> discussion of hostile military activities or placing of military devices on the seabed of the EEZ will be discussed below in the section on the continental shelf.

**E. The Continental Shelf.** The continental shelf comprises the seabed and subsoil of a coastal State from the outer boundary of its territorial sea to the outer edge

of the continental margin or, for coastal States with margins less than 200 miles, to the outer boundary of the exclusive economic zone.<sup>140</sup> For the few coastal States which have continental margins wider than 200 miles, the edge of the continental margin is determined by a complex formula contained in article 76 of the Convention which may extend the outer boundary to as much as 350 miles from the baseline or 100 miles beyond the 2500-meter isobath.

On the continental shelf the coastal State exercises "sovereign rights for the purpose of exploring it and exploiting its natural resources."<sup>141</sup> Unlike the EEZ, however, the coastal State's jurisdiction over the continental shelf does not extend to the water column or airspace above it, except insofar as is necessary to allow the coastal State to construct artificial structures on the continental shelf for the purpose of exploiting it and establishing reasonable safety zones around such structures. In this connection, the provisions of Article 60 of the EEZ Part of the Convention apply *mutatis mutandis* to the continental shelf.<sup>142</sup> The Convention provides explicitly that "the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters" and that "[t]he exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention."<sup>143</sup> Conversely, by incorporation of article 60 by reference into the continental-shelf Part of the Convention, "All ships must respect these safety zones [around continental-shelf installations] and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones."<sup>144</sup> Thus, the waters above the continental shelf are governed by the regime of the exclusive economic zone insofar as they are within 200 miles of the baseline and by the regime of the high seas where they are beyond that limit.

Since the continental shelf itself has a status different from the waters superjacent to it, it is appropriate to discuss acts of warfare that may be conducted in the water column separately from those that may be conducted on the seabed itself.

**1. Waters Superjacent to the Continental Shelf.** As the previous discussion of the exclusive economic zone has concluded, the waters of the EEZ have the same characteristics as those of the high seas with respect to the conduct of hostilities by belligerents therein and the application of the law of neutrality thereto, save only for the duty to have "due regard" for the rights of the coastal State in the zone. *A fortiori* the waters above the continental shelf beyond the exclusive economic zone are high seas in the strictest sense of that term and are not in any way different from other parts of the high seas with respect to belligerent activity save only the duty to respect the safety zones and comply with international standards regarding navigation in the vicinity of artificial islands, installations, structures, and safety zones.<sup>145</sup> Thus, the only restriction on the law

of armed conflict at sea that would be made necessary by the emergence of the continental shelf as a defined area of the oceans is to incorporate cautionary notes concerning respect for and non-interference with legitimate activities and structures utilized by the coastal State for exploitation of the natural resources of the shelf.

**2. The Seabed of the Continental Shelf.** Since the relevant articles of both the 1958 Continental Shelf Convention<sup>146</sup> and the LOS Convention<sup>147</sup> recognize that the coastal State exercises only “sovereign rights for the purpose of exploiting” the shelf and its resources, they visualize that other States may use the seabed of the shelf for other purposes not inconsistent with and not interfering with the coastal State’s exclusive rights of exploitation of natural resources. Although India introduced a proposal at UNCLOS I that would have prohibited the building of military bases or installations on the continental shelf “by the coastal State or any other State,” this proposal was defeated.<sup>148</sup> A similar proposal, but limiting the prohibition to States other than the coastal State, was put forth by Mexico and Kenya at an early stage of UNCLOS III. This proposal did not find its way into the negotiating texts nor the final Convention.<sup>149</sup> The negotiating history of the two most important international instruments would thus seem to suggest that, subject to the restrictions on the use of the seabed found in the Conventions themselves, emplacing weapons or other military devices on the seabed of the continental shelf, both within the 200-mile EEZ and beyond, is permissible as the exercise of a freedom of the high seas.<sup>150</sup> The military activities on the seabed of the continental shelf most often discussed are the laying of mines or cable arrays for underwater detection and surveillance.

Article 60 of the LOS Convention, which is applicable to the continental shelf as well as to the EEZ, contains the relevant restrictions on the construction of installations on the seabed. It provides in part as follows:

Article 60  
Artificial islands, installations and structures in the  
exclusive economic zone

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

- (a) artificial islands;
- (b) installations and structures for the purposes provided in article 56 and other economic purposes;
- (c) installations and structures *which may interfere* with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over *such* artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

3. Due notice must be given of the construction of *such* artificial islands,

installations or structures. . .

4. The coastal State may, where necessary, establish reasonable safety zones around *such* artificial islands, installations and structures . . .

. . .

6. All ships must respect these safety zones. . .

7. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

(Emphasis supplied)

A careful reading of the quoted portion of Article 60 reveals that a coastal State may regulate (under a reasonable interpretation this would also include “prohibit”) the construction, operation, and use of artificial islands whatever their purposes, other installations and structures whose purposes are the economic exploration or exploitation of the EEZ or continental shelf, and those installations erected by others which may interfere with the rights of the coastal State in the zone. In other words, a coastal State has the exclusive right to construct and regulate artificial islands in the EEZ and on the continental shelf. But it does *not* have the right to regulate or prohibit installations and structures other than artificial islands *unless* they are for an economic purpose *or* would interfere with the coastal State’s right to economic exploitation of the zone or shelf. In addition, neither the coastal State nor any other State may construct or operate structures or installations where they will interfere with navigation (para. 6), and other States must respect the safety zones established by the coastal State. Furthermore, the constructing State need not give notice of such installations or structures unless they are of such a type that their location or operation “may interfere with the exercise of the rights of the coastal State” (para. 3). Of course, the State other than the coastal State engaging in such activities must abide by the requirements of “due regard” for the rights of the coastal State and for the interests of all States in their exercise of the freedoms of the high seas.

Under the foregoing interpretation, which is believed to be the correct one, there is no prohibition against States other than the coastal State employing or emplacing weapons or detection devices on the seabed of the EEZ or continental shelf if they would not interfere with the coastal State’s exploitation of the resources of the EEZ or continental shelf and if they are in compliance with the explicit restrictions contained in article 60.<sup>151</sup>

Although the Partial Test Ban Treaty of 1963,<sup>152</sup> the Seabed Treaty of 1971,<sup>153</sup> and the Tlatelolco Treaty of 1967<sup>154</sup> contain certain restrictions on the emplacement of nuclear weapons and other weapons of mass destruction in some areas of the seabed, I have not included a discussion of their provisions, since the subjects of those treaties are beyond the scope of this paper.

*F. Archipelagic Waters.* Under the traditional law of the sea, and under most circumstances in the 1982 LOS Convention, islands are treated in the same manner as mainlands with respect to the drawing of baselines and delimitation of the territorial sea and other coastal zones. The 1982 Convention, however, recognized a special exception in the case of archipelagic States, which are permitted to draw archipelagic baselines enclosing a newly recognized category of waters—archipelagic waters.

Archipelagic waters are created when an archipelagic State meeting the qualifications of article 47 of the LOS Convention draws archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago. The waters enclosed thereby are denominated “archipelagic waters.”

The terms of article 47 permit archipelagic baselines to be as much as 100 nautical miles long, with up to three percent of the total number of baselines as much as 125 miles in length. As can be seen by examining a map of Indonesia, which is the archetypical archipelagic State, adoption of archipelagic baselines can create archipelagic waters of enormous proportions. Indonesia stretches approximately 3,000 miles east to west and almost 1,000 miles north to south. Indonesia’s archipelagic baselines are over 8,000 miles in length and enclose some 666,000 square nautical miles of ocean space. They also encompass the important straits of Sunda, Sumba, Lombok, Ombai, Molucca, and Macassar as well as a number of important internal passages within the archipelago.<sup>155</sup>

The sovereignty of the archipelagic State extends to all waters enclosed by archipelagic baselines, regardless of their depth or distance from the coast (article 49). The sovereignty also extends to the airspace above and the bed and subsoil of the archipelagic waters. Essentially, the only limitations on the sovereignty of the archipelagic State over archipelagic waters are the rights preserved in all other States (1) to archipelagic sea lanes passage and air routes through archipelagic sea lanes as defined by the archipelagic State, or if none are designated then through the routes normally used for international navigation (article 53), and (2) to innocent passage through other areas of archipelagic waters (article 52). Within archipelagic waters, archipelagic States may draw closing lines for the delimitation of internal waters in accordance with the rules for drawing baselines for the territorial sea (article 50). The archipelagic State’s territorial sea, contiguous zone, exclusive economic zone and continental shelf extend outward from the archipelagic baselines.

**1. Archipelagic Waters Outside of Archipelagic Sea Lanes.** The legal character of archipelagic waters is essentially identical to that of the territorial sea. On this basis Dr. Rauch concludes without serious discussion that “belligerents in future will have to respect archipelagic waters the same way as they have to respect the territorial sea of the coastal State.”<sup>156</sup> The United States manual adopts

the same conclusion, although it precedes it with a cautionary statement, as follows:

The balance of neutral and belligerent rights and duties with respect to neutral waters is, however, at its most unsettled in the context of archipelagic waters.

Belligerent forces must refrain from acts of hostility in neutral archipelagic waters and from using them as a sanctuary or a base of operations.<sup>157</sup>

In its chapter on the rights and duties of neutral powers, the Canadian draft manual likewise equates archipelagic waters of a neutral State to the territorial sea of such a State, stating:

1. Neutral waters are the inland waters, internal waters, territorial seas and, where applicable, archipelagic seas of states which are not participants in an international armed conflict. . . .

2. Any act of hostility, as, for example, the seizure of or attack upon an enemy vessel within neutral waters is a breach of neutrality and as such is forbidden.<sup>158</sup>

In the chapter on conduct of hostilities at sea, however, in the paragraph entitled "General Area of Naval Warfare," the Draft Manual does not include archipelagic waters of belligerents in the recitation of areas of the sea open to the conduct of hostilities. That paragraph provides:

1. The general area within which the naval forces of belligerents are permitted to conduct operations involving the use of force includes: the high seas (including exclusive economic zones), the territorial sea and internal waters of belligerents, the territory of belligerents accessible to naval forces, and the air space over such waters and territories.<sup>159</sup>

These apparent inconsistencies undoubtedly reflect the fact that the Canadian Manual is still in draft form and will be addressed in the review process.<sup>160</sup>

Although the German Manual states that archipelagic waters of *the parties* to the conflict are legitimate areas for the performance of acts of naval warfare,<sup>161</sup> its chapter 11 on the law of neutrality refers only to the "territorial waters" of neutrals.<sup>162</sup> In paragraph 1012 of the preceding chapter on armed conflict at sea, however, the Manual states that "The rights of coastal and archipelagic states must . . . be taken into due consideration." The German Manual, like the Canadian one, is also in draft form and subject to further revision.

What has been said above with respect to the effects of the broadening of the territorial sea as a result of the adoption of a twelve-mile breadth and the liberalization and abuse of straight baselines<sup>163</sup> applies with even more vigor to archipelagic waters. If, in a situation in which an archipelagic State such as Indonesia is a neutral, these vast areas of archipelagic waters which were formerly high seas are to be removed from the area open to the conduct of naval hostilities

and to become “neutral waters” with all the consequences that that term implies, both for the rights and obligations of neutral States as well as to the belligerent States, one may wonder whether either neutrals or belligerents will be able to live up to their obligations. If the narrow Norwegian territorial sea was a “covered way” enabling German submarines to transit to and from the high seas sheltered from attack by British naval and air forces,<sup>164</sup> neutral archipelagic waters could become a vast, protected superhighway providing a tempting haven for escape from attack and as a secret base for operations. The vastness of such waters certainly renders dubious the so-called twenty-four-hour rule of Hague XIII<sup>165</sup> and increases manifold the burdens imposed on a neutral State by the obligation to exercise surveillance of its neutral waters.<sup>166</sup> This is true whether the archipelagic State chooses to allow belligerent warships to continue to exercise the right of “mere passage” through its archipelagic waters or deny such passage, as would be permitted if archipelagic waters are analogized to the territorial sea in this respect.<sup>167</sup> In either event, the burdens of surveillance and enforcement on the neutral State would be heavy, and the neutral’s failure or inability to live up to these obligations would be likely to embroil it in the conflict. This danger is recognized in the United States manual, which provides:

The neutral archipelagic nation has an affirmative duty to police its archipelagic waters to ensure that the inviolability of its neutral waters is respected. If a neutral nation is unable or unwilling effectively to detect and expel belligerent forces unlawfully present in its archipelagic waters, the opposing belligerent may undertake such self-help enforcement actions as may be necessary to terminate the violation of neutrality. Such self-help enforcement may include surface, subsurface, and air penetration of archipelagic waters and airspace and the use of proportional force as necessary.<sup>168</sup>

**2. Archipelagic Sea Lanes and Archipelagic Sea Lane Passage.** The waters of archipelagic sea lanes and the airspace above them are subject to a different navigation regime than are archipelagic waters outside such sea lanes. An archipelagic State may not deny to ships and aircraft of other States the right of archipelagic sea lane passage through its archipelagic waters in time of peace.<sup>169</sup> In designating such passages, which will normally be fifty nautical miles in width, the archipelagic State must include for ships “all normal navigational channels.”<sup>170</sup> If the archipelagic State fails to make such designations, “the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.”<sup>171</sup> As previously stated, archipelagic sea lanes passage, in legal terms, is essentially identical to transit passage through straits.<sup>172</sup> In exercising their rights of archipelagic sea lanes passage, foreign ships and aircraft may proceed in their “normal mode” but only for the purpose of “continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive

economic zone,"<sup>173</sup> and they must observe the same types of rules and regulations that are applicable in transit passage through straits.<sup>174</sup>

Since transit passage and archipelagic sea lanes passage are to all intents and purposes legally identical, the same logic which compelled the conclusion that in time of war belligerent warships and military aircraft may exercise the right of transit passage through neutral straits would lead to the same conclusion with respect to archipelagic sea lanes passage through archipelagic sea lanes.

This conclusion is accepted by the United States manual, which states that:

Belligerent ships or aircraft, including submarines, surface warships, and military aircraft retain the right of unimpeded archipelagic sea lanes passage through, over, and under neutral archipelagic sea lanes. Belligerent forces exercising the right of archipelagic sea lanes passage may engage in those activities that are incident to their normal mode of continuous and expeditious passage and consistent with their security.<sup>175</sup>

The Canadian Manual does not deal with archipelagic sea lane passage separately but rather couples it with transit passage, as follows:

Warships and military aircraft of a belligerent state may exercise the right of transit passage, that is, of essentially unimpeded passage or overflight in an appropriate state of readiness with appropriate sensors activated, through certain straits where the transit passage [regime?] applies or through archipelagic sea lanes.<sup>176</sup>

In interpreting what the United States manual means when it states "activities that are incident to their normal mode," one needs to turn to the provisions of the manual dealing with transit passage through neutral straits, where it is stated:

Belligerent forces in transit may . . . take defensive measures consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance.<sup>177</sup>

Although archipelagic sea lanes passage through archipelagic waters may be the legal equivalent of transit passage through straits, geographical factors may create large differences in practical effect. A strait is usually a geographical phenomenon of small dimensions, usually only a few miles from entrance to exit, requiring only a few hours, at most, for passage.<sup>178</sup> Usually there is only one entrance and one exit.<sup>179</sup> On the other hand, taking Indonesia as the prime example, archipelagic waters include vast areas, with numerous internal straits and passages, dictating multiple, intersecting archipelagic sea lanes. A naval ship or formation entering at one extremity of the archipelago and steaming at a wartime cruising speed of twenty knots, for example, would require over six days to traverse its entire East-to-West dimension using the most direct route. The ship or formation could, through the use of intersecting archipelagic sea

lanes, emerge at any of a number of exits, shielded the entire time from air, surface, or submarine attack from enemy forces. One may question whether it is reasonable to assume that an enemy force would accept the traditional restraints on hostile activities (which presumably would include surveillance) for passage of such great span and duration.

**3. Concluding Remarks Concerning Archipelagic Waters.** It is apparent from the foregoing discussion that of the “new zones” recognized in the 1982 LOS Convention, archipelagic waters present the most difficult issues. In a paper prepared for delivery soon after the close of UNCLOS III, Rear Admiral Bruce Harlow, a vice-chairman of the United States delegation to that Conference, posed a number of questions concerning the impact archipelagic waters would have on the law of neutrality. He stated:

What then is the solution? When a neutral cannot or will not take meaningful measures to preclude potential violations, may a belligerent step in and undertake the mission of verifying that neutral waters are free of the enemy? Or would this contravene the traditional rule of inviolability of neutral sovereignty? If a departure from this rule were permitted for surveillance missions, would such missions have to be identified so that they would not be confused with prohibited belligerent operations? If the surveillance/verification mission detected a violator, would the matter have to be referred to the neutral for action, or could those engaged in surveillance attack the violator pursuant to their belligerent right to take corrective measures against known violations? What would happen if two opposing surveillance forces met? May aircraft be used for surveillance/verification missions despite the traditional prohibition on overflight of sovereign waters? What standard would justify initiation of surveillance/verification missions: in the discretion of the belligerent; upon a reasonable determination that the enemy might use neutral waters; upon determination that the enemy was using neutral waters? What would be the impact of a pattern of prior abuses without evidence of a present violation? Would a different standard apply for a neutral archipelagic state that was willing, but plainly unable, to take actions that would effectively ensure that neutrality violations were precluded, than in the case of another neutral whose words or deeds demonstrated a clear unwillingness, regardless of the level of its capabilities?<sup>180</sup>

Except for Dr. Rauch’s monograph, Admiral Harlow’s ruminations, and the United States Manual, it would appear that the relationship between the status of archipelagic waters and the law of armed conflict at sea (including the law of neutrality), is largely unexamined in the published legal literature.<sup>181</sup> As can be seen from the foregoing discussion, archipelagic waters pose the most difficult problems for a mechanical application of traditional rules of naval warfare and neutrality to the zones created in the “new” law of the sea. It is submitted that it is unlikely for the traditional rules to survive unchanged in the event of a naval conflict in which archipelagic waters of significant dimensions come into play, either as neutral waters or waters of either belligerent party.

**G. The Area.** According to the 1982 U.N. Convention on the Law of the Sea, the "Area" is "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."<sup>182</sup> In effect, this means that the seabed beyond the outer edge of the continental shelf of any State comprises the Area. The legal status of the waters superjacent to the Area and the airspace above those waters is not affected by the creation of the Area.<sup>183</sup> In essence, the freedoms of the high seas apply to these waters and airspace.

Part XI of the Convention, which governs activities in the Area, including the regime for exploration and exploitation of its resources, is the most controversial Part of the Convention. Unlike those Parts of the Convention heretofore discussed in this Report, Part XI has not been regarded as reflective of customary international law.<sup>184</sup> The United States and several other States of the developed world have assigned as their reason for refusal to become parties to the Convention the unacceptability of Part XI, and some have enacted interim deep-sea mining codes that permit exploitation of the seabed beyond national jurisdiction under national laws.<sup>185</sup> Nevertheless, even those States which have refused to accept the detailed regime for mining the deep seabed contained in Part XI accept the fact that whether the resources of the deep seabed are developed in accordance with Part XI or some successor regime or in accordance with national laws, no State may claim or exercise sovereignty over the seabed and subsoil beyond the limits of national jurisdiction.<sup>186</sup> For that reason it is appropriate to include a paragraph or two about the implications of the existence of such an area for the law of armed conflict at sea. For the sake of convenience, it will be referred to as the "Area," even though that term is not accepted by those States who object to Part XI of the Convention.

Since the Area includes only the seabed, ocean floor, and subsoil thereof, the only foreseeable impact it might have on hostile activities in the water column and airspace above it is in the possible interference between the platforms and other gear used by those who may be engaged in activities exploiting the seabed (presumably neutrals) and belligerents engaging in hostile activities against each other. With respect to such possible interferences, the LOS Convention provides that the freedoms of the high seas "shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area."<sup>187</sup>

The creation of the "Area," whatever form it may ultimately take, should thus have no more impact on the conduct of armed hostilities on the high seas than on other activities that take place on the open ocean, such as fishing and scientific research.

## VI Mine Warfare

Although all weapon systems and platforms are affected by the principles and considerations which have been addressed above, naval mines are probably the most acutely affected, since, except for rarely used unanchored mines, they are usually laid in shallow waters, placing them within one of the zones subject to coastal State jurisdiction. It is thus appropriate to include comments explicitly directed to mine warfare in addition to the general discussion above in section V.E. pertaining to the continental shelf.

Hague Convention (VIII) Relative to the Laying of Automatic Contact Mines is the only treaty law governing the emplacement and employment of naval mines.<sup>188</sup> Hague VIII contains no geographical limitations on where mines may be employed other than the rather vague geographical term “off the coast and ports of the enemy” in Article 2 and “off their coasts” (referring to neutral coasts) in article 4. As pointed out by Professor Howard Levie in his recent book, *Mine Warfare at Sea*,<sup>189</sup> articles originally proposed by the British delegation to the Hague Conference would have limited the laying of anchored automatic submarine contact mines beyond three nautical miles from the low-water mark along the whole extent of the coasts of belligerent States (friendly and enemy) with an extension allowed to ten nautical miles off defended ports.<sup>190</sup> Because of what Professor Levie describes as “strange twists” in negotiation and parliamentary complications,<sup>191</sup> all references to geographical limitations (other than the two mentioned above) were dropped from the Convention. The negotiation thus focused on restrictions on minelaying generally applicable, regardless of area. The result was, as stated by Sir Ernest Satow, the British delegate, that “the Convention as adopted imposes upon the belligerent no restriction as to the placing of anchored mines, which consequently may be laid wherever the belligerent chooses, in his own waters for self-defense, in the waters of the enemy as a means of attack, or finally on the high seas, . . .”<sup>192</sup>

A proposal by the Dutch delegation which would have prohibited the laying of mines so as to bar passage through straits met a similar fate.<sup>193</sup> Rather than include an article on straits, the final report of the Third Commission merely included a statement that:

[T]he committee decided unanimously to suppress all provisions relating to straits, which should be left out of the discussion in the present Conference. It was clearly understood that under the stipulations of the Convention to be concluded nothing whatever has been changed as regards the actual status of straits.<sup>194</sup>

After examining the practice of States in all conflicts since the adoption of Hague VIII in 1907, Professor Levie concludes that:

[T]oday the practice of nations is that there is only one geographical limitation on belligerent minelaying—they may not be laid in the territorial sea or inland waters of neutrals.<sup>195</sup>

It should be remembered, however, that during most of the period covered by Professor Levie's study, the breadth of the territorial sea was generally regarded as extending only three nautical miles from baselines which were almost uniformly drawn along the low-water mark of the coast line.

As developed in sections V.D. and E. above, the special economic and resource jurisdiction exercised by States in their EEZs and continental shelves does not prohibit the emplacement or employment of weapons (including mines) on the seabed or in the waters of the EEZ and continental shelf unless they would interfere with the coastal State's exploitation of the resources of the EEZ or the continental shelf. On the other hand, coastal States exercise full sovereignty over their internal waters, the territorial sea, and archipelagic waters. The territorial sea is subject to the right of innocent passage, and where it embraces a strait used for international navigation, also to the regime of transit passage. Archipelagic waters are subject to the right of innocent passage, and in archipelagic sea lanes (where none are designated, the routes normally used for international navigation), to the right of archipelagic sea lane passage. In principle, then, the same rules should apply to expanded territorial seas and to archipelagic waters as applied to the territorial sea prior to its increase in breadth to twelve nautical miles. Likewise, since archipelagic sea lanes passage is substantially identical to transit passage through international straits, in principle, the rules for mining archipelagic sea lanes should be the same as those for international straits. As we saw in Section V., however, rules applicable to a narrow territorial sea or a strait of limited geographical dimension may have a substantially different effect when applied to areas having the same legal characteristics but of vastly different geographical size. Nevertheless, the military manuals and draft manuals that have been examined (U.S., Canada, Germany), appear to accept the same rules for the mining of expanded territorial seas and archipelagic waters as previously have applied to internal waters and the territorial sea. The United States Manual states:

**9.2.2 Peacetime Mining.** Consistent with the safety of its own citizenry, a nation may emplace both armed and controlled mines<sup>196</sup> in its own internal waters at any time with or without notification. A nation may also mine its own archipelagic waters and territorial sea during peacetime when deemed necessary for national security purposes. If armed mines are emplaced in archipelagic waters or the territorial sea, appropriate international notification of the existence and location of such mines is required.<sup>197</sup> Because the right of innocent passage can be suspended only temporarily, armed mines must be removed or rendered harmless as soon as the security threat that prompted their emplacement has terminated. Emplacement of controlled mines in a nation's own archipelagic waters or territorial sea is not subject to such notification or removal requirements.

Naval mines may not be emplaced in the internal, territorial, or archipelagic waters of another nation in peacetime without that nation's consent. Controlled mines, however, may be emplaced in international waters beyond the territorial sea subject only to the requirement that they do not unreasonably interfere with other lawful uses of the oceans. . . .

**9.2.3. Mining During Armed Conflict.** Naval mines may be lawfully employed by parties to an armed conflict subject to the following restrictions:

...

2. Mines may not be emplaced by belligerents in neutral waters.<sup>198</sup>

...

6. Naval mines may be employed to channelize neutral shipping, but not in a manner to impede the transit passage of international straits or archipelagic sea lanes passage of archipelagic waters by such shipping.

...

8. Mining of areas of indefinite extent in international waters is prohibited. Reasonably limited barred areas may be established by naval mines, provided neutral shipping retains an alternate route around or through such an area with reasonable assurance of safety.

The Canadian Manual's paragraph on naval mines contains no reference to geographic limitations, confining itself to quoting verbatim Articles 1 through 3 of Hague VIII.<sup>199</sup> One must determine geographic limitations for mining by turning to other provisions of the Manual dealing with areas of operations<sup>200</sup> and defining neutral waters.<sup>201</sup> The former of these permits the conduct of operations using force (presumably including mines) on the high seas (including EEZs) and the territorial sea and internal waters of belligerents. The latter forbids acts of hostility within neutral waters, which are defined as the inland waters, internal waters, territorial seas, and archipelagic seas of States which are not participants in the international armed conflict. It thus appears that while the Canadian Manual would prohibit the laying of mines in neutral archipelagic waters, it takes no position as to whether a belligerent may mine an opposing belligerent's archipelagic waters. It is also silent as to whether any particular restrictions apply with regard to mining international straits.

The German Manual deals with naval mines in both a peacetime and wartime environment and in the context of protective, defensive and offensive mining, which it defines as follows:

In laying mines the following kinds are distinguished:

- **protective mining**, i.e., laying mines in friendly territorial and internal waters.
- **defensive mining**, i.e., laying mines in international waters for the protection of passages, ports and their entrances.
- **offensive mining**, i.e., laying mines in hostile territorial and internal waters or in waters predominantly controlled by the adversary.<sup>202</sup>

The Manual contains no explicit provisions against mining of neutral waters, but the paragraph on Scope of Application of the rules states that:

[T]he space in which acts of naval warfare within the meaning of paragraph 1014 may be performed comprises:

- the territory of the parties to the conflict accessible for naval forces.
- the internal waters, the archipelagic waters and the territorial sea of the parties to the conflict.
- the high seas, and
- the airspace over these land and sea areas.<sup>203</sup>

Peculiarly, paragraph 1014 does not include “mining” as one of the acts of naval warfare, nor, for that matter, does it include attacking or sinking of enemy warships. Presumably these ambiguities will be clarified upon further revision of the Draft Manual. Assuming, for the purpose of the discussion, however, that the limitations in the “Scope of Application” paragraph are meant to apply to mine warfare, it would appear that the German Draft Manual would equate the archipelagic waters of belligerent parties to the territorial sea and would authorize their mining under the same rules that would apply to the territorial sea.

The foregoing discussion suggests that neither the conventional law of mine warfare nor the customary practice of States has provided very clear guidelines as to the geographical limits of the employment of mines in naval conflict. The only settled principles are that in the era of the three-mile territorial sea it was lawful for a belligerent to employ mines in its own and its enemy’s territorial sea and internal waters and that it was unlawful to employ them in the territorial sea and internal waters of a neutral State. Although there have been attempts to preserve freedom of navigation through international straits, and the United States Manual states that it is unlawful to lay mines “in a manner to impede the transit passage of international straits,”<sup>204</sup> Professor Levie’s study concludes that passage through straits “has been barred by mines in past conflicts and undoubtedly will be again in the future.”<sup>205</sup>

Archipelagic waters present an even more difficult problem. As discussed earlier, they are subject to the full sovereignty of the archipelagic State and in their legal characteristics are substantially identical to the territorial sea. Technically, then, the same principles that govern the mining of the territorial sea, whether of a neutral or a belligerent, should govern the archipelagic waters, and by the same rationale, the principles applicable to international straits should apply to archipelagic sea lanes. Either expressly or impliedly, the three service manuals examined seem to accept these consequences. Whether this makes sense and will form a basis for an effective regime in time of conflict seems open to question. The vast areas encompassed within archipelagic waters and the great lengths of some archipelagic sea lanes would suggest that rule-makers should be careful not to create rules that will be honored more in their breach than in their observance.

## VII Conclusions and Recommendations

The emergence of a “new” peacetime regime for the oceans, with its expansion of existing zones subject to national jurisdiction and the creation of new zones also subject to the same or similar forms of jurisdiction, has created problems of adaptation of the traditional rules of armed conflict at sea to these new developments. As has been found in the foregoing analysis, the current national manuals which have been examined (U.S., Canadian and German) have adopted rules for the conduct of warfare in these new and expanded zones that are identical to those that were applicable prior to their expansion (*i.e.*, the twelve-mile territorial sea) or have adopted by analogy the same rules for newly created areas that were applicable to zones of much smaller dimension that in peacetime have the same legal characteristics (*i.e.*, archipelagic waters). As has been suggested by the foregoing analysis, however, the geographic and operational factors that determine the nature and scope of naval operations in time of armed conflict, and, in particular, the relationships between belligerent and neutral forces, render it uncertain as to whether such mechanical application of prior rules to new or expanded areas of national jurisdiction serves the best interests of either neutrals or belligerents or the humanitarian objectives of the rules. Massive expansions of waters that are denied to belligerents for hostile operations and for which neutral States have burdensome duties of surveillance and control are likely to increase beyond belligerents’ power to resist the temptation to violate such waters and to overtax the capabilities of neutral States to enforce their duties within them. The result may well be increased tension between neutral and belligerent States with the consequent danger of widening the area of conflict and drawing neutral States into it.

Admittedly, I have not been able to propose a better solution for the two areas that create the most difficult problems—the expanded territorial sea (which may be measured from greatly exaggerated baselines) and archipelagic waters. Accordingly, in suggesting the tentative recommendations for formulating updated rules applicable in various zones of the oceans as set forth below, I have adopted the formulations of the three manuals. While this to some extent ignores the problems I have pointed out with respect to these formulations, it nevertheless accepts the three manuals as evidence of an emerging international law in this area.<sup>206</sup> With this caveat in mind, I make the following tentative recommendations for reformulation of the rules of naval warfare that are affected by the emergence of new zones in the “new” law of the sea:

1. Subject to other applicable rules of the law of armed conflict at sea,<sup>207</sup> hostile operations by naval forces may be conducted on the high seas, the territorial sea and internal waters, the land territories, and where applicable the archipelagic waters, of the belligerent, any co-belligerent and the enemy. For

this purpose, the high seas include the exclusive economic zone and the waters and airspace above the continental shelf.

2. When such hostile operations are conducted within the exclusive economic zone or the waters or airspace above the continental shelf of a neutral State, the belligerent States shall, in addition to observing the other applicable rules of the law of armed conflict at sea, have due regard to the rights and duties of the coastal State for the exploitation of the economic resources of the exclusive economic zone and the continental shelf. They shall, in particular, respect artificial islands, installations, structures, and safety zones established by neutral States in the exclusive economic zone and on the continental shelf.

3. Neutral waters consist of the internal waters, territorial sea, and where applicable, the archipelagic waters, of a State which is not a party to the armed conflict.

4. Within neutral waters, hostile acts by belligerent forces are forbidden. A neutral State must exercise such surveillance and enforcement measures as the means at its disposal allow to prevent violation of its neutral waters by belligerent forces.

5. Hostile acts within the meaning of paragraph 4 include, *inter alia*:

- a. Attack or seizure of enemy warships or military aircraft;
- b. Laying of mines;
- c. Visit, search or capture;
- d. Detention of a prize or establishment of a prize court;
- e. Use as a base of operations.<sup>208</sup>

6. Subject to the duty of impartiality, and under such regulations as it may establish, a neutral State may, without jeopardizing its neutrality, permit the following acts within its neutral waters:

- a. Innocent passage<sup>209</sup> through its territorial sea, and where applicable its archipelagic waters, by warships and prizes of belligerent States; for the purpose of exercising the right of innocent passage the warship or prize may employ pilots of the neutral State;
- b. Replenishment by a warship of its food, water and fuel sufficient to reach a port within its national territory;
- c. Repairs of warships found necessary by the neutral State to make them seaworthy; such repairs may not include repair of battle damage<sup>210</sup> nor increase their fighting strength.

7. A belligerent warship may not extend its stay in neutral waters for longer than twenty-four hours unless the neutral State grants an extension because of:

- a. The stress of weather, or
- b. The route of innocent passage is of such length as to require more than twenty-four hours for passage.

8. Belligerent warships and military aircraft may exercise the right of transit passage through neutral international straits and archipelagic sea lanes passage

through neutral archipelagic waters. While within neutral waters comprising an international strait or an archipelagic sea lane, belligerent naval forces are forbidden to carry out any hostile act.

9. Should a neutral State be unable or unwilling to enforce its neutral obligations with respect to hostile military activities by belligerent naval forces within its neutral waters, the opposing belligerent may use such force as is necessary within such neutral waters to protect its own forces and to terminate the violation of neutral waters.

10. A neutral State shall not be considered to have jeopardized its neutral status by exercising any of the foregoing neutral rights nor by allowing a belligerent State to exercise any of the privileges permitted to a belligerent State.

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Rear Admiral Robertson retired from the Navy in 1976 following an assignment as the Judge Advocate General of the Navy. He was serving as the Charles H. Stockton Professor of International Law at the Naval War College at the time this article was written.

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### Notes

1. This paper is a revised version of a "report" prepared by the author as Rapporteur for the Fourth Meeting of the Round Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea under the Madrid Plan of Action. The Round Table is sponsored by the International Institute of Humanitarian Law, San Remo, Italy, to whom the author is grateful for encouraging its publication. The paper was prepared while the author was occupying the Charles H. Stockton Chair of International Law at the U.S. Naval War College in 1991-1992. The author wishes to express thanks to the Naval War College for making available the time and research resources necessary for completion of the paper during his tenure at the War College. The views expressed herein are personal to the author and do not necessarily reflect those of the United States Government or the U.S. Naval War College.

2. U.N. Document A/CONF.62/122, opened for signature at Montego Bay, Jamaica, 10 December 1982, reprinted in *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (1983), Sales No. E.83.V.5 (cited hereinafter as LOS Convention).

3. The Convention will enter into force one year after the deposit of the 60th ratification or accession. LOS Convention, *supra* n. 2, article 308. As of the time of the writing of this paper (June 1992), there were 51 ratifications.

4. Statement by U.S. President, 10 March 1983, *Weekly Compilation of Presidential Documents*, v. 19, No. 10, at 383 (14 March 1983).

5. American Law Institute, 2 RESTATEMENT (THIRD) OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES 5 (1987), (cited hereinafter as Restatement (Third)).

6. The term "zone" as used in this paper does not include wartime exclusion zones such as those proclaimed by Germany in World Wars I and II or by Great Britain in the Falkland Islands War. A discussion of such "war" zones is beyond the scope of this paper.

7. William L. Schachte, Jr., U.S. Department of Defense Representative for Ocean Policy Affairs, "The Value of the 1982 UN Convention on the Law of the Sea—Preserving our Freedoms and Protecting the Environment," (Address to the 25th Annual Conference of the Law of the Sea Institute, Malmö, Sweden, August 1991), reprinted in Special Report of the Council on Ocean Law under the same title.

8. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 Va. J. Int'l L. 809, 811 (1984) (cited hereinafter as Oxman).

9. See, e.g., Janis, *Neutrality*, in ROBERTSON, 64 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF NAVAL OPERATIONS 148 (1991), Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*, *id.* at 109.

10. Greenwood, *The Concept of War in Modern International Law*, 36 Int'l & Comp. L. 283, 300 (1987).

11. Perhaps the most complete and well-balanced history of the development of the law of the sea written in English (until its publication in 1911) is FULTON'S THE SOVEREIGNTY OF THE SEA (1911). Although subtitled, "An Historical Account of the Claims of England to the Dominion of the British Seas, etc., . . ." the

book nevertheless deals extensively with claims of other States to areas of exclusive jurisdiction as well as the counter-assertions of those States which opposed such claims of exclusive jurisdiction or sovereignty. I have relied extensively on this book in developing the following summary. Where important for identifying the specific source of a statement, I have cited to the particular pages of the book from which the statement was taken; where only general propositions are stated, I have not attempted to identify the precise source. (THE SOVEREIGNTY OF THE SEA is cited hereinafter as FULTON). A second exhaustive and more modern history may be found in SWARZTRAUBER, *THE THREE MILE LIMIT OF TERRITORIAL SEAS: A BRIEF HISTORY* (1972).

12. See JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 3 (1927), (hereinafter cited as JESSUP).

13. *Id.*, n. 3.

14. FULTON, *supra* n. 11, at 3. Fulton points out that these claims were generally recognized by other States because the right to levy tribute was accompanied by the obligation to protect commerce in these closed seas from pirates and other predators who swarmed over the oceans during this period. *Id.* at 6-7.

15. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 49 (7th ed. 1967).

16. *Id.*

17. FULTON, *supra* note 11, at 338; see also *id.*, at 105-108.

18. GROTIUS, *MARE LIBERUM* (*The Freedom of the Seas*), (Magoffin trans. 1916).

19. GROTIUS, *DE JURE BELLI AC PACIS* (*The Law of War and Peace*), (Kelsey trans. 1925).

20. The debates between Grotius on the one hand and Welwood and Selden on the other, as well as summaries of other significant writings on the subject in the era, are detailed in FULTON, *supra* n. 11, at 338 ff. The most influential of the books opposing the ideas of *Mare Liberum* was Selden's two-volume *MARE CLAUDIUM*, which was apparently completed in 1618 but was not published until 1635. *Id.* at 366-367.

21. Until the twentieth century the term most frequently used to describe the territorial sea was "territorial waters." In the 1930 League of Nations Conference on the Codification of International Law, the question of terminology—"territorial waters" or "territorial sea"—was a subject of debate. The Conference decided to use the term "territorial sea" on the ground that it was more precise, since the term "territorial waters" was sometimes used to include both the territorial sea and internal waters. See League of Nations, *Acts of the Conference for the Codification of International Law [1930]*, v. III., 202, reprinted in ROSENNE, 4 *LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW 1404* (1975), (cited hereinafter as Acts of the Conference, ROSENNE). Although the terms "territorial sea" and "territorial waters" continued to be used interchangeably in the literature and international fora, the International Law Commission settled on the term "territorial sea" for its draft Convention. See Report of the International Law Commission covering the work of its fourth session, II 1952 *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION*, 68. The same term was used in the 1958 and 1982 Conventions.

22. FULTON, *supra* n. 11, at 549.

23. FULTON, *supra* n. 11, at 557-558.

24. *Id.*

25. *Id.* at 558.

26. *Id.* at 558.

27. *Id.* at 554-555.

28. FULTON, *supra* n. 11, Section II, Chapter 2, *passim*; O'CONNELL, 1 *THE INTERNATIONAL LAW OF THE SEA* 128-129 (1982), (cited hereinafter as O'CONNELL). With respect to the breadth of the territorial sea I say "generally" rather than "universally" adopted because even at its most general acceptance, the three-nautical-mile territorial sea was never universal. The Scandinavian States claimed territorial seas of four nautical miles (their marine league being four rather than three nautical miles), and a number of States clung to their six-mile claims, with a few making claims to more extensive breadths, usually twelve miles.

29. See, for example, O'CONNELL, *supra* n. 28, at 152.

30. *Supra* n. 12, at 7.

31. O'CONNELL, *supra* n. 28, v. 1, 72.

32. See Acts of the Conference, v. III, pp. 179 and 202, ROSENNE, *supra* n. 21, v. 4, 1381 and 1404.

33. Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, UN Doc. A/3159, II *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION* 1956, 256 "Law of the Sea," article 1.

34. Convention on the Territorial Sea and Contiguous Zone, 29 April 1958, UN Treaty Series, v. 516, article 1 (cited hereinafter as the Territorial Sea Convention).

35. LOS Convention, *supra* n. 2, article 2, para. 1.

36. Jessup says that, "As a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law." JESSUP, *supra* n. 12, at 120.

37. See *infra* nn.77-79 and accompanying text.

38. *Supra* n. 12, at 77.

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39. *Church v. Hubbard*, 2 Cranch 187, 1 L. Ed. 249 (1804), and other cases cited in JESSUP, *supra* n. 12, at 80.
40. *Supra* n. 12, at 88-92.
41. *Id.* at 91.
42. For a detailed discussion of the controversies surrounding the United States Prohibition-Era "hovering acts," see JESSUP, *supra* n. 12, at 241-258.
43. Territorial Sea, Convention, *supra* n. 34, Article 24.
44. See FULTON, *supra* n. 11, Chapter V *passim*; JESSUP, *supra* n. 12, *passim*; O'CONNELL, *supra* n. 28, at 155.
45. *Supra* n. 12, at 20; FULTON, *supra* n. 11, Chapter V, *passim*.
46. FULTON, *supra* n. 11, at 694. See also FULTON, Chapter V, *passim*.
47. Presidential Proclamation 2667, "Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf," 28 September 1945, 10 U.S. Federal Register, at 12303, U.S. Code of Federal Regulations, 1943-1948 Comp., v. 3, at 67 (1945), reprinted in 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 756-757 (1965) (hereinafter cited as WHITEMAN).
48. White House Press Release of 30 September 1945, reprinted in U.S. Department of State *Bulletin*, v. XIII, No. 327, pp. 484-485 (1945), reproduced in WHITEMAN, *supra* n. 47, at 757-758.
49. Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, *supra* n. 33, at 256.
50. Territorial Sea Convention, *supra* n. 34.
51. Res. 1307 (XIII) (10 December 1958).
52. See WHITEMAN, *supra* n. 47, at 119-137.
53. See discussion in text *supra*, at nn. 38-43.
54. II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1956), *supra* n. 33, at 294-295 (emphasis supplied).
55. *Id.*
56. Convention on the Continental Shelf, 29 April 1958, UN Treaty Series, v. 499, at 311, U.S.T., v. 15, at 471, U.S. T.I.A.S. No. 5578, Article 2.
57. *Id.*, article 1.
58. *Fisheries Case (United Kingdom v. Norway)*, 1951 I.C.J. Reports 116 (Merits).
59. See examples discussed in Reisman, *Straight Baselines in International Law: A Call for Reconsideration, Proceedings of the 82nd Annual Meeting (1988) of the American Society of International Law* at 260 (1990), see also, Office of Ocean Affairs, U.S. Department of State, *Limits in the Seas No. 112: United States Responses to Excessive National Maritime Claims* (12 March 1992).
60. Restatement (Third), *supra* n. 5. This opinion is also reflected in the joint statement of the U.S. and U.S.S.R. governments at the 1989 Jackson Hole Summit Conference which included the statement that the two governments were guided by the provisions of the 1982 Convention "which, with respect to traditional uses of the oceans, generally constitute international law and practice and balance fairly the interests of all States." U.S. Department of State, *Department of State Bulletin*, v. 89, 25-26 (December 1989).
61. U.S. Department of the Navy, Office of the Chief of Naval Operations, *Law of Naval Warfare* (NWIP 10-2) (Washington: U.S. Government Printing Office, 1955), section 430a. (NWIP 10-2 is the predecessor manual to NWP-9 and is hereinafter cited as NWIP 10-2). I state "as a general rule" because, under certain circumstances, when a neutral State does not live up to its obligation to prevent hostile acts within its maritime territory by one belligerent, the opposing belligerent who is harmed by such acts may take armed self-help measures. O'CONNELL, *supra* n. 28, at 1117; LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 695 (7th ed. 1952), (hereinafter cited as LAUTERPACHT); U.S. Department of the Navy, Office of the Chief of Naval Operations, *The Commander's Handbook on the Law of Naval Operations* para. 7.3.4.2 (NWP-9 (Rev. A)) (1989), (hereinafter cited as NWP-9).
62. LAUTERPACHT, *supra* n. 61, 673; WHITEMAN, *supra* n. 47, at 178 and sources cited therein. The principle is codified in article 9 of Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907, 36 Stat. 2415 (U.S.), 100 British & Foreign State Papers (1906-1907), 448-454 (U.K.), reprinted at 2 Am. J. Int'l L. 202 (Supp.), (cited hereinafter as Hague XIII).
63. Hague XIII, *supra* n. 62.
64. Schindler, Commentary [on Hague Convention XIII], in RONZITTI, THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES 211, at 215, 221 (1988).
65. Although Hague XIII does not include the words, "in its territorial waters," State practice suggests that this was the meaning intended by the Article. See LAUTERPACHT, *supra* n. 61, 746 and sources cited therein; TUCKER, 50 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF WAR AND NEUTRALITY AT SEA 219 note 52 (1957), (cited hereinafter as TUCKER).

66. It is a disputed point as to whether this article applies only to stays in ports, roadsteads or territorial waters or also to mere passage through the territorial sea which lasts more than twenty-four hours. The *Altmark* incident, which will be discussed *infra* n. 75, is illustrative of how this issue might arise.

67. It is a disputed point as to whether a neutral State may allow a warship to repair battle damage in a neutral port. See SMITH, *THE LAW AND CUSTOM OF THE SEA* 154 (2d ed. 1950) (SMITH); COLOMBOS, *supra* n. 15, at 654-657. In any event, it is settled law that repairs which increase the fighting strength of the damaged warship are not permitted. See Harvard Research in International Law, *Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, Comment on Articles 32-36, 33 Am. J. Int'l L. 169, 463 (1939).

68. LOS Convention, *supra* n. 2, article 8, para. 3.

69. RAUCH, *THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS FOR THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: REPERCUSSIONS ON THE LAW OF NAVAL WARFARE* 32, (1984), citing Hague XIII, NWIP 10-2, *supra* n. 61, and the Soviet Naval International Law Manual (Moscow: 1966). Both of these manuals, of course, were published prior to the codification of the twelve-mile limit in the UN Law of the Sea Convention. (Dr. Rauch's monograph is cited hereinafter as Rauch.)

70. NWP 9, *supra* n. 61, para. 7.3.4.2.

71. Canadian Forces, *Law of Armed Conflict Manual* (Second Draft) (Ottawa: undated), para. 1509 (hereinafter cited as *Canadian Manual*). It should be noted that as an interim measure until its draft manual is completed, the Canadian Armed Forces have promulgated MAOP-331, *Handbook on the Law of Naval Operations*, which, with a 16-page Canadian introduction, incorporates NWP 9 as Annex A.

72. German Federal Ministry of Defense, *Humanitarian Law in Armed Conflicts—Manual* para. 1119 (1992), (hereinafter cited as *German Manual*).

73. Hague XIII, *supra* n. 62, article 3 (release a prize captured within neutral's waters), article 8 (prevent fitting out or arming of warships), article 25 (exercise surveillance to prevent violation of neutrality).

74. See authorities cited in n. 61 *supra*; see also WHITEMAN, *supra* n. 47, 190 ff. and sources cited therein.

75. For a detailed examination of the *Altmark* incident, see MACCHESNEY, *U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS AND DOCUMENTS, 1956, SITUATION, DOCUMENTS, AND COMMENTARY ON RECENT DEVELOPMENTS IN THE INTERNATIONAL LAW OF THE SEA* 3 (1957), (hereinafter cited as MACCHESNEY). A revised version is printed in MacChesney, *The Altmark Incident and Modern Warfare—'Innocent Passage' in Wartime and the Right of Belligerents to Use Force to Redress Neutrality Violations*, 52 Nw. U.L. Rev., 320 (July-August 1957). See also, C.H.M. Waldock, *The Release of the Altmark Prisoners*, 24 Brit. Y.B. Int'l L. 216 (1947).

76. See CHURCHILL, *THE GATHERING STORM* 531-532; (1948), see also H. A. Smith, *supra* n.67 at 153.

77. Some States continue to assert that innocent passage of warships is subject to advance notification or consent. During UNCLOS III, a number of States introduced amendments to the draft Convention seeking to make this an explicit requirement. Opponents pointed out that adoption of such a requirement would be a "conference-breaker." The matter was finally resolved when the President of the Conference persuaded the proponents of the amendments to withdraw them in conjunction with his entering into the records of the Conference a statement that "their decision is without prejudice to the rights of coastal States to adopt measures to safeguard their security interests, in accordance with articles 19 and 25 of the draft Convention." United Nations, *Third United Nations Conference on the Law of the Sea: Official Records* (New York: United Nations, 1984), v. XVI, 132, para. 1 (cited hereinafter as UNCLOS OR). A number of States made statements at their signing or ratification of the Convention that the terms of the Convention are without prejudice to their right to adopt measures regulating the passage of warships through their territorial seas. These States included Cape Verde, Democratic Yemen, Egypt, Finland, Iran, Oman, Romania, Sao Tome and Principe, Sudan, Sweden, and Yemen. See *Multilateral Treaties Deposited with the Secretary-General*, ch. XXI.6 (ST/LEG/SER.E/8, pp. 780-794). Several States made statements asserting that warships were entitled to exercise the right of innocent passage without notifying or obtaining the authorization of the coastal State. See statements in the exercise of the right of reply by France, Italy, United Kingdom, and the United States, UNCLOS III OR, *supra*, v. XVII, 241-244.

78. Hague XIII, *supra* n. 58, Article 10. MacChesney's examination of the meaning of "mere passage" provides the following insights: "The British who introduced the phrase in their draft of [Article 10] indicated that innocent passage in the peacetime sense was what they had in mind. . . . [T]he peacetime analogy serves to indicate the type of passage that belligerents were willing to allow neutrals to grant. The type of passage contemplated is limited by two basic criteria. It must be an innocent passage for bona fide purposes of navigation rather than for escape or asylum. The passage must be innocent in the sense that it does not prejudice either the security interests of the coastal State, or the interests of the opposing belligerent in preventing passage beyond the type agreed to in Article X." MACCHESNEY, *supra* n. 75, 18-19.

79. SMITH, *supra* n. 67, 153; TUCKER, *supra* n. 65, 232; NWIP 10-2, *supra* note 61, section 443a, note 28; NWP 9, *supra* n. 61, para. 7.3.4.1. Canada's draft manual does not appear to recognize the right of neutral States to close their territorial seas to the passage of belligerent warships. *Canadian Manual*, *supra* n. 71, para. 1511(3). The German Manual is ambiguous. In paragraph 1130 of the revised draft (August 1991) it states, "The innocent passage through neutral territorial waters of warships belonging to the parties to the conflict shall be permissible" (citing Hague XIII, Article 10), but in paragraph 1133 it states, "It is within the discretion of a neutral state to allow the passage of warships and prizes through neutral territorial waters" (also citing Hague XIII, Article 10). *German Manual*, *supra* n. 72, pars. 1130 and 1133.

80. Reisman and Lietzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, in ROBERTSON, *supra* n. 9, 1, 7.

81. See authorities cited in n. 79 *supra*. See also RAUCH, *supra* n. 69, at 40-44. Rauch states that although the 1907 Hague Conference took up the issue of wartime passage through neutral straits, it did not include an article in Hague XIII on the subject. But he also states that near uniform practice since that time justifies the conclusion that "if the littoral States are neutral, innocent passage of belligerent warships through international straits in time of war may be interfered with only in exceptional cases." *Id.*, at 44.

82. *United Kingdom v. Albania (Corfu Channel Case)*: MERITS, JUDGMENT, 1949 I.C.J. Reports, 4.

83. *Id.* at 28.

84. Territorial Sea Convention, *supra* n. 34, Article 16, para. 4.

85. See authorities cited in Robertson, Jr., *Passage Through Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea*, 20 Va. J. Int'l L. 801, 803, n. 7.

86. Note that straits joining the high seas or an EEZ with the territorial sea of a foreign State are excluded by omission, although they were grouped with other straits used for international navigation in the 1958 Territorial Sea Convention. Compare LOS Convention, *supra* n. 2, article 37, with the Territorial Sea Convention, *supra* n. 34, article 16, para. 4. The right of nonsuspendable innocent passage for such straits is preserved by article 45, para. 2(b) of the LOS Convention, however.

87. LOS Convention, *supra* n. 2, article 35(c).

88. *Id.*, article 36.

89. *Id.*, article 38, para. 1.

90. Although there is no explicit provision of the Convention so stating, the result follows from the fact that this category of straits is not included within either those governed by the regime of transit passage or those governed by article 45 (nonsuspendable innocent passage).

91. LOS Convention, *supra* n. 2, Article 45, para. 1(a). The most significant effect of the non-applicability of transit passage to this category of straits is that it closes them to overflight by aircraft, and submarines must navigate on the surface and show their flag. Of course, if the passage seaward of the island is truly "of similar convenience with respect to navigational and hydrographical characteristics," the requirement to use such an alternate passage rather than the strait is of little operational significance.

92. LOS Convention, *supra* n. 2, article 38, para. 2 (emphasis supplied).

93. *Id.*, article 38, para. 1(c).

94. Civil aircraft are required to observe the rules; State aircraft, which are not bound by the ICAO rules, "will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation." LOS Convention, *supra* n. 2, article 39, para. 3(a).

95. *Id.*, article 42, para. 1.

96. *Id.*, article 42, para. 2.

97. *Id.*, article 42, para. 5. See also, statement of U.K. representative explaining the meaning of the proposal introduced by his delegation which eventually became article 42. UNCLOS III OR, *supra* n. 77, v. II, Second Committee, 11th Meeting, p. 125, para. 23. See also, LOS Convention, *supra* n. 2, article 304.

98. See Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, Am. J. Int'l L. 74, 77, 95 (1980); Burke, *Submerged Passage through Straits: Interpretations of the Proposed Law of the Sea Treaty Text*, 52 Wash. L. Rev. 193 (1977); Robertson, *supra* n. 85, at 843-846.

99. RAUCH, *supra* n. 69, at 45-46 (footnotes omitted).

100. NWP 9, *supra* n. 61, para. 7.3.5.

101. *Canadian Manual*, *supra* n. 71, para. 1511 (2). A footnote to the paragraph identifies those straits to which the right of transit applies, following the criteria laid down in Part III of the LOS Convention.

102. See n. 79 *supra*.

103. LOS Convention, *supra* n. 2, article 35(c) (emphasis supplied).

104. See Convention regarding the Regime of the Straits, Montreux, 20 July 1936, League of Nations Treaty Series, v. 173, p. 213, reprinted in 31 Am. J. Int'l L. 1 (Supp. 1937).

105. See Boundary Treaty between the Argentine Republic and Chile, 23 July 1881, 159 Consolidated Treaty Series (Parry), 45. Article 5 thereof provides, in English translation, "Magellan's Straits are neutralized forever, and free navigation is guaranteed to the flags of all nations." In the Argentina-Chile Treaty of Peace and Friendship of 1984, the two countries reaffirmed that the Straits of Magellan "are perpetually neutralized

and freedom of navigation is assured to ships of all flags," 29 November 1984, English translation reprinted in 24 I.L.M. 11 (1985).

106. See Treaty for the Redemption of the Sound Dues between Denmark and a number of other European States, 14 March 1857, reprinted in English in 116 Consolidated Treaty Series (Parry), 357. The United States concluded a separate bilateral treaty with Denmark discontinuing Sound Dues for ships flying the U.S. flag. Convention for the Discontinuance of the Sound Dues, 11 April 1857, U.S. Statutes at Large, v. 11, 719, reprinted in English in Parry, v. 116, 465. It should be noted that the ICJ is currently seised of a case concerning navigation through the Belts.

107. See Convention Relating to the Non-Fortification and Neutralization of the Aaland Islands, 20 October 1921, League of Nations Treaty Series, v. 9, 213, reprinted in 17 Am. J. Int'l L. 1 (1923).

108. RAUCH, *supra* n. 69, at 53. the two authorities cited in opposition are Moore in *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, *supra*, n. 98 at 111, and Barabolja in MODERNES SEEVOLKERRECHT, 230 published by the Academy of Science of the USSR, translated into German by Rauch, 1, (1978). Professor Moore was Vice Chairman of the U.S. delegation to UNCLOS III; General Barabolja was a senior member of the Soviet delegation.

109. NWP 9, *supra* n. 61, para. 7.3.5.

110. Montreux Convention, *supra* n. 104, articles 19 and 20; see also, RAUCH, *supra* n. 69, at 51.

111. See text *supra* nn. 53-55.

112. Territorial Sea Convention, *supra* n. 34, article 24; LOS Convention, *supra* n. 2, article 33.

113. See text, *supra* at nn. 54 and 55.

114. *Supra* at n. 46.

115. RAUCH, *supra* 69, 33.

116. LOS Convention, *supra* n. 21, article 56.

117. See Oxman, *supra* n. 8, at 848; see also Robertson, *Navigation in the Exclusive Economic Zone*, 24 Va. J. Int'l L. at 874-875, and note 52.

118. For a full discussion of this issue, which has been frequently debated in the legal literature, see KWIATKOWSKA, THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA 230-235 (1989), (cited hereinafter as KWIATKOWSKA).

119. Richardson, *Power, Mobility and the Law of the Sea*, Foreign Affairs, 902 at 916 (Spring 1980).

120. Professor Oxman concludes that the addition of the phrase, "other internationally lawful uses, etc. . . ." is the "functional substitute for the 'inter alia' in article 87." Oxman, *supra* n. 8, at 837.

121. *Id.* at 837-838.

122. See Oxman, *supra* n. 8.

123. RAUCH, *supra* n. 69, at 34, quoting from 70 SVERIGES FLOTTA, 8-11 (1974).

124. See, for example, UNCLOS III OR, *supra* n. 77, v. XVII, at 54, para. 224.

125. RAUCH, *supra* n. 69, 36.

126. *Id.* at 37.

127. *Id.*, quoting from SCOTT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, THE CONFERENCE OF 1907 288-290 (1920), I. Report of the Third Commission to the Conference, meeting of 9 October 1907 (Annexes).

128. *Id.* at 38.

129. Statement of the delegate of Brazil, Plenary, 187th Meeting, 7 December 1982, UNCLOS III OR, *supra* n. 77, v. XVII, at 40, para. 28.

130. Statement of the representative of Cape Verde, 188th Meeting, Plenary, UNCLOS III OR, *supra* n. 77, v. XVII, at 62, para. 124.

131. Statement of the representative of Uruguay, 192nd Meeting, Plenary, UNCLOS III OR, *supra* n. 77, v. XVII, at 120, para. 55.

132. Italy, Statement made in the exercise of the right of reply, 7 March 1983, UNCLOS III OR, *supra* n. 77, v. XVII, at 241-242; France, Statement made in the exercise of the right of reply, 12 May 1983, *id.*, at 241; United States of America, Statement made in the exercise of the right of reply, 8 March 1983, *id.*, at 243-244.

133. Koh, in JON M. VAN DYKE, CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 304 (A Workshop of the Law of the Sea Institute, Honolulu, Hawaii, January 9-13, 1984) (1985).

134. See KWIATKOWSKA, *supra* n. 118, at 211.

135. See KWIATKOWSKA, *id.*, n. 118, at 203.

136. Canadian Manual, *supra* n. 71, para. 703.

137. German Manual, *supra* n. 72, para. 1011. The German Manual adds a cautionary note that, "The rights of coastal and archipelagic states must, however, be taken into due consideration." *Id.* A similar cautionary statement is carried in a footnote in the Canadian Manual. *Supra* n. 71, para. 703, n. 1.

138. NWP 9, *supra* n. 61, para. 7.3.

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139. LOS Convention, *supra* n. 2, article 56, para. 3.
140. LOS Convention, *supra* n. 2, article 76.
141. *Id.*, article 77.
142. *Id.*, article 80.
143. *Id.*, article 78.
144. *Id.*, article 60(6).
145. *Id.*, article 80 (incorporating article 60 *mutatis mutandis*).
146. Convention on the Continental Shelf, 29 April 1958, U.N. Treaty Series, v. 499, 311, article 2.
147. LOS Convention, *supra* n. 2, article 77.
148. See Tullio Treves, *Military Installations, Structures, and Devices on the Seabed*, 74 Am. J. Int'l L. 808, at 834 (cited hereinafter as Treves).
149. See *id.* at 839
150. *Id.* at 840-846.
151. An alternative argument legitimizing the employment of weapons or other military devices on the seabed of the EEZ and continental shelf could be made on the basis that military devices, such as mines and detection or surveillance devices are not "installations or structures." Some weight is added to this argument by the replacement of the nomenclature "installations and devices" in the 1958 Continental Shelf Convention, *supra* n. 146, article 5, by "installations and structures" in the 1982 Convention. See Treves, *supra* n. 148, p. 841. A second alternative basis for the same conclusion, at least for detection and surveillance devices, can be found in the explicit provisions in articles 58 and 79 recognizing the right of all States to lay and maintain submarine cables. *Id.* at 842-843.
152. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, (5 August 1963). 480 U.N. Treaty Series 43.
153. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, 11 February 1971, U.N. Treaty Series, v. 955, p. 115.
154. Treaty for the Prohibition of Nuclear Weapons in Latin America, with Additional Protocols I and II, (14 February 1967) 634 U.N. Treaty Series 281.
155. U.S. Department of Defense, Office of the Assistant Secretary of Defense (International Security Affairs), MARITIME CLAIMS REFERENCE MANUAL (Washington: U.S. Dept. of Defense, 1989), v. 2, at 232 (for sale by the National Technical Information Service as DoD 2005.1-M). Although Indonesia is the paradigm case of an archipelagic State, the archipelagic waters claimed by a number of other States enclose ocean areas of substantial dimensions. Examples include (with their approximate North-South and East-West dimensions in nautical miles): Cape Verde (144 x 130), Fiji (300 x 300), Papua-New Guinea (840 x 600), Solomons (500 x 120), Vanuatu (420 x 100). *Ibid.*, *passim*. The Republic of the Philippines is not included in this list because its archipelagic baselines, which are drawn in a manner inconsistent with the LOS Convention, are not generally recognized as valid.
156. RAUCH, *supra* n. 69, at 33.
157. NWP 9, *supra* n. 61, para. 7.3.6. The Annotated version of NWP-9 footnotes this statement to Hague XIII, articles 1, 2 and 5, and NWIP 10-2, para. 441, both of which address neutral waters in the context of the territorial sea and internal waters only.
158. Canadian Manual, *supra* n. 71, para. 1509.
159. *Id.*, para. 703. See also para. 706, entitled "Passage Through Neutral Waters," which provides in part that, "Neutral waters are the internal waters and the territorial seas, including straits overlapped by such waters, of states which are not participants in a conflict."
160. Telephone conversation between the author and Commander William Fenrick of the Canadian Ministry of Defense on 4 February 1992.
161. German Manual, *supra* n. 72, para. 1010 (emphasis supplied).
162. See, for example, *id.*, paras. 1121-1123, 1130-1133. It should be noted, however, that paragraph 1012 of the German Manual states that archipelagic States exercise full sovereignty within their archipelagic waters, adding that, with respect to acts of naval warfare, "The rights of . . . archipelagic states must . . . be taken into due consideration."
163. See text at nn. 73-79 *supra*.
164. See *supra*, nn. 75 and 76 and accompanying text.
165. Hague XIII, *supra* n. 62, article 13.
166. *Id.*, article 25. The Canadian draft manual recognizes the difficulty posed for the neutral, stating, "There is a significant possibility that weak neutral archipelagic states will be unable to ensure that strong belligerents will not use their archipelagic waters as a base of operations. HMC ships should not, however, presume that enemy warships present in neutral archipelagic waters are using those waters as a base of operations and are hence subject to attack unless the enemy warships pose an immediate and substantial threat or unless

guidance on the subject has been received from a higher command." Canadian Manual, *supra* n. 71, para. 706(6).

167. See *supra*, nn.77-79 and accompanying text for discussion of the neutral's rights in this regard.

168. NWP 9, *supra* n. 61, para. 7.3.6.

169. LOS Convention, *supra* n. 2, article 44, as incorporated *mutatis mutandis* into the archipelagic-State Part of the Convention by article 54.

170. *Id.*, article 53, para. 4.

171. *Id.*, para. 12.

172. Some publicists have tried to draw a distinction between the two concepts on the basis that in Part III (straits), the term "freedom of navigation and overflight" is used (article 38, para. 2), whereas in Part IV (archipelagic States), the expression "right of archipelagic sea lanes passage" is used (article 53, para. 2). See, for example, Wisnumurti, *Archipelagic Waters and Archipelagic Sea Lanes*, in VAN DYKE, ALEXANDER, & MORGAN, *INTERNATIONAL NAVIGATION: ROCKS AND SHOALS AHEAD?* 198, 204-205. (1988). In view of the near identity of the provisions in the other articles of the two Parts as well as incorporation of key provisions of the transit passage regime by reference *mutatis mutandis* into Part IV (article 54), it is difficult to conclude that this difference in terms has any legal significance.

173. LOS Convention, *supra* n. 2, article 53, para. 3.

174. *Id.*, article 54.

175. NWP 9, *supra* n. 61, para. 7.3.6.

176. Canadian Manual, *supra* n. 71, para. 1511(2).

177. NWP 9, *supra* n. 61, para. 7.3.5.

178. There are, of course, exceptions such as the Singapore-Malacca Strait.

179. The Singapore-Malacca Strait is an exception here also.

180. Rear Admiral Bruce A. Harlow, JAGC, USN, *The Law of Neutrality at Sea for the 80's and Beyond*, A Paper Prepared for the Hawaii Regional Meeting of the American Society of International Law, 16-18 February 1983, reproduced in 3 UCLA Pacific Basin Law Review, 42 at 53-54. Although Admiral Harlow uses the term "neutral waters" in the quoted paragraph, he is referring throughout to archipelagic waters. Despite his reservations and uncertainties about treating archipelagic waters the same as the territorial sea, Admiral Harlow seems to come down in favor of that solution as more consistent with the expectations of neutral archipelagic States and the opportunity for the progressive development of international law applicable to armed conflict provided that a belligerent's right to self-help is recognized in the event the neutral archipelagic State is unwilling or unable to enforce the neutrality of its archipelagic waters.

181. In response to comments on his paper, *Archipelagic Waters and Archipelagic Sea Lanes*, *supra* n. 172, Dr. Wisnumurti, who was the Director of Legal and Treaty Affairs of the Indonesian Department of Foreign Affairs, posed a hypothetical situation which appeared to assume that archipelagic sea lanes would be open to belligerent warships in time of armed hostilities. It would be presumptuous, however, to interpret such an informal remark as an expression of the government of Indonesia's position on this issue.

182. LOS Convention, *supra* n. 2, article 1(1).

183. *Id.*, article 135.

184. Restatement (Third), *supra* n. 5, section 523, Reporters' Notes, para. 1.

185. See interim mining laws enacted by France, Germany, Japan, the former U.S.S.R., and the United Kingdom reprinted in 21 I.L.M. 808 (1982), v. 20, at 393 (1981), v. 22, at 102 (1983), v. 21, at 551 (1982), and v. 20, at 1717 (1981) respectively. The United States act is at Title 30, United States Code, sections 1401 *et seq.*

186. LOS Convention, *supra* n. 2, article 137, para. 1. Restatement (Third), *supra* n. 60, section 523, para. (1)(a).

187. LOS Convention, *supra* n. 2, article 87, para. 2 (emphasis supplied).

188. 18 October 1907, 37 U.S. Statutes at Large, at 2332, Bevans, v. 1, at 699. Although the Convention, by its own terms, covers only "automatic contact mines," it seems to be generally accepted that the principles stated therein are applicable *mutatis mutandis* to other forms of naval mines developed since Hague VIII was adopted in 1907. See, e.g., TUCKER, *supra* n. 65, at 304, note 49; RAUCH, *supra* n. 69, at 116; NWP 9, *supra* n. 61, para. 9.2.1; Canadian Manual, *supra* n. 71, para. 710.

189. LEVIE, *MINE WARFARE AT SEA* (1992) (cited hereinafter as LEVIE).

190. *Id.*, 36.

191. *Id.*, 37-42.

192. Sir Ernest Satow, Proceedings of the Conference, v. 1, at 274-275, as quoted in Levie, *supra* n. 189, p. 41. Sir Ernest added that Great Britain regarded the Convention as only a partial codification of the law of mine warfare and that it would not "be permissible to presume the legitimacy of an action for the mere reason that this Convention has not prohibited it." *Id.*, at 41-42. Great Britain filed a reservation to the same effect. See SCHINDLER & TOMAN, *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 808 (3rd ed. 1988).

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193. LEVIE, *supra* n. 189, at 42-44.

194. As quoted by LEVIE, *id.*, at 44.

195. LEVIE, *supra* n. 189, at 177.

196. NWP 9 defines armed and controlled mines as follows: "Armed mines are either emplaced with all safety devices withdrawn or are armed following emplacement, so as to detonate when preset parameters (if any) are satisfied. Controlled mines (including mines possessing remote control activation devices) have no destructive capability until affirmatively activated by some form of controlled arming order (whereupon they become armed mines)." NWP 9, *supra* n. 61, para. 9.2.1.

197. The annotated version of NWP 9 cites the *Corfu Channel* case, *supra* n. 82, for this proposition.

198. Impliedly this includes neutral archipelagic waters. See NWP-9, *supra* n. 61, para. 7.3.6.

199. Canadian Manual, *supra* n. 71, para. 710.

200. *Id.*, para. 703.

201. *Id.*, para. 1509.

202. German Manual, *supra* n. 72, para. 1039.

203. German Manual, *supra* n. 72, para. 1010. As previously noted, paragraph 1012 of the German Manual equates neutral or nonbelligerent EEZs with high seas insofar as acts of naval warfare are concerned.

204. NWP 9, *supra* n. 61, para. 9.2.3, subpara. 6. Note that the German Draft Manual states that there is no right of protective mining of straits in times of crisis but is silent as to the mining of straits in armed conflict. German Manual, *supra* n. 72, para. 1041 (emphasis supplied).

205. LEVIE, *supra* n.189 at 178.

206. See Reisman and Lietzau, *supra* n. 80, as to the shaping of customary international law through publication of national manuals.

207. The "other applicable rules" are those applicable to the conduct of hostilities regardless of where the hostile acts take place, such as rules regarding prohibitions on specific weapons or means of warfare, targeting, treatment of civilian persons and objects, etc.

208. The prohibition against erecting any apparatus to communicate with belligerent forces at sea, contained in article 5 of Hague VIII, has not been included because it is deemed obsolete.

209. Hague XIII uses the term "mere passage." I have used "innocent passage" as more consonant with modern usage and also because it is more clearly defined in international law. See n. 78 *supra*, where it is suggested that the two terms are legally equivalent.

210. This provision adopts a position as to which practice is divided. See *supra* n. 67.

## **PART THREE**

### **USE OF FORCE LAW**



# Chapter 20

## Fighting by the Rules\*

Commander Christopher Craig, D.S.C., Royal Navy

**H**MS *Alacrity*, a type 21 general-purpose frigate, sailed from the United Kingdom on 5 April 1982 and accompanied the two carriers, HMS *Hermes* and HMS *Invincible*, throughout their passage south. We were subject to the first Argentine Mirage attack on 1 May, partook in the Total Exclusion Zone (TEZ) operations, were involved in a variety of naval gunfire support missions and clandestine operations, ran a number of night transport convoys into San Carlos water after the amphibious landing on 21 May, and had the dubious privilege of being present in the carrier battle group during each of the Exocet attacks. We departed the TEZ just before the fall of Port Stanley. Throughout this period I was, as Commanding Officer, privy to the evolution of the Rules of Engagement and quite naturally held a deep and vested interest in the rules—rules that were necessary to ensure our survivability, to police the TEZ effectively, and yet afforded us the necessary freedom to be militarily effective in pursuit of our aims.

*The Royal Navy's Use of Exclusion Zones.* From the outset, we in the task force saw the United Kingdom's position as being rooted in a "self-defensive" posture under the UN Charter's Article 51. Everything we undertook—deploying the task force, establishing the Maritime Exclusion Zone (MEZ) and Total Exclusion Zone (TEZ), and effecting a landing—were predicated upon this basic assumption. I believe this has been our national standpoint throughout.

The declaration of the MEZ on 7 April became effective on the 12th. At this stage we had a nuclear-powered attack submarine on station. This MEZ became the Total Exclusion Zone on 30 April. For it to be effective, it was necessary that our carrier air assets, our "police" force, should be within 200 nm of Port Stanley. We had, of course, given due notice to the world as early as 23 April that any approach by Argentine units which could amount to a threat to any of our forces would be dealt with appropriately; the scope of this warning was not restricted to the Exclusion Zone.

This leads us to an emotive issue—the sinking of the Argentine cruiser *General Belgrano*. The clear perception of the Commander Task Group, Rear Adm. John Woodward, was that the *Belgrano* formed the southern arm of a three-pronged

\* Reprinted from the Naval War College Review May-June 1984.

surface attack force. This threat, coupled with the facts that the *Belgrano* was less than 12 hours steaming from the task force and that darkness was coming on, warranted her being attacked under the terms of the last warning. Her sinking, as you know, had a devastating deterrent impact upon the Argentine surface fleet. Subsequent action led to the loss of the *Sheffield*; after which we reiterated our intentions by warning Argentina that her surface and air units outside their 12-mile territorial limits could well be “in play.” With this background let us take a closer look at the Rules of Engagement (ROE): rules that were staffed and transmitted on the traditional basis that we would observe accepted international law at all times.

Minimum force to ensure survivability was very much the keynote of early operations; hence, anticipatory self-defense had to be addressed. Our national ROE publication was our primary source document with the addition of some new rules with specific South Atlantic relevance. The Ministry of Defence produced a library of the rules most likely to be used and, hence, comprehensive pre-briefing of decision makers was possible.

A clear statement of the ROE politico-military environment always accompanied basic rules at any stage. This writer cannot overly *stress* the importance to the on scene commanders for having this overall perspective to guide their interpretation of the basic rules. Although the staffing and production of the rules were a notable success, the end product could not help but be complex. Identification criteria were established, as were the critical threat ranges of enemy units so as to deal appropriately with hostile intent when the situation warranted.

In the ships of the task force, total familiarity with the rules by the command team involved much care and thoroughness, and extended to the Commander Task Group “quizzing” his commanding officers on their familiarity with the rules extant. It clearly demonstrated the degree that the military bent to political reality and to the constraints of international law, as it always *must*. I believe it also ensured that we had no engagements between our own units—firm identification criteria curbed too ready a trigger-finger!

The following are some of the areas which posed the greatest problems:

- How to deal with the shadower, particularly if it were a Boeing 707 or a trawler.
- Resupply merchantmen and in particular the place of the naval auxiliary in this generic title.
- The safety of civilians adjacent to naval gunfire support targets 10 miles away on a darkened island at night.
- Unidentified air contacts by night or in low visibility.

At this point it would be useful to describe actions in which my ship took part which required clear, unambiguous rules and, yet, where something less than unbridled aggressive action was called for.

On the afternoon of 1 May, we carried out the first, and almost the last, day bombardment of Port Stanley airport. A bombing and strafing attack from three Mirages convinced us all that night bombardments might be a more palatable and enduring prospect for the future. On that day, and, thereafter, our targets were clearly delineated and all of the 8,000 shells from HM ships were directed solely onto military targets with safety zones between them and adjacent civil areas. The accuracy of our systems allowed us considerable confidence. Indeed, to my knowledge only two dwellings were damaged by naval gunfire, and then only in the final stages of the advance upon Stanley. Clearly, if we had been allowed unrestricted engagements of key military targets, such as radar sites that had been placed near the population centers, we would have been more effective. But it was never considered nor could it be. Similarly, the frustration at being unable to “soften up” the heavy troop concentration at Fox Bay, Goose Green, and other places, was tempered by a clear awareness of the plight of the adjacent Falklanders. Nevertheless, we did ensure that the jockeys of the Port Stanley racecourse were confronted with somewhat uneven going for many months ahead—the Argentinians having placed considerable military presence on the racecourse.

On 11 May the *Alacrity* undertook the first and only complete transit of Falkland Sound by an HM ship before the landings. We were detached from the carrier battle group at midday on 10 May and were to reconnoiter the southern harbors of both East and West Falklands—before attempting overnight, the first penetration of Falkland Sound. The mission was primarily to counter any Argentine resupply efforts, but the verified absence of mines would be most relevant to plans for the forthcoming landing. The ship made the 100-mile transit to the Falklands silently, at 25 knots, relying upon satellite navigation to skirt just south of shore radar detection range. Late in the afternoon, our Lynx flew a two-hour sortie during which the crew reconnoitered the rocky natural harbors south of the two main islands, whilst the ship continued westward almost to the longitude of Weddell Island to the extreme west of East Falkland. Both ship and aircraft were grateful for the thick overcast and the one-half mile visibility in fog which denied the Argentine Air Force an attack opportunity.

Shortly before midnight, the ship entered the narrow southern strait of Falkland Sound, still grateful for the cover afforded by continuous rain and a 100-foot cloud base. At this time there was intense speculation as to whether the Argentines had mined the Sound! Accordingly, we planned our transit at slow speed, in a totally quiet condition and without benefit of our echo sounder. Our anxiety at the possibility of mines was matched by uncertainty over Argentine artillery positions—the narrows of the channel often being little more than two miles across.

After one hour of transit the Lynx was launched to reconnoiter Fox Bay to the south and to act as a diversion. Flying conditions were appalling. At 0035 a

moving radar contact was detected in the channel 6 miles ahead of us, proceeding north at a similar speed, 10 kts. I gradually increased speed to close the gap in the hope of identifying the contact in the open waters to the north of Swan Island where there would be room to maneuver and to evade shore fire. When the distance had closed to 4.8 miles we saw the vessel alter sharply to port, then increase speed and change her heading to gain cover of North Swan Island two miles away.

I fired a starshell in the hope of identifying the stranger, without success. Hence, I commenced fire at the vessel at 0112. The first dozen rounds were equipped with airburst fuzing so as to deter the vessel from further flight rather than to attempt to sink her. After two minutes I checked fire to assess the effect. But the quarry continued towards shelter, steering evasively. I then recommenced fire at 0117 with contact fuzing. We saw a number of hits, three of them sizable, even through the soaking gloom. Once more I checked fire, but still the ship continued toward shelter. Again I recommenced fire and, after about forty rounds, there was a large orange flash which rose up into the cloud base—two minutes later the radar contact faded from the screen. The vessel destroyed was later established to be the Argentine naval transport *Islas de los Estados*, which was carrying, according to information obtained from captured Argentines later, 325,000 liters of aviation fuel and some military vehicles.

Life jacket lights were sighted close inshore, some five miles south of the Argentine garrison at Port Howard, hence out of navigable waters and beyond my assistance. *Alacrity* recovered her helicopter, completed her transit at high speed in order to deny Argentine forces any chance to retaliate, and finally passed through the northern channel at 0300. There were no mines along our track!

The lesson here was that I had the rules which gave me the operational flexibility to engage a militarily important target. I had the required identification criteria to engage a valid target before he could escape.

So what are the key “messages” to be learned that would be instructive regarding Exclusion Zones and Rules of Engagement?

### ***Exclusion Zones.***

- The exclusion zone can greatly simplify the military commander’s task—especially against submarine and air threats—particularly if the criteria which are deemed to demonstrate hostile intent by intruders are clearly defined.
- Declaration of the zone *must* be early enough to allow the potential foe to respond as you wish—always allowing for the difficulties of strategic communications, particularly with his subsurface units.
- The benefits of exclusion zones will clearly hinge upon:
  - (1) Adequate “police” force levels.
  - (2) The presence and density of neutrals.
  - (3) The complexities of identification criteria required.
  - (4) The potential for escalation that their enforcement will generate.

***Rules of Engagement.***

- In a world where the stakes of escalation become ever higher, the necessity for clear and comprehensive rules is plain.
- Briefing staffs ashore must anticipate the distant military needs whilst their counterparts afloat harness and present their ROE requests with clarity, thoroughness, and an awareness of the political issues involved.
- It is necessary to think through most thoroughly the problem of the innocent intruder or the fleeting submarine contact.
- Educating both the politician and the military man is essential both for the compilation and the transmission of rules, as well as for the swift and responsible interpretation required “in the field.”

I believe that for the Royal Navy in the South Atlantic, both the Exclusion Zones and Rules of Engagement worked well. I never felt my survival to be threatened by too rigid rules, nor was my flexibility of operation unduly impaired, and yet my freedom of action was always tied firmly to the political requirements. Equally important, I believe that throughout the campaign we conducted ourselves within the bounds of international law, and with due awareness and concern to our international reputation for a civilized code of conduct.

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Commander Craig was the Commanding Officer of HMS Alacrity during the Falklands Campaign.



## Chapter 21

# Grenada: The Spirit and the Letter of the Law\*

Captain William T. DeCamp, US Marine Corps

**D**uring the predawn hours of 25 October, 1983, a multinational force from the United States and six Caribbean island nations launched "Operation Urgent Fury," the invasion of the island of Grenada in the eastern Caribbean Sea. President Reagan subsequently gave three reasons for the use of military force on Grenada. "First, and of overriding importance, to protect innocent lives, including up to 1000 Americans whose personal safety is, of course, my paramount concern. Second, to forestall further chaos, and third, to assist in the restoration of conditions of law and of governmental institutions to the island of Grenada."<sup>1</sup>

Since the time of the invasion, there has been considerable discussion among the friends and foes of the United States, and among political factions within America, the focus of which has frequently been the international legality of the action. The purpose of this paper is to address, not only the legality of the rescue mission, but also the morality of the mission in the broader context of *realpolitik*.

Grotius identified the first just cause of war as, "an injury, which even though not actually committed, threatens our persons or our property. . . . The danger must be immediate, and as it were, at the point of happening. If my assailant seizes a weapon with the obvious intention of killing me, I admit too that I have a right to prevent the crime."<sup>2</sup>

On 27 October 1983, the Reagan Administration announced that evidence including "documents that were found at a Cuban military installation in the village of Frequente [indicated] that serious consideration was being given to seizing Americans as hostages. . . . It appears we got there just in time to prevent a tragedy."<sup>3</sup>

There were eleven hundred Americans on Grenada at the time of the invasion, eight hundred of whom were students at St. George's Medical School, which operated two campuses on the island. U.S. diplomats returning to Washington, D.C. from Grenada on 23 October reported to the Administration that there was high anxiety among many of the St. George's medical students. Bill Riffley, a medical student living off campus, surely received a dose of high anxiety when

\* Reprinted from the Naval War College Review May-June 1985.

thirty Grenadians armed with Soviet AK-47 rifles kicked in the door of his house and held him and other students against their wills for three hours. Jeff Geller, another St. George's student, said, "We thought we could be potential hostages. We just wanted to get out, if we could."<sup>4</sup> Charles Modica, the Chancellor of St. George's Medical School, indicated on 25 October that he did not believe the students were in danger. Modica was in New York at the time of his assessment. He later rescinded his statement after a briefing at the State Department. Why? Had he seen the so-called "hostage plan," or had he made a deal with the State Department to change his tune in exchange for future security on his Caribbean investment?

