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The Regime of Warships Under the United Nations Convention on the Law of the Sea

BERNARD H. OXMAN*

The United Nations Convention on the Law of the Sea ("Convention")¹ adopted in 1982 is the result of negotiations that began with diplomatic communications between the Soviet Union and the United States and other States in 1966 and 1967. The purpose of these communications was to ascertain whether a basis could be found for convening a new conference on the law of the sea to fix the maximum permissible breadth of the territorial sea at twelve nautical miles, without prejudice to continued maritime mobility through international straits.

This underlying purpose was different from that of Ambassador Pardo of Malta in his 1967 speech in the U.N. General Assembly calling for the establishment of an international regime for the seabeds beyond the present limits of national jurisdiction.² There was a shared concern for the effects of the rapidly increasing extensions of coastal State jurisdiction out to sea. But the objective of the maritime powers engaged in conversation by the Soviet Union was,

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1. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), reprinted in 21 *ILL.M.* 1261 (1982) [hereinafter cited as *Convention*].

2. 22 U.N. GAOR Annex 3 (Agenda Item 92) at 1, U.N. Doc. A/6695 (1967).

unlike Ambassador Pardo's, in a literal sense, conservative: preventing the erosion of the freedoms of the high seas as they had traditionally existed.

Three types of freedoms preoccupied these maritime powers, each to varying degrees: freedom to conduct military activities, freedom of navigation for merchant shipping, and freedom of fishing. Thus, protecting the mobility and use of warships was a central motivating force in organizing the Third United Nations Conference on the Law of the Sea. Indeed, in the end, those maritime countries that had a major interest in preserving freedom of fishing sacrificed that interest in large measure for the purpose of preserving the other freedoms. The Soviet Union is but one example.

Object and Organization

The object of this study is to examine the regime of warships under the 1982 United Nations Convention on the Law of the Sea.³ Many of the provisions relevant to this question may be regarded now, or in the future, as declaratory of customary international law binding on all States irrespective of ratification of the Convention. This may be so because these provisions reiterate the language of provisions in the 1958 Conventions on the Law of the Sea⁴ that had this status, because they codify existing State practice, because they influence subsequent State practice, or because they come to be regarded as decisive evidence of *opinio juris*.⁵ Identification of the specific provisions that may have this dual status is, at this stage, speculative and beyond the scope of this study.

The Convention is not organized by type of ship or, with some exceptions, by type of activity. Most of it is organized by zone. It

3. The study concentrates on changes in the law of the sea affecting the regime of warships. Frequently, no change or only a minor change has been made in provisions copied from the 1958 Conventions on the Law of the Sea. In that case, it will be assumed that the literature regarding the 1958 conventions is either familiar to or readily available to the reader; no attempt will be made to repeat or to summarize it here.

4. The three 1958 Conventions on the Law of the Sea of particular relevance to this study are the Convention on the High Seas, done Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; the Convention on the Territorial Sea and the Contiguous Zone, done Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as Territorial Sea Convention]; and the Convention on the Continental Shelf, done Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

5. See Statement by the President, March 10, 1983, 19 Weekly Comp. Pres. Doc. 383 (Mar. 14, 1983). The author addresses this question in A.W. Koers & B.H. Oxman, *The 1982 Convention on the Law of the Sea* 668-80 (1984).

sets forth legal rights and duties in the context of the regime for each zone. It presents the zones of coastal State sovereignty first, then the zones that may be regarded as intermediate in nature, followed by the full classic high seas regime and a new regime for the international seabed area.

If, in his classic treatise, Professor Gidel⁶ began with the regime of the high seas because it was, at the time, the regime covering the most significant area of the sea, an argument could be made that the inquiry today should commence with the exclusive economic zone. If, on the other hand, as one suspects, Professor Gidel adopted that approach for the purposes of analytical clarity, it remains as useful today. In any event, it is the approach adopted for this study.

The study deals first with provisions of general applicability in the Convention. It then examines rules specific to the regimes seaward of the territorial sea: the high seas, the international seabed area, the exclusive economic zone and the continental shelf. It concludes with internal waters, the territorial sea, straits, and archipelagos.

A Note on War and Peace

To the extent one continues to divide public international law into the two classic categories — the laws of war and the laws of peace — the Convention on the Law of the Sea would doubtlessly fall within the latter category. This is so in the sense that the rules of armed conflict and neutrality are not addressed by the Convention.

At the same time, the Convention does contain rules for dividing the oceans into different jurisdictional zones. Some of the rules of warfare and neutrality vary with the status of geographic areas. The integration of the new regimes of the law of the sea with the rules of naval and air warfare is accordingly a subject that merits attention. The classic dichotomy in the law of the sea between internal waters and the territorial sea on the one hand, and the high seas on the other, has yielded to new subtleties and modalities, particularly in the regimes of straits, archipelagic waters, the exclusive economic zone, and the continental shelf. To these are added broad new duties to protect and preserve the marine

6. G. Gidel, *Le droit international public de la mer* (1934).

environment.

A detailed analysis of the implications of these changes for the laws of war is, however, beyond the scope of this study. Still, it must be noted that it would be contradictory to conclude that the maritime powers that strove so long, hard and successfully to preserve maximum freedom for military activities at sea in times of peace envisaged that the new regimes of the law of the sea entailed significant new restrictions on their freedom of operation in times of armed conflict.

I. PROVISIONS OF GENERAL APPLICABILITY

1. *The Definition of Warships*

Article 29 of the Convention on the Law of the Sea contains the following definition:

For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.⁷

7. Convention, *supra* note 1, art. 29. The definition specifically uses the word "Convention" rather than "Part" or "Section." It would appear that the correct view is that the definition, as expressly stated in its text, applies to the entire Convention.

Article 29 appears in part II of the Convention, which deals with the territorial sea and contiguous zone, and more precisely, in section 3 of that part, which deals with innocent passage in the territorial sea. It might perhaps be argued that the definition is therefore applicable only to the regime of innocent passage. Proponents of this view may note that the Convention begins with a general article 1 on use of terms throughout the Convention. However, article 1 of the Convention contains very few definitions, and these only from first committee texts on deep seabed mining, third committee texts on marine pollution, and the final clauses. Efforts in the drafting committee of the Conference to move additional definitions of general applicability to article 1 did not succeed.

The basic legal rule on immunity of warships in article 8, paragraph 1, of the Convention on the High Seas is copied verbatim into article 95 of the 1982 Convention. It would indeed be anomalous to assume that a decision was made to exclude the definition of warships in article 8, paragraph 2, of the Convention of the High Seas from application to the new high seas regime and to add it to the new territorial sea regime, with no apparent reason. Moreover, since the 1958 Convention on the High Seas was originally part of a single set of articles on the entire law of the sea as prepared by the International Law Commission in 1956, there is reason to believe that the definition was intended from the beginning to apply to all of the sea, not just the high seas. See Report of the International Law Commission to the

This definition is drawn from article 8, paragraph 2, of the 1958 Convention on the High Seas.⁸ Like its predecessor, article 29 does not require that a ship be armed to be regarded as a warship. The most significant change is that a ship no longer need belong to the "naval" forces of a State, 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 to "armed forces" is designed to accomodate the integration of the 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 States.

This definition is of importance only when the Convention distinguishes between rules applicable to warships and rules applicable to other ships. Warships are a special subclass of government ships operated for noncommercial purposes, which are themselves a subclass of ships.⁹

Whether or not the definition in article 29 is a functional one, one may infer therefrom that a warship is regarded as a political and military instrumentality of the State. To the extent the Con-

General Assembly, 11 U.N. GAOR Supp. (No. 9) at 1, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 253, U.N. Doc. A/CN.4/SERA/1956.

8. Article 8, paragraph 2, provides:

For the purposes of these articles, the term "warship" means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

Convention on the High Seas, *supra* note 4, art. 8, para. 2.

9. Thus, for example, since the pollution exception in article 236 of the Convention applies to warships as well as any other vessel owned or operated by a State and used for the time being only on government noncommercial service, the precise line of demarcation between warships and other government noncommercial ships is of no special significance in interpreting and applying that article.

The Convention uses the terms "ship" and "vessel" indiscriminately in its English text, emphasizing the former in texts derived from the 1958 Conventions on the Law of the Sea and the latter in texts derived from various marine pollution conventions. The distinction made in the English text does not appear in the official Arabic, Chinese, French, Russian, or Spanish texts, although the Russian text itself uses two different words where the other texts, including the English, do not. There was broad agreement within the drafting committee of the Conference on including a provision in article 1 that the terms "ship" and "vessel" and the two Russian terms have the same meaning, but the difficulties in translating such a provision into languages which did not use two different terms in the text and the annoyance of some language groups at the inability of the English and Russian language groups to select a single word led to the conclusion that it was unnecessary to make the point in any event.

vention contains special legal rules affecting warships as distinguished from other ships, we would expect these rules to deal with:

- the political or military activities of one State directed at another;
- the law enforcement activities of one State directed at the nationals of another; and
- the immunity of the political and military instrumentalities of a State from the jurisdiction of any other State.

2. *The Prohibition on the Threat or Use of Force*

Article 301 of the Convention sets forth a prohibition on the threat or use of force drawn from article 2, paragraph 4 of the Charter of the United Nations.¹⁰ It is applicable to all activities dealt with by the Convention. It states:

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.¹¹

Particularly in view of article 103 of the U.N. Charter,¹² this provision would not seem to add anything (except perhaps emphasis) to the existing obligations of States. The issue is whether additional legal consequences attach to violations of these obligations under the Convention.

10. Article 2, paragraph 4, provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

U.N. Charter art. 2, para. 4.

11. Convention, *supra* note 1, art. 301. A similar obligation is included in article 19, paragraph 2(a), regarding the meaning of innocent passage and article 39, paragraph 1(b), regarding the duties of ships and aircraft while exercising the right of transit passage.

12. Article 103 provides:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

U.N. Charter art. 103.

One such consequence is that the Convention provides in principle for the compulsory arbitration or adjudication of disputes between States regarding its interpretation or application. On the other hand, a State is free to file a declaration excluding military activities or disputes before the U.N. Security Council from this dispute-settlement obligation.¹³

It may perhaps be argued that an otherwise lawful exercise of a right under the Convention would be rendered unlawful if the purpose were an unlawful threat or use of force. Like the question of third-party dispute settlement, this too becomes a question of the consequences of violation — or more accurately, the consequences of an alleged violation. In particular, the question is whether responses to the threat or use of force may be taken other than those authorized by the U.N. Charter, which allows individual or collective self-defense in the event of armed attack or enforcement measures authorized by the U.N. Security Council.¹⁴ Since the prohibition on the threat or use of force in the Law of the Sea Convention is a cross-reference to the Charter, it follows that the answer to this question is in the negative absent additional provisions in the Convention. The use of force against a military instrumentality of a foreign State — that is a warship of a foreign State — in a situation or manner not authorized by the Charter, is itself a violation of both the Charter and the Convention, even if the purpose is to deal with an alleged violation of the Charter and the Convention.

This seemingly obvious point can be overlooked if one makes the error of thinking of the issue in terms of "law enforcement." That term is properly applied to the relationship between a government and persons or ships subject to its enforcement jurisdiction. An attempt to exercise law enforcement jurisdiction against a foreign warship is in fact an attempt to threaten or use force against a sovereign instrumentality of a foreign State. That is primarily the subject matter of the law regarding the maintenance of international peace and security, not the law of the sea as such — with a notable qualification in the case of innocent passage in the territorial sea, which will be discussed later in this study.

13. Convention, *supra* note 1, arts. 286, 298. For further discussion on this matter, see *infra* text accompanying notes 38-43.

14. See U.N. Charter arts. 39-51.

3. *Immunities of Warships*

Article 32 of the Convention provides as follows:

With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.¹⁵

Article 32 is derived from article 22 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.¹⁶

One difference between the two provisions is that article 32 uses the words "nothing in this Convention" while article 22 says "nothing in these articles," limiting its applicability to articles dealing with internal waters, the territorial sea and the contiguous zone. Since both article 8 of the 1958 Convention on the High Seas and article 95 of the 1982 Convention expressly provide for the complete immunity of warships on the high seas from the jurisdiction of any State other than the flag State, and since article 95 of the 1982 Convention also applies within the exclusive economic zone (pursuant to article 58), article 32 cannot be regarded as applying to the high seas and economic zone regimes in the sense that it would nullify the effect of article 95.

