

## Chapter II

# International Law and Naval and Air Operations at Sea

by  
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### Introduction

**T**he publication of *The Commander's Handbook on the Law of Naval Operations* (NWP-9) is a suitable occasion for reconsidering the relationship between international law and naval and air operations at sea in times of peace.<sup>1</sup>

The *Handbook* is replete with articulations of specific rules and principles of the law of the sea that may be of use to the naval or air commander. Its purpose is "general guidance" and "not a comprehensive treatment of the law."<sup>2</sup> The rules and principles it articulates relating to navigation and overflight are expressly based on those set forth in the 1982 United Nations Convention on the Law of the Sea,<sup>3</sup> "[a]lthough not signed by the United States and not yet in formal effect."<sup>4</sup> The *Handbook* could hardly be significantly more faithful to the text of the Convention<sup>5</sup> had the United States ratified the text of the Convention and Congress enacted penalties for its violation.

Still the *Handbook* contains interesting innovations not found in the Convention. For example, use of the terms "national waters" and "international waters"<sup>6</sup> was doubtless designed to facilitate an explication to the non-expert of the law of naval and air operations in the exclusive economic zone.<sup>7</sup> If the *summa divisio* between "national" and "international" waters persists as such in coastal areas—a matter open to some doubt—it might be useful for the commander to know that the classifications set forth in the *Handbook* might prove controversial. Unlike the authors of the *Handbook*, some coastal states would regard the exclusive economic zone as falling within the former category and at least some commentators might regard international straits (and comparable archipelagic sealanes) as falling within the latter category.

Another arguable innovation is the concept of "assistance entry" into the territorial sea.<sup>8</sup> The concept is appropriately rooted in the ancient duty of

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mariners “to assist those in danger of being lost at sea.”<sup>9</sup> Although the Law of the Sea Convention does not expressly address the question of entry into the territorial sea for the purpose of rescue, textual support can be found in the newly articulated and analogous principle of the Convention that permits stopping and anchoring while in innocent passage through the territorial sea “for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.”<sup>10</sup> In the principle that the sovereignty of the coastal state over the territorial sea is subject to other rules of international law,<sup>11</sup> and in the principle that the coastal state’s rights and jurisdiction must be exercised in a manner which would not constitute an abuse of right,<sup>12</sup> one can find ample basis for concluding that the coastal state’s rights must be interpreted in light of the ancient duty to rescue, and that the coastal state is presumed to consent to *bona fide* efforts to rescue those in danger of being lost at sea.

Probably in order to avoid too much confusing detail, the *Handbook* is also less than complete on the question of straits overlapped by internal waters.<sup>13</sup> Article 35(a) of the Law of the Sea Convention makes it clear that the regime of straits applies to internal waters established by a system of straight baselines in accordance with the Convention where the waters enclosed were not previously considered internal (that is they would not be regarded as juridical bays, for example). Why then, except perhaps for reasons of economy of text, is overflight excluded from transit passage of such straits?<sup>14</sup> Why is the discussion of international straits essentially limited to “International Straits Overlapped by Territorial Seas?”<sup>15</sup>

All (or at least almost all) of this is as it should be. Taken as a whole, the *Handbook* should achieve its purposes admirably. This writer has expressed his specific views on the legal rules governing naval and air operations at sea elsewhere, and will not repeat them here.<sup>16</sup>

What the *Handbook* does not address, or addresses only in passing, is why those concerned with naval and air operations at sea should be concerned with the international law of the sea. Such an analysis is probably beyond the scope of a handbook of the kind addressed here. But the analysis is essential if one is to understand what one is probably reading, and why one is reading it, when one refers to the *Handbook*.

### The Duty to Obey International Law

From the perspective of the naval commander, a fairly simple answer can be posed to the question, “Why worry about international law?” As the *Handbook* notes,<sup>17</sup> article 0605 of U.S. Navy Regulations, 1973, states:

At all times, a commander shall observe and require his command to observe the principles of international law. Where necessary to the fulfillment of this responsibility, a departure from other provisions of Navy Regulations is authorized.

The *Handbook* also attempts an explanation of the underlying reasons for this duty:

International law provides stability in international relations and an expectation that certain acts or omissions will effect predictable consequences. If one nation violates the law, it may expect that others will reciprocate. Consequently, failure to comply with international law ordinarily involves greater political and economic costs than does observance.<sup>18</sup>

The *Handbook* does not stop there however. It ventures into the complex world of law and interest when it states, "In short, nations comply with international law because it is in their interest to do so."<sup>19</sup> This sentence is not without its ambiguities. Legal restraints are of particular significance when one perceives an interest in ignoring those restraints. What the authors presumably mean is that the interest in observing international law ordinarily outweighs the perceived interest in acting otherwise in a particular instance.

The brief discussion concludes with a declaration at once as terse and as pregnant as one is likely to encounter: "Like most rules of conduct, international law is in a continual state of development and change."<sup>20</sup> Nothing at all is said about the role of the *Handbook* itself in this process. As for the role of naval and air forces, the *Handbook* asserts:

When maritime nations appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of nations and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime nations to protest through diplomatic channels all excessive claims of coastal or island nations, and to exercise their navigation and overflight rights in the face of such claims. The President's Oceans Policy Statement makes clear that the U.S. has accepted this responsibility as a fundamental element of its national policy.<sup>21</sup>

What the *Handbook* appears to be saying is that because the law may evolve and change, it is important for the United States to influence that process, where appropriate, using its naval and air forces to that end. More than that, the *Handbook* appears to be used to resist attempts by other states to change the law, particularly "excessive maritime [presumably coastal state] claims" and "constraints on international navigation and overflight." The "law" that the United States will defend is expressly identified with the rules of the Law of the Sea Convention affecting navigation and overflight rights.