Those critics who would have us believe that the Americans on Grenada were never in danger, or that Americans on the island were endangered because of the invasion, should review the history of Grenada from 1979, paying particular attention to events immediately preceding the invasion. Of special interest is the first decree of the Austin Regime, which took power on 13 October and six days later brutally executed the former Prime Minister, Maurice Bishop, and members of his cabinet, along with numerous innocent civilians. Austin imposed a 24-hour curfew and announced over the island's radio that violators would be shot on sight. Americans on the island of Grenada were in grave and imminent danger, whether they knew it or not. In response to this situation, Gerhard von Glahn makes the point, "If the citizens of a state are mistreated in another state, the former, it has been asserted, possesses a lawful right to intervene on behalf of its citizens after all available peaceful remedies have been exhausted. Despite much opposing argument by certain writers, the practice of states supports this right as yet."<sup>5</sup>

The United States, its citizens being threatened and mistreated, and facing the challenge of "internal subversion and indirect aggression, with few [and no reliable] means short of force to counter such activities,"<sup>6</sup> invaded Grenada and rescued the Americans on the island. There was no legitimate government to speak of or to speak to.

The second justification that President Reagan gave for the invasion of Grenada was "to forestall further chaos." Granted, "law cannot create order in international relations, but a minimum degree of order can greatly increase the effectiveness of international law."<sup>7</sup> Once the United States and her Caribbean partners established order in Grenada, they could "assist in the restoration of the conditions of law and of governmental institutions to the island"—President Reagan's third reason for invading Grenada.

President Reagan did not choose to defend his decision to invade Grenada by applying the often used principles of invitational or humanitarian intervention. He might easily have claimed either of these justifications, and there are those who defend Reagan's decision based upon Scoon's invitation to the U.S.—transmitted through the Organization of Eastern Caribbean States by way of the Prime

Minister of Dominica—to intervene. After all, Scoon, not Austin, became the lawful authority in Grenada on Bishop's death. "Under generally accepted rules of international law, outside assistance cannot be requested by a government faced by a purely domestic civil war in which the outcome is in doubt, for such a government cannot truly speak for its country. But if a civil war is aided and promoted from the outside, by agencies of another state—if, in other words, subversive intervention has occurred—then the target government has a legal right to ask for assistance in its struggle to maintain itself. . . .

"Under the conditions described—that is, a civil war supported, on the rebel side, from the outside—third parties may assist the incumbent government regardless of a possible diminution of the control exercised by it over its national territory."<sup>8</sup>

In the case of Grenada, Scoon, the Governor-General, had a legal right to ask for intervention and the United States had a legal right to respond. The Soviet/Cuban actions in Grenada, it can be argued, amounted to "subversive intervention." Edmund Burke in his *Thoughts on the Cause of Present Discontents* said, "When bad men combine, the good must associate; else they will fall, one by one, an unpitied sacrifice in a contemptible struggle." President Reagan did not disclose Scoon's invitation initially for fear of Scoon's personal safety—Scoon being in Grenada at the time of his request for U.S. intervention.

But, claim Reagan critics, the Soviets were invited into Afghanistan in 1979. What, they ask, is the difference between the Soviet invasion of Afghanistan and the U.S. invasion of Grenada? For a clue one can examine Soviet actions after their invasion of Afghanistan. First, they promptly engineered a coup in which their "host," President Hafizullah Amin, and members of his family were brutally executed. Next, they then installed a new government led by Babrak Karmal, and they continue to wage war against the Afghani people five years later.

In the writer's view, there is a reasonable and strong case for humanitarian intervention. "If certain practices or actions, revolting when judged by generally accepted standards of morality and decency, continue to take place in a given state despite protests and objections by its neighbors, then humanitarian considerations outweigh the prohibition on intervention and justify a decision to interfere.

"If a moral consensus can be shown to exist, if the conscience of mankind is outraged by a repetition of repulsive practices within a state, then conceivably a moral justification may exist for intervention on the part of other states. The question remaining would of course, be the old one: Does the end justify the means? In this instance, justification might be admitted in favor of interference, provided an absence of selfish aims could be demonstrated."<sup>9</sup>

These justifications for the use of military force in Grenada have legal merit; however, if the Americans on the island were in danger, then no other justification was necessary. For the sake of discussion here, considerations will be

limited to the initial concerns for intervention. Nevertheless, it is easy to understand why those defending the Administrations's decision to invade Grenada felt compelled to give other justifications. Americans these days tend to ask not "Was that the right thing to do?" but rather, "Did we have a right to do that?"<sup>10</sup> Traditionally, US citizens, arguing about wars, justified their Nation's conduct and judged the conduct of others. During the post-Vietnam era, Americans have tended to judge the conduct of their own government and justify the conduct of others.<sup>11</sup> The results of these trends are disturbing because, "they shape, and . . . are sometimes intentionally used to shape, the political climate: they promote national flinching."<sup>12</sup> Even more disturbing is the elevation of legality above morality by those who judge their nation. Was the use of force in Grenada moral? This is an important question. Put another way, did the United States, by invading Grenada, act in accordance with established international standards of good behavior?

**T**here are those who seek to follow the letter of the law which can bring death and slavery, and there are those who follow the spirit of the law which leads to freedom—freedom for life, liberty and the pursuit of happiness. The Americans who judged our invasion of Grenada to be illegal opted to follow the letter of the law. Their answers to the questions posed above regarding the morality of America's use of force in Grenada are predicated on their answer to the age-old question: "Does the end justify the means?" Antagonists of the Administration fail to take into account the motive behind the use of the means. Therefore, let us look at several different approaches to the question of ends and means and address the critical question of motive as it pertains to the invasion of Grenada.

Gordon A. Craig and Alexander L. George, in their book, *Force and Statecraft*, discuss the problem of ethical and moral constraints on the use of force in foreign policy, and identify three schools of thought on whether and how moral principles apply in foreign policy. Each school of thought takes a different position on the question, "does the end justify the means?" The *amoralists* apply questions of morality to the ends only, not to the means to achieve those ends. The *perfectionists* argue that no matter how moral the ends, they never justify means that violate moral standards. A good example of a perfectionist is a pacifist who excludes the use of military force in all circumstances. Another type of perfectionist is the moralizer who dispenses with the question of the costs—to others as well as to himself—should his moralistic views on foreign policy actually be adopted. Some perfectionists espouse the idea that nations should behave according to the moral standards of individuals. The *nonperfectionists* reformulate the question so it reads: "Under what conditions do which ends justify what means?" This might be considered the realists' approach to the question; it is the

most difficult to apply in practice because chiefs of State can be guided only by very general principles in making decisions. For example:

- “The objective of a foreign policy action must be genuinely constructive and praiseworthy if the decision maker is even to consider choosing morally dubious methods on its behalf.
- “Morally dubious means should not be employed when less dubious means that may achieve the same objective are available.
- “A statesman should choose that course of action which, in the given circumstances, promises to cause the least destruction of things of value.
- “The statesman should be constrained in the choice of means by the ‘principle of proportionality.’”<sup>13</sup>

This paradigm can be helpful in analyzing the morality and legality of the Grenadian rescue mission.<sup>14</sup>

Reagan critics comparing the Grenadian action to the Soviet invasion of Afghanistan would certainly link the President with the amoral school described above. Those who make the Afghan analogy disparage means without addressing motive. They do not consider morality of intent.

“All the Grenadian operation has in common with recent Soviet enforcements of the Brezhnev Doctrine, so-called, is the unpleasant use of military force. If force per se is to be condemned [as it is by the perfectionists], if the legitimacy of its use under international law has nothing to do with intent or result, then it is anarchy merely disguised as law.”<sup>15</sup> The Grenadians freely chose the type of government that they wished. Law and order was restored to the island and to the region, and the balance of power in the Caribbean basin was maintained. Legal arguments covered in the presence of a higher good, but few will argue that it would have been better to have had the pretense of law than the reality of moral victory.<sup>16</sup>

International law is a double-edged sword, providing protection for the innocent and judgment for the wrongdoer. Men who act illegally and immorally by international legal standards, are subject to judgment under the law. If international law provides protection for such men, its very purpose is subverted. General Austin, Mr. Coard, and others involved in the murder of Prime Minister Bishop, members of his cabinet, and innocent civilians in St. George’s should have been subject to the doubled edge of the sword of international law—*judgment*. “People who initiate massacres lose their right to participate in the normal (even in the normally violent) processes of domestic self-determination. Their military defeat is morally necessary.”<sup>17</sup>

General Austin had run amuck and was intent on murdering his political opposition. “Against the enslavement or massacre of political opponents . . . there may well be no help unless help comes from outside.”<sup>18</sup> When, as in the case of Grenada, help does come from outside, the reaction of the indigenous population is a genuine gauge of the morality of the action. The

Grenadian people overwhelmingly supported the invasion, and their gratitude was evident to American servicemen, congressmen, and journalists who were on the island during and after the invasion. The Grenadian's only fears were that Americans would leave the island and the Cubans and Soviets would return. The Soviet reception in Afghanistan has not been that cordial.

If President Reagan were an amoralist, unconcerned with the morality of the means, would he have sent a delegation of State Department officials to Grenada at the eleventh hour in an attempt to arrange for the evacuation of Americans? It was only after those officials returned from Grenada on 23 October, indicating that conditions on the island were near anarchy and their efforts had been obstructed at every turn, that the President made the final decision to use force to rescue Americans on the island.

The perfectionists and the moralizers among the critics of the invasion based their criticism on the belief that the United States' action violated the Charter of the United Nations, the Treaty of the Organization of American States and other conventions whose articles outlaw war. It is in these articles that the ideal is found. They ignored the articles in those conventions that attempt to limit war, and it is in those articles that legal justification for the Grenadian rescue mission can be found. "The U.N. Charter was supposed to be the constitution of a new world, but for reasons that have often been discussed, things have turned out differently. To dwell at length on the precise meaning of the Charter is today a kind of utopian quibbling. And because the U.N. sometimes pretends that it already is what it has barely begun to be, its decrees do not command intellectual or moral respect, except among the positivist lawyers whose business it is to interpret them. The lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us live in."<sup>19</sup>

The United Nations attempted to condemn the United States for the Grenadian invasion. The fact that they were unable to do so points out the inherent flaws in the Charter. "Only he can judge of matters great and wise whose soul is likewise," said Montaigne. "In the United Nations' short history there have been many hundred uses of force by members for territorial aggrandizement or religious, ideological, or ethnic advantage. If the United Nations, which condemned Zionism as racism, and would not condemn the Korean Airlines massacre, condemns the United States, it should be told that the world needs more uses of force such as the Grenadian invasion. . . ."<sup>20</sup>

The moralizers must be forced to deal with the costs of the adoption of their views in the real world. The potential costs far outweigh the benefits in practice. "Does an absolute condemnation of all warfare not put peace-loving nations at the mercy of those animated by an ideology of domination?"<sup>21</sup> Should the people of Grenada have been dominated by armed thugs against whom they were defenseless? Implicit in these questions is the Manichaean division of the world, and for this there can be no apology, because twentieth century history and

political philosophy detail the aggressive nature of Marxism-Leninism. On the other hand, "domination of other peoples, as we have seen, has always created an uneasy feeling in Americans; they naturally look towards establishing the institutions of freedom wherever they go."<sup>22</sup> Americans do not resort to the use of force simply to establish these institutions. American forces remained in Grenada after the operation for humanitarian and strategic reasons, and to insure the Grenadians' rights to choose their own form of government. If the perfectionists or the moralizers had had their way, the immediate costs might have been the loss of that right to choose and the loss of other rights which we Americans often take for granted.

"The morality of foreign policy can be questioned not only when a state takes actions that conflict with ethical principles, but also when it fails to take actions to further a moral objective."<sup>23</sup> President Reagan had a good objective, and yet the moralizers demanded passivity. They talked about the law—how humanitarian, invitational intervention violated this treaty or that treaty. They talked about the "moral high ground" and how America would lose it by using force in Grenada. And they talked about Article 2 of the UN Charter, as the ideal. They should have taken note of American democratic ideals and the strong influence they exert upon American foreign policy. They should have studied ethics where they would have found that "it is in the extension of the notion of solidarity with others that the first evolution of ethics is to be seen. . . . In the history of man, this idea of responsibility toward others has been wholly or partially formulated in various cultures at various times."<sup>24</sup> It is a morality based on action. Altruism does not call for resignation, but rather, enhanced activity on behalf of humanity. "Slogans about nonintervention, and solemn disavowals of force, might allow Americans to seize the rhetorical high ground. The Soviet Union would continue to occupy more and more real ground,"<sup>25</sup> and neither one would ever reach the moral high ground, which is our primary objective. Alexander Solzhenitsyn said that to speak about high values and then never defend them is impotence.

Alexis de Tocqueville recognized idealistic, abstract, but moral goals such as justice, dignity of the individual, freedom and equality. He also recognized the duality of our natures, and he spoke of a pragmatic sphere in which we assess what works too. He took a contextualist approach to the question of whether the ends justify the means, just as the nonperfectionists do. President Reagan approached the crisis in Grenada in a nonperfectionist way, taking into account all the circumstances of the situation. He was guided by general principles in his decision. His objective was "genuinely constructive and praiseworthy." He exhausted "less dubious means" to achieve his objective. The President chose a course of action which caused "the least destruction of things of value," if we are to consider de Tocqueville's intangibles as things of value. Finally, he was "constrained in the choice of means by the principle of proportionality." Critics

of Reagan's use of force in Grenada are particularly fond of zeroing in on the numbers of American fighting men that landed on Grenada to evict a few hundred Cuban "construction workers." "People who only ask how much is enough, or how few we can barely get by with, tend to develop an instinct for the capillaries. That is not the instinct it is wisest to cultivate if you want to win real—not bureaucratic—battles."<sup>26</sup>

"The facts of war are often in total opposition to the facts of peace . . . . The efficient commander does not seek to use just enough means, but an excess of means. A military force that is just strong enough to take a position will suffer heavy casualties in doing so; a force vastly superior to the enemy's will do the job without serious loss of men."<sup>27</sup>

President Reagan, in his decision to use force in Grenada, balanced morality, legality, and reality; nevertheless, like Melville's Billy Budd, he was lauded by the people but hung legally for doing what was morally right.

**T**he realities of geopolitics, national policies, economics, and military strategy may all have been considered by the Reagan Administration prior to the President's decision to invade the island. Nevertheless, ideas and ideals, based on definite moral preoccupations, were a very important factor in the President's decision-making process, and led him to conduct American foreign policy as he did in Grenada. "The judgments we make are best accounted for if we regard life and liberty as something like absolute values and then try to understand the moral and political processes through which these values are challenged and defended."<sup>28</sup>

The United States' action to protect the lives of Americans and Grenadians by conducting an invasion of the island of Grenada secured the real and moral high ground for America. The temporary occupation of the island—a source of irritation to Reagan critics—insured for the Grenadians, life, liberty, choice and security against the forces that threatened them in the first place. "The world of war is not a fully comprehensible, let alone a morally satisfactory place. And yet it cannot be escaped, short of a universal order in which the existence of nations and peoples could never be threatened. There is every reason to work for such an order. The difficulty is that we sometimes have no choice but to fight for it."<sup>29</sup>

It is important for us, during this critical time in our history, to recall the words of John Stuart Mill: "War is an ugly thing, but not the ugliest of things. The ugliest is that man who thinks nothing is worth fight or dying for." In Grenada, American soldiers, sailors, and marines fought so that others might enjoy life and liberty and the ideals that de Tocqueville so eloquently elaborated over a century ago. We mourn for those who died on Grenada, but celebrate in the knowledge that the United States of America is still willing to defend those ideals when challenged. America's moral courage is equal to the physical courage of her

warriors. The cost of American action in Grenada was great, but the cost of inaction might have been far greater. The Spirit lives.

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Captain DeCamp was serving as the Commanding Officer H&S Company, 3rd Battalion, 8th Marines at the time this article was first published.

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# Chapter 22

## International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?\*

George Bunn

**B**ecause one missile may sink a ship, naval officers often ask:

I know I can use force in self-defense if my ship is actually attacked. *But do I have to take the first hit?*

This paper discusses how international law, Navy Regulations and naval rules of engagement (ROE) answer this question for the on-scene commander. It also deals with the more general question sometimes asked by the President and other national command authorities: Are there circumstances when the United States may use force first?

In general, international law, Navy Regulations and ROE permit the use of force in peacetime only in self-defense. Their policy is to restrain aggression, to prevent the outbreak of hostilities, and to limit escalation if shooting starts. There are, however, a few circumstances where shooting first is permitted.

**First**, Navy Regulations and typical peacetime ROE authorize an on-scene commander to shoot first when necessary for *anticipatory* self-defense of forces under his command—for example, to shoot a kamikaze aircraft diving on a ship in time to ward off the blow. This is called *unit* self-defense.

**Second**, shooting first may be specifically authorized by higher command in a few other cases, including:

- when necessary for anticipatory self-defense of *other* U.S. forces, citizens or territory (“national” self-defense);
- when authorized by the United Nations or a regional collective security agency to deal with a threat to the peace;
- to protect Americans in danger in foreign territory because, for example, of an internal insurgency or civil war; or
- at the request of an established government to help put down an insurgency within its territory.

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**Third**, force may of course be used first when necessary for *law enforcement* in internal and territorial waters and occasionally in international waters.

### The Law of Self-Defense

The law of self-defense is like the rule parents use to restrain violence between their kids. What parent has not asked, “Who started it?” when confronted with a fight. Kids learn early that they need especially good justification for hitting first.

In our own national practice of international law, we need to go back only 150 years for a classic statement of the law of self-defense. During an 1837 rebellion against British rule in Canada, the insurgents secured recruits, weapons and supplies from across the border in New York and used an island on the American side to train recruits. As a result, an armed band working for the British crossed the border from Canada to attack a small steamer, the *Caroline*, used by the insurgents to transport recruits, weapons and supplies to Canada. The attacking party killed several Americans, set fire to the *Caroline* and sent her over Niagara Falls.

The British claimed “self-defense” as a justification for using force on American soil. Secretary of State Daniel Webster admitted that self-defense could sometimes justify an attack across a border, but insisted that the United States Government itself had remained neutral even if American soil was used to aid the insurgents. He concluded that there was no necessity for self-defense in this case. Webster’s description of the law of self-defense has become a classic:

The only exception to the “inviolable character of the territory of independent states” is self-defense, and that should be confined to cases in which the “necessity of that self-defense is instant, overwhelming and leaving no choice of means and no moment for deliberation.” An attack on another state’s territory “justified by the necessity of self-defense must be limited by that necessity and kept clearly within it.”<sup>1</sup>

The British did not disagree with this statement of the rule and finally offered an apology, while insisting that their intervention was within the rule. Webster did not require more.

By 1946, Webster’s statement had become so widely accepted that the Nuremberg War Crimes Tribunal said it reflected general international law. In rejecting a plea of self-defense by German leaders to a charge involving first use of force, the Tribunal adopted Webster’s words in the *Caroline* case as its own. Relying also on a 1928 treaty which renounced recourse to war as an instrument of foreign policy, the Tribunal convicted Germans of the war crime of initiating aggression for invading Norway. The Germans had attempted to justify their

invasion as self-defense against an anticipated British attack using Norway as a base.<sup>2</sup>

Today, the U.N. Charter repeats both Webster's concern for the "inviolable character of the territory of independent states" and his acceptance of a right of self-defense. The Charter calls on all members to settle their disputes by peaceful means and enjoins them from using "force against the territorial integrity or political independence of any state." But it recognizes "the inherent right of individual or collective self-defense if an armed attack occurs. . . ."<sup>3</sup>

U.S. alliances, reflecting this language, typically state that an "armed attack" against one ally will be considered an attack against all—justifying *collective* self-defense. The North Atlantic Treaty so provides. In the Americas, the Rio Treaty of alliance contains similar language. And the parallel charter of the Organization of American States contains a rule like that of the United Nations against intervention "in the internal or external affairs of any state."<sup>4</sup>

How does this body of law work in practice? The military enforcement machinery contemplated by the U.N. Charter to enforce its rule against shooting first was never created. Agreements allocating armed forces permanently to the U.N. Security Council could not be negotiated, and the veto has been exercised repeatedly, first by the Soviet Union and increasingly by the United States. The Security Council does not provide reliable central authority to enforce the rule against first use of force. Does this mean the rule has no value?

A system with central law-giving and law-enforcing authority may produce better compliance with rules than does a decentralized system of sovereign States. But even with enforcement authority, domestic laws against murder or assault are often violated, as are family rules against hitting first. Yet we keep them "on the books."

So it is with the rules against first use of force. There have been many uses of force which seem unjustifiable as self-defense in the 40 years since the U.N. Charter was adopted. But despite this and the lack of reliable central enforcement authority in the U.N. Security Council, States have not repealed the rule against first use of force. And they usually attempt to justify their uses of force by claiming self-defense.

Let us look at a recent application of the rule—the Argentine invasion of the Falkland-Malvinas Islands in 1982. Argentina was not deterred from invading the Falklands by the U.N. Charter's rule against first use of force. It claimed the islands as its own: How, it argued, could protecting its territory from British occupation be illegal (even if the British had settled and occupied most of the Falklands for over a century)?

The rule against first use of force did assist the British in justifying their response in self-defense. Aware, of course, that no U.N. peace force would come to British aid, Prime Minister Thatcher said that Britain had "a duty to the whole world to show that aggression will not succeed,"<sup>5</sup> a duty to exercise self-defense to

enforce the rule against first use of force. This justification mobilized both domestic and allied public opinion to her cause. Indeed, Secretary of State Haig's memoirs show that enforcing the rule against first use was important in gaining American support for Britain rather than for our other ally, Argentina.<sup>6</sup> In the end, the rule gave moral strength and allied assistance to the British and it helped isolate the Argentines, even from some of their most important Latin American allies. Indeed, the U.N. Security Council called upon Argentina to withdraw with only Panama voting no, though the Security Council offered no force to help the British.<sup>7</sup>

### The Intervention Exceptions to the General Rule Against Shooting First

The Falklands case was a clear-cut armed invasion, as was Grenada in 1983. In both cases, the invader was condemned at first by most of the other States of the world. In the Grenada case, the United States justified its invasion on three grounds: the intervention was requested by the Governor General of Grenada to put down an insurgency; the intervention was undertaken to protect American medical students in danger because of the insurgency; and the intervention was authorized by a regional collective security organization, "standing in the shoes" of the U.N. Security Council. I will discuss each of these justifications.

***Intervention of the Request of the Sovereign Government.*** The Governor General of Grenada had asked for assistance from outside in defending the island's government from a military coup which had resulted in the murder of the Prime Minister and some of his cabinet. The U.N. Charter, of course, permits collective self-defense against an armed attack from the outside.<sup>8</sup> Many nations justify assistance to an established government against a domestic insurgency on similar grounds, especially if the insurgency is assisted from the outside.<sup>9</sup> But the Governor General had been captured by the insurgents. Moreover, the United States could not make his request public while he was in captivity for fear of endangering his life.<sup>10</sup> As a result, this justification was not described in initial press accounts.

***Intervention to Protect Nationals.*** The second justification was that the American medical students on the island were in danger following the coup, and there seemed to be no established government to protect them. Protecting a State's nationals *abroad* as well as *at home* can be a part of self-defense. Many States recognize a right of intervention when: there is an imminent threat of danger to nationals of the intervenor; the government of the State intervened is unable or unwilling to protect them; and the intervention is confined to providing for their protection.<sup>11</sup>

*Intervention Authorized by a Regional Collective Security Agency "Standing in the Shoes" of the Security Council.* The third justification was that the Organization of Eastern Caribbean States had authorized a multilateral peace force to take over Grenada long enough to bring back peace and order. Under the U.N. Charter, the Security Council has authority to use peace forces which nations put at its disposal to deal with threats to the peace and acts of aggression.<sup>12</sup> Without a large permanent peace force and with repeated exercise of the veto, the Security Council has usually been unable to perform such a function.

Under the U.N. Charter, regional collective security organizations may deal with threats to the peace if authorized to do so by the Security Council.<sup>13</sup> In several cases, regional organizations have taken collective action without prior Security Council authorization but then reported their action to the Security Council.<sup>14</sup> This is what happened in Grenada. But the Security Council would have condemned the action as an invasion in violation of international law if the United States had not exercised its veto. The General Assembly did vote overwhelmingly for such a condemnation, with almost all of our allies deserting us in the final vote.<sup>15</sup>

One lesson of the Falklands and Grenada cases is certainly that a clear-cut first use of force to cross boundaries is difficult to justify to the world, but self-defense against such an invasion is not. If the general rule against first use of force has no other meaning, it means this much. That is one reason why general peacetime rules of engagement typically provide no authority for an on-scene commander to use force first except for an imminent threat of armed attack on his command, such as a kamikaze aircraft diving on his ship. First uses of force based on other grounds must ordinarily be authorized by the national command authorities so that the responsibility will rest ultimately where it belongs, on the President.

### The Anticipatory Self-Defense Exception to the General Rule Against Shooting First

Many States contend that self-defense is only permitted against and *actual* "armed attack" under the U.N. Charter language quoted above. But U.S. practice has long recognized an inherent right "to counter either the use of force or an immediate threat of the use of force," to quote a Navy regulation.<sup>16</sup> Typical naval rules of engagement for an on-scene commander are likely to provide something like this: "The right to exercise self-defense is based on 'necessity' and 'proportionality.' The requirement of 'necessity,' or *present* danger, arises when an armed attack occurs. The requirement may also be satisfied when there is a *threat of imminent attack*, in order to prevent that attack or reduce its impact. In either case, 'proportionally' requires that the use of force be limited in intensity, duration and magnitude to what is reasonably necessary to counter the attack or threat of attack."<sup>17</sup>

This language is but an elaboration of Daniel Webster's rule of self-defense in the *Caroline* Case. He probably contemplated anticipatory self-defense when the imminence and magnitude of the threat were great enough. The British justification for attacking the *Caroline* was that she would be used in the future to support the insurgency.

Threats move faster and can result in more violence than in Webster's day. When confronted with a truck bomber driving full speed towards a Marine barracks, or a kamikaze aircraft diving on a ship, most people would agree that force can be used first to ward off the blow. The situation is not different from the domestic legal defense against a charge of murder for shooting a man about to shoot you. If you can convince the prosecutor or jury that those were the facts, you will be exonerated.

When is an armed attack sufficiently imminent to justify anticipatory self-defense?

- The official justification given by the United States for its forceful quarantine of Cuba in 1962 to persuade the Soviet Union not to bring more ballistic missiles to Cuba (and to remove those already there) did not rely expressly on self-defense.<sup>18</sup> The use of those missiles to attack the United States was not yet immediately threatened. If a State was justified in using force first—preemptively—against its neighbor whenever that neighbor acquired threatening new weapons, there might be little left of the rule against first use.

- In the 1981 Gulf of Sidra incident, U.S. pilots were authorized to shoot two Libyan aircraft after the Libyans had shot first, missed and turned away.<sup>19</sup> The Libyan aircraft represented a continuing present danger. They had shown their hostility clearly and could have turned around at any moment.

- Are there circumstances *before* an opponent's first shot when the threat is sufficiently imminent to justify self-defense? What if the Cuban missiles were known to have nuclear warheads and an attack on the United States appeared imminent? I have already referred to the truck bomber and the kamikaze pilot where the attack had been initiated but had not yet struck.

Until the Israeli destroyer *Eilat* was destroyed by Styx missiles from an Egyptian patrol boat in 1967, naval commanders usually assumed that they could "take the first hit" and still have time to defend themselves effectively. In ROE lingo, having to take the first hit means that potential enemy forces cannot be declared "hostile" even in times of high tension unless they have been guilty of a "hostile act" (e.g., shooting first). As D.P. O'Connell, an authority on the influence of law on navies, put it: "Following that event [the *Eilat* sinking] naval speculation experimented with clarifying the ambiguous borderland between 'hostile intent' and 'hostile act,' so as to encompass the possibility of *anticipating immediate attack* so that tactical advantage would not pass irrevocably to the potential assailant. This has usually [included] . . . combinations of such matters as the unhousing of a missile or the locking on of a fire-control radar in firing positions."<sup>20</sup>

O'Connell described several circumstances in which political intelligence and technical sensors give the commander sufficient information to make a determination of "hostile intent" (i.e., imminent threat of armed attack). Peacetime ROE tell the commander what to do in such a circumstance to avoid "taking the first hit." In the case of a possible missile attack by a ship or aircraft identified as a potential adversary by intelligence and local observation, the ROE might authorize a "hostile" designation in the judgment of the on-scene commander "when the potential attacker's radar guidance system has 'locked on' to target, supposing that the missile is 'beam-riding.' It has been argued that this is the moment of 'armed attack' and the moment when measures of force in self-defense may be undertaken."<sup>21</sup> Based on this argument, ROE may provide detailed criteria for an on-scene commander's decision whether an attack on his unit is so imminent as to justify shooting first in self-defense.

### The Law Enforcement Exception to the Rule Against Shooting First

Navies and coast guards around the world may use force first if necessary for law enforcement in waters and for crimes over which they have enforcement jurisdiction. The U.S. Navy is limited by domestic regulations from stopping vessels and aircraft for law enforcement purposes.<sup>22</sup> That function is ordinarily performed by the Coast Guard or other civilian agencies. But when the primary purpose of the enforcement actions is a military or foreign affairs function, or when civilian agencies do not have ships or aircraft available to perform the function, naval commanders may receive orders to do so.<sup>23</sup>

A coastal nation in its own internal and territorial waters has sovereign authority to enforce its own laws against ships of other nations, though there are exceptions for certain crimes committed on board ships in transit or even in port.<sup>24</sup> In "international" waters, that is, beyond its territorial seas (which may now extend 12 miles from its coast), a nation may enforce its laws against ships flying its flag.<sup>25</sup> Moreover, against foreign flag ships, it may enforce customs, fiscal, immigration, sanitary and resource-protection laws out as far as 24 miles from its coast: if it has claimed a 12-mile territorial sea, it may claim 12 more miles as a contiguous zone in which it may enforce laws on these subjects.<sup>26</sup> Resource-protection jurisdiction may continue even further to 200 miles from its coast if it claims an exclusive economic zone of that width.<sup>27</sup> Resources include, of course, fish and minerals. In these two zones (contiguous and economic) and on the high seas beyond (all referred to as "international" waters here), a coastal nation may also engage in "hot pursuit" to arrest vessels which have violated certain of its laws while they were in its internal or territorial waters, or sometimes even in the contiguous or economic zones.<sup>28</sup>

Thus, the general rule permitting only a ship's *flag State* to use force in order to stop the ship in international waters has exceptions for a few crimes of particular concern to a coastal nation. In the case of offenses committed aboard civil aircraft, the general rule is also that only the flag State, the nation of registry, has jurisdiction to force the aircraft down over international water in order to arrest and prosecute. Another State "may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction." There are, however, exceptions including when the offense was committed "by or against" a national of the arresting State.<sup>29</sup>

For both ships and aircraft, there are thus important exceptions to the general rule that only the flag State may use force to arrest when in international waters or airspace. Moreover, for at least one offense, treaties permit any State which is a party to stop ships or aircraft on or over international waters even though they do not fly its flag. The 1982 U.N. Convention on the Law of the Sea permits "every State" to seize a pirate ship or aircraft on or above international waters even if it is flying the flag of another nation.<sup>30</sup>

The international law dealing with terrorism may be moving in this direction. There are now treaties against aircraft hijacking and sabotage, and against hostage-taking whether on aircraft or elsewhere.<sup>31</sup> Each of these treaties expands criminal jurisdiction over the offenders to party nations *beyond* the nation having sovereignty over the aircraft, ship or territory where the offense occurred. For example, in addition to this State, these treaties give jurisdiction to any party where the aircraft later lands with offenders on board or where an offender is later found. In the case of the hostage-taking treaty, the nation-party of which the offenders are nationals and any other party of which the hostages are nationals may also exercise jurisdiction.<sup>32</sup>

Each of these treaties requires States which are within one of these interested classes "to take such measures as may be necessary" to arrest and prosecute offenders. Each of them establishes a basic obligation on a nation which is party and which gets its hands on an alleged offender: either turn him over to your own prosecutors or to those of another nation-party classed as interested by the treaty, for example, one whose nationals had been held hostage.

This does not establish universal jurisdiction over terrorists but its purpose is to deny them sanctuary anywhere. Nor does it clearly authorize using force to arrest ships in international water or to bring down aircraft in international airspace in order to arrest terrorists. But the new treaties impose obligations on many States to take various measures to arrest hijackers, saboteurs and hostage-takers, and to turn them over to their own prosecutors or to those of another party within an interested class.

How do these rules fit the measures taken by Egypt, Italy and the United States to deal with hijackers in the recent *Achille Lauro* case? Taking control of the *Achille Lauro* by force and holding its passengers as hostages clearly constituted

“hostage-taking” if not piracy. Hostage-taking includes seizing, detaining or threatening to kill other persons (hostages) in order to compel a third person to do something as a condition for release of the hostages.<sup>33</sup> Under the hostage-taking treaty, the United States was authorized to take necessary measures to arrest the hijackers because Americans were hostages. Italy, though not yet a party to the treaty, could have stopped the ship in international waters to arrest the hijackers for violating Italian law because the ship flew the Italian flag.

When the hijackers gave themselves up to Egypt, that country had an obligation under the hostage-taking treaty (to which it is a party) to turn them over to its own prosecutors or to extradite them to one of the other States in the interested classes (including the United States and all the other parties whose nationals were taken hostage or whose nationals were among the hijackers). Instead of doing so, Egypt planned to turn them over to the Palestinian Liberation Organization, ostensibly for prosecution. When the Egyptian airliner, under police or military control, in which the hijackers were aboard was intercepted by American naval aircraft over international waters, it had been denied landing permission in both Tunisia and Syria where different PLO factions had headquarters. The U.S. aircraft then forced it to land in Italy.

Forcing the aircraft down to assert criminal jurisdiction would have fit an exception to the general rule limiting jurisdiction in international waters to the flag State if the hijacking had occurred on a civil airliner rather than on the *Achille Lauro* because, among other reasons, Americans were among the hostages.<sup>34</sup> In actuality, the hostage-taking occurred earlier aboard ship, and the offenders were under Egyptian police or military control on the aircraft. But since Egypt had failed to exercise its responsibility to prosecute or extradite under the hostage-taking treaty, forcing the plane down was important for the United States to carry out its obligations to “take necessary measures” to assure prosecution under that treaty. Did this justify the United States taking the law into its own hands—violating its cherished notions of freedom of navigation and overflight in international waters? I believe it did, to fulfill the international duty which Egypt had but failed to perform.<sup>35</sup>

Customary international law is made by the action and reaction or acquiescence of States. A new rule may be in the making permitting seizure of terrorists by those States within the interested classes specified in the treaties when another party with an obligation to do so refuses.

## Conclusion

The policy of international law, ROE and Navy Regulations is to discourage on-scene commanders from starting wars which nobody wants—from shooting first in peacetime—unless the survival of their ships or aircraft depends upon it. According to O’Connell, the basic assumption is that naval force, when used,

“will be progressively applied to achieve or defeat political goals without resulting in hostilities; that if hostilities do occur they can be brought to a successful termination without progression to another mode of warfare or to other areas of conflict. Intrinsic to this assumption is the requirement, to put it simply, that the other side fires first, for then the use of force can be presented as self-defense . . . . The rules of the game . . . require that the burden [of shooting first] be shifted, if possible, to the other side in the event of a confrontation of warships, or at least that the opening of fire be necessary to enforce the law. . . .”<sup>36</sup>

But modern technology can make taking the first hit lethal. Yet the rule against shooting first remains on the books. And U.S. experience with the exceptions to the rule should convince any reader that a successful political justification for using force is extraordinarily difficult except when based upon self-defense or law enforcement, as O’Connell says. It is therefore not surprising that the only justification for shooting first given the on-scene commander by typical peacetime general ROE is anticipatory self-defense of his unit.

Modern technology assists him in determining the imminence of an attack on his unit—just as it makes his adversary’s weapons come further, faster, more accurately and more destructively, toward him. In the end, the high standard given by Daniel Webster is useful to have in mind even if it must be interpreted in light of modern technology: Anticipatory self-defense should be confined to cases in which the necessity is “instant, overwhelming and leaving no choice of means and no moment for deliberation.”

This raises a difficult question with which I will conclude this paper: Should the United States avoid shooting first (with the exceptions of self-defense and law enforcement) whether or not the Soviet Union and other hostile States regularly do so? My answer is yes, for the following reasons:

- The rule against first use of force is based on long-held Western values and diplomatic goals. When our allies perceive us as departing from the rule, we are likely to lose their support, at least temporarily—as we did in Grenada. In the long run, we may consider the strength of our alliances to be more important to our security than exercising the freedom to flout the rule.

- A long-term U.S. diplomatic goal is, to quote Woodrow Wilson, “to make the world safe for democracy.”<sup>37</sup> Democracies cannot flourish as well in a lawless, “might-makes-right” world. To sustain support for our leadership in the direction of a world which respects the rule of law, we need to comply ourselves.

- The rule against first use of force probably still has some deterrent effect, though that is difficult to prove. States never say: “But for the rule we would have committed aggression.” Because we hear about interventions in violation of the rule, we tend to conclude it no longer deters aggression. Even if the rule lacks deterrent effect, however, it clearly helps justify mobilization at home and assistance from aboard when using force in self-defense against a clear armed attack—as the British found in the Falklands conflict.

- It is hard to conceive a scenario in which the rule would prevent us from protecting our vital interests. It is not inflexible, as the creativity of American precedents suggests.
- The rule's opposition to aggression means that it generally favors the status quo. We have become a status quo power. We usually support the existing territorial and political integrity of nation States. We usually urge the peaceful settlement of disputes. In these respects, the rule serves our foreign policy goals more often, probably, than those of the Soviet Union.
- Since World War II, the rule has been part of a broader effort to prevent hostilities of a sort which might escalate to a third world war and a nuclear exchange. That effort continues to be essential.

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Professor Bunn was serving as the Stockton Chairholder at the Naval War College when this article was first published.

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### Notes

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2. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: PROCEEDINGS, 27 AUGUST-1 OCTOBER 1946 411, 427-428, 446-450, 460-461, 463 (1948).
3. U.N. Charter, Arts. 2(4) and 51.
4. Inter-American Treaty of Reciprocal Assistance (Rio Treaty), 62 Stat. 1681; 21 U.N.T.S. 77 (1947); Charter of Organization of American States, 2 U.S.T. 2394; 119 U.N.T.S. 3 (1948).
5. Text of Falkland Speech by Prime Minister Thatcher in House of Commons, *The New York Times*, 21 May 1982, p. A10.
6. HAIG, CAVEAT 266, 268-269, 276, 291 (1984); see also Franck, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, Am. J. Int'l L. 109, 111-114 (January 1983).
7. U.N. Security Council Resolution 502, 3 April 1982. The European Economic Community voted to impose economic and military sanctions on Argentina on 10 April 1982, *The New York Times*, 11 April 1982, sec. 1, at 1, 12; Franck, at 114-124.
8. U.N. Charter, Art. 51.
9. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 242-243 (1984); Cutler, *The Right to Intervene*, 96, 100-101 Foreign Affairs (Fall 1985).
10. Letter of D.R. Robinson, The Legal Advisor to the State Department, to Chairman, Committee on Grenada, section on International Law and Practice, American Bar Association, *The International Lawyer* 381-387 (Spring 1984).
11. *Id.*; Waldock, *The Regulations of the Use of Force by Individual States in International Law*, Recueil de Cours, 451-467 (1952); HENKIN INTERNATIONAL LAW, CASES AND MATERIALS 922-924 (1980).
12. U.N. Charter, Chap. VII.
13. U.N. Charter, Art. 53.
14. Whiteman, *U.S. Quarantine of Cuba in Missile Crisis of 1962*, 4 DIGEST OF INTERNATIONAL LAW 523-524 (1965); Meeker, *Defensive Quarantine and the Law*, Am. J. Int'l L. 515, 523-524 (July 1963); OAS *Intervention in Dominican Republic in 1965*, 4 I.L.M. 594 (Merillat ed. 1965); 52 U.S. Dept. of State Bulletin 862 (1986); Stevenson, *Principles of U.N.-OAS Relationship in the Dominican Republic*, 52 U.S. Dept. of State Bulletin 975-977. Compare 1968 Warsaw Pact Organization's intervention in Czechoslovakia, *The New York Times*, 27 September 1968. See HENKIN *supra* n. 11 at 926-929, 951-953.
15. U.N.G.A. Resolution 38/7, 2 November 1983; Richard Bernstein, *U.N. Assembly Adopts Measure 'Deeply Deploing' Invasion of Isle*, *The New York Times*, 3 November 1983, p. A21.
16. U.S. Navy Regulations, 1973, Art. 0915.
17. Roach, *Rules of Engagement*, *Naval War College Review* 46, 49-50 (January-February 1983); Naval War College, Operations Dept., "General Rules of Engagement," *Extracts from Legal Sources*, NWC-1008 (1985) p. 14-1.
18. Meeker, *supra* n. 14 at 523-524.

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19. Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, U.S. Nav. Inst. Proc. 26 (January 1982).
20. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 71 (1975).
21. *Id.* at 82.
22. U.S. Dept. of Navy, SECNAVINST 5820.7A, OP-642 (Washington: 1984).
23. *Id.*, par. 9.
24. *Id.*, parts 10, 14.
25. U.N., *The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea* (hereinafter LOS Convention) (1983), Art. 92. Though the United States has not signed this treaty, it accepts the provisions cited in this article as a valid reflection of customary international law binding on the United States in its dealings with other States which comply with the freedom of navigation and overflight rules in the treaty in their dealings with us.
26. LOS Convention, Arts. 11, 55, 56.
27. LOS Convention, Arts. 56-57.
28. LOS Convention, Art. 111.
29. Convention on International Civil Aviation (Chicago, Ill.: 7 December 1944), 15 U.N.T.S. 295, Art. 12; Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo, Japan: 14 September 1963), 704 U.N.T.S. 219, Art. 3-4.
30. LOS Convention, Arts. 105, 110; but compare RUBIN, 63 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, *THE LAW OF PIRACY* (1986).
31. Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), (The Hague: 16 December 1970) 22 U.S.T. 1641, Art. 4; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), (Montreal, Canada: 23 September 1971) 24 U.S.T. 564, Art. 5; International Convention Against the Taking of Hostages, (New York: 17 December 1979) TIAS 11081.
32. International Convention Against the Taking of Hostages, Art. 5.
33. *Id.*, Art. 1.
34. Treaties cited in n. 31, *supra*.
35. Murphy, *Legal Aspects of International Terrorism: Summary Report of an International Conference*, Am. S. Int'l L. 30 (1980); Sheehan, *The Entebbe Raid: The Principle of Self-Help in International Law as Justification for State Use of Armed Force*, The Fletcher Forum 135 (Spring 1977).
36. *Supra* n. 20 at 70; see also 53-55.
37. PALMER & COLTON, *A HISTORY OF THE MODERN WORLD* 673 (1978).

# Chapter 23

## An Appropriate Use of Force\*

James H. Webb, Jr.

**T**he differing responsibilities of civilian and military control have not always been fully appreciated by those in the operating units who are responsible for implementing policy. I remember my own frustrations in this regard, and in fact the problem has timeless dimensions. The Duke of Wellington, while fighting the French in 1812, wrote the following message to the British Foreign Office in London:

Gentlemen:

While marching from Portugal to a position which commands the approach to Madrid and the French forces, my officers have been diligently complying with your requests which have been sent by His Majesty's ship from London to Lisbon and thence by dispatch rider to our headquarters.

We have enumerated our saddles, bridles, tents and poles, and all manner of sundry items for which His Majesty's government holds me accountable. I have dispatched reports on the character, wit and spleen of every officer. Each item and every farthing has been accounted for, with two regrettable exceptions for which I beg your indulgence.

Unfortunately, the sum of one shilling and ninepence remains unaccounted for in one infantry battalion's petty cash, and there has been a hideous confusion as to the number of jars of raspberry jam issued to one cavalry regiment during a sandstorm in Western Spain. This reprehensible carelessness may be related to the pressure of circumstance, since we are at war with France, a fact which may come as a bit of a surprise to you gentlemen in Whitehall.

This brings me to my present purpose, which is to request elucidation of my instructions from His Majesty's government, so that I may better understand why I am dragging an army over these barren plains. I construe that perforce it must be one of two alternative duties, as given below, I shall pursue either one with the best of my ability but I cannot do both:

1) To train an army of uniformed British clerks in Spain for the benefit of the accountants and copy-boys in London, or, perchance

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2) To see to it that the forces of Napoleon are driven out of Spain.

One can hardly have experienced combat without some recollection of similar frustrations. As a rifle platoon commander in Vietnam, one of the most ridiculous tasks I had to perform was to fill out a "Mine and Booby Trap Report" every time someone detonated a booby trap. The bomb explodes, people are screaming; imagine trying to clear lanes to your casualties so that other booby traps would not be detonated as you treated the wounded, calling to arrange a Medevac, placing your men into a defensive perimeter to protect against ambush so the Medevac would land, and at the same time entertaining the string of questions from higher authority: What kind of booby trap was it? What size ordnance was involved? What was the actuating device? Trip wire, pressure, pressure release, other? How was it hidden?

And, of course, the accurate response was, if we had known all of that, we would not have set the thing off. But the demands of statisticians and historians prevailed, so what we did, inevitably, was make up some standard responses in order to get people off our backs. If only one or two people were wounded, with no amputations, it was a Mike-26 grenade. If there was an amputation, or if someone was mangled, it was a mortar round. If someone was killed or if there were several people seriously wounded, including amputations it was some form of artillery shell. If someone got blown to smithereens and you could not find very much of him, it was a 250-pound bomb. And so on.

Of course, the bureaucracy and, I imagine, historians as well, took all of this quite seriously, so that while I was in Vietnam a startling tabulation of these reports was made—their results so alarming that a specially printed message was sewn inside our flak jackets: "Don't leave your grenades lying about. Fully 69 percent of all booby traps are caused by our own Mike-26 grenades."

The point of this, I suppose, is that there are areas in defense policy where the needs of the policymakers and the realities of the implementers diverge, and the two separate elements must seem foreign to each other. However, this cannot be said of the development and continual refinement of our military strategy. The proper definition of our strategic goals is the true meeting place of military and civilian priorities. Our strategy places the proper military means to guarantee the Nation's political objectives. Within the Department of Defense it shapes the nature and extent of our resourcing and dictates the general positioning of our forces and our equipment. That is to say, it often places you and your compatriots face-to-face with the myriad of problems we face around the world.

These are more than intellectual and military issues, especially in a democracy. The importance of a well-defined and properly articulated strategy assumes the realm of moral obligation in a society that nurtures and protects free debate. The defense of a free society depends upon support freely given by its citizenry. That

support depends in turn upon understanding a government's purposes and trusting in its intentions. A democratic government must articulate clearly the ends and means of defense if that trust is to endure.

There are many examples throughout history of democratic governments forgetting this vital, *moral* aspect of strategy and losing the support of loyal citizens who despaired over clouded strategic thinking. One of the most poignant to me was that of Siegfried Sassoon, a talented British poet. After almost 3 years of fighting during World War I, having been wounded several times, and awarded the Military Cross, Sassoon quit the Army in late 1917, causing national headlines. This was not an act of cowardice; Sassoon had been wounded so badly that he would have been kept at home if he had stayed in the service. Rather, it was an act of immense frustration with the leadership of a country he loved and had defended.

Sassoon wrote, "I am making this statement as an act of wilful defiance because I believe that the war is being deliberately prolonged by those who have the power to end it. . . . I believe that the purposes of which I and my fellow-soldiers entered upon this war should have been so clearly stated as to have made it impossible to change them, and that, had this been done, the objects which actuated us would now be attainable by negotiation. . . . I am not protesting against the conduct of the war, but against the political errors and insincerities for which the fighting men are being sacrificed."

Sassoon's objections were classic. The war had begun for Britain, completely without strategic objectives, in response to the violation of Belgium's neutrality. The Germans were implementing an inflexible strategy called the "Schlieffen Plan" and believed the war would be over in exactly 39 days. Instead, it would eventually cost almost a million dead among British Empire soldiers, the deaths of 1 1/2 million French soldiers, and almost 2 million German soldiers. From beginning to end, except for the first 4 days on the part of the Germans, and for Winston Churchill's ill-fated Gallipoli Campaign, the war lacked strategic focus.

Citizens in free societies are unique in this regard: they have the right to know what they might be dying for. This was true in World War I, it was true in Vietnam, and it is true today. If we cannot tell our people what our objectives are around the world, and clearly indicate to them why these objectives are important to our Nation, we cannot expect them to invest the lives of their sons and fathers in the national interest.

I would suggest another key element: in the evocation of U.S. military strategy, the sea services are, and always have been, the linchpin. We are not a continental ground power, except on our own continent, and never have been. In fact, we have never truly fought a continental war, except the Civil War. In contrast to the horrendous figures just mentioned, we lost 55,000 men in combat during World War I and another 50,000 died from illness. In World War II, we basically fought a rearguard action against the Germans while defeating the

Japanese through seapower projection. The Germans and the Russians slaughtered literally millions of each others' soldiers—3.7 million Germans and 7 million Russians. We suffered 290,000 combat deaths in all services and in all theaters of the war. We do not know the price of this kind of warfare because, thankfully, we have never been required to pay it in order to guarantee our national security, except for the horrible bloodletting of the Civil War here on our own continent.

I would say also that, in wartime or in these periods that we now call a violent peace, our Nation's ability to affect world events, either positively or negatively, is most often measured by the size and capability of its Navy. As with Great Britain, who for centuries was Queen of the Seas, and with Japan, who has alternately attempted maritime power or appended itself to the dominant navies of its region over the last century, this is driven by economic and geographic necessity. By contrast, as we all know, nations who concentrate on naval power without such geographic and economic necessity, such as prewar Germany and today's Soviet Union, give us cause for alarm.

The disturbing realities are that, since World War II, allied navies have declined around the world and the Soviet Navy has dramatically expanded. We say this frequently, some of us taking this shift for granted and others not quite believing its enormity, but consider a few examples:

In 1946—and this is after demobilization—the U.S. Navy retained, among other assets, 106 aircraft carriers, 34 of them actively deployed, and 798 larger surface combatants, 220 of them in the active fleet. The British actively operated another 29 aircraft carriers worldwide and 419 larger surface combatants. Five years later, during the Korean war, we were operating 33 aircraft carriers and 308 larger surface combatants in the active fleet, while the British numbers had dropped to 10 carriers and 74 surface combatants. By 1961, we were operating 23 carriers and 262 surface combatants, while the British had been reduced to only 1 aircraft carrier and only 71 surface combatants. The trend continued, with slight undulations, until today when we have been able to rebuild our navy to 14 active carriers and 217 surface combatants, while the British, once the mightiest navy in the world, operate 3 aircraft carriers and 54 surface combatants.

By contrast, the Soviet fleet has steadily emerged from a coastal force with only 62 larger surface combatants and no carriers in 1964 to a force of 4 aircraft carriers and 284 larger surface combatants today, while at the same time maintaining a huge numerical lead in submarines, minesweepers, and small combatants.

These changes dramatically affect a nation's ability to impact events. For example, there were 418 allied ships in the Mediterranean in 1947 at the time of the crisis that occasioned the proclamation of the Truman Doctrine. There were no, repeat, no Soviet ships. By the time of the 1967 Arab-Israeli War there were 66 U.S. and 21 British ships present in the Mediterranean, and the Soviets

operated 29, for the first time creating a permanent presence in the region. By the 1973 Yom Kippur War, however, there were 59 U.S. ships, only 7 British ships, and 95 Soviet combatants. This is a trend that has replicated itself throughout the globe. We see it in the Pacific, where the Soviets operate their largest fleet and where on any given day at Cam Ranh Bay, Vietnam, there are *two dozen* Soviet combatants. We see it in the Indian Ocean and the Persian Gulf. We see it in the Caribbean, and we see it off of our own shoreline.

Luckily, our country has built up a vast reservoir of experience in the uses of the sea services to influence events. Strategically, we know, first, that our strategic submarine force provides the greatest deterrent to the Soviet nuclear threat, as it provides half of the country's nuclear capability at one-fourth of the overall cost of this element of national defense.

We know, secondly, that our carrier battle groups and amphibious forces have vast maneuverability which allows power projection to occur at key crisis points irrespective of either the need for expensive base rights or the vulnerability that goes along with long-term static positions.

And we know, thirdly, that the battle at sea can often be decisive to the battle on land. I am reminded of Liddell Hart's depiction of the historic race for Tunis during the North African Campaign of World War II, when the Germans moved 250,000 occupation troops from France, principally by airlift, and were unable to control the sea in order to equip and resupply their soldiers. The end results were disastrous on a strategic level: we captured more than 200,000 of these troops when we took Tunis, and we did not have to fight them when we invaded Normandy. Without control of the sea, the Germans lost twice. We should not forget this as we contemplate our own reinforcement plans in the NATO arena.

Despite the record, however, we are still afflicted by the persistent illusion that somehow we can remake these fundamentals of maritime strategy through technological breakthrough or mental gymnastics. Sometimes, policymakers seek relief through strategic amnesia, which is perhaps the only way we might explain what happened to the Navy during the 1970s. Twenty years ago we had a thousand ships. By 1979 the fleet had dropped to 479 combatants and was burdened with expanding commitments driven by the crises in the Indian Ocean and Persian Gulf. The 600-ship navy we have been building since 1981 represents less an innovation of strategy than simply the long overdue effort to close the gap between political ends and military means. By revisiting a maritime strategy driven by historic demographics, we remind ourselves that we must have maritime supremacy over any threat to our seagoing communications, and that we must be supreme on the sea if we are to have a chance of prevailing on the land. This is not an option, it is a prerequisite, the very basis of our national strategy.

Any military strategy worthy of the name chooses the means, ordains what we procure and why. The critics of today's strategy claim that 15 deployable

carrier battle groups are too weak to deal with the Soviets, yet not flexible enough to deal with other contingencies. Our main business, in this view, is to convoy supplies to NATO in a long war. The Navy, this view concludes, is irrelevant in a short war.

I would venture two very careful reactions to such logic. First, if you examine any short war in recent history, you will see that the sea services have been predominant. And if you examine any European war during this century, you will find that, despite a myriad of predictions beforehand, it has never been short. Take your pick; unless a war were to escalate quickly to a nuclear exchange that destroyed the world as we know it, you could not fight it without a strong and capable Navy.

And of course, our purpose is to be so strong that we will not have to fight. The military means at our disposal are dedicated to the prevention of war because we believe that our political objectives are so attractive to other countries that they inevitably will be obtained in peace. This, too, is a strategy. It is called deterrence and requires both military strength and a clear national will. But we have a problem here. Deterrence is often described as a spectrum. We have been most successful at the most dangerous end of that spectrum. And yet, while we have avoided direct confrontation with the Soviet Union, since World War II more than 100,000 Americans have died in the unofficial conflicts at the lower end of the spectrum. This may be a failure of our overall strategy, or it may be a sort of leakage that is uncontrollable in the wake of successfully controlling all-out war. In any event, the fate of our generation has been to learn a new lexicon of warfare, terms like low-intensity conflict, fear of escalation, diplomatic presence, political mission, avoidance of provocation, proportionate response, protective reaction, and rules of engagement.

Such equivocations are in many ways a sad function of our very strength. Our military units are often more vulnerable than they should be because political rules have given an enemy a weird sort of equality by reducing our own level of power to the point that the enemy can compete. We call this restraint. There have been times when our political system has placed combat forces into combat situations and precluded their having a combat mission in the name of gaining a political objective. Too often, as all of us know, military action is taken against these forces, political objectives fail, and our highly competent military leaders are ridiculed because of situations they did not fully control. This may be the most difficult strategic question of the moment: how do we, as a nation, deter military action on the lower end of the scale? Or, if deterrence is not possible, when do we shoot, and how much force do we use to accomplish political objectives that include the containment of hostilities?

Today's sea services are highly capable and highly flexible. We are developing the ability to cross-fertilize our warfare specialties, utilizing a combined arms approach to many varied situations. Within weapons systems we are developing

the capability for multiple missions. But all of this technology is meaningless unless our commanders know that if they take a considered risk in the field, they will be backed up at home. We must not use military force unless we are prepared to see it through in a way that makes military as well as political sense.

Nor should we be confined, in the name of proportionality, to responding to an attacker's aggression at the time or place of his choosing. Tit for tat responses have their uses, but as we have learned over the past 35 years through our frustration and suffering, these uses are narrow. The objective of military forces is to prevail, to punish an attacker beyond his ability to respond yet again, to exact a political and, at times, a human cost that will in fact deter future acts.

Our sea services, as I mentioned earlier, are the very symbol of our international commitments. We have long been at the cutting edge of our country's actions abroad. Where we operate and how we operate cause us to be the most exposed forces in this confused, semipolitical, semimilitary era of violent peace. Our response to the challenge of this era is therefore of utmost concern to the Nation. I have suggested that there are things we need to do. We must establish a better balance between our political objectives and our military forces. We must clarify for ourselves and for the world that we know when to shoot and how much to shoot. And, above all, we must review the vital bond between the commander in the field and the Nation at home.

The Nation must understand why our sailors and Marines are out there on the far-flung edges of the world, what it is they are defending, and the value of that effort. And our commanders must know that, above all, should they be required to use force in this era of violent peace, while performing a military mission, they will be backed by their leadership.

And, not incidentally, our political leaders must make the conscious judgment that the introduction of military units carries with it the rather high risk that they will be called upon to use force, and that the appropriate use of this force must be ratified in advance.

These understandings would comprise the basis of a strategy that will address the most troublesome aspect of our ability to deter. And this era might have less violence and more peace.

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James Webb, Jr. was serving as the Secretary of the Navy at the time he made this address to the Naval War College. This article is a version of Secretary Webb's address to the 1987 Current Strategy Forum at the Naval War College.



# Chapter 24

## The Constitution and Presidential War Making against Libya\*

Lieutenant David L. Hall, U.S. Naval Reserve

Since the Vietnam War, U.S. military operations have been followed by intensive but short-lived debates about the constitutionality of the unilateral use of military force by the President.<sup>1</sup> The tone of these debates became especially urgent during the development of what has been called a “compellent diplomacy”<sup>2</sup> under President Reagan. Opponents of presidential war making have argued that since Congress alone is empowered to declare war,<sup>3</sup> the President exceeds the scope of his constitutional authority by employing force abroad without a declaration of war. Proponents of the President’s actions have claimed that his authority as the nation’s chief executive and as commander in chief<sup>4</sup> of the armed forces justifies his actions. Superimposed over these constitutional debates have been statutory wrangles about the President’s compliance with the requirements of the War Powers Resolution,<sup>5</sup> which was enacted in 1973. Some observers have found the legal issues to be either overwhelming or irrelevant; after the Grenada intervention, *The Wall Street Journal* wished the lawyers would “shut up.”<sup>6</sup> Nevertheless, the stakes in these debates are quite high: at issue is not only the question of which branch of government is constitutionally empowered to make war, but also the broader question of how seriously the Constitution is to be treated in determining the distribution of war powers.

One source of confusion and incoherence in the post-Vietnam war powers debates has been the failure of many participants to distinguish the question of whether the President’s actions were lawful from the question of whether they were wise.<sup>7</sup> This article is about the former; it seeks to determine whether the circumstances under which the Constitution permits the President to use military force, wisely or not, were present during the 14 April 1986 air strikes against Libya.

### The Libya Mission as a Case Study

On more than a hundred occasions since the Constitutional Convention of 1787, Presidents have waged war without a congressional declaration.<sup>8</sup> During

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one such undeclared war in Vietnam, some commentators insisted that the President's use of force was not lawful.<sup>9</sup> Others, including several courts,<sup>10</sup> argued that the President's use of force in Vietnam was authorized by the Tonkin Gulf Resolution,<sup>11</sup> as well as numerous appropriations and draft enactments. Even those who contend that the Vietnam War was unconstitutional acknowledge that at least some aspects of the war, such as its financing, were authorized by Congress. For these critics, the argument that the Vietnam War was unconstitutional is based solely on the absence of a declaration of war.

In spite of this criticism, post-Vietnam presidential war making has been accompanied by less congressional authorization than was the Vietnam War. The introduction of U.S. Marines into Lebanon in 1982, for example, was only authorized by Congress in 1983 by the Multinational Force in Lebanon Resolution.<sup>12</sup> The 1983 intervention in Grenada<sup>13</sup> was also preceded by no express congressional authorization. Similarly, the only formal contact between the President and Congress on the question of the 1986 air strikes against Libya took place several hours before commencement of operations and did not result in any form of congressional approval, either express or implied. The Libya mission<sup>14</sup> thus provides an unambiguous factual situation against which to test the scope of the President's constitutional war-making authority. If some form of prestrike congressional authorization (whether or not a declaration of war) was required by the Constitution, then the President's conduct on 14 April 1986 was clearly unconstitutional. If not, then the President's action was undertaken within the bounds of his constitutional authority.

### The Libya Mission<sup>15</sup>

On the morning of 27 December 1985, terrorists attacked and killed civilians, including five Americans, in the Vienna and Rome airports.<sup>16</sup> The Abu Nidal terrorist group was widely suspected of executing the attack. Abu Nidal was linked by a 31 December 1985 State Department study to the government of Libya.<sup>17</sup> Specifically, the study found a "likelihood" of support from Libya in the form of "financing, safehaven and logistical assistance."<sup>18</sup> Libya denied involvement in the Rome and Vienna attacks,<sup>19</sup> even as it praised them. On 29 December, the Libyan press agency, JANA, termed the Rome and Vienna attacks "heroic."<sup>20</sup> By contrast, Yasir Arafat, chairman of the Palestinian Liberation Organization, condemned the attack.<sup>21</sup>

Despite Libya's denial, the United States accused Libya of participation.<sup>22</sup> A State Department report issued 8 January 1986, stated: "[Colonel Muammar el-] Qaddafi has used terrorism as one of the primary instruments of his foreign policy and supports radical groups which use terrorist tactics. . . . Qaddafi has provided safehaven, money and arms to these groups—including the notorious Abu Nidal group. . . . Libya's support has broadened to include logistical support for

terrorists operations. For example, Libya provided passports to the Abu Nidal members responsible for the [27 December 1985] attack on the El Al counter in Vienna."<sup>23</sup> Although Qaddafi at first denied the State Department's allegations, he later proclaimed, "I declare that we shall train [certain groups] . . . for terrorist and suicide missions and . . . place all weapons needed for such missions at their disposal. . . . Libya is a base for the liberation of Palestine."<sup>24</sup>

The United States brought punitive measures against Libya, imposing trade restrictions and freezing Libyan government assets held by U.S. banks.<sup>25</sup> Rumors ran high about the possibility of military operations, Secretary of State George P. Shultz and Secretary of Defense Caspar W. Weinberger disagreeing over the advisability of such action. Secretary Weinberger disputed the suggestion of Secretary Shultz that military action against Libya should be undertaken in the absence of data absolutely confirming a direct connection between specific terrorist acts and Libya.<sup>26</sup> Secretary Shultz said that the United States "cannot wait for absolute certainty and clarity" as a precondition for military actions.<sup>27</sup> He added, "A nation attacked by terrorists is permitted [by international law] to use force to prevent or preempt future attacks, to seize terrorists or to rescue its citizens when no other means is available."<sup>28</sup> Secretary Weinberger, on the other hand, criticized those pursuing "instant gratification from some kind of bombing attack without being too worried about the details."<sup>29</sup> He raised "the basic question of whether what we are doing will discourage and diminish terrorism in the future."<sup>30</sup>

By the end of March, three U.S. aircraft carriers, the *Coral Sea*, the *Saratoga*, and the *America*, and their battle groups were operating in the Mediterranean, and the Pentagon announced plans for naval air operations over the Gulf of Sidra.<sup>31</sup> Libya considered these activities to be provocative because it claimed the entire 150,000-square-mile Gulf as part of Libyan territorial waters. This territorial dispute had led, in August of 1981, to the downing of two Libyan SU-22 fighters by two U.S. Navy F-14 fighters. On 24 March 1986, during U.S. naval air operations over the Gulf of Sidra, Libyan shore batteries launched surface-to-air missiles (SAMs) against U.S. aircraft. The missiles missed, and U.S. naval forces retaliated by attacking the radar installation at the SAM site with HARM antiradiation missiles from naval aircraft. Later that day, naval aircraft launched Harpoon missiles against a Libyan *La Combattante*-class fast-attack craft, sinking it. U.S. Navy aircraft also attacked a Libyan Nanuchka-class corvette proceeding toward the carrier task force.<sup>32</sup> In addition, the guided missile cruiser U.S.S. *Yorktown* launched missiles against a second *La Combattante* fast-attack craft that had proceeded to within ten miles of the task force. On 25 March, Navy aircraft attacked a second Nanuchka-class corvette, leaving the vessel dead in the water and afire.<sup>33</sup> Former Secretary of the Navy John Lehman has reported that a total of three Libyan craft were destroyed.<sup>34</sup> On 27 March, President Reagan reported to Congress by letter that the naval exercises in the Gulf of Sidra had ended.<sup>35</sup>

That same day, the Arab League's Council of Ministers denounced U.S. actions in the Gulf of Sidra.<sup>36</sup> Colonel Qaddafi claimed victory.<sup>37</sup>

On 5 April, terrorists bombed a West Berlin nightclub frequented by U.S. military personnel, killing a civilian woman and an American soldier, Army Sergeant Kenneth T. Ford, and wounding scores of other Americans.<sup>38</sup> American officials in West Berlin declared a "definite, clear connection" between the bombing and Libya.<sup>39</sup> Robert B. Oakley, head of the State Department's counterterrorism office, stated that the bombing "fit the pattern" of Libya-sponsored terrorism.<sup>40</sup> West German officials focused their investigation on reports that the Libyan People's Bureau in East Berlin had used its embassy status to provide logistical support to terrorists operating in West Berlin.<sup>41</sup> France expelled two Libyan diplomats accused of participating in the planning of terrorist attacks against Americans in Europe.<sup>42</sup> On 9 April, President Reagan held a press conference during which he announced that the United States had "considerable evidence" indicating Libyan support for terrorism against Americans.<sup>43</sup> The President announced his intention to act militarily if further intelligence established a direct connection between Libya and the terrorists. "We're going to defend ourselves," he said.<sup>44</sup>

Early on 14 April (15 April local) 1986, U.S. forces executed air strikes against Libyan targets. Air Force F-111 aircraft bombed targets in and around Tripoli: the military side of the Tripoli airport, the Libyan External Security building, the el-Azziziya military barracks (including the compound of Libyan leader Colonel Muammar el-Qaddafi), and the Libyan commando training center of Sidi Bilal.<sup>45</sup> Navy attack aircraft bombed military targets in and around Benghazi, including the Benina air base and the Jamahiriya barracks.<sup>46</sup> These targets had been selected to "stop Qaddafi's direction of the support of international terrorism."<sup>47</sup> U.S. aircraft encountered significant resistance from SAM batteries and anti-aircraft artillery.<sup>48</sup> For undetermined reasons, one F-111 was lost, as were its two crewmen, Air Force Captains Paul F. Lorence and Fernando L. Ribas-Dominicci. Some residential neighborhoods in Tripoli were damaged in the attack,<sup>49</sup> although accounts differed as to whether the damage was caused by U.S. bombs or Libyan SAMs returning to earth undetonated.<sup>50</sup>

Secretary Shultz stated at the press conference announcing the operation that the strikes had been ordered as the result of "irrefutable" evidence of Libyan involvement in the bombing of the West Berlin club.<sup>51</sup> He said that the strike was necessary to deter future Libyan support of terrorism.<sup>52</sup> "If you raise the costs [of terrorism]," he stated, "you do something that should eventually act as a deterrent. And that is the primary objective, to defend ourselves both in the immediate sense and prospectively."<sup>53</sup> President Reagan addressed the nation to confirm that Libya had played a "direct" role in the Berlin bombing; he said that "Libya's agents . . . planted the bomb."<sup>54</sup> President Reagan stated that the air strikes were conducted in retaliation for the Libyan role in the Berlin bombing

and were “preemptive” in nature.<sup>55</sup> “Self-defense is not only our right, it is our duty,” he said.<sup>56</sup>

### The Libya Mission and the U.S. Constitution

The Constitution’s Framers did not want the President to be the King.<sup>57</sup> Indeed, the Articles of Confederation, ratified just six years before the Constitutional Convention of 1787, did not provide for a national executive at all. It is clear, then, that the Framers did not mean to render the President omnipotent. It is equally clear, however, that they did not mean for the President to be an impotent, titular executive. The Framers did name the President commander in chief of all military forces, grant the President executive power, and designate him the primary agent for the conduct of foreign affairs. On the other hand, the Framers granted Congress the powers to declare war and to ratify or withhold ratification of the President’s treaties, thus inviting a “struggle for power”<sup>58</sup> in the area of foreign relations.<sup>59</sup> The fact is that the record of the Framers’ debate on war powers is so wide-ranging and inconclusive that proponents of each view can find significant support in the record. Supreme Court Justice Jackson noted in 1952: “Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be derived from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.”<sup>60</sup>

The sparse record of the constitutional debate does not contain a definition of the powers of the commander in chief. This silence is consistent with the collective ambivalence expressed by the Framers about the war powers in general: the President, on the one hand, should not have unfettered warmaking power and, on the other, should be able to respond to crises affecting national security. Alexander Hamilton, who favored a strong executive, attempted to reconcile the tension in the Framers’ ambivalent view by stating that the President was “to have the direction of war when authorized or begun.”<sup>61</sup> This remark can be taken to mean that the President can direct a war “only after it has been commenced”<sup>62</sup> by congressional declaration. Indeed, James Madison emphasized the distinction between the President’s power “to conduct a war” and Congress’ power to decide “whether a war ought to be commenced, continued, or concluded.”<sup>63</sup> But Hamilton’s statement contemplates the possibility of congressionally unauthorized war by establishing the disjunction, “authorized” or otherwise “begun.” Hamilton expressed his position more clearly when he wrote: “[I]t is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; whether from calculations of policy or from provocations, or injuries received: in other words, it belongs to Congress

only, *to go to War*. But when a foreign nation declares or openly and outwardly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary."<sup>64</sup>

Hamilton and the other Framers did not consider war to be unlawful in the absence of express legislative authorization; undeclared war was well known to the Framers. Indeed, between "1700 and 1870, declarations of war prior to hostilities only occurred in one case out of ten. . . ."<sup>65</sup> The issue of whether to wage undeclared war arose in the early years of the nation. In 1798, for example, President Adams embraced the suggestion of Secretary of War James McHenry to not seek a congressional declaration of war against France and instead to engage in a "qualified hostility," which, "while it secures the objects essential and preparatory to a state of open war, involves in it the fewest evils. . . ."<sup>66</sup>

So the Framers' collective point of view lies away from the extremes: war is not necessarily illegal when undeclared<sup>67</sup> and the President is neither omnipotent nor impotent. From this context emerges the rule that regardless of whether the President may engage lawfully in offensive,<sup>68</sup> sustained war, he may act unilaterally in an emergency to defend the security of the United States without congressional approval.<sup>69</sup> The validity of this generalization is not subject to serious doubt. Indeed, it was James Madison, otherwise disinclined to grant the President war-making power, who moved the Constitutional Convention to delete language in the draft Constitution empowering Congress to "make" war and to replace it with language granting Congress the power to "declare" war. Such a change, said Madison, would leave "to the Executive the power to repel sudden attacks."<sup>70</sup> Madison's motion carried, indicating that even in withholding from the President the royal prerogative to declare war, the Framers granted the President some measure of power to defend the national security without a congressional declaration of war.

Although this power to defend<sup>71</sup> was not conferred on the President by the express language of the Constitution, it has been recognized by the courts. In *Durand v. Hollis*,<sup>72</sup> the federal District Court ruled on the lawfulness of President Pierce's approval in 1854 of the naval bombardment of Greytown, Nicaragua, in the response to the failure of the revolutionary government to make reparations to Americans harmed by recent violence. "The question whether it was the duty of the president to interpose for the protection of the citizens at Greytown against an irresponsible and marauding community that had established itself there, was a public political question, in which the government, as well as the citizens whose interests were involved, was concerned, and which belonged to the executive to determine; and his decision is final and conclusive, and justified the defendant [naval officer] in the execution of his orders given through the secretary of the navy."

In the *Prize Cases*, the Supreme Court found President Lincoln's naval blockade of Southern ports to be lawful and stated: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."<sup>73</sup> The Supreme Court's interpretation in the *Prize Cases* is consistent with Hamilton's view of the President's war-making power. It is now axiomatic that another nation's initiation of hostilities against the United States (including U.S. citizens and their property) justifies unilateral defensive war making by the President. As a corollary, the President is constitutionally authorized to determine whether or not the United States is involved in a situation justifying the use of force for defensive purposes.<sup>74</sup>

One indication of how the Founding Fathers viewed presidential war making is the manner in which the early Presidents exercised their warmaking power. President Washington was provoked in 1794 by the establishment by the British of a fort twenty miles inside the western boundary of the United States. Without consulting Congress, he caused the following order to be issued to General Wayne, Commander of the Western Department: "If, therefore, in the course of your operations against the Indian enemy, it should become necessary to dislodge the [British] party at the [fort located at the] rapids of the Miami [River], you are hereby authorized, in the name of the President of the United States, to do it."<sup>75</sup>

Early in his presidency, Thomas Jefferson, who viewed the congressional power to declare war as an "effectual check to the Dog of war,"<sup>76</sup> ordered the Navy to defend American commercial vessels in the Mediterranean against the Barbary pirates without congressional declaration of war. Consequently, the 12-gun tender U.S.S. *Enterprise* engaged and captured a 14-gun corsair of the Bey of Tripoli. On 8 December 1801, President Jefferson reported to Congress in his First Annual Message: "I sent a small squadron of frigates into the Mediterranean, with assurances to that Power [the Bey of Tripoli] of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. . . . The Bey had already declared war. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. The arrival of our squadron dispelled the danger. One of the Tripolitan cruisers, having fallen in with and engaged the small schooner *Enterprise*, commanded by Lieutenant Sterret, which had gone as a tender to our larger vessels, was captured, after a heavy slaughter of her men, without the loss of a single one on our part. . . . Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the [Tripolitan] vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject,

that in the exercise of this important function confided by the Constitution to the legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight."<sup>77</sup>

This message suggests no doubt in President Jefferson's mind about his authority to commit naval forces to combat for defensive purposes in the face of *de facto* war without a congressional declaration of war. It also suggests that President Jefferson recognized a prohibition against presidential war making beyond the scope of tactical self-defense in an engagement commenced by the enemy. This latter appearance, however, is misleading. What President Jefferson did not report to Congress is that, without congressional authorization, he had ordered the squadron to which the *Enterprise* was attached to engage Barbary naval forces. On President Jefferson's behalf, General Samuel Smith, Acting Secretary of the Navy, wrote to Commodore Richard Dale on 30 May 1801: "Recent accounts received from the consul of the United States, employed near the regencies of Algiers, Tunis and Tripoli, give cause to fear, that they will attack our commerce, if unprotected, within the Mediterranean; but particularly, such apprehension is justified by absolute threats on the part of the Dey of Tripoli.

"Under such circumstances, it is thought probable, that a small squadron of well appointed frigates appearing before their ports, will have a tendency to prevent their breaking the peace which has been made, and which has subsisted for some years, between them and the United States.

"It is also thought, that such a squadron, commanded by some of our most gallant officers, known to be stationed in the Mediterranean, will give confidence to our merchants, and tend greatly to increase the commerce of the country within those seas.

"I am therefore instructed by the President to direct, that you proceed with all possible expedition, with the squadron under your command, to the Mediterranean.

". . . [S]hould you find on your arrival at Gibraltar, that all the Barbary powers have declared war against the United States, you will then distribute your force in such a manner, as your judgment shall direct, so as best to protect our commerce and chastise their insolence—by sinking, burning, or destroying their ships and vessels wherever you shall find them. The better to enable you to form a just determination, you are herewith furnished with a correct state of the strength and situation of each of the Barbary powers. The principle strength you will see, is that of Algiers. The force of Tunis and Tripoli is contemptible, and might be crushed with any one of the frigates under your command.

"Should Algiers alone have declared war against the United States, you will cruise off that port so as effectually to prevent anything from going in or coming out, and you will sink, burn, or otherwise destroy their ships and vessels wherever you find them.

“Should the Dey of Tripoli have declared war, (as he has threatened) against the United States, you will then proceed direct to that port, where you will lay your ship in such a position as effectually to prevent any of their vessels from going in or out.”<sup>78</sup>

If anything is clear from the message from Secretary Smith to Commodore Dale, it is that President Jefferson viewed his authority as extending to preemptive war making against foreign powers that had displayed hostile intent. President Jefferson’s view thus appears similar to President Reagan’s. Neither President was required to obtain congressional authorization prior to the employment of armed force to defend U.S. citizens or property from imminent threat.

The rationale for this rule is that the exigency<sup>79</sup> of circumstances justifies the President’s action. Interpreting the Militia Act of 1795, the Supreme Court stated in 1827: “We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself. . . . The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.”<sup>80</sup>

The Court’s reference to “power” is not free from ambiguity. On the one hand, the Court held that the Militia Act of 1795 conferred on the President statutory power to determine the existence of a national emergency. Thus the Court may have intended to limit its holding to the President’s statutory powers, granted by Congress. On the other hand, the Court found that the President as chief executive and commander in chief “is necessarily constituted the judge of the existence of the exigency, in the first instance, and is bound to act according to his belief of the facts.”<sup>81</sup> The most natural interpretation of the opinion is that the Court found the President so empowered under both the Militia Act of 1795 and the Constitution. The Supreme Court was more clear in 1863 when the same question arose in the context of the Civil War: “Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*. . . .”<sup>82</sup> Thus the President is constitutionally authorized not only to defend against an imminent threat to the lives or property of U.S. citizens, but also to determine whether a threat is sufficiently imminent to justify the use of force without a congressional declaration of war.<sup>83</sup>

The pronouncement of the courts do not suggest, however, that the President’s power to wage defensive war unilaterally is without limit. Since Congress exercises the power of appropriation,<sup>84</sup> Congress can refuse to fund disapproved military activity undertaken by the President.<sup>85</sup> Moreover, Congress possesses the ultimate weapon: impeachment of the President for “high crimes and misdemeanors.”<sup>86</sup> However, although a few commentators have read

Congress' power to declare war as incorporating a veto-like power to "declare *against* a war,"<sup>87</sup> no authoritative source supports such a conclusion. Indeed, the Framers unanimously rejected a proposal to grant Congress the power to declare war "and peace."<sup>88</sup>

This balance of power is not altogether satisfying to those concerned about the practical effectiveness of congressional checks on the President. Professor Louis Henkin has remarked: "No one can disentangle the war powers of the two branches, including their powers to act towards the enemy . . . [But such an arrangement of] power often begets a race for initiative and the President will usually 'get there first.'"<sup>89</sup> A guileful President would experience little difficulty identifying or even creating a threatening incident abroad that would be sufficiently provocative to justify the use of force. Similarly, a cynical President might find it expedient to undertake an offensive military campaign and simply label it a defensive, preemptive action. Although Congress might have the power under such circumstances to bar the use of federal funds for combat, it might also lack the political will to do so. The President's power to commit forces to combat in the name of national defense thus would present Congress with a *fait accompli*, a war to be terminated by congressional vote for withdrawal short of victory.<sup>90</sup> War would become, in such a situation, as Madison noted, "the true nurse of executive aggrandizement."<sup>91</sup>

The Supreme Court addressed this concern in *Martin v. Mott* by rejecting the presumption of presidential guile and emphasizing the penalties for abuse of power: "It is no answer, that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government, the danger must be remote, since, in addition to the high qualities which the executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation of wanton tyranny."<sup>92</sup> In short, the *Mott* Court was not willing to assume an abuse of power by virtue of the exercise of power. To the contrary, the Court found that as a matter of law, as opposed to politics, the presumption worked in the President's favor.

The Constitution was not designed to predetermine a politically satisfying balance of power. Rather, the constitutional allocation was meant to establish the legal limits within which the political process might produce such an equilibrium. This is to say that the Constitution set boundaries beyond which the President and Congress may not stray during a political clash over the propriety of the use of force. The political questions raised by President Reagan's unilateral decision to use military force against Libya in 1986 included whether the decision was morally sound, whether it would enjoy domestic popular support, and whether it would serve the strategic and diplomatic interests of the

United States. The constitutional issue was much more narrow: whether the President acted within the bounds of his authority to make war unilaterally, a question that can be answered without reference to whether the President's actions were politic or wise.<sup>93</sup>

By 1986, President Reagan had been advised that the government of Libya had supported terrorist attacks on Americans in Vienna, Rome, and West Berlin. This pattern of aggression by Libya against American citizens arguably established a state of *de facto* war between Libya and the United States. Whether or not a state of war existed, the President's information supported the inference that Libya had undertaken a course of action that had harmed Americans. This course of conduct suggested a continuing threat to Americans from Libya. The President could have presented this information to Congress, seeking a declaration of war. But he did not, considering the threat to Americans sufficiently imminent to justify the use of force without a congressional declaration of war.

Critics of the President's decision to use force against Libya might argue that the President's determination of imminent threat was too tenuous to be entitled to constitutional sanctification. The President, they would claim, did not have in hand any indication of a specific terrorist attack to be executed against Americans on any specific future date. They would say that what the President had, at most, was a generalized indication that a terrorist attack against Americans might be executed sometime in the future. The critics would argue that for the President to characterize such a future attack as imminent because inevitable, would be hyperbolic justification; a standard of inevitability would grant the President *carte blanche* to use his defensive powers to initiate a military offense. The air strikes against Libya, they would conclude, were labelled defensive but were in fact offensive and therefore unconstitutional.