This change in text relates to two structural considerations. First, if article 32 used the word "Part" rather than "Convention," it would narrow the scope of applicability of the rule. Subjects such as passage through straits used for international navigation, which are dealt with in the 1958 Territorial Sea Convention,¹⁷ are not dealt with in part II of the Convention containing the articles on the territorial sea, but rather in another part.¹⁸ The subject matter of part IV of the Convention, archipelagic baselines and archipelagic passage, although not addressed in the 1958 Territorial Sea Convention because the concept was rejected at that time, clearly falls within the scope of subjects dealt with by the 1958

15. Convention, *supra* note 1, art. 32.

16. Article 22 provides:

1. The rules contained in sub-section A and in article 18 shall apply to government ships operated for non-commercial purposes.

2. With such exceptions as are contained in the provisions referred to in the preceeding paragraph, nothing in these articles affects the immunities which such ships enjoy under these articles or other rules of international law.

Territorial Sea Convention, *supra* note 4, art. 22.

17. See *id.* art. 14.

18. See Convention, *supra* note 1, pt. III.

Territorial Sea Convention.

The second structural consideration is related but somewhat broader. The 1958 conference divided the International Law Commission's unified articles on the law of the sea into four conventions.¹⁹ Only two were of particular relevance to the regime of warships, namely the Territorial Sea Convention and the High Seas Convention. The 1982 Convention reproduces the substance of much of those two conventions in only two of its seventeen parts and nine annexes, others of which also affect the regime of warships. Accordingly, the use of the term "Convention" avoids the possibility of ambiguity.

Another difference between the two provisions is that article 22 of the 1958 Territorial Sea Convention does not refer to warships. Although as a logical matter it may be maintained that warships are a subset of the category of government ships operated for non-commercial purposes, article 22 appears in a sub-section entitled "Rules Applicable to Government Ships Other Than Warships," and is followed by a different subsection entitled "Rule Applicable to Warships." The rule contained in the latter subsection, substantially repeated in article 30 of the 1982 Convention, provides that if a warship does not comply with a request to respect coastal State regulations regarding passage through the territorial sea, the coastal State may require the warship to leave the territorial sea. The power to require departure from its territory is of course the classic remedy for a State that lacks enforcement jurisdiction over the sovereign agent or instrumentality of a foreign State, be it a diplomat or a warship.

Compared with the ringing declaration of "complete immunity from the jurisdiction of any state other than the flag state" for government noncommercial ships on the high seas in article 9 of the Convention on the High Seas,²⁰ the formulation "nothing in this Convention affects"²¹ seems somewhat less decisive. This is because, in 1958, there was some difference of opinion regarding the scope and the effect of the immunities of government noncommercial ships other than warships when in the territorial sea. The ad-

19. In addition to the three conventions cited *supra* note 4, there was also the Convention on Fishing and Conservation of the Living Resources of the High Seas, done Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

20. Convention on the High Seas, *supra* note 4, art. 9. This article was copied into article 96 of the 1982 Convention.

21. Convention, *supra* note 1, art. 32.

dition of warships to this clause in the 1982 Convention does not, however, reflect any dispute regarding the scope or effect of the immunity of warships. Rather, it reflects a common opinion that the rules of international law regarding immunity of warships and government noncommercial ships will continue to apply. This explains the deletion of the arguably illogical reference to "the immunities which such ships enjoy under these articles" that appears in article 22 of the 1958 Territorial Sea Convention.²² It does not, however, explain the deletion of the reference to international law in article 32.

As a purely textual matter, the last preambular paragraph of the 1982 Convention compensates for the deletion of the reference to international law, as it affirms "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."²³ The deletion reflects a general (although not consistent) allergy toward references to international law in the Convention by representatives of developing countries who, for unrelated reasons, fought such references in the U.N. Charter of Economic Rights and Duties²⁴ and in the U.N. Declaration of Principles regarding the seabeds beyond the limits of national jurisdiction.²⁵ Both the context of article 32 and the preambular provision cited suggest that no change in legal result is mandated by the deletion of the reference to international law.

The "exceptions" referred to in article 22, paragraph 2, of the 1958 Territorial Sea Convention are all included in the "exception" for sub-section A referred to in article 32 of the 1982 Convention.²⁶ Sub-section A contains the rules regarding innocent passage in the territorial sea applicable to all ships. The point being made is that immunity from enforcement jurisdiction of the coastal State does not excuse a warship from the duty to respect the provisions of the Convention regarding the regulation of innocent passage. The word "exception" is not the best word that could have been selected to convey the nature of this cross-reference.

Article 32 of the new Convention also contains two other cross-

22. Territorial Sea Convention, *supra* note 4, art. 22.

23. Convention, *supra* note 1, art. 30.

24. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 52, U.N. Doc. A/9631 (1974).

25. G.A. Res. 2749, 25 U.N. GAOR Supp. (No. 28) at 24, U.N. Doc. A/8028 (1970) [hereinafter cited as Declaration of Principles].

26. Compare Territorial Sea Convention, *supra* note 4, arts. 14-18 with Convention, *supra* note 1, arts. 17-26, 30, 31.

references in its list of "exceptions." The first, to article 30, is a cross-reference to the rule that the coastal State may require a warship to leave the territorial sea if it does not comply with a request to respect regulations regarding innocent passage.²⁷ Again, the word "exception" was not the best choice.

The final "exception" refers to a provision added by the 1982 Convention regarding international responsibility of the flag State for any loss or damage to the coastal State resulting from non-compliance with innocent passage regulations by warships or non-commercial government ships.²⁸ This too is hardly an exception to the rule of immunity. It is a legal consequence of the fact which gives rise to the immunity in the first place, namely that the warship is a sovereign instrumentality of the flag State.

4. *The Protection and Preservation of the Marine Environment*

The change in the preoccupations of governments between the time that the 1958 Conventions on the Law of the Sea were completed and the time that the 1982 Convention was completed is no more evident than in the extensive provisions in the 1982 Convention on the protection and preservation of the marine environment. A large and elaborate part of the Convention is devoted to this subject.²⁹ It begins with an uncharacteristically categorical statement that "States have the obligation to protect and preserve the marine environment."³⁰ In addition, the chapters dealing with individual regimes applicable to particular geographic areas contain extensive environmental protection provisions.³¹

27. The text of article 30 provides:

If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.

Convention, *supra* note 1, art. 30.

28. Article 31 provides:

The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law.

Id. art. 31.

29. *Id.* pt. XII.

30. *Id.* art. 192.

31. See *id.* arts. 19, para. 2(h); 21, para. 1; 22, para. 2; 23, para. 2(b); 42, para. 1(b); 43, para. b; 56; 79, para. 2; 94, para. 3; 123; 145; 240, para. d; 266, para. 2; 277, para. c; 290; 297,

Accordingly, the "warship exception" contained in article 236 is of particular significance:

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.³²

This article goes further than providing warships with immunity from enforcement by a State other than the flag State. Warships are declared exempt from the provisions of the Convention, including the duties imposed by the Convention to observe national and international regulations, regarding the protection and preservation of the marine environment.

Article 236 was adopted for several reasons. Pollution regulations of a general character, including international regulations, may be inappropriate to the special configuration or mission of certain warships.³³ It was also feared that coastal States, in the exer-

para. 1(c).

32. *Id.* art. 236. The word "or" appears after "naval auxiliary" in the International Convention for the Prevention of Pollution from Ships, done Nov. 2, 1973, art. 3, I.M.C.O. Doc. MP/CONF/WP.35, reprinted in 12 I.L.M. 1319 (1973). It was erroneously omitted from the English text of article 236.

The text was originally copied correctly. Informal Single Negotiating Text, pt. III, art. 42, IV Third United Nations Conference on the Law of the Sea: Official Records 137, U.N. Doc. A/CONF.62/WP.8 (1975) [hereinafter cited as Official Records]. When a reference to aircraft was added the next year, the "or" was omitted in the Revised Single Negotiating Text, pt. III, art. 45, and was never replaced. V Official Records 125, U.N. Doc. A/CONF.62/WP.8/Rev. 1 (1976). The French text of article 236 uses the conjunction "ni" after the reference to naval auxiliaries. All of the other provisions of the English text dealing with ships entitled to sovereign immunity make clear that a general reference to "ships" or "vessels" is qualified by the clause "owned or operated by a State and used, for the time being, only on government non-commercial service," or its equivalent. See, e.g., Convention, *supra* note 1, arts. 31; 32; 42, para. 5; 96. In light of these factors, as well as the punctuation of article 236 in English and the absurd result of regarding the reference to "other vessels" as unqualified, the difficulty created by the omission of the word "or" is purely grammatical, not legal.

33. This was the reason for the inclusion of the predecessor of article 236 in the International Convention for the Prevention of Pollution from Ships, *supra* note 32, art. 3.

cise of powers to prevent and control pollution from foreign ships, could thereby acquire leverage over warship passage in general, and the passage of nuclear warships in particular. A question regarding the compliance of a warship with a particular standard might require the inspection or release of data regarding the ship, its design or its equipment — data which most flag States would be reluctant to disclose.

Because warships were not considered a substantial source of marine pollution, and because the rules of sovereign immunity would have restricted the possibilities of enforcement against the will of the flag State in any event, there was no significant opposition to article 236. Moreover, given the political mission of naval vessels that operate far from their home shores in peacetime, it was not considered unrealistic to expect a high degree of self-imposed environmental diligence by major flag States in any event.³⁴

34. As in the case of article 29, discussed *supra* note 5, it may be argued that since article 236 appears in part XII of the Convention ("Protection and Preservation of the Marine Environment"), it applies only to the provisions of that part.

A closer examination of pollution provisions in other parts of the Convention is necessary to assess this argument:

— Of the geographic regimes applicable seaward of the territorial sea that contain anti-pollution provisions, those in article 56 of part V on the exclusive economic zone are merely a cross-reference to part XII, and those in part XI and its related annexes on deep seabed mining affect, by definition, only exploration and exploitation of mineral resources of the area, activities not relevant to warships.

— In so far as innocent passage in the territorial sea is concerned, the elaborate treatment of this issue in part XII, article 211, paragraph 4, and article 220, paragraph 2, the express cross-reference to part II, section 3 of the Convention in article 211, paragraph 4, and the reverse cross-reference from part II to part XII in article 19, paragraph 2(h), and the chapeau of article 21, paragraph 1, would render exceedingly awkward any attempt to isolate the applicability of article 236 to the provisions of part XII.

— The right of transit passage in straits in article 38 and the right of archipelagic sea lanes passage in archipelagic waters in article 53 are more liberal than the right of innocent passage in the territorial sea but more restricted than the full freedom of navigation beyond the territorial sea. It would be difficult to justify an argument that article 236 applies to both the freedom of navigation and the right of innocent passage, but does not apply to the transit passage and archipelagic sea lanes passage regimes.

Just as the Convention does not contain an article for all generally applicable definitions, it does not contain a single chapter dealing with all provisions applicable to the entire Convention. The brief part XVI entitled "General Provisions" is a collection of a few items left over largely from Second Committee negotiations that were placed in a separate part in order to avoid reopening substantive negotiations in the Second Committee. In fact, part XII itself is a chapter of general applicability to the Convention on the subject of protection and preservation of the marine environment.

5. *The Disclosure of Sensitive Information*

Under Article 302, nothing in the Convention "shall be deemed to require a State Party . . . to supply information the disclosure of which is contrary to the essential interests of its security."³⁵ Such a provision obviously applies to the construction, equipment, armaments, manning and capabilities of most warships. It also applies, at least some of the time, to their location, operations, and mission.

Article 302 is based on article 223, paragraph 1(a), of the 1957 Treaty of Rome establishing the European Economic Community.³⁶ The most significant difference is that an objective test — disclosure of information "is" contrary to the essential security interest of a State — was substituted for a subjective test — the State "considers" such disclosure to be contrary to those essential interests.

During discussion of this change, two points were made. First, there was opposition to reproducing the text verbatim from the Treaty of Rome because only a few States controlled its history and interpretation. Second, there is no difference in the application of the two formulae, since a State cannot be expected to disclose the information to foreigners — including judges not subject to its security laws and procedures — for purposes of reviewing its determination. The reason for the difference is to emphasize the need to make a good faith determination as required by the general "good faith" provision of article 300.³⁷

Accordingly, there would appear to be little if any basis for concluding that article 236 means anything other than what it expressly states, namely that it applies to the entire Convention, and accordingly to all international and national environmental regulations referred to therein. Whether such an exclusion may be invoked by non-parties to the Convention as a rule of customary international law is a question beyond the scope of this essay.

