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CHAPTER 2

INTERNATIONAL STATUS AND NAVIGATION OF MILITARY VESSELS AND MILITARY AIRCRAFT

2.1 SOVEREIGN IMMUNITY

As a matter of customary international law, all State public property is protected against the exercise of jurisdiction or control by another State under the doctrine of State immunity. All manned and unmanned vessels and aircraft owned or operated by a State—and used, for the time being—only on government, noncommercial service are entitled to sovereign immunity under this doctrine. This means such vessels and all other U.S. Government public property—wherever located—are immune from arrest, search, inspection, or other assertions of jurisdiction by a foreign State. Such vessels and aircraft are immune from:

1. Foreign taxation

2. Exempt from any foreign State regulation requiring flying the flag of such foreign State either in its ports or while passing through its territorial sea. Foreign flags may be displayed to render honors in accordance with United States Navy regulations.

3. Are entitled to exclusive control over persons on board such vessels with respect to acts performed on board.

Sovereign immunity includes protecting the identity of all personnel, stores, weapons, or other property on board the vessel.

Commentary

The concept of sovereign immunity is a long-standing rule of customary international law. It provides that State property is immune from interference by another State—that is, it limits the adjudicatory power of national courts against a foreign State and it limits the executive authorities of a State from taking or interfering with the property of another State.

Sovereign immunity of warships and other government ships owned or operated by a State and used, for the time being, only on government, noncommercial service is codified in a number of international agreements. The International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels provides that the provisions of Articles 1 and 2 of the Convention, regarding jurisdiction over claims relating to the operation of State vessels and their cargoes, do not apply to "ships of war . . . or other craft owned or operated by a State and used at the time a cause of action arises exclusively on Governmental and non-commercial service." Such vessels and their cargoes "shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*."[1] Additionally, "State-owned cargoes carried on board merchant vessels for Governmental and non-commercial purposes shall not be subject to seizure, attachment, or detention, by any legal process, nor to judicial proceedings *in rem*."[2] Similarly, the United Nations Convention on the Jurisdictional Immunities of States and Their Property provides that Article 16(1) and (3), regarding jurisdiction over State vessels used for commercial purposes and their cargo, do "not apply to warships, or naval auxiliaries, nor . . . to other vessels owned or operated by a State and used, for the time being, only on government non-commercial service" and their cargoes, as well as "cargo owned by a State and used or intended for use exclusively for government non-commercial purposes."[3]

Sovereign immunity of warships and other government ships used in governmental non-commercial service is also reflected in the Territorial Sea Convention, the High Seas Convention, and UNCLOS. The Territorial Sea Convention and UNCLOS confirm that nothing in the Conventions affects the immunities of government ships operated for non-commercial purposes.[4] "If a 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

1. International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, art. 3(1)–(2), Apr. 10, 1926, 1937 L.N.T.S. 200.

2. *Id.* art. 3(3).

3. G.A. Res. 59/38, annex, United Nations Convention on Jurisdictional Immunities of States and Their Property arts. 16(2), 16(4) (Dec. 2, 2004).

4. UNCLOS, art. 32; Territorial Sea Convention, art. 22(2).

made to it, the coastal State may require the warship to leave the territorial sea."[5] UNCLOS and the High Seas Convention provide that "warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State"[6] and, similarly, that "[s]hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."[7] UNCLOS additionally exempts "any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service" from the provisions of the Convention regarding the protection and preservation of the marine environment.[8] Nonetheless, each "State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention."[9]

Sovereign immunity exceptions for warships and/or other government non-commercial ships are also contained in numerous conventions under the auspices of the IMO, including the 1974 International Convention for the Safety of Life at Sea (SOLAS);[10] the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL), as modified by the Protocols of 1978 and 1997;[11] the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, as amended;[12] the 1965 Convention on Facilitation of International Maritime Traffic;[13] the 1966 International Convention on Load Lines;[14] the 1988 Convention for

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5. UNCLOS, art. 30; Territorial Sea Convention, art. 23.
6. UNCLOS, art. 95; High Seas Convention, art. 8(1).
7. UNCLOS, art. 96; High Seas Convention, art. 9.
8. UNCLOS, art. 236.
9. *Id.* art. 236.
10. SOLAS, regs. I/3(a)(i), V/1.1.
11. MARPOL, art. 3(3).
12. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, art. 3(a), July 7, 1978, 1361 U.N.T.S. 2, 1362 U.N.T.S. 2.
13. Convention on Facilitation of International Maritime Traffic, art. II(3), Apr. 9, 1965, 591 U.N.T.S. 265.
14. International Convention on Load Lines, art. 5(1)(a), Apr. 5, 1966, 640 U.N.T.S. 1333.

the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, and the 2005 Protocols;[15] the 1972 London Convention and the 1996 Protocol;[16] the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation;[17] the 2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances;[18] the 2001 International Convention on the Control of Harmful Anti-fouling Systems on Ships;[19] the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments;[20] the 1969 International Convention on Civil Liability for Oil Pollution Damage;[21] the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage;[22] the 1989 Salvage Convention;[23] and the 2007 Nairobi International Convention on the Removal of Wrecks.[24]

The rule of sovereign immunity reflected in UNCLOS was upheld by the International Tribunal for the Law of the Sea (ITLOS) in the *ARA Libertad* case. On October 1, 2012, the Argentine frigate ARA *Libertad* arrived in the port of Tema, Ghana. The ship's departure from port was prevented by Ghanaian authorities pursuant to a decision of the High Court of Accra on October 4, 2012. Argentina

15. SUA Convention, art. 2.

16. London Convention, art. VII(4).

17. International Convention on Oil Pollution Preparedness, Response and Co-operation, art. 1(3), Nov. 30, 1990, 1891 U.N.T.S. 51.

18. Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, art. 1(3), IMO Doc. HNS-OPRC/CONF/11/Rev 1 (Mar. 15, 2000).

19. International Convention on the Control of Harmful Anti-fouling Systems on Ships, art. 3(2), Oct. 5, 2001, 3356 U.N.T.S. 1.

20. International Convention for the Control and Management of Ships' Ballast Water and Sediments, art. 3(2)(e), IMO Doc. BMW/CONF/36 (Feb. 13, 2004).

21. International Convention on Civil Liability for Oil Pollution Damage, art. XI.1, Nov. 29, 1969, 973 U.N.T.S. 3.

22. International Convention on Civil Liability for Bunker Oil Pollution Damage, art. 4(2), Mar. 23, 2001, IMO.

23. 1989 Salvage Convention, art. 4(1).

24. Nairobi International Convention on the Removal of Wrecks, art. 4(2), May 18, 2007, *reprinted in* 46 INTERNATIONAL LEGAL MATERIALS 694 (2007).

instituted arbitration proceedings against Ghana on October 30 concerning the detention of the frigate. On November 14, 2012, Argentina submitted a request for the prescription of provisional measures under Article 290(5) of UNCLOS. The Tribunal determined that a warship is an expression of the sovereignty of the State whose flag it flies and that a warship enjoys immunity, including in internal waters. Accordingly, the Tribunal ordered that Ghana immediately and unconditionally release the *Libertad* and ensure that the frigate, its commander, and its crew be permitted to leave the port of Tema and the maritime areas under the jurisdiction of Ghana.[25]

U.S. domestic courts likewise recognize the rule of sovereign immunity for warships and other vessels owned or operated by a State and used in governmental non-commercial service. In *The Schooner Exchange v. McFaddon*, the U.S. Supreme Court recognized that U.S. courts do not have jurisdiction over foreign warships of a State at peace with the United States that enter a U.S. port.[26]

U.S. Navy sovereign immunity policy is set out in Chief of Naval Operations (CNO) NAVADMIN 165/21, Sovereign Immunity Policy.[27] U.S. Coast Guard sovereign immunity policy is set out in COMDT COGARD ALCOAST 370/21.[28] Sovereign immune vessels and aircraft, wherever located, are immune from arrest, search, and inspection by foreign authorities, including inspections by or under the supervision of a competent authority of areas, baggage, containers, conveyances, facilities, goods or postal parcels, and relevant data and documentation thereof for most purposes. Moreover, such vessels and aircraft are exempt from certain foreign taxes, duties, or fees, as well as foreign regulations that require flying the flag of a foreign State or a compulsory pilotage requirement. Customary international law further grants to commanding officers, officers-in-

25. ARA Libertad (Arg. v. Ghana), Case No. 20, Order of Dec. 15, 2012, ITLOS Rep. 2012, at 332, ¶¶ 94–95; James Kraska, *The "ARA Libertad,"* 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 404 (2013).

26. The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).

27. NAVADMIN 165/21 (CNO WASHINGTON DC 041827Z AUG 21), Sovereign Immunity Policy (Aug. 4, 2021).

28. COMDT COGARD ALCOAST 370/21 (061626Z OCT 21), Sovereign Immunity (Oct. 6, 2021).

charge, aircraft commanders, and masters the right to protect the identity of personnel, stores, weapons, and other property aboard a sovereign immune vessel or aircraft, as well as exclusive control over any person aboard a sovereign immune vessel or aircraft concerning acts performed aboard.[29]

U.S. warships (which include combatant craft), aircraft, and sovereign immune auxiliary vessels shall comply with host country requirements regarding traffic control, health, customs, and immigration, to the extent that such requirements do not contravene U.S. sovereign immunity policy.[30] See § 3.2.3 for a discussion of quarantine.

Except as otherwise provided in an international agreement (e.g., Status of Forces Agreement (SOFA)), commanding officers and officers-in-charge shall not permit a warship under their command to be searched or inspected on any pretense whatsoever by foreign authorities or organizations, nor permit any person within the confines of their warship to be removed by foreign authorities, so long as they have the capacity to repel such act.[31] Commanding officers and officers-in-charge shall also not provide vessel documents or other vessel-specific information (except a vessel's public characteristics for purposes of appropriate pilotage or berthing) to foreign authorities and organizations without the approval of the cognizant Geographic Naval Component Commander after consultation with OPNAV N3/N5 (Navy) or higher authority via the chain of command (Coast Guard).[32]

A foreign tax is defined as "all direct or indirect foreign customs duties, import and export taxes, excises, fees and other charges imposed at the national, local, or intermediate level of a foreign country other

29. NAVADMIN 165/21, *supra* note 27, ¶ 2; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 2.

30. NAVADMIN 165/21, *supra* note 27, ¶ 3; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 3.

31. NAVADMIN 165/21, *supra* note 27, ¶ 5.a; U.S. Navy Regulations, arts. 0828, 0860 (1990); COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.a; U.S. Coast Guard Regulations, §§ 4-1-28A(2)–(3), 4-2-10A(5) (1992).

32. NAVADMIN 165/21, *supra* note 27, ¶ 5.a; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.a.

than charges for services requested and received, regardless of how a charge is denominated in foreign law or regulation."[33] Unless there is an international agreement to the contrary, commanding officers and officers-in-charge shall refuse to pay any tax or revenue-generating fee imposed on a warship by a foreign sovereign. These taxes—including port taxes, port tariffs, port tolls, port security surcharges, port dockage fees, and other similar taxes or fees—are impermissible. Commanding officers and officers-in-charge may pay reasonable charges for goods and services requested and received, less taxes and similar charges. If requested to pay impermissible taxes or fees, commanding officers and officers-in-charge should request an itemized list of all charges, pay reasonable charges for goods and services requested and received, and explain that, under customary international law, sovereign immune vessels are exempt from foreign taxes and fees.[34] If port authorities directly insist on payment of an impermissible tax or fee, commanding officers and officers-in-charge should seek assistance from the respective Geographic Naval Component Commander (GNCC) (Navy) or higher authority (Coast Guard) and the U.S. Embassy via the chain of command.[35] If such taxes or fees are levied indirectly through a Husbanding Service Provider as part of a foreign fixed price contract, they may be paid as part of the contract price.[36]

If, after an oil or hazardous substance spill in foreign territorial or internal waters, a commanding officer or officer-in-charge determines that foreign authorities need additional information to properly respond to the spill and prevent serious environmental damage, the commanding officer or officer-in-charge may release information similar to that releasable to U.S. authorities in accordance with the Department of the Navy's Environmental Readiness Program Manual (OPNAV M-5090).[37] Before releasing spill-related information to foreign authorities, the commanding officer or officer-

33. NAVADMIN 165/21, *supra* note 27, ¶ 5.b.

34. *Id.* ¶ 5.b(1); COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.b(1).

35. NAVADMIN 165/21, *supra* note 27, ¶ 5.b(2); COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.b(2).

36. NAVADMIN 165/21, *supra* note 27, ¶ 5.b(3); COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.b(3).

37. OPNAV M-5090.1, Environmental Readiness Program Manual (June 25, 2021).

in-charge shall consult the GNCC (Navy) or higher authority via the chain of command (Coast Guard) and, if release is deemed appropriate, inform the foreign authorities that the ship or vessel is a sovereign immune vessel of the United States, and that spill-related information is being voluntarily provided to help minimize environmental damage.[38]

Commanding officers are authorized to employ pilots when, in the commanding officer's judgment, such employment is prudent. Inherent in such discretion is the authority to refuse use of a pilot or to disregard such pilot's advice regarding the safe navigation of a warship. Accordingly, U.S. vessels may, but are not required to, employ pilots as is prudent. If a nation deems pilot employment as a condition for entering port or transiting its waters, commanding officers shall inform foreign authorities that the ship or vessel is a sovereign immune vessel of the United States and that pilotage services are being accepted voluntarily and not as a condition of entry.[39] Pilotage is mandatory for U.S. vessels transiting the Panama Canal[40] or vessels navigating at a naval shipyard or station or entering or leaving drydock. In these circumstances, the pilot assigned to the vessel shall have control of the navigation and movement of the vessel.[41]

A foreign flag or ensign may be displayed by a U.S. warship during certain circumstances as a matter of policy and courtesy.[42]

Assertion of sovereign immunity is a privilege of the U.S. government. Thus, waiver is not within the discretion of a commanding

38. NAVADMIN 165/21, *supra* note 27, ¶ 5.f; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.f.

39. NAVADMIN 165/21, *supra* note 27, ¶ 5.g; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.g; U.S. Navy Regulations, art. 0856 (1990); U.S. Coast Guard Regulations, § 4-2-3 (1992).

40. Rules and Regulations Covering Navigation of the Panama Canal and Adjacent Waters, 35 C.F.R. ch. 1.

41. U.S. Navy Regulations, art. 0856 (1990); U.S. Coast Guard Regulations, § 3-1-6.C (1992).

42. *See* U.S. Navy Regulations, arts. 1276–78 (1990); U.S. Coast Guard Regulations, §§ 14-8-19 to 14-8-21 (1992); NAVADMIN 165/21, *supra* note 27, ¶ 5.e; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.e.

officer, officer-in-charge, aircraft commander, or master. Geographic Naval Component Commanders (Navy) and officers exercising Tactical Control (Coast Guard) are delegated authority to interpret sovereign immunity policy consistent with overarching U.S. government policies and shall be notified by lower echelons via the chain of command regarding any challenges to asserting sovereign immunity that are unable to be resolved in favor of U.S. sovereign immunity policies. Where a Geographic Naval Component Commander or officer exercising TACON can execute U.S. sovereign immunity policy without conflict with existing guidance, no waiver is required. However, except as provided in existing guidance, any action that may constitute a waiver or potential waiver of sovereign immunity must be coordinated with N3/N5 (Navy) or COMDT/CG-5R (Coast Guard) in advance of taking action on the matter.[43]

While on board ship in foreign waters, the crew of a warship are immune from local jurisdiction. Their status ashore, however, will be governed by the applicable SOFA, if any. Under the SOFA, an obligation may exist to assist in the arrest of crew members and their delivery to foreign authorities.[44] Nonetheless, commanding officers or other persons in authority shall not deliver any person in the naval service to civil authorities except as provided by the Manual of the Judge Advocate General.[45] Commanding officers are not authorized to deliver servicemembers or Navy civilian employees, or their dependents, to foreign authorities except when provided by agreement between the United States and the foreign government.[46]

See § 2.2.3. for a discussion of U.S. policy prohibiting providing a list of crew members or passengers on board USS or USCGC vessels as a condition of port entry or to satisfy port State immigration requirements.

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43. NAVADMIN 165/21, *supra* note 27, ¶ 4; COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 4.

44. *See* SECNAVINST 5820.4G, Status of Forces Polices, Procedures, and Information (Jan. 14, 1990).

45. U.S. Navy Regulations, art. 0822 (1990).

46. JAGINST 5800.7G, Manual of the Judge Advocate General, § 0609 (Ch. 1, Feb. 14, 2022).

2.1.1 Sovereign Immunity for U.S. Vessels

The United States asserts all the privileges of sovereign immunity for United States Ships (USSs), United States Naval Ships (USNSs), United States Coast Guard cutters (USCGCs), other vessels owned by the United States, and Department of Defense time-chartered U.S.-flagged vessels. U.S.-flagged, voyage-chartered vessels are entitled to all of the privileges of sovereign immunity when under the direction of the United States and used exclusively in government, noncommercial service, as a matter of policy. The United States ordinarily claims only limited immunity from arrest and taxation for such vessels. The United States does not claim sovereign immunity for foreign-flagged chartered vessels. The United States recognizes reciprocal full sovereign immunity privileges for the equivalent vessels of other States. See NAVADMIN 165/21 (041827Z AUG 21), Sovereign Immunity Policy, for additional information on U.S. Navy sovereign immunity policy. See COMDT COGARD ALCOAST 370/21 (061626Z OCT 21), Sovereign Immunity, for additional information on United States Coast Guard (USCG) sovereign immunity policy.

Commentary

As discussed in § 2.1, the United States asserts all the privileges of sovereign immunity for manned and unmanned United States Ships (USSs) and United States Coast Guard Cutters (USCGCs). The United States also asserts all the privileges of sovereign immunity for all manned and unmanned United States Naval Ships (USNSs), Military Sealift Command (MSC) vessels, the U.S. Maritime Administration National Defense Reserve Fleet and its Ready Reserve Force (when activated and assigned to the DoD), U.S. government-owned vessels or those under bareboat-charter to the U.S. government, and commercially owned U.S.-flagged vessels under time-charter to the U.S. government.[47]

In addition to the general privileges and obligations discussed in § 2.1, which apply in full, the following guidance applies for naval auxiliaries asserting full sovereign immunity:

47. NAVADMIN 165/21, *supra* note 27, ¶ 7.a.

Masters shall not permit a ship or vessel under their command to be searched or inspected on any pretense whatsoever by foreign authorities or organizations, nor permit any of the personnel within the confines of their ship or vessel to be removed by foreign authorities. Additionally, masters shall refuse requests by foreign authorities to interview personnel aboard or to provide any physical evidence. Masters shall not provide vessel documents or other vessel-specific information, including a list of crew members (military and/or nonmilitary), riding gang members, or passengers, to foreign authorities or organizations without the approval of the applicable GNCC via the chain of command and consultation with N3/N5.[48]

Unless there is an international agreement to the contrary, masters shall refuse to pay any tax or revenue-generating fee imposed on USNSs, U.S. government-owned vessels, or U.S.-flagged time- or bareboat-chartered vessels by a foreign sovereign. These taxes, including port taxes, port tariffs, port tolls, port security surcharges, port dockage fees, and other similar taxes or fees, are impermissible. Masters may pay reasonable charges for goods and services requested and received, less taxes and similar charges. If requested to pay impermissible taxes or fees, masters should request an itemized list of all charges, pay reasonable charges for goods and services requested and received, and explain that under customary international law, sovereign immune vessels are exempt from foreign taxes and fees.[49]

If port authorities directly insist on payment of an impermissible tax or fee, masters should seek assistance from the respective GNCC and U.S. Embassy via the chain of command. Whether the U.S. Navy will directly pay such an impermissible tax or fee is a matter of overarching U.S. government policy. This decision may be based on other concerns,

48. *Id.* ¶ 7.a(1).
49. *Id.* ¶ 7.a(2)(a).

> such as operational needs, contracting principles, and potential fiscal liability. If a GNCC determines that risk to mission clearly necessitates the port visit, the fees may be paid and a refund should be sought from the foreign sovereign.[50]
>
> If such taxes or fees are levied indirectly through a Husbanding Service Provider as part of a foreign fixed price contract, such tax or fee may be paid as part of the contract price.[51]
>
> If, after an oil or hazardous substance spill in foreign territorial or internal waters, a Master determines foreign authorities need additional information to properly respond to the spill and prevent serious environmental damage, the Master may release information similar to that releasable to U.S. authorities under . . . [OPNAV M-5090.1]. Before releasing spill-related information to foreign authorities, the Master shall consult the GNCC, via the established chain of command, and, if release is deemed appropriate, inform the foreign authorities that the ship or vessel is a sovereign immune vessel of the United States and that spill-related information is being voluntarily provided to help minimize environmental damage.[52]
>
> While naval auxiliaries asserting full sovereign immunity are exempt from foreign regulations that require flying a foreign State flag, such vessels may fly foreign State flags to render honors in accordance with . . . [Articles 1276–78 of the U.S. Navy Regulations, 1990]. Regional practices to display marks of respect for host nations vary and masters shall consult with the operational chain of command, theater- and fleet-specific guidance, and local embassies for further guidance if the issue is raised by host nation officials.[53]

50. *Id.* ¶ 7.a(2)(b).
51. *Id.* ¶ 7.a(2)(c).
52. *Id.* ¶ 7.a(5).
53. *Id.* ¶ 7.a(6).

> [M]asters may employ pilots when, in the master's judgement, such employment is prudent. Inherent in such discretion is the authority to refuse use of a pilot or to disregard such pilots advice regarding the safe navigation of a vessel. Accordingly, U.S. vessels may, but are not required to, employ pilots as prudent. . . . If a nation deems pilot employment as a condition for entering port or transiting their waters, . . . masters shall inform foreign authorities that the ship or vessel is a sovereign immune vessel of the United States and that pilotage services are being accepted voluntarily and not as a condition of entry.[54]

Pilotage is mandatory for vessels transiting the Panama Canal[55] or vessels navigating at a naval shipyard or station or entering or leaving drydock. In these circumstances, the pilot assigned to the vessel shall have control of the navigation and movement of the vessel.[56]

Although U.S.-flagged voyage-chartered vessels are entitled to assert full privileges of sovereign immunity when under the direction of the United States and used exclusively in government non-commercial service, as a matter of policy, the United States only claims limited immunity from arrest and taxation for such vessels.[57] Nonetheless, the U.S. Navy reserves the right to assert full or limited sovereign immunity on a case-by-case basis, as determined by the respective GNCC via MSC Headquarters or the MSC Area Commander. Masters shall be informed of the U.S. Navy's intention to assert full or limited sovereign immunity.[58] When full sovereign immunity is asserted, masters shall comply with the guidance applicable to naval auxiliaries. "When limited sovereign immunity is asserted, Masters shall refuse attempts to arrest or impose foreign taxes on the vessel

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54. *Id.* ¶ 7.a(7).

55. Rules and Regulations Covering Navigation of the Panama Canal and Adjacent Waters, 35 C.F.R. ch. 1.

56. NAVADMIN 165/21, *supra* note 27, ¶ 7.a(7); U.S. Navy Regulations, art. 0856 (1990).

57. NAVADMIN 165/21, *supra* note 27, ¶ 7.a. *See also* U.S. Department of State, Message 317062 (R 152102Z OCT 85), Status of Military Sealift Command Vessels (Oct. 15, 1985).

58. NAVADMIN 165/21, *supra* note 27, ¶ 7.a(1).

and shall seek assistance from the respective GNCC and U.S. Embassy, in coordination with MSC Headquarters or MSC Area Commander, if foreign authorities attempt to arrest or impose foreign search or inspect U.S. military cargo."[59]

> When limited or no sovereign immunity is asserted, U.S.-flagged voyage-chartered vessels may provide a list of crew members as a condition of entry into a port or to satisfy local immigration officials upon arrival. U.S.-flagged voyage-chartered vessels generally follow the same procedures as commercial vessels when information is requested by foreign authorities, including environmental response information after an oil spill. Foreign authorities may search these vessels, but masters shall request that these authorities to refrain from inspecting or searching U.S. military cargo onboard. Masters should seek assistance from the respective GNCC and U.S. Embassy, via MSC Headquarters or the MSC Area Commander, if foreign authorities attempt to search or inspect U.S. military cargo.[60]

> The U.S. Navy does not claim sovereign immunity for foreign State-flagged chartered vessels. These vessels are in the same position as commercial vessels when interacting with foreign authorities except that U.S. government cargo on such vessels should receive special consideration, protection, and treatment. Foreign authorities may search these vessels, but masters shall request that these authorities refrain from inspecting or searching U.S. military cargo onboard their vessel. Masters should seek assistance from the respective GNCC and U.S. Embassy, via MSC Headquarters or the MSC Area Commander, if foreign authorities attempt to search or inspect U.S. military cargo.[61]

59. *Id.* ¶ 7.a(2).
60. *Id.* ¶ 7.a(3).
61. *Id.* ¶ 7.b.

It is U.S. government policy to extend to all foreign warships, State aircraft, and auxiliary vessels visiting the United States the same sovereign immunity privileges that apply to U.S. vessels and aircraft.[62] Navy commanders should ensure that U.S. federal, state, and local civil authorities "understand the principles of sovereign immunity and respect these principles at all times."[63] "Navy commanders should seek to develop relationships with local U.S. authorities and provide them with planning and liaison assistance, as needed, before, during, and after visits by foreign sovereign immune vessels and aircraft."[64] Doing so will ensure that visits by foreign sovereign immune vessels and aircraft are conducted in accordance with international law and with "the same courtesy and efficiency expected by the U.S. Navy when visiting foreign ports and airports."[65]

2.1.2 Sunken Warships, Naval Craft, Military Aircraft, and Government Spacecraft

Sunken warships, naval craft, military aircraft, government spacecraft, and all other sovereign immune objects retain their sovereign-immune status and remain the property of the flag State until title is formally relinquished or abandoned, whether the cause of the sinking was through accident or enemy action—unless the warship or aircraft was captured before it sank. As a matter of policy, the U.S. Government does not grant permission to salvage sunken U.S. warships or military aircraft that contain the remains of deceased service personnel or explosive material. Requests from foreign countries to have their sunken warships or military aircraft, located in U.S. national waters, similarly respected by salvors, are honored.

Commentary

Under UNCLOS, all objects of an archaeological and historical nature found in the high seas and deep seabed (the Area) shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical

62. *Id.* ¶ 8.
63. *Id.*
64. *Id.*
65. *Id.*

and archaeological origin.[66] UNCLOS also imposes a duty on States to cooperate and protect objects of an archaeological and historical nature found at sea.[67] In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the seabed in the contiguous zone without its approval would result in an infringement of its laws and regulations within its territory or territorial sea.[68] Nothing in Article 303, however, affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.[69] Moreover, Article 303 is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.[70]

"Underwater cultural heritage" includes "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as . . . vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context."[71] States shall take all appropriate measures to protect underwater cultural heritage.[72] Nevertheless, consistent with State practice and international law, including UNCLOS, nothing in the Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.[73] States are encouraged to enter into bilateral, regional, or other multilateral agreements, or to develop existing agreements, for the preservation of underwater cultural heritage.[74]

States, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters, and territorial sea.

66. UNCLOS, art. 149.
67. *Id.* art. 303(1).
68. *Id.* art. 303(2).
69. *Id.* art. 303(3).
70. *Id.* art. 303(4).
71. Underwater Cultural Heritage Convention, art. 1(1)(a)(ii).
72. *Id.* art. 2(4).
73. *Id.* art. 2(8).
74. *Id.* art. 6.

States should inform the flag State of the discovery of identifiable State vessels and aircraft.[75] States may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone.[76] A State in whose EEZ or continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for in UNCLOS.[77] Where there is a discovery of underwater cultural heritage or it is intended that activity shall be directed at underwater cultural heritage in a State's EEZ or on its continental shelf, that State shall consult all other States that have declared an interest on how best to protect the underwater cultural heritage.[78] However, no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the "Coordinating State."[79] The Director-General shall invite all States that have declared an interest and the International Seabed Authority to consult on how best to protect the underwater cultural heritage located in the Area.[80] Nonetheless, no State shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State.[81]

As State property, sunken military vessels and aircraft continue to enjoy sovereign immunity until the State clearly abandons the wreck or relinquishes or transfers title to it.[82]

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75. *Id.* art. 7.
76. *Id.* art. 8.
77. *Id.* art. 10(2).
78. *Id.* art. 10(3).
79. *Id.* art. 10(7).
80. *Id.* art. 12(2).
81. *Id.* art. 12(7).
82. Institute of International Law, Resolution: The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law, art. 4 (Aug. 29, 2015), *reprinted in* 76 YEAR BOOK OF THE INSTITUTE OF INTERNATIONAL LAW 362–66 (2016). *See also* Natalino Ronzitti, *The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law*, 76 YEAR BOOK OF THE INSTITUTE OF INTERNATIONAL LAW 267, 286–95 (2016); Wolff Heintschel von Heinegg, *Belligerent Obligations Under Article 18(1) of the Second Geneva Convention: The Impact of Sovereign Immunity, Booty of War, and the Obligation to Respect and Protect War Graves*, 94 INTERNATIONAL LAW STUDIES 127 (2018).

> On June 11, 1864, the CSS *Alabama* struck its colors after a brief naval engagement with the USS *Kearsarge* and then sank off the coast of Cherbourg, France. In 1984, the French Navy mine hunter *Circe* discovered the remains of the *Alabama* in about 200 feet of water. Although the *Alabama* was located within the French territorial sea and was therefore subject to French law, the United States claimed ownership of the wreck as the successor State. The Association CSS *Alabama*, a non-profit organization, was founded in 1988 to conduct scientific exploration of the shipwreck.[83] On October 3, 1989, the United States and France signed an agreement that recognized the CSS *Alabama* as an important heritage resource of both nations and established a joint French-American Scientific Committee to oversee archaeological investigation of the wreck.[84] France recognized U.S. ownership of the *Alabama* on October 18, 1991.[85]
>
> The Sunken Military Craft Act of 2004 (SMCA) preserves the sovereign status of sunken U.S. military vessels and aircraft by codifying their protected sovereign status and permanent U.S. ownership, regardless of the passage of time. The purpose of the law is to protect sunken military vessels and aircraft and the remains of their crews from unauthorized disturbance. The SMCA protects sunken U.S. military ships and aircraft wherever they are located, as well as the graves of their lost military personnel, sensitive archaeological artifacts, and historical information. Thus, right, title, and interest of the United States in and to any U.S sunken military craft are not extinguished except by an express divestiture of title by the United States (an express act of abandonment, gift, or sale), regardless of when the craft sank.[86] Title is also lost if the military craft is captured or surrenders during battle before it sinks. The term "sunken military craft" means all or any portion of (A) any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government

83. *CSS Alabama Wreck Site (1864)*, NAVAL HISTORY AND HERITAGE COMMAND (Dec. 2, 2020), https://www.history.navy.mil/research/underwater-archaeology/sites-and-projects/ship-wrecksites/css-alabama.html.

84. Agreement concerning the wreck of the CSS Alabama, U.S.-Fr., Oct. 3, 1989, T.I.A.S. 11687.

85. Note Verbale No. 2826 (Oct. 18, 1991).

86. Pub. L. No. 108-375, Title XIV, §§ 1401–2, Sunken Military Craft Act of 2004, § 1401.

on military noncommercial service when it sank; (B) any sunken military aircraft or military spacecraft that was owned or operated by a government when it sank; and (C) the associated contents of such craft, if title thereto has not been abandoned or transferred by the government.[87] The term "associated contents" means (A) the equipment, cargo, and contents of a sunken military craft that are within its debris field; and (B) the remains and personal effects of the crew and passengers of a sunken military craft that are within its debris field.[88] The SMCA also applies to sunken foreign military craft in U.S. waters, to include U.S. internal waters, the territorial sea, and the contiguous zone.[89]

No person shall engage in any activity that disturbs, removes, or injures any sunken military craft except (1) as authorized by a permit; (2) as authorized by regulations issued pursuant to the SMCA; or (3) as otherwise authorized by law.[90] At the request of any foreign State, the Secretary of the Navy, in consultation with the Secretary of State, may issue permits with respect to any foreign sunken military craft of that foreign State located in U.S. waters.[91] Prohibited activities do not apply to actions taken by, or at the direction of, the United States or to any action by a person who is not a U.S. citizen, national, or resident alien, except in accordance with (A) generally recognized principles of international law; (B) an agreement between the United States and the foreign country of which the person is a citizen; or (C) in the case of an individual who is a crew member or other individual on a foreign vessel or foreign aircraft, an agreement between the United States and the flag State of the foreign vessel or aircraft that applies to the individual.[92] The Department of State, in consultation with the Secretary of Defense, is encouraged to negotiate and conclude bilateral and multilateral agreements with foreign countries with regard to sunken military craft consistent with the SMCA.[93]

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87. *Id.* § 1408(3).
88. *Id.* § 1408(1).
89. *Id.* § 1406(c)(2).
90. *Id.* § 1402(a). *See also id.* § 1403; Guidelines for Permitting Archaeological Investigations and Other Activities Directed at Sunken Military Craft and Terrestrial Military Craft Under the Jurisdiction of the Department of the Navy, 32 C.F.R. pt. 767 (2023).
91. Pub. L. No. 108-375, *supra* note 86, § 1403(d).
92. *Id.* § 1402(c).
93. *Id.* § 1407.

Nothing in the SMCA is intended to affect (1) any activity that is not directed at a sunken military craft; or (2) traditional high seas freedoms of navigation, including the laying of submarine cables and pipelines, the operation of vessels, fishing, or other internationally lawful uses of the sea related to such freedoms.[94] The SMCA and its implementing regulations shall be applied in accordance with generally recognized principles of international law and in accordance with the treaties, conventions, and other agreements to which the United States is a party.[95] The law of finds shall not apply to any United States sunken military craft, wherever located, or any foreign sunken military craft located in U.S. waters.[96] No salvage rights or awards shall be granted with respect to any U.S. sunken military craft without the express permission of the United States, or with respect to any foreign sunken military craft located in U.S. waters without the express permission of the relevant foreign State.[97] The SMCA does not alter the international law of capture or prize with respect to sunken military craft.[98]

2.2 WARSHIPS

Commentary

General guidance for the classification of naval vessels and battle force ship counting procedures is set out in Secretary of the Navy Instruction (SECNAVINST) 5030.8D.[99] Enclosures (1) through (5) of the instruction issue guidance for establishing naval ship and craft categories, classifications, types, and type designations.

Battle force ships are commissioned USS warships built or armed for naval combat and capable of contributing to combat operations, or other naval ships, including USNSs, that contribute directly to Navy warfighting or support missions. The battle force inventory will be

94. *Id.* § 1406(a).
95. *Id.* § 1406(b).
96. *Id.* § 1406(c).
97. *Id.* § 1406(d).
98. *Id.* § 1406(e).
99. SECNAVINST 5030.8D, General Guidance for the Classification of Naval Vessels and Battle Force Ship Counting Procedures (June 28, 2022).

maintained in the Naval Vessel Register (NVR). The battle force ship count will only include combat-capable ships and ships that contribute to warfighting missions, specified combat support missions, or service support missions.

Enclosure (1) applies to warship classification, which includes any commissioned ship built or armed for naval combat. These ships are counted in the battle force inventory.

Enclosure (2) applies to auxiliary ship classification, which includes any naval ship designed to operate in the open ocean in a variety of sea States to provide indirect support to combatant forces or services to shore-based establishments and infrastructure. These ships are not part of the battle force inventory.

Enclosure (3) applies to combatant craft classification, which are craft specifically designed to meet various combat-related mission roles, including amphibious warfare, insertion, patrol, overwatch and enemy denial-of-use, and mobility of riverine and littoral areas. These craft are not part of the battle force inventory (except patrol coastal ships).

Enclosure (4) applies to unmanned maritime platform classification. Unmanned maritime vessels and vehicles are platforms designed to operate remotely, independently, or integrated with manned platforms. These systems may possess varying degrees of autonomy, as specified by the platform and system level requirements. Unmanned surface vehicles (USVs) and unmanned undersea vehicles (UUVs) are categorized according to specifying characteristics. Certain unmanned maritime vehicles may, in the future, be part of the battle force inventory. Although unmanned platforms are currently not counted in the battle force, the testing of these platforms and their concepts of employment continue to evolve. When these platforms are deemed capable of contributing to combat operations, the Chief of Naval Operations will recommend their reclassification and inclusion in the battle force count for Secretary of the Navy (SECNAV) approval.

> Enclosure (5) applies to other types of crafts and boats. Support craft are non-commissioned vessels and watercraft designed to provide support for naval operations or shore-based establishments, are command-managed assets, and are not part of the battle force inventory. Service craft (including non-self-propelled) are utilitarian craft designed to operate in coastal and protected waters and provide general support to either combatant forces or shore-based establishments. Sealift support platforms include waterborne systems and craft designed to enable logistics over the shore in support of combatant forces. Navy boats are self-powered waterborne craft not otherwise specifically designed as combatant craft, service craft, or sealift support craft, which are suitable primarily to be carried aboard ships and to operate in and around naval activities or other safe havens. Service craft will be maintained in the NVR; Navy boats will not be maintained in the NVR.

2.2.1 Warship Defined

A warship is a ship belonging to the armed forces of a State:

1. Bearing the external markings distinguishing the character and nationality of such ship

2. Under the command of an officer duly commissioned by the government of that State and whose name appears in the appropriate service list of officers

3. Manned by a crew that is under regular armed forces discipline.

Warships need not be armed and maintain their status, even if civilians form part of the crew. There is no requirement the commanding officer or crew be physically on board the warship. Warships may be remotely commanded, crewed, and operated. In the U.S. Navy, ships designated USS are warships, as defined by international law. U.S. Coast Guard vessels designated USCGC under the command of a commissioned officer are warships under international law.

Commentary

The definition of a "warship" first appeared in Hague VII. A merchant ship converted into a warship must be placed under the direct authority, immediate control, and responsibility of the State whose flag it flies. Merchant ships converted into warships must bear the external marks that distinguish the warships of their nationality. The commander must be in the service of the State and duly commissioned by the competent authorities and his or her name must be on the list of the officers of the fighting fleet. Finally, the crew must be subject to military discipline.[100] The High Seas Convention defines a warship 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.[101]

Similarly, UNCLOS defines a warship as

> 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.[102]

There is no requirement in any of these instruments that a ship needs to be armed to be designated a warship.

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100. Hague VII, arts. 1–4.
101. High Seas Convention, art. 8(2). *See also* NEWPORT MANUAL, § 3.2.2.
102. UNCLOS, art. 29.

Similar definitions are found in the Oxford Manual,[103] NWIP 10-2,[104] the DoD Law of War Manual,[105] the German Manual, Japan's Rules of Naval War,[106] and the Newport Manual.[107]

The Coast Guard is considered a military service and a branch of the U.S. armed forces.[108] U.S. Coast Guard cutters are distinguished by display of the national ensign and the union jack. The Coast Guard ensign and the Coast Guard commission pennant are displayed whenever a Coast Guard vessel takes active measures in connection with boarding, examining, seizing, stopping, or heaving to a vessel for the purpose of enforcing U.S. laws.[109]

The service list for U.S. naval officers is the Register of Commissioned and Warrant Officers of the U.S. Navy and Marine Corps and Reserve Officers on Active Duty, NAVPERS 15018. The comparable list for the U.S. Coast Guard is CG Personnel Service Center Instruction M1427.1 (series) (PSCINST M1427.1), Register of Officers.

An unmanned maritime systems (UMS) may be autonomous, semi-autonomous, or remotely controlled on the surface or underwater and may operate independently as a ship or be launched from the surface, subsurface, air, or land. Unlike aircraft, international law does not provide a bright-line test for whether a UMS can be designated as a "ship" or "vessel" by the flag State. Regarding operation of a ship, UNCLOS requires that the flag State effectively exercises jurisdiction and control over its master, officers, and crew, but it does not require that these personnel be physically present on the ship.[110] Like unmanned aerial vehicles (UAVs), a UMS may be remotely operated by a crew and under the charge of a master or commanded by

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103. OXFORD MANUAL, art. 12.
104. NWIP 10-2, ¶ 500e.
105. DOD LAW OF WAR MANUAL, § 13.4.1.
106. Japan, Rules of Naval War, art. 1 (1914).
107. NEWPORT MANUAL, § 3.2.1.
108. 10 U.S.C. § 101(a)(4); 14 U.S.C. § 1.
109. U.S. Coast Guard Regulations, §§ 10-2-1, 14-8-2, 14-8-3 (1992); 14 U.S.C. § 638; 33 C.F.R. pt. 23 (2023).
110. UNCLOS, art. 94.

an officer who are shore-based, far-removed from the area of operation, or embarked on a warship or naval auxiliary in the vicinity of the UMS. The only requirement imposed by international law is that the flag State ensure that the master, officers, and crew who are remotely manning and operating a UMS are fully conversant with and observe the applicable international regulations.[111]

"Ship" and "vessel" are defined differently in several of the conventions adopted by the IMO.[112] The one thing they have in common is that human versus autonomous or remote control is not an essential characteristic of what constitutes a ship, vessel, or craft under domestic and international law.[113] Since 2017, the IMO has been discussing the issue of maritime autonomous surface ships (MASSs) and adopted interim guidelines for MASS trials.[114] In 2021, the IMO determined that, depending on the degree of autonomy, many of the existing IMO treaties and instruments apply to UMSs through "equivalences" or interpretation, while others would require amendment of the instruments or the development of a new instrument altogether.[115] The Maritime Safety Committee agreed on a roadmap for developing a goal-based code for MASS with a view to adopting a mandatory MASS Code and associated convention(s) giving effect to the new Code by 2025 (MSC 110).[116]

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111. Comité Maritime International, *CMI International Working Group Position Paper on Unmanned Ships and the International Regulatory Framework* 6 (2017) [hereinafter CMI Position Paper].

112. SOLAS, reg. V/2; MARPOL, art. 2; COLREGS, reg. 3; London Convention, art. 1; SUA Convention, art. 2.

113. CMI Position Paper, *supra* note 111.

114. IMO, *Report of the Maritime Safety Committee on Its One Hundredth Session* annex 2 ¶¶ 1, 3, 4 (Dec. 7, 2018); IMO, Maritime Autonomous Surface Ships: Proposal for a Regulatory Scoping Exercise, IMO Doc. 98/20/2 (Feb. 27, 2017); IMO, Interim Guidelines for MASS Trials, IMO Doc. MSC.1/Circ.1604 (June 14, 2019).

115. IMO, *Regulatory Scoping Exercise for the Use of Maritime Autonomous Surface Ships (MASS)*; *Report of the Working Group*, IMO Doc. MSC.99/WP.9 (May 23, 2018). *See also* IMO, *Report of the Maritime Safety Committee on its Ninety-Ninth Session*, IMO Doc. MSC/99/22 (June 5, 2018); IMO, Outcome of the Regulatory Scoping Exercise for the Use of Maritime Autonomous Surface Ships (MASS), IMO Doc. MSC.1/Circ.1638 (June 3, 2021).

116. IMO, *Report of the Maritime Safety Committee on Its 105th Session* annex 28, IMO Doc. MSC 105/20/Add.2 (May 24, 2022).

The definition of a "warship" must be reinterpreted considering current and emerging technologies. If a UMS can be a "ship," then it can also be designated a "warship" by the flag State if it belongs to the armed forces of the State, bears external markings regarding its nationality, and is manned by a crew subject to armed forces discipline and under the command of a commissioned officer who are not physically present on the platform. Every sovereign decides "to whom he will accord the right to fly his flag and to prescribe the rules governing such grants."[117] Thus, domestic, not international, law governs ship registration, and many States agree that a UMS can be designated a ship under their national laws.[118] In the United States, the Chief of Naval Operations has authority to register, classify, and designate naval water-borne craft as warships.[119] Warship classification applies to any ship built or armed for naval combat that the Service maintains on the NVR and the Chief of Naval Operations is responsible for entering vessels into the battle force ship inventory and the NVR.[120] Neither the U.S. Navy Regulations nor the Secretary of the Navy Instruction distinguish between manned and unmanned vessels. Consequently, there is nothing that prohibits the Chief of Naval Operations from designating a UMS a warship. Thus, a UMS may be designated as a "warship" by the flag State if it is under the command of a commissioned officer and manned by a crew under regular armed forces discipline, by remote or other means.

On May 22, 2019, the Department of the Navy established Surface Development Squadron ONE (SURFDEVRON ONE) to lead fleet integration of USVs and encourage innovation, experimentation, and combat readiness. The new command's primary function is to (1) "execute experimentation to support development of new and emerging surface warfighting capabilities"; (2) "develop material and technical solutions to tactical challenges"; and (3) "coordinate doctrine, organization, training, material, logistics, personnel and facili-

117. The Muscat Dhows Case (Fr. v. Gr. Brit.), Hague Ct. Rep. (Scott) 93, 96 (Perm. Ct. Arb. 1916); UNCLOS, art. 91.

118. IMO, *Report of the Maritime Safety Committee on Its Ninety-Ninth Session* annex 1, IMO Doc. MSC 99/20 (Feb. 13, 2018); 46 C.F.R. § 67.3 (2020); 46 C.F.R. § 67.5 (2020).

119. U.S. Navy Regulations, art. 0406 (1990); 10 U.S.C. § 6011 (2018).

120. SECNAVINST 5030.8D, *supra* note 99.

ties requirements for unmanned surface systems." The SURFDEVRON ONE headquarters is located onboard Naval Base San Diego but will operate throughout various areas of operation.[121]

The command's fleet-manned unmanned operations center (UOC) ashore is staffed with surface warfare-qualified officers who are trained in the 1972 International Regulations for Preventing Collisions at Sea (COLREGS) and ship-handling and senior enlisted personnel in relevant rates. The UOC will also supervise the development of code for the supervisory control system of the vessel to ensure precise and reliable command and control. In 2020 (USV *Ranger*) and 2021 (USV *Nomad*), the large USVs (LUSVs) conducted long-range autonomous transits from the Gulf of Mexico to California, via the Panama Canal, under the command and control of the UOC. Each LUSV was at sea for six weeks and navigated over 4,400 nautical miles, 98 percent of which was in autonomous mode. These transits tested the vessels' endurance, the hull mechanical and electrical systems reliability, and the ability to operate autonomously under the command and control of SURFDEVRON ONE.[122]

In August 2022, four USVs—*Sea Hunter*, *Seahawk*, *Nomad*, and *Ranger*—participated in the six-week multilateral Rim of the Pacific (RIMPAC) exercise. *Nomad* and *Ranger* deployed from Pearl Harbor under the command and control of the UOC in San Diego, while *Sea Hunter* and *Seahawk* were operated by crews embarked on manned

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121. Commander, Naval Surface Force, U.S. Pacific Fleet, *Navy Leadership Accelerates Lethality with Newly Designated Surface Development Squadron*, DEPARTMENT OF THE NAVY, NAVAL SURFACE FORCE, U.S. PACIFIC FLEET (May 23, 2019), https://www.surfpac.navy.mil/Media/News/Article/2473949/navy-leadership-accelerates-lethality-with-newly-designated-surface-development/.

