

SPECIAL ASPECTS OF JURISDICTION AT SEA

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For almost three hundred years, the law of the sea has been controlled by two opposing concepts, namely: the doctrine of freedom of the seas, which proclaims that the seas are open to all nations on an equal basis; and the doctrine which recognizes that the coastal State may exercise jurisdiction and control over the marginal area in order to enforce its fiscal, customs, and sanitary laws, and to meet its defensive needs.

These two concepts would be in hopeless conflict if reasoned to their logical extremes. Notwithstanding, they have coexisted over the years without doing violence to each other. This was achieved because of the general view that the high seas, which are common to all nations, should not be appropriated to the exclusive control of any single State beyond that which is strictly necessary to meet a State's essential needs.

But the emphasis has been shifting in recent years. It has become the tendency for individual States, acting unilaterally and without the consent or the acquiescence of other States, to lay claim to vast areas of the sea abutting their coasts. These claims, if valid, effectively deny to all of the nations of the world the free use of vital areas of the sea. If invalid, they constitute a cloud upon the right of other nations to navigate these seas, and thereby breed

international incidents. In either event they do violence to the fundamental principle of freedom of the seas, and establish what may be an ever-increasing threat to sea communications among nations.

Thus, the principles which we will discuss this morning are not relics of the past, without current interest or purpose; rather, they are very much alive today, and, in many instances very much in controversy. These same rules of international law are now being studied by some 75 nations in preparation for a world conference which will convene early next year. This conference, which is sponsored by the United Nations, will attempt to codify the law of the sea. The conference will have before it the draft articles on the law of the sea, which have been prepared by the International Law Commission.

A great deal of work is underway in the Executive Branch of our own Government in preparation for this conference. The Navy has been designated Executive Agent for the Department of Defense. The Judge Advocate General of the Navy is the Defense Representative on the Interdepartmental Committee, which will coordinate the interests of all government agencies. A working group, consisting of representatives of the Chief of Naval Operations and the Judge Advocate General, has

been studying each draft article in the preparation of the Department of Defense position, based upon the interests of national defense. Teams of naval officers have visited many friendly foreign countries and explained to military and foreign office officials the strategic considerations in support of a narrow territorial sea. Two naval officers have just returned from briefing all naval commands and the senior naval officer of all NATO commands in the European and Mediterranean areas.

These intense and thorough preparations reflect our concern over the threat to the doctrine of freedom of the seas which is abroad in the world today. This doctrine is generally accepted to mean that the high seas are open to all nations, and that no nation may subject any part of it to its sovereignty. It includes, among other things, freedom of navigation on the high seas and freedom to fly over the high seas.

The strength of the Navy is measured in part by the mobility of our fleets and air arms and in the ability of fleets to disperse over vast areas of the sea if threatened by atomic attack. We are vitally concerned, therefore, with the freedom to maneuver in all of the seas of the world and in any proposed changes to the rules of international law which would restrict that freedom.

It has been said that the Navy is the precision instrument of national power because of its ability to move rapidly into troubled areas without crossing frontiers and, yet, get close enough to the trouble to show that we can apply force, if necessary. It has the further psychological advantage of possessing massive striking power which may be employed or held back without previous disclosure of its intentions. As Admiral Burke stated in a recent interview, "When the fleet moves in and shows its flag, it gives pause to an aggressor." The Sixth Fleet has demonstrated this point in the Suez and Jordan crises. The very presence of the Sixth Fleet in the

eastern end of the Mediterranean on those occasions was a show of force which is credited by many as having deterred Communist aggression. The Seventh Fleet has been equally effective as a deterrent to aggression in the western Pacific.

An important factor contributing to these results has been our freedom to move into the areas of the sea where there could be in fact a show of force. This right is being threatened by the claims of many States which would close off vast areas of the open sea to our forces.

International law recognizes that the coastal States have a variety of interests and rights in the sea. That part of the sea which is termed "landlocked" (such as San Francisco Bay) is considered to be internal water and an integral part of the coastal State. Once an arm of the sea has been recognized as internal water, it moves outside the sphere of international law and becomes wholly within the jurisdiction of the coastal State, except for the rules to be applied in determining its outer limits.