35. Convention, *supra* note 1, art. 302.

36. Article 223, paragraph 1(a) provides:

No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security. . . .

Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 223, para. 1(a), 298 U.N.T.S. 11.

37. Article 300 provides:

States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

Convention, *supra* note 1, art. 300.

6. *Dispute Settlement*

Subject to certain exceptions regarding coastal State jurisdiction over natural resources and other matters, all disputes between States relating to the interpretation or application of the Convention that have not been settled by other means, and that are not subject to binding third-party arbitration or adjudication under another treaty, are subject to binding arbitration or adjudication under the Convention.³⁸ On the other hand, a State party may at any time declare that it excludes certain categories of disputes from this dispute-settlement obligation, including *inter alia*:

- disputes concerning military activities, including military activities by government vessels and aircraft engaged in noncommercial service;³⁹

- disputes concerning coastal State law enforcement activities with regard to marine scientific research or fisheries in its economic zone;⁴⁰

- disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in the Convention.⁴¹

Since the text of the Convention distinguishes between military activities and law enforcement activities, it would appear that law enforcement activities that are neither military activities, nor an exercise of coastal State enforcement rights over marine scientific research or fisheries in the exclusive economic zone, are subject to compulsory, third-party settlement.

The most important situation in which this might occur is one in which it is alleged that a warship of a coastal State, not engaged in military activities but attempting to enforce coastal State regulations, has acted in contravention of the provisions of the Convention in regard to freedom of navigation. The exclusion of law enforcement activities applies only to coastal State law enforcement

38. Id. arts. 282, 286.

39. Id. art. 298, para. 1(b).

40. Id. See also id. art. 297, paras. 2-3.

41. Id. art. 298, para. 1(c).

activities in regard to the exercise of fishery and marine scientific research rights.⁴² Disputes regarding the exercise by the coastal State of its sovereign rights or jurisdiction are subject to third-party settlement when it is alleged that the coastal State has acted in contravention of the freedoms and rights of navigation of another State.⁴³

Thus, the arbitrary or unwarranted boarding, search or arrest of a foreign merchant ship navigating in the economic zone by a warship or coast guard vessel of the coastal State in a law enforcement situation would be subject to compulsory, third-party settlement on grounds of unlawful interference with navigation. This result was considered particularly important in order to protect freedom of navigation while also according broad new pollution enforcement rights to coastal States in the economic zone.

A nice question is posed as to whether a boarding in the economic zone on grounds of suspicion of piracy would constitute a military activity subject to exclusion of third-party settlement, or a law enforcement activity subject to compulsory, third-party settlement. The issue would appear to be whether liability can be assigned for loss or damage caused by seizure and, perhaps, boarding and inspection effected without adequate grounds where the ship has not committed any act justifying the suspicions. The textual question is whether "law enforcement" is exclusively, or merely primarily, a reference to the exercise of coastal State jurisdiction rather than universal enforcement jurisdiction.

It should be noted that while many substantive provisions of the Convention may be (or may come to be) regarded as declaratory of customary international law binding on all States whether or not party to the Convention, submission to compulsory, third-party dispute-settlement procedures is generally thought to require express agreement.

II. AREAS SEAWARD OF THE TERRITORIAL SEA

1. *The High Seas*

The regime of the high seas applies to "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic wa-

42. Id. art. 298, para. 1(b). See also id. art. 297, paras. 2-3.

43. Id. art. 297, para. 1(a).

ters of an archipelagic state."⁴⁴ Much of that regime also applies within the exclusive economic zone to the extent it is not incompatible with the provisions on the exclusive economic zone.⁴⁵

The basic principle of the freedom of the high seas is set forth in article 87⁴⁶ which is based on article 2 of the 1958 Convention on the High Seas.⁴⁷ However, subparagraphs 1(d) and 1(f) of the new article 87 refer to freedoms that are not expressly mentioned in the old article 2. Moreover, while the chapeau of article 87, paragraph 1, retains the words "*inter alia*," indicating that the list of freedoms is not exhaustive, paragraph 2 substitutes a reference to "the freedom of the high seas" for the reference to "[t]hese freedoms,

44. Id. art. 86.

45. Id. art. 58.

46. Article 87 provides:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Id. art. 87.

Part VI of the Convention deals with the continental shelf. Part XIII of the Convention deals with marine scientific research.

Pursuant to definitions in articles 1 and 133 of the Convention, "activities in the Area" means all activities of exploration for, and exploitation of, the mineral resources of the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.

47. Article 2 of the Convention on the High Seas provides:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas;

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Convention on the High Seas, *supra* note 4, art. 2.

and others which are recognized by the general principles of international law" in the 1958 Convention.⁴⁸ While the reason for the change is not clear,⁴⁹ the retention of the words "*inter alia*" suggests either that the change has no legal significance or that it eliminates the need for demonstrating that a non-enumerated freedom is "recognized by the general principles of international law."⁵⁰

Warships of course do much more than point-to-point navigation characteristic of merchant ships. In the context of the high seas beyond the exclusive economic zone, whether one regards these activities as embraced by the word "navigation" — as submerged navigation certainly is — or by the words "*inter alia*" is largely a matter of taste. This question acquires greater significance in the context of the exclusive economic zone and will be addressed in that context.

Article 87 and most of the other high seas articles of the 1982 Convention substantially repeat the provisions of the 1958 Convention on the High Seas. The preamble of the Convention of the High Seas expressly declares itself to be a codification of long-standing customary international law.⁵¹ This supports the conclusion that warships, absent specific new restraints to the contrary, remain free in principle to do the things that warships have customarily done, including maneuvers, patrol, anchoring, surveillance, and weapons exercises. Since the warship is a political and military instrumentality of the State, it is assumed that the warship is engaged, or may well be engaged, in an activity of a political or military nature directed at one or more other States.

The mere fact that warships enjoy a broad range of freedoms in principle does not mean that they, any more than other ships on the high seas, may ignore the rights of others who use the high

48. *Id.*

49. It was possibly related to the dispute as to whether seabed mining seaward of the continental shelf could be regarded as a freedom of the high seas under customary international law.

50. Convention on the High Seas, *supra* note 4, art. 2.

51. The preamble provides:

The States Parties to this Convention,
Desiring to codify the rules of international law relating to the high seas,
Recognizing that the United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958, adopted the following provisions as generally declaratory of established principles of international law,
Have agreed as follows

Id. preamble.

seas. Thus all freedoms of the high seas must be exercised "with due regard for the interests of other States in their exercise of the freedom of the high seas" and rights in the international seabed area.⁵² It would appear that physical interference with the operation of foreign ships, as well as damage to the object of their activities, would come within the scope of this rule. However, it is not mere interference or damage that is prohibited, but interference without due regard for the interests of the other State or States involved: a balancing of interests in the use of the seas is required.

Like other ships owned or operated by a State and used only on government noncommercial service, warships on the high seas "have complete immunity from the jurisdiction of any State other than the flag state."⁵³ A warship may not be boarded, even on suspicion of piracy, unless the crew has mutinied, taken control of the ship, and committed acts of piracy.⁵⁴

The right of visit on the high seas is — or more accurately was — unique to warships. That right has now been extended to military aircraft and "to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service."⁵⁵ The circumstances justifying a visit are set forth in article 110, paragraph 1, of the Convention.⁵⁶

52. Convention, *supra* note 1, art. 87, para. 2. The change from "reasonable regard" in the English text of article 2 of the 1958 Convention on the High Seas to "due regard" in the English text of the 1982 Convention is the result of a retranslation of the Spanish term "debida consideracion" (which is the Spanish equivalent of "reasonable regard" in the Convention on the High Seas) as "due regard" or "due consideration" in proposed Second Committee texts originally drafted by Spanish-speaking delegates. There was no suggestion that the change was substantive. On the other hand, paragraphs 1 and 3 of article 147, a First Committee text, were drawn directly from proposals by the United States, and thus retained the "reasonable regard" terminology. In this connection, it should be noted that articles 87, paragraph 2, and 147, paragraph 3, in part address the same duty, but use "due regard" and "reasonable regard" respectively to express that duty.

53. *Id.* art. 95.

54. *Id.* art. 102.

55. *Id.* art. 110, para. 5. This extension is arguably a technical correction, conforming to a similar extension with respect to piracy in the 1958 Convention on the High Seas, arts. 21; 23, paragraph 4. These extensions are probably unnecessary in light of the amendments to the definition of warships in the 1982 Convention, art. 29. The broad drafting of article 110, paragraph 5, may come to be regretted if—as intimated by some British experts—States begin to delegate such police powers to private persons on oil rigs. Private armies died (or should have died) with feudalism; "privateering" at sea died (or should have died) with mercantilism.

56. Article 110, in part, provides:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship enti-

The most significant difference between article 110 and its predecessor, article 22 of the Convention on the High Seas, is the addition of subparagraphs 1(c) and 1(d).⁵⁷ The right of visit under subparagraph 1(c) extends to the warships of any State where transmissions can be received or any State where authorized radio communication is suffering interference.⁵⁸ They may proceed to arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus.⁵⁹

Warships, military aircraft, and "other ships or aircraft clearly marked and identifiable as being on government service"⁶⁰ may "seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board."⁶¹ The police powers of the warship in this respect derive not from any particular right of the flag State, but rather from the impracticality — or some modern commentators might say the inefficiency — of allocating this right only to particular States. The necessity of suppressing private violence in the vast open areas of the sea, combined with this impracticality, gave

tled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under Article 109;
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

Id. art. 110, para. 1.

57. Another more technical change is that the clause in article 110, "a foreign ship, other than a ship entitled to complete immunity in accordance with Articles 95 and 96," id. art. 110, replaced the 1958 phrase "a foreign merchant ship," Convention on the High Seas, *supra* note 4, art. 22. One might also note that the 1982 Convention uses the English neuter pronoun "it," rather than the feminine "she," in references to a ship. Female delegates from a variety of English-speaking countries supported the change. The British delegation, representing a female head of State and a female head of government, took no position on the issue.

58. Convention, *supra* note 1, art. 109. The main significance of this amendment sought by EEC member States is its incorporation by reference into the economic zone regime. Id. art. 58, para. 2. In that area, its extension to installations is arguably unnecessary in light of, and arguably qualified by, the exclusive jurisdiction of the coastal State over installations and structures used for economic purposes. Id. art. 60, para. 1(b).

59. Id. art. 109, para. 4. Broadcasting is unauthorized if it is "intended for reception by the general public contrary to international regulations" (excluding distress calls). Id. art. 109, para. 2.

60. Id. art. 107.

61. Id. art. 105.

rise to the duty of all States to "cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."⁶²

An attempt was made at the Conference to extend this universal jurisdiction to cover illicit traffic in narcotic drugs and psychotropic substances. This effort was complicated by the fact that there is some lawful traffic in many of these drugs and substances, that some may be carried for purposes of medical treatment of persons on board, and that the definition of the terms "narcotic drugs" and "psychotropic substances" has been extended so far that it is probable that, unknown to those responsible for the ship, some such substance may be in the possession of crew members or passengers aboard a large number of ships, whether for purposes of consumption or traffic. Accordingly, it was feared that there was too much potential for abuse and harassment, either in good faith or as a pretext.

Thus, the Convention is limited in principle to a general requirement that States cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances on the high seas contrary to international conventions, and to providing that a flag State may request the cooperation of other States to suppress such traffic.⁶³ Clearly, a warship may board a vessel at the request, or with the consent, of the State whose flag the vessel is flying. Thus, bilateral and regional arrangements that permit boarding, inspection and seizure of ships suspected of unlawful trafficking in drugs may be used, and are now common in the Western Hemisphere. One must also bear in mind the clarification in article 110 that a warship may board a foreign ship if there is reasonable ground for suspecting that the ship is without nationality.⁶⁴ In this connection, a ship which sails under two or more flags, flying them according to convenience, may be assimilated to a ship without nationality.⁶⁵ This provision, like bilateral boarding arrangements, can be of significant aid in controlling the illegal drug trade at sea.

