# THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW

## Volume III: Marine Environmental Law and Maritime Security Law

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# 18

# MILITARY USES OF THE SEA

*Natalino Ronzitti*

## 18.1 Introduction

The oceans offer several opportunities for military users, ranging from hard security to soft security. The former involves navies' mobility, capability of self-defence, and exercise of sea power for a number of reasons, including military action or simply showing the flag to assert a claim, countering other States' excessive claims and the use of the sea in wartime. The latter is related to maintaining law and order in the oceans or to implement coastal States' jurisdiction, such as the fight against illegal immigration, drug trafficking and vindicating coastal States laws beyond the territorial sea. Other naval activities, such as the fight against terrorism and piracy, fall between the two main uses of the sea. The present chapter is devoted only to 'hard security'. Soft security is dealt elsewhere in this volume as well as those activities that fall between, like terrorism and piracy. This does not mean that some reference is to be made to them, mainly when their relevance becomes a topic for hard security.

## 18.2 Military Uses

### 18.2.1 Warships: Definition

Oceans may be used for multiple purposes, such as leisure, fishing, transportation, and commerce. Military purposes are one of the possible uses of the oceans. The main military users are navies. Hence the importance to define warships and their status.

The United Nations Convention on the Law of the Sea 1982 (UNCLOS)[1] restates in its Article 29 the definition of warship given by Article 8, para. 2

[1] United Nations Convention on the Law of the Sea (Montego Bay, opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).



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of the Convention on the High Seas 1958 (HSC).[2] According to the definition

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

There is another category of vessels which is not defined by the UNCLOS even though their regime is similar to that of warships in many respects: naval auxiliaries and other government ships operated for non-commercial purposes. In the commentary of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004[3], the following examples are given under Article 16, para. 2: police patrol boats, custom inspection boats, hospital ships, oceanographic ships, training vessels and dredgers, owned and operated by a State and used or intended for use in government non-commercial service.

A commercial vessel may be transformed into a warship. The pertinent rules are embodied in the Hague Convention No. VII of 1907 relating to the conversion of merchant ships into warships. For this purpose, the merchant ship should be placed under direct authority, control, and responsibility of the flag State, bear the external marks which distinguish the warships of the nationality of the flag State, and be under a commander in the service of the State and duly commissioned. The crew must be subject to military discipline and the converted warship, which should appear in the list of warships, must observe in its operation the laws and customs of war. The law dictates a procedure which has been drafted for wartime. The rules of the Hague Convention may in principle be applied also in peacetime, even though it is extremely improbable that States would have recourse to the conversion of merchant ships given the contemporary complexity of warships.

Sunken warships are no longer considered to be warships since they are lacking the element of 'flottabilité' (navigability). However, they remain State property unless abandoned, and are still entitled to sovereign immunity.[4]

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[2] Convention on the High Seas (Geneva, adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11 (HSC).

[3] United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004, not yet in force) UN Doc A/59/508.

[4] See generally N Ronzitti, 'The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law' (2012) 74 *Yearbook of Institute of International Law*, Rhodes Session, 131–70; S Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press, 2013) 134–64.



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### 18.2.2 Innocent passage through the territorial sea

Both the Convention on the Territorial Sea and the Contiguous Zone 1958 (Territorial Sea Convention)[5] and the UNCLOS allow the innocent passage through the territorial sea but do not specify whether warships may engage the passage. However since both Conventions contain rules on measures which may be taken against warships violating the rules on passage, they will be deprived by their purposes if the passage is denied: the Territorial Sea Convention embodies Article 23 applicable to warships and Articles 30–31 of UNCLOS dictate rules for warships. It is controversial whether the passage of warships is made conditional upon the consent of the coastal State, or only previous notification is required. The existence of a right of passage of warships according to the customary international law is likewise controversial. The point was not clarified by the International Court of Justice (ICJ) in its judgment on the Corfu Channel case referred below, since the Court dictum refers only to the right of passage through an international strait but does not consider the right of passage through territorial waters.

Third world countries continue to assert that passage is subject to the consent or previous notification of the coastal State. A number of States have changed their position. In this connection the practice of the Union of Soviet Socialist Republics (USSR) is of paramount importance. At the time of ratification of the 1958 Territorial Sea Convention, the Soviet Union and a number of socialist countries entered a reservation according to which the transit of warships was made conditional upon the consent of the coastal State. However on 23 September 1989 the Soviet Union and United States (US) signed a common declaration stating that all ships, including warships, enjoy the right of innocent passage through territorial waters in time of peace.[6] Since then the right of passage through territorial sea without prior notification/authorization has gained currency in State practice. This right is enjoyed by all warships without any distinction as to armament and means of propulsion. Submarines are required to navigate on the surface and to show their State flag. According to a number of authorities a norm of customary international law allowing the passage of warships through territorial waters is already in existence or at least in progress. The number of States subjecting the passage to their consent or prior notification is being reduced.

### 18.2.3 Innocent passage through international straits

Article 16 (4) of the 1958 Territorial Sea Convention grants a right of passage in straits used for international navigation connecting two parts of open sea or one

[5] Convention on the Territorial Sea and the Contiguous Zone (Geneva, adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205 (Territorial Sea Convention).

[6] 'Uniform Interpretation of Rules of International Law Governing Innocent Passage', United Nations, *Law of the Sea Bulletin*, No. 14 (1989), 12–13.

part of the high seas and the territorial sea of a foreign State. Passage cannot be suspended. Overflight is not allowed without the consent of the riparian State/States, unless specifically granted as stated by the 1979 Peace treaty between Egypt and Israel which preserves the right of navigation for all flags through the strait of Tiran and the Gulf of Aqaba, the waterway allowing the entry into the Israeli port of Eilat.

Freedom of passage is enjoyed both by merchant vessels and warships, and this rule—as far as straits connecting two parts of open seas are concerned—is a codification of customary international law, as can be inferred from the Corfu Channel Case, where the Court clearly stated that straits used for international navigation are open both to merchant and military vessels.[7]

The UNCLOS, while introducing the regime of transit passage for straits connecting two parts of the open seas or two Exclusive Economic Zones (EEZ(s)) or an EEZ and the high seas, maintains the regime of innocent passage with no suspension for international straits connecting the territorial sea and the open seas or the territorial sea and the EEZ (Art. 45).

### 18.2.4 Transit passage through international straits and archipelagic waters

The UNCLOS is very innovative as far as the passage through international straits connecting two parts of open seas or two EEZs or an EEZ with the open seas, since it grants transit passage (Art. 38).

The transit passage allows more navigational rights than the innocent passage since it allows: a) a unimpeded right of transit for both civilian ships and warships; b) the right of overflying the straits with civilian or military aircraft; c) the right of submarines to a submerged passage along all the waters of the strait. Ships and aircraft in transit should refrain from any threat or use of force and in general from any activity not directly connected with the normal mode of operation of ships and aircraft. Normal mode of operation for warships means that they may transit singularly or in squadron. Aircraft carriers are allowed to transit and aircraft on board may take off and deck during the transit.[8]

The right of transit passage was inserted because of the necessity of mobility of fleets and was promoted by the then superpowers. It serves their interest and it is recognized together with other military navigational rights by the US, even though they are not party to UNCLOS.

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[7] [1949] ICJ Reports 28.

[8] DR Rothwell and T Stephens, *The International Law of the Sea* (Hart Publishing, 2010) 273. However that interpretation of the rule on transit passage is subject to controversy: see N Klein, *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) 33.

