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THE LAW OF THE SEA AND THE MILITARY USE OF THE OCEANS IN 2010

Scott C. Truver, Ph.D.*

This analysis focuses on the likely reliance on military power, specifically naval power, to support national policy in an ambiguous future international legal regime for the oceans. The uses of sea power in 2010, as evidenced by the history of peacetime and combat operations conducted over the last 350 years, are not likely to be much different from the military uses of the oceans in the mid-1980s. Barring an Armageddon of global nuclear war between the United States and the Soviet Union, navies will continue to be relied upon in peace and limited war as the cutting edge in the employment of military force as a "handmaiden of diplomacy." Sea power will be a fundamental tool of coercive and supportive diplomacy employed by coastal and maritime states alike to safeguard all their interests in the oceans, particularly in light of the potential for international tension and crisis to arise over ocean rights and obligations.

In April 1982, after eight years of complex, sometimes byzantine negotiations, the Third United Nations Conference on the Law of the Sea (UNCLOS III) adopted the comprehensive Convention on the Law of the Sea,¹ but without the United States' acquiescence. Three other states (Israel, Turkey and Venezuela) joined the United States in voting against the treaty, while seventeen states, including several NATO allies, the Soviet Union and most Warsaw Pact countries, abstained; 130 states voted to accept the convention. The heart of the U.S. rejection, in addition to other grievances, lay in the perception that the treaty would not adequately protect U.S. firms which had already made considerable

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1. United Nations Convention on the Law of the Sea—Final Act, U.N. Doc. E.83.V.5, reprinted in 21 Int'l Legal Materials No. 6 (Nov. 1982).

investments in deep seabed mining technologies. The President's advisors also agreed that the operations of the International Seabed Authority and the Enterprise established by the convention would potentially damage important U.S. policy interests. Nevertheless, other convention provisions, particularly those relating to maritime navigation and naval operations, were acceptable to Washington.

On 9 July 1982, President Reagan announced his decision not to sign the treaty when opened for signature later in the year, on 10 December. According to some observers, the United States thereby risked complete isolation from the new global system of international marine law. For one, Leigh Ratiner, Deputy Chairman of the U.S. delegation at the spring 1982 session of UNCLOS III, argued that the United States "will suffer a significant, long-term foreign policy setback with grave implications for U.S. influence in world affairs."² Two years earlier, another prominent actor in U.S. law of the sea politics had voiced his concerns if a comprehensive law of the sea treaty failed to garner U.S. and global acceptance. Aware of the potential for seabed issues to torpedo U.S. participation in any treaty, Elliot Richardson warned:

We would thus be forced to sacrifice not only the guarantees of freedom of navigation and overflight. . . but other gains as well, including effective protection of the marine environment, a stable regime for marine scientific research, and a workable definition of the outer limits of coastal-state jurisdiction over oil and gas resources of the continental margin.³

This "all or nothing" philosophy was rejected by John Lehman, U.S. Secretary of the Navy, who asserted in late July 1982 that "well-established" international law and "amicable relations" with coastal states, including those holding different interpretations of the law, would be sufficient to safeguard vital U.S. interests. These "vital interests," in Secretary Lehman's view, include maritime and naval transit through territorial seas, exclusive economic zones, archipelagic waters, and international straits. Other Reagan Administration officials argued that much of the treaty merely codified existing customary law. For example, Ambassador James L. Malone, noting that state practice since the United States refused to sign the treaty had confirmed the existence of law independent of the treaty, argued:

Particularly with respect to navigation rights, the history of the law of the sea has been predominantly a history of customary laws evolving through state practice. The convention does not

2. Ratiner, *The Law of the Sea: Crossroads for U.S. Policy*, 60 *Foreign Affairs* 1006, 1007 (1982).

3. Richardson, *Power, Mobility and the Law of the Sea*, 58 *Foreign Affairs* 902, 917 (1980).

so much create positive law in the nonseabed area as simply incorporate existing law that will continue to be applicable to all states, not because of the treaty, but because of the customary law underlying the treaty.⁴

During this same period, awakened by crises in Iran and Afghanistan, Lebanon and the Red Sea, and Nicaragua and El Salvador to imperatives and responsibilities in the Third World, the United States has been engaged in a debate both at home and abroad over the directions and form American and Western policies should take concerning the protection of interests both within and outside of NATO. In the Middle East, the United States for thirty years has viewed the requirements of maintaining regional stability and an assured flow of oil as necessitating some form of military—primarily naval—presence in the area. This presence was intended to underscore the importance of U.S. interests there and, at the same time, to counter nascent Soviet influence. However, other Third World areas, most notably the Caribbean and Latin America, Southeast Asia, and Africa, in addition to the “Arc of Crisis” in the Middle East and Persian Gulf region, increasingly have captured the attention of Washington’s foreign and defense policy planners.

Since the low point in the post-Vietnam War reluctance to employ U.S. military force as an instrument of national policy—during Angola’s 1975 civil war in which massive Soviet and Cuban aid was offered to the Marxist Popular Movement for the Liberation of Angola without a tangible American response—Americans have gradually embraced the military dimension as an attractive policy alternative to be employed in situations short of actual conflict. Indeed, as Edward Heath remarked in the 1980 Alastair Buchan Memorial Lecture, there is a growing tendency in many governments toward a “more assertive use of military force as the only way of regaining dignity and authority in a hostile and confusing world.”⁵ An important component of this trend, naval forces are again being viewed as effective tools of coercive and supportive diplomacy in these regions of instability and change. The recent U.S. URGENT FURY operations in Granada and the use of battleship gunfire support and tactical sea-based air power in Lebanon bear out Heath’s assertion. (Questions remain, however, concerning their *effectiveness* in these instances.)

Coupled with the Reagan Administration’s commitment to rebuilding U.S. naval power and maintaining “maritime superiority” over the Soviet Union and all other potential adversaries, this perception, if widely held throughout the Reagan Administration and in other world capitals, may presage a future of international instability and tension and a greater

4. Malone, Who Needs the Sea Treaty, 54 Foreign Policy (1984).

5. Heath, The 1980 Alastair Buchan Memorial Lecture, 22 Survival 198 (Sept.-Oct. 1980).

proclivity to employ armed naval force to achieve diplomatic and policy objectives. Indeed, the conflict between Argentina and Great Britain over the Falkland Islands, a controversy colored, albeit slightly, by law of the sea issues, may provide a model for future exercises of armed suasion by the navies of the superpowers, other traditionally powerful states, and even developing countries of the Third World.

One important source of possible conflict is over the use of ocean space as a medium for the movement of naval forces to safeguard national interests in peacetime and crisis short of declared war. However, navies also use the seas to carry out exercises, test weapons, conduct scientific research, and station reconnaissance and surveillance sensors, activities which, when carried out beyond a nation's territorial jurisdiction, rely on the freedom of the seas and good relationships with allies and friends. Other areas in which states' oceans interests may collide are dealt with in other articles in this symposium. Although but a single aspect of the international law of the sea, the continued ability of navies to move freely about the world's seas may directly affect, both positively and negatively, the continued enjoyment of other lawful uses of the seas by all states.

