Winter 1972

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NOTES

THE THREE-MILE LIMIT: ITS JURIDICAL STATUS

INTRODUCTION

The nations of the world are now facing decisions of momentous importance to man's use of the oceans for decades ahead. At issue is whether the oceans will be used rationally and equitably and for the benefit of mankind or whether they will become an arena of unrestrained exploitation and conflicting jurisdictional claims . . . .

The issue arises now—and with urgency—because nations have grown increasingly conscious of the wealth to be exploited from the seabeds and throughout the waters above . . . . The stark fact is that the law of the sea is inadequate to meet the needs of modern technology and the concerns of the international community. If it is not modernized multilaterally, unilateral action and international conflict are inevitable.¹

The content of the above is as realistic as it is ominous in its message. Its validity is being strongly testified to today, and it promises to have even more dire portent for the future.

A diagram of the pattern of national control in offshore waters involves the delimitation of three zones:² the high seas which are free to the use of all states;³ a narrow territorial sea over which coastal states⁴ have sovereignty, subject to the right of limited passage;⁵ and

3. The high seas, which lie outside the territorial seas of the littoral states, are open and free to all states alike for the purposes of navigation, fishing and submarine cable communications. "The principle of the community of the seas (res communis omnium) was proclaimed long ago in antiquity." U.N. Doc. A/CN.4/17 (1950).
4. The term state denotes the concept of the association of persons in a particular place for a particular purpose, not merely an association of persons characterized by ethnic homogeneity.
5. As a general principle firmly established in international law, the right of limited or innocent passage prohibits unreasonable interference with the navigation of vessels while in the territorial sea of a coastal state. Besides traversing the waters, innocent passage may include stopping and anchoring incidental to ordinary navigation or an emergency. For a discussion of the principle of innocent passage as a customary rule of international law, see Colombos §§ 144-45.

Ten articles of the 1958 Convention on the Territorial Sea and the Contiguous
national waters, over which national sovereignty is absolute. The term territorial sea indicates a definite maritime zone or belt adjacent to a state's territory. Such portions of the sea along a state's coasts are by world-wide acceptance considered as a prolongation of that state's territory, and the jurisdiction of the state over it is recognized.

It may be said that the coastal state is sovereign over its territorial waters. The word sovereignty is used to denote the rights and powers which each nation concededly exercises over its own land territory. A state may exercise exclusive jurisdiction within its territorial sea and do any act which it may lawfully do upon its own territory. Under international law, the territorial sea is as much a part of the state "as is the land itself." The right of limited passage granted to foreign states, and other privileges granted, are concessions which leave the general principle of sovereignty intact. The territory of a coastal state includes also the air space above the territorial sea as well as the bed of the sea and its subsoil.

Today, no unanimity exists as to the extent of a coastal state's exclusive jurisdiction, and the controversy lies in the failure of the law to provide a definitive answer regarding the correct breadth of the territorial sea. More specifically, there exists no international convention governing disputes over the width of the territorial sea.

The result of this unresolved controversy is clearly illustrated by the
Wet War in the Pacific—the tuna boat conflict between Chile, Ecuador and Peru and the United States. The crux of this fishing vessel dispute is the disparity in the width of the territorial sea claimed by the United States. Chile, Ecuador and Peru claim a territorial sea 200 marine miles in breadth. The United States claims a three mile territorial sea and an exclusive fishing zone which extends from shore a distance of 12 miles. This dispute is 17 years old, during which time United States’ ships have been seized, payments of fines impressed, gear and catch confiscated and fishermen injured. Nor does the contemporary situation show any improvement over that of the past. Rather, it indicates far deeper involvement in the future. The fact, then, that a definitive answer as to the correct breadth of territorial seas is appropriate to the situation becomes more and more apparent.

**Analysis of International Custom**

When the process of codification has failed to establish a rule of international law pertaining to the width of territorial seas, such a rule must be found in the customs and usages of the states. For a rule to appear as customary international law, it is necessary that there exist a well-established “general practice” by the states which complies with the rule that is “accepted as law.” Custom arises when numeorous states

12. The marine or nautical mile now commonly used is equivalent to about 1.15 English statute miles, or 1.85 kilometers. It is this mile which is referred to in modern treaties and statutes relative to maritime jurisdiction. The so-called “three-mile limit” thus equals about three and one-half statute or geographic miles.

