

Has the LOSC caused an increase in conflict amongst States?

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The Southern Supporter chases the Viarsa 1 (courtesy Australian Customs.)

The young Dutch scholar and lawyer, Hugo Grotius, who gained prominence as the founder of maritime law in the early seventeenth century, couldn't have envisaged the state of our oceans in the twenty first century. His concept of a limitless sea available for all to use, that should remain in the same condition as first created by nature,¹ has steadily eroded with the progression of mankind. Grotius would doubtlessly be alarmed and amazed to see powerful nations conducting lengthy discussions on the most prudent method to protect fish stocks such as swordfish or tuna. However, perhaps after the initial shock, he may be heartened to see agreements being reached through international negotiation and cooperation.

In the four hundred years since Grotius first postulated on the freedom of the seas the world has increasingly utilised the oceans' resources. Almost 100 million tons of fish are harvested globally at an approximate value of 50 billion dollars.² Sustainability has become a critical issue in a world that can no longer view the oceans as an inexhaustible resource for the commons. The United Nations Convention on the Law of the Sea 1982 (LOSC) has been an international effort

to address the fundamental problem of how to share the oceans amongst an expanding and progressive population. The implementation of this framework involved over ten years of negotiation amongst states and other international bureaucracies³ and still meets with dissent.

The living resources of the ocean are a growing source of conflict in a hungry world. Djalal believes that despite the efforts of the LOSC, acts of illegal fishing have multiplied significantly in the West and Central Pacific.⁴ With tensions continuing to surface, the success of the LOSC as an effective mechanism for regulating maritime order is questionable. In this article I intend to assess the claim that the LOSC may have increased conflict among states. Although there are a number of contentious issues associated with the LOSC this essay will focus on fisheries as one of the most difficult aspects to reconcile.

BACKGROUND

Occupying over 70% of the Earth's surface the sea has had a long history of disputation. Earlier debate had a theological flavour as Hugo Grotius in 1608 refuted claims of the Portugese and Spanish to exclusive rights to the

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high seas in his dissertation *Mare Liberum*. Grotius argued that the sea as a creation of nature should be for the common use of all people. Furthermore, as the sea cannot be occupied then it cannot be anyone's property.⁵ Generally this principle has been accepted as customary law, however, most nations have sought to maintain sovereignty over a corridor between the land and the high seas known as territorial sea.

Efforts to codify customary laws of the sea can be traced to the inception of the International Law Association in 1873 and eventually become the responsibility of the United Nations in 1945. The first UN Conference on the Law of the Sea in 1958 established four conventions as a foundation for maritime law and a second conference occurred in 1960 primarily concerned with defining the dimensions of a territorial sea and contiguous zone, however no agreement was reached.⁶ The third United Nations Conference on the Law of the Sea commenced in 1973 and was finally adopted as a convention in 1982.⁷ This convention has become known as *a constitution for the oceans*⁸ providing a comprehensive legal framework for sharing the world's seas.

The key issue in this process was balancing the competing interests in the use of the oceans and their resources⁹ amongst an ever increasing and 'globalised' population. The problems associated with fishing were of primary concern as the total world catch trebled in twenty years from 20 million tons in 1950 to 70 million in 1970.¹⁰ Arguably, the fisheries provisions of the LOSC generally favour coastal states that were more predominantly represented during negotiation of the Convention.¹¹ This

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apparent imbalance has the potential to fuel conflict amongst nations and may have aggravated the issue of fishing rights and responsibilities. In assessing whether the LOSC has increased conflict I will review a number of causes that have contributed towards tension in the quest for the living resources of the sea. These can be broadly divided into two areas - those causes beyond the control of the LOSC and those that may occur as a consequence of the LOSC.

CAUSES OF CONFLICT BEYOND THE CONTROL OF THE LOSC

POPULATION GROWTH. The world population has grown from 3.3 billion in 1970 to 6.3 billion in 2003.¹² This quite simply means that there are nearly twice as many mouths to feed since the LOSC was initiated and the worldwide hunt for protein demands increased harvesting of the oceans. Without law and order to determine the boundaries and fishing rights of nations a state of chaos would develop as the demand for fish steadily increased whilst available stocks dwindled. Prior to the LOSC, agreement on the breadth of territorial seas and fishery limits had not been resolved¹³ and states varied in applying such measures. The Cod Wars between Iceland and Great Britain were a result of a dispute over the breadth of Iceland's fishing limits and their availability to other nations. Three separate conflicts occurred between 1958-75 due to Iceland extending its fishing zone from four to twelve miles, then a further extension to fifty miles, and finally implementing a two hundred mile limit.¹⁴ Iceland had been motivated to implement these limitations due to concerns over the growing number of foreign fishermen from other European nations over-exploiting their fish stocks.¹⁵ The Limits of the Territorial Sea and the Exclusive

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Economic Zone (EEZ) were confirmed in the LOSC to protect the rights of coastal states and to provide uniform and equitable limitations. The LOSC cannot overcome the fundamental problem of a growing population, but implementing fixed limitations does prevent the likelihood of coastal states taking unilateral action to protect fishing rights and risk conflicts such as The Cod Wars. At the same time negotiation is available within the bounds of the Convention to ensure use of resources are optimised amongst nations.

