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Elliott L. Richardson

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Law of the Sea: Navigation and Other Traditional National Security Considerations

ELLIOIT L. RICHARDSON*

This article compares the existing law of the sea and the United Nations Draft Convention on the Law of the Sea as they relate to navigation and other national security considerations. The existing law is found to be unclear and unsupported by a global consensus. Without consensus, deployment of naval and air forces will conflict with States' claims of jurisdiction, involving territorial seas, straits used for international navigation, archipelagoes, and economic zones. To avoid this conflict or acquiescence in unilateral claims, the Draft Convention provides for essential navigational and other security rights, represents an improvement over existing law, and will, upon coming into force, create a widely accepted system of international law for the oceans.

INTRODUCTION

Coastal-State assertions of jurisdiction over maritime areas have been expanding over the years. These claims, of both a geographical and functional nature, have been advanced by developed and developing States, by major maritime and other States, and by friend and foe alike. The claims are numerous, varied, and often at odds with one another. Their most serious impact is on the traditional freedoms of navigation and overflight and related

* Senior resident partner in the Washington Office of Milbank, Tweed, Hadley, and McCloy; head of the U.S. delegation to the Third United Nations Conference on the Law of the Sea 1977-80; Public Chairman of the Advisory Committee to the delegation, 1980 to date. In the preparation of this article, the author has been ably assisted by George Taft, Esq., Attorney Advisor in the U.S. Department of State and former Director of the Law of the Sea Office.
and associated legitimate uses of the seas; they raise serious questions relating to the mobility, flexibility, and credibility in peacetime of our general purpose forces in the face of a lack of a global consensus on ocean law.

The lack of consensus may be demonstrated by the fact that of the 137 independent coastal States, 24 claim a three-nautical-mile territorial sea, 79 claim a 12-nautical-mile territorial sea and 26 claim more than 12 nautical miles. Most States bordering key straits used for international navigation claim territorial seas in excess of three nautical miles, thus between them claiming sovereignty over the entire strait and eliminating the high-seas corridor throughout it. A number of island States claim archipelagic status, drawing baselines connecting the outermost points of their outermost islands and declaring the waters landward thereto subject to their sovereignty. Fifty-four States claim 200-nautical-mile economic zones, some of which purport to restrict navigation and overflight. And this is merely an illustrative listing.1

These and other extensions of jurisdiction have inexorably increased the likelihood that deployments of naval and air forces will come into conflict with coastal-State claims. Our choices in such a situation are uncomfortable ones. We may decide to challenge the claims that we do not recognize, and in that event we must be prepared to pay the potential economic and political costs as well as the military costs. If our policy is to be reasonably consistent, the costs will be cumulative. It is worth recalling in this regard that friends and allies of the United States border many key sea areas and claim jurisdiction not recognized by the United States.2 We may decide to avoid these costs; but this would constrain the mobility of our forces and the credibility of our will to use them, while at the same time erode by non-practice the very principles of customary international law we seek to defend and advance. It has been suggested that we might attempt to avoid the dilemma of chaos or acquiescence by attempting to negotiate bilateral or regional agreements, recognizing our right to navigate through or overfly a State's claimed waters or airspace. The difficulties in such an approach are manifest; success depends upon the relations between the parties and other political factors, including treaty entanglements with a superpower directly related to the superpower's national security requirements.


2. For example, Indonesia claims archipelagic status with a restrictive navigation and overflight regime as well as a 12-nautical-mile territorial sea. Spain, Morocco, and Oman claim 12-nautical-mile territorial seas which overlap key straits.
In the case of the United States, the price that may be exacted in
the form of economic, political, or economic concessions could be
exorbitant, especially if we have to conclude a number of agree-
ments. The superpowers could thus be encouraged to compete
with each other for influence over strategically located coastal
States; and not only would the coastal States be caught in the
 crunch, but the very consistency in customary international law
that we seek would thus be undermined rather than advanced.

The only satisfactory solution of this dilemma is the develop-
ment of a new consensus regarding the rules of ocean law that is
compatible with the mobility, flexibility, and credibility of routine
global deployments of our forces. The codification and develop-
ment of the international law of the sea, particularly regarding na-
tional security matters, will yield clarity in the law and enhanced
authority for it. This objective is well served by the Draft Con-
vention on the Law of the Sea as it relates to navigation and
overflight and related and associated uses of the seas. It reflects a
new consensus that will, should a treaty be adopted, represent a
major and successful effort to arrest the trend toward chaos and
replace it with a synthesis combining the codification of extensive
State practice, precedent, doctrine, and law with the innovative
development of new legal principles.

