Navigational Freedoms in a Time of Insecurity

Jon M. Van Dyke

Abstract

Navigational freedoms have increasingly come under restrictions because of ecological, economic and security concerns of coastal states. Fishing vessels, oil tankers, ships carrying ultra-hazardous nuclear cargoes and even military vessels have to conform to stringent international, regional and national regulations. Often there is a conflict of interest as maritime activities of one state can interfere with the efforts of others to utilise the sea. The Law of the Sea Convention was adopted to provide a balance among these competing interests. But new state practices have created challenges for the Convention that have to be better understood and dealt with. The balance between navigation and other national interests has continuously changed, and navigational freedoms appear to be disappearing during this evolutionary process.

Our vision of the ocean is still dominated by the description given to us by the Dutch diplomat and scholar Grotius (Hugo de Groot) who explained that the oceans should not be subject to national ownership because, by their inherent nature, they are a common resource. One ship can cross the ocean, he explained, and such passage does not interfere with the ability of another ship to do the same. One fishing boat can cast its net into the sea and its catch will not affect the efforts of the next group of fishers who want to fish in the same area. Today, however, we know that this vision is no longer accurate with regard to fishing, because with modern technology and overcapitalisation of the fleets, the first group of fishers can indeed take a major portion of the fish in a region and seriously interfere with the ability of others to find any remaining fish. Similarly, navigational activities can also now interfere with the efforts of others to utilise the sea area, because of the pollution and security threats that may be caused by the navigational activities. The countries of the world have been searching to find a proper
balance among these competing activities. The formulations found in the Law of the Sea Convention are now the starting point in understanding this balance, but recent state practice must also be examined to determine the current state of the law.

Coastal State’s Right to Stop and Search Fishing Vessels in the Exclusive Economic Zone

Article 58 of the Law of the Sea Convention states that ‘all states’ enjoy high seas freedoms of navigation and overflight in the exclusive economic zone (EEZ) of other states, but also states that these freedoms should be exercised with ‘due regard’ to the right of the coastal state to exploit the resources of the EEZ and the responsibilities of the coastal state to protect the marine environment, which are spelled out in Article 56. The patchwork of provisions in the Law of the Sea Convention relating to the EEZ reveals the competing priorities. Rights of navigation are qualified ‘subject to the relevant provisions of this convention’ and maritime states are directed to ‘have due regard to the rights and duties of the coastal state’ and to ‘comply with the laws and regulations adopted by the coastal state in accordance with the provisions of this convention and other rules of international law in so far as they are not incompatible with this part’. Coastal states have been active in exploiting these resources and seeking to reduce pollution and have been placing limitations upon navigational rights when necessary to protect their resources and the marine environment.

Article 73(1) of the Law of the Sea Convention allows coastal countries to stop and search any fishing vessel that it suspects has been violating its laws governing resource exploitation in its EEZ:

The coastal state may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this convention.

This provision appears to allow the coastal state to expect every foreign fishing vessel to identify itself and explain its intentions whenever it enters an EEZ, even if the fishing vessel is only transiting through the area on its way to distant fishing grounds.
This conclusion appears to follow from the decision of the International Tribunal for the Law of the Sea (ITLOS) in the *Monte Confurco Case (Seychelles v. France)*, which involved a longline fishing vessel flying the Seychelles flag boarded by France in the EEZ around the French-claimed Antarctic island of Kerguelen. The vessel had no fresh fish on board, but the French found 158 tonnes of Patagonian tooth fish in the cargo hold frozen to a very low temperature (worth about $1.3 million) and longlines and defrosted baitfish in the waters around the ship, which had apparently been jettisoned into the sea.

Seychelles asserted that the *Monte Confurco* had been fishing outside the Kerguelen EEZ for 2 1/2 months, and was sailing through the Kerguelen EEZ to get to Williams Bank (in international waters) to continue fishing. Seychelles argued that the ship had failed to notify the French of its passage through the waters around Kerguelen because its fax machine was broken. France pointed out that the satellite telephone on the ship was working, challenged the claimed route of the vessel and submitted an expert who claimed that the vessel could not have caught the tooth fish at the location marked on the ship’s log. Seychelles responded that the ship’s crew had learned new techniques from Spain that enabled them to catch the tooth fish at greater depths.

The tribunal ruled against the Seychelles on the basis of the testimony that the tooth fish probably could not have been captured at the location identified in the ship’s log and the failure of the vessel to notify France of its passage and its intentions. In other words, a fishing vessel found in an EEZ of another country without permission and with fish in its hold will be presumed to have caught the fish in that EEZ. Apparently, the only way for a fishing vessel that is genuinely transiting through an EEZ to protect its cargo and itself from seizure is to provide notification to the coastal state prior to such passage.

**Restrictions on Navigation Related to Protecting the Marine Environment**

*Coastal State’s Right to Search Cargo Vessels in the EEZ*

Perhaps, the most potent provision in favour of coastal state authority is Article 220 (3)–(6) of the Law of the Sea Convention, which authorises coastal states to obtain the identification of and to conduct a search of
commercial cargo vessels in its EEZ that are suspected of violating the pollution regulations of the coastal state. Under Article 220 (3)–(6), if 'clear grounds' for believing that a vessel is violating international pollution standards, a coastal state may:

- demand information,
- physically inspect (if a 'substantial discharge' causes or threatens 'significant pollution of the marine environment'), and
- detain the vessel (if the discharge causes or threatens damage to the coastline or resources).

This right of visit, inspection and detention gives the coastal state a right to take action in some circumstances, but state practice appears to have expanded this right dramatically after the disastrous break-up of the oil tanker *Prestige* off the coast of Spain in November 2002. When future histories of navigational rights are written, they will probably point to this incident as the defining moment that changed perceptions and the governing principles of international law. When this aged single-hull tanker started foundering and leaking its oil cargo, Spain refused to permit the crippled vessel to come into one of its port for 'safe haven'. And then, when the tanker was towed out into the open ocean, it broke apart causing a dramatic and destructive spillage of its cargo. After huge amounts of oil washed up along the beautiful and resource-rich coasts of Spain, Portugal and France, the governments of France and Spain issued a decree that said:

A. All oil tankers travelling through these two countries’ EEZs will have to provide advance notice to the coastal countries about their cargo, destination, flag, and operators.

