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Intelligence Collection and the International Law of the Sea

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CONTENTS

I.	Introduction.....	603
II.	Spying at Sea.....	603
III.	The High Seas	605
	A. Intelligence Collection as a High Seas Freedom.....	605
	B. Due Regard	607
	C. Intelligence Collection is “Peaceful”	607
IV.	Intelligence Collection in the Exclusive Economic Zone	610
	A. Restrictive Views of the EEZ	611
	B. Permissive Views of the EEZ.....	616
V.	Intelligence Collection in the Territorial Sea	617
	A. Innocent Passage.....	617
	B. Maritime Domain Awareness During Innocent Passage	620
	C. Disguised Maritime Boundary Disputes	621
	D. Non-innocent Passage in the Territorial Sea.....	622
VI.	Warship Sovereign Immunity	626
	A. Require it to Leave Immediately	628
VII.	Naval Intelligence Collection Not a “Use of Force”.....	630
	A. Naval Intelligence Collection Not an “Armed Attack”	631
	B. Analogy with National Airspace	634

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I. INTRODUCTION

This article explores the legal implications of intelligence collection operations at sea. The analysis concludes that in terms of the international law of the sea, intelligence collection that occurs outside of the territorial sea is lawful. Furthermore, even intelligence collection by a foreign ship inside the territorial sea, while a violation of State sovereignty, may not violate the law of the sea, *per se*. Furthermore, within the territorial sea, coastal States are limited in the measures they may take against foreign-flagged submarines and surface warships collecting intelligence since those activities are not an armed attack or even the use of force in international law and the platforms are protected by sovereign immunity. Ultimately, what these findings suggest is that the international law of the sea does not prohibit intelligence collection in the maritime domain, and it has limited utility in addressing larger questions about the lawfulness of intelligence collection activities more generally.

II. SPYING AT SEA

Data is collected in the maritime domain for myriad purposes, including safety of navigation, marine scientific research, hydrographic surveys, underwater cultural heritage, environmental monitoring, and for military purposes.¹ Naval intelligence collection is the process of acquiring vital information to inform military operations and the conduct of statecraft, and it may be gathered passively or actively from submarines, surface ships, aircraft, satellites, and numerous types of aerial and maritime unmanned sensors.

While there is no universal definition of what activities constitute “intelligence collection,” a “spy” acting during armed conflict is defined by the 1907 Hague Regulations as someone who “clandestinely or under false pretenses . . . obtains or endeavors to obtain information in the zone of operation of a belligerent” with the intention to pass that information to a hostile party.² Unlike individual spies, however, vessels and aircraft engaged in intelligence operations belong to flag States and enjoy sovereign immunity

1. J. ASHLEY ROACH, *EXCESSIVE MARITIME CLAIMS* 486–87 (4th ed. 2021).

2. Regulations Respecting the Laws and Customs of War on Land art. 29, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539.

from the jurisdiction of foreign States. The international law of the sea regulates the conduct of States and their operation of ships and aircraft throughout the world's oceans. These rules govern interaction between ships and aircraft of States operating on the high seas, and between ships and aircraft of one State operating within the coastal State exclusive economic zone (EEZ) and on the continental shelf, the contiguous zone, and in territorial waters of coastal States. The United Nations Convention on the Law of the Sea (UNCLOS) codifies and sets forth these regimes of oceans governance and the treaty reflects much of the State practice that forms the international law of the sea. UNCLOS is supplemented by other sources of international law, including customary law.

The terms “intelligence” and “intelligence collection” are not specifically referenced in UNCLOS, although they may be regarded obliquely through the term “military activities,” which itself is also a term not defined in the treaty.³ While officials and scholars have debated for hundreds of years the proper scope of lawful naval activities during armed conflict and in peacetime, there is much less analysis concerning whether or when “intelligence activities” are included as a subset of these discussions or are considered a separate and even more opaque activity. This article suggests that while intelligence operations overlap substantially with military activities, there are important nuances that make them distinct State operations that sometime lie outside the scope of military activities.

Maritime operational intelligence uses intelligence, surveillance, and reconnaissance to inform civilian leaders and military commanders of the strength, location, and intentions of the adversary. The maritime boundaries from which intelligence collection occurs includes a three-dimensional area encompassing the oceans of the world, the water column and seabed of the oceans, the surface of the water, and the airspace above the ocean to the outer edge of the atmosphere and the beginning of outer space—the Kármán line. This massive maritime arena is the world's largest domain of military operational and intelligence collection, and it includes about twenty kilometers of atmosphere from sea level to the Kármán line, the geographic

3. The term “military” is found in UNCLOS arts. 19(2)(f) (meaning of innocent passage); 107 (ships and aircraft which are entitled to seize on account of piracy); 110 (right of visit); 11(5) (right of hot pursuit); 224 (exercise of powers of enforcement); 298(1)(b) (optional exceptions). None of these articles address intelligence collection specifically, although art. 19(2)(c) refers to “any act aimed at collecting information to the prejudice of the defence or security of the coastal State.” United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

extent of all the oceans and seas of the world (some 71 percent of the Earth), the water column at varying depths of up to nearly eleven kilometers deep, and superjacent seabed and continental shelf. This operational arena is exceeded in size only by outer space.

Information collected at sea may be used to facilitate the accomplishment of theater, strategic, and tactical objectives. Intelligence gathering helps to identify adversaries' centers of gravity, critical vulnerabilities and decision points, and accurate and timely assessment of capabilities and plans. Naval forces collect, assess, and provide information for informing the decision cycle through the process of intelligence preparation of the operational environment (IPOE).⁴ The IPOE defines the operational environment, describes the impact on the adversary's and friendly forces, evaluates adversary capabilities, and assesses an opponent's objectives.⁵

III. THE HIGH SEAS

The international law of the sea does not prohibit the collection of national security or military intelligence on or from the high seas. Surface warships, submarines, and naval aircraft, both manned and unmanned, are outfitted with a range of active and passive intelligence collection systems.

The high seas are open to all States, whether coastal or landlocked. Flag States enjoy "freedom of the high seas" under the conditions in UNCLOS and other rules of international law.⁶ These freedoms include freedom of navigation and freedom of overflight.⁷ Freedom of the high seas also includes the freedom to lay submarine cables and pipelines, construct artificial islands and other installations, the freedom of fishing, freedom of scientific research, and other unspecified freedoms, denoted by the qualifier that these examples are "inter alia" in Article 87, UNCLOS, concerning a list of activities within the scope of freedom of the high seas.

A. Intelligence Collection as a High Seas Freedom

Intelligence operations and activities are logically and reasonably within this broad ambit of freedom of the seas. This interpretation is supported by State

4. See Chairman, Joint Chiefs of Staff, Joint Publication 2-0, Joint Intelligence, at III-1 (May 26, 2022).

5. *Id.* at III-2 fig. III-1.

6. UNCLOS, *supra* note 3, art. 87.

7. *Id.* arts. 87, 90.

practice, including reports of numerous intelligence operations and the design, equipping, and manning of specially designed ships, submarines, and aircraft for the purpose. China, for example, operates a large fleet of intelligence collection vessels, including the Type 815 *Dongdiao*-class auxiliary general intelligence ship *Neptune*, which is an electromagnetic reconnaissance vessel able to detect signals intelligence of warships.⁸ Since freedom of the seas is a wide remit, the only qualifications on the right of sovereign States in the international system to collect intelligence from the high seas are those that are specific to the international law of the sea, as reflected in UNCLOS. This approach incorporates the *Lotus* Principle, based on the famous 1927 case at the Permanent Court of Arbitration, which held that sovereign States are not subordinate to any external authority and therefore may act in any way they choose so long as they do not contravene an explicit prohibition of international law. As the *Lotus* tribunal held, “all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”⁹

This article begins with (and sets aside) the conventional view that international law generally does not prohibit intelligence gathering that is not tantamount to an “armed attack” or “armed aggression” proscribed in Article 2(4) of the Charter of the United Nations. Returning to the focus of the law of the sea, however, the article sidesteps the issue of whether international law prohibits intelligence collection more generally and finds that there is nothing in the law of the sea precluding intelligence operations on the high seas.

Intelligence collection from the high seas (like all naval operations) must comply with two other requirements besides the proscription against the use of force in Article 2(4). These are that naval operations must exercise due regard for other users of the oceans and that such activities must be “peaceful” or for “peaceful purposes,” itself merely a reference back to the UN Charter. The same rules that apply to the high seas also apply by extrapolation in the EEZ and on the continental shelf. Article 58 of UNCLOS states that the legal regime governing the high seas and freedom of the seas applies *mutatis mutandis* to the EEZ. Similarly, the rights of the coastal State over the

8. Minnie Chan, *Chinese Spy Ship Spotted off Australian Coast Could Collect Intel on US Warships in the Region: Experts*, SOUTH CHINA MORNING POST (May 16, 2022), <https://www.scmp.com/news/china/military/article/3177962/chinese-spy-ship-spotted-australian-coast-could-collect-intel>.

9. S.S. *Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7).

continental shelf do not affect “the legal status of the superjacent waters or of the air space above those waters.”¹⁰ Consequently, while the EEZ and continental shelf are not “high seas” per se or “international waters” (a term not in UNCLOS), they are subject to the exact same legal regime concerning military and intelligence operations, which lie beyond the limited coastal State competence over the living and non-living resources in those areas.

B. *Due Regard*

The freedom of the seas shall be exercised by all States with due regard for the interests of other States in their exercise of high seas freedoms. The primary limitation on this freedom is that States must exercise freedom of the high seas with due regard for the interests of other States.¹¹ Naval operations on the high seas and in the international deep seabed area must have due regard for the collection of rights enjoyed by other States in the international community and that fall within the competence of the International Seabed Authority, respectively. Due regard is not a substantive right, but simply means that operations at sea must consider the operations of other States. One State may not unduly interfere with other uses of the common space to the extent other users are lawfully exercising their freedom of the seas.¹² Due regards extends only to others’ lawful rights. The standard means that purposeful interference against other users in their operation of ships and aircraft on the high seas is unlawful. It does not mean, however, that naval operations on the high seas must respect every nuanced sensitivity or claimed right, interest, or whim offered by another State, whether coastal State or flag State.

