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## The Legal Framework Applicable to Intrusive Intelligence, Surveillance, and Reconnaissance Operations in the Air and Maritime Domains

*Raul (Pete) Pedrozo*

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# The Legal Framework Applicable to Intrusive Intelligence, Surveillance, and Reconnaissance Operations in the Air and Maritime Domains

Raul (Pete) Pedrozo\*

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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

## I. INTRODUCTION

Whether intrusive intelligence, surveillance, and reconnaissance (ISR) operations can be lawfully conducted against a coastal State depends on where the collecting State is operating. Seaward of the territorial sea and national airspace, all States have the absolute right under international law to conduct intrusive ISR operations against another State.

International law divides the maritime and air domains into clearly defined zones. Each zone has a specific legal regime that determines the amount of control coastal States can exercise over the activities of foreign-flagged merchant ships and warships, as well as civilian and State aircraft, operating within these zones.

Waters landward of the baseline of the territorial sea form part of the internal waters of the coastal State.<sup>1</sup> All States may also claim a territorial sea up to a limit not exceeding twelve nautical miles, measured from baselines determined in accordance with the United Nations Convention on the Law of the Sea (UNCLOS).<sup>2</sup> Coastal States exercise sovereignty over their land territory, internal waters, archipelagic waters (in the case of archipelagic States), and the territorial sea.<sup>3</sup> Coastal State sovereignty also extends to the national airspace over internal waters, land territory, and the territorial sea.<sup>4</sup> Within national airspace, States are responsible for providing air traffic ser-

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1. United Nations Convention on the Law of the Sea art. 8, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

2. *Id.* art. 3.

3. *Id.* art. 2. In international straits completely overlapped by territorial seas, which connect one part of the high seas or an exclusive economic zone (EEZ) and another part of the high seas or an EEZ, all ships and aircraft enjoy the right of unimpeded transit passage through such straits and their approaches. *Id.* arts. 37–44; U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 2.5.3.2 (2022) [hereinafter NWP 1-14M]. Similarly, all ships and aircraft enjoy the right of archipelagic sea lanes passage while transiting through, under, or over archipelagic waters and adjacent territorial seas via all routes normally used for international navigation and overflight. UNCLOS, *supra* note 1, arts. 53–54; NWP 1-14M, *supra* note 3, § 2.5.4.1. During transit passage and archipelagic sea lanes passage, ships may not carry out any research or survey activities without the prior authorization of the bordering or archipelagic States. UNCLOS, *supra* note 1, arts. 40, 54.

4. UNCLOS, *supra* note 1, arts. 40, 54; Convention on International Civil Aviation art. 1–2, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295, Dec. 7, 1944 [hereinafter Chicago Convention].

vices in flight information regions (FIR)—“an airspace of defined dimensions within which flight information service and alerting service are provided”—established in accordance with Annex 11 (Air Traffic Services) to the Convention on International Civil Aviation (Chicago Convention).<sup>5</sup>

Beyond the territorial sea and national airspace, coastal State authority over user State activities is limited. In a zone contiguous to the territorial sea, coastal State authority is limited to taking necessary measures to prevent and punish infringement of its customs, fiscal, immigration, or sanitary laws and regulations committed within its territory or territorial sea.<sup>6</sup> UNCLOS also created a new zone—the two hundred nautical mile exclusive economic zone (EEZ)—for the purpose of granting coastal States greater control over the living and non-living resources adjacent to their coasts.<sup>7</sup> Coastal State jurisdiction in the EEZ also extends to resource-related artificial islands and structures, marine scientific research (MSR), and protection of the marine environment.<sup>8</sup> Apart from this limited coastal State authority, all ships and aircraft enjoy high seas freedoms of navigation and overflight, and other internationally lawful uses of the seas related to these freedoms (such as intrusive ISR) in the EEZ.<sup>9</sup>

UNCLOS does not provide for coastal State authority over international airspace above the contiguous zone and EEZ. Nonetheless, coastal States may be authorized to provide air traffic services in FIR established pursuant to a regional air navigation agreement approved by the Council of the International Civil Aviation Organization (ICAO).<sup>10</sup> FIR rules and procedures, however, do not apply to State aircraft, including military aircraft, as a matter of international law.<sup>11</sup>

International law also does not prohibit a State from establishing an air defense identification zone (ADIZ) in national and international airspace adjacent to its coast to the extent that the ADIZ does not impede high seas freedom of overflight and other internationally lawful uses of international

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5. Chicago Convention, *supra* note 4, annex 11 ¶ 2.1.1.

6. The contiguous zone may not extend beyond twenty-four nautical miles from the baselines from which the breadth of the territorial sea is measured. UNCLOS, *supra* note 1, art. 33.

7. *Id.* arts. 55–57.

8. *Id.* art. 56.1(b).

9. *Id.* arts. 58, 86–87, 89; NWP 1-14M, *supra* note 3, § 2.6.2.

