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Moderator's Report: Legal Experts' Workshop on the Future Global Legal Order

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MODERATOR'S REPORT

Legal Experts' Workshop on the Future Global Legal Order

Craig H. Allen

In late 2006, as part of its multifaceted effort to help the Chief of Naval Operations develop a new, contemporary maritime strategy for the nation, the Naval War College convened a “Delphi group” of experts—in this case, in international law—to provide the maritime strategy development team a candid assessment of the probable state of the global legal order in 2020. The workshop, chaired by Craig H. Allen, the Charles H. Stockton Professor of International Law, was held 31 October–1 November 2006 in the College’s Decision Support Center (equipped with an advanced World Wide Web–based group collaboration and decision-support system), in the Center for Naval Warfare Studies.

In addition to four faculty members of the College’s International Law Department, thirty-eight outside experts participated, drawn from the United States and ten other nations. (The list of participants is available on the Naval War College Press website.) The group included military and coast guard legal advisers; attorneys from the Defense, State, Justice, and Homeland Security Departments and from the Center for Naval Analyses in Alexandria, Virginia; law professors; an attorney specializing in commercial maritime law; and the director of the United Nations Division of Ocean Affairs and the Law of the Sea.

The experts participated in their personal capacities, on the understanding that no views would be attributed to any nation, agency, or individual. They were provided advance copies of the questions that would be asked and six “strawman” legal futures that would be considered during the workshop. They were also given a list of materials that might provide helpful

Professor Allen, of the University of Washington School of Law (where he is Judson Falknor Professor of Law), was the Charles H. Stockton Chair in International Law at the Naval War College for 2006–2007. He chaired the NWC Legal Experts' Workshop discussed in this article.

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background: the Chief of Naval Operations/Commandant of the Marine Corps, *Naval Operational Concept* (2006); National Intelligence Council, *Mapping the Global Future* (2004); Center for Strategic and International Studies, *Seven Revolutions* (2006); Princeton University, Woodrow Wilson School of Public and International Affairs, Project on National Security, *Forging a World of Liberty under Law* (2006); and the UN secretary-general's high-level panel report *A More Secure World: Our Shared Responsibility* (2004).

RELEVANT CHANGES IN THE GLOBAL LEGAL ORDER

Most organizations assume that the world in front of us is basically continuous—that tomorrow will be like today. . . . On the contrary, we live in a time of perpetual discontinuity, a time in which bombshells and shockers are part of everyday life.

PETER SCHWARTZ

The legal experts' workshop began with a presentation of the principal law-related findings of the 24–25 August 2006 Geo-Strategic Environment Workshop (GSEW) held at the Naval War College. The GSEW findings were summarized in a “geostrategic grid” comprising six analytic dimensions: economic, energy, environment, governance, technology, security/law, and demographics. The GSEW analysis of the governance and security and law dimensions revealed significant concern about the vitality of international law and institutions. For example, the GSEW concluded that “some international organizations are looking long in the tooth and incapable of coping with emerging challenges.” Another expressed concern over the fact that “bilateral agreements are on the rise as international organizations continue to fall short in their objectives.” Those concerns and others raised a number of questions that warranted closer examination by legal experts.

The experts considered, without formally adopting, several propositions as possible starting points for the workshop. They included the propositions that:

- A robust and respected global legal order, founded on respect for the rule of law, would save lives by providing predictability, preventing conflicts, and providing effective and peaceful means to resolve conflicts that do arise.
- Military operations that conflict with international law are more likely to fail in achieving the desired end state.
- Any maritime strategy must be adapted to the global legal order in which it will function.
- The future global legal order is uncertain but can be estimated.
- The future global legal order can to some degree be shaped.

Following the scenario-based planning approach advocated by, among others, Peter Schwartz (author of *The Art of the Long View: Planning for the Future in an Uncertain World*) and former National Security Council planner Philip Bobbitt (now law professor at the University of Texas), the experts considered six possible future global legal order scenarios for 2020. The first three focused on the degree and direction of change in the legal order (from significant growth to regression), one posited a shift from globalism to regionalism, and a fifth posed the possibility of a collapse of the global legal order. A sixth scenario posited a dynamic global legal order that defied the foregoing, essentially linear approach. The suggested characteristics of this sixth future scenario included:

- There would be no single future global legal order—the global legal order of 2020 would be multifaceted.
- International relations, international law, and international institutions would be in a constant state of flux, as they would have to be in order to adapt.
- The roles of international law and institutions would wax and wane in response to changes in leadership (international, national, and non-governmental); their effectiveness in responding to crises, chronic problems, human rights abuses, and demands for reform; the state of the economy; and perceptions of key stakeholders.

