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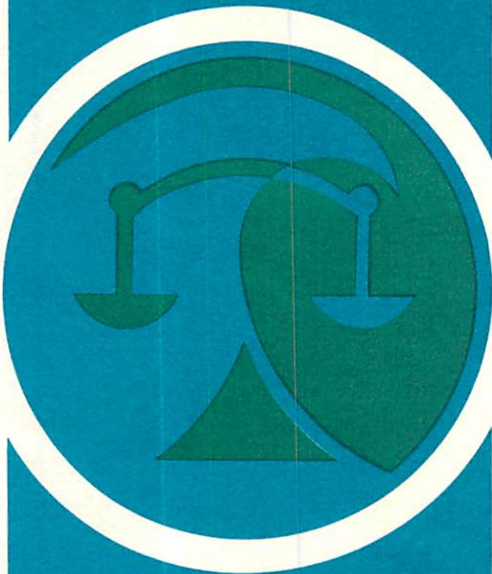

Some Current Sea Law Problems

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SOME CURRENT SEA LAW PROBLEMS

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INTRODUCTION

This U.N.C. Sea Grant Legal Research publication comes after the conclusion of the 1974 Caracas Law of the Sea Conference and before the 1975 Geneva resumption of the continuing effort to bring integrated legal ecological stabilization to the world's marine environment. In this era of many uncertainties, government lawyers and diplomats of the world community continue to seek elusive comprehensive solutions. More pedestrian, but equally dedicated, legal minds press forward for answers in limited problem areas in the Law of the Sea. A few of the important constituent elements of the desired overall solution are here examined. Innocent passage; crime control on aircraft while in over seas flight; recovery rights to craft and their contents disabled in international waters; national security interests at sea; the binding nature of international law development and the contents of the United States' Emergency Marine Fisheries Protection Act of 1974, are all relevant components of viable international legal solutions to global marine resources problems.

These areas have been probed, under guidance, by selected members of the International Law class in the University of North Carolina Law School during the 1974 Fall Semester. The papers here published are part of the results of that research. These researchers will soon become responsible members of the bar of the State of North Carolina and thus an active part of the solution mechanism.

This publication will be the twelfth U.N.C. Sea Grant document produced by the Marine Resources legal research project at the Law School of the University of North Carolina in the last four years. Law School Dean Robert G. Byrd gives his strong personal support to this research effort, as do Doctors B. J. Copeland and William Rickards, who are, respectively, the Director and Assistant Director of the University of North Carolina Sea Grant program. Their personal interest is appreciated.

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INNOCENT PASSAGE:

AN HISTORICAL AND ANALYTICAL PERSPECTIVE

Charles D. Fagan

Introduction

The issue of innocent passage through a nation's claimed territorial sea has a long history in the international law of the sea. Although its conceptual inception dates almost to the beginnings of maritime law, its application, definition and ancillary problems have undergone significant metamorphosis under the influence of time, technology and political application. More recent international law of the sea conferences have increasingly codified and redefined the concept in an attempt to meet the growing emphasis on and importance of innocent passage in a world that is apparently beginning to feel the pains of geometrically expanding demands and the increasingly evident restrictive parameters of space and resources in the previously denominated "endless sea." There is a growing clamor and custom toward increased control by littoral states over their adjacent seas, facilitated primarily by expansive claims to territorial seas, as broad as 200 miles,[1] and to great seaward extensions of sovereignty over economic resources both in the sea and on the continental shelf.[2] As national control and claims to control extend further seaward, the potential for conflict with world community use of the seas for navigation, commerce and defense increases dramatically. Thus, the concept of innocent passage as a means of assuring some of the basic uses of the sea and the flow of commerce with its attendant international contacts, communication and the balanced opposition of world seabound military force entertain glaring scrutiny. This paper will outline the historical basis and development of innocent passage from the beginnings of maritime commerce through the several law of the sea conferences. The sections pertaining to innocent passage in the conventions produced by the Hague and the 1958 Geneva Conferences are closely analyzed to illuminate their respective strengths, weaknesses and areas of possible future conflicts. The major problem area inhibiting the international codification of a territorial sea width, that of guaranteed commercial and military passage through maritime straits, is then outlined as preparation for the impending major Law of the Sea Conference.

History

The early maritime codes of the Mediterranean civilizations have never been absolutely ascertained. The civilizations of the Phoenicians, Assyrians, Carthaginians and Greek states formed primarily around their coastal cities and maritime trade routes. Although the nation of Carthage

[1] See McDougal and Burke, The Community Interest in a Narrow Territorial Sea: Inclusive versus Exclusive Competence over the Oceans, 45 Cornell L. Q. 171 (1959-60).
[2] See Z. Slouka, International Custom and The Continental Shelf, (1968).

employed extensive and structured control over her ports and "territorial seas," this policy was principally a deviation of a highly restrictive maritime trade policy.[3] The prevalent attitude among the Mediterranean nations was quite the opposite; they "encouraged foreign trade and commerce"[4] and large populations gathered into the major coastal cities to thrive on the maritime intercourse.[5] The attitudes and development of the period is described by Azuni, who states that:[6]

> every nation situated on the borders of the sea must have soon perceived that it had an equal right to navigation and fishing, and to a common participation in the advantages which might result from these pursuits...this truth acquires force from the consideration of the impossibility of taking possession of the high seas...every nation has an equal right to navigate, to transport the productions of his soil or the fruits of his industry, and to plough the surface of the deep from pole to pole. (Emphasis added)

As can be seen, the concepts of freedom of the seas and commercial transit were viable and closely aligned in this incubation period of the international law of the sea. While the surviving remnants of the major codifications of the maritime laws of this era, the Rhodian Code,[7] do not include specific statements on the status of commercial transit through marginal seas, other history of the time shows that the Rhodians employed force if necessary to ensure freedom of the seas and rights of navigation for at least their own vessels.[8]

The Rhodian Code was adopted by and formed the basis of Roman maritime custom and law.[9] During the height of Roman rule and the establishment of Jus Gentium, the Romans were masters of the Mediterranean, enjoying a monopoly over the entire civilized maritime world. For this reason Oppenheim feels that international sea law was effectively suspended for this period.[10] However, Roman law as it grew from the Rhodian Code, is broadly considered as the basis of all modern admiralty law. "All nautical matters and litigation are developed by the Rhodian law...unless some other is found contrary thereto."[11] The Romans exercised imperium over the Mediterranean that "did not claim exclusive use."[12]

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[3]Gormley, The Development and Subsequent Influence of the Roman Legal Norm of Freedom of the Seas, 40 Uni. Det. L.J. 561, 567 (1962-63).

[4]Id.

[5]Id., citing Lobinger, The Maritime Law of Rome, 47 Judicial Rev. 2 (1935).

[6]Gormley, supra note 3, at 566, citing 1 Anuzi, The Maritime Law of Europe 6-9 (1806).

[7]Colombos, International Law of the Sea, 29 (5th ed., 1962).

[8]Gormley, supra note 3, at 571.

[9]Colombos, supra note 7, at 29.

[10]Oppenheim, International Law, 534 (Lauterpacht, 7th ed., 1948).

[11]Gormley, supra note 3, at 570 citing 1 Sherman, Roman Law in the Modern World 21 (1937).

[12]Gormley, supra note 3, at 571.

> [Y]et this claim was not expanded into a claim involving any sort of property right in the sea itself; the claim to _imperium_ was not developed into a claim of dominion. Beyond this, positive evidence exists that, in the opinion of men generally, at least during the period of Roman greatness--in other words, when Rome was in a position to assert effectively the opposite position--the sea, and the fish in it, were open or common to all men for their use...[13]

With a natural emphasis upon commerce and trade, the public law of this period was primarily concerned with "the protection of the right of free passage and the unobstructed use of the sea lanes."[14]

The decline of the Roman Empire and the entry of the world into the second half of the Middle Ages brought the use of real and substantial claims of sovereignty over parts of the open sea with a resultant reduction in the overall freedom of commerce and passage. The Republic of Venice was the recognized sovereign of the Adriatic Sea as the Republic of Genoa ruled the Sea of Ligurian. Alexander VI issued two Papal Bulls in 1493 purportedly dividing the New World between Spain and Portugal. Under the Bulls, Spain claimed the Pacific and Gulf of Mexico and Portugal claimed the Indian Ocean and the Atlantic south of Morocco. Great Britain asserted sovereignty over the Narrow Seas,[15] the North Sea and the Northern Atlantic while Sweden and Denmark divided claims over the Baltic.[16] These claims survived for several hundred years. Interference with passage and commerce is demonstrated by numerous accounts of lesser littoral states "asking permission" to transport commodities, obtain fishing licenses and pay both monetary and symbolic tribute to the various sovereigns as fare for using "their" seas. The levying of tolls and broad control of trade by maritime powers was the rule of the day.[17] The whole concept of freedom of transit and innocent passage was buried under the political and monetary ambitions of the medieval maritime powers. The rise of the British State and her search for a legal basis to break the monopolies of the status quo soon interrupted this domination.

Pursuant to the prevailing practices, Spain and Portugal tried to keep foreign vessels out of the New World. The other maritime nations were actively exploring the New World for trade routes and possible commercial exploitation and the resultant conflict soon struck to the legal foundation of the restrictive control. In 1580, the Spanish ambassador Mendoza lodged a complaint with Queen Elizabeth protesting the violation of "their" Pacific Ocean by the famous Drake circumnavigation.[18] In an answer prophetic of the gathering shift in sea use concept, Queen Elizabeth answered "that the use of the sea and air is common to all; neither can any title to the ocean belong to any people and private man for as much as neither nature nor regard

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[13]Gormley, _supra_ note 3 citing 1 _Oppenheim_, _supra_ note 10 at 571.
[14]Gormley, _supra_ note 3, at 573.
[15]The Narrow Seas were the St. George Channel, the Bristol Channel, the Irish Sea and the North Channel, see 1 _Oppenheim_, _supra_ note 10, at 463.
[16]_Id._ at 535.
[17]_Colombos_, _supra_ note 7, at 45-49.
[18]_Id._ at 47.

of public use permitteth any use thereof."[19] Elizabeth is thus credited as being the first to proclaim the freedom of the seas in the modern sense and her later statements on the subject made evident the fact that this freedom was specifically designed to insure commerce and passage through all seas and ports.[20] While British foreign policy has always been the well-exercised tool of the prevailing British economic interest, the concept of freedom of the seas was essentially maintained by her through her defeat of the Spanish Armada and her eventual rise to the position of "ruler of the waves." Being an island nation absolutely dependent upon maritime commerce for growth and survival, it continued to be in her best interests to maintain and enforce open seas. She did, however, receive wide support for her policies from the growing momentum among expanding maritime trade empires through occupation and colonialism. In 1609, Mare Liberum was published by the "Father" of modern international maritime law, Hugo Grotius.

Grotius, a young Dutch lawyer was employed by the Dutch East India Company to justify and support Dutch trade in the Indies in contravention of Portugal's purported monopoly on the Indian Ocean. His book was a skillful philosophical blending of the teachings of the ancients[21] with religious allusions and historical practice woven together to support the basic premise that sovereignty rests upon the right of occupation, and:

> [t]he right of occupation, again, rests upon the fact that most things become exhausted by promiscuous use and that appropriation consequently is the condition of their utility to human beings. But this is not the case with the sea; it can be exhausted neither by navigation nor by fishing, that is to say, in neither of the two ways in which it can be used.[22]

Grotius received swift academic support for his view and writers of several nations expanded upon his beginning in written declarations supporting similar national claims.[23] However, "general opposition to the bold attack of Grotius on maritime sovereignty prevented his immediate victory."[24] Seldern reacted with a conceptual antithesis, Mare Clausum.[25] The resistance slowed progress in this area so that there was certainly no rapid collapse of sovereign claim and control over vast areas of ocean. However, it appears that progress was fast achieved on at least one point, that of navigation of the sea.[26] Grotius considered innocent passage aligned with the "most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation and to trade with it."[27] This right of

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[19] Id. at 49.
[20] Id.
[21] H. Grotius, Mare Liberum 7 (Magoffin transl. 1916).
[22] Id.
[23] Smith, The Law and Custom of the Sea, 45 (3rd ed. 1959).
[24] 1 Oppenheim, supra note 10, at 536.
[25] See Id.
[26] 1 Oppenheim, supra note 10, at 537.
[27] Grotius, supra note 21.

passage doctrine was considered to apply to both land and territorial waters.[28] With the previously outlined support of the relatively young British nation, freedom of sea transit received growing acknowledgement.

The eighteenth century writers took up support for the open sea and began making the distinction between the open sea and the maritime belt which a littoral state could legally dominate. In 1702 Bynkershock published De dominio maris dissertatio, espousing the theory of marginal territorial seas. Bynkershock is generally atrributed with establishing the "cannon shot" rule to determine the permissible width of a nation's territorial sea under imperium terrae finitur ubi finitur armorum vis, which roughly means that territorial sea extends only so far as the power of arms control. This theory was translated into the three-mile territorial sea limit which, along with the Scandinavian one league theory became the standard for territorial sea claims until very recently. The important observation here is that the "cannon shot" rule was not created to justify a nation's right to exclude absolutely ships from navigation in the territorial sea so much as to insure that ships could enjoy navigation in the waters of a neutral nation, i.e., to protect passage that was essentially innocent.[29] Thus, the development of ocean use and the evolution of states' sovereignty over territorial seas was predicated upon a generally accepted theory of freedom of navigation and the right of nations to protect and enforce that freedom. This era of development and evolution is succintly summarized by Elihu Root:

> These vague and unfounded claims [of the 18th, 17th and earlier centuries] disappeared entirely, and there was nothing of them left.... The sea became, in general, as free internationally as it was under the Roman Law. But the new principle of freedom, when it approached the shore, met with another principle of protection, not a residuum of the old claim, but a new independent basis and reason for modification near the shore, of the principle of freedom. The sovereign of the land washed by the sea asserted a new right to protect his subjects and citizens against attack, against invasion, against interference and injury, to protect them against threatening their peace, to protect their revenues, to protect their health, to protect their industries. This is the basis and the sole basis in which is established the territorial zone that is recognized in the international law today. Warships may not pass without consent into this zone, because they threaten. Merchant ships may pass and repass because they do not threathen.[30]

Thus it can be seen that guaranteed commercial passage was a dominant thought around which the concept of marginal territorial sea was knowingly constructed. Jessup states that:

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[28] Hall, International Law. 137 (4th ed. 1895).

[29] Heinzen, The Three Mile Limit: Preserving the Freedom of the Seas, 11 Stanford L. Rev. 597, 605 (1958-59).

[30] Jessup, The Law of Territorial Waters and Maritime Jurisdiction, 5 (1927).

> the right of innocent passage seems to be the result of an attempt to reconcile the freedom of ocean navigation with the theory of territorial waters. While recognizing the necessity of granting to littoral states a zone of waters along the coast, the family of nations was unwilling to prejudice the newly gained freedom of the seas.[31]

However, there are two theories of minor note that offer challenge to that determination. Hall contends that the right of innocent passage is in substance an improper servitude upon the littoral state.[32] Moore refutes this by noting that "the sovereignty of the states does not preclude...the existence of a servitude upon the territory of one state for the benefit of another."[33]

Also, some writers contend that the right to innocent passage by merchantmen is established by usage only and therefore under strict law a littoral nation may prevent such passage entirely.[34] This theory contravenes the overwhelming weight of influential international scholars and the historical development herein presented. Jessup, noting modern scholarly concurrence with Grotius[35] simply states 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."[36]

As with most historically established legal concepts, the right of innocent passage has gone through various levels of refined definition to maintain its contemporary applicability. A general and concise synopsis of the right as presented by the major international scholars will provide a conceptual overview that will be useful in later discussion on the codification conventions and recent developments.

The right of innocent passage is essentially a literal description of itself. A right of passage is granted to certain maritime vessels freely to navigate the sovereign territorial sea of another state, provided such navigation is "innocent," i.e., imposes no undue harm upon the littoral state. The unrestricted right is extended only to commercial vessels. Warships of foreign nations are subject to restrictions (in some cases, prohibition) to insure that their passage is under the close scrutiny of the coastal state and that, in fact, such passage remains innocuous to the safety of the state. The passage must be of continuous navigation and does not include putting into port or dropping anchor for other than an emergency (_force majeure_) and navigational requirements. A vessel in innocent passage may not engage in sabotage nor in the transportation of goods from one port to another within the same state. Legal jurisdiction that may be exercised by the

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[31] _Jessup_, _supra_ note 30, at 120.
[32] _Hall_, _supra_ note 28, at 166.
[33] _Jessup_, _supra_ note 30, at 119, citing 1 Moore's _Digest_, p. 19.
[34] _Jessup_, _supra_ note 30, at 119.
[35] _See_ note 27, _supra_.
[36] _Jessup_, _supra_ note 30, at 120.

coastal state over a vessel in transit is an area of some disagreement. The general policy is that a littoral state may exercise jurisdiction only in the event of actions that somehow disturb the peace of the territorial sea. Other theories would extend jurisdiction to actions contained wholly within the integrity of the vessel and for crimes committed before entering the particular sovereign area. The only charges that are allowed against a passing vessel are for actual naval services and no dues or levies based solely upon the right of passage may be demanded. Finally, the view on whether the right may be suspended or otherwise altered ranges from an absolute right of passage vested in the foreign vessel to a clear and subjective authority in the coastal state to suspend or revoke for cause at any time.[37] The modern evolution of the concept is objectified by two major law of the sea conferences, the first one held at The Hague in 1930.

The generally accepted view of the delegates to the 1930 Hague Conference was that a coastal state exercises sovereignty over its territorial sea subject to a carefully defined right of innocent passage insured to the vessels of other nations.[38] Several articles in The Law of Territorial Waters, as ratified by the convention, pertain to innocent passage. Article 14 provides that:

> A state must permit innocent passage through its marginal sea by the vessels of other states, but it may prescribe reasonable regulations for such passage.[39]

There were several implicit restrictions contained in this article that parallel the general outline offered above. Passage was restricted to voyages between destinations outside the coastal state and not involving internal waters. Since passage was reserved for purposes of commerce, no obligatory right was extended to warships. A state could make reasonable regulations governing the passage provided the regulations are uniform to all states. The establishment, both directly and indirectly, of dues on vessels in passage is prohibited.[40]

Jurisdiction over vessels in innocent passage is covered by the 1930 Hague Convention, Articles 15 and 16.

> Article 15:
> A state may not exercise jurisdiction in respect of an act committed in violation of its criminal law on board a vessel of another state in the course of innocent passage through its marginal seas, unless the act has consequences outside the vessel and tends to disturb the peace, order or tranquillity of the state.

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[37] Colombos, supra note 7, at 121-126; see also Brownlee, Principles of Public International Law, 204-9 (2nd ed. 1973).

[38] Slonim, The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea, Colum. J. Transnat. L. 96, 97 (1966).

[39] 23 Am. J. Int'l L. 243 (Spec. Supp. 1929).

[40] Id. at 295-296.

Article 16:

A state may not exercise civil jurisdiction over a vessel of another state while it is in course of innocent passage through the marginal sea, except in respect of an act committed by the vessel during the course of that innocent passage and not relating solely to the internal economy of the vessel.[41]

Normally a state has complete jurisdiction over all acts committed within its territorial sea. However, since innocent passage is designed as a limitation on littoral state sovereignty, it follows that the jurisdiction that may be exercised over a vessel in innocent passage be limited also. Essentially, the internal character of the vessel was maintained immune. Exercise of criminal jurisdiction was limited to acts which produced consequences outside the vessel in transit and disturbed the peace of the state. Civil jurisdiction was limited to acts committed by the vessel itself which created effects beyond its own enclosed economy.[42]

The definition of "vessel" was objectified by Article 22:

Article 22:

The term vessel, as used in this convention, unless otherwise indicated, means a privately owned and privately operated vessel or a vessel the legal status of which is assimilated to that of such a vessel.[43]

Modern usage of ships necessitated the definition of vessels that would be covered by the innocent passage detailed in the convention. Military vessels were notably excluded. Vessels in public use were afforded a broader immunity separated from innocent passage and covered in Article 19.[44] Publicly owned vessels engaged in commerce were most likely included under Article 22 depending upon their definition in coastal domestic law.

As can be seen, the 1930 Conference codified sea law in broad terms with many implicit assumptions. The era following showed an increase in maritime activity. More complex situations were encountered and the unworkability of a generally worded convention was increasingly evident. The implicit assumptions were not adhered to or shared by a growing number of nations. The answer was a more detailed code and the 1958 Geneva Conference undertook to fill that need.

The 1958 Geneva Convention on the Law of the Territorial Sea and the Contiguous Zone went into force on September 10, 1964, when the minimum of 22 states ratified it.[45] Innocent passage is covered by Section III of the convention. Subsection A (Articles 14-17) covers Rules applicable to all ships. Subsection B (Articles 18-20) defines rights of merchant ships while Subsection

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[41] Id. at 297.

[42] Id.

[43] 23 Am. J. Int'l L., 362 (spec. supp. 1929).

[44] Id. at 328.

[45] Slonim, supra note 38, at 106.

