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# Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral

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## **Abstract**

Hugo Grotius, in his work *Mare Liberum*, asserted that the world's oceans were free and incapable of acquisition by states. His work sparked a debate in the seventeenth century as to the freedom of the seas, and whether states could exclude the vessels of other states from certain waters. Grotius' viewpoint ultimately prevailed, and is still prevalent within the law of the sea. Greater security concerns of states since 11 September 2001, have raised questions as to the current extent of the doctrine of freedom of navigation, and whether the old norm remains intact. This article will consider this issue, and determine if the right to navigate freely across the world's oceans has been circumscribed. It will also attempt to apply the law to the collision of United States of America and Chinese military aircraft over the South China Sea.

## **Keywords**

Freedom, Navigation, Surveillance, Security, Legal, Issues, Surrounding, Collection, Intelligence, from, Beyond, Littoral

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# Freedom of Navigation, Surveillance and Security: Legal Issues Surrounding the Collection of Intelligence from Beyond the Littoral

Stuart Kaye\*

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## Introduction

Hugo Grotius, in his work *Mare Liberum*, asserted that the world's oceans were free and incapable of acquisition by states. His work sparked a debate in the seventeenth century as to the freedom of the seas, and whether states could exclude the vessels of other states from certain waters. Grotius' viewpoint ultimately prevailed, and is still prevalent within the law of the sea. Greater security concerns of states since 11 September 2001, have raised questions as to the current extent of the doctrine of freedom of navigation, and whether the old norm remains intact. This article will consider this issue, and determine if the right to navigate freely across the world's oceans has been circumscribed. It will also attempt to apply the law to the collision of United States of America and Chinese military aircraft over the South China Sea.

## Historical Background

Freedom of navigation has its origins in Hugo Grotius' response to the Spanish and Portuguese claims of control over the oceans and territories outside of Europe by virtue of the Papal Bull<sup>1</sup> and Treaty of Tordesillas.<sup>2</sup> These documents purported not only to give control over territory outside of Europe, but also provided for exclusive seaborne trading rights in the South Atlantic and Indian Oceans.<sup>3</sup> In reaction to this assertion, Grotius produced his seminal work, *Mare Liberum*, asserting that the oceans were incapable of appropriation by states, and that the ships of any state could journey anywhere on the world's oceans.<sup>4</sup>

In the modern law of the sea, freedom of navigation was equally perceived as important, and this status is reflected in the now superseded Geneva

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<sup>1</sup> Bull *Inter Caetera* of Pope Alexander VI, (4 May 1493) <<http://bullsburning.itgo.com/essays/Caetera.htm#theBull>>.

<sup>2</sup> Treaty of Tordesillas, (7 June 1494) <<http://www.yale.edu/lawweb/avalon/modEUR/mod001.htm>>.

<sup>3</sup> C J Colombos, *The International Law of the Sea* (6th ed, 1967) 48-49; H Caminos, 'Sources of the Law of the Sea' in R-J Dupuy and D Vignes (eds), *A Handbook of the New Law of the Sea* (1991) 29, 64-65.

<sup>4</sup> H Grotius, *The Freedom of the Seas* (reprinted 1952).

Conventions on the Law of the Sea. Article 14 of the Convention on the Territorial Sea and Contiguous Zone guaranteed a right of innocent passage to vessels, non-suspendable for waters in international straits, and article 23 indicated explicitly that such rights were available to warships.<sup>5</sup> Freedom of navigation on the high seas was guaranteed in article 2 of the Convention on the High Seas,<sup>6</sup> with article 3 of the Continental Shelf Convention ensuring that the status of waters above a state's continental shelf remained as high seas, and therefore enjoying freedom of navigation.<sup>7</sup>

These efforts had been prefaced by the International Court of Justice (ICJ) in 1949, in the *Corfu Channel Case*, which confirmed the right of innocent passage, available even to warships, passing through 'straits used for international navigation'. In resolving the case, the Court was obliged to consider *inter alia* the definition of an international strait, and the nature of innocent passage through such straits. The portion of the Channel that had been mined was within Albania's territorial sea, so the legality of the passage of the ships was directly in issue. Albania had argued that British warships had no right to pass through the Channel because it was not an essential or significant international thoroughfare.<sup>8</sup> The Court rejected this view emphatically, noting that the volume of traffic through the strait did not demote its character as an international strait. Rather it noted that the decisive factors were that it was a body of water connecting two parts of the high seas<sup>9</sup> and that it was being used for international navigation. Although the level of shipping activity through the Corfu Channel was not great, the Court was satisfied that it was used by vessels under a variety of flags, and thereby it qualified as an international strait.<sup>10</sup>

The Court was also prepared to state that foreign vessels, including warships, had a right of innocent passage during peacetime through all international straits. Further this right existed without the necessity of the foreign vessel obtaining prior authorisation to pass through. Such a right existed as a result of international custom, and existed even during the state of high tension that existed between Greece and Albania, the two littoral states.<sup>11</sup> The Court was also satisfied that the passage of the warships, even to test whether Albania would fire upon them, was still innocent, as although the ships were at action stations, their guns were trained fore and aft as for normal cruising.