The Baseline

The experts ultimately chose an approach that looked at the likely changes from the existing “baseline” global legal order. Although they were not asked to define the baseline, they reviewed some broad parameters before turning to the changes. Among the baseline considerations discussed (but not resolved or voted on) was that any discussion of the global legal order must include not only the obvious treaties, customary international law, and Security Council resolutions but also the transnational application of national laws, decisions of international tribunals (courts and arbitral tribunals), and “soft law.” In some Muslim states the Sharia also plays an important, even preeminent, role. Second, these laws may come into conflict with each other or otherwise create uncertainties. One uncertainty singled out for discussion was the relationship of Security Council resolutions to existing international law, such as the UN Convention on the Law of the Sea (UNCLOS). Third, U.S. planners must appreciate the important role of international law and institutions in perceptions regarding the legitimacy of state action. Legitimacy perceptions will be critical in the increasingly difficult task of building coalitions. A fourth baseline consideration was that the United States must understand that not all states implement and enforce laws in

the maritime domain in the same way. Foreign navies and coast guards may play roles quite different from their American counterparts, particularly in the area of law enforcement.

Governance Issues

The legal experts were only slightly more optimistic about international organizations and national institutions than were the GSEW experts. Seventy-eight percent agreed with the latter that some international organizations are “long in the tooth” and incapable of coping with emerging challenges. A majority also agreed that as international organizations and global treaties fall short, more states will rely on bilateral approaches. They almost universally (92 percent) agreed that the effective power of nongovernmental organizations (NGOs) will grow significantly between now and 2010. When later asked if it is likely that future maritime security operations will require the U.S. Navy to coordinate with NGOs more often, 38 percent believed they would. One expert believed that there would be much more pre-response engagement with NGOs.

The experts overwhelmingly (72 percent) listed the United Nations Security Council as the most influential international organization in global affairs; the European Union (EU) was a distant second at 45 percent, followed by the Group of Eight (G-8)* at 40 percent. There was less agreement on the future course of the Security Council.

A majority of the experts predicted that the UN Charter would be amended to expand the veto-wielding permanent members of the Security Council beyond the present five. Those who predicted an increase foresaw up to twenty permanent members, though most put the number at from seven to ten. One expert reminded the group that before it would be legally binding on the United States any amendment would have to receive the advice and consent of two-thirds of the Senate, leading to the possibility that much of the world might ratify a change to the Charter that the United States rejected.

All of the experts believed that it is likely (62 percent) or very likely (38 percent) that the Security Council will pass more “legislative” resolutions in the coming years—as it has done with respect to international terrorism, in UN Security Council Resolution (UNSCR) 1373, and proliferation of weapons of mass destruction (WMD), in UNSCR 1540. A slight majority believed that the Security Council would eventually impose upon Iran proliferation-related sanctions that could require maritime enforcement (which it later did, in UNSCR 1747). That might have significant consequences for the U.S. Navy and its partners in the Arabian Gulf and Indian Ocean. More generally, however, 83 percent of the

* The Group of Eight, established in October 1975 to facilitate economic cooperation among the members: Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States.

experts believed that in the foreseeable future the Security Council would—even where it has found, under Article 39 of the Charter, that a given situation threatens international peace and security—authorize enforcement measures in only about half the cases.

There were fifty-one member states when the UN was established in 1945; today there are 192. Most of the experts believed that the number of states will increase by 2020. They differed, however, in how high the number would go; estimates ranged up to 225, the average being approximately 200. In a world that increasingly operates on a one-nation/one-vote rule, U.S. influence would be diminished. The experts discussed the extent to which the international legal order (global or regional) enhances or impedes the ability of the United States to respond unilaterally as a primary actor. They also discussed whether the universality of global “rule sets” and institutions was hindered by their growth on the regional level. Opinions on the latter question were mixed. Some saw the relationship between global and regional approaches as complementary; others believed they can come into conflict and that regional approaches can undermine the unity of effort needed to solve global problems.

The experts widely believed that failing states will be a significant problem in the coming years. One cited a study that provided a disturbing estimate: twenty states that have already failed, twenty that are in danger of failing, and twenty that are borderline. The total accounts for nearly one-third of the states in the world. Failed states present a number of challenges. One challenge the experts briefly considered was massive migrant/refugee flows.

Regional Developments

Opinions on regional issues were mixed. One expert opined that global problems require global solutions but that states often do not have the capacity to implement those measures without regional cooperation. It is also clear that UNCLOS, particularly Part XII on protection of the marine environment, calls for global or regional solutions. One expert pointed out that regional rule sets often fill actual gaps in the global rule set or provide alternatives better adapted to a given regional identity (e.g., the Pacific Islands Forum states).^{*} The group seemed particularly moved by the warning of one expert that “regional” measures pertaining to enclosed and semi-enclosed seas—such as the Straits of Singapore/Malacca, the Persian Gulf, and the Mediterranean, Baltic, and Red Seas—should be monitored closely. Those measures have the potential to impact significantly on navigation rights.

^{*} Formerly the South Pacific Forum, established 5 August 1971 to promote regional cooperation in political matters between the sixteen members: Australia, Cook Islands, Fiji, Kiribati, the Marshall Islands, the Federated States of Micronesia, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, the Solomon Islands, Tonga, Tuvalu, and Vanuatu.

Several experts believed that as the national security stakes go up, if the Security Council fails to take sufficient action on WMD proliferation, regional security organizations or coalitions will feel compelled to act. Some experts discussed the possibility of greater delegation by the Security Council to regional organizations. The fact that at least one such organization, NATO, now responds out of its area is a significant development. One expert suggested that the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)* be closely watched. If ReCAAP succeeds in improving the security conditions in the Malaccan Straits, the idea may catch on. Regional arrangements may also extend their interest or protection to pipelines and submarine communication cables on the seabed, which are vulnerable to accidental or intentional damage or destruction.