C. *Intelligence Collection is “Peaceful”*

The concept of “peaceful uses” or “peaceful purposes” underpins the entire geographic and functional structure of UNCLOS. Like all activities on the high seas, naval operations must be conducted for “peaceful uses” or “peaceful purposes,” which are synonymous.

The concept of reserving the oceans for peaceful uses or purposes emerged from Ambassador Arvid Pardo’s resounding speech in the UN

10. UNCLOS, *supra* note 3, art. 58(1)–(2).

11. *Id.* art. 87(2).

12. DEFINITIONS FOR THE LAW OF THE SEA: TERMS NOT DEFINED BY THE 1982 CONVENTION 179–80 (George K. Walker ed., 2012).

General Assembly in 1967.¹³ The following month, the General Assembly established an Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.¹⁴ These efforts emerged within the context of the Cold War, as competition between the United States and the Soviet Union spilled into the oceans.

After three sessions, in 1968 the Ad Hoc Committee presented its conclusion to the General Assembly.¹⁵ The study convinced the General Assembly of the need for further work, which was initiated through establishment of a Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.¹⁶ The Committee was comprised of forty-two member States and explored the norms and rules for global oceans governance. On December 15, 1970, the Committee report requested that the Secretary-General gauge the support among member States for convening a multilateral conference to develop worldwide oceans governance.¹⁷ Two days later, the General Assembly adopted a resolution reserving the high seas and seabed and ocean floor for peaceful purposes and deciding to convene a general comprehensive conference in 1973 on the law of the sea.¹⁸

From the outset in 1973 States disagreed on the meaning of “peaceful purposes” or “peaceful uses.” Some developing States held the position that the terms must mean the complete demilitarization of all naval activities at sea.¹⁹ This perspective did not reflect State practice across millennia and was rejected at the negotiations as the United States, the Soviet Union, and other States pushed back on a restrictive interpretation.²⁰

13. *See Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interests of Mankind*, G.A. Off. Rec., 22d Sess. 1st Comm., 1515th–1616th meetings (Nov. 1, 1967), https://www.un.org/depts/los/convention_agreements/texts/pardo_ga_1967.pdf (transcript of Pardo’s speech).

14. G.A. Res. 2340 (XXII) (Dec. 18, 1967).

15. Report of the Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, U.N. Doc. A/7230 (Dec. 31, 1968).

16. G.A. Res. 2467 (XXIII) (Dec. 21, 1968).

17. G.A. Res. 2574 (XXIV) (Dec. 15, 1970).

18. G.A. Res. 2750 (XXV) (Dec. 17, 1970).

19. *See Official Records of the Third U.N. Conference on the Law of the Sea*, 4th sess., 67th plenary meeting, U.N. Doc. A/CONF.62/SR.67 (Apr. 23, 1976), at 56.

20. *Id.* at 62.

The term “peaceful purposes” or a variation is included in eight provisions of UNCLOS, plus the preamble.²¹ Article 301 declares that States parties shall refrain from “the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” This text is copied from Article 2(4) of the Charter of the United Nations and reflects a bedrock norm of international law. The high seas are reserved for peaceful purposes by Article 88, applied by Article 56(2) throughout the EEZ and continental shelf. Article 141 reserves for peaceful purposes the international seabed Area beyond national jurisdiction. Articles 240, 242, and 246 specify that marine scientific research may be conducted only for peaceful purposes.

In the end, a large majority of States accept that Article 2(4) of the Charter is the most apt metric for whether activities are “peaceful.” That provision prohibits the threat or use of force against the territorial integrity or political independence of another State and constitutes the general proscription against armed attack. The equally valid French language text proscribes “armed aggression.”²² The text is also replicated in Article 19 concerning innocent passage. This view has become the conventional understanding of the term “peaceful purposes” and “peaceful uses” of the sea. In 1985 a report of the UN Secretary-General adopted the view that “peaceful purposes” meant naval operations that are consistent with Article 2(4) of the Charter.²³ Moreover, there is no logical alternative to this conclusion. Were all military activities on the high seas generally to be considered unlawful, the optional exception for military activities in Article 298 of UNCLOS would be non sequitur.

In addition to UNCLOS, the term “peaceful purposes” is featured in excess of a dozen treaties affecting the maritime domain, including the Outer Space Treaty,²⁴ the Non-Proliferation Treaty,²⁵ and the Seabed Arms Control

21. UNCLOS, *supra* note 3, pmb1.

22. *See also* “act of aggression” in G.A. Res. 3314 (XXIX) (Dec. 14, 1974).

23. Study on the Naval Arms Race: Report of the Secretary-General, ¶ 188, U.N. Doc. A/40/535 (Sept. 17, 1985).

24. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies art. 4, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205. *See also* Agreement Governing the Activities of States on the Moon and Other Celestial Bodies art. 3, Dec. 5, 1979, 1363 U.N.T.S. 22.

25. Treaty on the Non-Proliferation of Nuclear Weapons, pmb1., arts. 3, 4, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161.

Treaty.²⁶ The term is also part of regional agreements, including the South Pacific Nuclear Free Zone Treaty,²⁷ Latin American and Caribbean Nuclear Free Zone Treaty,²⁸ and the Antarctic Treaty.²⁹ In 1971 the UN General Assembly declared the Indian Ocean as a zone of peace.³⁰ While these agreements may limit military activities, such as the use of nuclear weapons, they have nothing to say about intelligence collection. For example, the UN General Assembly declaration on the Indian Ocean as a zone of peace did not call for the complete demilitarization of the area. Instead, it aspired for the “great powers” to eliminate their naval bases in the region and remove nuclear weapons and weapons of mass destruction.³¹ To the extent these instruments are more restrictive than UNCLOS, however, they bind only the member States and then only within a limited geography.

IV. INTELLIGENCE COLLECTION IN THE EXCLUSIVE ECONOMIC ZONE

Foreign ships and aircraft operating in a coastal State’s EEZ also enjoy high seas freedoms of navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines.³² The framework of freedom of the seas that is the hallmark of the high seas was lifted from Articles 88 to 115 in UNCLOS Part VII (High Seas), and incorporated into Part V (EEZ) by virtue of Article 58(2), to the extent they are not incompatible with Part V. This provision means that all the freedoms that apply in the high seas also apply in the EEZ, except in cases in which the coastal State’s competence in the EEZ might be undermined by doing so, such as in the freedom of fishing.

26. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, pmbl., Feb. 11, 1971, 23 U.S.T. 701; T.I.A.S. 7337; 955 U.N.T.S. 115.

27. South Pacific Nuclear Free Zone Treaty art. 4, Aug. 6, 1985, 1445 U.N.T.S. 177 (Treaty of Rarotonga).

28. Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, pmbl., arts. 1, 12, 17, 18, Feb. 14, 1967, 634 U.N.T.S. 281 (Treaty of Tlatelolco).

29. Antarctic Treaty arts. 1, 9, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

30. G.A. Res. 2832 (XXVI), Declaration of the Indian Ocean as a Zone of Peace (Dec. 16, 1971).

31. *Id.* ¶ 3.

32. UNCLOS, *supra* note 3, art. 58(1).

The navigational regime for vessels and aircraft, however, is the same in the EEZ as it is in the high seas. The wide range of such operations includes intelligence, surveillance, and reconnaissance, and is reflected in Table 1.

Surface navigation	Patrols	Exercises
Submarine navigation	Underway replenishment	Special operations
Overflight	Logistics	Submarine support
Maneuvers	Acoustic naval research	Ballistic missile defense
Forward presence	Military surveys	Strategic nuclear deterrence
Intelligence collection	Spacecraft and satellite support	Strategic arms limitations treaty verification
Surveillance	Missile range instrumentation	Humanitarian assistance
Reconnaissance	Maritime law enforcement	Disaster relief

Table 1. Selected internationally lawful uses of the sea associated with the operation of ships and aircraft permissible in foreign EEZs under Article 58(2), UNCLOS.

A. Restrictive Views of the EEZ

The liberal view of the EEZ is not universally accepted. In 1968, North Korea seized the U.S. spy ship USS *Pueblo* operating on the high seas. The seizure was unlawful due to its location as well as the *Pueblo's* sovereign immune status as an American warship.³³ During the negotiations for UNCLOS that began five years later a group of coastal States sought to expand the nature of the EEZ from a resource zone by proposing that coastal States should have jurisdiction over military activities in the zone. Venezuela, Colombia, and Mexico offered such a proposal in 1973 and separately, Peru, in 1978.³⁴ These proposals also would have required coastal State consent for military

33. Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AMERICAN JOURNAL OF INTERNATIONAL LAW 53, 66 (1984).

34. See 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶ 58.8 at 563 (Satya N. Nandan & Shabtai Rosenne eds., 1993); 5 LAW OF THE SEA 13, 15 (Renate Platzöder ed., 1984).

installations or devices on the continental shelf.³⁵ The provisions were not accepted by the conference and are not included in the text of the treaty. Nine States made formal declarations upon signature or ratification of UNCLOS challenging the lawfulness of foreign military activities in their EEZ: Bangladesh, Brazil, Cape Verde, Ecuador, India, Malaysia, Pakistan, Thailand, and Uruguay. At the same time, China offered its view of foreign military activities in the EEZ. During informal discussions in Geneva on May 9, 1978, Shen Wei-Liang, deputy head of the Chinese delegation, stated that the treaty should be crafted so that no foreign country is allowed to establish military installations or carry out military activities in the EEZ of a coastal State.³⁶ Each of these proposals were rejected by most States present at the negotiations and did not make it into the final text, which was adopted by the conference in 1982 and entered into force in 1994.

