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SPECIAL ASPECTS OF JURISDICTION AT SEA

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It is superfluous before a naval audience to emphasize the significance of the law of the sea. Certainly the developments on the continental shelf, fisheries, base lines, and the breadth of the territorial sea in recent years have been of tremendous importance. The 1956 Final Report of the International Law Commission on the Law of the Sea in Time of Peace, to which several of my colleagues have already referred, is the latest statement on that subject and the Report is of great interest to our Government and Navy in the United States and to other navies and countries.

There have been many recent incidents, involving various aspects of conflict arising out of these developments, which will illustrate the kind of problems that are involved. There has already been some reference to the seizure some years ago by Peru of four or five whaling ships of Panamanian registry off the coast of Peru. This seizure enabled Peru to assess a judicial fine of 3 million dollars, which was paid to release the vessels from seizure, which Peru asserted was within their claimed 200-mile zone. In fact, some of the boats were seized under the doctrine of "hot pursuit" more than 200 miles out from the coast.

Off the coast of Ecuador, two American-registered merchant vessels were stopped and seized, with one American seaman being injured by gunfire. A fine of $49,000 was imposed. Moreover, in a subsequent conference between Ecuador and the United States, Ecuador took the position that the privilege of innocent passage did not extend to fishing vessels. Numerous incidents involving the seizure by Mexico of American vessels fishing for shrimp in disputed waters have also been reported.

There have been other instances in many other areas. For example, Norway and the Soviet Union have been involved in controversy. Norway has seized various Soviet fishing boats inside her claimed limits and has fined them $88,000 in one case this year, which is the largest single fine in Norwegian court history for this offense. Moreover, Sweden and Denmark are involved in a dispute with the Soviet Union over territorial water limits in the Baltic.

As many of you know, there have been frequent incidents in which Japanese fishing vessels have been seized by Korea, Communist China, Nationalist China and Russia. Since Japan, like Iceland, is largely dependent upon its fisheries, this has raised a very serious problem for that country. The U.S.S.R., in addition, established unilaterally a conservation zone, which accentuated the difficulties. The two countries have subsequently changed this situation somewhat by temporary arrangements pending the conclusion of a peace

treaty, which has now been signed. When it goes into effect, a long-range fishing agreement will also become effective. Furthermore, Australia and Japan are involved in a dispute over pearl fisheries off the coast of Australia, which may be submitted to the International Court of Justice for settlement.

There have been many other significant developments which I will not be able to go into this morning. There is the growth of the continental shelf doctrine; there is the question of the status of radar ships and oil platforms off a coast; there is the use of testing areas, such as the hydrogen bomb area, and the proving grounds, which I will discuss later, for testing guided missiles and high-flying interception; there is the establishment of air defense identification zones by the United States and Canada; and, finally, there is the problem of legal control of outer space.

The main emphasis of my talk will be upon the problems of the breadth of the territorial sea and the measurement thereof. This is not the occasion to discuss the historical origin of the doctrine of the freedom of the seas and its general acceptance in the eighteenth and nineteenth centuries. But one contrast with that period which Mr. Phleger, the legal advisor of the State Department, has pointed out is that in those days it was the large, powerful maritime states that tried to close off the high seas. Today, it tends to be rather the smaller coastal states that are making such claims.

In order to make this subject more concrete, I am employing visual aids. With the exception of Latin America (for which no adequate slide was available), all the other major areas will be shown in the course of the discussion. (See Chart 1)

This chart, which has been used in previous years at the Naval War College, indicates some of the zones that are claimed by states for various purposes:

1. The territorial limit of three miles;
2. The inland waters (bays, harbors, and rivers);
3. The customs enforcement zone;
4. The extent of the Pacific ADIZ;

