

EDITORIAL COMMENT

THE HYDROGEN BOMB TESTS AND THE INTERNATIONAL LAW OF THE SEA

From high quarters has come the suggestion that the hydrogen bomb tests conducted by the United States off the Pacific islands, held by it under strategic Trusteeship Agreement with the United Nations, contravene the customary public international law of the sea. Thus Earl Jowitt remarked in the House of Lords:

I am entirely satisfied that the United States, in conducting these experiments, have taken every possible step open to them to avoid any possible danger. But the fact that the area which may be affected is so enormous at once brings this problem: that ships on their lawful occasions may be going through these waters, and you have no right under international law, I presume, to warn people off.¹

In a recent issue of the *Yale Law Journal* this suggestion has been elaborated by Dr. Emanuel Margolis into a comprehensive attack upon the legality of the tests.² The thesis of Dr. Margolis is, in brief, that the establishment of "a 400,000 square mile 'warning area' cannot be reconciled" with "the international law principle of freedom of the seas and its attendant corollaries, freedom of navigation (of both the sea and the air), and freedom from interference with the lawful pursuit of maritime industries (fishing, transport, and the like)."³ Freedom of the seas is urged as "an absolute freedom" except as modified by certain "general" police powers, emerging from "custom" and "not being limited to particular maritime zones," and by "special" police powers, existing only "by virtue of treaties" and applying "exclusively to the states which are parties to them."⁴ The warning areas established for the hydrogen bomb tests cannot, it is argued, be justified under either class of powers.

The purpose of this editorial is to indicate that this evaluation of the hydrogen bomb tests completely misconceives the nature and requirements of the international law of the sea and unnecessarily impugns the legality of measures commonly regarded as indispensable to the security of the free world.⁵

From the perspective of realistic description, the international law of the sea is not a mere static body of rules but is rather a whole decision-

¹ 186 H.L. Deb. (5th Ser.) 808-09 (1954).

² Emanuel Margolis, "The Hydrogen Bomb Tests and International Law," 64 *Yale L. J.* 629 (1955). It is also argued in this article that the tests are in violation of both the U.N. Charter and the Trusteeship Agreement for the former Japanese Mandated Islands and of certain alleged prescriptions with respect to the pollution of international waters and airspace.

³ *Id.* 635, 630.

⁴ *Id.* 634, 635.

⁵ For a more comprehensive and detailed development of this theme, see Myres S. McDougal and Norbert A. Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," 64 *Yale L. J.* 648 (1955), with a statement of the facts and a collection of authorities in support of the points made in this editorial.

making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nation-state officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.

The factual claims asserted by nation state decision-makers to the use of the world's seas, the events to which the "regime of the high seas" is authoritative response, vary enormously in the comprehensiveness and particularity of the interests sought to be secured, in the location and size of the area affected, in the duration of claim, and in the degree of interference with others. Such claims range, in rough categorization, from the comprehensive and continuous claim to practically all competence in the "territorial sea," through the continuous but limited claims to navigation, fishing, and cable-laying upon the "high seas," to the relatively temporary and limited claims to exercise authority and control beyond territorial boundaries for a vast array of national purposes, such as security and self-defense, enforcement of health, neutrality and customs regulations, conservation or monopolization of fisheries, exploitation of the sedentary fisheries and mineral resources of the sea bed and continental shelf, the conducting of naval maneuvers and other military exercises, and so on. It may be observed, however, that, despite their variety in institutional nuance, all these claims share certain common characteristics: they are all unilateral assertions of demands by particular claimants to the individual use of a great common resource and all are affected in equal degree—navigation and fishing no more and no less than the others—with a community interest in fullest utilization and conservation and with specific national interest, which, though varying in particular instances with geographic propinquity, is in the sum of all instances common to all claimants.

The authoritative decision-makers put forward by the public order of the high seas to resolve all these competing claims include, of course, not merely judges of international courts and other international officials, but also those same nation-state officials who on other occasions are themselves claimants. This duality in function ("*dédoublement fonctionnel*"),⁶ or fact that the same nation-state officials are alternately, in a process of reciprocal interaction, both claimants and external decision-makers passing upon the claims of others, need not, however, cause confusion: it merely reflects the

⁶ Schiffer, *The Legal Community of Mankind* 264 (1954), presenting the views of Georges Scelle.

present lack of specialization and centralization of policy functions in international law generally. Similarly, it may be further observed, without deprecating the authority of international law, that these authoritative decision-makers projected by nation states for creating and applying a common public order, honor each other's unilateral claims to the use of the world's seas not merely by explicit agreements but also by mutual tolerances—expressed in countless decisions in foreign offices, national courts, and national legislatures—which create expectations that effective power will be restrained and exercised in certain uniformities of pattern. This process of reciprocal tolerance of unilateral claim is, too, but that by which in the present state of world organization most decisions about jurisdiction in public and private international law are, and must be, taken.⁷