**TERRITORIAL SEA**

The coastal State's sovereignty has historically extended
throughout the breadth of its territorial sea. Indeed, there seems
to be no doubt that the rights that may be exercised by a coastal
State in its territorial sea are the same as those that may be exer-
cised within its land territory, except that the sovereignty of the
coastal State is subject to the right of innocent passage by foreign
flag vessels. The principle of coastal-State sovereignty was incorporated in
the following articles of the Convention on the Territorial Sea and

art. 312(2) (Aug. 28, 1981).
4. See Report of ILC covering the work of its Eighth Session, 23 April - 4 July,
1956, U.N. Doc./A3159, also in U.N. GAOR Supp. (No. 9) 12 (1956); [1956] 2 Y.B.
Int'l L. Comm'n 265; U.N. Doc. A/CONF.4/SER. A/1958 (a commentary on the is-
 sue of sovereignty). In light of the sparse legislative history on this subject at the
Third UN Conference on the Law of the Sea and similar language of pertinent arti-
cles, the ILC Commentary is particularly useful.
the Contiguous Zone,\textsuperscript{5} which emerged from the First United Nations Conference on the Law of the Sea in 1958:

\begin{enumerate}
\item The sovereignty of a State extends beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.
\item This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.
\end{enumerate}

\textit{article 2}

The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil.\textsuperscript{6}

\textbf{Article 2 of the Draft Convention on the Law of the Sea also incorporates this principle of sovereignty but adds an innovation in international law, \textit{i.e.}, the concept of archipelagic waters.}\textsuperscript{7} This article reads as follows:

\begin{center}
\textbf{Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil}
\end{center}

\begin{enumerate}
\item The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
\item This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
\item The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.\textsuperscript{8}
\end{enumerate}

While there is no dispute under existing international law regarding the status of the waters of the territorial sea, the same cannot be said as to the maximum permissible breadth of the territorial sea. At the Hague Conference for the Progressive Codification of International Law in 1930, there seemed to be broad, although not unanimous, support for the traditional three-mile maximum breadth of the territorial sea.\textsuperscript{9} Nevertheless, that Conference did not adopt a provision on the subject. A number of

\begin{flushright}
6. \textit{Id.}
7. \textit{See} notes 47-56 and accompanying text \textit{infra}.
8. \textit{See supra} note 5, art. 2.
9. For the United States, Secretary of State Jefferson informed the British Minister that while the "ultimate extent" of the territorial sea was reserved "for further deliberations," the 3-mile or one "sea league" limit was not opposable by any nation. Note dated Nov. 18, 1793, in 1 Moor, \textit{Int'l L Digest} 702-03 (1906). The United States has consistently adhered to the 3-mile limit as the maximum breadth of the territorial sea it would recognize. \textit{See} Cunard Steamship Co. v. Mellon, 262 U.S. 100, at 122-23 (1923):
\begin{quote}
It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays, and other inclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or 3 geographic miles.
\end{quote}
\textit{Id.}
\end{flushright}
States thereafter made claims to broader limits of sovereignty with the aim either of controlling fishing or of asserting more general national claims.

In 1958, on the eve of the First United Nations Conference on the Law of the Sea, a statistical breakdown of territorial-sea claims produced the following tabulation:

<table>
<thead>
<tr>
<th>Breadth (Nautical Miles)</th>
<th>Number of States</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>45</td>
</tr>
<tr>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>12</td>
<td>9</td>
</tr>
<tr>
<td>200</td>
<td>2</td>
</tr>
<tr>
<td>No Legislation</td>
<td>5</td>
</tr>
</tbody>
</table>

That Conference failed, however, to reach agreement on the maximum limit of the territorial sea, as did the Second United Nations Conference in 1960. The trend away from the three-mile limit accelerated, as shown in the following graph:

As late as the 1950's, the three-mile limit was broadly reflected in State practice. It could thus be regarded as among the rules of customary international law that have "grown up by common consent of the States—that is, the different States have acted in such a manner as to imply their tacit consent to these rules." As stated in the Asylum case:

The Party which relies on a custom... must prove that this custom is established in such a manner that it has become binding on the other Party... that the rule invoked... is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.

Although more recent trends have weakened the standing of the

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11. Id.
14. Id. at 276.
three-mile limit, the proponents of a broader limit cannot avoid the strictures of international law:

The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.\(^\text{15}\)

One need not fully argue the question whether the current maximum permissible breadth of the territorial sea is three miles or 12 miles to recognize that there is no longer a consensus on the matter in the world community. It seems clear, on the other hand, that there is scant support for the proposition that the territorial sea may as a matter of law extend beyond 12 miles.\(^\text{16}\)

The Draft Convention on the Law of the Sea provides for a maximum limit of 12 miles.\(^\text{17}\) Indeed, this limit, as the only basis for agreement, was variously linked by participating States to agreement on passage through straits used for international navigation, coastal State rights in an economic zone, or other elements of "the package deal."

Under customary international law as well as the Draft Convention, navigation in the territorial sea is regulated by the regime of innocent passage, which is the one exception to complete coastal State sovereignty.

The right of innocent passage seems to be the result of an attempt to reconcile the freedom of ocean navigation with the theory of territorial waters. While recognizing the necessity of granting to littoral States a zone of waters along the coast, the family of nations was unwilling to prejudice the newly gained freedom on the seas. As a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law. . . \(^\text{18}\)

The conflicting interests surrounding coastal-State rights and innocent passage have been succinctly stated:

All claims by coastal states to exercise authority affecting access to the marginal belt, and the opposing counterclaims by other states to be free of such authority, bring into conflict the two fundamental policies that have traditionally been of paramount importance in disputes about use of the oceans of the world. In protection of widely recognized common interests,