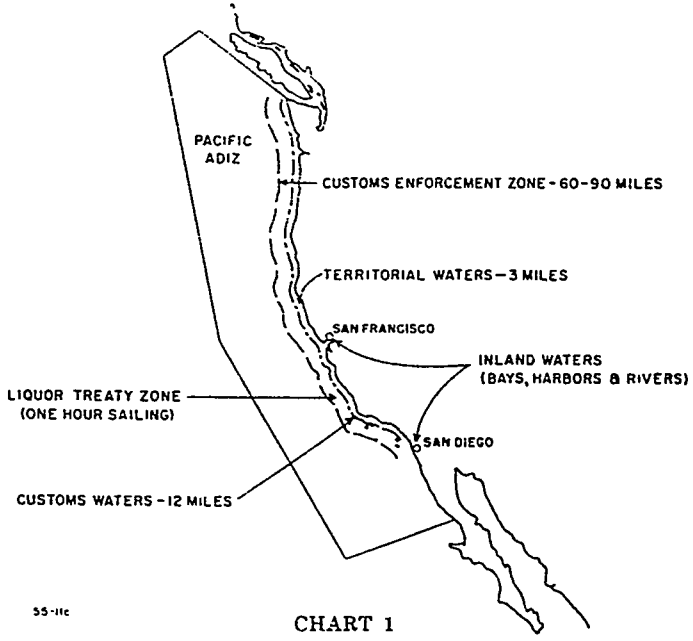

CHART 1

5. The liquor treaty zone in the 20's; and

6. Special customs waters, and so on.

By and large, the high seas are divided into: (1) internal waters; generally speaking, the territorial states claim full sovereignty over these waters, subject, for example, to certain customary rules in ports; (2) the territorial waters; there is also a claim to sovereignty here, but this claim is subject to various customary rules of international law, such as the right of innocent passage, entry in distress, et cetera; (3) the contiguous zones; there are for this area special claims for specific purposes, including defense; and (4) the high seas; these are free to all, but they are subject to exceptional claims to suppress piracy, self-defense and hot pursuit.

Discussion of territorial waters in the past has frequently not distinguished very closely between the problem of how the territorial sea is measured and the extent of it. The Anglo-Norwegian Fisheries case in the World Court made this differentiation extremely clear, and I will come to that in a moment. First, a question of measurement—the location of the base lines, which divide the *internal* waters from the *territorial* waters, and serve as the base-point for measuring from land. There is a general agreement that the low-water mark, as against the high-water mark, should be used where land is the measuring point. What points on the land and on islands and rocks that should be used as a base has, however, been the subject of vigorous controversy. There is the so-called "coast line rule," defended by the United Kingdom and other maritime powers, and the so-called "straight line system" and the "headland theory," which other states have employed.

The system of measuring should also be distinguished from the question of what base-points should be used. I think that the method of determining this by arcs of circles was somewhat misunderstood in the Anglo-Norwegian argumentation, or at least appeared to be misunderstood. Such a method could be used no matter which base-point theory is employed for measuring the starting place. The question of bays is also important because, as you will see from this map, a bay is also an important factor in some cases in creating inland waters out of what were formerly high seas. One significant aspect of the measurement question lies in its possible impact on the creation of "inland waters" out of what was formerly territorial or open sea. If "internal waters" are thus created, and if the previous law as to internal waters is uncritically applied to these new expanded areas, the scope of the right of innocent passage will be very seriously affected. This emphasizes the importance of critically examining any automatic extension of the previous rules to these new problem areas. (See Chart 2)

In the Anglo-Norwegian Fisheries case (which I will summarize briefly), the chart indicates the area in dispute, which starts at the Arctic Circle and goes all the way around to the Norwegian border. The Norwegian claim enclosed large areas of water hitherto regarded as high seas. The base line is this dotted line which marks the boundary of internal waters; the four miles beyond that are the claimed territorial waters. This was laid down in a 1935 decree of Norway, with a great deal of historical argument buttressing it. The effect of the decision upholding this system, instead of following the coast line more closely, is to enclose large areas of water not merely as territorial waters but as inland waters as well. Of course, the effect is to expand tremendously the area of sea generally reserved, including fishing rights, to the coastal state's exclusive control.

