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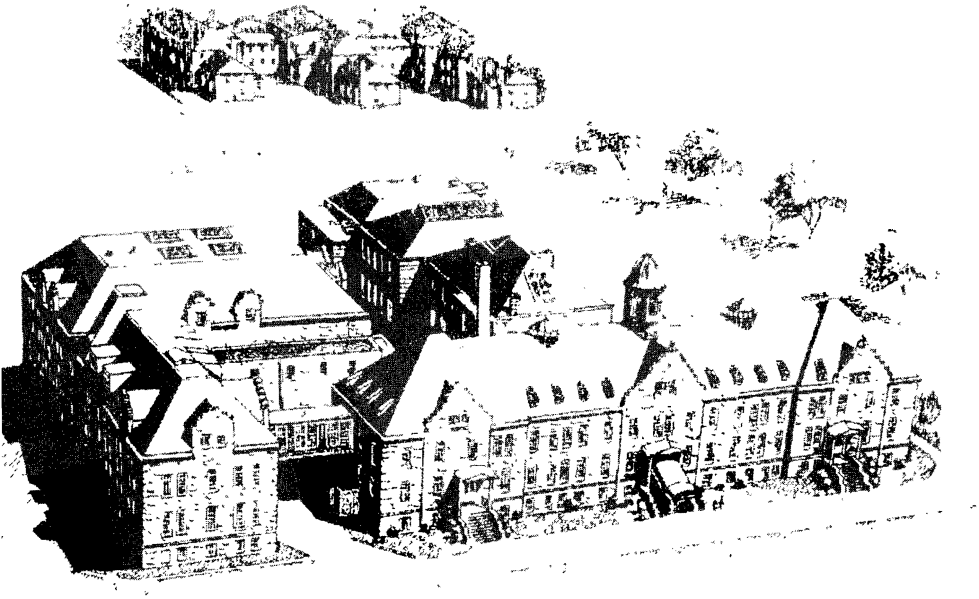
The "New" Law of the Sea and The Law of Armed Conflict at Sea



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The "New" Law of the Sea
and
The Law of Armed Conflict at Sea

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Abstract

The 1982 United Nations Convention on the Law of the Sea establishes a regime for the oceans that includes a number of "zones" in addition to the traditional divisions of internal waters, territorial sea, and high seas. Although explicitly applicable only in peacetime, these new zones have a spillover effect on the law of naval warfare, particularly in the relationships between belligerents and neutral States.

The spillover effect is most pronounced in the expanded territorial sea of twelve nautical miles and in archipelagic States. Mechanical extension of rules that were applicable to a narrow (three-nautical mile) territorial sea to these broader areas of national jurisdiction is likely to create additional tensions between neutrals and belligerents, perhaps widening the areas of conflict and drawing neutrals into it. The study concludes that despite the dangers of such a result, the developing law, as reflected in the military manuals of several maritime States, seems to accept the old rules as applicable to the new and expanded national zones in the oceans.

The "New" Law of the Sea and The Law of Armed Conflict at Sea.[1]

Horace B. Robertson, Jr.

I
Introduction

THE UNITED NATIONS CONVENTION on the Law of the Sea,[2] adopted at the close of the Third United Nations Conference on the Law of the Sea (UNCLOS III) in 1982, created what many conferees and others regard as a new constitution for the oceans. Although it has not yet entered into force,[3] and no major maritime State has ratified it, it has nevertheless had a profound impact on the law of the sea. President Ronald Reagan, while announcing that the United States would neither sign nor become a party to the Convention because its provisions on the mining of the deep seabed were fatally flawed, at the same time stated that, "the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states."[4] The American Law Institute, in its authoritative Third Restatement of the Foreign Relations Law of the United States, went further, stating:

> [B]y express or tacit agreement, accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions of the Convention, other than those addressing deep sea-bed mining, as customary law binding upon them apart from the Convention.[5]

The features of the Convention that have had the most impact on the practice of States are the new or expanded jurisdictional zones[6] recognized in the Convention. These include the twelve-nautical-mile territorial sea, the twenty-four-nautical-mile contiguous zone, the 200-nautical-mile exclusive economic zone (EEZ), the greatly expanded continental shelf, and archipelagic waters, all of which have in one way or another reduced the areas in which high seas freedoms may be exercised. A new regime for international straits—transit passage—is also an important development.

Although, as will be developed below, the differentiation of an area of the ocean that is subject to the territorial sovereignty of the coastal state—the territorial

sea—had its origin in the practices of States in time of war—specifically in their assertions as neutrals that acts of hostilities should not take place close to their shores—the jurisdictional areas that are a part of the current law of the sea have been developed primarily for the protection of peacetime interests and are regarded as basically a peacetime regime. Nevertheless, by defining the areas that are subject to coastal State sovereignty or the exercise of other forms of jurisdiction, this regime may have significant effect on the exercise of both belligerent and neutral rights during time of armed conflict.[7] As stated by Professor Bernard H. Oxman:

> 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.[8]

As suggested by Professor Oxman, the most significant effect of the new jurisdictional zones will be upon the rules of neutrality, where the relationship between neutrals and belligerents and the applicability of rules depends on the particular jurisdictional area in which hostile activities take place. For that reason, this paper concentrates principally on the effect that the establishment or recognition of new jurisdictional zones may have on the law of neutrality.

Although some publicists have questioned the continued viability of the concepts of belligerency and neutrality in light of the adoption of the United Nations Charter and the limitations it has placed on the use of armed force,[9] as experience in the two recent Persian Gulf conflicts demonstrate, there is no other body of law that deals adequately with the relationships between states that are party to the conflict and those that choose not to take part in it. As Professor Christopher Greenwood has stated:

> [T]he law of neutrality still provides the only body of rules sufficiently precise and detailed to regulate such matters as rights to intercept shipping. The casualties amongst "neutral" shipping in the Gulf [Iraq-Iran] conflict illustrate the need for a detailed body of rules on this subject and the inadequacy of attempts to deal with such matters simply by reference to the broad principles of self-defence.[10]

Accordingly, I shall use the terms "belligerent" and "neutral" to describe respectively those States that are involved in an armed conflict and those that are not taking part in the armed conflict.

II
A Brief History of the Origins and Development of "Zones" in the Oceans[11]

The history of the law of the sea is a history of the tensions between coastal states seeking to exercise jurisdiction over or special interests in ocean waters lapping their shores and other states seeking to exercise freedoms of navigation, fishing, and other common interests in the oceans.[12]

Roman law recognized the doctrine of freedom of the seas, although it remains unclear whether the freedoms embraced in the doctrine applied to all or just to Roman citizens.[13] With the breakup of the Holy Roman Empire and the creation of numerous city-states and principalities in Europe, those bounding the seas laid claim to vast expanses of the oceans, asserting exclusive rights of navigation and fishing within them and exacting tribute from the ships of other states that wished to sail "their" waters.[14] The trend toward national claims over vast expanses of the oceans reached its apogee near the end of the fifteenth century when Pope Alexander VI, in 1493, divided the then-known oceans of the world between Spain and Portugal.[15] A year later, in the Treaty of Tordesillas, Spain and Portugal confirmed this arrangement, each claiming for itself a monopoly of navigation and commerce within its respective sphere.[16]

Even England, that later bastion of the freedom of the seas, laid claims to the seas that washed the British Isles during the reigns of the Plantagenet and Stuart monarchs, although the intervening Tudor Elizabeth actively opposed "the exclusive maritime sovereignty arrogated by Venice, Portugal, or Spain."[17]

The shrinking of these expansive claims began with the great juridical debates about *mare liberum* and *mare clausum* that occurred in the early seventeenth century. The most influential voice in these debates was that of Grotius, who, in 1609, published *Mare Liberum*,[18] in which he argued for the right of the Dutch to trade in the East Indies, where the Portuguese claimed a monopoly on the right of trade and navigation flowing from the Papal Bull and Treaty of Tordesillas. Grotius' arguments for the freedom of the seas and against the acquisition of property rights in the oceans were repeated and refined in his more extensive work, *The Law of War and Peace*,[19] published in 1625. Grotius' books went unchallenged by Portuguese and Spanish publicists, against whose claims they were specifically directed, but they struck a nerve in England, where Welwood and later Selden undertook the defense of the Stuart monarchs' pretensions to dominion over the "British seas" (the extent of which were never clearly defined), particularly with respect to the right to exclude

Dutch fishermen and the practice of requiring the striking of the flag to British men-of-war in those seas.[20]

England continued to assert its dominion over "British seas" during the Stuart monarchies (1603-1714) as well as during the Interregnum period of the Commonwealth and Protectorate (1649-1659). The Scandinavian States made similar claims to the waters of the Baltic and the western seas between the Scandinavian States and Iceland and Greenland. The main opponent of these extravagant claims was the United Provinces (the Dutch), whose international commerce and fishing fleets predominated during that period. Their resistance to British demands for the striking of topsails and flag in the presence of British men-of-war and their insistence on the right of their fishing fleet to fish in "British seas" precipitated three naval wars with England during the seventeenth century. At various times during these tumultuous times of shifting alliances the Dutch were joined by France and other continental powers.

During these same times, however, the embryo of the concept of a territorial sea[21] began to take shape. Grotius himself had addressed only the vast expanses of the oceans, and he recognized that some enclosed and narrow parts of the sea might be subjected to control from the adjacent land territory. Later, as stated by Fulton:

> During the seventeenth and eighteenth centuries another principle was gradually evolved, and was ultimately accepted as furnishing such a natural basis, so that it may now be regarded as an established part of international law. It was, that the maritime dominion of a state ended where its power of asserting continuous possession ended. The belt of sea along the coast which could be commanded and controlled by artillery on shore thus came to be regarded as the territorial sea belonging to the contiguous state. Beyond the range of guns on shore the sea was common.[22]

The evolution of this principle owes its origins to the law of neutrality, where prize courts held that the prizes taken within the range of guns of a neutral fort were not "good prize" and were restored to their owners.[23] It was reinforced by the practice of vessels rendering a salute when they came within the range of the artillery of a foreign fort.[24] At the beginning of the eighteenth century, the Dutch jurist Cornelius van Bynkershoek "transferred in theory to all parts of a coast this decisive property of compulsion and dominion which, strictly speaking, only existed where forts or batteries were placed."[25] Bynkershoek's principle became known as the "cannon-shot rule," and since the range of cannon in Bynkershoek's era was about three nautical miles or one marine league, it became the equivalent of a three-nautical-mile territorial sea. Although Bynkershoek's theory did not receive immediate universal acceptance, it did, over the next century, become "incorporated into international law as the rule for fixing the boundary of the territorial waters."[26] The causes for this gradual

acceptance of a narrow band of territorial sea along the coast were, according to Fulton, twofold:

> One was the moral and material victory of the Dutch Republic in its long and persistent struggle against the exorbitant claims to maritime dominion, first of Spain and Portugal, and then of England and Denmark. The other was the great extension of commerce and navigation, in which England secured an ever-increasing share, so that in the [eighteenth] century we find her taking the part of Holland in opposition to the Danish claims to *mare clausum*. As maritime commerce extended and the security of the sea became established, it was felt more and more that claims to a hampering sovereignty and jurisdiction were incompatible with the general welfare of nations; and as the states interested in this commerce had the greatest power, the assertion of a wide dominion was gradually abandoned, surviving only in remote regions or in enclosed seas like the Baltic.[27]

For whatever reasons (and international-law scholars are not always in agreement as to what they are), by the end of the eighteenth century or early in the nineteenth century there was international acceptance of the idea that a nation's territorial sea was constituted by a uniform band along its coast, generally considered to be three nautical miles in width.[28] By the end of the nineteenth century, of course, the range of cannon greatly exceeded three nautical miles, but despite the assertions of many publicists as to the illogic of preservation of a principle whose underlying theoretical basis was outdated,[29] the principle remained essentially intact until the end of World War II. As stated by Jessup, "it remained because the nations found it a convenient compromise between conflicting interests."[30]

During this same period there developed also a legal regime *of* the territorial sea as well as a generally accepted rule as to its breadth. Despite varying theories that existed in the nineteenth century as to the nature of the territorial sea (sovereignty, jurisdiction, bundle of servitudes, etc.), by the early twentieth century, "scarcely any author took issue with the notion that the territorial sea is subject to sovereignty."[31] This theory of sovereignty was confirmed by national practice and codifications of the 1920s as well as the preparatory work for the Hague Codification Conference of 1930,[32] the International Law Commission's Draft Convention on the Law of the Sea,[33] and the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.[34] This principle is carried forward into the 1982 United Nations Convention on the Law of the Sea, which provides, *inter alia*, in article 2, that, "The sovereignty of a coastal State extends, beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea."[35]

The sovereignty exercised by the coastal State over its territorial sea is the same as for its land areas and internal waters save for the right of ships of other nationalities to pass through the territorial sea in the exercise of the right of

innocent passage in time of peace.[36] Whether innocent passage includes the right of warships to pass without prior notification or consent in time of peace, and the extent of permissible regulation or suspension of innocent passage in time of war, will be examined below.[37]

Concurrently with the development of the law of the territorial sea, a number of States also asserted certain rights more limited than full sovereignty in areas of the oceans beyond the narrow territorial sea. These took a number of forms and were extended to various distances from shore. Until all such acts were repealed in 1876, Great Britain had several laws (commonly referred to as "hovering acts") extending jurisdiction for enforcement of customs and excise laws to as much as four leagues (twelve nautical miles) from shore.[38] As early as 1799 the United States had similar laws applicable to ships bound for United States ports, and in several cases the United States Supreme Court recognized the lawfulness of the enforcement of similar rights by other States beyond the limits of the territorial sea.[39] Russia, France, Belgium, Italy, and Spain had similar laws extending to varying distances beyond three miles, as did the Scandinavian States.[40] Several South American States adopted zones extending to twelve nautical miles for fiscal, revenue, and security purposes.[41] Great Britain, having repealed the last of its "hovering acts" in 1876, strongly contested the right of other States to enforce such laws. It was joined by a number of other States in protesting the United States' pretensions to enforce its anti-liquor laws beyond the three-mile limit during the Prohibition Era.[42] For these reasons, as well as the lack of uniformity both as to the content and outer limits for zones of special jurisdiction, it is difficult to conclude that the right to establish such zones had become a part of customary international law, at least until 1958 when the Convention on the Territorial Sea and Contiguous Zone recognized the contiguous zone for the purposes of preventing infringements of a coastal State's customs, fiscal, immigration, or sanitary regulations.[43]

Although a number of States at various times claimed the exclusive right to exploit the fishery resources off their shores beyond the territorial sea or at least to regulate their exploitation,[44] such a right was not recognized in customary international law,[45] even though as Fulton states, the three-mile limit "was selected, not on any grounds special to fisheries, but because it had been already recognised and put into force in connection with the rights of neutrals and belligerents in time of war. . . . [I]ts application to the right of fishing is accidental and arbitrary."[46]

At the conclusion of the Second World War, then, the only area of the ocean as to which it might be said that a coastal State had an undisputed right under international law to exercise jurisdiction and control was the territorial sea. Any rights beyond that outer boundary were subject to dispute unless contained in a treaty. At that point in time, therefore, the oceans were divided into three

distinct areas—(1) internal waters, that is, waters inside the baseline, (2) the territorial sea of a breadth of three nautical miles over which the coastal State exercised full sovereignty except for the right of innocent passage by surface ships of other States, and (3) the high seas, which included all other waters of the oceans, in which all States were entitled to the freedoms of the high seas, which included, *inter alia*, the freedoms of navigation, fishing, scientific research, and laying of undersea cables and pipelines, and in time of war, the right of belligerents to conduct hostilities in accordance with the law of armed conflict at sea.

The event which triggered the demise of this tripartite division of the oceans and resulted ultimately in today's multiple and overlapping zones of coastal-state jurisdiction was President Harry Truman's Proclamation of the United States's claim to jurisdiction and control over the natural resources of the seabed and subsoil of the continental shelf of the United States.[47] The outer boundary of the continental shelf was not defined in the Proclamation, but an accompanying White House Press release stated that generally the continental shelf extended to a point at which the depth of the water was 100 fathoms (600 feet).[48] Although the Proclamation carefully delimited the extent of the claim and explicitly affirmed that "[t]he free and unimpeded navigation of the high seas above the continental shelf and rights under international law with respect to free swimming fish are in no way thus affected," this unilateral claim by the then-preeminent maritime power and one of the leading exponents of the freedom of the high seas opened the door for wider and more comprehensive unilateral claims by other states. The broadest of these were claims by several Central and South American States to extend their territorial seas to a breadth of 200 nautical miles. The relative uniformity and tranquility which had existed for about 150 years with respect to the law of the sea began to erode. The era of "creeping jurisdiction" had begun.

