

## CHAPTER 2

# International Status and Navigation of Warships and Military Aircraft

### 2.1 STATUS OF WARSHIPS

**2.1.1 Warship Defined.** International law defines a warship as a ship belonging to the armed forces of a nation bearing the external markings distinguishing the character and nationality of such ships, under the command of an officer duly commissioned by the government of that nation and whose name appears in the appropriate service list of officers, and manned by a crew which is under regular armed forces discipline.<sup>1</sup> In the U.S. Navy, those ships designated "USS" are "warships" as defined by international law.<sup>2</sup> U.S. Coast Guard vessels designated "USCGC" under the command of a commissioned officer are also "warships" under international law.<sup>3</sup>

**2.1.2 International Status.** A warship enjoys sovereign immunity from interference by the authorities of nations other than the flag nation.<sup>4</sup> Police and port authorities may board a warship only with the permission of the commanding officer. A warship cannot be required

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<sup>1</sup> High Seas Convention, art. 8(2); 1982 LOS Convention, art. 29; Hague Convention No. VII Relating to the Conversion of Merchant Ships into War-ships, The Hague, 18 October 1907, 2 Am. J. Int'l L. (Supp.) 133, Schindler & Toman 591, arts. 2-5; GP I, art. 43. The service list for U.S. naval officers is the Register of Commissioned and Warrant Officers of the United States Navy and Naval Reserve on the active duty list (NAVPERS 15018); the comparable list for the U.S. Coast Guard is COMDTINST M1427.1 (series), Subj: Register of Officers.

<sup>2</sup> U.S. Navy Regulations, 1990, art. 0406; SECNAVINST 5030.1 (series), Subj: Classification of Naval Ships and Aircraft.

It should be noted that neither the High Seas Convention nor the LOS Convention requires that a ship be armed to be regarded as a warship. Under the LOS Convention, however, a warship no longer need belong to the "naval" forces of a nation, under the command of an officer whose name appears in the "Navy list" and manned by a crew who are under regular "naval" discipline. The more general reference is now made to "armed forces" to accommodate the integration of different branches of the armed forces in various countries, the operation of seagoing craft by some armies and air forces, and the existence of a coast guard as a separate unit of the armed forces of some nations. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 Va. J. Int'l L. 813 (1984).

<sup>3</sup> The U.S. Coast Guard is an armed force of the United States. 10 U.S.C. sec. 101 (1988), 14 U.S.C. sec. 1 (1988). U.S. Coast Guard cutters are distinguished by display of the national ensign and the union jack. The Coast Guard ensign and Coast Guard commission pennant are displayed whenever a USCG vessel takes active measures in connection with boarding, examining, seizing, stopping, or heaving to a vessel for the purpose of enforcing the laws of the United States. U.S. Coast Guard Regulations, 1985, secs. 10-2-1, 14-8-2 & 14-8-3; 14 U.S.C. secs. 2 & 638 (1988); 33 C.F.R. part 23 (distinctive markings for USCG vessels and aircraft).

<sup>4</sup> High Seas Convention, art. 8; 1982 LOS Convention, arts. 32, 58(2), 95 & 236. The rules applicable in armed conflict are discussed in Part II, particularly Chapters 7 and 8. The historic basis of this rule of international law is evidenced in *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812).

to consent to an onboard search or inspection,<sup>5</sup> nor may it be required to fly the flag of the host nation.<sup>6</sup> Although warships are required to comply with coastal nation traffic control, sewage, health, and quarantine restrictions instituted in conformance with the 1982 LOS Convention, a failure of compliance is subject only to diplomatic complaint or to coastal nation orders to leave its territorial sea immediately.<sup>7</sup> Moreover, warships are immune from arrest and seizure, whether in national or international waters, are exempt from foreign taxes and regulation, and exercise exclusive control over all passengers and crew with regard to acts performed on board.<sup>8</sup>

### 2.1.2.1 Nuclear Powered Warships. Nuclear powered warships and conventionally powered warships enjoy identical international legal status.<sup>9</sup>

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<sup>5</sup> U.S. Navy Regulations, 1990, art. 0828. CNO Washington DC message 032330Z MAR 88, NAVOP 024/88, regarding foreign port visits, points out that the United States also will not respond to host nation requests for specific information on individual crew members including crew lists and health records, and will not undertake other requested actions upon which the Commanding Officer's certification is definitive. *See also* Annex A2-1 (p. 2-43) for a more recent summary of U.S. sovereign immunity policy regarding U.S. warships, auxiliaries and military aircraft promulgated as ALPACFLT message 016/94, 020525Z Jun 94.

<sup>6</sup> The U.S. Navy has provided, as a matter of policy and courtesy, for the display of a foreign flag or ensign during certain ceremonies. *See* U.S. Navy Regulations, 1990, arts. 1276-78.

<sup>7</sup> Territorial Sea Convention, art. 23; 1982 LOS Convention, art. 30; U.S. Navy Regulations, 1990, art. 0832, 0859, & 0860. Quarantine is discussed in paragraph 3.2.3 (p. 3-4). As stated in paragraph 2.3.2.1 (p. 2-7), force may also be used, where necessary, to prevent passage which is not innocent.

<sup>8</sup> Territorial Sea Convention, art. 22; High Seas Convention, art. 8(1); 1982 LOS Convention, arts. 32, 95 & 236. While on board ship in foreign waters, the crew of a warship are immune from local jurisdiction. Their status ashore is the subject of SECNAVINST 5820.4 (series), Subj: Status of Forces Policies, Procedure, and Information. Under status of forces agreements, obligations exist to assist in the arrest of crew members and the delivery of them to foreign authorities. *See* AFP 110-20, chap. 2; U.S. Navy Regulations, 1990, art. 0822; and JAG Manual, sec. 0609.

<sup>9</sup> Cf. 1982 LOS Convention, arts. 21(1), 22(2) and 23, and U.S.-U.S.S.R. Uniform Interpretation of Rules of International Law Governing Innocent Passage, Annex A2-2 (p. 2-47), para. 2. For further information and guidance *see* OPNAVINST C3000.5 (series), Subj: Operation of Naval Nuclear Powered Ships (U). *See also* Roach & Smith, at 160-1.

The Department of State has noted that:

[I]n recognition of the sovereign nature of warships, the United States permits their [nuclear powered warships] entry into U.S. ports without special agreements or safety assessments. Entry of such ships is predicated on the same basis as U.S. nuclear powered warships' entry into foreign ports, namely, the provision of safety assurances on the operation of the ships, assumption of absolute liability for a nuclear accident resulting from the operation of the warship's reactor, and a demonstrated record of safe operation of the ships involved. . . .

1979 Digest of U.S. Practice in International Law 1084 (1983). Exec. Order 11,918, 1 June 1976, 3 C.F.R. part 120 (1976), 42 U.S.C. sec. 2211n (1988), was issued pursuant to 42 U.S.C. sec. 2211 to provide prompt, adequate, and effective compensation in the unlikely event of injury or damage resulting from a nuclear incident involving the nuclear reactor of a U.S. warship. 1976 Digest of U.S. Practice in International Law 441-42 (1977).

(continued...)

**2.1.2.2 Sunken Warships and Military Aircraft.** Sunken warships and military aircraft remain the property of the flag nation 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.<sup>10</sup>

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<sup>9</sup>(...continued)

Although nuclear powered warships frequently pass through the Panama Canal, they have transited the Suez Canal only infrequently. The transit by USS ARKANSAS (CGN 41) on 3 November 1984 was the first (U.S. Naval Inst. Proc., May 1985, at 48); the transit by USS ENTERPRISE (CVN 65) from the Indian Ocean to the Mediterranean via the Suez Canal on 28 April 1986 was the second (U.S. Naval Inst. Proc., May 1987, at 38). A request for ENTERPRISE to return to the Pacific via the Suez Canal was denied by Egypt "because it is reviewing its new rules governing passage." Washington Post, 4 July 1986, at A21. The Egyptian President noted in a newspaper interview that safety of the waterway and residents on both banks had to be considered, along with a possible surcharge for the passage of nuclear ships, as well as a guarantee for compensation in case of nuclear accidents. USS EISENHOWER (CVN-69) on 7 August 1990 and USS THEODORE ROOSEVELT (CVN-71) on 14 January 1991 transited the Suez Canal into the Red Sea in response to Iraq's attack on Kuwait on 2 August 1990. See paragraph 2.3.3.1, note 36 (p. 2-14) for a discussion of canals.

With regard to nuclear armed warships and aircraft, U.S. policy is to neither confirm nor deny the presence of nuclear weapons on board specific U.S. ships and aircraft. The firmness of the U.S. policy is illustrated by the U.S. reaction to the February 1985 decision of the Government of New Zealand to deny permission for USS BUCHANAN (DDG 14) to enter Auckland Harbor since the U.S. would not confirm the absence of nuclear weapons in BUCHANAN. The U.S. suspended all military cooperation with New Zealand, including the ANZUS agreement, training, foreign military sales, and intelligence exchange. Dep't St. Bull., Sep. 1986, at 87; Note, The Incompatibility of ANZUS and a Nuclear-Free New Zealand, 26 Va. J. Int'l L. 455 (1986); Woodliffe, Port Visits by Nuclear Armed Naval Vessels: Recent State Practice, 35 Int'l & Comp. L.Q. 730 (1986); Recent Developments, International Agreements: United States' Suspension of Security Obligations Toward New Zealand, 28 Harv. Int'l L.J. 139 (1987); Chinkin, Suspension of Treaty Relationship: The ANZUS Alliance, 7 UCLA Pac. Bas. L.J. 114 (1990). Cf. Flacco, Whether to Confirm or Deny?, U.S. Naval Inst. Proc., Jan. 1990, at 52. See also, Thies & Harris, An Alliance Unravels: The United States and Anzus, Nav. War Coll. Rev., (Spring 1993), at 98. On 27 September 1991, President Bush ordered the removal of all tactical nuclear weapons from all U.S. surface ships, tactical submarines and land-based naval aircraft bases, reserving the right to return them during a crisis. The President also ordered the elimination of ground-launched tactical nuclear weapons, stood down strategic bombers from alert and stood down all ICBM's scheduled for deactivation under START. See N.Y. Times, 28 Sept. 1991, at A1; *id.* 29 Sept. 1991, sec. 1, at 1 & 10; Dep't State Dispatch, 30 Sep. 1991, at 715.

<sup>10</sup> 9 Whiteman 221 & 434; Deputy Legal Adviser, U.S. Dep't of State letter to Deputy General Counsel, Maritime Administration, 30 December 1980, reprinted in 1980 Digest of U.S. Practice in International Law 999-1006; Roach, France Concedes United States Has Title to CSS ALABAMA, 85 Am. J. Int'l L. 381 (1991); 29 Jap. Ann. Int'l L. 114-15, 185-87 (1986); 30 *id.* 182-83 (1987). Under analogous reasoning, on 12 November 1976 Japan returned a MiG-25 Foxbat flown by LT Victor I. Belenko from Chuguyevka, U.S.S.R., to Hakodate Airport, Hokkaido, Japan on 4 September 1976, albeit the Foxbat was returned disassembled. Barron, MiG Pilot: The Final Escape of LT. Belenko 129, 180 (1980); 28 Jap. Ann. Int'l L. 142-43, 146-47 (1985). See paragraph 3.9 (p. 3-14) regarding attempts by other nations to recover U.S. government property at sea, and paragraph 4.3.2 (p. 4-10) regarding the right of self-defense.

The procedures for abandonment of sunken U.S. warships and aircraft located outside the territory of the United States are set forth in 40 U.S.C. sec. 512 (1987 Supp. V), and its implementing regulation, 41 CFR sec. 101-45.9 (1989). *Hatteras, Inc. v. The U.S.S. Hatteras, her engines, etc., in rem, and the United States of America, in personam*, 1984 AMC 1094 (S.D. Tex. 1981) (failure to follow disposal procedures renders null purported abandonment by the Secretary of the Navy), *aff'd w/o opinion* 698 F.2d 1215 (5th Cir.), *cert. denied* 464 U.S. 815 (1983). Government and military vessels are exempt (continued...)

**2.1.3 Auxiliaries.** Auxiliaries 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, auxiliaries enjoy sovereign immunity. This means that, like warships, they are immune from arrest and search, whether in national or international waters. 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.<sup>11</sup>

U.S. auxiliaries include all vessels which comprise the Military Sealift Command (MSC) Force. The MSC Force includes: (1) United States Naval Ships (USNS) (i.e., U.S. owned vessels or those under bareboat charter, and assigned to MSC); (2) the National Defense Reserve Fleet (NDRF) and the Ready Reserve Force (RRF) (when activated and assigned to MSC); (3) privately owned vessels under time charter assigned to the Afloat Prepositioned Force (APF); and (4) those vessels chartered by MSC for a period of time or for a specific voyage or voyages.<sup>12</sup> The United States claims full rights of sovereign immunity for all USNS, APF, NRDF and RRF vessels. As a matter of policy, however, the

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<sup>10</sup>(...continued)

from the International Convention for the Unification of Certain Rules Relating to Salvage of Vessels at Sea, 23 September 1910, 37 Stat. 1658, T.I.A.S 576, art. 14; the 1989 International Convention on Salvage, art. 4; and 46 U.S.C. sec. 731 (1982). 46 U.S.C. App. sec. 316(d) (1988) forbids foreign vessels from engaging in salvaging operations within the territorial or inland waters of the United States, except pursuant to treaty or 46 U.S.C. App. sec. 725. However, the United States is subject to claims for salvage outside U.S. territorial waters. *Vernicos Shipping Co. v. United States*, 223 F. Supp. 116 (S.D.N.Y. 1963), *aff'd*, 349 F.2d 465 (2d Cir. 1965) (tugs prevented USS ALTAIR and USS MERCHANT from sinking in Piraeus harbor, Greece); *B.V. Bureau Wijsmuller v. United States*, 487 F. Supp. 156 (S.D.N.Y. 1979), *aff'd* 633 F.2d 202 (2d Cir. 1980); 8 J. Mar. L. & Com. 433 (1977) (tugs pulled USS JULIUS A. FURER from a sandbar off the Dutch coast). The Abandoned Shipwreck Act of 1987, 43 U.S.C. sec. 2101 et seq. (1988), is not applicable to sunken warships which have not been affirmatively abandoned. H. Rep. 100-514(I), at 3, 4 U.S.C.C.A.A.N. 367-68 (1988); H. Rep. 100-514(II), at 5, 4 U.S.C.C.A.A.N. 374 & 381.

Control over shipwrecks and sunken aircraft is distinguished from control over the environs surrounding a wreck. When a sovereign immune vessel or aircraft lies within what is or becomes the territorial sea or internal waters of a foreign nation, the flag State retains control over the disposition of the vessel or aircraft, while the coastal nation controls access to its situs. As a practical matter, such situations may be the subject of cooperative arrangements for the preservation or exploration of the site. *See*, for example, the U.S.-French agreement concerning the CSS ALABAMA, 3 Oct. 1989, 85 Am. J. Int'l L. 381 (1991).

*See also* Roach, Sunken Warships and Military Aircraft, 20 Marine Policy 351 (1996).

<sup>11</sup> Territorial Seas Convention, art. 22; High Seas Convention, art. 9; 1982 LOS Convention, arts. 32, 96 & 236. The right of self-defense, explained in paragraph 4.3.2 (p. 4-10), applies to auxiliaries as well as to warships. Auxiliaries used on commercial service do not enjoy sovereign immunity. *See* Territorial Sea Convention, arts. 21-22; High Seas Convention, art. 9; 1982 LOS Convention, arts. 27-28, 32 & 236.

<sup>12</sup> Commander Military Sealift Command Force Inventory, MSC Rep. 3110-4, Pub. 8 (8 Aug. 1988); Whitehurst, The U.S. Merchant Marine 113-27 (1983) (describing U.S. government-owned shipping).

U.S. claims only freedom from arrest and taxation for those MSC Force time and voyage charters not included in the APF.<sup>13</sup>

U.S. Navy and U.S. Coast Guard vessels which, except for the lack of a commissioned officer as commanding officer would be warships, also are auxiliaries.

## 2.2 STATUS OF MILITARY AIRCRAFT

**2.2.1 Military Aircraft Defined.** International law defines military aircraft to include all aircraft operated by commissioned units of the armed forces of a nation bearing the military

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<sup>13</sup> 1985 SECSTATE Washington DC message 317062, subj: status of MSC vessels. The United States also claims sovereign immunity for the ships belonging to the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce. *See* Leonard, NOAA and the Coast Guard Ark, U.S. Naval Inst. Proceedings, Dec. 1990, at 81.

*Merchant Ships.* In international law, a merchant ship is any vessel, including a fishing vessel, that is not entitled to sovereign immunity, *i.e.*, a vessel, whether privately or publicly owned or controlled, which is not a warship and which is engaged in ordinary commercial activities. For an excellent discussion on the distinction between commercial and non-commercial service, *see* Knight & Chiu, *The International Law of the Sea: Cases, Documents, and Readings* at 364-69 (1991).

*In International Waters (i.e. beyond the territorial sea).* Merchant ships, save in exceptional cases expressly provided for in international treaties, are subject to the flag nation's exclusive jurisdiction in international waters. High Seas Convention, art. 6(1); 1982 LOS Convention, art. 92(1). Unless pursuant to hot pursuit (*see* paragraph 3.11.2.2.1 (p. 3-21)), merchant vessels in international waters may not be boarded by foreign warship personnel without the master's or flag nation consent, unless there is reasonable ground for suspecting that the ship is engaged in piracy, unauthorized broadcasting, or the slave trade, that the ship is without nationality, or that, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship, High Seas Convention, art. 22; 1982 LOS Convention, art. 110. Warship's right of approach and visit is discussed in paragraph 3.4 (p. 3-8). The belligerent right of visit and search is discussed in paragraph 7.6 (p. 7-23). On *flags of convenience*, *see* 1982 LOS Convention, art. 91, and Mertus, *The Nationality of Ships and International Responsibility: The Reflagging of the Kuwaiti Oil Tankers*, 17 *Den. J. Int'l L. & Pol'y* 207 (1988).

The coastal nation may, in the exercise of its economic resource rights in the EEZ, take such measures, including boarding, inspection, arrest, and judicial proceedings against foreign flag merchant vessels as are necessary to ensure compliance with coastal nation rules and regulations adopted in conformity with the Convention. 1982 LOS Convention, art. 73. *Compare id.*, art. 220.

*In the Territorial Sea.* Foreign merchant vessels exercising the right of innocent passage through the territorial sea have the duty to comply with coastal nation rules and regulations, as discussed in paragraph 2.3.2.2 (p. 2-9). On board the transiting vessel, the coastal nation may exercise its criminal jurisdiction, if a crime is committed on board the ship during its passage *and*:

- a. the consequences of the crime extend to the coastal nation;
- b. the crime is a kind which disturbs the peace of the coastal nation or the good order of the territorial sea;
- c. assistance of local authorities has been requested by the flag nation or the master of the ship transiting the territorial sea; or
- d. such measures are necessary for the suppression of illicit drug trafficking.

The above circumstances do not affect the broader right of the coastal nation to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign merchant ship passing through the territorial sea after leaving that coastal nation's internal waters. Territorial Sea Convention, art. 19; 1982 LOS Convention, art. 27. *See* Nordquist, Vol. II, at 237-43.

markings of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline.<sup>14</sup>

**2.2.2 International Status.** Military aircraft are "state aircraft" within the meaning of the Convention on International Civil Aviation of 1944 (the "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 (see paragraph 2.5.1), state aircraft may not enter national airspace (see paragraph 1.8) or land in the sovereign territory of another nation without its authorization.<sup>15</sup> 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 nation immediately.<sup>16</sup>

**2.2.3 Military Contract Aircraft.** Civilian owned and operated aircraft, the full capacity of which has been contracted by the Air Mobility Command (AMC) and used in the military service of the United States, qualify as "state aircraft" if they are so designated by the United States. In those circumstances they too enjoy sovereign immunity from foreign search and inspection.<sup>17</sup> As a matter of policy, however, the United States normally does not designate AMC-charter as state aircraft.

## 2.3 NAVIGATION IN AND OVERFLIGHT OF NATIONAL WATERS

**2.3.1 Internal Waters.**<sup>18</sup> As discussed in the preceding chapter, coastal nations exercise 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 ordinarily involves navigation in internal waters. Because entering internal waters is legally equivalent to entering the land territory of another nation, that nation's permission is required. To facilitate international maritime commerce,

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<sup>14</sup> AFP 110-31, para. 2-4b, at 2-4 to 2-5. Commissioned units of U.S. military aircraft are called squadrons and are established pursuant to the authority of the chief of service concerned. All aircraft, like ships, assume the nationality of the nation in which they are registered, and are marked with symbols or designations of their nationality. The markings of military aircraft should differ from those of other state aircraft and of civil aircraft. AFP 110-31, para. 2-4d.

<sup>15</sup> "State aircraft" include aircraft used in "military," "customs" and "police" service. Chicago Convention, art. 3(b). Transit passage through international straits and archipelagic sea lanes passage are discussed in paragraphs 2.3.3 (p.2-12) and 2.3.4.1 (p. 2-17) respectively. *See also* paragraph 2.3.2.5 (p. 2-12) regarding the right of assistance entry.

<sup>16</sup> AFP 110-31, paras. 2-2a & 2-5a, at 2-3 & 2-5. CNO Washington DC message 032330Z MAR 88, NAVOP 024/88, reinforced the U.S. position that detailed lists of personnel embarked in military aircraft visiting foreign airfields may not be released to foreign governments. *See also* Annex A2-1 (p. 2-43). *See* paragraph 2.3.1 (p. 2-6) regarding entry in distress. Quarantine is discussed in paragraph 3.2.3 (p. 3-4). Self-defense is discussed in paragraph 4.3.2 (p. 4-10).

<sup>17</sup> Taylor, Fed. B.J., Winter 1968, at 48. The Civil Reserve Air Fleet is distinguished from military contract aircraft and discussed in Bristol, CRAF: Hawks in Doves Clothing? 20 A.F.L. Rev. 48 (1978).

<sup>18</sup> Territorial Sea Convention, art. 5, 1982 LOS Convention, art. 8.

many nations 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, require specific and advance entry permission, unless other bilateral or multilateral arrangements have been concluded.<sup>19</sup>

Exceptions to the rule of non-entry into *internal* waters without coastal nation permission, whether specific or implied, arise when rendered necessary by *force majeure* or by distress,<sup>20</sup> or when straight baselines are established that have the effect of enclosing, as internal waters, areas of the sea previously regarded as territorial seas or high seas.<sup>21</sup> In the latter event, international law provides that the right of innocent passage (see paragraph 2.3.2.1)<sup>22</sup> or that of transit passage in an international strait<sup>23</sup> (see paragraph 2.3.3.1) may be exercised by all nations in those waters.

## 2.3.2 Territorial Seas<sup>24</sup>

**2.3.2.1 Innocent Passage.** International law provides that ships (but not aircraft) of all nations 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.<sup>25</sup> Passage is *innocent* so long as it is not prejudicial to the peace, good order, or security of the coastal nation.<sup>26</sup> Military activities

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<sup>19</sup> For further information and guidance, see OPNAVINST 3128.3 (series), Subj: Visits by U.S. Navy Ships to Foreign Countries, and OPNAVINST 3128.10 (series), Subj: Clearance Procedures for Visits to United States Ports by Foreign Naval Vessels.

<sup>20</sup> *Force majeure* includes a ship forced into internal waters by distress or bad weather. The distress must be caused by an uncontrollable event which creates an overwhelming or grave necessity to enter port or risk loss of the vessel or her cargo. See paragraph 3.2, note 1 (p. 3-1). See also, *The New York, 3 Wheat. 59* (16 U.S. 59) (1818); see also O'Connell 853-58; Restatement (Third) sec. 48. See paragraph 3.2.2 (p. 3-3) regarding safe harbor, and paragraph 4.4 (p. 4-15) regarding interception of intruding aircraft.

<sup>21</sup> 1982 LOS Convention, art. 8(2).

<sup>22</sup> *Id.*

<sup>23</sup> 1982 LOS Convention, art. 35(a).

<sup>24</sup> Navigation by foreign vessels in the territorial sea is regulated by the regimes of innocent passage, assistance entry, transit passage and archipelagic sea lanes passage which are discussed in paragraphs 2.3.2.1 (p. 2-7), 2.3.2.5 (p. 2-12), 2.3.3.1 (p. 2-12), and 2.3.4.1 (p. 2-17), respectively.

<sup>25</sup> Territorial Sea Convention, art. 14(2), (3) & (6); 1982 LOS Convention, art. 18. Stopping or anchoring is also permitted to assist those in danger or distress.

<sup>26</sup> What constitutes prejudice under art. 14(4) of the Territorial Sea Convention was left undefined. The 1982 LOS Convention endeavors to eliminate the subjective interpretative difficulties that have arisen concerning the innocent passage regime of the Territorial Sea Convention.

considered to be *prejudicial* to the peace, good order, and security of the coastal nation, and therefore inconsistent with innocent passage, are:

1. Any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal nation
2. Any exercise or practice with weapons of any kind
3. The launching, landing, or taking on board of any aircraft or of any military device
4. Intelligence collection activities detrimental to the security of that coastal nation
5. The carrying out of research or survey activities
6. Any act aimed at interfering with any system of communication of the coastal nation
7. Any act of propaganda aimed at affecting the defense or security of the coastal nation
8. 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
9. Any act of willful and serious pollution contrary to the 1982 LOS Convention
10. Any fishing activities
11. Any other activity not having a direct bearing on passage.<sup>27</sup>

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<sup>27</sup> 1982 LOS Convention, art. 19. This is an "exhaustive list of activities that would render passage not innocent." Joint Interpretation of the Rules of International Law Governing Innocent Passage, attached to the Joint Statement by the United States of America and the Union of Soviet Socialist Republics, Jackson Hole, Wyoming, 23 September 1989, Dep't St. Bull., Nov. 1989, at 25, 28 Int'l Leg. Mat'ls 1445 (1989), 84 Am. J. Int'l L. 239 (1990), Annex A2-2, para. 3 (p. 2-47). On the other hand, 1 O'Connell 270 suggests the list may not be complete since the list does not say "only" the listed actions are prejudicial. The Territorial Sea Convention contains no comparable listing. See Stevenson & Oxman, The Third United Nations Conference on the Law of the Sea: the 1975 Geneva Session, 69 Am. J. Int'l L. 763, 771-72 (1975); Froman, Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea, 21 San Diego L. Rev. 625, 659 (1984); Grammig, The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea, 22 Harv. Int'l L.J. 331, 340 (1981). See also Nordquist, Vol. II, at 164-178.

Since these activities must occur "in the territorial sea" (LOS Convention, art. 19(2)), any determination of noninnocence passage by a transiting ship must be made on the basis of acts committed while in the territorial sea. Thus cargo, destination, or purpose of the voyage can not be used as a criterion in determining that passage is not innocent. Professor H.B. Robertson testimony, House Merchant Marine & Fisheries Comm., 97th Cong., hearing on the status of the law of the sea treaty negotiations, 27 July 1982, Ser. 97-29, at 413-14. Accord Oxman, paragraph 2.1.1, note 2 (p. 2-1), at 853 (possession of passive characteristics, such as the innate combat capabilities of a warship, do not constitute "activity" within the meaning of this enumerated list).

(continued...)

Foreign ships, including warships, exercising the right of innocent passage are required to comply with the laws and regulations enacted by the coastal nation in conformity with established principles of international law and, in particular, with such laws and regulations relating to the safety of navigation.<sup>28</sup> Innocent passage does *not* include a right of overflight.

The coastal nation may take affirmative actions in its territorial sea to prevent passage that is not innocent, including, where necessary, the use of force. If a foreign ship enters the territorial sea and engages in non-innocent activities, the appropriate remedy, consistent with customary international law, is first to inform the vessel of the reasons why the coastal nation questions the innocence of the passage, and to provide the vessel a reasonable opportunity to clarify its intentions or to correct its conduct in a reasonably short period of time.<sup>29</sup>

**2.3.2.2 Permitted Restrictions.** For purposes such as resource conservation, environmental protection, and navigational safety, a coastal nation may establish certain restrictions upon the right of innocent passage of foreign vessels. Such restrictions upon the right of innocent passage through the territorial sea are not prohibited by international law, provided that 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 nation or those carrying cargoes to, from, or on behalf of any nation. The coastal nation may, where navigational safety dictates, require foreign ships exercising the right of innocent passage to utilize designated sea lanes and traffic separation schemes.<sup>30</sup>

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<sup>27</sup>(...continued)

The 1983 Soviet "Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters and Internal Waters and Ports of the USSR," *translation in* 24 Int'l Leg. Mat'ls 1717 (1985), were not entirely consistent with the relevant provisions of the 1982 LOS Convention. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 Am. J. Int'l L. 331 (1987). In particular, the Soviet claim to limit the innocent passage of warships to five "routes ordinarily used for international navigation" was inconsistent with the Convention's terms and negotiating history, and prior Soviet support therefor. Neubauer, *The Right of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union*, Nav. War Coll. Rev., Spring 1988, at 49; Franckx, *Further Steps in the Clarification of the Soviet Position on the Innocent Passage of Foreign Warships through its Territorial Waters*, 19 Ga. J. Int'l & Comp. L. 535 (1990). That portion of the 1983 Rules was amended effective 23 September 1989 to conform to the Uniform Interpretation, Annex A2-2 (p. 2-47). *See* paragraph 2.6, note 105 (p. 2-32) regarding U.S. challenges to this and other excessive maritime claims.

Since coastal nations are competent to regulate fishing in their territorial sea, passage of foreign fishing vessels engaged in activities that are in violation of those laws or regulations is not innocent. Territorial Sea Convention, art. 14(5); 1982 LOS Convention, art. 21(1)(e).

<sup>28</sup> Territorial Sea Convention, arts. 16(1) & 17; 1982 LOS Convention, art. 21(1) & 21(4).

<sup>29</sup> This concept of customary international law was incorporated into the U.S.-U.S.S.R. Uniform Interpretation of the Rules of International Law Governing Innocent Passage. *See* Annex A2-2, para. 4 (p. 2-47). *See also* Kinley, *The Law of Self-Defense, Contemporary Naval Operations, and the United Nations Convention on the Law of the Sea*, 19 L. Sea Inst. Proc. 10, 12-15 (1987) discussing coastal nation enforcement options in light of the U.N. Charter and the law of the sea, particularly articles 25, 27, 28 and 30 of the 1982 LOS Convention.

<sup>30</sup> 1982 LOS Convention, art. 21. Tankers, nuclear powered vessels, and ships carrying dangerous or noxious substances may be required, for safety reasons, to utilize designated sea lanes. 1982 LOS Convention, art. 22(2). These controls may be exercised at any time.

(continued...)

**2.3.2.3 Temporary Suspension of Innocent Passage.** A coastal nation may suspend innocent passage temporarily 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 in fact among foreign ships.<sup>31</sup>

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<sup>30</sup>(...continued)

Art. 21 of the 1982 LOS Convention empowers a coastal nation to adopt, with due publicity, laws and regulations relating to innocent passage through the territorial sea in respect of all or any of the following eight subject areas (which do not include security, *but see* art. 25(3) re temporary closure of the territorial sea for security purposes):

1. The safety of navigation and the regulation of marine traffic (including traffic separation schemes).
2. The protection of navigational aids and facilities and other facilities or installations.
3. The protection of cables and pipelines.
4. The conservation of living resources of the sea.
5. The prevention of infringement of the fisheries regulations of the coastal nation.
6. The preservation of the environment of the coastal nation and the prevention, reduction and control of pollution thereof.
7. Marine scientific research and hydrographic surveys.
8. The prevention of infringement of the customs, fiscal, immigration or sanitary regulations of the coastal nation.

This list is exhaustive and inclusive.

The coastal nation is required to give appropriate publicity to any dangers to navigation of which it has knowledge within its territorial sea. Territorial Sea Convention, art. 15; 1982 LOS Convention, art. 24. The U.S. Inland Rules are discussed in paragraph 2.7.2.1 (p. 2-35).

<sup>31</sup> Territorial Sea Convention, art. 16(3); 1982 LOS Convention, art. 25(3). Authorization to suspend innocent passage in the U.S. territorial sea during a national emergency is given to the President in 50 U.S.C. sec. 191 (1988). *See also* 33 C.F.R. part 127. "Security" includes suspending innocent passage for weapons testing and exercises.

For instances in which innocent passage has been suspended, *see* 4 Whiteman 379-86.

The Conventions do not define how large an area of territorial sea may be temporarily closed off. The 1982 LOS Convention does clearly limit the maximum breadth of the territorial sea to 12 nautical miles, and thus any nation claiming to close areas beyond 12 NM during such a suspension would be in violation of international law. The Conventions do not explain what is meant by "protection of its security" beyond the example of "weapons exercises" added in the 1982 LOS Convention. Further, how long "temporarily" may be is not defined, but it clearly may not be factually permanent. Alexander, 39-40; McDougal & Burke 592-93. The prohibition against "discrimination in form or fact among foreign ships" clearly refers to discrimination among flag nations, and, in the view of the United States, includes direct and indirect discrimination on the basis of cargo, port of origin or destination, or means of propulsion. This position is strengthened by the provisions of the LOS Convention explicitly dealing with nuclear powered and nuclear capable ships (arts. 22(2) & 23).

*See* the last subparagraph of paragraph 2.3.3.1 (p. 2-16) regarding the regime of nonsuspendable innocent passage in international straits.