We have now moved beyond a mere duty to respect international law as it is now or as it may evolve in the future. The law of the sea, at least that part of it governing naval and air operations at sea, has itself become an object of those operations. Why?

## International Law and Large Navies

Large navies operate around the world. Their ships approach or enter the territory of many states. Their operations are subject to scrutiny within their own government and legislature, by their own press and public at least in democratic states, and by the governments, press and people of foreign countries, whether friendly or hostile. Alone or in combination, every one of these groups has some actual or potential influence on the ability to define naval missions and to carry them out. The question of whether they should have such influence is beside the point.

Few naval missions (other than purely humanitarian assistance) are likely to be applauded by everyone. Even a peaceful visit to a port of a friendly country may be an implicit warning to others. The capacity to define and carry out naval missions is maximized if one maximizes the number of people with influence over the definition or execution of the mission who believe that:

- (1) the specific mission is desirable;
- (2) navies should have the right to conduct that kind of activity in the manner undertaken; and
- (3) navies do have the right to conduct that kind of activity in the manner undertaken.

Human nature being what it is, there is some likelihood that an individual who falls within group 1 will also fall within group 2, and that an individual who falls within group 2 will also fall within group 3. However, not everyone who falls within group 1 or even 2 will necessarily fall within group 3. For example, some people who believe that Israel's rescue of hostages in Entebbe or even its raid on the Iraqi nuclear reactor were, if viewed in isolation, desirable, also believe that such intrusions into the territory of a foreign state are (and should be) of doubtful legality.

Moreover, what if a significant number of people with actual or potential influence over the definition or execution of the mission do not believe that the specific mission, or its mode of execution, is desirable? The objective in that case to achieve their acquiescence is facilitated (but by no means guaranteed) if they are persuaded either that the navy should, or that it does, have a right to carry out the mission in the manner contemplated.<sup>22</sup> To put the matter differently, the political, economic or military resources that must be expended to achieve acquiescence are minimized, and often eliminated, if those whose acquiescence is sought believe a navy does or should have a right to undertake the action in the manner contemplated.<sup>23</sup>

Since no government's political, economic, or military resources are unlimited, the more costly it is to achieve acquiescence, the more limited are a government's options to choose and execute its naval missions.

Accordingly, perceptions of what the law is or should be by people with influence over the definition or execution of the mission have a real influence over the range of a government's naval options.

### Whose Acquiescence is Important?

For purposes of this analysis, a naval or air mission might be divided into three parts: the objective, the means, and the logistics.

We might assume, for example, that the proposition up for decision is delivering a warning to some government or group in the eastern Mediterranean region designed to deter violence or escalation of violence on land or at sea. We might assume further that the means under consideration are a substantial augmentation of naval presence in the eastern Mediterranean Sea. Finally, we might assume that the augmentation would require the movement of ships from the Atlantic Ocean and perhaps the Indian Ocean, the former through the Strait of Gibraltar and the latter through the Strait of Bab-el-Mandeb and the Suez Canal.

The classic argument for maintaining and using a large surface navy in this manner is nicely summarized in the *Handbook*:

Depending upon the magnitude and immediacy of the problem, naval forces may be positioned near areas of potential discord as a show of force or as a symbolic expression of support and concern. Unlike land-based forces, naval forces may be so employed without political entanglement and without the necessity of seeking littoral nation consent.<sup>24</sup>

Three aspects of this statement require emphasis. First, it is normally assumed that the naval forces will be positioned “near areas of potential discord,” that is near land, and may engage in naval maneuvers once there.<sup>25</sup> This is true whether one wishes to influence the behavior of regular or irregular land forces or the behavior of armed ships or boats likely to operate mainly in coastal areas. Second, it is normally assumed that some “positioning” in response to the specific mission is required, i.e. that the ships will have to be moved into position from elsewhere. Third, it is assumed that the positioning may be achieved “without political entanglement and without the necessity of seeking littoral nation consent.”

Taken together, these assumptions presuppose the acquiescence of three different classes of foreign states. The first class comprises the state or states near whose coast the force will be positioned. The second class consists of the state or states off whose coast the ships will navigate en route to their position. The third class embraces other states with global or “blue water” navies.<sup>26</sup>

Let us assume that states in all three classes either oppose, do not wish to support, or do not wish to appear to support the mission. The question then

becomes one of acquiescence. The various classes of states will be examined in reverse order in this connection.

### *1. Other Naval Powers*

Much attention is normally devoted to the third class and, in particular, the Soviet Union. History has demonstrated that the United States and Soviet navies and air forces, notwithstanding occasional lapses into pubescent behavior,<sup>27</sup> are reluctant to engage each other far from their shores (and exercise at least relative caution even in their own waters). The reaction of other major naval powers is therefore ordinarily a political rather than strictly military consideration, although one must of course bear in mind that political cost may reduce one's flexibility to undertake a mission.