C (Articles 21-22) presents the delimitation of rights of government ships other than warships. Subsection D (Article 23) states the passage restrictions on warships.[46]

Article 14 provides, inter alia;

1. Subject to the provisions of these articles, ships of all states, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.[47]

The inclusion of transit to and from port as an exercise of innocent passage is a significant expansion of the ancient custom. This inclusion has received much criticism from those who think such passage should receive unique and more restrictive treatment.[48] There was no debate on this question at Geneva and therefore, the positions of the delegates on this question is undetermined.[49]

Article 15, paragraph 4, states:

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with these articles and with other rules of international law.[50]

This wording focuses on "passage" as an element that may be considered prejudicial to the peaceful integrity of the coastal state and as a consequence gives a nation the right to define the type of passage it considers innocent. This focus was endorsed by the International Court of Justice in the Corfu Channel case.[51] "The International Court of Justice ...had gone on to consider the manner in which the passage was carried out in order to determine whether it was innocent."[52] (emphasis added) A United States' proposal that would have focused regulation on the actual actions of a particular ship in passage was soundly rejected as against established law and unpermissibly subjective in application.[53]

Article 16, in part, provides:

1. The coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent.

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[46] Slonim, supra note 38, at 98.
[47] 52 Am. J. Int'l L., 834, 837 (1958).
[48] Slonim, supra note 38, at 99.
[49] Slonim, supra note 10, at 100.
[50] See supra note 47.
[51] The Corfu Channel case involved the use of the channel claimed by Albania as territorial waters. Damage to British warships from Albanian mines brought about an International Court of Justice case; see Corfu Channel Case [1949] I.C.J.Rep. 4.
[52] Slonim, supra note 38, at 101.
[53] Id.

2. In the case of ships proceeding to internal waters, the coastal state shall also have the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject.

3. Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst 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. Such suspension shall take effect only after having been duly published.

A further attempt to remove the subjective from the convention occurred here also. An amendment changed the International Law Commission draft from allowing suspension "if it [the coastal state] should deem such suspension essential."[55] A United Kingdom comment on the draft held that this paragraph should make clear the burden of proving that "the passage is 'prejudiced, etc....' is one which must be discharged according to the criteria of international law rather than the law of the coastal state."[56] This interjection of some objectivity was the strongest control element agreed upon and at least provides some review of and restraint on state action in this area. It is partially over-ruled by possible subjective input into Article 17 which requires ships to comply with "the laws and regulations enacted by the coastal state <u>in</u> conformity with these articles and other rules of international law...."[57]

Depending on individual phrase modifications, either the article is open to broad unilateral state legislation or subject to formulating rules in concordance with established international law, an uncertain event in itself. The clarifying amendments offered at the convention were defeated on specifics, and the debate left the issue unclear.

Article 14(5)[58] specifically notes that fishing vessels are under close regulation and control, a reaction to an already growing fishing rights controversy. Article 15 imposes an affirmative duty on the coastal state to "not hamper innocent passage" and "to give appropriate publicity to any danger to navigation of which it has knowledge within its territorial sea."[59]

Article 16(4) requires that:

> There shall be no suspension of the innocent passage of foreign ships <u>through straits</u> which are used for international navigation between one part of the high seas or the territorial sea of a foreign state.[60] (emphasis added)

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[54] <u>See supra</u> note 47, at 838.
[55] Slonim, <u>supra</u> note 38, at 103.
[56] <u>Id</u>.
[57] <u>See supra</u> note 47, at 838.
[58] <u>Id</u>. at 837.
[59] <u>Id</u>.
[60] <u>See supra</u> note 47, at 838.

The first part concerning the connection of high seas is a direct answer to the Corfu Channel Case.[61] The second requires the connection of the high seas with territorial waters and was a novel inclusion in international codification. It was designed to cover problems analogous to those with the Straits of Tiran.[62] The problem of straits is a major current international issue and is covered more fully later.

Criminal jurisdiction over vessels in innocent passage is covered in Article 19:

> 1. The criminal jurisdiction of the coastal state <u>should not</u> be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases;....
>
> 5. The coastal state <u>may not</u> take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.[63] (emphasis added)

The conflict of strong sovereign control vs. established right to passage extended into these paragraphs. Note the "should not" in paragraph 1 and the "may not" in paragraph 5, an asymmetrical example of the balancing that took place at the conference. The same structure carried over into the civil jurisdiction area, Article 20:

> 1. The coastal state <u>should not</u> stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship.
>
> 2. The coastal state <u>may not</u> levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal state.[64]

The International Law Commission draft utilized mandatory language in both articles. The hortatory language was injected at the request of the United States to tip the balance against vessels in transit and in favor of the sovereign coastal state.[65] Coming from the United States, normally a

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[61] <u>See</u> note 51, <u>supra</u>.
[62] Eckert, <u>The Straits of Tiran: Innocent Passage or an Endless War?</u>, 22 Miami L. Rev. 873 (1967-68).
[63] <u>See supra</u> note 47, at 838.
[64] <u>Id.</u> at 840.
[65] Slonim, <u>supra</u> note 38, at 122.

supporter of strong innocent passage rights, this is an interesting example of issue shifted emphasis and amplifies the major inhibition of broad conceptualized international ideas, the demands of arbitrary politics.

The conference statement on warships, Article 23, is deceptively simple in appearance.

> Article 23;
> If any warship does not comply with the regulations of the coastal state concerning passage through that territorial sea and disregards any request for compliance which is made to it, the coastal state may require the warship to leave the territorial sea.[66]

The question of what right foreign warships have in innocent passage is a hotly disputed issue dating almost from the inception of the passage concept itself. International writers are not in agreement on the subject. The territorial basis for a right for warship passage is tenuous at best. It certainly is not passage for commerce. Its most logical support is a view of innocent passage that requires respect for all maritime transit not directly threatening to the coastal nation. In the Corfu Channel case, the United Kingdom produced statistics showing that "34 states clearly assumed a right on the part of warships to traverse territorial waters."[67] The clear lesson of the conference is that some form of passage is extended to warships. The details and extent of that freedom is the source of much present international conflict.

Current

There is a current increasing demand for incisive changes in the international law of the sea. The 1960 Geneva Conference considered exhaustive proposals to establish multinational agreement on one of the most fundamental rules of the sea, the width of the territorial sea. The proposal that came closest was not the previously revered three-mile limit.[68] Since then, growing world demands for sea resources and previously unforeseen technological advances have made an expansion of sovereign control over the seas through broader territorial seas, economic resource zones and continental shelf concepts, an eminent reality. A key area in this expansion of sovereign control is innocent passage. There are one hundred important straits in the world that would fall under state sovereign control if the permissible width of the territorial sea is extended to twelve miles.[69] Coupled with the baseline methods being employed by several archipelago nations,[70] the mobility of naval vessels could be greatly inhibited. Both the United States and Russia are strongly against any such restrictions, but for somewhat varying reasons. America has invested her nuclear deterrent power heavily in her naval fleet. Both the defense of the United States and the free world depend heavily upon transoceanic supply. According to Soviet Rear Admiral Andrev, "the very possibility of conducting war depends [for the 'imperialist' states] upon the support of uninterrupted operation of sea and oceanic communications."[71]

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[66] See supra note 47, at 840.
[67] Slonim, supra note 38, at 116.
[68] McDougal and Burke, supra note 1.
[69] Lawrence, Military-Legal Considerations In the Extension of Territorial Seas, Military L. Rev. 47, 86 (1965).
[70] Dean, The Second Geneva Conference on the Law of the Sea: The Flight For Freedom of the Seas, 54 Am. J. Int'l L. 751, 753 (1960).
[71] Lawrence, supra note 69, at 66.

Although the Soviets have long claimed sovereignty over twelve miles of territorial sea, they have continually refused passage to United States ships through controversial straits and strongly supported a worldwide attitude of strong sovereignty over territorial sea, they also have inherent interest in free international passage for warships. Although Communist nations are land-connected and do not depend upon the oceans for commerce and communication,[72] Russia has also invested much military force in her navy.[73] She sees naval power as a means of interceding into free world ocean transit and enhancing her world influence.

For these reasons both nations are working for a guaranteed freedom of passage for military vessels. This would include both a guaranteed passage through straits without current restrictions and some solution to the archipelago problem.[74] The solution to this problem may well be the key to the upcoming Law of the Sea Conference.[75] Both the United States and Russia were very careful to include the question on the agenda being prepared for the meeting.[76] The general consensus among the delegation members who attended the Caracas Conference was reportedly that the United States was prepared to support a twelve mile limit if proper "innocent passage" could be guaranteed in return.

Conclusion

The concept of innocent passage rests strongly in the history of maritime law and the development of the concept of freedom of the seas. It has been refined and reapplied through centuries of use, abuse and conflict. Today it apparently stands as a key to reaching a multinational agreement on volatile sea law issues which threaten to turn the sea into a no man's land where "might rules right." The concept of innocent passage is strong enough to encompass the needed flexibility. Its intelligent redefinition of course relies upon the wisdom and skill of the member nations who attend pending Law of the Sea conferences. This tool for world agreement is well aged and historically solid. Time will hopefully demonstrate the effective use of a modern reaffirmation and definition of "innocent passage."

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[72] Lawrence, supra note 69, at 87.

[73] Butler, The Legal Regime of Russian Territorial Waters, 62 Am. J. Int'l L. 51 (1968).

[74] Speaking of the Indonesian and Philippines Archipelagos, Arthur Dean wrote: "For navigational purposes...[the extension of the territorial sea] would change a large Pacific area into a series of unconnected 'lakes' of high seas." See Leverson, The Problems of Delimitations of Baselines for Outlying Archipelagos, 9 San Diego L. Rev. 773 (1971-72).

[75] Nolta, Passage Through International Straits: Free or Innocent? The Interests at Stake, 11 San Diego L. Rev. 815 (1973-74).

[76] See Stang, The Donnybrook Fair of The Oceans, 9 San Diego L. Rev. 569 (1971-72).

THE U. S. POSITION ON THE BREADTH OF THE TERRITORIAL SEA:

NATIONAL SECURITY AND BEYOND

Kent Hedman

On November 8, 1793, the United States Secretary of State, Thomas Jefferson, in notes to Mr. Hammond, the British Minister, and M. Genet, the Minister of France, indicated that although the ultimate extent of the territorial sea was reserved for future deliberation, American officials would recognize a distance of three geographical miles for the present.[1] This breadth was recognized by Congress in 1794 when the jurisdiction of federal district courts was extended over waters within a marine league of shore.[2] In two early decisions the courts recognized the nation's sovereignty over this marine league maritime belt[3] as did Secretary of State Seward in 1862, Secretary of State Fish in 1875, and Secretary of State Hughes in 1924.[4] Philip C. Jessup concluded in 1927 after an exhaustive analysis of the question that the three mile limit accepted by the United States was in fact a rule of international law,[5] but hedged that it was a rule of customary law or no law at all and could not exist save by the universal assent of nations.[6] Jessup states, uncannily foreboding the future, that the rule would be changed when it ceased to be convenient and would probably be changed by a general convention.[7]

The three mile breadth for the territorial sea is still the only breadth recognized by the United States,[8] although it appears it is no longer convenient as a customary rule of international law and has been the impetus for four international conventions on the subject since 1930. No agreement was reached as to the breadth of the territorial sea at the Hague Codification Conference in 1930. The primary reason for the failure was the refusal of Great Britain and her supporters to recognize the historical rights of the Scandinavians to a four mile sea and the rights of other states in contiguous zones.[9] In the view of Professor L. F. E. Goldie this was a mortal blow to the three mile limit as a rule of customary international law, although its death and burial was postponed until the Geneva Conference of 1958 failed to

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[1] P. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 7 (1927), [hereinafter cited as Jessup].
[2] Id. at 5.
[3] The Ann, 1 Fed 928, 929 (1872) and Church v. Hubbard 2 Cranch 187, 231 (1804).
[4] Colombos, International Law of the Sea 75 (3rd ed. 1954).
[5] Jessup, supra note 1, at 5.
[6] Id. at 6.
[7] Id. at 7.
[8] Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923); statement of Ambassador Arthur H. Dean at the 1958 Geneva Convention: "We have made it clear that in our view there is no obligation on the part of states adhering to the three mile rule to recognize claims on the part of other states to a greater breadth of territorial sea. On that we stand."
[9] 4 M. Whiteman, International Law 15 (1965).

reach agreement on the breadth of the territorial sea.[10] Although at the 1958 Geneva Conference forty-six of seventy-three countries accepted a three-mile limit, this can hardly be construed as the general acquiescence necessary for non-agreeing states required to continue a customary rule of law supported by those states in accord.[11] A second conference was convened at Geneva in 1960 to consider the question of the breadth of the territorial sea.[12] A compromise proposal of the United States for a six-mile territorial sea linked to a six-mile contiguous zone failed to pass by one vote. By 1972 only 36 states claimed a three to four-mile territorial sea while fourteen states made claims of from five to eleven miles, 49 made claims of twelve miles, four pressed claims of 13 to 199 miles, and seven made claims of 200 miles.[13] The Caracas Conference on the Law of the Sea, convened in the summer of 1974, failed to reach agreement on the breadth of the territorial sea, although the United States proposed a twelve-mile territorial sea, provided free transit was guaranteed in all international straits.[14] As no agreement was reached, the United States continued to recognize only a three-mile limit. The only conclusion that can be drawn from these current claims and conferences is that despite the United States' adherence to a three-mile limit in this vacuum of a codified restraint on jurisdiction, most states of the world have ignored what the United States considers customary law and have made extensions convenient to their own interests.

There may be a better legal basis for these claims of convenience than for the position of the United States. In 1959, H. A. Smith concluded that the Anglo-Norwegian Fisheries Case, decided in 1949, was the most important contribution to international law yet made by an international court and was of far more import than the conventions on the Law of the Sea adopted at Geneva in 1958.[15] He interpreted the case (following generally the concurring opinion of Justice Alvarez) as encouraging all states to determine for themselves within reasonable limits[16] the width of their own territorial zones; and that it was clear that the three-mile limit, except as a minimum width, was no longer a general rule of international law. The question that must be asked is why the United States continues to cling to a rule of customary international law that has lost the force of custom in all but the most abstract theoretical sense.

The answer on its face is a simple one. At the 1958 Geneva Conference

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[10] Goldie, International Law of the Sea: A Review of State's Offshore Claims and Competences. Naval War College Review, (Feb. 1972), at 48.

[11] Bishop, International Law, 32 (3rd ed. 1971).

[12] See Dean, The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas, 54 Am. J. Int'l Law 751.

[13] Lay, Churchill, Nordquist, New Directions in the Law of the Sea: Documents Vol. II 873 (1973).

[14] Speech of Ambassador John R. Stevenson before the Plenary Session of the Law of the Sea Conference, 11 July 1974; 120 Cong. Rec. 107, S12901 (daily July 18, 1974).

[15] Smith, The Law and Custom of the Sea, vii (2nd ed. 1959).

[16] A reasonable limit was defined as one that took into account the configuration of the coast, the economic needs of the population, and the security needs of the coastal states.

on the Law of the Sea, Ambassador Arthur H. Dean supported the United States' position in these terms:

> The desire of the United States to maintain a relatively narrow territorial sea, and more particularly, to prevent any extension to twelve miles was based not merely on the fact the three-mile limit has been recognized in international law but also on compelling military and commercial reasons. To reduce the area of the high seas...would decrease the security of the United States by reducing the efficiency of its naval and air power and increase the risk of surprise attack.... In time of war observance of rules of international law unfortunately becomes very often a question of expediency. But a nation such as the United States which has regard for the rights of mankind and respect for legally ordered society cannot lightly envision the disregard of international law.[17]

As it was doubtful even in 1958 that the three-mile limit was a rule of customary international law, Mr. Dean in effect argued that the basis for the adherence of the United States to a three-mile territorial sea was national security. The chief threat to United States' security as he conceived it was the fact that the huge Soviet submarine fleet (in 1958 numbering some 474 diesel powered boats)[18] could refuge in the twelve-mile neutral waters and interdict United States' shipping, while the United States respected the neutrality of the coastal states under the rules of international law.[19] Professor Sorenson, the chairman of the Danish delegation, remarked that it was just this emphasis on military considerations that strengthened the opposition to the three-mile limit by the states antagonistic to the naval supremacy of the Western powers.[20] In an effort to reach some agreement at the 1960 Geneva Conference, the United States compromised with the six plus six proposal, but there is every indication that national security interests were still the primary basis for the United States' position. Ambassador Dean indicated that the emphasis was now on freedom of navigation of our forces as the basis for opposition to a twelve-mile sea, instead of the refuge from enemy submarine concept.[21] Naval interests emphasized that a three to twelve-mile option based on reciprocity would be as damaging as a twelve-mile limit[22] and favored the six plus six proposal pointing out that with a twelve-mile sea, over one-hundred straits would become territorial

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[17]Dean, Freedom of the Seas, 37 Foreign Affairs 83-86 (1958).

[18]120 Cong. Rec. 107, H6777 (daily ed. July 18, 1974).

[19]Jessup, "The U.N. Conference on the Law of the Sea," Columbia Essays in International Law 201 (1965).

[20]Franklin, The Law of the Sea: Some Recent Developments, Naval War College International Law Studies 1959-1960, 118 (1961).

[21]Ambassador Dean pointed out the necessity of the United States' submarine USS Triton to transit the Suriago and Macassar Straits claimed as within the territorial waters of the Philippines and Indonesia in its around the world submerged voyage.

[22]Franklin, supra note 20, at 307.

seas.[23] As for the deterrent effect of the naval presence mission, six miles was the maximum breadth allowable, as beyond six miles, visual identification of warships and aircraft was impossible.[24]

By the mid-sixties, security agreements were centering almost exclusively on the problem of passage through straits in territorial seas, if the twelve-mile sea became the legal limit. The Office of the Geographer, Department of State, published a chart in 1966 showing the 116 international straits that would lie within territorial waters of coastal states with a twelve-mile limit. Also, in 1966 the Navy withdrew its opposition to the extension of the United States' fishing zone to twelve miles; this opposition had been based on the intimate identification of exclusive fishing zones with the territorial sea.[25] In October of 1966, Congress extended exclusive United States' fishing rights to twelve miles. The focus was continuing to narrow to the issue of passage. Although the Corfu Channel Case had held in 1959 that, in time of peace, states

> have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state, provided that the passage is innocent,[26]

deficiencies in the 1958 Geneva Convention on the Territorial Sea[27] as to what was innocent and who determined innocence were the root of the reluctance of the United States to agree to a twelve-mile territorial sea. Under Article 14(4) passage was innocent as long as it did not prejudice the peace, order, or security of the coastal state. Sub-section (6) of Article 14 required all submarines to navigate on the surface in the territorial sea. Article 16(1) allowed the coastal state to prevent passage not considered innocent and sub-section (3) provided that the coastal state could temporarily suspend even the innocent passage of foreign vessels within its territorial sea if the suspension was essential for its security. In effect, if a twelve-mile claim was recognized by the United States without changing the present regime of the territorial sea, coastal states that felt their security threatened could cripple the passage of United States' forces through vital international straits and be completely within their rights under international law. If the United States was going at last to recognize the twelve-mile claim (and

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[23] Id. at 122.

[24] Id. at 123.

[25] Carlisle, The Three Mile Limit: Obsolete Concept? Proceedings of the U.S. Naval Institute, (July 1970), at 29.

[26] 43 Am. J. Int'l Law 576 (1949).

[27] 516 UNTS 205.

recognition was being pressed by force of events),[28] it could only be a quid pro quo for free transit of international straits if security interests were to be protected. In May of 1970 the Judge Advocate General of the Navy wrote:

> One factor which could affect our [Navy] adherence to the three mile policy would be to negotiate, preferably multilaterally, for maintenance of high seas passageways through international straits regardless of the breadth of the territorial sea.[29]

Thus, in July of 1970, President Nixon called for a new treaty to rationalize the law of the seas; the proposals he outlined provided for a twelve-mile territorial sea and a right of unimpeded transit for all ships and unimpeded overflights for all aircraft through and over international straits.[30] The President indicated that twelve miles represented the only figure upon which international agreement was possible, but as a matter of national security policy, the United States would not accept a twelve-mile sea without free transit, pointing out that the concept of innocent passage was not adequate to ensure free transit. In the "Presidential Announcement on United States Ocean Policy" he stated:

> The stark fact is that the law of the sea is inadequate to meet the needs of modern technology and the concerns of the international community. If it is not modernized multilaterally, unilateral action and international conflict are inevitable.[31]

The obvious implication was that without a treaty that corresponded to the security needs of the United States, the United States would be forced to ignore claims not in its best interests. The problem, of course, was that

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[28] Lay, Churchill, Nordquist, supra note 13, at 873: By 1968, 41 states claimed territorial seas of 12 miles or greater as compared to 14 in 1958. Thirty-five states claimed 3 or 4-mile seas while 20 states claimed 5 to 11-mile seas. In the Anglo-Norwegian Fisheries Case [1951], ICJ 116, 191, Justice Read said in dissent on the subject of claims of states to extensive (greater than 3 miles) territorial seas: "Such claims may be important as starting points, which if not challenged, may ripen into historic title in course of time." In 1965 the Soviets would not allow the U.S. icebreaker Northwind to pass through the Vilkitski strait into the Laptev Sea on the gounds of territorial waters; in 1967 the icebreakers Eastwind and Edisto were called back from passage through the same strait. In effect the U.S. bowed to the claim of the USSR to sovereignty over the strait as it fell within its 12-mile territorial waters. Synhorst, Soviet Strategic Interests in the Maritime Arctic, Proceedings of the US Naval Institute, (May 1973), at 102.