The territorial sea is recognized as an area over which the coastal State has sovereignty. In effect, it is as though the territory of the coastal State has been extended to the outer limit of this marginal belt. Within these limits—except for the right of innocent passage—the coastal State has absolute sovereignty over the subsoil, the sea-bed, the water above the sea-bed, the living resources in the water, and the air space above the water.

This principle was developed in recognition of the needs of the coastal State to control a maritime belt in order to insure its well-being. It evolved as a consequence of world acceptance of the Grotius theory that the seas were open to all. But, because the principle of sovereignty over an area of the sea was in derogation of the more compelling principle of freedom of the seas, sovereignty was asserted initially only to the

extent necessary to meet the essential requirements. By the beginning of the nineteenth century, a territorial sea of one marine league (or three nautical miles), as claimed by the maritime nations of the world, had become established as a part of customary international law.

The adherence of the United States Government to the three-mile rule was first announced in 1793, when Mr. Jefferson, as Secretary of State, informed the British and French officials that the United States would confine the enforcement of certain orders to an area not more than one league (or three miles) from the shore. This position has been restated and reaffirmed on many occasions in diplomatic notes, Acts of Congress, and decisions of the Supreme Court; and it is the position of the United States today.

But the jurisdiction of the coastal State does not end at the outer limits of the territorial sea for all purposes. In a contiguous area of the high seas, the coastal State may exercise a limited jurisdiction or control in relation to customs, sanitation, and fiscal matters. The United States first asserted the right to enforce its customs laws within a zone twelve miles from the coast by an Act of Congress in 1790. Legislation for this purpose has been in effect ever since, and is in effect today. Our pioneering in this field has led to universal recognition of such a practice. It is now well settled that a State may exercise authority on the high seas in order to secure itself from injury and to give effectiveness to the jurisdiction which it exercises within its own territory. It is important to note that the right of the coastal State to exercise a limited control of jurisdiction in the contiguous zone does not change the character of the high seas nor confer any right of sovereignty or general jurisdiction over any area outside the territorial sea.

Another example of the exercise of limited control beyond the territorial

sea is the air defense identification zones, which are maintained by the United States and Canada. Here, we have two coastal States imposing certain identification and control requirements on foreign aircraft entering these zones, which, off the east coast of the United States, extend some 300 miles to sea. These controls are exercised in the interest of national security. Clearly, under the fundamental principle of self-defense, a State in times of peace as well as in times of war may take reasonable measures to protect its national security, even though these measures take place upon the high seas. I think that the comments of Mr. Elihu Root were very much in point when he stated that every sovereign state has a right to protect itself by preventing a condition of affairs in which it would be too late to protect itself.

It is interesting to note that the establishment of these identification zones has not resulted in a single protest. Furthermore, all nations engaged in international air commerce in the North American areas are cooperating in the enforcement of the regulations.

The regime of the continental shelf recognizes in coastal States certain rights in the sea-bed and in the subsoil beneath the high seas. The Truman Proclamation of 1945, which was one of the earliest pronouncements on this subject, announced this doctrine as recognized by the United States. It announced that the United States regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

This concept was quickly accepted by the Family of Nations. Mr. Lauterpacht, writing in 1950, stated that seldom has an apparent major change in international law been accepted by peaceful means more rapidly and with more general acquiescence and approval

than is the case of claim to the resources of the continental shelf.

Because of the newness of this doctrine, however, international law relating to the continental shelf must be considered in a state of development. Consequently, there are questions which can be foreseen but for which there are no immediate answers. One such question reserved for future resolution is the outer limit of the continental shelf. The International Law Commission proposes that the continental shelf be considered as extending out to the 100-fathom curve, or beyond that limit to where the depth of the water admits the exploitation of the natural resources. No substantial objection to this proposal appears to have been expressed, and perhaps it represents the best rule which can be devised at this time.