TECHNOLOGY AND

INDUSTRIALISED FISHING. *The inherent contradictions between using the oceans as a place to generate wealth and maintaining freedom of access are perhaps most vivid in the case of the sea's living resources.*¹⁶ Until the 1950s the limited means of preserving a catch on board prevented fishing fleets from venturing too far from their home shores, however, the advent of factory trawlers with freezing facilities has allowed vessels to remain at sea for weeks.¹⁷ Distance no longer restricts the search for new fishing grounds. The hunt for the Patagonian Toothfish in the Southern Ocean is a contemporary reminder of this capability. The 20 day hot pursuit by Australian authorities of the Uruguayan-flagged long-liner *Viarsa* in August 2003, after being discovered in the Heard Island EEZ, is testament to the endurance and capability of modern fishing vessels. The commercial attraction is also hard to ignore with loads worth up to A\$3 million.¹⁸ The increased capacity of fishing fleets motivated by lucrative returns is inevitable. These developments threaten coastal states as fishing vessels search the seas for new fishing grounds. The LOSC has articulated limitations that will always be contrary to the ambitions of commercial fishing by restricting

potential sources of income. There have been numerous cases of vessels infringing nations' EEZs, but to suggest that the LOSC has been the cause of these conflicts would not be focusing on the real issue. The LOSC only serves to allow enforcement by states to protect their livelihood and conserve the living resources of the sea rather than risk commercial exploitation.

GLOBALISATION. The effects of globalisation allows wider access to the oceans by commercial interests without the traditional barriers of maritime boundaries and national borders. The arrest of the longliners *Volga* and *Lena* by Australian authorities in the Southern Ocean in 2002 revealed a complex, international web of commercial activity. The vessels were Russian flagged with multinational crews, but were alleged to be owned by a Hong Kong based company with subsidiary processing organisations in Indonesia and mainland China.¹⁹ A globally integrated, commercial fishing operation such as this highlights the extent companies will go to for the profitable resources of the ocean.²⁰ A number of cases heard by the International Tribunal for the Law of the Sea (ITLOS) have been the result of flag states representing fishing vessels, often operated by foreign interests, that have been arrested by coastal states.²¹

In summary, the expanding population combined with an increasingly advanced and globalised capacity for fishing provides a challenging environment for law and order at sea. These issues are not a result of the LOSC and regulations within the convention have provided the means for states to take a more active role in protecting and conserving fish stocks. However, it could be argued that the LOSC may have exacerbated the situation in other ways.

POTENTIAL CAUSES OF CONFLICT AS A CONSEQUENCE OF THE LOSC

The shrinking commons.

Although the introduction of the EEZ by the LOSC was an initiative to allow coastal states to protect fish stocks in a growing unregulated environment,²² it also had other ramifications as distant water fishing nations (DWFN) suddenly lost access to vast fishing grounds. Implementing the EEZ meant that over 35% of the world's oceans became enclosed under national control, an area accounting for roughly 90% of all harvested living marine resources.²³ The Pacific Island states were substantial beneficiaries receiving disproportionately large EEZs relative to their size and populations. Moreover, the South Pacific supports the largest tuna fishery in the world.²⁴ The loss of high seas in the Pacific has displaced DWFN such as Japan, requiring them to negotiate bilateral agreements to permit continued access to fisheries zones.²⁵ This has been a critical source of income for the region, but also a potential for conflict. There are over one thousand fishing vessels in the South Pacific, yet less than ten per cent are owned by Pacific Island nations.²⁶ Illegal fishing, either by violating license conditions or breaching EEZs without authority, has been problematic for these small nations.²⁷ The Nieuwe Treaty recognises the vast areas covered by South Pacific nations' EEZs and the need to combine surveillance and enforcement to protect their interests.²⁸ Such treaties are in response to the potential for illegal fishing arising as a result of nations displaced by the introduction of the EEZ and the loss of available fishing grounds.

GEOGRAPHIC DIVISIONS. The allocation of EEZs is purely based on geography with no consideration for population or nation size. An inhabitable island that is strategically

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isolated by more than four hundred miles can secure an EEZ of 125 600 square nautical miles,²⁹ yet Zaire, the largest nation in Africa with a 22 mile coastline, receives an EEZ of only 300 square miles.³⁰ Landlocked states are even more disadvantaged. Of the 148 states that convened for the first LOSC in 1974, 118 were coastal and of those 15 stood to gain 42% of the universal area allocated as EEZs.³¹ This situation clearly represented a potential for conflict. The LOSC has attempted to address this issue in several areas. Part X provides landlocked states with rights of access and freedom of transit, while Arts 69 and 70 confer the right of geographically disadvantaged and land-locked states to participate in the exploitation of living resources of coastal states' EEZs where surplus stocks exist. Furthermore, Art 62 encourages coastal states to promote the optimum utilisation of living resources by providing access to other states when it does not have the capacity to harvest the entire allowable catch. These rights, however, are subject to provisions such as the economic dependence of the coastal state on its living resources, the conservation of stock and other national interests. An example of national interest causing conflict in EEZ access is in the northern Pacific. An agreement between Japan and South Korea allowing fishing in each others EEZs became a negotiating tool when Japan threatened to ban South Korean fishing vessels in the northeastern part of its EEZ in 2001. Tensions had risen due to South Korea reaching a separate agreement with Russia to fish in an area that Japan claimed sovereignty to. This was not the first time conflict had occurred between these two fishing nations, nor is it the only area under dispute.³² The division and use of EEZs was a factor in this disagreement as national interests

clashed.