The decision by the International Court of Justice in the Anglo-Norwegian Fisheries case in 1951 was mainly concerned with the question of the starting

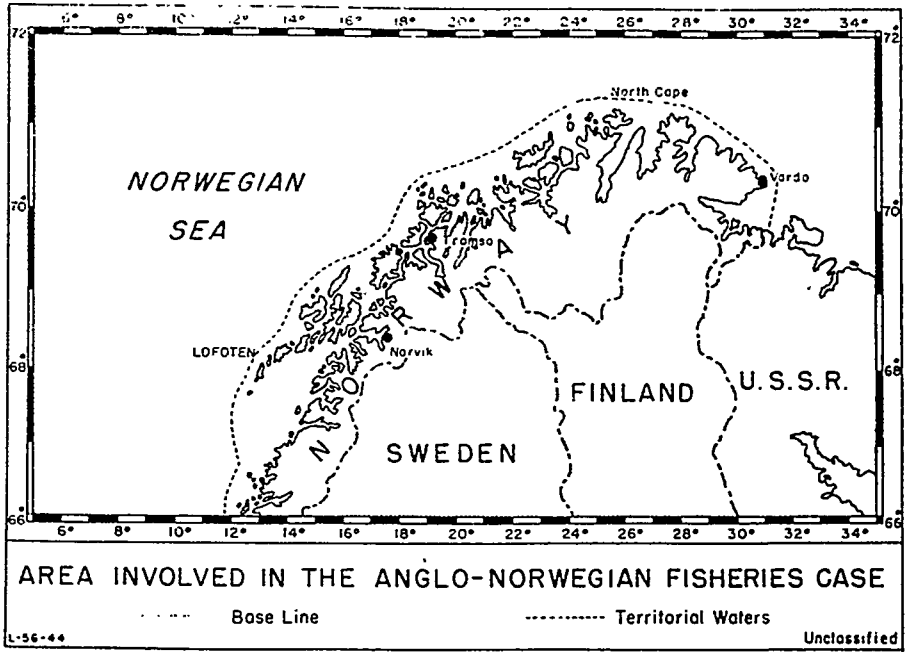

CHART 2

point for the base lines. For the purposes of that case the United Kingdom did not contest the four-mile breadth against the three-mile breadth of the actual territorial belt. The Court emphasized the historical background and the lack of protest (as they saw it) and purported to find acquiescence on the part of other states in this Norwegian system.

It is important to remember that while Norway won the case, the World Court made it very clear that base lines, the extent of the territorial sea, and the status of waters are all governed by international law. Even though they adopted a more flexible approach than the rather technical rules which were advocated by the United Kingdom, they certainly gave no warrant to an interpretation that the coastal state is free to fix their base lines and the limit of their sea at will. I do not want to go much further in this case, except to indicate that it has also been criticized partly because the Court gave a good deal of weight to the so-called "economic factors," tying them in, however, rather closely with the alleged unique character of the Norwegian coast.

Although this decision is not technically a precedent, other states have taken advantage of the decision, so to speak, as a springboard for an extension of their claims in a similar manner. This is part of the practice of states which must be taken account of in determining the rule of international law on the subject. Egypt and Yugoslavia have laws built to some extent on the decisions from the point of view of the method of measurement. Canada recently announced an important change of position in the course of a debate in Parliament, saying that at the next General Assembly they would urge the applicability of the Norwegian base-line system to their coast line, and would also espouse the twelve-mile limit for their territorial belt. Other states have also acted on this decision in varying ways, but I think it is quite clear that

there is nothing in the case which justifies the 200-mile claim made by several Latin American States. (See Chart 3)

One of the states which has acted upon this, and which was acting upon it even before the decision came down, is Iceland. You can see from this chart the way in which they have also drawn their lines around the headlands and then added four miles as their territorial belt. With regard to the question of the width of the territorial belt, which was discussed to some extent by previous speakers, I have already mentioned the fact that the three-mile rule was historically the rule developed in recent centuries, so I will not go into further details. The United Kingdom and the United States have generally adhered to this rule and defended it, as having other leading maritime powers.

On the other hand, there have been other limits historically advanced in the Baltic. The Scandinavian States have usually claimed four miles as the extent of their territorial sea, while six miles has been quite a common claim in the Mediterranean. This map is not particularly drawn for this purpose, but it suggests what I am going to comment upon briefly later on: namely, the effect that an extension of the territorial belt could well have on maritime interests in a sea such as the Mediterranean.

Some states have claimed the twelve-mile limit. Professor Lissitzyn has discussed the Russian practice, and the fact that they base their claim now on their law of 1927. There are certain gaps in the continuity and extent of their practice in this respect, but they and certain other states have claimed this limit in the past and more states are now beginning to claim this limit. I have already mentioned the intent of Canada.