2. *Reservation for Peaceful Purposes*

The 1982 Convention provides that the high seas "shall be re-

62. Id. art. 100.

63. Id. art. 108.

64. Id. art. 110, para. 1(d).

65. Id. art. 92.

served for peaceful purposes."⁶⁶ This provision also applies to the economic zone.⁶⁷ Much has been written on the question of the meaning of the term "peaceful purposes" as used in various international instruments. Such an analysis is beyond the scope of the present study; nevertheless, some comments on the matter are in order.

Similar provisions previously appeared in the Antarctic Treaty,⁶⁸ the Outer Space Treaty,⁶⁹ and the United Nations General Assembly declaration on the seabed beyond the limits of national jurisdiction.⁷⁰ In the Antarctic Treaty and the Outer Space Treaty, the "peaceful purposes" language is followed immediately by specific prohibitions on military fortifications, military maneuvers, and testing of weapons. In the Declaration of Principles governing the seabed beyond the limits of national jurisdiction, it was contemplated that specific military prohibitions would be agreed upon in the context of arms control negotiations. This was done, and resulted in the treaty banning the emplacement of nuclear weapons and other weapons of mass destruction on the seabed.⁷¹

This history would seem to indicate that a "peaceful purposes" clause does not, in and of itself, have specific *arms control* content.⁷² Moreover, the preamble of the Convention does not identify

66. Id. art. 88.

67. Id. art. 58, para. 2.

68. The Antarctic Treaty, Dec. 1, 1959, art. I, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

69. Treaty on principles governing the activities of states in the exploration and use of outer space, including the moon and other celestial bodies, opened for signature Jan. 27, 1967, art. IV, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 [hereinafter cited as Outer Space Treaty].

70. Declaration of Principles, *supra* note 25, at 24.

71. Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof, done Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337, 955 U.N.T.S. 115 [hereinafter cited as Seabed Arms Control Treaty].

72. On the other hand, it can be argued that there are implications in the Antarctic and Outer Space treaties that the term is not devoid of all meaning. The sentence immediately following the "peaceful purposes" clause in the Antarctic treaty states, "There shall be prohibited, *inter alia*, any measures of a military nature, such as" Antarctic Treaty, *supra* note 68, art. I. What informs the meaning of "*inter alia*"? In the Outer Space Treaty, the "peaceful purposes" clause applies only to the moon and other celestial bodies, not to outer space. Outer Space Treaty, *supra* note 69, art. IV. A negative implication of content in the "peaceful purposes" clause derived from its geographically restricted use in the Outer Space Treaty is nevertheless confused by the fact that the Outer Space Treaty expressly prohibits the stationing of nuclear weapons and other weapons of mass destruction in outer space, to which the "peaceful purposes" clause does not as such apply; yet the prohibition

arms control as one of its objectives.⁷³ In that regard its purpose differs significantly from the Antarctic and Outer Space treaties.

It would presumably be common ground that the "peaceful purposes" clause, if it has legal content, prohibits military activities inconsistent with the U.N. Charter. The question is whether other military activities are prohibited, particularly in light of the Convention's general prohibition on the threat or use of force contrary to the U.N. Charter.⁷⁴ To be more precise, the question is: if the "peaceful purposes" clause has legal content beyond a prohibition on military activities inconsistent with the U.N. Charter, but is not a specific arms control measure as such, what are the other possibilities?

The size and complexity of the Convention is intrinsic evidence that a one-sentence reference to peaceful purposes, applicable to all activities of all States, including coastal States, in both the exclusive economic zone and the high seas beyond, and therefore in all of the seas and oceans seaward of the territorial sea, was not intended to impose new legal restraints on military activities at sea. The history of the military use of the sea is measured in millennia. As the Antarctic and Outer Space treaties indicate, legal restraints on military activities, even in areas where substantial military activities have not previously occurred, require more detail than a single sentence. If there is anything that is clear from the legislative record of the Conference on the Law of the Sea, it is

on emplacement of nuclear weapons and other weapons of mass destruction in the Seabed Arms Control Treaty was precisely the specific implementation of the "peaceful purposes" clause in the U.N. Declaration of Principles on the seabeds beyond the limits of national jurisdiction.

73. The most relevant of the specific preambular paragraphs recognizes:

the desirability of establishing . . . a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources and the study, protection and preservation of the marine environment

Convention, *supra* note 1, preamble.

The very next preambular paragraph begins, "*Bearing in mind* that the achievement of such goals will contribute to the realization of a just and equitable international *economic* order" *Id.* (emphasis added). The contribution to "the strengthening of peace, security, cooperation and friendly relations among all nations" is effected not by any specific rules, but by the overall "codification and progressive development of the law of the sea achieved in this Convention." *Id.* The preamble concludes by "*[a]ffirming* that matters not regulated by this Convention continue to be governed by the rules and principles of general international law." *Id.*

74. See *supra* text accompanying notes 10-11.

that one of the primary motivations of the major maritime powers in negotiating a new Convention was to protect the broadest possible freedom to conduct military activities at sea. It is unlikely that they would have agreed to legal restraints on those very activities without significant negotiation and detail.

Needless to say, the meaning of the "peaceful purposes" clause in each legal instrument must be interpreted in the context of that instrument. In the context of the Convention, if the clause has any meaning beyond an injunction to observe the prohibitions of the U.N. Charter in conducting military activities at sea, it may be regarded at most as aspirational: a policy goal for States in the conduct of future arms control negotiations in the appropriate fora and context.⁷⁵

To some, this explication of the "peaceful purposes" clause may constitute an indelicate revelation that there is little if any substance to the rhetoric. It is not unlike questioning the pledges of eternal friendship in a freshly negotiated treaty of peace between traditional enemies. To others, shaping rhetoric is a useful first step in setting the agenda for negotiation of the future law, albeit in another setting at another time.

3. *The International Seabed Area*

The international seabed "Area" is defined as "the seabed and

75. For those who prefer to rely more heavily on linguistic nuance, it is notable that article 88 of the Convention says the high seas "shall be reserved for peaceful purposes," without using the word "only" or "exclusively." Convention, *supra* note 1, art. 88. They would contrast this language with article 141 of the Convention, which provides that the international seabed area shall be open to use "exclusively for peaceful purposes," *id.* art. 141, with article 1 of the Antarctic Treaty, which provides that Antarctica shall be used for "peaceful purposes only," Antarctic Treaty, *supra* note 68, art. 1, and with article 4 of the Outer Space Treaty, which provides that the moon and other celestial bodies shall be used "exclusively for peaceful purposes." Outer Space Treaty, *supra* note 69, art. 4.

One practical difficulty with this linguistic approach is that it would require the attribution of greater legal consequences to the "peaceful purposes" proscription in connection with the international seabed area, without any intrinsic or extrinsic evidence to support the distinction or provide guidance as to its nature. The articles on the high seas and the articles on the international seabed area were prepared in separate committees generally attended by different personnel even on smaller delegations. The drafting committee of the Conference operated under great time pressure, and was able to harmonize particular texts only if there was no objection from any quarter. Harmonization of texts emanating from two different committees required delegates in the drafting committee to achieve the agreement of their governments' representatives in both committees, a task that not infrequently entailed insurmountable logistical, political or personality problems. Much was done, but much also could not be done. See, e.g., *supra* note 52.

ocean floor and subsoil thereof, beyond the limits of national jurisdiction."⁷⁶ Except in the unusual case of an isolated uninhabitable rock,⁷⁷ the international seabed area is, in effect, the seabed beyond the seaward limit of the continental shelf of the coastal State as defined in the Convention. That limit is 200 nautical miles from the coastal baselines or the outer edge of the continental margin, whichever is further seaward.⁷⁸ All of the international seabed area therefore lies beneath waters of the high seas.

Virtually all of the provisions regarding the international seabed area are concerned with "activities in the Area."⁷⁹ This term is defined to mean "all activities of exploration for, and exploitation of, the resources of the Area."⁸⁰ Accordingly, these provisions are essentially of no relevance to the regime of warships, except that under article 87, and the companion provision in article 147, paragraph 3, the exercise of the freedoms of the high seas must be carried out with due regard (or reasonable regard) for rights with respect to "activities in the Area."

Article 87 expressly refers to high seas freedoms that involve use of the seabed, such as laying of cables and pipelines and constructing artificial islands and installations, and implies other such uses (for example, anchoring).⁸¹ A question therefore may arise as to whether the provisions regarding the international seabed area, aside from those dealing with exploration and exploitation of mineral resources, are inconsistent with the high seas regime or, to be more specific, with the exercise of high seas freedoms by warships involving the use of the seabed.

The basic provisions on the international seabed area that are not expressly limited to the question of exploration and exploitation of mineral resources are articles 136,⁸² 137,⁸³ 138,⁸⁴ and 141.⁸⁵

76. Convention, *supra* note 1, art. 1, para. 1(1).

77. *Id.* art. 121.

78. *Id.* art. 76.

79. *Id.* art. 1, para. 1(3).

80. *Id.*

81. For the text of article 87, see *supra* note 46.

82. Article 136 provides:

The Area and its resources are the common heritage of mankind.

Convention, *supra* note 1, art. 136.

83. Article 137, in part, provides:

No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

There is also an article on marine scientific research, which provides that "States parties may carry out marine scientific research in the Area," contains its own "peaceful purposes" provision, and encourages international cooperation in marine scientific research.⁸⁶

Article 137 is a more elaborate analog of the prohibition on claims of sovereignty on the high seas contained in article 89.⁸⁷ The "open to use" clause of article 141 parallels the statement in article 87⁸⁸ that the high seas are open to all States. The "peaceful purposes" clause of article 141 parallels the provision of article 88⁸⁹ that the high seas shall be reserved for peaceful purposes, which has already been discussed. The marine scientific research provisions⁹⁰ are an abbreviated statement of those that apply to all marine scientific research under part XIII, sections 1 and 2.⁹¹

This leaves only the "common heritage" principle of article 136. The most serious question posed by the "common heritage" principle is whether activities specifically regulated by the provisions of the Convention regarding the international seabed area — and particularly those activities for which authorization from the Inter-

Id. art. 137.

84. Article 138 provides:

The general conduct of States in relation to the Area shall be in accordance with the provisions of this Part, the principles embodied in the Charter of the United Nations and other rules of international law in the interests of maintaining peace and security and promoting international co-operation and mutual understanding.

Id. art. 138.

85. Article 141 provides:

The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this Part.

Id. art. 141.

86. Id. art. 143. The issues posed are discussed elsewhere in connection with the "peaceful purposes" clause on the high seas, see *supra* text accompanying notes 41-49, and marine scientific research in the exclusive economic zone and on the continental shelf, see *infra* text accompanying notes 133-43.

87. Article 89 provides:

No State may validly purport to subject any part of the high seas to its sovereignty.

Convention, *supra* note 1, art. 89.

88. For the text of article 87, see *supra* note 46.

89. Article 88 provides:

The high seas shall be reserved for peaceful purposes.

Convention, *supra* note 1, art. 88.

90. Id. art. 143.

91. Id. arts. 238-244.

national Seabed Authority is required — may be conducted outside, or in a manner inconsistent with, the Convention system. Since the provisions of the Convention regarding the international seabed area contain no specific regulation of, or restraints on, the activity of warships or other military activities, other than those that apply under the regime of the high seas, resolution of that question has no bearing on the matters being addressed in this essay.⁹²

Accordingly it would appear that there is nothing in the provisions regarding the international seabed area that is inconsistent with the exercise of high seas freedoms by warships.

4. *The Exclusive Economic Zone*

There are a number of provisions in the Convention regarding the exclusive economic zone that are relevant to this inquiry.⁹³ The activities that may be conducted by all States without coastal State consent or control are enumerated in article 58, paragraphs 1

92. The issue would arise of course in the unlikely event that a warship engaged in exploration or exploitation of mineral resources.

93. See, e.g., the following articles. Article 55 provides:

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Id. art. 55.

Article 57 provides:

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Id. art. 57. Pursuant to article 3 of the Convention, the landward limit of the exclusive economic zone is a maximum of 12 miles from the coastal baseline.

Article 59 provides:

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

Id. art. 59.

Article 86 provides:

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

Id. art. 86.

and 2.⁹⁴ Those two paragraphs are therefore the basic source for ascertaining the legal rights of warships in the economic zone.