B. All single-hulled tankers more than 15 years old travelling through the EEZs of Spain and France will be subject to spot inspections by coastal maritime authorities while in the adjacent EEZs and will be expelled from the EEZs if they are determined, after inspection, to be not seaworthy.¹²

Shortly after the Spanish–French decree, Portugal announced that it would also take the same position on this issue.¹³ Morocco then announced that single-hull oil tankers more than 15 years old carrying heavy fuel, tar, asphaltic bitumen or heavy crude oil would be subject to requirement that they provide prior notification and adhere to strict safety regulations.¹⁴
In addition, in the spring of 2003, the European Union banned large single-hulled tankers carrying heavy-grade oil from coming into any European port. On April 3, 2003, the French National Assembly unanimously adopted a new law asserting the right to intercept ships that release polluting ballast waters out to a distance of 90 miles from its Mediterranean coast as well as imposing stricter controls on transient oil tankers. Captains of vessels violating these new French rules can be sentenced to up to 4 years in prison and fined up to $600,000. About this same time, Spain, France and Portugal were joined by Belgium and the United Kingdom in submitting a petition to the International Maritime Organization (IMO) to declare virtually their entire EEZs to be ‘particularly sensitive sea areas’ that would be completely off-limits for single-hulled oil tankers and other cargo vessels transporting dangerous cargoes. Acting upon the recommendation of its Marine Environmental Protection Committee (MEPC), the IMO Council granted this request in October 2004 and then established the West European Tanker Reporting System, which had the effect of superseding the initiative of the European states that single-hulled tankers be prohibited altogether. This sequence of events initiated by five maritime countries to protect their own coastal resources can be viewed as an example of ‘state practice’ restricting navigational freedom in order to protect the resources of the EEZ.

Other examples of restrictions on navigational freedom in order to protect environmental resources include the US proposal, which was approved by the IMO in December 1998, to establish a mandatory ship reporting system off the northeast and southeast coasts of the United States to protect the northern right whale from being hit by ships. This whale species was hunted almost to extinction because of its oil, and is now thought to be the rarest whale species in the world. This new mandatory ship reporting area joins nine others that have been established by the IMO to protect fragile environmental areas. In May 1996, the IMO approved a reporting regime for the Torres Strait region between Australia and Papua New Guinea and the inner route of Australia’s Great Barrier Reef as well as the area adjacent to France’s Ushant islet. Six months later, the IMO gave this status to Denmark’s Great Belt Traffic Area, the Strait of Gibraltar and the area off Cape Finisterre on the Spanish coast. On May 29, 1998, the IMO similarly required that notice be provided by ships passing through the Strait of Bonifacio between Corsica (France) and Sardinia (Italy) and also through the Straits of Malacca and Singapore. In addition, on December 3, 1998,
the IMO imposed this requirement on ships passing through the Strait of Dover/Pas de Calais as well as those going through the coastal waters adjacent to the northeastern and southeastern United States, as described above, to protect the remaining right whales.26

The US Department of Defense vigorously opposed the designation of the waters adjacent to the US eastern coastal areas as mandatory ship reporting areas, because it “was concerned that although public ships—notably warships—were exempt under the NOAA proposal, to require civilian vessels to report would make it possible to determine (by elimination) which ships were military’ and thereby ‘would erode navigational freedoms globally and endanger American lives’.”27 The US Coast Guard, however, supported this initiative, because of its mandate to enforce US environmental laws, even though it recognised that this move might require the United States to support similar initiatives by other countries and might lead to the perception that ‘international law increasingly recognises environmental protection as a justifiable reason to curtail freedom of navigation’.28

The Transport of Ultra-hazardous Nuclear Materials29

Ratifying countries have lodged competing declarations to the Law of the Sea Convention under Article 310 on the issue of ultra-hazardous nuclear transport. One group of mainly non-nuclear states consider that Articles 22 and 23 of the convention presumes the existence of international conventions regulating such transport and that, until such treaties are developed, coastal states can require prior notification or even prior authorisation for such shipments.30 Another group, of mainly nuclear states, emphasises the right of free navigation and disputes the obligations of prior consent or even notification.31 Some of these declarations confuse the issues of prior notification and prior informed consent. These issues are distinguishable, and a particularly strong argument can be presented for prior notification and consultation where potential consequences for a coastal state’s environment are serious.

Numerous states have declared that the shipments of ultra-hazardous nuclear cargoes should not transit through their EEZs. In 1992, for instance, South Africa and Portugal explicitly requested that Japan’s shipment stay out of their EEZs,32 and in response to an inquiry from Australia, Japan stated that ‘in principle’ the ship would stay outside the 200-nautical mile
zone of all nations. In 1995, Brazil, Argentina, Chile, South Africa, Nauru and Kiribati all expressly banned the British nuclear cargo ship Pacific Pintail from their EEZs, while Chile sent its ships and aircrafts to force the ship out of its EEZ. In 1999, New Zealand issued a strong statement protesting these shipments and stating that they should not be permitted through New Zealand’s EEZ because of the ‘precautionary principle’ enshrined in the Rio Declaration.

In October 2002, Chile modified its ‘Law for Nuclear Safety’ to require prior authorisation for any transport of ‘nuclear substances’ and ‘radioactive materials’ through its EEZ. Such authorisation will be granted only if the transporter establishes that the shipment will ‘keep the environment free of contamination’ and only after information has been provided regarding the date and route of the shipment, the ‘characteristics of the load’ and the ‘safety and contingency measures’ that are being utilised.

The San Onofre Nuclear Reactor

Another defining moment in the tension between navigational freedom and the right of coastal states to restrict the movement of ships through their EEZs based on the nature of the ship and its cargo was the US announcement on February 3, 2004, that it was abandoning its plan to ship the 770-tonne decommissioned nuclear reactor from the San Onofre nuclear plant in Southern California around Cape Horn at the tip of South America to South Carolina for burial. This plan, which had previously been approved by the US Department of Transportation despite conflicting views within the US government, was to put the reactor on a barge that would make a 90-day journey around South America. This journey would thus include the transiting of Drake’s Passage at the continent’s tip, which is one of the world’s most dangerous nautical passages where gale force winds blow 200 days each year. Although logic would have favoured burial in California, or Hanford, Washington, or transporting the reactor across the United States by train, these options had all been rejected because of US laws governing the disposal of nuclear wastes and because of liability concerns.

The US State Department originally instructed Southern California Edison that it ‘should not apply for Chilean authorisation for the passage because it was concerned that our doing so would set an unfavourable
precedent for future shipments’. Subsequently, however, the US Department of Transportation indicated that it thought consultations with Chile would be logical because of the potential risks and the advantages of having emergency contingency plans. The Department of Transportation also urged Southern California Edison to develop more realistic salvage plans in the case of a sinking.

These concerns seemed to have resonated in the State Department because a month later, in late November, it stated that ‘a number of significant issues’ needed to be resolved before the reactor could be shipped, and stated specifically that Southern California Edison should consider another route around South America, explain in detail its salvage contingency plans and show it has adequate liability insurance. Finally, however, the Department of Transportation did issue a permit for the shipment on December 1, 2003. Southern California Edison said that ‘the ocean journey will be made in international shipping lanes hundreds of miles off the coasts of Central and South America. The journey around Cape Horn will have to be completed before the beginning of the region’s winter storms, typically by April’. It was never clear whether the vessel was going to avoid passing through Chile’s EEZ altogether by staying more than 200 nautical miles from the Chilean coast.

