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## Current International Law Problems of the Navy

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*Man's increasing ability to utilize the seas for military and commercial purposes has created many new problems in international law which directly affect the Navy. In this article the Judge Advocate General of the Navy delineates some of these problems and discusses their implications for military operations and economic enterprises.*

## **CURRENT INTERNATIONAL LAW PROBLEMS OF THE NAVY**

A lecture delivered at the Naval War College

by

Rear Admiral Joseph B. McDevitt, JAGC, U.S. Navy

Judge Advocate General of the Navy

It is always a pleasure for me to be here at the War College to discuss with you some of the current problem areas that we face in international law.

When we speak of the Navy's area of operations at sea, we are speaking of air, surface, and subsurface operations in an area which is almost entirely beyond the sovereign territory of the United States and any other nation. Our right to use this area is determined largely by a variety of rules of international law.

There are many kinds of thread woven into the fabric known as international law. Whether written or unwritten, international law represents the consensus of the community of nations.

It is evidenced in part by international conventions which are binding on states by agreement and, in many cases, are binding because they codify customary international law.

It is in part represented by state practices of long standing which, though never formalized, have been accepted,

shared, or acquiesced in by the other members of the community of nations. It is reflected by the decisions of the International Court of Justice and the decisions of the highest courts of the various countries.

It includes the teachings and writings of eminent publicists who have studied the relationship between states in the light of the times in which they lived. It is this package that comprises the bulk of international law.

Though the concept of international law may lack a preciseness to be found in municipal law, nevertheless it provides accepted standards for the measurements of the conduct of nations.

Our national policy is formulated and executed within the framework of the law of nations. We are a party to many alliances of collective security such as NATO, SEATO, the Organization of American States, among others. We are bound by the accepted customs and practices between nations and by

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international conventions that both prescribe and proscribe conduct both in peace and in war.

International law is, of course, not a completely effective instrument for international peace. But it has progressed toward minimizing resort to war or armed conflict as a method of settling international disputes. When it fails to prevent armed conflict, it still operates to impose rights and duties on parties and nonparties to the conflict. More importantly, it provides peaceful alternatives to armed conflict.

International law does not have a system of sanctions as we define and understand the term in municipal law, but this does not indicate that international law is a myth, merely that it has limitations. The same could be said of any specialized legal system. There are many sanctions under international law which do work effectively. Among the most obvious and effective of these is the promise of reciprocity—either favorable or adverse. This provides a strong reason for states to observe the rules.

Reconciling legal equality with political inequality remains a serious impediment to the development of international law. But effective seapower exercised in support of the rule of law can be a positive force in providing a stable background for the continued growth and acceptance of international law.

One area of international law of primary interest to the Navy is the law of the sea. We are in a time when the oceans are being taken into a sphere of politics; a plethora of newspaper and periodical articles on the law of the sea comes from all nations and consequently creates a growing pressure on all governments to publicly justify their legal positions in this area.

There has developed an alarming tendency for complex international legal issues to become political footballs. The dispute over the status of the waters off portions of the coast of

South America has been straining relations between the United States and a number of South American nations for almost two decades. However, after a series of preliminary meetings, the United States entered into discussions with Chile, Ecuador, and Peru in August of last year aimed at arriving at a solution to this problem. I was in attendance for a portion of these discussions. They are still in their preliminary stages and therefore I cannot elaborate on them except to note that sitting down at a conference table is a first positive step taken toward the resolution of this persistent dispute over the right to use extensive areas of the high seas. The heated controversy and diplomatic crisis occasioned by the tuna boat seizures point up the danger involved in unilateral coastal state claims to sovereignty over areas of the high seas.

Even more dramatic and tragic events have underlined the absolute necessity for arriving at uniform international legal regimes for the world's oceans. These were the seizure of the U.S. intelligence ship *Pueblo* and the subsequent destruction of an unarmed reconnaissance aircraft by North Korea. These incidents occurred on or over high seas areas. In the United States, in the wake of the North Korean incidents, the Congress has considered a legislative proposal which would have undercut our present position on the 3-mile limit for the breadth of the territorial sea and would have greatly hindered any change for the formulation of any uniform international limit in the future. This proposal (S.J. Res 84) would have established a territorial sea which could vary from 3 to 12 miles, depending on the extent of the territorial sea claimed by the other country involved; in other words, a territorial sea based on mutuality. Administrative problems aside, the problem with this is that it would have been tantamount to recognition of the legality of exercising any measure of

territorial sea jurisdiction out to 12 miles. A Senate vote on this proposal was adverted only after extensive briefings by DOD. This incident demonstrated the danger to operational mobility of recognizing the unilateral extension of a nation's territorial sea without providing for adequate safeguards for navigation rights.

