

Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters

JAMES KRASKA*

Incidents by suspected Russian submarines spying in Swedish and Finnish waters in 2014 and 2015, and the ample history of such incidents over the past sixty-five years involving Chinese, British, North Korean, American, and Soviet (and Russian) submarines, suggest undersea spying occurs with some regularity, yet the political and legal consequences are uncertain. While submarine intrusions into the territorial sea are not uncommon, the legal standards that govern such operations and the rights and duties of affected coastal states are murky.

First, although it is apparent that submarine espionage violates the sovereignty of the coastal state in the territorial sea, it is unclear whether the operations are inconsistent with the law of the sea, or even international law more generally. Certainly undersea operations and spying in territorial waters without coastal state consent are not compatible with the regime of innocent passage in the law of the sea, but it is unclear whether they are lawful as “non-innocent” passage. Second, even if the affected coastal state has suffered a violation of its sovereignty, there is disagreement over lawful coastal state responses or countermeasures. Although the law

* Howard S. Levie Professor of International Law and Research Director, Stockton Center for the Study of International Law, U.S. Naval War College; Distinguished Fellow, Law of the Sea Institute, University of California, Berkeley School of Law; and Senior Fellow, Center for Oceans Law and Policy, University of Virginia School of Law. The author kindly thanks the very enlightening discussions about this research with colleagues and former U.S. Navy submarine officers and captains Professor William F. Bundy, Ph.D., Director, Gravely Naval Warfare Research Group and Professor John Litherland, Deputy Director and Senior Operations Researcher at Gravely Naval Warfare Research Group, U.S. Naval War College.

of the sea recognizes coastal state prescriptive jurisdiction over vessels not in innocent passage in order to “require” them to leave the territorial sea, the authority to enforce such measures—especially against warships with sovereign immune status—is unresolved. Third, it is doubtful whether states may take recourse to forceful action or invoke the doctrine of self-defense against submarine intrusions, even though several states appear to have done so.

These issues have particular salience in the Asia-Pacific region, where regional states are invested in development and expansion of submarine fleets. Sophisticated undersea technologies are entering service in states situated along an arc that stretches from the Persian Gulf and Indian Ocean in the west to Southeast Asia and Northeast Asia in the east. Many of these states, such as those surrounding the South China Sea, are engaged in fierce maritime disputes. The lack of consensus concerning the legal standards of submarine espionage, combined with a lack of operational naval acumen and simmering maritime rivalries, raises the risks of conflict.

The Article presents a roadmap of legal issues associated with submarine espionage in the territorial sea, and the conclusions will tend to generate greater confidence, predictability, and stability at sea. While submarine espionage does not appear to be inconsistent with the law of the sea, espionage in the territorial sea is injurious to the sovereignty of the coastal state. In response to such incursions, coastal states may, without impinging on their sovereign immune status, require submarines to leave the territorial sea. The use of force in self-defense, however, may not be invoked by the coastal state to compel compliance.

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*There is nothing so powerful as truth; and often nothing so strange.*¹

INTRODUCTION

This Article describes and dissects peacetime submarine espionage and the law of the sea. Suspicion that a Russian submarine (or miniature submarine) intruded into Sweden's territorial waters in

1. DANIEL WEBSTER, *Argument on the Trial of John F. Knapp, for the Murder of Joseph White, Esq. of Salem, in the County of Essex, Massachusetts; On the Night of the 6th of April, 1830*, in 1 SPEECHES AND FORENSIC ARGUMENTS 450, 463 (8th ed. 1846).

October 2014 has raised issues regarding the interplay between submarines, intelligence collection, and the regime of the territorial sea. The incident occurred in the inner archipelago near Stockholm, where Swedish naval and air forces searched for the mysterious underwater “human-made object,”² after sonar tracks of the seabed and credible sightings on the surface confirmed a “plausible foreign underwater operation.”³

In an effort to find the submarine, Sweden launched the country’s largest military mobilization since the Cold War. Swedish armed forces deployed aircraft, fast attack craft, minesweepers, and the HMS *Visby*, a stealthy corvette armed with guided missiles and Bofors guns, to scour the waters off Stockholm, an area dotted by 30,000 small islands.⁴ Rear Admiral Anders Grenstad of the Swedish Navy stated that the nation was prepared to use weapons against the mystery submarine to “get it to stop whatever it is doing.”⁵ With dour urgency the entire Swedish Navy was tied up in the hunt for “one tiny submarine.”⁶ The unsuccessful search ended in frustration; Grenstad captured the sense of the Government of Sweden: “We hate the fact that we have something in our waters.”⁷

The encroachment immediately raised fears and comparisons to the famous “whiskey on the rocks” saga that began on October 27, 1981.⁸ A Soviet whiskey-class nuclear-armed submarine ran aground on a shoal and surfaced inside the territorial sea just ten kilometers from the main Swedish naval base at Karlskrona. The

2. Peter Walker, *Sweden Searches for Suspected Russian Submarine Off Stockholm*, *GUARDIAN* (Oct. 19, 2014), <http://www.theguardian.com/world/2014/oct/19/sweden-search-russian-submarine-stockholm>.

3. David Crouch, *Sweden Calls Off Hunt for Submarine*, *GUARDIAN* (Oct. 24, 2014), <http://www.theguardian.com/world/2014/oct/24/sweden-calls-off-hunt-submarine-stockholm-archipelago>.

4. Walker, *supra* note 2; Dan Bilfesy, *Sweden: Intruder Was a Foreign Vessel, Officials Say*, *N.Y. TIMES*, Nov. 15, 2014, at A7; Roland Oliphant, *Why Would a Russian Submarine Enter Swedish Waters?*, *TELEGRAPH* (Oct. 20, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/sweden/11174289/Why-would-a-Russian-submarine-enter-Swedish-waters.html>.

5. Ian Johnston & James Rush, *Swedish Military Prepared to Use “Armed Force” as Search for “Russian Submarine” Continues*, *INDEPENDENT* (Oct. 22, 2014), <http://www.independent.co.uk/news/world/europe/swedish-military-prepared-to-use-armed-force-as-search-for-russian-submarine-continues-9810495.html>.

6. David Crouch, *Sweden Bathes in Echoes of Cold War Drama as Submarine Hunt Continues*, *GUARDIAN* (Oct. 21, 2014), <http://www.theguardian.com/world/2014/oct/21/sweden-cold-war-submarine-hunt-russia-vessel-military>.

7. Johnston & Rush, *supra* note 5.

8. See generally *infra* notes 138–56 and accompanying text.

Swedish government was furious, detained the boat, U-137, and interviewed its captain ashore. The submarine was stranded for ten days and the incident created the greatest diplomatic confrontation between neutral Sweden and the USSR during the Cold War. Reluctantly, Sweden eventually towed the submarine off the rocks and escorted it to the outer limit of its territorial sea, where a Soviet naval task force waited.

Submarine intrusions are not uncommon. During the first week of December 2014, for example, a mysterious submarine periscope—also believed to be from a Russian vessel—was spotted above water near the coast of Scotland. The contact was sighted outside the Royal Navy’s ballistic missile submarine HMNB⁹ Clyde at Faslane.¹⁰ It is unclear whether the unknown submarine actually entered Britain’s territorial sea, although concern was sufficient for maritime patrol aircraft from Canada, France, and the United States to scour the area in search of the enigmatic contact.¹¹

Similarly, on April 28–29, 2015, the Finnish Navy detected a foreign submarine in the country’s internal waters near Helsinki.¹² The capital of Finland lies only 175 miles from the Russian submarine base at St. Petersburg. Finnish forces dropped high explosive depth charges on the undersea contact to communicate that the submarine had been detected.¹³

These incidents and many more like them are reminders that much of what we know about espionage and international affairs is associated with maritime power, a great deal of which remains, so to speak, hidden beneath the surface. These recent incursions are the latest of numerous cases over the past sixty years that juxtapose rules

9. Her Majesty’s Naval Base. Clyde is one of three bases in the United Kingdom, and the location of the four British submarines that carry the Trident thermonuclear-armed ballistic missile with multiple, independently targeted warheads.

10. Tony Osborne, *Canadians, French, U.S. Hunt For Submarine Off Scotland*, AVIATION WEEK & SPACE TECH. (Dec. 9, 2014), <http://aviationweek.com/defense/canadians-french-us-hunt-submarine-scotland>.

11. *Id.*

12. Juhana Rossi, *Finland Chases Off Suspected Submarine: Country’s Maritime Forces Detect Underwater Activity Inside Finnish Waters*, WALL ST. J. (Apr. 28, 2015), <http://www.wsj.com/articles/finland-chases-off-suspected-submarine-1430212090>.

13. Jussi Rosendahl, *Finnish Military Fires Depth Charges at Suspected Submarine*, REUTERS (Apr. 28, 2015), <http://www.reuters.com/article/2015/04/28/us-finland-navy-idUSKBN0NJOY120150428>; Andrew Marszal, *Finland Fires Warning Shots at “Foreign Submarine” Near Helsinki*, TELEGRAPH (Apr. 28, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/finland/11568042/Finland-fires-warning-shots-at-foreign-submarine-near-Helsinki.html>.

of navigation and intelligence gathering with coastal state sovereignty against the backdrop of the international law of the sea.

Clandestine submarine operations are the most secretive and dangerous activities at sea. Admiral Kinnaird McKee, the former Director of Naval Nuclear Propulsion, described them as “putting your head in the tiger’s mouth.”¹⁴ This Article recounts those incidents going back seventy-five years that are available in open sources, and it charts a course for navigation through the legal issues. Where does submarine espionage fit within the panoply of state rights and duties in international law, and especially under the international law of the sea, and in particular, under the U.N. Convention on the Law of the Sea (UNCLOS)?¹⁵ What remedies may the coastal state employ to eject an unknown foreign submarine from maritime areas under its sovereignty?

Although media, legal scholars, and national leaders of affected coastal states firmly renounce submarine espionage in their territorial waters as inherently unlawful,¹⁶ applicable international law on the subject is somewhat more circumspect. To reach this conclusion, this Article begins with Part I, which analyzes state practice and the norms of espionage. Part I.A focuses on the general acceptance of espionage by ships, aircraft, and satellites in areas beyond national jurisdiction (i.e., the high seas, international airspace, and outer space). In these areas, espionage often is considered a public good because it generates transparency and builds confidence. Part I.B addresses the general international law of espionage from areas under national jurisdiction, including overflight of national airspace, and spying in the territorial sea and the exclusive economic zone.

Part II uncovers the scope of submarine activity throughout the world. The burgeoning submarine fleets of the Indo-Pacific are explored in Part II.A. The proliferation of submarines in the Indian and Pacific Oceans coincides with increased regional tensions over a host of disputes over access to sea lines of communication from Iran to Japan, and unresolved maritime boundaries in the East China Sea and South China Sea. In these parts of the oceans, unfriendly

14. John J. Grossenbacher, *SUBLANT: Anytime, Anywhere*, UNDERSEA WARFARE, Fall 2000, http://www.public.navy.mil/subfor/underseawarfaremagazine/Issues/Archives/issue_09/sublant.html.

15. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

16. See, e.g., *Sweden Hits Out at Illegal Submarine*, HERALD, Nov. 15, 2014, at 18; *Japan Protests New Incursion*, INVESTOR’S BUS. DAILY, Dec. 9, 2004, at A2; Gareth Parry, *Sweden Tries Both the Hard and Soft Sell*, GUARDIAN, Apr. 3, 1986, at 6.

interactions among states are increasing, as is the likelihood of a dangerous or tragic underwater incident. Part II.B explains how daring tactics encourage submarines to get close to shore to collect intelligence against potential adversaries. Advances in anti-submarine technology, however, are making it easier to detect underwater intrusions, so subsurface operations are becoming riskier just as they are becoming more likely.

Part III recounts the state practice of submarine operations inside the territorial sea of coastal states. Part III.A illustrates Russian submarine activity in the territorial seas of its neighbors during and after the Cold War. Part III.B shows that the United States is also alleged to have conducted such operations against China, Cuba, and the Soviet Union. Part III.C looks at the relatively new phenomenon of North Korean and Chinese submarine intrusions in the Asia-Pacific. Part III is the most complete accounting of the state practice of submarine espionage in the territorial sea available, and it presents the range of responses by the affected coastal state. State practice is an essential component of customary international law, and provides context for and informs the legal analysis that follows.

Part IV introduces the legal concept of innocent passage in the territorial sea and the controversial theory of non-innocent passage. The recognition that some parts of the territorial sea constitute international straits further complicates the analysis, since the navigational regime of transit passage rather than innocent passage applies in those discrete areas. Innocent passage and non-innocent passage, as well as transit passage, are functions of treaty law and customary law, and the interplay among the different approaches within the context of submarine espionage is unresolved.

Part V examines lawful responses by coastal states to submarine espionage in the territorial sea. Part V.A applies the legal doctrine of sovereign immunity to intruding submarines. Since submarines are warships that have sovereign immunity, the coastal state lacks legal competence to assert jurisdiction over them. Under the law of the sea, however, coastal states may request that all vessels comply with the obligations of innocent passage, which for submarines includes transit on the surface and the display of the flag of registry. Part V.B focuses on the parameters of the coastal state request for compliance, and the associated right of the coastal state to “require” a vessel not in innocent passage to depart the territorial sea. Part V.C then shifts toward the rules governing the use of force to compel compliance with innocent passage or to “require” a submarine in non-innocent passage to leave the territorial sea. In sum, the mere presence of a submarine not in innocent passage is

insufficient to justify the use of force to remove it from the territorial sea. Parts V.D. and V.E, respectively, contemplate whether the doctrine of state responsibility or the process of international dispute resolution provide additional tools for coastal state action. This Article concludes that while submarine intelligence operations may violate the national laws of coastal states, they may not necessarily be inconsistent with the international law of the sea or with international law more generally.

This Article does not address maritime intelligence collection more broadly, that is, intelligence gathering by aircraft or surface warships¹⁷ either within or beyond the territorial sea, except in passing and as context for submarine espionage.¹⁸ Submarine special operations in the territorial sea, however, pose a set of issues with unique characteristics that differ from surface warships and aircraft, and deserve their own analysis. Submarines must meet specific rules for innocent passage (transit on the surface and show of their flag). The nature of submerged transit makes it much more difficult for a coastal state to locate and identify a submarine than to find a surface ship or aircraft. Frustration over underwater espionage and the fear of the unknown tends to drive states toward kinetic responses rather than less coercive countermeasures, such as shouldering or tactical maneuvering. Finally, and perhaps most importantly, the United States has obliquely suggested a legal rationale for submerged espionage within the territorial sea.

Submarine spy operations in territorial waters raise a distinct set of issues. While such operations certainly are inconsistent with innocent passage, it is less clear that they therefore violate international law or the law of the sea as reflected in UNCLOS. Furthermore, there is little agreement on the appropriate or lawful

17. This Article adheres to the conventional usage of the terms “ship” and “vessel” as being interchangeable, and applying to submarines as well as surface craft. Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT’L L. 809, 813 n.9 (1984) (large ships are not normally referred to as “boats,” but submarines of any size may be referred to as “boats”).

18. Several prominent incidents arising from intelligence collection by foreign warships and military aircraft against a coastal State are well known: the Gulf of Tonkin incident, involving USS *Maddox*, in 1964; the mistaken attack by Israel of the U.S. spy ship USS *Liberty*, in 1967; the capture of the spy ship USS *Pueblo*; the seizure of SS *Mayagüez* by Cambodia in 1975, which was alleged to have been spying; China’s aggressive interception of a U.S. Navy P-3 maritime patrol surveillance aircraft in the South China Sea in 2001; and China’s numerous interferences with U.S. military survey ships USNS *Impeccable*, USNS *Sumner*, USNS *Bowditch*, and USNS *Victorious* since the late-1990s. See, e.g., JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 290–94 (2013).

response a coastal state may take in the face of evidence of clandestine entry of a foreign submarine into its territorial waters. A number of states have either pledged or conducted lethal self-help anti-submarine operations against suspected underwater intruders. Sweden and other coastal states uniformly claim a right to sink trespassing submarines, but the law of the sea and the rules of *jus ad bellum* within the U.N. Charter system suggest a more nuanced position as a matter of law.

In order to benefit from the regime of innocent passage, submarines must travel on the surface and show their flag. Innocent passage is a right that submarines may exercise, but the U.S. view is that it is not a prohibition on submerged transit. Coastal states may require foreign submarines to leave the territorial sea if their transit is inconsistent with innocent passage. How coastal states may claim their rights in this regard, however, is less certain. The Article concludes that although foreign submarine intelligence collection inside the territorial sea surely violates coastal state law and constitutes a violation of state sovereignty, the collection is not necessarily inconsistent with the international law of the sea.

I. INTELLIGENCE COLLECTION IN THE GLOBAL COMMONS

The term “spying” has a colloquial rather than legal meaning. During armed conflict, a spy is an individual acting clandestinely or under false pretense to obtain information “in the zone of operations of a belligerent, with intention of communicating it to the hostile party.”¹⁹ In the late-eighteenth century the Swiss jurist Vattel wrote that “artifice, stratagem and surprise,” including employment of spies, dated at least from the Roman era and were merely an accepted element of international politics.²⁰ “Deceptions practiced on an enemy either by words or actions but without perfidy—snares laid for him consistent with the rights of war—are stratagems, the use of which has always been acknowledged as lawful”²¹ The idea that ruses or trickery in war are fair play, so long as they do not veer into unlawful perfidy, persists. Ruses are intended to mislead an enemy, but they are not perfidious because they do not invite the confidence

19. Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex art. 29, Oct. 18, 1907, 36 Stat. 2277.

20. EMMERICH DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 374–76 (1797).

21. *Id.* at 374.

of the adversary with respect to protected status, such as civilian vessels or hospital ships.²² The challenge, of course, is in distinguishing between mere ruses and perfidy. Sending of false intelligence to an adversary, for example, does not violate “the rights of humanity” and is not “pernicious to mankind,” and therefore is permissible.²³ On the other hand, according to Vattel, a warship that falsely signals distress and then seizes a boat that comes to its assistance “implies odious perfidy” and “deserves severe punishment.”²⁴

Peacetime intelligence is concerned with gathering knowledge—facts or propositions to which a degree of probability can be assigned—that inform national security decision makers.²⁵ National laws universally condemn espionage as one of the highest crimes.²⁶ International law is more circumspect, however. The view persists that peacetime collection of intelligence is not a violation of international law.²⁷ Certainly, there is no prohibition of intelligence and espionage activities conducted beyond state territory.²⁸ The high seas, international airspace, and outer space are unfettered by restrictions on intelligence collection, but for the proscription against the threat of aggression in Article 2(4) of the U.N. Charter. The iconic scholars of the New Haven School of jurisprudence agreed, and they even were comfortable with peacetime intelligence collection inside the territory of another state—if it were done for the right reasons. They concluded that the lawfulness of intelligence collection inside the territory of another state depended on its purpose:

22. See DEP’T OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS AND HEADQUARTERS, U.S. MARINE CORPS, DEP’T OF HOMELAND SECURITY AND U.S. COAST GUARD, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, ¶¶ 12.1.1–12.1.2 (July 2007) [hereinafter THE COMMANDER’S HANDBOOK]; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIV., COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 244–57 (Mar. 2010).

23. VATTEL, *supra* note 20, at 9.

24. *Id.*

25. Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The Intelligence Function and World Public Order*, 46 TEMPLE L.Q. 365, 367 (1973).

26. U.S. Naval War Coll., *International Law Situations, with Solutions and Notes*, 1904 INT’L L. STUD. SERV. U.S. NAVAL WAR C. 1, 106–07 (1904).

27. See Dieter Fleck, *Individual and State Responsibility for Intelligence Gathering*, 28 MICH. J. INT’L L. 687, 687–88 (2007). See generally J. BRIERLY, THE LAW OF NATIONS 59–61 (H. Waldock ed., 6th ed. 1963).

28. Oliver J. Lissitzyn, *Electronic Reconnaissance from the High Seas and International Law*, 22 NAVAL WAR C. REV. 26, 31 (1970).

The gathering of intelligence within the territorial confines of another state is not, in and of itself, contrary to international law unless it contravenes policies of the world constitutive process affording support to protected features of internal public order.²⁹

These scholars championed a policy-oriented approach of authoritative decision that valued individual dignity and human rights more than state sovereignty. Consequently, peacetime espionage in the territorial sea of another state occupies an uncomfortable gray area between clearly lawful conduct and an unmistakable international delict.

The legality of maritime intelligence activities is governed by the international law of the sea, formed principally by UNCLOS and “other rules of international law not incompatible” with the Convention.³⁰ These rules provide the framework for considering the use of submarines in intelligence collection, and are distinct from the rules that address the use of submarines as instruments of war.³¹ Hence, there is no rule of international law that prohibits peacetime usage of spy satellites that operate from outer space. Similarly, neither customary international law of the sea nor UNCLOS prohibits ships and aircraft from intelligence activities in international airspace, on the surface or in the water column of the oceans, or on the seabed beyond the territorial sea.

A. Spying from the High Seas and Outer Space

The right to use the global commons has aided the acceptance of remote intelligence collection; in the maritime domain, it has become fused with the doctrine of freedom of the seas. Rather than seeing remote intelligence collections as something to be avoided, a

29. McDougal, Lasswell & Reisman, *supra* note 25, at 395.

30. UNCLOS, *supra* note 15, at art. 293(1).

31. Armed conflict at sea is governed by the law of naval warfare, an offshoot of international humanitarian law. For rules concerning the law of submarine warfare, see THE COMMANDER'S HANDBOOK, *supra* note 22, ¶ 8.7; SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (L. Doswald-Beck ed., 1995); ILA Comm. on Maritime Neutrality, *The Helsinki Principles on the Law of Maritime Neutrality*, 68 INT'L L. ASS'N REP. CONF. 496, 497 (1998). For secondary sources, see J. Ashley Roach, *Legal Aspects of Modern Submarine Warfare*, 6 MAX PLANCK Y.B. U.N. L. 367 (2002); J. Ashley Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, 94 AM. J. INT'L L. 64, 64–77 (2000). Concerning submarines and the law of naval warfare, see Wolff Heintschel von Heinegg, *The International Legal Framework of Submarine Operations*, 39 ISRAEL Y.B. ON HUM. RTS. 331, 331–56 (2009).

reliable flow of information is regarded as a stabilizing function that aids decision makers, and is a “key to the contemporary global security system.”³²

Intelligence gathering by remote means—through a telescope, from ships or aircraft, or by satellite—is a preferable means of collection over human contact because it reduces the danger of being exposed or captured. In the West, and particularly in the liberal Anglo-American tradition of common law, remote intelligence gathering is deemed less injurious to national sovereignty than would be a spy on the ground. The worldwide acceptance of state practice from strategic reconnaissance operations and satellites during the Cold War, explored in more detail below, illustrates broad acceptance.

The use of spy satellites emerged from the U-2 incident. In the modern era, the United States began overflights of Soviet bloc countries in 1956; the flights ended on May 1, 1960, when the U-2 piloted by Francis Gary Powers was shot down over the USSR.³³ In a departure from historical norms, President Eisenhower explicitly defended the recourse to espionage.³⁴ While the United States also acceded to Soviet demands to halt the flights, it simply shifted its efforts to spy satellites, which soon became operational. The first spy satellites, the U.S. “Corona” or “Keyhole” system, conducted ninety-five missions from 1960 to 1972 against the Soviet Union. The top secret information gathered on Soviet nuclear capabilities was akin to shining an “enormous floodlight” in a “darkened warehouse.”³⁵

In September 1961, after only five successful Corona missions, the CIA reduced its estimate of Soviet long-range missiles to between ten and twenty-five launches, from an earlier estimate of 140 to 200.³⁶ The disclosures were stabilizing because they dispelled U.S. fears of a “missile gap,” and thereby avoided an unnecessary

32. McDougal, Lasswell & Reisman, *supra* note 25, at 434.

33. Office of the Dir. of the Cent. Intelligence Agency, Memorandum for Brigadier Gen. Andrew J. Goodpaster, U-2 Overflight of the Soviet Bloc (Aug. 18, 1960) (declassified Aug. 17, 1999), http://www.eisenhower.archives.gov/research/online_documents/u2_incident.html.

34. Tom Wicker, *Powers is Freed by Soviet in Exchange for Abel, U-2 Pilot on Way to U.S.*, N.Y. TIMES (Feb. 10, 1962), <http://www.nytimes.com/learning/general/onthisday/big/0210.html>.

35. William J. Broad, *Spy Satellites' Early Role As "Floodlight" Coming Clear*, N.Y. TIMES (Sept. 12, 1995), <http://www.nytimes.com/1995/09/12/science/spy-satellites-early-role-as-floodlight-coming-clear.html>.

36. *Id.*

surge in the superpower nuclear arms race.³⁷ President Lyndon Johnson remarked:

We've spent \$35 or \$40 billion on the space program And if nothing else had come out of it except the knowledge we gained from space photography, it would be worth 10 times what the whole program has cost. Because tonight we know how many missiles the enemy had and, it turned out, our guesses were way off. We were doing things we didn't need to do. We were building things we didn't need to build. We were harboring fears we didn't need to harbor.³⁸

The pioneering satellite program solved a multitude of riddles that helped the United States understand its allies and its adversaries, including a two-month prior notice of China's first nuclear detonation in 1964 and independent and reliable confirmation of Israel's stunning victory against Egypt, Jordan, and Syria in 1967.³⁹ Director of Central Intelligence John M. Deutch recalled that the satellite program was instrumental in "keeping us back from the nuclear threshold."⁴⁰ In this respect, the New Haven School appears vindicated.