There are existing laws by Ethiopia and some other countries which now explicitly claim the twelve-mile limit. Turkey, for example, has stated to the International Law Commission that it believes twelve miles is the established limit, although I have seen no official document which makes that claim. In

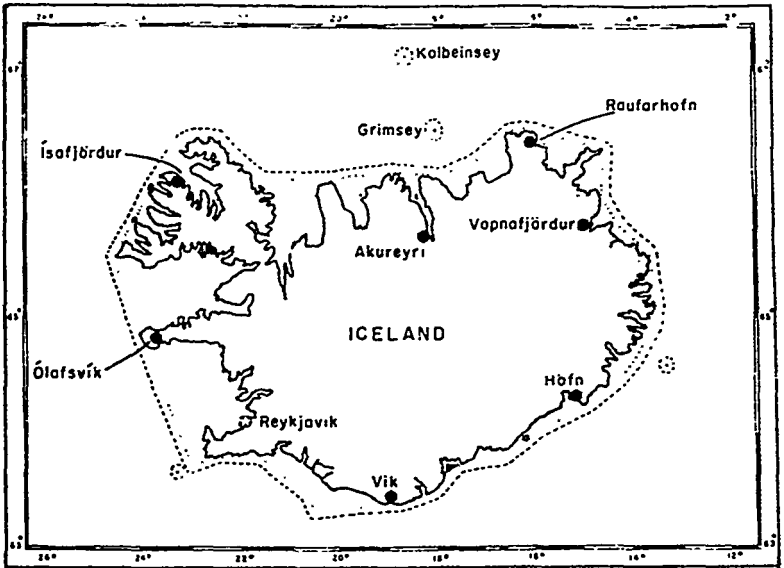

CHART 3

the western Pacific, the fishing zone has been used in effect to extend territorial waters, just as they have done in Latin America. Many of the Latin American States have, as you know, claimed two-hundred-mile limits, including exclusive exploitation of fisheries, and purportedly based their claims on American proclamations and the practice of other states. In some cases they have gone way beyond any continental shelf which they may have, and have attempted to set up a two-hundred-mile maritime zone on the basis of continental shelf precedents. Chile, Ecuador, Peru, Costa Rica, and many others have made these claims despite the fact that the United States and United Kingdom shelf proclamations expressly deny any claim to exclusive fisheries and preserve the right of free navigation over the superjacent waters. (See Chart 4)

This is not as detailed a map of the western Pacific as I would have liked to have shown you, but there is the so-called "Rhee Line" set up by Korea, and the fishing zone restrictions by the Russians (which were set out unilaterally at first). There is also a good deal of evidence that the Philippines may be attempting to claim sovereignty over the Sulu Sea and certain other waters that are so-called "internal seas," although this claim has not been formerly incorporated in any instrument.

Very briefly, this problem has been debated at many international conferences. My fellow professors are familiar (as are many of you also, I am sure) with the failure to reach agreement at the 1930 Hague Conference. There has been a series of conferences within the Inter-American system in the past few years. At Rio de Janeiro, in 1953, the Inter-American Juridical Committee, a subsidiary technical organ, by a divided vote of four to three, made some very broad pronouncements with respect to the right of the coastal state to claim extensive areas of sea.