Frequently, however, the easiest way to lose a right is to press it to the extreme. For example, until the beginning of this century, it was generally agreed that 3 miles was the maximum breadth of the territorial sea and that all areas beyond were high seas in which all nations, among other things, had an equal right to fish. Since World War II several nations—notably Japan and the Soviet Union—have developed huge fishing fleets which can operate off the coasts of foreign countries thousands of miles away. The first sign of reaction came in Latin America, where, as I have mentioned, several states proclaimed either 200-mile territorial seas or 200-mile exclusive fishing zones, in order to control distant water fleets. Then in 1964 some of the most conservative 3-mile states in Western Europe signed the European Fisheries Convention which, in effect, reserved all fisheries out to 12 miles to these states. Subsequently, in 1966, the United States—the country which has the most to gain from free use of the seas and the airspace above them—itself declared a 9-mile exclusive fisheries zone extending seaward from the outer limits of our 3-mile territorial sea.

The establishment of this zone is an example of how DOD, and the Navy in particular, must recognize and evaluate significant nonmilitary national pressures if the present dimensions of the high seas are to be maintained.

Public Law 89-658 of 14 October 1966 established the 9-mile contiguous fishing zone. The Senate report on this legislation makes it perfectly clear that this was a reaction to intensive foreign

fishing operations off our coast. In earlier years the Navy had opposed such legislation. It feared that the establishment of the fishing zone would be the first step toward the undesirable formation of a 12-mile territorial sea.

In 1966 the Navy merely entered no objection to the zone—it did not *support* the establishment of the zone. In retrospect, that may have been a mistake since the U.S. 12 mile fisheries zone lends credence to an approaching 12-mile territorial sea. The argument that such a zone was needed because of Soviet intelligence activities was advanced by the interests that wanted the zone established. It was never stated that the AGI's—though they might have trawler hulls—were warships and not fishing vessels.

Since the enactment of Public Law 89-658, there have been constant efforts on the part of various interested lobbies to widen the scope of the law to prohibit all manner of activities to foreign fishing vessels within the zone, not just the extraction of fish from the zone.

The most recent effort accomplished the enactment of Senate bill 1752 (S. 1752) over opposition by the Department of Defense. The wording of this amendment, which makes it unlawful for any non-U.S. vessel “to engage in activities in support of a foreign fishery fleet” within the contiguous fishing zone or territorial sea, could be misinterpreted as authorizing interference with activities which do not have any relation to the protection of living resources of the territorial sea or fisheries zone.

This is but a single illustration of how specialized legislation can have highly undesirable side effects. The DOD continues to maintain that the fisheries zone is high seas for the purpose of navigation and that to qualify the right to navigate or operate in the area could be seen by others as a claim of a 12-mile territorial sea rather than a

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contiguous fisheries zone. A series of similar special-purpose bills could be extremely detrimental to our presently avowed position supporting the maintenance of the 3-mile territorial sea rule.

The United States initially supported the 3-mile limit in 1793 when Secretary of State Jefferson informed the British and French Ministers that the United States had adopted a 3-mile zone; it has never claimed a greater distance as the breadth of the territorial sea. It has been the traditional position of the United States, moreover, that the 3-mile limit is not only domestic law but that 3 miles has been the maximum breadth of the territorial sea it need recognize off the coasts of other states. The United States has continued to support the doctrine of the freedom of the seas by vigorously opposing the claims of other governments to extend unilaterally their territorial seas beyond 3 miles.

This problem of the gradual unilateral extension of the territorial sea of coastal states exists where military operations are concerned. All of us know that if the United States forced Soviet warships to stay, let us say, at least 200 miles from our coast, then not just the Soviet Union, but every country in the world, would have a basis to demand that American warships stay 200 miles from their coasts.

But when you have to explain this to a newspaper editor who is involved in a crusade against the presence of Soviet intelligence ships off our coast, you are put in the difficult position of saying that, on balance, the defense of the United States is better served if we let those Russian ships stay there. But, I ask you, would this be true if it were not for the worldwide deployment of our air and naval forces? It is therefore not surprising that many developing countries which perceive no direct interest in using the seas at great distances from their shore feel that there is something to gain and very little to lose—in extending their territorial seas.