What is *not* attempted in this discussion is a projection of naval forces, capabilities, and military technologies. In essence, this is because of the inherent "conservatism" of navies. By and large, the specific naval forces (type, if not the actual units) in existence in 1985 will be present in the year 2010. For example, large-deck aircraft carriers, the backbone of the U.S. Navy's general-purpose forces and expected to be so for the Soviet Navy after 2000, in peacetime have incredibly long service lives. The U.S. Navy's *Midway* (CV-41) and *Coral Sea* (CV-43) carriers were commissioned in 1945 and 1947, respectively, at a time when a 25-year lifetime was the norm. *Coral Sea* completed a \$190 million overhaul in early 1985 to keep her active until the early 1990s, when she will relieve the *Lexington* (AVT-16, commissioned in 1943) as the Navy's training carrier—a "first-line" service life of over 45 years. The *Midway* is also expected to remain active until the mid-1990s. Furthermore, the U.S. Navy currently has under construction or on order three nuclear-propelled carriers of the *Nimitz* class. Expected to be commissioned between 1986 and 1991, the 45-year service lives of these CVNs and their three active (in 1985) sisters will ensure a vital core of sea power well into the second decade of the next century. The Soviet navy also has under way an ambitious nuclear carrier building program, with at least four CVNs being projected for the years after 1990, while France is planning to construct two CVNs which will be active in the late 1990s and early 2000s.

Another example of the "conservatism" of navies is afforded by the U.S. Navy's on-going battleship reactivation program. The four ships of the *Iowa* (BB-61) class were all laid down and commissioned between June 1940 and April 1944. All four saw action in World War II and the Korean War, while the *New Jersey* (BB-62) received an austere

reactivation as a gun fire support ship in mid-1967 and saw combat off Vietnam during 1968 and 1969. The current reactivation and modernization program has its genesis in the late 1970s, especially the reaction in the United States to the 1978-1979 Iranian revolution and ensuing hostage crisis and the December 1979 Soviet invasion of Afghanistan. Many observers believed the United States lacked sufficient military and naval power to protect U.S. interests, allies, and friends throughout the world. One aspect of this reaction was a recognition of the need to enhance the U.S. Navy's major surface vessel combat strength, which led, eventually, to the program to upgrade and modernize the four *Iowa* BBs. The point of this peroration is that warships designed in 1938 have received new weapons and electronic systems that will ensure their future usefulness and extend their service lives by twenty years. All of these "old" ships will likely be active in the first decade of the next century. Moreover, the U.S. Navy is now beginning studies to define the "next-generation" large surface combatants as follow-ons to current cruiser and battleship programs, indicating that function if not form of future ships will be similar to that of the existing fleet.

Certainly there will be advances and technological leaps over the next twenty-five years, but they will not radically alter the "look" or uses of sea power. By the year 2010, for example, supersonic short takeoff and verticlelanding (STOVL) aircraft may be entering widespread application in modern navies, and may permit the expansion of sea-based tactical air power throughout the fleet. The word "may" was chosen deliberately, as preliminary conceptual design and engineering studies are only now being pursued seriously. Because it takes an average of ten to fifteen years for a major new weapon system to reach fruition, a supersonic STOVL aircraft "may" be operational at the turn of the century. It will take several more years for viable force structures comprised of these aircraft to be filled out.

Nevertheless, technological developments in lasers, communications, quieting and "stealth" techniques, computers, radar, offensive and defensive weapons, directed-energy and space-based systems, propulsion systems, hull forms (SWATH, SES), and the like will obviously have a dramatic effect on the capabilities of naval forces—submarines, surface ships, and aircraft—to carry out their present roles and missions, and perhaps to take on new roles only dimly perceived in 1985. That has been the promise of technology in naval affairs since sails were first fitted to canoes. Most fundamentally, these dynamics will ensure the continued usefulness of navies to support their governments' policies in peace and war. At the margin, however, the impact of these developments on the law is likely to be much less pervasive than some would think. The law in 2010 will remain as relevant to the employment policies and practices of sea power as it is in the mid-1980s.

These issues are of vital concern to the future peaceful relations among states, at both regional and global levels of analysis. In the absence of general agreement on ocean law, the potential for instability

and crisis will increase dramatically, while the use of naval force in 2010 to support principles and to protect national interests may ultimately impede international cooperation. The Gulf of Sidra incident of August 1981, involving elements of the U.S. Navy and the Libyan air force, is an example of what the future may hold as disputes over ocean zones and uses multiply.

Sea Power and the Diplomacy of Violence

The ambiguity of the present international legal milieu for the oceans and the expectation that this situation is likely to continue well into the twenty-first century compels an analysis of sea power as both a means to protect national interests endangered by controversy and a source of controversy itself. Sea power has remained an important element in the maintenance of international stability and peace in the post-World War II era, even during a period when nuclear weapons and "massive response" employment policies were thought to have made navies obsolete.

A traditional view of sea power is concerned with the application of military power at sea, whether it be airborne, surface, or submarine. That is, sea power traditionally has been measured by the numbers, types, and gross tonnages of ships and submarines, and by the numbers and types of guns, aircraft, and weapons carried on board these platforms. In a somewhat simplistic calculus, the aggregate inventories of naval power could be added and compared, thus arriving at a measure, however crude, of a country's sea power. But this method ignored more important variables such as the operational characteristics of the weapons carried, reload rates and number of reloads carried, speed, endurance, the skill and professionalism of crews, the basing facilities and support required and available, the missions of the individual ships or groups of ships, and how these naval assets fit into a country's overall strategic doctrine.

Increasingly, moreover, it has been argued that sea power embraces much more than just naval force, that it encompasses all of a nation's resources which can be devoted to naval/maritime activities. Indeed, since 1956 this perception has been strongly advocated by Admiral of the Fleet of the Soviet Union Sergei G. Gorshkov, who has argued that a country's sea power is determined by its merchant marine; its fishing and oceanographic fleets; its maritime outlook, tradition, and history; as well as its weapons and armed forces.⁶

As important as the civil maritime assets are, however, this discussion is concerned solely with the present and future uses of naval power, especially in the legal-politico-military context of the future law of the sea. That is, why do states want navies and what purpose does sea

6. McGwire, *Naval Power and Soviet Oceans Policy*, in *NOPS, Soviet Oceans Development* 135-41 (Washington, DC: Gov't Printing Office 1976).

power serve in a "peacetime" environment? Second, what are the special attributes of sea power which permit states to pursue their politico-military objectives by relying upon naval force? And finally, what are the roles of naval power as an instrument of foreign policy in situations short of war?

The U.S. Navy publication, *Strategic Concepts of the U.S. Navy, NWP-1*, provides a clear statement of the importance of sea power to the United States. America's geographical position, the location of major allies, America's great dependence on international seaborne trade, and the increasing importance of the oceans as sources of food, energy and minerals offer compelling rationales for the missions, structure, and size of the U.S. Navy. The central importance of the seas to continued American prosperity and national security is evident in this excerpt from *NWP-1*:

The United States is a maritime nation with only two international frontiers and thousands of miles of coastline bordering on two of the world's largest oceans. . . . Unlike its potential adversaries, the United States is heavily involved in the interdependent world economy. Should the sea lines of communication be interdicted for any length of time, the welfare of U.S. citizens would be radically impaired. The majority of U.S. allies are overseas and even more dependent of free use on the seas than we are. The critical support required by them in time of war is that which can be projected across the seas. All U.S. international relations, be they economic, political, or military, are influenced by this heavy dependence on free and unimpeded passage on the oceans of the world. The dependence on the seas impacts directly on any consideration of national strategy.⁷

The doctrinal foundation for this statement was expressed at the end of the nineteenth century in the writings of Admiral Alfred Thayer Mahan, whose conception of the close relationships among national power, foreign policy, and sea power provided a cardinal thesis for the use of sea power to further national objectives.⁸ Mahan perceived the sea as "a great highway" or "a wide common" providing countries having access to it with an easier and cheaper means of transportation than across land. Using Great Britain as an example and citing the effective use of the sea for both commercial and military transport which brought Great Britain tremendous wealth and international prestige, Mahan argued that no nation that aspired to great power status could ignore the importance of sea power. Navies, the tools with which to forge great power, had two purposes in Mahan's scheme. The first was

7. Office of the Chief of Naval Operations, *NWP-1* (Washington, DC: Department of the Navy, January 1977), p. 2-1.

8. A. Mahan, *The Influence of Seapower upon History, 1660-1783*, ch. 1 (1965).

to protect commerce, so that no country could interfere with the free use of the oceans as an avenue for international trade. The second purpose was to carry out "aggression" or combat.

