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 Role of International Law and an Evolving Ocean Law
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WHAT IS INTERNATIONAL LAW?

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The words "international law" are apt to draw a wry smile from the man in the street—and our present involvement in Vietnam merely gives more twist to the smile which would have been there before. To the layman, to the reader of newspapers and reporters of international events, international law conjures up a mature legal system—one in which an established legislature makes laws, an executive carries them out, a judiciary presides over trials of persons charged with infractions of those laws, and a sheriff stands ready to place a convicted violator in jail and keep him there. The layman knows that no such system or its counterpart exists in the international arena, controlling the relationships between states. He is reminded almost daily of the essentially lawless behavior of certain states in the international community, and accordingly (and for this purpose this probably means most of you in the audience) he comes to think of international law as a lot of words and academic concepts and arguments unrelated to the realities of world forces and power politics. He tends to dismiss this material as having no significant effect or impact, as providing no

significant assistance towards or guarantee of peace, or of a context in which the individual states can go about the business of government. He thinks of international relations basically as a function or problem in the exercise of power, and in comparative power, with spheres of particular interest or influence.

One of the objectives of this study is to suggest to you that such a layman's view may be somewhat out of focus, and that military planning and strategy demand an understanding and appreciation of the real strengths and utility of international law as well as of its real weaknesses and shortcomings.

But, as a preliminary step to embarking on any analysis of international law, it is necessary to establish what it is not. When we think of a legal system (and the words "international law" suggest a reference to such a system), we are almost certain to borrow from the legal system we know and project it as far as possible into the next context. The essential flaw in a layman's approach to an appreciation of international law frequently lies in such an extension. The legal system we know constitutes the

backbone of our society, and without it none of us would have any security or freedom of person or of property. Personal freedom would be meaningless and property would be useless to us without a system of protection and vindication of our rights. The existence of a mechanism for vindication presupposes a tribunal with authority to adjudicate the existence and extent of such rights as well as of a system for enforcement of any rulings made by such a tribunal. It usually is said that the maturity of a society, and the rod for measuring the progress made from the primitive state, is found in its legal system and its operational efficacy. What comparable institutions currently exist in the international arena?

There is no organization comparable to the Congress having substantial legislative competence with right to pass laws binding upon the individual states of the world. And we are a long way from the type of international consensus or common ground which would constitute a necessary prerequisite for the creation of any such organization. Just ask yourselves how much agreement it would be possible to master among states at the present time on such an organization's authority to legislate on allocation of world resources and materials, including water, distribution of population surpluses, and food-stuffs. The present chances of a significant number of states agreeing to confer such legislative authority on an international organization must be slight indeed. The European Community, or Common Market, represents a remarkable step in that direction taken by the six West European states involved. But the successes as well as the difficulties of that union indicate the scope of the problems confronting efforts to extend further such a union.

How does the United Nations compare to an international legislature? Some critics of our participation in the United Nations have charged that our

membership in and adherence to that organization amount to giving up national sovereignty and control in significant areas. Were that charge true, then the United Nations might be, at the present time, a form of international legislature of limited authority—but it is not. In ratifying the Charter of the United Nations, we undertook to conform our conduct to the standards and requirements of that landmark treaty, but it does not commit us to acceptance of binding decisions in significant areas without our own future consent. The authority of the General Assembly, at least as illustrated by the 20 years of its practice, is advisory rather than binding. Actions such as the U.N. intervention in the Congo might suggest a greater authority, but reflection will suggest that participation by the states supplying troops was dependent on their individual willingness to do so. In an advisory opinion in 1962, the International Court of Justice rules that other members of the United Nations were obliged to contribute their rated share to the cost of such operations. Subsequent political decision in the Assembly, however, has undercut the judgment handed down by the Court; it would seem that a political compromise has been achieved falling short of adherence to any compulsory duty to contribute in such a case.

The Security Council, on the other hand, is provided with authority to hand down binding rulings in certain limited situations. On paper, this authority of the Security Council appears to give it limited legislative competence. In practice, the well-known veto power insisted on by the Russians (and equally essential to original participation by the other great powers), reduces that binding authority to nearly zero so far as the five powers with a veto are concerned. For states other than the big five, it might be thought that the Security Council possesses significant legislative authority. In fact, international disputes

involve two or more parties—it usually takes two to tango. This being the case, the likelihood of both or all participants finding a friend among the veto powers is rather substantial.