The Navy is one of the strongest supporters of freedom of the seas. While new and varied uses are emerging, navigation and commerce remain the most valuable uses of the ocean. Efforts by coastal states to impose unjustifiable restrictions and to improperly encompass world sealanes within claimed territorial waters must be resisted. Such unilateral attempts to extend sovereign control will create confrontation situations with great potential for conflict. Very important problems of mobility are involved. For example, while the right of innocent passage of vessels through international straits may not be suspended, there are disputes regarding the application of this right to warships and regarding the application of the criteria for identifying international straits. Should the right to establish a broader territorial sea be conceded without concomitant guarantees of passage through waters of straits, interpretation of the right of innocent passage would become extremely critical. For example, some states have claimed a unilateral right to determine what kinds of passage are innocent even when, by objective standards, passage is clearly not prejudicial to peace, good order, or security within the coastal state. Well over 100 straits which would be within the sovereign territory of coastal states if, for example, a 12-mile territorial sea were conceded, might then be closed to transit by possibly capricious interpretations of the right of innocent passage. The Straits of Gibraltar, Dover, Bab el Mandeb, and Malacca would be among them. The disruptive effect that such actions might have on our naval operations is obvious. Unless navigational guarantees are internationally recognized by international agreement, the U.S. Navy cannot afford to lend its support or recognition to unilateral territorial sea claims in excess of 3 miles. Neither could the Air Force, I might add, since no right of innocent passage for state aircraft exists on the airspace

above territorial waters. Of course, one factor which could significantly affect our continued adherence to the 3-mile policy would be to negotiate, preferably on a multilateral basis, for the maintenance of high seas passageways through international straits regardless of the breadth of the territorial sea. Such a development would mitigate possible extensions of territorial seas without unduly jeopardizing the worldwide mobility of our naval forces.

In addition to the international problems raised by the dispute over the proper breadth of territorial seas, there are additional problem areas involving the oceanic regimes which are of interest to the Navy. The continued discovery of new sources of both minerals and foods in the seas and on the ocean floor has occasioned a fantastic increase in the emphasis on the development of our technological ability to extract these resources on a practical and competitive basis. In any area in which rapid utilization occurs, the development of a set of valid rules or guidelines to safeguard against conflict among the various users will be necessary. The development of such a set of rules is of prime interest to the Navy. We will undoubtedly be called upon to protect our nationals and their economic activities on the ocean floor beyond what are now recognized as areas of coastal sovereignty. Equally important will be our task of ensuring the proper utilization of these seabed areas in the preservation of our national security.

The seabed areas to which I have been referring are generally divided into two principal regimes: the Continental Shelf and the deep ocean floor.

The Continental Shelf is defined by the 1958 Geneva Convention on the Continental Shelf as the seabed and subsoil of the "the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters, or beyond that limit, to where the depth of the superjacent

waters admits of the exploitation of the natural resources of said areas." This convention embodies what we may call the international law of the Continental Shelf. The rules laid down by this convention further provide that the coastal state shall exercise "sovereign rights" in these areas for the purpose of exploration and exploitation of the natural resources of the seabed and subsoil thereof. It must be noted that this important convention affects only exploration and exploitation of the natural resources on the shelf. The consent of the coastal state must be obtained "in respect of any research concerning the Continental Shelf and undertaken there." The convention, by its own terms, in no way affects the character of the superjacent waters as high seas which remain open to all and subject to the sovereignty of no nation.

The Continental Shelf is becoming increasingly important as the technological ability to exploit its resources advances at an ever-accelerating rate. An increasing number of corporations throughout the world are taking an active interest in undersea operations. They are developing tools and technology for extended operations on the Continental Shelf. The scientific and academic communities are also conducting many research and development projects aimed at increasing man's effectiveness beneath the ocean's surface.

At present the extent of a nation's jurisdiction over the resources of the Continental Shelf is governed by the "200 meter or exploitability depth" test of the 1958 Continental Shelf Convention. This convention, however, contains no precise definition of the outer boundary of the shelf. As a result, domestic and international controversy has arisen as to the ultimate boundary of a nation's Continental Shelf. The waters have become more and more muddy as the arguments concerning various boundary theories proliferate.

The United States has been a leader

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in discussions of this complex issue in many international forums. It is particularly likely that this matter will receive considerable attention in the United Nations Seabeds Committee. The United States has clearly indicated the importance of establishing a precise Continental Shelf boundary and has supported the principle that as soon as practicable an internationally agreed boundary should be determined.