The activities in the economic zone requiring the consent of, and subject to the control of, the coastal State are identified in article 56, paragraph 1(a), and in the articles to which paragraphs 1(b) and 1(c) refer.⁹⁵ However, as previously discussed, pursuant to article 236, provisions regarding the protection and the preservation of the marine environment do not apply to warships.⁹⁶

94. Article 58 provides:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

Id. art. 58.

Article 87 sets forth the freedoms of the high seas. Articles 88 to 115 comprise all of part VII on the high seas except for articles 86, 87 and the provisions of section 2 on the conservation and management of living resources.

95. Article 56 provides:

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

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

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.

Id. art. 56

96. See *supra* text accompanying notes 32-34.

Article 58, paragraph 1, incorporates the high seas freedoms "referred to in article 87"⁹⁷ into the regime of the exclusive economic zone with one major difference: article 58 contains its own list of the high seas freedoms applicable in the economic zone, and that list is not left completely open-ended by the words "*inter alia*." While article 58 does not contain the article 87 references to the freedoms of fishing, scientific research, and the construction of artificial islands and installations, it repeats the article 87 references to the freedoms of navigation, overflight, and the laying of submarine cables and pipelines. Article 58 then adds a reference to "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention."⁹⁸ In so far as warships are concerned, this new clause is, in effect, the functional substitute for the "*inter alia*" in article 87.

Many activities are traditionally carried out by warships at sea. Are they covered by the words "navigation," "overflight," or the "laying of submarine cables and pipelines"? To the extent that they are not, it is difficult to imagine an activity of warships that is not "related to these freedoms." The rights of the warship in this regard must be analyzed in terms of its function. The warship is not a merchantman transporting goods or persons from point to point. Its primary mission is to remain and patrol the very "highways" and "outlands" that the merchantman hopes to traverse as quickly and expeditiously as possible, in part so as to keep those areas safe for the merchantman. So long as there is no unlawful use or threat of force and the warship acts with "due regard" for the rights of the coastal State and other States to use the sea, the subjective question of whether the warship is a welcome visitor is outside the scope of legal inquiry.

To put the matter differently, warships in principle enjoy freedom to carry out their military missions under the regime of the high seas subject to three basic obligations: (1) the duty to refrain from the unlawful threat or use of force; (2) the duty to have "due regard" to the rights of others to use the sea; and (3) the duty to observe applicable obligations under other treaties or rules of international law. The same requirements apply in the exclusive eco-

97. Convention, *supra* note 1, art. 58, para. 1. For the text of article 87, see *supra* note 46.

98. Convention, *supra* note 1, art. 58, para. 1.

conomic zone, with the addition of an obligation to have "due regard to the rights and duties of the coastal State" in the exclusive economic zone.⁹⁹

It is essentially a futile exercise to engage in speculation as to whether naval maneuvers and exercises within the economic zone are permissible. In principle, they are. States simply never agreed to abandon such rights in all the semi-enclosed seas of the world, including all those bordering Europe and Arabia, for example. The relevant inquiry is whether the particular activity in a particular place is consistent with the "due regard" obligation. For example, it would be difficult to justify a weapons exercise that does significant damage to a valuable natural resource being exploited by the coastal State in the economic zone. On the other hand, a coastal State's political or military interest in avoiding the presence of the warship is not in itself reflected in its economic zone rights under article 56,¹⁰⁰ and accordingly is not an object of the "due regard" obligation of the flag State.

The "high seas" nature of the rights and obligations enjoyed by warships in the economic zone is strongly reinforced by the provisions of article 58, paragraph 2.¹⁰¹ That paragraph incorporates all of the substantive provisions of the high seas regime into the economic zone regime except for the enumeration of freedoms in article 87 (since article 58, paragraph 1, contains its own enumeration) and provisions on fishing (since there is no freedom of fishing in principle in the exclusive economic zone), unless those provisions are incompatible with the economic zone provisions. In particular, there would appear to be nothing in the rule regarding the complete immunity of warships from the jurisdiction of any other State,¹⁰² the rule regarding the duty to render assistance,¹⁰³ the

99. Id. art. 58, para. 3. Because of a technical problem in the cross-reference provisions of article 58, paragraph 2, of the Convention, the rule that the freedoms of the high seas shall be exercised by all States with due regard for the interests of other States in their exercise of the freedoms of the high seas, which appears in article 87, paragraph 2, is not expressly incorporated into the economic zone regime by article 58, paragraph 2. Nevertheless, article 58, paragraph 1, uses the general term "the freedoms referred to in article 87." Id. art. 58, para. 1. Since the cross-reference is to article 87 as a whole, it can, and obviously should, be read as incorporating the basic restraint on the freedoms set forth in paragraph 2 of article 87.

100. For the text of article 56, see *supra* note 95.

101. For the text of article 58, see *supra* note 94.

102. Convention, *supra* note 1, arts. 95-96.

103. Id. art. 98.

rule prohibiting the transport of slaves,¹⁰⁴ or the rules regarding the nationality and administration of ships,¹⁰⁵ piracy,¹⁰⁶ submarine cables and pipelines,¹⁰⁷ narcotic drugs,¹⁰⁸ or the right of visit¹⁰⁹ that are "incompatible" with the provisions of part V on the exclusive economic zone.¹¹⁰ Hot pursuit lawfully commenced elsewhere may proceed through the exclusive economic zone of a foreign State until the territorial sea is reached.¹¹¹

Under article 58, paragraph 3, while exercising their rights and performing their duties in the exclusive economic zone, States are required to comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention and compatible rules of international law.¹¹² The textual antecedent of this provision is article 17 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.¹¹³ It refers to a situation in which the right or freedom to conduct an activity is subject to some regulation by the coastal State.

In the exclusive economic zone, this situation may arise in two circumstances. First, and most importantly, the coastal State has the right, with respect to ships exercising the freedom of navigation in the exclusive economic zone, to take certain measures to enforce internationally approved regulations regarding the discharge of pollutants in the exclusive economic zone as well as its own regulations regarding the dumping of wastes in the zone.¹¹⁴

Second, pursuant to article 79, which applies in effect to all of the seabed within the economic zone, the coastal State's duty not to impede the laying or maintenance of submarine cables and pipe-

104. Id. art. 99.

105. Id. arts. 91-94, subject to arts. 97; 220, para. 6.

106. Id. arts. 100-07.

107. Id. arts. 112-15.

108. Id. art. 108.

109. Id. art. 110.

110. Id. arts. 55-75.

111. Id. art. 111.

112. For the text of article 58, see *supra* note 94.

113. Article 17 provides:

Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation.

Territorial Sea Convention, *supra* note 4, art. 17.

114. Convention, *supra* note 1, arts. 210; 211, paras. 5-6; 216; and 220, paras. 3-7. In addition, in ice-covered areas, the coastal State may adopt and enforce its own laws and regulations to prevent pollution from ships. Id. art. 234.

lines on the continental shelf is "subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources, and the prevention, reduction and control of pollution from pipelines."¹¹⁵ Moreover, the delineation of the course for laying pipelines on the seabed is subject to coastal State consent.¹¹⁶

None of the foregoing provisions would appear to be generally relevant to the activities of warships. Thus the "laws and regulations" clause of article 58, paragraph 3, need not detain us further for purposes of this study.

In principle, the right to authorize the conduct of an activity in the economic zone is expressly attributed to:

115. *Id.* art. 79, para. 2. Article 79 provides in full:

1. All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article.

2. Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.

3. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.

4. Nothing in this Part affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.

5. When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

Id. art. 79.

116. *Id.* art. 79, para. 3. Some may argue that there is another category, namely the exercise of reasonable regulatory authority to ensure that ships exercising the freedom of navigation do not engage in activities that require coastal State consent, particularly fishing. For example, may the coastal State require fishing boats exercising freedom of navigation in the economic zone to stow their gear in the same manner as fishing boats exercising the right of innocent passage through the territorial sea?

The basis for analysis of this question is not article 58, paragraph 3, of the Convention. There is no general power to regulate navigation for the purpose of facilitating the enforcement of coastal State rights over other activities.

The basis for analysis of this question is the right of the coastal State to enforce its exclusive sovereign rights over exploitation of natural resources. It may be reasonable for the coastal State, in exercising those powers, to indicate that the failure of fishing boats navigating in the zone to conform to standard and relatively simple gear stowage practices will give rise to a presumption that further investigation for possible fishery violations is merited.

Moreover, it should be recalled that fishing vessels of States that desire to engage in fishing in the economic zone of a particular coastal State may be subject to gear stowage and other restrictions designed to facilitate enforcement of coastal State fishery regulations as a condition of permission to fish in the zone.

- (a) the coastal State pursuant to article 56 and the articles referred to therein;
- (b) all States pursuant to article 58 and the articles referred to therein; or
- (c) neither.

These categories are mutually exclusive. If it appears that an activity may be covered by both articles 56 and 58, then it is the task of the lawyer to decide which is properly applicable. If, on the other hand, it appears that an activity is not properly regarded as being within the ambit of either article 56 or article 58, then the matter is dealt with pursuant to the "residual rights" provision of article 59.¹¹⁷

It is not likely that the types of activities with which this essay is concerned would be subject to the sovereign rights of the coastal State with respect to exploration and exploitation of natural resources or with respect to other activities for the economic exploitation and exploration of the zone. Interference with the exercise of those rights raises a question of the "due regard" obligation of the flag State under article 58, not the regulatory rights of the coastal State under article 56 (except in the specific instance of installations to be discussed presently).

The remaining coastal State rights in the economic zone are to be found not in article 56, but in the articles to which article 56, paragraphs 1(b) and 1(c), refer. As has already been noted, jurisdiction with respect to protection and preservation of marine environment is not directly relevant to this inquiry. That leaves artificial islands, installations and structures as well as marine scientific research.

It should be noted before proceeding that the coastal State has the exclusive right to authorize and regulate "drilling" on the continental shelf "for all purposes" under article 81. Since the continental shelf as defined in article 76 itself embraces the seabed area within 200 miles of the coast, the ensuing discussion applies only to activities that do not involve "drilling."

5. Artificial Islands, Installations and Structures in the Economic Zone

The first potential conflict arises between the freedoms and

117. For the text of article 59, see *supra* note 93.

rights of all States under article 58¹¹⁸ and the exclusive rights of the coastal State under article 60.¹¹⁹ There is a basic distinction of course between objects engaged in navigation and overflight (the ship and aircraft being paradigms) and "artificial islands, installations and structures." That distinction may on occasion pose some nice questions, but it normally need not detain us for the purposes of this inquiry.

We are also presented with a potential conflict between the freedom to lay "submarine cables and pipelines" in article 58 and the jurisdiction of the coastal State over "installations and structures" in article 60. In this instance, taking into account the interpretive canon that the specific governs the general, it is reasonable to conclude that "submarine cables and pipelines" within the meaning of article 58 are not "installations and structures" within the meaning of article 60. This conclusion is reinforced by the fact that the rights of the coastal State with respect to submarine cables and pipelines are separately elaborated in article 79.¹²⁰

The more serious issue arises with respect to the right of all States under article 58 to enjoy "other internationally lawful uses of the sea related to" the freedoms of navigation, overflight and the laying of submarine cables and pipelines. Unlike the enumerated freedoms themselves, the right to engage in other activities related to these freedoms relates to "uses . . . compatible with the other provisions of this Convention."¹²¹ To what extent does that right include the deployment and use of objects that are not properly regarded either as engaged in navigation or overflight (for example, maneuvering, being towed or free floating) or as submarine cables and pipelines? With respect to such objects, two questions are posed. First, are they "installations" or "structures" within the meaning of article 60? Second, if they are, are they within the cate-

118. For the text of article 58, see *supra* note 94.

119. Article 60 provides, in part, as follows:

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

(a) artificial islands;
(b) installations and structures for the purposes provided for in article 56 and other economic purposes;
(c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

Convention, *supra* note 1, art. 60, para. 1.

120. For the text of article 79, see *supra* note 115.

121. Convention, *supra* note 1, art. 58, para. 1.

gories of installations and structures covered by article 60, paragraphs 1(b) and 1(c)? If the answer to both of these questions is in the affirmative, then acknowledging both the premise that the specific governs the general and the compatibility requirement, it is generally reasonable to conclude that the objects are governed by article 60 and are subject to exclusive coastal State jurisdiction.