**2.3.2.4 Warships and Innocent Passage.** All warships, including submarines, enjoy the right of innocent passage on an unimpeded and unannounced basis.<sup>32</sup> Submarines, however, are required to navigate on the surface and to show their flag when passing through foreign territorial seas.<sup>33</sup> If a warship does not comply with coastal nation regulations that conform to established principles of international law and disregards a request for compliance which is made to it, the coastal nation may require the warship immediately to leave the territorial sea in which case the warship shall do so immediately.<sup>34</sup>

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<sup>32</sup> Territorial Sea Convention, art. 14(1); 1982 LOS Convention, art. 17. Some nations view the mere passage of foreign warships through their territorial sea *per se* prejudicial (e.g., because of the military character of the vessel, the flag it is flying, its nuclear propulsion or weapons, or its destination), and insist on prior notice and/or authorization before foreign warships transit their territorial sea. See the list of such nations at Table A2-1 (p. 2-83). The United States' position, consistent with the *travaux préparatoires* of the Territorial Sea Convention and the 1982 LOS Convention, is that warships possess the same right of innocent surface passage as any other vessel in the territorial sea, and that right cannot be conditioned on prior coastal nation notice or authorization for passage. Oxman, paragraph 2.1, note 2 (p. 2-1), at 854; Froman, paragraph 2.3.2.1, note 27 (p. 2-8), at 625; Harlow, Legal Aspects of Claims to Jurisdiction in Coastal Waters, JAG J., Dec. 1969-Jan. 1970, at 86; Walker, What is Innocent Passage?, Nav. War Coll. Rev., Jan. 1969, at 53 & 63, reprinted in 1 Lillich & Moore, at 365 & 375. The Soviet Union (now Russia) has accepted the United States' position. See para. 2 of the Uniform Interpretation of the Rules of International Law Governing Innocent Passage, Annex A2-2 (p. 2-47), and Franckx, Innocent Passage of Warships: Recent Developments in US-Soviet Relations, Marine Policy, Nov. 1990, at 484-90. For the earlier Soviet views, see Franckx, The U.S.S.R. Position on the Innocent Passage of Warships Through Foreign Territorial Waters, 18 J. Mar. L. & Com. 33 (1987), and Butler, Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy, 81 Am. J. Int'l L. 331 (1987). Attempts to require prior authorization or notification of vessels in innocent passage during the Third LOS Conference were focused on warships. All attempts were defeated: 3d session, Geneva 1975; 4th session, New York 1976, 9th session, New York 1980; 10th session 1981; 11th session, New York 1982; and 11th resumed session, Montego Bay 1982. The United States' views on innocent passage in the territorial sea were set forth in its 8 March 1983 statement in right of reply, 17 LOS Documents 243-44, Annex A1-1 (p. 1-25).

<sup>33</sup> Territorial Sea Convention, art. 14(6); 1982 LOS Convention, art. 20. Unless the coastal nation has consented to submerged passage, which none has done publicly to date (January 1997). For discussions of the incident in which the Soviet Whiskey-class submarine U-137 grounded outside the Swedish naval base of Karlskrona, after having entered Swedish territorial and internal waters submerged without Swedish permission, see Sweden and the Soviet Submarine--A Diary of Events, 112 Army Q. & Def. J. 6 (1982); Leitenberg, Soviet Submarine Operations in Swedish Waters 1980-1986 (1987); Bildt, Sweden and the Soviet Submarines, Survival, Summer 1983, at 168; Lofgren, Soviet Submarines Against Sweden, Strategic Review, Winter 1984, at 36; Delupis, Foreign Warships and Immunity for Espionage, 78 Am. J. Int'l L. 53 (1984); Amundsen, Soviet Submarines in Scandinavian Waters, The Washington Quarterly, Summer 1985, at 111.

<sup>34</sup> Territorial Sea Convention, art. 23; 1982 LOS Convention, art. 30. A warship required to leave for such conduct shall comply with the request to leave the territorial sea immediately. Uniform Interpretation of the Rules of International Law Governing Innocent Passage, para. 7, Annex A2-2 (p. 2-47).

Under art. 23 of the 1982 LOS Convention, foreign nuclear-powered ships, and ships carrying nuclear or other inherently dangerous or noxious substances, exercising the right of innocent passage must "carry documents and observe special precautionary measures established for such ships by international agreements," such as chap. VIII of the 1974 International Convention for the Safety of Life at Sea (SOLAS), 32 U.S.T. 275-77, 287-91, T.I.A.S. 9700 (nuclear passenger ship and nuclear cargo ship safety certificates). These provisions of the 1974 SOLAS are specifically *not* applicable to warships.

**2.3.2.5 Assistance Entry.** All ship and aircraft commanders have an obligation to assist those in danger of being lost at sea. See paragraph 3.2.1. This long-recognized duty of mariners permits assistance entry into the territorial sea by ships or, under certain circumstances, aircraft without permission of the coastal nation to engage in *bona fide* efforts to render emergency assistance to those in danger or distress at sea. This right applies only when the location of the danger or distress is reasonably well known. It does not extend to entering the territorial sea or superjacent airspace to conduct a search, which requires the consent of the coastal nation.<sup>35</sup>

### 2.3.3 International Straits

**2.3.3.1 International Straits Overlapped by Territorial Seas.** Straits used for international navigation through the territorial sea between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone are subject to the legal regime of *transit passage*.<sup>36</sup> Transit passage exists throughout the entire strait and

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<sup>35</sup> Art. 0925, U.S. Navy Regulations, 1990; COMDTINST 16100.3, Subj: Search and Rescue in Foreign Territory and Territorial Seas, 3 December 1987; National Search and Rescue Manual, vol. I, COMDTINST M16120.5A, para. 1222 (1991). The U.S. Department of State is of the view that the right of assistance entry for aircraft is not as fully developed as that for vessels. The efforts to render emergency assistance must be undertaken in good faith and not as a subterfuge. See 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, Annex A2-3 (p. 2-48). That Statement of Policy, extended to include assistance entry into archipelagic waters, is implemented within the Department of Defense by CJCSI 2410.01A, Subj: Guidance for the Exercise of Right of Assistance Entry, of 23 April 1997. Annex A2-4 (p. 2-50).

<sup>36</sup> Under the 1958 Territorial Sea Convention, international straits overlapped by territorial seas were subject to a regime providing only *nonsuspendable* innocent surface passage. Territorial Sea Convention, arts. 14 & 16(4). Part III of the 1982 LOS Convention establishes the regime of transit passage for international straits overlapped by territorial seas. Transit passage also applies in those straits where the high seas or exclusive economic zone corridor is not suitable for international navigation. See 1982 LOS Convention, arts. 36 & 37. See also Nordquist, Vol. II at 279-396.

The United States' view regarding the status of the transit passage regime as existing law is reflected in its 3 March 1983 Statement in Right of Reply, Annex A1-1 (p. 1-25), and Presidential Proclamation 5928, Annex A1-6 (p. 1-64). The right of transit passage was fully recognized in art. 4 of the Treaty of Delimitation between Venezuela and the Netherlands, 21 March 1978, an English translation of which is set out in Annex 2 to U.S. Dep't of State, Limits in the Seas No. 105, Maritime Delimitations, and in Art. VI of the Agreement on the Delimitation of Maritime and Submarine Areas between Venezuela and Trinidad and Tobago, 18 April 1990, *reprinted in* U.N. LOS Bull., No. 19, Oct. 1991, at 24. Although the term "transit passage" was not used in the statement in connection with extension of Great Britain's territorial sea to 12 NM (apparently to preclude any implication of incorporation by reference of the entire straits regime, 37 Int'l & Comp. L.Q. 415 (1988)), the "transit passage" regime was used in a Declaration issued by France and Great Britain setting out the governing regime of navigation in the Dover Straits in conjunction with signature on 2 November 1988 of an Agreement establishing a territorial sea boundary in the Straits of Dover. U.K. White Paper, France No. 1, Cm. 557 (1989); FCO Press Release No. 100, 2 Nov. 1988.

*Straits used for international navigation:* In the opinion of the International Court of Justice in the *Corfu Channel Case*, 1949 I.C.J. 4, *reprinted in* U.S. Naval War College, International Law Documents 1948-1949, "Blue Book" series, 1950, v. 46, at 108 (1950), the decisive criterion in identifying international straits was not the volume of traffic flowing through the strait or its relative importance to international navigation, but rather its geographic situation connecting, for example, the two parts of the high seas, and the fact of its being "used for international navigation." *Id.* at 142. This geographical approach is reflected in both the Territorial Sea Convention (art. 16(4)) and the 1982 LOS Convention (arts. 34(1), 36 & 45).  
(continued...)

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<sup>36</sup>(...continued)

The geographical definition appears to contemplate a natural and not an artificially constructed canal, such as the Suez Canal. Efforts to define "used for international navigation" with greater specificity have failed. Alexander, 153-54. The United States holds that all straits *susceptible* of use for international navigation are included within that definition. Grunawalt, United States Policy on International Straits, 18 Ocean Dev. & Int'l L.J. 445, 456 (1987).

Part III of the 1982 LOS Convention addresses five different kinds of straits used for international navigation, each with a distinct legal regime:

1. Straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ (art. 37, governed by transit passage, *see* paragraph 2.3.3.1 (p. 2-12)).

2. Straits connecting a part of the high seas/EEZ and the territorial sea of a foreign nation (art. 45(1)(a), regulated by nonsuspendable innocent passage, *see* paragraph 2.3.3.1, last subparagraph (p. 2-16)).

3. Straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ where the strait is formed by an island of a nation bordering the strait and its mainland, if there exists seaward of the island a route through the high seas/EEZ of similar convenience with regard to navigation and hydrographical characteristics (art. 38(1), regulated by nonsuspendable innocent passage). (Table A2-2 (p. 2-84) lists 22 such straits, including the Strait of Messina (between the Italian mainland and Sicily). Difficulties in defining "mainland" and alternate routes are discussed in Alexander, 157-61.)

4. Straits regulated in whole or in part by international conventions (art. 35(c)). The 1982 LOS Convention does not alter the legal regime in straits regulated by long-standing international conventions in force specifically relating to such straits. While there is no agreed complete list of such straits, the Turkish Straits and the Strait of Magellan are generally included:

- the *Turkish Bosphorus and Dardanelles Straits*, governed by the Montreux Convention of 20 July 1936, 173 L.N.T.S. 213, 31 Am. J. Int'l L. Supp. 4; and

- the *Straits of Magellan*, governed by article V of the Boundary Treaty between Argentina and Chile, 23 July 1881, 82 Brit. Foreign & State Papers 1103, 159 Parry's T.S. 45 (Magellan Straits are neutralized forever, and free navigation is assured to the flags of all nations), and article 10 of the Treaty of Peace and Friendship between Argentina and Chile, 29 November 1984, 24 Int'l Leg. Mat'ls 11, 13 (1985) ("the delimitation agreed upon herein, in no way affects the provisions of the Boundary Treaty of 1881, according to which the Straits of Magellan are perpetually neutralized and freedom of navigation is assured to ships of all flags under the terms of Art.5<sup>o</sup> of said Treaty").

Alexander 140-50 and Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 Am. J. Int'l L. 77, 111 (1980) also list in this category *The Oresund and the Belts*, governed by the Treaty for the Redemption of the Sound Dues, Copenhagen, 14 March 1857, 116 Parry's T.S. 357, 47 Brit. Foreign & State Papers 24, granting free passage of the Sound and Belts for all flags on 1 April 1857, and the U.S.-Danish Convention on Discontinuance of Sound Dues, 11 April 1857, 11 Stat. 719, T.S. 67, 7 Miller 519, 7 Bevans 11, guaranteeing "the free and unencumbered navigation of American vessels, through the Sound and the Belts forever" (*see* Figure A2-1 (p. 2-71)). Warships were never subject to payment of the so-called "Sound Dues," and thus it can be argued that no part of these "long-standing international conventions" are applicable to them. 7 Miller 524-86; 2 Bruel, *International Straits* 41 (1947). The U.S. view is that warships and state aircraft traverse the Oresund and the Belts based either under the conventional right of "free and unencumbered navigation" or under the customary right of transit passage. The result is the same: an international right of transit independent of coastal nation interference. The Danish view is, however, to the contrary. Alexandersson, *The Baltic Straits* 82-86 & 89 (1982). Both Denmark and Sweden (Oresund) maintain that warship and state aircraft transit in the Baltic Straits are subject to coastal nation restrictions. They argue that the "longstanding international conventions" apply, as "modified" by longstanding domestic legislation. The United States does not agree. *See* Table A2-3 (p. 2-85) (listing the Bosphorus, Dardanelles, Magellan, Oresund and Store Baelt) and Alexander, 140-50.

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<sup>36</sup>(...continued)

Sweden and Finland claim *Aland's Hav*, the 16 NM wide entrance to the Gulf of Bothnia, as an exception to the transit passage regime, since passage in that strait is regulated in part by the Convention relating to the Non-fortification and Neutralization of the Aaland Island, Geneva, 20 Oct. 1921, 9 L.N.T.S. 211, art. 5 ("The prohibition to send warships into [the waters of the Aaland Islands] or to station them there shall not prejudice the freedom of innocent passage through the territorial waters. Such passage shall continue to be governed by the international rules and usage in force.") Declarations on signature of the 1982 LOS Convention, 10 December 1982. It should be noted that under art. 4.II of the 1921 Convention, the territorial sea of the Aaland Islands extends only "three marine miles" from the low-water line and in no case extends beyond the outer limits of the straight line segments set out in art. 4.I of that convention. The 1921 Convention is therefore not applicable to the remaining waters that form the international strait. The United States, which is not a party to this Convention, has never recognized this strait as falling within art. 35(c) of the LOS Convention. The parties to the 1921 Convention include Denmark, Finland, Germany, Italy, Poland, Sweden, the United Kingdom, Estonia and Latvia.

It may be noted that free passage of the *Strait of Gibraltar* was agreed to in a series of agreements between France, Spain and Great Britain in the early 20th Century. Article VII of the Declaration between the United Kingdom and France respecting Egypt and Morocco, London, 8 April 1904, 195 Parry's T.S. 198, acceded to by Spain in the Declaration of Paris, 3 Oct. 1904, 196 Parry's T.S. 353; Declarations on Entente on Mediterranean Affairs, Paris, 16 May 1907, 204 Parry's T.S. 176 (France and Spain) and London, 16 May 1907, 204 Parry's T.S. 179 (United Kingdom and Spain); and art. 6 of the France-Spain Convention concerning Morocco, Madrid, 27 Nov. 1912, 217 Parry's T.S. 288.

5. Straits through archipelagic waters governed by archipelagic sea lanes passage (art. 53(4) (*see* paragraph 2.3.4.1 (p. 2-17))). For a listing of nations claiming the status of archipelagic States in accordance with the 1982 LOS Convention *see* Table A1-7 (p. 1-85).

There are a number of straits connecting the high seas/EEZ with claimed historic waters (*see* Table A2-4 (p. 2-85)). The validity of those claims is, at best, uncertain (*see* paragraph 1.3.3.1 (p. 1-11)). The regime of passage through such straits is discussed in Alexander, at 155.

**Canals.** Man-made canals used for international navigation by definition are not "straits used for international navigation," and are generally controlled by agreement between the countries concerned. They are open to the use of all vessels, although tolls may be imposed for their use. They include:

- the *Panama Canal*, governed by the 1977 Panama Canal Treaty, 33 U.S.T. 1, T.I.A.S. 10,029, ("in time of 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 . . . . Vessels of war and auxiliary vessels of all nations shall at all times be entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament");

- the *Suez Canal*, governed by the Convention respecting the Free Navigation of the Suez Canal, Constantinople, 29 October 1888, 79 Brit. Foreign & State Papers 18, 171 Parry's T.S. 241, 3 Am. J. Int'l L. Supp. 123 (1909) ("the Suez maritime canal shall always be free and open, in time of war and in time of peace, to every vessel of commerce or war, without distinction of flag"), reaffirmed by Egypt in its Declaration on the Suez Canal, 24 April 1957, U.N. Doc. A/3576 (S/3818), and U.N. Security Council Res. 118, S/3675, 13 Oct. 1956 ("There should be free and open transit through the Canal without discrimination, overt or covert--this covers both political and technical aspects"), Dep't St. Bull., 22 Oct. 1956, at 618; and

- the *Kiel Canal*, governed by art. 380 of the Treaty of Versailles, 28 June 1919, T.S. 4, 13 Am. J. Int'l L. 128, Malloy 3329, 2 Bevans 43, 225 Parry's T.S. 188 ("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"). The Federal Republic of Germany does not consider the Treaty of Versailles to apply to the Kiel Canal. Alexander, at 181. *See also The SS Wimbledon*, P.C.I.J., Ser. A, No. 1, 1923.

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not just the area overlapped by the territorial sea of the coastal nation(s).

Under international law, the ships and aircraft of all nations, including warships, auxiliaries, and military aircraft, enjoy the right of unimpeded transit passage through such straits and their approaches.<sup>37</sup> Transit passage is defined as the exercise of the freedoms of navigation and overflight solely for the purpose of continuous and expeditious transit in the normal modes of operation utilized by ships and aircraft for such passage.<sup>38</sup> This means that submarines are free to transit international straits submerged, since that is their normal mode of operation, and that surface warships may transit in a manner consistent with sound navigational practices and the security of the force, including formation steaming and the launching and recovery of aircraft.<sup>39</sup> All transiting ships and aircraft must proceed without delay; must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of nations bordering the strait; and must otherwise refrain from any activities other than those incident to their normal modes of continuous and expeditious transit.<sup>40</sup>

Transit passage through international straits cannot be hampered or suspended by the coastal nation for any purpose during peacetime.<sup>41</sup> This principle of international law also

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<sup>36</sup>(...continued)

The passage of nuclear powered warships through the Suez Canal is discussed in paragraph 2.1.2.1, note 9 (p. 2-2). Canals are further discussed in Alexander, at 174-81. Other canals may involve internal waters only, such as the U.S. Intracoastal Waterway, and the Cape Cod and Erie Canals.

<sup>37</sup> The great majority of strategically important straits, *i.e.*, Gibraltar (Figure A2-2 (p. 2-72)), Bab el Mandeb (Figure A2-3 (p. 2-73)), Hormuz (Figure A2-4 (p. 2-74)), and Malacca (Figure A2-5 (p. 2-75)) fall into this category. Transit passage regime also applies to those straits less than six miles wide previously subject to the regime of nonsuspendable innocent passage under the Territorial Sea Convention, *e.g.*, Singapore and Sundra. *See* Table A2-5 (p. 2-86). It should be noted that transit passage exists throughout the entire strait and not just the area overlapped by the territorial seas of the littoral nation(s). Navy JAG message 061630Z JUN 88 (Annex A2-5, (p. 2-59)). *See, e.g.*, Figure A2-4 (p. 2-74).

<sup>38</sup> 1982 LOS Convention, arts. 38(2) & 39(1)(c); Moore, *The Regime of Straits and The Third United Nations Conference on the Law of the Sea*, 74 Am. J. Int'l L. 77, 95-102 (1980); 1 O'Connell 331-37. *Compare* art. 53(3) which defines the parallel concept of archipelagic sea lanes passage as "the exercise . . . of the rights of navigation and overflight *in the normal mode* solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." The emphasized words do not appear in art. 38(2), but rather in the plural in art. 39(1)(c); art. 39 also applies *mutatis mutandis* to archipelagic sea lanes passage.

<sup>39</sup> Burke, *Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text*, 52 Wash. L. Rev. 193 (1977); Robertson, *Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea*, 20 Va. J. Int'l L. 801 (1980); Clove, *Submarine Navigation in International Straits: A Legal Perspective*, 39 Naval L. Rev. 103 (1990). *But see* Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 Am. J. Int'l L. 48 (1980). *See also*, Nordquist, vol. II at 342.

<sup>40</sup> 1982 LOS Convention, art. 39(1).

<sup>41</sup> *Id.*, at art. 44.

applies to transiting ships (including warships) of nations at peace with the bordering coastal nation but involved in armed conflict with another nation.<sup>42</sup>

Coastal nations bordering 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 (the International Maritime Organization) in accordance with generally accepted international standards.<sup>43</sup> Ships in transit must respect properly designated sea lanes and traffic separation schemes.<sup>44</sup>

The regime of *innocent passage* (see paragraph 2.3.2.1), rather than transit passage, applies in straits used for international navigation that connect a part of the high seas or an exclusive economic zone with the territorial sea of a coastal nation. There may be no suspension of innocent passage through such straits.<sup>45</sup>

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<sup>42</sup> Warships and other targetable vessels of nations in armed conflict with the bordering coastal nation may be attacked within that portion of the international strait overlapped by the territorial sea of the belligerent coastal nation, as in all high seas or exclusive economic zone waters that may exist within the strait itself.

<sup>43</sup> 1982 LOS Convention, arts. 41(1) & 41(3). Traffic separation schemes have been adopted for the Bab el Mandeb (Figure A2-3, (p. 2-73)), Hormuz (Figure A2-4, (p. 2-74)), Gibraltar (Figure A2-2, p. (2-72)), and Malacca-Singapore straits (Figure A2-5, (p. 2-75)).

<sup>44</sup> Merchant ships and government ships operated for commercial purposes must respect properly designated sea lanes and traffic separation schemes. Warships, auxiliaries and government ships operated for non-commercial purposes, e.g., sovereign immune vessels (see paragraph 2.1 (p. 2-1)) are not legally required to comply with such sea lanes and traffic separation schemes while in transit passage. Sovereign immune vessels must, however, exercise due regard for the safety of navigation. Warships and auxiliaries may, and often do, voluntarily comply with IMO-approved routing measures in international straits when practicable and compatible with the military mission. When voluntarily using an IMO-approved traffic separation scheme, such vessels must comply with applicable provisions of the 1972 International Regulations for Preventing Collision at Sea (COLREGS). (Annex A2-6 (p. 2-62)).

<sup>45</sup> 1982 LOS Convention, art. 45. These so-called "dead-end" straits include Head Harbour Passage, the Bahrain-Saudi Arabia Passage, and the Gulf of Honduras. Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 Am. J. Int'l L. 112 (1980). Alexander, 154-55 & 186 n.46, asserts the Strait of Juan de Fuca, which is capable of shallow water passage, would belong in this list when the U.S. claims a 12 NM territorial sea, as it now does.

As between Israel and Egypt at least, the Strait of Tiran (Figure A2-6, (p. 2-76)) is governed by the Treaty of Peace between Egypt and Israel, 26 March 1979, 18 Int'l Leg. Mat'ls 362, art. V(2) ("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"). See the list at Table A2-4 (p. 2-85). Israel did not object to Part III of the LOS Convention "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." 17 LOS Official Records 84, para. 19. Egypt's declaration accompanying its ratification of the LOS Convention on 26 August 1983 stated "[t]he 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 regime of waters forming straits referred to in part III of the Convention, wherein it is stipulated that the general regime 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." At a 29 January 1982 press conference, U.S. LOS Ambassador Malone said, "the U.S. 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  
(continued...)

**2.3.3.2 International Straits Not Completely Overlapped by Territorial Seas.** Ships and aircraft transiting through or above straits used for international navigation which are *not* completely overlapped by territorial seas and through which there is a high seas or exclusive economic zone corridor suitable for such navigation, enjoy the high seas freedoms of navigation and overflight while operating in and over such a corridor. Accordingly, so long as they remain beyond the territorial sea, all ships and aircraft of all nations 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.<sup>46</sup>

### 2.3.4 Archipelagic Waters

**2.3.4.1 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. Archipelagic sea lanes passage is defined under international law as the exercise of the freedom of navigation and overflight for the sole purpose of continuous, expeditious and unobstructed transit through archipelagic waters, in the normal modes of operations, by the ships and aircraft involved.<sup>47</sup> This means that submarines may transit while submerged<sup>48</sup> and that surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security, such as formation steaming and the launching and recovery of aircraft. The right of archipelagic sea lanes passage is substantially identical to the right of transit passage through international straits (see paragraph 2.3.3.1).<sup>49</sup> When archipelagic sea lanes are properly designated by the archipelagic nation, the following additional rules apply:

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<sup>45</sup>(...continued)

Treaty between Egypt and Israel. In the U.S. 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." 128 Cong. Rec. S4089, 27 April 1982. *Compare* Lapidoth, The Strait of Tiran, the Gulf of Aqaba, and the 1979 Treaty of Peace Between Egypt and Israel, 77 Am. J. Int'l L. 84 (1983) with El Baradei, The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime, 76 *id.* 532 (1982).

<sup>46</sup> 1982 LOS Convention, art. 36. *See* Table A2-5 (p. 2-86). Table A2-6 (p. 2-88) lists other straits less than 24 NM wide which could have a high seas route if the littoral nations continue to claim less than a 12 NM territorial sea. While theoretically the regime of transit passage would apply if the corridor is not suitable for passage, Alexander found no such strait. Alexander at 151-52. *Compare*, however, the suitability for the passage of deep draft tankers through the waters in the vicinity of Abu Musa Island in the southern Persian Gulf.

<sup>47</sup> 1982 LOS Convention, art. 53(3).

<sup>48</sup> Nordquist, Vol. II at 342 (para. 39.10(e)) and 476-77 (paras. 53.9(c) & 53.9(d)).

<sup>49</sup> 1982 LOS Convention, art. 54. *See* discussion at paragraph 2.3.4.2, note 56 (p. 2-18).

1. Each such designated sea lane is defined by a continuous axis line from the point of entry into the territorial sea adjacent to the archipelagic waters, through those archipelagic waters, to the point of exit from the territorial sea beyond.<sup>50</sup>

2. Ships and aircraft engaged in archipelagic sea lanes passage through such designated sea lanes are required to remain within 25 nautical miles either side of the axis line and must approach no closer to the coast line than 10 percent of the distance between the nearest islands. See Figure 2-1.<sup>51</sup>

This 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 nation for any purpose.<sup>52</sup>

**2.3.4.2 Innocent Passage.** 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.<sup>53</sup> Submarines must remain on the surface and fly their national flag. Any threat or use of force directed against the sovereignty, territorial integrity, or political independence of the archipelagic nation is prohibited. Launching and recovery of aircraft are not allowed, nor may weapons exercises be conducted. The archipelagic nation may promulgate and enforce reasonable restrictions on the right of innocent passage through its archipelagic waters for reasons of navigational safety and for customs, fiscal, immigration, fishing, pollution, and sanitary purposes.<sup>54</sup> Innocent passage may be suspended temporarily by the archipelagic nation in specified areas of its archipelagic waters when essential for the protection of its security, but it must first promulgate notice of its intentions to do so and must apply the suspension in a nondiscriminating manner.<sup>55</sup> There is no right of overflight through airspace over archipelagic waters outside of archipelagic sea lanes.<sup>56</sup>

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<sup>50</sup> 1982 LOS Convention, art. 53(5).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, art 53(3). *See also*, Nordquist, Vol. II at 476-77.

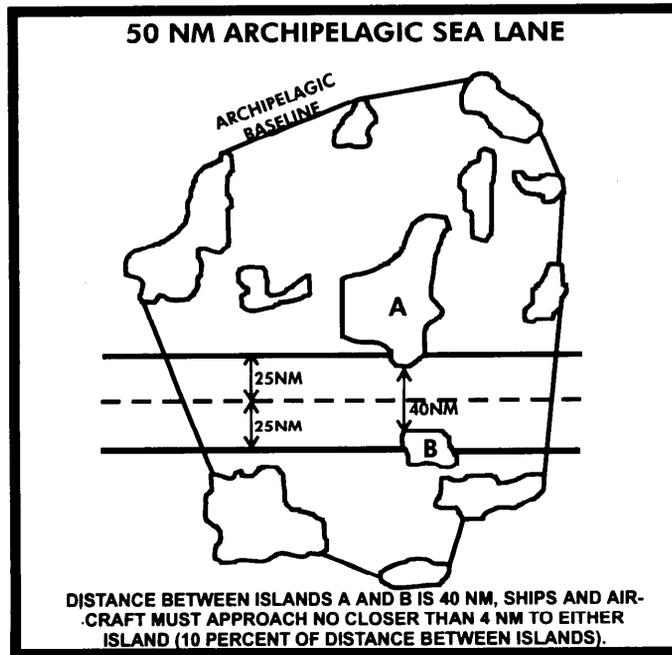
<sup>53</sup> 1982 LOS Convention, art. 52(1).

<sup>54</sup> *Id.*, arts. 52(1), 53 & 21.

<sup>55</sup> *Id.*, art. 52(2).

<sup>56</sup> Most of the essential elements of the transit passage regime in non-archipelagic international straits (paragraph 2.3.4.1 (p. 2-17)) apply in straits forming part of an archipelagic sea lane. 1982 LOS Convention, art. 54, applying *mutatis mutandis* art. 39 (duties of ships and aircraft during transit passage), 40 (research and survey activities), and 42 and 44 (laws, regulations and duties of the bordering State relating to passage). This right exists regardless of whether the strait connects high seas/EEZ with archipelagic waters (e.g., Lombok Strait) or connects two areas of archipelagic waters with one another (e.g., Wetar Strait). Alexander, 155-56. Although theoretically only the regime of innocent passage exists in straits within archipelagic waters not part of an archipelagic sea lane (paragraph 2.3.4.2 (p. 2-18); 1982 LOS Convention, (continued...)

Figure 2-1. A Designated Archipelagic Sea Lane



## 2.4 NAVIGATION IN AND OVERFLIGHT OF INTERNATIONAL WATERS

**2.4.1 Contiguous Zones.** The contiguous zone is comprised of international waters in and over which the ships and aircraft, including warships and military aircraft, of all nations enjoy the high seas freedoms of navigation and overflight as described in paragraph 2.4.3. Although the coastal nation may exercise in those waters the control necessary to prevent and punish infringement of its customs, fiscal, immigration, and sanitary laws that may occur

<sup>56</sup>(...continued)

art. 52(1); Alexander, 156), since archipelagic sea lanes "shall include all normal passage routes . . . and all normal navigational channels . . ." (art. 53(4)), the regime of archipelagic sea lanes passage effectively applies to these straits as well.

If a nation meets all the criteria but has not claimed archipelagic status, then high seas freedoms exist in all maritime areas outside the territorial seas of the individual islands; transit passage applies in straits susceptible of use for international navigation; and innocent passage applies in other areas of the territorial sea. *See also* U.S. Statement in Right of Reply, Annex A1-1 (p. 1-25).

within its territory (including its territorial sea), it cannot otherwise interfere with international navigation and overflight in and above the contiguous zone.<sup>57</sup>

**2.4.2 Exclusive Economic Zones.** The coastal nation's jurisdiction and control over the exclusive economic zone are limited to matters concerning the exploration, exploitation, management, and conservation of the resources of those international waters. The coastal nation may also 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. Accordingly, the coastal nation cannot unduly restrict or impede the exercise of the freedoms of navigation in and overflight of the exclusive economic zone. Since all ships and aircraft, including warships and military aircraft, enjoy the 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 exclusive economic zone in an area of naval operations need not, of itself, be of operational concern to the naval commander.<sup>58</sup>

**2.4.2.1 Marine Scientific Research.** Coastal nations may regulate marine scientific research conducted in marine areas under their jurisdiction. This includes the EEZ and the continental shelf.<sup>59</sup> Marine scientific research includes activities undertaken in the ocean and coastal waters to expand knowledge of the marine environment for peaceful purposes, and includes: oceanography, marine biology, geological/geophysical scientific surveying, as well as other activities with a scientific purpose. The United States does not require that other nations obtain its consent prior to conducting marine scientific research in the U.S. EEZ.<sup>60</sup>

**2.4.2.2 Hydrographic Surveys and Military Surveys.** Although coastal nation consent must be obtained in order to conduct marine scientific research in its exclusive economic zone, the coastal nation cannot regulate hydrographic surveys or military surveys conducted beyond its territorial sea, nor can it require notification of such activities.<sup>61</sup>

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<sup>57</sup> Territorial Sea Convention, art. 24; 1982 LOS Convention, art. 33. *See* paragraph 2.4.4 (p. 2-22) regarding security zones.

<sup>58</sup> 1982 LOS Convention, arts. 56, 58 & 60; *see* paragraph 1.5.2, note 49 (p. 1-19). A few nations explicitly claim the right to regulate the navigation of foreign vessels in their EEZ beyond that authorized by customary law reflected in the LOS Convention: Brazil, Guyana, India, Maldives, Mauritius, Nigeria, Pakistan and the Seychelles. *See* Tables A2-7 (p. 2-89) and A2-8 (p. 2-90); Attard, *The Exclusive Economic Zone in International Law* 51-52, 81 & 85-86 (1987); Rose, *Naval Activity in the EEZ--Troubled Waters Ahead?*, 39 *Naval L. Rev.* 67 (1990). The United States rejects those claims. U.S. Statement in Right of Reply, Annex A1-1 (p. 1-25), and 1983 Oceans Policy Statement, Annex A1-3 (p. 1-38).

<sup>59</sup> 1982 LOS Convention art. 246.

<sup>60</sup> *See* Annex A1-7 (p. 1-65).

<sup>61</sup> *See* Commentary accompanying Letter of Transmittal, Oct. 7, 1994, Senate Treaty Doc. 103-39 (Annex A1-2 (p. 1-29)), at 80. The Commentary may be found in U.S. State Department, Dispatch, Vol. 6, Supp. No. 1 (Feb. 1995).

A hydrographic survey is the obtaining of information in coastal or relatively shallow areas for the purpose of making 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 hazards to navigation.<sup>62</sup>

A military survey is the collecting of marine data for military purposes. A military survey may include collection of oceanographic, marine geological, geophysical, chemical, biological, acoustic, and related data.<sup>63</sup>

**2.4.3 High Seas.** 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 nations also enjoy the right to lay submarine cables and pipelines on the bed of the high seas as well as on the continental shelf beyond the territorial sea, with coastal nation approval for the course of pipelines on the continental shelf.<sup>64</sup> All of these activities must be conducted with due regard for the rights of other nations and the safe conduct and operation of other ships and aircraft.<sup>65</sup>

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<sup>62</sup> Roach, *Research and Surveys in Coastal Waters*, Vol. 20 Center for Oceans Law and Policy, UVA, Annual Seminar (1996), at 187.

<sup>63</sup> *Id.*, at 187-88. *See also* Roach, *Marine Scientific Research and the New Law of the Sea*, 27 *Ocean Dev. & Int'l L.* 59 (1996) at 61.