10. Chicago Convention, *supra* note 4, annex 11 ¶ 2.1.2.

11. *Id.* art. 3; U.S. Department of Defense, DoD Instruction 4540.01, Use of International Airspace by U.S. Military Aircraft and for Missile and Projectile Firings ¶ 3.c(2)(b), (incorporating change 1, May 22, 2017) [hereinafter DoDI 4540.01].

airspace provided for in international law. In times of peace, all States have a right to establish reasonable conditions of entry into their land territory, internal waters, and national airspace. Thus, aircraft approaching national airspace may be required to provide identification even while in international airspace, but only as a condition of entry approval.<sup>12</sup>

This article examines the legal framework for conducting intrusive ISR in the air and maritime domains. It reviews some of the more prominent arguments used by States that purport to regulate such activities beyond their territorial sea and national airspace. The article concludes that all States have an absolute right under both conventional and customary international law, as well as long-standing State practice, to conduct intrusive ISR operations from beyond the territorial sea and national airspace of coastal States.

## II. INTRUSIVE ISR FROM THE MARITIME DOMAIN

The validity of intrusive ISR in the maritime domain depends on the location from which the operation is conducted. Intelligence collection within internal waters is regulated in the same way that intelligence collection is treated on land. Intelligence collection by ships transiting the territorial sea would be inconsistent with the innocent passage regime. Intrusive ISR conducted beyond the territorial sea, however, is considered an internationally lawful use of the sea that is not subject to coastal State jurisdiction or interference.

### A. Internal Waters and Territorial Sea

Internal waters have the same legal character as the land territory. Therefore, foreign-flagged military and commercial vessels may only enter internal waters with the consent of the coastal State.<sup>13</sup> Intrusive ISR from within internal waters is considered espionage, which is punishable under the domestic laws of the coastal State.<sup>14</sup>

Coastal State sovereignty over the territorial sea is subject to the right of innocent passage for all ships, including warships and other government non-commercial vessels.<sup>15</sup> When exercising the right of innocent passage,

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12. DoDI 4540.01, *supra* note 11, ¶ 3.c(1)(b). See Section III(c), *infra*, for a discussion of rules applicable in ADIZs.

13. UNCLOS, *supra* note 1, art. 25(2).

14. See 18 U.S.C. § 793 for the U.S. law on gathering, transmitting, or losing defense information.

15. UNCLOS, *supra* note 1, art. 17.

submarines and other underwater vehicles must navigate on the surface and fly their flag.<sup>16</sup> Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State.<sup>17</sup> One of the activities that is considered to be prejudicial to the peace, good order, or security of the coastal State, and therefore inconsistent with the right of innocent passage, is “any act aimed at collecting information to the prejudice of the defense or security of the coastal State.”<sup>18</sup> The submerged transit of a submarine or collection of intelligence while transiting the territorial sea would therefore be inconsistent the regime of innocent passage, thereby allowing the coastal State to take necessary steps to prevent passage of ships engaged in activities proscribed by Article 19 of UNCLOS.<sup>19</sup>

Nevertheless, because warships and other government non-commercial vessels enjoy complete immunity from foreign jurisdiction,<sup>20</sup> the coastal State may only order the non-compliant ship or submarine to leave the territorial sea immediately.<sup>21</sup> Unless required in self-defense to a hostile act or demonstrated hostile intent, the use of armed force against a non-compliant warship or other government non-commercial vessel would violate the vessel’s sovereign immunity.<sup>22</sup>

Moreover, the United States takes the position that the “innocent passage provisions of the Convention set forth conditions for the enjoyment of the right of innocent passage in the territorial sea.”<sup>23</sup> They do not, however, “prohibit or otherwise affect activities or conduct that is inconsistent with that right and therefore not entitled to that right.”<sup>24</sup> Similarly, although Article 20 requires submarines and other underwater vehicles to navigate on the surface and to show their flag in order to enjoy the right of innocent passage, “failure to do so is not characterized as inherently not ‘innocent.’”<sup>25</sup> Therefore, while intelligence collection and submerged transits are inconsistent

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16. *Id.* art. 20.

17. *Id.* art. 19.

18. *Id.* art. 19.2(c).

19. *Id.* art. 25.1.

20. *Id.* art. 32.

21. *Id.* art. 30.

22. “ARA Libertad” (Arg. v. Ghana), Case No. 20, Order of Dec. 15, 2012, 2012 ITLOS Rep. 332, ¶¶ 94–95; *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

23. S. EXEC. REP. NO. 110-9, at 12 (2007).

24. *Id.*

25. *Id.*

with the right of innocent passage, they are not a violation of general international law or an internationally wrongful act that gives rise to the use of countermeasures.

### B. *Contiguous Zone, Exclusive Economic Zone, and High Seas*

As discussed below, intrusive ISR may lawfully be conducted against coastal States from anywhere beyond the territorial sea.