13. In 1966, the United States Congress enacted legislation which established a nine-mile exclusive fishery zone contiguous to the three-mile territorial sea. 16 U.S.C. §§ 1091-94 (1970). This, in effect, extended the fisheries zone out to a distance of 12 miles from the United States coastline:

The United States will exercise the same exclusive rights in respect to fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States.

*Id.* § 1091. Yet the United States has remained adamant in its position on the lawful breadth of territorial seas: “The United States recognizes the territorial sea as being no more than 3 nautical miles in breadth.” U.S. DEP’T OF STATE, PUB. NO. 8423, AM. FOREIGN POLICY, CURRENT DOCUMENTS 213 n.17 (1969). On the one hand, then, the United States has extended its jurisdiction in order to take advantage of the fishery resources off its coast, and on the other it maintains that only a three-mile territorial sea is legitimate. The United States would have it both ways.

14. Beginning on January 11, 1971, naval forces of the Government of Ecuador seized 14 United States fishing boats well beyond 12 nautical miles of the Ecuadorian coast but within 200 nautical miles thereof. The Government of Ecuador imposed substantial fines on the vessels. As a result of these seizures, the United States, pursuant to its domestic law, suspended its military sales to Ecuador.

15. For a comprehensive account of contemporary efforts to codify international law, see U.S. DEP’T OF STATE, PUB. NO. 7825, 1 DIGEST OF INTERNATIONAL LAW § 13 (M. Whiteman ed. 1965).

16. See Article 38 of the Statute of the International Court of Justice which
"acquire the habit of adopting, with respect to a given situation . . . a given attitude to which legal significance is attributed." [17]

Analysis reveals there are two distinct elements in the operation of custom as a source of international law. [18] First, there is the historical element. This is the general practice of states as it has emerged from the community of states in its entirety. [19] Here, two factors have to be taken into consideration: the continuity of the practice, and its extent as to the number of states that conform to it, as well as the status of such states. [20]

In the past, it could be asserted that only an "immemorial practice" could establish a customary rule. [21] Such a stand would make impossible the creation of new customary rules under any conditions. The contemporary international community is so susceptible to change that this view is no longer maintainable. Today the period of time which must pass before a custom may be declared established depends upon the circumstances of the cases and the nature of the rule involved. [22]

Secondly, there is the mental element involved in the formation of custom—the conviction on the part of the states that in creating precedents they are "implementing legal rule." [23] It becomes necessary, therefore, to establish whether a state practices a custom because it is so obliged by a rule of international law, or due to some other motivation—such as courtesy, friendship or convenience. [24]

speaks of "international custom, as evidence of a general practice accepted as law." I.C.J. Stat. art. 38, para. 1(b).


18. Id. ¶ 3.15.
19. Id. ¶ 3.13.
20. Id.
21. Id. The weakening effect of such a principle on the development and growth of international law has been observed:

Some writers have charged with some justice that in numerous cases a customary rule, when finally arriving at that exalted position, was quite outdated and archaic. In other words, the slow growth of a usage into a customary rule of law did not allow the law to keep up to date with changing aspects of the very international relations that were to be governed and regulated by the rule. As a result states, recognizing the inadequacy of a customary rule, fell into the habit of violating it because of that inadequacy.


22. Sørenson ¶ 3.13. A recent illustration of the formation of customary law is the rapid and universal acceptance of the principle of sovereignty over the air. That is, "the principle is firmly established that each state has full and exclusive sovereignty in the air space over its territory and territorial waters." B. Brierly, The Law of Nations 219 (6th ed. 1963).

