UNIDIR/92/89

UNIDIR
United Nations Institute for Disarmament Research
Geneva

Maritime Security: The Building of Confidence

Edited by
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UNITED NATIONS
New York, 1992

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UNIDIR/92/89

UNITED NATIONS PUBLICATION

Sales No. GV.E.92.0.31

ISBN 92-9045-074-6

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Preface

Maritime questions have always posed particularly sensitive and delicate problems in the field of disarmament. Freedom of the high seas, even if its dimensions have tendency to be restricted, remains a cardinal principle of international law, and the freedom of its strategic use which is one of its components is jealously guarded by the great maritime powers. Beyond the technical difficulty which the attempts at disarmament encounter in this field, the very application of the concept itself is often contested. The ocean is a pathway which leads to all shores and security imperatives dictate that the freedom of this pathway, or rather of these pathways since they may well also be submarine, surface or aerial, is protected.

The result of a detailed analysis of the different existing arrangements, not on the level of disarmament *per se*, but rather on that of collateral measures, such as confidence- and security-building measures, is far richer than one would imagine at first glance. The different chapters of this report shall provide ample illustrations.

On this basis, but without pretending to draw up a complete programme for the future, it is possible to suggest or to imagine some new measures. This is what Jozef Goldblat sets out to do. He assured the co-ordination of the research and the direction of its publication. It is to be noted that some of the ideas which are put forward are his own, and that the recommendations contained in Chapter 1 do not express a joint position of the group. Yet they are stimulating and may nourish debate, as was pointed out during the meetings of the UNIDIR group of experts.

UNIDIR would like to express its recognition and thanks to the different experts which have contributed, by their articles and their observations, to the success of the whole project: Hervé Coutau-Bégarie (Are Confidence-Building Measures Verifiable?); Georgy Dimitrov (Possible New Restriction on the Use of Naval Mines); James Eberle (Military Conduct at Sea); Habib Fedhila (Naval Manoeuvres and the Security of Coastal States); Jozef Goldblat (Introduction, Review of Existing Constraints, Recommendations and Conclusion); Mitsuo Kanazaki (International Consultative Mechanisms Related to Maritime Security); Christopher Pinto (Maritime Security and the 1982 United Nations Convention on the Law of the Sea); Jan Prawitz (The "Neither Confirming nor Denying" Policy of Sea); Bakhtiyar Tuzmukhamedov ("Sailor-Made" Confidence-Building Measures); Stanley B. Weeks (Measures to Prevent Major Incidents at Sea); and Arthur Westing (Environmental Dimensions of Maritime Security). The Institute also expresses its gratitude to the authorities of the Russian Federation and to those of Tunisia whose generous hospitality permitted the convening of two expert group meetings.

Professor *Serge Sur*
Deputy Director
UNIDIR

List of Acronyms

ANU	Australian National University
ANZUS	Australia/New Zealand/US
ASEAN	Association of South-East Asian Nations
CFCE	Conventional Forces Conference in Europe
CFE	Conventional Armed Forces in Europe
CIS	Commonwealth of Independent States
C^3I	Command, Control, Communication, Intelligence
CMBs	Confidence-Building Measures
COPREDAL	Preparatory Commission for the Denuclearization of Latin America
CSBMs	Confidence- and Security-Building Measures
CSCE	Conference on Security and Co-operation in Europe
CTS	Consolidated Treaty Series
DMA	Dangerous Military Activities
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICNT	Informal Composite Negotiating Text
IMO	International Maritime Organization
INCSEA	Incident at Sea
INF	Inermediate-Range Nuclear Forces
IUCN	International Union for Conservation of Nature and Natural Ressources
LIC	Low Intensity Conflict
LNG	Liquified Natural Gas
LNTS	League of Nations Treaty Series
MTSG	Military Treaties deposited with the Secreatary-General
NAFO	North Atlantic Fisheries Organization
NATO	North Atlantic Treaty Organization
NiCNoD	Neither confirming nor denying
NOTAMs	Notices to Airmen
NOTMARs	Notices to Mariners
NZ	New Zealand
PRC	Peoples Republic of China
RIMPAC	Rim of the Pacific (Naval exercise; name refers to the four participating countries: Australia, Canada, New Zealand and the United States)
RN	Royal Navy
ROK	Republic of Korea
SALT	Strategic Arms Limitation Treaty
SIPRI	Stockholm International Peace Research Institute
SLBM	Submarine-Launched Ballistic Missile
SSBN	Nuclear-Powered, Ballistic Missile-Submarines
SSGN	Guided-Missile Submarine, Nuclear-Powered
SSN	Nuclear Submarine
START	Strategic Arms Reduction Talks (Treaty)
TG	Task Group

UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
USN	United States Navy
UNTS	United Nations Treaty Series
WMO	World Meteorological Organization
WTO	Warsaw Treaty Organization
WRI	World Resources Institute
WWF	World Wildlife Fund

Chapter 1
Introduction, Review of Existing Constraints, Recommendations and Conclusion

Jozef Goldblat

Introduction

Although the principle *mare liberum*, formulated centuries ago, continues to be valid, a multitude of measures adopted by sovereign nations have in many ways restricted freedoms at sea. Such measures include the designation of sea lanes for reasons of navigational safety, regimes for the orderly exploitation of ocean resources, or the protection and preservation of the marine environment. This project deals mainly with measures aimed at regulating naval activities of states with a view to minimizing the risks of armed confrontation at sea.

Remarkable progress has recently been made in diminishing the threat posed by nuclear-armed navies. As a result of bilateral agreements between the Russian Federation and the United States the numbers of strategic ballistic missiles deployed on the submarines of these two powers have been limited, and may soon be significantly reduced. The number of nuclear warheads, which each of these missiles carries, will also be cut. Moreover, by virtue of unilateral undertakings, the US, Russian and British tactical nuclear weapons, deployed on all kinds of warship, have been or are being withdrawn to be stored on land or destroyed. France is scaling down the nuclear component of its navy as well. Even the movements of nuclear-armed ships may be somewhat restricted by multilateral treaties setting up nuclear weapon-free areas.

Important negotiated cuts are expected in the main categories of non-nuclear land-based armament, in particular in Europe. However, there is, as yet, no prospect for restricting significantly non-nuclear naval armaments, even though the size of navies themselves may be shrinking in response to budget pressures (rather than as a result of international treaties). It is difficult to see why, in the search for improved world security, conventional naval forces and activities should be treated differently than conventional ground or air forces. And yet, besides geostrategic asymmetries among the potential parties, several obstacles stand in the way of negotiated naval arms control which would limit naval forces substantially, both quantitatively and qualitatively. Warships will continue to navigate in distant waters in support of national political and economic interests, taking advantage of the exceptional mobility and flexibility of maritime power. The establishment of 200-nautical-mile exclusive economic zones and the growing exploitation of the seas, as well as the awareness of the vast unused resource potential of the seas, have increased the need for surveillance and for enforcement of international rules of conduct at sea. Other missions of naval ships, which states are unlikely to renounce, include the defence of their coastal waters, training exercises and protection of fishing fleets, as well as power projection or simply flag showing. Such activities may lead to dangerous situations and conflicts. Hence the need for building confidence at sea. Maritime confidence building may encourage attitudes of co-operation having political, economic and security consequences that extend far beyond the maritime field.

Origin of CBM

Confidence-building has been practised for many years by many nations, but the term "confidence-building measure" (CBM) entered the vocabulary of international relations only in the

early 1970's. The practice became institutionalized through a Document forming part of the 1975 Final Act of the Conference on Security and Co-operation in Europe. In 1978 the first UN General Assembly special session devoted to disarmament called, in its Final Document, for a commitment to CBMs in order to prevent armed attacks which could take place by accident, miscalculation or failure of communication. Subsequently, the Conference on Security and Co-operation in Europe developed the original notion of CBM by accentuating its security dimension. This is why the measures in question are also referred to as "confidence and security-building measures" (CSBMs).

Functions of CBM

The objective of CBMs is to translate the general principles of international law regulating inter-state relations into positive action.

These principles are laid down in the Charter of the United Nations, in the 1970 UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, as well as in the 1975 Final Act of the Conference on Security and Co-operation in Europe. The most important principles are:

a. no use or threat of use of force against the territorial integrity or political independence of any state;
b. peaceful settlement of disputes between states;
c. non-intervention in the internal affairs of states;
d. co-operation among states in solving international problems and in promoting respect for human rights;
e. self-determination of peoples; and
f. sovereign equality of states.

The positive action, into which these principles must be translated to provide credibility to affirmations of peaceful intentions, amounts to the implementation of balanced measures, possibly linked with each other and aimed at:

a. reassuring states of the non-aggressive intentions of their potential adversaries;
b. narrowing the scope of political intimidation by the forces of stronger powers;
c. reducing the possibility of misrepresentation of the activities of other states; and
d. minimizing the likelihood of inadvertent escalation of hostile acts in a crisis situation.

In general, CBMs do not directly affect the strength of armed forces or the inventories of arms, but they make the use of force for the settlement of disputes less likely. They may also facilitate progress towards disarmament. In fact, the distinction between CBMs in the military field and other arms control measures is becoming increasingly blurred.

To have the expected effect of reducing the risk of war and increasing the likelihood of continued peace, CBMs must be significant in scope and legally or at least politically binding.

Regional CBMs

For a great majority of states threats to national security arise from conditions within their own region. Consequently, without denying the importance of CBMs operating among the great powers for the good of the general international climate, it is desirable to devote attention to regional approaches.

Regional CBMs cannot be imposed by outsiders. They must be freely negotiated and agreed to by states within the region. It is only these states that can address the causes of their specific security problems and determine the type, scope and area of application of the required CBMs. In one region, distrust and tension could be generated by the lack of reliable information about the military activities of the neighbouring states or by the inadequacy of the channels of communication among the respective political decision-makers. In another region, distrust and tension could be generated by an absence of agreed restraints on the behaviour of armed forces, or by an uncertainty about state compliance with international obligations.

By promoting security in one region, CBMs could have a stabilizing effect on the situation in other regions, and thereby strengthen global security. Because of the possibility of such interaction, it is necessary that, in adopting CBMs, the states of a region take into account the security and other concerns of states outside that region. Equally, the latter would be expected to respect the interests of states within the region in question, and even co-operate in bringing agreed CBMs into effect.

The notion of "region" in the context of CBMs should be a flexible one. A region could be considered to embrace states not necessarily meeting strict geographical criteria, but which are linked with each other politically or economically. Moreover, an arrangement initiated by a few neighbouring states could subsequently attract more distant states.

Categories of CBM

Confidence-building can start with modest steps, such as the establishment of personal contacts in order to overcome prejudices. But, to have an impact, confidence-building must be a continuous process, consisting of ever more substantial measures. Declarations of good intentions, as well as pledges not to resort to force, can be helpful as a prelude to the peaceful settlement of disputes, but do not really qualify as CBMs.

Since the primary purpose of CBMs is to reduce the risks of armed conflicts among states, the CBMs in force are focused on military-related matters. It is clear that security cannot be obtained by promoting measures solely in the military field, but the military factor has undeniable priority, the absence of war being a prerequisite for bringing into effect non-military CBMs. These considerations suggest that the following categories of CBM have quasi-universal applicability: CBMs that impose constraints on the behaviour of the parties; CBMs that promote transparency and openness among the parties; and CBMs that strengthen the security of the parties through political, economic and environmental co-operation. Examples for each of these three categories are given below.

CBMs in the Field of Constraints:

a. abstention from certain military activities in land- and sea-border areas;
b. disengagement of armed forces by establishing partially or fully demilitarized zones;
c. voluntary submission to international on-site inspection to demonstrate compliance with agreed standards of behaviour;
d. formalized commitment to the peaceful settlement of disputes.

CBMs in the Field of Openness and Communication:

a. exchange of information about military expenditures, strength of armed forces, arms production and arms transfers;
b. open presentation and clarification of the defence doctrines;

c. prior notification of military manoeuvres and major military movements, including their scope and extent;
d. checking the accuracy of the data provided by states through a specially created international mechanism;
e. presence of foreign observers at military exercises;
f. exchanges of visits by military officers;
g. exchanges between alumni of military schools and academies;
h. establishment of direct, rapid communication links--so called "hot lines"--for possible crisis management.

Other Security-Strengthening CBMs:

a. reinforcement of existing or establishment of new organizations for regional political co-operation;
b. undertaking of joint economic development projects, in particular in adjacent land and sea areas;
c. co-operation in the protection of the environment.

Format of CBMs

CBMs can take the form of unilateral declarations, by which states commit themselves to follow a certain confidence-building line of conduct in the expectation of reciprocity by others. However, unilateral commitments can be quite easily reversed.

The documents on CBMs, adopted by the Conference on Security and Co-operation in Europe, contain politically (as distinct from legally) binding commitments by states or recommendations regarding agreed forms of behaviour or action. Unlike formal treaties, such documents may not require ratification by states.

Non-observance of a measure that is politically, but not legally, binding would not entail legal responsibility, but may destroy the confidence which the measure had been designed to create, and thus produce negative effects for all concerned. As a matter of fact, there is no evidence that political commitments are respected less than formal treaties. Consistent and uniform implementation of politically binding CBMs over a substantial period of time may even lead to the development of an obligation under customary international law. Nevertheless, formal treaties, by virtue of the force of law associated with them, are more durable and are therefore preferable.

Review of Existing Naval Constraints

Unlike the CBMs related to conventional ground and air forces, those related to conventional naval forces do not form a distinct class of international instruments. (CBMs adopted for Europe cover naval activities in the sea area adjoining Europe only if they are functionally linked with notifiable military activities on land.) Some naval CBMs are incorporated in arms limitation or other treaties and intermingled with norms regulating various other activities. The most important are those imposing constraints on naval movements and methods of warfare.

Constraints Relating to Movements

The 1982 UN Convention on the Law of the Sea (not yet in force) reaffirms the customary rule of international law that permits only innocent passage of ships through the territorial sea of another state. The Convention declares that passage would not be considered innocent if the ship concerned

were to engage, *inter alia*, in any threat or use of force against the coastal state, any exercise or practice with weapons, any act aimed at collecting information to the prejudice of the defence or security of the coastal state, the launching or landing of aircraft or the launching or taking on board of any military device. Submarines must navigate on the surface and show their flag. Although the Convention does not provide for prior notice or permission for the passage of naval vessels through territorial waters, a number of countries require advance notification. For passage through internal waters, that is, waters on the landward side of the baseline of the territorial sea, consent of the coastal state is generally required. Aircraft have no corresponding right of passage in the airspace above the territorial sea.

The UN Convention specifies the rules for "transit passage" through straits used for international navigation. Ships and aircraft in transit passage must proceed without delay through or over the strait; refrain from any threat or use of force against the states bordering the strait; and refrain from any activities other than those incident to their normal modes of continuous and expeditious transit.

The 1972 US-Soviet Incidents at Sea Agreement has established rules to avoid dangerous operations when ships of the signatory nations are in proximity to each other. The ships are to remain well clear to avoid risk of collision, and those engaged in surveillance must avoid executing manoeuvres embarrassing or endangering the ships under surveillance. Ships must not simulate attacks by aiming weapons in the direction of a passing ship of the other party, and appropriate signals must be shown when exercises with submerged submarines are conducted. Commanders of aircraft are under the obligation to use caution in approaching aircraft and ships of the other party operating on and over the high seas, in particular, ships engaged in launching or landing aircraft. Both parties are committed to providing notification of actions on the high seas which represent a danger to navigation or to aircraft in flight. Similar agreements have been concluded by the Soviet Union with several NATO states.

Constraints Relating to Weapons and Methods of Warfare

The 1907 Hague Convention VIII forbids the laying of unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them. Also forbidden is the use of anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings, as well as torpedoes which do not become harmless when they have missed their mark. Upon the termination of hostilities the parties to the conflict in which mines were used are obliged to remove the mines they have laid, each removing its own mines. With regard to mines laid by one of the belligerents off the coast of the other, their position must be made known to the other party by the power which laid them.

The 1977 Environmental Modification Convention bans the manipulation of natural processes, which may cause widespread, long-lasting or severe destruction, damage or injury to the parties. In the marine environment, the Convention prohibits the use of environmental modification techniques for producing tsunamis (seismic sea waves) or changes in ocean currents.

Recommendations

The contributors to this project have discussed a wide range of measures to lower further the risks of incidents at sea, improve the security of coastal states and render non-military maritime activities safer. On the basis of this discussion, the author of this Chapter, who is also editor of the Report, has formulated recommendations which are summarized below. These recommendations do not represent a collective opinion and should not be regarded as a package.

Recommendations for Constraints

1. Although the 1982 Convention on the Law of the Sea does not prohibit innocent passage of foreign warships or ships on government non-commercial service through the territorial sea, such ships should normally refrain from passing within 12 nautical miles of the baselines of the coastal states. When the passage is necessary for the conduct of peace-time naval activities, the coastal state should be notified in advance. The suggested practice could be extended to cover all nuclear-powered ships as well as ships carrying nuclear or other dangerous or noxious substances.
2. The nuclear weapon states should abandon the policy of neither confirming nor denying the presence or absence of nuclear weapons on board their ships.
3. The passage of ships carrying nuclear weapons through the territorial waters of foreign countries should not be considered "innocent" within the meaning of the 1982 Convention on the Law of the Sea.
4. A limit to the frequency and size of naval exercises, as well as to their duration, should be agreed.
5. States should not conduct naval exercises in international straits or in the exclusive economic zones of foreign states.
6. States should refrain from constructing military installations and emplacing weapons or other devices on the continental shelves of other states without an express consent of the latter.
7. The 1972 US-Soviet Incidents at Sea Agreement and other similar bilateral agreements might be used as a model for regional agreements, or a global, multilateral incidents-prevention treaty. One could envisage the possibility of designating a region, in particular a zone of armed conflict, as a "special caution area"--similar to that provided for in the 1989 US-Soviet Dangerous Military Activities Agreement--where special communications are to be maintained to avoid potential incidents.
8. Since submarines are often involved in incidents, and since the 1972 Agreement, referred to above, does not deal with submarine collisions, "water-space management", by which separate areas for different nations' submarine operations are established, could reduce the dangers of close quarter situations between submarines in time of peace. Submarines should be required to avoid simulated attacks on ships or submarines of other nations, and to minimize submerged operations in the coastal areas.
9. Restrictions on the use of mines at sea must apply to all types of mines, not only to automatic contact mines covered by the 1907 Hague Convention referred to above. The laying of mines in international straits for offensive purposes should be prohibited. States should also refrain from laying mines in areas of intense shipping or fishing. Mines must be equipped with a neutralizing mechanism which renders them harmless once they are no longer of military use, and the immunity of vessels belonging to non-belligerent states must be guaranteed. Each party to a conflict should keep detailed records of the location of the minefields and of the technical characteristics of the mines. Upon the cessation of hostilities, all such information should be made available to the other party, to third countries, or to appropriate international organizations, and the belligerent states should be responsible for removing or rendering safe the mines they have laid.

Recommendations for Openness and Communication

1. Information on naval force structure, deployment and capabilities, as well as on other naval matters of general interest, should be regularly exchanged, especially among countries within regions; communications links among coastal states should be improved.

2. Naval manoeuvres of agreed categories and above a certain size should be notified in advance with the indication of the numbers and classes of vessels involved and attended by observers from other states.
3. In addition to warships, the register of conventional arms, set up by the 1991 UN General Assembly Resolution 46/36, should include naval building plans.
4. Exchange of ship visits, as well as contacts among the naval personnel of different countries, should be intensified, including high-level meetings to discuss maritime doctrine.

Recommendations for Other Security-Strengthening Measures

1. To facilitate the widest possible adherence to the 1982 Convention on the Law of the Sea, the signatories could negotiate agreed understandings regarding those controversial provisions which are inconsistent with the policies of certain states.
2. Manuals should be elaborated for warship personnel to ensure observance of the provisions of the 1982 Convention on the Law of the Sea, as well as of the laws and regulations adopted in accordance with the Convention by coastal states through whose jurisdiction the warships may pass.
3. Upon being informed of an alleged breach of a coastal state's laws or regulations, or the provisions of the 1982 Convention on the Law of the Sea or other rules of international law, by a warship or other ship on government non-commercial service, the flag state should promptly investigate the incident. Upon proof that an offence had been committed, the flag state should take appropriate disciplinary measures, as well as remedial or corrective action, including payment of compensation for any loss or damage caused.
4. The UN Secretariat should be strengthened so as to be able to maintain its role (a) in collecting and disseminating information on the zonal limits of states, the scope of jurisdiction exercised in each of them, and the state practice in applying the Law of the Sea; and (b) in advising states (upon request) on the services required for the establishment of zonal limits, as well as the administration and surveillance of zones.
5. Regional maritime councils or other co-ordinating bodies could be established for the purpose of strengthening co-operation among coastal states and enhancing their security.
6. Special agreements might be concluded between the Security Council and UN members to establish a UN on-call naval force in accordance with Article 43 of the UN Charter. Also regional UN on-call forces could be set up subject to operational control of a multinational naval staff.
7. International mine-clearing units should be formed to ensure the safety of commercial shipping in areas of armed conflicts.
8. The International Convention for the Prevention of Pollution from Ships, in force since 1983, should be amended so as to make its provisions on the protection and preservation of the marine environment applicable to warships, naval auxiliaries and other vessels on government non-commercial service, at least in time of peace.
9. It is necessary to work out guidelines for the safety of all seaborne nuclear reactors and minimize the environmental risks which may arise from damage to nuclear-powered ships.
10. International co-ordination between civil and military maritime research activities should be improved, and possibilities for demilitarizing some of the present oceanographic research programmes should be examined.

Conclusion

Certain naval CBMs, for example those regarding naval manoeuvres, could be relatively easily verified. Others, for example those regarding movements of submarines, present obstacles to both national and international verification, which may be difficult to surmount. The fear of excessive intrusiveness is, in any event, a limiting factor. However, unlike in arms control which directly affects military forces or hardware, verifiability - though desirable does not need to be a condition *sine qua non* for CBMs.

Confidence-building affects the behaviour of states rather than their military potential. It involves transformations in the perception of threat and is therefore, essentially, psychological in nature. Consequently, the recommendations listed above rest on the assumption that states participating in the confidence-building process do not *a priori* harbour hostile intentions against each other. For if they did, CBMs would be of no avail.

Some of the recommendations, if accepted, may require amendments to the existing agreements, or common understandings, or additional protocols. Others may call for new agreements. The Conference on Disarmament could provide an appropriate forum for negotiating with the assistance of naval experts most of the recommended multilateral measures.

Chapter 2
Maritime Security and the 1982 United Nations Convention on the Law of the Sea

Christopher Pinto

Abstract

The 1982 UN Convention on the Law of the Sea (not yet in force) deals essentially with management of the living and non-living resources of the sea, but has provisions that have important implications for maritime security. It confers rights and jurisdiction on coastal States for the purpose of managing marine resources in prescribed adjacent maritime zones, and for related economic purposes, and provides for international co-operation in managing marine resources beyond such zones. The Convention makes its contribution to maritime security by providing uniformly applicable (1) rules on the status and immunity of warships (and other ships and aircraft on government non-commercial service) and (2) rules concerning innocent passage of ships through the territorial sea and unimpeded transit for ships and aircraft in other seaward zones of national jurisdiction, and beyond. Having described these rules, the Chapter examines the Convention's provisions on reservation of the seas for "peaceful purposes" and concludes that they are not inconsistent with use of the seas for non-aggressive military operations. The Chapter discusses the arms control impact of the proliferation of peaceful uses of the seas which the Convention is designed to promote, the potential contribution of the Convention's dispute settlement system to confidence-building, and the relation of the 1982 Convention to the legal regime that subsists pending the Convention's entry into force, including international custom. The Chapter concludes with suggestions on how the Convention could provide a framework for measures to build confidence and reduce risks arising from tensions at sea.

Introduction

It was the activities of merchantmen and naval vessels that first inspired a movement in the direction of clarifying or developing rules to govern conduct among nations. Among those nations on whom economic and political power conferred the capacity to influence emerging legal concepts, the use of the sea to carry on trade, as well as for defence and other military purposes, was part of the natural order of things, and the development of the law of the sea throughout most of history, centered on transport, transit and naval activity. Important modern efforts to codify international law on these subjects that have a bearing on maritime security include the *Declaration of Paris*, 16 April 1856,[1] which was intended to resolve several questions of maritime law arising in time of war; *Hague Conventions VI-XIII* of 1907 dealing with aspects of naval warfare;[2] the 1922 *Washington Treaty Relating to the Use of Submarines and Noxious Gases in Warfare*, which required ratification by all the signatories and never entered into force; the 1930 *London Treaty for*

[1] Clive Parry (ed.), 115 *Consolidated Treaty Series* (*CTS*), 1-3; Roberts, A. and Guelff, R. (eds), *Documents on the Laws of War*, 2nd edn, Oxford, 1989, pp. 23 ff.

[2] Scott, J.B. (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, Oxford, 1915, pp. 96-217; Roberts, A. and Guelff R. (eds), *op. cit.*, above note 1, pp. 71-119.

the Limitation and Reduction of Naval Armament, which did enter into force among the 11 States which had ratified it, but expired on 31 December 1936;[3] and the 1936 *London Procès-Verbal* which continued in force "without limit of time", article 22 of the 1930 Treaty which deals with rules of international law in regard to the operation of submarines or other war vessels with respect to merchant ships.[4] An attempt by the *Hague Conference* of 1930 under the auspices of the *League of Nations* to adopt a convention dealing *inter alia* with the breadth of the territorial sea, and innocent passage, was not successful.

While the nineteenth century did see the conclusion of international agreements regulating fishing on the high seas,[5] it was only about the middle of the present century that there appears evidence of a shift from preoccupation with the rules governing navigation and the military uses of the seas to those concerned with exploration for and exploitation of living and non-living marine resources, beginning with the conclusion of an agreement between Venezuela and the United Kingdom concerning a maritime boundary in the Gulf of Paria in 1942,[6] and the Proclamations by President Truman in 1945 claiming (1) the natural resources of the continental shelf of the United States, and (2) the right to establish conservation zones, and to regulate fishing off the coasts of the United States.[7] Several factors spurred this shift in focus. Among them were the rapid advancement during World War II of technologies that could augment exploitation of marine resources, and a growing awareness of the risks attendant upon over-exploitation; a trebling of the number of States eager to participate in the international law-making process, most of them poor and, lacking significant naval and merchant fleets, seeing in the notion of restricting the territorial sea to 3 miles, a device favouring only the few who possessed the ships to exploit the vast potential of the oceans beyond that limit; and perhaps the acute difficulty of dealing with naval questions in a post-war period dominated by bitter rivalry among power blocs.

Of the four Conventions formulated at the 1958 United Nations (Geneva) Conference on the Law of the Sea on the basis of draft articles prepared by the International Law Commission, two were concerned essentially with resource-exploitation (Convention on Fishing and Conservation of the Living Resources of the High Seas;[8] Convention on the Continental Shelf[9]), while the other two (Convention on the Territorial Sea and the Contiguous Zone;[10] Convention on the High Seas[11]) prescribed rules for demarcating off-shore zones subject to varying degrees of coastal State jurisdiction in regard to navigation in those zones, flag-State jurisdiction in those areas and on the high seas, and other "traditional" topics. A second United Nations (Geneva) Conference on the Law of the Sea in 1960 convened to deal with unresolved questions of importance for the regulation of navigation (maximum breadth of the territorial sea, transit through straits) and fishing rights, failed to accomplish its objective. In 1963, the *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water* (Partial Test Ban Treaty) prohibited nuclear weapon test explosions or any other nuclear explosions in any place under the jurisdiction or control of a Party to it, *inter alia* under water, "including territorial waters or high seas".[12]

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[3] 112 *League of Nations Treaty Series* (*LNTS*), 65.

[4] Roberts, A. and Guelff, R. (eds), *op. cit.* ,above note 1., pp. 149-51.

[5] *E.g.* Hague Convention of 1882 for the Regulation of the Police of Fisheries in the North Sea outside Territorial Waters. Hudson, M.O. International Legislation, Vol. IV, p. 2825.

[6] 205 *LNTS*, 121.

[7] Proclamations 2667 and 2668 of 28 September 1945, 10 *Federal Register*, 12303, 12304.

[8] Entered into force 20 March 1966, 559 *United Nations Treaty Series* (*UNTS*), 285 (36 ratifications).

[9] Entered into force 10 June 1964, 499 *UNTS*, 311 (54 ratifications).

[10] Entered into force 10 September 1964, 516 *UNTS*, 205 (46 ratifications).

[11] Entered into force 30 September 1962, 450 *UNTS*, 11 (57 ratifications).

[12] Entered into force 10 October 1963, 480 *UNTS*, 43 (103 ratifications).

The Third United Nations Conference on the Law of the Sea was the result of two roughly contemporaneous sets of initiatives:

1. in 1966 and 1967 the Soviet Union and the United States in pursuit of their joint interests in maintaining maximum naval mobility in the context of their rivalry, sought agreement on the maximum breadth of the territorial sea and, in the event that the agreed breadth were to be 12 miles, on the right of unimpeded transit through and over straits, as well as on measures to safeguard their distant-water fishing industries; and
2. the developing countries at the United Nations, following a proposal by Malta in 1967, sought recognition of the status of the sea-bed beyond national jurisdiction, and of its resources, as the "common heritage of mankind". Accordingly, negotiations aimed at giving legal content to the "common heritage" concept, which commenced in the United Nations Seabed Committee in 1968, had evolved by 1972 into preparations for review of large sections of the Law of the Sea including those of interest to the Soviet Union and the United States referred to above. On the basis of that review the Third United Nations Conference on the Sea which held its first working session at Caracas in 1974, formulated and adopted the text of what came to be known as the United Nations Convention on the Law of the Sea.[13]

Meanwhile, in a parallel development, the Soviet Union and the United States formulated in 1971 in the Conference of the Committee on Disarmament, a *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Sub-soil Thereof* (Sea-bed Arms Control Treaty), which prohibits "emplantment or emplacement" on the sea-bed seaward of 12 miles from the applicable baseline, of "nuclear weapons or any other type of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons", but appears to leave unaffected weapons of this type that are able to move without constant contact with the sea-bed, such as those carried aboard submarines.[14]

There emerged, as results of these initiatives

1. the perception of many government representatives, perhaps fostered by the naval powers, that military aspects of the law of the sea were best dealt with among specialists in the context of disarmament negotiations, and that the *Sea-bed Arms Control Treaty* had already achieved what was for the time being possible in that respect; and
2. correspondingly, the view that the Third UN Conference on the Law of the Sea should concentrate on the "peaceful uses" of the sea, including, in particular, the rights and obligations of States in regard to conservation and management of the resources of the sea and the sea-bed. The developing countries, with the support of the countries of eastern Europe and other like-minded States, went further, in seeking to "reserve" certain maritime

[13] United Nations, *Official Records* of the Third United Nations Conference on the Law of the Sea, 16 volumes 1975-83. (UN docs. A/CONF.62/...); Platzöder, R., *Third United Nations Conference on the Law of the Sea*, Documents, 9 volumes. Dobbs Ferry, N.Y. Anand, R.P., *Origin and Development of the Law of the Sea*, The Hague, 1982; Bouony, L., "Les Etats arabes et le nouveau droit de la mer", 90, 1986, *Revue générale de droit international public* 849-975; Butler, W.E., *The USSR, Eastern Europe and the Development of the Law of the Sea*, 2 vols, London, 1986; Churchill R.R. and Lowe A.V., *The Law of the Sea*, 2d. ed. Manchester, 1988; Hollick, A.L., *US Foreign Policy and the Law of the Sea*, Princeton, 1981; Rao, P. Chandrasekhara, *The New Law of Maritime Zones*, New Delhi, 1983; Rembe, N.S., *Africa and the International Law of the Sea*, The Hague, 1980; Szekely, A., *Latin America and the Development of the Law of the Sea*, 2 vols. Dobbs Ferry, N.Y. 1976; Tangsubkul, P., *ASEAN and the Law of the Sea*, Singapore, 1982.

[14] Entered into force 18 May 1972, 1973, *United Kingdom Treaty Series*, 13 (74 ratifications).

zones, or resource and transit activities within them, for "peaceful purposes". A significant aspect of the negotiations at the Conference was the willingness of some naval powers to offer concessions regarding rights in resources in exchange for guarantees in regard to transit rights, and the general willingness of the developing countries to endorse the validity of that exchange.

The United Nations Convention on the Law of the Sea signed at Montego Bay in Jamaica on 10 December 1982 on behalf of some 119 participating States, thus does not deal directly with military uses of the seas. Its contribution to maritime security is substantial but derivative, and will be examined under the heads

1. naval mobility in time of peace,
2. the theme of reservation for "peaceful purposes",
3. proliferation of peaceful uses, and
4. the Convention's system for settling disputes.

Naval Mobility in Time of Peace

The purposes for which navies may be deployed by the major maritime powers in time of peace, are part of the political heritage of those countries, and include the following:

1. to assure the security of military, merchant or fishing fleets wherever located;
2 as a means of national defence against possible attack on its territories or vital interests;
3. as a deterrent in relation to other powers competing for military supremacy in a region or globally;
4. as a visual threat or show of force by way of support for the political penetration of a foreign country, or for the maintenance of hegemony over it;
5. for the gathering often clandestine of information relevant to operational and policy decisions concerning the foregoing; and (6) for carrying out scientific research for military or other purposes.

Navies are called upon to undertake a wide variety of operations in carrying out these purposes.[15] For the planning and efficient execution of those operations naval strategists must be able to count

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[15] One writer suggests that all military activities at sea fall into at least one of the six following categories: "1. Navigation on the water surface or in the water column including all military activities connected with navigation. Navigation and connected activities are performed as routine marine operations or periodic conditioned maneuvers. The may serve one or more of the following purposes: exercising of ships, co-operation between navy, air force and land forces of one or more nationalities, the latter adding a further co-operation aspect (*e.g.* Ocean Venture 1981), control of the sea, projection of naval presence (e.g. the presence of US units in the vicinity of the Persian Gulf) and deterrence; 2. Emplacement of sea-based missiles for strategic purposes. This activity is presently fulfilled (mainly) by missile launching nuclear submarines; 3. The emplacement of sea-based surveillance devices such as fixed acoustic detection systems; 4. The emplacement of sea-bed based weapons systems for strategic or tactical purposes such as magnetic or acoustic mines against surface ships or submarines. Furthermore, the emplacement of strategic missiles on the sea-bed has been discussed; 5. The emplacement of sea-bed based surveillance devices like the fixed acoustic detection array systems which according to some sources have been deployed along the east and west coast of the United States and some strategically important points in the oceans; 6. Military research including the testing of weapons, conducted either on the water surface, in the water column, or the subjacent sea-bed and subsoil."

Wolfrum, R., "Restricting the Use of the Sea to Peaceful Purposes: Demilitarization in Being?" in *German Yearbook of International Law*, Vol. 24, 1981, p. 200, 205-6. On the "assets of warships" (versatility, controllability, mobility, projection ability, access potential, symbolism and endurance) and "naval diplomacy" see Booth, Ken., *Law, Force and Diplomacy at Sea*, London, 1985, pp. 137 ff. See also Rao, P. Sreenivasa, "Legal regulation of maritime military uses" in Vol. 13 (1973) *Indian Journal of International Law*, 425-54.

on maximum flexibility which requires the elimination of uncertainty as to the availability for use of known sea routes. This, in turn, pre-supposes that the risk of arbitrary restriction by particular coastal States has been eliminated, or reduced to a known and acceptable level, a result which may be achieved either through *ad hoc* uncertain and vulnerable diplomatic arrangements, or, more reliably, through regional or global treaties.

Such operations may be carried out with full knowledge of the international community - indeed, such knowledge may be an essential element in their execution, for example, when a "show of force" is intended; or their effectiveness may depend on secrecy. Whatever the mode, overt or covert, the projection of naval power at will attained the status of an attribute of State sovereignty during the formative stages of international law and is today the foundation of provisions of the Convention which have as their objective the maintenance of naval mobility in time of peace, notably:

1. provisions according warships a special status and immunity; and
2. provisions limiting by reference to specified zones, the seaward extension of coastal State jurisdiction, while ensuring as far as possible, freedom of warships and other ships on government non-commercial service to traverse those zones and to conduct other lawful activities within them.

Although these provisions were approached warily by the great majority of participants in the Third United Nations Conference on the Law of the Sea, whose naval capabilities were minimal, a consensus emerged based on the futility of opposing the demands of the major maritime States, perceived by the latter as being directly related, to their vital national interests, including security, on the relative value to the maritime security of all States of agreed, uniformly applicable, provisions governing these subjects, and on the willingness of the major maritime States to recognize, in exchange for rights of passage and rights to conduct other naval operations, rights in marine resources that were claimed for coastal States, or on behalf of "mankind as a whole".

Special Status Accorded to Warships

Military activity, being an essential branch of State activity, is carried out at sea by ships owned or operated by a State. Ships used in military activity are on "government non-commercial service" and are, under the Convention as under customary international law, accorded a special status. The Convention further distinguishes a "warship" as

> 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.[16]

Recognizing that ships are now often operated by branches of the armed forces other than the navy (*e.g.* army, air force, coast guard) this provision is cast in broader terms than its forerunner, article 8, paragraph 2 of the 1958 *Geneva Convention on the High Seas*, which referred to "the Navy list" and "naval discipline".

The provisions of the Convention dealing with the functions and status of ships on government non-commercial service,[17] and with warships in particular, reflect the sensitivity and priority

[16] United Nations Convention on the Law of the Sea (*UNCLOS*), 1982, article 29.

[17] *UNCLOS*, articles 31, 32.

associated with such service as being connected with matters of such fundamental importance as the security of the State or the maintenance of public order. Some activities other than the purely military performed by such ships are foreseen by the Convention, among them exercise of the right of hot pursuit[18] and of certain powers to enforce environmental protection laws,[19] and exercise of the rights of visit[20] and of seizure[21] on account of piracy.

Thus, on the high seas warships and other ships owned or operated by a State and used only on government non-commercial service have "complete immunity from the jurisdiction of any State other than the flag State".[22] Although the Convention contains no specific reference to the activity of warships on the sea-bed and ocean floor lying beneath the high seas (and thus beyond the limits of coastal State jurisdiction as being more than 200 nautical miles from its baselines, or beyond the edge of its continental shelf as defined by the Convention) it may be assumed that thus "complete immunity" would attach to them there as well.

While the immunity of warships from the jurisdiction of a State other than the flag State is complete on the high seas and on the subjacent sea-bed, in the sense that the "other" State can neither make laws governing the warships nor enforce them there,

1. international law, including the Convention (with the exception of its provisions regarding the protection and preservation of the marine environment, as noted below), other applicable treaties and the regulatory authority of competent international organizations, continues to apply to warships in those areas and, indeed, wherever they may operate;[23] and
2. in other areas landward of the high seas and the subjacent sea-bed, the legislative jurisdiction of the "other" State, the coastal State whose jurisdiction the warship has entered, revives in respect of those activities (for example, exploration for or exploitation of, resources) over which the coastal State may exercise sovereign rights. Enforcement jurisdiction however, would continue to reside with the flag State exclusively.

Thus, in the exclusive economic zone, on the continental shelf, and in areas subject to coastal State sovereignty in which warships have a right of passage, viz. the territorial sea, the contiguous zone, straits used for international navigation and archipelagic waters, warships are not immune from the legislative jurisdiction of the coastal State and are bound to observe those laws and regulations which the coastal State is authorized to enact.[24] While the warship's flag State also has concurrent legislative authority, it is the flag State alone which may enforce any law or regulation applicable to a warship. Thus, if a warship does not comply with the laws and regulations of a coastal State concerning innocent passage through the territorial sea and disregards any request for compliance

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[18] *UNCLOS*, article 111, paragraph 5. These rights may also be exercised by "any other duly authorized ships or aircraft clearly marked and identifiable as being on government service".

[19] *UNCLOS*, article 224. Enforcement may also be carried out by "military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect".

[20] *UNCLOS*, article 110. These rights may also be exercised by "any other duly authorized ships or aircraft clearly marked and identifiable as being on government service" (paragraph 5).

[21] *UNCLOS*, article 107. Seizure may also be carried out by "military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect".

[22] *UNCLOS*, articles 95 and 96.

[23] *E.g.* article 20, 39, 87 paragraph 2, 147 paragraph 1 and 3, 301. As to the status of warships, see generally, Oxman, B.H., "The Regime of Warships Under the United Nations Convention on the Law of the Sea" in *Virginia Journal of International Law*, Vol. 24, 1984, pp. 809-63.

[24] This legislative jurisdiction of the coastal State is the "exception" to warship immunity which article 32 refers to as being "contained in subsection A". Neither that "exception", nor the coastal State's legislative jurisdiction implied in, for example, articles 40, 41, 42, 53, 56, 60 and 81, nor the provisions of articles 30 or 31, in any way abridge a warship's immunity from the enforcement jurisdiction of a foreign State.

therewith, the coastal State is in principle entitled to do no more than "require it to leave the territorial sea immediately".[25] If a warship were to fail to comply during transit passage through straits used for international navigation, with the coastal State's navigational safety regulations, and causes damage, it would engage the international responsibility of the flag State.[26] However, remedies may be sought only through diplomatic channels, or other agreed dispute settlement methods.

On the other hand, one provision of the Convention does appear to provide warships and other ships and aircraft on government non-commercial service with complete immunity from the jurisdiction (both legislative and enforcement) of the "other" State, and even, it would seem, from compliance with the provisions of the Convention. Thus, article 236 states that

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

Such immunity subsists notwithstanding any specific enforcement powers conferred on a foreign State,[27] and even where pollution of the marine environment could cause major harm or irreversible disturbance of the ecological balance, as in ice-covered areas.[28]

Concern for the environment was gaining momentum as negotiations opened on a new Convention on the Law of the Sea, and protection and preservation of the marine environment was an important part of the mandate given to the Conference's main Committee III. The naval powers sought the exemption provided for in article 236 in order to avoid the risk of interference with naval operations based on the requirements of coastal State environmental protection legislation, or complex dispute settlement procedures. Other participants at the Conference, conceding that naval vessels were not among the main sources of marine pollution and aware of the virtual impossibility of controlling the activities of ships on a military mission and of enforcing any applicable environmental regulations, did not, in the end oppose it. The exemption has not, however, discouraged voluntary application by a naval power of the content of Part XII of the Convention dealing with protection and preservation of the marine environment.[29]

Immunity from national jurisdiction does not imply immunity from international responsibility. Damage caused by a warship may engage the international responsibility of the flag State. Compensation may, however, be sought only through diplomatic channels, or other agreed dispute settlement methods.

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[25] *UNCLOS*, article 30.

[26] *UNCLOS*, article 31.

[27] *E.g.* under articles 213-222.

[28] *E.g.* under article 234.

[29] "I want to emphasize that nations cannot use or construe the sovereign immunity exemption as a means to avoid measures to protect the environment. In fact, the US Department of Defense and the US Navy view Article 236 and Part XII as a mandate to ensure responsibility for environmentally sound practices... To this end, the US Navy has developed what is called an Environmental Strategy Plan..." Rear Admiral and Deputy Advocate General of the US Navy William L. Schachte Jnr., speaking at the 25th Annual Conference of the Law of the Sea Institute in August 1991. Text published by Council on Ocean Law, Special Report, August 1991.

Zonal Limits to Coastal State Jurisdiction over Adjacent Marine Areas

The interest of a coastal State in ensuring its security from foreign interference from the sea led to recognition of its exclusive rights in the adjacent marine areas. Thus, the coastal State's exclusive rights in its internal waters, and in an adjacent "territorial sea" and in the air space above it, in almost all respects the equivalent of its rights over its land territory, have been acknowledged for centuries. Given the status of a rule by the major maritime powers active in developing international law in the sixteenth century Europe, the breadth of the territorial sea was conceived as being no more than 3 miles from the shore, leaving navies of the law-making States of the time a vast expanse of ocean traversable at will for purposes of trade, as for purposes of spiritual and temporal conquest. In a further abridgement of the interests of coastal immunities, a "right of innocent passage" was established within a coastal State's territorial sea.

Increase in the number of coastal States with maritime interests and the capacity to participate in the international legislative process led both to extension and refinement of coastal state jurisdiction over adjacent seas at the Third UN Conference on the Law of the Sea, a delicate balance being struck among the interests of naval powers, of coastal States, of neighbouring States whether landlocked or coastal, and of the international community as a whole, in matters of security, use of the seas for transport and communication for purposes of trade, and marine resource exploitation.

On the "high seas" dealt with in Part VII of the Convention, all States may, subject to conditions laid down by the Convention, exercise "freedom of the high seas" which includes, but is not limited to

(a) freedom of navigation;
(b) freedom of overflight;
(c) freedom to lay submarine cables and pipelines subject to Part VI;
(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2;
(f) freedom of scientific research, subject to Parts VI and XIII.[30]

On the sea-bed subjacent to the high seas, the Convention confers the status of "common heritage of mankind" to be administered on behalf of mankind as a whole, but for specified purposes only, by the International Seabed Authority.[31] Freedom of the high seas must be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.[32]

The Convention recognizes a coastal State's right to enact and to enforce its laws in adjacent marine "zones", the scope of that right diminishing as distance from its shores increases, until the high seas are reached. For the naval powers, a substantial gain was the establishment of limits on the breadth of each zone, ending what they saw as the "creeping jurisdiction" of coastal States.[33] The coastal State is accorded varying extents of legislative and enforcement jurisdiction in the

[30] *UNCLOS*, article 87, paragraph 1.

[31] *UNCLOS*, articles 1, paragraph 1; 136, 156, 157.

[32] *UNCLOS*, article 87, paragraph 2.

[33] For a recent survey of tendencies to expand jurisdiction over maritime areas, see Kwiatkowska, B., "Creeping Jurisdiction Beyond 200 miles in the Light of the 1982 Law of the Sea Convention and State Practice", in *Ocean Development and International Law*, Vol. 22, 1991, pp. 153-87. Concerning a policy of systematic response to claims that are considered excessive, see below, p. 48.

maritime zones established: "internal waters";[34] archipelagic waters";[35] a "territorial sea" of up to a maximum of 12 nautical miles from the applicable coastal baselines;[36] "straits used for international navigation";[37] a "contiguous zone" which may extend up to 24 nautical miles from those baselines[38] and which forms a part of an "exclusive economic zone" which may extend up to 200 nautical miles from those baselines;[39] and a "continental shelf" which may extend up to 200 nautical miles from the baselines or, under specified conditions, up to the edge of the continental margin, or up to a distance of 350 nautical miles from the baselines, or 100 nautical miles from the 2500 meter isobath.[40]

While coastal State rights in internal waters, archipelagic waters and in the territorial sea reflect its sovereignty over those zones and arise out of recognition of the primacy of its interests both in security and in adjacent marine resources, extension of its jurisdiction to the contiguous zone is limited to specified law enforcement purposes, while jurisdiction over the exclusive economic zone and the continental shelf were acknowledged primarily for resource exploitation purposes or, in a sense, to safeguard the State's economic security. A negotiated balance among the claims of coastal States to expand their resource jurisdiction, and the claims of other States to rights of passage as being vital to their security and trade interests, and, in particular, the claims of those States with the capacity to project naval power for the purpose of maintaining global security, is reflected in the Convention's provisions on the maintenance of naval mobility in time of peace, in particular those on transit passage through straits used for international navigation.

Regimes Governing Naval Mobility within the Zones

Consent of the Coastal State

Waters on the landward side of the baseline of the territorial sea such as rivers, ports and bays, form part of the internal waters of a State. Except in certain areas of internal waters enclosed by straight baselines as described article 8, paragraph 2, which are subject to a regime of "innocent passage" or "transit passage", and certain internal waterways governed by specific treaties, neither ships nor aircraft of a foreign State may enter internal waters without the consent of the coastal State save in situations of distress or emergency.[41]

Innocent Passage

Ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea, and in the internal waters of a State enclosed by straight baselines.[42] Passage must be continuous and expeditious. Stopping and anchoring is permitted only if incidental to ordinary navigation, or are rendered necessary by *force majeure* or distress or for the purpose of assisting persons, ships or aircraft in distress.[43]

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[34] *UNCLOS*, article 8.

[35] *UNCLOS*, articles 49-52.

[36] *UNCLOS*, article 3.

[37] *UNCLOS*, articles 34-45.

[38] *UNCLOS*, article 33.

[39] *UNCLOS*, article 57.

[40] *UNCLOS*, article 76. See also Annex II to the Convention on the constitution and functions of the Commission on the Limits of the Continental Shelf; and Annex II to the Final Act of the Convention, which contains a Statement of Understanding concerning a Specific Method to be used in establishing the Outer Edge of the Continental Margin, applicable in respect of certain States in the southern part of the Bay of Bengal.

[41] On the right of access to internal waters, see generally Churchill, R.R., and Lowe, A.V., *op. cit.*, note 13.

[42] *UNCLOS*, article 17; article 8, paragraph 2; as to innocent passage through straits used for international navigation, article 45; and through archipelagic waters, article 52.

[43] *UNCLOS*, article 18.

All ships, including warships and other ships on government non-commercial service may exercise the right of innocent passage, but may do so only in conformity with the Convention and other rules of international law. Passage must be innocent, *i.e.* is not prejudicial to the peace, good order or security of the coastal State. The Convention both lays down basic rules governing the right of innocent passage, and confers upon the coastal State specified legislative and enforcement powers concerning such passage. Thus, as to innocent passage by *all ships*, including warships and other government ships operated for non-commercial purposes:

1. Article 19 declares passage by a foreign ship *not* to be innocent if it engages in any of the following activities:

   (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
   (b) any exercise or practice with weapons of any kind;
   (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
   (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
   (e) the launching, landing or taking on board of any aircraft;
   (f) the launching, landing or taking on board of any military device;
   (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
   (h) any act of wilful and serious pollution contrary to this Convention;
   (i) any fishing activities;
   (j) the carrying out of research or survey activities;
   (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
   (l) any other activity not having a direct bearing on passage",

   such criteria being specified so as to facilitate objectivity in the making of decisions by coastal States on lack or loss of innocence, and discouraging arbitrary or discriminatory decisions;
2. Article 20 requires submarines and the underwater vehicles to navigate on the surface and to show their flag; and
3 Article 23 requires foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances, to carry documents and observe special precautionary measures established for such ships by international agreements.

There is no comparable facility for aircraft, which have no right of overflight and may only enter the air space above the territorial sea under arrangements that have the consent of the coastal State except where the regimes of transit passage or archipelagic sea-lanes passage described below, prevail.

The Convention empowers the coastal State:

1. to adopt laws and regulations, in conformity with the Convention and other rules of international law, relating to all or any of the following:

   (a) the safety of navigation and the regulation of maritime traffic;
   (b) the protection of navigational aids and facilities and other facilities or installations;
   (c) the protection of cables and pipelines;
   (d) the conservation of the living resources of the sea;
   (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;

(f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
(g) marine scientific research and hydrographic surveys;
(h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State,

but not laws and regulations applying to ship design, construction, manning or equipment unless giving effect to generally accepted international rules and standards), and requires foreign ships to comply with them, as well as with generally accepted international regulations on prevention of collisions at sea;[44]

2. when necessary, to require foreign ships exercising the right of innocent passage (and in particular, tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances) to use sea lanes and follow traffic separation schemes prescribed by it;[45]
3. without discriminating among foreign ships, to levy charges upon them for specific services;[46]
4. to take the necessary steps in its territorial sea to prevent passage which is not innocent;[47] and
5. when essential for the protection of its security including weapons exercises, to suspend innocent passage temporarily in specified areas of the territorial sea, after due publicity, and without discriminating among foreign ships.[48]

Legislative and enforcement powers conferred on the coastal State are balanced by the provisions of article 24 entitled "Duties of the coastal State", which require that the coastal State give appropriate publicity to navigational hazards in the territorial sea, and not hamper innocent passage of foreign ships except in accordance with the Convention. The coastal State is specifically required not to apply the Convention or any laws and regulations so as to impose requirements that in effect deny or impair the right of innocent passage, or in a manner that is discriminatory. Ships while in the territorial sea may become subject to proceedings for breach of the coastal State's environmental protection legislation,in which event they would be entitled to the "safeguards" provided for in Section 7 of Part XII of the Convention. However, as noted above, vessels or aircraft "owned or operated by a State and used, for the time being, only on government non-commercial service", a category which includes warships, are declared immune from the Convention's provisions on protection and preservation of the marine environment, and in effect from such provisions enacted by any State other than the flag State.

In establishing the maximum breadth of the territorial sea and re-stating, in as much detail as practicable, the rules of international law governing passage through it, the Convention clarifies and codifies the right of innocent passage to an extent never achieved before. A controversy which it was not, however, able to resolve, concerns the view held by several States, that warships are required to notify the coastal State, or obtain its consent, before exercising the right of innocent passage. Such a view would seem to imply that warships, by their very nature and irrespective of the criteria for objective assessment of the character of passage set out in article 19, must be presumed to be on passage that is not innocent, unless recognized as such by the coastal State in granting its consent. In the event, the supporters of that position at the Conference on the Law of

[44] *UNCLOS*, article 21.
[45] *UNCLOS*, article 22.
[46] *UNCLOS*, article 26.
[47] *UNCLOS*, article 25.
[48] *Ibid.*, paragraph 3.

the Sea, in response to an appeal by the President of the Conference, decided not to press the matter to a vote, but did however, through him

> re-affirm that their decision is without prejudice to the rights of coastal States to adopt measures to safeguard their security interests, in accordance with article 19 and 25 of the convention.[49]

While there appears to be a trend favouring recognition of the right of warships to innocent passage through the territorial sea under normal circumstances, one recent work cites 40 States which currently maintain special legislative provision regarding the passage of warships through the territorial sea, including 23 requiring authorization, and 11 requiring notification.[50]

Having established the framework of the legal regime governing innocent passage of all ships through the territorial sea, the Convention specifically grants warships exemption from the enforcement jurisdiction of the coastal State, providing in effect that if a warship does not comply with the laws and regulations of the coastal State and disregards any request for compliance therewith, the coastal State's only remedy would be to "require it to leave the territorial sea immediately". As was noted above, while a warship is thus virtually immune from the coastal State's enforcement jurisdiction in the territorial sea, it remains subject to the jurisdiction of the flag State, and may, through its conduct, engage that State's international responsibility.