Many of the experts expect more regional development in laws governing fishing and environmental protection. One of the experts pointed out that, for his nation, regional solutions are a necessity, not a luxury; regions must marshal resources to meet some of their challenges. One expert thought there was a good possibility that regional port-state control organizations (the United States participates in several) will evolve beyond their present safety and environmental-protection focus to take on maritime security. With their large vessel owner/charterer databases and access to the Automatic Identification Systems, port-state control organizations will be favorably positioned to conduct the analysis necessary to detect anomalies.

Nonproliferation and Disarmament

One-third of the experts expressed a belief that if North Korea and Iran join India, Israel, and Pakistan as nuclear-weapons states, the already fragile Nuclear Non-proliferation Treaty will collapse. One suggested that we could soon be facing a world of thirty nuclear-weapons states. The experts' answers to certain related questions are revealing (figure 1).

A majority of experts were skeptical of the efficacy of Security Council-ordered sanctions. Asked "What will be the likely effect of UNSCR 1718 sanctions against North Korea?" they answered as shown in figure 2 (at this writing it is still unclear what course North Korea will take). Interestingly, most experts did not believe the United States should lead any maritime enforcement of sanctions against North Korea. Seventy-five percent thought China should conduct any necessary maritime interdiction operations, with Japan, South Korea, Australia, Russia, and NATO also getting large support. Most thought that any such operation should be multilateral; one suggested that a UN-based force would

* Entered into force on 4 September 2006, with fourteen states ratifying to date: Bangladesh, Brunei Darussalam, Cambodia, China, India, Japan, South Korea, Laos, Burma, the Philippines, Singapore, Sri Lanka, Thailand, and Viet Nam.

FIGURE 1

Do you believe that the Nuclear Non-Proliferation Treaty will survive if North Korea and Iran join India, Israel, and Pakistan as non-NPT-compliant nuclear-weapons states?	Yes: 68% No: 32%
How likely is it that the Security Council will impose sanctions against Iran for violations of UNSCR 1696?	Likely: 53% Unlikely: 47%
How likely is it that the Security Council will impose sanctions against Iran for NPT violations that will require maritime enforcement?	Likely: 47% Unlikely: 53%

have the greatest legitimacy. Whether future maritime enforcement actions against North Korea would have to be reconciled with the existing UN cease-fire agreement was not posed directly to the experts.

The nuclear nonproliferation challenge will almost certainly grow. A rapidly growing demand for nuclear power applications, in response to oil scarcity and carbon emission concerns, means there will be significantly more fissile material in circulation, which could be diverted to nuclear or radiological devices. The future challenge of preventing proliferation and safeguarding nuclear materials while in storage or transit will be significant. The International Atomic Energy Agency's visibility will also grow.

The regime for missile technology (including cruise missiles and unmanned aerial vehicles) is very weak, as the interdiction of the M/V *So San*—which violated no laws transporting Scud missiles from North Korea to Yemen—demonstrated.* The fact that Iran provided Hezbollah with both unmanned aerial vehicles and antiship cruise missiles demonstrates the urgency of the mission and of the at-sea enforcement, missile-defense, and force-protection challenges.

Jus ad Bellum: Law Governing Resort to Armed Force

We cannot accurately characterize the security threat environment of 2025; therefore we must organize and arrange our forces to create the agility and flexibility to deal with unknowns and surprises in the coming decades.

GENERAL PETER PACE, USMC, CHAIRMAN, JOINT CHIEFS OF STAFF

The law governing a state's resort to armed force against the territorial integrity or political independence of another state is governed by articles 2(4) and 51 of the UN Charter. In the coming years, that law might not have the flexibility needed to meet the threat environment described by General Pace in his Chairman's Assessment of the 2006 Quadrennial Review, particularly with regard to threats posed by transnational terrorist networks and WMD proliferators.

* For the *So San* incident, see, in the *Naval War College Review*, Craig H. Allen, "The Limits of Intelligence in Maritime Counterproliferation Operations," vol. 60, no. 1 (Winter 2007), pp. 42–43.

FIGURE 2

Sanctions will have no effect on North Korea's nuclear weapons or missile programs but will result in further hardships to the North Korean people.	54%
Sanctions will persuade North Korea to abandon its nuclear weapons and missile programs, accept IAEA safeguards, and return to Six-Party Talks.	21%
Sanctions will simply force North Korea to be more covert about its programs.	21%

A significant minority of the experts (43 percent) believed that the majority of states do not accept that “anticipatory self-defense” is lawful under the UN Charter, insisting that a state is justified in using armed force only after it has been the victim of an armed attack. Of the experts holding that a majority of states *do* accept the principle of anticipatory self-defense, 59 percent believed that the principle was limited to situations meeting the test set out in the *Caroline* case—that is, immediacy, proportionality, and necessity.* Some experts believed that growing concerns over WMD proliferation will cause more states to soften their stance against preemptive use of force, particularly as they come to appreciate the consequences of the fact that nation-states have lost their historical monopoly on the large-scale use of force. Absorbing an “armed attack” before responding may be untenable if the attack is by WMD.