Argentina’s Court Decision

A second hurdle was presented by a January 2004 court decision in Argentina, which prohibited the passage of the reactor through Argentina’s EEZ. This decision issued by Argentine Federal Judge Jorge Pfleger cited the Basel Convention on the Control of Trans-Boundary Movements of Hazardous Wastes and Their Disposal as authorising coastal countries to block such shipments. After this decision, Argentine officials stated that if the shipment passed through Argentina’s EEZ, ‘the load will be intercepted by the military and escorted out of the nation’s territorial waters’. This important decision set the stage for a significant international incident if the shipment had taken place and had transited within 200 nautical miles of Argentina’s coast.

Opposition to Nuclear Cargoes From Other Countries

The decision to abandon the effort to ship the reactor by sea, and thus to leave it in place in Southern California, avoided confrontations, and also
reinforced the view that countries can act to protect their coastal populations and coastal resources by preventing passage of particularly dangerous cargoes and unseaworthy ships through their coastal waters. Numerous states have previously declared that the shipments of ultra-hazardous nuclear cargoes should not transit through their EEZs. In 1992, for instance, South Africa and Portugal explicitly requested that Japan’s shipment of plutonium stay out of their EEZs, and in response to an inquiry from Australia, Japan stated that ‘in principle’ the ship would stay outside the 200-nautical mile zone of all nations.

Initiatives of the Small Island States

At the Pacific Islands Forum in August 2004, the independent island states of the Pacific sought to develop a region-specific environmental impact assessment of nuclear shipments, and restated their concerns about a possible economic loss after an incident involving a nuclear shipment that did not result in a release of measurable radioactivity but nonetheless caused fears that led to declines in the tourism and fishery industries. These small island states have long been concerned about the possibility of economic losses their fragile tourism and fishing interests may suffer from a nuclear incident or accident in the region, regardless of actual contamination, thus leaving coastal states without compensation. The Permanent Representative of the Federated States of Micronesia, Masao Nakayama, stated at the United Nations in November 2004 that ‘the continued shipment of plutonium and radioactive wastes through our Exclusive Economic Zones remains of great concern. Our Pacific Ocean is a vital breadbasket for the entire planet. Any transhipment accident could have a serious impact on the livelihood of our peoples, our economies, and would be felt far beyond our shores, for many generations to come.’

On the occasion of the February 2005 shipment of high-level waste from France to Japan, the Secretary General of the Pacific Islands Forum said that the forum was concerned about possible economic loss in the event of an incident involving a nuclear shipment, whether or not that incident results in a radioactive release. In response to news of the shipment, New Zealand reportedly asked that the shipment stay out of its EEZ. A series of meetings have been held between the shipping states (France, Japan and the United Kingdom) and the Pacific Island countries, which have involved primarily the restating of the positions of each side, without consensus, but
an important concession was made at the 2004 meeting by a British official who said that the United Kingdom would provide ‘notification (vessel, cargo, route, timing of approach to and possible entry to EEZ) in advance to both the [Pacific Island] Forum Secretariat and coastal states past whose EEZs the vessel was passing’.54

The Caribbean nations have been equally united in their opposition to shipments of ultra-hazardous cargoes. Their coordinating body CARICOM explained in its statement to the 2004 Prepcom of the Nuclear Proliferation Treaty that:

In addition to the provision of information regarding the shipment of radioactive materials, CARICOM states continue to call for the establishment of a comprehensive regulatory framework, to promote state responsibility with respect to disclosure, prior informed consent, liability and compensation in the event of accidents. While we appreciate the steps undertaken by states to prevent the likelihood of accidents, we cannot overstate the damage that would be done to the ecosystems of our countries, and the potentially catastrophic impact on our vulnerable economies should an accident occur.55

Judicial Development

In the MOX Plant Case (United Kingdom v. Ireland),56 the ITLOS stated in its order of December 3, 2001, that ‘the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the [Law of the Sea] Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention’.57 This order instructed the United Kingdom to consult and cooperate with Ireland on possible consequences resulting from the proposed expansion of the MOX (mixed plutonium/uranium oxide) plant at Sellafield on the United Kingdom’s Cumbrian Coast facing the Irish Sea and to monitor risks and devise measures to prevent pollution. This order underscored the obligation to consult under international law, particularly when read in light of the International Atomic Energy Agency (IAEA) General Conference resolutions of 2003 and 2004 discussed below. Issues on which coastal states have demanded consultation include prior notification of routes, emergency response preparations, the further development of liability and compensation regimes, and the preparation of an environmental impact assessment. One shipping company, the French COGEMA, has started publicising the
intended route of vessels transporting ultra-hazardous nuclear cargoes upon their departure.

**Developments in the IAEA**

The IAEA held an international conference on the Safety of Transport of Radioactive Material in July 2003. Notification of shipments to coastal states was discussed, and the IAEA General Conference in September 2003 welcomed the practice of some shipping states and operators of providing in a timely manner information and responses to relevant coastal states in advance of shipments to enable them to participate in making preparations regarding safety and security, including emergency preparedness, and invited other countries to do the same in order to improve mutual understanding and confidence regarding shipments of radioactive materials. In March 2004, the IAEA developed an International Action Plan for the Safety of Transport of Radioactive Materials, which addressed the issue of emergency responses to a maritime incident or an accident involving radioactive material being transported in international waters.

In September 2004, the IAEA General Conference passed a resolution that recalled that states have under international law the obligation to protect and preserve the maritime environment and (while reaffirming maritime and air navigation rights and freedoms) stressed the importance of international cooperation to enhance the safety of international navigation. The resolution again welcomed the practice of some shipping states and operators of providing in a timely manner information and responses to relevant coastal states in advance of shipments for the purpose of addressing concerns regarding safety and security, including emergency preparedness, and invited others to do so. This resolution recognised concerns about the potential for damages resulting from an accident or incident during the maritime transport of radioactive materials, including pollution of the marine environment, recognised the importance of having in place effective liability mechanisms, and stated that the principle of strict liability should apply in the event of nuclear damage arising from an accident or incident during the transport of radioactive materials. In addition, the resolution stressed the need to take adequate measures to deter or defeat terrorist and other hostile or criminal actions directed against carriers of radioactive materials.
Recent UN Developments

On January 14, 2005, at the UN meeting on Small Island Developing States (SIDS) in Mauritius, these small island states and the rest of the international community participating in this event adopted the Mauritius Declaration and a companion strategy to implement the Barbados Programme of Action for their sustainable development. The SIDS, composed of islands in the Caribbean, the Pacific and the AIMS region (Atlantic Ocean, Indian Ocean, Mediterranean Sea and South China Sea), were united in their opposition to the transport of radioactive material through their regions. The statement that emerged from this important meeting recognised that the cessation of transport of radioactive materials through SIDS regions is the ultimate desired goal of SIDS and some other countries (which was recognised to include New Zealand, whose representative was chairing the negotiating meeting). The declaration notes that:

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\ldots \text{cessation of transport of radioactive materials through small island developing states regions is an ultimate desired goal of small island developing states and some other countries, and recognises the right of freedom of navigation in accordance with international law. States should maintain dialogue and consultation, in particular under the aegis of the IAEA and IMO, with the aim of improving mutual understanding, confidence building and enhanced communications in relation to safe maritime transport of radioactive materials. States involved in the transport of such materials are urged to continue to engage in dialogue with Small Island Developing States and other states to address their concerns. These concerns include the further development and strengthening, within the appropriate fora, of international regulatory regimes to enhance safety, disclosure, liability, security and compensation in relation to such transport.}\]

In addition, identical language was included in the Outcome Document agreed upon at the UN Millennium Summit in New York in September 2005 and in the resolution adopted by the UN General Assembly on ‘Oceans and the Law of the Sea’ in November 2005.