Transit Passage

By the time the Third United Nations Conference on the Law of the Sea opened in 1973, several coastal States had extended their territorial seas to 12 miles, and others even claimed comprehensive maritime jurisdictions up to 200 miles. The naval powers were thus presented with the prospect that straits around the world, vital to the global deployment of their forces, as to world trade and communications, would become territorial seas subject to the jurisdiction of the coastal States concerned, and the regime of "innocent passage". As expressed by the head of the United States delegation to the Conference:

> On that argument, the legal right to overfly a strait could be gained only with coastal state consent, submarines would be obliged to travel on the surface, and surface assets would be subject to varying assertions of coastal-state regulatory power. All the world's most important straits would be subject to these restrictions... The result could seriously impair the flexibility not only of our conventional forces but of our fleet ballistic missile submarines, which depend on complete mobility in the oceans and inimpeded passage through international straits. Only such freedom makes possible the secrecy on which their survivability is based.[51]

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[49] UN doc. A/CONF.62/SR.176 (1982). Note also the opinion of the President of the Conference (Ambassador T.T.B. Koh) expressed on another occasion: "I think the Convention is quite clear on this point. Warships do, like other ships, have a right of innocent passage, through the territorial sea, and there is no need for warships to acquire the prior consent or even notification of the coastal State", quoted in Oxman, B.H., *op. cit.*, note 23, at p. 854, footnote 159.

[50] Shao Jin, "The question of innocent passage of warships: after *UNCLOS* III", in *Marine Policy*, January 1989, pp. 56-67. Authorization required: *Asia* - Bangladesh, Burma (Myanmar), China, Iran, Maldives, Pakistan, Sri Lanka, Yemen (DPR), Yemen (AR); *Africa* - Algeria, Somalia, Sudan; *Europe* - Albania, Bulgaria, German Dem.Rep., Malta, Romania; *Latin America* - Antigua and Barbuda, Barbados, Brazil, Dominican Republic, Grenada, S. Vincent and Grenadines (23). Notification required: *Asia* - India, Indonesia, Rep. of Korea; *Africa* Egypt, Mauritius, Seychelles; *Europe* Denmark, Malta, Sweden; *Latin America* Guyana, Honduras (11). Compare: Momtaz, D., "Les forces navales et l'impératif de sécurité dans la Convention des Nations Unies sur le Droit de la Mer" in Vukas, B. (ed.), *Essays on the New Law of the Sea 1*, Zagreb, 1985, pp. 230 ff.

[51] Richardson, Elliot L., "Power, Mobility, And the Law of the Sea", in 1980 *Foreign Affairs*, p. 905. See generally, Moore, J.N., "The regime of straits and the Third United Nations Conference on the Law of the Sea", Vol. 74, 1980, *American Journal of International Law*, pp. 77-121; Reisman, W.M., "The regime of straits and national security", *id.* pp. 48-76; Anand, R.P., "Transit passage and overflight of international straits", Vol. 26, 1986, *Indian Journal of International Law*, pp. 72-105; Treves, T., "Le nouveau régime des espaces marins et la circulation des navires", in Vukas, B. (ed.), *op. cit.*, above note 50, pp. 202 ff.

In response to these concerns, the Convention establishes in "straits used for international navigation", whether or not they are less than 24 miles broad and thus consist, wholly or in part, of the territorial seas of the States bordering them, a new regime of "transit passage". In straits which form part of the territorial sea of a State, exercise by the latter of sovereignty or jurisdiction over the waters and their airspace, bed and subsoil is preserved, subject only to the incidents of "transit passage", which supersedes the general regime of "innocent passage" generally applicable in the territorial sea.

Thus, article 38, paragraph 1 declares that in such straits "all ships and aircraft enjoy the right to transit passage, which shall not be impeded...", while by paragraph 2,

> Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait...

any activity not an exercise of this right remaining subject to the zonal and other applicable provisions of the Convention.

The intent of the new regime being to provide the naval powers with optimum mobility through straits in use prior to recognition of the right to extend the territorial sea to 12 nautical miles, a border State's legislative as well as its enforcement jurisdiction in relation to passage, are circumscribed. Thus, border States may designate sea-lanes and prescribe traffic separation schemes in the straits, but may do so only if such sea-lanes and traffic separation schemes would be in conformity with "generally accepted international regulations" and after their adoption by "the competent international organization",[52] the International Maritime Organization. Although border States are empowered to adopt laws and regulations relating to transit passage, the range of subjects on which legislation is contemplated is limited, and the Convention requires that such laws and regulations should not discriminate among foreign ships.[53]

Limiting the border State's enforcement jurisdiction with respect to all ships, article 42 declares that its laws and regulations

> shall not ... in their application have the practical effect of denying, hampering or impairing the right of transit passage...,

while article 44 requires that

> States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

The international responsibility of the flag State of a warship or other government ship operated for non-commercial purposes, having been declared in article 31 for the purpose of the Convention as a whole, article 42, paragraph 5 is a reminder that the immunity of such ships from border State jurisdiction does not imply immunity from liability. Thus, the flag State of a ship, or the State of registry of an aircraft entitled to "sovereign immunity" will bear international responsibility for any loss or damage caused to a border State as the result of an act contrary to laws and regulations relating to transit passage enacted by that State.

Limits on the scope of the border States' legislative and enforcement jurisdictions are balanced by duties imposed on foreign ships and aircraft exercising the right of transit passage that take into account the security, environmental and resource interests of border States. Thus, such ships and

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[52] *UNCLOS*, article 41.

[53] *UNCLOS*, article 42.

aircraft in transit passage are required to proceed without delay through or over the strait; to refrain from the threat or use of force against the sovereignty, territorial integrity and political independence of border States or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; to refrain from any activities other than those incident to their normal modes of continuous and expeditious transit, unless rendered necessary by *force majeure* or distress; and to comply with generally accepted international regulations relating to navigational safety and environmental protection;[54] to respect applicable sea lanes, and traffic separation schemes established by a border State in accordance with article 41,[55] and to comply with a border State's laws and regulations relating to transit passage;[56] and to refrain from carrying out research or survey activities without the prior authorization of the border States.[57]

In adopting the concept of unimpeded transit through and over straits used for international navigation, the community conceded that, as in the case of innocent passage, it would be futile to attempt to abridge through legislation the naval powers' claim to mobility. Accordingly, it was felt that the establishment of broadly agreed rules balanced so as to take into account both the interests of the States bordering a strait and those of the naval powers, and expressed with optimum clarity would best serve the interests of maritime security. In contrast to rights concerning passage through the territorial sea, the question of "innocence" does not arise with respect to transit passage; submarines and underwater vehicles are not required to navigate on the surface; the right of transit passage enjoyed by all ships including warships and other ships on government non-commercial service, and its exercise may not be suspended by the border States;[58] the expenses of navigational safety aids and other improvements, and of measures for the prevention, reduction and control of pollution from ships, may be met or off-set under co-operative agreements between the border States and States using the straits;[59] and border States, having agreed not to exercise enforcement jurisdiction against ships in transit passage, including warships and ships on government non-commercial service, may not even require such ships to leave the strait immediately, and may only claim through diplomatic channels for any loss or damage resulting from acts contrary to its laws and regulations relating to such passage.[60]

Mixed Regimes and Treaty Regimes in Straits Used for International Navigation

Article 45 of the Convention provides that under specified geographic conditions a strait used for international navigation may be subject to the regime of innocent passage rather than transit passage, save that the rights of border States do not include the right to suspend passage. Thus,

1. if the strait is formed by an island and the mainland of the same State, if there is a route of convenience similar to the strait seaward of the island through the high seas or an exclusive economic zone; and
2. if the strait lies between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State, the regime of innocent passage applies to the strait, except that "There shall be no suspension of innocent passage through such straits.[61]

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[54] *UNCLOS*, article 39.
[55] *UNCLOS*, article 41, paragraph 7.
[56] *UNCLOS*, article 42, paragraph 4.
[57] *UNCLOS*, article 40.
[58] *UNCLOS*, article 44.
[59] *UNCLOS*, article 43.
[60] *UNCLOS*, article 42, paragraph 5.
[61] *UNCLOS*, article 45.

Regimes provided for under the Convention do not affect the legal regime in straits in which passage is regulated by international treaties of long standing relating specifically to those straits.[62]

Regimes Applicable in Archipelagic Waters

Mid-ocean archipelagos sometimes extending over many thousands of square kilometers lie across routes traditionally used for international navigation by sea and by air, for commerce and for the projection of naval power. The formation of States composed of such island groupings, and their assimilation of water to land territory as incidental to the exercise of sovereignty, raised the prospect that those routes might become subject to regulation in an arbitrary or discriminatory manner, or even closure. Accordingly, evolution of the notion of an archipelagic State received no encouragement from naval powers, and failed to attract general acceptance either in discussions within the International Law Commission[63] when preparing draft articles in preparation for the first United Nations Conference on the Law of the Sea, or in 1958 at the Conference itself.[64]

However, the rising importance of States such as Indonesia and the Philippines and support from the developing countries within and outside their region during the Third United Nations Conference of the Law of the Sea, contributed to the success of later proposals for recognition of the fully articulated concept of the archipelagic State and its incorporation in the 1982 Convention. Thus, article 46 of the Convention declares that the term "archipelagic State" means a State "constituted wholly by one or more archipelagos and may include other islands", the use of the word "wholly" implying exclusion from the definition of a State which is in part continental landmass. For the purposes of the Convention, the term "archipelago" means

> a group of islands, including parts of islands, inter-connecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

An archipelagic State may draw straight baselines not exceeding 100 (exceptionally 125) nautical miles joining the outermost points of the outermost islands and drying reefs so as to enclose the archipelago, within which the ratio of the area of water to the area of land is between 1 to 1 and 9 to 1.[65] The territorial sea, contiguous zone, exclusive economic zone and continental shelf of the archipelago are measured outward from the archipelagic baselines.[66] The archipelagic State has sovereignty over the archipelagic waters enclosed by the baselines, over the airspace above those waters, as well as over their bed and subsoil, including their resources.[67]

Four regimes applicable to passage within archipelagic waters may be distinguished. Thus, the regime generally applicable within *archipelagic waters* is that of innocent passage prescribed by

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[62] *E.g.* Convention relating to the Non-Fortification and Neutralization of the Aaland Islands (Geneva) entered into force 6 April 1922 (8 ratifications) 9 LNTS 212; Convention regarding the Regime of the Straits (Montreux) entered into force 9 November 1936 (11 ratifications) 173 LNTS 213.

[63] Report of the International Law Commission, reprinted in *Yearbook of the International Law Commission*, Vol. 2, 1956, 270.

[64] United Nations *Official Records* of the first United Nations Conference on the Law of the Sea (1958) UN doc. A/CONF.13/39 at 148. See generally, Evensen, J., "Certain legal aspects concerning the delimitation of the territorial waters of archipelagos", *First UN Conference on the Law of the Sea, Official Records*, Vol. I, pp. 289-302; Amerasinghe, C.F., "The problem of archipelagos in the international law of the sea", Vol. 23, 1974, *International and Comparative Law Quarterly*, pp. 539-75; Anand, R.P., "Mid-ocean archipelagos in international law. Theory and practice", Vol. 19, 1979, *Indian Journal of International Law*, pp. 228-56; Dugosević, D., "Les états archipels et le droit de passage des navires et aéronefs", in Vukas, B., *op.cit.* above note 50 pp. 221 ff.; Rogers, P.E.J., *Mid-ocean Archipelagos and International Law*, New York, 1981; Tangsubkul, P., *The Southeast Asian Archipelagic States: Concept, Evolution and Current Practice*, Honolulu, 1984.

[65] *UNCLOS*, article 47.

[66] *UNCLOS*, article 48.

[67] *UNCLOS*, article 49.

Part II, section 3 of the Convention as applicable in a State's territorial sea.[68] As coastal States may do in territorial seas (other than those falling within straits used for international navigation), an archipelagic State may temporarily suspend the innocent passage of foreign ships in specified areas when such action is essential for its security. Suspension will take effect only after it is duly published, and must not discriminate among foreign ships.

In *archipelagic sea lanes*, and in the air routes above them, ships and aircraft of every description and of every nationality enjoy the right of archipelagic sea lanes passage,[69] a regime whereby they may, in accordance with the Convention, exercise

> the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Archipelagic sea lanes and air routes traverse archipelagic waters and the adjacent territorial sea and include all normal passage routes used as routes for international navigation or overflight through or over those waters. The archipelagic State may designate sea lanes and air routes above them which are suitable for continuous and expeditious passage. The Convention requires that such sea lanes and air routes be defined by axes joining entry points with exit points. Ships and aircraft in archipelagic sea lanes passage may deviate from an axis lane, but not more than 25 nautical rules on either side of such a line, and may not navigate closer to the coasts than 10 percent of the distance between islands bordering the sea lane.

Archipelagic sea lanes, and any traffic separation schemes which the archipelagic State may prescribe within them for safe passage must conform to generally accepted international regulations. The archipelagic State may substitute such sea lanes and traffic separation schemes by others should circumstances require and after due publicity. In designating sea lanes and prescribing traffic separation schemes or in substituting them, the archipelagic State is obligated to "refer proposals to the competent international organization [the International Maritime Organization] with a view to their adoption". IMO may itself adopt only such sea lanes and traffic separation schemes as may be agreed with the archipelagic State. If an archipelagic State does not designate sea lanes or air routes, all ships and aircraft may exercise the right of archipelagic sea lanes passage through the routes normally used for international navigation.

The Convention declares that articles 39, 40, 42 and 44 dealing respectively with the duties of ships and aircraft during transit passage through straits used for international navigation, prohibiting conduct of research and survey activities during transit passage, the legislative jurisdiction with respect to transit passage conferred on States bordering such straits, and the duties of such States, in particular, not to hamper or suspend transit passage, are to apply *mutatis mutandis* to archipelagic sea lanes passage.[70]

In the waters of an archipelagic State that are subject to *regimes laid down in treaties or based on customary law, or tradition among neighbouring States*, passage through them will be governed by those regimes; and finally, passage within the mouths of rivers, small bays, and ports, delimited by the archipelagic State as *internal waters*, passage would be subject to the coastal State's consent, exercised in accordance with international law.

The regime of archipelagic sea lanes passage, similar to transit passage in the manner in which it ensures the unimpeded navigation and overflight of areas that are in some degree (*e.g.* in matters of resource jurisdiction) subject to the sovereignty of the coastal State, was needed so as to preserve

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[68] *UNCLOS*, article 52.
[69] *UNCLOS*, article 53.
[70] *UNCLOS*, article 54.

for the naval powers their capability to project naval presence and protective air power across the world, even traversing interposed territorial limits of States, without the consent of those States, and whether or not those States might approve the purpose of a particular military mission. The regime being at once reasonably clear and applicable to passage through archipelagic sea lanes by all ships of all nations, it offered benefits to the major naval powers in terms of confidence that mobility and non-discrimination were assured, while the archipelagic State might be satisfied that it had reduced the risk that its territory might become the scene of conflict, as well as of pressures to take up political positions in relation to the military missions of particular powers.

Freedom of Navigation and Overflight in the Exclusive Economic Zone

Proclamations by the President of the United States in 1945 extending the country's jurisdiction to the resources of its continental shelf, and regulating fishing in the superjacent waters, but saving rights of passage, were followed in the next decade by declarations by other coastal States of the region, extending sovereignty and jurisdiction over both sea-bed and water column in their adjacent maritime areas.[71] The new concept of the *exclusive economic zone* negotiated among participants at the Third United Nations Conference on the Law of the Sea, and provided for in Part V of the Convention, in essence concedes resource jurisdiction to the coastal State in a maritime zone extending up to 200 nautical miles from the applicable baselines while preserving high seas' freedoms of navigation and overflight in that zone for the ships of all nations.[72]

The Convention thus attempts to establish a balance which takes account both of a coastal State's (and to some degree its neighbours') interests in the living and non-living resources of the waters and the underlying sea-bed and subsoil to which contiguity and natural continuity offered the basis of a claim; and of the interests of States generally in being able to exercise freedom of navigation and overflight, in particular the interests of the naval powers in maintaining maximum mobility for their fleets.

Part V of the Convention establishes a specific legal regime[73] in the exclusive economic zone which recognizes the coastal State's "sovereign rights"

> for the purpose of exploring and exploiting, conserving and managing the natural resources ... [of the zone] ... and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

The coastal State also has "jurisdiction" as provided for in the Convention with regard to

> (i) the establishment and use of artificial islands, installations and structures;
> (ii) marine scientific research;

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[71] *E.g.* Decrees by Mexico, December 1945; Argentina, October 1946; Panama, December 1946; Honduras and Nicaragua, 1950: see United Nations, *Laws and Regulations on the Regime of the High Seas*, Vol. I. U.N. Legislative Series, 1951 ST/LEG/SER.B/1. The Santiago Declaration (1952) by Chile, Ecuador and Peru in 1952 Whiteman, M.M., *Digest of International Law*, Vol. IV, p. 48 claimed *inter alia* "sole jurisdiction and sovereignty" in a maritime zone up to a distance of 200 miles from the coast line. As one writer points out "if the [Truman Proclamation] released the continental shelf from the clutches of the concept of the freedom of the seas, the [Santiago Declaration] paved the way for removing the resources of the sea up to 200 miles from the concept of the freedom of fishing". P. Chandrasekhara Rao, *op. cit.*, above note 13, at p. 191. The claim was vehemently protested by the United States and the United Kingdom, among others.

[72] On the EEZ generally, Kwiatkowska, B., *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, Dordrecht, 1989; see Attard, D., *The Exclusive Economic Zone in International Law*, Oxford, 1987; Clingan, T.A. (ed.), *Law of the Sea: State Practice in Zones of Special Jurisdiction*, Honolulu, 1982; Rao, P. Chandrasekhara, *op. cit.*, above note 13; Robertson, "Navigation in the exclusive economic zone" in 24 *Virginia Journal of International Law*, 865-915; Smith, R.W., *Exclusive Economic Zone Claims. An Analysis and Primary Documents*, Dordrecht, 1986. United Nations, *The Law of the Sea. National Legislation on the Exclusive Economic Zone and the Exclusive Fishery Zone*, New York, 1986.

[73] *UNCLOS*, article 56.

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

as well as "other rights and duties provided for in this Convention", which would include the detailed rights and duties relating to artificial islands, installations and structures,[74] conservation and utilization of the living resources of the zone,[75] as well as those concerning conflict resolution,[76] delimitation[77] and dispute settlement.[78]

On the other hand, the Convention preserves for all States within the exclusive economic zone, and subject to the provisions of the Convention,

> the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention...[79]

By providing specifically that in the zone all States are to enjoy freedom of navigation and overflight and "other lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft...", the Convention appears to place no specific restriction on the movement of warships or other ships on government non-commercial service, which are thus allowed, on a non-discriminatory basis, the use of the zone for any and all those operations traditionally associated with such ships.

Legal restraints on navigation and related uses do exist, however, for both the coastal State and the other users of the zone. Thus, the coastal State, in exercising its rights and performing its duties "shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention".[80] Although a coastal State has sovereign rights in respect of the natural resources of the zone, and the exclusive right to construct, authorize and regulate the construction, operation and use of most if not all artificial islands, installations and structures within the zone it cannot, in carrying out such activities disregard the rights of other States so as, for example, to hamper navigation and overflight in the zone. Recognizing that the balance of interests thus conceived is a delicate one, and that it leaves unattributed either to coastal States or other States, some important rights such as the right to emplace underwater military devices and the right to remove wrecks beyond the contiguous zone, article 59 offers guidelines on how any resulting conflicts are to be resolved.[81] The coastal State must, moreover, act in accordance with any treaty obligations it may have undertaken concerning passage through the zone. Correspondingly, flag States whose ships traverse the zone

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[74] *UNCLOS*, article 60.

[75] *UNCLOS*, articles 61 and 62.

[76] *UNCLOS*, article 59.

[77] *UNCLOS*, article 74.

[78] *UNCLOS*, *e.g.* article 297, sub-paragraphs 1(a), 1(b), and paragraph 3; article 298, sub-paragraph 1(a).

[79] *UNCLOS*, article 58, paragraph 1.

[80] *UNCLOS*, article 56, paragraph 2.

[81] *Article 59: Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone*: In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

As to the question of "residual rights" in the exclusive economic zone, see Kwiatkowksa, B., *op. cit.*, above note 72, pp. 227-30, and Ibler, V., "The importance of the exclusive economic zone as a non-resource zone", in Vukas, B. (ed.), *op. cit.*, above, note 50.

> shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this part.[82]

All ships, including warships and other ships on government non-commercial service are thus bound by the "due regard" obligation, and would be subject to certain of the laws enacted by the coastal State (among them the customs, fiscal, health, safety and immigration laws operative within the *contiguous zone*, and laws concerning management and conservation of living resources, artificial islands, installations and structures, and marine scientific research within the exclusive economic zone as a whole, but excluding environmental protection legislation), as well as to international law and to treaty undertakings. Of particular importance in regard to warships and military aircraft using the waters of the zone or the airspace above them, is article 301 of the Convention, which requires a State to refrain from the threat or use of force against any other State in a manner inconsistent with the principles of international law embodied in the United Nations Charter. As noted above all such ships and aircraft are nevertheless immune from the enforcement jurisdiction of any but the flag State or, in the case of aircraft, the State of registration. Immunity from enforcement jurisdiction does not, of course, imply immunity from liability for damage caused as a result of non-compliance. The coastal State would be entitled to make a claim for compensation, but may do so only through diplomatic channels, or other agreed dispute settlement methods.

There has been considerable debate concerning the legality of naval manoeuvres and military intelligence gathering activities by foreign ships in the exclusive economic zone. While such activities, if carried out without the consent of a coastal State may well raise tensions and give rise to protest, it is difficult to maintain that they contravene the provisions of Part V or, when they do not amount to the threat or use of force against any State prohibited by article 301, any other provisions of the Convention. Both naval manoeuvres and intelligence gathering are, as far as warships are concerned, "among the lawful uses of the sea related to [freedoms of navigation and overflight of the high seas]".[83] It would similarly be difficult to maintain that the provisions of the Convention relating to construction and operation of "installations and structures",[84] and to marine scientific research in the exclusive economic zone, which are designed respectively to protect a coastal State's commercial and economic interest in the natural resources of the zone, and to ensure that such research would increase "scientific knowledge of the marine environment for the benefit of all mankind",[85] could be interpreted so as to support the prohibition of military intelligence gathering activity in the zone. Thus, article 60 (1) (b) gives the coastal State exclusive rights in respect of installations and structures for *economic* purposes, the only "purpose" mentioned in the limiting article 56, being national-resource-related "economic activities". The coastal State may not be able to claim regulatory authority on the basis of article 60 (1) (c) since any military devices

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[82] *UNCLOS*, article 58, paragraph 3.

[83] For declarations/statements made pursuant to *UNCLOS* article 310, to the effect that the Convention does not authorize foreign States to carry out military exercises or Manoeuvres in the exclusive economic zone without the consent of the coastal State (*e.g.* by Brazil) as well as others expressing views to the contrary (*e.g.* by Italy), see United Nations, *Multilateral Treaties deposited with the Secretary General* (status as at 31 December 1991) ST/LEG/SER.E/10, pp. 794 ff; and see below, pp. 61 ff.; for a discussion of the controversy: Oxman, B.H., *op. cit.*, note 23, at pp. 835-41; Lowe, A.V., "Some legal problems arising from the use of the seas for military purposes", in 10, 1986, *Marine Policy*, 171-84; Kwiatkowska, B., "Military uses in the EEZ: a reply", *ibid.*, 11, 1987, pp. 249-50; Lowe, A.V., "Rejoinder", *ibid.*, pp. 250-2; Vukas, B., "Military uses of the sea and the LOS Convention", in Vukas, B. (ed.), *Essays on the New Law of the Sea 2*, Zagreb, 1990, at pp. 409-12; Scovazzi, T. "Naval manoeuvres in the exclusive economic zone", *ibid.*, pp. 281-97.

[84] *UNCLOS*, article 56, sub-paragraph 1 (b) (i), read with article 60, sub-paragraphs 1(b) and 1(c). See Treves, T., "Military installations, structures and devices on the sea-bed", in Vol. 74, 1980, *American Journal of International Law*, pp. 808-57; Zedalis, R., "Military installations, structures and devices on the sea-bed: a response", *ibid.*, Vol. 75, 1981, pp. 926-33; Treves, T., "Reply", *ibid.*, pp. 933-5.

[85] *UNCLOS*, article 56, sub-paragraph 1(b) (ii), read with article 246.

located in the zone (*e.g.* monitoring devices such as sonar surveillance systems) are unlikely to "interfere with the rights of the coastal State", may not come within the usual meaning of the terms "installation" or "structure", and may not even be known to the coastal State. Nor could the requirement of coastal State permission for, or participation in, research for military purposes and disclosure of the results thereof to the coastal State, been contemplated under article 56, sub-paragraph 1 (b) (ii) or article 246, since article 302 entitles a State not to disclose information when to do so would be "contrary to the essential interests of its security". However, States have made declarations pursuant to article 310 claiming such regulatory powers, and these are noted below.

While the Convention thus recognizes and regulates the exercise of the coastal State's sovereign rights and jurisdiction over the exclusive economic zone conferred on it for the protection of its interests in the zone's natural resources both living and non-living, the provisions of Part V deal in detail only with management of the living resources of the water column of the zone and aspects of navigation, being concerned to maintain a balance as between the interest of the coastal State and of other States in those uses of the zone. On the other hand, for regulation of the exercise of rights with respect to the sea-bed and subsoil of the zone, the reader is referred to the provisions of Part VI of the Convention, dealing with the Continental Shelf.

Regime of the Continental Shelf

The legal concept of the continental shelf, no longer connected with the 200 metre isobath, extends to the entire continental margin, up to a maximum distance of 350 nautical miles from the coastal State's baselines, or 100 nautical miles from the 2500 metre isobath.[86] The coastal State's sovereign rights with respect to the natural resources of the sea-bed and subsoil of the exclusive economic zone and of their physical extension, the continental shelf, are recognized (as was the case with respect to management and use of the resources of the water column of the exclusive economic zone) for the purpose of protecting the economic interests involved.[87] Accordingly, they have little or no direct impact upon the military uses of the sea-bed and subsoil of the zone, and of the continental shelf.

As in the case of provisions governing the management and use of the resources of the water column of the exclusive economic zone, a balance as between the exercise of coastal State rights in the resources of the sea-bed and subsoil of the exclusive economic zone and of the continental shelf, and the rights of other States to use those areas for other purposes permitted by international law, is achieved by providing expressly for accommodation of different uses of these areas. Thus, article 78 states:

> 1. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the airspace above those waters.
> 2. The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention,

while article 79 re-affirms the right of all States to lay and to maintain submarine cables and pipelines on the continental shelf subject, however, to certain rights of the coastal State to take "reasonable measures" in connection with resource exploitation and pollution control, to delineate the course of such cables and pipelines, and in certain circumstances, to establish conditions for cables or pipelines entering its territory or jurisdiction.

The exercise of a coastal State's important resource-related

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[86] *UNCLOS*, article 76.

[87] *UNCLOS*, article 77, paragraph 1.

1. exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures on the continental shelf, provided for in article 80;
2. exclusive right to authorize and regulate drilling on the continental shelf "for all purposes" provided for in article 81; and
3. right to regulate, authorize and conduct marine scientific research in its exclusive economic zone or on its continental shelf provided for in article 246; as well as its rights in regard to submarine cables and pipelines, are all subject to the prohibition of "unjustifiable interference" with navigation, and other "freedoms of other States as provided for in this Convention", and thus do not preclude the conduct of military activity.

Freedom of the High Seas

All parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State, are governed by part VII of the Convention entitled "High Seas". The "high seas" are "open to all States, whether coastal or land-locked", and all States may exercise therein the "freedom of the high seas". "Freedom of the high seas" comprises several freedoms which include, but are not restricted to, the six freedoms listed in article 87 of the Convention, viz. freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing, and freedom of scientific research.

The Convention follows its confirmation of the ancient principle of the freedom of the high seas with a declaration, in article 88 that "The high seas shall be reserved for peaceful purposes."

Interpretation of this and other similar provisions on "peaceful purposes" is the subject of part III of this paper, which concludes that they were not intended to, and do not, prohibit military activity.

Any freedom of the high seas may only be exercised under the conditions laid down in the Convention and by other rules of international law. Thus, the Convention prescribes specific conditions in relation to the laying of submarine cables and pipelines, the construction of artificial islands and other installations, fishing, and scientific research. Article 87 also prescribes, as a general condition applicable with regard to all high seas activities, that

> These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the [sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction].

While the maintenance of freedom of navigation is as much the intent of provisions concerning the high seas as of those dealing with areas subject to some form of national jurisdiction, the Convention subjects exercise of that freedom to prescribed conditions such as those relating to the nationality and status of ships and the primacy of flag State jurisdiction and control over them. Freedom of navigation however, implies more than mere passage, and the "inclusive" wording of the Convention's provisions on high seas freedoms confirms the general principle that the ships of all States are free to traverse the high seas on their lawful occasions, stopping, anchoring and carrying out the activities for which the ship was constructed, subject to flag State jurisdiction, and exceptionally to the jurisdiction of other States and of competent international organizations.

The variety of activities in which warships and other ships on government non-commercial service might be engaged in was outlined above, and the Convention places no restriction on such activities when carried out on the high seas. In any event, article 95 declares, consistently with other provisions on the same subject, that "Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."

Introduction of the word "complete" in this context cannot raise doubts regarding any lack of "completeness" in the immunity of warships in other contexts. Warships and other ships and aircraft on government non-commercial service are on the high seas, as in areas subject to a degree of coastal State jurisdiction, not subject to the enforcement jurisdiction of any but the flag State. Immunity subsists even if the ship has been used to commit acts coming within the definition of "piracy", except where the crew has mutinied and taken control of the ship or aircraft.[88] Such ships and aircraft are not, when operating on or above the high seas, immune from liability for damage caused by non-compliance with rules of law applicable to them. Redress, however, may only be sought through diplomatic channels, or other agreed dispute settlement methods.

Regime Governing the Sea-Bed and Ocean Floor and the Subsoil thereof beyond the Limits of National Jurisdiction (the "Area")

The sea-bed and the ocean floor and the subsoil thereof beyond the outer limit of the continental shelf as defined by the Convention, and thus "beyond the limits of national jurisdiction" is an area for which the Convention prescribes a special regime, "the common heritage of mankind",[89] to be administered when the Convention comes into force, by a new inter-governmental organization, the International Sea-bed Authority.

The regime prescribed by the Convention is of limited application: it governs only "activities in the Area",[90] defined to mean "all activities of exploration for, and exploitation of, the resources of the Area". The term "resources" in turn is defined as "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the sea-bed, including polymetallic nodules".[91] Careful limitation of the "common heritage" regime, as elaborated in the Convention, to sea-bed mining activity, and corresponding limits to the competence of the Authority administering that regime, would appear to leave activities on and in the Area other than those specifically provided for, to be regulated by customary international law or treaty, and certain "Principles governing the Area" included in the Convention.

Three sets of these principles are of relevance here:

1. Article 138 requires that the "general conduct of States in the Area" be in accordance with the principles of the UN Charter and other rules of international law "in the interests of maintaining peace and security and promoting international co-operation and mutual understanding", while article 141 declares that the Area is open to "use exclusively for peaceful purposes by all States ... without discrimination and without prejudice to the other provisions of this Part";
2. Article 147, paragraphs 1 and 2, require that activities governed by the resource regime must be "carried out with reasonable regard for other activities in the marine environment", and in particular that installations used for such activities not endanger navigation, the latter re-enforcing article 135, which safeguards high seas freedoms in the waters superjacent to the Area, and the corresponding status of the airspace above them;
3. Article 147, paragraph 3 requires that activities in the marine environment other than those subject to the resource regime "be conducted with reasonable regard for activities in the Area".

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[88] *UNCLOS*, article 102.
[89] *UNCLOS*, articles 136, 153.
[90] *UNCLOS*, article 1, sub-paragraphs 1(1) and 1(3).
[91] *UNCLOS*, article 133, paragraph (a).

The interpretation of articles 138 and 141 is considered along with other provisions on "peaceful purposes", in part III of this paper which concludes that they were not intended to, and do not, prohibit military activity. Thus, article 147, paragraph 3, actually contemplates activities in the marine environment that are *not* subject to the resource regime provided for in Part XI of the Convention and the relevant annexes, while article 135 re-affirms freedom of navigation on, as well as over and within, the waters superjacent to the Area, implying clearly that military activity is not prohibited.

Nothing in the provisions of the Convention concerning the "common heritage" would thus appear to preclude the conduct of military activity. The latter would be subject to regulation only by the principles of the UN Charter and other rules of international law, which may be taken to include the "accommodation of uses" principle specifically provided for in the Convention. The immunity of warships and ships on government non-commercial service would likewise subsist when operating in the Area.

The Theme of Reservation for "Peaceful Purposes"

The Convention deals essentially with the peaceful uses of the sea: with navigation in time of peace, and management (including conservation and exploitation) of marine resources; with the development and spread of technologies that would enhance capacities to carry out such activities among all countries; with protection and preservation of the marine environment, and with resolving disputes in an amicable and orderly manner. The theme of "peaceful use" is emphasized in several contexts, and interpretation of the theme is relevant to determining the overall effect of the Convention on maritime security.

The Preamble at the outset declares the intent of the drafters that the Convention should be an "important contribution to the maintenance of peace..." and should "promote the peaceful uses of the seas and oceans...", as well as their belief that the codification and progressive development of the law of the sea achieved in the Convention would *inter alia* "contribute to the strengthening of peace, security, co-operation and friendly relations among all nations..."

The provisions of the Convention present the theme in different ways. Thus, article 88 contains the unqualified assertion "The high seas shall be reserved for peaceful purposes." Through article 58(2), the Convention applies the "peaceful purposes" reservation also to the exclusive economic zone of a State. The continental shelf of a State lying beyond its exclusive economic zone would be considered subject to the regime of the high seas, and thus also subject to the reservation.

Article 141, is a similar provision, only slightly more elaborate, on the area of the sea-bed and the ocean floor beyond the limits of national jurisdiction:

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

It may be noted that the latter is to be one of the "entrenched" provisions in the event a Review Conference is held pursuant to article 155.

The principles governing freedom of marine scientific research generally (article 240(a)) and with respect to the Area (article 143) and the erection of research installations (article 147(2)(d)) also contain the restriction to use for peaceful purposes.

Other provisions of the Convention, instead of requiring that a particular marine activity be carried out for peaceful purposes, prohibit the threat or use of force. Article 301 states the prohibition in its most general form under the heading "Peaceful uses of the seas":

Article 301
Peaceful Uses of the Seas

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

The provision, inspired by article 2, paragraph 4 of the United Nations Charter, departs from the latter in substituting for the phrase "the Purposes of the United Nations", the phrase "principles of international law embodied in the Charter..." designed to recall the lawfulness of the use of force in accordance with chapter VII (which includes article 51 on the right of self-defence) of the Charter. The obligation to refrain from the threat or use of force in similar terms is imposed on ships in innocent passage through the territorial sea, in order to safeguard the security of coastal States,[92] and is undertaken in respect of States bordering straits used for international navigation, in connection with transit passage.[93]

Two separate but related questions arise:

1. do the outright restrictions to "peaceful uses" and "peaceful purposes" actually prohibit military activity of every description, including the defensive or precautionary? and
2. how do the terms of article 301, intended to be of general application, assist in the interpretation of the term "peaceful uses" in its title?

The drafting of earlier treaties containing injunctions to "peaceful use" or use for "peaceful purposes", indicate that where those phrases are intended to preclude military use of any kind, express provision to that effect is made. Thus, the International Atomic Energy Agency, authorized by its Statute

> To encourage and assist research on, and development and practical application, of atomic energy for peaceful purposes ... and to perform any operation or service useful in [those activities] for peaceful purposes;[94]

is also authorized to

> To establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities and information made available by the agency or at its request or under its supervision or control are not used in such a way as to further any military purpose...[95]

while article XII of the Statute on "Agency safeguards", makes detailed provision regarding such matters as prevention of "diversion of materials for military purposes", and determination of "compliance with the undertaking against use in furtherance of any military purpose..."

The 1959 Antarctic Treaty, having declared in its preamble that Antarctica should "continue forever to be used exclusively for peaceful purposes...", provides in article I that "Antarctica shall be used for peaceful purposes only", followed immediately by the inclusive prohibition

> There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapons.

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[92] *UNCLOS*, article 19, sub-paragraph 2(a).
[93] *UNCLOS*, article 39, sub-paragraph 1(b).
[94] *Statute of the International Atomic Energy Agency*, Article III, sub-paragraph (A)1.
[95] *Ibid.*, sub-paragraph (A)5.

So broad is the intent of the prohibition of military activity, that the drafters felt it necessary to include a saving clause to the effect that the Treaty was not to "prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose". Thus, the injunction to use "exclusively for peaceful purposes" when complemented by a context that prohibits "any measures of a military nature", may be said to establish a regime of complete demilitarization. It may be noted that while States Parties to the Antarctic Treaty agree to apply it in "the area south of 60o South Latitude", its effects including presumably its demilitarization obligations, are not to "prejudice or in any way affect the rights, or the exercise of rights, of any State under international law with regard to the high seas within that area".[96]

The 1967 Outer Space Treaty[97] follows, in so far as concerns the Moon and other celestial bodies, the textual path to demilitarization taken when dealing with the peaceful use of atomic energy and the continent of Antarctica. Having declared in article 1 that the "exploration and use of outer space, including the Moon and other celestial bodies" are the "province of all mankind", article 3 provides that those activities are to be governed by international law and the Charter of the United Nations. Article 4 then provides that the Moon and other celestial bodies "shall be used ... exclusively for peaceful purposes" following it with a comprehensive prohibition of specified measures of a military nature along the lines of article I of the Antarctic Treaty. However, outer space, the surrounding medium use of which is essential in order to maintain their security and for purposes of supply and communication, is not subject to demilitarization, but only to prohibition of the placement in orbit *around the Earth* of any object carrying nuclear weapons or other weapons of mass destruction. This differential treatment, which recalls that applied to the Antarctic and its surrounding seas, emphasizes the reluctance of the major military powers to accept any regime for a medium of supply and communication such as the sea, the air or outer space, which would place any restraint on their mobility for strategic purposes.

The 1979 Moon Treaty which, following the wording of the 1970 Sea-bed Declaration, provides that the moon and its natural resources are the "common heritage of mankind",[98] includes both the injunction to use of the Moon "exclusively for peaceful purposes", and the prohibition of specified measures of a military nature on it,[99] confirms demilitarization of the Moon. Those provisions do not, however, apply in space surrounding the Moon, in which only the placement in orbit of weapons of mass destruction is prohibited. The Moon Treaty does however, introduce an additional prohibition of use of the Moon for or in connection with "hostile" activity: having provided in article 2 that all activities on the moon shall be carried out in accordance with international law, in particular the Charter of the United Nations, and taking into account the 1970 Declaration on Friendly Relations, article 3 prohibits "Any threat or use of force or any other hostile act or threat of hostile act on the moon..." as well as use of the moon for such acts or threats.

No mention is made of restriction of use of the seas or the sea-bed to "peaceful purposes" in the Geneva Conventions of 1958, or indeed in any previous international agreement on the law of the sea. Its textual antecedents as far as the law of the sea is concerned may be found in the 1970 Sea-bed Declaration,[100] which also provides clues to its interpretation. Thus, paragraph 5 of the Declaration which declares that "The area shall be open to use exclusively for peaceful purposes

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[96] The *Antarctic Treaty*, article VI. Entered into force 23 June 1961. 402 *UNTS*, 136 (34 ratifications).

[97] *Treaty on Principles Governing the Activities of States in the Exploration and the Use of Outer Space, Including the Moon and other Celestial Bodies*. Entered into force 10 October 1967. 610 *UNTS*, 205.

[98] *Agreement Governing Activities of States on the Moon and Other Celestial Bodies*. Entered into force 11 July 1984 (8 ratifications). See article 11, paragraph 1.

[99] *Ibid.*, article 3.

[100] *Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction*, UN General Assembly Resolution 2749 (XXV), adopted 17 December 1970 by 108 votes in favour, with none against and 14 abstentions.

... in accordance with the international regime to be established" is interpreted in paragraph 8 which states that reservation for peaceful purposes is not to prejudice agreement reached in the context of on-going disarmament negotiations, and foresees, as in a *pactum de contrahendo*, that

> One or more international agreements shall be concluded as soon as possible in order to implement effectively this principle and to constitute a step towards the exclusion of the sea-bed, the ocean floor and the sub-soil thereof from the arms race.

Paragraph 8 having thus relegated international agreement on reservation of the Area for peaceful purposes to some future negotiation which might be undertaken in the field of disarmament possibly aimed at widening the area (up to 12 miles from the applicable baseline of a coastal State) covered by the Sea-bed Arms Control Treaty, the Declaration lays down the parameters of an international regime applying to the Area, but dealing not with demilitarization or arms control, but with the resources of the Area - their orderly and safe development, and rational management, with emphasis on expanding opportunities in the use of those resources, and equitable sharing in benefits derived from them.

During discussions in the Sea-bed Committee and in the First Committee of the Conference, statements by several developing countries urged prohibition of all military uses of the sea-bed and its resources, receiving some support from the Soviet Union and China. These initiatives were firmly opposed by the United States and the major naval powers, and were eventually abandoned, only the bare injunction to "use exclusively for peaceful purposes" from paragraph 5 of the Declaration surviving in the Convention's article 141 without elaboration. However, from the history of the provision it seems clear that it was never contemplated that article 141 should be interpreted as prohibiting all military activity.[101]

Article 88, whereby the high seas shall be reserved for peaceful purposes, may have had its origin in a proposal by Malta that "International Ocean Space shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination in accordance with the provisions of this Convention". Appearing in the first phase of systematic drafting under the guidance of Committee Chairmen as "The high seas shall be open to all States, whether coastal or land locked, and their use shall be reserved for peaceful purposes", the succeeding drafting phase saw the first clause detached and transposed as the introductory sentence of a draft text that became article 87 of the Convention on the freedom of the seas, leaving the injunction to use of the seas for peaceful purposes on its own. Without further elaboration and, in particular, without the express prohibition of military activities which, in the earlier instruments noted above, had signified the intent to demilitarize, the bare reservation of the sea for peaceful purposes was not interpreted as precluding military activity. Article 87 re-affirms the traditional freedoms of the sea including, in particular, navigation and overflight. Far from prohibiting the activities of warships and other ships and aircraft on government non-commercial service, the Convention clearly contemplates and makes special provision for their operation, subjecting them only to the Convention's provisions on accommodation of uses of the area, to general international law and to the enforcement jurisdiction of the flag State. The Convention's dispute settlement system is applicable in respect of military activities, including military activities by government vessels and aircraft engaged in non-commercial service, although by article 298, sub-paragraph (1)(b) a State would, by declaration, be entitled to exclude them from the system.

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[101] For a detailed account of the evolution of article 88, and other "peaceful purposes" provisions of the Convention, out of negotiations during the Sea-bed Committee and at the Third United Nations Conference on the Law of the Sea, see Wolfrum, R., *op. cit.*, above note 15; Oxman, B., *op. cit.*, above note 23, at pp. 829-32. See also Tsarev, V.F., "Peaceful uses of the seas: principles and complexities", in 1988 *Marine Policy*, pp. 153-9; Boczek, B.A., "The Peaceful Purposes Reservation of the UN Convention on the Law of the Sea", in Vol. 8, 1989, *Ocean Yearbook*, pp. 329-61; Vukas, B., *op. cit.*, above note 83.

That military operations are permitted on the high seas notwithstanding article 88 is also the necessary inference to be derived from the specific prohibition of certain military activities in a State's territorial sea, *e.g.* "any exercise or practice with weapons of any kind"; "the launching, landing or taking on board of any military device".

In any event it seems inconceivable, notwithstanding the idealism of many participants in seeking to prohibit the use of the sea for military purposes of any kind, that the Conference could have intended, through the sparse and unelaborated provisions of articles 88 and 141, summarily to excise the military dimension of the sea, a medium which, from time immemorial had been used by all countries for fortification and defence of their territories.

Article 301, linked by its title "Peaceful uses of the seas" to article 88, requires that States refrain from the threat or use of force contrary to the UN Charter "In exercising their rights and performing their duties under this Convention". Unlike specific prohibitions along similar lines provided for in relation to ships exercising the right of innocent passage through the territorial sea, the right of transit passage through straits used for international navigation or the right of archipelagic sea lanes passage, article 301 is of general application, being addressed to coastal States as well as to flag States and is of particular significance for conduct on the high seas (and through article 58, paragraph 2, in the exclusive economic zone and on the continental shelf beyond 200 miles) and in the Area, in relation to which no such prohibitions are specified. On the other hand, the need for any provision of this kind has been questioned given the virtually universal obligations of the same order created by article 103 of the Charter of the United Nations.

It may well be, as has been persuasively argued,[102] that the prohibition of the threat or use of force contrary to the Charter is the sole agreed content of the injunction to use for "peaceful purposes" in article 88, although some significance must be attached to the fact that a proposal by its sponsors to make it a part of that article failed to receive widespread support, and was abandoned. There can be little doubt, however, that, lacking the express exclusion of measures of a military nature which has come to be regarded as characteristic of legal instruments aimed at demilitarization, article 88 and article 301 together still fail to achieve that objective.

While article 88 is not to be interpreted as prohibiting military activity, and article 301 which prohibits aggressive conduct, does no more than re-affirm obligations already imposed by the Charter, they are significant expressions of aspirations shared by all States represented at the Conference, that a certain priority ought to be accorded to maintaining peace on the seas and oceans, and reserving them for use *as far as possible* for peaceful purposes, so as to facilitate accomplishment of the other goals of the Convention for which detailed provision is made, viz. the equitable and efficient utilization of marine resources, the conservation of living resources, and the study, protection and preservation of the marine environment.

Proliferation of Peaceful Uses

While the Convention's provisions on reservation for "peaceful purposes", without precedent in any multilateral agreements on the law of the sea, do not have the legal effect of precluding military activity and could, at most, when read in the light of article 301, be said to confirm, in relation to maritime activity, the Charter's proscription of aggressive conduct, those provisions should be seen as the cornerstones of the Convention's great edifice of regulatory and institutional arrangements aimed at promoting the exploration, exploitation, conservation and management of marine resources on a rational and sustainable basis. These activities, whether carried out in the exclusive economic zone or on the continental shelf, on the high seas or on or under the Area beneath them, and

[102] Wolfrum, R., *op. cit.*, above note 15, p. 225.

whether they concern living or non-living resources, or again, whether their objective is to expand knowledge of the oceans and their processes, or to protect and preserve the marine environment, are all facilitated by the prevalence of peace, which the Convention, seems naively merely to enjoin.

But the outcome of the Convention's hundreds of provisions on resource management and conservation are likely to have, over time, far-reaching effects of a practical nature which would lead to a gradual reduction of military activity at sea. Measures adopted in implementation of the Convention's provisions on protection and preservation of the marine environment could be among the earliest to have an impact on navigation. The Convention would impose on States Parties obligations with respect to marine pollution that may arise from activities under their jurisdiction or control, and provide a general legal framework for the elaboration of specific international regulatory measures by the competent international organizations, such as IMO, UNEP and IAEA, as well as for global and regional co-operation in their implementation, including the development and promotion of contingency plans for responding to marine pollution.

A recent Report on the Law of the Sea by the Secretary-General of the United Nations (UN doc. A/46/724, 5 December 1991) may be indicative of future developments. Thus, the Report refers to collaboration between IMO and IAEA in assessing future possibilities regarding the use of civilian nuclear powered ships to determine whether the present *Code of Safety for Nuclear Merchant Ships* would be adequate in its coverage and its reflection of nuclear safety technology. The Report notes that some 9 civilian nuclear-powered vessels have been commissioned, and that there are some 575 nuclear-powered naval vessels, about 510 being submarines, observing also that sea transport of nuclear materials is common practice for materials within the fuel cycle, and that sealed radiation sources are used widely in the marine environment in navigation aids and in association with engineering, construction, and oil and gas prospecting and extraction. The Report suggests that continuing developments with respect to the maritime law aspects of the transboundary movement of hazardous wastes and radioactive wastes could also be expected to contribute to the development of a special regime under article 23 of the Convention.

The Report also notes such developments as the assumption by coastal States of increased powers to undertake pollution combating operations and intervention measures both in the exclusive economic zone and in the marine environment generally; the many proposals before IMO for mandatory ship reporting, especially for ships entering zones established to control ship traffic, including areas beyond the territorial sea; and issues as to navigation rights that had arisen in contexts such as the preparation of the *1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the 1989 Basel Convention on the Transboundary Movement of Hazardous Wastes*, and the *1990 Protocol on Protected Areas of the Wider Caribbean Region*, during which some States made declarations concerning a requirement of prior notification, while others expressed objections to such a requirement.

Although the Convention's environmental protection provisions are, by article 236, not to apply to "any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service", the rapid development of regulatory measures, driven mainly by new scientific evidence, and the declared willingness of some major naval powers to abide by such measures as far as possible, could together lead eventually to general acceptance of a range of internationally agreed constraints on navigation.

As the need for sea-bed minerals foreseen earlier becomes a reality, and prospecting and mining operations commence in areas of the ocean floor from the Indian Ocean to the Pacific, under the supervision of the International Sea-bed Authority; as living resource management measures provided for under the Convention, administered by competent regional and international organizations in partnership with coastal States, result in a substantial widening of participants in the harvesting of optimum sustainable yields, and the Convention's marine technology transfer

provisions succeed in augmenting the harvesting capacities of many States not currently engaged in intensive fishing efforts; and as provisions preventing marine pollution and promoting marine scientific research bring about the active participation of increasing numbers scientists, technicians and administrators from around the world, the Convention would have so multiplied the variety, frequency and geographical incidence of marine resource-related activity that pressures generated through the obligation to accommodate these proliferating peaceful uses, could not but result in significantly reducing both the need and the scope for military activity at sea, and would then have accomplished that aim in the most natural and effective manner. Elizabeth Young foresaw these developments even before the Convention had itself taken shape:

> The activities of the various existing and planned United Nations bodies and of an ocean regime's own organization are bound to result in a considerable international presence in ocean space... This presence, of itself, would have an arms control effect, proportionate to its scale and to the range of its activities, and at some point it will be necessary to consider how this effect can be enlarged and enhanced... any international inspectorate, research exercise, or monitoring body, is part of a *de facto* international verification system. In setting them up, the arms control significance of the information they are to acquire should be kept in view and eventually concerted.[103]

System for Settling Disputes

While proliferation of the peaceful uses of the sea and an increase in numbers of those engaged in them could thus have the effect of reducing military activity, such a development could nevertheless lead to an increase in the frequency of disputes, which could contribute to endangering maritime security. The establishment of maritime boundaries in areas of high resource potential, interference with rights of navigation or overflight, which the Convention goes to great lengths to protect, arrest of a ship which the flag State claims to be unjustified, are among the infinite number of situations which could cause tensions and lead States to consider resort to unilateral measures whether or not sanctioned by international law.

Foreseeing this eventuality, the Convention, having already clarified and refined the substantive law of the sea, and, for certain conflict situations, even specified the basis on which resolution should be sought,[104] establishes a system for the compulsory settlement of disputes. The scope of the system is unprecedented in the history of multilateral agreements concluded among States in a world still bitterly divided on ideological lines, and beset by doubts regarding the capacity of third-party settlement mechanisms to render impartial decisions that are just when considered in the light of all pertinent circumstances.

Parties to the Convention undertake the general obligation to submit to the dispute settlement system prescribed by it, one of the main inducements to do so being that the system has, built into it, a substantial degree of flexibility. Part XV first offers the parties the traditionally wide choice of settlement mechanisms provided for in article 33, paragraph 1 of the UN Charter, and accords a certain priority to submission of the dispute to procedures under agreement arrived at outside the Convention's framework, such as through some other general, regional or bilateral treaty.[105] If such agreement subsists, the Convention's settlement mechanisms will apply only if no settlement is reached under such outside agreement, and if that agreement does not exclude any further procedure.[106]

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[103] Young, E., "Arms control in the oceans: active and passive", in Borghese E.M., and Krieger, D., *The Tides of Change*, New York, 1975, pp. 111-2.

[104] *E.g. UNCLOS*, articles 15, 59, 74, 83.

[105] *UNCLOS*, article 282.

[106] *UNCLOS*, article 281.

Where parties to a dispute have not reached a settlement by a method chosen by them, the Convention first directs them to procedures not entailing binding decisions: to exchange views regarding settlement by negotiation or other means,[107] and to consider upon the request of one party[108] implementing the conciliation procedures prescribed in Annex V of the Convention, or some other conciliation procedure, voluntarily.