<sup>64</sup> Submarine cables include telegraph, telephone and high-voltage power cables. Commentary of the International Law Commission on draft arts. 27 and 35 on the law of the sea, U.N. GAOR Supp. 9, U.N. Doc. A/3159, II Int'l L. Comm. Y.B. 278 & 281 (1956). *See also*, Commentary accompanying Letters of Transmittal and Submittal in U.S. Department of State, Dispatch, Vol. 6, Supp. No. 1 (Feb. 1995) at 19. All nations enjoy the right to lay submarine cables and pipelines on the bed of the high seas as well as on their own and other nations' continental shelves. Consequently, SOSUS arrays can be lawfully laid on other nations' continental shelves beyond the territorial sea without notice or approval. 1982 LOS Convention, art. 79.

Willfully or with culpable negligence damaging a submarine cable or pipeline, except in legitimate life-saving or ship-saving situations, is a punishable offense under the laws of most nations. In addition, provisions exist for compensation from a cable owner for an anchor, net or other fishing gear sacrificed in order to avoid injuring the cable. Warships may approach and visit a vessel, other than another warship, suspected of causing damage to submarine cables in investigation of such incidents. Convention on the Protection of Submarine Cables, Paris, 14 March 1884, 24 Stat. 989, T.S. No. 380, as amended, 25 Stat. 1414, T.S. Nos. 380-1, 380-2, 380-3, *reproduced in* AFP 110-20 at 36-1; Franklin, *The Law of the Sea: Some Recent Developments* 157-178 (U.S. Naval War College, *International Law Studies* 1959-1960, v. 53, 1961) (discussing the boarding of the Soviet trawler NOVOROSSIISK by USS ROY O. HALE on 26 February 1959, 40 Dep't St. Bull. 555-58 (1959)). The 1884 Submarine Cables Convention is implemented in 47 U.S.C. sec. 21 *et seq.* (1982).

<sup>65</sup> High Seas Convention, art. 2; Continental Shelf Convention, art. 4; 1982 LOS Convention, arts. 79 & 87; Chicago Convention, art. 3(d) (military aircraft). The exercise of any of these freedoms is subject to the conditions that they be taken with "reasonable regard", according to the High Seas Convention, or "due regard", according to the 1982 LOS Convention, for the interests of other nations in light of all relevant circumstances. The "reasonable regard" or "due regard" standards are one and the same and require any using nation to be cognizant of the interests of others in using a high seas area, and to  
(continued...)

**2.4.3.1 Warning Areas.** Any nation may declare a temporary warning area in international waters and airspace to advise other nations of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. The U.S. and other nations 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 high seas by others. Notice of the establishment of such areas must be promulgated in advance, usually in the form of a Notice to Mariners (NOTMAR) and/or a Notice to Airmen (NOTAM). Ships and aircraft of other nations are *not* required to remain outside a declared warning area, but are obliged to refrain from interfering with activities therein. Consequently, ships and aircraft of one nation may operate in a warning area within international waters and airspace declared by another nation, collect intelligence and observe the activities involved, subject to the requirement of due regard for the rights of the declaring nation to use international waters and airspace for such lawful purposes.<sup>66</sup>

**2.4.4 Declared Security and Defense Zones.** International law does not recognize the right of any nation to restrict the navigation and overflight of foreign warships and military aircraft beyond its territorial sea. Although several coastal nations have asserted claims that purport

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<sup>65</sup>(...continued)

abstain from nonessential, exclusive uses which substantially interfere with the exercise of other nations' high seas freedoms. Any attempt by a nation to impose its sovereignty on the high seas is prohibited as that ocean space is designated open to use by all nations. High Seas Convention, art. 2; 1982 LOS Convention, arts. 87 & 89. *See* MacChesney 610-29. Section 101(c) of the Deep Seabed and Hard Minerals Resources Act, 30 U.S.C. sec. 1411(c) (1988), requires U.S. citizen licensees to exercise their rights on the high seas with reasonable regard for the interests of other States in their exercise of the freedom of the high seas. Section 111, codified at 30 U.S.C. sec. 1421, requires licensees to act in a manner that does not unreasonably interfere with interests of other States in their exercise of freedom of the high seas, as recognized under general principles of international law.

A legislative history of the articles of the 1982 LOS Convention regarding navigation on the high seas (arts. 87, 89-94 and 96-98) may be found *in* U.N. Office for Oceans Affairs and the Law of the Sea, *The Law of the Sea: Navigation on the High Seas*, U.N. Sales No. E.89.V.2 (1989). *See also* Commentary, paragraph 2.4.2.2, note 61 (p. 2-20) at 17-19; Nordquist, Vol. III at 72-86.

<sup>66</sup> Franklin, paragraph 2.4.3, note 64 (p. 2-21), at 178-91; SECNAVINST 2110.3 (series), Subj: Special Warnings to Mariners; OPNAVINST 3721.20 (series), Subj: The U.S. Military Notice to Airmen (NOTAM) System.

For example, in response to the terrorist attacks on U.S. personnel in Lebanon on 18 April and 23 October 1983, involving the use of extraordinarily powerful gas-enhanced explosive devices light enough to be carried in cars and trucks, single engine private aircraft, or small high-speed boats, U.S. forces in the Mediterranean off Lebanon and in the Persian Gulf took a series of defensive measures designed to warn unidentified ships and aircraft whose intentions were unknown from closing within lethal range of suicide attack. Warnings were promulgated through NOTMARS and NOTAMS requesting unidentified contacts to communicate on the appropriate international distress frequency and reflected NCA authorization of commanders to take the necessary and reasonable steps to prevent terrorist attacks on U.S. forces. *See* 78 Am. J. Int'l L. 884 (1984).

The effectiveness of such attacks was firmly established by the 23 October 1983 levelling of the USMC BLT 1/8 Headquarters building at Beirut International Airport by a truck bomb generating the explosive power of at least 12,000 pounds effective yield equivalent of TNT. Report of the DOD Commission on Beirut International Airport Terrorist Act, October 23, 1983 (Long Commission Report), 20 Dec. 1983, at 86; Frank, *U.S. Marines in Lebanon 1982-1984*, at 152 (1987); *Navy Times*, 15 Dec. 1986, at 11.

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.<sup>67</sup>

The Charter of the United Nations and general principles of international law recognize that a nation 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 nation seeks to enforce some degree of control over foreign entry into those areas. 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. International law does not determine the geographic limits of such areas or the degree of control that a coastal nation may lawfully exercise over them, beyond laying down the general requirement of reasonableness in relation to the needs of national security and defense.<sup>68</sup>

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<sup>67</sup> Leiner, *Maritime Security Zones: Prohibited Yet Perpetuated*, 24 Va. J. Int'l L. 967, 980 & 984-88 (1984). See paragraph 1.5.4, note 54 (p. 1-21). U.S. protest of the "restricted area" established by Libya within 100 NM radius of Tripoli is recorded in 1973 Digest of U.S. Practice in International Law 302-03. See also 1975 *id.* 451-52; 1977 *id.* 636; Note-Air Defense Zones, Creeping Jurisdiction in the Airspace, 18 Va. J. Int'l L. 485 (1978). Roach & Smith discuss so-called "security zones" at 104-106.

<sup>68</sup> *Defense Zones*. Measures of protective jurisdiction referred to in this paragraph 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 World War II. In addition, so-called "defensive sea areas," though usually limited in past practice to the territorial sea, occasionally have included areas of the high seas as well. See U.S. Naval War College, *International Law Documents*, "Blue Book" series, 1948-49, v. 46 (1950) at 157-76, MacChesney 603-04 & 607.

The statute authorizing the President to establish defensive sea areas by Executive Order (18 U.S.C. sec. 2152 (1988)) does not restrict these areas to the territorial sea. Executive Orders establishing defensive sea areas are promulgated by the Department of the Navy in OPNAVINST 5500.11 (series) and 32 C.F.R. part 761. It should also be noted that establishment of special control areas extending beyond the territorial sea, whether established as "defensive sea areas" or "maritime control areas," has been restricted in practice to periods of war or of declared national emergency. On the other hand, in time of peace the United States has exercised, and continues to exercise, jurisdiction over foreign vessels in waters contiguous to its territorial sea consistent with the authority recognized in art. 24 of the 1958 Territorial Sea Convention and art. 33 of the 1982 LOS Convention. This limited jurisdiction has, of course, been exercised without establishing special defensive sea areas or maritime control areas covering such waters. NWIP 10-2, art. 413d n.21. See Woods, *State and Federal Sovereignty Claims Over the Defensive Sea Areas in Hawaii*, 39 Nav. L. Rev. 129 (1990).

*Closed Seas and Zones of Peace*. Proposals have been advanced at various times to exclude non-littoral warships from "closed" seas such as the Black Sea or Baltic Sea, where water access is limited, or from the entire Indian Ocean as a designated "zone of peace." These claims have not gained significant legal or political momentum or support and are not recognized by the United States. Views of the former-Soviet Union on closed seas are discussed in Darby, *The Soviet Doctrine of the Closed Sea*, 23 San Diego L. Rev. 685 (1986). See also paragraph 1.3.3.1, note 23 (p. 1-11). The proposed Indian Ocean Zone of Peace is discussed in Alexander, at 339-40.

Nuclear free zones are discussed in paragraph 2.4.6 (p. 2-26).

## 2.4.5 Polar Regions

**2.4.5.1 Arctic Region.** The U.S. considers that the waters, ice pack, and airspace of the Arctic region beyond the lawfully claimed territorial seas of littoral nations have international status and are open to navigation by the ships and aircraft of all nations. Although several nations have, at times, attempted to claim sovereignty over the Arctic on the basis of discovery, historic use, contiguity (proximity), or the so-called "sector" theory, those claims are not recognized in international law. Accordingly, all ships and aircraft enjoy the freedoms of high seas navigation and overflight on, over, and under the waters and ice pack of the Arctic region beyond the lawfully claimed territorial seas of littoral states.<sup>69</sup>

**2.4.5.2 Antarctic Region.** A number of nations have asserted conflicting and often overlapping claims to portions of Antarctica. These claims are premised variously on

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<sup>69</sup> Arctic operations are described *in* Lyon, *Submarine Combat in the Ice*, U.S. Naval Inst. Proc., Feb. 1992, at 33; Allard, *To the North Pole!*, U.S. Naval Inst. Proc., Sept. 1987, at 56; LeSchack, *ComNavForArctic*, U.S. Naval Inst. Proc., Sept. 1987, at 74; Atkeson, *Fighting Subs Under the Ice*, U.S. Naval Inst. Proc., Sept. 1987, at 81; Le Marchand, *Under Ice Operations*, Nav. War Coll. Rev., May-June 1985, at 19; and Caldwell, *Arctic Submarine Warfare*, *The Submarine Rev.*, July 1983, at 5. Alexander, *Navigational Restrictions 311-19 & 358-59*, notes the following unilateral claims that adversely impact on navigational freedoms through Arctic straits:

- The [former] U.S.S.R. claims the White Sea and Cheshskaya Gulf to the east as historic waters, and has delimited a series of straight baselines along its Arctic coast closing off other coastal indentations, as well as joining the coastal islands and island groups with the mainland, thereby purporting to close off the major straits of the Northeast Passage. *See* Franckx, *Non-Soviet Shipping in the Northeast Passage, and the Legal Status of Proliv Vil'-kitskogo*, 24 *Polar Record* 269 (1988).

- Norway has delimited straight baselines about the Svalbard Archipelago that do not conform to art. 7 of the 1982 LOS Convention.

- Canada purports to close off its entire Arctic archipelago with straight baselines and declares that the waters within the baselines -- including the Northwest Passage -- are internal waters. 24 *Int'l Leg. Mat'ls* 1728 (1985). *See* Figures A2-7 (p. 2-77) and A2-8 (p. 2-78). The United States has not accepted that claim. *See* the Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation, 11 January 1988, 28 *Int'l Leg. Mat'ls* 142 (1989). The negotiation of this agreement is discussed in Howson, *Breaking the Ice: The Canadian-American Dispute over the Arctic's Northwest Passage*, 26 *Colum. J. Trans. L.* 337 (1988). The October 1988 transit by the icebreaker USCGC POLAR STAR pursuant to this agreement is discussed *in* 83 *Am. J. Int'l L.* 63 and 28 *Int'l Leg. Mat'ls* 144-45 (1989); the POLAR STAR's August 1989 transit is summarized *in* West, *Breaking Through the Arctic*, U.S. Naval Inst. Proc., Jan. 1990, at 57. The Canadian claim is discussed *in* Pullen, *What Price Canadian Sovereignty?*, U.S. Naval Inst. Proc., Sept. 1987, at 66 (Captain Pullen, Canadian Navy retired, argues that the Northwest Passage is the sea route that links the Atlantic and the Pacific oceans north of America, and lists the 36 transits of the Passage from 1906 to 1987). *See* Figure A2-8 (p. 2-78). *See also* MacInnis, *Braving the Northwest Passage*, *Nat'l Geog.*, May 1989, at 584-601 and Roach & Smith, at 207-215.

Other Arctic straight baselines not drawn in conformity with the 1982 LOS Convention include those around Iceland and Danish-drawn lines around Greenland and the Faeroe Islands.

discovery, contiguity, occupation and, in some cases, the "sector" theory. The U.S. does not recognize the validity of the claims of other nations to any portion of the Antarctic area.<sup>70</sup>

**2.4.5.2.1 The Antarctic Treaty of 1959.** The U.S. is a party to the multilateral treaty of 1959 governing Antarctica.<sup>71</sup> Designed to encourage the scientific exploration of the continent and to foster research and experiments in Antarctica without regard to conflicting assertions of territorial sovereignty, the 1959 accord 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.<sup>72</sup>

The treaty also provides that Antarctica "shall be used for peaceful purposes only," and that "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" shall be prohibited.<sup>73</sup> 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.<sup>74</sup> Therefore, classified activities are not conducted by the U.S. in Antarctica, and all classified material is removed from U.S. ships and aircraft prior to visits to the continent.<sup>75</sup> In addition, the treaty prohibits nuclear explosions and disposal of nuclear waste anywhere south of 60° South Latitude.<sup>76</sup> The treaty does not, however, affect in any way the high seas freedoms of navigation and overflight in the Antarctic region. Antarctica has no territorial sea or territorial airspace.

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<sup>70</sup> Although the United States would be fully justified in asserting a claim to sovereignty over one or more areas of Antarctica on the basis of its extensive and continuous scientific activities there, it has not done so. *See* Joyner, *Maritime Zones in the Southern Ocean: Problems concerning the Correspondence of Natural and Legal Maritime Zones*, 10 *Applied Geog.* 307 (1990); Hinckley, *Protecting American Interests in the Antarctic: The Territorial Claims Dilemma*, 39 *Naval L. Rev.* 43 (1990).

<sup>71</sup> Antarctic Treaty, Washington, 1 December 1959, 12 U.S.T. 794; 402 U.N.T.S. 71; T.I.A.S. 4780; text *reprinted in* AFP 110-20 at 4-21. Its provisions apply south of 60° South Latitude.

<sup>72</sup> Art. IV.2.

<sup>73</sup> Art. I.1.

<sup>74</sup> Art. VII.3.

<sup>75</sup> For further information and guidance, *see* DOD Directive 2000.6, Subj: Conduct of Operations in Antarctica, and OPNAVINST 3120.20 (series), Subj: Navy Policy in Antarctica and Support of the U.S. Antarctic Program.

<sup>76</sup> Arts. V and VI.

**2.4.6 Nuclear Free Zones.** The 1968 Nuclear Weapons Non-Proliferation Treaty,<sup>77</sup> to which the United States is a party, acknowledges the right of groups of nations to conclude regional treaties establishing nuclear free zones.<sup>78</sup> Such treaties or their provisions are binding only on parties to them or to protocols incorporating those provisions. To the extent that the rights and freedoms of other nations, including the high seas freedoms of navigation and overflight, are not infringed upon, such treaties are not inconsistent with international law.<sup>79</sup> The 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco)<sup>80</sup> 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.<sup>81</sup> This in no way

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<sup>77</sup> Treaty on the Non-proliferation of Nuclear Weapons, Washington, London & Moscow, 1 July 1968, 21 U.S.T. 483; 729 U.N.T.S. 161; T.I.A.S. 6839.

<sup>78</sup> *Id.*, Art. VII.

<sup>79</sup> The United States, therefore, does not oppose the establishment of nuclear free zones provided certain fundamental rights are preserved in the area of their application. These include non-interference with the high seas freedoms of navigation and overflight beyond the territorial sea, the right of innocent passage in territorial seas and archipelagic waters, the right of transit passage of international straits and the right of archipelagic sea lanes passage of archipelagic waters. Parties to such agreements may, however, grant or deny transit privileges within their respective land territory, internal waters and national airspace, to nuclear powered and nuclear capable ships and aircraft of non-party nations, including port calls and overflight privileges. Dept St. Bull., Aug. 1978, at 46-47; 1978 Digest of U.S. Practice in International Law 1668; 1979 Digest of Practice in International Law 1844. *See also* Rosen, Nuclear-Weapon-Free Zones, Nav. War Coll. Rev., Autumn 1996, at 44.

<sup>80</sup> Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), Mexico City, 14 February 1967, 22 U.S.T. 762; 64 U.N.T.S. 281, T.I.A.S. 7137; AFP 110-20 at 4-9, entered into force 22 April 1968. The Treaty of Tlatelolco consists of the Treaty and two Additional Protocols. The parties to the Treaty are listed in 28 Int'l Leg. Mat'ls 1404 (1989). By its terms, the United States cannot be a party to the Treaty of Tlatelolco since the United States does not lie within the zone of its application. *See* Figure A2-9 (p. 2-79). The United States is, however, a party to both Additional Protocols.

<sup>81</sup> Additional Protocol I to the Treaty of Tlatelolco, 33 U.S.T. 1972; T.I.A.S. 10147; 634 U.N.T.S. 362, entered into force 11 December 1969 (for the U.S., 23 November 1981), and calls upon nuclear-weapons nations outside the treaty zone to apply the denuclearization provisions of the Treaty to their territories in the zone. As of 1 January 1997, France, the Netherlands, the United Kingdom, and the United States are parties to Additional Protocol I. Within the Latin American nuclear-weapons free zone lie the Panama Canal, Guantanamo Naval Base in Cuba, the Virgin Islands, and Puerto Rico. Since Additional Protocol I entered into force for the United States on 23 November 1981, the U.S. may not store or deploy nuclear weapons in those areas, but its ships and aircraft may still visit these ports and airfields, and overfly them, whether or not these ships and aircraft carry nuclear weapons. In this regard, *see also* Articles III.1(e) and VI.1 of the 1977 Treaty Concerning the Permanent Neutrality and Operations of the Panama Canal, 33 U.S.T. 1; T.I.A.S. 10,029, which specifically guarantee the right of U.S. military vessels to transit the Canal regardless of their cargo or armament. This includes submarines as well as surface ships. The United States also has the right to repair and service ships carrying nuclear weapons in ports in the Virgin Islands, Puerto Rico and Guantanamo when incident to transit through the area. Further, the United States retains the right to off-load nuclear weapons from vessels in these ports in the event of emergency or operational requirements if such off-loading is temporary and is required in the course of a transit through the area.

The U.S. ratification of Protocol I (and of Protocol II discussed below) was subject to understandings and declarations that the Treaty of Tlatelolco does not affect the right of a nation adhering to Protocol I to grant or deny transit and transport privileges to its own or any other vessels or aircraft irrespective of cargo or armaments, and that the treaty does not affect the rights of a nation adhering to Protocol I regarding exercise of the freedoms of the seas, or regarding passage through or over waters subject to the sovereignty of a Treaty nation. *See* 28 Int'l Leg. Mat'ls 1410-12 (1989).

(continued...)

affects the exercise by the U.S. of navigational rights and freedoms within waters covered by the Treaty of Tlatelolco.<sup>82</sup>

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<sup>81</sup>(...continued)

The terms "transit and transport" are not defined in the Treaty. These terms should be interpreted on a case-by-case basis, bearing in mind the basic idea that the Treaty was not intended to inhibit activities reasonably related to the passage of nuclear weapons through the zone. No Latin American party to the Treaty objected when the United States and France made formal statements confirming transit and transport rights when ratifying Protocol II. No Latin American party has denied transit or transport privileges on the basis of the Treaty or its Protocols, notwithstanding the fact that U.S. military vessels and aircraft frequently engage in transit, port calls and overflights in the region, and that it is U.S. policy neither to confirm nor deny the presence of nuclear weapons in such cases. 1978 Digest at 1624; Prohibition of Nuclear Weapons in Latin America, Hearing before Sen. For. Rel. Comm., 97th Cong., 1st Sess., 22 Sept. 1981, at 18-20.

Additional Protocol II to the Treaty of Tlatelolco, 22 U.S.T. 754; T.I.A.S. 7137; 634 U.N.T.S. 364; AFP 110-20 at 4-18, entered into force 11 December 1969 (for the U.S., 12 May 1971) and obligates nuclear-weapons nations to respect the denuclearized status of the zone, not to contribute to acts involving violation of obligations of the parties, and not to use or threaten to use nuclear weapons against the contracting parties (*i.e.*, the Latin American countries). The United States ratified Protocol II subject to understandings and declarations, 22 U.S.T. 760; 28 Int'l Leg. Mat'ls at 1422-23 (1989), that the Treaty and its Protocols have no effect upon the international status of territorial claims; the Treaty does not affect the right of the Contracting Parties to grant or deny transport and transit privileges to non-Contracting Parties; that the United States would "consider that an armed attack by a Contracting Party, in 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;" and, 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 toward the territories of the Latin American Treaty parties. China, France, the former-Soviet Union, the United Kingdom, and the United States are parties to Protocol II. 28 Int'l Leg. Mat'ls 1413 (1989). *See also id.* at 1414-23.

<sup>82</sup> Both the 1985 South Pacific Nuclear Free Zone Treaty and the 1995 African Nuclear-Weapon-Free Zone Treaty seek the same goals as the Treaty of Tlatelolco. The South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga), Rarotonga, 6 August 1985, 24 Int'l Leg. Mat'ls 1442 (1985) entered into force 11 December 1986. The Treaty of Rarotonga consists of the Treaty and three Protocols. The Treaty itself is open only to members of the South Pacific Forum (Australia, Cook Islands, Fiji, Kiribati, Marshall Islands, Micronesia, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa, all but four of whom (Marshall Islands, Micronesia, Palau and Tonga) are parties. Modeled after the Treaty of Tlatelolco, the Treaty of Rarotonga does not impinge on international freedoms of navigation and overflight in the area of its application (*See Figure A2-10 (p. 2-80)*).

- Protocol I to the Treaty of Rarotonga (not in force as of 1 January 1997) calls upon parties to apply the prohibitions of the Treaty to the territories for which they are internationally responsible within the zone. Protocol I is open to France, the United Kingdom and the United States, all of whom are signatories. U.S. ratification of Protocol I was awaiting Senate advice and consent as of 1 November 1997.

- Protocol II to the Treaty of Rarotonga (not in force for the U.S. as of 1 January 1997) calls upon the parties not to use or threaten to use nuclear weapons against any party of the Treaty. Protocol II is open to China, France, the former-Soviet Union, the United Kingdom and the United States, all of whom are signatories. U.S. ratification of Protocol II was awaiting Senate advice and consent as of 1 November 1997.

- Protocol III to the Treaty of Rarotonga (not in force for the U.S. as of 1 January 1997) calls upon the parties not to test any nuclear explosive device within the zone. Protocol III is open to China, France, the former-soviet Union, the United Kingdom and the United States, all of whom are signatories. U.S. ratification of Protocol III was awaiting Senate advice and consent as of 1 November 1997.

African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba), (Cairo), 11 April 1996, 35 Int'l Leg. Mat'ls 698 (1996) (not in force as of 1 January 1997). The Treaty of Pelindaba consists of the Treaty and three Protocols. The Treaty (continued...)

## 2.5. AIR NAVIGATION

**2.5.1 National Airspace.**<sup>83</sup> Under international law, every nation has complete and exclusive sovereignty over its national airspace, that is, the airspace above its territory, its internal waters, its territorial sea, and, in the case of an archipelagic nation, its archipelagic waters.<sup>84</sup> *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 nations.*<sup>85</sup> Accordingly, unless party to an international agreement to the contrary, all nations have complete discretion in regulating or prohibiting flights within their national airspace (as opposed to a Flight Information Region - see paragraph 2.5.2.2), with the sole exception of overflight of international straits and archipelagic sea lanes. 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

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<sup>82</sup>(...continued)

is open to all African nations. As of 1 January 1997, Mauritius was the only African nation to have ratified the Treaty. The Treaty of Pelindaba explicitly upholds the freedoms of navigation and overflight of the international community in its area of application (see Figure A2-11 (p. 2-81)).

- Protocol I to the Treaty of Pelindaba (not in force as of 1 January 1997) calls upon its parties not to use or threaten the use of nuclear weapons within the African zone (see Figure A2-11 (p. 2-81)). Protocol I is open to China, France, Russia, the United Kingdom and the United States, all of whom are signatories except Russia. U.S. ratification of Protocol I was awaiting the advice and consent of the Senate as of 1 November 1997.

- Protocol II to the Treaty of Pelindaba (not in force as of 1 January 1997) calls upon its parties to refrain from testing any nuclear explosive device within the zone. Protocol II is open to China, France, Russia, the United Kingdom and the United States, all of whom are signatories except Russia. U.S. ratification of Protocol II was awaiting the advice and consent of the Senate as of 1 November 1997.

- Protocol III to the Treaty of Pelindaba (not yet in force) applies to nations with dependent territories in the zone (e.g., France and Spain) and calls upon them to observe certain provisions of the Treaty in those territories. Although France is a signatory, neither France nor Spain are parties as of 1 November 1997.

<sup>83</sup> Under international law, airspace is classified under two headings: national airspace (airspace over the land, internal waters, archipelagic waters, and territorial sea of a nation) and international airspace (airspace over a contiguous zone, an exclusive economic zone, and the high seas, and over unoccupied territory (*i.e.*, territory not subject to the sovereignty of any nation, such as Antarctica)). Airspace has, in vertical dimension, an upward (but undefined) limit, above which is outer space (see paragraph 1.1, note 1 (p. 1-1) and paragraph 2.9.2 (p. 2-38)).

<sup>84</sup> Territorial Sea Convention, art. 2; Chicago Convention, art. 1; 1982 LOS Convention, art. 2. Effective upon the extension of the U.S. territorial sea on 27 December 1988, the Federal Aviation Administration extended seaward the limits of controlled airspace and applicability of certain air traffic rules. Amendment 91-207, 54 Fed. Reg. 265, 4 Jan. 1989, amending 14 C.F.R. parts 71 and 91, and 54 Fed. Reg. 34292, 18 Aug. 1989.

<sup>85</sup> There is also no right of overflight of internal waters and land territory.

course and/or altitude. Aircraft in distress are entitled to special consideration and should be allowed entry and emergency landing rights.<sup>86</sup> Concerning the right of assistance entry, see paragraph 2.3.2.5. For jurisdiction over aerial intruders, see paragraph 4.4.

**2.5.1.1 International Straits Which Connect EEZ/High Seas to EEZ/High Seas.** All aircraft, including military aircraft, enjoy the right of unimpeded transit passage through the airspace above international straits overlapped by territorial seas.<sup>87</sup> 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 nation or nations bordering the strait.<sup>88</sup> 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.<sup>89</sup>

In international straits not completely overlapped by territorial seas, all aircraft, including military aircraft, enjoy high seas freedoms while operating in the high seas corridor beyond the territorial sea. (See paragraph 2.5.2 for a discussion of permitted activities in international airspace.) 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.<sup>90</sup>

**2.5.1.2 Archipelagic Sea Lanes.** All aircraft, including military aircraft, enjoy the right of unimpeded passage through the airspace above archipelagic sea lanes. The right of overflight of such sea lanes is essentially identical to that of transit passage through the airspace above international straits overlapped by territorial seas.<sup>91</sup>

**2.5.2 International Airspace.** International airspace is the airspace over the contiguous zone, the exclusive economic zone, the high seas, and territories not subject to national sovereignty (e.g., Antarctica). All international airspace is open to the aircraft of all nations.<sup>92</sup> Accordingly, aircraft, including military aircraft, are free to operate in international airspace

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<sup>86</sup> Chicago Convention, arts. 5-16.

<sup>87</sup> 1982 LOS Convention, art. 38(1).

<sup>88</sup> *Id.*, art. 38(2). All aircraft must, however, monitor the internationally designated air-traffic control circuit or distress radio frequency while engaged in transit passage. Art. 39.

<sup>89</sup> *Id.*, art. 44.

<sup>90</sup> 1982 LOS Convention, art. 38(1). *See also*, Nordquist, Vol. II at 312-315.

<sup>91</sup> 1982 LOS Convention, art. 53. As in the case of transit passage, all aircraft overflying archipelagic sea lanes must monitor the internationally designated air-traffic control circuit or distress radio frequency. 1982 LOS Convention, arts. 39 & 54.

<sup>92</sup> High Seas Convention, art. 2; Territorial Sea Convention, art. 24; 1982 LOS Convention, arts. 87, 58 & 33.

without interference from coastal nation 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 nations and the safety of other aircraft and of vessels.<sup>93</sup> (Note, however, that the Antarctic Treaty prohibits military maneuvers and weapons testing in Antarctic airspace.<sup>94</sup>) These same principles apply with respect to the overflight of high seas or EEZ corridors through that part of international straits *not* overlapped by territorial seas.<sup>95</sup>

**2.5.2.1 Convention on International Civil Aviation.** The United States is a party to the 1944 Convention on International Civil Aviation (as are most nations). That multilateral treaty, commonly referred to as the "Chicago Convention," applies to civil aircraft.<sup>96</sup> It does *not* apply to military aircraft or AMC-charter aircraft designated as "state aircraft" (see paragraph 2.2.2), other than to require that they operate with "due regard for the safety of navigation of civil aircraft."<sup>97</sup> The Chicago Convention established the International Civil Aviation Organization (ICAO) to develop international air navigation principles and techniques and to "promote safety of flight in international air navigation."<sup>98</sup>

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 DOD Dir. 4540.1 and OPNAVINST 3770.4 (series) and the Coast Guard Air Operations Manual, COMDTINST M3710.1 (series).)

**2.5.2.2 Flight Information Regions.** A Flight Information Region (FIR) is a defined area of airspace within which flight information and alerting services are provided. FIRs 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. As mentioned above, exceptions to this policy include military contingency operations, classified or politically sensitive missions, and routine aircraft carrier

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<sup>93</sup> 1982 LOS Convention, art. 87(2), Chicago Convention, art. 3(d).

<sup>94</sup> See paragraph 2.4.5.2.1 (p. 2-25).

<sup>95</sup> 1982 LOS Convention, arts. 35(b), 87 & 58.

<sup>96</sup> Art. 3(a); text reprinted in AFP 110-20, at 6-3.

<sup>97</sup> Art. 3(d).

<sup>98</sup> Art. 44(h).

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.<sup>99</sup>

Some nations, however, 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.<sup>100</sup> The U.S. does not recognize the right of a coastal nation to apply its FIR procedures to foreign military aircraft in such circumstances. Accordingly, U.S. military aircraft not intending to enter national airspace need not identify themselves or otherwise comply with FIR procedures established by other nations, unless the U.S. has specifically agreed to do so.<sup>101</sup>

**2.5.2.3 Air Defense Identification Zones in International Airspace.** International law does not prohibit nations from establishing Air Defense Identification Zones (ADIZ) in the international airspace adjacent to their territorial airspace. The legal basis for ADIZ regulations is the right of a nation to establish reasonable conditions of entry into its territory. Accordingly, an aircraft approaching national airspace can be required to identify itself while in international airspace as a condition of entry approval. ADIZ regulations promulgated by the U.S. apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports.<sup>102</sup> The U.S. does not recognize the right of a coastal nation to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace nor does the U.S. apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace. Accordingly, U.S. military aircraft not intending to enter

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<sup>99</sup> Chicago Convention, art. 3(d); DOD Directive 4540.1; 9 Whiteman 430-31; AFP 110-31, at 2-9 to 2-10 n.29. 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 en route or overflight fees, including charges for providing FIR services, when merely transiting international airspace located in the FIR. The normal practice of nations 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 directly to services provided at the specific request of the aircraft commander or by other appropriate officials of the nation operating the aircraft. 1993 State message 334332.

<sup>100</sup> The United States has protested such claims by Cuba, Ecuador, Nicaragua and Peru, and has asserted its right to operate its military aircraft in the international airspace of their FIRs without notice to or authorization from their Air Traffic Control authorities. *See* Roach & Smith at 231-34.

<sup>101</sup> Chicago Convention, arts. 3(a), 11, 28; OPNAVINST 3770.4 (series), promulgating DOD Directive 4540.1, Subj: Use of Airspace by U.S. Military Aircraft and Firings Over the High Seas. Applicable ROE should also be consulted. *See also* ALLANTFLT 016/97 (CINCLANTFLT MSG 101900Z OCT 97).

<sup>102</sup> United States air defense identification zones have been established by Federal Aviation Administration (FAA) regulations, 14 C.F.R. part 99. (The ADIZs for the contiguous U.S. are set out in 14 C.F.R. part 99.42; for Alaska in 99.43; for Guam in 99.45 and for Hawaii in 99.47.) In order that the Administrator may properly carry out the responsibilities of that office, the authority of the Administrator has been extended into the airspace beyond the territory of the United States. U.S. law (49 U.S.C. sec. 1510) grants the president the power to order such extraterritorial extension when requisite authority is found under an international agreement or arrangement; the president invoked this power by Exec. Order 10,854, 27 November 1959, 3 C.F.R. part 389 (1959-1963 Comp.). *See also* MacChesney 579-600; NWIP 10-2, art. 422b.

national airspace need not identify themselves or otherwise comply with ADIZ procedures established by other nations, unless the U.S. has specifically agreed to do so.<sup>103</sup>

It should be emphasized that the foregoing contemplates a peacetime or nonhostile environment. In the case of imminent or actual hostilities, a nation may find it necessary to take measures in self-defense that will affect overflight in international airspace.<sup>104</sup>

## **2.6 EXERCISE AND ASSERTION OF NAVIGATION AND OVERFLIGHT RIGHTS AND FREEDOMS**

As announced in the President's United States Oceans Policy statement of 10 March 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 the [1982 LOS] 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."