Concurrently, the International Law Commission (ILC) began its studies leading ultimately to the development of a draft convention on the law of the sea. In its successive drafts of articles on the law of the sea prior to the convening of the First United Nations Conference on the Law of the Sea in 1958, the ILC was unable, however, to agree on a breadth of the territorial sea. In the articles produced at its Eighth Session, which served as the negotiating text for the 1958 Conference, the article on the breadth of the territorial sea provided as follows:

Article 3

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.
2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.
3. The Commission, without taking any decision as to the breadth of the

territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less.

4. The Commission considers that the breadth of the territorial sea should be fixed by an international conference.[49]

Although the first UN Conference on the Law of the Sea adopted four conventions on the law of the sea, one of which was the Convention on the Territorial Sea and Contiguous Zone,[50] the conferees were unable to agree on an article establishing the breadth of the territorial sea, primarily because of the wide disagreement as to whether States could exercise exclusive control over fisheries in a zone beyond the limits of the territorial sea. Consequently, in its next session, the United Nations General Assembly voted almost unanimously to convene a Second Conference in 1960 exclusively "for the purpose of considering further questions of the breadth of the territorial sea and fishery limits."[51] This Second Conference also failed to reach agreement on the breadth of the territorial sea, rejecting by a one-vote margin a compromise proposal sponsored jointly by the United States and Canada for a six-mile territorial sea with an additional six-mile exclusive fishery zone beyond that.[52]

The 1958 Conference did, however, succeed in reaching agreement on the contiguous zone which prior to the Conference had been disputed.[53] Article 24 of the Convention on the Territorial Sea and Contiguous zone provides, *inter alia*, as follows:

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.

The article adopted by the Conference was identical to that proposed by the ILC in its final draft except for the addition of the word "immigration" in paragraph 1(a). The ILC's Commentary on its draft article includes the following comments:

(1) International law accords States the right to exercise preventive or protective control for certain purposes over a belt of the high seas contiguous to their territorial sea. *It is, of course, understood that this power of control does not change the legal status of the waters over which it is exercised. These waters are and remain a part of the high seas* and are not subject to the sovereignty of the coastal State, which can exercise over them only such

rights as are conferred on it by the present draft or are derived from international treaties.[54]

Significantly, the Commission added the following comment:

> (4) The Commission did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term "security" would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State. In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations.[55]

The Convention also gave treaty recognition to the continental shelf doctrine, providing that coastal States exercise "sovereign rights" over the shelf for the purpose of "exploring it and exploiting its natural resources."[56] The outer limit was defined as the point at which the water depth reached "200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."[57]

Finally, the 1958 Convention incorporated into its provisions the principles enunciated by the *Anglo-Norwegian Fisheries* case[58] for the adoption of straight baselines for portions of the coast which are marked by deep indentations or a fringe of coastal islands. Although these provisions result in only modest expansions of the national waters of a coastal State when the criteria for their use are appropriately applied, the practice of States since 1958 demonstrates a constant increase in their application to coastlines that do not fit the criteria, as well as expansive abuses of the criteria in situations where they may arguably be applicable.[59] The result has been to incorporate large areas that were formerly high seas into the internal waters or territorial seas of coastal States. In some cases, the adoption of straight baselines results in the appropriation of much larger areas of the high seas than would an increase of the breadth of the territorial sea to twelve miles or more.

Following the failure of the Second UN Conference on the Law of the Sea, the three-mile territorial sea began to lose adherents. Figure 1 summarizes the status of the claims of states to various breadths of the territorial sea from 1945 to the present. By 1965, the three-mile claim had become a minority position with twelve miles being almost as common; by 1974, shortly after the opening of the Third United Nations Conference on the Law of the Sea (UNCLOS III), twelve-mile adherents outnumbered three-mile adherents almost 2 to 1. The erosion of consensus as to what was the proper breadth of the territorial sea was one of the motivating factors for calling the Third United Nations Conference on the Law of the Sea.

The Expansion of Territorial Sea Claims

Claims National	1945	1958	1965	1974	1979	1983	1991
3 NM	46	45	32	28	23	25	9
4-11 NM	12	19	24	14	7	6	5
12 NM	2	9	26	54	76	78	112
OVER 12 NM	0	2	3	20	25	30	19
Number of Coastal or Island Nations	60	75	85	116	131	139	145

Figure 1

Source: U.S. Department of the Navy

III
The Status of Maritime Zones in the Current Law of the Sea

The Third United Nations Conference on the Law of the Sea (UNCLOS III) met from 1973 to 1982 and produced the United Nations Convention on the Law of the Sea. Although the Convention has not yet entered into force, its provisions concerning traditional uses of the oceans are widely considered as reflective of customary international law.[60] The provisions of the Convention which are most likely to have an impact on the law of armed conflict at sea are the following:

- States may establish the breadth of their territorial sea up to a limit not exceeding twelve nautical miles (article 3).
- States may draw straight baselines using the same criteria adopted in the 1958 Territorial Sea Convention (article 7).
- States may establish a contiguous zone beyond their territorial sea over which they exercise a limited jurisdiction for the prevention of infringement of its customs, fiscal, immigration or sanitary laws and regulations with an outer limit no more than twenty-four nautical miles from the baseline (article 33);
- States may establish an exclusive economic zone (EEZ) beyond and adjacent to the territorial sea out to a limit of 200 nautical miles from the baseline; in the EEZ they have "sovereign rights" for the purpose of exploring and exploiting, conserving and managing the living and non-living natural resources of the seabed and subsoil and superjacent waters; in the EEZ they also exercise jurisdiction as provided in other provisions of the Convention with regard to establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment (articles 55-57). Other States "enjoy" within the EEZ the freedoms

of navigation and overflight, 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" (article 58). Both the coastal State and other States are required, in exercising their rights in the EEZ, to have "due regard" for the rights of the other States and coastal States respectively (articles 56 and 58).

- The outer boundary of the continental shelf is extended to 200 nautical miles from the baseline for all States, and for States with continental margins wider than 200 miles, to the edge of the margin according to a formula provided in the Convention, but in no case more than 350 nautical miles from the baseline or 100 nautical miles from the 2,500 meter isobath (article 76).
- Straits embraced by the territorial sea of one or more States but used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ are governed by the right of "transit passage," which permits "the freedom of navigation and overflight solely for the purpose of continuous and expeditious passage of the strait." Such passage may not be suspended (article 44), and passage may be made in the ship or aircraft's "normal mode" of operation (articles 37 and 38). Straits that have a ribbon of high seas or EEZ through them or are formed by an island and its mainland are not governed by the transit-passage regime if the high seas or EEZ route or the route seaward of the island is "of similar convenience with respect to navigational and hydrographical characteristics" (articles 36 and 37). The regime for these latter categories of straits, and for straits leading to the territorial sea of a foreign State, is innocent passage (non-suspendable in the cases of island-mainland straits and straits leading to the territorial sea of a foreign State)(article 45). In addition, the regimes for straits "regulated in whole or in part by long-standing international conventions in force specifically relating to such straits" are unaffected by the straits provisions of the Convention (article 35(c)).
- States which are comprised solely of islands or parts of islands, which form an intrinsic geographical, economic and political entity, and which meet certain criteria as to land-to-water ratio and distance of separation may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago (Articles 46 and 47). The waters inside the baselines become "archipelagic waters" (article 49), and the territorial sea, contiguous zone, exclusive economic zone and continental shelf are measured outward from these archipelagic baselines (article 48). The archipelagic State exercises sovereignty over archipelagic waters, their seabed and subsoil, and the airspace above, regardless of their depth or distance from the coast (article 49). All States have the right of "archipelagic sea lanes passage" (which is equivalent to "transit passage" through straits) through archipelagic sea-lanes designated by the archipelagic State or in the absence of

such designation through the routes normally used for international navigation. For other areas of archipelagic waters, the ships of all States have the right of innocent passage.

- The unrestricted freedoms of the high seas are exercised only from the outer limit of the exclusive economic zone rather than from the outer limit of the territorial sea (article 86). The area for the exercise of full high seas freedoms has thus been reduced by the subtraction of those areas that comprise the EEZ. If all coastal and island States claim an EEZ of 200 miles, this will reduce the area of the high seas by approximately one-third. As outlined above, however, the freedoms of navigation and overflight and the freedoms to lay cables and pipelines are preserved in the EEZ subject to the right of those exercising them to have "due regard" for the legitimate activities of the coastal state in its EEZ.
- The Convention creates an international seabed "Area," which is defined as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction" (article 1). In effect, the "Area" comprises all of the seabed beyond the outer edge of the juridical continental shelf. Unlike the other zones discussed above, the "Area" is not subject to national jurisdiction or control but is regarded by the LOS Convention as the "common heritage of mankind" (article 135). Part XI of the Convention provides a regime and institutions for the purpose of exploration and exploitation of its mineral resources. Although Part XI has not been received into customary law as have the other Parts of the Convention, the "Area" will be briefly discussed in subsection V.G. below.

The effect of the adoption of the 1982 Convention and absorption into customary international law of many of its provisions is to replace the three-fold division of the ocean (internal waters, a narrow territorial sea, and the high seas) with a multiplicity of broad and overlapping coastal areas under varying measures of jurisdiction and control by the contiguous states and a much reduced area of high seas. These divisions of the ocean are depicted in Figure 2.

IV
The Law of Armed Conflict at Sea and the Traditional Areas of the Oceans

In order to understand how the emergence of new maritime areas may affect the law of armed conflict at sea, which has traditionally been conducted in oceans which juridically consisted of only three divisions—internal waters, territorial waters (territorial sea), and high seas—it is necessary to understand how this trifold division of the oceans affected the conduct of operations before the manifold and overlapping divisions of the present era were created.

The essential overarching principles could be stated as follows:

- First, the areas within which belligerents could conduct hostile operations were the high seas (which, it is to be remembered, consisted of all parts of the

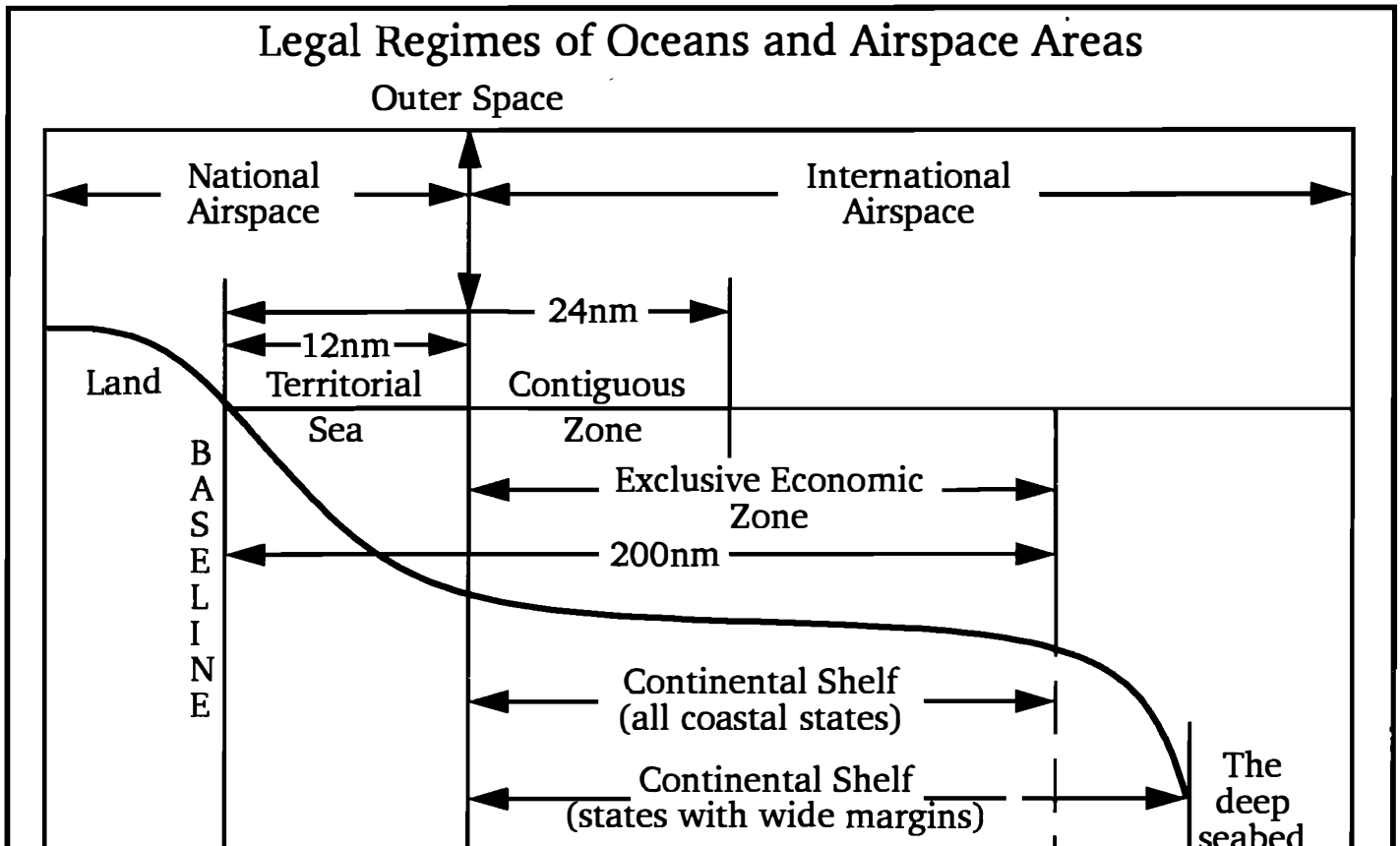
Legal Regimes of Oceans and Airspace Areas
Outer Space
National Airspace
International Airspace
24nm
12nm
Land
Territorial Sea
Contiguous Zone
BASELINE
Exclusive Economic Zone
200nm
Continental Shelf (all coastal states)
Continental Shelf (states with wide margins)
The deep seabed

Figure 2

oceans beyond the territorial sea), the territorial sea and internal waters of belligerents, and the airspaces above these areas.

- Second, the obverse of the first principle—as a general rule, hostile operations could not be conducted in the internal waters or territorial sea of a neutral State, nor in the airspace above these divisions of the oceans.[61]
- Third, the neutral State is required to apply its neutrality regulations impartially to all belligerents engaged in the conflict.[62]

During the seventeenth and eighteenth centuries these general principles were fleshed out by the practice of States into a set of generally agreed upon and rather formal rules of conduct. Most of them were codified in the Second Hague Peace Conference as the 1907 Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War.[63] Although Hague XIII has not received universal ratification, and a number of important States, including the United Kingdom, have never ratified it, most of its provisions are considered to be declaratory of customary law.[64] In any event, it comprises the latest expression in treaty form of the respective rights and duties of neutrals and belligerents with respect to hostile activities within neutral "maritime territory" (that is, internal waters and the territorial sea) and may be used as a starting point for discussion of these issues.