122. Press Release, DoD, Ghost Fleet Overload Unmanned Surface Vessel Program Completes Second Autonomous Transit to the Pacific (June 7, 2021), https://www.defense.gov/News/Releases/Release/Article/2647818/ghost-fleet-overlord-unmanned-surface-vessel-program-completes-second-autonomou/. *See also* Megan Eckstein, *Pentagon "Ghost Fleet" Ship Makes Record-Breaking Trip from Mobile to California*, USNI NEWS, Nov. 10, 2020, https://news.usni.org/2020/11/10/pentagon-ghost-fleet-ship-makes-record-breaking-trip-from-mobile-to-california; Sam LaGrone, *Ghost Fleet Ship "Nomad" Transited Panama Canal, Headed to California*, USNI NEWS, May 20, 2021, https://news.usni.org/2021/05/20/ghost-fleet-ship-nomad-transited-panama-canal-headed-to-california.

destroyers participating in the exercise. Data from the USVs was integrated into the combat systems of nearby destroyers.[123]

2.2.1.1 Belligerent Acts at Sea

Warships, manned or unmanned, may be used by States to exercise belligerent rights at sea. Belligerent rights at sea are those rights to engage in hostilities, including:

1. The right to visit, search, and divert enemy and neutral vessels

2. The right to capture

3. The right to inspect specially protected enemy vessels (e.g., hospital ships)

4. The right to control neutral vessels and aircraft in the immediate vicinity of naval operations

5. The right to establish and enforce a blockade

6. The right to establish and enforce an exclusion zone

7. The right to demand the surrender of enemy military personnel

8. The right to undertake convoy operations.

States are obligated under customary international law of war to ensure belligerent rights at sea are exercised on their behalf by lawful combatants, and combatants use offensive force only as necessary, with distinction, proportionality, without causing unnecessary suffering, and within the bounds of military honor, particularly without resort to perfidy (see 5.3–5.4.1). To meet

123. Caitlin M. Kenney, *Robot Ships Debut at RIMPAC, Helping US Navy Sail Toward a Less-Crewed Future*, DEFENSE ONE, Aug. 3, 2022, https://www.defenseone.com/technology/2022/08/robot-ships-debut-rimpac-helping-us-navy-sail-toward-less-crewed-future/375305/; Justin Katz, *After RIMPAC Sailor Feedback Shows Evolving View of Unmanned Vessels: Officials*, BREAKING DEFENSE, Aug. 2, 2022, https://breakingdefense.com/2022/08/after-rimpac-sailor-feedback-shows-evolving-view-of-unmanned-vessels-officials/.

these obligations, the direction and execution of belligerent rights at sea from any platform, manned or unmanned and however classified, must be conducted by military commanders and military personnel.

Commentary

The Paris Declaration of 1856 was signed at the conclusion of the Crimean War and was widely acceded to by most States. The United States, however, did not accede to the Declaration. Nonetheless, at the beginning of the Civil War in 1861, the United States announced that it would respect the principles of the Declaration.[124] The United States reaffirmed its commitment to abide by the Declaration at the beginning of the Spanish-American War.[125] The Declaration abolished privateering, thus limiting the right to engage in hostile belligerent rights to warships.

The rule limiting the right to exercise belligerent rights to warships is reflected in numerous instruments.[126]

2.2.2 Warship International Status

Under customary international law, warships enjoy sovereign immunity from interference by authorities of States other than the flag State. Police and port authorities may board a warship only with permission of the commanding officer. A warship cannot be required to consent to an on board search or inspection nor may it be required to fly the flag of the host State. Although warships are required to comply with coastal State traffic control, sewage,

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124. Message of the President of the United States to the Two Houses of Congress, at the Commencement of the Second Session of the Thirty-Seventh Congress, Instructions and Dispatches: Mr. Seward to Mr. Clay, Sept. 3, 1861, *reprinted in* FOREIGN RELATIONS OF THE UNITED STATES 307 (1861).

125. Secretary of State (Sherman) to Diplomatic Representatives (Apr. 22, 1898), *reprinted in* 1 POLICY OF THE UNITED STATES TOWARDS MARITIME COMMERCE IN WAR 486 (Carlton Savage ed., 1934); War with Spain—Maritime Law, Presidential Proclamation (Apr. 26, 1898), *reprinted in* 63 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 772–73 (1901); Standards of Conduct and Respect of Neutral Rights in the War with Spain, Proclamation No. 413 (Apr. 26, 1898).

126. *See, e.g.*, Hague VII, arts. 1–4; OXFORD MANUAL, art. 12; NWIP 10-2, ¶ 500e; DOD LAW OF WAR MANUAL, § 13.3.3; GERMAN MANUAL; Japan, Rules of Naval War, art. 1 (1914); NEWPORT MANUAL, § 3.1.

health, and quarantine restrictions instituted in conformity with customary international law as reflected in UNCLOS, a failure of compliance is subject only to diplomatic complaint or to coastal State orders to leave its territorial sea immediately. Warships are immune from arrest and seizure, whether in national or international waters, and are exempt from foreign taxes and regulation and exercise exclusive control over all passengers and crew with regard to acts performed on board. U.S. Navy policy requires warships to assert the rights of sovereign immunity.

Commentary

In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.[127] If a 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, the coastal State may require it to leave the territorial sea immediately.[128] The flag State bears international responsibility for any loss or damage to the coastal State resulting from the noncompliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with other rules of international law.[129]

Commanding officers shall not permit a ship under their command to be searched on any pretense whatsoever by any person representing a foreign State, nor permit any of the personnel within the confines of their command to be removed from the ship, so long as they have the capacity to repel such act. If foreign authorities exert force to compel submission, commanding officers are to resist that force to the utmost of their power.[130]

See §§ 2.1 and 2.1.1 for a detailed discussion of the principle of sovereign immunity.

127. UNCLOS, art. 25(2).
128. *Id.* art. 30; Territorial Sea Convention, art. 23.
129. UNCLOS, art. 31.
130. U.S. Navy Regulations, art. 0828 (1990).

2.2.3 Crew Lists and Inspections

U.S. policy prohibits providing a list of crew members—military and non-military personnel—or any other passengers on board a USS or USCGC vessel as a condition of entry into a port or to satisfy local immigration officials upon arrival. For more information concerning U.S. policy in this regard, see CNO NAVADMIN 165/21 (041827Z AUG 21) and COMDT COGARD ALCOAST 370/21 (061626Z OCT 21). See USCG COMDTINST 3128.1H, Foreign Port Calls.

It is U.S. policy to refuse host-government requests to:

1. Conduct inspections of U.S. Navy and U.S. Coast Guard vessels

2. Conduct health inspections of crew members

3. Provide specific information on individual crew members (including providing access to a crew member's medical record or the completion of an individual health questionnaire)

4. Undertake other requested actions beyond the commanding officer's certification on NAVMED form 6210/3.

In response to questions concerning the presence of infectious diseases on visiting U.S. Navy ships, the U.S. diplomatic post may inform host governments that a commanding officer of a U.S. Navy ship is required under Navy regulations to report at once to local health authorities any condition aboard the ship which presents a hazard of introduction of a communicable disease outside the ship. The commanding officer, if requested, may certify, via the NAVMED 6210/3, that there are no indications that personnel entering the host State from the ship will present such hazard. Rules governing medical quarantine are provided in 3.2.3.

Commentary

Commanding officers and officers-in-charge shall not provide a list of crew members (military and/or nonmilitary) or passengers aboard a warship to foreign officials under any circumstances. In response to requests for a crew list, the host nation should be informed that

> the United States exempts foreign sovereign immune vessels visiting the United States from the requirement to provide crew lists in accordance with the same sovereign immunity principles claimed by U.S. sovereign immune vessels. When a host country maintains a demand for a list of crew members as a condition of entry into a port or to satisfy local immigration officials upon arrival, seek guidance from the GNCC (Navy) or higher authority via the chain of command (Coast Guard).[131]
>
> Navy sovereign immune vessels are generally immune from complying with visa or other entry requirements, which includes immunity from the requirement to provide a crew list. Although personnel become subject to the laws and regulations of a host country upon disembarkation (unless otherwise provided by an international agreement), the request for a list of personnel raises force protection concerns and is inconsistent with long-standing, worldwide naval port visit practices and protocols. Accordingly, commanding officers and officers-in-charge are not authorized to provide such lists, or variations of such lists, without approval from the GNCC, who shall look to use alternative means to avoid providing such information.[132] The initial response to a request from a host nation to provide a crew list is to inform local authorities that U.S. policy exempts foreign sovereign immune vessels visiting the United States from the requirement to provide crew lists in accordance with the same sovereign immune principles that U.S. sovereign immune vessels claim. If the host nation continues to press for more information, commanding officers shall consult with the responsible U.S. Embassy country team and notify their chain of command up to the GNCC. The GNCC may provide additional guidance to commanders/commanding officers as delegated by the Chief of Naval Operations.[133]
>
> Absent an international agreement, a U.S. Coast Guard commanding officer or officer-in-charge of a vessel may provide information about personnel going ashore for a temporary time and for unofficial

131. NAVADMIN 165/21, *supra* note 27, ¶ 5.c(1); COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.c(1).

132. NAVADMIN 165/21, *supra* note 27, ¶ 5.c(2).

133. NAVADMIN 288/05 (CNO WASHINGTON DC 101814Z NOV 05), Vessel Sovereign Immunity and Crew List Policy (Nov. 5, 2005).

purposes (e.g., liberty) to comply with a host country's immigration laws. However, if information is provided, it should include the minimum amount of information required to comply with the host nation's laws and it should include no more than names (without rank), place of birth, date of birth, and sex. A commanding officer should not provide foreign officials with other sensitive or personal information, such as social security numbers, rank, addresses, or other specific information. Such liberty lists are not the same as crew lists, even though they may contain the names of all crew members.[134]

See § 2.3.2 for guidance concerning providing crew lists and Military Sealift Command vessels.

See § 3.2.3 for guidance concerning medical quarantine.

2.2.4 Quarantine

See 3.2.3.

2.2.5 Nuclear-powered Warships

Nuclear-powered warships and conventionally powered warships enjoy identical international legal status.

Commentary

States may require foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances to carry documents and observe special precautionary measures established for such ships by international agreements when exercising the right of innocent passage through the territorial sea.[135]

In 1993, the IMO introduced the voluntary Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code) to complement existing International Atomic Energy Agency Regulations. The INF Code

134. COMDT COGARD ALCOAST 370/21, *supra* note 28, ¶ 5.c(2).
135. UNCLOS, art. 23.

contains guidance for the design of ships transporting radioactive material and addresses such issues as stability after damage, fire protection, and structural resistance. In January 2001, the INF Code was made mandatory and renamed the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Waste on Board Ships.[136] SOLAS is the umbrella convention for the INF Code. Therefore, the code does not apply to sovereign immune vessels.

2.3 OTHER NAVAL CRAFT

2.3.1 Auxiliary Vessels

Auxiliary vessels are vessels, other than warships, that are owned by or under the exclusive control of the armed forces. Because they are State owned or operated, and used for the time being only on government noncommercial service, auxiliary vessels enjoy sovereign immunity. This means, like warships, they are immune from arrest and search. Like warships, they are exempt from foreign taxes and regulation and exercise exclusive control over all passengers and crew with respect to acts performed on board.

Commentary

See §§ 2.1 and 2.1.1 for a discussion of sovereign immunity of auxiliary vessels.

Sovereign immunity of auxiliary vessels is codified in the Territorial Sea Convention,[137] the High Seas Convention,[138] and UNCLOS.[139]

Naval auxiliaries—such as ocean surveillance ships, troop transports, and replenishment ships—are under the command of a civilian master and not a duly commissioned officer. They are lawful targets and may be captured as booty of war or made the object of attack, even

136. IMO Res. MSC.88(71), Adoption of the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code), annex (May 27, 1999).

137. Territorial Sea Convention, art. 22.

138. High Seas Convention, art. 9.

139. UNCLOS, arts. 32, 96, 236.

if the vessel is unarmed and civilians make up part or all of the crew. Unlike warships, auxiliary vessels are prohibited from exercising belligerent rights. However, auxiliaries can undertake certain roles in direct support of military forces conducting hostilities that are not considered to be belligerent rights. For example, State practice indicates that an auxiliary can (1) disembark military forces and materiel in a port or to another installation as part of an ongoing operation (e.g., 2003 Iraq War); (2) disembark forces and materiel to shore in an amphibious operation; (3) refuel and re-arm helicopters and attack craft being directly employed in maritime attack operations, visit and search operations, and amphibious operations (e.g., Expeditionary Transfer Dock (ESD) and Expeditionary Sea Base (ESB) ships); and (4) serve as a base/support vessel for mine countermeasures (MCM) operations. Naval auxiliaries may also defend themselves, including resisting attacks by enemy forces.[140] Active resistance and other defensive measures taken by an auxiliary do not violate the law of armed conflict.[141]

The right of self-defense is discussed in more detail in § 4.4.1.

2.3.2 Military Sealift Command Vessel Status

The following Military Sealift Command (MSC) vessels are auxiliary vessels of the United States and are entitled to sovereign immunity:

1. USNS, to include U.S. government-owned vessels or those under bareboat charter to the government and assigned to MSC.

2. Privately-owned, U.S.-flagged vessels under charter to MSC, to include ships chartered for a period of time (time-chartered ships) and vessels chartered for a specific voyage or voyages (voyage-chartered ships).

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140. OXFORD MANUAL, art. 12; DOD LAW OF WAR MANUAL, § 13.3.3; GERMAN MANUAL, ¶ 1020.

141. JAPANESE LAW OF WAR MANUAL, 76; Italy, Rule of Naval Warfare, 1924, art. 14; J.A. HALL, THE LAW OF NAVAL WARFARE 24 (1914); Robert W. Tucker, *The Law of War and Neutrality at Sea*, 50 INTERNATIONAL LAW STUDIES 1, 56–57 (1955); LAUTERPACHT, 2 OPPENHEIM'S INTERNATIONAL LAW 466–67.

3. U.S. Maritime Administration's National Defense Reserve Fleet and its Ready Reserve Force when activated and assigned to MSC.

USNS vessels are either government-owned, government-operated (GOGO) or government-owned, contractor-operated (GOCO). USNS GOGO vessels are crewed by MSC civil service mariners. USNS GOCO vessels are crewed by private-sector contract mariners (CONMARs) hired by the operating company. U.S.-flagged, time-chartered vessels operated by MSC are contractor-owned, contractor-operated by CONMAR crews hired by the vessel's owner, but are used exclusively in government, noncommercial service and completely and at all times directed by and subject to the instructions (e.g., sailing orders) of MSC. Time-chartered vessels often have government contractor or DOD personnel (military and civilian) aboard to perform government functions, including force protection services. These vessels are exclusively operated by MSC to only carry U.S. Government, noncommercial cargo and for the performance of other noncommercial, U.S. Government missions. These MSC U.S.-flagged, time-chartered ships are entitled to sovereign immunity, and the United States asserts the full privileges of sovereign immunity regarding them—just like USNS vessels. A diplomatic clearance request is normally submitted to a foreign port State before these vessels enter a foreign port.

Although MSC U.S.-flagged, voyage-chartered vessels are entitled to the full privileges of sovereign immunity, the United States continues as a matter of policy to claim only limited immunity from arrest and taxation for such vessels. (The United States reserves the right to assert full sovereign immunity for MSC U.S.-flagged, voyage-charter vessels on a case-by-case basis.) These vessels may be boarded and searched by foreign authorities and may provide documents such as crew lists, but masters shall request these authorities to refrain from inspecting or searching U.S. military cargo on board and seek assistance from U.S. authorities, if needed.

As a matter of policy, the United States does not assert sovereign immunity for MSC foreign-flagged voyage or MSC foreign-flagged, time-chartered vessels. These vessels are subject to foreign-flag State jurisdiction and will provide the same information to foreign authorities that commercial ships provide.

Commentary

MSC operates approximately 125 civilian-crewed ships that replenish U.S. Navy ships, conduct specialized missions, strategically preposition combat cargo at sea around the world, and move military cargo and supplies used by deployed U.S. forces and coalition partners. Expeditionary Fast Transport vessels (T-EPF) provide rapid transport of military equipment and personnel in theater. Hospital Ships (T-AH) provide afloat, mobile, acute surgical medical facilities in support of the U.S. military, as well as hospital services to support U.S. disaster relief and humanitarian operations worldwide. Dry Cargo/Ammunition ships (T-AKE) are multi-product ships that deliver ammunition, food, mail, dry provisions, limited quantities of fuel, repair parts, and expendable supplies to ships at sea. Underway Replenishment Oilers (T-AO) provide underway replenishment of fuel to U.S. Navy combat ships and jet fuel for aircraft aboard carriers at sea. Cable Laying/Repair (T-ARC) ships transport, deploy, retrieve, and repair undersea cables. Rescue/Salvage Ships (T-ARS) assist in rescue and salvage missions. Submarine Tenders (T-AS) provide repair services to submarines and are commanded by a commissioned naval officer and manned by a combined civil service mariner (CIVMAR)/uniformed navy crew. Fleet Ocean Tugs (T-ATF) provide towing services and operate as platforms for U.S. Navy divers in the recovery of downed aircraft and ships. Command Ship (LCC) is the U.S. Sixth Fleet flagship. It has advanced C4I suites and is commanded by a commissioned naval officer and manned by a combined CIVMAR/uniformed navy crew. Expeditionary Mobile Base (T-ESB) is an AFSB-variant of the mobile landing platform that provides dedicated support for mine countermeasures and special warfare missions. Fast Combat Support vessels (T-AOE) are MSC's largest combat logistics ships that deliver petroleum products, ammunition, food, and other cargo to other ships at sea.[142]

See § 2.1.1 for a discussion of sovereign immunity for MSC vessels.

142. *Ships of MSC*, U.S. DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, https://sealiftcommand.com/about-msc/ships-msc.

At the master's discretion on non-warships, a shore party list may be provided to the host nation before a port visit for those individuals onboard who intend to go ashore for liberty. This shore party list may contain only the names and passport numbers of those personnel. Other information—such as health record, job description, or employer—shall not be provided. Masters shall comply with applicable U.S. host nation agreements, such as Status of Forces Agreements, that specify particular procedures for port visits to that country.[143]

2.3.3 Small Craft Status

All U.S. Navy and U.S. Coast Guard watercraft, including motor whale boats, air-cushioned landing craft, and all other small boats, craft, and vehicles deployed from larger vessels or from land, are sovereign immune U.S. property. The status of these watercraft is not dependent upon the status of the launching platform. The United States may exercise any internationally lawful use of the seas—including navigational rights and freedoms—with such watercraft.

Commentary

Small craft, such as Riverine Command Boats (RCBs), are entitled to full sovereign immunity. Sovereign immunity protects the transit of the RCBs and any materiel or personnel onboard from seizure or search, as well as protecting the identity of any crew or cargo, whether in national or international waters.

On January 12, 2016, two U.S. Navy RCBs left Kuwait on a 259-nautical mile transit to Bahrain. From the moment they left port, the two boats deviated from the Plan of Intended Movement, which was to remain outside any territorial seas. The crews' unplanned and unauthorized deviation caused them to transit unknowingly through Saudi Arabian territorial seas and then through Iranian territorial seas off the coast of Farsi Island. When the RCBs were about 1.5 nautical miles from Farsi Island, one of the two boats suffered an engine casualty. The boat went dead in the water to conduct engine repairs,

143. NAVADMIN 165/21, *supra* note 27, ¶ 7.a(3).

while the second RCB stopped and waited. Shortly thereafter, Iranian Revolutionary Guard Corps Navy (IRGCN) patrol craft approached the RCBs in a threatening posture (with weapons uncovered). As the crews briefly attempted to evade and then communicate with the Iranians, two more IRGCN vessels arrived. The RCBs, being overmatched, were then forced to reposition to Farsi Island, where the crews were held overnight and interrogated. The crews were released the next morning.

While it was reasonable for Iran to investigate the unusual appearance of armed U.S. Naval vessels within its territorial waters, the IRGCN's boarding and seizure of the RCBs, followed by the interrogation and video recording of the crew, clearly violated established norms of sovereign immunity. Sovereign immunity also protects personnel onboard a State vessel from search and seizure by foreign authorities to include preserving the sanctity of their identities. Iran therefore further violated sovereign immunity by its detention, search, and video recording of the crew. The violation of sovereign immunity was compounded by the forcible detention of the U.S. crews and by taking down the American flag and replacing it with an Iranian flag, ransacking the vessels, damaging equipment, searching the vessels and crew members, and interrogating the crew members. Additionally, although the protections of Article 13 of Geneva Convention (GC) III from "insults and public curiosity" did not apply, since the U.S. is not in an international armed conflict with Iran and the crew members were not prisoners of war (POWs), the filming of the crew while in Iranian custody further violated sovereign immunity by revealing the identities of the crew.[144]

2.3.4 Unmanned Systems

Unmanned systems (UMSs) are either autonomous or remotely navigated on the surface or underwater. They may operate independently as a ship or be launched from the surface, subsurface, air, or land. Unmanned maritime systems may be used to exercise any internationally lawful use of the seas. Such uses include:

144. U.S. Department of the Navy, Report of the Investigation to Inquire into Incident in the Vicinity of Farsi Island Involving Two Riverine Command Boats (RCB 802 and RCB 805) on or About 12 January 2016, at 3–4, 18–20 (Feb. 28, 2016).

1. Intelligence, surveillance, and reconnaissance

2. Mine countermeasures (MCM)

3. Antisubmarine warfare

4. Surface warfare

5. Inspection/identification

6. Oceanography

7. Communication/navigation network nodes

8. Payload delivery

9. Information operations (IO)

10. Time-critical strike

11. Barrier patrol and operations (e.g., homeland defense, antiterrorism/force protection (AT/FP))

12. Seabase support

13. Electronic warfare (EW)

14. Laying undersea sensor grids, sustainment of at sea operating areas, bottom mapping and survey

15. Special operations.

Commentary

U.S. policy on unmanned systems is addressed in a range of documents.[145]

145. *See* U.S. DEPARTMENT OF THE NAVY, THE NAVY UNMANNED SURFACE VEHICLE (USV) MASTER PLAN (July 23, 2007); U.S. DEPARTMENT OF THE NAVY, THE NAVY UNMANNED UNDERSEA VEHICLE (UUV) MASTER PLAN (Nov. 9, 2004); U.S. DEPARTMENT

2.3.5 Unmanned System Status

In all cases, U.S. Navy UMSs are the sovereign property of the United States and immune from foreign jurisdiction. When flagged as a ship, a UMS may exercise the navigational rights and freedoms and other internationally lawful uses of the seas related to those freedoms. Unmanned systems may be designated as USS if they are under the command of a commissioned officer and manned by a crew under regular armed forces discipline, by remote or other means.

Commentary

See §§ 2.1 and 2.1.1 for a discussion of sovereign immunity of U.S. property and vessels.

See § 2.2.1 for a discussion of designating UMSs as warships.

2.4 MILITARY AIRCRAFT

2.4.1 Military Aircraft Defined

Military aircraft means:

1. Any aircraft operated by the armed forces of a State
2. Bearing the military markings of that State
3. Commanded by a member of the armed forces

OF THE NAVY, UNMANNED CAMPAIGN FRAMEWORK 10 (Mar. 16, 2021); U.S. NAVY, CHIEF OF NAVAL OPERATIONS, NAVIGATION PLAN 2022, 10 (July 26, 2022); U.S. DEPARTMENT OF THE NAVY, STRATEGIC ROADMAP FOR UNMANNED SYSTEMS (SHORT VERSION) (2021); U.S. DEPARTMENT OF DEFENSE, PUB. NO. 14-S-0553, UNMANNED SYSTEMS INTEGRATED ROADMAP: FY2013–2038, 20 (2014); U.S. DEPARTMENT OF DEFENSE, UNMANNED SYSTEMS ROADMAP (2007–2038) 19 (Dec. 10, 2007); CONGRESSIONAL RESEARCH SERVICE, PUB. NO. R45757, NAVY LARGE UNMANNED SURFACE AND UNDERSEA VEHICLES: BACKGROUND AND ISSUES FOR CONGRESS 2 (July 26, 2022); CONGRESSIONAL RESEARCH SERVICE, PUB. NO. R45757, NAVY LARGE UNMANNED SURFACE AND UNDERSEA VEHICLES: BACKGROUND AND ISSUES FOR CONGRESS 2–3 (Mar. 31, 2022). *See also* NEWPORT MANUAL, § 3.3.

4. Controlled, manned, or preprogrammed by a crew subject to regular armed forces discipline.

Commentary

The term "aircraft" is defined in Annex 1 of the Chicago Convention as "[a]ny machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface."[146] The Chicago Convention also refers to pilotless aircraft.[147] Unmanned aircraft are further defined as an "aircraft and its associated elements which are operated with no pilot on board."[148] Although the Chicago Convention does not contain a "manning" or "pilot-in-command" requirement for State aircraft, its predecessor treaty, the Paris Convention of 1919, did contain such a requirement. The Paris Convention provided that "[e]very aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft."[149] U.S. domestic law defines "aircraft" as "any contrivance invented, used, or designed to navigate, or fly in, the air."[150]

State aircraft include "aircraft used in military, customs, and police services."[151] State aircraft possess the nationality of the State that operates them. Civil aircraft possess the nationality of the State in which they are registered.[152] The United States defines "military aircraft" to include both manned and unmanned aircraft.[153] DoD military aircraft include any "U.S. military aircraft and DoD-contracted aircraft that have been designated by responsible U.S. authorities as U.S. state aircraft."[154] Military aircraft are operated by the armed forces of a State, bear the military markings of that State, and are commanded

146. Chicago Convention, annex 1 at § 1.1.
147. *Id.* art. 8.
148. ICAO Cir. 328 (AN/190), Unmanned Aircraft Systems (UAS) (2011).
149. Paris Convention of 1919, art. 31.
150. 49 U.S.C. § 40102(a)(6); 14 C.F.R. § 1.1 (2023).
151. Chicago Convention, art. 3(b).
152. DOD LAW OF WAR MANUAL, § 14.3.2.
153. DoDI 4540.01, Use of International Airspace by U.S. Military Aircraft and for Missile and Projectile Firings 11 (Ch. 1, May 22, 2017); DOD LAW OF WAR MANUAL, § 14.3.3.
154. DoDD 4500.54E, DoD Foreign Clearance Program, 12 (May 31, 2022).

by a member of the armed forces of the State.[155] To help distinguish friend from foe and preclude misidentification of neutral and civil aircraft, military aircraft are normally marked to signify both their nationality and their military character. A single marking may be used to signify both an aircraft's nationality and its military character.[156] Military aircraft are commanded by members of the armed forces of that State. The crew may include civilian members.[157]

2.4.2 Military Aircraft International Status

Military aircraft are State aircraft within the meaning of the 1944 Convention on International Civil Aviation (Chicago Convention) and, like warships, enjoy sovereign immunity from foreign search and inspection. Subject to the right of transit passage, archipelagic sea lanes passage, and entry in distress, State aircraft may not enter national airspace or land in the sovereign territory of another State without its authorization. Foreign officials may not board the aircraft without the consent of the aircraft commander. Should the aircraft commander fail to certify compliance with local customs, immigration, or quarantine requirements, the aircraft may be directed to leave the territory and national airspace of that State immediately.

Commentary

It is U.S. government policy to assert full sovereign immunity for all manned and unmanned U.S. Navy aircraft and other State aircraft. The general privileges and obligations discussed in § 2.1 apply equally to military and State aircraft.[158]

Aircraft commanders shall not permit an aircraft under their command to be searched or inspected on any pretense whatsoever by foreign authorities or organizations, nor permit any of the personnel within the confines of their aircraft to be removed by foreign authorities. Aircraft commanders shall not provide aircraft documents or

155. DOD LAW OF WAR MANUAL, § 14.3.3.
156. *Id.* § 14.3.3.2.
157. *Id.* § 14.3.3.3.
158. NAVADMIN 165/21, *supra* note 27, ¶ 6.

other aircraft-specific information, including passenger lists, to foreign authorities or organizations without the approval of the applicable GNCC via the chain of command.[159]

Unless there is an international agreement to the contrary, aircraft commanders shall refuse to pay navigation fees, overflight fees, and other similar fees or taxes for transit through the national airspace of a foreign State or Flight Information Regions (FIRs) in international airspace. Additionally, aircraft commanders shall refuse to pay any revenue-generating tax or fee imposed on a State aircraft by a foreign sovereign, including landing fees, parking fees, and other similar use fees or taxes at foreign State-operated airports. Aircraft commanders may pay reasonable charges for goods and services requested and received, less taxes and similar charges. If requested to pay impermissible fees or taxes, aircraft commanders should request an itemized list of all charges, pay reasonable charges for goods and services requested and received, and explain that under customary international law, sovereign immune aircraft are exempt from foreign fees and taxes. If local authorities insist on the payment of an impermissible tax or fee, aircraft commanders should seek assistance from the respective GNCC and U.S. Embassy via the chain of command. Whether the U.S. Navy will directly or indirectly pay such an impermissible tax or fee is a matter of overarching U.S. government policy. This decision may be based on other concerns, such as operational needs, contracting principles, and potential fiscal liability. If a GNCC determines that risk to mission clearly necessitates the visit, the fees may be paid and a refund should be sought from the foreign sovereign.[160] In some cases, Military Basing Agreements may require the United States to reimburse a host nation for costs associated with joint-use air bases located in the host nation.[161]

Aircraft commanders shall not provide a list of crew members (military and/or nonmilitary) or passengers aboard a State aircraft to foreign parties as a condition of landing at a foreign airport or to satisfy local immigration officials upon arrival when there is no intention for crew members or passengers to enter the country, such as for

159. *Id.* ¶ 6.a.
160. *Id.* ¶ 6.b(1)–(3).
161. *Id.* ¶ 6.c.

refueling and cargo transfer stops. Sovereign immune aircraft are generally immune from complying with visa or other entry requirements. Although personnel, absent a superseding international agreement, become subject to the laws and regulations of a host country upon disembarkation for the purposes of entry into the country, the request for a list of personnel raises force protection concerns and is inconsistent with long-standing, worldwide Naval landing practices and protocols. The privilege of sovereign immunity does not extend to individuals once they disembark a sovereign immune aircraft for the purposes of entry into the host country. If leaving the airfield and/or remaining overnight, crew and passengers will comply with host nation immigration regulations in accordance with any Status of Forces Agreement and the Foreign Clearance Guide to include requirements for official passports and entry visas.[162]

Aircraft commanders shall comply with all domestic or foreign State quarantine regulations for the area within which the aircraft is located that do not contravene U.S. sovereign immunity policy. Aircraft commanders, or their representatives, may certify to foreign authorities compliance with foreign State quarantine regulations (i.e., provide a general description of measures taken to comply). However, aircraft commanders shall not permit an aircraft under their command to be searched on any pretense whatsoever by foreign authorities. In response to a request by foreign authorities for health information required by foreign State quarantine regulations, aircraft commanders shall provide all information required by authorized foreign officials, consistent with force protection concerns. If requested, aircraft commanders may provide additional information to the host nation regarding precautionary measures taken onboard due to an ongoing pandemic, without providing any specific individual medical data. Aircraft commanders shall not grant foreign authorities access to individual health records.[163]

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162. *Id.* ¶ 6.d(1)–(3).
163. NAVADMIN 165/21, *supra* note 27, ¶ 6.e(1)–(2).

2.4.3 State Aircraft

State aircraft include military, customs, police, and other aircraft operated by a government exclusively for noncommercial purposes. State aircraft enjoy sovereign immunity. Civilian owned and operated aircraft—the full capacity of which has been contracted by DOD and used in military service of the United States—qualify as State aircraft. As a matter of policy, the United States does not normally designate Air Mobility Command charter aircraft as State aircraft.

Commentary

State aircraft include "aircraft used in military, customs, and police services."[164] The Chicago Convention generally does not apply to State aircraft,[165] except that State aircraft may not fly over the territory of another State or land thereon with authorization or as otherwise permitted by special agreement[166] and must fly with "due regard" for the safety of civil aviation.[167] DoD commercial contract aircraft and other U.S. government contract aircraft are not State aircraft unless the particular aircraft is specifically designated as such by the U.S. government. The normal U.S. practice is not to designate contract aircraft as State aircraft.[168]

2.4.4 Unmanned Aircraft Definition and Status

Unmanned aircraft (UA) are aircraft that do not carry a human operator and are capable of flight with or without human remote control. They may be launched from the water's surface, subsurface, air, or land. All UA operated by the DOD are considered military aircraft and retain the overflight rights under customary international law, as reflected in UNCLOS. Since DOD-operated UA are considered military aircraft, all domestic and international law pertaining to military aircraft is applicable. This includes all conventions, treaties, and agreements relating to military aircraft and auxiliary aircraft, as

164. Chicago Convention, art. 3(b).
165. *Id.* art. 3(a).
166. *Id.* art. 3(c).
167. *Id.* art. 3(d).
168. Secretary of State Cable 22631, USG Policy Regarding Status of DOD Commercial Contract Aircraft (Mar. 10, 2010).

well as certain provisions recognizing the special status of military aircraft contained in conventions or treaties pertaining to civil aircraft and civilian airliners. Unmanned aircraft enjoy all of the navigational rights of manned aircraft.

Commentary

See § 2.4.1 for the definition of military aircraft.

2.5 NAVIGATION IN AND OVERFLIGHT OF NATIONAL WATERS

2.5.1 Internal Waters

Coastal States enjoy the same jurisdiction and control over their internal waters and superjacent airspace as they do over their land territory. Because most ports and harbors are located landward of the baseline of the territorial sea, entering a port involves navigation in internal waters and is subject to coastal State conditions of port entry, which can include mandatory pilotage requirements. Because entering internal waters is legally equivalent to entering the land territory of another nation, that State's permission is required. To facilitate international maritime commerce, many States grant foreign merchant vessels standing permission to enter internal waters in the absence of notice to the contrary. Warships and auxiliaries and all aircraft, on the other hand, generally require specific and advance entry permission, unless other bilateral or multilateral arrangements have been concluded or the foreign State's laws permit entry. An exception to the rule of nonentry into internal waters without coastal nation permission, whether specific or implied, arises when rendered necessary by *force majeure* or distress in order to preserve human life. Vessels may exercise innocent passage where straight baselines have the effect of enclosing—as internal waters—areas of the sea previously regarded as territorial seas or high seas.

Commentary

Internal waters are defined as all waters landward of the baseline along the coast.[169] Lakes, rivers, some bays, roadsteads, harbors, canals, and lagoons are examples of internal waters, which lie landward of the baseline. Unless otherwise provided by an international agreement or special arrangement, entering a foreign port requires the consent of the port State. There is no right of innocent passage by foreign vessels in internal waters except in situations where the coastal State has established straight baselines that have the effect of enclosing as internal waters areas that had not previously been considered as such.[170] In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.[171]

Therefore, transit rights do not exist in internal waters except as authorized by the coastal State or as rendered necessary by *force majeure* or distress. In recent decades, however, coastal States have narrowed the rule on *force majeure* to prevent damaged vessels from entering their ports and harbors because they might cause environmental damage or pollution. Thus, the extent of the classic right of *force majeure* is not well settled.[172] IMO guidelines recognize that there is "no obligation" for the coastal State to grant permission to a foreign ship to access a place of refuge in cases of *force majeure* or distress. The coastal State need only weigh all the factors and risks in a balanced manner and "give shelter whenever reasonably possible."[173] Under U.S. law, the U.S. Coast Guard Captain of the Port or District Commander may deny entry into a U.S. port to any vessel not in

169. UNCLOS, art. 8(1); Territorial Sea Convention, art. 5(1).

170. UNCLOS, art. 8(2); Territorial Sea Convention, art. 5(2).

171. UNCLOS, art. 25(2).

172. JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 217 (2013).

173. IMO, Guidelines on Places of Refuge for Ships in Need of Assistance, ¶ 3.12, IMO Doc. A.949(23) (Dec. 5, 2003).

compliance with the provisions of the Port and Tanker Safety Act or regulations issued thereunder.[174]

2.5.2 Territorial Seas

2.5.2.1 Innocent Passage

Ships (not aircraft) of all States enjoy the right of innocent passage for the purpose of continuous and expeditious traversing of the territorial sea or for proceeding to or from internal waters. Innocent passage includes stopping and anchoring—but only insofar as incidental to ordinary navigation or as rendered necessary by *force majeure* or by distress—or for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress. There is no requirement that the passage be the most expeditious means to arrive at the ship's destination or the route minimize the amount of time in the coastal State's territorial waters, so long as it is continuous, expeditious, and innocent. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State. The following is an exhaustive list of activities considered to be prejudicial to the peace, good order, or security of the coastal States, and therefore inconsistent with innocent passage:

1. Any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal nation, or in any other manner in violation of the principles of international law embodied in the Charter of the UN

2. Any exercise or practice with weapons of any kind

3. Any act aimed at collecting information to the prejudice of the defense or security of the coastal nation

4. Any act of propaganda aimed at affecting the defense or security of the coastal nation

5. The launching, landing, or taking on board of any aircraft

6. The launching, landing, or taking on board of any military device

174. 33 C.F.R. § 160.107 (2023).

7. The loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration or sanitary laws, and regulations of the coastal nation

8. Any act of willful and serious pollution contrary to UNCLOS

9. Any fishing activities

10. The carrying out of research or survey activities

11. Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal nation

12. Any other activity not having a direct bearing on passage.

Commentary

All ships—including warships, regardless of destination, flag, cargo, armaments, or means of propulsion—enjoy the right of innocent passage through the territorial sea.[175] Submarines and other underwater vehicles also enjoy a right of innocent passage but must navigate on the surface and show their flag.[176] Passage must be continuous and expeditious but includes stopping and anchoring if incidental to ordinary navigation or rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress.[177]

Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal State.[178] An inclusive list of activities considered to be non-innocent is contained in Article 19(2)(a)–(k) of UNCLOS.[179]

175. UNCLOS, art. 17; Territorial Sea Convention, art. 14(1).
176. UNCLOS, art. 20; Territorial Sea Convention, art. 14(6).
177. UNCLOS, art. 18(1)(b); Territorial Sea Convention, art. 14(3).
178. UNCLOS, art. 19(1); Territorial Sea Convention, art. 14(4).
179. *See also* Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.S.R.-U.S., Sept. 23, 1989, *reprinted in* 28 INTERNATIONAL LEGAL MATERIALS 1444 (1989) [hereinafter Jackson Hole Agreement].

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements (e.g., the INF Code).[180]

The INF Code contains guidance for the design of ships transporting radioactive material and addresses such issues as stability after damage, fire protection, and structural resistance.[181]

In 2021, China revised its Maritime Traffic Safety Law (MTSL). The new law requires, inter alia, nuclear-powered vessels, vessels carrying radioactive substances, ultra-large oil tankers, bulk liquefied gas carriers, and bulk dangerous chemicals carriers that may endanger the safety of the port that intend to navigate, anchor, or change berths in the pilotage areas designated by the competent transport department to submit to compulsory pilotage.[182] Additionally, the MTSL requires submersibles, nuclear-powered vessels, vessels carrying radioactive substances or other poisonous and harmful substances, and other vessels that may endanger the maritime traffic safety of the People's Republic of China to provide prior notification to the maritime traffic authority when they enter and leave China's territorial sea.[183]

The MTSL is inconsistent with the right of innocent passage reflected in UNCLOS and the Territorial Sea Convention. The coastal State may adopt laws and regulations relating to innocent passage regarding, inter alia, the safety of navigation, the regulation of maritime traffic, the preservation of the marine environment, and the reduction and control of pollution.[184] However, coastal State laws and regulations may not impose requirements on foreign ships that have the practical effect of denying, impairing, or hampering the right of

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180. UNCLOS, art. 23.

181. IMO Res. MSC.88(71), *supra* note 136, annex.

182. Maritime Traffic Safety Law of the People's Republic of China, art. 30 (promulgated by Standing Committee of the National People's Congress, Apr. 29, 2021, effective Sept. 1, 2021).

183. *Id.* art. 54.

184. UNCLOS, art. 22.

> innocent passage.[185] Prohibiting transits based on the type of propulsion system or cargo on board, or imposing mandatory pilotage requirements, is inconsistent with international law. China may require nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials to use designated sea lanes and traffic separation schemes, as well as carry documents and observe special precautionary measures established for such ships by international agreements, but it may not impose compulsory pilotage or prohibit transits by such ships or require that they provide prior notification before entering the territorial sea.[186] Prior notification was discussed during the UNCLOS negotiations. Efforts by a handful of States to include a prior notification or prior consent requirement in Article 21 failed to achieve a majority vote, so the proponents agreed not to pursue the matter as it was clear that there was insufficient support to adopt the proposal.[187]

Foreign ships, including warships, exercising the right of innocent passage are required to comply with the laws and regulations enacted by the coastal State in conformity with established principles of international law and with such laws and regulations relating to the safety of navigation. Innocent passage does not include a right of overflight. A vessel does not enjoy the right of innocent passage if, in the case of a submarine, it navigates submerged, or, 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 nation.

UNCLOS does not prohibit passage that is noninnocent, such as overflight of or submerged transit in the territorial sea. However, a coastal State has a right to take the necessary steps in and over its territorial sea to prevent passage that is not innocent, including, where necessary, the use of force. If a foreign ship or aircraft enters the territorial sea or airspace above it and engages in noninnocent activities, the appropriate remedy, consistent with customary international law and includes the right of self-defense, is first to inform the ship or aircraft of the reasons the coastal nation questions the in-

185. *Id.* art. 24.

186. *Id.* arts. 22–23.

187. 2 VIRGINIA COMMENTARY at 195–99. *See also* Raul Pedrozo, *China's Revised Maritime Traffic Safety Law*, 97 INTERNATIONAL LAW STUDIES 956 (2021).

nocence of the passage. They are to provide the vessel a reasonable opportunity to clarify its intentions or to correct its conduct in a reasonably short period of time.

Commentary

There is no right of overflight through national airspace without coastal State consent.[188]

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 defence or security of the coastal State."[189] Similarly, the submerged transit of the territorial sea by a submarine or UUV would be inconsistent with the regime of innocent passage. The coastal State would therefore be authorized to take necessary steps to prevent passage of ships engaged in activities proscribed by Article 19 or Article 20 of UNCLOS.[190] Nevertheless, because warships and other government non-commercial vessels enjoy complete immunity from foreign jurisdiction,[191] the coastal State may only order the noncompliant ship or submarine to leave the territorial sea immediately.[192]

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."[193] They do not, however, "prohibit or otherwise affect activities or conduct that is inconsistent with that right and therefore not entitled to that right."[194] 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

188. UNCLOS, art. 2(2); Territorial Sea Convention, art. 2; Chicago Convention, arts. 1–2.
189. UNCLOS, art. 19(2)(c).
190. *Id.* art. 25(1); Territorial Sea Convention, art. 16(1).
191. UNCLOS, art. 32.
192. *Id.* art. 30; Territorial Sea Convention, art. 23.
193. CONVENTION ON THE LAW OF THE SEA, S. EXEC. REP. 110-9, at 12 (2007).
194. *Id.*

do so is not characterized as inherently not 'innocent.'"[195] For example, Charles Allen, former Assistant Director of Central Intelligence for Collection, has suggested that while submarines engaged in subsurface transit 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."[196] William H. Taft IV, former Legal Adviser to the Department of State, concurred that UNCLOS does not prohibit or regulate intelligence activities in the territorial sea:

> With respect to whether articles 19 and 20 of the Convention would have any impact on U.S. intelligence collection, 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.[197]

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 the Contiguous Zone and the 1982 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":[198]

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195. *Id.*

196. 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 S. EXEC. REP. 110-9, *supra* note 193, at 32–33.

197. Statement of William H. Taft, Legal Adviser, U.S. Department of State, Before the Senate Select Committee on Intelligence (June 8, 2004), *reprinted in* S. EXEC. REP. 110-9, *supra* note 193, at 34, 36.

198. S. EXEC. REP. 110-9, *supra* note 193, at 12.

> (Article 20 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.[199]

> While intelligence collection and submerged transits are inconsistent with the right of innocent passage and with the principle of coastal State sovereignty, they are not a violation of a rule of sovereignty in general international law and therefore do not constitute an internationally wrongful act that gives rise to the use of countermeasures.[200]

2.5.2.2 Permitted Restrictions

For purposes such as resource conservation, environmental protection, and navigational safety, a coastal State may establish certain restrictions upon the right of innocent passage of foreign vessels. Such restrictions upon the right

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199. *Id. See also* James Kraska, *Putting Your Head in the Tiger's Mouth: Submarine Espionage in the Territorial Sea*, 54 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 164 (2016); Robert J. Grammig, *The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea*, 22 HARVARD INTERNATIONAL LAW JOURNAL 331 (1981); F. David Froman, *Uncharted: Non-Innocent Passage in the Territorial Sea*, 21 SAN DIEGO LAW REVIEW 625 (1984).

200. *See* Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, ¶ 20, U.N. Doc. A/68/98 (June 24, 2013); Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, ¶ 27, U.N. Doc. A/70/174 (July 22, 2015); Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly Resolution 73/266, at 139/142, U.N. Doc. A/76/136 (July 13, 2021).

of innocent passage through the territorial sea are not prohibited by international law, provided they are reasonable and necessary; do not have the practical effect of denying or impairing the right of innocent passage; and do not discriminate in form or in fact against the ships of any State or those carrying cargoes to, from, or on behalf of any State. These restrictions cannot prohibit transit or otherwise impair the rights of innocent and transit passage of nuclear-powered vessels. The coastal State may, where navigational safety dictates, require foreign ships—except sovereign-immune vessels—exercising the right of innocent passage to utilize designated sea lanes and traffic separation schemes. Sovereign-immune vessels are not legally required to comply with such sea lanes and traffic separation schemes but may do so voluntarily where practicable and compatible with the military mission and navigational safety dictates.

