Leveraging Transit Passage to Accomplish Operational Objectives

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The main role of operational level of war (OLW) commanders and their staffs is to synchronize tactical forces in space and time to accomplish operational objectives that nest with strategic goals. This includes integrating each of the operational functions (C2, Movement and Maneuver, Fires, Force Protection, Intelligence, and Sustainment) to set the conditions for success of assigned tactical forces. When synchronizing the activities of tactical forces, planners must develop a scheme of maneuver. Unfortunately, too few planners appreciate the legal aspects of the operational environment and how they might take advantage of the Law of the Sea in peacetime to enhance their scheme of maneuver. The purpose of this article is to focus on the regime of transit passage and how it can be leveraged by planners to accomplish operational objectives.

Transit Passage- A Brief History

Many are unaware that prior to the late 1960’s most nations claimed a territorial sea (TTS) of only 3 NM. As a result, most of the world’s key international straits (a.k.a. chokepoints) had running through them a high seas corridor where all freedoms of navigation applied to include submerged transit of submarines and overflight of military aircraft. This liberal maritime regime benefitted the world’s leading powers, many of which owned colonies around the globe.
However, when the 1958 Territorial Seas Convention failed to reach international consensus on what the TTS limit should be, several nations began to assert a 12NM TTS via national legislation, to include many of the newly formed nations in the wake of de-colonialization. By 1979, 76 nations claimed a 12NM TTS which left 121 international straits with overlapping TTS. A resulting “strait debate” ensued pitting “freedom of navigation nations” such as the United States and Soviet Union against “strait states” (e.g. Fiji, Greece, Indonesia, Malaysia, Morocco, Yemen, Spain, Philippines) who sought to significantly restrict navigational freedoms through straits for ships and aircraft. The US and USSR wanted to preserve the ability to send military assets through key straits without interference by coastal nations, to include their SSBNs submerged so as to remain undetected. Straits’ nations expressed both security and environmental concerns for their desire to restrict navigational freedoms.

In an effort to mollify both sides on the strait debate, during the Third UN Convention on the Law of the Sea (1973-1982) Great Britain proposed a regime called “transit passage” that essentially ensured navigational freedoms for ships, subs, and aircraft as they transited international straits. The resulting Part III of the UN Convention of the Law of the Sea (better known as UNCLOS which entered into force in 1994 after being ratified by 60 nations) thus
established certain rights and duties for transiting ships and aircraft as well as coastal nations bordering international straits. While the US has not ratified UNCLOS (despite the backing of every SECNAV, JCS Chairman, and President since Ronald Reagan) it still adheres to the provisions regarding navigation as they are deemed reflective of customary international law (CIL) as originally set forth in President Reagan’s 1983 Oceans Policy Statement.¹

Understanding Transit Passage

Ships, subs, and aircraft have the right to transit international straits that connect one part of the high seas or exclusive economic zone (EEZ) with another part of the high seas or EEZ as long as they do so continuously, expeditiously, and in the normal mode of operations.² The right of transit passage applies from shoreline to shoreline throughout the strait as well as the approaches to the strait.³ Moreover, sovereign immune vessels like US Navy ships, subs, and craft such as unmanned underwater and surface vehicles are NOT required to adhere to established traffic separation schemes (TSS).⁴ Finally, US ships and aircraft may take necessary and proportionate self-defense measures as they transit to include formation steaming, providing air cover, and, to the extent required for self-defense, conducting intelligence, surveillance, and reconnaissance (ISR) activities.⁵

Applying these basic principles to an actual international strait is instructive. In the diagram below you can see that in the Strait of Hormuz there is only a small area where the TTS of Iran and Oman overlap.
You will also notice that as you approach the strait from the Gulf of Oman the TTS of Iran, Oman, and the UAE extend 12 NM off the coast as you funnel your way to the strait. The US position is that as you navigate toward the actual strait you may expeditiously transit through the normal approaches to the strait to include the 12NM TTS (and airspace above) Iran, Oman and the UAE because you should NOT have to go from high seas freedoms, to innocent passage, to transit passage. Recall there is no right of innocent passage for aircraft. Rather, the right of transit passage implies that you can proceed directly from high seas freedoms to transit passage and back to high seas freedoms.6

Additionally, the right of transit passage doesn’t just exist where the TTS of Iran and Oman overlap but instead applies through the entire strait. Typically charts will not have “bright lines” that denote exactly where an international strait begins and ends. As such, maritime component commanders might deem it prudent to promulgate information as to where the strait
begins/ends insofar as where US vessels and aircraft are expected to assert their right of transit passage if challenged.

