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ASSESSMENT OF THE FAILURE OF THE 1958 GENEVA CONFERENCE
TO ADOPT THE U. S. POSITION ON THE BREADTH OF THE TERRITORIAL SEA

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Regulation of the problems of the sea has long been among the principal objects of international law. The Conference on the Law of the Sea, which was convened in Geneva in February, 1958, was an effort to codify law on those aspects of maritime practice which yet remain unregulated or which require adjustment to harmonize with a changed technological, economic, and political environment. Although many thorny questions were successfully resolved by the Conference, it failed to achieve effective agreement on the thorniest question of all, the breadth of territorial sea. It is the purpose of this paper to investigate the principal reasons for the failure, with particular reference to the position of the United States. In effect, why did the U. S. fail to win sufficient adherents to its position on the breadth of the territorial sea?

The analysis of U. S. failure on this point will be approached by means of the analytical method derived from cybernetic theory. The Conference, as a purposeful association of all the recognized nations of the world, represented a system which in theory was capable of self-regulation, self-control, and self-direction. U. S. failure can thus be analyzed in terms of the efficiency of the system within which the U. S. acted.

It is proposed to answer the question of U. S. failure by means of an examination of the performance of the Conference itself. This involves a study of those factors which influenced the actual capacity of the Conference to achieve agreement, or maximum equilibrium. The procedure is necessarily concerned with a picture of the Conference as it is seen through U. S. eyes. To this extent, the results are distorted. The procedure is also concerned with a body of tangible and intangible factors that is too huge for full coverage. Too, this extent (which is considerable), its application is superficial.

The Conference on the Law of the Sea was the creation of the General Assembly of the United Nations. As a system, the Conference consisted of the delegates of all 86 recognized nations, their supporting staffs, the governments which instructed the delegates, and a Conference secretariat. Members of the International Law Commission, which had prepared a draft report for the guidance of Conference, were present, as was the press. The environment of the Conference was exactly that of the variably conflicting and harmonizing motivations, interests, and purposes of the international community itself. Common to all delegates was the impulse to achieve agreement on the breadth of the territorial sea. The desirability of codifying law on the subject was accepted by all nations and the Conference had been encouraged in this task by the General Assembly. However, response to this impulse, and to the myriad other impulses that developed during the give-and-take of the Conference, operated in the context of several institutionalized groupings of nations.

The most obvious of these were:

1. Ideological--Communist vs. democratic nations.
2. Military--Western powers vs. Soviet Bloc; neutralist nations.
3. Regional--U.S. and Western Europe, Latin America, South Asian Nations.
4. Economic--fishing nations, shipping nations, under-developed nations, maritime vs. non-maritime nations.
5. Nationalist--new nations vs. old nations.

Communications within the system represented by the Conference produced no problems. The Committee meetings and Plenary session operated according to the rules of parliamentary procedure. This encouraged a maximum of receptivity while enforcing appropriate pertinency. Flexibility was provided by the availability of special sub-committees to consider troublesome matters in great detail, extra-Conference caucuses, and informal discussions between delegations.

Means of rapid communication with his government were available to each delegate. That there occurred some communications failures was the fault not of the facilities but of their use.

The Conference commenced its deliberations on the breadth of the territorial sea with an immense body of pertinent information already collected and available. That which was commonly accessible was information on legal precedent in the field. This consisted of the following:

1. The territorial sea is agreed to be an extension into the bordering sea of a nation's sovereignty and over which she has complete jurisdiction subject to agreed limitations.
2. The 3-mile limit is the only specific breadth on which there has been anything like common agreement among the nations.
3. A majority of nations claim breadths of more than 3 miles, but in most cases no more than 12 miles.

4. The delimitation of a sea area cannot be dependent only on the will of a coastal state as expressed in its municipal law

5. The previous major attempt to codify law on the subject-- the Hague Conference of 1930--tentatively agreed on 3 miles but ended in failure because of the refusal of Great Britain to accept the concept of fisheries control in a contiguous zone outside the territorial sea.