One expert cited two areas of concern in the *jus ad bellum*. The first is its treatment of transborder responses by one state against another that is supporting terrorists who attack across the border. The second area concerned responses to states that harbor such terrorists. The expert who made that point warned that decisions by the International Court of Justice on “self-defense” must be carefully monitored.

The experts cited some continuing gray areas in the law. For instance, is an attack on a merchant vessel, submarine cable or pipeline, offshore platform, satellite, unmanned vehicle, or computer network an “armed attack” justifying the attacked state in using force to defend itself? One development to watch for is the forthcoming definition of the crime of “aggression” by the International Criminal Court (ICC). Most of the experts (78 percent) thought it was unlikely that the majority of states will accept the argument that the “duty to protect” justifies humanitarian intervention to halt gross human rights abuses in the absence of an authorizing Security Council resolution. Given the number of potentially failing states, this is sure to be more widely discussed.

Jus in Bello: Law of Armed Conflict

Some experts predicted that states and NGOs will increasingly argue that everything in Additional Protocol I to the Geneva Conventions represents customary international law and is therefore binding on all states whether they are party to

* For a discussion of the legal principles established by the 1837 *Caroline* case see Yoram Dinstein, *War, Aggression and Self-Defense*, 4th ed. (Cambridge, U.K.: Cambridge Univ. Press, 2005), pp. 184–85.

the protocol or not (the United States is not). They warn that one of the international tribunals, such as the International Court of Justice or one of the international criminal tribunals, might hold to that effect in the near future. Some also point out that the decision might not come from an international tribunal but instead from U.S. federal legislation or the Supreme Court.

Several experts warned that the law of armed conflict might evolve in a way that steadily narrows the use of force, by taking increasingly strict positions on military necessity and proportionality. One expert opined that the law of armed conflict is already a virtual arms control treaty. When asked if the 2006 conflict between Israel and Hezbollah would lead to efforts to further restrict the rules regarding proportionality (e.g., collateral damage or casualties), 40 percent thought it would. There is already considerable debate within the American Society of International Law on this subject—most of it highly critical of Israel.

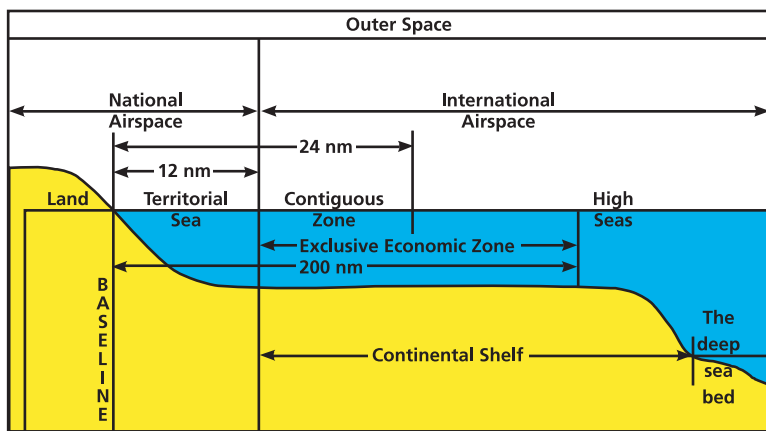
The experts saw the law of armed conflict as an area in which the U.S. Navy can help shape the law, through participation in international negotiations and conferences with relevant governmental and nongovernmental organizations. It is also an area that may present more interoperability issues in the coming years, as allies and coalition partner states come to the game with different law of armed conflict rule sets and different rules of engagement.

Law of the Sea

The experts who spoke out all voiced strong support for U.S. accession to the 1982 UN Convention on the Law of the Sea and frustration over the continued delay in its doing so. (The convention's system of seas, zones, airspace, etc., is summarized in figure 3.) Some described experiences demonstrating that being a nonparty is a source of considerable friction, if not a disability, in dealing with other states on maritime issues. Most believed that the United States would in fact accede to the convention either by 2010 (60 percent) or by 2015 (83 percent). Significantly, President Bush formally announced on 15 May 2007 that he was urging the Senate to act favorably on U.S. accession to the convention during the current session of Congress.

A significant minority of the experts expressed concern about the stability of navigation rights codified in the UNCLOS (see figure 4). In answer to a related question on what they believed would have the most influence on the construction and application of UNCLOS in the next ten years, they ranked the influences as follows (beginning with the most influential): state practice; processes in intergovernmental organizations other than the UN (e.g., International Maritime Organization, Food and Agriculture Organization); decisions by international tribunals; and the annual UN process (the Informal Consultative Process on Ocean Affairs and Law of the Sea, and the General Assembly review).

FIGURE 3
UNCLOS ZONES AND LIMITS



On the influence of state practice, several experts were very outspoken on the need to pay particular attention to practice by the United States. The U.S. push to extend its laws into coastal waters in the name of security or environmental protection will, they argued, encourage other states to do the same, leading to an erosion of navigation rights.