The current 1982 Convention on the Law of the Sea<sup>12</sup> maintains the approaches found in the *Corfu Channel Case* and the Geneva Law of the Sea

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<sup>5</sup> Convention on the Territorial Sea and Contiguous Zone (29 April 1958), 516 UNTS 205.

<sup>6</sup> Convention on the High Seas (29 April 1958), 450 UNTS 82.

<sup>7</sup> Convention on the Continental Shelf (29 April 1958), 499 UNTS 311.

<sup>8</sup> *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 28.

<sup>9</sup> The waters of the Adriatic Sea were still regarded in 1949 as high seas, as the territorial sea was generally no more than three-to-four nautical miles in breadth, and the EEZ was still some decades from international acceptance.

<sup>10</sup> Above n 8 28-29.

<sup>11</sup> Ibid 28.

<sup>12</sup> Convention on the Law of the Sea (10 December 1982), 1833 UNTS 397.

Conventions. It deals with navigation in two distinct contexts. First, it examines freedom of navigation in the territorial sea and archipelagic waters. Three passage regimes are established in these waters: innocent passage, transit passage, pertaining to straits used for international navigation, and archipelagic sealanes passage. It then moves to consider freedom of navigation in areas beyond national sovereignty. It is profitable to examine each in turn before considering whether the Convention's structure within the United Nations (UN) system may impose its own limitations on navigation for surveillance purposes.

### Navigation in Areas under National Sovereignty

The Law of the Sea Convention divides the world's oceans into maritime zones, based on the distance a particular location is from the nearest land. Waters closest to the coast, are susceptible to appropriation by states as part of their sovereignty and national airspace. Waters closest to the coast that can be enclosed on one of the variety bases at international law, are internal waters and are accorded the same status in terms of access as land territory. Beyond these waters, to a maximum distance of 12 nautical miles, a coastal state may assert a territorial sea, which is also part of its sovereignty and national airspace, but is subject to limited use by ships of other states.

Within areas subject to national sovereignty, the Law of the Sea Convention prescribes three types of passage by vessels, none of which require explicit consent to be obtained by the ship concerned. The first, through the territorial sea, is the regime of innocent passage.<sup>13</sup> The second, through international straits by ships and aircraft, is the regime of transit passage,<sup>14</sup> while the third, archipelagic sealanes passage is limited to travel by ships and aircraft through archipelagic waters in certain designated lanes or routes normally used for international navigation.<sup>15</sup> Each will be considered in turn.

The regime of innocent passage deals with navigation by ships only in the territorial sea of a coastal state, and as noted above, it retains the same approach as that used in the Territorial Sea Convention and the *Corfu Channel Case*. Article 17 of the Law of the Sea Convention grants ships the right of innocent passage through the territorial sea, while the remaining articles in part II, section 3A of the Convention indicate how the right is circumscribed. Essentially, vessels are required to transit in a continuous and expeditious fashion, on the surface of the ocean. Article 19 requires that a ship's passage cannot be prejudicial to the peace, good order or security of the coastal state, and that a range of activities that fall outside this requirement be explicitly listed, including 'any other activity not having a direct bearing on passage'.

Several points can be made in relation to intelligence gathering and innocent passage. First, if the purpose of gathering any intelligence from a coastal state is to prejudice its peace, good order or security, then the action could be perceived as contrary to international law, on the basis that it is action that is associated

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<sup>13</sup> Ibid, part II.

<sup>14</sup> Ibid part III.

<sup>15</sup> Ibid part IV.

with a possible use of force against that state.<sup>16</sup> The UN Charter would make such an activity unlawful, unless it was undertaken in furtherance of action authorised by the UN Security Council, or in self-defence.<sup>17</sup> The Law of the Sea Convention clearly does not intend to facilitate intelligence gathering as a prelude to the use of force, and this is confirmed in article 301.<sup>18</sup> However, it is conceivable that not all intelligence is intended to have the objective of prejudicing international peace and security, so further consideration of article 19 is needed.

A number of examples are given in article 19 of activities that are inconsistent with innocent passage, and several are pertinent to intelligence gathering activities:

- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.

In the context of research and survey, intelligence gathering with a view to establishing the bathymetry of the approaches to a coastal state, potentially to utilise for landing craft at some future date will not be permissible. Similarly, using electronic means of surveillance that interfere with communications in the littoral state will not be consistent with the Convention. Many types of intelligence gathering will also be matters that do not have a direct bearing on passage, and consequently be inconsistent with international law.

However, a different question arises in the case of data obtained that is incidental to normal navigation. Normal navigation will require some forms of data gathering to take place. Safe operation of a ship will require it to know its position, and also, if it is close to shore or other navigational hazards, and the depth of water in which it is operating. Similarly, the ship may also operate standard navigational radar, in order that it may avoid other vessels navigating in its vicinity. Use of this equipment will mean that data may be collected by the vessel exercising a right of innocent passage, but clearly this is data incidental to safe navigation, and is not collected to prejudice the peace, good order and security of the coastal state. Neither would it be practical, or even desirable, for vessels exercising a right of innocent passage to dispose of data collected incidental to their safe navigation through a territorial sea, even if such data might conceivably have military application.