For these reasons, in terms of a realistic appraisal, we cannot regard the United Nations as having significant obligatory legislative authority. We are parties to a variety of other treaties which create organizations with special limited authority to make binding rules. But the limit of competence of these organizations is specialized and narrow, not touching the major issues of international peace.

Just as there is no real international counterpart for Congress, so there is no real international counterpart for our courts or judicial and law enforcement system. The International Court of Justice is a unique institution. If I wish to sue my neighbor because he damaged my property, I can invoke the assistance of a court without his consenting to be sued by me in that court. This is not so with the International Court. In suits between individual states, the ICJ authority is dependent upon agreement by *both* or *all* parties that the Court hear the case. The Statute of the Court makes provision for states to indicate in advance of any particular dispute that they accept the compulsory jurisdiction of the Court. Most such acceptances, however, have been rather carefully qualified by the states filing them. Thus, in the celebrated Connolly amendment to the United States declaration concerning the jurisdiction of the Court, it is provided that the United States reserves the right itself to decide whether certain types of suit are within or outside the jurisdiction of the Court. This gives us in many cases the ability to decide, after suit has been brought, whether we will allow it to continue. Pretty smart, you say. Well, unfortunately, this means that if we wish to sue any other country in that Court, it gets the benefit of a similar veto over the

Court's jurisdiction. If the United States is not prepared to make a more general commitment to the authority of the International Court, it goes without saying that a number of other states are prepared even less.

True, the International Court does have another kind of jurisdiction: its so-called advisory jurisdiction. The General Assembly, the Security Council, and certain other organs of the United Nations can ask the Court for an opinion on an allegedly hypothetical question. The Court's opinion on whether the Soviet Union and other countries were obligated to contribute towards the cost of the Middle East and Congo operations came before the Court under this authority. The opinion given under such jurisdiction is advisory in name as well as in political reality; the organ requesting it is not bound to follow it, nor are the individual states.

In sum, it is clear that in the international context not only is there no substantial counterpart to the Congress, but also there is no substantial counterpart to our judicial system. How then can we speak of a subject called "international law"? Austin once defined law as the command of a sovereign. By this he meant that before you could have law you must have a body with authority to make law or rules of conduct, and, in addition, you must have the machinery necessary to enforce those rules when they are made. Clearly, in the Austinian sense, we have no such thing as international law. What, then, do we have, and why is it called "international law"?

To work towards answers to these questions, it is necessary to go back to our domestic concept of a legal system. We have laws prohibiting one person from assaulting another or taking his property by force. We have laws requiring automobiles to be driven according to specified requirements. The existence of these laws does not guarantee that certain individuals will not break them

and thereby expose themselves to prosecution. For most of us under most circumstances, however, what is important in terms of the way we live our everyday lives is that most people do obey the requirements of these laws. Most people do drive on the right side of the road (with the notable exception of the English) and most people do not assault others or attempt to take their property away by force. If a significant number of the people in this country began to violate these laws steadily, our system of order would break down, notwithstanding the backup threat of prosecution of the violators. Laws or rules are significant in our daily lives, therefore, because we safely can predict that others *will* obey them, and we can plan our own actions and lives on the premise that they *will* be broadly obeyed. For these reasons, one school of thought defines law as a system of rules and orders for the mutual benefit of the members of society, which rules and orders are generally followed and obeyed. *In this sense*, we have a significant amount of international law *but it is of the utmost importance to bear in mind that the reason why there is habitual behavior consistent with the rules is mutual benefit and not the threat of a policeman or a sheriff*. You have the international rules of navigation—what would happen to navigation of shipping without habitual observance of those rules? If you think of international law as that body of custom and experience which has grown up or evolved from consideration of regulation required for the common benefit and estimate the strength of any particular rule in any particular case in terms of the reciprocal interest of the other state or states in maintaining adherence to that rule, you will come closer to an understanding and appreciation of what international law means, to what extent it can be relied upon, and to what extent it must be taken into account in planning action or strategy.

If, at the same time, you bear in mind the old adage about the importance of acting consistently, you will come even closer. If the United States takes the position today that the rule of conduct in a particular situation is one thing, and tomorrow takes an entirely different and possibly inconsistent position from that taken the day before, you can see easily that other states are less likely to be prepared to follow or accept either yesterday's statement of the rule or today's statement of them. The importance of acting *consistently*, therefore, requires each state in any particular situation to think not only of the immediate problem and what might be done with it, but also to think of the precedent (as lawyers call it) which any particular action might create. In analyzing action in any particular situation, it is most important to put ourselves in the shoes of the other state or states involved, and then ask how the particular rule we urge might be used by them in another context. Let me give you an illustration. If we claim that it is permissible to stop shipping on the high seas to see whether arms are being carried to the Viet Cong aboard the vessels stopped, what happens if the Russians claim to have a reciprocal right to stop our shipping in the Caribbean area to see whether it is carrying supplies usable by revolutionaries seeking the overthrow of the Castro regime? It is difficult obviously for us to assert a right to stop and search shipping on the high seas for particular purposes without according a similar right in similar situations to other states. This element in analysis we sometimes call *mutuality* or *reciprocity*, and, if you stop to think for a moment, you can see that a similar concept underlies many of our own everyday dealings.

