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INTRODUCTION TO INTERNATIONAL LAW AS IT PERTAINS TO THE NAVAL OFFICER

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My subject is an introduction to international law as it pertains to the naval officer. My approach will be to introduce you in general fashion to some of the areas of concern to the naval officer to which the principles of international law apply. My aim is to stimulate your interest in the direction of the problems you will discuss during this study and, by example, demonstrate the importance of having storèd in your arsenal of knowledge some of the principles of international law which you will need to know for decision-making purposes in the years ahead. Without attempting to list them in any order of importance, let me name a few of the problems of an international character which are current today:

1. The tendency of states to claim an extension of sovereignty or jurisdiction over areas of the high seas.
2. The right of visit and search of ships on the high seas.
3. The proposed convention on return of astronauts and space vehicles.
4. The visits of nuclear ships to foreign ports.
5. NATO Multilateral Force.
6. Status of Forces Agreements.

At first you might think that these are quite dissociated subjects, but there is a common thread which ties most of them together; that is, that two or more countries are trying to work out a solution to a problem, or a potential problem, of military interest. The tool that is being utilized is our subject—international law.

Thus, the scope of the subject matter we are going to explore and study here is as broad as the world itself. Some problems are old, steeped with tradition and state practice of long standing, such as the law of the sea. Some are so new we deal in terms of analogy rather than precedent, such as the law of outer space and the law of inner space. Some are glamorous headline-makers. Many are resolved with little public notice.

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I am sure that some of you have asked yourselves: Why study international law? What is its significance to me as a military officer? With the uniformed lawyers available in the military services, the political advisors assigned to major commands, and the

ready access to departmental headquarters and the Department of State in Washington through modern communications, why should we, as military officers, study or concern ourselves with the study of international law? Perhaps a good reason why you should, could be given by the Commanding Officer of the *Hale* who—while on patrol in the area of the Grand Banks some few years ago—received out of the blue an Operational Immediate ordering him to intercept and board a Russian trawler suspected of cutting the transatlantic cables.

In reply to such a question, I would say that international law problems of military significance will become the ordinary bill-of-fare for many of you; and the more a military commander knows about the subject, the better his position to discharge his duties and responsibilities. Further, a commander would be hard pressed to request instructions when confronted with a novel international situation unless he understood the legal implications and could recognize and evaluate the salient facts.

Military officers, as a class, deal in the arena of public international law and international relations more than any group in government with the exception of State Department personnel. Our commanders on foreign soil do so daily. The commander in Korea is operating under an international organization, the United Nations, carrying out or enforcing an armistice or truce. If he is unfamiliar with its provisions, its implications, and its legal significance in the international community, he will be hard pressed to fulfill the responsibilities reposed upon him. The commander in Berlin must know the terms of the agreement under which he is garrisoned in Berlin and where the North Atlantic Treaty Organization fits into the scheme of things. How far can he go and still be within the agreement; how far may he permit the East Germans to go before they violate the terms of the agreement; and what would be the legal implications of each of these situations? The commander at Guantanamo Bay, Cuba, must know the terms of the two treaties and the lease agreement between the United States and Cuba which govern our rights to the Naval Base at Guantanamo, in order not to give Castro any legal basis for abrogating these agreements.

The commanding officer of any military activity stationed in a foreign country must be familiar with the agreements under which he is operating, such as base rights and status of forces agreements. The commander at sea must know the rights and obligations with respect to international waters, territorial sea, and the rights of a man-of-war in foreign territorial seas and in foreign ports. The air commander must realize the legal significance of foreign boundaries overflying foreign territory, and other rights obtained from foreign governments. These are all matters involving international relations.