The United States and Russia also conducted espionage from the high seas. Russian spy ships often patrolled off the coast of the United States to collect intelligence on U.S. warships and submarines getting underway.⁴¹ In one Polaris submarine ballistic missile exercise in the Atlantic Ocean, for example, a Soviet trawler loitered off the East Coast of the United States, at one point sailing just one mile from a Chesapeake Bay lighthouse, or about twelve miles from Cape Henry, Virginia. Yet U.S. naval forces did not molest the ship because it remained in international waters at all times. Rear Admiral Charles C. Kirkpatrick, Navy chief information officer, said the ship was equipped with eleven antennae, and was obviously a "snooper," but that it would not be interdicted in international waters; "We are a legal people and abide by international law."⁴²

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. DAVID F. WINKLER, *COLD WAR AT SEA: HIGH SEAS CONFRONTATION BETWEEN THE UNITED STATES AND THE SOVIET UNION* 33–34 (2000).

42. Jack Raymond, *Soviet Trawler Called Spy Ship: Navy Says Craft That Sailed Through Missile Test Area off L. I. Was "Snooper,"* N.Y. TIMES, July 14, 1960, at 8.

Between 1969 and 1983, the Soviet Union sent warships to Cuba twenty-two times, usually twice per year.⁴³ During their deployments the ships loitered off the East Coast of the United States to collect intelligence against U.S. naval bases and Cape Canaveral.⁴⁴ In 1983, the Soviet Navy deployed a task force composed of two surface ships—a guided missile cruiser and a frigate—plus a submarine and a supply ship, into the Caribbean Sea.⁴⁵ The supply ship *Genrik Gasanov* delivered fuel to a Soviet intelligence-gathering trawler off the coast of the United States. Intelligence-gathering trawlers traditionally parked off the Florida coast to monitor U.S. missile tests from Cape Canaveral, but the Caribbean operation was remarkable in that the flotilla included both surface ships and submarines. The warships came within fifty miles of the coast of Mississippi, and likely approached even closer to shore on previous occasions.⁴⁶

The United States conducted similar surface naval intelligence gathering against its adversaries. In 1964, for example, USS *Maddox* and USS *Turner Joy* were apparently attacked in the Gulf of Tonkin while engaged in a DESOTO Patrol intelligence gathering operation against North Vietnam.⁴⁷ The DESOTO Patrols were conducted off the coast of North Vietnam, China, and North Korea and involved mapping of coastal radar. The attack led to the Gulf of Tonkin Resolution in the U.S. Congress that gave President Johnson a “blank check” to expand the U.S. commitment to South Vietnam.⁴⁸

In another instance during the early-1960s, the National Security Agency operated a handful of *Liberty*-class electronic intelligence (ELINT) ships. In 1967, USS *Liberty*, classified as a “technical research ship,” was sent to collect intelligence during the Six Day War between Israel and several Arab states. While in international waters off the coast of Sinai, the vessel was attacked by

43. Richard Halloran, *Soviet Ships Came Close, Navy Says*, N.Y. TIMES (Feb. 14, 1983), <http://www.nytimes.com/1983/02/15/world/soviet-ships-came-close-navy-says.html>.

44. *Id.*

45. *Id.*

46. *Id.*

47. EUGENE G. WINDCHY, *TONKIN GULF* 60, 295, 309 (1971); EDWIN E. MOISE, *TONKIN GULF AND THE ESCALATION OF THE VIETNAM WAR* 50–66 (1996).

48. See Lyndon B. Johnson, Statement by the President upon Instructing the Navy to Take Retaliatory Action in the Gulf of Tonkin (Aug. 3, 1964), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1963–64, at 926 (1965); Lyndon B. Johnson, U.S. Reaction to Events in the Gulf of Tonkin, August 1–10, 1 VIETNAM 1963–1968, 1964, at 589 (1992).

Israeli torpedo boats and aircraft.⁴⁹ The incident ignited conspiracy theories that Israeli forces intentionally targeted the ship, but the attack appears to have been a “tragic mistake.”⁵⁰

Similarly, North Korea struck and seized the spy ship USS *Pueblo* in 1968 while it was on a signals intelligence (SIGINT) mission off the coast of Wonsan.⁵¹ On January 10, 1968, the *Pueblo*, a passive ELINT ship, got underway from Yokosuka, Japan, to collect radio frequencies along the coast of North Korea. The vessel was ordered to remain at least thirteen nautical miles (nm) from the nearest land areas claimed by North Korea. On January 23, while reportedly fifteen miles offshore, the ship was surrounded and attacked by three North Korean naval patrol craft.⁵² North Korea and the United States still dispute whether the ship was operating in territorial or international waters.⁵³

The United States protested that the ship was on the high seas and was entitled to engage in the purely passive act of listening to North Korea’s SIGINT electronic emissions as part of its right of freedom of navigation. Furthermore, although not a combatant, USS *Pueblo* was a U.S. warship and enjoyed complete sovereign immunity. Even if the ship had strayed into North Korea’s claimed territorial sea, as North Korea claimed, Pyongyang was limited to

49. JAMES BAMFORD, *THE PUZZLE PALACE: A REPORT ON AMERICA’S MOST SECRET AGENCY* 212–17 (1982).

50. A. JAY CRISTOL, *THE LIBERTY INCIDENT REVEALED: THE DEFINITIVE ACCOUNT OF THE 1967 ISRAELI ATTACK ON THE U.S. NAVY SPY SHIP 172* (2013). *But see* BAMFORD, *supra* note 49, at 293–94 (stating Israel purposefully attacked USS *Liberty*). *See generally* JAMES SCOTT, *THE ATTACK ON THE LIBERTY: THE UNTOLD STORY OF ISRAEL’S DEADLY 1967 ASSAULT ON A U.S. SPY SHIP* (2009); JAMES M. ENNES, JR., *ASSAULT ON THE LIBERTY: THE TRUE STORY OF THE ISRAELI ATTACK ON AN AMERICAN INTELLIGENCE SHIP* (1979).

51. Cent. Intelligence Agency, *North Korea Capture of USS Pueblo* (Jan. 23, 1968) (declassified Nov. 1999), *reprinted in* CIA, *FREEDOM OF INFORMATION ACT ELECTRONIC READING ROOM*; H. ARMED SERVS. COMM., *INQUIRY INTO THE U.S.S. PUEBLO AND EC-121 PLANE INCIDENTS*, H.A.S.C. No. 91-12, at 1657–59 (1st Sess. 1969).

52. *See generally* George H. Aldrich, *Questions of International Law Raised by the Seizure of the U.S.S. Pueblo*, 63 AM. SOC’Y INT’L L. PROC. 2 (1969); William E. Butler, *The Pueblo Crisis: Some Critical Reflections*, 63 AM. SOC’Y INT’L L. PROC. 7 (1969); Cornelius F. Murphy, Jr., *Pueblo, E.C. 121, and Beyond: A Suggested Analysis*, 38 FORDHAM L. REV. 439 (1970); Alfred P. Rubin, *The Impact of the Pueblo Incident in International Law*, 49 OR. L. REV. 1 (1969).

53. *See* H. ARMED SERVS. COMM., *supra* note 51, at 1661 (“The [House] Subcommittee has examined every facet of [the possibility that the ship strayed into North Korea’s territorial sea] and has unanimously concluded that at no time during its mission did the U.S.S. *Pueblo* ever penetrate North Korean territorial waters.”).

ordering the ship to leave the area.⁵⁴

North Korea held the crew captive for eleven months, during which time they were required to sign “confessions” of illegal entry into North Korean territorial waters and espionage. In a bizarre twist, at a ceremony for the captives’ release at Panmunjom, the United States signed a document prepared by the North Korean government that admitted wrongdoing and apologized. Then, the U.S. representative read a prepared statement denying the veracity of the document he had just signed, and indicated that his signature was made only as a condition to free the crew.⁵⁵

If the incident in the Gulf of Tonkin marked the entry of the United States into the Vietnam War, the attack on the SS *Mayagüez* marked the end of that engagement. Cambodia captured the U.S.-flagged SS *Mayagüez* on May 12, 1975, under the pretense that it was on a spy mission.⁵⁶ The container ship was under contract to the U.S. Navy Military Sea Transportation Service bound for Thailand, and transited six and one-half miles from the islands of Poulo Wai, about sixty miles from the Cambodian mainland.⁵⁷ Like the assault on USS *Pueblo*, the United States protested the seizure of the *Mayagüez* as a violation of U.S. sovereign immunity. The vessel was released right as a U.S. Marine task force engaged Cambodian forces to free the ship in a bloody battle on and around Koh Tang Island in the Gulf of Thailand.⁵⁸ In another incident, in 1983 the USSR shot

54. U.S. Dep’t of State, Office of Media Servs., Bureau of Pub. Affairs, *North Korean Document Signed by U.S. at Panmunjom*, 60 DEP’T STATE BULL. 2, 3 (1969). One scholar suggests that USS *Pueblo* violated Article 10 of the Korean Armistice Agreement, which provides that naval forces of each side “shall respect the waters contiguous to the Demilitarized Zone and to the land area of Korea under the control of the opposing side.” *The “Pueblo” Seizure: Facts, Law, Policy*, 63 AM. SOC’Y INT’LL. PROC. 1, 1–2 (1969).

55. U.S. Dep’t of State, Office of Media Servs., Bureau of Pub. Affairs, *Crew of U.S.S. Pueblo Released at Panmunjom; U.S. Position on Facts Unchanged*, 60 DEP’T STATE BULL. 1, 2 (Jan. 6, 1969); see U.S. Dep’t of State, Office of Media Servs., Bureau of Pub. Affairs, *North Korean Document Signed by U.S. at Panmunjom*, reprinted in 8 I.L.M. at 199 (1969); U.S. Dep’t of State, Office of Media Servs., Bureau of Pub. Affairs, *Statement by the Department of State Spokesman*, reprinted in 8 I.L.M., at 198 (1969); U.S. Dep’t of State, Office of Media Servs., Bureau of Pub. Affairs, *Statement of President Johnson*, reprinted in 8 I.L.M., at 198 (1969); U.S. Dep’t of State, Office of Media Servs., Bureau of Pub. Affairs, *Statement by Secretary Rusk, December 22*, reprinted in 8 I.L.M., at 198–99 (1969).

56. Robert E. Ward, *The Mayaguez: The Right of Innocent Passage and the Legality of Reprisal*, 13 SAN DIEGO L. REV. 765, 774 (1976).

57. *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on Int’l Sec. and Sci. Affairs of the H. Comm. on Int’l Relations*, 94th Cong. 105 (1975).

58. Letter from Gerald R. Ford to the Speaker of the House and the President Pro Tempore of the Senate (May 15, 1975), in 11 Weekly Comp. Pres. Docs., 1975, at 514–15;

down a Korean Airline flight that apparently had flown off-course over the Kamchatka peninsula because of allegations that it was spying on Soviet military installations on Sakhalin Island.⁵⁹ Two hundred sixty-nine people, including a U.S. congressman, were killed in the attack.⁶⁰

These naval surface and aviation incidents between the United States and the Soviet Union were a product of the Cold War and have been chronicled in greater detail elsewhere.⁶¹ The history underscores what are euphemistically referred to as “interactions” at sea with adversaries, which raise a complex blend of issues over espionage and sovereignty, coastal state authority, and freedom of navigation. The mixture of nationalism and the clash in principles tends to escalate incidents at sea into broader conflicts. While these cases are well known, incidents involving submarines are not. In the 1990s, for example, when naval historian David Winkler was researching U.S.-Soviet maritime incidents for a book on Cold War naval interactions, Norman Polmar, another naval expert, advised him to avoid study of superpower submarine competition because public information on the subject was too scarce.⁶²

B. Spying in Areas of State Sovereignty or Jurisdiction

The international legal norm against peacetime espionage is based on respect for the territorial boundaries of sovereign states, as these lines enclose the land territory and extend to national airspace,⁶³ internal waters, and territorial seas.⁶⁴ Sending agents of

RALPH WETTERHAHN, *THE LAST BATTLE: THE MAYAGUEZ INCIDENT AND THE END OF THE VIETNAM WAR* 273 (2001). See generally GERALD REMINICK, *AN ACT OF PIRACY: THE SEIZURE OF THE AMERICAN-FLAG MERCHANT SHIP MAYAGUEZ IN 1975* (2009); JAMES E. WISE, JR. & SCOTT BARON, *THE 14-HOUR WAR: VALOR ON KOH TANG AND THE RECAPTURE OF THE SS MAYAGUEZ* (2011); ROBERT J. MAHONEY, *THE MAYAGUEZ INCIDENT: TESTING AMERICA'S RESOLVE IN THE POST-VIETNAM ERA* (2011).

59. Michael R. Gordon, *Ex-Soviet Pilot Still Insists KAL 007 Was Spying*, N.Y. TIMES, Dec. 9, 1996, at A12.

60. Warren Richey, *Theories Persist on KAL 007 Shootdown*, CHRISTIAN SCI. MONITOR, May 28, 1986, at 3; *Soviet Action Threatens East-West Relations*, GUARDIAN WEEKLY, Sept. 11, 1983, at 6.

61. See, e.g., WINKLER, *supra* note 41.

62. *Id.* at viii.

63. Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT'L L. 559, 561, 567 (1953); Oliver J. Lissitzyn, *Some Legal Implications of the U-2 and RB-47 Incidents*, 56 AM. J. INT'L L. 135, 137 (1962).

64. McDougal, Lasswell & Reisman, *supra* note 25, at 394; Quincy Wright, *Espionage*

one state into the territory of another state without its consent is normally considered an exercise of power that is prohibited by international law based on these fundamental rules of exclusive sovereign control over territory and sovereign independence.⁶⁵ This norm first emerged with the Peace of Westphalia in 1648 and is still accepted as a proscription in the U.N. Charter that states should respect the territorial integrity and political independence of other states.⁶⁶ Consequently, the U-2 flights were a clear violation of the national airspace, and therefore the sovereignty, of the Soviet Union. While the Soviet Union did not conduct spy missions over the United States, it did overfly U.S. allies, including Japan, Iran, Turkey, and Pakistan.⁶⁷

The conduct of espionage inside the territory of a state during peacetime is inconsistent with the essential norm of international law that states respect the sovereignty, territorial integrity, and political independence of other states. Oppenheim described the territorial sea as a dominion in which foreign ships had a right of innocent passage under the qualified sovereignty of the coastal state.⁶⁸ Despite being a qualified sovereignty, a foreign state was not permitted to send “troops, its men-of-war, or its police forces into or through foreign territory . . . without permission.”⁶⁹ Consequently, the conventional view is that peacetime intelligence gathering inside the territory of another state is unlawful per se.

The adoption of the Law of the Sea Convention in 1982

and the Doctrine of Non-Intervention in Internal Affairs, in *ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW* 3 (Roland J. Stranger ed., 1962) [hereinafter Wright, *Espionage*]; Quincy Wright, *Legal Aspects of the U-2 Incident*, 54 *AM. J. INT'L L.* 836, 845, 849 (1960).

65. See JOHN KISH, *INTERNATIONAL LAW AND ESPIONAGE* 88 (1995) (stating that the general principle of territorial sovereignty negates the permissibility of espionage in national territory of another state); Wright, *Espionage*, *supra* note 64, at 12–13.

66. U.N. Charter art. 2, ¶ 4. The principles of mutual respect, non-intervention, non-aggression, and peaceful coexistence also were a feature of the African-Asian Bandung Conference of 1955, which established the Third World bloc of states. See *Final Communiqué of the Asian-African Conference of Bandung (24 April 1955)*, CVCE (Oct. 21, 2012), http://www.ena.lu/final_communique_asian_african_conference_bandung_24_april_1955-2-1192.

67. U.S. Dep't State, *Soviet Overflights of Free World Areas* (May 1960) (declassified Jan. 1998), reprinted in National Archives and Records Administration, DWIGHT D. EISENHOWER PRESIDENTIAL LIBRARY (last visited Nov. 5, 2015), http://www.eisenhower.archives.gov/research/online_documents/u2_incident/5_60_Background_Paper.pdf.

68. 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 460–61 (H. Lauterpacht ed., 8th ed. 1955); JOHN WESTLAKE, *INTERNATIONAL LAW, PART I: PEACE* 195 (2d ed. 1910) (“[R]ight of the littoral state is limited by the right of innocent passage . . .”).

69. OPPENHEIM, *supra* note 68, at 288–89.

tended to push maritime disputes over espionage into the newly created Exclusive Economic Zone (EEZ). The EEZ was created as a 200-nm resource zone over which the coastal state enjoys exclusive sovereign rights and jurisdiction for the exploration and exploitation of living and non-living resources. By the close of the Third U.N. Conference on the Law of the Sea in 1982 there was “ostensible consensus” that all states had a right to conduct military activities in the EEZ of coastal states.⁷⁰ All states are entitled to conduct freedom of navigation and overflight “and other internationally lawful uses of the sea” under the terms of UNCLOS,⁷¹ but there were contending visions of the scope and content of those rights. Disputes concerning warship espionage have tended to settle into disagreement over the nature of the EEZ and the legality of military activities within it. The United States and China became the principal, although not exclusive, antagonists in this debate.

Beginning in the late 1990s, the United States and China began to clash over the presence in the Chinese EEZ of U.S. special mission ships that conduct military surveys and collect other intelligence.⁷² Among the numerous incidents, two are emblematic: the EP-3 aircraft strategic reconnaissance flight interception in 2001 and the harassment of the USNS *Impeccable* as it conducted military surveys near China in 2009.⁷³ In April 2001, two Chinese fighter jets boldly intercepted a U.S. Navy EP-3 propeller aircraft during a reconnaissance mission in the South China Sea.⁷⁴ One of the fighter jets collided with the U.S. aircraft—the Chinese jet and pilot were lost at sea, and the U.S. aircraft made an emergency landing on

70. Ivan Shearer, *Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance*, 17 OCEAN Y.B. 548, 561 (2003).

71. UNCLOS, *supra* note 15, at arts. 58(1), 87.

72. JAMES KRASKA, MARITIME POWER AND THE LAW OF THE SEA 270–76 (2011); J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 379–91 (Vaughan Lowe & Robin Churchill eds., 3d ed. 2012). See generally Raul Pedrozo, *Close Encounters at Sea: The USNS Impeccable Incident*, 63 NAVAL WAR C. REV. 101 (2009); Jonathan G. Odom, *The True “Lies” of the Impeccable Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (Outside of China) Should be Concerned*, 18 MICH. ST. J. INT’L L. 411 (2010).

73. *United States Protests Chinese Interference with U.S. Naval Vessel, Vows Continued Operations*, 103 AM. J. INT’L L. 349 (2009).

74. See Elisabeth Rosenthal & David E. Sanger, *U.S. Plane in China After It Collides with Chinese Jet*, N.Y. TIMES, Apr. 2, 2001, at A1; John Pomfret, *U.S., Chinese Warplanes Collide Over S. China Sea*, WASH. POST, Apr. 2, 2001, at A1; Erik Eckholm, *A Standoff Brews: Chinese Leader Wants Halt to Surveillance Flights Off Coast*, N.Y. TIMES, Apr. 4, 2001, at A1; *Aerial Incident Off the Coast of China*, 95 AM. J. INT’L L. 630 (Sean D. Murphy ed., 2001).

Hainan Island. The U.S. crew was detained for more than one week and the U.S. aircraft was stripped of its advanced electronic equipment.

The United States protested the treatment of the aircraft and crew as a violation of sovereign immunity, and asserted the right to exercise freedom of overflight in the EEZ.⁷⁵ Similarly, in 2009, while conducting military surveys in China's EEZ, the USNS *Impeccable* was "surrounded and harassed" by a Chinese flotilla composed of a naval intelligence vessel, a fisheries patrol boat, an oceanographic ship, and two small cargo ships or fishing trawlers.⁷⁶ The *Impeccable* incident was just one of many occasions in which the Chinese government, using both warships and purportedly commercial vessels that form a vast maritime militia, harassed U.S. surface naval ship intelligence gathering.⁷⁷

Disagreement over the division of rights and duties in the EEZ has played out among academics and governments in a crescendo of scholarly work,⁷⁸ including my book-length study of the

75. See Raul (Pete) Pedrozo, *Military Activities in and over the Exclusive Economic Zone*, in FREEDOM OF SEAS, PASSAGE RIGHTS AND THE 1982 LAW OF THE SEA CONVENTION 235, 239–48 (Myron H. Nordquist, Tommy T.B. Koh & John Norton Moore eds., 2009); see also *Aerial Incident Off the Coast of China*, *supra* note 74, at 630–33; KRASKA & PEDROZO, *supra* note 18, at 290–94.

76. Thom Shanker & Mark Mazzetti, *Tussle at Sea Has U.S. and China Quarreling*, N.Y. TIMES, Mar. 11, 2009, at A10.

77. *America's Security Role in the South China Sea Before the Subcomm. on Asia and the Pacific of the H. Comm. on Foreign Affairs*, 114th Cong. (2015) (testimony of Andrew S. Erickson, Associate Professor, China Maritime Studies Institute of U.S. Naval War College), <http://www.andrewerickson.com/2015/07/my-testimony-before-the-house-committee-on-foreign-affairs-subcommittee-on-asia-and-the-pacific-hearing-on-americas-security-role-in-the-south-china-sea>; Andrew S. Erickson & Conor M. Kennedy, *Meet the Chinese Maritime Militia Waging a "People's War at Sea,"* WALL ST. J.: CHINA REAL TIME REP. (Mar. 31, 2015, 11:08 AM), <http://blogs.wsj.com/chinarealtime/2015/03/31/meet-the-chinese-maritime-militia-waging-a-peoples-war-at-sea>.

78. See, for example, the debates between Lowe and Kwiatkowska and Pedrozo and Zhang. A. V. Lowe, *Some Legal Problems Arising from the Use of the Seas for Military Purposes*, 10 MARINE POL'Y 171–84 (1986); Barbara Kwiatkowska, *Letters to the Editor: Military Uses in the EEZ—A Reply*, 11 MARINE POL'Y 24–50 (1987); A.V. Lowe, *Rejoinder*, 11 MARINE POL'Y 250–52 (1987). See generally Raul Pedrozo, *Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone*, 9 CHINESE J. INT'L L. 9 (2010); Haiwen Zhang, *Is It Safeguarding the Freedom of Navigation or Maritime Hegemony of the United States?—Comments on Raul (Pete) Pedrozo's Article on Military Activities in the EEZ*, 9 CHINESE J. INT'L L. 31 (2010); Raul Pedrozo, *Responding to Ms. Zhang's Talking Points on the EEZ*, 10 CHINESE J. INT'L L. 207 (2011); Stuart Kaye, *Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral*, 24 AUSTRALIAN Y.B. INT'L L. 93 (2005); Erik Franckx, *American and Chinese Views on Navigational Rights of*

subject.⁷⁹ With the growth in China's Navy, however, the issue of military activities in the EEZ has waned. China now conducts intelligence operations in the U.S. EEZs of Guam and Hawaii,⁸⁰ making the issue legally, if not politically, moot,⁸¹ and it is not further explored here. Still, disputes over surface ship military surveys and surveillance and reconnaissance aircraft in the EEZ serve as contemporary background for submarine activities lying within the territorial sea. While the presence of foreign warships and espionage operations in the EEZ has been controversial, the prospect of intelligence gathering within the territorial sea of a nation-state is regarded as positively scandalous.

II. THE GLOBAL SUBMARINE FLEET

There are some thirty-eight countries that operate about 550 submarines throughout the world.⁸² Nuclear submarines are extremely quiet and have the longest endurance (although advanced air independent propulsion (AIP) diesel-electric submarines are also quiet, they lack the endurance).⁸³ The United States has seventy-two submarines, and fifty-eight are nuclear-powered.⁸⁴ Russia's submarine force is comprised of sixty-four boats, with eleven nuclear-powered. Russia is building four types of submarines, and has increased production for its own naval forces and for export.⁸⁵

Warships, 10 CHINESE J. INT'L L. 187 (2011).

79. See generally KRASKA, *supra* note 72, at 19.

80. Kathrin Hille, *Chinese Navy Begins U.S. Economic Zone Patrols*, FIN. TIMES (June 2, 2013), <http://www.ft.com/cms/s/0/02ce257e-cb4a-11e2-8ff3-00144feab7de.html>.

81. There is no guarantee, of course, that China will acknowledge and accept the right of other States to do in its EEZ the very activities that it does in other States' EEZs. For example, while China has conducted reconnaissance and surveillance flights over the EEZ of its neighbors, it has simultaneously complained about U.S. surveillance flights in its own EEZ.

82. See *World-Wide Conventional Submarines*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/ss-intro.htm> (last visited Oct. 13, 2015); *Total Submarine Strength by Country*, GLOBAL FIREPOWER, <http://www.globalfirepower.com/navy-submarines.asp> (last updated Apr. 1, 2015).

83. OFFICE OF THE SEC'Y OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2014, at 8 (2014).

84. The United States operates seventy-three submarines, including fifty-five nuclear-powered attack submarines (SSN), four nuclear-powered cruise missile submarines (SSGN), and fourteen ballistic missile submarines (SSBN). See STEPHEN SAUNDERS, *United States, in IHS JANE'S FIGHTING SHIPS 2014–2015*, at 927, 934–40 (2014).