23. Sørenson ¶ 3.15.
24. See The Scotia, 81 U.S. (14 Wall.) 170 (1872), where the Supreme Court stated:

This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but it is recognition of the

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An international practice gives rise to a custom only when continuity and generality are present. These reflect the presence of the general consent by the states to the rule of law which the custom embodies. On the other hand, a general custom need not have been expressly approved by a given state in order to become applicable to it. \(^{25}\)

Thus in the sphere of international law it is not necessary—or, normally, possible—to show that a rule, asserted to represent a customary rule, has been followed (i.e. consented to) by all States. The element of consent is satisfactorily met by the circumstance that a rule has been generally followed, that it has been generally consented to. . . . [T]he will of States, of every single State, is not an absolute condition of the creation of a rule of international law. \(^{26}\)

A customary rule of international law will not apply to a state which has consistently refused to consent to it and has constantly opposed its application. \(^{27}\) Such persistent opposition may not prevent “the recognition of the rule in question as a rule of general international law.” \(^{28}\) Firm opposition of several states, however, particularly if they constitute a substantial portion of the international community or include one or more of the great powers, may obstruct the formation of a customary rule of international law. \(^{29}\)

It becomes necessary, then, to determine whether a particular width of territorial seas exists as the exclusive customary rule of international

\(^{25}\) historical fact that, by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Id. at 188.

\(^{26}\) Sørenson ¶ 3.16.


\(^{28}\) Sørenson ¶ 3.16. This principle inherent in custom as a source of international law gives rise to an anomaly:

[A]s a usage develops into legal custom, any country objecting to the usage may state its objections and refuse to follow the example of others who assent to the practice in question. When the usage changes into a legal custom at a later date, the objecting nation is not bound by the new rule. On the other hand, it is understood quite generally that when a new state comes into being and is admitted into the community of nations, it is bound by all rules of international law originating in custom.

G. von Glahn, Law Among Nations 17 (2d ed. 1970). But see U.N. Charter art. 2, para. 6: “The Organization shall ensure that States which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.” Id. In recognition of this provision, the International Court of Justice may invoke “international custom, as evidence of a general practice accepted as law.” I.C.J. Stat. art. 38, para. 1(b).

\(^{29}\) Sørenson ¶ 3.16.
law. Vastly different limits have been put forward at various periods on the extent of the territorial sea. To date no agreement has been reached on the breadth of the territorial sea. This failure is mainly due to the attitude of the "three-mile states."

**The Three-Mile Limit**

No one maintains that the three-mile limit for the territorial sea exists by force of a general international convention. One must look, then, for its roots and growth in custom. The three-mile limit exists, if at all, because "the usage and practice" of nations has accepted and maintained it.30 A review of the origins and rationale of the width of the territorial sea will be made therefore, with a view toward ascertaining whether the three-mile limit is an existing rule of customary international law.

*Genesis of the Three-Mile Limit*

The three-mile limit emerged as a compromise between the cannon-shot rule and the practice of measuring the width of the territorial sea by the mile. It was the Mediterranean countries and Holland that formulated the cannon-shot rule,31 while the Scandinavian states of Denmark, Norway and Sweden "claimed territorial jurisdiction within a measured distance from their coasts."32

The generally accepted view has been that the origins of the three-mile limit lay in a concept concisely formulated by the Dutch jurist, Bynkershoek: "the dominion of the land ends where the power of the arms end."33 For him "dominion depended on control,"34 and by control in marginal seas was meant actual control exercised by cannon present on the shore. The misinterpretation of this principle has been that a state was entitled to exercise sovereignty over the maritime belt extending seaward from its shore up to the extreme range of cannon shot, and that the extreme range of cannon shot was about three marine miles from the low-water mark of the shore. Therefore, three miles came to be recognized as the limit of territorial waters.35

Bynkershoek at no time mentions a limit of three miles as the

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31. The extent of a state's territorial dominion over the marginal sea should be measured by the range of cannon fired from the shore.
33. *Colombos* § 102.
35. *Id.* 210-13.
proper extent of territorial waters. The rule he mentions is a limit of cannon shot from the shore—a rule he did not invent. It was a rule practical for purposes of maritime neutrality in time of war, and Bynker- shock did not put forth a doctrine of a uniform territorial sea along the entire coastline of a state. He dealt instead with a series of protected zones covered by actual guns placed on the shore and merely restated the cannon-shot rule as it applied to the limit of territorial waters in time of neutrality as it was practiced by southern Europe. This did not result in a continuous maritime belt of uniform width, but rather is an undulating line dependent upon the location and range of cannon positioned on the shore.86