The overriding policy which has in the past infused this whole decision-making process, and which from the perspective of rational preference should continue to infuse it, is not the negation, but rather the encouragement, of use. The major policy purpose inspiring the regime of the high seas has been not merely the negation of unnecessary restrictions upon navigation and fishing, but also the effective promotion of the fullest, peaceful, and conserving use and development by all peoples of a great common resource, covering two thirds of the world's surface, for all contemporary values. The concept of a common and reciprocal interest in fullest utilization has underlain, and should continue to underlie, the whole flow of decision.⁸

For implementing this overriding policy of fullest, peaceful utilization in resolving the conflicting claims which confront them, the authoritative decision-makers of the world community have elaborated a comprehensive body of technical doctrine, "the regime of the high seas," composed of two complementary sets of prescriptions. The one set of these prescriptions, that generally referred to under the label of "freedom of the seas," was formulated, and is invoked, to honor unilateral claims to navigation, fishing, cable-laying, and other similar uses. The other set, that which includes the prescriptions summed up in a wide range of technical terms such as "territorial sea," "contiguous zones," "jurisdiction," and "continental shelf," was formulated, and is invoked, to honor all the great variety of claims, both comprehensive and particular, which may interfere, in greater or less degree, with navigation and fishing. To the initiated, these prescriptions and technical terms are not absolute, inelastic dogmas but rather

⁷ It is not of course the unilateral claims but rather the reciprocal tolerances of the external decision-makers which create the expectations of pattern and uniformity in decision, of practice in accord with rule, commonly regarded as law.

The great bulk of claims to authority and control upon the high seas are honored and protected, it may be emphasized, not by explicit bilateral or multilateral agreement, but by this process of mutual tolerance. The decision-makers of the world community have never regarded themselves as confined within any such categorization as that of "general" and "special" powers propounded by Dr. Margolis.

⁸ Excellent statements of this positive policy of promoting, rather than restricting, use may be found in Lauterpacht, "Sovereignty over Submarine Areas," 27 *Brit. Y.B. Int. L.* 376, 378, 407 *et seq.* (1950), and in U.N. Secretariat, *Regime of the High Seas*, U.N. Doc. No. A/CN.4/32, at 10, 12 (1950).

flexible policy preferences, permitting decision-makers a very broad discretion for adjusting particular controversies in terms of the multiple variables peculiar to each controversy and for promoting major policies. For all types of controversies the one test that decision-makers have in fact invoked and applied is that simple and ubiquitous, but indispensable, standard of what, considering all relevant policies and variables in context, is *reasonable* as between the parties;⁹ and for the clarification of detailed policies in ascribing meaning to particular prescriptions and terms, such decision-makers have habitually turned to all those sources authorized for the International Court of Justice, including not only "international conventions, whether general or particular" but also "international custom, as evidence of a general practice accepted as law," "the general principles of law recognized by civilized nations," "judicial decisions and the teachings of the most qualified publicists," and considerations "*ex aequo et bono*."¹⁰

The concept of "freedom of the seas" was introduced into international law, as is well known, to combat certain broad claims to territorial sovereignty over vast sea areas asserted by various nation states in the sixteenth and seventeenth centuries. The object of such claims was to monopolize both fisheries and trade with areas thought particularly rich in resources. The policy projected in "freedom of the seas" was designed to foster transportation and communication free of restrictions imposed by any nation state for the purpose of restricting commercial gain to itself, and to promote equality of access to fisheries free of comparable claims to monopoly. It is in this sense that the policy finally triumphed to universal acceptance and has long been applied to promote the utmost practicable freedom of navigation and fishing and to minimize international friction by confining each state's regulatory power, where possible, to ships flying its own flag.

From the beginning of the modern law of the sea, it has, however, been recognized that nation states and their peoples have interests in the world's seas other than navigation and fishing, and the decision-makers of the world community have projected and applied a great variety of prescriptions honoring claims to authority and control for the protection of such interests, even against protests that such claims interfere with navigation and

⁹ The test is well stated in Smith, *The Law and Custom of the Sea* 20 (1950). See also Jessup, *Law of Territorial Waters* 91-101 and *passim* (1927); Masterson, *Jurisdiction in Marginal Seas* xiii-xviii, 375 *et seq.* (1929); Dickinson, "Jurisdiction at the Maritime Frontier," 40 *Harv. L. Rev.* 1 (1940).

¹⁰ Stat. I.C.J., Art. 38. A decision-maker is thus not confined, in determination of lawfulness, to explicit agreements or inferences from prior customary behavior, but may draw creatively upon a great variety of principles, precedents, analogies, and considerations of fairness. An excellent example of this process by which external decision-makers appraise unilateral claims is offered by the *Anglo-Norwegian Fisheries Case*, Judgment of Dec. 18, 1951, [1951] I.C.J. Rep. 116. In this case Norway asserted claims which could not be justified by reference to either explicit agreement or widely accepted custom, and which had been protested by other nation states, but by drawing upon all relevant sources of policy and a great variety of considerations in the context, the Court concluded that Norway's claims were lawful. See Waldock, "The Anglo-Norwegian Fisheries Case," 28 *Brit. Y.B. Int. L.* 114 (1951).