The complex problems involved in arriving at a precise outer boundary for the Continental Shelf have not dampened world interest in discussing regimes for the deep ocean floor beyond the Continental Shelf. This broad expanse—almost 7 miles deep at points—is largely unknown and unexplored. Yet the very mystery of the deep ocean floor stimulates some to assume that it is a vast storehouse of easily available riches. This, in turn, has prompted lively interest in the legal problems involved in the utilization of this area. The Navy is, of course, also interested in these problems from the standpoint of the military utilization of these seabeds.

Some have suggested that we divide the ocean floor between coastal states with median lines, much the same way as the seabed in the North Sea has been divided. We must consider the fact that, under a median line formula, the United States would receive only a very narrow strip in the Atlantic and that small islands in the Pacific, some under European control, would become the center of enormous seabed domains.

Others have urged turning the deep ocean seabed over to the United Nations. Ambassador Pardo of Malta has proposed creating a new international authority with broad powers to administer and police the deep ocean floor. Senator Pell of Rhode Island has stopped short of this, proposing that the United Nations be given leasing authority over the deep ocean floor in much the same way as the Interior Department has leasing authority over

our Continental Shelf.

There are, however, respected voices in both national and international forums which urge that we have too soon become intoxicated with the promise of riches in the deep oceans; that we have little idea of what is to be found there and will not be able to conduct economical operations in this area for many years to come. These people urge that mankind has a far greater interest at this time in a unified effort to explore the ocean floor than in becoming embroiled in premature legal and political disputes.

The problems involved in regulation of a largely unknown environment have been involved in recent seabed disarmament discussions. The United States has constantly advocated steps to avoid the seabeds becoming an arena for another round of the arms race and has now agreed with the Soviet Union on a draft treaty which was presented to the Conference of the Committee on Disarmament (CCD) in Geneva recently. The joint draft treaty would prohibit implanting or emplacing any objects with nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations, or other facilities specifically designed for storing, testing, or using such weapons on the seabed and ocean floor or the subsoil thereof. The treaty prohibitions would apply beyond the maximum contiguous zone provided for in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

Certainly agreement on this draft treaty indicates that on important items of significant interest cooperation between the world's two superpowers is feasible. However, it must also be noted that whatever the outcome of the seabeds disarmament talks or the ultimate form of any treaty which may emerge, the many and diverse views expressed in these negotiations thus far clearly point up the need for further hard knowledge of the deep ocean floor.

From the point of view of the Navy, it may be in our best interest with respect to the deep ocean floor to follow those who insist that we apply the doctrine of freedom of the seas. In this case there would be no distinction in international law between the legal status of the high seas and that of the subjacent seabed beyond the Continental Shelf. Where navigation of submarines is involved, we certainly are interested in free seas. With respect to deep submersibles that will transit the bottoms by partial physical contact with the bottom, we are anxious to preserve free navigation on the ocean floor. Nevertheless, there will be those who will advocate the adoption of a doctrine recognizing the seabeds areas as being capable of being appropriated by the first occupier. With the advent of mining operations on 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. This may lead to claims of outright sovereignty of the deep ocean floor. If, ultimately, national control is established to the full depth of the ocean, effectively 20,000 feet, then there exists the complex and politically hazardous international task of dividing a territory more than three times as large as that of the world's landmass.

A reasonable accommodation of users in accordance with the doctrine of freedom of the seas may be the most promising approach at this stage. Assuming the remote possibility that a conflict between two exploiters of the deep ocean floor were to arise in the immediate future, it is clear that such a controversy would be governed by international law. At the very least, the principle of freedom of the seas would apply. It has been accepted by seafaring nations for centuries that freedom of the high seas shall be exercised with a reasonable regard to the interests of other states in their exercise of the

freedom of the seas.

Today we face a plethora of fishing interests and oil interests, as well as political interests which view the oceans as an area of experimentation in international organization.

These interests have at their disposal a large battery of extremely competent and aggressive legal representatives. Each group appears to be single-mindedly pursuing its own ends. Certainly, these diverse interests can and will be accommodated in a friendly manner. But, the only way in which the Navy can hope to advance its mission to safeguard the national security is to meet these challenges with equal preparation and expertise. Everyone can come up with a mockup of defense reasons for supporting any proposal. The challenge is for the Navy to take the lead by making fine "on ballance" military decisions and advancing them persuasively and in unison.

The lawyer can do no more than help his client decide and then do everything possible to insure that his client succeeds. For this we need penetrating analysis and deep reflection, with the sober realization that severe restrictions on the Navy's right to go where it needs on and under the seas will hamper its vital mission and inevitably affect its central role in U.S. strategic and tactical planning.