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Up to this point, I have been speaking in terms of generalities. But it is the specific cases and situations which have arisen in the past, and which may be expected to occur again in kind, that demonstrate the significance of international law to the naval officer and to military officers generally. As I mentioned a few moments ago, some problems are old and some are new. This brings to mind the case of the yacht *Adventuress* and the pilot boat *Stormalong.* The question presented was the right, in time of peace, of the vessels of one nation to visit and search vessels of another nation which are proceeding peacefully on the high seas between two foreign ports. Factually, the *Adventuress* and *Stormalong* were two U.S. registered merchant vessels, flying the U.S. flag, proceeding between the ports of two friendly countries in the Caribbean. There was some evidence that a

third unfriendly Caribbean country might attempt to visit and search these ships. A U.S. Navy destroyer was dispatched to the scene with orders to prevent any such action.

These orders were given under the principle of international law that merchant vessels of one country, when proceeding peacefully in pursuit of commerce, are not subject to visit and search on the high seas by officials of another country. An interesting thing about this case is that the correspondence relating to the *Adventuress* and *Stormalong* was found among some old files in my office. The advice to the Chief of Naval Operations from the Judge Advocate General was dated April 15, 1936. The reason I cite this incident is that it might well have happened yesterday in view of our present relations with Cuba. It might well happen again tomorrow. When it happens next, by happenstance, you might be the commanding officer of the ship involved.

This question of the right of warships to visit and search merchant vessels of another country on the high seas has arisen in various forms over the years. The *Santa Maria* incident, in 1961, was such a case. As you may recall, a group of Portuguese rebels under command of Captain Henrique Galvao in January 1961 took command by force of the *Santa Maria* as she was departing Curacao on a return voyage to Lisbon. There were 600 passengers aboard, including 42 Americans. Captain Galvao professed to be seeking the overthrow of the Portuguese Government. At the request of the Portuguese Government, U.S. naval forces undertook the recovery of the vessel. Action included locating the *Santa Maria* and keeping her under surveillance for several days. It included negotiations on the high seas between Rear Admiral Allen Smith, Jr., and Captain Galvao, with the result that the *Santa Maria* was brought into Recife by Galvao, the passengers were discharged, and the ship was returned to the Government of Portugal. This is what our actions were designed to bring about, and they worked.

A similar case was the seizure of the Venezuelan freighter *Anzoategue* in February 1963 by left-wing guerrillas who were opposed to the government of Venezuelan President Betancourt. The *Santa Maria* and *Anzoategue* incidents also involved, among others, international law questions of piracy and insurgency, in addition to the question of visit, search and seizure.

We have noted the question of visit and search of merchant ships. Let us take a look now at warships. A warship on the high seas is not subject to the jurisdiction of any state other than her own. Generally speaking, the same is true of warships in foreign ports and waters. The general doctrine is, therefore, that a warship remains under the exclusive jurisdiction of her flag-state on the high seas and during her entry and stay in foreign ports. No legal proceedings can be taken against her either for damages for collision, for a salvage award, or for any other cause, and no official of the territorial (or host) state is authorized to board the vessel without the permission of the commanding officer.

Are there any exceptions? It may surprise some of you to learn that there is one by agreement—the Antarctic Treaty which entered into force in June 1961. An article of the treaty states, in order to promote the treaty's peaceful objectives and to ensure disclosure of violations of its prohibitions, that observers shall have complete freedom of access for inspection. Specifically, it provides: "All areas of Antarctica, including all stations, installations and equipment within those areas, and all ships and aircraft at points of discharging or embarking cargoes of personnel in Antarctica, shall be open at all times to inspection by such observers." Does this provision in the treaty mean

that U.S. Navy ships and planes in Antarctica would have to submit to inspections by Soviet observers? The answer is probably yes.

The United States decided to exercise the right to *unilateral inspection* during the current astral summer season, and announced this decision to the other signatories. The Arms Control and Disarmament Agency prepared an inspection plan which was coordinated with U.S. Government departments concerned, including the Navy. The plan called for two teams of three civilian observers to inspect foreign installations, ships, and planes. As a result of inspections of Russian installations, planes and ships, reciprocal inspections by the Russians may be expected.