This information, and proposed approaches to codification, was embodied in the Report on the Law of the Sea made by the International Law Commission to the General Assembly in preparation for the Conference. Because of the controversial nature of its subject, the Report, which itself was produced in a multi-nation committee, avoided specificity on the breadth of the sea and related points. Guidance provided by the report was also limited by the fact that the Commission did not attempt to take account of

"technical, biological, economic, and political aspects." These were explicitly left for the Conference to handle.

All delegates were aware of the surge of unilateral claims to greater breadths of the territorial sea and contiguous zone in recent years. Individually, they also had available to them (barring a few of the delegates from new nations) a complex of information which related to their government's position and the factors involved in the attitudes of other nations. Feedback was provided through the response of world and sectional opinion and the shifting of opposing positions during the Conference. In the case of the United States, this complex consisted of the following:

Position -- The U. S. stood for a breadth of 3 nautical miles, and regarded any greater breadth as a violation of precedent, ethics, and its security interests.

Understanding of the Attitudes of Other Nations -- The U. S. was aware or soon became aware that certain nations of the Afro-

Asian Bloc, as well as the Sino-Soviet Bloc, were antagonistic to the naval supremacy of the Western powers; that fishery-controlling nations like Canada, Mexico, South Korea, Chile, Ecuador, Peru, Argentina, and the Southeast Asian countries sought a breadth of the territorial sea in terms that would facilitate that control; that nations dependent on access to fisheries outside of their own waters--such as Portugal, Spain, United Kingdom, Japan--sought a breadth of the territorial sea in terms that would facilitate that access; that the United Arab Republic and its associated nations sought almost exclusively a breadth which would injure Israel by making a territorial sea out of the Gulf of Aqaba; that India sought a law on the breadth of the territorial sea which would be flexible so as to permit the expression of individualism by newly-independent states; that the attitude of coastal and interior states conflict in that the one sought assurance of security while the other sought assurance of freedom; that the Soviet Union sought a law which would impose comparatively greater military handicaps on the U. S.

while at the same time not permitting unrestricted encroachment by the coastal nations.

Feedback -- So far as internally-produced information was concerned, the U. S. had access to a great variety of feedback in the preparation of its position paper. Additional feedback was available through Departmental instructions, the response of the domestic press to Conference proceedings, and the presence on the delegation of advisors representing such institutions as Congress, Department of Defense, Department of Interior, Department of Justice, and shipping and fishing interests. Externally, feedback was derived from the world press, Foreign Service reporting, and the reactions of other delegations in extra-Conference discussions and arguments. In one key instance feedback was not cultivated, and the results appear to have contributed to the ultimate failure of the U. S. position. The feedback in question was the growing inclination of the U. K.

delegation to retreat from the 3-mile limit--which had encountered broad opposition--and to propose the substitution of a 6-mile breadth.

The U. S. was ignorant of this development because it had not shared its own initial plan for compromise--to support the Canadian proposal, which called for a 3-mile territorial sea with exclusive fishing rights in an 9-mile contiguous zone--with the U. K. or with anyone else. Thus, on April 1st the U. S. and the U. K. presented violently differing new proposals to the Conference and were immediately in heated conflict with each other. Although the U. S. subsequently attempted a further compromise--a 6-mile territorial sea with a 6-mile contiguous zone that would permit "historic" fishing rights to outside nations--it still had to make a public choice between Western Europe and the Western Hemisphere. The Western powers subsequently never attained

the unanimity they needed to secure agreement by the Conference itself. One opinion is that the spectacle of the U. S. and U. K. in basic conflict bewildered other delegates and produced in the Conference a psychological atmosphere which favored the human inclination to avoid decision when questions become complex.

It was inevitable that a political gathering like the Conference should have been additionally handicapped by irrelevant or distorted information. Each nation naturally selected and interpreted information in terms of its own valuations, standards, and stereotypes. To greater or less degree, the actions of each also reflected that 20th Century urge to impose valuations and standards on others which Morgenthau calls "nationalistic universalism." Facts were distorted by propagandist speeches, particularly--in the eyes of the U. S.--by the Soviet Bloc and the U. A. R., and envy and mistrust were evident. The U. S., for example, saw fit to question the professed concern

of the Soviet Union with the fishery interests of the new nations. The U. A. R., on the other hand, questioned U. S. ethical standards with the allegation that the U. S. had once attempted to close the Bering Sea. Irrelevancies were present in generous number, but because of the effectiveness of pre-Conference work appear to influenced the Conference only as they expressed established political and economic rivalries.