By rejecting proposals to limit freedom of the seas in the EEZ and on the continental shelf States appear to have accepted the position that “[m]ilitary operations, exercises and activities have always been regarded as internationally lawful uses of the sea. The right to conduct such activities will continue to be enjoyed by all States in the exclusive economic zone.”³⁷

Twenty-one States purport to limit either the right of foreign States to conduct military operations, exercises, or maneuvers in the EEZ or on the continental shelf, or to authorize, construct, and regulate all types of installations and structures on their continental shelf. These limitations presumably apply to intelligence activities. The States making these minority claims are Bangladesh, Brazil, Burma (Myanmar), Cambodia, Cape Verde, China, Ecuador, India, Indonesia, Iran, Kenya, Malaysia, Maldives, Nicaragua, North Korea, Pakistan, Philippines, Portugal, Thailand, Uruguay, and Vietnam.³⁸

35. 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, *supra* note 34, ¶¶ 60.7, 60.10, 60.15(c).

36. *Sharp Struggle Develops over Exclusive Economic Zone at Geneva Sea Law Conference*, XINHUA GENERAL OVERSEAS NEWS SERVICE (May 13, 1978).

37. Statements of Representatives to the 3rd United Nations Conference on the Law of the Sea, U.N. Doc. A/CONF.62/WS/37 (Apr. 25, 1983); Statements of Representatives to the 3rd United Nations Conference on the Law of the Sea, U.N. Docs. A/CONF.62/WS/37; A/CONF.62/WS/37/ADD.1 (Aug. 2, 1983); A/CONF.62/WS/37/ADD.2 (Oct. 11, 1983).

38. See the relevant entries in DEPARTMENT OF DEFENSE, MARITIME CLAIMS REFERENCE MANUAL, https://www.jag.navy.mil/organization/code_10_mcrm.htm (last visited Sept. 20, 2022). See also U.N. Office of Legal Affairs, Law of the Sea Bulletin No. 5, at 15–

China has a restrictive interpretation of foreign military activities in its EEZ, purporting to deny warships the right of high seas freedoms.³⁹ In 1998 China enacted the Law on the Exclusive Economic Zone and the Continental Shelf.⁴⁰ China claims exclusive jurisdiction over artificial islands, installations, and structures in the EEZ and on the continental shelf, which includes “jurisdiction with regard to customs, fiscal, health, security and immigration laws and regulations.”⁴¹ Four of these authorities—customs, fiscal, immigration, and sanitary—arise in the contiguous zone that extends out to twenty-four nautical miles from lawfully drawn baselines.⁴² Coastal State authority over “health,” however, is not identified in the contiguous zone, although authority over “sanitary” (disease quarantine) risks are included. There is no authority in UNCLOS to assert an interest in “security” or “intelligence” in the contiguous zone, as it overlaps the EEZ, where high seas freedoms apply. In recent decades only China has acted against foreign-flagged warships, submarines, and military and surveillance aircraft operating in its EEZ.

China conflates the international airspace above the EEZ beyond the territorial sea as “national airspace.”⁴³ The International Convention on Civil Aviation defines national airspace as extending to the outer limit of the territorial sea.⁴⁴ China has interfered with and protested U.S. military overflight of the EEZ, even though these flights are conducted in international airspace. The United States has protested these purported restrictions in 2001, 2002, and 2007, and in every fiscal year since 2007 to the present. In April 2001, a U.S. EP-3 maritime patrol aircraft was intercepted over the Chinese EEZ by two FU-8 fighter jet aircraft about seventy-five nautical miles off

16 (1985); Status of the U.N. Convention on the Law of the Sea, U.N. Treaty Collection, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec (status as of Sept. 20, 2022).

39. People’s Republic of China, *Declaration of the Government of the People’s Republic of China on China’s Territorial Sea* (Sept. 4, 1958), in *COLLECTION OF THE SEA LAWS AND REGULATIONS OF THE PEOPLE’S REPUBLIC OF CHINA* (3d ed. 2001).

40. People’s Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (June 26, 1998), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf.

41. *Id.* art. 8.

42. UNCLOS, *supra* note 3, art. 33.

43. The national airspace of a coastal State extends only to the outer limits of the territorial sea. *Id.* art. 2(2).

44. Convention on International Civil Aviation arts. 1–2, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

the coast of Hainan Island.⁴⁵ One of the FU-8s collided with the propeller-driven EP-3, and the U.S. aircraft was forced to make an emergency landing on Hainan Island. The Chinese aircraft and its pilot were lost at sea. Chinese authorities held the U.S. Navy aircrew captive for over one week and permitted the return of the dismantled spy aircraft three months later.

In July 2017, a U.S. EP-3 surveillance aircraft was aggressively intercepted over the East China Sea and had to take evasive action to avoid colliding with a Chinese fighter jet.⁴⁶ One of the Chinese planes flew directly in front of the U.S. aircraft, forcing the Americans to take evasive action to avoid a collision. The United States continues to assert its rights to sail, fly, and operate anywhere in the oceans that international law permits, including in the EEZ. But the United States characterized the interception as “the exception, not the norm,” indicating that most overflights do not result in such a dramatic incident. A Pentagon spokesman said, “This is uncharacteristic of the normal safe behavior we see from the Chinese military.”⁴⁷

In August 2020, a U.S. U-2 spy plane overflew the Yellow Sea in international airspace in an area where China was conducting military exercises and had declared a no-fly zone to foreign aircraft. China protested the flight, and the United States responded that it would “continue to fly and operate anywhere international law allows, at the time and tempo of our choosing.”⁴⁸

China also claims that marine survey and mapping activities in the EEZ by foreign-flagged ships require its approval. Chinese ships have interfered with U.S. Navy military surveys in its EEZ, most notably in the incident involving the USNS *Impeccable* in 2009, in which five Chinese vessels surrounded the U.S. ship as it was tracking a towed array behind it.⁴⁹ While

45. Craig R. Quigley, Deputy Assistant Secretary of Defense for Public Affairs, News Briefing (Apr. 3, 2001); Gerry J. Gilmore, *Chinese Jet Struck Navy EP-3 Aircraft, Rumsfeld Says*, AMERICAN FORCES PRESS SERVICE (Apr. 13, 2001); Sean D. Murphy, *Aerial Incident off the Coast of China*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 626 (2001).

46. Helene Cooper, *U.S. Navy Plane Takes “Evasive Action” to Avoid Chinese Fighter Jet*, NEW YORK TIMES (July 24, 2017), <https://www.nytimes.com/2017/07/24/world/asia/navy-plane-intercepted-chinese-jets.html>.

47. *Id.*

48. Teddy Ng & Kristin Huang, *US Spy Plane Enters No-Fly Zone During Chinese Live-Fire Naval Drill*, SOUTH CHINA MORNING POST (Aug. 26, 2020), <https://www.scmp.com/news/china/military/article/3098885/us-spy-plane-enters-no-fly-zone-during-chinese-live-fire-naval>.

49. Raul Pedrozo, *Close Encounters at Sea: The USNS Impeccable Incident*, NAVAL WAR COLLEGE REVIEW, Summer 2009, at 1; David Morgan, *U.S. Says Chinese Vessels Harassed Navy Ship*, REUTERS (Mar. 9, 2009), <https://www.reuters.com/article/us-usa-china-navy/us-says-chinese-vessels-harassed-navy-ship-idUSTRE52845A20090309>.

regulation of civilian marine scientific research is indeed under the competence of the coastal State, military and hydrographic surveys are not marine scientific research. China conflates these terms. In Chinese law, the conduct of marine surveys, both military and hydrographic, in the EEZ without the consent of China constitutes a criminal offense as a violation of the regime of marine scientific research. Violators may be fined, ordered to leave the area, or subject to criminal prosecution. The attempt to assert coastal State criminal jurisdiction over sovereign immune warships and naval auxiliaries is a violation of general international law and UNCLOS.⁵⁰

From these examples we cannot draw the conclusion that China has a longstanding and good faith interpretation that UNCLOS prohibits military activities or intelligence collection in the EEZ. While China has attempted to impair the right of high seas freedoms in its EEZ, it has exercised those rights—and more—in other countries' EEZs. Beginning in 2013, the People's Liberation Army Navy started operating in the U.S. EEZ off Guam and then Hawaii.⁵¹ The commander of U.S. forces in the Pacific, Admiral Samuel Locklear, said, “we encourage their ability to do that,” and that because the EEZ comprises more than one-third of the oceans, any restrictions on high seas freedoms in the zone would cripple military operations.⁵² In 2015, a flotilla of five Chinese warships transited through the territorial sea and EEZ of the Aleutian Islands of Alaska.

China's 2019 Defense White Paper states that it “firmly upholds freedom of navigation and overflight by all countries in accordance with international law.”⁵³ Yet China has numerous EEZ disputes with its neighbors and prefers to address the issue of conflicting maritime EEZ claims on the basis of bilateral negotiations.⁵⁴ It regularly conducts military operations in its neighbors' EEZs in the East China Sea and South China Sea as part of a concerted campaign to diminish their sovereignty, sovereign rights, and jurisdiction.

50. UNCLOS, *supra* note 3, arts. 32, 95.

51. *China Spy Ship at US-Led Navy Exercise off Hawaii*, BBC NEWS (July 21, 2014), <https://www.bbc.com/news/world-asia-china-28400745>.

52. Kathrin Hille, *Chinese Navy Begins US Economic Zone Patrols*, FINANCIAL TIMES (June 2, 2013), <https://www.ft.com/content/02ce257e-cb4a-11e2-8ff3-00144feab7de>.

53. China's National Defense in the New Era: The State Council Information Office of the People's Republic of China 7 (July 2019), <http://www.xinhuanet.com/english/download/whitepaperonnationaldefenseinnewera.doc>.