The provisions of Hague XIII concerning the respective rights and obligations of belligerents and neutrals in neutral maritime territory that are most likely to be affected by the replacement of the singular coastal zone of the territorial sea with the multiplicity of coastal zones resulting from the 1982 United Nations Convention are outlined below. Since ports are normally within internal waters, which are unaffected by the creation of additional zones beyond the territorial sea, I have not included the provisions of Hague XIII dealing solely with ports. On the other hand, roadsteads may be within either internal waters or the territorial sea and thus may be affected by the extension of the breadth of the territorial sea to twelve miles or the drawing of straight baselines. Accordingly, those provisions of Hague XIII dealing with "roadsteads" are included. The significant provisions of the Convention are as follows:

Belligerents are required to respect the sovereign rights of neutral States and to abstain from acts that would constitute a violation of neutrality (article 1);

Any act of hostility, including visit, search and capture by a warship in the territorial sea of a neutral power is a violation of neutrality (article 2);

A neutral State must employ the "means at its disposal" to release a prize captured within its territorial sea (article 3);

A prize court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters (article 4);

Belligerents cannot use neutral ports or waters as a base of operations nor erect any apparatus to communicate with belligerent forces at sea (article 5);

A neutral Government must employ the "means at its disposal" to prevent the fitting out or arming of vessels within its jurisdiction which it believes are intended for cruising or engaging in hostile operations and to prevent departure from its jurisdiction of such vessels (article 8);

A neutral State must apply its rules and restrictions impartially to the belligerents and may forbid the entry of vessels which have violated its rules or its neutrality (article 9);

The "mere passage" of belligerent warships or prizes through a neutral's territorial sea does not affect the neutral's neutrality (article 10);

A neutral power may allow belligerent warships to employ its pilots (in its territorial waters[65])(article 11);

Unless the neutral's regulations provide otherwise, belligerent warships may remain in neutral ports, roadsteads or territorial waters no more than 24 hours (article 12);[66]

A neutral Power must notify a belligerent warship within its ports, roadsteads or territorial waters at the outbreak of hostilities to depart within 24 hours or such other period as required by the neutral's regulations (article 13);

A belligerent warship may not prolong its stay in a neutral port except on account of damage or stress of weather and must depart as soon as the cause of delay is at an end (article 14);

In neutral ports and roadsteads belligerent warships may carry out only repairs that are necessary to make them seaworthy. The local authorities may decide what repairs are necessary (article 17);[67]

Belligerent warships may not use neutral ports, roadsteads, or territorial waters for replenishing their supplies of war material or armament or for completing their crews (article 18);

In neutral ports or roadsteads belligerent vessels may revictual only to the peacetime standard and receive fuel only in sufficient quantity to reach the nearest port of their own country or fill their bunkers, if the latter is the formula adopted in the neutral's regulations (article 19). They may not make a repeat visit for refueling at the port of a neutral in any of whose ports they have refueled for the previous three months (article 20);

A neutral State must exercise such surveillance "as the means at its disposal allow" to prevent violation of its territorial waters (article 25); and

The exercise of its rights under the Convention by a neutral cannot be considered an unfriendly act by a belligerent (article 26).

To reemphasize a point already made, when the Convention uses the term "neutral waters" or waters "within its jurisdiction," or similar terms, it is referring either to the internal waters or the territorial waters (territorial sea) of the neutral State, since those were the only areas of the oceans recognized at that time as being within the jurisdiction or sovereignty of the coastal State.

V
The Impact of Changes in Jurisdictional Zones upon the Law of Neutrality

A. The Territorial Sea. As developed above, the concept of the territorial sea originated with the claims of neutral States to prevent belligerent hostile activities from occurring close to their shores, and the breadth of the territorial sea was originally tied to the actual area that a coastal State could control from its shore, *i.e.*, the range of shore-based artillery or three nautical miles. Although the range of cannon soon exceeded this short distance, the rights and duties of neutral and belligerent States in the offshore areas bounding neutral coastal States remained tied to the three-mile breadth of the territorial sea. The series of compromises which resulted in the rules which eventually became embedded in the law of neutrality were thus based on the assumption that they would apply only in a very narrow coastal margin, measured from baselines which corresponded to the low-water line along the coast.

The territorial sea now has a breadth of up to twelve miles, and while the normal baseline is still the low-water line along the coast, many coastal States claim the right to draw straight baselines in a manner that extends the outer boundary of the territorial sea many miles more than twelve miles from the actual coast. (Although the waters inside these exaggerated baselines become internal waters, the right of innocent passage is preserved through them where they enclose areas which had previously not been considered as internal.)[68] The combined effect of increasing the breadth of the territorial sea and allowing the use of straight baselines is thus to more than quadruple the area of the waters subject to coastal state sovereignty. This in turn raises the question of the continued applicability of all the rules summarized above to this broader band along a neutral's coast.

Dr. Elmar Rauch, in his study of the issue, has no difficulty in concluding, without discussion, that the same rules apply in this expanded territorial sea that formerly applied in the narrow territorial sea. He states:

> As a matter of principle belligerents are bound to respect the sovereignty of neutral powers and to abstain, in neutral territory or neutral waters [by which he means the territorial sea and internal waters] from any act of warfare. Any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral power, constitutes a violation of neutrality and is strictly forbidden.[69]

Dr. Rauch may well be correct that such a conclusion can be drawn without further analysis. His conclusion is bolstered by the recently published United States Navy operational law manual, which explicitly accepts the idea that

extension of the territorial sea to twelve nautical miles does not affect the application of the laws of neutrality, stating:

> [T]he 12-nautical mile territorial sea is not, in and of itself, incompatible with the law of neutrality. Belligerents continue to be obliged to refrain from acts of hostility in neutral waters and remain forbidden to use the territorial sea of a neutral nation as a place of sanctuary from their enemies or as a base of operations.[70]

The Canadian[71] and German[72] draft manuals, both of which were prepared subsequent to the adoption of the twelve-mile territorial sea, state without comment that any hostile acts within neutral territorial seas are prohibited.

It, of course, goes without citation that internal waters and the territorial sea are subject to the sovereignty of the coastal State, save only for the right of innocent passage in the territorial sea, and that the cardinal principle of the law of neutrality is that belligerents may not conduct hostilities in neutral territory, land or sea. Nevertheless, one may question whether rules which were developed to apply to a narrow band of water along a neutral's coast should be applied automatically to a band that may be more than four times as wide. As outlined above, neutral States have an obligation to use the means at their disposal to conduct surveillance of their waters to ensure that belligerents do not violate their neutrality and to take preventive or corrective action if they detect such violations.[73] A broader territorial sea presents a greater burden of surveillance and enforcement for the neutral State as well as a greater temptation for belligerent naval forces, especially submarines, to use neutral waters as "safe corridors" for passage to or from legitimate areas of hostilities, for transit to or from home ports, or as safe havens for rendezvous with replenishment ships. If neutral States are unable or unwilling to carry out their obligations to prevent such activities, the opposing belligerent may legitimately take hostile action against the enemy forces that are unlawfully using the neutral's territorial sea.[74] Such actions would tend to embroil the neutral in the armed conflict rather than isolate it from such actions, which, of course, is the purpose of the law of neutrality. The passage of the *Altmark* through the Norwegian territorial sea in World War II,[75] as well as Great Britain's claim that German submarines were using the same sea as a thousand-mile-long "covered way" for passage of their submarines from home ports to operational areas in the open seas[76] are examples of how even a narrow territorial sea may tempt belligerents to test the limits of tolerance of both neutrals and opposing belligerents to the use of neutral territorial seas for safe havens from attack. Increasing the breadth of the territorial sea more than four-fold would undoubtedly vastly increase such temptations.

In time of peace, the ships of all States, including warships,[77] have the right of innocent passage through the territorial seas of all States. In time of war,

neutrals may, if they choose, allow "mere passage" of belligerent warships through their territorial seas without jeopardizing their neutral status.[78] On the other hand, neutrals may, if they choose, close their territorial seas except for those parts leading to an international strait to passage by belligerent warships.[79] The temptations for belligerents to ignore a neutral State's closure of its territorial sea to passage, and the greater burdens of surveillance and enforcement on neutrals will undoubtedly result in increased tensions in a broader territorial sea.

Professor Michael Reisman and William K. Lietzau have recently written that, "In addition to their important function in dissemination and transmission of international legal information, [military operational] manuals are an important mode for making international law as well as evidencing its existence."[80] In other words, the military manuals promulgated by States represent the practice of such States. The fact that the manuals of three major maritime States (United States, Canada, and Germany) have accepted the rules that were applicable to a three-mile territorial sea as equally applicable to a twelve-mile territorial sea strongly suggests that these principles are being incorporated into customary international law despite rather strong arguments that could be made that the factual and theoretical underpinnings for these rules have been undermined by a quadrupling of the breadth of the territorial sea.

B. International Straits. Although, as developed above, a neutral coastal State was permitted to close its territorial sea to all belligerent hostile activity, including "mere passage by belligerent warships" under the pre-1982 regime of the territorial sea, it was also generally accepted that this right did not apply to those parts of the territorial sea that comprised an international strait.[81] This view was reinforced by the *Corfu Channel* case,[82] which affirmed the right of British men-of-war to transit the strait between the Greek island of Corfu and the Albanian mainland which was a secondary passage between the Ionian and Adriatic Seas. In that case, the ICJ stated:

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without previous authorization of a coastal State, provided the passage is innocent.[83]

This principle was codified in the 1958 Territorial Sea Convention as follows:

> There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the

high seas and another part of the high seas or the territorial sea of a foreign State.[84]

As the number of adherents to territorial seas of twelve or more miles expanded in the 1960s, a number of maritime States became concerned that the regime of nonsuspendable innocent passage would provide insufficient protection for undisputed transit rights through international straits. Not only did this increased breadth of the territorial sea bring the waters of dozens of important straits within the territorial seas of bordering States, some of these States gave a more restrictive meaning to the "innocent" half of the innocent passage definition than had been visualized by either the International Court of Justice in the *Corfu Channel* case or the negotiators of the 1958 Territorial Sea Convention. Some States based their determinations of innocence on such factors as ownership of vessels, cargo carried, or destination of voyage.[85] As a result, a number of States, following the initiative of the United States and the Soviet Union, began to discuss the possibility of a third U.N. conference on the law of the sea for the purpose of establishing general agreement on a twelve-mile territorial sea coupled with freedom of navigation for ships and aircraft through international straits. This movement coincided in time with Ambassador Pardo's initiative in the U.N. General Assembly for internationalization of the seabed beyond the limits of national jurisdiction. The confluence of these two movements eventually resulted in the convening of the Third United Nations Conference on the Law of the Sea (UNCLOS III), one of whose outcomes was the adoption of the doctrine of "transit passage" for ships and aircraft through straits used for international navigation between the high seas or an EEZ and another part of the high seas or EEZ.

The provisions of the LOS Convention concerning transit passage are contained in Part III of the Convention, "Straits Used for International Navigation." As previously stated, transit passage applies to all straits used for international navigation between the high seas or an EEZ and another part of the high seas or EEZ,[86] with three exceptions, as follows:

1. Straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits;[87]
2. Straits through which there exists a high seas or EEZ route "of similar convenience with respect to navigational and hydrographical characteristics;[88] and
3. Straits formed by an island and mainland of the same State if there exists a high seas or EEZ route "of similar convenience with respect to the navigational and hydrographical characteristics" seaward of the island.[89]

For the first category, the governing regime is that which is provided in the "long-standing international convention" regulating passage through it. For the second, it is ordinary (*i.e.*, suspendable) innocent passage as codified in the

territorial-sea Part of the Convention.[90] For the third, the regime is nonsuspedable innocent passage.[91]

By the terms of Part III of the LOS Convention, transit passage is more akin to the freedom of navigation exercised by ships and aircraft on the high seas than it is to innocent passage as codified in Part II of the Convention. Transit passage is defined as the exercise of the "*freedom* of navigation and overflight"[92] by ships and aircraft in their "normal modes of continuous and expeditious transit."[93] During transit passage ships and aircraft must proceed through the strait without delay, refrain from the threat or use of force against bordering States and other acts contrary to the U.N. Charter, and comply with other relevant provisions of Part III. In addition, ships must comply with generally accepted rules for safety at sea and for the prevention, reduction, and control of pollution from ships, and aircraft must observe the ICAO rules for air navigation[94] and monitor the appropriate radio frequencies. Although ships and aircraft in transit passage must comply with the laws and regulations of the States bordering straits, the content of such rules is confined to the safety of navigation, the prevention of fishing by fishing vessels, the prevention of customs, fiscal, immigration or sanitary offenses, and regulations which give effect to applicable international regulations for the control of pollution by oil and other noxious substances.[95] States bordering straits may not impede transit passage nor adopt laws or regulations "that 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. . . ."[96] Even if the transiting ship or aircraft violates the laws or regulations of the States bordering a strait, these States may not deny or terminate the transit-passage rights of the ship or aircraft but must find their remedy in a civil suit if the offender is a merchant ship or civil aircraft or under the principles of State responsibility if it is a ship or aircraft entitled to sovereign immunity.[97]

If under the pre-existing regime for straits it was generally accepted that neutral States could not deny passage to belligerent ships, including warships, in time of war, then *a fortiori* it should follow that this rule should be preserved under the more liberal transit-passage regime. But this new regime has two elements not included in the older one of nonsuspendable innocent passage: (1) it applies to aircraft; and (2) ships and aircraft may transit in their "normal mode." The second of these has been interpreted as including the submarines' right to submerged transit.[98] Does it necessarily follow that submerged passage by submarines and overflight by belligerent aircraft should be allowed under the doctrine of transit passage in time of war? Adopting a teleological approach, Dr. Rauch answers yes. He states:

> One of the advantages of the new transit passage concept is that it keeps the littoral States bordering straits with great strategic value out of the vicious

circle of escalation in times of tension and crisis. If transit through such straits were subject to the discretion of the coastal States, they would unavoidably become involved, even if the discretionary power were to be exercised evenhandedly. . . . The ramifications of a refusal or of a permission of transit in whole or in part . . . could, albeit legally non-discriminatory, in fact be of quite different military and strategic value to the parties to the conflict. . . . The escalation-preventing quality of transit passage in times of tension and crisis—*i.e.*, in time of fragile peace—are even more important for neutral States in times of armed conflict.[99]

The United States naval manual asserts that the transit passage provisions of the LOS Convention are a part of customary international law and interprets them as providing very broad rights for passage of belligerent forces in time of war for straits bounded by neutral States, stating:

Customary international law as reflected in the 1982 Law of the Sea Convention provides that belligerent and neutral surface ships, submarines and aircraft have a right of transit passage through, over, and under all straits used for international navigation. Neutral nations cannot suspend, hamper, or otherwise impede this right of transit passage through international straits. Belligerent forces transiting through international straits overlapped by neutral waters must proceed without delay, must refrain from the threat or use of force against the neutral nation, and must otherwise refrain from acts of hostility and other activities not incident to their transit. Belligerent forces in transit may, however, take defensive measure consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerent forces may not use neutral straits as a place of sanctuary nor a base of operations, and belligerent warships may not exercise the belligerent right of visit and search in those waters.[100]

The Canadian draft manual has a similar, though less extensive provision, as follows:

Warships and military aircraft of a belligerent state may exercise the right of transit passage, that is, of essentially unimpeded passage or overflight in an appropriate state of readiness with appropriate sensors activated, through certain straits where the transit passage [regime?] applies. . . .[101]

The German draft manual does not address the issue of passage through neutral straits separately from the question of passage through the territorial sea generally. It is to be recalled that the German manual appears to be ambiguous as to whether the right of innocent passage for belligerent warships through the territorial sea of a neutral State may be suspended.[102]

Based on the foregoing, both logic and state practice lead to the conclusion that the peacetime regime of transit passage, as formulated in Part III of the

LOS Convention, is equally applicable in time of armed conflict to the passage of belligerent warships (including submerged submarines) and aircraft through straits bounded by neutral States.

One further aspect of the straits question deserves at least brief mention before leaving this subject; that is, the issue of straits governed by treaty regimes. As will be recalled, Article 35 of the LOS Convention excepted from the transit-passage regime, "straits in which passage is *regulated* in whole or in part by long-standing international conventions in force specifically relating to such straits."[103] During the course of the negotiations in UNCLOS III, various delegates suggested that this exception would apply to the Straits of the Dardanelles and Bosporus (Turkey),[104] the Strait of Magellan (Argentina and Chile,)[105] the Belts and Sound (Sweden-Denmark,)[106] and the Aaland Strait (Sweden-Finland).[107]

A detailed examination of each of these Conventions is beyond the scope of this paper. Dr. Rauch, however, raises the question in his monograph as to whether all of these straits are actually "regulated" by the Conventions referred to in the footnotes so as to qualify for exemption from the transit-passage regime. Although acknowledging that at least two leading international authorities in the field disagree with him as to the Danish Straits and the Strait of Magellan, he concludes, based on the analysis therein as well as his prior works to which he refers, that except for the Turkish Straits, "would-be claimants to Art. 35(c) status simply fail to make a credible case."[108] The United States' manual, though not explicitly excluding other treaty-regime straits, mentions only the Turkish Straits as being entitled to this exception to the regime of transit passage.[109]

In the case of the Turkish Straits, in time of war, Turkey being a neutral, the Montreux Convention provides for freedom of transit for neutral warships but prohibits passage of belligerent warships except under certain exceptional circumstances delineated in the Convention. If Turkey is at war, Turkey has complete discretion as to the transit of warships.[110]

C. The Contiguous Zone. As discussed above,[111] the contiguous zone is an area of limited jurisdiction. The competence of the coastal State in this zone is limited to the exercise of the control necessary to prevent infringement of the coastal State's customs, fiscal, immigration, and sanitary regulations within its territory or territorial sea.[112] The International Law Commission explicitly refused to recognize special security rights for the contiguous zone, and the 1958 and 1982 Conventions adopted the ILC's formula.[113] The contiguous zone is, for all intents and purposes, the equivalent of the high seas insofar as the conduct of hostile operations by belligerents and the exercise of belligerent or neutral rights and obligations are concerned. Thus, the extension of the outer limit of the contiguous zone from its former distance of twelve miles from the

baseline to twenty-four nautical miles as provided by article 33 of the 1982 LOS Convention should not be of any significance in the application of the law of armed conflict at sea.

