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# The Barometer

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# THE BAROMETER

*The* Review *has received several letters, particularly from the legal community, regarding the article, "Law and Conflict at Sea," by Lieutenant Roger Wiegley, that appeared in the January-February 1980 issue. In contention is the point of law with respect to the arrest of warships and the policy point addressing "restrictive coastal state claims." What follows is a representative reader comment and Lieutenant Wiegley's response.*

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Editor
*Naval War College Review*
Newport, RI

Dear Commander Pettyjohn,

The JAN-FEB 1980 issue of your professionally enhancing publication contained an article by Lieutenant Roger D. Wiegley, JAGC, USN, styled "Law and Conflict at Sea" which requires reader comment. At page 75 Lieutenant Wiegley makes the statement: "A state has the right to arrest a foreign warship if the latter is posing an actual and imminent threat to the arresting state's security." This statement is clearly not supported in either treaty law or customary international law. Lieutenant Wiegley cites John C. Colombos, "The International Law of the Sea," 6th ed., p. 314, to support his conclusion. Page 314 contains "Section 337 the right of self defense" under the general heading "The Legal Regime of *Merchant* Ships" (emphasis added). In fact, the self-defense case discussed at page 314 was that of the merchant ship, The Virginius, which, to make this supporting footnote even more egregious, was purporting to sail under an American flag ("[I]t was eventually found that the ship was not entitled to registration as an American ship, but was flying the United States flag fraudulently." Colombos *supra* at 314-315). In fact, the doctrine of sovereign immunity ensures that sanctions which apply to merchant vessels do not apply to warships. A coastal state may only require a foreign warship to leave its territorial sea for noncompliance with international rules concerning passage. This sanction was codified in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone and the concept of sovereign immunity as applied to warships has been incorporated consistently into analogous articles of the negotiating texts of the Third U.S. Conference on the Law of the Sea. Although this type of substantive error is certainly unusual for your publication, it nevertheless should not be allowed to stand without public clarification.

Lieutenant Wiegley's thesis that "restrictive coastal state claims" should be addressed only by diplomatic protest also deserves comment. Primarily, this assertion assumes that all illegal claims are protested, and/or that protests are lodged in a timely fashion. This is simply not the case. Concerns for diplomatic sensitivities can inordinately stall the lodging of a protest. Further, it is not unheard of for an adverse claim to go unnoticed until it becomes an issue vis-à-vis an operational requirement. Accordingly, in March of last year the United States affirmed its policy regarding excessive maritime claims. The United States has undertaken to regularize the practice of protesting diplomatically, and contesting through the peaceful exercise of navigational rights and freedoms, those claims that are inconsistent with international law and U.S. policy. This policy is consistent with international practice which recognizes that a peaceful operational demonstration of a state's willingness to "exercise" its rights in the face of claims which are inconsistent with international law is one legitimate, independent method of protesting illegal claims. Further, the operational use of dispured areas is an essential adjunct to diplomatic protests. Without operational state practice which is adverse to incompatible claims to jurisdiction, those "incompatible" claims can ripen into customary international law. It is hoped that Lieutenant Wiegley's views will not be interpreted by your readers as either the correct or majority opinion of the legal community on this matter.

Sincerely yours,

/s/ W.L. Schachte, Jr.

W.L. SCHACHTE, JR.
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Editor
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Dear Commander Pettyjohn,

I have reconsidered my article in the light of criticisms you have received and feel that I did not devore as much discussion as I should have to two difficult issues.

The first issue that merits further discussion is the sovereign immunity of warships. Here, I must concede error in my reference to Colombos as authority for the proposition that warships can be arrested. The relevant passage in Colombos is entitled "The right of self-defence," but, contrary to

my assertion regarding warships, the chapter in Colombos containing the passage to which I referred the reader is "The Legal Regime of Merchant Ships." Despite the inaccuracy of my reference, however, the context in which I presented my argument illustrates the difficulty of analyzing the concept of self-defense in law of the sea terms. As a general proposition of law, a warship cannot be lawfully arrested or otherwise detained. If a warship is not complying with the regulations of the coastal state concerning passage through the territorial sea, it can be required to leave the territorial sea. But suppose that, in the opinion of the coastal state, a warship is posing an actual and imminent threat and the warship refuses to leave the territorial sea. At what point is the threat so imminent that the coastal state can attack (or seize) the offending warship? Would the refusal of the warship to leave the territorial sea be a factor in analyzing the threat? At what point would the *United States* exercise self-defense against a foreign warship? With that in mind, how should U.S. military vessels react if challenged in a territorial sea claimed by a foreign government but not recognized by the United States? Would a refusal to leave the unrecognized waters be viewed by the foreign government as a threat of sufficient gravity to give rise to self-defense posturing? Could an incident thus occur with each side defending what it believed to be its legal rights? Finally, how does the general prohibition against the use of force apply in such situations? I do not pretend to have the answers to these questions, but I feel that the risk of confrontation over legal rights is serious enough that policy guidance for U.S. naval forces should comprehend the implications of foreign legal claims, notwithstanding well-established expectations of immunity for military vessels.