\(^{16}\) See, e.g., Convention on the Territorial Sea and Contiguous Zone, supra note 5, art. 24, para. 2: "The contiguous zone may not extend beyond 12 miles from the baseline from which the breadth of the territorial sea is measured."
\(^{17}\) Draft Convention, supra note 3, art. 3.
it has long been general community policy. . . to maintain the oceans as a
common resource available for the peaceful use by all for the purposes of
transportation and communication. Because, in varying degree, the territo-
rial seas of coastal states must be utilized in this transportation and
communication, the community is also concerned that passage through
these areas be preserved free of undue coastal restrictions.19

The 1958 Convention on the Territorial Sea and the Contiguous .
Zone states that “ships of all States . . . shall enjoy the right of
innocent passage through the territorial sea.”20 “Passage is inno-
cent so long as it is not prejudicial to the peace, good order or se-
curity of the coastal State. Such passage shall take place in
conformity with these articles and with other rules of interna-
tional law.”21 “Submarines are required to navigate on the sur-
face and to show their flag.”22

Although that Convention does not purport to codify customary
international law, the provisions cited above are accepted as cus-
tomary law if we may judge by State practice, including its reflec-
tion in the legislation of coastal States. Innocent passage is a
“subjective” regime in so far as the Convention leaves open to
coastal-State interpretation the question of what activities are in-
nocent or noninnocent. Indeed, there is the danger that “inno-
cence” can be interpreted on the basis of the flag the vessel is
flying, the cargo it is carrying, its means of propulsion, or its desti-
nation, although any such interpretation is open to scrutiny and
thus to correction by the community of nations. And since the
concept of innocent passage evolved before the development of
the airplane or submarine, it does not embrace the right to overfly
or navigate submerged through the territorial sea.

The Draft Convention’s provisions on innocent passage are a
major improvement. While excluding submerged transit or over-
flight, they enumerate the activities of ships which are prejudicial
to the peace, good order, or security of the coastal State, thus re-
moving the vessel from innocent passage.23 There is a new provi-
sion on the laws and regulations of the coastal State relating to
innocent passage. The right of innocent passage by nuclear-pow-
ered ships and ships carrying nuclear substances is explicitly rec-
ognized.24 There is a prohibition on discrimination in form or in
fact against the ships of any State or against ships carrying car-
goes to, from, or on behalf of any State.25 Unlike the 1958 Conven-

(1962).
20. Supra note 5, art. 14, para. 1.
21. Id. art. 14, para. 4.
22. Id. art. 14, para. 6.
23. Draft Convention, supra note 3, art. 19, para. 2.
24. Id. art. 23.
25. Id. art. 24, para. 1(b).
tion, the Draft Convention explicitly embraces the immunities of warships in the territorial sea. In sum, the Draft Convention provisions on the territorial sea will make an important contribution to the codification, clarification, and development of ocean law, thereby benefiting coastal States and flag States alike.

STRAITS USED FOR INTERNATIONAL NAVIGATION

The legal status of straits used for international navigation is, with the exception of straits subject to special treaty arrangements, based upon general rules of international law with respect to internal waters, the territorial sea, or the high seas. However, to recognize coastal-State rights in straits to be as broad and encompassing as coastal-State rights in the territorial sea outside of straits would be tantamount to granting a license to interfere with interests in trade and communications that are essential to all States and would substantially impair freedom of navigation on the high seas.

Prominent publicists early in this century maintained that straits used for international navigation should be open to all ships, including warships. By the time the First United Nations Conference on the Law of the Sea was held in Geneva in 1958, the right of all ships to innocent passage through territorial straits used for international navigation was well recognized. Many publicists, however, maintained that coastal States might, at least in extraordinary circumstances, subject warships to broader regulation than would be permissible for merchant ships. Moreover, the International Court of Justice stated in the Corfu Channel Case:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace. . . .

26. Id. art. 32, but see Convention on the Territorial Sea and the Contiguous Zone, supra note 5, sub-sections C & D.
27. E. BRUEL, 1 INTERNATIONAL STRAITS 79 (1947).
28. Id. at 230; JESSUP, supra note 18, at 120.
29. See, e.g., BONTIL MANUEL DE DROIT INTERNATIONAL PUBLIC 406 (Fauchille, ed. 1912); BRUEL, supra note 27, at 232; BUSTAMANTE, THE TERRITORIAL SEA 120 (1930); L. OPPENHEIM, INTERNATIONAL LAW 464 (7th ed., Lauterpacht, 1949).
The Court is of opinion that Albania, in view of these exceptional circum-
stances, would have been justified in issuing regulations in respect of the
passage of warships through the Strait, but not in prohibiting such pas-
sage or in subjecting it to the requirement of special authorization.\[31\]

The Convention on the Territorial Sea and Contiguous Zone
specifically addresses straits in only one paragraph. It provides:
"There shall be no suspension of the innocent passage of foreign
ships through straits which are used for international navigation
between one part of the high seas and another part of the high
seas or the territorial sea of a foreign State."\[32\]

In all other respects the regime of innocent passage through
straits is the same as the regime in the territorial sea outside of
straits. Thus, under the 1958 Convention, there is no right of sub-
merged passage or overflight through territorial straits. There is a
right of the coastal State to regulate passage unilaterally, pro-
vided that such regulation does "not hamper innocent passage
through the territorial sea."\[33\] While acceptable so long as cus-
tomy international law confined the territorial sea to the his-
toric three-mile limit, extension of the territorial sea to 12 miles
would make this regime inadequate to support the requirements
of the international community with regard to certainty of the
rights of their ships and aircraft to carry on trade and communi-
cation or military activities, vital to the peace and stability of the
world community. Such an extension would overlap more than
100 straits between six miles and 24 miles in width. With a three-
mile territorial sea, these straits embraced a high-seas corridor.
From the outset of the Third United Nations Conference on the
Law of the Sea, the United States conditioned its willingness to
agree to a 12-mile territorial sea upon obtaining recognition of a
treaty right to unimpeded transit through, under, and over straits
used for international navigation. Without clear recognition of
such a right, it might have been possible for the States bordering
straits to assert that the right of innocent passage applied even to
such strategically important straits as Gibraltar.