If no settlement has been reached through recourse to these preliminary settlement initiatives, the parties are directed to compulsory procedures entailing binding decisions, set forth or referred to in section 2 of part XV. A State may, on signing, ratifying or acceding to the Convention make a formal declaration choosing one or more of the four mechanisms offered, as the means by which its disputes concerning the interpretation or application of the Convention would be settled:

1. the International Tribunal for the Law of the Sea, functioning in accordance with Annex VI;
2. the International Court of Justice;
3. an arbitral tribunal constituted in accordance with Annex VII; and
4. a special arbitral tribunal for specified disputes of a technical nature constituted in accordance with Annex VIII.[109] A State which is a party to a dispute not covered by such a declaration, is deemed to have accepted arbitration in accordance with Annex VII.[110]

In general, disputes regarding the exercise by a coastal State of its sovereign rights or jurisdiction provided for in the Convention (*e.g.* in the exclusive economic zone and on the continental shelf) are subject to the compulsory settlement procedures in section 2 of Part XV when it is alleged that the *coastal State* has acted in contravention of the Convention's provisions on "the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines or in regard to other internationally lawful uses of the sea specified in article 58", that *another State* has, when exercising those freedoms, rights or uses, acted in contravention of the coastal State's laws or regulations adopted in conformity with the Convention; or, again, that the *coastal State* has acted in contravention of specified international rules and standards for the protection of the marine environment.[111]

Limitations on the Applicability of Procedures Entailing Binding Decisions

In deference to the position taken by coastal States that there are disputes which, because they relate to the exercise of certain categories of their rights that are of special national importance, and therefore of political sensitivity, need not be the subject of procedures entailing binding decisions, the Convention's system provides that such disputes should be resolved by recourse to alternative methods. The rights in question are mainly those in regard to "the exercise by a coastal State of its sovereign rights or jurisdiction" over resources in its exclusive economic zone or continental shelf. Accordingly, the Convention requires recourse to the *conciliation procedures of Annex V, section 2*, of

[107] *UNCLOS*, article 283.
[108] *UNCLOS*, article 284.
[109] *UNCLOS*, article 287.
[110] *UNCLOS*, article 287, paragraph 3.
[111] *UNCLOS*, article 297, paragraph 1.

1. disputes arising from an allegation by a State carrying out scientific research in the exclusive economic zone or on the continental shelf of another State, that that coastal State has acted in breach of its obligations under articles 246 or 253 of the Convention;[112] and
2. fisheries disputes arising out of allegations that a coastal State (i) "manifestly failed to comply" with its conservation and management obligations with respect to its exclusive economic zone, (ii) "arbitrarily refused" to determine the allowable catch or its harvesting capacity in regard to fish stocks of interest to another State, or (iii) "arbitrarily refused" to allocate the surplus of an allowable catch.[113] However, the Conciliation Commission established to deal with such cases is not permitted to call in question the exercise by the coastal State of a discretion conferred upon it by the Convention.[114]

Option to Exclude Certain Disputes Altogether, from the Application of Procedures Entailing Binding Decisions

Article 298, paragraph 1 provides that a State may, by declaration addressed to the Secretary-General of the United Nations exclude three specified categories of dispute of extreme political sensitivity from the application of procedures entailing binding procedures:

1. disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea-boundary delimitations or historic bays or titles which is not to be settled by some other agreed procedure, this exclusion being subject to the condition that the declarant State binds itself to submit any new dispute (*i.e.* arising after entry into force of the Convention) which cannot be settled by negotiation, to compulsory conciliation pursuant to Annex V, section 2, and should the conciliation effort fail, to submit the dispute to the procedures of part XV, section 2, entailing binding decisions, unless the dispute also involves questions of sovereignty or other rights over land territory;
2. disputes concerning military activities, as well as disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal by paragraphs 2 and 3 of article 297 (law enforcement in regard to marine scientific research and fishery rights); and
3. disputes in respect of which the Security Council is exercising the functions assigned to it under the Charter of the United Nations.[115] A declaration made pursuant to article 297, paragraph (1) may be withdrawn at any time by notice to the Secretary-General, and any new declaration, or the withdrawal of a declaration, does not *ipso facto* affect pending proceedings.

The Convention distinguishes "military activities" and "law enforcement activities", but defines neither. Since naval and coast guard vessels are often used in law enforcement, it may sometimes be necessary to determine whether a dispute involving, say, a naval vessel should be excluded from application of the Convention's dispute settlement system by a declaration made under article 298, sub-paragraph 1 (b) as concerning either a military activity or an "excepted" law enforcement activity (*i.e.* connected with marine scientific research or fishery rights); or whether the dispute is

[112] *UNCLOS*, article 297, paragraph 2.
[113] *UNCLOS*, article 297, paragraph 3.
[114] *UNCLOS*, articles 297, sub-paragraph 2 (b) and 297, sub-paragraph 3 (c).
[115] *UNCLOS*, article 298, sub-paragraph 1 (a). For examples of such declarations see below note 144.

subject to the system as being a law enforcement activity not subject to the exception (*e.g.* contravention of a State's freedoms and rights of navigation).[116]

Relation of the 1982 Convention to the Present Legal Regime, Including International Custom

The Law of the Sea at Present

Signed by some 159 States, and ratified at the time of writing by 51 of the 60 States required by article 311 for entry into force, the provisions of the Convention have yet to become legally binding. The lapse of several years between signing of the Convention, and its ratification by the number of governments required for its entry into force is not unusual in the international legislative process, and was to have been expected in this instance, due to the range and technical character of the subjects dealt with and the number of States with different policies and objectives involved in negotiating it. Progress toward entry into force of the 1982 Convention may, however, be hindered by the reluctance of some major maritime States to ratify,[117] or even to sign[118] due to objection to the Convention's provisions dealing with mining of the deep sea-bed.

The Convention will enter into force in accordance with article 308, twelve months after the date of deposit with the Secretary-General of the United Nations, of the sixtieth instrument of ratification or accession. When the Convention does enter into force it will bind those States and international organizations which have deposited such instruments, and those that do so thereafter, but would not, in the absence of certain conditions laid down by general international law, become binding on others. However, before the Convention comes into force certain legal consequences flow from its adoption and signature. One such consequence is that international custom, as reflected in article 18(a) of the Vienna Convention on the Law of Treaties, obliges each of the 159 signatories to refrain from acts which would defeat the object and purpose of the Convention. Again, as a text negotiated over a period of some eight years, agreed to by the overwhelming majority of the international community with a view to its becoming legally binding, and signed now by 159 of them, the Convention may be expected to influence State practice, and thus the formation of international custom.

For the time being, and pending the Convention's entry into force, the law of the sea is contained

1. for States parties to the four 1958 Geneva Conventions, and States parties to other general treaties in force dealing with navigation, fishing and other maritime activities, as well as regional and bilateral treaties on such subjects, in the provisions of those treaties; and

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[116] As one writer observes: "Thus, the arbitrary or unwarranted boarding, search or arrest of a foreign merchant ship navigating in the economic zone by a warship or coast guard vessel of the coastal State in a law enforcement situation would be subject to compulsory, third-party settlement on grounds of unlawful interference with navigation. This result was considered particularly important in order to protect freedom of navigation while also according broad new pollution enforcement rights to coastal States in the economic zone". Oxman, B.H., *op. cit.*, above note 23, p. 824.

[117] See the declarations made when signing the Convention, by Belgium, France and Italy, and by the European Economic Community, United Nations, *Multilateral Treaties deposited with the Secretary-General*, status as at 31 December 1991 (*MTSG*), pp. 796, 800-3.

[118] See statement by the President of the United States of America dated 10 March 1983, United Nations, *Law of the Sea: Current Developments in State Practice*, New York, 1987, p. 137. Similar considerations appear to deter participation by the United Kingdom and, despite the Convention's provision on location of the seat of the International Tribunal for the Law of the Sea in the Free and Hanseatic City of Hamburg (Annex VI, art. 1), the Federal Republic of Germany as well.

2. for all States, in "international custom", or the general practice of States observed by them in the belief that they are legally bound to do so. Although detailed consideration of the relationships between this present body of law governing uses of the sea, and the 1982 Convention, and between the Convention and international custom could not be attempted here, some aspects of those relationships will be noted.

Relation of the 1982 Convention to other International Agreements

When the Convention enters into force, the rights and obligations of States which are parties to it but are also parties to other conventions and international agreements relating to the same subject-matter as is dealt with by the Convention, will be regulated by article 311. Thus, as to the four 1958 Geneva Conventions on the Law of the Sea, article 311 declares that among the States Parties to the 1982 Convention, that Convention will prevail. As to other international agreements which are "compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention", the 1982 Convention will not alter the rights and obligations of States Parties to those agreements. It is the clear implication of this provision that the 1982 Convention would "prevail" over international agreements that are *not* "compatible" with its provisions, provided those agreements are not expressly permitted or preserved by the Convention itself.

To the extent that the provisions of article 311 do not resolve questions concerning the relation of the Convention to other agreements, general principles of treaty law, such as those contained in article 30 of the Vienna Convention on the Law of Treaties, are likely to be applied.

Relation of the 1982 Convention to International Custom

Assertions Concerning the Emergence of International Custom

On 10 March 1983, some eight months after President Ronald Reagan had announced that the United States of America would not sign the 1982 Convention, and some 3 months after the Convention had been signed on behalf of some 119 States at Montego Bay, the President proclaimed[119]

> the sovereign rights and jurisdiction of the United States of America and confirm[ed] also the rights and freedoms of all States within an exclusive economic zone, as described [t]herein...

The zone so proclaimed extends to a distance "200 nautical miles from the baselines from which the breadth of the territorial sea is measured", and is otherwise described in terms borrowed in large measure from the corresponding provisions of the 1982 Convention.

The Proclamation states as its legal basis that

> international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the exclusive economic zone, a coastal State may assert certain sovereign rights over natural resources and related jurisdiction...

[119] Proclamation by the President of the United States of America on the exclusive economic zone of the United States of America, 10 March 1983, United Nations, *Law of the Sea: Current Developments in State Practice*, New York, 1987, pp. 135-6. See also the statements made on 8 April 1983 by the Group of Eastern European (Socialist) Countries at a plenary meeting of the Preparatory Commission, and on 23 April 1983 by the Government of the USSR, expressing opposition to the United States' position as reflected in the Proclamation, *ibid.*, pp. 139-42.

An accompanying Statement by the President asserts that, while the United States will not sign the Convention because its "deep sea-bed mining provisions are contrary to the interests and principles of industrialized nations", the Convention

> contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all States.

The Proclamation's affirmation of its basis in "international law" could only imply a reference to international custom, since the first general multilateral treaty to provide for an exclusive economic zone was the 1982 Convention. Accordingly, the relationship of treaty law to custom, and in particular, the question whether portions of the Convention had achieved the status of international custom and were thus universally binding by the close of the eight year Conference, became the subject of extensive discussion.[120]

The 1982 Convention may relate to international custom in at least four ways:

1. some of its provisions may codify, *i.e.* refine, clarify and incorporate an existing rule of international custom;
2. other provisions may incorporate emergent rules of international custom, and thereby promote their generalized application and acceptance by the community of States as a whole;
3. yet other provisions may incorporate rules which become the origin of new rules of international custom; and
4. to the extent that States declare or otherwise demonstrate their agreement, disagreement or separate interpretation of some provision, such conduct may be relevant in any inquiry as to whether that provision has achieved the generality of acceptance required to elevate it to the level of a customary rule.

The International Court of Justice in the *North Sea Continental Shelf Cases* endorsed the validity of the process whereby a treaty may come to incorporate a rule that is no longer merely contractual, but has "passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention". The Court there outlined the elements usually regarded as necessary before the provision of a treaty could be considered to have become a general rule of international law. Thus,

1. the provision should potentially be "of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law";

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[120] Referring to the Proclamation and to the accompanying statement of the President to the effect that the provisions of Part V of the Convention generally confirmed existing rules of international law, the Chamber of the International Court of Justice dealing with the *Gulf of Maine Case (USA/Canada)* observed, albeit with a certain caution, "In the Chamber's opinion, these provisions, even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question", 1984, *ICJ Reports*, page 294. On the whole question see generally Jennings, Sir Robert, "Law-making and Package Deal", in *Mélange offert à Paul Reuter*, Paris 1981, pp. 347-55; Howard, L.A., "The Third United Nations Conference on the Law of the Sea and Treaty/Custom Dichotomy", Vol. 16, 1981, *Texas International Law Journal*, 321-345; MacRae, L.M., "Customary International Law and the United Nations Law of the Sea Treaty", Vol. 13, 1983, *California Western International Law Journal*, 181-222; Gamble, J.K., and Frankowska, M., "The 1982 Convention and Customary Law of the Sea: Observations, a Framework and a Warning", Vol. 21, 1984, *San Diego Law Review* 491-511; Caminos, H., and Molitor, M.R., "Progressive Development of International Law and the Package Deal", Vol. 79, 1985, *American Journal of International Law*, 871-890; and Harlow, Admiral B., *ibid.* at p. 1037 ff.; Schmidt, M.G., *Common Heritage or Common Burden?* Oxford, 1989, pp. 261 ff.

2. State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of that provision;
3. State practice should have occurred in such a way as to show general recognition that a rule of law or legal obligation is involved (*opinio juris*); and
4. passage of a considerable period of time. As to the last element, the Court acknowledged that it might not be necessary where there had been (i) very widespread and representative participation in the convention concerned and (ii) States whose interests were specifically affected by the provision were among those so participating.[121]

A rule of international custom must be proved by the party asserting its existence. Since the factual contexts of State action may often be distinguished one from another in important ways, it is difficult to establish that a "general practice" has developed, and equally, that it is "accepted as law". State practice supportive of the existence of international custom is found in the repeated actions by States, which do not evoke negative responses from other States. Both action and acquiescence therein should have been the consequence of the belief that such conduct was required by law (*opinio juris sive necessitatis*). Thus, claims by an increasing number of States to the resources of their continental shelves following the Truman Proclamation of 1945 was regarded by the International Court of Justice as "reflecting, or as crystallizing, received or at least emergent rules of customary international law". Similarly, the resolute claim by Russia in 1909 to a 12-mile territorial sea, followed much later by an increasing number of States, may be said to have given rise to a rule of custom that is now codified in article 3 of the 1982 Convention. Categories of State activity that are evidence of the existence of a practice regarded as obligatory, include national legislation, the decisions of domestic courts and tribunals, the formal statements of duly accredited representatives of governments and, of particular importance here, the conclusion and operation of treaties.

In the *Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*,[122] where the parties had, in their Special Agreement, authorized the Court *inter alia* to take into account "new accepted trends" in the Third United Nations Conference on the Law of the Sea, the Court observed,

> the Court would have had *proprio motu* to take account of the progress made by the Conference even if the parties had not alluded to it in their Special Agreement; for it could not ignore any provision of the draft convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law.

In reaching its conclusions in that case the Court did give extensive consideration to those provisions which had been incorporated in successive versions of the Informal Composite Negotiating Text (ICNT) and in the draft convention developed from that text in accordance with conditions laid down in Conference document A/CONF.62/62 of 14 April 1978, as being indicative of the "new accepted trends" referred to in the Special Agreement.

Any proposition that portions of the Convention are to be regarded already as part of international custom, or that others represent stages in a process toward that status, will be subjected to rigorous scrutiny along lines indicated by the International Court of Justice, and the outcome could not be predicted with any degree of certainty. The Court's caveat that transformation of a contractual rule into a rule of international custom, is a result "not lightly to be regarded as having been attained", should also be borne in mind.

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[121] International Court of Justice Reports (1969), paragraphs 71-77.

[122] 1982 *ICJ Reports* pp. 37-8, 47-9; see also the Separate Opinion of Judge Jiménez de Aréchaga (pp. 108-9, 113-6) and the extensive analysis contained in the Dissenting Opinion of Judge Oda (pp. 158-72).

The "Package Deal" and the Emergence of International Custom

The difficulty of proving that particular provisions of the 1982 Convention had become part of international custom in the course of the eight years that preceded its adoption, is compounded by the negotiating context endorsed by the Conference as a whole. That context was made up of

1. the perception shared by all delegations that "the problems of ocean space are closely interrelated and need to be considered as a whole"; and
2. the derived legislative principle that came to be known as the "package deal", and its procedural corollary whereby all efforts to reach consensus should have been exhausted before voting on questions of substance could take place.

The Convention, in a sense, sets its seal upon, and gives legislative expression to, the "package deal" by providing in article 309 that

> No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.

The President of the Conference (H.S. Amerasinghe) described the "package deal" in the following terms:

> [T]he very nature of the concept of a package deal must mean that no delegation's position on a particular issue would be treated as irrevocable until at least all the elements of the "package" as contemplated had formed the subject of agreement. Every delegation, therefore, had the right to reserve its position on any particular issue until it had received satisfaction on other issues which it considered to be of vital importance to it.[123]

In his observations at the final session of the Conference at Montego Bay the President (T.T.B. Koh) elaborated upon the legal implications of the principle:

> Although the Convention consists of a series of compromises, they form an integral whole. This is why the Convention does not provide for reservations. It is therefore not possible for States to pick what they like and disregard what they do not like. In international law, as in domestic law, rights and duties go hand in hand. It is therefore legally impermissible to claim rights under the Convention without being willing to assume the correlative duties.[124]

In assessing the interaction between the 1982 Convention and international custom, the implications of the "package deal" need to be taken into account. As has been persuasively argued,[125] where the provisions of the 1982 Convention are in substance the same as those of an earlier treaty (such as the 1958 Convention on the High Seas) that have already received recognition as declaratory of established rules, this fact may be regarded as strong evidence of the continued claim that those rules are in fact international custom. Where such 1958 provisions have been taken over in modified form, the claim that they represent customary rules must be judged to be weaker. Where innovative provisions of the Convention can be shown to have achieved customary status *before* the Conference's negotiated "package" had crystallized, a claim that such provisions might be universally binding as custom independent of the Convention, would be open to substantiation. On the other hand, innovative provisions of the Convention that are the outcome solely of the "package

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[123] Explanatory Memorandum by the President of the Conference, UN doc. A/CONF.62/WP.10/Rev. 1, 1949.

[124] Remarks by Ambassador Tommy T.B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea, reproduced in United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea, with Index and Final Act*, New York, 1983, at p. xxxvi (adapted from statements made on 6 and 11 December 1982).

[125] Caminos H., and Molitor, M.R., *op. cit.* above note 120, at pp. 887-9.

deal" and the consensus procedure, would be difficult to include among the rules of custom incorporated in the Convention: notwithstanding virtually universal representation at the Conference, "State practice" as that term is currently understood, could not be demonstrated there, and the negotiating context governed by the "package deal" and consensus procedure was such as to mask, if not distort, parameters such as protest and acquiescence, that need to be considered in order to determine the existence of a customary rule.

It follows from the foregoing that any assertion by a single State that this or that provision of the 1982 Convention is declaratory of custom is likely to result in acute controversy, regardless of the power and influence exercised by that State. Similarly, an assertion by a group of States that a set of provisions has attained the status of international custom would not be sufficient to make it so.[126] Any such assertions, in the absence of proof of general acceptance and the other parameters to be considered in connection with the evolution of international custom, is likely merely to cause confusion, and would hardly contribute to achieving the objective, re-stated in the Convention's preamble, of establishing a legal order for the seas and oceans. The existence of a rule of international custom can ultimately be determined only by an international tribunal or other body duly authorized to do so, and any such determination may bind only the parties to the dispute concerned.

Reservations and Exceptions; Declarations and Statements under the 1982 Convention

As was noted, article 309, in accordance with the spirit of the "package deal" in effect prohibits the making of "reservations" within the meaning of that term as used in the 1969 Vienna Convention on the Law of Treaties, viz:

> ... a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;...[127]

Since reservations in the latter sense are prohibited by article 309, any communication falling within that category would be presumed to be "incompatible with the object and purpose of the Convention", and the State making it would not be a party to the Convention. No action by other States Parties would be called for in order to achieve that result, and their silence could not be interpreted as consent. Such a position finds support in the general acceptance of the notion of the inseparability of the Convention's provisions, of which its preamble and the "package deal" are evidence. Complex questions could arise, nevertheless, if it is unclear whether a State's communication is, in fact, a reservation *stricto sensu*, or if one or more State's Parties were, notwithstanding the prohibition in article 309, or pursuant to some interpretation of that article, were expressly to accept a reservation contained in that communication.

However, article 309 does contemplate the admissibility of reservations and exceptions "expressly permitted by other articles of this Convention". Examples of permitted "exceptions" are those made through declarations under article 298 of non-acceptance of one or more types of dispute settlement procedure provided for under articles 286-296. The Convention does not make express provision for permitted "reservations".[128] However, inclusion of the notion of permitted reservations could be understood as covering declarations or statements that are merely called

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[126] See for example, "The Legal Position of the Group of 77" UN doc. A/CONF.62/106 of 23 September 1980, concerning the status of the sea-bed and the ocean floor beyond the limits of national jurisdiction as the "common heritage of mankind".

[127] Vienna Convention on the Law of Treaties, article 2 (d).

[128] Yemen is listed by the Secretary-General as having signed the Convention on 10 December 1982 "with the following reservations...", *MTSG* above, note 117, at p. 813.

"reservations", but are nevertheless, upon evaluation of their content, found to be admissible under the Convention.

Article 310, on the other hand, enables a State to make "declarations and statements" that are *not* "reservations" in the sense of the Vienna Convention:

> *Article 310*
> *Declarations and statements*
>
> Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

The terms "declaration" and "statement" are thus used in the Convention, as in international law generally, to make a preliminary distinction between a reservation *stricto sensu*, and other formal State communications intended merely to harmonize its laws and regulations with the provisions of the Convention or, such as might be "considered essential or desirable to give notice of certain matters of policy or principle, without an intention of derogating from the substantive rights or obligations stipulated in the treaty".[129] As observed by one authority,

> These are statements by a State the purpose of which is to put forward an interpretation or understanding of a clause of a treaty or to deal with some matter that is incidental to the operation of the treaty. Also in this category could be included a general statement of policy, or indications as to an internal procedure for carrying out the obligations established in the treaty.[130]

Several States have made interpretative declarations and statements pursuant to article 310 when signing the Convention or when ratifying it, sometimes doing so on both those occasions.[131] While a comprehensive analysis of such communications could not be undertaken here, most of them are of particular relevance to the maintenance of naval mobility and should be noted. Such declarations and statements by States contain understandings relative to their positions with respect to: application of article 301 by a coastal State in implementing the prohibition of the threat or use of force in its adjacent maritime zones;[132] the authority of the coastal State to regulate passage of foreign warships under articles 19 and 25, and of foreign nuclear-powered ships under article 23, through the territorial sea,[133] or through archipelagic waters;[134] the *sui generis* character of the exclusive economic zone as distinct from the high seas, as implying residual powers in the coastal State including that of prohibiting the conduct of military exercises or manoeuvres within the zone without its consent;[135] the scope of the coastal State's exclusive right to construct or authorize construction, operation and use of installations and structures in the exclusive economic zone or on the continental shelf, as not being limited by article 60;[136] *denying* the authority of a coastal State to make innocent passage of categories of foreign ships dependent on prior consent or notification,

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[129] Whiteman, M.M., *op. cit.* above note 71, Vol. XIV. 138.

[130] Ruda, J.M., "Reservations to Treaties" in *Recueil des cours de l'Académie de droit international de La Haye*, 146, 1975-III, pp. 105-6.

[131] Above, *MTSG*, above note 117. Information on current developments in State practice is available from the Office of Legal Counsel of the United Nations in a series of "Bulletins" and other publications.

[132] *E.g.* Brazil, Cape Verde.

[133] *E.g.* Brazil, Cape Verde, Chile, Egypt, Iran, Oman, Romania, S. Tome and Principe, Sudan, Yemen, Yugoslavia.

[134] *E.g.* Philippines.

[135] *E.g.* Brazil, Cape Verde, Chile, Uruguay.

[136] *E.g.* Brazil, Uruguay.

since the provisions of the Convention on that subject correspond to international custom, denying that that State's authority regarding construction, operation or use of installations and structures in the exclusive economic zone or on the continental shelf could exceed that conferred by article 60, and denying that State's authority to authorize or obtain notification of military exercises or manoeuvres in the exclusive economic zone;[137] the rights of States bordering straits used for international navigation;[138] treaty regimes applicable to specified straits;[139] the right of archipelagic States to take certain measures relating to archipelagic sea-lanes passage;[140] the right of a State to interpret the Convention with due regard to its sovereignty;[141] application of the Convention "on the basis of reciprocity",[142] and non-recognition of a participant in the Conference.[143]

Other such declarations and statements, or parts thereof, relate to choice of methods of dispute settlement;[144] arrangements regarding living resources of the exclusive economic zone, as well as "straddling stocks", anadromous, and highly migratory species;[145] regimes concerning, or sovereignty over certain islands;[146] archeological objects in adjacent maritime areas;[147] certain perceived flaws and deficiencies in the provisions of Part XI of the Convention on sea-bed mining;[148] the "common heritage" concept as *jus cogens*;[149] and compatibility of the Convention with its constitution, its national legislation of a State, or its practice.[150]

A declaration or statement in conformity with article 310, not being a "reservation" in the sense of the 1969 Vienna Convention, would not be subject to the acceptance/objection process provided for in that Convention[151] and by customary international law in respect of reservations. If determined to be inadmissible, it would merely have no effect on contractual relations among parties to the Convention. Whether a particular declaration or statement made or to be made by any State is in conformity with article 310 or is more in the nature of a reservation and therefore prohibited, is a matter on which individual negotiating States and contracting States may take up different positions.[152] If a dispute were to arise, it should be resolved by means of the applicable settlement procedure.

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[137] Italy.

[138] *E.g.* Greece, Spain, Yugoslavia.

[139] *E.g.* Finland, Spain, Sweden.

[140] *E.g.* Philippines, Cape Verde. Interpretation by the Philippines of its powers in relation to passage through archipelagic waters, and archipelagic sea lanes evoked several "objections" from other States. See MTSG, above note 117, pp. 809 ff.

[141] *E.g.* Angola, Guinea Bissau, Mali, Philippines, San Tome and Principe, Uruguay.

[142] Uruguay.

[143] *E.g.* Algeria, Iraq, Kuwait, Qatar, Tunisia.

[144] *E.g.* Belarus, Belgium, Cape Verde, Cuba (non-acceptance of International Court of Justice), Egypt, Guinea-Bissau (non-acceptance of ICJ), Iceland, Iran, Nicaragua, Oman, Tunisia, Tanzania, Uruguay.

[145] *E.g.* Cape Verde, Costa Rica, S. Tome and Principe, Uruguay.

[146] *E.g.* Iran, Romania, Yugoslavia; as to sovereignty over islands; Philippines (evoking contradictions by China and Vietnam) and Yemen (evoking contradiction by Ethiopia).

[147] Cape Verde.

[148] See *MTSG*, above note 117.

[149] Chile.

[150] *E.g.* as to compatibility of constitution, Philippines, San Tome and Principe; as to compatibility of legislation, Cape Verde, Oman; as to compatibility of practice, Finland, Sweden.

[151] Vienna Convention on the Law of Treaties, article 23. On the whole subject of declarations and statements made pursuant to UNCLOS article 310, see Vajić, N., "Interpretative declarations and the United Nations Convention on the Law of the Sea", in Vukas, B. (ed.), *op. cit.* above note 83 pp. 371-97. See also R.W.G. de Muralt "The military aspects of the UN Law of the Sea Convention", Vol. XXXII, 1985, *Netherlands International Law Review* pp. 78-99.

[152] As one writer has observed: "The main legal problem emerging in this connection resides in the fact that those interpretative declarations which are in fact prohibited reservations annul the validity of the ratification of the declaring State. The consequence thereof should be that such a contracting State is not considered a party, independently of whether other States have objected to the entry into force of the treaty as between them and the declaring State or not." Vajic, N., *op. cit.* note 151.

On the other hand, such declarations and statements may, depending upon the responses to them, have an impact going beyond their immediate interpretative function, in that they may contribute to the establishment over time of "subsequent practice" relevant in the interpretation of the Convention,[153] and at the same time influence the development of rules of international custom. Legislative or enforcement action taken pursuant to interpretations of coastal State rights contained in such declarations and statements, as for example, regulation of the passage of warships through the territorial sea, or requiring prior consent for the construction of installations and structures in the exclusive economic zone for non-resource-related purposes, or again, for the conduct of foreign naval manoeuvres, may gradually result in establishing an expanded coastal State jurisdiction in those areas, exceeding that provided for under the terms of the Convention, as generally understood.[154]

Finally, note may be taken of a different kind of communication: one made in contemplation of the Convention, but for which it makes no specific provision. On 23 September 1989 the United States of America (which had in 1983 announced its intention not to sign the Convention, and the Soviet Union (which had signed, but not ratified the Convention) signed a *Joint Statement concerning a Uniform Interpretation of Rules of International Law governing Innocent Passage*, which declared that the relevant rules of international law governing innocent passage of ships in the territorial sea were those contained in the 1982 UN Convention on the Law of the Sea. The two countries are reported to be preparing for talks concerning "objective criteria for determining straight baselines and historic bays" with the intention of establishing such criteria which are consistent with the Convention.[155] Helpful as the *Joint Statement*, and future joint statements might be, in the promotion of maritime security, there can be little doubt that the international community would prefer it by far to see these two States were actually to become parties to the Convention.

Under a *Freedom of Navigation (FON) Program* begun by the United States of America in 1979, that government undertakes "the peaceful exercise of the rights and freedoms of navigation and overflight recognized under international law". Its declared policy is to exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention, and thereby demonstrate its refusal to acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses. Under the Program, diplomatic consultations with a State making what is considered by the United States to be an excessive maritime claim, may be followed by formal protest, and finally by naval and air operations designed to emphasize internationally recognized navigational rights and freedoms. Since 1979, the United States has reportedly carried out such operations in regard to maritime claims of more than 35 countries, at the rate of some 30-40 per year.[156]

Conclusion and Recommendations

The foregoing review of the main provisions of the 1982 United Nations Convention on the Law of the Sea relevant to naval mobility in time of peace, the reservation of the high seas and the Area

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[153] Vienna Convention on the Law of Treaties, article 31, sub-paragraph 3 (b).

[154] On the subject of expanding coastal State jurisdiction and its implications for naval operations, see Booth, K., *op. cit.* above note 15, at pp. 37-58. See also Kwiatkowska, B., *op. cit.* above note 33.

[155] See *Law of the Sea: Report of the Secretary-General* United Nations doc. A/46/724, 5 December 1991, paragraphs 11-13.

[156] See *Limits in the Seas, United States Responses to Excessive National Maritime Claims*, US Department of State, 9 March 1992; Roach, J.A., "Excessive Maritime Claims", in "Law of the Sea: evolving national policies", *Proceedings, Eighty-fourth Annual Meeting, The American Society of International Law*, Washington, DC, March 28-31, 1990, pages 288-95.

for "peaceful purposes", promotion of peaceful uses of the sea, in particular for resource exploitation purposes, and the peaceful resolution of disputes, suggests the main ways in which the Convention has had an important and beneficial impact on the maintenance of maritime security. The first of these might perhaps be succinctly described as "levelling the playing field" as among the major naval powers, among volunteers in the costly enterprise of maintaining security in areas geographically far removed from their shores, and consists essentially of rules governing the mobility of ships, including warships and other ships, and aircraft, on government non-commercial service. The goal of maritime security is sought to be achieved not by prohibiting military activity on, above or below the seas, but by providing the means for its regulation on an open, non-discriminatory basis, building confidence and reducing the risk of tensions.

Thus, rules known and accepted in advance

1. confirm the traditional status and immunity from foreign enforcement jurisdiction accorded to warships, and extend their application to other ships and aircraft on government non-commercial service, but provide nevertheless for State responsibility for damage resulting from their non-compliance with applicable rules;
2. provide for innocent passage of ships, including warships and ships on government non-commercial service through the territorial sea and, in respect of all ships aircraft, for transit passage through and over straits used for international navigation, and for archipelagic sea lanes passage through and over such sea lanes; and
3. as to the high seas, the Area, the exclusive economic zone and the continental shelf beyond 200 miles from the applicable baselines, maintain traditional "freedom" of navigation and overflight including all lawful uses of the sea associated with the operation of ships and aircraft whether military or civil.

Beyond the territorial sea (in which foreign ships have only the right of innocent passage, or when the territorial sea forms part of a strait used for international navigation, foreign ships and aircraft have the right of transit passage) the Convention's provisions on accommodation of uses applies in respect of all activity, military or civil. Finally, in exercising their rights and performing their duties under the Convention, States Parties undertake to refrain from the threat or use of force inconsistent with the Charter of the United Nations, and must thus ensure that ships flying their flag, or aircraft of their registration, act accordingly whether their mission is of a civil or military character.

The injunctions to use the seas and the Area for "peaceful purposes", even when supplemented by a prohibition of the threat or use of force contrary to the United Nations Charter, do not, when interpreted in the context of those provisions, and by reference to their antecedents in other international agreements, have the legal effect of prohibiting military activity. On the other hand, they are not without legal significance: they may be considered the equivalent of directive principles of policy included in some State constitutions - statements of aspirations, or exhortations universally subscribed to, but legally unenforceable. They are moreover, the foundation on which the Convention's complex regulatory and institutional structures rest, peace or the absence of tension and conflict, being the condition under which the Convention's delicately balanced, complex and carefully drawn provisions could be implemented with optimum benefit. Implementation of the Convention by States through acceptance of its constraints, and the exercise of rights conferred by it subject to the accommodation of uses rule, all reflected, where necessary, in domestic legislation, and through the establishment and operation of the institutional framework provided for or foreseen in the Convention, could offer a firm foundation and context for confidence-building measures at sea.

As observed by the group of experts commissioned by the United Nations General Assembly to make a study of the naval arms race in order to "facilitate the identification of possible areas for disarmament and confidence-building":

> The principle of freedom of navigation on the world's oceans makes a coastal state the neighbour across the sea of every other coastal state, including all significant naval Powers. While naval forces have the recognized legal right to cruise and operate off the coasts of foreign states, coastal states, particularly those which are small or medium in size, have on the other hand a legitimate claim for a reasonable "seaboard security" and should not be subjected to power projection possibly originating from such activities. It should be noted in this regard that the Convention on the Law of the Sea includes balanced provisions which would meet security needs of both flag states and coastal states provided they are strictly implemented. It should also be noted that the security of both categories of states could be further enhanced by means of agreed confidence- and security-building measures in harmony with the Convention and customary international law.[157]

The first and most essential step called for in order to initiate confidence-building measures at sea, is to bring the 1982 Convention into force. At the time of writing 9 more States should deposit instruments of ratification or accession, and a period of 12 months should elapse after the last of them, before the Convention ceases merely to guide, and begins to impose its benign order on uses of the oceans.

A second preliminary step is for the States Parties to the Convention to negotiate with those naval powers critical of Part XI of the Convention, either agreed understandings with regard to controversial provisions on sea-bed mining or agreed modifications of those provisions, which are not inconsistent with the policies of any State or group of States. This would pave the way for adherence by all the industrialized powers, making participation in the Convention virtually universal.

Entry into force of the Convention would, taking into account the work of Special Commission IV of the Preparatory Commission, enable the establishment and operation of the Convention's dispute settlement system. The availability of that system should, on the one hand, encourage restraint in the assertiveness of naval powers apprehensive of the erosion of their rights of passage and rights to carry out other naval activity; and on the other, encourage restraint in coastal States which may have hitherto tended to rely on a claimed right to expand their maritime jurisdiction unilaterally in the expectation that by so doing they could acquire rights for the purpose of protecting their economic and political security. To have a broadly accepted dispute settlement system in place would, as was stated on behalf of a major naval power,

> help relieve us of having to choose between acquiescence and defiance each time a claim is made... It would give us an important new option in our efforts to control and discourage such claims...[158]

The United Nations Secretariat unit dealing with the Law of the Sea should be strengthened and adequately funded and staffed so as to be able to maintain its active role in

1. collecting and disseminating information on the zonal limits of States, the scope of jurisdiction exercised in each of them, and State practice in applying the Law of the Sea; and
2. advising States Parties, when requested to do so, concerning procurement of services required for the establishment of zonal limits, as well as the administration and surveillance of zones and related matters.

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[157] United Nations, *The Naval Arms Race*, UN doc. A/40/535, UN Study Series No. 16, New York, 1986, paragraph 264.

[158] Richardson, Elliot L., *op. cit.*, above note 51.

Thoughts regarding the "confidence- and security-building measures in harmony with the Convention" contemplated by the United Nations Report referred to, should take as their starting point the balance, implicit in the Convention's provisions, between the interests of coastal States and those of naval powers. The confidence-building measures outlined below are thus offered primarily in the context of that balance, although their general observance could also mitigate tensions arising in the different context of rivalries among the naval powers themselves.[159] They do not fall within the categories of formal, negotiated and agreed naval arms control measures, but are rather

> ... less formal, non-negotiated or unilateral measures of self-restraint that either achieve similar ends - although with less force than negotiated agreements provide - or that lay the foundation for further measures.[160]

It seems essential that, to be viable, such measures should be established between coastal States and naval powers on a foundation of mutual respect for each other's security interests and concerns, and that their implementation should be governed by policies that have been carefully reviewed and, where necessary, revised to incorporate optimum openness and restraint. Implementation would be facilitated if carried out primarily or exclusively through co-operation among naval authorities duly authorized to represent in these matters, the governments concerned.

Many writers have commented upon the "ambiguity" of some of the Convention's provisions.[161] Those provisions deal with politically sensitive situations relating to State security concerning which the Conference was unable to adopt clear rules acceptable both to coastal States and naval powers and reflecting a balance of interests between them. In order to preserve the integrity of the legislative process as a whole, the Conference responded by adopting texts which, when read alone or in the light of related texts or a statement of the President of the Conference, could be interpreted as authority for conduct consistent with either the position of a coastal State or that of a naval power. The situations to which such provisions relate are among those in which confidence-building measures would seem to be most needed, since it was the lack of confidence or the existence of suspicion and distrust that prevented inclusion in the Convention of clear rules to cover them. Since confidence-building measures are voluntary demonstrations of benign intent, they may be seen as expressions of commitments under article 300 of the Convention:

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[159] Some measures designed to reduce tensions among naval powers may, in part, be based on peacetime rules of navigation. Thus, the *Agreement on Incidents at Sea beyond the Territorial Sea* concluded on 19 June 1990 between the USSR and the Netherlands recognizes that the basic rules applicable are those contained in the *1972 Convention on International Regulations for Preventing Collisions at Sea* (concluded under the auspices of the International Maritime Organization) as currently revised, adding supplementary rules, *e.g.* formations will not manoeuvre through areas with dense shipping traffic, in sea lanes and traffic separation schemes. Other agreements on preventing naval incidents at sea were signed by the USSR with the United States of America (1972), United Kingdom (1986), France (1989), Canada (1989) and Italy (1989). A *Joint Statement* issued on 25 September 1991 by the United Kingdom and Argentina deals with navigational safety matters, as well as reciprocal information and consultation, maritime and air search and rescue, prior notification of naval or air movements carried out within 80 miles of coasts, and mutual agreement for any movement closer than 15 miles (UN doc. A/46/596/). Incidents-at-sea agreements have reportedly been proposed for the South China Sea and the South-East Asian region generally, while the United States has shown interest in helping to create a North-East Asian co-operative security system, based *inter alia* on multilateral application of the provisions of the 1972 USA/USSR Agreement to the seas and air of a designated geographic zone. See *Law of the Sea: Report of the Secretary-General* UN doc. A/46/724, 5 December 1991, paragraphs 47-8.

[160] Fieldhouse, R., "Naval forces and arms control" in Fieldhouse, R. (ed.), *Security at Sea: Naval Forces and Arms Control*, Oxford, 1990, p. 8.

[161] See for example, Booth, K., "Historic compromise or paradigm shift? Naval mobility versus creeping jurisdiction in the 1982 UN Convention on the Law of the Sea" in Koers, A., and Oxman, B. (ed.), *The 1982 Convention on the Law of the Sea*, Honolulu, 1984 pp. 312-35, at 321 ff.

Article 300
Good faith and abuse of rights

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

Thus, with respect to innocent passage of warships or ships on government non-commercial service through the territorial sea, a naval power might, unless absolutely essential for the proper conduct of peace time naval operations, (a) ensure that such ships do not pass within 12 n.m. of the baselines of the coastal State; or (b) notify the coastal State of the passage of such ships.[162] The notification could, if it were considered necessary, be accompanied by a declaration as to its essentially voluntary nature. Such a practice could be extended to cover nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances, and may, as to the latter, be substituted eventually by an agreed understanding that distinctive markings on such ships would constitute any required notification.

With regard to the activity of warships and ships or aircraft on government non-commercial service generally, naval powers might, unless absolutely essential for the proper conduct of peace time naval operations, reduce the number and duration of cruises of such ships and the numbers of vessels involved. Through appropriate instructions in manuals issued to personnel operating such ships[163] and aircraft, they could seek to ensure scrupulous adherence to the provisions of the Convention and to standards, laws and regulations adopted in accordance with it by coastal States through whose jurisdictions they may pass. They could, in following policies of optimum restraint and openness, for example, voluntarily avoid carrying out naval manoeuvres in the exclusive economic zone of a foreign State, or voluntarily seek the concurrence of the coastal State in the carrying out such activities, even seeking the latter's participation and active co-operation for the purpose *inter alia*, of protecting human life, marine resources and the environment during the planned operation. Naval powers might voluntarily refrain from the construction of military installations and structures or the emplacement of devices on the continental shelves of other States, at least within 200 n.m. from the applicable baselines, as well as from the conduct there of such naval scientific research as is, in their opinion, permitted under the provisions of the Convention. Whenever a naval power notifies a coastal State of a naval operation on what it considers to be a voluntary basis, the notification could be accompanied by a declaration to that effect, so as to forestall an assertion at a later stage that the notification was evidence of the evolution of a customary rule making such notification obligatory.

A naval power would contribute to confidence-building if, upon being informed of an alleged breach of a coastal State's laws and regulations, or of the provisions of the Convention or other rule of international law, by a warship or ship or aircraft on government non-commercial service, it were to proceed promptly to investigate the incident and, upon proof that an offence had been committed, take such disciplinary measures as might be appropriate, as well as any necessary remedial or corrective action, including the payment of compensation for any loss or damage caused. The conclusion of international or regional agreements for the settlement of disputes arising out of such incidents by the application of agreed special procedures is contemplated under the Convention.[164]

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[162] Note the proposal submitted to the Conference on Security and Co-operation in Europe's (CSCE) Negotiations on Confidence and Security Building Measures at Vienna in 1989, by Austria, Cyprus, Finland, Liechtenstein, Malta, San Marino, Sweden, Switzerland and Yugoslavia, encouraging participating States to inform other participating States of their intention to exercise the right of innocent passage of warships through their territorial seas (Doc. CSCE/WV.5).

[163] *E.g.* the efforts of the United States Navy to "integrate an environmental protection ethic into all Navy planning, management and operations..." referred to by Rear Admiral Schachte in the speech cited above note 29.

[164] *UNCLOS*, article 282.

Alternatively, the flag State may agree to submit any such dispute to the Convention's dispute settlement system, if necessary waiving its right to take advantage of any exclusionary declaration made by it under article 298.

Coastal States could themselves contribute to the maintenance of a climate of confidence by adhering to policies of optimum restraint and openness, voluntarily refraining from regulatory action affecting passage or other operations of naval vessels or aircraft, even when they believe they are authorized to take such action under the Convention. It would be open to a coastal State, when responding positively say, to a request for the conduct of naval manoeuvres by foreign ships and aircraft in its exclusive economic zone, for example, to declare the exceptional nature of its consent, and its intention to review any such request on a case-by-case basis.

Finally, in the spirit of the Convention, which seeks to promote international co-operation through institutions at the national, regional and international level, it may be feasible to adopt one or more codes of conduct setting out standards of behaviour to be observed by various types of naval vessels (*e.g.* submarines, nuclear-powered ships) and aircraft, as well as by coastal States, in balanced and mutually beneficial terms. Such codes could be adopted and implemented at the level of the naval authorities of the States concerned acting as designated national representatives and co-ordinators. Such codes of conduct implemented at the technical level away from the glare of publicity, but with the knowledge and concurrence of the States concerned, could make a significant contribution to the maintenance of confidence among nations.

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In the words of Ambassador Koh who presided with distinction over the concluding stages of the Third United Nations Conference on the Law of the Sea, the Convention is a "comprehensive constitution for the oceans". Its rules were not, as were those that evolved in the formative stages of international law, the work of a group of States with a monopoly of naval power. Its provisions were negotiated on the basis of informed discussion at what was at the time the most widely attended gathering of governmental representatives in history, and were adopted only after the sober balancing of the interests of States and groups of States, had won for them "widespread and substantial support". Signed by some 159 States and ratified or acceded to by 30 June 1992 by 51,[165] the Convention looks well on the way to obtaining in the near future the 60 ratifications needed for its entry into force. The dedicated and pioneering spirit which led to the formulation and adoption of the text of this landmark Convention, will need to inform those first States Parties as they set out to make a reality of its historic "contribution to the maintenance of peace, justice and progress for all peoples of the world".

[165] Angola, Antigua and Barbuda, Bahamas, Bahrein, Belize, Botswana, Brazil, Cameroon, Cape Verde, Côte d'Ivoire, Cuba, Cyprus, Djibouti, Dominica, Egypt, Fiji, Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Iceland, Indonesia, Iraq, Jamaica, Kenya, Kuwait, Mali, Marshall Islands*, Mexico, Micronesia*, Namibia, Nigeria, Oman, Paraguay, Philippines, Saint Lucia, Sao Tome and Principe, Senegal, Seychelles, Somalia, Sudan, Togo, Trinidad and Tobago, Tunisia, Uganda, United Republic of Tanzania, Yemen, Yugoslavia, Zaire, and Zambia. (* Accession). An initiative undertaken by Secretary-General Perez de Quellar and continued by Secretary-General Boutros Ghali, seeks to resolve the problems arising for some countries from the Convention's provisions on deep sea-bed mining and thus open the way to universal acceptance of the Convention. See for recent developments, *Law of the Sea: Report of the Secretary-General* UN doc. A/46/724, paras. 15-20.

Chapter 3
Measures to Prevent Major Incidents at Sea

Stanley B. Weeks

Abstract

The 1972 Navy-to-Navy US-Soviet Incidents at Sea (INCSEA) Agreement was a product of the Cold War and a landmark tension-reduction and confidence-building measure between the major power navies. Establishing special rules to minimize ship manoeuvres that create dangers of collisions, to prohibit actions (simulated attacks, etc.) that might be interpreted as hostile or harassment, and to establish special communications procedures, the US-Soviet INCSEA Agreement has been remarkably successful in minimizing incidents between the two navies despite their more frequent global interaction in the two decades since the agreement. The 1972 agreements have also served as a model for more recent similar bilateral INCSEA agreements, as well as for the broader 1989 US-Soviet military leaders' agreement on prevention of Dangerous Military Activities (DMA). However, the "high seas" coverage limits of the INCSEA Agreement do not address boundaries and operations in territorial waters, nor do the INCSEA provisions cover the inherently stealthy submerged submarine and the lack of INCSEA procedures to avoid US-Soviet incidents in areas of ongoing conflict (such as the Persian Gulf during the Iran-Iraq War) was only remedied in the 1989 DMA Agreement.

The experience of the 1972 US-Soviet Incidents at Sea Agreement (and the 1989 US-Soviet Dangerous Military Activities Agreement) suggests several supplementary approaches to minimize incidents at sea in the post-Cold War world. Existing and additional bilateral agreements still provide a sound technical and political basis to reduce special bilateral incidents at sea. There may be benefit in certain specific regions to a regional "Safety at Sea" approach which broadens these provisions through a regional agreement addressing also non-naval (fishing and merchant) shipping and including regional territorial waters (as well as the high seas). Additionally, the time-tested provisions of the US-Soviet bilateral INCSEA Agreement requiring naval forces on the high seas to communicate and avoid dangerous manoeuvres and harassment might be incorporated into a multilateral agreement open to all nations. It is significant to note that these bilateral, regional, and multilateral approaches are not necessarily mutually exclusive. Nor can they deal with the problems of inherently covert submerged submarines, law of the sea disputes over boundaries of territorial seas (and Exclusive Economic Zones), and the danger of incidents in waters adjacent to an ongoing conflict. A flexible variety of bilateral and multilateral actions is needed to minimize these latter more difficult causes of incidents at sea. These include continuing appropriate bilateral and multilateral negotiations on agreed interpretations of law of the sea boundaries, prudent caution in forward submerged submarine operations near disputed boundaries (and perhaps provisions for submarine underwater communications in extreme situations of perceived close danger), and agreements for special designation and appropriate communication of ships and aircraft in dangerous zones of ongoing conflict. A proper complementary mix of these suggested actions can help further reduce global incidents at sea in the post-Cold War world.

The 1972 US-Soviet Incidents at Sea (INCSEA) Agreement was a product of the Cold War and a landmark tension-reduction and confidence-building measure between major power navies.[1] The success of the US-Soviet INCSEA agreement over a period of two decades has inspired similar bilateral agreements and proposals for even more ambitious multilateral agreements. In 1989, the US and the USSR reached a broader military agreement on prevention of Dangerous Military Activities, which owed much to the experience of the INCSEA agreement.[2] Using the US-Soviet Incidents at Sea agreement as a benchmark, this analysis will examine the nature of incidents at sea, the historical background and reasons for success of the US-Soviet INCSEA agreement, and consider the implications for maritime security of this and similar INCSEA agreements in the post-Cold War security environment.

Incidents at Sea - Variations on a Dangerous Theme

There are a variety of types of dangerous or potentially dangerous interactions between ships or between ships and aircraft that may be categorized as "incidents at sea".[3] Perhaps the most common are manoeuvres by ships which create dangers of collisions. These manoeuvres may be intentional violations of the recognized "International Regulations for Preventing Collisions at Sea", for example by a ship manoeuvering without signal or in violation of the right of way provisions of these agreements. Often equally dangerous are manoeuvres in violation of the spirit of these agreements, as when a ship having right of way proceeds to the point of causing a danger of collision. Manoeuvering in front of aircraft carriers or other ships launching aircraft, or manoeuvering in front of ships conducting underway replenishment are particularly dangerous manoeuvres. These manoeuvres in turn have sometimes given rise to dangerous attempts to shoulder or block off the offending ship by the ships whose operations were challenged or disrupted.

Other common incidents have included simulated attacks (by aiming weapons or fire control radar systems) at opposing ships, training searchlights on bridges of opposing ships (thereby blinding the crews at night), firing or dropping flares from aircraft in close proximity to ships, "buzzing" of ships by low overflight by aircraft, and even accidental firing on ships during naval exercises.

The results of the various categories of incidents noted above may vary, but their implications are serious. Perhaps most common is a "close call" where no actual contact or damage between ships or ships and aircraft results. On numerous occasions, however, dangerous manoeuvres have resulted in collisions between ships. These collisions have on sometimes resulted in loss of life and damage to valuable equipment. Simulated attacks and other harassment could, in times of tension or crisis, have resulted in an action-reaction cycle of escalation to hostilities at sea or even a deliberate preemptive attack. Although the US and Soviet navies fortunately avoided such hostilities

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[1] The text of the INCSEA Agreement, formally the "Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents on and over the High Seas" of 25 May 1972, is provided in US Department of State, United States Treaties and other International Agreements, Vol. 23, Part 1, Washington, DC, US GPO, 1973, pp. 1168-80.

[2] The text of the DMA Agreement, formally the "Agreement Between the Government of the Union of Soviet Socialist Republics and the Government of the United States of America on the Prevention of Dangerous Military Activities" of 12 June 1989, is provided in Richard Fieldhouse, (ed.), *Security at Sea: Naval Forces and Arms Control*, Oxford, Oxford University Press/SIPRI, 1990, pp. 278-85.

[3] Hilton, Robert P., Sr., "A Confidence-Building Measure at Work: The 1972 United States-USSR Incidents-at-Sea Agreement", in *Disarmament Topical Papers 4: Naval Confidence-Building Measures*, United Nations, New York, United Nations Department for Disarmament Affairs, 1990, p. 151. Also see Lynn-Jones, Sean M., "Agreements to Prevent Incidents at Sea and Dangerous Military Activities: Potential Applications in the Asia-Pacific Region," Revised version, 12 August 1991, of a paper prepared for the ANU Peace Research Center/ISIS Malaysia Workshop on "Naval Confidence Building Regimes for the Asia-Pacific Region", Kuala Lumpur, Malaysia, 8-10 July 1991, p. 2.

on the high seas during the tense Cold War era, past and recent history offers numerous examples where at least local hostilities resulted from "incidents at sea". "Incidents at sea" with the British Royal Navy were largely responsible for US involvement in the War of 1812, and a century later German submarine attacks helped lead to US involvement in both World Wars. In the Dogger Bank incident of 1904, Russian attacks by mistake on British trawlers nearly precipitated a war.[4] More recently, naval incidents in or over the Golf of Sidra (in 1981, 1986 and 1989) and in the Persian Gulf (1987-1988) led to US clashes with Libyan and Iranian naval forces (as well as the Iraqi EXOCET missile attack "by mistake" on the US frigate Stark in the Persian Gulf in 1987). Disputes over oil exploration activities by ships in disputed territorial seas brought Greece and Turkey to the brink of war in March 1987.[5] Disputed territorial waters and rival claims to islands led to clashes between the navies of Vietnam and China in the Spratley Islands in the South China Sea as recently as March 1988.[6] The possible implications of these historical examples of incidents at sea are mixed. As we shall see below in the case of the US and Soviet navies in the Cold War era, an agreement to avoid incidents at sea greatly reduced the frequency of such incidents and thus contributed to the avoidance of hostilities. However, as other examples above suggest, disputes between nations over territorial waters, and the presence of even neutral naval forces in waters when a conflict is ongoing, are two circumstances that frequently have led to naval hostilities that in origin and extent go beyond simple "incidents at sea".