85. Christopher P. Cavas, *Will Russia's Sub-Building Boom Matter?*, DEF. NEWS (Jan.

The United Kingdom and France each operate six fast attack submarines and four ballistic missile submarines, all of which are nuclear-powered. Both Turkey and Israel have fourteen submarines. Iran operates thirty-one submarines. Countries as diverse as Brazil⁸⁶ and Israel⁸⁷ are investing heavily in advanced submarines. With this breadth of maritime prowess in mind, one begins to appreciate that the law of submarine espionage has contemporary and worldwide implications.

A. Submarine Growth in the Indo-Pacific

Nowhere is the importance of the norms relating to submarine espionage more acute than in the Indo-Pacific region. The major powers are in the throes of a classic security dilemma, which hinders peaceful cooperation.⁸⁸ The world submarine market is booming, even as some states scale back on land and air forces.⁸⁹ The growth in submarine force structure is in the Asia-Pacific region; states located there will acquire more than half of all new submarines over the next decade.⁹⁰ At a time when overall military spending for the rest of the world continues to fall, it is surging in Asia.⁹¹ The Stockholm International Peace Research Institute reports that most of the increase in submarine fleets in Asia is due to Chinese military spending, and reactions to it by neighbor states.⁹² While North Korea

24, 2015), <http://www.defensenews.com/story/defense/naval/submarines/2015/01/24/russia-navy-submarine-shipbuilding-nuclear/22190761/>.

86. Janet Tappin Coelho, *Brazil Plans to Expand Submarine Fleet*, IHS JANE'S 360 (Dec. 16, 2014), <http://www.janes.com/article/47060/brazil-plans-to-expand-submarine-fleet> (indicating Brazil intends to build fifteen diesel and six nuclear submarines).

87. *Israel Submarine Capabilities*, NUCLEAR THREAT INITIATIVE (July 30, 2013), <http://www.nti.org/analysis/articles/israel-submarine-capabilities>; see also Louis René Beres & Leon Edney, *Israel's Nuclear Strategy—A Larger Role for Submarine-Basing*, JERUSALEM POST (Aug. 17, 2014), <http://www.jpost.com/Experts/Israels-nuclear-strategy-a-larger-role-for-submarine-basing-371323>.

88. Joseph S. Nye, *China's Re-Emergence and the Future of the Asia-Pacific*, 39 SURVIVAL 65, 74 (1997).

89. Daniel Michaels, Christina Zander & Robert Wall, *Sub Industry Rises as Militaries Flex Around the Globe*, WALL ST. J. (May 2, 2015), <http://www.wsj.com/articles/SB20752443983005913987204580587501791808426>.

90. *Id.*

91. John Feffer, *World Cuts Back Military Spending, But Not Asia*, INTER PRESS SERVICE (Apr. 14, 2014), <http://www.ipsnews.net/2014/04/world-cuts-back-military-spending-asia/>.

92. SAM PERLO-FREEMAN & CARINA SOLMIRANO, STOCKHOLM INT'L PEACE RESEARCH INST., SIPRI FACT SHEET: TRENDS IN WORLD MILITARY EXPENDITURE, 2013, at 4-5 (2014),

remains the region's greatest source of instability, the remarkable rise of China has the greatest strategic consequence for the region. Chinese military power, and, in particular, Chinese naval power, has upended the strategic balance in the Asia-Pacific.⁹³ In 2013, while military spending in the United States fell 6.8%, it increased in China by 7.4%.⁹⁴ For the first time in 500 years, Asia outspends Europe on military hardware.⁹⁵ As a maritime domain, naval fleets in the Indian Ocean and Pacific Ocean have reaped the benefit of this macro-political transition.

The legal questions raised by submarine espionage have particular salience for the Indian Ocean and Pacific Ocean because coastal states are acquiring new fleets amidst spiraling maritime tensions over island disputes and historical animosities. In a long arc that stretches from India in the west to Japan in the east, Asian states are engaged in the world's only naval arms race.⁹⁶ China's precocious maritime claims in the East China Sea and South China Sea,⁹⁷ in conjunction with its substantial increase in seapower over the past fifteen years,⁹⁸ have unsettled the region.⁹⁹ China is

http://books.sipri.org/product_info?c_product_id=476.

93. AARON L. FRIEDBERG, *A CONTEST FOR SUPREMACY: CHINA, AMERICA, AND THE STRUGGLE FOR MASTERY IN ASIA* 218–19 (2011).

94. PERLO-FREEMAN & SOLMIRANO, *supra* note 92, at 1–5.

95. In 2014, military expenditure in Asia and Oceania was \$439 billion, and military expenditure in Europe was \$386 billion. SAM PERLO-FREEMAN ET AL., *SIPRI FACT SHEET: TRENDS IN WORLD MILITARY EXPENDITURE, 2014*, at 4–5 (Apr. 2014), <http://books.sipri.org/files/FS/SIPRIFS1504.pdf>.

96. Rodion Ebbinghausen, *The New Arms Race in Asia*, DEUTSCHE WELLE (Mar. 18, 2013), <http://www.dw.com/en/the-new-arms-race-in-asia/a-16681158> (“Two recent studies have shown that, essentially, an arms race is in full swing in Asia—a cause for serious concern, considering the number of simmering conflicts in the region.”).

97. Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 AM. J. INT'L L. 124, 141 (arguing China's historic maritime claims are inconsistent with international law).

98. Edward Wong, *Chinese Military Seeks to Extend Its Naval Power*, N.Y. TIMES, Apr. 24, 2010, at A1.

99. See Richard Lloyd Parry, *Japan Increases Its Military Budget in Challenge to China*, TIMES, Dec. 18, 2013, at 30; Martin Fackler, *With Its Eye on China, Japan Builds up Military*, N.Y. TIMES, Mar. 1, 2011, at A4; Ann Scott Tyson, *Chinese Buildup Seen as Threat to Region*, WASH. POST, July 20, 2005, at A16; Edward Wong, *China Navy Reaches Far, Unsettling the Region*, N.Y. TIMES, June 15, 2011, at A11; David Tweed, *Modi Touring Indian Ocean to Keep China's Submarines at Bay*, BLOOMBERG (Mar. 9, 2015), <http://www.bloomberg.com/news/articles/2015-03-09/modi-tours-indian-ocean-to-keep-china-and-its-submarines-at-bay>; Sanjeev Miglani & Tommy Wilkes, *Rattled by Chinese Submarines, India Joins Other Nations in Rebuilding Fleet*, REUTERS (Dec. 2, 2014), <http://www.reuters.com/article/2014/12/03/us-india-china-navy-idUSKCN0JG2GM201412>

especially focused on upgrading its undersea capabilities, including improving its anti-submarine warfare skills and developing a more advanced submarine force, steps it has taken with the aid of technology from Russia.¹⁰⁰ China's naval buildup and the reaction of its neighbors already seem to fit the model of an armaments spiral, playing out through massive investments in naval force structure.¹⁰¹

Twelve states in the region operate about 173 submarines: Australia, China, India, Indonesia, Japan, North Korea, Malaysia, Pakistan, Singapore, South Korea, Taiwan, and Vietnam.¹⁰² Altogether, the regional submarine market over the next decade is estimated at fifty-four billion dollars.¹⁰³ The advanced and next-generation submarines in these fleets are equipped with extended and stealthy features that make them especially useful for intelligence, surveillance, and reconnaissance (ISR), and it is expected that they will be employed farther beyond their national waters.¹⁰⁴

The People's Liberation Army Navy (PLAN) is expected to eclipse the U.S. Navy by 2020, with 350 warships and submarines compared to the U.S. fleet of fewer than 280.¹⁰⁵ The U.S. Navy is thinly spread worldwide, but intends to forward deploy sixty-seven submarines and surface ships to the Pacific by 2020, an increase from fifty vessels in 2014.¹⁰⁶ With the long-term strategic pivot to the east,¹⁰⁷ the United States intends to station sixty percent of its armed forces in Asia. Already, fifty-six percent of its naval forces and sixty

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100. Nat'l Inst. for Def. Stud. Japan, *Southeast Asia: South China Sea Grows More Complicated*, in EAST ASIAN STRATEGIC REVIEW 2014, at 134 (2014), http://www.nids.go.jp/english/publication/east-asian/pdf/2014/east-asian_e2014_04.pdf.

101. On the risks of war from armament-tension spirals, see J. David Singer, *Threat-Perception and the Armament-Tension Dilemma*, 2 J. CONFLICT RESOL. 90 (1958).

102. Kelvin Wong, *Analysis: Diesel-Electric Subs Take Centre Stage in Asia-Pacific Waters*, 48 JANE'S INT'L DEF. REV. 4, 4 (2015).

103. *Id.*

104. *Id.*

105. David Tweed, *North Korea Is Asia's Biggest Security Threat, U.S. Admiral Says*, BLOOMBERG (Dec. 3, 2014), <http://www.bloomberg.com/news/articles/2014-12-03/north-korea-is-asia-s-biggest-security-threat-u-s-admiral-says>; see U.S.-CHINA ECON. & SEC. REV. COMM'N, 113TH CONG., 2014 ANNUAL REP. TO CONG. 17, 301, 329 (Nov. 2014); Greg Sheridan, *Why World's Most Powerful Military Man Matters to You*, AUSTRALIAN (Oct. 9, 2010), <http://www.theaustralian.com.au/news/world/why-worlds-most-powerful-military-man-matters-to-you/story-e6frg6ux-1225936166873>.

106. 2014 ANNUAL REP. TO CONG., *supra* note 105, at 17, 329.

107. Elisabeth Bumiller, *U.S. Pivots Eastward to Address Uneasy Allies*, N.Y. TIMES, Oct. 25, 2011, at A4.

percent of U.S. submarines are assigned to the Pacific Ocean.¹⁰⁸ Three U.S. fast attack nuclear submarines are forward deployed to Guam, and a fourth may be assigned to the region.¹⁰⁹

Regional states are especially concerned about the growth in China's submarine program.¹¹⁰ China has sixty-six submarines, including five nuclear attack submarines, four nuclear ballistic missile submarines and fifty-seven diesel attack submarines.¹¹¹ These forces are also patrolling farther from port—in 2014 a Chinese submarine conducted a patrol of the Indian Ocean for the first time.¹¹² By 2020, the number of Chinese submarines will be over seventy.¹¹³

Since the 1990s, Beijing has acquired twelve Russian-made Kilo attack submarines, and developed four new classes indigenously—a nuclear-powered ballistic missile submarine (SSBN) (Type 094), a nuclear-powered attack submarine (SSN) (Type 093), and the Yuan (Type 039A) and the Song class (Type 039/039G) diesel attack submarines (SS).¹¹⁴ A new SSN Type 095 fast attack submarine and a new SSBN Type 096 ballistic missile nuclear submarine are expected to join the Chinese fleet over the next decade.¹¹⁵ The Harbin Institute of Technology in China is building a high-speed submarine that would achieve much higher underwater

108. Tweed, *supra* note 105.

109. *Topeka Named as 4th Sub to Be Based in Guam*, NAVY TIMES (Feb. 11, 2014), <http://archive.navytimes.com/article/20140211/NEWS/302110009/Topeka-named-4th-sub-based-Guam>.

110. See Michaels, Zander & Wall, *supra* note 89; RONALD O'ROURKE, CHINESE NAVAL MODERNIZATION: IMPLICATIONS FOR U.S. NAVY CAPABILITIES—BACKGROUND AND ISSUES FOR CONGRESS 7 (2014).

111. OFFICE OF NAVAL INTELLIGENCE, THE PLA NAVY: NEW CAPABILITIES AND MISSIONS FOR THE 21ST CENTURY 15–16 (2015).

112. *Id.* at 4.

113. *Id.* at 15–16.

114. *Id.* For discussion of the possible effects of China's acquisitions on U.S. naval abilities, see Lyle Goldstein and William Murray, *Undersea Dragons: China's Maturing Submarine Force*, 28 INT'L SECURITY 161, 183–87 (2004).

115. Thomas M. Skypek, *China's Sea-Based Nuclear Deterrent in 2020: Four Alternative Futures for China's SSBN Fleet*, in A COLLECTION OF PAPERS FROM THE 2010 NUCLEAR SCHOLARS INITIATIVE 105 (Mark Jansson ed., 2010), http://csis.org/files/publication/110916_Skypek.pdf; Mike Hoffman, *China's Advancing Sub Fleet Concerns U.S. Navy*, DEFENSETECH (Feb. 5, 2014), <http://defensetech.org/2014/02/05/chinas-advancing-sub-fleet-concerns-u-s-navy/>; Kris Osborn, *China's Submarine Fleet Takes Historic Steps Forward*, DEFENSETECH (Oct. 29, 2014), <http://defensetech.org/2014/10/29/chinas-submarine-fleet-takes-historic-steps-forward/>.

speeds than those of other submarines.¹¹⁶

India operates fifteen submarines, including one nuclear-powered vessel leased from Russia, and Delhi seeks Moscow's help in domestically producing nuclear submarines.¹¹⁷ Japan has eighteen submarines, and may compete with Russia to supply six advanced AIP boats to India.¹¹⁸ This year South Korea became the sixth armed force in the world after the United States, Japan, the United Kingdom, France, and India to establish a submarine command, and Seoul will operate eighteen submarines within four years.¹¹⁹ Regional rival North Korea has some seventy submarines.¹²⁰

The undersea domain of the Indo-Pacific is about to become even more crowded. Based on the old adage that the best weapon to counter a submarine is another submarine, virtually every state in the region is rapidly growing its submarine fleet or acquiring submarines for the first time. In 2009, Malaysia took delivery of its first of two submarines purchased from France. That same year Vietnam ordered six Kilo-class submarines from Russia. The first boat was delivered at Cam Ranh Bay in January 2014.¹²¹ At the end of 2013, Korea had outstanding orders for twenty-three submarines, including three bound for Indonesia.¹²² Singapore began operating two Archer-class submarines purchased from Sweden, and has two "new build" AIP propulsion boats on order from Germany.¹²³ Korea is building six submarines for India.¹²⁴ Similarly, Australia now plans to increase the size of its submarine fleet from six to twelve boats under a twenty billion dollar deal with Japan, and India has invited Japan to compete

116. Terrence McCoy, *Chinese Reportedly Working on Submarine that Would "Fly" in an "Air Bubble,"* WASH. POST (Aug. 26, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/08/26/the-chinese-are-reportedly-working-on-submarine-that-would-fly-in-an-air-bubble/>.

117. Zachary Keck, *Russia's Eyes Massive Nuclear Submarine Deal with India*, NAT'L INTEREST (May 29, 2015), <http://nationalinterest.org/blog/the-buzz/russias-eyes-massive-nuclear-submarine-deal-india-12997>.

118. *Id.*

119. Song Sang-ho, *Seoul Launches Sub Command*, KOREA HERALD (Feb. 1, 2015), <http://www.koreaherald.com/view.php?ud=20150201000231>.

120. *Id.*

121. See Nat'l Inst. For Def. Stud. Japan, *supra* note 100, at 155.

122. SIEMON T. WEZEMAN & PIETER D. WEZEMAN, SIPRI FACT SHEET: TRENDS IN INTERNATIONAL ARMS TRANSFERS, 2013, at 2–3 (Mar. 2014), <http://books.sipri.org/files/FS/SIPRIFS1403.pdf>; Wong, *supra* note 102.

123. Wong, *supra* note 102.

124. Aiswarya Lakshmi, *HII, HSL Ink Pact to Build Submarines*, MARINE TECH. NEWS (Jan. 20, 2015), <http://www.marinetechologynews.com/news/build-submarines-507281>.

for six diesel submarines.¹²⁵ On July 7, 2014, Thailand established a submarine squadron at Sattahip naval base in anticipation of purchasing boats.¹²⁶

After the United States and Russia, Germany is the largest arms exporter in the world and the largest exporter of submarines. From 2009–2013, Germany delivered eight submarines to five countries, including the Republic of Korea and Pakistan.¹²⁷ Similarly, in Sweden defense conglomerate Saab is expanding production to become a global exporter of submarines.¹²⁸ Greater submarine sales will fortify the Swedish naval industrial base and put Russia on notice that the small country will be a leader in undersea technology.

B. Submarine Tactics, Techniques, and Technology

The increase in the number of submarines is coupled with advances in undersea technology that make the submarines easier to find. In the past, submarines were found by listening for their telltale acoustic signatures below the surface. Breakthroughs in miniaturization of sensors and big data are paving the way for submarine detection on the surface of the water. Slight emanations

125. Rahul Bedi, *India Asks Japan to Offer Soryu Subs for Project 75I Requirement*, 52 JANE'S DEF. WEEKLY, Jan. 29, 2015, at 25; Rob Taylor, *Australia Defends Planned Submarine Purchase*, WALL ST. J. (Mar. 25, 2015), www.wsj.com/articles/australia-defends-planned-submarine-purchase-1427259450; Rob Taylor & Patrick Barta, *Australia Reviews Plan to Double Submarine Fleet*, WALL ST. J. (Feb. 27, 2014), <http://www.wsj.com/articles/SB10001424052702304071004579408282844676104>. The proposal by the Conservative Australian Government reflects the judgment of the former Labor Government, which released a white paper in 2009 that called for doubling the size of the submarine force to twelve submarines. See Michaels, Zander & Wall *supra* note 89; see also DEP'T OF DEF., GOV'T OF AUSTL., DEFENDING AUSTRALIA IN THE ASIA PACIFIC CENTURY: FORCE 2030, at 64 (2009), http://www.defence.gov.au/CDG/Documents/defence_white_paper_2009.pdf (featuring on its cover three submarines on the surface and in formation); Rob Taylor, *Japan Gains Edge in Australia Submarine Deal*, WALL ST. J. (Dec. 2, 2014), <http://www.wsj.com/articles/japan-gains-edge-in-australia-submarine-deal-1417503055>; Anna Fifield, *Japan Wrestles with Wartime Legacy as it Starts Selling Weapons*, WASH. POST (Jan. 10, 2015), https://www.washingtonpost.com/world/asia_pacific/japan-wrestles-with-wartime-legacy-as-it-starts-selling-weapons/2015/01/10/c0e065f4-968c-11e4-8385-866293322c2f_story.html.

126. Wong, *supra* note 102.

127. Wezeman & Wezeman, *supra* note 122.

128. Gerard O'Dwyer, *Damen Deal a Sign of Saab's Sub Ambitions*, DEFENSE NEWS (Feb. 1, 2015), <http://www.defensenews.com/story/defense/naval/submarines/2015/02/01/damen-saab-sweden-subs-deal/22535665>.

from the submarine of energy, chemicals, or radiation may be detected on the surface using principles of big data and new oceanographic models.¹²⁹ As more submarines with advanced AIP and ISR capabilities are developed, it is more likely that they will be used near the shores of other countries, while new detection capabilities make a submarine incident more likely.¹³⁰ Now AIP submarines are “rewriting naval strategy” because they can remain submerged for longer periods of time, and when they run on fuel cells and batteries, they are even quieter than nuclear-powered submarines.¹³¹

For many of the same reasons that naval forces generally serve as such useful instruments of power projection, submarines are ideal platforms for gathering intelligence about potential adversaries. Submarines are globally mobile, flexible expeditionary platforms with scalable payloads that can simultaneously conduct multiple missions.¹³² They may be equipped with sophisticated electronics that can collect High Frequency (HF), Very High Frequency (VHF), and Ultra High Frequency (UHF) signals, and cell phone transmissions.¹³³ Because they are difficult to detect, submarines can loiter and maintain a forward presence for long periods of time, conducting concealed surveillance. Submarines are designed for optimal performance under the water, and subsurface transit is faster, safer, and more efficient than surface transit. They are impervious to all but the most sophisticated countermeasures, and due to their sovereign immunity, they are exempt from the laws of any nation other than the flag state.¹³⁴

Submarines are regarded as nefarious and sneaky; their methods are an affront and unfair in light of their dark history of

129. BRYAN CLARK, THE EMERGING ERA IN UNDERSEA WARFARE 8–11 (2015); see Bryan Clark, *Is America's Dominance Below the Seas Coming to an End?*, NAT'L INT. (Jan. 27, 2015), <http://nationalinterest.org/feature/americas-dominance-below-the-seas-coming-end-12125>.

130. Michaels, Zander & Wall, *supra* note 89, at A1.

131. *Id.*

132. See KRASKA, *supra* note 72, at 186–87; Karl Lautenschlager, *The Submarine in Naval Warfare 1901–2011*, 11 INT'L SECURITY 94, 140 (1986).

133. *Spy Games: The Dark Arts of Intelligence at Sea*, JANE'S NAVY INT'L, Dec. 18, 2006.

134. See *Nationality of Vessels: Law of the Flag State*, in 9 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1 (1968) (stating that the law of the flag State is the “most venerable and universal rule of maritime law”); Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L L. 53, 67–69 (1984).

upsetting accepted norms during World War II.¹³⁵ A submarine surreptitiously operating in the territorial sea is essentially a warship relying on concealment to maximize its combat posture. A submerged submarine is in its war-fighting mode. Mobilization of forces to counter submarines near shore acquires a political and psychological dimension that tends to overtake the importance of the actual incursion.

The classified nature of intelligence means that obtaining accurate facts about the state practice of undersea espionage is virtually impossible. Submarine operations are among the most sensitive intelligence programs, and the few book-length treatments of the subject focus primarily on the exploits of the Cold War.¹³⁶ The former commander of the U.S. submarine force of the Atlantic Fleet acknowledged the legitimacy and need to talk about submarine operations, but also cautioned against his captains revealing too much:

We all need to remember that revealing specific information on when, where, how, and how well these operations can be conducted simply serves to sharpen today's or a future tiger's teeth. It has been necessary to publicly address Cold War submarine intelligence collection, surveillance and reconnaissance capabilities in generic terms. I don't think we need to go further.¹³⁷

With that caution in mind, the next part of this Article relies solely on open-source scholarship and media reports and declassified U.S. government documents of confirmed or suspected intrusions into the territorial sea by submarines. The first subsection below recounts the undersea operations inside the territorial sea of foreign states by the former Soviet Union and the Russian Federation. The second subsection turns toward reports of similar U.S. submarine operations. The third subsection covers an incident involving a Chinese submarine in Japan's territorial waters. The third subsection also takes a prospective look at the rapid pace of advanced

135. Jeffrey W. Legro, *Which Norms Matter? Revisiting the "Failure" of Internationalism*, 51 INT'L ORG. 31, 46-49 (1997).

136. See generally SHERRY SONTAG & CHRISTOPHER DREW, *BLIND MAN'S BLUFF: THE UNTOLD STORY OF AMERICAN SUBMARINE ESPIONAGE* (1998); JOHN PEÑA CRAVEN, *THE SILENT WAR: THE COLD WAR BATTLE BENEATH THE SEA* (2001); GARY E. WEIR & WALTER J. BOYNE, *RISEING TIDE: THE UNTOLD STORY OF THE RUSSIAN SUBMARINES THAT FOUGHT THE COLD WAR 176-77* (2003); PETER SASGEN, *STALKING THE RED BEAR: THE TRUE STORY OF A U.S. COLD WAR SUBMARINE'S COVERT OPERATIONS AGAINST THE SOVIET UNION* (2010).

137. Grossenbacher, *supra* note 14.

submarines entering the navies of countries in the Indo-Pacific region—a region fraught with maritime disputes. Analyses of submarine operations inside the territorial sea have normative and legal implications throughout the world, but the burgeoning fleets of the Indo-Pacific pose the greatest risk of conflict.

III. SUBMARINE INTELLIGENCE COLLECTION IN THE TERRITORIAL SEA

A. *Russian Submarine Espionage*

Sweden has a long history of chasing enigmatic foreign submarines. In early October 1982, yet another mysterious submarine—believed to be either Russian or Polish—was detected near the Muskö naval base, about twenty miles from Stockholm. Sweden deployed forty vessels and Coast Guard commandos to search the area, and also scattered nets and wires across Horsfjärden Bay to trap the boat.¹³⁸ Twenty-five depth charges were dropped in an effort to force the submarine to the surface.¹³⁹ Captain Cay Holmberg of the Swedish Navy stated at the time that if the vessel tried to break out, “more drastic methods,” including sinking the submarine, would be used.¹⁴⁰ Like most such submarines, however, it was never caught.

Proof of intrusion into Swedish waters by a Soviet whiskey-class submarine occurred a year earlier and ignited an eleven-day international drama.¹⁴¹ Soviet submarine U-137 and its crew of fifty-six went aground on the night of October 27, 1981 inside a restricted area of the country southeast of Karlskrona Naval Base. The vessel sat on the rocks for a week. Sweden reported that the incident was “all the more remarkable and serious” because U-137 was believed to be carrying nuclear weapons on board.¹⁴²

The crisis produced a flurry of diplomatic protests, as Sweden detected leaked radiation from the submarine’s damaged hull while uncovering evidence of a second submarine prying about the area.¹⁴³

138. *Swedish Navy Still Hunting a Submarine*, N.Y. TIMES (Oct. 7, 1982), <http://www.nytimes.com/1982/10/07/world/no-headline-203157.html>.

139. *Id.*

140. *Id.*

141. *See supra* Introduction.