The answer to this criticism is that the Constitution does not assign a specific deadline or minimum probability level as the standard to determine when a threat is sufficiently imminent to justify presidential war making. The Constitution did not require the President to certify to Congress that Libya would have attacked Americans abroad in May of 1986, for example, but for his preemptive strike in April. If anything is clear from the Framers' debates and the courts' infrequent clarifications of the constitutional war-making powers, it is that the Constitution establishes no such fixed standard to mark the limit of presidential war-making authority. No authoritative source suggests that the President must resolve uncertainly in favor of a potentially hostile force by doing nothing. Rather, the Constitution allows the President wide latitude to decide if an imminent threat, however manifested, is too grave to await a congressional declaration of war and to determine whether the actions of a foreign State have created a situation requiring a military response.<sup>94</sup> What this means is that critics of President Reagan's actions against Libya in 1986 misdirect their criticism when they argue that the air strikes were unconstitutional; to the extent that they oppose the

President's use of force, they should focus their objections on the wisdom of his actions.

Just as President Reagan was authorized to identify the threat posed by Libya in 1986 and to order a defensive action, so he was empowered to choose the tactics best suited to achieve his objectives. President Reagan chose to respond to Libya's support of terrorism by means of air strikes against command, control, and communication (C<sup>3</sup>) facilities used by Libya to conduct terrorist operations. He sought to accomplish two stated purposes: deterrence, in the form of retaliation for past attacks, and preemption, in the form of neutralizing the terrorists' C<sup>3</sup> capability. Critics could argue that such purposes are actually offensive and therefore unauthorized. The critics would have a point to the extent that a legally meaningful distinction between offensive and defensive force is not self-evident. Indeed, the Navy's Maritime Strategy<sup>95</sup> is itself a good example of how a defensive strategy can yield ostensibly offensive tactics. By taking the fight to the enemy to defend U.S. allies, pursuant to the Maritime Strategy, the Navy would engage in apparently offensive operations against Soviet targets. Thus might a defensive military operation appear, in isolation, to be offensive.

However, as the Supreme Court noted in the *Prize Cases*,<sup>96</sup> the Constitution resolves this ambiguity in the President's favor: it is the President who decides when the national security is jeopardized; it is the President who decides on the appropriate defensive reaction. The ability to make this sort of decision is the very essence of the constitutional power and duty to defend. President Reagan's decision to employ air power to the ends of deterrence and preemption of terrorism was a decision to use military force to address a threat to national security. His actions were therefore undertaken within the limits of his constitutional authority.

The Framers of the Constitution did not establish a clear boundary to mark the limits of presidential war-making authority. They did not foresee the Vietnam War, the deaths of 241 U.S. Marines in their Beirut barracks in 1983, or the deaths of 37 sailors aboard the U.S.S. *Stark* in the Persian Gulf in 1987. Lacking perfect foresight, they left the hard question of whether a war should be fought to the realm of political, as distinct from legal, debate. They knew that even in triumph, war is tragic. They did not seek to encumber with legal doctrine the political issue of whether to fight.

The Constitution does not tell Congress, the President, or the people when war should be waged. It reserves to the political process the question of whether the exercise of military force is good and right, addressing instead the question of how the legal power to wage war should be allocated. To say that the President may wage war under certain circumstances is not, therefore, to say that he should.

In the spring of 1986, the President believed that Libya would continue its campaign to harm U.S. citizens. He sought to defend against such attacks by

means of a preemptive strike on 14 April 1986. As a defensive measure undertaken without a declaration of war by Congress, the strike against Libya was within the scope of the President's constitutional war-making authority.

Lieutenant Hall was serving as an air intelligence officer with Naval Reserve Patrol Wing 0593 when this article was first published.

## Notes

1. Such a debate also took place of course, during the Vietnam War. See e.g. Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. Pa. L. Rev. 1 (1972); Berger, *War-Making By The President*, 121 U. Pa. L. Rev. 29 (1972); Rehnquist, *The Constitutional Issues—Administration Position*, 45 N.Y.U.L. Rev. 628 (1970); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 Harv. L. Rev. 1771 (1968); Moore, *International Law and the United States' Role in Viet Nam: A Reply*, 76 Yale L. J. 1051 (1967); Falk, *International Law and the United States' Role in the Viet Nam War*, 75 Yale L. J. 1122 (1966); Wright, *Legal Aspects of the Viet-Nam Situation*, 60 Am. J. Int'l L. 750 (1966).

2. Huntington, *Coping with the Lippmann Gap*, 66 Foreign Affairs 453, 463 (1988).

3. U.S. CONST., Art. I, Sec. 8, Cl. 11. See e.g., Chayes, *Grenada was Illegally Invaded*, N.Y. Times, Nov. 15, 1983, at 35; Schlesinger, *Grenada Again: Living Within the Law*, Wall Street Journal, Dec. 14, 1983, at 30.

4. U.S. CONST., Art. II, Sec. 2, Cl. 1. See e.g. Rostow, *Law Is Not a Suicide Pact*, N.Y. Times, Nov. 15, 1983, at 35; J. MOORE, LAW AND THE GRENADA MISSION (1984).

5. 50 U.S.C. secs. 1541-1548. See, e.g., TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE (1983); Torricelli, *The War Powers Resolution After the Libya Crisis*, 7 Pace L. Rev. 647 (1987); Comment, *Congressional Control of Presidential War-making under the War Powers Act: The Status of a Legislative Veto After Chadha*, 132 U. Pa. L. Rev. 1217 (1984); Carter, *The Constitutionality of the War Powers Resolution*, 70 U. Va. L. Rev. 101 (1984); Note, *The Future of the War Powers Resolution*, 36 Stan. L. Rev. 1407 (1984).

6. *Harvard Decides Grenada*, Wall Street Journal, Nov. 2, 1983, at 30.

7. This sort of confusion has been exhibited by such respected figures as former Secretary of State Cyrus R. Vance. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. Pa. L. Rev. 79 (1984).

8. See, e.g., *War Without Declaration: A Chronological List of 199 Military Hostilities Abroad Without Declaration of War, 1798-1972*, 199 CONG. REC. 25,066-25,076 (1973).

9. See, e.g., SCHLESINGER, THE IMPERIAL PRESIDENCY (1973). For a vigorous debate on the question, see CONGRESS, THE PRESIDENT, & FOREIGN POLICY, (ABA Standing Committee on Law and National Security) (Soper ed. 1984).

10. *Commonwealth of Mass. v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971); *DaCosta v. Laird*, 448 F.2d 1368, 1370 (2nd Cir. 1971) (per curiam), cert. denied, 405 U.S. 979 (1972); *Orlando v. Laird*, 443 F.2d 1039, 1042 (2nd Cir.), cert. denied, 404 U.S. 869 (1971); *Drinan v. Nixon*, 364 F. Supp. 854, 862 (D. Mass. 1973).

11. P.L. 88-408, 78 Stat. 384 (August 10, 1964). See generally MOORE, LAW AND THE INDOCHINA WAR 533-598 (1972).

12. P.L. 98-119, 97 Stat. 805 (October 12, 1983). See also Lebanon Emergency Assistance Act of 1983, P.L. 98-43, 97 Stat. 214 (June 27, 1983).

13. See generally MOORE, LAW AND THE GRENADA MISSION (1984).

14. For testimony on whether the air strikes were lawful, see WAR POWERS, LIBYA, AND STATE-SPONSORED TERRORISM: HEARINGS BEFORE THE SUBCOMMITTEE ON ARMS CONTROL, INTERNATIONAL SECURITY, AND SCIENCE OF THE HOUSE COMMITTEE ON FOREIGN AFFAIRS, 99th Cong., 2d Sess. (1986).

15. All facts presented are derived from unclassified, public, published sources.

16. N.Y. Times, Dec. 28, 1985, at 1, col. 5. The airport massacres followed the October 3, 1985 hijacking of the cruise ship *Achille Lauro*, during which an American, Leon Klinghoffer, was murdered, the November 23, 1985 hijacking of an Egyptian airliner, during which an American was murdered, and the November 24, 1985 bombing of a Frankfurt, West Germany shopping mall, which injured 23 Americans. LEHMAN, COMMAND OF THE SEAS 364-367 (1988).

17. N.Y. Times, Jan. 1, 1986, at 1, col. 3.

18. *Id.* at 4, col. 4 (Text of State Department Report).

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18. *Id.* at 4, col. 4 (Text of State Department Report).
19. *Id.* at 5, col. 1; *id.*, Jan. 6, 1986, at 1, col. 4.
20. *Id.* at 6, col. 1.
21. *Id.* at 6, col. 2.
22. *Id.* at 6, col. 1; Mar. 23, 1986, at 1, col. 5.
23. *Id.* at 6, col. 1 (Text of State Department Report).
24. *Id.*, Jan. 16, 1986, at 8, col. 1.
25. *Id.*, Jan. 9, 1986, at 1, col. 6.
26. *Id.*, Jan. 17, 1986, at 1, col. 4.
27. *Id.*, Jan. 16, 1986, at 1, col. 5.
28. *Id.* at 8, col. 2.
29. *Id.*, Jan. 17, 1986, at 1, col. 4.
30. *Id.* at 1, col. 4.
31. *Id.* Mar. 19, 1986, at 1, col. 5; Mar. 20, 1986, at 7, col. 1; Mar. 22, 1986, at 3, col. 2.
32. *Id.*, Mar. 25, 1986, at 1, col. 6. See text of Secretary Weinberger's statement at *id.*, Mar. 25, 1986, at 10, col. 1.
33. *Id.*, Mar. 26, 1986, at 8, col. 1; Mar. 27, 1986, at 8, col. 1.
34. LEHMAN, *COMMAND OF THE SEAS* 370 (1988).
35. N.Y. Times, Mar. 28, 1986, at 1, col. 2.
36. *Id.* at 12, col. 4.
37. *Id.*, Mar. 29, 1986, at 3, col. 1.
38. *Id.*, Apr. 6, 1986, at 1, col. 5-6.
39. *Id.* at 1, col. 6.
40. *Id.*, Apr. 7, 1986, at 6, col. 2.
41. *Id.*, Apr. 6 1986, at 1, col. 5-6.
42. *Id.* at 19, col. 1.
43. *Id.*, Apr. 10, 1986, at 1, col. 6; *id.*, Apr. 10, 1986, at 22, col. 1.
44. *Id.* at 1, col. 6.
45. *Id.*, Apr. 15, 1986, at 1, col. 5. See transcript of Weinberger/Shultz press conference, *id.*, Apr. 15, 1986, at 13, col. 1.
46. *Id.* at 1, col. 5; *id.*, Apr. 16, 1986, at 15, col. 3 (remarks of Vice Admiral Frank Kelso, Jr., USN); *id.*, Apr. 15, 1986, at 1, col. 3.
47. *Id.*, Apr. 16, 1986, at 20, col. 5 (remarks of State Department spokesman Bernard Kalb). See also LEHMAN, *COMMAND OF THE SEAS* 371-374 (1988).
48. N.Y. Times, Apr. 16, 1986, at 15, col. 3.
49. *Id.* at 1, col. 5.
50. *Id.* at 1, col. 6; Apr. 16, 1986, at 15, col. 3; April 17, 1986, at 22, col. 1 (report that SAMs supplied to Libya by Soviet Union auto-detonate in air, so unlikely to explode on ground impact).
51. *Id.*, Apr. 15, 1986, at 10, col. 1. See also transcript of Press Secretary Spokes' press conference, *id.*, Apr. 15, 1986, at 13, col. 1. See also President Reagan's Address to American Business Conference, *id.*, Apr. 16, 1986, at 20, col. 1.
52. *Id.*, Apr. 15, 1986, at 1, col. 3.
53. *Id.*
54. *Id.* at 10, col. 1.
55. *Id.* at 11, col. 3.
56. *Id.*
57. "Fear of a return of Executive authority like that exercised by the Royal Governors or by the King had been ever present in the States from the beginning of the Revolution." WARREN, *THE MAKING OF THE CONSTITUTION* 173 (1928).
58. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984*, 255 (1984).
59. See *U.S. vs. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).
60. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-635 (1952) (Jackson, J., concurring).
61. FARRAND, *I RECORDS OF THE FEDERAL CONVENTION OF 1787*, 292 (1911) ("RECORDS").
62. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale L. J. 672, 680 (1972).
63. "Helvidius" Number 1 (24 August 1793), 15 *THE PAPERS OF JAMES MADISON* 71 (Mason, Rutland and Sisson ed. 1985).
64. 7 *WORKS OF ALEXANDER HAMILTON* 746-747 (Hamilton, ed. 1857).
65. CASTREN, *THE PRESENT LAW OF WAR NEUTRALITY* 96 (1954).
66. ADAMS PAPERS, Massachusetts Historical Society microfilm (as quoted in Sofaer, *The Presidency, War and Foreign Affairs: Practice Under the Framers*, 40 L. & Cont. Prob. 12, 19-20 (1976)). See also SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS*, 139-161 (1976).

67. *Talbot v. Seeman*, 5 U.S. (1 Cr.) 1 (1801); *Bas v. Tinhy*, 4 U.S. (4 Dall.) 37 (1800).
68. See KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER (1982). See also Testimony of John Norton Moore, "Congress, the President, and the War Powers: Hearing Before the Committee on Foreign Affairs, House of Representatives," 91st Congress, 2d Session (June 25, 1970); Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 *Naval War College Rev.* 28 (1969).
69. See, e.g., Emerson, *The War Powers Resolution Tested: the President's Independent Defense Power*, 51 *Notre Dame Lawyer* 187, 192 (1975).
70. II RECORDS at 318.
71. See generally BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 58-77 (1921).
72. 8 F.Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860).
73. *The Prize Cases*, 67 U.S. 635, 668 (1863) (upholding President Lincoln's blockade of Confederate ports). See also *U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-320 (1936); *Myers v. U.S.*, 272 U.S. 52 (1926).
74. *The Prize Cases*, 67 U.S. 635-670 (1863). See also *In re Neagle*, 135 U.S. 1, 64 (1890).
75. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 62-63 (1921) (quoting FISH, AMERICAN DIPLOMACY 83-84). This action by President Washington exceeded the bounds of the Act of September 29, 1789, ch. 25, 1 Stat. 95, 96, granting the President authority to call forth the militia to protect frontier settlers from Indians.
76. Letter to James Madison, September 6, 1789, 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Boyd ed. 1958).
77. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 326-327 (Richardson ed. 1899). See 2 Stat. 129 (1802).
78. W. GOLDSMITH, I GROWTH OF PRESIDENTIAL POWER: A DOCUMENTARY HISTORY 373-374 (1974) (citing I STATE PAPERS AND DOCUMENTS OF THE UNITED STATES 78-78 (1814); Sofaer, *The Presidency, War and Foreign Affairs: Practice Under the Framers*, 40 L. & Cont. Prob. 12, 25 (1976) (citing 1 NAVAL DOCUMENTS RELATED TO THE UNITED STATES WARS WITH THE BARBARY POWERS, 465-467 (1939)).
79. The Constitution expressly grants the individual states an analogous power to act militarily under exigent circumstances. U.S. CONST., Art. I, Sec. 10, cl. 3 ("No state shall, without the consent of Congress . . . engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."). See also Articles of Confederation, Art. VI ("No state shall engage in any war without the consent of . . . Congress . . . , unless such state be actually invaded by enemies, or shall have received advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the . . . Congress . . . can be consulted . . .")
80. *Martin v. Mott*, 25 U.S. (12 Wheat.) 1, 28 (1827).
81. *Id.* at 31.
82. *The Prize Cases*, 67 U.S. 635, 670 (1863) (emphasis original).
83. *Id.*
84. U.S. CONST., Art. I, Sec. 8. See Glennon, *Strengthening the War Powers Resolution: The Case For Purse-Strings Restrictions*, 60 *Minn. L. Rev.* 1 (1975).
85. Congress did this on several occasions during the Vietnam War. See, e.g., Defense Procurement Authorization Act, P.L. 91-121, 83 Stat. 204 (1969); Defense Appropriation Act 1970, P.L. 91-171, 83 Stat. 469 (1969); Defense Procurement Act, P.L. 91-441, 84 Stat. 905 (1970); Special Foreign Assistance Act., P.L. 91-652, 84 Stat. 1942 (1970); Foreign Military Sales Act Extension, P.L. 91-672, 84 Stat. 2053 (1970); Supplemental Appropriations Act of 1973, P.L. 93-50, 87 Stat. 99 (1973); Supplemental Appropriations Act, P.L. 93-52, 87 Stat. 130 (1973).
86. U.S. CONST., Art. 2, Sec. 4.
87. Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 *U. Pa. L. Rev.* 1, 5 (1972); HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 81 (1972).
88. II RECORDS at 319.
89. HENKIN, *supra* n. 87 at 105.
90. This is the problem the War Powers Resolution was intended to solve. However, the War Powers Resolution's only pre-conflict requirement on the President is "consultation" with Congress. See Hall, *War Powers By The Clock*, 113 *U.S. Naval Institute Proceedings* 36 (September 1987).
91. "Helvidius" Number 4 (14 September 1793), 15 THE PAPERS OF JAMES MADISON 108 (Mason, Rutland and Sisson ed. 1985).
92. 24 U.S. at 32.
93. One commentator has suggested that the President "should obtain congressional support in advance for military action that will probably require congressional action, as by appropriations, before it is completed." Wright, *The Power of the Executive to Use Military Forces Abroad*, 10 *Va. J. Int. L.* 1, 49 (1969). The political wisdom of this statement is self-evident. However, nothing in the Constitution suggests that such a step is

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wishes to use force in violation of international law, that is, for political purposes such as "military pressure in aid of diplomacy, territorial acquisition, or intervention to influence the policy or ideology of a foreign government." *Id.* See also Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. Pa. L. Rev. 1035, 1071 (1986).

94. *The Prize Cases*, 67 U.S. 635, 670 (1863).

95. Watkins, *The Maritime Strategy*, U.S. Nav. Inst. Proc. Supp. (January 1986).

96. 67 U.S. at 670.

# Chapter 25

## Law in Support of Policy in Panama\*

Colonel James P. Terry, U.S. Marine Corps

Operation “Just Cause,” the December 1989 military intervention in Panama by the United States to restore order, protect U.S. lives, and ensure the integrity of the Panama Canal Treaty,<sup>1</sup> was the fifth such incursion into that nation by the United States in this century.<sup>2</sup> When this use of force is judged from the dual perspectives of law and U.S. policy, the U.S. initiative, unlike our intervention in Nicaragua earlier in the decade, can be justified under conventional and customary international law as a legitimate use of American military power in defense of U.S. and Panamanian national interests.

Under the best of circumstances, the use of the military instrument will lead to international criticism. Operation “Just Cause” was no exception. The Soviet Union used traditional Cold War rhetoric to denounce the action, while all the neighboring Latin American nations condemned the incursion—individually, within the Organization of American States (OAS), and within the United Nations.<sup>3</sup> (Strangely, their criticism was far more vocal than when Noriega nullified the victory of the Endara government over his puppet regime the preceding May.) Britain and other Western nations were supportive of the operation.

This use of military power in Panama emphasized that criticism will be short-lived when both the people of the nation in which the intervention occurs, as well as the opposition party of the intervenor-nation, support the action as within their national interests. For the people of Panama, the intervention represented fulfillment of the ongoing civil movement for democratization, their vital economic interest in political change (they recognized that U.S. economic sanctions would only be lifted if Noriega were deposed or surrendered to face U.S. drug and conspiracy charges), and an appeasement of the new critical attitude in the international community over conditions in Panama.

### The Threat to U.S. National Interests

For more than two years prior to the 20 December 1989 intervention by U.S. Southern Command (SOUTHCOM) forces, the U.S. government had attempted to resolve the crisis in Panama through negotiation. That effort was

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directed toward protecting the 35,000 Americans in Panama, combating the drug transshipment trade from Colombia, which was being orchestrated in Panama City, and ensuring that the operation of the Canal remained secure.

Our concern had grown in May 1989 when opposition candidates on a slate headed by Guillermo Endara in the national election appeared to have beaten the Noriega puppet-slate by a wide margin. Noriega quickly nullified the election. Memories remain fresh of Second Vice President-Elect Guillermo Ford's brutal beating by thugs from the "Dignity Battalions" on the day following the national elections.

Harassment of U.S. military personnel and their dependents increased significantly after the election. On Friday, 15 December 1989, General Noriega declared his military dictatorship to be in a "state of war" with the United States. This followed a declaration by his puppet regime that he was "Maximum Leader" of the Panamanian people. Noriega's declaration of war was coupled by not-so-veiled threats against Americans, including statements to the effect that he looked forward to seeing U.S. corpses floating in the Panama Canal.

On 16 December, forces under his command shot and killed an unarmed Marine Corps officer (1st Lieutenant Robert Paz) and wounded another. Both were assigned to U.S. forces in Panama pursuant to the Panama Canal Treaty. Shortly after that incident, a naval officer similarly assigned and traveling with his wife in Panama City was arrested without cause and brutally beaten. His wife was interrogated and then threatened with sexual abuse.

Believing that this pattern of violence against U.S. citizens would continue, President Bush acted to protect U.S. lives and interests and to restore democracy in Panama on behalf of the legitimately elected Panamanian government.

### Application of International Law

The law supporting U.S. intervention can be found in both international agreement and custom. The cornerstone of the law regulating coercion between States is found in the minimum world order system represented by Articles 2(4), 2(7) and 51 of the U.N. Charter.<sup>4</sup> The provisions of Article 2 preclude the use of armed force by one State against another. The provisions of Article 51 authorize one exception, the inherent right to use military force in self-defense. The United Nations Charter system requires strict accountability, however, before the projection of force into the territory of another State can be justified.

The U.S. intervention in Panama must be tested against each of the several conditions required to justify the use of military force in self-defense under Article 51. The first condition is the existence of an armed attack, or the imminent threat of armed attack upon the territory or citizens of the United States. In December 1989, U.S. citizens lawfully resident in Panama pursuant to Panama Canal Treaty provisions, their property, and an international waterway vital to U.S. national

power projection were all imminently threatened with armed attack. Not only had there been dangerous rhetoric (including a declaration of war) placing the Canal Treaty provisions in imminent risk, but attacks on U.S. citizens, coupled with allusion by Noriega to further “corpses,” made more attacks likely. Further, there was every evidence that this threat would continue as long as General Noriega remained in power.

A further condition to be satisfied relates to the possibility of an alternative to military force which might have returned the U.S.–Panamanian relationship to an acceptable status quo. The Charter contemplates a hierarchy of responses with armed force authorized only when other responses have been attempted and have failed, or are obviously without application. In the case of Panama, all other reasonable measures had been addressed. Every form of diplomatic (including the recall of our ambassador), economic (including sanctions) and legal initiative (including indictment of Noriega) had been attempted, yet conditions had only worsened.

Although the use of force has been seriously questioned by some international legal scholars<sup>5</sup> and certain Latin nations, a detailed scholarly analysis brings one to the same conclusion held by President Bush. Sir Gerald Fitzmaurice, former jurist on the International Court of Justice (ICJ), notes that international law “by no means permits [self-defense] in every case of illegality, but on the contrary, confines it to a very limited class of illegalities.”<sup>6</sup> Professor Ian Brownlie of Oxford University sets the parameters clearly when he states “. . . provided there is control by the principal, the aggressor State, and an actual use of force by its agents, there is an ‘armed attack.’”<sup>7</sup> This view was further expanded by the International Court of Justice in their 1979 ruling Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran). The Court found Iranian actions in seizing our diplomats to be an armed attack on the United States.<sup>8</sup>

Professor John Norton Moore of the University of Virginia clearly brings actions such as were carried out by Noriega’s forces against U.S. citizens and interests within the scope of an “armed attack” when he concludes that “a state is entitled to respond against aggressive attack, whether that is a direct attack using armies on the march, or whether it is low intensity conflict or guerrillas or terrorist attack.”<sup>9</sup> The more significant legal issue may not have been whether the United States might respond to attacks on its personnel, however, but whether it could take those actions necessary to preempt reasonably anticipated future acts of violence against its citizens in Panama through removal of Noriega. The U.S. position has always been that Article 51 of the U.N. Charter does not create a new principle, but rather reiterates the inherent right of self-defense recognized by customary international law.<sup>10</sup>

As such, the right of self-defense is not limited to responding to an actual armed attack but also includes preemptive or anticipatory self-defense. Former Secretary of State Shultz reaffirmed this view during the Libyan crisis in 1986

when he stated the United States "is permitted to use force to preempt future attacks, to seize terrorists, or to rescue its citizens when no other means are available."<sup>11</sup>

Four basic arguments in favor of anticipatory self-defense have been advanced and each has application with respect to our intervention in Panama.<sup>12</sup> First, Article 51 of the Charter embraces the inherent right of self-defense (which includes anticipatory self-defense). Second, it is very difficult to distinguish those acts which constitute preparation for aggression (but which might not justify responding coercion under a restrictive view) and those that constitute elements of an attack. Third, the destructive power of modern weaponry makes it unreasonable to expect a State to await a first strike before responding.<sup>13</sup> Finally, a more restrictive position would only benefit an aggressor.<sup>14</sup>

A further requirement of the "minimum world order system," represented by Articles 2 and 51 of the U.N. Charter, against which the U.S. intervention in Panama must be tested is the customary international law principle of proportionality. Although the corresponding requirement of "necessity"<sup>15</sup> is directly embraced, at least implicitly, within Article 51, the same arguably cannot be said for "proportionality of response." Professor Myers McDougal and Dr. F. Feliciano of Yale University Law School have defined the rule as follows: "Proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense. For present purposes, these objectives may be most comprehensively generalized as the conserving of important values by compelling the opposing participant to terminate the condition which necessitates responsive coercion."<sup>16</sup> This definition simply requires a rational relationship between the intensity of the attack and the intensity of the response. Although the relationship need not approach precision, a nation subjected to a number of State-sponsored attacks on its citizens is not entitled, for example, to destroy in its entirety the capital city of the offender State.

Other canons of military practice, such as conservation of resources, support this principle of restraint in defense. The United Nations has condemned as reprisals those defensive actions which greatly exceed the provocation.<sup>17</sup> Where a continuation of hostile acts beyond the triggering event or events is reasonably to be expected, however, as was the case in Panama, a response which anticipates requirements of a continuing nature beyond the scope of the initial attack would be legally appropriate.

The addition on 20 December of some 9,500 troops from Fort Bragg and Fort Ord, among others, to the 13,000 soldiers within the U.S. forces already in Panama can hardly be viewed as exceeding the parameters established by this rule, given the significant forces under Noriega's control.

## Application of Regional Agreements

In addition to the regime established by the United Nations Charter, the United States and Panama are bound by the Charter of the Organization of American States (OAS),<sup>18</sup> the Inter-American Treaty of Reciprocal Assistance (Rio Treaty)<sup>19</sup> and the 1977 Panama Canal Treaty.<sup>20</sup> Our Latin neighbors are particularly sensitive to the provisions of the Rio and OAS agreements because of their view that the United States violated provisions of those agreements during the years 1981-84 when the United States was involved in laying mines in Nicaraguan ports, and in participating in the planning and direction of attacks on Nicaraguan ports, oil installations and naval bases.

The International Court of Justice (I.C.J.) ruled in the case of *Nicaragua v. U.S.*<sup>21</sup> that the support given by the United States to the military and paramilitary activities of the Contras by financial support, training, supply of weapons, intelligence, and logistics support, constituted a clear breach of the principles of non-intervention under provisions of the OAS and Rio accords. The I.C.J. further found in that case that the actions of Nicaragua against its neighbors did not, as the United States maintained, amount to an armed attack which could have authorized the collective countermeasures taken by the United States. In making these findings, the I.C.J. ruled that the U.S. actions in Nicaragua had resulted in an infringement of territorial sovereignty under both agreements, as well as the U.N. Charter.<sup>22</sup> It is small wonder, then, that the Latin nations expressed concern over the U.S. intervention in Panama.

### OAS Charter

The prohibitions against the use of force in the OAS Charter are phrased in language that is even more categorical than that of Article 2(4) of the U.N. Charter, reflecting the long and painful history of the Latin American States. Article 13 establishes, for example: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and social elements." Article 20 is equally clear with respect to territorial integrity: "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatsoever."

The one exception to these comprehensive prohibitions, and the one relied upon by the United States in taking action to protect U.S. citizens and interests in Panama, is Article 22, which provides: "Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a

violation of the principles set forth in Articles 18 and 20." The measures addressed in Article 22 include the right of self-defense under Article 51 of the U.N. Charter, as well as diplomatic and economic actions, to the extent they are not considered regional enforcement initiatives pursuant to Article 53 of the U.N. Charter. Because the U.S. measures in Panama satisfy the self-defense criteria of the U.N. Charter, they likewise trigger the exception specified in Article 22 of the OAS Charter.

Another important article within the OAS Charter is relevant to the U.S. military action. Article 3d provides: "The solidarity of the American States and the high aims which are sought through it require political organization of those States on the basis of the effective exercise of representative democracy." Not only had General Noriega violated this provision in May 1989 when he had refused to allow the Endara government to assume power, but the abuses heaped upon his opponents also violated similar provisions of the 1953 American Declaration on the Rights and Duties of Man.<sup>23</sup> While the I.C.J. in the past has opined (most recently in *U.S. v. Nicaragua*) that the commitment of States under Article 3d of the OAS Charter is political, rather than legal in nature,<sup>24</sup> the Court also asserted that there is nothing which precludes a State from assuming a binding and enforceable international commitment of this kind.<sup>25</sup> When Panama committed itself to the multilateral 1953 Declaration pledging to preserve these rights for its people, a binding obligation was created which could be enforced by other States party to the Declaration.<sup>26</sup>

### The Rio Treaty

This multilateral agreement authorizes self-defense measures similar to those within the OAS Charter and the U.N. Charter. Article 3 provides that the parties undertake ". . . to assist-in-meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations." This provision reinforces the U.S. right in the U.N. and OAS Charters to take measures in self-defense when the criteria established for an armed attack is met.

### Panama Canal Treaty

The strongest tenet underlying U.S. actions was the bilateral Canal Treaty<sup>27</sup> itself. Under Article 4, the United States has not only the right, but the duty to protect the waterway. The basic U.S. responsibility is to operate and defend the Panama Canal until its transfer to Panama at the end of this century. Even after the Noriega regime's illegal seizure of power, the United States continued to do what it has done since the entry into force of the treaty in 1979—provide for the safe and orderly transit of vessels through the canal while assuring increased Panamanian participation in its management and operation.

During 1988 and 1989, however, the Noriega regime engaged in a systematic campaign to harass and intimidate U.S. and Panamanian employees of the Panama Canal Commission and the U.S. forces. In 1989 alone, there were over 300 violations of the U.S. military bases by Panamanian Defense Forces (PDF) personnel, over 400 U.S. personnel were detained, and 140 U.S. personnel were endangered.<sup>28</sup> When this dangerous and provocative behavior reached an intolerable level in mid-December, President Bush was required to act to end the threat to American and Panamanian lives as well as to canal operations.

### Meeting the Weinberger Criteria for Intervention

From the perspective of the U.S. Congress, the fact that the initiative met the carefully circumscribed criteria established by former Secretary of Defense Caspar Weinberger for intervention in 1984 was critical. Senate Majority Leader George Mitchell stated immediately after the interventions: "I support the President's decision. It was made necessary by the action of General Noriega."<sup>29</sup> House Speaker Thomas S. Foley echoed these sentiments when he stated: "I support that decision. The President made a convincing argument. . . . The President asked for my support, I gave him that assurance. The decision is justified."<sup>30</sup>

These statesmen were two of the principal protagonists in the 1984 debate concerning the use of military force following the Beirut bombing and Grenada intervention. That debate, precipitated by the military services over the appropriate circumstances in which the government may place American military personnel in harm's way, led to the clear articulation of six criteria for intervention by then-Defense Secretary Weinberger before the National Press Club on 28 October 1984. These tests, applauded then and since by the Congress, require that:

- Any use of force be predicated upon a matter deemed vital to our national interest.
- The commitment be with the clear intention of winning.
- We have clearly defined political and military objectives.
- The forces committed be sufficient to meet the objective.
- There be reasonable assurance we have the support of the American people.
- The commitment of U.S. forces to combat be a last resort.<sup>31</sup>

The intervention in Panama met each of these tests, and because it did, the support of the American people and the Congress was overwhelming. If we have learned one lesson from Panama, it is that legal criteria and political criteria are not unrelated. Where use of military force can be defended as necessary and proportional under the canons of international law, the American people will support its use as a proper exercise of national power.

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Colonel Terry a 1986 graduate of the Naval War College was serving as the Staff Judge Advocate, III Marine Expeditionary Force at the time this articles was first published.

## Notes

1. President Bush cited these as the objectives of the intervention in his speech to the nation at 0740 (Eastern) on 20 December 1989.
2. In 1908, U.S. forces landed in Panama, which had gained independence from Colombia in 1903 with U.S. support, in the first of four landings in that nation in the next decade. (Although not an intervention *per se*, in 1964, 23 persons were killed and 300 injured during "flag" riots against the U.S. presence. U.S. forces assigned in Panama were used to quell the nationalist riots.)
3. See *Many Governments Condemn Use of Force in Panama*, The Washington Post, 21 December 1989, p. A34; also see *OAS Votes to Censure U.S. for Intervention*, The Washington Post, 23 December 1939, p.A.7.
4. U.N. Charter, 59 Stat. 1031; TS 993; 3 Bevans 1153. Signed at San Francisco, 26 June 1945. Entered into force 24 October 1945. Reprinted in U.S. Department of State Publication 2368, pp. 1-20.
5. Two weeks after the intervention, 69 politicians and political activists, including 1972 Presidential nominee George McGovern, took out a full page ad in The New York Times decrying the Panama initiative. The open letter to the President states: "Your invasion of Panama is illegal . . . a violation of the Constitution . . . the U.N. Charter, the OAS and Canal Treaties."
6. Fitzmaurice, *The Problem of the Authority of International Law and the Problem of Enforcement*, 19 Modern L. Rev. 1 (1956).
7. BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 373 (1963).
8. See Concerning United States Diplomatic and Consular Staff in Iran (U.S. v. Iran), merits, 1980 International Court of Justice (ICJ), paras. 17, 24, 25, 57, and 91. See also Terry, *The Iranian Hostage Crisis: International Law and U.S. Policy*, 32 JAG Journal 94-117 (1982).
9. Moore, *International Law and Terrorism*, ROA National Security Report 4, no. 10 (October 1986).
10. See Article 0915, U.S. Navy Regulations, 1973.
11. George P. Shultz, quoted in The New York Times, 16 April 1986, p. A8.
12. See ERICKSON, *LEGITIMATE USE OF MILITARY FORCE AGAINST STATE SPONSORED INTERNATIONAL TERRORISM* 138-139 (1989) for a full discussion of each of these principles.
13. See Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?* Naval War College Review 69-80 (May-June 1986).
14. See WHITEMAN, *DIGEST OF INTERNATIONAL LAW*, V. 12 at 49-50.
15. "Necessity" embodies the concept that the use of military force to protect or defend vital national interests, U.S. citizens, or U.S. territory from armed attack or the imminent threat of armed attack shall be resorted to only after all other lesser means have been exhausted. See O'Brien, *The Meaning of Military Necessity in International Law*, 1 World Polity 166 (1966); and Downey, *The Law of War and Military Necessity*, 47 Am. J. Int'l L. 251 (1953).
16. MCDUGAL AND FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 242 (1961).
17. See the Security Council's discussion in 36 U.N. SCOR (2232-2285) mtg; U.N. Docs. S/PV 2285-2288 (1981).
18. Revised Charter of the Organization of American States, 2 U.S.T. 2394; T.I.A.S. 2361; 119 U.N.T.S. 3. Amendments, 21 U.S.T. 607; T.I.A.S. 6847. Entered into force for the U.S. 13 December 1951. Amendments entered into force 27 February 1967.
19. Inter-American Treaty of Reciprocal Assistance, 62 Stat. 1681; T.I.A.S. 1838; 4 Bevans 559; 21 UNTS 77. Done at Rio de Janeiro 2 September 1947; entered into force 3 December 1948.
20. Panama Canal Treaty, with Annex, Agreed Minute, and related letter, T.I.A.S. 10031. Signed at Washington 7 September 1977; entered into force 1 October 1979, subject to reservation and understandings.
21. *U.S. v. Nicaragua*, Judgment, International Court of Justice (ICJ) Reporter, 1986; reprinted in 80 Am. J. Int'l L. 785-807 (1986).
22. *Id.*
23. Res. XXX of the Ninth International Conference of American States (1953), reprinted in *Human Rights: The Inter-American System*, v. 1, pt. 1, Ch. 4, p. 1 (Buergenthal and Norris eds. 1984).
24. *U.S. v. Nicaragua*, *supra* n. 21, ICJ Reporter, para. 259, at 131.
25. *Id.*
26. The United States was certainly entitled to make this claim, as a party to the Declaration.
27. *Supra* n. 20.
28. These figures are provided in U.S. Department of State, Bureau of Public Affairs, Current Policy No. 1240, 22 December 1989.
29. Quoted in The Washington Post, 21 December 1989, p. A35.
30. *Id.*
31. Secretary Weinberger's speech was reprinted verbatim in The New York Times, 29 October 1984, pp. A1, A4.

**PART FOUR**

**TERRORISM**



# Chapter 26

## Reflections on Terrorist Havens\*

Robert A. Friedlander

*Terrorism does not depend on the existence of havens for terrorists but would not have been as prevalent nor extensive a phenomenon as it has been, absent those havens. This and the terrorist threat to world public order are generally agreed. Little else, not proscriptive measures nor even definitions, is agreed.*

Any group of extremists, however justifiable some of their grievances may be, can thus, through hijacking of aircraft or kidnapping of foreign diplomats, receive international attention, remain unpunished, involve innocent people, and sow the seeds of international anarchy.

### Secretary-General U Thant<sup>1</sup>

“This has been a terrifying year.”<sup>2</sup> Although intended to apply only to the domestic political scene, the observation of Italian Communist Party First Secretary, Enrico Berlinguer, can just as appropriately refer to the current state of international terrorism. On the one hand, the numerical trend of known terrorist activities appears to have taken a downturn.<sup>3</sup> On the other hand, the level and intensity of terror violence have continued to escalate, notwithstanding an apparent reduction in the number of overall incidents. Terrorism in a sense has become commonplace throughout the world, so that an ordinary hijacking or bombing no longer has any really significant effect upon the audience at which terrorist acts are invariably directed. Consequently, there has been an escalation in the severity of terror violence in order to make it more dramatic and thereby to recapture the attention of the media and to be reimpressed upon the public imagination.

Four bloody events stand out during 1978: the kidnap-murder of former Italian Premier Aldo Moro;<sup>4</sup> the P.L.O. massacre of 34 tour bus passengers near Tel Aviv;<sup>5</sup> the Sandinista forcible seizure of the Nicaraguan National Palace;<sup>6</sup> and the murderous attack by Rhodesian guerrillas upon a defenseless civilian airliner.<sup>7</sup> The latter two episodes must be considered “successful” in that the perpetrators made good their escape to havens. The Zimbabwean terrorist

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guerrillas seem merely to have returned to their home bases in Zambia, whereas the Sandinistas, as a result of negotiated concessions, were put on an airplane by the Nicaraguan Government and flown to asylum in Panama. In both instances, the element of haven was essential to the total success of the operation.

It is, admittedly, too strong to say that without havens there would be no terrorist acts. But it would be equally misleading to say that terrorism in either its past or present form would have been as extensive and as prevalent if havens did not exist. According to recent Central Intelligence Agency estimates, "62.8 percent of terrorist missions had elaborate escape plans built into them."<sup>8</sup> Many terrorists expect to survive, and the record shows that a large majority have achieve their goal.<sup>9</sup>

There are those who will argue that the Rhodesian and Nicaraguan incidents are not relevant and thus the assumptions above are erroneous as a legal distinction should be made between terrorists and guerrillas.<sup>10</sup> Others take a *contra* view, maintaining that terrorism is intrinsically criminal, and that international terrorism must by definition be an extraditable crime.<sup>11</sup> The quarrel is essentially definitional but one cannot hope to get at the problem if its essence is not understood. As with any legal analysis, there must first be some agreement over what is actually at issue.

Despite the global effect of terror violence during the past decade, and the innumerable studies, analyses, reports, and resolutions by social scientists, legalists, and even governments, there still is no generally accepted definition of terrorism and a legal definition, likewise, has yet to be formulated. But there is enough agreement among analysts to derive a manageable formula. Individual or group terrorism—as opposed to government or State terrorism—may be described as the use of force or the threat of force directed against innocent third parties for primarily ideological, financial, or psychological purposes. Terror violence, either international or transnational,<sup>12</sup> must include at least one of the following elements: (1) the act or series of acts must take place in more than one State; (2) the act or series of acts must involve citizens of more than one State; (3) the act or series of acts must be directed at internationally protected persons; (4) the act or series of acts must occur outside of an exclusively national jurisdiction; (5) the act or series of acts must be directed against internationally protected property. If one or more of these elements is satisfied, then the act or acts in question are no longer merely common criminality but rather international crimes affecting world public order.<sup>13</sup>

For every legal rule there is almost always an exception, and it is no different with restrictions upon terror violence. Aerial hijacking, or interference with commercial air transport, have been legally construed as internationally prohibited terrorist acts. The three major antihijacking conventions—Tokyo (1963), the Hague (1970), and Montreal (1971)—have criminalized attacks upon aircraft, passengers, and airport facilities, although many loopholes still exist and

sanctions against both principals and accomplices are not yet compulsory.<sup>14</sup> Seizure of aircraft has invariably involved both the taking of hostages and the demand for haven, and escape for the perpetrators inevitably depends upon political asylum granted by a sympathetic receiving state. Small wonder then that "[t]he emphasis in anti-terrorism conventions is on extradition, with prosecution presumably the objective."<sup>15</sup>

A complicating factor is the controversial issue of political crimes. Here, too, a uniformly acceptable definition is lacking.<sup>16</sup> Traditionally, the juridical standard relating to political crimes has developed out of *stare decisis* rather than being determined by statute, especially in common law countries.<sup>17</sup> The real significance of political criminality under customary international law lies in its exculpatory features *vis-à-vis* the extradition process. Among Western European and other civil law countries there has long been a tradition of granting asylum to political offenders. Beginning with the Belgian law of 1833, followed by the Franco-Belgian Treaty of the very next year, nonextradition of actors accused of political crimes became part of customary international law.<sup>18</sup> Anglo-American law, however, has been very restrictive in its protections. With minor deviations, Great Britain has offered haven only when the act in question has been an integral part of the revolutionary process. Canada has been far more rigorous, while the United States has relied solely upon treaties and conventions to define its role in extradition practice.<sup>19</sup> As far as political terrorism is concerned, the words of Secretary of State William P. Rogers before the U.N. General Assembly on 25 September 1972, clearly depoliticized terrorist acts:

Political passion, however deeply held, cannot be a justification for criminal violence against innocent persons . . . [and] must be universally condemned, whether we consider the cause the terrorists invoke noble or ignoble, legitimate or illegitimate.<sup>20</sup>

Despite the general legal tradition that political criminality can constitute an excusing condition, one type of act *has* been widely accepted as an international crime. The so-called *attentat* clause, criminalizing murderous attacks upon heads of State or members of their immediate family, was incorporated into customary international law during the middle of the 19th century.<sup>21</sup> This exception to the exculpatory nature of political crimes received a statutory formalization 100 years later in Article 3 of the 1957 European Convention on Extradition.<sup>22</sup> The protections granted to heads of State were broadened to include diplomats and other internationally protected persons first on a regional basis by the Organization of American States in 1971,<sup>23</sup> and then globalized by the 1973 U.N. Convention on Crimes Against Internationally Protected Persons, Including Diplomatic Agents, which at present is two ratifications shy of entering into force.<sup>24</sup> On 8 October 1976 the U.S. Congress enacted legislation implementing the U.N. Convention, proscribing violent attacks, murder, or imprisonment of

foreign officials, official guests, or internationally protected persons within the territorial jurisdiction of the United States.<sup>25</sup> Thus, certain politically motivated offenders are now denied the claim of right to haven by international agreement, even though the proscribed offenses may be of a limited classification.

The politics of atrocity engulfing Western Europe in the early and mid-1970s<sup>26</sup> galvanized the European Economic Community into taking some form of remedial action. Beginning in June 1976, the member states of the E.E.C. undertook a program of cooperation and collaboration<sup>27</sup> that ultimately resulted in the adoption by the Council of Europe of a convention on the suppression of terrorism that negated the political offense exception for specifically enumerated acts of terror violence.<sup>28</sup> Although the convention was not tightly drafted and has yet to be ratified, and although the republics of Ireland and Malta refused to sign,<sup>29</sup> the fact that 17 European Governments had resolved to place limitations on haven for political criminals engaged in acts of terror violence has great significance for the future. The threat posed to world public order by political terrorism, especially to pluralistic democracy, had at last been perceived and a line of proscription, however tenuous, was finally drawn.

Similarly, the world community was forced to adopt a more rigorous position on international criminality as a result of increased aerial hijackings and hostage seizures. With some reluctance, under strong pressure from the International Federation of Airline Pilots Association (IFALPA), the U.N. General Assembly on 3 November 1977 agreed by consensus to condemn the unlawful interference with air transport and urged member States to take any and all means to combat such offenses. But the Assembly also criticized any unilateral actions directed against sheltering States.<sup>30</sup> On 22 July 1977 the Federal Republic of Germany submitted to the U.N. General Assembly a draft convention against the taking of hostages that stressed the long-established but rarely adhered to international legal norm of *aut dedere aut punire* (extradite or prosecute).<sup>31</sup> The West German proposal, as it came to be called, has languished in the General Assembly despite the celebrated Mogadishu incident. West Germany had originally come forward with its stringent suggestions in its capacity as member of the *Ad Hoc* Committee on Hostages created by the Assembly on 15 December 1976.<sup>32</sup> In February 1978 the two working groups of the *Ad Hoc* Committee reported belatedly that they could not agree on a draft convention, foundering on the rock of national liberation movements.<sup>33</sup>

The U.S. position has been erratic at best, and often evasive, with executive and legislative branches assuming contradictory positions. "Terrorism, like piracy, must be seen as outside the law."<sup>34</sup> This statement by Secretary of State Henry A. Kissinger made before the American Bar Association Annual Convention in Montreal on 11 August 1975 sums up official U.S. policy during the Nixon-Ford administrations. Beginning with the U.S. Draft Definition on International Terrorism submitted to the U.N. General Assembly in 1973,<sup>35</sup> the

U.S. Government attempted a mildly activist role to constrict air hijacking and to seek sanctions against those States that had either aided and abetted terrorist acts or provided haven to terrorist offenders. The Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses, signed by the United States and Cuba on 15 February 1973, eliminated the Cuban haven for hijackers of American aircraft.<sup>36</sup> Despite Prime Minister Castro's denunciation of that agreement on 15 October 1976, he has continued to enforce its provisions.<sup>37</sup> Also during that same year the American and Canadian Governments jointly proposed to the International Civil Aviation Organization (ICAO) that commercial air service for countries providing terrorist havens be suspended. In 1974 the U.S. Congress passed an Anti-Hijacking Act that had authorized the President to do the same, and a similar resolution was voted by the Senate in 1976.<sup>38</sup>

Recently, however, the United States has seemed uncertain in its direction. On the one hand, the Omnibus Anti-Terrorism Act, sponsored by Senator Abraham A. Ribicoff, as originally proposed was a stringent, even somewhat repressive document that provided for stiff penalties to be directed against sheltering States.<sup>39</sup> Conversely, the current version of the Senate Bill is a much watered-down, mild-toned statute that emphasizes reportage and official statements rather than punitive, self-executing measures.<sup>40</sup> The State Department now opposes automatic sanctions, and the Senate apparently has acceded to those views.<sup>41</sup> Even though the Bonn summit has raised doubts to the contrary, it would seem that the United States has not accepted the strong stance of Secretary Kissinger at the American Bar Association 1975 Annual Meeting:

If all nations deny terrorists a safe haven, terrorist practices will be substantially reduced—just as the incidence of skyjacking has declined sharply as a result of multilateral and bilateral agreements. All governments have a duty to defend civilized life by supporting such measures.<sup>42</sup>

Given the cautious tentative approach of the Western democracies, the decisions taken in Bonn during July 1978 must be termed a major surprise. Seven heads of government representing Canada, the United States, Great Britain, France, West Germany, Italy, and Japan not only agreed to deny political haven to skyjackers, but also pledged themselves to cut off commercial air service with any harboring State.<sup>43</sup> At the same time they appealed to the world at large to do likewise, but so far that request has met with no apparent response. A followup session was to be held in the German capital by the seven signatory governments the next week,<sup>44</sup> but no further results have been announced. President Carter was especially enthusiastic, declaring their skyjacking pronouncement to be worth the entire trip.<sup>45</sup> Thus, the Bonn summit declaration presently remains a mere statement of principles, and unless implementing legislation is forthcoming, the antihijacking agreement is liable to be a symbol not of cooperation and

coordination, but of bureaucratic obfuscation, enabling the Western nations and Japan to substitute a mirror image for harsher reality.

Serving as the chief catalyst at the Bonn summit was Canadian Prime Minister Pierre Trudeau.<sup>46</sup> Canada has manifested an increasingly hard line on the perpetration of terror violence. The passage of the Temporary Immigration Security Act in February 1976 gave to the Ministry of Immigration the power to deny entry into the country to any visitor that an immigration official believed might engage in terroristic activities. No reasons have to be given for that decision and no appeal will be granted.<sup>47</sup> The proposed revision of the Fugitive Offenders Act points toward mandatory extradition of terrorist actors.<sup>48</sup> Because of provisions of the Hague (1970) and Montreal (1971) anti-hijacking Conventions, as well as the still unratified Optional Protocol to the Single Convention on Narcotics (1972), the principle of extradite or prosecute has been incorporated into the Canadian Criminal Code. Moreover, if a particular crime has been proscribed by treaty, then the political offense exception cannot be invoked on behalf of the alleged offender.<sup>49</sup> Immediately following the Bonn summit the Canadian External Affairs Minister announced the creation of a new subcabinet position—Deputy Under Secretary of State for Security and Intelligence Affairs—whose duties would include developing programs and procedures aimed at combating the threat of international terrorism.<sup>50</sup>

The Canadian approach reflects a harder attitude toward terror violence and its advocates than the position taken by the great majority of the world community. Indeed, numerous commentators have claimed that the United Nations, and by implication international law, cannot effectively meet the challenge.<sup>51</sup> That the record of the United Nations is something less than distinguished cannot be gainsaid, but some things have been accomplished, however minimal, and the dangers of terrorism have at least been perceived.<sup>52</sup> Assertions such as international law “isn’t set up to deal with terrorist activities”<sup>53</sup> are counterproductive at best, and often lead to diffidence and even despair. Therefore, the words of former Secretary of State, William P. Rogers, represent an effective antidote to the disease of inaction, for the alternatives, in reality, do violence to the rule of law: “*We will continue* our efforts to translate into law the fundamental principle that terrorist behavior and victimization of innocent people are unacceptable means of solving problems.”<sup>54</sup>

Exemptions granted by the United Nations to national liberation movements have compounded the difficulties and have literally given U.N. condonation to sheltering activities of haven States.<sup>55</sup> Both the Third World States and the Marxist world have broadly supported the principle that the end justifies the means. One contemporary observer of the Algerian scene has clearly, if not cogently, presented the anti-western perspective:

Is violence itself, whether political or not, a necessary catharsis to balance the scales between colonizer and colonized, between black and white, or is violence just as necessary in certain situations in which racial or colonial inequality will continue unless the worm has courage to turn.<sup>56</sup>

It is true that there are fewer States willing to provide haven today than at any other time within the last two decades. And those governments that have been the most prominent providers of refuge for perpetrators of terrorist acts have sometimes been forced to deny the authenticity of their actions.<sup>57</sup> The Permanent Representative to the United Nations of the Libyan Arab Republic even addressed a letter to the Secretary General on 21 August 1976 wherein he averred that the Libyan Government "does not approve of highjacking," and that the law of the Libyan Republic "stipulates that the perpetrators of such crimes shall be subject to the most extreme penalties."<sup>58</sup> The historical record, unhappily, speaks for itself.

Although the Sixth (Legal) Committee of the U.N. General Assembly has been debating the issue of State responsibility throughout this decade, and although there is sufficient legal precedent and international legislation already in existence to permit some sort of sanctions system,<sup>59</sup> a will to enforce has been conspicuously lacking. Little attention and no consideration were given to the proposal of former U.N. Secretary General U Thant for an international hijacking tribunal.<sup>60</sup> Despite the lessons of the past and the portents of the future, the world community appears to prefer Doublethink and Newspeak to safeguarding the innocent and maintaining a global rule of law. When the Republic of Panama offered haven to the Sandinista guerrillas, "[t]errorism, for the moment had won"; no matter how sincere the purpose or how noble the motivation of the terrorist actors.<sup>61</sup>

The last quarter of the 20th century is not only an age of great technological achievement, it is also a time of terror.<sup>62</sup> Eric Hoffer, the moral conscience of a brutal age, recently observed that "history is made not by the hidden hand of circumstances but by men."<sup>63</sup> To deny the lessons of human experience in the era of doomsday technology is to yield before adversity, succumbing to the frustrations of the passing moment. But the primordial issue is the survival of the innocent. Malfesance and nonfesance equally ignore Dante's warning from the depths of hell about the fatal consequences that must occur when "those, who sowing discord, harvest guilt."<sup>64</sup>

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### Notes

1. CORDIER & HARRELSON, PUBLIC PAPERS OF THE SECRETARIES-GENERAL OF THE UNITED NATIONS: VOL. VIII, U THANT, 1968-1971 at 471 (1977).

## 384 Readings on International Law

2. Lord, *Rome*, European Community 40:3 (September–October 1978).
3. See United States, Central Intelligence Agency, *International Terrorism in 1977* (Washington: 1978), and the comments of John Dillin, *Terrorist Activity Ebbs-for Now*, *The Christian Science Monitor* 1:1 (15 September 1978), who notes that “international terrorism seems to move in cycles, and the current period appears to be a ‘down’ cycle.”
4. See *Newsweek*, 27 March 1978, at 65–66; *id.*, 24 April 1978 at 54; *id.*, 1 May 1978, at 34–35; *id.*, 8 May 1978, at 44; and *id.*, 29 May 1978, at 62.
5. *Id.*, 29 March 1978, at 24; *id.*, 27 March 1978, at 32.
6. *Id.*, 4 September 1978, at 30–31.
7. *Id.*, 18 September 1978, at 45–47.
8. Miller, *Negotiations for Hostages: Implications from the Police Experience*, 1 *Terrorism* 125, 132 (1978).
9. United States, Central Intelligence Agency, *International and Transnational Terrorism: Diagnosis and Prognosis* (Washington: 1976); U.S. News & World Report, 17 March 1975, p. 26.
10. See, for example, Mallison and Mallison, *The Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of Human and Material Values*, 18 *Howard Law Journal*, 12 (1973); BELL, ON REVOLT: THE STRATEGIES OF NATIONAL LIBERATION 3–18, 179–191 (1976); SINGH & KO-WANG MEI, THEORY AND PRACTICE OF MODERN GUERRILLA WARFARE 42–44 (1971).
11. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 219–234 (1971); BASSIOUNI & NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 490–500 (1973); Friedlander, *Terrorism and Political Violence: Do the Ends Justify the Means?* 24 *Chitty's Law Journal* 240 (1976); WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 176–206 (1977), centers on moral issues. These, he claims, are questions “which the law gets at only imperfectly.” *Id.* at 183.
12. WILKINSON, TERRORISM AND THE LIBERAL STATE 173–174 (1977), takes issue with those writers who distinguish between transnational and international terrorism. His concern is well taken, but for purposes of this study, transnational will refer to nonpolitical, nonstate actors. Cf. BELL, TRANSNATIONAL TERROR 4, 6–8 (1975).
13. The variety of definitions is almost as great as the variety of terrorist acts themselves. Cf. the following: *National Advisory Committee on Criminal Justice Standards and Goals, Report of the Task Force on Disorders and Terrorism* 3 (1976), hereinafter cited as *Terrorism Task Force* [1975]; Lord Gardiner, et. al., *Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland* 25 (Cmd. 5847); CARLTON & SCHAEFER, INTERNATIONAL TERRORISM AND WORLD SECURITY 50–58 (1975); ALEXANDER, TERRORISM: INTERDISCIPLINARY PERSPECTIVES 18–29 (1977); LIVINGSTON, INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD 1–3 (1978). It is questionable as to whether the Guiana massacre was legally an act of terrorism, but the assassination of Congressman Leo Ryan certainly falls into the category of internationally prohibited acts. For a descriptive analysis of the events in Guiana, see especially *The Times* (London), 26 November 1978, p. 17:1; *The Observer* (London), 26 November 1978, p. 5:1, *Newsweek*, 4 December 1978, pp. 38–60.
14. Friedlander, *Banishing Fear from the Skies: A Statutory Proposal*, 16 *Duq. L. Rev.* 283 (1978); MCWHINNEY, THE ILLEGAL DIVERSION OF AIRCRAFT AND INTERNATIONAL LAW (1975); EMANUELLI, LES MOYENS DE PREVENTION ET DE SANCTION EN CAS D'ACTION ILLICITE CONTRE L'AVIATION CIVILE INTERNATIONALE (1974).
15. ALEXANDER, *supra* n. 13 at 131–132.
16. ADLER & MUELLER, POLITICS, CRIME AND THE INTERNATIONAL SCENE: AN INTER-AMERICAN FOCUS 91–95 (1972); SCHAEFER, THE POLITICAL CRIMINAL: THE PROBLEM OF MORALITY AND CRIME 1–55 (1974); BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 375–385 (1974); SINHA, ASYLUM AND INTERNATIONAL LAW 173–188 (1971).
17. BASSIOUNI & NANDA, *supra* n. 11 at 314–316; Friedlander, *The Origins of International Terrorism: A Micro Legal-Historical Perspective*, 6 *Israel Year Book on Human Rights* 49, 54–55 (1976); LA FOREST, EXTRADITION TO AND FROM CANADA 61–65 (2nd ed. 1977).
18. Deere, *Political Offenses in the Law and Practice of Extradition*, 27 *Am. J. Int'l L.* 247–250–251 (1933); SINHA, *supra* n. 16 at 20.
19. Friedlander, *supra* n. 17 at 55–56.
20. Rogers, *A World Free of Violence*, 425–429. Department of State Bulletin (16 October 1972).
21. Deere, *supra* n. 18 at 252–254; BASSIOUNI & NANDA, *supra* n. 11 at 316.
22. Reprinted in BASSIOUNI & NANDA, *supra* n. 11 at 409–416.
23. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, O.A.S. Doc. AC/Doc. 88, rev. 1 corr. 1 of 2 February 1971; OAS/Ser. A/17; U.N. Doc. A/C.6/418, Annex V (2 November 1972).
24. A.G. Res 3166 (XXVIII), 28 U.N. GAOR, U.N. Doc. A/RES/3166 (1973), reprinted in 68 *Am. J. Int'l L.* 383 (1974). See especially, BLOOMFIELD & FITZGERALD, CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS: PREVENTION AND PUNISHMENT (1975).

25. 18 U.S.C. Sections 1111-1116, vol. 18, at 878 (1976).
26. See WILKINSON, *POLITICAL TERRORISM* (1974); BELL, *A TIME OF TERROR: HOW DEMOCRATIC SOCIETIES RESPOND TO POLITICAL VIOLENCE* (1978); LAQUEUR, *TERRORISM* (1977).
27. *The Times* (London), 30 June 1976.
28. Council of Europe, *European Convention on the Suppression of Terrorism*, November 1976, reprinted in I.L.M. at 1272 (November 1976).
29. BELL, *supra* n. 26 at 158.
30. Safety of International Civil Aviation, G.A. Res. 32/8, 32 U.N. GAOR, U.N. Doc. A/RES/32/8, 1977. Cf. U.N., Report of the Security Council, 16 June 1976-15 June 1977, U.N. GAOR, Supp. No. 2, U.N. Doc. A/32/2, 1977, pp. 34-37. See also Friedlander, *supra* n. 14 at 283, 287-288.
31. Draft Convention against the Taking of Hostages, U.N. Doc. A/AC.188/L.3, July 1977.
32. G.A. Res. 31/103, 31 U.N. GAOR, U.N. Doc. A/31/430, 1976.
33. U.N., Report of the *Ad Hoc* Committee on the Drafting of an International Convention against the Taking of Hostages, U.N. GAOR 33, Supp. No. 39, U.N. Doc. A/33/39, 1978, pp. 5-16; also cited in U.N. Chronicle, March 1978, p. 32. France, surprisingly, offered the strongest condemnation, while Algeria—a frequent haven for hijackers—insisted upon excusing conditions for anticolonial and antiracist liberationists.
34. KISSINGER, *AMERICAN FOREIGN POLICY* 232 (3rd ed. 1977).
35. See Franck and Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 *Am. J. Int'l L.* 69 (1974).
36. U.S.T. 737, T.I.A.S. No. 7579 (1973). Canada signed an identical pact with Cuba on the same day.
37. *Chicago Tribune*, 26 March 1978, sec. 1, p. 42:1.
38. Friedlander, *supra* n. 14 at 287.
39. S. Res. 2236, 95th Cong., 1st Sess., 123 *Congressional Records*, S17706, 25 October 1977.
40. S. 2236, 95th Cong., 2nd Sess. [Committee Print], 19 May 1978. I am indebted to Mr. Louis G. Fields, Jr., Assistant Legal Adviser, Department of State, for a copy of the current bill.
41. Information provided by Mr. Fields. See also Richard Bradee, "Congress Battles terrorists with Bills," *Milwaukee Sentinel*, 16 August 1978, p. 12:2.
42. *Supra* n. 34 at 232.
43. *The Globe and Mail* (Toronto), 26 July 1978 p. 7:1; *The World Jurist*, July-August 1978, p. 8. For a contra view, see the biting fictional rejoinder of Boll, *Confession of a Hijacker*, *The New Yorker* 42-43, 9 October 1978.
44. *Chicago Tribune*, 30 July 1978, p. 6:3. Further explanatory talks took place in Ottawa, Canada, during November 1978, but serious divisions arose among the seven participating countries over how the Bonn agreement was to be implemented. (Private information)
45. *The Globe and Mail* (Toronto), 19 July 1978, p. 6:1. "Now," editorialized the *Globe and Mail*, the seven summit nations "must tell the world's airlines that they mean it."
46. *The Toronto Star*, 17 July 1978, p. 1:6.
47. *The Globe and Mail* (Toronto), 26 February 1976, p. 11:5.
48. See editorial comment in the *Globe and Mail* (Toronto), 23 May 1978, p. 6:2. The Senate version, however, would grant authority to the Minister of Justice to refuse extradition where the offender would be subject to capital punishment in the requesting State.
49. LA FOREST, *supra* n. 17 at 32-33.
50. *The Globe and Mail* (Toronto) 4 August 1978, p. 34:5.
51. Cf. Kitzrie, *Reconciling the Irreconcilable: The Quest for International Agreement over Political Crime and Terrorism*, 32 *YEAR BOOK OF WORLD AFFAIRS* 208 (1978); LIVINGSTON, *supra* n. 13 at 68-71; BELL, *supra* n. 26 at 152-157, 165-166; HACKER, *CRUSADERS, CRIMINALS, CRAZIES: TERROR AND TERRORISM IN OUR TIME* 303-305, 340 (1977).
52. Friedlander, *Terrorism and International Law: What is Being Done?* 8 *Rutgers Camden L.J.* 383 (1977); Franck, *International Legal Action Concerning Terrorism*, 1 *Terrorism* 187 (1978).
53. Letter from David Martin, Editor of *Student Lawyer* to author, 3 March 1977.
54. ROGERS, *UNITED STATES FOREIGN POLICY, 1972: A REPORT OF THE SECRETARY OF STATE* 95 (1973).
55. See, for example, G.A. Res. 3034 (XXVII), 27 U.N. GAOR, Supp. No. 30, U.N. Doc. A/C.6/418, 1972, and the qualifying words attached to a later resolution of the same title on Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence which Lie in Misery, Frustration, Grievance and Despair, and which Cause Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes, G.A. Res. 31/102 (XXXI), 31 U.N. GAOR, Supp. No. 37, U.N. Doc. A/31/42, 1976.

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56. Joan Brace, Book Review, 11 Int'l J. Afr. Stud. 288, 289 (1978). See also Smith, *International Terrorism: A Political Analysis*, 31 YEAR BOOK OF WORLD AFFAIRS 138, 155-157 (1977). The American legal view is definitely *contra*. See Comment, *Criminal Responsibility and the Political Offender*, 24 Am. U.L. Rev. 797 (1975).

57. See the instructive commentary of E. McWhinney, pp. 93-101.

58. 1 U.N. Doc.S/12191, 1976.

59. Cf. Lillich and Paxman, *State Responsibility for Injury to Aliens Occasioned by Terrorist Activities*, 26 Am. U.L. Rev. 217 (1977); Friedlander, *supra* n. 52.

60. U.N. Press Release, SG/SM 1333, September 1970.

61. "Those Cheers in Managua," Chicago Tribune, 26 August 1978, p. 8:1.

62. The phrase is that of BELL in A TIME OF TERROR: HOW DEMOCRATIC SOCIETIES RESPOND TO POLITICAL VIOLENCE. The international linkage of terrorist groups is clearly, if not convincingly, identified by Claire Sterling, *The Terrorist Network*, The Atlantic 37-47 (November 1978). See also DEMARIS, BROTHERS IN BLOOD: THE INTERNATIONAL TERRORIST NETWORK (1977). Although terrorist linkage is an international reality, the existence of a widespread, centrally coordinated terrorist network has yet to be proven in fact.

63. Hoffer, *Works and Days*, Harper's 78 (October 1978).

64. MILANO, THE PORTABLE DANTE 148 (1962).

# Chapter 27

## Combating International Terrorism: The United Nations Developments\*

L.F.E. Goldie

*The problem of international terrorism has not been ignored by the Security Council nor the General Assembly of the United Nations. It seems generally agreed that it is unlawful for States to support terrorist activities that adversely affect other States. Definitions flowing from this agreement and applying its sense to specific situations have surfaced many areas of disagreement, however.*

**Introduction.** Although reflected in one word, “terrorism” has become refracted, in the numerous U.N. bodies dealing with it, into a multicolored concept—and all its qualities tend to be given different emphases. Also, although that one word has been with us since the last decade of the 18th century, its connotations have changed as States mature and yesterday’s partisans become today’s establishment. Over and over again the model of Lord Wellington’s (as the Duke of Wellington then was) protest to Marshal Massena (the former general of the French Revolutionary Armies) against the latter’s order to his troops to shoot the Portuguese Ordenanza—ununiformed militia who were harassing the French lines of communications during the peninsular campaign of the Napoleonic Wars. Wellington wrote:

Ce que vous appelez “des paysans san uniforme,” “des assassins et des voleurs de grand chemin” sont l’Ordenanza du pays, qui comme j’ai déjà eu l’honneur de vous assurer sont des corps militaires commandés par des officiers, payés, et agissant sous les lois militaires. Il paraît que vous exigez que ceux qui jouiront des droits de la guerre soient revêtus d’un uniforme; mais vous devez vous souvenir que vous-même avez augmenté la gloire de l’armée française en commandant des soldats qui n’aient pas d’uniforme.<sup>1</sup>

To those who permit themselves to be struck by the paradox of that most conservative of beings, the Duke of Wellington, protesting against short shrift being given in 1810 to the guerrilleros and Ordenanza of the peninsula at the hands of a veteran of the French Revolution, it should be emphasized that such is the nature of this paradoxical subject, and that its underlying necessities

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continue to call for pragmatic responses independently of ideological commitments or perspectives.

**Refraction of "Terrorism" in the U.N.'s Many Prisms.** There appears to be abroad in the world, and reflected in many meetings, panels and symposia, an expectation, indeed a demand, that the United Nations "do something" to prevent the recurrence of transnational terroristic acts. The United Nations has done many things in this regard that are within its competence. Apart from the Security Council, especially when it contemplates action under Chapter VII of the Charter, the organs of the United Nations, and in particular the General Assembly, constitute forums of debate rather than the repositories of legislative or executive authority.<sup>2</sup> In the General Assembly, moreover, the 150 member States reflect almost every ideology now forming part of the political ideas and premises of policy (if such a word is applicable) at large in the world today. General Assembly Resolutions, in particular those resulting from a hard-won consensus, while not having the status of legislation, reflect compromise and accommodation regarding emerging common values and, possibly, an agreed view of future State practice. It may, furthermore, direct incipient development of national policies into cooperative channels. In short, the General Assembly tends to achieve, as its work product in any field, the highest common factor (low as this may appear to many) of the relevant values and perspectives of the multipolar world it reflects.

Specifically, the three Resolutions relating to terrorism<sup>3</sup> that the General Assembly agreed upon last fall at its 32nd Session, were inscribed as agenda items, intensely negotiated, amended and carried out with the purpose of both articulating and defining proscribed acts of terrorism and of bringing the pressure of world public opinion to bear on States often known as "sanctuary States." These are the States that provide training, weapons and safe havens to which terrorists can flee after a caper or be received after release from jail through hostage-taking, and, generally, make acts of terrorism safer for their perpetrators to commit. It is observable that, with the Mogadishu rescue of the Lufthansa passengers last year, Somalia has ceased to be a sanctuary State. Indeed, the expression of a widespread disgust with terrorists' excesses through General Assembly resolutions has assisted in the erosion of the number of safe haven States for terrorists. Thus, while not acting as a legislature, let alone as an effective one, the U.N. General Assembly tends to bring moral opinion to bear, making gratuitous acts of cruelty and the denial of human rights more embarrassing or more costly to perpetrate.

On the other hand, it may be observed that the greater the number of resolutions passed condemning terrorism, and the greater the number of committees, subcommittees and working groups deliberating on the subject, the more innocuous and watered down the resolutions and reports tend to become. The

diffuseness of the institutional treatment of terrorism in the United Nations has tended to weaken the force of specific proposals to limit let alone eliminate it.

**The United Nations General Assembly.** In the General Assembly of the United Nations there is consensus that terrorism cuts against the ideals of justice and peace. There is also agreement that such a deplorable institution should have no place in the relations of nations and peoples. But there is no consensus on the cure. While some hold that terrorism is a crime, in the punishment of which States should cooperate, others insist that when a terrorist act is committed for political ends such cooperation is not due. Others, again, insist that terrorism can only be cured if its underlying causes of misery, frustration, grievance and despair are themselves eliminated. In addition, different bodies in the United Nations have offered different prescriptions. For example, the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation proposed, and the General Assembly adopted, the following clauses regarding terrorism in the Resolution on Friendly Relations:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force. . . .

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.<sup>4</sup>

Of course, in agreeing to the above paragraphs, members of the General Assembly implicitly excluded persons or organizations whose activities were, in those States' perceptions, more validly characterizable as national liberation fighters and movements than as terrorists. Indeed, the question who is a terrorist and who is a resistance fighter provides another basis of disagreement once the debate moves from the general to the concrete. Despite these reservations in terms of specific situations, it is clear that a widespread consensus exists, at the level of generality, that the United Nations stands for a norm asserting that it is unlawful for States to support terrorist activities that adversely affect other States.

By contrast, the General Assembly's Resolution on the Definition of Aggression,<sup>5</sup> which came up from the Special Committee on the Question of Defining Aggression—a different body from the General Assembly's Special Committee

on Friendly Relations, reflects its Committee's compromise on the inclusion of terroristic activities within the concept of aggression in terms of "sending" by or on behalf of a State of armed bands and other irregular groups usually included within the category of terrorists for carrying out acts of armed force. This prohibition is, one should stress, limited to "sending." Terms such as "organizing," "encouraging," "instigating," or "participating in" and, in addition, "foment," "finance," "incite" or "tolerate," all to be found in the Declaration of Friendly Relations, are missing from the Definition of Aggression. Also, a State becomes guilty of aggressive conduct when it puts its territory "at the disposal of" another State. But this latter conduct is narrowed by the limitation of the beneficiaries of such a disposal to States, not private individuals. Accordingly it would not be germane to many instances of terrorism.

In response to the General Assembly's resolution on its 1971 Report,<sup>6</sup> and especially the favorable reception given to paragraphs 133 and 134 thereof,<sup>7</sup> the International Law Commission produced in 1973 the draft articles that were more or less endorsed by the General Assembly through their adoption in a Resolution<sup>8</sup> and became the Convention on the Prevention and Punishment of Crimes against International Protected Persons, Including Diplomatic Agents. This Convention entered into force on 20 February 1977.<sup>9</sup> Its thrust is to ensure that persons who commit, or attempt or threaten to commit, or participate as accomplices in the commission of such crimes of violence as murder, kidnapping or other attack on the person or liberty of heads of States or governments, or diplomatic or other representatives, or attack official premises or private accommodation or means of transport of such persons, shall be either prosecuted or extradited "without exception whatsoever and without undue delay" (Article 7).<sup>10</sup>

The history of the General Assembly's adoption of this Convention and its recommendation that the member States ratify it is of interest. Despite the widespread feeling that such a convention was needed, a considerable number of developing countries was very disappointed by the failure of the drafters to include exculpatory provisions for those asserting "the legitimate right of self-determination" and might well have prevented the passage of the Resolution recommending that member States should adopt the Convention which the General Assembly had before it.<sup>11</sup> A compromise was reached when the accompanying draft Resolution, which included a paragraph condoning such acts, was amended by the addition of a paragraph instructing the Secretary General always to publish the Resolution together with the Convention.<sup>12</sup> The paragraph on the right of self-determination was as follows:

4. Recognizes also that the provisions of the annexed Convention could not in any way prejudice the exercise of the legitimate right to self-determination and independence, in accordance with the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law

concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination and apartheid;<sup>13</sup>

In a note of 8 September 1972<sup>14</sup> the Secretary General took the initiative by requesting the inclusion in the agenda of the General Assembly's 27th session of an item entitled "measures to prevent terrorism and other forms of violence which endanger or take innocent human lives or jeopardize fundamental freedoms." At its 2037th meeting on 23 September 1972 the General Assembly decided to include the item in the agenda of its 27th session and to allocate it to the Sixth Committee in the following amended form:

Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair which causes some people to sacrifice human lives, including their own, in an attempt to effect radical change.

On 2 November 1972 the Secretariat produced its *Study Prepared in Accordance with the Decision taken by the Sixth Committee at its 1314th Meeting on 27 September 1972*.<sup>15</sup> This study concluded with the following paragraphs:

It is clear from the foregoing study that the origins and underlying causes of terrorism are complex and various, but that many of them lie in international political or social situations which the United Nations was founded to improve. The effort to eliminate those causes should be intense and continuous, as mankind, despite its intellectual powers, has not yet succeeded in creating a social order free from misery, frustration, grievance and despair—in short, an order which will not cause or provoke violence. Yet terrorism threatens, endangers, or destroys the lives and fundamental freedoms of the innocent, and it would not be just to leave them to wait for protection until the causes have been remedied and the purposes and principles of the Charter have been given full effect. There is a present need for measures of international cooperation to protect their rights as far as possible. At all times in history, mankind has recognized the unavoidable necessity of repressing some forms of violence, which otherwise would threaten the very existence of society as well as that of man himself. There are some means of using force, as in every form of human conflict, which must not be used, even when the use of force is legally and morally justified, and regardless of the status of the perpetrator.

Measures, more or less effective and appropriate, have been devised or attempted in the past by the international community to deal with parts of the problem of terrorism or with related problems. These measures afford some help in the work which should now be done in order to prevent new violence towards new innocent victims.<sup>16</sup>

The Sixth Committee debated the issues and considerable divergences of opinion came to light. While some States stressed the distinction between

adventurist terrorism and the cause of national liberation and people's revolution, others stressed State terrorism, yet others again condemned colonialism as not only a form of terrorism, but also as causes of "individual terrorism." The United States submitted a Draft Convention<sup>17</sup> that stressed international cooperation in the apprehension of terrorists, their arraignment, trial and appropriate punishment (Article 2—"punishable by severe penalties"). Article 3 provides:

A State Party in whose territory an alleged offender is found shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

And Article 4 calls upon States to establish effective jurisdiction over terroristic crime under national law. Some States argued that the U.S. Draft Convention could be the basis of a convention. Others, however, viewed it as a helpful contribution for further work. But no further steps were taken for the implementation of either its terms or the goals it prescribed.

By Resolution 3034 (XXVII)<sup>18</sup> the General Assembly established an *Ad Hoc* Committee to consider the subject and submit a "report with recommendations for possible co-operation for the speedy elimination of the problem."<sup>19</sup> This *Ad Hoc* Committee met from 16 July to 11 August 1973 and concluded its *Report*<sup>20</sup> with the following statement:

During the general debate, the *Ad Hoc* Committee heard statements by 27 delegations of Member States. A similarly large number of delegations participated in the discussion held in each of the three sub-Committees. In taking up the study of the delicate and complex problem entrusted to it by the General Assembly, the *Ad Hoc* Committee was fully aware of the difficulties of its task. Representatives of the various geographical groups took part in the debates of the plenary *Ad Hoc* Committee and of each of the Sub-Committees. The resulting frank and extensive exchange of ideas brought out the diversity of existing views on the various aspects of the subject submitted for consideration to the *Ad Hoc* Committee. Those views are faithfully reflected in the summaries of the plenary and Sub-Committee debates contained in the report, the careful consideration of which the *Ad Hoc* Committee recommends to the General Assembly.<sup>21</sup>

Subsequently, at its sessions in December 1973,<sup>22</sup> 1974,<sup>23</sup> and 1975,<sup>24</sup> the Sixth Committee reported that "because of the lack of time," it had been unable to deliberate on the subject and recommended that it be carried forward on the agenda to the next session of the General Assembly. On 15 December 1976, however, the Sixth Committee recommended, and the General Assembly adopted, Resolution 31/102<sup>25</sup> in which, *inter alia*, it noted that the *Ad Hoc* Committee had "been obliged to suspend its work"<sup>26</sup> and invited it "to continue

its work in accordance with the mandate entrusted to it<sup>27</sup> and decided to include the item in its next (32nd) session.

1977 proved to be a year of considerable activity. In March the *Ad Hoc* Committee met, but it did not produce a draft convention or any legal propositions adherence to which would bind States to specific legal obligations. Instead, its Report showed agreement only on the following generalizations:

- (1) An inalienable right of all peoples to self-determination and independence exists;
- (2) The need to condemn and repress acts of international terrorism is obvious;
- (3) The General Assembly should continue its efforts to combat international terrorism; and
- (4) There is a need for international cooperation in tackling international terrorism.

At its 32nd Session the General Assembly instructed the Committee to continue its work but imposed a new set of priorities. In the seventh operative paragraph the General Assembly stated that it;

*Invites the Ad Hoc Committee on International Terrorism to continue its work in accordance with the mandate entrusted to it under General Assembly resolution 3034 (XXVII), first by studying the underlying causes of terrorism and then by recommending practical measures to combat terrorism;*<sup>28</sup>

The United States voted against this Resolution.

In August another *Ad Hoc* Committee, this one on the taking of hostages, met. It had been created as the result of an initiative taken by the Federal Republic of Germany<sup>29</sup> in the Sixth Committee of the General Assembly's 31st Session.<sup>30</sup> The Committee was requested, in the same resolution, "to present its report and make every effort to submit a draft convention" in good time for its consideration at the 32nd session of the General Assembly.<sup>31</sup> Because of the greater specificity of its definition and subject matter, the proponents of this agenda item were sanguine that the new committee would focus on issues more closely related to the procedures and methods of combating acts of taking hostages rather than on the sociopsychological factors that have tended to render the work of the *Ad Hoc* Committee on International Terrorism rather more diffuse. This may, perhaps, have been premised on a faith in the power of words and definitions to control effectively the purposes and the perspectives of the various regional and ideological groups that constitute the General Assembly. Despite its mandate, the Hostage Committee, after many vicissitudes, failed to produce a draft convention in the 3 weeks available to it.<sup>32</sup>

After the hijack on 12 October 1977 of the Lufthansa Boeing 737 aircraft, its 6,000-mile odyssey, the murder of its captain, and finally the rescue of the passengers and crew at Mogadishu on 18 October by a special unit of German

forces, the International Federation of Airline Pilots Associations called a 2-day strike of mainly Western airlines. After the General Assembly agreed to debate within the Special Political Committee the issues of the pilots' concern, especially airport security measures, international cooperation in the apprehension, trial and punishment of the perpetrators of aerial piracy, and the problem of hijackers' "safe havens," the Federation agreed to postpone its threatened strike. Rather than discuss this emergency-inspired topic under one of the existing agenda items, a new agenda item "Safety of International Civil Aviation"<sup>33</sup> was inscribed and the Special Political Committee proceeded to debate the problem. This body drafted a Resolution that apparently satisfied the International Federation of Airline Pilots' Associations. On the other hand, a comparison of its operative paragraph 3 with the equivalent provision of the 1972 Terrorism Resolution,<sup>34</sup> namely paragraph 5, and paragraphs 1, 2, 3 and 4 of the General Assembly's 1970 Resolution on Aerial Hijacking or Interference with Civil Air Travel<sup>35</sup> illustrates a decline in the definitiveness and positivism of the language employed:

### 1977

Appeals to all States which have not yet become parties to the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1968, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, to give urgent consideration to ratifying or acceding to those conventions;

### 1972

*Invites* States to become parties to the existing international conventions which relate to various aspects of the problem of international terrorism;

### 1970

1. *Condemns*, without exception whatsoever, all acts of aerial hijacking or other interference with civil air travel, whether originally national or international, through the threat or use of force, and all acts of violence which may be directed against passengers, crew and aircraft engaged in, and air navigation facilities and aeronautical communications used by, civil air transport;

2. *Calls upon* State to take all appropriate measures to deter, prevent or suppress such acts within their jurisdiction, at every stage of the execution of those acts, and to provide for the prosecution and punishment of persons who perpetrate such acts, in a manner commensurate with the gravity of those crimes, or without prejudice to the rights and obligations of States under existing international instruments relating to the matter, for the extradition of such persons for the purpose of their prosecution and punishment;

3. *Declares* that the exploitation of unlawful seizure of aircraft for the purpose of taking hostages is to be condemned;

4. *Declares further* that the unlawful detention of passengers and crew in transit or otherwise engaged in civil air travel is to be condemned as another form of wrongful interference with free and uninterrupted air travel; . . .

Furthermore, the above formula used in the 1970 Resolution may be contrasted with that in the General Assembly's 1977 Terrorism Resolution. This reflection of the contemporary international consensus on the subject ordained that the *Ad Hoc* Committee on International Terrorism should merely study the "underlying causes of terrorism" before "recommending practical measures"<sup>36</sup> for combating it. Of the three resolutions agreed upon in 1977, that on International Terrorism was the most general and the mildest. On the other hand, that on interference with international civil aviation, while perhaps lacking the unequivocal force of the relevant paragraphs of the 1970 statement, was more strongly expressed than its two contemporaries; and the question of hostage-taking is the subject of continuing investigation, study and negotiation.