54. Exclusive Economic Zone and Continental Shelf Act, *supra* note 40, art. 2.

B. Permissive Views of the EEZ

The United States and other maritime powers consistently reject claims that embellish coastal State competence over the EEZ to include a security interest. Italy, for example, has declared that “the rights of the coastal State to build and to authorize the construction, operation, and use of installations and structures in [the EEZ] and on the continental shelf is limited only to the categories of such installations and structures as listed in article 60 [of UNCLOS].”⁵⁵ Italy objected to the declarations made by Ecuador, India, Brazil, Cape Verde, and Uruguay.

Similarly, the Netherlands has stated: “The Convention does not authorize the coastal State to prohibit military exercises in its EEZ. . . . In the EEZ all states enjoy the freedoms of navigation and overflight, subject to the relevant provisions of the Convention.”⁵⁶ The Netherlands also objected to Ecuador’s declaration.⁵⁷ Similarly, Germany stated, “the coastal State does not enjoy residual rights in the exclusive economic zone. In particular, the rights and jurisdiction of the coastal State in such zone do not include the rights to obtain notification of military exercises or manoeuvres or to authorize them.”⁵⁸ Germany objected to the declaration made by Ecuador as constituting a reservation purporting to exclude or modify UNCLOS.⁵⁹

At least officially, Russia has a permissive view of foreign military activities in the EEZ. Russian law states: “In the EEZ, all States shall enjoy freedom of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of vessels, aircraft, and submarine cables and pipelines.”⁶⁰ While Russia occasionally harasses U.S. warships and military aircraft in the EEZ, unlike China, it does not suggest the operations are unlawful.

55. U.N. Office of Legal Affairs, Law of the Sea Bulletin No. 4, at 12–13 (1985). The United Kingdom rejected such claims on January 12, 1998. Declaration of the UK, *in* Status of the U.N. Convention on the Law of the Sea, *supra* note 38.

56. Declaration of the Netherlands, *in* Status of the U.N. Convention on the Law of the Sea, *supra* note 38.

57. *Id.*

58. Declaration of Germany, *in id.*

59. *Id.*

60. Russian Federation, Federal Act on the Exclusive Economic Zone of the Russian Federation, Dec. 2, 1998, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_EZ.pdf.

Since the EEZ is not under the sovereignty of the coastal State, the balance of interests in the zone inure to the user States. This condition is reversed in the territorial sea, which is subject to the sovereignty of the coastal State.

V. INTELLIGENCE COLLECTION IN THE TERRITORIAL SEA

States have legal competence over their territory, including internal waters, archipelagic waters, and the territorial sea. The legal competence of the coastal State inside its own territory is described as “sovereignty.”⁶¹ This right entails discretion and liberties in respect to the normal internal organization and disposal of territory. This power of government, administration, and disposition is imperium, a capacity that is generally exclusive.⁶²

A. Innocent Passage

All nations are entitled in the territorial sea to the navigational regime of innocent passage.⁶³ When a ship or submarine complies with the regime of innocent passage, it is cloaked in the rights and protections afforded to that status. International law does not specify how much information about the surrounding physical environment may be collected incidental to normal transit before crossing the threshold of non-innocent passage. The 1958 Convention on the Territorial Sea left open the possibility that a submerged submarine in the territorial sea nonetheless could be regarded as exercising innocent passage. Article 16 recognized that the coastal State could take “necessary steps in its territorial sea” to prevent passage that was not innocent,⁶⁴ but it left unclear whether a submerged vessel was in violation of innocent passage, as “distinct from merely being in breach of a duty to remain on the surface” while exercising the right of innocent passage.⁶⁵

61. JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 204 (8th ed. 2012).

62. *Id.*

63. UNCLOS, *supra* note 3, art. 17.

64. Convention on the Territorial Sea and the Contiguous Zone art. 16, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

65. D. P. O’Connell, *International Law and Contemporary Naval Operations*, 44 *BRITISH YEAR BOOK OF INTERNATIONAL LAW* 19, 56 (1970).

Article 19(2)(c) of UNCLOS sets forth those activities that are inconsistent with innocent passage, including “any act aimed at collecting information to the prejudice of the defence or security of the coastal State.” Foreign ships, including warships and submarines, are entitled to innocent passage through the territorial sea. In 2015, for example, a flotilla of five Chinese warships transited the U.S. territorial sea in innocent passage through the Aleutian Islands without incident.⁶⁶

While in innocent passage, warships are entitled to observe the coastline, including foreign warships and naval fortifications, without losing their right to innocent passage. This issue was tested on February 12, 1988, when the USS *Yorktown* and USS *Caron* entered the territorial sea of the Soviet Union just off the Russian naval base at Sevastopol during a freedom of navigation operation. The U.S. ships conducted a brief transit through the territorial sea under the Freedom of Navigation program to protest Soviet laws that purported to require foreign warships to obtain permission to exercise the right of innocent passage.⁶⁷ The ships were intercepted and shouldered (bumped) by two Soviet warships inside the territorial sea of the USSR.⁶⁸ The Soviet Union had protested a foray previously made by the same U.S. vessels into the territorial waters of the USSR in the Black Sea,⁶⁹ and both U.S. warships were outfitted with a suite of electronic sensors.⁷⁰ After the Black Sea Bumping incident, the U.S. Navy claimed it was sensitive to the prohibition against

66. Jeremy Page, *Chinese Navy Ships Came Within 12 Nautical Miles of U.S. Coast*, WALL STREET JOURNAL (Sept. 4, 2015), <https://www.wsj.com/articles/chinese-navy-ships-off-alaska-passed-through-u-s-territorial-waters-1441350488>.

67. The Freedom of Navigation program demonstrates U.S. non-acquiescence of excessive maritime claims through three activities: diplomatic protests, military-to-military engagement, and operational challenges. See U.S. Dep’t of State, Freedom of Navigation Report Annual Release (Mar. 16, 2021), <https://www.state.gov/freedom-of-navigation-report-annual-release/>; JAMES KRASKA, MARITIME POWER AND LAW OF THE SEA 397–404 (2011), William J. Aceves, *The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics*, 19 HASTINGS INTERNATIONAL & COMPARATIVE LAW REVIEW 259 (1996).

68. Susan F. Rasky, *Senators Say Black Sea Affair Casts Doubt on Soviet Aims*, NEW YORK TIMES, Feb. 15, 1988, at A3; Philip Taubman, *Moscow Shrugs Off “Provocation,”* SYDNEY MORNING HERALD, Feb. 15, 1988, at 8.

69. The Soviet Union protested a transit made on March 10, 1986. See *Kremlin Protest on US Warships Adds to Superpower Tensions*, TIMES, Mar. 19, 1986, at 5; W. E. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 331 (1987).

70. Richard Halloran, *2 U.S. Ships Enter Soviet Waters off Crimea to Gather Intelligence*, NEW YORK TIMES, Mar. 19, 1986, at A1.

intelligence collection in the territorial sea, and that it does not violate the rule.⁷¹

The Black Sea Bumping incident generated political fallout and congressional hearings. A conversation between Senator Sam Nunn, Secretary of Defense Frank Carlucci, and Chairman of the Joint Chiefs of Staff Admiral William Crowe during a Senate hearing illustrates how difficult it is to define the precise contours of innocent passage of surface warships.⁷²

Chairman Nunn: What about intelligence functions? Can innocent passage include intelligence gathering under international law?

Secretary Carlucci: We had better ask the lawyers. All ships have intelligence capability on them, so I do not see how you could avoid it . . .

Chairman Nunn: Innocent passage is a means of getting from one place to another?

Admiral Crowe: That is exactly right. If you gather intelligence in the process, all right. But you cannot do anything unusual in order to gather intelligence while you are engaged in innocent passage. In fact, you cannot do anything to operate out of the ordinary pattern except to go. That is it.⁷³

The word used by Admiral Crowe—that a ship in innocent passage cannot do anything “unusual” to gather intelligence—is different than the text of UNCLOS, which places off-limits “any act aimed at collecting information to the prejudice of the defence or security of the coastal State.”⁷⁴ The two are not necessarily incompatible, but the complexity and ambiguity in the law governing innocent passage is apparent.

William M. Arkin called the transit “illegal,” and said the U.S. claim that it was merely exercising freedom of navigation was “total nonsense.”⁷⁵ Arkin suggested the U.S. operation violated the rules on innocent passage. Alfred P. Rubin, a former Stockton Professor at the U.S. Naval War College, also

71. William L. Schachte, Jr., *The Black Sea Challenge*, PROCEEDINGS, June 1988, at 62.

72. John C. Hitt, Jr., *Oceans Law and Superpower Relations: The Bumping of the Yorktown and the Caron in the Black Sea*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 713, 738 (1989).

73. Hearings Before S. Comm. on Armed Services, 100th Cong. 2d Sess. 97–98 (1988).

74. UNCLOS, *supra* note 3, art. 19(2)(c).

75. William M. Arkin, *Spying in the Black Sea*, BULLETIN OF THE ATOMIC SCIENTISTS, May 1988, at 44.

called the U.S. operation “wrong in law.”⁷⁶ He further explained: “If the radio shacks of the U.S. warships were listening to anything from the coastal state not directly aimed at them, if the officers on the bridge were scanning the land, or if [there was] any other activity not having a direct bearing on passage . . . the passage was not innocent.”⁷⁷ These assessments are impractical; they do not reflect actual State practice and are incorrect as a matter of law.

Arkin and Rubin would be proved wrong in their assessment that the Black Sea mission was not innocent. The following year both superpowers signed an agreement that set forth a “uniform interpretation” of innocent passage in which the USSR adopted the U.S. position.⁷⁸ The “Jackson Hole Agreement” affirmed that “all warships, regardless of cargo, armament, or means of propulsion” enjoy the right of innocent passage, and that the coastal State could not require prior notification or prior authorization for such transits.⁷⁹

B. *Maritime Domain Awareness During Innocent Passage*

Vessels engaged in innocent passage are entitled to collect certain operational information to facilitate their transit. Information about the maritime environment, including weather and oceanographic characteristics, such as currents and tides, land features, shoals and reefs, other ships in the area, shipping traffic patterns, and harbors and roadsteads, may be observed to facilitate passage that is innocent. Ships routinely collect weather and marine environmental data, including that related to navigational hazards, such as territorial features and rocks, low-tide elevations, and submerged features. Vessels are required to maintain a proper lookout for natural and manmade hazards, all the while actively and passively collecting data on the marine environment. Safe navigation requires domain awareness, including the surface and subsurface of the water, and may include the airspace above it, such as to ensure warning against drone attack.