Moreover, because the same rules normally apply to all, it may be assumed that governments with large navies generally believe all states have, or should have, the right to do what large navies generally do. In other words, much as the Soviet Union may dislike a particular United States naval mission in the eastern Mediterranean Sea, or the United States may dislike a particular Soviet naval mission in the Caribbean Sea, each is likely not only to concede (albeit privately) the legal right of the other to do what it is doing, but perhaps even welcome (albeit silently) the augmentation of state practice in support of the kinds of operations large navies undertake.<sup>28</sup>

From this analysis, one may draw at least the following inferences regarding the effect of the international law of the sea on the acquiescence of other naval powers in operations off the coasts of third states. The naval powers have no desire to engage each other directly. The law of the sea would appear to be relevant to the degree of acquiescence obtained from other naval powers in two different ways. If the naval powers disagree on what the law of the sea rules are or should be, and that disagreement involves the question of whether there has been an incursion on the territory or rights of a third state by the naval power undertaking the mission, the disagreement could force a more severely negative reaction by the other naval power either in principle or because of political or defense commitments to the third state. Conversely, if the naval powers agree on what the law of the sea rules are, and those rules are observed, the perception that the power undertaking the mission is within its rights—and that other naval powers wish to preserve the right to do the same thing elsewhere—may increase the degree of acquiescence, that is dampen the political opposition.

This is the first illustration of a basic point central to the relationship between the law of the sea and naval and air operations at sea: to the extent that the law of the sea is relevant to the question of acquiescence by a foreign power, its relevance depends not on what the naval power undertaking the mission believes its rights to be, or even on whether that belief is well founded

in law, policy or good morals, but rather on whether the powers concerned agree or disagree with each other on what the rules are.

## 2. *States Off Whose Coast Ships Will Navigate En Route to Their Position*

The *Handbook* assumes that ships will be able to navigate to their intended position "without political entanglement and without the necessity of seeking littoral nation consent." In this case, the reference is therefore to the acquiescence of states off whose coasts ships will navigate en route to their position. In this connection, the political, military, and psychological question of what constitutes a route close to the coast of another country must be distinguished from the strictly legal question of what rights a state may claim and exercise in waters off its coast. For purposes of this analysis, the acquiescence of a state "off whose coast" one must navigate is relevant if that state has the means and the will to disrupt, or otherwise increase the political, economic or military cost of, the mission.

A route close to land may be selected because of geographic necessity. For example, a ship cannot enter or leave the Mediterranean Sea without traversing a strait (or canal) at some point. Some seas are so constricted that one is rarely far from land. A route close to land may be selected for reasons of safety or weather. It may also be selected because it is substantially shorter and more convenient than an alternative route. The same considerations may apply in the case of military aircraft where consent to overfly land territory is unavailable.<sup>29</sup>

The acquiescence of states along a selected route therefore affects the mobility of naval forces as well as the mobility of air forces for which consent to overfly land territory is unavailable. Such acquiescence affects naval and air transports in the same way, whether used to move ground or amphibious forces or to deliver material to friendly foreign forces. The number of states potentially involved is large and difficult to predict. It depends on the location of possible missions, the location of ships when assigned such missions, and the routes selected.

In considering the implications of this problem, one must bear in mind that states do not have balanced bilateral reciprocal interests in the right to navigate off each other's coast without consent.<sup>30</sup>

One reason for the imbalance relates to geographic position. Not many states have an overwhelming interest in navigating close to the coast of the United States without consent, despite the enormity of the United States coastline. Many would perceive a far greater interest in navigating close to England and France, Spain and Morocco, Greece and Turkey, Oman and Iran, or Singapore, Indonesia and Malaysia.

Another reason for the imbalance relates to naval capacity, defense strategy, and foreign policy. Very few states maintain global navies or a

defense strategy or foreign policy that entails deployment of their navies at great distances from their own shores. While it is true that a significant number of states rely, explicitly or implicitly, on the mobility of a global navy for protection from another global power or ambitious regional powers, not many are likely to attach a high priority to this interest without insistent reminders from their naval ally. Moreover, in some regions, particularly semi-enclosed seas, it is fashionable to believe that elimination of the right of warships (of global navies) to navigate in the region would, by removing the great naval powers, promote peace and stability. These views are sometimes inspired by regional powers whose ambitions may be held in check by the actual or potential presence of a global navy.

The significance of the imbalance means that unlike other naval powers, states along the route taken to a mission position will not necessarily perceive a strong interest (if any) in the proposition that navies should generally have the right to navigate close to the coast in order to take the necessary or most convenient route to their mission destination. Thus, to the extent one wishes to encourage their acquiescence in the use of the route off their coast, one must often rely more on their perception of what the law is than on their perception of what the law should be.

The acquiescence of this particular group of states is central to any concept of flexibility to deploy forces at sea. Prudence requires the planner to anticipate that a naval force may provoke political resistance and retaliation, or even armed resistance, once the force reaches its mission position (especially when the very purpose of the mission is to deter violent behavior by those in the region). But what if, even in peacetime, the decision-maker must deal with such contingencies not only at the mission destination but in connection with the movement of ships to their destination?

Several methods for promoting acquiescence are possible. One is the threat of armed resistance or retaliation. A cost of this approach is that every naval mission then requires the potential diversion of additional military resources to yet another mission, namely defense of the means to reach the mission destination. In addition, the political or economic costs of threatening friends and the military costs of threatening adversaries may be too high.

Another method is the threat of economic retaliation. Such retaliation is in fact more difficult than it appears. Those responsible for international trade policy can be expected to resist interference with trade either in principle or because the United States as well as the target state would be hurt.