The contiguous zone is, of course, overlapped by the exclusive economic zone and the continental shelf. Insofar as the rules of armed conflict may be affected by the creation of these latter juridical areas in the oceans, which will be discussed below, those same effects would be felt in the contiguous zone.

D. The Exclusive Economic Zone. The adoption of the concept of an exclusive economic zone (EEZ) in the 1982 Law of the Sea Convention represents the culmination of a long-continued effort by some segments of the international community to separate "jurisdiction" over the natural resources of offshore waters from "sovereignty" manifest in the territorial sea. As stated earlier,[114] by virtue of the territorial sea owing its origin to the law of neutrality, its "application to the right of fishing is accidental." In the words of Dr. Rauch, "[The EEZ] is the synthesis of the fisheries zone, epicontinental sea, patrimonial sea, and the continental shelf concept which started with the Truman Proclamation of 1945."[115]

Although the coastal State exercises "sovereign rights" over the EEZ for the purpose of exploring and exploiting, managing and conserving its living and non-living resources and "jurisdiction" to the extent provided in the Convention with regard to the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment,[116] it is clear that the EEZ is not incorporated into the territorial regime of the coastal State as are internal waters and the territorial sea.[117] Reinforcing the distinction between the territorial sea and the exclusive economic zone is paragraph 2 of Article 58, which states, "Articles 88 to 115 [from the High Seas Part of the Convention] and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part." Article 89, which is among those articles so incorporated into the exclusive-economic-zone Part of the Convention, states, "No State may validly purport to subject any part of the high seas to its sovereignty."

Whether one considers the EEZ as part of the high seas, as some authorities contend, or as an area that is *sui generis*, as contended by others,[118] it is clear that it is a zone that is neither territorial nor has wholly the characteristics of high seas. It is a zone in which competences are allocated to coastal States on the one hand and all other States on the other so as to balance the need of the coastal State to have sufficient authority to exploit and manage the economic resources (article 56 (1)) against the need of all other States to retain high seas navigation and communications freedoms and uses related to such freedoms (article 58 (1)). Article 58(1) describes these high-seas freedoms as follows:

> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the 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.

As stated by Elliot Richardson, the United States Ambassador to UNCLOS III:

> In the group which negotiated this language it was understood that the freedoms in question . . . must be *qualitatively* and *quantitatively* the same as the traditional high-seas freedoms recognized by international law: they must be qualitatively the same in the sense that the nature and extent of the right is the same as the traditional high-seas freedoms; they must be quantitatively the same in the sense that the included uses of the sea must embrace a range no less complete—and allow for future uses no less inclusive—than traditional high-seas freedoms.[119]

Except for the freedom of fishing, freedom of scientific research, and freedom to construct artificial islands and other installations which are related to the exploration and exploitation of the resources of the EEZ, the freedoms are identical to those enumerated in article 87 as applicable in the high seas. Although article 58 is not open-ended, as is article 87 in which the enumeration of high seas freedoms is preceded by the term *inter alia*, the addition of the phrase "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" in article 58 seems to serve the same purpose.[120] The balance between the rights of coastal States and other States in the EEZ is also reflected in the paragraphs of articles 56 and 58 which require both coastal States (article 56(2)) and other States (article 58(3)) to have "due regard" to the rights and duties of "other" States and coastal States respectively.

In assessing this balance and applying it to the operations of warships in the exclusive economic zone, Professor Oxman concluded as follows:

> [W]arships 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 economic 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.[121]

Although Oxman was concerned explicitly only with peacetime rights, his conclusion is equally applicable in time of armed conflict as well. The juridical nature of the zone does not change with the transition from peace to war.[122] There is thus no basis for concluding that, except for the duty to have due regard to the rights of the coastal State for the exploitation of the economic resources of the zone, the conduct of hostilities by belligerent States in the exclusive economic zone of a neutral State is subject to greater restraints than is their conduct on the high seas. Clearly, there is no basis for concluding from the terms of the LOS Convention that the EEZ is to be equated to the territorial sea insofar as the application of the rules of neutrality are concerned.

Nevertheless, there have been suggestions from States and in the literature that some States may regard the regime of the EEZ as encompassing the right of coastal States to control military operations in the EEZ. The earliest suggestion to this effect which I have discovered was published anonymously in the official journal of the Swedish Navy in 1974, and is quoted in English translation in Dr. Rauch's monograph as follows:

> For Sweden it is of great interest to prevent, that other States use our exclusive economic zone for the deployment of nuclear weapons. The coastal State has to make sure that this does not happen. . . . In times of war the neutral State has the obligation under the 1907 Convention to protect its merchant navy and those of other States against military operations. The neutral State is also obliged to prevent the use of its sea territory by a belligerent as a base for naval operations against the adverse party. The rights and duties layed upon the coastal States in the exclusive economic zone will also have to be fulfilled in situations where the coastal State remains neutral in a war between third powers. The protection of neutrality in this case is evidently—in whole or in part—*extended to the exclusive zone.*[123]

At several times during the negotiation of the Law of the Sea Convention, the delegate of Sweden made statements concerning the relevance of the Convention to the law of neutrality as expressed in Hague XIII.[124] Although the connection between the anonymous article and the official statements of the Government of Sweden is not readily apparent, Dr. Rauch raises them as a matter of concern.

Dr. Rauch analyzes several bases on which a claim might be made that the neutrality rules of Hague XIII applicable to the territorial sea were also applicable to the EEZ. One is the similarity of language in Hague XIII and the LOS Convention. While acknowledging that the French text of the LOS Convention uses the terms *droit souverain* and *juridiction* to describe the jurisdiction exercised by the coastal State in the EEZ, which are also the terms used in the French text of Hague XIII (the only authentic text), he does not conclude from this that "the new concept of the exclusive economic zone is *nunc pro tunc* to be included in the historical scope of application" of Hague

XIII. In his view, it is clear that what was meant by the terms *droit souverain* and *juridiction* in Hague XIII was maritime areas subject to the sovereignty of the State—in modern terms, the territorial sea and internal waters.[125] But Rauch does not stop at that point; he argues that if a State may not subject the EEZ to its sovereignty in time of peace, citing article 89, it "amounts to a clear prohibition in time of war to attempt to subject the exclusive economic zone to principles of neutrality,"[126] since "[t]he starting point of the regulations ought to be the sovereignty of the neutral State."[127] He concludes that "acts of hostility between belligerents can be committed in the exclusive economic zones of neutral States as a legitimate exercise of traditional rights under the law of war."[128]

While Dr. Rauch's conclusion would appear to be irrefutable, at least one other thread tying the EEZ to territorialist theories has appeared. At the final session of the Conference in Montego Bay, Jamaica, in 1982, Brazil declared on its signing of the Convention that its government "understands that the provisions of the Convention do not authorize other States to carry out military exercises or manoeuvres within the exclusive economic zone, particularly when these activities involve the use of weapons or explosives, without the prior knowledge and consent of the coastal State."[129] Similar statements have also been made by the governments of Cape Verde[130] and Uruguay.[131] These statements were contested by statements of the governments of Italy, France, and the United States, exercising the right of reply,[132] and have been rejected by Ambassador T.T.B. Koh, who was the President of UNCLOS III during the latter part of the Conference,[133] as well as by Barbara Kwiatkowska in her treatise on the EEZ.[134]

In addition to its assertions concerning military maneuvers in the EEZ, Brazil also requested the Legal Committee of ICAO to hold that the rules of overflight of the EEZ were the same as for those over land territory and the territorial sea. The Legal Committee rejected this request, holding that such a position was totally incompatible with the provisions of the LOS Convention, which equate the EEZ with the high seas insofar as freedom of overflight is concerned.[135]

Although the positions stated by Brazil, Cape Verde, and Uruguay were directed explicitly to a peacetime situation, one may infer that they might be asserted with respect to the conduct of hostilities and other military operations in their exclusive economic zones in time of war. As already developed, this position cannot be supported by the terms of the LOS Convention. Nor is it supported by the three military manuals that have been examined. The Canadian Draft Military Manual provides explicitly in paragraph 703 that, "The general area within which the naval forces of belligerents are permitted to conduct operations involving the use of force includes: the high seas (including exclusive economic zones). . . ."[136] The German Manual likewise provides, "[A]s a matter of principle acts of naval warfare may be performed as in the high seas

also in the exclusive economic zones of neutral or non-belligerent states."[137] Although the United States's manual does not state the same proposition explicitly, it does so by negative implication by defining neutral territory as including only the neutral's land, internal waters, territorial sea, and archipelagic waters (if any).[138]

From the foregoing analysis, it seems incontestable that, despite the assertions of a few States and publicists, the exclusive economic zone may be equated to the high seas insofar as the application of the law of neutrality is concerned.

Since the rights of the coastal State in the seabed of the EEZ are exercised in accordance with the continental-shelf Part of the LOS Convention,[139] discussion of hostile military activities or placing of military devices on the seabed of the EEZ will be discussed below in the section on the continental shelf.

E. The Continental Shelf. The continental shelf comprises the seabed and subsoil of a coastal State from the outer boundary of its territorial sea to the outer edge of the continental margin or, for coastal States with margins less than 200 miles, to the outer boundary of the exclusive economic zone.[140] For the few coastal States which have continental margins wider than 200 miles, the edge of the continental margin is determined by a complex formula contained in article 76 of the Convention which may extend the outer boundary to as much as 350 miles from the baseline or 100 miles beyond the 2500-meter isobath.

On the continental shelf the coastal State exercises "sovereign rights for the purpose of exploring it and exploiting its natural resources."[141] Unlike the EEZ, however, the coastal State's jurisdiction over the continental shelf does not extend to the water column or airspace above it, except insofar as is necessary to allow the coastal State to construct artificial structures on the continental shelf for the purpose of exploiting it and establishing reasonable safety zones around such structures. In this connection, the provisions of Article 60 of the EEZ Part of the Convention apply *mutatis mutandis* to the continental shelf.[142] The Convention provides explicitly that "the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters" and that "[t]he exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention."[143] Conversely, by incorporation of article 60 by reference into the continental-shelf Part of the Convention, "All ships must respect these safety zones [around continental-shelf installations] and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones."[144] Thus, the waters above the continental shelf are governed by the

regime of the exclusive economic zone insofar as they are within 200 miles of the baseline and by the regime of the high seas where they are beyond that limit.

Since the continental shelf itself has a status different from the waters superjacent to it, it is appropriate to discuss acts of warfare that may be conducted in the water column separately from those that may be conducted on the seabed itself.

1. Waters Superjacent to the Continental Shelf. As the previous discussion of the exclusive economic zone has concluded, the waters of the EEZ have the same characteristics as those of the high seas with respect to the conduct of hostilities by belligerents therein and the application of the law of neutrality thereto, save only for the duty to have "due regard" for the rights of the coastal State in the zone. *A fortiori* the waters above the continental shelf beyond the exclusive economic zone are high seas in the strictest sense of that term and are not in any way different from other parts of the high seas with respect to belligerent activity save only the duty to respect the safety zones and comply with international standards regarding navigation in the vicinity of artificial islands, installations, structures, and safety zones.[145] Thus, the only restriction on the law of armed conflict at sea that would be made necessary by the emergence of the continental shelf as a defined area of the oceans is to incorporate cautionary notes concerning respect for and non-interference with legitimate activities and structures utilized by the coastal State for exploitation of the natural resources of the shelf.

2. The Seabed of the Continental Shelf. Since the relevant articles of both the 1958 Continental Shelf Convention[146] and the LOS Convention[147] recognize that the coastal State exercises only "sovereign rights for the purpose of exploiting" the shelf and its resources, they visualize that other States may use the seabed of the shelf for other purposes not inconsistent with and not interfering with the coastal State's exclusive rights of exploitation of natural resources. Although India introduced a proposal at UNCLOS I that would have prohibited the building of military bases or installations on the continental shelf "by the coastal State or any other State," this proposal was defeated.[148] A similar proposal, but limiting the prohibition to States other than the coastal State, was put forth by Mexico and Kenya at an early stage of UNCLOS III. This proposal did not find its way into the negotiating texts nor the final Convention.[149] The negotiating history of the two most important international instruments would thus seem to suggest that, subject to the restrictions on the use of the seabed found in the Conventions themselves, emplacing weapons or other military devices on the seabed of the continental shelf, both within the 200-mile EEZ and beyond, is permissible as the exercise of a freedom of the high seas.[150] The military activities on the seabed of the continental shelf most often discussed are the laying of mines or cable arrays for underwater detection and surveillance.

Article 60 of the LOS Convention, which is applicable to the continental shelf as well as to the EEZ, contains the relevant restrictions on the construction of installations on the seabed. It provides in part as follows:

Article 60
Artificial islands, installations and structures in the exclusive economic zone

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 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.

2. The coastal State shall have exclusive jurisdiction over *such* artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

3. Due notice must be given of the construction of *such* artificial islands, installations or structures. . .

4. The coastal State may, where necessary, establish reasonable safety zones around *such* artificial islands, installations and structures . . .

. . .

6. All ships must respect these safety zones. . .

7. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

(Emphasis supplied)

A careful reading of the quoted portion of Article 60 reveals that a coastal State may regulate (under a reasonable interpretation this would also include "prohibit") the construction, operation, and use of artificial islands whatever their purposes, other installations and structures whose purposes are the economic exploration or exploitation of the EEZ or continental shelf, and those installations erected by others which may interfere with the rights of the coastal State in the zone. In other words, a coastal State has the exclusive right to construct and regulate artificial islands in the EEZ and on the continental shelf. But it does *not* have the right to regulate or prohibit installations and structures other than artificial islands *unless* they are for an economic purpose *or* would interfere with the coastal State's right to economic exploitation of the zone or shelf. In addition, neither the coastal State nor any other State may construct or operate structures or installations where they will interfere with navigation (para. 6), and other States must respect the safety zones established by the coastal State. Furthermore, the constructing State need not give notice of such installations or structures unless they are of such a type that their location or

operation "may interfere with the exercise of the rights of the coastal State" (para. 3). Of course, the State other than the coastal State engaging in such activities must abide by the requirements of "due regard" for the rights of the coastal State and for the interests of all States in their exercise of the freedoms of the high seas.

Under the foregoing interpretation, which is believed to be the correct one, there is no prohibition against States other than the coastal State employing or emplacing weapons or detection devices on the seabed of the EEZ or continental shelf if they would not interfere with the coastal State's exploitation of the resources of the EEZ or continental shelf and if they are in compliance with the explicit restrictions contained in article 60.[151]

Although the Partial Test Ban Treaty of 1963,[152] the Seabed Treaty of 1971,[153] and the Tlatelolco Treaty of 1967[154] contain certain restrictions on the emplacement of nuclear weapons and other weapons of mass destruction in some areas of the seabed, I have not included a discussion of their provisions, since the subjects of those treaties are beyond the scope of this paper.

F. Archipelagic Waters. Under the traditional law of the sea, and under most circumstances in the 1982 LOS Convention, islands are treated in the same manner as mainlands with respect to the drawing of baselines and delimitation of the territorial sea and other coastal zones. The 1982 Convention, however, recognized a special exception in the case of archipelagic States, which are permitted to draw archipelagic baselines enclosing a newly recognized category of waters—archipelagic waters.

Archipelagic waters are created when an archipelagic State meeting the qualifications of article 47 of the LOS Convention draws archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago. The waters enclosed thereby are denominated "archipelagic waters."