By the middle of the 18th century, the Scandinavian states had developed the practice of claiming jurisdiction over continuous belts of adjacent water measured in leagues.87 This development took place without any reference whatever to the cannon-shot rule.88 Rather, this claim to jurisdiction within a coastal belt of standard mileage was provoked by economic considerations—coastal fishing and trade. The cannon-shot rule and the practice of fixing a territorial coastal belt measured by the mile were thus distinct in both origin and rationale.89

Prohibitions on trading and fishing in waters surrounding Danish territories to a distance of one league, of four nautical miles,40 were enforced as early as 1743. Economic reasons were responsible for the introduction of a one-league limit.41 Danish sea power, weak in relation to that of Holland, France and Britain, could not enforce claims to wide belts of coastal waters. A retreat to narrower limits was necessary if Denmark hoped to preserve at least her claims to the offshore fishing.42

In the closing decade of the 18th century, the scope of the cannon-shot rule closely resembled the limits of the uniform maritime belt laid down by Denmark. The transition from the cannon-range doctrine to the three-mile limit had clearly begun, with each being treated as equivalent.43 France was prepared to acknowledge a continuous belt of standard width provided it was one of three miles, which was regarded as the possible range of cannon. When claims to jurisdiction over a

36. Id. 228.
37. Id. 213.
38. Id. 228.
39. Id.
40. The Danish-Norwegian league of the 18th century measured four marine miles, while the nautical league of the Mediterranean countries usually was nearer to three miles.
41. Kent, supra note 32, at 539.
42. Id. 552.
43. Walker, supra note 34, at 230.

Produced by The Berkeley Electronic Press, 1972
continuous belt of territorial waters were confined to a width of three miles, the essential elements of the two rules met. The three-mile limit, then, emerged from both rules—"Danish practice contributing to it the concept of a continuous belt, and the cannon-shot rule determining its width." However, the concept of the modern three-mile limit had already been received in the courts of the United States.

**Practice of the United States of America**

In the infancy of the United States, American statesmen enunciated a conservative view in regard to the extent of territorial waters. In 1793, Secretary of State Jefferson announced that United States officials were to restrict the enforcement of their orders for the present to the distance of "one sea league or three geographic miles from the seaside." No further executive declarations during the 19th century appear to be contrary to that assertion. When the question arose again, the three-mile limit seemed to be established as the American position.

Consideration of early judicial opinions confirms the three-mile limit as the approved position of the United States. In the case of *The Ann*, Justice Story posited the principle of international law that every state has exclusive jurisdiction over the waters adjacent to its shores to the distance of a "cannon shot, or marine league" (or three miles). Subsequently, the Supreme Court of the United States took the view that the limit of the right of a state to control its seacoasts was never less than a marine league from the coast on the open sea. In 1923, this traditional position supporting the three-mile limit became fixed in American law when the Court stated:

> It is now settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays,

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45. P. Jessup, *supra* note 9, at 49.
46. 1 C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 455 (2d ed. 1945). But Jefferson further acknowledged the disparity of the then existing claims to territorial seas:

> "The greatest distance to which any respectable assent among nations has been at any time given has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league."

 Id. 455 n.1.
47. P. Jessup, *supra* note 9, at 51.
49. *Id*.
and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coastline outward a marine league, or three geographic miles.51

On September 28, 1945, President Truman issued the "Truman Proclamation" which secured specific rights in the resources of the seabed and subsoil of the continental shelf.52 The proclamation did not extend sovereignty over offshore waters beyond the three-mile limit of the territorial seas. Apparently other nations construed the proclamations as an extension of sovereignty, because a number of pronouncements by other states followed. Among those nations were Chile, Ecuador and Peru, which claimed sovereignty and jurisdiction over the areas of sea adjacent to their coasts, extending not less than 200 nautical miles from shore.53