CONSERVATION AND CREEPING JURISDICTION. As well as providing coastal states with certain sovereign rights, the LOSC also imposes obligations for the management of fisheries resources.³³ This follows the theme that, as the common heritage of mankind, the oceans are an integrated ecological system,³⁴ and are the responsibility of all states to conserve for future generations. Art 61 provides for coastal states to ensure proper conservation and management measures in their EEZs. The migratory nature of some fish stocks and the integrated ecology of the ocean mean that a state must look beyond its EEZ when considering conservation measures. Arts 63 and 64 impose some responsibility on coastal states to manage stocks beyond the EEZ including cooperation with other states, while Arts 117-120 oblige states to cooperate with other states to conserve the living resources of the high seas. A number of separate bilateral and multilateral conventions have formed to pursue this obligation such as the International Convention for the Conservation of Atlantic Tunas (ICCAT) and the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. The obligation for conservation requires an integrated and coordinated effort by states to achieve any level of success, but to what limit? The *Spain/Canada Fisheries Dispute 1995* was the result of Canada taking action against a Spanish vessel, the *Estai*, on the high seas believing it was not adhering to the quotas imposed by the North Atlantic Fisheries Organisation.³⁵ Canadian concerns for the conservation of fish straddling the high seas and its EEZ led to its unilateral declaration of jurisdiction over vessels on the high seas threatening such

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stocks.³⁶ This dispute was presented to the International Court of Justice (ICJ), however, the Court determined it had no jurisdiction and separate negotiations between the European Union and Canada eventually resolved the issue.³⁷

Enforcing conservation under the auspices of the LOSC is a potential source of tension in the future as creeping jurisdiction occurs. On the other hand there are examples to illustrate the goodwill of states to conserve on a cooperative basis. The conciliatory approach in the *Case on Conservation of Swordfish Stocks Between Chile and the European Community 2000* is one instance.³⁸ Both parties requested ITLOS preside over a disagreement relating to the conservation of swordfish in the high seas adjacent to Chile's EEZ, but the parties eventually reached a provisional agreement and did not require proceedings by the ITLOS.³⁹ This was a demonstration of the faith each party had in dispute resolution and the joint pursuit of conservation of the seas. In addition, numerous other worldwide conventions that focus on the conservation of fisheries are a positive sign for the future.¹

INTERPRETATION ISSUES. The LOSC, like many treaties, does not always provide clear definitive answers to resolve disputes. Terms such as 'reasonably' or 'consistent with generally accepted international practices' are examples of the equivocal language sometimes used by the Convention; but this is arguably a key to its success.⁴⁰ Broad language allows for future changes and can also be politically popular by not clearly favouring or excluding the interests of participating parties.⁴¹ Furthermore, should the LOSC be articulated to the degree that it clearly supported the interests of particular parties, and did not have the capacity to allow

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alternative views, sovereign equality amongst nations would be lost.⁴² Conversely, the risk of ambiguity does invite possible dissent amongst states.

One issue that could be considered unclear and a possible source of conflict in the LOSC is the section relating to conservation and the use of the EEZ in Part V. The coastal state is responsible for calculating the maximum sustainable yield of a species and then determining whether other states can have access to promote optimum utilisation (Arts 61-62). In doing so economic and environmental factors are to be taken into account. Eckert (1979) argues that these two considerations will not reach the same conclusion.⁴³ This dilemma can be complicated further when a joint decision must be reached between states due to stocks occurring within two EEZs or areas adjacent to the EEZ (Art 63). Oda (1979) states, 'the problems inherent in the allocation of limitations have in fact made it difficult, perhaps impossible, to compromise conflicting national interests even among those states which are most vitally concerned with the conservation of resources.'⁴⁴ The Southern Bluefin Tuna (SBT) Case heard by the ITLOS in 1999 was a conservation related dispute where Australia and New Zealand disagreed with Japan's proposal on the global quota for SBT. The Convention for the Conservation of Southern Bluefin Tuna had been signed by the three parties in 1993 and included decisions on total allowable catch and individual allocations by states. Conflicting views on stocks, and Japan's plan to commence an experimental fishing programme in 1998, created a dispute between conservation and utilisation that was eventually resolved by ITLOS.⁴⁵

Conflict over the interpretation of maritime law is not a new development or solely a result of the LOSC. The

Anglo Norwegian Fisheries Case 1951 resulted from the United Kingdom challenging the baselines drawn by Norway to determine its territorial sea limits, claiming the method used was not in accordance with customary international law. The case was brought before the ICJ who ruled that the lines drawn were justified.⁴⁶ The basis of the United Kingdom's objection was that a rule to draw baselines had been used previously to the extent that it was customary law, but the Court found that Norway had always objected to this rule and could be exempt as a persistent objector.⁴⁷ The LOSC has ensured that ratifying nations have one standard to help prevent such disputes, while still allowing room for negotiation. Nevertheless interpretation has the potential to heighten tensions, particularly on conservation issues.

DISPUTE RESOLUTION MECHANISMS

With numerous possible sources of conflict one critical aspect to the LOSC is its ability to settle disputes as early as possible. If parties cannot resolve issues through discussion or the conciliation procedure, four dispute resolution mechanisms are available: the ICJ, the ITLOS, an arbitration tribunal or a special arbitration tribunal. Art 296 binds states to any decision made by a court or tribunal, however, Art 297 obviates this provision in some cases of sovereign rights. This includes issues relating to living resources in the EEZ and the determination of allowable catch and allocation of surpluses to other states. These exclusions allow states to ignore decisions that might have a significant impact on other nations and has the potential to leave disputes unresolved.⁴⁸ Nevertheless, given the extensive negotiations in establishing the LOSC this system of resolution is at least reasonably thorough and paves the way for the

settlement of disputes.⁴⁹ As an example the first fisheries dispute to be heard by the ITLOS was the *Southern Bluefish Tuna Case 1999*. The final decision prescribed a number of measures that favoured conservation and both parties responded positively to the Tribunal's order.⁵⁰

Unfortunately there have been occasions when decisions by regulatory bodies have not been complied with.² A further risk is the failure of the respondent state to appear as occurred in the *Fisheries Jurisdiction Case 1974 (U.K v Iceland)* heard by the ICJ. In this case Iceland refused to take part in proceedings believing the treaty relating to the case had been terminated and therefore the ICJ had no jurisdiction.⁵¹ The risk of non-compliance seems likely without the power of enforcement yet international law such as the LOSC rests more on the goodwill of states.⁵²