When maritime nations 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 nations and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime nations to protest diplomatically all excessive claims of coastal nations and to exercise their navigation and overflight rights in the face of such claims. The President's Oceans Policy Statement makes clear that the United States has accepted this responsibility as a fundamental element of its national policy.<sup>105</sup>

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<sup>103</sup> Chicago Convention, art. 11; OPNAVINST 3770.4 (series), promulgating DOD Directive 4540.1, Subj: Use of Airspace by U.S. Military Aircraft and Firings Over the High Seas; OPNAVINST 3772.5 (series), Subj: Identification and Security Control of Military Aircraft; General Planning Section, DoD Flight Information publications. Appropriate ROE should also be consulted.

<sup>104</sup> See also paragraph 2.4.4, note 68 (p. 2-23).

<sup>105</sup> Annex A1-3 (p. 1-38). See U.S. Dep't State, GIST: US Freedom of Navigation Program, Dec. 1988, Annex A2-7 (p. 2-68); and DOD Instruction C2005.1, Subj: U.S. Program for the Exercise of Navigation and Overflight Rights at Sea (U). See also Roach & Smith, at 255; National Security Strategy of the United States, August 1991, at 15; and Rose, Naval Activity in the Exclusive Economic Zone--Troubled Waters Ahead?, 39 Naval L. Rev. 67, 85-90 (1990). On 23 September 1989 the United States and the former-Soviet Union issued a joint statement (Annex A2-2 (p. 2-47)) in which they recognized "the need to encourage all States to harmonize their internal laws, regulations and practices" with the navigational articles of the 1982 LOS Convention.

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<sup>105</sup>(...continued)

The 1982 LOS Convention was designed in part to halt the creeping jurisdictional claims of coastal nations, or ocean enclosure movement. While that effort appears to have met with some success, it is clear that many nations currently purport to restrict navigational freedoms by a wide variety of means that are neither consistent with the 1982 LOS Convention nor with customary international law. *See* Negroponete, *Who Will Protect the Oceans?*, *Dep't St. Bull.*, Oct. 1986, at 41-43; Smith, *Global Maritime Claims*, 20 *Ocean Dev. & Int'l L.* 83 (1989). Alexander warns of a continuation of the ocean enclosure movement. He particularly sees more unauthorized restrictions on the movement of warships, military aircraft and "potentially polluting" vessels in the territorial seas and EEZ, and on transit passage in international straits. Alexander 369-70. The United States' view regarding the consistency of certain claims of maritime jurisdiction with the provisions of the LOS Convention is set forth in its 3 March 1983 Statement in Right of Reply, Annex A1-1 (p. 1-25).

Since 1948, the Department of State has issued approximately 150 protest notes to other nations concerning their excessive maritime claims, as well as engaging in numerous bilateral discussions with many countries. Negroponete, *Current Developments in U.S. Oceans Policy*, *Dep't St. Bull.*, Sept. 1986, at 84, 85; *Navigation Rights and the Gulf of Sidra*, *Dep't St. Bull.*, Feb. 1987, at 70; Roach, *Excessive Maritime Claims*, 1990 *Proc. Am. Soc. Int'l L.* 288, 290; Roach & Smith, at 4. United States responses to excessive maritime claims are discussed in *Limits in the Seas* No. 112 (1992).

*See* 1 O'Connell 38-44 for a discussion of the significance of protest in the law of the sea. *Compare* Colson, *How Persistent Must the Persistent Objector Be?*, 61 *Wash. L. Rev.* 957, at 969 (1986):

First, States should not regard legal statements of position as provocative political acts. They are a necessary tool of the international lawyer's trade and they have a purpose beyond the political, since, occasionally, States do take their legal disputes to court.

Second, there is no requirement that a statement of position be made in a particular form or tone. A soft tone and moderate words may still effectively make the necessary legal statement.

Third, action by deed probably is not necessary to protect a State's legal position as a persistent objector when that State has otherwise clearly stated its legal position. Action by deed, however, promotes the formation of law consistent with the action and deeds may be necessary in some circumstances to slow erosion in customary legal practice.

Fourth, not every legal action needs an equal and opposite reaction to maintain one's place in the legal cosmos.

Fifth, the more isolated a State becomes in its legal perspective, the more active it must be in restating and making clear its position.

"The exercise of rights--the freedoms to navigate on the world's oceans--is not meant to be a provocative act. Rather, in the framework of customary international law, it is a legitimate, peaceful assertion of a legal position and nothing more." Negroponete, *Who Will Protect the Oceans?*, *Dep't St. Bull.*, Oct. 1986, at 42. In exercising its navigational rights and freedoms, the United States "will continue to act strictly in conformance with international law and we will expect nothing less from other countries." Schachte, *The Black Sea Challenge*, *U.S. Naval Inst. Proc.*, June 1988, at 62.

"Passage does not cease to be innocent merely because its purpose is to test or assert a right disputed or wrongfully denied by the coastal State." Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 27 *Br. Y.B. Int'l L.* 28 (1950), commenting on the *Corfu Channel Case* in which the Court held that the United Kingdom was not bound to abstain from exercising its right of innocent passage which Albania had illegally denied. 1949 *ICJ Rep.* 4, 4 *Whiteman* 356. The Special Working Committee on Maritime Claims of the American Society of International Law has advised that

programs for the routine exercise of rights should be just that, "routine" rather than unnecessarily provocative. The sudden appearance of a warship for the first time in years in a disputed area at a time of high tension is unlikely to be regarded as a largely inoffensive exercise related solely to the preservation of an

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<sup>105</sup>(...continued)

underlying legal position. Those responsible for relations with particular coastal states should recognize that, so long as a program of exercise of rights is deemed necessary to protect underlying legal positions, delay for the sake of immediate political concerns may invite a deeper dispute at a latter [sic] time.

Am. Soc. Int'l L. Newsletter, March-May 1988, at 6.

The United States has exercised its rights and freedoms against a variety of objectionable claims, including: unrecognized historic waters claims; improperly drawn baselines for measuring maritime claims; territorial sea claims greater than 12 NM; and territorial sea claims that impose impermissible restrictions on the innocent passage of any type of vessel, such as requiring prior notification or authorization. Since the policy was implemented in 1979, the United States has exercised its rights against objectionable claims of over 35 nations, including the former-Soviet Union, at the rate of some 30-40 per year. Department of State Statement, 26 March 1986, Dep't St. Bull., May 1986, at 79; Navigation Rights and the Gulf of Sidra, Dep't St. Bull., Feb. 1987, at 70. *See also*, Roach & Smith, at 6.

Perhaps the most widely publicized of these challenges has occurred with regard to the Gulf of Sidra (closing line drawn across the Gulf at 30°30'N). *See* Figure A2-12 (p. 2-82) and Annex A2-8 (p. 2-70). The actions of the United States are described in Spinatto, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 *Ocean Dev. & Int'l L.J.* 65 (1983); *N.Y. Times*, 27 July 1984, at 5; and Parks, *Crossing the Line*, *U.S. Naval Inst. Proc.*, Nov. 1986, at 40.

Other publicized examples include the transits of the Black Sea in November 1984 and March 1986 (*Washington Post*, 19 March 1986, at 4 & 21; *Christian Science Monitor*, 20 March 1986, at 1, 40) and in February 1988 (*N.Y. Times*, 13 Feb. 1988, at 1 & 6) challenging the Soviet limitations on innocent passage, *see* paragraph 2.3.2.1, note 27 (p. 2-8), and of Avacha Bay, Petropavlovsk in May 1987 (straight baseline) (*Washington Post*, 22 May 1987, at A34). Most challenges, however, have occurred without publicity, and have been undertaken without protest or other reaction by the coastal nations concerned.

Some public commentary on the Black Sea operations has incorrectly characterized the passage as being not innocent. Rubin, *Innocent Passage in the Black Sea?* *Christian Sci. Mon.*, 1 Mar. 1988, at 14; Carroll, *Murky Mission in the Black Sea*, *Wash. Post Nat'l Weekly Ed.*, 14-20 Mar. 1988, at 25; Carroll, *Black Day on the Black Sea*, *Arms Control Today*, May 1988, at 14; Arkin, *Spying in the Black Sea*, *Bull. of Atomic Scientists*, May 1988, at 5. Authoritative responses include Armitage, *Asserting U.S. Rights On the Black Sea*, *Arms Control Today*, June 1988, at 13; Schachte, *The Black Sea Challenge*, *U.S. Naval Inst. Proc.*, June 1988, at 62; and Grunawalt, *Innocent Passage Rights*, *Christian Sci. Mon.*, 18 Mar. 1988, at 15. *See also*, Note, *Oceans Law and Superpower Relations: The Bumping of the Yorktown and the Caron in the Black Sea*, 29 *Va. J. Int'l L.* 713 (1989); Franckx, *Innocent Passage of Warships*, *Marine Policy*, Nov. 1990, at 484-90; Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?* 135 *Mil. L. Rev.* 137 (1992); and Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, *Nav. War Coll. Rev.*, Spring 1993, at 59. Mere incidental observation of coastal defenses could not suffice to render noninnocent a passage not undertaken for that purpose. Fitzmaurice, this note, 27 *Br. Y.B. Int'l L.* 29, n.1, *quoted in* 4 *Whiteman* 357.

Other claims not consistent with the 1982 LOS Convention that adversely affect freedoms of navigation and overflight and which are addressed by the U.S. FON program include:

- claims to jurisdiction over maritime areas beyond 12 NM which purport to restrict non-resource related high seas freedoms, such as in the EEZ (paragraph 2.4.2 (p. 2-20)) or security zones (paragraph 2.4.4 (p. 2-22));
  - archipelagic claims that do not conform with the 1982 LOS Convention (paragraph 2.3.4 (p. 2-17)), or do not permit archipelagic sea lanes passage in conformity with the 1982 LOS Convention, including submerged passage of submarines and overflight of military aircraft, and transit in a manner of deployment consistent with the security of the forces involved (paragraph 2.3.4.1 (p. 2-17)); and
  - territorial sea claims that overlap international straits, but do not permit transit passage (paragraph 2.3.3.1 (p. 2-12)), or that require advance notification or authorization for warships and auxiliaries, or apply discriminatory
- (continued...)

## 2.7 RULES FOR NAVIGATIONAL SAFETY FOR VESSELS AND AIRCRAFT

**2.7.1 International Rules.** Most rules for navigational safety governing surface and subsurface vessels, including warships, are contained in the International Regulations for Preventing Collisions at Sea, 1972, known informally as the "International Rules of the Road" or "72 COLREGS."<sup>106</sup> These rules apply to all international waters (i.e., the high seas, exclusive economic zones, and contiguous zones) and, except where a coastal nation has established different rules, in that nation's territorial sea, archipelagic waters, and inland waters as well. The 1972 COLREGS have been adopted as law by the United States. (See Title 33 U.S. Code, Sections 1601 to 1606). Article 1139, U.S. Navy Regulations, 1990, directs that all persons in the naval service responsible for the operation of naval ships and craft "shall diligently observe" the 1972 COLREGS. Article 4-1-11 of U.S. Coast Guard Regulations (COMDTINST M5000.3 (series)) requires compliance by Coast Guard personnel with all Federal law and regulations.

**2.7.2 National Rules.** Many nations 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 subject the U.S. to lawsuit for collision or other damage, provide the basis for diplomatic protest, result in limitation on U.S. access to foreign ports, or prompt other foreign action.<sup>107</sup>

**2.7.2.1 U.S. Inland Rules.** The U.S. has adopted special Inland Rules<sup>108</sup> applicable to navigation in U.S. waters landward of the demarcation lines established by U.S. law for that purpose.<sup>109</sup> (See U.S. Coast Guard publication Navigational Rules, International — Inland, COMDTINST M16672.2 (series), Title 33 Code of Federal Regulations part 80, and Title 33 U.S. Code, sections 2001 to 2073.) The 1972 COLREGS apply seaward of the demarcation lines in U.S. national waters, in the U.S. contiguous zone and exclusive economic zone, and on the high seas.

**2.7.3 Navigational Rules for Aircraft.** Rules for air navigation in international airspace applicable to civil aircraft may be found in Annex 2 (Rules of the Air) to the Chicago

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<sup>105</sup>(...continued)

requirements to such vessels (paragraph 2.3.2.4 (p. 2-11)), or apply requirements not recognized by international law to nuclear powered warships or nuclear capable warships and auxiliaries (paragraph 2.3.2.4, note 32 (p. 2-11)).

See also Boma, *Troubled Waters off the Land of the Morning Calm: A Job for the Fleet*, Nav. War Coll. Rev., Spring 1989, at 33.

<sup>106</sup> 28 U.S.T. 3459, T.I.A.S. 8587, 33 U.S.C. sec. 1602 note (1988), 33 C.F.R. part 81, app. A.

<sup>107</sup> See U.S. Navy Regulations, 1990, art. 1139.

<sup>108</sup> 33 U.S.C. sec. 2001 *et seq.* (1988), implemented in 33 C.F.R. parts 84-90.

<sup>109</sup> Such demarcation lines do not necessarily coincide with the boundaries of internal waters or the territorial sea. For the U.S., they are indicated on navigational charts issued by the United States Coast and Geographic Survey.

Convention, DOD Flight Information Publication (FLIP) General Planning, and OPNAV-INST 3710.7 (series) NATOPS. The same standardized technical principles and policies of ICAO that apply in international and most foreign airspace are also in effect in the continental United States. Consequently, 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.

## 2.8 U.S.-U.S.S.R. AGREEMENT ON THE PREVENTION OF INCIDENTS ON AND OVER THE HIGH SEAS

In order better to assure the safety of navigation and flight of their respective warships and military aircraft during encounters at sea, the United States and the former Soviet Union in 1972 entered into the U.S.-U.S.S.R. Agreement on the Prevention of Incidents On and Over the High Seas. This Navy-to-Navy agreement, popularly referred to as the "Incidents at Sea" or "INCSEA" agreement, has been highly successful in minimizing the potential for harassing actions and navigational one-upmanship between U.S. and former Soviet units operating in close proximity at sea. Although the agreement applies to warships and military aircraft operating on and over the "high seas," it is understood to embrace such units operating in all international waters and international airspace, including that of the exclusive economic zone and the contiguous zone.<sup>110</sup>

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<sup>110</sup> OPNAVINST C5711.94 (series), Subj: US/USSR Incidents at Sea and Dangerous Military Activities Agreements; and U.S. Addendum to volume II of ATP 1. The 1972 INCSEA Agreement, 23 U.S.T. 1168, T.I.A.S. 7379, and its 1973 Protocol, 24 U.S.T. 1063, T.I.A.S. 7624, are reproduced in AFP 110-20, at 36-4.

The INCSEA Agreement does not prescribe minimum fixed distances between ships or aircraft; rules of prudent seamanship and airmanship apply.

Similar agreements, incorporating the provisions and special signals from the U.S.-U.S.S.R. INCSEA Agreement, entered into force between the former-Soviet Union and the United Kingdom on 15 July 1986 (U.K.T.S. No. 5 (1987)), the Federal Republic of Germany on 28 October 1988; Canada on 20 November 1989; France on 4 July 1989; and Italy on 30 November 1989.

An agreement on the prevention of dangerous military activities between the armed forces of the United States and the former-Soviet Union operating in proximity to each other during peacetime entered into force on 1 January 1990. The agreement provides procedures for resolving incidents involving entry into the national territory, including the territorial sea, of the other nation "owing to circumstances brought about by *force majeure*, or as a result of unintentional actions by such personnel;" using a laser in such a manner that its radiation could cause harm to the other nation's personnel or equipment; hampering the activities of the other nation in Special Caution Areas in a manner which could cause harm to its personnel or damage to its equipment; and interference with the command and control networks of the other party in a manner which could cause harm to its personnel or damage to its equipment. The text of the agreement, entitled Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Dangerous Military Activities, which was signed in Moscow, 12 June 1989, appears in 28 Int'l Leg. Mat'ls 879 (1989); see also Leich, Contemporary Practice of the United States Relating to International Law--Prevention of Dangerous Military Activities, 83 Am. J. Int'l L. 917 (1989).

Principal provisions of the INCSEA agreement include:

1. Ships will observe strictly both the letter and the spirit of the International Rules of the Road.
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 signalling 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 nor illuminate their navigation bridges.
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 nor drop objects near them.

The INCSEA agreement was amended in a 1973 protocol to extend certain of its provisions to include nonmilitary ships. Specifically, the 1973 protocol provided that 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 nor launch or drop any objects near nonmilitary ships of the other party in such a manner as to be hazardous to these ships or to constitute a hazard to navigation.

The agreement also provides for an annual review meeting between Navy representatives of the two parties to review its implementation.<sup>111</sup> The INCSEA agreement continues to apply to U.S. and Russian ships and military aircraft.<sup>112</sup>

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<sup>111</sup> The results of each annual review meeting are promulgated by the Chief of Naval Operations to the operational commanders. Consult appropriate Fleet Commander instructions and OPORDS for detailed guidance.

<sup>112</sup> The INCSEA Agreement is also in force between the U.S. and Ukraine. Treaties in Force 266 (1995).

## 2.9 MILITARY ACTIVITIES IN OUTER SPACE

**2.9.1 Outer Space Defined.** As noted in paragraph 2.5.1, each nation has complete and exclusive control over the use of its national airspace. Except when exercising transit passage or archipelagic sea lanes passage, overflight in national airspace by foreign aircraft is not authorized without the consent of the territorial sovereign. However, man-made satellites and other objects in earth orbit may overfly foreign territory freely. 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 at earth orbiting altitude and beyond.<sup>113</sup>

**2.9.2 The Law of Outer Space.** International law, including the United Nations Charter, applies to the outer space activities of nations. Outer space is open to exploration and use by all nations. However, it is not subject to national appropriation, and must be used for peaceful purposes.<sup>114</sup> The term "peaceful purposes" does *not* preclude military activity. While acts of aggression in violation of the United Nations Charter 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, and on and under the sea.<sup>115</sup> Users of outer space must have due regard for the rights and interests of other users.

**2.9.2.1 General Principles of the Law of Outer Space.** International law governing space activities addresses both the nature of the activity and the location in space where the specific rules apply. As set out in paragraph 2.9.1, outer space begins at the undefined upper limit of the earth's airspace and extends to infinity. In general terms, outer space consists of both the earth's moon and other natural celestial bodies, and the expanse between these natural objects.

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<sup>113</sup> See paragraph 1.1, note 1 (p. 1-1) and Schwetje, *The Development of Space Law and a Federal Space Law Bar*, Fed. B. News & J., Sep. 1988, at 316.

<sup>114</sup> Although a number of nations maintain that "peaceful purposes" excludes military measures, the United States has consistently interpreted "peaceful purposes" to mean *nonaggressive* purposes. Military activity not constituting the use of armed force against the sovereignty, territorial integrity, or political independence of another nation, and not otherwise inconsistent with the U.N. Charter, is permissible. The right of self-defense applicable generally in international law also applies in space. For a discussion of the U.S. interpretation of "peaceful purposes" and related issues see, De Saussure & Reed, *Self-Defense--A Right in Outer Space*, 7 AF JAG L. Rev. (No. 5) 38 (1985), and Reed, *The Outer Space Threat: Freedoms--Prohibitions--Duties*, 9 AF JAG L. Rev. (No. 5) 26 (1967).

<sup>115</sup> Naval operations in support of national security objectives are increasingly dependent upon space systems support services. Today, virtually every fleet unit relies to some extent on space systems for support, and the military applications of space technology are steadily increasing. See Holland, *The Challenge in Space: The Navy's Case*, U.S. Naval Inst. Proc., Feb. 1990, at 37; Skolnick, *The Navy's Final Frontier*, *id.* Jan. 1989, at 28; Howard, *Satellites and Naval Warfare*, *id.* April 1988, at 39; Jones, *Photographic Satellite Reconnaissance*, *id.*, June 1980, at 41; U.S. Naval Space Command: *Supporting the Fleet*, Aviation Week & Space Technology, March 21, 1988, at 38-51; Burrows, *Deep-Black: Space Espionage and National Security* (1986); Yost, *Spy-Tech* (1985); Karas, *The New High Ground: Strategies and Weapons of Space-Age War* (1983); Canan, *War in Space* (1982); Stine, *Confrontation in Space* (1981); and Jane's Spaceflight Directory (annual).

The rules of international law applicable to outer space include the following:

1. Access to outer space is free and open to all nations.<sup>116</sup>
2. Outer space is free from claims of sovereignty and not otherwise subject to national appropriation.<sup>117</sup>
3. Outer space is to be used for peaceful purposes.<sup>118</sup>
4. Each user of outer space must show due regard for the rights of others.<sup>119</sup>
5. No nuclear or other weapons of mass destruction may be stationed in outer space.<sup>120</sup>
6. Nuclear explosions in outer space are prohibited.<sup>121</sup>
7. Exploration of outer space must avoid contamination of the environment of outer space and of the earth's biosphere.<sup>122</sup>
8. Astronauts must render all possible assistance to other astronauts in distress.<sup>123</sup>

**2.9.2.2 Natural Celestial Bodies.** Natural celestial bodies include the earth's moon, but not the earth. Under international law, military bases, installations and forts may not be erected nor may weapons tests or maneuvers be undertaken on natural celestial bodies. Moreover, all equipment, stations, and vehicles located there are open to inspection on a reciprocal basis. There is no corresponding right of physical inspection of man-made objects located in the

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<sup>116</sup> Art. I, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, 18 U.S.T. 2411; T.I.A.S. 6347; 610 U.N.T.S. 205; AFP 110-20 at 6-2 [hereinafter "Outer Space Treaty"].

<sup>117</sup> *Id.*, art. II.

<sup>118</sup> *Id.*, arts. III & IV.

<sup>119</sup> *Id.*, art. IX.

<sup>120</sup> *Id.*, art. IV.

<sup>121</sup> Art. I, Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water, 5 August 1963, 14 U.S.T. 1313; T.I.A.S. 5433; 480 U.N.T.S. 43; AFP 110-20 at 4-3.

<sup>122</sup> Note 116, Outer Space Treaty, art. IX.

<sup>123</sup> *Id.*, art. V.

expanse between celestial bodies. Military personnel may be employed on natural celestial bodies for scientific research and for other activities undertaken for peaceful purposes.<sup>124</sup>

**2.9.3 International Agreements on Outer Space Activities.** The key legal principles governing outer space activities are contained in four widely ratified multilateral agreements: the 1967 Outer Space Treaty;<sup>125</sup> the 1968 Rescue and Return of Astronauts Agreement;<sup>126</sup> the Liability Treaty of 1972;<sup>127</sup> and the Space Objects Registration Treaty of 1975.<sup>128</sup> A

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<sup>124</sup> See paragraph 2.9.2, note 114 (p. 2-38) for the U.S. interpretation of "peaceful purposes."

<sup>125</sup> See paragraph 2.9.2.1, note 116 (p. 2-39), regarding the Outer Space Treaty.

<sup>126</sup> Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, 22 April 1968, 19 U.S.T. 7570; T.I.A.S. 6599; 672 U.N.T.S. 119; AFP 110-20 at 6-34.

<sup>127</sup> Convention on International Liability for Damage Caused by Space Objects, 29 June 1971, 24 U.S.T. 2389; T.I.A.S. 7762, AFP 110-20 at 6-37. The "launching nation" is responsible for damage. The launching nation is, for purposes of international liability, the nation launching, procuring the launch, or from whose territory the launch is made. Thus, with respect to any particular space object, more than one nation may be liable for the damage it causes. The launching nation is internationally liable for damages even if the launch is conducted entirely by a private, commercial undertaking.

The launching nation is said to be absolutely liable for space-object damage caused on earth or to an aircraft in flight. Liability can be avoided only if it can be shown that the claimant was grossly negligent. The question of liability for space object damage to another space object, at any location other than the surface of the earth, is determined by the relative negligence or fault of the parties involved. The Liability Convention elaborates the general principle of international liability for damage set forth in Art. VII of the Outer Space Treaty in Arts. Ia, II, III and VI. Arts. IV and V address joint and several liability. The crash of COSMOS 954 in the Canadian Arctic on 24 January 1978 is discussed *in* Galloway, Nuclear Powered Satellites: The U.S.S.R. Cosmos 954 and the Canadian Claim, 12 Akron L. Rev. 401 (1979), and Christol, International Liability for Damage Caused by Space Objects, 74 Am. J. Int'l L. 346 (1980). The Canadian claim is set forth *in* 18 Int'l Leg. Mat'ls 899-930 (1979); its resolution is at 20 Int'l Leg. Mat'ls 689 (1981) wherein the USSR agreed to pay C\$3M in settlement. See also Lee & Sproule, Liability for Damage Caused by Space Debris: The Cosmos 954 Claim, 26 Can. YB. Int'l L. 273 (1988).

There are no "rules of the road" for outer space to determine which spacecraft has the right of way.

The Liability Convention does not distinguish between civil and military space objects. If military weapons are involved, the injured nation may take the view that the principle of self-defense, rather than the Liability Convention, applies. Advice and consent to U.S. ratification of the Convention came only after the Department of State provided assurances to the Senate that it was inapplicable to intentionally caused harm. Christol at 367 *citing* Senate Comm. on Foreign Relations, Convention on International Liability for Damage Caused by Space Objects, S. Exec. Rep. 92-38, 92d Cong., 2d Sess. 10 (1972).

<sup>128</sup> Convention on Registration of Objects Launched into Outer Space, 14 January 1975, 28 U.S.T. 695; T.I.A.S. 8480; 1023 U.N.T.S. 15; AFP 110-20 at 6-42. In order to enhance safety of space operations, a dual system for registering space objects launched from earth has been established in the Registration Treaty.

The first obligation is for each launching nation to maintain a registry containing certain information about every space object launched.

The second obligation is to pass this basic information to the Secretary-General of the United Nations "as soon as practicable," and to advise the Secretary-General when the object is no longer in earth orbit. A United Nations registry is thereby maintained for all space objects launched from earth. Objects in space remain subject to the jurisdiction and control of the nation of registry. Arts. II(1), II(2), III, IV & VIII, Outer Space Treaty, (paragraph 2.9.2.1, note 116 (p. 2-39). If  
(continued...)

fifth, the 1979 Moon Treaty,<sup>129</sup> has not been widely ratified. The United States is a party to all of these agreements except the Moon Treaty.<sup>130</sup>

**2.9.3.1 Related International Agreements.** Several other international agreements restrict specific types of activity in outer space. The US-USSR Anti-Ballistic Missile (ABM) Treaty of 1972 prohibits the development, testing, and deployment of space-based ABM systems or components. Also prohibited, is any interference with the surveillance satellites both nations use to monitor ABM Treaty compliance.<sup>131</sup> The ABM Treaty continues in force between the U.S. and Russia.

The 1963 Limited Test Ban Treaty (a multilateral treaty) includes an agreement not to test nuclear weapons or to carry out any other nuclear explosions in outer space.<sup>132</sup>

The 1977 Environmental Modification Convention (also a multilateral treaty) prohibits military or other hostile use of environmental modification techniques in several environments, including outer space.<sup>133</sup>

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<sup>128</sup>(...continued)

more than one nation is involved in a launch, one of those nations must agree to act as the nation of registry (article II(2)). The term "as soon as practicable" is not defined in the Registration Treaty. State practice has established that the extent and timeliness of information given concerning space missions may be limited as required by national security.

<sup>129</sup> Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 18 December 1979, 18 Int'l Leg. Mat'ls 1434 (1979), *reprinted in* AFP 110-20 at 6-45.

<sup>130</sup> The United States' objections to the Moon Treaty include those advanced regarding the deep seabed provisions of the 1982 LOS Convention. *See* paragraph 1.6, note 57 (p. 1-23). *See also* Hosenball, Relevant Treaties Governing Space Activities: A Summary of World Wide Agreements, Fed. Bar News & J., April 1991, at 128.

<sup>131</sup> Treaty Between the United States and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, 26 May 1972, 23 U.S.T. 3435; T.I.A.S. 7503, *reprinted in* AFP 110-20 at 4-29. Sofaer, The ABM Treaty and the Strategic Defense Initiative, 99 Harv. L. Rev. 1972, and Chayes & Chayes, Testing and Development of 'Exotic' Systems Under the ABM Treaty: The Great Reinterpretation Caper, 99 Harv. L. Rev. 1956 (1986), discuss the interpretation of the scope of the obligation in article V of the ABM Treaty not to "develop, test or deploy space-based ABM systems or components." *See* 26 Int'l Leg. Mat'ls 282 (1987), *id.* 1130, and *id.* 1743 for additional debates on this issue, as well as 133 Cong. Rec. S6623 (19 May 1987), *id.* S12181 (16 Sep. 1987) (State Department Legal Adviser's report to Congress), and *id.* S6809 (20 May 1987) (fourth part of Sen. Nunn's restrictive view). *See also* the series of articles and commentaries in Arms Control Treaty Reinterpretation, 137 U. Pa. L. Rev. 1351-1558 (1989).

<sup>132</sup> Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 5 August 1963, 14 U.S.T. 1313, T.I.A.S. 5433, 480 U.N.T.S. 43, *reprinted in* AFP 110-20, at 4-3. *See* paragraph 10.2.2.5, note 9 (p. 10-4).

<sup>133</sup> Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977, 31 U.S.T. 333; T.I.A.S. 9614, *reprinted in* AFP 110-20 at 4-74.

The 1982 International Telecommunication Convention<sup>134</sup> and the 1979 Radio Regulations<sup>135</sup> govern the use of the radio frequency spectrum by satellites and the location of satellites in the geostationary-satellite orbit.

**2.9.4 Rescue and Return of Astronauts.** Both the Outer Space Treaty and the Rescue and Return of Astronauts Agreement establish specific requirements for coming to the aid of astronauts. The treaties do not distinguish between civilian and military astronauts.

Astronauts of one nation engaged in outer space activities are to render all possible assistance to astronauts of other nations in the event of accident or distress. If a nation learns that spacecraft personnel are in distress or have made an emergency or unintended landing in its territory, the high seas, or other international area (e.g., Antarctica), it must notify the launching nation and the Secretary-General of the United Nations, take immediate steps to rescue the personnel if within its territory, and, if in a position to do so, extend search and rescue assistance if a high seas or other international area landing is involved. Rescued personnel are to be safely and promptly returned.<sup>136</sup>

Nations also have an obligation to inform the other parties to the Outer Space Treaty or the Secretary-General of the United Nations if they discover outer space phenomena which constitute a danger to astronauts.<sup>137</sup>

**2.9.5 Return of Outer Space Objects.** A party to the Rescue and Return of Astronauts Agreement must also notify the Secretary-General of the United Nations if it learns of an outer space object's return to earth in its territory, on the high seas, or in another international area. If the object is located in sovereign territory and the launching authority requests the territorial sovereign's assistance, the latter must take steps to recover and return the object. Similarly, such objects found in international areas shall be held for or returned to the launching authority. Expenses incurred in assisting the launching authority in either case are to be borne by the launching authority. Should a nation discover that such an object is of a "hazardous or deleterious" nature, it is entitled to immediate action by the launching authority to eliminate the danger of harm from its territory.<sup>138</sup>

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<sup>134</sup> Sen. Treaty Doc. 99-6, Sen. Ex. Rep. 99-4, entered into force for the United States 10 January 1986.

<sup>135</sup> Sen. Treaty Doc. 97-21, entered into force for the United States 27 October 1983.

<sup>136</sup> Outer Space Treaty, paragraph 2.9.2.1, note 116 (p. 2-39), art. V; Rescue and Return Agreement, paragraph 2.9.3, note 126 (p. 2-40), arts. 1 - 4. If the astronauts land during an armed conflict between the launching nations and the nations in which they land, the law of armed conflict would likely apply and permit retention of the astronauts under the 1949 Geneva Conventions. See Part II, Chapter 11 of this publication.

<sup>137</sup> Outer Space Treaty, art. V.

<sup>138</sup> Rescue and Return Agreement, art. 5.

## ANNEX A2-1

R 020525Z JUN 94  
FM CINCPACFLT PEARL HARBOR HI  
TO ALPACFLT  
INFO USCINCPAC HONOLULU HI  
CINCLANTFLT NORFOLK VA  
CINCUSNAVEUR LONDON UK//N00//  
BT

UNCLAS //N00000//

ALPACFLT 016/94

SUBJ/SOVEREIGN IMMUNITY POLICY

REF/A/DOC/OPNAV/05OCT89

REF/B/DOC/SECNAV/14SEP90

REF/C/DOC/CINCPACFLT/24JAN85

REF/D/DOC/SECNAV/24JAN92

NARR/REF A IS PARAS 2.1.2 AND 3.2.3 OF NWP-9A. REF B IS ARTS 0828, 0859, AND 0860 OF U.S. NAVY REGULATIONS 1990. REF C IS CINCPACFLTINST 5440.3H, ART. 2605. REF D IS SECNAVINT 6210.2, QUARANTINE REGULATIONS OF THE ARMED FORCES, PARA I.5.

RMKS/1. PURPOSE. TO PROVIDE PERIODIC EMPHASIS ON UNITED STATES SOVEREIGN IMMUNITY POLICY. REFS A THROUGH D ARE PERTINENT POLICY DIRECTIVES.

2. U.S. MILITARY AIRCRAFT, WARSHIPS, AND AUXILIARIES (INCLUDING USNS VESSELS AND AFLOAT PREPOSITIONED FORCE SHIPS) ENJOY SOVEREIGN IMMUNITY FROM INTERFERENCE BY FOREIGN GOVERNMENTAL AUTHORITIES (E.G., POLICE, HEALTH, CUSTOMS, IMMIGRATION, MILITARY, ETC.) WHETHER WITHIN FOREIGN TERRITORY, FOREIGN TERRITORIAL SEAS/AIRSPACE, OR INTERNATIONAL WATERS/AIRSPACE. THIS IMMUNITY PRECLUDES FOREIGN GOVERNMENTAL ACTIONS SUCH AS SEARCH, INSPECTION, OR DETENTION; AND ALSO PROHIBITS FOREIGN GOVERNMENTAL OFFICIALS FROM EXERCISING AUTHORITY OVER PASSENGERS OR CREW WHEN EMBARKED, OR WITH RESPECT TO OFFICIAL OR PRIVATE ACTS PERFORMED ON BOARD.