The traditional doctrine of innocent passage was premised on a
narrow territorial sea. This both accounted for and made tolera-
ble the fact that innocent passage does not countenance either
submerged transit by submarines or overflight by aircraft. It also
made possible the avoidance of an agreed international under-
standing as to what passage is "innocent." A consequence was
the lingering danger of subjective interpretation of "innocence,"
which was defined as passage that is not prejudicial to the "peace,

\[31\] Id.
\[32\] Supra note 5, art. 16, para. 4.
\[33\] Id. note 5, art. 15, para. 1.
good order or security” of the coastal State. Some strait States had asserted, for example, that the transit of large petroleum tankers or nuclear-powered vessels was inherently “non-innocent.”

But it never made sense to apply to international straits a legal doctrine developed to govern passage in the territorial sea generally. As the United States declared when substantive negotiations were getting underway at the Third United Nations Conference on the Law of the Sea in 1974:

Unlike the territorial sea in general, international straits serve as access and connecting points for large areas of the oceans. As such, transit through straits is essential to meaningful exercise of the high seas rights of all states in these vast areas. Functionally, then, straits are quite distinct from other territorial sea areas. And because of their special prominence, the potential for conflict from an uncertain legal regime is greatly increased in straits.34

Of course in practice, major maritime States have not accepted the regime of article 16, paragraph 4, of the 1958 Convention, at least as applied to major straits. “[T]he approach adopted by many States in 1958 to deal with this problem was to oppose extensions of coastal state sovereignty beyond three nautical miles.”35 Many States bordering key straits have nevertheless purported to extend their territorial seas to 12 miles, without providing an exception to the innocent passage regime which they have apparently continued to regard as applicable. This has been the announced position of Spain and Morrocco toward the Strait of Gibraltar, and of Oman and Iran toward the Strait of Hormuz. In these and many other straits used for international navigation, the littoral powers are allies or friends of the United States. We can ignore or openly contest the claims of non-friends and discount in some cases the price we may pay, but persistent challenges to a friend on an issue of importance to both States can in the long run incur serious costs.

The Draft Convention approaches transit passage in a practical manner. Reflecting the practice of major maritime States, the Draft Convention distinguishes the regime of transit passage from the regime of innocent passage. The transit passage regime applies to straits used for international navigation between one part


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of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.\textsuperscript{36} The innocent passage regime applies to straits used for international navigation between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State and to certain other straits excluded from the regime of transit passage.\textsuperscript{37}

Moreover, Part III of the Draft Convention (Straits Used for International Navigation) lays down detailed rules for straits, but these do not apply to the territorial sea outside of straits. Indeed, article 45 is the only one which addresses innocent passage through straits, and this article deals exclusively with straits not subject to the transit passage regime. Furthermore, it is clear on the face of Part III that it, rather than Part II (Territorial Sea and Contiguous Zone) which defines innocent passage, governs passage through straits.\textsuperscript{38} This approach, which is in sharp contrast with the 1958 Convention, affirmatively recognizes the unique importance of straits.

The transit passage regime provided for in the Draft Convention permits both overflight and submerged transit. Overflight is explicitly recognized in article 38, paragraph 2, which is the right of transit passage, including “the freedom of . . . overflight . . . .”\textsuperscript{39} The 1958 Convention recognizes no such right or freedom except to the extent that freedom of navigation and overflight may be exercised on the high seas beyond the territorial sea, both in straits and otherwise.\textsuperscript{40}

It is equally clear, although less explicitly so, that the transit passage regime provided for in the Draft Convention includes a right of submerged transit for submarines. The right of transit passage includes “the freedom of navigation . . . solely for the purpose of continuous and expeditious transit of the strait . . . .”\textsuperscript{41} The term “freedom of navigation” antedates the 1958 Convention on the High Seas and has always been understood as including submerged passage. The transposition of freedom of navigation to straits is limited only by the other provisions of Part III and by other rules of international law such as, for example, those deriving from the Charter of the United Nations. The Draft