During February 1978, the General Assembly's *Ad Hoc* Committee on Hostages met in Geneva with a view, pursuant to a General Assembly Resolution<sup>37</sup> prescribing its mandate, to drafting an international convention against the taking of hostages. This committee would appear to have agreed that the taking of hostages is prohibited by international law. A number of States have asserted that safeguards to be assured to national liberation movements should in no way entail the granting of a license to take hostages. Certain participants have also pointed out that in drafting the Convention no confusion should be permitted between the status of prisoners of war (captive military personnel participating in hostilities) and hostages (human beings held in order to extract an advantage or concession, including money, from a third person). Some States have shown concern for safeguarding the right of asylum. Emphasis was placed on the obligation not to derogate from the duty to respect the territorial integrity and sovereign independence of States in connection with the release of hostages. Although certain technical and administrative articles were agreed upon, a convention could not be drafted owing to fundamental political differences over safeguarding the rights of movements of national liberation. The next meeting of the *Ad Hoc* Committee on International Terrorism will be held in 1979.

**"Host Country" Problems.** The United Nations seems to be confronted by the problem of terrorism in a number of additional contexts. For example, one is said to have arisen in the United States as the proceedings of the "Committee on Relations with the Host Country" reflected (this is a committee set up by the General Assembly to take care of such housekeeping problems as the complaints and conditions of life of diplomats and, generally, relations between the United States and the United Nations) at its 60th meeting:

*Strongly condemns* the terrorist and other unlawful acts perpetrated against the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations and its personnel as well as those committed against any other missions to the United Nations as fundamentally incompatible with the status of missions and their personnel under international law.<sup>38</sup>

It recommended at its 65th meeting on 9 November 1976, that:

Considering that the security of the missions accredited to the United Nations and the safety of their personnel are indispensable for their effective functioning, the Committee noted with satisfaction the assurances given by the competent authorities of the host country and recognizes the usefulness of the various measures taken to this end.

The Committee considered with deep concern the serious acts of terrorism and other criminal acts which had nevertheless been committed against several missions to the United Nations, their personnel and property, including demonstrations and picketing accompanied by violence, threats, malicious harassment, attacks and insults against personnel of those missions.

The Committee condemns terrorist and other criminal acts in relation to any mission, its personnel and property as being totally incompatible with the status of missions and their personnel under the norms of international law, especially those of the Vienna Convention on Diplomatic Relations of 1961.<sup>39</sup>

In this committee the inhibitions and hesitations so apparent in other committees were not so evident. Condemnations of "terrorism" in the United States was clearly felt not to need to wait upon the elucidation of causes as was, for example, the felt need for proceeding further with the far more generally formulated General Assembly Resolution 32/147 of 16 December 1977.<sup>40</sup>

**The Security Council and Entebbe—Invasion or Rescue?** The aerial hijack that led to Israeli action and that action itself at Entebbe Airport on 4 July 1976 precipitated a meeting of the Security Council. The Security Council held its first session on 9 July 1976<sup>41</sup> on the complaint dated 6 July 1976<sup>42</sup> of the Prime Minister of Mauritius on behalf of the Organization of African Unity, Heads of State and Government who were then present at the Organization's meeting then being held in Mauritius. The African complaint stemmed from the unpermitted use of force on Ugandan soil—President Amin never having agreed to the landing of Israeli forces. The subsequent meetings of the Security Council were inconclusive. Whereas one group of States, including the United States and the United Kingdom, stressed the need to condemn aerial hijacking, both in general and specifically with regard to the case before the Council, the Arab and African States stressed the need to condemn the action of the Israeli forces as contrary to Article 2 (4) of the United Nations Charter. Each side presented a draft resolution<sup>43</sup> that reflected the aspect of the debate it was stressing. Neither draft resolution was adopted. No permanent member of the Security Council used its

veto power. The somewhat analogous Mogadishu air rescue of the passengers of a Lufthansa aircraft by special forces of the Federal Republic of Germany over a year later did not stimulate the calling of a meeting of the Security Council because the Government of Somalia permitted the landing of the rescue team.

**Conclusion.** While the United Nations has tackled the problem of international terrorism through a plurality of organs and in terms of approaches to the subject in general and of specific topics, it becomes clear that the more general the topic undertaken the less effective the resultant action adopted. In addition, the greater the number of bodies deliberating on the topic, the less positive the resultant outcome appears to be. Again, the longer a formulation satisfactory to all points of view takes to emerge, the more insipid it becomes. On the other hand, when the issue is attached to a specific subject matter, for example acts of violence against representatives of States and diplomatic persons, or aerial hijacking, or a specific grievance, for the symbolic acts by various U.S. groups towards members of certain Missions to the United Nations and their families, the more definitive and effective the formulations of the organ's point of view becomes.

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Professor Goldie was serving as the Senior Legal Officer of the United Nations Secretariat at the time this article was first published.

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## Notes

The views expressed in this study are the *personal views* of the author and do not necessarily reflect those of the U.N. Secretariat.

1. (What you call "peasants without uniforms" and "murderers and highwaymen" are l'Ordenanza (militia) of the land who, as I have already had the honor of assuring you, are paid military bodies, commanded by officers, and operating under military law. It would appear that you require those who enjoy the rights of war to be uniformed but you should remember that you yourself have added to the glory of the French Army while commanding non-uniformed soldiers.) Reproduced in HALL, *A TREATISE ON INTERNATIONAL LAW*, 619, note 1 (8th ed. 1924).

2. For a study that discusses the limited areas of the specific competences of the General Assembly under the Charter of the United Nations and the scope and limits of its "recommendations" apart from specific topics it may regulate, see Sloan, *The Binding Force of a Recommendation of the General Assembly of the United Nations*, 25 Brit. Y.B. Int'l L. (1948); Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law*, 5 Indian J. Int'l. L. 23 (1965). For the relevance of voting support for the United Nations General Assembly resolutions to the formation of international law, see Goldie, *The North Sea Continental Shelf Cases—A Ray of Hope for the International Court?*, 16 N.Y.L. Forum 325, 342-49 (1970), and the authors cited therein as participants in the debate.

3. a. Resolution on Safety of International Civil Aviation, Resolution No. 32/8;

b. Measures to Prevent International Terrorism, which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of those Forms of Terrorism and Acts of Violence which lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, Including their Own, in an Attempt to Effect Radical Changes, Resolution No. 32/147;

c. Drafting of an International Convention Against the Taking of Hostages, Resolution No. 32/148.

4. Resolution 2625 (XXV), United Nations, General Assembly, *Official Records*, Supplement No. 28, 25th Session, U.N. Document A/8023 (New York: 1971), p. 123.

5. Resolution 3314 (XXXIX), United Nations, General Assembly, *Official Records*, Supplement No. 31, 29th Session, U.N. Document A/9631 (New York: 1975), p. 143. Article 3, paragraphs (f) and (g) where the words referred to in the text are to be found, state the following to be acts of aggression (*inter alia*):

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(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by the other State for-perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

6. Resolution 2780 (XXVI), United Nations, General Assembly, *Official Records*, Supplement No. 29, 26th Session, U.N. Document A/8429 136 (1972).

7. *Id.*

8. Resolution 3166 (XXVIII), United Nations, General Assembly, *Official Records*, Supplement 30, 28th Session, U.N. Document A/9030 (New York: 1974), p. 146.

9. *Department of State Bulletin* 155 (21 February 1977).

10. Resolution 3166 (XXVIII) at 148.

11. *Id.*, at 145-146.

12. *Id.*, para. 6, at 147.

13. *Id.*, para. 4.

14. U.N. Document A/8791.

15. U.N. Document A/C.6/418.

16. *Id.*, at 40-41.

17. See Report of the *Ad Hoc* Committee on Terrorism, United Nations, General Assembly, *Official Records*, Supplement No. 28, 28th Session, U.N. Document A/9028 at 48 (1974).

18. United Nations, General Assembly, *Official Records*, Supplement No. 30, 27th Session, U.N. Document A/8730 119 (1973).

19. *Id.*, para. 10.

20. United Nations, General Assembly, *Official Records*, Supplement No. 28, 28th Session, U.N. Document A/9028 (New York: (1973).

21. *Id.*, at 20.

22. See Sixth Committee, Report, U.N. Document A/9410 (10 December 1973).

23. See Sixth Committee, Report, U.N. Document A/9947 (11 December 1974).

24. See Sixth Committee, Report, U.N. Document A/10465 (10 December 1975).

25. U.N. Document A/RES/31/102 (mimeo 19 January 1977).

26. *Id.*, Preamble.

27. *Id.*, para. 7.

28. Resolution 32/147, para. 7.

29. Agenda item 123. The Federal Republic of Germany introduced its draft resolution on 26 November 1966, A/C.6/L/10. It became U.N. General Assembly Resolution 31/103 (15 December 1976).

30. Resolution No. 31/105 (15 December 1976). See Report of the Sixth Committee, Drafting of an International Convention Against the Taking of Hostages, U.N. Document A/32/467 (15 December 1977).

31. Resolution adopted by the General Assembly, Drafting of an International Convention Against the Taking of Hostages. This was reflected in Resolution 32/148 of (19 December 1977).

32. See Report of the *Ad Hoc* Committee on the Drafting of an International Convention Against the Taking of Hostages, U.N. General Assembly, *Official Records*, Supplement No. 39, 32nd Session, U.N. Document A/32/39 (1977).

33. This became agenda item 129.

34. U.N. General Assembly Resolution No. 3034 (XXVII), U.N. General Assembly, *Official Records*, Supplement No. 30, 27th Session, U.N. Document A/8730 at 119 (1973). See also General Assembly Resolution on Aerial Hijacking or Interference with Civil Air Travel, Resolution No. 2645 (XXV), U.N. General Assembly, *Official Records*, Supplement No. 28, 25th Session, U.N. Document A/8208 at 126-127 (1971).

35. Resolution 2645 (XXV), U.N. General Assembly, *Official Records*, Supplement No. 28, 25th Session, U.N. Document A/8028 at 126 (1971).

36. See para. 7, Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair Which Cause Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes. U.N. General Assembly Resolution 32/147. U.N. Document A/RES/32/147 (mimeo 8 March 1978). See also text accompanying n. 28.

37. U.N. General Assembly Resolution 32/148, U.N. Document A/RES/32/148 (mimeo 2 February 1978).

38. Committee on Relations with the Host Country, Report, U.N. General Assembly, *Official Records*, Supplement No. 26, p. 12, U.N. Document A/31/26 (New York: 1976).

39. *Id.*, at 22.

40. See nn. 28 and 36 and the text accompanying them.
41. See U.N. Document S/12126 (mimeo, 6 July 1976). See also:
  - a. Letter dated 6 July 1976 from the Assistant Executive Secretary of the Organization of Africa Unity to the United Nations addressed to the President of the Security Council (S/12126).
  - b. Letter dated 6 July 1976 from the Permanent Representative of Mauritania to the United Nations address to the President of the Security Council (S/12128).
  - c. Letter dated 4 July 1976 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General (S/12123).
  - d. Letter dated 5 July 1976 from the Charge d'Affaires, a.i., of the Permanent Mission of Uganda to the United Nations addressed to the President of the Security Council (S/12124) S/Agenda/1942 (12 July 1976).
43. Draft Resolution submitted by the United Kingdom and the United States, U.N. Document S/12138 (12 July 1976). Draft Resolution submitted by Benin, Libyan Arab Republic and the United Republic of Tanzania, U.N. Document S/12139 (12 July 1976).



# Chapter 28

## Terrorism is . . . ?\*

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*Terrorism, a term in common use, has little common meaning among its users. Individual experience, background, prejudice, and intention may flavor any attempt at definition but efforts toward increased clarity should continue. This article is such an endeavor.*

**W**hen one speaks of terrorism it is not always clear just what one has in mind. The term has no precise and completely accepted definition. Some countries label those who engage in violent acts against them as “terrorists.” Freedom fighters rarely label themselves in such a way, but they often claim they are subjected to governmental terror. “In short, the definition of terrorism seems to depend on point of view—it is what the ‘bad guys’ do.”<sup>1</sup>

Terrorism is frequently described as mindless, senseless and irrational violence. However, none of these terms is appropriate. It is not mindless and there is a theory of terrorism that frequently works. Terrorism should be viewed as a means to an end and not an end unto itself. While terrorist activity may appear random, closer examination reveals that terrorism has objectives. Attacks are often carefully choreographed to attract news media attention. Hostages serve to increase the drama, especially if their being killed is a possibility. Terrorism is aimed at the people watching and, in this sense, “terrorism is theater.”<sup>2</sup>

While the term “terrorism” is often indiscriminately used and is difficult to use accurately in a strictly legal context, it raises little doubt in the mind of the man in the street. Though definitional precision is difficult, terrorism is not hard to describe and, for those who have experienced it, is easy to comprehend. “Terrorism is thus an easily recognized activity of a bad character, subjectively determined and shaped by social and political considerations.”<sup>3</sup> The term is in flux—like fashion, it is anything we choose it to be. When the question “What is terrorism?” is raised, there always is present some sort of an answer, though it is often colored by the purposes of asking it.<sup>4</sup>

From a “purely physical” perspective, terrorism is not easily isolable from wars, disasters, and the like. And, when combined with the known subjectivity of those who seek to attach a definition to it, greatly complicates any attempt to count and measure terrorist trends.<sup>5</sup> Early attempts to isolate and deal with terrorism

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(1890s) produced a number of theories. Cranial measures of captured terrorists were taken and a connection between terrorism and lunar phases was detected. Cesare Lombroso, a distinguished criminologist of his day, found both medical and climatological explanations. "Terrorism, like pellagra and some other diseases, was caused by certain vitamin deficiencies, hence its prevalence among maize-eating people of Southern Europe." He also found that the further north one went, the less terrorism there was.<sup>6</sup>

A serious attempt to define terrorism was made in 1937 when the League of Nations formulated the Convention for the Prevention and Punishment of Terrorism. The Convention, signed by 24 States, was ratified by only one and never actually came into force. It was a direct response to the assassination of King Alexander I of Yugoslavia and the President of the Council of the French Republic in 1934 by persons who would now be described as Yugoslav freedom fighters or terrorists, depending upon one's political stance. The drafters concerned themselves with the problem as they saw it, namely, preparation of a convention to prohibit any form of planning or execution of terrorist outrages upon the life or liberty of persons taking part in the work of "foreign public authorities and services." The Convention was intended to suppress acts of terrorism having an international character only. "Acts of terrorism," as set forth in Article I, are "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or the general public."<sup>7</sup>

It is interesting to note that the League's successor, the United Nations, has been unable to agree on a definition of the term and has become diverted by an inclusive discussion of the causes and motives of terrorists.<sup>8</sup>

With the exception of a number of bilateral agreements for the exchange of intelligence and technical assistance, the international response to terrorism continues to be relatively weak. The United Nations, in the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States, adopted without vote by the General Assembly on 24 October 1970, asserts at one point that:

Every State has the duty to refrain from organizing, instigating, assisting, or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activity within its territory directed towards the commission of such acts when the acts referred to in the present paragraph involve a threat or use of force.<sup>9</sup>

However, this same declaration clouds the issue by the greater emphasis on "the principle of equal rights and self-determination of peoples." The language employed in this regard implies that it is the overriding duty of all States to assist groups struggling for the realization of these rights in every way possible. For example:

Every State has the duty to refrain from any forcible action which deprives people above in the elaboration of the present principles of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.<sup>10</sup>

Despite these problems, some international conventions that have dealt with one or another aspect of the terrorism problem have been adopted. These conventions are briefly summarized below:

— The Tokyo Convention (Convention on Offenses and Certain Other Acts Committed On Board Aircraft): Signed in September 1963, it did not come into force until December 1969. It is a very limited accord that does no more than set a few jurisdictional ground rules and require the contracting States to (1) make every effort to restore control of the aircraft to its lawful commander and, (2) arrange for the prompt onward passage or return of the hijacked aircraft together with its passengers, cargo, and crew.

— The Hague Convention (Convention for the Suppression of the Unlawful Seizure of Aircraft): Signed in December 1970, it came into force 10 months later. Its principal feature is that it requires (albeit with important discretionary exceptions) contracting parties either to extradite or to prosecute skyjackers.

— The Montreal Convention (Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation): Signed in September 1971, it came into force in January 1973. Covering the sabotage or destruction of aircraft or air navigational facilities, it requires the contracting parties to make such offenses subject to severe penalties and establishes the same extradition-or-prosecution system for offenders as in The Hague Convention.

— The Organization of American States Convention (Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance): Signed in February 1971, it entered into force in October 1973 (the United States is a signatory but not a party). With its emphasis on the prevention and punishment of crimes against persons to whom the State owes a special duty of protection under international law, it was a precursor of the U.N. convention concerning the protection of diplomats, cited below. It also employs the Hague Convention extradite-or-prosecute formula.

— The United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents: Signed in December 1973, it requires the contracting States to establish certain specified acts against protected persons (or against the official premises, private accommodations, or means of transport of such a person), as crimes under internal law. Once again, the Hague Convention's extradite-or-prosecute formula applies.<sup>11</sup>

— European Convention on the Suppression of Terrorism: Signed and entered into force 4 August 1978. It is very strong in its wording and states that none of the many acts (hijacking, kidnapping, use of bombs, grenades, letter bombs, etc.) “shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.” While Austria, the Federal Republic of Germany and Sweden readily signed, France, Italy, Norway and Portugal all attached reservations concerning the determination of a “political” offence.<sup>12</sup>

— Convention Against Taking of Hostages: Drafted by the United Nations during the first week of December 1979, it gives the nations that adhere to it a choice of prosecuting those who seize others with the intention of forcing a government to act or sending them back for prosecution in their native land. The Convention will come into force after 22 nations sign it. One article was contested by the Soviet Union and its East European allies. This specifically provides for the prosecution of a person who takes hostages but spares him from being sent home if extradition is requested to punish him for “race, religion, nationality, ethnic origin or political opinion.” The Soviets offered a counter proposal but it was defeated by a vote of 103 to 10.<sup>13</sup>

Although the above conventions reflect some international concern, they do not constitute effective constraints on terrorist activity. Many States, including most of those that have been particularly active in supporting revolutionary or national liberation groups, are not yet parties. Further, the conventions lack teeth in that all make the extradition or prosecution of terrorists subject to discretionary escape clauses and none provides for the application of punitive sanctions against States that simply refuse to comply at all.

Another aspect that makes defining terrorism difficult, other than the involvement of varying nationalities and cultures, is that terrorism may be committed for several purposes.<sup>14</sup> First, individual acts of terrorism may aim at wringing specific concessions, such as the payment of ransom or the release of prisoners. Second, terrorism may attempt the gaining of publicity. Third, terrorism may target the causing of widespread disorder, demoralizing society and breaking down social order. Fourth, terrorism may be aimed at deliberately provoking repression in hopes of inducing the government to “self destruct.”<sup>15</sup> Fifth, terrorism may also be used to enforce obedience and cooperation. Sixth, terrorism is frequently meant to punish. Terrorists often declare that the victim of their attack is somehow guilty of something.<sup>16</sup>

One fundamental aspect intimately related to the term *terrorism* is that it is a “bad” word.<sup>17</sup> No one desires to have the label applied to his activity. The employment of such terms as *freedom fighter* or *liberator* are attempts to mitigate what is in fact an ugly profession. If what terrorism stands for were basically “good,” the problem of definition would be easier.

To do unto others what is comprised in terrorism is recognized everywhere as being bad—unless, like war, it can be justified. Terrorism, so defined, is not something that in all conscience can be allowed of as being right and proper, unless there is a massive justification for it—in *which case it is not terrorism!*<sup>18</sup>

Here we encounter the fine line between terror and terrorism and the attempts to legalize or justify the former while proscribing the latter. Terror practiced by a government in office appears as law enforcement and is directed against the opposition. Terrorism, on the other hand, implies open defiance of law and is the means whereby an opposition aims to demoralize government authority. While the terrorist group may make no pretense at legality, legitimate government must at least formally adhere (or give the appearance of adhering) to the law. In the absence of directly supporting legislation, governmental terror is made to appear justified by declaring a state of emergency and the issuing of decrees.<sup>19</sup> From a legal point of view “there is nothing strange or incongruous about the dualism with which the phenomenon of terrorism is viewed.”<sup>20</sup>

Another example worth noting relates to an identical set of physical facts that can be criminal or noncriminal according to its association with “a specific mental element.” Murder and justifiable homicide are good examples. What is good or evil about the matter is not dependent upon the physical aspects of the case itself but rather on the way it is perceived. “The true struggle over definition in the area of terrorism is fundamentally between those who claim an exception at law for certain manifestly harmful conduct and those who will not admit it.”<sup>21</sup> When viewed this way, in terms of individual crimes, these acts, in and of themselves, are not terrorism. Terrorism is more the *why* of an act than the *what*.<sup>22</sup>

What about this legal definition of terrorism?

Terrorism involves the intentional use of violence or the threat of violence by the precipitator(s) against an instrumental target in order to communicate to a primary target a threat of future violence. The object is to use intense fear or anxiety to coerce the primary target to behavior or to mold its attitudes in connection with demanded power (political) outcome. It should be noted that in a specific context the instrumental and primary targets could well be the same person or group. . . . The crucial factor is that the task of deciding between the permissible and impermissible labels of a particular coercive process should be guided by community expectations and all relevant policies and features of context.<sup>23</sup>

Terrorism, like beauty, remains in the eye of the beholder.<sup>24</sup>

These efforts to reach an operational definition of terrorism are put forth not as an exercise in semantics but to illustrate the difficulty that surrounds this particular term. Further, they are an attempt to arrive at a readily workable definition that is more than just one writer’s view of the phenomenon. Studies of terrorism must try, when possible, to develop more precise language.

Common use of terms is a prerequisite for expanding knowledge. With this as a goal, the following definition is proffered:<sup>25</sup>

Terrorism is a purposeful human political activity directed primarily toward creation of a general climate of fear designed to influence, in ways desired by the perpetrator, other human beings and, through them, some course of events.

Terrorism poses an unacceptable affront to the principles on which an organized society rests. It is expressed through the employment of various criminal acts calculated to harm human life, property or other interests. Terrorists seek to arrogate to themselves and use the powers normally reserved to the State.

If this is an acceptable definition, types of terrorism need to be differentiated. The term *international terrorism* is frequently mentioned in the literature. This should be clearly distinguished from *transnational terrorism*. International terrorism ought to be employed carefully and applied to groups or individuals *controlled* by a *sovereign State*.<sup>26</sup> The term should not imply the existence of a “terrorist international”<sup>27</sup> in the sense of a central body coordinating the activities of terrorists in different countries. No evidence in this regard has been discovered.<sup>28</sup>

Transnational terrorism is carried out by basically *autonomous nonstate actors*, whether or not they enjoy some degree of support from sympathetic States.<sup>29</sup> The difficulty surrounding an accurate definition of terrorism presents itself again in dealing with topologies.

To find a solution to this dilemma we would best concern ourselves with the nature of the *act* as opposed to the nature of the group. A transnational terrorist act, then, may be viewed as one:

1. committed or taking effect outside the territory of a State of which the alleged offender is a national; and
2. committed or takes effect:
  - a. outside the territory of the State against which the act is directed, or
  - b. within the territory of the State against which the act is directed and the alleged offender knows or has reason to know that the instrumental target against whom the act is directed is not a national of the State;<sup>30</sup> or
  - c. the instrumental target is a national of the primary target State but is a different nationality from that of the offender; and
3. is intended to damage the interests of a State or an international intergovernmental organization;<sup>31</sup> and
4. is committed neither by nor against a member of the armed forces of a State in the course of military hostilities.

Before ending this definitional attempt, two concepts should be briefly addressed, namely; *nonterritorial terrorism* and *domestic terrorism*. The term nonterritorial came about because researchers found other terminology lacked the needed precision to provide effective analysis. Nonterritorial terrorism is defined

as "a form of terror not confined to a clearly delineated geographical area."<sup>32</sup> Today's terrorist is seen as having the potential for striking virtually anywhere at will. Brian Jenkins made reference to this when he described terrorism as ". . . a kind of warfare without territory, waged without armies as we know them. It is warfare that is not limited territorially; sporadic 'battles' may take place worldwide. It is warfare without neutrals, and with few or no civilian bystanders."<sup>33</sup>

While this effort removes barriers encountered in trying to "squeeze" a group into either the international or transnational definition, it, in a sense, removes too much and is too broad.

Domestic terrorism is activity by a State's nationals attempting to influence that State's behavior. All activity takes place within that State. The activities of the Symbionese Liberation Army is an example of this phenomenon. The George Jackson Brigade, active during the period 1975 through 1978, is another illustration. This particular group grew out of an unsuccessful prison reform movement and focused on the commission of urban operations directed against the "fascist" U.S. Government. Of the 28 actions (bombings and robberies) conducted by the group, 23 were against business, utility and commercial targets and the remainder against government or police facilities. The Puerto Rican Armed Forces of National Liberation (FALN) have operated both within Puerto Rico and major cities of the United States. The group is the most active of the so-called nationalist groups seeking an independent Puerto Rico. Since its founding in 1974, the FALN has carried out over 60 bombing operations. Within the United States, five persons have died and 75 have been injured.<sup>34</sup> The scope of these attacks could be viewed as limited and it may appear that the United States would not be vulnerable to a serious transnational attack within its boundaries. However, despite the growth of modern weaponry and the increased sophistication of defense planning, highly industrialized nations remain quite fragile. In fact, the highly technological, exposed and interdependent automated systems so essential in our modern society provide many prime targets for terrorist groups. Commercial aircraft, natural gas pipelines, electric power grids, offshore oil rigs, and computers storing government and corporate records are examples of sabotage-prone targets whose destruction would have more serious effects than their primary losses would suggest. Social fragility is reflected in the blackout that occurred in New York City (13 July 1977). The disproportionately high damage caused by uncontrolled looting and arson, resource shortages, and loss of public confidence, attests to urban vulnerability. On that day lightning completely disrupted the Consolidated Edison System, immobilizing ten million people. Subways and elevators came to a halt. Airports and television networks were forced to close down. Thousands of looters surged through the streets, resulting in 3,300 arrests and injury to nearly 100 policemen. It was estimated that the cost of the damage would be \$150 million.<sup>35</sup> If the blackout lasted 4 or

5 days, it is easy to picture New York almost completely paralyzed with numerous incidents of looting, arson, and panic. The point here is that an “act of nature” with the aid of human inefficiency produced a 2-day siege—a quite small but trained paramilitary force could take the city of New York or any other large metropolitan area off line for a considerable period of time.<sup>36</sup>

A poignant encapsulation of the “decade of dismal terror” has been presented by J. Bowyer Bell in his recent work, *A Time of Terror*.<sup>37</sup>

All now know the long and grotesque litany of massacre. Lod-Munich-Khartoum-Rome-Athens-Vienna. Now millions are familiar with the luminous dreams of the obscure South Moluccans and the strange Japanese Red Army, with the fantasies of the Hanafis and the Symbionese Liberation Army, and with the alphabet of death—PFLP, FLQ, IRA. Carlos-the-Jackal is a media antihero, and Croatia is now found in the headlines instead of in stamp albums. Anyone can be a victim, can ride the wrong airline, take the wrong commuter train or accept the wrong executive position abroad. While opening mail, passing a foreign embassy, standing in an airport boarding line or next to a car, or attending a diplomatic reception, any of us may draw a “winning” lottery ticket in the terrorist game. And everyone is the target of the television terrorists, choreographing massacres for prime time. After each crafted incident, terror still produces intense anguish and indignation, a plea if not for vengeance then at least for effective action. The target-audience has not become inured to violence. Repetition has established ritual, not ennui. Sophocles never pales nor, so far, has the murder of innocents, brought to us personal and close-up by the media.

Faced with what has been and recognizing what may well be, an attempt to clarify, through a definitional process, the nature of terrorism has been presented. I hope it will be subjected to scrutiny and criticism as we seek to agree on terminology free of confusion and complexity.

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Major Farrell wrote this paper while attending the College of Naval Command and Staff, Naval War College.

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### Notes

1. Jenkins, *International Terrorism: A New Kind of Warfare*, Rand Report P-5216 at 1 (June 1974).
2. *Id.*, at 3-4. To illustrate this, one has only to recall the Symbionese Liberation Army. Through the news media everyone became familiar with the seven-headed cobra symbol and heard audio tapes of the group's demands. A significant number of FBI agents and policemen were mobilized to track down the group. Patty Hearst's kidnapping added greatly to the notoriety as the group was viewed nightly by millions on network news. However, it has subsequently been determined that the group had only a dozen or so members at its height of strength. At its demise it had to its credit one murder, one kidnapping, one bank job and a few stolen cars. The difference between actual violence and the amplified effects of the violence is most notable. See also David Anable, “Coming to Grips with World Terrorism” *Christian Science Monitor*, 19 December 1975, p. 3, where terrorism is described as the “weapon of the weak . . . whose shock waves then buffet millions.”
3. Cooper, *What is a Terrorist: A Psychological Perspective*, 1 *Legal Med. Q.* 18 (1977) as reprinted in U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, *The Terrorist and His Victim*, Hearings (1977).
4. *Id.*

5. Johnson, *Perspectives on Terrorism*, in LAQUEUR, *THE TERRORISM READER* 269 (Laqueur ed. 1978).
6. Laqueur, *Terrorism—A Balance Sheet*, *id.* at 262-263. Presumably Eskimos would be immune from any inclinations in this direction.
7. Dugard, *International Terrorism: Problems of Definition*, *International Affairs* 67-69 (January 1974).
8. Louis Hoffacher, "The U.S. Government Response to Terrorism," *Vital Speeches of the Day*, 15 February 1975, p. 266. While the speech is slightly dated, it still holds true.
9. United Nations, *YEARBOOK OF THE UNITED NATIONS: 1970* at 790 (1971).
10. *Id.*
11. Milbank, *International and Transnational Terrorism: Diagnosis and Prognosis*, U.S. CIA Research Study PR76 10030 27 (April 1976).
12. ALEXANDER, *CONTROL OF TERRORISM: INTERNATIONAL DOCUMENTS 87-109* (1979). This compilation contains the text of treaties dating from 1902 dealing with extradition of those who commit terrorist or terrorist-like acts. It also contains U.S. Resolutions and International Civil Aviation Organization Resolutions.
13. *The New York Times*, 9 December 1979, p. 12.
14. Jenkins, *International Terrorism: A Balance Sheet*, in ENDICOTT & STAFFORD, *AMERICAN DEFENSE POLICY 184-186* (4th ed. 1977).
15. Brian Crozier, Director of the Institute for the Study of Conflict, London, in testimony before a U.S. Senate subcommittee, indicated that there were two main categories of terrorism: disruptive and coercive. The aims of disruption are: self-publicity, to build up the movement's morale and prestige; to discredit and demoralize the authorities; and to provoke the authorities into taking excessively harsh repressive measures, likely to alienate the population and force a rising spiral of official expenditure in arms, lives and money, resulting in public clamor for the abandonment of counteraction. On the other hand, the aims of coercive terrorism are: to demoralize the civil population, weaken its confidence in central authority and instill fear of the terrorist movement, and to make an example of selected victims by torture or death to force obedience to the leadership of the movement. U.S. Congress, Senate, Committee on the Judiciary, *Terrorist Activity-International Terrorism*. Hearings 181 (1975).
16. Jenkins makes this point most clearly with an illustration from the massacre at Lod Airport in 1972. He states that with terrorism there is a stronger connotation of guilt and punishment than in other forms of warfare or politics and a narrower definition of innocent bystanders. The victims of the Lod incident, many of whom were Christian pilgrims from Puerto Rico, were said by the terrorist to be guilty because they had arrived in Israel on Israeli visas and thereby had tacitly recognized the State that was declared enemy of the Palestinians and, by coming to Israel, they had in effect entered a war zone. What was being said was not that the victims were innocent bystanders unfortunately caught in a crossfire; neither was it saying it would seek and kill all those holding visas from the State of Israel. The organization was saying that those who happened to get shot—just because they were there—were nonetheless guilty or they would not have been shot. Stated another way, they did not become victims because they were enemies, but rather they became enemies because they happened to be victims. Jenkins, *supra* n. 14 at 186.
17. International Association of Chiefs of Police, Inc., Final Report, *Needs Assessment Study: Terrorism in Dade County, Florida* at 10 (Miami, FL: Dade-Miami Criminal Justice Council, July 1979).
18. *Id.*, at 11. The governments of Mexico and Brazil have not frequently used the labels "terrorist" and "political" for the urban terrorists. They use instead "criminal" and "bandit," hoping to deprive the terrorists of any glamour. Such a tactic makes any system of repression easier to justify, should the need arise. PARRY, *TERRORISM FROM ROBESPIERRE TO ARAFAT* 524 (1976).
19. Hardman, *Terrorism*, *THE ENCYCLOPEDIA OF THE SOCIAL SCIENCES* v, xiv, at 576 (1964).
20. International Association of Chiefs of Police, Inc., at 12.
21. *Id.* at 14.
22. One of the potential dangers that is embodied in the European Convention of 1978 cited above is its potential for not concerning itself with the "why" of a particular act. Blanket prohibition may be an overreaction and exemplify deterrence through "overkill." The several attached reservation tend to endorse this view.
23. Paust, *A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment, and Cooperative Action*, 5 Ga. J. Int'l & Comp. L. 434-435 (1975).
24. Numerous other definitions, or attempts at definition, are found in many of the works cited in this article. Others of interest are Bouthoul, *Definitions of Terrorism*, in CARLTON & SCHAEF, *INTERNATIONAL TERRORISM AND WORLD SECURITY* 50-53 (1975); Fromkin, *The Strategy of Terrorism*, *Foreign Affairs* 690 (July 1975); SCHREIBER, *THE ULTIMATE WEAPON: TERRORISTS AND WORLD ORDER* 20-37 (1978).
25. This definition closely resembles the one put forth on page 42 of the study by the International Association of Chiefs of Police, Inc. One of the major differences is the insertion of the word "political" between the words "human" and "activity." My reasons for doing this is to avoid admixing terrorism with gangland intimidation or similar acts. Terrorism is directly concerned with the exercise of, or the attempt to

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exercise, public powers or to influence the allocation of values by a ruling body. For those who may be interested in an excellently presented review of definitional efforts in this regard, see the cited study.

26. *Supra* n. 11 at 9.

27. This was stated by Brian Crozier as part of his testimony before the Senate subcommittee in 1975 and all indications are that it is equally true today.

28. While a central authority may be missing, there are many indications of cooperation between groups and open support from governments who support their objectives. A good example of this is the case of the Japanese terrorists who carried out the Lod Airport attack. They had received training from Syria and Lebanon, received money passing through Germany, received their arms in Italy, and carried out their act for the Popular Front for the Liberation of Palestine.

29. *Supra* n. 11 at 9. The author makes the following point:

Given the element of governmental patronage that is common to both, the boundary between transnational and international terrorism is often difficult to draw. To the degree that it can be determined, the key distinction lies in who is calling the shots with respect to a given action or campaign. Hence, groups can and do drift back and forth across the line. For example, even a one-time "contract job" undertaken on behalf of a governmental actor by a group that normally acts according to its own lights qualifies as international terrorism.

30. The person or person against whom the act is directed may be either the primary or instrumental target as indicated previously.

31. *Supra* n. 7 at 79. The basis of this definition was taken from Article 1 of the Draft Convention for Prevention and Punishment of Certain Acts of International Terrorism, submitted by the United States to the U.N. General Assembly, 26 September 1972. For a complete text see Alexander et al., eds., pp. 113-118. If we were to concern ourselves with the particular groups, we would seek to examine not only the site of the act but also such relevant aspects as the nationalities or foreign ties (i.e., training, funding, arms) of the group, sanctuaries, declared ideology and mechanics of the act's resolution. I am grateful for the assistance of Maj. Barton S.G. Edsall III, U.S. Air Force in "fine tuning" this section of this article. His "systems analysis approach" to each definitional attempt disclosed many initial weaknesses.

32. Sloan and Kearney, *Non-Territorial Terrorism: An Empirical Approach to Policy Formulation*, I CONFLICT 132 (1978). See also SLOAN, THE ANATOMY OF NON-TERRITORIAL TERRORISM, AN ANALYTICAL ESSAY (Gaithersburg, Md.: International Association of Chiefs of Police, 1978).

33. Jenkins, *supra* n. 14 at 4. The prolonged situation in Iran can be viewed (based upon available evidence) as initially beginning as mob action directed against the United States. However, as the incident progressed and governmental sanction of the activity was given, the act took on the flavor of international terrorism. In this sense the Iranian case can be viewed as evolving into a terrorist act inasmuch as the initial "purposefulness" is a matter of speculation.

34. Risks International, Inc., North America at 16-17, 21-22 (August 1979).

35. The New York Times, 15 July 1977, p. 1; 22 July 1977, p. 12.

36. KUPPERMAN, FACING TOMORROW'S TERRORIST INCIDENT TODAY 1 (October 1977).

37. BELL, A TIME OF TERROR 263 (1978).

## Chapter 29

# Military Involvement In Domestic Terror Incidents\*

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*The use of military force in domestic situations is severely limited by constitutional and statutory law. These limitations and some attendant ambiguities are of considerable legal consequence not only to the policymaking level of government but to local commanders in defining, planning for, and implementing the military role in domestic terror incidents.*

**T**he possible employment of American military forces in a large-scale domestic terrorist incident is a matter worthy of consideration. Such use of forces would entail significant legal decisions made in light of the role played by the military in American society. Before discussing the actual capabilities of existing forces, it is necessary to examine other factors in some detail.

In the comparatively recent period since the beginning of World War II, the American Military Establishment has passed through several distinctive phases.<sup>1</sup> Before the war, the military forces constituted less than one percent of the male labor force and were strictly volunteers. The enlisted force was composed mainly of people from working-class or rural origins, while officers were drawn predominantly from southern, Protestant, middle-class families. Socially, the pre-World War II military was self-contained and markedly separated from civilian society.

By 1945 close to 12 million people were in uniform, a large majority of whom were assigned to combat and service units. While these forces were socially representative of American society, the military remained an institution whose organization contrasted starkly with existing civilian structures. A large demobilization took place after the conflict, only to reverse itself to a ceiling of 3.6 million men at the height of the Korean war. Organizationally and materially, the armed forces of that war closely resembled those of World War II.

The military of the cold war, which averaged 2.5 million men, was composed increasingly of those with some form of technical specialization. The proportion of people assigned to combat or service units declined markedly with the corresponding increase of electronic and technical specialists. The war in Vietnam illustrated yet another phase of the armed forces in American society. Not

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only was the war itself opposed by many, but the basic legitimacy of military service was brought into question. Coupled with the antiwar feeling were the revelations of “atrocities” and “ecological devastation” in Vietnam. Adding to these woes were the reports of widespread drug abuse, corruption in the operation of clubs, cost overruns and military spying on civilian political activists.

The contrast in ideological and public evaluation of the American military establishment over three wars is revealing. In World War II, the American military was almost universally held in high esteem in a popularly supported war. Conservative and isolationist sectors of American public opinion were quick to fall in line behind a liberal and interventionist national leadership. In the wake of the Korean war, defamatory images of the American serviceman were propagated by right-wing spokesmen. Liberal commentators, on the other hand, generally defended the qualities of the American armed forces. In the war in Southeast Asia a still different image emerged. Although initially an outcome of a liberal Administration, the war came to be primarily defended by political conservatives, while the severest attacks on both the behavior of American soldiers and the military establishment emanated from the left.<sup>2</sup>

As the above would indicate, the domestic employment of military force could well depend upon society's view of the military as an acceptable institution. A President would be loathe to call in the military to quell a domestic incident when the presence of men and women in uniform could greatly exacerbate the existing turmoil.

Coupled with the concern for the perceptual considerations of the military as an institution is yet another serious aspect. Having once accepted the military as a valid (needed) part of society, the role it would be allowed to play in maintaining domestic security had to be examined. Many of the founding fathers considered that the arbitrary use of military force by the British was a factor contributing to the Revolution. By the separation of powers and the use of constitutional checks and balances, the control of the military was divided between the Federal Government and the states on the one hand and between branches within the Government on the other.<sup>3</sup> While many people have viewed these constitutional efforts as attempts to prevent the military from gaining too much political control, at least one author takes a different and very interesting view:

The Framers' concept of civilian control was to control the uses to which civilians might put military force rather than to control the military themselves. They were more afraid of military power in the hands of political officials than of political power in the hands of military officers.<sup>4</sup>

If there was a struggle for control of the military, it was not between the armed forces and civilians. Rather, it was a struggle between the Congress and the

President. The Chief Executive identified civilian control with presidential control, while Congress viewed it as congressional control.<sup>5</sup>

Whatever one's perspective, this congressional/executive power struggle had made political involvement with the military a matter of routine. While the executive branch has been generally in control since the end of World War II, Congress more recently has made vigorous efforts to regain some of that power (i.e., the 1973 War Powers Resolution) and reassert greater congressional control over the military. Such activity additionally provides the military an opportunity to take advantage of any political involvement.

As both parties to this struggle have maneuvered for an advantage, the military itself has been drawn into the controversy. Each side seeks to enlist the support and assistance of military leaders, the services, and even the entire profession. Executive Branch leaders call upon the Joint Chiefs of Staff and senior commanders to support Administration proposals for reorganizing the Defense Department, while congressional committees call upon the service chiefs and their deputies to oppose Defense Department efforts to increase centralized control over the services by the Office of the Secretary of Defense. As a result, the military is compelled to become involved in what is essentially a political power struggle—a power struggle that takes the form of disputes over policy decisions. In (Samuel) Huntington's words, "The separation of powers" between Congress and the President "is a perpetual invitation, if not an irresistible force, drawing military leaders into political conflicts."<sup>6</sup>

What we have, then, is a military that has been involved consistently in politics. The armed forces have not been an isolated segment of the population but, rather, an element very much subject to and a participant in our political system. Its role within our society has been the subject of much interpretation, both favorable and unfavorable. It is within these political and societal bounds that the President must make his choice for eventual employment in a domestic terrorist incident.

**Legal Rationale.** The current state of constitutional and statutory law severely limits the use of military forces in domestic situations. The authority to order the intervention of federal troops in domestic law enforcement generally centers on the office of the President.

The strongest legal prohibition against the use of military force to execute civil and criminal law is Title 18, Section 1385, of the U.S. Code, Use of Army and Air Force as *Posse Comitatus* (power of the county). This provides that whoever, except under circumstances expressly authorized by the Constitution or Congress, willfully uses any part of the above-stated forces as a *posse comitatus* or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than 2 years or both. The Act was originally passed in 1878 as the result of the use of U.S. troops by President Grant "to secure the better execution of the laws" during the election of 1876.<sup>7</sup> During debates in Congress

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at the time it was argued that the Army had been used improperly to execute local laws, control strikes and collect taxes, and that these “improper” actions had been performed at the behest of U.S. attorneys and law enforcement agents.

Various Army reports were cited showing that in 1871 four companies helped collect revenue in New York, that from 1871 through 1875 there were more than 441 reported incidents in Kentucky in which soldiers were called out to aid federal and state law enforcement authorities, and that in 1876 at least 71 detachments of soldiers aided civil authorities.<sup>8</sup>

Originally, the *Posse Comitatus* legislation prohibited only the Army from aiding civil authorities. In 1956 the Act was added to Title 18 of the U.S. Code, and the Air Force was included to reflect earlier legislation separating the two services. There has been a good deal of controversy resulting from the fact that the Navy (to include the Marine Corps) has not been specifically included. While there was extensive debate for years on this issue, the Secretary of the Navy clarified the matter in 1974 when he issued a directive forbidding Navy and Marine Corps personnel from enforcing or executing local, state, or federal civil law in violation of the *Posse Comitatus* Act.<sup>9</sup>

The U.S. Coast Guard is under the jurisdiction of the Navy during war and therefore would be controlled by the Act. However, during times of peace it is not completely clear exactly how the Act would apply inasmuch as the Coast Guard is under the jurisdiction of the Department of Transportation.<sup>10</sup>

As indicated earlier, the President could call into federal service the militia of any state and such armed forces as he considers necessary to suppress “unlawful obstructions, combinations or assemblages, or rebellion” against the authority of the United States or any state in particular.<sup>11</sup>

This authority is contained in the Constitution which states (*italics added*):

. . . He shall receive ambassadors and other public ministers; *he shall take care that the laws be faithfully executed*, and shall commission all the officers of the United States.<sup>12</sup>

The United States shall guarantee to every State in this Union a republican form of government and *shall protect each of them against invasion*; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.<sup>13</sup>

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*<sup>14</sup>

The following federal statutes allow the President to use federal troops under certain conditions (*italics added*):

Whenever there is an insurrection in any State against its government, the President may, upon request of its legislature or of its governor if the legislature cannot be

convened, call into federal service such of the militia of the other States, in the number requested by that State, and use such of the Armed Forces, as he considers necessary to *suppress the insurrection*.<sup>15</sup>

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into federal service such of the militia of any State, and use such of the Armed Forces, as he considers necessary to *enforce those laws or to suppress the rebellion*.<sup>16</sup>

The President, by using the militia or the Armed Forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, *any insurrection, domestic violence, unlawful combination, or conspiracy*, if it-

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.<sup>17</sup>

Although the *Posse Comitatus Act* prevents the use of federal troops to enforce federal or state laws without constitutional or statutory authorization, it does not forbid the loan of military material and equipment to federal law enforcement agencies in connection with a continuing civil disorder.

In *United States vs. Red Feather* (one of the "Wounded Knee" cases)<sup>18</sup> the court ruled that the loan of military equipment was not a violation of the Act. The court went one step further, outlining the differences between the use of federal troops in an *active* role of executing the laws and the *passive* role in which they would indirectly aid civilian law enforcement by saying:

Based on the clear intent of Congress, this court holds that the clause "to execute the laws," contained in 18 U.S.C. 1385 makes unlawful the use of federal military troops in an active role of direct law enforcement by civil law enforcement officers. Activities which constitute an active role in direct law enforcement are: arrest; seizure of evidence; search of a person; search of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect and other like activities . . . .

However,

Activities which constitute a passive role which might indirectly aid law enforcement are: mere presence of military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of

military personnel to deliver military material, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment, and to maintain such material or equipment; aerial photographic reconnaissance flights and other like activities.<sup>19</sup>

**Legal Difficulties.** While certain aspects of the law are clear, there are others that are undergoing close examination to remove ambiguities. Both the Department of Justice and the Department of Defense continue attempts to come to grips with this uncertainty in efforts to coordinate their preparations for and response to domestic terrorism.<sup>20</sup> The actions considered center on the use of military force with their civilian counterparts before actual use of the armed forces has been authorized under the provisions outlined above, inasmuch as, prior to their being invoked, the *Posse Comitatus* Act forbids civilian authorities from using the military to carry out their own responsibilities.

One aspect of concern for the military is to determine at what point military observers could be sent to the location of an event without violating the law. The Department of Justice appears to endorse the finding of the *United States vs. Red Feather* case while indicating that some disagreement exists about what additional activities the military observer could engage in (e.g., maintenance of equipment as it is being used by civilian authorities) without going beyond the limits of the law. Mere presence at the scene would not be viewed as a violation of the *Posse Comitatus* Act. It was also noted that in the court's review of the cases resulting from the Wounded Knee incident,<sup>21</sup> it was not explicitly set forth that the impending use of military force was needed as a justification for the presence of military observers. Concern had also been voiced about the propriety of liaison for the purpose of sharing intelligence concerning a terrorist incident. The prevailing thought is that the prohibition of use of the military by civilian authorities to execute laws does not bar contact for the sole purpose of enabling the military to obtain knowledge relating to a situation. If it appears that it may be necessary to preposition troops in anticipation of their actual employment, such prepositioning is not determined to involve actual enforcement and, therefore, would not be considered illegal. Likewise, reconnaissance by the military, independent of civilian law enforcement, would be considered legal in the sense that it was done with the expectation that forces would be needed to augment local authorities.

The foregoing discussion indicates that the use of military force must be an option taken after due consideration of the social, legal and political context of an incident. The President, satisfied that the employment of military force is needed, would issue the necessary orders through the Secretary of the Army who is the Executive Agent for the use of military forces in civil disturbances. These forces are assigned or committed to him through the Chief of Staff, U.S. Army (CSA).<sup>22</sup>

The concept of operations involved is detailed in the Department of the Army Civil Disturbance Plan, "Garden Plot," which provides for the employment of military forces in times of civil disturbance within the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and U.S. territories or possessions.<sup>23</sup> The definition of a "terrorist" incident as defined in the plan is extremely broad, providing considerable latitude for interpretation.<sup>24</sup> Military commanders who have been delegated the authority to supply equipment, in those cases in which it may be difficult to determine whether an incident falls into the terrorist category, are "authorized to accept the judgement of the FBI official making the request if it is supported by available facts." The FBI official does not have to be the Director but may well be the senior agent on the scene.<sup>25</sup>

As a matter of policy, the FBI has been given overall jurisdictional responsibility at the locus of a terrorist incident wherever it occurs, including military installations.

Department of Defense components are authorized to respond to "reasonable" requests of the FBI for military resources. The form of assistance may include material, facilities, and technical personnel acting in an advisory capacity. As noted above, military personnel could not be used in a law enforcement role outside a military installation without Presidential authorization. While troops can be made available to the FBI with approval of the President, command and operational control would remain with the military.

Requests for training, long-term loans of equipment and other requests not based on imminent threats or ongoing incidents would be forwarded through FBI and Department of Justice (DOJ) channels for submission by DOJ to the Secretary of the Army.

Procedurally, the secretaries of the military departments, commanders of military installations or organizations with delegated authority, and the commanders in chief of unified and specified commands outside the United States could grant requests for riot control agents, concertina wire, firefighting resources, protective equipment, clothing, communications gear, searchlights, explosive ordnance disposal and detector dog teams. Other items not prohibited could be provided.

Although circumstances will determine the order in which various forces are employed, it is envisioned that first local and state police would be used, followed by Army and Air National Guard under state control and, finally, federal military forces.<sup>26</sup>

The commitment of federal military forces as set forth in "Garden Plot" has been viewed as a drastic last resort and their role should never be greater than absolutely necessary under the particular circumstances that prevail. Firepower is to be limited, with only semi-automatic weapons used. Where automatic weapons must be employed, they will not be fired automatically, except on order of competent authority as delegated by the task force commander.<sup>27</sup>

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Because the use of deadly force invokes the power of summary execution it can be justified only in extreme necessity. Its use is not authorized for the purpose of preventing activities that do not pose a significant risk of death or serious bodily harm.<sup>28</sup>

Having set forth the prohibition on the use of force under *Posse Comitatus*, two significant exceptions must also be addressed. Under certain circumstances, readily conceivable, military force can be employed domestically without Presidential proclamation.

As a result of the Organization of American States "Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance" and the U.N. "Convention on the Prevention of Crimes Against Internationally Protected Persons," the U.S. Congress had to pass effecting legislation. It is standing policy of the State Department not to deposit an instrument of ratification unless it is assured that federal law would permit the United States to discharge fully its treaty obligations. The safeguards of this legislation not only pertain to Heads of State but also to:

Any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodations or his means of transport, it committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.<sup>29</sup>

Additionally, the legislation authorized "The Attorney General, in the course of enforcing the provisions of the statute relating to internationally protected persons to request assistance from any federal, state, or local agency."<sup>30</sup> Specifically, the law reads:

In the course of enforcement of this and any other sections prohibiting a conspiracy or attempt to violate this section, the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy and the Air Force, any statute, rule, or regulation to the contrary notwithstanding.<sup>31</sup>

This particular piece of legislation's provisions parallel part of Public Law 91-644 passed in 1971 dealing with Congressional assassination, kidnapping and assault. That law stated that whoever kills or kidnaps (or attempts same) of any individual who is a member of Congress or a member of Congress-elect shall be punished and

Violations of this section shall be investigated by the Federal Bureau of Investigation. Assistance may be requested from any Federal, State, or local agency,

including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.<sup>32</sup>

In their concern to protect foreign dignitaries and themselves, members of Congress enacted two laws that provide a basis for overriding the letter and intent of *Posse Comitatus*. It is interesting to note that the implications of this were not completely realized by members of the Executive Committee on Terrorism until 1980, when a legal advisor in the Department of State brought it to their attention. As one participant at the meeting described the effect on those present, it was profound.<sup>33</sup>

While it is not expected that the military would, in fact, be called up without the President being informed, it is a vastly different situation than the need for Presidential authority for such action. It is interesting to speculate about the stand of the Department of Defense in such a situation. Two strong tides would be drawing on the decision makers: the continuance of the longstanding tradition of abstaining from civil affairs versus the opportunity to prove successfully (it is hoped), in the wake of the Iranian mission, that a true counterterror capability exists within the armed forces.

***Military Capabilities.*** “Garden Plot” provides the basis for planning the use of military personnel and equipment to respond to terrorist acts. What the plan does not indicate is the full complement of military capability. This issue of capability, not only as it pertains to the military, has been the subject of intense discussion. “Specialists in the field” and “high-ranking officers familiar with the activities” have repeatedly contended that the U.S. antiterrorist competence is relatively weak.<sup>34</sup>

In response to questions raised by the Committee on Government Affairs of the U.S. Senate, Assistant Secretary of Defense for International Security Affairs, David E. McGiffert, gave testimony relative to United States’ capability for dealing with terrorists. At these hearings on the Omnibus Antiterrorist Act, Senator John Glenn asked about United States’ capabilities similar to those displayed by Israel’s *Saiyeret* at Entebbe, the West German *Grenzschutzgruppe-9* at Mogadishu and the Egyptian commando force at Cyprus. The reply was that, although never activated as of that time to counter a terrorist threat or act, U.S. forces consisted of Army, Navy and Air Force units trained in counterterrorism. Further, the emphasis on training was for employment abroad because use of Army personnel domestically “would require waiver by the President of the *Posse Comitatus* Act.”<sup>35</sup> These forces were described as “specially trained military” which are among the resources of the Department of Defense available as “may be appropriate in a terrorist situation.”<sup>36</sup>

Such testimony could have been interpreted as the United States having available a strike force that is comparable to the West German Border Protection

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Group Nine (G.S.G.-9), which was formed as a result of the Munich Olympic massacre. Under the leadership of Ulrich Wegener, G.S.G.-9 might be one of the most formidable antiterrorist groups in the world. Each member of the group must be a volunteer, capable of maintaining calmness under the most severe stress, and possess a minimum I.Q. of 110. Rigorous training in martial arts, hand combat, scuba diving and special weapons use has built a team capable of quick, decisive action as exemplified by the success at Mogadishu.

Other countries have also formed specialist antiterrorist teams, such as the British Special Air Service (SAS) that was created during World War II and used successfully in London in 1980. The French have a highly respected 30-man team, the *Gigene*, and the Italians formed a 50-man *Squadra Anti-Commando*.<sup>37</sup>

Compared to these “lean and mean” units, the United States identified the following U.S. military forces as having counterterrorist capabilities:<sup>38</sup>

1. U.S. Army Ranger Battalions
  - 588 men
  - Located at Fort Stewart, Ga, and Fort Lewis, Wash.
2. USMC Battalion Landing Team
  - 1200 men
  - Located at Camp Lejeune, N.C., Camp Pendleton, Calif., and on Okinawa
  - Can be air-landed
3. USMC Marine Amphibious Unit
  - 1800 men
  - Located in WESTPAC and Mediterranean (afloat)
  - Immediately available but location varies
  - Can be landed by helicopters
4. U.S. Army Special Forces
  - Nine battalions of 242 men
  - Located at Fort Bragg, N.C. (5), Fort Devens, Mass (2), Canal Zone (1), and FRG (1)
  - Response time varies depending on current operations/training missions underway
  - Parachute qualified
  - Language qualified for many areas
5. U.S. Marine Force Reconnaissance Company
  - One company of 190 men
  - Located at Camp Lejeune, N.C.
  - Parachute, scuba qualified
  - Extensive training suitable for counterterrorist operations
6. U.S. Navy, Sea, Air, Land (SEAL) Platoons
  - Nineteen platoons of 14 men each

- Located at Little Creek, Va. (7), Coronada, Calif. (10), and Subic bay, Phil.
- (2)
- Capable of infiltration/exfiltration by submarine, boat, ship, aircraft, and parachute

#### 7. Air Force Support

- Special mission aircraft
- Combat Talon—nap-of-the-earth penetration methods. Located in Florida, Okinawa, and Germany
- Combat specter gunships located in Florida

It is obvious from this listing that the U.S. Forces that have been designated are heavy in terms of men, equipment and firepower when compared to their European counterparts.

McGiffert's testimony to the Senate subcommittee further stated that:

- Depending on the nature of the mission, the size of U.S. military forces may range from a small element to a larger task force.
- Force size is scenario-dependent and the division of labor between units is tailored to specific circumstances and technical requirements.
- Counterterrorist exercises have been conducted.<sup>39</sup>

In terms of planning:

- The JCS has developed plans to provide for U.S. military operations to counter terrorist activities overseas.
- There are a number of terrorist acts that might trigger a U.S. military response. Possible military missions range from the rescue of hostages from a hijacked U.S. aircraft to recovery/neutralization/destruction of stolen nuclear weapons.<sup>40</sup>

Yet one analysis of the degree of U.S. preparations led its authors to contend that:

Today, the United States has no single unit equivalent to the West German Border Group Nine (Grenzschutzgruppe Neun or G.S.G.-9 for short), successful at Mogadishu, which is authorized to act outside of our borders in response to terrorist action aimed at American interests or citizens abroad. Domestically, we have three degrees of antiterrorist capabilities: First, some local police departments have developed and fielded antiterrorist units. At the second level of slightly higher response, we find a few state and Federal special teams and armed forces elements with limited special training. Whether the state units could operate internationally or the military could perform domestically is questionable, but at least the raw resource is recognized and present to some degree. At the highest tier, that of transnational terrorism, however, there is a cloud.<sup>41</sup>

Both the authors of this study and other have made reference to "Blue Light." The term possibly came from the flash of the stun grenades that were used at

Mogadishu. Other authors assigned the name "Operation Blue Light" to a combined force of Army, Navy, Air Force and Marine personnel. It has been written that the force called "Blue Light" was one established by order of President Carter in March 1978. The force, under command of Col. Charles Beckwith, is 200 men strong, given special weapons and training, and is retained as a specialized force.<sup>42</sup> Newsweek magazine also reported in 1977 that the Pentagon maintained two special 600-man "Black Beret" Army Ranger battalions at Fort Stewart, Georgia, and Fort Lewis, Washington.<sup>43</sup>

The true nature of the U.S. military counterterrorism capability began to unfold in 1980 in the wake of the aborted Iranian rescue mission. The impression created by the testimony of McGiffert was shattered like the wreckage of the aircraft left behind in the desert. The review report presented by Adm. (Ret.) James L. Holloway III, provided a narrative of the events leading up to the mission and a clear indictment of many aspects of the operation.<sup>44</sup>

Immediately following the hostage seizure, a small planning cell working at the Pentagon and augmented by two officers from the ground rescue force (described above under the command of Col. Beckwith) began to formulate concepts for military operations as directed by the Chairman, Joint Chiefs of Staff (JCS). During the early stages, existing JCS contingency plans were employed only relating to the use of intelligence assets and the selection of the ground rescue force. Other significant areas, such as organization planning, integration of concurrent planning by subordinate units and the determination of support requirements were compartmentalized and based upon *ad hoc* arrangements.

Training was quickly undertaken and the helicopter option was recommended as having the best chances of success. An Air Force general was appointed as a special advisor to the task force based upon his recent experience in Iran. The senior Marine officer involved in the operation was assigned to the Office of the Chairman JCS and while not officially designated a member of the rescue task force, became actively involved in mission planning especially relating to helicopter training.

It was implied that this officer was in charge of the helicopter force during the preparation phase, and he believed this to be so. However, COMJTF (Commander Joint Task Force) may have thought differently, and it was evident the first two months of training that much (if not all) of the COMJTF effort concerning helicopter preparation and special mission capability was done through the general officer who was thought to be the consultant on Iran. In mid-January 1980, the role of senior Marine had evolved into that of overall helicopter force leader, and since no other designation had been made, and at his request, he began to attend the COMJTF planning meetings.<sup>45</sup>

The officer who served as the Deputy Commander of the Air Force component was “just prior to (mission) execution” designated “on scene” commander at the desert site:

... implying a command, control and communications (C<sup>3</sup>) capability to exercise command. This was not fully provided. A general officer served primarily as a consultant on Iran from late November 1979 to mid-February 1980. He spent considerable time during this period at the western training site in the western United States monitoring helicopter and other air training. On 12 April 1980, he was designated the Deputy COMJTF.<sup>46</sup>

Additionally, the Holloway group faulted the operation’s security as being too stringent, causing excessive compartmentalization and planning review by those who had actually drawn up the original plans.<sup>47</sup> The available existing intelligence assets were seen as being deficiently managed and integrated.<sup>48</sup> Training activity was faulted as being too decentralized,<sup>49</sup> and lacking overall management.<sup>50</sup> Communications between the helicopters and transport aircraft at the desert rendezvous were all seen as deficient in some respects.<sup>51</sup> Finally, the size of the helicopter force and the accuracy of weather data were criticized by the review group.<sup>52</sup>

On the positive side the report noted:

We are, nevertheless, apprehensive that the critical tone of our discussion could be misinterpreted as an indictment of the able and brave men who planned and executed this operation. We encountered not a shred of evidence of culpable neglect or incompetence.

The facts are that, in the conduct of this review, we have seen infinitely more to be proud of than to complain about. The American servicemen who participated in this mission—the planner, crewman, or trooper—deserved to have a successful outcome. It was the ability, dedication, and enthusiasm of these people who made what everyone thought was an impossibility into what should have been a success.

Finally, we were often reminded that only the United States military, alone in the world, had the ability to accomplish what the United States planned to do. It was risky and we knew it, but it had a good chance of success and America had the courage to try.<sup>53</sup>

In the late summer of 1980 the Department of Defense announced that it would establish a counterterrorist task force with specialists from the Army, Navy, Air Force and Marines. The unit is to be responsible for gathering information concerning the tactics and operations from other special groups such as the British SAS and the West German G.S.G.-9. Should an incident take place the unit would allegedly put together a strike force from the military services according to the needs of a specific mission.<sup>54</sup> The core of this counterterror capability is said to be the “few hundred commandos” of the Army’s Delta Team headquartered at Fort Bragg, North Carolina.<sup>55</sup>

The Joint Chiefs of Staff also has organized a panel of senior officers, both active and retired, to oversee training and operational plans.<sup>56</sup> Further information concerning the size, scope and capabilities of this entire effort is not available because of security considerations.

The United States in the early 1980s finds itself on the horns of a dilemma. President Reagan has pledged "swift and effective retribution" against acts of international terrorism directed against the United States. However, the ability of this nation to conduct a military response has been attempted only once and the effort was unsuccessful. Though some have argued that the failure centered on a logistical problem not likely to occur again, the result remains the same. Secretary of Defense Caspar W. Weinberger enunciated his difficulty in testimony before Congress when he advised that "describing the country's antiterrorist capabilities might compromise a future operation, but that keeping them secret was preventing him from sending a strong message to potential terrorists."<sup>57</sup>

Deterrence is one of the four main blocks of the U.S. strategy to counter terrorism. Integral to deterrence strategy are capability, credibility, and communication. This requires that those seeking to employ this concept need to communicate their capability to insure its credibility to the adversary.<sup>58</sup> Thus, the decision faced by Secretary Weinberger is indeed a difficult one.

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This paper was written as part of a larger study of the U.S. Government's response to transnational terrorism.

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### Notes

1. Moskos, *The Emergent Military: Civil, Traditional, or Pluralistic?* in ENDICOTT & STAFFORD, *AMERICAN DEFENSE POLICY* 527-537 (1977).

2. *Id.* at 528-529.

3. Garrison, *The Political Dimension of Military Professionalism*, in ENDICOTT & STAFFORD, *supra* n. 1 at 582.

4. *Id.*

5. *Id.*

6. *Id.* at 583.

7. Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, Mil. L. Rev. 83, 91-92 (Fall 1975).

8. *Id.* at 92. It should be noted that the vote to pass the act was fairly close: 130 to 117 with 44 abstentions.

9. *Id.* at 103.

10. Rabe, *Crisis Management of Terrorist Incidents: Legal Aspects and Issues*, 14 (Unpublished paper, copyright 1979 by author).

11. *Id.*

12. *U.S. Constitution*, Article 2, Section 3.

13. *Id.*, Article 4, Section 4.

14. *Id.*, Article 14, Section 1.

15. U.S. Laws, Statutes, etc., "General Military Law," *U.S. Code, Title 10 sec. 331—Armed Forces*, 1973 ed. (1974).

16. *Id.*, sec. 332.

17. *Id.*, sec. 333.

18. These cases stemmed from the takeover of the hamlet of Wounded Knee on the Oglala Sioux reservation in South Dakota by armed supporters of the American Indian Movement (AIM), February 1973. They sought a review of the 371 treaties between the U.S. Government and the Sioux Indians. Additionally, there was also concern for alleged corruption within the Bureau of Indian Affairs. The 70-day confrontation ended in May of that year with the Government promising an intensive investigation into the complaints. Several people were killed and wounded during the incident.

19. *Supra* n. 10 at 17.

20. The content of this and the next several paragraphs is based upon interviews of personnel assigned to the Department of Defense's Office of International Security Affairs and the Department of Justice's Emergency Programs Center.

21. *Supra* n. 7 at 83-136. During the civil disturbances at Wounded Knee, South Dakota (March 1973), the Department of Defense sent an Army colonel to observe the disorders instigated by the members of the American Indian Movement. As an observer he was not violating the *Posse Comitatus* Act; however, the officer actually became an advisor to the civil law enforcement agents, giving advice on rules of engagement, negotiation and placement of equipment. He also obtained another active-duty Army colonel to assist with logistical support. The judge in the Red Feather case concluded that the colonels' advice (as well as the aid given by the vehicle mechanics and pilots) was passive involvement. He reasoned that only active involvement such as participation in arrest, search of persons and places, seizure of evidence and the pursuit of escaped prisoners violates the Act. However, both the DOJ and DOD in policy statements tend to back away from the Red Feather case and state that the use of equipment loaned to civil authorities would be authorized but the operators "employed in connection with loaned equipment may not be used in a direct law enforcement role." This matter is still not clearly resolved and may yet require further judicial review.

22. U.S. Department of the Army, *DA Civil Disturbance Plan (Garden Plot)* (Washington: 3 August 1978), p. 1.

23. *Id.* at C-2.

24. *Id.* at 0-1. A Terrorist incident "is defined as a distinct criminal act committed or threatened to be committed by a group or single individual in order to advance a political objective, and greatly endangering safety or property."

25. *Id.* at 0-2.

26. *Id.* at C-1.

27. *Id.* at C-10-1.

28. *Id.*

29. *United States Code, 4 Congressional and Administrative News, 4481 94th Congress, Second Session* (1976).

30. *Id.* at 4483.

31. *United States Code, 2 Congressional and Administrative News, 1998 94th Congress, Second Session Public Laws 94-456 to 94-588* (1976).

32. *United States Code, Annotated, Title 18, Crimes and Criminal Procedure, Unannotated Text* (1970) p. 16.

33. Interview with a member of the Executive Committee on Terrorism (14 November 1980).

34. *The New York Times*, 23 April 1978, p. 14.

35. McGiffert, "Testimony," U.S. Congress, Senate, Committee on Governmental Affairs, *An Act to Combat International Terrorism, Hearings at 192* (1978).

36. *Id.* at 191-192.

37. *Newsweek*, 31 October 1977, p. 51.

38. *Supra* n. 35 at 195.

39. *Id.*, at 197.

40. *Id.*

41. Del Grosso & Short, *A Concept for Antiterrorist Operations*, Marine Corps Gazette 54 (June 1979).

42. DOBSON & RAYNE, *THE TERRORISTS* 144-145 (1979).

43. *Newsweek*, 31 October 1977, p. 51.

44. Holloway, *Rescue Mission Report*, 15-16 (Unpublished paper for Joint Chiefs of Staff, Washington, D.C.: August 1980).

45. *Id.* at 16.

46. *Id.* at 16-17.

47. *Id.* at 13.

48. *Id.* at 20.

49. *Id.* at 23.

50. *Id.* at 25.

51. *Id.* at 29.

52. *Id.* at 34, 41.

53. *Id.*, Forwarding statement, page unnumbered.

54. *The New York Times*, 3 February 1981, p. B-13.

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55. The Washington Post, 7 February 1981, p. 10.
56. The New York Times, 3 February 1981, p. B-13.
57. *Id.*
58. EVANS, *CALLING A TRUCE TO TERRORISM* 63-67 (1979). This book provides an excellent discussion of deterrence theory in relation to terrorism.

## Chapter 30

# Terrorists and Chemical/ Biological Weapons\*

Elliott Hurwitz

**W**ith all of the interest that has been shown in terrorism in recent months, relatively little attention has been paid to the possibility that terrorists could dramatically escalate the type of weapons they use, and so pose a much greater threat to organized societies and governments than they do at present. What we have in mind is a terrorist group's use, or credible threat to use, mass casualty weapons—those that can cause several hundred to tens of thousands of casualties in a single attack.

Some attention has been paid, in both fictional and nonfiction accounts to the possibility that terrorist groups might acquire nuclear weapons.<sup>1</sup> To be sure, the acquisition of a nuclear device by a terrorist group would indeed be a spectacular event of high political moment and grave public concern. It would mark a new era in terrorist operations and might have an important effect on the political balance in a particular region. However, the seriousness with which we view such a threat is reduced by the extreme difficulty that any terrorist group would face in fabricating or stealing a nuclear device. In effect, the very difficult technical and political problems that a group would have to overcome in order to acquire a weapon have reduced our anxiety that such an event could occur.

However, there exists a second category of mass casualty weapons whose use terrorists could plausibly consider: chemical/biological (C/B) weapons. While these weapons do not quite have the unique destructive power or political force of nuclear weapons, their acquisition and credible deployment by a terrorist group would undoubtedly be considered as a very significant—and ghastly—escalation of the terrorist threat. The use of C/B weapons in a terrorist incident—for example, an attack with a nerve agent on a large auditorium that caused several thousand casualties—would traumatize the government at which the attack was aimed. If the terrorists were well organized and the initial attack were followed up with threats to use C.B weapons again, the possibility exists that widespread social disruption or even panic might result. *Most significantly, and most disturbing, if appears from the available evidence that it is entirely feasible for a terrorist group of even*

\* Reprinted from the Naval War College Review May-June 1982.

*modest resources to acquire and effectively use C/B weapons.* For, as will be shown later, the chemical and laboratory supplies needed to prepare lethal agents are freely available, and the required procedures are discussed in literally dozens of articles in the open literature.

It is the purpose of this article to explore the question of C/B weapons and their possible use by terrorists. We will describe the nature of terrorism, how terrorists could acquire and plausibly use C/B weapons, and give our view of the outlook for terrorist use of C/B weapons. We should emphasize that by illuminating the possibility that C/B weapons might be used by terrorists, this article is intended to stimulate more effective preparation by governments and security agencies for that possibility. It is not intended to alert any terrorist group to the existence of a terrible new weapon that they have thus far overlooked. In fact, for any terrorist group interested in escalating the weapons in its arsenal, numerous books and articles in the general literature and the publicity surrounding the repeated uses of C/B weapons by the Soviets and their surrogates in Laos, Cambodia, and Afghanistan will already have served as ample notice.<sup>2</sup>

Looking at the goals of terrorists and the ways in which they operate, it would seem at first glance that terrorism is the type of instrument for which C/B weapons would be ideally suited. Consider the following attributes of terrorism:

- Terrorism is not just what terrorists do, but is the general sense of alarm and fear that they cause by their actions.
- Public perceptions of terrorism in the world appear to be governed not by the actual level of violence, but by the quality of the incidents, the location, and the media coverage. For example, more people tend to recall the hijacking in the United States of a TWA airliner in September 1976 by Croatian extremists—resulting in one death—than remember the bomb explosion three weeks later that destroyed a Cubana airline with the loss of 93 lives.
- Terrorism, at bottom, is theater. Terrorist will adapt to maintain their “Broadway presence,” endeavor to stay ahead of counter-terrorist preparation, maintain their facade of strength, and increase the audacity, drama, and magnitude of their threat.

Considering these attributes of terrorism, wouldn’t terrorists find C/B weapons to be an ideal instrument by which to escalate their threat and maintain their “Broadway presence?” Before attempting to answer this question, it is useful to examine the types of scenarios in which terrorists might use C/B weapons and the objectives that they would probably want to achieve by this dramatic escalation:

- A large or a sophisticated terrorist group might, after considerable debate, decide “rationally” that the use of C/B weapons was to its advantage. A credible threat of a mass casualty C/B attack, perhaps preceded by a “demonstration” with casualties numbering in the hundreds, would be viewed as a highly leveraged instrument of coercion that could crack the resolve even of intransigent governments

that had not yielded to less severe threats. The goals of such a threat might include the release of imprisoned comrades, a very large ransom, a demonstration of the government's impotence, and perhaps televised speeches of concession by government leaders.

- In the hands of a group such as the IRA that perceived straightforward military value from the use of C/B weapons, these weapons might be used in an attack on an enemy military or political target of extremely high symbolic or actual importance.

- In a less "rational" mode, C/B weapons might be used by an extremist group that had little concern about alienating an outside constituency, but perceived that it might, through a last desperate act or series of acts, achieve a measure of influence. If it failed to influence events, a group could try to destroy what it could not control, avenge its killed or tortured comrades, or simply attack the members of a group that they despised or considered as subhuman. Finally, one could consider the use of C/B weapons as an instrument of punishment by desperate terrorist group facing imminent defeat and the loss of all that they had fought for. Historically, the model for this would be the final desperate acts of terrorism carried out or planned by the Secret Army Organization in Algeria in 1962. In the future, one could imagine an extremist Palestinian group using C/B weapons in a desperate last-ditch effort to block an Arab-Israeli peace treaty.

If terrorists were to use C/B weapons in a mass casualty attack, there is no doubt that it would be an event of singular visibility and importance. The particular group would receive enormous publicity, and the event would be perceived as not just *another* assassination, kidnapping, bombing, or hijacking. The effect would be even greater if the attack took place in a western city such as London, Paris, or New York. The context of the attack and the terrorists' ability to threaten more such incidents would also influence perceptions.

If it is so plausible and potentially so effective for terrorists to use C/B weapons, then why haven't more groups made use of these weapons? It isn't because C/B agents are too difficult to make or acquire. In fact, as scary as it may seem, making or otherwise acquiring C/B agents is well within the capabilities of a terrorist or other group of even modest resources.

It's relatively easy to make violently toxic nerve agents because the techniques by which they are made are similar to those used for insecticides, and in some cases may simply involve taking as intermediate products insecticides or other chemicals that can be purchased commercially and putting them through one additional chemical reaction. The equipment needed and the chemicals are readily available from chemical supply houses. And the chemical procedures used are described in dozens of articles available in the open literature.

The nerve agent sarin for instance, discovered by German scientists in the late 1930s, is an order of magnitude more potent than the agents that caused so many casualties during World War I. Yet, although preparing it might be a risky

business, sarin can be synthesized in 100 gram quantities by an organic chemist with modest graduate training for an investment of only a few thousand dollars.<sup>3</sup> (It should be remembered, however, that a larger quantity would probably be needed for a successful attack.)

It may be even easier for terrorists to acquire biological weapons than it would be for them to acquire chemical weapons. Quantities of clostridium botulinum, the bacillus that produces botulinum toxin, is available from the American Type Culture Collection, in Rockville, Maryland, for a fee of \$34. All that the collection requires is that the request be made on a business letterhead or requisition form from a suitable research facility or laboratory, a procedure that would seem to be well within terrorist capabilities. There is even an 800 number provided for easier service!<sup>4</sup>

Once the bacillus has been acquired, a terrorist need only grow the culture under anaerobic conditions in a pure culture in order to produce the deadly botulinum toxin. (The botulinum toxin is one of the most deadly substances known to man. It has been estimated that seven ounces of botulinum toxin, if efficiently dispersed, would be sufficient to kill *the entire human population of the world*. It should be kept in mind, however, that the purification process is complex and that a small quantity might not be adequate for an effective attack.)<sup>5</sup>

It would be somewhat more difficult for a terrorist group to disperse C/B agents in an actual attack than it would be to acquire the agents themselves. Efficient dispersal presumes a thorough knowledge of the spaces that are to be attacked and the air flow within them, as well as a precise knowledge of the physical properties of the C/B agent used. However, even if the terrorists only managed to reach 10 percent of the intended victims with a lethal dose of the dispersed agent, the casualties from a single terrorist attack—depending on the scenario and the agent used—might easily amount to several thousand deaths.<sup>6</sup>

How might an actual attack take place? It is frighteningly simply. Terrorists using biological agents could disperse them among bulk food supplies, e.g., at a central market, a large-scale catering operation, or even a single supermarket. Chemical agents could be effective if introduced into the air handling system in a small office building or dispersed, say, from an ice cream cart standing amidst thousands of people in a large auditorium. (Introducing an agent into a municipal water supply would not be a credible threat because of the huge volume of water that would need to be contaminated and the numerous steps in the filtration and purification process.)

*So why haven't terrorists made more use of C/B?* It is the belief of the author that terrorist groups have not so far (with minor exceptions) used C/B weapons because of a straightforward assessment that the potential gain may not exceed the potential loss. Looked at in this coldly rational way, the "benefits" that a group could expect to achieve from a successful mass casualty C/B attack and the credible threat to repeat the episode would be spectacular visibility and

excellent short-term bargaining power against a resistant government. Even such stalwarts as Margaret Thatcher, Menachem Begin, or Ronald Reagan would find it difficult to resist terrorist demands after 1,000 to 2,000 of their citizens had died in an initial incident.

On the other hand, the terrorist organization that used C/B agents in a mass casualty attack would take a tremendous risk of alienating key friendly and neutral constituencies. Years of patiently cultivating the support of certain groups might be sacrificed in a few moments. World opinion might be quite hostile in the aftermath of this "heinous crime." Even the adversary government might harden its policies after the initial threat had failed. It is this risk that a C/B attack might backfire and cause perverse results that has so far limited the use of these weapons by terrorists.

However, the fact that terrorists have not paid much attention to C/B weapons in the past does not assure that they will not do so in the future. The ready availability of C/B agents that can be used in an attack means that, for a major incident to occur, only one terrorist group at any single point in time needs to find that such a weapon meets its requirements. As mentioned earlier, groups that might find C/B weapons to their liking include radical groups opposed to any accommodation with the enemy or mainstream groups that want to kill thousands at a prestigious enemy military or political facility. While the question of whether terrorists will use C/B weapons in a mass casualty attack is unknown—and perhaps unknowable—this author believes that the odds are perhaps even or slightly higher that an attack will eventually occur. Established governments and security agencies would do well to recognize this threat and make plans to deal with it before it actually materializes.

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Elliott Hurwitz was serving as a Senior Analyst of Ketron, Inc., at the time this article was first published.

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### Notes

1. LAPIERRE & COLLINS, *THE FIFTH HORSEMAN* (1980); Jenkins, *Nuclear Terrorism and Its Consequences*, *Social Science and Modern Society* 5 (July/August 1980). Some of the points made below on potential terrorist goals and actions have also been taken from this article.

2. Sources that discuss the potential for C/B terrorism include: Mullen, *The Clandestine Use of Chemical or Biological Weapons*, *International Association of Chiefs of Police* (1978); Mullen covers much of the same ground in his article, *Mass Destruction and Terrorism*, *J. Int'l Aff.* 63-89; (Spring/Summer 1978), KUPPERMAN & TRENT, *TERRORISM, THREAT, REALITY, RESPONSE* (1979). Pages 62-68 deal with potential use of C/B weapons.

3. Mullen, *supra* n.2 at 10.

4. American Type Culture Collection, Rockville, Md.: *Ordering Information*.

5. KUPPERMAN & TRENT, *supra* n.2 at 361.

6. Mullen, *supra* n.2 at 16; KUPPERMAN & TRENT, *supra* n.2 at 361.



## Chapter 31

# Offshore Maritime Terrorism: International Implications and the Legal Response\*

Christopher C. Joyner

**O**ffshore maritime terrorism is a crime waiting to happen. Even so, that such maritime terrorism has not yet gripped the public's attention, nor stirred polemical debate in legal circles, nor produced pronounced policy reactions by governmental officials is hardly surprising. To date, not a single incident involving an illicit seizure or destruction of an offshore drilling platform or rig has been reported. Consequently, policy contingencies in the event such acts are perpetrated have been kept cloistered and thus remain cloaked in legal ambiguities—a situation not unlike aircraft “skyjacking” prior to the intense proliferation of incidents during the early 1970s.<sup>1</sup>

Nevertheless, the international political milieu of the early 1980s differs markedly from that of a decade ago. In this regard, since 1970 politically inspired terrorist violence has attracted ever increasing attention as it has grown in frequency and pervasiveness. Terrorism apparently not only is becoming psychologically accepted as an anticipated—indeed, some would argue practically an inevitable<sup>2</sup>—facet of the international political process; it also is being actively legitimized as a policy instrument to intimidate governments and to influence public opinion.

Concurrent with the disturbing rise in terrorism over the past decade has come an equally sensational albeit wholly unrelated development: the rapid growth in energy demands to meet burgeoning needs created by accelerated industrialization and modernization programs worldwide. Correspondingly, as the search for more exploitable hydrocarbon energy resources has proceeded, so too has the allure and economic feasibility of offshore drilling ventures increased. Regrettably, the proliferation of such offshore operations implicitly carries with it concomitant opportunities for being potential targets of terrorist groups.

Appreciating these observations, this article seeks to achieve three principal aims. First, it undertakes a discussion and evaluation of the threat posed by terrorists to offshore maritime structures. Second, an analysis is performed of the

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status such terrorist acts would assume under international law, especially with reference to coastal state jurisdiction, the relevance of international piracy law, and the doctrine of State responsibility. Third, an assessment is made of the present capacity of coastal States to dissuade and curtail maritime terrorism. Toward this latter end, some policy-oriented recommendations for fashioning an effective, more clearly elaborated antiterrorist deterrent program for seaward drilling structures are proffered for reflection and critical consideration.

### The Terrorist Threat to Offshore Structures

Transnational terrorism has become a stark fact of modern life. Recent data indicates that in 1981 more than 2,500 terrorist incidents occurred worldwide, including at least 600 assassinations, 960 bombings, and 825 facility attacks.<sup>3</sup> *Inter alia*, the unremitting widening economic gap between rich and poor nations, aggravated by the attendant socio-psychological dislocation and frustration it produces; the easy market access any interested purchasers have to conventional weapons and explosives; and, the rather blatant political, financial, ideological, and material support given by some governments to radically militant organizations or “national liberation movements”—these factors in combination have served to foster and facilitate conspicuous resort to terrorist violence worldwide.

As stated earlier, hydrocarbon resources extracted from the oceans’ depths are assuming increasing importance for the world economy. As demand for and expectation of petroleum and natural gas have intensified, so too the amount of commercially available land-based supply has been depleted. Consequently, in recent years declining exploitable reserves on land, coupled with advancements in appropriate oceanic engineering technology, have enhanced the economic feasibility of moving offshore to undertake deep-water drilling ventures.