These two rationales are implicit in the strategic concepts which will provide doctrinal guidance for the U.S. Navy for the remainder of this century and into the next. Secretary of Defense Caspar W. Weinberger, in his February 1985 *Annual Report to Congress*, discussed the maritime mission of the U.S. Navy:

The United States has traditionally maintained a strong Navy to preserve the freedom of the seas and to support the global commitments associated with its forward defense strategy. In peacetime, naval forces are routinely deployed overseas as a means of reassuring allies and deterring potential adversaries. In times of crisis, their inherent mobility permits them to be redeployed to world trouble spots rapidly without relying heavily on foreign bases or special transit rights. Deployed to areas of vital interest to the United States and its overseas allies, naval forces can remain on station for extended periods, ready to project power ashore should deterrence fail and the circumstances warrant American military action. If need be, they can apply power rapidly and flexibly in support of such key objectives as protecting friendly shipping from air or sea attacks, depriving enemy forces of access to strategic ocean areas, and protecting power against enemy targets ashore.

Taken together, these capabilities make our naval forces a powerful instrument for peace and stability in an often troubled world. Their importance to Western security and world peace requires that we take steps to maintain their strength in future years.⁹

Special attributes and broad options inherent in the use of naval forces have made them particularly well suited for the purposes of the defense of sea lines of communication (SLOC) and the projection of power into regions of importance to the state. Naval units have the capability to respond quickly to crisis situations and contingencies world-wide with the precise type and magnitude of force necessary to achieve the stated objective. The naval forces of the major maritime powers have the capability to apply military power deftly across the entire spectrum of armed force: from the maintenance of unobtrusive presence, to the deliberate show of force for political purpose, to limited war, to general conventional war, to a launch of a strategic nuclear attack. Naval force, then, is flexible and possesses wide geographical reach. As Hedley Bull has described these special qualities:

9. Report of the Secretary of Defense Caspar W. Weinberger to the Congress on the FY 86 Budget, FY 1987 Authorization Request and FY 1986-90 Defense Programs 153 (Washington, DC: Gov't Printing Office 1985).

As an instrument of diplomacy, sea power has long been thought to possess certain classical advantages *vis-a-vis* land power and, more recently, air power. The first of these advantages is its flexibility: a naval force can be sent and withdrawn, and its size and activities varied, with a higher expectation that it will remain subject to control than is possible when ground forces are committed. The second is its visibility: by being seen on the high seas or in foreign ports a navy can convey threats, provide reassurance, or earn prestige in a way that troops or aircraft in their home bases cannot do. The third is universality or pervasiveness: the fact that the seas, by contrast with the land and the air, are an international medium allows naval vessels to reach distant countries independently of nearby bases and makes a state possessed of sea power the neighbor of every other country that is accessible by sea.¹⁰

Inherent in the peacetime use of navies, however, is the ability to travel freely upon the oceans of the world. Without the free use of international ocean space, these special attributes of naval force for the exercise of sea power in peacetime can provide little benefit to the nation with great power ambitions.

The presence of naval forces in a region or off a nation's coast can serve as a highly visible reminder of an ally's interest or commitment. Both the U.S. and, increasingly since the mid-1960s, the Soviet navies have been used numerous times world-wide in this manner, while other states' navies have similarly been relied upon in more circumscribed regions. In a crisis where military force may be required to protect national security interests, to evacuate nationals, or to support a friendly government, but where the visible presence of military forces could further inflame the situation, naval forces can remain out of sight over the horizon, ready to respond quickly if necessary. And, just as the visibility of naval force can be regulated to suit national needs, the military capabilities of naval forces can be controlled; naval presence can be large or small, provocative or unobtrusive, depending on the situation and the interplay of interests.

For centuries navies have thus been the "handmaidens of diplomacy," and, as Barry Blechman instructed in 1975:

A nation's navy not only defends its coastal waters and protects national interest aboard; it also signals overall military potential and political intent to influence world affairs. Changes in relative naval strength among the leading powers have always been watched closely in other nations on the assumption that the size of a country's conventional naval forces reflects its willingness—and ability—to affect political events. This assumption prevails even today when more potent weapons are available.

10. Bull, *Sea Power and Political Influence, Power at Sea I: The New Environment* 6 (London: IISS, Adelphi Paper 122, Spring 1976).

Navies support diplomacy in more direct ways as well. Armed confrontation between opposing fleets has often marked the opening of hostilities between great powers; perhaps just as often it has led to a settlement of their dispute. And great powers frequently have relied upon warships to impose their will upon lesser states. There is even a term for this: gunboat diplomacy.¹¹

In his study of *The Political Uses of Sea Power*, Edward N. Luttwak provided an analytical overview of the uses of navies in peacetime situations short of war.¹² He described the presence mission in terms of "suasion" because of the importance of the symbolic uses of sea power and the central place of the psychological perceptions and reactions of the parties against whom a naval threat—however ambiguously or precisely defined—is projected. Luttwak argued that there is a dynamic linkage between any deployment of naval force and a country's political interest in the area to which the force is deployed. He invited his readers to distinguish discrete actions within a continuum of naval suasion by which this linkage is exploited: between those actions which are latent or routine and those active deployments that involve a deliberate attempt to invoke a desired reaction; between actions which are designed to coerce adversaries and those which are supportive of allies; between acts which deter specific reactions and suasion that is compellent in nature; and between armed suasion symbolizing naval force deployed for specific situations and naval deployments that symbolize general national commitment and resolve.

However, naval symbolism and war-fighting capabilities must be considered together, especially in an evaluation of the efficacy of armed naval force to support national objectives in a peacetime international environment in which highly sophisticated and lethal weapons are widely held and the relevant international law may be controversial. In order to encourage allies, to deter potential adversaries, or to influence non-aligned states, naval forces deployed to a region on a routine basis or to a crisis area in an emergency must possess clearly visible war-fighting capabilities. That is, whenever naval forces are committed to supportive or coercive diplomatic roles, especially when weapons might be involved, and particularly for the purpose of asserting rights in legal or political disputes, the "primary axiom" is that the forces used must be superior, or at least capable of the requisite degree of self-defense in the event of challenge. Particularly in situations "where the law can be used as a political excuse to achieve a *fait accompli* it is fatal to undertake the risk of demonstrating in favor of a particular view of the law if superior force is not available to sustain the option."¹³ This was the case in the Gulf of Sidra incident concerning Libyan

11. Blechman, *The Control of Naval Armaments: Prospects and Possibilities* 1 (Washington, D.C.: The Brookings Institution, 1975).

12. E. Luttwak, *The Political Uses of Sea Power* (1974).

13. D. O'Connell, *The Influence of Law on Sea Power* 8 (1975).

claims that the Gulf was "internal water," and in the United Kingdom's response to Argentine aggression in the Falklands. (Lebanese Shiite terrorism in June 1985 perhaps showed the limits of naval power to support state policies and interests.)