The second and more important issue is the repudiation of unilateral claims that are not recognized by the United States. I did not say, nor do I think I implied, that it would be *unlawful* and unwise for the United States to sail through waters within the unrecognized claims of foreign governments. The point I tried to make is that it is *unnecessary* and unwise to sail through claimed waters for the *sole* purpose of repudiating the claims. The question of the *necessity* for such transits is a legal one, i.e., whether the claims become legitimate if, over the course of years, they are not physically challenged. It is true that the practices of nations can become "customary" international law if tacitly accepted by the world community, but the development of an international custom cannot be equated with a prolonged absence of demonstrative behavior by adversely affected nations. The recognition of custom as a matter of *law*, although difficult to define, would seem to require an activity or claim so well established as to be beyond controversy. It is hardly persuasive to speak of unilateral claims becoming "customary" if (1) the leading maritime nations of the world officially protest the claims, (2) the United States ignores the claims in situations where they would, if recognized, affect U.S. interests, and (3) the claims represent mere assertions of right, not activities which require international cooperation to be effective. It would be anomalous if international law, which serves to promote peace, required the risk of physical confrontation whenever one nation claimed legal rights not recognized by other nations. For example, the Soviet Union has claimed for many years that foreign warships must obtain advance authorization before entering the 12-mile territorial sea claimed by the Soviets. Similarly, the Soviet Union has claimed that Peter the Great Bay in

the Sea of Japan is part of its internal waters (and, therefore, closed to foreign shipping). Neither of these Soviet claims is recognized by the United States. To esrablish its legal objections, the U.S. can (1) make official protests, (2) transit through the areas claimed by rhe Soviets, or (3) transit through similar areas claimed by countries that do not have the means to challenge U.S. naval presence As a matter of law, the first option (which has been exercised) should be sufficient. The second and third options should be pursued only when nonlegal considerations dictate; otherwise, international law would encourage conflict or, even more oddly, would require some demonstration of force against only those states that cannot enforce their claims.

I understand that current U.S. policy is to transit through ocean areas encompassed by unilateral claims not recognized by the United States. I agree with that policy to the extent that such transits serve some naval requirement or otherwise promore U.S. interests. I do not know if it is the official position of the U.S. Government that, as a matter of law, unilateral claims must be challenged by naval presence in order for the United States to maintain that the claims are not customary international law. If the latter *is* U.S. policy, then my article should be viewed as a dissenting opinion.

Sincerely,

/s/ Roger D. Wiegley

Roger D. Wiegley

Editor
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It's unusual these days to pick up a serious analysis of Soviet behavior toward Afghanistan, Yugoslavia or elsewhere, without finding the ubiquitous reference to the "upcoming succession crisis." Our concern with this soon-to-develop phenomenon is so great that it leads one to suspect that the United States is going to experience the crisis right along with the Soviet Union, in a manner somewhat akin to having sympathy pains.

Two things bother me about the nature of this concern with Soviet succession politics, and both point to a potential lack of clear-sightedness in American foreign policy.

First, the Soviet succession crisis is not "upcoming." It "is." Surely no serious Western scholar expects the Soviets to wait until Secretary Brezhnev has breathed his last to start scurrying about to organize the government that will see their country through at least a transitional period. Yet many Soviet-watchers seem to be waiting for the gauntlet to drop before taking seriously the subtle but substantial changes that have taken place in the Soviet hierarchy of late. By ignoring the fact that the Soviets are in the thick of a succession crisis at this very moment, they deprive themselves of valuable insights into the reasons behind the Soviet invasion of Afghanistan or the possible Soviet reaction to post-Tito Yugoslavia.

Such insights might include the natural reaction of a country experiencing internal instability to focus attention, both domestic and international, on external activities. A related phenomenon is the effort to achieve national unity by establishing a "clear and present" external danger.

There is also evidence pointing to the ascendance of hawkish elements within the Kremlin, some of whom were forced to "sit on their hands" during the height of the Brezhnev-favored détente. It stands to reason that these elements will continue to exist and hold increasing sway (in much the same way as this country is experiencing a pendulum-swing to the right). A new leader then might be expected to attempt to establish himself as a hard-liner in order to secure the support of this faction.