142. GORDON H. MCCORMICK, *STRANGER THAN FICTION: SOVIET SUBMARINE OPERATIONS IN SWEDISH WATERS* 8 (1990).

143. Chris Mosey, *Sweden “Captures” a Sheepish Soviet Sub*, CHRISTIAN SCI. MONITOR (Oct. 30, 1981), <http://www.csmonitor.com/1981/1030/103047.html>; Leonard Downie Jr., A-

Sweden obtained the consent of the USSR to interrogate the submarine captain, Pyotr Gushin, in exchange for granting him personal immunity and promising not to detain the submarine's officers.¹⁴⁴ Throughout the incident, the submarine captain maintained that the boat had wandered into restricted waters near Swedish military facilities due to faulty navigational equipment.¹⁴⁵ Soviet authorities agreed to permit Swedish officials to board the submarine to confirm the captain's contention that the compass was faulty.¹⁴⁶

While the captain and the navigator were being interrogated on board a nearby Swedish torpedo boat, the crew of the Soviet boat played an unexpected hand by signaling that the vessel was in danger. Exposed to gale force winds roaring off the Baltic Sea, the submarine took on a list of 17 degrees and was in danger of foundering. The hazard of spilling battery acid would create risk of a fire and release poisonous chlorine gas, threatening the lives of the crew. Aiding mariners in distress at sea is an ancient and sacred maritime duty, so Swedish authorities were caught between their obligation under maritime law to refloat the submarine, and their insistence on keeping it until completion of a full investigation.¹⁴⁷ After previously stating that it would not refloat the submarine until the interrogation was complete, Swedish officials quickly relented to preserve the safety of the crew.

In driving rain, rough seas, and high winds, Sweden reluctantly towed the submarine to a protected deep-water anchorage.¹⁴⁸ The vessel lay there surrounded by Swedish warships and under the glare of searchlights, within sight of heavily armed commandos and with Swedish Marine landing exercises on the visible shoreline.¹⁴⁹ Eleven days after it ran aground the submarine was escorted to the outer boundary of Sweden's twelve-mile limit, where it was met by a flotilla of between eleven and twenty Soviet

Arms Probably on Sub, WASH. POST, Nov. 6, 1981, at A1.

144. Frank J. Prial, *Soviet Captain Is Interrogated in Sub Incident*, N.Y. TIMES, Nov. 3, 1981, at A1.

145. *Id.*

146. *Id.*

147. See *The Eleanor* (1809) 165 Eng. Rep. 1058, 1068 (High Ct. Adm.); *The New York*, 16 U.S. (3 Wheat.) 59, 68 (1818); *The Brig Concord*, 13 U.S. (9 Cranch.) 387, 388 (1815). The duty to render aid to mariners in distress is codified in UNCLOS, *supra* note 15, at art. 98(1)(c); see also D. J. Devine, *Ships in Distress—A Judicial Contribution from the South Atlantic*, 20 MARINE POL'Y 229 (1996).

148. Prial, *supra* note 144.

149. *Id.*

warships, including two Riga class frigates and two Kochin class destroyers.¹⁵⁰

Swedish Defense Minister Torsten Gustafsson declared the episode “the most serious violation of Swedish neutrality since the Second World War.”¹⁵¹ Officials from the Nordic states were particularly outraged that the submarine likely had nuclear weapons on board.¹⁵² In retaliation, ambassadors from Norway, Denmark, Iceland, and Sweden boycotted Moscow’s annual Red Square parade that year.¹⁵³ At the same time, Max Kampelman, the chief U.S. delegate to the European security conference in Madrid, denounced the incursion as a “blatant disregard’ for Swedish territorial integrity,” and said the “probably nuclear-armed submarine” had engaged in “hostile espionage.”¹⁵⁴ Moscow always claimed the entry of U-137 into Sweden’s territorial sea was unintentional, but ample evidence suggests that the USSR routinely conducted such operations. The incursion coincided with a Swedish naval exercise in the area of a Swedish naval base. The captain of the boat initially claimed that his navigation equipment failed, causing the submarine to get lost, even though it already had managed to thread undersea through a perilous series of narrow straits infested with rocks and islands.¹⁵⁵ Later, the Soviet Navy claimed that the submarine was in distress and exercising force majeure entry into the territorial sea, even though the boat had never sent a distress signal and indeed tried to escape detection.¹⁵⁶

The dramatic episode of U-137 is the most trenchant example of suspected Russian submarine intrusions. There were many more instances of Russian submarine espionage reported throughout the world beginning shortly after World War II. The rest of this section traces these incidents, moving roughly chronologically and beginning

150. The incident is chronicled by two scholars from the University of Stockholm as a crisis case study between a powerful state and a weaker state. See generally Eric Stern & Bengt Sundelius, *Managing Asymmetrical Crisis: Sweden, the USSR, and U-137*, 36 INT’L STUD. Q. 213 (1992).

151. Mosey, *supra* note 143.

152. Frank J. Prial, *Sub Leaves Sweden; Joins Soviet Flotilla*, N.Y. TIMES (Nov. 7, 1981), <http://www.nytimes.com/1981/11/07/world/sub-leaves-sweden-joins-soviet-flotilla.html>.

153. *Id.*

154. *Id.*

155. Marie Jacobsson, *Sweden and the Law of the Sea*, in 28 THE LAW OF THE SEA: THE EUROPEAN UNION AND ITS MEMBER STATES 495, 517 (Tullio Treves & Laura Pinesch eds., 1997).

156. *Id.*

with the United States, and then South America and Europe, before returning to additional reports of Soviet submarine intrusions in the Baltic States.

The USSR began operating submarines off the coast of the United States in the late-1940s. By 1947, the United States knew that Russian submarines were patrolling near U.S. bases in the Pacific Ocean.¹⁵⁷ Just two years after World War II, at least five submarines positively identified as belonging to the USSR were spotted cruising near the Aleutian Islands.¹⁵⁸ After a spate of Russian submarine activity off the coast of the United States in 1948, Secretary of the Navy John L. Sullivan and other Navy officials confirmed that the Soviet Union was engaged in intelligence collection beyond the outer limits of the U.S. territorial sea.¹⁵⁹ The U.S. position was that foreign submarines were “free to roam the high seas as they please,” as long as they did not enter the territorial sea while submerged.¹⁶⁰

In March 1950, numerous sightings of unknown submarines by fishermen, light aircraft pilots, and shore-watchers were reported off the coast of Northern California.¹⁶¹ The Navy sortied maritime patrol aircraft and USS *Colahan* (DD 658), a reserve training surface ship, from Treasure Island in San Francisco to try to locate the mysterious craft, believed to be Soviet.¹⁶² The unknown submarine was spotted by a maritime patrol aircraft about forty miles from Cape Mendocino and about five miles offshore, and another contact was spotted by fishermen within “a few miles” of the coast of Eureka, California.¹⁶³ A U.S. Navy spokesman said that foreign submarines had a right under international law to operate beyond the limit of the three nautical miles territorial sea of the United States.¹⁶⁴ Although U.S. ships and aircraft queried unknown submarines, it acknowledged that unknown vessels were not required to respond, and could only be challenged if found inside U.S. territorial

157. *No Curb on Submarines: Foreign Craft Free to Roam Outside 3-Mile Limit*, *Say Navy Men*, N.Y. TIMES, Mar. 27, 1948, at 2.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Submarine Hunted by Navy on Coast*, N.Y. TIMES, Mar. 31, 1950, at 21.

162. *Id.*

163. *Id.*

164. The United States adopted a twelve nautical miles territorial sea in 1988. *See* Ronald Reagan, Pres. Proc. No. 5928, Territorial Sea of the United States of America, Dec. 27, 1988, 54 Fed. Reg. 777.

waters.¹⁶⁵ In the event a foreign submarine was inside U.S. territorial waters, if it dived or refused to stop, the Navy stated that it “would have the right to follow it.”¹⁶⁶

The Soviet Union apparently conducted operations in South American waters as well. In March 1952, the Dominican Republic complained to the U.N. Security Council that Russian submarines had violated its territorial waters.¹⁶⁷ Argentine admiral Isaac F. Rojas told the *New York Times* in May 1958 that an unknown submarine, “obviously on an unfriendly and inconfessable [*sic*] mission,” was detected inside territorial waters along the Patagonian coast.¹⁶⁸ The submarine was likely surveying the deserted coastline, which affords several bays that may be used to shelter fleets in the event of war.¹⁶⁹ The country’s President, Arturo Frondizi Ercoli, stated that the submarine was not asked to identify itself, and that “[u]nder international law, a submarine must surface after a first depth charge, which did not happen on this occasion.”¹⁷⁰ “On the other hand,” he stated, since the submarine “was in Argentine territorial waters, it was openly in violation of international law.”¹⁷¹

In February 1960, Argentina, using hastily provided U.S. sono-buoys and depth charges, hunted two unknown submarines in Golfo Nuevo, a forty-by-twenty mile wide bay along the Patagonian Atlantic coast.¹⁷² The government of Argentina stated that it “reserve[d] the right to attack hostile ships” located there.¹⁷³

Likewise, that same month British Minister of Defence Harold Watkinson accused Soviet surface trawlers of patrolling “constantly at sea in close proximity” to British coastal waters while Soviet submarines spied on Aberporth weapons testing range.¹⁷⁴ Prime Minister Harold Macmillan complained about the incidents in a letter to Premier Nikita Khrushchev, and stated that Moscow’s submarine operations bring the Soviet Union “perilously close to a

165. *Submarine Hunted by Navy on Coast*, *supra* note 161.

166. *Id.*

167. “Soviet” Submarines to be Cited to U.N., N.Y. TIMES, Mar. 5, 1952, at 6.

168. *Admiral Sees Unfriendly Act*, N.Y. TIMES, May 24, 1958, at 13.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Argentina Hunts a 2d Submarine Believed to be Trapped in Gulf*, N.Y. TIMES, Feb. 14, 1960, at 26; *Argentina Presses Hunt*, N.Y. TIMES, Feb. 13, 1960, at 1.

173. *Argentina Presses Hunt*, *supra* note 172.

174. Drew Middleton, *Soviet Sea Spying on Britain Grows: Officials Declare Trawlers and Submarines Intensify Electronic Espionage*, N.Y. TIMES, July 22, 1960, at 6.

showdown with the West.”¹⁷⁵ Six years later a Soviet submarine was identified inside the territorial sea of the United Kingdom, just off the U.S. fleet ballistic missile base at Holy Loch, Scotland.¹⁷⁶

No region has experienced more suspected intrusions than the Baltic States. Sweden, for example, began regularly sighting foreign submarines—presumably Russian—in its territorial waters in the mid-1950s.¹⁷⁷ The USSR appears to have been a serial violator of Swedish territorial seas for three-fourths of a century, and for the most part, denied doing so. In what would become a familiar routine, foreign submarines believed to be Soviet were spotted on five occasions during the summer of 1955; the USSR denied it had any vessels in the vicinity.¹⁷⁸

In early October 1966 unidentified submarines—also believed to be Russian—were spotted while they were spying on combined military exercises in the Gota River estuary near Goteborg.¹⁷⁹ As a warning, Swedish armed forces dropped depth charges about 500 meters from one of the underwater contacts.¹⁸⁰ The submarine fled the area.¹⁸¹

In the 1960s, Sweden experienced about one confirmed and two suspected foreign submarine intrusions each year.¹⁸² From 1979 to 1981, there were nineteen probable entries into the territorial sea by foreign submarines, and some incidents involved more than one boat.¹⁸³ During the decade from 1980 to 1990, the pace picked up, with an estimated seventeen to thirty-six foreign, presumably Russian, submarines in Swedish waters.¹⁸⁴ These operations are believed to involve multiple submarines, miniature submarines, and combat swimmers operating in coordination.¹⁸⁵ Overall, a RAND Corporation study concludes that nearly 200 confirmed incidents and more than 200 suspected incidents of submarine espionage occurred

175. *Id.*

176. WEIR & BOYNE, *supra* note 136.

177. *Swedes Sight Alien Submarine*, N.Y. TIMES, Aug. 10, 1955, at 4.

178. *Soviet in Denial on Submarines*, N.Y. TIMES, Aug. 11, 1955, at 2.

179. *Submarine Routed by Swedish Copters*, N.Y. TIMES, Oct. 6, 1966, at 1, 24; *New Submarine Incursion Is Reported by Sweden*, N.Y. TIMES, Oct. 7, 1966, at 3.

180. *Submarine Routed by Swedish Copters*, *supra* note 179.

181. *Id.*

182. MCCORMICK, *supra* note 142, at 1–3.

183. *Id.* at 3–4.

184. *Id.*

185. *Id.* at 6 fig.1.

inside Sweden's territorial sea between 1962 and 1988.¹⁸⁶

Sweden's neighbors have had similar experiences. On June 19, 1982, Finnish coastguardsmen fired warning shots at an unidentified submarine inside the territorial waters of the Sea of Åland.¹⁸⁷ The vessel was southbound from the Gulf of Bothnia, where in previous weeks Swedish maritime forces had spotted unknown submarines.¹⁸⁸

Norway also experienced numerous suspected or confirmed foreign submarines in its waters, none of which are believed to have been Western.¹⁸⁹ In late April 1983, for example, the Norwegian Navy encountered an unknown submarine in the waters off the coast of Sweden, and three warships and two submarines pursued the craft without success.¹⁹⁰ A Norwegian frigate fired a missile at the unknown contact off Leirvik in attempt to force it to the surface.¹⁹¹ Two months after that incident, the Norwegian Navy detected a foreign submarine in Andsfjord, near the NATO base off Andøya Island. The boat was evidently Russian, and at the time *Agence France-Presse* reported that since 1970 there had been some 230 suspected violations of Norway's territorial waters by submarines, presumably Russian.¹⁹²

Frustrated over the 1981–1982 escalation in submarine intrusions in its waters, Sweden adopted new rules of engagement to permit repeated close order depth charges to debilitate foreign submarines.¹⁹³ After the new policy went into effect, Swedish forces routinely used armed force to try to compel mysterious submarines to the surface.¹⁹⁴ The use of depth charges is akin to warning shots

186. *Id.* at 5 tbl.1.

187. *Unidentified Submarine Is Chased by Finns*, N.Y. TIMES, June 19, 1982, at 5.

188. *Id.*

189. OLAV RISTE, *THE NORWEGIAN INTELLIGENCE SERVICE: 1945–1970*, at 185–87 (1999).

190. *Norwegian Navy Opens Fire on Suspected Foreign Sub*, N.Y. TIMES, Apr. 29, 1983, at A11.

191. *Id.*

192. Marian Leighton, *Soviet Strategy Toward Northern Europe and Japan*, in *SOVIET FOREIGN POLICY IN A CHANGING WORLD* 285, 300 (Robin F. Laird & Erik P. Hoffmann eds., 1986).

193. MILTON LEITENBERG, *SOVIET SUBMARINE OPERATIONS IN SWEDISH WATERS: 1980–1986*, at 83–96 (1987); *see infra* Section V.C.2.

194. Rolf Soderlind, *Swedish Navy Bombs Suspected Foreign Submarines*, UNITED PRESS INT'L (June 7, 1986), <http://www.upi.com/Archives/1986/06/07/Swedish-navy-bombs-suspected-foreign-submarines/3383518500800/>.

from U.S. warships, which are regarded not as a use of force, but rather as a warning signal.¹⁹⁵

The Soviet Union was caught operating in Swedish and Norwegian waters hundreds of times in order to forward position attack submarines. These deployments must be understood within the context of Moscow's strategic policy. Moscow's submarine activity around Scandinavia is a function of the region's strategic importance and Russia's unforgiving geography.

Russia is keen to protect ballistic missile submarine bastions in the Barents and Kara Seas.¹⁹⁶ The fjords and archipelagoes of Scandinavia have a mixture of salt and fresh water and unstable thermocline layers that distort sonar echoes and make submarine detection almost impossible.¹⁹⁷ The Norwegian fjords, in particular, are exceptionally deep and ideal hiding places for submarines.¹⁹⁸ During the Cold War, USSR war plans called for seizing control of the Norwegian Sea, the approaches to the Barents Sea, and turning the Baltic Sea into Moscow's *mare nostrum*.¹⁹⁹ Russia had to shield its northern tier against U.S. submarines and ensure the survivability of its own underwater ballistic missile fleet. Russia has incentive to operate in the region today in order to disperse its boats and broaden the underwater battle space, as well as to conduct submarine espionage and training operations against Nordic states that are less likely to result in military conflict than incursions against a major maritime power.

Similarly, in the east, the USSR created a ballistic missile submarine (SSBN) bastion in the Sea of Okhotsk, which is shielded behind the nearly 800-mile long Kamchatka Peninsula. Soviet paranoia to protect this SSBN bastion was evident in the downing of Korean Air Lines Flight 007 in 1983, which overflew the Sea of Okhotsk and came amid reports that U.S. submarines previously

195. THE COMMANDER'S HANDBOOK, *supra* note 22, ¶ 3.11.5.2 ("A warning shot [from a warship] is a signal—usually to warn an offending vessel to stop or maneuver in a particular manner or risk the employment of disabling fire or more severe measures."). Warning shots by individual security personnel engaged in security generally are not permitted. See U.S. Dep't of Def. Directive 5210.56, Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order, or Counterintelligence Activities, Enclosure 2, ¶ 2(d) (Apr. 1, 2011).

196. Richard Halloran, *A Silent Battle Surfaces*, N.Y. TIMES (Dec. 7, 1986), <http://www.nytimes.com/1986/12/07/magazine/a-silent-battle-surfaces.html>.

197. *Norwegian Navy Opens Fire on Suspected Foreign Sub*, *supra* note 190.

198. Leighton, *supra* note 192.

199. Halloran, *supra* note 196.

engaged in intelligence collection in the area.²⁰⁰

In May 1967, a Chilean warship attacked an unidentified submarine in its territorial waters off the port of Iquique, apparently to no effect.²⁰¹ In March 1982, Italy complained that a Russian submarine had operated subsurface in its territorial waters near the large naval base at Taranto.²⁰² Italian warships, airplanes, and helicopters engaged in an eighteen-hour chase of an underwater submarine intruder that was spotted by an Italian submarine conducting a joint anti-submarine exercise about thirty-five miles from Taranto.²⁰³

For decades, Soviet submarines patiently waited outside U.S. ballistic missile submarine bases at Bangor, Washington, and Charleston, South Carolina to tail U.S. warships that got underway.²⁰⁴ By the 1980s, Soviet submarines had acquired global reach, extending their operations into the Caribbean Sea from bases in Cuba, and patrolling throughout the Mediterranean Sea from the port of Tartus, Syria.²⁰⁵ The USSR also sent submarines on patrol in the Arctic Ocean, off the coast of South Africa, into the Indian Ocean and Persian Gulf, and the South China Sea, where Soviet ships and submarines used the old U.S. naval base at Cam Ranh Bay.²⁰⁶

B. U.S. Submarine Espionage

The United States, of course, was not absent from this undersea drama. This section details, generally in chronological order, media reports of U.S. submarine espionage against China, the Soviet Union, and Cuba. Near the end of World War II, U.S. submarines deployed to the coastal waters of Pacific islands occupied by Japan.²⁰⁷ The boats eavesdropped on Japanese communications and developed expertise that would be used after the war.

In the aftermath of the December 1949 communist victory in China's civil war, the United States conducted submarine operations

200. *Id.*

201. *Submarine Off Chile Attacked*, N.Y. TIMES, May 22, 1967, at 27.

202. *Italians Issue a Protest over Intrusion by Sub*, N.Y. TIMES, Mar. 2, 1982, at A4.

203. *Id.*

204. Halloran, *supra* note 196; WINKLER, *supra* note 41, at 33–34.

205. Halloran, *supra* note 196.

206. *Id.*

207. W. CRAIG REED, RED NOVEMBER: INSIDE THE SECRET U.S.-SOVIET SUBMARINE WAR 9 (2010).

in the Taiwan Strait to gather military intelligence. The submarine USS *Pickrel* (SS 524) was deployed on short notice as one of the first two U.S. submarines to begin “special mission” reconnaissance patrols in China’s territorial waters along the Taiwan Strait. The boats sailed from Yokosuka, Japan, and the huge naval base located there would become “spy sub central” for U.S. submarine espionage operations in the Pacific Ocean.²⁰⁸ The official report of *Pickrel*’s patrol from July 23–30, 1950 describes Mainland China’s preparations for an impending amphibious assault on Taiwan, which was expected to commence on August 3–7, 1950.²⁰⁹

The U.S. submarine was under orders to clandestinely observe the volume and character of seaborne traffic and prevent either the Nationalists or the Communists from launching an attack across the Strait. The goal was to prevent an escalation “in this war which is not a war—or more properly, peace which is not a peace.”²¹⁰ Intelligence against shipping traffic was collected immediately off the mainland ports of Amoy and Foochow (Fuzhou), but the submarine remained beyond twelve miles from the mainland and outside of six miles from Taiwan—the respective Communist and Nationalist territorial sea claims.²¹¹

By the mid-1950s, U.S. submarines routinely patrolled not only the Taiwan Straits, but also waters off Petropavlovsk, in the Sea of Japan near Vladivostok, in the Yellow Sea off Darien, Kwantung, and Tsingtao, in the Barents Sea and Norwegian Sea, in the vicinity of Iceland and in the seas around Denmark, and around the Faroe Islands and the British Isles.²¹² These stealthy missions captured magnified periscope images and collected wavelengths, frequencies, and pulse repetition rates of radar signals emanating from shore.²¹³ U.S. fast attack submarines routinely slipped into Soviet waters near Vladivostok to observe shipping in the largest Russian naval and

208. SONTAG & DREW, *supra* note 136, at 25.

209. Memorandum from Commanding Officer, USS *Pickrel*, to Chief of Naval Operations, Report of Reconnaissance Patrol off Amoy and Foochow Areas of China Coast to Report any CHICOM Movement to Invade Taiwan (Aug. 3, 1950).

210. *Id.*

211. *Id.*

212. Memorandum from Admiral Arleigh Burke, Dep’t of the Navy, to Admiral Arthur W. Radford, Chairman of the Joint Chiefs of Staff, Submarine Patrols (Nov. 7, 1956).

213. The contemporary term for collection of communications from the electromagnetic spectrum, such as radio, is “signals intelligence,” or “SIGINT.” Hearing Before the House Permanent Select Committee on Intelligence, Statement for the Record of NSA Director Lt. Gen. Michael V. Hayden, USAF, at 6 n.4 (Apr. 12, 2000), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB24/nsa24.pdf>.

commercial port in the Far East.²¹⁴ As part of U.S. intelligence gathering during the Korean War, U.S. submarines observed the quantity and types of supplies sent on ships by the Soviet Union from Vladivostok to North Korea.²¹⁵ The Russian naval complex at Sevastopol on the Crimean Peninsula was also targeted.²¹⁶ In the Arctic Ocean, U.S. submarines approached inside the territorial sea of the Russian island of Novaya Zemlya, an Arctic island more than twice as large as the state of Massachusetts. A vast Soviet airbase complex and atomic bomb test range were located on the island.²¹⁷

Beginning in the early-1960s, four specially equipped U.S. submarines spied on foreign nations inside their three-mile territorial seas, including within the U.S.-recognized three-mile territorial seas of the Soviet Union and China.²¹⁸ At this time, many states were moving toward acceptance of a twelve nautical mile territorial sea, but the United States still held fast to the ideal of preserving the three-mile standard as a fundamental right, essential for the maintenance of national security.²¹⁹

The Chinese government broadcast its 300th “serious warning” against U.S. submarine violations on June 29, 1964, calling them “provocations,” but there was scant credible evidence of the operations.²²⁰ Many of the U.S. missions came to light from an initial report in the *Washington Post* in 1974,²²¹ followed by a more detailed, blockbuster story by Seymour Hersh the following year in the *New York Times*.²²²

Cuba protested the presence of U.S. submarines, as well as surface ships and aircraft, operating within its territorial waters from May 6–11, 1960.²²³ The Castro government alleged that the light cruiser USS *Norfolk* came within two and one-half miles of Cayo

214. REED, *supra* note 207, at 3–9, 312–16.

215. *Id.* at 3–9.

216. *Id.* at 11–12.

217. *Id.* at 62.

218. Seymour Hersh, *Submarines of U.S. Stage Spy Missions Inside Soviet Waters*, N.Y. TIMES, May 25, 1975, at 1.

219. See SAYRE A. SWARZTRAUBER, *THE THREE-MILE LIMIT OF THE TERRITORIAL SEAS* 243–60 (1970). See generally Bernard G. Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 652 (1959).

220. *300th Peking “Warning” to U.S.*, N.Y. TIMES, June 30, 1964, at 3.

221. Laurence Stern, *U.S. Subs Spying in Soviet Waters*, WASH. POST, Jan. 4, 1974, at A1.

222. Hersh, *supra* note 218.

223. *Castro Says Cuba Fired on U.S. Sub*, N.Y. TIMES, May 14, 1960, at 1.

Blanco, and that a U.S. submarine was spotted and “sped north swiftly with her lights out.”²²⁴

In August 1961, Moscow charged “foreign submarines” with violation of its territorial waters, and warned “future intruders would be destroyed.”²²⁵ The accusation was especially unsettling because it arose amid the second Berlin crisis. When Soviet Premier Khrushchev vowed to control Western access to the beleaguered Allied sector of the city, Berlin became the epicenter of East-West conflict.²²⁶

Many of the U.S. submarine espionage missions were conducted under the name “Operation Holystone.”²²⁷ These missions lasted about ninety days each.²²⁸ The program used specially equipped submarines to gather intelligence on the configuration, capabilities, and combat capabilities of the Soviet submarine fleet, and helped to verify Soviet compliance with nuclear arms control agreements. The operations also resulted in two known and up to six suspected collisions with Soviet submarines,²²⁹ the grounding and escape of a U.S. submarine inside the territorial sea of the USSR, and the accidental sinking of a North Vietnamese minesweeper by a U.S. submarine.²³⁰ USS *Gato* collided with a Soviet submarine while on one Holystone mission in 1969.²³¹ The incident occurred fifteen to twenty-five miles off the entrance to the White Sea near the Barents Sea.²³² The U.S. submarine had approached (inadvertently, according to the captain of the boat) within one mile of the Soviet Union.²³³

224. *Id.*

225. Theodore Shahad, *Soviet Charges Foreign Submarines Are Spying Near Coast*, N.Y. TIMES, Aug. 29, 1961, at 6.

226. Sydney Gruson, *The Two Germanys—ABC of a Key Problem in Europe*, N.Y. TIMES, May 6, 1962, at 207; Harry Schwartz, *The Berlin Wall—A Year of Tension Along the Communists’ Barrier*, N.Y. TIMES, Aug. 12, 1962, at E3.