With respect to the first of these two questions, the category including "artificial islands, installations and structures" suggests substantial objects both in terms of their size and the duration of their stationary deployment. Under article 60 itself, they are the kinds of objects around which, in principle, a safety zone might be established. These words should be contrasted, for example, with the word "device" in article 19, paragraph 2(f), or the word "equipment" in articles 258 to 262 on marine scientific research.¹²² In this regard, it is particularly notable that article 260 which deals with safety zones around marine scientific research installations, an issue similar to that dealt with in paragraph 5 of article 60,¹²³ is the sole article in the marine scientific research installations series to refer only to "installations" and not to "equipment." Thus, for example, a temporary buoy marker would seem to be more clearly within the scope of article 58 than article 60.

With respect to the second question, it is clear that article 60, paragraph 1(b), does not refer to the specific types of activities with which this essay deals.¹²⁴ Therefore, if an object is properly regarded as an "installation" or "structure," it is subject to the exclusive rights of the coastal State if it falls within paragraph 1(c) of article 60. The issue is whether the installation or structure "may interfere with the exercise of the rights of the coastal State in the zone."¹²⁵ As indicated in the general rule of good faith set forth in

122. Of course, the use of even the smallest and most inconsequential object, even one attached to a ship, may be prohibited if the activity itself (irrespective of the use of an object in connection with that activity) is subject to the exclusive jurisdiction of the coastal State. Thus, for example, in general one may not fish without permission in the economic zone of a foreign State, even from a rowboat using a piece of string.

Whether sailors on board a ship that is equipped neither for substantial fishing nor for substantial stowage of fish may engage in incidental fishing to feed themselves while navigating through the zone is a nice question. In the context of this study, the question is likely to arise infrequently, and then in a setting in which general humanitarian principles and ordinary good sense, rather than the jurisdictional principles of the law of the sea, are likely to determine the outcome.

123. For the text of article 60, see *supra* note 119.

124. See *infra* text accompanying notes 128-38.

125. Convention, *supra* note 1, art. 60, para. 1(c).

article 300,¹²⁶ the question of interference is one to be resolved in good faith in light of the particular circumstances. For example, absent significant long-term damage to resources, one could not properly regard installations and structures of which the coastal State and its nationals are, for the time being, unaware, as interfering with the exercise of the rights of the coastal State in the zone during that time.¹²⁷

6. *Marine Scientific Research in the Economic Zone*

Another potential conflict arises in determining whether an activity related to the acquisition of information at sea constitutes an internationally lawful use of the sea within the meaning of article 58, paragraph 1,¹²⁸ or marine scientific research within the meaning of part XIII.¹²⁹

126. For the text of article 300, see *supra* note 37.

127. Article 60, paragraph 1(c), of the Convention was the result of a compromise between those who favored the establishment of coastal State jurisdiction over installations and structures only of an economic nature and those who favored coastal State jurisdiction over all installations and structures. The compromise is based on the case of *United States v. Ray*, 423 F.2d 16 (5th Cir. 1970), in which the United States persuaded the court to enjoin foreign nationals from constructing a gambling casino in an area where permanent damage would be done to a coral reef, a living resource of the continental shelf.

128. Convention, *supra* note 1, art. 58, para. 1. For the text of article 58, see *supra* note 94.

129. Relevant provisions in part XIII follow.

Article 244 provides, in part:

1. States and competent international organizations shall, in accordance with this Convention, make available by publication and dissemination through appropriate channels information on proposed major programmes and their objectives as well as knowledge resulting from marine scientific research.

Id. art. 244.

Article 246 provides, in part:

1. Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention.

2. Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State.

3. Coastal States shall, in normal circumstances, grant their consent for marine scientific research projects by other States or competent international organizations in their exclusive economic zone or on their continental shelf to be carried out in accordance with this Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind.

Id. art. 246, paras. 1-3.

Article 248 provides:

States and competent international organizations which intend to undertake

Serious issues of classification arise in this connection only with respect to efforts to obtain information about the natural marine environment. Efforts to obtain intelligence about the activities of

marine scientific research in the exclusive economic zone or on the continental shelf of a coastal State shall, not less than six months in advance of the expected starting date of the marine scientific research project, provide that State with a full description of:

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

Id. art. 248.

Article 249 provides, in part:

1. States and competent international organizations when undertaking marine scientific research in the exclusive economic zone or on the continental shelf of a coastal State shall comply with the following conditions:

(a) ensure the right of the coastal State, if it so desires, to participate or be represented in the marine scientific research project, especially on board research vessels and other craft or scientific research installations, when practicable, without payment of any remuneration to the scientists of the coastal State and without obligation to contribute towards the costs of the project;

(b) provide the coastal State, at its request, with preliminary reports, as soon as practicable, and with the final results and conclusions after the completion of the research;

(c) undertake to provide access for the coastal State, at its request, to all data and samples derived from the marine scientific research project and likewise to furnish it with data which may be copied and samples which may be divided without detriment to their scientific value;

(d) if requested, provide the coastal State with an assessment of such data, samples and research results or provide assistance in their assessment or interpretation;

(e) ensure, subject to paragraph 2, that the research results are made internationally available through appropriate channels, as soon as practicable;

(f) inform the coastal State immediately of any major change in the research programme;

(g) unless otherwise agreed, remove the scientific research installations or equipment once the research is completed.

Id. art. 249, para. 1.

Article 258 provides:

The deployment and use of any type of scientific research installations or equipment in any area of the marine environment shall be subject to the same conditions as are prescribed in this Convention for the conduct of marine scientific research in any such area.

Id. art. 258.

foreign governments, ships and nationals (as contrasted with their environmental effects) are not normally marine scientific research. While the Convention contains no definition of marine scientific research, this conclusion is reinforced by article 243. That article refers to "the effort of scientists in studying the essence of phenomena and processes occurring in the marine environment and the interrelation between them."¹³⁰ Similarly, the basic consent provision of article 246, paragraph 3, refers to projects "to increase scientific knowledge of the marine environment for the benefit of all of mankind."¹³¹ Article 19, paragraph 2, distinguishes between research activities and acts aimed at collecting information to the prejudice of the defense or security of the coastal State.¹³² Even marine archaeology is dealt with separately.¹³³

Collection of military intelligence regarding foreign activities at sea, in brief, is a use related to the exercise and protection of the freedoms of navigation and overflight and the laying of submarine cables and pipelines within the meaning of article 58, paragraph 1.¹³⁴ It does not constitute marine scientific research within the meaning of the Convention.

The significant question is whether all gathering of information regarding the natural marine environment is marine scientific research within the meaning of the relevant articles. The text of the Convention itself makes clear that it is not. Exploration of natural resources is consistently treated differently from marine scientific research.¹³⁵ Hydrographic survey is referred to separately from, and in addition to, marine scientific research.¹³⁶ Article 204 deals separately with monitoring the risks or effects of pollution.

130. *Id.* art. 243.

131. *Id.* art. 246, para. 3.

132. For the text of article 19, see *infra* note 151.

133. Convention, *supra* note 1, arts. 149, 303. Article 303 limits coastal State rights over marine archaeology to the 24-mile contiguous zone.

134. On the basis of State practice, it would be difficult to maintain that mere observation and listening are not "internationally lawful." If more than mere observation and listening is involved, questions may arise regarding the obligation to have due regard to the interests of other States in their exercise of their freedoms and rights at sea, or even the obligation to respect the territorial sovereignty of a foreign State on land. Such questions are beyond the scope of this essay.

135. See Convention, *supra* note 1, arts. 56, 77. See also the definition of the term "activities in the Area," *id.* art. 1, which largely determines the scope of the regulatory competence of the International Seabed Authority, as contrasted with the article on marine scientific research in the Area. *Id.* art. 143.

136. See *id.* arts. 19, para. 2(j); 21, para. 1(g); 40.

Perhaps most dispositive of this question is the fact that the elaborate disclosure requirements of articles 244, 248 and 249¹³⁷ themselves make it abundantly clear that the marine scientific research provisions cannot apply to secret activities, or activities intended to generate information that is to be kept secret. If the object of secrecy is commercial, the coastal State would normally be justified in concluding that the activity in question is commercial exploration subject to its complete discretionary control. If, on the other hand, the reason for the secrecy is military, then the activity is not subject to the jurisdiction of the coastal State regarding marine scientific research. There is no other basis for exercising coastal State jurisdiction because there is no general competence of the coastal State over military activities in the economic zone. Since it may generally be assumed that the secret activities of navies in gathering information regarding the natural marine environment are closely related to the exercise and protection of the freedom of navigation, those activities fall within the purview of article 58, paragraph 1.

Needless to say, navies also conduct or sponsor a great deal of oceanographic research intended for open publication that would of course be covered by the marine scientific research articles and the provisions regarding disclosure and consent.

7. *Residual Rights in the Economic Zone*

The previous discussion has dealt with general classes of activities (deployment of objects, gathering of information) that fall within both article 56 and article 58, necessitating the establishment of refined and principled lines of demarcation of sub-classes. Article 59¹³⁸ deals with the opposite situation, namely one in which an activity does not appear to fall within either article 56 or article 58.

There is a significant danger of error in taking the function of article 59 too literally. The principal attention of the maritime powers in ensuring the continued unimpaired operation of their warships in the economic zone was focused on article 58 rather than article 59. Thus, while the text of article 59 appeared in close to final form in the very first single negotiating text in 1975,¹³⁹ it

137. For the texts of articles 244, 248, and 249, see *supra* note 129.

138. For the text of article 59, see *supra* note 93.

139. Informal Single Negotiating Text, *supra* note 32, pt. II, art. 47, para. 3, IV Official

took two more years to reach agreement on a revised text of articles 56 and 58, the elimination of a geographic definition of the high seas in article 86, and the inclusion of a new article 55 in a manner satisfactory to the major maritime powers.¹⁴⁰

The issue addressed by article 59 is essentially one of principle. Some "territorialist" coastal States maintained that the economic zone should be a zone of coastal State jurisdiction, subject to specific enumerated rights for all States. Others, particularly the major maritime powers, contended that the economic zone should be part of the free high seas open to all, subject to specific enumerated exclusive coastal State rights. Article 59 in effect opts for allocation on the merits of the particular use, rather than on the basis of conceptual status. As the opening of article 55¹⁴¹ on the exclusive economic zone provides, specificity of functional allocation of rights is itself the essence of the exclusive economic zone.

Should the need arise, the principal intrinsic guide to the proper application of article 59 is the general thrust of articles 56 and 58 themselves. The question posed would be whether the activity involved is more akin to the type of activity dealt with in article 56 or in article 58. In this connection, one observes that article 56 generally deals with localized activities of actual or potential economic significance, while article 58 generally deals with communications and military activities.

8. *The Continental Shelf*

The primary significance of the regime of the continental shelf for purposes of this essay is that it applies to uses of the seabed and subsoil of the continental margin where that margin extends seaward of the 200-mile exclusive economic zone. Nevertheless it should be noted that pursuant to article 81, all drilling on the continental shelf, both within and seaward of 200 miles, is subject to coastal State authorization.

The full regime of the high seas is applicable seaward of the 200-mile exclusive economic zone. As previously noted, that regime includes express and implied freedoms of the sea that involve use of the seabed. As with the international seabed area, the question is

Record 159, U.N. Doc. A/CONF.62/WP.8 (1975).

140. See, e.g., Informal Composite Negotiating Text, VIII Official Record 1, U.N. Doc A/CONF.62/WP.10 (1977)(text incorporating revisions).

141. For the text of article 55, see *supra* note 93.

whether there is anything in the regime of the continental shelf which is inconsistent with those high seas freedoms. The answer in this case is different.

While the exclusive sovereign rights of the coastal State over exploration and exploitation of the natural resources of the continental shelf are not particularly relevant to the activities of warships, the coastal State has other rights that do qualify the exercise of high seas freedoms relevant to this inquiry. In particular, the coastal State has essentially the same rights with respect to artificial islands, installations, structures and marine scientific research on the continental shelf as it enjoys in the exclusive economic zone.¹⁴² Thus, the questions of classification that arise in connection with installations and structures as well as marine scientific research in the exclusive economic zone arise in similar form with respect to the continental shelf.¹⁴³ They are of somewhat less significance for purposes of this essay because only uses of the seabed are affected outside the exclusive economic zone.