The 1972 US-USSR Agreement on the Prevention of Incidents at Sea

Historical Background

US-Soviet incidents at sea were relatively limited for the first twenty years after 1945, largely because the Soviet navy did not begin to appear as a global open-ocean challenge to the US Navy until the mid- to late-1960s. In the 1940s and 1950s, the few ship incidents occurred in the Baltic Sea and Sea of Japan - which were also areas where the USSR shot down US reconnaissance aircraft.[7] Perhaps the most dangerous incidents during this period involved US naval forces pressing Soviet submarines to surface during the 1962 Cuban Missile Crisis.

After the Cuban Missile Crisis - and arguably because of the effectiveness of US naval power in that crisis the USSR dedicated its resources to developing an open-ocean navy capable of challenging US naval power on a global basis. By the latter half of the 1960s, Soviet naval forces were permanently deployed in the Mediterranean and routinely trailing US aircraft carriers in action off Vietnam. In 1965 and 1966, official US papers recorded 24 and 33 significant incidents at sea with the Soviets.[8]

The US public and leadership became aware of the increasing US-Soviet tensions at sea when the US destroyer Walker, operating with an anti-submarine task force in the Sea of Japan, collided with a Soviet destroyer on 10 May 1967, and with another Soviet ship the next day. This resulted in two US diplomatic protests to the Soviets, a call by the then-Minority Leader of the US House

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[4] Lynn-Jones, Sean M., "A Quiet Success for Arms Control: Preventing Incidents at Sea", *International Security*, Spring 1985, Vol. 9, No. 4, pp. 163-64.

[5] Karaosmanoglu, Ali, "Turkey and the Southern Flank: Domestic and External Contexts", in Chipman, John, *Nato's Southern Allies: Internal and External Challenges*, New York, Routledge, 1988, pp. 345-46.

[6] Hamzah, B.A., *The Spratlies: What Can Be Done to Enhance Confidence*, Kuala Lumpur, Malaysia, Institute of Strategic and International Studies (ISIS) Malaysia, 1990.

[7] See the account of his 1962 experience in the Baltic by Admiral Elmo Zumwalt in *On Watch*, Quadrangle, New York, 1976, p. 393.

[8] Winkler, David F., *Extracts from Government Documents and Other Sources Concerning Incidents at Sea*, unpublished, undated paper, Fall 1991, pp. 1-2.

of Representatives Gerald Ford for US Navy authorization to fire on intruding Soviet ships, and a statement of concern by President Johnson.[9] During the Arab-Israeli Six-Day War in June 1967, Soviet warships interfered with the operations of the US aircraft carrier America. After the North Korean seizure of the USS Pueblo in January 1968, the US Navy cited Russian ships for a dozen violations of collision regulations in the Sea of Japan, and a Soviet merchant ship and US destroyer collided.[10]

Negotiating the US-Soviet INCSEA Agreement

The increasing frequency, publicity, and seriousness of these US-Soviet incidents at sea throughout 1967 and 1968 led to a formal US proposal to the Soviets on 16 April 1968 for "Safety at Sea" discussions.[11] The Soviets ignored the US proposal for two years. In August 1970, the US protested other Soviet ship actions, and repeated the offer of negotiation. In the Mediterranean during the Jordanian crisis of September 1970, US and Soviet fleets were in further close contact, and the next month a US general and his aircraft were seized when accidentally landing in Armenia. On 10 November 1970, immediately following a collision between the British aircraft carrier Ark Royal and a Soviet destroyer, in which Soviet sailors were killed, a Soviet diplomat in Moscow agreed to the US proposal for bilateral diplomatic meetings on safety at sea. It is likely that both the cumulative effect of the increasingly serious US-Soviet confrontations at sea, and the broader turn in the atmosphere of US-Soviet relations toward detente which was apparent by late 1970 influenced Soviet willingness to address the problem of incidents at sea. Undoubtedly, Soviet naval officers also appreciated the implied recognition of the Soviet Navy as a global naval power, and perhaps the increased standing this provided in the Soviet military bureaucracy.

After intensive interagency preparations in Washington and US consultations with Allies, the formal negotiation of the INCSEA Agreement began with the arrival of a US delegation in Moscow on 12 October 1971. Significantly, the negotiations were led by then Under-Secretary of the Navy John Warner and US naval officers, meeting with their Soviet Navy counterparts and diplomats from both sides. The Soviet Navy proudly hailed the US team as "the highest-ranking military delegation to arrive in Moscow since the Second World War".[12] The US concern in these negotiations centered on elaborating on the Collision Regulations to prevent dangerous manoeuvres by Soviet ships, particularly those that harassed and disrupted aircraft carrier flight operations. To the relief of the US delegation, the Soviets readily agreed to exclude from the agreement any mention of the inherently covert submarines of both sides. The Soviets were particularly concerned about US aircraft overflights for reconnaissance and dropping of sonobuoys in the water, and wanted "fixed distances" for minimum ship-to-ship and aircraft-to-ship approach. The US, desiring to maintain operational commanders' flexibility for close approach for identification and intelligence collection, opposed fixed distances. A second round of talks, hosted by the US Navy in Washington (with side trips to San Francisco and Disneyland) was held during early May 1972. Despite President Nixon's May 8 announcement of the mining of the harbours of the USSR's North Vietnamese ally an announcement watched on television by the Soviet naval delegation in the home of the new US Secretary of the Navy John Warner! - agreement (without fixed distances) was

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[9] Winkler, David F., *The Day the Russians Invaded Disneyland: Negotiating the Incidents at Sea Agreement*", unpublished, undated paper, Fall 1991, p. 2.

[10] Lynn-Jones, "A Quiet Success for Arms Control", p. 168.

[11] Winkler, *The Day the Russians Invaded Disneyland*, p. 2.

[12] *Ibid.*, p. 5. Winkler's account of these negotiations is detailed and newly researched.

initialled on 17 May 1972.[13] The formal signature of the agreement, by Admiral Gorshkov and Secretary Warner, took place on May 25 during President Nixon's Summit in Moscow.

Terms of the US-Soviet INCSEA Agreement

The terms of the US-Soviet INCSEA Agreement (see Figure 1) have two aspects technical and political. The central technical focus of the Agreement supplements the International Collision Regulations ("Rules of the Nautical Road") to restrict dangerous manoeuvres, discourage harassment, and provide specific channels of communication.[14] Two technical aspects of the agreement merit mention in light of subsequent experience. First, submarines are not included in the text of the Agreement, and only are subject to the agreement when operating on the surface like a ship.[15] Second, the Agreement applies to interactions on the "high seas" not in territorial waters. The broader political aspect of the Agreement is embodied in Articles VII and IX, which provide Navy-to-Navy channels to exchange information on incidents and establish annual review sessions that institutionalize Navy-to-Navy contacts.

These basic technical terms of the 1972 INCSEA Agreement have remained but been supplemented over the ensuing two decades. At the first annual review conference in 1973, a protocol was added which included non-military ships of both nations (such as merchant and fishing vessels), requiring them to be notified of the Agreement's safety provisions and prohibiting simulated attacks or hazardous dropping of objects near such ships.[16] The "special signals", in addition to those already in the International Code of Signals, were developed, revised over time, and provided to all ships of both parties as provided in Article VI of the basic Agreement. These signals warn of submerged submarines, flight operations and gunnery/missile exercises, and can signal manoeuvering or other intentions. In 1987, both parties agreed to add a voice radio circuit (VHF Channel 16) as another means of communications. In 1988, dangerous use of lasers was added as a violation of Article III. Agreement was never reached on fixed distance requirements, despite continued consideration of this issue.

The broader political aspect of the Agreement has likewise stood the test of time. Even in the early 1980's, at the height of renewed US-Soviet Cold War, the annual review meetings and Navy-to-Navy contacts continued.[17] Indeed, the INCSEA Agreement proved to be remarkably resistant to the ups and downs of US-Soviet political tensions in the latter decade of the Cold War.

Assessment of the 1972 US-Soviet INCSEA Agreement

As will be seen in more detail in our analysis below of recent incidents, the US-Soviet INCSEA Agreement has been remarkably successful in minimizing incidents between the two navies (for example, there were no ship-to-ship incidents in 1990[18]). This is all the more noteworthy in view

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[13] *Ibid.*, p. 9.

[14] The International Maritime Organization, a specialized United Nations agency, produces the International Regulations for Preventing Collisions at Sea. These Regulations govern maneuvering, signalling, and lighting procedures to ensure safe navigation and avoid collisions. Recent changes are discussed in Cutter, T.J., "More Changes to the Rules of the Road", *US Naval Institute Proceedings*, Vol. 109, No. 6, June 1983, pp. 89-93.

[15] Allen, Thomas B., "Incidents at Sea", *US Naval Institute Proceedings*, Vol. 116, No. 9, September 1990, p. 44.

[16] Protocol to the Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents on and over the High Seas, signed May 25, 1972, in US, Department of State, *United States Treaties and Other International Agreements*, Vol. 24, Part 1, 1973, Washington, US GPO, 1974, pp. 1063-66.

[17] In 1985, US Secretary of Defense Weinberger initially included the Annual INCSEA Review in his cutoff of all US-Soviet military contacts in retaliation for the killing of a US Army Major by Soviet forces in East Germany. But the INCSEA annual meetings were eventually held later in the year, without some of the routine social contact.

[18] Hilton, *op. cit.*, p. 157.

of the fact that the Soviet Navy and US Navy had far more interactions and operations in proximity to one another after 1972 than before.

Figure 1: Summary of Terms of US-Soviet INCSEA Agreement

Article I	Defines ships to mean both warships and naval auxiliaries (such as intelligence collection ships (AGI's), US Coast Guard and Soviet border guard ships), operating on the high seas.
Article II	Reaffirms governing role of international Collision Regulations ("Rules of the Road"), acknowledge freedom in international law to operate on high seas. The Rules of the Road are not to be narrowly used to dangerously disrupt ship activities or formations, and ships are to avoid hindering formation evolutions, and stay clear of ships conducting flight or underway replenishment operations.
Article III	Establishes rules to avoid dangerous manoeuvres when ships of both nations are in close proximity (*e.g.*, during surveillance operations), and requires use of appropriate Rules of the Road and International Code flag, sound, and flashing light signals to indicate intentions and actions, and to signal operations with a submerged submarine. Ships in proximity are to remain well clear to avoid risk of collision, and ships engaged in surveillance are to avoid manoeuvres endangering the ships under surveillance. Ships are not to simulate attacks (by aiming weapons at opposing ships) nor are objects (*e.g.*, sonobuoys, flares) to be launched or dropped hazarding safe navigation, nor are ships bridges to be illuminated by searchlights.
Article IV	Contains provisions similar to Article III for aircraft approaching aircraft or ships of the other party. Simulated attacks are prohibited.
Article V	Requires signals of intent to begin flight operations and display of aircraft navigation lights at night whenever feasible.
Article VI	Requires advance (3 to 5 days) notification of actions (*e.g.*, gunnery or missile exercises) which represent a danger to ships navigation or aircraft. Notification is by established international "Notices to Airmen (NOTAMs)" and "Notices to Mariners (NOTMARs)."
Article VII	Provides direct communications through naval attaches for exchange of information on incidents at sea.
Article VIII	Brought Agreement into effect (for 3 year period, automatically extended unless six-month withdrawal notice provided).
Article IX	Established annual review of agreement implementation.
Article X	Established committee to "consider the practical workability of concrete fixed distances to be observed in encounters between ships, aircraft, and ships and aircrafts".

(This increased proximity was a reflection not only of the Soviet Navy's full maturity as a globally deployed open-ocean navy, but also a result of the increased frequency of US forward operations

closer to Soviet home waters as a reflection of the US forward maritime strategy in the 1980s.) Those US-Soviet incidents at sea that did occur also appear to have caused less diplomatic and public controversy than such incidents as the 1967 Walker collisions, as addressal of these incidents was automatically channelled through the established Navy-to-Navy procedures. A variety of reasons for the general success of the agreement have been suggested.[19] The following characteristics of the US-Soviet INCSEA Agreement are most noteworthy for their implications for other similar agreements:

- *Mutual interest*, in avoiding loss of life and expensive ships, and avoiding escalation, even to hostilities, underpinned US and Soviet Navy agreement.
- *Specific and realistic provisions* in the technical coverage of the Agreement, made it straightforward and simple to implement in both navies.
- The *professional, Navy-to-Navy character* of the agreement gave the navies of both countries a certain proprietary interest in its success and discouraged, even at the height of the Cold War, its political manipulation by either government as a propaganda tool.
- The *bilateral nature of the agreement* helped ensure confidentiality and precluded political posturing to a multilateral audience.

Despite the overall success of the US-Soviet INCSEA Agreement, it would be unrealistic to expect that incidents had disappeared entirely. However, as the survey of recent incidents below will indicate, the major incidents between the US and Soviet navies since 1972 have involved areas beyond the reach of the INCSEA Agreement - operations of submerged submarines, and operations in territorial waters (vice the "high seas"). At the conclusion of this chapter, ways of dealing with these problems will be considered.

The 1972 US-Soviet INCSEA Agreement as Model: The US- Soviet Dangerous Military Activities (DMA) Agreement of 1989 and Other INCSEA Agreements

If imitation is indeed the sincerest form of flattery, the authors of the 1972 US-Soviet INCSEA Agreement should be well pleased. In June 1989, then-US Chairman of the Joint Chiefs of Staff Admiral Crowe and his Soviet counterpart General Moiseyev signed an Agreement on Prevention of Dangerous Military Activities. Patterned on the 1972 INCSEA Agreement, the DMA accord addressed other dangerous military activities, for example intrusions into territory or airspace (such as resulted in the 1983 showdown by the USSR of the South Korean civilian airliner), dangerous use of lasers, activities in areas of high tensions (such as the Persian Gulf), and interference with command/communications networks.[20] Special communications procedures for air, land, and sea were established. Like the INCSEA Agreement, the DMA accord provided for incidents to be addressed by direct military contacts (at Defense Attache level) and through an annual review meeting of a Joint Military Commission. In summary, DMA provided a (more general) all-service agreement at the joint/general staff level.

The 1972 US-Soviet INCSEA Agreement has been more directly emulated by the ten other bilateral INCSEA Agreements reached in recent years since the first new INCSEA accord (between the UK and the USSR) in 1986. Nine of these bilateral agreements involve the USSR with the following countries: UK, Germany (1988), France (1989), Canada (1989), Italy (1989), Spain

[19] See *ibid.*, pp. 162-163 and Lynn-Jones, *Agreement to Prevent Incidents at Sea and Dangerous Military Activities...*, pp. 6-11.
[20] Lynn-Jones, *ibid.*, pp. 17-22.

(1990), Norway (1990), Greece (1991), Netherlands (1991). In late 1991, additional agreements were under negotiation by the USSR with Japan and with Turkey. Although similar to the US-Soviet Agreement of 1972, these agreements were not carbon copies, as reference was made to the new Law of the Sea provisions and various other specific adjustments were made.[21] In November 1990, the first INCSEA Agreement not involving the US and the USSR was concluded between Germany and Poland. This agreement may have been spurred by a 1987 incident in which a West German naval ship observing manoeuvres in the Baltic Sea was hit by shells from a Polish naval ship.[22]

In summary, the US-Soviet INCSEA Agreement of 1972 has provided a useful model for an all-service US-USSR agreement on Dangerous Military Activities and for a variety of other bilateral INCSEA Agreements. The brief general analysis which follows of global incidents at sea since 1972 may suggest the effectiveness and the limits of the INCSEA approach.

General Analysis of Recent Incidents at Sea

Before drawing conclusions on the implications of the INCSEA agreements for security at sea in the post-Cold War environment, a brief analysis of the major US-Soviet and other, third country, incidents at sea since 1972 is instructive. Dr. William J. Durch of the Henry L. Stimson Center recently conducted a detailed analysis of incidents at sea in the 1972-1989 period which provides several interesting insights and contains an excellent Table of selected incidents in Appendix V-A.[23]

US-Soviet Incidents

In analyzing US-Soviet incidents at sea over time, the number of incidents remained low throughout the "Detente" era from 1972 to 1977, increased somewhat (to a peak in the late 1970's) as the Cold War intensified again in the 1978 to 1985 period, then began to drop steadily from 1986 as Gorbachev came to power and the Cold War waned. As noted earlier, it is particularly striking that INCSEA procedures proved effective in minimizing incidents despite the significant increase in US-Soviet naval interactions and in political tension in the early 1980s. By region, the most US-Soviet incidents have occurred in Northern European waters (Baltic and Norwegian Seas, Atlantic Ocean), with significant but lesser incidents centered in the Mediterranean Sea and Pacific Ocean areas.

Several US-Soviet incidents at sea since 1972 are worth noting. First, in the October 1973 Arab-Israeli War - when an all-time Soviet high of nearly 100 ships operated near US naval forces in the Mediterranean - there were various minor incidents but overall surprisingly few serious events. This was particularly fortunate, since any serious incidents at sea with both navies present in force in an area of ongoing conflict might have quickly escalated to unintended US-Soviet conflict. The next major incidents occurred at perhaps the height of US-Soviet Cold War hostility, following the September 1983 Soviet shootdown of the Korean airliner in the Sea of Japan. Soviet ships reportedly harassed US naval ships conducting salvage operations in the Sea of Japan. In November 1983, a Soviet frigate collided with the US destroyer Fife in the Arabian Sea after reportedly disrupting carrier flight operations. In early 1984, a Soviet Victor I nuclear attack submarine

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[21] Winkler, *Extracts from Government Documents...*, p. 46. Although most of these bilateral agreements are very similar to the US-Soviet model, there are some differences. The Soviet-British agreement refers to the area of application as "beyond the territorial seas" instead of high seas, in implicit recognition of other (*e.g.*, 200 mile EEZ) sea areas, established in the 1982 UN Convention on the Law of the Sea. The later agreements with Canada and Norway also include a new paragraph referring to the use of lasers.

[22] "Errant Shells Hit a German Ship", *New York Times*, 16 June 1987, p. A14.

[23] Durch, William J., "Things that Go Bump in the Bight: Assessing Maritime Incidents, 1972-1989", in Blechman, Barry M. (eds), *The US Stake in Naval Arms Control*, Washington, The Henry L. Stimson Center, October 1990, pp. 245-98.

collided with the US aircraft carrier Kitty Hawk in the Sea of Japan. A week later, the Soviet carrier Minsk fired flares at a US frigate, hitting the ship and only narrowly missing the captain. In February 1984, Soviet aircraft fired near a US destroyer in the Black Sea. Again in February 1988, during one of the periodic US exercises of the right of "innocent passage" through Soviet territorial waters in the Black Sea, the US destroyer Caron and cruiser Yorktown were harassed and suffered several collisions with Soviet ships.[24] Several collisions between US and Soviet submarines have occurred since 1972, including several supposedly inside Soviet-claimed territorial waters. In 1986, a US submarine was damaged when it collided in the Strait of Gibraltar with a Soviet submarine.[25]

The most recent incidents (of the post-USSR, post-Cold War era) have again involved submerged submarines not covered under the 1972 INCSEA Agreement. On 11 February 1992 a modern Sierra Class nuclear attack submarine of the Commonwealth of Independent States (CIS) navy collided with the US Los Angeles-class nuclear attack submarine Baton Rouge while surfacing off the Kola Bay in the Barents Sea. The US submarine was at periscope depth, probably monitoring naval activities out of this Soviet naval base. The Russians protested that the US submarine was in Russian territorial waters, but US leaders rejected this, noting that the US and Russia disagree on territorial waters limits (Russia claims an area within a straight baseline drawn across the Kola Bay, beyond the 12-mile limit observed by the US).[26] (A subsequent statement by a Russian Northern Fleet spokesman claimed that such submarine collisions "had been an almost annual occurrence between 1967 and 1986, but that this was the first registered case since then".[27]) US Secretary of State Baker, in Moscow for a meeting with Russian President Boris Yeltsin, broke with past silences on both sides and informed Yeltsin that a US submarine was involved. Most recently, on 26 March 1992, the Commonwealth of Independent States Navy claimed to have chased a foreign submarine from her territorial waters off the strategic Barents Sea port of Murmansk.[28] As Dr. Durch's analysis indicated, submarines have also been involved in many incidents with fishing trawlers and their nets, often in the local waters adjacent to the submarines' home country ports. The UK Royal Navy recently announced a thirty-percent cut in submarine operations in its Clyde area, and a compulsory two-mile distance between fishing boats and submarines, after four deaths in the accidental sinking of a fishing boat in November 1990.[29]

Other Significant Naval Incidents

The most notable non-US-Soviet incidents at sea over the past twenty years have involved various global disputes over territorial waters, and incidents in the Persian Gulf area during the 1980-1988 Iran-Iraq War.

Disputes over territorial waters have occurred between a variety of nations around the globe. Perhaps the longest series of hostile incidents has occurred between the US and Libya over the Gulf of Sidra area. Libya's Colonel Qaddafi has claimed a vast area in the Southern Mediterranean, the Gulf of Sidra, as Libyan territorial waters, while the US, in defense of freedom of the seas, has challenged those claims to avoid their recognition by acquiescence and the setting of an unfavourable precedent. As early as March 1973, and again in September 1980, Libyan fighters shot at (but missed) US reconnaissance aircraft in this area. In August 1981, US Navy fighters shot

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[24] See Lynn-Jones, *Agreements to Prevent Incidents at Sea and Dangerous Military Activities...*, note 58, p. 41.

[25] *Ibid.*, note 49, pp. 39-40.

[26] See "US, Russian Subs Collide in Arctic", *Washington Post*, 19 February 1992, p. 1.

[27] *London Times*, 28 February 1992, p. 10.

[28] *Washington Times*, 27 March 1992, p. A7.

[29] *Jane's Defense Weekly*, 21 March 1992, p. 463.

down two Libyan fighters which appeared to be attacking them. In March 1986, US naval forces conducting "freedom of navigation" operations in the Gulf of Sidra sank two challenging Libyan patrol boats. Again in January 1989, US Navy aircraft shot down two Libyan fighters.[30] Elsewhere, we have already noted how Greek-Turkish disputes over territorial waters and airspace brought both countries to the brink of war due to incidents surrounding the activities of a Turkish oil exploration ship in March 1987. In the South China Sea, territorial disputes exist between many nations over the Spratlies and Paracels Islands groups, which led to hostilities between the navies of Vietnam and the PRC in March 1988. Attacks on, and seizure of, South Korean and Japanese fishing boats by North Korea have been recurrent incidents creating tension in Northeast Asia, as have Soviet seizures of Japanese fishing boats near the disputed "Northern Territories" islands north of Hokkaido. Indeed, fishing boat seizures, in the new Exclusive Economic Zones as well as in territorial waters, have been common global occurrences even between such close allies as the US and Canada. (Indeed, fishing rights disputes led to a series of dangerous collisions of UK naval ships and Icelandic fishing boats during their "Cod War" of the mid-1970s.)

In addition to these disputes over the extent (and exploitation of) territorial and adjacent waters, the other common category of recent major incidents has involved the presence of neutral naval forces in the waters of the Persian Gulf during the 1980-1988 Iran-Iraq War. In May 1987, two Iraqi aircraft-launched Exocet missiles struck, and nearly sank, the US frigate Stark in the Persian Gulf. Later that summer, the US seized an Iranian vessel laying mines in the Gulf. In April 1988, after an Iranian mine severely damaged a US frigate in the international waters of the Gulf, US Navy ships and aircraft destroyed two Iranian oil platforms and sunk or damaged six Iranian naval vessels. In early July 1988, the US Aegis cruiser Vincennes shot down by error an Iranian Airbus civilian airliner crossing the Persian Gulf. As was the case in the North Atlantic during the early World War I and World War II periods, the actions of the combatants in the Persian Gulf during the Iran-Iraq war tended to lead to hostile incidents with affected neutral naval forces not to mention the extensive damage to neutral merchant shipping.

In summary, since 1972 the US-Soviet INCSEA Agreement seems to have been successful in minimizing incidents between the two navies. Perhaps the most serious recent incidents have involved two areas which were intentionally not covered by the INCSEA Agreements disputes over territorial water boundaries and operations of submerged submarines. Other major incidents since 1972 have centered also on disputes over territorial water (and airspace) boundaries, notably between the US and Libya, but also between other neighbouring countries in the Aegean Sea, the South China Sea, East China Sea, and Sea of Japan areas. Finally, maritime areas surrounding ongoing wars (such as the Persian Gulf) remain a source of hostile incidents with neutral shipping and navies.

Conclusions: Minimizing Incidents at Sea in the Post-Cold War World

With the end of the Cold War (and even of the Soviet Union[31]), it is appropriate to consider the broader implications of the 1972 INCSEA Agreement for minimizing incidents at sea in the post-Cold War world. The 1972 US-Soviet INCSEA Agreement has been successful in both technical terms reducing the frequency and severity of incidents and political terms in establishing

[30] Durch, pp. 262-63.

[31] The US is continuing the 1972 US-Soviet INCSEA agreement with the Russian Federation, considered as the legal successor to the former USSR and major home of the Commonwealth of Independent States (CIS) Navy. Unofficial comments by US Naval officers indicate no current plans to broaden the INCSEA agreement to other successor republics of the former USSR, although this may be a future possibility if the CIS, and its Navy, split up.

regular professional Navy-to-Navy meetings which served broader confidence-building and tension reduction goals.

Our earlier analysis makes clear that the INCSEA Agreement was not designed, however, to deal with two other sources of incidents at sea disputed boundaries of territorial waters and airspace, and the operations of submerged submarines. Our analysis has also indicated that incidents at sea on a global (not just US-Soviet) basis frequently arise from two major sources: disputes over the boundaries of territorial (and Exclusive Economic Zones) waters and airspace, and attacks on neutral shipping and navies in maritime areas adjacent to an ongoing conflict (such as the Persian Gulf during the Iran-Iraq conflict in the 1980s). Our conclusions below will consider potential ways to minimize the incidents resulting from these circumstances.

Recent positive developments in bilateral actions to deal with the "gaps" territorial waters disputes and submerged submarine operations - in the 1972 INCSEA Agreement may provide some positive lessons for other nations in the international community dealing with similar problems.

Since 1986, the US and the Soviet Union have engaged in a series of bilateral law of the sea negotiations, conducted by diplomats, with the participation of naval officers. The 1988 incidents, where US naval ships Caron and Yorktown had minor collisions with Soviet ships protesting their "innocent passage" through Black Sea territorial waters, provided a final spur for both countries to act to end years of incidents in this Black Sea region. The law of the Sea discussions resulted in a Joint Statement in September 1989 by Secretary of State Baker and Foreign Minister Shevardnadze, in which the USSR joined the US in acknowledging the right of warships to transit the territorial sea in innocent passage, and the US acknowledged that "innocent passage" challenges in this Black Sea area would no longer be necessary.[32] Bilateral law of the sea negotiations are continuing, with a focus on resolving disputes over the boundaries of territorial waters, straight baselines or historic bay claims in areas such as Kola Bay in the Barents Sea and Peter the Great Bay in the Sea of Japan. The recent February 1992 US-Russian disputes over the location, relative to territorial waters, of the US submarine that collided with the CIS submarine in Kola Bay indicates the importance of ongoing bilateral negotiations between nations having disputes over territorial waters boundaries to resolve these disputes. Keeping such negotiations separate from any agreements on incidents at sea seems to be an appropriate course of action, as disputes over boundaries of territorial seas and airspace and Exclusive Economic Zones involve interpretations of the law of the sea best addressed in an international legal context through diplomatic channels, rather than by the Navy-to-Navy military channels of INCSEA Agreements. The implications for similar disputes in the global context Greek-Turkish disputes in the Aegean, India-Pakistan disputes, conflicting claims of multiple nations in the Spratlies and Paracels Islands of the South China Sea, and North and South Korean disputes is that the international community should strongly encourage bilateral and, where necessary (*e.g.*, South China Sea) multilateral law of the sea negotiations to resolve these disputes that are perhaps the most frequent cause of incidents, and more often involve fishing boats rather than naval ships. Pending the slow resolution of such disputes, disputing nations might do well to adopt provisions similar to those in Articles II and III of the US-Soviet Dangerous Military Activities agreement of 1989 designed to avoid incursions (and to communicate, if they cannot be avoided) into the territory of other nations.

Solving the problem of the involvement of submarines in incidents at sea is more difficult. The inherent stealthy nature of submerged submarines in the "silent service" of all nations precludes the various visual communications possible under the INCSEA Agreement. Although underwater communications on sonar are possible,[33] such actions reveal the locations of transmitting submarines. The governments of the US and its major submarine-capable Allies have long rejected

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[32] Hilton, *op. cit.*, p. 161.

[33] See Hill, Rear Admiral J.R., Royal Navy (Ret.), *Arms Control At Sea*, Annapolis, Naval Institute Press, 1989, pp. 198-99.

as a violation of the concept of freedom of the seas, and as a negation of the unique value of the submarine another radical solution formerly trumpeted by the USSR and some Western arms controllers, of establishing "keep out" areas in international waters which submarines would pledge to avoid. Indeed, even the Soviet Navy, with the largest submarine force in the world, readily agreed with the US Navy to exclude these stealthy vessels (except when on the surface like another ship) from the provisions of the 1972 INCSEA Agreement.

Despite the recent February 1992 reminder that submarines may be a source of incidents at sea even in the post-Cold War world, resolution of this problem is not simple. "Keep out" areas will continue to be rejected by the US and many other nations as a violation of the basic principle of freedom of the seas. Another way of avoiding potential submarine collisions is "waterspace management", where separate areas for different nations' submarine operations are established, and "Submarine Notes" on area submarine presence are exchanged. In the past, such co-operative underwater procedures have been limited to close NATO Allies. At a time now when US Secretary of Defense Cheney is meeting with the Russian Defense Minister in the Co-operation Council at NATO Headquarters and speaking of future joint military exercises with Russian and other former Warsaw Pact opponents, it is conceivable that in the future co-operative submarine procedures could be adopted. But the new security environment has not quite progressed that far yet, and may not do so as long as the monitoring of deploying ballistic missile submarines by the "national technical means" of a covert, forward-deployed submarine is still deemed necessary.

This leaves three possible near-term courses to minimize (primarily US-Soviet, but potentially other nations' submarine incidents). First, nations should be governed by a "general prudential rule" regarding submerged submarine operations in territorial waters whose precise boundaries are disputed (such as the Kola Bay). While separate diplomatic bilateral law of the sea negotiations proceed to reach agreement on disputed boundaries, and given the overall post-Cold War improvement in relations, it might be wise to maintain monitoring submarine operations outside the disputed area of territorial waters. Should a collision occur, the recent notification of the other nation involved by Secretary Cheney should set a precedent for notification of involvement. Second, an even more ambitious near-term step might be to agree, in the INCSEA Agreement context, to require submarines to avoid simulated attacks on ships or submarines of the other party and to require transmission on sonar when a dangerous underwater situation of close proximity is discovered. Rear Admiral Hill, in earlier making similar suggestions, noted that "the intelligence penalties could be considerable" but also questioned whether "the risks are worth it" in continuing traditional covert submarine practices in dangerous situations.[34] Third, to avoid the frequent problems of incidents in which submarines damage fishing trawlers in coastal areas, nations should ensure their submarines minimize submerged operations in their coastal fishing areas.

Having addressed these problems of the existing prototype 1972 US-Soviet INCSEA Agreement, it is appropriate to consider the continuing relevance of similar INCSEA Agreements to the post-Cold War world. Three possibilities, not necessarily exclusive, exist for using the 1972 INCSEA Agreement as a model to reduce future incidents at sea.

First, there are other nations which should consider appropriate bilateral INCSEA agreements modeled on the US-Soviet agreement. Despite the list of recent bilateral INCSEA agreements between NATO nations and the USSR noted earlier, there remain numerous nations around the globe whose relations are unfriendly and whose opportunities for interaction and incidents at sea are frequent. Potential candidates include: Greece-Turkey, Israel-Syria, Iran-Iraq, India-Pakistan, numerous nations bordering the South China Sea (including the PRC), PRC-Russia, Japan-PRC, Japan-Russia, and North and South Korea. Where appropriate, such INCSEA agreements should be

[34] *Ibid.*, p. 199.

paralleled by diplomatic-legal negotiations to resolve law of the sea disputes over territorial and Exclusive Economic Zone boundaries. Additionally, given the fact that incidents of many smaller nations frequently involve fishing vessels vice naval ships, provisions (similar to those in the US-Soviet DMA Agreement) to minimize hostile incidents from intrusions in territorial waters might be included in any INCSEA agreement, and made applicable to fishing and merchant vessels.

A second possibility is to use the proven US-Soviet bilateral INCSEA agreement as a model for appropriate regional agreements. To avoid a messy proliferation of bilateral agreements among the new post-Soviet nations and others in the Baltic Sea and Black Sea, for example, a multilateral INCSEA agreement might be useful. Other areas where proximity and shared interests in avoiding incidents among a variety of nations might be useful include the South China Sea and the Sea of Japan area. Unlike the US-Soviet INCSEA Agreement, agreements in the regions that are relevant would likely have to address incidents in territorial waters (as well as the "high seas"), and include merchant and fishing vessels as well as naval ships and auxiliaries. In short, these agreements would be more in the nature of broad regional "Maritime Safety and Confidence-Building" accords than a narrowly focused accord on naval incidents. The broader regional nature of such agreements may make them more difficult to negotiate, and will in all cases raise difficult questions about the geographic scope of the agreement, as well as the impact on (and involvement of) extra-regional naval and other ships.[35] Nonetheless, the concept of regional "maritime safety" agreements may well be appropriate for at least the specific areas identified above.

A third possibility for building on the 1972 US-Soviet INCSEA Agreement is the suggestion in the 1985 UN Report on the naval arms race that "consideration should be given to making multilateral the existing bilateral agreement between the Soviet Union and the United States".[36] The Swedish Delegation to the United Nations later circulated a draft multinational treaty on incidents at sea, and the Disarmament Advisor to the Swedish Minister of Defense has written in support of such a multilateral regime.[37] Establishing as international norms the INCSEA technical provisions for naval forces on the high seas to avoid dangerous manoeuvres, restrict harassment, and establish communications would probably help to avoid some incidents. However, the political aspects and benefits of the bilateral US-Soviet INCSEA Agreement - the vested interest of two large navies frequently interacting on the high seas, and the regular professional and confidential Navy-to-Navy contacts would not be so apparent in a multilateral agreement. Many countries with very small, coastal navies would be minimally involved, and if regular review of implementation were done in a multilateral context, the temptation to "play to the audience" might increase and result in public polemics. These potential drawbacks of a multilateral INCSEA Agreement have led the United States to oppose such an agreement. The Soviet Union, on the other hand, in June 1990 tabled a proposal at the Vienna CSCE negotiations for a multilateral INCSEA Agreement among CSCE members.[38] In the post-Cold War environment, it is possible that a multilateral proposal to deal with naval incidents on the high seas might be reevaluated as a narrow supplement to existing bilateral INCSEA agreements dealing with naval forces on the high seas. This approach would retain and broaden the technical benefits of the INCSEA measures to discourage dangerous manoeuvres and harassment and encourage communications, while retaining the political benefits

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[35] Ball, Desmond and Bateman, Commodore W.S.G., Royal Australian Navy, "An Australian Perspective on Maritime CSBMs in the Asia-Pacific Region", paper prepared for the ANU Peace Research Center/ISIS Malaysia Workshop on "Naval Confidence Building Regimes for the Asia-Pacific Region", Kuala Lumpur, Malaysia, 8-10 July 1991, pp. 38-39.

[36] United Nations, *The Naval Arms Race*, Report of the Secretary-General, UN Study Series No. 16, UN Document A/40/535, United Nations, New York, 1986, p. 83.

[37] Prawitz, Jan, "A Multilateral Regime for Prevention of Incidents at Sea", in Fieldhouse, Richard, (eds), *Security At Sea: Naval Forces and Arms Control*, Oxford, Oxford University Press/SIPRI, 1990, pp. 220-25.

[38] Despite the support of Sweden and Finland, the "Western 16" countries rejected the Soviet proposal in favour of their current bilateral agreements. Winkler, *Extracts from Government Documents...*, p. 46.

of confidential Navy-to-Navy discussions under existing bilateral INCSEA agreements (or, on request, between two parties to the multilateral agreement).

A final source of incidents at sea has been attacks on neutral naval and merchant ships in waters adjacent to an ongoing conflict, such as the Persian Gulf during the 1980-1988 Iran-Iraq War. Although existing laws of war address many of these situations, the US and the USSR, as a result of the close operations of their forces in the dangerous Persian Gulf area, agreed to a provision in the 1989 Dangerous Military Activities agreement for designating a region as a "Special Caution Area" where special communications would be maintained to avoid potential incidents (such as an attack by a third party resulting in bilateral incidents).[39] Although the increased danger to naval and air forces in a zone of conflict is a natural problem, nations might consider including in any bilateral, regional, or multilateral INCSEA agreements a provision on special "caution area" designation and special communications similar to that in the recent US-Soviet DMA Agreement.

In conclusion, the experience of the 1972 US-Soviet Incidents at Sea Agreement (and the 1989 US-Soviet Dangerous Military Activities Agreement) suggests several supplementary approaches to minimize incidents at sea in the post-Cold War world. Existing and additional bilateral agreements still provide a sound technical and political basis to reduce special bilateral incidents at sea. There may be benefit in certain specific regions to a regional "Safety at Sea" approach which broadens these provisions through a regional agreement addressing also non-naval (fishing and merchant) shipping and including regional territorial waters (as well as the high seas). Additionally, the time-tested provisions of the US-Soviet bilateral INCSEA Agreement requiring naval forces on the high seas to communicate and avoid dangerous manoeuvres and harassment might be incorporated into a multilateral agreement open to all nations. It is significant to note that these bilateral, regional, and multilateral approaches are not necessarily mutually exclusive. Nor can they deal with the problems of inherently covert submerged submarines, law of the sea disputes over boundaries of territorial seas (and Exclusive Economic Zones), and the danger of incidents in waters adjacent to an ongoing conflict. A flexible variety of bilateral and multilateral actions is needed to minimize these latter more difficult causes of incidents at sea. These include continuing appropriate bilateral and multilateral negotiations on agreed interpretations of law of the sea boundaries, prudent caution in forward submerged submarine operations near disputed boundaries (and perhaps provisions for submarine underwater communications in extreme situations of perceived close danger), and agreements for special designation and appropriate communication of ships and aircraft in dangerous zones of ongoing conflict. A proper complementary mix of these suggested actions can help further reduce global incidents at sea in the post-Cold War world.

[39] Lynn-Jones, *Agreements to Prevent Incidents at Sea and Dangerous Military Activities...*, p. 17.

Chapter 4
"Sailor-Made" Confidence-Building Measures

Bakhtiyar Tuzmukhamedov[1]

Abstract

Maritime CBMs are not the invention of the Twentieth Century. Some CBMs, without being called so, were applied as early as prior to the conclusion of the 1817 Rush-Bagot Agreement. Some remain in force, others may serve as an example, or a lesson, for negotiators of today. Europe was the testing ground for modern CBMs. To what extent, if at all, this experience can be used in designing "sailor-made" CBMs?

Introduction (A Definitional Note)

In general terms confidence-building measures (CBMs) may be defined as specific steps, prescribed by treaty or determined otherwise, undertaken for the purpose of generating confidence that the actions of one party do not have the purpose of harming the security of another party.

One official definition of CBMs describes them as "measures designed to enhance mutual knowledge and understanding of military activities, to reduce the possibility of conflict by accident, miscalculation, or the failure of communication, and to increase stability in times of both normal circumstances and crisis."[2] Some definitions stress an adversarial relationship that they are designed to ameliorate. A Congressional Research Service study underscores that CBMs are "steps intended to increase mutual confidence in the benign intentions of a *potential adversary (emphasis added)*."[3]

A more positive attitude may be found in a UN-sponsored Comprehensive Study on Confidence-Building Measures according to which "the goal of confidence-building measures is to contribute to, reduce or, in some instances, even eliminate the causes for mistrust, fear, tensions and hostilities... A second goal is to reinforce confidence where it already exists. Confidence-building should facilitate the process of arms control and disarmament negotiations, including verification; facilitate the settlement of international disputes and conflicts; and facilitate the strengthening of the security of States..."[4]

A brief semantical remark might be worthwhile at this point. The Russian language equivalent for CBMs can be inversely translated into English as "trust-strengthening measures".

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[2] Quoted in: Ronald Lehman II, "Measures to Reduce Tension and Prevent War", in: *National Security Law*, Durham, NC, 1990, p. 642.

[3] "Confidence Building Measures and Force Constraints for Stabilizing East-West Military Relations in Europe", *Congressional Research Service Report for Congress*, Washington DC, 1988, p. 14.

[4] "Comprehensive Study on Confidence-Building Measures", *UN Disarmament Study Series 7*, New York, 1982, p. 6.

The discrepancy in the use of terms is obvious, as well as it is symbolic. Initially, CBMs were designed as a substitute for trust, which was a rare commodity in bi-polar, two-block relationships. The confidence-building effect of those CBMs consisted not only of acquiring substantive evidence of absence of aggressive intentions, but also of making sure of one's ability to effectively prevent those intentions from transforming into practical steps.

Trust, rather, is a characteristic of more developed relations between nations than the ones that require adoption of special measures to prove absence of malice in the behaviour which otherwise is likely to be interpreted as containing evil intent. Such special measures, while establishing or enhancing confidence in the proper protection of one's interests, are motivated by the perception of an existing or potential threat to those interests. On the contrary, trust is based upon mutual presumption of innocence. CBMs, administered properly and under favourable conditions, may lead to trust and eventually grow into trust-building measures.

CBMs: A General Appraisal

Although confidence, or trust for that matter, is a component of many factors, CBMs which have been adopted and which are being formulated pertain primarily to the military domain. While they may contain certain elements of arms control, they do not amount to disarmament measures, nor do they assume the functions of the latter; however, adopted separately or as attendant measures, they create favourable conditions for initiation of negotiations or promote progress and co-operation at talks already under way.

A review of these measures reveals trends both toward a broadening of the aggregate of measures and of the scope of covered military activities, and also, as applied to Europe, toward an increase in the binding force of measures on which agreement has been reached. This latter trend is manifested in the fact that, while measures prescribed by the CSCE Final Act of 1975 were carried out on a voluntary basis, measures specified by the Stockholm Document of 1986, enhanced and further elaborated by the Vienna Documents of 1990 and 1992 are politically binding.

CBMs, which originally were confined to improving communications between parties (as under agreements on establishing direct communication links) and ensuring safety of navigation (a group of agreements on preventing incidents on the high seas), eventually began to include notifications and other information on military activities (with an increase in the period of submitting notifications and scope of submitted information), exchange of observers and inspections at the sites of military activities. Agencies established pursuant to arms control and disarmament treaties began to be assigned confidence-building functions. While CBMs agreed upon in the 1960s-1970s were for the most part aimed at reducing the danger of nuclear conflict, subsequent measures were intended to reduce the risk of conventional conflict. Since the adoption of the Stockholm and both of Vienna Documents, CBMs have been transformed from military-technical measures limited to the provision of information on absence of preparations for a surprise attack into comprehensive measures characterized by a degree of confidence and trust which enables the negotiating partners to formulate and apply not only notificational but also restraining measures.

CBMs by Category

Apart from broad in scope and multilateral CBMs prescribed by CSCE documents, some specific CBMs are also envisioned in bilateral agreements; certain CBMs appear as attendant measures in arms control and disarmament treaties. These CBMs can conditionally be subdivided into several

types. The categories offered below coincide in some respects with, and differ in others from, other similar schemes.[5]

Measures to Ensure Predictability in the Conduct of Certain Types of Military Activities

The 1971 Soviet-US Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War, among other notifications, prescribes advance notification of planned missile launches if such launches were to extend beyond national territory of one party and in the direction of the other party. However, the submarine-launched ballistic missiles (SLBMs) were not addressed by the Agreement. The obligations under the 1971 Agreement were made more specific in the 1988 Soviet-US Agreement on Notification of Launches of Intercontinental Ballistic Missiles and Submarine-Launched Ballistic Missiles, by introducing the requirement that the area of missile launch and the area of impact be indicated, by broadening the overall parameters of notification, and the provisions were extended to cover all strategic ballistic missile launches, that is, including SLBMs.

The 1972 Soviet-US Agreement on Prevention of Incidents on and over the High Seas (as amended by the 1973 Protocol), as well as similar agreements between the former USSR, on the one hand, and most of NATO countries, on the other, prescribe measures aimed at reducing the possibility of occurrence of hazardous or dangerous situations when warships and military aircraft are operating in proximity to one another. In particular, the parties pledge to observe the International Regulations for Preventing Collisions at Sea; warships are prohibited from simulating attacks by aiming their weapons in the direction of another nation's warships and non-military ships, and aircraft are prohibited from simulating attacks, executing aerobatic maneuvers above warships and civilian ships, and dropping objects near such vessels in such a manner as to be hazardous to ships or to constitute a hazard to navigation.

The 1989 Soviet-US Agreement on Prevention of Dangerous Military Activities, which "in effect, ... supplements the 1972 agreement",[6] regulates activities of the armed forces of a party in proximity to the armed forces of the other if undertaken near the national territory of the latter. It also regulates the use of lasers, as well as interference with command and control networks, and provides for the establishment of "special caution areas" within which each party's armed forces are to establish and maintain communications with the other down to and including the level of a warship, an aircraft, a ground unit, in order to prevent the occurrence of any dangerous military activities.

Communications Links and Consultation Mechanisms

The 1963 Soviet-US Memorandum of Understanding Regarding the Establishment of a Direct Communications Link (as amended by the agreements of 1971 and 1984) called for the establishment of a continuously functioning communications link for use in emergency situations, in particular, as specified in the 1971 Soviet-US Agreement on Measures to reduce the Risk of Outbreak of Nuclear War, for urgent transmissions when there is a danger of use of nuclear

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[5] See, for example, James Macintosh, "Extending the Confidence-Building Approach to the Maritime Context", in: *Naval Confidence-Building Measures. Disarmament Topical Papers 4*, New York, 1990, p. 184; Sverre Lodgaard, "A Critical Appraisal of CSBMs by Category", in: *Confidence and Security-Building Measures: From Europe to Other Regions. Disarmament Topical Papers 7*, New York, 1991, p. 21-26.

[6] John McNeill, "Measures for Strengthening Mutual Guarantees of Non-Aggression Among States", in: *International Law and International Security. Military and Political Dimensions. A US-Soviet Dialogue*, Armonk, NY, London, 1991, p. 302.

weapons. Later similar links were established between other countries. In 1987 a Soviet-US Agreement on the Establishment of Nuclear Risk Reduction Centers was signed, with two protocols, providing for the establishment of such national centers in the capitals of both countries, connected by FAX links. Notifications of ballistic missile launches covered by the 1988 Agreement, and notifications prescribed by the INF Treaty are communicated via these centers. The list of notifications may be altered, or parties may transmit other messages at their own discretion as a display of good will and with a view of building confidence.

Some agreements have established consultation mechanisms fostering confidence-building between the parties. These, in particular, include a Joint Military Commission established to consider matters pertaining to the Agreement on Prevention of Dangerous Military Activities, as well as annual consultations and regular communications via naval attaches pursuant to the agreements on prevention of incidents. The Conflict Prevention Center established in accordance with the 1990 Charter of Paris promotes confidence and security-building measures by combining the functions of collection and dissemination of information on the military activities of states, helping to increase the transparency of such activities, and clarifying unclear and disputable situations.

Attendant Measures

These measures might include various measures fostering the fulfilment of obligations under disarmament agreements and facilitating verification of compliance. These, for example, would include such measures as data exchange under arms control and disarmament treaties, as well as obligations, prescribed by a number of agreements, not to impede national technical means of verification and not to use deliberate concealment measures impeding verification by such means.

Openness and "Glasnost" in Military Matters

Unlike formal and binding treaty-specific attendant measures, these are carried by states on a unilateral basis, in particular in conformity with domestic laws. Such measures could include open parliamentary discussion and resolution of matters pertaining to military doctrine, military budget, armed forces manpower acquisition and equipment, employment of military forces beyond national boundaries, arms transfers abroad, etc, as well as voluntary invitation of foreign observers to military installations and activities, and public disclosure of information on military matters, such as turning it over to the United Nations.[7]

Military Contacts

CBMs of this type have recently developed into a separate group, which is connected with a general improvement in international relations, plus positive experience of European CBMs. They consist in development of personal relations between military personnel of all ranks, which constitutes a substantial supplement to military-technical CBMs. They may include official port calls by warships, mutual visits of military units, military educational institutions, *e.a.*

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[7] For example, the UN General Assembly Resolution 46/36 requests the Secretary-General "to establish and maintain at United Nations Headquarters in New York a universal and non-discriminatory Register of Conventional Arms, to include data on international arms transfers as well as information provided by Member States on military holdings, procurement through national production and relevant policies".

Lessons from the Past

Browsing through an historic experience, one may come across numerous exercises in general, as well as in dedicated maritime confidence-building. Let's look at some of them, not attempting to make a comprehensive analysis, but rather an exemplary and, where appropriate, comparative review.[8]

To begin with, a glove removed before a hand-shake, or an open hand raised in a military salute can be traced back to their origins as symbols of peaceful intentions. Likewise, surprise-denial CBMs have evolved from rituals of medieval tournaments and rules of "battle behaviour". Those rules were later embodied in Art.1 of the 1907 Hague Convention No. III Relative to the Opening of Hostilities, which said that "the contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war."

A text-book example of a naval arms control treaty with attendant CBMs is the 1817 US-British Rush-Bagot Agreement[9] "which is still in force but truly obsolete in a political sense".[10]

Pressed by budgetary constraints one of the reasons for unilateral naval limitations of today, the former rivals in the war of 1812 decided to limit their warships on the Great Lakes. The US Congress in February 1815 authorized the President to sell or haul out each unit of the Lake fleet not necessary for enforcing the revenue laws, which he promptly did. Nine months later President Madison instructed Adams (then minister to Great Britain) to point out that if each side began competitive ship-building on the Lakes, "vast expense will be incurred and the danger of collision augmented in like degree." He therefore authorized Adams to propose a limitation of naval forces on the lakes, to "demonstrate their (United States) pacific policy."[11]

The confidence-building intentions of the parties were augmented by an exchange in August 1816 of lists of naval inventories done prior to the conclusion of an accord[12] - similar to what the negotiators of the SALT-2, INF, CFE and START treaties did later. A rough analogy of inventory notifications may be found in later treaties. For example, the 1902 *Pactos de Mayo* between Argentine and Chile provided, along with naval disarmament measures, for a ban on unnotified naval procurement. Similarly, the 1930 and 1931 Naval Protocols signed, respectively, by Greece and Turkey, and by Turkey and the USSR, envisaged the exchange of information on prospective changes in naval inventories. Or, Parties to the 1922 Washington Treaty Limiting Naval Armament had to make notifications of replacement naval construction. The 1930 London Treaty on Limitation and Reduction of Naval Armament developed even further inventory-oriented, as well as information exchange provisions of the Washington Treaty.

Another CBM-related act, though not provided for in the Rush-Bagot Agreement, and even related to a clear violation, was the notification of the US by the other Party of the introduction of two British gunships into the Lakes in late 1830s. The notification included the purpose and specified the temporary nature of ship deployment.[13] Was this a surrogate of trust similar to the one displayed in late 1980s when a Soviet auxiliary ship could not find a torpedo launched by a Soviet frigate during exercise, and it was unexpectedly hoisted aboard a German ship? Although

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[8] For a detailed discussion of pre-World War II naval arms control see: V. Romanov, *Against the Arms Race and Confrontations on the Sea* (in Russian), Moscow, 1989, p. 11-54.

[9] For a in-depth appraisal of the Rush-Bagot Agreement see: Barry O'Neill, "Rush-Bagot and the Upkeep of Arms Treaties", *Arms Control Today*, September 1991, p. 20-23.

[10] Jan Prawitz, "Naval Arms Control: History and Observations", in: *Security at Sea. Naval Forces and Arms Control*, New York, 1990, p. 44.

[11] *The Oxford History of the American People*, Vol. 2, New York, 1972, p. 140.

[12] O'Neill, *op. cit.*, p. 20.

[13] *Id.*

the Incidents at Sea Agreement between the two countries does not provide for the return of recovered property, they promptly activated the naval attaches' communication link and managed to settle the problem almost in a matter of hours.

Like the Rush-Bagot Agreement, most treaties of older times relative to naval matters were concluded in the aftermath of wars. Unlike it, they were coercive and as such short-lived. One notable exception perhaps is the 1828 Russian-Persian Peace Treaty of Turkmanchi, which reaffirmed and amended certain provisions of an earlier accord the 1813 Russian-Persian Peace Treaty of Ghulistan. The exclusive privilege of Russia to have the navy in the Caspian Sea is still effective,[14] with its validity unclear following the break-up of the Soviet Union and the division of the Caspian Naval Flotilla between adjacent former Soviet republics.

The 1856 Paris Treaty and the Russian-Turkish Convention concluded in conformity with Art. XIV of the Treaty stopped short of total naval disarmament of Russia which was a loser in the Crimean War. By late 1860s, however, Russia recovered to an extent when she not only found it appropriate to raise her voice against unfair obligations, but had reasons to believe that her voice would be listened to. In 1870 Foreign Minister A. Gorchakov instructed Russian ambassadors at the royal courts of parties to the Paris Treaty to explain the reasons why the country did not consider itself to be bound by several provisions of the Treaty. Among other reasons was what Russia considered an abuse of its trust by Turkey which violated the neutral status of the Black Sea by fortifying its own shores and augmenting the navy, as well as by letting foreign warships to sail into the Sea, thus diminishing Russia's confidence in the security of its maritime borders.