227. Hersh, *supra* note 218. “Operation Holystone,” was also known as “Operation Barnacle” and “Operation Bollard,” and later renamed “Operation Pinnacle.” Seymour Hersh, *A False Navy Report Alleged in Sub Crash; Ex-Crew Members on U.S. Vessel Tell of Collision with Russian Craft Off Soviet Union*, N.Y. TIMES, July 6, 1975, at 1.

228. Hersh, *A False Navy Report Alleged in Sub Crash*, *supra* note 227.

229. SASGEN, *supra* note 136, at 73.

230. Hersh, *supra* note 218.

231. Hersh, *A False Navy Report Alleged in Sub Crash*, *supra* note 227.

232. *Id.*

233. *Id.* One member of the crew reported that the submarine was under orders to remain beyond three miles, which the United States recognized at the time as the lawful extent of the territorial sea. *Id.*

Operation Holystone missions tapped USSR submarine communications cables over which secure military communications were sent.²³⁴ Apparently, the U.S. Navy declined the suggestion by some government officials to make the program public, although U.S. government lawyers “said that it was at least arguable that the [cable-tapping] operation was in accord with international law.”²³⁵

During the 1970s, the United States converted the nuclear-powered submarine USS *Halibut* into a spy platform that could snoop into Soviet waters with a team of saturation deep divers to place induction taps and recording devices onto Soviet submarine cables in Shelikhova Bay, at the northern point of the Sea of Okhotsk.²³⁶ The missions were under a program called “Operation Ivy Bells,” and produced a treasure trove of classified communications between the Soviet Pacific Fleet base at Petropavlovsk on the Kamchatka Peninsula and Vladivostok.²³⁷

In May 1974, USS *Pintado* and a Soviet Yankee-class nuclear submarine collided underwater almost head-on when the U.S. submarine was inside the waters of the USSR.²³⁸ USS *Pintado* was cruising at a depth of 200 feet near the Soviet naval base at Petropavlovsk on the Kamchatka Peninsula.²³⁹ The Soviet vessel immediately surfaced, as USS *Pintado* fled underwater at high speed. Both vessels had nuclear weapons on board.²⁴⁰ Despite damage to its conning tower, USS *Pintado* eluded Soviet vessels that pursued it.²⁴¹ A U.S. submarine also surfaced into the hull of a Soviet ship during a fleet naval exercise.²⁴²

U.S. submarines also operated inside Canadian-claimed internal waters in the Arctic Ocean. Arthur Dean, the chairman of the U.S. delegation to the 1958 and 1960 law of the sea conferences,

234. Hersh, *supra* note 218. These operations are also featured in SONTAG & DREW, *supra* note 136, at 171–98.

235. Hersh, *supra* note 218.

236. *Id.*

237. Patrick E. Tyler & Bob Woodward, *Super-Secret Work Revealed*, WASH. POST, May 28, 1986, at A1; see BOB WOODWARD, *VEIL: THE SECRET WARS OF THE CIA, 1981–1987*, at 455–63 (2005); SONTAG & DREW, *supra* note 136, at 158–83; ROBERT G. WILLISCROFT, *OPERATION IVY BELLS iii–v* (2014).

238. *Collision of U.S. and Soviet Subs Off Siberia in 1974 Is Recounted*, N.Y. TIMES, July 4, 1975, at 21.

239. *Id.*

240. *Id.*

241. Hersh, *supra* note 218.

242. *Id.*

proclaimed the opening of the Northwest Passage between the Atlantic and the Pacific Oceans under the Arctic ice by the atomic submarines USS *Seadragon* and USS *Nautilus*.²⁴³ Underwater submarine transits are one of the oldest disagreements between the United States and Canada.²⁴⁴ The United States has used at least parts of the waterways that form the Northwest Passage as a convenient way for submarines to travel between the East and West Coasts. A transit through the Northwest Passage is faster and, with the added risk of threat from terrorism after the attack on USS *Cole*, safer than the route through the Panama Canal.

Although the United States disputes the claim, Canada maintains that the waters throughout the Northwest Passage (or more accurately, passages) are historic internal waters.²⁴⁵ The United States does not recognize the claim, and has utilized the waters within the Canadian claim for submarine transit. The dispute over the legal character of the Northwest Passage is ameliorated by the close political, security, and economic relationship between the two neighbors, and to demonstrate its commitment to NATO Canada has avoided making too much of the U.S. transits.²⁴⁶

Occasionally, Russia has complained of U.S. submarines operating in its waters. On February 11, 1992, for example, USS *Baton Rouge* collided with a Russian submarine inside Russian territorial waters.²⁴⁷ The following month the Russian Navy chased a foreign nuclear-powered submarine from its territorial sea in the same spot, six miles west of Kildin Island at the entrance of Kola Bay.²⁴⁸ Secretary of Defense Richard B. Cheney demurred, stating there was not enough information to say whether it was a U.S. submarine, but that the United States was “careful to operate in a way

243. Arthur H. Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L L. 751, 751 (1960).

244. Memorandum from Theodore L. Eliot, Jr., Exec. Sec'y, State Dep't, to Henry Kissinger (Mar. 12, 1970), FOREIGN RELATIONS OF THE UNITED STATES, 1969-1976, VOLUME E-1, DOCUMENTS ON GLOBAL ISSUES, 1969-1972, <http://history.state.gov/historicaldocuments/frus1969-76ve01/d367>.

245. Legal Bureau Briefing of May 21, 1987, 25 CAN. Y.B. INT'L L. 406 (1987); see Legal Bureau Paper of Mar. 29, 1988, 26 CAN. Y.B. INT'L L. 314 (1988).

246. Clyde H. Farnsworth, *Prince Rupert Journal; In Nuclear Age, Canadians Adopt "54-40 or Fight,"* N.Y. TIMES, Dec. 26, 1991, at A4.

247. *Protest Lodged*, IZVESTIYA (Moscow), Mar. 27, 1992, morning ed. at 2, translated in FBIS-SOV-92-060, Mar. 27, 1992, at 6.

248. See *id.*; *Rear Admiral Comments*, TASS (Moscow), Mar. 26, 1992, translated in FBIS-SOV-92-060, Mar. 27, 1992, at 6.

not to cause any problem.”²⁴⁹ Two years later, Russia’s Northern Fleet detected a foreign submarine—also determined to be nuclear powered—in the same vicinity as the *Baton Rouge* incident. Sonar recordings indicated it was a U.S. vessel, and the submarine fled after it had been detected.²⁵⁰ Likewise, in 2003, the Russian Navy spotted a U.S. fast-attack submarine spying on a Pacific Fleet exercise near the eastern shore of the Kamchatka Peninsula.²⁵¹ Aircraft dropped hydro-acoustic buoys to block the submarine’s egress and warned the U.S. vessel that it had been identified.²⁵²

C. North Korean and Chinese Submarine Espionage

North Korea and China are the newest entrants in underwater espionage that have created publicly reported incidents. This section sets forth North Korea’s subversive submarine campaign against Japan and South Korea. Pyongyang’s submarine operations include spying and kidnapping, and in 2010, a torpedo strike that sank a Republic of Korea warship. Next, the section moves on to Chinese submarine operations, including a case in 2004 that violated Japan’s territorial sea. While the U.S.-Russian experience above illustrates the historical context for rules concerning submarine espionage, the case studies from the Western Pacific foreshadow future incidents.

Reclusive North Korea is active in submarine construction and operations. In 1996 and 1998, North Korean submarines were caught in South Korean territorial waters.²⁵³ On September 18, 1996, a North Korean submarine ran aground on rocks along the east coast of South Korea and foundered while trying to land reconnaissance commandos.²⁵⁴ Eleven men were found dead, either from suicide or by the hand of their compatriots. All were dressed in civilian clothes,

249. *Sub in Russian Waters*, WASH. POST, Mar. 27, 1992, at A30.

250. See *Navy Cites U.S. “Violation,”* ITAR-TASS (Moscow), Nov. 3, 1994, translated in FBIS-SOV-94-214, Nov. 4, 1994, at 4; *Navy Aide on Submarine Intrusion*, NOVAYA YEZHEDNEVNAYA GAZETA (Moscow), Nov. 4, 1994, at 1, translated in FBIS-SOV-92-214, Nov. 4, 1994, at 4.

251. Igor Korotchenko, *Yankees Near the Shores of Kamchatka*, NEZAVISIMAYA GAZETA, No. 88, at 8, in RUSDATA DIALINE—RUSSIAN PRESS DIG., Apr. 29, 2003 (Lexis-Nexis).

252. *Id.*

253. Kyong-Hwa Seok, *South Korea Says No North Korean Agents from Sub Remain in South*, ASSOCIATED PRESS, June 29, 1998; Paul Shin, *North Korea Apologizes for Submarine Incursion that Heightened Tensions*, ASSOCIATED PRESS, Dec. 29, 1996.

254. John Burton, *Seoul to Keep N Korea Sub*, FINANCIAL TIMES, Sept. 24, 1996, at 6.

which suggests they were on a mission to infiltrate the South.²⁵⁵ South Korean troops using helicopters, boats, and tracking dogs engaged in bloody gun battles with the infiltrators who dispersed on land.²⁵⁶ Eleven North Korean commandos made it ashore and later were killed, and one was captured. Three South Korean troops were also killed in the battle.²⁵⁷ North Korea claimed that the submarine drifted into South Korean waters after engine failure, and demanded the return of the boat and the bodies of its sailors.²⁵⁸ South Korea denied the request. The bizarre episode was reminiscent of a 1968 infiltration in which thirty-one North Korean Special Operations Forces wearing South Korean uniforms while on a mission to assassinate President Park Chung Hee managed to get within half a mile of the presidential mansion.²⁵⁹

After the 1996 incident, the President of the U.N. Security Council issued a statement imploring the two sides to maintain the Armistice until a permanent peace agreement could be established.²⁶⁰ Two years later, another North Korean submarine was caught in South Korea's territorial sea. On June 22, 1998, a South Korean fishing boat spotted a dark green submarine periscope entangled in drift nets eleven miles off the coast.²⁶¹ The fishermen called South Korean authorities, and the South Korean Navy seized the vessel. While being towed, the submarine sank. The nine commandos on board committed suicide to avoid being caught.²⁶² The North Korean Central News Agency reported that mechanical trouble caused the submarine to drift into South Korean territorial waters.²⁶³

255. Michael Zielenziger, *Bizarre Korean Incursion Turns Bloody*, SAN JOSE MERCURY NEWS, Sept. 19, 1996, at 1A.

256. *Id.*

257. *N. Korean Says Sub Spied*, WASH. POST, Oct. 30, 1996, at A28; Nicholas D. Kristof, *Koreans Kill 7 Northern Infiltrators As Manhunt Widens*, N.Y. TIMES, Sept. 20, 1996, at A3; Burton, *supra* note 254.

258. Burton, *supra* note 254; Andrew Browne, *24 Killed in "Incursion" by N Korea*, GUARDIAN WEEKLY, Sept. 29, 1996, at 4.

259. Kristof, *supra* note 257.

260. Statement by the President of the Security Council, U.N. Doc. S/PRST/1996/42 (Oct. 15, 1996).

261. Nicholas D. Kristof, *Sub's Goal Infiltration, Seoul Says*, N.Y. TIMES, June 27, 1998, at A3; Nicholas D. Kristof, *North Korean Sub Sinks Under South Korean Tow*, N.Y. TIMES, June 24, 1998, at A8.

262. Kristof, *Sub's Goal Infiltration, Seoul Says*, *supra* note 261.

263. Kristof, *North Korean Sub Sinks Under South Korean Tow*, *supra* note 261 ("[The submarine] had troubles in a nautical instrument, oil-pressure system and submerging and surfacing machines.").

In recent years, the danger of North Korean submarine intrusions in South Korea's territorial waters has only worsened. On March 26, 2010, for example, one of Pyongyang's submarines torpedoed and sank the South Korean corvette *Cheonan* in the Yellow Sea.²⁶⁴ The ship split in two and sank in minutes, causing the loss of forty-six lives.²⁶⁵ The attack constituted a violation of the Armistice in place since the cessation of hostilities in the Korean War more than sixty years ago.²⁶⁶ North Korea has a long record of violating the maritime border with the South, and naval skirmishes are not uncommon.²⁶⁷

In this case, the attack was done with impunity. The U.N. Security Council failed to take action or even issue a resolution to condemn the attack, and instead issued a statement that North Korea correctly described as "devoid of any proper judgment and conclusion."²⁶⁸ The President of the Security Council issued a statement, but North Korea hailed it as a "victory" since it did not blame Pyongyang.²⁶⁹ China declined to take a position on the issue, which provided rationale to conduct a four-day U.S.-Republic of

264. Attribution of the attack to North Korea was unanimous among fifty South Korean investigators and twenty-four experts from the United States, Australia, Britain and Sweden. See Blaine Harden, *S. Korea Jettisons Doubt About Sinking; Report Says Evidence of North's Involvement Is Overwhelming*, WASH. POST, May 20, 2010, at A11; Sebastien Falletti, *Investigation Attributes Chon An Sinking to North Korean Torpedo*, JANE'S NAVY INT'L, May 21, 2010; *Final Cheonan Report*, KOREA HERALD, Sept. 15, 2010. The attack appears to be part of the cycle of action and reaction on the Korean Peninsula. See Leon V. Sigal, *Primer—North Korea, South Korea, and the United States: Reading Between the Lines of the Cheonan Attack*, 66(5) BULLETIN OF THE ATOMIC SCIENTISTS 35, 36 (2010).

265. *Final Cheonan Report*, *supra* note 264.

266. Agreement Concerning a Military Armistice in Korea, China-N. Kor., July 27, 1953, 4 U.S.T. 234, reprinted in 47 AM. J. INT'L L. SUPP. 186 (1953); Letter from the Acting U.S. Representative to the United Nations Addressed to the Secretary-General, Transmitting a Special Report of the Unified Command on the Armistice in Korea, U.N. Doc. S/3079 (Aug. 7, 1953); Howard S. Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. 880, 894, 905–06 (1956).

267. *NK Naval Boats Violate Western Sea Border*, KOREA TIMES (May 16, 2010), http://www.koreatimes.co.kr/www/news/nation/2010/05/113_65946.html.

268. Donald Kirk, *UN Statement Sinks Along with the Cheonan*, SOUTH CHINA MORNING POST, July 16, 2010, at 11.

269. Statement by the President of the Security Council, U.N. Doc. S/PRST/2010/13 (July 9, 2010); see Letter from the Permanent Representative of the Republic of Korea to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2010/281 (June 4, 2010); Letter from the Permanent Representative of the Democratic People's Republic of Korea to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2010/294 (June 8, 2010); *North Korea Welcomes UN Statement on Cheonan Sinking*, BBC NEWS (July 9, 2010), <http://www.bbc.com/news/10565560>.

Korea naval war game in the Sea of Japan in July 2010 that involved the U.S. aircraft carrier USS *George Washington*.²⁷⁰ The war footing and political instability of the North leaves South Korean society,²⁷¹ and armed forces,²⁷² constantly on alert for intrusive submarines.

China was also caught in a submerged transit in the territorial sea of its neighbor. On November 10, 2004, an anti-submarine maritime patrol aircraft of the Japanese maritime self-defense forces located an unidentified submarine in Japan's territorial sea near Sakishima Gunto in the Ryukyu island chain.²⁷³ The Director-General of the Defense Agency, with the approval of the Prime Minister as commander of the Japan Self-Defence Force, ordered the commander of the Maritime Self-Defence Force (JMSDF) to demand the vessel surface and show its flag.²⁷⁴

If the submarine failed to respond the JMSDF was ordered to demand that it leave Japanese territorial waters.²⁷⁵ The JMSDF deployed a destroyer and an anti-submarine helicopter to track the vessel, and these assets followed the contact until it left the territorial sea.²⁷⁶ Subsequently, the JMSDF made no further demands for the submarine to surface, but it was trailed until it crossed beyond the outer limits of Japan's Air Defence Identification Zone (ADIZ) on a

270. *South Korea and U.S. to Flex Military Muscles; In Warning to Pyongyang, the Allies Are Conducting Joint Naval Exercises*, INT'L HERALD TRIB. July 21, 2010, at 3; *US-South Korean Drill Said "Direct Result" of China's Support for North*, BBC MONITORING ASIA PACIFIC, July 29, 2010, Factiva, Doc. No. BBCAPP0020100729e67t0002x.

271. Joo Sang-min, *The Sub That Never Was . . . Defense Ministry Says*, KOREA HERALD, Oct. 15, 2004; *Ministry Denies Report on Intrusion by NK Submarines*, KOREA TIMES, Oct. 15, 2004.

272. *S. Korea Prepares Against Maritime Intrusion on Day 2 of Naval Exercises*, YONHAP NEWS AGENCY, reported as, *South Korea Prepares Against North Maritime Intrusion on Day Two of Drills*, BBC MONITORING ASIA-PACIFIC, Aug. 6, 2010, Factiva, Doc. No. BBCAPP0020100806e686000jh.

273. This section relies to a great extent on an excellent case study by Miyoshi Masahiro that utilized Japanese language sources and privately held government documents and interviews. See Miyoshi Masahiro, *The Submerged Passage of a Submarine Through the Territorial Sea—The Incident of a Chinese Atomic-Powered Submarine*, 10 SING. Y.B. INT'L L. 243, 249 (2006). See generally Yukiya Hamamoto, *The Incident of a Submarine Navigating Underwater in Japan's Territorial Sea*, 48 JAPANESE ANN. OF INT'L L. 123 (2005).

274. Def. Operations Div., Def. Operations Bureau, Def. Agency, *Kokuseki-fumei Sensuikan Tanchi-Jian ni tsuite* (On the Case of a Detected Unidentified Submarine) mimeo., Nov. 12, 2004, ¶ 2, as cited in Masahiro, *supra* note 273, at 243.

275. *Id.*

276. *Id.*

north by northwest course at about 1 p.m. on November 12, 2004.²⁷⁷

Based upon the course of the submarine and other intelligence sources, the government of Japan determined that the vessel was nuclear-powered and belonged to the PLAN.²⁷⁸ The Foreign Minister of Japan issued a protest to China “against its act in violation of international law, demanded an apology, [and] demanded an adequate explanation about the reason why it acted as it did.”²⁷⁹ Vice Minister Wu Dawei of China replied that indeed a Chinese nuclear-powered submarine “got into the Ishigaki Channel of Japan by mistake from a technical cause during its normal training course”²⁸⁰ Japan demanded an apology, which China declined, but Beijing “expressed regret” that the incident happened due to a “technical error.”²⁸¹ The incident has combined with other disagreements to fuel a “simmering rivalry” between the two Asian powers.²⁸²

Chinese submarines continue to operate near the Japanese islands. In March 2014, for example, the Ministry of Defense in Japan announced that its aircraft detected a suspected Chinese submarine in the contiguous zone of the Okinawan island of Miyakojima on the night of March 19, 2014.²⁸³

Submarine operations in the Indian and Pacific Oceans are conducted within a dynamic geostrategic context. Regional maritime disputes of the East China Sea and South China Sea are either caused or magnified by historical and cultural animosity and rivalry, contending visions of order in Asia, and an absence of regional security institutions. The region is unsettled, and the risk of submarine incidents is high. North and South Korea have a bitter maritime island and boundary dispute in the Yellow Sea that

277. *Id.*

278. *Id.* at 244.

279. China Div., Asia-Pacific Affairs Bureau, Ministry of Foreign Affairs, *Sensuikan Tanchi-Jian-Chugokugawa eno Kogi* (Case of an Unidentified Submarine—Representation to China), Nov. 16, 2004, mimeo., ¶¶ 2–3, as cited in Masahiro, *supra* note 273.

280. China Div., Asia-Pacific Affairs Bureau, Ministry of Foreign Affairs, *Chugoku Sensuikan niyoru Wagakuni Ryoukai Senkou Jijan* (Case of a Chinese Submarine Passing Submerged through the Japanese Territorial Sea), Nov. 17, 2004, mimeo., ¶ 1, as cited in Masahiro, *supra* note 273.

281. *Id.*; see also *In Brief—China Sorry for Submarine Intrusion*, JANE’S DEFENCE WKLY., Nov. 19, 2004.

282. Kent E. Calder, *China and Japan’s Simmering Rivalry*, 85 FOREIGN AFF. 129, 133 (2006).

283. Kosuke Takahashi & James Hardy, *Japan Tracks Suspected Chinese Sub near Okinawa Island*, JANE’S DEFENCE WKLY., Mar. 20, 2014.

periodically turns violent. China, Japan, and Korea have competing historic claims over islands and waters in the East China Sea. The Taiwan Strait is a potential flashpoint between Beijing and Taipei. In the South China Sea, Vietnam, the Philippines, Malaysia, Brunei, and Indonesia have overlapping maritime claims with China and, in most cases, with each other. Outside maritime powers, including the United States, India, and Australia, maintain a naval presence in these regions, to the annoyance of China. These disputes continually destabilize the region, and not infrequently ignite a dangerous crisis. Deadly confrontations have erupted in the waters surrounding Korea, and in the East China Sea and South China Sea, where naval ships and aircraft, coast guard vessels, and fishing trawlers frequently clash, raising tensions and on occasion leading to the loss of life. These cleavages are compounded by (except for Japan and Australia) a conspicuous lack of naval acumen and operational submarine experience among regional states, increasing the likelihood of mistake or miscalculation that could lead to conflict.

There is also disagreement over the content and applicability of operational protocols and confidence-building measures that might help to defuse inadvertent encounters. The lack of clarity or agreement concerning operational norms and law for submarine espionage add an additional element of volatility to a region in geopolitical flux. These unstable political and social factors suggest that an incident arising from submarine espionage quickly could turn deadly.

IV. INNOCENT AND NON-INNOCENT PASSAGE

The episodes in Part III raise questions about the appropriate distribution of legal rights and duties between coastal states and foreign submarines in transit or that conduct intelligence operations in territorial waters. The incidents, derived from the annals of the Cold War, the entry into force of UNCLOS in 1994, and the recent submarine activity in territorial seas, bring submarine intelligence operations into sharp relief. The law in this area has immediacy and importance for international peace and security.

On the high seas, maritime espionage is an element of freedom of navigation and overflight and other internationally lawful uses of the sea. The International Law Association adopted a Resolution on the Laws of Maritime Jurisdiction at its 1926 Vienna session that confirmed, "No State or group of States may claim any right of sovereignty, privilege or prerogative over any portion of the high seas or place any obstacle to the free and full use of the high

seas.”²⁸⁴ The following year, the *Institut de Droit International* adopted a resolution on “Navigation on the High Seas” at its meeting in Lausanne. Article 1 of the Resolution recognized that the legal concept of freedom of the high seas means that ships operate under the *contrôle exclusif* (exclusive control) of the flag state.²⁸⁵

The classic doctrine of freedom of the seas is captured in UNCLOS, which recognizes the right of all nations to freedom of navigation and overflight and to internationally lawful uses of the seas associated with the operation of ships and aircraft.²⁸⁶ Ships, aircraft, and installations on the high seas operate pursuant to the laws of the flag state, which may exercise “exclusive” jurisdiction over them.²⁸⁷ Disagreements over high seas freedoms, particularly in the EEZ, persist. A parallel debate, however, concerns the scope of innocent passage and the lawfulness of “non-innocent” passage in the territorial sea.

A. Development of the Regime of Innocent Passage

Coastal state rights over the territorial sea derive from sovereignty over the adjacent land, a principle that is summarized by the legal axiom of the continental shelf that “the land dominates the sea.”²⁸⁸ The traditional doctrine of state sovereignty views intelligence gathering within the territorial seas or internal waters of a coastal state as an unlawful intrusion into sovereign territory, and a violation of international law. Conventional wisdom leaves no doubt that submarine intelligence collection inside another country’s territorial sea is patently illegal as a matter of international law.²⁸⁹

Submarine intelligence collection within the territorial sea is legally akin to intelligence activities conducted on the land territory of a state, since territorial waters constitute part of the sovereign space of the coastal state. While nations have been tolerant of

284. Int’l Law Ass’n, Res. on the Laws of Maritime Jurisdiction, art. 13, Vienna, Aug. 5–11, 1926, 34 INT’L L. ASS’N Y.B. 103 (1926).

285. Inst. of Int’l Law, Res. on Open Sea Navigation, art. 1, Lausanne, Sept. 1, 1927, Y.B. INST. INT’L L. 88 (1927) (original in French), http://www.idi-iil.org/idiF/resolutionsF/1927_lau_03_fr.pdf.

286. UNCLOS, *supra* note 15, at art. 87.

287. *Id.* at arts. 92, 94.

288. North Sea Continental Shelf (Fed. Republic of Ger. v. Neth.), Judgment, 1969 I.C.J. 51, ¶ 96 (Feb. 20); Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. 62, ¶ 86 (Dec. 19).