[29] McDevitt, Current International Law Problems for the Navy, Naval War College Review (May 1970) 45.

[30] Nixon, US Foreign Policy for the 1970's: Shaping a Durable Peace, Dept. of State Bull, (4 June 1973), at 826.

[31] Hearings on Territorial Sea Before the Sub-Committee on Seapower, HASC No. 91-61, at 9292.

without a free transit treaty the United States would be forced to violate customary international law to protect its own security,[32] something that the United States said in 1958 in Geneva that it would not do, in spite of a twelve-mile limit. As Leigh Ratiner, Chairman of the Defense Advisory Group of the Law of the Sea in 1970,[33] explained the President's proposals, the proposal protected national security primarily by building on the fundamental belief that international law is best created by international decision, and not via customary law as customary law now favored the coastal state instead of the maritime powers as in the past.[34] In response to a question on whether the President's proposal met all security criteria, Mr. Ratiner replied that the decision of the President was designed to protect all the interests the United States' Government had found in the sea.[35] Security as the continuing basis for the United States' position on the territorial sea was manifest in June of 1970.

The Draft articles presented to the United Nations' Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction on July 30, 1971,[36] codified the President's proposal for a twelve-mile territorial sea and the right of unimpeded passage through and over international straits. These proposals were presented by Ambassador John R. Stevenson, the United States' Representative to the Caracas Conference on 11 July 1974:

> With respect to the coastal state's right to establish a territorial sea up to a maximum of 12 miles, it is the view of many delegations, including our own, that general recognition of this right must be accompanied by treaty provisions for unimpeded passage through, over, and under straits used for international navigation. The formulation of treaty language which will maintain a nondiscriminatory right of unimpeded transit while meeting coastal state concerns with respect to...security will be one of the second committee's most important tasks.[37]

The United States Delegation Report summarized the work of Committee II on the question of the territorial sea and straits in the following terms:

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[32]Assumption: If the twelve mile rule crystallized into customary law while under the concept of innocent passage, the United States, for security reasons, would of necessity have to transit international straits despite coastal state objections that the transit was not innocent and threatened its security.
[33]The Defense Admisory Group on the Law of the Sea was composed of (in addition to Mr. Ratiner) the Assistant Secretary of Defense for International Security Affairs, the CNO, the Navy JAG, the Air Force and Army Chiefs of Staff. Mr. Ratiner was the alternate United States Representative to the 1974 Law of the Sea Conference in Caracas.
[34]Hearings on Territorial Sea, supra note 31, at 9298.
[35]Id. at 9300.
[36]See UN Doc A/AC.138/SC.II/L.4 (1971).
[37]Cong. Rec., supra note 14, at S12901.

> Agreement on a 12-mile territorial sea is so widespread that there were virtually no references to any other limit in the public debate. Major conditions for acceptance of 12 miles as a maximum was agreement on unimpeded transit of straits.... While there was little public movement toward conciliation on the part of the straits states, debate was less heated. The U.S. made a statement reiterating the fundamental importance of unimpeded passage on, over, and under straits used for international navigation.... The U.S. also made it clear that distinctions regarding the right of passage could not be made between commercial vessels and warships.[38]

Thus, despite Professor Sorenson's warning from 1958 concerning pressing security interests too heatedly, and indication from Caracas, and from as early as October of 1971, that there was more opposition than support for free transit,[39] the United States again presented proposals dominated by its own national security interests. The underlying question, however, is whether these proposals are in fact a necessary ingredient in the maintenance of the security of the United States, or are they something more. The Third World sees the United States' proposals as an effort by the United States and other maritime powers to retain the ability to influence their internal affairs without the sanction of violating international law. Internal United States fishing and mineral interests see these same proposals as an over-cautious entrenchment by the Department of Defense which will result in the loss of control over valuable natural resources which are the true basis of national security. The Naval establishment may well see the United States proposals as prerequisites for the survival of its surface forces. Whether the 1975 Geneva Conference on the Law of the Sea results in an agreement on the breadth of the territorial sea may well depend on the ability of United States' planners to evaluate the underpinnings of present policy. An insistence on the primacy of the United States' national security interests as here defined may very well create the same antagonisms created in Geneva in 1958 and 1960. The following paragraphs offer a short analysis of other opinions on the role of the security interests of the United States in determining the conditional breadth of the territorial sea.

In an attempt to reassure coastal states that unimpeded passage in international straits would not hamper their security, John Moore, Chairman of the United States' National Security Council Task Force on the Law of the Sea told Committee II that:

> unimpeded transit is a right of transit, not a right to engage in activities inimical to the security of these states.... To ensure that unimpeded transit will be consistent with the security interests of states bordering straits, the treaty should require that ships and aircraft

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[38] See U.N. Doc. A/Conf.63/C.2/L.86 (1974).

[39] Outlook for Territorial Sea and Navigation Through International Straits, Law of the Sea Report: Geneva (Oct. 18, 1971), at 135, 136.

> in transit refrain from any threat or use of force in violation of the Charter of the United Nations against the territorial integrity or political independence of a state bordering the strait.[40]

The reassurances may have fallen on deaf ears, but certainly not the fact that Mr. Moore was a representative of the United States' Security Council. Nor would the fact that for the first time since the Soviet Union announced its adoption of the Czarist twelve-mile fishing zone as a twelve-mile territorial sea, the United States and the Soviet Union were in general accord on the issues of the law of the sea. The Soviet Union, now at naval parity[41] with the United States, views a narrow twelve-mile sea and free transit through international straits as essential to the global missions of their powerful new navy.[42] The United States has traditionally used its fleets as instruments of foreign policy and the Soviets declared their position on Moscow radio in 1971:

> The presence of the Soviet Navy...is a bridle on the imperialists who want to use their fleets as a police force in the struggle against democratic and national liberation movements.[43]

To the Third World coastal states, assurances by the United States that free transit will not impair their security, and a rapprochement with the Soviet Union on these issues must be querulous indeed. The effect, as the Third World States view it, is that free transit is not designed to protect the national security interests of the maritime powers at all, but rather to allow them the mobility to interfere in foreign domestic affairs for perhaps unrelated motives or Cold War issues apart from questions of actual survival.[44] The maritime powers under their proposal are free to vie with each other in the business of influence peddling in foreign states while the coastal states ruminate on the question of why they gave up their right to control innocent passage. The issue then becomes not the national security of the maritime powers, but the national security of the coastal states. As Professor Anaud stated:

> The more the Big Powers insist on freedom of navigation as essential to their security, the more the smaller states become skeptical of their true intentions and fear for their own security. Freedom of the seas cannot be used to impair the more fundamental principle of national sovereignty and self preservation.[45]

In response to uncertainty about the motives of the maritime powers and their own security a group of coastal states bordering on important international straits[46] offered alternate draft articles to the U.N. in 1973 on the

[40]U.S. Dept. of State Press Release, No. 326, August 8, 1974.
[41]Cong. Rec., supra note 18, at H6777.
[42]See Janis, The Soviet Navy and Ocean Law, Naval War College Review, (Mar.-Apr. 1974), at 52.
[43]Cong. Rec., supra note 18, at H6778.
[44]See Anaud, The Tyranny of the Freedom of the Seas Doctrine, 12 International Studies 416, 429 (1973).
[45]Id. at 425.
[46]Greece, Indonesia, Malaysia, Morocco, Philippines, Cyprus and Yemen.

territorial sea and straits used for international navigation.[47] These proposals allowed the strait state to regulate the passage of nuclear-powered ships and ships carrying nuclear weapons and to continue to apply the concept of innocent passage to warships and to require prior notification for the transit of warships. In its defense brief to the Corfu Channel Case, the Albanian government earlier argued that the right of free passage through international straits should be limited because of security considerations citing Elihu Root in the North Atlantic Fisheries Arbitration: "warships may not pass without consent into this zone [the territorial] because they threaten;" and the 1929 Harvard Research in International Law: "There is...no reason for freedom of innocent passage of vessels of war."[48] Nevertheless, the United States insists that free transit cannot threaten security[49] and that if indeed a threat did occur there is no limit on the coastal state's right to defend itself under customary international law.[50] The coastal states, however, continue to see the issue as state sovereignty versus compulsion to submit to an agreement which favors the interests of the maritime powers. They have outlined their feelings in numerous international declarations and conventions beyond specific counter-proposals to the United States draft.[51] The critical realization that the United States must make is that these states (using the formula of Myres McDougal)[52] see their assertions of authority over transit in straits as reasonably proportionate to the interest (security) which they are seeking to protect while at the same time interfering minimally with community use. To the Third World community use is not the uncontrolled transiting of foreign war fleets through super-adjacent straits. The United States must consider more seriously this viewpoint before the next Geneva Conference is convened in 1975.

The considerations of offshore resources as a basis for security versus military mobility and the question of naval self-interest in the maintenance of mobility both derive from a basic split in emphasis on sea related national security measures. To Vice-Admiral John T. Hayward, past President of the Naval War College, retired, the missile launching nuclear submarine is the best strategic deterrent because of its maneuverability and basic invulnerability.[53] To Vice-Admiral Stansfield Turner, current President of the War College, the attack carrier and amphibious assault forces (the surface oriented

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[47]See U.N. Doc. A/AC.138/S.C.II/L.18 (1973) and Nulta, Passage Through International Straits: Free or Innocent, San Diego L. Rev. 824 (1974).

[48]Chung, The Corfu Channel Incident: Legal Problems, 175 (1959).

[49]See Dept. of State Press Release No. 326 supra.

[50]See 4 M. Whiteman, International Law, 87 (1965). The Virginius II Moore's Digest (1873) 895, 980 held that self-preservation was a right superior to the normal right of freedom of the seas.

[51]The most recent resolution was "The Resolution on the Law of the Sea," passed by the 4th Conference of Heads of State or Gov't. of the 75 Non-Aligned Countries of Algiers in Sept. of 1973; in part it read: "supports the recognition of the rights of the coastal states in seas adjacent to their coasts ...within zones...not exceeding 200 miles...without prejudice to freedom of navigation and overflight, where applicable."

[52]McDougal, Crisis in the Law of the Sea, 67 Yale L.J. 539 (1958).

[53]Hogan and Kipp, U.S. and U.S.S.R. Naval Strategy, Proceedings of the U.S. Naval Institute, (Nov. 1973), at 40.

maritime option) offer the best method of deterring an attack on the United States.[54] If, in fact, the preferred strategy is to emphasize the submarine deterrent, are free transit of international straits and a narrow territorial sea vital to the security interests of the United States? Many observers fear that the United States' rigid position on the free transit of straits may jeopardize the chances of creating an ordered regime on the territorial sea essential to broader American interests.[55] Others argue that free transit is not an adequate quid pro quo for giving up absolute rights in the natural resources of the continental shelf beyond the 200-mile economic zone.[56] The United States' proposal is that a revenue-sharing regime would be imposed on resources of the continental shelf beyond the 200-mile zone.[57] The basis for requiring free transit for submarines is that under Art. 14(6) of the current convention of the Territorial Sea, submarines must remain on the surface while within a state's territorial waters. With a twelve-mile territorial sea, United States' submarines would have to remain on the surface while transiting many vital international straits. As a result, they would be vulnerable, their locations pinpointed at specific times, and their deployment areas charted. Also, United States' submarines could be prevented from transiting altogether if the coastal state determined their passage was not innocent. Therefore, the argument concludes, the two basic advantages of the submarine, maneuverability and invulnerability would be nullified.

This argument, of course, begs the question as it assumes transit of these enclosed international straits by submarines or transit of any straits for that matter are necessary for the submarine to fulfill its deterrent mission. Those arguing for a de-emphasis of the free transit prerequisite in the United States' stance point out that with the currently operational 2800-mile Polaris missile and with a 4500 to 6000-mile missile operational by 1978, the necessity to use such affected major straits would be wholly lacking.[58] The stakes involved are, of course, high; but the routing disadvantages to naval strategists may be far outweighed by other factors. With no agreement the United States might find itself having to bulldoze entire fleets through a regime of closed seas[59] on the slim legal grounds of self-help implications from the Corfu Channel Case.[60]

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[54] Id. at 41.

[55] Osgood, U.S. Security Interests in Ocean Law, Ocean Development and Int'l Law J., 1-86 (1974).

[56] Hull, Domestic Political Implications, Law of the Sea Reports, 107 (1971).

[57] U.S. Delegation Report, The Third U.N. Conference on the Law of the Sea, 13 (1974).

[58] Osgood, supra note 55, at 12, 13: Osgood points out that of the 116 international straits affected by the 12-mile sea, only 16 are major world straits and only 7 of these are vital to security. Of these 7, only 4 present problems without free transit: Malacca, Sunda, Lonbok, Gibraltar. Gibraltar is the most complicated, but the U.S. can target the Soviet Union from outside the Mediterranean.

[59] Alexander, Special Circumstances: Semienclosed Seas, Proceedings of the Law of the Sea Institute, (June 18-21, 1973).

[60] McHugh, Forcible Self-Help in International Law, Naval War College Review, (Nov.-Dec. 1972). The implication from the Corfu Channel Case is that a state may legitimately use force other than self-defense in order to secure the exercise of a legal right.

The most interesting argument questioning the national security basis for the United States' position develops from the other branch of sea borne security measures, the surface maritime option. The missions of the United States Navy, in addition to strategic deterrence discussed above, are; sea control, projection of power ashore and the naval presence mission.[61] The mission of strategic deterrence is little affected by the necessity to utilize international straits. Assuming that in the event of general war the United States could not be bound by the niceties of offshore claims in moving its fleets through international straits (although it might, as suggested in 1958, attempt not to violate neutral waters), the sea control mission and projection of power ashore mission as purely wartime missions[62] would not be affected by the free transit question. The naval presence mission,[63] however, is essentially a peacetime mission and subject to the control of international treaty law on the transit of international straits. It follows that it is vital to the naval presence mission that the United States have free transit over and through international straits. It also follows that the viability of the Navy's peacetime surface mission may depend on how effective the naval presence mission can be.

Of the 33 significant multicrisis uses of the surface naval elements since World War II, 28 of the missions would be characterized as naval presence missions.[64] The most significant recent use of a naval presence force was in December, 1971, when elements of the U.S. Seventh Fleet were dispatched to the Indian Ocean during the Indo-Pakistani Conflict. For present purposes the most important aspect of the mission was the fact that the United States' Task Force passed through an international strait (Malacca) wholly within the claimed territorial waters of Indonesia and Malaysia. The U. S. Naval high command was appalled by the requirement of having to request permission for transit though permission was granted.[65] Admiral Moorer, Chairman of the Joint Chiefs of Staff, stated: "We should have and must have the freedom to go through, under, and over the Malacca Straits."[66]

The question that develops from this analysis is whether free transit of naval presence missions is vital to national security or is the existence of naval presence missions dependent on free transit. The naval presence mission

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[61] Turner, Missions of the U.S. Navy, Naval War College Review, (Mar.-Apr. 1974), at 2.

[62] Id. at 7, 10-11.

[63] Id. at 14. The objectives of the naval presence mission are to deter actions inimical to the interests of the U.S. and its allies and to promote actions that favor U.S. and allied interests. McNulty, Naval Presence: the Misunderstood Mission, Naval War College Review, (Sept.-Oct. 1974), at 24. Naval presence exists purely as a peacetime mission, having as its only objective the avoidance of war through its impact on the political decisions of a foreign actor.

[64] J. Howe, Multicrisis: Sea Power and Global Politics in the Missile Age, 15 (1971). Excluded uses are the Korean War, the Vietnam War, the Cuban Missile Crisis (sea control), landings in Thailand in 1962 and the landings in Lebanon in 1958 (amphibious assault).

[65] See Oliver, Malacca: Dire Straits, Proceedings of the United States Naval Institute, (Jan. 1973), 29.

[66] Id. at 29.

is not vital in the strategic sense; our enemies are deterred by our submarine-launched missiles,[67] not by the presence of TF 74 in the Indian Ocean. What national security objective did TF 74 fulfill? There are several levels involved in the answer. One objective was to reenforce perceptions of America's will and intent, but that objective could have been accomplished by cutting off foreign aid to India. But more particularly, the mission's function was to consolidate U.S. naval presence in the Indian Ocean and demonstrate to Congress the need for a naval force and to make a case for the value of aircraft carriers, especially CVNs.[68] In effect, the mission had an internal effect beyond national security--promoting the usefulness of the navy's surface maritime option. The fact that this surface force-enhancing mission could not have been accomplished if TF 74 had been unable to transit the Malacca Strait did not go unheeded.

Conclusion

United States' security interests have dominated our national position on the breadth of the territorial sea. In the past, these interests, in conjunction with other factors, have prevented agreement on an internationally recognized territorial sea. If a successful agreement is to result from the 1975 Geneva Conference, the United States must weigh the following factors: the United States' position as perceived abroad and the United States' position as perceived internally in terms of real interest and self-interest. If the Geneva Conference is going to result in agreement, the United States may be forced to make a hard negotiating choice: whether to reevaluate her security interests and reach agreement, or whether to maintain a perhaps unrealistic security stance and be out to sea with an outmoded concept of former customary law.

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[67] Hogan and Kipp, _supra_ note 53, at 42.

[68] _See_ McGruther, _The Role of Perception in Naval Diplomacy_, Naval War College Review, (Sept.-Oct. 1974) 18.

THE RECOVERY OF VESSELS, AIRCRAFT, AND TREASURE IN INTERNATIONAL WATERS

Holmes Eleazer

The intense interest in the exploration and exploitation of the mineral resources of the deep seabed that has been gaining momentum since the 1958 Geneva Conventions presages a new era of sea use.[1] While the use of the seas as a trade medium will continue to be of prime importance, a major readjustment of international law to accommodate the tapping of the seas' wealth of resources is inevitable. The inexorable shift to resource exploitation, made possible by rapid advances in technology, leads one to inquire whether present law governing the recovery of distressed or lost property at sea is adequate in the evolving environment of sea use.

This paper will examine the present scope of the law concerning recovery of vessels, aircraft, and treasure. The scope will be limited to recovery in and on international waters.[2] The focus of the examination will be on the inadequacies of the present legal milieu in relation to an atmosphere of accelerated technological and multi-national involvement in the seas. The fundamental purpose will be to speculate not on answers, but on the needs of the international community.

Part I: Present State of the Law of Recovery

A. National Law Aspect

When one speaks of recovery of property at sea, the central focus is on property that has become imperiled either through natural or man-made misfortune and which will be severely damaged or lost unless rescued. Such recovery is broadly termed the law of salvage.[3] The law of salvage is a part of the wider category of maritime law. The body of maritime law including salvage is as ancient as the seafaring state having its origin as a system nine-hundred years before Christ in the island state of Rhodes.[4] It must

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[1] Knight, Law of the Sea Negotiations 1971-1972, San Diego L. Rev. 383 (1972). Four conventions were drafted in 1958: The Convention on the High Seas, Convention on the Territorial Sea and Contiguous Zones, Convention on the Continental Shelf, and Convention on Fisheries and the Living Resources of the Sea. They represented a multilateral attempt to define the interests of individual nations and the international community in the use of the seas.

[2] While the focus is on the principles governing recovery in international waters, frequent reference will be made to the municipal law of various countries. This must be so, since, as will subsequently be discussed, the controlling principles are at present those of national, not international law.

[3] M. Norris, The Law of Salvage 2 (1958), [hereinafter cited as Norris].

[4] Norris, supra note 3, at 4.

be noted that maritime law and thus salvage law are by nature municipal law. A salvage dispute in international waters where the parties are of different nationalities becomes a conflicts of law problem.[5] The United States, for example, grants admiralty jurisdiction in suits involving maritime claims arising out of occurrences anywhere on the globe, even when none of the parties are American nationals.[6]

The willingness of national courts to decide salvage disputes of an international character is based in the conviction that the hazards of the sea know no national boundaries. While the law of salvage remains a facet of national law, it is also jus gentium, the law of nations. The fundamental principles of salvage are firmly rooted in the general practice of nations and therefore there is minimal difficulty for the court of one nation to apply the salvage law of another if the applicable conflicts of law rule so dictates.[7]

The fundamental principles of salvage law generally recognized in the laws of nations involve the basic nature of the salvage concept.

> Salvage is the compensation allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict abandonment, or recapture.[8]

For a salvage award to be made there must be peril; the action of the salvor must be volunary; and the salvor's efforts must be successful. Salvage under present maritime law applies exclusively to vessels and their cargoes.[9] The owner of the salvaged property does not lose title to the salvor. The salvor earns a right to compensation for preventing damage or loss to the owner that would have beset the owner but for the actions of the salvor. The salvage award is not based merely on a quantum meruit formula, but is markedly more liberal to encourage the saving of life and property in peril

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[5] G. Gilmore and C. Black, The Law of Admiralty 46 (1957), [hereinafter cited as Gilmore and Black].