Moreover, absent an extreme emergency, forceful military or economic measures are unlikely to be used unless those individuals with substantial influence over decisions by the government of a major naval power believe there is a legal right to use the route in question. In other words, before one can effectively pressure the foreign state to acquiesce, one must have persuaded one's domestic constituency of the right to use the route. That

constituency will include all relevant participants in government decision-making (including defense and foreign ministry lawyers), members of the legislature, informed and influential members of the public, and at least some influential friendly foreign leaders. Therefore, even if one chooses to ignore international law as such as the means to obtain acquiescence from the foreign states concerned, one would probably need to use international law to persuade the relevant domestic constituency to threaten military or economic retaliation.

One also may purchase acquiescence. Those familiar with the full political, military, and economic costs of some base-rights agreements could doubtless appreciate what it would cost to buy, on a bilateral basis, acquiescence in the right to navigate along all foreign coasts likely to lie astride the approaches to possible mission destinations. As previously noted, very few states would perceive a reciprocal interest in the right to operate warships (or even merchant ships) off the United States coast. Most would wish something in return that they would not otherwise receive; many would insist that the value to them of what is received be comparable to the value to the United States of the mobility of its naval forces; a goodly number would reserve an explicit or implicit right to renegotiate terms or end the arrangement; and some would refuse (or would be forced by political pressures to refuse) to deal at any conceivably acceptable price.<sup>31</sup> One must also bear in mind that purchasing (agreeing bilaterally on the existence of) rights to navigate in one place arguably implies that exercising such rights in similar areas elsewhere requires agreement of the coastal state.

This analysis suggests that the international law of the sea would be a useful tool in helping to induce the acquiescence of foreign states lying along the route to a particular mission. A variety of tactical considerations reinforce this conclusion.

While the number of states that perceive a direct interest in the global mobility of warships may be small, the number that perceive an important interest in the free movement of international trade by sea is quite large. By linking the two in a single principle of freedom of navigation or free transit of straits, one can substantially increase the number of governments that believe all ships (and therefore warships) should have a right to navigate along the coast where necessary to reach their destination.

Some governments would have difficulty gaining domestic acceptance of the premise that all warships, or warships of a particular state, have been accorded a right to navigate off the coast. Their capacity to act on the basis of such a premise is enhanced if the right is not localized, but rather derives from a global rule applicable to all similarly situated coastal states everywhere.

This being said, we must recall the object of the exercise: inducing the acquiescence of states lying along the routes used to reach the mission

destination despite their opposition to, or unwillingness to support, the mission itself. This is then the second illustration of the basic point, referred to earlier, central to the relationship between the law of the sea and air operations at sea.

The challenge then is to affect the perceptions of others as to what the law is (what some term their “expectations”).

One way is to persuade them that the particular proffered rule of law serves their interests. The potential for using this approach has already been discussed.

Another way is to rely on habit. There is some tendency to associate the factual *status quo* with the legal *status quo*. If your neighbor crosses your land regularly, you are more likely to believe that he has a right to do so or, perhaps more importantly, that you would be disrupting good-neighborly relations (“legitimate expectations founded on custom”) if you tried to stop him. Thus, whatever the theoretical relationship between a program of exercise of rights and the preservation of rights under international law, foreign states as a practical matter are more likely to acquiesce in activities off their coasts that occur regularly and without serious impairment of their interests.

Still another way is to influence directly the foreign state’s perceptions of legitimacy, that is, to operate from a platform of principle likely to be accepted by the foreign state in determining its own behavior. One thing is certain: a platform of principle unilaterally enunciated by the naval power (including its legislature and its domestic partisans) is not likely to be regarded by foreign states as “law” necessarily binding on them.

To induce foreign acquiescence in navigation rights important to naval mobility, we must find propositions that:

- (1) are understood to allow activities important to naval mobility, and
- (2) are accepted as law by the states off whose coast one must navigate.

The most commonly cited repository of such propositions is called customary international law, fairly defined by the *Handbook* as the “general and consistent practice among nations with respect to a particular subject, which over time is accepted by them generally as a legal obligation.”<sup>32</sup> But if this is so, have we come full circle?

The object of the exercise was to use law, rather than or in conjunction with other means, to induce foreign acquiescence at the lowest possible cost. Yet we are now told that this law rests on general and consistent practice among nations. Therefore, in order to ensure our first objective, namely that the law is understood to allow activities important to naval mobility, we will have to discourage states everywhere in the world from engaging in practices to the contrary. Whether we are especially interested in the actual or potential need to use an area off the coast of a particular state, we must discourage the emergence of new practices inconsistent with our view of what the relevant law is and needs to be.

When we object to the change in practice, the foreign state could accurately quote the *Handbook*: “[L]ike most rules of conduct, international law is in a continual state of development and change.”<sup>33</sup> The foreign state might add: If law changes, and if customary international law is rooted in general practice, then the only way customary law can change is if general practice changes, and the only way general practice can change is if someone starts the process alone.

How then do we ensure that state practice is generally consistent with the existence of rights necessary to naval mobility? One way is by investing political, economic, and even military resources in the endeavor. This means that those concerned with the maintenance of an international law of the sea that encourages acquiescence of foreign states in naval operations must constantly persuade their colleagues in government that this is an objective worth the investment of national resources. Their task is not an easy one. The same people are frequently asking for money to acquire and maintain the ships and personnel necessary to have a navy. The political or economic costs of doing more than protesting adverse claims (practice) by a foreign coastal state are likely to be more immediate or apparent than the abstract erosion of a legal position.