289. See, e.g., Masahiro, *supra* note 273, at 249.

satellite espionage from outer space, and for the most part intelligence gathering from international airspace and the high seas, there is no international acceptance of spying inside either the land territory or the territorial sea of a state.²⁹⁰

In 1894, the *Institut de Droit International* adopted a resolution that recognized the right of all ships without distinction to enjoy the right of innocent passage (*passage inoffensif*) through the territorial sea.²⁹¹ While coastal states held sway in a belt of water offshore, ships flying the flag of other states enjoyed access to the zone under the customary right of innocent passage.

Since the law of maritime navigation is “universally framed” by navigation of ships on the surface of the water, customary law dictated that a submarine in the territorial sea of a coastal state during time of peace should adhere to the same practice.²⁹² Belgium, joined by Sweden and Germany, proposed the requirement of surface transit for submarines in 1923.²⁹³ In 1925, the Assembly of the League of Nations adopted a Swedish proposal to study those areas of international law that may be brought under their auspices or incorporated into a treaty.²⁹⁴ That same year, Professor Giulio Dena of the University of Turin and Associate of the *Institut de Droit International* argued that it was impossible for the coastal state to verify the pacific character of the passage unless the submarine was on the surface.²⁹⁵ This approach was incorporated into the report to the Committee of Experts for the Progressive Codification of International Law,²⁹⁶ preparatory to the 1930 Hague Conference, and

290. Wright, *Espionage*, *supra* note 64.

291. 13 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 329–30 (1894–1895), reprinted in U.S. Naval War Coll., 13 INT'L L. TOPICS AND DISCUSSIONS 1913, at 27, 28 (1914).

292. I D. P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 294 (I. A. Shearer ed., 1984).

293. See *Belgium Regulations Relative to the Admission of Foreign Warships into Belgium Ports and Harbors—Brussels*, Dec. 30, 1923, reprinted in BRITISH AND FOREIGN ST. PAPERS, 118 BRIT. & FOREIGN ST. PAPERS 43 (1923); LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA, UNITED NATIONS LEGIS. SERIES, Dec. 1956, U.N. Leg., Ser. ST/LEG/SER B/6, 361–62; *id.* at 409–10 (listing the 1923 regulation for Sweden); *id.* at 377–78 (listing the 1925 regulation for Germany).

294. Letter from the Chairman of the Committee of Experts for the Progressive Codification of International Law to the Acting President of the Council, Work of the Committee of Experts for the Progressive Codification of International Law During its First Session, 6 LEAGUE OF NATIONS O.J. 842, 843, annex (1925).

295. 32 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 524 (1925), as cited in O'CONNELL, *supra* note 292, at 295.

296. *Council Resolution of December 12, 1924*, 6 LEAGUE OF NATIONS O.J. 274, 274–

subsequently adopted by the subcommittee of the Committee on the Territorial Sea.²⁹⁷

The League established a Committee of Experts for the systematic study of the progressive codification of international law. Rather than calling upon governments to nominate appropriate subjects as the 1924 Swedish proposal had suggested, the Committee of Experts selected certain subjects and sent questionnaires to member states. After receiving replies, the Committee of Experts settled upon seven topics appropriate for codification, three of them related to the law of the sea: territorial waters, piracy, and exploitation of ocean resources.²⁹⁸ The Committee optimistically believed that these issues were particularly amenable to codification by means of treaty because they avoided the most politically charged issues.

It was still unclear, however, whether the right of innocent passage applied to commercial ships only or included warships. Philip Jessup wrote at the time that the “sound rule seems to be” that warships do not “enjoy an absolute right to pass through a state’s territorial waters any more than an army may cross the land territory.”²⁹⁹ In 1927, the Permanent Court of International Justice highlighted this principle in the *Lotus Case*: “[T]he first and foremost restriction imposed by international law upon a State,” the Court held, “is that it . . . may not exercise its power in any form in the territory of another State.”³⁰⁰

The Preparatory Committee for the League of Nations 1930 Codification Conference, however, accepted the rule that innocent passage applied to warships, including surface ships and submarines, but that submarines had to travel on the surface and show their flag.³⁰¹ The coastal state could require ships in innocent passage to

75, annex 719 (1925).

297. *Amended Draft Convention Communicated to Various Governments by the League of Nations Committee of Experts for the Progressive Codification of International Law, with Questionnaire No. 2, January 29, 1926*, League of Nations Doc. C.196M.70 1927 V, at 72 (1927), reprinted in Appendix No. 1, 23 AM. J. INT’L L. SUPP. 366 (1929).

298. *Report to the Council of the League of Nations on the Questions Which Appear Ripe for International Regulation*, League of Nations Doc. C.196M.70 1927 V (1927), reprinted in 22 AM. J. INT’L L. SUPP. 4, 8–13 (1928).

299. PHILIP C. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 120–21 (1927).

300. S.S. *Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

301. League of Nations Doc. C.74M.39, 1929 V (1929), reprinted in 24 AM. J. INT’L L. SUPP. 25, 38–40 (1930). Replies from the Government of Canada and the Government of the USSR were received after publication and recorded separately as League of Nations Doc.

depart the territorial sea if they infringed on local laws and regulations.³⁰²

The 1930 Codification Conference did not adopt final treaty text on coastal states' "marginal" or territorial seas, however, as it was unable to agree on either the width of the territorial sea or the scope of coastal state competence over it.³⁰³ But the basic approach on innocent passage and submarines was reflected throughout subsequent state practice and treaty law.

In 1949, the U.N. General Assembly issued a recommendation to the International Law Commission (ILC) to develop rules for the codification of the law of the territorial sea and high seas.³⁰⁴ The ILC Special Rapporteur on the Law of the Sea submitted a report in 1950 that declared that all states enjoy freedom of the high seas as a global public domain and part of the common heritage of mankind.³⁰⁵

In 1958, the first U.N. Conference on the Law of the Sea referred the ILC Draft Articles to its Second Committee. The Second Committee adopted Draft Article 27 on the freedom of the high seas, and it was regarded as declaratory of customary international law and incorporated into the 1958 Convention on the High Seas.³⁰⁶ The high seas are open to ships and aircraft of all nations, and no nation may purport to assert sovereignty over them.³⁰⁷

The 1958 Conference also produced the Convention on the Territorial Sea and the Contiguous Zone, which was a milestone in the progressive codification of the rules pertaining to the territorial sea, as it confirmed that all states enjoy the right of innocent passage.³⁰⁸ The agreement failed, however, to address questions both

C.74(a)M.39(a) 1929 V. and League of Nations Doc. C.74(b)M.39(b) 1929 V. *Id.*

302. *Id.*

303. See *Work of the Conference for the Progressive Codification of International Law*, 11 LEAGUE OF NATIONS O.J. 539, 543 (1930); *The Law of Territorial Waters*, 23 AM. J. INT'L L. SPECIAL SUPPLEMENT 240, 243 (1929); Jesse S. Reeves, *The Codification of the Laws of Territorial Waters*, 24 AM. J. INT'L L. 486, 490-93 (1930).

304. G.A. Res. 374 (IV), at 66 (Dec. 6, 1949).

305. J.P.A. François (Special Rapporteur), *Regime of the High Seas*, U.N. Doc. A/CN.4/17, reprinted in 2 Y.B. INT'L L. COMM'N 1950, at 36 (1957).

306. Convention on the High Seas pmbl., art. 2(1), (4), Apr. 29, 1958, 450 U.N.T.S. 11 (entered into force on Sept. 30, 1962).

307. *Id.* at art. 2.

308. O'CONNELL, *supra* note 292; see also Convention on the Territorial Sea and the Contiguous Zone art. 14(2), Apr. 29, 1958, 15 U.S.T. 1605, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964).

general and specific. Broadly, the Convention did not determine the lawful outer limits of the territorial sea, and states had wildly varying practice of claiming sovereignty to a distance of 3, 4, or as many as 200 nautical miles from the shoreline.³⁰⁹ The treaty also did not explicitly confirm that warships enjoyed the right of innocent passage, although it did so by implication.³¹⁰

B. Innocent Passage of Warships

The very first case adjudicated by the International Court of Justice (ICJ) addressed the scope of innocent passage of warships. The *Corfu Channel Case* arose from incidents that transpired in the Corfu Channel in 1946, as British warships came under fire from Albanian shore artillery. The British government protested the attacks, and the Albanian government replied that warships did not have a right to transit through the strait without obtaining prior authorization from Albanian authorities.

The Royal Navy continued to use the Corfu Channel without the permission of Albania, and two of its warships struck naval mines sown in the channel, apparently by Albania. Albania submitted the dispute to the ICJ. The Court ruled that states enjoyed a peacetime right to transit “between two parts of the high seas without the previous authorization of a coastal state, provided that the passage is innocent. . . . [T]here is no right for a coastal State to prohibit such passage through straits in time of peace.”³¹¹ The British warships were considered to be in innocent passage because they were not in combat formation or engaged in maneuvers, their guns were unloaded and stowed in a normal peacetime position, no extra soldiers were on board, and there was no evidence that the ships were spying upon coastal defenses.³¹²

Despite the judgment in favor of the Royal Navy, a measure of legal ambiguity lingered over whether innocent passage was reserved for commercial vessels only, or could also be enjoyed by warships. Throughout the 1950s and 1960s, for example, the Soviet

309. See *Law of Territorial Waters*, *supra* note 303, at 250–62.

310. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 308. Section III is titled “Innocent Passage” and Subsection A is titled “Rules Applicable to All Ships,” which suggests that every type of ship enjoys innocent passage. The first article of the subsection, however, Article 14(1), refers to “ships of all States.” It might be argued that the subsection title of “All ships” means “ships of all States” rather than all types of ships.

311. See *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, 28 (Apr. 9).

312. *Id.* at 30–32.

bloc of states maintained that coastal states could require prior notification of warships or some other clearance procedures. Contemporary scholars, however, almost universally accept that the right covers warships as a matter of customary and positive law.³¹³

Reflecting the holding in the *Corfu Channel Case*, the 1958 Territorial Sea Convention adopted the principle of nonsuspendable innocent passage in those areas of the territorial sea that constitute straits used for international navigation. Under Article 14(4) of the Convention, passage is considered innocent so long as it is “not prejudicial to the peace, good order or security of the coastal State.”³¹⁴ Submarines also enjoy the right of innocent passage, but only on the condition that they travel on the surface and show their flag.³¹⁵ The rules of innocent passage governing warships and submarines later were incorporated into UNCLOS.³¹⁶

1. Adoption of Innocent Passage in UNCLOS

Improving upon the 1958 Convention, UNCLOS refined and calibrated the scope of activity that may be considered not innocent into a more objective set of criteria for activities that may be considered “prejudicial to the peace, good order or security of the coastal State” to twelve specific activities:

[A]ny 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;

any exercise or practice with weapons of any kind;

any act aimed at collecting information to the

313. Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 23 VA. J. INT'L L. 809, 851–55 (1983–1984). *But cf.* YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 89 (2012) (concluding “it may have to be accepted that customary international law is obscure on this subject”).

314. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 308, at art. 14(4).

315. *Id.* at art. 14(6); *see* MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 221 n.123a (1962) (explaining that submarines must navigate on the surface and show their flag to “come within the concept of innocent passage”); William T. Burke, *Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text*, 52 WASH. L. REV. 193, 196 (1977); D. P. O’Connell, *The Juridical Nature of the Territorial Sea*, 45 BRIT. Y.B. INT’L L. 303, 340 (1971).

316. UNCLOS, *supra* note 15, at art. 19(1).

prejudice of the defence or security of the coastal State;

any act of propaganda aimed at affecting the defence or security of the coastal State;

the launching, landing, or taking on board of any aircraft;

the launching, landing, or taking on board of any military device;

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;

any act of wilful and serious pollution contrary to this Convention;

any fishing activities;

the carrying out of research or survey activities;

any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

any other activity not having a direct bearing on passage.³¹⁷

Submarine intelligence activities are inconsistent with several activities on the list. Foremost, the proscription against “any act aimed at collecting information to the prejudice of the defence or security of the coastal State,” quite plainly makes intelligence gathering inherently not innocent.³¹⁸ The rule does, however, raise an interesting issue as to whether intelligence collection in the territorial sea of one coastal state by a foreign submarine against a third or neighboring state is a violation of innocent passage. Since the regime of innocent passage was designed to protect the coastal state and not neighboring states, it appears that the act of collecting information in such case would not necessarily be inconsistent with innocent passage. That is, a vessel that claims it is exercising the navigational regime of innocent passage owes a duty to the coastal state in whose waters it transits to comply with the requirements of the regime. There is no similar duty owed to neighboring states, however, so acts of espionage against a neighboring state do not violate the duty to comply with innocent passage that is owed to the coastal state. The issue appears moot if the espionage is conducted

317. *Id.* at art. 19(2).

318. *Id.* at art. 19(2)(c).

from a submarine that is submerged, as submerged transit itself is not innocent, and therefore on that basis, the submarine would have violated the duty owed to the coastal state in whose waters it transits.

The regime of innocent passage is a conditional supranational right in derogation of the sovereignty of the coastal state, and UNCLOS reflected codification of the regime from customary international law.³¹⁹ A small but vocal group of states at the Third U.N. Conference, however, sought to make innocent passage a qualified right for warships, contingent on either notification to the coastal state, or a requirement to obtain its consent.³²⁰ This approach implied that warships, by their very nature and irrespective of any objective assessment of the character of their passage, receive a presumption of non-innocent passage. Although states that preferred this outcome did not put the matter to a vote, they continued even in the final session of the Conference to assert their right to restrict warships.³²¹

2. Straits Used for International Navigation

With the expansion of the territorial sea from three to twelve nm, more than 100 straits used for international navigation now were completely overlapped with the territorial sea. The major maritime powers deemed innocent passage insufficient to ensure the unimpeded global movement of ships, submarines, and aircraft. Consequently, parties negotiated to apply the regime of transit passage to the world's numerous strategic straits such as the Strait of Gibraltar, the Strait of Bab el-Mandeb, the Strait of Hormuz, the Malacca and Singapore Straits, the Sunda and Lombok Straits, and the Windward Passage between Cuba and Hispaniola. Navigational regimes for "normal" territorial seas and straits used for international

319. Thomas A. Clingan, Jr., *An Overview of Second Committee Negotiations in the Law of the Sea Conference*, 63 OR. L. REV. 53, 63-64 (1984); see R. R. CHURCHILL & A. V. LOWE, *THE LAW OF THE SEA* 82-83 (2d ed. 1988); see also Statement on United States Oceans Policy, 1 PUB. PAPERS 378-79 (Mar. 10, 1983); Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 77 AM. J. INT'L L. 616, 619 (1983). See generally *U.S. Oceans Policy*, 83 U.S. DEP'T OF STATE BULL. 70 (1983).

320. The group was comprised of Algeria, Bahrain, Benin, Cape Verde, China, Congo, Democratic People's Republic of Korea, Democratic Yemen, Djibouti, Egypt, Guinea-Bissau, Iran, Libyan Arab Jamahiriya, Malta, Morocco, Oman, Pakistan, Papua New Guinea, Philippines, Romania, São Tomé and Príncipe, Sierra Leone, Somalia, Sudan, Suriname, Syria, Uruguay and Yemen. See Official Records of the Third U.N. Conference on the Law of the Sea Volume XVI, U.N. Doc. A/CONF.62/L.117, at 225 (Apr. 13, 1982).

321. Official Records of the Third U.N. Conference on the Law of the Sea, Volume XVI, U.N. Doc. A/CONF.62/SR.176, at 132 (Apr. 26, 1982).

navigation were bifurcated. Whereas the regime of innocent passage still required submarines to travel on the surface and show their flag, the regime of transit passage recognizes the right of submerged transit through straits, which was seen as a major improvement in naval mobility.³²² The United States viewed obtaining the right of transit passage through straits used for international navigation as essential to protect ballistic missile submarine mobility and ensure strategic nuclear security.³²³ Japan also opposed repeated attempts at the Third U.N. Conference to restrict the freedom of submarines to operate throughout the oceans.³²⁴ These two states, along with the USSR, the United Kingdom, and France, constituted the Group of Five major maritime powers (MMP) that formed one of the most influential informal negotiating blocs during the Third U.N. Conference.³²⁵ The MMP were united in their advancement of transit passage through straits, which were regarded as the crown jewels of freedom of navigation and essential for submarine operations.

The regime of transit passage overlays the territorial sea in those waters that connect one part of the high seas or EEZ and another part of the high seas or EEZ.³²⁶ During peacetime, transit passage through straits cannot be hampered or suspended by the coastal states bordering the strait. Transit passage is the exercise of the freedoms of navigation and overflight solely for the purpose of continuous and expeditious transit in the normal modes of operation utilized by ships and aircraft for such passage.³²⁷ While transit passage is a more accommodating set of rules for warships, submarines, and military aircraft, like the regime of innocent passage, it does not protect a right to commit espionage. Ships and aircraft, while exercising the right of transit passage, shall follow certain rules: they must proceed without delay through or over the strait; refrain from any threat or use of force against the sovereignty,

322. UNCLOS, *supra* note 15, at art. 38(1); see John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77, 80–81, 95–110 (1980).

323. Moore, *supra* note 322, at 80–81, 95–110.

324. See ANN L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 254–55 (1981).

325. These States sought to limit the application of zonal approaches to coastal State jurisdiction beyond the territorial sea. See *id.* See generally Edward Miles, *The Structure and Effects of the Decision Process in the Seabed Committee and the Third United Nations Conference on the Law of the Sea*, 31 INT'L ORG. 159, 165, 176, 179, 231, 232 (1977) (discussing the Group of Five).

326. UNCLOS, *supra* note 15, at art. 37.

327. *Id.* at art. 38(2).

territorial integrity, or political independence of states bordering the strait; and, refrain from any activities other than those incident to their normal modes of continuous and expeditious transit.³²⁸

Transit passage is a more generous navigational regime than innocent passage first, because warships may transit in formation to maintain the security of the force, and second, to employ electronic detection and navigational equipment, such as radar, sonar and depth-sounding devices, and launch and recovery of aircraft.³²⁹ Submarines are free to transit submerged, as undersea navigation is their normal mode of operation.³³⁰ The regime is designed to promote global mobility, however, and does not entitle foreign warships or aircraft to engage in activities “inimical to the security” of the coastal states bordering a strait.³³¹ Ships and aircraft in transit passage, therefore, must “refrain from any threat or use of force against the sovereignty, territorial integrity or political independence” of states that border the strait.³³² This standard is not as restrictive as innocent passage. Whereas Article 19(2)(c) of UNCLOS specifically prohibits the collection of intelligence in innocent passage, such operations appear compliant with transit passage so long as they do not rise to the level of a threat or use of force. In short, intelligence gathering or collection of information about the coastal state may be consistent with transit passage, but only so long as it is not tantamount to a threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal state.

C. Non-Innocent Passage in the Territorial Sea

When a ship or submarine complies with the regime of innocent passage, it is cloaked in the rights and protections afforded to that status. International law does not specify how much information about the surrounding physical environment may be collected incidental to normal transit. At some point, however, the collection of information incidental to normal navigation crosses the threshold from operational oceanography, such as sea state and temperature, required to safely navigate, and crosses the line of non-

328. *Id.* at art. 39(1).

329. THE COMMANDER'S HANDBOOK, *supra* note 22, ¶ 2.5.3.1.

330. See UNCLOS, *supra* note 15, at art. 39(1)(c).

331. John Norton Moore, Deputy Special Representative of the President and Deputy Chairman of the U.S. Delegation, Statement by Mr. Moore, Committee II (July 22, 1974), reprinted in 71 U.S. DEP'T OF STATE BULL. 409, 410 (Sept. 1974).

332. UNCLOS, *supra* note 15, at art. 39(1)(b).

innocent passage by collection of information to the prejudice of the peace, good order, or security of the territorial sea. The precise location of that line is debatable.

The 1958 Convention on the Territorial Sea and the Contiguous Zone left open the possibility that a submerged submarine in the territorial sea nonetheless could be regarded as exercising innocent passage. Article 16 recognizes that the coastal state could take “necessary steps in its territorial sea” to prevent passage that was not innocent,³³³ but it left unclear whether a submerged vessel was in violation of innocent passage, as “distinct from merely being in breach of a duty to remain on the surface” while exercising the right of innocent passage.³³⁴

Certain operational information about the maritime environment, including weather and oceanographic characteristics, such as currents and tides, land features, shoals and reefs, other ships in the area and shipping traffic patterns, and harbors and roadsteads, may be observed to facilitate passage that is innocent.³³⁵ The line between innocent and non-innocent passage, however, has not been drawn clearly.

Events of February 12, 1988, tested the nature of innocent passage and intelligence or information gathering and the uneasy relationship between them when USS *Caron* and USS *Yorktown* were intercepted and shouldered or bumped by two Soviet warships inside the territorial sea of the USSR.³³⁶ The U.S. ships conducted a brief transit through the territorial sea under the Freedom of Navigation program to protest Russian laws that purported to require foreign warships to obtain permission to exercise the right of innocent passage.³³⁷ The Soviet Union protested a foray previously made by

333. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 308, at art. 16.

334. D. P. O’Connell, *International Law and Contemporary Naval Operations*, 44 BRIT. Y.B. INT’L L. 19, 56 (1970).

335. See S. EXEC. DOC. NO. 108-10, at 9 (2004) (“[T]here are other activities, such as operational oceanography, that are not considered marine scientific research.”); see also ROACH & SMITH, *supra* note 72, at 417.

336. Susan F. Rasky, *Senators Say Black Sea Affair Casts Doubt on Soviet Aims*, N.Y. TIMES, Feb. 15, 1988, at A3; Philip Taubman, *Moscow Shrugs Off “Provocation,”* SYDNEY MORNING HERALD, Feb. 15, 1988, at 8.

337. The Freedom of Navigation demonstrates U.S. non-acquiescence of excessive maritime claims through three activities: diplomatic protests, military-to-military engagement, and operational challenges. See MARIAN LLOYD NASH, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 997–98 (1979); U.S. Dep’t of State, Bureau of Pub. Affairs, U.S. Freedom of Navigation Program, Gist (Dec. 1988); U.S. Dep’t of State, Bureau of Pub. Affairs, U.S. Freedom of Navigation Program, Gist (Dec. 1988), *reprinted in* Office

the same U.S. vessels into the territorial waters of the USSR in the Black Sea,³³⁸ and both U.S. warships were outfitted with a suite of electronic sensors.³³⁹

The event came to be known as the Black Sea bumping incident, and it generated political fallout and congressional hearings. The precise contours of innocent passage of surface warships are difficult to define, as illustrated by this conversation between Senator Sam Nunn and Secretary of Defense Frank Carlucci and Chairman of the Joint Chiefs of Staff Admiral J. Crowe in the aftermath of the Black Sea bumping incident:³⁴⁰

Chairman Nunn: What about intelligence functions? Can innocent passage include intelligence-gathering under international law?

Secretary Carlucci: We had better ask the lawyers. All ships have intelligence capability on them, so I do not see how you could avoid it. . . .

Chairman Nunn: Innocent passage is a means of getting from one place to the other?

Admiral Crowe: That is exactly right. If you gather intelligence in the process, all right. But you cannot do anything unusual in order to gather intelligence while you are engaged in innocent passage. In fact, you cannot do anything to operate out of the ordinary pattern except to go. That is it.³⁴¹

Although UNCLOS had not entered into force at the time, the

of the Judge Advocate General, Dep't of the Navy, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NAVAL WARFARE PUB. NO. 9 Rev. A, ¶ AS2-17A-1 (1989), <http://www.dtic.mil/dtic/tr/fulltext/u2/a221855.pdf>; John D. Negroponte, *Who Will Protect the Oceans?*, 86 U.S. DEP'T OF STATE BULL. 41, 41-43 (1986); THE COMMANDER'S HANDBOOK, *supra* note 22, ¶ 2.8; KRASKA, *supra* note 72, at 397-404; William J. Aceves, *The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics*, 19 HASTINGS INT'L & COMP. L. REV. 259, 294-300 (1996).

338. The Soviet Union protested a transit made on March 10, 1986. W. E. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 AM. J. INT'L L. 331, 344-45 (1987); Christopher Walker, *Kremlin Protest on US Warships Adds to Superpower Tensions*, TIMES, Mar. 19, 1986, at 5.

339. Richard Halloran, *2 U.S. Ships Enter Soviet Waters Off Crimea to Gather Intelligence*, N.Y. TIMES, Mar. 19, 1986, at A1.

340. John C. Hitt, Jr., *Oceans Law and Superpower Relations: The Bumping of the Yorktown and the Caron in the Black Sea*, 29 VA. J. INT'L L. 713, 738 n.190 (1989).

341. *Department of Defense Authorization for Appropriations for Fiscal Year 1989: Hearing on S. 2355 Before the S. Comm. on Armed Services*, 100th Cong. 97-98 (1988).

navigational regimes within it reflected customary international law. The United States, for example, did not sign UNCLOS, but agreed that it would comply with the navigation provisions, and it expected other countries to do the same.³⁴²

The words Admiral Crowe used—that a ship in innocent passage cannot do anything “unusual” to gather intelligence—differ in substance from the text of UNCLOS, which precludes “any act aimed at collecting information to the prejudice of the defence or security of the coastal State.”³⁴³ The two are not necessarily incompatible, but they highlight the apparent complexity and ambiguity in the law governing innocent passage.