[6] The willingness to grant admiralty jurisdiction is subject to a self-imposed, discretionary limitation based on the principle of forum non conveniens, which federal courts may assert in an attempt to promote a fairer litigation. See Bickel, The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty, 35 Cornell L.Q. 12 (1950).

[7] Dalmos v. Stathatos, 84 F. Supp. 828, 829 (S.D.N.Y. 1959); Norris, supra note 3, at 21-22.

[8] The Blackwall, 77 U.S. 1 (10 Wall 1) (1869).

[9] I. Wildeboer, The Brussels Salvage Convention 93 (1965), [hereinafter cited as Wildeboer]. Norris, supra note 3, at 97.

on the sea.[10]

Although there is little disagreement among nations concerning basic principles, the municipal laws differ widely as to the exact meaning of the principles and their application.[11] What situations are encompassed by "peril?" When is a salvage act successful? The development of the maritime law of each nation has resulted in varying answers to these questions. Resort to conflicts of law does little to dispel marked divergencies in the application of salvage law between nations.

Reduced to its essential context, salvage of vessels and cargoes concerns relationships between individuals, owners on the one hand, salvors on the other. Recovery of property at sea then, is a problem of private international law. The core issue of private international law is what approach to dispute resolution is most effective, resort to conflicts of law solutions, giving wide play to the divergencies in municipal law, or multilateral convention by which nations agree to bring their own law into conformity with internationally established norms.[12] In the framework of an international dispute on recovery, the latter approach promotes efficient conflict resolution and fair decisions at least in the sense of generally consistent outcomes throughout the international community. Equally important is the reduction of friction and dissatisfaction between diverse nationals through the application of universally accepted international norms. Therefore, in salvage disputes arising over transactions on the high seas, international uniformity is a desirable goal.[13]

B. Private International Law through Conventions

That the goals of private international law would be better served by a unifying convention rather than by variant systems of national law was recognized as early as 1885. That year witnessed the first international congress on commercial law at Antwerp. Chief among the delegates' considerations was the unification of salvage law. Their deliberations were continued by the _Comité Maritime International_ after its foundation in 1897. Work on unifying salvage law culminated in 1910 at Brussels where at a diplomatic conference of government representatives the Brussels Salvage

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[10] _Id._ at 246 and 369. This examination purposefully omits non-salvage methods of recovery such as self-recovery by the owner using his own resources or contracts to recover between the owner and another after peril or damage is known and for which compensation is negotiated. The latter is subject to the law of contracts of the jurisdiction in which the contract is made or the conflicts of law rule of the forum. Main emphasis is placed on the law of salvage since this type of recovery is spurred by immediate necessity and is most susceptible to dispute particularly in an international context.

[11] Salvage awards in England and the United States are generally higher than the countries of Western Europe. _Wildeboer_, _supra_ note 9, at 221. _See_ text accompanying notes 25-29, _infra_, where further divergences are identified.

[12] _Wildeboer_, _supra_ note 9, at 2.

[13] _Gilmore and Black_, _supra_ note 5, at 144.

Convention was signed.[14]

The crucial inquiry is whether the Convention has accomplished its purpose of unifying salvage law and whether concepts developed in 1910 are still viable in the sea-law environment of the 1970s. One must begin an examination by considering the scope of the Convention. The provisions of the Convention are to be applied whenever one or both of the vessels concerned (salving vessel or vessel salved) belong to one of the contracting states.[15] The import of this command concerns private international law in that the admiralty courts of contracting states are bound to apply the provisions of the Convention in salvage suits by individuals. The framers, however, intended an even wider scope in hopes of achieving uniformity. They intended for contracting states to incorporate the provisions of the Convention into their national legislation. In this way the unifying impact would be felt not only by having contracting states apply the Convention's provisions apart from municipal law, but by having the provisions inserted into municipal law.

This incorporation aspect has not achieved its goal; rather it has tended to muddy the waters. For example, France and Belgium subsequently incorporated the provisions of the Convention verbatim into their national law. In Germany and the Netherlands, however, the provisions were adopted but not in a literal translation. The semantic variances have caused subsequent divergencies in the application of the provisions in these countries. The British position has been that the Convention was a reflection of English maritime law and need not be affirmed by legislation since the rules already exist in case law. A statute was passed, the Maritime Conventions Act of 1911, but it embodied only two provisions from the Convention, Articles 6 and 7. The United States' view paralleled that of the British. The Convention merely represented a codification of the extant law of salvage in American case law. Thus the Salvage Act of 1912 only incorporated those provisions, Articles 5, 9, 10, and 11, thought not to be a part of existing American law.[16] It may be concluded from the ratification process that the contracting states viewed the Convention as essentially an embodiment of general principles rather than explicit uniform rules. Such a jus gentium outlook in effect allows national admiralty courts to proclaim adherence to the Convention while looking to municipal law to provide flesh to their legal decisions. Salvage disputes are thus pulled back into the realm of conflicts of law in spite of the Convention.

A brief analysis of key provisions of the Salvage Convention shows there is significant room for divergence in rules supposedly establishing

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[14] Wildeboer, supra note 9, at 1 and 280. The Convention was not self-executing but required affirmative ratification by contracting states. Subsequent ratifications and adhesions encompassed all major maritime nations including the United States (1915), the countries of Western Europe, the Soviet Union (1936), and Japan.

[15] Convention For The Unification of Certain Rules of Law Respecting Assistance and Salvage At Sea, Art. 15, [hereinafter cited by article]. Convention cited in full in 6 A. Benedict, Admiralty 414 (1969) and Wildeboer at 275.

[16] Wildeboer, supra note 9, at 5-8. Gilmore and Black, supra note 5, at 445.

uniformity. First, the law of salvage has not been provided for exhaustively in the provisions of the Convention. Where questions arise that are left unanswered in the Convention recourse must be had to national law.[17] Such omissions buttress the view of the United States that the Convention is merely a codification of existing American salvage law. The admiralty courts need only go to municipal law to find the applicable rules and principles. Gilmore and Black conclude that the Convention has had little effect on the development of American salvage law which is evidenced in the fact that the Convention is rarely cited, construed, or discussed in salvage suits before the Federal Courts sitting in their admiralty jurisdiction.[18]

Article 1 of the Convention[19] limits what can constitute salvage to seagoing vessels. It limits what can be salvaged to those two types of vessels and "things" on board. There is no mention of salvage of objects which are not ships and which are not on board a ship. One must look to municipal law to determine if such objects are subjects of salvage. There is significant divergence on the treatment of non-vessel, non-"on-board" property. In the United States and Great Britain salvage assistance may be rendered to and an award claimed for a vessel, cargo, ship's apparel or wreck. Wreck includes those objects committed to the sea which are salved on the bottom of the sea, floating on it, or washed up on shore.[20] In French or Belgian law, salvage of parts of vessels or wrecks are not subject to salvage since they do not fall within the Convention's limits. This divergence is most important for the would-be salvor of floating goods or goods sunk in the sea. If he brought his salvage suit in France, salvage law would be held

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[17]Wildeboer, supra note 9, at 58. Miss Wildeboer in her excellent article by article analysis of the Convention will be cited frequently hereafter. She examines the meaning and unifying aspects of the Convention's provisions against a comparative backdrop of the salvage law of England, Germany, France, Belgium, and the Netherlands both prior and subsequent to ratification of the Convention. She concludes that except for limited areas, the Convention has had little unifying effect either because the provisions leave room for divergency on national law lines or because uniformity existed prior to the Convention.

[18]Gilmore and Black, supra note 5, at 445.

[19]"Assistance and Salvage of seagoing vessels in danger, of anything on board, of freight and passage money, and also services of the same nature rendered by seagoing vessels to vessels of inland navigation or vice versa, are subject to the following provisions, without any distinction being drawn between these two kinds of service, and in whatever waters the services have been rendered."

[20]Wildeboer, supra note 9, at 11. Norris, supra note 3, at 51-56 and 61-62. Wreck in modern American and British terminology consists of parts of ships and their cargoes sunk or loose at sea and the categories of jetsam, flotsam and ligan. Jetsam includes those goods thrown into the sea to lighten a ship's load when it is in peril of sinking. Flotsam includes those goods cast afloat in the sea when a ship sinks or otherwise perishes. Ligan consists of goods cast into the sea but marked by a buoy so that they may be found again.

inapplicable and his remuneration for the rescue would be much less than the liberal salvage award.[21] France further strays from the Convention by construing "vessel" to be an instrumentality capable of navigation. A vessel is subject to salvage. A vessel bereft of navigability is a wreck and subject to municipal recovery laws rather than salvage in the sense of the Convention. The same rationale applies to cargoes on wrecks.[22]

There are several conspicuous omissions in the Convention that deserve mention since in a salvage dispute part of the issue would be governed by the Convention and others by rules of municipal law. The Convention defines salvage in terms of "vessels" not parties. The person entitled to and the person owing salvage awards are purposefully left unregulated and subject to municipal law. Furthermore, the Convention leaves procedure, avenues of redress, and the nature of privileges connected with a salvage claim to municipal law.[23] While these omissions do not necessarily go to the substantive issues of a salvage dispute, they definitely affect the outcome and certainly detract from uniformity. Leaving these areas to municipal law encourages reliance on substantive municipal salvage law. The _Comité Maritime International_ in its 1949 conference at Antwerp recognized the unsettling effect of procedural omissions. The Permanent Bureau was instructed to establish a committee to study and propose an international maritime court.[24] Unfortunately, there has been little progress in establishing international machinery to handle salvage disputes of an international nature.

The Convention itself and its application by the courts of the various contracting nations permit of further divergencies. Article 6 leaves to municipal law the apportionment of a salvage award between the owner, master, and crew of the salving vessel.[25] Article 14 excludes warships and government ships appropriated exclusively to public service from the application of the Convention. The drafters purposefully avoided intruding into the sphere of public law, but the effect was to render the Convention inapplicable to salvage rendered _to_ a warship with the resulting effect of discouraging the beneficial policy of rendering assistance.[26]

Article 8 enumerates the factors to be taken into consideration in determining a salvage award. But application of those factors by national courts have not produced uniform results with salvage awards in Britain and the United States remaining consistently higher than in the other contracting countries.[27] Success of the salvage operation is required by Article 2 before salvage remuneration is due. Yet there is no uniformity in the application by the contracting nations as to when a service is or is not successful.[28]

The conclusion must be drawn that the Convention, while pointed toward salutary uniformity, has had little unifying effect in the area of traditional salvage law. Basically, the Convention sought to impose standard rules, but it has been hampered by the nature of private international law.

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[21] _Wildeboer_, _supra_ note 9, at 11 and 20-21.
[22] _Id._
[23] _Id._ at 66-68.
[24] 6 _Benedict_, _supra_ note 15, at 413.
[25] Art. 6, para. 3.
[26] Art. 14; _Wildeboer_, _supra_ note 9, at 27-29.
[27] _Id._ at 221.
[28] _Id._ at 125.

That is to say that the standard rules are subject to application and therefore interpretation by national courts. The way the provisions have been interpreted has been most disparate.[29] The question remains as to whether present salvage law in combination with the Salvage Convention are adequate in the present day context of sea-use.[30]

C. Recovery of Aircraft

The fundamental presumption of the law of salvage is that recovery of property at peril on the sea is a humanitarian and economically beneficial goal. Secondly, there is the presumption of international law that uniformity in the settlement of international disputes is a desirable conflict-quelling goal in a world getting smaller by the year. Thirdly, there is the reality that technology and its implications for sea-use are outstripping traditional formulations of maritime law and international law of the sea.[31] The latter factor is in conflict with the former two and nowhere is that conflict more evident than in the law governing recovery of aircraft.

Air transportation of both persons and goods has increased enormously in the last thirty years, but there is still doubt as to whether aircraft downed or lost at sea are subject to salvage.[32] Aircraft downed on the high seas constitute a prime example of the need for quick response to rescue life and property aimed at in the policy behind salvage law. They also represent a maximum coalescence of the elements necessary for an occurrence of international proportions. Yet there is no international accord governing recovery of aircraft. The Brussels Salvage Convention of 1910 makes no mention of salvage by or of aircraft.[33] A movement toward international agreement occurred in Brussels in 1938. Representatives of a broad cross-section of nations produced the Convention for the Unification of Certain Rules Relating to the Assistance and Salvage of Aircraft. This convention would have made applicable to aircraft in peril on the sea the salvage provisions of the 1910 Convention.[34] Like its counterpart the 1938 Convention is not self-executing. It requires five ratifications to bring it into effect. After thirty-six years, only three nations have performed the

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[29]Wildeboer, supra note 9, at 272-73.

[30]Further examination of the Convention's provisions, and its deficiencies, will occur in the discussions of recovery of aircraft and treasure.

[31]M. MacDougal and W. Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea, 546 (1962).

[32]Gilmore and Black, supra note 5, at 449.

[33]Wildeboer, supra note 9, at 12. In 1909 there were no over-water international air flights and the problem simply had not arisen.

[34]H. Reiff, The United States and the Treaty Law of the Sea, 151 (1959). As well as making aircraft subject to salvage law as set out in the 1910 Salvage Convention, Article 3 of the 1938 Convention forwarded the novel concept that remuneration would not depend on success. The fact that a downed aircraft makes its plight known via radio causes the probability of several would-be salvers answering the call. Under the article answering the call whether or not the rescuer finds the aircraft or is successful in recovery entitles the rescuer to reimbursement for out-of-pocket expenses. Norris, supra note 3, at 59-60.

necessary formalities.[35]

While there is the possibility that the 1938 Convention may bring needed order into aircraft salvage, the present state of aircraft recovery is dependent on municipal law. The British answered the problem by legislation making airplanes and the cargoes salvageable.[36] The United States has yet to resort to legislation, and the evolutionary process of changing the law through court decisions has not proved totally satisfactory. The problem the courts have faced is whether present maritime law will allow aircraft to be classed as vessels. The problem is compounded by existing statutes relating to smuggling, customs duties, navigation, and shipping which define "vessel" to sometimes include and sometimes exclude aircraft.[37]

In Foss v. The Crawford Brothers[38] in 1914, the court paid lip service to the need for flexibility in the face of changing times, but concluded the problem was one for legislation. In Lambros Seaplane Base v. The Batory,[39] the court backed off somewhat from the hard line taken in Foss. The court held that "...a seaplane when in the sea is a maritime object which is subject to the maritime law of salvage."[40] Lambros Seaplane Base was limited to seaplanes; therefore, the salvage status of a land-based plane downed on the sea is at present doubtful. The leading American scholars on maritime law, Norris, Gilmore and Black, urge in their treatises that salvage awards to distressed land-based aircraft should be made because such awards are in line with the beneficial policy underpinning salvage law.[41]

D. Recovery of Treasure

There is no uniformity among nations as to the recovery of treasure.[42] Not only is there divergency as to ownership, but also as to what actually constitutes treasure. The problem is further compounded by the overlap of two distinct concepts in maritime law, the "find" which is a subject in itself and "abandoned property" which is part of salvage

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[35] Italy, Mexico, and Guatemala. The United States, although instrumental in the formulation of the Convention, has yet to get requisite enabling legislation through Congress.

[36] Air Navigation Act of 1936. Gilmore and Black, supra note 5, at 449-50.

[37] Id.

[38] 215 F. 269 (D. Wash. 1914). A plane fell into Puget Sound and was successfully brought to shore. Recovery was denied.

[39] 215 F.2d 228, 232-33 (2d Cir. 1954). This case had a definite international character. The S.S. Batory, a Polish ship, picked up a downed seaplane on the high seas fifty miles from New York and continued en route to England where the plane was delivered to the British Receiver of Wrecks. The Polish salvor then instituted his libel in Federal Court in New York for a salvage award.

[40] Id. at 233.

[41] Norris, supra note 3, at 60-61. Gilmore and Black, supra note 5, at 450. The only limits these authors would place on salvaging distressed land-based planes are that the property saved be engaged in commerce or transportation, and that the salvage service be performed in an area within maritime jurisdiction.

[42] Kenny and Hrusoff, The Ownership of the Treasures of the Sea, 9 William and Mary L. Rev. 383, 399 (1968), [hereinafter cited as Kenny and Hrusoff].

law. At the outset it must be noted that the 1910 Salvage Convention neither applies to finds nor abandoned, or as it is sometimes called "derelict," property. The Convention assumes the existence of an owner with whom the salvor enters into a certain relationship which creates rights and duties in both.[43] As will subsequently be shown, there is no one principle controlling finds or derelicts so there cannot be said to be a general practice among nations.

Treasure may be defined essentially in line with the romantic images the word evokes. Gold, silver, coins, jewels and historic artifacts comprise the category of treasure. It exists in relative abundance hidden in and on the sea-bed. The frequency and practicality of its recovery have transformed treasure-hunting into big business.[44] Treasure is classified as a "find." It is property that belongs to no one.[45] The nations of the world fall into two groups, generally speaking, as regards the ownership of recovered treasure. For the sake of clarity, the first group will be said to adhere to the English Rule--recovered treasure belongs to the sovereign. The second group adheres to the American Rule--recovered treasure belongs to the finder.[46] The crucial characteristic to note is that title to recovered treasure vests in either the sovereign or the finder. There is no notion that title may somehow remain in the owner, thereby raising the possibility of salvage. The stark divergency as to who gets title to recovered treasure is of immense importance to a finder of treasure in international waters, particularly as regards where he can take such finds.[47]

The problem of ownership of abandoned property is more complex and in the absence of international uniformity more conducive to serious conflict.[48] Recovery of abandoned or derelict property presumes the relinquishment of hope of recovery by the owner. Abandonment may be express or implied as in the passage of a long period of time. Technically, the recovery of abandoned property is a branch of the law of salvage. "Should a vessel be abandoned without hope of recovery or return, the right of property still remains in her owner." The salvor gets a right of possession

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[43]Wildeboer, supra note 9, at 17.

[44]Kenny and Hrusoff, supra note 42, at 383.

[45]Norris, supra note 3, at 258-59. Beall, State Regulation of the Search For and Salvage of Sunken Treasure, 4 Natural Resources Lawyer 1 (1971).

[46]See Kenny and Hrusoff, supra note 42, at 383-398, for a thorough analysis of development of the two rules. The terms, English Rule and American Rule, are used since the two theories of ownership in essence evolved out of the maritime law development of England beginning with the Laws of Oleron in the late twelfth century.

[47]There has been a relatively recent development in American jurisdictions where the states of Florida and North Carolina have claimed ownership of historical artifacts in the sea against salvors and finders based on the English Rule. These claims involve objects within the territorial waters of these states and are thus beyond the scope of this writing. See Kenny and Hrusoff, supra note 42, at 397-99, and Beall, supra note 45, at 1-7.

[48]For a thorough treatment of property rights in abandoned property, see Comment, 12 William and Mary L. Rev. 97 (1970) [hereinafter cited as Comment].

from which he derives a right of salvage award either from the owner if he wishes the return of the salved property or from the judicial sale of the property.[49]

The orderly processes of salvage law are not necessarily the rule. In the United States the American Rule as to "finds" applies to title as well as to possession. An affirmative act of abandonment constitutes a repudiation of ownership by the true owner and a shift of title to the salvor.[50] Similarly, British courts apply the British Rule to abandoned property that is recovered by a salvor.[51] Title vests in the sovereign. Both Norris and Gilmore argue that the law of "finds" should not supplant salvage law as regards abandoned property at sea because of the ominous effect that divesting the owner of title would have in international occurrences.

> Were publicly abandoned marine property discovered on the high seas--international waters --regarded at law as "find" it could well be that violent and lawless acts of the eager or desperate "finders" would be thus encouraged.[52]

Part II: Implications of New Forms of Sea Use on the Law of Recovery

International law on recovery such as it is, and general maritime law as now applied by nations, have not changed in any fundamental way since 1930. Yet since that time the world has entered the jet age and the nuclear age, both having significant effects on sea use and the requirements for recovery of property at sea. In an era when nations and peoples of nations are coming into closer contact on the seas, exploring and exploiting their increasingly accessible wealth, uniformity of rights and duties and cooperation in the form of an international regime on sea and sea-bed use is demanded. Where processes of efficient conflict resolution are required, the law of recovery stands out as a conspicuous anomaly. At present, one finds little uniformity in the application salvage law concerning vessels and their cargoes. There exists wide and debilitating divergence on the recovery of aircraft distressed at sea. Uncertainty describes the legal status of the recovery of treasure and abandoned property. How should this competitive legal environment be integrated with the international regime now being sought to govern the exploitation of the sea and deep sea-bed?

The most satisfactory answer would be a return to the multilateral convention aimed at establishing an international regime concerning recovery of property imperiled or lost at sea. Such a regime could be a separate undertaking if it maintained a keen interest in keeping apace with the impact

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[49] Norris, supra note 3, at 246.

[50] Nippon Shosen Kaisha, K.K. v. United States, 238 F. Supp. 55 (N.D. Cal. 1969); Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452 (E. D. Va. 1960).

[51] Comment, supra note 48, at 101.