#### 1. Contiguous Zone

The contiguous zone is a law enforcement zone. Within the zone, coastal State jurisdiction is limited to exercising the control necessary to prevent and punish infringement of its customs, fiscal, immigration, or sanitary laws and regulations committed within its territory or territorial sea.<sup>26</sup> Five States—Cambodia, China, Sudan, Syria, and Vietnam—illegally purport to assert “security” jurisdiction in their twenty-four nautical mile contiguous zones.<sup>27</sup> These claims are inconsistent with the negotiating history of the Convention, which rejects that coastal States retain residual competencies (like security jurisdiction) beyond the territorial sea.<sup>28</sup> Thus, intrusive ISR is an internationally lawful use of the sea that is not subject to coastal State interference or control.

#### 2. Exclusive Economic Zone

As previously indicated, within their EEZ, coastal States enjoy sovereign rights for the limited purpose of “exploring, exploiting, conserving and managing” living and non-living natural resources, as well as jurisdiction over resource-related off-shore installations and structures, MSR, and protection and preservation of the marine environment.<sup>29</sup> Coastal States do not, however, exercise sovereignty in the zone. The term “sovereign rights” was pur-

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26. UNCLOS, *supra* note 1, art. 33.

27. U.S. Department of Defense, Maritime Claims Reference Manual, [http://www.jag.navy.mil/organization/code\\_10\\_mcrm.htm](http://www.jag.navy.mil/organization/code_10_mcrm.htm) (last updated Feb. 8, 2022).

28. II UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 529–30 (Satya N. Nandan & Shabtai Rosenne eds., 1993) [hereinafter VIRGINIA COMMENTARY II].

29. UNCLOS, *supra* note 1, art. 56.

posely chosen to clearly distinguish between the coastal State's limited authorities in the EEZ and the more comprehensive coastal State right of sovereignty over the territorial sea.<sup>30</sup> Article 89, which applies to the EEZ pursuant to Article 58(2), confirms that States do not exercise sovereignty beyond the territorial sea and therefore may not assert jurisdiction over security-related matters in the EEZ.<sup>31</sup>

The Convention is explicit in this regard. Although the EEZ is a *sui generis* zone,<sup>32</sup> Article 86 makes clear that nothing in the article abridges the non-resource-related high seas "freedoms enjoyed by all States in the EEZ in accordance with Article 58."<sup>33</sup> Thus, the Convention retains the distinction for the EEZ that had previously existed between the high seas, which are open to all States, and the territorial sea, where the coastal State exercises sovereignty. Regarding intrusive ISR, ships transiting the territorial sea in innocent passage may not collect "information to the prejudice of the defense or security of the coastal State."<sup>34</sup> A similar restriction does not appear in Part V of the Convention.

Thus, within foreign EEZs, all States enjoy high seas freedoms of "navigation and overflight . . . and other internationally lawful uses of the seas related to those freedoms."<sup>35</sup> These "other internationally lawful uses of the seas" may be conducted without coastal State notice or consent and include a broad range of military activities, including intrusive ISR. Efforts by a handful of States to limit military activities in the EEZ were rejected by a majority of the States participating in the Third United Nations Conference on the Law of the Sea (UNCLOS III).<sup>36</sup> The overwhelming majority of States agreed that "military operations, exercises and activities have always been

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30. VIRGINIA COMMENTARY II, *supra* note 28, at 531–44. *See also* JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 233 (2013).

31. UNCLOS, *supra* note 1, art. 58.2 (Articles 88–115 apply to the EEZ in so far as they are not incompatible with Part V), art. 89 ("no state may validly purport to subject any part of the high seas to its sovereignty").

32. *Id.* art. 86 (The provisions of Part VII "apply to all parts of the sea that are not included in the exclusive economic zone").

33. *Id.*; III UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 60–71 (Satya N. Nandan & Shabtai Rosenne eds., 1995) [hereinafter VIRGINIA COMMENTARY III].

34. UNCLOS, *supra* note 1, art. 19.2(c).

35. *Id.* art. 58.1.

36. VIRGINIA COMMENTARY II, *supra* note 28, at 529–30.



regarded as internationally lawful uses of the sea” and that the “right to conduct such activities will continue to be enjoyed by all States” in the EEZ.<sup>37</sup>

### III. INTRUSIVE ISR FROM THE AIR DOMAIN

In peacetime, activities in the air domain are regulated by the Chicago Convention. Like maritime ISR operations, the validity of intrusive ISR in the air domain depends on whether the intelligence collection is being conducted in national or international airspace. In general, intrusive ISR conducted in national airspace can be restricted by the coastal State, but ISR in international airspace is not subject to coastal State jurisdiction or interference.

#### A. National Airspace

National airspace is subject to coastal States’ sovereignty and includes all airspace above the land territory, internal waters, archipelagic waters (for archipelagic States), and territorial sea.<sup>38</sup> There is no right of innocent passage for aircraft through national airspace. However, coastal State sovereignty over the territorial sea and archipelagic waters is subject to the right of transit passage<sup>39</sup> and archipelagic sea lanes passage,<sup>40</sup> respectively.