EEZ Group 21

Under the auspices of Japan’s Ocean Policy Research Foundation (with funding from the Nippon Foundation), a group of 15 experienced ocean law scholars and officials prepared ‘Guidelines for Navigation and Overflight in the Exclusive Economic Zone’ in September 2005 after a series of meetings
to discuss these issues. The following are among the guidelines adopted by this group:

II. Rights and Duties of the Coastal State

a. A coastal state may, in accordance with international law, regulate navigation in its EEZ by ships carrying inherently dangerous or noxious substances in their cargo.

V. Military Activities

F. Military activities of a state in the EEZ of another state should not cause pollution or negatively affect the marine environment or marine living resources, including mammals. In particular, if prohibited by the laws of the coastal state, such activities in a coastal state’s EEZ should not involve live weapons fire, underwater explosions or creation of sound waves and dangerous or radioactive materials that may directly or indirectly harm marine life or cause marine pollution.

The Inadequate Liability Regime

Article 235(3) of the Law of the Sea Convention requires states to ‘cooperate in the implementation of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds’. But the maritime and nuclear states have resisted developing a complete liability regime to govern nuclear shipments, and the existing treaties are inadequate and are not widely ratified. The Vienna and Paris conventions, even as recently amended, remain hedged with exceptions, and incidents related to terrorist attacks and damages related to the marine environment and losses to the tourist and fishery industries are not likely to be covered by these treaties. The treaties do not identify any neutral tribunal for adjudication of claims, and so Pacific Island countries seeking to pursue a claim for damages resulting from the shipments of ultra-hazardous nuclear materials on British-flagged vessels would have to file their claim in a British court. Such an action would require hiring expensive British lawyers, paying high costs if they should lose and subjecting their claims to the restrictive British laws, which seem designed to protect the nuclear industry. Liability is limited
by short statutes of limitations and by limits on the amount of damages that can be recovered. An example of an enlightened liability regime is the 1999 Austrian ‘Act on Civil Liability for Damages Caused by Radioactivity’, which has generous definitions of damages, requires no sudden incident and has no limit on liability.

Restrictions on Navigation Related to Security and Military Concerns

Traditional Concepts of Neutrality and Belligerency at Sea

Prior to the prohibition on the initiation of warfare that became formalised in the 1928 Kellogg-Briand Pact and in Article 2(4) of the UN Charter, diplomats and scholars sought to reduce the scourge of war by requiring attacking countries to issue formal declarations of war and protecting those not involved in the conflict through measures designed to separate ‘belligerents’ from ‘ neutrals’. These rules have been particularly important at sea, to allow commercial shipping to continue during times of war, and were specifically designed to protect the commercial ships of the ‘ neutrals’ from being attacked by the warships of the ‘belligerents’.

One of the first steps in this direction is documented in the Final Act of the Congress of Vienna (1815), signed by Austria, France, Great Britain, Portugal, Prussia, Russia and Sweden, which formally ended the Napoleonic wars. Among the norms that emerged from this congress were the principle of free navigation (not only for the riparian states but also for all states) on the major rivers of Europe (the Rhine, the Neckar, the Mayne, the Moselle, the Meuse and the Scheldt), and recognition of the neutrality of Switzerland. Another important step was taken in 1817, when the United States and the United Kingdom agreed to limit their naval forces on the Great Lakes, leading to a demilitarisation of the US–Canada border. Other demilitarised zones established during this era included those on the Aaland Islands in the Baltic Sea, established in 1856 by a treaty between Sweden, Finland and Russia (which remains demilitarised at present); the southern shore of the Strait of Gibraltar, demilitarised in 1904 by agreement between France and the United Kingdom reiterated in the treaty of November 12, 1912, between France and Spain (and lasting until 1956 when the international status of this area ended); and Sakhalin Island and the Gulf of Tartary, which were demilitarised in the 1905 Treaty of Portsmouth after the defeat of Russia by Japan (remaining in effect for more than 30 years, probably because of the reciprocal nature of the treaty).
When the 20th century began, the dramatic increase in destructive weaponry resulting from the industrial revolution caused many to realise that further constraints were needed on the use of force, and efforts accelerated to try to outlaw the initiation of warfare. Major international meetings were called, the most significant being the 1899 and 1907 Hague conferences, which were designed to codify the laws of armed conflict and establish limits on certain types of military activities. The Hague peace conferences of 1899 and 1907 were convened during ‘a high tide of idealism’, and they marked important efforts to articulate the laws of armed conflict and promote the peaceful settlement of disputes. The growth of daily newspapers in the industrialised countries had the effect of allowing common citizens to participate more fully in policy decisions, and led, in many countries, to a democratisation of international politics.

A consensus was thus reached during this period that noncombatants should be protected even during the most terrible of wars. Grotius had written eloquently on this topic in his celebrated treatise, *De Jure Belli ac Pacis*, which was written when ‘‘the Thirty Years’ War was in the full tide of its destructive progress’ marked by ‘[m]assacre, pillage and famine’, with ‘[n]either age nor sex’ being spared’. Grotius ‘protested’ against this brutal infatuation’, and gradually ‘[t]he distinction between combatants and non-combatants [became] the vital principle of the modern law of war’. Diplomat and Columbia University Law Professor John Bassett Moore attributed this recognition to a ‘moral revolt’ resulting from ‘a loftier conception of the destiny and rights of man and of a more humane spirit’, but it also resulted from the mutual realisation that destruction of noncombatants is not militarily advantageous to either side.

These developments took shape with regard to naval warfare through the distinction drawn between ‘belligerents’ and ‘neutrals’. The laws of ‘neutrality’ emerged to contain the spread of hostilities and limit the impact of war on nonparticipants, particularly with regard to commerce. Neutral countries remained free to trade with each other, and also to trade with belligerents so long as they did not trade in ‘contraband’, which was defined as ‘those goods or materials, such as ammunition, that are directly related to war fighting, or that are war-sustaining, such as oil, electronic components, and industrial raw materials’. However, a grey area still exists and it is frequently difficult to determine whether certain goods will be used for military purposes. It is, therefore, best for the belligerents to publish a specific list of prohibited goods. Today, if the
UN Security Council has issued a ‘decision’ pursuant to its powers under Chapter VII of the UN Charter, such a ‘decision’ is binding on all member states under Article 25 of the Charter and it would then appear to be impossible for any country to opt out of its obligations claiming the status of ‘neutrality’.