As evidence of this trend, in 1969 world production of crude totaled 15.2 billion barrels, of which some 2.26 billion barrels (or 14.9 percent) came from offshore wells; by 1980 the world crude production total had reached 21.8 billion barrels, but the offshore contribution had climbed to exceed 5 billion barrels (or about 23 percent).<sup>4</sup> When viewed within the context of the persistent increase projected for world energy consumption, and the lucrative exploitation opportunities afforded by potential offshore hydrocarbon resources reserves,<sup>5</sup> it is not unexpected that drilling operations have proliferated offshore. Accordingly, thousands of platforms related to oil and gas extraction have been constructed on continental shelves throughout the world. In this connection, operation platforms off the United States’ coast alone in January 1981 reportedly numbered more than 3,800.<sup>6</sup> Perhaps of greater salience for this study, the world fleet of offshore mobile drilling rigs is growing dramatically. Whereas in March 1982, 527 rigs were operating,<sup>7</sup> by May the number had risen to 592,<sup>8</sup> and by early 1983, the petroleum industry calculates the number of available offshore drilling

rigs to reach 720.<sup>9</sup> Save for Antarctica, these rigs operate seaward from every continent.

To be sure, multinational oil companies are among the most prominent, profitable, and economically visible corporate actors engaged in international trade and commerce. To wit, worldwide investment for petroleum exploration and exploitation in 1980 approximated \$100 billion (of which nearly \$75 billion was allocated by U.S. industry alone).<sup>10</sup> As would be expected, the increasingly sophisticated technology needed to extract hydrocarbon resources from environmentally inhospitable deep-water sites (such as the North Sea) have necessitated more extensive capital outlays. Thus, the sheer magnitude of the economic investment required by multinational corporations to construct and maintain offshore drilling installations render them all the more enticing as targets for a terrorist attack.<sup>11</sup>

As of this writing no noteworthy terrorist actions have yet been launched against any offshore drilling structures. Nevertheless, recent patterns of terrorist activities in Western Europe suggest that a new trend may be on the rise, one that counts as prime targets local power plants and other industrial facilities such as nuclear generators, oil tank farms, and gas pipeline systems.<sup>12</sup> If this indeed is the case, any of the seventy or so North Sea drilling rigs would provide attractive targets. Costing up to \$2 billion each, these platforms supply much of the energy needs for the North Sea nations. Accordingly, they are considered vital national assets by Great Britain, Norway, West Germany and the Netherlands, and to this end, special patrol vessels, troops, and aircraft have been committed and assigned by these governments to defend their offshore structures from the prospect of terrorist attacks. Put tersely, for these nations the threat of terrorism is perceived as being very real and, consequently, is taken quite seriously.<sup>13</sup>

**Possible Terrorist Strategies.** Before proceeding to the international legal nuances earmarking terrorism in general and its applicability to offshore drilling structures in particular, brief mention is merited about possible terrorist strategies. Four main options or tactical designs seem most plausible for a terrorist unit to undertake in executing an attack against maritime structures.

- First, terrorists could opt to sabotage the connecting pipeline system and pumping machinery between the deep-water facility and its onshore relay stations. Logistically, this option would allow for a relatively simple operation, entailing less risk than a sea-based attack, with potentially the same results, i.e., the production facility would be crippled, and widespread media attention would be galvanized on the attack.

- A second conceivable scenario would find the terrorists merely issuing a threat to destroy the facility unless some political precondition is met or monetary extortion is paid. Admittedly, this option could allow sufficient time for the crew to evacuate the platform and reduce the possible loss of human life. Even so,

were the facility to be destroyed, technology worth millions of corporate dollars would be lost; and, perhaps even more important, it is likely there would be considerable environmental degradation and ecological damage if an oil spill or well blowout occurred.

- Still another plan would involve “hijacking” the offshore facility. That is, terrorists could attack a rig either by surface ship, submersible vessel, or from the air (viz., by helicopter), capture the crew, and hold them and the structure hostage for ransom or political extortion. This situation would present the traditional negotiating confrontation between hostage-takers and the respective authorities.

- Last, though certainly not least in terms of probability, some terrorist organization might decide to destroy a drilling platform without warning and claim “credit” for the act *ex post facto*. In this manner, the profound fear of indiscriminate injury stemming from terrorism, as well as the focus of media publicity upon the perpetrators could be achieved with graphic results, and very likely with only a minimal chance of apprehension.

**Assessment.** In sum, terrorist activities are expressly designed to produce psychological and symbolic effects rather than to attain physical or material gains. Attacks aimed at innocent victims—for example, a rig crew or living resources in the ocean—could be especially effective in that these victims would become highly salient pawns in a tense bargaining situation. As a consequence, such perceptions could engender sympathy from the public and, coincidentally, increase pressure upon governmental authorities to succumb to the terrorists’ demands. Herein is couched a catch-22 paradox associated with terrorism generally: On the one hand, if a government reacts too vehemently or capriciously against terrorist activities (e.g., by suspending civil rights and liberties), then it may appear to the citizenry as being overly repressive and authoritarian. On the other hand, should a government’s policy toward terrorism be perceived as weak, indecisive, or nonassertive, then very likely that response might foster further attacks over the short term.

### The Status of Offshore Maritime Terrorism in Contemporary International Law

There is little doubt amongst Western expert commentators that terrorists in general should be regarded as international criminals. More to the legal point, terrorism essentially is viewed as a stateless crime, ostensibly directed against all States. Even so, securing a universal consensus on the legal niceties of terrorism has not been so neatly achieved. As one commentator has observed: “The United Nations, in view of the ideological and political divisions among its 150 member States [has] not reach[ed] any agreement on a definition of terrorism. Nevertheless, as a result of the extreme vulnerabilities of our complex society and the

growing challenge to governments presented by non-state groups having access to modern weapons capabilities, a new sense of greater realism about 'terrorism' is slowly emerging."<sup>14</sup>

This "greater realism" and the implicit need to scotch—or at least patently discourage—transnational terrorism through international legal conduits has become unmistakably evident. In recent years, specific antiterrorism conventions concerning aviation hijacking,<sup>15</sup> crimes against diplomats and other protected persons,<sup>16</sup> hostage-taking,<sup>17</sup> and terrorism *per se*<sup>18</sup> have been promulgated. Relatedly, international condemnation of the Khomeini regime's blatant support in 1979 of the Iranian "students" illegal seizure of the United States embassy and jailing of its official personnel suggests that a government's recognized legitimacy under international law can be grievously undermined by its use, advocacy, or indulgence of overt terrorism.

Notwithstanding this, while terrorism has become a manifest reality of contemporary world politics, its exact status under international law remains open to conjecture and polemical interpretation. The chief difficulty for this confusion seems to lie in the subjectivity of defining precisely what constitutes an act of terrorism. That is, the somewhat hackneyed bromide, "One man's terrorist is another man's freedom fighter," plainly presents the key problem; i.e., politics intrudes into the domain of international law, and consequently muddies the waters of universal juridical interpretation. Would destruction of an offshore drilling platform by some minority ethnic group or nationality, avowedly done in pursuit of securing its own political independence and recognized national homeland, entail a breach of international law? It follows logically that such an act would indeed abrogate international legal norms. However, what if said terrorist action had been directed at a regime whose domestic and foreign policies were themselves perceived as being legally suspect, say, for instance by defending or endorsing colonialism, imperialism, or apartheid? The answer for this query comes not so fast.

The point here is that terrorism in general suffers from an imprecise status in international law, save for certain specified crimes.<sup>19</sup> Violent terrorist acts directed at privately owned offshore drilling facilities are likely also to be viewed selectively as either episodes in a process of self-determination or as base crimes committed against the law of nations. Undoubtedly, in substantial measure political convenience is likely to prove to be the preeminent arbiter in interpreting the legitimacy of such acts. Respective to the legal jurisdiction over terrorist activities perpetrated against offshore structures, however, recent developments pertaining to the law of the sea have contributed significantly to making the situation less ambiguous both legally and politically.

*Legal Jurisdiction over Offshore Maritime Terrorism.*

**1. Maritime Zone Delimitations.** Inasmuch as offshore drilling structures legally may be classified as “artificial islands” under customary international law (as well as under most domestic legal system),<sup>20</sup> they assume particular relevance in the emergent law of the sea. Since late 1973 diplomats from some 160 nations have been formally engaged in a series of complex, protracted negotiations—the third United Nations Conference on the Law of the Sea (UNCLOS III)—an aim of which is to produce a comprehensive multilateral treaty for regulating use and exploitation of the world’s oceans.<sup>21</sup> These negotiations have produced the United Nations Convention on the Law of the Sea signed at Montego Bay, Jamaica, on 10 December 1982 (the United States is not a signatory). Importantly, this treaty very likely will come to be regarded by the vast majority of States as the modernized codification of ocean law. Hence, those provisions in the Convention which specifically are applicable to artificial islands, especially as regards their jurisdiction and the coastal State’s responsibilities, merit particular attention here.

*a. The Territorial Sea.* Since the seventeenth century, international law has mandated that a belt of sea (inclusive of the airspace above and the seabed and subsoil below) three nautical miles in breadth be reserved for the coastal State’s exclusive sovereign jurisdiction. Since World War II, however, this customary tenet of law has come under increasing challenge; consequently, the international community’s contemporary consensus as embodied in the draft text affirms that a territorial sea may extend out to a distance of twelve nautical miles.<sup>22</sup> Accordingly, any fixed facilities operating offshore within this zone, be they privately or governmentally owned would be subject to the sovereign legal jurisdiction, regulation, and, presumably, protection of the coastal State. As a result, all acts of terrorism directed against installations situated in territorial waters perforce not only would constitute violations of international law generally but also would abrogate domestic law specifically.

*b. The Exclusive Economic Zone.* In the currently emergent law of the sea, a novel departure from traditional maritime zonal delimitations has rapidly evolved. This rather radical modification, known as the exclusive economic zone (EEZ) entails an extensive assertion of coastal State jurisdiction over contiguous marine waters, principally for purposes of resource management and development. Extending seaward not beyond 200 nautical miles, the “exclusive economic zone is an area beyond and adjacent to the territorial sea,”<sup>23</sup> in which the coastal States exercises:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of

energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

- (i) the establishment and use of artificial islands, installations, and structures;
  - (ii) marine scientific research;
  - (iii) the protection and preservation of the marine environment;
- (c) other rights and duties provided for in this Convention.<sup>24</sup>

Of special relevance for this study, coastal State jurisdiction explicitly is provided for those activities on “artificial islands, installations, and structures.” In relevant part, Article 60 of the 1982 LOS Convention stipulates that:

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
  - (a) artificial islands;
  - (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
  - (c) installations and structures which may interfere with the exercise of the rights of the coastal States in the zone.
2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal health, safety and immigration laws and regulations.<sup>25</sup>

Of related importance, coastal States may establish around these facilities “reasonable safety zones” of up to 500 meters, within which “it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.”<sup>26</sup> Presumably, unauthorized activities detected in these safety zones could serve as a reasonable cause for the coastal State’s legal intervention into a suspected related incident involving immobile installations in an EEZ.

*c. The Outer Continental Shelf.* Still another aspect of the law of the sea relevant to offshore maritime installations—and thus to terrorist actions taken against them—concerns access to continental shelf areas. Article 77 of the 1982 LOS Convention provides that “The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.”<sup>27</sup> That permission from a coastal State is required before undertaking extractive measures on the continental shelf is unmistakably assured by Article 80, which, in full, mandates that: “Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.”<sup>28</sup> Put succinctly, this provision imbues a State’s government with the exclusive rights to construct, authorize and regulate artificially implanted facilities located within a 200-mile economic zone seaward from its coast.

To summarize, legal jurisdiction over all activities occurring on or around man-made installations as far seaward as 200 nautical miles ultimately will fall under the supervisory, regulatory, and enforcement aegis of the coastal State’s

government. To this end, should acts of marine terrorism occur against offshore extractive structures in these zones, a coastal State would be duly authorized under the 1982 LOS Convention to take appropriate steps in rejoinder, whether they be nonviolent or involving use of force. The fact that such installations only could be constructed *in situ* by means of a licensing arrangement with the coastal State's government further substantiates this conclusion.

**2. Offshore Maritime Terrorism as Piracy.** As mentioned, terrorism can be aptly viewed as a stateless crime directed against international society. Similarly, the classic legal perception of piracy holds that "Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessels of any particular State, and brought within its territorial jurisdiction, for trial in its tribunals."<sup>29</sup> One might suitably infer that overt acts of maritime terrorism perpetrated against the crew of an offshore facility conceivably could qualify as modern day piratical acts under international law. Unlike nearly all other aspects comprising the changing law for the oceans, however, present legal norms pertaining to piracy have remained locked in custom and correspondingly sealed by the legal 1958 Geneva Convention on the High Seas.<sup>30</sup> As a consequence, serious juridical and definitional difficulties arise when one equates offshore maritime terrorism with the traditional international law pertinent to piracy.

As defined by customary international law, an act of piracy *jure gentium* had to be "adequate in degree—for instance, robbery, destruction by fire, or other injury to persons or property."<sup>31</sup> Moreover, said act must have been committed on the high seas, as opposed to similar illicit acts committed within some States' jurisdiction.<sup>32</sup> Lastly, the perpetrators, "at the time of the commission of the act, should be in fact free from lawful authority . . . in the predicament of outlaws."<sup>33</sup> Thus the international crime of piracy *jure gentium* came to be predicated upon indiscriminate plunder by a private vessel against commercial vessels on the high seas.

During the twentieth century, the traditional definition of piracy as robbery on the high seas became more comprehensively refined by the so-called Harvard Research on International Law Group. In 1932, the Harvard Researchers' Draft Convention on Piracy concluded that: Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any State:

"Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends and without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character."<sup>34</sup> While not a legally binding codification,

the Harvard Group's conception of piracy introduced the notion of "private ends" motivation as a necessary element for an act of piracy to occur.

Significantly, this precondition subsequently was codified into the 1958 Geneva Convention on the High Seas. Article 15(1)(a) of that instrument stipulates piracy to be: "any illegal acts of violence, detention, or any act of depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed on the high seas, against another ship or aircraft or against persons or property on board such ship or aircraft."<sup>35</sup> According to this provision, then, piracy as a crime was not limited to robbery, plunder or pillage at sea. So long as: an act of violence occurred on the high seas or outside the jurisdiction of any coastal State; it was committed for private, as opposed to public reasons; and, it was performed by a private vessel against another vessel—then, the criteria for international piracy would be met in full.

Though admittedly slightly abridged, it bears noting that the 1958 Geneva definition of piracy was inserted practically verbatim into the 1982 LOS Convention as Article 101:

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).<sup>36</sup>

The traditional legal character and criteria of piracy as international crime thus was preserved for its application to contemporary acts and incidents.

The relevance which piracy's conceptual evolution as a normative consideration under international law holds for acts of offshore maritime terrorism is clear: Such latter depredations fail to meet the definitional test of piracy on at least four counts. First, although admittedly earmarked as illegal violence or detention, an incident involving maritime terrorism is not likely to be perpetrated for "private ends." Rather the motive most likely is apt to be *politically* inspired, thereby rendering the action more suitably subsumed under international law as a facet of war, belligerency, or aggression.<sup>37</sup> Second, an act of maritime terrorism taken aboard or against a stationary platform literally would not involve a vessel-to-vessel encounter. (Mobile rigs might be considered vessels under admiralty law.) Rather, a vessel-to-fixed facility incident would transpire. Third, the high seas

qualifications for piratical acts would go unfulfilled. Because of their explicit extractive purpose, offshore extractive installations, with only a paucity of conceivable exceptions, would be located within the territorial jurisdiction of some coastal State. Continental shelves rarely extend seaward beyond the 200-nautical-mile EEZ delimitation; consequently, all activities on these platforms would be subsumed under the jurisdictional purview of the appropriate coastal State. Incidents of terrorism would not be any exception.

**3. Offshore Maritime Terrorism and Coastal State Control.** Coastal State control over offshore facilities vis-à-vis terrorist threats should be viewed in at least three lights: national regulation, maintenance of public order, and national defense. Each of these responsibilities relates to the security of the structure, and thus have important implications for effectuating antiterrorist policies.

*a. National Regulation.* As defined, national regulation entails “the imposition of requirements on some aspect of the design, construction, operation or maintenance of an offshore structure with which the owners or operators of the structure must comply or be liable under civil law.”<sup>38</sup> To be sure, the regulatory authority possessed by a coastal State’s government provides a convenient vehicle for protecting offshore structures.

Obviously, coastal State regulations could be fashioned in such a manner that they would render offshore installation less vulnerable to attack. Specifically, regulations could be designed purposefully to improve a structure’s physical security by requiring builders to use reinforced materials that are more highly resistant to explosives, as well as to enhance appropriate damage control systems; and to improve administrative and inspection security systems that could more expeditiously deter, dissuade, or detect an impending terrorist attack.<sup>39</sup>

As previously noted, international law recognizes the right of each coastal State to construct artificial islands or fixed platforms in the waters off its shores. In this connection, national regulation of offshore rigs and structures must be designed prudentially and comprehensively to ensure that it encompasses a myriad of relevant activities. Sale of mineral rights leases on the outer continental shelf; conservation and management of continental shelf resources; approval of pipeline conduits over and on the shelf region; domestic construction of vessels and semisubmersible drilling rigs operating offshore; promotion of safety for life and property on and under coastal waters; establishment of shipping lanes and vessel traffic control patterns; creation and enforcement of environmental standards and antipollution policies—all these are activities appropriate for regulation oversight by the national government. Even so, for offshore structures, most coastal States have tended to deal with such regulation in a piecemeal fashion, i.e., by applying disparate legislative provisions enacted at different times, often done with unrelated purposes in mind.<sup>40</sup> The point to be underscored here simply is that the welter of governmental agencies involved—many of which frequently

may have conflicting jurisdictional priorities—poses a significant problem for coastal States in regulating, construction, supervision and protection of offshore extractive facilities.<sup>41</sup> Consolidation of regulatory responsibility therefore into a more centralized comprehensive legislative scheme would seem to proffer better opportunities for dealing with offshore maritime terrorism.

**b. Maintenance of Public Order.** There is no question that the ocean energy industry constitutes a prime national asset against which terrorists could inflict serious damage and in the process generate widespread sensationalistic publicity. Further, there is little doubt regarding the legal parameters of such acts. Jurisdictionally, they fall within the territorial legal purview of the coastal State, and are thus made subject to its criminal laws, as well as its domestic means of enforcement and prosecution.

However, for many coastal States a major obstacle seemingly impeding adoption of national antiterrorist response plans is the yet unclear situation regarding specific *in situ* jurisdiction. Does the protection responsibility for offshore structures fall principally to private oil companies defending their own corporate property? Or, is it attributable more so to local government agencies enforcing their regional law offshore? Or, perhaps the proper responding agency should be the coast guard, presumably an armed service empowered to enforce national maritime regulations? Not to be overlooked, what role should a State's navy play in undertaking protecting measures against terrorists as part of its mission to defend the nation against enemies in coastal waters? While each of these queries suggests plausible and well intentioned options, the distinct realization surfaces that responsibilities could overlap, policies could be duplicated (or worse, neglected), and contingency reactions confused. Expressed tersely, a coastal State's responsibility for law enforcement offshore must be unambiguous, resolute, and clearly defined.

As discussed above, authority for a coastal State's maintenance of public order over extractive activities offshore has been clearly stipulated in international law. Most recently, the 1982 LOS Convention provides in Article 73 that: "The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."<sup>42</sup> For many coastal States, the most plausible national alternative for sustaining public order over ocean space offshore would be an agency trained particularly for that purpose. Such an organization would be a coast guard-like force, possessing the authority to "make inquiries, examinations, inspections, searches, and arrests upon the high seas and [territorial] waters" in order to prevent, detect and suppress violations of a coastal State's municipal laws.<sup>43</sup> Moreover, determination of the most appropriate agency to enforce criminal law against terrorist activities offshore must ultimately rest with

the coastal State government, based upon proven maritime capabilities and experience.

*c. National Defense.* Responsibility for safeguarding offshore drilling platforms from terrorist attacks initially rests with the corporate owner or operator, unless of course the facility is government-owned. Nevertheless, a fine line exists between what constitutes an attack made by profiteering criminals, politically inspired terrorists acting alone, terrorists acting on behalf of another State (i.e., mercenaries performing surrogate warfare), or some foreign State's regular armed forces operating under the guise of terrorists. Depending upon the case, the attack might be construed as an action necessitating either a law-enforcement response or a national defense (i.e., military) response. Because of time constraints the need for expeditious reaction, and the possibility of interagency confusion or misappropriation, having a force capable of performing both roles would appear very desirable. For most coastal States, their national coast guards could perform this mission adequately. For other States where particular geographical circumstances or environmental conditions make regular coast guard patrols impractical or overly onerous, maintaining a ready reserve strike force that is specifically trained for the eventualities of such terrorist attacks would entail a welcome measure of added security.

### Recommendations for Policy Consideration

As gleaned from the legal analysis and political observations above, some policy-oriented recommendations vis-à-vis offshore maritime terrorism seem appropriate. Accordingly, two pertinent approaches for policy consideration loom apparent: prevention, and punishment.

*Preventive Measures.* The best cure for offshore maritime terrorism is intentional dissuasion through prevention. Generally speaking, prevention against such terrorist attacks can be achieved in great part by pursuing a threefold policy-oriented strategy consisting of "The Three P's": *Planning, Preparedness, and Performance.*

In planning, there is an integral need to consider a wide variety of conceivable terrorist situations and scenarios; risk assessment of platform vulnerability should be performed, evaluated, and appraised. Contingency plans and options should be drawn up and distributed throughout the facility's operational hierarchy on a "need-to-know" basis. Put tersely, the more thorough the planning, the more prepared the offshore facility is likely to be.

With regard to preparedness, training programs assume critical import. Written instructions outlining how and when to implement emergency plans should be made accessible to decision makers, and command-control communications networks should be set up to ensure constant interface between a sea-based

structure and the requisite industry officials, as well as relevant law enforcement agencies, on shore. Most specifically, several defensive measures can be effected to enhance security preparedness. For example, backgrounds of employees having access to the drilling platform should be carefully screened for past criminal involvement or linkages to suspect political groups. All materials and containers brought onto a facility should be inspected judiciously to guard against smuggling of explosives or weapons aboard. Fixed schedules should be assigned so as to prevent unauthorized entry to a platform, and specific blocking procedures should be devised in the event they become necessary.<sup>44</sup>

Not to be overlooked, actual performance of contingency plans needs to be tested. Regularized practice sessions, as well as unscheduled ad hoc drills, would serve to familiarize personnel with contingency options and thereby facilitate their appropriate responses. In particular, simulation exercises involving mock terrorist attacks could be highly instructive for underscoring strengths and also revealing weaknesses in various contingency preparations. Important to realize, these precautions in and of themselves won't prevent terrorist attacks against offshore drilling rigs or structures. They will serve as deterrents at best and may function to minimize facility damage and casualties to the crew, while maximizing opportunities for apprehension and punishment of the terrorists.

## Conclusion

As intimated by the analysis in this study, several conclusions about offshore maritime terrorism can be posited. First, recent evidence suggests that terrorist incidents have increased in frequency and pervasion during the last decade. Similarly, in that same period persistent worldwide demands for additional energy resources have made offshore hydrocarbon development economically feasible and thus an attractive exploitation option. This tendency to go offshore can be expected to continue throughout the 1980s and 1990s. Accordingly, then, offshore drilling rigs and platforms owned and operated by multinational corporate concerns very likely may become more favorably viewed as potential targets for attack or extortion by terrorist groups.

Regarding legal jurisdiction over terrorist attacks affecting offshore drilling facilities, international law plainly assigns responsibility to the coastal State. Moreover, should the 1982 Draft Convention on the Law of the Sea enter into force, this legal jurisdiction would be extended seaward to 200 nautical miles for those States party to the treaty.

Concerning the precise legal status of offshore maritime terrorist activities, they in all likelihood would not be considered as acts of piracy under international law. Consequently response to maritime terrorism directed against offshore extractive installations should be subsumed most aptly under the jurisdictional

purview of the coastal State's law enforcement agencies. A coast guard-like force trained in antiterrorist tactics would seem particularly well suited to this task.

In conclusion, it warrants observation that the best cure for offshore maritime terrorism would appear to be overt deterrence through premeditated prevention. Even so, some recent evidence suggests that many coastal States today may be ill-prepared to deal efficaciously with a terrorist situation were it to be perpetrated against a facility off their shores.<sup>45</sup> If this speculation actually is more fact than fancy, then it is not presumptuous to assume that, for all intents and purposes, an open invitation for such attacks may have been issued to terrorist groups everywhere. That indeed would be lamentable. Given the political vagaries of the contemporary international order, callous indifference or myopic incredulity by governments toward possible terrorist threats is patently inexcusable. Put bluntly, for offshore installations in particular, to be forewarned about terrorism is to facilitate forearmament against terrorism. The time is not too early to begin.

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### Notes

1. For an insightful study, see JOYNER, *AERIAL HIJACKING AS AN INTERNATIONAL CRIME* (1974).
2. See e.g., STERLING, *THE TERROR NETWORK: THE SECRET WAR OF INTERNATIONAL TERRORISM* (1981).
3. This data is extrapolated from *Statistics: Terrorism, by Risk International*, reprinted in 5 *Terrorism* no. 4, at 371-372 (1982).
4. American Petroleum Institute, 11 *Basic Petroleum Data Book* sec. XI, Table 1 (May 1982).
5. *Id.* at sec. II, Table 4. In 1981, the U.S. Geological Survey estimated that for the United States alone proven crude reserves offshore ranged from a near-certain 16.9 billion barrels to a possible 43.5 billion barrels (with a mean of 28 billion barrels). Similarly, proven offshore natural gas reserves ranged from a near-certain 117 trillion cubic feet (tcf) to possibly as much as 230.6 tcf (with a mean of 167.0 tcf).
6. *Id.* at sec. XI, Table 13. The exact figure was 3,834.
7. 1982 OFFSHORE CONTRACTORS & EQUIPMENT DIRECTORY at 328 (14th ed. 1982).
8. *Offshore Drilling Maintains Past Pace*, *Oil & Gas Journal*, 145 (3 May 1982). Of this number 20 rigs are idle.
9. *Id.*
10. Frick and Heggland, *Financing International Oil and Gas Projects*, *World Oil* 207; (May 1981). *U.S. Capital Outlay to Soar to a record \$74.7 billion*, *Oil & Gas Journal* 57-61. (16 February 1981).
11. This point is constantly made throughout terrorists' writings. For example, as expressed by Carlos Marighella in his *Minimanual*, "It is necessary for every urban guerrilla [i.e., terrorist] to keep in mind always that he can only maintain his existence if he is disposed to kill the police, . . . and if he is determined—truly determined—to expropriate the wealth of the big capitalists, the latifundists, and the imperialists." Marighella, *From the 'Minimanual,'* in *THE TERRORISM READER* 161 (Laqueur ed. 1978).
12. *International Terrorism and the Defense of Offshore Facilities*, U.S. Naval Institute Proceedings 56 (September 1979).
13. Matt, *Maritime Terrorism—An Unacceptable Risk, Part I*, *Ocean Industry* 66 (February 1981).
14. Cline, *Foreword*, in ALEXANDER, *CONTROL OF TERRORISM: INTERNATIONAL DOCUMENTS* vii (1979).
15. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, 20 U.S.T. 2941, Suppression of Unlawful Seizure of Aircraft (Hijacking), 22 U.S.T. 7192, T.I.A.S. No. 7192 (entered into force 14 October 1971), reprinted in *id.* at 55-61; and Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), 24 U.S.T. 564, T.I.A.S. No. 7570 (entered into force 26 January 1970), reprinted in *id.*, pp. 63-70.
16. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, T.I.A.S. No. 8413 (promulgated 2 February 1971),

reprinted in *id.*, pp. 71-75; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, T.I.A.S. No. 8532 (entered into force 20 February 1977), reprinted in *id.*, pp. 77-85.

17. International Convention Against the Taking of Hostages, U.N. Doc. A/C.6/34/L.23 (4 December 1979), (opened for signature 18 December 1979), reprinted in I.L.M. 1456-63 (November 1979).

18. European Convention on the Suppression of Terrorism, Great Britain Cmnd. 7031 (1977), (entered into force 4 August 1978), reprinted in ALEXANDER, *supra* n. 14 at 87-109.

19. Namely, those cited in nn. 15-18 *supra*. For treatments of the difficulties inherent in defining terrorism, see Frank & Lockwood, *Preliminary Thoughts Towards an International Terrorism Convention*, Am. J. Int'l L. 69-70 (1974) and Dugard, *Towards the Definition of International Terrorism*, Am. S. Int'l L. Proc. 94-100 (November 1973).

20. See PAPADAKIS, THE INTERNATIONAL LEGAL REGIME OF ARTIFICIAL ISLANDS (1977). As treated in this study, an offshore structure is considered to be any facility constructed on or placed in ocean space for purposes of work accommodation or technology mounting and which, in functioning, remains relatively stationary.

21. See LARSON, MAJOR ISSUES OF THE LAW OF THE SEA (1976); HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA, and *Law of the Sea XIV*, 19 San Diego L. Rev. (no. 3, 1982).

22. Third United Nations Conference on the Law of the Sea, Convention on the Law of the Sea and Resolution I-IV, Working Paper 1 (4 June 1982) [Hereinafter cited as 1982 LOS Convention].

23. *Id.* Article 55.

24. *Id.* Article 56.

25. *Id.* Article 60, para. 1 and 2. Provision is also made for giving due notice and publicity of constructing such installations and after abandonment ensuring their removal. *Id.* Article 60, para. 3.

26. *Id.* Article 60, para. 4.

27. *Id.* Article 77, para 1. As therein defined, "natural resources" pertain to mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil." *Id.* Article 77, para. 4.

28. *Id.* Article 60.

29. WHEATON, ELEMENTS OF INTERNATIONAL LAW 162 (1936). See also DUBNER, THE LAW OF INTERNATIONAL SEA POLICY (1980).

30. Done 29 April 1958 [1962] 2 U.S.T. 2312, T.I.A.S. No. 5200, 327 U.N.T.S. 3. See the discussion in the text *infra*, at nn. 34-36.

31. WHEATON at 163 n. 83.

32. *Id.*

33. *Id.*

34. Harvard Research in International Law, *Draft Convention on Piracy, with Comment*, 26 Am. J. Int'l L. Sup. 764 (1932).

35. 1958 Geneva Convention on the High Seas, Article 15, para.1(a).

36. 1982 LOS Convention, Article 101. But compare the contentions of Crockett, *Toward a Revision of the International Law of Piracy*, 26 DePaul L. Rev. (1976).

37. DUBNER, *supra* n. 29 at 7. See also Crockett, at 78-80.

38. KESSLER, LEGAL ISSUES IN PROTECTING OFFSHORE STRUCTURES 1-2 (Center for Naval Analyses 1976).

39. *Id.* at 2.

40. With respect to the United States, see the discussion in Kessler, *supra* n. 38 at 2-23; Morris and Kindt, *The Law of the Sea: Domestic and International Considerations Arising from the Classification of Floating Nuclear Power Plants and Their Breakwaters as Artificial Islands*, Va. J. Int'l L. 299-319 (Winter 1979); and Note, *The Regulation of Deepwater Ports*, Va. J. Int'l L. 927-957 (Summer 1975).

41. For example, agencies in the U.S. Government having specific legislative mandates affecting offshore maritime activities include, *inter alia*, the following: The Bureau of Land Management and the U.S. Geological Survey in the Department of Interior; the Federal Power Commission; the Interstate Commerce Commission; the Nuclear Regulatory Commission; the Maritime Administration in the Department of Commerce; the Office of Pipeline Safety and the Coast Guard in the Department of Transportation; and, the Corps of Engineers in the Department of the Army, KESSLER, *supra* n. 38 at 4-17.

42. 1982 LOS Convention, Article 73.

43. 14 U.S.C. 89.

44. See Wettern, *North Sea: Drilling Oil in Troubled Waters*, 40-48 U.S. Nav. Inst. Proc. (December 1977); Ebersole, n. 12 at 54-60; and Watson, *The Defense of Offshore Structures* 23-30 (Center for Naval Analyses, 1976).

45. See Gillan, *Old Field Terrorism: Nobody Wants the Bomb*, v. 193 World Oil 140-142 (October 1981) Matt, *Maritime Terrorism—An Unacceptable Risk (Part II)*, 93-98; *id.* (Part III) at 59-63.



## Chapter 32

# Responding to Terrorism: What, Why and When?\*

Lieutenant Colonel William R. Farrell, US Air Force

**W**hen one speaks of terrorism it is not always clear just what one has in mind. The man in the street has a sense of what it means, and like pornography, one knows it when one sees it. It is a phenomenon that is much more easy to described than define. In some respects we may be better served by doing just that, rather than by trying to force the attributes into an arbitrary grammatical construct which will satisfy lawyers. This conclusion is not reached without some effort and justification.

A review of efforts by the United Nations since its inception has disclosed that the international organization has been unable to reach any mutually acceptable definition of the term. In such a body of diverse cultures and races, when the question, "What is terrorism?" is raised, there is always present some form of answer—through it is often colored by the purposes of those who raised the question initially. Where the United Nations has been successful is in dealing with manifestations of terrorism, i.e. hijacking, hostage-taking, etc., and not the phenomenon itself.

Related to the above is the fact that terrorism may be carried out for many different purposes. First, individual acts of terrorism may aim at wringing specific concessions, such as the payment of ransom or the freeing of prisoners. Second, terrorism may also attempt to gain publicity. Third, terrorism may aim at causing widespread disorder, demoralizing society and breaking down the social order. Fourth, terrorism may target the deliberate provocation of repression, hoping to have the government self-destruct. Fifth, terrorism may be used to enforce obedience and cooperation. Sixth, terrorism is frequently meant to punish. Terrorist often declare the victim of their attack is somehow guilty.<sup>1</sup>

Other aspects also hinder the efforts to fully understand terrorism. The term itself is emotive and pejorative in its application. No one seems to readily call him or herself a terrorist. They refer to themselves as a revolutionary, a liberator, a freedom fighter. The term is just too negative. Even if we were to arrive at an acceptable definition, the application to a particular group would cause counterclaims and disclaimers. It is not by accident that both President Reagan

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and Qaddafi have called each other terrorists while denying the applicability of the term to themselves.

The physical manifestations of an act do not necessarily make it terrorism. There has been a tendency to label bombings, hijacking, kidnappings and hostage situations as terrorism just because, "that's what terrorists do." But this overlooks the fact that bank robbers, homesick Cubans looking for a free trip home, extortionists and other engage in these acts too. The outward manifestations are not the only gauge of what is and is not a terrorist act. More often it is more the "why" behind it than the act itself. Having said all this, it may be best to describe the attributes of terrorism without claiming to define it; the objective being to achieve comprehension of the phenomenon while allowing policymakers enough flexibility in developing their responses independent of confines of a legalistic definition.

Terrorism should be viewed as *purposeful* activity. It is a conscious policy choice of one group of people toward another. This activity is designed to create "a climate of fear which is intense and overriding." This creation of fear is central to the activity itself and not incidental. If one were to examine the crimes of rape or robbery, the use of force to create fear is not the purpose of the act. Monetary gain or physical domination is primary, the fear is incidental. In terrorism the fear is the prime purpose of the act. The fear is pervasive and continuing, such as that experienced by those flying planes in the early 1970s, those living in Belfast, Ireland, and those Turkish and Israeli diplomatic officials serving abroad, not to mention our own State Department personnel in certain Middle Eastern nations.

This purposeful fear-generating activity is seeking to resolve some form of political struggle and arrogate to the terrorist the powers of the State or authority. A belief in the justification of the end allows the harshest of means and permits no innocent bystanders. There are really no victims, only those who are with the terrorist or against him.

While terrorism may appear to be a new activity, it has been going on for hundreds of years. It can be practiced by groups and governments—domestically as well as internationally. What makes it appear to be "modern" is more the result of the tools employed than the act itself. This coupled with the nature of the target is what should be of concern to governments. This should be viewed as the real threat and it is to this aspect that we now turn our attention.

### Why Governments Must Respond

Terrorism is an affront to society and threatens the very foundation upon which it rests. Often the targets of terrorist attacks are the institutions and the personages holding power within a society. The strength of a society and its government depends in part upon the ability of agencies to provide for the safety and security of its people. In democratic States there is a need for public support,

or at a minimum, acceptance of the activities undertaken by a government to insure the public welfare.

Based upon numbers alone, one might be tempted to argue that terrorism does not represent a great threat to the United States. Since the late 1960s there have been less than 500 Americans killed as the result of terrorism. Should you not count the loss of the 241 Marines and other servicemen in Beirut, the number is almost halved.<sup>2</sup> During each long holiday weekend, more Americans are killed on the highways in a matter of days than in the nearly twenty years since statistics concerning terrorism have been maintained.

One must focus on the nature of the target rather than the numbers. What is under attack is the sovereignty of the nation; the right to maintain embassies abroad; the right to have government representatives safely carry out their assigned duties; and the right of free democracies to provide for their populations. Terrorists have not sought out just any target. They seek those who represent what the government or democratic institutions seem to foster. Ambassadors, educators, military personnel, business people and members of the media all have been targets over the years.

It is no coincidence that Western societies have borne the bulk of terrorist attacks over the years. These are the nations that are most open, affording the terrorist fairly free movement, as well as the guarantee of media coverage for any significant event. To create and maintain the climate of fear described above, the nature and consequences of the terrorist act must be widely publicized. Further, the industrialized democracies of the West have achieved great technological advances which, while bettering society, have also made them much more vulnerable. Whole cities can be immobilized with the loss of key power grids and the ensuing disruption could be catastrophic. Centralized computer data bases pose an additional target for a terrorist group. The loss of records by a large bank or multinational corporation would have ramifications far beyond the dollar loss of the material itself.

The nature of the international environment today lends itself to the violence represented by terrorism. In a world faced with the real potential for nuclear conflict and the subsequent devastating aftermath, lesser, "safer" forms of warfare are desirable. These indirect means of conflict by various powers take on an attractive appearance and present an affordable choice. The once credible threat of massive retaliation proffered in the late 1950s and early 1960s for any transgression, however slight, has generally lost credibility. The United States has shown that it is very tolerant of violence directed against it. Terrorists, through the mid-1980s, were literally guaranteed no retaliation for attacks which kidnapped people, assassinated government representatives in the street, leveled US embassies and killed its occupants. However, the patience of the American people is showing signs of waning and the Government may take a different tack in the future.

One additional reason for concern regarding terrorism is that there are numerous deprived people in the world today. Some, such as the PLO, have sought the addressal of grievances through peaceful and violent means. Similar groups and causes have become tired of waiting for their needs to be met and have sought to take action on their own behalf. Populations such as these, and those who would aid or exploit their cause, will resort to terrorism when such is seen as meeting their needs.

### How Should We Respond?

Having determined that there is a legitimate requirement to meet the terrorist challenge in some way, just what does the United States do? Do we go to the source if there is sponsorship by some government? Do we attack training camps where the terrorists learn their trade? Do we seek out the terrorists through undercover operations and strike them no matter where they are on a given day? Questions such as these are of paramount interest to the policymaker and could well determine the methods of response—diplomatic, economic or military—to be employed.

There is general agreement that the nation has a right to defend itself when threatened by an aggressor. Beyond this one could say that a nation has a moral obligation to do just that and not allow its people to suffer unnecessarily. The policymaker realizes that the choices which confront him will not always be clear and readily discernible. What is legal may not always be moral and vice versa. Beyond this, what is considered both moral and legal may not be politically feasible. There needs to be an evaluation of all three factors as policy is formulated. However, there should be no response without some strong moral justification at its foundation. The populace in a democracy will not view as legitimate, immoral activities which are on a par with those of the terrorists. Claiming justifiable defense in the protection of democratic values while employing tactics which are similar to those practiced by the terrorists undermines public confidence. While there may be some immediate emotional release no matter what the response, thoughtful reflection over the long term will only tolerate action based on moral grounds.

While there may be strong inclinations to employ military force as the first and only response to a terrorist incident, care should be taken lest one acts too swiftly. Diplomatic action, alone or in concert with allies, which could conceivably impact successfully upon a terrorist group and/or its sponsor, should be considered and employed initially. Political or economic sanctions are also alternatives which demand consideration before military force is employed. Should these be insufficient or not feasible, the stronger option may then be employed. It is the perception of employing force as a last resort which helps ensure that popular support remains when all the shouting subsides.

Further complicating the decision process are the concerns for success, proportionality and discrimination. Actions undertaken more as a reflex action than as thoughtful calculation may lead to long-term consequences which will impact adversely on the nation or its people. Escalatory acts on the part of the terrorists against innocent Americans may well be the result of any action. Other groups may act in sympathy with the "injured" terrorists and either attack U.S. assets or those of our allies. Therefore, when policymakers think in terms of success the thought processes must take a long-term view and be willing to endure potential consequences and ramifications.

Having suffered a series of terrorist attacks over a period of years, there is concern that a nation may respond to a particular act and that the response may be geared to the emotion and force built up during years of doing little or nothing. As such the response may not be proportionate to the act perpetrated. A large nation such as the United States must demonstrate the restraint demanded of a superpower. While some may applaud the forceful actions of the small embattled nation of Israel, our position on the world's stage does not allow us that solution. Additionally, we must be sure to discriminate between the terrorist and those among whom he may take refuge. Every effort must be taken to insure that noncombatants are left uninjured, or in the worst case that their casualties are kept to a minimum. At some point the President or the Secretary of State may need to address a concerned nation or a skeptical Congress justifying a response to a terrorist act. Not all will agree to the arguments proffered in terms of degree of success, justification or scale (such as the U.S. Government's forcing of the Egyptian aircraft carrying PLO terrorists to land on Italian soil). But any rationale that has as its basis plausible moral considerations coupled with a credible plan of action will at a minimum be condoned, if not fully approved.

Fully understanding just what terrorism is—and what it is not—is an initial step in the development of a government's policy of response. This done, a democratic nation is capable of determining the extent of the threat to itself and to similar sovereignties around the globe. It is upon this that the particulars of any action are built. Forming essential supports for its foundation are the legal, political and moral elements considered by the decision makers. When the leadership goes before the people and presents its justification for actions against terrorism, these three pillars will be evaluated to some degree of sophistication by all. While there will not be complete agreement on all aspects of the act there has to be acceptance that the evidence was credible and the response was fundamentally moral. The latter should be able to withstand the rigors of debate. If not, the terrorists will have scored the victory they sought.

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Lieutenant Colonel Farrell was serving on the faculty of the Naval War College when this article was first published.

### Notes

1. Brian Jenkins of the Rand Corporation made this point most clearly with an illustration from the massacre at LOD Airport in 1972. He states that with terrorism there is a stronger connotation of guilt and punishment than in other forms of warfare or politics and a narrower definition of innocent bystanders. The victims of the Lod incident, many of whom were Christian pilgrims from Puerto Rico, were said by the terrorists to be guilty because they had arrived in Israel on Israeli visas and thereby had tacitly recognized the State that was the declared enemy of the Palestinians and, by coming to Israel, they had in effect entered a war zone. The organization was saying that those who happened to get shot, just because they were there, were nonetheless guilty or they would not have been shot.

2. The incident at the Marine Headquarters in Beirut does not necessarily equate to an act of terrorism. It is more in line with a hostile surprise attack in a war zone for which the victims were ill prepared. A careful review of the Long Commission Report published in December 1983 provided a good deal of information which supports this view. At the time of the attack there were two occupying armies, four contingents of multinational forces, seven contributors to the United Nations peacekeeping force, and some two dozen extra legal militias operating in a country about the size of Connecticut. Over 100,000 people had been killed in the past eight years as a result of the violence. The government that received US support was viewed by many as yet one other faction of the many seeking power. Our siding with the government was seen as entry into factional warfare on the side of one of many participants. The shelling by the Navy at Suq-Al-Gharb in support of the Lebanese Armed Forces confirmed this in the minds of many engaged in the battles. What has been called in this country an act of terrorism may have rather been a warring faction, surprising and successfully penetrating the defenses of an enemy. The incident is easier to digest, however, if the victims are described by their leaders as having suffered at the hands of terrorists. Somehow the heavy responsibility for the lack of defense becomes more tolerable. The Long Commission Report has much value for the military individual if one reads beyond the talk of terrorism and focuses on poor intelligence, unclear chains of command, clarity of mission, communications, perceptions and organizational problems.

# Chapter 33

## An Appraisal of Lawful Military Response to State-Sponsored Terrorism\*

Lieutenant Colonel James P. Terry, U.S. Marine Corps

**I**n their military posture statement for fiscal year 1986, the Joint Chiefs of Staff state:

The use of terrorism against the United States . . . continues to pose a formidable challenge . . . . The threat from international terrorism has never been greater . . . . In addition to the renewed activity of terrorists indigenous to countries in Western Europe, the threat is growing from Muslim transnational groups which originate in the Middle East and are influenced by Iran, Libya and Syria. These groups pose a significant threat to U.S. interests both in the Middle East and in Europe.<sup>1</sup>

This JCS statement echoes Administration concerns regarding State terrorism addressed in National Security Decision Directive (NSDD) 138, signed by President Reagan on 3 April 1984. In the words of Defense Department official Noel Koch, NSDD 138 “represents a quantum leap in countering terrorism, from the reactive mode to recognition that pro-active steps are needed.”<sup>2</sup> Although the document itself remains classified, Robert C. McFarlane, former assistant to the President for National Security Affairs, suggested at the Defense Strategy Forum on 25 March 1985 that it includes the following key elements:

- The practice of terrorism under all circumstances is a threat to the national security of the United States.
- The practice of international terrorism must be resisted by all legal means.
- State-sponsored terrorism consists of acts hostile to the United States and to global security and must be resisted by all legal means.
- The United States has a responsibility to take protective measures whenever there is evidence that terrorism is about to be committed.
- The threat of terrorism constitutes a form of aggression and justifies acts in self-defense.<sup>3</sup>

It is clear that the Reagan Administration had embraced a new proactive posture, asserting the right to act preemptively to defend its citizens and interests where threatened by State-supported terrorism abroad.

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Is the new U.S. stance justified? The recent instances of State-supported violence would indicate "yes." Terrorist attacks in 1983 and 1984 took the highest annual toll of lives and property on record. More U.S. lives were lost in 1983 to international terrorism than in the previous 15 years combined. And with rare exception, the often spectacular attacks during 1983 and 1984 were carried out by groups that were State-supported.<sup>4</sup>

While moral justification for this new U.S. policy may be obvious, the problem of defining that State support or linkage which warrants a U.S. military response, that legal framework supportive of such a proactive policy, and those reasonable force alternatives responsive to the threat, is more difficult. It is to these particular concerns that this paper is addressed.

### State Sponsorship

Unlike the 1960s when most terrorist groups were autonomous, international terrorism since that time has come to resemble the workings of a multinational corporation. Walter Laqueur placed this in perspective when he noted: "An operation would be planned in West Germany by Palestinian Arabs, executed in Israel by terrorists recruited in Japan with weapons acquired in Italy but manufactured in Russia, supplied by an Algerian diplomat, and financed with Libyan money."<sup>5</sup>

The United States was jolted into an awareness of the changing character of terrorism when its Embassy in Tehran was seized on 4 November 1979 by Iranian militants who enjoyed the support of Ayatollah Khomeini's revolutionary government.<sup>6</sup> While the U.S. Government resolved that crisis with the loss of only eight lives—lost in the aborted rescue mission—nations, including the United States, have not been as fortunate in the 1980s. Shiite terrorists bombed the U.S. Embassy in Beirut in April 1983, the U.S. Embassy in Kuwait in December 1983 and the U.S. Embassy Annex in Beirut in September 1984, all with paralyzing effectiveness. Similar attacks against South Korean diplomats in Rangoon in 1984 and against the Italian cruise ship *Achille Lauro* in October 1985 suggest that we have only seen the beginning. While the last two incidents could be clearly linked either to a government or nongovernmental international organization, the linkage in the attacks on U.S. interests in Lebanon and Kuwait was less clear.

It is the linkage between the terrorist and the sponsoring State which is crucial to providing our Government with the justification for response against that State and with the ability to capitalize on the response in terms of deterrence. Causal connectivity or linkage, however, can only be established if effective intelligence operatives are positioned to discover who the terrorists are, where they are, and who supports them. Covert intelligence operatives are necessary for identifying and targeting terrorist training camps and bases, and for providing an effective

warning of impending terrorist attacks. Unfortunately, a decade of dismantling our security apparatus in the 1970s has radically reduced our human intelligence collection capability. Secretary of State Shultz has correctly noted, “we may never have the kind of evidence that can stand up in an American court of law.”<sup>7</sup>

The question then is how much information is enough? Secretary Weinberger has underscored the very real practical difficulties that exist for the military planners in attempting to apply small amounts of force, especially over great distances, with insufficient intelligence. He has accurately noted the difficulty of assuring success, and has echoed the need for public support for any sustained resort to force by the United States in defending against terrorist attack.<sup>8</sup> While these honest concerns would, of course, be factored into any decisional process concerned with the possible use of force, former Security Advisor McFarlane, speaking with the full support of President Reagan, has pledged: “We cannot and will not abstain from possible action to prevent, preempt and respond to terrorist acts where conditions merit the use of force.”<sup>9</sup>

Although no Reagan administration official has yet been able to define adequately “how much information is enough,” the demand for probative, or court-sustainable evidence affirming the complicity of a specific sponsoring State is an impractical standard that has contributed to the impression—on the part of certain States—that the United States is inhibited from responding meaningfully to their outrages. Hugh Tovar correctly notes: “There is a very real danger that the pursuit of more and better intelligence may become an excuse for non-action, which in itself might do more harm than action based on plausible though incomplete intelligence.”<sup>10</sup> Thus, the United States should seek a functional standard of guilt appropriate to the threat and prove wrong those terrorist sponsors operating on the assumption the United States will never use force.

### Legal Framework for Response

An examination of authorized responses to State-sponsored terrorism requires an understanding that terrorism is a strategy that does not follow traditional military patterns. In fact, a fundamental characteristic of terrorism is its violation of established norms. Even war has norms that survive despite their frequent violation. The only norm for terrorism is effectiveness. International law requires that belligerent forces identify themselves, carry arms openly and observe the law of war.<sup>11</sup> Principal among the laws of war are the principles of discrimination (or noncombatant immunity) and proportion. Terrorists, however, do not distinguish between the innocent (noncombatants) and the armed forces of the country in which the attack is made. Two rationales explain this strategy. The very fact that the victims of terrorist attacks are innocent third parties enhances the shock effect of attacking them. Alternatively, the terrorist may decree that everyone living in a certain society is guilty of its sins and deserving of punishment. In the

contemporary language of defense economics, they wage countervalue rather than counterforce warfare.

Why is this important? It is important because the only credible response to terrorism is deterrence. There must be an assured, effective reaction that imposes unacceptable damage on the terrorist and those who make possible their activities. However, this reaction must counter the terrorists' strategy within the parameters of international law, and more specifically the law of armed conflict. Those who suggest otherwise neither understand the inherent flexibility of international law nor the cost of violating that law.<sup>12</sup>

International law has long recognized the need for flexible application. The underlying tenet of that law, the prohibition against the use of force, has as its principal exception the right of response in self-defense. Self-defense, however, is an inherent right, shaped by custom and subject to customary interpretation. Its codification within Article 51 of the U.N. Charter recognizes this inherent quality: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ."

According to some legal scholars, though, responding coercion cannot be justified under Article 51 unless the force directed against the "political independence" of another State has as its purpose "the permanent subjugation of that State to domination."<sup>13</sup> This interpretation envisions a broad-based and far-reaching attack; but arguably an attack against just a small segment of a nation's governmental, military or social apparatus is legally analogous to an attack against the whole. If U.S. citizens, diplomats or military personnel are attacked or held captive in an attempt to induce a change in American policy, the political independence of our nation has clearly been subjected to attack.

The final clause of Article 2(4) of the U.N. Charter, which forbids the threat or use of force "in any other manner inconsistent with the Purposes of the United Nations," supports this interpretation. The principles codified in the Charter have as their primary purpose to "bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."<sup>14</sup> The terrorist seizure of, or attack on U.S. citizens or instrumentalities, are certainly uses of force "in a manner inconsistent" with the Charter. Article 2(4) and Article 51, its exception, must be read together in a way that will give them both reasonable meaning. As Professor Myres McDougal explains: "Article 2(4) refers to both the threat and use of force and commits the Members to refrain from 'threat or use of force against the territorial integrity of political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'; the customary right of defense, as limited by the requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purpose of the United Nations, and a decent respect for

balance and effectiveness would suggest that a conception of impermissible coercion, which includes threats of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion."<sup>15</sup>

A second restriction which doctrinaire legal scholars attempt to impose would permit self-defense only when an armed attack "occurs." This interpretation is based not only on Articles 51 and 2(4) but also on Article 2(3), which states: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Ian Brownlie argues that while "isolated or sporadic" incidents may constitute aggression, they do not reach the threshold of an "armed attack."<sup>16</sup> It has thus been argued that because the definition of armed attack is narrower than aggression, then "certainly self-defense against armed bands would not seem to be included within the permitted area."<sup>17</sup>

Such rigid interpretations do violence to the very values underlying Article 51 and to the customary international law it seeks to codify. Neither the plain language of Article 51 nor U.S. practice in addressing incidents of aggression under its inherent right of self-defense suggests such a restrictive interpretation.

In 1818, the United States established the right to enter the territory of another State to prevent terrorist acts where the host is unable or unwilling to quell the continuing threat. The Seminole Indians in Spanish Florida had demanded "arms, ammunition, and provisions or the possession of the garrison at Fort Marks." President Monroe directed General Jackson to proceed against the Indians with the explanation that the Spanish were bound by treaty to keep her Indians at peace but were incompetent to do so.<sup>18</sup>

Subsequently, in 1873, the standard under which anticipatory self-defense could be justified was more clearly established. During an insurrection in Canada, the American steamer *Caroline* was used to transport men and materials for the rebels from American territory into Canada across the Niagara River. The U.S. Government had shown itself unable or unwilling to prevent this traffic, and, in these circumstances, a body of Canadian militia crossed the Niagara, and, after a scuffle in which some Americans were killed, sent the *Caroline* adrift over the falls. In the controversy that followed, the United States did not deny that circumstances were conceivable which would justify this action, and Great Britain for her part admitted the necessity of showing circumstances of extreme urgency. They differed only on the question of whether the facts brought the case within the exceptional principle. Charles Cheney Hyde has summed up the incident by saying that "the British force did that which the United States itself would have done, had it possessed the means and disposition to perform its duty."<sup>19</sup> The formulation of the principle of self-defense in this case by the U.S. Secretary of State, Daniel Webster, has met with general acceptance. There must be shown, he said, "a necessity of self-defense, instant, overwhelming, leaving us no choice of means and no moment for deliberation."<sup>20</sup>

The requirement of “necessity” for self-defense is not controversial as a general proposition. However, its application in concrete cases requires judgements on facts and intentions that often involve diverse perceptions. A case for self-defense is not persuasive either on the political or legal level unless a reasonable basis of necessity is perceived. Those to whom a justification is addressed (that is, other governments or the public) will consider whether it is well-founded; they will not regard the use of force as a purely discretionary act.

An important dimension of this question concerns the separate issue of *when* does action become necessary; that is, when is the use of force justified? Pertinent to this question is whether the force is to be used for rescue of nationals whose lives are threatened, as a response to a continuing threat, or as reprisal.

The law with respect to imminently endangered nationals is clearest. The late Sir Humphrey Waldock (who served as a judge and president of the International Court of Justice) underscored that law when he wrote that force may be used to intervene in another State to protect its nationals from injury if there is: an imminent threat of such injury; a failure or inability on the part of the territorial sovereign to protect them; and measures of protection are strictly confined to the object of protecting them from injury.<sup>21</sup> Waldock later observed that, “Cases of this form of armed intervention have not been infrequent in the past and, where not attended by suspicion of being a pretext for political pressure have generally been regarded as justified by the sheer necessity of instant action to save the lives of innocent nationals, whom the local government is unable or unwilling to protect.”<sup>22</sup>

Examples of such cases of military action to protect nationals in peril include the Belgian action in the Congo (Stanleyville) in 1961, the U.S. action in the Dominican Republic in 1965, and, more recently, the U.S. rescue of the *Mayaguez* in 1975, the Israeli rescue action in Entebbe, Uganda in 1976, and the West German rescue effort in Mogadishu, Somalia in 1977.

The law with respect to military response to a continuing threat is more difficult. Military action has been justified,<sup>23</sup> however, where an imminent threat of attack exists and where the purpose is to protect the security of the State and its essential rights of territorial integrity and/or political independence. Would this line of reasoning support an attack on terrorist camps in one country when terrorists trained at that camp have executed hostages in another? It might be argued that military action against the camps would deter or preclude further hostage deaths or hostage-taking. An argument on similar lines was advanced in the Boxer Rebellion incidents in China at the turn of the century.<sup>24</sup> However, elimination of the threat of future attacks by terrorists from those camps in the delinquent States could be more effectively justified under the rationale of anticipatory self-defense.

Professor Lauterpacht states, as an example, that when a State is informed that a body of armed men is being organized on foreign territory for the purpose of

attack on its citizens, and when an appeal to the authorities of the foreign State "is fruitless or not possible, or if there is danger in delay, a case of necessity arises"; then "the threatened State is justified in invading the neighboring country and disarming the intended invaders."<sup>25</sup> Lauterpacht further points out that every State judges "for itself, in the first instance, whether a case of necessity in self-defense has arisen," but that "it is obvious that the question of the legality of action taken in self-preservation is suitable for determination and must ultimately be determined by a juridical authority of political body . . ."<sup>26</sup> The United States has long taken the position that each nation is free to defend itself and is the "judge of what constitutes the right of self-defense and the necessity . . . of same."<sup>27</sup> Similarly, more than half a century ago Secretary of State Frank Kellogg noted that when a State has resorted to the use of force, "if it has a good case, the world will applaud and not condemn its actions."<sup>28</sup>

The use of force as a reprisal or punishment presents the greatest dilemma. If the terrorists holding U.S. hostages in Lebanon were summarily to execute them, and it were shown that a specific country had sponsored their acts, could the United States execute punitive raids against the State? Although the grisly nature of terrorism often invokes strong public sentiment for retaliative action, the present international law may not permit the use of force in reprisal against a violating State. The "Declaration of Principles of International Law On Friendly Relations Between States," adopted unanimously by the U.N. General Assembly in 1970, declares categorically: "States have a duty to refrain from acts of reprisal involving the use of force."<sup>29</sup> The United States supported the declaration, and, like other nations, has gone on record in stating that it considers reprisal to be unlawful in contrast to acts of lawful self-defense.<sup>30</sup>

While there will continue to be debate on whether reprisals are legally permissible, it is clear that coercive actions whose purpose is protective are more easily justified than actions whose express aim is punishment. The more important point is that military response to State-supported murder of hostages, one's own nationals, would be justified under the doctrine of self-defense as a necessary and proportional coercive action to eliminate a continuing threat.

### Proactive Responses Authorized Under International Law

The decision to use force against the terrorist must be as closely tied to a clear objective as is the case in planning at the higher end of the coercion spectrum. Because the relationship between objective and threat is often unclear in the low intensity conflict arena, a strategy to fight State-supported terrorist violence must always focus on the underlying political purpose of the States presently supporting terrorist organizations. That purpose is unquestionably our removal from the region concerned. How do we counter this purpose, this objective? Secretary of State Shultz was correct when he stated that our policy ". . . must be

unambiguous. It must be clearly and unequivocally the policy of the United States to fight back—to resist challenges, to defend our interests, and to support those who put their own lives on the line in a common cause.”<sup>31</sup> Implementation of this proactive policy requires that we make the fullest use of all the weapons in our arsenal. These should include not only those defensive measures which reduce U.S. vulnerability, but also new legal tools and agreements on international sanctions, as well as the collaboration of other concerned governments. While we should use our military power only if conditions justify it and other means are not available, there will be instances, as there have been in the past, where the use of force is our only alternative. In this circumstance, our action would be fully justified as a necessary defensive measure to eliminate a continuing threat or to save U.S. lives.

Closely related to the legal question is the question of linkage. When clear linkage to a supporting State exists, we must publicize that relationship and attack with discrimination only those targets which most affect the well-being of the State sponsor. The “center of gravity” in the sponsoring State must always be that target whose destruction will most significantly undermine the target State’s will to commit future acts of terror against us. Since terrorism is a form of international conflict bound by its rules, lawful response is properly limited to those targets which do not enjoy civilian immunity. Military targets may be preferable for two other reasons. First, the selection of military targets—while the terrorists are attacking our civilians in violation of international law—should not raise concerns on the part of other States. Additionally, selection of military targets would refocus attention on the fact that terrorism is, in fact, a form of armed conflict.

The thrust of this new strategy, outlined in NSDD 138, must be to reclaim the initiative lost while the United States pursued a reactive policy which neither deterred terrorist activity nor encouraged successful response. A note of caution concerning our willingness to use force is required, however. The closest coordination between our military force and civilian leadership is critical, both to prevent publicity concerning our planning and to protect those forces involved. Maintaining secrecy can mean the difference between success and failure. Equally important, other countries working with us often have good reasons not to want publicity, and unacknowledged programs offer them some protection.

**T**he key to an effective response to the threat posed by terrorist States is the commitment to address the attacks they sponsor within the scope of armed conflict. Full implementation of NSDD 138 should lead to increased planning for lawful preemptive contingency operations to eliminate the military threat; rather than, as now, treating each incident after the fact as a singular crisis provoked by international criminals. By treating terrorists as combatants, the right

of self-defense against their sponsor is triggered, and responding coercion may be the only proportional response to the threat. Because the unlawful acts of combatants are violations of the law of armed conflict, those terrorists who do succeed in their war crimes may be tried upon capture and the linkage to the supporting State publicized. Where terrorist acts cannot be prevented, the law supports military action to eliminate a continuing threat. Military action could lawfully include strikes at the heart of offending States' military apparatus where necessary to preempt further attacks. Finally, we may not be able to wait for absolute certainty and clarity. If we do, the world's future will be determined by others—most likely by those who are the most brutal, the most unscrupulous and the most hostile to everything we believe in.

This proactive strategy, long overdue, embraces use of the military instrument, along with other defensive and nonmilitary measures, as a lawful and effective response to State-supported terrorism. It attempts, for the first time, to use international law and its inherent right of self-defense as a force for the rights of Americans rather than as a shield for the scorn of our enemies.

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Lieutenant Colonel Terry wrote this paper while attending the Naval War College.

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### Notes

1. U.S. MILITARY POSTURE FY-1986 at 94-95 (1985).
2. *Preemptive Anti-Terrorist Raids Allowed*, The Washington Post, 16 April 1984, p. 19.
3. McFarlane, *Terrorism and the Future of Free Society*, (Speech delivered at the National Strategic Information Center, Defense Strategy Forum, Washington, D.C.: 25 March 1985).
4. See Livingstone & Arnold, *The Rise of State-Sponsored Terrorism* in LIVINGSTONE & ARNOLD, EDS., FIGHTING BACK 14-21 (1985).
5. LAQUEUR, *GUERRILLA: A HISTORICAL AND CRITICAL STUDY* 324 (1976).
6. *Supra* n. 4 at 14; see also Terry, *The Iranian Hostage Crisis: International Law and U.S. Policy*, JAG Journal 31-79 (Summer 1982).
7. Shultz, *Terrorism and the Modern World* at 23 (Speech to Park Avenue Synagogue, New York City: 25 October 1984).
8. See Taubman, *The Shultz-Weinberger Feud*, The New York Times Magazine 3 (14 April 1985).
9. *Supra* n. 3.
10. Tovar, *Low-Intensity Conflict: Active Responses in an Open Society*, at 24 (Paper prepared for the Conference on Terrorism and Other "Low-Intensity" Operations: International Linkages, Fletcher School of Law and Diplomacy, Medford, Mass.: April 1985).
11. The rules of land warfare are found primarily in Hague Convention IV of 1907.
12. See Terry, *State Terrorism: A Juridical Analysis*, Journal of Palestine Studies 94-117 (Autumn 1980) for one view of the cost incurred when a nation State violates international law in the name of increased security.
13. See, e.g., Wright *The Cuban Quarantine*, 57 Am. J. Int'l L. 588 (1963).
14. U.N. Charter, Art. 1, para. 1.
15. McDougal *The Soviet Cuban Quarantine and Self-Defense*, 57 Am. J. Int'l L. 596 (1963).
16. Brownlie, *International Law and the Activities of Armed Bands*, 7 Int'l & Comp. L. Q. 712, 731 (1958).
17. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 118-120 (1962).
18. MOORE, A DIGEST OF INTERNATIONAL LAW in v. II 409 (1906).
19. HYDE, 2 INTERNATIONAL LAW 107 (2nd ed. 1945).
20. *The Caroline Case*, MOORE n. 18 at 412.
21. WALDOCK, 81 HAGUE ACADEMY RECUEIL DES COURS 467 (1952).
22. WALDOCK, 106 HAGUE ACADEMY RECUEIL DES COURS 240 (1962).

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23. See Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, U.S. Naval Institute Proceedings, 1-5 (January 1982). The attack by Navy F-14s on two Libyan jets which had fired on them over the Gulf of Sidra, had missed, and were returning to base in Libya was justified on the basis that they constituted a continuing threat because they could have turned at any time and reinstated the attack.
24. See MCDUGAL, *STUDIES IN WORLD PUBLIC ORDER* 711 (1960).
25. OPPENHEIM, *INTERNATIONAL LAW* 298 (8th ed. 1955).
26. *Id.* at 299.
27. Brownlie, *The Use of Force in Self-Defense*, 37 *Brit. Y.B. Int'l L.* 183, 207 (1961).
28. Address by Secretary of State Kellogg before the American Society of International Law, 28 April 1928, *Am. S. Int'l L. Proc.* at 141, 143 (1928).
29. U.N. General Assembly (UNGA) Resolution 2625 (1970).
30. See, e.g. the statement of the Secretary of State in 68 *Am. J. Int'l L.* 736 (1974).
31. George Shultz, Address before the Low-Intensity Warfare Conference (National Defense University, Washington, D.C.: 15 January 1986).

**PART FIVE**

**LAW OF WAR**



# Chapter 34

## The 1977 Protocols to the Geneva Convention of 1949\*

Major W. Hays Parks, U.S. Marine Corps

**O**n 12 December 1977, a decade of international negotiation was culminated when the Government of Switzerland opened for signature the Protocols Additional to the Geneva Conventions of 12 August 1949. The United States was one of 46 nations participating in the signing ceremony in Bern.<sup>1</sup>

Modern law regulating the conduct of armed conflict—commonly referred to as the “law of war”—dates from the mid-19th century. Commencing with the Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field and the U.S. Lieber Code of 1865, “Instructions for Government of Armies of the United States in the Field,” the law of war is intended to:

Protect both combatants and non-combatants from unnecessary suffering;

Safeguard certain fundamental rights of civilians, prisoners of war, and wounded, sick, and shipwrecked members of armed forces; and thereby to

Facilitate the restoration of peace.

Before the Geneva Convention of 1864, agreements providing protection to noncombatants were sporadic, limited to a particular conflict and the parties concerned, and based upon strict reciprocity. Agreements commencing with the 1864 Geneva Convention, negotiated in the aftermath of war rather than the heat of battle, seek universal agreement, application at all times and under all circumstances, and rely upon their consistency with the principles of war, tactical considerations, and leadership principles rather than reciprocity exclusively for their success.

Law of war conventions of this century reflect the evolutionary development of warfare as well as the slow but steady definition of the rights of individuals not engaged in battle. The principal treaty of the 14 Hague Conventions of 1907, Hague Convention IV Respecting the Laws and Customs of War on Land,<sup>2</sup> is in large measure a codification of those principles governing the conduct of warfare that had evolved through the customary practice of States to that time.

An acknowledgement of the premise that the right of belligerents to adopt means

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of injuring one another is not unlimited, it is primarily a statement of the obligations of the combatants toward each other.

In contrast, the four Geneva Conventions of 1949 for the Protection of War Victims<sup>3</sup> serve to delineate minimum standards of protection and respect to be afforded persons placed *hors de combat* or taking no direct part in hostilities. This protection covers members of the armed forces no longer capable of carrying on the battle because of wounds, sickness, shipwreck, capture or surrender, and civilians who have no direct influence on the war-making potential of the enemy.

As often is said of tactics, law of war conventions stem from and reflect the conflict or conflicts most recently concluded. The Hague Conventions of 1907 address problems which arose during the Franco-Prussian and Russo-Japanese wars, while the Geneva Protocol of 1925 banning the use of poisonous gas<sup>4</sup> and the two Geneva Conventions of 1929<sup>5</sup> evolved as a direct result of the experience of the belligerents in World War I. Similarly, the Geneva Conventions of 1949 are based upon abuses committed by the Axis Powers during World War II and other law of war issues surrounding a European-style international conflict between conventional forces in occupied territory. Only Article 3, common to all four of the 1949 Geneva Conventions, anticipated the then-developing problem of wars of a noninternational character fought by or against unconventional forces. The resultant problem may be illustrated by the incident at My Lai where U.S. Army Forces on 16 March 1968 assembled and executed several hundred unarmed, unresisting men, women, and children. Despite the heinousness of the offense there was no violation of the Geneva Conventions inasmuch as the victims were citizens of the host country and U.S. Forces were present as an ally rather than as an occupying power. This experience and others in the more than 100 conflicts since the promulgation of the 1949 Conventions—the civil wars in the Dominican Republic, Nigeria, the Congo, and Angola, the Bangladesh war for independence, the British counterinsurgency campaign in Malaya, the chronic violence in Cyprus, the Arab-Israeli conflicts and their attendant guerrilla operations, to name a few—suggests that existing law is not fully attuned to the conflicts of the 1960s and the 1970s.

Moreover, as with all law, the law of war was in need of an overhaul to catch up with technological advances. Serious questions were being raised with regard to the lawfulness of a number of weapons. Medical evacuation by helicopter, developed by the United States in Korea and refined in Vietnam, went beyond the aerial evacuation methods contemplated in the 1949 Geneva Convention for the Wounded and Sick. New means for the protection of hospital ships were available and international acceptance was necessary in the over-the-horizon naval warfare of today. Finally, no specific agreement had been reached governing bombardment from the air as Hague Convention XIV of 1907 prohibited the “discharge of projectiles and explosives from balloons. . . .”<sup>6</sup>

While moves to update the law of war can be traced back as far as 1956, when the International Committee of the Red Cross (ICRC) unsuccessfully proposed its Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, it was not until 1968 that there was any impetus behind the move. In that year the United Nations-sponsored Tehran Conference on Human Rights adopted a resolution requesting the General Assembly to invite the Secretary-General to examine the “need for additional humanitarian international conventions or of possible revision of existing conventions” to “ensure the better protection of civilians [and] prisoners [of war] . . . in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.”<sup>7</sup> General Assembly Resolution No. 2444, approved on 16 December 1968, made such a request.

This action by the General Assembly served to encourage a number of nations to direct their attention to ICRC initiatives to update the law of war. The ICRC is the traditional guardian of the humanitarian law of war, is possessed of a professional staff highly knowledgeable of the law of war and, above all else, is both neutral and apolitical. As a result, the ICRC sponsored conferences of government experts in 1971 and 1972 to discuss the draft Protocols that it had prepared. Forty-one nations sent delegations in 1971, 77 in 1972, with the United States playing a very active role at each session. In 1974, Switzerland, the depository of the 1949 Geneva Conventions, convened the first of what would be four annual sessions of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts to consider the draft Protocols. The fourth session, which concluded on 10 June 1977, produced the Protocols signed by the United States on 12 December 1977.

The Protocols reflect the experience of the last three decades, Protocol I serving to further the definition of the law of war as it relates to conflicts of an international character, Protocol II offering clarification and elaboration of the protection afforded noncombatants and the duties of combatants in internal or civil wars. They are intended to supplement rather than replace existing codifications of the law. Among the more significant measures there are considerations of means and methods of warfare, legality of weapons, protection of medical transportation, and internal warfare.

*Means and Methods of Warfare.* Traditionally the legality of the means and methods of warfare have been measured by a balancing of *military necessity* and *unnecessary suffering*. The former is defined as permitting “a belligerent to apply only that degree and kind of regulated force, not otherwise prohibited by the law of war, required for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources.”<sup>8</sup> Article 35 of Protocol I reaffirms the longstanding principles of *unnecessary suffering* by declaring:

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- (1) In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
- (2) It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

The classic example of the balancing of these two considerations is that of an infantry unit delayed in its attack by a lone sniper hiding at the edge of a village. While incidental injuries are an unfortunate but not prohibited aspect of war, the calling in of an artillery barrage to take out this lone sniper potentially would cause greater damage to the village and its inhabitants than is warranted. Herein lies a third factor in the means and methods equation, that of *proportionality*. In weighing incidental injury to civilians, the degree of such injury must not be disproportionate to the military advantage to be gained.

During the Vietnam War, for example, the North Vietnamese installed substantial concentrations of anti-aircraft guns and missiles on the earthen dikes and dams surrounding Haiphong and Hanoi. *Military necessity* warranted airstrikes against these positions. However, attack of the positions with conventional ordnance would destroy not only the enemy positions but the dams as well. This would result in massive flooding and in the probable deaths of several hundred thousand civilians, a cost U.S. authorities concluded was disproportionate to the military advantage to be gained. When the mission finally was approved by President Nixon, it was executed with a clear proviso that only anti-personnel bombs, capable of neutralization of the positions without substantial damage to the dikes, would be used.

While examples of this balancing of *military necessity*, *unnecessary suffering*, and *proportionality* are common-place in U.S. practice, the concept of *proportionality*, though part of customary international law, has not found its way into previous codifications of the law of war. This legislative lag has existed since 1911 when Italy conducted the first bombardment by aircraft (in the Libyan War against Turkey). As with other successful weapons, once the military efficiency of the airplane was realized, suggestions for the regulation of its use failed because of inadequate sponsorship. Thus attempts to codify the *proportionality* concept in the "Rules of Air Warfare" drafted by the Commission of Jurists meeting at The Hague in 1922-23 flew in the face of airpower arguments that "terror" bombing of the civilian population would destroy the morale of the enemy and hasten the end of any war. Although this theory was contradicted by the experience of both sides during World War II, legislation regulating aerial bombardment and codifying the rule of *proportionality* was not immediately forthcoming, prompting one expert to offer the following observation regarding the state of the law:<sup>9</sup>

Here are two villages in an occupied country. Detachments of the enemy are going through them. Unidentified inhabitants shoot down some fifteen soldiers. A rapid

police inquiry naturally produces nothing. To identify the assailants would require long interrogations and probably torture, since it is a matter of extracting information from patriots, conscious of serving a sacred cause. Moreover, other columns are arriving and there can be no question of conducting enquiries for weeks. The [division] commander will simply consider that "the enemy" is present in these two villages. He has a few planes at his disposal; he causes one of the villages to be bombed flat and several hundred people are killed. In the case of the other, he orders . . . the execution of twenty-five people.

Faced with these two series of homicides, what will be the attitude of justice? There is no room for hypotheses: the law is perfectly clear. The pilots who wiped out the village, and their officers, will be charged with no crime. On the other hand, the soldiers, members of the firing squad and officers who took no part in the execution . . . of the twenty-five inhabitants of the second village, will be found guilty of homicide.

From this state of the law there can be drawn only one precious, but amoral, axiom: Never carry out executions or destructions with the care of a craftsman. But long live wholesale massacre!

Article 57 of Protocol I not only corrects this paradox by codifying the rule of *proportionality*, but also provides the military commander with uniformly recognized guidance with respect to his responsibility to the civilian population in executing attacks against military objectives. Simultaneously, Protocol I charges the military commander under attack with the duty to avoid civilian casualties by prohibiting "the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attack" (Article 51(7)) or the improper use of the red cross (Articles 28(1) and 38(1)). In requiring that a commander "do everything feasible" to identify a target as a military objective, Article 57 coincides with the rules of engagement used by U.S. forces in Vietnam,<sup>10</sup> traditional target intelligence requirements, principles of war such as economy of force, and practical political considerations arising from excessive collateral injury to civilians or civilian objects. While objective criteria are provided, the decision of the commander ultimately is based upon subjective factors, i.e., the best information available to him at the moment of decision.<sup>11</sup>

*Weapons.* Weapons also are judged by considerations of *military necessity* and *unnecessary suffering*, the latter phrase in the classic sense concerning itself with such weapons as barbed spears or dum dum bullets that "uselessly aggravate the sufferings of disabled men, or renders their death inevitable."<sup>12</sup> The rationale for this rule is twofold: (a) weapons which cause unnecessary suffering cause needless injury to the individual long after the conclusion of hostilities, as evidenced by the effects of poisonous gas in World War I; and (b) militarily, wounding generally is more effective than killing, diverting men from the battlefield to evacuate and care for their wounded.

While the concept may be simple, further definition is elusive. Concerted efforts at definition have been made by the Secretary-General of the United Nations and the ICRC during this decade without success. Considerations have hinged upon whether a weapon causes unnecessary suffering or superfluous injury, whether the weapon is indiscriminate in effect, or whether the weapon kills through treachery. Studies to date have concentrated on napalm and other incendiary weapons, small caliber projectiles, and mines and boobytraps in an effort to identify "illegal" weapons. Those studies have found, however, that few weapons are illegal per se, and that questions of illegality are more inclined to arise in a particular use of a weapon than design intent. Moreover, there is considerable difference between an arbitrary declaration by a social scientist or movie actress that a weapon is "illegal," "immoral," or causes unnecessary suffering, the establishment of empirically proved criteria by which to measure a weapon, and scientific support for an allegation against a particular weapon. Most certainly, efficiency in its task is not tantamount to illegality. To the contrary, the Geneva Protocol of 1925 banning poisonous gas was adopted in large measure because of the military inefficiency of gas.

Three conferences of government weapons experts sponsored by the ICRC in conjunction with the 1974, 1975, and 1976 sessions of the Diplomatic Conference generally were little more than battles of rhetoric between the "haves" and the "have nots," with at least one developing nation changing its position over the course of the sessions once it had acquired its own arsenal of the weapons it previously had condemned. Other ironies surrounded the negotiations. Sweden was in the forefront of the battle to condemn napalm while simultaneously being a world leader in its manufacture and export. On more than one occasion the intensity of its delegation's obligations to a particular weapon was directly proportional to the capabilities of its arms industry to develop and market its version of that weapon. The Soviet Union, long a supporter of the arguments of the underdeveloped nations and liberation movements, found its position as an arms developer outweighed the "humanitarian" arguments of those States opposing certain weapons, ultimately siding with the United States in asserting that the Diplomatic Conference was not the proper forum for consideration of the weapons issue.

Failing to achieve any new definition, Protocol I (Article 36) limits itself to the requirement that new weapons be reviewed to ensure their legality, a requirement the United States placed into effect by DOD Directive 5500.15 on 16 October 1974. However, Resolution 22 of the Diplomatic Conference recommends the convening of a conference in 1979 to endeavor to reach agreement regarding the issues raised by the previous conferences of government experts.

***Protection of Medical Transportation.*** In 1910 two young Army doctors at Fort Barrancas, Florida, built and flew an aircraft with a view to using it to evacuate the wounded and sick from the battlefield. Although their experiment ended with the crash of their aerial ambulance on its maiden flight, the concept remained, with Marine 1st Lt. Christian F. Schilt performing one of the first aerial combat evacuations during the campaign against Nicaraguan bandit Augusto Sandino in January 1928. Briefly, technology and the law were almost parallel in their development. In 1923, at the XIth International Red Cross Conference, the French delegation placed on the agenda for the XIIth Conference (in 1927) a proposal to grant protection to medical aircraft. This proposal eventually became Article 18 of the 1929 Geneva Convention for the Wounded and Sick and provided protected status to aircraft dedicated exclusively to medical evacuation, painted white with red crosses,<sup>13</sup> and (absent special and express permission to the contrary) operating solely to the rear of medical clearing stations.

Although aerial evacuation became an essential means of medical transportation during World War II, it was limited primarily to theater evacuation rather than evacuation from the combat zone. Attempts to update the law at Geneva in 1949 were influenced by the experience of World War II and the fact that (unlike wheeled ambulances and hospital ships) seldom were aircraft dedicated to exclusive medical use. Moreover, government experts argued that Article 18 of the 1929 Convention had found only limited application during World War II, technical progress in fighter aircraft and antiaircraft having rendered unrealistic any justification for the development and wide-scale use of protected medical aircraft. It was anticipated that future conflicts would continue the practice of theater aerial evacuation with fighter escort. As a result, Article 36 of the 1949 Geneva Convention for the Wounded and Sick provided protected status to medical aircraft solely when "flying at heights, times, and on routes specifically agreed upon between the belligerents concerned."

In 1942 a civilian physician in Virginia wrote to the War Department suggesting the feasibility of using helicopters for frontline medical evacuation. Development of the concept lagged, however, and frontline medical evacuation received little consideration by the 1949 Diplomatic Conference. The outbreak of the Korean war the following year quickly changed regard for helicopter evacuations. As early as 17 August 1950, Marine HO3S-1 helicopters of VMO-6 operating within the Pusan perimeter were evacuating wounded from the 5th Marines' regimental aid station to the Army's 8076th Surgical Hospital at Miryang, 20 miles away. Helicopters evacuated more than 8,000 wounded in the first 16 months of the war alone. By the end of the war, as little as 43 minutes elapsed between the time a Marine was wounded and the time he was placed on board a hospital ship by helicopter, 30 minutes where delivery was to a land-based hospital.<sup>14</sup> Helicopter evacuation became the rule rather than the exception in

Vietnam, where experience taught that flights by medical aircraft within the combat zone were both a reality and a necessity.<sup>15</sup>

Recognizing this technological advancement and change in manner of operation, Protocol I significantly extends the areas in which medical aircraft may operate and be entitled to protection. Although guarantees of protection remain tied to communication to and acceptance of flight plans by the enemy, Protocol I recognizes the myriad situations in which medical evacuation by helicopter may occur by affording protection for flights over areas not controlled by an adverse party (communication not required but recommended, particularly when within range of enemy surface-to-air weapons systems), areas controlled by an adverse party (prior agreement required), and within that area identified in Protocol I as the "contact zone."<sup>16</sup> Medical aircraft operating in the contact zone without prior agreement do so at their own risk, but are entitled to respect after they have been recognized as medical aircraft. For military security reasons, medical aircraft continue to be prohibited from carrying out search and rescue missions over enemy-controlled areas or in the contact zone.