\textsuperscript{36} Draft Convention, \textit{supra} note 3, art. 37.
\textsuperscript{37} \textit{Id.} note 3, art. 45.
\textsuperscript{38} As to the regulatory powers of the States bordering straits, see, e.g., Draft Convention, \textit{supra} note 3, arts. 41, 42 (Part III) & 233 (Part XII).
\textsuperscript{39} Draft Convention, \textit{supra} note 3, art. 38, para. 2. See also explicit recognition of overflight in \textit{id.} art. 38, para. 1 and \textit{id.} art. 39, para. 3.
\textsuperscript{41} Draft Convention, \textit{supra} note 3, art. 38, para. 2.
Convention's only limitations on the exercise of freedom of navigation are those found in articles 38, 39, 40, 41, and 42. The Convention nowhere contains an explicit or implicit prohibition on submerged transit of straits.\textsuperscript{42} The conclusion that no such limitation was intended is reinforced by the fact that the part of the Draft Convention (Part II) dealing with the territorial sea explicitly provides in article 20 that submarines are "required to navigate on the surface and to show their flag." Nothing of the sort appears in Part III. In addition, article 39(c) restrains ships from activities other than their "normal mode" of transit. This phrase is also used in article 53, paragraph 3, with respect to archipelagic sealanes passage. As thus newly introduced into the law of sea lexicon, the phrase is widely viewed as embracing submerged transit.

The transit passage regime provided for in the Draft Convention delineates the obligations of ships and aircraft during the course of transit passage\textsuperscript{43} while at the same time circumscribing the rights of the coastal State with regard to transit passage.\textsuperscript{44} The sovereign immunity of ships and aircraft entitled thereto is explicitly recognized.\textsuperscript{45} As I have earlier pointed out:

The provisions...emphasize the obligations of transiting states rather than the right of coastal states to control transit. This approach is designed to protect legitimate coastal state interests without permitting coastal state interference with transit... [T]he only significant exceptions pertain to enforcement of internationally approved maritime safety and pollution measures.\textsuperscript{46}

In sum, the transit passage regime of the Draft Convention will satisfactorily protect and enhance the legal regime in straits that is essential for the continued mobility and flexibility of air and naval forces. It can be seen as a major improvement when viewed against the ambiguity of the 1958 Convention on the Territorial Sea and Contiguous Zone and against the existing lack of agreement on the maximum breadth of the territorial sea. Its significance, moreover, is highlighted by the fact that all but a very few States have indicated their willingness to accept the transit pas-

\textsuperscript{43} Draft Convention, supra note 3, arts. 39, 40, 41 and 42.
\textsuperscript{44} Id. note 3, arts. 41, 42 and 233.
\textsuperscript{45} Id. note 3, art. 42, para. 5.
\textsuperscript{46} Remarks of E. Richardson at the launching of the U.S.S. Samuel E. Morison, Bath, Maine (July 14, 1979) [Dep't State, Press Release No. 171, July 13, 1979] (on file with the author).
sage regime so long as it remains part of a comprehensive Law of the Sea Convention which brings them compensating benefits.

ARCHIPELAGOES

While there has been for years a general recognition that island nations should have jurisdictional rights equivalent to those of continental nations, it has never been acknowledged that islands should have greater rights. In recent decades, however, a number of island nations, led by Indonesia and the Philippines, have pressed for recognition of the concept of an "archipelagic State." Although the concept had little support before 1958, and the First United Nations Conference did not accept it, these island nations have since embodied a claim of archipelagic status in national legislation. They have drawn baselines connecting the outermost points of their outermost islands and claimed the waters thus enclosed, which had been traditionally viewed as part of the high seas, as "internal waters" or waters otherwise subject to coastal-State sovereignty, thereby purporting to subject them to at least the same degree of sovereignty as that exercisable over the territorial sea.\footnote{47} It was to be expected that resistance to the concept would spring from the fact that in some cases the waters for which archipelagic status was claimed were not only vast in area like the Java Sea, but covered key straits and navigation and overflight routes critical to the movement of military forces. Moreover, the claims sometimes had the effect of separating two parts of a neighboring State, as is the case with Indonesia's claim as it affects Malaysia. Furthermore, there was a deep concern that the concept would be applied by non-island nations with untoward political effects.

Indonesia, the Philippines, Fiji, the Solomon Islands, Sao Tome and Principe, and Cape Verde now claim archipelagic status; and other island nations are likely to do so in the next few years at most. It was apparent at the Third United Nations Conference that the claimants would not withdraw or modify their claims in the absence of a treaty that met their legitimate interests in bolstering the unity and integrity of their nations. It was also apparent, insofar as the object of the Conference was a comprehensive treaty, that a deal had to be struck with the archipelagic concept's main proponents, which, like Indonesia and the Philippines, were

\footnote{47. The Philippines law is: An Act to Define the Baselines of the Territorial Sea of the Philippines, Republic Act No. 3046, approved June 17, 1961, amended by Republic Act No. 5446, Sept. 18, 1968. Among other things, this Act declares waters landward of the baselines to be internal. The Indonesian law is Law No. 4 (Feb. 18, 1960), and waters inside baselines are called "internal waters."}
and are important friends of the United States. Hence, although the Indonesian and Philippines legislation is among the most restrictive with regard to navigation, it could not be assimilated by a comprehensive treaty without damage to the global interest in communications and trade and without impairing the freedoms of navigation and overflight. As defined in a universal convention, the concept of archipelagic waters had to be accommodated with these interests as well as with the concerns of neighboring States. It was also essential to confine its application in such a way as to avoid the serious political problems that would otherwise have been precipitated.