**Military Intercept Operations**

The US and allied ‘military intercept operations’ during the past decade have also imposed restrictions on navigational movement. Blockades have been used historically in wartime, and the United States imposed a ‘quarantine’ around Cuba during the October 1962 Cuban Missile Crisis. During the 1982 Falklands/Malvinas War, the United Kingdom declared a 200-nautical mile military exclusion zone around the islands, which some military lawyers viewed ‘as a bad mistake’ because it ‘strengthened the trend by which a zone 200 miles from the shore is seen to have security as well as legal implications’.

Since then, the United Nations has authorised military intercept operations in connection with the 1991 Gulf War, the civil war in the former Yugoslavia in 1991–1993, the internal conflict in Haiti in 1993–1994 and the civil war in Sierra Leone in 1997. After the September 11, 2001, attacks, the United States began boarding vessels in the Indian Ocean, the Red Sea, the Strait of Hormuz and elsewhere in search of Osama bin Laden and his Al Qaeda associates. Attempts have been made to undertake these boarding operations with the consent of the masters of the vessels, but ‘the US notification made to the maritime industry made it clear that vessels suspected of transporting or assisting bin Laden and senior Al Qaeda leadership would be subject to the use of force to compel a boarding’. Although the specific legal basis for these searches has never been articulated, US President George W. Bush has said generally that US actions to respond to the attacks by Al Qaeda are ‘acts of self-defense’.

On December 9, 2002, a North Korean cargo vessel, the *M/V So San*, said to be registered variously in Cambodia or Singapore, was forcibly stopped in the Gulf of Aden 600 miles east of the Horn of Africa by two Spanish warships, which discovered 23 containers filled with 15 Scud missiles hidden beneath 40,000 sacks of cement. After some confusion and
high-level negotiations involving US Vice President Dick Cheney and US Secretary of State Colin Powell talking with Yemen President Ali Abdullah Salih, the United States ‘[a]cknowledged[ed] that the purchase of the missiles was not unlawful’, and the vessel was released to continue its voyage to Yemen.\(^99\)

**The Proliferation Security Initiative**

Since then, the United States has shown an increased interest in using its naval muscle to stop ships that it views as presenting a security threat. In a speech delivered in Poland May 31, 2003, US President George W. Bush outlined the ‘Proliferation Security Initiative’, or PSI, whereby the United States has been trying to mobilise ‘like-minded states’ to prepare for and participate in naval intercept operations designed to inspect ships thought to be carrying nuclear materials to or from the so-called ‘rogue’ states, notably North Korea and, perhaps, also Iran. The countries most actively supporting this US initiative are Spain, France, the United Kingdom, Portugal, Australia, Germany, Italy, Japan, the Netherlands and Poland.

The countries coordinating these efforts met several times during 2003 and 2004 and held a number of joint exercises to practice interdiction techniques. Related to these efforts were the seizure by Taiwan of 150 barrels of dual-use chemicals from a North Korean freighter when it stopped in Kaohsiung to refuel,\(^101\) the confiscation of 214 ultra-strong dual-use aluminium pipes bound for North Korea on the French-flagged vessel *Ville de Virgo* when it was about to enter the Suez Canal on April 12, 2003\(^102\) and Japan’s searches of the cargoes of North Korean ferries when they are in Japanese ports.\(^103\)

After numerous meetings, the concerned countries issued a ‘Statement of Interdiction Principles’ in September 2003 including the following:

- Countries agree to inspect suspicious vessels flying their own flag and will consider allowing other countries to inspect suspicious vessels flying their flag.
- Countries agree to stop and search suspicious vessels in their internal waters, territorial seas or contiguous zones.
Countries agree to require suspicious vessels entering or leaving their ports, internal waters or territorial seas to be boarded and searched prior to entry.

Although the public statements have stated that these endeavours would be undertaken in a manner that is consistent with international law, it is also clear that the United States and its allies are seeking to modify international law to permit more active interception when warranted. President Bush’s National Security Advisor Condoleezza Rice has explained that:

While all actions will be taken consistent with existing national and international legal authorities, we are also seeking ways to expand those authorities. And it is for this reason that the president proposed in his September address to the United Nations that the Security Council adopt a resolution calling on all states to criminalize proliferation activities, establish effective export controls, and ensure the safety and security of sensitive materials and technologies.104

In addition, Australia’s Foreign Minister Alexander Downer has expressed support for changing the law permitting free navigation on the high seas in order to stop North Korea’s shipping of missiles, nuclear materials and drugs to its allies or customers.105 In January 2004, the Japanese press reported that its government was planning to submit a bill to the Diet that would allow the Japanese Maritime Self-Defense Force to stop foreign vessels and inspect their cargo in its territorial waters or on the high seas near Japan during periods of emergency or conflict in the areas surrounding Japan.106

**Australia’s 1000-Mile Maritime Identification Zone**

In a proposal exemplifying the global trend recognising the requirements of prior notification and consultation, Australia announced on December 14, 2004, its intention to establish a Maritime Information Zone, which extends up to 1,000 nautical miles from the Australian coastline.107 Upon entering this zone, vessels proposing to enter Australian ports will be required to provide comprehensive information regarding its identity, crew, cargo, location, course, speed and intended port of arrival. The goal is thus to identify all vessels, other than day recreational boats, that are navigating within its 200-nautical mile EEZ. Malaysia,108 New Zealand109 and Indonesia110 have expressed concern at the plan, with New Zealand
providing its ‘understanding’ of this plan\textsuperscript{111} that vessels transiting the zone but not travelling to an Australian port will be asked to provide information on a voluntary basis.\textsuperscript{112}

\textit{Military Manoeuvres in the EEZ}

This topic, which has been examined in detail elsewhere,\textsuperscript{113} remains controversial. Do maritime nations have unlimited authority to engage in all variety of military activities in the EEZs of other coastal states, or does the duty of ‘due regard’ impose limits on such activities, particularly with regard to the launching of missiles and other weapons?

\textit{The Disagreements Regarding Hydrographic Surveys}

The issue regarding whether hydrographic surveying to aid navigational safety is ‘marine scientific research’ continues to fester.\textsuperscript{114} In December 2002, China announced that it had enacted a new law explicitly requiring Chinese approval of all survey and mapping activities in its EEZ, and stating that unapproved ocean survey activity will be subject to fines and confiscation of equipment and data.\textsuperscript{115}

\textit{Aerial Surveillance}

The April 2001 incident involving the US surveillance plane flying along China’s coast, which was forced to land in China’s Hainan Island after it was hit by a Chinese fighter jet, has been described extensively elsewhere.\textsuperscript{116} A somewhat similar incident occurred along the North Korean coast on March 2, 2003, when four North Korean fighter jets intercepted a US RC135S Cobra Ball reconnaissance aircraft and appeared to be trying to force it to land in North Korea.\textsuperscript{117} The United States halted its surveillance for a few days, but news reports indicated they resumed on March 11, 2003.