The Strait of Gibraltar is subject to the law of transit passage, which means that every vessel, including warships, has an unimpeded right of transit, and submarines may transit the strait submerged. There is also a right of overflight as proved during the US air bombing of Libya on 15 April 1986. The US aircraft coming from British bases overflew the Strait of Gibraltar since their continental allies denied them transit right over their territories.

The two States bordering the Strait of Gibraltar, Spain and Morocco, tried to resist the stipulation of transit passage at the III Law of the Sea Conference. However, subsequent practice shows that the two States acquiesced in the right of transit passage, including overflight, as proven by the declaration issued at the time of the overflight of US aircraft in 1986.[9]

As far as the Strait of Hormuz is concerned, the only waterway allowing the entry in the Persian Gulf, it should be subject to the regime of transit passage. However, one of the States bordering the Strait, Iran, is not party to UNCLOS and does not recognize the regime of transit passage as belonging to customary international law. Consequently Iran claims that its territorial waters lying in the Strait are only subject to the regime of innocent passage and warships are admitted to passage only after their duly notification to the Iranian authorities. In time of crisis Iran threatened to close the Strait or at least the part belonging to its territorial waters. During the Iran–Iraq war (1980–1988) Iran firstly declared that it would leave the Strait open to navigation. Subsequently it changed its policy and declared the part lying within its territorial waters as a war zone, obliging neutral States to navigate along the coastal belt lying under Oman's sovereignty. Threats by Iran to close the Strait of Hormuz are often repeated but not implemented.

### 18.2.5 Straits under a long-standing regime: The Dardanelles and other straits

Article 35c of UNCLOS preserves the navigation through straits under a long-standing regime regulated by a convention specifically devoted to the strait. The most celebrated example is the 1936 Montreux Convention regulating the passage through the Bosphorus and Dardanelles.[10] The Convention distinguishes between commercial shipping and warships and between peacetime and wartime.

In time of peace all private flags enjoy freedom of navigation through the straits. They may be subject to sanitary control and to the payment of a fee.

As far as warships are concerned it is necessary to distinguish ships belonging to non-Black Sea States and ships belonging to Black Sea States.

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[9] Cf. T Treves, 'Codification du droit international et pratique des Etats dans le droit de la mer' (1990-IV) 223 *Recueil des cours de l'Académie de droit international* 130–32.

[10] Convention Regarding the Regime of the Straits, (Montreux, adopted on 20 July 1936, entered into force 9 November 1936) 173 LNTS 213 ('Montreux Convention').

The first category of ships may passage through the Turkish straits provided that they are light surface vessels. Submarines are thus excluded. Ships may be subject to the sanitary control of the Turkish authorities and to the payment of a fee. Moreover the total tonnage of all 'foreign' warships (ie belonging to States other than Turkey) passaging the Straits cannot exceed 15,000 tons and their number cannot exceed nine vessels. Previous notification is required.

The second category enjoy a more favourable treatment. Black Sea States have the right to passage through the Straits with warships over 15,000 tons provided they transit one at time. Submarines may transit provided they have been built or purchased outside the Black Sea and need to reach a State naval facility inside the Black Sea or need to exit from the Black Sea in order to be repaired. In both cases submarines may transit one at a time, but should emerge and transit during daytime. Black Sea States should notify the transit to the Turkish authorities. There is another limitation: the total tonnage of foreign warships operating in the Black Sea cannot exceed 45,000 tons.

There is no mention of aircraft carriers in the Montreux Convention. The majority of writers, however, are of opinion that the passage of this kind of ship is not allowed. In 1976 Turkey allowed the passage of the Soviet aircraft carrier *Kiev* capable of transporting 25–30 aircraft with vertical take-off and the same number of helicopters. In notifying the passage the Soviet Union referred to the *Kiev* as a cruiser equipped for anti-submarine warfare.

During the Georgia conflict (2008) Turkey did not authorize the passage of the US hospital ships *Mercy* and *Comfort*, the total tonnage of which amounted to 140,000 tons.

In time of war if Turkey is neutral, non-belligerent powers enjoy the freedom to use the straits in a manner equal to time of peace. Belligerent powers are forbidden to pass through the straits except in the case of an action undertaken under the League of Nations (which nowadays may be read United Nations) or a pact of mutual defence to which Turkey is party (eg the North Atlantic Treaty Organization (NATO)). If Turkey is at war the passage is left entirely to the discretion of Turkey.

### 18.2.6 The exclusive economic zone

The rights of navigation and overflight both for commercial/military shipping and civil/military aircraft are guaranteed by Article 58, para. 1, of UNCLOS which recalls Article 87 where those rights are specifically mentioned as belonging to the freedom of the high seas. Problems are raised by military exercises carried out in a foreign EEZ. During the negotiation of UNCLOS a number of States tabled a proposal according to which military exercises in the EEZ should



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be authorized by the coastal State. However the proposal was not accepted. Article 19, para. 2, specifically forbids military exercises during the passage through the territorial sea. Should negotiating States prohibit military exercises within a foreign EEZ, they should have clearly affirmed the prohibition. One may conclude that military exercises are a manifestation of the freedom of high seas to which Article 58 refers.

At the moment of UNCLOS ratification a number of States, mainly third world countries, have issued a declaration stating that foreign military exercises are forbidden in their EEZ. These declarations were followed by the insertion of the prohibition in the legislation on EEZ.[11]

The above claims were met by opposite declarations by Western countries made upon signature/ratification of UNCLOS or autonomously formulated in order to avoid any implied recognition of the claim.[12]

### 18.2.7 The continental shelf

The continental shelf can be used for military purposes such as the emplacement of dormant mines or more innocent listening posts for submarine tracking. Third world countries are usually opposed to such uses of their continental shelves by foreign States and claim that the emplacement of such devices hampers their sovereign right to exploit the natural resources of the seabed. Even more innocent activities as charting and mapping raise their protests. There are no specific provisions in UNCLOS. On the one hand, Article 77 grants sovereign rights to the coastal State for exploring and exploiting continental shelf natural resources; on the other Articles 79 and 80 deal, respectively, with cable and pipelines and artificial islands, installations, and structures. They are civilian devices which are not comparable with military assets. The point is not explicitly regulated by UNCLOS and a possible conclusion is that military activities on the continental shelf fall within the freedom of the sea and are permitted in so far as they do not interfere with the right of exploration and exploitation granted to the coastal State. Extreme examples are always possible. For instance, building an artificial island to serve as a platform for military purposes, or laying an extensive minefield attached to the seabed compromising the capacity of the coastal State to exploit and explore its continental shelf, and constituting a danger for the preservation of marine environment would certainly be forbidden under Article 80.

[11] Declarations excluding foreign exercises or making them conditional upon the consent of the coastal State were made for instance by Bangladesh, Brazil, Cape Verde, Malaysia, India, Pakistan: see J Geng, 'The Legality of Foreign Military Activities in the Exclusive Economic Zone under UNCLOS' (2012) 28 *Utrecht Journal of International and European Law* 25–6.

[12] According to Y Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 369, claims and counter-claims together with the 'high degree of political sensitivity involved in this subject' do not allow giving a definitive answer to the question of military exercises in a foreign EEZ.