Another possibility is to place more direct emphasis on the element of acceptance of a legal obligation and less on practice. One example would be a treaty setting forth the relevant rules and accepted by all. This is exactly what was attempted in the negotiation of the United Nations Convention on the Law of the Sea.<sup>34</sup> But for serious disagreements on the question of mining of seabed hard minerals in areas beyond (at times well beyond) 200 miles from any land, it appears that the Convention might have achieved very widespread ratification, thus by definition setting forth rules regarded by foreign states as legally binding on them. Moreover, since the Third United Nations Conference on the Law of the Sea, a very large number of states seem prepared to accept all or virtually all of the propositions set forth in the Convention as an authoritative source of law binding on all.

The *Handbook*, the Statement of the President on United States Oceans Policy,<sup>35</sup> and other government statements represent an effort to use the treaty strategy under the rubric of customary international law. They declare that the propositions set forth in the U.N. Convention on the Law of the Sea reflect customary international law. Where the Convention text is sufficiently precise, legal argument is then largely confined to interpretation of the text as if it were a treaty, with little if any attention devoted to state practice. States that make claims or undertake activities regarded as inconsistent with the propositions set forth in the Convention are told that their activities are inconsistent with the Convention and therefore illegal under customary international law.

The reason for this approach is obvious. The propositions set forth in the Convention are generally understood to allow activities important to naval mobility. Because the Convention was negotiated largely by a consensus procedure over a long period of time with the participation of the entire community of states, it enjoys substantial legitimacy as a source of rules binding on all. Thus, from the perspective of naval mobility, there is nothing to gain and a great deal to lose by allowing inconsistent state practice to overtake the Convention as a source of law in any specific instance or, even more importantly, in principle.

It is open to serious doubt whether a government that refuses to ratify the Convention, or even to renegotiate the objectionable deep seabed mining provisions, can succeed in the long run in persuading foreign governments to respect as law the provisions of the Convention affecting navigation, overflight and related naval activities. But the authors of the *Handbook*, compelled to accept that risk for the present, are almost certainly correct in concluding that treating the Convention as if it were a treaty in force for all, including positive “enforcement” of its provisions if need be, represents a policy regarding the law of the sea most likely to achieve the underlying naval objective: acquiescence by others in activities important to naval mobility at the lowest possible cost.

It is in this context that the provisions of the *Handbook* regarding the exercise and assertion of navigation and overflight rights and freedoms might be understood.<sup>36</sup> The strategy for inducing foreign acquiescence in naval activities seems to be one of combining habit with the textual legitimacy of the Convention. The Convention serves a double function in this regard. First, it is the most plausible platform of principle from which to seek to encourage foreign acquiescence. Second, because of its international pedigree, it is the most plausible platform of principle from which to seek domestic support for a sometimes risky or costly program of exercise of rights and freedoms designed to establish a pattern, or habit, of naval activity around the world permitted by the Convention (at least as understood by the United States).

### **3. States Near Whose Coast the Force Will be Positioned**

Much of the analysis set forth in the previous section is relevant to the question of positioning forces off a state “without the necessity of seeking littoral state consent.” The most important new element is that the objective of deploying forces “without political entanglement” becomes a larger part of the equation.

In principle, it is of course difficult to station a naval force off any area of actual or potential conflict “without political entanglement.” Indeed, the very objective is “a show of force” or “a symbolic expression of support and concern.” The key to the point being made in the *Handbook* is that “[u]nlike land-based forces,” naval forces may be positioned near areas of potential discord without political entanglement. The salient difference

would appear to be the possibility of positioning naval forces near areas of potential discord without introducing a military presence into the territory of a foreign state, particularly one that is the scene, object, or source of the discord.

This facility can be important in two opposite situations. In one situation, the appearance of the naval force off the coast of a state may be designed as a warning to those threatening that state or its government. If the naval force is deemed to be located outside the coastal state and its consent is not required for the force to be positioned in the area, then both the coastal state and the naval power can reap the benefits of the force's presence without necessarily implying any political or military alliance or arrangement, and in particular without the stationing of armed forces of a major power on the territory of the state concerned.

In another situation, the appearance of the naval force off the coast of a state may be designed as a warning to that very state's government. If the naval force is deemed to be located outside the coastal state and its consent is not required for the force to be positioned in the area, then the coastal state is in a position to react to the message as it deems best without the need to defend its territory from intrusion, while the naval power is in a position to send a very strong and direct message without necessarily entangling itself in armed hostilities.

To an important degree, the positioning of the naval force in both of these scenarios depends on the coastal state's perception of the extent of its maritime territory and jurisdiction. In some circumstances, the political or military consequences of entering a maritime area claimed by the coastal state may be the same whether or not that claim is recognized by the naval power. If the purpose of the mission is to support the government of the coastal state, one would presumably prefer to avoid, if possible, a potentially embarrassing dispute over an intrusion into what the coastal state regards as its territory. If the purpose of the mission is to warn the government of the coastal state while minimizing the risk of direct military engagement, the risk of a military or political reaction to an intrusion into the state's claimed waters must be considered even if the claim is not recognized by the naval power (and perhaps others).<sup>37</sup>

This, then, is a third illustration of the basic point, referred to earlier, central to the relationship between the law of the sea and naval and air operations at sea.

### Naval and Air Operations at Sea, International Law and Domestic Politics

The influence of the international law of the sea on domestic politics has

two important implications for naval and air operations at sea. Both relate to the restraints on and costs of deploying naval or air forces in furtherance of political, military or economic objectives.

