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The International Legal Status of the Territorial Sea

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IN FEBRUARY, 1958, representatives from eighty-six nations assembled at Geneva for the purpose of codifying the international law of the sea. They met for three months and in April, 1958 completed work on four conventions involving: (1) the Territorial Sea and the Contiguous Zone, (2) the High Seas, (3) Fishing and Conservation of the Living Resources of the High Seas, and (4) the Continental Shelf. The progress achieved in codifying the law of nations in the vital area of sea law represents an important milestone in the clarification of previously existing ambiguities. Yet the problem of the limits of the territorial sea was not resolved. Instead the extent to which states may legally exercise jurisdiction beyond their coasts seems more confused than before. This article summarizes the work of the Geneva Conference regarding the breadth of the territorial sea and assesses its current international legal status.

Until this century most maritime nations followed the long established practice of asserting sovereignty over a maritime belt extending only three miles from their coasts in deference to the principle of the freedom of the seas. Gradually, however, the traditional three-mile rule, long considered one of the hallowed rules of customary international law, yielded in the face of important commercial considerations. Of increasing significance is the rising importance of fisheries, many, but not all of which lie more than three but less than twelve miles from the coast.[1] Deviations extending more than 200 miles have been proclaimed by certain Latin American nations in an effort to monopolize the exploitation of fisheries over a broad area. Disagreements over the breadth of the territorial sea became important enough to be considered by the Hague Codification Conference of 1930 in which the nations unsuccessfully attempted to reach agreement.

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1. Jessup, *The United Nations Conference on the Law of the Sea,* 59 COLUM. L. REV. 234, 244 (1959).

After World War II the International Law Commission of the United Nations resumed efforts to codify the various branches of international law. Among other subjects considered ripe for codification, the ILC singled out both the regime of the high seas and territorial waters at its first session in 1949. From then until 1956 it engaged in the formulation of rules governing the law of the sea based on extensive investigation of state practice. A final draft report presented to the United Nations General Assembly in 1956 contained a complete set of articles and commentaries concerning the various aspects of the law of the sea, including the problem of the territorial sea.

The success of the 1958 Geneva Conference on the Law of the Sea is due in large measure to the excellence of the ILC report. Unfortunately, the ILC draft that became the basis for the work of the Geneva Conference contained no express agreement on the breadth of the territorial sea. Recognizing the lack of uniformity with regard to the practice of states, the ILC expressed the opinion that international law does not permit extension of the territorial sea beyond twelve miles. While this statement represented a clear denunciation of recent Latin American extensions beyond twelve miles, it did not bring any measure of clarification with respect to a uniform legal limit of the territorial sea. Indeed, this would have been impossible in view of the fact that ". . . hardly more than twenty out of some seventy-three coastal states adhered to the three-mile rule" at the time the Geneva Conference convened.[2]

The fact that only a minority of coastal states still adhere to the three-mile rule is often overlooked by those who argue that this rule is unalterably etched in custom. On the contrary, this once undisputed custom of international sea law is changing. For this reason there is an urgent need for securing revision of the three-mile rule to bring it in conformity with international realities and, more significantly, because of the growing importance of the territorial sea for the commercial policies of states.

As will be shown later, uncertainty has contributed to an important dispute within the past year between Great Britain and Iceland over the breadth of the territorial sea.

The Geneva Conference clearly revealed the interplay between international politics and international law in the sense that sharply conflicting foreign policies prevented the emergence of a uniform maritime boundary embodied in a rule of law.

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2. Sorensen, *Law of the Sea,* 519 INTERNATIONAL CONCILIATION 195, 243 (1958).