FIGURE 4

Will the innocent passage regime remain stable until 2020?	62% yes 38% no
Will the innocent transit regime through international straits remain stable until 2020?	59% yes 41% no
Will the archipelagic sea lanes passage regime remain stable until 2020?	49% yes 51% no

As one expert warned, one cannot focus on the innocent-transit passage regimes through the territorial seas without also carefully watching what coastal states (including the United States) are doing in their exclusive economic zones (EEZs). As he put it, “If you can’t get through the EEZ, you will never get to the international strait.” The experts further warned that navigation rights of warships and military aircraft should not be the sole focus but that the navigational and overflight rights of the merchant vessels and commercial aircraft so vital to military logistics and to the vitality of international trade should also be considered.

Maritime zones were briefly discussed (Israel having imposed a “blockade” on Lebanon less than four months before the workshop). One expert warned of the often-overlooked connection between navigation rights and freedoms and *jus ad bellum*: If the doctrine of preemptive self-defense grows, could a state

bordering the Strait of Hormuz attempt to close it to all navigation in the name of coastal-state “self-defense”?

The experts made one prediction that suggests a potential new partner in the quest to protect freedom of navigation: 72 percent of the experts believed that in the coming years China will regularly patrol waters more than a thousand miles from the Chinese coast.

A majority of the experts believed that more marine protected areas will be established between now and 2020. Management plans for these areas may incorporate a variety of navigation restrictions to protect vulnerable ecosystems, perhaps including vessel reporting and movement systems, pilotage requirements, routing measures and areas to be avoided, and discharge restrictions that exceed the standards of the 1973 International Convention for the Prevention of Pollution from Ships (or MARPOL, as modified in 1978). Fifty-one percent of the participants believed that more than 10 percent of the oceans will be designated as maritime protected areas by 2020; 24 percent put the number at 34 percent or more. Another source of concern to freedom of navigation will be boundary-delimitation disputes over offshore areas (particularly those with oil and gas) as states attempt to exclude foreign vessels from disputed waters.

One expert with extensive personal knowledge and experience on the subject pointed out that the executive branch of the U.S. government is poorly organized for making balanced ocean-policy decisions. The National Security Council–led Policy Coordinating Committee, Oceans Sub-Policy Coordinating Committee, on which the Navy serves, seldom meets. As a result, the Committee on Ocean Policy (led by the Council on Environmental Quality) dominates the ocean policy agenda, and in a way that favors environmental protection over freedom of navigation.

The experts were cautious regarding the legal status of sea-basing vessels and unmanned vehicles, some expressing the belief that their status has not been authoritatively determined. One urged that the U.S. Navy should not assume that other states will accept its position without question. Another argued that sea basing must be distinguished from “navigation.” Unmanned vehicles will not necessarily be accorded the same navigation and overflight rights as manned craft, particularly as armed unmanned vehicles become more common, and at least one expert considered the case for claiming sovereign immunity for them weak.

Ninety-five percent of the experts predicted that in the coming years more states will claim the legal right to exercise jurisdiction and control over military activities in and over their EEZs. At the same time, 92 percent believed that more Mediterranean states will assert EEZ claims; presently, only Egypt and Cyprus have made full EEZ claims.

The discussion made it clear that the answers of some of the experts regarding coastal-state control over military activities included intelligence and hydrographic collection activities. One expert pointed out that China takes the position that all such collection activities fall within the UNCLOS provisions for marine scientific research and would therefore require coastal-state consent before they could be carried out in the two-hundred-nautical-mile EEZ.

Environmental Laws Applicable to Military Operations

The experts predicted that restrictive environmental regulations will increase both in the United States and overseas. Those regulations would extend to vessel and aircraft discharges, including air and sound emissions (i.e., sonar). The regulations would take several forms, including conditions on basing and port and landing restrictions, and some would increasingly extend the coastal zone out to two hundred nautical miles. As mentioned earlier, the experts also foresaw an increase in the portion of the seas that will fall within marine protected areas of various kinds. Canadian claims over Arctic waters will take on added importance if future ice conditions in those seas open a northern interocean route to ordinary surface vessels. One expert warned that the immunity or exemption for warships and other public vessels from applicable coastal-state environmental laws may be eroding. Moreover, an increasing number of laws hold commanders personally liable for violations by their vessels or aircraft.

One expert warned that the G-77* states, a body that operated so effectively during UNCLOS III, is once again driving the Law of the Sea environmental agenda within the annual Informal Consultative Process on Ocean Affairs and Law of the Sea. Navigation rights are not of great concern to G-77 states. The experts urged the U.S. Navy to join the Department of State in fully engaging in the Consultative Process or it might find its interests underrepresented. The same is true at the International Maritime Organization, where the National Oceanic and Atmospheric Administration and the Environmental Protection Agency might push for a position inimical to Navy and merchant-marine mobility interests. One expert noted that shipping NGOs (e.g., the Baltic and International Maritime Council and the International Chamber of Shipping) are engaged in the same issues.