3. ALTHOUGH IMMUNE FROM LAW ENFORCEMENT ACTIONS BY FOREIGN AUTHORITIES, U.S. MILITARY SHIPS AND AIRCRAFT PROCEEDING TO AND FROM A FOREIGN PORT UNDER DIPLOMATIC CLEARANCE SHALL COMPLY WITH REASONABLE HOST COUNTRY REQUIREMENTS AND/OR RESTRICTIONS ON TRAFFIC, HEALTH, CUSTOMS, IMMIGRATION, QUARANTINE, ETC. NONCOMPLIANCE, HOWEVER, IS SUBJECT ONLY TO BEING ASKED TO COMPLY, PURSUING DIPLOMATIC PROTEST, OR TO BEING ORDERED TO LEAVE THE HOST COUNTRY'S TERRITORY OR TERRITORIAL SEA/AIRSPACE, NOT TO LAW ENFORCEMENT ACTIONS.

4. WHILE ENFORCEMENT ACTIONS BY FOREIGN OFFICIALS TO ENSURE COMPLIANCE WITH HOST COUNTRY LEGAL REQUIREMENTS ARE NOT PERMITTED, COMMANDING OFFICERS, MASTERS, AND AIRCRAFT COMMANDERS MAY THEMSELVES, OR THROUGH THEIR REPRESENTATIVES, CERTIFY COMPLIANCE WITH HOST COUNTRY LAWS/REQUIREMENTS. IF REQUESTED BY HOST COUNTRY AUTHORITIES, CERTIFICATION MAY INCLUDE A GENERAL DESCRIPTION OF MEASURES TAKEN BY U.S. OFFICIALS TO COMPLY WITH REQUIREMENTS. AT THE DISCRETION OF THE COMMANDING OFFICER, MASTER, OR AIRCRAFT COMMANDER, FOREIGN AUTHORITIES MAY BE RECEIVED ON BOARD FOR PURPOSE OF ACCEPTING CERTIFICATION OF COMPLIANCE, BUT UNDER NO CIRCUMSTANCES MAY THEY BE PERMITTED TO EXERCISE GOVERNMENTAL AUTHORITY, NOR

## Annex A2-1

MAY THEY INSPECT THE SHIP/AIRCRAFT OR ACT AS AN OBSERVER WHILE U.S. PERSONNEL CONDUCT SUCH INSPECTIONS.

5. BEFORE ENTERING THE TERRITORY, TERRITORIAL SEA, OR AIRSPACE OF A FOREIGN COUNTRY, COMMANDING OFFICERS, MASTERS, OR AIRCRAFT COMMANDERS SHOULD DETERMINE THE NATURE AND EXTENT OF LOCAL LAWS/REQUIREMENTS BY REVIEWING APPLICABLE SOURCES OF INFORMATION, E.G., FOREIGN CLEARANCE GUIDE, PORT DIRECTORY, OPORDS, LOGREQ RESPONSES, NCIS SUMMARIZES OF LOCAL LAW ENFORCEMENT ISSUES, OR OTHER PERTINENT REFERENCE SOURCES.

6. GUIDANCE FOR SPECIFIC SITUATIONS IS PROVIDED BELOW:

SITUATION	GUIDANCE
A. FOREIGN AUTHORITIES REQUEST PERMISSION/DEMAND TO SEARCH SHIP, AIRCRAFT, OR ANY PART THEREOF, INCLUDING PERSONAL EFFECTS OR LOCKERS, FOR CONTRABAND, EVIDENCE OF CRIME, ETC.	DO NOT PERMIT THE SHIP/AIRCRAFT TO BE SEARCHED FOR ANY REASON BY FOREIGN AUTHORITIES. EXPLAIN U.S. SOVEREIGN IMMUNITY POLICY. U.S. AUTHORITIES MAY THEMSELVES CONDUCT CONSENT, COMMAND AUTHORIZED, OR OTHER LAWFUL SEARCHES OR INSPECTIONS AND PRESERVE EVIDENCE WITHOUT FOREIGN OFFICIALS BEING PRESENT, BUT EVIDENCE SEIZED SHALL NOT BE TURNED OVER TO FOREIGN AUTHORITIES ABSENT SPECIFIC DIRECTION BY HIGHER AUTHORITY.
B. FOREIGN AGRICULTURAL OR HEALTH INSPECTIONS DEMAND/ REQUEST TO COME ON BOARD U.S. AIRCRAFT OR SHIP TO CONDUCT SPRAYING/INSPECTION IAW FOREIGN COUNTRY REGULATIONS.	U.S. AUTHORITIES SHALL REFUSE FOREIGN OFFICIALS ACCESS TO INSPECT OR SPRAY, BUT MAY AGREE TO CONDUCT REQUIRED INSPECTION/SPRAYING THEMSELVES AND CERTIFY THAT APPROPRIATE REQUIREMENTS HAVE BEEN MET.
C. FOREIGN AUTHORITIES REQUEST/ DEMAND CREW LIST, PERSONNEL RECORDS OR PERSONAL INFORMATION ON MILITARY PERSONNEL.	COMPLY WITH APPLICABLE STATUS OF FORCE AGREEMENTS (SOFA), OR OTHER INTERNATIONAL AGREEMENT. ABSENT AN INTERNATIONAL AGREEMENT REQUIRING DISCLOSURE, U.S. AUTHORITIES MAY NOT PROVIDE SUCH INFORMATION, BUT MAY CERTIFY COMPLIANCE WITH INOCULATION OR OTHER PUBLIC HEALTH REQUIREMENTS THAT CREW IS FREE OF COMMUNICABLE DISEASE. WITH RESPECT TO HOST COUNTRY INQUIRIES ABOUT HIV INFECTION, THE FOLLOWING CERTIFICATION MAY BE OFFERED: U.S. POLICY REQUIRES ALL MILITARY PERSONNEL TO BE SCREENED FOR

## Annex A2-1

- SEROLOGICAL EVIDENCE OF HIV INFECTION. THOSE TESTING POSITIVE FOR HIV ARE ASSIGNED WITHIN THE UNITED STATES AND NOT TO DEPLOYING UNITS.
- D. FOREIGN AUTHORITIES REQUEST/ DEMAND CREW LISTS, PERSONNEL RECORDS OR PERSONAL INFORMATION ABOUT NON-MILITARY PERSONNEL, INCLUDING CREWMEMBERS (CIVIL SERVICE AND COMMERCIAL MARINERS), OTHER CIVIL CONTRACTOR PERSONNEL (E.G. TECH REPS).  
COMPLY WITH APPLICABLE SOFA OR OTHER INTERNATIONAL AGREEMENT. ABSENT AN INTERNATIONAL AGREEMENT REQUIRING DISCLOSURE, A LIST LIMITED TO NAMES AND PASSPORT NUMBERS OF NON-MILITARY PERSONNEL ON BOARD USN SHIPS (VESSELS)/ AIRCRAFT MAY BE PROVIDED TO FOREIGN AUTHORITIES. OTHER INFORMATION CONCERNING EMBARKED NON-MILITARY PERSONNEL, SUCH AS HEALTH RECORDS, JOB DESCRIPTION, OR EMPLOYER, MAY NOT BE PROVIDED.
- E. FOREIGN AUTHORITIES REQUEST/ DEMAND A LIST OF STORES OR FIREARMS ON BOARD VESSELS/ ACFT.  
DO NOT PROVIDE LIST OF STORES/ FIREARMS WHICH ARE TO REMAIN ON BOARD VESSEL/ACFT. LIST OF ITEMS TO BE TAKEN OFF VESSEL/ACFT MAY BE PROVIDED.
- F. FOREIGN AUTHORITIES ATTEMPT TO LEVY FINE OR TAX ON VESSEL/ACFT.  
PAYMENT OF ANY FINES OR TAXES IS PROHIBITED REGARDLESS OF REASONS OFFERED FOR IMPOSITION. APPROPRIATE CHARGES FOR PILOTS, TUGBOATS, SEWER, WATER, POWER AND OTHER REQUIRED GOODS OR SERVICES MAY BE PAID.
- G. FOREIGN AUTHORITIES REQUIRE VESSELS TO FLY FOREIGN COUNTRY'S FLAG WHILE IN PORT.  
FLYING FOREIGN COUNTRY'S FLAG IS PROHIBITED EXCEPT IN SPECIAL CIRCUMSTANCES AS PROVIDED IN NAVY REGULATIONS. WHEN IN DOUBT CONSULT HIGHER AUTHORITY.
- H. IN A COUNTRY WHICH DOES NOT HAVE A SOFA WITH THE U.S., FOREIGN AUTHORITIES DEMAND/ REQUEST THAT AN INDIVIDUAL (MILITARY OR EMBARKED CIVILIAN) SUSPECTED OF AN OFFENSE BE TURNED OVER FOR ARREST OR INVESTIGATION PURPOSES.  
IF AN INDIVIDUAL (MILITARY OR EMBARKED CIVILIAN) SUSPECTED OF AN OFFENSE ASHORE IS ON BOARD, EITHER BECAUSE HE HAS RETURNED TO THE VESSEL/ACFT BEFORE BEING APPREHENDED, OR BECAUSE HE WAS RETURNED BY LOCAL POLICE OR SHORE PATROL BEFORE FORMAL DEMAND FOR CUSTODY WAS MADE BY FOREIGN

**Annex A2-1**

AUTHORITIES, DO NOT TURN OVER INDIVIDUAL WITHOUT PERMISSION FROM HIGHER AUTHORITY. IF FOREIGN OFFICIALS RETURN SOMEONE TO U.S. JURISDICTION, U.S. OFFICIALS MAY NOT PROMISE TO RETURN THE INDIVIDUAL UPON LATER DEMAND BY FOREIGN AUTHORITIES.

I. IN A COUNTRY WHICH HAS A SOFA WITH THE U.S., FOREIGN AUTHORITIES REQUEST AN INDIVIDUAL WHO IS SUSPECTED OF AN OFFENSE BE TURNED OVER TO THEM FOR ARREST OR INVESTIGATION.

IAW SOFA, U.S. OFFICIALS MAY BE REQUIRED TO SURRENDER AN INDIVIDUAL SUSPECTED OF COMMITTING AN OFFENSE IN THE FOREIGN JURISDICTION; TO TURN OVER EVIDENCE OBTAINED BY VESSEL/ACFT INVESTIGATORS; OR TO PROVIDE SUSPECTED PERSONNEL TO PARTICIPATE IN OFF SHIP/ACFT IDENTIFICATION OR LINE-UP. IF ANY DOUBT EXISTS AS TO SOFA TERMS, GUIDANCE SHOULD BE SOUGHT FROM HIGHER AUTHORITY.

J. DURING GENERAL PUBLIC VISITING IN FOREIGN PORTS, VISITORS ENGAGE IN PROTEST AND/OR DISRUPTIVE ACTIVITY, OR OTHERWISE VIOLATE CONDITIONS OF ACCESS TO SHIP OR AIRCRAFT.

RESTORE ORDER, ESCORT OFFENDERS OFF SHIP OR AIRCRAFT AND TURN OVER TO LOCAL AUTHORITIES. DO NOT ALLOW/ INVITE FOREIGN POLICE ON BOARD TO ARREST OR TAKE CUSTODY OF THE OFFENDERS.

7. ALL CINCPACFLT PERSONNEL WHO ARE LIKELY TO DEAL WITH FOREIGN OFFICIALS (E.G., CO, MASTER OF A SHIP, ACFT COMMANDER, SUPPLY OFFICER, SHORE PATROL OFFICER, MEDICAL DEPT REPRESENTATIVE, LIAISON PERSONNEL, ETC.) SHOULD UNDERSTAND U.S. SOVEREIGN IMMUNITY POLICY AND COMPLY WITH REQUIREMENTS. IF IN DOUBT ABOUT APPLICATION OF PRINCIPLES OF SOVEREIGN IMMUNITY TO SPECIFIC SITUATIONS, CONSULT A JUDGE ADVOCATE FOR ADVICE OR ASSISTANCE, AND/OR SEEK GUIDANCE FROM HIGHER AUTHORITY.

8. ADM R. J. KELLY, USN.

## ANNEX A2-2

### JOINT STATEMENT BY THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS

Since 1986, representatives of the United States of America and the Union of Soviet Socialist Republics have been conducting friendly and constructive discussions of certain international legal aspects of traditional uses of the oceans, in particular, navigation.

The Governments are guided by the provisions of the 1982 United Nations Convention on the Law of the Sea, which, with respect to traditional uses of the oceans, generally constitute international law and practice and balance fairly the interests of all States. They recognize the need to encourage all States to harmonize their international laws, regulations and practices with those provisions.

The Governments consider it useful to issue the attached Uniform Interpretation of the Rules of International Law Governing Innocent Passage. Both Governments have agreed to take the necessary steps to conform their internal laws, regulations and practices with this understanding of the rules.

FOR THE UNITED STATES OF AMERICA:

James A. Baker, III

FOR THE UNION OF SOVIET SOCIALIST REPUBLICS:

E.A. Shevardnadze

Jackson Hole, Wyoming  
September 23, 1989

### UNIFORM INTERPRETATION OF RULES OF INTERNATIONAL LAW GOVERNING INNOCENT PASSAGE

1. The relevant rules of international law governing innocent passage of ships in the territorial sea are stated in the 1982 United Nations Convention on the Law of the Sea (Convention of 1982), particularly in Part II, Section 3.

2. All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.

3. Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.

4. A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.

5. Ships exercising the right of innocent passage shall comply with all laws and regulations of the coastal State adopted in conformity with relevant rules of international law as reflected in Articles 21, 22, 23 and 25 of the Convention of 1982. These include the laws and regulations requiring ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may prescribe where needed to protect safety of navigation. In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage.

6. Such laws and regulations of the coastal State may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Convention of 1982.

7. If a warship engages in conduct which violates such laws or regulations or renders its passage not innocent and does not take corrective action upon request the coastal State may require it to leave the territorial sea, as set forth in Article 30 of the Convention of 1982. In such case the warship shall do so immediately.

8. Without prejudice to the exercise of rights of coastal and flag States, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed means.

**ANNEX A2-3**

**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**

I. Purpose. To establish a uniform policy for the exercise of the right of assistance entry by United States military ships and aircraft.

II. Background. For centuries, mariners have recognized a humanitarian duty to rescue others, regardless of nationality, in danger or distress from perils of the sea. The right to enter a foreign territorial sea to engage in bona fide efforts to render emergency assistance to those in danger or distress from perils of the sea (hereinafter referred to as the right of assistance entry) has been recognized since the development of the modern territorial sea concept in the eighteenth century. Acknowledgment of the right of assistance entry is evidenced in customary international law. The right of assistance entry is independent of the rights of innocent passage, transit passage, and archipelagic sea lanes passages.

III. Right of Assistance Entry. 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.

IV. Policy.

a. Assistance Entry by Military Vessels. When the operational commander of a United States military vessel determines or is informed that a person, ship, or aircraft in a foreign territorial sea (12nm or less) is in danger or distress from perils of the sea, that the location

is reasonably well known, and that the United States military vessel is in a position to render assistance, assistance may be rendered. Notification of higher authority and the coastal State will be as specified in applicable implementing directives. Implementing directives will provide for prompt notification of the Department of State.

b. Assistance Entry by Military Aircraft. In accordance with applicable implementing directives, when the appropriate operational commander determines or is informed that a person, ship, or aircraft in a foreign territorial sea is in danger or distress from perils of the sea, that the location is reasonably well known, and that he is in a position to render assistance by deploying or employing military aircraft, he shall request guidance from higher authority by the fastest means available. Implementing directives will provide for consultation with the Department of State prior to responding to such requests. If, in the judgment of the operational commander, however, any delay in rendering assistance could be life-threatening, the operational commander may immediately render the assistance. Notification of higher authority and the coastal State will be as specified in applicable implementing directives. Implementing directives will provide for prompt notification of the Department of State.

V. Application. This statement of policy applies only in cases not covered by prior agreement with the coastal State concerned. Where the rendering of assistance to persons, ships, or aircraft in a foreign territorial sea is specifically addressed by an agreement with that coastal State, the terms of the agreement are controlling.

VI. Implementation. The parties to this statement of policy will implement the policy in directives, instructions, and manuals promulgated by them or by subordinate commands and organizations.

June 27, 1986

Date

/S/

for the Department of State  
Abraham Sofaer, Legal Adviser

July 20, 1986

Date

/S/

for the Department of Defense  
Hugh O'Neill, Oceans Policy Adviser

Aug 8, 1986

Date

/S/

for the U.S. Coast Guard  
P.A. Yost  
Admiral, U.S. Coast Guard  
Commandant

ANNEX A2-4

CHAIRMAN OF THE JOINT  
CHIEFS OF STAFF  
INSTRUCTION

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J-5  
DISTRIBUTION: A,C,S

CJCSI 2410.01A  
23 APRIL 1997

GUIDANCE FOR THE EXERCISE OF RIGHT OF ASSISTANCE ENTRY

- References:
- a. "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," 8 August 1986
  - b. Joint Pub 3-50/COMDTINST M1620.5 (Coast Guard), 1 February 1991, "National Search and Rescue Manual," Volume 1
  - c. DOD 2500.1M, 6 January 1997, "Maritime Claims Reference Manual"
  - d. CJCSI 3121.01, "Standing rules of Engagement for US Forces," Enclosure A, subparagraph 8(e)

1. Purpose. This instruction establishes uniform policy for the exercise of the right of assistance entry (RAE) by US ships or aircraft within the territorial seas or archipelagic waters of foreign states.

2. Cancellation. CJCSI 2410.01, 20 July 1993, "Guidance for the Exercise of right of Assistance Entry" is hereby canceled.

3. Applicability. This instruction applies to the CINCs, Services, and the Directors for Operations and Strategic Plans and Policy, Joint staff. Copies are provided to the Secretary of State and the Commandant of the Coast Guard for information and use as appropriate.

4. Background.

a. For centuries, mariners have recognized a humanitarian duty to rescue persons in distress due to perils of the sea, regardless of their nationality or location. The international community has long accepted the right of vessels of any nation to enter a foreign state's territorial sea to engage in good faith efforts to render emergency assistance. RAE is independent of the customary international legal rights of innocent passage, transit passage, and archipelagic sea lanes passage.

b. Following incidents in which US vessels on scene failed to assist ships in distress because of excessive concern about entry into the territorial sea of another state, the Department of Defense, DOS and US Coast Guard reviewed US Government policy. The result was a unified statement of policy concerning RAE within the territorial sea of another state, issued in August 1986 (reference a).

c. The UN Law of the Sea Convention provides that ships of all states enjoy the right of innocent passage through the territorial sea of other states. Article 18 of the Convention provides that passage includes stopping and anchoring for the purpose of rendering assistance to persons, ships, or aircraft in danger or distress. As the regime of innocent passage now applies in archipelagic waters, and given the longstanding duty of mariners to render assistance to persons in distress due to perils of the sea, it follows that the right of assistance entry is equally applicable to archipelagic waters.

d. This instruction implements the 1986 statement of policy and extends it to include archipelagic waters. This instruction applies in all cases except those specifically covered by prior agreements with foreign states that address assistance to persons, ships, or aircraft in their territorial seas or archipelagic waters. The enclosure discusses bilateral RAE agreements with Canada and Mexico.

5. Policy.

a. RAE applies only to rescues in which the location of the persons or property in danger or distress is reasonably well known. The right does not extend to conducting area searches for persons or property in danger or distress when their location is not yet reasonably well known. US forces will conduct area searches within a U.S. recognized foreign territorial sea or archipelagic waters only with the permission of the coastal state. Such permission may be by international agreement, such as a search and rescue (SAR) agreement with that state, as listed in Appendix B of reference b. When considering or conducting area searches within a claimed or U.S. recognized foreign territorial sea or archipelagic waters, commanders should inform those agencies listed in Enclosure A, subparagraph 4a.

b. RAE into the territorial sea or archipelagic waters of a foreign state involves two conflicting principles: (1) the right of nations to regulate entry into and the operations within territory under their sovereignty, and (2) the time-honored mariners' imperative to render rapid and effective assistance to persons, ships, or aircraft in imminent peril at sea without regard to nationality or location.

c. The operational commander on the scene must determine whether RAE is appropriate under the circumstances. The test is whether a person, ship, or aircraft, whose position within the territorial sea or archipelagic waters of another state is

reasonably well known, is in danger or distress due to perils of the sea and requires emergency assistance.

d. In determining whether to undertake RAE actions, commanders must consider the safety of the military ships and aircraft they command, and of their crews, as well as the safety of persons, ships, and aircraft in danger or distress.

e. Commanders should also consider whether other rescue units, capable and willing to render timely and effective assistance, are on the scene or immediately en route.

f. The customary international law of RAE is more fully developed for vessels than for aircraft. Therefore, the military commander must consider the possible reaction of the coastal or archipelagic state, especially if the commander intends to employ military aircraft within its territorial sea or its archipelagic waters.

g. Although exercise of RAE does not require the permission of the foreign coastal or archipelagic state, US commanders should notify the state's authorities of the entry in order to promote international comity, avoid misunderstanding, and alert local rescue and medical assets.

h. Because of the implications for international relations and for US security, commanders should keep appropriate authorities and the NMCC informed. See subparagraph 8d(1) below.

i. RAE actions should comply with any applicable bilateral RAE and SAR agreements (Enclosure B), including those listed in Appendix B of reference b.

j. Reference c is the DOD source document for determining the scope of a particular maritime claim (e.g., extent of a claimed territorial sea) and whether or not that particular maritime claim is recognized by the United States. The fact that the United States has conducted an operational freedom of navigation assertion or sent a protest note regarding a particular coastal state claim can be taken as nonrecognition of the claim in question. Otherwise, the territorial sea of a coastal state or the archipelagic waters of an archipelagic state will be regarded as presumptively valid for the purpose of this instruction. The DOS "Limits of the Seas" series and the Naval War College "Blue Book, Vol. 66," are secondary sources for determining whether and to what extent a particular country's maritime claims are considered excessive by the United States

k. The policy set forth in this instruction is consistent with the current standing rules of engagement for US forces pursuant to reference d.

6. Definitions.

a. Operational commander on the scene. The senior officer in tactical command of the unit(s) capable of rendering meaningful and timely assistance; this commander is responsible for coordinating rescue efforts at the site.

b. Territorial sea. The belt of ocean measured seaward up to 12 nm from a state's baselines determined in accordance with international law and subject to the state's sovereignty. The U.S. does not recognize the portions of claimed territorial sea more than 12 nm from properly drawn baselines.

c. Archipelagic waters. An archipelagic state is a state that is constituted wholly of one or more groups of islands. Such states may draw straight archipelagic baselines joining the outermost points of their outermost islands, providing the ratio of water to land within the baselines is between 1 to 1 and 9 to 1. The waters enclosed within properly drawn archipelagic baselines are called archipelagic waters and are subject to the archipelagic state's sovereignty.

d. Danger or distress. A clearly apparent risk of death, disabling injury, loss, or significant damage.

e. Perils of the sea. Accidents and dangers peculiar to maritime activities, including storms, waves, and wind; grounding; fire, smoke and noxious fumes; flooding, sinking, and capsizing; loss of propulsion or steering; and other hazards of the sea.

f. Emergency assistance. Rescue action that must be taken without delay to avoid significant risk of death or serious injury or the loss of or major damage to a ship or aircraft.

g. Military ships and aircraft. For the purposes of this instruction, a US military ship is either a warship designated "USS" or an auxiliary in the Military Sealift Command (MSC) force. For the purposes of this instruction, a US military aircraft is an aircraft operated by a unit of the US Armed Forces, other than the Coast Guard (except when operating as part of the Navy), bearing military markings and commanded and manned by personnel of the Armed Forces.

7. Responsibilities.

a. The Chairman of the Joint Chiefs of Staff will monitor the exercise of RAE and develop further procedural guidance for the CINCs and the Chiefs of the Services under the overall DOD policy guidance.

- b. The combatant commanders will issue policy guidance and specific procedural reporting requirements tailored to their areas of regional responsibility and the forces under their operational control.
  - c. The NMCC will follow routine procedures to coordinate with cognizant DOS and US Coast Guard officials to ensure timely notification, review, and response to CINCs and operational commanders in RAE situations.
  - d. The Military Services will provide training on RAE operations, coordination, and communications procedures.
  - e. Guidance for operational commanders is contained in Enclosure A.
8. Summary of Changes. This revision updates CJCSI 2410.01 to include the right of assistance entry within archipelagic waters, clarifies that RAE only applies within a foreign state's US-recognized territorial sea or archipelagic waters and clarifies that the instruction applies to auxiliaries in the MSC Force.
9. Effective Date. This instruction is effective upon receipt.

For the Chairman of the Joint Chiefs of Staff:

/s/

Dennis C. Blair  
Vice Admiral, U.S. Navy  
Director, Joint Staff

Enclosures:

A--Guidance for Operational Commanders

B--Bilateral Agreements Affecting Right of Assistance Entry

**ENCLOSURE A**

**GUIDANCE FOR OPERATIONAL COMMANDERS**

1. The operational commander of a US military ship should exercise RAE and immediately enter a foreign state's US-recognized territorial sea or archipelagic waters when all three following conditions are met:

- a. A person, ship, or aircraft within the foreign territorial sea or archipelagic waters is in danger or distress from perils of the sea and requires emergency assistance.
- b. The location is reasonably well known.
- c. The US military ship is in a position to render timely and effective assistance.

Although not a required condition, the operational commander should also consider whether other rescue units, capable and willing to render timely and effective assistance, are on the scene or immediately en route. Military ships conducting RAE operations will not deploy aircraft (including helicopters) within a US-recognized foreign territorial sea or archipelagic waters unless paragraphs 2 or 3 below apply.

2. An operational commander may render emergency assistance employing US military aircraft in a US recognized foreign territorial sea or archipelagic waters under RAE only when the commander determines that all four following conditions apply:

- a. A person, ship, or aircraft in the foreign territorial sea or archipelagic waters is in danger or distress from perils of the sea and requires emergency assistance.
- b. The location is reasonably well known.
- c. The US military aircraft is able to render timely and effective assistance. If available, unarmed aircraft will be used to conduct RAE activities.
- d. Any delay in rendering assistance could be life threatening.

Although not a required condition, the operational commander should also consider whether other rescue units, capable and willing to render timely and effective assistance, are on the scene or immediately en route.

Enclosure A

3. An operational commander may render assistance in non-life-threatening situations employing US military aircraft in a US-recognized foreign territorial sea or archipelagic waters under RAE when the following two conditions are met:

- a. The Conditions in subparagraphs 2a, b, and c above are met.
- b. The cognizant CINC or other appropriate authority in the operational chain of command has specifically authorized the exercise of RAE employing aircraft. Before authorizing RAE employing aircraft, such higher authority will consult with the DOS (Operations Center) by contacting the NMCC.

4. When a commander enters or authorizes entry into the claimed or US-recognized territorial sea or archipelagic waters of a foreign state under RAE, the commander will immediately notify:

- a. Appropriate authorities and the NMCC by an OPREP-3 PINNACLE. The OPREP-3 PINNACLE will describe location; unit(s) involved; nature of the emergency assistance; reaction by the coastal or archipelagic state, including efforts to deny entry or offers of assistance; and estimated time to complete the mission. The NMCC will immediately inform the DOS (Operations Center) and Headquarters, US Coast Guard (Flag Plot). (USCG HQ is prepared to facilitate contacting foreign state rescue authorities to notify them of the RAE operation, as appropriate.) The cognizant Chief of Mission and US Defense Attache Office (USDAO) will be information addresses.
- b. The coastal or archipelagic state, by the fastest means available, of the location, unit(s) involved, nature of the emergency and assistance required, whether any assistance is needed from that government, and estimated time of departure from the territorial sea or archipelagic waters. Contact will normally be with the Rescue Coordination Center of the foreign state involved.

**ENCLOSURE B**

**BILATERAL AGREEMENTS AFFECTING  
RIGHT OF ASSISTANCE ENTRY**

International agreements to which the United States is a party and that modify the application of this guidance are discussed below. (For more information, see Appendix B of reference b.)

a. Canada. "Memorandum of Understanding Between the United States Coast Guard, the United States Air Force, the Canadian Forces and the Canadian Coast Guard on Search and Rescue," 24 March 1995.

(1) This understanding states that in accordance with customary international law, solely for the purposes of rendering emergency rescue assistance to persons, vessels, or aircraft in danger or distress, when the location is reasonably well known, SAR units of either country may immediately enter onto or over the territory or the territorial seas of the other country, with notification of such entry made as soon as practicable.

(2) Pursuant to this understanding, commanders should notify the nearest Canadian Rescue Coordination Centre (RCC). (Upon receipt by the NMCC of the OPREP-3 required in subparagraph 4a, Enclosure A of this instruction, the NMCC will notify US Coast Guard Headquarters, which will arrange contact with the appropriate Canadian RCC.)

b. Mexico. Treaty to Facilitate Assistance to and Salvage of Vessels in Territorial Waters," 13 June 1935, T.I.A.S. No. 905, 49 Stat. 3359.

(1) This treaty permits vessels and rescue equipment of either country to assist vessels (and crews) of their own nationals that are disabled or in distress within the territorial waters or on the shores of the other country:

(a) Within a 720-nm radius of the intersection of the international boundary line and the Pacific Coast.

(b) Within a 200-nm radius of the intersection of the international boundary line and the coast of the Gulf of Mexico.

Enclosure B

(2) The treaty requires the commander to send notice of entry to assist a distressed vessel to appropriate authorities of the other country at the earliest possible moment. Assistance efforts may proceed unless the authorities advise that such assistance is unnecessary.

(3) In this treaty, assistance means any act that helps prevent injury arising from a marine peril to persons or property, and the term vessel includes aircraft.

## ANNEX A2-5

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TO AIG NINE NINE ZERO TWO

BT

UNCLAS //NO5800//

SUBJ: GUIDANCE FOR JUDGE ADVOCATES CONCERNING THE TRANSIT  
PASSAGE REGIME IN INTERNATIONAL STRAITS

1. PASS TO ASSIGNED JUDGE ADVOCATES.

2. THIS MESSAGE PROVIDES GUIDANCE AND AMPLIFYING INFORMATION CONCERNING THE RIGHT OF TRANSIT PASSAGE THROUGH INTERNATIONAL STRAITS AS IT EXISTS IN CUSTOMARY INTERNATIONAL LAW AS REFLECTED IN THE 1982 U.N. CONVENTION ON THE LAW OF THE SEA (HEREINAFTER REFERRED TO AS "THE 1982 CONVENTION"). THE US IS NOT A SIGNATORY TO THE 1982 CONVENTION DUE TO ITS SEABED MINING PROVISIONS. HOWEVER, IN HIS STATEMENT ON UNITED STATES OCEANS POLICY OF MARCH 10, 1983, PRESIDENT REAGAN ANNOUNCED THAT THE US CONSIDERS THE NON-SEABED PROVISIONS OF THE 1982 CONVENTION AS REFLECTIVE OF EXISTING MARITIME LAW AND PRACTICE AND THAT THE US WOULD ACT ACCORDINGLY.

3. THE REGIME OF TRANSIT PASSAGE IS DEFINED IN PART III (ARTICLES 34 THROUGH 45) OF THE 1982 CONVENTION. TRANSIT PASSAGE MEANS THE EXERCISE OF THE FREEDOM OF NAVIGATION AND OVERFLIGHT, SOLELY FOR THE PURPOSE OF CONTINUOUS AND EXPEDITIOUS TRANSIT OF A STRAIT. THERE IS NO REQUIREMENT OF PRIOR NOTIFICATION TO OR AUTHORIZATION OF THE STATE OR STATES BORDERING A STRAIT. WITH VERY FEW EXCEPTIONS, SOME NOTED IN PARAGRAPH 8 BELOW, THE REGIME APPLIES TO ALL STRAITS USED FOR INTERNATIONAL NAVIGATION BETWEEN ONE PART OF THE HIGH SEAS OR AN EXCLUSIVE ECONOMIC ZONE (EEZ) AND ANOTHER PART OF THE HIGH SEAS OR AN EEZ, IF EITHER OF THE FOLLOWING CONDITIONS EXIST: (A) THE TERRITORIAL SEA CLAIMS (OF 12 NM OR LESS) OF THE STATE OR STATES BORDERING THE STRAIT OVERLAP SO THAT THERE IS NO HIGH SEAS OR EEZ ROUTE THROUGH THE STRAIT, OR (B) THERE IS NO OVERLAP, BUT THE RESULTING CORRIDOR BETWEEN THE AREAS OF TERRITORIAL SEA IS UNSUITABLE FOR SURFACE OR SUBSURFACE TRANSIT BECAUSE OF ITS NAVIGATIONAL AND HYDROGRAPHIC CHARACTERISTICS.

4. THE GEOGRAPHICS OF STRAITS VARY. THE AREAS OF OVERLAPPING TERRITORIAL SEAS IN MANY CASES DO NOT ENCOMPASS THE ENTIRE AREA OF THE STRAIT IN WHICH THE TRANSIT PASSAGE REGIME APPLIES. THE REGIME APPLIES NOT ONLY IN OR OVER THE WATERS OVERLAPPED BY TERRITORIAL SEAS BUT ALSO THROUGHOUT THE STRAIT AND IN ITS

APPROACHES, INCLUDING AREAS OF THE TERRITORIAL SEA THAT ARE OVERLAPPED. THE STRAIT OF HORMUZ PROVIDES A CASE IN POINT; ALTHOUGH THE AREA OF OVERLAP OF THE TERRITORIAL SEAS OF IRAN AND OMAN IS RELATIVELY SMALL, THE REGIME OF TRANSIT PASSAGE APPLIES THROUGHOUT THE STRAIT AS WELL AS IN ITS APPROACHES INCLUDING AREAS OF THE OMANI AND THE IRANIAN TERRITORIAL SEAS NOT OVERLAPPED BY THE OTHER. (NOTE: THE ESSENCE OF TRANSIT PASSAGE IS THAT A VESSEL OR AIRCRAFT IN A STRAIT CONTINUOUSLY AND EXPEDITIOUSLY MOVING BETWEEN TWO BODIES OF WATER (IN WHICH THE FREEDOM OF NAVIGATION AND OVERFLIGHT IS THE APPLICABLE REGIME) NEED NOT BECOME SUBJECT TO THE REGIME OF INNOCENT PASSAGE WHEN REQUIRED TO ENTER A TERRITORIAL SEA IN THE STRAIT OR ITS APPROACHES.)