All ships engaged in innocent passage, including sovereign immune vessels, shall comply with applicable provisions of the 1972 International Regulations for Preventing Collisions at Sea (1972 COLREGS).

Commentary

The coastal State may adopt laws and regulations relating to innocent passage through the territorial sea with respect to (a) the safety of navigation and the regulation of maritime traffic; (b) the protection of navigational aids and facilities and other facilities or installations; (c) the protection of cables and pipelines; (d) the conservation of the living resources of the sea; (e) the prevention of infringement of the fisheries laws and regulations of the coastal State; (f) the preservation of the environment of the coastal State and the prevention, reduction, and control of pollution thereof; (g) marine scientific research and hydrographic surveys; and (h) the prevention of infringement of the customs, fiscal, immigration, or sanitary laws and regulations of the coastal State.[201] These laws may not, however, apply to the design, construction, manning, or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards adopted by the IMO.[202]

201. UNCLOS, art. 21(1).
202. *Id.* art. 21(2).

The coastal State may also, where necessary, having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes (TSSs) as it may designate or prescribe for the regulation of the passage of ships. In particular, tankers, nuclear-powered ships, and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes.[203] When designating sea lanes and prescribing TSSs, the coastal State shall take into account (a) the recommendations of the IMO; (b) any channels customarily used for international navigation; (c) the special characteristics of particular ships and channels; and (d) the density of traffic.[204]

Except as provided in UNCLOS (e.g., suspension of innocent passage: see § 2.5.2.3 below), a coastal State may not hamper the innocent passage of foreign ships through the territorial sea. Coastal State laws and regulations may not (a) impose requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage; or (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from, or on behalf of any State.[205]

Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea (i.e., COLREGS).[206] Coastal State ships' routing systems—including TSSs, ship reporting systems, and vessel traffic services—are adopted and implemented in accordance with Regulations 10, 11, and 12, respectively, of Chapter V of SOLAS. Sovereign immune vessels are exempt from compliance with Chapter V and are not required to comply with these coastal State measures.[207]

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203. *Id.* art. 22(1)–(2).
204. *Id.* art. 22(3).
205. *Id.* art. 24; Territorial Sea Convention, art. 15.
206. UNCLOS, art. 21(4); Territorial Sea Convention, art. 17.
207. SOLAS, reg. V/1.

2.5.2.3 Temporary Suspension of Innocent Passage

A coastal nation may temporarily suspend innocent passage in specified areas of its territorial sea when it is essential for the protection of its security. Such a suspension must be preceded by a published notice to the international community and may not discriminate in form or fact among foreign ships.

Commentary

A coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. The suspension must be duly published before it can take effect.[208]

Note that UNCLOS does not define how large an area of territorial sea may be temporarily closed off. Similarly, UNCLOS does not define the term "temporarily," but clearly the closure may not be permanent. At a minimum, closure areas must be reasonable in extent and location so as not to interfere unnecessarily with surface and air navigation. For example, on April 24, 2021, Russia issued a notice to mariners indicating that it was closing off portions of the Black Sea to foreign warships and other State vessels, twenty-four hours a day, seven days a week, for a period of six months. Russia's announcement is problematic for several reasons. First, the combination of a closure that extends twenty-four hours a day, seven days a week, for six months would not be considered temporary. Second, Russia's declaration applies only to warships and other State vessels and therefore discriminates in fact among types of foreign ships. Thus, Russia's purported suspension of passage to foreign warships and other State vessels operating off the coast of Crimea is inconsistent with international law.

2.5.2.4 Warships and Innocent Passage

All warships, regardless of cargo, armament, or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with

208. UNCLOS, art. 25(3); High Seas Convention, art. 16(3).

international law, for which neither prior notification nor authorization is required. The UNCLOS sets forth an exhaustive list of activities that would render passage noninnocent (see 2.5.2.1). A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage. If a warship does not comply with coastal nation regulations that conform to established principles of international law, and disregards a request for compliance, the coastal State may require the warship immediately leave the territorial sea, in which the warship shall do so immediately.

Commentary

See § 2.5.2.1 for a discussion of the right of innocent passage.

The International Law Commission (ILC) drafted provisional articles concerning, inter alia, the regime of the territorial sea in preparation for the negotiations of the Territorial Sea Convention at the Second United Nations Conference on the Law of the Sea (UNCLOS II). Draft Article 25, adopted in 1955, provided that coastal States could "make the passage of warships through the territorial sea subject to previous authorization or notification," except in "straits normally used for international navigation between two parts of the high seas."[209] Nevertheless, the ILC believed that warships should normally not be required to "request a special authorization for each passage" and that coastal State authorization should be provided "in general terms giving vessels the right of passage," provided that warships comply with coastal State laws and regulations.[210]

The ILC reconsidered the issue in 1956 and approved a new Article 24, which also allowed coastal States to condition innocent passage of warships through the territorial sea "to previous authorization or notification" but required coastal States to normally grant passage subject to compliance with Articles 17 (Rights of Protection of the Coastal State) and 18 (Duties of Foreign Ships During Their Passage).[211] The Commission noted that, even though "a large number

209. ILC, Report on Its Seventh Session, U.N. Doc. A/CN.4/94 (1955), *reprinted in* [1955] 2 YEARBOOK OF THE ILC 19, 41.

210. *Id.*

211. ILC, Report on Its Eighth Session, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 YEARBOOK OF THE ILC 253, 276.

of States do not require previous authorization or notification," that did not mean that "a State would not be entitled to require such notification or authorization if it deemed it necessary to take this precautionary measure."[212] The ILC reasoned that the "passage of warships through the territorial sea of another State can be considered by that State as a threat to its security."[213] The Commission was, therefore, "not in a position to dispute the right of States to take such a measure."[214] However, prior notification or consent would only be required if the coastal State had enacted and duly published a restriction to that effect.

Notwithstanding the ILC's preparatory work, the diplomatic conference did not adopt the language of draft Article 24. Instead, the Territorial Sea Convention provides that "ships of all States . . . shall enjoy the right of innocent passage through the territorial sea" and passage is considered innocent "so long as it is not prejudicial to the peace, good order or security of the coastal State."[215] If a foreign 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" by the coastal State, the coastal State may require the warship to leave its territorial sea.[216] The requirement for prior notice or consent was not adopted by the majority of delegations present at UNCLOS II.

The issue was revisited during UNCLOS III. An attempt by a few States to include a prior notification or authorization requirement failed to receive sufficient support during the negotiations, so the proponents agreed not to press the proposed amendment to Article 21.[217] At the conclusion of UNCLOS III, Ambassador Koh confirmed on the record that "the Convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage

212. *Id.* at 277.
213. *Id.*
214. *Id.*
215. Territorial Sea Convention, art. 14.
216. *Id.* art. 23.
217. 2 VIRGINIA COMMENTARY at 195–99.

through the territorial sea, and there is no need for warships to acquire the prior consent or even notification of the coastal State."[218] As a result, Articles 17, 19, and 30 of UNCLOS contain language virtually identical to that found in the Territorial Sea Convention.

Despite the unambiguous rejection of the prior notification or consent requirement in the 1958 and 1982 conventions, there are forty-seven States that condition the passage for warships on prior notice or consent.[219] These claims are clearly inconsistent with Article 17 of UNCLOS, which on its face applies to all ships, including military and other sovereign immune vessels. The right of innocent passage of warships is further confirmed by Article 19, which contains a list of military activities that are prohibited when ships are engaged in innocent passage, such as weapons exercises, intelligence collection, and launching or recovering aircraft or military devices. Lack of notification or consent is not one of the listed proscribed activities. This creates a presumption that warships not engaged in one of the prohibited activities automatically enjoy the right of innocent passage. Article 19 would be unnecessary if warships were not entitled to exercise the right. The right of innocent passage for warships was confirmed in ¶ 2 of the Jackson Hole Agreement.[220]

If a 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, the coastal State may require it to leave the territorial sea immediately.[221]

2.5.2.5 Unmanned Systems and Navigational Rights

Properly flagged UMS ships enjoy the right of innocent passage in the territorial sea and archipelagic waters of other States, transit passage in interna-

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218. 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, 854 n.159 (1984).

219. J. ASHLEY ROACH, EXCESSIVE MARITIME CLAIMS 250–51 tbl.11 (4th ed. 2021).

220. *Supra*, note 179. *See also* U.S. statement in right of reply, *reprinted in* 17 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 243–44, U.N. Doc. A/CONF.62/WS/37 and ADD.1-2 (1973–82).

221. UNCLOS, art. 30; Territorial Sea Convention, art. 23.

tional straits, and archipelagic sea lanes passage in archipelagic sea lanes. Unmanned systems not classified as ships may be deployed by larger vessels engaged in innocent passage, transit passage, or archipelagic sea lanes passage as long as their employment complies with the navigational regime of innocent passage, transit passage, or archipelagic sea lanes passage.

Commentary

In support of the IMO's work on MASS discussed in § 2.2.1, the Comité Maritime International (CMI) Executive Council established an International Working Group to study the current international legal framework and consider what amendments, adaptions, or clarifications are required in relation to unmanned ships to ensure that the use and operation of such vessels is consistent with international law. To this end, CMI developed a questionnaire for the IMO asking nations whether UMSs are considered "ships" under their national laws. Seventy percent of the States responding to the CMI questionnaire indicated that UMSs could constitute a ship under their national laws.[222]

If a UMS qualifies as a ship or vessel, it is "subject to the same rules of the law of the sea as any ordinarily manned ship."[223] UMSs have an obligation to comply with the same international rules that apply to manned vessels, and "they also enjoy the same passage rights as other ships and cannot be refused access to other states' waters merely because they are not crewed."[224] Seventy percent of the States responding to the aforementioned CMI questionnaire indicated that unmanned ships would enjoy the same rights and duties as manned ships under UNCLOS.[225] The U.S. Maritime Law Association reached a similar conclusion, indicating that, under U.S. law, "ship" is defined without regard to manning and that unmanned ships are probably subject to the same rights and obligations under the law of the sea.[226]

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222. IMO Doc. MSC 99/20, *supra* note 118, annex 1 (Feb. 13, 2018).

223. CMI Position Paper, *supra* note 111, at 3.

224. *Id.*

225. IMO, *Work Conducted by the CMI International Working Group on Unmanned Ships* annex 1, IMO Doc. MSC 99/INF.8 (Feb. 13, 2018).

226. *Id.*

2.5.2.6 Assistance Entry

Long before the establishment of territorial seas, mariners recognized a humanitarian duty to render assistance to persons in distress. Today, ship and aircraft commanders have the same duty to assist those in distress. Ships have the duty to enter into a foreign State's territorial sea without permission of the coastal State when there is reasonable certainty (based on the best available information) that a person is in distress, their location is reasonably well known, and the rescuing unit is in position to render timely and effective assistance. Based on the circumstances on scene, if the ship or aircraft commander has determined that the coastal State is taking inadequate steps to assist the persons in distress, assistance may continue in the coastal State's territorial sea if deemed necessary and appropriate by the commander.

Aircraft have the authority to enter into corresponding airspace without permission of the coastal State when there is reasonable certainty (based on the best available information) that a person is in distress, their location is reasonably well known, and the rescuing unit is in position to render timely and effective assistance. Though the ship or aircraft conducting the rescue shall not request approval from the coastal State to enter the State's territorial sea to conduct a rescue operation, it shall provide timely notification to the coastal State's search and rescue authorities. Assistance entry into a coastal State's territorial sea does not include the conduct of search operations, the rescue of property, assistance to persons not in distress, or transit into the internal waters or over the land mass of the coastal State. Reasonable doubt as to the immediacy or severity of a situation shall be resolved by assuming the person is in distress and, if required, conducting an assistance entry rescue operation.

Commentary

Mariners have an obligation under customary international law to render assistance to persons in distress at sea to the extent that they can do so without serious danger to their ship, crew, or passengers.[227] This long-standing custom is codified in a number of international treaties adopted under the auspices of the IMO, as well as the High

227. 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1114 (1983).

Seas Convention, UNCLOS, and the Chicago Convention. The obligation is not, however, absolute. Although masters of ships are required to render assistance to persons found in danger of being lost at sea, the duty only arises if they can do so without serious danger to their ships, crew, or passengers.[228] Ships engaged in innocent passage may stop and anchor for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress.[229] Similar obligations are found in the 1910 Salvage Convention, SOLAS, the SAR Convention, and the 1989 Salvage Convention.[230]

States parties to the Chicago Convention are similarly required to devote aviation assets to provide prompt search and rescue services. If a pilot-in-command observes another aircraft or a surface craft in distress, "the pilot shall, if possible and unless considered unreasonable or unnecessary . . . keep the craft in distress in sight until compelled to leave the scene or advised by the rescue coordination centre that it is no longer necessary."[231]

U.S. law imposes a statutory obligation on ships' masters and individuals in charge of vessels to "render assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without serious danger to [their] vessel or individuals on board."[232] Failure to comply with this obligation subjects a master or individual violating the law to a fine not exceeding $1,000, two years' imprisonment, or both.[233]

The aforementioned obligations do not apply to warships or military aircraft. However, the DoD imposes similar obligations on the commanding officers of warships and aircraft commanders. U.S. Navy Regulations, for example, require the commanding officer or senior officer present, insofar as can be done without serious danger to the ship or crew, to (a) "proceed with all possible speed to the rescue of

228. UNCLOS, art. 98(1)(a); High Seas Convention, art. 12(1)(a).

229. UNCLOS, art. 18(2).

230. 1910 Salvage Convention, art. 11; SOLAS, reg. V/33; SAR Convention, annex ¶¶ 2.1.1, 5.9.1; 1989 Salvage Convention, art. 10.

231. Chicago Convention, annex 12 (Search and Rescue) ¶ 5.6.2.a (2004).

232. 46 U.S.C. § 2304(a)(1).

233. 46 U.S.C. § 2304(b).

persons in distress if informed of their need for assistance, insofar as such action may reasonably be expected of him or her"; (b) "render assistance to any person found at sea in danger of being lost"; and (c) "afford all reasonable assistance to distressed ships and aircraft."[234] Assistance may be rendered inside the territorial sea of a foreign country without the permission of the coastal State in accordance with customary international law, but such assistance is limited to situations in which the location of persons or property in distress is reasonably well known.[235] If the distress is not life-threatening, "U.S. aircraft will remain outside foreign territorial seas pending coordination with the operational chain of command, including the cognizant unified commander and the Department of State."[236] Navy Regulations are lawful general orders under Article 92 of the Uniform Code of Military Justice.[237] Failure to comply with the obligation to render assistance, unless doing so would seriously endanger the ship or its crew, is therefore subject to criminal prosecution at a special or general court-martial.[238]

U.S. Coast Guard Regulations impose a comparable, but more expansive, duty on commanding officers of Coast Guard ships. "Upon receiving information that a vessel or aircraft is in distress within the area of operation of the unit, the commanding officer shall, whenever it is appropriate to do so, assist such vessel or aircraft as soon as possible."[239] When rendering assistance, "the commanding officer shall aid the distressed vessel or aircraft and its passengers and crew until such time as it is able to proceed safely, or until such time as further Coast Guard assistance is no longer required."[240] In the event of a reported distress, the commanding officer of a Coast Guard vessel under way shall, unless otherwise directed by higher authority, "proceed immediately toward the scene of any reported distress

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234. U.S. Navy Regulations, art. 0925(1) (1990).

235. *Id.* art. 0925(2).

236. *Id.* art. 0925(3).

237. Uniform Code of Military Justice, 10 U.S.C. §§ 801–946(a), art. 92.

238. *See* KRASKA & PEDROZO, *supra* note 172, at 684–86, for a discussion of the USS *Dubuque* incident. *See also Navy Checking Report Ship Left Boat People to Die*, NEW YORK TIMES, Aug. 11, 1988, at A7.

239. U.S. Coast Guard Regulations, § 4-1-7B (1992).

240. *Id.* § 4-1-7C.

within the range of operation."[241] Similarly, the commanding officer of a ship in port shall, unless otherwise directed by higher authority, "proceed, as soon as possible, to the scene of any reported distress within that area of operation."[242] When rendering aid and assistance, "the commanding officer shall use sound discretion and shall not unnecessarily jeopardize the vessel or the lives of the personnel assigned to it."[243] Additionally, having due regard for the health of his or her crew, "the commanding officer shall take on board distressed seamen of the United States, shipwrecked persons, and persons requiring medical care."[244] Once on board, "assisted persons shall be furnished rations and may be transported to the nearest or most convenient port of the United States."[245]

Uniform policy for the exercise of the right-of-assistance entry (RAE) by U.S. military ships and aircraft within U.S.-recognized foreign territorial seas and archipelagic waters is set out in CJCSI 2410.01E.[246] Danger or distress includes a "clearly apparent risk of death, disabling injury, loss, or significant damage."[247]

U.S. ship and aircraft commanders have an obligation to assist those in danger of being lost at sea. Entry into the territorial sea by ships or, under certain circumstances, aircraft without permission of the coastal State is permitted to engage in legitimate efforts to render immediate rescue assistance to those in danger or distress at sea. RAE applies only to rescues in which the location of the persons, vessels, or aircraft in danger or distress is reasonably well known.[248]

RAE does not extend to conducting area searches for persons, vessels, or aircraft in danger or distress when their location is not yet reasonably well known. Unless otherwise provided by international

241. *Id.* § 4-2-5A.
242. *Id.* § 4-2-5B.
243. *Id.* § 4-2-5C.
244. *Id.* § 4-2-5F.
245. *Id.* § 4-2-5F.
246. CJCSI 2410.01E, Guidance for the Exercise of Right-of-Assistance Entry, ¶ 1 (Nov. 30, 2017).
247. *Id.* ¶ 5.
248. *Id.* ¶ 4(a).

agreement (e.g., the SAR Convention), area searches within U.S.-recognized foreign territorial seas or archipelagic waters will be conducted only with the permission of the coastal State. When considering conducting area searches within claimed or U.S.-recognized foreign territorial seas or archipelagic waters, commanders must comply with the provisions of the U.S. National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual (May 2000) and the U.S. Standing Rules of Engagement (CJCSI 3121.01 (series)).[249]

The customary international law of RAE is more fully developed for vessels than for aircraft. Given that unauthorized entry into national airspace could be considered a breach of a State's sovereignty, operational commanders who intend to employ military aircraft into national airspace should consider the possible reaction of the coastal or archipelagic State. The U.S. position is that aircraft engaged in RAE are an extension of the vessels conducting rescue operations and, as such, those flights are consistent with the "duty to render assistance" described in Article 98 of UNCLOS.[250] Nonetheless, there are additional coordination steps that may be required for the use of military aircraft, as discussed below.[251]

The following guidance applies to U.S. operational units conducting the RAE in U.S.-recognized territorial seas and archipelagic waters of foreign States. The operational commander of a military ship may exercise RAE and immediately enter a foreign State's U.S.-recognized territorial sea or archipelagic waters when all three of the following conditions are met: (a) "a person, ship, or aircraft within the foreign territorial sea or archipelagic waters is in distress and requires immediate rescue assistance"; (b) "the location is reasonably well known"; and (c) "the U.S. military ship is in a position to render

249. *Id.* ¶ 4(b).

250. *Id.* ¶ 4(d).

251. *See also* U.S. Department of State, Statement of Policy by the Department of State, the Department of Defense, and the United States Coast Guard Concerning Exercise of the Right of Assistance Entry, Aug. 8, 1986, *reprinted in* ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS annex A2-3 (A.R. Thomas & James C. Duncan eds., 1997) (Vol. 73, INTERNATIONAL LAW STUDIES).

timely and effective assistance."[252] An operational commander may render immediate rescue assistance by deploying a U.S. military aircraft (including aircraft embarked aboard military ships conducting RAE operations) into the U.S.-recognized national airspace of a foreign State when all four of the following conditions are met: (a) "a person, ship, or aircraft within the foreign territorial sea or archipelagic waters is in distress and requires immediate rescue assistance"; (b) "the location is reasonably well known"; (c) "the U.S. military aircraft is able to render timely and effective assistance"; and (d) "any delay in rendering assistance could be life-threatening."[253] If the situation is not life-threatening, "the operational commander must request guidance from higher authority via the operational chain of command using the fastest means available" before exercising assistance entry in U.S.-recognized foreign territorial seas or archipelagic waters.[254]

Before executing the RAE, "operational commanders should consider the safety of the crews, military ships, and military aircraft they command, as well as the safety of persons, ships, and aircraft in distress."[255] Operational commanders should also assess force protection considerations based on all available information and, although not required, "whether other rescue units, capable and willing to render timely and effective assistance, are on the scene or immediately en route.[256]

Exercise of RAE does not require coastal or archipelagic State notification or consent. However, if possible, operational commanders should notify coastal or archipelagic State authorities before entry into U.S.-recognized foreign territorial sea or archipelagic waters, "in order to promote international comity, avoid misunderstanding, and alert local rescue and medical assets."[257] Operational commanders should not, however, request consent for entry. If notification can-

252. CJCSI 2410.01E, *supra* note 246, ¶ 6(c)(1).
253. *Id.* ¶ 6(c)(2).
254. *Id.*
255. *Id.* ¶ 6(c)(3).
256. *Id.*
257. *Id.* ¶ 6(c)(4).

not be provided in advance, the operational commander "must notify the coastal or archipelagic state, as soon as possible, of the location, unit(s) involved, nature of the emergency, and government assistance required as well as an estimated time of departure from the territorial sea or archipelagic waters."[258] Contact will normally be with the Rescue Coordination Center of the foreign state involved or the U.S. Embassy Country Team. If RAE is executed in a foreign-claimed territorial sea or archipelagic waters not recognized by the United States, "notification is not required, but may be made if necessary to obtain coastal state assistance."[259] If notification is provided, it "will not indicate that an entry was made into the foreign state's territorial seas or archipelagic waters and will not request consent for such entry."[260]

The duty to render assistance to persons, ships, and aircraft in danger or distress applies throughout the entire sea, including a coastal State's territorial sea.[261] 46 U.S.C. § 2304 (Duty to provide assistance at sea) does not apply to a vessel of war owned by the U.S. appropriated to public service. "Assistance entry" is the entry of vessels or aircraft into a coastal State's territorial sea to render emergency assistance to persons, ships, or aircraft in danger or distress at sea. The coastal State's right to control activities in its territorial sea is balanced with the requirement to rescue persons in distress at sea. Many States view assistance entry solely as a duty, not a right, even a limited one. It is affirmed that the *duty* to render assistance permits a vessel to enter a coastal State's territorial sea without prior notice or consent; however, most States do not subscribe to the U.S. view that the duty to render assistance is, by necessity, supported by a corresponding "right" under international law.

The 1986 Statement of Policy by the Department of State, the Department of Defense, and the United States Coast Guard Concerning Exercise of the Right of Assistance Entry (RAE Statement), states:

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258. *Id.*
259. *Id.*
260. *Id.*
261. 1989 Salvage Convention, art. 11; UNCLOS arts. 18, 98; SOLAS, reg. V/33; SAR Convention, annex ¶ 2.1.10; High Seas Convention, art. 12; 46 U.S.C. § 2304(a)(1).

> The right of assistance entry is not dependent upon seeking or receiving the permission of the coastal State. While the permission of the coastal State is not required, notification of the entry should be given to the coastal State both as a matter of comity and for the purpose of alerting the rescue forces of that State. The right of assistance entry extends only to rescues where the location of the danger or distress is reasonably well known. The right does not extend to conducting searches within the foreign territorial sea without the permission of the coastal State. The determination of whether a danger or distress requiring assistance entry exists properly rests with the operational commander on scene.

The RAE Statement provides U.S. policy concerning assistance entry. When a U.S. military vessel determines that a person, ship, or aircraft is in danger or distress from the perils of the sea, the location of the incident is reasonably well known, and the U.S. military vessel is in a position to render assistance, then the vessel may render the necessary assistance. For U.S. military aircraft, the operational commander should, if possible, request additional guidance. If a delay could be life-threatening, then immediate assistance may be rendered.

A 2012 Coast Guard legal opinion on assistance entry provides clarification on when a vessel is *not* required to render assistance:

> There are certain circumstances where a vessel would not be duty-bound to come to the aid of a mariner in distress. For example, a master is not required to place his own vessel and crew in undue peril in order to attempt to render assistance. Also, there is no duty to attempt to render assistance in instances where doing so would be impracticable or futile. Further, if a coastal State has responded in a timely and effective manner, such that the distress has been addressed and no longer exists, then the prerequisite of distress is absent and engaging in [assistance entry] is not legally justified.

Coast Guard search-and-rescue policy clarifies when assistance entry would not be warranted: (1) to perform a search without the coastal

State's permission prior to entering the territorial sea; (2) to rescue (or salvage) property, except in limited cases incidental to the rescue operation, such as the retrieval of medical supplies or towing a vessel; (3) to assist persons not in distress; or (4) within the internal waters or over the land mass of a coastal State.

2.5.3 International Straits

2.5.3.1 Types of International Straits

International law recognizes five different kinds of straits used for international navigation. Each type of strait has a distinct legal regime governing passage.

1. Straits connecting one part of the high seas or EEZ with another part of the high seas or EEZ (e.g., Strait of Hormuz, Strait of Malacca, Strait of Gibraltar, Strait of Bab el Mandeb). Transit passage applies.

2. Straits regulated by long-standing treaties (e.g., Turkish Straits, Strait of Magellan). Treaty terms apply to the extent the United States adheres to them.

3. Straits not completely overlapped by territorial seas (e.g., a high seas corridor exists, such as Japan's approach in the Soya, Tsugara, Tshushima East Channel, Tshushima West Channel, Osumi Straits, and the Taiwan Strait). High seas freedoms apply in the corridor.

4. Straits formed by an island of a State bordering the strait and its mainland and where a route of similar convenience exists to the seaward of the island (e.g., Strait of Messina). Nonsuspendable innocent passage applies.

5. Straits between a part of the high seas or an EEZ and the territorial sea of a foreign state (e.g., dead-end straits such as Head Harbour Passage, Strait of Tiran, and Gulf of Honduras). Nonsuspendable innocent passage applies.

Commentary

See Articles 35(c), 36, 37, 38(1), and 45 of UNCLOS.

2.5.3.2 International Straits between One Part of the High Seas or Exclusive Economic Zone and Another Part of the High Seas or Exclusive Economic Zone

Straits used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ are subject to the navigational regime of transit passage. Transit passage exists throughout the entire strait (shoreline-to-shoreline) and not just the area overlapped by the territorial sea(s) or archipelagic waters of the coastal State(s). Under international law, ships and aircraft of all States—including warships, auxiliary vessels, UMSs, and military aircraft (including UA)—enjoy the right of unimpeded transit passage through such straits and their approaches.

Commentary

All ships and aircraft enjoy the unimpeded right of transit passage through international straits used for international navigation between one part of the high seas or EEZ and another part of the high seas or EEZ.[262]

Prior to UNCLOS, most strategic chokepoints—like the Straits of Gibraltar, Hormuz, and Malacca—contained a high seas corridor that allowed for free and unimpeded transit for all surface ships, submarines, and aircraft. With the expansion of the maximum breadth of the territorial sea from 3 to 12 nautical miles, more than one hundred of these straits used for international navigation are today overlapped by territorial seas. Under the prevailing law of the time, these straits would be governed by the regime of innocent passage, which does not include a right of overflight for aircraft or submerged transit for submarines.[263] As a compromise, UNCLOS balances coastal States' interests to expand their territorial seas with the international

262. UNCLOS, art. 38(1).
263. Territorial Sea Convention, arts. 2, 14.

community's interest in unimpeded navigation and overflight on, over, and under these strategic waterways.

The regime of transit passage applies in straits used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ.[264] Transit passage would also apply in straits where the high seas or EEZ corridor is not suitable for international navigation.[265] Transit passage exists throughout the entire strait and its approaches, not just the area overlapped by the territorial seas of the littoral nation(s).[266]

The criteria for determining whether a strait qualifies as an international strait subject to the regime of transit passage is a geographical test. If the strait connects one part of the high seas or EEZ with another part of the high sea or EEZ, transit passage applies. In the *Corfu Channel* case, the Albanian government argued that, even though it was a strait in the geographical sense, the North Corfu Channel did not belong to the "class of international highways through which a right of passage exists" on the grounds that it was only of secondary importance and was not a necessary route between two parts of the high seas and was used almost exclusively for local traffic.[267] The ICJ held that the decisive criterion in determining whether a strait qualified as an international strait was not the volume of traffic passing through the strait or the importance of the strait, but rather its geographical situation connecting two parts of the high seas and its use for international navigation.[268] The Court, therefore, concluded that the North Corfu Channel belonged to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace.[269]

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264. UNCLOS, art. 37.

265. *Id.* art. 36.

266. *See* ROACH, *supra* note 219, at 302, excerpting U.S. Department of the Navy, Judge Advocate General, telegram 061630Z (June 6, 1988), State Department File No. P92 0140-0820/0822, 2 1981–88 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2018; Charles A. Allen, *Persian Gulf Disputes*, *in* SECURITY FLASHPOINTS: OIL, ISLANDS, SEA ACCESS AND MILITARY CONFRONTATION 339, 340–41 (Myron H. Nordquist & John Norton Moore eds., 1998).

267. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 28 (Apr. 9).

268. *Id.* at 28.

269. *Id.* at 29.

> Some States, like Canada, suggest that a strait must meet two criteria—geographic and functional—to qualify as an international strait. With regard to the second criterion, Canada maintains that potential use of the strait is insufficient; actual use is required to satisfy this requirement.[270] Canada argues that the Northwest Passage does not meet the second criterion articulated by the ICJ in the *Corfu Channel* case—that the strait has been a "useful route for international maritime traffic," as evidenced by the "total number of ships . . . passing through the channel."[271] According to the Canadian government, between 1903 and 2005, the Northwest Passage was transited only sixty-nine times by foreign-flagged vessels.[272] In the *Corfu Channel* case, the Court cited 2,884 transits in a twenty-month period.[273] Given the low number of transits of the strait by foreign-flagged vessels over the past hundred-plus years, as well as the extensive level of control exercised by the Canadian government over those vessels, Canada argues that the Northwest Passage does not have "a history as a useful route for international maritime traffic" and that the Northwest Passage is, therefore, not an international strait subject to the regime of transit passage.[274] The United States diplomatically protested Canada's claim to the Northwest Passage as internal waters in 1985, 1986, and 2010.[275]

Transit passage is defined as the exercise of the freedoms of navigation and overflight solely for the purpose of continuous and expeditious transit of a

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270. Donat Pharand, *The Legal Regime of the Arctic: Some Outstanding Issues*, 39 INTERNATIONAL JOURNAL 742, 787 (1984) [hereinafter Pharand 1]; Donat Pharand, *Canada's Sovereignty Over the Northwest Passage*, 10 MICHIGAN JOURNAL OF INTERNATIONAL LAW 653, 668–69 (1989) [hereinafter Pharand 2]; Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 OCEAN DEVELOPMENT & INTERNATIONAL LAW 3, 30 (2007) [hereinafter Pharand 3].

271. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 28–29 (Apr. 9).

272. Pharand 1, *supra* note 270, at 789; Pharand 2, *supra* note 270, at 670; Pharand 3, *supra* note 270, at 31–33.

273. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 29 (Apr. 9).

274. Pharand 1, *supra* note 270, at 790; Pharand 2, *supra* note 270, at 670; Pharand 3, *supra* note 270, at 42.

275. MCRM. *See* James Kraska, *The Law of the Sea Convention and the Northwest Passage*, 22 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 257 (2007).

strait. Such transit is conducted in the normal modes of continuous and expeditious transit utilized by such ships and aircraft. Ships and aircraft, while exercising the right of transit passage, shall:

1. Proceed without delay through or over the strait

2. Refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of States bordering the strait

3. Refrain from any activities other than those incident to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeure*; distress; or in order to render assistance to persons, ships, or aircraft in danger or distress.

Commentary

Transit passage means the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait.[276] While exercising the right of transit passage, ships and aircraft shall (a) "proceed without delay through or over the strait"; (b) "refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations"; and (c) "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress."[277]

Surface warships may transit in a manner consistent with sound navigational practices and the security of the force, including the use of their electronic detection and navigational devices (e.g., radar, sonar and depth-sounding devices, formation steaming, and the launching and recovery of aircraft). Military aircraft may operate in an international strait as part of a military formation with surface vessels—flying in a pattern that provides force protection while the entire formation transits the strait. Submarines are free to

276. UNCLOS, art. 38(2).
277. *Id.* art. 39(1).

transit international straits submerged, since that is their normal mode of operation.

Commentary

> The term "normal mode" means that submarines may transit while submerged, military aircraft are entitled to overfly in combat formation and with normal equipment operation, and surface ships may transit in a manner consistent with vessel security, to include formation steaming and launch and recovery of aircraft, where consistent with sound navigational practices.[278]

Transit passage through international straits cannot be hampered or suspended by the coastal State for any purpose during peacetime. This principle of international law applies to transiting ships (including warships) of States at peace with the bordering coastal State but involved in armed conflict with another State.

Commentary

> States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.[279]
>
> States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of (a) "the safety of navigation and the regulation of maritime traffic"; (b) "the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait"; (c) "the prevention of fishing, including the stowage of fishing gear"; and (d) "the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration, or sanitary laws and regulations of

278. Letter of Transmittal from President Bill Clinton, United Nations Convention on the Law of the Sea, S. TREATY DOC. NO. 103-39, 103rd Cong., 19 (Oct. 7, 1994); KRASKA & PEDROZO, *supra* note 172, at 222.

279. UNCLOS, art. 44.

States bordering straits."[280] These laws and regulations "shall not discriminate in form or in fact among foreign ships or . . . have the practical effect of denying, hampering or impairing" the right of transit passage.[281]

Coastal States that border international straits overlapped by territorial seas may designate sea lanes and prescribe traffic separation schemes to promote navigational safety. However, such sea lanes and separation schemes must be approved by the competent international organization such as the International Maritime Organization (IMO), in accordance with generally accepted international standards. Merchant ships and government-operated ships operated for commercial purposes must respect properly designated sea lanes and traffic separation schemes. Warships, auxiliaries, and government ships operated on exclusive government noncommercial service (i.e. sovereign-immune vessels (see 2.1)) are not legally required to comply with such sea lanes and traffic separation schemes while in transit passage. Sovereign-immune vessels must exercise due regard for the safety of navigation. Sovereign-immune vessels may, and often do, voluntarily comply with IMO-approved routing measures in international straits where practicable and compatible with the military mission.

Commentary

States bordering straits may designate sea lanes and prescribe traffic separation schemes (TSSs) for navigation in straits where necessary to promote the safe passage of ships.[282] Sea lanes and TSSs shall conform to generally accepted international regulations and shall be referred to the IMO for adoption prior to their designation.[283] Merchant ships in transit passage shall respect applicable sea lanes and TSSs.

All ships engaged in transit passage, including sovereign-immune vessels, shall comply with applicable provisions of the 1972 COLREGS.

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280. *Id.* art. 42(1).
281. *Id.* art. 42(2).
282. *Id.* art. 41(1).
283. *Id.* art. 41(3)–(4).

Commentary

> Ships in transit passage shall comply with (a) generally accepted international regulations, procedures, and practices for safety at sea, including the COLREGS; and (b) generally accepted international regulations, procedures, and practices for the prevention, reduction, and control of pollution from ships (MARPOL).[284] Aircraft in transit passage shall observe the Rules of the Air established by the International Civil Aviation Organization (ICAO) as they apply to civil aircraft. State aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation. Aircraft in transit passage shall, at all times, monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.[285]

2.5.3.3 International Straits not Completely Overlapped by Territorial Seas

Ships and aircraft transiting through or above straits used for international navigation that are not completely overlapped by territorial seas and through which there is a high seas or EEZ corridor suitable for such navigation, enjoy the high seas freedoms of navigation and overflight while operating in and over such a corridor. So long as they remain beyond the territorial sea, all ships and aircraft of all States have the unencumbered right to navigate through and over such waters subject only to due regard for the right of others to do so as well. In international straits not completely overlapped by territorial seas, all vessels enjoy high seas freedoms while operating in the high seas corridor beyond the territorial sea. If the high seas corridor is not of similar convenience (e.g., to stay within the high seas corridor would be inconsistent with sound navigational practices), such vessels enjoy the right of unimpeded transit passage through the strait.

284. *Id.* art. 39(2).
285. *Id.* art. 39(3).

Commentary

Transit passage does not apply in a strait that contains a route through the high seas or EEZ that is of similar convenience as the strait, so long as the alternative route meets the test with respect to navigational and hydrographical characteristics.[286] This situation may arise if a coastal State chooses to maintain a high seas corridor between two land territories by not extending its territorial seas to 12 nautical miles. During UNCLOS III, Japan opposed any interpretation of the law regarding straits that would permit the Soviet Union to overfly the Tsugaru Strait.[287]

Japan elected not to claim a 12-nautical mile territorial sea throughout five of its international straits, called "designated areas."[288] The La Perouse or Sōya Strait separates the northernmost part of Hokkaido and Russia's Sakhalin Island. The Tsugaru lies between Honshu and Hokkaido. The Osumi Strait is off the southern tip of Kyushu. The Tsushima and Korea Straits separate Kyushu and South Korea. The Tsushima West Channel connects the Sea of Japan with the Cheju Strait and the East China Sea. In each of these straits, Japan claims a 3-nautical mile territorial sea, thus retaining an EEZ area through each strait in which high seas freedoms of navigation and overflight apply. By claiming only a 3-nautical mile territorial sea, Japan deprived Soviet and North Korean surface ships, submarines, and aircraft of the right to navigate shoreline-to-shoreline through these straits.[289] Korea also claims only 3 nautical miles on its side of the strait.[290]

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286. *Id.* art. 36.

287. National Security Council Memorandum, Evening Report for Zbigniew Brzezinski (Aug. 1, 1978) (Secret/sensitive; declassified, July 26, 2000).

288. Law No. 30 of 1977, Supplementary Provisions, art. 2.

289. *See* YURIKA ISHII, JAPANESE MARITIME SECURITY AND LAW OF THE SEA 93–107 (2022).

290. *See* CHI YOUNG PAK, THE KOREAN STRAITS (1988).

2.5.3.4 International Straits between a Part of the High Seas or Exclusive Economic Zone and the Territorial Seas of a Coastal State (Dead-end Straits)

The regime of innocent passage (see 2.5.2.1), rather than transit passage, applies in straits used for international navigation that connect a part of the high seas or an EEZ with the territorial sea of a coastal State. There may be no suspension of innocent passage through such straits. Warships, auxiliaries, and ships operated on exclusive government service (i.e., sovereign-immune vessels (see 2.1)) are not legally required to comply with sea lanes and traffic separation schemes while conducting innocent passage but must exercise due regard for the safety of navigation.

Commentary

A non-suspendable right of innocent passage applies in straits used for international navigation between a part of the high seas or EEZ and the territorial sea of a foreign State.[291] There is no right of overflight through such straits. These so-called "dead-end" straits include Head Harbour Passage, which leads through the Canadian territorial sea to Passamaquoddy Bay, an inlet of the Bay of Fundy between the Canadian province of New Brunswick and Washington County, Maine.[292]

Another example is the Strait of Tiran. The regime of non-suspendable innocent passage for this prominent dead-end strait was incorporated into the Israeli-Egyptian peace treaty as a key pillar of peace between the two nations.[293] Article V of the treaty provides, inter alia, that

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291. UNCLOS, art. 45(1)(b), (2); Territorial Sea Convention, art. 16(4).

292. S. TREATY DOC. NO. 103-39, *supra* note 278, at 19. *See* James Kraska, *The Law of the Sea and LNG: Head Harbor Passage*, 37 CANADA-UNITED STATES LAW JOURNAL 131 (2012).

293. Mohamed ElBaradei, *The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime*, 76 AMERICAN JOURNAL OF INTERNATIONAL LAW 532, 534 (1982); Ruth Lapidoth, *The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace Between Egypt and Israel*, 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 84, 85 (1983).

> the Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The parties will respect each other's right to navigation and overflight for access to either country through the Strait of Tiran and the Gulf of Aqaba.[294]

A similar provision is found in Article 14 of the Israel-Jordan peace treaty, which provides, in part, that

> the Parties consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight. The Parties will respect each other's right to navigation and overflight for access to either Party through the Strait of Tiran and the Gulf of Aqaba.[295]

Note that both treaties provide for a right of overflight through the strait, even though a right of overflight normally does not apply in dead-end straits. Following the conclusion of UNCLOS III, the Israeli delegation indicated that Part III of the Convention was "a source of great difficulty for us, except to the extent that particular stipulations and understandings for a passage regime for specific straits, giving broader rights to their users, are protected, as is the case for some of the straits in my country's region, or of interest to my country."[296] Egypt's declaration accompanying its ratification of UNCLOS similarly states that

> the provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general régime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general régime

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294. Treaty of Peace, Egypt-Isr., art. V, Mar. 26, 1979, *reprinted in* 18 INTERNATIONAL LEGAL MATERIALS 362 (1979).

295. Treaty of Peace, Isr.-Jordan, art. 14(3), Oct. 26, 1994, *reprinted in* 34 INTERNATIONAL LEGAL MATERIALS 43 (1994).

296. Israeli statement in right of reply, *reprinted in* 17 OFFICIAL RECORDS, *supra* note 220, at 84.

> shall not affect the legal status of waters forming straits and shall include certain obligations with regard to security and the maintenance of order in the State bordering the strait.[297]

The United States took a similar position:

> The United States fully supports the continuing applicability and force of freedom of navigation and overflight for the Strait of Tiran and the Gulf of Aqaba as set out in the Peace Treaty between Egypt and Israel. In the United States view, the Treaty of Peace is fully compatible with the LOS Convention and will continue to prevail. The conclusion of the LOS Convention will not affect these provisions in any way.[298]

2.5.3.5 Straits Regulated in Whole or in Part by International Conventions

The navigational regime that applies in straits regulated by long-standing international conventions is the regime specified in the applicable convention.

Commentary

> Part III of the Convention does not apply to the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.[299]

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297. Egyptian Declaration concerning passage through the Strait of Tiran and the Gulf of Aqaba, Aug. 26, 1983, *Status of Treaties: United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec.

298. 128 Cong. Rec. S4089 (Apr. 27, 1982); Israeli statement in right of reply, *reprinted in* 17 OFFICIAL RECORDS, *supra* note 220, at 84.

299. UNCLOS, art. 35(c).

2.5.3.5.1 Turkish Straits

The Turkish Straits (including the Bosporus, the Sea of Marmara, and the Dardanelles) are governed by a multilateral treaty—the Montreux Convention of 1936—which limits the number and types of warships that may use the Straits, both in times of peace and armed conflict. Although not a signatory to the treaty, the United States respects its provisions, which sets specific standards relevant to passage through the straits and naval operations in the Black Sea. Turkey can be expected to strictly enforce the treaty's provisions almost without exception.

Specific provisions:

1. Only warships with a displacement of 10,000 tons or less may pass through the straits. Naval auxiliaries may have a displacement of up to 15,000 tons. The definitions of vessels of war and auxiliary vessels, and the method to calculate their tonnage are unique to the Convention and should be interpreted for operational/exercise purposes in consultation with United States Naval Forces Europe and/or United States Sixth Fleet.

2. The maximum aggregate tonnage of all non-Black Sea Powers in transit in the straits at any given moment is 15,000 tons. Transit shall begin in daylight. Aircraft shall not fly during transit.

3. The maximum aggregate tonnage of all non-Black Sea Powers in the Black Sea at any given moment is 45,000 tons. The aggregate tonnage of any single non-Black Sea Power in the Black Sea at any given moment is 30,000 tons.

4. Turkey must be officially notified through diplomatic channels at least 15 days prior to any passage of vessels through the straits. Notification requires name, type, number of ships in transit, destination, and date for return transit. Changes in the date of transit are subject to 3 days prior notice to the Turkish Government.

5. Any vessel from a non-Black Sea Power may operate in the Black Sea for no more than 21 days.

Commanders and commanding officers should refer to specific operation orders and other guidance promulgated by U.S. Naval Forces Europe and U.S. Sixth Fleet when anticipating transit through the Turkish Straits and/or operations/exercises in the Black Sea.

Commentary

Access to the Black Sea from the Mediterranean Sea is under the exclusive control of Turkey and is regulated by the 1936 Convention regarding the Régime of the Straits (Montreux Convention). The original parties to the convention include Australia, Bulgaria, France, Greece, Japan, Romania, Turkey, the Soviet Union, the United Kingdom, and Yugoslavia. The treaty affirms the principle of freedom of transit and navigation by sea in the Straits (Dardanelles, Sea of Marmara, and Bosphorus), subject to certain limitations in times of war and peace. There is no right of overflight of the Straits without Turkey's consent.[300]

In time of peace, all merchant ships, regardless of flag or cargo, enjoy complete freedom of transit and navigation in the Straits, subject to certain sanitary controls prescribed by Turkish law.[301] In time of war, if Turkey is not a belligerent, all merchant ships, regardless of flag or cargo, may transit the Straits subject to the same conditions applicable to merchant ships in time of peace.[302] If Turkey is a belligerent, neutral merchant ships may transit the Straits by day through designated routes, but only if they maintain their neutrality and do not assist the enemy.[303] If Turkey considers itself to be threatened with imminent danger of war, the peacetime rules[304] continue to apply, except that ships must transit the Straits by day through designated routes and Turkish authorities may impose mandatory pilotage.[305]

In time of peace, warships also enjoy passage rights through the straits but must provide advance notice to Turkey (eight days for

300. Montreux Convention, art. 1.
301. *Id.* art. 3.
302. *Id.* art. 4.
303. *Id.* art. 5.
304. *Id.* arts. 2, 3.
305. *Id.* art. 6.