As a result, the 1871 London Treaty abrogated some major provisions of the 1856 Paris Treaty. One of formal reasons, though certainly not a major one, to put it in modern terms, was that attendant CBMs to a disarmament/neutralization treaty did not work properly. As opposed to those yesteryear arrangements for a post-war settlement, in modern times the UK and Argentine seem to be trying to find a more lasting solution to the Falkland Islands/Islas Malvinas conflict. One notable recent step is their 1991 Joint Statement which contains a whole set of CBMs, including not only direct communication links and notifications, but also joint search and rescue at sea and measures to enhance safety of navigation.

Nonetheless, certain measures taken in 1856 eventually led to more stable accords with maritime arms control and confidence-building effect. The status of the Turkish/Black Sea Straits, first regulated by the Paris Treaty and related documents, was finalized by the 1936 Montreux Convention, drastically limiting naval activities of extra-regional states in the Black Sea, and providing for notification of Turkey of the passage of warships through the Straits. Worth noting is that another document concluded at the Paris Congress of 1856 was the Convention on the Aaland Islands, the first one in a series of agreements that established and confirmed the still effective neutral and demilitarized status of the Islands. The 1856 Convention was succeeded in 1921 by the Convention Relating to the Non-Fortification and Neutralization of the Aaland Islands concluded under the auspices of the League of Nations. Another treaty pertaining to the neutralization and demilitarization of that territory is the 1940 Agreement between the USSR and Finland on the Aaland Islands.

Limited Scope

Of the CBMs now applied, both modern and old, only few incidents prevention, notifications under the Montreux Convention, maybe some others, are dedicated maritime measures, embodied in formal agreements. The Dangerous Activities Agreement has broader application, as do

[14] See Romanov, *op. cit.*, p. 17.

communication links and consultation mechanisms. Some others, like attendant measures under the START Treaty, apply to maritime domain simply because the Treaty covers sea-based strategic assets.

The maritime application of CSCE CBMs is limited by the Madrid mandate which specified that "as far as the *adjoining sea area* and air space is concerned, the measures will be applicable to the military activities of all the participating States taking place there whenever these activities affect security in Europe *as well as constitute a part of activities* taking place within the whole of Europe" (emphasis added). Although under that same mandate "the notion of the adjoining sea area is understood to refer also to ocean areas adjoining Europe", it cannot be interpreted so as to justify an automatic extension of CSCE CBMs to naval activities which do not "constitute a part", an integral part that is, of activities on land. J. Prawitz pointed out that "this formula would not require notification of independent naval activities, that do not involve amphibious landings and other land-related operations, however large they are or however close to European land areas they operate."[15]

In a broader perspective, some major arms control and disarmament treaties contain certain measures with respect to maritime domain. For example, the 1959 Treaty on Antarctica, while implicitly permitting navigation of navies within the area of application, bans naval maneuvers and weapon tests there. Or, the 1971 Seabed Treaty bans deployment of nuclear weapons or other weapons of mass destruction on the seabed and subsoil beyond the twelve-mile limit. Some provisions of the 1967 Tlatelolco Treaty and of the 1985 Rarotonga Treaty extend to ocean areas, thus affecting naval activities.

But again, these measures are not of major significance and have only marginal application as regards naval activities.

CBMs "Sailormade"

While considering confidence-building for the maritime domain one can agree with J. Macintosh writing that "the confidence-building concept was developed and refined in a particular context Europe of 1970-1986 to deal with a particular problem (tank-heavy conventional force balance asymmetries) that may be intimately connected with its basic nature. This origin may colour the confidence-building concept and make it imperfectly suited to dealing with naval issues."[16] In fact, many naval CBM proposals have been plagued with exactly such attitude. To quote J. Prawitz, "naval arms control is frequently discussed as an extension of land provisions into sea areas. But that implies a land-lubber view of the matter. The starting point should rather be to design naval arms control measures tailormade to the maritime conditions, *i.e.* 'sailormade'."[17]

From that point of view Vienna talks under the Madrid mandate do not seem to be perfectly suited for a meaningful and "sailormade" discussion of naval CBMs, let alone naval arms control and disarmament. At the next stage of talks there will be no two confronting alliances (one of which is defunct anyway), and there will be a merger of the two negotiating fora (confidence and security measures, and disarmament), which may be a complicating factor. On the one hand, the block-structured talks brought more order and discipline into negotiations. On the other, two separate sets of talks gave a chance to the proponents of naval limitations to trade for some maritime CBMs, however modest, while opponents to cuts or even meager regulation of naval inventories could avoid them.

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[15] Jan Prawitz, "Naval Arms Control: Position of Sweden", introduction at the conference on "Naval Arms Control - Possibilities, Problems, Prospects", Stockholm, 11-12 December 1989, p. 11.

[16] Macintosh, *op. cit.*, p. 180.

[17] Jan Prawitz, "Security and Arms Control at Sea", *UNIDIR Newsletter*, 1991, No. 3, p. 3.

Another complicating factor is that with the break-up of the Soviet Union and admission of former Soviet republics into the CSCE (in certain cases not undisputable) the area of application tends to become diluted. Though the very fact of their admission does not mean the automatic expansion of the area of application, it may become an argument in favour of such expansion.

Thus, with a strong motivation to change the mandate, it is likely that future talks would remain land-oriented, extending beyond the Urals further into the Eurasian landmass. Proceeding from statements by J. Macintosh and J. Prawitz quoted above one may conclude that while certain land CBMs may be imported into the maritime domain, with others, like certain notifications, already having naval application by analogy, still navies and oceans are essentially different from, respectively, ground forces and territories. Though some ideas could probably be borrowed from land CBM experience. These may include exchanges of information on deployment, prior notification of exercises above certain size with limitations in certain geographic areas, dialogue on naval doctrines and policies, clarifying goals and concepts of parties, various naval exchanges (*e.g.* official visits and port calls by ships, exchanges of naval delegations, including midshipmen etc.)

Still, besides obvious military-technical and politico-strategic peculiarities of navies, they are operating in a different legal environment, based on well-established norms of the Law of the Sea, which unlike a patch-work of national legislations on land, are more or less standard in their substance and mode of application beyond outer limits of the territorial sea. Even within those limits, despite differences in laws of coastal states, the right of innocent passage is a universal rule with confidence-building effect.[18]

Conclusion: Where to Begin

It would seem that an increase in the number of bilateral agreements on preventing incidents on the high seas standard agreements in their basic provisions but differing in details connected with strength and composition of naval forces, region of their probable interaction, and other factors is at the present time a fairly promising direction to take in this area. Subsequently they could be integrated into system by linking the channels of communication they have established and occasionally making multilateral the regular consultations by the parties which are conducted under those agreements. Presumably in the future it would be possible on this basis to establish an independent naval structure similar to the European Conflict Prevention Center with a broader scope of activities than just incident prevention.

To enhance the confidence-building effect of incidents prevention agreements one could recommend a number of modest but feasible steps. For example, when warships flying the flags of parties to such agreements are sailing in immediate proximity to one another, training exercises may be conducted for the purpose of practising rules and procedures of incidents prevention. The first arrangement of that kind has been carried out by the former USSR and France off Marseilles in June 1990. In early 1992 a more elaborate, though not pre-planned exercise took place in the Mediterranean which involved two ASW cruisers and ship-based helicopters of the Commonwealth of Independent States, and a US frigate, a helicopter and a P3 "Orion" aircraft. In the future it would make sense to do the same thing on a multilateral basis.

It could also make sense to extend incident-prevention measures to cover submarines and to draft special measures to apply to nuclear-powered surface combatants and other vessels, as well as to oil-drilling platforms.

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[18] Under the 1982 UN Convention on the Law of the Sea, the right of innocent passage includes, along with such general obligations as a ban in Art. 19 2(a) on "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State", specific CBMs that require submarines to "navigate on the surface and to show their flag" (Art. 20).

Other measures may include bi-lateral and multilateral in-class and open air exercises to train ship commanders in practising "rules of the road", and joint efforts by naval and civilian legal experts to draw up commentaries to those agreements, with a uniform interpretation of provisions contained therein.

Such steps through greater familiarity and enhanced confidence and trust[19] may lay ground for further co-operative, and in fact, co-operational CBMs in such areas as joint search and rescue, ecological disaster relief, or international law-enforcement.

Speaking in general terms it would seem that the ocean space is convenient for application of uniform and universal CBMs. Ideally, such CBMs need not be region-specific with the exception of demilitarized/neutralized zones where naval activity is already regulated either directly or by implication (*i.e.* Antarctic waters), or other areas with treaty-specific regimes (*i.e.* the Turkish/Black Sea Straits).

It would also seem that naval CBMs should rather be global than tied to a specific region. But even if applied on a regional level, they should conform to similar measures in other regions. And they should be maritime regional, not land-adjoining measures.

There is still another lesson to be learned from the past. In rejecting Tsar Alexander I's proposal for reductions in military forces in 1816, Lord Castlereagh offered instead that each government should "explain to allied and neighbouring States the extent and nature of its arrangements as a means of dispelling alarm and of rendering moderate establishments mutually convenient."[20] Which makes the concept of "CBMs as a substitute for disarmament" almost nine score years old. This is one lesson that should not be repeated while elaborating CBMs for maritime security.

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[19] A pessimistic (or sobering?) quotation might be worthwhile: "The exchange of information or the interaction of decision-makers may eliminate groundless fears and encourage cooperation... Again, however, communications can enhance fears, just as it can reduce them... Measures preventing an unobserved military build-up or undetected access to strategic areas fall into (surprise-denial) category. Again, however, if such measures permit the aggressor to plan his attack and target his forces more effectively or if they deny the defender timely mobilization and key defensive terrain, then the CBMs could contribute to instability. ... The fundamental question remains, "Is conflict more or less likely as nations come to understand each other?" ... The very members of the diplomatic, military and intelligence communities responsible for the planning and conduct of war frequently have the most contact with, and best understanding of, their potential foe." Lehman, *op. cit.*, p. 643, 645.

[20] Quoted in: Lehman, *op. cit.*, p. 648.

Chapter 5
Possible New Restrictions on the Use of Naval Mines

Georgy Dimitrov[1]

Abstract

Naval mines have proved to be a powerful and effective means of warfare at sea. The only international instrument in force dealing specifically with them is the Convention (VIII) relative to the laying of automatic submarine contact mines, signed at the Hague in 1907 By failing to accommodate later technical developments and to distinguish between mine-laying in territorial waters and mine-laying in the high seas, the Hague Convention, as it turned out, could not provide unequivocal answers to fundamental problems which occurred later in the practice. Modernization of the legal regime governing the us of naval mines is therefore a long overdue. Any new regulations which would attempt to widen the scope of restrictions of the 1907 Convention in order to cover modern mines should first of all incorporate the concepts of construction standards and recording and notification of danger zones. It should be prohibited to use naval mines without having the means to locate and neutralize them. The immunity of vessels which are not involved in hostilities must be proclaimed and guaranteed through various measures. In addition to the precautionary measures needed to avoid civilian casualties during the hostilities, the combatants should be bound to remove or render safe their mines at the close of hostilities. Issues which have received little or no attention in the 1907 Convention, like the protection of the environment, the use of mines in ports and international straits, liability and others, must be also addressed in a future legal instrument. Peace-time international co-operation could be set up on various matters related to mines. The possibility of creating, within the United Nations, joint naval forces, including mine-clearing units to ensure the safety of peaceful shipping in crisis areas, deserves to be seriously examined.

Introduction

In addition to arms control and confidence-building, the international community has developed through the years another approach to security, designed to diminish the evils of war should the efforts to preserve peace and prevent armed conflicts fail, and events bring about an appeal to arms. A system of treaty norms of international law regulating the behaviour of states and their officials in the event of an armed conflict was established at the end of the 19th beginning of the 20th century and developed in the 1930s and, especially, after World War II.[2] This set of rules includes also some sea-warfare regulations. One of the conventions adopted at the 1907 Hague Peace Conference relates specifically to the use of naval mines.

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[1] The views contained in this paper are those of the author and do not necessarily reflect official Bulgarian policy.

[2] Sometimes a distinction is made between the "law of war" (or the Law of the Hague) which encompasses the Hague Conventions of 1899 and 1907 and some other related instruments governing the conduct of hostilities, and the "humanitarian law" (the Law of Geneva) on the protection of the victims of armed conflicts, consisting primarily of the Geneva Conventions of 1949 with the Additional Protocols of 1977. In practice, a clear distinction between the two cannot be maintained. They cannot be dissociated in time of war, and have to be necessarily considered by belligerents as a single whole. "International humanitarian law" is the term usually used to encompass both fields of law. (See: Sydney D. Bailey, *Prohibitions and Restraints in War*, London, 1972, pp. 62, 75).

There are many flaws in the existing humanitarian law itself. It is out of date in many respects. Technological developments in the last decades have put a new dimension to the whole problem of war and have added tremendously to the legal difficulties in this field. Therefore, enrichment and modernization of this body of international law is required with respect both to the general rules applicable to all armed conflicts, and the rules governing the conduct of hostilities in specific areas or the use of specific weapons, including naval mines.

Modernization of the laws of sea warfare is part of the of the discussion on naval matters conducted lately within the United Nations. One of the important topics in this sphere relates to naval mines, including the possibility of updating the Hague Convention VIII of 1907. A number of ideas and proposals on possible new restrictions on their use were put forward in the course of the discussion.[3]

Mines as a Means of Warfare at Sea

Historical Experience

Naval mines have proved to be a powerful and effective means of warfare at sea designed to damage and sink warships and other vessels, as well as to block their activities by denying the use of certain areas of the seas and oceans and internal waterways. Naval mines have been used in wars since the middle of the 19th century. Their extensive use in the Russo-Japanese war of 1904-1905 brought for the first time the attention of the international community to the need for placing some restrictions on them. Nearly 309,000 mines were emplaced in the seas in the First World War. During the Second World War naval mines were used on an even larger scale, both with respect to the sea-areas involved and the quantity of mines emplaced (over 650,000). More than 500 German, 520 British and American and 107 Japanese warships sank as a result. More recently, naval mines were also used in local wars and conflicts Korea, Vietnam, the Middle East, the Falklands, the Persian Gulf, etc.[4]

Definition an Types of Mines

"Naval mine" could be generally defined as an explosive device laid in the water, on the sea-bed or in the subsoil thereof and designed to be detonated or exploded by the presence, proximity or contact of a ship or another vessel.[5]

There are many types of mines but their design is principally the same. The mine consists of a body, a charge of explosive material, a fuze, special devices (timer, counter, sensors, self-neutralizing or self-destruct mechanism, etc.), a power source, a burying or a propelling mechanism. The method used to detonate the mines establishes them as contact- or influence mines. The way their position is sustained in water defines them as anchored, bottom or drifting mines.

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[3] See: "Study on the Naval Arms Race". Report of the Secretary General. Doc. A/40/535; United Nations Disarmament Commission. Naval Armaments and Disarmament. Chairman's Paper on Agenda Item 8 (Doc. A/CN.10/102 of 22 May 1987 and A/CN.10/113 of 19 May 1988). Working paper submitted by Sweden (Doc. A/CN.1/101/Rev.1 of 3 May 1988. A/CN.10/129 of 16 May 1989. A/CN.10/141 of 8 May 1990); 15th Special Session of the UNGA. Naval Armaments and Disarmament. Working paper submitted by Finland. Indonesia and Sweden (Doc. A/S-15/AC.1/13 of 10 June 1988); 46th Session of the UNGA. Note verbal of Sweden (Doc. A/C.1/46/15 of 6 November 1991).

[4] See: *Voennaya Misl*. No 1. 1986. pp. 26-9; *Zarubejnoe Voennoe Obozrenie*. No 9. 1990. pp. 47-8.

[5] The VIII Hague Convention of 1907. which is the only international instrument in force dealing specifically with naval mines. does not contain any definition. The definition proposed in this paper is based on Protocol II to the 1981 Convention prohibiting or restricting certain conventional weapons deemed to be extremely injurious or to have indiscriminate effects (See: *Status of Multilateral Arms Regulation and Disarmament Agreements*. United Nations. New York. 1988. p. 157). For the purposes of a concrete agreement however. more precision might be found necessary to reflect the specific characteristics of naval mines (See in this context the proposals of Sweden contained in UN Doc. A/CN.10/129. A/CN.10/141 and A/C.1/46/15).

Mines can be mobile or stationary, remotely controlled or uncontrolled. Mines may be laid by surface vessels, submarines or aircraft.

Most of the naval mines possessed by states today are of the influence type. They are activated by one or several physical effects (acoustic, magnetic, hydrodynamic, etc.) caused by the passage of the target at a given distance from the mine. The UK bottom influence mines of the type "Stonefish", for instance, are activated by acoustic, magnetic or pressure influences (or a combination thereof) and are capable of hitting targets under water, as well as on the surface. Their modular construction allows the use of the mine sub-systems in different modes. The USA and Britain are jointly developing an antisubmarine advanced sea mine (ASM) which will have the capability to power itself around the seabed and be able to pick off a passing submarine more than 1000 yards away, possibly using multiple warheads for a shotgun effect. Sweden has developed an innovative bottom mine "ROCAN" capable, due to its specific hydrodynamic form, to "swim away" at a distance twice as big as the sea-depth at the point it has been dropped. Modern trends in this area point to a co-development of naval mines and torpedoes. For example, one of the most sophisticated US mines is the MK60 "CAPTOR" which contains a MK46 torpedo and a sonar detection system covering an area much wider than the traditional contact or influence mines. Another torpedo-type self-propelled mine is the MK67 SLMM (submarine-launched mobile mine). Denmark has developed a mine similar to the US CAPTOR which consists of a container with a small torpedo, a mooring device and a system for detection and identification of the targets reacting to changes in the acoustic and magnetic fields.[6]

Role of Mines in Naval Operations

Mines as a means of warfare at sea have a particularly important feature they can affect the enemy's activities for a long period of time by creating a permanent danger for shipping in certain sea areas. By blocking a zone with the help of mines naval forces can be released for the performance of other duties. This can radically change the situation at the theater of military activities to the advantage of the side having used mines. Mines are an "universal" weapon not only can they hit military targets, but adversely affect also the economy of a state. The massive use of mines can significantly hinder or stop completely sea and ocean transports for a long time and paralyze industrial activities at sea. Mines can be an instrument of military pressure mining the sea-routes and the entrances to a naval base or a port for a given period of time would demonstrate to the enemy the effect of a possible blockade. Mines can be used in a "flexible" manner their emplacement can be openly announced looking for the psychological effect on the enemy, or carried out covertly in order to take him by surprise and inflict the maximum damage on his forces. Mines can be used both for offensive and defensive purposes. They would allow in time of war to close easily the main shipping lanes through geographic "choke points" (straits, bays, enclosed seas, etc.) in order to gain control over vast ocean areas.[7] On the other hand, for countries which lack the means to build large surface fleets, the use of mines in combination with other systems (aircraft, coastal artillery) could be very effective for coastal defence. Due to the multiple functions they can perform, mines hold an important place in the overall naval strategy of states as well as in their operative plans for the different naval theaters of war.[8] This is the reason why many analysts think

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[6] For more details on these matters see: Richard Fieldhouse and Shunji Taoka, *Superpowers At Sea: An Assessment of the Naval Arms Race*, SIPRI, Oxford University Press, 1989, p. 73; *Zarubejnoe voennoe obozrenie*, No 9, 1990, pp. 48-9; Ian Anthony, *The Naval Arms Trade*, SIPRI, Oxford University Press, 1990, p. 69; *Technica i voorujenie*, 1/86, pp. 38-39; *Armed Forces Journal International*, November 1986, p. 30.

[7] US and NATO naval strategy, for example, largely relies on the control of the strategically important "choke points". See on this: William M. Arkin, "The Nuclear Arms Race at Sea", *Neptune Papers*, No 1, October 1987, p. 10-11; *The Defense Monitor*, Vol. XIV, No 7, 1985, p. 2.

[8] For more details see: *Zarubejnoe Voennoe Obozrenie*, No 9, 1990, p. 47-8; *Voennaya Misl*, No 1, 1986, p. 26-31.

that, as the complete prohibition of mines outside the context of general disarmament is hardly conceivable, their use should continue to be regulated by international law of armed conflict.[9]

Existing Legal Framework

General Rules and Principles of Humanitarian Law

Despite all their shortcomings, there can be no question of invalidating existing agreements which represent a useful and humane set of instruments. They are regarded as being declaratory of the laws and customs of war, and should be strictly observed. Their basic principles are applicable to all armed conflicts and at all times. Such principles are:

1. non-combatants shall not be subject to hostilities and shall be protected against the effects of hostilities;
2. the right of belligerents to choose methods and means of warfare is not unlimited;
3. the use of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering is prohibited;
4. it is also prohibited to employ methods or means of warfare which are intended, or may be expected to, cause widespread, long-term and severe damage to the natural environment;
5. in cases not covered by treaty regulations, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[10]

These general principles are of growing importance today, in the context both of the arms control efforts to ban or limit certain types of weapons, and of the need to protect life and human rights in the case of an armed conflict. They should be duly respected in the cases also when naval mines are involved.

For many years, the International Committee of the Red Cross has been urging for a new comprehensive agreement codifying and concretizing the basic rules and principles of international humanitarian law. In 1955-57, for instance, it drafted a set rules which, *inter alia*, specified the objectives barred from attack, laid down requirements in order to minimize the damage inflicted on civilians during attacks against military objectives (identification of military objectives, precision in attack, giving of warning in certain cases, etc.) and declared prohibited the use of weapons which do not allow for precision or have such wide-spread effects in time and place as to be uncontrollable. Specifically singled-out in this context were mines, the use of which was made subject to some safety requirements.[11]

Specific Law of the Sea-Warfare Regulations

The only international instrument in force dealing specifically with naval mines is the Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, signed at the Hague in 1907.[12]

Article 1 forbids to lay

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[9] Joseph Goldblat, "The Seabed Treaty and Arms Control", in: Richard Fieldhouse (ed.), *Security at Sea. Naval Forces and Arms Control*, SIPRI, Oxford University Press, 1990, p. 198.

[10] See: Sydney D. Bayley, *op. cit.*, p. 62-5.

[11] In: D. Schindler and J. Toman (eds), *The Law of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents*, Geneva, 1973, p. 183.

[12] See: *International Law Concerning the Conduct of Hostilities. Collection of Hague Conventions and some other Treaties*, ICRC, Geneva, 1989, pp. 168-71.

1. unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them; and
2. anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.

Some delegations at the 1907 Hague Peace Conference were of the opinion that the convention did not offer sufficient protection, especially to neutrals, *vis-à-vis* the danger which could result from the use of unanchored mines in particular. Serious doubts as to the possibility to construct unanchored mines in the manner prescribed were expressed by delegates from Great Britain, Russia, Spain, the United States. A formal proposal by Great Britain to prohibit any use of unanchored mines was rejected.[13] It follows therefore from article 1 that as long as certain requirements are met, the laying even in high seas of automatic contact mines, anchored or unanchored, is permitted or at least not prohibited by the convention. The reservation made by Britain seems to address exactly this issue. It is formulated as follows:

> ... the mere fact that this Convention does not prohibit a particular act or proceeding must not be held to debar His Britannic Majesty's Government from contesting its legitimacy.

Article 2 forbids to lay automatic contact mines off the coasts and ports of the enemy, with the sole object of intercepting commercial shipping.[14] To prove however that the laying of mines has no military objectives at all would be practically impossible. A British proposal to prohibit the use of automatic contact mines for the establishment of a commercial blockade indicates what was initially planned to achieve by this article. The efforts to accommodate differing considerations had as a final result a text which is probably the vaguest one in the convention.[15]

Article 3 proclaims the need to take every possible precaution for the security of peaceful shipping. While introducing important concepts, its practical value is questionable. First to be noted is the fact that the article relates only to anchored mines. Ambiguous wording weakens additionally the effectiveness of the undertakings - to do "the utmost" to render mines harmless within "a limited time", and to notify the danger zones "as soon as military exigencies permit". Very dangerous for the safety of neutral navigation is also the fact that the convention does not contain any restrictions as to the place where mines may be laid in the seas.

Article 4 recognizes the right of neutrals to lay automatic contact mines off their coasts.[16] In doing so, the same rules must be observed and the same precautions taken as those imposed on belligerents. For neutral states the obligation to notify is however much more absolute the notice must be issued not "as soon as military exigencies permit" but in advance.

Article 5 provides for the removal of mines at the close of the war. Each party is obliged to remove its own mines, except for anchored mines laid off the coast of another belligerent. In the latter case the party which laid the mines must only notify their position, while the obligation to remove them is imposed on the coastal state. One might argue whether this is the fairest solution. Moreover, by saying "... the contracting powers undertake to do their utmost to remove the mines...", the Convention seems to admit that a complete removal might be impossible. The lack of any time-frame for the removal is also indicative, especially in the light of the aforementioned concerns regarding unanchored mines. A built-in uncertainty regarding implementation may be

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[13] See: Alberic Rolin, *Le droit moderne de la guerre*, Tome Second, Bruxelles, 1920, pp. 92-6.

[14] Germany and France ratified the Convention under the reservation of this article.

[15] See: A. Rolin, *op. cit.*, p. 101.

[16] The lack of precision of the term "off their coasts" should not be interpreted as establishing a right for the neutrals to lay mines beyond their territorial waters (see: A. Rolin, *op. cit.*, p. 104-05).

observed in Article 6 as well. The states which "could not at present carry out the rules laid down in Articles 1 and 3" undertake to convert their mines "as soon as possible".

Already at the time it was adopted, the 1907 Convention was judged imperfect and regarded by many as only a first step to be necessarily followed by others. The signatories gave her only a limited duration of seven years (Art. 11)[17] and undertook to reopen the question of the employment of automatic contact mines before the expiration of this period (Art. 12). The last engagement was never fulfilled.

Convinced that further protection of commercial and neutral navigation against indiscriminate warfare was needed, the Institute of International Law took on the improvement of the Hague Convention. In its Oxford Manual of Naval War (1913) it suggested a complete prohibition of the laying of automatic contact mines in the open sea. A clear-cut prohibition to lay any mines along the coasts and harbours of the adversary in order to establish or to maintain a commercial blockade was formulated. Unanchored mines also were made subject to the precautionary measures prescribed by the Hague Convention. An obligation to announce the completion of the removal of mines was added.[18]

Further restrictions on the use of naval mines could never be adopted after 1907. Later events, and especially the two world wars, confirmed the doubts about the ability of the Hague Convention to protect effectively neutral shipping. In the early days of the Second World War many neutral states complained that they have not been duly notified on the emplacement of mine-fields. One of the grounds for the first British order for retaliation, dated 27.11.1939, was that ships belonging to Great Britain, to allied and neutral states have sunk from the collision with mines laid by Germany without any restraint and notification.[19] By failing to accommodate later developments and to distinguish between mine-laying in territorial waters and mine-laying in the high seas, the Hague Convention, as it turned out, could not provide unequivocal answers to fundamental problems which occurred in the practice.[20] There is a point of view according to which the Convention does not spread over acoustic and magnetic mines developed and used during World War II, and that even automatic contact mines could be laid everywhere in the open sea without any obligation to notify neutral states. Others contend that mines may be used only in the territorial waters of the belligerents, but not in the high seas where they could affect the freedom of neutral navigation. Finally, there is the opinion that, insofar as international law does not contain an explicit prohibition, to lay mines in the open sea would be legitimate provided the requirements of article 3 of the Hague Convention (VIII) were met. The view that, despite all its shortcomings, the provisions of the Hague Convention should be regarded as customary law to be applied in all circumstances seems to prevail.[21]

Other Relevant Agreements

Without referring specifically to naval mines, a number of arms control agreements, especially in the nuclear field, have some implications on them. For example, the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water places some barriers

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[17] Under the terms of Article 11, unless denounced, the Convention remains in force, after the expiration of the initial period, between the States that have ratified it.

[18] See: *International Law Concerning the Conduct of Hostilities*, *op. cit.*, pp. 101-02.

[19] *Statutory Rules and Orders*, Vol. 2, 1939, p. 3606 (N. 1709).

[20] In the absence of universal treaty solutions, after the war the victorious Powers disallowed the defeated States "to possess, construct or experiment with ... sea-mines or torpedoes of non-contact types actuated by influence mechanisms" (Article 44 of the Peace Treaty with Italy; Article 14 of the treaty with Roumania; Article 12 of the treaty with Bulgaria; Article 13 of the treaty with Hungary; Article 16 of the treaty with Finland) - See: Paris Peace Conference, 1946, Selected Documents, Washington DC, 1947, pp. 624, 1000, 1204, 1338.

[21] See: I.P. Blishchenko (ed.), *Mejdunarodnoe morskoe pravo*, Moscow, 1988, pp. 239-42.

to the development of new submarine nuclear mines, torpedoes, depth-charges and other naval nuclear weapons. The Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) of 1967 and the South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) of 1985, in assigning a denuclearization status to certain sea and ocean areas , prevent not only the testing, but also the stationing and the use of naval nuclear mines in the waters falling under their zones of application. The 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof can also be seen as putting some restrictions on the use in the high seas of nuclear mines, or at least of bottom and anchored nuclear mines.[22] On the conventional weapons' side, there is the 1981 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or To Have Indiscriminate Effects[23] which includes a protocol (II) relating to the use of land-mines. A number of the provisions of the said protocol on definitions, protection of civilians, indiscriminate use, recording of location, construction standards, removal of mines, etc. could be easily adjusted for the purposes of a separate instrument relating to naval mines.

Possible New Regulations

Even if one has to admit that the laws of warfare are out of date in many respects, it seems indisputable that their modernization should proceed from the existing principles and rules by adjusting them to the new realities. In considering the possibility of developing the laws of sea warfare, the following circumstances must be taken into account:

- First, the level of military technology is much higher today than at the time when the Hague Conventions were adopted. The development of modern naval armaments must be duly reflected in the possible new regulations.
- Second, the laws of sea warfare were not dealt with during the elaboration of the Additional Protocols (1977) to the 1949 Geneva Conventions in order not to prejudge in any way the outcome of the then on-going law of the sea negotiations.

Consequently, in adjusting the laws of sea warfare to the new realities, the changes that the 1982 Law of the Sea Convention has introduced in the order at sea should be also taken into account. Any new regulations which would attempt to widen the scope of restrictions of the 1907 Convention in order to cover modern mines should first of all incorporate the concepts of construction standards and recording and notification of danger zones. Modern mines are not easy to neutralize by counter-measures. Besides, most countries have limited mine-sweeping or mine-hunting capacity.[24] Hence, if mines remain active for a long time, and if their location is unknown, they would present a considerable hazard to everybody many years after the cessation of hostilities.

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[22] It should be noted in this context that during the negotiations and at subsequent review-conferences of this treaty, many delegations insisted (and formal proposals were submitted to this effect) on a total demilitarization (and not just a denuclearization) of the sea-bed and the ocean floor and the subsoil thereof (see: R.B. Byers (ed.), *The Denuclearisation of the Oceans*, London, 1986, pp. 91-2). Had these proposals materialized, many of the problems connected with the use of naval mines would have been solved.

[23] For the texts of all these agreements, see: *Status of Multilateral Arms Regulation and Disarmament Agreements*, United Nations, New York, 1988.

[24] See: Ove Bring, "International Law and Arms Restraints at Sea", in: Sverre Lodgaard (ed.), *Naval Arms Control*, PRIO, Oslo, 1990, pp. 194-95; *Study on the Naval Arms Race*, *op. cit.*, p. 40.

Construction Standards

In order to assure a certain degree of precision in the use of mines, and contain their effects in time and place, it should be compulsory to equip naval mines with a neutralizing mechanism (self-actuating or remotely controlled) which renders a mine harmless or causes it to destroy itself when it is no longer of military use, or within specified time.[25] It certainly would be advisable to give concrete expression to this general rule, in the way the Hague Convention does with respect to contact mines. Whether individual standards for all types of mines can be established, remains to be examined. Sweden has suggested for instance a time-limit of one hour for a drifting mine to become harmless.[26]

Recording and Notification of Location

In order to protect civilians from the effect of mines and to facilitate their subsequent removal, the parties to a conflict should keep records of the position of all minefields laid by them, and of the technical characteristics of all mines emplaced. As soon as possible, and especially after the cessation of hostilities, they should make available to each other, to third countries upon request or to the appropriate international authorities and institutions, all information in their possession concerning the borders (exact co-ordinates) of the mine-fields, the type of mines and their position in the mine-field. A recommended course of navigation through or near a mined area could be indicated in addition.

To sum up, it should be prohibited to use naval mines without having the means to locate and neutralize them. It must be noted however that even this may not be enough to ensure protection against indiscriminate use.[27] Naval mines are among those weapons which, in view of the experts, are particularly liable to cause indiscriminate effects, both in the short and in the long term, even if special measures of the type mentioned above are taken.[28] It follows therefore that some additional precautions should be envisaged in order to decrease, if not forestall completely, the indiscriminate effects of mines.[29]

Protection of Civilian Shipping

Under existing rules of international law attacks may be directed only against military objectives. Accordingly, a possible legal instrument regulating the use of mines must proclaim and guarantee the immunity of vessels which are not involved in hostilities and should not be object of attack through the laying of mines. Under protection should be vessels of neutral or non-belligerent states, passenger vessels when engaged only in carrying civilian passengers, small coastal fishing vessels and small boats engaged in local coastal trade, hospital ships, vessels on humanitarian relief or rescue missions, vessels designated for and engaged in the exchange of prisoners of wars and other vessels guaranteed safe conduct by prior agreement between the belligerent parties, ships

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[25] In Doc. A/C.1/46/15 Sweden suggests a time-limit of two years at the latest after the emplacement. It can be imagined that this period would be considered too long by many people.

[26] Doc. A/C.1/46/15 (In an earlier document A/CN.10/129 - Sweden proposed a complete prohibition of the use of drifting mines, *i.e.* mines which are free to move under the influence of wind and tide).

[27] Indiscriminate is considered such use which is not or cannot be directed at a military objective, which may be expected to cause incidental loss of civilian life and injury of civilians or which would be excessive in relation to the direct military advantage anticipated (See Paragraph 3, Article 3 of Protocol II to the 1981 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects UN Doc. A/CONF.95/15 and Corr. 2, annex).

[28] See: *Anti-personnel Weapons*, SIPRI, London, 1978, pp. 193-94, 199.

[29] As of now, the full protection of civilians seems to be discarded as a feasible option. According to paragraph 4, article 3 of Protocol II to the 1981 Convention feasible are only those measures which are "practicable or practically possible" in the "circumstances ruling at the time, including humanitarian and military considerations"

engaged in the protection of the environment.[30] Protected at any time during hostilities should be also ships, sailing under the flag of the United Nations, which perform peace-keeping, observation or similar functions.

Various measures could be thought over for the purpose of ensuring safe navigation for such ships issue of advance warnings and other relevant information; providing for safe corridors and directing the ships through the mine-field, especially at the approaches to ports and in areas with intensive commercial traffic; notification of danger zones, as soon as mines cease to be under surveillance, etc. Hazardous incidents involving peaceful ships and caused by mines should be reported and clarified in order to prevent misunderstandings and mitigate the effects on other non-belligerent states. The affected state must have the right to request information and clarification from the state which has laid the mines.

In addition, states might undertake to refrain, to the extent possible, from mine-laying in areas through which the busiest international sea-lanes pass; laying of mines in waters where the tides are strong (for example in the zones adjacent to straits); the use of self-propelled (torpedo-type) mines in the waters of big ports; the laying of bottom mines on a rocky sea-bed, etc.

A general provision allowing to use mines only for defensive purposes would seem to many (and rightly so!) the most desirable solution. But even if an unconditional prohibition to lay mines anywhere except in one's own territorial waters in wartime should prove possible, the coastal State would still have to apply certain measures to ensure the safety of peaceful shipping.

Protection of the Environment[31]

There can be little doubt that naval mines of the existing highly sophisticated and destructive types can present a serious threat to the environment, especially when used without any restraints and precautions. The destruction of oil tankers, nuclear-powered ships, vessels carrying highly toxic, explosive or other dangerous substances, etc., could provoke severe, long-lasting and wide-spread environmental damage. In the light of this, environmental considerations, as part of the humanitarian ones, must play an increasingly substantial role in the efforts to limit the harmful effects and consequences of armed conflicts. In this context, the prohibition of the use of mines with a non-conventional charge would be for instance a step of considerable proportions.

Restrictions Relating to Naval Blockades

The question of whether it is legitimate to lay mines at the approaches to the ports of the enemy in order to block the routes to or from its territorial and internal waters has often emerged in international practice.[32] Experience shows that such acts create a direct danger to third parties. As a result, a conflict of a local character could start affecting on an increasing scale the interests of many countries which do not participate in the conflict.[33] Setting aside the fact that the use of mines even for a military blockade is disputable,[34] mine-laying with the purpose to establish a commercial blockade at least should be categorically discarded as an option. Basing itself on the

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[30] See: Doc. A/C.1/46/15, p. 3.

[31] The environmental aspects of maritime security are dealt with in detail by A. Westing in Chapter 6 of this study.

[32] More recently, this problem occurred for instance when the USA mined in 1972 the Haiphon harbour. On another occasion, the International Court of Justice decided in 1986 that, "by laying mines in the internal or territorial waters of Nicaragua.... the United States of America has acted ... in breach of its obligations under customary international law" (Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, *ICJ Reports*, 1986, p. 147).

[33] Even those judges which found unable to support the above mentioned decision on the Nicaragua v. USA case admitted that: "mining could affect and did affect third States as against whom no rationale of self-defence could apply" in which case "the international responsibility of the United States may arise" ("Dissenting opinion of Judge Schwebell", *ICJ Reports*, *op. cit.*, pp. 269, 379-80; see also: "Dissenting opinion of Judge Jennings", pp. 536-37).

[34] Some jurists assert that a blockade, in the meaning known in international law, cannot be established and maintained by naval mines, or at least not only by mines (without the participation of surface vessels). See: A. Rolin, *op. cit.*, t. III, p. 340-41.

customary law codified by the 1982 Convention on the Law of the Sea, the International Court of Justice judged in 1986 that:

> if this right of access to the port is hindered by the laying of mines by another State, what is infringed is the freedom of communications and of maritime commerce. At all events, it is certain that interference with navigation in these areas prejudices both the sovereignty of the coastal State over its internal waters, and the right of free access enjoyed by foreign ships.[35]

It goes without saying that, as the blockade of neutral ports is absolutely contrary to international law, mining by parties to a conflict of internal, territorial or archipelagic waters of neutral or non-belligerent states must be explicitly prohibited.

Regulations Regarding International Straits

The 1907 Hague Convention does not say anything on the question of laying of mines in the straits.[36] This problem remains largely unresolved and is bound to manifest itself at any time when a real or a potential conflict of interests between sea users and coastal states emerges.[37] The interests of both of them must be properly accounted for and reconciled. With respect to those straits which form a traditional and indispensable commercial sea-lane, an absolute neutrality would be the ideal solution. This would mean a complete prohibition to lay mines there in any circumstances and by anyone. Yet, it would probably be not realistic to expect from coastal states, be they neutral or belligerent, to renounce completely the right to use mines in order to defend themselves in times of war. On the other hand, it is important to uphold the principle of freedom of peaceful shipping. Large straits should not pose big problems it would be possible for states to lay mines in their territorial waters without creating obstacles to peaceful navigation. But there is quite a number of very narrow straits which exclude such a possibility. Without prejudice to the international treaty regimes already established for many of them, the prohibition of offensive mine-laying in international straits should be a general rule covering all individual cases. The right to lay mines would thus be accorded only to coastal states within the limits of their territorial waters. Unless it is absolutely necessary for their defense, coastal states should undertake from their part to refrain from the use of mines, especially when this cannot be done without completely closing the strait for navigation. Accordingly, they should take all necessary and possible measures for the safety of peaceful shipping, including advance warning and notification of the location of mines, escorting neutral ships throughout the strait, avoiding the use of mines which may go out of control or act indiscriminately, etc. Article 44 of the United Nations Convention on the Law of the Sea seemingly addresses these issues but, first, the Convention itself has not yet entered into force and, second, the applicability of its provisions to armed conflicts is open to question.[38]

Removal or Neutralization of Mines

In addition to the precautionary measures needed to avoid civilian casualties during the hostilities, the combatants should be bound to remove or render safe their mines at the close of hostilities. Removal of the mines by the side which has laid them should be the general rule. In

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[35] *ICJ Reports*, *op. cit.*, pp. 111-12.

[36] Still, Turkey made a reservation that it "could not in any way subscribe to any undertaking tending to limit the means of defense that it may deem necessary to employ" for the Dardanelles and the Bosphorus (see: *The Laws of Armed Conflicts*, *op. cit.*, pp. 588-89). Consequently, these particular straits are exempted even from those modest regulations which are laid down in the Hague Convention.

[37] Events of 1987-88 in the Persian Gulf have shown that strategically located countries are in a position to defy other sea users by, *inter alia*, threatening to close straits by way of mining.

[38] More on the regime governing naval mobility within international straits established in *UNCLOS*, incl. "transit passage", see in C. Pinto's paper (Chapter 2 of the present study).

performing this, notifications of detected mines, of the progress and the ultimate removal of the mines from areas of international or considerable national importance should be issued for the benefit of all interested countries.

In the cases when a coastal state would prefer to remove itself the mines from its own territorial waters, it should have the right to obtain, upon request, from the state which has laid the mines all the relevant information and technical and material assistance necessary to remove or otherwise render ineffective the mines.

Subject to agreement reached after the conclusion of hostilities among former parties to the conflict, or between them and third countries or international organizations, joint mine-sweeping operations could be conducted in different areas.[39]

Liability

The Hague Convention of 1907 does not address the question of liability of states for damage caused by the use of mines. A Dutch proposal on the matter was dismissed on the ground that the general principles of law were sufficient for resolving all difficulties which could arise.[40] Later incidents led on to an examination of the international humanitarian law applicable to disputes of this type. It showed that the legal rules in the light of which the acts of mining could be judged depend first of all upon where they took place a question which, as seen earlier, the Hague Convention failed to resolve. This, in its turn, together with the vague notification obligation under the Convention, creates serious problems in assigning responsibility for damage caused by mines. The International Court of Justice did not find possible for instance to base its decision in the Corfu Channel case on the provisions of the Hague Convention of 1907, "but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war".[41] However, in the absence of unequivocal treaty regulations "elementary considerations of humanity" do not free from difficulty even the finding that the laying of unnotified mines is unlawful. In 1986 the Court, in the Nicaragua vs. United States of America case, felt necessary to refer to the Hague Convention by stating that:

> if a State lay mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907.[42]

While by these standards States would seem to be held directly responsible for violation of customary international law, the Court's decision is far from clear as to whether and to whom the respondent State is answerable for damaging or impeding shipping. A clear-cut treaty provision on liability, linked with an effective enforcement mechanism, would therefore be highly desirable. Potentially less controversial are cases when damage results from an illegal act. It should not be too difficult, it seems, to embody in a future legal instrument a provision on the liability of states which have neglected to notify the location, to remove the mines or otherwise fulfil their treaty obligations, to pay compensation for any material and moral damage suffered by other countries as

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[39] There are important precedents of international co-operation in mine-clearing. Post World War II mine-clearance in European waters was conducted under the auspices of an international organization containing mine-clearance boards for the different sea zones. Joint mine-clearing operations were also carried out bilaterally. In the mine-clearing of the Suez after the 1973 war took part naval units of Egypt, France, Great Britain, USA and USSR. International mine-clearing and escort of tankers through the Persian Gulf were organized in 1987-1988. International co-operation in this field took place also during and after the recent war in the Gulf area.

[40] See: A. Rolin, *op. cit.*, pp. 115-16.

[41] *ICJ Reports*, 1949, p. 22.

[42] *ICJ Reports*, 1986, p. 112.

a result. But as observed earlier, in spite of all the precautionary measures which might be possibly agreed upon, the safety of peaceful navigation can still not be fully ensured. Would it not be fair then to offer an additional guarantee to neutral states in the form of a compensation for damage, which has resulted even from a perfectly legal use of mines? The principle of absolute liability is known to the legal theory and practice, serving among other things as an instrument of restraint for those who are engaged in potentially harmful activities.

Peace-Time International Co-operation

In order to promote transparency and increase confidence, an international exchange of information could be set up on various matters related to mines, including information on the types of mines possessed by states and on their technical characteristics, the available means and methods of mine-laying and mine-sweeping (mine-hunting), the exports of advanced influence mines, etc. Foreign observers could be invited to naval exercises involving mine-laying or mine-clearing operations. An international co-operation in the search for new, more effective mine-countermeasures solutions could be envisaged. The possibility of creating, within the United Nations, a joint naval force, including mine-clearing units to ensure the safety of peaceful shipping in crisis areas, deserves to be seriously examined.

Conclusion

It is hardly probable that a complete prohibition of the use of mines, or even of individual types of mines, can be internationally decreed, as long as they are judged necessary for national defence. The most one could expect are some agreed limitations as a part of wider confidence-building or disarmament measures for certain sea areas, provided this is strongly felt by states to be of vital common interest. Pending such a common understanding, measures designed to mitigate human suffering in times of war, to prohibit or restrict the use of particularly inhumane weapons and to protect non-combatants would serve to increase general confidence among states and create a better climate for future more comprehensive arrangements. The so-called humanitarian approach to security should not be left without attention especially nowadays when, due to technological developments, the existing laws of sea-warfare are largely outdated. It may be true that a complete revision of the relevant international instruments is hardly attainable, and that a more feasible approach would be to adopt a framework document that reaffirmed general principles and rules of humanitarian law adapted to contemporary realities, without referring to specific weapons.[43] But it is also true, that it should be possible to single out certain issues, even of a seemingly modest nature, and to adopt additional measures, presumably in the form of separate protocols, in order to enhance confidence and security and facilitate arms control at sea. Placing new restrictions on the use of naval mines is one of those issues of particular interest.

[43] See: "Naval Confidence-Building Measures", *Disarmament, Topical Papers 4*. United Nations, New York, 1990, pp. 144-45.

Chapter 6
Environmental Dimensions of Maritime Security

Arthur Westing

Abstract

The chapter begins by presenting the ocean as a common heritage of humankind and then continues by outlining environmental abuses of the ocean. Following that it offers a number of environmentally relevant confidence-building measures, after some initial considerations emphasizing international law, ecogeographical regions, natural resources, and nature reserves. It is concluded that the need is becoming ever more urgent for the community of nations to develop sufficient confidence among themselves to develop naval restraints that would, *inter alia*, help alleviate the pressures on an ever more heavily utilized ocean. It is additionally concluded that co-operation among nations to achieve sustainable and equitable development for the ocean, whether regionally or globally, would itself contribute to the development of mutual trust.

Introduction

The world ocean covers more than two-thirds of the global surface, distributed among several major and numerous minor basins. Of the present 189 nations, 150 (79%) enjoy direct access to the ocean.[1] Although most nations with direct access to the ocean maintain at least a small navy or coast guard, less than two dozen of them maintain substantial naval forces, and only a few maintain really huge ones. However, the vast extent, enormous volume, remarkable buoyancy, low level of friction, partial opacity, and extensive resources of the ocean all combine to make it an ever more important theater of operations for both civil and military purposes.

The present chapter analyzes environmental dimensions of maritime security. It builds upon prior work by the author (*e.g.*, Westing, 1980; 1985; 1986; 1989).

The Ocean as a Common Natural Heritage of Humankind

Most coastal nations (*circa* four-fifths of them) have within the past 15 years or so laid claim to an exclusive economic zone of coastal ocean that extends out for 370 kilometers (200 nautical miles), altogether amounting to perhaps 110 million square kilometers of ocean (*circa* 30% of the total ocean). Nonetheless, the ocean beyond any national jurisdiction, including the seabed beneath it, remains a vast extra-territorial domain, still covering some 250 million square kilometers.

It is clear to many that for a combination of social and environmental reasons, the ocean and its natural resources should be treated as a common natural heritage of humankind, that is, as an environmental domain to be equitably managed in perpetuity managed on a sustained basis for the benefit of humankind as a whole. In fact, such a common-heritage notion was supported in

[1] **Sovereign nations**: The number of *de facto* sovereign nations in the world is for purposes of this study considered at present (mid-1992) to be 189: the 178 current members of the United Nations plus Andorra, Georgia, Kiribati, Macedonia, Monaco, Nauru, Switzerland, Taiwan, Tonga, Tuvalu, and Vatican City. Of these 189 *de facto* sovereign states, 150 are coastal (littoral) - of which 46 are islands - and 39 are landlocked (hinterland).

principle, at least with respect to the extra-territorial seabed, by more than 100 nations as long ago as 1970 (UNGA, 1970), and would gain important legal support from the Law of the Sea Convention of 1982, were that instrument to come into force.

Abuses of the Ocean

Human abuses of the ocean can emanate either from the civil sector of society or from its military (including naval) sector. Most abuses emanate from the civil sector, simply because only a rather small fraction of all human activity (of the order of 5%) falls within the military sector. Moreover, most of the military activity occurs during peacetime. On the other hand, the recurring wartime activities of the military sector have a great potential for serious abuse.

So far, the continuing influx of pollutants into the ocean as a whole (much of it from land-based sources) has been rendered more or less innocuous by dilution and decomposition (both abiotic and biotic) (Goldberg, 1976; McIntyre *et al.*, 1990; Strong, 1991b). On the other hand, a considerable number of local areas that are partially cut off from the rest of the ocean are being subjected to waste inputs beyond the level of sustainable discharge, for example, the Baltic Sea (Westing, 1989), Mediterranean Sea (Haas, 1990), and Persian Gulf (Strong, 1991a). Microbial contamination from raw sewage has become a public health problem in an increasing number of coastal areas.

The harvesting of fish or other ocean species beyond the capacity of the exploited populations to renew their numbers is a flagrant abuse of the sacrosanct principle of sustained-yield management. Of the 16 recognized major marine fishery areas, 4 are now clearly being fished beyond sustainability (the Northwest Pacific, Southeast Pacific, Mediterranean plus Black, and Eastern Indian); and 5 additional ones more ambiguously so (the Northeast Pacific, East-Central Pacific, West-Central Pacific, Northeast Atlantic, and East-Central Atlantic) (WRI, 1990, Table 23.3). Such over-use is to be expected in the absence of well-administered multilateral compacts owing to the well known tragedy-of-the-commons phenomenon (Hardin, 1969).

Military abuses of the ocean are to a considerable extent comparable to the civil ones, but some are more or less distinct and have the potential for being more spectacular. The safe disposal of decommissioned nuclear-propelled submarines presents a particular problem. Underwater explosions and contamination with radioactive isotopes and chemical warfare agents are among the significant military abuses, both in peacetime and wartime. A recently revealed case of repeated secret radioactive dumping provides one flagrant example (Marshall, 1992; Tyler, 1992). Military landing operations, whether as training exercises or in wartime, have the potential for severely disrupting estuaries, coral reefs, and other important inshore habitats.

In wartime, the sinking of naval and merchant ships has the potential for releasing inherently dangerous or noxious substances, so-called dangerous forces (whether explosive, poisonous, or otherwise environmentally disruptive). Radioactive contamination from damaged nuclear propulsion systems is a most worrisome possibility, especially considering the large numbers of nuclear-powered ships in service that would become high-priority targets in wartime: currently, more than 400 submarines and more than 50 surface ships. The explosion of liquified natural gas (LNG) from damaged LNG tankers could be locally catastrophic.

Releases of oil from damaged shore facilities, pipelines, offshore platforms, and supertankers, whether with hostile intent or otherwise, are additional matters of concern. Indeed, during the Gulf War of 1991, at least 160 thousand cubic meters (1 million barrels) of oil was released into the Persian Gulf, with substantial ecological impact (Sheppard and Price, 1991; Strong, 1991a). Regarding this, the United Nations Security Council resolved that Iraq is "liable ... for any direct ... environmental damage and the depletion of natural resources" (UNSC, 1991, § 16). Sea mines that become unanchored and drift out of their zone of emplacement, or those that remain functional after their military purpose has expired, are a special environmental hazard (Westing, 1985, p. 5).

Apropos the diverse military threats to the ocean environment, during the Gulf (Iran-Iraq) War of 1980-1988 the United Nations Security Council specifically called upon "both parties to refrain from any action that may endanger ... marine life in the region of the Gulf" (UNSC, 1983, § 5).

Nuclear-propelled and nuclear-armed naval forces are a menace to the ocean environment even in peacetime, owing to the occasional accidents associated with training, testing, and routine patrolling (Arkin and Handler, 1989; Gregory and Edwards, 1989; Handler *et al.*, 1990). To date these accidents have from time to time resulted in local radioactive contamination; and, although the risk is minimal, the potential always exists for the far greater calamity of a nuclear explosion.

The testing of nuclear weapons above, at, or beneath the ocean surface has accounted for a significant amount of radioactive contamination of the ocean (Westing, 1980, pp 159-163), and at least the possibility exists for further abuse of this sort. The dumping of chemical warfare agents into the ocean whether by accident or intent has resulted in serious local contamination (Laurin, 1991; Westing, 1980, pp 163-165).

Thus it becomes clear that any measure, civil or military, that would contribute to an amelioration of the natural-resource and other environmental problems just outlined would contribute to human security, thereby providing a further justification for pursuing maritime confidence-building measures.

Confidence-Building Measures

Initial considerations

A proper test of whether measures to build confidence among nations have been successful is whether the nations in question have thereby established sufficient mutual trust, and come to feel sufficiently secure, to reduce the size of their military sector. However, the ultimate test of their success must be measured in terms of the reduced frequency with which the resolution of their interstate disputes is carried out using deadly force.