A deployment may be opposed for legal reasons by either supporters or opponents of a mission. Legal objections may preclude a decision to deploy, may increase the domestic political costs of the deployment, or may erode domestic support for the mission and more generally for the maintenance of military and naval options. The greater the doubts about the international legality of a naval operation, the greater the difficulty one may encounter in assembling and maintaining the necessary domestic support. A foreign ministry will not necessarily accept a navy's view of what the law permits; a legislature will not necessarily accept a foreign ministry's view; and an informed public will not necessarily accept the legislature's view. In brief, the international pedigree of the platform of principle on which a naval mission is based must be almost, if not quite, as great for domestic reasons as for international ones.

The maritime interests of a large naval power are by no means limited to the preservation of its options to deploy its navy at will to different parts of the world. Like those of most coastal states, its people would probably want uninvited foreign navies to stay far away, control of as much of the ocean's natural resources off the coast as possible, stronger measures to intercept illegal immigrants and smugglers, and would probably fear an environmental catastrophe not only from tankers and oil rigs off the coast but perhaps from nuclear armed or powered warships or aircraft. If the paradigm coastal state might prefer a thousand-mile territorial sea for itself without regard to the global consequences, the paradigm maritime power, since it is also a coastal state, would probably prefer a thousand-mile territorial sea for itself and a three-mile territorial sea for everyone else.

Limiting the authority of coastal states over the use of the sea off their coasts is important to global navies and, more broadly, global deployment of armed forces; to international trade and communications; and to those fishermen who seek their livelihood off foreign coasts rather than their own. Most remaining ocean interests either favor increased control of the sea by coastal nations, or are unconcerned with the issue. Accordingly, the legislators of even great naval powers are under constant pressure to expand the coastal state's control over the oceans in one area or another or for one purpose or another.

This pressure presents a global navy with two problems. First, it cannot plausibly assert rights off foreign coasts that its own government denies foreign ships or aircraft off its own coast. Second, and more seriously, increasing unilateral assertions of coastal state jurisdiction by the great naval powers tends to legitimate the notion that each coastal state may unilaterally assert control over activities off its coast to the extent such an assertion serves

its interests. The fact that a global naval power may perceive an interest in coastal state control of fishing vessels but not warships does not, from this perspective, preclude some other state from calculating its interests in a different way and making different kinds of unilateral claims. The whims of a quixotic national legislature are unlikely to provide a firm foundation for a platform of principle from which to seek global acquiescence in the definition and exercise of legal rights.

The problem is even more severe if the global navy is attempting to harmonize perceptions of legality around a particular articulation of the law, in this case the U.N. Convention on the Law of the Sea. The key to this effort is the legitimacy not merely (and in some cases not principally) of the particular rule set forth in the Convention, but rather the legitimacy that flows from the notion that the Convention itself is the reflection of the positive will of the community of states. Quite apart from the controversy over deep seabed mining, if the legislature of the naval power exercises the option to ignore certain proscriptions of the Convention, why should other states not ignore other proscriptions?

Given the strong competing pressures on their own government and legislature, the promoters of a law of the sea conducive to foreign acquiescence in global naval operations are constantly attempting to prevent domestic laws or actions, often in response to problems of the moment, that would undermine the navy's long-term global legal position and strategy. Their ability to persuade their own government to respect certain rules and restraints depends in part on what domestic decision-makers and their advisers believe international law requires.

Whether or not one may properly characterize as wishful thinking the view that customary international law based on the 1982 U.N. Convention on the Law of the Sea will restrain the behavior of foreign governments as much as a ratified Convention would, there is no basis whatever for believing that the United States Congress, in the face of political pressures to the contrary, is as likely to respect the restraints imposed by an unratified treaty as it is a ratified one. Indeed, as a matter of the pure theory of customary international law, it is likely that international custom and practice would rather quickly conform to virtually any coastal state claim likely to be made by the United States, precisely because the state with perhaps the greatest interest in opposing and capacity to oppose the emergence of such custom and practice is the one making the claim in the first place.

No international legal strategy can alone solve the domestic problem. Those responsible for promoting a legal climate conducive to protecting the option of present and future governments to deploy naval forces to any part of the sea must however recognize that a strategy for ensuring domestic restraint is at least as important as a strategy for ensuring foreign restraint. Indeed, an excessive claim by one foreign state may well have no operational

significance and limited legal impact. On the other hand, every domestic claim by a major naval power automatically limits the options of its navy in every part of the world, and frequently tempts significant numbers of foreign governments to make even more ambitious claims.

### Conclusion

The willingness of foreign governments to acquiesce in naval operations has an important bearing on the range, cost and utility of options to maintain and deploy a navy off foreign shores. The perceptions of foreign governments regarding the rights and obligations of states with respect to naval operations may in turn have an important bearing on their willingness to acquiesce in such operations. Any long-term naval strategy should therefore contain within it a strategy for influencing the perceptions of foreign governments regarding the content of the international law of the sea and enhancing their willingness to respect its proscriptions voluntarily. That strategy should also include a system for ensuring scrupulous domestic restraint along similar lines.

Any successful strategy for achieving these legal goals will entail some political, economic, and even military costs. Those costs must be measured against the importance of maintaining the option to deploy a navy off foreign shores and the likelihood and costs of obtaining by other means the desired degree of foreign acquiescence over time and in all the places it may be needed. Moreover, the alternative costs of different strategies for achieving these legal goals must be assessed carefully.

The *Handbook* is a useful part of this process. At the least it encourages behavior from United States forces consistent with the international legal positions and objectives of the United States. It is a reasonably accurate guide to the perceptions of foreign governments primarily because it is based on the U.N. Convention on the Law of the Sea. Accordingly, it is likely to remain an accurate guide only so long as the United States and foreign governments resist the temptation to act in ways at variance with the provisions of the Convention limiting coastal state powers in principle, and in particular over navigation, overflight and related naval operations.