Another question which is eventually to occur concerns the possible conflict between the demands of navigation in the waters above the continental shelf and the obstructions which are created in order to exploit its natural resources. There have been suggestions that shipping be routed through specific channels in order to prevent interference with the exploitation of the natural resources. These suggestions have been opposed on the grounds that such action would be in derogation of the character of the waters as high seas. Equally objectionable—for the same reason—would be a proposal that the exploitation of resources of the continental shelf and the rights of navigation, fishing, and conservation be placed upon equal footing.

It is important to note that the language of the Truman Proclamation limits the claim of the United States to the sea-bed and the subsoil and disclaims expressly any control in the waters above the continental shelf. It is evident that this language was chosen with great care in order to dispel the idea of any claim of sovereignty to either the subsoil of the sea-bed of the

continental shelf, or the superjacent waters.

After stating that the United States regards the natural resources of the sea-bed and the subsoil of the continental shelf as being under its jurisdiction and control, the Proclamation provides specifically as follows: "The character as high seas of the water above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."

Notwithstanding the clarity of this language, claims have been made by other States, relying upon the Truman Proclamation as a precedent, which state that the continental shelf and the waters thereon are subject to the sovereign powers of the coastal State. The United States has informed each of these claimants that it could not recognize sovereignty of the coastal State over the continental shelf and over seas adjacent to its coast outside the generally recognized limits of the territorial sea.

Notwithstanding the rights which a State may exercise beyond the territorial sea—that is, the right to exploit the natural resources of the continental shelf and the right to exercise a limited jurisdiction over adjacent waters for such purposes as defense, customs, fiscal matters—there is the view, strongly supported in some quarters, that a coastal State should be entitled to exercise sovereignty over vast areas of the sea. Those who support this position, Russia among others, consider the question one of domestic concern, and believe that international law does not prohibit a coastal State from extending the breadth of its territorial sea to meet what it considers to be its domestic needs, without regard to the interests or the needs of the Community of Nations and without their acquiescence or consent.

Acting in accordance with this view, a number of States have extended their claim of sovereignty to various limits.

The most extravagant claims have been made by the Declaration of Santiago in 1952. This Declaration, after noting that the former breadth of the territorial sea and of the contiguous zone was inadequate, stated in part:

The Governments of Chile, Ecuador and Peru proclaim as a norm of their international maritime policy, the sovereignty and exclusive jurisdiction that corresponds to each of them over the sea off the coasts of their respective countries up to a minimum distance of 200 marine miles.

The United States and the other adherents of the three-mile rule have never accepted this principle nor acquiesced in the claims of sovereignty over extended areas of the high seas. While nations that have made these claims do not now agree that three miles is the maximum breadth of the territorial sea recognized in international law, neither do they agree among themselves on any other limit.

A recent tally of the various claims discloses the box score shown below. Most of the States claiming in excess of three miles have been motivated by one of the following considerations: (1) the economic advantages to be gained by acquiring exclusive control over fishing in the waters adjacent to their coast; (2) the necessity of keeping up with neighboring States that have increased the breadth of their territorial seas. An official of one such State has stated quite frankly that they had no real desire to increase the breadth of their territorial sea, but felt bound to do so since their neighbor, State "X," had increased its territorial sea, and that if State "X" would go back to three

miles so would they; (3) because of considerations of security.

A broad territorial sea has a certain superficial attraction to States looking for means of keeping future wars away from their door. If it could be assumed that all belligerents would respect the territorial sea of a neutral, certainly twelve miles would serve this end better than three miles. But, there are many historical illustrations which demonstrate that belligerents have been less than circumspect in their observance of the sovereignty of neutral waters. Experience also shows that the broader the territorial sea, the better haven it offers to belligerent submarines seeking to avoid detection by any enemy anti-submarine aircraft and surface vessels; and the more usable it is a means of moving to and fro from areas of the high seas without risking contact with enemy forces.

The Norwegian territorial sea created just such a situation during the early part of World War II, even though in time of war Norway has claimed a territorial sea of only three miles for defense purposes. The British were concerned over ways of stopping the steady stream of ships carrying contraband to Germany and U-boats making way to and from the high seas. It was of importance to Germany to insure the continued availability of this corridor as a safe covered way to and from its home waters. The result was the Invasion of Norway in April, 1940.