\textit{Other Recent Navigational Restrictions Based on Security Concerns}

Restrictions on navigation based on security concerns have proliferated during the past 2 years. In December 2002, for instance, the IMO adopted an International Ship and Port Facility Security Code that requires 25,000 ships owned by 3,500 companies to have a security officer on board and to
develop security plans that will be reviewed and certified by a recognised security organisation. All ships will have to have an identification number on their hulls and provide onboard records of their last 10 ports of call. In January 2003, fearing terrorist attacks, Canada prohibited vessels from coming within 500 m of its military ports at Halifax, Nova Scotia, and those at Esquimalt and Nanoose Bay in British Columbia.

Military Vessels, Sovereign Immunity and Environmental Rules

The Law of the Sea Convention treats military and commercial vessels without distinctions, and thus states that both are entitled to exercise freedoms of navigation. This view remains somewhat controversial, however, and it is interesting to note that the United States once took the view that warships were not entitled to exercise the right of innocent passage. In the North Atlantic Coast Fisheries Arbitration, the US agent Elihu Root argued that warships did not have the right to pass through the territorial sea ‘without consent into this zone, because they threaten. Merchant ships may pass because they do not threaten’. Articles 31, 32 and 236 of the Law of the Sea Convention state that warships have immunity from coastal state jurisdiction, but also make it clear that the countries operating such warships are nonetheless liable for any environmental or other damage caused by the operations of the warship.

The Law of the Sea Convention and Armed Conflict

The question of the convention’s applicability in times of military conflict remains unresolved. Does the convention apply in its entirety? Does it apply, but with modifications as deemed necessary to accommodate the conflict? Do some provisions still apply, while others are in abeyance? What meaning would Articles 88 and 301 of the Law of the Sea Convention have if they can be swept aside when armed conflict erupts? The United States apparently accepted the right of Iran to search US-flagged vessels on the high seas for contraband during the Iran–Iraq war, and the United States, in turn, declared a 5-mile ‘moving bubble’ identification zone around its warships in the Persian Gulf, requiring aircraft and vessels to identify themselves before entering this bubble.

Some commentators have written that the Law of the Sea Convention was designed ‘to regulate the uses of the seas in time of peace’, implying
that it may not be applicable in times of war. Others have observed that the 1958 Convention on the High Seas was clear in applying only to peacetime situations, and that ‘[t]he same notion might apply to the 1982 Convention where the application during times of armed conflict is not clearly articulated’.\textsuperscript{127} Professor R.P. Anand explained that ‘there is no doubt that the law of the sea, which has been codified for times of peace, is bound to be modified during armed conflicts. These rules have been modified during previous wars, particularly in light of the more fundamental rules such as the right of self-defense’.\textsuperscript{128} Two US military scholars have written that the laws of armed conflict would apply in times of conflict, but that the law of neutrality ‘is, in great part, consistent with the law of the sea; the maritime rights and duties states enjoy in peacetime continue to exist, with minor exceptions, during armed conflict’.\textsuperscript{129} A report written to the UN Secretary General in 1985 explained that:

\begin{quote}
In the exercise of the right of collective self-defence it is clear that parties to these security arrangements may use force upon the high seas, within the limits prescribed by international law, to protect their armed forces, public vessels or aircraft. As always in the case of legitimate self-defence, the use of force shall not exceed a proportional response to the armed attack, taking into account its nature and magnitude.\textsuperscript{130}
\end{quote}

\textbf{Transit Passage Through International Straits: the Malacca Straits}

Historically, charges have been imposed on ships passing through the Malacca Straits. When the Portuguese controlled the straits, between 1511 and 1641, they imposed a toll on vessels.\textsuperscript{131} The Dutch took over the strait in 1641, and carefully controlled passage through it.\textsuperscript{132} Not until 1824, when the Dutch signed a treaty with the United Kingdom, was the right of passage for vessels of all nations established.\textsuperscript{133}

Both Malaysia and Indonesia have asserted at earlier points that the straits are part of their territorial seas\textsuperscript{134} and that ‘the Straits of Malacca and Singapore are not international straits’.\textsuperscript{135} The earlier position of Indonesia and Malaysia was that ‘the regime of innocent passage should obtain in straits used for international navigation that have been assimilated either by territorial or internal waters’, such as the Strait of Malacca.\textsuperscript{136} The major maritime powers objected to this position as too restrictive, and the Law of the Sea Convention adopted the transit passage regime through international straits to ensure that straits would be open to navigation.\textsuperscript{137}
The strait has been generally open to all international transit, but Singapore and Indonesia in 1993 opposed the passage of a Japanese ship carrying plutonium through the Strait of Malacca because of the danger of collisions and piracy. Malaysia developed a plan to escort the ship through the strait if that route were to be taken, but also threatened to block passage as a threat to its national security. The ship did not pass through the strait, and instead went south around Australia.

Regime of Transit Passage Through International Straits

The United States has not yet ratified the Law of the Sea Convention, but has argued vigorously that the regime of transit passage through international straits is now part of binding customary international law. On August 17, 1987, the United States said:

The United States particularly rejects the assertions that the rights of transit through straits used for international navigation, as articulated in the LOS Convention, are contractual rights and not codification of existing customs or established usage. The regimes of transit passage, as reflected in the convention, are clearly based on customary practice of long standing and reflects the balance of rights and interests among all states, regardless of whether they have signed or ratified the convention.

Other countries have, however, viewed transit passage as emanating directly from the Law of the Sea Convention, and thus not applicable to countries that are not contracting parties. Some commentators have suggested that the transit passage regime in the Law of the Sea Convention may not yet have been confirmed as customary international law because of ‘the attitude taken by a significant number of states which appear reluctant, either explicitly or implicitly, to accept the transit passage regime as a whole or some of its implications’. Some Greek scholars have argued, for instance, that Turkey would not be entitled to invoke the right of transit passage through the Aegean Sea (if Greece were to claim 12-mile territorial seas around its Aegean islands), because Turkey is not a contracting party to the Law of the Sea Convention.

Professor Tullio Scovazzi has explained that the convention does not adequately protect the ‘vital concern’ of states bordering straits regarding the protection of their marine environment. In particular, the convention provides only limited authority to the bordering states to enforce their environmental regulations, it does not create an adequate liability regime, nor
does it require the prior notification of transit of ultra-hazardous cargoes that would allow coastal states to protect their coastal populations and resources.147 These inadequacies have led a number of straits-bordering states to promulgate regulations that appear to go beyond what is permitted by the convention.148 Professor Scovazzi concludes that ‘[i]t is therefore possible to argue that the LOS Convention transit passage regime is still far from fully corresponding to present customary international law’.149

Conclusion

This survey of governing documents and state practices involving navigation illustrates that shipmasters must carefully limit their movements in many ways. Even military vessels that have immunity from seizure must nonetheless respect the many rules that have been established to protect the marine environment and the security of coastal populations.