In fact, at no time since World War II has the situation been more propitious, on the one hand, to conserve and restore the global biosphere; and, on the other, for the major powers to shrink their military sectors. And, in the present context, virtually every nation in the world has recently expressed a specific interest in addressing the issue of naval disarmament (UNGA, 1990c). Although most attention by diplomats and scholars has in recent years been directed towards restrictions or reductions related to ground, air, and space forces, the naval sector has not been entirely ignored. Naval strengths have been scrutinized with care (*e.g.*, Alatas *et al.*, 1986; Arkin, 1987; Durch, 1991; Fieldhouse and Taoka, 1989; Handler and Arkin, 1990); and naval disarmament has been examined in some detail, both monographically (*e.g.*, Alatas *et al.*, 1986; Blechman *et al.*, 1991; Fieldhouse, 1990; Hill, 1989; Lodgaard, 1990; UN, 1990a) and in valuable briefer treatments (*e.g.*, Arnett, 1990; Eberle, 1990; Prawitz, 1990; Prins, 1990; Ross, 1989-1990).

Measures, direct or indirect, that lead to a shrinking of the naval sector of the major powers are of potential benefit to the ocean environment inasmuch as this would reduce the routine naval peacetime disruption, and presumably also the frequency and extent of wartime disruption. First and foremost, any measure that reduces the risk of nuclear war at sea and, secondarily, of the likelihood of nuclear-weapon accidents at sea, would be a boon to the ocean environment, the importance of which is difficult to exaggerate. Thus, the recent unilateral announcement by the USA that "under normal circumstances" its ships would no longer carry tactical nuclear weapons must be lauded (Bush, 1991); as must the responses of the then USSR (Gorbachev, 1991) and the United Kingdom (Schmidt, 1992) to do the same. It can only be hoped that all of the major naval powers will recognize the need for, and conclude, a multilateral agreement that commits them to such repudiation. Moreover, regarding the dangers associated with naval nuclear-propulsion systems, one

highly useful step would be for the International Atomic Energy Agency (Vienna) to develop suitable safety standards for all ocean-going reactors, comparable to those it has for the land-based ones, perhaps doing so in co-operation with the International Maritime Organization (London). Nations that adopt such (or even more stringent) standards would certainly be contributing to mutual trust through such action.

More generally, confidence could be enhanced by virtue of a coastal nation encouraging lines of communication among its ocean officials, both civil and military, and their counterparts in other countries; and by doing the same for its marine research institutes. Regular meetings ought to be set up for standardizing monitoring procedures and for the routine exchange of marine biological and other oceanographic information. The International Council for the Exploration of the Sea (Copenhagen) could play a valuable role in catalyzing such bureaucratic and research co-operation.

Singled out for special discussions below are confidence-building measures related to: (a) international law; (b) ecogeographical regions; (c) natural resources; and (d) nature reserves.

International Law

There is considerable room for building confidence in the realm of international ocean law, especially as it relates to naval disarmament (Bring, 1990a; Goldblat, 1990). Thus, a number of multilateral treaties are in force that serve to protect the ocean environment from one aspect or another of military disruption, but their value could be strengthened in various ways. Treaties having special potential in this regard include: (a) the Partial Test Ban Treaty of 1963, in which the parties agree not to test nuclear weapons in the ocean environment; (b) the Seabed Treaty of 1971, in which the parties agree not to emplace nuclear or other weapons of mass destruction in the seabed beyond 22 kilometers (12 nautical miles) of the shoreline, an exclusion zone of about 350 million square kilometers of ocean (*circa* 97% of the total ocean); (c) the Sea Mine Convention of 1907, in which the parties eschew the use of unanchored mines and additionally agree to remove any mines they have laid at the cessation of hostilities; (d) Protocol I of 1977 on the Protection of Victims of International Armed Conflicts, in which the parties agree not to employ methods of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment;[2] and (e) the Latin American Nuclear-Weapon-Free Treaty of 1967, in which the parties have the intent to keep all nuclear weapons out of about 68 million square kilometers of ocean surrounding them (*circa* 19% of the total ocean).[3] Some would add to

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[2] **Protocol I of 1977**: It has been suggested that the protection of the natural environment afforded by Protocol I on the Protection of Victims of International Armed Conflicts (Bern, 1977; in force, 1978; UNTS No. 17512) does not apply to naval warfare (*e.g.*, Alatas *et al.*, 1986, p. 78). This is *not* the case. It is true that the protection deriving from its Article 55 is subject to the limitations imposed by Article 49; thus, although the source of the threat - whether an attack from land, sea, or air - is not limited by Article 49, some might suggest that the protection resulting from Article 55 applies only to the terrestrial environment. On the other hand, the protection of the natural environment afforded by Article 35 has no comparable limitations attached to it, either as to origin of attack or location of target.

It is useful to point out that, by virtue of Articles 35 and 55, environmental protection has in a formal sense become part and parcel of the international humanitarian law component of the law of war or armed conflict. This is especially important because the environmental protection deriving from the corpus of international environmental law is largely inapplicable to environmental disruption of military origin (see note 5).

[3] **Miscellaneous ocean zones**: 1. *South Pacific Ocean*: The South Pacific Nuclear-Weapon-Free Treaty (Rarotonga, Cook Islands, 1985; in force, 1986; UNTS No. 24592) serves to denuclearize the territorial seas of the parties - a coastal strip of ocean 22 kilometers (12 nautical miles) in width for most of the parties. The treaty additionally delineates an ocean zone surrounding the parties which is about 118 million square kilometers in extent (*circa* 33% of the total ocean), which the nuclear powers are invited to respect as a nuclear-weapon-free zone; 2. *Indian Ocean*: The 1971 Declaration of the Indian Ocean as a Zone of Peace designates that body, about 73 million square kilometers in extent (*circa* 20% of the total ocean), "for all time as a zone of peace" (UNGA, 1971). Many years of negotiation on clarifying and implementing that declaration have to date been inconclusive (*e.g.*, UNGA, 1990a; 1991a).

this enumeration the Environmental Modification Convention of 1977, in which the parties agree (with some debilitating provisos) not to manipulate the ocean environment for hostile purposes (Westing, 1992).

Not all eligible nations have become party to the five above-noted ocean-related treaties considered here to be of particular relevance (see Table 6.1). Thus, one way to build confidence that remains open to many nations both coastal and landlocked is for them to develop a recognition of the importance of these treaties sufficient to join them (concomitantly enacting any necessary co-ordinate domestic legislation); and, as necessary, to conclude an appropriate Safeguard Agreement with the International Atomic Energy Agency (Vienna). Those among the permanent members of the United Nations Security Council not parties to these treaties (or their relevant protocols) could generate much confidence by joining them. Some suggestions to the contrary (*e.g.*, Thorpe, 1987), the Sea Mine Convention of 1907 remains an important instrument, especially in the absence of a comprehensive new treaty of the sort (cf. Dimitrov, 1992).

Table 6.1: Multilateral Treaties Serving to Protect the Ocean (selected)

Treaty	*Total parties (%)*	*Coastal parties (%)*	*Landlocked parties (%)*	*Permanent UNSC parties (%)*
1963 Partial Test Ban	63	65	56	60
1971 Seabed	49	49	46	80
1907 Sea Mine	20	21	13	60
1977 Protocol I	59	62	49	40
1967 Latin American	70	68	100	(100)
1959 Antarctic	23	26	11	100
1973/78 Marpol	40	47	13	100
1982 Law of the Sea	(27)	(31)	(13)	(0)

Notes:

1. Of the current 189 sovereign states, 150 are coastal (littoral) and 39 are landlocked (hinterland).[4] The permanent members of the UN Security Council (UNSC) are: China, France, Russia, the United Kingdom, and the USA.
2. The multilateral treaties presented are: (a) Partial Test Ban Treaty (Moscow, 1963; in force, 1963; UNTS No. 6964), 189 sovereign states eligible; (b) Seabed Treaty (London, Moscow, and Washington, 1971; in force, 1972; UNTS No. 13678), 189 sovereign states eligible; (c) Hague Convention VIII relative to the Laying of Automatic Submarine Contact Mines (the Hague, 1907; in force, 1910), 189 sovereign states eligible; (d) Protocol I of 1977 on the Protection of Victims of International Armed Conflicts (Bern, 1977; in force, 1978; UNTS No. 17512), 189 sovereign states eligible; (e) Latin American Nuclear-Weapon-Free Treaty (Tlatelolco, Mexico, 1967; in force, 1968; UNTS No. 9068), 33 sovereign states eligible, 31 coastal and 2 landlocked; a Safeguard Agreement with the International Atomic Energy Agency (Vienna) is mandated; the 5 permanent members of the UN Security Council are invited to respect its provisions; (f) Antarctic Treaty (Washington, 1959; in force, 1961; UNTS No. 5778), 179 sovereign states automatically eligible, 142 coastal and 37 landlocked (10 other states are eligible by invitation of the parties); (g) International Convention for the Prevention of Pollution from Ships [Marpol] (London, 1973 and 1978; in force, 1983), 189 sovereign states eligible; and (h) Law of the Sea Convention (Montego Bay, Jamaica, 1982; **not** in force), 189 sovereign states eligible.
3. Information on parties to the treaties is from the respective depositaries as of mid-1992. The texts of the major disarmament treaties can be viewed elsewhere (Goldblat, 1982), as can summaries of the major environmental treaties (UNEP, 1991) and a catalog of the ocean protection treaties (UN, 1990b).

[4] See note 1.

Three additional ocean-related treaties lend themselves well to confidence building, each in its own fashion: (a) the Antarctic Treaty of 1959; (b) the International Convention of 1973 and 1978 for the Prevention of Pollution from Ships; and (c) the Law of the Sea Convention of 1982 (not in force).

The Antarctic Treaty of 1959 is of potential importance in the present context because its zone of application includes about 21 million square kilometers of ocean (*circa* 7% of the total ocean). Although military activities are prohibited in the terrestrial portion of the treaty's zone of application (see its Article 1), it seems clear that such a stricture does not apply to the ocean portion (see its Article 6). Indeed, naval operations could occur in these waters (Morgan, 1990). Thus, one way in which the full ("consultative") parties to the treaty could build confidence would be to amend the treaty by deleting Article 6. Short of such a measure, any individual present or future party, whether full or partial ("non-consultative"), could build confidence, as appropriate, by attaching a reservation to its ratification or accession which renounces that article, or else by making a unilateral declaration to the same effect.

The International Convention of 1973 and 1978 for the Prevention of Pollution from Ships (for which the International Maritime Organization [London] serves as the secretariat) is one of a number of generally laudable multilateral treaties serving to minimize ocean pollution. The rather weak support it has to date received from the full range of the international community is therefore to be regretted (see Table 6.1 above). In the present context, however, attention must be drawn to the fact that this treaty does not apply to warships or any other naval ships (see its Article 3.3). Again, two possible ways the nations party to this treaty could build confidence would be to amend the treaty by deleting Article 3.3 (or at least by making it applicable only during wartime, and then perhaps only in a battle zone); or, short of such a measure, any individual present or future party could build confidence, as appropriate, by attaching a reservation to its ratification or accession which renounces that article, or else by making a unilateral declaration to the same effect.[5]

The Law of the Sea Convention of 1982 would, if it came into force, provide a comprehensive and enforceable body of international law for the conservation and sustainable utilization of the ocean, both the exclusive economic zones and the extra-territorial domains beyond (the "Area"). Included would be procedures for the non-violent resolution of disputes. The environmental merits of this treaty have been widely endorsed (*e.g.*, Brundtland *et al.*, 1987, pp 272-274; IUCN *et al.*, 1991, p. 160). It is thus a pity that insufficient numbers of nations - especially insufficient numbers of industrialized nations - feel comfortable with a common-heritage approach to the exploitation of natural resources in the common domains of the world (see Table 6.1 above). Therefore, as weak or peripheral as the disarmament aspects of the treaty might be (*e.g.*, Boczek, 1989; Bring, 1990b; Pinto, 1992), an enormous amount of confidence would be generated among nations if a sufficient number of industrialized and other nations - including landlocked nations - were to ratify this treaty to bring it into force. (The fact that some non-ratifying states selectively respect portions of this treaty is a mixed blessing, because such picking and choosing serves to undermine the rule of law.)

Nations could greatly enhance the level of confidence they project beyond their borders through their participation in ocean-protection treaties, by means of domestic educational programs. To

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[5] **Sovereign immunity**: The International Convention for the Prevention of Pollution from Ships (London, 1973 & 1978; in force, 1983) does not apply to warships or any other naval ships (see its Article 3.3). Regrettably, such so-called sovereign immunity is a common feature of ocean-related treaties. For example, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (London, Mexico City, Moscow, & Washington, 1972; in force, 1975; UNTS No. 15749) has a similar restriction (see its Article 7.4). And the Law of the Sea Convention (Montego Bay, Jamaica, 1982; **not** in force) repeats such a restriction in a number of its articles. Of special importance here is the deleterious waiver spelled out in its Article 236: "The provisions of this Convention regarding protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service". A detailed exposition of sovereign immunity is available (Pinto, 1992).

borrow the exhortation from Protocol I of 1977, all parties to these treaties should "... undertake, in time of peace as in time of armed conflict, to disseminate the [ocean-related treaties in question] as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population..." (Article 83.1). The International Committee of the Red Cross (Geneva) could assist in this process of strengthening the cultural norms that underpin the legal norms, by developing appropriate curricula and study guides, as could the United Nations Educational, Scientific and Cultural Organization (Paris).

Ecogeographical Regions

Most natural-resource and other environmental problems are essentially limited to their ecogeographical region or ecosystem, a condition that holds true both for the land and the ocean. At the same time, a majority of the recurring international conflicts is between neighboring nations. It thus becomes eminently sensible to foster co-operation among a group of nations that shares such an ecogeographical region (often a "sub-region" in political terminology).

With specific reference to the ocean, the best candidates for regional confidence building are the nations that together occupy the drainage basin (catchment basin, watershed) of a semi-enclosed sea. Indeed, efforts along these lines are being actively pursued in a number of such regions, for example, the Mediterranean Sea (Haas, 1990), the Baltic Sea (Westing, 1989), and the North Sea (Sætvik, 1988). The United Nations Environment Program (Nairobi) has been singularly successful with its "Regional Seas" program, in which it has catalyzed confidence-building measures among the nations associated with at least eight different semi-enclosed portions of the ocean in some instances, despite a history of local political antagonisms (Gebremedhin, 1989). Additional regions are ripe for such attention, among them the Arctic Ocean and the South China Sea.

Natural Resources

Ocean fisheries are becoming ever more important in concert with rising human numbers and aspirations. The fish and other species that comprise this major renewable natural resource are harvested primarily over the continental shelves and thus largely (*circa* 90%) within the exclusive economic zones that have been proclaimed in recent decades. Although most national fishing fleets are coastal, a dozen or more nations maintain distant-water fleets, several of which are very large. As noted earlier, various of the major marine fishery areas (large marine ecosystems) are currently being abused, that is, utilized beyond their sustainable yield. The nations exploiting such an area - not to mention the biota being exploited would benefit from scientifically (ecologically) based co-operative efforts, both informal and formal, with sustained-yield management as their aim (Belsky, 1990; Peterson and Teal, 1986; Young, 1989).

Conflicts arise when foreign fishing vessels encroach upon a nation's exclusive economic zone, a common occurrence. Fishing on the high seas (*i.e.*, in extra-territorial waters) can also lead to conflict, for example, when a nation is seen to be harvesting beyond the level of renewal. There is also a potential for conflict when particular fish stocks overlap the border between the exclusive economic zones of two countries, or the border between an exclusive economic zone and the high seas - situations that, in fact, often prevail. Littoral states patrol their exclusive economic zones with their coast guards, with special fishery police, with their armed forces (both naval and air), and with combinations thereof. However, many developing countries are incapable of carrying out fully adequate policing and might thus consider instituting co-operative (and thus confidence-building) policing arrangements with their neighbors.

Considerable numbers of multilateral treaties exist (often with associated fishery commissions) that have the purpose of managing either a particular category of fish (*e.g.*, the 1949 Inter-American Tropical Tuna Commission) or a particular portion of the ocean (*e.g*, the 1952 International North Pacific Fisheries Commission). Fishing nations thus have the opportunity to maintain the sustained yield of such fish or regions via these commissions. However, all relevant nations would have to become party to the treaties. Moreover, the parties to such a treaty would have to provide the commission with adequate research capabilities to establish proper fishing limits. Even more important, they would have to empower the commission to allocate fishing quotas among themselves, and to monitor and police the harvesting. Most of these commissions are in practice quite ineffectual so that confidence would be generated among the involved nations to the extent that they truly co-operated in these worthy endeavors. Finally, the Law of the Sea Convention of 1982 would, if it came into force, become the single most important multilateral treaty related to ocean fisheries: it would provide for the sustainable utilization of the renewable natural resources of the entire ocean, both within and beyond the zones of national jurisdiction, thus in essence treating those resources as a common heritage of humankind.

The special case of semi-enclosed portions of the ocean, which provides great opportunity for confidence building among the nations that share such an ecogeographical region, has already been examined above.

Numerous bilateral treaties also exist, often between neighboring littoral states, for the purpose of avoiding fishing conflicts, thereby fostering trust between them. One interesting example is the Exchange of 1975 and 1976 between Kenya and Tanzania on the Territorial Sea Boundary that has established a common fishing zone extending out for 22 kilometers (12 nautical miles) on either side of their sea boundary (UN Treaty Series No. 15603).

Finally, it is worth noting that particularly egregious assaults on the renewable natural resources of the ocean beyond the limits of national jurisdiction can lead to widespread outrage and co-ordinated international condemnation. The best recent example such confidence-building action has been the reasonably successful attempt by the community of nations to put an end to drift-net fishing on the high seas (UNGA, 1989; 1990b; 1991b).

Nature Reserves

An even less adequate worldwide fraction of the marine environment than of the terrestrial environment has been set aside as nature reserves: less than 0.2% of the ocean (with a substantial portion of the protected ocean accounted for by one site, the Australian Great Barrier Reef Marine Park) as opposed to about 4% of the land. Given the ever greater pressures on ocean biota and ocean ecosystems noted earlier, it becomes increasingly urgent to set aside additional ocean refugia (IUCN *et al.*, 1991, pp 157-158; Lien and Graham, 1985; Salm and Clark, 1984; Tisdell and Broadus, 1989). Comparable to the case of terrestrial reserves, representative coastal and other marine ecosystems must be safeguarded as sources of assured replenishment for the ocean's renewable natural resources (some of which have become highly endangered) and, more generally, to maintain the genetic diversity of the ocean biota. To borrow a relevant guideline from the Law of the Sea Convention of 1982, "The measures ... shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life" (Article 194.5). Additional justifications for establishing marine (and other) nature reserves include their value for comparative purposes in ecological research, their recreational and aesthetic values, and in some instances their archeological or other cultural values.

No matter where in the ocean such nature reserves are established, they would be of widespread benefit. It would thus be in the enlightened self-interest of the wealthier nations of the world not

only to establish new reserves within their own territorial waters and exclusive economic zones, but additionally to assist the poorer nations to do likewise. Such co-operation could take the form of scientific, technological, and financial support; and it could be carried out bilaterally or else via such agencies as the United Nations Environment Program (Nairobi) or the World Conservation Union (Gland, Switzerland). For any nature reserve created in the extra-territorial domain of the ocean to succeed, a widely supported multilateral treaty plus administration by an intergovernmental agency would seem to be necessary.

There is no question that the value to nature of a global system of protected areas in the ocean on the one hand, and the enhancement of international confidence engendered by such a system on the other, would outweigh the modest concomitant curtailment in freedom of the seas.

Recommendations

Maritime confidence-building measures associated with the environment can take a number of forms; and they can have various outcomes. To begin with, it has been suggested here that confidence among nations could be greatly enhanced by making the ocean nuclear-weapon free, the latter the potentially single greatest boon to the ocean environment. Measures taken to avoid radioactive releases from the many naval nuclear propulsion systems, during both peacetime and wartime, would generate additional confidence.

Confidence could be enhanced to the extent that more nations both coastal and landlocked recognize the need to become party to the various major multilateral treaties that contribute to the protection of the ocean environment from military activities; and then, after joining these treaties, go on to uphold and support them through co-ordinate domestic legislation, by educational means, and in other ways. Confidence could be further enhanced if the parties to certain multilateral ocean-related treaties agreed to expand the scope of those treaties to encompass military activities; or, short of such improvement, for individual nations to make unilateral commitments to that effect.

An enormous level of confidence would be generated if sufficient numbers of industrialized and other nations were to embrace the Law of the Sea Convention of 1982. They would thereby be supporting the rule of law, but more specifically, they would be accepting the concept that the ocean is subject to a comprehensive body of law. They would also be accepting that at least some of its components (the extra-territorial seabed and, to some extent, all fish) are a common natural heritage of humankind as well as the practical implications, both societal and environmental, of such acceptance.

Many advantages would accrue to the nations that share the drainage basin of a semi-enclosed portion of the ocean if they were to co-operate on its environmental protection and sustainable exploitation through impartial mechanisms of monitoring and enforcement; and the level of confidence among them would be strengthened in the process.

The establishment of a co-ordinated system of nature reserves in the ocean including, as necessary, the transfer of technology and other co-operation between rich and poor nations - would be of great value to the ocean ecology and would create much confidence among the co-operating nations.

Conclusion

Ocean ecosystems, especially in coastal and semi-enclosed regions, are coming under increasing human pressure (McIntyre *et al.*, 1990; Strong, 1991b). Some of this pressure emanates on a continuing basis from the military sector of society; and the possibility always exists for hostile actions that lead to locally serious or even cataclysmic disruption (Alatas *et al.*, 1986). In addition,

there is much, and growing, room for international conflict over ocean resources (Peterson and Teal, 1986). Thus it becomes ever more urgent for the community of nations to develop sufficient mutual trust to carry out a process of naval and other disarmament, to facilitate co-operation in the equitable sharing of the ocean's natural resources in perpetuity doing so for the benefit of humankind and the biosphere upon which it depends.

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Chapter 7
The "Neither Confirming nor Denying" Policy at Sea

Jan Prawitz

Abstract

The practice of neither confirming nor denying the presence or absence of nuclear weapons onboard ships became a hot political issue in relation to port visits in many non-nuclear weapon states in the 1980s. The policies of the nuclear weapon states and of two non-nuclear weapon states New Zealand and Sweden are described. Several aspects involved are discussed including radiation detection. The possible impact of recent arms reductions is analysed. Some measures are suggested.

The Issue

Over the past decade, an issue of permitting or not permitting port visits of warships carrying nuclear weapons, and thus, in essence under nuclear weapon power flag, gained considerable political weight in a number of countries. In one case, a controversy between USA and New Zealand caused the cancellation of their ANZUS[1] alliance co-operation. In 1988, the same issue caused government crisis and an extraordinary election in Denmark. The issue was prominently debated in many other countries.

More precisely, some non-nuclear weapon states adopted a policy that nuclear weapons would not be permitted in their territories, certainly not for permanent stationing, but also not onboard ships making temporary calls at ports or aircraft making stops at airports. Among these countries are both members of military alliances and non-aligned states.

Nuclear weapon powers,[2] on the other hand, have long ago adopted a policy of neither confirming nor denying (NiCNoD)[3] the presence or absence of any nuclear weapons onboard any specific ship at any specific time.

Concerns about security and nuclear weapons in general are claimed as the main reason for the attitude of the coastal states, military and doctrinal considerations as the main reason for the policies of the nuclear weapon states.

The contradiction between the policies of these coastal states and the nuclear weapon flag states and the resulting controversies constituted a significant political problem in the 1980s.

However on 27 September and 5 October 1991, President Bush of the USA and Gorbachev of the USSR respectively announced dramatic unilateral reductions in the nuclear weapon arsenals. These announcements imply that all nuclear weapons will be withdrawn from surface ships and submarines, except strategic ballistic missiles onboard submarines (SSBNs). Some of the weapons withdrawn will be dismantled, others stockpiled on shore. When these measures are implemented,

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[1] ANZUS: Security Treaty between Australia, New Zealand and the United States of America. Entered into force 29 April 1952.

[2] According to the principles laid down in the Treaty on the Non-Proliferation of Nuclear Weapons (Art IX:3), the nuclear weapon powers are China, France, Great Britain, the former Soviet Union and the USA. After the dissolution of the USSR, the Russian Federation has declared itself the successor to the status of the USSR under the treaty. India exploded a nuclear device in 1974 "for peaceful purposes", but is usually not considered a nuclear weapon power.

[3] The expression "neither confirming nor denying" is growingly shortened with the acronym NCND in the literature. In this paper, the orally more fluent NiCNoD will be used occasionally.

the only US and USSR nuclear weapons onboard ships in peacetime would be strategic submarine based ballistic missiles. France and the UK have announced their readiness to conduct similar withdrawals.

Furthermore, at the Summit Meeting in Washington on 17 June 1992, Presidents Bush of the USA and Yeltsin of the Russian Federation announced further dramatic cuts in strategic nuclear weapons including such based on submarines. These cuts will be implemented before the year 2003. Thus, most if not not all of the NiCNoD controversy will after some time be gone.[4]

Port visits by warships in foreign countries have a long tradition. They are intended to demonstrate friendly relations between states, and provide opportunities for personal contacts between navies.

For the European scene, the Helsinki Final Act[5] of 1975 prescribes that the participating states "will, with due regard to reciprocity and with a view to better understanding, promote exchanges among their military personnel, including visits by military delegations", a formulation intended to imply also that visits of warships would have a confidence-building role.[6]

In the current port visit debate, ships with nuclear weapons onboard and ships propelled by nuclear power are frequently considered together as one problem category. Indeed, many nuclear powered ships were adapted to have nuclear weapons onboard. While both concepts are important, they are different in character and should not be mixed up. Deployment of nuclear weapons at sea is a fundamental strategic issue involving the central balance of power in the world and the national security status of states but provides almost no risks in peacetime.

Nuclear propulsion of ships, however, is a less fundamental strategic factor but does constitute risks for leakages of radioactivity in peacetime. Such risks would be enhanced when ships propelled with nuclear reactors navigate in narrow or shallow waters or dock in harbours. There are currently 579 nuclear reactors used for propulsion of warships,[7] to compare with 420 nuclear power stations in operation (in about 200 clusters) on land.[8]

The Nuclear Weapon Powers

The policy of nuclear weapon powers neither to confirm nor to deny the presence or absence of any nuclear weapon onboard ships has a long history. This policy is, however, not limited to nuclear weapons onboard ships. It is rather applied to any nuclear weapons anywhere. Secrecy has always been surrounding nuclear weapons in all nuclear weapon states.

The objective of the NiCNoD policy has primarily been explained in military terms. When the US position was stated[9] recently, the principle was said to be necessary to:

- enhance the deterrence value of having nuclear weapons deployed on ships and aircraft;

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[4] Before the announcement of these dramatic reductions, the NiCNoD issue has been analysed by this author in an article "Neither Confirming Nor Denying: Thoughts on a Principle", in Lodgaard, S. (ed.), *Naval Arms Control*, Sage Publications, London, 1990, pp. 240-57.

[5] Conference on Security and Co-operation in Europe (CSCE). *The Final Act* was signed on 1 August 1975 by 33 European (then all but Albania and Andorra), Canada and the USA. In 1992, 52 states are participating in the CSCE. The newcomers subscribe to all documents agreed in the past. The Final Act is not a ratified treaty and is considered by the signatories as "politically" rather than legally binding.

[6] This provision has been further developed in the Vienna Document 1992, paragraph 34 (Military Contacts).

[7] Handler, J., Arkin, W.M., *Nuclear Warships and Naval Nuclear Weapons 1990: A Complete Inventory*, Neptune Papers No. 5, September 1990.

[8] *Nuclear Power Reactors in the World*, IAEA, April 1992.

[9] Material provided by the US Navy to SIPRI in 1988 and published in Fieldhouse, R. (Ed.), *Security at Sea: Naval Forces and Arms Control*, SIPRI, Oxford University Press, 1990.

- impede potential adversaries from identifying weapon deployment patterns, and determining distribution and numbers of weapons;
- withhold from a potential enemy information that could be used against US forces in the event of a conflict;
- complicate an enemy's tactical problem by forcing all nuclear capable platforms to be treated as if they were fully nuclear armed;
- contribute to security of weapons especially against terrorist and saboteur threats;
- reduce potential for release of classified technical information relating to nuclear weapon design, stowage and handling;
- avoid handing adversaries data of intelligence value which would permit rechanneling intel (intelligence) resources to other targets.

But these goals seem not to be the only or even the most important reason for the NiCNoD policy. General secrecy and public relations seem to be as important since the mid-50s. First, the US does not share all nuclear secrets with allies. Second, the NiCNoD policy was supposed to avoid public concern and protest, when nuclear weapons were brought into allied territory. The latter objective, often pursued in co-operation with the host country, worked well for long time.[10]

The early history of the Soviet NiCNoD policy is less well known. One source suggests that the Soviet Union pursued a "deny policy" rather than a NiCNoD policy.[11] As a consequence, the USSR would have denied the presence of nuclear weapons onboard a specific ship regardless of the arms it might have been carrying. But that would not have been possible to prove from the outside.

The Soviet position was tested in August 1980 when a Soviet submarine, disabled by an accident east of Okinawa, was towed through Japanese territorial waters on its way home[12]. On request, the Soviet government declared that the ship had no nuclear weapons onboard, but only after the submarine had left Japanese territory.

Another example emerged in 1981 when the Soviet submarine 137 stranded on a rock in southern Sweden.[13] When the Swedish government, after radiation measurements had created suspicion that the ship had a nuclear weapon onboard, asked the Soviet government for an explanation, the Soviet response was that "the Soviet submarine 137 carries, as do all other naval vessels at sea, the necessary weapons and ammunition".[14]

In recent years, the Soviet position loosened. Commenting on the extraordinary general election in Denmark in 1988, the Soviet general Batenin stated that "when Soviet ships call on foreign ports, *e.g.* in Mexico, Ireland or Greece, their captains declare on request that the ship has no nuclear weapons onboard". In addition Soviet ships, he said, respect nuclear weapon free zones and generally the policies of host countries.[15]

In June 1988, the Soviet Foreign Minister Shevardnadze stated before the United Nations General Assembly that "on the basis of reciprocity with the United States and other nuclear powers,

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[10] The history of the issue in the USA has been described *i.a.* in Arkin, W.M., *Contingency Overseas Deployment of Nuclear Weapons*, Report, Institute for Policy Studies, February 1985, and in Pugh, M.C., *The ANZUS Crisis, Nuclear Visiting, and Deterrence*, Cambridge University Press, 1989, pp. 64-68.

[11] Kristensen, H.M., Arkin, W.M., Handler, J., *US Naval Nuclear Weapons in Sweden*, Neptune Paper No. 6, September 1990, p. 6, footnote 3.

[12] On 21 August 1980, a fire broke out on a Soviet 4600 ton Echo-class submarine. A tug towed the stricken ship home to Vladivostok beginning on 23 August.

[13] On 27 October 1981, the Whiskey class submarine U 137 stranded on a rock in internal Swedish waters just outside the naval base of Karlskrona. On 6 November, the submarine was released and returned to the Soviet Union. The incident is discussed in Leitenberg, M., *Soviet Submarine Operations in Swedish Waters 1980-1986*, Praeger, New York, 1987.

[14] Documents on Swedish Foreign Policy 1981, Ministry of Foreign Affairs, pp. 81-101.

[15] Batenin, G., Novosti 20 April 1988.

the USSR is ready to announce the presence or absence of nuclear weapons onboard its naval vessels calling at foreign ports".[16]

The policies of France and Great Britain have been similar to those of the USA. So far, China has not deployed tactical nuclear weapons at sea and its position was neither declared nor tested.

In the 1980s, more than every fourth nuclear weapon was deployed in the maritime domain. Towards the end of the decade that number began to decline.

It was estimated that in 1989, about 14580 nuclear warheads were earmarked for naval and maritime deployment. 9220 of those were used for strategic submarine launched ballistic missiles (SLBM) that would never or very seldom be carried to foreign ports. It was the remaining 5360 tactical or non-strategic weapons that came into focus of the NiCNoD controversies. How many of this latter category that were on the move onboard ships at any specific time did of course vary but were certainly considerable.

The number of nuclear weapon capable ships of nuclear weapon powers were at the same time estimated to be about 850, among them 425 submarines.[17]

This picture was drastically changed in 1991. On 31 July, the USA and the USSR signed the START agreement reducing strategic nuclear warheads by 20-25%, and implying that the number of US and USSR SLBMs would be reduced to 5372.[18]

Two months later, on 27 September US President Bush announced dramatic unilateral reduction measures. He declared *i.a.* that

> the USA will withdraw all tactical nuclear weapons from its surface ships, attack submarines, as well as those nuclear weapons associated with our land-based naval aircraft. This means removing all nuclear Tomahawk cruise missiles from US ships and submarines, as well as nuclear bombs aboard aircraft carriers. The bottom line is that under normal conditions, our ships will not carry tactical nuclear weapons. Many of these land- and sea-based warheads will be dismantled and destroyed. The remaining will be secured in central areas where they would be available if necessary in a future crisis.

On 5 October USSR President Gorbachev made a matching unilateral declaration, stating *i.a.* that

> all tactical nuclear weapons should be removed from surface ships and multipurpose submarines. These weapons, as well as nuclear weapons on land-based naval aviation, shall be stored in central storage sites and a portion shall be eliminated.

He also declared that

> the Soviet Union has already decommissioned three nuclear missile submarines with 44 launchers of SLBMs and will decommission an additional three submarines with 48 launchers.[19]

The effect of these declarations, when implemented, will be that "under normal conditions" only strategic nuclear weapons onboard submarines will be deployed at sea and that transit and visits in foreign waters and ports by warships with nuclear weapons onboard will be very rare, if any at all.

Reacting to the US-USSR reductions, the British Government later declared that

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[16] UN Document A/S-15/PV.12.

[17] "Nuclear Notebook", *Bulletin of the Atomic Scientists*, Vol. 45, No. 7, September 1989, p. 48.

[18] This figure is within START limits and based on the deployment and procurement plans existing at the time. for texts of START documents, see *e.g. World Armaments and Disarmament*, SIPRI Yearbook 1992, pp. 38-63.

[19] For full text of the Bush and Gorbachev-statements, see *e.g. World Armaments and Disarmament*, SIPRI Yearbook 1992, pp. 85-88.

> Royal Navy ships and aircraft and Royal Air Force maritime patrol aircraft will no longer have the capability to deploy tactical nuclear weapons. The UK weapons previously earmarked for this role will be destroyed.[20]

The French government reacted by repeating the willingness of France to participate in nuclear disarmament, but expressed no specific commitments on sea-based weapons. China welcomed the announcements but expressed no commitments for itself.

The USA and the Russian Federation[21] exchanged new rounds of unilateral declarations on further nuclear reduction in 1992, on 28-29 January and 17 June, further limiting the number of US and Russian SLBM warheads. According to the 17 June "Joint Understanding", there would, seven years after the entry into force of the START treaty, be no more than 2160 SLBM warheads on each side. By the year 2003, the number of SLBM warheads would be further reduced to 1750 on each side.[22]

The fact that all ships except strategic submarines normally will be non-nuclear would not mean, however, that the NiCNoD policy will be abandoned. The statements made, rather indicate the opposite.

The Non-Nuclear Weapon Port States

A variety of policies have been adopted by coastal states on reception of visiting warships under nuclear weapon power flag. A summary of the policies of 55 countries has been published by Robert White.[23] According to his report, about half of the states studied do permit ship visits with nuclear weapons onboard or do at least not raise the issue. 19 of the coastal states studied one way or another entertain the policy that visits with nuclear weapons would not be accepted.[24]

Those which do not permit introduction of nuclear weapons in their territories have adopted various procedures for dealing with the neither confirming nor denying situation. Some made one general declaration that nuclear weapons are not permitted on their territory. Others make such a declaration every time a port call is requested. In both cases they leave it with that and accept visiting ships without explicit assurances that there are no nuclear weapons onboard. This is the usual procedure in *e.g.* the Scandinavian countries. There are also those who have not specified their no-permit policy and probably treat visit requests on a case by case basis. A general observation is that the annual number of visits is low for many of the countries studied.

This survey has recently been extended in a new report with an analysis of records of visits to ports in a number of countries by nuclear capable ships, including records of the movements of a number of individual ships in 1984 and 1985. Special attention is given to port visits in Japan, New Zealand and Scandinavian countries. The report concludes that the NiCNoD policy has been used widely to allow nuclear weapons to be taken covertly into ports, airspaces, and other areas from which they are in principle excluded and that many of these actions are carried out in

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[20] Statement in the House of Commons 15 June 1992. See *e.g.* Document CD/1156.

[21] The USSR was dissolved as a state at the end of 1991 and was succeeded by its largest republic, the now independent Russian Federation as far as control over nuclear weapons is concerned.

[22] For texts of the 28-29 January statements, see *e.g. World Armaments and Disarmament*, SIPRI Yearbook 1992, pp. 88-92; for the 17 June text, see *e.g. Arms Control Today*, Vol. 22, No. 5, June 1992, p. 33.

[23] White, R., *Nuclear Ship Visits. Policies and data for 55 Countries*, Tarkwood Press, Dunedin, 1989.

[24] The 19 states are (China), Denmark, Egypt, Finland, Iceland, India, Iran, Ireland, Japan, Malta, New Zealand, Nigeria, Norway, Seychelles, Solomon Islands, Spain, Sri Lanka, Sweden, and Vanuatu. Among the studied land-locked states, Austria, Laos and Switzerland do not permit landings of aircraft with nuclear weapons.

collusion with the governments of a number of countries whose official policies prohibit the entry of nuclear weapons into their ports, thereby defeating those same policies.[25]

The policies of two states, New Zealand and Sweden, will be further discussed below.

The Law of the Sea

The Convention on the Law of the Sea (UNCLOS),[26] completed in 1982, defines the status of different sea areas and prescribes rights and obligations of states in relation to such areas.

According to the convention, a coastal state exercises full jurisdiction over its internal waters only. Internal waters are as a rule waters on the landward side of the baselines (Art. 8:1) including ports (Art. 11). In internal waters, the coastal state has the legal right to prescribe on what conditions ships may be present, *e.g.* prohibit access for ships with nuclear weapons onboard.

UNCLOS provides coastal states with jurisdiction also over their territorial seas and archipelagic waters. Every state has the right to establish a territorial sea with a breadth not exceeding 12 nautical miles measured from the baselines (Art. 3). Archipelagic waters are all but internal waters enclosed by the baselines of an archipelagic state (Art. 49-50).

A flag state has, however, the right of innocent passage for its ships in territorial seas and archipelagic waters of other states (Part II, sec.3; Art. 45, 52-53). Passage is considered innocent "so long as it is not prejudicial to the peace, good order or security of the coastal state" (Art. 19:1). In particular, the passage is not considered innocent if the ship engages in a number of specified activities (Art. 19:2).[27]

Innocent passage by a submarine should be on the surface with its flag shown (Art. 20).

A coastal state may adopt further laws and regulations relating to innocent passage of foreign ships (Art. 21-22).

Future regulation of passages through the territorial sea by "nuclear-powered ships or ships carrying nuclear or other inherently dangerous or noxious substances" is foreseen in the convention (Art. 23).

The coastal state has according to UNCLOS presently no right to impede passage of ships that may carry nuclear weapons in territorial or archipelagic waters as long as the ship behaves innocently.

In brief, passage is innocent as long as it is just strait passage. Military activities undertaken en route in foreign territorial seas and archipelagic waters would require coastal state permission.[28]

In the special case of international straits the flag state enjoys the more liberal regime of transit passage (Part III, sec. 2).

In exclusive economic zones and on the high seas the convention gives no rights to the coastal states with regard to ships carrying nuclear weapons.

Any future restriction limiting the general freedom of navigation has to be instituted by separate international agreements in addition to and in harmony with the Convention on the Law of the Sea.

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[25] White, R.E., *The Neither Confirm Nor Deny Policy: Oppressive, Obstructive and Obsolete*, Working Paper No. 1, Center for Peace Studies, University of Auckland, May 1990. Compare also Kristensen, H.M., Arkin, W.M., Handler, J., *US Naval Weapons in Sweden*, Neptune Paper No. 6, September 1990.

[26] *The Law of the Sea*, United Nations Sales No. E.83.V.5. UNCLOS has not yet entered into force and a few important maritime states have not signed it. That is not a serious drawback for this analysis, however, as most of the sovereignty related provisions are considered customary law, as much as treaty law applying to all states of the world.

[27] For a detailed account, see Chapter 2.

[28] A legal analysis of the towing of a Soviet submarine through Japanese territorial waters in August 1980 is made in Grammig, R.J., "The Yoron Jima Submarine Incident in August 1980, a Soviet Violation of the Law of the Sea", *Harvard International Law Journal*, Vol. 22, No. 2, Spring 1981, pp. 331-54. The incident took place before the final completion of UNCLOS.

Nuclear Weapon Free Zones

Under the two international treaties establishing nuclear weapon free zones the 1967 Tlatelolco Treaty establishing the Latin American zone[29] and the 1985 Rarotonga Treaty establishing the South Pacific zone[30] there is no general commitment to refuse port calls by ships with nuclear weapons onboard. It is left to the individual parties to grant or deny in each case "transit" of nuclear weapons through their territories including temporary port calls by ships with nuclear weapons onboard.

In the Latin American case, the treaty does not refer at all to the issue of "transit". The preparatory commission drafting the treaty stated that "transit" in "the absence of any provision in the Treaty, must be understood to be governed by the principles and rules of international law" and that "it is for the territorial State, in the free exercise of its sovereignty, to grant or deny permission for such transit in each individual case".[31] This treatment of the issue did reduce the NiCNoD problem to a bilateral issue in each case and did not contradict the traditional US rights to pass the Panama Canal with nuclear weapons.

The Tlatelolco Treaty defines the zonal area as comprising both the territorial waters of zonal states and large additional ocean areas. The nuclear weapon powers while undertaking to respect the zone by adhering to its Additional Protocol II made interpretative statements to the effect that they did not consider that the treaty limits any freedoms of the seas in accordance with international law.[32]

In the South Pacific case, the transit issue is explicitly addressed. Its Art. 5:2 prescribes that "each Party in the exercise of its sovereign rights remains free to decide for itself wether to allow visits by foreign ships and aircraft to its ports and airfields". This provision was intended to be "realistic" in avoiding imminent controversies with nuclear weapon powers. One zone partner, New Zealand, did use its sovereign rights to legislate a general prohibition of nuclear port visits.

The Rarotonga Treaty defines the zonal area as comprising very large ocean areas (Art. 1(a) Annex I), while most treaty provisions apply only to "territories" subject to the jurisdiction of the parties, including "internal waters, territorial seas and archipelagic waters, the seabed and subsoil beneath, the land territory and the airspace above them" (Art. 1(b)). The treaty explicitly states that nothing in the treaty would affect the rights of any State with regard to freedom of the seas (Art. 2:2).

When signing Additional Protocol II of the Tlatelolco Treaty and Protocol 2 of the Rarotonga Treaty, the USSR made interpretative statements to the effect that transit and visits by foreign warships and flying vehicles with nuclear weapons onboard would be in conflict with the aims of the treaties and incompatible with the non-nuclear status of the zones and the parties.

It is interesting to note that the Antarctic Treaty does not explicitly forbid introduction of nuclear weapons into the continent, although Antarctica is a demilitarized area (Art. I) and although the carrying out of nuclear explosions in the area is prohibited (Art. V:1). However, "all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica, shall be open at all times to inspection" (Art. VII:3). This provision would probably discourage bringing nuclear weapons to Antarctica.

The Antarctic Treaty applies to the area south of the latitude S 60°, but does not affect the rights of any state under international law with regard to the high seas within that area (Art. VI).

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[29] Treaty for the Prohibition of Nuclear Weapons in Latin America with Additional Protocols I and II.

[30] South Pacific Nuclear Free Zone Treaty with Protocols 1-3.

[31] Document COPREDAL/76, p. 8 or UN document A/6663.

[32] For texts of the Antarctic, Tlatelolco and Rarotonga treaties, their status and reservations to them, see *Status of Multilateral Arms Regulation and Disarmament Agreements*, Third Edition: 1987, United Nations, Sales No. E.88.IX.5.

There is no territorial sea in Antarctica. The treaty seems thus not to prohibit ships to pass south of S 60° with nuclear weapons onboard.

A number of more nuclear weapon free zones have been proposed but not yet been established. The discussions about them have not reached such a degree of detail that transit regulations and port visit policies have been determined. The issue is touched upon, however, in official reports that have been prepared on the proposed zones in Northern Europe and the Middle East.[33]

The Case of New Zealand

New Zealand is a founding party of the South Pacific Nuclear Free Zone. But she has gone a few steps beyond the treaty provisions in the denuclearization process. In 1987, New Zealand adopted a special legislation on a review procedure for determining whether or not to permit visits of nuclear capable ships. When a port call by such a ship is requested, a visit into internal waters of New Zealand will be granted only "if the Prime Minister is satisfied that the warships will not be carrying any nuclear explosive devices upon their entry into the internal waters of New Zealand". In considering wether to grant approval to such an entry "the Prime Minister shall have regard to all relevant information and advice that may be available".[34] Similar rules apply to visits of aircraft.

The responsibility for decisions thus falls upon the Prime Minister, while no formal request is directed to the nuclear weapon flag states to make any declaration of non-presence of nuclear weapons or to abandon their NiCNoD principle. It should be noted, however, that the Prime Minister may have difficulties to determine whether no nuclear weapons are present onboard a particular visiting ship also in the case the flag state's government makes a positive declaration to that effect.

The roots of New Zealand's current policy go back to the 1960s, when the idea of declaring the South Pacific a nuclear-free zone was discussed in the NZ Parliament. In 1974, New Zealand raised the zone-idea at an annual ANZUS Council meeting, getting a negative response from its main ally, the USA. A year later, New Zealand nevertheless proposed and got endorsed the idea in the South Pacific Forum. At the United Nations General Assembly New Zealand the same year initiated a resolution proposing such a zone and got it passed.[35]

In the 1980s, a major issue in the New Zealand security debate was the possibility of restricting its defence co-operation within the ANZUS Pact to conventional force only, a security concept that the US government considered incompatible with alliance obligations. In 1984 the New Zealand government decided to pursue this general security view, and the port visit policies logically became an element of that concept.

In February 1985, the New Zealand government accordingly refused entry of the US destroyer USS Buchanan because the prospective visitor's non-nuclear status was not guaranteed. The refusal resulted in the suspension of co-operation between United States and New Zealand within the ANZUS alliance in August 1986. The US Congress in September 1987 passed legislation down-grading the status of New Zealand from "ally" to "friend". The ANZUS Pact has not been formally terminated, but has at present only two fully "active" parties. New Zealand still co-operates with Australia regarding conventional defence under the ANZUS Pact.

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[33] *Nuclear-Weapon-Free Zone in the Nordic Area*. Report from the Nordic Senior Officials Group, March 1991; *Towards a Nuclear-Weapon-Free Zone in the Middle East*. UN Document A/45/435 (Sales No. E.91.IX.3.).

[34] *New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987*. No. 86, clause 9.

[35] UN Document RES A/3477(XXX). All nuclear weapon powers but China abstained.

This is the most prominent controversy so far over the neither confirming nor denying principle.[36]

The nuclear policy development in New Zealand has sometimes been called the "Kiwi-Disease" to describe a turn of events that several nuclear weapon states consider unfortunate. The strong US reaction was also meant to discourage other countries from following the New Zealand way.[37] There is no reason to believe that other countries would meet a reaction lesser in strength should they on an individual basis adopt a New Zealand type port policy. That has indeed become the experience of Denmark.

Although the New Zealand government has repeatedly stated that its nuclear policy is not for export,[38] it is obvious that irritation over the NiCNoD principle has infected a fair number of countries having now developed early stages of the Kiwi-Disease. Refusal of receiving nuclear capable ships in ports without security reasons that are well understood by both the flag state and the port state, combined with a durable public anxiety about the port call issue should, in the view of the present author, be diagnosed as such an early stage.

But the dissolution of the Warsaw Pact, the cessation of the Cold War, and current dramatic arms reductions, including withdrawals of nuclear weapons from ships, would certainly contribute to the curing of the Kiwi-Disease. Following the announcement on 2 July 1992 by the USA that all substrategic nuclear weapons outside the US, including those onboard surface ships and attack submarines, had been withdrawn, the New Zealand Prime Minister, on 3 July 1992, said that there was no longer any reason why US naval vessels could not call at New Zealand ports.[39]

The Case of Sweden

Sweden is a country which once contemplated acquiring its own nuclear force but later abstained by becoming a party to the Non-Proliferation Treaty.[40] As a neutral state for long time sandwiched between the two military blocs in Europe, Sweden also refused to accept the presence of nuclear weapons of others on its territory, including temporary port calls of foreign warships with nuclear weapons onboard. On the other hand, port calls of foreign warships are generally welcome, often reciprocal to visits abroad by Swedish naval ships.

In principle, Sweden has the same port policy as New Zealand. The difference is that New Zealand does not grant a permission to visit unless its Prime Minister is positively convinced of the absence of nuclear weapons, while the Swedish government trusts the visitors and accordingly grants permission to visit.

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[36] New Zealand security issues are the subject of a growing literature. See *e.g.* Thakur, R., *In Defence of New Zealand*, Westview, 1986; Bercovitch, J. (ed), *ANZUS in Crisis*, St Martin's Press, New York, 1988; Mc Millan, S., *Neither Confirm Nor Deny*, Praeger 1987; Graham, K., *National Security Concepts of States: New Zealand*, Taylor & Francis, New York, 1989. A comprehensive account of the "Kiwi-disease" or "the ripple effect", as is the author's preferred term, is contained in Pugh, M.C., *The ANZUS Crisis, Nuclear Visiting and Deterrence*, Cambridge University Press, 1989. See also Jamieson, E., *Friend or Ally? A Question for New Zealand*, Mc Nair Papers No. 12, The Institute for National Strategic Studies, Washington D.C., May 1991; and Clements, K., *Breaking Nuclear Ties: The Case of New Zealand*, Westview, 1992.

[37] The US navy had wanted the reaction to be even stronger. The Secretary of the Navy proposed in December 1986 economic and other sanctions against New Zealand, but "an undertaker's committee of career bureaucrats in the JCS, DoD and State" found the proposal "needlessly provocative" and let the proposal disappear "into the memory-hole". See memoirs of John F. Lehman, Jr., *Command of the Seas*, Charles Scribner's Sons, New York, 1988, p. 412-14.

[38] Prime Minister David Lange said in 1987 that "the Solution of New Zealand is not for export. You cannot simply export a model based on our own particular security considerations. But the analysis of one's security is, I think, *transportable*" (emphasise added). Ministry of Foreign Affairs Press Statement No. 8, 19 June 1987, p. 12.

[39] *International Herald Tribune*, World Brief (Reuters), 4-5 July 1992.

[40] For description of this decision process, see *e.g.* Prawitz, J., "Sweden - A Non-Nuclear Weapon State", in Holst, J.J. (ed), *Security, Order, and the Bomb*, Oslo University Press, Oslo 1972, p. 61-73; and Wallin, L., "Sweden", in Karp, R.C. (ed.), *Security with Nuclear Weapons*, (SIPRI), Oxford University Press, 1991, pp. 310-81.

The position of the Swedish government was stated in the UN General Assembly in June 1988 by Prime Minister Ingvar Carlsson referring to the secrecy applied to naval nuclear arms as "confidence-blocking". His statement reads:

> The huge number of tactical nuclear arms that are routinely carried around the world by the naval vessels of the nuclear-weapon States in itself constitutes a threat to international security. Additionally, it causes the increasing and legitimate concern of public opinion when nuclear-capable ships call at ports. The secrecy traditionally surrounding the deployment of nuclear weapons at sea does not build confidence. On the contrary, it is confidence-blocking. Therefore the nuclear-weapon Powers should abandon their outdated policy of neither confirming nor denying the presence or absence of nuclear weapons on board any particular ship at any particular time. In Sweden we do not permit visiting warships to carry nuclear arms and we will work internationally for a new policy where assurances against such visits would be given.[41]

Sweden has also together with a fair number of cosponsors initiated a debate in the United Nations on naval arms control, including nuclear weapon issues. Among such initiatives are the expert study on the Naval Arms Race 1984-1985[42] and the annual deliberations on Naval Armaments and Disarmament in the UN Disarmament Commission.[43]

At the meeting of the Commission in May 1989, the NiCNoD principle was referred to for the first time in the reporting documentary reflecting the suggestion

> by several delegations that the current practice of nuclear-weapon States of neither confirming nor denying the presence or absence of nuclear weapons onboard any particular ship at any particular time should be abandoned.[44]

The statement was not unanimous, however. The concerns expressed were focused on the deployment of nuclear weapons at sea in general, referring to the more spectacular port call events as part of the security issue only.

A summary and comparison of the port call policies of the five Nordic states was published in 1990.[45] Among them, three are members of NATO and two are neutral.

Radiation Detection

The whole issue of neither confirming nor denying would be reduced if there were methods for detection from a distance of nuclear weapons onboard ships. Various attempts to study the problem of radiation detection have been undertaken.

The Swedish Defence Research Institute successfully identified by means of gamma-spectroscopy a nuclear warhead onboard the stranded Soviet submarine 137 in 1981.[46] This was not a typical verification situation, however.

The detection problem was discussed by Gary Brown in 1986.[47] He concludes that there might be some capability for detection available to the Super Powers, with the actual capabilities unknown. For smaller countries the possibilities are of course far less.

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[41] UN Document A/S-15/PV.2, 1 June 1988.

[42] *The Naval Arms Race*, Report of the Secretary General, UN Document A/40/535, Sales No. E.82.IX.3.