On 19 August 1981, elements of the U.S. Sixth Fleet were conducting exercises in the southcentral Mediterranean Sea and the northwestern Gulf of Sidra, off the Libyan coast, a region in which the United States had previously conducted naval exercises. The exercises were begun only after routine notification had been given to aircraft and ships operating in the area; the U.S. Navy's clear range procedures had been followed explicitly. However, after numerous interceptions of Libyan fighter aircraft had been carried out by the combat air patrol aircraft based on the USS *Nimitz* (CVN-68), in the early morning of 19 August, two Libyan SU-22 fighters failed to turn away from the exercise area. Instead, one of them fired two air-to-air missiles at two U.S. F-14 Tomcat fighters. The Tomcats took evasive action and, as the rules of engagement under which they were operating at the time specified defensive fire was permitted only if they were attacked first, quickly shot down both Libyan aircraft.

The incident occurred over Libya's disputed claim to sovereignty in the Gulf of Sidra, a claim dating to October 1973 when Libya gave notice that a 275 nautical mile long closing line connecting Misurata and Benghazi delimited Libyan internal waters; furthermore, a twelve nautical mile territorial sea was claimed, drawn from the same closing line. The United States and other states, including Great Britain and France, had continuously rejected Libya's claim as without any foundation in international law. Since 1973, moreover, the United States had repeatedly challenged the Libyan claim by purposefully sending ships and aircraft into the disputed area. Only on one occasion, so far, has the U.S. challenge been met by armed counter-challenge and, then, superior force was available to reinforce the U.S. view of the law.

In Falklands crisis, because diplomatic negotiations continued while the British fleet was assembled and sailed to the South Atlantic in the spring of 1982, after Argentine forces had landed on the Falklands and South Georgia, the ships at the very least had to *look* capable of retaking the islands. However, the ships were principally configured to fight in North Atlantic battles in defense of NATO, largely an antisubmarine warfare mission, not to carry out an extended, force-projection operation some 8,000 miles from home. This factor contributed to Argentine intransigence. After all, fighting in their "backyard," only 400 miles from the mainland, Argentina's military command could not conceive of defeat.

At the outset of the Falklands crisis, then, because the eventual outcome could not be predicted from a simple analysis of the balance of forces available to each side, a diplomatic settlement acceptable to the United Kingdom was impossible prior to bloodshed. Although the Argentine air force inflicted terrible losses on the British task force, the availability of superior force—superior in terms not only of equipment and weapons, but of the professionalism and tactical skill of its forces, and political conditions

at home and abroad—enabled the British to carry the day. As Laurence Martin has remarked on the use of force in similar situations:

In all limited operations, prudence requires anticipating what the outcome would be if the incident escalated to higher levels. Thus, ideally, one should enter a nonbelligerent demonstration with the ability to prevail if it evolves into limited war and limited war with the confidence of winning any larger conflict that might result . . . “gunboat diplomacy” had its full efficacy when behind the gunboat was known to lurk a cruiser, and behind the cruiser a battle fleet.¹⁴

Naval forces deployed abroad in diplomatic roles, whether in 1985 or 2010, must therefore be perceived by the target country's leaders as possessing that capability, and the national command authorities must be perceived as willing to use the available capabilities, so that potential counterthreats will not materialize in the first place. And if they do, naval forces must be so configured and manned to be successful in their tasks. The linkage between national interests and naval capabilities cannot be ambiguous in the use of naval force as an instrument of foreign policy in situations short of war. The opportunities for misperception and miscalculation are high, creating additional dangers in an already risky environment.

Throughout the post-war period, the United States has turned most often to its Navy when it desired to employ components of the armed forces to support policy objectives.¹⁵ Of the 215 incidents reported between 1946 and 1975, naval units alone or in conjunction with other elements of U.S. armed forces, participated in 177 incidents (over 82%). Since 1955 the U.S. Navy was involved in over 99% of all occasions: aircraft carriers participated in 106 incidents, amphibious forces in 71, and the U.S. Marine Corps was committed twice as often as was the U.S. Army.

Since 1975, U.S. naval forces have been actively deployed in support of policy in the Middle East, Central America, Southwest Asia and North-east Asia, in addition to routine operations in forward areas. Not all incidents were in the same coercive-compellent mode as the 1983-1984 naval operations involving the U.S. aircraft *Independence* (CV-64), the battleship *New Jersey* (BB-62), and the cruiser *Ticonderoga* (CG-47) off Beirut, when air strikes and naval gunfire were used against Syrian and Lebanese insurgents threatening Amin Gemayel's government.

For example, in the late summer of 1984, the United States sent three ships, eight mine countermeasures helicopters, and over 1,500 personnel in “Operation INTENSE LOOK,” in support of Egypt and Saudi Arabia. Mine countermeasures assets from Great Britain, France, Italy, and the

14. Martin, *The Use of Naval Forces in Peacetime*, 38 *Naval War College Rev.*, 10 (1985).

15. B. Blechman & S. Kaplan, *The Use of Armed Forces as a Political Instrument* (1976).

Netherlands were also deployed to assist in mine hunting. Between early July and the end of September, nineteen ships were identified as possibly "striking" mines in the Gulf of Suez, the Red Sea, and the Bab el Mandeb.¹⁶ Although the terrorist group Islamic Jihad (Holy War) claimed responsibility, initial suspicion centered on Iran and Libya. Subsequent intelligence analysis, circumstantial evidence relating to a Libyan flag ferryboat that had made a circuitous voyage through the region immediately prior to the explosions, and analysis by the Royal Navy of a Soviet-made mine it recovered in the Gulf Suez point to Libyan culpability. The navies of the five Western states provided assistance to the coastal states in keeping the vital international waterway open for navigation that had been threatened by this new form of state-supported maritime terrorism. It is this type of positive support which sea power makes possible.

The Soviet navy has also recognized the possibilities of the use of sea power to influence foreign leaders and support Moscow's foreign policies. Indeed, Soviet doctrine has accepted the classical concept of seapower, as is evident in the writings of Admiral Gorshkov:

Owing to the high mobility and endurance of its combatants, the navy possesses the capability to vividly demonstrate the economic and military might of a country beyond its borders during peacetime. This quality is normally used by the political leadership of the imperialist states to show their readiness for decisive actions, to deter or suppress the intentions of potential enemies, as well as to support "friendly states." . . . Consequently, the role of a navy is not limited to the execution of important missions in armed combat. While representing a formidable force in war, it has always been an instrument of policy of the imperialist states and an important support for diplomacy in peacetime owing to its inherent qualities which permit it to a greater degree than other branches of the armed forces to exert pressure on potential enemies without the direct employment of weaponry.¹⁷

The Soviet navy is configured, first and foremost, to carry out its combat missions in any future world conflict. Strategic nuclear strikes, protection of Soviet ballistic missile submarines (SSBNs), and fleet operations against enemy SSBNs, carrier battle groups, and surface fleets are the principal wartime missions of the Soviet navy. In addition to these war-fighting roles, the new classes (since 1975) of Soviet submarines, surface combatants, and aircraft carriers have increasingly been relied upon to support a peacetime "internationalist mission," which includes such activities as friendly port visits at one extreme, or, at the other, the actual

16. See Truver, *The Mines of August: An International Whodunit*, U.S. Naval Institute Naval Review (May 1985).

17. Translation of an article by Admiral S. G. Gorshkov (*Morskoi Sbornik* 2 Nov. 1972), published in U.S. Naval Institute Proceedings (October 1974), p. 59.

use of armed force in crises or limited wars where Soviet state interests are engaged. Indeed, it could be argued that current and projected future Soviet naval shipbuilding programs, especially the large, nuclear-powered aircraft carriers and multi-mission surface combatants, like *Kirov* and *Slava*, are intended to be used to influence international events during peace and crisis short of war, during which actual combat with Western navies is to be avoided.