Some experts were worried that environmental regulations applicable out to two hundred nautical miles—both in the United States and overseas (especially the EU and Australia)—would open the way to what one called the “territorialization” of the exclusive economic zone, by which he meant that the EEZ regime would be as pervasive and restrictive of operations as the territorial

* The Group of Seventy-seven, so called for its original membership, now includes 130 states and the Palestine Liberation Organization. It was established 15 June 1964 to promote economic cooperation among developing countries.

sea regime. The experts cautioned the Navy to pay careful attention to domestic legislation, both federal and state, because such regulations may prove to be the first and worst to encroach upon freedom of navigation. One expert pointed out that UNCLOS, because the United States is not party to it, is not a treaty under Article VI of the Constitution and that therefore some courts will be reluctant to hold that the international law of the sea preempts conflicting state laws.

Four potential consequences of the increasing scope of environmental regulations were identified. First, they will make it harder to conduct combined operations, thereby limiting the U.S. Navy's ability to overcome interoperability problems (the RIMPAC '06 sonar litigation is a case in point). Second, they will make it more difficult to obtain overseas bases or to enter foreign ports or land at foreign airports. Third, they will expose commanders and their subordinates to enforcement actions by foreign governments. Finally, they will make weapons training more difficult. Although the United States can offset some loss of live training with "synthetic" training, that technology is not available to most other nations.

Accountability of Military and Civilian Personnel

The experts most familiar with accountability issues saw little or nothing in that realm favorable for the U.S. military in the future. The expectation is that more conduct will be criminalized and that more states will seek to prosecute American service members and civilians. It is to be expected that some status-of-forces agreements and visiting-forces agreements will have to be renegotiated to give host states more extensive jurisdiction over U.S. personnel. Article 98* agreements will be harder to come by. More states may claim universal jurisdiction over certain offenses (particularly those within the jurisdiction of the ICC), and more states may adopt laws equivalent to the U.S. Alien Tort Claims Act. Some states may be expected in the not-too-distant future to refer a U.S. service member to the ICC. The chilling effect this would have on officials, commanders, and ordinary service members must be considered.

Allies and partner nations may find their freedom of action further limited by regional legislation or judicial decisions (e.g., the European Court of Human Rights), making it harder to attract coalition partners and increasing legal interoperability challenges. In the near future we may well see rulings from international, regional, and national courts that will send a chill through commanders and their subordinates. We should also expect to see more "commander liability" laws imposing personal liability for environmental violations. As a result, commanders might increasingly feel compelled to take out professional liability insurance and to keep criminal defense attorneys on retainer.

* That is, agreements negotiated under Article 98 of the Rome Statute protecting U.S. nationals from surrender for prosecution by the International Criminal Court (ICC).

Law Enforcement/International Criminal Law

When asked what they thought the greatest threat was to the sea lines of communication (the conversation included international straits), 47 percent answered criminal activities or terrorism. Piracy was listed by only 5 percent of the experts. The majority (69 percent) of the experts did not believe that the international criminal law regime will evolve sufficiently between now and 2020 to effectively address transnational terrorism, WMD proliferation networks, maritime trafficking (in narcotics, weapons, and humans), or piracy, in the absence of significant military assistance. However, some did believe that by 2020 terrorism and trafficking in narcotics or humans could become crimes of universal jurisdiction or grounds for an expanded right of approach under Article 110 of UNCLOS.

One expert pointed out that many of the missions listed under “maritime security operations” in the *Navy Operational Concept* require law enforcement authority and that at present the only authorization the Navy has from Congress is for piracy and counterdrug enforcement. Perhaps (the question is unclear) the Navy should reconsider its stance on the Posse Comitatus Act (PCA) and the related Department of Defense directives. One expert reported significant and unresolved tensions with the PCA in the U.S. Northern Command area of responsibility.

The experts were also asked to express their opinion on future trends in enforcing laws in the maritime domain. When asked what proportion of flag states would be willing and able to exercise effectively their jurisdiction and control over their ships outside their own waters, none thought that 80 percent would be able to do so; the majority (71 percent of the experts) thought that only 40 percent or less of the flag states would. As to which states would likely see their roles in maritime law enforcement grow the most, 61 percent of the experts believed it would be coastal states, followed by the “willing and able states” (19 percent, some citing NATO and Proliferation Security Initiative [PSI] states), port states (16 percent), and flag states (2 percent).

Several experts raised questions regarding the use of force in law enforcement operations. Some wondered whether any use of force, even warning shots or disabling fire, raises issues under the UN Charter. Others believe that force used by a vessel engaged in law enforcement against a nongovernment vessel to compel compliance (to stop or board) raises questions regarding probable cause, reasonableness, and the necessity to compel compliance but not Article 2(4) use-of-force questions. The issue is squarely presented by UNSCR 1718, which authorizes “inspections” but cites Article 41 for its authority, implying that no armed force can be used.*

* Article 41: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

Intelligence/Information

The experts identified a number of links between intelligence and the law of the sea. There was concern that more states may assert the position that no intelligence collection can take place in or over a state's two-hundred-nautical-mile EEZ unless prior consent is obtained from, and all information obtained is shared with, the coastal state. Disputes over laws governing intelligence and hydrographic collection activities by air (e.g., the April 2001 EP-3 dispute with China) and sea (China's March 2001 protests concerning USNS *Nathaniel Bowditch*) in a coastal state's EEZ are a potential flashpoint, particularly with China and North Korea.