It is not likely that many coastal states (or legal commentators) will conclude that customary international law limits the freedom of action of coastal states more than the Convention. Any significant change in the law of the sea is therefore likely to be either neutral or prejudicial from the perspective of naval operations, not favorable. The *Handbook* is therefore correct in seeking to anchor the future evolution of the sea in the principles of the Convention. It is also correct in emphasizing the importance of a program of routine exercise of rights and freedoms not only to avoid perceptions of acquiescence in coastal state claims but to enhance the

perception that naval operations are normal and lawful. While the point is not made, such a program is important whether or not there is a ratified Convention. The meaning and effect of treaties may also evolve in response to practice.

The question remains whether the objectives of a legal strategy would be enhanced by a globally ratified Convention on the Law of the Sea. In considering this matter, two additional questions are particularly important. First, are governments more likely to respect the restraints on their freedom of action set forth in a ratified Convention on the Law of the Sea? Second, are missions for the purpose of exercising rights and freedoms protected by the Convention, in the face of inconsistent claims or otherwise, more likely to be supported by the Executive Branch and Congress if they are rooted in ensuring respect for a ratified Convention?

If these questions are answered in the affirmative, then are the benefits of a widely ratified Convention worth the costs that may be entailed in obtaining it? Stripped of the legal and political rhetoric hurled at this issue, it comes down to a simple question of priorities.

### Notes

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1. It is also a suitable occasion for examining the same question with reference to armed conflict. This writer (fortunately) was not invited to address that subject.

2. *The Commander's Handbook on the Law of Naval Operations* NWP-9, p. 27 (hereinafter *Handbook*).

3. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Pub. Sales No. E.83.V.5 (1983), reprinted in *International Legal Materials*, Nov. 1982, v. 21, p. 1261 (hereinafter cited as *Law of the Sea Convention*).

4. *Handbook*, *supra* note 2, par. 1.1.

5. As the United States Navy would be expected to understand it.

6. *Handbook*, *supra* note 2, pars. 1.4, 1.5, 1.8.

7. The authors of the *Handbook* are to be congratulated on an elegant attempt at a solution to the question of the relationship between the exclusive economic zone and the regime of the high seas. This writer believes that the question cannot be resolved by assigning a geographic status to the exclusive economic zone identical to that assigned to the high seas beyond: "The question whether relevant aspects of the economic zone regime are part of the high seas regime has been resolved by making relevant aspects of the high seas regime part of the economic zone regime and by deleting the geographic definition of the high seas." Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: the 1977 New York Session," *American Journal of International Law*, January 1978, v. 72, p. 57 (more generally at pp. 67-75).

It should be noted nevertheless that insofar as the authors of the *Handbook* are concerned with the kinds of operations warships and military aircraft ordinarily conduct in peacetime, rather than with other activities, they point to a conclusion not markedly different from that previously stated by this writer:

To put the matter differently, warships in principle enjoy freedom to carry out their military missions under the regime of the high seas subject to three basic obligations: (1) the duty to refrain from the unlawful threat or use of force; (2) the duty to have "due regard" to the rights of others to use the sea; and (3) the duty to observe applicable obligations under other treaties or rules of international law. The same requirements apply in the exclusive economic zone, with the addition of an obligation to have "due regard to the rights and duties of the coastal State" in the exclusive economic zone.

Bernard H. Oxman, "The Regime of Warships Under the United Nations Convention on the Law of the Sea," *Virginia Journal of International Law*, Summer 1984, v. 24, p. 809, at pp. 837-38 (English adaptation

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of an article originally published in *Annuaire Francais de Droit International*, v. 28, p. 811 (1982)) (hereinafter the Regime of Warships).

8. *Handbook, supra* note 2, par. 2.3.2.5.

9. *Id.*

10. Law of the Sea Convention, *supra* note 3, art. 18, par. 2.

11. *Id.*, art. 2, par. 3.

12. *Id.*, art. 300.

13. In considering the importance of this question, one might bear in mind, for example, that the baselines established by Oman extend well into the Strait of Hormuz, and that the question of navigation and overflight rights in the Arctic Ocean north of Canada and the Soviet Union is not necessarily resolved even if one were to regard as valid the internal waters claims overlapping part or all of the Northwest Passage or Northeast Passage.

14. *Handbook, supra* note 2, par. 2.3.1.

15. *Id.*, par. 2.3.3.1.

16. See Oxman, The Regime of Warships, *supra* note 7. Some of the matters treated in that article are not addressed at length in the *Handbook*. These include the implications of the prohibition on the threat or use of force for peacetime activities (p. 814), the duty to protect and preserve the marine environment (p. 819), disclosure of sensitive information (p. 822), reservation of the high seas for "peaceful purposes" (p. 829), the international seabed area (p. 832), as well as military maneuvers (p. 838), installations and structures (p. 841), scientific research (p. 844), intelligence collection (p. 846), and residual rights in the exclusive economic zone (p. 847).

17. *Handbook, supra* note 2, p. 28.

18. *Id.*

19. *Id.*

20. *Id.* It is possible to infer, at least with regard to the international law of the sea, that the word "continual" conveys precisely the intended meaning.

21. *Id.*, par. 2.6. The reference is to the following excerpt as quoted from the President's Statement on United States Oceans Policy of March 10, 1983:

The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 LOS] convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

President's Statement on United States Oceans Policy, *Weekly Compilation of Presidential Documents*, v. 19, No. 10, p. 383 (March 14, 1983), reprinted in *International Legal Materials*, v. 22, p. 464 (1983) (hereinafter cited as Presidential Statement).