Fishing vessels are subject to the most restraints and must now give notice whenever they travel through the EEZ of another country. Oil tankers, especially those with single hulls, are now subject to a wide variety of restraints, and any ship with a dangerous cargo must conform to international, regional and national regulations. Ships carrying ultra-hazardous nuclear cargoes have been told by many countries to avoid their EEZs, and these ships have, in fact, picked routes designed to avoid most EEZs. A new norm of customary international law appears to have emerged that allows coastal states to regulate navigation through their EEZ based on the nature of the ship and its cargo.

The right to engage in military activities in the EEZs of other states was controversial during the negotiations that produced the Law of the Sea Convention, and this topic remains controversial today, with groups of countries asserting dramatically opposing views. Countries remain deeply divided on the legitimacy of launching of weapons, hydrographic surveying and surveillance activities in the EEZs of other countries.

Security concerns have increased dramatically during the past decade, and it has become almost commonplace for the major maritime and military powers to assert the right to stop and board merchant vessels to look for suspect cargoes in all parts of the oceans. The relationship between the law of the sea and the laws of armed conflict has always been fuzzy, and
the early efforts to define the laws of neutrality and blockades need to be re-examined and updated to deal with current security concerns.

Navigational rights in the EEZ of other countries are subject to the legitimate concerns of the coastal country and are being restricted for a wide variety of reasons. Coastal states have acted to control such navigation to protect their coastal living resources, to guard against marine pollution and to protect the security of coastal populations, and it can be anticipated that such assertions of coastal state control will continue. In many cases, these claims have been approved by the IMO and by other regional and global organisations. The balance between navigation and other national interests continues to develop, and navigational freedoms appear to be disappearing during this evolutionary process.

Notes


5 Ibid., Article 58(1).

6 Ibid., Article 58(3).

7 David Joseph Attard, no. 3, p. 94.

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10 The Kerguelen Archipelago is situated at 49°20' South, 70°20' East, midway between Africa, Antarctica and Australia. The main island is about 120 km by 140 km, occupies 6,675 sq km, and is surrounded by around 300 other smaller islands, reefs and rocks, forming an archipelago of 7,215 sq km. These islets are barren and have never had an indigenous population, but France has maintained a scientific outpost on the main island since 1949, with a rotating population of some 50 to 100. The French base at Port aux Francais has a small hospital, restaurant, library, sports centre, cinema and chapel (Notre Dame des Vents). The base is shared with CNES (The French National Space Centre), which operates a base dedicated to the tracking of satellites. Because this islet has never supported a permanent population and appears to be unable to do so because of its inhospitable nature, a strong argument could be made that it should be considered to be a ‘rock’ under Article 121(3) of the Law of the Sea Convention that would be unable to generate an EEZ. See, for example, Jon M. Van Dyke, Joseph Morgan, and Jonathan Gurish, ‘The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?’ San Diego Law Review, 25, 1988, p. 425. Nonetheless, the legitimacy of the French EEZ claim around Kerguelen does not appear to have been raised in the Monte Confurco litigation.

11 The Tribunal ruled, however, that it was not logical to assume that the entire cargo had been caught in France’s EEZ and reduced the bond from $8 million to a more reasonable $2.6 million.


16 Ibid.

17 Ibid.

18 ‘Interview with Kristina Gjerde,’ no. 13.

20 Resolution MSC.190 (79) (December 6, 2004), at http://www.imo.org/ (Accessed May 1, 2007). WETREP requires oil tankers of more than 600-tonnes deadweight to provide regular reports on their routing and cargo to adjacent coastal states.

21 Rachel Cantry (US Coast Guard), ‘The Coast Guard and Environmental Protection,’ Naval War College Review, 52(4), Autumn 1999, p. 77.

22 Ibid., p. 78.

23 IMO Resolution MSC 52(66) (May 30, 1996). Ushant (Ouessant in French) is the most westerly of the islands off the coast of France, about 14 m from the coast of Finistre. Ushant is about 3,850 acres in extent and almost entirely granitic, with steep and rugged coasts accessible only at a few points, and rendered more dangerous by the frequency of fog. It has a small population of pilots, fishers and farmers.

24 IMO Resolution MSC.63 (67) (December 3, 1996).


26 IMO Resolution MSC.85 (70) (December 3, 1998).


28 Rachel Cantry, no. 21, p. 85.


30 For instance, Malaysia cited the inherent danger entailed in the passage of nuclear-powered vessels or vessels carrying nuclear material or material of a similar nature and stated that the government, ‘with all of the above in mind, requires the aforesaid vessels to obtain prior authorization of passage before entering the territorial sea of Malaysia until such time as the international agreements referred to in Article 23 are concluded and Malaysia becomes a party thereto. Under all circumstances, the flag of state of such vessels shall assume all responsibility for any loss or damage resulting from the passage of such vessels within the territorial sea of Malaysia’, at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (Accessed May 1, 2007).

31 The UK stated that it considers that declarations and statements not in conformity with Articles 309 and 310 include ‘those which purport to require any form of notification or permission before warships or other ships exercise
the right of innocent passage or freedom of navigation or which otherwise purport to limit navigational rights in ways not permitted by the Convention’, at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (Accessed May 1, 2007).


33 Statement of Toichi Sakata, Director of the Japanese Science and Technology Agency’s Nuclear Fuel Division, to participants in the Asia-Pacific Forum on Sea Shipments of Japanese Plutonium, Tokyo, October 6, 1992.


36 Chile’s Law for Nuclear Safety, Law No. 18.302, Article 4, originally promulgated April 16, 1984, and amended pursuant to Law-19825 on October 1, 2002.

37 Ibid., Article 4(II).


40 Ibid. ‘Although we recognize that advance notification of coastal states is not required, we consider it to be an important element in preparation for contingencies’, Robert A. McGuire, the US Department of Transportation associate administrator for hazardous materials, wrote in an October 17, 2003, letter. ‘It may be necessary to seek shelter in waters of a coastal state’. McGuire’s letter also noted that Southern California Edison had made no arrangements for emergency equipment, such as cranes, backup tugs or salvage vessels.

41 Ibid. Quoting McGuire’s October 17, 2003, letter as saying: ‘Given that your transport is entirely over open ocean, your proposal to salvage only in water up to 300 feet appears insufficient’.


47 Dan Weikel and Hector Tobar, no. 44.
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48 See Jon M. Van Dyke, ‘Applying the Precautionary Principle,’ no. 29, p. 386.
49 See Statement of Toichi Sakata, no. 33.
54 Fifth Meeting on Liability and Compensation for the Transport of Radioactive Materials (Nadi, Fiji, June 21–25, 2004), Summary of Discussions with Shipping States, para 6. Despite this positive development, the Pacific Island countries remained concerned about the lack of a region-specific environmental impact assessment, the failure of the shipping states to coordinate their contingency response preparedness plans with countries in the region, and the deep disagreement between the island and shipping states regarding the adequacy of the liability and compensation regimes and the measurement of damages.
55 Statement by CARICOM, April 26, 2004, presented by the Bahamas to the NPT Prepcom 2004.
57 Ibid., p. 415, para 82.
63 See also International Action Plan, no. 61, at B.2.1.
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64 A/Conf.207/L.6.