The importance and significance of this element of reciprocity or mutuality in international affairs is seen most easily in the more mundane transactions and events of everyday affairs. Suppose

that a U.S. corporation is thinking of establishing a fairly large business in Venezuela or Brazil, of building a factory, of establishing a stock of merchandise for sale and distribution from there through other Latin-American countries. Among the things it must consider are the following: Can it get permission to come in? Will its personnel be allowed to enter and leave the country and travel freely? Will their lives and safety be assured? Will the company's capital investment be fairly protected? And, nowadays, will a fair method of taxation be used and applied both to the corporation and its personnel by the host state? American companies are going abroad every day and setting up such establishments precisely because rather precise rules of international law apply to regulate the rights and duties of the corporation and the rights and duties of the host country. The element of mutuality and reciprocal interest for the host country as well as for the United States is clear.

What, then, is the source of international law which provides this measure of assurance and predictability? If there is no international legislature, where does this law come from and how is its content ascertained? The answer is from at least two more or less distinct sources: treaties or agreements entered into between states, and the so-called general, customary, or "common" international law.

Customary international law claims to be a distillation of the experience of states over at least the last 500 years. It purports to have as its core or basis those practices, those rules, which have been observed and followed habitually by states in their dealings with other states. Now you will notice that in talking about international law, I am talking about a state dealing with another state. I am not talking about an individual of one state dealing with an individual of another state, and there is a reason for this. International law says

(right or wrong and for whatever reason) that this whole body of learning has to do with the relationships between states, not between individuals. This approach is beginning to break down, but at least the historical material emphasizes heavily, just as the International Court Statute emphasizes, that the parties who are concerned with international law are the states of this world, not their individual citizens as such.

Let me give you a couple of illustrations of rules of customary international law. Castro broke one of them in confiscating American property in Cuba. There is a rule of general international law which states that it is unlawful to take someone's property without paying just compensation for it. There is another standard which says (these are generalizations, the rules are more precise than this) that a state is required to provide minimum acceptable levels of protection for visiting aliens—not less than national standards, and sometimes more.

Now you may think this pretty nebulous stuff: states change, governments change, and governmental attitudes to these rules doubtless change, too. As a matter of fact, one of the biggest problems at the present time is that many of the new nations do not think very highly of many of the standards established by the older nations, primarily from western Europe. A considerable argument is going on concerning just how sound and how good and how reliable for purposes of prediction some of these rules of international law are. But one of the interesting features of customary international law is the flexibility that it has.

Now, as you know, many of the rules of law which govern your everyday lives—for instance, the law which governs your protection against people negligently injuring you—are general rules not to be found in statutes at all. They are found in the decisions of

courts, built up into a consistent body of practice through case-by-case adjudication. They are an important part of our domestic legal system and provide some analogy for customary international law.

The second, and probably the far more important source of international law rules, is the treaties or agreements which states make. The United States is a party to some 6,000 treaties with the other countries of the world. These treaties, of which the U.N. Charter is one, run the gamut from broad political treaties, including military defense agreements, through trade and commerce treaties, through tax agreements, to agreements fixing the size and nature of visiting military missions. Obviously, these treaties are of greatly varying importance to our national interest. Less obviously, but equally clearly, these treaties are negotiated and worded with widely differing standards of precision and clarity of meaning. A treaty establishing the appropriate taxing power of the two countries party to it can be expected to be drawn with technical precision and detail. A political treaty expressing friendship between two countries and suggesting that they will take a common view and common policy in matters of military action and defense will use broad and nebulous standards. And, if you have any question, look at the language of the SEATO treaty and the statements there about the circumstances under which one party may come to the defense of another.

In other words, some kinds of treaties establish a relatively clear and definite list of rights and duties for both or all parties, and the statement leaves little room for interpretation or difference of opinion about the scope and extent of those rights and duties. Others are deliberately framed in language so general as in reality to create no rights or duties.