[52] Norris, supra note 3, § 158 (Supp. 1970).

that extensive exploitation of the deep sea-bed will have on recovery. Conceivably, an invigorated regime on recovery law could be developed within the framework of the broader regime that must be developed for the law of the seas. In either case the guiding policy behind the law of salvage, the encouragement of assistance to lives and property endangered by the sea, should remain the foundation of the reconstituted law of recovery.

A new international regime on recovery will have to discard the limitations presently imposed on objects subject to recovery. A new classification system is most certainly necessary. The present limitation in Article 1 of the 1910 Convention restricting salvage to sea-going vessels has been interpreted by national courts so as to subvert uniformity. For example, in The Netherlands an object is a vessel if it is able to sail, but it need not possess the means of self-propulsion. This kind of classification includes practically any object that floats to include floating docks, elevators, pile-driving frames, derricks, dredgers, pontoons, house boats and boat-bridges even if secured to land. In the German interpretation, a vessel must have the capacity to propel itself, must be able to carry goods and persons, cannot be of negligible size, and cannot be fixed to the shore. Thus, in the German view, boat-bridges, house boats, pontoons, rafts, floating docks, row boats, and canoes are not objects of salvage.[53] The United States classifies all craft capable of being used or navigated on the water as vessels. This classification includes scows, barges, derricks, sunken vessels and wrecks.[54] In France a craft must have the ability to sail and float to be a vessel. If it loses the ability to sail, it no longer is a vessel subject to salvage under the 1910 Convention. A sunken ship or a wreck would not qualify for salvage in France.[55] The lack of uniformity reflected above breeds conflict and should be exorcised from a new convention.

Aircraft should certainly be included in classifications of objects capable of salving and subject to being salved. Not only does the increase in air traffic over the seas call for aircraft inclusion, but so also does the progress of aircraft technology in producing salving instrumentalities of great potential such as the heliocopter. A new classification system should also be flexible enough to provide for advancing technology. One area badly in need of attention is that of nuclear ships and the transportation of nuclear fuel. The importance of nuclear fuel for peaceful, beneficial uses will lead to increased shipment of irradiated materials.[56] Here legal minds will have to work most closely with scientifiv experts. Nuclear accident and nuclear damage at sea may pose situations in which the assistance policy of salvage should be discouraged or at the very least highly regulated. Nuclear fuels will most likely be public property. The obtaining of possession of such material by salvors of

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[53] Wildeboer, supra note 9, at 18-19.

[54] Norris, supra note 3, at 52.

[55] Wildeboer, supra note 9, at 19.

[56] Symposium on Maritime Carriage of Nuclear Material, International Atomic Energy Agency 3 (1973).

nations other than the owner-nation could cause serious international conflicts. In a particular set of circumstances it might be safer to forego salvage of a sunken vessel completely, rather than risk nuclear pollution.[57]

A system of classifying vessels must provide for the appearance of novel technology developed to tap the sea's resources. Undersea vehicles, permanent undersea installations,[58] undersea mining equipment, artificial islands, and the myriad of unique technology sure to spring forth in future years will all be subject to the non-discriminatory hazards of the sea and will certainly be worthy of recovery and salvage assistance. Classification of property other than vessels subject to salvage should probably follow the view espoused in present American maritime law. "Anything rescued from navigable waters, without regard to what it is or how it got there, will be considered salvageable."[59] Emphasis must be placed on the word, "rescued." Property to be recoverable must have been in the possession of someone.[60] Rights to possession and ownership of mineral wealth in and on the sea-bed is a problem of international law to be solved by international regime. The possibility of classing the sea-bed's mineral wealth as treasure and therefore subject to find should be discounted. While it is the most patent speculation to guess what form the law of the sea concerning sea-bed exploitation will ultimately take, classing sea-bed minerals as treasure would lead to the heightened conflict environment envisaged by Norris.[61] A wild grab for the sea-bed's mineral resources is not an acceptable alternative.

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[57]The only international accord reached to date concerning salvage of nuclear materials is in the 1962 Brussels Convention of the Liability of Operators of Nuclear Ships where Article II shifts the absolute liability of a nuclear ship operator for nuclear damage to a salvor who attempts to raise a nuclear wreck without the operator's permission. *See* 6 *A. Benedict*, *supra* note 15, at 653-58 and 9 *M. Whiteman*, *Digest of International Law* 287 (1968).

[58]MacDonald, Recent Trends in the Development of the Law of Undersea Installations, *Current Aspects of Sea Law UNC-SG-74-03*, 29 (1974).

[59]Colby v. Todd Packing Co., 77 F. Supp. 956 (D. Alaska, 1948).

[60]Several difficult issues will rear their heads concerning the recovery of mineral wealth of the deep sea-bed. For example, assume that a license to mine a tract of sea-bed is granted a company under authority of an international regime. That company mines and places on board a cargo ship a quantity of manganese nodules. A storm forces the ship's captain to jettison the cargo away from the tract. Do the nodules constitute objects subject to salvage, or do they revert to the sea-bed to be controlled by the international authority? Probably the former.

[61]*See* text at note 52, *supra*. Furthermore, the existing Continental Shelf Convention, U.N. Resolution 2479, on the common heritage of mankind, and the on-going negotiations toward a definitive Law of the Seas, seek to establish an international regime which will delineate rights and authority over sea-bed resources that would remove them from recovery based on "find." 4 *Whiteman* 843-856. II *Yearbook of the I.L.C.* 297-98 (1956).

Finally, and perhaps most importantly, any international regime on recovery of property at sea will have to construct a procedural framework to adjudicate results. If the variant interpretations of national admiralty courts are to be avoided, adjudicatory machinery must exist and be effective. If an international tribunal to handle all recovery litigation is too unrealistic, given nations' tendencies jealously to guard their sovereignty, resort might be had to an international body whose function it would be to determine standards and arbitrate disputes involving variant application of those standards. Uniform procedural machinery is crucial to the achievement of uniformity of results in recovery law disputes.

Conclusion

The recovery of vessels, aircraft and treasure in international waters represents an area of private international law in which uniformity of the practices among nations would be of most salutary benefit. Uniformity would serve to reduce conflicts among individuals and nations that erupt out of variant application of what is basically a humane and beneficial policy--the rendering of assistance to those distressed upon the sea. The heightened interest of the international community in exploiting the mineral wealth of the seas lends added immediacy to unifying the law of recovery. The present state of recovery law, far from moving toward uniformity, encourages divergence. Municipal maritime law still provides the flesh to general principles of salvage law. The attempt to unify through international convention succeeded chiefly in providing lacunae in which international divergency was institutionalized. The horizon of recovery law does not adequately cope with technological progress of the last thirty years. It cannot hope to handle adequately the problems that will arise as the international community moves into a dramatically new phase of sea use. The law of recovery requires a rejuvenation, international in scope, and aimed at achieving a discernible and salutary uniformity.

INTERNATIONAL LAW PERTAINING TO CRIMES ABOARD AIRCRAFT

Robert E. Collins

In the seventy-one short years since the Wright brothers first flew at Kitty Hawk, their invention has made astounding progress and has revolutionized almost all aspects of the modern world. The changes are evident everywhere--the vacations in Europe, business trips between distant cities, air war in every conflict since World War I, and men walking on the moon. The full development of aircraft has made not only communications, but personal travel between any two points of the globe, quick and easy. It has brought the world closer together, has helped make all nations aware of the problems in the world, and has created some problems of its own.

The airplane can travel between nations, or over nations, at high speeds, touching several sovereign jurisdictions in a single trip. This makes the regulation of aircraft a difficult problem of jurisdiction, even more so than the historical problem of maritime jurisdiction, because the domain of aircraft is unlimited, unlike the limited confines of the sea.[1] When a crime is committed aboard an aircraft in flight, a multitude of states may claim the right to impose jurisdiction. Some of the interests which justify jurisdiction are: the nationality or registry of the aircraft involved, the nationality of the parties involved, the domicile of the air carrier, the place where the actor actually committed the offense, the place where the wrongful act takes full effect, the interests of the State directly under the aircraft in preserving public order, the place where the aircraft lands after the offense, and the physical power of the authorities in the landing state to arrest and investigate.[2]

In recent times, this problem has come to the forefront due to repeated hijackings of aircraft for ransom, transportation, or political purposes. The resultant loss of dollars and lives has made the jurisdictional problems more pressing, and more difficult.

History

The first record of concern over the control of air space is in Roman law dating back over 2000 years. A careful examination of early property law in Rome reveals the philosophy most aptly expressed by the Latin maxim, *cuius est solum, eius est usque ad caelum*.[3] Roughly translated, this expression means that he who owns the surface of the earth, owns or has an exclusive right to all things that are upon the land or above it to an indefinite height. This early conception, although it arose through no connection whatever with air travel, has had a visible influence on the progress of air law since the invention of flying machines.

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[1] J. Verplaetse, *International Law In Vertical Space*, (Madrid, 1960), at 4, [hereinafter cited as *Verplaetse*].

[2] *Id.* at 417.

[3] J. Cooper, *The Right To Fly*, 58 (1947).

The real beginning of air law in relation to aircraft was shortly after the flight of the first flying machine in 1782. The "machine" was a balloon filled with hot air piloted by the Montgolfier brothers in France.[4] The first proclamation of air law was on April 23, 1784, when French police enacted a regulation prohibiting the flight of a Montgolfier (as the balloons were called) without a permit from the police.[5]

The early history of states' attempts to deal with aircraft in their territories showed concern on the part of the states, and a great deal of confusion over exactly how to handle the situation. When balloons or dirigible airships crossed the borders and landed in foreign states, the action was usually punitive, but there was no uniform practice. Sometimes the states would seize the aircraft and charge the pilots with espionage. At other times the aircrafts were charged with violations of customs rules.

All of the states initially reacted as if the airspace above their territory was an extension of their territory over which they held exclusive jurisdiction. This was similar to the practice of claiming territorial waters to a specified limit in the seas surrounding a country; however, the claims on airspace above a territory recognized no limits.

As air travel became more frequent, even before the introduction in 1903 of motor driven aircraft, there began to develop three theories with respect to the control of airspace.

The first theory proposed was that of free air. It was first expressed by Fauchille, an outstanding French international lawyer in his work, _Le domaine aérien et le régime juridique des aérostats_.[7] The argument is based on a slightly limited idea of sovereignty. Under this theory, sovereignty is a direct, permanent and actual tie between the possessor of sovereignty and the subject matter of that sovereignty. It results in exclusive dominion of the sovereign over the subject. Sovereignty, therefore, is the consequence of an actual, material, lawful possession (although the legality can be subsequent to actual possession).

Since there can be no real possession or control of the airspace, Fauchille argued, there can be no sovereign dominion over airspace. There were no recognized rules of international law on which sovereign rights over airspace could be based. The only right states could assert was the right to prevent any actions in the airspace above its territory which could endanger its existence or the personal safety of its citizens.[8] Therefore the proponents of free air allowed a state, for the purpose of self-defense, to forbid flights of alien airships below 1,500 meters.

However, there were many opponents of the free air approach. When Fauchille proposed the 1,500 meter limit it was based partly upon his premise that reliable photographs could not be taken from more than that distance, and the only current use of aircraft which seemed dangerous was for reconnaissance. However, it quickly became clear that the airplane was capable

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[4] _Verplaetse_, _supra_ note 1, at 20.
[5] _Id_. at 20.
[6] _G. Gal_, _Space Law_ 53 (1969), [hereinafter cited as _Gal_].
[7] _Id_. at 49.
[8] _Id_. at 50.

of infinitely more dangerous actions and many sought to deal with the situation by proposing a theory of air sovereignty.

The first serious movement in favor of this rule was at the 1906 session of the Institut de Droit International at Ghent.[9] Supporters of this doctrine argued that under the free air doctrine states would not only be open to attack from the air but that belligerent states could conduct military operations above neutral territory. Their theory relies on the close connections between the earth's surface and water space with the airspace above them. The state sovereignty is necessarily three-dimensional: it must extend vertically to the airspace above it for productivity and protection. While the air sovereignty advocate did concede that there should be an allowance for non-offensive traffic over a territory, they asserted that with the future development of aircraft there would become a need for more control of the airways by subjacent states.

A third theory which developed was a mutation of the law of the sea. Pointing to the analogy of territorial waters and the high seas, the authors of this theory proposed that the airspace be divided into different layers, or zones, each of which would have a different status. Different theories set the limits at various heights--some determining the area of state sovereignty by the height to which a gun could be fired, others proposed the height of the tallest building. The leading theory of Merignac proposed three zones.[10] The first zone, called the zone national, reached to an altitude of 200 meters and was under the exclusive sovereignty of the state. The international zone, between 200 meters and 400 meters, was free except that offensive or dangerous flights could be condemned by the subjacent state. The airspace above 400 meters was considered completely free.

It was in this background that the first international meetings began to consider the problem of the regulation of airspace. The first "Conference of Air Law" met in Paris in 1889.[11] This meeting resulted in a first Draft of an International Code of the Air, advocating free air, submitted to the Institut de Droit International by Fauchille at the Ghent session in 1906. At this meeting the free air concept was accepted by the parties attending with a strong minority in favor of the air sovereignty approach.

In 1909 some Paris jurists founded the Comité International de Droit de l'Aviation and in 1911 the problem of crime aboard aircraft was first touched by Fauchille at a meeting of the Institute of International Law.

At most of these early meetings, the free air theory was accepted. But with the beginning of the First World War and the use of guns and bombs in aircraft, many states began to claim air sovereignty. The first actual declaration came from a neutral state. A Swiss declaration of August 4, 1914, forbade the penetration of its airspace by any aircraft.[12] Before the end of the war, the principle of air sovereignty had become universally accepted.

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[9] Id. at 52.
[10] Id. at 53.
[11] Verplaetse, supra note 1, at 20.
[12] Gal, supra note 6, at 55.

Convention of Paris

The first international multilateral air treaty was the Convention of Paris relating to the Regulation of Aerial Navigation. It was signed by most of the Allied and Associated Powers on October 13, 1919. Article 1 of the Convention states:

> The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory.[13]

Article 2, however, provided that in times of peace, each party would accord the other parties the freedom of innocent passage in the space above its territory. Thus, the principle of air sovereignty was decided, and every conference since the Paris meeting has begun with this basic premise.

The Convention set up the International Commission for Air Navigation, a permanent organization under the League of Nations. Its function was to determine principles of nationality and registry of aircraft, conditions of airworthiness, jurisdiction of personnel and related problems. The CINA accomplished much toward standardizing European flying, but China, the U.S. and many American republics never ratified the Paris Convention. So, after World War II, it was recognized that a new convention should meet to discuss the tremendous expansion of aircraft use and consequently, the legal problems involved.

Chicago Convention

Therefore, in November, 1944, the Chicago International Civil Aviation Conference began its meetings. All members of the United Nations, except the U.S.S.R., and many non-member states were in attendance.

The conference, although it was considered a failure at the time, made a number of significant accomplishments. The major accomplishment was the organization of an adminsitrative and advisory group known as the International Civil Aviation Organization (ICAO). The primary task of the ICAO is to fix standards for air safety and operations.

The Convention dealt primarily with the flight of aircraft over the territory of Contracting States, the nationality of aircraft, and air navigation. There was really no consideration at this time of the problems of crimes on board aircraft.

The specific problem of crime aboard aircraft was first considered by a subcommittee of the ICAO. At its ninth session at Rio de Janeiro in 1953, the Legal Committee of the ICAO established a Subcommittee on the Legal Status of Aircraft. At its first plenary session in Geneva in 1956, the Subcommittee narrowed the scope of its study to (1) acts which are crimes under the law of the states of registration of aircraft and the law of the state in which the act occurred, and (2) acts which are crimes according to the law of one of the states mentioned in (1).[14]

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[13] Verplaetse, supra note 1, at 23.
[14] S. Shubber, Jurisdiction Over Crimes on Board Aircraft 7 (1973).

In Montreal in 1958, the subcommittee developed a draft convention called "Legal Status of Aircraft," which was the first convention on crimes aboard aircraft. The draft provides for the jurisdiction of the state of registration and the jurisdiction of the territorial state (the state over which the act occurred) under certain conditions.

This draft was submitted to the Legal Committee of the ICAO at its session in Munich in 1959. The Legal Committee drafted its own convention, broader in scope, entitled, _The Draft Convention on Offenses and Certain Other Acts Occurring on Board Aircraft_. It provided not only for jurisdiction over crimes aboard aircraft, but also for security against double trial if multiple jurisdiction arose; the rights and duties of aircraft commanders, members of the crew and passengers; and the immunity of certain acts. Jurisdiction was granted in some cases to the state of landing as well as the previously mentioned state of registration and the territorial state.

The Convention was returned to the subcommittee for consideration and suggestions at its Montreal meeting in 1962. The Legal Committee met in Rome later in 1962 and prepared a final draft: _Draft Convention on Offenses and Certain Other Acts Committed On Board Aircraft_. At this conference, the problem of aircraft hijacking was first discussed and an article was added to the final draft dealing with hijacking.

Tokyo Convention

In order to effectuate the ideas contained in the Rome draft, the ICAO Council convened a conference at Tokyo, from August 20 to September 14, 1963. Sixty-one states, including the United States and five international organizations were represented at the conference.

The Tokyo Convention was called specifically to consider the conduct and activities of persons flying in aircraft. Therefore, it deals not only with criminal offenses aboard an aircraft in flight, but also any acts which may threaten the safety of the aircraft, persons or property on board, or acts which jeopardize order and discipline on board an aircraft in flight.[15]

Article 1, paragraph 1(a) reads: "This Convention shall apply in respect of: (a) offenses against penal law." The most significant part of this provision is that its scope is usually wide. It applies to any violation of penal law on board, regardless of whether or not the act endangers the safety of the aircraft or persons or property on board. Therefore, offenses from smuggling, theft, or extortion, to the more serious offenses of hijacking and murder, are within the scope of the convention.

Having established that violations of "penal law" are governed by this Convention, the problem immediately arises, what penal law? Is it the law of the state of registry, the state of landing, the state flown over, or any state? There are many interpretations which could be given. For example, the Italian representative at the Tokyo Convention proposed that the phrase applied to the penal law of any state, whether a party to the Convention or not. This universal penal law approach did not find significant support at the Convention. The United States' representative proposed that the phrase

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[15]_Id_. at 142.

referred to the state of registration of the aircraft. The Swiss representative suggested that the phrase was in reference to the laws of any Contracting State and proposed that the provision read: "Offenses against the penal laws of a Contracting State."[16]

However, the interpretation which seemed to draw the most support was that the term, "penal law," referred to the laws of the state actually asserting jurisdiction under Articles 3 and 4 of the Convention, which will be discussed later. This interpretation also seems to be the most logical one because a State exercising jurisdiction should not be expected to use the law of a foreign state as the basis of its determination of the issues.

It should be mentioned here that although Article 1(1)(a) makes the scope of the Convention extremely broad, there are some limitations on that provision. Article 2 of the Convention reads: "Without prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offenses against penal laws of a political nature or those based on racial or religious discrimination."

The problem here again is interpreting exactly what is a political, racial, or religious act or offense. The immediate thought which presents itself is the recent rash of hijackings for political reasons. However, since a hijacking would almost of necessity threaten the safety of the aircraft or persons and property on board, it does not come within this provision and would be governed by the Convention. The problems of interpretation in this area cannot be satisfactorily decided by a review of the proceedings of the Convention and in most cases will have to be resolved in each individual case under international law guidelines.

Apart from the violations of penal laws, the Convention covers [Article 1(1)(b)]: "acts which, whether or not they are offenses, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board."

At first glance, it would seem that this provision, in view of the broad scope of Article 1(1)(a) is unnecessary. Most acts imaginable, from hijacking to smoking on board the aircraft, which would endanger the aircraft, persons or property on board, are within the first provision. But the real key to paragraph 1(b) is the power of the aircraft commander under Chapter III to act to restrain and/or discharge a passenger when that passenger's actions bring him within the scope of the Convention. Without this provision, if a passenger's actions seemed to be disrupting the aircraft or threatening its safety, an officer might be hesitant about taking any action for fear that the activities of the passenger might not come within a violation of a penal law. The commander is presumed to be only a layman in international law and if it were necessary for him to think twice about his actions, extensive harm could result to the aircraft and all parties involved. The commander is deemed to be knowledgeable about matters which may adversely effect the aircraft and may safely exercise his judgment in this area under

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[16] _Id._ at 153.

paragraph 1(b) without exposing himself to unreasonable risks if his judgment does not coincide precisely with penal laws.

Finally, in considering the scope of the Convention, attention must be accorded to Chapter IV, Article 11; Unlawful Seizure of Aircraft. This provision, which seems to be added as an afterthought, was occasioned by the recent outbreak of hijackings as forums for political expression or high altitude extortion.

The first recorded hijacking of an aircraft was in 1948.[17] The motive for the earlier hijackings was usually flight from one country by political dissidents to another country which was more in line with their philosophies. However, the act became increasingly popular in the sixties as a means of extortion, and publicity for political causes.

Article 11(1) reads: "When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft."