The experts believed that the breadth and depth of persistent intelligence, surveillance, reconnaissance, and other collection sources—including many open sources, like Google Earth and Digital Global—together with the growing and increasingly networked databases, will vastly increase our maritime domain awareness, as well as that of adversaries. At the same time, the U.S. Navy will itself grow increasingly transparent, eliminating its potential for achieving surprise and increasing its force-protection challenge. Nevertheless, the difficulty of sifting through a global merchant fleet that now numbers over six hundred thousand vessels (as the UN Conference on Trade and Development reported in 2006), 270,000 of which are registered in “flag of convenience” states, to detect anomalies will be daunting.

Legal issues in intelligence and information sharing will also present a growing challenge in the coming years. More laws in the United States and EU that make it more difficult to share information are to be expected, as well increased hostility in Congress to some collection methods. Moreover, federal courts cannot be expected to continue to shield intelligence broadly from disclosure under the Classified Information Procedures Act.

Migrants/Refugees

The United States is certainly not alone in its struggle to stem the flow of illegal migration. Australia and the Mediterranean states also have serious problems. The experts discussed several scenarios that could trigger massive migrant or refugee flows. As mentioned above, 73 percent of the experts were of the opinion that the present legal regime on refugees is inadequate to handle such large movements.

CONSEQUENCES FOR MARITIME SECURITY MISSIONS

Linear analysis will get you a much-changed caterpillar, but it won't get you a butterfly. For that you need a leap in imagination.

ROBERT L. HUTCHINGS, CHAIRMAN, NATIONAL INTELLIGENCE COUNCIL

After examining changes in the global legal order, the experts turned to a discussion of the likely effects those changes might have on maritime security missions. They were first given a list of twenty-two missions listed in the current *Navy Operational Concept* and asked which would likely no longer be necessary in 2020. Only two of the twenty-two missions received many votes for elimination: pollution response (52 percent of the experts) and marine resource protection (33 percent). Surprisingly, 11 percent thought deterrence and maritime law enforcement could be eliminated by 2020, and 5 percent said the same about sea control and Security Council sanctions enforcement.

Defense Missions

Few of the experts forecasted significant change to the national defense missions of the Navy, other than the earlier suggestion by 11 percent that deterrence would no longer be necessary (it is unclear whether these answers referred only to strategic deterrence). Some appear to suggest that counterterrorism and counterproliferation will be of such a scale as to present a greater demand for a national defense response. This will almost certainly be the case if (when?) another 9/11-scale attack or a WMD attack occurs. One discussion focused on ballistic missile defense; however, the experts were not polled on the matter. Several experts offered extended comments on potential growth in enforcement measures ordered by the Security Council (a MOOTW mission, about which more is said below). Those views focused on sanctions enforcement against North Korea or Iran and on the likelihood that failed states would create threats to international peace and security requiring intervention. Enforcement actions against North Korea or Iran would carry a significant risk of escalation. It was also noted that North Korea presents two significant threat potentials: escalation during counterproliferation/Security Council enforcement operations and the kind of collapse that could trigger a massive refugee flow.

Military Operations Other than War (MOOTW)

Most of the comments regarding the global legal order changes that are likely to affect naval missions fell within the MOOTW rubric. Some saw an increasing demand for counterproliferation, counterterrorism, maritime intercept operations, maritime law enforcement, humanitarian relief, and freedom of navigation operations. Several predicted that maritime law enforcement will become the dominant naval mission in the future. A majority of the experts expected an upturn, perhaps a sharp upturn, in the demand for maritime interception operations, particularly those conducted under a Security Council resolution, or outside such a resolution, to interdict WMD or delivery systems. They were less sure about the legitimacy and viability of an interception scheme if the underlying legal regime collapses. For example, if the Non-Proliferation Treaty were to collapse after

reaching a tipping point of renunciations, the underlying legal prohibition on the transfer of fissile materials or nuclear technology would disappear.

Some experts expected that concern over proliferation would lead a large number of states to ratify the 2005 Protocol to the SUA Convention.* The protocol's amendments to Article 3 will extend the prohibitions on the transfer or transport of WMD, while amendments to Article 8 will provide new authority for boardings by states other than flag states. When the protocol enters into force, demand for interdiction operations may rise appreciably; however, it is doubtful that the U.S. Navy or Marine Corps will have authority under American domestic law to take enforcement action under it. Accordingly, any maritime enforcement by the United States would be carried out by the Coast Guard.

Several events could trigger a need for a rapid surge response, including a pandemic, natural disaster, or a collapsed state that triggers a massive refugee flow. Planners should understand, it was suggested, that the global legal regime for such crises is grossly inadequate. With up to sixty states failed, failing, or on the borderline, there will be a continuing need for naval evacuation operations and for an offshore stabilizing presence.

Means and Methods

The experts predicted that future Navy maritime operations will be more joint (85 percent), more combined (94 percent), and more interagency (88 percent). One warned that the transition to interagency operations under the “lead federal agency,” “supported-supporting agency” approach will present much more of a challenge than will the transition to joint operations. The majority did not believe that future operations will more often be coordinated with or directed by the UN (68 percent) or with NGOs (62 percent). Friction due to legal interoperability issues and pressure on foreign navies to avoid operations with the navies of states that do not subscribe to their full rule set (UNCLOS, Geneva Protocol I, etc.) may make it increasingly difficult to form coalitions. When asked what factors they believed would be most influential in persuading other states to join a global maritime partnership (formerly referred to as the “thousand-ship navy”), they answered: shared interest (79 percent), economic incentives (8 percent), threat concerns, gaining access to information held by partners (2 percent), and a pledge to promote and abide by the rule of law (2 percent).