Where, in this scale of things, does

the U.N. Charter fall? Article 51 of the Charter provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. . . .

Our position in Vietnam is, in part, premised on this article; we are engaging in collective self-defense of the Republic of Vietnam against external aggression. But the Communist countries take a different view of the meaning of this article, as do some writers and speakers in this country, including some of those critical of our current policies. In the event of disagreement over the meaning of article 51, where do we go to find the "true" meaning of the Charter? If you and I sign a contract for the sale of my house to you, and we disagree as to the meaning of one of its terms, we go to court to find out which of us is right. In the absence of an International Court with binding jurisdiction, where do we go for an authoritative interpretation of our treaty commitments? Are we forced to the conclusion that our 6,000-odd treaties and agreements are useless because there is no tribunal with compulsory jurisdiction to interpret and apply them? Common sense suggests the answer is no—otherwise, why would our State Department so sedulously go about negotiating new ones, like the Test Ban Treaty?

Once again, the answer comes back to practicalities and not theoretical possibilities. In everyday international life, states usually, and in fact almost invariably, keep those treaty commitments of the kind which get framed with some degree of precision. And the reason is clearly one of mutual interest. Cuba violated treaties as well as customary law in confiscating American property interests without compen-

sation. She is paying the price by finding out how difficult it is for her now to get development capital.

But it must be realized that as the subject matter of a given treaty approaches more nearly to the vital interests of a country, so increases the unwillingness of the country to make a precise binding commitment for the future, and so increases the danger of any commitment receiving a forced interpretation to suit the particular tastes of the interpreter. The degree of security, certainty and predictability found in commercial matters between states on friendly terms diminishes sharply when the treaty is one between less friendly states and involves more vital interests or subject matter. Many of the commitments set forth in the U.N. Charter do involve vital national interests. Accordingly, competing and divergent interpretations frequently are urged as to the nature and content of those obligations. The issues creating the problems of interpretation are more apt to arise between relatively hostile states or groups of states so that the factors of mutuality and reciprocity are likely to be minimized. Threats or acts of reprisal by the Russians are unlikely to influence our action or interpretation of a particular Charter provision. The *quid pro quo* or mutuality is here hardest to see. In this context of divergent claims and interpretations of the Charter, what good does law or legal interpretation of the Charter as a treaty do us? Does the Charter have any real meaning, any real significance, if the different protagonists can interpret it to suit themselves?

Let me illustrate this problem. In 1956, an Emergency Force for the Middle East was set up pursuant to U.N. resolutions. In 1960, a somewhat similar force was dispatched to the Congo likewise pursuant to U.N. resolutions. The Soviet Union refused to make any contribution to the large costs of either force as did a number of other U.N.

members. France refused to pay a nickel towards the costs of the Congo operation. The U.S.S.R. gave as its reason that these forces were constituted illegally, since only the Security Council had authority to use force or direct the use of force and only the Security Council had authority to allocate any consequent expenses. We advanced the legal argument that article 17 of the Charter gave the General Assembly the necessary authority to, in effect, tax the members to cover the costs of these operations. Here, then, you had the interesting situation of both the United States and the Soviet Union earnestly advancing and pressing detailed legal arguments as to the meaning of the charter. Why should *either*, why should *both* have been concerned to advance arguments of this sort? What did either hope to gain or stand to gain? Eventually, the General Assembly, by majority vote, requested the advisory opinion of the International Court on this issue. What was the supposed object of this move? Who would stand to gain from such an opinion, whichever way it went? The Court finally decided by a 9-5 majority that our interpretation was correct. Who, then, gained from this decision? As far as I know, the Russians still have to pay their first nickel towards the costs of those operations. In problems of this importance and complexity, affecting vital national interests, the answer appears to be that a complicated game of chess is being played. Obviously, both sides feel that something is to be gained by making as persuasive an argument as possible; obviously, both feel that there is a market to be persuaded; obviously, both see goals or objects the attainment of which merits investing in the best available legal argument in order to maximize the persuasiveness of their particular position. And, yet, this species of psychological warfare leaves the layman or newspaper reader somewhat confused. He clings tenaciously to the belief or

hope that law, treaties, and the meaning of treaty commitments are immutable of fixed, definite, and precise meaning. That hope or belief is just as false in the international arena as it is in the domestic arena, as illustrated by some of the landmark disputes of recent years which tested the meaning of our own Constitution.