More recently, in Mexico City, the

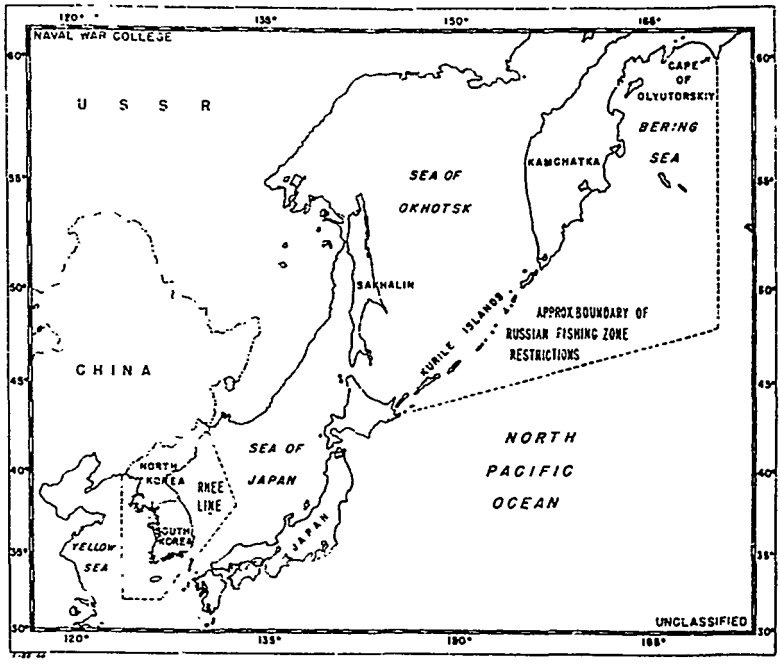

CHART 4

Inter-American Council of Jurists, a more authoritative and policy-making body, voted fifteen to one to approve the so-called "Declaration of Mexico" (the one vote being that of the United States), which, in general terms, pretty much took the position that the coastal state is free under international law to develop extensive sea zones in the protection of its economic and other interests.

Still more recently there was a specialized conference of the Organization of American States itself at Ciudad Trujillo, which produced a more balanced statement on the question. It indicated the differences of opinion and made clear that there was no agreed international law upholding these extensive Latin-American claims.

Similarly, the United States has held conferences with Chile, Ecuador and Peru in an attempt to resolve our differences with them on the two-hundred-mile claim made by those countries. Thus far, there has been no effective result. Those countries rejected the offer of the United States to refer their differences to the International Court of Justice for decision. Such an attitude is no service to the orderly development of international law on this question.

The positions taken in the International Law Commission's Final Report, previously referred to, will be summarized briefly. In effect, they have said that the three-mile rule is not a uniform rule of practice, but that international law does not permit more than a twelve-mile limit. They also say, without taking a decision, that some states claim more than three miles and other states do not recognize claims for more than this amount. They then suggest that a diplomatic conference be called to handle the whole problem.

On the question of measurement, they have attempted to restate the holding of the Anglo-Norwegian case. One interesting by-product of that restatement is that they have inserted in Article 5, concerning the "straight base line system," that wherever the use of that system creates internal waters out of areas that were formerly high seas and which were normally used for international navigation, the right of innocent passage through such waters should be preserved. With respect to this last Report, there was no noted dissent by the representative of the United States. The United Kingdom, Russian and Czechoslovak representatives made reservations to a number of these provisions, however.

On the question of contiguous zones, I will merely attempt to indicate some of the areas in which, for various reasons, we have exercised these claims—particularly in the realm of defensive sea areas in effect, mostly outside the Continental United States and mostly covering territorial waters only. Like many other states, we have an effective order which closes certain ports to foreign vessels—again, mostly in ports outside the United States. We established a closed area in the Marshall Islands for hydrogen bomb tests. There are still twenty-four airspace reservations in effect, both inside and outside of the country and in many cases overlapping the defensive sea areas.

The United States has established Air Defense Identification Zones, as has Canada (shown on Chart 1). This includes *internal* air defense identification zones and coastal air defense identification zones. There was a discussion yesterday of a possible submarine defense identification zone, which would raise different considerations as to practicability and legality.

On the question of proving grounds, I will not deal with the hydrogen bomb tests. But we have entered into an extensive series of arrangements concerning proving grounds with the United Kingdom for setting up test range areas and providing for interflight-interceptor practice. These agreements with them

have gradually been extended, the latest one going as far as Ascension Island in the southeastern Atlantic. We have also made collateral agreements of a similar character with Puerto Rico, the Dominican Republic, and a rather closely allied —but not strictly the same—agreement with Haiti.

In general, these agreements on proving grounds are elaborate and complex, as are the *Status of Armed Forces Agreements.* They cover a wide range of activities with respect to jurisdiction, taxation, and the like. But with respect to the possible question of damage, these agreements had a specific provision in the basic Agreement of 1950 between the United Kingdom and the United States, and this same provision has been repeated in the subsequent agreements to a large extent.