A number of points need to be made concerning this provision. First, it is apparent that a full scale take-over of the aircraft is not necessary to bring the Tokyo Convention into play. Interference short of an actual take-over is enough to obligate Contracting States to aid the aircraft. Another important point is that while Article 1(1)(a) and Article 11(1) tend to overlap, the obligations of the Contracting States are different. A violation of Article 1(1)(a) brings the entire Convention into play, while Article 11(1) obligates the Contracting States to use their authority only to restore control of the hijacked aircraft to its lawful commander.

A third significant provision of Article 11(1) is that it obligates states to act even before an act of hijacking is committed. In the face of a multitude of hijackings in recent years, this places at least a minimal responsibility upon all Contracting States to attempt to prevent hijackings, rather than simply helping to restore the aircraft after the fact.

Having considered the scope of the Convention, it is now appropriate to turn to the second question, what state or states have jurisdiction over crimes committed on board aircraft? Article 3(1) of the Convention reads: "The State of registration of the aircraft is competent to exercise jurisdiction over offenses and acts committed on board." This provision assures that there is always at least one state with the authority to assert jurisdiction over an offender under any circumstances. Under customary international law before the Tokyo Convention, there were often claims by multiple jurisdictions, but there were also instances in which no state could positively assert jurisdiction. This occurred due to the fact that all states recognized the power of the state of registry to assert jurisdiction over acts committed while the aircraft was over the territory of that state, but many states did

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[17] _Id._ at 169.

not recognize jurisdiction of the state of registry when the aircraft was outside the territorial limits of the state.

However, Article 3(1) of the Convention does not geographically limit the jurisdiction of the state of registry in any way. The Convention, therefore, recognizes the customary rule of jurisdiction within the territory of the state of registration, but extends this jurisdiction to include extra-territorial areas also. This makes it impossible for an offender to escape prosecution because no state is competent to assert jurisdiction.

But the problem of multiple jurisdictions seems to remain unaffected by the Tokyo Convention. The provision makes no mention of the jurisdictional claims of the state of landing, the state of the victim, the state of the offender, and only limited reference to the territorial state (the state flown over). Could not all these states still assert jurisdiction as they often have under customary international law?

The answer to this question lies in the basic nature of international law. International law is not a collection of hard and fast rules which can be enforced under all circumstances. Since the parties to public international law are all sovereign states, they cannot be forced, short of warfare, to act in accord with the principles of international law. Its enforcement depends upon the good faith of all nations involved. Treaties and other formal expressions of international law are attempts on the part of the states involved to develop cooperation and uniform standards in matters concerning all states.

When viewed in this light, the Tokyo Convention was an attempt by all Contracting States to set forth uniform standards for the exercise of jurisdiction over crimes which occur on board aircraft, whether they take place over a particular state or over territory or waters not claimed by any state. The Convention expressly grants jurisdiction to a definite state and it limits, at least by implication in not granting jurisdiction in other cases, that jurisdiction exclusively to the state specified. In any case, if Contracting States other than the state of registry asserted jurisdiction the Tokyo Convention would give the claim of the state of registry the superior claim.

This solves the question of who can assert jurisdiction, but it leaves open the question of whether or not the state of registry of the aircraft is required to exercise this jurisdiction. Article 3(2) reads: "Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the state of registration over offenses committed on board aircraft registered in such state." This question is answered by reference to the discussions. Sir Richard Wilberforce, the head of the United Kingdom delegation, proposed that Article 3(2) be drafted to "reflect the principles that, while each state is obliged to establish jurisdiction over offenses committed on board aircraft registered in that state, each state has power to define the precise offenses over which jurisdiction is to be asserted and to decide whether to enforce its jurisdiction."[18] This proposal was accepted by a vote of 23 to 1.

Thus, the state of registration has jurisdiction, but it also has

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[18] *Id.* at 69.

the authority to determine whether or not it will exercise jurisdiction in cases of offenses committed on board aircraft of its nationality.

The second question of jurisdiction is the authority of the territorial state to assert jurisdiction. Article 4 states: "A Contracting State which is not the state of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offense committed on board except in the following cases:

a) the offense has effect on the territory of such state;
b) the offense has been committed by or against a national or permanent resident of such state;
c) the offense is against the security of such state;
d) the offense consists of a breach of any rules or regulations relating to the flight or maneuver of aircraft in force in such state;
e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral international agreement.

Although Article 4 does not make specific reference to the territorial state, there are a number of points which indicate the drafters had this in mind. First, it cannot be asserted that "in flight" in Article 4 applies to the aircraft wherever it may be. It is an established rule of international law that ships and aircraft on or over the high seas or territory not claimed by any state are subject to the exclusive jurisdiction of the flag state. Also, it is evident that no state would attempt to interfere in any event occurring on board an aircraft flying in the territory of another state. Furthermore, paragraph (a) refers to the "effect" of the offense on the territory of a state. If "effect" is viewed as a physical effect, it could only take place while the aircraft is over the territory of a specific state. Finally, in paragraph (d) the article refers to a breach of any rules or regulations, which would only be in force in the territorial airspace of a state.

Therefore, it is contended that the only jurisdiction recognized other than that of the state of registration, is the jurisdiction of a state being flown over, if one of the enumerated offenses of Article 4 occurs. In that case the territorial state is entitled to interfere with the aircraft. In other words, the state may force the aircraft to land in order to take the steps necessary to exercise its criminal jurisdiction over the offense committed.

There is one apparent problem left unsolved by the Convention in conferring jurisdiction. Articles 3 and 4 both grant jurisdiction, but there is no indication of whether or not the jurisdiction stated in each case is exclusive or concurrent with the other. If an offense does not fall within Article 4, the problem is simple; there is no other jurisdiction other than that of Article 3. However, if both Article 3 and Article 4 could apply, there is no provision for settling which jurisdiction controls. It is possible to speculate that, since the goal of the Convention was to unify and simplify the instances of jurisdiction, when a state is given jurisdiction under Article 4, it takes precedence over Article 3. This is analogous to the reasoning used in determining that Article 3 grants exclusive jurisdiction to the state of registration. The logical argument is that express provisions

at least lend authority to a claim of jurisdiction by a Contracting State.

There is one further provision which must be considered in determining jurisdiction. Article 1(2) states that the Convention applies to offenses committed on board "any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any state." Article 1(3) defines in flight as from "the moment when power is applied for the purpose of takeoff until the moment when the landing run ends." This is in keeping with the premise that crimes committed within the actual territory of a state are under the exclusive jurisdiction of that state. Therefore any offenses committed while the aircraft is on the ground within the territory of a given state are subject to the jurisdiction of that state and do not come within the reach of the Tokyo Convention.

There is one final provision which should be noted before moving on to developments subsequent to the Tokyo Convention. It became apparent after the Chicago Convention that the designation of the state of registration as the state competent to exercise jurisdiction did not immediately solve all jurisdictional problems.

One of the major gaps in jurisdiction which resulted from the state of registration jurisdictional criterion resulted from the ownership of aircraft by joint operation organizations. These organizations are established by states in order to operate air services and to pool their resources for the maximum benefit of all states concerned. Examples of this type of organization are the Scandinavian Air System and the British Commonwealth Pacific Airlines. The problem which arose prior to the Tokyo Convention was that often aircraft owned by these organizations were not registered in any state. Therefore, whenever an offense should occur on board one of these aircraft, there was a considerable amount of confusion as to which of the party states of the organization was entitled to jurisdiction over the aricraft. This problem was considered later in the Tokyo Convention, and Article 18 was drafted in order to fill this gap in jurisdiction. Article 18 provides that: "If Contracting States establish joint air transport operating organizations or international operating agencies, which operate aircraft not registered in any one state, those states shall, according to the circumstances of the case, designate the state among them which, for the purposes of this Convention, shall be considered as the State of registration and shall give notice thereof to the International Civil Aviation Organization...."

This provision allows the members of the joint operating organizations the opportunity to consider the problem in advance and file an official notice which will control any subsequent disputes if an offense, in fact, occurs.

The Tokyo Convention stands today as the major authority in international law dealing with crimes aboard aircraft. However, there have been two major Conventions since the adoption of the Tokyo Convention (which came into force on December 4, 1969). Both attempted to deal with specific problems in the field of international aircraft regulation and they merit further attention.

Later Developments

The popularization of hijacking in the sixties, already cited in this discussion, made that particular crime aboard aircraft a matter of considerable international concern. From January of 1969, until August of 1971, there were 141 aircraft successfully hijacked. The hijackers came from more than 32 different nationalities. Five aircraft were blown up by hijackers, two others crashed and two more suffered extensive damage. Over 12,000 passengers and crew members were victims of hijackings. Of those, 477 were held hostage, 56 were killed and another 73 were injured.[19]

As a result of these acts of violence, the ICAO convened a Convention for the Suppression of Unlawful Seizure of Aircraft at The Hague in December of 1970. Its purpose was to unify and coordinate international efforts to combat the rising tide of aircraft hijackings.

Article 1 of the Hague Convention defines the scope of the Convention. It provides that "any person who on board an aircraft in flight

> a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of that aircraft, or attempts to perform any such act, or
> b) is an accomplice of a person who performs or attempts to perform any such act

commits an offense."

The Tokyo Convention sets out guidelines for jurisdiction based mainly on the state of registration and the state over-flown. Article 4 of the Hague Convention confers jurisdiction in the following cases:

> a) when the offense is committed on board an aircraft registered in that state;
> b) when the aircraft on board which the offense is committed lands in the territory with the alleged offender still on board;
> c) when the offense is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that state.

But the Hague Convention goes farther than the Tokyo Convention because the Tokyo Convention did not require the state which has jurisdiction to act. The Hague Convention, under Article 7, says in part: "The contracting state in the territory of which the alleged offender is found, shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution."

Article 2 also provides that: "Each contracting state undertakes to make the offense punishable by severe penalties."

Thus, while the Hague Convention has a limited scope, it provides a broader base of jurisdiction than the Tokyo Convention and it obligated

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[19] S. Agrawala, Aircraft Hijacking and International Law 19 (1973).

the Contracting States to take action in this area. It was drafted as a tough solution to a pressing problem.

The Hague Convention was still in its final stages when it became apparent that its scope had been too limited. It applied only to unlawful seizure of aircraft in flight, which left open the problems of sabotage and armed attacks against an aircraft while it was on the ground. Between 1949 and 1970 explosives detonated within aircraft damaged or destroyed twenty-two aircraft and caused the death of over 400 people. While the Legal Committee of the ICAO was considering the Draft Convention on Unlawful Seizure, on February 21, 1970, two aircraft were struck by explosions. One crashed in Switzerland causing the death of forty-seven people on board.[20]

To combat this problem, the ICAO Assembly convened a session in June, 1970, in Montreal. The pressing need to establish a convention is illustrated by the fact that over ninety states were represented on short notice. The results of the Montreal session is a convention captioned, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Avaition.

The Montreal Convention has many of the features of the Hague Convention. The first part of Article 7 of the Montreal Convention which obligates states to take action if they have jurisdiction is identical with Article 7 of the Hague Convention. Also, Article 3 of the Montreal Convention, calling for severe penalties, is almost exactly the same as Article 2 of the Hague Convention.

The main difference in the two Conventions is their scope. The Montreal Convention provides in Article 1:

> Any person commits an offense if he unlawfully and intentionally:
> a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
> b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
> c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
> d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
> e) communicates information which he knows to be false, thereby endangering the safety of aircraft in flight.

The jurisdictional limits of the Montreal Convention are similar to those of the Hague Convention with one exception: the Montreal Convention

[20] Id. at 80.

gives a state jurisdiction when an offense is actually committed within the territory of that state. However, this provision does not really effect a significant change because this right of jurisdiction is recognized almost without exception in international law.

Conclusion

Aircraft presently play a key role in international relations. Furthermore, aircraft technology has improved rapidly and there is every reason to believe that the future will see new developments and refinements in the field of aviation. With these advancements, inevitably, will come more problems. However, the progress that has been made up to this point illustrates the willingness of states to deal with the problems as they arise. Hijacking is an excellent example of a problem which brought states to the conference table and compelled positive results. Due to international cooperation, the number of hijackings has dropped since 1970.

There are still, however, at least two major problems which merit careful consideration in the future.

The first was touched upon briefly in the discussion of the Tokyo Convention. There still remains in the Tokyo Convention some ambiguity in the area of jurisdiction. The Convention does not clearly establish priorities when several states claim jurisdiction. While the Convention is presently functioning satisfactorily under the interpretations outlined in this discussion, there is a real possibility of future difficulties unless more detailed guidelines are established.

A second area which needs attention is the international application of the Conventions already drafted. They can only affect the states which have ratified them and as yet, neither the U.S.S.R. nor Communist China has been a party to any of the recent Conventions cited in this discussion. Both states have considerable aviation resources, and it may well prove difficult to provide a uniform international treatment of crimes aboard aircraft without the interest and cooperation of these two states.

Much has been done in the short time since the area of crimes aboard aircraft was first considered, but the future will occasion new problems and it is hoped that the current trend of cooperation in this field will continue and provide adequate solutions. What happens in the air space above the oceans has become an important facet of the laws to promote safety at sea.

Bibliography

S. Agrawala, AIRCRAFT HIJACKING AND INTERNATIONAL LAW, (1973).

B. Alper and J. Boren, CRIME; INTERNATIONAL AGENDA, (1972).

M. Bassiouni and V. Nanca, A TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME II JURISDICTION AND COOPERATION, (1973).

J. Cooper, THE RIGHT TO FLY, (1947).

G. Gal, SPACE LAW, (1969).

N. Katzenbach and L. Lipson, REPORT TO THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION ON THE LAW OF OUTER SPACE, (1961).

W. Hyman, MAGNA CARTA OF SPACE, (1966).

R. Mankeiwicz, YEARBOOK OF AIR AND SPACE LAW, (1967).

E. McWhinney, AERIAL PIRACY AND INTERNATIONAL LAW, (1971).

S. Shubber, JURISDICTION OVER CRIMES ON BOARD AIRCRAFT, (1973).

J. Verplaetse, INTERNATIONAL LAW IN VERTICAL SPACE, (1960).

I. Vlasic, EXPLORATION IN AEROSPACE LAW, (1968).

STARE DECISIS IN THE DEVELOPING LAW OF THE SEA

David H. Rogers

It would no doubt be a perversion of the best that resides in the body of legal jurisprudence if the principle of stare decisis were advanced by some advocates as the protector of the obsolete and a harbor for the archaic. Nor would such an argument conform with the philosophy of Dean Roscoe Pound who, in lecturing at the University of Georgia Law School, said:

> Law must be stable and yet it cannot stand still. Hence all the writing about law has struggled to reconcile the conflicting demands of the need of stability and the need of change.... Thus the legal order must be flexible as well as stable;...the need of stability is emphasized in the maxim stare decisis et quieta non movere.[1]

And so it is that when a court recognizes the value of stare decisis, it is giving stability to the law, not immobility.

There could scarcely be a more urgent requirement for legal stability than in the emerging law of the sea. Dr. Arvid Pardo, called by many the father of the developing sea law, remarked to one writer, "I think most people are finally realizing that we are involved in a revolution in our uses of ocean space. In the face of this revolution, traditional law of the sea has almost totally collapsed."[2] More to the point, Dr. Pardo warned that man would quickly have to formulate new rules for the conduct of nations on the oceans and the seabeds if widespread warfare was to be avoided.[3]

Much of the sought-after stability will be reached through an elaboration of conventional international law. Attendance at and good-faith participation in the Law of the Sea Conferences in 1958, 1960, 1973, and 1974 by most responsible nation-states is indicative of the accelerating effort to codify or re-codify the important areas of international law as it affects the seas and seabeds. The four conventions forthcoming from the 1958 conference were major achievements, considering that no similar multi-national treaties had ever preceded them, and it is to be greatly hoped for that the 1975 Law of the Sea Conference in Geneva will carry this progress further.

But much responsibility also rests with the several international judicial bodies which must interpret both the conventional and customary

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[1] R. Pound, Lecture Two - Stare Decisis, in Law Finding Through Experience and Reason, (1960), at 23, 33.

[2] Anderson, Chaos at Sea, Saturday Review/World, November 6, 1973, at 15.

[3] Id. at 14.

international law, when they are called upon to do so.

> More recently...claimants to use and authority over the ocean have increasing resort to fully organized arenas, including both specially constituted ad hoc conferences and more durable international institutions. The roles of the Geneva conferences, of the International Court of Justice, and of various arbitral tribunals in the prescription and application of policies are familiar.[4]

Consequently, the International Court of Justice (hereinafter, ICJ) at The Hague can expect to play a larger role in the defining and settling of controversies spawned by man's current rush back to the sea. It is the purpose of this paper, then, to examine what has occurred to date in the development of the law of the sea by the highest tribunal of international law and to discern, if possible, any trend toward the creation of a body of jurisprudence within the emerging sea law which might be accurately identified as <u>stare decisis</u>.

A necessary first step would be to circumscribe that much of ocean law intended to be analyzed by this paper. In the first place, some circumscription is essential in order to comply with the academic and Sea Grant format. More importantly, however, the paper ought to endeavor to outline more clearly this amorphous legal sea nymph which has led so many confreres on such a chase.

This new or emerging law of the sea, if it may be called that for purposes of distinction, would address itself to the various proprietary interests of nations in the ocean per se. It includes, <u>inter alia</u>, jurisdictional interests of the coastal or littoral states in such zones as territorial waters, contiguous zones or "patrimonial seas," and conservation zones. Likewise, it will obviously include deep sea fishing rights and the mining or extraction of resources on or beneath the seabed.

This much law of the sea will <u>not</u>, therefore, encompass what is considered to be admiralty law. Thus, the celebrated case of the <u>S.S. Lotus</u> decided in 1927 by the Permanent Court of International Justice (hereinafter, PCIJ), involving a collision at sea between French and Turkish vessels, was primarily a maritime case and will not be discussed. The Eastern and Southeastern Greenland Cases are frequently cited in works treating the new law of the sea, since the <u>terra nullius</u> concept of Greenland as advanced by Norway is analogous to the ancient theory of the high seas being <u>res nullius</u>. But, inasmuch as the case dealt solely with the issues raised by claims on this enormous land mass, rather than by the presence of some smaller island within some state's territorial seas, it has been left out of the analysis of those cases contributing to the body of case law in the new law of the sea.[5] Likewise, the 1960 Advisory Opinion of the ICJ on the Maritime Safety Committee

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[4] <u>M. McDougal and W. Burke</u>, <u>The Public Order of the Oceans</u>, 38-39 (1962).

[5] <u>O. Svarlien</u>, <u>The Eastern Greenland Case in Historical Perspective</u>, (1964).

must be excluded as strictly concerned with admiralty law.[6]

The Corfu Channel Case, decided by the ICJ in April of 1949, produced one of the most important judgments yet rendered by this court. It is a benchmark case in the law of the sea, involving "the principle of the freedom of maritime communication."[7] However, the essence of this case was the legitimacy of the actions of the British or the inactions of the Albanians within the territorial waters of Albania. There was no dispute at all that the North Corfu Channel lay entirely within the territorial seas of Albania; hence there was no controversy over certain proprietary rights, as defined above. The case goes far in prescribing the proper conduct of nations toward each other, but it cannot contribute to the emerging law of the sea outlined herein.

In passing, it should be noted that there were at least two controversies surrounding perfectly suitable issues for the development of emergent ocean law that "might have been" but "never were." In 1933, litigation was instituted between Italy and Turkey concerning the delimitation of the territorial waters between the Island of Castellorizo and the coasts of Anatolia, but the proceedings were terminated by mutual consent of the parties.[8] And in 1955, the United Kingdom filed an application with the ICJ for a settlement of "a dispute relating to the sovereignty over certain islands and lands in the Antarctic...."[9] However, Argentina and Chile, dual respondents, both declined to submit to the jurisdiction of the Court and so in 1956 the case was removed from the list.