The Submerged Lands Act of 1955,54 which establishd the title of states of the Union to resources of the seabed of the continental shelf, implicitly limits to three miles the distance to which the boundaries of the coastal states may extend into the Atlantic Ocean or the Pacific Ocean.55 Thus, the United States has consistently adhered to the three-mile limit. In 1955, an official statement of the United States' position read as follows:

That the breadth of the territorial sea should remain fixed at three miles, is without any question the proposal most consistent with the principle of freedom of the seas. The three-mile limit is the greatest breadth of territorial waters on which there has ever been anything like common agreement. Everyone is now in agreement that the coastal state is entitled to a terri-

53. In August, 1952, Chile, Ecuador and Peru signed the so-called Declaration of Santiago on the Maritime Zone, whereby the three countries proclaimed "the exclusive sovereignty and jurisdiction corresponding to each of them over the ocean adjacent to the coasts of their respective countries up to a minimum distance of 200 marine miles from their coasts." Hearings on H.R. 9584 Before the Committee on Merchant Marine and Fisheries, 83rd Cong., 2d Sess., at 33-34 (1954). On May 8, 1970, the governments of Argentina, Brazil, Chile, Ecuador, El Salvador, Panama, Peru, Nicaragua and Uruguay proclaimed in a joint declaration [1]he right to delimit their maritime sovereignty and jurisdiction in conformity with their own geographic and geological characteristics and consonant with factors that condition the existence of marine resources and the need for national exploitation.
55. The United States Supreme Court has qualified that limitation where historical events had fixed the seaward boundaries for some states in excess of three marine miles. U.S. v. Louisiana, 363 U.S. 1 (1960).
torial sea to that distance from its shores. There is no agreement on anything more. If there is any limit which can safely be laid down as fully conforming to international law, it is the three-mile limit. . . . [N]either 6 nor 9 nor 12 miles, much less other more extreme claims for territorial seas has the same historical sanction and a record of acceptance in practice marred by no protest from other states. A codification of the international law applicable to the territorial sea must, in the opinion of the government of the United States, incorporate this unique status of the three-mile limit and record its unquestioned acceptance as a lawful limit. 56.

It would appear, then, the United States remains a champion of the three-mile limit. However, since the Geneva Conference in 1958, a willingness to explore any projected proposals in an effort to achieve international agreement seems apparent. 57 The proposal of the United States to extend the territorial sea is presumptive evidence of a softening of the United States' traditional position.

International Evidence of the Extent of Territorial Waters

Having completed a survey of the practice of the United States, it is necessary to examine evidence of an international character. Efforts by a world organization to codify the law of the territorial sea began with the Hague Codification Conference of 1930. 58 At the Hague, the conferees dealt only with the problem of territorial seas. The question of the proper breadth of the territorial sea was debated so vigorously and with so little concurrence of opinion that no resolution proposing an appropriate maximum breadth was ever put to a vote. Figures for the breadth of the territorial sea ranging from three miles to several hundred miles were suggested but none was adopted. More states continued to conform to the three-mile limit than to any other, but they did not constitute a majority of the international community. 59

56. 32 DEPT. STATE BULL. 699-700 (1955).
58. In view of the divergence of doctrines relating to territorial seas, the League of Nations organized the Conference to negotiate an international agreement on the subject.
59. Twenty of the 38 coastal states attending the Conference would have accepted either the three-mile limit or the three-mile limit together with a contiguous zone. Reeves, The Codification of the Law of Territorial Waters, 24 AM. J. INT'L L. 486, 492 (1930).
Since the establishment of the United Nations in 1945, the task of codifying the law of territorial seas has been delegated to the United Nations International Law Commission.\(^{60}\) When the International Law Commission was set up, the Commission's work was to involve the more precise formulation and systematization of rules of international law, particularly the regime of the territorial sea. This aspect was discussed at six sessions of the Commission, with the final report of the law of the sea being completed at its eighth session in 1956.\(^{61}\)

The Commission, however, was unable to agree on any of several proposals. In article three of its draft it set forth the following provisions:

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.