A small number of Latin American states had advanced exaggerated claims of sovereignty over waters extending 200 miles beyond their coasts. Chile, Ecuador, and Peru had advanced these claims in order to restrict the exploitation of fisheries off their shores to their own nationals. Canada and Iceland wanted an extension to twelve miles in order to prevent the depletion of their fisheries by foreign fishing vessels while India, Burma, Thailand, Cambodia, Korea, and South Viet Nam wanted an extension of the three-mile rule in order to restrict Japanese fishing vessels.[3] The Philippines and Indonesia asserted special rights for their own archipelagoes. International acceptance of these rights would have transformed large areas of high seas into internal waters and would have closed important navigation and aerial routes between India, Australia and New Zealand.[4] Finally, a heated dispute over Israel's right of passage through the Strait of Tiran connecting the Gulf of Aqaba and the Red Sea prompted several Arab states to vote in favor of a Soviet proposal for extending the territorial sea to twelve miles.[5]

The United States delegation argued in favor of the retention of the three-mile limit and was supported by most of the European coastal states. The basis for this position rested primarily on certain security considerations rather than the long established practice of the three-mile rule. In essence the American position constituted a reaffirmation of the historic principle of the freedom of the seas.

Arthur Dean, chairman of the United States delegation, elucidated this position in a recent article in *Foreign Affairs* in which he asserted that an extension of the territorial sea to twelve miles, as advocated by several states at the Geneva Conference, would reduce the efficiency of American naval power by barring the United States fleet from waters formerly considered to be part of the high seas.[6] In the Aegean, eastern Mediterranean, and the seas around Indonesia, the Philippines, and Japan, an extension of each island's territorial sea would restrict the operational ability of the fleet. Such an extension would have impeded the landing of American troops in Lebanon and would seriously restrict implementation of the Eisenhower doctrine in other trouble spots in the Middle East. In the Far East access of the United States Seventh Fleet to Formosa and the China Seas would

3. Dean, *Freedom of the Seas,* 37 FOREIGN AFFAIRS 83, 87 (1958).

4. *Id.* at 88.

5. *Id.* at 86. The legal right of Israel to use the Strait of Tiran was affirmed in article 16 of the Convention on the Territorial Sea. This article forbids the suspension of innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas.

6. *Id.* at 90.

be jeopardized. A line drawn twelve miles off the coast of mainland China or the island of Formosa would mean that American ships in those areas protecting Formosa, Quemoy, and Matsu would be violating territorial waters rather than occupying the high seas. For this reason, of course, the United States does not recognize as legal the declaration by the People's Republic of China of an extension of its territorial sea to twelve miles effective as of September 4, 1958.

Extension of the territorial sea would also disrupt air operations inasmuch as the air space over territorial sea has always been considered subject to the sovereignty of the coastal state unless such state by treaty or consent permits an exception. Both commercial and freight aircraft operations as well as military operations of the leading air states would have to be curtailed pending the conclusion of new international agreements allowing passage over the territorial sea.

A plausible argument presented by the United States concerned the effect of an extension of the territorial sea on the law of war and neutrality. In the event of war, neutrals would be hard put to detect belligerent submarines submerged outside the three-mile limit and violations of neutrality would be increased. While submarines cannot operate effectively within the three-mile limit because of the greater possibility of detection, if the territorial sea were extended to twelve miles neutrals would have difficulty in patrolling this greater expanse of sea in order to enforce their neutrality. Although article 14 of the Convention on the Territorial Sea requires submarines when navigating in a territorial sea to stay on the surface and show their flag, it is unlikely that belligerent submarines would obey the law in time of war at the risk of detection and charges of neutrality violation. Under such conditions, belligerent submarines would find a convenient haven of escape from enemy surface vessels and antisubmarine aircraft which could not legally pursue such submarines without violating the territory of a neutral coastal state.

Since an extension of the territorial sea would thus probably result in an increase in violations of neutrality, the effect of such violations would be greatly disadvantageous to the United States in the event of a future conflict with the Soviet Union. With a marked numerical superiority in submarines, the Soviet Union would be able to impede effectively American and allied shipping destined for neutral ports. This is one important reason why the Soviet Union adheres to a twelve-mile limit. Moreover, if a neutral state actually favored the United States without legally joining in the hostilities, as was the case with Ireland during World War II, the Soviet Union would

be able to take countermeasures by discharging missiles while submerged under the territorial sea of the neutral where chances of detection would be minimal. Such considerations as mentioned above were not explicitly articulated by the United States at the Conference, but they underlie the whole American argument regarding the ease with which violations of neutrality could be perpetrated by extension of the territorial sea to twelve miles.