In the context of Vietnam, this aspect of psychological warfare is being played and *played hard* by both sides. It is being played hard by forces of differing viewpoints right within this very United States, as you all know. And so you are apt to conclude: this is a business for experts, for legal officers of senior rank responsible for advising our government and the President. What does it have to do with the military officer, even of most senior rank?

The answer to that question varies through something like the same spectrum as treaties vary, as I suggested earlier. Rather clearly, it is a matter of interest but not of professional responsibility for the senior military officer to be well informed about the legal basis of our position in Vietnam. The Legal Adviser to the State Department has issued a lengthy paper on that subject which may provide guidance. The military officer is entitled to rely on the task being done well by that office. But suppose that the question is: May I or should I, as commanding officer of a destroyer, intercept shipping on the high seas destined, as I believe, for the Viet Cong? Here, you may say, there is another answer available to relieve the commanding officer. Either the problem may be covered by orders, issued from above, or such orders may be obtained quickly by single sideband. Once again, someone with authority and legal experience will have considered the international law problems, if any, and will have supplied adequate guidance for the destroyer skipper. The large element of truth in this last answer cannot be denied. The problems of a commanding

officer which can be foreseen in advance are fairly easily answered by preestablished orders or guidelines. Trouble is apt to come, however, in those situations which have not been foreseen, or are not covered in orders, or as to which a measure of discretion (large or narrow) is left within the orders. In this context, as in any other executive situation, the officer or person charged with carrying out policy or orders must have some substantial appreciation of the policy underlying his orders in order to be in a position to implement them as well as possible. And the skipper here, as in other situations, has little room for error. As commander of a commissioned naval vessel, his acts may engage directly the responsibility of the United States whether or not his actions are within or beyond the scope of his orders. Failure to act may be just as bad as acting too vigorously, particularly in circumstances in which, under Navy Regulations, he is charged with the duty of protecting American lives and commercial interests. But this, and other provisions of Navy Regulations, would seem to require the skipper to be a "sealawyer." Confronted with what may seem an impossible burden requiring legal skills you have not received, you may throw up your hands. You may regard these regulations as a basis for charging a scapegoat if the necessity for finding one arises. There may be a scintilla of truth in both these propositions. Certainly, no one imagines that you can be given a serious foundation in the substantive content of international law in the course of this seven-day study. Former classes have experienced a measure of frustration over this—some have felt that the instructors and the College have presented international law as something which the officer is required, by appropriate regulations, to have a working knowledge of, and yet he cannot possibly obtain that knowledge from the brief time allotted to its study. The consultants who have come

for this program, in government service and academics both, have invested a goodly number of years in studying this material. You, as classes before you have discovered, will find that they have a great fondness for argument and little comparable fondness for clear and direct answers. Blame this on their legal training and experience. But do not go away thinking that the uncertainties, the doubts, and the large scope for argument make this subject a matter of debate only. It is quite unrealistic to suppose that, in the space of this short study, you can become international lawyers; and you should not be disconcerted when, at its end, you decide that you have mastered little, if any, of the substance of international law.

What you should derive from this study is an introduction or background, a viewpoint or perspective, of what international law is all about, how it can affect and does affect national policy, the kinds of influence it can exert on policy and strategy, and some feel for the varying significance of international law imputs in varying situations. As background, this study is certain to be of significance to future work you may do in planning operations. Many of you, in the near future (or indeed in the immediate past), will be preparing operational plans, and your choices or alternatives and the reasons for choosing between them well may be affected by considerations of international law. In short, you have been or will be responsible for initial preparation of the plans which carry with them the instructions to the skipper or other commander on the line. Here, your interest in this

subject matter becomes much more obvious and direct. Suppose, for instance, that you had been assigned to work on preparation of orders covering Operation Market-Time. While you would expect to go to JAG for help on available international law, you would still want to be in a position yourself to appraise and orient the advice you receive and correlate it to your operational plan.

Let me summarize for a moment. The international law which you most likely are to be concerned with in planning is the body of material affecting rather vital national interests. This is the material, within the broad field of international law, which is most volatile and relatively uncertain, in which approaches and attitudes may be more important than knowledge of specific treaty provisions or precedents from the past, in which balanced consideration of varying arguments may be required. This aspect of international law does contain great uncertainty, as well as great capacity for flux and change. It is worthwhile remembering that other areas of international law, less closely identified with basic national interest and peace but fundamentally important to everyday international exchange and trade, are much more certain in their content and much more reliable in state conformity of conduct to those standards. Status-of-forces agreements, for instance, are carried out every day—many of you will be familiar with some of the details of cases involving members of a crew or other contingent involved with local authorities in another country.