Nevertheless, extensive war-fighting and power-projection capabilities are fundamental to a Soviet policy of coercive naval diplomacy. These capabilities, moreover, will be necessary in any conflict between the United States and the Soviet Union. Yet, because of the particular ideological basis of Soviet concepts of war and national strategy, the prevention of total world war is a prime objective of Soviet foreign policy. Nevertheless, conflict with the "decadent, bourgeoisie, capitalist West" can, as a matter of policy, occur at lower levels of international violence. It is at these levels of "limited wars" of national liberation and "gunboat diplomacy" that the new Soviet navy will play its most likely roles, particularly after the year 2000.

Admiral Gorshkov argued in 1973 that the future development of the Soviet navy will be characterized by an intensification of its "internationalist mission," that the Soviet navy will be relied upon as a "consolidator of international relations."¹⁸ Later, in his book *Sea Power of the State*, Gorshkov announced that the naval forces being produced in the mid-1970s and the next decades will permit "projection of power" operations in the Third World, "to promote the strengthening of peace and friendship between the peoples and restraining the aggressive strivings of the imperialist states."¹⁹ From the perspective of Western concepts of "gunboat diplomacy," Gorshkov's statements imply strongly that the peacetime roles of the Soviet navy will be managed according to the specific requirements of individual situations, from friendly and supportive operations to fleet deployments intended to coerce, deter, and compel responses in support of Soviet foreign policy objectives. Indeed, the peacetime operations of the Soviet navy since the mid-1950s underscore a strong, and continually growing, reliance on naval forces to achieve specific policy goals, each but a single element in the overall strategy leading to the eventual defeat of the West, without necessarily predestining general war between the Capitalist and Socialist blocs. As one analyst has concluded:

. . . the improved Soviet Navy and its potential for the geopolitical role has not gone unnoticed by Soviet leaders. Even if some of Admiral Gorshkov's boasts about the global advancement of Soviet state interests can be discounted as service special pleading, the pledges of Marshal Grechko that Soviet military power ensures

18. Quoted in N. Polmar, *Guide to the Soviet Navy* 39 (1983).

19. S. Gorshkov, *The Sea Power of the State* 277 (1979).

the irreversibility of socialist gains around the world clearly endorse an "imperial" role for the Soviet Navy which recent history well illustrates. . . . [T]he mere presence of the Soviet Navy on all the high seas has radically altered the context within which the United States must consider both the war and peacetime exercise of its own sea power.²⁰

The New International Military Environment

It is evident in 1985, however, that the largely permissive—or at worst benign—international environment that since 1945 allowed the wide-ranging application of military force at sea may be changing to a future environment in which the opportunities for coercive diplomatic uses of naval forces by the great powers could become severely circumscribed. Two trends reinforce this perception: (1) the widespread availability of sophisticated weapons among coastal states, and (2) an evolving politico-legal system in which the traditional concepts of the freedom of the seas may be subject to strong opposition, especially given the inconclusive nature of the UNCLOS III deliberations.

The naval and maritime states in 2010 could be inhibited in certain regions of the world by comparatively weaker coastal powers because the widespread sale of modern weapons among them has heightened the risks of armed intervention and has raised doubts about the efficacy of symbolic shows of force offshore. There are two facets to the development, one psychological and the other military, although both are closely related. As Hedley Bull has warned:

These states have so altered the international legal rules relating to the use of force and magnified the costs of breaking them as to have precluded the older kind of "gunboat diplomacy," which assumed a set of rules weighted in favor of the strong European powers and a division of the world into fully and partially sovereign states. They will be able to appeal to the prevailing Third World animus against interference by the rich industrial states of East and West, a spirit reflected in General Assembly majorities . . . and solemnized in zones of peace, such as that proclaimed since 1972 in relation to the Indian Ocean.²¹

It is the military dimension of these changing circumstances that will provide the capabilities to fulfill Third World ambitions. The sinking of the Israeli destroyer *Eilat* in 1967 by Russian-built and -provided cruise missiles launched from small, fast patrol boats of the Egyptian navy and the destruction of the Pakistani destroyer *Khaibar* by Styx cruise missiles launched

20. Martin, *supra* note 14, at 7-8.

21. Bull, *supra* note 10, at 7; also, Truver, *New International Constraints on Military Power: Navies in the Political Role*, *Naval War College Review* (July-August 1981).

from Indian missile boats in December 1971 graphically illustrated the lethality of the readily-available modern weapons.

The Falklands battles in 1982 were seen by some analysts as irrefutable evidence that even modern and highly capable surface combatants are vulnerable to small, relatively cheap, precision-guided munitions, or even "dumb" weapons, and that large warships would be doomed if caught in any conflict involving the use of widely available, sophisticated weapons like Exocet antiship missiles. The sinking of the aged Argentine cruiser *General Belgrano*, hit by two World War II-vintage MK 8 torpedoes fired from the British nuclear attack submarine (SSN) *Conqueror*, and the extensive damage inflicted on the British fleet by Argentine aircraft employing pre-Vietnam War-era technologies, weapons, and tactics likewise underscored the deadliness of even obsolescent weapon systems. The point is that numerous coastal states in the mid-1980s possess the military wherewithal to counter directly the naval threats of the major powers, especially if the threats materialize close off-shore, and, over the next twenty-five years, many more coastal countries are likely to take advantage of the largess of the superpowers and other major weapons suppliers—the French, British, Brazilians, and Israelis, among others—to develop potent (in a local or regional context) forces. And, the inhibitions on the use of force against each other's navies apparently felt by the nuclear superpowers may be absent in a small coastal state's risk calculus. Michael McGwire has offered a terse admonition that reads like an epitaph:

Meanwhile, "missiles don't know their mums," and Soviet-supplied weapons can protect against Soviet as well as American intervention. By the same token, the United States may come to regret the lavish distribution of her latest ships and fighters.²²

The Falklands crisis again provides important lessons for the future. The French-built Exocet missiles that struck and sank the British destroyer *Sheffield* and the RO/RO ship *Atlantic Conveyor* by some accounts included British components comprising 20% of each missile. The British, moreover, expected to find themselves up against missiles, ships, helicopters, and radars they had sold to Argentina, in addition to other NATO-supplied weapons. The battles thus gave pause for reflection; the weapons suppliers should now know that in some future conflict they may face the weapons they have sold.

These developments portend at best an uncertain future for the continued successful use of naval forces in diplomatic roles, and may push the "safe" areas for naval demonstrations farther out to sea, beyond the range of missiles, aircraft, and ships based along the shore. Coupled with Third World moves for expanded coastal state sovereignty and jurisdiction over adjacent marine areas, the potential for controversy and conflict to ensue

22. McGwire, *Maritime Strategy and the Super Powers*, in *Power at Sea II: Super Powers and Navies* 18 (London IISS, Adelphi Paper 123, Spring 1976).

over different interpretations of the law of the sea is expected to increase dramatically over the next quarter-century. Because of the new military environment, a premium will be placed on the military capabilities to enforce the law.