Despite the reasonableness of the American argument, smaller powers were not overly impressed, perhaps since such an argument may have inadvertently contributed "to a 'great power complex' in the minds of small states." [7]

In addition to the United States, the United Kingdom voiced similar security considerations by circulating charts to show how an extension of the territorial sea from three to twelve miles would close off a great number of important sea lanes not now subject to the sovereignty of any state.[8] Unfortunately, the emphasis on security considerations by the maritime states had the effect ". . . of strengthening opposition to the three-miles rule by those states, belonging to the Soviet as well as to the Afro-Asian group, which are antagonistic to the naval supremacy of the Western powers."[9]

When it became apparent that the majority of states represented at the Conference were unwilling to support the three-mile rule, the United States made a compromise proposal in which it abandoned the three-mile standard but did not concede a twelve-mile limit. The United States proposed that the territorial sea be extended to a maximum breadth of six miles and that the coastal state should have jurisdiction with respect to fisheries in a contiguous zone up to twelve miles from the coast. It represented an effort to consider the interests of such states as Canada, Iceland, Korea, and the Philippines who were most concerned with preserving exclusive rights over fisheries. However, the United States proposal contained one provision that made it unacceptable to these states: foreign fishermen who had fished in the area of the contiguous zone for the last five years might continue to do so indefinitely.[10] The application of fishery rights within a contiguous zone constituted an attempt to enlarge the law of nations regarding that zone. Although customary international law has long recognized that coastal states may exercise sovereignty beyond their territorial sea for the purpose of enforcing sanitary, customs, immi-

7. Jessup, *supra* note 1 at 239, n. 32.
8. Sorensen, *supra* note 2 at 245.
9. *Ibid.*
10. Sorensen, *supra* note 2 at 247.

gration, and fiscal regulations, the question of exclusive fishing rights within the contiguous zone has never been sanctioned by international law.

The United States proposal for a compromise on the breadth of the territorial sea failed to secure enough votes for adoption. Subsequent proposals by other states to break the deadlock were also unsuccessful. The only definitive accomplishment with regard to the breadth of the territorial sea consisted in the incorporation into the Convention on the Territorial Sea and the Contiguous Zone of an article of the ILC draft, namely, that international law does not recognize as legal extensions of the territorial sea beyond twelve miles from the coast.

In view of the lack of international agreement regarding the breadth of the territorial sea, it is impossible to state definitively that claims of jurisdiction beyond the three-mile limit are illegal except insofar as they exceed twelve miles (assuming, of course, that a sufficient number of states ratify the Convention to place it legally in force). It therefore follows that one could not argue with any substantial justification that since the three-mile rule has not been superseded by a new standard it is still the legal standard for the international community. The latter view was not supported by the majority of the members of the International Law Commission in its report on the law of the territorial sea even though certain members of the Commission insisted on this view; moreover, the Commission asserted that extensions between three and twelve miles were not to be considered breaches of international law.[11] The ILC, of course, has no authority to make international law, but its opinions are highly respected by statesmen and scholars.

The International Law Commission, therefore, supports the opinion of the writer regarding the current legal status of the breadth of the territorial sea. This opinion is based on the contention that since only a minority of states accept the three-mile rule, this constitutes evidence that the rule is changing despite the fact that no revision has been incorporated into a written rule of law.

The position of the United States with regard to the breadth of the territorial sea reflects the attitude taken at the Conference by those states still adhering to the three-mile limit. On March 11, 1958, Arthur Dean asserted that:

> ". . . Unilateral acts of States claiming greater territorial seas are not only not sanctioned by any principle of international

11. 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 265-66 (1956).

law but are indeed in conflict with the universally accepted principle of freedom of the seas. . . . We have made it clear that in our view there is no obligation on the part of States adhering to the 3-mile rule to recognize claims on the part of other states to a greater breadth of the territorial sea. . . ." [12]

While legally there may be no obligation on the part of the United States to recognize claims of territorial sea beyond three miles, it may be contended that on moral ground the United States cannot completely disregard claims of from four to six miles. The United States compromise proposal of six miles submitted to the Geneva Conference reveals the willingness of the United States to abandon the three-mile standard.