Coastal States are responsible for providing air traffic services in FIRs within their national airspace.<sup>41</sup> However, the Chicago Convention and its annexes only apply to civil aircraft.<sup>42</sup> Nonetheless, State aircraft—aircraft used in military, customs, and police services<sup>43</sup>—may not enter national airspace without the consent of the coastal State<sup>44</sup> and must operate with “due regard” for the safety of navigation of civil aircraft.<sup>45</sup> Thus, intrusive ISR from within national airspace may be prohibited by the coastal State.

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37. 17 THIRD UN CONFERENCE ON THE LAW OF THE SEA, PLENARY MEETINGS, OFFICIAL RECORDS 244, U.N. Doc. A/CONF.62/WS/37 and ADD.1–2 (1984) [hereinafter OFFICIAL RECORDS vol. 17]; *Study on the Naval Arms Race: Report of the Secretary-General*, ¶ 188, U.N. Doc. A/40/535 (Sept. 17, 1985).

38. UNCLOS, *supra* note 1, arts. 2, 49; Chicago Convention, *supra* note 4, arts. 1–2.

39. UNCLOS, *supra* note 1, art. 38.

40. *Id.* art. 53.

41. Chicago Convention, *supra* note 4, annex 11 ¶ 2.1.1.

42. *Id.* art. 3(a).

43. *Id.* art. 3(b).

44. *Id.* art. 3(c).

45. *Id.* art. 3(d).

To illustrate, between 1945 and 1977, over forty U.S. reconnaissance aircraft were shot down in the European and Pacific regions.<sup>46</sup> Most of these attacks were justified on the grounds that the aircraft had violated national airspace.<sup>47</sup> During the 1950s and 1960s, the issue of aerial reconnaissance was discussed in the Security Council following several incidents between U.S. and Soviet aircraft. When asked if surveillance aircraft could be attacked over the high seas, the Soviet representative rejected the position that coastal States had the right to interfere with intelligence collection activities in international airspace.<sup>48</sup> The United Kingdom delegation similarly indicated without objection that aerial surveillance directed at a coastal State from international airspace was consistent with international law and the UN Charter.<sup>49</sup>

A recent example of the distinction between national and international airspace is the shootdown of a Turkish RF-4E Phantom reconnaissance aircraft by Syrian forces in June 2012. Damascus claimed that the Turkish spy plane was illegally collecting intelligence from within its national airspace.<sup>50</sup> Similarly, in June 2019, an unmanned U.S. MQ-4C Triton surveillance drone was shot down by the Islamic Revolution Guards Corps (IRGC) in the Persian Gulf. The commander of the IRGC's aerospace force claimed that the MQ-4C was downed by an Iranian missile while it was collecting intelligence in Iran's national airspace.<sup>51</sup>

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46. Center for Cryptologic History, *Dedication and Sacrifice: National Aerial Reconnaissance in the Cold War*, <https://media.defense.gov/2021/Jul/13/2002761784/-1/-1/0/DEDICATION-SACRIFICE.PDF> (last visited Nov. 14, 2022).

47. Oliver J. Lissitzyn, *The Role of International Law and an Evolving Oceans Law*, 61 INTERNATIONAL LAW STUDIES 563, 566–67, 574–75, 578–79 (1980); Samuel J. Cox, *H-029-3: A Brief History of U.S. Navy Cold War Aviation Incidents (Excluding Korea and Vietnam)*, NAVAL HISTORY AND HERITAGE COMMAND (Apr. 2019), <https://www.history.navy.mil/content/history/nhhc/about-us/leadership/director/directors-corner/h-grams/h-gram-029/h-029-3.html>.

48. See U.N. SCOR, 9th Sess., 680th mtg., U.N. Doc. S./P.V.680, ¶ 125 (Sept. 10, 1954).

49. See U.N. SCOR, 15th Sess., 881st mtg., U.N. Doc. S./P.V.881, ¶ 64 (July 25, 1960).

50. Eric Schmitt & Sebnem Arsu, *Backed By NATO, Turkey Steps Up Warning To Syria*, NEW YORK TIMES (June 26, 2012), <https://www.nytimes.com/2012/06/27/world/middleeast/turkey-seeks-nato-backing-in-syria-dispute.html>.

51. U.S. officials denied the allegation, indicating that the attack was unprovoked and that the MQ-4C was legally operating in international airspace. Richard Sisk, *Iran Chose to Take Out Drone Instead of Manned Navy Jet, Iranian General Says*, MILITARY.COM (June 21, 2019), <https://www.military.com/daily-news/2019/06/21/iran-chose-take-out-drone-instead-manned-navy-jet-iranian-general-says.html>; *Iran's IRGC Force Shoots Down Intruding US Spy Drone*, PRESSTV (June 20, 2019), <https://www.presstv.com/Detail/2019/06/20/598942/Iran-IRGC-US-spy-drone>.

### B. International Airspace

All airspace seaward of the territorial sea is considered international airspace and, like the high seas, is not subject to coastal State sovereignty. Neither UNCLOS nor the Chicago Convention grants coastal States any authority over military aircraft operating in international airspace.