Winston Churchill, reporting on the event in the House of Commons, had this to say:

The extraordinary configuration of the Norwegian western coast provides a kind of corridor or covered way, as every one

CLAIMS OF SOVEREIGNTY BY STATES

3-Mile Limit	4-Mile Limit	6-Mile Limit	7-Mile Limit	9-Mile Limit	10-Mile Limit	12-Mile Limit	200-Mile Limit	Positions Unannounced
23	4	14	1	1	1	9	4	10

knows, through which neutral trade and German ships of all kinds, warships and others, could be moved to and fro through the Allied blockade within the territorial waters of Norway and Sweden until they were under the effective protection of the German air force in northern Germany. . . . The existence of this geographical and legal covered way has been the greatest disadvantage which we have suffered, and the greatest advantage which Germany has possessed in her efforts to frustrate the British and Allied blockade.

Russia and the Communist Bloc claim a twelve-mile territorial sea. One of the reasons the Communists desire a broad territorial sea was expressed by the Bulgarian delegate to the Sixth Committee which met in New York last December. He said that such a broad belt was necessary in order to keep foreign shipping from approaching close enough to the shore to observe military and naval installations.

Normally, States do not recognize territorial seas greater than their own. This absence of uniformity has been the source of much international friction and increased tensions. For example, many fishing vessels have been seized for violation of extended territorial seas. In a great number of instances the exact position of the fishing vessel at the time of the seizure was in dispute, and in other instances the vessels were fishing within nine or twelve miles from the coast unintentionally and only because of difficulty in determining exact position without having reference to the shore line.

There was the case in 1950 of two Swedish fishing boats seized by a Russian patrol craft in Danzig Bay, and charged with fishing eleven and ten and a half miles respectively from the coast, in violation of Russia's twelve-mile limit.

In 1954, Peru seized a whaling ship of Panamanian registry approximately one hundred miles at sea and levied a fine of approximately \$3,000,000 for unauthorized whaling operations in Peruvian territorial waters.

In 1955, two United States fishing vessels were seized—one fourteen and the other twenty-four miles off the coast of Ecuador—and fined a total of \$49,000 for fishing without a permit in Ecuadorian jurisdictional waters.

There have been many instances of Mexican authorities seizing United States shrimp boats on charges of shrimping within the nine-mile territorial sea claimed by Mexico.

Of course the obvious effect of extending the territorial sea is to decrease the area of the high seas; that is, the area of the seas where there is freedom of operation. The extent of that reduction is startling. Some three million square miles of high seas would be lost if the territorial sea were extended from three to twelve miles. This is an area three times as large as the Mediterranean. If a twelve-mile territorial sea were applied to the Mediterranean, it would take away over 13% of its open water.

But the real significance of a broadened territorial sea, from the standpoint of our maritime and national defense interests, becomes apparent when we consider some of the restrictions that are imposed on the right to navigate areas of the seas not included in the high seas. Ships of all States have the right of innocent passage through the territorial seas. However, in order to enjoy this right the passage must be innocent; that is, a ship does not use the territorial seas for committing any acts prejudicial to the security of the coastal State. On the other hand, the coastal State may not hamper innocent passage. It must give notice of any dangers to navigation of which it has knowledge, and is under the obligation to use all means at its disposal to insure respect

for innocent passage in its territorial sea. But, in the interest of its own security, a coastal State may temporarily suspend innocent passage in definite areas and it may designate specific courses for ships to follow upon navigating the territorial sea. The ship is bound to comply with the rules and regulations imposed by the coastal State concerning such passage and may, under certain circumstances, come within the civil and criminal jurisdiction of the coastal State.

I mention these various rights and responsibilities to point out the fact that although there is a right of innocent passage through the territorial sea, it is subject to many possible interferences and harassments not to be experienced on the high seas.

Thus, the extension of the territorial sea could in many areas of the world bring the sea lanes within the sovereignty of coastal States. Conceivably, this could result in the lengthening of sea lanes because of the unwillingness of shippers to subject their vessels to possible interferences which are inherent in the passage through the territorial sea. This might well result in increasing sailing time, and, hence, the cost of the voyage.