With respect to traffic separation schemes (TSS), a close read of the 1972 International Regulations for Preventing Collisions at Sea (COLREGs) in conjunction with the 1974 International Convention for the Safety of Life at Sea (SOLAS) leads to the conclusion that warships, naval auxiliaries, and other ships owned or operated by a contracting government and used only on non-commercial service are exempt from adhering to International Maritime Organization (IMO) approved TSS. As such, should planners deem it appropriate, they might task a ship to transit outside the TSS (as long as they exhibit due regard for the safety of navigation) for situations such as military contingencies, classified missions, politically sensitive area missions, freedom of navigation assertions, mine clearance operations, self-defense purposes, or any other legitimate purpose.
Delving deeper into the right of transit passage for aircraft may also be instructive. Clearly aircraft do not have to adhere to traffic separation schemes which exist solely for the navigational safety of vessels. As such, aircraft (fixed wing, rotary wing, and UAVs) may also transit shoreline to shoreline as long as they exercise due regard for the safety of others.\(^9\) With respect to transit passage in the approaches to a strait, perhaps looking at the Bab el Mandeb (BAM) will better explain. In the below diagram you will note that the approach to the northern and southern portions of the BAM are dotted with islands and rocks, each of which has their own 12NM TTS and associated national airspace above. The right of transit passage for aircraft would be rendered virtually useless if an aviator was forced to jink and dodge around all of the national airspace associated with these islands and rocks. As William Schacte, Jr., a former Rear Admiral in the Navy JAG Corps stated, “It would defy navigational safety to require ships or aircraft to converge at a ‘hypothetical entrance’ to the strait. It would also effectively deny many aircraft the right of transit passage if the pilot had to zigzag around the TTS of rocks and islands during the approaches to the strait. For transit passage to have any meaning, open over-water access through the approaches must be included.”\(^10\)
How Can Planners Leverage Transit Passage?

Given the above, planners ought to give careful consideration regarding if and how they can leverage the right of transit passage to meet operational objectives. For example, if a coastal nation threatened to use mines to close a strait deemed vital for international commerce, planners might want to maintain a persistent ISR and fires presence in the strait in order to
monitor the situation, take action per national policy, and defend transiting units. The schemes of maneuver, fires, protection, logistics, and intelligence (the core operational functions) could all take advantage of the somewhat non-restrictive transit passage rights afforded to US ships, subs, aircraft, unmanned surface vehicles (USVs) and unmanned aerial vehicles (UAVs), and unmanned underwater vehicles (UUVs). As long as units transit continuously and expeditiously (e.g. at the normal speed of the slowest transiting unit), they would be entitled to do so shoreline to shoreline under, on, and over both the strait and its approaches. Since there is no limit to how many assets can transit at the same time, the notion of continuous presence is more restricted by capacity than law. As such, it might be feasible to transit multiple assets under, on, and over the water in such a manner as to deter mine laying, be prepared to conduct fires per US policy, and conduct ISR as required to defend the transiting units (which would naturally include collection ashore to some degree). As always, the political sensitivity of the area must be considered as well as the risk associated with transiting in close proximity to land (e.g. a UAV flying 1NM off the coast conducting ISR as part of force protection/self-defense of transiting units.) Finally, planners should also be aware that the character of the waters and airspace where the TTS of straits nations overlap is subject to coastal nation consent to authorize US units to operate in their TTS or airspace, as long as those units exercise due regard for the safety of others. For example, if a coastal nation were to consent to a US P-8 orbiting in its national airspace within an international strait then that is certainly their prerogative. Similarly, a coastal nation bordering a strait could allow surface assets to conduct military research activities or MCM operations inside their TTS to map the ocean floor.

Conclusion

Too often planners lament legal restraints imposed on their freedom of action and course of action (COA) development. More often than not it is actually US policy that is more restrictive than international or domestic law. JAGs on numbered fleet staffs are well-trained to plug into Operational Planning Teams (OPTs) in order to provide planners with the “legal range of options” as they relate to desired actions and effects. JAGs are similarly taught to examine every aspect of a COA through a legal lens so that they can highlight any legal risk to ensure that appropriate mitigation measures can be considered and that COAs support US international legal positions.

This brief article was intended to debunk the misconception that transit passage overly restricts and negatively impinges on the freedom of action of military forces. Indeed, far from it, the right of transit passage, and the duty of coastal straits nations not to impede, hamper, or
suspend that right actually provides planners with a wide range of options when considering how to employ assigned forces.

1 Ronald Reagan, Statement on United States Ocean Policy, 10 March 1983
3 NWP 1-14M, Commanders Handbook on the Law of Naval Operations, 2.5.3
4 Id.
5 Id. See also Department of the Navy, Deputy Assistant Judge Advocate General (International and Operational Law) Memorandum for Commander, Naval Warfare Development Command, 20 Apr 05, Subj: The Use of UAVs While Transiting the Straits of Hormuz.
7 1974 International Convention for the Safety of Life at Sea (SOLAS) as revised in 2007, Chapter 5, Regulation 1. See also NWP 1-14M at 2.5.3.
8 Annotated Supplement at 2-66.
9 NWP 1-14M at 2.5.3.
11 UNCLOS, Art. 34.
12 UNCLOS, Art. 40.

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