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During the Kosovo war in 1999, NATO aircraft still carrying weapons on board after having accomplished their mission discharged them in the Adriatic before landing at the Italian base in Aviano. The practice of 'jettison areas' raised protests from Croatia, since the weapons were discharged on its continental shelf and caused casualties among Italian fishermen. However, neither NATO nor the US accepted any responsibility. The weapons were cleared away by a NATO squadron, which claimed that the sweeping operation was a mere exercise and was not the result of any duty of reparation for an illegal act.[13] It is open to inquiry, however, whether NATO's attitude is in conformity with the general obligation, stemming from customary international law, to pay due regard to the marine environment, even in case of belligerency.[14]

### 18.2.8 The high seas

The freedom of the high seas includes a number of rights which are exemplified by Article 87 of UNCLOS. The list therein stated is not conclusive. Freedom of navigation and overflight are obviously the most important as far as military uses of the seas are concerned. Problems arise when the content of these freedoms should be spelled out. They are qualified by the obligation to take due account of the interests of the other States exercising the same freedoms, and by the rights conferred by the UNCLOS provisions on the Area (ie the seabed and ocean floor beyond the national jurisdiction).

Article 87 lists two liberties which may have a military significance among the freedoms of the high seas: the laying of cables and pipelines and the construction of artificial islands and other installations. The former should be installed taking into account the provisions on the continental shelf if they lie on that part of sea and the consent of the coastal State should be sought for the delineation of their course (Art. 79); the latter should be in line with the provisions of the EEZ, which reserves any emplacement to the coastal State (Art. 60), and with the relevant provisions of international law. In this connection Article 89 should be considered and the installation of artificial islands should not become a means for claims of sovereignty of the part of the high seas where they are floating.

Warships on the high seas enjoy a complete immunity and are only subject to the jurisdiction of the flag State (Art. 95). They cannot be boarded and are not subject to any exception that the law foresees for private shipping. For instance, by definition, a warship cannot commit an act of piracy unless the crew has mutinied (Art. 102). Article 221 on the prevention of pollution for accidents on the high seas cannot be applied to warships.

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[13] See M Mancini, 'Air Operations against the Federal Republic of Yugoslavia (1999)' in N Ronzitti and G Venturini (eds), *The Law of Air Warfare. Contemporary Issues* (2006) 293–5.

[14] See eg the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995), drafted under the auspices of the International Institute of Humanitarian Law, Rule 44.

Usually the relevant law relating to interference with foreign warships on the high seas should be found in the law of self-defence, naval interdiction and other forceful measures which may be lawfully exerted in time of peace. All these issues will be considered below.

## 18.3 Naval Interdiction: Blockade and Quarantine

The blockade is a measure of warfare which may be employed during an international armed conflict. Although no longer as frequent as during the 18th and 19th centuries, it has not become totally obsolete. Modern examples are the controversial blockade by the United States of the port of Haiphong (1972) during the Vietnam War, the blockade by Israel of the Lebanon coast in 2006 and the blockade by Israel of the Gaza strip, which is still in existence at the time of writing. During the NATO intervention against the Federal Republic of Yugoslavia in 1999, the United States proposed the blockade of the port of Bar, but the proposal was not endorsed by France and Italy as they deemed it required authorization by the UN Security Council (UNSC). Blockade is often an example of asymmetric warfare in that it is not easy to enforce a blockade against a powerful adversary, with the blockading force running the risk of being exposed to missile fire from the coastal State. Under the UNSC Resolution 1973 (2011) States were allowed to inspect vessels to impede weapons delivery to Libya. However the NATO fleet cruising off the Libyan coast did not establish a blockade in a proper meaning since it was only tasked to visit and search vessels suspected to transport military equipment.

According to the 1909 London Declaration, a blockade, in order to be lawful, has to be effective (ie maintained by a naval force able to impede the entry or exit of vessels via the blockaded coast); non-discriminatory (ie enforced against all flags, even those belonging to the blockading State); and duly notified by diplomatic means or by the commander of the blockading force, since all States should know the existence of the blockade. Merchant vessels in breach of blockade may be captured and adjudicated as a prize.

Blockades aimed at starving the civilian population of the blockaded coast are forbidden. As can be implied from both Article 23 IV Geneva Convention and Article 70 Additional Protocol I, the effectiveness of the blockade is not frustrated by humanitarian actions. For instance, during the Israeli blockade of Lebanon (2006), Italy was permitted to evacuate its own and other countries' nationals. Humanitarian action requires the consent of the blockading State.

If terrorists act at the order of the coastal State or are part of its governmental structure, the blockade is a lawful means for implementing an antiterrorist strategy, since it takes place within an international armed conflict.



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The problem is whether a blockade may be employed against a non-State actor controlling a coastal territory. The precedents are related to insurgents' communities and involve the relations between the constituted government and insurgents as well as those between the constituted government and third State. The most quoted precedent is that of the blockade of Confederate States by the United States during the American civil war (1861–1865). Modern examples include the blockade of Biafra's ports by the Federal Government of Nigeria (1967). Usually it is admitted that the constituted government may blockade the ports in the hands of insurgents, but this implies a recognition of belligerency.

The very controversial example is the blockade of the Gaza strip by the Israeli navy in order to prevent the Palestinian Authority and now Hamas from reaching the open sea. On 3 January 2009 Israel proclaimed a formal blockade off the Gaza waters at 50 miles from the coast. There are precedents of blockade of ports controlled by insurgents, but the blockade of coasts controlled by non-State entities regarded by the blockading State as a terrorist organization is new. In this case the blockading State can invoke the right of self-defence, but the problem is that the blockade generally affects the rights of third countries since it is established against all flags. The Israeli blockade was challenged by a flotilla of six ships organized by a number of NGOs. On 31 May 2010 an Israeli commando intervened against a Turkish ship, the *Mavi Marmara*, causing a number of deaths and injuries. In that case the legal problems are twofold: the ships stopped and seized were 70 miles off the coast, and a blockade aiming at starving the civilian population is prohibited. The Israeli defence claim was that the flotilla attempted to breach the blockade and a belligerent is allowed to take action to impede it; moreover that humanitarian aid should be authorized by the blockading force. The international panel established by the UN Human rights Council took the stance that the blockade was illegal because it was held to be out of proportion in respect to the suffering caused to the civilian population and was considered a collective punishment forbidden by the Geneva Conventions.[15]

[15] See UN doc. A/HRC15/21, 22 September 2010. For the opinion according to which the blockade was lawful even though implemented with an excessive use of force see, however, the conclusion of a panel of inquiry established by the UN Secretary General: J Crawford (ed.), *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press, 2012) 309. On 22 March 2013, thanks to the good offices of the US, relations between Israel and Turkey were re-established. Israel expressed its apology to Turkey and at the same time declared itself to be ready to compensate the families of the victims. The relations between the two governments were again frozen after the Criminal Court of Istanbul tried in absentia 4 Israeli officers held responsible for the assault of *Mavi Marmara* and issued an arrest warrant (26 May 2014) (cf. the comment by M Bianchi, 'The Mavi Marmara Case: State Security and Human Rights at Sea' in G Andreone (ed.), *Jurisdiction and Control at Sea: Some Environmental Security Issues* (Giannini Editore, 2014) 169–87). The ship, Turkish owned, had the flag of the Union of the Comoros, a party to the International Criminal Court Statute. The Comoros referred the case to the ICC, but it was later dismissed (2014), being declared not of sufficient gravity by the Prosecutor.

Recent practice (October 2010) includes the request by the African Union to the UNSC of a resolution authorizing the blockade of the Somalia coast and the establishment of a no-fly zone that would stop the shipment of weapons to rebels suspected of being infiltrated by Al-Qaida.