STATE COMPLIANCE TO INTERNATIONAL LAW

International law relies on the desire of states to seek cooperation and a peaceful co-existence and does not legislate, but rather, utilises treaties and customary practice.⁵³ Concerns over compliance can be warranted when states flout the law and do not accept the decisions of tribunals and courts. However, a treaty is a consensual instrument and therefore states have elected to participate through self-interest.⁵⁴ It would follow then that those states would have a propensity to abide by the rules of a treaty they had ratified in order to maintain that self-interest. The willingness of nations to ratify the LOSC³ is an optimistic sign of the desire of states to maintain a harmonious relationship in the international arena. Cases of states wilfully breaching the LOSC are virtually non-existent.⁴ Fisheries disputes mostly occur through

interpretation issues and differing standards with the potential for resolution. It is at the commercial level that most conflict relating to the LOSC has occurred

CONCLUSION

When the LOSC celebrated its 20th Anniversary in 2002 the UN heralded the Convention as *a monument to international cooperation in multilateral treaty making on a scale and magnitude unprecedented in treaty history*.⁵⁵ Despite such confidence the complex issue of regulating fishing remains a potential source of conflict in a challenging environment.

The LOSC has the difficult task of balancing the contradictory notions of conservation and utilisation. A significant step in this process was the implementation of the EEZ. This empowered nations to take charge of their own destiny by allowing sovereign rights over a considerable portion of the oceans. An unfavourable aspect to the EEZ is the adverse impact on some nations through geographical disadvantages and the reduction of high seas available as common fishing grounds.

Disputes prior to the LOSC, such as the *Cod Wars* and the *Anglo Norwegian Fisheries Case*, centred on the application of customary law whereas disputes after the LOSC have tended to relate to conservation measures such as the *Spain Canada Fisheries Dispute* and the *Southern Bluefin Tuna Case*. Another area of increased conflict since the inception of the LOSC has been fishing vessels breaching EEZs, often as part of large commercial operations.

An expanding and progressive population with limited resources is an environment conducive to conflict. The LOSC has endeavoured to provide an equitable and flexible framework aimed at conserving these resources, but it would be naive to think a simple

set of regulations will overcome such a fundamental problem. I believe that conflict over fisheries may have increased since the LOSC and it could be responsible for exacerbating some of these tensions. However, the LOSC took pre-emptive steps that were necessary for the long-term future of the world so it could remain, as much as possible, in the same condition for perpetuity as Grotius had envisaged.⁵⁶

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(Footnotes)

¹ This includes the convention arising from the *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks 1995*, plus multilateral conventions such as ICCAT, the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and the Convention on Conservation of Antarctic Marine Living Resources.

² A more recent example was Iran's failure to comply in the *Case Concerning United States Diplomatic Staff in Tehran in 1980*, Rebecca M.M. Wallace, *International Law*, Sweet & Maxwell, London, 1986, p. 252.

³ On 23 June 2003, Albania became the 143rd nation to ratify the LOSC. The United States is the most conspicuous non-participant, 'List of ratifications' last updated 23 August 2003 http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm

⁴ This assumption is based on a complete review of fisheries cases heard by the ITLOS and ICJ through the UN website on 1 September 2003. There were no cases heard where a state intentionally disregarded the LOSC. Even Canada's arrest of the *Estai* on the high seas was acknowledged by the ICJ as an issue beyond its jurisdiction. It is questionable, however, whether some nations are turning a blind eye to commercial fishing operations that are breaching the LOSC.

(Endnotes)

¹ James B Scott, *The Freedom of the Seas - A Dissertation by Hugo Grotius*, Oxford University Press, New York, 1916, pp. 27-28.

² Oceans: the Lifeline of our Planet Anniversary of the United Nations Convention of the Law of the Sea: 20 Years of Law and Order on the Oceans and Seas (1982-2002), 27 August 2003, <http://www.>

International law relies on the desire of states to seek cooperation and a peaceful co-existence and does not legislate, but rather, utilises treaties and customary practice

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³ Abram and Antonia Chayes, *The New Sovereignty*, First Harvard University Press, USA, 1998, p. 4.

⁴ Prof. Dr. Hasjim Djalal, *International Framework for Maritime Security: Current Situation and Problems*, Paper presented at the IIPS Meeting, Tokyo, 9-14 December 2001

⁵ Scott, p. 27.

⁶ Henry W Degenhardt, *Maritime Affairs - A World Handbook*, Longman Group Ltd, United Kingdom, 1985, p. 5.

⁷ R.R. Churchill & A.V. Lowe, *The law of the sea third edition*, Juris Publishing, p. 16.

⁸ Tommy T.B. Koh, 'A Constitution for the Oceans', remarks by the President of the Third United Nations Conference on the Law of the Sea, in the Official text of UNCLOS, St Martin's Press, New York, 1983, p. xxxiii.

⁹ 'UNCLOS Praised as Milestone for Rule of Law' *UN Press Release*, 9 December 2002, <http://www.un.org/News/Press/docs/2002/ga10116.doc.htm>.

¹⁰ Clyde Sanger, *Ordering the Oceans, The Making of the Law of the Sea*, University of Toronto Press, Toronto, 1987, p. 136.

¹¹ Martin Tsamenyi, 'Fishing Rights and Responsibilities at Sea' in Martin Tsamenyi & Max Herriman (eds), *Wollongong Papers on Maritime Policy No. 5*, University of Wollongong, 1996, p. 78.

¹² 'World Population Prospects Database', UN Population Division, <http://esa.un.org/unpp/>

¹³ Churchill & Lowe, p. 15.