At the time of the incident, the transit in the Black Sea was criticized internationally as crossing the line between innocent and non-innocent passage. Moscow objected to the mere presence of the U.S. warships in the territorial sea without permission as incompatible with the regime of innocent passage.³⁴⁴ Professor Alfred Rubin, for example, wrote: “If the radio shacks of the U.S. warships were listening to anything from the coastal state not directly aimed at them, if the officers on the bridge were scanning the land, or if, in the language of the [1958 Convention on the Territorial Sea and the Contiguous Zone], ‘any other activity not having a direct bearing on passage’ was involved, the passage was not ‘innocent.’”³⁴⁵ After the Black Sea bumping incident, the U.S. Navy claimed it was sensitive to the prohibition against intelligence collection in the territorial sea, and that it does not violate the rule.³⁴⁶

However, Rubin would be proved wrong in his overly broad assessment of the Black Sea mission as not innocent. The following year both superpowers signed an agreement that set forth a “uniform interpretation” of innocent passage in which the USSR adopted the U.S. position.³⁴⁷ The “Jackson Hole Agreement” affirmed that all “warships, regardless of cargo, armament or means of propulsion” enjoy the right of innocent passage, and that the coastal state could

342. Statement on United States Oceans Policy, *supra* note 319.

343. UNCLOS, *supra* note 15, at art. 19(2)(c).

344. See John H. Cushman Jr., *2 Soviet Warships Reportedly Bump U.S. Navy Vessels: Challenge in Black Sea*, N.Y. TIMES, Feb. 13, 1988, at 1.

345. Alfred P. Rubin, *Innocent Passage in the Black Sea?*, CHRISTIAN SCI. MONITOR (Mar. 1, 1988), <http://www.csmonitor.com/1988/0301/eship.html>.

346. See generally William L. Schachte, Jr., *The Black Sea Challenge*, 114 U.S. NAVAL INST. PROC. 62 (1988).

347. Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.-U.S.S.R., Sept. 23, 1988, 28 I.L.M. 1444 (1989) [hereinafter Jackson Hole Agreement]; see KRASKA & PEDROZO, *supra* note 18, at 257–59.

not require prior notification or prior authorization for such transits.³⁴⁸

Analysis of non-innocent passage in the territorial sea has tended to focus on surface warships, and where the line is drawn between “innocent” and “not innocent” conduct.³⁴⁹ The rules applicable to vessels not exercising the right of innocent passage are not specifically addressed in UNCLOS. Regarding the absence of non-innocent conduct in UNCLOS, one perspective is that there is no such thing as non-innocent passage—UNCLOS mentions only innocent passage, and that is all that is permitted. Passage that is not compliant with innocent passage has not only no entitlement, but lacks lawful status entirely. It is per se illegal.

Another view suggests that UNCLOS privileges innocent passage, but ships may transit in non-innocent passage. Innocent passage does not create a general obligation that must be kept—*pacta sunt servanda*—but rather it offers a privilege that may be accepted or rejected.³⁵⁰ Although non-innocent passage is an amorphous but distinct category, UNCLOS does not apply to it and thus does not restrict it. Consequently, there may be a lawful basis other than innocent passage to justify the presence of a submerged submarine in another country’s territorial sea. For example, right of assistance entry³⁵¹ and safe harbor³⁵² are not authorized by innocent passage, but are generally accepted as lawful activities under theory of force majeure. The difference of course, is that safe harbor and force majeure are recognized legal regimes that confer lawful status on a ship present in the territorial sea, whereas recognition of non-innocent passage simply means that the transit is not illegal, but it is also neither a right nor protected.

Non-innocent submarine passage and espionage may not qualify as violations of the international law of the sea, or even as inconsistent actions with international law more generally. One of the most fundamental rules of international law is that states are free to do that which is not specifically prohibited.³⁵³ Furthermore,

348. Jackson Hole Agreement, *supra* note 347, at 1446.

349. See John W. Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How “Innocent” Must Innocent Passage Be?*, 135 MIL. L. REV. 137, 162–66 (1992); F. David Froman, *Uncharted Waters: Non-Innocent Passage of Warships in the Territorial Sea*, 21 SAN DIEGO L. REV. 625, 644–45 (1984).

350. See Vienna Convention on the Law of Treaties art. 26, Mar. 23, 1969, 1155 U.N.T.S. 331.

351. C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 345–46 (6th ed. 1967).

352. O’CONNELL, *supra* note 292, at 853–54.

353. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18–20 (Sept.

obligations in treaty law are to be read specifically and narrowly.³⁵⁴ The terms of a treaty should not be expanded or enlarged through interpretation, which cannot “alter, amend, or add to any treaty.”³⁵⁵

Under this perspective, non-innocent passage is not *delicta juris gentium*. Neither customary international law nor UNCLOS requires submarines in the territorial sea to navigate on the surface, or forbid submerged transit. But rather, the treaty excludes submarines from the right of innocent passage if they are submerged. A submarine can demonstrate “innocence” and dispel any doubt by traveling on the surface and showing its flag.³⁵⁶ A submarine on the surface showing its flag enjoys a presumption of innocence, while a submerged submarine is not entitled to claim it is exercising the regime of innocent passage, but its presence otherwise may be lawful.

The United States has stated this position through a handful of understandings and official testimony associated with U.S. accession to UNCLOS. Charles Allen, former Assistant Director of Central Intelligence for Collection, for example, has suggested that while submarines engaged in subsurface transit are ineligible for the rights and privileges of innocent passage, their conduct is not necessarily unlawful. In unclassified testimony in 2004, Allen stated that, “the overwhelming opinion of Law of the Sea experts and legal advisors is that the Law of the Sea Convention simply does not regulate intelligence activities, nor was it intended to.”³⁵⁷

William H. Taft IV, former Legal Adviser to the U.S. Department of State, joined Allen in this assessment. Taft concurred that UNCLOS does not prohibit or regulate intelligence activities in the territorial sea³⁵⁸:

With respect to whether articles 19 and 20 of the Convention would have any impact on U.S. intelligence collection, the answer is no. . . . A ship

7).

354. *Id.*

355. *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821).

356. W. Michael Reisman, *The Regime of Straits and National Security*, 74 AM. J. INT’L L. 48, 65 (1980).

357. Letter from J.M. McConnell, Dir. of Nat’l Intelligence, to Hon. Sen. Rockefeller IV and Hon. Sen. Bond (Aug. 8, 2007), S. Exec. Rep. No. 110-9, at 32–33 (2007).

358. Written Statement of William H. Taft, Legal Adviser U.S. Dep’t, Before the S. Select Comm. on Intelligence on June 8, 2004 Concerning Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part IX of the Law of the Sea Convention, S. EXEC. REP. NO. 110-9, at 34, 36 (2007).

does not, of course, under [the 1982 Convention] any more than under the 1958 Convention, enjoy the right of innocent passage in the territorial sea if, in the case of a submarine, it navigates submerged or if, in the case of any ship, it engages in an act aimed at collecting information to the prejudice of the defense or security of the coastal State, however, such activities are not prohibited or otherwise affected by the Convention.³⁵⁹

Furthermore, Taft testified that the United States “was not aware of any State’s taking the position” that either the 1958 or 1982 instruments “setting forth the conditions for the enjoyment of the right of innocent passage prohibit or otherwise regulate intelligence collection or submerged transit of submarines.”³⁶⁰

The 2007 Senate Foreign Relations Committee report on UNCLOS reiterates the U.S. position that the provisions concerning innocent passage in the 1958 Convention³⁶¹ and the 1982 Convention “set forth conditions for the enjoyment of the right of innocent passage in the territorial sea but do not prohibit or otherwise affect activities or conduct that is inconsistent with that right and therefore not entitled to that right.”³⁶² It further noted that “Article 20 provides that submarines and other underwater vehicles are required to navigate on the surface and to show their flag in order to enjoy the right of innocent passage; however, failure to do so is not characterized as inherently not ‘innocent.’”³⁶³

Yet if UNCLOS really serves as a “constitution” for the world’s oceans,³⁶⁴ is the concept of non-innocent but lawful passage a viable principle? The answer to this question may inform the permissible responses by coastal states that encounter submerged submarines in the territorial sea. Whether the presence of the submarine is a violation of international law may be less important than whether the vessel is a threat to the coastal state. In either case, the response of the coastal state is complicated by the sovereign

359. *Id.* at 37.

360. *Id.*

361. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 308, at arts. 18–20.

362. S. EXEC. REP. NO. 110-9, at 12 (2007).

363. *Id.*

364. Amb. Tommy T. B. Koh, *A Constitution for the Oceans, Remarks at the Conference at Montego Bay* (Dec. 6, 1982), in *The UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: OFFICIAL TEXT*, at xxxiii (1982).

immunity of the submarine, as well as limitations on the state's freedom of action that are reflected in the U.N. Charter and UNCLOS. Part V analyzes these constraints on coastal state responses to submarine espionage.

V. COASTAL LEGAL STATE RESPONSES AND REMEDIES

A. *Submarine Sovereign Immunity*

A corollary to the doctrine of freedom of the seas is exclusive flag state control over ships that fly its flag.³⁶⁵ The link between a flag state and its craft is strongest with state government ships, which include warships, naval auxiliaries, submarines, and ships used on non-commercial service.³⁶⁶ As warships, submarines are protected by sovereign immunity; while coastal states may have prescriptive jurisdiction over their territorial seas, they do not have enforcement jurisdiction over foreign submarines that operate there. Coastal states lack competence to arrest, detain, or impose coercive measures against foreign warships, including submarines engaged in espionage, in order to address violations of coastal state law.

Surface warships and submarines enjoy immunity from foreign jurisdiction or legal process, perhaps to a greater degree than other elements of the armed forces.³⁶⁷ State aircraft, such as military aircraft, also enjoy immunity from the jurisdiction of other states.³⁶⁸ Immunity from prescriptive and enforcement jurisdiction of another state extends to the ship and aircraft, as well as their commanders and the crews.³⁶⁹

The 1958 Convention on the High Seas defines a warship as

365. See James Kraska, *Military Operations*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 866, 871–72 (Donald R. Rothwell et al. eds., 2015). See generally HUGO GROTIUS, *MARE LIBERUM* (J.B. Scott ed., R.V.D. Magoffin trans., 1916) (1608).

366. See the “designed usage” test of the International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships art. 3, Apr. 10, 1926, 1 L.N.T.S. 199; see also European Convention on State Immunity art. 30, May, 16, 1972, C.E.T.S. No. 74. Although only a handful of states have ratified the Brussels Convention, it codifies the general rule of immunity of warships.

367. *The Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *The Alexander*, [1906] 1 H.K.L.R. 122, 129–30.

368. Convention on International Civil Aviation art. 3, Dec. 7, 1944, 61 Stat. 1180 (entered into force Apr. 4, 1947).

369. Consider for example the Tampico Incident, as discussed in 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 420–21 (1941).

“a ship belonging to the naval forces of a state and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.”³⁷⁰ The treaty also states “warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.”³⁷¹ The United States suggests the 1958 instrument codifies customary international law.³⁷² Likewise, Oxman’s classic study of the peacetime regime of warships in UNCLOS states that the principles of warship sovereign immunity derive from state practice as well as the 1958 agreements, and therefore reflect customary international law.³⁷³

The UNCLOS definition of warships includes surface vessels and submarines of the armed forces that meet four criteria:

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.³⁷⁴

Furthermore, Article 32 provides, “nothing in this Convention affects the immunities of warships.”³⁷⁵ Oxman notes that the article specifically refers to “the Convention” rather than “Part” or “Section,” and therefore the sovereign immunity of warships applies in all aspects of UNCLOS.³⁷⁶ Article 32 is in Part II of UNCLOS, which pertains to the territorial sea and contiguous zone. The provision is complemented by Article 95, which is in Part VII of UNCLOS concerning the high seas, and it states emphatically that warships on the high seas have “complete immunity” from the jurisdiction of any state except the flag state. The article also applies

370. Convention on the High Seas, *supra* note 306, at art. 8(2).

371. *Id.* at art. 8(1).

372. Statement on United States Ocean Policy, *supra* note 319, at 378.

373. Oxman, *supra* note 313, at 810; Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT’L L. 53, 55, 75 (1984).

374. UNCLOS, *supra* note 15, at art. 29.

375. *Id.* at art. 32.

376. See Oxman, *supra* note 313, at 812 n.7. Compare this with the 1958 Convention on the Territorial Sea and the Contiguous Zone, which states “nothing in these articles,” and therefore applies only to internal waters, the territorial sea, and the contiguous zone. *Id.*

in the 200 nm EEZ of coastal states.³⁷⁷

In short, warship sovereign immunity applies worldwide on the high seas and in all zones under national jurisdiction, including the territorial sea. Warship sovereign immunity is plenary, and it applies independently of the location of the ship. Submarines are shielded from the enforcement jurisdiction of the coastal state even in the territorial sea³⁷⁸ and internal waters of a coastal state.³⁷⁹ In peacetime, submarines could enter uninvited even into the internal waters of a foreign state without becoming subject to coastal state jurisdiction.³⁸⁰ Still, submarines have a duty to comply with coastal state law. But if they fail to do so, what recourse does the coastal state have?

B. Request Compliance and Require It to Leave

Coastal states generally have taken a dark view of foreign submarine espionage in the territorial sea. Part of the unease has to do with uncertainty regarding the appropriate remedy or response, or more accurately, the paucity of any single appealing response. In general, UNCLOS limits coastal state enforcement against foreign sovereign-immune vessels for violation of coastal state law in the territorial sea to two courses of action: request the vessel come into compliance with the law or “require” it to leave the territorial sea.

Quincy Wright argued that some territorial intrusions are of such a grievous nature that a sovereign-immune aircraft can “lose” its sovereign immunity. Writing in the aftermath of the Soviet downing of Francis Gary Powers’ U-2 spy aircraft, Wright suggested that although the U.S. pilot was an agent of the U.S. Government, he was not lawfully in the airspace of the USSR and therefore was not entitled to immunity under international law.³⁸¹ Only during periods of armed conflict, however, would a coastal state have a right to seize

377. By virtue of UNCLOS Article 58(2), Articles 88 to 115 are imported from the high seas into the EEZ insofar as they are not incompatible.

378. UNCLOS, *supra* note 15, at art. 32.

379. The “ARA Libertad” (Arg. v. Ghana), Case No. 20, Order of Dec. 12, 2012, ¶ 95, <https://www.itlos.org/cases/list-of-cases/case-no-20>; James Kraska, *The “ARA Libertad” (Argentina v. Ghana), ITLOS Case No. 20, Provisional Measures*, 107 AM. J. INT’L L. 404, 408–09 (2013); *see also* OPPENHEIM, *supra* note 68, at 847.

380. OPPENHEIM, *supra* note 68, at 460–61 (“[R]ight of the littoral state is limited by the right of innocent passage.”).

381. Wright, *Espionage*, *supra* note 64, at 14.

foreign naval vessels engaged in espionage.³⁸²

The Territorial Sea Convention states: “If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.”³⁸³ For a submarine, this provision means requesting that the boat surface and show its flag. In 1968, for example, the United States claimed that even if the spy ship USS *Pueblo* had been within North Korea’s territorial sea at the time it was captured, its seizure would still have been improper and a violation of its U.S. sovereign immunity: “In the absence of an immediate threat of armed attack, the strongest action a coastal State may take is to escort foreign warships out of its territorial waters.”³⁸⁴ Only if the foreign warship disregards the request may the coastal state require the non-compliant vessel to leave the territorial sea.

Similarly, Article 30 of UNCLOS provides that, “If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.”³⁸⁵

Likewise, this approach is reflected in paragraph 2.6 of the 2003 Code for Unplanned Encounters at Sea, which states, “The only sanction against a warship or public vessel that can be imposed by a coastal State is to require that it depart internal waters or the territorial sea.”³⁸⁶ There is a fair amount of uncertainty over how coastal states pursue these available remedies, as the precise content of “requiring” the warship to leave immediately is uncertain. The rule makes clear, however, that coastal states have a duty to approach warships that are not in innocent passage under a two-step framework

382. 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 750–51 (H. Lauterpacht ed., 7th ed. 1955).

383. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 308, at art. 23; see also Christopher Pinto, *Maritime Security and the 1982 United Nations Convention on the Law of the Sea*, in UN INST. FOR DISARMAMENT RESEARCH, *MARITIME SECURITY: THE BUILDING OF CONFIDENCE* 9, 20 (Jozef Goldblat ed., 1992).

384. George H. Adrich, *The Pueblo Seizure: Facts, Law, Policy*, 63 PROC. AM. SOC’Y INT’L L. 1, 3 (1969). The United States took such action on the occasions that it discovered Soviet Electronic Intelligence (ELINT) vessels in the U.S. territorial sea, ordering them out of the area. See Leonard C. Meeker, *Legal Aspects of Contemporary World Problems*, 58 DEP’T STATE BULL. 465, 468 (1968).

385. UNCLOS, *supra* note 15, at art. 30.

386. Western Pacific Naval Symposium, Code for Unalerted Encounters at Sea (CUES) ¶ 2.6, reprinted in 4(4) AUSTRALIAN J. OF MARITIME AND OCEAN AFFAIRS 126, 127 (2003).

that first requests compliance with innocent passage before requiring it to leave. First, how can the armed forces of a coastal state communicate with a foreign submarine on a covert mission? In cases in Sweden and Finland, the coastal states dropped depth charges near (but not on) the submarine to signal that it has been discovered and should surface or leave the area. The submarine also might be “pinged” with active sonar from sono buoys dropped by aircraft into the water near the submarine. Second, perhaps even more challenging is how a coastal state may “require” a foreign submarine to leave. The coastal state may assert that the foreign submarine is “required” to leave, but can that requirement be enforced?

C. *The Use of Force*

Oppenheim declared that coastal states are entitled to seize—presumably by force—military vessels engaged in espionage activities off their shores.³⁸⁷ Some states have either used force or expressed a willingness to use force against unidentified submarines, claiming such action is justified in self-defense.³⁸⁸ After one incident in 1960, the *New York Times* reported, “As to the right of a country to attack a warship entering territorial water without permission, international practice is to assume that force may be used against an intruder violating a defense area.”³⁸⁹ Yoram Dinstein agrees with this assessment, and he has suggested that intrusion of a submarine may be regarded by the coastal state as “incipient armed attack” that opens the door for forcible countermeasures.³⁹⁰ Dinstein cites state practice to support his proposition, but the conduct of states lacks uniformity on this point. Therefore, it cannot be said that force may be used by a coastal state against a submerged submarine in the territorial sea solely because of its presence in national waters. As a matter of law, ICJ jurisprudence tends to have a more restraining effect on coastal states, and the threshold for the use of force is higher than mere presence.

From the perspective of the coastal state as well as the flag state of a foreign submarine, the most practical and acute issue is

387. See 2 OPPENHEIM, *supra* note 382, at 750–51; H.A. SMITH, *THE LAW AND CUSTOM OF THE SEA* 47–48, 164–165 (3d ed. 1959).

388. Theodore Shahad, *Soviet Charges Foreign Submarines Are Spying Near Coast*, N.Y. TIMES, Aug. 29, 1961, at 6; see, e.g., LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA, UNITED NATIONS LEGIS. SERIES, December 1956, U.N. Leg. Ser. ST/LEG/SER/B/6 81, 241.

389. *International Law Invoked*, N.Y. TIMES, Feb. 13, 1960, at 4.

390. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 213 (5th ed. 2011).

whether a coastal state may use force against an unidentified submerged submarine to make it comply with innocent passage or leave the territorial sea. Article 25(1) of UNCLOS states that coastal states “may take the necessary steps in [their] territorial sea to prevent passage which is not innocent.”³⁹¹ However, the language remains ambiguous as to exactly what “necessary steps” may be taken by a coastal state against a non-conforming passage. Both the 1958 and 1982 Conventions are silent with regard to the appropriate level of force a coastal state may employ to compel compliance with its law. In maritime case law, “necessary and reasonable” force may be used beyond the territorial sea to conduct visit, board, search and seizure, and bring a non-compliant ship into port.³⁹² Furthermore, coastal state enforcement authorities are expected to employ every device short of force, such as harassment by navigational means, before resorting to the use of force.³⁹³ These general rules offer some insight into questions over the use of force. However, because these laws apply specifically to non-sovereign-immune vessels, they have limited utility and precedential value in cases involving warships and submarines.

1. The Charter Paradigm

The U.N. Charter governs the law on the use of force in international affairs. The goal of the United Nations is to suppress “acts of aggression or other breaches of the peace.”³⁹⁴ Under Article 2(4) of the Charter, “armed attack” (or more accurately, armed aggression or *aggression armee* in the equally authentic French translation) is unlawful. Article 2(4) also states that the threat of the use of force is as much a violation as the use of force itself.³⁹⁵ States have an inherent right of individual and collective self-defense against armed aggression. States that suffer an armed attack may invoke the inherent right of individual and collective self-defense

391. UNCLOS, *supra* note 15, at art. 25(1).

392. S.S. “I’m Alone” (Can. v. U.S.), 3 R.I.A.A. 1609, 1615 (presenting the rule in a customs violation case); *see also Claim of the British Ship “I’m Alone” v. United States*, 29 AM. J. INT’L L. 326, 326 (1935); G. G. Fitzmaurice, *The Case of the I’m Alone*, 17 BRIT. Y.B. INT’L L. 82, 88 (1936); Charles Cheney Hyde, *The Adjustment of the I’m Alone Case*, 29 AM. J. INT’L L. 296, 299 (1935); William C. Dennis, *The Sinking of the I’m Alone*, 23 AM. J. INT’L L. 351, 359 (1929).

393. *Red Crusader*, (U.K. v. Den.), Comm’n of Enquiry, Mar. 23, 1962, 35 I.L.R. 485 (E. Lauterpacht ed. 1967).

394. U.N. Charter art. 1, ¶ 1.

395. *See* U.N. Charter art. 2, ¶ 4.

under Article 51 of the Charter.³⁹⁶

The rules codified in the U.N. Charter stand alone as legal authority, but Article 301 of UNCLOS provides a separate but reinforcing duty to refrain from the threat or use of force in activities at sea.³⁹⁷ This rule simply reflects the prohibition against the threat or use of aggressive force memorialized in the U.N. Charter. “[O]ther rules of international law” also may be applied by tribunals hearing disputes brought under UNCLOS,³⁹⁸ although the Charter remains the supreme restatement of the law on the initiation of the use of force, or *jus ad bellum*.

Is a submarine gathering intelligence against the coastal state an act of armed aggression? Jurisprudence on the use of force at the ICJ suggests that it is unlikely that the Court would consider a peacetime submarine intrusion for purposes of espionage as tantamount to an “armed attack” at all, and certainly not one with sufficient gravity to justify resort to the use of force in self-defense. In the *Paramilitary Activities Case*, the ICJ considered a range of U.S. intervention in Central America, including U.S. surveillance flights.³⁹⁹ The case concerned the Reagan administrations’ low-intensity support for Contra rebels against the communist regime in Nicaragua, which the United States asserted was part of a broader strategy of individual and collective self-defense in concert with allies in Central America. Nicaragua complained, *inter alia*, that U.S. flights over the territory of Nicaragua in 1984 were contrary to the principle of state sovereignty over its national airspace.⁴⁰⁰ The United States countered that its reconnaissance missions were conducted pursuant to the right of individual and collective self-defense against Nicaraguan armed aggression against its Central American neighbors.⁴⁰¹

The Court rejected the U.S. and El Salvadorian claims of self-defense against an armed attack by Nicaragua, and averred that the U.S. overflights violated international law.⁴⁰² The ICJ also held that

396. *Id.* at art. 51.

397. UNCLOS, *supra* note 15, at art. 301.

398. *Id.* at art. 293.

399. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 190–91 (June 27).

400. Memorial of Nicaragua, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Pleadings 60, ¶¶ 11–20 (Apr. 30, 1985) (claiming that activities amount to a breach of Article 2(4)); see *Paramilitary Activities*, 1986 I.C.J. ¶¶ 92, 227.

401. *Paramilitary Activities*, 1986 I.C.J. ¶ 292.

402. *Id.* ¶ 292(5).

U.S. naval maneuvers conducted by the United States from 1982 to 1985 off the coast of Nicaragua during the ongoing U.S.-backed counter-revolution against the Sandinista regime did not constitute a threat or use of force against Nicaragua. In its ruling on the Merits, the Court held that Nicaragua's right to sovereignty may not be jeopardized by U.S. paramilitary activities. Training, arming, equipping, and supplying the Contras was a violation of international law, and not a lawful measure of collective self-defense taken by the United States and its regional allies in response to Nicaraguan aggression.⁴⁰³

The ICJ ruled lower-level coercion or intervention, such as "the sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries" into another country, constitutes an "armed attack" only if such intervention reaches the "scale and effects" or is of sufficient "gravity" tantamount to a regular invasion.⁴⁰⁴ In the case, there was no right to use self-defense against coercion or lower-level armed attack by irregulars or insurgents. Submarine espionage that involves the passive collection of information against the coastal state settles well below the threshold of an "armed attack," let alone being of sufficient "gravity" or "scale and effects" to justify resort by the coastal state to self-defense.⁴⁰⁵ Lacking some other indicia of armed aggression by the submarine or the flag state, the use of force in self-defense against submarine intrusion during peacetime does not meet the "gravity" threshold of *Paramilitary Activities*, and, thus, the use of force in self-defense is not a lawful response by the coastal state.