While a warship is not subject to the jurisdiction of a coastal State while it is in a territorial sea, it is nevertheless expected to comply with all security, quarantine, and similar rules and regulations or face expulsion. But, more important, international law, as it presently exists, does not forbid a coastal State from subjecting the passage of a warship through its territorial sea to prior authorization or notification. Thus, there is no inherent right of innocent passage for warships, as in the case of merchantships.

Perhaps the basis for this principle was stated by Mr. Elihu Root in the North Atlantic Coast Fisheries Arbitration when he said that warships may not pass into the zone because they threaten, but merchantships can pass

and repass because they do not threaten. This same reasoning may be responsible for the generally accepted view that a submarine must remain on the surface while navigating the territorial sea.

It is interesting to note that when the International Law Commission met in 1954 it took the view that passage should be granted to warships without prior notice or authorization. The following year, the Commission modified its position so as to stress the right of the coastal State to make the right of passage of warships through the territorial sea subject to previous notification or authorization. It is in this latter form that the Article will be considered by the Conference in 1958.

It is said that there is no controlling practice of the United States regarding the passage of our warships in foreign waters or the passage of foreign warships in our waters. In determining a position on this Article, it would be expected that the recognized breadth of the territorial sea would have a bearing upon the conclusion reached. Conceivably, a State might be willing to accept the view that innocent passage of a warship may be subject to authorization or notification if the territorial sea was but three miles, and yet be unwilling to adopt such a position if the territorial sea were extended to, let us say, twelve miles.

The rule as to the right of innocent passage of warships is different when the territorial sea comprises an international strait; that is, when it connects two parts of the high seas and is used for international navigation. In such a case, innocent passage in time of peace cannot be made the subject of either authorization or notification. It is, of course, the requirement for warships—as well as for all other ships—that the passage be innocent and that there be compliance with the regulations issued by the coastal State concerning the use of a strait. This rule reflects the holding

of the International Court of Justice in the Corfu Channel case.

This right of innocent passage does not exist unless the strait serves as a connecting link, or as a means of communication between two parts of the high seas. If the area of sea at either or both ends of the strait does not have the character of high seas, then the strait does not meet the test of an international strait. This becomes highly significant when we consider the possible effect of broadened territorial seas.

As an example, let us consider the Gulf of Aqaba. As you probably know, the Gulf is approximately 125 miles long and 14 miles wide at its widest point. It is connected to the Red Sea by the Strait of Tiran, which is wholly within the territorial seas of Egypt and Saudi Arabia. The Gulf is bound by Egypt, Saudi Arabia, Israel and Jordan. On the basis of a three-mile territorial sea, there is an area of high seas within the Gulf. Accordingly, under the rule of the Corfu Channel case, the Strait of Tiran constitutes an international strait, and the right of innocent passage exists. However, if a twelve-mile territorial sea were to be recognized, then the Gulf would be comprised entirely of the territorial seas of the coastal States, and the Strait would no longer have the characteristics of an international strait.

Before considering the effect of extending the breadth of the territorial sea on other narrow passages between two points of the high seas, I want to invite your attention to the status of aircraft in international law. While an airplane enjoys the freedom to fly over the high seas, it does not have the right of innocent passage over territorial waters. This prohibition is not changed because the territorial sea happens to be an international strait, through which warships may sail as a matter of right. Thus, the extension of the territorial sea would, in certain areas of the world, deny aircraft access to large areas of open water. Let me cite examples.

The Strait of Gibraltar is seven miles wide at its narrowest point. In the event of the recognition of a territorial sea greater than three miles, the entire Strait would be within the territorial sea of the coastal States. Thus, aircraft would not have the right to fly from the Atlantic into the Mediterranean without getting permission from the coastal States. The same result would occur in the Strait of Bab el Mandeb, which connects the Gulf of Aden to the Red Sea.