In sum, the gross body of available information was sufficient and for the most part it was effectively utilized. Failures occurred in the decisions for action or non-action that the controls on governments motivated them to make.

The equilibrium which the Conference sought related only in an immediate sense to such points as the breadth of the territorial sea. This goal was itself important enough, and there appeared to be no question that all delegates adhered to the belief that frontiers should be certain, definite, and accepted. As one author puts it, "...all rights which depend for their exercise upon territorial sovereignty must

be valid up to a given line and there stop." However, the principal common program was to increase the capacity of the nations to maintain peace among themselves. Both the instruction given to the Conference by the General Assembly and the primary interests of the delegates themselves assured harmony on these points. The capacity to change end goals as needed was nonetheless a factor in that to achieve agreement the delegates had to compromise between their national interest and the interest of other states. As has been seen, this capacity did not prove to be sufficient to permit accomplishment of the Conference program.

Postural and voluntary controls placed upon the Conference were among the most significant influences on its efficiency. The main postural controls were:

1. The use of the parliamentary system, involving representation from all recognized nations.

2. The fact of existence of the United Nations and the International Court of Justice, whose machinery would necessarily be involved in the implementation of Conference agreements.

3. The rigid control normally imposed on each delegate by his government.

4. The antipathy felt by some nations towards others.

As to the first control, it does not appear that a Conference of 86 nations organized and proceeding like the United Nations General Assembly, and deliberating in a similarly political atmosphere, was the most appropriate body for the detailed consideration of legal provisions. As one author has noted, "the draft rules of the International Law Commission, although admittedly subject to improvement on many points of detail, were nevertheless a more coherent product than the conventions adopted by the Conference."

The second control noted may be considered to have had influence in that the United Nations could pressure but could not require the

Conference to produce agreement on all points, while the International Court of Justice could resolve claims brought to it, but could not enforce Conference agreements. The Conference, therefore, conducted its deliberations with each nation aware that agreement placed its prestige at stake but left unquestioned its absolute right of independence. Third, the dependence of each delegate upon the instructions of his government may have in instances been a hinderance, but the control at least lent itself to the prevention of personal arbitrariness. One cannot say that the Conference would have operated more efficiently without the control. Lastly, the attitude of some nations towards the interests of certain others was so rigid as to basically define their interrelations at the Conference. The following instances may be specifically noted:

1. The antipathy of the U. S. toward any agreement that would represent a net security gain for the Soviet Bloc, and vice-versa.

2. The antipathy of the U.A.R. toward any agreement that would leave the Gulf of Aqaba open for Israeli shipping.
3. The antipathy of Southeast Asian nations toward Japanese fishing activities off their coasts.
4. The tendency of the U. S. to favor Western European nations in any inter-regional conflict.

These controls were fundamentally involved in the failure of the Conference to come to an agreement on the breadth of the territorial sea.

Voluntary controls on the Conference consisted mainly in the national interests that were represented. The most dramatic of these controls were those rigidified attitudes that are noted above under postural controls. Considered in broader terms, however, national interests represented simply the conditions felt by each nation to be beneficial to its political and economic security. Most nations emphasized the economic aspects of security.

The U. S. on the other hand, subordinated its economic interests to the military elements of political security. The U. S. was convinced that the capacity of the Free World to defend itself and carry a war to the enemy would be seriously impaired by an increase in the breadth of the territorial sea. It argued that some 15 strategic straits and a total of 3,000,000 square miles would be lost to the high seas if a 12-mile breadth were adopted. Since the naval strength of the USSR is primarily in submarines and that of the U. S. in surface ships, the U. S. felt that broad territorial seas would substantially benefit the enemy by providing him with privileged sanctuaries. It also noted the difficulties this would present the neutral nations in staying neutral, and the financial and technical burden which the regulation of a broad territorial sea would involve. That the argument did not carry the day was because friendly nations did not agree that a 12-mile territorial sea would automatically keep U. S. surface ships out in

time of need. The counter-argument was that the need for entry would be clear and acceptable at the time, and that the U. S. would go in anyway should it feel that national security was threatened. Furthermore, there was as yet no record of instances of harassment of foreign shipping by nations which had unilaterally extended their territorial sea.