The U.N. Charter and the *Paramilitary Activities Case* inform the conclusion that a submerged submarine in territorial waters may not be attacked, barring some other indicia of posing an actual threat or use of force. Mere presence, even combined with a suspicion of spying, is insufficient grounds to destroy the intruding submarine. This analysis is underscored by state practice concerning aircraft intrusions. The right of a coastal state to use force against an intruder that violates the territorial sea is analogous to attacks on aircrafts that "invade" national airspace, notwithstanding the provisions in the Law of the Sea.⁴⁰⁶

On September 1, 1983, for example, a Soviet fighter jet shot down a civilian Korean Boeing 747 airliner that had strayed into the

403. *Id.* ¶ 292(3).

404. *Id.* ¶¶ 195, 247, 249.

405. *Id.* ¶ 195.

406. See *supra* Part IV(B)(1), at 218–20; *International Law Invoked*, *supra* note 389.

airspace of the USSR over Sakhalin Island.⁴⁰⁷ The Kremlin justified the action as necessary to protect the country against espionage,⁴⁰⁸ but the shoot-down was deplored by numerous states.⁴⁰⁹ The Council of the International Civil Aviation Organization adopted a resolution that condemned the Soviet response.⁴¹⁰ The USSR vetoed a similar resolution at the U.N. Security Council.⁴¹¹

Consider also the case of the U-2 that was shot down by the Soviet Union in 1960. After the U-2 incident the Soviet Union declared at the Security Council that the U.S. overflight was an unlawful infringement on its sovereignty.⁴¹² The USSR proposed draft resolution S/4321 to the Security Council that “[c]ondemns the incursions by United States aircraft into the territory of other states and regards them as aggressive acts.”⁴¹³ The United States denied that such overflight constituted “aggressive acts,” and defended the missions as essential “to assure the safety of the United States and the free world against surprise attack.”⁴¹⁴

407. Soon after the incident, the White House announced that it would open the Global Positioning System to civilian aircraft, once it became operational in 1988, to give pilots more accurate information on latitude, longitude, and altitude. *See* Soviet Attack on Korean Civilian Airliner: Statement by the Principal Deputy Press Secretary to the President (Sept. 16, 1983), in WKLY. PRESIDENTIAL COMP. DOC. (Off. Fed. Reg.), Sept. 19, 1983, at 1225, 1266.

408. Boris Rygenkov, the Soviet delegate to the International Civil Aviation Organization, insisted the aircraft had been on a spy mission and stated that his country’s “measures to protect its airspace were in accord with the rules and procedures of international law. . . . Every warning and measure was taken to have the violation handled and the airplane landed.” *Aviation Council Faults Soviet*, N.Y. TIMES, March 7, 1984, at A4.

409. *11 Nations Halt Moscow Air Service to Protest Downing*, AVIATION WK. SPACE TECH., Sept. 19, 1983, at 26. Protests were issued by the United States, the Republic of Korea, Japan, China, Australia, Canada, the United Kingdom, New Zealand, Zaire, Liberia, the Netherlands, France, Sweden, Belgium, Italy, the Federal Republic of Germany, Singapore, Fiji, Colombia, Ecuador, and Paraguay.

410. *Attachment B: Resolution Adopted by the Council on 6 March 1984, International Civil Aviation Organization: Action with Regard to the Downing of the Korean Air Lines Aircraft*, reprinted in 23 AM. SOC’Y INT’L L. 864 (1984); Marian Nash Leich, *Destruction of Korean Airliner: Action by International Organizations*, 78 AM. J. INT’L L. 244, 244–45 (1984); *see* INT’L CIV. AVIATION ORG., A24-WP/49/P/18 (1983).

411. *See* S.C. Res. Drft. S/15966/Rev.1, Sept. 12, 1983, 22 I.L.M. 1148 (1983).

412. *See* Cable Dated 18 May 1960 from the Minister of Foreign Affairs of the Union of Soviet Socialist Republics Addressed to the President of the Security Council, Rep. of the S.C. on Its Fifteenth Session (July 16, 1959–July 15, 1960), at 12, U.N. Doc. A/4494 (1960) [hereinafter Cable from Minister of Foreign Affairs].

413. *Id.* at 13.

414. *Id.*; *see also* Wright, *Espionage*, *supra* note 64, at 19 (declining to characterize overflight of an unarmed plane as an act of aggression).

France classified the U-2 flights as “intelligence activities,” and while each specific intrusion into Soviet airspace was “regrettable,” and “implied interference in a country’s internal affairs and a violation of its borders,” they were acceptable as “normal [state] practice.”⁴¹⁵ Furthermore, France stated “there were no rules of international law concerning the gathering of intelligence in peacetime,” and on these bases France did not support the USSR’s assertion that the U-2 flights constituted a threat to peace.⁴¹⁶

Likewise, the representative of the United Kingdom suggested that the Soviet Union “had exaggerated the implications of the overflight,” and “failed to make out a case for branding the U-2 incident as aggression.”⁴¹⁷ Ecuador and Argentina also rejected the claim that aerial intelligence collection was “aggression,” as did China, which called it “a simple case of intelligence collecting, which was neither a new nor a rare phenomenon in international society.”⁴¹⁸ Like the United Kingdom, China “felt that the Soviet Union was making too much out of the whole affair.”⁴¹⁹ The draft Soviet resolution was rejected by a vote of seven to two, with only Poland, an eastern bloc state under Soviet influence, and the USSR voting in favor of calling the U-2 flights “aggression.”⁴²⁰

2. National Approaches

The analogy of errant aircraft is helpful, but the examples of Sweden and Japan are even more compelling. Before World War II, the Nordic states passed neutrality legislation to help them stay out of the war. Sweden revised its law in 1966⁴²¹ and 1982 under the name IKFN-Ordinance.⁴²² The Ordinance regulates innocent passage of

415. Cable from Minister of Foreign Affairs, *supra* note 412, at 13.

416. *Id.*

417. *Id.*

418. *Id.* at 14–15.

419. *Id.* at 14.

420. *Id.* at 15. Tunisia and Ceylon abstained. *Id.*

421. Ove Bring, *1938 Stockholm Declaration Regarding Similar Rules of Neutrality: Commentary*, in *THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES* 839, 842 (Natalino Ronzitti ed., 1988).

422. Ordinance Concerning Intervention by Swedish Defence Forces in the Event of Violations of Swedish Territory in Peacetime and in Neutrality etc. (IKFN-Ordinance) (1982:756); see Swedish statutes in translation (*Svenska författningar i översättning till främmande språk*) Ds 2001:7 (Ministry Publication Series), Government Offices, Prime Minister’s Office, <http://www.regeringen.se/contentassets/12ac809d8e78406c994acb5971d438ce/swedish-statutes-in-translation>. The IKFN-Ordinance is read in conjunction with the

warships and other foreign government ships, providing that these ships' passage through Swedish territorial waters shall take place in a manner "not prejudicial to the peace, good order or security" of Sweden, and "shall be continuous and expeditious."⁴²³ The Ordinance also requires foreign vessels to show their national flags; submarines are required to navigate on the surface.⁴²⁴ Ships in innocent passage also "shall not stop or anchor without permission."⁴²⁵

Swedish law also states that "a foreign government ship which stops within Swedish territorial sea without having the right to do so, shall be reminded of the relevant regulations and be turned away from the territory."⁴²⁶ If necessary, Sweden may employ force of arms.⁴²⁷ Furthermore, force may be used "without warning" against intruding submarines, although there are significant qualifiers. First, the submarine has to cross the boundary of Swedish territorial waters "under circumstances indicating hostile intention,"⁴²⁸ or in cases in which "acts of violence are launched" against targets in Swedish territory from these ships. Second, the hostile acts or demonstrations of hostile intent must be directed against the targets within or outside Swedish territory or Swedish vessels and aircraft on the high seas.⁴²⁹ The requirement for a hostile act or a demonstration of hostile intent is aligned with international law, and in fact, approaches the standard set forth in U.S. rules of engagement.⁴³⁰

U.S. forces predicate the peacetime use of force in self-defense in response to either a hostile act or the demonstration of hostile intent by another country. The demonstration of hostile intent includes maneuvers to block U.S. warships or military aircraft, approaching U.S. forces in an attack profile, such as when an aircraft or vessel has a constant bearing and decreasing range to U.S. forces,

Admission Ordinance (1992:118), which regulates entry of foreign warships and government ships into Swedish territorial waters. Prior to 1994, Sweden purportedly required prior notification for entry, but that requirement was rescinded.

423. IKFN-Ordinance, *supra* note 422, § 3.

424. *Id.* § 7.

425. *Id.* § 8.

426. *Id.* § 18.

427. *Id.* § 17.

428. *Id.* § 13.

429. *Id.* § 14.

430. Chairman of the Joint Chiefs of Staff, CJCSI 3121.01B, Standing Rules of Engagement for U.S. Forces (C.J.C.S. 2005) at A-4, L-3.

and the use of fire control radar to “paint” U.S. forces. While the language of Sweden’s ordinance is different than the U.S. rules of engagement, Sweden has captured their essence that force may be used in self-defense based on indicia of hostile intent, even in the absence of an actual attack:

A foreign submarine that is found submerged within the territorial sea shall be expelled from the territory. If necessary, the force of arms shall be used. Should special circumstances so require, the force of arms aiming at preventing continued activities may be used without prior warning pursuant to a decision by the Armed Forces.⁴³¹

The Ordinance also states that a foreign submarine found submerged in Swedish internal waters “shall be prevented from any further activities there,” and that force may be used without warning. If the submarine surfaces, it will be towed to an anchorage “for further actions.”⁴³² The Swedish Ordinance has not elicited protest by any other state, which leads one scholar to suggest that Stockholm’s approach illustrates the erosion of the norm against the use of force for violations of innocent passage.⁴³³ This determination, however, may be unwarranted, as a predicate for the use of force in the Swedish Ordinance against non-compliant submarines appears to hinge on the threat or use of force, and not merely the presence of the vessel in the territorial sea. The lack of response from Sweden’s neighbors is unsurprising since, except for Finland, they are members of NATO and face the same threat of submarine intrusions. Finland is unlikely to want to antagonize Russia. Russia, the principle suspect in these cases, is unlikely to protest Stockholm’s law. A protest by Moscow would not change Sweden’s approach, but it would reinforce the suspicion that Russia was behind the violations. The more recent experience of Japan, however, indicates a more restrained approach.

Japan has suffered infiltrations by North Korean mini-submarines that resulted in the landing of commandos, and even abduction of its citizens.⁴³⁴ As an island nation situated in a “tough

431. IKFN-Ordinance, *supra* note 422, § 15, ¶ 2.

432. *Id.* § 16.

433. Roma Sadurska, *Foreign Submarines in Swedish Waters: The Erosion of an International Norm*, 10 YALE J. INT’L L. 34, 52 (1984). This work was revised and included as Roma Sadurska, *Foreign Submarines in Swedish Waters: The Erosion of an International Norm*, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 40, 59–60 (W. Michael Reisman & Andrew R. Willard eds., 1988).

434. Peter Goodspeed, *North Korea Pressed to Find Missing Japanese*: 11

neighborhood,” characterized by territorial disputes with both Russia and China and historical enmity with Korea, Japan’s approach is particularly compelling evidence of recent state practice in the Indo-Pacific region.

In response to the Chinese nuclear submarine that penetrated Japan’s territorial sea in 2004, Tokyo issued a statement that clarifies how it “copes with foreign submarines that navigate underwater in the Japanese territorial waters”⁴³⁵ Japan’s policy is based on Article 82 of Japan’s Self-Defense Forces Act No. 165 of 1954, which provides that “[t]he Director-General may, with approval of the Prime Minister, order” the Japan Self-Defense Force to “take necessary action at sea” to protect life or property, or for “the maintenance of public peace and order.”⁴³⁶ Whereas Sweden’s regulation is focused on projecting seriousness to the outside world, Japan’s is inwardly focused on facilitating interagency decision-making so that the country’s leadership can issue orders quickly to respond to an incursion.⁴³⁷

1. Policy Lines

(1) We demand . . . that submarines navigating submerged within the territorial waters navigate on the surface or leave the territorial waters⁴³⁸;

Disappearances: PM, Relatives Want Answers About “Kidnap Victims,” NAT’L POST, Sept. 5, 2002, at A14; *Probe Likely to Reveal Wealth of Information,* DAILY YOMIURI, May 2, 2002, at 2.

435. Cabinet Secretariat, *Ryousui-nai Senbotsu-Sensuikan e no Taisho nit suite* (On Coping with Submarines Navigating within Territorial Waters) 19 January 2005 mimeo (unofficially translated by and cited in Masahiro, *supra* note 273, at 244–45, 245 n.9 (2006)).

436. Unofficially translated by and cited in Masahiro, *supra* note 273, at 244 n.7. Article 82 of the Act states:

(海上警備行動 (Kaijo Keibi Kodo))

第八十二条 防衛大臣は、海上における人命若しくは財産の保護又は治安の維持のため特別の必要がある場合には、内閣総理大臣の承認を得て、自衛隊の部隊に海上において必要な行動をとることを命ずることができる。

(Police Action at Sea)

The Ministry of Defense may, with the authorization of the Prime Minister, command Self-Defense Force to take necessary measures at sea, when it is specifically necessary in order to protect human lives or property at sea or to maintain peaceful order.

Translation provided by Yurika Ishii, Assistant Professor, National Defense Academy of Japan.

437. Cabinet Secretariat, *supra* note 435.

438. *Id.* The first paragraph of the Policy Lines sets forth the expectation that submarines in innocent passage must transit on the surface and show their flag. This

(2) In such an eventuality, the Director-General immediately issues a command [sic] of maritime security operations . . .⁴³⁹;

(4) In the event of [a] submarine intruding into the Japanese territorial sea, a command of maritime security operations is issued unless another measure is required by special circumstances⁴⁴⁰;

(5) After the submarine leaves the territorial sea, the maritime security operations are continued in principle to make sure of the possibility of its re-entry into the territorial sea, to identify its nationality, etc.⁴⁴¹;

(6) Necessary measures are taken in contact with the countries concerned; . . .⁴⁴²

Japan also makes it a point to publish and disseminate to the public “without delay” an “appropriate and timely explanation” of any incident.⁴⁴³

Japan’s policy also is aimed at ensuring interagency coordination. The lack of a specified action in case of a submarine intrusion may be seen as shying away from willingness to use force, but it also generates greater uncertainty on the part of a potential intruder, thus raising deterrence. The policy also amounts to a

provision projects to potential violators that Japan is focused on preserving sovereignty over the territorial sea, and it also provides the organizing principle for action by the government of Japan.

439. *Id.* Paragraph (2) designates the Director-General of the Defense Agency, also known as the Minister of State for Defense, as the senior executive government with authority to initiate maritime security operations. In 2007, the Director-General was redesignated as the Minister of Defense, a Cabinet-level official, in order to facilitate more rapid and accurate action during national security crises or emergencies.

440. *Id.* Paragraph (4) suggests that unless there are “special circumstances”—which are undefined—the Japan Maritime Self-Defense Force and the Ministry of Foreign Affairs may expect issuance of a maritime security order by the Director-General as part of the expected response to a submarine intrusion.

441. *Id.* Paragraph (5) alerts the Ministry of Foreign Affairs and the Japan Self-Defense Forces that the crisis precipitated by the entry of a foreign submarine into Japan’s territorial sea may continue for some time after it has departed to ensure that the boat does not shortly return. This provision indicates that surveillance and reconnaissance by maritime patrol aircraft and other assets will continue even upon apparent withdrawal of the submarine from the territorial sea.

442. *Id.* Finally, paragraph (6) places the Ministry of Foreign Affairs on notice that the Cabinet and Prime Minister will expect international engagement with partner nations and the United States, as well as with the flag state of the intruding submarine.

443. *Id.*

compact with the Japanese people to deliver an accounting of each incident, which further signals to a potential antagonist the likely political elevation and consequences of an intrusion.

D. State Responsibility

Regardless of the response by the coastal state, UNCLOS Article 31 states that the flag state “shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship . . . with the laws and regulations of the coastal State” concerning innocent passage.⁴⁴⁴ Article 31 does not address warship immunity as such, but rather is focused on the consequences of international responsibility of the flag state that flow from its invocation. This provision derogates from sovereign immunity in Article 32. The travaux préparatoires of UNCLOS indicate that the provision was designed to impose liability for damage to the marine environment from foreign government ships, such as warships.⁴⁴⁵ States that operate warships are liable for the environmental harm they may cause inside the territorial sea, which balances the coastal state inability to enforce environmental standards on them. Consequently, although coastal states might be tempted to pursue flag state responsibility for submarine espionage through Article 31, the purpose of the provision makes it an unlikely avenue of success.

States are legally responsible for their internationally wrongful acts.⁴⁴⁶ Dieter Fleck has argued that generally, states are even responsible for their intelligence gathering activities, although there is no good mechanism for pursuing such a claim.⁴⁴⁷ In practice, submarine intelligence collection in the territorial sea has been bypassed by an otherwise energetic revolution in state responsibility.⁴⁴⁸ In addition to diplomatic avenues, an aggrieved coastal state might consider the dispute resolution procedures in Part XV of UNCLOS, although this approach is also likely to prove unsatisfying.

444. UNCLOS, *supra* note 15, at art. 31.

445. 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 263 (Satya N. Nandan & Shabtai Rosenne eds., 1993).

446. G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, at 2 (Jan. 28, 2002).

447. See Fleck, *supra* note 27, at 698–702.

448. See generally Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT’L L. REV. 301, 301 (2003).

E. Dispute Resolution

Subject to exceptions related to coastal state jurisdiction over marine resources and related matters, disputes between State Parties relating to the Convention are subject to binding arbitration or adjudication.⁴⁴⁹ In the event of a dispute over submarine intelligence gathering, the flag state of the submarine is likely to invoke sovereign immunity of the warship, as well as an exception to the dispute resolution process. Any state may declare three distinct types of issues off-limits to compulsory dispute resolution: military activities,⁴⁵⁰ law enforcement activities related to fisheries and marine scientific research,⁴⁵¹ and disputes being handled by the U.N. Security Council.⁴⁵²

While most disputes, including disputes over military activities, are legally amendable to binding arbitration or adjudication, the exceptions invariably swallow the rule. A State Party may at any time declare that it excludes these specific dispute categories from dispute settlement procedures, including, in particular, “disputes concerning military activities . . . by government vessels and aircraft engaged in non-commercial service.”⁴⁵³

The United States views military activities as encompassing intelligence activities, and therefore excludable from jurisdiction of the Convention’s dispute settlement procedures.⁴⁵⁴ This is a reasonable interpretation that other states are likely to follow. During the 2004 hearings on U.S. accession to UNCLOS, State Department Legal Adviser Taft testified that the Convention does not prohibit or regulate intelligence activities.⁴⁵⁵ Disputes concerning military activities, including intelligence activities, he testified, “would not be subject to dispute settlement under the Convention as a matter of law and U.S. policy. As such, [the United States] joining the Convention would not affect the conduct of intelligence activities in any way”⁴⁵⁶ On the other hand, Senators David Vitter (R-LA) and

449. UNCLOS, *supra* note 15, at arts. 282, 286.

450. *Id.* at art. 298(1)(b).

451. *Id.* at arts. 297(2)–(3), 298(1)(b).

452. *Id.* at art. 298(1)(c).

453. *Id.* at art. 298(1)(b).

454. S. REP. NO. 110-9, at 32–34, 36 (2007).

455. *The United Nations Convention on the Law of the Sea (Treaty Doc. 103-39): Hearing Before the Sen. Comm. on Foreign Relations*, 110th Cong. 51 (2007) (statement of William H. Taft IV, Legal Advisor, Department of State).

456. *Id.* at 52.

Jim DeMint (R-SC), opponents of U.S. accession to UNCLOS, argued that the military activities exemption in Article 298 does not cover intelligence activities.⁴⁵⁷ Just as the U.S. Congress manages military and intelligence activities through separate and distinct line items in the budget that remain subject to different committees, comparable to the division created in the U.S. Code by apportioning military activities into Title 10 and intelligence activities into Title 50, so too might an arbitral tribunal make a similar distinction in a case involving submarine espionage. In such a case, Vitter feared that an international court might assert jurisdiction over U.S. maritime intelligence activities.

Aggrieved coastal states that suffer submarine intrusion have political recourse, but they are unlikely to find satisfaction in the legal process. In areas such as cyber operations, states may consider resort to countermeasures to respond to provocations by another state.⁴⁵⁸ The practical difficulties of positioning a submarine in another state's territorial sea, as well as the risk that such action may result in armed conflict, means that duplicative countermeasures offer little prospect for submarine espionage.

Perhaps unsurprisingly, disagreements over submarine espionage are likely to play out in bilateral and multilateral security organizations, from regional arrangements, such as the Organization for Security and Cooperation in Europe and the Association of Southeast Asian Nations, to global entities such as the U.N. Security Council. Do these political structures relegate the law to a less meaningful position in this area? On the contrary, the rules in UNCLOS are now treated as sacrosanct, and provide the point of departure for every maritime dispute. While naturally issues of submarine espionage remain dominated by geo-strategic politics, the provisions of international law will form the language of diplomacy.

457. S. REP. NO. 110-9, at 26 (2007). In the Minority Views, the Senators stated in their objection to U.S. advice and consent:

The Treaty fails to clearly include intelligence, surveillance, and reconnaissance activities under "military activities." While administrations have stated that these terms are covered, the United States Senate and House of Representatives consider these separate functions and have different committees that oversee the intelligence community and the armed services. When there is a disagreement on terms, this disagreement is settled by the courts.

Id.

458. See Michael N. Schmitt, "Below the Threshold" Cyber Operations: The Countermeasures Response Option and International Law, 54 VA. J. INT'L L. 698, 701-07 (2014).

CONCLUSION

The extensive history of Russian and U.S. submarine espionage in the territorial sea is complemented by recent case studies from North Korea and China. The acrimonious maritime disputes and rapid expansion of submarine fleets in the Asia-Pacific region have set the conditions for an underwater incident. In such case, officials in the region and beyond will be desperate to have a roadmap to navigate the legal issues.

It is unclear whether submarine espionage in the territorial sea is a violation of UNCLOS, let alone general international law. The intentional presence of a submarine in the territorial waters of a coastal state is a violation of sovereignty of the coastal state, but the activity of espionage may not be inconsistent with international law, as spying has been tolerated by the community of states.

A foreign submerged submarine inside the territorial sea of another state has committed a delict because its presence presumably is prejudicial to the peace, good order, or security of the coastal state. Interestingly, however, a foreign submarine from State A that operates illicitly under the water of the territorial sea of State B on a spy mission to collect intelligence adverse to neighboring State C, might presume that the operation is innocent because it is not prejudicial to State B.

The clearer case involves a submarine from State A that conducts a submerged espionage operation in the territorial sea of State B that is to the prejudice of its “defense or security.” In this case, while the submarine is involved in the commission of a delict, it may not be accurate to say it “violated” the international law of the sea, or the terms of UNCLOS. The Law of the Sea Convention states that foreign ships “shall comply” with coastal state regulations and laws, but this mandate is contingent on ships that are exercising the right of innocent passage. In this hypothetical, the submarine from State A merely relinquishes the right it otherwise might enjoy to travel in innocent passage and instead has chosen to transit in passage that is not innocent, and therefore unprivileged as a matter of law.

While there is no right that may be claimed to travel in non-innocent passage, neither does there exist a law that has been violated in doing so. State A accepts the legal exposure of a transit that is unprotected by the regime of innocent passage, and in doing so accepts the political risk and legal jeopardy inherent in such operations. The remaining sets of questions coalesce around the appropriate remedy of the coastal state under the law of the sea, and as a matter of general international law.

The coastal state may “take the necessary steps” in its territorial sea to “prevent passage” that is not innocent. The scope of content of “necessary steps” is undetermined. There is similar ambiguity over how a coastal state may “require” a non-compliant warship to “leave the territorial sea immediately,” although these coastal state rights, like all state conduct, are governed by the U.N. Charter and the proscription against the use of force in Article 2(4). The presence of a submarine, even if accompanied by intelligence collection, does not on its face constitute the “threat or use of force against the territorial integrity or political independence” of the coastal state, any more than would the operation of a foreign spy inside the capitol.

Suppose, however, that foreign submarine espionage is regarded as a use of force in contravention of Article 2(4) of the Charter. In such case, the coastal state still would not be entitled to exercise the right of self-defense under Article 51. The ICJ jurisprudence on the use of force has exposed a “gap” between the use of force by one state and the threshold for a response in self-defense by the armed forces of the injured state. Only states that suffer armed attack of such “gravity” or wide-scale “effects” tantamount to a major military action are justified in resort to the use of force in self-defense.

Foreign states that operate submarines inside the territorial sea of a coastal state without permission are legally responsible for their conduct. States generally are responsible for their espionage activities, although there is a lack of effective mechanisms or institutions for pursuing such claims. The ability to take countermeasures against submarine espionage in the territorial sea runs into two major hurdles, one practical and one legal. In a practical sense, there is very little a coastal state can do except to employ force to bring an uncooperative undersea contact to the surface. Moreover, once a foreign submarine is on the surface, it is still protected legally and is beyond the jurisdiction of coastal state authorities by virtue of its sovereign immunity. The prospect for mandatory dispute resolution is similarly precluded because of the exemption of warships and military activities. These difficulties for legal action or lawful countermeasures tend to drive any type of submarine incident into the domain of diplomacy. With worsening foreign relations between Russia and its neighbors and China and its neighbors, it is uncertain whether diplomacy is up to the task.