III. WATERS SUBJECT TO COASTAL STATE SOVEREIGNTY

In conceptual terms, the distinguishing characteristic of waters landward of the exclusive economic zone is that they are in principle subject to the territorial sovereignty of the coastal State. In functional terms, these waters may be divided into three categories:

- 1.) areas where foreign ships do not enjoy a right of passage;
- 2.) areas where foreign ships enjoy a right of passage that may be suspended temporarily for security reasons without discrimination amongst foreign ships; and
- 3.) areas where foreign ships enjoy a right of passage that may not be suspended.

142. Convention, *supra* note 1, arts. 80, 246, 248, and 249. It also has some regulatory powers over submarine pipelines, but not cables. *Id.* art. 79, para. 2.

143. While the coastal State may deny consent for marine scientific research on the continental shelf seaward of 200 miles only in specifically designated areas in which exploitation or detailed exploration operations are occurring or will soon occur, that does not affect the obligations to give notice to the coastal State of the project, provide for its participation, and disseminate results. *Id.* art. 246, para. 6. Accordingly, the restrictions on the consent requirement in areas beyond 200 miles are of no particular relevance to the conduct of military activities of a secret nature.

In the first category are the rivers, small bays, and other "classic" internal waters of the coastal State, as well as so-called "historic bays." Except during an emergency, there is no right to enter these waters without the consent of the coastal State.

In the second category are the territorial sea, waters which are internal only by virtue of the establishment of a system of straight baselines connecting coastal promontories or fringing islands immediately off the coast, and archipelagic waters of an archipelagic State. However straits used for international navigation and archipelagic sea lanes, irrespective of whether the waters are territorial, archipelagic, or internal by virtue of the establishment of a system of straight baselines, are in the third category.

It has already been observed that warships normally do more than point-to-point navigation. From that perspective, the most important characteristic of waters subject to coastal State sovereignty is that activities that are not incidental to passage between one point and another point outside those waters require the consent of the coastal State. To avoid the requirement of consent, passage must also be continuous and expeditious.¹⁴⁴ Ships must refrain from any activity "not having a direct bearing on passage,"¹⁴⁵ or from activities "other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress."¹⁴⁶

This being said, it is important to note that these provisions do not restrict the normal incidents of navigation. Ships do not normally travel in a straight line but take into account seabed topography, currents, weather conditions, availability of navigational aids, and other factors relevant to the safety of the ship and those on board. The classic priority given to safety at sea by the law of the sea is not only maintained by the new Convention, but augmented by a new rule that passage includes stopping and anchoring not only where incidental to ordinary navigation or rendered necessary by *force majeure* or distress, but also "for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."¹⁴⁷

Not only natural factors, but man-made hazards as well, may re-

144. Id. arts. 18, para. 2; 38, para. 2; 53, para. 3.

145. Id. art. 19, para. 2(l).

146. Id. art. 39, para. 1(c) and subject to art. 54.

147. Id. art. 18, para. 2.

quire deviation from straight-line navigation. These may run the gamut from giving fairly wide berth to oil rigs to taking precautions where geographic conditions permit against surprise attack by an unknown and potentially hostile submarine.

1. *Innocent Passage*

"Innocent passage" is the classic right of passage enjoyed by all States in the territorial sea. The 1958 Convention extended the regime of innocent passage to waters which are internal only by virtue of the establishment of a system of straight baselines.¹⁴⁸ The 1982 Convention further extended that regime to archipelagic waters outside archipelagic sealanes.¹⁴⁹ The 1982 Convention however applies the regime of "transit passage" rather than innocent passage to most straits used for international navigation.¹⁵⁰

In so far as warships are concerned, the most salient characteristics of the innocent passage regime are as follows:

- submarines must navigate on the surface;
- there is no right of overflight;
- the coastal State has the right to prevent passage that is not innocent;
- the meaning of innocence is subject to different interpretations; in particular, there has traditionally been disagreement as to whether innocence is to be measured solely by a ship's conduct while in the territorial sea of the coastal State (an objective standard), or also by its flag or mission (a subjective standard);
- the coastal State has certain rights to regulate innocent passage;
- except in straits used for international navigation, innocent passage may be temporarily suspended in specific areas without discrimination amongst foreign ships;
- there has traditionally been a substantial difference of opinion, even among some maritime powers, as to whether the innocent passage of warships may be subject

148. Territorial Sea Convention, *supra* note 4, art. 4.

149. Convention, *supra* note 1, art. 52.

150. *Id.* art. 38.

to a requirement of prior notification to or authorization by the coastal State;

— charges may be levied upon a foreign ship as payment for specific services rendered to the ship.

The 1982 Convention changes this situation in two important respects. First, it adds more detail to the regime of innocent passage. Second, in straits and archipelagic sealanes, instead of the regime of innocent passage, it applies a more liberal passage regime.

In so far as innocent passage is concerned, the most important clarifications concern the meaning of innocence and the scope of coastal State regulatory powers. The relevant provisions are article 19,¹⁵¹ defining innocent passage; article 21,¹⁵² providing the param-

151. Article 19 provides:

1. *Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.*

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

(d) any act of propaganda aimed at affecting the defence or security of the coastal State;

(e) the launching, landing or taking on board of any aircraft;

(f) the launching, landing or taking on board of any military device;

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

(h) any act of wilful and serious pollution contrary to this Convention;

(i) any fishing activities;

(j) the carrying out of research or survey activities;

(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

(l) any other activity not having a direct bearing on passage.

Id. art. 19. (Text substantially copied from the 1958 Territorial Sea Convention is italicized.)

152. Article 21, in part, provides:

1. *The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:*

(a) the safety of navigation and the regulation of maritime traffic;

eters of coastal State laws or regulations governing innocent passage; article 24,¹⁵³ defining the duties of the coastal State; and article 30,¹⁵⁴ allowing an exception for warships.

The new provisions of article 19, paragraph 2, and article 24, paragraph 1(b), are decidedly influenced by an objective, rather than subjective, test for innocence. The chapeau of article 19, paragraph 2, is of particular interest in this regard, since the test for innocence is linked to activities while in the territorial sea, rather than passage itself.¹⁵⁵

(b) the protection of navigational aids and facilities and other facilities or installations;

(c) the protection of cables and pipelines;

(d) the conservation of the living resources of the sea;

(e) the prevention of infringement of the fisheries laws and regulations of the coastal State;

(f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;

(g) marine scientific research and hydrographic surveys;

(h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

...

4. *Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.*

Id. art. 21. (Text substantially copied from the 1958 Territorial Sea Convention is italicized.)

153. Article 24 provides:

1. *The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:*

(a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or

(b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.

Id. art. 24. (Text substantially copied from the 1958 Territorial Sea Convention is italicized.)

154. Article 30 provides:

If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.

Id. art. 30. (Text substantially copied from the 1958 Territorial Sea Convention is italicized.)

155. One finds a certain irony in the fact that while British and Israeli personnel lost their lives in battle against a subjective interpretation of innocent passage and both govern-

The regulatory rights of the coastal State are elaborated with greater specificity in article 21 and, more importantly, are subject to new specific limitations in article 21, paragraph 2, and article 24, paragraph 1, elaborate "safeguards" on the exercise of anti-pollution enforcement powers,¹⁵⁶ and the exclusion of warships from application of pollution regulations.¹⁵⁷

The debate over whether the innocent passage of warships may be subject to a requirement of prior notification to or authorization by the coastal State was vigorously pursued at the Third U.N. Conference.¹⁵⁸ Those who supported such requirements were unsuccessful in obtaining general support for their position, and acquiesced in the plea of the president of the Conference not to force the matter to a vote. The president announced that these delegations "would, however, like to reaffirm that their decision is without prejudice to the rights of coastal States to adopt measures to safeguard their security interests, in accordance with article 19 and 25 of the convention."¹⁵⁹

In the earlier discussion of the general prohibition in article 301 on the threat or use of force contrary to the U.N. Charter, the author concluded that no responses to such a threat or use of force were authorized other than those provided for in the Charter itself (i.e., self-defense and Security Council measures), but noted that the statement must be qualified in the case of innocent passage.¹⁶⁰ Article 19 specifically excludes such a threat or use of force from the definition of innocence; article 25 expressly provides that a coastal State "may take the necessary measures in its territorial

ments finally won their point in the Convention, both refuse to give the Convention the necessary support to ensure a legal victory.

156. See Convention, *supra* note 1, arts. 223-32. See also *infra* note 163.

157. See Convention, *supra* note 1, art. 236.

158. It was not proposed that such requirements would apply in straits or archipelagic sea lanes.

159. U.N. Doc. A/CONF.62/SR.176 (1982). The statement of the Conference President was specifically crafted to be unobjectionable to all, since articles 19 and 25 place the security interest of the coastal State in a carefully limited context. During the Conference's closing session in Jamaica (December, 1982), however, some supporters of notification or authorization requirements made references to the President's statement to reinforce their position. It might be noted that the Conference President, Ambassador T.T.B. Koh of Singapore, has publically adopted a quite different position.

Ambassador Koh stated, "I think the Convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage through the territorial sea, and there is no need for warships to acquire the prior consent or even notification of the coastal State." Address by Ambassador Koh, Duke Symposium on the Law of the Sea (Oct. 30, 1982).

160. See *supra* text accompanying notes 10-14.

sea to prevent passage which is not innocent,"¹⁶¹ and article 30 provides that the coastal State may require a warship to leave the territorial sea for failure to comply with applicable regulations. As previously noted, however, article 19 clearly moves in the direction of an objective test for the determination of "innocence" in terms of specific *conduct* during passage, not in terms of the class or subclass of ship exercising the right of innocent passage.¹⁶² In any event no such powers, however delimited, are given the coastal State in connection with transit passage of straits, archipelagic searoutes passage, or freedom of navigation and overflight in the economic zone.

2. *Transit Passage*

By articulating a specific regime of transit passage for straits used for international navigation between the high seas or exclusive economic zones, the Convention renders both the rules and the uncertainties of the earlier innocent passage regime irrelevant in such straits.¹⁶³

161. Convention, *supra* note 1, art. 25.

162. See *supra* text accompanying note 155.

163. The salient provisions of the Convention in this regard follow.

Article 37 provides:

This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Convention, *supra* note 1, art. 37.

Article 38 provides, in part:

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded

2. Transit passage means the exercise in accordance with this part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Id. art. 38, paras. 1-2.

Article 39 provides, in part:

1. Ships and aircraft, while exercising the right of transit passage, shall:

(a) proceed without delay through or over the strait;

(b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;

(d) comply with other relevant provisions of this Part.

2. Ships in transit passage shall:

As compared with the characteristics of the innocent passage re-

(a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;

(b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

Id. art. 39, paras. 1-2.

Article 41 provides, in part:

1. In conformity with this part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.

...

2. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them.

Id. art. 41, paras. 1-2.

Article 42 provides, in part:

1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

(a) the safety of navigation and the regulation of maritime traffic, as provided in article 41;

(b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;

(c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;

(d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.

2. Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.

...

4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations.

5. The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.

Id. art. 42, paras. 1-2, 4-5.

Article 44 provides, in part:

States bordering straits shall not hamper transit passage . . . There shall be no suspension of transit passage.

Id. art. 44.

Article 233 provides, in part:

However, if a foreign ship other than those referred to in section 10 has committed a violation of the laws and regulations referred to in article 42, paragraph

gime set forth earlier, the salient characteristics of the transit passage regime are as follows:

- there is no requirement that submarines navigate on the surface;
- since the right of transit passage also applies to over-flight, airborne escort is lawful;
- the coastal State does not have the right to prevent passage that is not innocent; in particular, the prohibition on the threat or use of force is set forth as an obligation of the flag State, not a right of the coastal State;
- the question of “innocence” in connection with warships does not arise;
- the coastal State has no unilateral regulatory powers relevant to warships; in particular, pollution regulations do not apply, traffic regulations must be approved by the competent international organization, and the express remedy for violation of coastal State regulations by a warship is not the power to take measures to prevent passage that is not innocent or to require the warship to leave the territorial sea, but rather a diplomatic claim against the flag State;
- transit passage may not be suspended;
- there were neither proposals nor suggestions that any requirement of prior notification or authorization for warships would be applicable to transit passage, even by those who argued that such requirements be applied to innocent passage;
- the cost of navigation and safety aids and special anti-pollution measures should be borne through cooperative agreements between user States and States bordering

1(a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures and if so shall respect *mutatis mutandis* the provisions of this section.