A second major voluntary control consisted of the array of moral principles and ethical standards that each nation brought to the Conference. It is not necessary to go into these in detail, for outside of the Soviet Bloc--Western powers conflict, there were no significant disagreements apparent as to which were valid guides.

The outstanding of the principles and standards centered on the following:

Freedom -- of the seas, of the individual.

Equal opportunity.

Equal rights.

Promotion of common welfare.

Promotion of international understanding.

Respect for precedent and custom.

Recognition of special needs--flexibility.

Peace--regime of law.

Where conflict mainly arose during the Conference was in the relative weight given to each. Thus, the particularly intense nationalism of the new nations caused them to discount precedent as a guide and emphasize the value of flexibility. The U. S. weighted precedent more heavily, but also did its best to compromise in a context of promoting common welfare and peace. The fishery-controlling and fishery-dependent nations emphasized the recognition of special needs.

As a final type of control, one may cite the manner in which the delegates approached their task. The important elements here were the attitudes of the nations toward negotiation and compromise and the self-restraint and tact of delegates in often intense

argumentation. We have noted that there was common interest in achieving compromise. Self-restraint and tact were not uniformly present--the delegates of both the U. S. and Canada, for example, have been described as "occasionally pugnacious". However, pugnacity did not interfere with the effectiveness of the conference and likely served to benefit effectiveness by helping to ensure that realities rather than romanticisms or irrelevancies would guide the delegates.

Memory, in the sense that the Conference as a system required an accounting of what transpired, was no problem. Large and pertinent memory capacity was provided by the Secretariat, which recorded all official proceedings and related papers. Auxiliary memory was provided by delegation staffs, which recorded and organized the information output of informal discussions among the delegates.

On the other hand, decision-making was a very great problem. By the nature of its constitution, the conference could have no

explicit decisional unit. Authority wielded by the President of the Conference and by the various Committee chairmen represented a technical facilitating of talk rather than a substantive managing of results. The decisional unit could consist only in that group of two-thirds of the delegates which, by supporting a single proposal for whatever varying individual reasons, might achieve thereby a decision by the Conference. This was at best a technical sort of decision, for it left unresolved the conflicts that were glossed over to achieve a two-thirds majority, in addition to leaving aside the variant stands of opposing delegates. Comparison with the normal legislating processes of democracies points up the weakness, for the Conference lacked the presence of a regulating executive unit which could provide detailed policy formulation and apply pressure for its implementation through laws. As matters worked out, of course, none of the proposals on the breadth of the territorial sea was sufficiently broadened and

watered to attract the requisite two-thirds majority, and there was simply no decision on the point. The absence of an explicit, regulating decisional unit was clearly a great weakness in the Conference and the most limiting to its efficiency.

To complete the analysis, it is necessary also to note that the system lacked the power to implement its decisions. The special protocol on this point secured passage only after its principal teeth were extracted by nations unwilling to dilute their sovereignty. Additional damage was done thereby to the effectiveness of the Conference.

It appears clear that the U. S. failed to secure codification of its position on the breadth of the territorial sea because it could not achieve a dominance over the informational and control elements of the system that was sufficient to establish a decisional unit. The fact that no other nation was able to, either, points up the problem posed by the multiplicity of individual approaches represented.

Further compromise was needed, combined with persuasion which would shift the weights that the various nations presently place on the controlling elements of their national interest. As Morgenthau says, international law is "the ideological disguise of a policy of status quo", and a nation must find the status quo very agreeable before it will vote for it. The basic task of the United States in preparation for the next Conference would now seem to be the achievement of a formula that will resolve the differences--essentially concerned with fishing rights--between Western Europe, the Commonwealth, and Latin America. As a part of this task, the U. S. will have to re-evaluate its willingness to sacrifice the image of the U. S. as a champion of the fundamental needs of others in deference to a hypothetical military security problem.

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