The Law of the Sea in Transition

In his excellent analysis, *The Influence of Law on Seapower*, D.P. O'Connell described the nexus between the law and sea power:

It is the law of the sea which dictates the practicalities of this deployment of sea power, related to areas of its exercise and the modes of its exercise. Changes in the law of the sea in these respects would alter the factors which give rise to or aggravate political tension. . . .²³

Because the sea is the only area "where armed forces can joust with more or less seriousness in order to promote political objectives,"²⁴ the advantages and disadvantages of rules of international law—rules of the road; national jurisdiction and sovereignty over sea areas; national rules of engagement; rules about installations, cables, and pipelines; rules about pollution control—are fundamentally important to naval operations. The "freedom of the seas" is not absolute; it is constrained and qualified in the mode and place of its exercise.

However, the roles that the law will play in shaping the use of naval force will be tied to levels of political tension and the specific goals of a state that resorts to sea power. Perceptions of the importance of law in its relations to political objectives will shape states' responses to "peacetime crises" or "peacetime limited war." O'Connell recognized the dynamic properties of law, as evidenced by the history of sea power in the modern state era, which:

reveals the persistent interaction of law and naval policy, although the emphasis has at different times variously affected the interests to be protected, the areas of sea in which naval power has been deployed, and the weapons to be used. . . . The law has never been static. Its pliable character has meant that it has been made to serve the purposes of sea power, and so has become a weapon in the naval armoury. Just how it has played this role has depended on the issues that occasioned the resort to naval force, but it has always been prominent in giving form and character to the issues as well as influencing the conduct of those who have sought their resolution.²⁵

23. O'Connell, *supra* note 13, at 189.

24. *Id.* at 8.

25. *Id.* at 16.

Certainly, this should not be interpreted that the rules of law will always be observed, particularly in an imperfect world where some rights cannot be safeguarded except by the use of force. Furthermore, there will always be situations where the gains to be achieved will be perceived as outweighing the cost of rejecting the rules. The point to be considered is, however,

... not whether the law is breached but how it enters into the decision to breach it, what value it has in the circumstances compared with other values, and what influence it is allowed to have. It does not cease to be law merely because it is relegated to a low level of priority, but neither should it be presumed that it will be so relegated.²⁶

What is remarkable in peacetime, crisis, and war is that generally the rules are observed. Indeed, states have used the law to interpose ships, confine the enemy to his ports, deny him tactical advantage, and deprive him of access to neutral cargoes, often without shots being fired, and often without the resort to unlawful countermeasures. If international law was ignored, this usually occurred as the military and political situations became so desperate that curbs on the conduct of naval operations were of no value or political importance. This hardly ever occurred, however, at the outset of crises or even war. In "peacetime" crises and limited wars, the expectation is that central, strategic values of the state will not usually be threatened—the rhetoric of the Cuban Missile Crisis shows the exception—and the legal rules will usually be followed. Where laws were disregarded in the use of armed force, it has usually been done with reference to the concept of self-defense, and even then this rationale has limitations based on the ideas of the necessity and proportionality of the response to the threat. In short, O'Connell notes that "the only prediction" possible is that:

... the lower the level of conflict, the more localized the situation and the more restricted the objectives, the more predominant will be the element of law in the governing of naval conduct; and that the law will assume a diminished role—as it did in the Second World War—when the conflict becomes global, when an element of desperation has entered into operational planning. . . . [W]hat is likely is a proliferation of the causes of dispute and of technologically advanced naval methods for dealing with them. . . . [T]he uses of sea power at an advanced level are not likely to be confined to the traditional naval Powers of the northern hemisphere.²⁷

Although trends can be traced at least to the 1930s, the failure of the second Geneva Conference on the Law of the Sea in 1960 to reach agree-

26. *Id.* at 52.

27. *Id.* at 3.

ment on a specific limit for territorial seas seemed to result in an erosion of traditional rules and expanding claims of coastal state jurisdiction and sovereignty. Clearly, interests in mobility and transit rights of navies, critical components in the exercise of sea-based military power, had the potential to be jeopardized by a new consensus on expansive zones of coastal state control. Arthur H. Dean, Chairman of the U.S. delegation to the 1960 Geneva Conference, remarked before the Senate Foreign Affairs Committee:

Our navy would like to see as narrow a territorial sea as possible in order to preserve the maximum possibility of deployment, transit, and maneuverability on and over the high seas. . . . The primary danger to the continuance of the ability of our warships and supporting aircraft to move, unhampered, to wherever they may be needed to support American foreign policy presents itself in the great international straits of the world—the narrows which lie athwart the sea routes which connect us and our widely scattered friends and allies and admit us to the strategic materials we do not ourselves possess.²⁸ This perception largely shaped the initial positions of the United States, Soviet Union, and other naval powers in the preparatory U.N. Seabed Committee and the early negotiations at UNCLOS III.

Indeed, several years later, after UNCLOS III was convened, Elizabeth Young warned that a fundamental change had already begun, that the international legal system was moving incrementally away from the traditional doctrine of *mare liberum* toward a system of *mare clausum*. She argued that despite the efforts of the maritime and naval powers in the Seabed Committee and at UNCLOS III to preserve as much of the high seas and traditional freedoms as desirable and possible, this enclosure movement seemed destined to continue because of the press of technological advances, economic demand for resources, and national jealousies and rivalries. In the future world she envisioned, the “great navies”

. . . will find their traditional roaming of the open seas, “showing the flag” in their nation’s interest, constrained, psychologically where not physically, by the multitude of new jurisdictional boundaries of quite unfamiliar texture, the nature of new kinds of sovereignty . . . will need establishing not only by theoretical definition, in terms of international convention, but also by subjection to all the normative pressures of practice and experience.²⁹

Certainly, this has not yet happened. And while the next twenty five years may witness dramatic changes in some aspects of the law of sea, the

28. Quoted in D. Bowett, *The Law of the Sea* 7 (1967).

29. Young, *New Laws for Old Navies: Military Implications of the Law of the Sea*, 16 *Survival* 265 (1974).

maritime and naval states' interests in navigation rights have clearly been satisfied in the Law of the Sea Convention produced by UNCLOS III. These powerful states, moreover, will resist any further changes to the rules that might inhibit the military uses of the oceans. In a sense, the new ocean regime represents a grand compromise over core values, a compromise in which the coastal states accepted relatively unconstrained navigation provisions in return for broadened coastal control over resources, research, and marine pollution. As one analyst has summarized the UNCLOS process and its implications for naval uses of the oceans:

During UNCLOS, a strong contingent of coastal states tried various ways of restricting the activity of foreign warships in their coastal waters . . . part of a general attempt to extend sovereignty and jurisdiction into the oceans, but in this sector they met extremely determined opposition from the maritime powers. While the maritime powers were prepared to concede very large areas of control over resources and associated activities, they refused to yield almost anything on the rights of warships.³⁰

Under customary international law, the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, and the 1982 Convention on the Law of the Sea, navigation in the territorial sea is regulated by the provisions of innocent passage—the one exception to complete coastal state sovereignty in the territorial sea. However, previously the rules presented difficulties stemming from “subjective interpretations:” the activities that are “prejudicial to the peace, good order or security of the coastal state” remained ill-defined and contentious. Moreover, some coastal states maintained that foreign warships in general could not pass through territorial seas unless prior notification were provided. And, while submarines would have to navigate on the surface in innocent passage, no similar right was enjoyed by military aircraft.

At UNCLOS III, members of the Group of 77 tried to extend the legal distinctions between warships and commercial vessels, with the idea that a broader right of navigation could be preserved for the latter while the former would have greater restrictions applied. This move was rejected by the naval powers and no significant distinctions have been added to the law which would empower coastal states to discriminate against warships in their territorial seas. In fact, while the 1982 treaty still excluded submerged navigation and overflight from the definition of innocent passage, it makes no distinction between commercial ships and combatants in the exercise of the right, and in the second paragraph of Article 19 specifically enumerates the *activities* of ships, and not the character of the ships themselves, which would make a specific transit non-innocent.