Next, it is necessary to point out that the scope of this paper must be limited to only those judgments and advisory opinions of the PCIJ and its successor, the ICJ. Unquestionably, the new law of the sea has and will be shaped by the decisions of the many international tribunals of arbitration and indirectly by the various national supreme courts. Still, because there are literally hundreds of such recorded decisions in the law libraries, it was not feasible to undertake a survey of such court holdings in international ocean law. Professor Alexander M. Stuyt's magnificent work entitled, Survey of International Arbitration, 1794-1970, is highly recommended for rapid access to this area of information.[10]

It is quite essential that any discussion of precedent-making cases in international law include those before the PCIJ as well as those heard by the ICJ. The PCIJ held sessions from 1922 through 1940, although it existed in name until 1946, when the United Nations Charter created the ICJ. Following the general intent of the Dumbarton Oaks Proposals of October 7, 1944, that the statute of the new court of international justice should reflect the

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[6]Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, (1960) I.C.J. 150.
[7]The Corfu Channel Case, (1949) I.C.J. 22.
[8]Delimitation of the Territorial Waters Between the Island of Castellorizo and the Coasts of Anatolia, Order of January 26th, (1933) P.C.I.J., ser. A/B, No. 51.
[9]Antarctica Case, Orders of March 16th, (1956) I.C.J. 12, 15.
[10]A. Stuyt, Survey of International Arbitrations, 1794-1970 (1972).

heritage of the PCIJ, the United States proposed (in Committee IV/1) that the Charter of the UN include this provision: "The Statute (of the ICJ) is based upon the Statute of the Permanent Court of International Justice."[11]

Summary Reports of Committee IV/1 reveal:

> A view was expressed that the proposal merely states a historical fact and might give rise to confusion. Others thought that in view of the general desire to perpetuate the jurisprudence of the old Court [emphasis by author], and of the number of delegations which favored legal continuity of the old Court, the paragraph was desirable.[12]

The U.S. proposal was adopted and is now part of numbered article 92 of the UN Charter. The Rapporteur for Committee IV/1 reported that, "The creation of the new Court will not break the chain of continuity with the past.... In a sense, therefore, the new Court may be looked upon as the successor to the old Court which is replaced.... Hence, continuity in the progressive development of the judicial process will be amply safeguarded."[13]

And ICJ President B. Winiarski of Poland, addressing the Court on March 1, 1962, remarked that,

> The present Court has since the beginning been conscious of the need to maintain a continuity of tradition, case law, [emphasis by author] and methods of work. Its first President was Judge Guerrero, the last President of the former Court. It adopted the rules of the former Court, with a few modifications of minor importance, and even its external forms. Above all, without being bound by *stare decisis* as a principle or rule, it often seeks guidance in the body of decision of the former Court, and the result is a remarkable unity of precedent, an important factor in the development of international law.[14]

Now, when it is observed that, excepting the *Lotus* and *Greenland* cases mentioned earlier, the PCIJ heard no cases at all even suggesting the sudden burst of controversy over proprietary interests in the oceans following World War II...it is not sportingly to cause a big let-down after such a build-up. Knowledge that the ICJ was and is the legal extension of the PCIJ is important for two reasons. First, we have confirmation of the fact that the ICJ will look to its predecessor Court for case law, where it may exist. Second, the fact that no modern type law of the sea cases were brought to the PCIJ only re-emphasizes the suddenness with which such cases burst upon the post-World War II scene and the resultant difficulty of the present Court in arriving at consistent law of the sea decisions.

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[11] *M. Whiteman*, *Digest of International Law*, 12:1181 (1971).
[12] *Id.* at 1181-82.
[13] *Id.*
[14] B. Winiarski, *I.C.J.Y.B.* (1962).

Four different cases have been fully or partly resolved by the ICJ, which when taken together (perhaps with one exception) begin to establish a rudimentary body of case law for the emerging law of the sea:

1. The Fisheries Case (United Kingdom v. Norway) of 1951 (hereinafter, the Anglo-Norwegian Fisheries Case).
2. The Minquiers and Ecrehos Case (France v. United Kingdom) of 1953 (hereinafter, the Channel Islands Case).
3. The North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark & The Netherlands) of 1969 (hereinafter, the North Sea Cases).
4. The Fisheries Jurisdiction Case (United Kingdom v. Iceland) of 1974 (hereinafter, the Icelandic Fisheries Case) --partly concluded; the companion case involving but not joining the Federal Republic of Germany versus Iceland should be settled shortly.

The Anglo-Norwegian Fisheries Case concerned "the dispute [over] the validity of otherwise under international law of the lines of delimitation of the Norwegian fisheries zone...."[15] Still, there was "no doubt that the zone delimited by this [fisheries] Decree is none other than the sea area which Norway considers to be her territorial sea."[16] Thus, the case settled at once the extent of the coastal state's territorial seas and the fishing rights therein. The United Kingdom conceded that Norway had the right to claim out four miles from its baselines for its territorial waters; the problem was in locating exactly where the baselines should be drawn.

There being then no international convention in force regarding the definitions or delimitations of high seas, territorial waters, et al, it was necessary for the Court to focus squarely on the status of customary international law in these regards. However, in reaching their finding that the outer edge of the "skjaergaard" should be the baseline for the delimitation of Norwegian territorial waters, the majority concluded, "This solution is dictated by geographic realities."

It was then necessary for the Court to open up on what certain geographic realities might be. As was noted, there was no convention to follow, nor any predecessor case from the history of the PCIJ or even the earlier years of the ICJ. One reference was made to the work of the "experts of the Second Sub-Committee of the Second Committee of the 1930 Conference for the codification of international law" in trying to formulate the "low-water-mark rule."[17] But it was a passing reference and inconclusive. Further, the ICJ refused to recognize that any consistent practice among the world's coastal states could be found in attempting to justify the trace parallele, courbe tangente, or straight baselines methods of describing the outer edge of a coastline (and if the last, how long a straight line?).

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[15]The Fisheries Case (United Kingdom v. Norway), (1951) I.C.J. 125.

[16]Id. at 125-26.

[17]Id. at 126-28, 129.

Certain dicta did surface, however, from this decision showing how much emphasis the Court placed on natural geographical considerations. The holding states:

> The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.[18]

Whereupon four test factors were enumerated: (1) territorial sea must have a close dependence upon the land domain, (2) baselines must not depart significantly from the general direction of the coast, (3) sea areas may be defined by their relationship to the land formations which divide or surround them, and (4) baselines must be adapted to the special conditions of different regions.[19]

The issue of historical claims to title as a possible justification for situations conflicting with international law was raised by the United Kingdom, but was deflected by the Court (the UK would score those points two years later). Observing that Norway's delimiting lines passed the four geography tests, that they had been notorious, long-standing (since the 19th century), and generally acquiesced in by the UK, the ICJ ruled in favor of respondent Norway ten votes to two--Judges Sir Arnold McNair (of the UK) and Read, dissenting. That this decision would prove invaluable as a starting point in future law of the sea controversies was noted by Judge Alvarez in his separate opinion:

> ...the decision of the Court...will be of the very greatest importance to the world generally as a <u>precedent</u> [emphasis by author], since the Court's decision in this case must contain important pronouncements concerning the rules of international law relating to coastal waters. The fact that so many governments have asked for copies of our Pleadings in this case is evidence that this is the general view.[20]

Judge Alvarez clearly foresaw what was to come as he wrote, "For it now happens with greater frequency than formerly that, on a given topic, no applicable precepts are to be found, or that those which do exist present lacunae or appear to be obsolete.... In all such cases, the Court must <u>develop</u> the law of nations...."[21]

Note is made of the fact that Judge McNair drew from the 1946 U.S. Supreme Court holding in <u>United States v. State of California</u>, 332 U.S. 19, 35, and cites numerous prize courts rulings with regard to determining territorial waters in his dissenting opinion.[22]

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[18] <u>Id</u>. at 132.
[19] <u>Id</u>.
[20] <u>Id</u>. at 145.
[21] <u>Id</u>.
[22] <u>Id</u>. at 160-61.

Two years later, in the Channel Islands Case, the ICJ was called upon the adjudicate merely the "worthier title." Both France and Great Britain lay claim to these tiny bits of land in the southern reaches of the English Channel based on proofs of kingly title going back to the Middle Ages, and both had in their Special Agreement excluded questions of res nullius or condominium.[23]

The Court saddled each side with a burden of proof, indulged itself in a rambling history lesson, and then unanimously but warily chose the British title as the more plausible. As a contribution to the development of international law the decision was a fiasco. Nowhere is there any recognition of a need for a solution dictated by "geographic realities." Indeed, we see claims resting on a "close dependence" of land upon other far-flung islands (Jersey, Guernsey, etc.) which are themselves geographic and national anomalies.

The one faint glimmer of observance of what had been hammered out so well in the Anglo-Norwegian Fisheries Case showed at the end of the opinion in Judge Alvarez's declaration that the parties "have not sufficiently taken into account the state of international law or its present tendencies in regard to territorial sovereignty," and that "the task of the Court is to resolve international disputes by applying, not the traditional or classical international law, but that which exists at the present day and which is in conformity with the new conditions of international life...."[24]

The ICJ, in the North Sea Cases, returned once more to the basic rationalizations of the natural geography of the subject area. Of course, by 1969, the Court had the Geneva Conventions of 1958, most importantly the Convention on the Continental Shelf, to work with. Nevertheless, the opinion of the Court is rife with geographical, as opposed to juridical, terms--adjacency, equidistance, natural appurtenance, closest proximity, natural prolongation of the land mass, and so forth.

Here again, as in the Anglo-Norwegian Fisheries Case, the problem revolved about a "line-drawing" method. The differing factors, though, are that instead of attempting to fix a baseline from whence the reach of a given distance out into the seas can be measured, the dispute now was over how to draw the demarcating line between neighboring states, both of which would be reaching out together as far as possible over the continental shelf. Germany faces out to the North Sea from a concave shoreline, bunched in to the left by The Netherlands and to the right by Denmark; she saw her reach out over the continental shelf of the North Sea bunched in on both sides, foreshortened and eventually terminated by the method of the drawing of the dividing line claimed by Denmark and The Netherlands. On the other hand, Denmark and The Netherlands saw Germany endeavoring to enlarge upon its rightful claims by crowding over into the shelf areas belonging to them. The Court was requested by Special Agreement not to actually divide up or apportion the available continental shelf, but to enunciate what proper rule of international law, be it conventional or customary, the parties must use in order to draw correctly these two demarcating lines.[25]

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[23] The Minquiers and Ecrehos Case (France v. United Kingdom), (1953) I.C.J. 52.
[24] Id. at 73.
[25] North Sea Continental Shelf Cases, (1969) I.C.J. 8-19.

Denmark and The Netherlands easily went to Article 6 of the 1958 Convention on the Continental Shelf and read that such dividing lines would be drawn first according to agreement between the neighboring states (there was none), then according to "another boundary line" when there was a special circumstance (they denied that Germany was such a circumstance), and finally according to the method of equidistance (which they wanted, as it gave them the greatest possible shelf area vis-a-vis Germany). They countered Germany's argument that the solution should present all coastal states with a "just and equitable share" of the shelf areas was in reality a demand for a decision ex aequo et bono--not permitted by Article 38 of the Court's Statute unless agreed to in advance by all parties.

Germany asserted that as she was not a party to the 1958 Convention on the Continental Shelf, the equidistance method described in Article 6 of that treaty was wholly inapplicable to her; that if it did apply to her, she was one of the "special circumstances" mentioned in Article 6 of the Convention; and that her demands for a "just and equitable share" had no basis in ex aequo et bono but in justitia distributiva, a principle of fairness inherent in all litigation.[26]

The good Judges of the ICJ proved ready for the task at hand. In some thirty pages of the most convoluted reasoning imaginable, the majority determined that (1) Germany, not being a party to the Geneva Convention, was not bound under conventional or codified international law to the equidistance method described in Article 6; (2) the equidistance method embodied in Article 6 could not have been the existing rule under customary international law since there was no common state practice in this regard; and (3) the equidistance method thus codified in Article 6 had not subsequently obtained the force of customary international law since there had not been sufficient passage of time or sufficient ratifications or accessions by other states. Logically enough, the question remained: was there any rule to be found which could guide the parties? Germany's Memorials had not offered a better rule; rather, she seemed to be asking only for the negation of the opposing rule.

The answer is to be found in the next ten pages:

> The Court has to indicate to the Parties the principles and rules of law in the light of which the methods for eventually effecting the delimitations will have to be chosen. The Court will discharge this task in such a way as to provide the Parties with the requisite directions, without substituting itself for them by means of a detailed indication of the methods to be followed and the factors to be taken into account for the purposes of a delimitation the carrying out of which the Parties have expressly reserved to themselves.[27]

In other words, the parties were commanded to go back to the negotiating table and work out on their own an equitable agreement satisfactory unto themselves, taking care that each Party's share of the shelf be proportional to its shoreline and "as much as possible" of its own natural prolongation of its land territory "into and under the sea."[28] All things considered

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[26] Id. at 20-21.
[27] Id. at 22-44, 46.
[28] Id. at 53.

it was really about as good an answer as any court could have given to an impossible question.

Several features about the majority opinion were remarkable. The ICJ cited prior cases on many occasions; three previous PCIJ holdings--the Lotus case, the case of the Free Zones of Upper Savoy and the District of Gex, and the advisory opinion from Railway Traffic between Lithuania and Poland; and twice from their own rulings--the advisory opinion in the I.L.O.-UNESCO matter and the Corfu Channel case.[29] True, the citations were in support of general principles of good faith conduct among the nations of the world and not solely lessons in the law of the sea. But they did reveal an increasing willingness to call upon their own precedents.

Also, the continuation of the very strong preference for geographical rather than juridical definitions and solutions was noted, as mentioned earlier. Ample numbers of dicta were sprinkled throughout the opinion for future reference, the strongest of which was:

> the rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.[30]

Contained within the context of this vital statement are three factors pertaining to a coastal state's rights on its continental shelf: they are inherent and sovereign; no affirmative steps or exercise of the rights are required to possess them; and they are exclusive as against all other states.

It was but two years in coming that the Government of Iceland decided to prove that "the continental shelf of Iceland and the superjacent waters were within the jurisdiction of Iceland."[31] On July 14th, 1971, she abrogated the agreements with the United Kingdom and West Germany, and extended her claim of territorial sovereignty to fifty miles out to sea, including therein all fishing rights. Shortly thereafter incidents between trawlers and gunboats from all three states proliferated.

The United Kingdom applied to the ICJ for a resolution of the various rights involved as well as for recovery of damages her ships had suffered; Iceland refused to submit to the Court's jurisdiction. In an unprecedented action, the ICJ determined, in 1973, that it could hear the case under the provisions of Article 53 of its own Statute, even though the respondent would not be present in court. In a vote of fourteen to one, the Court found that it had jurisdiction to entertain Great Britain's application.

On July 25th, 1974, the ICJ rendered its judgment on the merits of the case: By a ten to four vote, Iceland was deemed to have violated international law in its actions of excluding British fishing interests from its coastal waters out to fifty miles.[32]

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[29] Id. at 44, 47, 48 and 49.
[30] Id. at 22.
[31] Fisheries Jurisdiction Case, (1974) I.C.J. 14-15.
[32] Id. at 34.

The first major question resolved was what was the law on fishery conservation, preferential fishing rights, and the use of catch-limitation figures for states entering other states' coastal waters. Turning to the 1958 Geneva Resolution on Special Situations relating to Coastal Fisheries, "which constituted the starting point of the law on the subject,"[33] the adopted joint amendment on preferential fishing rights passed by the Plenary Meetings of the 1960 Conference on the law of the sea,[34] numerous bilateral and multilateral treaties and agreements done by European and North Atlantic states, including both states here involved, and particularly the bilateral agreement between the United Kingdom and Iceland of March 11th, 1961, the Court held that both customary and conventional international law recognized the need for conservation of fish stocks, the rights of coastal states to certain preferences in fishing their coastal waters, especially in special circumstances of dependence upon fishing, into which category Iceland clearly fell, and the viability of numerical limitations on fish catches by other states. Yet it was further held that preferential fishing rights in a given zone by the coastal state did not mean the total exclusion from fishing that zone of other states; Great Britain had a well-established historical right to fish the waters off Iceland's territorial seas, and should be permitted to continue doing so as long as she respected the requirements of conservation by her catch limitations.[35]

Next, the critical question of to what extent could Iceland, or any state, unilaterally acquire various types of jurisdiction over reaches of the ocean that had formerly been high seas was treated--not, it appears, altogether completely or satisfactorily. On this matter, the best evidence of stare decisis in the holdings of the ICJ to date on the law of the sea came forth. Twice the Court cited and relied strongly upon its earlier dictum from the Anglo-Norwegian Fisheries Case regarding the necessity for any unilateral delimitation of sea areas being in conformance with international law.[36] The incipient trend of ever-extending fisheries jurisdictions by coastal states was observed in the opinion, but the Court refused to give such a trend the weight of customary law; the question was, instead, answered in terms of what the codified law said. The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone was interpreted as permitting "the extension of that fishery zone up to a twelve-mile limit from the baselines." In addition, the 1961 Exchange of Notes between both states had the force of a treaty which was still valid and in force.[37] The recognition of the twelve-mile limit by both parties and the elaboration of rights within that zone were clearly contained within this bilateral convention, and the Court held that Iceland had no right to unilaterally abrogate it.[38]

But the foregoing answers only the effect of an extension of a fisheries conservation or "contiguous" zone beyond twelve miles. What might be the result of Iceland's treatment of those seas out to fifty miles as her territorial waters? Though she has not so claimed, it is conceivable that

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[33] Id. at 32.
[34] Id. at 25.
[35] Id. at 30 and 34.
[36] Id. at 22 and 24.
[37] Id. at 24.
[38] Id. at 27.

she might follow the lead of some South American and African nations in order to counter the frustration of this ruling. The Court has decided that the 1958 Geneva Convention on the Territorial Sea has not defined the permissible breadth of a coastal state's territorial sea, and in view of current efforts to codify this area of international law, it chose to avoid any ruling on it with the admonishment that, "as a court of law, [it] cannot render judgment sub specie legis ferendae, or anticipate the law before the legislator has laid it down."[39]

Of course, the ICJ has no requirement to decide issues not before it, and it did do a commendable job in restating and thus treating as settled points of international law several issues which arose in the first three of their law of the sea cases. In addition to the references to the Anglo-Norwegian Case dictum, the opinion of the majority twice referred to the North Sea Cases, holding...but not on the matters of the obligation to negotiate[40] and the need for an equitable solution to the fisheries dispute,[41] and unfortunately not on the subject of the law as it is developing regarding continental shelves. Furthermore, the separate concurring opinions of Judges Dillard, De Castro, and Waldock as well as the dissenting opinion of Judge Gros make frequent note of the majority opinions in the Anglo-Norwegian Fisheries and North Sea Cases, thus favoring these two law of the sea cases with added respect.

Leaving the case law on the emerging law of the sea, it would be wise to consider what the body of legal writing has to say as to the efficacy of the concept of stare decisis in international law. It is commonly heard that there is no stare decisis in international law, a statement arising from a narrow reading of Articles 38-1(d) and 59 of the ICJ Statute. The first article states that the Court shall apply, "subject to the provisions of Article 59, judicial decisions...as subsidiary means for the determination of rules of law."[42] And Article 59 states, "The decision of the Court has no binding force except between the parties and in respect of that particular case." Professor Oliver Lissitzyn has also remarked that this reluctance to ascribe a continuum of jurisprudence to the highest tribunal of international law undoubtedly reflects "the fact that the standards administered and the procedure followed by international tribunals are generally subject to a greater degree of control by the parties than are the standards and procedures of judicial tribunals in modern states."[43]

Professor William Bishop writes that while Article 59 merely reiterates the absence of a rule of stare decisis in international law, "Nevertheless, judges, statesmen, and lawyers dealing with questions of international law inevitably give weight to the work of their predecessors and their colleagues," and "in practice more and more weight is being given by such [international] tribunals to international judicial decisions.... International courts also frequently prefer to distinguish prior cases rather than to overrule earlier decisions."[44]

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[39] Id. at 23-24.
[40] Id. at 32.
[41] Id. at 33.
[42] W. Bishop, International Law-Cases and Materials, 1083, 1085 (1971), [hereinafter cited as Bishop].
[43] O. Lissitzyn, The International Court of Justice, no. 35 at 59 (1972).
[44] Bishop, supra note 42, at 39-40.

Sir Hersch Lauterpacht, in his seventh edition of Oppenheim's International Law, wrote that the effect of Article 59 in the Court's Statute was an apparent effort to exclude the strict Anglo-American doctrine of judicial precedent, but that

> the habit of being influenced, consciously or unconsciously, by conclusions previously formed in pari materia is an inevitable mental process to which judges like others are subject, and experience has shown that Article 59 and the reference to it in Article 38 have not hindered the Court in its task of consolidating and enlarging the corpus juris gentium.... It has become an effective agency for developing and clarifying International Law.[45]

And Judge Kotaro Tanaka of the ICJ noted, "There is no doubt that 'the International Court does not adhere to the doctrine of stare decisis; nevertheless it will not readily depart from a prior ruling.'"[46]

It would be heady optimism, indeed, to suppose that a mere three or four cases involving the new law of the sea would implant the seeds of stare decisis in the minds of the judges at present and future International Courts of Justice. But the seven seas have been transformed into arenas of the most serious form of competition--national survival. Whether or not the international conferences meet with success in the codification of the laws on proprietary interests in and under the oceans, confrontations will occur with increasing frequency. The ICJ will have more than an ample supply of law of the sea cases to consider; it may discover that this area of international law will predominate its docket for the coming decade.

The coastal nations and those with ships will not ask if stare decisis is applicable to the law of the sea. They will demand to know what the law is! And the Bench will not hesitate. As more applications are brought to The Hague, the learned judges will clearly enunciate the law of the sea, giving back the stability that is so critical to this most turbulent portion of the earth's face.

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45 H. Lauterpacht, Oppenheim's International Law, 70 (1952).

46 Southwest Africa Cases, Dissenting Opinion of Judge Tanaka, I.C.J. 260 (1966).

THE EMERGENCY MARINE FISHERIES PROTECTION

ACT OF 1974

S. 1988:

A SOLUTION, OR JUST

AN EXTENSION, OF THE CURRENT PROBLEM OF DISORDER

Ronald Wayne Burris

Essential to the effective understanding of our political world is a comprehension of the decision-making processes of the various responsible institutions. Two levels on which such institutions function are the national and the international, these often being somewhat amorphous. Indeed, especially important is a conception of the continuous interaction of national and internation decision-making, a process of continuous demand and response.