The terms of article 47 permit archipelagic baselines to be as much as 100 nautical miles long, with up to three percent of the total number of baselines as much as 125 miles in length. As can be seen by examining a map of Indonesia, which is the archetypical archipelagic State, adoption of archipelagic baselines can create archipelagic waters of enormous proportions. Indonesia stretches approximately 3,000 miles east to west and almost 1,000 miles north to south. Indonesia's archipelagic baselines are over 8,000 miles in length and enclose some 666,000 square nautical miles of ocean space. They also encompass the important straits of Sunda, Sumba, Lombok, Ombai, Molucca, and Macassar as well as a number of important internal passages within the archipelago.[155]

The sovereignty of the archipelagic State extends to all waters enclosed by archipelagic baselines, regardless of their depth or distance from the coast (article 49). The sovereignty also extends to the airspace above and the bed and

subsoil of the archipelagic waters. Essentially, the only limitations on the sovereignty of the archipelagic State over archipelagic waters are the rights preserved in all other States (1) to archipelagic sea-lanes passage and air routes through archipelagic sea-lanes as defined by the archipelagic State, or if none are designated then through the routes normally used for international navigation (article 53), and (2) to innocent passage through other areas of archipelagic waters (article 52). Within archipelagic waters, archipelagic States may draw closing lines for the delimitation of internal waters in accordance with the rules for drawing baselines for the territorial sea (article 50). The archipelagic State's territorial sea, contiguous zone, exclusive economic zone and continental shelf extend outward from the archipelagic baselines.

1. **Archipelagic Waters Outside of Archipelagic Sea-Lanes.** The legal character of archipelagic waters is essentially identical to that of the territorial sea. On this basis Dr. Rauch concludes without serious discussion that "belligerents in future will have to respect archipelagic waters the same way as they have to respect the territorial sea of the coastal State."[156] The United States manual adopts the same conclusion, although it precedes it with a cautionary statement, as follows:

> The balance of neutral and belligerent rights and duties with respect to neutral waters is, however, at its most unsettled in the context of archipelagic waters.
>
> Belligerent forces must refrain from acts of hostility in neutral archipelagic waters and from using them as a sanctuary or a base of operations.[157]

In its chapter on the rights and duties of neutral powers, the Canadian draft manual likewise equates archipelagic waters of a neutral State to the territorial sea of such a State, stating:

> 1. Neutral waters are the inland waters, internal waters, territorial seas and, where applicable, archipelagic seas of states which are not participants in an international armed conflict. . . .
>
> 2. Any act of hostility, as, for example, the seizure of or attack upon an enemy vessel within neutral waters is a breach of neutrality and as such is forbidden.[158]

In the chapter on conduct of hostilities at sea, however, in the paragraph entitled "General Area of Naval Warfare," the Draft Manual does not include archipelagic waters of belligerents in the recitation of areas of the sea open to the conduct of hostilities. That paragraph provides:

> 1. The general area within which the naval forces of belligerents are permitted to conduct operations involving the use of force includes: the high seas (including exclusive economic zones), the territorial sea and internal

> waters of belligerents, the territory of belligerents accessible to naval forces, and the air space over such waters and territories.[159]

These apparent inconsistencies undoubtedly reflect the fact that the Canadian Manual is still in draft form and will be addressed in the review process.[160]

Although the German Manual states that archipelagic waters *of the parties* to the conflict are legitimate areas for the performance of acts of naval warfare,[161] its chapter 11 on the law of neutrality refers only to the "territorial waters" of neutrals.[162] In paragraph 1012 of the preceding chapter on armed conflict at sea, however, the Manual states that "The rights of coastal and archipelagic states must . . . be taken into due consideration." The German Manual, like the Canadian one, is also in draft form and subject to further revision.

What has been said above with respect to the effects of the broadening of the territorial sea as a result of the adoption of a twelve-mile breadth and the liberalization and abuse of straight baselines[163] applies with even more vigor to archipelagic waters. If, in a situation in which an archipelagic State such as Indonesia is a neutral, these vast areas of archipelagic waters which were formerly high seas are to be removed from the area open to the conduct of naval hostilities and to become "neutral waters" with all the consequences that that term implies, both for the rights and obligations of neutral States as well as to the belligerent States, one may wonder whether either neutrals or belligerents will be able to live up to their obligations. If the narrow Norwegian territorial sea was a "covered way" enabling German submarines to transit to and from the high seas sheltered from attack by British naval and air forces,[164] neutral archipelagic waters could become a vast, protected superhighway providing a tempting haven for escape from attack and as a secret base for operations. The vastness of such waters certainly renders dubious the so-called twenty-four-hour rule of Hague XIII[165] and increases manifold the burdens imposed on a neutral State by the obligation to exercise surveillance of its neutral waters.[166] This is true whether the archipelagic State chooses to allow belligerent warships to continue to exercise the right of "mere passage" through its archipelagic waters or deny such passage, as would be permitted if archipelagic waters are analogized to the territorial sea in this respect.[167] In either event, the burdens of surveillance and enforcement on the neutral State would be heavy, and the neutral's failure or inability to live up to these obligations would be likely to embroil it in the conflict. This danger is recognized in the United States manual, which provides:

> The neutral archipelagic nation has an affirmative duty to police its archipelagic waters to ensure that the inviolability of its neutral waters is respected. If a neutral nation is unable or unwilling effectively to detect and expel belligerent forces unlawfully present in its archipelagic waters, the

opposing belligerent may undertake such self-help enforcement actions as may be necessary to terminate the violation of neutrality. Such self-help enforcement may include surface, subsurface, and air penetration of archipelagic waters and airspace and the use of proportional force as necessary.[168]

2. Archipelagic Sea-Lanes and Archipelagic Sea-Lane Passage. The waters of archipelagic sea-lanes and the airspace above them are subject to a different navigation regime than are archipelagic waters outside such sea-lanes. An archipelagic State may not deny to ships and aircraft of other States the right of archipelagic sea-lane passage through its archipelagic waters in time of peace.[169] In designating such passages, which will normally be fifty nautical miles in width, the archipelagic State must include for ships "all normal navigational channels."[170] If the archipelagic State fails to make such designations, "the right of archipelagic sea-lanes passage may be exercised through the routes normally used for international navigation."[171] As previously stated, archipelagic sea-lanes passage, in legal terms, is essentially identical to transit passage through straits.[172] In exercising their rights of archipelagic sea-lanes passage, foreign ships and aircraft may proceed in their "normal mode" but only for the purpose of "continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone,"[173] and they must observe the same types of rules and regulations that are applicable in transit passage through straits.[174]

Since transit passage and archipelagic sea-lanes passage are to all intents and purposes legally identical, the same logic which compelled the conclusion that in time of war belligerent warships and military aircraft may exercise the right of transit passage through neutral straits would lead to the same conclusion with respect to archipelagic sea-lanes passage through archipelagic sea-lanes.

This conclusion is accepted by the United States manual, which states that:

> Belligerent ships or aircraft, including submarines, surface warships, and military aircraft retain the right of unimpeded archipelagic sea lanes passage through, over, and under neutral archipelagic sea lanes. Belligerent forces exercising the right of archipelagic sea lanes passage may engage in those activities that are incident to their normal mode of continuous and expeditious passage and consistent with their security.[175]

The Canadian Manual does not deal with archipelagic sea-lane passage separately but rather couples it with transit passage, as follows:

> Warships and military aircraft of a belligerent state may exercise the right of transit passage, that is, of essentially unimpeded passage or overflight in an appropriate state of readiness with appropriate sensors activated, through

> certain straits where the transit passage [regime?] applies or through archipelagic sea lanes.[176]

In interpreting what the United States manual means when it states "activities that are incident to their normal mode," one needs to turn to the provisions of the manual dealing with transit passage through neutral straits, where it is stated:

> Belligerent forces in transit may . . . take defensive measures consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance.[177]

Although archipelagic sea-lanes passage through archipelagic waters may be the legal equivalent of transit passage through straits, geographical factors may create large differences in practical effect. A strait is usually a geographical phenomenon of small dimensions, usually only a few miles from entrance to exit, requiring only a few hours, at most, for passage.[178] Usually there is only one entrance and one exit.[179] On the other hand, taking Indonesia as the prime example, archipelagic waters include vast areas, with numerous internal straits and passages, dictating multiple, intersecting archipelagic sea-lanes. A naval ship or formation entering at one extremity of the archipelago and steaming at a wartime cruising speed of twenty knots, for example, would require over six days to traverse its entire East-to-West dimension using the most direct route. The ship or formation could, through the use of intersecting archipelagic sea-lanes, emerge at any of a number of exits, shielded the entire time from air, surface, or submarine attack from enemy forces. One may question whether it is reasonable to assume that an enemy force would accept the traditional restraints on hostile activities (which presumably would include surveillance) for passage of such great span and duration.

3. Concluding Remarks Concerning Archipelagic Waters. It is apparent from the foregoing discussion that of the "new zones" recognized in the 1982 LOS Convention, archipelagic waters present the most difficult issues. In a paper prepared for delivery soon after the close of UNCLOS III, Rear Admiral Bruce Harlow, a vice-chairman of the United States delegation to that Conference, posed a number of questions concerning the impact archipelagic waters would have on the law of neutrality. He stated:

> What then is the solution? When a neutral cannot or will not take meaningful measures to preclude potential violations, may a belligerent step in and undertake the mission of verifying that neutral waters are free of the enemy? Or would this contravene the traditional rule of inviolability of neutral sovereignty? If a departure from this rule were permitted for surveillance missions, would such missions have to be identified so that they would not be confused with prohibited belligerent operations? If the surveillance/verification mission detected a violator, would the matter have to be

referred to the neutral for action, or could those engaged in surveillance attack the violator pursuant to their belligerent right to take corrective measures against known violations? What would happen if two opposing surveillance forces met? May aircraft be used for surveillance/verification missions despite the traditional prohibition on overflight of sovereign waters? What standard would justify initiation of surveillance/verification missions: in the discretion of the belligerent; upon a reasonable determination that the enemy might use neutral waters; upon determination that the enemy was using neutral waters? What would be the impact of a pattern of prior abuses without evidence of a present violation? Would a different standard apply for a neutral archipelagic state that was willing, but plainly unable, to take actions that would effectively ensure that neutrality violations were precluded, than in the case of another neutral whose words or deeds demonstrated a clear unwillingness, regardless of the level of its capabilities?[180]

Except for Dr. Rauch's monograph, Admiral Harlow's ruminations, and the United States Manual, it would appear that the relationship between the status of archipelagic waters and the law of armed conflict at sea (including the law of neutrality), is largely unexamined in the published legal literature.[181] As can be seen from the foregoing discussion, archipelagic waters pose the most difficult problems for a mechanical application of traditional rules of naval warfare and neutrality to the zones created in the "new" law of the sea. It is submitted that it is unlikely for the traditional rules to survive unchanged in the event of a naval conflict in which archipelagic waters of significant dimensions come into play, either as neutral waters or waters of either belligerent party.

G. The Area. According to the 1982 U.N. Convention on the Law of the Sea, the "Area" is "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."[182] In effect, this means that the seabed beyond the outer edge of the continental shelf of any State comprises the Area. The legal status of the waters superjacent to the Area and the airspace above those waters is not affected by the creation of the Area.[183] In essence, the freedoms of the high seas apply to these waters and airspace.

Part XI of the Convention, which governs activities in the Area, including the regime for exploration and exploitation of its resources, is the most controversial Part of the Convention. Unlike those Parts of the Convention heretofore discussed in this Report, Part XI has not been regarded as reflective of customary international law.[184] The United States and several other States of the developed world have assigned as their reason for refusal to become parties to the Convention the unacceptability of Part XI, and some have enacted interim deep-sea mining codes that permit exploitation of the seabed beyond national jurisdiction under national laws.[185] Nevertheless, even those States which have refused to accept the detailed regime for mining the deep seabed contained in Part XI accept the fact that whether the resources of the deep seabed

are developed in accordance with Part XI or some successor regime or in accordance with national laws, no State may claim or exercise sovereignty over the seabed and subsoil beyond the limits of national jurisdiction.[186] For that reason it is appropriate to include a paragraph or two about the implications of the existence of such an area for the law of armed conflict at sea. For the sake of convenience, it will be referred to as the "Area," even though that term is not accepted by those States who object to Part XI of the Convention.

Since the Area includes only the seabed, ocean floor, and subsoil thereof, the only foreseeable impact it might have on hostile activities in the water column and airspace above it is in the possible interference between the platforms and other gear used by those who may be engaged in activities exploiting the seabed (presumably neutrals) and belligerents engaging in hostile activities against each other. With respect to such possible interferences, the LOS Convention provides 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 freedom of the high seas, *and also with due regard for the rights under this Convention with respect to activities in the Area.*"[187]

The creation of the "Area," whatever form it may ultimately take, should thus have no more impact on the conduct of armed hostilities on the high seas than on other activities that take place on the open ocean, such as fishing and scientific research.

VI
Mine Warfare

Although all weapon systems and platforms are affected by the principles and considerations which have been addressed above, naval mines are probably the most acutely affected, since, except for rarely used unanchored mines, they are usually laid in shallow waters, placing them within one of the zones subject to coastal state jurisdiction. It is thus appropriate to include comments explicitly directed to mine warfare in addition to the general discussion above in section V.E. pertaining to the continental shelf.

Hague Convention (VIII) Relative to the Laying of Automatic Contact Mines is the only treaty law governing the emplacement and employment of naval mines.[188] Hague VIII contains no geographical limitations on where mines may be employed other than the rather vague geographical term "off the coast and ports of the enemy" in Article 2 and "off their coasts" (referring to neutral coasts) in article 4. As pointed out by Professor Howard Levie in his recent book, *Mine Warfare at Sea*,[189] articles originally proposed by the British delegation to the Hague Conference would have limited the laying of anchored automatic submarine contact mines beyond three nautical miles from the low-water mark along the whole extent of the coasts of belligerent states

(friendly and enemy) with an extension allowed to ten nautical miles off defended ports.[190] Because of what Professor Levie describes as "strange twists" in negotiation and parliamentary complications,[191] all references to geographical limitations (other than the two mentioned above) were dropped from the Convention. The negotiation thus focused on restrictions on minelaying generally applicable, regardless of area. The result was, as stated by Sir Ernest Satow, the British delegate, that "the Convention as adopted imposes upon the belligerent no restriction as to the placing of anchored mines, which consequently may be laid wherever the belligerent chooses, in his own waters for self-defense, in the waters of the enemy as a means of attack, or finally on the high seas, . . ."[192]

A proposal by the Dutch delegation which would have prohibited the laying of mines so as to bar passage through straits met a similar fate.[193] Rather than include an article on straits, the final report of the Third Commission merely included a statement that:

> [T]he committee decided unanimously to suppress all provisions relating to straits, which should be left out of the discussion in the present Conference. It was clearly understood that under the stipulations of the Convention to be concluded nothing whatever has been changed as regards the actual status of straits.[194]

After examining the practice of States in all conflicts since the adoption of Hague VIII in 1907, Professor Levie concludes that:

> [T]oday the practice of nations is that there is only one geographical limitation on belligerent minelaying—they may not be laid in the territorial sea or inland waters of neutrals.[195]

It should be remembered, however, that during most of the period covered by Professor Levie's study, the breadth of the territorial sea was generally regarded as extending only three nautical miles from baselines which were almost uniformly drawn along the low-water mark of the coast line.

As developed in sections V.D. and E. above, the special economic and resource jurisdiction exercised by States in their EEZs and continental shelves does not prohibit the emplacement or employment of weapons (including mines) on the seabed or in the waters of the EEZ and continental shelf unless they would interfere with the coastal State's exploitation of the resources of the EEZ or the continental shelf. On the other hand, coastal States exercise full sovereignty over their internal waters, the territorial sea, and archipelagic waters. The territorial sea is subject to the right of innocent passage, and where it embraces a strait used for international navigation, also to the regime of transit passage. Archipelagic waters are subject to the right of innocent passage, and

in archipelagic sea-lanes (where none are designated, the routes normally used for international navigation), to the right of archipelagic sea-lane passage. In principle, then, the same rules should apply to expanded territorial seas and to archipelagic waters as applied to the territorial sea prior to its increase in breadth to twelve nautical miles. Likewise, since archipelagic sea-lanes passage is substantially identical to transit passage through international straits, in principle, the rules for mining archipelagic sea-lanes should be the same as those for international straits. As we saw in Section V., however, rules applicable to a narrow territorial sea or a strait of limited geographical dimension may have a substantially different effect when applied to areas having the same legal characteristics but of vastly different geographical size. Nevertheless, the military manuals and draft manuals that have been examined (U.S., Canada, Germany), appear to accept the same rules for the mining of expanded territorial seas and archipelagic waters as previously have applied to internal waters and the territorial sea. The United States Manual states:

> **9.2.2 Peacetime Mining.** Consistent with the safety of its own citizenry, a nation may emplace both armed and controlled mines[196] in its own internal waters at any time with or without notification. A nation may also mine its own archipelagic waters and territorial sea during peacetime when deemed necessary for national security purposes. If armed mines are emplaced in archipelagic waters or the territorial sea, appropriate international notification of the existence and location of such mines is required.[197] Because the right of innocent passage can be suspended only temporarily, armed mines must be removed or rendered harmless as soon as the security threat that prompted their emplacement has terminated. Emplacement of controlled mines in a nation's own archipelagic waters or territorial sea is not subject to such notification or removal requirements.
>
> Naval mines may not be emplaced in the internal, territorial, or archipelagic waters of another nation in peacetime without that nation's consent. Controlled mines, however, may be emplaced in international waters beyond the territorial sea subject only to the requirement that they do not unreasonably interfere with other lawful uses of the oceans. . . .
>
> **9.2.3. Mining During Armed Conflict.** Naval mines may be lawfully employed by parties to an armed conflict subject to the following restrictions:
>
> . . .
>
> 2. Mines may not be emplaced by belligerents in neutral waters.[198]
>
> . . .
>
> 6. Naval mines may be employed to channelize neutral shipping, but not in a manner to impede the transit passage of international straits or archipelagic sea lanes passage of archipelagic waters by such shipping.
>
> . . .
>
> 8. Mining of areas of indefinite extent in international waters is prohibited. Reasonably limited barred areas may be established by naval mines, provided neutral shipping retains an alternate

route around or through such an area with reasonable assurance of safety.