[43] UN Documents A/CN.10/83, 102, 113, and 134.

[44] UN Document A/CN.10/134, paragraph 15.

[45] "The Port Call Issue: Nordic Considerations", *Bulletin of Peace Proposals*, Vol. 21, No. 3, September 1990, pp. 337-52.

[46] Sundström, O., FOA-tidningen No. 4, December 1981 (in Swedish).

[47] Brown, G., *Detection of Nuclear Weapons and the US Non-Disclosure Policy*, Working Paper No. 107, Australian National University, Strategic and Defence Studies Center, November 1986.

However, at the Super Power summit in Washington 10 December 1987, Soviet President Mikhail Gorbachev said at a press conference that the Soviet Union had developed a technical capability to identify from a distance the presence and the capacity of nuclear weapons on both surface vessels and submarines.[48]

A study of the scientific background[49] of Mr Gorbachev's statement shows, however, that the main problem addressed was verification of a ban on sea-based cruise missiles and that that problem may be solved if the parties agree not to interfere with or deliberately obstruct each other's verification efforts with national technical means.[50]

A later joint US-USSR scientific report states that "the neutron emissions from normal plutonium warheads can be readily detected at distances of 10 to 40 meters with hand-held neutron detectors. Using larger (but still movable) detectors, such warheads could be detected at distances of up to 100 meters". If the warhead does not contain plutonium or is deliberately shielded, the task will be more difficult.[51]

This detection technology was tested by a practical experiment in the Black Sea in July 1989.[52] The results generally confirm the conclusions of the report.[53]

An independent Swedish analysis concludes that

> passive measurements of escaping gamma and neutrons can never be enough to satisfy *e.g.* port authorities that a visiting naval vessel is free of nuclear weapons. A warhead can be detected with varying degrees of reliability, if it is located close to the hull, but this is by no means equivalent to saying that a missing signal implies that there is no warhead.[54]

There are thus reasons to be cautious about the general technical possibilities to disclose the presence or prove the absence of nuclear weapons onboard ships at present.

But, if further research efforts turn out to be successful, their results may be accepted as *the* solution to the port call part of the problem. It should be understood, however, that such results developed to any reasonable reliability and effectivity, would hardly be able to establish a hundred percent truth in the legal sense, only what is "almost" true in the physical sense. If that alone would be sufficient would then be a matter for political judgement.

Discussion of Policies

The stated reason for the neither confirming nor denying policy is military considerations. This was so before the recent dramatic reductions of nuclear weapons deployed at sea and there seems to be no change planned. The NiCNoD policy will leave in doubt which ships have nuclear weapons

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[48] USSR-USA Summit: Washington, December 7-10, 1987, Novosti.

[49] Sagdeev, R.Z., Prilutskii, O.F., Frolov, V.A., *Problems of Monitoring Sea-Based Cruise Missiles Bearing Nuclear Warheads*, Report of the Committee of Soviet Scientists for Protecting the World from the Nuclear Threat. Presented at the Seminar on Verification Problems Held Jointly with the Federation of American Scientists in Key West, February 1988.

[50] This principle of cooperation was established in 1972 under the ABM (Art. XII:2,3) and SALT I (Art. V:2,3) agreements. It was inscribed also in the SALT II agreement (Art. XV:2,3) of 1979.

[51] Fetter, S., Frolov, V.A., Miller, M., Mozly, R., Prilutskii, O.F., Rodionov, S.N., Sagdeev, R.Z., *Detecting Nuclear Warheads*, Science and Global Security, Vol. 1, 1990, p. 323.

[52] On 5 July 1989 scientists from the National Resources Defence Council (NRDC) in Washington D.C. and the Soviet Academy of Sciences undertook close-in passive measurements of neutrons emitted by the nuclear warhead of a SS-N-12 Sandbox SLCM in a launcher on the deck of the Soviet cruiser Slava. The experiment took place in the Black Sea off the Crimean city of Yalta. (NRDC News Release 12 July 1989; Washington Post 6 July 1989.)

[53] Fetter, S., Cochran, T.B., Grodzins, L., Lynch, H.L., Zucker, M.S., "Gamma-Ray Measurements of a Soviet Cruise Missile Warhead", *Science*, Vol. 248, 1990, p. 828.

[54] De Geer, L.E., *Non-intrusive Detection of Nuclear Weapons on Ships*, National Defence Research Establishment, Sweden, FOA Report C 20817-4, 1 December 1990.

onboard and which ships have not, forcing an adversary to assume that any ship may be nuclear armed. This will be a military advantage if actual deployment at sea is limited.

If, on the other hand, most nuclear capable ships are nuclear armed most of the time, this objective becomes less important as the adversary could easily compensate for some errors in his guesswork. It may also be possible that a nuclear weapon power has reasons to assume that another major power can identify ships carrying nuclear weapons. If so, the NiCNoD policy of the former would be directed primarily against smaller states.[55]

Another objective for the NiCNoD principle referred to has been avoiding demonstrations or other public protests against port visits that open declarations of nuclear weapon presence might provoke. In this respect, the policy seems to have been successful some time ago. In some cases visited states have requested discretion and co-operated with the nuclear weapon flag state in order to avoid protests. Later it became clear, however, that the NiCNoD principle as a public relations policy became less successful.

It may be surprising that the nuclear weapon states have not sufficiently well explained to their allies and to other countries the rational for deploying nuclear weapons at sea in a way that makes such deployment including necessary port calls well understood and accepted. One reason for that could be that the original rational for some of the weapon systems involved became obsolete.[56] The recent unilateral measures confirms that view. Another reason could be unwillingness on the part of a nuclear weapon power to share information about nuclear weaponry with allies. The secrecy would then serve to avoid debate within the alliance in addition to confusing an adversary.

For some non-nuclear weapon states members of a military alliance with a nuclear weapon power, a declared non-nuclear status in peace time is an essential element in its security policy, *i.e.* in its relation to its nuclear weapon power allies and to its nuclear weapon power adversaries. This is true for instance in the case of Denmark and Norway. Whether port calls and "transit" with nuclear weapons are compatible with the non-nuclear status will then become a question of political judgement, as will the problem of handling the NiCNoD policies of allies.

Non-aligned countries with a non-nuclear status, whether members of nuclear weapon free zones or not, occasionally made this same kind of security analysis for the purpose of dealing with the NiCNoD policies of visitors.

If such an analysis by a port state would suggest that absolute absence of nuclear weapons from its territory is important, that conclusion might not necessarily be well understood by nuclear weapon states.

In the public debate both safety and security reasons are referred to as explanations for the policies of some non-nuclear weapon states not to accept ships with nuclear weapons onboard. Those policies should rather be understood as political and symbolic, however.

Few weapons related activities, if any, have a better safety record than handling of nuclear weapons. While nuclear weapons have been involved in a number of accidents, no unauthorized nuclear explosion has ever occurred. Up to about 60,000 nuclear weapons have been handled over several decades without a single accidental explosion. There should thus be no risk whatsoever for a nuclear explosion onboard a visiting ship. The release of a limited amount of radioactive material

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[55] It is not fully clear whether the nuclear weapon powers declare the presence or absence when visiting each other or how much the host country may know. Compare Van Ness, P., *China and the Question of Nuclear Ship Visits*, Working Paper No. 48, Australian National University, Strategic and Defence Studies Center, July 1988; and Arkin, W.M., "Keep our secrets and theirs, too", *Bulletin of the Atomic Scientists*, Vol. 45, No. 9, November 1989, p. 3.

[56] Former US Secretary of the Navy, John F. Lehman, Jr., explained to a stunned audience at the conference "INF at Sea" in London 18 May 1989, that tactical nuclear weapons at sea "were the product of a naive view of nuclear warfare that prevailed 30 years ago", *Christian Science Monitor*, 25 May 1989.

in connection with a possible fire or other accident involving nuclear weapons, while extremely unlikely, cannot be excluded, however.[57]

A variety of factors is usually considered by a port state before responding positively to a visit request. This would particularly be true in times of tension and crisis. Therefore, prior to granting a permission to visit, the port state could convince itself that a temporary port call in peace time should not attract a preemptive attack from any adversary of the flag state and should thus not be considered a security problem for the host country.

Therefore, non-nuclear policies of port states should rather be explained in terms of a growing concern about nuclear issues in general. The arms race, deterrence issues, the risk for accidental nuclear war has been important issues in political life. Governments have responded by proposing general arms control measures such as a comprehensive nuclear test ban, various kinds of freezes and nuclear weapon free zones. But for the public, such issues and proposals are perceived as abstract. By experience, people know that the prospect that such proposals lead to agreement is uncertain also in the long run.

A visiting ship, however, is visible and concrete and is bound to attract latent political energy. In addition, there are people who might accept and even welcome visits with nuclear weapons, but consider the NiCNoD secrecy as unfriendly arrogance decreasing the confidence-building value of the visit.

Although absolute absence of nuclear weapons might in specific countries not be required for security reasons, the NiCNoD principle irritated public opinion in some of them to such an extent that the resistance against nuclear port visits did become a prominent political issue. For the nuclear weapon flag states, the issue grew sufficiently to make the possibilities for docking a problem.[58]

This development was unfortunate, because so much political energy and prestige was spent on a few annual port calls, strategically and militarily a mere detail as compared to the role and deployment of nuclear weapons at sea. It drew attention away from the fact that the NiCNoD principle had much wider implications as a general obstacle to any serious discussion of arms control and confidence-building related to nuclear weapons at sea.

The possibility to find out independently and without onboard inspection whether a visiting ship has or has not nuclear weapons onboard seems to be inadequate. Which ships are nuclear weapon capable is a matter of public record. The ship's navigational history before the visit may give some indications. Monitoring the communications of the specialist crew handling the nuclear weapons may provide some further evidence, as may radiation measurements from dock-side.[59] But these methods could provide indications, not politically or legally significant proofs.

There is also the possibility that a ship carrying nuclear weapons onboard before a visit, in order to honour a port state's request for absence of nuclear weapons, would send away the special nuclear crew together with some essential parts of the weapons. That would leave most of the warheads onboard but exclude any possibility of producing a nuclear explosion with them. Does the ship then have nuclear weapons onboard in the legal sense? The answer should be no.

Finally, a radical solution was sometimes suggested that port calls of nuclear capable ships should be abolished altogether. That would be undesirable, however, as visits of warships are intended to be confidence-building. On the other hand repeated controversies over the status of

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[57] A record of more than 230 publicly known accidents involving nuclear weapons of the USA, Great Britain and the USSR has recently been published by Gregory, S., Edwards, A., "The Hidden Cost of Deterrence: Nuclear Weapons Accidents 1950-88", *Bulletin of Peace Proposals*, Vol. 20 (1), 1989 p. 3-26. Compare also Arkin, W.M., Handler, J., *Naval Accidents, 1945-1988*, Neptune Papers No. 3, June 1989; and Handler, J., Wickenheiser, A., Arkin, W.M., *Naval Safety 1989: The Year of the Accident*, Neptune Papers No. 4, April 1990.

[58] Bowen, A.M., O'Rourke, R., *Ports for the Fleet*, US Naval Institute Proceedings, Vol. 112, May 1986, p. 137-51.

[59] Professor Desmond Ball, private communication, January 1986. See also Van Ness, P., *China and the Question of Nuclear Ship Visits*, Working Paper No. 48, Australian National University, Strategic and Defence Studies Center, July 1988, p. 8.

visiting ships could turn that effect into its reverse. Within military alliances, port visits would also have operative purposes. In addition, availability of liberty ports for sailors is essential and should be recognized as a human right for them.

However, the dramatic reductions of seagoing nuclear weapons agreed or announced between July 1991 and June 1992 would mean a similarly dramatic change in the implications of the NiCNoD policy. When these measures have been implemented, almost no non-strategic nuclear weapons would "under normal conditions" be onboard ships at sea. A reduced number of strategic nuclear missiles will be carried onboard submarines. Warships transiting foreign waters or calling at foreign ports would most probably have no nuclear weapons onboard. In general, the port call controversies of the past will be gone.

The withdrawal of non-strategic nuclear weapons from US and British naval ships would be completed in mid-1992, while the same procedure may take longer time for the Russian navy. Some French naval weapons may continue to be deployed. The reduction of the US and Russian arsenals of SLBMs was agreed to be done in steps to be completed before 2003.

While most maritime nuclear weapons are withdrawn and many dismantled, there will remain an option to bring stored weapons back onboard in times of crisis. Therefore, many ships will continue to be nuclear weapon capable, normally operating without nuclear weapons onboard but ready to load them again.

Is NiCNoD Still an Issue

It is clear that the NiCNoD controversies have been embarrassing to governments of both nuclear weapon flag states and of visited states. It is clear that a solution would be welcome. It is further clear that agreed and declared reduction measures has removed much of the basis for the spectacular port call controversies of the past. But it also seems clear that states, which pursued the NiCNoD policy in the past will continue to do so. Among other reasons, much prestige has been invested in the current positions.

In the new world situation the NiCNoD issue will be related to a number of strategic submarines with SLBMs on permanent patrol. In addition, a number of surface ships and other submarines may be temporarily rearmed with nuclear weapons in times of crisis. The adversary situation of the East-West conflict would probably not return in a future crisis, and the need to confuse a formidable adversary would thus not emerge. On the contrary, declaring or denying presence of nuclear weapons may be politically opportune in a future crisis depending on its nature.

From the point of view of non-nuclear coastal states, there is also a need for reassessment. Nuclear weapons would normally not be onboard ships cruising off their coasts, transiting through their territorial waters or calling at their ports. Some uncertainty will continue to exist, however, as long as the NiCNoD policies are pursued. As in the past, SLBM submarines will generally not be a concern, as they operate invisibly and unrelated to coastal areas. Only in times of crisis, the traditional NiCNoD problem could thus return.

Still, the interest of non-nuclear coastal states to know will be as strong as in the past and not only in relation to port visits, while the nuclear weapon flag states will or will not tell depending on the nature of a specific situation.

While the NiCNoD policies will thus normally not be an issue, situations may emerge in the future, where a conflict between secrecy interests of a nuclear weapon flag state and transparency interests of coastal states could surface. Such transparency interests could be rather enhanced, depending on the situation and depending on how much a specific coastal state is connected, politically or geographically, to that situation. In this sense, NiCNoD will continue to be an issue.

The question is now whether international agreement on further measures could solve this remaining potential source of conflict. One possibility, built on a balance between navigational

previledges for the nuclear weapon flag states and enhanced "seaboard security" for coastal states, could be the following package of measures.

1. Abandonment of the neither confirming nor denying principle.
2. Constituting a special legal category of warships having nuclear weapons onboard. Such ships should distinguish themselves by flying an agreed special flag or bearing another agreed external mark. They would be entitled to navigational privileges and extended immunities in addition to what men-of-war already enjoy. An additional reason for the latter would be to reduce the risk for accidents and to secure that nuclear weapons, lost or abandoned at sea, would not be recovered by non-nuclear weapon states or other illegitimate salvors.
3. Reinforcement of the "seaboard security" of coastal states by means of agreed confidence- and security-building measures related to maritime nuclear weapons.[60] One such measure suggested long ago is that passage through the territorial waters of foreign states with nuclear weapons onboard would not be considered innocent[61] implying the need for coastal state consent as a condition for the passage.

The above package of elements is one possibility out of many. But this example should show the scope of the political problem as it stands in the new world situation. The realization of this or any similar package of measures would require flexibility on the part of both nuclear weapon flag states and relevant non-nuclear weapon states. However, with the East-West conflict gone, the time may finally have come, when a compromise on these matters could be worked out.

[60] The concept of "seaboard security" for coastal states was introduced in the UN Study on *The Naval Arms Race*, *op. cit.*, paragraph 264.

[61] The proposal was advanced both at the first and the third UN Conference on the Law of the Sea. For texts see UN Documents A/CONF.13/C.1/L.21, 1958 and A/CONF.62/C.2/L.16, 1974.

Chapter 8
Naval Manoeuvres and the Security of Coastal States

Habib Fedhila

Abstract

The sea has always figured large in the lives of coastal States because it affords the opportunity to sustain an economic policy dependent on supplies of raw materials and energy that nearly all come by sea; to exploit maritime and ocean wealth and resources; and to respond to political factors (protecting national interests around the world), military factors (honing sophisticated, long-range weapons systems that require vast expanses of ocean for testing and being made battle-ready) and legal factors (ensuring compliance with international rules on the exploitation of maritime and ocean resources which give coastal States certain privileges).

In pursuit of these objectives, the great seafaring nations have a naval strategy of ensuring that they retain the freedom of the high seas and secure communications, and can protect their national interests. The strategy takes the form of a naval presence stretching across the oceans, forces of warships and merchant vessels always on the move, ready to carry out any mission they are assigned. These fleets have to establish a naval presence across the expanses of ocean in order to guarantee maximum security at sea, using their presence and friendly manoeuvres to consolidate friendships and co-operation with friendly countries and allies; emergency and threatening manoeuvres to steer general crises that might endanger national interests; and tactical intervention and support to curtail aggressive acts and force belligerents to abandon their hostile designs.

Countries also maintain a naval presence to enforce international rules governing the sea and make sure that coastal States do not overstep their privileges as regards the extent of their maritime spaces and exploitation of the resources they contain.

Some risk is attached to all these activities, and may threaten the security of coastal States. For that reason, efforts are being made to bring about conditions conducive to confidence-building measures, with a view to safeguarding stability and security on the seas and oceans. This chapter puts forward suggestions for some confidence-building measures at the regional level.

The sea has always interested strategists because of its importance and its role in relations and competition between nations.

The American naval historian, A.T. Mahan, and Soviet Admiral S.G. Gorshkov agreed on the status of power which an appropriate naval force could give a nation.

General de Gaulle not long ago offered the following definition:

> The sea has always been above all an element of communication and, through communication, of domination ... More than ever the sea is the object of international competition. Human activity will turn increasingly towards exploring and exploiting the sea and, naturally, States' ambitions will include dominating the seas in order to control their safety and resources.

These definitions derive from the definition of naval doctrine which, nowadays, is based on mastery of the sea in order to be able to respond to the dictates of an international situation where several

different interests may be at stake: first, to support an economic policy that depends on supplies of raw materials and energy products delivered almost entirely by sea, and then to exploit the resources and riches of the seas and oceans; but also to respond to other, political and military considerations, protecting national interests around the world and honing sophisticated, long-range weapons systems that require large expanses of ocean for testing and being made battle-ready. Another important consideration, legal this time, is the desire to ensure compliance with international rules on the exploitation of sea and ocean resources, where coastal States have secured certain privileges.

Such mastery of the sea must be accompanied by a naval strategy, which is vital to the freedom of the seas, the security of communications lines and the protection of national interests overseas. The sea still features prominently in the lives of nations because it covers two thirds of the planet and because at least 85 per cent of the world population lives within 500 km - the range of a sea-borne missile of the coast.

Hence communications lines must be protected at all times so that regional crises and localized tensions which might get out of control can be dealt with. The situation in the Gulf during the Iran-Iraq war is the best example. Multinational forces were set up to protect freedom of shipping lest the economy of the Western world be stifled by an interruption in oil supplies.

This kind of co-operation between nations has given birth to alliances and protocols of co-operation between friendly and allied countries, not just to guarantee supplies but, more particularly, to contain threats and handle crises.

Naval vessels are uniquely equipped to apply this strategy.

It is argued in some quarters that the navy should be designed for defensive action, providing a nation with close-range protection against any threat from the sea. This remains true of certain third-world countries whose resources are still limited.

It is held in other quarters that security begins far from national shores: to deal with the threat, the great navies conduct manoeuvres in distant waters so as to familiarize themselves with, and adapt their operational tactical systems to, new conditions at sea, and to master new weapons technologies which themselves require large expanses of ocean because of their long range.

Other considerations also determine a need for maritime space overseas. Scientific research and technological evolution are among them.

Hence the navy must accommodate itself to a space commensurate with the geostrategic dimensions of national policy, and must be ready to go into action where and when necessary. This is included in the mission plans drawn up by the great navies in response to the strategy of "projecting power" so as to ensure freedom of the seas and protect interests around the globe.

Thus, since the last world war, the most varied and lethal naval forces have concentrated in the Mediterranean and the Indian Ocean; they include cruisers, destroyers, escort vessels, landing-craft, supply ships and logistical support vessels, submarines and aircraft-carriers. Some of these vessels carry nuclear devices. Aircraft-carriers and submarines are key elements in these naval forces in view of the role which their complement of weaponry and devices allows them to play. An aircraft-carrier can carry 60 to 90 aircraft of different types, from interceptors to fighters to reconnaissance aircraft and electronic warfare platforms. A floating base, the aircraft-carrier with its escort of surface vessels and submarines represents a very large strike potential which can deal the enemy a lethal blow on land or at sea, and can also be shifted from one crisis zone to another and remain there as long as required or until the crisis or conflict ends. The recent Gulf war showed what aircraft-carriers and submarines can do when assigned to take part in a conflict. The fleet also includes a number of merchant ships and fishing craft and research or electronic detection vessels which are used for military purposes.

Nowadays such vessels are designed and laid out along military lines, and can be rapidly converted to form part of a battle fleet or to fulfil supply and logistical support functions. Trawlers can also be used in military operations: their gear can be used to lay or sweep underwater mines.

These naval and merchant fleets are mobile and can move freely at sea, thus constituting a permanent presence, ever ready to carry out their chosen missions. This freedom is today circumscribed by a new notion introduced by the United Nations Conference on the Law of the Sea, dividing offshore areas of sea up between littoral States and giving the littoral States certain privileges over them. These privileges are discussed by M.C.W. Pinto in chapter 2: a coastal State enjoys complete sovereignty over its internal and territorial waters and the airspace above them. Navigation, mooring and overflight are subject to the regulations of the littoral State. Innocent passage by naval vessels must be swift and uninterrupted and must not affect the security of the coastal State in any way.

The Convention on the Law of the Sea also grants coastal States an exclusive economic zone 200 nautical miles broad, and rights over the continental shelf which can extend as far as 350 nautical miles.

The coastal State's sovereignty over this area extends to the exploitation of its biological and mineral resources.

Hence the authority of the coastal State extends over the surface of its national waters and in part over the airspace, waters, and seabed.

A coastal State must thus be ready to monitor and, where necessary, prohibit passage through or overflight of its territorial waters. It must also protect fisheries and the exploitation of biological and mineral resources, and all the fixed and mobile facilities used for that purpose; monitor and participate in scientific research; oversee the enforcement of international rules on navigation and shipping; protect lines of communication; be prepared to combat espionage activities and illicit or subversive operations; and confront threats from the sea.

Hence it may be seen that this new apportioning of maritime areas not only introduced new legal notions about the freedom to control much of the sea and a new definition of the exploitation of its resources, but also placed coastal States under a constraint to exercise the authority granted them to control and protect those waters.

The coastal State must acquire sufficient naval resources to cope with the various tasks involved. This is particularly a problem for newly independent countries, and this new arms build-up has been found to be the cause of many incidents at sea, chiefly over fishing rights. Firearms have been used on several occasions, and in some cases have narrowly missed provoking more dangerous scenes owing to the presence of naval vessels protecting trawlers under their flag.

Thus the new apportioning of maritime areas, giving coastal States certain privileges, paid insufficient attention to their security, since they now have powers which in some cases are beyond their capacity to exercise. Instead, it can be argued, the principle of freedom of the seas has been strengthened, and vessels can sail and engage in manoeuvres without problems or restrictions up to the limits of coastal States' territorial waters.

In order to assert their control over their new seas, a number of coastal States have been quick to acquire more and more sophisticated naval equipment to protect their interests and enforce the sovereignty they have been granted. It goes without saying that the debt this arms build-up incurs runs counter to their development policies and economic equilibrium. The build-up can also be regarded as a potential risk to regional security, just as it can also contribute actively to the settlement of regional conflicts. Naval vessels are uniquely equipped not only to guarantee freedom of movement and action but also to ensure compliance with international regulations. Thus the great seafaring nations hold sway over the oceans by means of a permanent presence and influence, making littoral States aware of the limits of their sovereignty. Force was used for this purpose in response to the proclamation that domestic shipping rules would apply to the Gulf of Sirte. The Gulf of Sirte, an area with little regular shipping, was used for manoeuvres and naval training exercises by foreign naval formations.

In other, similar cases, the use of force has been abandoned in favour of wisdom and diplomacy in order to avoid complicating an already worrisome regional situation. In 1964, following a conflict between Indonesia and Malaysia over the ownership of island chains, the Indonesians, fearing reprisals from the British, forbade the aircraft-carrier *Victorious* and its escort, which were manoeuvring off Australia, to pass through the Selat Sunda. The Indonesians regarded such passage as an act threatening the integrity of their country. Instead of asserting the right of innocent passage by force, the commander of the detachment side-stepped the problem by taking it through the Selat Lombok, thus avoiding open naval conflict while following the procedures of international law.

There was a similar case in 1968 when, after the Philippines laid claim to Sabah, British and Australian naval vessels then in the area were forbidden to pass through the Balabac Strait and the Basilan Strait. The British and Australian presence was regarded by the Philippines as a show of force. The reaction to this move argued neither for nor against the use of legal means for innocent passage, but relied instead on the status quo to avoid further aggravating the local crisis in part also because of friendly relations with the Philippines.

This all goes to show that the new international rules should be skilfully handled and cannot always be imposed by force. From time to time peaceful means must be used, and these have often allowed delicate situations to be resolved without difficulty. In this context, the navy can play a determining role. It is still considered an appropriate component in the handling of delicate situations by means of a well-maintained naval presence and, when appropriate, naval manoeuvres, depending on circumstances and situations. It may be said that a naval presence and naval manoeuvres become hard to distinguish in a strategy that rests on the policy of protecting interests and maintaining security on a large scale. Such a policy must seek to avert threats and settle crises which might otherwise lead to large-scale regional conflict. It can take a number of forms, as detailed below.

Naval Presence and Friendly Naval Manoeuvres

Countries maintain a naval presence to consolidate their friendships and co-operation with friendly and allied countries, thus confirming the definition of naval presence as a tool of foreign policy.

Its purpose in this setting is to renew and consolidate co-operation with friends and assure them, where necessary, of support and assistance.

It generally takes the form of friendly visits which may develop into joint training manoeuvres. Bilateral agreements are drawn up whereby the host State permits the use of its infrastructure for ships to undergo maintenance and crews to rest. In exchange it may receive economic aid, which may extend into the military sphere, with consequences which in the long run may influence its freedom of action and ability to withstand external pressure. Its own naval forces are also subject to periodic evaluation of their potential and operational capacity.

The agreements may be no more than protocols of co-operation on crew training and drilling. The drills may include joint exercises, leading to the formulation of plans of action such as would be needed in any joint operations. Up to a point, this practice acts as a deterrent to crises involving the host country. A suitable naval force can, when necessary, play a decisive role in resolving delicate situations.

A number of crises have been settled thanks to timely naval manoeuvres.

The 1973 war pitting Israel against Egypt and Syria prompted intervention by the United States of America and the Soviet Union, in part to be able to assist their respective allies and in part also to be able to influence the course of the conflict and the actions of the belligerents so that the fighting did not spread beyond certain bounds. A number of resources were deployed on that occasion. Besides naval vessels providing tactical support for the intervention, air lifts were staged

and transport vessels were deployed to cope with logistical requirements. The intervention was decisive and, despite the explosive situation it created, it passed off without incident. The two fleets had shown during the operation that they were well prepared and fully able to handle crises and regularize delicate situations.

The dispatch by France of a naval force to the Indian Ocean in 1977, at the time of the referendum on independence in Djibouti, can also be cited as an example, since it was done to prevent any foreign influence from shaping events.

Likewise, the presence of the USS *Enterprise* in the Gulf of Bengal in 1971 was a means of supporting Pakistan during the Indo-Pakistan conflict.

Emergency and Threatening Manoeuvres

Other, more complex situations have led the great seafaring nations to deploy sizeable naval forces for the sole purpose of protecting special interests. Such shows of force are often followed by threatening acts and procedures as a means of handling overall emergencies which might dangerously affect national interests.

The situation in the Gulf during the recent war between Iran and Iraq illustrates intervention of this kind, which involved several naval forces of different nationalities in a collective manoeuvre to keep shipping routes clear and maintain the West's oil supplies. The intervention on occasion went beyond threatening behaviour and turned into aggression, provoking serious incidents during which innocent people died. One such incident was that of the Iranian Airbus shot down in July 1988 by the American cruiser *Vincennes* at the cost of 290 lives, not to mention the mental suffering caused. In such circumstances the ship's commander ought to have used his identification system (Identification Friend or Foe) to check the identity of the target. This suggests that the accident was caused chiefly by a misinterpretation of the readings on the radar screens. The conclusions that can be drawn from this incident suggest that in such situations one should not rely entirely on electronic means of identification, despite the technological level and excellent reliability of the equipment carried aboard naval vessels. Operating malfunctions may occur and other, supplementary sources of information must be used as well.

The quality of the operating personnel also plays a decisive role. Such personnel should be technically qualified and well drilled. Calmness and collectedness during difficult moments are of great assistance in handling delicate situations and prevent many errors whose consequences might often be very serious and unforgivable. Joint manoeuvres should in principle allow for unforeseen events, and all vessels operating in the area should therefore exchange information and follow agreed procedures so as to avoid tactical misunderstandings and errors which could threaten the safety of the vessels themselves and, hence seriously affect regional security.

The Agreement on the Prevention of Incidents on and over the High Seas, signed in 1972 between the United States of America and the Soviet Union, outlines the agreed procedures and measures governing the behaviour of vessels of either party when vessels belonging to the other party engage in naval manoeuvres or exercises or other activities.

A number of supplementary recommendations may be added to create an atmosphere of trust and security. These include advance notification of manoeuvres or exercises, the establishment of a hot-line between those in charge, and periodic meetings between them to discuss the problems that arise in order to find viable and lasting solutions.

Tactical Intervention and Support Manoeuvres

Another aspect of manoeuvres is the preparation and readiness of naval forces to impose a blockade, which normally occurs when threatening manoeuvres have not sufficed. Blockades are often

imposed to defend special interests and force belligerents to abandon their hostile activities or aggressive intentions.

Two examples may be cited. The first dates from 1962, when United States naval forces were deployed to throw a blockade around Cuba in order to prevent the installation of Soviet missiles which could permanently threaten the United States.

The second example occurred recently, following the invasion of Kuwait by Iraqi forces. The reaction to the invasion was extensive, and international consensus was reached on the imposition of an embargo on Iraq. Naval forces from various nations were deployed, partly to monitor the embargo and partly to ward off the threat to regional security and thereafter prevent any kind of disruption to the system of energy supplies, given the danger that the deposits in the region might be seized. The embargo did not by itself produce the results hoped for, and force was used to put a stop to the situation: Kuwait was liberated and all hostilities and aggressive acts ceased. This intervention displayed perfect co-ordination between the participating forces, and the fleets demonstrated once again their ability to handle delicate situations and resolve conflicts.

Given the speed with which the crisis was resolved, and bearing in mind the results, a new idea for handling crises was put forward: establishing a joint standing force comprising fleets and forces drawn from the existing allies' reserves or contributed by the littoral countries in each region. It would be put under a specified command and trained for intervention on a global or regional scale to confront any kind of threat to international security.

Another idea was to set up a joint force committed to performing the same role under the auspices of the United Nations.

These suggestions are still just wishful thinking, but if given effect they could only benefit security throughout the seas and oceans.

Naval Presence for Scientific Research and Information-Gathering

A naval presence is also maintained for scientific research. But such research screens parallel activities with the aim of gathering information, both military and economic, for tactical naval operations, or installing sensors in major shipping lanes, laying underwater mines in shipping corridors or, again, to learn more about the lie of the sea bed and the coastline. All this information is needed for modern naval combat. Naval combat is no longer limited to battles between fleets on the high seas, for their long-range weapons and sea-borne missiles allow attacks to be mounted directly on enemy territory with the aim of destroying its economic and strategical potential, paralysing it and crippling its support and supply facilities. Again under the cover of scientific research, information on fish stocks is gathered and supplied to fishing fleets. The appropriation of stocks, thanks to the sovereignty over the 200 nautical mile economic zone granted to coastal States, means that foreign trawlers no longer have access to these resources. But one often finds that fishing regulations are breached with the complicity of naval vessels assigned to escort and protect trawlers and the flag. Coastal States' surveillance vessels are sometimes confronted with delicate situations.

As naval vessels have extended investigative powers, their commanders are required to know the current international conventions and regulations. They must apply them with diplomacy and skill in order to avoid altercations and foul-ups which might have awkward consequences. Alongside scientific research, specially designed and outfitted vessels conduct espionage missions and gather military information. Such activities are generally conducted during times of crisis and conflict. The case of the *Pueblo* is an illustration.

The *Pueblo*, a United States vessel, was seized by the North Koreans in January 1968 while operating off the North Korean coast, gathering information as described above. The Koreans considered that the ship was engaging in illegal activities within their territorial waters, and was not

covered by the right of innocent passage. The Americans, for their part, considered that the seizure had taken place in international waters and regarded it as an act of war, but they decided not to take reprisals in order to protect the safety of the *Pueblo*'s crew.

Confidence-Building Measures

Up to now naval forces and weapons have been excluded from disarmament talks, but the rapprochement between East and West could lead to the introduction of a number of confidence-building measures to ease the situation and determine the best approach to deal with these problems. Besides the Agreement between the United States and the Soviet Union on the Prevention of Incidents on or over the High Seas, the current trend seems to be to look for and propose other means of cutting down on major naval movements and permitting exchanges of observers for manoeuvres and exercises. But the drive to reduce the number of vessels operating at sea is incompatible with the mastery of the sea which is still the principal objective of naval strategy.

Yet if reductions in naval forces as part of a disarmament exercise or restrictions on their numbers in manoeuvres and exercises were to be covered in talks between the major seafaring nations it would be possible, by strengthening the United Nations and other international organizations, to bring substantial moral pressure to bear on these nations. Some suggestions in this direction were made during the third United Nations Conference on the Law of the Sea: the third world countries put forward, during discussions on the peaceful uses of the sea and the establishment of zones of peace and security, the following suggestions: conducting no more military manoeuvres in the exclusive economic zone; prohibiting free passage by naval vessels in States' territorial seas; no longer interfering in the rights of coastal States; prohibiting maritime espionage under the cover of scientific research; and no longer using the international area for military purposes.

Hence it can be seen that the areas and aspects which international regulations are supposed to cover are complex, and any suggestions and proposals in that regard should seek as their primary objective a rapprochement between coastal States in order to harmonize as far as possible their position *vis-à-vis* naval manoeuvres, the use of the seas and oceans, and the exploitation of their resources. In any case, in order to prevent crises, the international trend today is to set up regional groups with the task of establishing institutions in which States from the same region can together lay the groundwork for fruitful and sincere co-operation in safeguarding regional stability and security.

In some regions the sea is playing an important role in consolidating such co-operation. The Conference on Security and Co-operation in Europe has served as a model for preparations by coastal States in the western Mediterranean basin for what people are starting to call "the Conference on Security and Co-operation in the Mediterranean". The first meeting, held in Rome in early October 1990, enabled France, Spain, Italy, and Portugal to enter into consultations with the five Arab Maghreb countries over the first steps in the creation of a regional security and co-operation organization among the coastal States of the western Mediterranean. This may be regarded as a precursor to the establishment of bodies where decision makers and experts can meet to discuss regional problems of common interest, seeking solutions in the framework of a system whereby States can promote security and co-operation in the region.

Taking the initiative to reduce threats and seeking viable and lasting solutions to regional crises enables coastal States to safeguard their own security and live together in peace. For the East-West divide has passed, new nuclei of influence are forming around the globe, in the hope of fostering more flexible interregional co-operation against a background of confidence and mutual

respect. Hence confidence-building measures are easy to identify. In this framework, naval manoeuvres can help to bring about greater mutual awareness through a series of shared activities:

1. By organizing periodic meetings between experts to draw up protocols and instruments of agreement with the aim of instituting confidence-building and security measures.
   Certain areas would be covered by such an agreement, relating to manoeuvres and exercises at sea. Co-operation among coastal States, in exchanging information on the regional situation at sea, in staging mutual support manoeuvres in the event of incidents or difficulties at sea, and in periodically exchanging friendly visits, would greatly advance preparations for confidence-building measures between participants.
   The proposed periodic meetings could be held at a high political level if the situation so required, in order to bring about regional-level co-operation in identifying mutually advantageous solutions to localized crises and shield the region from confrontation and conflict.
   Such meetings could look to ease military tension through talks on reducing the naval forces of coastal States throughout the region, and the withdrawal of or, at the very least, limits on foreign naval forces in the region.
2. By taking steps always to notify coastal States in advance of naval manoeuvres, which (except for joint manoeuvres or by agreement with the State concerned) should never be conducted in the waters of other coastal States. Exchanges of observers would always be very helpful in this regard.
   For joint manoeuvres, a number of practical arrangements can be agreed on by the High Commands and communicated to participants in order to avoid surprises that might endanger anyone involved. Discipline must be observed in the conduct of operations, particularly when weapons are scheduled to be deployed.
   Periodic meetings between navies could lay down the rules and practices to be followed in this area.
   In any event, efforts should always be made to keep the forces taking part in naval manoeuvres in proportion to the area of sea in which the manoeuvres are conducted, in order to reduce the risk of accidents and their effects on the environment and life in the region.
3. By prescribing progressive cuts in military budgets and encouraging moves towards a policy of shared defence. This would undoubtedly limit arms build-ups and could lead to the adoption of regional-level security measures and moves promoting compliance with the rules on international navigation.
4. By respecting international rules on the exploitation of marine resources. The notion of shared interests should be taken into consideration in any activity conducted in the framework of such exploitation. The prospects for the settlement of disputes and differences over the delimitation of their waters and maritime boundaries by coastal States, belong in this context. Even today, certain zones are still highly sensitive owing to maritime disputes which are often the chief cause of deteriorating relations between States.

Conclusion

It should be said by way of conclusion that the Mediterranean, the Indian Ocean, and other ocean areas around the globe are still theatres for manoeuvres and conflicts which the littoral States cannot control. The economic and social imbalance which separates them is growing more and more alarming. It is the responsibility of the States involved to settle these problems through co-operation, in order to prevent any kind of interference, to ease tensions and to avoid conflict, so that they may

live in security. This is the best way to start the process of identifying and applying viable and lasting confidence-building measures.

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Chapter 9
Military Conduct at Sea

James Eberle

Abstract

This chapter is principally concerned with the use of naval forces on the high seas, and the possibilities for establishing a comprehensive code of military conduct at sea. The subject is considered from the point of view of the practitioner rather than the lawyer although good practice must of course be based on the law, and its interpretation by national governments. Many of the issues addressed here were addressed in the 1986 United Nations Study on "The Naval Arms Race". In the light of subsequent events, it is difficult to disagree with a conclusion of that report[1] which stated that:

> As this century approaches its close, the need for improved and more effective internationally accepted ocean management policies will become ever more apparent. In no way must the widened national responsibilities that will be introduced by the entry into force of the Convention of the Law of the Sea be misused as justification for the expansion and utilisation of naval force. Yet within a framework of improved international security, there is much that might be done by naval ships and aircraft to assist in the peaceful uses of the sea for the benefit of humanity.

The Chapter concludes that there is now an opportunity for the international community to consider the introduction of a new code for military conduct at sea, thus providing a framework for a much greater depth of international naval co-operation, and a new dimension to the building of mutual confidence in the field of maritime affairs. It sets out an outline agenda for a meeting of a new Group of Naval Experts to follow up the 1986 study.

Background

The maritime powers of ancient Greece, the Roman Empire and the Italian City States during the middle ages sought to claim sovereignty over what they considered to be their ocean space. The freedom of the seas had its genesis in the work of the Dutch scholar, Hugo Grotius, who in 1604 produced his dissertation "Mare Liberum". Selden's "Mare Clausum" sought to defend the idea that a state had the right to appropriate parts of the sea. Nevertheless, the development of the Law of the Sea on a global and customary basis which progressed throughout the seventeenth and eighteenth centuries, enshrined the concept of the freedom of the high seas and introduced the "territorial sea", over which the coastal state held sovereignty and jurisdiction. The width of the territorial sea has long since been a matter of dispute, although a three mile limit was accepted by most of the major naval powers during the nineteenth century. The 1930 Hague conference attempted to reach full international agreement on this matter, but failed. In the aftermath of World War II, the United Nations took up the issue in the first (1958) Law of the Sea Conference; and again failed to reach agreement. After a further fourteen years work, involving more than 150 countries, which included the issuing of the 1958 Conventions on "the Territorial Sea and the

[1] *The Naval Arms Race*, New York 1986, ISBN 92-1-142116-0.

Contiguous Zone", on the "Continental Shelf" and on the "High Seas", the United Nations Convention on the Law of the Sea was completed on the 10th December 1982. This convention introduced a 12 mile Territorial Sea, a 24 mile Contiguous zone and a 200 mile Exclusive Economic Zone, within which the rights and duties of the coastal state were defined. With regard to the High Seas, the convention sates that they:

> are open to all states, whether coastal or landlocked; freedom of the high seas is exercised under the conditions laid down in the Convention and by other rules of international law.[2]

Whilst the Convention recognises and defines the special status of warships, it does not directly address issues of military force at sea, except in respect of violations of international order by piracy or the transportation of slaves. However, there remained universal recognition that, underpinning all military action at sea in time of peace or war, lay the inherent right of self defence,[3] with its attendant obligation of proportionality. The special status of warships in peacetime is also recognised in the International Rules for the Prevention of Collisions at Sea ("The Rules of the Road").

Issues of military conduct at the international level were addressed during the nineteenth and twentieth century in respect of the laws of armed conflict at sea. The Paris Declaration of 1856, which dealt with a number of contemporary issues, such as privateering, contraband and blockade, is still in force, although its relevance to modern conditions is extremely questionable. The most comprehensive attempt to achieve international agreement on the laws of war at sea came in the Hague Conventions of 1907. These conventions related to:

VI. The status of enemy merchant ships at the outbreak of hostilities.
VII. The conversion of merchant ships into warships.
VIII. The laying of automatic submarine contact mines.
IX. Bombardment by naval forces in time of war.
X. The treatment of wounded, sick and shipwrecked members of armed forces at sea.
XI. The rights of capture in Naval War.
XII. The creation of an international prize court. (Not entered into force)
XIII. The rights and duties of neutral powers in naval war.

Attempts to supplement these agreements were made in the London Declaration of 1909 concerning the Laws of Naval War, the Washington conventions of 1922 concerning constraints on naval shipbuilding and the use of submarines and noxious gases in warfare, the London Treaty of 1930, and the London protocol of 1936 on the use of submarines in war. The 1937 Nyon Agreement attempted, in the context of the Spanish civil war, to designate unwarned submarine attacks as "piracy". These measures were largely unsuccessful in limiting either the growth of naval armaments or effective constraints on their use. This was clearly demonstrated by the events of World War II. Post World War II efforts were directed towards the establishment of 'Humanitarian Law', intended to mitigate the worst effects of armed conflict on the military forces and civilian populations of the states involved. The most important humanitarian law is contained in the 1949 Geneva Convention and their 1977 Additional Protocols.

These agreements of the early twentieth century and before were largely predicated on the classical prelude to the initiation of the use of naval force at sea, which was a declaration of war. The existence of a state of war divided nations into "belligerents" and "neutrals", each having its

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[2] UN Law of the Sea Convention, Article 87.
[3] UN Charter Article 51.

own set of rights and duties. Since the signing of the UN Charter, which renounced war, other than as an act of self defence, there has been a loss of clear distinction between conditions of peace, war and neutrality. In none of the recent major conflicts involving naval forces, has there, for instance, been a formal declaration of a state of war. A more graduated system of control over the escalating use of force by governments has increasingly been executed by means of "Rules of Engagement", a formal process in which the detailed restraints on military action, and the circumstances within which it may be used by an operational commander, are laid down. Such Rules of Engagement have been supplemented by agreements to prevent incidents at sea, rather than to control them once they have occurred. The US Soviet Incidents at Sea Agreement was the first of these. The 1989 US/Soviet agreement on the Prevention of Dangerous Military Activities is a more recent example. These have been discussed in Chapter Three.

Maritime Roles and Missions

A discussion on the future structure of a new comprehensive code of military conduct at sea must surely begin with consideration of the roles and missions of maritime forces. The classical objective of the major naval powers has been to protect their national territory and political independence, together with their maritime interests, by ensuring "Command of the sea". This is defined as the ability to use the sea for one's own purposes and to deny its use to an enemy. The more limited concept of "sea denial" is self evident. The modern interpretation of the Command of the Sea, has been that of "Sea Control", a control usually limited in both time and space. Such concepts, although involving the projection of power, were of a strategically defensive nature; although their attainment at the tactical level frequently involved the conduct of offensive operations.

The development of the Aircraft Carrier, and the techniques of amphibious assault landing, which were the centrepiece of US operations in the Pacific in World War II, backed by the post war development of the sea based ballistic missile, and more recently re-enforced by the demonstrated success of the land attack cruise missile launched by surface ships at submarines, introduced a new offensive element to naval strategy. Naval forces now represent a direct threat to the territory of a nation, rather than just to its maritime interests. Their ability to remain "hull down" over the horizon from an area of potential conflict is often quoted as an example of the political and military flexibility of naval force. There must, however, be at least some doubt as to the extent to which such action today could be said to imply the "threat of the use of force", from which all signatories to the Charter of the United Nations have committed themselves to refrain. Nevertheless, there is widespread acceptance that the mission of today's large Navies has been extended to include "the projection of power *ashore*", which to many carries with it an offensive connotation.

Another widely accepted naval mission is "presence". The continuous deployment of naval forces can have a general stabilising affect in a region, by demonstrating commitment and capability on the part of an external power. This is exemplified by US naval deployments in the Mediterranean, and by the presence of the US and other navies in the Arabian Gulf. Influence can also be applied and re-enforced by periodic port visits by warships. However, to a large extent, stability is in the eye of the beholder. That which might be presented as a stabilising presence by one would be seen as an illegally applied threat by another. Similarly, the withdrawal of naval forces can be a confusing signal leading to instability, as was demonstrated by the British withdrawal from the South Atlantic in 1981 of the patrol ship, "HMS Endurance" The Argentine Government mis-interpreted this move by the British Government, made as part of its efforts to cut its military expenditure, as a sign that Britain was not prepared to defend the Falkland/Malvinas Islands. The presence of warships on the high seas can also act as a deterrent to disorder and illegal acts as an "ocean guard", in a way that is similar to an important role played within coastal waters by the "coastguard".

Traditional naval missions have also involved the concept of blockade. Initially this was a measure, employed in the immediate vicinity of the enemy's ports to prevent his battle fleet from reaching the high seas where it could fight effectively. The concept of the close blockade was largely invalidated by the introduction of the submarine. Also in former days, the capture of merchant ships on the high seas, as they plied the trading routes, was a source of considerable income. However, the increasing effectiveness of warships and the weapons that they carried, together with the growing volume and importance of international seaborne trade during the nineteenth century, introduced new possibilities and incentives for sinking, rather than capturing, the merchant ships of an adversary, thus again achieving an economic blockade. This resulted in the unrestricted submarine warfare campaigns against merchant shipping in the first and second World Wars. As a result, it was held at the Nurenburg Trials that the unrestricted sinking of merchantmen by submarines without warning was a war crime.

However, to stop a merchant ship or craft which is intent on reaching its destination regardless of the subsequent cost, whether by submarine or surface ship, without sinking it and risking civilian lives, has proved very difficult. This is illustrated by the failure of the British Navy to halt the flow of post World War II Jewish immigrants into Palestine; by the difficulties of the Beira Patrol in the British Government's attempts to apply economic sanctions against the Rhodesian unilateral declaration of independence; and more recently by the difficulty of preventing the Vietnamese "boat people" from entering Hong Kong. Nevertheless, the concept of economic blockade has been revived as a means of the international community applying sanctions to a state, as part of the process of UN peacekeeping. This has had mixed success, not only because of the difficulty of stopping merchant ships without sinking them, but also because of the ingenuity of the international commercial market which has outwitted the intentions of governments. In the special case of Iraq, whose external economy is dependent almost entirely on the sale of oil, the blockade, backed by the very wide support of the international community and more sophisticated methods of boarding merchant ships, has been very successful. However, its impact on Iraq in economic and political terms has been less easy to interpret in a positive way.

The Protection of Trade

In the last two decades, the vulnerability of seaborne trade has been transformed. Modern weapon technology, supported by much improved surveillance capability, has greatly increased the ease with which merchant ships can be found, identified (but not by submarine), boarded and, if necessary, diverted or sunk. However, the growing internationalisation of shipping and trade, together with the increasing size and complexity of the international market place, has also much reduced the economic impact of such a sinking. Although it was widely forecast over many years that a threat to the supply of oil from the Arabian Gulf would send "shockwaves" through the international oil market, the price of oil during the Iran/Iraq war, in which a large number of oil tankers sailing under "neutral" flags were seriously damaged or sunk, remained at one of its lowest sustained levels.

Seaborne trade, whilst still a very important factor in the international economic system, is no longer its lifeblood. It has been replaced in this respect by international finance, which allows the almost instantaneous transfer of vast sums of capital around the world over secure data links. Foreign offshore shipping registers ("Flags of convenience"), together with the sophistication of the international financial system which provides the money to build or purchase ships, obscure the issues of the "nationality" of ownership and confuse the nature of neutrality. This situation is further complicated by the recently introduced practice of re-flagging. Cargoes, which are increasingly the product of multinational companies, complicate the concept of "beneficial ownership" And the international nature of the insurance market further spreads the risk.

Any progress towards a new code of military conduct at sea must also take into account the major changes in military technology. It is no longer difficult for a warship to find and hit another ship. Modern C^3I systems, using satellite sensors and communication links, make the surface of the oceans no longer a safe place to hide from the major naval powers. Both land based and carrier based fixed wing aircraft provide a potent and long range strike force. Shipborne helicopters have given the small ocean going warship much longer range tactical reconnaissance capability, and re-enforce the medium range strike capability now provided by surface to surface missiles. The range, endurance and underwater speed of the nuclear powered submarine has radically changed the nature of both submarine and anti-submarine warfare. Surface to surface missiles, including those that can be fitted to small coastal craft, have greatly increased the ability of navies to take offensive action. Modern technology has much improved the accuracy and effectiveness of naval gunfire.

Environmental Issues

There are other circumstances of change. Pressure on the worlds natural resources, and not least the accessibility of fresh water, is growing apace. The spread of concern about the conservation of fish stocks of many species outside the 200 mile Exclusive Economic Zone (EEZ), from dolphins in the Pacific to cod in the North Atlantic, is giving rise to the need for international agreements on measures of constraint on fishing activities, and for their enforcement. Lack of enforcement can lead to considerable international tension as in the North Atlantic Fisheries Organisation (NAFO) between Canada and the European Community. Successful enforcement requires surveillance and monitoring. There is thus an increasing requirement for some form of international surveillance on the high seas, to assist with the control of fishing activities there. Such surveillance would also meet an increasing need to assist in combatting the international drug trade.

The role played by the worlds oceans in the global climate balance is also being increasingly recognised and gives rise to further concern about ocean pollution. Its control also requires ocean surveillance. This requirement can be met at least in part by co-ordination of existing national sea area surveillance capabilities to constitute a global ocean area surveillance system. Such co-ordination, and consideration of ways of making the results freely available to all nations, should be high on the agenda of international naval co-operation.

Peacekeeping and Enforcement

A concept of international peacekeeping at sea is not easy to define. Whilst it is widely accepted that naval "presence" contributes to international peace, stability and order, it is difficult to translate this into the terms in which the requirements for UN peacekeeping are normally drawn. Whilst there was a large international (US, UK, Australia, Canada, Netherlands, New Zealand and ROK) naval force deployed under the UN flag in Korea in 1950, this was a UN operation of self defence under Article 51 of the UN Charter, and not of peacekeeping. The international forces assembled in support of economic sanctions against Iraq, and to evict the Iraqi forces from Kuwait, in which maritime operations no less than 22 countries were involved, were also initially deployed under article 51. Subsequently, they operated under the authority of Article 41, although they were not under UN "command", as provided for in Article 47(3), and did not fly the UN flag. The only UN peacekeeping force to have involved naval vessels operating under the UN flag appears to have been in 1989 in Nicaragua, where four small Argentine river patrol craft were deployed.

An attempt to form an international naval force was made in 1980 at the time of the outbreak of the Iran/Iraq war. The two principal navies involved were the RN and the USN. The attempt failed, not only because any referral to the United Nations would have inevitably been met by a

security Council veto, but also because the motivation of the two governments differed greatly. The US Government wished recognition that, by attempting to ensure the free flow of oil by sea from the Gulf, it was supporting the interests of the international community; but in forming an international force, it did not wish to find itself constrained by others in taking actions that it considered vital in its own national interest. Britain on the other hand, whilst recognising the wider international interest, also wished to be involved in order that it might have some influence over American action. The British did not, however, wish to be so closely involved that if the US took unilateral action of which it did not approve, it could not reasonably withdraw its support. At the operational level, this difference in motivation made it impossible to agree either command arrangements or appropriate Rules of Engagement. The French Government, which also had significant naval forces deployed in the region had no intention of having its freedom of national action constrained.

The deployment of the international naval force to enforce the UN maritime blockade of Iraq, and to support land and air operations to remove Iraqi forces from Kuwait, was a thoroughly well executed operation. It is, however, perhaps appropriate to note that the international nature of the naval effort would have been much more difficult to sustain, if Iraq, or an ally, had possessed submarines that could have threatened the sea lines of communication to the Gulf. An Iraqi capability for distant water minelaying would also have considerably complicated the naval task.