Black Sea States and fifteen days for other States) before beginning their transit.[306] Submarines of non-Black Sea States, however, may not pass through the straits.[307] The Convention also imposes maximum aggregate tonnage restrictions and limitations on the number of non-riparian naval forces that can pass through the straits at one time,[308] as well as maximum aggregate tonnage limitations that non-riparian States can have in the Black Sea at one time.[309] Additionally, warships of non-riparian States may only stay in the Black Sea for twenty-one days.[310]

In time of war, if Turkey is not a belligerent, foreign warships enjoy complete freedom of transit and navigation through the straits under the same conditions that apply in peacetime, with one exception—Turkey may prohibit the transit of warships belonging to the belligerent powers unless it is a warship returning to its home port in the Black Sea.[311] If Turkey is a belligerent, the passage of foreign warships is left entirely to the discretion of the Turkish government.[312] Finally, if Turkey considers itself to be threatened with imminent danger of war, it may apply the provisions of Article 20.[313]

On February 24, 2022, Russia invaded Ukraine. That same day, Ukraine requested that Turkey close the Turkish Straits to Russian warships. On February 28, 2022, Turkey invoked Article 19 and announced that it was restricting passage of Ukrainian and Russian warships through the Straits unless they were returning to their home bases in the Black Sea and warned both riparian and non-riparian States not to send warships through the Straits:

> *'When Turkey is not a belligerent in the conflict, it has the authority to restrict the passage of the warring states' warships across the straits. If the warship is returning to its base in the Black Sea, the passage is not*

306. *Id.* art. 13.
307. *Id.* art. 12.
308. *Id.* art. 14.
309. *Id.* art. 18.
310. *Id.*
311. *Id.* art. 19.
312. *Id.* art. 20.
313. *Id.* art. 21.

> *closed. We adhere to the Montreux rules. All governments, riparian and non-riparian, were warned not to send warships across the straits."* Mevlut Cavusoglu, Foreign Minister of Turkey
>
> . . . .
>
> *"Turkiye will use its authority over the Turkish Straits under the 1936 Montreux Convention to prevent the Russia-Ukraine 'crisis' from further escalating."* Recep Tayyip Erdogan, President of Turkey[314]

Prohibiting the transit of all warships, whether belonging to the belligerents or not, exceeds Turkey's authority under Article 19, unless Turkey invoked Article 21 of the Convention. Turkey has not, however, officially announced that it considers itself to be threatened with imminent danger of war as a result of the Russia-Ukraine conflict.

2.5.3.5.2 Other International Straits and Canal Passage Governed by Specialized Agreements

Passage through the following international straits and canals are governed by specialized agreements:

1. Danish Straits. The 1857 Treaty of Redemption of the Sound Dues is a special regime governing the Danish Straits. The United States and Denmark signed the 1857 Convention on Discontinuance of Sound Dues eliminating tolls for passage through the Danish Straits. However, since they provide for free navigation consistent with UNCLOS, these agreements do not impact naval operations. Separately, Denmark passed a 1999 Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace, which requires Danish permission for the passage of more than three warships at once through the Danish Straits. The United States does not recognize this ordinance, because it is inconsistent with UNCLOS.

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314. Tayfun Ozberk, *Turkey Closes the Dardanelles and Bosphorus to Warships*, NAVAL NEWS (Feb. 28, 2022), https://www.navalnews.com/naval-news/2022/02/turkey-closes-the-dardanelles-and-bosphorus-to-warships/.

2. Strait of Magellan. Free navigation is guaranteed through the Strait of Magellan by Article 5 of the 1881 Boundary Treaty between Argentina and Chile (reaffirmed in Article 10 of the 1984 Treaty of Peace and Friendship between Argentina and Chile). The United States understands the guarantee of free navigation provided for under the 1881 Treaty and confirmed by long-standing practice, demonstrates that flag States may transit the Strait of Magellan under circumstances at least as favorable as the right of transit passage under customary international law as reflected in UNCLOS.

3. Suez Canal. Article I of the Constantinople Convention of 1888 provides:

> The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

4. Panama Canal. Article II of the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal of 1977 provides:

> In time or peace and in time of war it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality, so that there will be no discrimination against any nation, or its citizens or subjects.

5. Kiel Canal. Article 380 of the Treaty of Versailles of 1919 provides:

> The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.

Commentary

The Danish Straits are subject to the Treaty for the Redemption of the Sound Dues and a parallel treaty, the Convention between the United States and Denmark for the Discontinuance of Sound

Dues.[315] Both treaties recognize the "entire freedom of the navigation of the Sound and the Belts" and protection of "free and unencumbered navigation." Nonetheless, in 1999, Denmark enacted domestic legislation that requires States to provide prior notification through diplomatic channels if more than three warships of the same nationality are going to simultaneously transit through the Great Belt, the Samsø Belt, or the Sound. The law applies to all sovereign immune vessels.[316] The United State does not recognize the validity of the three-warship notice requirement, as notice requirements for warship innocent passage are inconsistent with international law regardless of the number of warships to which they apply.[317]

The Strait of Magellan is governed by the Boundary Treaty between the Argentine Republic and Chile, which states that the Strait is "neutralized forever, and free navigation is guaranteed to the flags of all nations."[318] Free navigation through the Straits was reaffirmed in the 1984 Treaty of Peace and Friendship between Argentina and Chile, which resolved the Beagle Channel dispute.[319] Traversing the Strait of Magellan requires a voyage from east to west that penetrates the internal waters of Chile along the Southwestern Atlantic and emerges through the internal waters and into the territorial sea of Chile in the Southeastern Pacific.

The geographical definition of a strait contemplates a natural waterway and not an artificially constructed canal. Thus, Part III of the Convention does not apply to man-made canals like the Suez, Panama, and Kiel Canals, which are generally controlled by bilateral or multilateral agreements between the States concerned.

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315. Treaty for the Redemption of the Sound Dues, Mar. 14, 1857, 116 Consol. T.S. 357; Convention on Discontinuance of Sound Dues between the United States and Denmark, Apr. 11, 1857, 116 Consol. T.S. 465.

316. Royal Ordinance No. 224, Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace, §§ 1(1), 1(2), 3(2) (Apr. 16, 1999).

317. MCRM.

318. Boundary Treaty, Arg.-Chile, art. 5, July 23, 1881, 159 Consol. T.S. 45.

319. Treaty of Peace and Friendship, Arg.-Chile, art. 10, Nov. 29, 1984, 1399 U.N.T.S. 102; *see also* HUGO CAMINOS, THE LEGAL REGIME OF STRAITS IN THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 131 (1987).

The Suez Canal is governed by the Constantinople Convention, which provides that the Canal shall always be free and open to all ships, regardless of flag, and the parties agree not to interfere with the free use of the Canal in times of war or peace. The original parties to the Convention were Austria-Hungary, France, Italy, the Netherlands, Russia, Spain, Turkey, and the United Kingdom. The parties further agreed that the Canal shall never be subjected to the exercise of the right of blockade.[320] The Suez Maritime Canal Company was nationalized and replaced by the Suez Canal Authority (SCA) in 1956 to manage and operate the Canal.[321] In October 1956, the UN Security Council adopted a resolution stating that (1) "there should be free and open transit through the Canal without discrimination"; (2) "the sovereignty of Egypt should be respected"; and (3) "the operation of the Canal should be insulated from the politics of any country."[322] Six months later, Egypt announced that the Canal was open for normal traffic. The Egyptian declaration reaffirmed that the government would respect, observe, and implement "the terms and spirit of the Constantinople Convention of 1888 and the rights and obligations arising therefrom" and maintain "free and uninterrupted navigation for all nations within the limits of and in accordance with the provisions of the Constantinople Convention of 1888."[323] In 1975, Egypt once again reaffirmed that the SCA shall (1) not take any procedure that is contrary to the provisions of the Constantinople Convention concerning the free navigation of the Canal; (2) not give any privilege to a vessel that is not given, in the same circumstances, to other vessels; and (3) not discriminate against some vessels in favor of others.[324]

In 1903, Panama and the United States signed a treaty granting the United States an exclusive right to construct a ship canal across the

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320. Convention respecting the Free Navigation of the Suez Canal, Oct. 29, 1888, *reprinted in* 3 AMERICAN JOURNAL OF INTERNATIONAL LAW Supp. 123 (1909).

321. Nationalization Decree, Law No. 285 of 1956.

322. S.C. Res. 118 (Oct. 13, 1956).

323. Declaration on the Suez Canal and the Arrangements for Its Operation, ¶¶ 1, 3, U.N. Doc. A/3576 (S/3818) (Apr. 24, 1957).

324. A Republican Decree, Law No. 30 of 1975, The Organization of the Suez Canal Authority, art. 14. For information and documents relating to the administration of the Suez Canal, see SUEZ CANAL AUTHORITY, https://www.suezcanal.gov.eg/English/About/Pages/default.aspx.

> Isthmus of Panama to connect the Atlantic and Pacific Oceans. The treaty also granted the United States sovereignty over a 10-mile-wide strip of land, in perpetuity, to construct and operate the canal in exchange for a one-time payment of $10 million and an annual payment of $250,000.[325] The Panama Canal was completed in 1914 and was operated by the United States until it was turned over to Panama on December 31, 1999, pursuant to the Neutrality Treaty.[326]
>
> Transit rights through the Panama Canal are governed by the Neutrality Treaty. The Treaty provides that the Canal is an international waterway that in times of peace is permanently neutral and in times of war "shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality," and "shall not be the target of reprisals in any armed conflict between other nations of the world."[327] Ships in transit are prohibited from committing hostile acts while in the Canal.[328]
>
> Transit rights are subject to the payment of tolls and other charges for transit and ancillary services, provided that the tolls and other charges are just, reasonable, equitable, and consistent with international law.[329] Ships must also comply with applicable rules and regulations that are just, equitable, and reasonable, and are limited to those necessary for safe navigation and efficient, sanitary operation of the Canal, to include ancillary services necessary for transit.[330] Vessels may also be "required to establish clearly the financial responsibility and guarantees for payment of reasonable and adequate indemnification . . . for damages resulting from acts or omissions of such vessels when passing through the Canal."[331] For sovereign immune vessels, the flag State may certify "that it shall observe its obligations under international law to pay for damages resulting from the act or omission of such vessels when passing through the Canal."[332]

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325. Convention for the Construction of a Ship Canal (Hay-Bunau-Varilla Treaty) arts. II, III, XIV, Nov. 18, 1903, 33 Stat. 2234, T.S. No. 431.
326. Neutrality Treaty, art. II, Sept. 7, 1977, 33 U.S.T. 39.
327. *Id.* art. II.
328. *Id.* art. II(c).
329. *Id.* arts. II(a), III(1)(c).
330. *Id.* arts. II(b), III(1)(a)–(b).
331. *Id.* art. III(1)(d).
332. *Id.*

Warships and naval auxiliaries of all nations are "entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament [or cargo], without being subjected, as a condition of transit, to inspection, search or surveillance."[333] However, sovereign immune vessels "may be required to certify that they have complied with all applicable health, sanitation and quarantine regulations."[334] Additionally, sovereign immune vessels are not required to "disclose their internal operation, origin, armament, cargo or destination."[335] Nonetheless, naval auxiliaries may be required to present written assurances certifying that they are government-owned or operated and are being used only on government non-commercial service.[336]

U.S. and Panamanian warships and naval auxiliaries get head-of-the-line privileges when transiting the Canal. U.S. and Panamanian vessels are assured transit through the Canal "as quickly as possible, without any impediment, with expedited treatment, and in case of need or emergency, to go to the head of the line of vessels in order to transit the Canal rapidly."[337] The determination of "need or emergency" to go to the head of the line "shall be made by the nation operating such vessel."[338]

Warships and naval auxiliaries are not subject to the rules relative to the transportation of dangerous cargos contained in the regulations.[339] Warships and naval auxiliaries also maintain their sovereign immunity privileges and rights to expeditious transit of the Canal but will comply with Panama Canal Authority regulations to the extent that regulations do not infringe on the vessels' sovereign immunity

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333. *Id.* art. III(1)(e).

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* art. VI(1); Joint Statement of Oct. 14, 1977, 13 WEEKLY COMP. PRES. DOC. 1547 (Oct. 17, 1977) [hereinafter 1977 Joint Statement].

338. U.S. Senate, Understandings to the Neutrality Treaty, (d)(3). For Panama Canal Authority Maritime Regulations, see https://pancanal.com/en/maritime-services/maritime-regulations/.

339. Regulation for Navigation in Canal Waters, Agreement No. 360, art. 118 (Dec. 12, 2019), https://pancanal.com/wp-content/uploads/2021/07/Acuerdo-360.pdf.

or treaty rights. The toll on warships is "based on their fully loaded displacement."[340]

Effective December 31, 1999, only Panama may maintain military forces, defense sites, and military installations on the Isthmus.[341] Nonetheless, the Treaty provides that both the United States and Panama agree to maintain the neutrality of the Canal so that it "shall remain permanently neutral" and "open and secure to ships of all nations."[342] This means that both nations "shall, in accordance with their respective constitutional processes, defend the Canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal."[343] Any U.S. military action in this regard must only be directed to ensure that the Canal remains "open, secure, and accessible," and must "never be directed against the territorial integrity or political independence of Panama."[344] In addition, notwithstanding Article V or any other provision of the Treaty, if the Canal is closed, or if its operations are interfered with, the United States and Panama "shall each independently have the right to take such steps as each deems necessary, in accordance with its constitutional processes, including the use of military force in the Republic of Panama, to reopen the canal or restore the operations of the canal, as the case may be."[345] This means that either party "may, in accordance with its constitutional processes, take unilateral action to defend the Panama Canal against any threat, as determined by the Party taking such action."[346]

Pursuant to Article VII of the Neutrality Treaty, the United States and Panama sponsored a resolution in the Organization of American States that calls on all States to accede to the Protocol to the

340. Regulation for the Admeasurement of Vessels to Assess Tolls for the Use of the Panama Canal, art. 22, https://pancanal.com/wp-content/uploads/2021/07/Regulation_for_Admeasurement_2019.pdf.

341. Neutrality Treaty, art. V.

342. *Id.* art. IV; 1977 Joint Statement, *supra* note 337.

343. 1977 Joint Statement, *supra* note 337.

344. *Id.*

345. U.S. Senate, Conditions to the Neutrality Treaty, (b)(1).

346. U.S. Senate, Understandings to the Neutrality Treaty, (d)(2).

Treaty.[347] Parties to the Protocol acknowledge the permanent neutrality of the Canal and associate themselves with the Treaty's objectives.[348] The parties also "agree to observe and respect the regime of permanent neutrality of the Canal in time of war as in time of peace, and to ensure that vessels of their registry strictly observe the applicable rules."[349]

The Kiel Canal is governed by the Treaty of Versailles,[350] which ended the First World War. The Treaty provides that the Canal "and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."[351] In 1921, the SS *Wimbledon* was chartered to transport a cargo of 4,200 tons of munitions and artillery stores to the Polish Naval Base at Danzig. When the vessel presented itself at the entrance of the Kiel Canal, it was refused access by the Director of Canal Traffic. The refusal was based on the German Neutrality Orders of July 25 and 30, 1920, issued by Germany in connection with the Russo-Polish war, which prohibited the transit of military-related cargoes destined for Poland or Russia. France, Italy, Japan, and the United Kingdom brought suit against Germany before the Permanent Court of International Justice, requesting that the Court decide that (1) the German authorities were wrong in refusing free access to the Kiel Canal to the *Wimbledon* and (2) the German government pay damages in the amount of 174,082 francs, 86 centimes, with interest at 6 percent per annum from March 20, 1921. The German government responded by asking the Court to (1) declare that the German authorities were within their rights in refusing to allow the *Wimbledon* to pass through the Kiel Canal; and (2) reject the claim for compensation. The Court held, inter alia, that the German au-

347. Neutrality Treaty, art. VII(1).

348. Protocol to the Neutrality Treaty, art. I.

349. *Id.* art. II.

350. Treaty of Peace between the Allied and Associated Powers and Germany, June 28, *reprinted in* 13 U.S. DEPARTMENT OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: THE PARIS PEACE CONFERENCE (1919).

351. *Id.* art. 380.

> thorities were wrong in refusing access to the Kiel Canal to the *Wimbledon* and that Article 380 of the Treaty of Versailles prevented Germany from applying its Neutrality Orders to the Kiel Canal.[352]

2.5.4 Archipelagic Waters

2.5.4.1 Archipelagic Sea Lanes Passage

All ships and aircraft, including warships and military 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. See 1.5.4 for discussion of archipelagic waters. Archipelagic sea lanes passage is defined as the exercise of the freedom of navigation (FON) and overflight for the sole purpose of continuous, expeditious, and unobstructed transit through archipelagic waters. The right of archipelagic sea lanes passage is substantially identical to the right of transit passage through international straits.

Archipelagic sea lanes passage may be exercised in a ship or aircraft's normal mode of operation. This means that submarines may transit while submerged and surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security (e.g., formation steaming and the launching and recovery of aircraft as well as operating devices such as radar, sonar, and depth-sounding devices). Military aircraft may operate in an archipelagic sea lane as part of a military formation with surface vessels—flying in a pattern that provides force protection while the entire formation transits the sea lane.

Archipelagic States may designate archipelagic sea lanes through their archipelagic waters suitable for continuous and expeditious passage of ships and aircraft. All normal routes used for international navigation and overflight are to be included. If the archipelagic nation does not designate such sea lanes, the right of archipelagic sea lanes passage may be exercised by all States through routes normally used for international navigation and overflight.

352. S.S. Wimbledon (U.K. v. Ger.), Judgment, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17).

Commentary

Archipelagic sea lane passage (ASLP) applies within archipelagic waters and the adjacent territorial sea, whether the archipelagic State has designated archipelagic sea lanes (ASLs) or not, and is virtually identical to the transit passage regime. It includes the rights of navigation and overflight in the normal mode of operation solely for the purpose of continuous, expeditious, and unobstructed transit through archipelagic waters. As in the case of transit passage, normal mode includes submerged transit by submarines; the launching and recovery of aircraft and military devices for force protection; formation flying and steaming for force protection; and replenishment at sea and air-to-air refueling. All military and commercial ships and aircraft enjoy the right of ASLP while transiting through, under, or over archipelagic waters and adjacent territorial seas via all normal passage routes used for international navigation or overflight.[353]

Archipelagic States may not impede or suspend the right of ASLP for any reason.[354] Additionally, there is no requirement for ships or aircraft to request diplomatic clearance or provide prior notice to or receive consent from the archipelagic State to engage in ASLP. Archipelagic States may adopt laws and regulations relating to ASLP, but these laws and regulations shall not discriminate in form or in fact among foreign ships and shall not have the practical effect of denying, hampering, or impairing the right of ASLP.[355]

Archipelagic States may, but are not required to, designate ASL through their archipelagic waters suitable for continuous and expeditious passage of ships and aircraft. ASL proposals should include all normal routes used for international navigation and overflight and must be referred to the IMO with a view to their adoption prior to designation.[356] If the archipelagic State does not designate, or makes only a partial designation of, ASLs, vessels and aircraft of all States may continue to exercise the right of ASLP in all normal passage

353. UNCLOS, art. 53.
354. *Id.* arts. 44, 54.
355. *Id.* arts. 42, 44, 54.
356. *Id.* art. 53(9).

> routes used for international navigation and overflight through the archipelago.[357]
>
> To date, the only archipelagic State that has designated ASLs is Indonesia. When it introduced its proposal before the Maritime Safety Committee, Indonesia confirmed that the proposed designation was a "partial" ASL proposal and that the right of ASLP would continue to apply in "all other normal passage routes used for international navigation and overflight . . . including an east-west route and other associated spurs and connectors, through and over Indonesia's territorial sea and its archipelagic waters."[358] The IMO therefore adopted Indonesia's ASL proposal as a "partial system" because it did not include all normal routes used for international navigation, as required by Article 53 of UNCLOS.[359] Relevant IMO documents reflect that, where a partial ASL proposal has come into effect, the right of ASLP "may continue to be exercised through all normal passage routes used for international navigation or overflight in other parts of archipelagic waters" in accordance with UNCLOS.[360]

Archipelagic sea lanes are governed by the following rules:

1. An archipelagic sea lane is defined by a series of continuous axis lines from the point of entry into the territorial sea adjacent to the archipelagic

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357. *Id.* art. 53(12); IMO, Guidance for Ships Transiting Archipelagic Waters, IMO Doc. SN/Circ.206/Corr.1 (Mar. 1, 1999); IMO Res. MSC.71(69), Adoption of Amendments to the General Provisions on Ships' Routeing (Resolution A.572(14) as amended), annex 2 ¶ 6.7 (May 19, 1998); IMO Res. MSC.72(69), Adoption, Designation and Substitution of Archipelagic Sea Lanes (May 19, 1998); IMO, Guidance for Ships Transiting Archipelagic Waters, ¶ 2.1.1, IMO Doc. SN/Circ.206 (Mar. 1, 1999).

358. IMO, *Report of the Maritime Safety Committee*, ¶ 5.23.2, IMO Doc. MSC 69/22 (May 29, 1998); IMO, *Report of the Maritime Safety Committee*, ¶ 25.40, IMO Doc. MSC 77/26 (June 10, 2003).

359. IMO Res. MSC.71(69), *supra* note 357, annex 2 ¶¶ 3.2, 3.12; IMO Res. MSC.72(69), *supra* note 357, ¶ 1; IMO, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, IMO Doc. SN/Circ.200 (May 26, 1998); IMO, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, IMO Doc. SN/Circ.200/Add.1 (July 3, 2008); IMO, Adoption, Designation, and Substitution of Archipelagic Sea Lanes, IMO Doc. SN/Circ.202 (July 31, 2008).

360. IMO Res. MSC.71(69), *supra* note 357, annex 2 ¶ 6.7; IMO Doc. SN/Circ.206, *supra* note 357, ¶ 2.1.1.

waters, through those archipelagic waters, to the point of exit from the territorial sea beyond.

2. Ships and aircraft engaged in archipelagic sea lanes passage through such sea lanes are required to remain within 25 nautical miles on either side of the axis line.

3. Ships and aircraft engaged in archipelagic sea lanes passage must approach no closer to the coastline than 10 percent of the distance between the nearest point on that coast bordering the sea lane and the axis line (Figure 2-1).

Commentary

ASLs (sea lanes and air routes) shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in ASLP shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that ships and aircraft shall not navigate closer to the coasts than 10 percent of the distance between the nearest points on islands bordering the sea lane.[361] If an archipelagic State designates ASLs, it may also prescribe traffic separation schemes (TSSs) for the safe passage of ships through narrow channels in such sea lanes.[362] The archipelagic State shall clearly indicate the axis of the ASLs and the TSSs designated or prescribed by it on charts to which due publicity shall be given. Ships in ASLP shall respect applicable ASLs and TSSs.

361. UNCLOS, art. 53(5).
362. *Id.* art. 53(6).

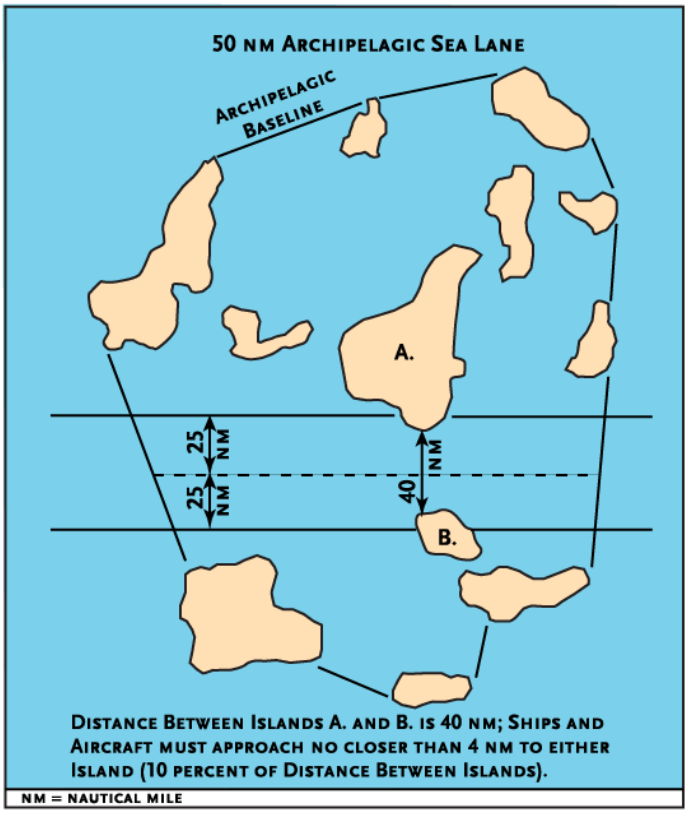

Figure 2-1. A Designated Archipelagic Sea Lane

The right of archipelagic sea lanes passage through designated sea lanes as well as through all normal routes cannot be hampered or suspended by the archipelagic State for any purpose. In situations where an archipelagic State has not designated or only partially designated sea lanes, vessels and aircraft may exercise the navigational regime of archipelagic sea lanes passage through all routes normally used for international navigation.

Commentary

Archipelagic States may not impede or suspend the right of ASLP for any reason.[363] Additionally, there is no requirement for ships or aircraft to request diplomatic clearance or provide prior notice to or

363. *Id.* arts. 44, 54.

receive consent from the archipelagic State to engage in ASLP. Archipelagic States may adopt laws and regulations relating to ASLP, but these laws and regulations shall not discriminate in form or in fact among foreign ships and shall not have the practical effect of denying, hampering, or impairing the right of ASLP.[364]

2.5.4.2 Innocent Passage within Archipelagic Waters

Outside of archipelagic sea lanes, all ships—including warships—enjoy the more limited right of innocent passage throughout archipelagic waters just as they do in the territorial sea. For the exercise of innocent passage, see 2.5.2.1. There is no right of overflight through airspace over archipelagic waters outside of archipelagic sea lanes.

Commentary

The right of innocent passage applies in archipelagic waters not covered by the ASLP regime.[365]

2.6 NAVIGATION IN AND OVERFLIGHT OF INTERNATIONAL WATERS

2.6.1 Contiguous Zones

The contiguous zone is comprised of international waters in and over which manned or unmanned ships and aircraft—including warships, naval auxiliaries, and military aircraft—of all States enjoy the high seas freedoms of navigation and overflight. Although the coastal State may exercise in those waters, the control necessary to prevent and punish infringement of its customs, fiscal, immigration, and sanitary laws that may occur within its territory (including its territorial sea), cannot otherwise interfere with international navigation and overflight in and above the contiguous zone.

364. *Id.* arts. 42, 44, 54.
365. *Id.* art. 52.

Commentary

In the contiguous zone, the coastal State may exercise the control necessary to "(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea."[366] The maximum breadth of the contiguous zone may not exceed 24 nautical miles.[367] In the contiguous zone, all ships and aircraft enjoy high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms.[368]

The contiguous zone is not a security zone. See § 1.6.4 for a discussion of security zones and see § 1.6.1 for a general discussion of the contiguous zone.

Consistent with international law, the U.S. proclamation establishing the contiguous zone preserves "high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines," for ships and aircraft of all nations.[369]

2.6.2 Exclusive Economic Zones

The coastal State's jurisdiction and control over the EEZ is limited to matters concerning the exploration, exploitation, management, and conservation of the resources of those international waters. The coastal State may exercise in the zone jurisdiction over the establishment and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable limitations); and over some aspects of marine environmental protection. The coastal State cannot unduly restrict or impede the exercise of the freedoms of navigation in and overflight of the EEZ. Since all ships and aircraft, including warships and military aircraft, enjoy the

366. *Id.* art. 33(1); Territorial Sea Convention, art. 24(1).
367. UNCLOS, art. 33(2).
368. S. TREATY DOC. NO. 103-39, *supra* note 278, at 23.
369. Proclamation No. 7219, Contiguous Zone of the United States, 64 Fed. Reg. 48,701 (Sept. 2, 1999).

high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms—in and over those waters—the existence of an EEZ in an area of naval operations need not, of itself, be of operational concern to the naval commander.

Commentary

The establishment of the EEZ represents a substantial change in the law of the sea. The new zone balances the rights of coastal States to the resources off their coast with the interests of all States in preserving high seas freedoms of navigation and overflight and other international lawful uses of the seas.[370]

The broad principles of the EEZ reflected in Articles 55–75 of UNCLOS were established as customary international law by the broad consensus achieved at UNCLOS III and the practices of nations.[371]

In the EEZ, coastal States have:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
(b) jurisdiction . . . with regard to:
  (i) the establishment and use of artificial islands, installations and structures;
  (ii) marine scientific research;
  (iii) the protection and preservation of the marine environment;

370. S. TREATY DOC. NO. 103-39, *supra* note 278, at 5–6.

371. Continental Shelf (Tunis. v. Libya), Judgment, 1982 I.C.J. 18; Delimitation of the Maritime Boundary of the Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. 246, 294; AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW § 408 reporters' note 3 at 198 (2017). *See also* 2 VIRGINIA COMMENTARY at 489–821.

(c) other rights and duties provided for in this Convention.[372]

In exercising their rights and performing their duties in the EEZ, coastal States shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention.[373] The uses of the terms "sovereign rights" and "jurisdiction" are intentional—they denote that coastal States have functional rights over certain matters in the EEZ but do not exercise sovereignty.[374]

Coastal States also have the exclusive right to construct and to authorize and regulate the construction, operation, and use of (a) artificial islands; (b) installations and structures for economic and scientific purposes; and (c) installations and structures that may interfere with the exercise of coastal State resource rights.[375] This provision does not preclude user States from deploying listening or other security-related devices in foreign EEZs.[376] Coastal States have exclusive jurisdiction over such artificial islands, installations, and structures, including jurisdiction with regard to customs, fiscal, health, safety, and immigration laws and regulations.[377] Coastal States may, where necessary, also establish reasonable safety zones (not to exceed 500 meters) around such artificial islands, installations, and structures in which they may take appropriate measures to ensure the safety of navigation and of the artificial islands, installations, and structures.[378] All ships shall respect these safety zones and shall comply with IMO standards regarding navigation in the vicinity of artificial islands, installations, structures, and safety zones.[379] Coastal States may not, however, establish artificial islands, installations, and structures (and safety zones around them) if it may interfere with the use of recognized sea lanes essential to international navigation.[380]

372. UNCLOS, art. 56(1).
373. *Id.* art. 56(2).
374. S. TREATY DOC. NO. 103-39, *supra* note 278, at 23.
375. UNCLOS, art. 60(1).
376. S. TREATY DOC. NO. 103-39, *supra* note 278, at 24.
377. UNCLOS, art. 60(2).
378. *Id.* art. 60(4)–(5).
379. *Id.* art. 60(6).
380. *Id.* art. 60(7).

When exercising their sovereign rights over the living resources in the EEZ, coastal States may take such measures, including boarding, inspection, arrest, and judicial proceedings, as may be necessary to ensure compliance with their laws and regulations.[381] "Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security."[382] Coastal State penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment, in the absence of an agreement to the contrary, or any form of corporal punishment.[383]

In the EEZ, all States enjoy the high seas freedoms 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 ships, aircraft, and submarine cables and pipelines.[384] In exercising their rights and performing their duties in the EEZ, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with UNCLOS and other rules of international law.[385]

Twenty-four States purport either to limit the right of foreign States to conduct military operations, exercises, or maneuvers in the contiguous zone, 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 States include Bangladesh, Brazil, Burma (Myanmar), Cambodia (contiguous zone security jurisdiction), Cape Verde, China, Ecuador, India, Indonesia, Iran, Kenya, Malaysia, the Maldives, Mauritius, Nicaragua (contiguous zone security jurisdiction), North Korea, Pakistan, the Philippines, Portugal, Sudan (contiguous zone security jurisdiction), Syria (contiguous zone security jurisdiction), Thailand, Uruguay, and Vietnam.[386]

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381. *Id.* art. 73(1).
382. *Id.* art. 73(2).
383. *Id.* art. 73(3).
384. *Id.* art. 58(1).
385. *Id.* art. 58(3).
386. MCRM. *See also* LOS BULLETIN No. 5, at 15–16 (1985); *Status of Treaties: United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

Nearly all of these States, however, take no practical step to vindicate their claim or enforce their law against foreign-flagged warships operating in their EEZ. In the past twenty years, only China has used coercion or threatened the use of force, and even China has done so only occasionally. The United States does not recognize such claims, which are not within the competence of coastal States under the Convention.[387] For example, China argues that military activities, including intelligence collection, are inconsistent with the "peaceful purposes" provisions of the Convention. Article 301 provides that "[i]n 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."[388] Such an argument is not supported by a plain reading of the Convention, the deliberations of the Security Council, or long-standing State practice.

The text of Article 301 mirrors the text of Article 2(4) of the UN Charter, which prohibits armed aggression in international relations between States. Article 2(4) requires member States to "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."[389]

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," while Article 19(2)(c) prohibits ships engaged in innocent passage from "collecting information to the prejudice of the defence or security of the coastal State." This differentiation clearly demonstrates that UNCLOS does not equate the "threat or use of force" with intelligence collection. Rather, the test of whether

387. S. TREATY DOC. NO. 103-39, *supra* note 278, at 24.
388. UNCLOS, art. 301.
389. U.N. Charter, art. 2(4).

a military activity is "peaceful" is determined by Article 2(4) of the UN Charter and other obligations under international law, including the inherent right of individual and collective self-defense reflected in Article 51 of the Charter.[390]

Most legal experts who have commented on 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."[391] Thus, the peaceful purposes clause in the Convention does 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 Charter."[392]

During the 1960s, the Security Council addressed the issue of peacetime surveillance. Following the shoot down of an American U-2 spy plane near Sverdlovsk in May 1960, a proposal by the Soviet Union to have the Security Council adopt a resolution that would have labelled U-2 flights as "acts of aggression" under the UN Charter was rejected by a vote of 7 to 2 (with 2 abstentions). This decision confirms that peacetime intelligence collection (even in national airspace) does not violate the Charter.[393] 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, while the Soviet Union alleged that the aircraft was within its national airspace when it was engaged. 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 9 to 2.[394]

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390. 3 VIRGINIA COMMENTARY at 89–91; 5 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 62, U.N. Doc. A/CONF.62/WS/67 (1973–82); *see also* Oxman, *supra* note 218, at 829–32.

391. Moritaka Hayashi, *Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms*, 29 MARINE POLICY 123–37 (2005).

392. *Id.*

393. U.N. SCOR, 15th yr., Suppl. for Apr.–June, at 7, U.N. Doc. S/4314 (May 18, 1960); U.N. SCOR, 15th yr., 857th mtg., ¶¶ 9, 99; U.N. SCOR, 15th yr., 860th mtg., ¶ 87.

394. U.N. SCOR, 15th yr., Suppl. for July–Sept., at 12, U.N. Doc. S/4384; U.N. SCOR, 15th yr., 880th mtg., ¶ 58; U.N. SCOR, 15th yr., 883rd mtg., ¶ 187.

A similar conclusion is reflected in a 1985 Report of the Secretary-General of the United Nations. The report finds that the Convention declares that "the high seas shall be reserved for peaceful purposes," but does not define the term "peaceful purposes." Nonetheless, the Convention provides an answer when it declares in Article 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.

Thus, the report concludes that "military activities which are consistent with the principles of international law embodied in the Charter . . . , in particular with Article 2, paragraph 4, and Article 51, are not prohibited by the Convention on the Law of the Sea."[395]

Declarations for Italy made upon signature and confirmed upon ratification on January 13, 1995 state:

> Italy wishes also to confirm the following points made in its written statement dated 7 March 1983: according to the Convention, 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 right to obtain notification of military exercises or manoeuvres or to authorize them.

In addition to the United States, Germany, Italy, and the Netherlands have each rejected coastal State claims that purport to regulate military activities of foreign naval forces in the EEZ.[396] Similarly, the Declaration for the Netherlands, made on February 13, 2009, states:

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

396. See the Declaration for Italy with respect to the declaration made by India upon ratification, as well as the similar declarations made previously for Brazil, Cape Verde, and Uruguay, Nov. 24, 1995, and the Declaration for Italy with regard to the declaration made by Ecuador upon accession, Oct. 23, 2013.

> The Convention does not authorize the coastal state to prohibit military exercises in its EEZ. The rights of the coastal state in its EEZ are listed in article 56 of the Convention, and no such authority is given to the coastal state. In the EEZ all states enjoy the freedoms of navigation and overflight, subject to the relevant provisions of the Convention.

Likewise, the Declaration for Germany, made on October 14, 1994, states: "According to the Convention, 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."[397]

Accordingly, "[m]ilitary activities, such as anchoring, launching and landing of aircraft, operating military devices, intelligence collection, exercises, operations and conducting military surveys are recognized historic high seas uses that are preserved by article 58."[398] Thus, all States have the right to conduct military activities within the EEZ consistent with their due regard obligation to coastal State resource and other rights.[399]

The concept of "due regard" balances the obligations of the coastal State and other States within the EEZ. Nonetheless, "it is the duty of the flag State, not the right of the coastal State, to enforce this 'due regard' obligation."[400]

See § 1.6.2 for a general discussion of the EEZ.

The U.S. EEZ proclamation of 1983 preserves for all States high seas rights and freedoms that are not resource-related. The proclamation recognizes that the EEZ "remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high

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397. The declarations supporting foreign military activities in the EEZ are available at *United Nations Convention on the Law of the Seal*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en.

398. S. TREATY DOC. NO. 103-39, *supra* note 278, at 24.

399. *Id.*

400. *Id.*

> seas freedoms of navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the seas."[401] Thus, within the U.S. EEZ, "all nations will continue to enjoy the high seas rights and freedoms that are not resource related."[402]

2.6.2.1 Marine Scientific Research

Coastal States may regulate marine scientific research (MSR) conducted in marine areas under their jurisdiction. This includes the EEZ and the continental shelf. Marine scientific research includes activities undertaken in the ocean and coastal waters to expand general scientific knowledge of the marine environment for peaceful purposes and can include:

1. Physical and chemical oceanography
2. Marine biology
3. Fisheries research
4. Scientific ocean drilling and coring
5. Geological/geophysical scientific surveying
6. Other activities with a scientific purpose.

The results of MSR are generally made publicly available. It is the policy of the United States to encourage MSR. The advance consent of the United States is required for MSR conducted within the U.S. territorial sea. U.S. advance consent is required for MSR conducted within the U.S. EEZ and on the U.S. continental shelf per Presidential Proclamation 10071 of 9 September 2020, which is a departure from the 1983 United States Oceans Policy Statement.

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401. Proclamation No. 5030, Exclusive Economic Zone of the United States, 48 Fed. Reg. 10605 (Mar. 14, 1983); Statement on United States Oceans Policy, 1 PUB. PAPERS 378–79 (Mar. 10, 1983) [hereinafter U.S. Ocean Policy Statement].

402. White House, National Security Decision Directive No. 83 (Mar. 10, 1983) (Confidential; partially declassified on Aug. 10, 1992).

Commentary

More than 80 percent of the world's oceans remain unexplored and unmapped. UNCLOS promotes and facilitates marine scientific research (MSR) throughout the various maritime zones, requiring States and competent international organizations to cooperate in the development and conduct of MSR.[403] UNCLOS, therefore, plays a critical role in helping States understand and manage the marine environment and its resources.

UNCLOS does not define "marine scientific research" but it refers to "those activities undertaken in the ocean and coastal waters to expand knowledge of the marine environment and its processes."[404] It includes "physical oceanography, marine chemistry, marine biology, fisheries research, scientific ocean drilling and coring, geological and geophysical research, and other activities with a scientific purpose."[405] MSR must, however, be distinguished from hydrographic surveys and military surveys (military marine data collection). See § 2.6.2.2.

All States and competent international organizations may conduct MSR subject to certain limitations.[406] Foreign-flag vessels transiting the territorial sea or archipelagic waters in innocent passage are prohibited from carrying out MSR activities without the consent of the coastal or archipelagic State.[407] Similarly, foreign ships engaged in transit passage or archipelagic sea lanes passage may not carry out MSR activities in international straits or archipelagic sea lanes without prior authorization of the bordering States or the archipelagic State.[408] MSR in the EEZ and on the continental shelf also requires coastal State consent.[409] Once a request is made, the researching State may presume that consent has been granted and may proceed with

403. UNCLOS, art. 239.

404. S. TREATY DOC. NO. 103-39, *supra* note 278, at 79–80.

405. National Oceanic and Atmospheric Administration, Office of General Counsel, *Marine Scientific Research* (updated Dec. 9, 2020).

406. UNCLOS, art. 238.

407. *Id.* arts. 19(2)(j), 52, 245.

408. *Id.* arts. 40, 54.

409. *Id.* arts. 56, 77, 246.

its project six months after the date on which it has provided the required information to the coastal State unless, within four months of receiving the information, the coastal State informs the researching State that consent is being withheld.[410] On the high seas and deep seabed (the Area), all States and competent international organizations have a right to conduct MSR.[411]

States and competent international organizations intending to conduct MSR in a foreign EEZ or on a foreign continental shelf must provide the coastal State six-month advance notification. The request shall contain the following information:

> (a) the nature and objectives of the project;
> (b) the method and means to be used, including name, tonnage, type and class of vessels and a description of scientific equipment;
> (c) the precise geographical areas in which the project is to be conducted;
> (d) the expected date of first appearance and final departure of the research vessels, or deployment of the equipment and its removal, as appropriate;
> (e) the name of the sponsoring institution, its director, and the person in charge of the project; and
> (f) the extent to which it is considered that the coastal State should be able to participate or to be represented in the project.[412]

Although permission is normally granted, coastal States may withhold consent if the MSR project (a) "is of direct significance for the exploration and exploitation of natural resources"; (b) "involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment"; (c) "involves the construction, operation or use of artificial islands, installations and structures"; (d) contains information from the researching State regarding the nature and objectives of the project that is inaccurate; or (e) involves a researching State that has "outstanding

410. *Id.* art. 252.
411. *Id.* arts. 87, 256, 257.
412. *Id.* art. 248.

obligations to the coastal State from a prior research project."[413] Thus, coastal State consent may not be arbitrarily withheld, thereby maximizing access for research activities while recognizing coastal State resource interests.

To encourage MSR, coastal State consent is implied unless the coastal State informs the requesting State or organization, within four months of receipt of the request, that (a) it has withheld its consent; (b) the information provided by the requesting State or international organization "regarding the nature or objectives of the project does not conform to the manifestly evident facts"; (c) it "requires supplementary information relevant to conditions and the information" provided by the requesting State or international organization; or (d) outstanding obligations exist with respect to a previous MSR project carried out by the requesting State or organization.[414]

If a coastal State lacks sufficient grounds to withhold consent, it can still protect its interests against potential surreptitious activities by imposing conditions on the researching State. For example, an MSR request may be a subterfuge to collect military intelligence against the coastal State. Under these circumstances, the coastal State could exercise its right to participate or be represented in the MSR project. This could include having a coastal State representative on board the research vessel or scientific research installation without obligation to contribute to the cost of the project.[415] The coastal State may also require the researching State to provide it with preliminary reports, as well as with the final results and conclusions after the project is completed.[416] The coastal State may additionally request the researching State to provide all data, which may be copied, and portions of samples derived from the project, as well as an assessment of such data, samples, and research results.[417] The United States, for example, requires submission of a copy of all data collected during a foreign research project, as well as the project's final report, to the

413. *Id.* art. 246(5).
414. *Id.* art. 252.
415. *Id.* art. 249(1)(a).
416. *Id.* art. 249(1)(b).
417. *Id.* art. 249(1)(c).

National Oceanic and Atmospheric Administration's National Center for Environmental Information.[418]

Additionally, a coastal State may suspend or cease MSR activities in progress within its EEZ or on its continental shelf if (a) the research activities are not being conducted in accordance with the information provided by the requesting State or international organization upon which coastal State consent was based; (b) the requesting State or competent international organization "fails to comply with the provisions of article 249 concerning the rights of the coastal State" with respect to the MSR project; (c) there is a major change to the MSR project or activities; or (d) the requesting State or international organization does not rectify within a reasonable period of time any of the discrepancies identified by the coastal State.[419]

The United States is a recognized leader in MSR and has consistently promoted maximum freedom for such research. It is also U.S. policy to promote the free and full disclosure of the results of MSR and States are encouraged to publicize and disseminate knowledge resulting from their MSR activities.[420] Nonetheless, if release of the data has direct significance on the exploration and exploitation of natural resources in the EEZ or on the continental shelf, coastal States may require their consent before such information is released to the public.[421]

MSR activities by the United States will contribute to the following objectives: (1) accelerate the development of ocean resources; (2) expand human knowledge of the marine environment; (3) encourage private investment in the exploration, technological development, marine commerce, and economic utilization of marine resources; (4) preserve the role of the United States as a leader in MSR and resource development; (5) advance education and training in marine science; (6) develop and improve the capabilities, performance, use, and efficiency of technology used to explore, research, survey, recover re-

418. NOAA, *supra* note 405.
419. UNCLOS, art. 253.
420. *Id.* arts. 239, 242–44, 255; S. TREATY DOC. NO. 103-39, *supra* note 278, at 79.
421. UNCLOS, art. 249(2).

sources, and transmit energy in the marine environment; (7) effectively use scientific and engineering resources in close cooperation between the public and private sectors to avoid unnecessary duplication of effort and waste; and (8) cooperate with other nations and international organizations in MSR activities.[422]

Despite the Convention's provisions on coastal State jurisdiction over MSR in the EEZ, the United States did not avail itself of that right in its 1983 Ocean Policy Statement because of the U.S. interest in encouraging MSR and avoiding unnecessary burdens on researching States.[423] However, in 2020, the United States amended its MSR policy to increase maritime domain awareness and reduce potential exposure to security, economic, and environmental risks. The new policy requires advance consent for all cases of foreign MSR in the U.S. EEZ or on its continental shelf.[424]

Coastal State consent is implied unless the coastal State informs the requesting State or organization within four months of receipt of the request that (a) it has withheld its consent; (b) the information provided by the requesting State or international organization "regarding the nature or objectives of the project does not conform to the manifestly evident facts"; (c) it "requires supplementary information relevant to conditions and the information" provided by the requesting State or international organization; or (d) outstanding obligations exist with respect to a previous MSR project carried out by the requesting State or organization.[425]

There is certain oceanographic research and similar activities that are not governed by the provision of MSR in Part XIII of UNCLOS,

422. 33 U.S.C. § 1101.

423. U.S. Ocean Policy Statement, *supra* note 401.

424. Proclamation No. 10071, Revision to United States Marine Scientific Research Policy, 85 Fed. Reg. 59165 (Sept. 18, 2020).