Man has now stepped on the moon—which dramatically reminds us that no area will remain forever inaccessible to mankind. However, the first footprints on the lunar surface do not constitute a superhighway which requires immediate formulation of an extensive traffic regulation code. Likewise, the first steps of man into the depths of ocean space do not signal the need to immediately abandon the international law of the sea which has evolved over hundreds of years. This body of law cannot and should not be prematurely replaced with new legal regimes designed to meet



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new needs and uses which are at best only partially foreseeable.

Even with regard to the classic use of the surface of the high seas for navigation, we are faced with immediate and perplexing international legal problems. An example of such a problem has arisen as a result of the rapid Soviet buildup of naval forces in the Mediterranean Sea.

Since the Arab-Israeli war in June 1967, we have been faced with this important naval confrontation in the Mediterranean. The strategic and political implications of this confrontation are weighty indeed. However, I would like to describe briefly the legal context in which the Soviet Fleet, and in particular its submarine fleet, meets the American Fleet.

There is nothing unique in having large naval fleets of two potentially hostile maritime powers deployed on the high seas in peacetime. Indeed, I can think of no extended period of time in modern history when this has not been the case. It is only natural for these fleets to seek maximum information regarding their respective operations and deployments. There is no legal prohibition to observation of naval operations on the high seas. Such activities are lawful so long as the observer does not unreasonably interfere with the activities of the observed vessels—and vice versa. Specifically, when the vessels are near each other and there may be risk of collision, they must respect the detailed "rules of the road" established by the international regulations for preventing collisions at sea.

However, from a legal point of view, vessels engaged in ASW operations present somewhat unique problems. These problems arise from the fact that although there are highly detailed navigational rules regarding surface ships which are near each other, this is not the case with submerged submarines. The international rules of the road

generally apply only to vessels on the surface.

This does not mean there is no law on the subject, but rather that general principles of law have not been given detailed application in an international treaty. Thus, the problem is that of applying these general legal principles to operational facts. From existing principles we can generally conclude that naval forces in time of peace must exercise prudent seamanship to avoid endangering foreign submarines and must not unreasonably interfere with their right to navigate or conduct other lawful activities on or under the high seas.

However, in the context of maintaining a submarine contact, additional unique facts are introduced. A specific example of this problem might be helpful. There is some judicial authority to the effect that a submarine navigating submerged has a duty to remain clear of all surface ships. However, the rationale of the case was that since the location of the submarine could not be ascertained by other vessels unless it was on the surface, the burden of staying clear necessarily falls upon the submarine. It is therefore doubtful whether this legal precedent has any significant value where the surface ships involved have substantial capability to detect the presence of the submerged submarine, and are, in fact, deployed for that purpose.

The international regulations for preventing collisions at sea were designed to deal with situations arising out of normal maritime traffic. Although their legal application is not so limited, there are no specific rules designed to handle a situation where one vessel actually desires to remain in close proximity with foreign vessels over a substantial period of time. Therefore, we and other large naval powers must, recognizing the necessity of observing foreign naval operations on the high seas, rely on general rules requiring prudent seamanship.

ship and prohibiting unreasonable interference.

The right of the United States to conduct naval exercises on the high seas is protected under international law from unreasonable interference. It would be difficult to attempt to lay down hard and fast rules of reasonableness in advance where ASW operations are concerned. The reason for this is relatively simple. Both the United States and the Soviet Union have interests on both sides of the issue. We are each concerned with the rights of our submarines as well as our ASW forces. It would be impractical to lay this question before a large international conference in order to develop a lawmaking treaty on the subject.

This is not an ideal situation, but it illustrates that in practice a situation not subject to existing detailed legal

rules can prove generally workable. Soviet reaction to quite a few contacts indicates they consider them significant naval incidents.

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### BIOGRAPHIC SUMMARY



Rear Adm. Joseph B. McDevitt, JAGC, U.S. Navy, holds both a bachelor of arts and a bachelor of laws degree from the University of Illinois and is a graduate of the Naval War College, Class of 1958. His legal duties

are varied and extensive and include duties with the Joint Staff of the Joint Chiefs of Staff; Director, International Law Division of the Judge Advocate General's Office; and Legal Affairs Officer for the Commander in Chief, Pacific. Rear Admiral McDevitt is currently the Judge Advocate General of the U.S. Navy.

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Merely to face upon the oceans is not, *ipso facto*, to have maritime power, but only presents an opportunity. The test is what is done with the opportunity.

*Paul H. Nitze: "Trends in the Use of the Sea,"  
Marine Corps Gazette, March 1965*