“THE RULE OF LAW AT SEA IS NOT SELF-EXECUTING”

The legal experts' workshop began the U.S. Navy's “conversation with the country,” indeed, with the world—a conversation that is an integral part of the

* Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted 10 March 1988, entered into force 1 March 1992. The 2005 Protocol to this convention has not yet entered into force.

maritime strategy development process. The experts are to be commended for their seriousness of purpose and their willingness to share their views on this vital matter. Plainly, they have demonstrated the wisdom of groups.

The geostrategic environment has been described as one characterized by rapid change. Although that is certainly true in some of the dimensions covered, such as technology, it is less true of the legal regime. Because the law tends to evolve relatively slowly, it can serve as a stabilizing force to promote public order. That said, however, it is clear that the experts believe that the global legal order will in fact evolve between now and 2020 and that those changes will alter the context in which the new maritime strategy operates. A number of experts forcefully stated that it would be a mistake for the U.S. Navy or the maritime strategy to portray international law *only* as a restriction on freedom of action. They clearly saw international law as an “enabler” as well.

There is an appreciable risk of an erosion of navigation and overflight rights in coastal waters and of high-seas freedoms in the coming years. The potential instability of the 1982 UNCLOS regime is exacerbated by the failure of the United States to accede to the convention. “Shaping” activities by the United States and like-minded nations (perhaps including China in the not-too-distant future)—through strategic communications and diligent, consistent diplomacy that focuses on shared interests and continued freedom-of-navigation exercises—will be indispensable to protecting existing freedoms. For the United States, the task begins at home, where overreaching legislation and presidential proclamations to enhance coastal security or environmental protection provide a template for other states.

The military profession will be increasingly challenged by the likely changes in the law of armed conflict and expanding personal-responsibility doctrines. The challenge may include an expansion of criminal prohibitions, assertions of jurisdiction by more states, or refusals to adhere to restrictions in existing status-of-forces/visiting-forces agreements on host-nation jurisdiction. The potential for a chilling effect on the willingness of members of the national security profession to take action or even travel abroad bears careful watching.

The U.S. Navy should expand its participation in global and regional fora with responsibility for the development of domestic and international law relating to the law of the sea (including provisions applicable to merchant vessels and military and commercial aircraft). It should pay, the experts felt, particular attention to the UN annual process on ocean affairs and the law of the sea, the International Maritime Organization and International Civil Aviation Organization, and, within the United States, the oceans policy working groups.

All of the experts agreed that the new maritime strategy should affirm the place of international law in maritime security. As one expert put it, international law “is the foundation on which we operate; it is why we are there and it defines the

parameters of everything we do.” Respect for international law does not mean abandoning rights protected by UNCLOS or acquiescence in attempts by other states or NGOs to further restrict rules governing the use of armed force. As one expert pointed out, to achieve the objectives established by higher-level strategy documents, this nation must employ diplomatic and information measures to “shape” international law. Accordingly, the new maritime strategy should:

- Acknowledge the central role of international law in protecting *the balance of state interests* in the oceans. Embrace the law of the sea as both a long-standing guarantor of the right to use the seas, as well as a set of carefully calibrated restraints on the exercise of those rights, to guard against abuses.
- Emphasize that freedom of navigation and overflight is not merely a U.S. interest, but a global interest, and that we must act cooperatively to protect those freedoms for merchant vessels and civil aircraft as well as warships and military aircraft.
- Acknowledge that the rule of law at sea is not self-executing. Without effective enforcement measures, compliance levels may not be adequate to meet the need for public order on the seas. Although international law assigns primary enforcement responsibility to the vessels’ flag states, we must recognize that not all flag states are willing or able to fully comply with their international obligations. The same can be said for a number of port states and coastal states. The common interest in maritime domain security urgently requires all states to take joint action to close these gaps.
- Pledge to redouble Navy efforts—in close partnership with the Departments of State, Justice, Commerce and Homeland Security—to encourage the new Senate to provide its advice and consent to U.S. accession to the 1982 UN Convention on the Law of the Sea.

MODERATOR’S NOTE

This report is based on the Web-IQ answers and written and oral remarks of the participants. The experts were not asked to approve it, and it does not necessarily represent the individual views of any given expert or of the Naval War College. The workshop “record” consists of: graphics produced on the second day recording the experts’ oral suggestions of the first day; moderator’s notes taken on the second day; forty-seven pages of Web-IQ summarized answers; and the handwritten submissions of twenty-five experts on a

handout prepared and circulated on the second day. The chairman/moderator culled from that record those opinions most relevant to the maritime strategy development project. The moderator prepared a separate summary of suggestions regarding issues the experts felt deserved closer examination in a dedicated legal conference. The Peter Schwartz epigraph is from his *Inevitable Surprises: Thinking Ahead in Time of Turbulence* (New York: Free Press, 2004).