While blockade is a belligerent measure carried out in wartime, pacific blockade is a forceful measure adopted in time of peace. Usually such a measure is selective since it is enforced only against a number of flags and not against all ships. For instance in 1902 Germany, Italy, and UK blockaded the coast of Venezuela as a measure to recover the debts owned by the Latin-American State. Currently Such a blockade should be unlawful unless authorized by the UNSC.[16]

A blockade should be distinguished from a quarantine, such as the one established by the United States around Cuba in 1962 in order to impede the shipment of Soviet missiles to the Fidel Castro government. Eastern bloc ships suspected of transporting the missiles were diverted from their route. The quarantine was not a blockade since it did not seal Cuba's coastline. Ships were allowed to sail from Cuba. The legitimacy of the Cuba quarantine is doubtful for it was not authorized by a UNSC but only an OAS resolution.

## 18.4 Insurgency and Civil War

During a civil war the constituted government usually takes measures against insurgents that may also involve naval actions.

The French Navy conducted naval operations aimed at intercepting weapons destined for Algerian rebels during the Algerian war of independence in the 1960s, visiting and searching third States vessels and seizing their cargo. Such actions are not easily justifiable if conducted on the high seas. The Yugoslav central government subjected the city of Dubrovnik to naval bombardment in 1991–2 and that action was considered unlawful in so far as it hit cultural property. As already recalled, Israel is also currently patrolling the waters off the Gaza Strip, thus preventing the Palestinian Authority and now Hamas from reaching the open sea.

Naval operations may also be mandated by the UNSC. During the embargo against Yugoslavia (1992–4), the Italian navy, alone or in conjunction with NATO and the Western European Union (WEU), implemented the embargo decided upon by UNSC resolutions 713, 724, 757, 787, and 820 by visiting and searching vessels bound for Yugoslavian ports. Vessels accused of violating the embargo were diverted to the Italian port of Bari and weapons and military equipment confiscated.

[16] For other examples see L Oppenheim, *International Law. A Treatise*, vol. *II, Disputes, War and Neutrality*, H Lauterpacht (ed.) (7th edn, Longmans Greeen & Co. 1952) 146–7.



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## 18.5 The PSI and the 2005 SUA Protocol

There are two main instruments to counter the proliferation of Weapons of Mass Destruction (WMD) that are of interest for the law of the sea: the Proliferation Security Initiative (PSI) and the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention 2005).[17] The former is a soft-law instrument, which was adopted in Paris in 2003, the latter is a treaty concluded in 2005.

The PSI relies on a 'Statement on Interdiction' and more than 100 States are now parties to the PSI, including all permanent members of the Security Council except China, which considers PSI at variance with the law of the sea. The PSI applies on land, air, and sea. As far as the sea is concerned, the rules to be applied are those embodied in the UNCLOS to which all the PSI States are parties with the main exception of the US, which however considers the navigation rules as declaratory of customary international law. According to the Statement of Principles, PSI States should take action in the following sea areas: internal waters, including ports used for transhipment, territorial sea, contiguous zone, and high seas. Action should be taken to the extent that it is allowed by international law, including UNSC resolutions.

Inspection of ships in the territorial State's ports does not raise any particular problem of international law, unless the foreign ship is a warship. But this would not be apposite, since the PSI rules address merchant vessels, and warships are allowed in port only after admission by the port State. The main subject of the PSI rules is that of trans-shipment, an activity usually carried out by merchant vessels anchored in a port or in a sea terminal.

The same regulation applies, *mutatis mutandis*, to vessels entering or leaving internal waters or the territorial sea. Suspected vessels should be subject to boarding, search, and seizure of prohibited cargo.

A problem arises when a ship enters a territorial sea with the intention of traversing it without proceeding into internal waters or into a port of the territorial State. The ship is in lateral passage and the question is whether it may be stopped by the territorial State. This depends on whether transit with a PSI prohibited cargo is considered contrary to the rules of innocent passage as the activity is prejudicial to the peace, good order, and security of the coastal State. The transport of WMD is not listed in Article 19, paragraph 2 of UNCLOS as an activity in contravention of innocent passage. UNSC resolution 1540 (2004) has rendered the proliferation

[17] 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (London, adopted 14 October 2005, entered into force 28 July 2010) IMO Doc. LEG/CONF.15/21 (SUA Convention 2005).



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of WMD and their means of delivery a threat to international peace and security whenever shipped to 'non-State actors'. It may be argued that a cargo destined to a non-State actor should be considered a threat to peace, while a cargo destined to a State should not, even though it is difficult to see a latent threat constituted by a cargo destined elsewhere as a threat to the security of the coastal State,[18] in particular when the cargo is made of 'related materials', for instance, schedule 3 chemicals under the 1993 Chemical Weapons Convention[19] (CWC) which are usually employed in agriculture.

The above conclusion should be applied, *a fortiori*, to transit passage and archipelagic passage, both of which give the coastal State fewer rights of interference. In these cases as well, a latent threat cannot be considered an actual threat against the sovereignty, territorial integrity, or political independence of the territorial State, allowing it to take action (Art. 39, 1.b UNCLOS). The question of transit or archipelagic passage is not addressed by the PSI principles.

In contrast, the contiguous zones of the States that have instituted them are taken into consideration. States are requested to take action. According to Article 33 UNCLOS, States are allowed, within their 24 miles contiguous zone, to exercise the control needed to prevent infringement of their customs, fiscal, immigration, or sanitary regulations within their territory or territorial sea and to punish infringement of the above regulations committed within their territory or territorial sea. Even though the power of exercising control is less intense than stopping a ship and bringing it into port, the majority of States consider the contiguous zone a zone with special rights of jurisdiction, where the power of boarding, inspection, and seizure can be exercised against foreign vessels. On this point, the PSI principles, which call upon the participant States to stop and search vessels and to seize prohibited cargoes, are in keeping with international law. The law of the sea allows for action to be taken if there is transhipment with the aid of a hovering vessel between a ship anchored beyond the contiguous zone and the coast (Constructive Presence doctrine).

The Statement of Interdiction Principles do not address the EEZ. For the purposes of the Interdiction Principles, this is a zone of high seas and States are not allowed to take action against foreign vessels, unless an exception to the freedom of the high seas can be invoked. Article 110 of UNCLOS, which lists those exceptions, is not of much help. The only two relevant exceptions are related to ships without nationality and the right of approach (*vérification du pavillon*), with the

[18] D Guilfoyle, 'Maritime Interdiction of Weapons of Mass Destruction' (2007) 12 *Journal of Conflict & Security Law* 16–17. See also by the same author *Shipping Interdiction and the Law of the Sea* (2009) 240–2.

[19] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Geneva, 3 September 1992, entered into force 29 April 1997) 1974 UNTS 45 (CWC).



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latter giving only limited rights unless it is discovered that the ship is without nationality or has the same nationality as the visiting ship. The right of hot pursuit should be added (and the pursuit may start from internal waters, the territorial sea, or the contiguous zone).

WMD proliferation is not a valid excuse for boarding a foreign vessel transporting a PSI prohibited cargo on the high seas. UNSC resolution 1540 does not give the right to board foreign vessels and the resolutions against North Korea and Iran (1718 (2006), 1737 (2006) and subsequent resolutions) do not confer the right to stop North Korean and Iranian vessels on the high seas. The same is true for resolutions 1874 (2009) and 1929 (2010), concerning respectively North Korea and Iran, inviting States to visit ships suspected to have a prohibited cargo only with the consent of the flag State.

The consent by the holder of the jurisdiction is a valid title for boarding a vessel. The principle *volenti non fit iniuria* applies and it is considered a circumstance excluding wrongfulness by the International Law Commission (ILC) Draft Articles on State Responsibility (Art. 20), that on this point is restating customary international law.