2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.

3. The Commission, without making any decision as to the breadth of the territorial sea up to that limit, notes on the one hand that many states have fixed a breadth greater than three miles and, on the other hand, that many states do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.\(^{62}\)

The Commission noted that the power to fix the limit of the territorial sea at three miles was not disputed. While it did not suggest any particular extension of that width, it did conclude that any claim of more than twelve miles was not permissible. The Commission did not, however, explicitly approve the twelve-mile limit. Since several states claimed a breadth of between three and 12 miles, it expressed the opinion that an international conference should settle the question.\(^{63}\)

The final report of the Commission served as the working papers for the Geneva Conference on the Law of the Sea, convened in 1958.\(^{64}\) The Conference took cognizance of "not only the legal but also of the technical, biological, economic and political aspects of the problem."\(^{65}\)

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62. Id. at 3.
63. See the commentary to Article III, id. at 12.
65. Id.
On the topic of central importance—the width of the territorial sea—the Geneva Conference failed to reach agreement.66 When submitted to the Conference, the third article of the International Law Commission could not obtain the two-thirds majority vote necessary for its approval. The Conference contented itself with the faultless conclusion set forth in the Convention on the Territorial Sea and the Contiguous Zone:67 “The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the sea.”68

In a renewed endeavor to reach an agreement on the breadth of the territorial sea, the United Nations summoned a second conference in 1960.69 The fact that the 1960 conference equally failed to produce an agreed solution to this question means that the codification of the law of the sea remains incomplete.

AN EXAMINATION OF THE THREE-MILE LIMIT AS AN EXISTING CUSTOMARY RULE OF INTERNATIONAL LAW

As stated previously, the continuity of the practice and its extent as to the number of states that conform to it give rise to custom. If the continuity of the practice of the three-mile limit is carefully examined, evidence points out that said continuity has not remained unbroken. Since 1945, it has ceased to have effect under the impact of con-

66. The rule fixing the breadth of the territorial sea at three miles was not supported by a majority of the participating states, and a diversity of opinion was evident:

Several proposals were made . . . Some members were of the opinion that it was for each coastal State . . . to fix the breadth of its territorial sea. They considered that in all cases where the delimitation of the territorial sea was justified by the real needs of the coastal State, the breadth of the territorial sea was in conformity with international law . . . Another opinion was that the Commission should recognize that international practice was not uniform as regards limitation of the territorial sea to three miles, but would not authorize an extension of the territorial sea beyond twelve miles. On the other hand every State would have the right to extend its jurisdiction up to twelve miles. A third opinion was that the Commission should recognize that every coastal State was entitled to a territorial sea of a breadth of at least three, but not exceeding twelve miles. . . . A fourth opinion was . . . that the breadth of the territorial sea could be determined by the coastal State in accordance with its economic and strategic needs within the limits of three and twelve miles, subject to recognition by States maintaining a narrower belt. According to a fifth opinion . . . the breadth of the territorial sea would be three miles, but a greater breadth should be recognized if based on customary law.

68. Id. at 1609, 516 U.N.T.S. at 210.
flicting customs or by no longer being practiced within the international community. Further examination shows that its extent as to the number of states that conform to it has been lessened to a large degree.

In fact, the specific territorial claims of the coastal states of the world reveal a pronounced trend toward twelve-mile territorial seas. Prior to 1945, there was no major extension of jurisdiction by any coastal state beyond the traditional three-mile limit. The number of twelve-mile states increased from three in 1950 to 26 in 1966. Of the overwhelming majority of coastal states as of January, 1969, 30 states claimed three miles as the breadth of their territorial sea, 30 claimed 12 miles and 21 had breadths between three and 12 miles. Seven other states had territorial claims in excess of 12 miles. Thirty-one states with less than a twelve-mile territorial sea claimed exclusive extraterritorial fishing rights out to 12 miles. Thus, foreign fishermen are forbidden entry within 12 miles of the shores of 61 countries.