425. UNCLOS, art. 252.

such as operational oceanography, prospecting for natural resources,[426] environmental monitoring,[427] underwater cultural heritage,[428] biologging, citizen science, aircraft sensing beyond the territorial sea, and satellite remote sensing.[429] Hydrographic surveys and military surveys are also not regulated by Part XIII and do not constitute MSR.[430]

2.6.2.2 Hydrographic Surveys and Military Surveys

Although coastal State consent must be obtained in order to conduct MSR in its EEZ, the coastal State may not regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor may it require notification of such activities. A hydrographic survey is the collection of information for maritime cartography (commonly used to make navigational charts and similar products to support safety of navigation).

A hydrographic survey may include measurements of the depth of water, configuration and nature of the natural bottom, direction and force of currents, heights and times of tides and water stages, and hazards to navigation.

A military survey is the collection of marine data for military purposes and, whether classified or not, is generally not made publicly available. A military survey may include collection of oceanographic, hydrographic, marine geological, geophysical, chemical, biological, acoustic, and related data.

OPNAVINST 3128.9G, Diplomatic Clearance for U.S. Navy Marine Data Collection Activities in Foreign Jurisdictions, provides guidance for the determination of requirements and procedures for marine data collection activities by Department of the Navy (DON) marine data collection assets. Marine data collection is a general term used when referring to all types of

426. *Id.* arts. 56, 77.

427. *Id.* art. 204.

428. *Id.* arts. 33, 303; Underwater Cultural Heritage Convention.

429. ROACH, *supra* note 219, ch. 15. *See also* James Kraska et al., *Bio-Logging of Marine Migratory Species in the Law of the Sea*, 51 MARINE POLICY 394 (2014).

430. *See* 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 37–48 (Peter Dutton ed., 2010).

survey or marine scientific activity (e.g., military surveys, hydrographic surveys, and MSR).

Commentary

While coastal States may regulate MSR in their EEZ, they do not have jurisdiction over hydrographic surveys and military surveys (military marine data collection) beyond their territorial sea. States that purport to limit military marine data collection (surveillance operations and oceanographic surveys) in their EEZ argue that such operations are akin to MSR and are therefore subject to coastal State control. That argument is clearly flawed. To the extent that coastal State laws purport to regulate hydrographic surveys and military marine data collection activities, to include military oceanographic surveys and underwater, surface, and aviation surveillance and reconnaissance missions, they are inconsistent with State practice and customary international law, as well as the plain language of UNCLOS.[431]

China, for example, enacted domestic legislation and implementing regulations in 1998 that prohibit all types of marine data collection—MSR, hydrographic surveys, and military marine data collection—in its EEZ without Chinese consent.[432] The law's implementing regulations similarly require Chinese consent for foreign-related marine data collection activities in the EEZ.[433] Additionally, the 2002 Surveying and Mapping Law requires foreign organizations and individuals that want to engage in surveying and mapping operations in "sea areas under the jurisdiction" of China to obtain the prior approval of competent Chinese authorities.[434] Surveying and mapping are

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431. Raul Pedrozo, *Military Activities in the Exclusive Economic Zone: East Asia Focus*, 90 INTERNATIONAL LAW STUDIES 514, 525 (2014).

432. Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, Order No. 6, art. 8 (promulgated by the Standing Committee National People's Congress, Feb. 26, 1998, effective June 26, 1998).

433. Provisions on the Administration of Foreign-Related Maritime Scientific Research, June 18, 1996 (promulgated by Decree No. 199 of the State Council of the People's Republic of China, June 18, 1996).

434. Law of the People's Republic of China on the Surveying and Mapping, art. 7 (promulgated by the Standing Committee National People's Congress, Aug. 29, 2002, effective Dec. 1, 2002).

broadly defined in the law to include the "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."[435] Beijing's application of the 1998 and 2002 laws is inconsistent with UNCLOS because the laws purport to regulate hydrographic surveys and military marine data collection in the EEZ, in addition to foreign MSR.[436]

Although UNCLOS does not define the different types of marine data collection, it clearly differentiates between MSR, surveys, and military activities in various articles. The term "marine scientific research" was specifically chosen by the drafters of the Convention to distinguish MSR from other types of marine data collection, such as hydrographic surveys and military oceanographic surveys. Ships in innocent passage, for example, may not engage in "research or survey activities."[437] A similar restriction applies to ships engaged in transit passage: "marine scientific research and hydrographic survey ships . . . may not carry out any research or survey activities" without prior authorization of the States bordering the strait.[438] The same prohibition applies to ships engaged in ASLP and ships transiting archipelagic waters in innocent passage.[439] Moreover, coastal State jurisdiction over marine data collection in the EEZ or on the continental shelf is limited to MSR.[440] Similarly, Article 87(1)(f) refers only to "scientific research." 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 in the other maritime zones, including the contiguous zone and the EEZ. Hydrographic surveys and other military marine data collection activities are considered high seas freedom of navigation

435. *Id.* art. 2.
436. Pedrozo, *supra* note 430. *See also* ROACH, *supra* note 219, at 442–58.
437. UNCLOS, art. 19(2)(j).
438. *Id.* art. 40.
439. *Id.* arts. 52, 54.
440. *Id.* art. 56(1)(b)(ii); *Id.* pt. XIII.

and other internationally lawful uses of the sea and are therefore exempt from coastal State jurisdiction in the contiguous zone and EEZ.[441]

2.6.3 High Seas Freedoms and Warning Areas

All ships and aircraft—including warships and military aircraft—enjoy complete freedom of movement and operation on and over the high seas. For warships, this includes task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities, and ordnance testing and firing. All States enjoy the right to lay submarine cables and pipelines on the bed of the high seas and the continental shelf beyond the territorial sea, with coastal State approval for the course of pipelines on the continental shelf. All of these activities must be conducted with due regard for the rights of other States and the safe conduct and operation of other ships and aircraft.

Commentary

Freedom to navigate and operate on, over, and under the high seas is a fundamental tenet of the U.S. Ocean Policy.[442] No State may validly purport to subject any part of the high seas to its sovereignty.[443] Thus, both UNCLOS and the High Seas Convention provide that all ships and aircraft, including warships and military aircraft, enjoy freedom of movement and operation on and over the high seas.[444] For warships and military aircraft, this includes task

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441. *Id.* arts. 58, 86, 87; DOALOS, MARINE SCIENTIFIC RESEARCH: A REVISED GUIDE TO THE IMPLEMENTATION OF THE RELEVANT PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 6, U.N. Sales No. E.10.V.12 (2010). *See also* James Kraska, *Sovereignty at Sea*, 51 SURVIVAL 13 (2009); JAMES KRASKA, MARITIME POWER AND THE LAW OF THE SEA 302–04 (2011); Oxman, *supra* note 218, 844–47. *See also* Raul Pedrozo, *Military Activities in and over the Exclusive Economic Zone*, in FREEDOM OF SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF THE SEA CONVENTION 235 (Myron H. Nordquist, Tommy T.B. Koh, & John Norton Moore eds., 2009); Raul Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone*, 9 CHINESE JOURNAL OF INTERNATIONAL LAW 9–29 (Mar. 2010); Raul Pedrozo, *Responding to Ms. Zhang's Talking Points*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 207–23 (Mar. 2011); Pedrozo, *supra* note 431, at 524–27.

442. S. TREATY DOC. NO. 103-39, *supra* note 278, at 26.

443. UNCLOS, art. 89; High Seas Convention, art. 2.

444. UNCLOS, arts. 87, 90; High Seas Convention, arts. 2, 4.

force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities, and ordnance testing and firing.[445]

All of these activities must be conducted with due regard for the rights of other States and the safe conduct and operation of other ships and aircraft.[446] The "due regard" standard requires States to be cognizant of the interests of other States in using a high seas area, to balance those interests with their own, and to refrain from activities that unreasonably interfere with the exercise of other States' high seas freedoms in light of that balancing of interests.[447]

All States also enjoy the right to lay and operate submarine cables and pipelines.[448] Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources, and the prevention, reduction, and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of submarine cables or pipelines.[449] However, the delineation of the course for the laying of pipelines on the continental shelf is subject to the consent of the coastal State.[450] When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position and possibilities of repairing existing cables or pipelines shall not be prejudiced.[451]

The Sound Surveillance System (SOSUS) is a network of hydrophone arrays on the seafloor throughout the Atlantic and Pacific Oceans that is used to track submarines. These arrays may be lawfully emplaced in other nations' continental shelves beyond the territorial sea without coastal State notice or approval.

In peacetime, the 1884 Submarine Cables Convention, the High Seas Convention, and UNCLOS protect submarine cables on the high

445. S. TREATY DOC. NO. 103-39, *supra* note 278, at 26.
446. UNCLOS, art. 87; High Seas Convention, art. 2.
447. S. TREATY DOC. NO. 103-39, *supra* note 278, at 26.
448. UNCLOS, arts. 79(1), 112(1); High Seas Convention, art. 26; Continental Shelf Convention, art. 4; S. TREATY DOC. NO. 103-39, *supra* note 278, at 30.
449. UNCLOS, art. 79(2); High Seas Convention, art. 26(2).
450. UNCLOS, art. 79(3).
451. *Id.* art. 79(5); High Seas Convention, art. 26(3).

seas from intentional damage. The 1884 Convention prohibits the breaking or injury of a submarine cable through willful or culpable negligence, which results in a total or partial interruption of telegraphic communication. This prohibition does not apply, however, to situations of accidental damage, such as by fishers. There is also an exemption for damage caused by parties while trying to protect their lives or vessels if they have taken "all necessary precautions" to avoid damaging cables.[452] If a warship on the high seas has "reason to believe" that a ship (other than a warship) has violated the provisions of the Convention, it may board the suspect vessel to examine the ship's documents and verify its nationality, but it may not seize the vessel or its crew.[453] This boarding authority has been used on only one occasion. In 1959, off the coast of Newfoundland, a boarding party from the USS *Roy O. Hale* boarded the Soviet fishing trawler *Novorossiisk*, which was suspected of cutting five submarine cables.[454] A subsequent investigation revealed that that the *Novorossiisk* had been operating in the immediate vicinity of all five cable breaks at the time the lines were cut. Following the investigation, the United States informed the Soviet Union that the boarding was justified under international law and that there was a "strong presumption" that the Soviet ship had cut the cables.[455] The flag State of the vessel accused of damaging a cable shall prosecute violations of the 1884 Convention.[456] If the flag State does not assert jurisdiction, the courts in each of the contracting States, in the case of its subjects or citizens, shall have jurisdiction.[457] To facilitate criminal prosecution, the parties are required to enact domestic legislation implementing the penal provisions of the Convention.[458]

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452. Submarine Cables Convention, art. 2.

453. *Id.* art. 10.

454. Press Release, U.S. Department of State, U.S. and U.S.S.R. Exchange Notes on Damage to Submarine Cables (Mar. 23, 1959), *reprinted in* 40 DEPARTMENT OF STATE BULLETIN, no. 1034, 555 (1959).

455. *Id.* at 557.

456. Submarine Cables Convention, art. 8.

457. *Id.*

458. *Id.* art. 12.

> Provisions in the High Seas Convention and UNCLOS mirror the prohibition in Article 2 of the Submarine Cables Convention.[459] UNCLOS prohibits "conduct calculated or likely to result" in a break or injury.[460] A State is also required to adopt domestic legislation that makes it a punishable offense for a ship flying its flag or a person subject to its jurisdiction to willfully or through culpable negligence break or injure a submarine cable beneath the high seas, in such manner as to be liable to interrupt or obstruct telegraphic or telephonic communications.[461] An exception applies if the break or injury occurs while the ship or person "acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury."[462] The boarding regime of the 1884 Convention is preserved in Article 30 of the High Seas Convention and is codified in 47 U.S.C. § 26. The High Seas Convention and UNCLOS also reflect the long-standing regime of liability and indemnity, which are derived from the 1884 treaty.[463]
>
> The Submarine Cables Convention is implemented in 47 U.S.C. § 21 et seq. (1982).

2.6.3.1 Warning Areas

Any State may declare a temporary warning area in international waters and airspace to advise other States of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. The United States and other States routinely declare such areas for missile testing, gunnery exercises, space vehicle recovery operations, and other purposes entailing some danger to other lawful uses of the seas by others. Notice of the establishment of such areas must be promulgated in advance in the form of a special warning to mariners, notice to mariners, notice to airmen, hydro-Atlantic/hydro-Pacific messages, and the global maritime distress and safety system.

Ships and aircraft of other States are not required to remain outside a declared warning area but are obliged to refrain from interfering with activities

459. High Seas Convention, art. 27; UNCLOS, art. 113.
460. UNCLOS, art. 113.
461. High Seas Convention, art. 27; UNCLOS, art. 113.
462. High Seas Convention, art. 27; UNCLOS, art. 113.
463. High Seas Convention, arts. 28, 29; UNCLOS, arts. 114, 115.

therein. Consequently, ships and aircraft of one State may operate in a warning area within international waters and airspace declared by another State to collect intelligence and observe the activities involved, subject to the requirement of due regard for the rights of the declaring State to use international waters and airspace for such lawful purposes. The declaring State may take reasonable measures including the use of proportionate force to protect the activities against interference.

Commentary

The Worldwide Navigational Warning Service (WWNWS) was established in 1977 through the joint efforts of the International Hydrographic Organization (IHO) and the IMO. The WWNWS is a coordinated global service for the promulgation of information on hazards to navigation that might endanger international shipping. Maritime safety information includes that hazardous military operations are taking place.[464]

The WWNWS recognizes that military activities at sea, such as naval exercises and missile firings, are lawful uses of the sea, for which "naval area" warnings are to be issued. The subjects considered suitable for transmission as NAVAREA warnings include "information that might affect the safety of shipping, sometimes over wide areas, e.g., naval exercises, missile firings."[465] Annex 15 to the Chicago Convention similarly acknowledges the legitimacy of military activities in international airspace by providing that military exercises that pose hazards to civil aviation are appropriate subjects for notices to airmen: "a NOTAM shall be . . . issued concerning the . . . presence of hazards which affect air navigation (including . . . military exercises . . .)."[466]

These temporary warning areas are not considered prohibited/exclusion zones. Seaward of the territorial sea, ships and aircraft of all

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464. National Geospatial-Intelligence Agency, Notice to Mariners No. 1, NM 1/22, Special Paragraphs ¶¶ 42, 40 (2022).

465. IMO, Amendments to Resolution A.706(17)—World-Wide Navigational Warning Service, annex 1 ¶ 4.2.1.3.13, IMO Doc. MSC.1/Circ.1288/Rev.1 (June 24, 2013).

466. Chicago Convention, annex 15 (Aeronautical Information Services) at § 6.3.2.3 (July 2018).

> nations enjoy high seas freedoms of navigation and overflight and other internationally lawful uses of the seas related to these freedoms.[467] Ships and aircraft, therefore, retain a right to transit through the area with the understanding that there is an increased risk in doing so. For example:
>
> > Firing and bombing practice exercises take place either occasionally or regularly in numerous areas established for those purposes along the coast of practically all maritime countries.
> >
> > . . . the responsibility to avoid accidents rests with the authorities using the areas for firing and/or bombing practice . . . .
> >
> > Warning signals, usually consisting of red flags or red lights, are customarily displayed before and during the practice, but the absence of such warnings cannot be accepted as evidence that a practice area does not exist. Vessels should be on the lookout for local warnings and signals, and should, whenever possible, avoid passing through an area in which practice is in progress, but if compelled to do so should endeavor to clear it at the earliest possible moment.[468]
>
> When conducting military activities, to include naval exercises, beyond the territorial sea, States shall have "due regard" to the rights of other States to exercise their high seas freedoms of navigation and overflight.[469] In exercising their high seas freedoms, States must do so with "due regard" for the right of States to use the high seas for lawful purposes, including conducting military exercises.[470] Intentional interference with a lawful military exercise would violate the due regard obligation.[471]

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467. UNCLOS, arts. 58, 86–87, 89–90.

468. National Geospatial-Intelligence Agency, Notice to Mariners No. 1, NM 1/20, ¶ 30 (Firing Danger Areas) (2020).

469. UNCLOS, arts. 58(3), 87(2).

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

471. *See also* Pedrozo, *supra* note 187, at 962–63; Raul Pedrozo, *China's Continued Disdain for the International Legal Order*, LAWFARE (Aug. 10, 2021), https://www.lawfareblog.com/chinas-continued-disdain-international-legal-order; Raul Pedrozo, *Fishing for Trouble? EEZs, Military Exercises, Due Regard, and More*, LAWFIRE (Feb. 4, 2022),

2.6.4 Declared Security and Defense Zones

International law does not recognize the peacetime right of any nation to restrict the navigation and overflight of foreign warships and military aircraft beyond its territorial sea. Although several coastal States have asserted claims that purport to prohibit warships and military aircraft from operating in so-called security zones extending beyond the territorial sea, such claims have no basis in international law in time of peace and are not recognized by the United States.

Commentary

Several States claim military security zones beyond the territorial sea, in which they purport to regulate the activities of foreign warships and military aircraft. Coastal State restrictions include prior notification or authorization for entry into the zone, limits on the number of foreign ships or aircraft present at any given time in the zone, prohibitions on various operational activities in the zone, or complete exclusion from the zone.[472]

The following States purport to regulate or prohibit foreign military activities in the EEZ: Bangladesh, Brazil, Burma (Myanmar), Cape Verde, China, Ecuador, India, Indonesia, Iran, Kenya, Malaysia, the Maldives, Mauritius, North Korea, Pakistan, the Philippines, Portugal, Thailand, Uruguay, and Vietnam. Indonesia and the Philippines have not enacted domestic regulations restricting military activities in their EEZ, but they have on occasion objected to foreign military activities in the zone.[473] In addition, six nations claim security jurisdiction in their 24-nautical mile contiguous zone: Cambodia, China, Nicaragua, Sudan, Syria, and Vietnam.[474]

These claimed security zones and restrictions on military activities have no basis in international law, including UNCLOS, and illegally

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https://sites.duke.edu/lawfire/2022/02/04/guest-post-professor-pete-pedrozo-on-fishing-for-trouble-eezs-military-exercises-due-regard-and-more/.

472. S. TREATY DOC. NO. 103-39, *supra* note 278, at 26.

473. MCRM; Pedrozo, *Military Activities in and over the Exclusive Economic Zone*, *supra* note 441, at 237.

474. MCRM.

> restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea. Accordingly, the United States does not recognize the peacetime validity of any claimed security or military zone seaward of the territorial sea that purports to restrict or regulate high seas freedoms of navigation and overflight, as well as other internationally lawful uses of the sea.[475]

> North Korea, for example, established an expansive illegal zone off its east and west coasts in August 1977. The "military zone" extends "50 miles from the starting line of the territorial waters in the East Sea and to the boundary line of the economic sea zone in the West Sea." The zone was purportedly established to safeguard the North Korean EEZ and defend the "nation's interests and sovereignty." Foreign military ships and aircraft are prohibited from entering the zone, and "civilian ships and civilian planes (excluding fishing boats) are allowed to navigate or fly only with appropriate prior agreement or approval." Civilian ships and aircraft that have been granted access to the zone may not, however, engage in "acts for military purposes or acts infringing upon the economic interests." Taking photographs and collecting marine data are also strictly prohibited.[476] In effect, North Korea treats the waters and airspace contained within the military zone as internal waters and national airspace, respectively. Such a claim is clearly inconsistent with Part II (the territorial sea and contiguous zone), Part III (the EEZ), and Part VII (the high seas) of UNCLOS, as well as Articles 1–3 of the Chicago Convention.[477]

The 1945 Charter of the United Nations (Charter of the UN) and general principles of international law recognize that a State may exercise measures of individual and collective self-defense against an armed attack or imminent threat of armed attack. Those measures may include the establishment of defensive sea areas or maritime control areas in which the threatened State seeks to enforce some degree of control over foreign entry into those areas.

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475. S. TREATY DOC. NO. 103-39, *supra* note 278, at 26.

476. MCRM; Korean Central News Agency, Aug. 1, 1977, *in* 4 FOREIGN BROADCAST INFORMATION SERVICE, Asia and Pacific, at D6; THE PEOPLE'S KOREA, Aug. 10, 1977, at 2 col. 1, *reprinted in* Choon-Ho Park, *The 50-mile Military Boundary Zone of North Korea*, 72 AMERICAN JOURNAL OF INTERNATIONAL LAW 866, 866–67 n.1 (1978).

477. *See* Pedrozo, *supra* note 431, 539–40.

Historically, the establishment of such areas extending beyond the territorial sea has been restricted to periods of war or to declared national emergency involving the outbreak of hostilities. The geographical scope of such areas and the degree of control a coastal State may lawfully exercise over them must be reasonable in relation to the needs of national security and defense.

Commentary

Measures of protective jurisdiction may be accompanied by a special proclamation defining the area of control and describing the types of control to be exercised therein. Typically, this is done where a state of belligerence exists, such as during the Second World War. In addition, so-called "defensive sea areas," though usually limited to the territorial sea, occasionally have included areas of the high seas.

The United States restricts free access to certain areas, such as military installations, due to their strategic importance. Restricted access to naval defensive sea areas, naval airspace reservations, administrative areas, and the Trust Territory of the Pacific Islands protects military installations and the "personnel, property, and equipment assigned to or located therein."[478] The entry or movement of persons, ships, or aircraft in the areas is controlled. Persons, ships, and aircraft shall not enter designated defense areas without authorization. Every effort is made, however, to avoid unnecessary interference with the free movement through the area.[479] Generally, cameras or photographs are prohibited within a naval defensive sea area.[480] Entry into defense areas will only be authorized if the ship, aircraft, or person will not, under "existing or reasonably foreseeable future conditions," endanger or impose an undue burden upon "the armed forces located within or contiguous to the area."[481]

Note, however, that the controls requiring entry authorization do not apply to foreign flag ships exercising their right of innocent passage under international law, and control of entry into the territorial sea

478. 32 C.F.R. § 761.2(a) (2023).
479. 32 C.F.R. § 761.2(b) (2023).
480. 32 C.F.R. § 761.20(1) (2023).
481. 32 C.F.R. § 761.6(a)(1) (2023).

by foreign flag ships shall be exercised consistently with the right of innocent passage.[482]

Entry into defense areas can be denied for any of the following reasons: (1) prior noncompliance with entry control regulations; (2) willfully furnishing false, incomplete, or misleading information; (3) advocacy of the overthrow or alteration of the government of the United States by unconstitutional means; (4) commission of, or attempt or preparation to commit, an act of espionage, sabotage, sedition, or treason; (5) performing, or attempting to perform, duties, or otherwise acting so as to serve the interest of another government to the detriment of the United States; (6) deliberate unauthorized disclosure of classified defense information; (7) knowing membership with the specific intent of furthering the aims of any foreign or domestic organization that unlawfully advocates or practices acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the government of the United States or any state or subdivision thereof by unlawful means; (8) serious mental irresponsibility; (9) chronic alcoholism or addiction to the use of narcotic drugs; (10) illegal presence in the United States; (11) being the subject of proceedings for deportation; or (12) conviction of larceny of property of the United States.[483] No person, except those aboard public vessels or aircraft of the U.S. armed forces, or those working on behalf of the armed forces or under military orders, shall enter a defense area without the permission of the Entry Control Commander.[484] Privately owned local craft that are pre-approved may enter the areas; foreign vessels traveling with diplomatic or special clearance and ships in distress also may enter the areas, but subject to local clearances and control by the senior officer present.[485]

The following officers of the armed forces are designated Entry Control Commanders with authority to approve or disapprove individual

482. OPNAVINST 5500.11F, Regulations Governing the Issuance of Entry Authorizations for Naval Defensive Sea Areas, Naval Airspace Reservations, and Areas Under Navy Administration, encl. (1) (Entry Regulations) ¶¶ 1.a(3), 1.b, 4.a(1)–(2), 5.a (July 17, 2012).

483. 32 C.F.R. § 761.6(b) (2023).

484. 32 C.F.R. §§ 761.7(a), 761.10 (2023).

485. 32 C.F.R. §§ 761.12, 761.14.601 (2023).

entry authorizations for persons, ships, or aircraft as indicated: (a) Chief of Naval Operations, authorization for all persons, ships, or aircraft to enter all defense areas; (b) Commander in Chief, U.S. Atlantic Fleet, authorization for all persons, ships, or aircraft to enter defense areas in the Atlantic; (c) Commander in Chief, U.S. Pacific Fleet, authorization for all persons, ships, or aircraft to enter defense areas in the Pacific; (d) Commander U.S. Naval Forces Caribbean, authorization for all persons, ships, and aircraft to enter the Guantanamo Bay Naval Defensive Sea Area and the Guantanamo Naval Airspace Reservation (this authority is delegated to the Commander U.S. Naval Base, Guantanamo Bay); (e) Commander U.S. Naval Base, Guantanamo Bay, authorization for all persons, ships, and aircraft to enter the Guantanamo Bay Naval Defensive Sea Area and the Guantanamo Naval Airspace Reservation; (f) Commander Third Fleet, authorization for U.S. citizens and U.S. registered private vessels to enter Midway Island, Kingman Reef, Kaneohe Bay Naval Defensive Sea Area, and Pearl Harbor Defensive Sea Area and for Filipino workers employed by U.S. contractors to enter Wake Island; (g) Commander U.S. Naval Forces, Marianas, authorization in conjunction with the High Commissioner for non-U.S. citizens, ships, or aircraft documented under laws other than those of the United States or the Trust Territory to enter those portions of the Trust Territory where entry is not controlled by the Department of the Army or the Defense Nuclear Agency; (h) senior naval commander in defense area, emergency authorization for persons, ships, or aircraft in cases of emergency or distress; and (i) the U.S. Coast Guard regulates the movement of shipping within the Honolulu Harbor and Commandant, Fourteenth Naval District, as representative of the Secretary of the Navy, retains responsibility for security of the Honolulu Defensive Sea Area.[486] The Commander Seventeenth Coast Guard District is also designated an Entry Control Commander by the Commandant, U.S. Coast Guard.

Naval Defensive Sea Areas and Naval Airspace Reservations may be established by the President by Executive Order.[487] The following

486. 32 C.F.R. § 761.9 (2023).
487. 18 U.S.C. § 2152.

Naval Defensive Sea Areas and Naval Airspace Reservations are under the control of the Secretary of the Navy:

- Guantanamo Bay Naval Defensive Sea Area and Guantanamo Bay Naval Airspace Reservation;[488]
- Honolulu Defensive Sea Area;[489]
- Kaneohe Bay Naval Defensive Sea Area and Kaneohe Bay Naval Airspace Reservation;[490]
- Pearl Harbor Defensive Sea Area;[491]
- Johnston Island, Kingman Reef, Midway Island, Palmyra Island, and Wake Islands Naval Defensive Sea Areas and Naval Airspace Reservations;[492]
- Kiska Island Naval Defensive Sea Area and Kiska Island Naval Airspace Reservation;[493] and
- Kodiak Naval Defensive Sea Area and Unalaska Island Naval Defensive Sea Area and Unalaska Island Naval Air-space Reservation.[494]

The Secretary of the Interior is responsible for the civil administration of Wake Island, whereas the Secretary of the Navy is responsible

488. Exec. Order No. 8749, 6 Fed. Reg. 2252, 3 C.F.R. 1943 Cum. Supp. 931 (May 1, 1941).

489. Exec. Order No. 8987, 6 Fed. Reg. 6675, 3 C.F.R. 1943 Cum. Supp. 1048 (Dec. 20, 1941).

490. Exec. Order No. 8681, 6 Fed. Reg. 1014, 3 C.F.R. 1943 Cum. Supp. 893 (Feb. 14, 1941).

491. Exec. Order No. 8143, 4 Fed. Reg. 2179, 3 C.F.R. 1943 Cum. Supp. 504 (May 26, 1939).

492. Exec. Order No. 8682, 6 Fed. Reg. 1015, 3 C.F.R. 1943 Cum. Supp. 894 (Feb. 14, 1941), *as amended by* Exec. Order No. 8729 (6 Fed. Reg. 1791, 3 C.F.R. 1943 Cum. Supp. 919 (Apr. 2, 1941) and Exec. Order 9881, 12 Fed. Reg. 5325, 3 C.F.R. (1943–48 Comp. 662) (Aug. 4, 1947).

493. Exec. Order No. 8680, 6 Fed. Reg. 1014, 3 C.F.R. 1943 Cum. Supp. 892 (Feb. 14, 1941), *as amended by* Exec. Order 8729, 6 Fed. Reg. 1791, 3 C.F.R. 1943 Cum. Supp. 919 (Apr. 2, 1941).

494. Exec. Order No. 8717, 6 Fed. Reg. 1621, 3 C.F.R. 1943 Cum. Supp. 915 (Mar. 22, 1941); Kodiak Naval Airspace Reservation, Exec. Order No. 8597, 5 Fed. Reg. 4559, 3 C.F.R. 1943 Cum. Supp. 837) (Nov. 18, 1940), *as amended by* Exec. Order 9720 of May 8, 1946 (11 Fed. Reg. 5105; 3 C.F.R. (1943–48 Comp. 527) (May 8, 1946); Exec. Order 8749, 6 Fed. Reg. 2252, 3 C.F.R. 1943 Cum. Supp. 931 (May 1, 1941).

for the civil administration of Midway Island.[495] On June 24, 1972, the Department of the Air Force assumed responsibility for the civil administration of Wake Island pursuant to an agreement between the Department of the Interior and the Department of the Air Force.[496]

Restricted entry into all Naval Airspace Reservations, except the Guantanamo Bay Naval Airspace Reservation, has been suspended. Furthermore, restricted entry into several Naval Defensive Sea Areas and Administrative Areas also has been suspended, including with regard to Honolulu Defensive Sea Area; Kiska Island Naval Defensive Sea Area; Kodiak Island Naval Defensive Sea Area; Unalaska Island Naval Defensive Sea Area; Wake Island Naval Defensive Sea Area (except for entry of foreign flag ships and foreign nationals); and that part of Kaneohe Defensive Sea Area lying beyond a 500-yard buffer zone around the perimeter of the Kaneohe Marine Corps Air Station at Mōkapu Peninsula and eastward to Kapoho Point, Oahu.[497] The suspension of restrictions on entry, however, does not obviate the authority of appropriate commanders to lift the suspension and reinstate controls on entry.[498]

2.6.5 Polar Regions

2.6.5.1 Arctic Region

The United States considers the waters, ice pack, and airspace of the Arctic region beyond the lawfully claimed territorial seas of littoral States have international status and are open, subject to the same navigation and overflight regimes for the ships and aircraft of all States. The Arctic region is a maritime domain. As such, existing policies and authorities relating to maritime areas continue to apply. Although several States have at times attempted to claim sovereignty over the Arctic on the basis of discovery, historic use, ethnicity, contiguity (proximity), or the so-called sector theory, those claims are not recognized in international law. The Northwest Passage is a strait used for international navigation. The Northern Sea Route includes straits used for

495. Exec. Order No. 11048, Administration of Wake Island and Midway Island, 27 Fed. Reg. 8851, 3 C.F.R. (1959–63 Comp. 632) (Sept. 4, 1962).

496. 32 C.F.R. § 935.11 (2023).

497. 32 C.F.R. § 761.4(d) (2023).

498. 32 C.F.R. § 761.4(e) (2023).

international navigation. The regime of transit passage applies to passage through those straits.

Commentary

The DoD Arctic Strategy sets forth three prioritized, interdependent DoD objectives for the Arctic region: (1) defend the homeland; (2) compete when necessary to maintain favorable regional balances of power; and (3) ensure that common domains remain free and open.[499] The DoD's strategic approach to advance these objectives is to protect U.S. national security interests and prudently address risks to those interests in ways that uphold the region's rules-based order, without fueling strategic competition.[500] Implementing this strategic approach to advance DoD's Arctic objectives will require the DoD to (1) build Arctic awareness; (2) enhance Arctic operations; and (3) strengthen the rules-based order in the Arctic.[501]

The U.S. Coast Guard's new strategic outlook for the Arctic was also released in 2019. The new strategy updates the Coast Guard's vision to ensure safe, secure, and environmentally responsible maritime activity along three lines of effort: (1) enhance capability to operate effectively in a dynamic Arctic to uphold U.S. sovereignty and deliver mission excellence; (2) strengthen the rules-based order by promoting the rule of law and preventing malign influence in the Arctic; and (3) innovate and adapt to promote resilience and prosperity to deliver mission-critical services—including search and rescue, incident management, law enforcement, and marine safety—to this remote region.[502]

The Navy released its new Arctic Strategy in January 2021, outlining how the Navy will provide the right levels and types of presence on, under, and above Arctic water, to ensure that the United States is prepared to compete effectively and efficiently to maintain favorable

499. U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE UNDERSECRETARY OF DEFENSE FOR POLICY, REPORT TO CONGRESS: DEPARTMENT OF DEFENSE ARCTIC STRATEGY, 6–7 (June 2019).

500. *Id.* at 7.

501. *Id.* at 8.

502. U.S. COAST GUARD, ARCTIC STRATEGIC OUTLOOK 42 (Apr. 2019).

balances of power. This includes strengthening cooperative partnerships to ensure coordination with key allies and partners in the region. The Navy will advance enduring U.S. national security interests in the Arctic by pursuing these objectives: (1) maintaining enhanced presence; (2) strengthening cooperative partnerships; and (3) building a more capable Arctic naval force.[503]

The Department of Homeland Security also released its new Arctic Strategy in January 2021, outlining three goals that the Department endeavors to achieve: (1) secure the homeland through persistent presence and all domain awareness; (2) strengthen access, response, and resilience in the Arctic; and (3) advance Arctic governance and a rules-based order through targeted national and international engagement and cooperation.[504]

The United States is a member of the Arctic Council, which was established in 1996 by the Ottawa Declaration.[505] The Council is comprised of the eight Arctic States (Canada, Denmark (Greenland), Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States), six permanent participants that represent the indigenous peoples of the Arctic, and thirty-eight observers (thirteen non-Arctic States (including China), thirteen intergovernmental organizations, and twelve non-governmental organizations).

The Council provides a forum for promoting cooperation, coordination, and interaction among the Arctic States on common Arctic issues, such as issues of sustainable development, environmental protection, scientific cooperation, and search and rescue. Military matters are specifically excluded from the Council's mandate.[506] In 2008, the five Arctic coastal States (Canada, Denmark (Greenland), the Russian Federation, Norway, and the United States) declared that the law of the sea, as reflected in UNCLOS, is the legal framework

503. U.S. DEPARTMENT OF THE NAVY, A STRATEGIC BLUEPRINT FOR THE ARCTIC 10 (Jan. 5, 2021).

504. U.S. DEPARTMENT OF HOMELAND SECURITY, 2021 STRATEGIC APPROACH FOR ARCTIC HOMELAND SECURITY 5 (Jan. 11, 2021).

505. Declaration on the Establishment of the Arctic Council, Sept. 19, 1996, 35 INTERNATIONAL LEGAL MATERIALS 1387 (1996).

506. *Id.* ¶ 1(a).

that governs the Arctic Ocean, and that there is no need for a new legal regime to govern the Arctic Ocean.[507] To date, the Council has adopted three agreements: (1) the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (May 12, 2011); (2) the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (May 15, 2013); and (3) the Agreement on Enhancing International Arctic Scientific Cooperation (May 11, 2017).

Given the potential hazards of operating in polar regions, the IMO adopted the International Code for Ships Operating in Polar Waters (Polar Code), and related amendments to SOLAS and MARPOL, to make it mandatory, effective January 17, 2017. The Polar Code covers the full range of design, construction, equipment, operational, training, search and rescue, and environmental protection matters relevant to ships operating in Arctic and Antarctic waters. The Code does not apply to sovereign immune vessels.[508]

Article 234 of UNCLOS provides special rules for protecting and preserving the marine environment in ice-covered areas like the Arctic. It authorizes coastal States to

> adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.

These laws and regulations must, at a minimum, apply international rules and standards, but they may be more stringent and they do not

507. Ilulissat Declaration, Arctic Ocean Conference, May 27–28, 2008.

508. IMO Res. MSC.385(94), International Code for Ships Operating in Polar Waters (Polar Code) (Nov. 21, 2014); IMO Res. MEPC.264(68), International Code for Ships Operating in Polar Waters (Polar Code) (May 15, 2015).

require review by the IMO. Nonetheless, any law or regulation enacted pursuant to Article 234 must have "due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence."[509] In addition, it must be "consistent with other relevant provisions of the Convention and international law, including the exemption for vessels entitled to sovereign immunity in Article 236."[510]

Article 234 was negotiated directly between Canada, the Soviet Union, and the United States to provide a legal basis for implementing the provisions of the 1970 Canadian Arctic Waters Pollution Prevention Act (AWPPA) to commercial and private vessels, while at the same time protecting U.S. national security interests in preserving navigational rights and freedoms throughout the Arctic.[511] The AWPPA was widely considered to violate international law when it was originally enacted by Canada.[512] Russia and Canada have misused Article 234 to bolster their excessive maritime claims in the Arctic.

Both Russia[513] and Canada[514] draw excessive straight baselines in the Arctic. These baselines have the effect of restricting the right of transit passage in various international straits in the Arctic, including

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509. UNCLOS, art. 234; James Kraska, *Governance of Ice-Covered Areas: Arctic Ocean Rules*, 46 OCEAN DEVELOPMENT & INTERNATIONAL LAW 260 (2014).

510. 4 VIRGINIA COMMENTARY at 396; S. TREATY DOC. NO. 103-39, *supra* note 278, at 40; UNCLOS, art. 236.

511. 4 VIRGINIA COMMENTARY at 392–98; S. TREATY DOC. NO. 103-39, *supra* note 278, at 40.

512. Press Release, U.S. Department of State, U.S. Opposes Unilateral Extension by Canada of High Seas Jurisdiction (Apr. 15, 1970), *reprinted in* 62 DEPARTMENT OF STATE BULLETIN 610–11 (May 11, 1970); 4 VIRGINIA COMMENTARY at 392–98.

513. List of Geographical Coordinates of the Points Determining the Baselines Position for Measuring the Breadth of the Territorial Waters, Economic Zone and Continental Shelf of the U.S.S.R., Adopted by Decrees of the U.S.S.R. Council of Ministers on Feb. 7, 1984; List of Geographical Coordinates of the Points Determining the Baselines Position for Measuring the Breadth of the Territorial Waters, Economic Zone and Continental Shelf of the U.S.S.R., Adopted by Decrees of the U.S.S.R. Council of Ministers on Jan. 15, 1985; Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation, Adopted by the State Duma on July 16, 1998, Approved by the Federation Council on July 17, 1998.

514. Territorial Sea Geographical Coordinates (Area 7) Order, P.C., SOR/1985-872 (Can.).

the Northeast Passage, the Northwest Passage, and various other straits located within Russia's Northern Sea Route (NSR)—the Demitri, Laptev, and Sannikov Straits. Russia's straight baselines closing the NSR straits and Canada's straight baselines around its Arctic Islands do not meet the legal criteria under international law.[515] Accordingly, the correct baseline for these areas is the low-water line.[516] Additionally, Russia's and Canada's restrictions on passage through various international straits are clearly inconsistent with the right of transit passage through international straits, which cannot be suspended or impeded by the bordering States.[517] The United States has diplomatically protested and operationally challenged these excessive straight baseline claims.[518]

Russia and Canada have also enacted domestic laws and regulations to regulate maritime traffic in their Arctic waters, citing Article 234 of UNCLOS as their legal basis. Both the Russian and Canadian laws and regulations in question, however, exceed what is permissible under international law, including SOLAS and UNCLOS.

The NSR is defined in Article 14 of the 1998 Federal Act of the Russian Federation, as amended by Article 2 of the 2012 Federal Law No. 132-FZ:

> Navigation in the waters of the Northern Sea Route, a historically established national transport communication route of the Russian Federation, shall be carried out in accordance with the generally recognized principles and norms of international law, the international treaties of the Russian Federation, this Federal Law, and other federal laws, as well as regulations issued in accordance with them.[519]

515. UNCLOS, arts. 5, 7.
516. *Id.* art. 5.
517. *Id.* arts. 38, 42.
518. MCRM.
519. Russia, Federal Law No. 132-FZ of July 28, 2012, On Amendments to Certain Legislative Enactments of the Russian Federation concerning State Regulation of Commercial Navigation in the Waters of the Northern Sea Route, art. 2, *reprinted in* MCRM.

Article 3(3) of the 2012 law also amended the Code of Commercial Navigation of the Russian Federation, adding, inter alia, a new Article 5, which defines the waters of the NSR as the water that adjoins the northern littoral of the Russian Federation, comprising the internal maritime waters, territorial sea, contiguous zone, and EEZ of the Russian Federation.[520]

Guidelines for navigating through the NSR, which ensure the safety of navigation and the protection of the marine environment, include (1) procedures for the navigation of vessels; (2) rules for the icebreaker pilotage of vessels; (3) rules for the pilotage of vessels by an ice-qualified pilot; (4) rules for the pilotage of vessels along routes in the NSR; (5) guidelines on navigational-hydrographic and hydrometeorological support; (6) rules for radio communication; and (7) other guidelines pertaining to the organization of the navigation of vessels.

Applications to obtain a permit to navigate through the NSR shall be submitted to the NSR Administration. Permits are issued if "the vessel fulfills the requirements pertaining to safe navigation and protection of the marine environment" that are established by the international treaties and laws of the Russian Federation and the aforementioned rules. Vessels are also required to submit documents certifying that they possess "insurance or other financial guarantee of civil liability . . . for harm resulting from pollution or for other harm caused by the vessels."[521]

The United States protested the NSR regulatory scheme on May 29, 2015, objecting to several of its provisions, including (1) a requirement to obtain permission to enter and transit the Russian EEZ and territorial sea and provide certification of adequate insurance; (2) the characterization of international straits that form part of the NSR as internal waters; (3) the characterization of the NSR as a "historically established national transport communication route"; and (4) the "lack of any express exemption for sovereign immune vessels." The

520. *Id.* art. 3(3).
521. *Id.*

> United States additionally encouraged Russia to submit relevant aspects of the regulatory scheme to the IMO for its consideration and adoption, in particular the provisions regarding the use of designated routes and the use of icebreakers and ice pilots. The United States also sought confirmation that the NSR scheme does not apply to sovereign immune vessels, and clarification on whether the provisions for the use of Russian icebreakers and ice pilots were mandatory. The United States believes that Article 234 does not support the imposition of mandatory icebreaker or pilotage requirements, that the exclusion of the use of foreign-flagged icebreakers is inconsistent with the nondiscrimination aspects of Article 234, and that the charges levied for these services are of concern.[522]
>
> In March 2019, the Russian Federation announced new rules for the NSR that are more problematic. The new rules require foreign warships and naval auxiliaries to provide forty-five days' advance notice and obtain permission to transit the NSR. The advance notice must include the ship's "name, purpose, route, timetable, and technical specifications, as well as the military rank and identity of its captain." Foreign ships are also required to take a Russian pilot on board before transiting through the Arctic, and transit can be denied without explanation. Unauthorized transits can result in the arrest or destruction of the noncompliant vessel. Russian authorities cite Article 234 and national security concerns as their legal authority for the new measures, which are clearly inconsistent with international law, including UNCLOS.[523]
>
> Canada's Arctic mandatory ship reporting system is equally problematic and has been challenged by the United States and several other nations. The Northern Canada Vessel Traffic Services Zone Regulations (NORDREG)[524] were adopted under the Canada Shipping

522. 2015 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 526–27, 537–38.

523. Alexey Kozachenko et al., *Cold Wave: Foreigners Created the Rules of Passage of the Northern Sea Route*, IZVESTIA (Mar. 6, 2019), https://iz.ru/852943/aleksei-kozachenko-bogdan-stepovoi-elnar-bainazarov/kholodnaia-volna-inostrantcam-sozdali-pravila-prokhoda-sevmorputi.

524. SOR/2010-127 (June 10, 2010). *See* 2010 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 514; ROACH, *supra* note 219, at 589–94.

Act[525] and took effect on July 1, 2010 in Canadian-claimed Arctic waters. The regulations have two main elements. First, they establish the NORDREG Zone that covers Canada's claimed northern waters, extending up to 200 nautical miles. A vessel may not enter, leave, or proceed within the zone unless it has previously obtained a clearance from Canadian authorities. Noncompliant persons and vessels are liable to a monetary fine and/or imprisonment. Second, the regulations establish a mandatory ship reporting system within the zone. Canada cites Article 234 as the legal basis for the regulations.[526]

The United States protested the regulations in August 2010, indicating that the NORDREGs are "inconsistent with important law of the sea principles related to navigational rights and freedoms" and recommending that Canada submit the system to the IMO for adoption. The United States noted that the prior permission requirement to enter and transit the EEZ and territorial sea, as well as the enforcement provisions for noncompliance, were inconsistent with navigational rights and freedoms in the EEZ, the right of innocent passage in the territorial sea, and the right of transit passage through straits, such as the Northwest Passage, used for international navigation. Moreover, conditioning transit on prior permission is inconsistent with Article 234, which requires coastal State laws and regulations to have due regard to navigation. The United States also expressed concern that the NORDREGs did not contain an express exemption for sovereign immune vessels and that any enforcement action would be inconsistent with international law, including Article 236 of UNCLOS. The United States additionally noted that Canada's unilateral imposition of mandatory ship reporting and mandatory ship routing should be submitted to the IMO for adoption consistent with Regulations V/10, V/11, and V/12 of SOLAS.[527]

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525. Canada Shipping Act, S.C. 2001, c. 26 (Can.).

526. *See* James Kraska, *The Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) and the Law of the Sea*, 30 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 225 (2015).

527. Diplomatic Note from the United States to Canada Commenting on Canada's Proposed NORDREGS (Mar. 19, 2010), 2010 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 515, 516–18.

> In September 2010, the United States and the International Association of Independent Tanker Owners made a joint submission to the IMO's Maritime Safety Committee expressing concern over the NORDREGs. In particular, the joint submission highlights that the mandatory ship reporting system applies to ships seeking to enter and transit Canada's EEZ and it is therefore inconsistent with Regulations V/11 and V/12 of SOLAS. Beyond the territorial sea, SOLAS does not permit coastal States to unilaterally adopt mandatory ship reporting systems. The IMO is the only international body competent to develop guidelines and criteria for regulations of ship reporting systems on an international level. Similarly, vessel traffic services may only be made mandatory in a State's territorial sea.[528]
>
> Regulation V/10 of SOLAS provides, in part, that "Ships' routeing systems . . . may be made mandatory . . . when adopted and implemented in accordance with the guidelines and criteria developed by the [IMO]" and that "Governments shall refer proposals for the adoption of ships' routeing systems to the [IMO]." Regulation V/11 provides, in part, that a "ship reporting system, when adopted and implemented in accordance with the guidelines and criteria developed by the [IMO] . . . , shall be used by all ships" and that "Government[s] shall refer proposals for the adoption of ship reporting systems to the [IMO]." Regulation V/12 stipulates, in part, that "[t]he use of [vessel traffic services] may only be made mandatory in sea areas within the territorial seas of a coastal State." Finally, Regulations V/10(10), V/11(9), and V/12(5) specify that "[n]othing in this regulation or its associated guidelines and criteria shall prejudice the rights and duties of Governments under international law or the legal regimes of straits used for international navigation and archipelagic sea lanes."
>
> See § 2.5.3.2 for a discussion of Canada's position on the Northwest Passage.