76. Alfred P. Rubin, *Innocent Passage in the Black Sea?*, CHRISTIAN SCIENCE MONITOR (Mar. 1, 1988), <https://www.csmonitor.com/1988/0301/eship.html>.

77. *Id.*

78. Joint Statement by the United States of America and the Union of Soviet Socialist Republics, with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage (Sept. 23, 1988), *reprinted in* 28 INTERNATIONAL LEGAL MATERIALS 1444 (1989) [hereinafter Jackson Hole Agreement]. *See also* JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 257–59 (2013).

79. Jackson Hole Agreement, *supra* note 78, app. I, art. 2.

On July 30, 2021, for example, a one-way “kamikaze” drone believed to have been launched by Iran struck the M/T *Mercer Street*, killing two crewmembers.⁸⁰ Ships in innocent passage are not required to steam blindly through their transit, oblivious to other ships and the associated shoreline. The duties of safe navigation and obligations in the Convention on the International Regulations for Preventing Collisions at Sea (COLREGs) to take affirmative steps to avoid collision require at least some level of maritime situational awareness.⁸¹ At the same time, Arkin and Rubin are correct that the use of innocent passage as a subterfuge for intelligence collection is not consistent with Article 19 of UNCLOS. Active naval espionage may employ signals along the electromagnetic spectrum to collect intelligence against a coastal State. This activity is inconsistent with innocent passage. However, even active collections, such as radar and sonar emissions, are permissible if they are essential for safe transit through the territorial sea but they may not be employed to learn about the operational forces of the coastal State. These two activities may be difficult to separate in the real world, however, and the same data might serve two functions—one consistent with innocent passage and the other inconsistent with innocent passage. Passive sensors are even more challenging. Foreign warships in innocent passage may receive coastal State electromagnetic or electronic transmissions that are released into the atmosphere or water column. This type of collection merely detects signals emanating from the State.

C. *Disguised Maritime Boundary Disputes*

Sometimes maritime boundary disputes may be disguised as disagreements over intelligence collection in the territorial sea. That appears to be the case with a U.S. *Virginia*-class submarine operating on February 12, 2022, near the Russian Federation Pacific Fleet’s naval exercise off Urup Island in the Kuril Islands. After the transit, the Main Directorate of the International Military Cooperation of Russia’s Defense Ministry delivered a protest to the U.S. military attaché in Moscow over an alleged American violation of the State border by an American submarine. The U.S. submarine was said to

80. Sam LaGrone, *U.S. Says New Iranian “Kamikaze” Drone Killed Two in Merchant Ship Attack*; U.K., *U.S. Condemn Tehran for Attack*, USNI NEWS (Aug. 6, 2021), <https://news.usni.org/2021/08/06/u-s-says-new-iranian-kamikaze-drone-killed-two-in-merchant-ship-attack-u-k-u-s-condemn-tehran-for-attack>.

81. *See generally* Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, T.I.A.S. No. 8587, 1050 U.N.T.S. 16.

have placed a “self-propelled simulator” in the water and then exited Russian territorial waters at high speed.⁸² The United States denied that one of its submarines conducted operations in Russia’s territorial waters.⁸³ While an American spokesman declined to “comment on the precise location” of U.S. submarines, he reiterated U.S. policy to “fly, sail, and operate safely in international waters.”⁸⁴

In this case we might accept that Russia and the United States agree on the position of the submarine, but probably disagree on the outer limit of the Russian territorial sea. If the submarine and drone were operating in a lawful Russian territorial sea, the activity was inconsistent with the regime of innocent passage. Generally, a territorial sea may be twelve nautical miles in breadth, as measured from baselines running along the low water mark. Since Russia has numerous unlawful or excessive maritime claims in the Kuril Islands based on straight baselines, it is probable that the disagreement is over where the territorial sea begins rather than a disagreement over the competence of Russia in its territorial sea.

Suppose the U.S. submarine was operating in a lawfully drawn territorial sea. Submarines in the territorial sea are required to operate on the surface and show their flag and they are prohibited from launching or recovering any “military device.” If the American submarine operated inconsistently with the rules in Part II of UNCLOS, was it in violation of UNCLOS?

D. *Non-Innocent Passage in the Territorial Sea*

Analysis of non-innocent passage in the territorial sea tends to focus on surface warships and where the line is drawn between “innocent” and “not innocent” conduct.⁸⁵ The rules applicable to vessels not exercising the right of

82. *Russia Hands Note to US Military Attaché Over Submarine Incident Near Kuril Islands*, TASS (Feb. 12, 2022, 1:05 PM), <https://tass.com/defense/1402297>; *US Military Attaché Summoned to Russian Defense Ministry Over Submarine Incident*, TASS (Feb. 12, 2022, 11:47 AM), <https://tass.com/defense/1402255>.

83. *U.S. Denies it Carried Out Operations in Russian Territorial Waters*, REUTERS (Feb. 12, 2022, 5:37 PM), <https://www.reuters.com/world/europe/russia-chases-off-us-submarine-its-far-east-waters-moscow-says-2022-02-12/>.

84. *Id.*

85. See John W. Rolph, *The Black Sea Bumping Incident: How “Innocent” Must Innocent Passage Be?*, 135 *MILITARY LAW REVIEW* 137, 162–66 (1992); F. David Froman, *Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea*, 21 *SAN DIEGO LAW REVIEW* 625, 644–45 (1984).

innocent passage are not specifically addressed in UNCLOS. One perspective is that there is no such thing as non-innocent passage—UNCLOS mentions only innocent passage and that is all that is permitted. Passage that is not compliant with innocent passage not only has no entitlement but lacks lawful status entirely. It is *per se* illegal.

Another view suggests that UNCLOS privileges innocent passage, but ships and submarines may transit in non-innocent passage. Innocent passage does not create a general obligation that must be kept—*pacta sunt servanda*—but rather it offers a privilege that may be accepted or rejected.⁸⁶ Although non-innocent passage is an amorphous but distinct category, UNCLOS does not apply to it and thus does not restrict it. Consequently, there may be a lawful basis other than innocent passage to justify the presence of a submerged submarine in another country's territorial sea. For example, right of assistance entry⁸⁷ and safe harbor⁸⁸ are not authorized by innocent passage, and yet they are accepted generally as lawful activities under theory of force majeure. The difference, of course, is that safe harbor and force majeure are recognized legal regimes that confer lawful status on a ship present in the territorial sea, whereas recognition of non-innocent passage simply means that the transit is not illegal, but it is not a right and is unprotected.

Non-innocent passage, for example by submarines conducting espionage, may not be a violation of the international law of the sea, or even inconsistent with international law more generally. One of the most fundamental rules of international law is that States are free to do that which is not specifically prohibited.⁸⁹ Furthermore, obligations in treaty law are to be read specifically and narrowly.⁹⁰ The terms of a treaty should not be expanded or enlarged through interpretation, which cannot “alter, amend, or add to any treaty.”⁹¹

Under this perspective, non-innocent passage is not *delicta juris gentium*, or breach of a duty in international law, even as it violates coastal State national law. Neither customary international law nor UNCLOS requires submarines in the territorial sea to navigate on the surface, or forbids submerged transit, but rather the treaty excludes submarines from the right of innocent

86. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

87. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 345–46 (6th ed. 1967).

88. 2 D. P. O'CONNELL, INTERNATIONAL LAW OF THE SEA 853–54 (1988).

89. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18–20 (Sept. 7).

90. *Id.*

91. The Amiable Isabella, 19 U.S. (6 Wheat) 1, 69 (1821).

passage if they are submerged. A submarine can demonstrate “innocence” and dispel any doubt by traveling on the surface and showing its flag.⁹² A submarine on the surface showing its flag enjoys a presumption of innocent passage, while a submerged submarine is not entitled to claim it is exercising the regime of innocent passage, but its presence otherwise may be lawful.

The United States has stated this position through a handful of understandings and official testimony associated with U.S. accession to UNCLOS. Charles Allen, former Assistant Director of Central Intelligence for Collection, for example, has suggested that while submarines engaged in subsurface transit in a foreign territorial sea are ineligible for the rights and privileges of innocent passage, their conduct is not necessarily unlawful. In unclassified testimony in 2004, Allen stated that “the overwhelming opinion of Law of the Sea experts and legal advisors is that the Law of the Sea Convention simply does not regulate intelligence activities, nor was it intended to.”⁹³

William H. Taft IV, former Legal Adviser to the U.S. Department of State, joined Allen in this assessment. Taft concurred that UNCLOS does not prohibit or regulate intelligence activities in the territorial sea.⁹⁴

With respect to whether articles 19 and 20 of the Convention would have any impact on U.S. intelligence activities, the answer is no. . . . A ship does not, of course, under [the 1982 Convention] any more than under the 1958 Convention, enjoy the right of innocent passage in the territorial sea if, in the case of a submarine, it navigates submerged or, if in the case of any ship, it engages in an act aimed at collecting information to the prejudice of the defense or security of the coastal State, however, such activities are not prohibited or otherwise affected by the Convention.⁹⁵

Furthermore, Taft testified that the United States “was not aware of any State’s taking the position” that either the 1958 or 1982 instruments “setting

92. W. Michael Reisman, *The Regime of Straits and National Security*, 74 AMERICAN JOURNAL OF INTERNATIONAL LAW 48, 64 (1980).

93. Letter from J. M. McConnell, Director of National Intelligence, to Hon. Sen. John D. Rockefeller IV and Hon. Sen. Christopher S. Bond, Aug. 8, 2007, *reprinted in* Senate Executive Report 110-9, at 32–33 (Dec. 19, 2007).