5. SHIPS AND AIRCRAFT ENGAGED IN TRANSIT PASSAGE ARE SUBJECT TO THE RESTRICTIONS AND OBLIGATIONS DESCRIBED IN ARTICLE 39 OF THE 1982 CONVENTION. THEY MUST REFRAIN FROM ACTIVITIES OTHER THAN THOSE INCIDENT TO THEIR "NORMAL MODES" OF CONTINUOUS AND EXPEDITIOUS TRANSIT. THUS, SHIPS AND AIRCRAFT MAY PROCEED IN THEIR NORMAL MODES, I.E., SUBMARINES MAY TRANSIT SUBMERGED, SHIPS MAY DEPLOY AIRCRAFT, AND NAVAL/AIR FORCES GENERALLY MAY BE DEPLOYED IN A MANNER CONSISTENT WITH THE NORMAL SECURITY NEEDS OF THOSE FORCES WHILE IN THE STRAIT. ALSO, THEY MUST PROCEED WITHOUT DELAY, REFRAIN FROM ANY THREAT OR USE OF FORCE, COMPLY WITH ACCEPTED INTERNATIONAL (I.E., IMO-TYPE) REGULATIONS, ETC. THERE IS NO REQUIREMENT FOR STATE (INCLUDING MILITARY) AIRCRAFT (ARTICLE 39) OR FOR SUBMERGED NAVIGATION TO FOLLOW ANY PARTICULAR ROUTE WHILE EXERCISING THE RIGHT OF TRANSIT PASSAGE.

6. THE REGIME OF TRANSIT PASSAGE DOES NOT IN OTHER RESPECTS AFFECT THE LEGAL STATUS OF THE WATERS FORMING THE STRAITS (ARTICLE 34.1). JURIDICALLY, INTERNAL WATERS REMAIN INTERNAL WATERS; TERRITORIAL SEAS REMAIN TERRITORIAL SEA; EEZ'S AND HIGH SEAS AREAS REMAIN EEZ'S AND HIGH SEAS. (ARTICLE 35). ANY ACTIVITY WHICH IS NOT AN EXERCISE OF THE RIGHT OF TRANSIT PASSAGE REMAINS SUBJECT TO WHATEVER LEGAL REGIME IS APPLICABLE UNDER THE 1982 CONVENTION TO THE WATER AREA OF THE STRAIT IN WHICH THE ACTIVITY OCCURS. (ARTICLE 38.3). THUS, IF NOT ENGAGED IN TRANSIT PASSAGE, E.G., IF THE SHIP IS NOT TRANSITING CONTINUOUSLY AND EXPEDITIOUSLY THROUGH THE STRAIT, THE SHIP IS SUBJECT TO THE RULES FOR NAVIGATING IN INTERNAL WATERS, TERRITORIAL SEAS, EEZ'S, AND HIGH SEAS, AS THE CASE MAY BE.

7. IN SUMMARY, THE REGIME OF TRANSIT PASSAGE CONFERS CERTAIN RIGHTS AND IMPOSES CERTAIN DUTIES ON SHIPS AND AIRCRAFT EXERCISING THE RIGHT OF TRANSIT PASSAGE. THESE RIGHTS AND DUTIES COMMENCE AS SOON AS THE SHIP OR AIRCRAFT ENTERS THE APPROACHES TO AN INTERNATIONAL STRAIT FOR THE PURPOSE OF CONTINUOUS AND EXPEDITIOUS TRANSIT OF THE STRAIT, AND THEY CEASE AS SOON AS THE

SHIP OR AIRCRAFT DEPARTS THE APPROACHES ON THE OTHER SIDE. HOWEVER, THE PROVISIONS FOR TRANSIT PASSAGE DO NOT ALTER THE UNDERLYING JURIDICAL NATURE OF THE WATERS WHICH MAKE UP THE STRAIT.

8. AS NOTED IN PARAGRAPH 3, ABOVE, THE 1982 CONVENTION PROVIDES THAT THERE ARE A FEW STRAITS USED FOR INTERNATIONAL NAVIGATION IN WHICH THE REGIME OF TRANSIT PASSAGE DOES NOT APPLY. ONE CATEGORY (ARTICLE 35(C)) IS STRAITS SPECIFICALLY REGULATED BY LONG-STANDING CONVENTIONS, FOR EXAMPLE, THE BOSPORUS AND DARDANELLES, WHICH ARE GOVERNED BY PROVISIONS OF THE MONTREUX CONVENTION. ANOTHER CATEGORY (ARTICLE 38.1) IS STRAITS FORMED BY AN ISLAND AND THE MAINLAND OF A STATE, IF THERE EXISTS, SEAWARD OF THE ISLAND, A HIGH SEAS OR EEZ ROUTE OF SIMILAR NAVIGATIONAL AND HYDROGRAPHIC CONVENIENCE. THE PRIME EXAMPLE OF THIS LATTER CATEGORY IS THE STRAIT OF MESSINA; IN SUCH A STRAIT, THE REGIME OF NON-SUSPENDABLE INNOCENT PASSAGE APPLIES. (ARTICLE 45.1(A)).

9. THIS MESSAGE HAS BEEN COORDINATED WITH THE DEPARTMENT OF STATE AND REFLECTS OFFICIAL US POLICY. QUESTIONS SHOULD BE REFERRED TO CODE 10 (DSN: 227-9161, COMMERCIAL: 202-697-9161).  
BT

**ANNEX A2-6**  
**(In draft as of 1 November 1997)**

FM

TO

INFO

BT

UNCLAS//N00000//  
MSGID/GENADMINXXXXXXXXXX/-//

SUBJ/TRANSIT PASSAGE IN INTERNATIONAL STRAITS POLICY//

REF/A/DOD 4500.54-G/-/NOTAL//  
NARR/REF A IS DOD FOREIGN CLEARANCE GUIDE. CHAPTER FIVE CONTAINS  
JOINT STAFF GUIDANCE ON MILITARY FLIGHTS IN INTERNATIONAL  
AIRSPACE, INTERNATIONAL STRAITS AND ARCHIPELAGIC SEA LANES.//

RMKS/1. SUMMARY. RECENT CHALLENGES TO U.S. TRANSIT RIGHTS THROUGH THE STRAIT OF HORMUZ BY OMAN AND IRAN HAVE MADE IT NECESSARY TO CLARIFY GUIDANCE ON POLICY AND PROCEDURES FOR U.S. SOVEREIGN IMMUNE VESSELS ENGAGED IN TRANSIT PASSAGE THROUGH INTERNATIONAL STRAITS. U.S. SOVEREIGN IMMUNE VESSELS ENJOY A RIGHT OF TRANSIT PASSAGE THROUGHOUT THE STRAIT (SHORELINE TO SHORELINE), AS WELL AS ITS APPROACHES (INCLUDING THE TERRITORIAL SEA OF ADJACENT COASTAL STATES). ALTHOUGH U.S. SOVEREIGN IMMUNE VESSELS WILL NORMALLY USE INTERNATIONAL MARITIME ORGANIZATION (IMO)-APPROVED TRAFFIC SEPARATION SCHEMES (TSS) AND COMPLY WITH RULE 10 OF COLREGS WHILE TRANSITING AN INTERNATIONAL STRAIT, THERE IS NO LEGAL REQUIREMENT TO DO SO IF SUCH VESSELS DO NOT ELECT TO VOLUNTARILY USE THE TSS. TRANSITS THAT DO NOT MAKE USE OF A TSS SHALL BE CONDUCTED WITH DUE REGARD FOR THE SAFETY OF NAVIGATION. IF CHALLENGED BY COASTAL STATE AUTHORITIES, A U.S. SOVEREIGN IMMUNE VESSEL SHOULD RESPOND THAT IT IS A U.S. WARSHIP OR OTHER SOVEREIGN IMMUNE VESSEL AND STATE, "I AM ENGAGED IN TRANSIT PASSAGE IN ACCORDANCE WITH INTERNATIONAL LAW." A DETAILED LEGAL ANALYSIS FOLLOWS IN PARAGRAPHS 3 THROUGH 6 FOR USE BY COMMAND JUDGE ADVOCATES.

2. PURPOSE.

A. TO CLARIFY GUIDANCE AND PROVIDE AMPLIFYING INFORMATION ON U.S. POLICY AND PROCEDURES FOR U.S. SOVEREIGN IMMUNE VESSELS ENGAGED IN TRANSIT PASSAGE THROUGH INTERNATIONAL STRAITS CONNECTING ONE PORTION OF THE HIGH SEAS/EXCLUSIVE ECONOMIC ZONE (EEZ) WITH ANOTHER PORTION OF THE HIGH SEAS/EEZ.

B. THIS GUIDANCE DOES NOT APPLY TO STRAITS SPECIFICALLY REGULATED BY LONG-STANDING CONVENTIONS (SUCH AS THE TURKISH STRAITS), TO STRAITS FORMED BY AN ISLAND AND THE MAINLAND OF A STATE, IF THERE EXISTS, SEAWARD OF THE ISLAND, A HIGH SEAS/EEZ ROUTE OF SIMILAR NAVIGATIONAL AND HYDROGRAPHIC CONVENIENCE (SUCH AS THE STRAIT OF MESSINA) OR TO STRAITS IN WHICH THERE EXISTS A HIGH SEAS/EEZ CORRIDOR OF SIMILAR NAVIGATIONAL AND HYDROGRAPHIC CONVENIENCE (SUCH AS THE FEMER BELT).

C. GUIDANCE ON MILITARY FLIGHTS IN INTERNATIONAL STRAITS IS PROVIDED IN REF A.

D. NOTHING IN THIS GUIDANCE IS INTENDED TO IMPAIR THE ABILITY TO CONDUCT OPERATIONS CONSISTENT WITH SAFETY OF NAVIGATION OR THE COMMANDER'S INHERENT AUTHORITY AND OBLIGATION TO USE ALL NECESSARY MEANS AVAILABLE AND TO TAKE ALL APPROPRIATE ACTION IN SELF-DEFENSE OF THE COMMANDER'S UNIT AND OTHER U.S. FORCES IN THE VICINITY.

### 3. BACKGROUND/REGULATORY REGIME.

A. THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1982 LOS CONVENTION).

(1) THE UNITED STATES IS NOT YET A PARTY TO THE 1982 LOS CONVENTION. HOWEVER, IN HIS STATEMENT ON U.S. OCEAN POLICY OF MARCH 10, 1983, PRESIDENT REAGAN ANNOUNCED THAT THE UNITED STATES CONSIDERS THE NON-SEABED PROVISIONS OF UNCLOS AS REFLECTIVE OF EXISTING MARITIME LAW AND PRACTICE AND THAT THE UNITED STATES WOULD ACT ACCORDINGLY. THIS VIEW HAS BEEN REITERATED BY EVERY SUCCESSIVE ADMINISTRATION.

(2) THE REGIME OF TRANSIT PASSAGE IS SET OUT IN PART III OF THE 1982 LOS CONVENTION (ARTICLES 37 THROUGH 44). TRANSIT PASSAGE IS DEFINED AS THE FREEDOM OF NAVIGATION AND OVERFLIGHT SOLELY FOR THE PURPOSE OF CONTINUOUS AND EXPEDITIOUS TRANSIT OF THE STRAIT IN THE NORMAL MODE OF OPERATION. THIS MEANS THAT SUBMARINES MAY TRANSIT SUBMERGED; MILITARY AIRCRAFT MAY OVERFLY IN COMBAT FORMATION AND WITH NORMAL EQUIPMENT OPERATION; AND SURFACE SHIPS MAY TRANSIT IN A MANNER NECESSARY FOR THEIR SECURITY, INCLUDING FORMATION STEAMING AND THE LAUNCHING AND RECOVERY OF AIRCRAFT, WHERE CONSISTENT WITH SOUND NAVIGATIONAL PRACTICES. ALL SHIPS AND AIRCRAFT, REGARDLESS OF CARGO, ARMAMENT OR MEANS OF PROPULSION, ENJOY THIS NONSUSPENDABLE RIGHT OF TRANSIT PASSAGE, WITHOUT PRIOR APPROVAL BY OR NOTIFICATION TO THE COASTAL STATES BORDERING THE STRAIT.

(3) COASTAL STATES BORDERING INTERNATIONAL STRAITS MAY DESIGNATE SEA LANES AND TRAFFIC SEPARATION SCHEMES (TSS) FOR

NAVIGATION IN STRAITS WHERE NECESSARY TO PROMOTE THE SAFE PASSAGE OF SHIPS. SUCH ROUTING MEASURES SHALL CONFORM TO IMO STANDARDS (I.E., REGULATION V/8 OF THE 1974 INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA (SOLAS) AND ITS ASSOCIATED GUIDELINES AND CRITERIA) AND SHALL BE REFERRED TO THE IMO FOR ADOPTION PRIOR TO THEIR DESIGNATION. SHIPS IN TRANSIT PASSAGE SHALL RESPECT APPLICABLE SEA LANES AND TSS ESTABLISHED IN ACCORDANCE WITH IMO STANDARDS. (NOTE: IMO-APPROVED ROUTING MEASURES APPLICABLE IN INTERNATIONAL STRAITS ARE SET OUT IN IMO PUBLICATION "SHIPS' ROUTEING" (SIXTH EDITION), AS AMENDED.)

(4) SHIPS IN TRANSIT PASSAGE SHALL COMPLY WITH GENERALLY ACCEPTED INTERNATIONAL REGULATIONS, PROCEDURES AND PRACTICES FOR SAFETY AT SEA, INCLUDING THE 1972 INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA (COLREGS). SHIPS IN TRANSIT PASSAGE SHALL ALSO PROCEED WITHOUT DELAY THROUGH THE STRAIT, REFRAIN FROM ANY THREAT OR USE OF FORCE AGAINST THE SOVEREIGNTY, TERRITORIAL INTEGRITY OR POLITICAL INDEPENDENCE OF THE STATES BORDERING THE STRAIT; AND REFRAIN FROM ANY ACTIVITIES OTHER THAN THOSE INCIDENT TO THEIR NORMAL MODE OF CONTINUOUS AND EXPEDITIOUS TRANSIT UNLESS RENDERED NECESSARY BY FORCE MAJEURE OR BY DISTRESS.

B. THE 1974 INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA (SOLAS), AS AMENDED.

(1) REGULATION V/8 OF SOLAS RECOGNIZES THE INTERNATIONAL MARITIME ORGANIZATION (IMO) AS THE ONLY INTERNATIONAL BODY RESPONSIBLE FOR ESTABLISHING AND ADOPTING SHIPS' ROUTING MEASURES, INCLUDING TSS, ON AN INTERNATIONAL LEVEL.

(2) RULES GOVERNING THE ESTABLISHMENT OF SHIPS' ROUTING MEASURES ARE CONTAINED IN REGULATION V/8 OF SOLAS AND ITS ASSOCIATED GUIDELINES AND CRITERIA (I.E., IMO ASSEMBLY RESOLUTION A.572(14), AS AMENDED). REGULATION V/8 AND RESOLUTION A.572(14) DO NOT APPLY TO WARSHIPS, NAVAL AUXILIARIES OR OTHER GOVERNMENT-OWNED OR OPERATED VESSELS USED ONLY FOR NON-COMMERCIAL SERVICE. HOWEVER, SUCH SHIPS ARE ENCOURAGED TO PARTICIPATE IN IMO-APPROVED SHIPS' ROUTING SYSTEMS.

(3) ADDITIONALLY, NOTHING IN REGULATION V/8 NOR ITS ASSOCIATED GUIDELINES AND CRITERIA SHALL PREJUDICE THE RIGHTS AND DUTIES OF STATES UNDER INTERNATIONAL LAW OR THE LEGAL REGIMES OF STRAITS USED FOR INTERNATIONAL NAVIGATION AND ARCHIPELAGIC SEA LANES.

(4) THE UNITED STATES IS A PARTY TO SOLAS.

C. THE 1972 INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA (COLREGS), AS AMENDED.

(1) PURSUANT TO RULE 1, COLREGS APPLY TO ALL VESSELS ON THE HIGH SEAS AND IN ALL WATERS CONNECTED THEREWITH NAVIGABLE BY SEAGOING VESSELS, INCLUDING VESSELS ENTITLED TO SOVEREIGN IMMUNITY.

(2) RULE 10 OF COLREGS PRESCRIBES THE CONDUCT OF VESSELS WITHIN OR NEAR TSS ADOPTED BY THE IMO IN ACCORDANCE WITH REGULATION V/8 OF SOLAS. PURSUANT TO RULE 10 OF COLREGS, A VESSEL USING A TSS SHALL NOT USE AN INSHORE TRAFFIC ZONE WHEN IT CAN SAFELY USE THE APPROPRIATE TRAFFIC LANE WITHIN THE ADJACENT TSS, EXCEPT THAT A VESSEL MAY USE AN INSHORE TRAFFIC ZONE WHEN EN ROUTE TO OR FROM A PORT, OFFSHORE INSTALLATION OR STRUCTURE, PILOT STATION OR ANY OTHER PLACE SITUATED WITHIN THE INSHORE TRAFFIC ZONE, OR TO AVOID IMMEDIATE DANGER. VESSELS NOT USING A TSS SHALL AVOID THE SEPARATION SCHEME BY AS WIDE A MARGIN AS IS PRACTICABLE. (NOTE: A VESSEL RESTRICTED IN HER ABILITY TO MANEUVER WHEN ENGAGED IN AN OPERATION (1) FOR THE MAINTENANCE OF SAFETY OF NAVIGATION IN A TSS OR (2) FOR THE LAYING, SERVICING OR PICKING UP OF A SUBMARINE CABLE, WITHIN A TSS IS EXEMPT FROM COMPLYING WITH RULE 10 TO THE EXTENT NECESSARY TO CARRY OUT THE OPERATION.)

(3) THE UNITED STATES IS A PARTY TO COLREGS.

D. U.S. NAVY REGULATIONS (1990).

(1) PURSUANT TO ARTICLE 1139, ALL PERSONS IN THE NAVAL SERVICE RESPONSIBLE FOR THE OPERATION OF NAVAL SHIPS AND CRAFT SHALL DILIGENTLY OBSERVE COLREGS AND THE INLAND NAVIGATION RULES, WHERE SUCH RULES AND REGULATIONS ARE APPLICABLE TO NAVAL SHIPS.

(2) IN THOSE SITUATIONS WHERE SUCH RULES OR REGULATIONS ARE NOT APPLICABLE TO NAVAL SHIPS OR CRAFT, THEY SHALL BE OPERATED WITH DUE REGARD FOR THE SAFETY OF OTHERS.

4. ANALYSIS.

A. FOR TRANSIT PASSAGE TO HAVE ANY MEANING, SURFACE, SUBSURFACE AND OVERFLIGHT NAVIGATION OF WATERS CONSTITUTING THE APPROACHES TO THE STRAIT MUST BE INCLUDED. IF THE RIGHT OF OVERFLIGHT OR SUBMERGED TRANSIT APPLIED ONLY WITHIN THE GEOGRAPHICAL DELINEATION OF A CERTAIN STRAIT, BUT NOT TO AREAS LEADING INTO/OUT OF THE STRAIT, IT WOULD EFFECTIVELY PREVENT THE EXERCISE OF THE RIGHT OF OVERFLIGHT AND SUBMERGED TRANSIT. MOREOVER, REQUIRING SHIPS AND AIRCRAFT TO CONVERGE AT THE HYPOTHETICAL ENTRANCE TO THE STRAIT WOULD BE INCONSISTENT WITH SOUND NAVIGATIONAL PRACTICES. THE RIGHT OF TRANSIT PASSAGE THEREFORE APPLIES NOT ONLY TO THE WATERS OF THE STRAIT ITSELF, BUT ALSO TO ALL NORMALLY USED APPROACHES TO THE STRAIT.

B. THE 1982 LOS CONVENTION RECOGNIZES THE AUTHORITY OF COASTAL STATES TO DESIGNATE, AND REQUIRES SHIPS IN TRANSIT PASSAGE TO RESPECT, IMO-APPROVED TSS IN INTERNATIONAL STRAITS, PROVIDED SUCH ROUTING MEASURES CONFORM TO IMO STANDARDS SET OUT IN REGULATION V/8 OF SOLAS AND RESOLUTION A.572(14). HOWEVER, AS DISCUSSED ABOVE, ROUTING MEASURES ADOPTED PURSUANT TO REGULATION V/8 AND ITS ASSOCIATED GUIDELINES AND CRITERIA (I.E., RESOLUTION A.572(14)) DO NOT APPLY TO SOVEREIGN IMMUNE VESSELS. HENCE, COMPLIANCE WITH AN IMO-APPROVED TSS IN AN INTERNATIONAL STRAIT IS NOT LEGALLY REQUIRED OF SOVEREIGN IMMUNE VESSELS.

C. SIMILARLY, RULE 1 OF COLREGS PROVIDES THAT TSS MAY BE ADOPTED BY THE IMO FOR THE SAFETY OF NAVIGATION. RULE 10 OF COLREGS APPLIES TO ANY TSS ADOPTED BY THE IMO, PURSUANT TO ITS AUTHORITY UNDER REGULATION V/8 OF SOLAS AND ITS ASSOCIATED GUIDELINES. HOWEVER, AS PREVIOUSLY DISCUSSED, SOVEREIGN IMMUNE VESSELS ARE SPECIFICALLY EXEMPT FROM COMPLIANCE WITH IMO-APPROVED ROUTING MEASURES. SOVEREIGN IMMUNE VESSELS ARE ENCOURAGED TO COMPLY VOLUNTARILY WITH SUCH MEASURES, BUT THERE IS NO LEGAL REQUIREMENT TO DO SO. HENCE, COMPLIANCE WITH RULE 10 OF COLREGS, WHICH PROHIBITS THE USE OF AN INSHORE TRAFFIC ZONE WHEN A SHIP CAN SAFELY USE THE APPROPRIATE TRAFFIC LANE WITHIN THE ADJACENT TSS AND REQUIRES SHIPS NOT USING THE TSS TO AVOID IT BY AS WIDE A MARGIN AS IS PRACTICABLE, IS NOT LEGALLY REQUIRED OF SOVEREIGN IMMUNE VESSELS THAT HAVE ELECTED NOT TO USE THE TSS. ACCORDINGLY, TRANSIT PASSAGE APPLIES THROUGHOUT THE STRAIT, SHORELINE TO SHORELINE.

## 5. POLICY.

A. FOR SOVEREIGN IMMUNE VESSELS, THE RIGHT OF TRANSIT PASSAGE APPLIES THROUGHOUT THE STRAIT (SHORELINE TO SHORELINE), AS WELL AS IN ITS APPROACHES (INCLUDING THE TERRITORIAL SEA OF AN ADJACENT COASTAL STATE).

B. ALTHOUGH U.S. SOVEREIGN IMMUNE VESSELS WILL NORMALLY USE IMO-APPROVED TSS (WHEN PRACTICABLE AND COMPATIBLE WITH THE MILITARY MISSION) AND COMPLY WITH RULE 10 OF COLREGS (INCLUDING ITS PROHIBITION ON THE USE OF INSHORE TRAFFIC ZONES) WHILE TRANSITING AN INTERNATIONAL STRAIT, THERE IS NO LEGAL REQUIREMENT TO DO SO IF SUCH VESSELS DO NOT ELECT TO VOLUNTARILY USE THE TSS. WHEN VOLUNTARILY USING AN IMO-APPROVED TSS, RULE 10 OF COLREGS MUST BE OBSERVED.

C. SITUATIONS WHICH MAY NOT LEND THEMSELVES TO COMPLIANCE WITH AN IMO-APPROVED ROUTING MEASURE INCLUDE: MILITARY CONTINGENCIES; CLASSIFIED MISSIONS; POLITICALLY SENSITIVE AREA MISSIONS; FREEDOM OF NAVIGATION ASSERTIONS; ROUTINE AIRCRAFT CARRIER OPERATIONS; MINE CLEARANCE OPERATIONS; SUBMERGED OPERATIONS; OR VARIOUS OTHER

LEGITIMATE PURPOSES/MISSIONS. SUCH OPERATIONS SHALL BE CONDUCTED WITH DUE REGARD FOR THE SAFETY OF NAVIGATION.

D. IF CHALLENGED BY AUTHORITIES OF A COASTAL STATE WHILE TRANSITING AN INTERNATIONAL STRAIT, U.S. SOVEREIGN IMMUNE VESSELS SHOULD ADVISE COASTAL STATE AUTHORITIES THAT IT IS A U.S. WARSHIP OR OTHER SOVEREIGN IMMUNE VESSEL AND STATE, "I AM ENGAGED IN TRANSIT PASSAGE IN ACCORDANCE WITH INTERNATIONAL LAW." THE VESSEL SHOULD THEN CONTINUE ON ITS PLANNED TRACK.

6. CONCLUSION. THE REGIME OF TRANSIT PASSAGE CONFERS CERTAIN RIGHTS AND IMPOSES CERTAIN DUTIES ON SHIPS AND AIRCRAFT EXERCISING THE RIGHT OF TRANSIT PASSAGE. THESE RIGHTS AND DUTIES COMMENCE AS SOON AS THE SHIP OR AIRCRAFT ENTERS THE APPROACHES TO AN INTERNATIONAL STRAIT FOR THE PURPOSE OF CONTINUOUS AND EXPEDITIOUS TRANSIT OF THE STRAIT, AND THEY CEASE AS SOON AS THE SHIP OR AIRCRAFT DEPARTS THE APPROACHES ON THE OTHER SIDE. THERE IS NO LEGAL REQUIREMENT FOR SOVEREIGN IMMUNE VESSELS TO COMPLY WITH IMO-APPROVED ROUTING MEASURES IN INTERNATIONAL STRAITS. SOVEREIGN IMMUNE VESSELS ARE ONLY LEGALLY OBLIGATED TO EXERCISE DUE REGARD FOR THE SAFETY OF NAVIGATION WHILE ENGAGED IN TRANSIT PASSAGE. HOWEVER, SUCH VESSEL MAY VOLUNTARILY COMPLY WITH IMO-APPROVED ROUTING MEASURES IN INTERNATIONAL STRAITS WHEN PRACTICABLE AND COMPATIBLE WITH THE MILITARY MISSION. WHILE VOLUNTARILY USING AN IMO-APPROVED TSS, RULE 10 OF COLREGS MUST BE OBSERVED.

7. THIS MESSAGE HAS BEEN COORDINATED WITH THE DEPARTMENT OF STATE AND REFLECTS OFFICIAL U.S. POLICY. QUESTIONS SHOULD BE REFERRED TO DOD REPOPA (DSN 227-9161, COMM 703-697-9161) OR N3L/N5L (DSN 227-0835, COMM 703-697-0835).

*gist*

A quick reference aid on U S foreign relations  
 Not a comprehensive policy statement  
 Bureau of Public Affairs • Department of State

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 US Freedom of Navigation Program

December 1988

Background: US interests span the world's oceans geopolitically and economically. US national security and commerce depend greatly upon the internationally recognized legal rights and freedoms of navigation and overflight of the seas. Since World War II, more than 75 coastal nations have asserted various maritime claims that threaten those rights and freedoms. These "objectionable claims" include unrecognized historic waters claims; improperly drawn baselines for measuring maritime claims; territorial sea claims greater than 12 nautical miles; and territorial sea claims that impose impermissible restrictions on the innocent passage of military and commercial vessels, as well as ships owned or operated by a state and used only on government noncommercial service.

US policy: The US is committed to protecting and promoting rights and freedoms of navigation and overflight guaranteed to all nations under international law. One way in which the US protects these maritime rights is through the US Freedom of Navigation Program. The program combines diplomatic action and operational assertion of our navigation and overflight rights by means of exercises to discourage state claims inconsistent with international law and to demonstrate US resolve to protect navigational freedoms. The Departments of State and Defense are jointly responsible for conducting the program.

The program started in 1979, and President Reagan again outlined our position in an ocean policy statement in March 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 the [1982 UN Convention on the Law of the Sea]. 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.

The US considers that the customary rules of international law affecting maritime navigation and overflight freedoms are reflected and stated in the applicable provisions of the 1982 UN Convention on the Law of the Sea.

Nature of the program: The Freedom of Navigation Program is a peaceful exercise of the rights and freedoms recognized by international law and is not intended to be provocative. The program impartially rejects excessive maritime claims of allied, friendly, neutral, and

unfriendly states alike. Its objective is to preserve and enhance navigational freedoms on behalf of all states.

Diplomatic action: Under the program, the US undertakes diplomatic action at several levels to preserve its rights under international law. It conducts bilateral consultations with many coastal states stressing the need for and obligation of all states to adhere to the international law customary rules and practices reflected in the 1982 convention. When appropriate, the Department of State files formal diplomatic protests addressing specific maritime claims that are inconsistent with international law. Since 1948, the US has filed more than 70 such protests, including more than 50 since the Freedom of Navigation Program began.

Operational assertions: Although diplomatic action provides a channel for presenting and preserving US rights, the operational assertion by US naval and air forces of internationally recognized navigational rights and freedoms complements diplomatic efforts. Operational assertions tangibly manifest the US determination not to acquiesce in excessive claims to maritime jurisdiction by other countries. Although some operations asserting US navigational rights receive intense public scrutiny (such as those that have occurred in the Black Sea and the Gulf of Sidra), most do not. Since 1979, US military ships and aircraft have exercised their rights and freedoms in all oceans against objectionable claims of more than 35 nations at the rate of some 30-40 per year.

Future intentions: The US is committed to preserve traditional freedoms of navigation and overflight throughout the world, while recognizing the legitimate rights of other states in the waters off their coasts. The preservation of effective navigation and overflight rights is essential to maritime commerce and global naval and air mobility. It is imperative if all nations are to share in the full benefits of the world's oceans.

For further information: See also GISTs, "Law of the Sea," June 1986, and "Navigation Rights and the Gulf of Sidra," December 1986.

## Navigation Rights and the Gulf of Sidra

### Background

In October 1973, Libya announced that it considered all water in the Gulf of Sidra south of a straight baseline drawn at 32° 30' north latitude to be internal Libyan waters because of the gulf's geographic location and Libya's historic control over it. The United States and other countries, including the U.S.S.R., protested Libya's claim as lacking any historic or legal justification and as illegally restricting freedom of navigation on the high seas. Further, the U.S. Navy has conducted many operations within the gulf during the past 12 years to protest the Libyan claim. These exercises have resulted in two shooting incidents between Libyan and U.S. forces. The first was in 1981, when two Libyan aircraft fired on U.S. aircraft and were shot down in air-to-air combat, and the second in March 1986, when the Libyans fired several missiles at U.S. forces and the United States responded by attacking Libyan radar installations and patrol boats.

### Barbary Coast History

This is not the first time that the United States has contended with navigational hindrances imposed by North African states. After the American Revolution, the United States adhered to the then common practice of paying tribute to the Barbary Coast states to ensure safe passage of U.S. merchant vessels. In 1796, the United States paid a one-time sum (equal to one-third of its defense budget) to Algiers with guarantees of further annual payments. In 1801, the United States refused to conclude a similar agreement with Tripoli, and the Pasha of Tripoli declared war on the United States. After negotiations failed, the United States blockaded Tripoli, in the autumn of 1803 Commodore Edward Preble led a squadron, including the U.S.S. *Constitution* ("Old Ironsides"), to the Mediterranean to continue the blockade. Shortly after the squadron arrived off Tripoli, a U.S. frigate, the *Philadelphia*, ran aground and was captured. Lt. Stephen Decatur led a team into Tripoli harbor and successfully burned the *Philadelphia*. In June 1805, the Pasha agreed to terms following a ground assault led by U.S. marines that captured a port near

[See map at Figure A2-12  
(p. 2-82)]

Tripoli. In 1810 Algiers and Tripoli renewed raids against U.S. shipping, and in 1815, Commodore Decatur's squadron caught the Algerian fleet at sea and forced the Dey of Algiers to agree to terms favorable to the United States. Decatur then proceeded to Tunis and Tripoli and obtained their consent to similar treaties. A U.S. squadron remained in the Mediterranean for several years to ensure compliance with the treaties.

### Current Law and Custom

By custom, nations may lay historic claim to those bays and gulfs over which they have exhibited such a degree of open, notorious, continuous, and unchallenged control for an extended period of time as to preclude traditional high seas freedoms within such waters. Those waters (closed off by straight baselines) are treated as if they were part of the nation's land mass, and the navigation of foreign vessels is generally subject to complete control by the nation. Beyond lawfully closed-off bays and other areas along their coasts, nations may claim a "territorial sea" of no more than 12 nautical miles in breadth (measured 12 miles out from the coast's low water line—or legal straight baseline) within which foreign vessels enjoy the limited navigational "right of innocent passage." Beyond the territorial sea, vessels and aircraft of all nations enjoy freedom of navigation and overflight.

Since Libya cannot make a valid historic waters claim and meets no other international law criteria for enclosing the Gulf of Sidra, it may validly claim a 12-nautical-mile territorial sea as measured from the normal low-water line along its coast (see map). Libya also may claim up to a 200-nautical-mile exclusive economic zone in which it

may exercise resource jurisdiction, but such a claim would not affect freedom of navigation and overflight. (The United States has confined its exercises to areas beyond 12 miles from Libya's coast.)

### U.S. Position

The United States supports and seeks to uphold the customary law outlined above, and it has an ongoing global program of protecting traditional navigation rights and freedoms from encroachment by illegal maritime claims. This program includes diplomatic protests (delivered to more than 50 countries since 1975) and ship and aircraft operations to preserve those navigation rights. Illegal maritime claims to which the United States responds include:

- Excessive territorial sea claims;
- Improperly drawn baselines for measuring maritime claims; and
- Attempts to require notification or permission before foreign vessels can transit a nation's territorial sea under the right of innocent passage.