528. United States and INTERTANKO, *Safety of Navigation: Northern Canada Vessel Traffic Services Zones Regulations*, IMO Doc. MSC 88/11/2 (Sept. 22, 2010); ROACH, *supra* note 219, at 589–94.

In 1988, the United States and Canada entered into an agreement—the Arctic Cooperation Agreement—to help reduce tensions between the two allies over their ongoing dispute concerning the Northwest Passage. Although it does not resolve the underlying dispute over the status of the Northwest Passage or the waters of the Arctic Archipelago, the agreement recognizes the importance of cooperation between the two neighbors to "advance their shared interests in Arctic development and security." Accordingly, the parties agreed to "facilitate navigation by their icebreakers in their respective Arctic waters and to develop cooperative procedures for this purpose" and to "develop and share research information . . . in order to advance their understanding of the marine environment of the area." The United States also agreed that "all navigation by U.S. icebreakers within waters claimed by Canada to be internal will be undertaken with the consent of . . . Canada." However, nothing in the agreement or its implementation is intended to affect the respective positions of the two governments on the law of the sea in the Arctic or other maritime areas, or their respective positions regarding third parties. Moreover, the agreement was limited to icebreaker transits; it did not apply to other types of vessels, such as warships or commercial merchant ships.[529]

In October 1988, the United States made its first request under the agreement asking Canada's consent to allow the USCGC *Polar Star* to "navigate within waters covered by the Agreement, and to conduct marine scientific research [MSR] during such navigation." After assisting the Canadian icebreakers *Pierre Radisson* and *Martha L. Black*, the U.S. icebreaker was compelled by heavy ice conditions to alter course and proceed east through the Northwest Passage to exit the Arctic. The U.S. request welcomed the presence of a Canadian scientist and Coast Guard officer on board the *Polar Star* and indicated that the United States would be pleased if a Canadian Coast Guard ship could accompany the U.S. icebreaker through the Northwest Passage. The request additionally indicated that the *Polar Star* would "operate in a manner consistent with the pollution control standards and other standards of the [AWPPA] and other relevant Canadian laws and regulations" and that the United States would pay for any

529. Agreement on Arctic Cooperation, Can.-U.S., Jan. 11, 1988, 1852 U.N.T.S. 59.

damages caused by transit.[530] The Canadian government granted consent for the transit and the conduct of MSR in the Northwest Passage, noting that the Canadian Coast Guard icebreaker *John A. MacDonald* would accompany the *Polar Star* and that a Coast Guard officer would be made available to be on board the U.S. icebreaker during its transit of the Northwest Passage.[531] Six additional transits of the Northwest Passage were conducted by U.S. icebreakers pursuant to the agreement in 1989, 1990, 2000, 2003, 2005, and 2021.[532] The USCGC *Maple* transited and conducted MSR in the Northwest Passage during a joint exercise with the Canadian icebreaker *Terry Fox* in 2017.[533]

At a joint press conference following the adoption of the U.S.-Canada MSR agreement, both sides reaffirmed that the status of the Northwest Passage and Canada's Arctic waters is still in dispute. Canada's Minister of External Affairs, Joe Clark, stated that the agreement is a

> practical step that leaves the differing views of Canada and the United States on the question of sovereignty intact. The United States has its view, we have a different view. They have not accepted ours. We have not accepted theirs. But we have come to a pragmatic agreement by which the United States will undertake to seek Canadian permission before any voyage of an icebreaker goes through these waters.

U.S. Secretary of State George Schultz echoed Minister Clark's sentiments. When asked if the United States would recognize Canada's sovereignty claims to Arctic waters if U.S. warships and submarines

530. American Embassy Ottawa Note No. 425 (Oct. 10, 1988), U.S. Department of State File No. P88 0129-0576, *reprinted in* 28 INTERNATIONAL LEGAL MATERIALS 144 (1989).

531. U.S. Department of State File No. P88 0129-0579, *reprinted in* 28 INTERNATIONAL LAW STUDIES 145 (1989); *see also* ROACH, *supra* note 219, at 368–69.

532. ROACH, *supra* note 219, at 368–69; Melody Schreiber, *US Icebreaker Departs on a Voyage That Will Transit the Northwest Passage*, ARCTIC TODAY (Aug. 26, 2021), https://www.arctictoday.com/us-coast-guard-science-joint-mission-northwest-passage/#:~:text=Healy%20last%20transited%20the%20passage,a%20joint%20exercise%20with%20Canada; Pharand 3, *supra* note 270, at 40.

533. Schreiber, *supra* note 532.

were guaranteed access to those waters in times of crisis, Secretary Schultz responded that "the answer to your question is no."[534]

2.6.5.2 Antarctic Region

The United States does not recognize the validity of the claims of other States to any portion of the Antarctic area. The United States is a party to the 1959 Antarctic Treaty governing Antarctica. Designed to encourage the scientific exploration of the continent and foster research and experiments in Antarctica without regard to conflicting assertions of territorial sovereignty, the treaty provides that no activity in the area undertaken while the treaty is in force will constitute a basis for asserting, supporting, or denying such claims.

Commentary

By the 1950s, seven nations—Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom—claimed territorial sovereignty over areas of Antarctica. Eight other nations—Belgium, Germany, Japan, Poland, South Africa, the Soviet Union, Sweden, and the United States—had engaged in exploration but had not claimed territory on the continent. Both the United States and the Soviet Union did not recognize the claims of other governments and reserved their right to assert claims in the future.[535]

On December 1, 1959, twelve nations—Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States—signed the Antarctic Treaty in Washington, DC. The Treaty entered into force on June 23, 1961.[536] The original contracting parties have the right to participate in consultative meetings provided for in Article

534. Press Release, U.S. Department of State, Joint Press Conference, Jan. 11, 1988 (Jan. 14, 1988), *reprinted in* 1 1981–88 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2050; *see also* ROACH, *supra* note 219, at 367.

535. *Antarctic Treaty*, U.S. DEPARTMENT OF STATE, https://2009-2017.state.gov/t/avc/trty/193967.htm.

536. *The Antarctic Treaty*, NATIONAL SCIENCE FOUNDATION, https://www.nsf.gov/geo/opp/antarct/anttrty.jsp.

IX of the Treaty for the "purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty."[537]

Since 1959, forty-three additional nations have acceded to the Treaty. The new parties may participate in consultative meetings once they demonstrate their interest in Antarctica "by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition."[538] Of the forty-three new parties, seventeen States—Brazil, Bulgaria, China, the Czech Republic, Ecuador, Finland, Germany, India, Italy, the Netherlands, Peru, Poland, the Republic of Korea, Spain, Sweden, Ukraine, and Uruguay—have had their activities in Antarctica recognized as "substantial scientific research activity" and have, thereby, achieved consultative party status. The remaining twenty-six non-consultative parties may attend consultative meetings but may not participate in any decision-making.[539]

Nothing contained in the Treaty shall be interpreted as (a) a renunciation by any State of "previously asserted rights of or claims to territorial sovereignty in Antarctica"; (b) a renunciation or diminution by any State of "any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise"; or (c) prejudicing the position of any State as regards its "recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica."[540] Moreover, no acts or activities taking place while the treaty is in force "shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica."[541] Additionally,

537. Antarctic Treaty, art. IX(1).

538. *Id.* art. IX(2).

539. *The Antarctic Treaty*, NATIONAL SCIENCE FOUNDATION, https://www.nsf.gov/geo/opp/antarct/anttrty.jsp; *Parties*, SECRETARIAT OF THE ANTARCTIC TREATY, https://www.ats.aq/devAS/Parties?lang=e.

540. Antarctic Treaty, art. IV(1).

541. *Id.* art. IV(2).

"[n]o new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted" while the Treaty is in force.[542]

The Antarctic Treaty establishes a special regime for Antarctica and suspends conflicting claims of territorial sovereignty. It contains provisions which affect the FON and overflight. It provides Antarctica shall be used for peaceful purposes only, and any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons are prohibited. All stations and installations and all ships and aircraft at points of discharging or embarking cargo or personnel in Antarctica are subject to inspection by designated foreign observers. Classified activities are not conducted by the United States in Antarctica. All classified material is removed from U.S. ships and aircraft prior to visits to the continent. The treaty prohibits nuclear explosions and disposal of nuclear waste anywhere south of latitude 60° south. The treaty does not affect in any way the high seas freedoms of navigation and overflight in the Antarctic region. The United States recognizes no territorial, territorial sea, or airspace claims in Antarctica.

The 1991 Protocol on Environmental Protection to the Antarctic Treaty, which the United States is a party, designates Antarctica as a natural reserve, devoted to peace and science, and sets forth basic principles and detailed mandatory rules applicable to human activities in Antarctica, including obligations to accord priority to scientific research.

Commentary

The Antarctic Treaty demilitarizes the Antarctic continent and provides for its cooperative exploration and future use. The Treaty provides that Antarctica shall be used for peaceful purposes only and prohibits "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons."[543] Military personnel and equipment may, however, be used for scientific research or for any other peaceful purpose.[544] Any nuclear explosions

542. *Id.*
543. *Id.* art. I(1).
544. *Id.* art. I(2).

and the disposal of radioactive waste material in Antarctica are prohibited.[545] The Treaty applies to the area south of 60° South Latitude, including all ice shelves, but nothing in the Treaty prejudices or in any way affects "the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area."[546]

The Treaty provides for freedom of, and international cooperation in, scientific investigation in Antarctica.[547] Accordingly, to the greatest extent feasible and practicable, "(a) information regarding plans for scientific programs . . . shall be exchanged to permit maximum economy and efficiency of operations; (b) scientific personnel shall be exchanged . . . between expeditions and stations; [and] (c) scientific observations and results from Antarctica shall be exchanged and made freely available."[548]

In order to ensure that the parties observe their obligations, the Treaty provides for designation of observers to carry out inspections in all areas of Antarctica, including all stations, installations and equipment, and ships and aircraft at discharge or embarkation points. Each observer has complete freedom of access at any time to any or all areas of Antarctica. Aerial observations may also be conducted.[549] In addition, each contracting party shall inform the other contracting parties in advance of "(a) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory; (b) all stations in Antarctica occupied by its nationals; and (c) any military personnel or equipment intended to be introduced by it into Antarctica."[550]

Disputes arising between the parties concerning the interpretation or application of the treaty shall be resolved through consultation among themselves with a "view to having the dispute resolved by

545. *Id.* art. V(1).
546. *Id.* art. VI.
547. *Id.* arts. II, III.
548. *Id.* art. III(1).
549. *Id.* art. VII.
550. *Id.* art. VII(5).

> negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice."[551] Disputes that cannot be resolved shall, with the consent of all parties to the dispute, be referred to the ICJ for settlement.[552]
>
> By ratifying the Antarctic Treaty, "the United States and all signatories undertook to use Antarctica for peaceful purposes only, and to prohibit 'any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.'"[553] When replying to any inquiry regarding the nuclear capabilities of U.S. Navy forces located in Antarctica (south of 60 degrees south latitude), Navy personnel shall indicate:
>
> > It is the position of the U.S. Government that nothing in the Antarctica Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law concerning the high seas within that area. We are aware of our commitments under that Treaty and are in full compliance with those commitments.[554]

2.6.6 Nuclear-free Zones

The 1968 Treaty on the Nonproliferation of Nuclear Weapons, which the United States is a party, acknowledges the right of groups of States to conclude regional treaties establishing nuclear-free zones. Such treaties are binding only on parties to them or to protocols incorporating those provisions. To the extent the rights and freedoms of other States, including the high seas freedoms of navigation and overflight, are not infringed upon, such treaties are not inconsistent with international law. The 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) is an example of a nuclear-free zone arrangement that is fully consistent with international law, as evidenced by U.S. ratification of its two protocols. This in

551. *Id.* art. XI(1).
552. *Id.* art. XI.
553. OPNAVINST 5721.1H, Release of Information on Nuclear Weapons and on Nuclear Weapons Capabilities of U.S. Navy Forces, ¶ 4.b (Sept. 24, 2019).
554. *Id.* ¶ 5.c(4).

no way affects the exercise by the United States of navigational rights and freedoms within waters covered by the Treaty of Tlatelolco.

Commentary

The Principal objectives of the Nuclear Non-Proliferation Treaty are to prevent the spread of nuclear weapons and weapons technology, promote cooperation in the peaceful uses of nuclear energy, and further the goal of achieving nuclear disarmament and general and complete disarmament.[555] The Nuclear Non-Proliferation Treaty entered into force in 1970 and currently has 191 States parties, including the original five nuclear-weapon States (P5): China, France, Russia, the United Kington, and the United States. The Treaty allows "any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories."[556]

A Nuclear-Weapon-Free Zone (NWFZ) is defined as

> any zone, recognized as such by the General Assembly of the United Nations, which any group of States, in the free exercises of their sovereignty, has established by virtue of a treaty or convention whereby:
>
> (a) The statute of total absence of nuclear weapons to which the zone shall be subject, including the procedure for the delimitation of the zone, is defined;
>
> (b) An international system of verification and control is established to guarantee compliance with the obligations deriving from that statute.[557]

555. Nuclear Non-Proliferation Treaty, arts. I–II.

556. *Id.* art. VII. *See* AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW § 304 comment b, at 28 (2017).

557. G.A. Res. 3472 (XXX), B (Dec. 11, 1975). For principles and guidelines for the establishment of an NWFZ as recommended by the U.S. Disarmament Commission, see Report of the Disarmament Commission, annex I, U.N. Doc. A/54/42 (1999).

An NWFZ agreement provides a legally binding framework to prohibit the use, possession, or deployment of nuclear weapons in a geographically defined zone. The United States has historically supported the establishment of NWFZs. When properly crafted and fully implemented, such zones can contribute to international peace, security, and stability, as well as reinforce the Nuclear Non-Proliferation Treaty and the worldwide nuclear nonproliferation regime. Each NWFZ treaty contains protocols in which the P5 provide negative security assurances. By ratifying the relevant protocols, the P5 give legally binding assurances to the parties to the treaty that they will not use or threaten to use nuclear weapons against them.

The United States makes decisions on whether to sign these protocols on a case-by-case basis, based on the following criteria:

- the initiative for the creation of the zone should come from the States in the region concerned;
- all States whose participation is deemed important should participate;
- the zone arrangement should provide for adequate verification of compliance with its provisions;
- the establishment of the zone should not disturb existing security arrangements to the detriment of regional and international security or otherwise abridge the inherent right of individual or collective self-defense guaranteed in the UN Charter;
- the zone arrangement should effectively prohibit its parties from developing or otherwise possessing any nuclear device for whatever purpose;
- the establishment of the zone should not affect the existing rights of its parties under international law to grant or deny other States transit privileges within their respective land territory, internal waters, and airspace to nuclear powered and nuclear capable ships and aircraft of non-party nations, including port calls and overflights; and
- the zone arrangement should not seek to impose restrictions on the exercise of rights recognized under international law, particularly the high seas freedoms of navigation and over-

> flight, the right of innocent passage of territorial and archipelagic seas, the right of transit passage of international straits, and the right of archipelagic sea lanes passage of archipelagic waters.[558]

There are currently five NWFZ treaties in force:

- the Treaty of Tlatelolco covers Latin America and the Caribbean;
- the Treaty of Pelindaba covers Africa;
- the Treaty of Rarotonga covers the South Pacific;
- the Treaty of Bangkok covers Southeast Asia; and
- the Treaty of Semipalatinsk covers Central Asia.

The United States has signed and ratified the relevant Protocols to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco).[559] Protocol I calls on nations outside the Treaty zone to apply the denuclearization provisions of the Treaty to the territories in the zone "for which, de jure or de facto, they are internationally responsible."[560] Senate advice and consent to the ratification of Protocol I was made subject to three understandings:

- that the provisions of the Treaty made applicable by the protocol do not affect the rights of the contracting parties regarding the exercise of freedom of the seas or passage through or over waters subject to the sovereignty of a State;
- that the understandings and declarations the United States attached to its ratification of Protocol II apply also to its ratification of Protocol I; and
- that the provisions of the Treaty made applicable by the Protocol do not affect the rights of the contracting parties to grant or deny transport and transit privileges to their own or other vessels or aircraft regardless of cargo or armaments.

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558. *Nuclear Weapon Free Zones*, U.S. DEPARTMENT OF STATE, https://2009-2017.state.gov/t/isn/anwfz/index.htm.

559. Feb. 14, 1967, 22 U.S.T. 762, 634 U.N.T.S. 281.

560. Additional Protocol I to the Treaty of Tlatelolco, art. 1, Feb. 14, 1967, 33 U.S.T. 1972, 634 U.N.T.S. 362.

In Protocol II, nuclear-weapon States undertake (1) to respect the denuclearized status of the zone; (2) not to contribute to acts involving violation of obligations of the parties; and (3) not to use or threaten to use nuclear weapons against the contracting parties.[561] Senate advice and consent to the ratification of Protocol II was made subject to the following understandings and declarations:

- The Treaty does not affect the rights of the contracting parties to grant or deny transport and transit privileges to non-contracting parties.
- With respect to the undertaking in Article 3 of Protocol II not to use or threaten to use nuclear weapons against the Treaty parties, the United States would "have to consider that an armed attack by a Contracting Party, which it was assisted by a nuclear-weapon state, would be incompatible with the Contracting Party's corresponding obligations under Article I of the Treaty."
- Considering the technology for producing nuclear explosive devices for peaceful purposes to be indistinguishable from that for making nuclear weapons, the United States regards the Treaty's prohibitions as applying to all nuclear explosive devices. However, the Treaty would not prevent the United States, as a nuclear-weapon State, from making nuclear explosion services for peaceful purposes available "in a manner consistent with our policy of not contributing to the proliferation of nuclear weapons capabilities."
- Although not required to do so, the United States will act, with respect to the territories of Protocol I adherents that are within the Treaty zone, in the same way as Protocol II requires it to act towards the territories of the Latin American Treaty parties.
- The Treaty and its protocols have no effect upon the international status of territorial claims.[562]

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561. Additional Protocol II to the Treaty of Tlatelolco arts. 1–3, Feb. 14, 1967, 22 U.S.T. 754, 634 U.N.T.S. 364.

562. *See Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean*, U.S. DEPARTMENT OF STATE, https://2009-2017.state.gov/p/wha/rls/70658.htm.

> The United States has signed but has not yet ratified the relevant Protocols to the African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba).[563] The Treaty document was transmitted to the Senate for advice and consent to ratification on May 2, 2011. Under Protocol I, the Protocol parties undertake not to use or threaten to use a nuclear explosive device against any party to the Treaty or against territories within the zone of parties to Protocol III and not to contribute to a violation of the Treaty or Protocol I. Under Protocol II, the Protocol parties undertake not to test, or assist or encourage the testing of, any nuclear explosive device anywhere within the zone or to contribute to any violation of the Treaty or Protocol II. Under Protocol III, the Protocol parties agree to apply certain of the Treaty's substantive provisions "in respect of the territories for which [they are] internationally responsible" within the zone. The United States maintains a large military base in Diego Garcia, which is within the geographic area described in Article 2 and the Annex of the Treaty. However, Diego Garcia is part of the British Indian Ocean Territories (BIOT) and is under the sovereign control of the United Kingdom. The BIOT is not part of the "territory" of the "Zone" as defined in the Treaty. Thus, neither the Treaty nor its Protocols apply to U.S. operations on Diego Garcia.[564]
>
> The United States signed but has not yet ratified the South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga).[565] The Treaty was transmitted to the Senate for advice and consent to ratification on May 2, 2011. Protocol 1 undertakes to apply certain prohibitions under the Treaty to the territories for which the United States is internationally responsible situated within the zone (American Samoa and Jarvis Island). Protocol 2 parties undertake not to use or threaten to use any nuclear explosive device against parties to the Treaty or

563. African Nuclear-Weapon-Free Zone Treaty, Apr. 11, 1996, 35 INTERNATIONAL LEGAL MATERIALS 698. *See African Nuclear Weapon Free Zone Treaty (Treaty of Pelindaba)*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS TREATY DATABASE, https://treaties.unoda.org/t/pelindaba.

564. *African Nuclear-Weapon-Free Zone Treaty and Protocols*, U.S. DEPARTMENT OF STATE, https://2009-2017.state.gov/t/isn/4699.htm.

565. South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, 24 INTERNATIONAL LEGAL MATERIALS 1442. *See South Pacific Nuclear Free Zone Treaty*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS TREATY DATABASE, https://treaties.unoda.org/t/rarotonga.

> against any territory within the zone for which a State party to Protocol 1 is internationally responsible. In addition, Protocol 2 parties are prohibited from contributing to any act of a Treaty party that would constitute a violation of the Treaty or to any act of another Protocol party that would constitute a violation of a Protocol. Protocol 3 parties undertake not to test any nuclear explosive device anywhere within the zone.[566]
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> The Treaty on the Southeast Asia Nuclear-Weapon-Free Zone (Bangkok Treaty) has one Protocol. The Protocol provides for legally binding security assurances from the P5 States not to use or threaten to use nuclear weapons against any State party to the Treaty and not to use or threaten to use nuclear weapons within the Southeast Asia Nuclear-Weapon-Free Zone. None of the P5 States have signed the Protocol to the Bangkok Treaty. The P5 States object to the inclusion of continental shelves and EEZs within the zone of application; to the restriction not to use nuclear weapons against any contracting State or protocol party within the zone of application, or from within the zone against targets outside the zone; and to the restriction on high seas freedom of navigation of nuclear-powered ships through the zone. The United States additionally
>
> > expressed concerns with the nature of the legally binding negative security assurances to be expected of the parties to the protocol, the alleged ambiguity of the treaty's language concerning the permissibility of port calls by ships, which may carry nuclear weapons, and the procedural rights of the parties to the protocol to be represented before the various executive bodies set up by the treaty to ensure its implementation.[567]

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566. *South Pacific Nuclear Free Zone Treaty and Protocols*, U.S. DEPARTMENT OF STATE, https://2009-2017.state.gov/t/isn/5189.htm.

567. *Protocols to the Nuclear-Weapon-Free-Zone Treaties*, UNITED NATIONS PLATFORM FOR NUCLEAR-WEAPON-FREE ZONES, https://www.un.org/nwfz/content/protocols-nuclear-weapon-free-zone-treaties; *Nuclear-Weapon-Free Zones at a Glance*, ARMS CONTROL ASSOCIATION (Mar. 2022), https://www.armscontrol.org/factsheets/nwfz.

The Central Asian Nuclear-Weapon-Free Zone Treaty (Treaty of Semipalatinsk) has one Protocol, which provides for legally binding security assurances from the P5 States not to use or threaten to use a nuclear weapon or other nuclear explosive device against any party to the Treaty. The United States has signed but has not ratified the Treaty.[568]

2.7 AIR NAVIGATION

2.7.1 National Airspace

Under international law, every State has complete and exclusive sovereignty over its national airspace. National airspace is the airspace above the State's territory, internal waters, territorial sea, and, in the case of an archipelagic State, archipelagic waters. There is no right of innocent passage of aircraft through the airspace over the territorial sea or archipelagic waters analogous to the right of innocent passage enjoyed by ships of all States. Subject to the rights of transit passage, archipelagic sea lanes passage, and assistance entry, there is no right of entry for aircraft into foreign national airspace. Unless party to an international agreement to the contrary, all States have complete discretion in regulating or prohibiting flights within their national airspace, with the sole exception of aircraft in transit passage or archipelagic sea lanes passage. Outside of these circumstances, foreign aircraft wishing to enter national airspace must identify themselves, seek or confirm permission to land or to transit, and must obey all reasonable orders to land, turn back, or fly a prescribed course and/or altitude.

Commentary

Airspace is classified as national airspace (airspace over the land territory, internal waters, archipelagic waters, and territorial sea of a nation) and international airspace (airspace over the contiguous zone, the EEZ, and the high seas, and over unoccupied territory—territory, such as Antarctica, that is not subject to the sovereignty of any nation).

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568. Central Asian Nuclear-Weapon-Free Zone Treaty (Treaty of Semipalatinsk), Sept. 8, 2006, https://treaties.unoda.org/t/canwfz; *Protocols to the Nuclear-Weapon-Free-Zone Treaties*, *supra* note 567.

All States have complete and exclusive sovereignty over the airspace above their territory, which includes the "land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate" of such States.[569] No State aircraft or scheduled commercial international air service may operate over or into the territory of a State without the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.[570] There is no right of innocent passage for aircraft in national airspace over the territorial sea.[571]

States are entitled to require civil aircraft flying over their territory without authority or being used for any purpose inconsistent with the Chicago Convention to land at a designated airport. For this purpose, States may resort to any appropriate means consistent with relevant rules of international law.[572] Civil aircraft shall comply with an order to land.[573] Unless warranted by the right of self-defense reflected in Article 51 of the UN Charter, States should refrain from using weapons against civil aircraft in flight. In case of interception, the lives of persons on board and the safety of aircraft must not be endangered.[574]

U.S. sovereignty over and use of national airspace is set out in 49 U.S.C. § 40103. The Administrator of the FAA, in consultation with the Secretary of Defense, may establish areas in U.S. national airspace necessary in the interest of national defense and may restrict or prohibit access to those areas to foreign aircraft.[575] Foreign civil aircraft may navigate in U.S. national airspace as provided in § 41703.[576] Foreign State aircraft may only navigate in U.S. national

569. Chicago Convention, arts. 1–2.

570. *Id.* arts. 3(c), 6. *See also* UNCLOS, art. 2; Territorial Sea Convention, arts. 1–2.

571. UNCLOS, arts. 17, 19(2)(e)–(f); Territorial Sea Convention, art. 14(1); AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW §§ 404, 408 reporters' notes 11, 2 at 179, 197 (2017).

572. Chicago Convention, art. 3*bis*(b).

573. *Id.* art. 3*bis*(c).

574. *Id.* art. 3*bis*(a).

575. 49 U.S.C. § 40103(b)(3)(A)–(B).

576. 49 U.S.C. § 40103(c).

> airspace when authorized by the Secretary of State.[577] The FAA Aeronautical Information Manual provides the aviation community with basic flight information and air traffic control procedures for use in the National Airspace System of the United States.[578] An international version, called the Aeronautical Information Publication, contains parallel information, as well as specific information on the international airports for use by the international community.[579]
>
> U.S. regulations regarding the limits of controlled airspace and the applicability of air traffic rules are contained in 14 C.F.R Parts 71 and 91. Foreign governments seeking diplomatic clearance for State aircraft to transit or land within U.S. territorial airspace must obtain a Diplomatic Clearance Number (DCN) issued in advance by the U.S. Department of State, Bureau of Political-Military Affairs, Office of Global Programs and Initiatives (PM/GPI). A DCN authorizes the aircraft to transit or land in the United States and its territories in accordance with the approved itinerary.[580]

Pursuant the Chicago Convention, civil aircraft in distress are entitled to special consideration and should be allowed entry and emergency landing rights. Customary international law recognizes that foreign-State aircraft in distress—including military aircraft—are similarly entitled to enter national airspace to make emergency landings without prior coastal nation permission. The crew of such aircraft are entitled to depart expeditiously, and the aircraft must be returned. While on the ground under such circumstances, State aircraft continue to enjoy sovereign immunity.

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577. 49 U.S.C. § 40103(d).

578. FAA, Aeronautical Information Manual (June 17, 2021), https://www.faa.gov/air_traffic/publications/media/aim_bsc_w_chg_1_2_dtd_5-19-22.pdf.

579. FAA, Aeronautical Information Publication (May 19, 2022), https://www.faa.gov/air_traffic/publications/media/aip_basic_dtd_5-19-22.pdf.

580. *See* U.S. Department of State, Diplomatic Aircraft Clearance Procedures for Foreign State Aircraft to Operate in United States National Airspace (Dec. 14, 2022), https://www.state.gov/diplomatic-aircraft-clearance-procedures-for-foreign-state-aircraft-to-operate-in-united-states-national-airspace/.

Commentary

The Chicago Convention prohibits State aircraft from flying over or landing in the territory of another State without authorization by special agreement or otherwise, and in accordance with the terms thereof.[581] The Convention similarly prohibits scheduled commercial international air service from operating over or into the territory of another State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.[582] There is an exception, however, for commercial aircraft in distress. A State shall

> provide such measures of assistance to aircraft in distress in its territory as it may find practicable, and to permit, subject to control by its own authorities, the owners of the aircraft or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances.[583]

The question of whether State aircraft enjoy a similar right of distress entry is unsettled. Some States, like China, take the position that State aircraft do not have a right of distress entry. For example, on April 1, 2001, a U.S. Navy EP-3 collided with a PLAN J-8II fighter jet over the South China Sea about 70 miles from Hainan Island. The EP-3 was conducting a routine surveillance operation when it was intercepted by two PLAN fighters. After making a number of aggressive close passes of the EP-3, one of the PLAN fighters collided with the EP-3. The collision resulted in significant damage to the EP-3, forcing it to make an emergency landing at Lingshui military airfield on Hainan Island. The plane and its twenty-four crew members were detained for eleven days until their release was negotiated by U.S. officials. The EP-3 was not returned until July 2001.[584]

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581. Chicago Convention, art. 3(c).

582. *Id.* art. 6.

583. *Id.* art. 25.

584. *EP-3 Collision, Crew Detainment, Release, and Homecoming, Collection Number: AR/695, Deployment Dates: 2–20 July 2001*, NAVAL HISTORY AND HERITAGE COMMAND, https://www.history.navy.mil/research/archives/Collections/ncdu-det-206/2001/ep-3-collision--crew-detainment-and-homecoming.html.

> U.S. State practice recognizes the right of distress entry into national airspace by foreign State aircraft. For example, in February 1974, a Soviet AN-24 reconnaissance aircraft that was conducting a surveillance mission off the coast of Alaska ran low on fuel and had to make an emergency landing at Gambell Airfield in Alaska. The crew remained overnight and was provided space heaters and food by the U.S. personnel. The plane was refueled the next day and allowed to depart without further incident. Similarly, in March 1994, a Russian surveillance aircraft monitoring a NATO antisubmarine warfare exercise ran low on fuel and made an emergency landing at Thule Air Base in Greenland. Again, the crew was fed, and the aircraft was refueled and allowed to depart without further delay.[585]

Further:

> Despite the unqualified assertions of the sovereignty of the subjacent states over the airspace and the express prohibitions of unauthorized entry of foreign state aircraft which are found in international conventions, there is a right of entry for all foreign aircraft, state or civil, when such entry is due to distress not deliberately caused by persons in control of the aircraft and there is no reasonably safe alternative.[586]

2.7.1.1 International Straits between one part of the High Seas or Exclusive Economic Zone and Another Part of the High Seas or Exclusive Economic Zone

All aircraft—including military aircraft and UA—enjoy the right of unimpeded transit passage through the airspace above international straits overlapped by territorial seas. Such transits must be continuous and expeditious, and the aircraft involved must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of the State or States bordering the strait. The exercise of the right of overflight by aircraft engaged in the transit passage of international straits cannot be impeded or suspended in peacetime for any purpose.

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585. News Briefing, Secretary of Defense Donald Rumsfeld on EP-3 Collision, CNN (Apr. 13, 2001), https://transcripts.cnn.com/show/se/date/2001-04-13/segment/02.

586. Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AMERICAN JOURNAL OF INTERNATIONAL LAW 559 (1953).

Commentary

See § 2.5.3.2 for a discussion of the right of transit passage.

Civil aircraft in transit passage shall observe the ICAO Rules of the Air. State aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation. Aircraft shall at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.[587]

In international straits not completely overlapped by territorial seas, all aircraft—including military aircraft and UA—enjoy high seas freedoms while operating in the high seas corridor beyond the territorial sea. If the high seas corridor is not of similar convenience (e.g., to stay within the high seas corridor would be inconsistent with sound navigational practices), such aircraft enjoy the right of unimpeded transit passage through the airspace of the strait.

Commentary

See § 2.5.3.3 for a discussion of transit rights through straits not completely overlapped by territorial seas.

2.7.1.2 Archipelagic Sea Lanes

All aircraft—including military aircraft and UA—enjoy the right of unimpeded, continuous, and expeditious passage through the airspace above archipelagic sea lanes. The right of overflight of such sea lanes is essentially identical to transit passage through the airspace above international straits overlapped by territorial seas. Military aircraft may transit an archipelagic sea lane as part of a military formation's continuous, unimpeded, and expeditious passage.

587. UNCLOS, art. 39(3).

Commentary

See § 2.5.4.1 for a discussion of archipelagic sea lanes passage (ASLP).

Civil aircraft in ASLP shall observe the ICAO Rules of the Air. State aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation. Aircraft shall at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.[588]

2.7.2 International Airspace

International airspace is the airspace over the contiguous zone, the EEZ, the high seas, and territories not subject to national sovereignty (e.g., Antarctica). All international airspace is open to the aircraft of all States. Aircraft—including military aircraft and UA—are free to operate in international airspace without interference from coastal State authorities. Military aircraft may engage in flight operations, including ordnance testing and firing, surveillance and intelligence gathering, and support of other naval activities. All such activities must be conducted with due regard for the rights of other States and the safety of other aircraft and of vessels. (Note that the Antarctic Treaty prohibits military maneuvers and weapons testing in Antarctic airspace.) These same principles apply with respect to the overflight of high seas or EEZ corridors through part of international straits not overlapped by territorial seas.

Commentary

Seaward of the territorial sea, in international airspace, civil and State aircraft of all States enjoy high seas freedoms of navigation and overflight, and other internationally lawful uses of the sea.[589] No State may validly purport to subject any part of the high seas or international airspace to its sovereignty.[590]

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588. *Id.* arts. 39(3), 54.
589. *Id.* arts. 58, 87; High Seas Convention, art. 2(4).
590. UNCLOS, art. 89.

See § 2.6 for a discussion of overflight rights of international waters.

2.7.2.1 1944 Convention on International Civil Aviation

The United States is a party to the 1944 Convention on International Civil Aviation (as are most States). That multilateral treaty applies to civil aircraft. It does not apply to military aircraft or other State aircraft, other than to require they operate with due regard for the safety of navigation of civil aircraft. The Chicago Convention established the International Civil Aviation Organization (ICAO) to develop international air navigation principles and techniques and promote safety of flight in international air navigation.

Commentary

The Chicago Convention does not apply to State aircraft, which are defined as aircraft used in military, customs, and police services. State aircraft may not fly over or land in the territory of another State without authorization by special agreement or otherwise, and in accordance with the terms thereof. States undertake, when issuing regulations for their State aircraft, that they will have due regard for the safety of navigation of civil aircraft.[591]

The objectives of the Convention are set out in Article 44.

Various operational situations do not lend themselves to ICAO flight procedures. These include military contingencies, classified missions, politically sensitive missions, or routine aircraft carrier operations. Operations not conducted under ICAO flight procedures are conducted under the due regard standard. For additional information, see DODI 4540.01, Use of International Airspace by U.S. Military Aircraft and for Missile and Projectile Firings; OPNAVINST 3770.2L, Airspace Procedures and Planning Manual; and COMDTINST M3710.11, U.S. Coast Guard Air Operations Manual.

Commentary

Procedures for U.S. military aircraft operations and missile and projectile firing activities in international airspace consistent with the

591. Chicago Convention, art. 3.

> Chicago Convention and the applicable navigational provisions reflected in UNCLOS are set out in DoD Instruction (DoDI) 4540.01.[592] Normally, military aircraft on routine point-to-point and navigation flights follow ICAO flight procedures.[593] Some operations in international airspace, through straits used for international navigation and through air routes over archipelagic waters, however, do not lend themselves to ICAO flight procedures. This may include, inter alia, military contingencies, classified missions, politically sensitive missions, routine aircraft carrier operations, and some training activities. Operations not conducted under ICAO flight procedures are conducted with due regard for the safety of all other aircraft.[594]
>
> Department of the Navy policy and procedures for use in the administration and management of all airspace matters are contained in OPNAVINST 3770.2L.[595] U.S. Coast Guard policy, standards, instructions, and capabilities pertinent to all phases of Coast Guard flight operations are set out in COMDTINST M3710.11.[596]

2.7.2.2 Flight Information Regions

A flight information region (FIR) is a defined area of airspace within which flight information and alerting services are provided. Flight information regions are established by ICAO for the safety of civil aviation and encompass both national and international airspace. Ordinarily, but only as a matter of policy, U.S. military aircraft on routine point-to-point flights through international airspace follow ICAO flight procedures and utilize FIR services. Exceptions to this policy include military contingency operations, classified or politically sensitive missions, and routine aircraft carrier operations or other training activities. When U.S. military aircraft do not follow ICAO flight procedures, they must navigate with due regard for civil aviation safety.

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592. DoDI 4540.01, *supra* note 153, ¶ 1.b.
593. *Id.* encl. 3 ¶ 3.b.
594. *Id.* encl. 3 ¶ 3.c.
595. OPNAVINST 3770.2L, Airspace Procedures and Planning Manual (Mar. 6, 2017).
596. COMDTINST M3710.11, U.S. Coast Guard Air Operations Manual (Mar. 29, 2021).

Commentary

The ICAO allocates, through regional air navigation agreements, responsibility for civil air traffic management in international airspace adjacent to coastal States in specified flight information regions (FIRs). States responsible for managing FIRs generally establish rules and procedures relating to civil aviation operations to carry out their responsibilities for providing air navigation facilities and air traffic management services both in national airspace and in assigned FIRs that may include international airspace. Nonetheless, these FIR rules and procedures do not apply as a matter of international law to State aircraft, including U.S. military aircraft.[597] However, U.S. military aircraft commanders will operate consistently with FIR rules and procedures when operating under ICAO flight procedures (see § 2.7.2.1 above).[598]

Military aircraft transiting through a FIR without intending to penetrate foreign national airspace over territorial seas are not required to and will not submit a request for diplomatic clearance. Military aircraft exercising the right of transit passage, or the right of archipelagic sea lanes passage, are also not required to and will not submit a request for diplomatic clearance. If penetration of foreign national airspace is required, a diplomatic clearance must be obtained (if required by the DoD Foreign Clearance Guide) from the State whose airspace will be penetrated.[599]

Acceptance by a government of responsibility in international airspace for a FIR region does not grant such government sovereign rights in international airspace. Consequently, military and State aircraft are exempt from the payment of air navigation, overflight, or similar fees for transit. The normal practice of States is to exempt military aircraft from such charges even when operating in national airspace or landing in national territory. The only fees properly chargeable against State aircraft are those which can be related di-

597. Chicago Convention, art. 3; DoDI 4540.01, *supra* note 153, encl. 3 ¶ 3.c(2).
598. DoDI 4540.01, *supra* note 153, encl. 3 ¶ 3.c(2).
599. *Id.* encl. 3 ¶ 3.c.

> rectly to services provided at the specific request of the aircraft commander or by other appropriate officials of the nation operating the aircraft.[600]

Some States purport to require all military aircraft in international airspace within their FIRs to comply with FIR procedures, whether or not they utilize FIR services or intend to enter national airspace. The United States does not recognize the right of a coastal State to apply its FIR procedures to foreign military aircraft in such circumstances. U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with FIR procedures established by other States, unless the United States has specifically agreed to do so.

Commentary

> Some States purport to require military aircraft to comply with FIR procedures at all times. The United States has protested such claims by Burma, Cuba, Ecuador, Iran, and Venezuela.[601]

2.7.2.3 Air Defense Identification Zones in International Airspace

International law does not prohibit States from establishing air defense identification zones (ADIZs) in the international airspace adjacent to their territorial airspace. The legal basis for ADIZ regulations is the right of a State to establish reasonable conditions of entry into its territory. An aircraft approaching national airspace with intent to enter such national airspace can be required to identify itself while in international airspace as a condition of entry approval. Air defense identification zone regulations promulgated by the United States apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports. The United States does not recognize the right of a coastal State to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace or does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. U.S. military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with

600. DoDD 4500.54E, *supra* note 154, ¶ 3.4.
601. ROACH, *supra* note 219, at 394–406.

ADIZ procedures established by other States, unless the United States has specifically agreed to do so.

Commentary

International law 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 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.[602]

An ADIZ is defined in Annex 15 to the Chicago Convention 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.[603] The United States defines an ADIZ as an area of airspace over land or water in which the ready identification, location, and control of all aircraft, except military and other State aircraft, is required in the interest of national security.[604]

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), the Alaska ADIZ, the Guam ADIZ, and the Hawaii ADIZ.[605] 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

602. DoDI 4540.01, *supra* note 153, ¶ 3.c(1).

603. Chicago Convention, annex 15.

604. 14 C.F.R. § 99.3 (2023).

605. 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).

claim ADIZs, including Bangladesh, China, India, Pakistan, and Taiwan.

U.S. ADIZ rules are contained in Chapter 5 of the FAA's Aeronautical Information Manual.[606] All aircraft intending to enter U.S. national airspace must file flight plans, provide periodic reports, and have a functioning two-way radio.[607] 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.[608] An aircraft may deviate from the above rules during an emergency that requires an immediate decision and action for the safety of flight.[609] Executive Order No. 10854 extends the application of 49 U.S.C. § 40103 to the overlying airspace of water outside the United States beyond the 12-nautical mile territorial sea in which the United States has appropriate jurisdiction or control.[610]

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. 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 that they will 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.[611]

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

606. 14 C.F.R. §§ 99.1–99.49 (2023).
607. 14 C.F.R. §§ 99.9(a)–(c), 99.11(a), 99.17(b)–(c), 99.15(a), 91.183 (2023).
608. 14 C.F.R. § 99.15(c) (2023).
609. 14 C.F.R. § 99.5 (2023).
610. Exec. Order No. 10854, Extension of the Application of the Federal Aviation Act of 1958, 24 Fed. Reg. 9565, 3 C.F.R. (1959–63 Comp. 389) (Nov. 27, 1959).
611. DoDI 4540.01, *supra* note 153, ¶ 3.c(2), encl. 3 ¶ 3.d.

> 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."[612] 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.[613]

It should be emphasized that the foregoing contemplates a peacetime or nonhostile environment. In the case of imminent or actual hostilities, a State may find it necessary to take measures in self-defense that will affect overflight in international airspace.

Commentary

See § 2.6.4 for a discussion of declared security and defense zones.

2.7.3 Open Skies Treaty

On 22 November 2020, the United States formally withdrew from the 1992 Open Skies Treaty. In June 2021, the Russian Federation announced it would formally withdraw from the treaty.

Commentary

The DoD made the following statement on the U.S. withdrawal from the Open Skies Treaty:

> Tomorrow the United States will formally submit its notification of its decision to withdraw from the Open Skies

612. Ministry of National Defense, People's Republic of China, Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the People's Republic of China, *reprinted in* CHINA DAILY (Nov. 23, 2013), https://www.chinadaily.com.cn/china/2013-11/23/content_17126618.htm.

613. UNCLOS, arts. 58(1), 87(1)(b), 89; Chicago Convention, arts. 1, 3, 9.

Treaty. After careful consideration, including input from Allies and key partners, it has become abundantly clear that it is no longer in the United States' best interest to remain a party to this Treaty when Russia does not uphold its commitments. U.S. obligations under the Treaty will effectively end in six months.

The Open Skies Treaty was designed decades ago to increase transparency, cooperation, and mutual understanding. Instead, Russia has increasingly used the Treaty to support propaganda narratives in an attempt to justify Russian aggression against its neighbors and may use it for military targeting against the United States and our Allies.

Russia has also continuously violated its obligations under the Treaty, despite a host of U.S. and Allied efforts over the past several years. Since 2017, the United States has declared Russia in violation of the Treaty for limiting flight distances over the Kaliningrad Oblast to 500 kilometers (km) and for denying flights within 10 km of portions of the Georgian-Russian border. Most recently, in September 2019, Russia violated the Treaty again by denying a flight over a major military exercise, preventing the exact transparency the Treaty is meant to provide.

We will not allow Russia's repeated violations to undermine America's security and our interests. We remain committed to effective, verifiable, and enforceable arms control policies that advance U.S., Allied, and partner security, and we will continue to work together to achieve those ends. The United States has been in close communication with our Allies and partners regarding our review of the Treaty and we will explore options to provide additional imagery products to Allies to mitigate any gaps that may result from this withdrawal.

> In this era of Great Power Competition, we will strive to enter into agreements that benefit all sides and that include parties who comply responsibly with their obligations.[614]

2.8 EXERCISE AND ASSERTION OF NAVIGATION AND OVERFLIGHT RIGHTS AND FREEDOMS

As announced in President Ronald Reagan's United States Oceans Policy statement of March 10, 1983:

> The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in (UNCLOS). The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

When States appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of States and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime States to protest diplomatically all excessive claims of coastal States and exercise their navigation and overflight rights in the face of such claims. The President's United States Oceans Policy statement makes clear that the United States has accepted this responsibility as a fundamental element of its national policy.

Since the early 1970s, the United States, through DODI S-2005.01, has reaffirmed its long-standing policy of exercising and asserting its FON and overflight rights on a worldwide basis. Under the FON Program, challenges of excessive maritime claims of other States are undertaken through diplomatic protests by the U.S. Department of State and by operational assertions by U.S. Armed Forces. U.S. FON Program assertions are designed to be politically neutral, as well as nonprovocative, and have encouraged States to

614. Press Release, DoD, Statement on Open Skies Treaty Withdrawal (May 21, 2020), https://www.defense.gov/News/Releases/Release/Article/2195239/dod-statement-on-open-skies-treaty-withdrawal/.

amend their claims and bring their practices into conformity with UNCLOS. Commanders and commanding officers should refer to combatant commander theater-specific guidance and appropriate operation orders for specific guidance on planning and execution of FON operations in a particular area of operations.