94. *Id.* at 34, 36.

95. Written Statement of William H. Taft, Legal Adviser U.S. Department of State Before the Senate Select Committee on Intelligence, June 8, 2004, *reprinted in* Senate Executive Report 110-9, at 37 (Dec. 19, 2007).

forth the conditions for the enjoyment of the right of innocent passage prohibit or otherwise regulate intelligence collection or submerged transit of submarines.”⁹⁶

The 2007 Senate Foreign Relations Committee report on UNCLOS reiterates the American position that the provisions concerning innocent passage in the 1958 Convention on the Territorial Sea and Contiguous Zone and the 1982 Convention do not prohibit non-innocent passage.

Article 20 [of UNCLOS] provides that submarines and other underwater vehicles are required to navigate on the surface and to show their flag in order to enjoy the right of innocent passage; however, failure to do so is not characterized as inherently not “innocent.”

The committee further understands that, as in the case of the analogous provisions in the 1958 Convention on the Territorial Sea and Contiguous Zone (Articles 18, 19, and 20), the innocent passage provisions of the Convention set forth conditions for the enjoyment of the right of innocent passage in the territorial sea but do not prohibit or otherwise affect activities or conduct that is inconsistent with that right and therefore not entitled to that right.⁹⁷

Yet if UNCLOS really is a “Constitution” for the world’s oceans,⁹⁸ is the concept of non-innocent but lawful passage a viable principle? The answer to this question may inform the permissible responses by coastal States that encounter submerged submarines in the territorial sea. Whether the presence of the submarine is a violation of international law may be less important than whether the vessel is a threat to the coastal State. In either case, the response of the coastal State is complicated by the sovereign immune status of the submarine as reflected in UNCLOS, as well as limitations on the State’s freedom of action regarding the use of force reflected in the UN Charter.

96. *Id.*

97. Senate Executive Report 110–9, *supra* note 95, at 12 (parentheses omitted).

98. Remarks by Amb. Tommy T. B. Koh, *A Constitution of the World’s Oceans*, in THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: OFFICIAL TEXT xxxiii, U.N. Sales No. E.83.V.5 (1983).

VI. WARSHIP SOVEREIGN IMMUNITY

A corollary to the doctrine of freedom of the seas is exclusive flag State control over ships that fly its flag.⁹⁹ The link between a flag State and its craft is strongest with State government ships, which include warships, naval auxiliaries, submarines, and ships used on non-commercial service.¹⁰⁰ As warships, submarines are protected by sovereign immunity; while coastal States may have prescriptive jurisdiction over their territorial seas, they do not have enforcement jurisdiction over foreign submarines that operate there.¹⁰¹ Coastal States lack competence to arrest, detain, or impose coercive measures against foreign warships, including submarines engaged in espionage, to address violations of coastal State law.

Surface warships and submarines enjoy immunity from foreign jurisdiction or legal process, perhaps to a greater degree than other elements of the armed forces.¹⁰² State aircraft, such as military aircraft, also enjoy immunity from the jurisdiction of other States.¹⁰³ Immunity from prescriptive and enforcement jurisdiction of another State extends to the ship and aircraft, as well as their commanders and crews.¹⁰⁴

The 1958 Convention on the High Seas defines warships as “a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.”¹⁰⁵ The treaty also states “warships on the high seas have complete immunity from the

99. See HUGO GROTIUS, *MARE LIBERUM* (J.B. Scott ed., R.V.D. Magoffin trans., 1916) (1608). See also James Kraska, *Military Operations in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 866, 871–72 (Donald R. Rothwell et al. eds., 2015).

100. See the “designed usage” test under Article 3 of the Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, Apr. 10, 1986, 1 L.N.T.S. 199. See also European Convention on State Immunity art. 30, May 16, 1972, Gr. Brit. T.S. No. 74 (Cmd. 7742). Although only a handful of States have ratified the Brussels Convention, it codifies the general rule of immunity of warships.

101. Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AMERICAN JOURNAL OF INTERNATIONAL LAW 53, 71–72 (1984).

102. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *The Alexander*, [1906] 1 H.K.L.R. 122, 129, 130.

103. Chicago Convention, *supra* note 44, art. 3.

104. *The Tampico Incident*, 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 420–21 (1941).

105. Convention on the High Seas art. 8(2), Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11.

jurisdiction of any State other than the flag State.”¹⁰⁶ The United States suggests the 1958 instrument codifies customary international law. Likewise, the principles of warship sovereign immunity derive from State practice as well as the 1958 agreements, and therefore reflect customary international law.¹⁰⁷

The UNCLOS definition of warship includes surface vessels and submarines of the armed forces that meet four criteria:

a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.¹⁰⁸

Furthermore, Article 32 states “nothing in this Convention affects the immunities of warships.” Bernard Oxman notes that the article specifically refers to “the Convention” rather than “Part” or “Section,” and therefore the sovereign immunity of warships applies in all aspects of UNCLOS.¹⁰⁹ Article 32 is in Part II of UNCLOS, which pertains to the territorial sea and contiguous zone. The provision is complemented by Article 95, which is in Part VII of UNCLOS concerning the high seas, and which states emphatically that warships on the high seas have “complete immunity” from the jurisdiction of any State except the flag State. Article 95 also applies in the two-hundred nautical mile EEZ of coastal States.¹¹⁰ Complementary to Article 95, Article 32 recognizes the sovereign immunity of warships and other government ships in the territorial sea.

106. *Id.*

107. Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VIRGINIA JOURNAL OF INTERNATIONAL LAW 809, 810 (1984); Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AMERICAN JOURNAL OF INTERNATIONAL LAW 53, 55, 75 (1984).

108. UNCLOS, *supra* note 3, art. 29.

109. Oxman, *supra* note 107. Similarly, the 1958 Convention on the Territorial Sea and Contiguous Zone states, “nothing in *these articles* affects the immunities which such ships enjoy *under these articles* or other rules of international law.” Convention on the Territorial Sea and Contiguous Zone, *supra* note 64, art. 22(2) (emphasis added). This wide remit suggests that warship sovereign immunity is not diminished even during passage through a foreign coastal State’s territorial sea.

110. By virtue of UNCLOS, *supra* note 3, art. 58(2), articles 88 to 115 are imported from the high seas into the EEZ in so far as they are not incompatible.

In short, warship sovereign immunity applies worldwide on the high seas and in all zones under national jurisdiction, including the territorial sea. Warship sovereign immunity is plenary, and it applies independently of the location of the ship. Submarines are shielded from the enforcement jurisdiction of the coastal State even in the territorial sea¹¹¹ and internal waters of a coastal State.¹¹² In peacetime, submarines could enter uninvited even into the internal waters of a foreign State without becoming subject to coastal State jurisdiction.¹¹³ Still, submarines have a duty to comply with coastal State law; if they fail to do so, however, what recourse has the coastal State?

A. *Require it to Leave Immediately*

Coastal States generally have taken a dark view of foreign submarine espionage in the territorial sea. Part of the unease has to do with uncertainty over an appropriate remedy or response, or more accurately, the paucity of any single appealing response. In general, UNCLOS limits coastal State enforcement against foreign sovereign immune vessels for violation of coastal State law in the territorial sea to two courses of action: request the vessel come into compliance with the law or “require” it to leave the territorial sea.

Quincy Wright argued that some territorial intrusions are of such a grievous nature that sovereign immune aircraft can “lose” their sovereign immune status. Writing in the aftermath of the Soviet downing of Francis Powers’ U-2 spy aircraft, Wright suggested that although the American pilot was an agent of the U.S. Government, he was not lawfully in the airspace of the USSR and therefore was not entitled to immunity under international law.¹¹⁴ Only during periods of armed conflict, however, would a coastal State have a right to seize foreign naval vessels engaged in espionage.¹¹⁵

The Territorial Sea Convention states: “If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it,

111. UNCLOS, *supra* note 3, art. 32.

112. “ARA Libertad” (Arg. v. Ghana), Case No. 20, Order of Dec. 15, 2012, 2012 ITLOS Rep. 332, ¶ 95; James Kraska, *The “ARA Libertad” (Argentina v. Ghana)*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 404, 408–9 (2013).

113. 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 460–61 (H. Lauterpacht ed., 8th ed. 1955); JOHN WESTLAKE, INTERNATIONAL LAW, PART I: PEACE 195 (1910) (“right of the littoral state is limited by the right of innocent passage”).

114. Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW 3, 14 (Quincy Wright et al. eds., 1962).

115. 2 OPPENHEIM, *supra* note 113, at 750–51.

the coastal State may require the warship to leave the territorial sea.”¹¹⁶ For a submarine, this provision likely means requesting that the boat comes to the surface and shows its flag. In 1968, for example, the United States claimed that even if the spy ship USS *Pueblo* had been within North Korea’s territorial sea at the time it was captured, its seizure would still have been improper and a violation of its U.S. sovereign immunity. “In the absence of an immediate threat of armed attack, the strongest action a coastal State may take is to escort foreign warships out of its territorial sea.”¹¹⁷ Only if the foreign warship disregards the request may the coastal State require the non-compliant vessel to leave the territorial sea.

Similarly, Article 30 of UNCLOS provides that: “If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.”¹¹⁸

This approach is also reflected in the 2003 Code for Unplanned Encounters at Sea, which states: “The only sanction against a warship or public vessel that can be imposed by a coastal State is to require that it depart internal waters or the territorial sea.”¹¹⁹ There is a fair amount of uncertainty over how coastal States pursue these available remedies, as the precise content of “requiring” the warship to leave immediately is uncertain. The rule makes clear, however, that coastal States have a duty to approach warships that are not in innocent passage under a two-step framework that first requests compliance with innocent passage before requiring it to leave.

116. Convention on the Territorial Sea and Contiguous Zone, *supra* note 64, art. 23. See also Christopher Pinto, *Maritime Security and the 1982 United Nations Convention on the Law of the Sea*, in MARITIME SECURITY: THE BUILDING OF CONFIDENCE 9, 20 (Jozef Goldblat ed., 1992).