A general naval "peacekeeping" role, rather than a role in maintaining international order at sea in which the opportunities for international conflict are increasing, is difficult to define. This is not to say that there may not be specific tasks related to peacekeeping operations for which naval forces are required. This can be illustrated by the recent case of Yugoslavia. In the fighting between Serbian and Croatian forces, the Yugoslav Navy blockaded a number of Croatian ports on the Dalmatian coast. Amongst these was the ancient town of Dubrovnik, which was bombarded by the Serbs both from the shore and from the sea. There is little doubt that Dubrovnik was an "open" town. Yet the blockade and the bombardment created much damage to historic buildings there and suffering to its innocent residents. There was a shortage of food and medical supplies. Serious casualties in need of special medical care could not be evacuated. The blockade and bombardment can certainly be described as a crime against both the European and a global heritage. It seemed to many also to be a crime against humanity.

The blockade from seaward was carried out by small Yugoslav gunboats, which were no match militarily for the larger frigates of some European navies that were available. The blockade could have been broken using minimum force; and probably with minimal casualties to either side. The possibility of counter battery fire from the frigates at sea might well have been enough to deter the bombardment of the city by the Serbian artillery ashore. Although approval was later given by the Council of the Western European Union to provide warships to protect Red Cross vessels evacuating wounded civilians from Yugoslav ports, an action that was described as "not a question of military action or intervention, but participation in humanitarian measures", such direct protection was not required. Subsequently, an Italian naval ship, backed up by a French hospital ship, was permitted to dock in Dubrovnik to pick up wounded civilians. There is a strong case, however, that earlier and more decisive armed action by the international community would have resulted in saving Dubrovnik from much damage and its people from much suffering.

The Laws of War at Sea

The passage of time has significantly eroded the applicability of the laws of war at sea as they now stand, and has certainly greatly complicated their interpretation. A series of meetings have been held under the auspices of the San Remo International Institute of Humanitarian Law with the object of drafting a new series of the proposed laws of Naval Warfare. These meetings are not yet complete,

but their outcome is clearly important in providing both an agenda and detailed proposals for discussion by national governments, many of whom see the use of international law as an important strategic tool.

International Naval Co-operation

A great deal of experience in the problems of international naval co-operation has been built up in NATO. The results of this experience were vital to the successful setting up of the international naval blockade of Iraq, following that countries invasion of Kuwait. It may be helpful therefore to set out in simple terms the basic areas in which action is required to establish a framework for successful international military action at sea.

Command

It is vital that the principles upon which the Command arrangements are founded be agreed. NATO has clear definitions of Command relationships, including "operational control", "operational command" and "full command", together with procedures for assigning these, which have been well tested and tried.

Communications

The ability of warships to communicate rapidly and securely is a prerequisite for the successful prosecution of naval operations. This involves the compatibility of equipments, the commonality of procedures and in some circumstances, the provision of common services such as data-link and satellite access.

Tactical Procedures

The procedures by which ships can be safely and effectively manoeuvred and operated as part of a co-ordinated force need to be laid down and well practised by personnel at all levels. Such procedures are laid down in NATO's Allied Tactical Publications. The dominant part played in tactical procedures, which increasingly rely on rapid reaction for their effectiveness, by voice communications places heavy emphasis on the ability to use a common language.

Rules of Engagement

These rules provide the means by which national political authorities can control in considerable detail the degree of delegated authority to take military action that they wish to assign to their military commanders. Common rules and procedures for their assignment are laid down by NATO and are essential to the efficient conduct of operations. Responsibility for deciding and promulgating the rules which they wish to apply to their own ships remains the responsibility of national governments. The application of different rules by different nations greatly complicate the task of an operational commander. Co-ordination at government level is therefore important.

Contingency planning

Although it is extremely difficult to forecast the exact circumstances in which the use of armed force may be required, it is important that outline plans be drawn up to meet possible contingencies. Such contingency plans should identify the principal considerations which need to be addressed when a full operational plan is required.

Logistics

The first logistic requirement is that of fuel, water and food. There has to be equipment compatibility and procedural agreement of both an operational and administrative nature in order

that satisfactory replenishment at sea may be carried out. The provision of other stores and spare parts can be handled on a more ad hoc basis, provided the principles of supply are agreed beforehand. The provision of satisfactory arrangements for the resupply of ammunition, including missiles, is greatly facilitated by the standardisation of weapon equipments.

An important element in the successful operation of multinational forces lies in the field of mutual confidence. In NATO this is built up through the conduct of common training courses, through exchange programmes for officers and men, through the establishment of permanent multinational staffs and through a continuing programme of training exercises. Such exercises can take place in tactical training simulators ashore or at sea. Experience has shown that, however clear and comprehensive may be the procedures and the rules, they are only effectively implemented by frequent and disciplined practice, backed by a sound knowledge of international law as it pertains to operations at sea. Hence NATO has always set rigorous standards of basic training and has held comprehensive and frequent operational training exercise periods. Operational training at the basic and individual ship level is a national responsibility. NATO exercises re-enforce the basic training, and practice ships in the more advanced levels of training as an international force. The extension of the practice of conducting simple tactical exercises with ships of other navies, and the brief exchange of officers and men needs to be encouraged.

NATO also has procedures for the provision of "On Call Forces", by which previously nominated ships can be brought together for limited periods and at short notice to carry out a predetermined task. Such tasks include exercises and training. "Standing Forces", which remain together under international command for continuous periods, provide the best opportunities for rapid, efficient and effective international action. They are, however, a heavy drain on national resources. The establishment of appropriate 'on call' forces is likely to be the most appropriate way of organising maritime support for UN operations, including support for any future UN rapid deployment force.

Experience in the Gulf war pointed to another aspect of international naval co-operation that has both military and political implications. This was the limitations placed on the degree of successful operational integration within the force, due to differing levels of technology and training. The effect of this was to create differing "classes" of capability amongst the ships of the various nations, which had to be matched to tasks of different complexity. This situation was further complicated by the fact that ships of different nations were operating under different rules of engagement. Thus, the ships of only very few nations were able to operate with the "front line" task group (TG). Whilst this simplified the task of the "front line" TG commander, it made the harmonious allocation of lesser tasks by the overall commander both militarily and politically sensitive. If, in the future, the advanced technology nations continue to exploit to the full every aspect of technological advance, almost regardless of the cost, then it will inevitably become more and more difficult for the lesser maritime nations to play an effective part in joint operations. Clearly, ships of any nation, whatever the circumstances, should not be placed in a position where they cannot cope with the threat with which they are likely to be presented. Nevertheless, the need to maintain political solidarity may well be as important as the need to demonstrate the highest level of military capability. In considering the requirements for the capabilities of ships that are likely to be committed to international peacekeeping operations, attention will have to be payed by the major maritime nations to their ability to operate effectively with ships of other nations that are not so technologically advanced.

Whilst the freedom of the high seas provides for great flexibility in naval operations, the transit of ships over long distances, and their subsequent support there, is a relatively slow and costly process. Thus, in addition to the fact that most maritime problems are of an essentially regional nature, there is a further, simple and very strong case for international naval co-operation to be based primarily on a regional structure. Some such regional structures have been in place for

some time. Of these, some are treaty based, others are in the form of less binding agreements, whilst yet others are a matter of regular practical, but less formal co-operation. Examples are the ANZUS Treaty, the Five Power Defense Agreement between Australia, Britain, Malaysia, New Zealand and Singapore, and US-Latin American naval co-operation. More recently, an informal arrangement of meetings has been set up between the Heads of European Navies.

A form of international action that is particularly appropriate to regional co-operation between naval forces is that of disaster relief. The ability of warships, with their very wide range of capabilities, not least in the field of communications, to bring succour to coastal regions or islands that have been struck by natural disaster has been frequently demonstrated in areas as widely separated as the Bay of Bengal, the Central Pacific and the Caribbean. However, experience shows that whilst it is essential that the local area Commanders are given a short clear directive as to their overall task and authority, which requires co-ordination with the governments of the other countries involved, they must then be left to carry out their task with the minimum of external interference.

Such regional naval co-operation, which must not exclude the participation of non-regional powers with interests in the area, clearly needs to be set in a wider regional and global maritime security structure, an issue which is dealt with in subsequent chapters. This co-operation should include the setting up of regional "on-call" naval forces that are able to operate under both regional control and UN authority. There may be occasions when the formation of a standing force would be appropriate.

The relationship between such regional centres of maritime co-operation and the United Nations "headquarters" is a subject which requires detailed study. A pre-requisite for any such successful relationship is that there is in the UN organisation a "focus" for maritime issues. This could be provided by a new Department of Maritime Affairs within the re-organised permanent secretariat, responsible to the new Assistant Secretary General for Political Affairs and Peacekeeping. This department would need to have available to it a "library" of operational and logistic planning data for the ships of the various navies concerned.

Arms Control and the Nuclear Issues

The field of naval arms control has been the subject of much controversy over a considerable period. In brief, the admirals were prepared to keep their heads below the parapet and to let measures of arms control on the land take the strain. In this they were broadly successful in containing naval arms control to the field of confidence building; and confidence building was a part of arms control. The new international situation has however radically changed the international perceptions of the arms control process. Confidence building is no longer part of arms control. Rather is arms control part of confidence building. It is in this sense that the UN Resolution 46/36 which establishes a Register of Conventional Arms Transfers and Holdings as part of the policy of openness and transparency in military matters is an important step forward. The categories of equipment covered by the register includes warships of a standard displacement of 850 tonnes or above, attack helicopters and missile systems with a range of at least 25 kilometres. The degree of openness and confidence would be greatly increased if future naval building plans were included in the "register".

The UN report on The Naval Arms Race concluded[4] that one of its basic objectives for action was " the achievement by negotiation of effective measures of nuclear disarmament at sea in order to halt and reduce the nuclear arms until the total elimination of nuclear weapons and their delivery systems has been achieved." Whether or not the total elimination of nuclear weapons would, or

[4] *The Naval Arms Race*, Paragraph 322.

would not, contribute to international security and a stable peace is a matter of contention. But the removal of all nuclear weapons from ships, other than ballistic missile firing submarines (SSBNs), has been a major breakthrough in the field of naval arms control. It has effectively ended the naval nuclear debate; for the issue of the SSBNs is an issue of strategic deterrence and not one of naval warfare. It has also removed from the agenda some other lesser controversies such as whether a ship carrying nuclear weapons could or could not, for the purpose of passing through the territorial seas of another state, be considered to be on "innocent passage".

An issue that has not yet surfaced strongly on the international scene is that of the safety of the operations of nuclear powered submarines. Whilst Western operated Nuclear submarines have a very good record of safe operation, this has not been so in the case of similar Soviet submarines. Recent widespread concern about the safety of the former Soviet Union's civil power generating nuclear reactors, together with the recently reported minor collision between a USN nuclear submarine (SSN) and a Russian nuclear powered submarine near the Russian Northern Fleet Base, might well have triggered major public interest in this subject. Further recent reports of the very poor material state of some ships in the Navy of the former Soviet Union, together with publicity about the difficulties of safely disposing of nuclear powered submarines that have come to the end of their useful life, are capable of exacerbating the situation. This has not yet happened. Nevertheless, it is quite widely known that very close quarter situations between Western and Soviet SSNs, which if they had happened accidentally between western submarines would have been the cause of a major enquiry, have occurred on no small number of occasions. No great stretch of the imagination is required to understand the widespread environmental and political consequences of a peacetime collision between two fast running submerged nuclear powered submarines.

There has been pressure on a number of occasions from the former Soviet Union to extend the Incidents at Sea agreement to the underwater field. This has been strongly resisted by the US and British Navies, on the fundamental grounds that they hold a considerable, valuable and important advantage in the operation of their own SSNs. Thus, to enter into any form of restrictive agreement would not be in their interest. With the end of the cold war, there is a considerable opportunity to reconsider. There now appears to be a common interest between the naval authorities, in that if there was a major accident, then there would very likely be the beginning of strong pressure for an international ban on the use of nuclear power in submarines; and perhaps in surface ships also. A political initiative is required to bring together the Naval authorities of all countries that operate, or have operated nuclear submarines, to consider whether agreement could be reached which would reduce the chance and danger of close quarter situations between nuclear powered submarines in times of peace.

The problems of the potential dangers of nuclear, environmental pollution in time of war as a result of military action against either nuclear powered surface ships or submarines are of a serious nature. A move to achieve an international ban on the targeting of nuclear installations, an issue which was raised by attacks on Iraqi nuclear facilities during the Gulf war, would have very great implications for the conduct of both SSBN and SSN operations. A detailed examination of these issues is required.

Zonal Constraints

The concept of the "freedom of the high seas" has become gradually eroded by international convention (eg. the establishment of the EEZ in UNCLOS); by challenges to the existing order (some nations claim the right to refuse entry to their territorial sea by warships of another nation); and by the establishment by some nations of various forms of declared security and defense zones (as in the "Total Exclusion Zone" established by Britain around the Falkland Islands during the 1982 South Atlantic war). The establishment of areas of temporarily restricted access for the

purposes of conducting naval exercises or weapon testing are, subject to appropriate prior notification, permitted by customary law. However the recent practice of declaring "exclusion zones" has a different genesis. Exclusion zones have been established for a variety of purposes; for the enforcement of economic blockade; as a means of identifying hostile forces; and as a device for limiting conflict by defining its area. There have also been numerous proposals, mainly emanating from the former Soviet Union, for the establishment of "nuclear free zones", including major sea areas, as a measure of reducing the tension in East West relations.

The legality of exclusion zones[5] is somewhat obscure, it being justified mainly by its announcement. It is argued that an exclusion zone gives merchant ships of neutral states a status, not consequent upon its activities, as provided for in the law of neutrality, but upon its position. But the effectiveness of the establishment of exclusion zones during a period of tension leading to war, which has been investigated in very many war games and exercises is also challenged on a number of other grounds. Firstly, that the delineation of such a zone conveys the initiative as to the time of the start of military action to the opposing side. It is the opponent who can choose the moment and place at which the zone can be violated. It also provides him with the opportunity to test the resolve and capability of the defender by making feints and small scale intrusions. Secondly, that such zones are very difficult to police effectively. In the submarine field, even the most sophisticated anti submarine detection devices make it almost impossible to detect and identify all intrusions.

However, this erosion of the "freedom of the seas" has been accompanied by vigorous assertion that constraints on the free movement of shipping, including the prior notification of warship movements, would not be beneficial, because it would contravene the very concept of "mare liberum", a concept that of itself contributes to international order and stability. A further argument in favour of their being no agreement to constrain naval movements is that the possibility of withdrawal from such an agreement at a time of international tension would constitute a destabilising factor of greater dimensions than the stability that such an agreement would itself provide. Although it might be argued that the new international situation provides some scope for challenging these arguments, it seems unlikely that change of such magnitude would be acceptable to the major naval powers. However, the possibility of defining a new concept of "lawful use" of the high seas, that would be broadly analogous to the concept of "innocent passage" for the territorial sea, so as to differentiate between legitimate naval high seas activities, and those that are prejudicial to international peace and security, appears worthy of further examination. This should include clarification of the law relating to military conduct in exclusion zones,

Oceanographic Research

International co-operation in the civil field of the ocean sciences takes place at the global level through both government and non government agencies. At the governmental level, the Intergovernmental Oceanographic Commission, which sits uneasily under the auspices of UNESCO, also involves various other UN agencies which have interests in various aspects of ocean science FAO, IMO, UNEP and WMO. At the non-governmental level, research is co-ordinated through an international science committee on ocean research. At the regional level, a number of initiatives, such as that for the Indian Ocean have been successfully pursued. Whilst the total civil resources devoted to the ocean sciences is very limited, the success of such modest projects as the World Ocean Circulation Experiment indicate that this co-operation is working well. A more ambitious

[5] See "The exclusion Zone Device in the Law of Naval Warfare", in W.J. Fenwick, *The Canadian Yearbook of International Law*, Vol. XXIV, 1986.

project for setting up a Global Ocean Observation System is now underway. There is however, very little evidence of any significant cross fertilisation of research in the ocean science area between the civil and military programmes, despite the very large effort devoted to the latter by the major maritime nations. This is principally on account of the very high security value, in relation to submarine and anti-submarine warfare, that is attached to work in this field. There is also little evident international co-operation between national military programmes, other than within NATO.

The ending of the cold war will inevitably bring major reductions in naval budgets, which seem likely to release some military resources in the ocean science field. The lessened tension in the international system may also have reduced some of the extreme sensitivity with regard to the security value of some ocean research, not directly related to sound propagation. It would be prudent therefore to investigate the extent to which some military resources could be switched to civil programmes; and whether there is any projected overlap between military and civil ocean monitoring systems which could be eliminated by better co-operation. The present situation in the former Soviet Union might present particular opportunities for some ocean science research to be made available on the "commercial" market for purchase in hard currency; and for some scientists in the CIS to be redeployed within civil applications of their work, to the benefit of the international community. Because of the remaining sensitivity of this area of research, the initiative to explore such possibilities as may exist is unlikely to be taken by the major naval powers. It may therefore be appropriate for the United Nations to take the lead in an exploration of the practical possibilities.

A Way Forward

The conclusion of the UN Report on the Naval Arms race envisaged that there might come a time when it would be appropriate to hold a global conference on the theme of "Security in the Maritime Environment" as a means of bringing together the disparate threads of these complex issues, and determining what further steps might be taken by the international community[6]. There must now be some doubts about the wisdom of holding a further global conference without prior work by a new Group of Experts on Maritime Security Affairs. The discussion of this chapter sets out an agenda for a meeting of such a new Group of Experts. The group would work towards recommendations for international agreement that governments should:-

1. Refrain from the use of Naval amphibious forces to project power ashore, except in response to aggression or, under UN authority, to maintain law and order.
2. Establish common principles and procedures for the command, communications, operation and logistics of international Naval forces.
3. Consider the setting up of regional UN "on call" forces, to be operated regularly from time to time under the operational control of a multinational naval staff.
4. Establish within the UN Secretariat a "focus" for international maritime affairs.
5. Establish UN Rules of Engagement for international naval forces.
6. Maintain a "register" of operational and logistic planning data for the principal "blue water" navies, so that outline plans can be drawn up by the appropriate UN authorities for international co-operation to meet various agreed contingencies.
7. Investigate the better co-ordination of national sea area surveillance systems so as to constitute an ocean surveillance capability to assist in the policing of the oceans.
8. Consider the concept of the "lawful use" of the high seas.

[6] *Naval Arms Race*, paragraph 325.

9. Discuss the inclusion of future Naval building plans in the UN "Register" established under Resolution 46/36, as a means of increasing "transparency".
10. Investigate the environmental risks arising from damage to nuclear powered ships in war.
11. Seek agreement on the multi-nationalisation and widening of the Incidents at Sea Agreement. (But see Chapter 3)
12. Review previous legislation relating to the Law of Armed Conflict at Sea, and Humanitarian Law with a view to updating it and concerting it in a new international agreement.
13. Investigate the possibilities for demilitarising some of the existing oceanographic research programmes, and for improving international co-ordination between the civil and military maritime research fields.

Conclusion

The changes and considerations discussed above, re-enforced by the ending of the "cold war", suggest that there are opportunities for the international community to consider anew the need for, and structure of, a code of military conduct at sea. The new international situation removes many of the constraints which for years have governed our ideas about the future. The realities of the ideological conflict between East and West prevented us from doing more than propose small incremental changes to the existing rules. Today we can be more adventuresome and can look to a structure based on co-operation rather than confrontation. Realism is of course still required, for we do not live in a world of universally accepted values. Above all, a new code of military conduct at sea, based on the rule of international law, can provide a framework for a much greater depth of international naval co-operation, and can add a new dimension to the building of international confidence in the maritime security field.

Chapter 10
Are Confidence-Building Measures Verifiable?

Hervé Coutau-Bégarie

Abstract

Verification is inseparable from disarmament. Does this also apply to confidence-building measures? The special features of the maritime environment make verification difficult, though not impossible. The central question is whether confidence-building measures must be verified, since their purpose is less to control the arsenals of the great powers or constrain their behaviour in a situation of crisis than to create a climate favourable for the reduction of risks of an arms race or of an outbreak of a major crisis. Recent agreements tend to demonstrate that with very limited risks confidence-building measures can, to some extent, contribute to the creation of such a climate.

Confidence and verification are at first sight almost contradictory. If one has confidence, one has no need to verify. A misunderstanding is nevertheless liable to arise, facilitated by the French term "mesures de confiance". The exact content is rendered more clearly by the English term "confidence-building measures". The idea is to promote or strengthen confidence, when it is non-existent or virtually non-existent. Consequently, verification becomes an integral part of confidence-building measures, until confidence becomes trust; in other words, the adversaries reach a point where they regard each other as true partners. The question may therefore legitimately be asked from a technical standpoint, as has been done for a very long time with the disarmament agreements: can confidence-building measures be verified?

However, it would be insufficient to confine ourselves to an exclusively technical debate, which could obscure the true scope of confidence-building measures. Unlike in the situation with regard to disarmament agreements or arms-limitation agreements, therefore, there is some point in adding to this first question a second question, this time of a political nature: must confidence-building measures be verified?

Can Confidence-Building Measures Be Verified?

Confidence-building measures at sea are of relatively recent origin. They may be placed in two categories, which Anglo-Saxon analysts tend to distinguish under the headings "structural arms control" and "operational arms control". More explicitly, one may speak of information on construction programmes and information on naval activities.

Information on Programmes

Advance information on construction programmes is a very old practice, since precedents date back as far as the eighteenth century. This practice was very much in vogue between the First and Second World Wars, particularly at the time of the Second London Treaty (1936); although very limited in terms of disarmament, the Treaty contained very detailed provisions on the exchange of information on the naval programmes of the signatory Powers. This practice no longer seems to be

in fashion today, for reasons relating to the fantastic scientific and technical revolution that has taken place since the Second World War.

The technical development of weapons has radically changed the basic data for disarmament and confidence-building measures since the period between the two wars, which witnessed major disarmament and arms-limitation agreements. In those days, purely quantitative limitations were sufficient: 406 mm artillery inevitably outclassed smaller-calibre artillery, with which engaging combat was not even thinkable. The global tonnage limitations, but also the limitations on unit tonnage of vessels and on the calibre of their artillery, therefore had an immediate and unquestionable restrictive effect.

This is no longer the case today in the missile age. Superiority belongs less to the heaviest charge than to the charge guided with the greatest precision by electronic means. Missiles mounted on light vessels or on aircraft are capable of inflicting serious damage on heavy vessels, as was seen in the famous cases of the Israeli frigate *Eilat*, sunk by Egyptian patrol boats in 1967, and the United States frigate *Stark*, hit by an Exocet launched from an Iraqi plane in the Persian Gulf.

The contemporary trend in armaments is towards the constantly increasing primacy of quality over quantity. In overall tonnage, fleets are today less substantial than they were 20 or 30 years ago. This is a trend with most navies, except those which maintain on paper obsolete units, whose military value is increasingly doubtful. One may thus have a simultaneous decrease in tonnage and increase in military effectiveness. The Soviet Pacific fleet has decommissioned a large number of vessels since 1990, notably submarines. But these were diesel-powered strike submarines, lacking modern equipment, which would have stood little chance against effective submarine defence. In 1991, the Japanese defence agency announced that two nuclear strike submarines of the Oscar 2 class had joined the Soviet Pacific fleet, which until then had had only one. Their arrival, with their formidable anti-surface capacity, is of much greater importance than the much trumpeted decommissioning.

Moreover, and above all, the development of "national technical resources", essentially satellites, has made possible the gathering of information which is often more complete, and in any event more accurate. The information which the Soviets decided to hand over in the late 1980s after decades of stubborn silence concerning the battle order of their fleet did not substantially call into question the commonly accepted data, based primarily on satellite monitoring. Today, it is no longer possible to conceal one's large ships, as Japan did before 1941, or to declare a ship of the line to be 35,000 tonnes when in fact it was over 41,000 tonnes, as the Germans did in the case of the *Bismarck*. Nowadays the unknowns relate to the effective value of men and equipment, rather than numbers.

This does not mean that the problems have vanished; they have simply shifted. Although today it is easy to verify the calibre of an artillery piece or the displacement of a ship, it remains almost impossible to determine effective and verifiable limitations on missiles. Their range cannot be verified without practical experimentation. The nature of their charge is extremely difficult to establish: most missiles have dual nuclear and conventional capacity. Verification tests conducted by independent scientists on a Soviet cruiser in the Black Sea in 1989 showed that it was very difficult to achieve certainty in this area, as the performances of the detectors were still too limited.

Disarmament and confidence-building measures do not tolerate a very wide margin of uncertainty. At the same time, it would appear illusory to try to eliminate this margin altogether. One has only to think of the controversies, in some cases extremely heated, between the naval analysts of a single country over the exact value of their own fleet.

Information on Activities

The second method is the advance notification of naval manoeuvres, or the invitation of foreign observers, on the pattern provided for by the Stockholm Agreement on Confidence and

Security-Building Measures and Disarmament in Europe intended to prevent dangerous interpretations. Then there is the establishment of a "code of good conduct" intended to avert incidents at sea during manoeuvres or transit. The model here is the Soviet-American Agreement of 29 May 1972, which is often overlooked because it was eclipsed by the SALT agreements; it nevertheless helped to reduce significantly incidents between the navies of the two Super Powers and was followed by similar agreements between the Soviet Union and several Western countries: the United Kingdom, France, the Federal Republic of Germany and Norway. This success is especially remarkable since the characteristics of the marine environment tend to make it very difficult to devise binding codes of good conduct.

Naval forces are distinguishable from land forces through their capacity for movement.[1] In peacetime, it is not possible for military forces, except by prior agreement, to cross the frontiers of another State. In wartime, the obstacles due to the nature of the terrain and logistic requirements make progress difficult, and the theatre of a land war is measured in tens or hundreds of kilometres, with advances never in excess of a few dozen kilometres a day in the most exceptional cases. Modern armies with their armour do not move any faster than Napoleon's Grande Armée. Naval warfare, on the other hand, has undergone a series of upheavals which have given it a radically new aspect, in which the fundamental characteristics of the marine environment, far from declining in importance, have on the contrary accentuated their effects.

The marine area is virtually flat, even though magnetic anomalies and anomalies of relief create humps and hollows (not perceptible to the sailor). There is no physical obstacle that can be used as a base for a defensive action. When a convoy sails from America to a port in Europe or the Far East, it may be attacked at any point on its route, between departure and arrival. There is no front line and practically no obstacle to the forward deployment, far from national frontiers, of a country's naval forces.

The marine area is also characterized by its expanse which entails thinking on a scale of hundreds or thousands of kilometres. The American War of Independence witnessed naval operations in the Atlantic, the Caribbean, the Mediterranean and the Indian Ocean. During the Crimean War, naval operations took place in the Black Sea, but also in the Baltic, the Arctic Ocean and the Pacific. The Pacific war of 1941-1945 offers an extreme example of this extension of area. It began with an attack from Japanese aircraft-carriers on Pearl Harbour in the Hawaiian Islands in December 1941. In April 1942, the same Japanese aircraft-carriers launched raids on Ceylon in the Indian Ocean. At the same time, other aircraft-carriers were taking part in the battle of the Coral Sea to the north of Australia and shortly afterwards an expedition was launched against the Aleutian Islands in the far north of the Pacific. In terms of longitude and latitude, the Japanese fleet was operating over distances covering half the world.

Today, with the development of fuelling at sea, and nuclear propulsion for submarines and the largest surface units, the navies of the major Powers are able to operate on a world scale. The Gulf war against Iraq recently showed that a rapid and spectacular increase in power was possible at any point in the world.

This absence of a physical barrier and this mobility of forces have created a unity of maritime area, even though contemporary law has tended to distinguish different zones. It is not possible to mark the boundary of the territorial sea. Beyond the territorial sea which can be controlled from the coast, the general principle is that of freedom of navigation. Despite the attempts of the third world to introduce limitations on this principle of navigation, it was confirmed by the Convention

[1] Naval forces are also distinguishable from air forces through their endurance; in other words, they are capable, once on station, of remaining there almost indefinitely. The French aircraft-carrier *Clemenceau* stayed in the Sea of Oman for 14 months during the final phase of the Iran-Iraq war. The United States Navy deployed aircraft carriers which stayed at sea for up to 150 consecutive days at the time of the Teheran hostage crisis, the Iran-Iraq war and the recent war against Iraq.

on the Law of the Sea signed at Montego Bay in 1982, including navigation in the exclusive economic zone. The freedom of action of fleets has thus been preserved.

This freedom in itself constitutes an obstacle to the establishment of certain confidence-building measures. The attachment of the United States to this principle manifests itself to its full extent with cruises in semi-enclosed seas (Sea of Okhotsk) or areas claimed by coastal States (Gulf of Syrte), as well as transit in the immediate vicinity of coasts. Such a demonstration in the Black Sea in 1988 was seen as a provocation by the Soviets and gave rise to a serious incident (attempted boarding). The law was on the side of the Americans, but the behaviour of the United States Navy was held by many to be unnecessarily aggressive.

A change is nevertheless apparent in that the United States, the leading maritime Power, is gradually coming to admit the essential provisions of the new law of the sea: it now recognizes the 12-mile limit for the territorial sea, which it long rejected. Great progress still remains to be made in this direction, in particular with regard to submarines. The collision in February 1992 between a CIS submarine and a United States submarine in the Arctic Ocean came as a reminder of the dangerous character of certain activities. But verification is in this case very difficult, despite the improvement of mobile or fixed listening systems, and the constant efforts to ensure discretion when submerged practically obviates any definition of a code of good conduct. The Soviet Union repeatedly proposed the establishment of patrol areas off-limits to submarines, which the United States always stubbornly rejected, not wishing to concede to the prospective enemy sanctuaries from which it would have safer access to the ocean.

* * *

Confidence-building measures therefore come up against several specific obstacles which relate to the characteristics peculiar to the marine environment. First of all, the physical environment: by virtue of its fluidity, the sea is profoundly different from the land environment, in which the determination of frontiers imposes at the outset limits which may not be transgressed without risk. On the contrary, the principle of freedom of navigation on the high seas enables fleets to travel in an almost totally unimpeded manner. Then there is the technical environment: progress in armaments has enabled naval warfare to develop in several dimensions, with a more diversified panoply of resources than on land. War at sea today takes place on the surface, below the surface and above the surface. The combination of these three dimensions is extremely complex. It exists against the dual background of the strategy of deterrence and the strategy of action with *matériel* of extreme diversity. The simultaneous verification of all this *matériel* naturally poses considerable problems, especially since the advent of the plane and the increase in the range of means of coastal defence (notably missiles) have caused land and naval strategies to overlap. Consequently, consideration has to be given not only to the naval resources proper, but also to the land-based or air resources capable of intervening at sea. The controversies caused by the transfer of a number of units of the Soviet air force to the naval air force in order to reduce the constraints of the treaty on conventional forces in Europe demonstrated the full seriousness of the problem.

Must Confidence-Building Measures Be Verified?

Although verification is difficult, it is by no means impossible. The state of armaments today is much more difficult to assess than in the past, but the development of what are coyly termed national technical resources has made the adversary far more transparent, contributing decisively to the reduction of strategic uncertainty. Admittedly, it may then be argued that confidence-building measures have lost much of their interest since a State can verify by itself and what it observes through its own resources has more value than the assurances of an adversary who is, by definition,

suspect. It is none the less true that the definition of a code of good conduct can bring about a significant improvement in security. There is no longer any argument about the positive results of the Soviet-American agreement of 1972. Instead of concluding that national technical resources render confidence-building measures unnecessary, it would seem more accurate to say that they have strengthened such measures. The strategic dialogue now has less hazardous foundations than in the past. When the Soviet Union acceded to the Treaty of London in 1938, it was at the same time secretly starting work on four super-cruisers which would have been the biggest in the world. It is more difficult to bring off such surprises today. Over and above the inevitable technical debate, however, the key question, in order to fully understand what is entailed by verification, is that of the exact purpose of such measures.

Like disarmament agreements and arms control agreements, confidence-building measures form part of a strategy; in other words, the party consenting to them does so with the ulterior motive of maximizing his advantage and minimizing the constraints which might be imposed on him as a result of the measures. They are accepted only to the extent that they do not contribute to the deterioration of security (or of the perception of security). History is full of examples of evasion strategies, in other words, Byzantine or adventurous interpretations of arms limitation agreements which are poorly drafted or incomplete. The period between the two World Wars yielded several examples of such agreements, and not only on the part of the Powers in the German-Japanese axis. Consequently, there was later a temptation to conclude increasingly precise and increasingly comprehensive agreements in order to avoid repetition of manoeuvres of this type. As an indirect consequence, however, when a text becomes more technical and more complex, it creates greater opportunities for fraud or at least interpretations liable to violate its spirit, while every appearance is given of formally complying with it. Hence the importance of verification measures. Agreements aimed at building confidence are necessary precisely because such confidence does not exist (or is insufficient) and they must be capable of being verified at all times.

It must nevertheless be borne in mind that most of the time those who enumerate these difficulties refer less to the verification of confidence-building measures than that of disarmament or arms limitation agreements. Confidence-building measures have a more restricted purpose. It is clearly understood that they would not operate in wartime, but are intended to prevent situations which may lead to escalation towards war. From this standpoint, improvements such as the increase in the range of missiles or the enhancement of the performance of means of detection may paradoxically have a stabilizing effect by making short-distance navigation less useful, such navigation being a frequent source of incidents, and by preventing "navy scares", which have frequently provoked irrational reactions in the past and helped to stoke the arms race.

But whenever such incidents occur, they mark entry into a crisis phase, during which no further confidence-building measure can be operational. Such measures must come into play earlier on, precisely with the aim of preventing a crisis situation. At this stage, the failure of confidence-building measures is linked not to a technical deficiency in verification, but to a global deterioration of the international context which can be resolved only at the highest level. Verification must therefore remain a constant concern, but this does not mean that because a measure is not 100 per cent verifiable, it is not capable of strengthening confidence.

The experience of the Soviet-American agreement of 1972 suggests, on the contrary, that the continuation of an uninterrupted dialogue, despite all these difficulties, engenders, if not a common language, at least a mutual knowledge which may lessen suspicion and facilitate the "coexistence" of potentially hostile navies in the same theatre of operations: even during the years of tension following the invasion of Afghanistan, incidents at sea have been less frequent than before 1972; because they have resulted from deliberate political decisions and not from misunderstandings caused by routine activities as was so often the case in the late 1960s. The code of good conduct which has been in existence for several years has not disappeared overnight. Similarly, the Afghan

affair prevented ratification of the SALT 2 Treaty, but the two parties nevertheless complied tacitly with its provisions: of questionable effectiveness with regard to disarmament, the Treaty has nevertheless maintained a general framework and serves as a confidence-building measure, safeguarding the small portion of confidence which could serve as such. The revival of strategic negotiations since 1985 has accordingly been facilitated. And there is no doubt that without the Washington Treaty, signed in 1987, external events would not have undergone the extraordinary acceleration which we have recently witnessed.

Chapter 11
International Consultative Mechanisms Related to Maritime Security

Mitsuo Kanazaki

Abstract

To carry out fully its mandate of maintaining international peace and security, the United Nations should activate the Military Staff Committee and establish UN Naval Forces. Special agreements to this effect must be concluded with individual countries. The present post-Cold War international situation is propitious for such action. The establishment of UN Naval Forces would, in itself, be an important confidence-building measure. It could, moreover, deter conflicts which may break-out in the process of creating a new world order. US Fleet could constitute the core of these Forces.

Introduction

The international consultative mechanisms related to maritime security are seen to be the main actors playing the most challenging roles for establishing and developing "Confidence Building-Measures" (CBMs) in the stage of the post Cold War era.

Prior to discussion of the details of maritime CBMs themselves, it is beneficial to analyze the current circumstances in which maritime CBMs are positioned for envisaging future framework.

First, the change of CBMs characters in the process of transition from Cold War era to the new world order.[1]

In the Cold War era, CBMs used to be mainly the matters of two Super Powers or the matters within the framework of East-West confrontation.

The new era changed the CBMs to be a general concern for various kinds of countries in size, power and stability. This situations mean the CBMs become more complicated issues.

Second, the necessity of establishing regional mechanism in the Pacific and Asian region will be emphasized. The most important point on this issue is to make the United States and the Commonwealth of Independent States involve into this mechanism as members of Asian countries.

Some of Asian countries have a sort of suspicions that PRC and Japan are growing to the strong military power exercising their influence.

To ease their concern, US and CIS are necessary to join this mechanisms.

Third, the necessity of compatibility between the CBMs and strategic deterrence will be enhanced.

The details are described in the latter part of this chapter, proposing prospective United Nations Naval Forces has dual functions both CBMs and strategic deterrence which are extremely indispensable for maintaining international peace and stability.

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[1] *The New World Order:* Since President Bush first use of this words in the "State of the Union Message" in 1991, it became very popular and used frequently with various meanings by many people. The meanings of these words used in this chapter are: a) The leading mechanisms of international relations are transformed from [bipolar structure] to [unipolar + P5 (permanent members of UNSC) + G7 (group seven) multi-layer structure]: b) The confrontation based on the ideological struggles are diluted and many other seeds of "Low Intensity Conflict" are surfaced.

Existing Mechanisms and Its Activities

General

The oceans of the world perform a great role, not only for the prosperity, security and sovereignty of individual nations, but for the prosperity of the entire world's international co-operations and mutual independence. Since the disorder of seas can directly induce frictions between nations, common rules for the usage of seas should be required.

The scope of the usage of seas has been expanded by the development of technology and increasing numbers of independent states. Accordingly, the rules of order cannot be feasible unless they are modernized to respond both technically and politically to the trends of the times. Looking over the existing ruling mechanisms of the seas, most of them are not defined as CBMs in the narrow sense. However, they have an indirect effect on CBMs.

Non-Military Mechanisms

The various rules of orders for a ship's safe navigation, transit, structures, search and rescue efforts, security of harbours and channels, preventative measures of ocean contamination, control of exploit and development of seas and the preservation of maritime natural resources are established and maintained mainly by the United Nations. In addition, some regional groups and specific countries established a bilateral or multilateral mechanisms in the limited circle, but the United Nations keeps the leading position by providing "Convention on the Law of the Sea" and many other rules mostly oriented by IMO (International Maritime Organization). Just for reference, IMO was established in 1958 by the name of IMCO and reorganized as IMO in 1982. Since the very beginning, IMO (IMCO) has been making great contributions to maintain the order of seas by adopting more than 34 treaties and affiliating with more than 135 countries.

Other than IMO, several organizations of the UN such as UNEP and WMO contribute to maritime security, which will be discussed as the inventory of major existing mechanisms.

Military Mechanisms

Different from the military mechanisms, the objectives of the non-military mechanisms are: first, to maintain the ship's safety, its cargo and human lives at sea from natural disasters such as storms and icebergs, or from the accidents caused by human error relating to maritime activities; second, to control effectively and economically the utilization of maritime natural resources from the viewpoint of technology and economy. On the contrary, military mechanisms are designed from the viewpoint of the political and military, to cope with or to minimize artificial threats intentionally produced by adversaries, which is considered a human wisdom.

The mechanisms of military and non-military are mutually associated and its relation will deepen in the future. Looking over the military related system, there are many numbers of mechanisms which cover a broad range. They are the international laws which apply to peacetime or wartime, and have existed with a long history. Also recently, after the Cold War, the United Nations Charter enhanced its authority, the multi-national consultative systems in Europe symbolized by the Stockholm Declaration and the other bilateral systems, preventing dangerous accidents at sea. However, the movement of CBM associated with maritime security affairs has not developed relatively as examined later, compared with other military components, so that the CBM effort is placed behind the current times.

The Inventory of the Major Existing Mechanisms and Activities Related to Maritime Affairs

Global Mechanisms

United Nations

- Security Council and General Assembly
- International Atomic Energy Agency (Verification)
- International Civil Aviation Organization
- International Maritime Organization
- International Hydrographic Office
- Intergovernmental Oceanographic Commission
- International Telecommunication Union
- International Maritime Satellite Organization
- World Meteorological Organization
- United Nations Institute for Disarmament Research
- United Nations Environmental Programme
- United Nations Disaster Relief Co-ordinator
- United Nations Development Programme
- Food and Agriculture organization (Fisheries)

International Red Cross

Regional/Multilateral Mechanisms

- Conference on Security and Co-operation in Europe (CSCE)
- North Atlantic Co-operation Council (NATO + former WTO Countries)
- Western European Union
- RIO Treaty and Organization of American States
- ANZUS Treaty Organization
- ASEAN Organization
- Arab League
- Gulf Co-operation Council
- Organization of African Unity

Bilateral Mechanisms

Various countries concerned bilateral security pacts, the agreements on prevention of incident at sea and regional naval exercises.

The Other Activities

Various countries concerned "Goodwill and Confidence Building Activities" exemplified below:

- Personal Exchange
- Exchange of Goodwill Port Visit
- Advanced Notifications of Naval Exercises
- Invitations to the Exercises

The Seminars for mutual understanding of doctrines.

Prospect for the Trends of Situations Related to Maritime CBMs

Due to the end of the Cold War and the following dramatic changes in Europe, the character and circumstance of CBMs which used to be the matters of just two Super Powers will be changed as follows.

1. In the age of the Cold War, CBMs used to be mainly the concern for matured and politically stable, large and developed countries which have it's own capability to collect intelligence they required. The new era changed the CBMs to be the common concern for various kinds of countries in size, powers and stability.
2. The possibility of low intensity conflict (LIC) may increase due to the reorganization or independence of ex-USSR countries, which means the necessity of the CBM's effort becomes more important and complicated than ever before.
3. The necessity of CBMs will be expanded to the Pacific and the Asian region, which used to be focused in the European region.
4. The boundary of CBMs and arms control/disarmament becomes indistinct, and non-military activities may become more closely related with CBMs.
5. Due to the end of the Cold War era and bipolar structure, the meaning of non-alliance and neutrality weaken their reason for being. This change gives the US a free hand to commit itself to regional issues.

The Limitations and Problems of Existing CBMs

Relations to Strategic Deterrence

Since CBMs are not the objective themself and only the means to serve the objectives, it is recommended not to weaken or interrupt the other functions or means for preventing war or confrontation by mutual interference. For example, CBMs require mutual transparency, however the strategy of deterrence requires the mixture of known factors with unknown factors which leaves the risk in the adversaries strategic judgement. This unknown factor gives a translucent effect. As long as nuclear weapons exists on earth and accordingly nuclear deterrence is indispensable for peace, transparency should compromise with NC/ND policy.

Natures and Level

Most existing CBMs are so technical that they cannot have political impact to improve the international situations.

Despite of the fact that US and ex-USSR had a firmly established agreement to prevent incidents at sea, the following examples had occurred between them.

1. USS VOGE and E-type SSGN collided at the Ionian Sea in August 1976.
2. USS MoLOY was cut off her towed array by V3-type SSN off South Carolina in October 1983.
3. USS KITTY HAWK and V1-type SSN Collided at Sea of Japan in March 1984.
4. Ex-USSR Carrier MINSK launched eight shots of illuminating shells to USS HAROLD and three of them hit her bridge at the South China Sea in April 1984.

Such examples clearly proved that the reasons for the collisions were beyond the technical efforts. This is a good example of the limitation of maritime CBMs.

Relations to the Freedom of High Seas

Excessive restrictions for manoeuvring or exercise conflict with the Freedom of High Seas. It is easy to understand the importance of the Freedom of High Seas by remembering the Gulf Crisis. The US carrier battle groups were able to make rapid reaction as the core of multi-national forces, which directly benefited from the Freedom of High Seas, allowing the US carrier groups to manoeuvre without any restrictions in the Indian Ocean, the Mediterranean Sea, and the Red Sea. The Freedom of the High Seas is vitally important to maintain the new world order, even after the end of the Cold War era.

Gaps of Nations

Re-organization of Eastern Europe and the independence of small underdeveloped nations may produce the gaps and shortfalls to closely manage and control respective maritime forces. This situation makes it difficult for all members to get together and discuss sophisticated issues like the CBMS. Also, in Asia, the characters of each countries are quite different from each other when compared with the European countries, therefore the CBMs situation may always be behind the European countries.

Geopolitical Asymmetry

The maritime CBMs are relatively behind the current time due to various reasons, and one of the major reasons is geopolitical asymmetry of maritime nations and non-maritime nations.[2]

The geopolitical asymmetry can be explained by many aspects such as national traits, characteristics of governments, structures of commerce and industry, the way of life and the nature of maritime powers, all of which are more or less affected by dependency of the sea. The introduction of a free economic regime into Russia and East European countries automatically increases their dependency on the sea as the means of free trade and national security. In spite of the efforts to reform their economic system, it will take a long time to diminish the asymmetry.

Possibility of Improvement of CBMs

The Improvement by Extending Present Paradigm

Every effort, either military or non-military, to stabilize the situations surrounding maritime activities will be the continuous, effective means in the future. However, it is necessary to take into account some of the conditions in order to enhance the effectiveness.

1. Ensure that the legitimate governments of some unstable nations such as those of the former USSR maintain firm authority and command function in order to guarantee well controlled activities of maritime powers.

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[2] *The Geopolitical Asymmetry:* The stable usage of seas are indispensable for the security and prosperity of the maritime nations. On the contrary, non-maritime nations are able to survive without the benefits of seas. The unstable seas give the non-maritime nations an advantage relatively over maritime nations from the view point of maritime strategy.

2. Mediate with the factors contradicting CBMs such as Freedom of High Seas and unknown factors in the strategic deterrence.
3. Back-up a favourable relationship between nations at a high level, which will promote existing technical mechanism from the political view point.
4. Promote study of CBMs in the Pacific and Asian region with the consideration of regional characteristics, which can be quite different from CBMs in the European region.

The Improvement of CBM With New Ideas

Establish the United Nations Naval Forces

Background

It is said, that the most effective access to promote CBMs is for many navies to get together and concentrate their efforts on a common goal, which will create a sense of solidarity among them. After the Cold War era, the circumstances have significantly improved for initiating such new policy. Under such circumstances, the idea of establishing United Nations Naval Forces is the most appealing concept.

For the purpose of effective and prompt execution of the mission provided by Article 43 of the United Nations Charter, it is necessary to activate the functions of the Military Staff Committee of United Nations and conclude the special agreements between United Nations and individual countries for establishing United Nations Naval Forces.

Once, the United Nations failed to conclude the special agreement in accordance with Chapter 7 Article 43 for establishing United Nations Forces. The main reason of the failure was the serious confrontation between the US and USSR, but situations were significantly changed. The confronting adversary, NATO and WPO were reshaped or disorganized and most of their members seemed to be merged into one organization which is almost identical to the collective security system which the United Nations initially intended to organize in an earlier stage. Even in 1947 when the relationship between the US and USSR was not very good, they were able to agree on certain terms.[3] Now that the Cold War is over, and the relationship has improved quite drastically, establishing United Nations Naval Forces is more favourable now than ever before.

The Characteristics of Naval Powers

The naval powers have unique merits to serve for political purposes, and proper assets to utilize for international force activities when compared with the ground/air assets.

1. Respond multi-purposely in accordance with various situations.
2. Operate flexibly by avoiding unexpected escalations.
3. Manoeuvre all over the world promptly with high mobility.
4. Deploy all over the world without restrictions by support of mobile logistic assets.
5. Communicate smoothly and internationally throughout most of major maritime nations applying the lessons learned from the multi-national exercises such as NATO or RIMPAC exercises.
6. Establish appropriate structures of command and control, intelligence activities, logistic support and other functions applying the lessons learned from NATO's experience.[4]

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[3] *The Military Staff Committee Activities:* The Military Staff Committee submitted the interim report discussing the organization of prospective United Nations Forces in April 1947 and which indicated twenty-five items of forty-one items in tutelary completely agreed with all five permanent members (Yearbook of the United Nations, 1947-48, p. 495).

[4] *The Nato Military Structure:* a) Chart-1 "NATO Military Structures"; b) Chart-2 "NATO International Military Staff".

7. Maintain favourable inter operability in many aspects among the navies, which have been developed historically in the navy circle. The combined operations carried out by multi-national navies in the Gulf Crisis last year was a good example for this case.

Responsibilities of Nations

The nations that can afford to dispatch the units are recommended to prepare the proper size of naval force to follow the combined air force in accordance with Article 45 of the UN Charter. In this occasion, the following conditions are required.

1. The strength of United Naval Forces must overwhelm the threat to peace.
2. Each nation selectively provides the forces in accordance with its naval strength and character of the nation, including economic capabilities.
3. United Naval Forces neither impose excessive burden to specific nations nor will it occupy total functions by a single nation.

The Side Effects

There may be the following effects produced from the process of discussions which aim at a common goal of UN Naval Forces, even if they do not reach the final conclusion very easily.

1. Positive proposal to challenge and create a new peace enforcement system, different from negative proposal to compel restriction and reduction. This may produce the feeling of good hope and not induce the persecution complexes.
2. Various efforts which have been continuing for many years, such as personal exchange, mutual port visits and invitation to exercises, joint seminar for respective navies may be promoted in a more friendly manner.
3. Even the UN Naval Forces that are still in the process and not competing, can be a strong support to organized activities for environmental safe guard or large scale disaster reliefs.

Promotion of Unilateral CBM Measures

Spontaneous, self-initiated unilateral actions such as reduction of forces, change of force deployment, and opening of information in a friendly manner will be beneficial, as shown below:

1. A process without unwilling concessions or compromises, which are part of negotiation, eliminates frictions, unwanted after-effects and unpleasant feelings.
2. Work from decision-making to action is carried out promptly.
3. Reconstruction of forces and re-mobilization do not require any agreement with partners or opponents; therefore, CBMs cannot bring a sense of insecurity to a nation adopting them.
4. It follows an easy consensus and persuades public opinion.
5. Unilateral action may cause favourable reaction by partners or opponents.
6. No obligation is needed to accept unwanted verification.

Promoting Transparency and Self-Restraint of Arms Export

The arms export race without transparency has induced mutual distrust among nations. After the Cold War, the most serious problems are proliferation of nuclear weapons and in this regard, the efforts to promote transparency and self-constraint of arms export, especially to the politically unstable nations, may contribute to diminishing mutual distrust. Referring to maritime issues, increasing number of nations possessing submarines, either conventional or nuclear propelled,

induces mutual mistrust in terms of maintaining stable use of sea lanes. In addition, the sea mines which require a great deal of effort and time to retrieve, should not be transferred to nations politically unstable or incompetent to clear their own mines with their own capabilities.

Establish the Regional Mechanism in the Pacific and Asian Region

The Pacific and Asian Region is relatively behind in terms of organized effort to regional co-ordination.

Regardless of such backwardness, this region has enormous possibility and potential to decide the most important fate of the new world order. Asian countries should unite in establishing regional co-ordination system for stabilizing the maritime strategic situations.

It is considered there must be various types of organizations to be chosen as follows:

1. Establish new bilateral mechanism.
2. Combine or integrate the existing bilateral mechanism. Develop the existing multilateral mechanism such as ASEAN to security and CBM's purpose.
3. Integrate the most Asian countries into a single multilateral mechanism such as CFCE in Europe.

Judging from present and predicable situations, it is very difficult to integrate large numbers of countries with different cultures and characteristics into the common basis such as CFCE.

The most feasible choice may be combining the existing bilateral mechanism on a step by step basis.

In any cases, the US and CIS must get involved in this system as members of the Pacific and Asian state, which contribute to ease the suspicions of some Asian countries against the influence of China and Japan.

Conclusion

Change of CBMs Characters

The CBMs, which used to be initiated for minimizing and easing the tensions between the two Super Powers in the age of the Cold War, is now changing its characteristics triggered by the beginning of the new world order.

However, even if the name of the USSR has been changed to be called CIS, or Eastern European Countries join NATO, the value and importance of various CBM's organizations which already exist, are still effective continuously. It can be said from another view point, CBMs may have more complicated aspects by transforming the international relations from bipolar world to multi-layer society.

Compatibility Between CBMs and Strategic Deterrence

Under any circumstances, the most important considerations for both CBMs and strategic deterrence are not to be weakened and confused with each other by mutual interference.

CBMs and strategic deterrence are essential functions to stabilize international situations. They are not only closely associated, but depend on each other like a pair of carriage wheels.

Wars, conflicts, confrontations and all other military struggles have a background of either "sense of impending crisis" or "sense of preemptive chance of attack" by national leaders and they are triggered accidentally by miscalculations or lack of information. We should never forget the

very important fact that the "sense of impending crisis" and the "sense of preemptive chance of attack" are eased and suppressed by CBMs and strategic deterrence respectively.

United Nations Naval Forces

The United Nations Naval Forces described in the preceding pages have dual functions of CBMs and deterrence. The forces are effective to deter the various low intensity conflicts which can occur in the process of establishing a new world order. At the same time this organization enhances the consciousness of solidarity or unity in continuing their efforts towards the common goal. Considering the future situations, the merits and potential of the US Navy should be properly calculated. The US Fleet, as the core of United Nations Naval Forces, has exclusive strategic deterrence power and global sea control capabilities, which are indispensable for maintaining stability of the world as "Public Goods".

Regional Mechanisms in the Pacific and Asian Region

CBMs should be generalized from Europe to all over the world, especially the Pacific and the Asian region where the geopolitical situations are more complicated and unstable. The oceans are the people's common and historical heritage. However, there are still the geopolitical asymmetry and disharmony of each country in terms of maritime policy. In order to develop the maritime CBMs each country should recognize, compromise, and overcome the contradictions derived from asymmetry and disharmony.

The New World Order and Maritime CBMs

The Cold War was terminated by human wisdom, and each country should try their very best to establish the new world order by eliminating the various risks which can be the new factors for future conflicts. In the coming years,CBMs for maritime security will play a very important role in contributing to these goals.

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