In regard to the sovereign immunity of American warships, Navy Regulations explicitly prohibit the commanding officer from permitting his command to be searched by any person representing a foreign state. In order to preclude posing a dilemma to our ship and aircraft commanders, and in order to comply with the treaty, the Chief of Naval Operations has authorized inspection of Navy ships and planes by foreign representatives in Antarctica. The literal and intended interpretation of the treaty does not restrict an observer to a superficial topside inspection but would permit an inspection of all compartments, right down to the bilges. The observer could see everything in a compartment including safes, files, cabinets and desk drawers. In effect, there is no protected sanctuary aboard a Navy ship or plane in Antarctica. For this reason, CNO also has ordered all activities, and ships proceeding to Antarctica, to remove any classified material that might be compromised by inspection.

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Turning from sea problems to those on land, let us take a look at Cuba. With the Castro regime hostile to the United States, international law problems confronting us in Guantanamo have been many and varied.

On 26 November 1963, we received an Operational Immediate message from the Commander Naval Base Guantanamo stating that a Cuban fishing vessel, the *Indalecio*, had entered the Guantanamo Defensive Sea Area. The Cuban ensign was at half-mast and someone was waving a white flag from the bow. The vessel requested permission to enter the Naval Base for "asylum." After boarding the vessel, it was discovered that there were five men, four women, and three children who wanted to enter the base. Three crew members and the captain were being held at gunpoint. Castro's government knew that these Cubans had arrived on the base, since a Cuban Army officer subsequently appeared at the northeast gate and informally asked that the refugees be returned to Cuba. We were concerned that Castro would charge the Cubans with being fugitives from Cuban justice, and demand that we return them to him under the terms of the 1903 treaty with Cuba. Article IV of the 1903 treaty provides: "Fugitives from justice charged with crimes or misdemeanors amenable to Cuban law, taking refuge within [the Base] shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities." As a matter of policy, the United States Government frequently has stated that it intends to comply strictly with the terms of the 1903 treaty.

The United States, as you know, has never accepted the principle of giving political asylum. Navy Regulations specifically prohibit naval officers from granting political asylum, and permits only the granting of temporary refuge to persons in imminent danger from mob violence. Since the defectors already were on the base, the only course of action to avoid a later charge that the United States was violating the treaty

was to remove the refugees from the base as soon as possible. The refugees were sent to Puerto Rico that evening.

Another Guantanamo problem was one with which you are all familiar—the water incident of 1964. On 2 February 1964, four Cuban fishing vessels were observed by units of the United States Coast Guard to be fishing off East Key in the Dry Tortugas, Florida, within the territorial sea of the United States and in violation of U.S. law. At the time, federal law contained no penal sanctions. Therefore, the boats and crews were turned over to Florida authorities, since the Cubans were fishing in violation of a Florida conservation law. Castro labeled the U.S. actions as an act of piracy. In retaliation, he decided to deprive the Guantanamo Naval Base of fresh water. Here is a case where our water was cut off literally, but not figuratively—for, as you know, we have survived.

One of the knottiest and most recurrent problems to be handled by the overseas commander is that of jurisdiction over military personnel who have committed offenses in foreign countries. The United States long ago recognized the fact that the only true security in the world today is collective security. In furtherance of this concept, the United States has entered into many alliances with other nations of the free world in order to protect itself as well as assist in the protection of these friendly countries. One such alliance is the North Atlantic Treaty Organization. And, as a part of our contribution to this partnership, we have stationed a sizeable number of our military forces in Europe. In other friendly countries throughout the world, our armed forces are assigned in more limited numbers.

The understanding with each country in which our forces are stationed includes specific arrangements with respect to the exercise of criminal jurisdiction over these forces. This aspect of the relationship between our forces and the host state is sometimes controversial, as with the *Girard* case in Japan, and, at times, has received a great amount of publicity.