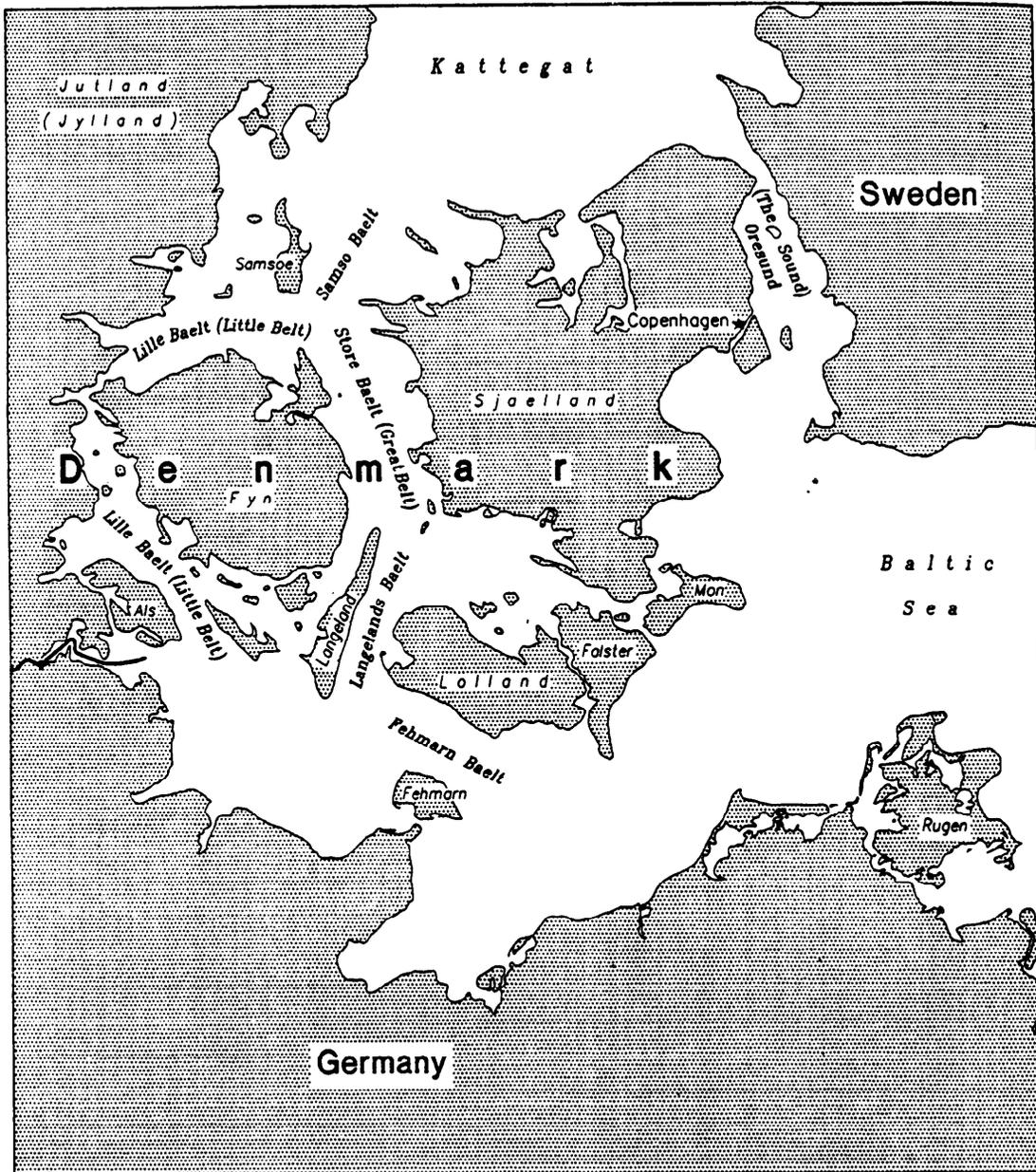
Thus Libya has not been singled out for special consideration but represents simply one instance in the continuing U.S. effort to preserve worldwide navigational rights and freedoms. The fact that Libya chose to respond militarily to the U.S. exercise of traditional navigation rights was regrettable and without any basis in international law.

### U.S. Intentions

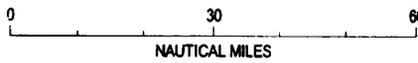
The United States will pursue actively its efforts to preserve traditional navigation rights and freedoms that are equally guaranteed to all nations. The preservation of rights is essential to maritime commerce and global naval and air mobility and is imperative if all nations are to share equally in the benefits of the world's oceans. As always, the United States will exercise its rights and freedoms fully in accord with international law and hopes to avoid further military confrontations, but it will not acquiesce in unlawful maritime claims and is prepared to defend itself if circumstances so require.

Taken from the GIST series of December 1986, published by the Bureau of Public Affairs, Department of State.

**FIGURE A2-1**  
**DANISH STRAITS**



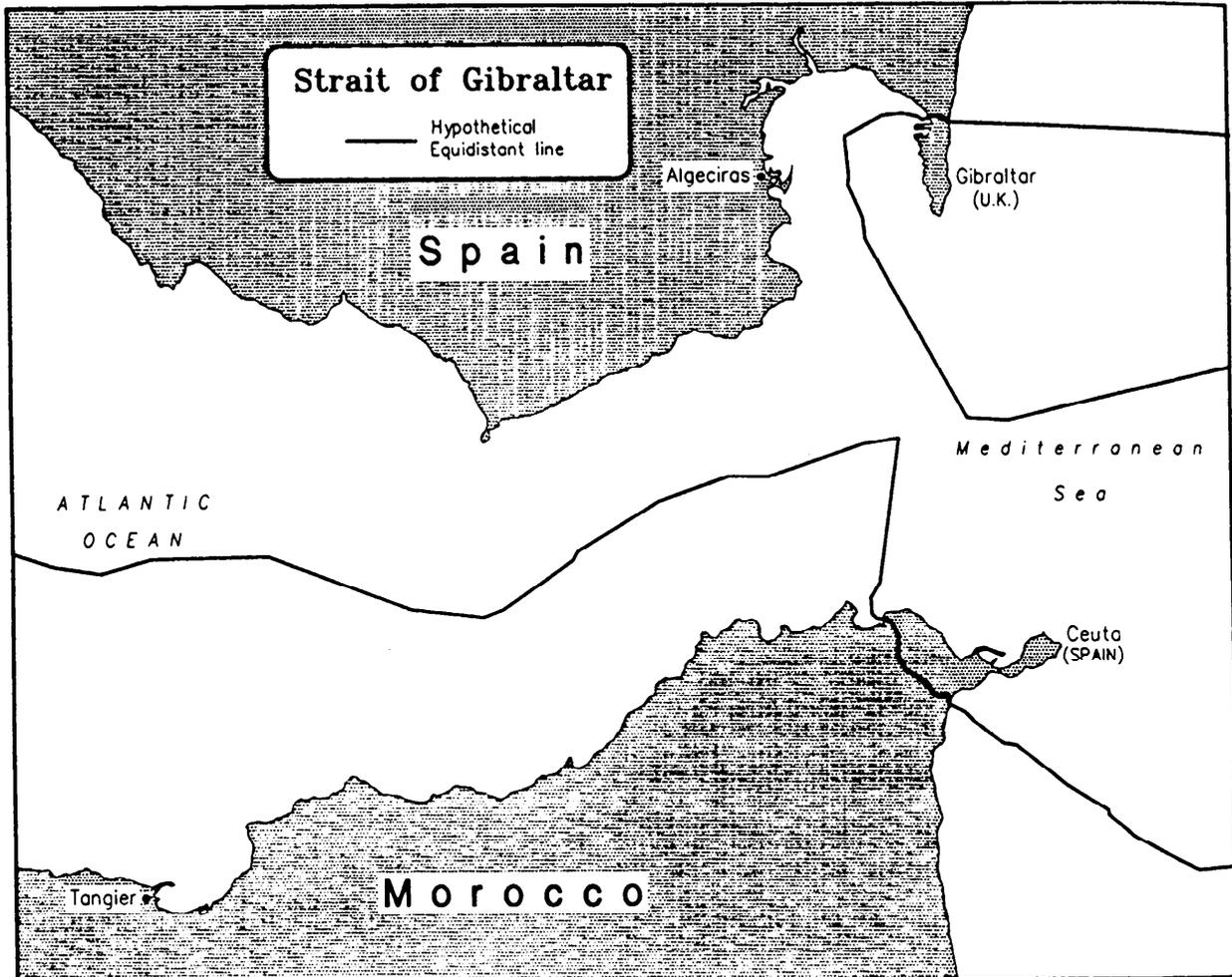
Names and boundary representations  
are not necessarily authoritative



Source: Roach & Smith, at 216.

FIGURE A2-2

STRAIT OF GIBRALTER



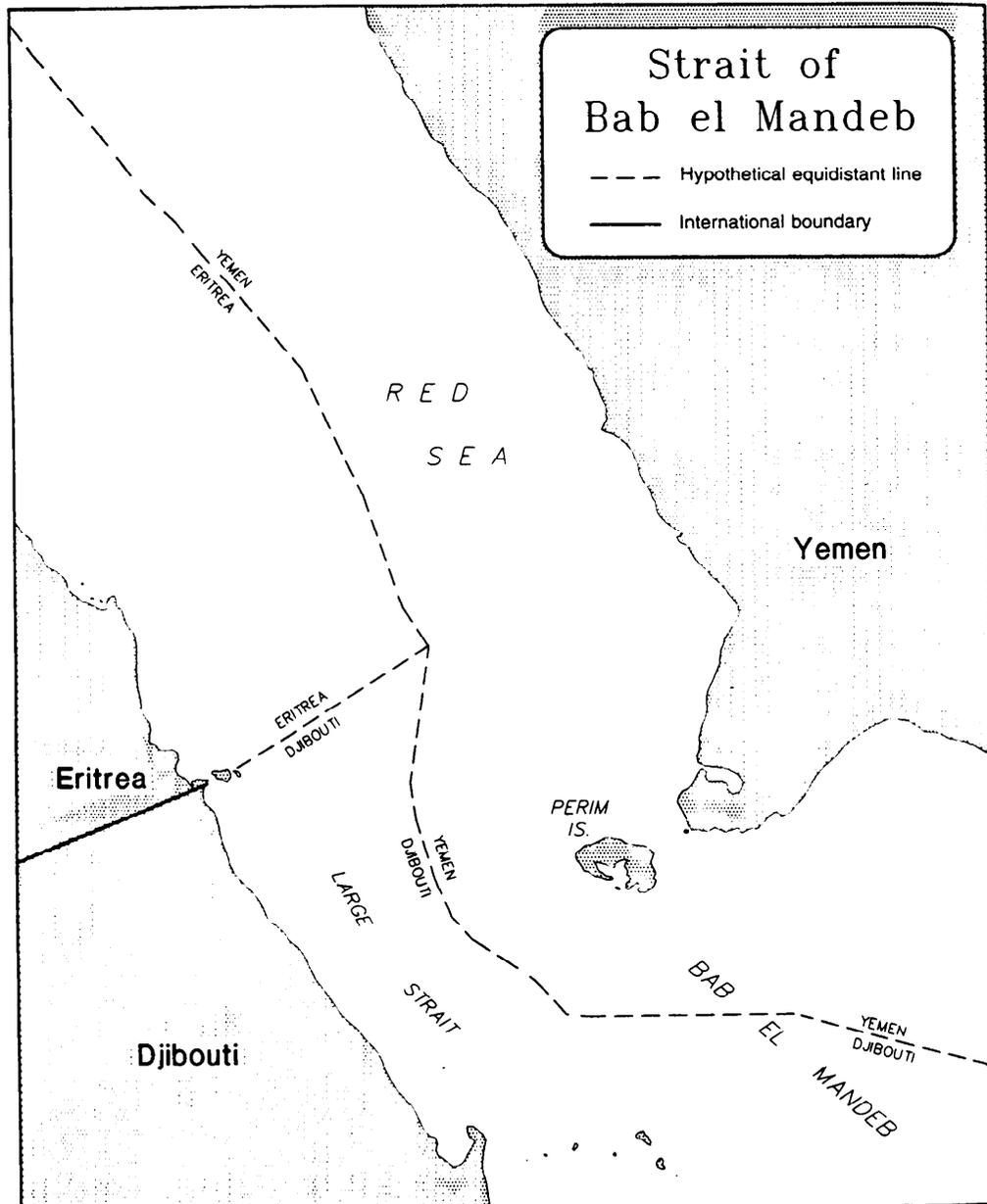
Names and boundary representations are not necessarily authoritative



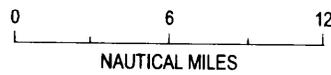
Source: Roach & Smith, at 186.

FIGURE A2-3

STRAIT OF BAB EL MANDEB

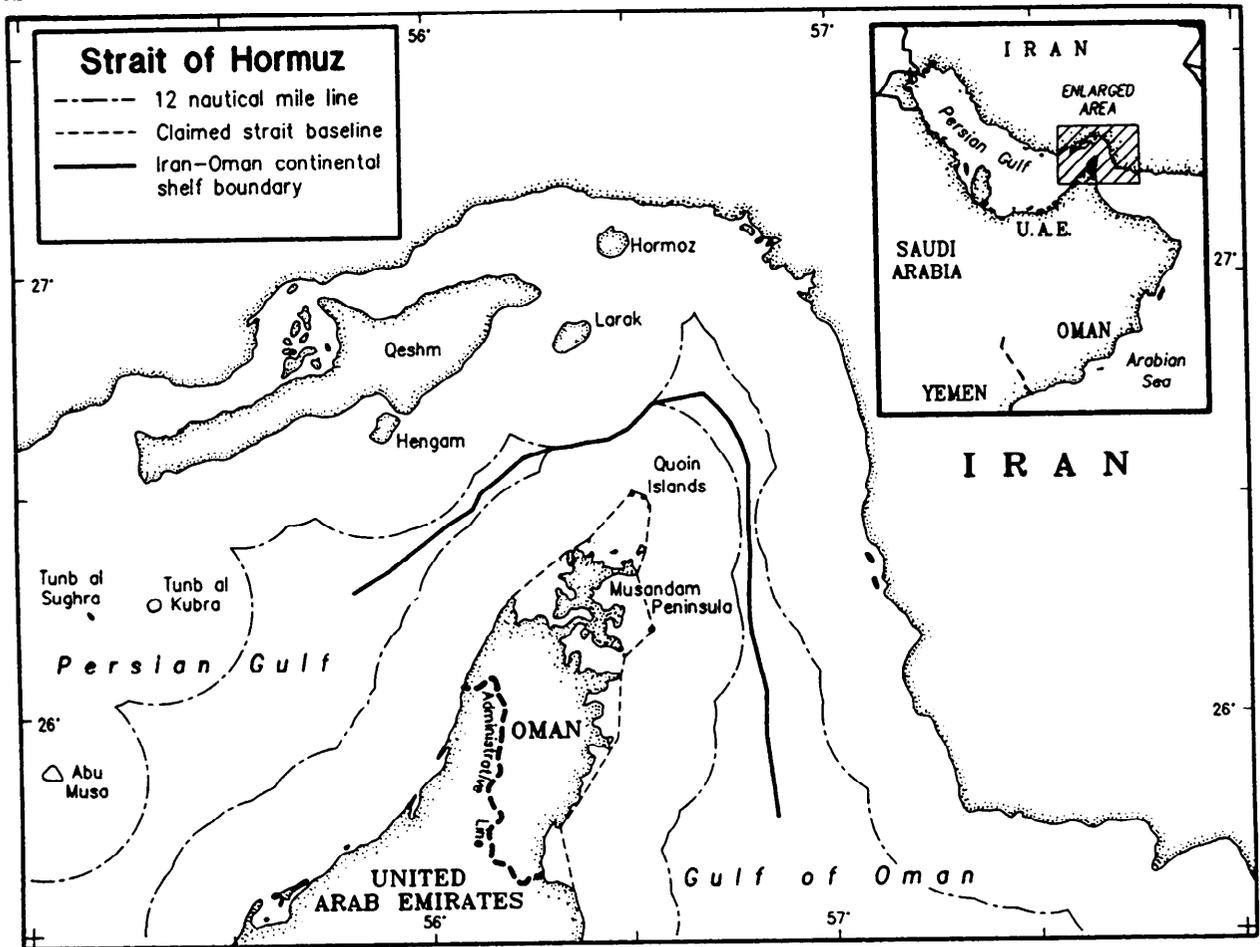


Names and boundary representation are not necessarily authoritative



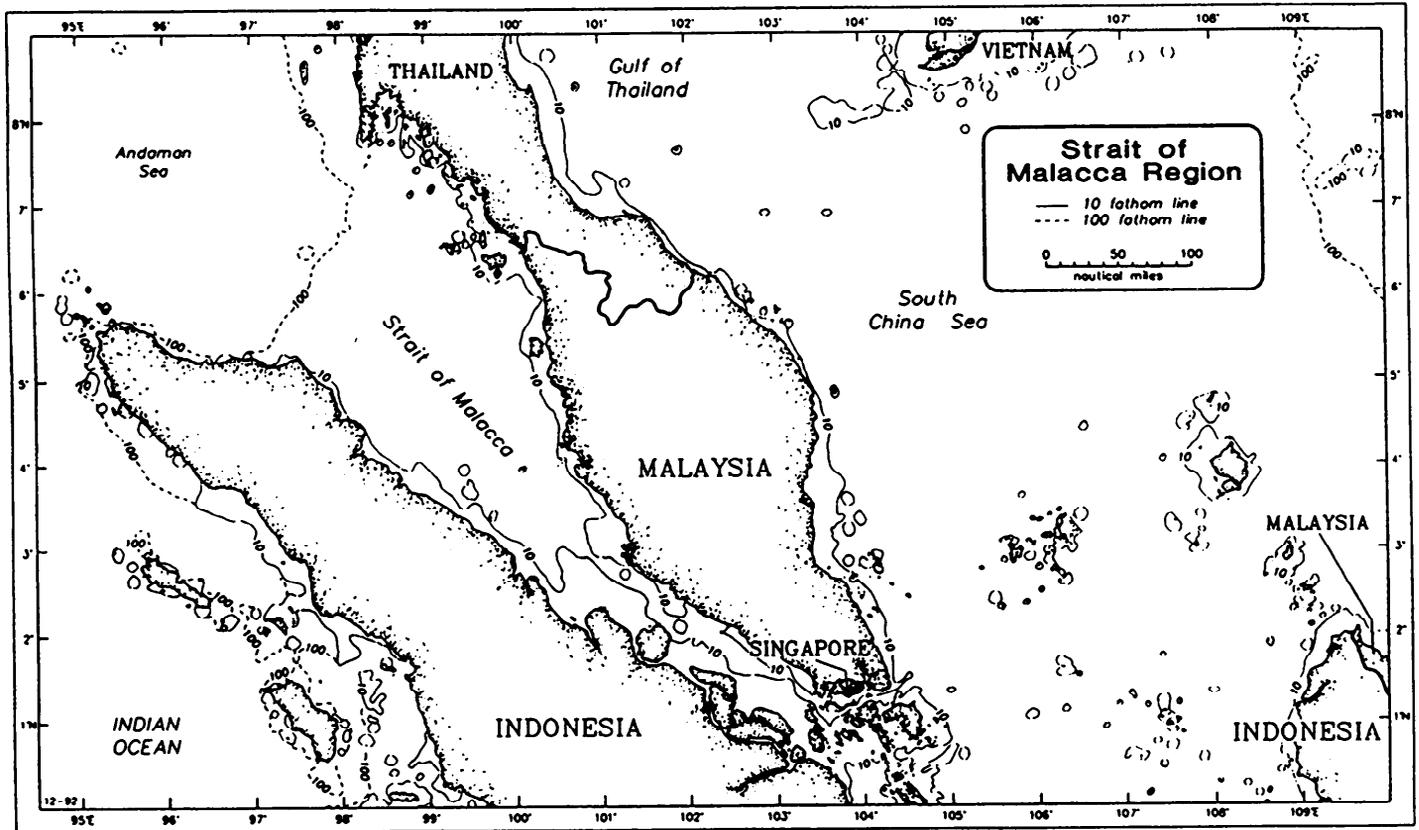
Source: Roach & Smith, at 184.

FIGURE A2-4  
STRAIT OF HORMUZ



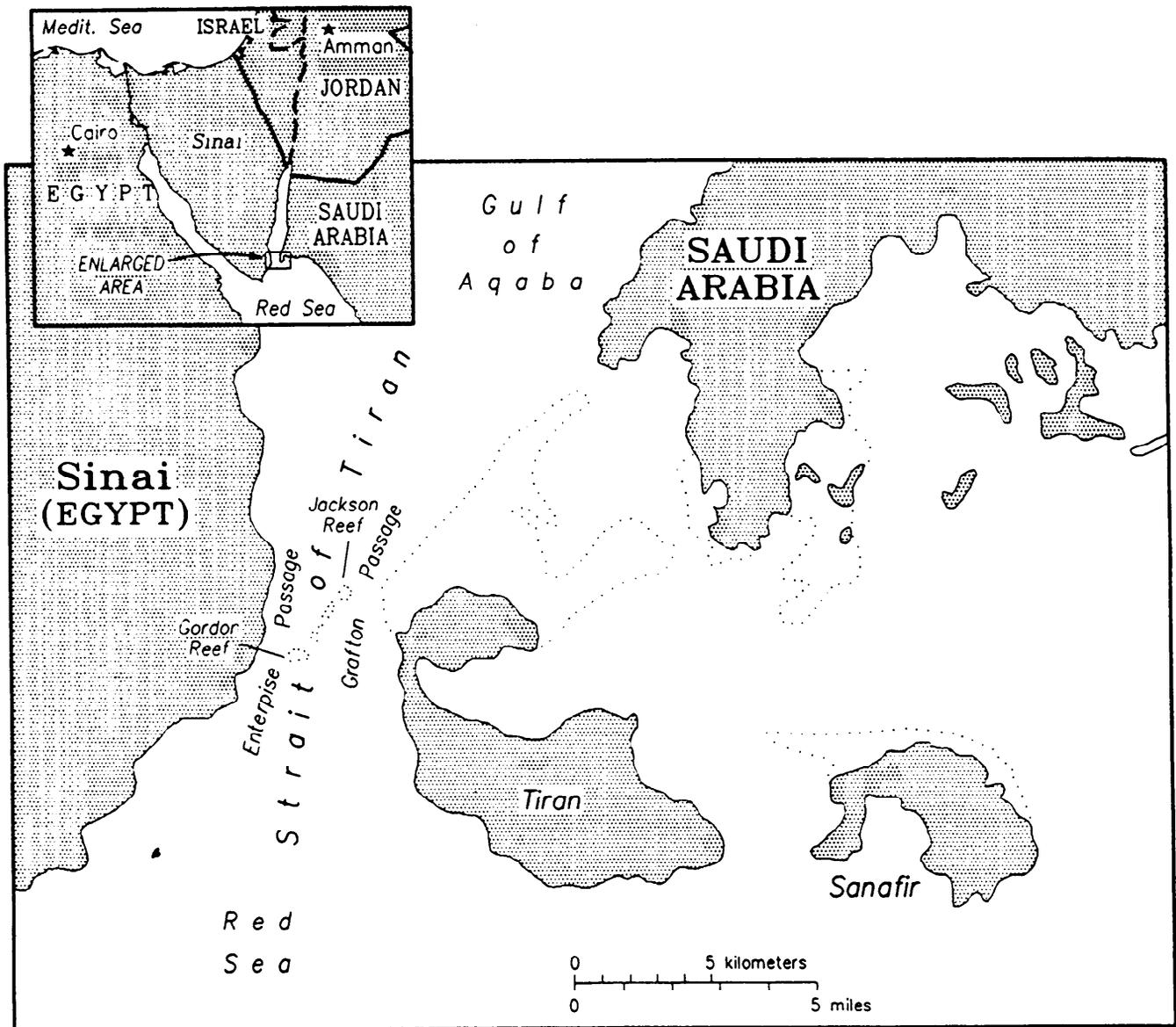
Source: Roach & Smith, at 190.

FIGURE A2-5  
STRAIT OF MALACCA



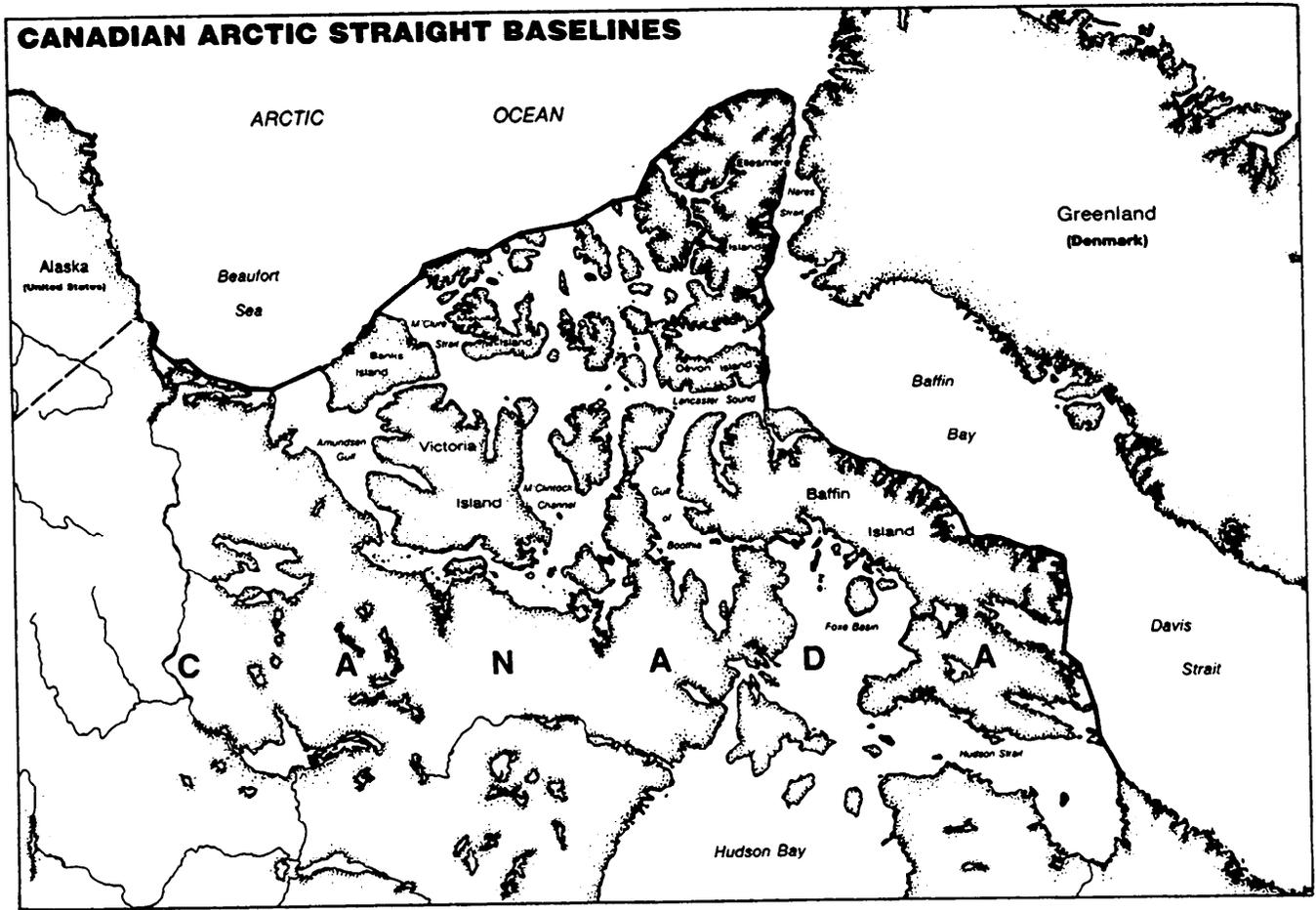
Source: Roach & Smith, at 195.

**FIGURE A2-6**  
**STRAIT OF TIRAN**



Source: Roach & Smith, at 220.

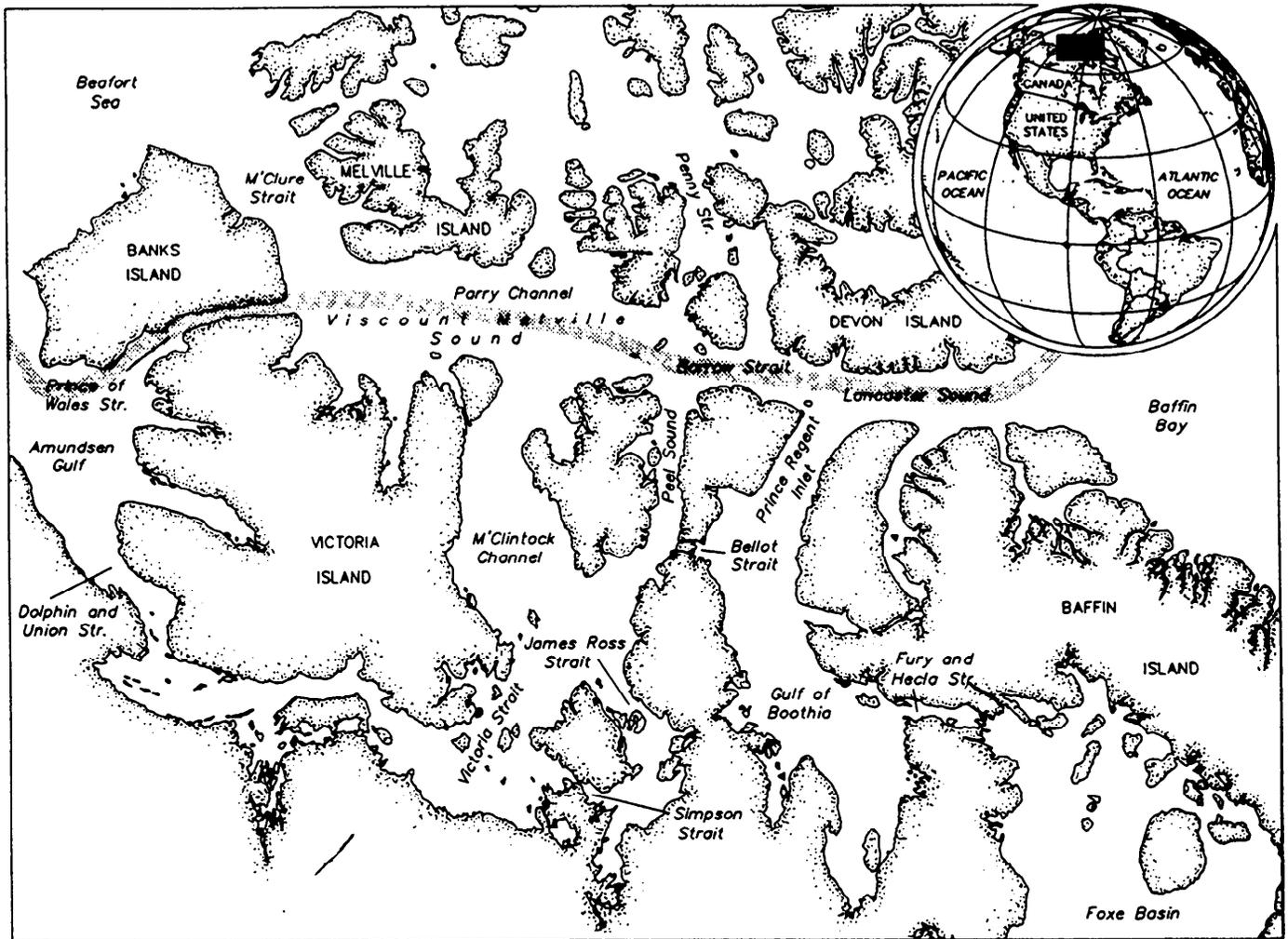
FIGURE A2-7  
CANADIAN ARCTIC



Source: Roach & Smith, at 66.

FIGURE A2-8

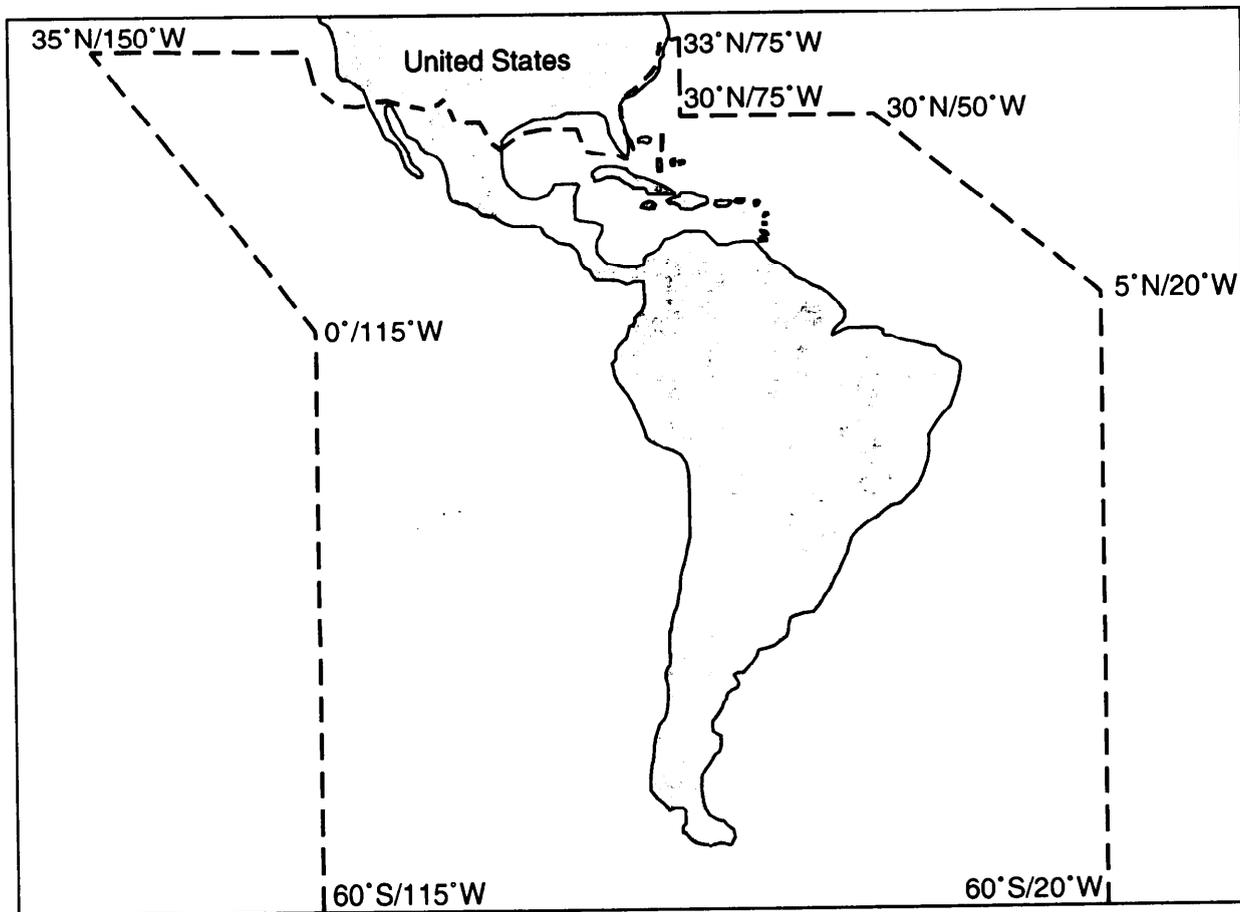
THE NORTHWEST PASSAGE



Source: Roach & Smith, at 208.