117. George H. Adrich, *The Pueblo Seizure: Facts, Law, Policy*, 63 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1, 3 (1969). The United States took such action on the occasions that it discovered Soviet electronic intelligence (ELINT) vessels in the U.S. territorial sea, ordering them out of the area. See Meeker, *Legal Aspects of Contemporary World Problems*, 58 DEPARTMENT STATE BULLETIN 465, 468 (1968).

118. UNCLOS, *supra* note 3, art. 30.

119. Western Pacific Naval Symposium, Code for Unalerted Encounters at Sea (CUES) (Review Supp. 2003), *reprinted in* 4 AUSTRALIAN JOURNAL OF MARITIME & OCEAN AFFAIRS 126 (2012). Para. 2.6, “Sanction,” states: “The only sanction against a warship or public vessel that can be imposed by a coastal State is to require that it depart internal waters and the territorial sea.” (CUES was revised and published as Western Pacific Naval Symposium, Code for Unplanned Encounters at Sea, in 2014, and this text was removed).

Accomplishing the first step of the framework presents a practical problem: how can the armed forces of a coastal State communicate with a foreign submarine on a covert mission? In some cases, coastal States have dropped depth charges near (but not on) the submarine to signal that they have been discovered and should surface or leave the area. The submarine also might be “pinged” with active sonar from sonobuoys dropped by aircraft into the water near the submarine.

The second, perhaps even more difficult, step of the framework presents a second issue: how may a coastal State “require” a foreign submarine to leave? The coastal State may assert that the foreign submarine is “required” to leave, but can that requirement be enforced?

VII. NAVAL INTELLIGENCE COLLECTION NOT A “USE OF FORCE”

H. A. Smith declared that coastal States are entitled to seize—presumably by force—military vessels engaged in espionage activities off their shores.¹²⁰ Some States have either used force or expressed a willingness to use force against unidentified submarines, claiming such action is justified in self-defense.¹²¹ After one incident in 1960, the *New York Times* reported: “As to the right of a country to attack a warship entering territorial water without permission, international practice is to assume that force may be used against an intruder violating a defense area.”¹²² Yoram Dinstein agrees with this assessment, and he has suggested that intrusion of a submarine may be regarded by the coastal State as “incipient armed attack” that opens the door for forcible countermeasures.¹²³ Dinstein cites State practice to support his

120. H.A. SMITH, *THE LAW AND CUSTOM OF THE SEA* 47–48, 164–65 (3d ed. 1959).

121. Theodore Shahad, *Soviet Charges Foreign Submarines are Spying Near Coast*, *NEW YORK TIMES*, Aug. 29, 1961, at 6. *See also* Decree of 10 October 1951 Concerning the Territorial and Inland Waters of the People’s Republic of Bulgaria, ¶ 10, *reprinted in* U.N. Legislative Series, *Laws and Regulations on the Regime of the Territorial Sea*, at 80–81, U.N. Doc. ST/LEG/SER.B/6, U.N. Sales No. 1957.V.2 (1956) (“Any submarine vessel found submerged in the territorial or inland waters of the People’s Republic shall be pursued and destroyed without warning, and no liability for the consequences shall be incurred”); Decree no. 39 of January 28, 1956, Concerning Regulations of the Regime of the Territorial Waters of the Popular Republic of Romania, art. 8, *reprinted in id.* at 238, 239–41 (“Foreign submarines navigating by diving in the waters of the People’s Republic of Romania will be hunted down and destroyed without warning”).

122. *International Law Invoked*, *NEW YORK TIMES*, Feb. 13, 1960, at 4.

123. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 213 (5th ed. 2011).

proposition, but the conduct of States lacks uniformity on this point. Therefore, it cannot be said that force may be used by a coastal State against a submerged submarine in the territorial sea solely because of its presence in national waters. As a matter of law, International Court of Justice (ICJ) jurisprudence tends to have a more restraining effect on coastal States and the threshold for the use of force is higher than mere presence.

From the perspective of the coastal State as well as the flag State of a foreign submarine, the most practical and acute issue is whether a coastal State may use force against an unidentified submerged submarine to make it comply with innocent passage or leave the territorial sea. Article 25(1) of UNCLOS states: “The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.” It is ambiguous as to exactly what “necessary steps” may be taken by a coastal State against a non-conforming passage, however. Both the 1958 and 1982 Conventions are silent on the appropriate level of force that may be used to compel compliance with coastal State law. In maritime case law, “necessary and reasonable” force may be used beyond the territorial sea to conduct visit, board, search and seizure, and bring a non-compliant ship into port.¹²⁴ Furthermore, coastal State enforcement authorities are expected to employ every device short of force, such as harassment by navigational means, before the use of force is justified.¹²⁵ These general rules offer some insight, but both apply to non-sovereign immune vessels and have limited utility and precedential value in cases involving warships and submarines.

B. Naval Intelligence Collection Not an “Armed Attack”

The UN Charter governs the law on the use of force in international affairs. The goal of the United Nations is to suppress “acts of aggression and other breaches of the peace.”¹²⁶ Under Article 2(4) of the Charter, “armed attack”

124. This rule emerged from the customs violation case, *I'm Alone* (Can. v. U.S.), Joint Final Report, Jan. 5, 1935, 3 Rep. Int'l Arbitral Awards 1609, 1611–15. See also *Claim of the British Ship “I'm Alone” v. United States: Reports of the Commissioners*, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW 326 (1935); G. G. Fitzmaurice, *The Case of the I'm Alone*, 17 BRITISH YEAR BOOK OF INTERNATIONAL LAW 82 (1937); Charles Cheney Hyde, *The Adjustment of the I'm Alone Case*, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW 296 (1935); William C. Dennis, *The Sinking of the I'm Alone*, 23 AMERICAN JOURNAL OF INTERNATIONAL LAW 351 (1929).

125. *The Red Crusader* (U.K. v. Den.), Comm'n of Enquiry, Mar. 23, 1962, 35 Int'l Rep. 485 (1962).

126. U.N. Charter art. 1(1).

(or more accurately, armed aggression or *aggression armee* in the equally authentic French translation) is unlawful. Article 2(4) also states that the threat of the use of force is as much a violation as the use of force itself. States have an inherent right of individual and collective self-defense against armed aggression. States that suffer an armed attack may invoke the inherent right of individual and collective self-defense under Article 51 of the Charter.

The rules codified in the UN Charter stand alone as legal authority, but Article 301 of UNCLOS provides a separate but reinforcing duty to refrain from the threat or use of force in activities at sea. This rule simply reflects the prohibition against the threat or use of aggressive force memorialized in the UN Charter. “Other rules of international law” also may be applied by tribunals hearing disputes brought under UNCLOS,¹²⁷ although the Charter remains the supreme restatement of the law on the initiation of the use of force, or *jus ad bellum*.

Is a submarine gathering intelligence against the coastal State an act of armed aggression? Jurisprudence on the use of force at the ICJ suggests that it is unlikely that the Court would consider a peacetime submarine intrusion for purposes of espionage as tantamount to an “armed attack” at all, and certainly not one with sufficient gravity to justify resort to the use of force in self-defense. In the *Paramilitary Activities* case, the ICJ considered a range of U.S. intervention in Central America, including U.S. surveillance flights.¹²⁸ The case concerned the Reagan administration’s low-intensity support for Contra rebels against the communist regime in Nicaragua, which the United States asserted was part of a broader strategy of individual and collective self-defense in concert with allies in Central America. Nicaragua complained, inter alia, that U.S. flights over the territory of Nicaragua in 1984 were contrary to the principle of State sovereignty over its national airspace.¹²⁹ The United States countered that its reconnaissance missions were conducted pursuant to the right of individual and collective self-defense against Nicaraguan armed aggression against its Central American neighbors.¹³⁰

The Court rejected the U.S. and El Salvadoran claims of self-defense against an armed attack by Nicaragua. The world court averred that the U.S.

127. UNCLOS, *supra* note 3, art. 293(1).

128. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 190–91 (June 27).

129. *See* Memorial of Nicaragua, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Apr. 30, 1985, in 4 Pleadings, Oral Arguments, and Documents 1, ¶¶ 119–20.

130. *Military and Paramilitary Activities*, *supra* note 128, ¶ 292.

over-flights violated international law.¹³¹ The ICJ also held that U.S. naval maneuvers conducted by the United States from 1982 to 1985 off the coast of Nicaragua during the ongoing U.S.-backed counter-revolution against the Sandinista regime did not constitute a threat or use of force against Nicaragua. In its ruling on the merits, the Court held that Nicaragua's right to sovereignty may not be jeopardized by U.S. paramilitary activities. Training, arming, equipping, and supplying the Contras was a violation of international law and not a lawful measure of collective self-defense taken by the United States and its regional allies in response to Nicaraguan aggression.¹³²

The ICJ ruled lower-level coercion or intervention, such as "the sending by or on behalf of a state of armed bands, groups, irregulars, or mercenaries" into another country constitutes an "armed attack" only if such intervention reaches the "scale and effects" or is of sufficient "gravity" tantamount to a regular invasion.¹³³ There was no right to use self-defense against coercion or lower-level armed attack by irregulars or insurgents that does not rise to the threshold of gravity or scale and effects. Submarine espionage that involves the passive collection of information against the coastal State settles well below the threshold of an "armed attack," let alone being of sufficient gravity or effects to justify resort by the coastal State to self-defense. Lacking some other indicia of armed aggression by the submarine or the flag State, the use of force in self-defense against submarine intrusion during peacetime is not a lawful response by the coastal State.