Except for production of energy from the winds, UNCLOS limits coastal State authority in the EEZ to the seabed, its subsoil, and the waters superjacent to the seabed.<sup>52</sup> Therefore, coastal States may not rely on the Convention to assert jurisdiction over military activities, including intrusive ISR, that occurs in international airspace seaward of the territorial sea.

Similarly, the Chicago Convention only limits military activities in national airspace and exempts State aircraft from compliance with its international airspace provisions. State aircraft are, therefore, not required to comply with procedures applicable to FIRs in international airspace that are under coastal State control for purposes of providing air traffic services to civil aviation.<sup>53</sup> Efforts at ICAO to designate the airspace above the EEZ as national airspace were rejected by the ICAO Legal Committee, indicating the proposal would flagrantly contradict “the relevant provisions of UNCLOS which equate the EEZ . . . with the high seas as regards freedom of overflight.”<sup>54</sup> In short, nothing in UNCLOS or the Chicago Convention provides a legal basis for regulating intrusive ISR activities in international airspace.

### C. Air Defense Identification Zones

As discussed above, international law does not prohibit a State from establishing an ADIZ in national and international airspace adjacent to its coast to the extent that the ADIZ does not impede high seas freedom of overflight and other internationally lawful uses of international airspace provided for in international law. An ADIZ is defined as a special designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures that supplement those related to civil air traffic services.<sup>55</sup>

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52. UNCLOS, *supra* note 1, art. 56.

53. Chicago Convention, *supra* note 4, art. 3, annex 11 ¶ 2.1.2.

54. BARBARA KWIATKOWSKA, THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA 203 (1989).

55. Chicago Convention, *supra* note 4, annex 15. The United States defines an ADIZ as an area of airspace over land or water in which the ready identification, location, and

The United States and Canada jointly established the first ADIZ in 1950. The United States currently maintains four ADIZs—the contiguous U.S. ADIZ (with Canada), Alaska ADIZ, Guam ADIZ, and Hawaii ADIZ.<sup>56</sup> These ADIZs were established to assist in the early identification of aircraft in international airspace approaching U.S. national airspace. The United States established the Japanese ADIZ in 1951 and transferred management of the zone to Japan in 1969. The United States also established the South Korean ADIZ in 1951 during the Korean War. A number of other States claim ADIZs, including South Korea, China, India, Italy, Norway, Pakistan, and Taiwan.<sup>57</sup>

The United States does not recognize any claim by a State to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace, nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace.<sup>58</sup> Thus, intrusive ISR from within an ADIZ in international airspace is authorized.

U.S. military aircraft transiting through a foreign ADIZ that do not intend to enter foreign national airspace normally will not identify themselves or otherwise comply with ADIZ procedures unless the United States has specifically agreed to do so. If a U.S. military aircraft intends to penetrate the national airspace of the ADIZ country the aircraft commander will follow the applicable ADIZ procedures.<sup>59</sup>

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control of all aircraft, except military and other State aircraft, is required in the interest of national security. 14 C.F.R. § 99.3 (2021).

56. 14 C.F.R. § 99.43 (2004) (Contiguous U.S.); 14 C.F.R. § 99.45 (2004) (Alaska); 14 C.F.R. § 99.47 (2004) (Guam); 14 C.F.R. § 99.49 (2004) (Hawaii).

57. Peter Dutton, *Caelum Liberam: Air Defense Identification Zones Outside Sovereign Airspace*, 103 AMERICAN JOURNAL OF INTERNATIONAL LAW 691, 691 n.3, 707 n.104 (2009).

58. U.S. ADIZ rules are contained in Chapter 5 of the Federal Aviation Administration's Aeronautical Information Manual. 14 C.F.R. §§ 99.1–99.49 (2021). All aircraft intending to enter U.S. national airspace must file flight plans, provide periodic reports, and have a functioning two-way radio. 14 C.F.R. §§ 99.9(a)–(c), 99.11(a), 99.17(b)–(c), 99.15(a), 91.183 (2021). Foreign civil aircraft may not enter the United States through an ADIZ unless the pilot reports the position of the aircraft when it is not less than one hour and not more than two hours average direct cruising distance from the United States. 14 C.F.R. § 99.15(c) (2021). An aircraft may deviate from the above rules during an emergency that requires an immediate decision and action for the safety of flight. 14 C.F.R. § 99.5 (2021). *See also* Exec. Order No. 10,854, Nov. 27, 1959, 24 Fed. Reg. 9565, 3 C.F.R., 1959–1963 Comp., at 389 (extending the application of 49 U.S.C. § 40103 to the overlying airspace of water outside the United States beyond the twelve nautical mile territorial sea in which the United States has appropriate jurisdiction or control).