Substantial progress was made toward resolving the perpetual problem of identification of medical aircraft and hospital ships. Historically, attacks on each of these craft have occurred more as the result of failure of identification than through intentional acts of wrong-doing.<sup>17</sup> The meter-and-a-half horizontal green hull band prescribed for hospital ships by Hague Convention X of 1907<sup>18</sup> was deleted from the provisions of the 1949 Geneva Convention for the Wounded and Sick after U.S. Navy tests determined that the band hindered rather than facilitated visual identification of those ships. Although other tests confirmed wartime experience that reliance upon visual identification exclusively was inadequate, efforts at the 1949 Diplomatic Conference to adopt modern means of communication and detection for identification of medical aircraft and hospital ships were unsuccessful.

In 1973 the ICRC convened a meeting of experts from 11 nations and 4 specialized international organizations to consider signalling and identification systems for medical transports. A system of distinctive visual and non-visual signals to supplement the emblem of the red cross was recommended and ultimately incorporated into Annex I to Protocol I for unilateral adoption by a party to a conflict if desired. These systems include: (a) use of a flashing blue light by medical aircraft; (b) a distinctive radio signal for medical units and transports; and (c) a designated Secondary Surveillance Radar (SSR) mode and code for medical aircraft. Further, the flashing blue light and SSR may be adopted for use by other forms of medical transportation upon special agreement between the parties to a conflict. Although technically feasible, efforts to establish a recognized underwater acoustic transmitter system as a means for identification of hospital ships by submerged submarines was placed in abeyance pending further study.<sup>19</sup>

*Noninternational Wars.* The Geneva Conventions of 1949 took a major step forward in adopting the article 3 common to all four conventions that in theory binds all parties to an internal conflict to certain minimum standards of conduct. The concept was and is not without difficulties in interpretation and implementation. A sovereign State, if a party to the conventions, is bound by the provisions of the article: its guerrilla opponent is not. The absence of reciprocity destroys what traditionally has been one of the more important forces for compliance with the laws of war. A government, fighting for its life against externally supported domestic foes committing acts of terrorism, is unlikely to take kindly the suggestion that these acts be responded to with humanity. Moreover, despite a provision to the contrary in common article 3, pronouncement by a government that it will apply the standards of conduct declared in common article 3 to a conflict has certain legal and political implications. Politically, it raises the dignity of an opponent from that of a mob of bandits to one of a legitimately recognized guerrilla force fighting for "national liberation" or "self-determination," inviting additional outside support in what otherwise would be purely a domestic affair. Legally, what ordinarily would be murder may become lawful killing by a "combatant" in wartime. For these reasons the Symbionese Liberation Army and the besieged Indians at Wounded Knee were quick to declare their intention to abide by the Geneva Conventions in their respective "wars" with the United States, while U.S. authorities were just as anxious to conclude that the level of conflict necessary for such recognition was not met.

Whatever the objections to common article 3, two decades of national liberation wars established that it did not go far enough in providing protection to the victims of noninternational conflicts. Protocol II is intended to offer additional delineation of this protection. The drafting and approval of its provisions were accomplished in an atmosphere frequently charged with emotion and political rhetoric, brought about in part by the participation for the first time of a number of national liberation movements. Nonetheless, Protocol II—18 substantive articles as compared to the 91 of Protocol I—states in greater detail than common article 3 both the minimum protection to be afforded the victims of noninternational conflicts and the responsibilities of the parties to a conflict. It specifically does not apply to riots, isolated and sporadic acts of violence, and other acts of a similar nature. Otherwise it does not attempt to establish a "threshold of violence" at which time Protocol II comes into effect, for that question only can be answered through analysis of a particular situation in light of myriad legal, historical, sociological, and political factors. Rather, it is an attempt to minimize violence in noninternational conflicts and to limit suffering by those not taking a direct part in the conflict. However, the history and nature of insurgent tactics suggests that Protocol II will face a plethora of difficulties in practical implementation.

**Other Provisions.** Other articles specify new areas of express protection. Article 56 of Protocol I and 15 of Protocol II, for example, prohibit making works or installations containing dangerous forces (such as dams or nuclear electrical generating stations) the object of attack, except where that facility offers regular, significant, and direct support of military operations and if such attack is the only feasible way that support may be terminated effectively. In order to facilitate the identification of such works or installations, Article 56(7) establishes a special sign—three bright orange circles placed on the same axis—to mark these facilities. Article 44 serves to neutralize those reservations by the Soviet Union and other Communist States to Article 85 of the 1949 Geneva Convention for Prisoners of War that have been used to deny prisoner-of-war status to captured combatants on the allegation that they have participated in aggressive war or committed war crimes (the argument of the Democratic Republic of Vietnam against U.S. prisoners of war during the Vietnam war). Paragraph 2 of Article 44 guarantees a combatant prisoner-of-war status notwithstanding his conduct (alleged or actual) prior to capture. Articles 32 through 34 recognize a new human right, the right of families to know the fate of their relatives, by setting forth a requirement for belligerents to search and account for the missing in action, and for the decent disposition and eventual repatriation of the remains of the dead.

**Conclusion.** The Protocols to the Geneva Conventions are the product of lengthy negotiation and a great deal of compromise between delegations representing diverse political views and geographic areas. They are evolutionary rather than revolutionary, constituting a codification of customary international law rather than embarking upon substantial change of that law. They are not without fault. In addition to some attempts at politicization of the law of war, there were the perennial efforts by moralists and idealists who, realizing the futility of any attempt to outlaw war, endeavored to interject language into the Protocols that could be interpreted as making the law governing combat operations so restrictive as to make the waging of war impossible. But the pages of history are strewn with moralistic documents which failed in their usefulness because they attempted to establish an unattainable standard of conduct.<sup>20</sup> In this regard the law of war is no different from domestic and other international legislation in achieving respect only to the extent it reflects the customary practice of those it seeks to govern.<sup>21</sup> Changes in limitations on the governing of military forces in combat can be particularly critical, for any change likely to be perceived as a threat to the survival of an individual, unit, or nation, or contrary to the Principles of War, tactical considerations, or reasonable means for the commander's accomplishment of his mission is likely to be honored more in its breach than in its adherence.

To avoid the imposition of unrealistic restraints upon its armed forces, the Protocols were the subject of detailed review by the Department of Defense and the Joint Chiefs of Staff prior to their signature by the United States. A more

detailed review is underway within the services, DOD, and other agencies of the U.S. Government to insure that U.S. interpretations of the Protocols are attuned to the realities and conditions of combat prior to submission of the Protocols by the President to the Senate for its advice and consent to ratification. The United States and its NATO allies are conducting a separate review of the Protocols to insure their common understanding of the Protocols' effect. If approved by the Senate, the Protocols will go into effect for the United States 6 months after deposit of its instrument of ratification with the Government of Switzerland, adding further definition to the law of war.

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Major Parks was serving in the Office of the Judge Advocate General of the Navy, International Law Division when this article was first published. He was the senior U.S. representative to the Seminar on the Dissemination of the Geneva Conventions in Warsaw in 1977.

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### Notes

1. Participating in the signing ceremony on 12 December 1977 were Austria, Belgium, Canada, Chile, Ivory Coast, Denmark, Egypt, El Salvador, Ecuador, Finland, Ghana, Guatemala, Honduras, Hungary, Iran, Ireland, Iceland, Italy, Liechtenstein, Jordan, Luxembourg, Morocco, Mongolia, Nicaragua, Norway, Pakistan, Panama, Netherlands, Peru, Poland, Philippines (Protocol I only), Portugal, East Germany, Byelorussian SSR, Ukrainian SSR, U.S.S.R., United Kingdom, Holy See, Senegal, Sweden, Switzerland, Togo, Tunisia, Vietnam (Protocol I only), Yugoslavia, and the United States.

2. U.S. Laws, Statutes, etc., "Convention on War on Land," 36, pt. 2 United States Statutes at Large 2277 (1970).

3. U.S. Treaties, etc., "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field," United States Treaties and Other International Agreements, T.I.A.S. 3362 (Washington: U.S. Dept. of State, 1949), v. 6, pt. 3, pp. 3115-3216; U.S. Treaties, etc., "Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea," United States Treaties and Other International Agreements, T.I.A.S. 3363 (Washington: U.S. Dept. of State, 1949), v. 6, pt. 3, pp. 3217-3315; U.S. Treaties, etc., "Geneva Convention Relative to the Treatment of Prisoners of War," United States Treaties and Other International Agreements, T.I.A.S. 3364 (Washington: U.S. Dept. of State, 1949), pp. 3316-3315; U.S. Treaties, etc., "Geneva Convention Relative to the Protection of Civilian Persons in Time of War," United States Treaties and Other International Agreements, T.I.A.S. 3365 (Washington: U.S. Dept. of State, 1949), pp. 3516-3695.

4. U.S. Treaties, etc., "Geneva Protocol Prohibiting the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare," United States Treaties and Other International Agreements, T.I.A.S. 8061 (Washington: U.S. Dept. of State, 1975), v. 26, pt. 1, pp. 571-582.

5. U.S. Laws, Statutes, etc., "Geneva Convention for the Amelioration of the Wounded and Sick of Armies in the Field," United States Statutes at Large (Washington: U.S. Govt. Print. Off., 1932), v. 47, pt. 2, p. 2074; U.S. Laws, Statutes, etc., "Geneva Convention Relative to the Treatment of Prisoners of War," United States Statutes at Large (Washington: U.S. Govt. Print. Off., 1932), v. 47, pt. 2, p. 2021.

6. U.S. Laws, Statutes, etc., "Hague Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons," United States Statutes at Large (Washington: U.S. Govt. Print. Off., 1910), v. 36, pt. 2, p. 2439.

7. Resolution XXIII, Final Act of the International Conference on Human Rights, U.N. Doc. A/CONF. 32/41, p. 18. (1968).

8. U.S. Office of Naval Operations, The Law of Naval Warfare para. 220b. (Washington: 1955).

9. BOISSIER, L'EPEE ET LA BALANCE 55-56. (1953). Prior to Protocol I, only air forces were without specific regulation. Naval and land forces are limited in their operations on land by Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, United States Statutes at Large (Washington: U.S. Govt. Print. Off., 1932), p. 36, pt. 2, p. 2351 and Hague Convention IV.

10. Paragraph 6a of MACV Directive 525-13 (May 1971), as reprinted in Congressional Record, 6 June 1975, pp. S9897-9898 provided:

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All possible means will be employed to limit the risk to the lives and property of friendly forces and civilians. In this respect, a target must be clearly identified as hostile prior to making a decision to place fire on it.

11. In the plenary sessions the United States offered the following understanding to Article 57:

Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

This statement reflects customary international law. In 1948 charges against former German Gen. Lothar Rendulic alleging he had carried out wanton destruction in the Norwegian province of Finnmark were dismissed by a Nuremberg tribunal, which declared that "... the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made (that is, . . . as a precautionary measure against an attack by superior [Russian] forces)." *U.S. v. List, et al.*, XI Trial of War Criminals 1113, pp. 1295-1297.

12. The Declaration of St. Petersburg, 1868, as found in Department of the Army Pamphlet 27-161-2, International Law, 1962, p. 227.

13. Or the red crescent or red lion and sun, the authorized distinctive signs of the medical services of the armed forces of some Moslem states (e.g. Egypt, Iraq, Jordan, Syria, and Turkey) and Iran, respectively. Israel uses a red shield of David, which has not gained international recognition.

14. In contrast, during the 1945 battle for Iwo Jima, Secretary of the Navy James V. Forrestal offered this praise of medical evacuation efforts: "I went aboard the [hospital ship] *Samaritan* [AH-10], where Navy surgeons and corpsmen were already dealing with the casualties from the day and the night before." MOREHOUSE, *THE IWO JIMA CAMPAIGN* 139 (1946).

15. The Army and Marine Corps estimate that virtually 100 percent of U.S. battlefield casualties in Vietnam requiring medical evacuation were removed from the battlefield by helicopter; 15 percent of battlefield casualties in Korea were removed by helicopter. The Army carried out 950,000 helicopter evacuations in Vietnam. During the Vietnam War, 1 percent of the personnel evacuated to hospitals died of wounds, as compared to 2.5 percent in Korea and 4.5 percent in World War II. While these advances are tied to improved medical facilities, they also relate to the increased use of the helicopter for battlefield evacuation.

16. Article 26(2) defined "contact zone" as "any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground."

17. Mossop, *Hospital Ships in the Second World War*, 24 Brit. Y. B. Int'l L. 402 (1947); and *I Report of the International Committee of the Red Cross on Its Activities During the Second World War* 213 (Geneva: ICRC, 1948).

18. U.S. Laws, Statutes, etc., "*Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention*," United States Statutes at Large (Washington: U.S. Govt. Print. Off., 1910), v. 36, pt 2, p. 2371.

19. Distinctive signals and communications necessary for the improved identification of medical transportation require implementation through the International Telecommunications Union (ITU), the International Civil Aviation Organization, and to some extent, the Intergovernmental Maritime Consultative Organization. This subject is on the agenda for the ITU 1979 World Administrative Radio Conference.

20. See e.g., Article 22 to the Treaty for the Limitation and Reduction of Naval Armaments, otherwise known as the London Treaty of 1930, which attempted to prohibit submarine warfare by placing unreasonable restrictions upon submarine operations. Although reaffirmed by a 1936 *Proces-Verbal* acceded to or signed by Great Britain, the United States, Germany, and Japan, the International Military Tribunal at Nuremberg in its proceedings against Grand Adm. Karl Doenitz, former Fuehrer der Unterseeboote, found that those limitations had not been followed by any of those parties during World War II.

21. Although degree of adherence is not the sole criteria for determining a law's effectiveness, the reader may consider the response of U.S. citizens to the 18th Amendment (prohibiting liquor) and the 55-mph speed limit as examples of legislating conduct beyond the perceived point of necessity or reality.

# Chapter 35

## Rules of Engagement\*

Captain J. Ashley Roach, JAGC, U.S. Navy

**T**here is a very real need for greater knowledge of Rules of Engagement on the part of strategy and policy personnel, tacticians and operators, and even by our civilian leaders. At present these rules are rarely, if ever, exercised and too few planners and commanders seek contingent approval for additional or relaxed rules. Particularly telling is the fact that the requirement for an annual compiling and sending to JCS of the effective Rules of Engagement is all but ignored—and few appear to care! Why?

### Definitions

Rules of engagement (ROE) are directives that a government may establish to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with enemy forces.<sup>1</sup>

Under this JCS definition, ROE should *not* delineate specific tactics, should *not* cover restrictions on specific system operations, should *not* cover safety-related restrictions, should *not* set forth service doctrine, tactics or procedures. Frequently these matters are covered in documents called ROE.<sup>2</sup> ROE should never be “rudder orders,” and certainly should never substitute for a strategy governing the use of deployed forces, in a peacetime crisis or in wartime.

Figure 1 is a Venn diagram showing two concentric circles, one wholly inside the other. The area of the larger circle encompasses all those actions permitted under the law (domestic law and the law of armed conflict). The area of the inner circle represents those fewer actions permitted by the ROE.

The law of armed conflict binds the actions of nations and their armed forces. The United States government can, by its own action, change its ROE; international law, however, can be changed only by international agreement or consistent practice of nations. The law of armed conflict and domestic law are, of course, important influences in drafting the ROE, but they are not the only influences. ROE also reflect the influence of operational, political, and diplomatic factors.

\* Reprinted from the Naval War College Review January–February 1983.

Figure 2, another Venn diagram, illustrates that ROE result from a composite of these four factors. We have four circles centered on different points. They generally will be of differing diameters, since the relative influence of these four factors will vary depending on the circumstances. The common intersection of these four circles represents ROE. ROE then shape the force that may be used in order to achieve the political purpose and thus form the plane upon which Clausewitz's observation (that war is the execution of politics by other means) is brought into focus.

These Venn diagrams illustrate that ROE restrict military operations far more than do the requirements of international or domestic law. Indeed, the judge advocate in reviewing ROE under the law of war (law of armed conflict)

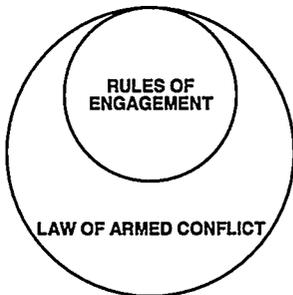


FIGURE 1.  
RULES OF ENGAGEMENT  
AND THE LAW OF ARMED CONFLICT

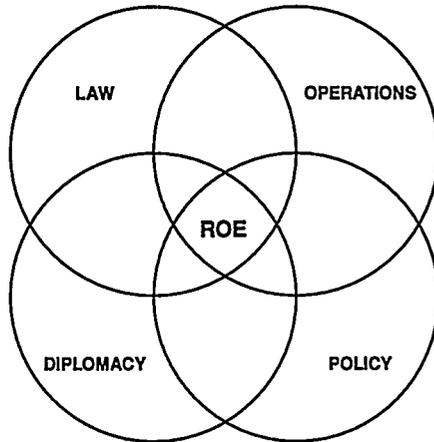


FIGURE 2.

program<sup>3</sup> performs a valuable service when he or she recommends that the ROE not be more restrictive than the law requires unless for clearly articulated operational, political or diplomatic reasons.

### Purposes of ROE

ROE represents the primary means by which the National Command Authorities (NCA) can, through the JCS, provide guidance to deployed forces in peacetime for handling crises and in wartime for controlling the fighting. ROE are one of the most effective tools for implementing strategic decisions made at

higher levels, and provide a mechanism for controlling the shift from peace to war. They can be viewed as having three, more specific, purposes.

### Political Purposes

ROE represents a measure of assurance that national policy will be followed in wartime or in sudden emergencies which do not allow time for communications between Washington and the field.<sup>4</sup> The rules should be flexible enough to accommodate changing circumstances. They should be designed to allow military courses of action that advance political intentions with a minimum chance for undesired escalation or reaction. It is for this reason (among others) that authority to employ certain weapons is generally reserved to the NCA (e.g., nuclear and chemical weapons, riot control agents and chemical herbicides).<sup>5</sup> Peacetime rules, in particular, are intended to preserve to the NCA, and all levels of operational command, the full range of options consistent with exercise of the right of self-defense and national policy.

### Military Purposes

ROE represent limitations, or upper bounds, on the freedom of an on-scene commander to dispose his forces toward successful completion of his mission. They must be designed, however, not to interfere with his right and responsibility to protect his command against attack or an imminent threat of such an attack. The ROE should be designed to remove any legal or semantic ambiguity which could lead a commander inadvertently to violate national policy by underreacting or overreacting to some foreign action.<sup>6</sup>

The conduct of operations in a tension situation always involves a balance of threat and counterthreat on the part of both sides. The main purpose of ROE is to prevent that balance from being disturbed by thrusting the apparent necessity of self-defense too obviously upon the opponent.

### Legal Purposes

ROE represent operational guidance, including that required for self-defense, which allows the commander to do whatever is necessary to achieve his military task within the constraints of stated national policy. ROE thus are a major tool for ensuring that a commander's actions stay within the bounds of national and international law.

## Peacetime and Wartime ROE Distinguished

Peacetime ROE are distinct from ROE applicable during armed conflict (WROE). Peacetime ROE generally limit military actions, including the use of force, to defensive responses to hostile acts or demonstrations of hostile intent in situations short of armed conflict. They are premised on the right of self-defense and provide rules for the exercise of that right. ROE during armed conflict do not limit military responses to defensive actions alone but do place limits, consistent with national objectives, strategy and the law of armed conflict, on the means and methods of warfare and will necessarily affect tactics. These include restrictions on certain weapons and targets, and ensure the greatest possible protection for noncombatants consistent with military necessity, proportionally and national policy. WROE are thus a useful tool to ensure that force is used toward achieving the desired military objectives and political goal.

### Right of Self-Defense

As previously noted, all peacetime ROE are premised on the right of self-defense. Every commander must understand that this right of self-defense is applicable for two distinct purposes: protecting his command and protecting the nation. Most every peacetime ROE contains a warning to the effect that “nothing in these rules is intended to limit the commander’s right of self-defense.” One might wonder what that warning means, particularly in light of all the detailed rules that accompany it. It means that the ROE do not address the right to protect the individual, the commanding officer, the unit commander and his command from attack or from threat of imminent attack, in situations involving localized conflict, or in low-level situations that are not preliminary to prolonged engagement. Those situations are always covered by the inherent right of unit self-defense (but little or no operational guidance is given on how and where to exercise that right). Rather, peacetime ROE provide guidance on when armed force can be used to protect the larger national interests, such as the territory of the United States, or to defend against attacks on other U.S. forces not under your command. This concept relates to regional or global situations even if a high-level commander knows that no hostile acts have been committed, or no hostile intent is evident, at a particular local level. When this distinction is understood, the disclaimer should be understandable and the purpose of the rules clearer.

The *Nimitz*’s two F-14s exercised their right of unit self-defense when they responded to the attack on them by two Libyan Su-22 fighters on 19 August 1981, in international airspace over international waters in the south central Mediterranean. Nevertheless, the open ocean missile exercise, which the F-14s

were assisting, was operating under the general peacetime ROE that covered such a contingency.<sup>7</sup>

It is a common misperception that under the peacetime ROE a commander must “take the first hit” and cannot act in self-defense until the opposing force has missiles away.<sup>8</sup> That is not the law and is not required by our general peacetime ROE.

### Definition of Self-Defense

The legal standard for the use of armed force in self-defense is the same whether to protect the individual, a ship or aircraft, or the nation. First, there must be a situation requiring the use of force (i.e., necessity) and, second, the amount of force used must be proportional to the situation giving rise to the necessity. The requirement of necessity, or present danger, obviously arises when an armed attack occurs. However, the right of self-defense may also involve the use of armed force against a threat of imminent attack. In either case, proportionality requires that the use of force be limited in intensity, duration and magnitude to what is reasonably required to counter the attack or threat of attack. In peacetime, force may never be used with a view to inflicting punishment for acts already committed.<sup>9</sup> Reprisals should not be undertaken until authorized by the NCA.<sup>10</sup>

### Hostile Acts and Hostile Intent

A hostile act is simply the actual use of armed force—attacking. The commission of a hostile act gives rise to the right to respond with the use of proportional force in self-defense by all authorized means available. Hostile intent is the threat of the imminent use of force. Evidence of hostile intent may lead to the force being declared hostile. Whether or not a force is declared hostile, where the hostile intent amounts to a threat of imminent attack, the rights exists to use proportional force in self-defense by all authorized means available.<sup>11</sup>

### Pursuit

ROE frequently provide rules regulating the pursuit of hostile forces, but sometimes confuse the legal limits of pursuit in self-defense with the law of the sea (LOS) law-enforcement concept of hot pursuit.<sup>12</sup>

*Self-defense pursuit*, often called *immediate pursuit*, properly refers to pursuit of hostile forces initiated in response to and in defense against the hostile acts of those forces. Although such pursuit does not have to be undertaken immediately, since it is a response taken in self-defense, pursuit may be lawfully taken only so long as the hostile force is an immediate threat to your force. Frequently the

ROE will impose geographical restraints, such as prohibiting pursuit into the territory of third (neutral) countries, or even into the territory of the hostile force (to minimize risk of escalation). There may be exceptions to those restrictions for situations when the hostile force attacks from either territory, or persists in committing hostile acts after it has entered the neutral territory and that nation is unable or unwilling to neutralize the hostile actions of the foreign force. The right to pursue in self-defense obviously ceases when the prerequisite for the exercise of that right disappears, for example, when a hostile ship ceases to constitute an immediate threat because it can no longer bring its weapon systems to bear.<sup>13</sup>

### Hot Pursuit

Frequently it is stated that pursuit must be continuous and immediate. At sea those restrictions are not legally required to pursue in self-defense. Rather, the requirement for continuous and immediate pursuit derives from the LOS right of “hot pursuit” set forth in article 23 of the 1958 High Seas Convention. The right of hot pursuit *only* relates to a coastal State’s attempts to enforce its domestic laws against foreign ships violating those rules in the coastal State’s internal waters, territorial sea, and contiguous zone. (The U.S. Coast Guard Peacetime ROE extends this to fisheries zones and over the continental shelf.)

Hot pursuit may not be commenced on the high seas, yet that is where pursuit is generally irrelevant in maritime self-defense ROE, and is clearly distinguishable from self-defense pursuit.<sup>14</sup>

### ROE as Implementation of the Law of Armed Conflict

All ROE must be consistent with domestic law as well as the law of armed conflict, and where used to control the use of armed force, implement the principles of military necessity, proportionality and humanity.<sup>15</sup>

### JCS Requirements

Volume 1 of the Joint Strategic Capabilities Plan (JSCP) routinely provides that commanders of unified and specified commands will establish and maintain ROE in conformity with rules issued by higher authority applicable to their areas of responsibility. (There are better than a dozen JCS directives that provide the unified and specified commanders with ROE guidance.) Their ROE are required to be in accordance with applicable law. Proposed ROE for situations not covered by existing rules and revisions of existing rules are to be submitted to the JCS for review and approval. ROE for U.S. maritime forces are to be consistent with those approved for NATO maritime forces. Whenever possible,

ROE are to be standardized for use by all major commands to facilitate movement between those commands. The Joint Operations Planning System (JOPS) (volume I) provides a format for the ROE appendix to the operations annex of all unified and specified commanders' operations plans.

### Compilation of ROE

The JSCP also requires the unified and specified commanders and COMRDJTF to compile all rules (and changes thereto) for their commands in formats such as instructions, letters, operation plans, or messages. The compilations are to be prepared no later than 1 October each year and provided to the JCS, Chiefs of the Services, USCincRed, CincSac, the commanders of other affected unified and specified commands and COMRDJTF if affected, and to commanders of other unified and specified commands or COMRDJTF upon request if unaffected. A typical unified commander's compilation would list the commander's central document promulgating his basic peacetime ROE, plus any special ROE contained in his operations plans.

### Review of Compilation of ROE

The JSCP provides that the JCS will assure appropriate Joint Staff and Service review of such compilations and changes thereto, including a legal review by the Services, to assure consistency of the ROE with applicable domestic and international law, including the law of armed conflict. This can occur, obviously, only when such compilations are submitted, although this has not always been done.

### Structure of ROE

ROE should be structured in accordance with JOPS, and with two distinct ideas in mind. Basic peacetime ROE, which are to serve as an unambiguous guide for the commander in the conduct of his mission, should be declarative, that is, written as action which define both the conditions and limits of that combat. Additionally, there should be available a series of supplemental measures that may be implemented to expand the authority of, or relax the restrictions on, the commander when the situation exceeds the bounds of the general case.<sup>16</sup>

### Content of ROE

Depending on the level of the promulgating commander and the contemplated circumstances of application, ROE should contain appropriately generalized or specific guidance on the employment of systems and platforms for

surveillance, targeting and ordnance delivery. ROE may delimit the conditions for employment of the systems and platforms, but should not delineate specific tactics. All ROE should contain political and military policy guidance as well as guidance on those areas of international and domestic law that are subject to misinterpretation. They should not cover safety-related restrictions. They should not set forth service doctrine, tactics or procedures, for example, relating to airspace management. In essence, ROE should never be designed as “rudder orders,” and never substitute for a strategy for the employment of the forces.

### Subject Matter of ROE

ROE may be general and comprehensive, so as to constitute part of the fighting instructions of a fleet, and in this case they must envisage a range of contingencies. Or they may be issued specifically for a particular operation.<sup>17</sup> Peacetime ROE cover such matters as general maritime operations, interception and engagement of aircraft, and defense operations for specific locations.

### Problems with Existing ROE

Frequently ROE are not well understood by those who need to know them, and often are neither clearly nor comprehensively written.<sup>18</sup> ROE are often best known by the junior officer who has custody of the documents. Occasionally even the existence of the ROE is known only to him! ROE are rarely seen by anyone else, except the commander and his operations and intelligence officers.<sup>19</sup> Perhaps it was this state of affairs that led VAdm Thomas Weschler, USN (Ret.), while Chairman of the Naval Operations Department of the Naval War College, to advise the *senior* College of Naval Warfare students to read the ROE held by their commands as soon as they report to each duty station.<sup>20</sup>

The rules are often perceived as being either too detailed or complex, or as being mere tools to implement decisions. Yet they reflect current policy which may not be found elsewhere, particularly in an emergency. Obviously they cannot be found by reference to a compilation if it does not exist—even in the command center. Nor is an emergency the time to locate and learn the rules.<sup>21</sup> Additionally, the current set of peacetime ROE is too narrow and too specific to be of general use—because the ROE were developed in response to particular situations. The result is patchwork guidance. There exists no overall national policy guidance to the unified and specified commanders for the use of armed force in all environments during peacetime or in armed conflict. Some have told me no coherent and overarching ROE are needed, since the system has shown its inherent flexibility without them. Perhaps so, but no timely effort was mounted to aid the *Pueblo*, in part, because “we had to check with higher authority since the ROE were not clear enough” despite ample legal authority

and the military necessity for immediately scrambling and using the F-4s or ROKAF assets to halt the procession to Wonson.<sup>22</sup>

Further, there does not appear to be anywhere enough training in the use of ROE or enough contingency planning for seeking additional or relaxed authority. The tactical training commands and the PCO/PXO schools must undertake on an urgent basis to teach ROE, particularly the new peacetime ROE and their mechanism for changing ROE.

Another problem with general ROE that encompass a variety of situations in which our forces may find themselves in the discharge of their political tasks, is the difficulty of providing adequate guidance for the contingencies. Frequently, this problem is sidestepped in planning—until the nature of the crisis is analyzed—by the expedient of including in the general ROE references to further guidance that will be received when the situation changes.

This approach reflects a widespread assumption that the theory of graduated escalation will allow the leisurely evolution of specific ROE by the ordinary process of governmental policy-making, by committee. Yet the suddenness with which political situations erupt means we may not have the luxury of time to formulate a reasoned set of ROE.

In the absence of precise thinking and sufficient theoretical preparation, ROE are not likely to express clearly the detailed controls that contemporary political constraints require of military conduct. Such vagueness and imprecision in the ROE can only compound the dangers of uncontrolled escalation. The Navy, for example, is often required to deploy units or fleets for the purpose of catalytic force without any clear objectives in mind, and in the hope that the Navy will do something to resolve the situation and nothing to aggravate it. Such assignments should be undertaken with precise ROE, in pursuance of a definite and coherent policy; precise ROE are, however, impossible to write when the government has not made up its mind—and this is usually the case in any catalytic use of seapower.

When developing specific operations, planners should anticipate what additional ROE will be needed in the event of changed circumstances, particularly if they run into increasingly tense or hostile situations—and then ask for revised or additional ROE ahead of time, on a contingency basis. That way, there will be time to figure out what additional ROE measures are needed and are best; time to get approval for them; and time to use them to tactical advantage.<sup>23</sup>

## Wartime ROE

Some feel that wartime ROE (WROE) are simple to prepare and therefore need not be prepared in advance in peacetime. Some go so far as to say that the service law of war manuals<sup>24</sup> are the WROE. Anyone who served in Vietnam or who has read the declassified portion of the WROE used in that conflict<sup>25</sup>

will have a different view of the matter. The service manuals are not up to date (albeit the Navy and Army are updating their manuals, by completely rewriting them).

In any event, at least in limited wars, the ROE will constrain military operations to less than the full range of legally permissible options.

More fundamentally, if we are to practice how we are going to fight in combat it seems less than sensible not to know in peacetime what the rules are going to be. Others may suggest in private that WROE is too hard to write, perhaps because of their own uncertainty of the future, or perhaps because of an uncertainty regarding what would be legally permissible.

Nevertheless, the basic principles for those rules are to be found in the law of armed conflict and relevant military doctrine. If not, then we should be developing new doctrine and fresh interpretations of the law to meet changing circumstances, e.g., doctrine and laws relating to the employment of missiles against targets located beyond visual range or over the horizon.

### Summary

ROE are one of the main instruments used to interpret policy and ensure that armed force is used to achieve and not to defeat the desired political goal.

In peacetime, ROE reflect significant legal, political, diplomatic, and military restrictions on the employment of military forces.

In wartime, ROE permit a wider range of uses of military force, but still are used to ensure that force is employed toward the achievement of desired political goals.

Every commanding officer retains the right to use force to protect his command in self-defense. He also has the obligation to do so.

Authority to employ certain weapons is generally reserved to the NCA (e.g., nuclear and chemical weapons, riot control agents and herbicides).

The new maritime ROE have mechanisms for changing—including relaxing—specific aspects of the ROE to provide precise responses to changing threats.<sup>26</sup> There should be developed similar mechanisms for the other peacetime ROE. All should be included in exercise play whenever possible. Appropriate modifications should be approved, in advance, for use if specified contingencies occur.

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Captain Roach was the Head of the Law of Armed Conflict Branch of the International Law Division in the Office of the Judge Advocate General of the Navy when this article was first published.

## Notes

1. JCS Pub 1, *Department of Defense Dictionary of Military and Associated Terms* 298 (1979). "Combat Engagement" is not defined in JCS Pub 1. A most insightful description of ROE and the law in relation to naval operations appears in the chapter on ROE in O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 169-180 (1975).

2. E.g., JCS Pub 12, *Tactical Command and Control Planning Guidance and Procedures for Joint Operations, Vol. IV, Joint Interface Operational Procedures, Part IV (Air Control/Air Defense Procedures for Joint Services Operations)*, Chapter III (Air ROE/Hostile Identification Criteria) (Washington, DC: U.S. Govt. Print. Off., 1981); OPNAVINST 3710.7J, Subj: NATOPS General Flight and Operating Instructions, paragraph 436c (ACM ROE).

3. SECNAVINST 3300.1A, 2 May 1980, Subj: Law of Armed Conflict (Law of War) Program to ensure compliance by the naval establishment.

4. In this connection O'Connell correctly adds that "In the absence of precise thinking and sufficient theoretical preparation, rules of engagement are unlikely to express sufficiently the detailed controls that contemporary political constraints and military conduct require." O'CONNELL, *supra* n. 1 at 170.

5. U.S. Navy Dept., *Law of Naval Warfare* NWIP 10-2 (1974), paragraph 613 n.8 (nuclear weapons) and 612 n.7 (chemical weapons); Executive Order 11850 (riot control agents and chemical herbicides).

6. Morse, *ASUW: Getting a Run for Our Money*, U.S. Nav. Inst. Proc. 100 (July 1982): "Commanders commonly have diverse interpretations of the criteria for conducting offensive or defensive operations. Although these rules (ROE) will never be comprehensive enough to cover all situations, questions related to specific points (i.e., if fired upon, must a U.S. or allied unit be hit before returning fire? What constitutes hostile intent? etc.) must be clarified by higher authority prior to any operation in order for surface forces to maintain a tactical advantage within the ROE."

7. Lieut. Gen. Philip J. Gast, USAF, Director of Operations of the Joint Staff, and Secretary of Defense Weinberger news conference on 19 August 1981, *The New York Times*, 20 August 1981, A-8; *U.S. Navy Fighters Shoot Down 2 Libyan Jets*, *The Washington Post*, 20 August 1981, A-1; McNeil-Lehrer Report interview with Deputy Secretary of Defense Carlucci, 19 August 1981; Tillman, *Comment and Discussion*, U.S. Nav. Inst. Proc. 87 (August 1982); Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, U.S. Nav. Inst. Proc. 26, 30 (January 1982).

8. Parker, *Thinking Offensively*, U.S. Nav. Inst. Proc. 29 (April 1981).

9. U.S. Navy Regulations 1973, Article 0915.

10. The service law of war manuals reflect a diversity of views on whether reprisals may be ordered by a subordinate commander on his own authority. Compare Air Force Pamphlet 110-31, *International Law—The Conduct of Armed Conflict and Air Operations* paragraph 10-7c(8) (1976) and Air Force Pamphlet 110-34, *Commander's Handbook on the Law of Armed Conflict* (1980), paragraph 8-4b(2) with NWIP 10-2, paragraph 310b, U.S. Army Field Manual 27-10, *The Law of Land Warfare* (1956), paragraph 497b, and Department of the Army Pamphlet 27-161-2, *International Law—Volume II* 66 (1962).

11. U.S. Navy Regulations 1973, Article 0915; O'CONNELL, n.1 at 71, 172; Weschler, *Rules of Engagement: (Lecture at the Naval War College, 17 April 1979)*.

12. O'CONNELL, *supra* n. 1 at 177.

13. Air Force Pamphlet 110-34, paragraphs 2-5c, 2-6c.

14. 12 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 75-76 (1971), quoting BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 38-41 (1958); *Self-Defense Actions of Military Forces Distinguished from "Hot Pursuit," Contemporary Practice of the United States Relating to International Law*, 63 Am. J. Int'l L. 122 (1969); Borck, *Hot Pursuit and the Rights of Pursuit*, JAG J. 18, 19-20 (March-April 1969).

15. These principles are explained in NWIP 10-2, Section 220.

16. O'CONNELL, *supra* n. 1 at 177. The distinction between an action and a supplemental measure is this: an action is a complete military concept for accomplishing a specified purpose. A supplemental measure restrains or liberates a limited area force capability; it is more restricted in scope and purpose than an action. Many supplemental measures may be needed to make an action feasible.

17. *Id.* at 169.

18. "Vagueness and imprecision in the rules of engagement can only compound the dangers of uncontrolled escalation." *Id.* at 170.

19. *Supra* n. 8 at 26, 29.

20. O'Connell also notes that the study of ROE "still forms an inadequate part of the defense curriculum." O'CONNELL, *supra* n. 1 at 170.

21. O'Connell puts it more eloquently in the context of naval operations: ". . . the suddenness with which political situations erupt means that naval staffs may not have the luxury of time to formulate a reasoned set of

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rules of engagement, and in the absence of these, naval operations are likely to be too hesitant for want of certainty or too uncontrolled to be politically acceptable." *Id.*

22. Inquiry into the USS Pueblo and EC-121 Plane Incidents, Report of the Special Subcommittee on the USS *Pueblo*, House Armed Services Committee Report No. 91-12, 91st Congress, 1st Session, 28 July 1969, at 1668-73.

23. Luckow, *Victory over Ignorance and Fear: The U.S. Minelaying Attack on North Vietnam*, Naval War College Review 17 (January-February 1982). ("Peacetime contingency planning should contain one or more sets of rules of engagement to fit the expected variations of possible scenarios in a time of tension," Luckow, at 26.)

24. NWIP 10-2, U.S. Army Field Manual 27-10, and Air Force Pamphlet 110-31.

25. Printed in the 6 June 1975 *Congressional Record*, the 1975 DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW, and the *Peers Report*, Volume I, Chapter 9, and Volume III, Book 2, Exhibits D-4 *et seq.*

26. Pease, *Comment and Discussion*, U.S. Nav. Inst. Proc. 83 (June 1982).

## Chapter 36

### False Colors and Dummy Ships: The Use of Ruse in Naval Warfare\*

Lieutenant Commander Mary T. Hall, JAGC, U.S. Navy

“**O**kay, we have an all-black hull with “Lykes Lines” on the side, mid-ships. White superstructure with black diamond, a block L inside the diamond.’ He lifted his binoculars. ‘Lookout mast forward of the superstructure. Check. Superstructure is nicely raked. Electronics mast is not. Proper ensign and house flag. Black funnels. Winches all by the barge elevator—doesn’t say how many winches. Damn, she’s carrying a full load of barges, isn’t she? Paintwork looks a little shabby. Anyway, it all checks with the book; that’s a friendly.’”<sup>1</sup>

This report, from Tom Clancy’s *Red Storm Rising*, is being delivered by the copilot of a P-3 Orion conducting a visual inspection and recognition pass on a merchant ship in the North Atlantic as war with the Soviet Union is about to erupt. Little does the copilot realize that the ship, which he believes to be an American seagoing barge carrier, is in fact Soviet. Concealed within her barges and hull are over one thousand air assault troops preparing to strike Iceland. Little does the copilot know that the shabby paintwork is only a few hours old and is, along with false colors and altered superstructure, part of an intricate scheme to pass the Soviet ship off as a “friendly.” The ruse works, right down to the Red Army major who speaks English with a Mississippi accent to the Orion crew over the VHF circuit.

#### The Commander’s Dilemma

The use of disguise in naval warfare is not new. Rather, because it capitalizes on the traditional force multiplier of surprise, deception has long been one of the most valuable weapons in a commander’s tactical arsenal. However, under the laws of naval warfare, not all forms of deception are legal. Hence, a commander must be able to distinguish between legal and illegal applications of deception.<sup>2</sup> Since the line between what is legal and what is not is indistinct, the commander’s task is difficult, and the heat of battle is hardly the ideal environment in which to make a detached, unemotional analysis of the law of naval warfare.

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Deception has often been a major contributor—if not the most decisive factor—to success in naval and land warfare. In the tactical sense, deception may be defined as the deliberate misrepresentation of reality to gain an advantage over the enemy.<sup>3</sup> It can take as many forms as a fertile human mind can conjure, and it serves countless functions. It can be used to control the time and site of battle, to achieve surprise by misleading the enemy, to maximize tactical advantages or minimize disadvantages, or even to render attack unnecessary by inducing the enemy to surrender.<sup>4</sup> Sun Tzu tells us that “[a]ll warfare is deception. Therefore, when capable, feign incapacity; when active, inactivity. When near, make it appear that you are far away; when far away, that you are near. Offer the enemy a bait to lure him; feign disorder and strike him. . . . When he is strong, avoid him. Anger his general and confuse him. . . . Pretend inferiority and encourage his arrogance.”<sup>5</sup>

One of the earliest recorded examples of the use of deception in naval warfare was in the Battle of Salamis in 480 B.C., when the vastly outnumbered Greeks feigned a withdrawal in order to lure Xerxes’ Persian fleet into a narrow channel. This maneuver contributed to a Greek victory by preventing the Persians from simultaneously deploying their entire fleet.<sup>6</sup> Modern technology, such as electronic warfare, has added new twists to the art of deception in battle, but the underlying premise—surprise—remains the same. However, it is not enough for a commander to simply know the current techniques of deception; he must also know the current law. The lawful use of deception in battle may earn him accolades as an astute master of naval warfare, but its illegal use may make him a war criminal.

### Deception: Ruse or Perfidy?

Those who write on the law of armed conflict generally classify the use of deception as either ruse, which is legal, or perfidy, which is not. Drawing a distinct line between these two is virtually impossible, since what is a permissible ruse in one situation may, with just a slight shift in circumstances, constitute perfidy in another.

Any commander, at sea, ashore, or aloft, must understand why international law is even concerned enough about the issue to distinguish between the two. It would seem to make more sense either to outlaw all forms of deception or to permit them all, rather than place commanders in the position of possibly violating international law by using some novel form of trickery which has neither been blessed nor condemned by the international legal community. However, the rationale underlying the prohibition against perfidy is that combatants are expected to behave in absolute good faith toward each other. This notion may seem contradictory to those unfamiliar with the law of armed conflict. Nevertheless, in order to minimize human suffering as much as possible

and to facilitate the restoration of peace, international law has placed limits on behavior during warfare.

Deception is not illegal *per se*,<sup>7</sup> but rather is permissible so long as it does not violate some rule or principle of international law. *NWP 9, The Commander's Handbook on the Law of Naval Operations*, provides the commander with a basic introduction to this concept: "The law of armed conflict permits deceiving the enemy through stratagems and ruses of war intended to mislead him, deter him from taking action, or to induce him to act recklessly, provided the ruses do not violate rules of international law applicable to armed conflict."<sup>8</sup> Obviously, a commander, especially one who operates without ready access to a judge advocate, must be familiar with the law of naval warfare in order to discern whether or not a proposed deception violates any principles of the law of armed conflict.

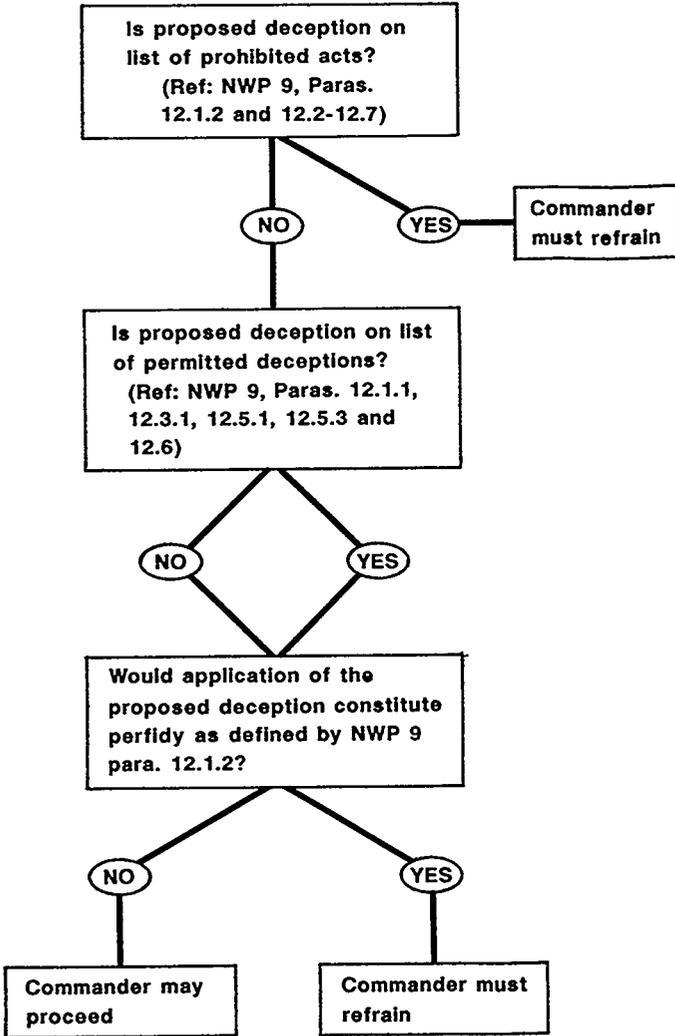
### A Proposed Method for Analysis

A commander intending to use a novel form of deception must be able to determine whether his proposed action is legal. In order to do this, he must be familiar with various elements of the law pertaining to deception. At a minimum, these elements include the following:

- The requirement for good faith between combatants;
- The definition of perfidy;
- The reason perfidy is prohibited;
- The list of permitted deceptions under *NWP 9*;
- The list of prohibited deceptions under *NWP 9*; and
- Historical applications of perfidy and ruse.

The flowchart provides a method by which the commander, using the elements described above, can analyze whether his proposed deception is lawful. The commander starts with the assumption that the deception is lawful (based on paragraph 12.1 of *NWP 9* cited above). Next, he must ascertain whether it is on the *NWP 9* list of prohibited deceptions. If it is, then the commander must not take the action. If it is not on the prohibited list, the commander must then determine whether it is on the list of permitted deceptions or if on this list it has a logically related counterpart. Even if the proposed deception is on the list of permitted deceptions, it must still be examined for potential perfidy since, as was noted earlier, even permitted deceptions can, through a slight change in circumstances or events, become perfidy. Alternatively, if the proposed deception is not on the list of permitted ruses and does not have a logically related counterpart, the commander must examine it for potential perfidy. Thus, the mere presence of a proposed deception on the list of permissible ruses does not guarantee the absence of perfidy in a particular situation. Only after determining

**ANALYSIS OF PROPOSED DECEPTION**



that the deception does not constitute perfidy may the commander take the action he proposes.

Other people's experience in the application of deception is extremely useful for the commander's analysis. Although commanders ashore have traditionally employed a wider variety of deception than naval commanders,<sup>9</sup> naval history provides ample precedent. A commander should not dismiss a 17th-century application of deception as unworthy of his attention. Even if the technique used in an old situation is no longer viable, the method for determining whether the

antecedent constituted perfidy or ruse will almost always apply to modern naval warfare.

### Perfidy Defined

By far the most complicated step in the method is determining whether a proposed deception falls within the *NWP 9* definition of perfidy. Although *NWP 9* is not the only source which defines perfidy, it is the best starting point for the naval commander. It states that acts of perfidy are “deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence.”<sup>10</sup> The requirement for absolute good faith is obvious from this definition. Furthermore, this definition appears to require a specific intent to betray the enemy’s confidence in order for a violation to have occurred, which would seem to excuse the commander for accidental violations.

Many commentators have attempted to delineate where ruse ends and perfidy begins. One of the most noteworthy was Henry W. Halleck, who in 1861 stated the following: “Whenever we have expressly or tacitly engaged to speak truth to an enemy, it would be perfidy in us to deceive his confidence in our sincerity. But if the occasion imposes upon us no moral obligation to disclose to him the truth, we are justifiable in leading him into error, either by words or actions. . . . It is the breach of good faith, express or implied, which constitutes the perfidy, and gives to such acts the character of lies.”<sup>11</sup>

Halleck’s definition of perfidy, however, has been criticized for emphasizing too much of one particular kind of deceit, that being false communications.<sup>12</sup> However, it is useful to read Halleck’s definition in conjunction with that proposed by William E. Hall in 1908: “As a general rule deceit is permitted against an enemy; and it is employed either to prepare the means of doing violent acts under favorable conditions, by misleading him before an attack, or to render attack unnecessary, by inducing him to surrender, or to come to terms, or to evacuate a place held by him. But under the customs of war it has been agreed that particular acts and signs shall have a specific meaning, in order that belligerent may carry on certain necessary intercourse; and it has been seen that persons and things associated with an army are sometimes exempted from liability to attack for special reasons. In these cases an understanding evidently exists that particular acts shall be done, or signs used, or characters assumed, for the appropriate purposes only, and it is consequently forbidden to employ them in deceiving an enemy.”<sup>13</sup>

Three examples will serve to demonstrate the breach of good faith required for an act to be considered perfidious. The first is the misuse of an internationally protected sign, such as the Red Cross emblem. *NWP 9* states that “misuse of protective signs, signals, and symbols in order to injure, kill, or capture the enemy

constitutes an act of perfidy."<sup>14</sup> Misuse of the Red Cross emblem constitutes a breach of good faith because it undermines the effectiveness of this emblem during combat and jeopardizes the safety of noncombatants and the traditional immunity of protected medical activities, structures, and modes of medical transportation, such as hospital ships, ambulances, and medical aircraft. Thus, it would constitute an act of perfidy for a commander to use a hospital ship to transport troops, weapons, or ammunition with the intent to elude or attack enemy forces.<sup>15</sup>

The second example is the feigning of distress through the false use of internationally recognized distress signals such as MAYDAY and SOS,<sup>16</sup> which evoke the traditional requirement for mariners to aid those in distress at sea. As with misuse of the Red Cross emblem, the misuse of a distress signal would undermine its effectiveness and would jeopardize the safety of neutral vessels.

A third breach of good faith is the misuse of a flag of truce. "The white flag has traditionally indicated a desire to communicate with the enemy and may indicate more particularly, depending upon the situation, a willingness to surrender. It raises expectations that the particular struggle is at an end or close to an end since the only proper use of the flag of truce or white flag in international law is to communicate to the enemy a desire to negotiate. Thus, the use of a flag of truce or white flag in order to deceive or mislead the enemy, or for any purpose other than to negotiate or surrender, has long been recognized as an act of treachery."<sup>17</sup>

These three examples demonstrate that perfidy, in its broadest sense, is the intentional and wrongful use against the enemy of his adherence to the law of war.

### Permissible Ruses

Just as it is impossible to compile a list of all possible acts of deception which would constitute perfidy, it is also impossible to compile a list of every permissible ruse. *NWP 9* lists camouflage, deceptive lighting, dummy ships, dummy armament, decoys, simulated forces, feigned attacks and withdrawals, ambushes, false intelligence information, electronic deceptions, and utilization of enemy codes, passwords, and countersigns;<sup>18</sup> but this list is hardly exhaustive. The Army's list contains several additional ruses which merit examination by naval commanders, including pretending to communicate with imaginary reinforcements, laying dummy mines, and carrying out deceptive supply movements.<sup>19</sup> As noted earlier, even though a deception is cited as a permitted ruse by *NWP 9*, that fact alone does not guarantee its legality. The use of a ruse is still limited by the requirement for absolute good faith. Camouflage provides an example of how an otherwise lawful ruse can become an act of perfidy. Ordinarily a lawful ruse, the use of camouflage is limited by the restriction that a commander cannot use a protected

sign to falsely identify his warship as a hospital ship.<sup>20</sup> Similarly, an aircraft cannot conceal its national markings as an act of camouflage.<sup>21</sup>

## False Colors and Dummy Ships

The use of false colors and dummy ships are two traditional naval ruses which continue to have merit in modern warfare, but which, under certain circumstances, could constitute perfidy. Although often used in tandem, each has proven invaluable in battle when used alone.<sup>22</sup> Under the law of naval warfare, a belligerent warship not in combat may fly false colors, either those of the enemy or those of a neutral country; but there is an absolute prohibition against flying false colors while actually fighting. Thus, commanders are required to hoist their true colors upon going into action.<sup>23</sup> Failure to do so constitutes perfidy. For example, in 1783, the French frigate *Sybille* deceived the British man-of-war *Hussar* by flying the British flag and pretending to be a prize in distress. When the *Hussar* approached to lend assistance, the *Sybille* opened fire without first hoisting French colors. Despite this disadvantage, the *Hussar* overpowered and captured the French ship. The victorious British captain then accused the *Sybille's* captain of perfidy and publicly broke his sword.<sup>24</sup> A more recent example of perfidy by failure to hoist true colors occurred during World War I when the British ship *Baralong*, while flying U.S. colors (the United States then being at peace with Germany), fired on a surfaced German U-boat.<sup>25</sup>

One might wonder whether the use of false colors continues to have validity as a tactic long after the age of sail has passed. This issue was discussed quite extensively at the Naval War College in the early 1900s. The conclusion drawn was that due to developments in tactics and technology, the risk of being lured by false colors was even greater in modern times than in the day of sail: "The war vessel of early days was also very different from that of to-day. The approach of the slow sailing vessel of the seventeenth century would allow time to determine its identity in most instances and to provide for action in case of mistake. A single shot from a gun of the early type into a vessel of its day would not, in general, have an effect corresponding to a shot sent into the complicated mechanism of a modern war vessel. The fighting in the period before the middle of the nineteenth century played a very different part in determining the issue of the conflict. Surprise was not, in early conditions, a matter of gravest importance. In the old days the contests were relatively long. In modern battles the first shot or those following soon after seem to have been very often the decisive one."<sup>26</sup>

During World War II, when a warship might have found herself in action at any moment while at sea, U.S. warships always flew their colors while underway.

While the significance of the "first shot" is certainly greater today than it was 80 years ago, or even 40 years ago, the importance of visual contact with a target has diminished in modern naval warfare. In this era of over-the-horizon targeting,

it is commonly assumed that ships will open fire without ever sighting the opponent's colors. Although the heyday of false colors may have passed, the ruse still has some validity in naval engagements where distance is not a factor, or where visual identification is needed before actual engagement. In the Persian Gulf, for example, visual identification is a practical necessity because numerous navies sail in close waters with small "generic" gunboats of the same or similar class. Furthermore, since other means of identification continue to present difficulties in implementing over-the-horizon targeting, visual identification remains the most reliable means of distinguishing friend from foe.

The law of naval warfare also sanctions the disguising of a ship as a neutral or friendly vessel,<sup>27</sup> but there are limits on the extent to which this can lawfully be done. For instance, as already noted, disguising a warship as a hospital ship or some other protected vessel is not permitted.<sup>28</sup> Probably the most famous use of disguise occurred during World War I when the legendary German cruiser *Emden* sailed into Penang harbor in Malaya under cover of darkness, outfitted with a fake fourth funnel to disguise her as a British cruiser which regularly made port at Penang. Although there is some question as to whether she was flying British, Japanese, or no colors at all when she entered the harbor, it is generally agreed that she did, in fact hoist her true German colors before firing a torpedo into the Russian cruiser *Zhemchug* which was at anchor in the harbor.<sup>29</sup>

Although disguising ships is hardly a 20th-century innovation, certainly its most ingenious applications occurred during World War I. In addition to the exploits of the *Emden*, a remarkable use of disguised ships was Great Britain's Q-ship program, which was established to combat the phenomenal success of the German U-boats in the early stages of the war.<sup>30</sup> These Q-ships (also known as "mystery ships") were former merchant vessels outfitted with concealed armament and manned by Royal Navy officers and enlisted personnel disguised as merchant mariners. The disguises given to the ships themselves were ingenious. In addition to superficial changes such as civilian paint jobs and false names, the Q-ships used creative devices such as dummy funnels and false housings over guns.<sup>31</sup>

The Q-ship's crew carried this ruse to full measure. When spotted by a surfaced U-boat, the Q-ship would allow herself to be shelled. Some of the crew played the part of the "panic party" by pretending to abandon ship. The remainder lay on the deck near their guns until the submarine closed, which sometimes did not happen for hours. Once the submarine was within range, the Q-ship's gun crews sprang into action, raised the British battle ensign, and opened fire. Although the Q-ships sank only twelve U-boats, the major impact of the program was a shift in German submarine tactics from surface gun attack to submerged torpedo attack.<sup>32</sup> One of the actions of the Q-ship's panic party raises an interesting point: the panic party would often throw into the lowered boat a packet of what appeared to be the ship's papers. The intention was to lead the

U-boat's commanding officer into approaching his "abandoned victim" so closely that the "victim's" gunners could overwhelm him quickly. This practice of feigning surrender may have been one of the reasons why the Germans decried the Q-ship program as barbarous and contrary to the rules of civilized warfare.

Does disguising a ship still have validity as a modern ruse? Certainly Tom Clancy appears to think so, and he is not alone. The concept of disguising merchant ships during war continues to receive attention from commentators.<sup>33</sup> But, regardless of the technical merits of a particular form of deception, the commander must know under what circumstances the deception is lawful. Otherwise, he may face the same shame as the captain of the *Sybille*, but with far more serious consequences than having his sword broken by a successful enemy. Under U.S. law, which is designed to fulfill the letter and spirit of the law of armed conflict, he must answer to his own countrymen as well. With a minimal degree of familiarization, however, a commander can both gain victory and avoid potential criminal liability long after the battle through the thoughtful application of deception within the parameters of the law.

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Lieutenant Commander Hall was serving as a military judge with the Northeast Judicial Circuit, Navy-Marine Corps Trial Judiciary, in Philadelphia when this article was first published.

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### Notes

1. CLANCY, RED STORM RISING 150 (1986).
2. Article 0605 of U.S. Navy Regulations, 1973, states that "At all times a commander shall observe, and require his command to observe the principles of international law. Where necessary to the fulfillment of this responsibility, a departure from other provisions of Navy Regulations is authorized." For a discussion of the naval commander's duties under international law, see Regan, *International Law and the Naval Commander*, U.S. Nav. Inst. Proc. 51-56 (August 1981).
3. HUGHES, FLEET TACTICS: THEORY AND PRACTICE 287 (1986). Since strategic deception is generally conducted on a much wider scale, it can be even more effective than tactical deception. "The term 'strategic deception' refers to instances during war or intense international competition when countries attempt to mask their diplomatic and military strategy either by confusing or misleading their opponents. The deceiver's overriding objective is to gain a strategic advantage by encouraging an opponent to respond inappropriately to the real state of affairs." *The Organization Approach to Strategic Deception: Implications for Theory and Policy*, in STRATEGIC MILITARY DECEPTION 70 (Daniel & Herbig eds. 1981).
4. MCDUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 668 (1961).
5. SUN TZU, THE ART OF WAR 66 (Griffith trans. 1963) quoted in Stuart & Tow, *The Theory and Practice of Chinese Military Deception*, in STRATEGIC MILITARY DECEPTION.
6. POTTER, SEA POWER: A NAVAL HISTORY 3 (2nd ed. 1981).
7. Article 24 of the Hague Regulations states that "Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible."
8. U.S. Navy Dept., NWP 9, The Commander's Handbook on the Law of Naval Operations, (Washington), para. 12.1.
9. See generally, SPAIGHT, WAR RIGHTS ON LAND at 152-156, 229, 241-242, 404, 433-434, and 453-454 (1911); GREENSPAN, THE MODERN LAW OF LAND WARFARE 319-320 (1959); and WHITEMAN, 10 DIGEST OF INTERNATIONAL LAW 378-400 (1968).
10. NWP 9, para. 12.1.2. The growing emphasis on joint operations means that a naval commander must be familiar with not only the law of naval warfare, but the law of land warfare and the law of aerial warfare, as well. An example situation would be a naval officer as commander of a Joint Task Force such as JTF 120 during Operations Urgent Fury in Grenada in 1983. It is useful, therefore, to examine how the other armed forces define perfidy; with few exceptions, the law of naval warfare parallels both the law of land warfare and the law

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of aerial warfare on this issue, but the definitions vary slightly. The Air Force states that “like ruses, perfidy involves simulations, but it aims at falsely creating a situation in which the adversary, under international law, feels *obliged* [emphasis provided in original source] to take action or abstain from taking action, or because of protection under international law neglects to take precautions which are otherwise necessary.” AFP 110-31, para. 8-3. The Army states that “in general, a belligerent may resort to those measures from mystifying or misleading the enemy against which the enemy ought to take measures to protect himself,” and that “it would be an improper practice to secure an advantage over the enemy by deliberate lying or misleading conduct which involves a breach of faith, or when there is a moral obligation to speak the truth.” FM 20-10, paras. 49-50.

11. HALLECK, *INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR* 402 (1861).

12. SPAIGHT, *AIR POWER AND WAR RIGHTS* 169 (3rd ed. 1947).

13. HALL, *A TREATISE ON INTERNATIONAL LAW* 533 (6th ed. 1909).

14. NWP 9, para. 12.2. Article 23 (f) of the Hague Regulations expressly prohibits improper use of the “distinctive badges of the Geneva Convention.”

15. NWP 9, para. 12.2.

16. *Ibid.*, para. 12.6.

17. AFP 110-31, para. 8-6. NWP 9, para. 11.10.4 states that customary international law recognizes the white flag as “symbolizing a request to cease fire, negotiate, or surrender.” Article 23(f) of the Hague Regulations states that “it is especially forbidden to make improper use of a flag of truce. . . .”

18. NWP 9, para. 12.1.1.

19. FM 27-10, para. 51.

20. NWP 9, para. 12.2.

21. NWP 9, para. 12.3.2.

22. One of the first commentaries on the use of false colors appeared in France in 1696. U.S. NAVAL WAR COLLEGE, *INTERNATIONAL LAW TOPICS AND DISCUSSIONS* 1906 at 9 (1907). One of the earliest recorded incidents of ship disguise was in 1672 when British Captain Knevet, in command of *Argier*, disguised his ship “by housing his guns, showing no colors, striking even his flagstaff, and working his ship with much apparent awkwardness,” and thus deceived a Dutch privateer. The practice was apparently very widespread during the Napoleonic era. CAMPBELL, *MY MYSTERY SHIPS* 8-9 (1929).

23. NWP 9, para. 12.3.1.

24. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 454 (1962).

25. The *Baralong* incident prompted great controversy in 1915, not only because of the reputed improper use of neutral colors in action, but also because of allegations that *Baralong's* captain ordered the massacre of the survivors of the U-boat. See COLES, *SLAUGHTER AT SEA* (1986).

26. U.S. NAVAL WAR COLLEGE, n. 22 at 7-8.

27. NWP 9, para. 12.3.

28. *Id.* at para. 12.2.

29. See generally, VAN DER VAT, *GENTLEMEN OF WAR: THE AMAZING STORY OF CAPTAIN KARL VON MULLER AND THE SMS EMDEN* 86 (1983), wherein it is reported that *Emden* was flying British colors prior to action; COLOMBOS, at 455, wherein it is reported that *Emden* was flying Japanese colors; and REVIEW OF REVIEWS, *TWO THOUSAND QUESTIONS AND ANSWERS ABOUT THE WAR* 133 (1918), wherein it is reported that *Emden* was flying no colors whatsoever.

30. Despite the countless historical precedents for disguising a ship in combat, one commentator has credited a trip to the London Zoo at the source of inspiration for the Q-ship program. Artist Sir John Lavery was working on shades of camouflage when, on a trip to the zoo, he noticed that from a distance in the evening light, he could not distinguish between a donkey and a zebra. He then concentrated on altering the shape of a warship so that it would appear to be an unarmed merchant ship, COLES, *supra* n. 25 at 41-42.

31. CAMPBELL, *supra* n. 22 at 46-51.

32. SIMS, *THE VICTORY AT SEA* 195 (1930). The Q-ship program was repeated in World War II, but with generally dismal results. For a description of the U.S. program in World War II, see MORJON, *THE TWO-OCEAN WAR* 132 (1963). For the British program see ROSKILL, *1 THE WAR AT SEA, 1939-1945* at 136-137 (1954). The Japanese also used Q-ships to lure American submarines. BLAIR, *1 SILENT VICTORY* 505 (1975).

33. Regan *supra* n. 2 at 55 states: “In the opening stages of a major conflict, the legal use of ruses may have great importance. For example, high-value naval auxiliaries at sea at the outbreak of hostilities may show neutral colors and slap on a quick coat of paint. Such ships might escape immediate first-strike destruction and be available for logistic support.” Also, see generally Crossland, *Unconventional Warfare Afloat*, U.S. Nav. Inst. Proc. 39-40 (November 1981).

## Chapter 37

# The Coming Explosion of Silent Weapons\*

Commander Stephen Rose, JAGC, U.S. Navy

**T**wenty years ago the United States unilaterally disbanded its biological warfare program. According to the wisdom of that time, germs and toxins were crude, uncontrollable weapons of little military value.<sup>1</sup> In recent times, however, analysts have begun to warn that biological agents are now poised to become flexible weapons perhaps “even more dangerous” than nuclear arms.<sup>2</sup> What has led to this complete turnaround in analytical thinking within the span of two decades?

The answer lies in the revolution in biotechnology, especially in genetic engineering, that began during the 1970s. Recently developed techniques permit the manipulation of key biological processes with a precision and power not dreamed of 20 years ago. Gene-splicing allows the transfer of toxic features from one biological agent to another. Science can now reshuffle the genetic deck of micro-organisms to produce a theoretically unlimited number of combinations, each with its own unique blend of toxicity, hardiness, incubation period, etc. In short, it is becoming possible to synthesize biological agents to military specifications. Thus, the world lies on the threshold of a dangerous era of designer bugs as well as designer drugs.

As if this were not concern enough, two additional factors serve to amplify the impact of this revolution on the military. First, the new biochemical processes are relatively cheap, easy to master, and accessible to all. This allows many more players to enter the arena of biochemical warfare, ranging from superpowers to Third World States to terrorist groups.

Second, the new technology inherently favors offense over defense. Although strengthened by a million years of evolution, the human organism remains vulnerable to biochemical assault. Several of the new supertoxins are ten thousand times more potent than nerve gases now held in military arsenals. One author estimates that “nerve gas, which has created a worldwide furor, is mere perfume compared to some agents on the drawing board.”<sup>3</sup> Even more sobering is the emerging possibility for designing organisms which resist all known treatment and which might take years to counter. The potential scope of this problem is

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illustrated by the billions of dollars and years of effort already expended to discover a defense against a naturally occurring biological phenomenon—the AIDS virus.<sup>4</sup>

As novelists are fond of reminding us, biotechnology could conceivably unleash the equivalent of a homemade “Andromeda strain”—a pathogen so demonic that it would result in global catastrophe. In the judgment of most knowledgeable experts, however, the more realistic threat lies in gene-splicing’s powerful ability to recombine bits and pieces of know organisms in a nearly limitless array. As one government official described the problem, “new [biological warfare] agents can be produced in hours; antidotes may take years.”<sup>5</sup>

### The Pressures and Perils of Proliferation

A key aspect of this emerging technology is that weapons of mass destruction threaten to become commonplace. We are crossing into an era when tiny nations and terrorist groups can arm themselves with biological and chemical weapons of great destructiveness—the equivalent of the “poor man’s atomic bomb.”

For example, Moammar Qadhafi has long sought a nuclear capability for Libya, but thus far without apparent success. Recent reports suggest, however, that Libya is now developing both biological and chemical weapons.<sup>6</sup> Should his nuclear quest continue to be thwarted, it is likely that Qadhafi’s long-touted “Moslem bomb” will be a biochemical weapon rather than an atomic one.

An estimated 10-20 other nations have biochemical weapons, and this number is expected to double in the coming decade.<sup>7</sup> While current technology permits even backward countries to achieve a quasi-nuclear status at bargain basement cost, the technological infrastructure required to develop an atomic weapon is far more complex and expensive than the effort needed to produce sophisticated biochemical weapons. The same processes used to make fertilizers and pesticides can also churn out poison gases; similarly, bulk toxins can be manufactured at a gene-splicing facility, at modest cost, and based on techniques freely available in the scientific press. Poor, nonnuclear nations caught up in a regional arms race or believing themselves menaced by heavily armed neighbors are beginning to invest in biochemical weapons as a “cheap” but potentially nasty deterrent.<sup>8</sup>

In the decades ahead, it is likely that many additional nations will opt to acquire such arms. Proliferation of biochemical weapons is part of a broader cycle of global diffusion of political, economic and military power. As the international alignment continues to shift from a bipolar to a multipolar world, weapons of mass destruction will also spread. It is conceivable that by the turn of the century 35 nations will possess a stockpile of nuclear, chemical and/or biological weapons. Aside from placing many new fingers on the triggers of mass destruction, such a development would also diminish superpower freedom of action. As time passes, conclude the authors of a landmark report on *Discriminate Deterrence*, “[t]he arsenals of the lesser powers will make it riskier and more

difficult for the superpowers to intervene in regional wars."<sup>9</sup> With the spread of biological and chemical weapons, even small nations will gain the capacity to mete out punishing counterstrokes to an intermeddler.

The good news is that none of the Third World countries suspected of developing biological weapons has, thus far, turned to genetic engineering to create novel organisms.<sup>10</sup> The not-so-good news is that at least a dozen countries are hard at work on toxins and chemicals. The bad news is that many of them, particularly in the Middle East, are actively shopping for missiles and other delivery systems to extend the reach of their new biochemical arsenals. The worse news is that the 50-year tradition of not using biochemical weapons in battle has collapsed in the past decade during a series of regional conflicts. Worst of all, the lesson demonstrated to many by Iraq's use of poison gas against Iran is that the military benefit gained by Iraq substantially outweighed any price paid in terms of international censure or economic sanctions.

Widespread use of chemical poisons in the Iran-Iraq war may have lowered the threshold for future use of biological weapons as well. This erosion of ancient taboos is being accelerated by the new biotechnology, which not only blurs the distinction between biological and chemical processes, but also provides a framework for controlled biological warfare. Thus, the proliferation of biochemical weapons gathers momentum from three trends—a search for economical deterrence, the weakening of old taboos, and the advent of a new and powerful technology ripe for exploitation.<sup>11</sup> In short, some countries are beginning to view biochemical weapons as both useful and, under certain circumstances, usable.

Nations of the Middle East are a case in point. The current scramble for chemical armaments in this region adds a dangerous twist to an already volatile situation. In the estimate of CIA Director William Webster, "the spread of chemical weapons among the Arab States, principally Iraq, Libya and Syria, could seriously alter the regional balance of power."<sup>12</sup> This threat will intensify as countries obtain quantities of missiles capable of delivering biochemical warheads throughout the region.

Thanks to Soviet largesse, the Syrians already have a supply of SS-21 missiles capable of sending warheads into neighboring States with considerable accuracy.<sup>13</sup> During the Gulf War, Iraq successfully managed to modify a number of short-range Scud-B missiles, tripling their reach to nearly 600 miles. With help from Iraq, Egypt is reported to be hard at work building the Badr-2000, which will have a range comparable to the modified Scud.<sup>14</sup> Finally, Israel served notice with the September 1988 launching of its first satellite that it too has the technology to deliver advanced ballistic payloads.<sup>15</sup>

For decades Israel and its Arab neighbors have circled each other like proverbial scorpions in a bottle. As biochemical warheads continue to spread through the Middle East, this analogy becomes increasingly apt. Virtually every

city in the region will be exposed to the sting of a formidable and potentially lethal attack.

In the past, Israel has enjoyed a regional monopoly over weapons of mass destruction. The one direct challenge to its presumed nuclear stranglehold—Iraq's effort to build an atomic weapon in the late 1970s—ended in the bombing of the main Iraqi research reactor in 1981. Similar preemptive strikes would be less useful to curb the spread of biochemical weapons. "If a country is serious about acquiring chemical weapons, it is hard for another country to eliminate that capability the way Israel knocked out Iraq's atomic bomb program," concludes one analyst. "These weapons can be made and stored in small sites all over a country, and you can never be sure you got them all."<sup>16</sup>

This is equally true for biological and toxin weapons. Like their chemical cousins, these agents can be prepared and stored in a small facility at relatively little capital investment. A batch of anthrax capable of killing millions of people, for example, can be concocted in a "room the size of a broom closet."<sup>17</sup>

Although the present furor over the Middle East balance of power centers on chemical agents, in time the biological side of the spectrum will be viewed as even more insidious and destabilizing. Chemical weapons, in comparison, are crude. Despite their lethal effect, chemicals require bulk application to qualify as a true weapon of mass destruction. The nerve gases in modern arsenals are, essentially, refined versions of agents developed prior to World Wars I and II. While some additional refinements can be expected, pure chemical agents are approaching the end of their evolutionary path. The menace of the future lies in biologicals—pathogens and toxins—which, thanks to the advancing power of genetic engineering, have a far richer potential for harm. If the proliferation of poison gas in the 1990s creates a decade of chemical concerns, the largely untapped, but nearly unlimited nature of this new biotechnology will threaten to turn the next century into a diabolic era of military biology.<sup>18</sup>

### The Soviet Perspective

The Soviet Union has long treated the entire gamut of biochemical weapons as a valuable adjunct to their overall war-fighting capability. Military implications of the biotechnological revolution have not escaped their notice. The magnitude of the Soviet effort to tap the dark side of this new technology is demonstrated by the existence of at least seven highly secure biological warfare centers under military control in the U.S.S.R.<sup>19</sup>

The scope of this program is mirrored by the multiple uses for which their biological and chemical arsenal is intended. In general, the Soviets consider these weapons to be excellent tools for sabotage and interdiction. Their doctrine emphasizes the need to prevent an enemy from effectively marshalling his forces. If the Soviets were to use biochemical weapons during an attack on NATO, a

likely target cluster would be rear-area chokepoints such as airfields, supply dumps, headquarters, and port facilities.<sup>20</sup> The vulnerability of these sites is presently amplified by NATO's inability to mount like-kind biochemical strikes against similarly valuable targets in the rear of the Warsaw Pact.<sup>21</sup>

Another Soviet scenario for biochemical use envisions an attempt to impair NATO's resolve to shift to a wartime posture. "As an opening salvo," suggests Joseph Douglass, "the Soviets might well initiate a massive covert C/B war that could confuse the leadership of the Western alliance and distract their attention away from even more critical events."<sup>22</sup> As Soviet writers have already noted, governments which are preoccupied with widespread civilian panic on the home front could suffer a crucial loss of time, will and coordination during the run-up period before conventional hostilities.<sup>23</sup>

On an even grander scale, the U.S.S.R. may view their biochemical capability as a strategic lever to offset American advances in other technologies. According to one recent report, there is some official indication that Moscow "might retaliate against an American Star Wars defense system not with new missiles, but with germs."<sup>24</sup> As early as 1987, Valentin Falin, then head of the Soviet Novosti Press Agency, let slip the following comments about Moscow's possible response to SDI: "We won't copy you anymore, making planes to catch up with your planes, missiles to catch up with your missiles. We'll take asymmetrical means with new scientific principles available to us. Genetic engineering could be a hypothetical example. Things can be done for which neither side could find defenses or countermeasures. . . . These are not just words. I know what I'm saying."<sup>25</sup>

At the other end of the weapons spectrum, the Soviets have also begun to tailor biochemical weapons for purely tactical use on a limited scale. Several years ago the world was caught up in a heated controversy over "yellow rain"—ignited by U.S. charges that Soviet-supplied forces in Laos and Kampuchea were using fungal toxins as a weapon against rebellious tribespeople. In 1982 the State Department issued several reports marshalling the evidence for yellow rain and estimated that use of this bioweapon in Southeast Asia had already led to 7,500 deaths.<sup>26</sup> Although many reporters and scientists continue to voice skepticism,<sup>27</sup> to this day the State Department has not withdrawn or softened its charges. The yellow rain dispute demonstrates how easily bioweapons can fade into ambiguity. As Stuart Schwartzstein observed, "there are great advantages in using weapons that are either very subtle . . . or where verification and identification is so difficult that arguments continue to rage over whether or not allegations of use are true."<sup>28</sup>

Although the Soviets are also alleged to have used yellow rain during their occupation of Afghanistan, they seem to have experimented with a new kind of biochemical agent as well. Reports from the Mujahidin rebels referred to a toxin spray known as "black rain," which incapacitated people so quickly that they

were frozen in place, unaware until regaining consciousness many hours later that they had in fact been attacked and immobilized.<sup>29</sup>

A common denominator of all these examples is the breadth and versatility of Soviet biochemical capability and doctrine. For them, it is a flexible and powerful tool—a frontline rapier as well as a global blunderbuss. As John Hemsley sizes up the situation, “it would appear that the Soviet High Command considers that current developments in novel CB agents . . . [are] leading to a quantum, rather than an incremental, change in the nature and practice of war.”<sup>30</sup> In contrast, the NATO/U.S. approach to biochemical weapons continues to suffer from an inherently defensive and makeshift posture which treats these weapons as an abhorrent deterrent to be kept, as much as possible, out of sight and out of mind.

### Military Utility of Biological Weapons

To what extent do these developments, especially those arising from the revolution in biotechnology, require a shift in American military preparations? Not surprisingly, reasonable minds differ as to the strategic and tactical implications of genetic engineering. A key issue is the “usability” of biological agents.

One school of thought suggests that there may be less to the new developments in life science than meets the eye. It judges that biotechnology “will not lead to the ‘ideal’ BW or routinize biological warfare. That would require a higher level of protection and predictability than is likely ever to be possible. Effective weapons will always pose deadly risks for their maker. And no realistic genetic transformation will yield biological weapons that are suitable for theater operations.”<sup>31</sup> In other words, science might well make biological warfare more dangerous, but never sufficiently controllable. Thus, the very nature of bioweapons induces self-deterrence, both now and for a long time to come.

Other thinkers view the situation as more threatening. From their perspective, controllability may not be an insoluble problem. Already, “in the case of biological agents . . . it is now possible to eliminate undesirable side effects . . . [to] preserve and package agents more effectively . . . to do more and do it safely.”<sup>32</sup> In the future, the phenomenal versatility of genetic engineering could enable an attacker to retain control over its biological agent, for example, “by designing it to . . . die off after a previously determined number of cell divisions . . . [or] by designing the organism to be bound by a narrow set of environmental factors.”<sup>33</sup>

The mysteries of biotechnology have just begun to be probed, and at their core lie the basic secrets of life. According to many scientists, the next major exploratory step will be to map the human genome—a ten-year, \$3 billion effort to determine the exact location, function and molecular structure of the 50,000 genes that human cells have in common. Humans genes are the memory bank for our species—the cell’s floppy disk governing all life processes at the molecular

level. Precise mapping of such genetic blueprints, whether for human beings or other organisms, would greatly enhance the reach and sophistication of genetic engineering. Thus, as science marches on, the potential for controllable biological warfare will also advance and should not be discarded out of hand as a dead issue.

In practical terms, this means that all dimensions of potential biological warfare—strategic and tactical, overt and covert—must be monitored with great care.

***Overt Strategic Use of Biological Weapons.*** The traditional scenario for germ warfare envisions an attack resulting in massive civilian casualties—devastation on a scale similar to the destructive power of nuclear weapons. Biological weapons have been viewed as inherently strategic in nature, and U.S. policymakers have assumed that a biological attack on a nuclear-armed nation could be countered with (and thus deterred by) another available weapon of mass destruction, i.e., nuclear arms. Therefore, when President Nixon dismantled our biological warfare program in 1969, he did not worry about the disappearance of a like-kind retaliatory capacity. Three years later, similar considerations led the United States to support a sweeping arms control ban on biological weapons, even though the agreement lacked any procedures for verification. At that time, overt biological warfare was correctly viewed as a clumsy, indiscriminate weapon, an all-or-nothing proposition allowing no tactical finesse or useful strategic advantage.

In part, the rationale of the Nixon era still makes sense. Nuclear deterrence continues to restrain superpower use of biological agents against another superpower.<sup>34</sup> In the words of a former director of a Defense Department laboratory responsible for identifying such agents: “one of the most awesome tasks I can think of [is] coming up with a definitive statement that we’ve been attacked with a biological weapon, knowing that that statement is probably equivalent to pushing the [nuclear] button. [The President] could always call the Kremlin and ask ‘What the hell did you do that for?’ My guess is he wouldn’t. He’d tape that message to the front end of a Minuteman missile.”<sup>35</sup>

Embedded in this scenario are the key assumptions that use of a biological agent would be both traceable and massive enough to qualify as a strategic threat. In times past, the relatively primitive nature of biological weapons made both assumptions nearly axiomatic. The new biotechnology complicates this old equation, however, by opening up novel possibilities for tactical and covert uses of biological agents.

***Overt Tactical Use of Biological Weapons.*** One potential use of genetic engineering is the mass production of toxins, which are poisons made by organisms. Toxins occupy an interesting niche between biological and chemical weapons—more potent than most man-made poisons, but also more controllable than living

agents. Until now, the availability of toxins has been limited by a production bottleneck. Large numbers of creatures and expensive, laborious processes were needed to yield even small quantities of toxin. For example, using refinement techniques available during the late 1960s, the U.S. government generated only 11 grams of shellfish toxin from several tons of mussels. Biotechnology changes all this.

With gene-splicing, micro-organisms can now be converted into miniature poison factories, permitting the production of militarily significant amounts of toxins at far less cost and effort. Soviet use of "black rain" in Afghanistan, believed to be a form of toxin causing one-breath anesthesia, illustrates the tactical potential of such agents. According to an official U.S. study, the Soviets are pursuing development of a broad spectrum of natural and synthetic toxin weapons, ranging from extraordinarily lethal agents to those which merely induce sudden panic, listlessness, or sleepiness.<sup>36</sup>

The obvious and chilling threat of lethal agents tends to divert our attention from problems posed by incapacitants. These nonlethal toxins could have a disproportionate impact, however, due to the natural reaction of the people who are unaffected to assist the stricken. In Douglass' estimate, incapacitants "can be militarily more effective [than lethal agents] because sick or disabled soldiers and dependents tie up scarce resources, demand the energies of those still healthy, and have a very demoralizing effect."<sup>37</sup> The crucial point is that toxin weapons can theoretically be tailored to create a wide variety of effects, depending on the tactical need.

***Covert Use of Biological Weapons.*** In the 1970s, Cuba charged that the CIA was clandestinely using biological agents to try to destabilize the island.<sup>38</sup> Allegedly, this campaign targeted vital crops such as tobacco (blue mold) and sugar cane (cane smut), livestock (African swine fever), and also the populace itself (hemorrhagic strain of dengue fever).<sup>39</sup> Whatever the source, these outbreaks cost Cuba several billion dollars and 300,000 cases of debilitating disease. The Cuban charges highlight several reasons why covert biological warfare is such a potential menace—the difficulty of proof, the range of potential targets, and the substantial damage that can be inflicted by relatively cheap and easily concealed agents.