On the high seas, consent should be given by the flag State and may be expressed ad hoc or may be consigned in a international agreement. The United States has concluded several treaties, called 'ship boarding agreements' in PSI jargon, with States having an open registry policy and allowing the flying a flag of convenience.[20]

It is not permitted to enter foreign territorial waters to carry out police operations. Such an activity would run counter to the provisions on innocent passage that allow a State to enter territorial waters only for traversing the territorial sea. This is more so for warships even though they are entitled to exercise the right of passage. The consent by the coastal State is required in order to carry out a police activity in foreign territorial waters. Moreover, a foreign vessel may be arrested as long as it is in violation of the right of innocent passage, for instance if a ship in the hands of terrorists performs any activity prejudicial to the coastal State.

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (SUA Convention 1988)[21] covers acts of maritime terrorism. It did not properly address WMD terrorism. An Additional Protocol was

[20] Boarding agreements account for over 60% of world tonnage and dictate a standard procedure for arresting vessels, with small differences. Boarding should be operated by warships. The boarded vessel remains under the jurisdiction of the flag State, which may renounce in favour of the jurisdiction of the boarding State.

[21] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221 (SUA Convention 1988).

negotiated to fill that lacuna. The Protocol does not deal only with nuclear weapons but with all three classes of WMD: bacteriological, chemical, and nuclear weapons (BCN weapons).

The Protocol establishes a number of offences that States are obliged to insert into their penal codes and contains provisions for legal cooperation, such as extradition. The use of a BCN weapon against or on a ship, causing or likely to cause death or serious injury or damage, is considered an offence 'when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act'. This special motive is not requested when BCN weapons are transported on board a ship. The mere transport is an offence, provided that the transport is carried out by a person doing it 'unlawfully and intentionally'. Also the transport of fissile material constitutes an offence if it is destined to build nuclear weapons or to be employed for any other nuclear activity not allowed under the International Atomic Energy Agency (IAEA) safeguard agreement. Transport in compliance with the Non-proliferation Treaty (NPT) is not an offence: shipment of fissile material coming from or destined to an NPT State is not forbidden.

The Protocol does not apply to the activity of armed forces in time of armed conflict or in time of peace and thus military transports do not fall within the provisions of the Protocol.

The Protocol does not add new causes for boarding besides those established by traditional law of the sea. Boarding thus requires the consent of the flag State and machinery has been drafted to facilitate the consensus. Rules have also been dictated to ensure that boarding take place in conformity with human rights provisions and to provide for the possibility of asking for compensation if the visit does not uncover any prohibited items.

## 18.6 Self-defence on the High Seas

States may use the high seas for exercising their right of self-defence (individual and collective). If a State is attacked it can take action on the high seas, for instance against the navy or air force of the attacking State. Obviously an action can be taken also when an armed attack takes place on the high seas. For instance, Article 6 of the NATO Treaty, in qualifying the notion of armed attack triggering the alliance mechanism of collective self-defence, states that an armed attack against vessels or aircraft located in the area covered by the Treaty (the Mediterranean and the North Atlantic) is considered a *casus foederis*.

Article 51 of the UN Charter allows the exercise of the right of self-defence if an armed attack has occurred. Article 51 does not qualify the notion of armed attack.



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It does not indicate (a) either the nature of the target of the armed attack that gives rise to the exercise of the right of self-defence (b) or the subject to whom the attack is attributable for allowing to react in self-defence.

According to the narrow interpretation, self-defence can be resorted to only if the territory of the State or its warships or military aircraft on the high seas are attacked. According to the broad interpretation, the right of self-defence can be exercised even if commercial ships and airplanes on the high seas are attacked. In the Oil Platform case, the ICJ held, albeit implicitly, that an attack against a merchant ship could constitute an armed attack for the purpose of self-defence. The ship in question was the US oil tanker *Sea Isle City*, which was anchored in the territorial waters of Kuwait at the time it was struck. The United States claimed a right of individual self-defence for the attack against its ship. It could not pretend to act in collective self-defence on behalf of Kuwait, since no request of assistance from Kuwait was made. The Court did not question the US claim because the object hit was a merchant ship. It only said that the proof that the *Sea Isle City* was struck by an Iranian missile had not been discharged.[22]

The standard interpretation has been in the sense that an armed attack should be attributed to a State in order to take action in self-defence. After the attack to the Twin Towers (2001) this interpretation has changed. It is now widely accepted, for instance by NATO, OSCE, and the EU, that an armed attack by a non-State entity allows to react in self-defence under Article 51 of the UN Charter. The ICJ has not taken a definitive stance on this point, for instance when it has delivered the advisory opinion on the Wall in Palestine (2004) or in its judgment on the controversy between the DRC and Uganda (2005). However one can count a number of opinions by ICJ judges arguing that an armed attack by terrorists may be considered as an armed attack for the purposes of Article 51 of the UN Charter. R Higgins has for instance affirmed that the dictum of the Court in the Wall in Palestine was too narrow since it referred to an armed attack only by a State, without considering non-State entities.[23] The same line of reasoning has been followed by judges Kooijmans and Simma in their separate opinion to the judgment on *DRC v Uganda*.[24] The *Institut de droit international* (*IDI*) in its resolution of Santiago of Chile (2007) has adopted a very narrow interpretation of armed attack stating that an armed attack coming from a non-State entity allows reaction against the State hosting the armed bands only if it is proved that the armed band acted under the control, direction, or instruction of the hosting State. According to the *IDI*, it is permitted to react against the non-State entity if the attack takes place in an area under no State's jurisdiction. Following the indication by the *IDI* it is certain that

[22] [2003] ICJ Reports 26, paras 48–63.
[23] [2004] ICJ Reports *Separate Opinion of Judge Higgins*, para. 33.
[24] [2005] ICJ Reports *Separate Opinions of Judges Kooijmans, and Simma.*

a ship attacked by terrorists on the high seas is allowed to react in self-defence. A warship may also intervene under the rationale of collective self-defence if a ship flying a third State flag is attacked.

## 18.7 Showing the Flag: Challenging Excessive Claims

It is traditionally admitted that a State can exercise its navigational rights and, if attacked, react in self-defence. Such a conduct constitutes neither a violation of the principle to peacefully solve international controversies, enshrined in Article 2, paragraph 3 of the UN Charter nor a threat of force contrary to Article 2, paragraph 4 of the same instrument. The Corfu Channel judgment is a case in question. The ICJ, while condemning the UK for the minesweeping in Albanian territorial waters, found the passage by the British squadron in conformity with international law.[25] The same is true for other instances, for example the exercise of a right recognized by the freedom of the high seas to oppose an excessive claim by the coastal State. The US carried out naval exercises in the waters of the Gulf of Sidra, which it considered a part of high seas and contested Libya's claim to consider the Gulf an historic bay. The US ships were attacked by Libyan missiles from the coast. The US reacted in self-defence (24–5 March, 1986).

Sometimes the challenge is covertly operated. This happened for the Gulf of Taranto. Italy claims the Gulf as an historic bay subject to its sovereignty. This claim is not recognized by the US which sent a note of protest at the time of delimitation. In 1982, a submarine intruded into the Gulf of Taranto in what was deemed a covert Soviet protest against the Italian delimitation. Italy filed an official protest against the Soviet Union, which denied its presence. Indeed the real nationality of the submarine was never officially assessed. Roach and Smith in their book on excessive claims referred in a footnote to 'foreign submarines transited Gulf of Taranto submerged on February 24, 1985'.[26]

The US maintains a programme aimed at preserving the freedom of navigation, contesting excessive claims, and impeding acquiescence. The programme, which was inaugurated in 1979, has never been discontinued. It consists not only in diplomatic representations and consultations, but also in asserting navigation and overflight rights and freedoms on a worldwide basis.[27]

[25] [1949] ICJ Reports 28–9. See also R Jennings and A Watts (eds), *Oppenheim's International Law* (9th edn, Oxford University Press, 1996) 444.