¹⁴ TED Case Studies, 'The Cod War', 29 August 2003, <http://www.american.edu/ted/icefish.htm>

¹⁵ *ibid*

¹⁶ Ross D Eckert, *The Enclosure of Ocean resources, Economics and the Law of the Sea*, Hoover Institution Press, California, 1979, p. 147.

¹⁷ Clyde Sanger, pp. 138-139.

¹⁸ 'Toothfish group praises Viarsa', ABC

News Online <http://www.abc.net.au/news/newsitems/s933559.htm>

¹⁹ 'The Alphabet Boats - Illegal Longline Fishing', *BBC Homepage* 17 December 2002, <http://www.bbc.co.uk/dna/360/A901801>

²⁰ As an example the price of fish in Japan tripled between 1961 and 1976 (FAO)

²¹ When viewing the ITLOS website on the 1 September 2003, 11 cases had gone before the Tribunal of which 5 related to flag states representing fishing vessels.

²² Tsamenyi, pp. 67-68.

²³ Degenhardt, p. 109.

²⁴ 'Sustainable tuna fishing in the South Pacific', A case study by Ausaid, viewed 1 September 2003, http://globaled.ausaid.gov.au/secondary/casestud/south_pacific/2/tuna.html

²⁵ Eckert p. 129.

²⁶ 'Sustainable tuna fishing in the South Pacific'

²⁷ 'Managing fishery resources in the South Pacific', Anthony Bergin, *Development Bulletin*, July 1994, <http://sunsite.anu.edu.au/region/spin/RSRC/DEVBULL/bergin.htm>

²⁸ 'Niue Treaty On Cooperation In Fisheries Surveillance And Law Enforcement In The South Pacific Region', p. 1.

²⁹ Sanger, p. 74.

³⁰ Eckert, p. 43.

³¹ *ibid*

³² 'The Koreas', *Asia Times Online*, 27 June 2001, <http://www.atimes.com/koreas/CF27Dg05.html>

³³ Tsamenyi, p. 68.

³⁴ Elisabeth MBorgese, 'Pacem in Maribus XIX - Background paper', in Peter B Payoyo (ed), *Ocean Governance, Sustainable Development of the Seas*, UN University Press, Tokyo, 1994, p. 350.

³⁵ David Downes, 'Effective Dispute Resolution, A Review of Options For Dispute Resolution Mechanisms and Procedures', A paper prepared for the fifth session of the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific,

September 1999.

³⁶ 'United Nations Fishing Agreement In Force 11 September 2001, An Incremental Step Towards Enforcement on the High Seas', *Admiralty Law. Com*, March 2002, <http://www.admiraltylaw.com/fisheries/Papers/unclos.htm>

³⁷ 'Fisheries Jurisdiction (Spain v. Canada), Separate Opinion of Judge Shigeru Oda, <http://www.oceanlaw.net/cases/fishj3so2.htm>

³⁸ Press Release, International Tribunal for the Law of the Sea, 21 December 2000

³⁹ Press Release, International Tribunal for the Law of the Sea, 21 March 2001

⁴⁰ Abram & Antonia Chayes, p. 217.

⁴¹ *ibid*, pp. 10-11.

⁴² *ibid*, p. 217.

⁴³ Eckert, p. 123.

⁴⁴ Shigeru Oda, *International Law of the Resources of the Sea*, Sijthoff & Noordhoff, The Netherlands, 1979, p. 47.

⁴⁵ Howard S Schiffman, 'The Southern Bluefin Tuna Case: ITLOS Hears Its First Fishery Dispute' 2(3) *Journal Of International Wildlife Law & Policy*, 1999

⁴⁶ Case Summary on the Judgement of the 18 December 1951 by the International Court of Justice, <http://www.dal.ca/~wwwlaw/kindred.intlaw/norwegianfisheries.htm>

⁴⁷ Churchill & Lowe, p. 8.

⁴⁸ Sanger, p. 202.

⁴⁹ *ibid*

⁵⁰ Schiffman, 'The Southern Bluefin Tuna Case: ITLOS Hears Its First Fishery Dispute'

⁵¹ 'Fisheries Jurisdiction Case (United Kingdom v. Iceland) Merits

⁵² Abram & Antonia Chayes, p. 4.

⁵³ Wallace, p. 3.

⁵⁴ Abram & Antonia Chayes, p. 4.

⁵⁵ 'Oceans: the Lifeline of our Planet Anniversary of the United Nations Convention of the Law of the Sea: 20 Years of Law and Order on the Oceans and Seas (1982-2002)'

⁵⁶ Scott, p. 27.



HMAS Townsville passes
HMAS Warramunga in
Jervis Bay

Book Reviews



SOMEWHERE BELOW By John Samuels Halstead Press, 160 pages. Reviewed by Tom Lewis

This new book on the supposed mystery of the sinking of *HMAS Sydney* in WWII pulls no punches. Its author, John Samuels, alleges a Japanese submarine – the *I-58* – took part in the destruction of *Sydney* as it fought the German raider *Kormoran*. Survivors from the Australian cruiser were massacred in the water afterwards, as war not been officially declared between Japan and the Allies.

Samuels also alleges that later scores of bodies were washed up on West Australian beaches. The British, he says, had broken the Japanese codes and knew of the plans for Pearl Harbor, and needed America in the war. So Royal Australian Navy officers, loyal to Churchill and their British mother Navy rather than their country, enlisted the help of the Army to bury bodies in mass graves. He suggests the bodies should be found and exhumed to analyse “Japanese bullets”.

The author’s proof for these allegations seem to rest in the main on inductive analysis; a painting seen post-war in a Japanese Naval Academy showing the action, and interviews

with an *I-58* engineer and a relative of a member of the burial party.