None of these problems is new. Even before the advent of genetic engineering, nations had at their disposal some nasty means for biological sabotage. Nature is a veritable cornucopia of pathogens and maladies. The biological revolution, however, expands both the size of the chessboard and the power of the pieces available for such covert operations.

As previously discussed, the potential number and potency of these biological "chess pieces" has increased dramatically due to gene-splicing's capacity for reshuffling the genetic deck in a controlled way. Nature no longer sets the upper limit for either variety or virulence; and as genetic engineering increases in

sophistication, so too will the subtlety and scope of covert biological weapons. If (when) a devastating new strain of wheat rust or pesticide-resistant fruit fly or AIDS-like virus pops up in America's future, will we be able to determine whether the source is a natural mutation or a genetic manipulation concocted by an adversary? Granted, these hypothetical examples seem more a product of science fiction than reality; however, judging from advances made in genetic engineering in just over a decade, science appears to be eclipsing fiction more rapidly than expected.

### Quo Vadis?

As the preceding discussion suggests, a number of factors—including regional conflicts, Soviet capabilities and the revolution in biotechnology—are converging to usher in an era of soft but deadly weapons. This threat, which has grave implications for American security, is here now and will grow progressively worse.<sup>40</sup> What can the United States do? There are three basic approaches: status quo; patchwork; and aggressive defense.

*Status Quo.* America's current biological warfare doctrine involves two tracks: a defensive posture (no stockpile of bioweapons) and deterrence (possible nuclear escalation in response to biological attack). The status quo approach would leave matters as they are. Unfortunately, recent advances in biotechnology seriously weaken both prongs of this doctrine.

As we have already seen, the traditional notion of treating military biology as a weapon of only strategic significance no longer seems to be valid. When such weapons were an instrument of relatively uncontrollable mass destruction, it may have been apropos to threaten nuclear retaliation in response to an outbreak of plague warfare. But now that the tactical possibilities of bioweapons are beginning to emerge, this deterrent linkage is not as seamless and credible as it once was.

Would we go nuclear, for example, in response to the use of "black rain" or a biological warfare campaign in Europe that sickened but did not kill the populace? Without the capacity for like-kind retaliation (as called for by U.S. chemical warfare doctrine), there is a policy/force mismatch that invites mischief and miscalculation. As former Senator John Tower wrote in 1982, when arguing the need for a robust U.S. chemical weapons capability, "the idea that we can credibly threaten to respond to a Soviet first-use of chemical weapons [during an attack on NATO] by resorting to nuclear retaliation should be as preposterous to the Soviets as it must be appalling to West Europeans."<sup>41</sup>

Similar pejoratives apply to the gap now opening up between American deterrence policy and the expanding world of bioweapons. Our nuclear umbrella cannot credibly deter tactical use of toxin or other limited biological agents any

more than it can deter chemical strikes. As biological warfare techniques and agents continue to evolve, becoming more and more “discriminate” as well as harder to detect, the problem of finding a range of credible and proportional deterrents will also grow.

The other prong of the U.S. biological warfare posture—defense but no offense—is grounded on adherence to the 1972 Biological and Toxin Weapons Convention, which bans possession of all biological and toxin agents except for small stocks retained solely for defensive research. Prior to the biotechnological revolution, this made some sense as a useful firebreak, because the biological agents and processes then in existence were relatively unwieldy and unreliable.

The new technologies, however, have potentially converted biological warfare from a major undertaking into a cottage industry—simple, cheap, quick, precise. Distinctions between research and production, between defense and offense, are now essentially meaningless. Counting missiles in their silos is child’s play compared to tracking the thousands of facilities which could be used to produce biological warfare material.

By their very nature such facilities are quite difficult to detect using standard technical means of verification, i.e., surveillance satellites and ground monitoring stations. “Unlike high energy physics experiments or the construction and testing of weapons delivery vehicles,” notes John Birkner, “new biotechnology research efforts devoted to military objectives would tend not to reveal themselves.”<sup>42</sup> Also, advances in bioprocessing technology made during the past decade have magnified the detection problem by scaling down the size of facilities needed to produce militarily significant amounts of biological agents. A verification procedure designed to cope with these problems—the 1972 Convention having no such provisions whatever—would have to be extraordinarily intrusive. Since the step from research to production could be quite rapid, a comprehensive inspection regime might, as one director of a research institute glumly noted, “have to inspect the lab notebooks of every [biological] lab in the country.”<sup>43</sup>

Summing up these concerns, the DoD official then in charge of negotiations policy, Douglas Feith, told Congress in 1986 that the 1972 Biological and Toxins Weapons Convention “must be recognized as critically deficient and unfixable.”<sup>44</sup> Labeling the Convention a “false advertisement to the world,” Feith went on to explain that the primary culprit was the revolution in biotechnology. “Because new technology makes possible a massive and rapid breakout, the treaty represents an insignificant impediment at best.” He concluded by suggesting that this potential for a quick breakout made the notion of a biological warfare treaty fundamentally unworkable. “Its principal failing, therefore, is no longer the absence of verification provisions or lack of effective compliance mechanisms, the commonly acknowledged shortcomings, but its inability to accomplish its purpose.” Feith ended his remarks with the following pessimistic appraisal: “It is not a pleasant task to deliver so dismal a report to the Congress. . . . But can

one responsibly inflate hope for an escape from the military problems posed by the Soviet BW programs? There can be no *deus ex* arms control in this arena. In answer to those who crave a constructive suggestion under even the least promising circumstances, one can recommend only: Defense."<sup>45</sup>

Overall, then, the status quo approach rests on two flawed premises—that the biological warfare genie can be kept on a tight leash through arms control and that bioweapons can otherwise be held in check by strategic deterrence. Both prongs invite more risk than seems prudent under the circumstances.

***A Patchwork Quilt.*** This approach seeks to contain the biochemical problem via the cumulative effect of several interlocking initiatives: economic sanctions, export controls, an augmented defensive capability, and participation in arms control negotiations.

**Sanctions.** During the Reagan Administration, other aspects of American policy clearly took precedence over a perceived need to keep the biochemical genie bottled up. Between 1986–88, for example, when Iraq was using mustard and nerve gas to break up human-wave assaults during its touch-and-go war with Iran, the United States basically turned a blind eye to this breach of the biochemical taboo. Later, Iraq began to use similar agents to settle a long-standing feud with Kurdish rebels, and several nations called for tough trade sanctions. After some dithering, the Reagan Administration came out in opposition to sanctions against Iraq,<sup>46</sup> and proponents eventually settled for diplomatic protests.

"The fundamental question," as John Kester sees it, "is whether . . . use [of biochemical weapons] by anyone will carry a real penalty—economic, political and perhaps military—even if enforcement injures Western economic or short-term political interests."<sup>47</sup> Thus far, developed nations have not been willing to stomach more than a taste of the required medicine, and during the past few years the United States has sadly been among the reluctant.

**Export Controls.** The U.S. track record regarding export controls is more favorable. In 1984 the Reagan Administration began to clamp down on the transfer of equipment and materials directly contributing to biochemical weapon programs in other countries. In the long run, this is probably a futile effort, since many of the items in question have dual use in paints, plastics and pharmaceuticals or are found in breweries, hospitals and pesticide plants. The unwelcome truth is that even if the United States imposes stringent export controls, too many other countries are willing to let their business firms peddle biochemical technology to a world of eager customers.

**Arms Control.** Under a patchwork approach, however, the time gained by these delaying maneuvers can be put to good use in trying to fashion a workable arms control regime for biochemical weapons. The expert consensus is that effective worldwide control of biological and chemical agents is probably a chimera, but nonetheless an effort worth making. For nearly 20 years diplomats

at the Geneva Disarmament Conference have been searching for an acceptable formula that would lead to a comprehensive, verifiable and global ban on chemical weapons. As with biological agents, the main stumbling block to an effective chemical warfare treaty has been the bugbear of verification. According to William Burns, Director of the U.S. Arms Control and Disarmament Agency, “no country in the world has offered a system which has a reasonable chance of verification.”<sup>48</sup>

Part of the problem is that chemical weapons can be produced by the same types of factories which turn common chemicals into fertilizers, pesticides and pharmaceuticals. Even more ominous, these plants can be switched from one production line to the other—from agents of well-being to agents of death—within a 24 to 48-hour period. Accordingly, a ban on chemical weapons would require continuous monitoring of some of the world’s most basic industries. Although the Soviet Union and the United States have agreed in principle on the need for short-notice challenge inspections as part of any chemical warfare treaty, negotiations have bogged down on the inevitable issues of how, what, when and where. In addition, several major countries, primarily China and India, have not yet accepted the principle of on-site challenge inspections.<sup>49</sup>

A further complication is the recent Arab call for linking any ban on chemical weapons to progress in nuclear disarmament.<sup>50</sup> The heavy Arab investment in biochemical weaponry is intended, in part, to offset Israel’s possession of nuclear arms. From the Arab perspective, a ban on chemical weapons appears to be discriminatory so long as Israel retains its weapons of mass destruction. Without Arab participation, a chemical warfare treaty would be stillborn—even if the verification quagmire could eventually be navigated.

This having been said, some kind of a chemical warfare convention will likely emerge from Geneva during the next few years. There is a growing consensus that even an imperfect ban would be preferable to the galloping proliferation now under way. As Brad Roberts puts it, “[t]he choice, practically speaking, will be between a partially disarmed world and a wildly proliferating world.”<sup>51</sup> To wait is to court increasing danger, especially in the Middle East cauldron; to move too quickly, however, without first resolving key issues of verification and linkage, would be to indulge in an illusion of progress.

**Defense.** Total defense against biochemical weapons is as elusive as a totally verifiable ban. Even so, several steps can be taken to strengthen deterrence by creating uncertainty in the minds of potential aggressors about U.S. capability to fend off a biochemical attack.

- Increase intelligence efforts to determine the scope and degree of current and emerging biochemical threats. Resources currently assigned to this area are miniscule compared to those directed at fathoming nuclear threats. To the extent that nuclear forces have settled into a kind of floating gridlock, whereas the

biochemical threat is gaining momentum, it seems prudent to begin to shift some intelligence assets.

The confusion surrounding the yellow rain controversy in Southeast Asia a few years ago illustrates how ill-prepared this country was to sort out and substantiate allegations of biochemical warfare. Experts still argue about the source of yellow rain—whether people were stricken by natural toxins from bee waste or by a biological weapon in the hands of Soviet allies.

Judging from recent reports, the American intelligence community scored a notable success this past year in tracing the commercial origins of Libya's new chemical plant. One hopes that the current attention paid to biochemical "economics" is a sign that extra care and resources are also going to be funneled into biochemical "diagnostics."

By definition, most covert operations depend on secrecy, or at least plausible deniability, to be useful. One way to reduce the threat of covert biological warfare is to increase the counterthreat that clandestine attacks will be exposed and traced to their origins. Two basic means are available to enhance detection capabilities: better intelligence gathering with regard to adversary capabilities and intentions; and a well-funded program of bio-sensing research. Only a small fraction of DoD's allotment for military chemistry and biology is spent on coping with the biological threat; and of the money allocated to biology, only a tiny percentage goes to advanced bio-sensing and diagnostic research.<sup>52</sup> This should be remedied immediately in order to minimize the risk of undetected and undetectable biological warfare.

- Based on the intelligence yield, intensify biochemical research and development programs to explore all options for antidotes and protective vaccines and to maintain a plausible capability for fashioning a like-kind retaliatory response if required. There is an urgent need to guard against biotechnological surprise. According to the authors of the 1988 report on *Discriminate Deterrence*, "the Soviets are sure to stay well ahead in their research on chemical and biological weapons, where they have practically no U.S. competition."<sup>53</sup> This gloomy forecast may overstate the problem a bit, but it does suggest the magnitude of the gap between Soviet and U.S. programs. In 1988 the United States spent more to buy a single F-14D fighter than on its entire biological research and defense program.

In summary, the patchwork approach is a combination of modest but mutually supporting improvements. The overarching goal is to slow down proliferation of biochemical agents and discourage their further use, while at the same time buttressing deterrence and defense. There is no single solution to the menace of biological and chemical weapons. Export controls, economic sanctions, and international conventions all play roles in limiting the threat, but the biochemical maze does not offer an easy exit, either nationally or internationally.

**Aggressive Defense.** A more forceful approach might involve preemptive strikes to prevent biochemical attacks on the United States or its allies. The controversy surrounding Libya's chemical plant at Rabta highlights the pros and cons of such action.<sup>54</sup> International law does not forbid the construction of a chemical weapons facility. The 1925 Geneva Convention prohibits "use" of chemical weapons, but not their manufacture or possession. Realistically, the United States is concerned about Colonel Qadhafi's track record of extremism which makes his possession of chemical arms a threat *per se*.

The saber-rattling of the last days of the Reagan Administration, during which Washington raised the prospect of a military strike against the Rabta plant, appears to have had three objectives: to put Qadhafi on final notice; to seize the lead and perhaps dampen any Israeli enthusiasm for an independent strike; and to impress on our allies the urgent need for export controls and vigilance to slow down biochemical proliferation. For now, the prevailing consensus within the U.S. government seems to be that, absent actual injury to our interests or at least hard intelligence that injury is imminently threatened, there is no clear legal justification for attacking the Libyan plant.<sup>55</sup>

One risk, of course, is that Qadhafi might opt to produce and stockpile large quantities of "pharmaceuticals" prior to distributing or employing them. Once such weapons are dispersed, a preemptive strike loses some of its value. This is especially true if biological agents are involved. In fact, a preemptive strike on a bioweapons workshop, if it broke open secure containment facilities without exterminating the pathogens inside, could precipitate, rather than prevent, a catastrophe.

By its very nature, military preemption is a weapon with limited reload capacity. Unless a nation cares little about its international reputation, preemptive attacks are usually reserved for situations posing clear, immediate and substantial danger. The Libyan plant at Rabta—capable of producing both medicine and military weapons; legal according to international norms but perceived to be a grave threat; built with Western connivance in pursuit of short-term profits at the risk of long-range perils—this one plant symbolizes the confusion and cross-currents that exacerbate the biochemical problem. Threats of a preemptive strike may help to keep Colonel Qadhafi in check, but preemption is obviously no solution to the larger issues posed by biochemical proliferation.

### The Orphan Threat

Even if all the recommended steps were implemented, one more change would still be necessary. Our country's biochemical effort needs to become less an Army program and more of a national one. As the organization most likely to come face to face with a biochemical threat, the Army has had the lead for over 50 years. Now that the biochemical problem is snowballing, it is time for

a multidisciplinary, multiagency effort. In the recent judgment of the Army's Science Board, "essentially little attention has been given by the Army in its biological defense programs as to how modern biotechnology might be used by potential adversaries."<sup>56</sup>

This is a dangerous state of affairs, yet somewhat understandable. Biochemical agents do not have a natural constituency within the military. Service members are reluctant to become involved with "soft" weapons. The paradigm of a weapon seems to be a platform bristling with firepower—and tomorrow's version will be bigger, faster and more powerful. Bugs and drugs are headed in the opposite direction: smaller, more covert, and increasingly repugnant. More to the point, the services themselves are leery of diverting resources from the weapons systems they prefer to the dismal world of biochemical agents, especially since the ramifications of this threat extend well beyond traditional service functions and forces.

Accordingly, the real force structure needed to cope with this expanding problem is an infrastructure that incorporates elements from DoD, the FBI, the State Department, the National Institute of Health, and the Center for Disease Control. Possible formats might be a presidential advisory council, a National Security Council interagency group, or a joint agency patterned after the Defense Nuclear Agency. Paralleling the doctrine of combined arms, a multidisciplinary group of this sort would seek to counter the biochemical threat by force of combined brains.

### A Glimpse of the Future

The outlook for biological weapons is grimly interesting. Weaponeers have only just begun to explore the potential of the biotechnological revolution. It is sobering to realize that far more development lies ahead than behind.

The modern battlefield is already, by design, an exceedingly dangerous place for human beings. Today's smart weapons will become the brilliant weapons of tomorrow; and future generations of "genius" weaponry lie below a not-so-distant horizon. The characteristics of such weapons will include a fire-and-forget mode, extended loiter capacity, micropropulsion, and enough true artificial intelligence to allow them to relentlessly hunt down individuals. Neural networks equivalent to the brain capacity of a bumblebee are already on the drawing board. Combine a refined version of this capability with advanced robotics, 10th-generation electronics and a shaped-charge or toxin "stinger," and there emerges the conceptual prototype of an "insect weapon" that could dominate the tactical battlefield of the next century. Today's RPV's could metamorphose into tomorrow's artificial killer bees.

Does this imply that the role of the human warrior is ultimately threatened? As a bearer of weapons, perhaps; as a director of weapons, no.<sup>57</sup> A human being

in the loop will still be the key to battle, no matter how lethal a battlefield becomes for living organisms. Despite predictable advances in robotics, artificial intelligence, and microminiaturization, a human being will long remain the most versatile, 100-gigabyte, mobile computer system that can be mass produced by unskilled labor.

So where does this leave bioweapons? Will they simply continue to be a wild card in the battlefield and force structure equation? The vision of an insect weapon described above arises from a view of the military future centered around hardware. Long before insect weapons become technically feasible, however, bioweapons may be able to achieve the same nasty results through gene-splicing and techniques yet to be developed. Even at the tactical level, precisely engineered microbes could turn out to be a more formidable threat than precision-guided munitions (PGMs).

Weaponizing the life sciences threatens to change a basic perspective of warfare. For centuries, the military's prime focus has been to marry its warriors to appropriate weapons. Conceptually, modern warriors still fight like their medieval counterparts—albeit with rifles instead of arrows, with tanks instead of horses, and with artillery and rockets instead of catapults. The regime of soft weapons, bugs and drugs, weakens this bond and threatens to end-run the modern focus on weapons that rely on the application of brute force. The battlefield of today is, in essence, a high-explosive environment. The battlefield of the future may well end up being a hellish mix of high explosives (micro-nukes and PGMs), low explosives (beam weapons and rail guns) and no explosives (biochemical agents).<sup>58</sup>

## Wars Hot and Cold

Soft weapons also circumvent current military operations in another fundamental way. An essential element of warfare is the ability to determine when one has been attacked. The use of a nuclear weapon, for example, is not likely to go unnoticed. This is not necessarily true of biological weapons.

An ominous new possibility is that attacks could be mounted which mimic natural phenomena so well that the onslaught may not be recognizable for what it is. Potentially, biological agents can be converted into the ultimate stealth weapons. The dark side of biotechnology enhances the opportunities for a kind of shadow war with no formal battlefronts and no detectable invasion.

One can analogize a nation's military forces to antibodies created by society to protect against, and deal with, external threats. But what if this protective "antibody" fails to recognize an invader or pinpoint the source? Invisible attacks of this sort represent the highest level of maneuver warfare. According to Jeremy Rivkin, "microbes are the foot-soldiers of the 21st century."<sup>59</sup> More precisely, they threaten to become the elite saboteurs of the coming century. To the degree

that hot wars grow increasingly impractical, the surreptitious and protean nature of soft weapons will unfortunately encourage their use as an extension of war by other means.<sup>60</sup>

The biotechnological revolution has unfolded dangerous new possibilities, for converting the basic processes of life into weaponry. Still in its infancy, this revolution is likely to be a source of continuing surprises. From the standpoint of national security, the United States must track these developments closely to minimize the chance of a decisive trump card turning up in enemy hands. To paraphrase Mao's well-known maxim, future power may come from the mouth of a test-tube as well as from the barrel of a gun.

Thus far, the national investment in biological defensive research has been a pittance compared to the expenditures made for traditional military systems. As discussed earlier, the deeper threat of biological agents lies not with formal use on a battlefield, but rather in their potential to become extraordinary weapons of stealth. Compared to the murky world of biological threats, nuclear weapons have an aura of refreshing clarity. Both types of weaponry pose grave dangers to U.S. security. Unfortunately, however, America's military ethos—centered around engineering, hardware, and firepower—makes it difficult for us to grasp the true strategic significance of soft weapons. Ironically, while the United States contemplates spending a sizeable part of its national treasure on SDI, comparatively few resources are being channeled to close a serious defensive gap now opening up along the biological frontier.

Our current international wrestling match over chemical weapons is only a forerunner of the far harder bout to come. A revolution in biology is liberating the life sciences and also unleashing the potential for bioweapons capable of nearly infinite refinement. Decisions made now, or evaded, about how to cope with the military implications of biotechnology, will cast a long shadow into the future. At present, the problem is comparatively small but it could easily cascade beyond control within a decade. Although the United States has begun to pay more attention to military biology in recent years, our overall stance still suggests a continuing inclination to whistle past the graveyard. If we fail to counter the expanding threat of biological warfare, someday this metaphor could take on a new and macabre meaning.

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Commander Rose wrote this paper while attending the Naval War College. He received both the Joint Chiefs of Staff and Naval War College's Richard G. Colbert prizes for this essay (under another title).

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### Notes

1. See Hamm, *Deterrence, Chemical Warfare, and Arms Control*, *Orbis* 157 (Spring 1985).
2. Douglass, *The Challenges of Biochemical Warfare*, *Global Affairs* 156 (Winter 1988).
3. PILLER & YAMAMOTO, *GENE WARS* 113 (1988).

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4. In 1987, the Soviets alleged that AIDS was created by an American biological weapon experiment gone haywire. Although no evidence has been offered to support this charge, some studies conclude that it would be possible to manipulate genes to interfere with the body's immune system. See *id.* at 97.

5. Feith, *Biological Weapons & the Limits of Arms Control*, *The National Interest* 81 (Winter 1986/87). Feith served as deputy assistant secretary of defense for negotiations policy from March 1984 to September 1986.

6. Gordon, *Libya Says It Can Make Chemical Arms If Others Do*, *New York Times*, 10 January 1989, p. A12. Libya is reported to have a joint biological warfare program underway with Romania. See Douglass, *Soviets Surge in Biochemical Warfare; West Remains Drugged with Apathy*, *Armed Forces Journal International* 58 (August 1988).

7. Fialka, *Chemical Weapons Spread in Third World, Pose Challenge to West*, *Wall Street Journal*, 15 September 1988, p. 1; Lescaze, *Quest for Way to Block Biological Weapons Is Itself Called a Threat*, *Wall Street Journal*, 19 September 1988, p. 1; Harris, *CBW Arms Control: A Regime Under Attack?* *Arms Control Today* 9 (September 1986). The following nations are reported to be either members of the chemical club or on the verge: United States, Soviet Union, France, Iraq, Iran, Egypt, Syria, Israel, Libya, North Korea, South Korea, Taiwan, China, South Africa, Romania, Czechoslovakia, Indonesia, Vietnam and Ethiopia. No nation admits to stockpiling biological weapons. Countries believed to have the capacity for developing a bioweapon on short notice include the United States, Soviet Union, Iraq, Egypt, Iran, Israel, Syria, China and Romania.

8. Modern weapons and munitions are enormously costly, and very few countries have the resources to spend large sums developing and stockpiling arms. The more expensive war stays, the fewer the nations that can pose a conventional threat. Unfortunately, biological and chemical (B/C) weapons threaten a lot of destruction at relatively little cost. In the judgment of Robert Gates, the new Deputy National Security Advisor, "the most immediate threat to world peace may well come from the proliferation of chemical and biological warfare in the Third World," David Ottaway, *Middle East Weapons Proliferate*, *Washington Post*, 19 December 1988, p. A11.

9. IKLE & WOHLSTETTER, *DISCRIMINATE DETERRENCE: REPORT OF THE COMMISSION ON INTEGRATED LONG-TERM STRATEGY* 10 (1988).

10. Cushman, *U.S. Cites Increase in Biological Arms*, *New York Times*, 4 May 1988, p. A9.

11. A breakthrough in biology described as "the most significant technological event since the Industrial Revolution," DOUGLASS, & LIVINGSTONE, *AMERICA THE VULNERABLE* 3 (1987), will be difficult to ignore, either militarily or commercially. The genie of genetic engineering cannot be stuffed back into its bottle for two basic reasons. First, the logic of deterrence and counterdeterrence suggests that in a fearful world nations will tend to explore and, where practical, exploit new technology for military purposes—if only to forestall an adversary from gaining an advantage.

Second, the commercial utility of genetic engineering continues to expand. As global oil supplies dwindle, the economics of production will gradually encourage chemical and pharmaceutical industries to use biotechnological methods in key production processes. As a result, even without overt military pressure, a vast reservoir of gene-cloning expertise will build up. This commercial momentum means that "in the not-too-distant future, countries throughout the world will learn how to produce an enormous variety of large biological molecules, including toxins, on a scale that was previously inconceivable." Tucker, *Gene Wars*, *Foreign Policy* (Winter 1984-85).

12. Ottaway, *supra* n. 8 at A4.

13. Moffett, *Israel: Determined Not to be a Chemical Target*, *Christian Science Monitor*, 13 December 1988, p. B15.

14. Ottaway, *supra* n. 8 at A4.

15. *Israeli Satellite Is 'Threat' Say Arabs*, *Jane's Defense Weekly* 753 (1 October 1988)

16. Fialka, *supra* n. 7 at 1, citing an unidentified "U.S. government expert."

17. Dr. Robert Kupperman, quoted in Rempel and Wright, *How Spying, Analysis and Luck Provided Proof of Libyan Chemical Warfare Plant*, *The Providence Sunday Journal*, 22 January 1989, p. A-8.

18. However, even if chemical weapons are just a harbinger of greater troubles to come, at present the main threat to Middle East stability appears to be chemical. With Israel holding an estimated 50-100 nuclear weapons and Arab adversaries beginning to amass a significant number of deliverable chemical and perhaps biological warheads, the region is entering a hair-trigger environment.

In essence, the Middle East is undergoing a shift from Israel's assured military superiority to a regime of reciprocal deterrence loosely equivalent to the U.S./Soviet notion of mutual assured destruction (MAD). Understandably, Israel views this turn of events with alarm and is currently mulling over whether to invest in an offensive or defensive strategy to deal with the new Arab threat.

The Middle East may simply be too volatile to permit transition to, much less maintenance of, a stable MAD equilibrium. Prime Minister Shamir and Defense Minister Rabin have already dropped strong hints that major chemical attacks against Israel would be met with a nuclear rather than chemical or conventional reply. (See Spector, *Nonproliferation After the Bomb Has Spread*, *Arms Control Today* at 10 (December 1988). The

proliferation of missiles and B/C weapons increases the chance of miscalculation by either side—and resurrects the possibility that Israel might take desperate retaliatory measures, such as using shaped nuclear charges to contaminate or even obliterate key oil fields upon which the wealth, and ultimately the military might, of the Arab bloc depends.

19. *Supra* n. 5 at 82. See also Wohl, *Biological Warfare: Advances Breed New Dangers*, Defense Science 2002+ at 57 (August 1984). Another indicator of Soviet interest in B/C technology is that in recent years 70 percent of all Soviet requests for research papers made to American universities, research establishments and libraries have been on subjects involving chemical and biological engineering. See HEMSLEY, *THE SOVIET BIOCHEMICAL THREAT TO NATO* 126-127 (1987).

20. The Soviets place a high priority on targeting an adversary's command and control apparatus. Although many of NATO's key C<sup>3</sup> sites have been hardened to offer some protection against conventional and even nuclear blasts, they remain relatively vulnerable to attack by B/C agents. As John Hemsley notes, "the problems associated with air-conditioning, limited capacities of closed-circuit systems, and staff shifts . . . [are] likely to become more acute with the introduction of 'novel' agents during the next decade." HEMSLEY *supra* n. 19 at 128-129. Hemsley is particularly concerned that the Soviets seem to be on the threshold of developing a new series of "penetrant and discipline breaker" agents which, in his judgment, will make "all hardened and static headquarters' sites especially vulnerable to CBW." *Id.* at 143.

21. Remedy of this deficiency will begin in 1990 when a new U.S. binary chemical bomb, the Bigeye, becomes available.

22. *Supra* n. 11 at 101.

23. HEMSLEY *supra* n. 19 at 49.

24. See Lescaze, *supra* n. 7.

25. Thatcher, *Disease as an Agent of War*, Christian Science Monitor, 15 December 1988, p. B10. It is also plausible, of course, that Falin's statement—far from being an unguarded comment—was a deliberate attempt to plant an idea intended to discourage SDI. Since then, there appear to have been no further open-source Soviet statements linking SDI and biotechnology. As John Hemsley points out, however, for reasons of economy "it could well prove that the Soviet Union sees biotechnologically derived 'designer' agents as the logical response to SDI." HEMSLEY, *supra* n. 19 at 48.

26. U.S. Dept. of State, *Chemical Warfare in Southeast Asia and Afghanistan*, Special Report no. 98 (Washington: March 1982) and U.S. Dept. of State, *Chemical Warfare in Southeast Asia and Afghanistan: An Update*, Special Report no. 104, November 1982. The government case was based on multiple information sources: testimony of victims and defectors, epidemiological data, analysis of medical samples, physical samples from attack sites, and intelligence data.

27. For criticism of the reliability of the government's evidence on yellow rain, see Robinson, *Chemical and Biological Warfare: Developments in 1983*, in SIPRI, *WORLD ARMAMENTS AND DISARMAMENT*, SIPRI YEARBOOK 1983 336-338 (1984); Salaff, *Yellow Rain: Time for Re-evaluation*, 14, no. 3 *Journal of Contemporary Asia*, (1984), 380-395 and Guyot, *Yellow Rain: The Case is Not Proved*, *The Nation* 465-484 (10 November 1984).

For alternative theories which explain yellow rain as a natural phenomenon, see Meselson, *The Search for Yellow Rain*, *Arms Control Today* 31-336 (September 1986); and Ember, *Yellow Rain*, *Chemical and Engineering News* 11 (9 January 1984).

28. Schwartzstein, "Statement," U.S. Congress, Senate, Committee on Foreign Relations, Subcommittee on Arms Control, Oceans, International Operations and Environment, *Yellow Rain: The Arms Control Implications*, Hearing 109 (1983).

29. *Supra* n. 2 at 159. See also U.S. Dept. of State, *Chemical Warfare in Southeast Asia and Afghanistan*, Special Report no. 98 (March 1982).

30. HEMSLEY, at 63; also at 23, n. 17, in which Hemsley cites OGARKOV, ISTORIYA UCHIT BDITELNOSTI (1985) for the proposition that the Soviets consider "modern forms of CBW . . . a quantum leap forward in the method of waging war."

31. *Supra* n. 3 at 113-114.

32. *Supra* n. 2 at 160. See also Wohl n. 19.

33. *Supra* n. 3 at 98, citing Zilinskas, *Managing the International Consequences of Recombinant DNA Research*, (Ph.D. dissertation, Los Angeles: Univ. of Southern California 1981).

34. An interesting feature of biological warfare is the absence of realistic options for counterforce targeting. Germs and toxins attack people (or livestock, crops, etc.), but not an enemy's retaliatory capacity, either nuclear or biological. By itself, a traceable bioweapons attack is a perilous gambit: It would serve to provoke an adversary without immediately disarming him. In a struggle between superpowers, the only practical value of a massive biological warfare capability is to provide limited insurance for the possible neutralization of one's nuclear arsenal. In other words, at the level of strategic interaction among the superpowers, *overt* biological warfare serves primarily as a back-up deterrent, and not as a first-strike weapon.

35. *Supra* n. 3 at 129, quoting David Kingsbury when he was director of the Naval Biosciences Laboratory in Oakland, California in 1984.

36. U.S. Congress, Senate, Committee on Armed Service, *Chemical Warfare Review Commission*, Staff Report at 118 (1985).

37. *Supra* n. 11 at 74. The Soviets are also reported to be working on quick-acting diseases, with an incubation period of a few hours, that could serve a tactical function. See Douglass, *supra* n. 6 at 58; and DOUGLASS, *supra* n. 11 at 77.

38. *Supra* n. 3 at 72.

39. Military planners tend to evaluate biological agents almost exclusively in terms of their threat as antipersonnel weapons. Just as important, however, is biological warfare's potential for harming other life. For example, plants lack an immune system and are therefore especially vulnerable to biological attack. This susceptibility is magnified by the widespread use of monocultivation, i.e., the planting of genetically identical strains to boost crop yield, as an agricultural standard in Western countries. Monocultivation provides ideal targets for biological warfare.

40. Another possible source of a B/C threat inside American borders might be terrorism. Although terrorists have targeted American citizens and interest throughout the world, thus far relatively little activity has been reported within the United States. In addition, up to this time nearly all terrorist groups have relied on conventional weaponry to carry out their attacks.

Many experts believe terrorists have not yet turned to B/C weapons because potential drawbacks continue to outweigh expected benefits. (See Horwitz, *Terrorists and Chemical/Biological Weapons*, *Naval War College Review* 36-40 (May-June 1982); Bremer, *High Technology Terrorism*, *Dept. of State Bulletin* 65-67 (July 1988). The likely gains from a B/C attack resulting in mass casualties would be spectacular visibility and perhaps short-term bargaining power; the probable disadvantages would include deep public revulsion, a high risk of alienating key support groups, and an unleashing of extremely vigorous countermeasures. As Dr. Robert Kupperman, terrorism expert at the Center for Strategic and International Studies in Washington points out, government pursuit of bioterrorists would probably be relentless: "If terrorists start to use [biologicals], there is no end to which a nation would go to stop them." MCDERMOTT, *THE KILLING WINDS* 254-255 (1987).

To some degree, terrorism is theater—a kind of psychodrama played out on the world stage with real victims to gain public attention for desperate causes. As Brian Jenkins sees it, "[t]errorists want a lot of people watching and a lot of people listening, not a lot of people dead." (Norton, *Terrorists, Atoms and the Future*, *Naval War College Review* 42 (May-June 1979). Of course, this logic holds only so long as the death of a few continues to be newsworthy. Some observers worry that after a decade of being exposed to terrorism based on conventional explosives, people are becoming "desensitized." (See McGeorge, *Reversing the Trend on Terror*, *Defense & Foreign Affairs* 16 (April 1988). Accordingly, as existing techniques begin to lose their propaganda punch, the temptation for terrorists to turn to more exotic and deadly means will grow. For this school of thought, the question is not whether B/C weapons will be used by terrorists, but only *when*.

Whatever their stance on the psychodynamics of terrorism, analysts generally agree on at least one point: the means to construct chemical or biological weapons are now within the grasp of many nonstate groups and, as time passes, the killing potential of these means will only expand. As previously discussed, many experts rely on a benefit-burden analysis to support their conclusion that terrorists are unlikely to resort to B/C agents. Unavoidably, such an argument pivots around the notion of a "rational" terrorist. There may be some freedom fighters who are not so calculating—those who, in a spasm of retribution, might seek to destroy what they cannot realistically hope to control. A terrorist group determined to inflict mass casualties (rather than just engage in theatrics) could well turn to B/C agents. The capability exists already. It seems inevitable that the international political climate will at some point be ripe to spawn an unholy trinity of bugs, drugs and thugs.

41. John Tower, *The Politics of Chemical Deterrence*, *Washington Quarterly*, Spring 1982, p. 36. See also Hamm, n. 1 at 127-128. In Hamm's judgment, "NATO has long relied in practice on the threat of nuclear escalation to deter Moscow from initiating chemical combat. But a nuclear response has always lacked credibility. . . . It can be all but ruled out that NATO's political leaders would muster the courage to permit the use of nuclear weapons to retaliate against chemical attacks or to transfer this decision to their military commanders in order to make the nuclear response automatic."

42. Quoted in Tucker, *Gene Wars*, *Foreign Policy* 76 (Winter 1984-85).

43. *Supra* n. 3 at 175, quoting Richard Novick, director of the New York Public Health Research Institute.

44. *Supra* n. 5 at 83. Feith's conclusions have been widely shared by government and private analysts. In 1986, H. Allen Holmes, an Assistant Secretary of State for Politico-Military Affairs, opined that "the Convention, in our judgment, cannot be made effective through amendment or design." (Cited in Dickson, *Gene Splitting Dominates Review of Weapons Pact*, *Science* 143 (10 October 1986). In 1985 the Defense Science Board on Chemical Warfare and Biological Defense concluded that "technology has made obsolete much of the distinctions and language of the BW treaty." (Dept. of Defense, *Biological Defense Program*, Report to the Committee on Appropriations, House of Representatives, May 1986, chap. 1, p. 6.) For the past five years, in numerous articles and books, Joseph Douglass, Jr., has been arguing that the Biological Warfare Convention

is a dangerous illusion lulling the United States to sleep. See, e.g., the Douglass sources cited in notes 2, 6, & 11 and Douglass and Lukens, *The Expanding Arena of Chemical-Biological Warfare*, Strategic Review 71-80 (Fall 1984). For a contrary view, the Biological Warfare Convention is not hopelessly obsolescent and could perhaps be salvaged, see *supra* n. 3.

45. *Supra* n. 5 at 83-84.

46. Gordon, *Senators Prepare Sanctions Laws For Supply and Use of Poison Gas*, New York Times, 24 January 1989, p. A8.

47. Kester, *Chemical Weapons, Cloudy Thinking*, New York Times, 13 January 1989, p. A31.

48. Watson, *The Winds of Death*, Newsweek 25 (16 January 1989). Other leading experts echo Burns' point. "It would be extremely difficult to detect a deliberate violation of a chemical warfare [CW] treaty—extremely difficult," observed Thomas Welch, Deputy Assistant to the Secretary of Defense for Atomic Energy and Chemical Matters. (Cited in Boyle, *An End to Chemical Weapons—What are the Chances?* International Defense Review 1087 (September 1988).

Brad Roberts, a CW expert at the Center for Strategic and International Studies in Washington, is quoted as concluding: "A realist would have to say that the prospects for a meaningful chemical disarmament regime are dim." (Watson, *Letting a Genie Out of a Bottle*, Newsweek 31 (19 September 1988).

49. Flowerree, *Elimination of Chemical Weapons: Is Agreement In Sight?*, Arms Control Today 9 (April 1988).

50. Markham, *Arabs Link Curbs on Gas and A-Arms*, New York Times, 9 January 1989, p. A8.

51. See Watson, *supra* n. 48. Judging from pledges made during the election campaign, President Bush is keenly interested in keeping up the momentum for a CW treaty. "If I'm elected president," he said, "if I'm remembered for anything, it would be this: a complete and total ban on chemical weapons. Their destruction, forever. That is my solemn mission." Taylor, *Bush: Ban Chemical Weapons*, Washington Post, 22 October 1988, at 7.

52. U.S. Army Dept., Committee on Chemical and Biological Sensor Technologies, *Assessment of Chemical and Biological Sensor Technologies* (Washington: June 1984), at 50. Chemical and biological warfare agents are divided into three categories: chemical (synthetic compounds), biological (live organisms), and toxins (biologically derived chemical substances). To defend against these agents, sophisticated sensors are needed to detect and identify minute concentrations. At present, the U.S. military has a number of fielded systems, ranging from battlefield vans to personal dosimeters, capable of monitoring chemical threats. There is no comparable capability for detecting biological or toxin agents, which can now be diagnosed only with microbiologic and/or serologic testing procedures available in clinical laboratories. Some studies are beginning to explore the possibility of developing biomicrosensors, i.e., detection devices based on an interaction between the suspected agent and a sensitive membrane—to remedy this defect. In addition, new developments in immunoassay techniques and gene probes offer some promise for enhanced detection of biological agents. The ultimate goal is to develop a multi-function "biochip" (the biological equivalent of an integrated circuit) capable of serving as the building block for a portable sensor system for biological and toxin agents.

53. *Supra* n. 9 at 9.

54. Tucker, *Using Force Against Libya*, New York Times, 11 January 1989, p. A23.

55. Ottaway, *U.S. Officials see Insufficient Grounds to Justify Attacking Libyan Plant Now*, Washington Post, 8 January 1989, p. A24.

56. Capaccio, *New Exotic Germs on the Way*, Defense Week 15 (16 May 1988).

57. See, generally, SHAKER & WISE, *WAR WITHOUT MEN—ROBOTS ON THE FUTURE BATTLEFIELD* (1988). According to the authors: "the opportunities for weapon superiority afforded by [new] technologies, as well as the increasingly dangerous battlefield environment, may eventually relegate man to the role of behind-the-scenes strategist, leaving machines to perform the actual fighting. If current trends continue, it is not a question of whether this will happen, but rather how long it will take" (at 6). They estimate that fully autonomous robots will be deployed on the battlefield within 20-30 years and comprise the "preeminent" force within 50-60 years. *Id.* at 10, 73. Ironically, the expanding threat of biochemical weapons will likely spur on the development of such robotic systems.

58. Of course, not all of society's important battles take place on a battleground in the formal sense. The continuum in which soft weapons can be used reaches beyond battlefields and the military's traditional capabilities for defense.

To cite a current example, one of the most damaging weapons systems presently being directed at the United States is chemical warfare in the guise of narcotics. According to some analysts, the growing trade in drugs involves more than just an unbridled quest for profits. In their judgment, the drug lords are being assisted by terrorists and certain governments hostile to the United States, for political reasons. Illicit drugs are not only a source of easy wealth but also a potent and expanding means to sap the vitality of American society. As explained by a high-ranking Nicaraguan defector, who claimed to have first-hand knowledge about Cuban and Sandinista strategy: "Yankee imperialism [is] armed to the teeth, believing that the Soviet Union [is] going to attack the U.S. as part of a nuclear war. But the Yankees [do] not realize that the Yankee imperialism [is] going to perish, eaten from within by . . . the drug traffic and the economic competition with Japan and the

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European Economic Community . . . ." (Testimony of Alvaro Aviles before the Senate Subcommittee on Security and Terrorism, quoted in Ehrenfeld, *Narco-Terrorism and the Cuban Connection*, Strategic Review 60 (Summer 1988).

Communist competition with the West is grounded on a belief in the inexorable and favorable march of history. Accordingly, patience becomes an essential element of the all-assets struggle. Nudge and chip and nibble away, but stop short of provoking a cataclysmic showdown. Given that frame of reference, why should adversaries engage in formal war if, at relatively little cost, they can stimulate efforts to eviscerate our society from within?

Several authors note that, historically, both the Soviet Union and the People's Republic of China have not been reluctant to use drugs as a weapon. (See Douglass, *supra* n. 11 at 119-126; and Buckelew, *The Secret World of Narcoterrorism*, Security Management 69-73 (September 1987). In his article Buckelew, a former senior U.S. intelligence officer who served in East Asia and Latin America, traces narcotics "warfare" against the West over a 40-year period. Phase one began in 1949 when Mao Tse-tung directed a flow of narcotics to U.S. occupation troops in Japan and later to American forces in Korea. Phase two started in the early 1960s when, impressed by Chinese success in using what Mao referred to as "indigenous chemical warfare," the Soviets decided to mount a similar—but much broader—campaign against the West. In late 1962, following the rebuff of the Cuban Missile Crisis, Nikita Khrushchev set into motion a large-scale operation to infiltrate narcotics into major Western nations. His declared intent was "to accelerate the process of demoralization of bourgeois society" by weakening American youth (DOUGLASS, *supra* n. 11 at 121).

Also targeted, as an extension of the overall strategy, were members of the armed forces. The cheap and plentiful supply of drugs available to service members in Vietnam and Europe during the late 1960s and 1970s was no accident. As described by Buckelew: "in the late 1960s, the major drug [supplied by China to American troops in Vietnam] was exceptionally potent marijuana dipped in opium to create addiction. Later, nearly pure heroin arrived in the vicinity of US bases in Vietnam, at or below cost (eighty cents a gram), while the supply of marijuana and other drugs dried up. The objective was clearly to stimulate heroin use by American troops" (*supra* n. 11 at 71).

During the last decade the U.S. Military has made substantial progress to bring its internal drug problem under control. The growing travail of American society as a whole, however, suggests that at least one prong of the original Sino-Soviet drug initiative continues to thrive as a self-sustaining weapon that pays for itself. And there may yet be worse to come. Douglass notes that the Soviet bloc has developed at least a half-dozen new "recreational" drugs which are deemed, on the basis of tests on prisoners, to be even more addictive and debilitating than cocaine. For now, the Soviets have decided not to "market" these new drugs but instead to hold them in reserve for the right opportunity (*Supra* n. 11 at 55).

59. Quoted in Thatcher, *Disease as an Agent of War*, Christian Science Monitor, 15 December 1988, p. B3.

60. Since 1945, nations possessing nuclear weapons have been careful not to engage in direct wars with each other. Most of the fighting has been done via proxies. But now that some of the proxy States are also beginning to acquire weapons of mass destruction, this technique might eventually become too risky as well. Twenty years from now, if current proliferation trends hold up, the world could easily have 50 nations with significant nuclear, chemical and/or biological capabilities. In such an environment, as weapons of mass destruction continue to disperse throughout the globe, hot wars will be a tricky business; and even the euphemistically named low-intensity conflicts may become carefully modulated duels with more political than military content.

To follow this speculative path one step further, *if* the world becomes increasingly locked up militarily, then economic competition will be ascendant, and "warfare" might shift from overt to more covert forms. What could eventually emerge as a darker side to this economic struggle is an intensified campaign of "dirty tricks"—a stream of soft weapons designed to sap an adversary's vitality: computer viruses, designer drugs, insect pests and, tapping the new potential of bioweapons, an array of enfeebling agricultural, animal and human disorders.

To the extent possible, this cool war would be waged out of the public eye and off the military mapboard. During the past 45 years, it is likely that the first salvos in such a clandestine campaign have already been launched—silently and without fanfare. The concept of social sabotage is not new. What is disturbingly new, however, is the growing potential for biological and toxin agents to serve as weapons in such a struggle.

## Chapter 38

# Neutrality and International Order\*

Count Wilhelm Wachtmeister

I am glad to be back in Newport, one of my favorite places, which I often visit as a guest of my good friend Senator Claiborne Pell and his wife Nuala. It is a particular honor and pleasure to be invited to speak at the Naval War College, which every two years gives a Swedish naval officer the benefit of a year's education.

My subject this evening is "neutrality and international order." By way of introduction, let me recall the story attributed to a famous British statesman, intimately familiar with warfare and in particular with the naval aspects of it. Once he rose to thank his hosts for a dinner and shocked the guests by saying that he had anticipated that honor and had prepared two speeches. Depending on the quality of the table, he would make use of one or the other. He said he had been treated well and therefore had decided to deliver them both. The brief speech went as follows: "Thank you!" And the longer one: "Thank you very much!"

I will do the same and deal with two slightly different but interrelated subjects: neutrality, and the policy of neutrality. I will naturally do so from a Swedish perspective, but in order to highlight that perspective I will briefly refer to the neutrality of other countries.

There are few neutral countries in the world, and their history, policies and problems are overshadowed by the flow of information from the great powers and their allies. I therefore believe that an introduction to neutrality is warranted.

A common denominator for the different forms of neutrality is that its meaning, in terms of international law and in military terms, is revealed only in time of war between foreign powers. That is the time when the rules of international law pertaining to neutrality enter into force, both for the neutral States and for the belligerents. Those rules, which are binding on both categories of States, are found in the fifth and the thirteenth Hague convention of 1907. These conventions deal with the Rights and Duties of Neutral Powers and Persons in War on Land, and the Rights and Duties of Neutral Powers in Naval War. (No such rules have been developed pertaining to the situation in the air.)

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Neutrality does not cease to exist if it is violated either by the neutral State not fulfilling all its obligations or by actions perpetrated against it by a belligerent State. In accordance with international law, a neutral State using armed resistance to stave off an intruder is not regarded as having committed a hostile act. At the same time, the neutral State is bound by the same rules to prevent its territory from being used for acts of war or as bases for such acts. A belligerent State is obliged to respect neutral territory and not to engage in acts of war there. And the neutral State is obliged to be impartial, that is, it may not engage in the war or support any of the belligerent States. Thus, neutrality must be applied equally toward the belligerents. At the same time, we should note that a neutral State is always free to offer mediation.

The rules laid down in the Hague conventions are based on long experience of what actions should not be tolerated by belligerent States, and what may lead them to regard a neutral State as a legitimate target for countermeasures, maybe even war. This applies, for example, to the obligation of the neutral State to refuse transit of troops, the duty to intern belligerent troops entering the neutral country and, if bans are imposed on exports of military equipment, the nondiscriminatory application of such bans to all belligerents. However, these rules say nothing about the general, nonmilitary trade, even if neutral States themselves often apply a principle of "normal trade."

When Sweden considered applying for membership in the United Nations in 1947 there was a dilemma, because adherence to the Charter of the UN is theoretically incompatible with neutrality if the Security Council decides to impose sanctions on a particular country. (There has so far been only one case of this kind: the resolution to impose sanctions against then Southern Rhodesia, a resolution that Sweden strictly implemented.) However, this limited waiving of neutrality is of little practical importance, because we are guaranteed *not* to be drawn into a military conflict that would encompass either one of the great powers or any of their allies. This is so because the great powers, that is, the five permanent members of the Security Council, must be in agreement before the Security Council can make a decision to apply military or other sanctions. They have a veto power, and therefore we run no risk of being ordered by the Council to declare war on either of them. As stated clearly in Parliament by the then foreign minister, it was for this reason that Sweden felt free to seek membership in the United Nations.

The international doctrine on neutrality has come to the conclusion that a neutral State must use its military resources to safeguard its neutrality. Of equal importance is the fact that there is no rule in international law stipulating that a neutral State should possess a military capacity to stave off *all* incursions. International law does not require a neutral State to be an impregnable fortress. There is no obligation for a neutral State to be at the peak of the spiral that technically drives the development of sophisticated armaments.

There are variants of neutrality by which a State, in peacetime, can be bound by arrangements in accordance with international law. In these instances the term *permanent neutrality* is often used. States which are permanently neutral in accordance with treaties have certain rights and obligations. They have to follow rules laid down in the treaties when conducting their security and foreign policy. Sometimes such treaty arrangements are paired with some kind of guarantees, by which the integrity of the neutral State is guaranteed by guarantor States. In return, the neutral State is obliged not to open hostilities against any State and not to enter into international agreements which could indirectly lead to such hostilities. The permanently neutral State of course has the right and obligation to defend its territory and its neutrality.

Austria has declared a self-chosen neutrality, and has applied some self-imposed restrictions to both its national and foreign policy. These restrictions are mentioned in the international documents by which Austria's sovereignty was restored in 1955.

Allow me in this context also to refer to the strict and permanent neutrality of Switzerland. Swiss neutrality is part of the constitutional system of that country. It is internationally recognized and was collectively guaranteed at the Vienna Congress in 1815 and in the Versailles peace treaty of 1919.

The picture would be incomplete if I did not mention Finland. The 1948 Treaty of Friendship, Cooperation and Mutual Assistance between Finland and the Soviet Union is the foundation of Finland's policy of neutrality. This treaty notes "Finland's desire to remain outside the conflicting interests of the Great Powers."

International treaty and guarantee arrangements give the States party to them the right to expect that a certain policy will be adhered to by the neutral State. If these obligations are violated, it is possible to imagine signals of displeasure from the guarantor States most directly concerned. I hasten to add, however, that the more time that has elapsed since the treaty arrangement, the less the real possibility for the guarantor States to intervene directly in the affairs of the neutral State.

In the case of Sweden, my country becomes, *stricto sensu*, neutral when there is war between powers in our vicinity. In peacetime, Sweden has no neutrality obligations. Sweden's neutrality is not laid down in its constitution or otherwise proclaimed as a permanent State doctrine. Our neutrality in the case of war is neither confirmed nor guaranteed by any international agreement. It is instead a policy that the Swedish government and Parliament have chosen to pursue, a policy which it could, should it so wish, amend at any given moment.

Sweden has rejected the idea of incorporating its neutrality in any international agreement. In our view, guarantees furnished by the great powers would create some measure of dependence on these States. They might claim the right to keep an eye on Sweden's foreign policy and to raise objections should they consider

that it conflicts with the terms of the international guarantees. In other words, the Swedish approach is not to give foreign powers any *droit de regard* toward Swedish affairs.

In peacetime, Sweden is therefore guided by what is appropriate in order to safeguard our neutrality in time of war. Because of this aim, our security policy must be conducted with precision, firmness and consistency. That is, however, different from legally binding obligations.

I now turn to the *policy* of neutrality, its scope, implications and opportunities.

Sweden's policy of neutrality can trace its roots to 1814, the year Sweden was last engaged in acts of war. Jean Baptiste Bernadotte, a former marshal in Napoleon's army, realized when he was King Karl XIV Johan of Sweden that the Napoleonic wars created a quagmire in which there were only losers. In order for his kingdom to prosper, he therefore moved to stay out of the vicissitudes of alliance-building on the European continent. What he started has little by little evolved into Sweden's policy of neutrality. That endeavor has obviously been highly successful, since we find ourselves in the unique position of not having been at war for the last 175 years.

Adhering to the policy of neutrality, Sweden has been saved from involvement in two world wars. Obviously it was not neutrality alone that saved us, but also strategic and political circumstances beyond our control. Certainly one component was luck. No one can deny, however, that a deliberate policy of neutrality was one factor enabling Sweden to avoid participation in these two major conflicts.

The evolution of the Swedish policy of neutrality over a long period of time has won the support of the Swedish people. The policy's credibility has been based on its consistency, a national consensus on its aims, broad political majorities supporting the means by which to achieve those aims, and a strong national defense. It is an exaggeration to say that Swedes regard the policy of neutrality as a flak jacket, but the vast majority would probably agree to liken it to a safety belt. Our policy of neutrality is deeply rooted in the minds of all citizens, and indeed, whoever electioneered from a political platform proposing a change of this basic policy would certainly lose in the elections.

As an interesting example of where another nation went, I would like to briefly sketch the path of the neutralistic tendencies in the United States. This nation was equally fed up with the European quarrels of the Napoleonic era. As a result, the United States turned its back on that continent in order to expand within its own borders and within the Western hemisphere (in accordance with the Monroe Doctrine).

A century later, at the outbreak of World War I in 1914, President Wilson proclaimed a policy of strict neutrality. In 1917 neutrality was abandoned, the main reason probably being the German strategy of unrestricted submarine warfare.

When World War I ended, Congress again shunned away from involvement in European affairs and rejected the fourteen points suggested by President Wilson. This restrictive attitude in U.S. foreign policy, exemplified by the rejection of the League of Nations in 1920, continued through the period between the wars. The definitive breaking point for the policy of neutrality of the United States can be set at the Lend Lease Agreement with Great Britain on March 11, 1941, when Congress accepted the proposal of President Roosevelt to come to the aid of the United Kingdom and other threatened democracies.

From then on, it is proper to regard the United States' policy toward the rest of the world as one of the two superpowers, where involvement in the affairs of various regions has indeed been significant. However, it is interesting to note what happened when the United States actively engaged itself in the preservation of the freedom of navigation in the Persian Gulf. It was stated that the U.S. Navy would protect American shipping in the gulf—later including reflagged former Kuwaiti tankers—while at the same time the United States would be neutral toward the belligerents involved in that war.

At this juncture I would like to emphasize the difference between the evolution of the United States' and Swedish security policies respectively. While the United States' interest in staying away from European affairs contained a tint of isolationism, the Swedish policy of neutrality is paired with a deep commitment to full participation in the affairs of the world community. The basic aim of Sweden's policy of neutrality is to make credible our intention to be neutral in times of war, so that belligerents respect that neutrality and Sweden can be spared the scourge of war. It is not an effort to climb to high moral ground, but a means by which Sweden endeavors to safeguard its independence and national security. This policy of neutrality has three main components: nonparticipation in alliances; a strong defense; and a foreign policy that makes credible our intentions in case of war.

Nonparticipation in alliances is, of course, a *sine qua non* for the credibility abroad that Sweden will be neutral in the case of war. Sweden's security policy is a well-established fact in the Nordic region: Iceland, Norway and Denmark are members of NATO; and Sweden and Finland, each in its own way, conduct a policy of neutrality. The Nordic States interact on the basis of a common history and cultural, social, linguistic and religious affinities. Despite the different orientations in their security policies, each has contributed to the relative calm in the Nordic subregion of Europe, and each bears a responsibility for that stability to continue. It is in this context that one can see the importance of Sweden continuing its policy of neutrality, because were it to be abandoned, it would in a stroke change the political map of Europe.

Recent developments in the European Community (EC) have influenced the debate on future Swedish options. Parliament has stressed that Sweden should work for a Western European common market encompassing all countries in

the EC and the European Free Trade Association; that we should seek far-reaching, close and lasting relations with the EC; and that we should associate ourselves to the extent possible with the EC's work to develop a truly internal market. At the same time Parliament decided that Sweden should not consider membership in the Community, because the cooperation and coordination of foreign policy inside the Community is tantamount to that performed within an alliance.

Nonparticipation in alliances is so fundamental that the correct definition has been set in concrete in the following phrase: "nonparticipation in alliances in peacetime aiming at staying neutral in the event of war." It follows, therefore, that no commitment must be made in peacetime that prevents us from fulfilling the obligations of a neutral power when there is war between other States.

The strongest proof of our will to be neutral in the event of war is our refusal to join alliances in combination with a determination to make considerable sacrifices to maintain a strong defense. Sweden has based its defense on the theory of marginal defense, i.e., Sweden will mobilize sufficient strength to match whatever surplus resources an aggressor may be able to spare for use against it in the context of a general war in Europe.

Soviet military developments in the vicinity of Sweden are characterized by an increase in the operational ranges of tactical aircraft, the deployment of cruise missiles, an increase in strategic and operational mobility, and the development of new underwater technology (as evidenced by submarine intrusions). These have all influenced Swedish threat perceptions. The possibility for surprise attack, the shortening of military warning times, and the existence of special sabotage groups are relatively new phenomena and have been given added attention in Swedish defense planning.

As noted earlier, international law does not require a neutral State to be an impregnable fortress. It does, however, require the neutral State in time of war to use the military resources at its disposal to uphold its neutrality. Sweden's military capacity, with a mobilized total defense, has been and remains significant. The air force enjoys the reputation of being one of the strongest in Europe. Fully mobilized, the armed forces number more than 800,000, not including 300,000 persons engaged in civil defense. That together with the determination of the Swedish people to defend themselves, even if the outcome is in doubt, adds to the effect of the military hardware available. Furthermore, Sweden maintains an indigenous production capacity for most of its weapons in order to be independent in this field. In addition to airplanes, Sweden produces armored vehicles, missiles, submarines, and artillery.

The changing threat perceptions have increased demands on Swedish defense efforts. Broad political majorities support the steps taken during the 1980s. The Swedish antisubmarine warfare capacity has been enhanced and, on the operational level, instructions have been altered to make possible the use of force

without prior warning against underwater vessels intruding in Swedish internal waters.

Despite economic constraints, it was decided in 1982 to develop a new generation of aircraft in order to ensure continued strength. The JAS/Gripen aircraft will use more indigenous than imported technology. Together with enhanced radar and base structures, the JAS system will improve our ability to counter aircraft and cruise missiles that might violate Swedish airspace. The system will thus serve as a platform for omnidirectional defense in the air and increase the capacity of the Swedish defense forces to deny Swedish territory to any side in the event of war.

The diversification of the threats has led to a series of other measures that will enhance our ability to deal with incidents in the grey zone between peace and war. New focus is being given to the need to protect the nation against surprise attacks. Particular attention has been devoted to counter-industrial espionage and international terrorism, and to the protection of communications and the whole civilian infrastructure of the state.

The underlying sentiment of these measures is clear. There is consensus in Sweden that the country is worth defending and that it is defensible by means at its own disposal. General conscription has created a sense not only of duty, but of privilege to prepare for the defense of the country. Defense spending is currently growing at a rate of 1.7 percent annually in real terms and is calculated to amount to 2.7 percent of the GNP. Under these circumstances, I know what the reaction would be on the part of the average Swedish taxpayer, or the conscript soldier in basic or refresher training, if someone told him that there are those who say that Sweden tries to have a free ride for its security. He would be disgusted.

So much for our *ability* to be neutral in time of war. Now to the foreign policy component of the policy of neutrality: our *will* to be neutral. If we have no military ability, the will is immaterial. On the other hand, if the capacity is available but there are doubts about our will, the situation would be equally bad, because then our intentions could be questioned. This is why we argue that our foreign policy is our first line of defense.

Sweden, with a large territory but only 8.6 million people, is a democratic country in northern Europe with strong economic ties to the Western world. Sweden is situated in the immediate vicinity of one of the superpowers. So placed, Sweden had better avoid either coming under the influence of the nearby superpower or becoming the threatening outpost of the other. Our own interest is best served by basing our policy on a rational assessment of reality as we see it. After all, it is we who decide on a day to day basis the content of our policy, and the geographic realities are permanent.

In peacetime we must pursue a policy that inspires and sustains the confidence of the rest of the world in our determination and our ability to be neutral in

wartime. This is no easy task in an era of increasing global interdependence in virtually all fields. Of prime importance in this regard is the confidence of the superpowers. If they believe that we are not really serious about our neutrality, or that only a little pressure is needed to get us to throw in our lot with either of them, then neutrality is worthless as an element of our security policy. That is why the Swedish government must remove groundless fears and hopes about our policy. And that is why Sweden must stand firm, even under strong external pressure.

I would like to take this opportunity to stress what the Swedish policy of neutrality is *not*. It is not aimed at neutrality *until* the time of war. It is not neutrality in ideological terms. Sweden is a Western, democratic country, and a member of the cultural community that traces its roots to the Judeo-Christian value system as developed under the influence of Greek philosophy. Therefore, Sweden has the right to express solidarity with this cultural community, to criticize phenomena that are contrary to our democratic principles and contrary to the basic human rights. In particular, Sweden demands respect for international law and the interests of small countries, so that the law of the jungle will not be the norm. This is particularly important in the case of those nations situated in the vicinity of one or the other of the great powers.

It also gives us the right to actively engage in developing cooperation with nations in the Third World. We believe that such cooperation in the long run will foster stability in a volatile and increasingly important part of the world, thereby contributing to the enhancement of our own security. It is an enlightened self-interest.

And it gives us the right to actively engage in the endeavors to abolish the nuclear threat to this planet. We do so in the knowledge that the nuclear threat is not one that exclusively hangs over those who possess those weapons, but over life on this planet in its entirety.

Countries neutral by treaty, permanently neutral, or, like Sweden, conducting a policy of neutrality aimed at being neutral in war, have in common their desire to avoid being drawn into war. In today's world these countries come in handy for the world community. They are trusted, and they shoulder international responsibilities that contribute to the building of peace and understanding, sometimes at great cost. They do so, of course, in accordance with their respective history and traditions, geographical locations, and individual political aims and aspirations, but in the common aim to benefit themselves from the lower tension that at least in part results from their contributions.

Permit me to mention a few examples:

- Switzerland, conveniently situated at the crossroads of Europe, has over the years played host to numerous international endeavors to solve disputes by peaceful means. The League of Nations, and later the United Nations and the International Red Cross (a genuinely Swiss organization), had or have impressive

facilities in Geneva. The superpowers have used Switzerland as one of the main venues for serious deliberations, be they in their respective embassies and missions or during walks in the woods in the surrounding mountains. France and Algeria (just about to be born) met on the Swiss shores of Lake Geneva; and when the central banks meet on the highest level, they assemble in Basel.

- Who today is not familiar with the increasing role Austria and its capital Vienna are playing in international affairs? The UN's center for humanitarian affairs is based there; OPEC found neutral ground for their deliberations there; and the Conference on Security and Cooperation in Europe seems to have found a semipermanent home in the former capital of the Habsburg Empire. Here is where East and West meet in Europe today; here is where the Mutual and Balanced Force Reduction talks started, failed and were buried; and here is the port of entry for those in distress who are permitted to leave the Soviet Union.

- When President Reagan wanted to reinvigorate himself for the challenges of the summit in Moscow, he stopped over in Helsinki in Finland. When the United Nations are in need of reliable, neutral and well-trained troops, the Secretary General rarely fails to call on the Finnish government to send a contingent. And when the time was ripe for Europe to leave the era of World War II behind in concerted effort to increase the security of all, it started in the Finlandia Hall in Helsinki. Who that is suffering from ill treatment, from torture or harassment, or from the despair of not being master of his own fate, does not see the word *Helsinki* as a beacon (as in the Helsinki accord or the Helsinki process)?

- In December 1988, 55,000 Swedes felt that they had received the Nobel Peace Prize when it was awarded to the United Nations peacekeeping forces. Swedish troops have participated in almost all of them since the first United Nations Emergency Forces in Sinai in 1956. When the superpowers want to receive data on nuclear experiments from independent, reliable and technically sophisticated sources, they have the Hagfors laboratory in Sweden at their disposal. And they use it.

- With no stake of their own, except the desire to create peaceful conditions worldwide as a contribution to their own security, Swedes have often been used to mediate, sometimes sacrificing their lives. I think of Dag Hammarskjöld, the Secretary General of the United Nations (whom I had the honor to serve), and Raoul Wallenberg, who saved ten of thousands of lives in Budapest during the last months of World War II. I recall Folke Bernadotte, who shipped people out of the concentration camps in Germany in 1945, and who later fell from an assassin's bullet in Jerusalem while serving the United Nations. And I remember Olof Palme, who mediated on behalf of the Secretary General of the United Nations in the conflict between Iran and Iraq. There are many others.

It has sometimes been said that neutrality is immoral because if you are not one of us, you are my enemy. I believe that is wrong on two grounds:

First, I do not believe that the world's future is best served by seeing enemies around every corner. The need for cooperation in a world increasingly interdependent makes me believe, instead, that he who is not my enemy is my friend.

Second, the role played by neutral States during times of crisis, war, and peace has contributed in a positive way to the stability of the world.

What Sweden seeks to promote is respect for human rights and for international law; nuclear disarmament; democracy (as the slowest but best way of government); and stability and peace as a foundation for building a society for our children that is better than the one we inherited from our parents.

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Count Wachtmeister was the Swedish Ambassador to the United States from 1974 to 1989. This article is adapted from a lecture delivered by Count Wachtmeister at the Naval War College on 21 March 1989 as part of the College's International Lecture Series. This series is sponsored by the Naval War College Foundation.

## Chapter 39

# The Environment and the Laws of War: The Impact of Desert Storm\*

Colonel James P. Terry, U.S. Marine Corps

**T**he Iraqi invasion of Kuwait and the resulting environmental carnage caused by the burning of oil wells and the fouling of Gulf waters have heightened international concern for the adverse environmental effects of armed conflict. The questions which arise relate to the sufficiency of the existing legal regime intended to protect the environment, and to parallel concerns that more extensive strictures could restrict legitimate defensive military operations under the law of armed conflict. This paper examines these issues, and concludes that the current framework of relevant international law, when understood and applied, protects both the environment and the broader interests represented in the law of armed conflict.

### The Debate

The Charter of the United Nations both prohibits the unlawful use of force by States and guarantees the right of self-defense against such unlawful coercion. Articles 2(4) and 51 of the Charter, together with Hague and Geneva Conventions limiting methods and means of conducting warfare and protecting combatants, noncombatants, and their environment, and create a comprehensive legal fabric designed to limit destructiveness of international armed conflict. Inherent within the law of armed conflict is the understanding that even the most sophisticated and precise weapon systems will exact a price upon the environment.

Environmentalists contend that that price is too high, and demand that any system destructive of the environment be banned. Those responding explain that only through a military capability such as reflected in the coalition reaction to Iraqi aggression can the environment, in the long term, best be preserved. They further remind the environmentalists that had existing environmental provisions within the law of armed conflict been adhered to by the Iraqis, the destruction of Kuwaiti resources would have been minimal.

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## Development of Restrictions on the Use of the Environment

Restrictions on the use of the environment have a long history in both national initiatives and international agreement and custom. The practice and acceptance by States of certain restrictions and limitations on the use of the environment have been observed both with regard to means and methods of warfare and to protection of victims. These two strands have come to be known as The Hague and Geneva law, respectively.

In the United States, for example, the Army's Lieber Code of 1863 restricted means and methods of warfare for Union forces during the Civil War so as to protect property whose destruction was not necessary to the war effort.<sup>1</sup> The 1868 Declaration of St. Petersburg, equally significant, proclaimed that the only legitimate objective of States during war is to weaken the military forces of the enemy.<sup>2</sup> In the years following, largely as a result of the massive destruction and loss of life occasioned by the American Civil War, the Crimean War, and the Wars of German Unification, an international consensus to limit wars' destructiveness developed and found its expression in the Hague Conventions of 1899 and 1907.

The theme of the peace conferences at The Hague centered on agreement among participants that the right of belligerents in an armed conflict to choose methods or means of warfare is not without limit, and that wanton destruction, superfluous injury, and unnecessary suffering should be eliminated by regulation from warfare. The Regulations Annexed to Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land remain the centerpiece of the two conferences.<sup>3</sup> It is important to note that during the Nuremberg Trials following World War II, the International Tribunal found the Annexed Regulations to be "declaratory of the laws and customs of war," and thus applicable to all nations whether parties to Hague Convention IV or not.<sup>4</sup>

The Regulations annexed to Hague Convention IV have application to the environmental depredation which occurred in the recent Gulf conflict. Article 22 provides that "the right of belligerents to adopt means of injuring the enemy is not unlimited." Article 23(g) specifies that it is especially forbidden "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Article 46 adds that "private property cannot be confiscated" by an occupying force, and Article 47 that "pillage is formally forbidden." To further clarify the restrictions upon occupying powers such as Iraq during the conflict with Kuwait, Article 55 states that "the occupying State shall be regarded only as administrator . . . of . . . real estate, forests and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."<sup>5</sup> Had these strictures been observed

by Iraq, there would have been no significant violation of the Kuwaiti environment.

The Geneva Conventions of 1949 merely built upon the requirements and prohibitions of the 1907 conference at The Hague. Article 50 of Geneva Convention I (Wounded and Sick in the Field), for example, provides that it shall be a grave breach to commit extensive destruction and appropriation of property that is not justified by military necessity and is carried out unlawfully and wantonly. Article 51 of Geneva Convention II (Wounded and Sick at Sea) merely restates this rule. The Fourth Geneva Convention (Civilians Convention), while restating in Article 147 the general protections for the environment seen in the Hague Rules, also places significant requirements upon the occupying power. Article 53 provides that "any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." It can certainly be argued that Kuwait's territorial seas, bays, beaches, and oil fields were subjected to wanton, unlawful destruction unjustified by military necessity.

The importance of the Geneva Conventions of 1949 to preservation of the environment extends far beyond the provisions of the articles themselves. An enforcement regime represented in articles common to each of the four Conventions requires that grave breaches by each of the Contracting Parties be identified and addressed.<sup>6</sup> Moreover, another article common to each requires penal sanctions.<sup>7</sup> That article, the cornerstone of the enforcement system, obligates each contracting party to: enact implementing legislation; search for persons alleged to have committed breaches of the Conventions; and bring such persons before its own courts or, if it prefers, hand them over for trial to another State party concerned. Article 146 of Geneva Convention IV provides further that the accused persons shall benefit from proper trial and defense no less favorable than the safeguards provided by Article 105 (and those following) of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. When these provisions addressing violations by individuals are considered in conjunction with the requirement in Article 3 of Hague Convention IV (that violating States are liable to pay compensation to the injured State), a very comprehensive scheme, and one appropriate for addressing recent events in the Gulf, is apparent.<sup>8</sup>

### Proscription of Environmental Modification

Although the United States renounced the use of climate modification techniques in July 1972, it was not until the entry into force of the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of

Environmental Modification Techniques (ENMOD Convention) that the use of this weapon was legally proscribed.<sup>9</sup> In brief, this convention commits each party not to engage in military or any other hostile use of environmental modification techniques that cause widespread, long-lasting, or severe destruction, damage or injury to any other State which is a party.<sup>10</sup> A formal “understanding” among all the participants defines the phrase “widespread, long-lasting or severe.” “Widespread” is defined as “encompassing an area on the scale of several hundred square kilometers”; “long-lasting” is defined as “lasting for a period of months, or approximately a season”; and “severe” is defined as “involving serious or significant disruption or harm to human life, natural or economic resources or other assets.”

Kuwait is a party of long standing to this convention. Iraq is one of seventeen nations that are signatories but (having failed to ratify) are not parties. While under Article 18 of the Vienna Convention on Treaties a signatory is obligated not to “defeat the object and purpose” of the agreement, the ENMOD Convention itself addresses relations specifically between full, ratifying parties; its enforcement mechanisms, accordingly, could not have been brought to bear on Iraq. In light of Security Council Resolution 674 (1990), which makes Iraq “liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq,” a complaint under the ENMOD Convention would not be necessary in any event.

### 1977 Geneva Protocol

Protocol I Additional to the 1949 Geneva Conventions was negotiated to protect not only the population of countries at war but also the environment as such. Two articles in the Protocol combine to prohibit the use of methods and means of warfare that are intended or “may be expected” to cause widespread, long term, and severe damage to the environment: Articles 35(3) and 55(1) attempt to prevent intended or reasonably predictable excessive environmental damage. Battlefield damage incidental to warfare is not proscribed by these provisions, however.<sup>11</sup>

Neither Iraq nor the United States is a party to the Protocol. During negotiations in Geneva the United States made clear its understanding that nuclear weapons were not to be included within the scope of Protocol I. During the ratification debate, however, it became clear that many nations took the more expansive view that Articles 35(3) and 55(1) would indeed place limitations upon nuclear weapons. Should the provisions be held to apply to nuclear arms in the future, the careful balance fashioned with the other nuclear powers in existing agreements affecting those weapons could be adversely impacted.<sup>12</sup> It can be persuasively argued, however, that the prohibitions included within the two

articles within Protocol I merely replicate the regime established to protect the environment in the Geneva Convention IV of 1907.

### Recent Developments

On 11 March 1991, Japan's parliamentary minister for the environment proposed that the Governing Council of the United Nations Environmental Program adopt a declaration of principles urging that the kind of environmental destruction observed in the Gulf should never again occur as an act of war. That same day, French representatives to the Governing Council proposed two initiatives, prohibiting targeting ecological areas, and protecting world heritage monuments in time of war.

At Nairobi, Kenya, on 20 May 1991, the sixteenth session of the Governing Council of the United Nations Environmental Program was convened. The Japanese and French proposals were raised, as were Canadian and Greenpeace concerns. The two latter announced their intention to host international conferences of legal experts to explore ways of strengthening international law to protect the environment more effectively.

A one-day conference in London on 3 June 1991 sponsored by Greenpeace, the London School of Economics, and Britain's Center for Defence Studies considered a possible "Fifth" Geneva Convention on the Protection of the Environment in Time of Armed Conflict. Greenpeace urged the 120 participants, including twenty-four representatives from government and environmental groups, to create a new convention which would state that the environment may not be used as a weapon, that weapons aimed at the environment must be banned, and that indirect damage to the environment must be forbidden.

This was followed by a July 1991 meeting of legal experts in Ottawa which reviewed the use of the environmental weapon in the Gulf context and examined existing international law regulating such use. U.S. participants at the Ottawa meeting carefully underscored the merits of the existing regulatory regime, which is based on the principles of necessity and proportionality under the law of armed conflict. The U.S. concern regarding more restrictive environmental provisions is that they could be implemented only at the expense of otherwise lawful military operations—such as attacking targets which require fuel-air explosives (FAE) for their destruction.

### Observations and Conclusions

Because the environment was ravaged during the recent Gulf conflict, some consider the relevant legal regime inadequate. In point of fact, the international agreements and customary international law to which Iraq is legally bound would

have precluded the carnage had she complied with their terms. Conversely, had a restrictive environmental regime been applied prohibiting the prudent use of modern weapon systems (systems which have some inherent incidental and collateral environmental impact), the effective coalition response to Iraqi aggression may not have been possible.<sup>13</sup>

The legal underpinning for the highly effective United Nations effort in the Gulf was found in the minimum world order provisions (Articles 2(4) and 51 of the U.N. Charter), not in environmental law. The vitality of the law of armed conflict is to be measured not only by the U.N. regime but the Hague and Geneva law as well. Together, they authorize only that necessary and proportional response required to return the parties to the *status quo ante*.

U.N. Security Council Resolutions 674, 678, and 687 require no less. In Resolution 687, the Security Council has reaffirmed Iraqi liability under international law for any direct loss or damage, "including environmental damage and the depletion of natural resources," as a result of the unlawful invasion and occupation of Kuwait. Coalition representatives in the United Nations are working hard to ensure the new compensation fund established under Resolution 687 and drawn from Iraqi oil sales includes payment for the environmental cleanup effort as well as long term damage to Kuwaiti resources.

Actions such as these, which reflect the United Nations' resolve and newfound enforcement capability in the framework of the law of armed conflict, provide greater hope for the environment than a statement of principles or a new Geneva Convention.

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Colonel Terry was the Deputy Legal Counsel to the Chairman, Joint Chiefs of Staff when this article was first published.

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## Notes

1. General Order NO. 100 (1863) signed by President Lincoln, in SCHINDLER & TOMAN, *THE LAWS OF ARMED CONFLICT* 3 (1988).

2. GOLDBLAT, *AGREEMENTS FOR ARMS CONTROL: A CRITICAL SURVEY* 120-121 (1982).

3. Regulations Annexed to Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land, 36 Stat. 2259; *Treaties and International Agreement Series (TIAS)* 538; BEVANS, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE U.S.A., 1776-1949* at 619, Dept. of State Publication 8407 (November 1968).

4. International Military Tribunal (Nuremberg), *Judgement and Sentence*, 41 Am. J. Int'l L. 172 (1947).

5. "Usufruct," as used in the Convention, means "the right of one State to enjoy all the advantages derivable from the use of property which belongs to another State."

6. See Art 51, Geneva Convention I (GCI); Art 52, GCII; Art 131, GCIII; and Art 148, GCIV.

7. See Art 49, GCI; Art 50, GCII; Art 129, GCIII; and Art 146, GCIV.

8. U.N. Security Council Resolution 687, requiring Iraqi compensation to Kuwait, has its underpinning in Article 3, Hague Convention IV of 1907.

9. Convention on Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), signed in Geneva, 18 May 1977; entered into force, 5 October 1978; U.S. ratification, 13 December 1979; ratification deposited at New York, 17 January 1980, published in U.S.

Arms Control and Disarmament Agency, ARMS CONTROL AND DISARMAMENT AGREEMENTS 214-219 (1990).

10. *Id.*, Article 1.

11. Though both appeared the same year, the ENMOD Convention and 1977 Geneva Protocol are not directly related. The 1977 Geneva Protocol I addresses both means and methods of international armed conflict and protection of victims of international armed conflict. It is therefore a melding of The Hague Law (means and methods) and the Geneva Law (protection of victims of warfare). The ENMOD Convention addresses only restrictions on changes to the environment in a widespread, long-lasting, or severe manner (Article I) by military or any other hostile use of environmental modification techniques. While the Conference of the Committee on Disarmament (C.C.D.), an arm of the U.N., sponsored the ENMOD Convention, the International Committee of the Red Cross (I.C.R.C.) in Geneva sponsored the negotiations on the 1977 Geneva Protocol, just as it had thirty years earlier for the 1949 Geneva Conventions.

Protocol I Article 35(3) (Basic Rules) states, "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-lasting and severe damage to the natural environment." Article 55(1) (Protection of the Natural Environment) provides that "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."

12. *See, e.g.*,

(i) Treaty Banning Nuclear Weapon Tests in the Atmosphere, In Outer Space, and Under Water, 5 August 1963, 14 United States Treaties (UST) 1313; TIAS 5433; 480 United States Treaty Series (UNTS) 43 (1963).

(ii) Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 21 UT 483; TIAS 6839 (1970).

(iii) Additional Protocol II to the treaty for the Prohibition of Nuclear Weapons in Latin America, 14 February 1967, 22 UST 754; TIAS 7137; 634 UNTS 364 (1971).

(iv) Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, 11 February 1971, 23 UST 701; TIAS 7337 (1972).

(v) Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, 26 May 1972, 23 UST 3435; TIAS 7503 (1972).

(vi) Interim Agreement between the Union of Soviet Socialist Republics and the United States of America on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, with Protocol, 26 May 1972, 23 UST 3462; TIAS 7504 (1972).

13. It is recognized that overly restrictive attempts to regulate weaponry and targeting parameters either to protect the environment or to induce disarmament (using environmental protection as the vehicle) raise the danger of bringing the law into disregard and weakening its legal and moral force. It is necessary to seek a realistic threshold of regulation; the present law, if enforced, provides such a threshold. It allows only that level of destruction and choice of targets necessary to restore the right of the nation attacked. Any regime which would preclude exercise of effective self-defense options in favor of environmental projections would be honored in the breach rather than adherence.



## Chapter 40

### The Obligation to Accept Surrender\*

Rear Admiral Horace B. Robertson, Jr., JAGC, U.S. Navy, Retired

On the day of the opening of offensive operations by coalition forces in the 1991 Gulf War, a United States Navy guided missile frigate, the USS *Nicholas* (FFG 47), in tactical control of a surface action group (SAG) consisting of itself and several Kuwaiti Navy ships, was ordered to a position amid offshore oil platforms in the northern Gulf. Its missions were to conduct combat search and rescue in support of coalition air attacks, which had just begun, and to conduct anti-surface operations against any Iraqi units that might be in the vicinity. Upon approaching the zone after dark, the *Nicholas* launched reconnaissance helicopters to search the area and to determine if the oil platforms were manned. Thermal imaging by the helicopters disclosed that some of the platforms were indeed manned, and the helicopter personnel observed what appeared to be shelters and bunkers on several of them. Since the wells had been capped and the platforms abandoned before the war, the commanding officer (CO) of the *Nicholas* concluded that the personnel on the platforms were probably Iraqis and that the SAG could not safely operate in the vicinity unless the Iraqi forces were removed. The CO reported his observations to superior authority and requested permission to use force to remove the Iraqi personnel from the platforms.

When permission for the attack was received the next day, the CO sent out helicopters for further reconnaissance. Approaching the platforms to as close as a hundred yards at a 150-foot altitude, the helicopters were not fired upon and their crews were able to observe 23mm anti-aircraft batteries on the top decks of several platforms, ammunition cases next to the guns, personnel in green fatigues standing around on the platforms, sandbagged bunkers and wooden personnel shelters, Zodiac (rubber) boats, diving gear, and communications antennas. They also observed two persons on two separate platforms waving white cloths. These observations were reported to the ship, where they were reported to the CO and logged in the Tactical Action Officer's (TAO) log. The log entries included the reports that the helicopter personnel had observed personnel waving "white flags" on two platforms. At no time did the helicopters observe any hostile acts, the manning or training of any weapons, or receive any fire, even though they were very close to the Iraqis and clearly visible, and thus

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extremely vulnerable. At the direction of the CO, the TAO's reports of the helicopters' observations to higher authority did not include the information on the "white flags."

During the following several hours, the executive officer (XO), having been informed of the white flags by two enlisted personnel, went to the combat information center, informed the CO of his concerns and those of the two men, and recommended that the information on the white flags be forwarded up the chain of command. The CO rejected that course, indicating that he did not want to risk his ship and crew and that it was his decision to make as the on-scene commander. He later testified that he had decided that the white flags did not indicate the intention of all personnel on the platform to surrender, and that his decision was influenced by his close working relationship with the Kuwaitis, who had told him that the Iraqis could not be trusted, having used white flags as a ruse during the Iraq-Iran war.