The major concept of status of forces agreements is the establishment of concurrent jurisdiction, together with a scheme designed to divide the exercise of jurisdiction between the authorities of the sending state and the host state, based upon the principle of primary interest. In general, the military authorities of the sending state are given the primary right to exercise jurisdiction over a member of a force—or civilian component—when the offense involves the property of the sending state, the person or property of a member of the force, a civilian component of the sending state, or a dependent; or if the offense arises out of the performance of official duties. In all other cases, the receiving state has primary jurisdiction. As you might imagine, the question of whether an offense was committed in the performance of official duty is not always an easy one.

I am reminded of a meeting I had recently with the Turkish Minister of Justice on the occasion of his visit to this country. During discussions with the three service JAG's, the Minister was asked if "duty certificates" were giving the Turkish authorities any problems. His reply went something like this: "An American serviceman spends the day fishing, and on his way home stops at a tavern and has several drinks. He leaves the tavern and is involved in an automobile accident which is clearly the result of his drinking. The next morning he shows up in court with a certificate executed in behalf of his command stating that at the time of the accident he was in the performance of official duties. Yes, duty certificates do give us problems at times." Of course, the Minister was speaking hypothetically and was not referring to an actual case. But it points to the need for fair dealing at all levels in order to gain the mutual

respect needed for maintaining satisfactory relationships with officials of the host states.

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I have touched land and sea problems confronting commanders. I would like to mention a current legal problem that confronts us in the air. The introduction of modern high-speed, high-altitude commercial jet aircraft and the attendant requirements for traffic control systems, navigational aids, and extension of runways—among other things—have increased the cost of maintaining international air routes. In order to defray these increased costs, some states have established a system of user charges. These charges not only involve payment for services rendered and supplies furnished—such as fuel—but also a general charge for use of the system. They are being imposed on state-owned aircraft, including military aircraft, as well as on civil aircraft. With respect to the payment of aviation user charges under international law, state aircraft (including military aircraft), like warships, are deemed to be state instrumentalities. No military aircraft is authorized to fly over the territory of another state, or land thereon, without special permission. In case of such permission, the military aircraft should enjoy, in principle—and in the absence of special stipulation—the privileges which customarily are accorded to foreign warships. These privileges include immunity from search, seizure, and inspection, and exemption from fees, taxes, duties, and other charges paid normally by civil aircraft. Of course, charges related directly to supplies and services specifically requested by the aircraft commander should be paid. It is our view that no other charges can be required. Diplomatic representations are being made to the various governments involved.

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Now let us look briefly at the developing law of the spaces—"outer space" and "inner space." In the field of outer space, the Legal Subcommittee of the U.N. Committee on Peaceful Uses of Outer Space considered two important documents at a meeting in Geneva in March 1964. The United States submitted two draft treaties: (1) Assistance to and Return of Astronauts and Space Vehicles; and (2) Liability for Damage Caused by Objects Launched into Outer Space. No agreed texts were produced. As in the past, the military services will participate with DOD in the development of the United States position papers for the next meeting of the committee. From these proceedings will evolve another chapter in the law of outer space.

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I mentioned a few moments ago the term "inner space." I use the term to describe the vast areas of the deep oceans and deep ocean floor. Admiral Denys W. Knoll (the Navy's Oceanographer) prefers the term "oceanspace." Others have called it "liquid space." No matter what you call it, it is an extremely and increasingly important area.

Figures show that salt water covers 71% of our planet, that 88% of the oceans are 12,000 feet or deeper, that the bottom slopes rapidly at the edge of the continental shelf, falling precipitously from 600 feet to 12,000 and then breaks more gently to the ocean floor to depths up to 36,000 feet. Contrast with the magnitude of these depths the fact that we are able to operate today only within the first few hundred feet, and it is apparent that to date man has been unsuccessful comparatively in conquering and subjecting to his use the ocean depths. Man still measures his conquests of the depths of the sea in terms of feet when he is in fact confronted with miles.