The UN Charter and the *Paramilitary Activities* case inform the conclusion that a submerged submarine in territorial waters may not be attacked, barring some other indicia of posing an actual threat or use of force. Mere presence, even combined with a suspicion of spying, is insufficient grounds to destroy the intruding submarine. This analysis is underscored by State practice concerning aircraft intrusions. The right of a coastal State to use force against an intruder that violates the territorial sea is analogous to attacks on aircraft that "invade" national airspace, notwithstanding the provisions in the law of the sea.¹³⁴

Spying in the territorial sea is analogous to spying inside the land territory or national airspace. The KAL 007 overflight and U-2 incidents provide perhaps the closest analogy to naval spying in the territorial sea. On September 1, 1983, a Soviet fighter jet shot down a civilian Korean Air Line Boeing 747

131. *Id.* ¶¶ 190–91, 292(5).

132. *Id.* ¶ 292(3).

133. *Id.* ¶¶ 195, 247, 249.

134. *International Law Invoked*, *supra* note 122, at 4.

that had strayed into Soviet national airspace over Sakhalin Island.¹³⁵ The Kremlin justified the action as necessary to protect the country against espionage,¹³⁶ but the shoot-down was deplored by numerous States.¹³⁷ The Council of the International Civil Aviation Organization adopted a resolution that condemned the Soviet response.¹³⁸ The USSR vetoed a similar resolution at the UN Security Council.¹³⁹ The case involved a civilian airliner rather than military aircraft. On May 1, 1960, the Soviet Union shot down U.S. pilot Francis Gary Powers flying a high-altitude U-2 spy aircraft in Russian national airspace.

C. *Analogy with National Airspace*

The U-2 aircraft took off from Pakistan and was bound for Norway when it was tracked and shot down by two surface-to-air missiles over Sverdlovsk (present-day Yekaterinburg, Russia). Powers parachuted to safety and was captured by Soviet forces. The United States was deeply embarrassed over the incident. After a cover story that the flight was a wayward NASA mission that inadvertently veered off course, President Dwight D. Eisenhower admitted that the flights had been occurring for several years. The spy missions collected aerial photography on Soviet armed forces, including weapons, missile tests, submarine production, nuclear research, and aircraft deploy-

135. Soon after the incident, the White House announced that it would open the Global Positioning System to civilian aircraft when it became operational in 1988 to give pilots more accurate information on latitude, longitude, and altitude. *See* 19 WEEKLY COMP. PRES. DOC. 1266 (Sept. 19, 1983).

136. Boris Rygenov, the Soviet delegate to the International Civil Aviation Organization, insisted the aircraft had been on a spy mission and stated that the Soviet Union's "measures to protect its airspace were in accord with the rules and procedures of international law. . . . Every warning and measure was taken to have the violation handled and the airplane landed." *Aviation Council Faults Soviet*, NEW YORK TIMES, Mar. 7, 1984, at A12.

137. *11 Nations Halt Moscow Service to Protest Downing*, AVIATION WEEK AND SPACE TECHNOLOGY, Sept. 19, 1983, at 26. Protests were issued by the United States, the Republic of Korea, Japan, China, Australia, Canada, the United Kingdom, New Zealand, Zaire, Liberia, the Netherlands, France, Sweden, Belgium, Italy, the Federal Republic of Germany, Singapore, Fiji, Colombia, Ecuador, and Paraguay.

138. *See* ICAO Doc. A24-WP/49/P18 (Sept. 20, 1983); Marian Nash Leich, *Destruction of Korean Airliner: Action by International Organizations*, 78 AMERICAN JOURNAL OF INTERNATIONAL LAW 244 (1984).

139. Revised Draft Security Council Resolution on the Shootdown of KAL-007, U.N. Doc. S/15966/Rev.1 (Sept. 12, 1983).

ments. The Soviet Union convicted Powers at trial for espionage and sentenced him to ten years in prison. While he was released in a “spy swap” less than two years later, the diplomatic and legal fallout persisted.

Over a period of four years some two hundred flights were authorized by a U.S. government “high authority,” believed to be the Secretary of Defense, Thomas S. Gates. A small group of representatives from the Department of State, Department of Defense, and the White House provided direction, and several members of Congress were informed.¹⁴⁰ Senator Alexander Wiley, a Republican from Wisconsin, concluded that the U-2 program was “conducted in accordance with a basic law of national life—self-preservation,” and was “essential for our national security.”¹⁴¹ Some earlier U-2 flights were cancelled for diplomatic, but not legal, reasons. The fateful flight was approved because there would always be diplomatic reasons to cancel or postpone a mission.¹⁴² Yet the lack of a U.S. protest of the Soviet shootdown suggests that the United States accepted the rule of national sovereignty as applicable customary international law.¹⁴³

After Powers was shot down, the Soviet Union called for a special session of the UN Security Council, which was held on May 18. Soviet Foreign Minister Andrei Gromyko stated, “The integrity of the territory of all states has always been and remains . . . a major and generally recognized principle of international law” and the “backbone of peaceable relations between states.”¹⁴⁴

Ambassador Lodge assured the UN Security Council that flights were suspended and would not resume. The other members of the Security Council agreed that the U-2 flight had violated Soviet territory.¹⁴⁵ Only Poland agreed with the Soviet assessment, however, that the overflight constituted “aggression.” France, Great Britain, Italy, the Republic of China, Argentina, and Ecuador thought the USSR was exaggerating the seriousness of the incident.¹⁴⁶ The Security Council unanimously adopted a resolution (the Soviet Union and Poland abstaining) calling on States to “refrain from uses or threats of force and to respect each other’s sovereignty, territorial integrity,

140. See S. REP. NO. 86-1761, at 5–6 (June 28, 1960).

141. *Id.*

142. *Id.*

143. Olive J. Lissitzyn, *Legal Implications of the U-2 and RB-47 Incidents*, 56 AMERICAN JOURNAL OF INTERNATIONAL LAW 135, 137 (1962).

144. Quincy Wright, *Legal Aspects of the U-2 Incident*, 54 AMERICAN JOURNAL OF INTERNATIONAL LAW 836, 841 (1960).

145. *Id.* at 842.

146. *Id.*

and political independence.”¹⁴⁷ The territorial sea constitutes one dimension of national sovereignty. Like the other maritime zones, the territorial sea is governed by the rules reflected in UNCLOS. The principal difference between overflight of national airspace and transit through the territorial sea is that national airspace is inviolable, whereas a right of innocent passage applies in the territorial sea.

After the U-2 incident the Soviet Union declared at the Security Council that the U.S. overflight was an unlawful infringement on its sovereignty.¹⁴⁸ The USSR proposed a draft resolution to the Security Council that “Condemns the incursions by United States aircraft into the territory of other States and regards them as aggressive acts.”¹⁴⁹ The United States denied that such overflight constituted “aggressive acts,” and defended the missions as essential “to assure the safety of the United States and the Free World against surprise attack.”¹⁵⁰

France classified the U-2 flights as “intelligence activities.”¹⁵¹ Although spy aircraft overflight was “regrettable and implied interference in a country’s internal affairs and a violation of its borders,” they were “normal practice.”¹⁵² Furthermore, France stated there were “no rules of international law concerning the gathering of intelligence in peace time,” and therefore France did not support the USSR’s assertion that the U-2 flights constituted a threat to peace.¹⁵³

Likewise, the representative of the United Kingdom suggested that the Soviet Union had “exaggerated” the implications of the overflight, and “failed to make out a case for branding the U-2 incident as aggression.”¹⁵⁴ Ecuador and Argentina also rejected the claim that aerial intelligence collection was “aggression,” as did China, which called it “a simple case of intelli-

147. UNITED NATIONS REVIEW, July 1960, at 8–9, 48–50; 42 DEPT. OF STATE BULLETIN 961 (1960).

148. See Cable Dated 18 May 1960 From the Minister of Foreign Affairs of the Union of Soviet Socialist Republics Addressed to the President of the Security Council, in *Report of the Security Council to the General Assembly 16 July 1959–15 July 1960*, U.N. GAOR, 15th Sess., Supp. No. 2 at 12, U.N. Doc. A/4494 (1960).

149. *Id.* at 13.

150. *Id.* See also Wright, *supra* note 144, at 851–52 (overflight not armed attack).

151. Cable Dated 18 May 1960, *supra* note 148.

152. *Id.*

153. *Id.*

154. *Id.*

gence collecting, which is neither a new nor a rare phenomenon in international society.”¹⁵⁵ Like the United Kingdom, China felt that “the USSR was making too much of the whole affair.”¹⁵⁶ The draft Soviet resolution was rejected by a vote of seven to two, with Poland and the USSR voting in favor of calling the U-2 flights “aggression.”¹⁵⁷

In short, coastal States may not use force in self-defense against submerged submarines in the territorial sea because submarine espionage is not an “armed attack” or even a “use of force” on the part of the flag State. In the aftermath of the U-2 incident, for example, the Soviet Union offered a resolution in the Security Council that alleged the American overflight constituted an “aggressive act.”¹⁵⁸ The draft resolution was rejected by a vote of seven to two, with the Soviet Union and Poland in favor. Ceylon and Tunisia abstained.¹⁵⁹

The Security Council adopted a resolution by a vote of nine to zero, with Russia and Poland abstaining, that called on member governments to “respect each other’s sovereignty, territorial integrity and political independence.”¹⁶⁰ In a similar incident just two months later, the Soviet Union shot down a U.S. RB-47 reconnaissance aircraft collecting intelligence along the Russian coast of the Kola peninsula in the Barents Sea. The Soviet Union claimed the aircraft had entered national airspace, however. During the ensuing debate at the Security Council, most States upheld the right of freedom of navigation beyond the territorial sea. No State, including the Soviet Union, claimed the right to shoot down a foreign spy aircraft flying beyond the national airspace.¹⁶¹

155 *Id.* at 14.

156 *Id.*

157 *Id.* at 14–15 (Tunisia and Ceylon abstained).

158 *Id.*

159 U.N. SCOR, 15th Sess., 860th mtg, U.N. Doc. S/P.V.860 (May 26, 1960).

160 S.C. Res. 135, (May 27, 1960).

161. U.N. SCOR., 15th Sess., 880th–883rd mtgs, U.N. Doc. Doc. S/P.V.880–883 (July 22–26, 1960).