Understanding such developments in Kremlin politics gives us at least some insight into the philosophical paradigm in which the Soviets may now be operating. Unfortunately, clues are generally all we get with respect to the internal machinations of the Kremlin.

The second unfortunate byproduct of Western preoccupation with the Soviet succession crisis is that it mistakenly confers far too great authority and power on Mr. Brezhnev's successor.

The days of Lenin and Stalin are gone. There now exists in the Soviet Union an adult generation that has never experienced one-man rule, as they were born after the death of Stalin, the last omnipotent, tyrannical leader.

This generation was weaned on the somewhat pitiful efforts of Nikita Khrushchev to achieve greatness; yet Khrushchev never escaped the precarious balancing act he was forced to perform, juggling powerful factions of the Soviet elite in order to maintain his own tenuous position.

That generarion then came of age in a period of oligarchical rule. While Brezhnev was successful in consolidating his power in the past decade, he never attempted to challenge the bureaucratic, institutional rules of the game by making an end-run for dicratorial control.

By attaching too great an importance to the specific personality who might emerge from the ranks to succeed Brezhnev, Western analysts overlook the continuity that has always characterized Soviet domestic and international policies. American foreign policymakers are continually amazed at what they consider to be irrational, unfathomable Soviet actions. Their Soviet counterparts likewise find it hard to believe that America can so consistently overlook their repeated signals, their consisrent expressions of intent and national self-interest.

In this, an election year, we are all too familiar with the American penchant for heroes, with our preoccupation with our leaders' personal lives, their families, their biographical histories, etc. American Soviet-watchers find it frustrating that the Soviets do not publish such "vital" statistics as the high schools attended by foremost Soviet leaders. They generally attribute such paucity of factual data to the Soviet "closed society." But perhaps it is more likely a reflection of the lack of Soviet interest in such personality-related information.

It is popular these days to eschew the faults of analytical "mirror-imaging." Yet there is every evidence in our anxious attendance of Brezhnev's successor that we are still laboring under the effects of that syndrome.

The Soviet Union's policies, like every country's policies, are motivated by longstanding perceptions of its geopolitical status in the world. It is unlikely that the death of Brezhnev will change those perceptions, which in some cases have remained unchanged for three centuries. It is equally unlikely that the personality, or job experience, or educational experience of Brezhnev's successor will change those perceptions.

We should, then, get on with the business of dealing with the Soviet Union on the merits and demerits of its long-held goals and aspirations and stop wasting our time and effort waiting for the other shoe to drop.

/s/Jacqueline Hess

JACQUELINE HESS

## COLONEL ROBERT D. HEINL, JR. MEMORIAL AWARD IN MARINE CORPS HISTORY

The Marine Corps Historical Foundation has announced the establishment of an annual Colonel Robert D. Heinl, Jr. Memorial Award in Marine Corps History. The initial award will be for $250 for the best article pertinent to Marine Corps history published in this or other similar magazines in 1980.

In keeping with Colonel Heinl's great breadth of interest, "Marine Corps history" is very broadly defined for purposes of this award and includes biography and contemporary events. The key consideration is that the candidate article be *pertinent* to U.S. Marine Corps history.

The 1980 Awards Jury will consist of Mr. Robert L. Sherrod, Mr. J. Robert Moskin, and Dr. Allan R. Millett. Mr. Sherrod, editor of the *Saturday Evening Post*, is the author of *History of Marine Corps Aviation in World War II*, *Tarawa*, and *On to the Westward*. Mr. Moskin, a senior editor with Aspen Institute, is author of *The U.S. Marine Corps Story*. Dr. Millett, professor of history at Ohio State University and a Marine Reserve lieutenant colonel, has written a soon-to-be published new history of the Marine Corps, *Semper Fidelis*.

Announcement of the 1980 Award winner will be made in the spring of 1981. Readers are encouraged to nominate articles of their choice. The address is

Colonel Robert D. Heinl, Jr. Award Committee
Marine Corps Historical Foundation
Bldg #58, WNY
Washington, DC 20374

## INTER-UNIVERSITY SEMINAR

The Inter-University Seminar on Armed Forces and Society (IUS) will hold its 1980 national conference 23 through 25 October at the University of Chicago in Chicago. Papers, representing diverse research areas including civil-military relations, the utility of force, arms control and military institutions, and military leadership and manpower, have been organized around 14 panels. Additional information can be obtained from IUS's Executive Secretary, Donna Ellefson, whose address is:

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