The Canadian Manual's paragraph on naval mines contains no reference to geographic limitations, confining itself to quoting verbatim Articles 1 through 3 of Hague VII.[199] One must determine geographic limitations for mining by turning to other provisions of the Manual dealing with areas of operations[200] and defining neutral waters.[201] The former of these permits the conduct of operations using force (presumably including mines) on the high seas (including EEZs) and the territorial sea and internal waters of belligerents. The latter forbids acts of hostility within neutral waters, which are defined as the inland waters, internal waters, territorial seas, and archipelagic seas of States which are not participants in the international armed conflict. It thus appears that while the Canadian Manual would prohibit the laying of mines in neutral archipelagic waters, it takes no position as to whether a belligerent may mine an opposing belligerent's archipelagic waters. It is also silent as to whether any particular restrictions apply with regard to mining international straits.

The German Manual deals with naval mines in both a peacetime and wartime environment and in the context of protective, defensive and offensive mining, which it defines as follows:

In laying mines the following kinds are distinguished:

— **protective mining,** i.e., laying mines in friendly territorial and internal waters.
— **defensive mining,** i.e., laying mines in international waters for the protection of passages, ports and their entrances.
— **offensive mining,** i.e., laying mines in hostile territorial and internal waters or in waters predominantly controlled by the adversary.[202]

The Manual contains no explicit provisions against mining of neutral waters, but the paragraph on Scope of Application of the rules states that

[T]he space in which acts of naval warfare within the meaning of paragraph 1014 may be performed comprises:

— the territory of the parties to the conflict accessible for naval forces.
— the internal waters, the archipelagic waters and the territorial sea of the parties to the conflict.
— the high seas, and
— the airspace over these land and sea areas.[203]

Peculiarly, paragraph 1014 does not include "mining" as one of the acts of naval warfare, nor, for that matter, does it include attacking or sinking of enemy warships. Presumably these ambiguities will be clarified upon further revision of the Draft Manual. Assuming, for the purpose of the discussion, however, that the limitations in the "Scope of Application" paragraph are meant to apply to mine warfare, it would appear that the German Draft Manual would equate the

archipelagic waters of belligerent parties to the territorial sea and would authorize their mining under the same rules that would apply to the territorial sea.

The foregoing discussion suggests that neither the conventional law of mine warfare nor the customary practice of States has provided very clear guidelines as to the geographical limits of the employment of mines in naval conflict. The only settled principles are that in the era of the three-mile territorial sea it was lawful for a belligerent to employ mines in its own and its enemy's territorial sea and internal waters and that it was unlawful to employ them in the territorial sea and internal waters of a neutral State. Although there have been attempts to preserve freedom of navigation through international straits, and the United States Manual states that it is unlawful to lay mines "in a manner to impede the transit passage of international straits,"[204] Professor Levie's study concludes that passage through straits "has been barred by mines in past conflicts and undoubtedly will be again in the future."[205]

Archipelagic waters present an even more difficult problem. As discussed earlier, they are subject to the full sovereignty of the archipelagic State and in their legal characteristics are substantially identical to the territorial sea. Technically, then, the same principles that govern the mining of the territorial sea, whether of a neutral or a belligerent, should govern the archipelagic waters, and by the same rationale, the principles applicable to international straits should apply to archipelagic sea-lanes. Either expressly or impliedly, the three service manuals examined seem to accept these consequences. Whether this makes sense and will form a basis for an effective regime in time of conflict seems open to question. The vast areas encompassed with archipelagic waters and the great lengths of some archipelagic sea-lanes would suggest that rule-makers should be careful not to create rules that will be honored more in their breach than in their observance.

VII
Conclusions and Recommendations

The emergence of a "new" peacetime regime for the oceans, with its expansion of existing zones subject to national jurisdiction and the creation of new zones also subject to the same or similar forms of jurisdiction, has created problems of adaptation of the traditional rules of armed conflict at sea to these new developments. As has been found in the foregoing analysis, the current national manuals which have been examined (U.S., Canadian and German) have adopted rules for the conduct of warfare in these new and expanded zones that are identical to those that were applicable prior to their expansion (*i.e.*, the twelve-mile territorial sea) or have adopted by analogy the same rules for newly created areas that were applicable to zones of much smaller dimension that in

peacetime have the same legal characteristics (*i.e.*, archipelagic waters). As has been suggested by the foregoing analysis, however, the geographic and operational factors that determine the nature and scope of naval operations in time of armed conflict, and, in particular, the relationships between belligerent and neutral forces, render it uncertain as to whether such mechanical application of prior rules to new or expanded areas of national jurisdiction serves the best interests of either neutrals or belligerents or the humanitarian objectives of the rules. Massive expansions of waters that are denied to belligerents for hostile operations and for which neutral States have burdensome duties of surveillance and control are likely to increase beyond belligerents' power to resist the temptation to violate such waters and to overtax the capabilities of neutral States to enforce their duties within them. The result may well be increased tension between neutral and belligerent States with the consequent danger of widening the area of conflict and drawing neutral States into it.

Admittedly, I have not been able to propose a better solution for the two areas that create the most difficult problems—the expanded territorial sea (which may be measured from greatly exaggerated baselines) and archipelagic waters. Accordingly, in suggesting the tentative recommendations for formulating updated rules applicable in various zones of the oceans as set forth below, I have adopted the formulations of the three manuals. While this to some extent ignores the problems I have pointed out with respect to these formulations, it nevertheless accepts the three manuals as evidence of an emerging international law in this area.[206] With this caveat in mind, I make the following tentative recommendations for reformulation of the rules of naval warfare that are affected by the emergence of new zones in the "new" law of the sea:

1. Subject to other applicable rules of the law of armed conflict at sea,[207] hostile operations by naval forces may be conducted on the high seas, the territorial sea and internal waters, the land territories, and where applicable the archipelagic waters, of the belligerent, any co-belligerent and the enemy. For this purpose, the high seas include the exclusive economic zone and the waters and airspace above the continental shelf.

2. When such hostile operations are conducted within the exclusive economic zone or the waters or airspace above the continental shelf of a neutral State, the belligerent States shall, in addition to observing the other applicable rules of the law of armed conflict at sea, have due regard to the rights and duties of the coastal State for the exploitation of the economic resources of the exclusive economic zone and the continental shelf. They shall, in particular, respect artificial islands, installations, structures, and safety zones established by neutral States in the exclusive economic zone and on the continental shelf.

3. Neutral waters consist of the internal waters, territorial sea, and where applicable the archipelagic waters, of a State which is not a party to the armed conflict.

4. Within neutral waters hostile acts by belligerent forces are forbidden. A neutral State must exercise such surveillance and enforcement measures as the means at its disposal allow to prevent violation of its neutral waters by belligerent forces.

5. Hostile acts within the meaning of paragraph 4 include, *inter alia*:

a. Attack or seizure of enemy warships or military aircraft;

b. Laying of mines;

c. Visit, search or capture;

d. Detention of a prize or establishment of a prize court;

e. Use as a base of operations.[208]

6. Subject to the duty of impartiality, and under such regulations as it may establish, a neutral State may, without jeopardizing its neutrality, permit the following acts within its neutral waters:

a. Innocent passage[209] through its territorial sea, and where applicable its archipelagic waters, by warships and prizes of belligerent States; for the purpose of exercising the right of innocent passage the warship or prize may employ pilots of the neutral State;

b. Replenishment by a warship of its food, water and fuel sufficient to reach a port within its national territory;

c. Repairs of warships found necessary by the neutral State to make them seaworthy; such repairs may not include repair of battle damage[210] nor increase their fighting strength.

7. A belligerent warship may not extend its stay in neutral waters for longer than twenty-four hours unless the neutral State grants an extension because of:

a. The stress of weather, or

b. The route of innocent passage is of such length as to require more than twenty-four hours for passage.

8. Belligerent warships and military aircraft may exercise the right of transit passage through neutral international straits and archipelagic sea-lanes passage through neutral archipelagic waters. While within neutral waters comprising an international strait or an archipelagic sea-lane, belligerent naval forces are forbidden to carry out any hostile act.

9. Should a neutral State be unable or unwilling to enforce its neutral obligations with respect to hostile military activities by belligerent naval forces within its neutral waters, the opposing belligerent may use such force as is necessary within such neutral waters to protect its own forces and to terminate the violation of neutral waters.

10. A neutral State shall not be considered to have jeopardized its neutral status by exercising any of the foregoing neutral rights nor by allowing a belligerent State to exercise any of the privileges permitted to a belligerent State.

Notes

1. This paper is a revised version of a "report" prepared by the author as Rapporteur for the Fourth Meeting of the Round Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea under the Madrid Plan of Action. The Round Table is sponsored by the International Institute of Humanitarian Law, San Reno, Italy, to whom the author is grateful for encouraging its publication. The paper was prepared while the author was occupying the Charles H. Stockton Chair of International Law at the U.S. Naval War College in 1991-1992. The author wishes to express thanks to the Naval War College for making available the time and research resources necessary for completion of the paper during his tenure at the War College. The views expressed herein are personal to the author and do not necessarily reflect those of the United States Government or the U.S. Naval War College.

2. U.N. Document A/CONF.62/122, opened for signature at Montego Bay, Jamaica, 10 December 1982, reprinted in *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (New York: United Nations, 1983), Sales No. E.83.V.5 (cited hereinafter as LOS Convention).

3. The Convention will enter into force one year after the deposit of the 60th ratification or accession. LOS Convention, *supra* note 2, article 308. As of the time of the writing of this paper (June 1992), there were 51 ratifications.

4. Statement by U.S. President, 10 March 1983, *Weekly Compilation of Presidential Documents*, v. 19, No. 10, pp. 383 (14 March 1983).

5. American Law Institute, *Restatement (Third) of the Law: The Foreign Relations Law of the United States* (St. Paul: American Law Institute Publishers, 1987), v. 2, p. 5 (cited hereafter as Restatement (Third)).

6. The term "zone" as used in this paper does not include wartime exclusion zones such as those proclaimed by Germany in World Wars I and II or by Great Britain in the Falkland Islands War. A discussion of such "war" zones is beyond the scope of this paper.

7. William L. Schachte, Jr., U.S. Department of Defense Representative for Ocean Policy Affairs, "The Value of the 1982 UN Convention on the Law of the Sea—Preserving our Freedoms and Protecting the Environment," (Address to the 25th Annual Conference of the Law of the Sea Institute, Malmo, Sweden, August 1991), reprinted in Special Report of the Council on Ocean Law under the same title (Washington, undated).

8. Bernard H. Oxman, "The Regime of Warships Under the United Nations Convention on the Law of the Sea," *Virginia Journal of International Law*, v. 24, p. 809, at p. 811 (1984 (cited hereinafter as Oxman).

9. See, e.g., Mark Janis, "Neutrality," in Horace B. Robertson, Jr., *U.S. Naval War College International Law Studies, The Law of Naval Operations* (Newport, R.I.: Naval War College Press, 1991), v. 64, p. 148; A.V. Lowe, "The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea," *id.*, p. 109.

10. Christopher Greenwood, "The Concept of War in Modern International Law," *International and Comparative Law Quarterly*, v. 36, p. 283 at p. 300 (1987).

11. Perhaps the most complete and well-balanced history of the development of the law of the sea written in English (until its publication in 1911) is Thomas Fulton's *The Sovereignty of the Sea* (Edinburgh and London: William Blackwood and Sons, 1911). Although subtitled, "An Historical Account of the Claims of England to the Dominion of the British Seas, etc., . . ." the book nevertheless deals extensively with claims of other states to areas of exclusive jurisdiction as well as the counter-assertions of those states which opposed such claims of exclusive jurisdiction or sovereignty. I have relied extensively on this book in developing the following summary. Where important for identifying the specific source of a statement, I have cited to the particular pages of the book from which the statement was taken; where only general propositions are stated, I have not attempted to identify the precise source. (*The Sovereignty of the Sea* is cited hereinafter as Fulton). A second exhaustive and more modern history may be found in Sayre A. Swarztrauber, *The Three Mile Limit of Territorial Seas: A Brief History* (Annapolis, Md: U.S. Naval Institute Press, 1972).

12. See Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York: G.A. Jennings Co., Inc., 1927), p. 3 (hereinafter cited as Jessup).

13. *Id.*, n. 3.

14. Fulton, *supra* note 11, p. 3. Fulton points out that these claims were generally recognized by other states because the right to levy tribute was accompanied by the obligation

to protect commerce in these closed seas from pirates and other predators who swarmed over the oceans during this period. *Id.* at 6-7.

15. C. John Colombos, *The International Law of the Sea* (London: Longmans Green & Co., Ltd., 7th ed., 1967), p. 49.

16. *Ibid.*

17. Fulton, *supra* note 11, at p. 338; see also *id.*, at pp. 105-108.

18. Hugo Grotius, *Mare Liberum (The Freedom of the Seas)*, Magoffin trans. (New York: Carnegie Endowment for International Peace, 1916).

19. Hugo Grotius, *De Jure Belli ac Pacis (The Law of War and Peace)*, Robert W. Kelsey trans. (Indianapolis and New York: Bobbs-Merrill Co., 1925).

20. The debates between Grotius on the one hand and Welwood and Selden on the other, as well as summaries of other significant writings on the subject in the era, are detailed in Fulton, *supra* note 11, at pp. 338 ff. The most influential of the books opposing the ideas of *Mare Liberum* was Selden's two-volume *Mare Clausum*, which was apparently completed in 1618 but was not published until 1635. *Id.*, pp. 366-367.

21. Until the twentieth century the term most frequently used to describe the territorial sea was "territorial waters." In the 1930 League of Nations Conference on the Codification of International Law, the question of terminology—"territorial waters" or "territorial sea"—was a subject of debate. The Conference decided to use the term "territorial sea" on the ground that it was more precise, since the term "territorial waters" was sometimes used to include both the territorial sea and internal waters. See League of Nations, *Acts of the Conference for the Codification of International Law [1930]*, v. III., p. 202, reprinted in Shabtai Rosenne, *League of Nations Conference for the Codification of International Law* (Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1975), v. 4, p. 1404 (cited hereinafter as Acts of the Conference, Rosenne). Although the terms "territorial sea" and "territorial waters" continued to be used interchangeably in the literature and international fora, the International Law Commission settled on the term "territorial sea" for its draft Convention. See Report of the International Law Commission covering the work of its fourth session, *1952 Yearbook of the International Law Commission*, v. ii, p. 68. The same term was used in the 1958 and 1982 Conventions.

22. Fulton, *supra* note 11, at p. 549.

23. Fulton, *supra* note 11, at pp. 557-558.

24. *Ibid.*

25. *Id.*, p. 558.

26. *Id.*, p. 558.

27. *Id.*, p. 554-555.

28. Fulton, *supra* note 11, Section II, Chapter 2, *passim*; D.P. O'Connell, *The International Law of the Sea* (Oxford: Clarendon Press, 1982), v. 1, pp. 128-129 (cited hereinafter as O'Connell). With respect to the breadth of the territorial sea I say "generally" rather than "universally" adopted because even at its most general acceptance, the three-nautical-mile territorial sea was never universal. The Scandinavian states claimed territorial seas of four nautical miles (their marine league being four rather than three nautical miles), and a number of states clung to their six-mile claims, with a few making claims to more extensive breadths, usually twelve miles.