In February of 1971, the United States signed the seabed treaty barring nuclear weapons from the ocean floor. The treaty prohibits the emplacement of mass-destructive weapons beyond the outer limit of a twelve-mile seabed zone. This demarcation of a twelve-mile coastal zone precludes any international restriction on the use of those weapons within the outer boundary. The seabed treaty preserves to each coastal state the absolute jurisdiction over the seabed and ocean floor and the subsoil thereof to a maximum of only 12 miles. As indicated, many

70. See notes 51-52 supra and accompanying text.
71. Alexander, Offshore Claims of the World, in Law of the Sea 72, 78 (L. Alexander ed. 1967). Significantly, however, several leading maritime powers, such as Canada, Great Britain, France, Japan and the United States, have continued to adhere to the three-mile limit.
72. 8 INT'L LEGAL MATERIALS 516-39 (1969). These statistics are quoted from an official survey on, inter alia, the breadth and status of the territorial sea undertaken by the Legislation Branch of the Food and Agriculture Organization of the United Nations. This survey provides a summary of the claims of 102 of the world's coastal states.
75. The initial United States' proposal, however, limited the area excluded from the prohibitions of the treaty to a "width of . . . three (3) miles." 8 INT'L LEGAL MATERIALS 667, 668 (1969) (reproduced from the text provided by the United States Arms Control and Disarmament Agency). The earlier Soviet draft proposal reserved to the coastal states a twelve-mile maritime zone. 24 U.N. GAOR, Annexes, Agenda Item Nos. 29-30, U.N. Doc. A/7741 (1969). In the subsequent revised joint draft treaty between the United States and the Soviet Union, the United States abandoned
states claim 12 miles as the width of their territorial sea; and within the territorial sea, the coastal state has full sovereignty over the seabed and subsoil beneath the waters. Notably, then, the coastal zone defined by the treaty fails to qualify the sovereignty of any state that maintains a twelve-mile territorial sea. That definition does not vitiate a claim to the wider margin of 12 miles, for the two are coextensive. It is suggested, therefore, that the stipulation of a twelve-mile coastal zone reflects an awareness of the trend toward extended territorial seas, if not a tacit recognition of the twelve-mile outer limit by the United States as a signatory power.

Thus, we see that to defend the three-mile limit as an existing rule of law becomes more difficult at this point in our maritime history than at any other time. Admittedly, no unilateral extension of the width of the territorial sea by any state is valid under international law unless recognized by other states. Such recognition must be by the express or tacit consent of an overwhelming majority of the states. It is clear that the three-mile rule as a maximum is not universally recognized and cannot be invoked by a state as a customary rule of international law. Considered as a minimum, it raises no controversy.

Conclusion

For purposes of analysis of the three-mile limit as an existing rule of international law, this note has 1) examined the historical background of the rule, 2) noted its international history and 3) remarked upon its influence upon the international community. The principle controversy remains between those states asserting that international law permits no more than three miles and states contending that three miles is not an authoritatively accepted maximum limit.

Upon review of all the evidence, it would appear that the United States must abandon its defense of the sanctity of the three-mile limit and accept the twelve-mile limit as her own. It is patently clear the breadth of the territorial sea is, on the basis of state practice, gradually widening.

76. An express disclaimer clause in the seabed treaty—one identical to a provision of the initial United States proposal—provides that:

[...] nothing in this treaty shall be interpreted as supporting or prejudicing the position of any State Party... with respect to the recognition or non-recognition of rights or claims asserted by any other State, related to waters off its coasts; including inter alia territorial seas... .


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Moreover, the twelve-mile limit tends to attract adherents faster than other proposals. It is therefore not likely that any international tribunal will hold that such a claim is illegal per se in international law.

Thus we have reached a stage where the three-mile limit has become obsolete, has been abandoned by state practice and has not retained the general consent which gave rise to its resolution as customary law.77

In discounting the trend evident in national claims, the United States assumes the risk that each state will unilaterally determine the breadth of its territorial sea. The consequence can only be a complete disintegration of the law of the sea.

77. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Address by Justice Holmes, Boston University School of Law, Jan. 8, 1897, in 10 HARV. L. REV. 457 (1896).