Allegations of a Japanese submarine’s involvement in the sinking of *HMAS Sydney* – the RAN’s largest wartime loss of life – are not new. They originally were made in a 1981 book by Michael Montgomery, entitled *Who Sank the Sydney?* Other theories explaining the loss of the cruiser – superior in armament and targeting ability – over the raider, include the *Kormoran*’s Captain Detmers firing under a false flag, and various cover-up stories involving the *Kormoran* survivors hiding evidence after the sinking, and so on. They have been examined in detail by many analysts, including excellent accounts by authors Tom Frame, Barbara Winter, and Wes Olson, and a Senate inquiry – to which this reviewer made a submission – which finally closed in 1999 after nearly two years of deliberations. Yet still suggestions such as that contained in *Somewhere Below* insist the truth lies elsewhere.

I am afraid there is not going to be much added to the debate by *Somewhere Below*. The author does not concern himself with the logical analysis applied in other examinations, which is a pity, because they have pointed out the fallacy of the Japanese submarine idea in detail. Why would the Japanese imperil their hammer blow against Pearl Harbor, which was designed to push the Americans out of the Pacific in one strike, for the sake of a light cruiser? Samuels’ answer to this is that the submarine commander had been ordered south to collaborate with the *Kormoran* in sinking the troopship *Aquitania*, presumably when war broke out, but he acted alone in deciding to join the *Kormoran* when it was bailed up by *Sydney* on 19 November. In the ensuing fight the *I-58* torpedoed the cruiser, and then followed her and finished her off, as well as killing

survivors in lifeboats and in the water.

This doesn’t work for me. The existing records don’t place *I-58* anywhere near the position off Western Australia. Samuels brazenly tells us that the *I-58* was ordered to refuel from *Kormoran* and co-operate in destroying the troopship. Where is the primary source showing us this: a written order; an interview with one of the parties or a witness perhaps? They are not presented, either in the text or in any supporting documentation within the book. We are simply told that it is so in the same way we are told *HMAS Coonawarra* existed in WWII – it didn’t; it was not commissioned but merely a wireless station; that two senior officers of the Navy were, gulp!, Freemasons!; that an Army doctor autopsied a body wearing a lifebelt with *Sydney* written on it. Strange, one would have thought it would have been removed before it reached the good doctor’s table, but there you have it. None of these “facts”, along with hundreds of others, are backed up by archival listings except in the most general terms. Putting “Australian War Memorial, Canberra” in the back of one’s book does not provide enough evidence. The whole point of establishing any truthful history is to allow others to check the veracity of your facts.

Samuels drags in as evidence an engineer from the submarine – still alive and interviewed – who doesn’t say anything of note, unsurprisingly, as he was running the engines most of the time. But his words are “interpreted” to show the dastardly crime of the *I-58*. The author makes several inductive leaps with this evidence but they don’t scale the wall of proof. But this is typical of the book: small items which might be “evidence” are brought in and before long they are touted as more planks in the gallows which Samuels seems to be building in order

to lynch senior officers of the RAN. These include such WWII sterling commanders as John Collins, and various shadowy figures of the RN. This is a sad reflection on the character of people such as Collins, the winner of the fight against the cruiser *Bartolomeo Colleoni*, and a man humane enough in another action, fought at night, to lower a lifeboat for the survivors of his victim – the destroyer *Espero* – and shine a searchlight on it momentarily before leaving. To blacken the name of a sterling naval officer – on no evidence, but merely conjecture – is poor indeed. But I shall reserve my greater sympathy for others to whom this author also will bring grief.

Let us turn to another item which supposedly proves the evils of the Imperial Japanese Navy. This is a painting, seen upon a wall of “the Japanese Naval Academy” in September 1945, by a Major Austin Chapman. We are told he was a “career officer” who enlisted in December 1944. So we must presume he was not a major then, but perhaps a second lieutenant, and by the time he viewed this painting he was in the Army for less than a year. A small matter, but it would suggest an inexperienced person, rather than a “major”. Let us push on, in the words of the author... this “haunting painting was of a Japanese submarine attacking a cruiser, and that cruiser was flying the White Ensign. Except on November 19th 1941 there has never been an engagement in which a Japanese submarine targeted an Australian cruiser.”

The painting is usefully reproduced in the book, in sketch format drawn from memory. It shows a cruiser resembling *Sydney*’s “modified-Leander” class approaching the conning tower of a partly submerged submarine, helpfully identified by a large Japanese flag painted on the tower. This is a mystery indeed, for

Japanese submarines did not have such a device painted on them after Pearl Harbor, but rather a letter which looked a little like our capital “I”, and then a number. But even more mysterious is why the author of this book has not researched a little further, for if he had he would have found that indeed the cruiser *HMAS Hobart* – also modified-Leander – was torpedoed by a Japanese submarine later in the war. This might therefore put paid to the now unnecessary efforts of the “other members of the occupation forces who have seen the painting and have begun coming forward to say so”, which the author breathlessly informs us of a little later, right after a suggestion that the painting was removed after it had been spotted. Quite so, I would have thought. What stupid fellows those Japanese were, to paint a picture of a perfidious crime and then leave it hanging on a wall for the Occupation forces to see. Is this the same armed forces who bought us the excellent Zero fighter; a clever strategic assault on the capital of NSW, and the clobbering of the mighty British Army in Singapore? One can hardly believe it!