After coming back on board, the helicopter personnel discussed the white flags among themselves and with their officer in charge, but none of them voiced concern to the CO, nor did the CO attempt to discuss the white flags with any of the helicopter crew who had actually observed them. Of the nine officers on board who were aware of the white clothes, only the executive officer and Tactical Action Officer expressed misgivings to the CO.

After dark, the SAG launched helicopters which attacked the platforms with missiles, rockets, and .50-caliber machine guns. The *Nicholas* and the Kuwaiti ships followed up with 76mm and 40mm gunfire. Following the three-hour engagement, battle damage assessment by the helicopters disclosed survivors in a rubber boat, which the frigate located and took on board. During processing one of the survivors asked through an interpreter why the ship had fired on them when they had tried to surrender. During the remainder of the night, the American frigate and Kuwaiti ships retrieved prisoners and the bodies of those killed from the platforms and provided medical treatment, food, and clothing. A naval special operations team that went on board the platform the next morning encountered no resistance but discovered large stocks of weapons and communications equipment. Five Iraqi soldiers had been killed in the attack of the day before and twenty-three taken prisoner. The prisoners were subsequently evacuated to Saudi Arabia; in debriefs conducted ashore, only one of them stated that the personnel on the platforms had wanted to surrender.

The subsequent board of investigation recognized the complexity of the situation faced by the frigate's CO. The SAG had been conducting a combat operation; however, the targets were not ships but rather fixed platforms manned by soldiers. The board opined that under the law of naval warfare at sea, a unit must surrender as a unit; individual displays of evidence of surrender must indicate that the unit is surrendering, not just one individual. The normal sign of surrender is the striking of the colors. On the other hand, under the law of land warfare,

a white flag displayed by an individual signifies that the individual desires to surrender; the opposing force is required to accept that surrender but is not required to cease firing at other members of the unit who have not indicated a similar intent.

The board concluded that the CO's decision, made in the fog of battle and under difficult conditions at the beginning of combat operations when the attitude of enemy forces toward surrender was unknown, was tactically sound and did not violate the law of armed conflict. It found further, however, that he should have investigated further and discussed his evaluation of the white flags with the XO and key officers, that he should have reported this significant event to his superiors, and that his failure to take these actions represented a serious lapse of judgement. An endorsing senior also faulted other officers of the command who had direct knowledge of the display of white flags for failing to come forward with their advice and concerns.

The foregoing narrative, greatly simplified in the interest of brevity, captures the essence of several dilemmas that may confront members of the armed forces at any level engaged in armed conflict. What are the acceptable "indicia," or indicators, that an enemy is attempting to surrender? What are the obligations of an officer in command upon receiving such indicia from an enemy? And what are his obligations if the signs of surrender are ambiguous or mixed? It is the purpose of this essay to explore these questions.

### Some Historical Background

Although the wartime usages of prehistoric peoples are to a large extent lost in the mists of antiquity, it is nevertheless asserted by some scholars that even among the most primitive societies, rudimentary group mores governed the waging of war between families, villages, or tribes. As stated by Quincy Wright in his scholarly treatise, *A Study of War*, "Illustration can be found in the war practices of primitive peoples of the various types of international rules of war known at the present time: rules distinguishing types of enemies; rules defining the circumstances, formalities, and authority for beginning and ending wars; rules describing limitations of persons, time, place, and methods of its conduct; and even rules outlawing war altogether."<sup>1</sup> Among the more advanced primitive societies, "women and children or even men captured from the enemy [were] spared, usually, to be made slaves."<sup>2</sup>

Among the written records of practices of early civilizations on the treatment of those who had surrendered or were *hors de combat* are Biblical accounts of Joshua's conquest of Jericho, in which the Israelites "utterly destroyed all that was in the city, both man and woman, young and old, and sheep and ass, with the edge of the sword."<sup>3</sup> By contrast, in other campaigns, although all conquered males were slain, women and children might be spared.<sup>4</sup> Professor Leslie Green

points out that in that period the victor's treatment of the vanquished enemy might have been determined by the identity of the vanquished enemy; idolaters were not to be spared, as their evil ways might contaminate the Israelites.<sup>5</sup>

In ancient Greece, the formal rule was, in the words of Herodotus, that "the victors come not off without great harm; and of the vanquished I say not so much as a word, for they are utterly destroyed."<sup>6</sup> In practice, however, more often than not, the vanquished, rather than being put to death, were made slaves, exchanged, or enrolled in the victorious army.<sup>7</sup> In the later Greco-Roman era a primitive law of warfare began to emerge, but it was applicable only to war between civilized States, not to uncivilized barbarians. Prisoners' lives were spared, but they were usually made slaves.<sup>8</sup>

The Middle Ages were a period of sharp contrast. This was the period of knighthood and the emergence of the chivalric code, but it was also a time of cruel barbarity. Under chivalry, the practice of enslaving prisoners gradually disappeared, at least within Christendom, but captured soldiers were routinely held for ransom.<sup>9</sup> On the other hand, some wars were fought to the death with no quarter given;<sup>10</sup> the signal for such a battle was a red flag or banner.<sup>11</sup> In a city taken by storm after siege, there was unlimited license to rape, kill, loot, and pillage. Only churches and churchmen were spared.<sup>12</sup> The notion of *lèse majesté* was used to justify horrible massacres of vanquished foes. In addition, as war within Christendom became transformed from what had been somewhat in the nature of tournaments conducted by aristocrats to "people's" wars, chivalric behavior began to have very little influence. According to Philippe Contamine, the "Flemish communes systematically massacred the vanquished and refused the practice of ransoms, seen by them as cowardly and likely to lead to deception. Inevitably in battles where they faced the communes, nobles adopted a similar attitude. . . . One might link to this style of warfare, devoid of all courtesy, the warlike customs of the Irish and Swiss. The *Kriegsordnung* of Lucerne in 1499 stipulated that no prisoners were to be taken; all the enemy should be put to death. That of Zurich in 1444 thought it necessary to prohibit combatants from tearing out the hearts of their dead enemies and cutting up their bodies."<sup>13</sup>

Even after the Middle Ages gave way to the Age of Discovery in the fifteenth and sixteenth centuries, Hugo Grotius, in his seminal treatise *The Rights of War and Peace*, published in 1625, expressed the view that the law of nations did not prohibit putting to death all subjects of the enemy, even women and children.<sup>14</sup> "Nor," he added, "did those who offered to surrender always experience the lenity and mercy, which they sought thereby."<sup>15</sup> Writing a century and a quarter later, eminent publicists Emmerich de Vattel and Christian Wolff took a different view. Vattel wrote, "As soon as an enemy submits and hands over his arms we have no longer the right to take away his life. Hence we must give quarter to those who lay down their arms, and when besieging a town we must never refuse to spare the lives of a garrison which offers to surrender."<sup>16</sup>

Wolff, although acknowledging that in former times “it was right to kill those captured in war at any time,” nevertheless concluded that “because it is not allowable to kill the subjects of a belligerent, as long as they refrain from all violence and do not show an intention to use force, or as long as you can provide in another way that this may not happen, it is not allowable to kill those captured in war, not even immediately, much less at any other time, unless some especial offense shall have been committed because of which they are liable for punishment.”<sup>17</sup> In a later section he added that it was not permissible to kill those who had surrender “unconditionally.”<sup>18</sup>

Nineteenth-century publicists uniformly adopted the position that it was unlawful to refuse quarter and to attack those who attempted to surrender. Typical of this group is William E. Hall, who stated that the “right to kill and wound armed enemies is subordinated to the condition that those enemies shall be able and willing to continue their resistance. It is unnecessary to kill men who are incapacitated by wounds from doing harm, or who are ready to surrender as prisoners. A belligerent therefore may only kill those enemies whom he is permitted to attack while a combat is actually in progress; he may not as a general rule refuse quarter.”<sup>19</sup>

Some authorities suggested that an exception existed in special situations in which it was impossible for a force to be encumbered with prisoners without increasing the danger to itself,<sup>20</sup> but Admiral Charles H. Stockton, a noted American international law authority and former President of the Naval War College, was critical of that article of the United States Army’s law-of-war instructions which adopted this exception, claiming that it was obsolete.<sup>21</sup> Certain authorities also acknowledged that in some situations in the heat of battle, such as in the midst of a cavalry charge, it was impossible to distinguish between those who wished to continue the fight and those desiring to surrender.<sup>22</sup>

It can thus be seen that by about 1900, most publicists recognized a customary rule which made it unlawful to refuse quarter or to wound or kill those who unconditionally offered to surrender or no longer had the means to resist.

### Codification of the Customary Rule

The first attempt to systematize and codify the rules of war was made during the American Civil War by Professor Francis Lieber of Columbia College in New York. Professor Lieber drew up, at the request of General William H. Halleck (then general in chief of the Union army), a set of instructions which, after review and revision by a board of officers, was promulgated to the field in 1863 by War Department General Order No. 100.<sup>23</sup> This “Lieber Code” included three articles dealing with quarter:

Art. 60. It is against the usage of modern warfare to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners.

Art. 61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

Art. 62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.<sup>24</sup>

Although the code was binding only on United States forces, it set the pattern for later international attempts to restrain the violence of warfare. The first of these international efforts was the Declaration of Petersburg, which did not directly address the subject of quarter.<sup>25</sup> The subsequent Brussels Conference of 1874, however, did. In the "Project of an International Declaration Concerning the Laws and Customs of War," annexed to the Final Protocol, the following provisions were included:

Article 12. The laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy.

Article 13. According to this principle are especially *forbidden*:

...

(c) Murder of an enemy who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

(d) The declaration that no quarter will be given.<sup>26</sup>

The Brussels Declaration was not ratified and consequently never entered into force. However, building on this initiative, the Institute of International Law, a society composed of a fixed number of international-law experts from different nations, adopted in 1880 a *Manual on the Laws of War on Land* (the so-called "Oxford Manual"), which, although not conceived as a treaty, was offered to governments "as the basis for national legislation in each State, and in accord with both the progress of juridical science and the needs of civilized armies."<sup>27</sup> Article 9 thereof declared that it was forbidden to "injure or kill an enemy who has surrendered at discretion or is disabled, and to declare in advance that quarter will not be give, even by those who do not ask it for themselves."

Although not itself a binding instrument, the Oxford Manual substantially influenced the development of various treaties at the Hague Peace Conferences of 1899 and 1907. The most important of these latter instruments, insofar as our present inquiry is concerned, are Hague Conventions II and IV "Respecting the Laws and Customs of War on Land."<sup>28</sup> The Conventions contain identical language (Article 23 in each) pertaining to the giving of quarter: "In addition to ['Besides,' in the 1899 Convention] the prohibitions provided by special Conventions, it is especially forbidden—

...

- (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
- (d) To declare that no quarter will be given.

Although Hague IV is by its own terms applicable only to armed conflict on land, the principle it states in Article 23 is regarded as customary law and applicable to sea warfare as well.<sup>29</sup>

Until the adoption of the Protocols Additional to the 1949 Geneva Conventions in 1977, conventions adopted subsequent to the Hague 1907 Conventions regulating the conduct of armed hostilities did not contain any explicit provisions concerning the giving of quarter or the obligation to cease hostilities against persons seeking to surrender. Both of the Additional Protocols, however, do contain such provisions. Protocol I, which is applicable to international conflicts, provides:

Article 40—Quarter.

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

Article 41—Safeguard of an enemy *hors de combat*.

1. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.

2. A person is *hors de combat* if:

- (a) he is in the power of an adverse party;
- (b) he clearly expresses an intention to surrender; or

(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.<sup>30</sup>

Protocol II, which is applicable in non-international conflicts, provides “fundamental guarantees” in more abbreviated form, in Article 4: “All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honor and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.”<sup>31</sup>

Neither Protocol I nor Protocol II is in effect for the United States, and the U.S. government has stated that it will not ratify Protocol I. However, as stated in the U.S. Navy’s official annotation of the *Commander’s Handbook on the Law of Naval Operations*, NWP 9, the Protocol I and II language is merely a reaffirmation of the Hague IV rule “in more modern language.”<sup>32</sup>

From the foregoing discussion, it is clear that under both customary and treaty international law, combatants have the obligation to desist from hostile acts against enemy military persons or units that manifest an unconditional intent to surrender. This is reflected in the U.S. Navy’s current operational doctrine,

which provides that “enemy warships and military aircraft, including naval and military auxiliaries, are subject to attack, destruction or capture anywhere beyond neutral territory. It is forbidden, however, to refuse quarter to any enemy who has surrendered in good faith.”<sup>33</sup> This simple statement, however, does not provide a full answer to the dilemma of a commander who, like the commanding officer of the *Nicholas*, faces an ambiguous situation in which the enemy’s intentions are not clear. How does he determine whether the enemy’s sign of surrender is genuine and unconditional?

### The Manifestation of an Intent to Surrender

As the board of investigation that inquired into the *Nicholas* incident observed, the “CO was confronted with a unique and ambiguous situation; i.e., some indicia of an intent to surrender by one individual on two separate platforms, by an enemy who is known to have abused the white flag to gain military advantage, where the TAO log notes the presence of both ‘white flags’ and ‘possible gunner’ in an oil field where the platforms are relatively close and offer overlapping fields of fire.”<sup>34</sup>

Furthermore, the report continued, “under the principles of the Law of Naval Warfare, there is no requirement to accept surrender of an enemy platform (warship or submarine) unless the signal of surrender carries with it the authority of the command. Under the Law of Naval Warfare, an enemy platform is viewed as a unit; consequently when that unit surrenders, there must be an indication that it is the unit that is surrendering, not just one individual. Traditionally, the Law of Naval Warfare recognizes the striking of colors as a command’s indication of an intent to surrender. Similarly, under the Law of Land Warfare, a white flag displayed by an individual may signify only that [that] individual desires to surrender. The opposing force is obliged not to fire on that individual, and to receive his surrender, but is not required to cease firing at other opposing forces who have not indicated an intent to surrender until it is reasonably clear the indication of surrender is a command or organizational indication and applies to the opposing force as a whole. Evidence of this intent might be the dispatch of a spokesperson to negotiate a cease fire, or all troops ceasing fire and throwing down their weapons.”<sup>35</sup>

As stated in the U.S. Navy’s operational law handbook, a warship indicates a readiness to surrender “by hoisting a white flag, by surfacing (in the case of submarines), by stopping engines and responding to the attacker’s signals, or by taking to lifeboats.”<sup>38</sup> The situation with aircraft is different. NWP 9 notes that “disabled enemy aircraft in air combat are frequently pursued to destruction because of the impossibility of verifying their true status and inability to enforce surrender. Although disabled, the aircraft may or may not have lost its means of combat. Moreover, it still may represent a valuable military asset. Accordingly,

surrender in air combat is not generally offered. However, if surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected."<sup>39</sup> Furthermore, parachutists descending from disabled aircraft may not be attacked while in the air and must be provided an opportunity to surrender upon reaching the ground.<sup>40</sup>

The situation in land warfare is more ambiguous. A noted authority, Professor James M. Spaight, observed in 1911: "Willingness to surrender is usually indicated by the hoisting of a white flag, or some improvised substitute for it, but there is no settled procedure in this matter. Some troops throw down their arms; others hold up their hands (such was the Boer practice). The Prussian appeal for mercy in 1870 was to raise the butt-end of the needle-gun; this the French considered insufficient and made them fall on their knees. In the war of 1904 the Russians sometimes went to the length of embracing the enemy to whom they wished to surrender. There are so many diverse ways of indicating surrender that it seems desirable for one universal procedure to be settled by international agreement."<sup>41</sup>

Professor Spaight's plea for an international agreement went unheeded, however, and the current U.S. Army field manual on the law of land warfare does not discuss acceptable methods of indicating an intention to surrender.<sup>42</sup> With respect to the use of a white flag, it states that the "white flag, when used by troops, indicates a desire to communicate with the enemy. The hoisting of a white flag has no other signification in international law. . . . If hoisted in action by an individual soldier or party, it may signify merely the surrender of that soldier or party. It is essential, therefore, to determine with reasonable certainty that the flag is shown by actual authority of the enemy commander before basing important action upon that assumption. The enemy is not required to cease firing when a white flag is raised."<sup>43</sup>

Confusion on what is a proper sign of surrender in land warfare was amply demonstrated in the recent Gulf War by the incident in which Iraqi tanks approached Saudi Arabian troops with their gun turrets turned to the rear, a sign of surrender in the opinion of some. Instead of surrendering, however, they reversed their guns and fired on the Saudis.<sup>44</sup> If in fact this was a valid sign of surrender, then the subsequent attack on Saudi forces was perfidy, a war crime.<sup>45</sup> If not, it was a lawful ruse of war.<sup>46</sup>

The circumstances of land warfare also complicate the surrender of units or individuals. Again, to quote Spaight, a "regiment, squadron, company or squad of men is not like a ship, which, when it 'hath its bellyful of fighting,' hauls down its colours and is clearly out of the fight."<sup>47</sup> The result, again in Spaight's words, is that "in the storming of a trench, when men's blood is aboil and all is turmoil and confusion, many are cut down or bayoneted who wish to surrender but who cannot be separated from those who continue to resist."<sup>48</sup>

### “Rough Practical Judgment”

As can be seen from the foregoing discussion, neither law nor practice provides any clear-cut guidelines for determining when a valid offer to surrender takes place. In evaluating an apparent attempt to surrender, an on-scene commander faces a severe test of his judgment in which the safety of his command may be pitted against his obligation to respect and uphold the humanitarian law of armed conflict.

The foundation stone for this law is the principle that “the right to adopt means of injuring the enemy is not unlimited.”<sup>49</sup> One of the limitations imposed by this law is the requirement to terminate hostilities against an enemy unit, or in some circumstances an individual, that is *hors de combat* or has manifested an unconditional intention to surrender. As we have seen, however, the clarity of the enemy’s intention is often obscured by the ambiguity of the signal, by the difficulty of perception or interpretation in the fog of combat, and by the lack of any generally recognized sign or symbolic act for manifesting surrender. Even in situations in which the intent may be clear, it may be impossible for the commander of the force to whom surrender is offered to accept it without increasing the danger to his command—as for example, where surrendering units or individuals are intermingled with others that continue to fight. In the heat of battle it comes down to “a matter of rough practical judgment” as to when hostile fire must cease. When, however, a tactical unit commander has time for deliberation, as was the case for the commanding officer of the *Nicholas*, he should use all the resources available to him to determine whether the offer of surrender he has received is genuine and one he is obligated to accept.

Factors that should be taken into account in making that judgment should include not only the tactical situation, the danger to his own command, and the applicable rules of engagement, but also such other factors as the cultural mores of the enemy force with respect to surrender, the prior history of the enemy forces in similar situations, the enemy’s history of compliance with the law of armed conflict, the enemy’s reputation for ruses or perfidy, and any other such traits as may bear on the genuineness of the offer. These latter factors may be beyond the knowledge of the commander himself or the members of his command. Thus, where time and the tactical situation permit, he should report ambiguous or otherwise unclear offers of surrender to higher authority, who may be able to provide additional relevant insights on likely enemy behavior as well as data from the larger tactical arena that may bear on the local decision. Commanders at higher echelons will presumably be more experienced and are more likely to have access to additional intelligence and expert advice on the law of armed conflict. In the end, however, unless the on-scene commander receives a specific directive from higher authority, he alone has the final responsibility for

making the crucial decision as to whether the manifestation of surrender is genuine and one that he is obligated to accept.

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Rear Admiral Robertson is a former Judge Advocate General of the Navy.

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## Notes

1. WRIGHT, 1 A STUDY OF WAR 98 (1942).
2. *Id.* at 97. See also Mouton, *History of the Laws and Customs of War up to the Middle Ages*, Revue Internationale de la Croix Rouge, Supplement 184-186 (October 1959).
3. Green, *What One May Do in Combat—Then and Now*, in DELISSEN & TANJA, HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD 271 (1991), quoting from the Bible, Joshua 6:21.
4. *Id.*, citing Deuteronomy 21:10.
5. *Id.*
6. DUCREY, WARFARE IN ANCIENT GREECE 236 (Lloyd trans. 1985) quoting Herodotus 7.9, (Godley trans.)
7. *Id.*
8. *Supra* n. 3 at 273.
9. CONTAMINE, WAR IN THE MIDDLE AGES 266 (Jones trans. 1986).
10. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 105 (1964).
11. *Id.*
12. *Id.* at 121.
13. *Supra* n. 9 at 291.
14. GROTIUS, THE RIGHTS OF WAR AND PEACE 328-329 (Campbell trans. 1901).
15. *Id.* at 329 (citing Roman practices).
16. Vattel, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (1758) at 280 (Fenwick trans. 1916). Some authorities during this and even later periods asserted that in cases of siege in which a weak defending force obstinately refused to surrender when defense was hopeless, it forfeited its claim to mercy. See, e.g., CREASY, FIRST PLATFORM OF INTERNATIONAL LAW 449-451 (1876) and authorities cited therein; LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 377 (Winfield ed., 7th rev. ed. 1876).
17. WOLFF, JUS GENTIUM: METHODO SCIENTIFICA PERTRACTATUM (1764), sec. 794 at 411 (Dranke trans. 1934).
18. *Id.*, sec. 797, at 412.
19. HALL, A TREATISE ON INTERNATIONAL LAW sec. 129, at 413-414 (4th ed. 1895).
20. See, e.g., *Id.* at 414.
21. STOCKTON, OUTLINES OF INTERNATIONAL LAW 324 (1914). The "Lieber Code," which will be discussed further below, was promulgated to the U.S. armies as War Department General Order No. 100, *Instructions for the Government of Armies of the United States in the Field*, in 1863. See n. 23.
22. See, e.g., LAWRENCE, *supra* n. 16 at 376.
23. U.S. War Department, General Order No. 100, 24 April 1863, *Instructions for the Government of Armies of the United States in the Field* (hereinafter Lieber Code), reprinted in U.S. Naval War College, INTERNATIONAL LAW DISCUSSIONS, 1903 at 115 (1904); also reprinted in SCHINDLER & TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (3rd ed. 1988).
24. Lieber Code, articles 60-62 (emphasis original). The last clause of article 60 is, of course, the passage that drew Admiral Stockton's criticism. See n. 21.
25. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 29 November/11 December 1868, reproduced in English in SCHINDLER & TOMAN, *supra* n. 23 at 101.
26. Project of an International Declaration Concerning the Law and Customs of War, annexed to Final Protocol of the Brussels Conference of 1874, 27 August 1874, reprinted in English in SCHINDLER & TOMAN, *supra* n. 23 at 27. It is interesting to note that in paragraph (c) the term used to describe the killing of a soldier who is *hors de combat* is "murder," indicating the criminal character of such an act.
27. Preface to THE LAWS OF WAR ON LAND, manual published by the Institute of International Law (Oxford Manual), adopted by the Institute of International Law at Oxford, 9 September 1880. Reprinted in SCHINDLER & TOMAN, *supra* n. 23 at 35.
28. Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, and Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907. (Hereafter Hague II and IV,

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respectively.) The 1907 Convention supersedes that of 1899 for those States that have ratified the former. For those states that have not ratified the 1907 Convention, the 1899 Convention remains binding as to their relations with other States that are party thereto. These Conventions are reproduced in a number of official sources, including U.S. Statutes at Large, v. 32, part 2, at 1803-1826 (1901-03) (Convention II), and *id.*, v. 36, part 2, at 2277-2309 (1909-11) (Convention IV). They are reprinted in a side-by-side version in SCHINDLER & TOMAN, *supra* n. 23 at 63. Although the 1907 Conference adopted several conventions concerning naval warfare, none contained a comprehensive code for warfare at sea such as that in Convention IV for land warfare.

29. U.S. Department of the Navy, LAW OF NAVAL WARFARE, NWIP 10-2 (1955), par. 511c and notes 34 and 35 thereto (hereafter NWIP 10-2); TUCKER, 50 U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES, THE LAW OF WAR AND NEUTRALITY AT SEA 71 (1957); Lauterpacht, 2 OPPENHEIM'S INTERNATIONAL LAW 474 (7th ed. 1952); MALLISON, 58 U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES, SUBMARINES IN GENERAL AND LIMITED WARS 133 (1968); Department of the Navy, Office of the Chief of Naval Operations, *The Commander's Handbook on the Law of Naval Operations*, par. 8.2.1 NWP 9 Rev. A/FMFM 1-10 (1989), (hereinafter NWP 9).

30. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, reprinted in English in SCHINDLER & TOMAN, *supra* n. 23 at 646 (hereinafter Protocol I).

31. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, reprinted in English in SCHINDLER & TOMAN, *supra* n. 23 at 692 (hereinafter Protocol II).

32. Judge Advocate General of the Navy, *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations* par. 8.2.1, n. 27 (1989).

33. NWP 9, par. 8.2.1.

34. Report of the Fact Finding Body Required to Conduct a Hearing into the Facts Surrounding the Attack on Iraqi Oil Platforms by USS *Nicholas* (FFG 47) While Operating in the Northern Arabian Gulf on or About 18 January 1991, opinion number 18.

35. *Id.*

36. *The Abbaye Ardenne Case*, U.S. War Crimes Commission, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 97 (1945); *Trial of Helmuth Von Ruchteschell*, *id.*, v. 9, at 82 (1947); *Trial of Karl Kneip*, U.N. Archives, U.N. War Crimes Commission, Reel 35, British No. 21 (1945).

37. *Soldier Acquitted in Panama Slaying*, *Facts on File*, 21 September 1990, p. 696, p. A3.

38. NWP 9, par. 8.2.1, which adopts what is described as the customary practice in the court's opinion in War Crimes Commission, *Trial of Von Ruchteschell*, 9 LAW REPORTS OF TRIALS OF WAR CRIMINALS at 89 (1949). NWP 9 also states at paragraph 11.10.4 that "customary international law recognizes the white flag as symbolizing a request to cease-fire, negotiate, or surrender." This contradicts, in part, the U.S. Army's Field Manual FM 27-10, THE LAW OF LAND WARFARE (1956), which states that the only signification of the white flag in international law is the "desire to communicate with the enemy." See n. 43.

39. *Id.*, citing in the annotated version U.S. Air Force Pamphlet 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, par. 4-2d (1976); U.S. Air Force Pamphlet 110-34, *Commander's Handbook on the Law of Armed Conflict 1990*, par. 3-3b; and SPAIGHT, AIR POWER AND WAR RIGHTS 128-130 (3d ed., 1947).

40. NWP 9, par. 11.7, citing in the annotated version, *inter alia*, articles 42 (1) and 42 (2) of Protocol I.

41. SPAIGHT, WAR RIGHTS ON LAND 95 (1911).

42. U.S. Department of the Army, THE LAW OF LAND WARFARE, Field Manual 27-10 (1956).

43. *Id.*, par. 458.

44. See, e.g., Bronner, *The Law: International Experts Defend U.S. Demands of Iraqis*, *The Boston Globe*, 27 February 1991, p. 3.

45. "Feigning surrender in order to lure the enemy into a trap, is an act of perfidy." NWP 9, par. 12.1.2.

46. NWP 9, par. 12.1.

47. *Supra* n. 41 at 92.

48. *Id.* at 91.

49. Hague II and IV, art. 22. Additional Protocol I states the principles in slightly different language as follows: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." Protocol I, art. 35(1).

**PART SIX**

**OTHER LEGAL ISSUES**



# Chapter 41

## Reassessing the Security Alliance Between the United States and Japan\*

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*While U.S. leverage in Asia can no longer be taken for granted, American policy is still a critical factor in the stability of the area. Some U.S. initiative leading to coordination of that policy with the East Asian policies of Japan seems necessary to promote mutual objectives and to reconcile differences.*

**T**he role of the United States in the security of Japan is an issue that has received relatively little official attention, despite significant developments in Northeast Asia over the past decade. These developments, clearly more than isolated or temporary phenomena, are relevant to the U.S.-Japan security alliance in at least three respects. First, the U.S. commitment to Japan has, *in Japan's perception*, lost much of its credibility. Second, improved relations between Japan and the People's Republic of China (PRC) raise the prospect of a shift in the strategic balance of power in Asia. And third, the Soviet Union has significantly increased its use of military forces to exert political pressure on Japan. Each development requires careful examination in terms of its implications for both United States and Japanese interests.

Japan's perception of the American commitment in Asia has been shaken by a series of dramatic events over the past 10 years. Beginning with the 1969 "Nixon Doctrine," which stated that conventional Asian wars would thereafter be fought by Asians, Japan witnessed the evolution of the U.S. policy of withdrawal from Vietnam. Initially, Tokyo's reaction to the U.S. withdrawal was muted, largely because U.S. pronouncements on military policy indicated a shift in emphasis toward clearly identifiable American interests—such as the security of Japan. Then, early in 1977, at the very outset of his administration, President Carter announced that American ground forces would be withdrawn from South Korea. The change in U.S. policy toward Korea caused considerable apprehension in Tokyo despite assurances from Washington that the United States was not deserting any of its Asian allies. Not surprisingly, many Japanese viewed the announcement of withdrawal from Korea as more indicative of

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American policy than promises of future support. Even before the U.S. announcement, the Vice Director of the Japanese Defense Agency stated in an annual Defense white paper (June 1969) that, "the United States has been replaced by the Soviet Union as the predominant military power in the Far East." If Japanese officials believe that the United States is second in strength to the Soviet Union in Asia, they would naturally take a skeptical view of American promises: after all, how sincere can the commitment be if the United States is willing to withdraw forces from Korea in the face of Soviet predominance?

More recent events have not been lost on Japanese observers either, such as Washington's apparent preoccupation with the security of Western Europe. In a recently delivered paper, a Japanese professor of international relations began by quoting the following statement by General Brown, Chairman of JCS, to the U.S. Congress:

At current levels of force structure, war in Europe would require the great preponderance of U.S. general purpose forces. Deployment of a significant portion of the Pacific Command's naval resources to the Atlantic may be required. If this were to occur, control of the seas between the continental United States and Hawaii could be maintained, as could the sea lanes between Alaska and the Lower Forty Eight. However, broad sea control beyond those lanes would be a difficult challenge. Forces of all Services available for other contingencies and crises—for example, war in the Middle East or on the Korean Peninsula—would be seriously reduced.<sup>1</sup>

The effect of such statements by high-level American officials should not be underestimated, especially when made to Congress. Whatever congressional hearings may mean to Americans, they are watched closely by foreign observers for signs of future U.S. policies. For example, it is unlikely that Tokyo failed to notice that Secretary of State Vance, in a February 1978 synopsis of U.S. foreign policy presented to the House International Relations Committee, did not even make reference to Asia.

A second perception evolving in Japan is that the U.S. Congress wants Tokyo to assume a greater share of Japan's defense burden.<sup>2</sup> Undoubtedly, there is some support in Congress for such a move, but the idea will almost certainly not gain momentum without support from the Department of Defense—an unlikely prospect for the foreseeable future. Nonetheless, it is easy to see how Japanese authorities might view discontented Congressmen as harbingers of a reduction in the U.S. contribution to Japan's defense.

Also important in Japan's perception of the U.S. commitment to East Asia is its view of U.S. policies toward the PRC and the Soviet Union. When the United States first made overtures toward Peking in 1971, the Japanese Government was surprised and offended by Washington's failure to consult with Tokyo in advance (the shift in U.S. policy was dubbed by the Japanese press as "Nixon's

shock”<sup>3</sup>). The diplomatic wounds have largely healed, partly as a result of improved relations between Tokyo and Peking, but Japan is undoubtedly concerned about the future of America’s new Asian policies. For example, a desire for full diplomatic relations with the PRC could cause the United States to abandon its relationship with Taiwan. If that were to occur, Japan’s economic links with the Taiwan Government would be jeopardized and, not incidentally, the level of U.S. forces in East Asia would be reduced even further. Moreover, some Japanese analysts may be concerned that U.S.–Soviet détente will cause Washington to reduce its forces in East Asia as part of an agreement, or to improve relations, with Moscow.

Such possibilities as these must loom large in Japan’s perception, if only because the United States acted so unpredictably in 1971. It is therefore likely that Japanese policymakers are particularly sensitive to the prospect of U.S. political objectives that would affect Japan’s security interests adversely. Once such suspicions are formed, insignificant acts by the United States are apt to be viewed as index of an unwelcome trend, thereby eroding Japan’s belief in the U.S. commitment for reasons Americans would not readily recognize. The problem, then, cannot be understood simply by examining Japan’s reaction to observable events; it is also necessary to consider that Tokyo may have unvoiced concerns about possible shifts in U.S. Asian policy that would subvert Japan’s interests for other U.S. objectives.

The foregoing discussion of Japan’s perception of the U.S. commitment has obviously been oversimplified. Nations do not perceive anything—people do. Undoubtedly, there is within Japan a wide range of opinions, held with varying degrees of certainty, concerning U.S. intentions. The point, however, is that an increasing number of Japanese are forming doubts about the U.S. commitment, and even those with the most faith in the U.S.–Japan alliance are probably less convinced than they once were. As will be discussed later, these doubts can lead to a national policy that undermines U.S. interests, and they should be dealt with accordingly.

The second major development in East Asia has been the improvement in relations between Japan and the PRC. Tokyo officially recognized the PRC in 1972, shortly after President Nixon’s initial trip to Peking, although informal discussions between the two countries had begun in the early sixties. Like the United States, Japan welcomed the opportunity to establish a dialogue with an emerging Communist power. Moreover, Japan was, and is, anxious to establish itself as the primary source of technology and capital for an economy with a prodigious growth potential.

The relationship between Japan and the PRC shows signs of developing into a political alignment with very important strategic implications. In August 1978 the two countries signed a symbolic pact called a “peace and friendship treaty” that called for the peaceful settlement of any disputes between them. Significantly, the

Japan-PRC treaty also contains a clause opposing "hegemony" in Asia by any nation—an unmistakable reference to the Soviet Union. Initially, Japan would not sign the treaty because the antihegemony clause provoked a very hostile reaction in Moscow. Not only did the Soviets denounce the treaty, but they repeatedly warned of a reassessment of their policy toward Japan if the latter signed a treaty containing the objectionable clause. China refused to remove the antihegemony clause and a 3-year impasse in treaty negotiations ensued. Finally, Japan agreed to accept the antihegemony clause, although it insisted on an additional clause stating that the treaty did not affect either party's relations with third countries. The compromise solution, if it can be called a compromise, was still a diplomatic victory for the PRC, and the Soviets were predictably upset. Statements in the official Soviet press warned of the treaty's "dangerous character," and the Soviet Ambassador to Japan returned to Moscow for an unusually prolonged stay of 4 months.

The Soviet Union is deeply concerned about the prospects of Sino-Japanese accord. Such accord would not only accelerate the PRC's industrial development, but it would also facilitate what the Soviets view as the ultimate PRC goal of replacing the United States as Japan's protection against the Soviet threat.<sup>4</sup> Soviet fears may be overdrawn, but they are not baseless. As Japan and the PRC strengthen their political and economic ties, the latter will probably become more and more vocal in support of Japan's security interests. This, in turn, could cause Tokyo to view Peking's aggressive anti-Soviet policy as the most effective counterforce against Soviet influence.

The problem for Japan is a delicate one: how to cultivate its relationship with China without unduly antagonizing the Soviet Union. If Moscow perceives that Japan is encouraging China's anti-Soviet objectives, Japan is likely to experience a much greater Soviet threat than it must cope with at present. Needless to say, such an escalation of tensions would put the United States right in the middle of a difficult situation.

Fortunately, the United States need not wait and watch while events unfold in East Asia. American policy is still a critical factor in the stability, or instability, of the area. Particularly important is the U.S. relationship with Japan, because American support can enable Japan to move away from PRC influence if circumstances require it. Furthermore, U.S. attitudes toward the PRC and the Soviet Union can affect Japan's relations with those two countries, assuming that the U.S.-Japan alliance remains essentially unchanged. U.S. leverage in Asian affairs cannot be taken for granted, however. It is essential that the United States coordinate its East Asian policy with that of Japan. Unless Tokyo and Washington undertake to promote mutual objectives, the two Governments may find themselves pursuing Asian policies that are not complementary. To avoid such a situation, the United States should take the initiative now to discuss with Japan

the best ways to advance common interests and reconcile those that are in conflict.

The third major development mentioned at the outset has been the increase in Soviet efforts to exert political pressure on Japan through the use of military forces. These Soviet efforts are significant because they affect Japan's perception of the Soviet threat and, hence, Japan's view of the adequacy of American support.

In April 1975, during the worldwide Soviet *Okean II* exercise, four Russian naval task forces were deployed around Japan, two of them on important Japanese trading routes. A year later Soviet warships sailed south through the Sea of Japan while Soviet reconnaissance aircraft flew a parallel course along both sides of Japan's home islands.<sup>5</sup> In 1977, Soviet military aircraft made nearly 200 "abnormal demonstrative flights" near Japan's airspace, including 30 flights that circled Japan.<sup>6</sup> Also in 1977 the Soviets conducted numerous naval maneuvers in the Sea of Japan.<sup>7</sup>

Such displays of Soviet military force are not Japan's only concern. Equally important in terms of political effect is the so-called "Northern Territories" problem. The Northern Territories are the four islands just north of the main Japanese island of Hokkaido that are claimed by both Japan and the Soviet Union (Etorufu, Kunashiri, Shikotan, and the Habomai group). The islands were occupied by Soviet forces at the end of World War II and the Soviets have been in possession ever since. Japan, which held undisputed title to the islands from 1855 to 1945,<sup>8</sup> claims that the Soviet annexation was illegal under the terms and principles governing boundary settlements after the war. The Soviets have been consistently inflexible in their view: the territorial issue is not negotiable.

The problem of the Northern Territories is significant for political, economic, and military reasons. Mere discussion of the problem arouses strong feelings of Japanese nationalism. In fact, the dispute has been a major obstacle to a peace and friendship treaty between Japan and the U.S.S.R., despite the fact that the two countries have had diplomatic relations since 1965. Moreover, the issue is becoming more sensitive as competition between Japanese and Soviet fishermen increases. The Northern Territories are surrounded by a very fertile fishery, and Japan has been forced to negotiate for limited fishing rights in what used to be traditional Japanese fishing grounds.<sup>9</sup> Soviet patrol boats do not hesitate to seize Japanese fishing vessels that either enter territorial seas around the disputed islands or violate the terms that regulate Japanese fishing in the area. Since 1945, some 8,000 Japanese fishermen and 1,000 vessels have been seized by Soviet patrols.<sup>10</sup>

Soviet seapower is also evident in the Northern Territories in a different form. A Peking radio broadcast in early 1976, quoting a Japanese fisherman, stated that Soviet planes were based at an airfield on Kunashiri and Soviet warships were anchored at Hittokappu Bay, Etorufu Island.<sup>11</sup> The strategic significance of the Northern Territories is undoubtedly well-known to the Soviets: the islands

overlook three straits into the Sea of Okhotsk (or three straits into the Pacific Ocean, depending on one's Perspective). Furthermore, the Soviet military presence north of Japan serves as a constant reminder to Tokyo that in the event of a major war the Soviets would almost certainly use the islands to launch an invasion against Japan's northern island of Hokkaido.<sup>12</sup>

It is not likely that the demonstrations of Soviet military strength enumerated above will decrease in the future. Such uses of seapower are consistent with the Soviet philosophy that the peacetime role of the Navy is to display the military might of the Soviet Union and thereby assist in the conduct and support of foreign policy. Japan, with its dependence on seaborne commerce and its strategic location, is particularly vulnerable to the peacetime applications of naval force advocated by the Soviet's influential Admiral Gorshkov:

Demonstrative actions of the fleet in many cases make it possible to achieve political goals without resorting to armed conflict by just indicating pressure by their potential might and the threat of beginning military actions.<sup>13</sup>

Given the prospect of a growing Soviet presence, the question for Tokyo—and Washington—is how to deal with the external pressure that is clearly designed to influence Japan whenever it makes decisions affecting Soviet interests.

Before discussing the role of the United States, it is important to consider two options that Japan might pursue if it loses faith in American support: rearmament and neutrality. The latter option, with certain qualifications, is the more likely of the two, but neither is so improbable that it can be ignored.

A number of knowledgeable observers have predicted that the rearmament of Japan would be an inevitable reaction to a decline in U.S. support. Notable among these observers is Zbigniew Brzezinski, President Carter's national security advisor, who, writing as an academic in 1972, expressed the view that a U.S. policy of isolation would compel Japan to develop its own military might, including a nuclear capability.<sup>14</sup> Other writers have taken a similar position, including the belief that rearmament would necessarily mean the acquisition of nuclear weapons by Japan.<sup>15</sup> Reasons offered to support predictions of rearmament have included Japan's need to balance the Soviet threat, a perception by the Japanese that economic success entitles them to a larger voice in world affairs, and a growing sense of nationalism and self-confidence in Japan. While such influences cannot be denied, they are considerably less significant than the factors militating against rearmament.

Two frequently cited indexes of anti-militarism in Japan are public opinion polls and the strength of "passivist" political factions. Such statistical indicators, while they may reflect the national mood at a given time, provide an unreliable basis for predicting future trends. They are effects rather than causes. It is more

useful to consider the advantages Japan has enjoyed as a result of low defense budgets and to compare the probable consequences of militarization.

The most obvious benefit of Japan's low military profile has been the facilitation of phenomenal economic growth. In the 30-plus years since World War II, Japan has risen from economic impotence to a nation with the world's third largest GNP. While Japan's growth cannot be attributed solely to low defense budgets, a contributing factor has certainly been the allocation of funds for industrial development rather than defense. It is apparent to the Japanese that their economic strength has given them more international prestige and a higher standard of living than would have been the case had they devoted a significantly larger share of their national wealth to military development.

A second factor militating against Japan's rearmament is the political instability it would cause in Asia, particularly if Japan were to acquire nuclear weapons. The Soviet Union would no doubt feel threatened, and it would almost certainly intensify its military buildup around Japan. Additionally, smaller nations with whom Japan has trade relations might be alarmed either by the prospect of alienating the Soviet Union or of becoming Japan's "satellites." This, in turn, could cause the smaller nations of Asia to reconsider their own need for more arms or stronger ties with a superpower. And finally, the acquisition of nuclear weapons by Japan would probably alienate the United States, given the latter's commitment to nuclear non-proliferation,<sup>16</sup> possibly leaving the PRC as the only power to which Japan could turn in the event of a crisis where the nuclear threat was inappropriate. Such reliance on the PRC would be dangerous for Japan because of the risk of a Sino-Soviet rapprochement or, more likely, the development of an intense economic rivalry between China and Japan for markets in Asia.

Based on a rough cost/benefit analysis, then, it seems unlikely that Japan would pursue a policy of rearmament, even to compensate for what was perceived as inadequate American support. Instead, Japan would probably seek an independent role in Asia, with a possible bias toward the PRC. The advantage of such a posture, if it succeeded, would be to allay Soviet fears by reducing the U.S. presence in East Asia. This, according to the plan, would cause the Soviets to abandon their threatening posture toward Japan, assuming the latter could show that it would not permit its friendship with the PRC to support anti-Soviet objectives.

If Japan were to embark on such an independent course, it would almost certainly proceed slowly, not only because of the uncertainties involved but also to minimize the adverse reaction in the United States. Friendship with the United States would retain a high priority in Tokyo's foreign policy, even while Japan was subordinating U.S. interests to the goal of eliminating the Soviet threat. A gradual movement by Japan away from U.S. influence would probably begin with a reduction in the Japanese Self-Defense Force, which is maintained at least

in part to satisfy American preferences,<sup>17</sup> and an announcement that the United States could not use Japanese bases in the event of another Korean war.<sup>18</sup> The latter action may not be as far away as it seems. Article VI of the 1960 "Treaty of Mutual Cooperation and Security between United States and Japan," states that the United States shall have the use of military facilities in Japan to maintain peace and security in the Far East. Significantly, Japan's Foreign Minister Miyazawa asserted in 1975 that North Korea was not included in the "Far East" for purposes of the U.S.-Japan security alliance.<sup>19</sup> While the statement may have been nothing more than a diplomatic gesture designed to improve relations with North Korea, the mere fact that it was made evidences a movement by Tokyo towards a more flexible Asian policy.

It is by no means inevitable that Japan will decide to ease out of its military alliance with the United States. To the contrary, the impetus is still in favor of strong military ties with Washington.<sup>20</sup> The United States, however, cannot afford to be complacent or it may witness a shift in Japan's foreign policy as the latter acts on its own to cope with the growing Soviet threat.

In response to what can accurately be called Japan's dilemma, the United States should take three steps. First, it should develop and communicate an Asian policy that demonstrates concern for Japan's needs and interests. Second, the United States should encourage the development of a more effective Japanese Self-Defense Force. And third, economic tensions between Japan and the United States should be dealt with in the overall context of the alliance between the two countries.

In the past, the United States has seemed content to allow world events to shape Japan's foreign policy. Such inattention to Japan's needs and interests is quite idealistic in that it assumes a great deal about future U.S.-Japan relations. Yet those relations are even now showing signs of strain, and the future is not nearly as predictable as it was just a few years ago. Accordingly, the United States should devote more attention to Japan and communicate that attention by coordinating a comprehensive U.S.-Japan Asian policy that addresses the myriad issues of concern to both countries. Such a mutual undertaking would demonstrate the sincerity of the American commitment to Japan and might alleviate some of the problems that have arisen over the last 10 years.

As an additional means of showing support, the United States should address the growing Soviet threat by improving the capabilities of both the 7th Fleet and the Japanese Self-Defense Force. Of course, political constraints in both the United States and Japan limit the available options, but there is still room for applications of technology that will augment the defense and attack capabilities of military forces in Japan. For example, more anti-air and anti-ship missiles would help compensate for the numerical superiority of Soviet forces, and they would require less reaction time in the event of an unexpected crisis. Similarly, computer technology, laser guidance systems, and sophisticated surveillance techniques can

improve military effectiveness without a significant increase in manpower requirements. To be sure, technological advances are already an important component of Japan's defense structure, but the recent increase in Soviet strength suggests that it is necessary to augment Japan's defense with an even more intensive application of the latest U.S. military technology.

Finally, when discussing the U.S.-Japan alliance, it is important to consider economic competition between the two countries. Recent economic trends have not been conducive to harmonious relations, and the chances for improvement are not promising. The United States is presently experiencing a huge trade deficit, largely because of imports from Japan. Moreover, the rising value of the yen in relation to the dollar has increased the cost of maintaining U.S. forces in Japan.

The Japanese also have complaints. Their fishing industry suffered a serious blow in 1977 when the United States put its 200-mile economic zone into effect. Additionally, the decline of the dollar has made Japanese goods more expensive, and hence less competitive, in America.

Clearly, economic tensions between the United States and Japan are not going to disappear. They can, however, be reduced if both countries are willing to discuss the problems and make concessions in the interest of better overall relations. Given the present state of the U.S. economy, Washington would undoubtedly have to accept greater losses than Tokyo, but such losses should be viewed, in the final analysis, as part of the cost of a strong U.S.-Japan alliance.

In summation, the United States is overdue for a thorough reexamination of its role in the security of Japan. The reexamination should be a high-level, mutual effort with Japan aimed at a better understanding and a coordinated policy. At the very least, a concerted effort to deal with Japan's problems and interests would do much to allay Tokyo's present apprehensions about the sincerity of the U.S. commitment to the security of Japan.

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Lieutenant Wiegley was assigned to the Naval Legal Services Office, Pearl Harbor, and was an International Law of the Sea Scholar at the University of Hawaii when this article was first published.

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### Notes

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16. *Supra* n. 3 at 511.
17. Langer and Moorsteen, *The U.S./Japanese Military Alliance: Japanese Perceptions and the Prospective Impact of Evolving U.S. Military Doctrines and Technologies*, 18 Rand Research Paper P-5393 (Santa Monica, Cal.: Rand).
18. Zumwalt and Bagley, *Strategic Deterioration in the Pacific: The Dilemma for the U.S. and Japan*, *Pacific Community* 125 (January 1978).
19. Barnds, *The United States, Japan and the Korean Peninsula*, *Pacific Community* 76 (October 1976).
20. MOMOI, *supra* n. 1 at 17.

## Chapter 42

# Greeks Bearing Gifts: Impact of the INF Treaty on European Security\*

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### The Scope of the Debate

Considering its far-reaching security implications, the INF Treaty signed by President Reagan and General Secretary Gorbachev in December 1987, and ratified this spring by the U.S. Senate, provoked a curiously muted debate. The contrast with SALT II is remarkable. There was no political football here; instead, Presidential candidates of all persuasions hastened to endorse it. Such opposition as emerged was focused not on issues of security, surely the ultimate test of any arms control agreement, but on whether the Treaty contained adequate provisions against Soviet subterfuge.

The widespread perception that the Treaty enhanced the security of the Western alliance was reinforced by the apparent lack of any overt military opposition. The sting was drawn from General Rogers' well-publicized remarks by the favorable testimony of his successor and of the Joint Chiefs of Staff. Responsible leaders asserted that flexible response was alive and well.<sup>1</sup> They took quiet satisfaction in the fact that the Soviet theater nuclear inventory would suffer a disproportionate cut, implying a concession on the long cherished doctrine of military superiority.<sup>2</sup> Yet there was little hard assessment in the public domain to support an optimistic interpretation. Months later, analysis of the impact of the Treaty on NATO strategy is still, at best, sketchy, and we have yet to see from any authority an account of what the Treaty means in terms of Soviet military strategy and doctrine.

A number of factors have combined to obscure and perhaps even overshadow the military case. Many see the Treaty primarily in political terms. They see the advent of *glasnost* as a historic opportunity to put the superpower relationship on a sounder footing. They do not reject the utility of nuclear weapons outright, but accept the consensus view that modern nuclear stockpiles are far in excess of any deterrent need and have become a cause of tension rather than a factor in stability. For these people, nuclear arms reductions are good per se. They hope that the INF Treaty will lead to more.

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Others appear to acknowledge a military dimension although their thinking remains rooted in a strategic consensus that is now more than a decade old. They supported the deployment of Pershing and Cruise as the counter to a specific strategic problem (the decoupling effect of Soviet theater weapons) and now acclaim the Treaty, which supposedly removes that threat, as total vindication of the dual-track decision adopted by the NATO nations in December 1979.<sup>3</sup> Few military leaders found it easy to oppose this argument, having to explain what was wrong with the theater nuclear balance of pre-INF days which the Treaty allegedly restores and which was considered acceptable at the time. Yet certain nagging doubts remain. Was the Soviet INF deployment really designed to decouple (surely a Western intellectual construct) or did it serve some more tangible function in Soviet strategy? Was the theater nuclear balance of the mid-1970s indeed satisfactory? Has Soviet strategy (or perhaps equally important, our understanding of it) changed during the decade that since has elapsed?

There was further, and influential, body of opinion which supported the Treaty, not for its intrinsic merits, but because it appeared to represent a triumph for diplomacy. The outcome, so their argument ran, demonstrated the wisdom of dealing with the Soviet Union from a position of strength.<sup>4</sup> They pointed to the numerous concessions made by the Kremlin during the course of negotiations—retreat on the issue of independent nuclear forces, on the principle of “equal security based on geographic factors,” on linkage to SDI, on intrusive verification procedures.<sup>5</sup> They saw the inclusion of shorter range systems within the Treaty as a further victory for U.S. negotiators. They were interested in the technique rather than the product. No one warned them of Greeks bearing gifts.<sup>6</sup>

### Arms Control and Asymmetric Strategies<sup>7</sup>

Now that we have it, if we are to satisfy ourselves that the INF Treaty is more than a series of tactical victories culminating in a strategic defeat, we must extend the debate beyond the issue of relative numbers and beyond the techniques of the negotiating process to the military balance as it will exist in Europe when the Treaty is fully implemented.

However tempting it may be to judge the Treaty solely on the basis of its contribution to political détente, this is not enough. We may accept the general proposition that nuclear arms reductions may contribute to a more stable relationship between the superpowers, while remaining skeptical about the effect of the Treaty on the security of Europe. Security must be measured against a wider set of criteria than nuclear weapons alone, and hopes of reducing tension will prove illusory if either side perceives that the overall military balance has tilted against it.

It will be as well too, to dispose of the idea, always prevalent at time of détente, that the Soviet Union is too conscious of the risks and limitations of military

power to initiate a European war. Those who hold such views tend to see relations between States in overly static terms. They ignore the contradictions within the postwar European settlement (the division of Germany and the political status of Eastern Europe) and fail to ask themselves why such an unnatural condition has survived. They ignore the fact of Soviet military power and the limits that NATO strategy has so far successfully placed on it. Without continuing and effective restraint on that power, European governments will not avoid for long the need to adjust their foreign and perhaps also their domestic policies in favor of the Soviet Union.

We can form no judgment on the Treaty's impact on European security without acknowledging the fundamental asymmetry between the military strategies (and doctrines) of NATO and the Warsaw Pact. Arms reductions may contribute to security when strategies are symmetrical, and there is an arguable symmetry between the strategic nuclear postures of the two superpowers, but in INF we have a case where nuclear weapons play a fundamentally different role in the operational concepts of the opposing sides. The enduring problem facing NATO planners has remained essentially unchanged throughout the 40-year history of the Alliance. It is a twofold problem. It is firstly how to counter a massive Soviet advantage in conventional power, and secondly how to compensate for a critical lack of defensive depth which leaves key political, economic, and military centers hostage to offensive action. The answer in the past has relied ultimately on the nuclear threat, and given the twofold nature of the problem, it is difficult to see any credible alternative.

The task facing Soviet strategists has been quite different. Soviet strength in the European theater has rested primarily on the conventional capability of its ground forces. However, to make these rationally usable, whether for political or military purposes, the military leadership has had to search for ways to neutralize NATO's nuclear threat. The grand strategy selected to achieve this objective has contained political as well as military elements and has varied over time. The military component has embraced nuclear as well as conventional means. Nuclear weapons nevertheless have played, and continue to play, radically different roles in the operational strategies of both sides, and in terms of total security it appears highly improbable that INF will be evenhanded in its effects.

### Flexible Response—Impact of the INF Treaty

The broad outlines of the NATO strategy of flexible response are well-known, even if the details remain hazy. Spokesmen rarely say much about it, preferring merely to correct misinterpretations rather than illuminate the truth and to rely on Soviet perceptions to fill the gaps. Their formulae usually aim to leave the Soviet Union with no doubt that NATO would respond, but with uncertainty as to the nature and timing of the response. They warn particularly against any

interpretation of the strategy as a formal or predictable process of escalation, implying therefore that no one escalatory step or any one system is essential to its successful implementation.

If the Russians can supply the missing details, so can we. It is normally assumed that NATO's initial and, indeed, preferred response will be conventional. This is what chiefly distinguishes flexible response from the strategies which went before. The Alliance will thus use conventional means to counter and defeat limited or probing attacks. Nevertheless, because of the imbalances and defensive weaknesses already described, NATO would rely on its nuclear arsenal to deter, and if deterrence fails, to check any more formidable incursion. Supreme Allied commanders continue to warn that early recourse to nuclear weapons is likely.<sup>8</sup>

No nuclear threat can be entirely credible unless nuclear use can offer the prospect of positive advantage. Escalation must threaten the enemy with a military setback (usually called a strategy of denial) or it must induce him to halt his aggression by presenting the prospect of intolerable cost or risk. Nuclear denial certainly underlaid NATO thinking in the days when the Alliance enjoyed an effective monopoly of nuclear weapons in theater. Nuclear weapons would then be seen as compensating directly for conventional weakness. But this former advantage has long since been eroded by the growth of Soviet theater nuclear capability. Although NATO has never formally rejected the denial option, its credibility is open to question. The Western nuclear powers have come to rely increasingly, therefore, on a strategy directed primarily against the enemy's will, the application of psychological shock, and the opening of vistas of uncontrolled escalation. A plausible linkage between theater weapons and the central strategic arsenal of the United States is an important factor in reinforcing these perceptions.

Clearly, Allied commanders will retain a spectrum of systems capable of implementing this threat, including artillery-delivered weapons, dual-capable aircraft, many with the range necessary for deep strike missions, as well as theater-assigned strategic systems (Poseidon and Polaris) whose ambiguity serves such a crucial purpose in linking the theater to the strategic arsenal of the United States. The continued viability of flexible response rests heavily on the credibility of these systems. But credibility is not an absolute term. We should not be asking whether credible options remain, but whether those options are more or *less* credible than those which preceded them. And here lies the nub of the problem. Short-range or battlefield systems threaten to provoke a nuclear war in the heart of Europe and to place the burden on the innocent rather than on the aggressor. Reliance on such weapons is a divisive issue, hence, West German *angst* regarding current modernization proposals.<sup>9</sup> Strategic systems assigned to the theater commander and the independent deterrents of Britain and France, because of their ambiguity or because they represent a final guarantee of security, might be held in reserve for some ultimate contingency. Soviet leaders could come to question whether either of these weapon categories would be used. The value of

intermediate systems, including those within the range necessary to place Soviet targets at risk, is thus clear. The INF Treaty has not eliminated NATO capability in this area but it has significantly reduced it. In the event of war, the nuclear powers could find themselves short of options in this key area.

Soviet perceptions are not the only issue. We must be concerned too with the will of decision makers to implement their threat. This arms reduction measure has advanced the moment at which National Command Authorities would have to consider the employment of strategic systems. We are moving slowly but perceptibly in the direction of self-deterrence.

### The Fundamentals of Soviet Military Strategy and Doctrine

The development of military strategy is a dynamic process, and analysts can point convincingly to a number of phases in the evolution of Soviet strategic thought as leaders have grappled with the political, economic, and technological factors of the day. However, at a time when some claim to detect a revolution in Soviet military strategy, and when speculation about "non-offensive defense" is rife, it is important to recognize too, the constants of Soviet strategy, that compendium of doctrine and historical experience that successive generations of Soviet strategists have carried in their knapsacks.

Perhaps the first point to recall is that Soviet strategists have never lost faith in the conventional offensive as a means of achieving decisive goals in a theater of war. While Western thinkers have tended to compartmentalize nuclear and conventional operations, and have even (for a time) questioned the very utility of conventional forces in the nuclear age, their Soviet counterparts have never shared these perspectives. Conventional ground operations and nuclear strikes were not mutually exclusive, but part of, as Sokolovskii put it, "a single continuous process of war."<sup>10</sup> A nuclear strike by the enemy might prove decisive in its own right; nuclear use on the battlefield would clearly complicate ground operations; but a fatalistic acceptance of these facts was not enough. The situation called for solutions. In the European context this meant practical measures both to isolate the strategic nuclear capability of the United States and to neutralize theater-deployed nuclear systems.

Development of Soviet strategic nuclear capability would play an important part in meeting the first of these requirements. Total assurance was in the nature of things illusory. Nevertheless, survivable strategic forces would remove a U.S. intervention at the strategic level from the framework of rational policy. In practical terms, that was all that could be done.

In context of ground operations in a theater of war, the Soviet military leadership made determined efforts to ensure the survival of conventional forces on the nuclear battlefield. Additionally, operational doctrine focused on the exploitation of nuclear firepower by maneuver formations, but these measures

were not in themselves sufficient. Nuclear war would be short and decisive, offering manifest advantages to the side that struck first. Military doctrine therefore came to demand the decisive laydown of nuclear fires that would “anticipate” (if not preempt) a NATO decision.<sup>11</sup> Despite its evident problems and risks, this strategy has survived at least as an option for countering the NATO theater nuclear threat.

The INF Treaty may tell us something about the role of this strategy (the decisive use of nuclear weapons in theater) in current Soviet thinking. The Soviet Union retains an impressive theater nuclear capability including systems capable of striking to the full depth of the enemy rear, but their post-INF force structure appears less effective for the kind of mission envisaged. The loss of intermediate and shorter range missiles, most of them mobile, the majority highly accurate, and all virtually immune to defensive countermeasures, indicates a genuine reduction in capability. If this strategic option was the target of the INF negotiations, and if it was the right target, then, from the Western perspective the Treaty may be judged a success.

Yet Soviet military leaders have long since concluded that the decisive use of nuclear weapons in the European theater was less than acceptable as a means towards their objectives and a strategy of last resort. They have therefore searched for alternative methods for countering the nuclear threat—methods that would be less likely to engage the strategic forces of the United States, of the independent nuclear powers, as well as surviving forward deployed systems. The search took them back to their strategic roots, to the theories of mass, tempo, and deep penetration by maneuver forces, developed by Frunze and Tukachevskii, and tested in the Second World War.

The broad outlines of this strategy, updated for the nuclear age in the form of the theater strategic operation, have received considerable attention from Western analysts.<sup>12</sup> The threat of escalation is addressed in two ways. Firstly, the ground offensive will be designed to achieve rates of advance so rapid that theater objectives will fall before the opponent can use his nuclear forces to rational advantage. Soviet military leaders have concentrated for decades on developing the mobility, firepower, and battle management techniques needed to make this operation feasible without recourse to nuclear weapons. Secondly, they will seek and maintain a posture of escalation dominance. This has involved both the prewar deployment of superior numbers of theater nuclear systems (an explanation for INF deployments that is more firmly rooted in Soviet military thought than Western notions of decoupling) and from the onset of war would involve a combined arms conventional air operation with the specific objective to further and perhaps decisively alter the nuclear correlation of forces in their favor. No assessment of the INF Treaty can be complete without considering its impact on this operational strategy.

## The Theater Strategic Operations—Impact of the INF Treaty

No doubt, during the course of INF negotiations, the Soviet General Staff provided the leadership with detailed estimates on how the Treaty would affect the viability of their preferred strategy and doctrine. We can only speculate on their findings, but some general conclusions suggest themselves.

They will have noted firstly that the United States has agreed to destroy nearly 500 of its most modern forward deployed systems, and especially those most difficult to counter either by offensive or defensive means. Clearly NATO retains alternative systems to support its strategy of flexible response, including some capable of threatening targets deep in Soviet territory. Nevertheless, Soviet leaders must take satisfaction in the fact that the agreement has successfully confined NATO theater nuclear capability to systems which are more vulnerable to the conventional air operation and which are more easily countered by conventional air defenses. The threat has been made more manageable.

Soviet officials may well be disappointed that the Treaty places no formal restrictions on alternatives or substitutes. NATO (indeed either party) can, in theory, strengthen its inventory of dual-capable aircraft or assign a theater role to sea-based forces. France and Great Britain have been quick to enter preliminary talks on a joint stand-off missile for their strike aircraft. The Soviet Union has already made its policy abundantly clear. During a visit to Bonn early in 1988, Soviet Foreign Minister Mr. Eduard Shevardnadze described such moves as "unacceptable."<sup>13</sup> This must be seen as the opening of a crescendo of Soviet propaganda on such issues. Western governments will not find it easy to evade this onslaught. In an era of supposed détente, which they have done so much to foster, their constituents will not readily understand why one set of weapons should be destroyed, only to be replaced by another. The Western alliance has lowered the cost of aggression; it will not be easy to restore it.

It is relevant to ask at this point what the West has received in return for this generous concession. Some will claim that the Soviet Union has accepted a reduction in its former capability to wage decisive nuclear war. It must be left to advocates of this view to explain how an operation of this kind is relevant to Soviet strategic objectives. It will be more to the point to inquire how the Treaty has affected Soviet ability to conduct the theater strategic operation, and within that general concept to hamper or restrict an effective nuclear response. It does nothing to limit Soviet ability to launch and conduct a *blitzkrieg*; and operational tempo, it will be recalled, was one of the ways in which they sought to circumvent the nuclear threat. What about the other—the correlation of nuclear forces designed to secure escalation dominance?

On a superficial level, it would seem that the Soviet Union has surrendered a favorable correlation of forces based on theater-deployed intermediate and shorter range missiles. This impression is misleading. Any realistic measure of the

theater nuclear balance is much more complex than that, and it is the post-treaty correlation of forces that is relevant to our analysis, not what went before. Clearly, the new balance will be less amenable to simplistic comparisons than the one which preceded it. We are no longer dealing with convenient entities like missiles, with known characteristics and high probabilities of survival and penetration; we are dealing instead with dual-capable systems and with delicate assumptions about tasking, basing, and vulnerability to offensive and defensive attrition. The new nuclear correlation will be more ambiguous than its predecessor and will offer less scope for impressing (or intimidating) neighboring States.

We may be certain, however, that the Soviet General Staff has done its homework, and in all necessary detail. Such calculations are the bread and butter of Soviet military decision making. We can be confident too that on the basis of systems deployed, on reinforcement rates, on relative vulnerability (the scarcity and exposure of NATO bases compares unfavorably with Soviet options for dispersal and defense in depth), on the relative strengths of the opposing air-defense systems, the correlation remains firmly in their favor. But our concern must be less with any theoretical pre-war force comparisons than with the effect of the Treaty on Soviet ability at the outset of war to alter the theater nuclear equation decisively in their favor. The means to this objective is, as we have seen, the conventional air operation, and the INF Treaty affects it not one jot. To the extent that NATO intermediate range missiles may have been targeted against components of the air operation, its prospects for success may even have been enhanced.

This article seeks to evaluate the INF Treaty in terms of its impact on the military strategies of both sides. These strategies are not symmetrical; nuclear weapons have a markedly different role to play in each of them. The Treaty has not had an equal effect on the two parties. For all the claims to the contrary, the Treaty has reduced the capability of NATO nuclear forces—central to the strategy of flexible response—and has weakened the credibility of their use. Given the ultimate dependence of flexible response on the nuclear threat, we must conclude that the Soviet Union has dealt effectively with NATO's strategic doctrine. In contrast, the Treaty has done nothing to restrict the centerpiece of Soviet strategy, the conventional forces designed to support the theater strategic operation, and the associated capabilities to counter the Western nuclear threat. Whatever the merits of the Treaty in a wider context, it must be judged to have failed on the crucial test of its contribution to the security of NATO. We have the right to expect a sophisticated understanding of strategic issues from Western leaders. We must hope that future arms reduction measures will aim at the right target and address the real issue that divides Europe—the conventional military power of the Soviet Union and its allies.

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### Notes

1. Secretary of Defense Frank C. Carlucci told the Senate Armed Service Committee on 25 January 1988: "The INF Treaty preserves intact NATO's strategy of flexible response as a credible framework for deterring aggression and intimidation."
2. See for instance Hine, *The Impact of Arms Control on the Balance of Nuclear and Conventional Forces*, RUSI 8-12 (December 1987).
3. Nitze, *Beyond the Summit: Next Steps in Arms Control*, Department of State Bulletin 81-84 (February 1988).
4. See for instance U.S. Secretary of State George Shultz' testimony before the Senate Foreign Relations Committee (27 February 1988).
5. For a comprehensive assessment see Adam, *Ways to Verify the US-Soviet Arms Pact*, IEEE Spectrum 30-34 (February 1988).
6. Owen, formerly U.K. Secretary of State for Foreign Affairs, may be an honorable exception. See his *Moscow's Nuclear Endgame*, The Times (London), 29 January 1988, p. 14.
7. Asymmetry should not be confused with the current vogue term "competitive strategy." Whereas competitive strategies claim to address only enemy weaknesses, an asymmetric strategy may more properly address his strengths.
8. A recent warning was made by General John R. Galvin, USA, in an ABC News interview on 2 March 1988.
9. See Joffe, *Germany's Singular Condition*, The Times (London), 26 February 1988, p. 14.
10. SOKOLOVSKII, SOVIET MILITARY STRATEGY 305 (1963).
11. Soviet thinking is perhaps best illustrated by Marshal Malinovskii's remarks to the 22nd Congress of the CPSU. "[the] main problem is considered to be the working out of means for reliably repelling a nuclear surprise attack and breaking up the aggressive plans of the enemy by dealing him a crushing blow in time." Quoted in Goure, *Notes on the second edition of Sokolovskii*, RAND memo RM 3972, 1964, at 65.
12. For an unclassified summary of Soviet operational thought see Hines and Peterson, *The Soviet Conventional Offensive in Europe*, Military Review 1-19 (April 1984). For a description of the Soviet Air Operation, see Peterson and Clark, *Soviet Air and Antiair Operations*, Air University Review 36-54 (March-April 1985); see also MCCGWIRE, MILITARY OBJECTIVES IN SOVIET FOREIGN POLICY 4, 67-89 (1987).
13. See *Diplomacy of Insolence*, The Times (London), 23 January 1988, p. 11.



## Chapter 43

# Military-to-Military Arrangements for the Prevention of U.S.-Russian Conflict\*

John H. McNeill

**A**N IMPORTANT ASPECT OF CONFLICT PREVENTION, avoidance, and resolution in the international security area is illustrated by several military-to-military arrangements originally worked out between the United States and the Soviet Union (and now in force with Russia) to deal with disputes of an operational nature—those which, if not resolved, might lead to actual conflict.

During the late 1960s, a pattern of activities involving the U.S. and Soviet navies, including their associated aircraft, began to evolve that had a potential for the use of force. For example, maritime surveillance was often conducted by each side in a way that the other perceived as provocative harassment. There were instances of warships of one country maneuvering dangerously close to those of the other, pointing weapons at the other side's ships, and interfering with night vision or operations by shining searchlights upon bridges of vessels or shooting flares in their direction. Because of the proximity in which American and Soviet naval units were operating, a series of near and actual collisions occurred. These incidents in particular heightened the risk of conflict and alerted the national leaderships in both Washington and Moscow to the potentially dangerous nature of this problem, whoever had initiated it. Both sides became sobered to the severity of the situation when on 25 May 1968 a Soviet Tupolev-16 maritime patrol bomber made a low pass over the carrier USS *Essex* in the North Sea and then, turning to make another run, dipped its wing into the water. The U.S. Navy picked up the remains of the aircrew.

I

On 10 November 1970, following something of an improvement in Soviet-American relations (as exhibited by willingness to discuss strategic arms limitations), the Soviets responded to a long-standing U.S. offer to hold talks on the subject of safety at sea. Commencing a year later, these discussions were the first direct exchanges between the two sides on naval matters since the end of the

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Second World War. Partly because of a relative paucity of bureaucratic experience in their foreign policy establishments with bilateral negotiations, and partly because it was obviously sensible to do so, both sides called primarily upon their armed forces to staff their negotiating teams. Thus the majority of negotiators were naval officers—representatives of the very people who would have to live under any new agreement and would be charged with making it work. Despite political tension arising from conflicts in the Middle East and Southeast Asia, the two sides held very direct and productive talks. The result, achieved in relatively little time, was a very substantive navy-to-navy agreement that was signed on 25 May 1972 at the Nixon-Brezhnev summit in Moscow—exactly four years to the day after the crash of that Soviet maritime patrol bomber.<sup>1</sup>

Officially known as the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Incidents on and over the High Seas, and more commonly as IncSea, the agreement contained several unusual features.<sup>2</sup> It provided, *inter alia*, that each side should avoid dangerous maneuvers, hindrance of navigation by dropping various objects near ships, and mock attacks simulating the use of weapons against aircraft or ships.

The Incidents at Sea Agreement also contained another then-unique feature; this was the requirement of Article IX for an annual review. Put into the agreement at the behest of the deputy chairman of the U.S. delegation, Herbert S. Okun, this provision allowed for continuing mutual contact between the two navies and enhanced to the greatest possible extent both the implementation of the agreement itself and the professional associations and interests of naval officers on both sides. The Soviet and American naval staffs and attachés each used the new channels to call attention to apparent deviations from the terms of the agreement, and for other relevant information as well. These matters were then considered at the annual reviews. Such annual review provisions are now found in, for example, many of the arms control agreements, both bilateral and multilateral, to which the sides (that is, the U.S. and Russia) are now parties.

Not long after it entered into force, the new agreement was severely tested during the 1973 October War in the Middle East. Nearly 150 U.S. and Soviet warships were crowded into the waters of the eastern Mediterranean, placing a premium on “sea room”; the atmosphere was highly charged. However, while compliance was not perfect, the agreement was effective in that major incidents did not occur and the regional crisis did not escalate into conflict between the world’s two major navies.<sup>3</sup>

During the first half of the 1980s, relations between the United States and the USSR again became strained, and occasionally very tense. Contributing to this situation were the Soviet war in Afghanistan and the NATO deployment of Pershing II ballistic missiles and ground-launched cruise missiles in Western Europe. This period also saw a movement toward larger-scale exercises at sea

and forward operations on the part of both sides. However, the Incidents at Sea Agreement, which had itself been negotiated and signed during a key phase of U.S. involvement in the Vietnam War, remained viable. With one exception noted below, the annual reviews were held regularly, and always on a low-key basis. It was the tightly focused military-to-military aspect of the agreement that allowed reviews to continue despite the political storms of the era.

The Incidents at Sea Agreement proved to be the first of a network of interlocking bilateral accords that have led to the establishment of a new operational environment for the two armed forces. These agreements have reduced tensions and enhanced mutual confidence through detailed navigational procedures designed to ensure that (other than when military, naval, or air operations are underway) each side respects the other's traditional freedoms and usages under international law. Although the Incidents at Sea Agreement was meant to address the immediate issue of navigational safety, it had the additional effect of causing the naval forces of both sides, especially those on the surface and in the air, to operate in a manner that was not only inherently safer than had been the case in the unmanaged situation that preceded it but also, as the respective forces recognized, produced an operational environment less suited to surprise attack.<sup>4</sup>

## II

By the middle of the 1980s, relations between the two parties had again become exacerbated. Among several occurrences that significantly raised tensions was the death in March 1985 of U.S. Army Major Arthur Nicholson while on duty under the U.S.-USSR Huebner-Malinin Agreement on the territory of the German Democratic Republic. Major Nicholson was shot by a Soviet soldier who apparently believed him to have entered a denied security area. Failure to resolve this case led to deferment of the IncSea review meeting scheduled for June 1985.<sup>5</sup>

With the lessening of U.S.-USSR tensions from 1986 on, Soviet and American military leaders began to exchange visits outside the structure of IncSea reviews. Besides opening ports to ship visits, the military leaders informally discussed ways to reduce potentially dangerous activities. The Chairman of the Joint Chiefs of Staff, Admiral William J. Crowe, Jr., expressed concern to his counterpart about the Soviet practice of shining lasers at the cockpits of U.S. military aircraft. In addition, he shared his anxiety about the threat of terrorism to American warships, explaining the need to establish, through Notices to Mariners, special "caution" areas around American ships in certain areas. These concerns made desirable a set of additional procedures, beyond the scope of the IncSea agreement, that would alleviate the tensions inherent in these new situations.

The sides began negotiating a new agreement to deal with such matters, and on 12 June 1989, the new U.S.-USSR Agreement on the Prevention of Dangerous Military Activities (DMA) was signed. It entered into force on 1 January 1990.<sup>6</sup> Like the Incidents at Sea Agreement, the DMA Agreement governs the activities and personnel of the armed forces of each side when operating in proximity to each other during peacetime. Also, and for the first time, it covered certain operations on land. Specifically, the subjects dealt with are:

- Entering the national territory of the other party either by *force majeure* or unintentionally;
- Using a laser in such a manner that it could harm personnel or damage equipment of the other party (a measure that amplifies an understanding reached through the annual IncSea review format);
- Hampering the activities of the other party in a special caution area in a manner that could harm personnel or equipment; and,
- Interfering with command and control networks in a way that could harm personnel or equipment.

Moreover, and of special interest, paragraph 2 of Article II of the agreement provides that “the parties shall take measures to ensure expeditious termination by peaceful means, without resort to the threat or use of force, of any incident which may arise as a result of dangerous military activities.” Thus, the agreement deals explicitly with the need to avoid the use of force and to regulate conduct in order to reduce the risk of conflict, especially in circumstances where armed forces are operating in a state of high readiness and in proximity to each other.

Emulating IncSea still further, DMA has a plethora of procedures to implement it. Again, the rules were written by military experts whose colleagues would have to live with them and make them work. These rules are written at a judicious level of detail and include the obligation to maintain communications channels using pre-agreed call signs (in both Russian and English), as well as pre-agreed radio frequencies—leaving nothing to chance. Indeed, a novel requirement is that the parties are mutually and regularly to test communication procedures established by the agreement or subsequently under it: air-to-air, air-to-ground, air-to-sea, with military aircraft while landing, as well as others. Also, as in IncSea, the parties have provided for annual review meetings and have established a joint military commission for this purpose. Again, the emphasis is on military-to-military discussion of problems and solutions.

### III

The U.S.-Soviet uniform interpretation of the rules of international law governing innocent passage is another example of agreements directly related to military operations and employed to resolve or otherwise defuse existing tensions

and avoid future conflict.<sup>7</sup> Its genesis was in the so-called Black Sea “bumping” incident of February 1988, when two U.S. naval vessels entered Soviet territorial waters of the Black Sea in an exercise under the U.S. Freedom of Navigation program of their right of innocent passage under international law. The American vessels were “shouldered” by two Soviet warships, to which the United States responded with a diplomatic protest. The USSR maintained at the time that its internal legislation forbidding innocent passage in this area had to be honored. It was plain to both sides, however, that the existing situation was volatile, and it became evident that a uniform interpretation of international law on innocent passage would provide the basis for a mutually acceptable resolution. Ultimately the two governments reached consensus, which they set out in a joint statement; in it the Soviet Union implicitly acknowledged that a correction to its domestic legislation and practice was due.<sup>8</sup>

A number of the specific provisions of the uniform interpretation bear examination. It was agreed that the relevant rules of international law governing innocent passage of ships in the territorial sea are those of the 1982 United Nations Convention on the Law of the Sea.<sup>9</sup> These provide that *all* ships, including warships, and regardless of cargo, armament, or means of propulsion, enjoy the right of innocent passage through territorial seas afforded by international law. Neither prior notification to nor authorization by the coastal State is required. As to what is in accordance with international law, the 1982 Convention asserts that passage must be continuous and expeditious; it also provides an exhaustive list of activities that would render the passage other than innocent. In practical terms, as now jointly reaffirmed by the U.S. and the USSR, if a coastal State questions the innocence of a particular ship’s passage through its territorial waters, the State is to inform the ship of its concerns and provide it a (reasonably short) period of time to clarify its intentions or conform its conduct. If the ship is not exercising the right of innocent passage, the coastal State may require it to leave the territorial sea—the sole remedy for noncompliance.

The uniform interpretation on innocent passage resulted in a number of benefits. First, the Soviet Union gave full recognition to an international right of innocent passage by warships. Second, the Soviet Union agreed that the navigation provisions of the 1982 Convention on the Law of the Sea were controlling. And thirdly, the goal of the U.S. Freedom of Navigation program having effectively now been met, it was no longer necessary for the U.S. Navy to conduct further such operations within Soviet (and now Russian) territorial waters of the Black Sea. A letter from the U.S. Secretary of State to the Soviet Foreign Minister stated: “Without prejudice to its rights to exercise innocent passage, the United States of America has no intentions to conduct innocent passage with its warships in the territorial sea of the Union of Soviet Socialist Republics in the Black Sea.”<sup>10</sup>

Thus the nations agreed on the right of innocent passage: the Soviet Union indicated its intention not to restrict it, and the United States indicated its intention not to exercise it in the Black Sea territorial waters of the USSR. This outcome has been praised as a “quiet, common sense solution to a mutual problem” that “could be applied to other problems.”<sup>11</sup> Indeed, both sides benefited, as was true also of IncSea and DMA.

#### IV

During the twentieth annual Consultative Meeting between the IncSea delegations of the Russian Federation and the United States, held in Moscow in May 1992, both sides agreed that the agreement continued to play a positive role in the relationships between their navies, as well as contributing to the safety of their ships and aircraft operating near one another. Both sides also expressed satisfaction that due to their conformity with the agreement, the number of incidents remained insignificant. In addition, the United States and Russia continued to refine and develop the special IncSea signals. Moreover, at this review, they also discussed improvements in communications, agreeing upon a new list of signals related to innocent passage through territorial waters.

It is clear that the success of these accords is not simply a matter of having brought forward into the later ones the useful approaches of the first. Rather, the three agreements, taken together, should be seen as a continuum of progress. They have been highly successful indeed: repetition of serious incidents of the types these agreements were designed to avoid has now become highly unlikely. What are the contributing factors?

- Although obviously subject to civilian control and supervision, all three accords were to a considerable extent negotiated by the cadre of military professionals who would have to implement them. Their discussions tended to be more practical and less political than those conducted in other negotiating fora.

- The focus in the negotiations was on the achievable, in a step-by-step approach; unresolved issues were set aside. The military professionals concentrated on prudent behavior, not on reducing arms or platforms.

- During times of political tensions, the annual reviews were not publicized, again downplaying the political aspect of this relationship.

- The arrangements were worked on, developed, and maintained by professionals having a stake in keeping the mechanism intact as a basis for evolving further methods of conflict and dispute avoidance.

As further testimony to the success of this process, some ten other countries now have bilateral, IncSea-type agreements with Russia. Since the emergence of Ukraine as an independent State, the United States has recognized that, as

Ukraine is a littoral State and has its own naval fleet, it also is a legal successor to IncSea.

Nevertheless, the most important IncSea-type agreement is the original one. Its usefulness as a confidence and security-building measure is evident. Its value today to the United States and Russia as a conflict-avoidance and conflict-resolution mechanism is amply proven.

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### Notes

1. See Honan, *Mediterranean: Playing Chicken*, in FIRE WHEN READY, GRIDLEY 319 (Honan ed. 1993). For details of the negotiations, see Lynn-Jones, *A Quiet Success for Arms Control*, International Security 154-84 (Spring 1985).

2. Text reprinted in I.L.M. 778-783 (1972).

3. Vice Admiral Leighton Smith, USN, Deputy Chief of Naval Operations (Plans, Policy & Operations), (Speech to Participants in the Middle East Peace Process, U.S. Department of State, Washington, 12 May 1992).

4. As previously noted by the present author in *Measures for Strengthening Mutual Guarantees of Non-Aggression Among States*, in STEPHEN & KLIMENKO, INTERNATIONAL LAW AND INTERNATIONAL SECURITY 302 (1991).

5. 31 KEESING'S CONTEMPORARY ARCHIVES 33928 (1985).

6. Text in 28 I.L.M. 877-895 (1989). See further, Nagle, note, *The Dangerous Military Activities Agreement: Minimum Order and Superpower Relations on the World's Oceans*, 31 Va. J. Int'l L. 125-144 (1990).

7. Text in 28 I.L.M. 1444-1447 (1989).

8. See further, Juda, *Innocent Passage by Warships in the Territorial Seas of the Soviet Union: Changing Doctrine*, 1 Ocean Devel. Int'l L. 111-116 (1990). See also Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, Naval War College Review 59-79 (Spring 1993).

9. U.N. Doc. A/CONF. 62/122, reprinted in I.L.M. 1261-1354 (1982). The U.S. is neither a signatory nor a party to the Convention. The U.S., however, regards the navigational provisions of the Convention as being part of customary international law anyway, thus binding on both the U.S. and USSR (and its successors).

10. Carroll, *Peace Comes to the Black Sea*, Arms Control Today 22 (July/August 1990).

11. *Id.*



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