[26] A Roach and RW Smith, *United States Responses to Excessive Maritime Claims* (3rd edn, Martinus Nijhoff, 2012) 46, n. 22.

[27] Roach and Smith (n. 26) 6–9.



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## 18.8 War Games and Rules of the Road

Navigation and military exercises are often sources of naval incidents. Thus, 'rules of the road' for navies are important. The most relevant document in this field is the US–Soviet Treaty of 25 May 1972. This model was followed by subsequent treaties stipulated with the Soviet Union by the UK (1986), France (1989), and Italy (1989). After the brief parenthesis of Russia's absence in the Mediterranean, those treaties have regained their strategic importance. Greece and Turkey concluded a memorandum of understanding concerning military activities on the high seas and in the international airspace in 1988. Two agreements were concluded between Italy and Tunisia on 10 November 1988: an Executive Protocol on the cooperation between the Italian Navy and the Tunisian Navy, and a Technical Arrangements on practical measures aimed at avoiding incidents at sea and facilitating cooperation between the Italian Navy and the Tunisian Navy.

Navy war games are a manifestation of the freedom of the high seas. However, a number of third world countries, as already pointed out, claim that military manoeuvres cannot be undertaken in foreign EEZs.

## 18.9 Nuclear Weapons/Weapons of Mass Destruction Free Zones

Except for the Treaty of Semipalantisk (2006) relating to Central Asia States, which comprises only inland countries, all other nuclear-weapon-free zone (NWFZ) treaties have littoral or archipelagic States as States parties (Treaty of Tlatelolco, 1967; Treaty of Rarotonga, 1985; Treaty of Bangkok, 1995; Treaty of Pelindaba,1996). Such treaties oblige States parties not to install nuclear weapons on their territories, including their territorial and archipelagic waters. Problems may arise for navigational rights of third States having on board nuclear armaments in the zone covered by the NWFZ treaty, in particular when the zone exempt of nuclear weapons encompasses archipelagic States or States controlling important international straits. As a rule NWFZ treaties guarantee the freedom of navigation also for States possessing nuclear weapons. The Treaty of Pelindaba prohibits the transportation of nuclear weapons in the inland waters. The overflight of the EEZ of NWFZ States is covered by the freedom of the seas and thus is admitted also for aircraft with nuclear weapons. The same is true for the marine areas where transit passage or archipelagic passage is allowed since it embodies also the air transit (Art. 5 of the Treaty of Rarotonga; Art. 2 of the Treaty of Bangkok; Art. 2 of the Treaty of Pelindaba). The overflight of territorial waters and of straits not subject to the transit passage is conditional upon the consent of the territorial



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sovereign. Usually NWFZ treaties admit that the littoral State may allow the overflight without infringing the treaty.

Other disarmament treaties may foresee limitations to the freedom of States to use their waters or their continental shelf. The 1971 Seabed Treaty prohibits emplacement of nuclear weapons or any other types of mass destruction on the seabed up to 12 miles from the baseline for measuring the territorial sea,[28] the 1963 Partial Test Ban Treaty (PTBT)[29] forbids any nuclear test under territorial waters or high seas,[30] and the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT) (not yet in force) prohibits all nuclear tests.[31]

## 18.10 The Peaceful Purposes Clause and the Notion of Zones of Peace

The 'peaceful purposes' clause has been incorporated in a number of UNCLOS provisions. Article 88 states that the high seas shall be reserved for peaceful purposes. The notion is also referred to in Article 141 according to which the Area shall be open to use exclusively for peaceful purposes by all States. The same is true for marine scientific research in the Area (Art. 143) and for the general principles for conducting marine scientific research under Part XIII of UNCLOS (Art. 240, a). Article 301, located at the end of UNCLOS under Part XVI (General Provisions), is named 'peaceful uses of the seas' and spells out the real meaning of this notion incorporating the language of Article 2, paragraph 4, of the UN Charter, stating that States in exercising their rights and performing their duties are obliged to refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principle of international law embodied in the Charter of the United Nations.

The peaceful purposes clause is not meant to ban any military activity in the oceans and/or to restrict their use for military purposes. It only means that States are obliged to comply with the prohibition of the use of force embodied in the Charter of the UN and should not pursue aggressive policies.

[28] See Articles I and II of the 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.

[29] The treaty is officially known as the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, but is often abbreviated as the Partial Test Ban Treaty (PTBT).

[30] Treaty banning nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, Art. I.

[31] Comprehensive Nuclear-Test-Ban Treaty, Article 1.



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Sometimes the notion of peaceful purposes is read in conjunction with that of enclosed or semi-enclosed seas under UNCLOS Articles 122 and 123 in order to establish a 'zone of peace'. However the notion of enclosed or semi-enclosed seas does not encompass, as a necessary ingredient, the institution of a zone of peace.

It was a Soviet proposal for the Mediterranean aimed at pulling out the US navy. The proposal was also endorsed by the Non-Aligned countries at the Special session of the General Assembly devoted to disarmament (1978). This idea was never implemented for obvious reasons. The transformation of the Mediterranean into a zone of peace would entail, at least, the prohibition of giving military facilities and the exclusion of navies not belonging to the littoral States, or their limitation in number. In legal terms, this outcome would result in a curtailment of the freedom of the high seas and of the principle of collective self-defence. The idea of a zone of peace is also mixed with that of a nuclear weapons-free zone, which has previously been considered.

Similar proposals were formulated in the 1960s by the Soviet Union and the Non-Aligned Movement (NAM). The Soviet Union was interested in the denuclearization of the Mediterranean, while NAM was mainly in favour of making the Mediterranean Sea a zone of peace. The idea was to remove all foreign navies from the Mediterranean and to shut all US bases abroad. Obviously those proposals were not acceptable to the US and its Mediterranean allies, including Israel.

Article 22 of the Treaty on Friendship, Partnership and Cooperation between Italy and Libya of 2008 states that the two countries will cooperate in the field of non-proliferation of WMD. Both countries will take the necessary steps to make the Mediterranean a WMD-free zone. However, even this engagement is not absolute in that it qualifies that the two States will act within the limits of their obligations stemming from relevant treaties and agreements in the field.

The idea of zone of peace has also been proposed for the Indian Ocean. The formal endorsement of the notion of zone of peace goes back to the UNGA Resolution 2831 (XXVI) of 16 December 1971 which declared the Indian Ocean a zone of peace and was repeated in subsequent resolutions. The latest resolution was adopted on 13 December 2011 (A/RES/66/22) and it was decided to include the item entitled 'Implementation of the Declaration of the Indian Ocean as a zone of peace' in the provisional agenda of the GA sixty-eighth session.

Though there is not only one notion of a zone of peace, its implementation would entail the prohibition of granting military facilities and the exclusion of fleets not belonging to the littoral States, or their limitation in number. As a rule, a zone of peace should also be a nuclear weapon-free zone. The proposal of instituting zones of peace has been in principle opposed by major naval powers, since its enforcement would curtail the principle of freedom of navigation on the high seas and that of collective self-defence. For non-littoral States, freedom of the high seas would be



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limited to non-military navigation. This is why France, the UK, and the US, which have naval interests in the Indian Ocean, voted against GA resolution 47/59 mentioned above, while the positive vote of the Russian Federation was nothing but lip service to the idea of zones of peace. In 2012 Sri Lanka announced that it would like to pursue a new approach to turning the Indian Ocean into a zone of peace.