The Draft Convention provides a practical and political solution that commands general support within the context of an acceptable treaty. The concept applies only to island States. While an archipelagic State may draw archipelagic baselines joining the outermost points of the outermost islands, they are subject to specific geographic limitations. The system of baselines may not be applied in such a way as to cut off from the high seas or economic zone the territorial sea of another State. If part of the archipelagic waters lies between two parts of an immediately adjacent neighboring State, the existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters will survive and must be respected.

The waters landward of the baselines are archipelagic waters under the sovereignty of the archipelagic State subject to the provisions of Part IV (Archipelagic States) of the Draft Convention (The territorial sea and other seaward extensions of jurisdiction are measured from these archipelagic baselines.) The most significant limitation of sovereignty over archipelagic waters is that preserving the right of all ships and aircraft of foreign States to enjoy continuous, expeditious, and unobstructed transit in, over, and under sealanes and air routes which traverse the archipelagic waters and innocent passage in the adjacent territorial sea. These sealanes, which are defined by courses and distances from

48. Draft Convention, supra note 3, art. 46. Greece could not, in consequence, claim archipelagic status for the Greek Islands nor could the United States do so for Hawaii.
49. Draft Convention, supra note 3, art. 47.
50. Id.
51. Id.
52. Id. art. 49.
53. Id. art. 53.
a point of entry into and a point of exit from the archipelagic wa-
ters and which extend 25 miles on each side of this axis, must be
approved by the competent international organization before they
are applied by the archipelagic State.\textsuperscript{54}

The right of passage through archipelagic sealanes is at least as
broad with respect to navigation and overflight as is transit pas-
sage through straits. The analysis of the straits regime\textsuperscript{55} is perti-
nent here. It is understood, moreover, in recognition of the broad
expanse of what is now high seas that would fall under national
sovereignty, that the wide sealanes permit transiting ships and
aircraft to be deployed as they would be on the high seas.
Outside of sealanes but within archipelagic waters, all ships of all
States enjoy the right of innocent passage. This right of innocent
passage is as broad and subject to the same limitations as in the
territorial sea.\textsuperscript{56}

While the claims of archipelagic status put forward by several
nations have no basis in international law today, they are suffi-
ciently numerous and in some cases embrace such important ar-
eas of the world as to warrant an international consensus
agreement on a circumscribed definition of archipelagic waters,
coupled with a liberal regime of navigation and overflight.

\textbf{ECONOMIC ZONE/HIGH SEAS}

Hugo Grotius in 1609 set forth the thesis that the freedom of the
seas was part of international law; the open seas were not capable
of being divided and could not be appropriated for exclusive use
by any nation.\textsuperscript{57} For over three centuries, it has been clear that
the high seas cannot be subject to the sovereignty of any State.
The only limitations on the principle of freedom of the seas were
those which recognized the unilateral right of States to deal with
customs, fiscal, immigration, and health matters, as well as slav-
er and piracy.

Triggered by the Truman Proclamation of 1945,\textsuperscript{58} resource
claims encroaching on the high seas have since proliferated. The
reaction of States to such claims has rested on their perceived
reasonableness and on their potential for direct or indirect harm
to other States. Albeit gradually and grudgingly, these claims

\textsuperscript{54} Id. The competent organization is understood to be the Intergovernmental
Maritime Consultative Organization (IMCO).
\textsuperscript{55} See notes 36-46 and accompanying text supra.
\textsuperscript{56} Draft Convention, supra note 3, art. 52.
\textsuperscript{57} H. Grotius, The Freedom of the Seas 8 (R. Magoffin transl. 1916).
\textsuperscript{58} See Richardson, Power, Mobility, and the Law of the Sea, 55 Foreign Aff.
902, 903-04 (1980).
have won general acceptance. Extensions of more general claims of sovereignty to wide areas of the seas have traditionally been resisted, in part because they conflicted implicitly or explicitly with the freedom of communication which affected all States, and in part because they transcended any reasonable requirement for the protection of the coastal State’s legitimate interests.

The Geneva Convention on the High Seas,\(^5\) which was the only one of the four Conventions adopted by the First United Nations Conference that explicitly purported to codify rules of international law, set forth the freedoms of the high seas in a broad and non-exhaustive way. Article 2 provides in part:

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

1. Freedom of navigation;
2. Freedom of fishing;
3. Freedom to lay submarine cables and pipelines;
4. Freedom to fly over the high seas.\(^6\)

In its final sentence, article 2 gives recognition to the interests of other States as follows: “These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.”\(^6\)

Despite the High Seas Convention, unilateral claims of sovereignty and jurisdiction in the high seas have multiplied since 1958. The invalidity of some of these claims as a matter of international law is obvious—for example, territorial sea claims of 200 miles—and need not be elaborated. Other claims are more difficult to evaluate on the basis of objective criteria. The Third United Nations Conference on the Law of the Sea had by 1975 already achieved a consensus on the establishment of a 200-mile “exclusive economic zone” as part of a broadly accepted package deal, thereby inducing many countries to assert jurisdiction over the resources within 200 miles of their coasts. Is the economic zone or certain commonly ascribed attributes of such a zone in accord with the law of nations?