Moreover, it is at least controversial, as indicated by the opinion of the International Law Commission cited above, that unilateral acts of states claiming territorial seas from three to twelve miles constitute violations of international law. While such acts may not be sanctioned by any principle of international law, it would be unpractical to insist on the retention of a custom of international law which the majority of states do not acknowledge. Even if it is admitted that such acts are encroachments on the principle of the freedom of the seas, they affect that principle only slightly except in the case of the obviously illegal claims of three Latin American states.

If international law is to fulfill its function of regulating the interests of states through the institution of mutually acceptable restraints, it must be adjusted from time to time in accordance with changing conditions. That this adjustment may be contrary to the national interests of the United States and the other nations adhering to the three-mile rule cannot be denied. Certainly, the American arguments in favor of the retention of the three-mile rule are logical and persuasive, but they cannot be effectively maintained so long as the majority of states disagree. This appears to be the same conclusion reached by Professor Philip Jessup, a leading authority in the field of international maritime law. Professor Jessup argues that:

". . . It is perfectly clear as a matter of international realities that this limit [three-mile] will not prevail on all the shores of the oceans. The United States, Japan, and others may continue to maintain it for themselves . . . but they will not be in a position to compel other states to follow suit. This is true because by and large, they will not follow the unfortunate recent example of the United Kingdom by using their navies to compel smaller States to accept the three mile limit. . . . Under such circumstances,

12. Dean, *supra* note 3 at 91.

compromise is clearly indicated. The situation is a challenge to the diplomatic skill of the United States, which is bound to gain from international agreement and bound to suffer from the continuance of a semi-anarchic condition." [13]

The failure of the Geneva Conference to produce agreement on the breadth of the territorial sea soon contributed to a serious international dispute involving Great Britain and Iceland. In September, 1958, Iceland proclaimed a twelve-mile limit to safeguard the preservation of fisheries off her coasts from British and European trawlers. Despite protests from Great Britain and other nations, Iceland refused to yield to pressure to rescind or curtail the new limit. While other nations withdrew their fishing boats in compliance with the new limit, Great Britain refused and asserted the traditional right of British trawlers to fish up to the previous four-mile limit. British left four trawlers within the new twelve-mile limit and dispatched four frigates of the Royal Navy to protect them. While no shots have been fired, the dispute continues not only to plague relations between the two countries but also to damage the NATO alliance of which Iceland is a key member because of its strategic location. The conflict has proved a timely issue for Soviet propaganda. The Soviet Union immediately recognized the new Icelandic limit and used the British action to undermine the loyalty of Iceland to NATO.

The dispute between Iceland and Great Britain is complicated not only by differing legal interpretations regarding the new zone but also by the fact that fish and fish products are of only marginal importance to Great Britain whereas this industry is of vital significance to the economy of Iceland.

While the British have urged that the dispute be adjudicated by the International Court of Justice, it is unlikely that this body could render an acceptable decision in view of the lack of uniformity regarding the breadth of the territorial sea. The dispute continues to serve as an unfortunate byproduct of the failure of the Geneva Conference to settle definitively the question of the breadth of the territorial sea.

What are the prospects for resolving the unsettled issue of the breadth of the territorial sea? Prior to its adjournment, the Geneva Conference adopted a resolution requesting the United Nations General Assembly to study the question of calling a second conference to examine again the questions which had not been solved at the first conference. During the thirteenth session of the General Assembly

13. Jessup, *supra* note 1 at 264.

in 1958, the issue of a new conference was discussed and the General Assembly agreed to hold another conference in the spring of 1960.[14]

When the new conference is convened, it is unlikely that the three-mile rule will become the starting point for negotiations in view of the willingness of the United States to compromise in favor of a six-mile rule at the 1958 conference. It seems, therefore, that the long cherished three-mile rule is being superseded by a wider limit despite efforts by the United States and other coastal states to perpetuate it in the law of nations.

The solution of the controversial question of the breadth of the territorial sea lies in the adoption of a legal standard representing a compromise of the conflicting claims of states. This is the function of law in the international community with regard to all controversial subjects, but it is a function which ultimately depends on political accommodation.

14. United Nations General Assembly Res. 1307, 13th Sess. (1958).