59. DoDI 4540.01, *supra* note 11, encl. 3 ¶ 3.d(1)(a).

An example of an illegal ADIZ is the Chinese zone in the East China Sea, which was established in November 2013. The ADIZ regulations require all aircraft entering the zone to file a flight plan and maintain communications with Chinese authorities, operate a radar transponder, and be clearly marked with their nationality and registration identification. Aircraft that fail to comply with the identification procedures or follow the instructions of Chinese authorities will be subject to undefined “defensive emergency measures.”<sup>60</sup> China’s application of its ADIZ procedures to all transiting aircraft, regardless of whether they intend to enter Chinese national airspace, interferes with high seas freedom of overflight in international airspace and is, therefore, inconsistent with international law.<sup>61</sup>

#### IV. ILLEGAL COASTAL STATE RESTRICTIONS ON INTRUSIVE ISR

Dissatisfied with the outcome of UNCLOS III, eighteen nations currently purport to regulate or prohibit military activities, including intrusive ISR, seaward of their territorial sea.<sup>62</sup> These efforts are clearly inconsistent with the text of the Convention, customary international law, and State practice. Coastal State constraints vary from State-to-State, but the two most prevalent arguments include (1) limitations on hydrographic surveys and military marine data collection (military surveys) and (2) restrictions on non-peaceful uses of the seas.

##### A. *Limitations on Marine Data Collection*

UNCLOS grants coastal States exclusive jurisdiction over MSR in their EEZ.<sup>63</sup> States that purport to assert jurisdiction over military marine data collection (surveillance operations and oceanographic (hydrographic) surveys) in the EEZ argue that such activities are analogous to MSR and are therefore subject to coastal State control.

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60. People’s Republic of China, Ministry of National Defense, Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the People’s Republic of China, CHINADAILY.COM.CN (updated Nov. 23, 2013 12:02 PM), [https://www.chinadaily.com.cn/china/2013-11/23/content\\_17126618.htm](https://www.chinadaily.com.cn/china/2013-11/23/content_17126618.htm).

61. UNCLOS, *supra* note 1, arts. 58(1), 87(1)(b), 89; Chicago Convention, *supra* note 4, art. 1, 3, 9.

62. These States include Bangladesh, Brazil, Burma (Myanmar), Cape Verde, China, India, Indonesia, Iran, Kenya, Malaysia, Maldives, Mauritius, North Korea, Pakistan, Philippines, Portugal, Thailand, and Uruguay.

63. UNCLOS, *supra* note 1, art. 56.1(b)(ii).

China, for example, prohibits all types of marine data collection in its EEZ without its consent.<sup>64</sup> Surveying and mapping are broadly defined in Article 2 of the 2002 Surveying and Mapping Law to include “surveying, collection and presentation of the shape, size, spatial location and properties of the natural geographic factors or the manmade facilities on the surface, as well as the activities for processing and providing of the obtained data, information and achievements.”<sup>65</sup> Both the 1998 and 2002 laws purport to apply to all types of data collection—MSR, hydrographic surveys, and military marine data collection—and are therefore inconsistent with international law, including UNCLOS.<sup>66</sup>

Although the terms “marine scientific research” and “hydrographic surveys” are not defined, the Convention clearly differentiates between MSR, hydrographic surveys, and intelligence collection in several articles. Article 19.2(j) and Article 52 prohibit both “research or survey activities” for ships engaged in innocent passage.<sup>67</sup> Collecting information to the prejudice of the defense or security of the coastal State while engaged in innocent passage is also proscribed by Article 19.2(c) and Article 52.<sup>68</sup> Ships engaged in transit passage through international straits “may not carry out any research or survey activities” without the consent of the States bordering the strait.<sup>69</sup> The same limitation applies to ships passing through archipelagic sea lanes.<sup>70</sup> More importantly, Article 56 and Part XIII only grant coastal States authority

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64. Law of the People’s Republic of China on the Exclusive Economic Zone and the Continental Shelf, Order No. 6, (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 26, 1998, effective June 26, 1998), art. 8, (China); Provisions on the Administration of Foreign-Related Maritime Scientific Research, 1996 (promulgated by Decree No. 199 of the State Council of the People’s Republic of China, June 18, 1996) (China); Law of the People’s Republic of China on the Surveying and Mapping, (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 29, 2002, effective Dec. 1, 2002), art. 7, [hereinafter 2002 Surveying and Mapping Law].

65. 2002 Surveying and Mapping Law, *supra* note 64, art. 2.

66. Raul Pedrozo, *Coastal State Jurisdiction over Marine Data Collection in the Exclusive Economic Zone: U.S. Views*, in *MILITARY ACTIVITIES IN THE EEZ: A U.S.-CHINA DIALOGUE ON SECURITY AND INTERNATIONAL LAW IN THE MARITIME COMMONS* 23–26 (Peter Dutton ed., 2010) (No. 7 China Maritime Study); J. ASHLEY ROACH & ROBERT W. SMITH, *EXCESSIVE MARITIME CLAIMS* 413–50 (3d ed. 2012).

67. UNCLOS, *supra* note 1, arts. 19.2(j), 52.

68. *Id.* arts. 19.2(c), 52.