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60. Id. art. 2.
61. Id.
The United States, for example, does not claim an economic zone nor does it recognize such zones as such. At the same time, the United States claims broad and exclusive fisheries jurisdiction to a limit of 200 nautical miles and, in the case of anadromous species of fish—in particular, salmon—to an unspecified limit which may range hundreds of miles beyond that limit. Coastal State fisheries jurisdiction to 200 miles is an attribute of economic zones. It is in contravention, however, of article 2 of the High Seas Convention. Many other States, which like the United States are parties to that Convention, claim similar jurisdiction within the 200-mile area. In the case of the United States legislation, the jurisdictional point is met by the conclusion of bilateral agreements with foreign fishing States whereby they agree to recognize our assertion of authority over the zone.

The introduction of new technology and new uses of the seas has led to certain other claims of jurisdiction to activities in, or areas of, what has traditionally been the high seas. The United States, for example, claims jurisdiction over the production of energy through utilizing the differential in water temperatures between the surface and the depths (ocean thermal energy conversion, or "OTEC"). This jurisdiction is narrowly drawn and is not exclusive, but it is an attribute of an economic zone. The United States likewise claims jurisdiction over deepwater ports beyond the territorial sea. While this too is a normal attribute of an economic zone, the deployment of such ports can be viewed as a high-seas freedom, with jurisdiction over the vessels using them accounted for by the port-State doctrine. Suffice it to say that the United States and many other States have staked out claims of jurisdiction to activities in, or areas of, what has traditionally been the high seas. This encroachment was inevitable, given the introduction of new technology and new uses of the seas; but it is sometimes in clear derogation of the traditional high seas freedoms.

The "reasonable regard" standard in article 2 of the High Seas Convention recognizes that accommodations are necessary in practice between and among high seas freedoms exercised by all States. However, the Convention did not envision a plethora of new claims and is silent on the relationship of high-seas claims

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63. OFFICE OF THE GEOGRAPHER, U.S. DEP'T OF STATE, LIMITS IN THE SEAS (No. 36 4th rev. 1981) [as updated by National Maritime Claims as of Jan. 1, 1982]. Of the States that have claimed 200-mile fisheries zone jurisdiction, a substantial number have claimed such jurisdiction since 1976. Examples of such claims include Mexico, Canada, Soviet Union, United States, Japan, and Venezuela.
and coastal-State rights. For most States, coastal-State rights are the predominant concern. For others, including the United States, emphasis is also placed on the freedoms of navigation and overflight and other legitimate uses of the seas by third States.

It followed quite naturally that at the Third United Nations Conference on the Law of the Sea, the issue of the legal status of the economic zone revolved around the position of the United States and the Soviet Union and their respective allies, which "regarded the [economic] zone as a part of the high seas subject to certain coastal state rights and jurisdiction," and the position of those countries which regarded the zone as neither territorial sea nor high seas but as *sui generis*. Indeed, States which—like Brazil, Peru, and Ecuador—claimed broad territorial seas, pressed to make the zone one of national jurisdiction where navigation, overflight, and other community rights were limited.

The struggle over this issue was at its height when in 1977, at the Sixth Session of the Third United Nations Conference, a representative group of affected States held informal but intensive negotiations outside the Conference framework on the status of the zone. These negotiations also dealt with issues involving marine scientific research and dispute settlement for fisheries. The resulting texts, which embodied compromises on all three issues and with changes only in the science articles, were incorporated in the composite text that emerged at the end of the Sixth Session. The language clarifying the relative rights of coastal States and other States in the seas beyond the territorial sea to the 200-mile limit has continued to be incorporated in successive drafts with only slight modifications by the Drafting Committee.

Article 56 provides for the rights, jurisdiction and duties of the coastal State in the 200-mile economic zone, as follows:

1. In the exclusive economic zone, the coastal State has:
   (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters, 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;
   (b) jurisdiction as provided for in the relevant provisions of the present Convention with regard to:
      (i) the establishment and use of artificial islands, installations and structures;

65. Draft Convention, *supra* note 3, art. 56.
(ii) marine scientific research;
(iii) the protection and preservation of the marine environment;
(c) other rights and duties provided for in the present Convention.

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

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.66

This article summarizes coastal State rights. While subparagraph 1(a) directly confers sovereign rights on the coastal State for various economic purposes, subparagraphs 1(b) and 1(c) refer to jurisdiction and other rights and duties specifically provided for elsewhere in the Convention. Taken together, article 56 and the articles to which it refers incorporate State practice regarding fisheries and make detailed provision for additional coastal-State rights. Thus, the ambiguities resulting from the co-existence of the 1958 Convention and inconsistent State practice are replaced by a carefully dovetailed set of provisions which seem satisfactorily to accommodate coastal-State interests.

The coastal State, however, in exercising its rights and performing its duties in the exclusive economic zone, is required to have due regard to the rights and duties of other States and to act in a manner compatible with the Convention. Thus, in contrast with the silence of the 1958 Convention on the High Seas, coastal States' rights (rather than only high seas freedoms) must be exercised with a degree of regard for other States. Under article 55, the zone is subject to the specific legal regime established in Part VI67 the rights, jurisdiction, and freedoms of coastal States and other States are governed by the relevant provisions of the Convention. By thus placing the zone in the context of the Draft Convention as a whole, article 55 draws attention to the two sources of limitation on coastal-State rights in the zone: first, the specificity of their enumeration and, second, their subjection to the due regard and compatibility provision. These limiting provisions, which have no counterpart in any pre-existing Convention, are reinforced by the cross-reference in article 58(2) to article 89,68 the effect of which is that no State may validly purport to subject any part of the exclusive economic zone to its sovereignty.