I should not be sarcastic perhaps, but there is far too much of this sort of surmise in *Somewhere Below* to be let off lightly. If the *I-58*’s Commander Kitamura did such a stupid thing – apparently with the knowledge of Captain Detmers and some of the *Kormoran* – why was he allowed to have another command, instead of being court-martialed and shot? Samuels tells us he went on to command *I-27*, but then he was allowed to “retire” “surely because what he did displeased Japan’s high command”. Samuels cannot have it both ways: if the bosses were displeased with Kitamura they would not let him have another boat; but then we are led to believe he was forcibly retired

because he did a Bad Thing. Perhaps it was, as Samuels wonders and then dismisses, because he was sick. Quite so. It was not the case in the IJN that “the only ‘retirement plan’ available to other Japanese naval officers at the time was dying in the service of the Emperor”. Even the notoriously harsh Imperial Japanese Navy was not stupid enough to place someone at sea who was suffering from malaria, or dysentery, or any other disabling sickness which might leave a vessel without a commander.

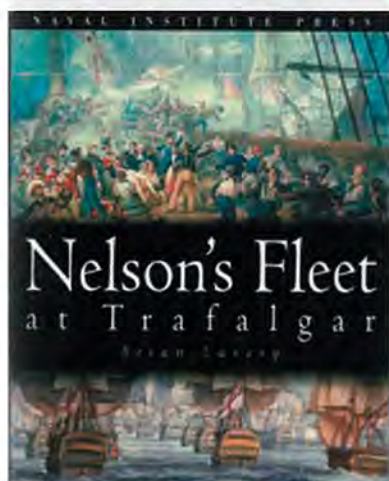
There is much similar leaping to conclusions in the book, but I shall conclude with the worst suggestions the author makes. He alleges that more than 50 bodies of the *Sydney* survivors washed up on the WA coast were buried near Dirk Hartog Island, and others are buried on the Island itself. If that is the case where is the testimony of the many, many Navy and Army men who would have had to have been party to this arrangement, and why have they kept silent? Is it because they are the same sort of military personnel who made up the war-crime committing crew of the *I-58*, and those wily criminals of the *Kormoran* – that is, non-existent?

While there are occasional grandstanders who seek notoriety through telling tall tales of combat, and those who are deceived by what they see, and make allegations about mysterious cover-ups in the Darwin air raids, or submariners from midge submarines ashore on the NSW coast, there are not hundreds of involved personnel coming forward to support them, just as there were not hundreds involved in covering up a crime associated with the *Sydney*, and who will carry that secret to the grave.

The saddest aspect of *Somewhere Below*, however, is the anguish it will bring anyone related to a member of *Sydney*’s ship’s company who is unlucky

enough to read this book. They have suffered enough already without going through the torment of imagining their loved ones being secretly buried in an unmarked grave. I urge them not to buy this book for that reason alone, and for anyone else, you will get far better entertainment from a good Roswell flying saucer story, for it is alongside such fantasies that *Somewhere Below* should be shelved.

Dr Thomas A Lewis is the author of Sensuikan I-124, a history of the Japanese submarine sunk in 1942 outside Darwin, which was also suggested as being involved in the sinking of the Sydney.



NELSON'S FLEET AT TRAFALGAR
by Brian Lavery,
US Naval Institute Press,
2004, 208 pp, softcover,
coloured and b/white
illustrations, index,
RRP US\$19.47

The Trafalgar bicentenary has spawned a minor industry of Nelson biographies, naval histories and battle studies about the Royal Navy in the high age of sail.

Some of these books are highly detailed blockbusters, some more popular, and some are by non-naval authors joining the celebration. Brian Lavery is well known as the world's leading authority on the sailing warship, and as the author of a fascinating study of the Battle of the Nile, and this is his Trafalgar book. It combines accessibility and authority in a unique way and is in this sense the pick of the bunch.

Lavery writes of the world of Nelson's Navy, of the Trafalgar campaign, and of the battle with profound learning, and with frequent quotations from previously unpublished eyewitness accounts. He keeps an excellent balance between the human and technical aspects, and between these and the historical narrative. He deals with Nelson, his tactics of battle and blockade, and his officers and seamen, with ships and life at sea, with the social and political background and the workings of the Admiralty, with the navies of France and Spain, and with the experience of combat under sail. He integrates these aspects into an historical account essentially beginning with the end of the Peace of Amiens in 1803.

Lavery provides histories and technical studies of representative ships from the first-rate *Victory* down to 74s such as *Bellerophon*, *Defence*, *Revenge* and *Mars*, to a frigate such as *Euryalus*: names which sum up the history of the Royal Navy during its greatest era. There are intriguing stories of individuals such as William Rivers, Gunner of the *Victory*, Midshipman Huskisson of the *Defence*, and Captain Francis Austen of the *Canopus*, who provided his sister Jane with the naval background for her novels. We hear of Alexander Scott, the *Victory's* Chaplain, whose flair for languages made him invaluable as Nelson's interpreter in several campaigns, and of George

Magrath, the ship's surgeon. Nelson was anxious to retain the services of both men on the resumption of war in 1803 (he had that appreciation of excellence which frequently causes those who are outstanding in one field to respect those who stand out in others). We hear of course of Collingwood, and of Nelson's Flag-Captain Hardy ('I never knew Hardy wrong upon any professional subject', declared Nelson). Lavery's elucidation of battle experiences and wounds is clinical and chilling. He tracks the path of the ball which wounded Nelson, concluding 'It is difficult to see how a single shot could have done more damage without killing its victim outright'.

Lavery ends with the aftermath of battle, the storm, and the cumulative effect upon individuals, and with Nelson's funeral, which he likens to a combination of the funerals of Churchill and Princess Diana (there are indeed many parallels between Nelson and Diana which help to explain their extraordinary popularity).

Brian Lavery understands the Nelsonian Navy from the inside and brings it alive in all its dimensions. There would be no better book to give someone as an introduction to this period of naval history. But the most informed naval historical buffs and scholars will also learn from it. The book is generously and well illustrated, frequently in colour, and is a delight to browse, read and own. It is highly recommended.