69. *Id.* art. 40.

70. *Id.* art. 54.

over MSR—surveys and intelligence collection are not mentioned—and Article 87 only refers to “scientific research.”<sup>71</sup>

Thus, while coastal States may regulate MSR and surveys in the territorial sea, archipelagic waters, international straits, and archipelagic sea lanes, they may not regulate hydrographic surveys or other marine data collection in the other maritime zones, including the contiguous zone and the EEZ. Hydrographic surveys and other military marine data collection activities are internationally lawful uses of the sea that are exempt from coastal State jurisdiction and can be conducted by all States beyond the territorial sea as high seas freedoms.<sup>72</sup>

The distinction between MSR and other forms of marine data collection articulated in UNCLOS reflects centuries of State practice. Naval ships have plied the world’s oceans for centuries collecting marine data for military use.<sup>73</sup> That practice continues today. Ships from Australia, China, Japan, NATO, Russia, South Africa, the United Kingdom, and the United States (to name a few) routinely engage in oceanographic surveillance and survey activities seaward of foreign territorial seas to ensure safety of navigation, build oceanographic and meteorological profiles, maintain force protection, and inform military commanders and civilian leaders.<sup>74</sup>

For example, the U.S. Navy maintains a fleet of over twenty ships that perform a variety of missions, including oceanographic surveys, underwater surveillance, hydrographic surveys, and missile tracking and acoustic surveys.<sup>75</sup> Six of these ships are multipurpose oceanographic survey ships that perform acoustic, biological, physical, and geophysical surveys using multibeam, wide-angle, precision sonar systems that allow the ships to chart wide areas of the ocean floor to enhance the Navy’s information on the marine environment. A seventh oceanographic survey ship collects data in coastal regions around the world that is used to improve technology in undersea warfare, enemy ship detection, and charting the world’s coastlines. The Navy also operates five ocean surveillance ships that use both passive and active low-frequency sonar arrays to detect and track undersea threats.

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71. *Id.* arts. 56, 87, Part XIII.

72. *Id.* arts. 58, 86, 87.

73. Raul (Pete) Pedrozo, *Responding to Ms. Zhang’s Talking Points on the EEZ*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 207, ¶ 16 (2011); VIRGINIA COMMENTARY III, *supra* note 33, at 63–64.

74. Pedrozo, *supra* note 73, ¶ 5.

75. U.S. Navy Fact File, Oceanographic Survey Ships—T-AGS (updated Oct. 13, 2021), <https://www.navy.mil/Resources/Fact-Files/Display-FactFiles/Article/2222996/oceanographic-survey-ships-t-ags/>.

These ships additionally provide locating data that promote navigational safety of various undersea platforms. Operations by these ships seaward of the territorial sea are consistent with international law and long-standing State practice.

*B. Restrictions on Non-Peaceful Uses of the Seas*

Some States, including China, argue that military activities, including intrusive ISR, are inconsistent with the “peaceful purposes” provisions of UNCLOS.<sup>76</sup> Such an argument is not supported by a plain reading of the Convention, the deliberations of the Security Council, or long-standing State practice.

Article 301 requires that States “refrain from any threat or use of force against the territorial integrity or political independence of any State.”<sup>77</sup> This language mirrors the text of Article 2(4) of the UN Charter, which prohibits armed aggression in international relations between States.<sup>78</sup> UNCLOS, however, distinguishes between “threat or use of force” and other military-related activities, such as intelligence collection. Article 19.2(a) repeats the language of Article 301, prohibiting ships in innocent passage from engaging in “any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State.”<sup>79</sup> Article 19.2(c) prohibits ships engaged in innocent passage from “collecting information to the prejudice of the defense or security of the coastal State.”<sup>80</sup> This differentiation clearly demonstrates that UNCLOS does not equate the “threat or use of force” with intelligence collection. Rather, the test of whether a military activity (like intrusive ISR) is “peaceful” is determined by Article 2(4) of the UN Charter

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76. UNCLOS, *supra* note 1, art. 301 (“In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations”).

77. *Id.*

78. U.N. Charter art. 2(4) (“All Members shall refrain in their international relations 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”).

79. UNCLOS, *supra* note 1, art. 19.2(a).

80. *Id.* art. 19.2(c).



and other obligations under international law, including the inherent right of individual and collective self-defense, reflected in Article 51 of the Charter.<sup>81</sup>

Most commentators that have addressed this issue agree that “based on various provisions of the Convention . . . it is logical . . . to interpret the peaceful . . . purposes clauses as prohibiting only those activities which are not consistent with the UN Charter.”<sup>82</sup> Thus, they concluded that the peaceful purposes clauses in the Convention “do not prohibit all military activities on the high seas and in EEZs, but only those that threaten or use force in a manner inconsistent with the UN Charter.”<sup>83</sup>