The proposed Emergency Marine Fisheries Protection Act of 1974 (EMFPA)[1] is an excellent focal point from which to view in perspective this interaction of national and international law. On the one hand, one may witness the formation of state policies, while on the other, observe the development of international decisions. Viewed initially as concentric circles, these integrated processes reveal their constantly dynamic quality, continuously exerting influences upon one another. The EMFPA is but one facet of this spectrum of cause and effect; but perhaps by better understanding the environment of this legislation in the national and international fields, we can better conceptualize the color complex of our sometimes "shady" political world.

One inherent weakness in the analysis of any behavior, individual or collective, is the inability to isolate all the variables which influence that activity. It is beyond the scope of this paper to attempt to do more than identify the broad parameters of the environment which produced

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[1]Senate Bill S. 1988, 93d Congress, 2d Session: "A BILL to extend on an interim basis the jurisdiction of the United States over certain ocean areas and fish in order to protect the domestic fishing industry, and for other purposes." Referred to Committee on Commerce, June 13, 1973; Reported with amendments, August 8, 1974; Referred to Committee on Foreign Relations, August 8, 1974; Reported unfavorably without amendments, September 23, 1974.

The primary purpose of the EMFPA of 1974 is to extend unilaterally U.S. fishery jurisdiction from twelve miles to two hundred miles until a general agreement is reached at the United Nations Law of the Sea Conference establishing an effective international regulatory regime. It also extends U.S. control over anadromous (salmon) species wherever they may range on the high seas. In addition, the bill would also initiate a national marine fisheries management effort by the creation of a Fisheries Management Council.

the EMFPA and perhaps threaten its survival.[2]

Viewed broadly, the EMFPA is largely a response to the depletion of a number of coastal and anadromous fishery stocks by foreign fishing interests.

Past Fisheries Management

In 1608, Hugo Grotius, a Dutch lawyer, enunciated the principle of freedom on the high seas,[3] which referred to those waters outside territorial seas of coastal nations; and according to this traditional international law, all nations have equal rights to fish anywhere they please on the high seas.[4] For most of the 350 years that followed, this rule formed the working arrangement for harvesting the living resources of the oceans. The past few decades, however, have shown that the resources of the sea are not inexhaustible, thus challenging the continued viability of that traditional rule.[5] As the fishing efforts around the world intensified, the theory of total freedom of fishing on the high seas began to erode; and efforts to develop a new system began through unilateral claims and specific bilateral and multilateral treaties.[6]

An example of United States' reaction by unilateral claims is the Truman Proclamation of 1945:

> In view of the pressing need for conservation and protection of fisheries resources, the Government of the United States of America regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coast of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale...and all fishing activities in such zones shall be subject to regulation and control.... The right of any State to establish conservation zones off its shores...is conceded.... The character as high seas of areas where such conservation zones are established and the right to free and unimpeded navigation are in no way thus affected.[7]

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[2]For a broader scope of variables, refer to these excellent sources: Comment, Fisheries Jurisdiction, 44 Wash. L. Rev. 307 (1968); Clinagon, A Second Look at U.S. Fisheries Management, 9 San Diego L. Rev. 432 (1972); T. Messick, Jr., Maritime Resource Conflicts - Perspectives for Resolution, U.S. Sea Grant Pub., (UNC-SG-74-06) (May, 1974); T. Suher & K. Hennessee, "Fishing Resources," State & Federal Jurisdictional Conflicts in the Regulation of U.S. Coastal Waters, U.S. Sea Grant Pub., (UNC-SG-74-05) (April, 1974); S. Wurfel, The Surge of Sea Law, U.S. Sea Grant Pub., (UNC-SG-73-01) (March, 1973).

[3]The Surge of Sea Law, note 2 supra, at 1-17.

[4]Report of the Senate Committee on Commerce on S. 1988 Together with Minority Views, Rpt. No. 93-1079, 3 (August 8, 1974) [hereinafter cited as Commerce Committee Report].

[5]Commerce Committee Report, note 4 supra, at 3.

[6]Id.

[7]Presidential Proclamation 2668, September 28, 1945; Coastal Fisheries in Certain Areas of the High Seas, 10 Fed. Reg. 12304 (1945); 59 Stat. 885.

While the proclamation was never exercised as a claim to exclusive fisheries jurisdiction over high seas fishing areas off the coast of the United States, it was the framework of a U.S. policy to establish conservation zones pursuant to agreement between the U.S. and other nations.[8] On the basis of this policy, the U.S. State Department has negotiated twenty-two fishery treaties to protect certain species of fish.[9]

In reaction to the Truman Proclamation, thirty-six nations subsequently declared exclusive fisheries zones beyond twelve nautical miles; many, up to two hundred miles.[10] In 1958 and 1960 four separate treaties regarding the law of the sea were negotiated in an attempt to resolve certain international conflicts;[11] but no specific limits on either the boundaries of the territorial seas or fisheries were achieved; and uncertainty remains as to the scope of exclusive fishery jurisdiction under international law. The Third Law of the Sea Conference has attempted unsuccessfully to adopt some international consensus regarding the rational management of the ocean areas covering two-thirds of the earth's surface. The Emergency Marine Fisheries Protection Act of 1974 is an individual effort to prescribe national rules designed to establish rational management of the ocean area contiguous to the United States. The EMFPA and the United States Proposal submitted to the Caracas Conference of the Law of the Sea are substantially the same;[12] the key difference between the two is <u>time</u>!

Modern Fisheries Management

In 1960 the United States took 92.9% of the total Atlantic catch; by 1972, the U.S. share of the total catch had been reduced to 49.1%.[13] Since 1950 the world production of fish multiplied from 20 million metric tons to 63 million metric tons in 1969, while the U.S. share of the catch has remained at a relatively fixed level between 2 and 2.2 million metric tons.[14] While the U.S. share of the world fish catch has been declining, consumption of fish and fishery products has been increasing, leading to an expansion of fish imports, and contributing to the adverse balance of payments.[15] The United States, with 6% of the world's population, consumes 7% of the total seafood catch, while harvesting only 2.5% of the total seafood catch.[16] With the emphasized current global food scarcity, the situation

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[8] <u>Commerce Committee Report</u>, note 4 <u>supra</u>, at 4.
[9] <u>Commerce Committee Report</u>, note 4 <u>supra</u>, at 47; Appendix I: List of Conventions and Bilateral Fishery Agreements to Which the United States is a Party.
[10] <u>Commerce Committee Report</u>, note 4 <u>supra</u>, at 51; Appendix II: Nations Which Have Unilaterally Extended Their Exclusive Fishery Jurisdiction Beyond Twelve Nautical Miles.
[11] <u>Convention on the Territorial Sea and Contiguous Zone</u>, 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205; <u>Convention of High Seas</u>, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82; <u>Territorial Sea Convention</u>, 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205; <u>Convention on Fishing and Living Resources of the High Seas</u>, 17 U.S.T. 138, T.I.A.S. 5969, U.N.T.S. 285.
[12] <u>Results of Caracas Session of the Third U.N. Law of the Sea Conference</u>, Dept. of State Special Report, No. 8781 (Oct., 1974) [hereinafter cited as <u>Results of Caracas Session</u>].
[13] <u>Commerce Committee Report</u> at 13; <u>see also</u> Figures 1-7, p. 6-14.
[14] <u>Commerce Committee Report</u> at 14.
[15] <u>Id</u>.
[16] <u>Id</u>.

can only be perceived as becoming more acute.[17] While food experts have long dreamed of "farming the sea" so as to increase the supply of food as a complement to the "Green Revolution," the high costs of technology involved, the lack of international cooperation, increasing pollution, and decreasing fishery supplies cast doubt on the role of aquaculture as being a single savior.[18] Indeed, experts warn that if the present trend of massive international fishing efforts continue, the maximum sustainable yield of one-hundred million metric tons, the number of fish capable of being taken from the sea without irreparably harming the biological breeding of fishing stocks, may be expected by 1980.[19] More currently, just one year of intense systematic concentration on the haddock, the most valuable Atlantic groundfish, by the Russian fleet, was enough virtually to eliminate a strong class of small fish to the point that breeding stocks are feared incapable of proper repopulation.[20] "Current international, national, and state conservation efforts are not successfully preventing the depletion of fisheries resources of the greatest economic importance."[21] Both the inadequacy and absence of treaties perpetuate the ever-increasing exploitation of fishery stocks. Even where treaties are present, enforcement is chronically deficient as each signatory nation is responsible for its own citizens. It is easy to understand both why the U.S. fishing industry is "frustrated" and why a nation, which on the one hand has directed its fishing fleet to return a high quota of fish, may not be as diligent as is necessary to insure full compliance with international agreements.[23] In many cases, it would appear the necessary sanctions are completely lacking and violations often go unpunished.[24]

Future Fisheries Management or Mismanagement

Recognizing that the evolutionary process of international law had not sufficiently formulated a recognized system of rules governing international conduct in the oceans, the United Nations in 1968 initiated an attempt to develop a consensus among the international community on the law of the sea. After several years of preparatory meetings, the Third Law of the Sea Conference met in Caracas, Venezuela, from June 20 to August 29, 1974, with the goal of achieving a "package" of treaties among the nations participating. The results of the Caracas session were less than had been hoped for, although many observers noted substantial progress.[25] Another session has been scheduled in accordance with the U.N. timetable set out in its resolution for the spring of 1975 in Geneva, with the goal of achieving, in part, future fisheries management.

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[17] Newsweek, Nov. 11, 1974, p. 56.
[18] Id. at 67, col. 3.
[19] Commerce Committee Report at 14, citing Dr. Robert M. White, Administrator of the National Oceanic and Atmospheric Administration.
[20] News Casts, American League of Anglers, Vol. 1, No. 1 (undated), p. 1.
[21] Commerce Committee Report at 15, citing paper by Ambassador Donald L. McKernan printed in World Fisheries Policy (University of Washington: 1972).
[22] Hearings before Senate Committee on Commerce, 93d Congress, 2d Session, (1974), Statement by Richard B. Allen, Executive Secretary, Atlantic Offshore Fish & Lobster Association, May 13, 1974, [hereinafter cited as Commerce Committee Hearings].
[23] Commerce Committee Hearings, note 22 supra, at 16.
[24] Id.
[25] Results of Caracas Session, note 12 supra, at 3.

The realization of past mismanagement, plus their pessimism as to any future management of fisheries by international agreement prompted the promulgation of EMFPA. Its sponsors are concerned about the effect of delay in the implementation, ratification, and effective date of any new conventions that may be negotiated in the Law of the Sea Conference. While the Act is designed to cover this expected substantial interim period,[26] the pessimism regarding an international management scheme prevails along with the feeling that, without the EMFPA, fisheries mismanagement will continue. Thus, the environment of the bill is one of pessimism toward international solutions. This was summarized by the Senate Committee on Commerce as follows:[27]

> (1) that stocks of fish of direct interest and importance to U.S. fishermen are depleted;
> (2) depletion of these stocks of fish are in large measure attributable to massive foreign fishing efforts in waters immediately off the shores of the nation;
> (3) international fishery agreements to which the U.S. is party and which purport to regulate and control fishing efforts on depleted stocks of fish have been ineffective in that goal;
> (4) a generally acceptable treaty on marine fisheries management jurisdiction will not be negotiated, signed, ratified, and implemented until later in this decade and there is danger of further depletion of other stocks of fish;
> (5) therefore, the U.S. in its own interest and in the interest of preserving threatened stocks of fish must take emergency action to manage, regulate, and control the taking of fish within 200 nautical miles of its shore and the taking of fish beyond such limit pending international agreement on an acceptable treaty.

There are, however, numerous countervailing influences operating against the Emergency Marine Fisheries Protection Act of 1974. In fact, there is substantial and strong opposition to the bill, most notably in the State Department, the Pentagon, the tuna industry, and among internationalists in general. Recognizing, as do the supporters of the bill, that neither limited bilateral or multilateral fisheries agreements offer a workable alternative to the classic "common pool" problem, these critics stress that unilateral action is not the appropriate solution as it would merely trigger an ineffectual round of diplomatic exchanges and reciprocal unilateral actions.[28]

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[26] Commerce Committee Hearings, note 22 supra, at 19.

[27] Id., see also "Additional Views" of Senators Claiborne Pell and Edmund S. Muskie in Report of the Senate Foreign Relations Committee on S. 1988 Together with Additional Views, Rpt. No. 93-1166, p. 13-14 (September 23, 1974), [hereinafter cited as Senate Foreign Relations Report].

[28] Statement by John Norton Moore, Chairman of the National Security Council Interagency Task Force on the Law of the Sea and Deputy Special Representative of the President for the Law of the Sea Conference, before Senate Foreign Relations Committee, September 5, 1974; Senate Foreign Relations Report, note 27 supra, at 5.

Instead, as pointed out by John Norton Moore, the only viable solution is a broadly-based international agreement providing coastal states with management jurisdiction over coastal and anadromous species with highly migratory species managed by appropriate regional or international organizations.[29] Further, "for the first time in the history of oceans law it is realistic to expect such a broadly-based agreement covering fisheries jursidiction to be achieved in the second session of the Third Law of the Sea Conference to be held in Geneva in the spring of 1975."[30]

The internationalists view the situation as an obvious policy choice: "Is U.S. oceans policy to be pursued through cooperative efforts at international agreement...or is it to be pursued through unilateral national measures risking an irreversible pattern of conflicting national claims?"[31] Fearing that passage would generate a wave of competing claims to the oceans and irreparably damage the chances of a comprehensive treaty, they urge national restraint in this critical period. Many of those who perceive the prompt achievement of a widely acceptable treaty cite the evidence reflecting consensus of the broad outlines of a comprehensive general agreement.[32] "So far each state has put forward in general terms the positions which would ideally satisfy its own range of interests in the seas and oceans. Once these positions are established, we have before us the opportunity of negotiation based on an objective and realistic evaluation of the relative strength of the different opinions. The idea of a territorial sea of twelve miles and an exclusive economic zone beyond the territorial sea up to a total maximum distance of two-hundred miles is, at least at this time, the keystone of the compromise solution favored by the majority of the states participating in the conference, as is apparent from the general debate in the plenary meetings and the discussions held in our committee.... Substantial progress has been made which lays the foundations for negotiation during the intersessional period and at the next session of the conference. What was missing in Caracas was sufficient political will to make hard negotiating choices. A principal reason for this was the conviction that this would not be the last session. The next step is for governments to make the political decisions necessary to resolve a small number of critical issues. In his closing statement before the Caracas session, the President of the conference, recognizing the problems, and that states have not infinite patience, stated, "We should restrain ourselves in the face of the temptation to take unilateral action."[33]

In opposition to the EMFPA of 1974, the internationalists warn that enactment of the Act would not satisfactorily resolve our fisheries problems; that it would at most merely anticipate a result likely to emerge in a matter of months from a successful Law of the Sea Conference, and would be seriously harmful to the United States' ocean and foreign policy interests. For example, it poses the danger of escalating unilateral claims and confrontation, and would constitute a violation of international law. Furthermore, EMFPA may

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[29] Id.
[30] Id.
[31] Id.
[32] Results of Caracas Session, note 12 supra, at 3.
[33] Id.

harm United States fishing interests as well as jeopardize the formation of a comprehensive ocean law treaty.

Escalating Unilateral Claims

A unilateral extension of jurisdiction for one purpose will not always be met by a similar extension, but rather may encourage broader claims which could have serious implications to other national interests. For example, unilateral action of the U.S. regarding fishing jurisdiction would be contrary to our obligations under the 1958 Convention on the High Sea which specifically identifies the freedoms of navigation, overflight, and fishing as elements of the high seas.[35] The response of other nations to this unilateral action is not likely to be limited to comparable restrictions on fishing. If the U.S. abrogates one identified freedom, it faces the prospect that other nations may abrogate other identified freedoms. Such actions could threaten security interests of the U.S. by restricting naval and air mobility.[36] As maximum mobility is an integral element of strategic deterrence, the likelihood of such actions should not be viewed as abstract theories, especially in light of the difficulties encountered during recent Israeli-Arab conflict in obtaining overflight clearances in Europe.[37]

Not only would repercussions be felt in national security interests, but they could be expected in the broad range of ocean area interests critically important to the United States.[38] Because of its leadership role, unilateral action by the U.S. could have a particularly severe demonstration effect which would lead to a wild profusion of uncontrolled national claims.

Confrontation

Enactment of EMPFA could be seriously damaging to important foreign policy objectives by placing the nation in a possible confrontation with other nations, particularly the Soviet Union, and Japan, who strongly maintain the right to fish in high seas areas and are unlikely to acquiesce in unilateral claims, especially during a period of sensitive law of the sea negotiations in which they have a large stake.[39] Enforcement of the act would be difficult to say the least, in light of the United Kingdom's provision of warship escort for its fishing vessels in response to Iceland's claim of extensive

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[34] Senate Foreign Relations Report, Stmt. by Moore, note 28 supra, at 6.
[35] Hearings before Senate Armed Services Committee on S. 1988, 93d Congress, 2d Session (1974), Statement General George S. Brown, USAF, Chairman, Joint Chiefs of Staff, October 8, 1974, at 8, [hereinafter cited as Armed Services Hearings, Stmt. by General Brown].
[36] Id.
[37] Id.
[38] Senate Foreign Relations Report, Stmt. by Moore, note 28 supra at 6. See also Hearings before House Merchant Marine and Fisheries Committee, 93d Congress, 2d Session (1974), statement by J. R. Stevenson, Chairman of U.S. Delegation to Third UN Law of the Sea Conference, September 23, 1974, p. 3.

fisheries jurisdiction last year.[40] Such a risk of direct military confrontation is highly unwarranted, especially when the chances of cooperation are substantial.

Violation of International Law

The United States has consistently protested any extension of fisheries jurisdiction beyond twelve miles as a violation of international law.[41] The International Court in August of 1974 held in two cases arising from the "Cod War" between Iceland and the United Kingdom that the fifty mile unilateral extension of fisheries jurisdiction by Iceland was not consistent with the rights of the United Kingdom and the Federal Republic of Germany.[42] The United States could invoke its "domestic jurisdiction" reservation or submit the probable suit to the ICJ and risk losing on the merits; either way, the certain loss would be the Law of the Sea Treaty. Violations of international legal obligations can have serious short and long run costs to the nation.[43]

Harm to U.S. Fisheries Interests

The proposed legislation could prove detrimental to certain fishing interests such as tuna, shrimp, and salmon, dependent upon the migratory nature of those species and who fish off the coasts of other nations.[44] The U.S. assertion of jurisdiction over anadromous species of fish will simply not be recognized by foreign nations. The salmon industry fears that Japan would abrogate the International North Pacific Fisheries Treaty and fish for salmon within the abstention line up to the edge of the two-hundred mile zone, realizing that Japan has the capacity to take a substantial portion of the salmon returning to the United States, thereby greatly reducing the domestic catch.[45]

Law of the Sea Negotiations

Jeopardizing the international effort to achieve a comprehensive oceans treaty is the inevitable result of the passage of EMPFA; it undermines the very essential element of political compromise necessary for any satisfactory overall agreement.

The executive Branch, in an attempt to provide interim relief and assuage discontent prior to obtaining a Law of the Sea Treaty and to reduce the need for unilateral action has initiated a policy of increased diligence.[46] First, the State Department is pursuing actively new bilateral and limited multilateral treaties to provide improved regional fishery protection. Second, the United States has proposed that any agreement reached in Geneva be provisionally applied. Thus, relief could be instituted before waiting for the

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[39] Senate Foreign Relations Report, Stmt. by Moore, note 28 *supra*, at 6.
[40] Armed Services Hearings, Stmt. by General Brown, note 35 *supra*, at 8.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Senate Foreign Relations Report, Stmt. by Moore, note 28 *supra*, at 8. *See* also AOF & LA Newsletter, Atlantic Offshore Fish and Lobster Association Inhouse Newspaper, August 8, 1972, September 8, 1972, August 22, 1974, p. 1 & 3.
[45] Senate Foreign Relations Report, Stmt. by Moore, note 28 *supra*, at 8.
[46] Commerce Committee Hearings, p. 21, letter from John Norton Moore to Senator Warren G. Magnuson (co-sponsor of S. 1988), September 5, 1974.

process of ratification to be completed, bringing the treaty into full legal effect. Third, enforcement of present laws has been increased in two ways: a substantial tightening of control over the incidental catch of living resources and additional funding for increased Coast Guard enforcement efforts in protecting the vulnerable fishery regions. The measures taken will not only aid in the interim period but ease the transition from the present limited fisheries jursidiction to the broader jurisdiction which is the likely outcome of the Law of the Sea Conference.[47]

Conclusion

The Emergency Marine Fisheries Protection Act of 1974 is thus analyzed in the context of its national and international aspects. One might conclude that the EMFPA is intended only as temporary relief for headache and tension, and like some remedies on the drugstore shelf may cause even more problems than it solves. The Act does indeed live in a hostile environment; its very survival is threatneed. Whether this legislation will endure the evolutionary "survival of the fittest" in the national and international world is open to doubt. The question remains, will there be an effective Law of the Sea Treaty in time?

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[47] *Id.*