Commentary

Excessive maritime claims unlawfully restrict the freedoms of navigation and overflight and other lawful uses of the sea guaranteed to all nations under international law. These claims are made through coastal State laws, regulations, or other pronouncements that are inconsistent with international law as reflected in UNCLOS and the Chicago Convention. If left unchallenged, these claims can infringe the rights, freedoms, and lawful uses of the sea enjoyed by the United States and other nations.

The DoD is tasked with securing access to the world's oceans in order to retain global freedom of action to maintain international peace and security and to facilitate and enhance global trade and commerce. To counter the proliferation of excessive maritime claims, the United States operates a Freedom of Navigation (FON) Program to influence States either to avoid new excessive maritime claims or to renounce existing ones.

By the late 1970s, the United States realized that diplomatic protests were insufficient to counter excessive maritime claims. On February 1, 1979, the Carter administration completed a "definitive" study of navigation rights and American interests towards the freedom of the Sea.[615] The NSC Staff Secretary memo was prepared by the Law of the Sea Contingency Planning Group on Navigation at the National Security Council. The paper set forth the scope of essential American interests in commercial and military navigation, overflight, and related national security interests at sea. The study outlined how unilateral measures by some coastal States to extend various forms of

615. *See* Memorandum from the National Security Council to the Vice President, Subject: Navigation and Overflight Policy Paper 3 (Feb. 1, 1979), *reprinted in* COOPERATION AND ENGAGEMENT IN THE ASIA-PACIFIC REGION 223 (Myron H. Nordquist et al. eds., 2019).

national jurisdiction beyond traditionally recognized limits, singly and in combination, pose a challenge to traditional high seas freedoms. The United States was concerned that unilateral measures to extend various forms of national jurisdiction beyond traditionally recognized limits posed a challenge to access to the oceans:[616]

NAVIGATION AND OVERFLIGHT POLICY AND PLANNING

I. Issue

What should United States policy be regarding the protection of navigation, overflight, and related national security interests in the oceans in the event of failure to conclude a widely accepted Law of the Sea (LOS) Treaty that the U.S. can ratify or during the period until such a treaty enters into force for the United States.

II. Background

The Law of the Sea Conference commenced in 1973 and it is not at all clear when, or if, we will conclude a comprehensive, widely acceptable LOS Treaty which could be submitted to national governments for ratification. It is also unclear how long the ratification process might take or whether agreement can be secured at the LOS Conference to provisionally apply all or selected parts of the treaty after signature but before the international ratification process and entry into force is accomplished. It is, therefore, timely to consider what our navigation and overflight policy should be both in the event of failure to conclude a treaty and during the pre-treaty period.

616 *See also* AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW § 408 reporters' note 3 at 197 (2017).

III. The United States Interests

The United States has an essential interest in protecting commercial and military navigation, overflight and related national security and other interests in and over the oceans. Recent developments, particularly unilateral measures to extend various forms of national jurisdiction beyond traditionally recognized limits, singly and in combination, pose a challenged to traditional high seas freedoms in general and the aforementioned interests in particular. The United States is physically separated from most of its major allies and trading partners by vast ocean areas. We are separated from our NATO and ANZUS allies as well as from allies with whom we have bilateral defense agreements. Our commitments and interests vary but they include requirements for naval and air support and resupply of land forces. Our interest in the unimpeded deployment of our general-purpose forces includes the traditional Sixth Fleet deployments in the Mediterranean and Seventh Fleet deployments in the Pacific. Moreover, we have both short and long range interests in ensuring that our naval and air forces maintain the unhampered right to range over other areas of the oceans, including the Indian Ocean. Such deployments to other areas are important *inter alia* in order to ensure that our military forces are familiar with various areas for purposes of contingency planning and as a stabilizing deterrent. We also have a significant interest in gathering intelligence throughout the world by the use of naval vessels, aircraft and ocean devices.

Our commercial interests include keeping worldwide lines of communication open in order to protect and foster trade with and between other countries as well as protect the economic interests of consumers, shippers and carriers. This applies not only to the transportation of oil and natural gas in ships and pipelines but is also applicable to the general transport of food and natural and finished products into and out of the United States as well as to our key allies and trading partners. As a world leader in civil aviation, we have a major

interest in fostering the maintenance of a civil aviation regime which facilitates efficient and economic air transport. These commercial interests are important not only to the maintenance of a healthy national and world economy, but also for the maintenance of a free world merchant marine, whether flying the U.S. flag or otherwise.

We have a general interest in maintaining good relations with coastal States including those in the Group of 77, while at the same time preserving our various interests noted above.

Finally, it is a substantial U.S. interest not to provoke new claims to offshore jurisdiction that affect navigation, or act in such a manner as to provoke changes to the important navigation texts contained in the Informal Composite Negotiating Text (ICNT) before the Conference, which are satisfactory to the United States.

IV. Trends in the Regime of the Oceans

Prior to the commencement of the LOS Conference in 1973, there were numerous and accelerating claims to extended jurisdiction in the oceans beyond those that the United States recognized as matter of law or policy. The LOS negotiations themselves have created a greater awareness of the potential benefits of extended coastal state jurisdiction and have had the effect of accelerating the making of such claims, although they have moderated certainly claims to conform to texts evolved at the conference. Some of these claims are consistent with the evolving consensus at the conference, but some—particularly territorial sea claims made before the conference—extend far beyond anything that might be recognized under any likely LOS Treaty.

Some of the claims that we do not recognize as a matter of law or policy at the present time we would recognize as part of an LOS treaty that we would ratify, e.g., archipelagic State status as defined in the ICNT. An acceptable treaty would presumably represent a balance of various U.S. interests and

would draw certain distinctions and contain certain safeguards that would not obtain in the absence of such a treaty. In this regard any LOS treaty is likely to contain provisions for the compulsory and peaceful settlement of disputes, including those involving navigation questions, subject to a military exemption. This would create a new deterrent to undesirable claims and expand the options for response by the U.S.

A. The Territorial Sea

The territorial sea (including the superjacent airspace) is an area adjacent to the coast in which the coastal state is sovereign, subject only to a right of innocent passage by foreign flag vessels, whether merchant ships or warships. Except as may be otherwise agreed, in the territorial sea there is no right of overflight by foreign aircraft or submerged transit by foreign submarines. Territorial sea claims in excess of three nautical miles have proliferated in the last few years. At the present time, of the 131 independent coastal States, only 20, including the United States, claim a territorial sea of three nautical miles in breadth. Eight States claim territorial seas greater than three miles but less than twelve miles. Seventy-five States claim territorial seas of 12 miles and 28 States claim territorial seas greater than 12 miles, some extending to 200 miles from shore. With respect to the regime for the territorial sea, certain States call for prior notification or authorization for passage by warships, nuclear powered ships, or oil tankers contrary to our interpretation of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone and customary international law.

B. The Contiguous Zone

The contiguous zone is an area of the high seas adjacent to the territorial sea in which an international law recognizes that the coastal State has certain competence regarding customs, immigration, sanitary and fiscal matters. In accordance with the 1958 Geneva Convention on the Territorial Sea and

Contiguous Zone the contiguous zone may extend a maximum of 12 nautical miles from the coast. Approximately 39 States claim contiguous zones of 12 miles or less, while approximately 23 claim contiguous zones in excess of 12 miles. In addition, some States claim within their contiguous zone competence over security matters which are not in our view sanctioned by international law. The latter claims directly affect our uses of the sea for defense purposes.

C. Historic Waters, Archipelagos and Other Baseline Systems

A number of States have incorporated into their national legislation various types of baseline systems which are inconsistent with our interpretation of international law. Some States, such as the Philippines, claim as historic waters areas of the sea ranging from one-half mile to approximately 300 miles from shore. Within these claimed "historical waters" high seas freedoms are not recognized by the claimants. Other States, such as Burma, have drawn straight baselines which include as internal waters vast areas of the high seas. A limited number of States, i.e., Indonesia, Fiji, Cape Verde, and Sao Tome and Principe have declared themselves to be archipelagos. They have drawn straight baselines connecting the outermost points of the outermost islands and declared the waters landward of such baselines inland waters or archipelagic waters. (The Philippines have done the same within their claimed historic waters.) This is contrary to our review of existing international law, as we only recognize the right of States to draw baselines around individual islands, with various types of offshore jurisdiction, including territorial seas, measured from shore, although we are under occasional pressure from certain elements in Alaska and Hawaii to alter this view.

D. Fisheries or Economic Zones

A number of States have claimed jurisdiction to 200 miles, not always as an assertion of full sovereignty but rather as a

fisheries zone, as in the case of the United States, or in the more expansive form of an exclusive economic zone. The exclusive economic zone is a concept of extended jurisdiction which has developed in the course of the LOS negotiations. While 44 States have claimed fishing jurisdiction beyond 12 miles, including 35 claims to 200 miles, 40 States have claimed 200 mile economic zones. The provisions of these economic zone claims vary widely but they usually include authority over fishing, Marine scientific research, and the prevention of pollution. In addition, certain States include in their economic zones authority over artificial islands and installations, pipelines and cables. Although most disclaim any restrictions on navigation and overflight, a few include such restrictions. These latter claims have many of the trappings of a territorial sea. It should be stressed that each variant of economic zone must be addressed on its own merit, as they range from essentially fishery conservation zones to the near functional equivalent of a territorial sea.

E. Security Zones

Approximately 20 States claim security zones separate from the contiguous zone noted above, with the distances in some cases extending up to 200 miles from the coast. These States seek to prevent passage by warships and aircraft of all or certain states within such zones. North Korea for example recently declared a 50-mile military zone which purports to prohibit or severely limit navigation and overflight.

F. Continental Shelf

The 1958 Geneva Convention on the continental shelf recognizes the sovereign rights of the coastal State over the continental shelf for the purpose of exploring it and exploiting its natural resources to the 200 meter isobath and beyond to where the depth of water admits of exploitation. Thus, the extent of permissible coastal State jurisdiction would increase as technology advances. This rule is a part of customary international law as well. At the same time States which claim

jurisdiction over an economic zone of 200 miles include the seabed and subsoil out to 200 miles. Thus, these States have claimed sovereign rights over the bed of the sea which may not admit of exploitation at this time and indeed in many cases extends beyond the geomorphological continental shelf and includes part of the deep seabed. Other States maintain that as a matter of customary law they have sovereign rights over the continental shelf to the edge of the continental margin, which is not defined and which is viewed by certain States as extending hundreds of miles offshore. Some States view their jurisdiction over the margin to include control over non-resource activities, including the emplacement of military devices.

V. United States Position vis-a-vis Extended Jurisdiction

The United States currently claims and recognizes a three-mile territorial sea (including the superjacent airspace) drawn from baselines established in accordance with the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, to which it is a party, a contiguous zone extending 12 miles from the base line in accordance with that Convention, a 200-mile fishery management and conservation zone as set forth in the Fishery Conservation and Management Act, and continental shelf jurisdiction in accordance with the 1958 Geneva Convention on the Continental Shelf, to which it is party. At the same time, the U.S. maintains the high seas freedoms of navigation, overflight, and related uses as well as the laying of submarine pipelines and cables beyond the territorial sea. Moreover, we maintain the freedom of marine scientific research in the water column beyond the territorial sea although we recognize a consent regime for research concerning the continental shelf and undertaken there, which we (but few others) interpret to mean physical contact with the shelf. We do not recognize the archipelago theory but rather recognize the rights of individual islands to the various offshore jurisdictional entitlements as noted above.

The U.S. has indicated that as a part of a comprehensive and widely acceptable LOS treaty we could accept a 12-mile territorial sea provided it was coupled with transit passage (freedom of navigation and overflight for transit purposes) through, over and under straits used for international navigation. We are also prepared to accept a contiguous zone extending 24 miles from the baseline. We are prepared to accept a 200-mile exclusive economic zone which, with respect to fisheries, is generally consistent with our legislation. We are prepared to accept a system of vessel source pollution control based upon a mix of flag State, port State and coastal State competence. We are prepared to accept limitations on the conduct of scientific research within a 200-mile economic zone and on the continental shelf. We are prepared to accept coastal State sovereign rights over the resources of the continental margin to a precisely defined outer limit beyond 200 miles. Our acceptance of various coastal State competence beyond a 12-mile territorial sea is, of course, conditioned on the maintenance of the traditional high seas freedoms of navigation, overflight, and related national security uses. With the exception of marine scientific research and a precise definition of the continental margin the texts before the Conference regarding those matters are satisfactory.

The first and second Geneva Conferences on the Law of the Sea were unable to agree on the maximum breadth of the territorial sea. The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone envisaged that the territorial sea and contiguous zone together could not extend more than 12 miles from the baseline. This uncertainty in the convention, coupled with the fact that a plurality of States now claim territorial seas of 12 miles in breadth, while approximately 28 States claim territorial seas in excess of 12 miles, indicates the nature of our position that we do not recognize territorial sea claims greater in breadth than three miles. Moreover, it should be noted that although we recognize only a 3-mile territorial sea, we have claimed certain attributes of a territorial sea out to 12 miles, including pollution control jurisdiction. Indeed, we are under periodic domestic

pressure to expand our pollution control claims off our own coast in ways that would subject us to navigational restraints off foreign coasts, particularly as foreign coastal States could be expected to expand on our precedents. The absence of clear international treaty law on the subject has made our dealings with Congress and the public more difficult in this regard. Claims of territorial seas of 12 miles or greater and indeed certain claims between three and 12 miles result in situations wherein straits used for international navigation which we view as having a high seas corridor are overlapped by territorial seas. While the 1958 Geneva Convention provides for non-suspendable innocent passage through straits, this is not satisfactory for ensuring the movement of ships and aircraft through, over and under straits used for international navigation. Innocent passage confers no rights of overflight or submerged passage. Certain States which claim a 12-mile territorial sea, e.g., the Soviet Union and France, maintain a customary law right of free navigation through straits. The U.S. should promote the view that there is freedom of navigation and overflight through straits used for international navigation regardless of the width of the straits, but without endorsing territorial sea claims in excess of three miles.

Assertions of jurisdiction over navigation, overflight, and related activities beyond a narrow territorial sea are illegal in our view and cannot diminish our rights in the oceans. Furthermore, claims of archipelago status by certain island nations are illegal in our view and not binding on other nations. Finally, while the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone and customary law envisage the drawing of straight baselines under certain geographic conditions as well as claims for historic bays, it is clear that many States have gone beyond what is permitted by the Convention and our view of customary law.

In singling out extended territorial sea claims, assertions of jurisdiction over navigation, overflight, and related matters to 200 miles, assertions of archipelago status, and assertions

of certain baseline and historic bay claims, it is not suggested that these are the only assertions of jurisdiction that are contrary to our view of international law and offensive to U.S. interests. These four types of claims, however, engage the most critical security and economic interests of the U.S. and should be considered at this time. Since essential U.S. interests are placed in jeopardy, it is clear that the U.S. should seek ways to put a lid on objectionable unilateral claims, to negate them if possible, or to direct such unilateral actions in a manner most consistent with our interests. In sum, we must seek ways to preserve U.S. rights and interests in the oceans. It should be noted, however, that the enactment by the U.S. in 1976 of the Fishery Management and Conservation Act probably encouraged other countries to make similar claims, legitimized some of the claims that have been made previously, and clearly made it more difficult for us to argue that States do not have the right to unilaterally define their own interests and act accordingly. Thus, some may argue that if we can unilaterally eliminate freedom of fishing on the high seas, they can take unilateral action with respect to other freedoms.

VI. Elements in Preserving Rights

A. General Statements of Positions

The U.S. has made official statements at the LOS Conference and in other fora concerning its present policy and what it is willing to accept as part of an LOS treaty. Our statements have been given wide enough currency to be viewed as giving some notice of our general position to other States. We have also indicated in notices to mariners that we do not necessarily recognize certain jurisdictions claimed by other countries. Moreover, the Office of the Geographer in the Department of State has prepared a *Limits in the Seas* series which comments on the claims of other countries in a factual and in some cases legal manner. This series is publicly available.

These statements, notices, and studies are useful in publicizing our juridical position regarding certain claims in the oceans.

B. Diplomatic Measures

Short of formal diplomatic protests, one can make informal approaches at an appropriate level to individual governments which have asserted or intend to make a claim contrary to international law. We can approach officials at the appropriate level and indicate the U.S. position and concern and this may serve as a vehicle for urging modification of the legislative or executive action taken or contemplated. In some cases, such approaches may most usefully be made in military rather than diplomatic channels. We have flexibility concerning the formality or informality of the approach and the level at which it will be made. Our particular approach would depend upon the circumstances of each case, including the seriousness of the action taken or contemplated and other aspects of our relations with the country concerned.

At a more formal level we can lodge a diplomatic protest of actions that we do not acquiesce in or recognize. Such a protest is a formal communication from one State to another that it objects to an action performed or contemplated by the latter. It serves the important purpose of preserving rights and making it known that the protesting State does not acquiesce in and does not recognize certain actions. A State can lodge a protest against other States' actions which have been notified to the protesting State or which have become otherwise known. On the other hand, if a State requires knowledge of an action which it considers internationally illegal and in violation of its rights and does not protest, this attitude may imply a renunciation of such rights. Further, express or tacit acquiescence in an act which a State has previously protested may have the effect of overriding the earlier protest. Thus, a simple protest without further action, may not in itself be entirely sufficient in all cases to preserve the rights in behalf of which the protest was made. Nevertheless, a diplomatic

protest enhances the status of the protesting State's position and detracts from the standing of the claim that is opposed.

At the same time, it is true that when an act is in violation of an existing rule of customary or conventional international law, it is tainted with invalidity and is incapable of producing legal results beneficial to the wrongdoer in the form of a new title or otherwise. That invalidity may be wholly or partially mitigated by an individual or collective act of other States that can be taken as an act of recognition or acquiescence. Thereafter, the new assertion may be viewed as valid notwithstanding the initial illegality of the act on which it was based. At some point the law confirms established practice and expectations.

The U.S. is now faced with a situation in which many States are asserting extended claims of jurisdiction, which we view as invalid, over ocean areas. To the extent that certain claimants have asserted the jurisdiction which is generally consistent with the Informal Composite Negotiating Text (whose provisions are likely to find their way into any ultimate LOS treaty), we are faced with a difficult problem, since a treaty may not be attainable or may only be attained several years hence. In such cases, and others, we should preserve our juridical position by protesting claims which we view as illegal, but at the same time we must be realistic and try to channel certain claims, which cannot be prevented, in a direction which, while still illegal in our view, is less harmful to U.S. interests in the absence of a treaty than the claim would otherwise be. Thus, while we could not dissuade Japan from extending its territorial sea to 12 miles, we did persuade her to exclude certain straits from the extended claim. In summary, our policy should be one of trying to discourage or negate illegal claims, to direct claims in a direction least offensive to us, and otherwise to preserve our position.

Until approximately 1973 or 1974, the early stages of the LOS Conference, the U.S. had protested various types of claims that it did not recognize. Since that time, however, we

have *generally* failed to protest navigation, overflight and related restrictive claims, in part because of uncertainty as to what claims the Congress would be making regarding fisheries and control of navigation for pollution purposes. No formal policy decision was taken to cease protests, although some were stopped at high levels for bilateral political reasons. Protests were made only in certain selected instances. It is generally agreed that the U.S. should regularize its protests of claims that it does not recognize now that our own fisheries and pollution positions are clearer.

1. Arguments Regarding Regularizing Protests

In moving ahead with protests the U.S. would indicate its resolve to protect its rights with or without a treaty and this could contribute to moving the LOS negotiations forward. We would provide leadership that some of our allies are looking for in the face of widespread assertions of jurisdiction. We might reassure the Soviets that we are committed to protecting navigation rights and allay some of their concerns regarding our reluctance to be as forceful on certain aspects of the economic zone as they are. Moving ahead now would tend to counter the stepped-up pace of adverse claims, many of which pose a serious threat to navigation, over-flight and other security and economic interests. For example, the French have recently incorporated a notice requirement for the entry of oil tankers in their territorial sea (a position which has been rejected at the Conference). Cape Verde, Fiji, and Sao Tome and Principe have recently declared themselves archipelagos. We must consider the adverse effect of no protest or a prolonged delay in protesting on those States, as well as on Indonesia which has claimed archipelago status for some time. Indeed, Indonesia in recent bilateral negotiations have sought to insert a territory clause into a tax treaty and science and technology agreement with the U.S., which would tend to imply recognition of the archipelago. We have resisted such a clause. Papua New Guinea has recently instituted a baseline system, which is the first step to moving to

the declaration of an archipelago. Most of the States in South Asia have recently asserted claims of 200-mile economic zones which have many of the attributes of a territorial sea and are clearly connected with the most undesirable aspects of various proposals regarding the Indian Ocean as a zone of peace.

Moving ahead now with protests would also indicate to the Congress that the Executive Branch is truly concerned with the unilateral actions of others with possible restraining effects on unilateral tendencies of the Congress. Moving ahead now is also important because we are not merely dealing with a contingency matter in the case of failing to conclude a treaty. A treaty will not be signed for at least two years and will not be ratified for some time thereafter.

At the same time, because we have generally held our protests in abeyance for some years, it may be argued that no significant prejudice would result while waiting until the prospects of a treaty are more clear. Postponement would not upset the on-going LOS negotiations or indicate that we are giving up on the negotiations. However, a postponement can be viewed as acquiescence and the longer we delay the less tenable some positions will become. For example, only 21 States now support a three-mile territorial sea. We can expect that number to decrease in the future. The longer we delay the more we will be faced with claims contrary to our position. Putting off protests further into the future, in essence, would be a policy not to protest.

2. Specific Objects of Protest Policy

With respect to navigation and overflight we should generally protest unilateral claims that we do not now recognize and will not recognize as part of a treaty, as well as certain claims which we do not recognize but which would be acceptable in the context of an acceptable LOS treaty. We should be mindful of the fact that recognizing certain claims in the absence of a treaty may reduce the incentive for such

claimants to work for the successful conclusion of a treaty. At the same time, we should recognize the possible adverse impact of inundating the international community with diplomatic protest. It is proposed, therefore, that the U.S. first focus on those claims which most adversely impact on our critical interests. At the same time, we must avoid acquiescing in other claims that are contrary to our interests.

We should protest all territorial sea claims in excess of 12 nautical miles and at least some of the claims greater than three miles but no greater than 12 miles. In this latter category we should protest at least those claims which overlap (or in combination with another State's claim overlap) a straight used for international navigation when no explicit provision is made to provide for either freedom of navigation and overflight or transit passage along the lines of the ICNT. In any case, we must not concede, and the coastal State must be made aware that we do not recognize, that a State may inhibit or condition freedom of navigation and overflight through and over waters which we view as a high seas corridor, as that is a right we already have under international law. All claims should be protested which contain requirements for advance notification or authorization for warships or which purport to exclude warships or purport to subject warships to a more onerous regime than other vessels. Moreover, protests should be made regarding rules for innocent passage through the territorial sea (not in straits) which are substantially different from the ICNT provisions on innocent passage. The reference is made to the ICNT provisions on innocent passage because they generally codify existing law and are, therefore, satisfactory to the U.S., with or without a treaty. With respect to not protesting a State which has provided for transit passage through Straits along the lines of the ICNT, a judgment has been made that realistically this is a satisfactory result even in the absence of a treaty, because of the significant number of territorial sea claims greater than three and not more than 12 miles, although the regime of complete freedom of navigation and

overflight is preferable. This is not meant, of course, to be an exclusive list but seeks to identify the main problem areas.

We should also protest assertions of jurisdiction over navigation and overflight and associated and related high seas uses beyond the territorial sea. Such assertions include provisions which differentiate warships from other ships or purport to apply a more onerous regime for nuclear warships or vessels carrying nuclear weapons or assert plenary pollution control. Once again, this listing is illustrative, not exclusive. We must, of course, be mindful of restrictions on commercial as well as military activities.

We should also protest all claims of archipelago status. We accepted privately the archipelago concept as part of a treaty only with great difficulty and with the full recognition that vast areas of the high seas would fall under coastal State sovereignty. The provisions for navigation and overflight in the ICNT are an adequate, not a full substitute for the high seas freedoms that we now enjoy. Moreover, we should not reduce the incentive for archipelago claimants to join an ultimate treaty by explicitly or implicitly recognizing the concept in the absence of a treaty.

Finally, we should protest certain baseline and historic bay/water claims. These would have to be considered on a case-by-case basis although clear examples of injurious assertions include those by Argentina, Uruguay, Libya, the Philippines and Burma.

In singling out these four types of claims as prime candidates for protests it is not meant to imply that other claims are acceptable. Claims regarding marine scientific research, for example, need further study.

It must be recognized that certain claims that have not been protested are in fact several years old. It might seem somewhat anomalous should we now send out a protest. Further consideration should be given to the possibility of preparing

a circular note to all States, perhaps through the U.N. system, indicating the claims of offshore jurisdiction that we recognize and reserve our rights and those of our nationals with respect to all other claims.

The policy of other developed countries regarding protests seems to be somewhat spotty. Most of the protests of which we are aware address territorial sea claims in excess of 12 nautical miles although certain protests have been made of archipelago claims. In this regard, a NATO NAC meeting in early 1979 will explore further the question of preservation of rights with a view to encouraging our allies to oppose certain types of claims, especially those noted above. We should also, at an appropriate time, consult with Japan, Australia, New Zealand, and perhaps certain members of the Group of 77. We might also consult with the Soviet Union which has a major interest in freedom of navigation and overflight. A demonstrated willingness of the U.S. to take a firm position on protests may facilitate cooperation with at least certain of the above mentioned countries.

C. Exercise of Rights

As noted above, a diplomatic protest is only one means of preserving rights and may not be sufficient to preserve our rights. We must at the same time exercise our rights in the illegally claimed areas or in opposition to an illegal restriction. Our naval and air forces should exercise traditional freedoms and rights in the face of illegal claims whenever doing so is practicable and taking into account other missions of these forces as well as fiscal constraints, although in certain cases we must consider going out of our way to contest the claim. We must clearly avoid an irrational disposition of forces but we must ensure that we are seen to be exercising our rights in an unequivocal manner. We should consider whether any of our current practices could be misconstrued as acquiescence in an illegal claim. We should consider, for example, distinguishing exercises conducted in cooperation with a coastal State or as a prelude to or aftermath of a port visit

from the exercise of rights which are not so associated. Such exercises should normally be conducted in a low-key and non-threatening manner but without special attempt at concealment. It should also become a matter of public knowledge that our military forces customarily exercise these freedoms and rights.

Bilateral and regional considerations must be factored into any decisions concerning exercise of rights. Furthermore, we should consider whether other States are exercising their rights in the face of particular claims.

In sum, it should be emphasized that juridical, as well as other, considerations should be factored into the planned deployments of our military forces.

A brief review of the history of U.S. exercise of rights indicates that our record is not as unequivocal as we would desire. The United States routinely deploys military forces to the Mediterranean and the Pacific as well as to the Baltic Sea, Indian Ocean and Black Sea. Our military forces in these areas are generally exercising our rights and freedoms of the sea, but it is not clear in many cases whether we, in fact, penetrate illegally claimed areas. In addition, on a non-routine basis we deploy forces to the Sea of Okhotsk and areas off the coast of Libya. Some deployments to sensitive areas, such as the Black Sea, the Baltic Sea, and the Sea of Okhotsk, are conducted in consultation with DOD, JCS, and the Department of State and are important as visible demonstrations of our willingness to exercise our rights and as a counter to Soviet and other assertions that these areas are either Soviet lakes or the preserve of the littoral States.

We have not exercised our rights for the most part off South America. Our deployments in this area are generally in cooperation and consultation with the coastal States concerned and, consequently, may not be viewed by others as an exercise of freedom of the seas.

At the same time, the question arises of whether we engage in certain practices which may undermine our rights. In certain instances it may facilitate the normal operations of military forces to alter operating routines to make them consistent with LOS claims of other countries. No formal recognition of the validity of such claims is involved and the alterations of normal operations are generally minor. We should study, however, these practices to determine what they are, how widespread they are, whether they could be deemed by others to be acquiescence, and whether they should be continued, altered, or eliminated.

VII. Recommendations

A. The U.S. should protest claims of other States that are inconsistent with international law and U.S. policy, with particular reference to extended territorial sea claims as well as the regime therein, assertions of jurisdiction over navigation, overflight, and related matters on the high seas beyond the territorial sea, assertions of archipelago status, and assertions of certain baseline and historic bay/water claims. The Department of State should maintain a current compilation of illegal claims made by coastal States and the dates and nature of U.S. protests with respect thereto.

B. The U.S. should exercise its rights in the face of the illegal claims noted above to the extent practicable and should avoid actions which may be viewed as acquiescence in such illegal claims. Juridical as well as other considerations should be factored into the deployment planning of our military forces. the Department of Defense should maintain a current compilation of data regarding U.S. exercise of rights contrary to coastal State claims. This compilation should include dates and places as well as information concerning unusual circumstances which may occur incident to the exercise of rights.

C. The U.S. should promote the view that there is freedom of navigation and overflight at least for purposes of

> transit (as in the ICNT) through straits used for international navigation, but without endorsing territorial sea claims in excess of three miles.
>
> D. The NSC working group on navigation and overflight contingency planning should continue to function as a review group, meeting, as necessary, to review the timely implementation of this policy and to make recommendations on further action which may be required.[617]

Based on the recommendation of the NSC Paper, on March 20, 1979, the National Security Adviser tasked the DoD to operationally assert U.S rights through warship transits and aircraft overflights in areas where excessive maritime claims were maintained.[618] As a result, the Carter administration established the FON Program in 1979 as a tangible demonstration of U.S. resolve to counter excessive maritime claims.[619]

President Reagan reaffirmed the Program in the 1983 U.S. Ocean Policy Statement, which provides that the United States will not "acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight," and that the United States will "exercise and assert its rights, freedoms, and uses of the sea on a worldwide basis in a manner that is consistent with the balance of interests" reflected in UNCLOS:

> United States Ocean Policy
> March 10, 1983
>
> The United States has long been a leader in developing customary and conventional law of the sea. Our objectives have

617. Memorandum from the National Security Council to the Vice President, *supra* note 615 (footnotes omitted).

618. *See* Lt. Gen. John A. Wickham, Jr., Director, Joint Staff, Memorandum for the Assistant Secretary of Defense (International Security Affairs), Navigational Freedom and U.S. Security Interests (Apr. 18, 1979).

619. Memorandum from Lincoln P. Bloomfield, National Security Council Staff, to Zbigniew Brzezinski, U.S. National Security Advisor (July 31, 1979).

consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources. The United States also recognizes that all nations have an interest in these issues.

Last July, I announced that the United States will not sign the United Nations Law of the Sea Convention that was opened for signature on December 10. We have taken this step because several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries.

The United States does not stand alone in those concerns. Some important allies and friends have not signed the Convention. Even some signatory States have raised concerns about these problems.

However, the Convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all States.

Today I am announcing three decisions to promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the Convention and international law.

First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight. In this respect, the United States will recognize the rights of other States in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal States.

Second, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

Third, I am proclaiming today an Exclusive Economic Zone in which the United States will exercise sovereign rights in living and nonliving resources within 200 nautical miles of its coast. This will provide United States jurisdiction for mineral resources out to 200 nautical miles that are not on the continental shelf. Recently discovered deposits there could be an important future source of strategic minerals.

Within this Zone all nations will continue to enjoy the high seas rights and freedoms that are not resource-related, including the freedoms of navigation and overflight. My Proclamation does not change existing United States policies concerning the continental shelf, marine mammals, and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction. The United States will continue efforts to achieve international agreements for the effective management of these species. The Proclamation also reinforces this government's policy of promoting the United States fishing industry.

While international law provides for a right of jurisdiction over marine scientific research within such a zone, the Proclamation does not assert this right. I have elected not to do so because of the United States interest in encouraging marine scientific research and avoiding any unnecessary burdens. The United States will nevertheless recognize the right of other coastal States to exercise jurisdiction over marine scientific research within 200 nautical miles of their coasts, if that jurisdiction is exercised reasonably in a manner consistent with international law.

> The Exclusive Economic Zone established today will also enable the United States to take limited additional steps to protect the marine environment. In this connection, the United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping.
>
> The policy decisions I am announcing today will not affect the application of existing United States law concerning the high seas or existing authorities of any United States government agency.
>
> In addition to the above policy steps, the United States will continue to work with other countries to develop a regime, free of unnecessary political and economic restraints, for mining deep seabed minerals beyond national jurisdiction. Deep seabed mining remains a lawful exercise of the freedom of the high seas open to all nations. The United States will continue to allow its firms to explore for and, when the market permits, exploit these resources.
>
> The administration looks forward to working with the Congress on legislation to implement these new policies.[620]

The FON Program preserves U.S. national interests and global mobility by challenging excessive maritime claims and demonstrating U.S. non-acquiescence in unilateral acts of other States that are designed to restrict navigation and overflight rights and freedoms of the international community and other lawful uses of the seas related to those rights and freedoms. The Program underscores U.S. willingness to fly, sail, and operate wherever international law allows and exemplifies our unwavering commitment to a stable, rules-based legal regime for the world's oceans. Since its inception in 1979, hundreds of operational challenges and diplomatic protests have been

620. Statement on United States Oceans Policy, *supra* note 1, at 378–79.

conducted to demonstrate U.S. non-acquiescence in excessive maritime claims.[621]

The Program operates along three tracks: diplomatic protests and other communications by the Department of State; operational assertions by U.S. ships and aircraft; and U.S. bilateral and multilateral consultations with other governments. Freedom of Navigation Operations (FONOPS) are intended to be non-provocative exercises of rights, freedoms, and lawful use of the sea and airspace recognized under international law. They are conducted on a worldwide basis to a wide range of excessive maritime claims, without regard to current events or the identity of the State advancing the claim. Routinely applying the Program on a nondiscriminatory basis to excessive claims of allies, partners, competitors, and adversaries alike maintains the legitimacy of the Program and demonstrates U.S. resolve to uphold navigational rights and freedoms guaranteed to all nations. FONOPS are deliberately planned, legally reviewed, properly approved by higher authority, and safely and professionally conducted in a non-escalatory manner.[622]

UNCLASSIFIED EXCERPTS

January 23, 1995

PRESIDENTIAL DECISION DIRECTIVE/NSC-32

This directive provides current guidance for protecting U.S. navigation, overflight rights and freedoms, and related interests on, under, and over the seas against excessive maritime claims. The purpose of this policy is to preserve the global mobility of U.S. forces by avoiding acquiescence in excessive maritime claims of other nations . . . .

Policy

621. *See* John D. Negroponte, *Who Will Protect Freedom of the Seas?*, 86 DEPARTMENT OF STATE BULLETIN 41 (Oct. 1986); Bureau of Public Affairs, U.S. Department of State, GIST: U.S. Freedom of Navigation Program (Dec. 1988); MCRM.

622. *See* DoDI S-2005.01, Freedom of Navigation Program (Oct. 20, 2014).

> The United States considers the 1982 Convention on the Law of the Sea (LOS Convention) to accurately reflect the customary rules of international law concerning maritime navigation and overflight rights and freedoms.
>
> It is U.S. policy to respect those maritime claims that are consistent with the navigational provisions of the LOS Convention. Additionally, the United States will exercise and assert its navigation and overflight rights on a worldwide basis in a manner consistent with the LOS Convention. The United States will not acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other traditional uses of the high seas.[623]

2.9 RULES FOR NAVIGATIONAL SAFETY FOR VESSELS AND AIRCRAFT

2.9.1 International Rules

Most rules for navigational safety governing surface and subsurface vessels—including warships—are contained in the 1972 COLREGS. For the purposes of the COLREGS, a vessel is defined as every description of watercraft used or capable of being used as a means of transportation on water. Unmanned systems constituting vessels will be governed by the COLREGS. These rules apply to all international waters (i.e., the high seas, EEZs, and contiguous zones) and, except where a coastal State has established different rules, in that State's territorial sea, archipelagic waters, and inland waters. The 1972 COLREGS have been adopted as law by the United States. See 33 United States Code (U.S.C.), § 1601–1608. U.S. Navy Regulations, 1990, Article 1139, directs all persons in the naval service responsible for the operation of naval ships and craft shall diligently observe the 1972 COLREGS. In accordance with COMDTINST M5000.3B, U.S. Coast Guard Regulations, USCG personnel must comply with all federal laws and regulations.

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623. Presidential Decision Directive/NSC-32, Freedom of Navigation (Jan. 23, 1995). The DoD's annual FON reports are available at https://policy.defense.gov/ousdp-offices/fon/.

Commentary

The COLREGS include forty-one rules that are divided into six sections: Part A (General), Part B (Steering and Sailing), Part C (Lights and Shapes), Part D (Sound and Light Signals), Part E (Exemptions), and Part F (Verification of Compliance with the Convention). There are also four annexes that contain technical requirements concerning lights and shapes and their positioning; sound signaling appliances; additional signals for fishing vessels when operating in close proximity; and international distress signals. The rules apply to all vessels, including sovereign immune vessels, beyond the territorial sea (Rule 1). Rule 2 covers the responsibility of the master, owner, and crew to comply with the rules.[624]

2.9.2 National U.S. Inland Rules

Some States have adopted special rules for waters subject to their territorial sovereignty (i.e., internal waters, archipelagic waters, and territorial seas). Violation of these rules by U.S. Government vessels—including warships—may provide the basis for diplomatic protest, result in limitation on U.S. access to foreign ports, or prompt other foreign action.

The United States has adopted special inland rules applicable to navigation in U.S. waters landward of the demarcation lines established by U.S. law for that purpose. See Amalgamated International and U.S. Inland Navigation Rules (available online only at https://www.navcen.uscg.gov/?pageName=NavRulesAmalgamated); 33 Code of Federal Regulations, Part 80, COLREGS Demarcation Lines; and 33 U.S.C. §§ 2071–2072. The 1972 COLREGS apply seaward of the demarcation lines in U.S. national waters, in the U.S. contiguous zone and EEZ, and on the high seas.

Commentary

The lines of demarcation delineating those waters upon which mariners shall comply with the COLREGS and those waters upon which

624. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, T.I.A.S. 8587; 33 U.S.C. § 1602 note (1988); 33 C.F.R. pt. 81 (2023).

mariners shall comply with the Inland Navigation Rules are established in 33 C.F.R. Part 80. The waters inside of the lines are Inland Rules waters and the waters outside the lines are COLREGS waters.[625]

2.9.3 Navigational Rules for Aircraft

Rules for air navigation in international airspace applicable to civil aircraft may be found in the Chicago Convention, Annex 2, Rules of the Air; DOD Flight Information Publication General Planning; and OPNAVINST 3710.7V, Naval Air Training and Operating Procedures Standardizations (NATOPS). The same standardized technical principles and policies of ICAO that apply in international and most foreign airspace are in effect in the continental United States. U.S. pilots can fly all major international routes following the same general rules of the air, using the same navigation equipment and communication practices and procedures, and being governed by the same air traffic control services with which they are familiar in the United States. Although ICAO has not yet established an international language for aviation, English is customarily used internationally for air traffic control.

Commentary

The Chicago Convention requires States to "adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force." States are also required to keep their "own regulations in these respects uniform, to the greatest possible extent, with those established . . . under this Convention." The rules established under the Convention apply over the high seas.[626] In adopting Annex 2 (1948) to the Convention and its Amendment 1 (1951), the Council decided that the Annex constitutes rules relating to the flight and maneuver of aircraft within the meaning of Article 12 of the Convention. Thus, Annex 2 applies over the high seas without exception.[627]

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625. 33 C.F.R. § 80.01 (2023).
626. Chicago Convention, art. 12.
627. *Id.* annex 2.

> DoD Flight Information Publication (FLIP) product groups are aligned with the three flight phases: planning, enroute, and terminal. No single publication contains all of the information that may be required by aircrews. Planning documents and charts, enroute charts and supplements, terminal procedures, and notice to airmen (NOTAM) files must be consulted prior to flight. International flight planners must also refer to the Foreign Clearance Guide.[628] Guidance for military flight operations in international airspace and air routes over international straits and archipelagic sea lanes is contained in Chapter 8 of the FLIP. Guidance on filing flight plans, pilot procedures (e.g., visual flight rules and instrument flight rules), and ICAO procedures is contained in Chapters 4, 6, and 7 of the FLIP, respectively.
>
> OPNAVINST 3710.7V establishes the Naval Air Training and Operating Procedures Standardization (NATOPS) Program.[629] The NATOPS General Flight and Operating Instruction Manual details the policies and procedures in support of this instruction, which is applicable to all NATOPS users, and prescribes general flight and operating instructions and procedures pertinent to the operation of all naval aircraft and related activities.[630] The NATOPS Manual is not intended to cover every contingency that may arise and every rule of safety and good practice.[631] In a tactical environment, military exigency may require on-site deviations from instructions and procedures contained in the Manual. The existing risk of deviation must be weighed against the benefit of deviating from the Manual. Deviation from specified flight and operating instructions is authorized in emergency situations when, in the judgment of the pilot in command, safety justifies such a deviation.[632]

628. DoD FLIP, General Planning (May 23, 2019).

629. OPNAVINST 3710.7V, Naval Air Training and Operating Procedures Standardization Program, ¶ 1 (Nov. 22, 2016).

630. *Id.* ¶ 4; Chief of Naval Operations, CNAF M-3710.7, NATOPS General Flight and Operating Instruction Manual, ¶ 1.1 (July 15, 2017).

631. CNAF M-3710.7, *supra* note 623, ¶ 1.1.1.1.

632. *Id.* ¶ 1.1.1.3.

U.S. Navy Regulations, 1990, Article 1139, directs all persons in the naval service responsible for the operation of aircraft shall diligently observe applicable domestic and international air traffic regulations and such other rules and regulations as may be established by the Secretary of Transportation or other competent authority for regulating traffic and preventing collisions on the high seas, including in the air. In situations where such law, rule, or regulation is not applicable to naval ships, craft, or aircraft, they shall be operated with due regard for the safety of others.

Commentary

All persons in the naval service responsible for the operation of naval ships, craft, and aircraft shall diligently observe the COLREGS, the Inland Navigation Rules, domestic and international air traffic regulations, and such other rules and regulations as may be established by the Secretary of Transportation or other competent authority for regulating traffic and preventing collisions on the high seas, in inland waters, or in the air, where such laws, rules, and regulations are applicable to naval ships and aircraft. In those situations where such laws, rules, or regulations are not applicable to naval ships, craft, or aircraft, they shall be operated with due regard for the safety of others. Any significant infraction of the laws, rules, and regulations governing traffic or designed to prevent collisions on the high seas, in inland waters, or in the air that is observed by persons in the naval service shall be promptly reported to the chain of command, including the Chief of Naval Operations or the Commandant of the Marine Corps when appropriate.[633]

2.10 MILITARY AGREEMENTS AND COOPERATIVE MEASURES TO PROMOTE AIR AND MARITIME SAFETY

2.10.1 United States-Union of the Soviet Socialist Republics Agreement on the Prevention of Incidents On and Over the High Seas

In order to better assure the safety of navigation and flight of their respective warships and military aircraft during encounters at sea, the United States and

633. U.S. Navy Regulations, art. 1139 (1990).

the Union of the Soviet Socialist Republics (USSR) (now Russian Federation) entered into the U.S.-USSR Agreement on the Prevention of Incidents On and Over the High Seas in 1972, which was renamed the Prevention of Incidents On and Over the Waters Outside the Limits of the Territorial Sea in a 1998 exchange of notes. Following the dissolution of the USSR, the Russian Federation and Ukraine succeeded to the USSR's position in the agreement. This binding bilateral international agreement, popularly referred to as the Incidents at Sea (INCSEA) Agreement, aims to minimize harassing actions and navigational one-upmanship between U.S. and former Soviet Union units operating in close proximity at sea. Although it predates UNCLOS and the maritime zones created therein, INCSEA applies to all waters beyond the territorial sea and to international airspace. The INCSEA Agreement has been amended twice by Protocol in 1973 and through an exchange of notes in 1998.

Commentary

A series of dangerous incidents between U.S. and Soviet naval forces during the 1960s—close passes by low-flying aircraft, intentional shouldering (bumping) of surface ships, threatening maneuvers by ships and aircraft, and simulated surface and air attacks—laid the groundwork for the negotiation of the Incidents at Sea (INCSEA) Agreement. On May 25, 1972, the INCSEA Agreement was signed by Secretary of the Navy John Warner and Soviet Admiral Sergei Gorshkov in Moscow and immediately entered into force.

Over the past fifty years, INCSEA has significantly reduced unsafe and unprofessional aerobatics and ship handling when U.S. and Soviet (and later Russian) forces operate in close proximity to one another on the high seas. For example, two years after INCSEA entered into force, the number of dangerous incidents fell from one hundred to forty per year.[634] A Protocol was signed in 1973, extending the prohibition on simulated attacks to nonmilitary ships.[635]

Principal provisions of the INCSEA Agreement include:

634. Eric A. McVadon, *The Reckless and the Resolute: Confrontation in the South China Sea*, 5 CHINA SECURITY (2009).

635. Protocol to the Agreement on the Prevention of Incidents On and Over the High Seas, May 22, 1973, 24 U.S.T. 1063, 1063 T.I.A.S. 7624.

1. Ships will observe strictly both the letter and the spirit of the 1972 COLREGS.

2. Ships will remain well clear of one another to avoid risk of collision and, when engaged in surveillance activities, will exercise good seamanship so as not to embarrass or endanger ships under surveillance.

3. Ships will utilize special signals for signaling their operation and intentions.

4. Ships of one party will not simulate attacks by aiming guns, missile launchers, torpedo tubes, or other weapons at the ships and aircraft of the other party, and will not launch any object in the direction of passing ships or illuminate their navigation bridges. Under the 1973 Protocol, U.S. and Soviet military ships and aircraft shall not make simulated attacks by aiming guns, missile launchers, torpedo tubes, and other weapons at nonmilitary ships of the other party or launch or drop any objects near nonmilitary ships of the other party in such a manner as to be hazardous to these ships or constitute a hazard to navigation.

5. Ships conducting exercises with submerged submarines will show the appropriate signals to warn of submarines in the area.

6. Ships, when approaching ships of the other party, particularly those engaged in replenishment or flight operations, will take appropriate measures not to hinder maneuvers of such ships and will remain well clear.

7. Aircraft will use the greatest caution and prudence in approaching aircraft and ships of the other party, in particular ships engaged in launching and landing aircraft, and will not simulate attacks by the simulated use of weapons or perform aerobatics over ships of the other party or drop objects near them.