If a twelve-mile territorial sea were accredited to each of the islands in the Aegean Sea, there would be a solid barrier of territorial water over which an airplane could not fly. Thus, an airplane would be denied the right to fly from any point in the Mediterranean to points in the Aegean, or beyond. Similar results would occur in the Straits connecting the Gulf of Pohai with the Yellow Sea, and in several areas in the Baltic.

The rule of international law relating to the recognition of bays as internal water determines the status of many large areas of the sea. For instance, when a bay is recognized as internal water, and thus considered a part of the territory of the coastal State, the territorial sea is measured from the outer limits of the bay rather than from the low-water mark along the sinuosities of the coast. Thus, where this rule is applied, it places within the exclusive control of a State large areas of water which would otherwise be high seas.

Normally, in order to be recognized as internal water, a bay must possess certain geographical characteristics. One of the departures from the recognized criteria proposed by the International Law Commission is an increase in the allowable width of the mouth of such a bay from ten to fifteen miles. Here, again, we see the influence of those who desire to make it easier for States to gain exclusive control over large areas of the high seas.

In addition, a bay may be considered internal water if it is a "historic" bay; that is, where the claim is based on a prescriptive right gained by reasons of its geographical characteristics and coupled with long usage and control. The "historic bay" concept is subject to great abuse, as where a State unilaterally declares areas of its coastal water to be internal water and thereby excluded from the areas of the high seas.

It was less than sixty days ago that the Council of Ministers of Russia announced the establishment of Peter the Great Bay as internal water, with the territorial sea measured seaward from the line running from the mouth of the Tumen River to Cape Povorotny. There was a further announcement that navigation of foreign vessels and flights of foreign aircraft in this area may now take place *only* with the permission of competent Soviet authorities.

About three weeks later, the Associated Press reported from Tokyo this very ominous news item: "Russia has warned that Japanese fishing boats coming within twelve miles of Russian territory will be confiscated."

From headland to headland, Peter the Great Bay is 115 miles wide at its mouth and 55 miles long. By this act, Russia laid claim to roughly 2,000 square miles of high seas and closed off traditionally important Japanese fishing grounds in the Bay and in the adjoining areas of the Sea of Japan. Of course this Bay is not internal water, and cannot be recognized as internal water under any concept of international law.

The United States immediately protested, charging that the Russian decree was an unlawful attempt to appropriate a large area of the high seas by unilateral action; that such an attempt has no foundation in international law, and encroaches upon the well-established principle of freedom of the seas.

In conclusion, I think it is significant that many of the States asserting claims are not in fact interested in securing a

uniform breadth of the high seas throughout the world, even though it might coincide with their particular claims. What they really seek is the blanket sanction of international law to establish whatever limit best suits their purpose at the time—whether it be twelve miles, today, or a thousand miles tomorrow.

This theory was best illustrated in a Soviet note which replied to our protest in connection with the shooting down of a B-29 in the Kurils in 1954:

Establishment of limits of territorial waters is regarded as within the competence of the littoral States, which define their extent in accordance with their national interests and also with interests of international navigation.

Such a concept, if universally accepted, would produce chaos in the sea lanes of the world. It would take us back to the era when Spain and Portugal divided up the oceans by degrees.

I think it also appears somewhat incongruous that many of the most sweeping assertions of sovereignty have been made by the smaller nations, possessing not the slightest means of the enforcement of their claims. On the other hand, the major maritime powers who have the wherewithal are staunch defenders of freedom of the seas.

It may be argued, as indeed it has been, that the three-mile rule is an archaic doctrine—good for the days of cannon shot and sailing ships, but little related to this era of guided missiles and nuclear power. To meet the missile threat, it has been contended that we should extend our sovereignty to fifteen hundred miles and concentrate our efforts on patrolling the zone. On the face, it is an appealing theory. In effect, it is a retreat to the "Fortress of America" concept. We could not long survive in some magical island surrounded by a world we abandoned to hostile forces.

The best defense is a good defense.

Our system of collective security is a maritime alliance dependent upon mobile forces and effective sea communications. Recent events in sensitive areas demonstrate beyond the shadow of a

doubt that the security of this country and of the Free World can best be protected if the present areas of the high seas remain open to our naval forces, both on the surface and in the air.

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