30. Buzan, *Naval Power, the Law of the Sea, and the Indian Ocean as a Zone of Peace*, 5 *Marine Policy* 194 (1981).

In a similar fashion, some coastal states tried to extend their jurisdiction over adjacent waters to apply restrictions to warships arising from the delimitation of territorial seas in straits and the placement of archipelagic waters. With regard to straits, the issue was critical for the mobility of naval forces. Under the existing regime, only a non-suspendable right of innocent passage would be enjoyed in straits used for international navigation.³¹ The United States, Soviet Union, United Kingdom and other maritime states considered this regime to be unacceptable. The 1982 treaty therefore includes provisions for "transit passage" (Part III) and "archipelagic sea lanes passage" (Part IV, Article 53) that represent a clear preservation of military/naval interests in return for the maritime states' agreement to a 12 nautical mile-wide territorial sea. "All ships and aircraft" enjoy "transit passage" rights in straits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone, for the purpose of continuous and expeditious transit (Articles 37 and 38). The "normal mode" of transit is permitted, which includes submerged navigation by submarines. The coastal states are accorded certain limited regulatory powers (Articles 41 and 42), and specific rules are established for the activities permitted or prohibited to ships and aircraft in the exercise of transit passage (Articles 39 and 40). These rules are also to apply to ships and aircraft exercising the right of archipelagic sea lanes passage (Article 54). The straits and archipelagic waters issues were, in O'Connell's analysis:

. . . the most vital legal issue of sea power, because it is in confined waters that naval coups can best be effected under the pretext of self-defense, and there that intolerable obstruction can be effectively raised to strategic and tactical deployment.³²

An interesting question concerning the "normal modes" of transit passage was highlighted during the 1984 "mines of August" crisis in the Red Sea and Gulf of Suez. Because of the threat of mines in the Bab el Mandeb, the U.S. Navy sent mine countermeasures helicopters that had been operating from the USS *La Salle* (AGF-3) off Jidda, Saudi Arabia, to sweep the northern part of the strait immediately prior to the 29 August transit of the U.S. carrier *America* (CV-66) and her escorts. Presumably, the mine-sweeping was conducted in high seas areas of Bab el Mandeb in this instance, and times did not require coastal state approval. However, if in the future radical states or terrorists rely on mine warfare to frustrate the movements of navies through international straits, certainly a self-defense rationale for minesweeping of suspected waters could be advanced.

31. See Truver, *The Strait of Gibraltar and the Mediterranean*, in 4 *International Straits of The World* (1980); and Moore, *The Regime of Straits and The Third United Nations Conference on the Law of the Sea*, 74 *Am. J. Int'l L.* 77 (1980).

32. O'Connell, *supra* note 13 at 103.

Such a practice could conceivably be justified as falling within (an expansive interpretation of) the 1982 Convention's provisions that ships and aircraft can engage in activities *not* related to "those incident to their normal modes" of transit if the otherwise prohibited activities are made necessary by *force majeure* or distress. It is likely to be controversial, in any event, and a common practice of sweeping strategic sea areas like straits could become a source of significant international discord.

The concept of the exclusive economic zone (EEZ) also provided the opportunity during UNCLOS III for several radical coastal states to seek greater restrictions on the mobility of warships. Some states called for "security zones," while others argued that the waters of the EEZ were not high seas as the EEZ was a zone *sui generis*. The discussions eventually narrowed to arguments over residual rights, whether rights not specified in the convention fell to the coastal state or to the international community, or whether the EEZ was high seas except for specific "sovereign rights" of the coastal state over resources and other specified jurisdictions. The maritime and naval states remained steadfast in opposition to coastal state "creeping jurisdiction" over their security interests.

The 1982 convention provides sweeping high seas rights to be enjoyed by all states in the EEZ, while giving the coastal state "sovereign rights" for "exploring and exploiting, conserving and managing" natural resources, and "jurisdiction" over artificial islands, installations and structures; marine scientific research; and the protection and preservation of the marine environment in the zone (Article 56). Article 58 cross-references Article 89 to the effect that no state can subject any part of the EEZ to its total sovereignty, and identifies the safeguarded high seas freedoms of Article 87 to be enjoyed by all states in EEZs. This provision, however, is restricted by the undefined *caveat* in Article 88 that the high seas are reserved for "peaceful purposes," although the restriction seems to have very little substance, as Elliot Richardson has noted:

. . . military maneuvers and activities that do not violate the [U.N.] Charter are permitted; and the fact that a particular coastal state may have a low threshold of anxiety regarding ships and aircraft off its coast cannot diminish the rights of the flag state, although the latter must pay due regard to the rights and duties of the coastal state.³³

Only in the area of marine scientific research did the coastal states manage, obliquely, to circumscribe naval activities. However, this is a broad issue that involves more than just national security and naval interests. The convention contains a fairly restrictive "consent regime" with the familiar *caveat* that marine scientific research is to be conducted exclusively for "peaceful purposes." This restriction is of some concern to global naval

33. Richardson, *Law of the Sea: Navigation and Other Traditional National Security Considerations*, 119 *San Diego L. Rev.* 574 (1982).

powers like the Soviet Union and, more recently, the United States which conduct extensive "in-house" naval oceanographic research to support the combat operations of their fleets. In an attempt to circumvent the "naval" label that could be used to deny consent, the military, especially in the West, can simply contract out to civilian organizations. For example, in February 1985, the U.S. Navy's Office of Naval Research announced two, of many, government-sponsored civilian research efforts:³⁴

Undersea Acoustic Research—tomography sound speed field mapping, arctic data reduction, shallow water bottom acoustics: part of a "continuing long-term program involving Woods Hole University and other university and contractor efforts."

Naval Oceanographic Research and Development Activity's ASW Environment Acoustic Support (AEAS) Program—a U.S. Navy advanced development project, the objective of which is to provide ocean environmental acoustic support for the design, development, deployment and operational use of current and proposed ASW [anti-submarine warfare] acoustic systems associated with ships, submarines, aircraft, ordnance and surveillance: mine warfare, acoustic data processing and analysis, synthesis and evaluation of models and data bases, area/systems performance assessments, and fleet support products. At most, the convention's provisions on scientific research are likely to be no more than a minor inconvenience.

The naval powers emerged from the UNCLOS III negotiations with their national security interests, for the most part, ensured. Although the territorial sea limit has now been specifically addressed and expanded to twelve nautical miles, and the concept of archipelagic waters has received recognition, navies will still be able to conduct activities in a regime that remains largely permissive. However, because the principal naval and maritime states have so far chosen to remain outside of the UNCLOS III framework established in the 1982 convention, many years of tension and discord are likely, during which navies will be major components in states' initiatives to safeguard their interests in ocean law and policy.