29. See, for example, O'Connell, *supra* note 28, at p. 152.

30. Jessup, *supra* note 12, at p. 7.

31. O'Connell, *supra* note 28, v. 1, p. 72.

32. See Acts of the Conference, v. III, pp. 179 and 202, Rosenne, *supra* note 21, v. 4, pp. 1381 and 1404.

33. Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, UN Doc. A/3159, *Yearbook of the International Law Commission 1956*, v. II, p. 256, "Law of the Sea," article 1.

34. Convention on the Territorial Sea and Contiguous Zone, 29 April 1958, UN Treaty Series, v. 516, article 1 (cited hereinafter as the Territorial Sea Convention).

35. LOS Convention, *supra* note 2, article 2, para. 1.

36. Jessup says that, "As a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law." Jessup, *supra* note 12, p. 120.

37. See *infra* notes 77-79 and accompanying text.

38. Jessup, *supra* note 12, at p. 77.

39. *Church* v. *Hubbart,* 2 Cranch 187, 1 L. Ed. 249 (1804), and other cases cited in Jessup, *supra* note 12, at p. 80.

40. Jessup, *supra* note 12, at pp. 88-92.

41. *Id.*, p. 91.

42. For a detailed discussion of the controversies surrounding the United States Prohibition-Era "hovering acts," see Jessup, *supra* note 12, pp. 241-258.

43. Convention on the Territorial Sea and Contiguous Zone, *supra* note 34, Article 24.

44. See Fulton, *supra* note 11, Chapter V *passim*; Jessup, *supra* note 12, *passim*; O'-Connell, *supra* note 28, at p. 155.

45. Jessup, *supra* note 12, at p. 20; Fulton, *supra* note 11, Chapter V, *passim.*

46. Fulton, *supra* note 11, at p. 694. See also Fulton, Chapter V, *passim.*

47. Presidential Proclamation 2667, "Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf," 28 September 1945, *U.S. Federal Register*, v. 10, p. 12303, *U.S. Code of Federal Regulations*, 1943-1948 Comp., v. 3, p. 67 (1945), reprinted in Marjorie M. Whiteman, *Digest of International Law* (Washington: U.S. Government Printing Office, 1965), v. 4, pp. 756-757 (hereinafter cited as Whiteman).

48. White House Press Release of 30 September 1945, reprinted in U.S. Department of State *Bulletin*, v. XIII, No. 327, pp. 484-485 (1945), reproduced in Whiteman, *supra* note 47, pp. 757-758.

49. Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, *supra* note 33, at p. 256.

50. Territorial Sea Convention, *supra* note 34.

51. Res. 1307 (XIII), 10 December 1958.

52. See Whiteman, *supra* note 47, at pp. 119-137.

53. See discussion in text *supra*, at notes 38-43.

54. II *Yearbook of the International Law Commission (1956)*, *supra* note 33, at pp. 294-295 (emphasis supplied).

55. *Ibid.*

56. Convention on the Continental Shelf, 29 April 1958, UN Treaty Series, v. 499, p. 311, U.S.T., v. 15, p. 471, U.S. T.I.A.S. No. 5578, Article 2.

57. *Id.*, article 1.

58. *Fisheries Case (United Kingdom v. Norway)*, 1951 I.C.J. Reports, p. 116 (Merits).

59. See examples discussed in W. Michael Reisman, "Straight Baselines in International Law: A Call for Reconsideration," *Proceedings of the 82nd Annual Meeting (1988) of the American Society of International Law* (Washington: American Society of International Law, 1990), p. 260; see also, Office of Ocean Affairs, U.S. Department of State, *Limits in the Seas No. 112: United States Responses to Excessive National Maritime Claims* (12 March 1992).

60. Restatement (Third), *supra* note 5. This opinion is also reflected in the joint statement of the U.S. and U.S.S.R. governments at the 1989 Jackson Hole Summit Conference which included the statement that the two governments were guided by the provisions of the 1982 Convention "which, with respect to traditional uses of the oceans, generally constitute international law and practice and balance fairly the interests of all States." U.S. Department of State, *Department of State Bulletin*, v. 89, pp. 25-26 (December 1989).

61. U.S. Department of the Navy, Office of the Chief of Naval Operations, *Law of Naval Warfare* (NWIP 10-2) (Washington: U.S. Government Printing Office, 1955), section 430a. (NWIP 10-2 is the predecessor manual to NWP-9 and is hereinafter cited as NWIP 10-2). I state "as a general rule" because, under certain circumstances, when a neutral state does not live up to its obligation to prevent hostile acts within its maritime territory by one belligerent, the opposing belligerent who is harmed by such acts may take armed self-help measures. O'Connell, *supra* note 28, at p. 1117; H. Lauterpacht, *Oppenheim's International Law* (London, New York, Toronto: Longmans, Green and Co., 7th ed, 1952), v. 2, p. 695 (hereinafter cited as Lauterpacht); U.S. Department of the Navy, Office of the Chief of Naval Operations, *The Commander's Handbook on the Law of Naval Operations* (NWP-9 (Rev. A)) (Washington: U.S. Government Printing Office, 1989), para. 7.3.4.2 (hereinafter cited as NWP-9).

62. Lauterpacht, *supra* note 61, p. 673; Whiteman, *supra* note 47, at p. 178 and sources cited therein. The principle is codified in article 9 of Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907, 36 Stat. 2415 (U.S.), 100 British & Foreign State Papers (1906-1907), pp. 448-454 (U.K.), reprinted at *American Journal of International Law*, v. 2 (Supp.), p. 202 (cited hereinafter as Hague XIII).

63. Hague XIII, *supra* note 62.

64. Dietrich Schindler, "Commentary [on Hague Convention XIII]," in N. Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988), p. 211, at pp. 215, 221.

65. Although Hague XIII does not include the words, "in its territorial waters," State practice suggests that this was the meaning intended by the Article. See H. Lauterpacht, *supra* note 61, p. 746 and sources cited therein; Robert W. Tucker, U.S. Naval War College International Law Studies, *The Law of War and Neutrality at Sea* (Washington: U.S. Government Printing Office, 1957), p. 219, note 52 (cited hereinafter as Tucker).

66. It is a disputed point as to whether this article applies only to stays in ports, roadsteads or territorial waters or also to mere passage through the territorial sea which lasts more than twenty-four hours. The *Altmark* incident, which will be discussed *infra* note 75, is illustrative of how this issue might arise.

67. It is a disputed point as to whether a neutral State may allow a warship to repair battle damage in a neutral port. See H.A. Smith, *The Law and Custom of the Sea* (New York: Frederick A. Praeger, 2d ed., 1950), p. 154 (cited hereinafter as Smith); Colombos, *supra* note 15, pp. 654-657. In any event, it is settled law that repairs which increase the fighting strength of the damaged warship are not permitted. See Harvard Research in International Law, "Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War," Comment on Articles 32-36, *American Journal of International Law*, v. 33 (Supp.) p. 169, at p. 463 (1939).

68. LOS Convention, *supra* note 2, article 8, para. 3.

69. Elmar Rauch, *The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of the Sea: Repercussions on the Law of Naval Warfare* (Berlin: Duncker & Humblot, 1984), p. 32, citing Hague XIII, NWIP 10-2, *supra* note 61, and the Soviet Naval International Law Manual (Moscow: 1966). Both of these manuals, of course, were published prior to the codification of the twelve-mile limit in the UN Law of the Sea Convention. (Dr. Rauch's monograph is cited hereinafter as Rauch.)

70. NWP 9, *supra* note 61, para. 7.3.4.2.

71. Canadian Forces, *Law of Armed Conflict Manual* (Second Draft) (Ottawa: undated), para. 1509 (hereinafter cited as *Canadian Manual*). It should be noted that as an interim measure until its draft manual is completed, the Canadian Armed Forces have promulgated MAOP-331, *Handbook on the Law of Naval Operations*, which, with a 16-page Canadian introduction, incorporates NWP 9 as Annex A.

72. German Federal Ministry of Defense, *Humanitarian Law in Armed Conflicts—Manual* (Bonn: 1992, mimeo), para. 1119 (hereinafter cited as *German Manual*).

73. Hague XIII, *supra* note 62, article 3 (release a prize captured within neutral's waters), article 8 (prevent fitting out or arming of warships), article 25 (exercise surveillance to prevent violation of neutrality).

74. See authorities cited in note 61 *supra*; see also Whiteman, *supra* note 47, pp. 190 ff. and sources cited therein.

75. For a detailed examination of the *Altmark* incident, see Brunson MacChesney, *U.S. Naval War College, International Law Situations and Documents, 1956, Situation, Documents, and Commentary on Recent Developments in the International Law of the Sea* (Washington: U.S. Government Printing Office, 1957), v. 51, pp. 3 ff. (hereinafter cited as MacChesney). A revised version is printed in MacChesney, "The Altmark Incident and Modern Warfare—'Innocent Passage' in Wartime and the Right of Belligerents to Use Force to Redress Neutrality Violations," *Northwestern Univ. Law Review*, v. 52, p. 320 (July-August 1957). See also, C.H.M. Waldock, "The Release of the Altmark Prisoners," *British Yearbook of International Law*, v. 24, p. 216 (1947).

76. See Winston S. Churchill, *The Gathering Storm* (Boston: Houghton Mifflin Co., 1948), pp. 531-532; see also H. A. Smith, *supra* note 67 at p. 153.

77. Some States continue to assert that innocent passage of warships is subject to advance notification or consent. During UNCLOS III, a number of States introduced amendments to the draft Convention seeking to make this an explicit requirement. Opponents pointed out that adoption of such a requirement would be a "conference-breaker." The matter was finally resolved when the President of the Conference persuaded the proponents of the amendments to withdraw them in conjunction with his entering into the records of the Conference a statement that "their decision is without prejudice to the rights of coastal States to adopt measures to safeguard their security interests, in accordance with articles 19 and 25

of the draft Convention." United Nations, *Third United Nations Conference on the Law of the Sea: Official Records* (New York: United Nations, 1984), v. XVI, p. 132, para. 1 (cited hereinafter as UNCLOS OR). A number of States made statements at their signing or ratification of the Convention that the terms of the Convention are without prejudice to their right to adopt measures regulating the passage of warships through their territorial seas. These States included Cape Verde, Democratic Yemen, Egypt, Finland, Iran, Oman, Romania, Sao Tome and Principe, Sudan, Sweden, and Yemen. See *Multilateral Treaties Deposited with the Secretary-General*, ch. XXI.6 (ST/LEG/SER.E/8, pp. 780-794). Several States made statements asserting that warships were entitled to exercise the right of innocent passage without notifying or obtaining the authorization of the coastal State. See statements in the exercise of the right of reply by France, Italy, United Kingdom, and the United States, UNCLOS III OR, *supra*, v. XVII, pp. 241-244.

78. Hague XIII, *supra* note 58, Article 10. MacChesney's examination of the meaning of "mere passage" provides the following insights: "The British who introduced the phrase in their draft of [Article 10] indicated that innocent passage in the peacetime sense was what they had in mind. . . . [T]he peacetime analogy serves to indicate the type of passage that belligerents were willing to allow neutrals to grant. The type of passage contemplated is limited by two basic criteria. It must be an innocent passage for bona fide purposes of navigation rather than for escape or asylum. The passage must be innocent in the sense that it does not prejudice either the security interests of the coastal State, or the interests of the opposing belligerent in preventing passage beyond the type agreed to in Article X." MacChesney, *supra* note 75, pp. 18-19.

79. Smith, *supra* note 67, p. 153; Tucker, *supra* note 65, p. 232; NWIP 10-2, *supra* note 61, section 443a, note 28; NWP 9, *supra* note 61, para. 7.3.4.1. Canada's draft manual does not appear to recognize the right of neutral States to close their territorial seas to the passage of belligerent warships. *Canadian Manual*, *supra* note 71, para. 1511(3). The German Manual is ambiguous. In paragraph 1130 of the revised draft (August 1991) it states, "The innocent passage through neutral territorial waters of warships belonging to the parties to the conflict shall be permissible" (citing Hague XIII, Article 10), but in paragraph 1133 it states, "It is within the discretion of a neutral state to allow the passage of warships and prizes through neutral territorial waters" (also citing Hague XIII, Article 10). *German Manual*, *supra* note 72, pars. 1130 and 1133.

80. W. Michael Reisman and William K. Lietzau, "Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict," in Robertson, *supra* note 9, p. 1 at p. 7.

81. See authorities cited in note 79 *supra*. See also Rauch, *supra* note 69, at pp. 40-44. Rauch states that although the 1907 Hague Conference took up the issue of wartime passage through neutral straits, it did not include an article in Hague XIII on the subject. But he also states that near uniform practice since that time justifies the conclusion that "if the littoral States are neutral, innocent passage of belligerent warships through international straits in time of war may be interfered with only in exceptional cases." *Id.*, p. 44.

82. *United Kingdom* v. *Albania (Corfu Channel Case): Merits, Judgment*, 1949 I.C.J. Reports, p. 4.

83. *Id.*, p. 28.

84. Territorial Sea Convention, *supra* note 34, Article 16, para. 4.

85. See authorities cited in Horace B. Robertson, Jr., "Passage Through Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea," *Virginia Journal of International Law*, v. 20, p. 801 at p. 803, note 7.

86. Note that straits joining the high seas or an EEZ with the territorial sea of a foreign State are excluded by omission, although they were grouped with other straits used for international navigation in the 1958 Territorial Sea Convention. Compare LOS Convention, *supra* note 2, article 37, with the Territorial Sea Convention, *supra* note 34, article 16, para. 4. The right of nonsuspendable innocent passage for such straits is preserved by article 45, para. 2(b) of the LOS Convention, however.

87. LOS Convention, *supra* note 2, article 35(c).

88. *Id.*, article 36.

89. *Id.*, article 38, para. 1.

90. Although there is no explicit provision of the Convention so stating, the result follows from the fact that this category of straits is not included within either those governed by the regime of transit passage or those governed by article 45 (nonsuspendable innocent passage).

91. LOS Convention, *supra* note 2, Article 45, para. 1(a). The most significant effect of the non-applicability of transit passage to this category of straits is that it closes them to overflight by aircraft, and submarines must navigate on the surface and show their flag. Of course, if the passage seaward of the island is truly "of similar convenience with respect to navigational and hydrographical characteristics," the requirement to use such an alternate passage rather than the strait is of little operational significance.

92. LOS Convention, *supra* note 2, article 38, para. 2 (emphasis supplied).

93. *Id.*, article 38, para. 1(c).

94. Civil aircraft are required to observe the rules; State aircraft, which are not bound by the ICAO rules, "will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation." LOS Convention, *supra* note 2, article 39, para. 3(a).

95. *Id.*, article 42, para. 1.

96. *Id.*, article 42, para. 2.

97. *Id.*, article 42, para. 5. See also, statement of U.K. representative explaining the meaning of the proposal introduced by his delegation which eventually became article 42. UNCLOS III OR, *supra* note 77, v. II, Second Committee, 11th Meeting, p. 125, para. 23. See also, LOS Convention, *supra* note 2, article 304.

98. See John Norton Moore, "The Regime of Straits and the Third United Nations Conference on the Law of the Sea," *American Journal of International Law*, v. 74, p. 77 at p. 95 (1980); William T. Burke, "Submerged Passage through Straits: Interpretations of the Proposed Law of the Sea Treaty Text," *Washington Law Review*, v. 52, p. 193 (1977); Robertson, *supra* note 85, pp. 843-846.

99. Rauch, *supra* note 69, at pp. 45-46 (footnotes omitted).

100. NWP 9, *supra* note 61, para. 7.3.5.

101. Canadian Manual, *supra* note 71, para. 1511 (2). A footnote to the paragraph identifies those straits to which the right of transit applies, following the criteria laid down in Part III of the LOS Convention.

102. See note 79 *supra*.

103. LOS Convention, *supra* note 2, article 35(c) (emphasis supplied).

104. See Convention regarding the Regime of the Straits, Montreux, 20 July 1936, League of Nations Treaty Series, v. 173, p. 213, reprinted in *American Journal of International Law*, v. 31 (Supp.), p. 1 (1937).

105. See Boundary Treaty between the Argentine Republic and Chile, 23 July 1881, Consolidated Treaty Series (Parry), v. 159, p. 45. Article 5 thereof provides, in English translation, "Magellan's Straits are neutralized forever, and free navigation is guaranteed to the flags of all nations." In the Argentina-Chile Treaty of Peace and Friendship of 1984, the two countries reaffirmed that the Straits of Magellan "are perpetually neutralized and freedom of navigation is assured to ships of all flags," 29 November 1984, English translation reprinted in International Legal Materials, v. 24, p. 11 (1985).