But we are making progress. The successful exploitation of the oil re-

sources of the continental shelf; the discovery of manganese on the bottom of the sea, leading to serious work on surface mining of the sea bottom; the development of the Polaris missile which can be launched from the depths of the sea; the successful extraction of salt, fresh water, and seaweed from the oceans; and the possibility of farming the oceans for both plants and fisheries resources all point up the importance of the area. The obvious concern is whether the law is keeping up with technology. There are two bills before the present Congress to appropriate $50,000 for a study of the legal problems of management, use, and control of the natural resources of the oceans and ocean beds. In this area, we are perhaps discussing "brand new" international law. At the very least, it is a controversial area and one in which we do not have customary practice to draw on.

Do we extend the doctrine of freedom of the high seas *down*? Do we extend the continental shelf doctrine *out*? Do we treat the area as a no-man's-land or as the common property of all nations? Or do we do a little of both? With respect to the legal position of the bed of the high seas, it would seem that a distinction might be drawn between the *bed* of the sea and its *subsoil*. Publicists are not in accord. With respect to the *bed* of the sea, the better opinion may be that it is incapable of occupation by any state, and that its legal status is the same as that of the waters above it. The same reasons for maintaining high seas unappropriated in the interests of freedom of navigation would seem to apply with equal force to the *bed* of the sea. On the other hand, the *subsoil* under the bed of the sea may be considered capable of *occupation*. There is perhaps less reason for extending the doctrine of freedom of the seas to the subsoil beneath its bed.

From a military point of view, it may be in our best interest with respect to the bed of the sea to apply the doctrine of freedom of the seas. When it comes to navigation of submarines, we certainly are interested in free seas. When we have deep submersibles that will transit the bottoms by crawling, or by partial physical contact with the bottom, we may also be interested in free navigation of the ocean floor. On the other hand, there will be those who will advocate the adoption of the doctrine that these areas are capable of being appropriated by the first occupier. With the advent of "fish-farms"—fish herding by means of electric fences or bubble barriers—mining operations and oil exploitation of the deep ocean floor, it is inevitable that there will be those who will, in the interest of developing the resources of the sea, seek state protection of areas capable of exploitation.

As we take more and more from the sea, not just along our coast but from the open ocean, we may well need more international agreements, perhaps even the granting of rights for exploitation, to resolve the conflicting interests. The Navy has a vital concern in the technological development of the field of oceanography, as well as the development of the law which will apply. The subject is under active study in the Department.

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One of the most important principles of international law to the naval officer in the cold (and sometimes not-so-cold) war environment in which we operate today, is the right of self-defense. That is the right to use the degree of force appropriate to meet a threat to a unit of our forces, or a threat to the security of the United States. We have had occasion to apply this principle in more than one situation in the recent past, and the latest example is the Gulf of Tonkin.

In connection with the experiences of the *Maddox* and the *Turner Joy*, the important facts are that these ships were

in international waters at the time of both attacks by PT boats of the North Vietnamese; that they were attacked by torpedoes and machine-gun fire to which the destroyers responded with 5-inch batteries; and that the subsequent strikes on the PT boat pens and the fuel dump were measured, calculated, and limited to that force necessary to destroy the threat to our continued use of an area of the high seas where our forces have every right to be.

As stated by Ambassador Stevenson before the Security Council, "The action we have taken is a limited and measured response fitted precisely to the attack that produced it." In summation, Ambassador Stevenson said, and I quote:

> Let me repeat that the United States vessels were in international waters when they were attacked. Let me repeat that freedom of the seas is guaranteed under long-accepted international law applying to all nations alike. Let me repeat that these vessels took no belligerent actions of any kind until they were subjected to armed attack. And let me say once more that the action they took in self-defense is the right of all nations and is fully within the provisions of the Charter of the United Nations.

Now I am not really sure how the missionary made out with the tiger I referred to at the beginning of my talk, but I sincerely hope that I have served to whet *your* appetite for the subject of international law. There is a lot here to bite into.

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