22. Those contemplating the distinction between agreement with an objective and support for the freedom to pursue that objective may recall the famous quotation attributed to Voltaire, "I disapprove of what you say, but I will defend to the death your right to say it." John Bartlett, *Familiar Quotations* (Boston: Little Brown & Co., 1980), 15th ed., p. 344.

23. The importance in this type of consideration is a universal feature of law. For example: A and B are neighbors in a suburb. A paints the exterior of his house yellow. B does not like yellow. B may acquiesce because B believes A has a right to choose the color of his house, or because B believes A should have that right. B may hold to that view for a variety of reasons, including B's interest in preserving his own right to choose the color of his own house. Note, however, that these considerations operate only in a limited range of tolerances. Should A paint his house black, he is not only less likely to obtain the acquiescence of his neighbors, but he may bring about an end to the principle that each home owner in the community has an independent right to choose the color of his home.

24. *Handbook, supra* note 2, par. 4.3.1.

25. The *Handbook* specifically refers to the right to conduct naval maneuvers in this context. *Id.*

26. Another class that may be implicated comprises the state or states from whose ports the warships normally operate or may need to obtain support. That class is excluded from this analysis because a port visit requires the consent of the port state and a home-porting or logistical support arrangement may well entail "political entanglement" with the port state.

27. It is rare that the law prohibits actions that have not occurred and are deemed unlikely to occur. With this in mind, one may approach with dark amusement a reading of the activities prohibited by the U.S.-U.S.S.R. Agreement on the Prevention of Incidents on or over the High Seas, May 25, 1972, 23 U.S.T. 1168, T.I.A.S. No. 7379, 852 U.N.T.S. 151, and the Protocol thereto, May 22, 1973, 24 U.S.T. 1063, T.I.A.S. No. 7624. The agreement is described in *Handbook, supra* note 2, para. 2.8.

28. A remarkable example of how the interests of major naval powers, even those who may regard themselves as adversaries, may converge is found in the Joint Statement of United States Secretary of State Baker and Soviet Foreign Secretary Shevardnadze at Jackson Hole, Wyoming, on September 23, 1989. In their statement the Secretaries state:

The Governments are guided by the provisions of the 1982 United Nations Convention on the Law of the Sea, which, with respect to traditional uses of the oceans, generally constitute international law and practice and balance fairly the interest of all States. They recognize the need to encourage all States to harmonize their internal laws, regulations and practices with those provisions.

They attach to their Joint Statement a "Uniform Interpretation of the Rules of International Law Governing Innocent Passage," which, *inter alia*, states that "[t]he relevant rules of international law governing innocent passage of ships in the territorial sea are stated in the 1982 United Nations Convention on the Law of the Sea. . . ." The Uniform Interpretation states explicitly that warships enjoy the right of innocent passage without the requirement of prior notification nor authorization. "Joint Statement by the United States of America and the Union of Soviet Socialist Republics," September 23, 1989, reprinted in *International Legal Materials*, Nov. 1989, v. 28, p. 1444-47.

29. One assumes, for example, that United States military aircraft en route from bases in Great Britain to a mission over Libya in 1986 would not have chosen to enter the Mediterranean Sea via the Strait of Gibraltar had consent to overfly France or Spain been sought and granted (or inferred from existing military agreements). "The F-111's flew a route of about 2,800 nautical miles, and over the Strait of Gibraltar, to avoid flying through the airspace of any other nation, [U.S. Secretary of Defense] Weinberger said. In response to questions, he said that permission to fly over France had been sought and had been denied." "Pentagon Details 2-Pronged Attack," *The New York Times*, Apr. 15, 1986, p. A1, col. 5.

Because the sovereignty of a state extends to the airspace over its territorial sea, because a state may extend its territorial sea up to 12 nautical miles from the coast, because the Strait of Gibraltar at its narrowest point is substantially narrower than 24 nautical miles, and because the Strait is completely overlapped by the territorial sea claims of the coastal states in that narrow area, it is in fact not possible "to avoid flying through the airspace of any other nation" in order to reach the airspace over the Mediterranean Sea. At least from the perspective of encouraging foreign acquiescence, the right of a military aircraft to transit the Strait of Gibraltar, without the need to seek and obtain the consent of the state whose territorial sea is overflowed, rests on the proposition that the right of transit passage of straits elaborated in the Law of the Sea Convention is in this respect declaratory of customary international law binding on that state.

30. Since we are discussing navigation off a foreign coast without the need to obtain consent, we exclude navigation off a state whose port a ship plans to enter or has entered, because port entry itself requires consent.

31. Considerations such as these presumably played a role in the refusal of the Malaysian government to base its rights to use the waters of the Indonesian archipelago on a bilateral agreement rather than on a global multilateral treaty on the international law of the sea.

32. *Handbook*, *supra* note 2, p. 28.

33. *Id.*

34. Law of the Sea Convention, *supra* note 3.

35. President's Statement, *supra* note 21.

36. See note 21 *supra* and accompanying text.

37. "The sudden appearance of a warship for the first time in years in a disputed area at a time of high tension is unlikely to be regarded as a largely inoffensive exercise related solely to the preservation of an underlying legal position." Report of the Special Working Committee on Maritime Claims of the American Society of International Law, *Newsletter of The American Society of International Law*, March-May 1988, p. 1, 6.