70 EEZ Group 21, Guidelines for Navigation and Overflight in the Exclusive Economic Zone, Ocean Policy Research Foundation, Tokyo, September 16, 2005 (emphasis added). The members of EEZ Group 21 are Masahiro Akiyama, Chair, Ocean Policy Research Foundation, Tokyo, Japan; Rear Admiral (Retd.) Kazumine Aki moto, Senior Researcher, Ocean Policy Research Foundation, Tokyo, Japan; Sam Bateman, University of Wollongong, New South Wales, Australia; Hasjim Djalal, Indonesian Maritime Council; Alberto A. Encomienda, Secretary-General, Maritime and Ocean Affairs Center, Department of Foreign Affairs, Philippines; Moritaka Hayashi, Waseda University, Tokyo, Japan; Ji Guoxing, Shanghai Jiao Tong University, China; Commander Kim Duk-ki, National Security Council, Republic of Korea; Pham Hao, Deputy Director General, Department of International Law and Treaties, Ministry of Foreign Affairs, Vietnam; Shigeki Sakamoto, Kobe University, Japan; Rear Admiral (Retd.) O.P. Sharma, College of Naval Warfare, Mumbai, India; Alexander S. Skaridov, Russian State Humanitarian University, St. Petersburg, Russia; Mark J. Valencia, Maritime Policy Analyst, Kaneohe, HI; Jon M. Van Dyke, University of Hawaii, Manoa, HI; and Judge Alexander Yankov, International Tribunal for the Law of the Sea, Hamburg, Germany.


72 See, for example, Merlin v. British Nuclear Fuels, PLC, [1990] 2 QB 557, [1990] 3 All ER 711, [1990] 3 WLR 383, rejecting a claim for loss resulting from contamination of a house from α-emitting radionuclides, even though the house had lost almost half its value because of the contamination, because the radionuclides caused no ‘physical’ damage to the fabric of the property, and noting that ‘it is in the nature
of nuclear installations that there will be some additional radionuclides present in the houses of the local population’. The High Court also stated, in justifying its rejection of the claim, that ‘the presence of alpha emitting radionuclides in the human airways or digestive tracts or even in the bloodstream merely increases the risk of cancer to which everyone is exposed from both natural and artificial radioactive sources. They do not per se amount to injury.


74 The General Treaty for the Renunciation of War, Aug. 27, 1982, 28 Stat. 2343, T.S. No. 796, 2 Bevans 732, 94 L.N.T.S. 57. This treaty has been ratified by 66 countries, including the United States, and is still in effect. In Article I, the contracting parties ‘condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another’.

75 See, for example, The Prize Cases, 67 U.S. (2 Black) 635, 667 (1862) (‘The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war’).


80 Mark W. Janis, no. 77, p. 173.

81 John Bassett Moore, no. 76, p. viii.

82 Ibid.

83 Ibid., p. 13.
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84 The US Supreme Court adopted from Vattel, for instance, the view that: ‘Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals; ...should he burn and ravage, they will follow his example; the war will become cruel, horrible, and every day more destructive to the nation’. Ibid., p. 38 (quoting from The Prize Cases, 67 U.S. (2 Black) 635, 666, 667 (1862)).


86 Ibid., p. 142.


88 See, for example, The Prize Cases, 67 U.S. (2 Black) 635, 665-66 (1862).


91 Ken Booth, ‘Naval Strategy and the Spread of Psycho-Legal Boundaries at Sea,’ International Journal, Canadian Institute of International Affairs, Summer 1983, pp. 373, 384


93 S.C. Res. 787 (November 16, 1992) and 820 (April 17, 1993).

94 S.C. Res. 875 (October 16, 1993) and 917, (May 6, 1994).

95 S.C. Res. 1132 (October 8, 1997).

96 Defense Institute of International Legal Studies (DIILS), Conference on Maritime Operations organised by the Russian Academy of Liberal Arts and Information Technologies Education and DIILS 11-8, St. Petersburg, Russia, June 2003.

97 Ibid.


Speech by Condolezza Rice to the National Legal Center for the Public Interest, Waldorf Astoria Hotel, New York City, November 2, 2003 (emphasis added).


For examples, see ibid.


See, for example, Jon M. Van Dyke, no. 113 and ‘Aerial Incident off the Coast of China,’ *American Journal of International Law*, 95, 2001, p. 630; see also Ralph Cossa, ‘Do We Need So Many Surveillance Flights?’ *Honolulu Star-Bulletin*, April 18, 2001,


Ibid.

‘Canada Bans Boats from Coming Within 500 Metres of Naval Ports,’ *BBC Monitoring Asia Pacific—Political*, January 13, 2003.

For example, see John Astley III and Michael N. Schmitt, no. 85, p. 132: ‘The Convention does not require prior notice or authorization before a ship may proceed in innocent passage. Nevertheless, some coastal states have imposed such requirements on warships. Over 25 nations purport to require prior permission, 13 insist on prior notification, and five place impermissible special restrictions on nuclear-powered warships’. (In their footnote 50, the authors list the countries that have made these claims.)


Harvey Dalton, ‘Comments on National Security Concerns,’ in Jon M. Van Dyke, Lewis M. Alexander, and Joseph R. Morgan (eds.), *International Navigation: Rocks and Shoals Ahead?* Law of the Sea Institute, Honolulu, HI, 1988, pp. 373, 374; Churchill and Lowe, no. 90, p. 425, have said, ‘It seems unlikely that moving zones will be accepted or tolerated by the international community as readily as fixed exclusion zones have been’.

Churchill and Lowe, no. 90, p. 421.

Harvey Dalton, no. 125, pp. 373, 374.


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132 Ibid.

133 Ibid.


137 Law of the Sea Convention, no. 4, Articles 34–44.


143 The Turkish scholar Nihan Unlu lists the countries that ‘consider the regime of transit passage as an exclusive part of the UNCLOS [UN Convention on the Law of the Sea]’ as Chile, Denmark, Egypt, Greece, Iran, Indonesia, Italy, Japan, South Korea, Malaysia, the Netherlands, Oman and Spain. Ibid., p. 75.


International Journal of Marine & Coastal Law, 497, 1995, p. 10) (summarising scholarly discussion that indicates that all aspects of the transit passage regime have not yet crystallised into customary international law), and Anastasia Strati, ‘Greece and the Law of the Sea: A Greek Perspective,’ in Aldo Chircop, Gerolymatos and Iatrides (eds.), The Aegean Sea After the Cold War, 2000, pp. 89, 94: ‘it is highly questionable whether the LOS Convention provisions on transit passage in all their detail reflect customary law, thereby entitling Turkey to benefit from them’.

146 Tullio Scovazzi, no. 144, pp. 174–175.
147 Ibid., pp. 175–177.
148 Ibid., pp. 177–187 (providing examples from the Malacca Strait, the Canadian Arctic Straits, the Russian Arctic Straits and the Turkish Straits).

Jon M. Van Dyke is Professor of Law at the William S. Richardson School of Law, University of Hawaii at Manoa.

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