Article 58 was the subject of particularly difficult negotiations in the informal group. Every word and comma was exposed to intensive debate. It was understood from the outset that the willingness of the maritime States to back off of their insistence on

66. Id.
67. Id.
68. Id. art. 58(2).
explicit high-seas status for the exclusive economic zone must be compensated for by coastal State recognition that the high-seas freedoms exercisable in the zone are qualitatively and quantitatively the same as the traditional high-seas freedoms recognized by international law. The quantitative objective required that, except for former freedoms (e.g., fishing) recognized as coastal-State rights in the zone, the freedoms exercisable in the zone be the same in character and content as the traditional high-seas freedoms. The quantitative objective required that the included uses of the sea embrace a range no less complete—and allow for future uses no less inclusive—than traditional high-seas freedoms. As finally hammered out, article 58 reads:

Rights and duties of other States in the exclusive economic zone

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

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

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.69

In order to carry out its qualitative purpose, paragraph 1 of article 58 identifies the safeguarded freedoms as those "referred to in Article 87," which is captioned "Freedom of the High Seas."70 The quantitative purpose is emphasized by the phrase "such as," which makes clear that the reference to specific uses is illustrative but not exhaustive. Again, article 87 defines "Freedom of the High Seas" by setting forth a list of freedoms whose non-exhaustive character is made clear by the prefatory phrase "inter alia."71

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69. Id. art. 58.
70. Id. art. 87.
71. Id. art. 87 which reads as follows:

**Freedom of the High Seas**

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

   (a) freedom of navigation;
The inclusiveness of article 58 with respect to both the quality and quantity of the freedoms thereby safeguarded is further reinforced by the phrase, “other internationally lawful uses of the sea related to these freedoms,” which is not only its common-sense meaning but the one intended for it by the bargaining process from which it emerged.

The substantive attributes of the freedoms enjoyed by all States in the exclusive economic zone derive their content not only from article 58, paragraph 1, and from the provisions of article 87, absorbed by the cross-reference to that article, but gain additional content from the other paragraphs of article 58. Thus the zone, like the high seas, must be reserved for “peaceful purposes,” a phrase intended to enjoin observance in those areas of the Charter of the United Nations. Military maneuvers and activities that do not violate the Charter are permitted, and the fact that a particular coastal State may have a low threshold of anxiety regarding ships and aircraft off its coast cannot diminish the rights of the flag State, although the latter must pay due regard to the rights and duties of the coastal State. As article 58, paragraph 3 makes clear, the freedoms of other States are not subject to the exercise of the rights of the coastal State, except as specifically provided for in the Convention with respect, for example, to compliance with international pollution standards.

The essence of the compromise between the maritime States’ position, that the exclusive economic zone should be regarded as a part of the high seas subject to certain coastal States rights, and the coastal States’ position, that it should be regarded as sui generis, is most clearly revealed in article 86. The first sentence of that article declares that Part VII, captioned “High Seas,” governs “all parts of the sea that are not included in the exclusive ec-

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

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

72. Id. art. 88, incorporated by art. 58, para. 2.
73. Id. art. 56, para. 2.
onomic zone . . . .”74 Lest this sentence be interpreted, however, as implying some difference between the character and scope of high-seas freedoms and those enjoyed by other States in the exclusive economic zone, the next sentence was added for the specific purpose of precluding any such implication. It reads, “This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.”75

In sum, the provisions are geared to deal with the complexities which have resulted from new and more intensive use of the oceans. Where both coastal States and other States have rights, there are detailed provisions governing the resolution of the problem and a “due regard” clause for the accommodation of these rights where more specific provisions may not be applicable; it is a rule of reason.

But should an unforeseen use of the sea become apparent which is attributed neither to coastal States nor to other States and should a conflict arise between the interests of those States, article 59 provides that “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.”76 Since no one can predict the future, the Convention broadly spells out the criteria to be employed in resolving such conflicts. Beyond the economic zone, the traditional high-seas freedoms obtain, subject to limitations of international law including a degree of regard for the rights of others.

74. The key provision is as follows:

PART VII
HIGH SEAS

SECTION 1. GENERAL PROVISIONS
Article 86
Application of the provisions of this Part

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

Id., see also note 71 supra.

75. Draft Convention, supra note 3, art. 86.
76. Id. art. 59.
CONCLUSION

The Draft Convention as it relates to navigation and overflight and related uses of the seas is a considerable improvement over existing law. The existing law of the sea does not command a global consensus. Its rules are neither clear nor authoritative. They are poorly understood in consequence by those at the seat of power, by those who must operate at sea, and by the public at large. Those who set store by law and order at home cannot disregard the importance of agreed law at sea.

Foreign perceptions of the applicable principles of international law can affect both the willingness and the ability of the United States to carry out various missions at sea. A law of the sea treaty creating a widely accepted system of international law for the oceans, including the Draft Convention's navigation and related provisions, would—if the other rules it contains adequately meet United States needs—be the most effective means of creating a legal environment in which our own perception of our rights is essentially unchallenged. We would then, for the first time since the Grotian system began to disintegrate, be assured rights of navigation and overflight free of foreign control, free of substantial military risk, and free of economic or political cost.