Commentary

The INCSEA Agreement was signed several months prior to the adoption of the COLREGS. Moreover, the COLREGS did not enter

into force until July 15, 1977. Consequently, INCSEA reaffirmed the parties' obligations under Article 18 of the VCLT to refrain from acts that would defeat the object and purpose of the COLREGS.[636] INCSEA specifically requires ship commanders to strictly observe the letter and spirit of the COLREGS.[637] Consistent with the COLREGS, Article III provides:

- When operating in close proximity, ships shall remain well clear to avoid risk of collision.
- When operating in the vicinity of a formation, ships shall avoid maneuvering in a manner that would hinder the evolutions of the formation.
- Formations shall not conduct maneuvers in internationally recognized traffic separation schemes.
- Ships engaged in surveillance shall stay at a distance that avoids the risk of collision and shall avoid executing maneuvers embarrassing or endangering the ship under surveillance.
- When operating in sight of one another, ships shall use signals prescribed in the COLREGS, the International Code of Signals (ICS), or other mutually agreed signals.
- Ships shall not simulate attacks, launch any object in the direction of a passing ship, or illuminate the navigation bridge of a passing ship.
- When conducting exercises with submerged submarines, exercising ships shall show the appropriate signals prescribed by the ICS.
- When approaching ships engaged in launching or recovering aircraft, as well as ships engaged in replenishment underway, ships shall take appropriate measures not to hinder maneuvers of such ships and shall remain well clear.

Guidance for U.S. aircraft commanders to ensure compliance with INCSEA is contained in the FLIP. Commanders of U.S. aircraft shall use the greatest caution and prudence in approaching aircraft and ships of the Russian Federation operating on and over the high seas,

636. VCLT, art. 18.
637. INCSEA Agreement, art. II.

> in particular ships engaged in launching or landing aircraft, and in the interest of mutual safety shall not permit simulated attacks by the simulated use of weapons against aircraft and ships, or performance of various aerobatics over ships, or dropping various objects near them in such a manner as to be hazardous to ships or to constitute a hazard to navigation.[638] U.S. ships and aircraft shall not make simulated attacks by aiming guns, missile launchers, torpedo tubes, and other weapons at Russian nonmilitary ships, nor launch or drop any objects near Russian nonmilitary ships in such a manner as to be hazardous to these ships or to constitute a hazard to navigation.[639] U.S. ships operating in sight of Russian ships shall give proper signals concerning the intent to begin launching or landing aircraft.[640] U.S. aircraft flying over the high seas in darkness or under instrument conditions shall, whenever feasible, display navigation lights.[641] U.S. unit Commanders shall provide through the established system or radio broadcasts of information and warning to mariners, not less than three to five days in advance, notification of actions on the high seas that represent a danger to navigation or to aircraft in flight.[642] In the event of an incident between U.S. and Russian naval or air forces, the United States and Russia shall exchange appropriate information concerning instances of collisions, incidents that results in damage, or other incidents at sea between ships and aircraft of the United States and Russia. The U.S. Navy shall provide such information through the Russian Naval Attaché in Washington and the Russian Navy shall provide such information through the U.S. Naval Attaché in Moscow.[643]

The agreement provides for annual consultations between Navy representatives of the two parties to review its implementation, which historically have been led by a Navy representative.

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638. DoD FLIP, General Planning, ¶ 8-8.b (May 23, 2019).
639. *Id.* ¶ 8-8c.
640. *Id.* ¶ 8-8d.
641. *Id.* ¶ 8-8e.
642. *Id.* ¶ 8-8f.
643. *Id.* ¶ 8-8g.

Commentary

> The annual INCSEA consultations are professional discussions reviewing the implementation of the agreement and reaffirming the enduring commitment of both sides to risk reduction dialogue. The consultations address air-to-air intercepts of each other's aircraft in international airspace, and interactions between the ships of the two nations that occurred in international waters over the past year. The discussions did not take place in 2020 due to the COVID-19 pandemic. The U.S. Navy hosted the last meeting in Washington, D.C. on July 18, 2019.[644]
>
> The United States also has an INCSEA Agreement with Ukraine.[645] Russia has INCSEA Agreements with Canada, France, Germany, Greece, Italy, Japan, the Republic of Korea, the Netherlands, Norway, Spain, and the United Kingdom.[646]

OPNAVINST 5711.96D, United States and Russia Incidents At Sea Including Dangerous Military Activities Agreements, provides information on and issues procedures concerning the INCSEA Agreement, including a table of supplementary signals authorized for use during communications between U.S. and Russian Federation units under the INCSEA Agreement.

Commentary

> The INCSEA Agreement applies to U.S. Navy, U.S. Marine Corps, MSC, U.S. Coast Guard, U.S. Air Force, and U.S. Army units when

644. Press Release, U.S. Department of the Navy, U.S. and Russian Navies Hold Annual INCSEA Consultations in Moscow (May 25, 2021), https://www.navy.mil/Press-Office/Press-Releases/display-pressreleases/Article/2631199/us-and-russian-navies-hold-annual-incsea-consultations-in-moscow/.

645. *See Treaties in Force*, U.S. DEPARTMENT OF STATE, https://www.state.gov/treaties-in-force/.

646. KRASKA & PEDROZO, *supra* note 172, at 8–9; Pedrozo, *supra* note 431, at 531. See the various Agreements Concerning the Prevention of Incidents at Sea Beyond the Territorial Sea: U.K.-U.S.S.R., July 15, 1986, 1505 U.N.T.S. 89; Ger.-U.S.S.R., Oct. 25, 1988, 1546 U.N.T.S. 203; U.S.S.R.-Fr., July 4, 1989, 1548 U.N.T.S. 223, amended by Protocol, Dec. 17, 1997, 2090 U.N.T.S. 219; U.S.S.R.-It., Nov. 30, 1989, 1590 U.N.T.S. 22; U.S.S.R.-Can., Nov. 20, 1989, 1568 U.N.T.S. 11; Ger.-Pol., Nov. 27, 1990, 1910 U.N.T.S. 39; Spain-U.S.S.R., Oct. 26, 1990, 1656 U.N.T.S. 429; U.S.S.R.-Neth., June 19, 1990, 1604 U.N.T.S. 3.

operating on and over waters beyond the territorial sea.[647] USNSs are U.S. naval auxiliaries and are subject to INCSEA.[648] The remainder of the MSC fleet consists of commercial ships under charter for various lengths of time. These ships bear the usual commercial markings of their owners. All commercial, nonmilitary U.S. ships are protected from harassment by Russian naval and naval auxiliary ships and military aircraft under the provisions of the 1973 Protocol. No specific action, such as the use of special signals, is required of nonmilitary ships.[649] On the Russian side, naval and naval auxiliary ships (ships authorized to fly a Russian naval auxiliary flag) are bound by INCSEA, to include Russian electronic reconnaissance ships.[650] Submarines are covered by INCSEA but only when they operate on the surface.[651]

INCSEA is intended to (a) reduce the risk of serious, unintended confrontation between U.S. and Russian forces on and over waters outside the limits of the territorial sea; and (b) promote the safety of operations where U.S. and Russian naval and air forces operate in proximity to each other.[652] In this regard, INCSEA is consistent, and requires compliance, with the COLREGS. Because surveillance activities are not fully accounted for by the COLREGS, INCSEA provides guidance in these situations, as well as guidance in aircraft-to-ship and aircraft-to-aircraft situations for which there are no internationally recognized rules of conduct.[653]

When operating in close proximity to Russian ships or aircraft, U.S. commanding officers and aircraft commanders will, to the maximum degree possible, establish radio communications and use the appropriate signals from the ICS and Flight Information Handbook (FIH)[654] and enclosures (1) and (2) of OPNAVINST 5711.96D to

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647. OPNAVINST 5711.96D, United States and Russian Federation Incidents at Sea Including Dangerous Military Activities Agreements, ¶ 4.a(2) (Apr. 5, 2021).

648. *Id.* ¶ 4.a(2)(a).

649. *Id.* ¶ 4.a(2)(b).

650. *Id.* ¶ 4.a(2)(d).

651. *Id.* ¶ 4.a(2)(c).

652. *Id.* ¶ 4.a(3)(a)–(b).

653. *Id.* ¶ 4.a(4).

654. DoD Flight Information Publication (Enroute), Flight Information Handbook, at A-44 (Mar. 1, 2018) [hereinafter FIH].

> indicate maneuvering intentions to Russian counterparts. At night, in conditions of reduced visibility, or under conditions of lighting and distance when signal flags are not discernable, flashing light, supplemented by radio communications, should be used to pass appropriate signals between U.S. and Russian units. Communication between military aircraft or between ships and military aircraft of the sides will utilize radio communication procedures set forth in INCSEA. Communication between ships may also use the INCSEA radio communication procedures. In addition, procedures for aircraft interception, specific to the Russian Federation, outlined in the FIH, are to be used when necessary. Commanders of ships and military aircraft should use appropriate signals from Enclosure (1) of OPNAVINST 5711.96D when they want to communicate information or describe an action that may constitute danger for ships and military aircraft of the sides. To ensure ship and aircraft safety, clear voice radio communications in English may also be used.[655]
>
> INCSEA incidents must be reported promptly to the chain of command. The message reports should provide sufficient detail (e.g., signals exchanged, position, course, speed, bearing, and range information on the units involved) to support timely discussions with the Russian Naval Attaché. Detailed written reports serve as the basis for detailed discussions at the annual INCSEA consultation.[656]

2.10.2 United States-Union of the Soviet Socialist Republics Agreement on the Prevention of Dangerous Military Activities

To avoid dangerous situations arising between their respective military forces when operating in proximity to each other during peacetime, the United States and the Soviet Union entered into the U.S.-USSR Agreement on the Prevention of Dangerous Military Activities in 1990. The agreement, commonly referred to as the Dangerous Military Activities (DMA) Agreement, addresses four specific activities:

1. Unintentional or distress (*force majeure*) entry into the national territory of the other party

655. OPNAVINST 5711.96D, *supra* note 647, ¶ 6.a(1).
656. *Id.* ¶ 6.a(2)–(3).

2. Use of lasers in a manner hazardous to the other party

3. Hampering operations in a manner hazardous to the other party in a special caution area

4. Interference with command and control networks in a manner hazardous to the other party.

The DMA Agreement continues to apply to U.S. and Russian Federation armed forces. OPNAVINST 5711.96D provides implementing guidance for the DMA Agreement to Navy department units.

Commentary

The Agreement on the Prevention of Dangerous Military Activities (DMA Agreement) seeks to ensure the safety of U.S. and Russian personnel and equipment by avoiding certain dangerous military activities and expeditiously and peacefully resolving related incidents.[657]

When in proximity to one another, the armed forces of each country are to refrain from (1) the dangerous use of lasers; (2) dangerous interference with command-and-control systems; and (3) certain activities in mutually agreed upon Special Caution Areas. The parties have also agreed to follow special procedures when the armed forces of one country enter, either unintentionally or as a result of *force majeure*, into the national territory of the other country.[658]

If it becomes necessary to immediately land in Russia, the U.S. aircraft should:

1. Attempt to establish radio contact with Russian air traffic control using frequencies, call signs, and procedures specified in the FIH.

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657. Agreement on the Prevention of Dangerous Military Activities, U.S.-U.S.S.R., June 12, 1989, 28 INTERNATIONAL LEGAL MATERIALS 879; DoD FLIP, ¶ 8–9.

658. FIH, *supra* note 654, at A-44(b)–(c). For more specific guidance on procedures regarding Dangerous Military Activities, see CDRNORAD CONPLAN 3310-07, annex C app. 34 at C-34-1 (Jan. 23, 2007).

2. Advise the Russian controlling agency or interceptor with the phrase "Request Landing" or the appropriate visual signal from Table I in the FIH. The Russian controlling agency or interceptor should provide assistance if possible.
3. Expect to be directed or escorted to a suitable airport.
4. Upon landing, expect to be parked on an isolated part of the airport or a separate hangar.
5. Use the U.S./Russia Checklist in Table III in the FIH to communicate minimum essential information to the Russian airport manager. Request billeting, messing, and transportation for aircrew and passengers. U.S. aircrews should expect assistance in arranging billeting, messing, and transportation, and in filing flight plans.
6. Secure the aircraft. It may be necessary to use aircrew members or passengers to provide a continuous presence at the airport.
7. The aircraft is not subject to any inspection except in cases where it poses a clear hazard to the environment or the health of personnel. Action may be taken to terminate the hazard. Refer questions involving inspections to higher U.S. and Russian representatives for resolution.
8. Request assistance to contact the U.S. Defense Attaché at the U.S. Embassy in Moscow as soon as possible.
9. Determine the maintenance and logistic support needed to launch the aircraft. Inform Russian officials and the U.S. Defense Attaché of the required support.
10. Sign no documents. Request that all bills be forwarded to the U.S. Embassy for payment. Request copies of all bills.
11. Depart the Russian airport as soon as practical.[659]

2.10.3 United States-China Military Maritime Consultative Agreement

Established in January 1998 by an agreement between the U.S. SECDEF and the Minister of National Defense of the People's Republic of China, the Military Maritime Consultative Agreement (MMCA) provides a forum for ex-

659. FIH, *supra* note 654, at A-44(i).

changes of views between the United States and China to strengthen maritime and air safety. The MMCA does not establish legally binding procedures between the countries, but rather provides a mechanism to facilitate consultations between their respective maritime and air forces. The MMCA forum addresses such measures to promote safe maritime practices as:

1. Search and rescue activities

2. Communications procedures when ships encounter each other

3. Interpretations of the International Rules of the Road

4. Avoidance of accidents at sea.

Commentary

The Military Maritime Consultative Agreement is designed to facilitate consultations between the DoD and China's Ministry of National Defense (MND) for the purpose of promoting common understandings regarding activities undertaken by their maritime and air forces.[660] The mechanisms for consultation include an annual meeting, working groups, and special meeting (as mutually agreed).[661] Agenda items include search and rescue, communication procedures when ships encounter each other, interpretation of the COLREGS, and avoidance of accidents-at-sea.[662]

2.10.4 2014 Code for Unplanned Encounters at Sea

The 2014 Code for Unplanned Encounters at Sea (CUES) is an international code designed to reduce uncertainty, enhance safety, facilitate communication, and promote standardized maneuvering practices between naval ships, submarines, auxiliaries, and aircraft. It consists of navigational safety rules, communications procedures, and signals. Although not legally binding, CUES provides a coordinated means of communication and maneuvering practices by utilizing existing international procedures to maximize safety at

660. MMCA, art. I.
661. *Id.* art. II.
662. *Id.* art. II(1).

sea with navies not accustomed to the routine use of maneuvering and signals manuals with each other. The participants in CUES are:

1. United States
2. Australia
3. Brunei
4. Cambodia
5. Canada
6. Chile
7. China
8. France
9. Indonesia
10. Japan
11. Malaysia
12. New Zealand
13. Papua New Guinea
14. Peru
15. Philippines
16. Republic of Korea
17. Russian Federation
18. Singapore

19. Thailand

20. Tonga

21. Vietnam.

Commentary

The Western Pacific Naval Symposium (WPNS) is a biannual meeting among navies with strategic interests in the Western Pacific. The WPNS aims to increase cooperation and the ability to operate together, as well as build trust and confidence among navies, by providing them a venue to discuss maritime issues of mutual interest as a group and through bilateral meetings. The WPNS adopted the Code for Unplanned Encounters at Sea (CUES) in 2014.

CUES offers safety procedures, a basic communications plan, and basic maneuvering instructions for naval ships and naval aircraft during unplanned encounters at sea.[663] It offers safety measures and means to limit mutual interference, to limit uncertainty, and to facilitate communication when naval ships and naval aircraft encounter each other in an unplanned manner.[664] An "unplanned encounter at sea" occurs when naval ships or naval aircraft of one State meet casually or unexpectedly with a naval ship or naval aircraft of another State.[665]

WPNS navies shall comply with the COLREGS and any action to avoid collision shall, if the circumstances permit, be positive, made in ample time, and made with due regard to the observance of good seamanship.[666] Commanding officers and masters should at all times maintain a safe separation between their vessel and those of other nations.[667]

663. CUES, ¶ 1.2.1.
664. CUES, ¶ 1.1.2.
665. CUES, ¶ 1.3.2.
666. CUES, ¶¶ 2.0, 2.1.1.
667. CUES, ¶ 2.6.2.

2.10.5 United States-China Memorandum of Understanding Regarding the Rules of Behavior for Safety of Air and Maritime Encounters

In November 2014, the United States and China entered into a memorandum of understanding (MOU) regarding the rules of behavior for the safety of air and maritime encounters. The MOU is not legally binding but is an effort to strengthen adherence to existing international law; improve operational safety at sea and in the air; enhance mutual trust; and develop a new model of military-to-military relations between the United States and China. The MOU consists of three annexes. The first annex is the terms of reference.

The second annex is the Rules of Behavior for Safety of Surface-to-Surface Encounters (Surface Rules). This annex seeks to avert incidents and build trust between U.S. and Chinese surface vessels by reiterating the requirements of international law (e.g., the 1972 COLREGS) and preexisting obligations (e.g., CUES). The Surface Rules encourage early and active communications during air-to-air encounters and reinforce the right to FON and overflight in warning areas. They discourage simulated attacks, acrobatics, discharge of weapons, illumination of bridges and cockpits, use of lasers, unsafe approaches by small craft, and other actions that could be interpreted as threatening by the other State's vessels.

The third annex was concluded in September 2015 and is the Rules of Behavior for Safety of Air-to-Air Encounters (Air Rules). This annex seeks to avert aviation incidents in international airspace between military aircraft of the United States and China. The Air Rules, like the rest of the MOU, is not legally binding and does not create any new substantive obligations. Most of the understandings reached in the Air Rules are already binding under international law, which requires military aircraft to fly in accordance with the rules applicable to civilian aircraft to the extent practicable, and to exercise due regard during air-to-air encounters. The Air Rules encourage active communication during air-to-air encounters, require intercepted aircraft to avoid reckless maneuvers, reinforce the right to FON and overflight in warning areas, and require aircraft to avoid actions that may be seen as provocative by the other State's aircraft.

Commentary

The DoD-MND Memorandum of Understanding (MOU) and its Annexes are designed to strengthen adherence to existing international law and norms, improve operational safety at sea and in the air, and enhance mutual trust.[668] By signing the MOU, both sides affirmed their commitment to the rules of behavior for the safety of military vessels and military aircraft when they encounter each other at sea or in the air.[669] Of note, nothing in the MOU prejudices either side's policies with respect to military activities in the EEZ.[670] Nothing in the MOU or its Annexes absolves a commander or master of the consequences of any neglect of precautions to avoid collision or avoid taking any other course of action that may be required by the ordinary practice of seamen, or by the special circumstances of the case.[671] Additionally, the flag State is responsible for taking such measures for military vessels flying its flag as are necessary to ensure safety at sea.[672]

The MOU further provides that those military vessels that encounter each other at sea are to abide by the COLREGs and implement CUES in good faith.[673] When military vessels encounter each other at sea, they should maintain a safe distance to avoid the risk of collision. However, "safe distance" is not defined in the MOU. Rather, the relevant provisions of the COLREGS and CUES, and the circumstances at sea at the time, will be used to determine "safe distance."[674] If either side establishes a warning area, military vessels and military aircraft should refrain from interfering with the activities (such as a military exercise or live weapons firing) in the warning area without prejudice to high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms.[675]

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668. Memorandum of Understanding Regarding the Rules of Behavior for Safety of Air and Maritime Encounters, U.S.-China, § I, Nov. 9 & 10, 2014.
669. *Id.* § I.
670. *Id.* § V.
671. *Id.* annex I § II(i).
672. *Id.* annex I § II(ii).
673. *Id.* annex II t § I.
674. *Id.* annex II § IV.
675. *Id.* annex II at § V(3).

2.11 MILITARY ACTIVITIES IN OUTER SPACE

2.11.1 Outer Space

Except when exercising transit passage or archipelagic sea lanes passage, overflight within national airspace by foreign aircraft is not authorized without the consent of the territorial sovereign. Man-made satellites and other objects in Earth orbit may overfly foreign territory freely while located in outer space. Although there is no legally defined boundary between the upper limit of national airspace and the lower limit of outer space, international law recognizes freedom of transit by man-made space objects throughout outer space. Outer space begins at the undefined upper limit of the Earth's airspace and extends to infinity.

Commentary

The DoD identifies the "space domain" as the "area above the altitude where atmospheric effects on airborne objects become negligible." The United States Space Command (USSPACECOM) area of responsibility (AOR) is the "area surrounding the Earth at altitudes equal to, or greater than, 100 kilometers (54 nautical miles) above mean sea level."[676] See § 1.10 for a further discussion of space activities.

The DoD released a new Space Policy in August 2022.[677] The new directive establishes policy and assigns responsibilities for DoD space-related activities in accordance with the National Space Policy, the U.S. Space Priorities Framework, the National Defense Strategy, the Defense Space Strategy, and U.S. law, including Titles 10, 50, and 51 of the United States Code.

2.11.2 The Law of Outer Space

International law, including the Charter of the UN, applies to the outer space activities of States. Outer space is open to exploration and use by all States. It is not subject to national appropriation and should be used for peaceful

676. JP 3-14, Space Operations (Ch. 1, Oct. 26, 2020).
677. DoDD 3100.10, Space Policy (Aug. 30, 2022).

purposes. The term peaceful purposes does not preclude military uses of outer space (including warfighting) and is therefore similar to the interpretation given to the reservation of the high seas for peaceful purposes in UNCLOS. While acts of aggression in violation of the Charter of the UN are precluded, space-based systems may lawfully be employed to perform essential command, control, communications, intelligence, navigation, environmental, surveillance, and warning functions to assist military activities on land, in the air, through cyberspace, and on and under the sea. In using outer space, States must have due regard for the rights and interests of other States.

Commentary

In December 1963, the UN General Assembly adopted Resolution 1962, which sets forth nine principles for conducting activities in outer space.[678] The resolution states that space is reserved for the benefit and in the interests of all mankind. All States are free to explore and utilize, on the basis of equality, outer space and celestial bodies, which are not subject to appropriation. The exploration and use of outer space shall be conducted in accordance with international law and the UN Charter. States are responsible for their space activities. States also shall have due regard to the interests of other States in outer space. The State of registry retains jurisdiction and control over its space objects, and any personnel thereon, while in outer space, and such objects and component parts shall be returned to the State of registry. States are internationally liable for damage to a foreign State or to its natural or juridical person caused by an object launched into outer space. Finally, astronauts shall be regarded as envoys of mankind in outer space, and States shall render assistance if they need help and quickly return them to the State of registry of their space vehicle in the event of distress.

The codified law of outer space arises principally from four major peacetime treaties: (1) the Outer Space Treaty; (2) the Rescue Agree-

678. G.A. Res 1962(XVII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (Dec. 13, 1963).

ment; (3) the Liability Convention; and (4) the Registration Convention. However, some of the provisions in these conventions may not apply between belligerents during international armed conflict.[679]

Generally, the law of armed conflict applies as a regime *lex specialis* during armed conflict.[680] In such case, the peacetime principle of non-interference with space systems may be displaced by the rules governing war. However, the ILC's Draft Articles on the Effects of Armed Conflicts on Treaties (Draft Articles) state that armed conflict does not *ipso facto* terminate or suspend peacetime treaties.[681] Article 6 of the Draft Articles states that the nature of the treaty, including its object and purpose, and the characteristics of the armed conflict, determine whether it continues to apply during armed conflict. Thus, the major outer space treaties set forth a framework that likely would exert a latent normative influence during an international armed conflict.

The United States interprets the use of outer space for "peaceful purposes" to mean "non-aggressive and beneficial" purposes consistent with the UN Charter and other international law.[682] This interpretation of "peaceful purposes" is similar to the interpretation given to the U.S. position regarding the peaceful purposes provisions of UNCLOS (see § 2.6.2). For example, observation or information-gathering from satellites in space is not an act of aggression under the UN Charter and thus would be a use of space for peaceful purposes.[683] Similarly, lawful military activities in self-defense (e.g., mis-

679. Department of Defense, Office of the General Counsel, An Assessment of International Legal Issues in Information Operations (2d ed. Nov. 1999), *reprinted in* 76 INTERNATIONAL LAW STUDIES 459, 494 (2002).

680. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S), Judgment, 1986 I.C.J. 14, ¶ 25 (June 27).

681. ILC, Draft Articles on the Effects of Armed Conflicts on Treaties, *in* Report on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10 (2011), *reprinted in* [2011] 2(2) YEARBOOK OF THE ILC 101, at 111 (art. 3).

682. *Treaty on Outer Space: Hearings Before the Senate Committee on Foreign Relations*, 90th Cong. 59 (1967) (Sen. Albert Gore, Sr.); DOD LAW OF WAR MANUAL, § 14.10.4.

683. Albert Gore, Sr., U.S. Representative to the United Nations, U.N. GAOR, 17th Sess., 1289th mtg. at 13, U.N. Doc. A/C.1/PV.1289 (Dec. 3, 1962); Report by the Committee on Satellite Reconnaissance Policy, attached to memorandum from Secretary Rusk to

sile early warning and the use of weapon systems) would be consistent with the use of space for peaceful purposes, but aggressive activities that violate the UN Charter would not be permissible.[684]

2.11.2.1 General Principles of the Law of Outer Space

In general terms, outer space consists of the moon and other celestial bodies and the expanse between these natural objects. The cornerstone of international space law is the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty of 1967). The rules of international law applicable to outer space include:

1. Access to outer space is free and open to all States.

2. Outer space is free from claims of sovereignty and not otherwise subject to national appropriation.

3. Outer space should be used for peaceful purposes.

4. Each user of outer space must show due regard for the rights of others.

5. No nuclear or other weapons of mass destruction (WMD) may be stationed in outer space. This does not prohibit weapons that are not WMDs (e.g., antisatellite laser weapons or other conventional weapons).

6. Nuclear explosions in outer space are prohibited.

7. States are to avoid harmful contamination of outer space and adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter.

8. Astronauts must render all possible assistance to other astronauts in distress.

President Kennedy (July 2, 1962), *excerpted in* 25 FOREIGN RELATIONS OF THE UNITED STATES (1961–1963), at 951–59 (2001).

684. CARL Q. CHRISTOL, THE INTERNATIONAL LAW OF OUTER SPACE 114 (1966).

9. Objects in outer space must be registered to a State.

10. States may be liable for damage inflicted by space objects where they are the State of registry or otherwise a launching State.

Commentary

The Outer Space Treaty entered into force on October 10, 1967. The agreement provides in Article I that outer space, the Moon, and other celestial bodies are the province of all mankind. Like the high seas, space is not subject to national appropriation or claims of sovereignty by means of use or occupation, or by any other means.[685] The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out "in the interest of maintaining international peace and security" and promoting cooperation and understanding.[686] The Moon, other celestial bodies, and outer space are also "free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies."[687]

Under Article IV, States parties "undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner." Article IV further requires that "the Moon and other celestial bodies shall be used . . . exclusively for peaceful purposes" and it prohibits the "establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies."

The Limited Test Ban Treaty, a bilateral agreement between the United States and the Soviet Union, bans explosive nuclear testing or other nuclear explosions in the atmosphere, outer space, and underwater.[688]

685. Outer Space Treaty, art. II.
686. *Id.* art. III.
687. *Id.* art. I.
688. Nuclear Test Ban Treaty, art. I.

The meaning of the term "peaceful purposes" is subject to contending interpretations. As discussed above (§ 2.11.2), the United States and other space powers interpret the term to allow for all military activities in space that are not specifically prohibited by treaty (e.g., stationing WMD in outer space) or that are not inconsistent with Article 2(4) (the prohibition on the aggressive use of force) or Article 51 (the right of individual and collective self-defense) of the UN Charter.[689]

In 2006, the Bush administration committed itself to explore and use space for peaceful purposes but clarified that "peaceful purposes" permit defense and intelligence-related activities.[690] Similarly, the Obama administration stated that "peaceful purposes" and international law allow outer space to be used for national security missions.[691] The 2020 U.S. Defense Space Strategy reinforces this interpretation.[692]

To accept that all military activities in space are, by their nature, prohibited by the "peaceful purposes" provision of Article IV would be inconsistent with long-standing State practice. The first military reconnaissance satellite was launched by the United States in 1959.[693] By 2020, twenty nations were operating more than three hundred military satellites in Earth's orbit.[694] Satellites are used for a variety of

689. Gore, *supra* note 682, at 13; Report by the Committee on Satellite Reconnaissance Policy, *supra* note 683. *See also* Bing Cheng, *Properly Speaking, Only Celestial Bodies Have Been Reserved for Use Exclusively for Peaceful (Non-Military) Purposes, but Not Outer Void Space*, 75 INTERNATIONAL LAW STUDIES 81, 96 (2000).

690. DEPARTMENT OF HOMELAND SECURITY, U.S. NATIONAL SPACE POLICY (Aug. 31, 2006).

691. OFFICE OF THE PRESIDENT, NATIONAL SPACE POLICY OF THE UNITED STATES OF AMERICA 3–7 (June 28, 2010).

692. DEPARTMENT OF DEFENSE, DEFENSE SPACE STRATEGY 8 (June 2020).

693. Albert D. Wheelon, *Corona: The First Reconnaissance Satellites*, PHYSICS TODAY, Feb. 1997, at 24, 29.

694. Joyce Chepkemoi, *Countries by Number of Military Satellites*, WORLD ATLAS (Mar. 16, 2018), https://www.worldatlas.com/articles/countries-by-number-of-military-satellites.html; *Here Are All the Satellites Orbiting the Earth in 2019*, ALL IN ALL SPACE (Mar. 25, 2019), https://www.allinallspace.com/here-are-all-the-satellites-orbiting-the-earth-in-2019/; *Iran Launches Military Satellite Amid Tensions with US*, THE MALAYSIAN INSIGHTS (Apr. 22. 2020), https://www.themalaysianinsight.com/s/239607; Amir Vahdat & Jon Gambrell, *Iran Guard*

> military purposes, including military communications; early warning systems; space-based navigation systems; intelligence, surveillance, and reconnaissance; and positioning, navigation, and timing operations.
>
> The Moon Agreement elaborates on numerous provisions in the Outer Space Treaty as applied to the Moon and other celestial bodies. The Agreement entered into force in June 1984 but has only eighteen States parties. None of the five permanent members of the UN Security Council is a party to the Agreement. The Agreement states that all activities on the Moon shall be carried out in accordance with the UN Charter and with due regard for the interests of all other States.[695] Moreover, the Moon and its natural resources shall be considered "the common heritage of mankind," and no State may purport to claim sovereignty over the Moon.[696] Article 11 further provides that, when exploitation of the natural resources of the Moon becomes feasible, the States parties to the Agreement undertake to establish an international regime to govern the exploitation of such resources. The Agreement requires that the Moon be used "exclusively for peaceful purposes" and "[a]ny threat or use of force or any other hostile act or threat of hostile act on the moon is prohibited."[697] Article 3 prohibits the use of the Moon to commit any such act or engage in any such threat "in relation to the earth, the moon, spacecraft, the personnel of spacecraft or man-made space objects" and States parties agree not to place in orbit around the Moon objects carrying nuclear weapons or any other WMD "or place or use such weapons on or in the moon." The Agreement further prohibits the "establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of

Reveals Secret Space Program in Satellite Launch, AP (Apr. 22, 2020), https://apnews.com/article/donald-trump-israel-persian-gulf-tensions-tehran-international-news-0b45baa8a846f55e058e98905e290ce5.

695. Moon Agreement, art. 2.

696. *Id.* art. XI.

697. *Id.* art. 3.

military manoeuvres on the moon."[698] States may, however, "establish manned and unmanned stations on the moon" to conduct activities consistent with the Agreement.[699]

In 2020, eight nations—Australia, Canada, Italy, Japan, Luxemburg, the United Arab Emirates, the United Kingdom, and the United States—signed the Artemis Accords, which represent a political commitment to establish a set of principles, guidelines, and best practices to enhance the civil exploration and use of outer space.[700] As of September 2022, twenty-one States had signed the Accords.[701] All cooperative activities under the Accords "should be exclusively for peaceful purposes and in accordance with relevant international law," including the Outer Space Treaty, the Rescue Agreement, the Liability Convention, and the Registration Convention.[702] Scientific information resulting from space activities under the Accords will be shared with the public and the international scientific community.[703] Any extraction and utilization of space resources, including any recovery from the surface or subsurface of the Moon, Mars, comets, or asteroids, should comply with the Outer Space Treaty and support safe and sustaining space activities.[704] Additionally, the exploration and use of outer space will be conducted with due regard for the rights of others and the signatories will "refrain from any intentional actions that may create harmful interference with each other's use of outer space."[705]

The Accords allow for the declaration of temporary safety zones to avoid harmful interference. Within these zones, the signatories commit to provide notification of their activities and coordinate with any

698. *Id.* art. 3.

699. *Id.* art. 9.

700. *Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes*, U.S. DEPARTMENT OF STATE (Oct. 13, 2020), https://www.state.gov/artemis-accords [hereinafter Artemis Accords].

701. *First Meeting of the Artemis Accords Signatories: Media Note*, U.S. DEPARTMENT OF STATE (Sept. 19, 2022), https://www.state.gov/first-meeting-of-artemis-accords-signatories/.

702. Artemis Accords, *supra* note 700, § 3.

703. *Id.* §§ 4, 8.

704. *Id.* § 10.

705. *Id.* § 11.

relevant actor to avoid harmful interference. Within a safety zone, the following principles will apply:

(a) the size and scope of the safety zone to include the nature of the operations being conducted and the environment in which such operations are conducted;
(b) the size and scope of the safety zone should be determined in a reasonable manner leveraging commonly accepted scientific and engineering principles;
(c) if the nature of an operation changes, the corresponding safety zone should be altered in size and scope as appropriate; and
(d) the signatories should promptly notify each other and the UN Secretary-General of the establishment, alteration, or end of any safety zone.[706]

Finally, as part of their mission planning process, the signatories commit to plan for the mitigation of orbital debris and "commit to limit, to the extent practicable, the generation of new, long-lived harmful debris released through normal operations, break-up in operational or post-mission phases, and accidents and conjunctions."[707]

2.11.2.2 The Moon and Other Celestial Bodies

Under international law, military bases, installations, and fortifications may not be erected, or may weapons tests or maneuvers be undertaken, on the moon or any other celestial bodies. All equipment, stations, and vehicles located on the moon or other celestial bodies (but not elsewhere in space) are open to representatives of other States on a reciprocal basis. Military personnel may be employed on celestial bodies such as the moon for scientific research and any activities undertaken for peaceful purposes.

Commentary

The prohibition on the placement of WMDs in orbit, as well as installing or stationing such weapons on celestial bodies or in outer

706. *Id.* § 11.
707. *Id.* § 12.

space, does not prohibit using space as a medium for delivering a nuclear weapon.[708] The Outer Space Treaty does not ban WMD that go into a fractional orbit or engage in suborbital flight. Intercontinental ballistic missiles are permissible since they travel through space during only a portion of their trajectory and are there temporarily. States are also prohibited from establishing military bases, installations, and fortifications on celestial bodies, as well as testing any type of weapons or conducting military maneuvers on such bodies.[709] These activities are prohibited only on the Moon and other celestial bodies, however, and not in the vast spaces between such bodies. Article IV also recognizes that military personnel, as well as equipment and facilities, may be used freely for peaceful purposes in outer space missions.

States are responsible in international law for their activities in outer space, "including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities."[710] If a State launches an object into outer space, including the Moon and other celestial bodies, it is internationally liable for damage to another State or its natural or juridical persons.[711] This provision would, however, be trumped by the *lex specialis* of the law of armed conflict between belligerents. However, it is not clear whether it also applies as against third-party States whose satellites are also harmed. States bear responsibility during armed conflict for violations of the law of war, which generate an obligation to compensate other States.[712]

States are additionally required to conduct all their activities in outer space, including the Moon and other celestial bodies, with "due regard" to the corresponding interests of all other States.[713] To monitor

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708. Outer Space Treaty, art. IV.

709. *Id.*

710. Outer Space Treaty, art. IV; Report of the ILC to the General Assembly, 53 U.N. GAOR Supp. No. 10, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 YEARBOOK OF THE ILC 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

711. Outer Space Treaty, art. VII. *See also* Kieran Tinkler, *Rogue Satellites Launched into Outer Space: Legal and Policy Implications*, JUST SECURITY (June 17, 2018), https://www.justsecurity.org/57496/rogue-satellites-launched-outer-space-legal-policy-implications/.

712. DOD LAW OF WAR MANUAL, § 18.9.1.

713. Outer Space Treaty, art. IX.

compliance, all stations, installations, equipment, and space vehicles on the Moon and other celestial bodies shall be open to the representatives of other States on the basis of reciprocity if advance notice of the projected visit is provided.[714]

See §§ 2.11.2 and 2.11.2.1 for the U.S. interpretation of "peaceful purposes."

The Liability Convention elaborates on Article VII of the Outer Space Treaty. Article II imposes absolute liability on the launching State "to pay compensation for damage caused by its space object on the surface of the earth or to aircraft flight." For damages not on the Earth's surface, the launching State is "liable only if the damage is due to its fault or the fault of persons for whom it is responsible."[715] A launching State may be exonerated from absolute liability if it can establish that the damage resulted "from gross negligence or from an act or omission done with intent to cause damage" by the "claimant State or of natural or juridical persons it represents," unless the damage results from activities conducted by the launching State that are inconsistent with international law, in particular the UN Charter and the Outer Space Treaty.[716] A claim for compensation for damages "shall be presented to the launching state through diplomatic channels" or through the UN Secretary-General.[717] If the parties cannot settle the claim through diplomatic negotiations within one year, the dispute will be decided by a Claims Commission.[718]

2.11.3 Rescue and Return of Astronauts

Both the Outer Space Treaty and the 1968 Rescue and Return of Astronauts Agreement establish specific requirements for coming to the aid of civilian and military astronauts. These include a requirement by States to extend search and rescue assistance if such persons have made an emergency or unintended landing in a State's territorial waters, the high seas, or other place

714. *Id.* art. XII.
715. Liability Convention, art. III.
716. *Id.* art. VI.
717. *Id.* arts. VIII–IX.
718. *Id.* arts. XIV, XVIII, XIX.

not under the jurisdiction of any State. Rescued personnel are to be safely and promptly returned.

Commentary

Astronauts are considered envoys of mankind. Accordingly, Article V of the Outer Space Treaty provides that all States shall render all possible assistance to such personnel of a spacecraft "in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas." Article V further provides that personnel of a spacecraft "shall be safely and promptly returned to the State of registry of their space vehicle" and that astronauts shall render all possible assistance to other astronauts when conducting activities in outer space and on celestial bodies. The State of registration maintains ownership over its space objects, wherever located, and all States shall, upon request, provide assistance to the launching State in recovering its space objects that return to Earth.[719]

The Registration Convention requires States to register their space objects launched into Earth orbit or beyond in an appropriate registry maintained by the launching State.[720] Article III requires the UN Secretary-General to maintain a Register of the various State registries. All States shall provide the Secretary-General information concerning each space object recorded in its registry, to include:

(a) name of launching State or States;
(b) an appropriate designator of the space object or its registration number;
(c) date and territory or location of launch;
(d) basic orbital parameters, including:
    (i) nodal period;
    (ii) inclination;
    (iii) apogee;
    (iv) perigee;
(e) general function of the space object.[721]

719. Outer Space Treaty, art. VIII.
720. Registration Convention, art. II.
721. *Id.* art. IV.

Article IV further requires States to inform the Secretary-General when a previously reported space object is no longer in Earth orbit.

2.11.4 Return of Outer Space Objects

The Rescue and Return of Astronauts Agreement includes obligations regarding the return to Earth of outer space objects. For example, where the component part of a space object lands in the sovereign territory of a contracting party, it must take steps to recover and return the object to the launching authority. However, such steps are only required if practicable and assistance is requested by the launching authority of the object. Expenses incurred by a State in assisting the launching authority are to be borne by the latter.

Commentary

Article 5 of the Rescue Agreement provides:

> 1. Each Contracting Party which receives information or discovers that a space object or its component parts has returned to Earth in territory under its jurisdiction or on the high seas or in any other place not under the jurisdiction of any State, shall notify the launching authority and the Secretary-General of the United Nations.
>
> 2. Each Contracting Party having jurisdiction over the territory on which a space object or its component parts has been discovered shall, upon the request of the launching authority and with assistance from that authority if requested, take such steps as it finds practicable to recover the object or component parts.
>
> 3. Upon request of the launching authority, objects launched into outer space or their component parts found beyond the territorial limits of the launching authority shall be returned to or held at the disposal of representatives of the launching authority, which shall, upon request, furnish identifying data prior to their return.

> 4. Notwithstanding paragraphs 2 and 3 of this Article, a Contracting Party which has reason to believe that a space object or its component parts discovered in territory under its jurisdiction, or recovered by it elsewhere, is of a hazardous or deleterious nature may so notify the launching authority, which shall immediately take effective steps, under the direction and control of the said Contracting Party, to eliminate possible danger of harm.
>
> 5. Expenses incurred in fulfilling obligations to recover and return a space object or its component parts under paragraphs 2 and 3 of this Article shall be borne by the launching authority.

2.11.5 Law of Armed Conflict in Outer Space

The law of armed conflict, as a critical component of international law, would regulate the conduct of hostilities in outer space. The customary law of armed conflict would apply to activities in outer space in the same way it applies to activities in other environments, such as the land, sea, air, or cyberspace domains. Provisions in law of war treaties of a general nature would apply to the conduct of hostilities in outer space. Certain provisions of these treaties may not be applicable between belligerents during international armed conflict See DOD Law of War Manual, 14.10.2.1.

Commentary

> There is no international consensus on whether all, or even some, of the law of armed conflict applies in outer space.[722] Nevertheless, the use of force in outer space during an international armed conflict is constrained by existing treaty and customary international law, including the UN Charter and law of armed conflict rules regulating

722. Frans G. von der Dunk, *Armed Conflicts in Outer Space: Which Law Applies?*, 97 INTERNATIONAL LAW STUDIES 188, 191–92 (2021); Michael N. Schmitt, *International Law and Military Operations in Space*, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 89 (2006); Michael Schmitt & Kieran Tinkler, *War in Space: How International Humanitarian Law Might Apply*, JUST SECURITY (Mar. 9, 2020), https://www.justsecurity.org/68906/war-in-space-how-international-humanitarian-law-might-apply/.

the means and methods of warfare.[723] Thus, belligerents must respect law of armed conflict rules governing the conduct of hostilities, to include the "principle of distinction, the prohibition against indiscriminate and disproportionate attacks, and the obligation to take precautions in attack against the effects of attack."[724]

There is no question that man-made space satellites are lawful military objectives if they carry weapons, are part of the enemy's kill chain (such as GPS), or are used for intelligence, surveillance, and reconnaissance; military communications; or command and control.[725] GPS satellites, however, are dual-use space objects. An attack on a GPS satellite could destroy or degrade safety-critical civilian activities, such as air traffic control, but it may also present a military advantage because the satellite could aid the adversary.[726] Therefore, targeting a GPS satellite requires a proportionality analysis to ensure that the anticipated military advantage outweighs expected incidental harm to civilians. Furthermore, attacks against military satellites and space vehicles may generate significant space debris that could affect civilian satellites, requiring an analysis of whether the attack is proportional in relation to the expected harmful effects and anticipated military advantage.[727] Such attacks also implicate the rights of neutral States that may own or operate satellites that are affected by debris.[728]

During an international armed conflict, enemy military satellites and other space objects are always lawful targets. Civilian and dual-use satellite objects in outer space may also be military objectives and subject to attack if they are used by the enemy to conduct or sustain

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723. ICRC, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT 32 (Nov. 22, 2019) [hereinafter ICRC REPORT ON CONTEMPORARY ARMED CONFLICT]; DOD LAW OF WAR MANUAL, § 14.10.2.2.

724. ICRC REPORT ON CONTEMPORARY ARMED CONFLICT, *supra* note 723, at 34.

725. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 144 (4th ed. 2022).

726. ICRC REPORT ON CONTEMPORARY ARMED CONFLICT, *supra* note 723, at 32–35.

727. DINSTEIN, *supra* note 725, at 139–40.

728. Michel Bourbonnière & Ricky J. Lee, *Jus ad Bellum and Jus in Bello Considerations on the Targeting of Satellites: The Targeting of Post-Modern Military Space Assets*, 44 ISRAELI YEARBOOK OF HUMAN RIGHTS 167, 200 (2014); *cf.* Wolff Heintschel von Heinegg, *Neutrality and Outer Space*, 93 INTERNATIONAL LAW STUDIES 526, 530 (2017).

operations—such as for precision navigation and timing or for intelligence, surveillance, and reconnaissance—and for other war fighting or war sustaining activities.[729]

Proportionality and precautions in attack also apply. A civilian satellite or space object that is not making an effective contribution to military action may not be attacked.[730] Moreover, in the event of a dual-use satellite or space object, belligerents must take into consideration the "expected incidental harm to civilians and civilian objects . . . while assessing the legality of the attack under the principles of proportionality and precautions."[731] Even temporarily disabling a commercial satellite may, in certain circumstances, impose severe consequences on the civilian population, such as the loss of essential civilian services, like an electrical power grid.[732]

Belligerents must also consider the amount of space debris that will be created by the operation when conducting a kinetic attack on a space object. Space debris resulting from an attack on a lawful military target in space could potentially harm both protected civilian and third-party neutral military satellites. If disabling, rather than destroying, an enemy satellite will achieve a similar military advantage, the means selected to engage it should be the one that is least likely to cause danger to civilians and civilian objects.[733]

The Woomera Manual on the International Law of Military Space Activities and Operations seeks to identify, clarify, and succinctly articulate the extant rules of international law that apply to military space activities and operations, to explain the basis for those rules, and to delineate the areas of legal uncertainty that remain.[734]

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729. AP I, art. 52(2); DOD LAW OF WAR MANUAL, § 5.17.2.3.

730. AP I, art. 52.

731. AP I, art. 57; ICRC REPORT ON CONTEMPORARY ARMED CONFLICT, *supra* note 723, at 34.

732. ICRC REPORT ON CONTEMPORARY ARMED CONFLICT, *supra* note 723, at 35.

733. AP I, art. 57; Schmitt & Tinkler, *supra* note 722.

734. *See The Woomera Manual*, THE UNIVERSITY OF ADELAIDE, https://law.adelaide.edu.au/woomera/.