fishing. Nation states have almost immemorially and universally demanded comprehensive governmental powers, subject only to "innocent passage," for the protection of all national interests in a littoral belt of the seas adjacent to their shores, and in contemporary international law this demand is honored in high measure under the concept of a "territorial sea." So intense, nevertheless, has been the conflict of claims and interests at the outer boundaries of this belt, that even the most basic elements of prescription are still unsettled: not only is the width of the area which may be claimed still disputed, but also the base line from which this unknown width must be measured, and the very degree and scope of the authority that may be exercised within the area once its limits are ascertained. Serious harm to community and national interest from this conflict has, fortunately, been avoided by the formulation of a set of safety-valve concepts, such as "contiguous zones," "jurisdiction," "continental shelf," and so on, which are now invoked to honor reasonable claims to national competence far beyond "territorial seas" for virtually all identifiable national interests. The history of this development with respect to claims for the enforcement of customs regulations, the protection of the security of neutrals against belligerent activities, the conservation or monopolization of fisheries, the exploitation of the sedentary fisheries and mineral resources of the sea bed and continental shelf, the administration of health and sanitation regulations, and so on, is well known;¹¹ and the special deference which authoritative decision-makers have in mutual tolerance long accorded to claims justified in terms of security, such as with respect to jurisdiction over pirates, activities in self-defense, the conducting of naval maneuvers, and the protection of coastal approaches from hostile aircraft, has often been noted.¹² In time of acknowledged war, of course, "freedom of the seas" retires almost completely before both the older doctrines of contraband, unneutral service, blockade, ultimate destination, war zones, and reprisals, and the newer administrative techniques of navicerts, rationing of neutrals, ship warrants, bunker control, insurance and credit control, black-listing, and so on.¹³

The claim of the United States with respect to the hydrogen bomb tests may be described factually as a claim to use territory (Bikini and Eniwetok Atolls), over which it has jurisdiction, for purposes which have the effect of temporarily excluding others from large areas of the high seas. The extent to which past tests have actually interfered with commercial navigation is, despite the size of the area affected, practically nil, and interference with fishing caused by the existence of the warning zones appears to have been slight.

¹¹ The items cited in note 8 *supra* review this history, with references. See Boggs, "National Claims in Adjacent Seas," 41 *Geographical Rev.* 185 (1951), with tabular presentation.

¹² For references, see Martial, "State Control of the Air Space over the Territorial Sea and the Contiguous Zone," 30 *Can. Bar Rev.* 245 (1952), and Masterson, "The Hemisphere Zone of Security and the Law," 26 *A.B.A.J.* 860 (1940).

¹³ Higgins and Colombos, *International Law of the Sea* (2d ed. Colombos 1951) Chs. 14, 16-18, 20.

The claim of the United States is obviously an unprecedented one, with no close prior analogies, and plainly no existing prescriptions in the regime of the high seas are literally applicable.¹⁴ The particular claim made bears no similarity to the claims which, historically, "freedom of the seas" was intended to combat: others are not excluded from the area affected in order to enable the United States to grant trade or fishing monopolies to its nationals or to pursue its commercial aggrandizement in any way; and others are affected, irrespective of purposes, in such minimum degree as to cause little offense to subordinate policies of preventing international frictions arising from exercises of police powers upon the high seas.

What is most relevant in prior prescriptions from the regime of the high seas, and can be applied without irrational extrapolation to this new problem of the hydrogen bomb tests, is simply the test of *reasonableness*—the test by which the decision-makers of the world community have in modern times adjudicated all controversies involving conflicts between claims to navigation and fishing and other claims.

The claim of the United States is in substance a claim to prepare for self-defense. It is not a claim to take the drastic measures of interference with others—as, for example, the sinking of fleets or the invasion of territory—which are commonly subsumed under self-defense. It is, however, a claim to take certain preparatory measures, with the minimum possible interference with others, under the conditions of high necessity and absence of alternatives which are commonly held to justify measures in self-defense. The conditions of this necessity and the absence of reasonable alternatives are familiar knowledge. The contemporary development of instruments of destruction makes it possible for a war-bent nation state armed with thermonuclear weapons utterly to destroy an opponent and perhaps much of the world. It has not been possible to establish, under the United Nations or otherwise, either effective international control of armaments or commitments and procedures of global scope which offer reasonable assurance against aggression. As expectations of imminent violence in the world arena have become ever more realistic and intense, many of the nations of the free world have organized themselves, under appropriate provisions of the United Nations Charter, into regional groupings for their more effective self-defense. The United States has undertaken its program of atomic and thermonuclear weapons development to ensure that these free nations are not lacking either in the retaliatory power which may deter aggression or in the weapons of self-defense if deterrence fails. In this posture of world organization and crisis, which puts so high a premium upon self-defense, with authorization of potentially the most drastic interferences with others, it cannot, we suggest, be reasonably concluded that it is unreasonable for the United States to engage in such temporary and limited interferences with navigation and fishing as are involved in the hydrogen bomb tests, in preparation for the defense of itself and its allies and of all the values of a free world society.

MYRES S. McDOUGAL

¹⁴ Unless one regards as of sufficiently close analogy the long-standing practice, apparently never questioned, of establishing the relatively smaller warning zones required for conducting naval maneuvers and other peacetime defensive activities with safety.