FIGURE A2-9

LATIN AMERICAN NUCLEAR FREE ZONE

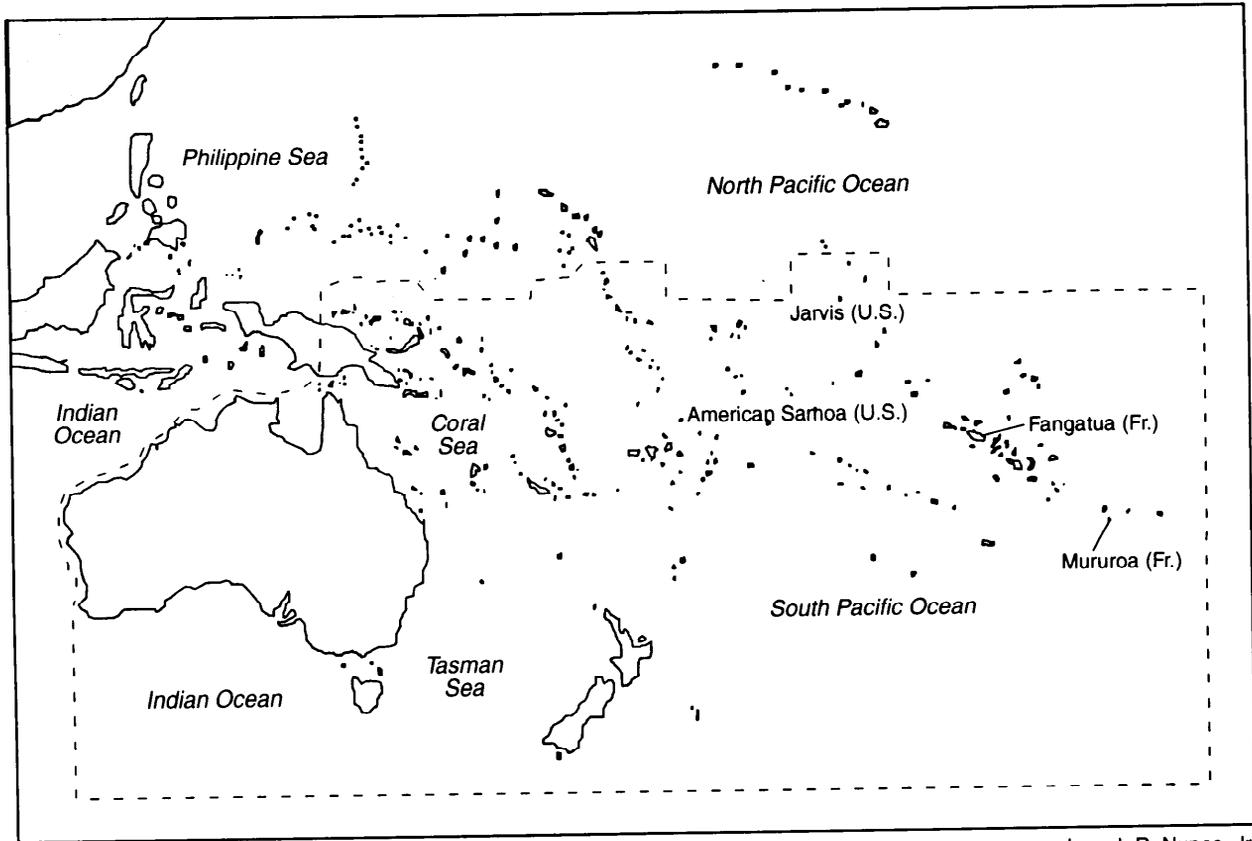


Joseph R. Nunes, Jr.

Source: Rosen, Nav. War Coll. Rev., Autumn 1996 at 46.

**FIGURE A2-10**

**SOUTH PACIFIC NUCLEAR-FREE ZONE**

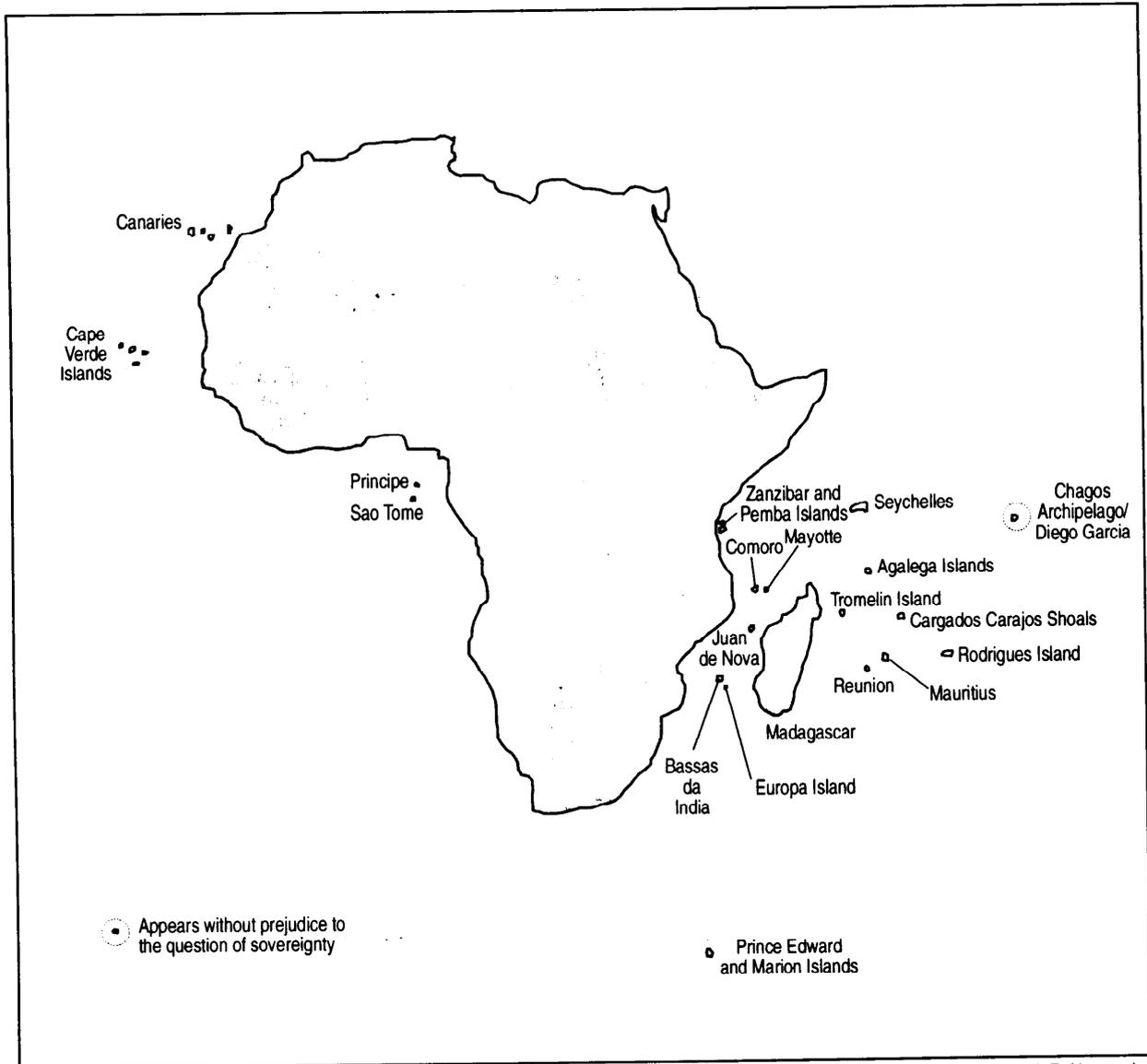


Joseph R. Nunes, Jr.

Source: Rosen, Nav. War Coll. Rev., Autumn 1996 at 49.

FIGURE A2-11

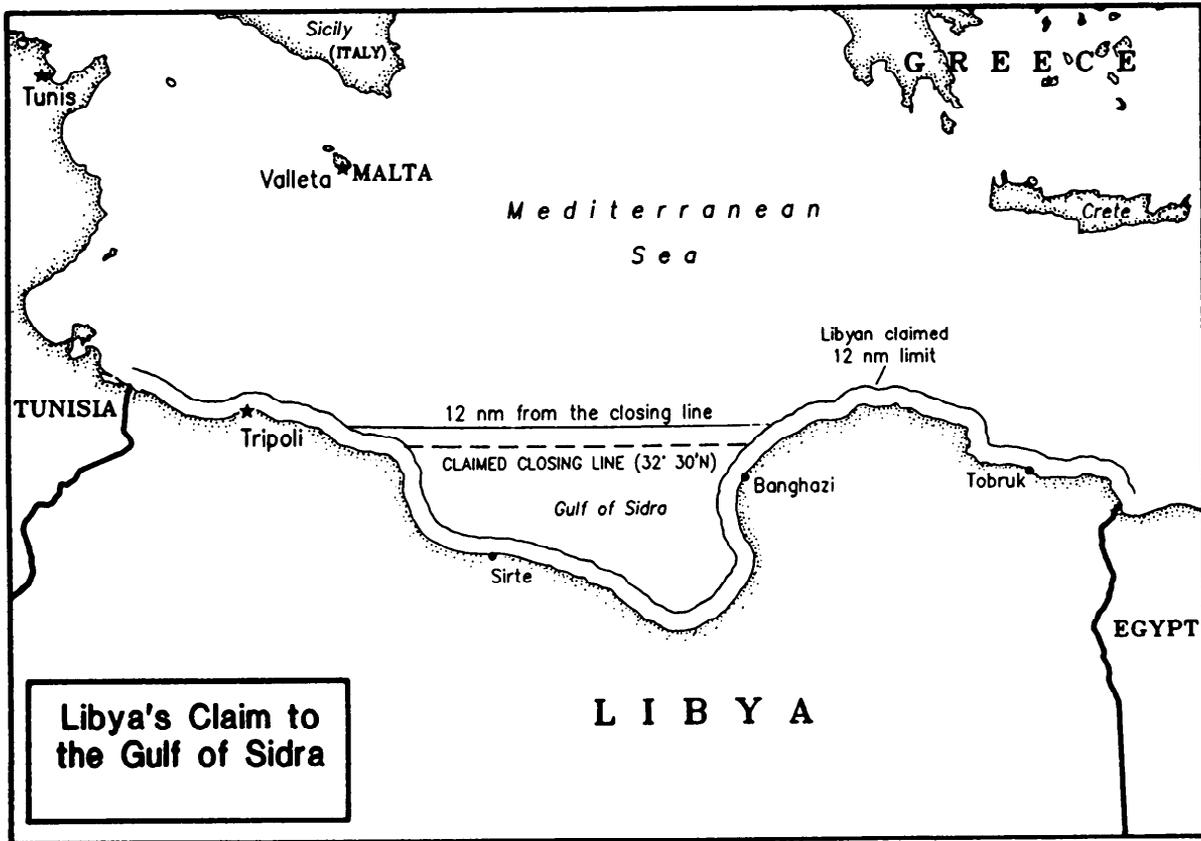
AFRICAN NUCLEAR-WEAPON-FREE ZONE



Joseph R. Nunes, Jr.

Source: Rosen, Nav. War Coll. Rev., Autumn 1996 at 50.

**FIGURE A2-12**  
**GULF OF SIDRA**



Source: Roach & Smith, at 30.

TABLE A2-1

**Restrictions on Warship Innocent Passage  
(As of 1 January 1997)**

<u>Nation</u>	<u>Restriction, Year of Claim</u>	<u>U.S. Protest</u>	<u>U.S. Assertion of Right of Innocent Passage</u>
Albania	Special permission; 1946	1989	1985 <sup>a</sup>
Algeria	Prior permission; 1963	1964 <sup>a</sup>	1979 <sup>a</sup>
Antigua & Barbuda	Prior permission; 1982	1987	1987
Bangladesh	Prior permission; 1974	1982	1996
Barbados	Prior permission; 1979	1982	1982 <sup>a</sup>
Brazil	Prior permission; 1954		
Bulgaria	Limited to sea lanes; 1987	1982	
Burma	Prior permission; 1977	1982	1985 <sup>a</sup>
Cambodia	Prior permission; 1982		1986 <sup>a</sup>
Cape Verde	Prior permission; 1982	1989	1991
China (PRC)	Prior permission; 1958; 1992, 1996	1992 <sup>a</sup>	1986 <sup>a</sup>
Congo	Prior permission; 1977	1987	
Croatia	Prior notification; 1995		
Denmark	Prior permission; 1976	1991	
Djibouti	Nuclear power/materials; 1979	1989	
Egypt	Prior notification; 1983	1985	1993 <sup>a</sup>
	Nuclear power/materials; 1982	1983	
Finland	Prior notification; 1981	1989	
Grenada	Prior permission; 1978	1982 <sup>a</sup>	1988
Guyana	Prior notification; 1977	1982	1988
India	Prior notification; 1976	1976 <sup>a</sup>	1985 <sup>a</sup>
Indonesia	Prior notice; 1962		
Iran	Prior permission; 1982, 1994	1987 <sup>a</sup>	1989 <sup>a</sup>
Korea, South	Prior notification; 1978	1977 <sup>a</sup>	
Libya	Prior notice; 1985	1985	
Maldives	Prior permission; 1976	1982	1981 <sup>a</sup>
Malta	Prior notification; 1981	1981 <sup>a</sup>	
Mauritius	Prior notification; 1977	1982	
Oman	Prior permission; 1989	1991	1991 <sup>a</sup>
	Nuclear power/materials; 1989	1991	
Pakistan	Prior permission; 1976	1982	1986 <sup>a</sup>
	Nuclear power/materials; 1976	1982	
Philippines	Prior permission; 1968	1969	1994
Poland	Prior permission; 1968	1989	
Romania	Prior permission; 1956	1989	1985 <sup>a</sup>
St. Vincent & the Grenadines	Prior permission; 1983		
Seychelles	Prior notification; 1977	1982	
Somalia	Prior permission; 1972	1982	1979 <sup>a</sup>
Sri Lanka	Prior permission; 1977	1986	1985 <sup>a</sup>
Sudan	Prior permission; 1970	1989	1979 <sup>a</sup>
Syria	Prior permission; 1963	1989	1984 <sup>a</sup>
United Arab Emirates	Prior permission; 1993		1995
Vietnam	Prior permission; 1980	1982	1982 <sup>a</sup>
	Limit on number; 1980	1982	
Yemen	Prior permission (PDRY); 1967	1982	1982 <sup>a</sup>
	Nuclear power/materials (PDRY); 1977	1982	
	Prior notification (YAR); 1978	1986	1979 <sup>a</sup>
	Nuclear power (YAR); 1982	1986	
Yugoslavia, Former	Prior notification; 1965	1986 <sup>a</sup>	1990
	Limit on number; 1986	1986	

<sup>a</sup> Multiple protests or assertions

Source: U.S. Department of State, Office of Ocean Affairs; Roach & Smith, at 158-9.

**TABLE A2-2**

**Straits Formed by an Island of a Nation and the Mainland Where There Exists Seaward of the Island a Route Through the High Seas or an Exclusive Economic Zone of Similar Convenience**

<u>Coastal Nation</u>	<u>Strait</u>	<u>Island</u>	<u>Alternative Route</u>
Argentina	Estrecho de la Maire	Isla de los Estados	high seas/eez route east of Isla de los Estados
Canada	Canso	Cape Breton	Cabot Strait
Canada	Georgia	Vancouver	high seas/eez route west of Vancouver Island
Canada	Jacques Cartier Passage	Anticosti	Cabot Strait
Canada	Johnstone	Vancouver	high seas/eez route west of Vancouver Island
Canada	Northumberland	Prince Edward	high seas/eez route north of Prince Edward Island
Canada	Queen Charlotte	Vancouver	high seas/eez route west of Vancouver Island
China	Hainan	Hainan	high seas/eez route south of Hainan Island
France	Ile d'Yeu	Ile d'Yeu	high seas/eez route west of Ile d'Yeu
Greece	Elafonisos <sup>1</sup>	Kithira	Kithira or Andirkithiron Straits
Italy	Messina	Sicily	high seas/eez route south of Sicily
Japan	Okushiri-kaikyo	Okushiri	high seas/eez route west of Okushiri Island
Japan	Rishiri-suido	Rishiri	high seas/eez route west of Rishiri Island
Japan	Sado-kaikyo	Sado	high seas/eez route west of Sado Island
New Zealand	Foveaux	Stewart	high seas/eez route south of Stewart Island
Russia	Provirv Litke	Karaginsky	high seas/eez route east of Ostov Karaginsky
Sweden	Kalmar Sund	Oland	high seas/eez route east of Oland Island
Tanzania	Mafia	Mafia	high seas/eez route east of Mafia Island
Tanzania	Zanzibar Channel	Zanzibar	high seas/eez route east of Zanzibar Island
Turkey	Imroz	Imroz	high seas/eez route west of Imroz Island
United Kingdom	Pentland Firth	Orkney Islands	high seas/eez route north of the Orkneys
United Kingdom	The Solent	Isle of Wight	high seas/eez route south of the Isle of Wight

<sup>1</sup> Andikithiron Strait has a least width of 16 miles. Given Greece's 6-mile territorial sea claim, this leaves a high seas/eez corridor of 4 miles through the strait. Source: Alexander, at 206-7.

**TABLE A2-3**

**Straits in Which Passage is Regulated by Long-Standing Conventions in Force**

Bosorus  
Dardanelles

Magellan  
Oresund

Store Baelt

Source: Alexander, Navigational Restrictions, at 205.

**TABLE A2-4**

**Straits Which do not Connect Two Parts of the High Seas or an Exclusive Economic Zone with One Another**

(1) Straits Connecting the High Seas or an Exclusive Economic Zone with the Territorial Sea of a Foreign State

Bahran-Qatar Passage  
Bahrain-Saudi Arabia Passage

Head Harbour Passage  
Strait of Tiran

(2) Straits Connecting the High Seas or an Exclusive Economic Zone with Claimed Historic Waters

Strait	State	Claimed Historic Waters
Amundsen Gulf	Canada	Arctic Archipelago
Barrow Strait	Canada	Arctic Archipelago
Entrance to the Bay D'Amatique	Guatemala	Bay D'Amatique
Geographe Channel	Australia	Shark Bay
Hainan Strait*	China	Gulf of Tonkin
Hudson Strait	Canada	Hudson Bay
Investigator Strait	Australia	Gulf of St. Vincent
Kerch Strait	USSR	Sea of Azov
Lancaster Sound	Canada	Arctic Archipelago
M'Clure Strait	Canada	Arctic Archipelago
Naturaliste Channel	Australia	Shark Bay
Palk Strait	India	Gulf of Manaar
Pohai Strait	China	Gulf of Pohai
Prince of Wales Strait	Canada	Arctic Archipelago
Viscount Melville Sound	Canada	Arctic Archipelago

\*China Claims the strait itself as historic, rather than the gulf with which it connects.

(3) Straits Connecting with Claimed "Special Status" Waters

Provliv Blagoveshchenskiy  
Provliv Dmitrya Lapteva  
Provliv Karskiye Vorota

Provliv Longa  
Provliv Sannikova  
Provliv Shokal'skogo

Provliv Vilkit'skogo

Source: Alexander, at 207-8.

**TABLE A2-5****International Straits: Least Width****Less than Six Miles in Width (52)**

Alalakeiki Channel	Icy Strait	Rosario Strait
Apolima Strait	Johnstone Strait	Roti Strait
Bali Channel	Kalmar Sund	Saipan Channel
Beagle Channel	Kerch Strait	San Bernardino Strait
Bonifacio, Strait of	Kuchinoshima-suido	Sape Strait
Bosporus	Lamma Channel	Serpent's Mouth
Canso Strait	Langeland Belt	Singapore Strait
Chatham Strait	Little Belt	The Solent
Clarence Strait [U.S.]	Magellan, Strait of	Store Baelt
Corfu Channel	Maqueda Channel	Sumner Strait
Dardanelles	Massawa Strait	Sunda Strait
Dragon's Mouths	Messina, Strait of	Tiran, Strait of
Durian Strait	Oresund	Torees Strait
Elafonisou Strait	Palk Strait	Vatu-I-Ra Channel
Gaspar Strait	Pentland Firth	Verde Island Passage
Georgia, Strait of	Prince of Wales Strait	Vieques Passage
Goschen Strait	Provliv Nevel'skogo	
Head Harbour Passage	Queen Charlotte Strait	

**Between Six and Twenty-four Miles in Width (153)**

Adak Strait	Cameroon Strait	Imroz Strait
Agattu Strait	Cheju Strait	Indispensable Strait
Aland's Hav	Clarence Strait [Australia]	Investigator Strait
Alas Strait	Coco Channel	Isumrud Strait
Andikithiron Strait	Cook Strait	Jacques Chartier Passage
Api Passage	Dampier Strait	Jailolo Passage
Aruba-Paraguana Passage	Dominica Channel	Juan de Fuca, Strait of
Auau Channel	Dover Strait	Jubal, Strait of
Bab el Mandeb	Dundas Strait	Kadet Channel
Babuyan Channel (Luzon Strait)	Entrance to Bay d'Amatique	Kafireos Strait
Bahrain-Qatar Passage	Entrance to the Gulf of Finland	Kaiwi Channel
Bahrain-Saudi Arabia Passage	Entrance to Gulf of Fonseca	Kalohi Channel
Balabac Strait	Estrecho de la Maire	Kandavu Strait
Balintang Channel (Luzon Strait)	Etolin Strait	Karpathos Strait
Bangka Passage	Etorofu-kaikyo	Kasos Strait
Bangka Strait	Fehmarn Belt	Kasos Strait
Banks Strait	Foveaux Strait	Kaulakahi Channel
Barrow Strait	Freu de Menorca	Kealaikahiki Channel
Basilan Strait	Galleons Passage	Keas Strait
Bass Strait	Geographe Channel	Kennedy Channel
Belle Isle, Strait of	Gibraltar, Strait of	Kithira Strait
Berhala Strait	Greyhound Strait	Korea Strait, West
Bering Strait, East	Hainan Strait	Koti Passage
Bering Strait, West	Herbert Pass	Kunashiri-suido
Boeton Passage	Hecate Strait	Little Minch
Bornholmshgat	The Hole	Lombok Strait
Bougainville Strait	Huksan Jedo	Maemel Sudo
Bristol Channel	Ile d'Yeu	Mafia Strait

**TABLE A2-5 (cont.)****Between Six and Twenty-four Miles in Width (cont.)**

Malacca Strait	Polillo Strait	Seguam Pass
Manipa Strait	Provliv Alaid	Serasan Passage
Manning Strait	Provliv Diany	Shelikof Strait
Martinique Channel	Provliv Blagoveschenskiy	Shikotan-siudo
Mayaguana Passage	Provliv Golovnina	Sibutu Passage
Mindoro Strait	Provliv Krenitsyna	Soya-kaikyo
Mouchoir Passage	Provliv Litke	Surigao Strait
Nakanoshima-suido	Provliv Luzhinka	Suwanose-suido
Nanuku Passage	Provliv Nadezhedy	Tanaga Pass
Nares Strait	Provliv Rikorda	Tanegashima-kaikyo
Naturaliste Channel	Provliv Severgina	Taraku-suido
Neumuro-kaikyo	Provliv Shokal'skogo	Tokara-kaikyo
North Channel	Provliv Urup	Tsugaru-kaikyo
North Minch	Provliv Yevreinova	Turks Island Passage
Northumberland Strait	Rishiri-suido	Unimak Pass
Notsuke-suido	Robeson Channel	Virgin Passage
Obi Strait	Sado-kaikyo	Vitiaz Strait
Okushiri-kaikyo	St. George's Channel	Wetar Strait
Old Bahama Channel	St. Lucia Channel	Yakushima-kaikyo
Ombai Strait	St. Vincent Passage	Yunaska Pass
Osumi-kaikyo	Samalga Pass	Zanzibar Channel
Pailolo Channel	Samsoe Belt	
Pervyy Kuril'sky Provliv	Santa Barbara Channel	
Pescadores Channel	Sapudi Strait	
Pohai Strait		

**More than Twenty-four Miles in Width (60)**

Alenuihaha Channel	Gorlo Strait	Preparis South Channel
Amami Passage	Great Channel	Providence Channel, Northeast
Amchitka Pass	Grenada-Tobago Passage	Providence Channel, Northwest
Amundsen Gulf	Guadeloupe Passage	Provliv Bussol
Amutka Pass	Hormuz, Strait of	Provliv Dmitrya Lapteva
Anegada Passage	Hudson Strait	Provliv Karskiye Vorota
Balut Channel	Jamaica Passage	Provliv Kruzenshterna
Bashi Channel (Luzon Strait)	Kamchatsky Provliv	Provliv Longa
Cabot Strait	Karimata Strait	Provliv Sannikova
Caicos Passage	Kauai Channel	Provliv Tatarskiy
Chetvertyy Kuril'sky Provliv	Korea Strait, East	Provliv Vil'kitskogo
Corsica-Elba Passage	Lancaster Sound	St. George's Channel [U.K.-Ireland]
Crooked Island Passage	Makassar Strait	Sicily, Strait of
Davis Strait	Malta Channel	Silver Bank Passage
Denmark Strait	M'Clure Strait	Sumba Strait
Detroit d'Honguedo	Mona Passage	Ten Degree Channel
Dixon Entrance	Moxambique Channel	Viscount Melville Sound
Eight Degree Channel	Otranto, Strait of	Windward Passage
Florida, Straits of, East	Pemba Channel	Yucatan Channel
Florida, Straits of, South	Preparis North Channel	
Formosa Strait	Preparis North Channel	

Source: Alexander, at 202-3.

**TABLE A2-6**

**Straits, Less Than 24 Miles in Least Width, in Which There Exists a Route Through the High Seas or an Exclusive Economic Zone of Similar Convenience With Respect to Navigational or Hydrographical Characteristics**

Andikithiron Strait—4 (Greece)	The Hole—14 (U.K.)	Nares Strait—4 (Denmark)
Bahrain-Qatar Passage—13 (Bahrain/Qatar)	Kadet Channel—12 (Denmark/F.R.G.)	North Channel—5 (U.K.)
Banks Strait—3 (Australia)	Karpathos Strait—11 (Greece)	Old Bahama Channel—3 (Bahamas)
Bass Strait—17 (Australia)	Kasos Strait—11.8 (Greece)	Osumi-kaikyo—11 (Japan)
Bornholmsgat—6.5 (Denmark)	Kennedy Channel—4.5 (Denmark)	Robeson Channel—2 (Denmark)
Bristol Channel—4 (U.K.)	Korea Strait West—7 (South Korea/Japan)	Samsøe Belt—1 (Denmark)
Dover Strait—6 (U.K.)	Little Minch—3 (U.K.)	Soya-kaikyo—7.5 (Japan/Russia)
Entrance to Gulf of Finland—3.4 (Finland)	Mayaguana Passage—14 (The Bahamas)	Tsugaru-kaikyo—4 (Japan)
Fehmarn Belt—4 (Denmark/ Germany)	Mouchoir Passage—17 (U.K.)	Turks Island Passage—12 (U.K.)

Distance given is for least width of the belt of high seas/EEZ, assuming current breadths claimed for territorial seas continue. Countries named are those off whose coasts the belt of high seas/EEZ exists.

Source: Alexander, at 206.

**TABLE A2-7**

**States Whose EEZ Proclamations and/or National Laws Appear Inconsistent with the Convention Provisions Regarding Freedoms of Navigation and Overflight**

Bangladesh—a, c, f	Indonesia—c	Russia—d
Burma—e	Ivory Coast—f	Samoa—c, f
Cape Verde—b, c, f	Kampuchea—c	Sao Tome & Principe—a
Colombia—a, c, e	Kenya—c	Seychelles—d, e, f
Comoros—a, c	Malaysia—a, c	Spain—f
Cook Islands—a, c, f	Maldives—a, d	Sri Lanka—c
Costa Rica—a	Mauritania—d	Suriname—a, f
Cuba—a	Mauritius—d, e	Togo—a, c
Dominican Republic—a	Mexico—a	Trinidad & Tobago—a
Fiji—a	Mozambique—a, c	United Arab Emirates—a
France—c	New Zealand—a, c	Uruguay—b
Guinea-Bissau—a, c	Nigeria—a, d	Vanuatu—c, e
Guyana—a, d, e	Norway—a, f	Venezuela—a
Haiti—b	Oman—a, c	Vietnam—c
Iceland—c	Pakistan—d, e, f	Yemen (Aden)—e
India—d, e	Portugal—f	

- a. States silent on the question of residual rights in their EEZ.
- b. States claiming possession of residual rights in their EEZ.
- c. States whose EEZ proclamations and/or national laws are silent on foreign rights to navigation and overflight in their EEZ.
- d. States whose EEZ proclamations and/or national laws allow the government to regulate the navigation of foreign vessels in the EEZ or in nationally designated zones of the EEZ (see Table A2-8 (p. 2-89)).
- e. States claiming "exclusive jurisdiction" over environmental protection in their EEZ.
- f. States having special formulations with respect to environmental protection in their EEZ.

Source: Alexander, at 91.

## TABLE A2-8

### State Proclamations Regarding Navigation and Overflight in and over the EEZ

- A. States whose EEZ proclamations and/or laws explicitly recognize the right of foreign navigation through and overflight over their national EEZ.

Barbados	Guatemala	Spain
Burma	Ivory Coast	Suriname
Cuba	Mexico	Thailand
Democratic Yemen	Norway	Trinidad and Tobago
Dominica	Philippines	United Arab Emirates (1)
Dominican Republic	Portugal	United States
Grenada	Sao Tome and Principe	Venezuela

- (1) The UAE legislation provides that national rights in the EEZ "shall not prejudice international navigation rights exercised by states in accordance with the rules of international law." It is not clear if this provision applies to aircraft.

- B. States whose EEZ proclamations and/or laws are silent on foreign navigation through and overflight over their national EEZ.

Bangladesh	Iceland	Oman
Cape Verde	Indonesia	Sri Lanka
Colombia	Kampuchea	Togo
Comoros	Kenya	Vanuatu
Cook Islands	Malaysia	Vietnam
France	Mozambique	Western Samoa
Guinea-Bissau	New Zealand	

- C. States whose EEZ proclamations and/or laws explicitly allow the government to regulate the navigation of foreign vessels in the EEZ or nationally designed zones of the EEZ (article citations refers to the respective national legislation).

**Guyana:** The President may declare any area of the EEZ to be a designated area and make provisions he deems necessary with respect to "entry into and passage through the designated area of foreign ships by the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of Guyana." [article 18(a) and (b) (vi)]

**India:** The government may provide for regulation of entry passage through designated area "by establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interests of India." [article 7(6) (Explanation)]

**Maldives:** "Ships of all States shall enjoy the right of innocent passage through the territorial waters and other exclusive economic zone of the Republic of the Maldives. . . [No] foreign fishing vessel shall enter its economic zone without prior consent of the Government of the Maldives." [article 1]

**Mauritania:** In its EEZ the rights and freedoms of States with respect to navigation, overflight, the laying of cables and pipelines, as provided for on the high seas, shall not be amended unless they adversely affect the provisions of Article 185 above [treating Mauritania's sovereign rights and jurisdiction in the EEZ] and the security of the Mauritanian State." [article 186]

**Mauritius:** The Prime Minister may provide in designated areas of the EEZ or continental shelf necessary provisions with respect to "the regulation of entry into the passage of foreign ships through the designated area" and "the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interest of Mauritius." [article 9(a) and (b) (vi)]

## TABLE A2-8 (cont.)

Nigeria: The government "may, for the purpose of protecting any installation in a designated area. . . prohibit ships. . . from entering without its consent such part of that area as may be specified." [article 392]

Pakistan: The government may declare any area of the EEZ to be a designated area and make provisions as it deems necessary with respect to "the regulation of entry into the passage through the designated area of foreign ships by the establishment of fairways, sealanes, traffic separation schemes or any other mode of ensuring freedom of navigation which is not prejudicial to the interest of Pakistan." [article 6(a) and (b) (vi)]

Seychelles: The President may declare any area of the continental shelf or EEZ to be a designated area and make provisions as he considers necessary with respect to "the regulation of entry into and passage of foreign ships through the designated area [and] the establishment of fairways, sealanes, traffic separation schemes or any mode of ensuring freedom of navigation which is not prejudicial to the interest of Seychelles." [article 9(a) and (b) (vii)]

Russia: "In connection with certain specifically bounded regions of the economic zone of the USSR in which, for technical reasons connected with oceanographic and ecological conditions, as well as for the use of these regions or for the protection of their resources, or because of the special requirements for navigation in them, it is necessary that special obligatory measures shall be taken to prevent pollution from vessels, such measures, including those connected with navigation practices, may be established by the Council of Ministers of the USSR in regions determined by it. The borders of these special regions should be noted in 'Notification to Mariners'. ." [article 13]

Source: Alexander, at 91-92.