In connection with a semi-enclosed sea, the idea of zone of peace has been proposed not only for the Mediterranean, but also by Iran for the Persian Gulf. Iran would remove outside naval powers from the Persian Gulf, a proposal that runs counter the defence agreements stipulated with the Gulf States. Moreover foreign navies are not ready to abandon the Gulf, given the strategic and commercial importance of the region.

## 18.11 The Immunity of Foreign Warships

There are a number of provisions on immunity of warships both in the Geneva Conventions (the Territorial Sea Convention and the Convention on the High Seas) and in the UNCLOS, which are merely declaratory of international law.

Warships and other government ships operated for non-commercial purposes enjoy sovereign immunity. This rule is enshrined in customary international law as well as in conventional law. Both Article 22 of the 1958 Geneva Territorial Sea Convention and Article 32 of the UNCLOS provide for sovereign immunity. Warships and government vessels should comply with certain rules indicated by those conventions, but they do not derogate from the principle of sovereign immunity. If a warship does not abide by the laws and regulations of the coastal State concerning passage in the territorial sea, the coastal State is not entitled to take any act of coercion and may only ask the ship to leave the territorial sea (Art. 23 of the Territorial Sea Convention, Art. 30 of the UNCLOS). In other words they are immune from the enforcement jurisdiction of the coastal State, unless the coastal State is entitled to take necessary steps to meet significant violations requiring enforcing measures. As far as the prevention of marine pollution is concerned, Article 236 of the UNCLOS exempts warships, naval auxiliary, and government vessels from rules on the protection and preservation of marine environment. The provision specifies, however, that every State should adopt appropriate measures in order to ensure that such vessels operate in a manner consistent with the UNCLOS rules 'so far is reasonable and practicable'. The Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (London Convention)[32] does not apply to ships entitled to sovereign immunity under

[32] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, adopted on 29 December 1972, entered into force 30 August 1975) 1046 UNTS 120 (London Convention).



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international law. As far as the high seas are concerned, both the Geneva Convention on the High Seas (Art. 8, para. 1) and UNCLOS (Art. 95) state that warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State. The same is true for ships owned by a State and operated only on government non-commercial service (Art. 9 Geneva Convention on the High Seas; Art. 96 UNCLOS).

The principle of sovereign immunity is reflected in other sectors of international law. Article 16 of the United Nations Convention on Jurisdictional Immunities of States and their Property 2004 confirms the immunity from jurisdiction of a foreign State in relation to its warships, naval auxiliaries and government vessels (ie 'vessels owned or operated by a State and used, for the time being, only on government non-commercial purposes'[33]). The same rule applies to any cargo on board those ships. The 1926 Brussels Convention on the Unification of certain rules on State-owned vessels[34] lays down the customary rule on warships, stating that warships 'shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*' (Art. 3). The category also includes State owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships, and other vessels owned or operated by a State and employed exclusively on governmental and non-commercial service. The only exceptions, which most probably are not in keeping with customary law, are related to collisions, salvage, and claims for repairing the ship. The 2004 UN Convention on Jurisdictional Immunities of States and their Property sets out immunity for the cargo on board of warships, naval auxiliaries, and other government vessels as well as for 'any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes' (Art. 16, para. 4). The ILC Commentary includes, for instance, 'cargo involved in emergency operations such as food relief or transport of medical supplies'.

The conventions on civil liability for nuclear damage by nuclear powered ships have provisions on immunity of warships only for measures of seizure and attachment,[35] while the 1952 Brussels Convention on the arrest of seagoing ships

[33] See Art. 16, para. 2 of the 2004 UN Convention. The following examples are given in the Commentary by the ILC on Article 16, para. 2 in relation to this category of vessels: police patrol boats, custom inspection boats, hospital ships, oceanographic ships, training vessels and dredgers, owned and operated by a State and used or intended for use in government non-commercial service. See further H Fox, *The Law of State Immunity* (2nd edn, Oxford University Press, 2008) 568–9. On 2 October 2012 the port authorities of Tema (Ghana) detained and impeded the departure of an Argentinian frigate pursuant to an order of the High Court of Accra activated by creditors of Argentinian government. The International Tribunal of the Law of the Sea issued provisional measures on 15 December 2012, ordering the release of the Argentine frigate: ITLOS, Case No. 20, The '*ARA Libertad*' Case (*Argentina v Ghana*).

[34] 1926 International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels (Brussels, 10 April 1926, entered into force 8 January 1937) 179 LNTS 199.

[35] See eg Art. X, para. 3 of the Brussels Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962).



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does not contain any provision on immunity of warships. That is the reason why a number of States parties (inter alia, the UK and the Russian Federation) made a reservation for warships and government vessels.[36]

Note that immunity of State-owned vessels or government vessels is enjoyed as long as they are employed solely for government non-commercial purposes. Otherwise the ordinary rules apply and, for instance, a foreign State-owned vessel may be the object of measures of attachment if it is used for transport of commercial goods.

Special provisions for warships and governmental vessels are also embodied in the 2007 Nairobi International Convention on the Removal of Wrecks[37] negotiated within the framework of the International Maritime Organization (IMO). The Convention authorizes the coastal State within its EEZ or equivalent distance to take measures for the removal of wrecks posing a hazard to navigation. It does not apply to the territorial sea, unless the coastal State declares its willingness to submit such body of water to its regime, nor to the high seas beyond the EEZ. The Convention excludes from its field of application 'any warship or other ship owned and operated by a State and used, for the time being, only on Government non-commercial service' (Art. 4, para. 2). However the flag State may decide otherwise.

As far as collisions are concerned one should refer to the Convention on the International Regulations for Preventing Collisions at Sea 1972 (COLREGs):[38] Article 1 states that the Rules apply to 'all' ships and thus warships are included since they are not expressly exempted. The Regulations cannot be applied in wartime, but also in peacetime when warships are conducting law enforcement missions (for instance a warship engaged in hot pursuit), as is stated by a number of navy manuals and by many authorities.

Visiting warships are admitted in inland waters and ports with the consent of the coastal State. They are immune from any search or arrest and the immunity extends to the crew. It sometimes happens that members of the crew commit while ashore a wrongful act in the hosting State. If they return on board the warship no arrest may be operated by the local authorities unless the naval commander decides to hand over those responsible for having breached the local law. The practice also shows that political dissenters can take refuge on board a foreign ship. The local authorities cannot board and cannot impede the departure of the warship. If it reaches the open sea naval asylum is successfully implemented.

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[36] Status of ratifications to Brussels Conventions, in *CMI Yearbook 2014*, 488–92, <http://www.comitemaritime.org/Status-of-Ratification-of-Maritime-Conventions/0,2769,16932,00.html>.

[37] 2007 Nairobi International Convention on the Removal of Wrecks (Nairobi, 18 May 2007, not yet in force).

[38] Convention on the International Regulations for Preventing Collisions at Sea (London, adopted on 20 October 1972, entered into force 15 July 1977) 1050 UNTS 18 (COLREGs).



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## 18.12 Air Defence and Identification Zones (ADIZ)

The freedom of the high seas includes the freedom of overflying on the high seas, including the contiguous zone and the EEZ. They are open both to commercial and military air navigation.