106. See Treaty for the Redemption of the Sound Dues between Denmark and a number of other European States, 14 March 1857, reprinted in English in *Consolidated Treaty Series* (Parry), v. 116, p. 357. The United States concluded a separate bilateral treaty with Denmark discontinuing Sound Dues for ships flying the U.S. flag. Convention for the Discontinuance of the Sound Dues, 11 April 1857, U.S. Statutes at Large, v. 11, p. 719, reprinted in English in Parry, v. 116, p. 465. It should be noted that the ICJ is currently seised of a case concerning navigation through the Belts.

107. See Convention Relating to the Non-Fortification and Neutralization of the Aaland Islands, 20 October 1921, League of Nations Treaty Series, v. 9, p. 213, reprinted in *American Journal of International Law*, v. 17 (Supp.), p. 1 (1923).

108. Rauch, *supra* note 69, p. 53. the two authorities cited in opposition are John Norton Moore in "The Regime of Straits and the Third United Nations Conference on the Law of the Sea," note 98 *supra*, at p. 111, and Pjotr Barabolja in *Modernes Seevolkerrecht*, published by the Academy of Science of the USSR, translated into German by Elmar Rauch, v. 1, (Baden-Baden, 1978), p. 230. Professor Moore was Vice Chairman of the U.S. delegation to UNCLOS III; General Barabolja was a senior member of the Soviet delegation.

109. NWP 9, *supra* note 61, para. 7.3.5.

110. Montreux Convention, *supra* note 104, articles 19 and 20; see also, Rauch, *supra* note 69, p. 51.

111. See text *supra* notes 53-55.

112. Territorial Sea Convention, *supra* note 34, article 24; LOS Convention, *supra* note 2, article 33.

113. See text, *supra* at notes 54 and 55.

114. *Supra* at note 46.

115. Rauch, *supra* note 69, p. 33.

116. LOS Convention, *supra* note 21, article 56.

117. See Oxman, *supra* note 8, at p. 848; see also Horace B. Robertson, Jr., "Navigation in the Exclusive Economic Zone," *Virginia Journal of International Law*, v. 24, at pp. 874-875, and note 52.

118. For a full discussion of this issue, which has been frequently debated in the legal literature, see Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1989), pp. 230-235 (cited hereinafter as Kwiatkowska).

119. Elliot Richardson, "Power, Mobility and the Law of the Sea," *Foreign Affairs*, Spring 1980, p. 902 at p. 916 (emphasis in original).

120. Professor Oxman concludes that the addition of the phrase, "other internationally lawful uses, etc. . . ." is the "functional substitute for the '*inter alia*' in article 87." Oxman, *supra* note 8, at p. 837.

121. *Id.* at pp. 837-838.

122. See Oxman, *supra* note 8.

123. Rauch, *supra* note 69, at p. 34, quoting from *Sveriges Flotta*, v. 70, pp. 8-11 (1974) (emphasis supplied).

124. See, for example, UNCLOS III OR, *supra* note 77, v. XVII, p. 54, para. 224.

125. Rauch, *supra* note 69, p. 36.

126. *Id.*, p. 37.

127. *Id.*, quoting from James Brown Scott, *The Proceedings of the Hague Peace Conferences, The Conference of 1907* (New York: Oxford University Press, 1920), v. I, p. 288, Report of the Third Commission to the Conference, meeting of 9 October 1907 (Annexes), at p. 290.

128 *Id.*, p. 38.

129. Statement of the delegate of Brazil, Plenary, 187th Meeting, 7 December 1982, UNCLOS III OR, *supra* note 77, v. XVII, p. 40, para. 28.

130. Statement of the representative of Cape Verde, 188th Meeting, Plenary, UNCLOS III OR, *supra* note 77, v. XVII, p. 62, para. 124.

131. Statement of the representative of Uruguay, 192nd Meeting, Plenary, UNCLOS III OR, *supra* note 77, v. XVII, p. 120, para. 55.

132. Italy, Statement made in the exercise of the right of reply, 7 March 1983, UNCLOS III OR, *supra* note 77, v. XVII, pp. 241-242; France, Statement made in the exercise of the right of reply, 12 May 1983, *id.*, p. 241; United States of America, Statement made in the exercise of the right of reply, 8 March 1983, *id.*, pp. 243-244.

133. T.T.B. Koh, in Jon M. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* (A Workshop of the Law of the Sea Institute, Honolulu, Hawaii, January 9-13, 1984) (Honolulu: LOS Institute, 1985), p. 304.

134. *See* Kwiatkowska, *supra* note 118, p. 211.

135. *See* Kwiatkowska, *id.*, note 118, p. 203.

136. *Canadian Manual*, *supra* note 71, para. 703.

137. *German Manual*, *supra* note 72, para. 1011. The German Manual adds a cautionary note that, "The rights of coastal and archipelagic states must, however, be taken into due consideration." *Ibid.* A similar cautionary statement is carried in a footnote in the Canadian Manual. *Supra* note 71, para. 703, note 1.

138. NWP 9, *supra* note 61, para. 7.3.

139. LOS Convention, *supra* note 2, article 56, para. 3.

140. LOS Convention, *supra* note 2, article 76.

141. *Id.*, article 77.

142. *Id.*, article 80.

143. *Id.*, article 78.

144. *Id.*, article 60(6).

145. *Id.*, article 80 (incorporating article 60 *mutatis mutandis*).

146. Convention on the Continental Shelf, 29 April 1958, U.N. Treaty Series, v. 499, p. 311, article 2.

147. LOS Convention, *supra* note 2, article 77.

148. See Tullio Treves, "Military Installations, Structures, and Devices on the Seabed," *American Journal of Int'l Law*, v. 74, p. 808, at p. 834 (cited hereinafter as Treves).

149. See *id.* at p. 839

150. *Id.*, pp. 840-846.

151. An alternative argument legitimizing the employment of weapons or other military devices on the seabed of the EEZ and continental shelf could be made on the basis that military devices, such as mines and detection or surveillance devices are not "installations or structures." Some weight is added to this argument by the replacement of the nomenclature "installations and devices" in the 1958 Continental Shelf Convention, *supra* note 146, article 5, by "installations and structures" in the 1982 Convention. See Treves, *supra* note 148, p. 841. A second alternative basis for the same conclusion, at least for detection and surveillance devices, can be found in the explicit provisions in articles 58 and 79 recognizing the right of all States to lay and maintain submarine cables. *Id.*, pp. 842-843.

152. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 5 August 1963, U.N. Treaty Series, v. 480, p. 43.

153. 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, 11 February 1971, U.N. Treaty Series, v. 955, p. 115.

154. Treaty for the Prohibition of Nuclear Weapons in Latin America, with Additional Protocols I and II, 14 February 1967, U.N. Treaty Series, v. 634, p. 281.

155. U.S. Department of Defense, Office of the Assistant Secretary of Defense (International Security Affairs), *Maritime Claims Reference Manual* (Washington: U.S. Dept. of Defense, 1989), v. 2, p. 232 (for sale by the National Technical Information Service as DoD 2005.1-M). Although Indonesia is the paradigm case of an archipelagic State, the archipelagic waters claimed by a number of other States enclose ocean areas of substantial dimensions. Examples include (with their approximate North-South and East-West dimensions in nautical miles): Cape Verde (144 x 130), Fiji (300 x 300), Papua-New Guinea (840 x 600), Solomons (500 x 120), Vanuatu (420 x 100). *Ibid.*, *passim*. The Republic of the Philippines is not included in this list because its archipelagic baselines, which are drawn in a manner inconsistent with the LOS Convention, are not generally recognized as valid.

156. Rauch, *supra* note 69, at p. 33.

157. NWP 9, *supra* note 61, para. 7.3.6. The Annotated version of NWP-9 footnotes this statement to Hague XIII, articles 1, 2 and 5, and NWIP 10-2, para. 441, both of which address neutral waters in the context of the territorial sea and internal waters only.

158. Canadian Manual, *supra* note 71, para. 1509.

159. *Id.*, para. 703. See also para. 706, entitled "Passage Through Neutral Waters," which provides in part that, "Neutral waters are the internal waters and the territorial seas, including straits overlapped by such waters, of states which are not participants in a conflict."

160. Telephone conversation between the author and Commander William Fenrick of the Canadian Ministry of Defense on 4 February 1992.

161. German Manual, *supra* note 72, para. 1010 (emphasis supplied).

162. See, for example, *id.*, paras. 1121-1123, 1130-1133. It should be noted, however, that paragraph 1012 of the German Manual states that archipelagic States exercise full sovereignty within their archipelagic waters, adding that, with respect to acts of naval warfare, "The rights of . . . archipelagic states must . . . be taken into due consideration."

163. See text at notes 73-79 *supra*.

164. See *supra*, notes 75 and 76 and accompanying text.

165. Hague XIII, *supra* note 62, article 13.

166. *Id.*, article 25. The Canadian draft manual recognizes the difficulty posed for the neutral, stating, "There is a significant possibility that weak neutral archipelagic states will be unable to ensure that strong belligerents will not use their archipelagic waters as a base of operations. HMC ships should not, however, presume that enemy warships present in neutral archipelagic waters are using those waters as a base of operations and are hence subject to attack unless the enemy warships pose an immediate and substantial threat or unless guidance on the subject has been received from a higher command." Canadian Manual, *supra* note 71, para. 706(6).

167. See *supra*, notes 77-79 and accompanying text for discussion of the neutral's rights in this regard.

168. NWP 9, *supra* note 61, para. 7.3.6.

169. LOS Convention, *supra* note 2, article 44, as incorporated *mutatis mutandis* into the archipelagic-State Part of the Convention by article 54.

170. *Id.*, article 53, para. 4.

171. *Id.*, para. 12.

172. Some publicists have tried to draw a distinction between the two concepts on the basis that in Part III (straits), the term "*freedom* of navigation and overflight" is used (article 38, para. 2), whereas in Part IV (archipelagic States), the expression "*right* of archipelagic sea lanes passage" is used (article 53, para. 2). See, for example, Nugroho Wisnumurti, "Archipelagic Waters and Archipelagic Sea Lanes," in Jon M. Van Dyke, Lewis Alexander, and Joseph R. Morgan (eds.), *International Navigation: Rocks and Shoals Ahead?* (A Workshop of the Law of the Sea Institute, 1986) (Honolulu: Law of the Sea Institute, 1988), p. 198, at pp. 204-205. In view of the near identity of the provisions in the other articles of the two Parts as well as incorporation of key provisions of the transit-passage regime by reference *mutatis mutandis* into Part IV (article 54), it is ifficult to conclude that this ifference in terms has any legal significance.

173. LOS Convention, *supra* note 2, article 53, para. 3.

174. *Id.*, article 54.

175. NWP 9, *supra* note 61, para. 7.3.6.

176. Canadian Manual, *supra* note 71, para. 1511(2).

177. NWP 9, *supra* note 61, para. 7.3.5.

178. There are, of course, exceptions such as the Singapore-Malacca Strait.

179. The Singapore-Malacca Strait is an exception here also.

180. Rear Admiral Bruce A. Harlow, JAGC, USN, "The Law of Neutrality at Sea for the 80's and Beyond," A Paper Prepared for the Hawaii Regional Meeting of the American Society of International Law, 16-18 February 1983, reproduced in *UCLA Pacific Basin Law Review*, v. 3, p. 42 at pp. 53-54. Although Admiral Harlow uses the term "neutral waters" in the quoted paragraph, he is referring throughout to archipelagic waters. Despite his reservations and uncertainties about treating archipelagic waters the same as the territorial sea, Admiral Harlow seems to come down in favor of that solution as more consistent with the expectations of neutral archipelagic States and the opportunity for the progressive development of international law applicable to armed conflict provided that a belligerent's right to self-help is recognized in the event the neutral archipelagic State is unwilling or unable to enforce the neutrality of its archipelagic waters.

181. In response to comments on his paper, "Archipelagic Waters and Archipelagic Sea Lanes," *supra* note 172, Dr. Wisnumurti, who was the Director of Legal and Treaty Affairs of the Indonesian Department of Foreign Affairs, posed a hypothetical situation which appeared to assume that archipelagic sea-lanes would be open to belligerent warships in time of armed hostilities. It would be presumptuous, however, to interpret such an informal remark as an expression of the government of Indonesia's position on this issue.

182. LOS Convention, *supra* note 2, article 1(1).

183. *Id.*, article 135.

184. Restatement (Third), *supra* note 5, section 523, Reporters' Notes, para. 1.

185. See interim mining laws enacted by France, Germany, Japan, the former U.S.S.R., and the United Kingdom reprinted in *International Legal Materials* at v. 21, p. 808 (1982), v. 20, p. 393 (1981), v. 22, p. 102 (1983), v. 21, p. 551 (1982), and v. 20, p. 1717 (1981) respectively. The United States act is at Title 30, United States Code, sections 1401 *et seq.*

186. LOS Convention, *supra* note 2, article 137, para. 1. Restatement (Third), *supra* note 60, section 523, para. (1)(a).

187. LOS Convention, *supra* note 2, article 87, para. 2 (emphasis supplied).

188. 18 October 1907, 37 U.S. Statutes at Large, p. 2332, Bevans, v. 1, p. 699. Although the Convention, by its own terms, covers only "automatic contact mines," it seems to be generally accepted that the principles stated therein are applicable *mutatis mutandis* to other forms of naval mines developed since Hague VIII was adopted in 1907. See, e.g., Tucker, *supra* note 65, p. 304, note 49; Rauch, *supra* note 69, p. 116; NWP 9, *supra* note 61, para. 9.2.1; Cana ian Manual, *supra* note 71, para. 710.

189. Howard S. Levie, *Mine Warfare at Sea* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992) (cited hereinafter as Levie).

190. *Id.*, p. 36.

191. *Id.*, pp. 37-42.

192. Sir Ernest Satow, Proceedings of the Conference, v. 1, pp. 274-275, as quoted in Levie, *supra* note 189, p. 41. Sir Ernest added that Great Britain regarded the Convention as only a partial codification of the law of mine warfare and that it would not "be permissible to presume the legitimacy of an action for the mere reason that this Convention has not

prohibited it." *Id.*, pp. 41-42. Great Britain filed a reservation to the same effect. See Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Dordrecht: Martinus Nijhoff Publishers, 3rd ed. 1988), p. 808.

193. Levie, *supra* note 189, pp. 42-44.

194. As quoted by Levie, *id.*, at p. 44.

195. Levie, *supra* note 189, p. 177.

196. NWP 9 defines armed and controlled mines as follows: "Armed mines are either emplaced with all safety devices withdrawn or are armed following emplacement, so as to detonate when preset parameters (if any) are satisfied. Controlled mines (including mines possessing remote control activation devices) have no destructive capability until affirmatively activated by some form of controlled arming order (whereupon they become armed mines)." NWP 9, *supra* note 61, para. 9.2.1.

197. The annotated version of NWP 9 cites the *Corfu Channel* case, *supra* note 82, for this proposition.

198. Impliedly this includes neutral archipelagic waters. See NWP-9, *supra* note 61, para. 7.3.6.

199. Canadian Manual, *supra* note 71, para. 710.

200. *Id.*, para. 703.

201. *Id.*, para. 1509.

202. German Manual, *supra* note 72, para. 1039.

203. German Manual, *supra* note 72, para. 1010. As previously noted, paragraph 1012 of the German Manual equates neutral or nonbelligerent EEZs with high seas insofar as acts of naval warfare are concerned.

204. NWP 9, *supra* note 61, para. 9.2.3, subpara. 6. Note that the German Draft Manual states that there is no right of **protective** mining of straits in times of crisis but is silent as to the mining of straits in armed conflict. German Manual, *supra* note 72, para. 1041 (emphasis supplied).

205. Levie, *supra* note 189, p. 178.

206. See Reisman and Lietzau, *supra* note 80, as to the shaping of customary international law through publication of national manuals.

207. The "other applicable rules" are those applicable to the conduct of hostilities regardless of where the hostile acts take place, such as rules regarding prohibitions on specific weapons or means of warfare, targeting, treatment of civilian persons and objects, etc.

208. The prohibition against erecting any apparatus to communicate with belligerent forces at sea, contained in article 5 of Hague VIII, has not been included because it is deemed obsolete.

209. Hague XIII uses the term "mere passage." I have used "innocent passage" as more consonant with modern usage and also because it is more clearly defined in international law. See note 78 *supra*, where it is suggested that the two terms are legally equivalent.

210. This provision adopts a position as to which practice is divided. See *supra* note 67.

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