One article, Article 2, paragraph 6, provides that "both governments agree to take reasonable precautions to avoid danger and damage." Article 22 provides that the United States agrees "to pay adequate compensation not less than the law of the Bahama Islands requires, and to idemnify the governments of the United Kingdom and the Bahama Islands for damage, for death, or injury to any person in the area except people employed by the United Kingdom on the project itself." It also provides for "property damage," for "acquisition of property," and so on. One interesting feature is that it provides that the laws in force in the Bahama Islands are those referred to as the laws at the time of the signing of the treaty, unless agreed otherwise.

The International Law Commission, in their article on the contiguous zones, did not even mention defense as one of the purposes in setting up an exact limit of twelve miles. I think that the inconsistency of that is clear.

In conclusion, omitting fisheries and the continental shelf, a brief word may be in order on the International Law Commission. As you know, the Commission is composed of so-called "experts," and not governmental representatives. They purport to engage in the codification and progressive development of international law. In their Final Report on the Law of the Sea, they have admitted, at least in that instance, that it is impossible to differentiate the provisions with respect to those two theoretically different objectives. Their work can either be merely published or an international conference can be called as a means of reaching a binding agreement. It can only be binding on governments by agreement. But, nevertheless, it is influential; it is an important subject for study; it certainly has an influence on doctrine and practice, as I have tried to suggest this morning; and it seems to me that it is particularly important to naval officers, not only of the United States but also of its allies in the Free World.

A brief discussion of the numerous protests that have been made will indicate the reactions of other claimants as decisionmakers. The United States and the United Kingdom have protested these extensive claims in Latin America and in other areas of the world. Similarly, other states have protested to indicate that they do not acquiesce in these claims. Many of these protests are not available for publication, but their existence is known. Others have been published. Many of them may be found in the written proceedings in the Anglo-Norwegian Fisheries Case.

In concluding, I want very briefly to suggest that while it may be currently fashionable in some circles to espouse a larger limit than three miles, and while the three-mile rule is certainly on the defensive, there are certain other considerations that may not have been given adequate consideration.

In time of peace, certainly fisheries are probably the element of most importance. With respect to fisheries alone, there are many equities of the coastal state which arouse sympathetic

consideration. In spite of that, any change from the three-mile rule to the twelve-mile rule should be given a great deal more thought than it has thus far received, and perhaps the security interests involved have not been adequately developed. A change from three miles to twelve miles would cut out of the high seas approximately 3 million square miles of water, or 2% of the high seas of the world. According to the Hydrographic Office, only 20% of the lighthouses in the world reach twelve miles out, and the expense of dealing with that problem is something to contemplate.

As I have tried to suggest today, it is not merely the extent of the territorial waters but the effect of these baseline claims that is of very great importance for security. The test of reasonableness in the Anglo-Norwegian Fisheries case is a vague formula. If properly interpreted, it is not an unwise standard. But it poses the question of the validity of these more extensive claims. The fact that there is no compulsory way of resolving these disputes, although the recording of protests makes clear the lack of agreement, accentuates the difficulties of reaching an equitable and authoritative solution.

With respect to security, we might also think of the fact that unless international law differentiates more than it has in many of these rules, a zone for fishing purposes, which is ardently desired, means also a zone to patrol for neutrality purposes in time of war, thus tripling the patrol area. It would permit a neutral who is conniving with another belligerent more easily to disguise the cooperation. With reference to the submarine, it would make submersion within territorial waters much easier. I have already mentioned the effect on innocent passage. Of course there is also the important problem of the fact that it is generally agreed that there is no right of innocent passage through the air. The extension of the airspace over these claimed areas is another serious problem for air operations. There is also practically a consideration that the extension of coastal state claims conceivably will hamper the freedom of navigation throughout the world through practical restrictions on pilotage, and so forth, as well as through the lack of adequate lights, which I have mentioned.

With respect to security, I cannot develop that aspect further now. But, as naval officers, I am sure you will realize the effect of extending from three miles to twelve miles the territorial claims in such seas as the Mediterranean, the Baltic, through the sea passages of the Philippines, the East China Sea, the Sea of Japan, and so on. So it should be borne in mind that it is not only the interests of the United States which are at stake and ought to be considered in this question, but the interests of all the Free World in the use of naval power to prevent aggression and to preserve peace.

It would be sanguine to predict that there will be agreement in the near future on these questions. I hope, however, that these brief remarks will perhaps stimulate the staff and students at the College to give this very important matter further consideration.

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