Id. art. 233.

For the relevant provision of section 10 (art. 236), see *supra* text accompanying note 32. Section 7 of the Convention, entitled “Safeguards,” contains restraints on the exercise of pollution enforcement powers designed to protect ship and cargo owners, crews, and producers and consumers.

straits; no reference is made to charges for specific services rendered to the ship.¹⁶⁴

It should be noted that the regime of non-suspendable innocent passage, rather than transit passage, applies in two categories of straits used for international navigation under the 1982 Convention:¹⁶⁵

— straits formed by an island and the mainland of the same State, if there is a route through the economic zone or high seas seaward of the island that is of similar convenience with respect to navigational and hydrographical characteristics; and

— straits used for international navigation between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State (rather than another part of the high seas or an exclusive economic zone).

In addition, special long-standing treaty regimes for particular straits (such as the Turkish straits), rights under the peace treaty between Egypt and Israel,¹⁶⁶ and artificial canals are unaffected by the Convention.¹⁶⁷

3. *Archipelagic Sea Lanes Passage*

Reversing a contrary decision in 1958,¹⁶⁸ the new Convention

164. This omission is arguably without prejudice to the rare case in which liability arises under general principles of law regarding *negotiorum gestio* or unjust enrichment.

165. Convention, *supra* note 1, art. 45.

166. The Egyptian instrument of ratification of the Convention was accompanied by the following declaration:

The provisions of the 1979 Peace Treaty between Egypt and Israel concerning passage through the Strait of Tiran and the Gulf of Aqaba come within the framework of the general 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.

Declarations made upon ratification of the Convention (Egypt), 3 Law of the Sea Bull. 13, 14 (1984).

167. Convention, *supra* note 1, arts. 35, 311.

168. See Report of the International Law Commission to the General Assembly, 11 U.N. GAOR Supp. (No. 9) at 16, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 270, U.N. Doc. A/CN.4/SER.A/1956/Add.1; Certain Legal aspects Concerning the Delimitation of the Territorial Waters of Archipelagos, Evensen, Prep. Doc. No. 15, U.N. Doc. A/CONF.13/18, I Official Records, United Nations Conference on the Law of the Sea

permits an independent island nation to enclose its archipelago with archipelagic baselines of up to 100 (or in a few cases, 125) nautical miles in length, provided that the ratio of water to land in the area thus enclosed is between 1:1 and 9:1.¹⁶⁹ The territorial sea, contiguous zone, economic zone, and continental shelf of such a State are measured seaward of the archipelagic baselines.¹⁷⁰ Within the archipelagic baselines, a new regime of archipelagic waters applies.¹⁷¹ Archipelagic waters, including their airspace and seabed and subsoil, are subject to the sovereignty of the archipelagic State.¹⁷² There are two regimes of passage applicable within archipelagic waters.

The regime of innocent passage is generally applicable throughout archipelagic waters in the same manner as in the territorial sea or internal waters enclosed by a system of straight baselines.¹⁷³ Since the regime of straits into and within the archipelago is subsumed within the broader regime of archipelagic sea lanes passage, the right of innocent passage outside such lanes may be suspended temporarily in archipelagic waters for security reasons, as in the territorial sea outside straits.¹⁷⁴

The more liberal regime of archipelagic sea lanes passage, rather than mere innocent passage, is applicable in archipelagic sea lanes. All ships and aircraft enjoy the right of archipelagic sea lanes passage, which may not be suspended. If the archipelagic State does not designate sea lanes or air routes, that right may be exercised through the routes normally used for international navigation.¹⁷⁵

289, 298 [hereinafter cited as Official Records UNCLOS I], reprinted in U.N. Doc. A/CONF.13/37 (1958); Proposal by the Philippines, U.N. Doc. A/CONF.13/C.1/L.93, III Official Records UNCLOS I 239, reprinted in U.N. Doc. A/CONF.13/39 (1958); Comment by Government of Cuba, U.N. Doc. A/CONF.13/5 (1958) and Add.1 to 4, I Official Records UNCLOS I, 79, 80, reprinted in U.N. Doc. A/CONF.13/37 (1958); Nineteenth Plenary Meeting U.N. CONF. L.O.S., Consideration of the report of the First Committee, U.N. Doc. A/CONF.13/SR.19, II Official Records UNCLOS I 61, 63, reprinted in U.N. Doc. A/CONF.13/38 (1958); Forty-eighth Meeting of the first Committee of the U.N. Conf. L.O.S., U.N. Doc. A/CONF.13.C.1/SR.48, III Official Records UNCLOS I 146, 148, reprinted in U.N. Doc. A/CONF.13/39 at 148 (1958).

169. Convention, *supra* note 1, arts. 46, 47.

170. *Id.* art. 48.

171. *Id.* art. 49. However, internal waters of individual islands, such as rivers and bays, retain their status as such. *Id.* art. 50.

172. *Id.* art. 49.

173. *Id.* art. 52. This does not apply in internal waters such as rivers or bays of an individual island. *Id.* art. 50.

174. *Id.* art. 52.

175. Article 53 defines archipelagic sea lanes passage as follows:

The rules governing the duties of the flag State and the rights of the archipelagic State with respect to the conduct of archipelagic sea lanes passage¹⁷⁶ are identical to those set forth with respect to transit passage of straits used for international navigation.¹⁷⁷

Archipelagic sea lanes, and air routes above them, are designated by the archipelagic State after its proposals have been adopted by the competent international organization. They traverse the archipelagic waters and adjacent territorial sea and must include all normal passage routes used as routes for international navigation or overflight.¹⁷⁸

The lanes are designated by axes traversing the archipelago. Ships and aircraft in archipelagic sea lanes passage may not deviate more than twenty-five nautical miles to either side of the axes and, within that area, may not navigate closer to the coasts of islands bordering the sea lane than ten percent of the distance between such islands.¹⁷⁹

These broad sea lanes were designed, *inter alia*, with a view to

Archipelagic sea lanes passage means the exercise in accordance with this Convention 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 or another part of the high seas or an exclusive economic zone.

Id. art. 53, para. 3.

176. Id. art. 54.

177. See id. arts. 37-44.

The virtual identity of wording used in connection with the regimes of 'transit passage' of straits (drafted first) and 'archipelagic sealanes passage' invites attention to the differences. The term 'rights of navigation and overflight in normal mode' is used in defining archipelagic sealanes passage, whereas the term 'freedom of navigation and overflight' is used in defining transit passage of straits. Many were prepared to use either term in connection with archipelagos. The comment was made that the underlying concept of unimpeded passage through, over, and under the waters would be the same. It would normally be applied in the same way, but certain practical considerations in the application of the concept might be sufficiently different, owing to the narrowness of straits as contrasted with the broad expanses of archipelagic waters, that one should not automatically tie oneself to identical application in all cases. It was also noted that, since the delimitation of the area to which archipelagic sealanes passage applies is dictated by practical considerations and is subject to change, it would be inappropriate to use the term 'freedom.' Read in the context of the two chapters, the difference in wording, if it produces problems at all, seems most likely to produce them for scholars.

Oxman, *The Third United Nations Conference on the Law of the Sea: the 1977 New York Session*, 72 Am. J. Int'l L. 57, 66 (1978).

178. Convention, *supra* note 1, art. 53.

179. Id. art. 53, para. 5.

accommodating the needs of warships and military task forces traversing such extended and exposed routes to employ evasive tactics and to disperse a broad defensive screen of ships, helicopters and fixed-wing aircraft around the heart of the task force. Both the transiting State and the archipelagic State have an interest in avoiding the creation of a tempting target.

IV. CONCLUSION

If there is anything at all surprising about this analysis, it is that there is nothing surprisingly new in the regime of warships under the 1982 Convention. Based on the early debates in the U.N. Seabed Committee in preparation for the Conference, this result was by no means "a foregone conclusion," to use the words of Shakespeare. There were widespread calls for a global organization with comprehensive powers over all ocean uses, pressures for the declaration of zones of peace, demands for seabed demilitarization and restrictions on submarines, nuclear power, and nuclear weapons, and bold assertions (paraphrasing Shakespeare) that we came to bury Grotius, not to praise him.

In addition, if one considers the revolutionary nature of the changes in the jurisdictional map of the sea pursuant to the Convention, one would expect to find some dramatic changes in the rules governing warships. The extension of coastal State sovereignty over broad expanses of archipelagic waters and a twelve-mile territorial sea, the creation of a huge economic zone of 200 nautical miles embracing all the marginal seas of the world, the extension of sovereign rights over the seabed at least to that distance and to the edge of the continental margin beyond, the creation of new environmental duties and coastal State environmental jurisdiction, and the formation of an international organization to control, as drafted, "all activities" in the remaining area of the seabed could have had monumental impact on the regime of warships.

The demilitarization pressures were deflected by liberal use of "peaceful purposes" clauses and cross-references to the prohibitions on the threat or use of force in the U.N. Charter that have little, if any, effect on the legal regime. With respect to all the new regimes or geographical expansions of existing regimes, effects on activities of warships are expressly eliminated or mitigated in each case:

— there is a liberal right of archipelagic sea lanes passage in broad sealanes traversing the newly recognized

archipelagic waters;

— the regime of innocent passage in the expanded territorial sea is made more objective and is replaced by a more liberal regime of transit passage in straits;

— high seas freedoms of navigation, overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, are expressly preserved in the economic zone;

— high seas freedoms are given more explicit protection from infringement by the coastal State in its exercise of continental shelf rights;¹⁸⁰

— warships are excluded from all environmental provisions;

— regulation of the deep seabeds depends on a definition of the term "activities in the Area" that does not cover military activities or marine scientific research.

It will come as no surprise to anyone that the United States was not the only, but certainly the most active, delegation in promoting this result. The irony is that a U.S. administration strongly committed to the expansion of the global military capability of the United States, including its capacity to project naval power, declined to accept the Convention when it was completed in 1982 because of its deep seabed mining provisions. This raises a more profound question regarding the future of the regime of warships. Lying behind the learned and conflicting arguments about the content of the future customary international law of the sea are assumptions about priorities: the will to act in a situation in which law is made, and unmade, by acquiescence. It was the strong priority accorded economic over political or military considerations that influenced the rest of the world to concede to the major powers most of what the latter desired on military issues at the Law of the Sea Conference. In broad terms, the same reasoning could apply to the reshaping of "customary law" in the coming years.

The question is whether the major powers in general, and the United States and Western Europe in particular, are themselves

180. *Id.* art. 78, para. 2. The prohibition on infringement, in addition to unjustifiable interference, and the open-ended reference to navigation and "other rights and freedoms of other States" are new to the 1982 Convention.

beginning to lower the priority they accord naval considerations (particularly the facilitation of global naval mobility and operations) as against economic, environmental, and perhaps even alternative defense considerations in shaping their ocean policies.

If we are witnessing such a change in priorities—dramatized by the U.S., British, and West German decisions not to sign the Convention—then we must expect corresponding changes in the law over time. Ignoring the U.N. and multilateral conferences will not make the pressures for restrictive change disappear, because those institutions are not the only—or even the major—source.¹⁸¹ The pressures are formed in the combination of fear, xenophobia, and the desire for relative advantage that confronts a warship every time it wanders into a foreign region. The “law” at any given time is a balance struck between those pressures and the counter-pressures of the major naval powers on behalf of their fleets. The counter-pressures must be applied on all fronts, political and economic as well as military. If the priorities of the major naval powers shift, so will their relative counter-pressures.

Even if restrictive changes in the law are to occur, we are less likely to notice them in the short run. Those who are closest to the decisions that may in the end produce new restrictions on warships will be the most sensitive to demonstrating clearly that they took no such risk. Thus, in the near term, strong “counter-pressures” on warship issues are likely to characterize the rhetoric, and some actions, of the United States and a few of its maritime allies. The risk will grow as the temporal and political distance increases between those responsible for the decision not to sign the Convention and those who must decide day-to-day issues of priority. If that growing risk is not perceived and dealt with at that stage, the “law” is certain to change (unless the Soviets can contain it, which is doubtful). If future governments do perceive the problem and are able to act effectively to resolve it, then we may see little change, if any.

181. Indeed, the Convention text is evidence of the contrary. Its treatment of warships is substantially more liberal than that found in the legislation of many coastal States, including some maritime powers.