Recent practice shows that a number of States (namely US, Canada, and France) claim the right to establish off their coasts air defence and identification zones (ADIZs) which stretch over adjacent EEZ and the high seas. Their extension varies; however the ADIZ extends for several miles. Usually the coastal State asks aircraft bound for its territory to identify and to give information on its flight plan. ADIZs are connected with the high speed of the aircraft and the need of the coastal State to protect from a sudden attack due to a State or a non-State actor. Security considerations may justify the establishment of an ADIZ, provided that measures against non-complying aircraft are in keeping with international law. However ADIZs are in principle justified to control the air navigation of aircraft bound for the coastal State territory (vertical passage); the limitation of the freedom of high seas is less justified when the aircraft is proceeding in a lateral passage, thus it is not representing an immediate threat to the coastal State security. In 2013 China declared an ADIZ over the whole South China Sea raising the protest of the US and South China Sea riparian States.

The ADIZ should be kept separated from the FIRs (Flight Information Regions) which are regulated by the 1944 Chicago Convention[39] . They are instituted for controlling the commercial air navigation and for establishing traffic corridors on international skies. The aircraft should communicate the information requested to the FIR controller according to the ICAO procedures. Aircraft are requested to pay a fee for services provided. The Chicago Convention rules do not apply to military aircraft, which are not obliged to disclosure their flight plans or to pay any fee. They are only requested to take in due account the security of civilian aircraft (Art. 3d of the Chicago Convention).

## 18.13 Carrying on Enforcing Measures Mandated/Allowed by the Security Council

It is well established that the use of force by individual States may be exerted not only in self-defence, but also if the force is authorized by the UN Security Council. The pre-condition is that the UNSC had determined the existence of a threat to the peace, breach of peace, or an act of aggression under Article 39 of the UN

[39] Convention on International Civil Aviation (Chicago, 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 ('Chicago Convention').

Charter. The UNSC may authorize acts of maritime interdiction and the practice shows that this has been for instance done in connection with sanctions to Rhodesia (UNSC 217 (1965)), against Iraq for the invasion of the Kuwait (665 (1990)), the situation in the former Yugoslavia (UNSC 713 (1991), 757 (1991), 820 (1993)). UNSC Resolution 1373 (2001) and Operation Enduring Freedom, which in its maritime dimension covered the Arabian Sea, should also be cited. Resolution 1373 did not explicitly say that naval interdiction measures were allowed on the high seas, but one may consider that their authorization was implied and they were effectively carried out by navies of the States taking part in Enduring Freedom. Measures of interdiction were taken off the Somalia waters for preventing smuggling of weapons into the mainland (eg UNSC Res. 1356 (2001)). A number of measures of embargo, including the right to inspect vessels on the high seas, were authorized by resolution 1973 (2011) on Libya (para. 13).

The UNSC may authorize naval interdiction and other forms of forceful action in foreign territorial waters. The case in point is that of Somalia. Navies were asked to intervene in territorial waters off the Somalia coast in order to protect humanitarian convoys from armed robbery. The resolutions are connected with piracy and the chaotic status of Somalia. They are backing the consent of the Transitional Federal Government of Somalia and its lack of effectiveness. The Somalia experience may also be applied to international terrorism. Piracy and terrorism are dealt elsewhere in this volume.

## 18.14 Military Use of the Sea in Wartime

The sea is used by navies in wartime in order to conduct their operations against the enemy. The use of the sea in wartime also limits the freedom of navigation of States not taking part in the hostilities. The law of the sea in wartime substantially differs from its regime in peacetime.

The areas of sea warfare are the high seas and the territorial waters of the enemy. Neutral waters are excluded unless they become an area of operations of the enemy. Neutral waters encompass internal and territorial waters of a neutral State. This statement should be qualified, taking into account the new law of the sea. Archipelagic waters of neutral archipelagic States should be immune from hostilities. The contiguous zone, now extending up to 24 miles, should be considered an area of the high seas for naval warfare. The same is true for the continental shelf and the EEZ. Neutral States are only entitled to claim that naval operations do not totally hamper their economic rights, for instance drilling on the continental shelf or fishing in their EEZ. This rule, vague as it is, implies that belligerents should have due regard for the economic rights of neutral States. For instance, belligerents are not allowed to destroy fixed platforms of a neutral State unless they become a base for hostile operations. Belligerents cannot conduct hostilities in neutralized waters such as those around Antarctica, the



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territorial waters of the Aaland Islands, or the waters of the Strait of Magellan. Artificial waterways such as the Suez Canal are excluded from hostilities by the treaty regulating their regime, but the rule has frequently been violated. Belligerents have the right to transit (innocent passage or transit passage according to the nature of the strait) through neutral straits serving for international navigation. They also have the right to archipelagic sea lane passage through the archipelagic waters of neutral States. In contrast, international straits under the control of a belligerent may become an area of operation by the enemy. The belligerent strait State is also entitled to exercise its belligerent rights towards neutral vessels, exercising visit and search. The area beyond the continental shelf may become an area of hostilities. Enemy enterprises exploiting the area are subject to control by the belligerent, which has the right to confiscate them and the mineral resources excavated. As stated by the British Manual of the Law of Armed Conflict, belligerents should take care to avoid damage to cables and pipelines which do not exclusively serve them.[40]

## 18.15 The Control of Contraband

Belligerents are entitled to visit neutral flags in order to check if they are transporting war contraband, that is, goods destined to the enemy. If the visit determines prima facie that the cargo is contraband, the ship is diverted to a port of the visiting State in order to be submitted to a prize judgment. The London Declaration of 1909 contains a list of goods which can be claimed to constitute contraband of war. However such list is completely obsolete and the goods considered to constitute contraband are currently very numerous. Goods destined to the survival of the civilian population of the enemy cannot be considered as contraband and the rule, which may be considered declaratory of customary international law, is now enshrined in Protocol I of 1977 additional to the Geneva Convention of 1949.[41] It is to be pointed out that only goods destined to the enemy may constituted contraband, not those coming from the enemy territory, since there is no prohibition on neutrals trading with the enemy.

## 18.16 War Zones and Total Exclusion Zones

Belligerents may curtail the freedom of the seas but they are not allowed to totally exclude it. During both World Wars I and II Germany declared the North Atlantic

[40] *The Manual of the Law of Armed Conflict* (UK Ministry of Defence) (2004), 354, rule 13.21.

[41] See Arts 54, 70. and 71 of Protocol I. The Protocol applies in principle only to land warfare, but in our opinion Art. 54 also applies to sea warfare as well as Arts 70 and 71: see N Ronzitti, 'Introductory: The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for its Revision' in Ronzitti (ed.), *The law of Naval Warfare. A Collection of Agreements and Documents with Commentaries* (Martinus Nijoff, 1988) 32–4.



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a war zone where all ships, neutral and belligerent, ran the risk of being sunk at sight. The Nuremberg Tribunal stated that war zones were illegal, namely when neutral ships were involved. During the Gulf war between Iran and Iraq, the latter proclaimed a war zone around the Kharg oil terminal. UNSC resolutions 582 (1986) and 589 (1987) addressed the freedom of navigation in the Gulf, condemning the attacks against neutral commercial shipping.

A Total Exclusion Zone (TEZ) was proclaimed by the UK around the Falkland during the war with Argentina in 1982 and had a radius of 200 miles: ships and aircraft not authorized by the UK entered the zone at risk of being attacked. Several States protested including the then Soviet Union and a number of Latin-American States. The TEZs are a modern version of the World Wars war zones and their establishment is unlawful if they have the aim to exclude the navigation of neutral States. At most they may be used as a tool for controlling navigation within the zone, which cannot imply the sinking on sight of shipping venturing into the zone.[42]

[42] See for instance the conditions set out in the *British Manual of the Law of Armed Conflict* (n. 40), 364 rule 13.78.