Reviewed by Dr John Reeve, University of New South Wales, Australian Defence Force Academy.



HMAS Manoora and HMAS Warramunga in company in Port Phillip Bay off Melbourne during the 2006 Commonwealth Games

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CONVENTIONS: use numbers for 10 and above, words below. Ship names use italics in title case; prefixes such as HMAS in capitals and italics. Book and Journal titles use italics.

Use single quotation marks for quotations. Do not use hyphens for any rank except Sub-Lieutenant.

CITATIONS: endnotes rather than footnotes. Use footnotes to explain any points you want the reader to notice immediately. Book titles follow Author surname, first name, title if any. Title. Place of publication: publisher, year of that edition. So:

Adkin, Mark. *Goose Green*. London: Leo Cooper, 1992.

Adler, Bill (Ed.) *Letters from Vietnam*.

New York: EP Dutton and Co., 1967.

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HMAS Sydney ship's company march along George Street, ANZAC Day 2006



2006 ANI EVENTS PROGRAMME

EVENT	DATE	LOCATION	COMMENTS/CONTACT
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ANI BRING A GUEST RECEPTION ANI SOCIAL EVENT	29 JUN 1700-1830	WARDROOM HMAS KUTTABUL SYDNEY	POINT OF CONTACT: STACY.CRAIGIE@DEFENCE.GOV.AU CDRE GRIGGS
BREAKFAST DISCUSSION: "HOW TO MAXIMISE THE CAPABILITIES OF THE ADELAIDE CLASS LHDs"	28 JULY	AUSTRALIAN DEFENCE FORCE ACADEMY (ADFA) CANBERRA	POINT OF CONTACT: LCDR DONNA.MULLER@DEFENCE.GOV.AU
ANI BRING A GUEST RECEPTION ANI SOCIAL EVENT	AUG (DETAILS TBA)	DARWIN	POINT OF CONTACT: AARON.INGRAM@DEFENCE.GOV.AU CAPT INGRAM (TBC)
ANI SEMINAR ON OFFSHORE PROTECTION	18 AUG	AUSTRALIAN DEFENCE FORCE ACADEMY (ADFA)	POINT OF CONTACT: LCDR DONNA.MULLER@DEFENCE.GOV.AU
VERNON PARKER ORATION SPEAKER: MR JOHN ROTHWELL AO	23 AUG 1830	AUSTRALIAN DEFENCE FORCE ACADEMY (ADFA)	POINT OF CONTACT: LCDR DONNA.MULLER@DEFENCE.GOV.AU
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ANI ON-LINE: A GUIDE TO THE NEW WEBSITE.

Our new website is now on-line! In addition to the features available on the previous site, the new site also features a library of past journals, a discussion forum, a news section and member list. This short guide is designed to help you take full advantage of the new features.



Figure 1

OBTAINING AN ACCOUNT

In order to access the new features of the site you must have a user account for the website. If you have a current subscription to the ANI, navigate to the website www.navalinstitute.com.au using your web browser (figure 1), click the "Members Login" menu item (figure 2), then click the link to download an application form. Fill in the form, then fax or post it to the ANI Business Manager. Once your account has been created, you will receive an email that outlines your member ID and password.

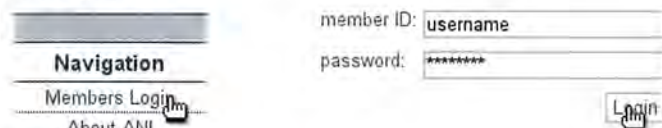


Figure 2



Figure 3

LOGGING IN TO YOUR ACCOUNT

Once you have your account details, you are ready to login and access the new features of the site. In order to login, navigate to the website (figure 1) and click the "Members Login" item (figure 2). Enter your member ID and password as they were provided to you, then click the "Login" button. The case of the member ID and password are important: i.e. "CaSe" and "case" are considered entirely different words by the authentication system. Each letter of the password will appear as a single "a" to prevent others from seeing your password as you type. If you have entered your details correctly, you will be presented with the news page. The grey status bar at the top notifies you of the account you are using (figure 4). You are now able to access all of the new features of the site.



Figure 4

LOGGING OUT OF YOUR ACCOUNT

In order to protect your identity and to prevent malicious use of your account by others, you must log out of the site when you are finished browsing. This is especially important on public computers. In order to log out, click the "Logout" link in the grey status bar (figure 4).

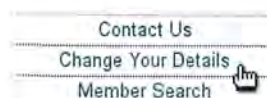


Figure 5

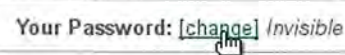


Figure 6

CHANGING YOUR DETAILS

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Figure 7

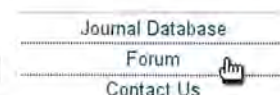


Figure 8

PARTICIPATING IN THE FORUM

In order to post topics and replies in the discussion forum, first login and click the "Forum" menu item (figure 8). Then select a forum that you would like to view by clicking its "View Topics" button (figure 9). Select a topic that you would like to read by clicking its "View this topic" link (figure 10). If you are not interested in any particular topic, you may add your own by clicking the "Add New Topic" button (figure 10). Similarly, once you are viewing a topic, you may post a reply by clicking "Add New Post". Fill in the heading and body of your reply and click the "Submit" button to add your reply to the topic. If you change your mind while writing your reply, you may click the "Cancel" button and your reply will not be added to the topic.



Figure 9



Figure 10

FURTHER QUESTIONS

If you have specific questions regarding website features or even a feature request, post a topic in the "Website Questions" forum and a site administrator will reply. Otherwise, happy browsing!

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