LOS and Sea Power: The Future

As of mid-March 1985, only fourteen states had ratified the 1982 Convention on the Law of the Sea: Bahamas, Belize, Cuba, Egypt, Fiji, Gambia, Ghana, Ivory Coast, Jamaica, Mexico, Namibia, Philippines, Senegal, and Zambia.³⁵ Although several maritime states have signed the treaty, no major naval power or maritime state has indicated that it is ready to ratify

34. Commerce Business Daily, 15 February 1985, p. 3; 16 February 1985, p. 5.

35. Information provided by the U.S. Department of State, Office of the Legal Advisor, Treaty Affairs, March 1985.

the document, which needs sixty ratifications to enter into force. Even then, this number is a minimum requirement; far greater numbers and the participation of powerful states will be necessary if the treaty is to have the moral force that was the objective of those drafting its provisions. As one observer has commented, "with due respect" to the states that have already ratified the convention:

. . . they are rather a bunch of oddfellows. They include no western states, no Warsaw-pact ones, no Arab states except Egypt, no Asian ones except the Philippines, no Latin Americans except Cuba and Mexico, only six of the 51 African states. If the Convention were to become law by being ratified by 60 states of no greater weight than these . . . , it could not have much real force. For one thing, such a grouping could not afford to finance the elaborate apparatus that is envisaged.³⁶

There are three possible outcomes to the present situation. First, the convention may never come into force. Second, it may "limp" into force, with so few parties of any international consequence that global acceptance of all provisions cannot, and should not be inferred. Finally, it is possible, although highly unlikely at the juncture, that the 1982 treaty will enter into force with a vast majority of states becoming parties, including some of the powerful maritime states. However, an analysis of the contentious seabed issues and a projection that perhaps as many as fifty new, developing "mini-states" may emerge by the first years of the next century compelled John King Gamble to conclude that "at least two decades will pass before harmony and consistency will be significant aspects of the emerging law of the sea."³⁷

It should be remembered, as well, in this regard, that an average of six years was necessary for each of the 1958 Geneva conventions to come into force. This was surprising given the fact that only four votes were cast against approval of these instruments. Furthermore, in each instance, fewer states signed the conventions than voted in favor of them, while nearly fifty percent of all signatures were never ratified. The 1982 Convention on the Law of the Sea is far more comprehensive, complex and ambitious than the four 1958 Geneva conventions combined. Yet only fourteen states have become parties to all four treaties, which in 1985 remain in force. Only the most optimistic observer can foresee the 1982 convention ever garnering global international acceptance and force.

If the treaty does eventually enter into force, although rejected by the powerful states and without the participation of a majority of nations, clearly its moral force would not be the same as the third possible outcome, noted above (*i.e.*, ratification by a majority of states including the great

36. The Economist, 22 December 1984, p. 30.

37. Gamble, *Where Trends the Law of the Sea?*, 10 *Ocean Development & Int'l L.* 62 (1982).

powers) even if participation is not universal. In the latter case, even those states not parties are affected, as Pollack remarked:

There is no doubt that, when all or most of the Great Powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among states which have never expressly consented to them. It is hardly too much to say that declarations of this kind may be expected, in the absence of prompt and effective dissent by some Power of the first rank, to become part of the universally received law of nations within a moderate time.³⁸

In the absence of dissent by the powerful states, whether the 1982 convention enters into force or not, certain provisions of the treaty may continue to act as models for state behavior in the sense that they embody customary law. Clearly, that is the position lately assumed by the United States, as expressed by Ambassador Malone:

. . . there exists an international law of the sea totally independent of the Law of the Sea Convention. And, indeed, the best evidence for the existence of such a body of law lies in the fact that today virtually all countries are applying rules of international law reflected in the treaty text even though that treaty is not in effect. Of course, a treaty not in force cannot confer legal rights and duties. Nevertheless, all coastal states now assert various jurisdictional rights, and all maritime states claim the rights of transit reflected in the convention. This is not true with regard to the seabed mining provisions.³⁹

The U.S. position in essence is that the 1982 convention, first, codifies customary law, second, reinforces provisions of the 1958 Geneva conventions that have not been affected by changes in state practices since the late 1950s, and third, specifically with respect to the seabed articles, creates new positive law. The navigation rights in the 1982 convention, inasmuch as they are not "new or unique" but only "clarified and codified pre-existing rights," can be "exercised by all states regardless of their status as parties or nonparties to the Law of the Sea Treaty."⁴⁰ Even if the 1982 treaty enters into force, the United States maintains that customary international law confers rights and duties upon states that cannot be destroyed if those states do not become parties to the new treaty. These rights and duties will be altered only if it can be proven that the customary law itself has changed. In a nutshell, the U.S. position is:

States certainly are free to continue to apply customary international law and to ignore *de novo* prescriptive provisions which

38. Pollack, *The Sources of International Law*, 18 L.Q. Rev. 419 (1902) 419

39. Malone, *supra* note 4 at 61.

40. *Id.* at 56.

have neither been tried nor admitted by wide practice to be source of recognized international law.⁴¹

This position is highly controversial as many supporters of the UNCLOS III-regime argue that the treaty creates new positive law in all areas—navigation as well as deep seabed exploitation—irrespective of what existed before. If the treaty does enter into force, the intent of parties to the convention to enforce the terms on non-parties will surely create the potential for conflict. Indeed, as John King Gamble has argued, looking toward the year 2010:

For many countries of the world, claims to the oceans may be one of the few political bargaining chips they have in a high stakes game of international politics. During the next 20 years, the temptation to play these chips will be great. The likely results will be increased tension, violence, and, maybe, regional wars. The combination of a volatile world situation, the desperate internal situation of many states, and the newness and uncertainty of managing these zones, mean that the odds are the world will not get it right the first time.⁴²

Sea power will figure prominently in the process by which the claims and counter-claims are sorted out. In a sense, such short-term conflicts as the 1981 Gulf of Sidra incident over closing lines in the Mediterranean are but a single aspect of the customary law-making process. And, given the expectation that the 1982 treaty in its present form will never enter into force, such positions and counter-positions are likely to multiply.

Perhaps by 2010, the controversy, tension, conflict, and violence of the preceding twenty-five years will have contributed to a new consensus on the law of the sea. In the interim, the navies of great powers and small states alike will be relied upon to uphold national interests. So many variables will affect those interests that navies will inevitably find themselves deployed farther and farther from home ports to defend the policies of their governments. These will be the occasions for disputes that are likely to lead to conflict. Coastal or regional navies will be used to enforce local claims, while "blue ocean," global navies like those of the United States and the Soviet Union in 1985, and perhaps the Peoples Republic of China in 2010, among others, may challenge them.

The intensifying instability of the international system will magnify insecurities and make the industrialized states depend upon global sea power as a necessary means of self-defense and, in Edward Heath's words, "the only way of regaining dignity and authority in a hostile and confusing world." New threats to national interests on land and in the seas in 2010 will give navies new responsibilities—countering terrorism, perhaps—and

41. Malone, Freedom and Opportunity: Foundation for a Dynamics Oceans Policy, U.S. State Dep't Bulletin, Dec. 1984, at 77.

42. *Id.* at 79-80.

reaffirm old missions. Indeed, the future development of certain technologies will contribute to the continued suitability of sea power for undertaking peacetime and crisis political roles. Improved command, control, and communications capabilities coupled with enhanced intelligence-gathering functions should reinforce national decision-makers' reliance on their navies. Moreover, modern technologies and tactics for target location and precise delivery of a wide variety of weapons are combining to produce a future in which military forces will be unprecedentedly able to achieve the effects their commanders require, should weapons' use be necessary.⁴³

In summary, the central role of navies as instruments of state policy will be reinforced by the dynamics of the law of the sea over the next quarter-century. The law in 2010 will be both a source of tension and a foundation upon which the reliance on sea power will be based. Perhaps D.P. O'Connell stated it in the most lucid manner when he forecast that:

. . . the occasion for navies to be employed to influence events will be multiplied because the increasing complexities of the law of the sea, with its proliferation of claims and texts and regimes covering resources, pollution, security and navigation, are multiplying the opportunities for disputes and the circumstances for the resolution of disputes by the exertion of naval power.⁴⁴

43. Martin, *supra* note 14, at 13.

44. O'Connell, *supra* note 13, at 10.