Whether peacetime surveillance constitutes an act of aggression was specifically addressed by the Security Council in the 1960s. Following the shoot down of an American U-2 spy plane near Sverdlovsk in May 1960, efforts by the Soviet Union to have a Security Council resolution adopted that would have labelled the U-2 flights as “acts of aggression” under the Charter were rejected by a vote of seven to two (with two abstentions), thereby confirming that peacetime intelligence collection (even in national airspace) does not violate the UN Charter.<sup>84</sup> Four months later, Soviet forces shot down an American RB-47 surveillance aircraft operating over the Barents Sea off the Kola Peninsula. The United States claimed that the aircraft was operating in international airspace. The Soviet Union alleged that the aircraft was within its national airspace when it was engaged.<sup>85</sup> Nevertheless, Soviet efforts to have the Security Council designate the U.S. surveillance flight an act of aggression once again failed by a vote of nine to two.<sup>86</sup>

A similar conclusion is reflected in a 1985 Report of the Secretary-General on the *Study of the Naval Arms Race*. The report notes that the Convention

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81. VIRGINIA COMMENTARY III, *supra* note 33, at 89–91; 5 THIRD UN CONFERENCE ON THE LAW OF THE SEA, 67TH PLENARY MEETING, OFFICIAL RECORDS 62, U.N. Doc. A/CONF.62/SR.67 (Apr. 23, 1976); 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, 829–32 (1984).

82. Moritaka Hayashi, *Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms*, 29 MARINE POLICY 123 (2005).

83. *Id.*

84. *See* U.N. SCOR, 15th Sess., 857th mtg., ¶ 99, U.N. Doc. S/PV.857 (May 23, 1960) (text of USSR’s draft resolution); U.N. SCOR, 15th Sess., 860th mtg., ¶ 87, U.N. Doc. S/PV.860 (May 26, 1960) (result of voting on draft resolution).

85. Cable Dated 13 July 1960 From the Minister for Foreign Affairs of the Union of Soviet Socialist Republics Addressed to the Secretary-General of the United Nations, U.N. Doc. S/4384 (July 13, 1960).

86. U.N. SCOR, 15th Sess., 883d mtg., ¶ 187, U.N. Doc. S/PV.883 and Add.1 (July 26, 1960).

declares that “the high seas shall be reserved for peaceful purposes,” but does not define the term.<sup>87</sup> Nonetheless, the Convention provides an answer when it declares in Article 301 that

in exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.<sup>88</sup>

Thus, the report concludes that “military activities which are consistent with the principles of international law embodied in the Charter of the United Nations, in particular with Article 2, paragraph 4, and Article 51, are not prohibited by the Convention on the Law of the Sea.”<sup>89</sup>

## V. CONCLUSION

For the foreseeable future, a handful of States will continue to interfere with naval vessels and military aircraft engaged in intrusive ISR beyond the territorial sea and national airspace. By raising the political and military costs of such operations, these States seek to pressure nations to remain outside their EEZs when conducting military activities, including intrusive ISR. These efforts clearly impinge on traditional uses of the seas and airspace by other States, are inconsistent with international law, and should be opposed by all sea-going nations. If the position of these nations becomes the new international standard, 38 percent of the world’s oceans that were once considered high seas and open to unfettered military use will come under coastal State regulation and control. Such a result was not part of the package deal agreed to at UNCLOS III.<sup>90</sup>

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87. U.N. Secretary-General, *Study on the Naval Arms Race*, U.N. Doc. A/40/535, annex ¶ 188 (Sept. 17, 1985).

88. *Id.*

89. *Id.*

90. OFFICIAL RECORDS vol. 17, *supra* note 37, at 244. *Accord* signing and ratification statements of Germany, Italy, the Netherlands, the Russian Federation, and the United Kingdom, U.N. Treaty Collection, Status of the U.N. Convention on the Law of the Sea (status as of Nov. 11, 2022), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf> (scroll down to relevant State). *See also* Elmar Rauch, *Military Uses of the Oceans*, 28 GERMAN YEARBOOK OF INTERNATIONAL LAW 229,

This conclusion is best summed up by the President of UNCLOS III, Ambassador Tommy T.B. Koh of Singapore. Speaking at a conference in 2008, Ambassador Koh recalled that

some coastal states would like the status of the EEZ to approximate the legal status of the territorial seas. Many other states held the view that the rights of the coastal states in the EEZ are limited to the exploitation of living and non-living resources and that the water column should be treated much like the high seas.<sup>91</sup>

He continued, “I find a tendency on the part of some coastal states . . . to assert their sovereignty in the EEZ . . . is not consistent with the intention of those of us who negotiated this text and is not consistent with the correct interpretation of [Part V] of the Convention.”<sup>92</sup>

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241–42 (1985); Boleslaw Adam Boczek, *Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea*, 20 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 329, 363, 368 (1989).

91. Tommy T.B. Koh, *Remarks on the Legal Status of the Exclusive Economic Zone*, in FREEDOM OF SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF THE SEA CONVENTION 53 (Myron H. Nordquist et al. eds., 2009).

92. *Id.* at 54–55, 87.