The issue becomes even more problematic in the context of international straits. The Law of the Sea Convention's provisions on the question of

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<sup>16</sup> In this context, it is not the act of gathering intelligence that is of itself an unlawful act, but rather as integral part of a wider unlawful use of force.

<sup>17</sup> See I A Shearer, *Starke's International Law* (11th ed, 1994) 484-90.

<sup>18</sup> Art 301, Law of the Sea Convention, above n 12, provides: 'In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.'

international straits and the regime of transit passage are to be found in part III. It deals with four categories of strait:

1. Straits which are subject to international conventions of long-standing;
2. Straits subject to the regime of "transit passage";
3. International straits with other routes of similar convenience (the so-called "Messina Exception")<sup>19</sup>; and
4. Straits which provide access between the high seas or an exclusive economic zone and the territorial sea of a foreign State.<sup>20</sup>

The three categories other than transit passage are all ultimately subject to innocent passage rules, which are essentially analogous to those under the Territorial Sea Convention. Under the first category, article 35(c) was designed to protect well-established arrangements, like those in relation to the Turkish Straits, from being brought into question by the 1982 Convention. However such arrangements are most unusual, and are not of general application. The third category practically downgrades certain international straits to the status of mere territorial waters. This can occur where the strait does not serve as a significant route for international navigation. The rationale behind it is that if international shipping will not be inconvenienced by the potential withdrawal of an international strait, then there is little reason for the affected coastal state to be burdened with having the care of an international strait.

Part III's principal focus is on stating the content of the regime of transit passage. Such passage is defined as taking place by vessels navigating through an international strait, from one part of the high seas or an exclusive economic zone (EEZ), to another part of the high seas or EEZ. Transit passage does not preclude entering or leaving a state bordering the strait, subject to the entry requirements of such a state.<sup>21</sup> Passage must be without delay, threat or use of force or any other activities apart from those necessary for normal ship (or aircraft) operation.<sup>22</sup> Article 39(2) also requires compliance with general international regulations pertaining to safety and control of pollution.

Most significant, however, is article 44, which provides that transit passage shall not be hampered or suspended. This provision was designed to meet the objective of the maritime powers to ensure that key international straits could not be subject to closure. It makes it clear that under no circumstances can a coastal state block an international strait to vessels, although transiting ships must comply with such regulations that can be validly applied to them.<sup>23</sup>

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<sup>19</sup> See generally L M Alexander, 'Exceptions to the Transit Passage Regime: Straits with Routes of "Similar Convenience' (1987) 18 *Ocean Development and International Law* 479.

<sup>20</sup> See D R Rothwell, 'International Straits and UNCLOS: An Australian Case Study' (1992) 23 *Journal of Maritime Law and Commerce* 461, 467-69.

<sup>21</sup> Art 38(2), Law of the Sea Convention, above n 12.

<sup>22</sup> Art 39, Law of the Sea Convention, above n 12.

<sup>23</sup> J N Moore, 'The Regime of Straits and the Third United Nations Conference on the Law of the Sea' (1980) 74 *American Journal of International Law* 77, 102-105.

The regime of innocent passage has only limited application to states used for international navigation. Article 45 provides that straits falling within the 'Messina exception' or between the high seas or EEZ and the territorial sea of a foreign state are subject to the regime of innocent passage. This suggests that the range of activities permissible under the transit passage regime is wider than under innocent passage, although the stipulation that ships and aircraft transiting a strait shall 'refrain from any activities other than those incident to their normal modes or continuous and expeditious transit unless rendered necessary by *force majeure* or by distress' would seem to indicate the differences are minor.

The issue of what constitutes 'normal mode' is not clarified in the Convention, and is an area of where states have different views.<sup>24</sup> Most archipelagic states and strait states, where a view has been expressed, have taken the view that normal mode essentially equates to the regime of innocent passage, albeit in a form that cannot be suspended. The maritime powers have, by and large, adopted a view of normal mode to suggest that what constitutes normal ship's or aircraft operation is encompassed by the concept.<sup>25</sup> Therefore, if a submarine's normal mode of travel is submerged, then transit passage can be exercised by submerged submarines. Similarly, if an aircraft-carrier battle group normally transits the oceans with a flight overhead for its protection, then such a flight can be launched, retained and landed as part of normal mode, even though for the individual aircraft the passage will not be expeditious, and such an activity would be directly inconsistent with the regime of innocent passage.

This difference in view is of direct relevance to the issue of surveillance and freedom of navigation. In its normal operation, a warship may have a range of sensors and instruments, which it deploys for its safe passage, and other vessels that may accompany it. These sensors may permit the collection of even more substantial amounts of possibly sensitive data. For example, the radar range of an aircraft-carrier battle group is substantially increased by the use of aerially mounted radar, and such aircraft may be incidents of normal mode. A coastal state may well take a very different view on the legitimacy of deploying sophisticated radar aircraft in its national airspace, even for a short period.

For archipelagic sealanes passage, essentially the same rules used in the context of transit passage are prescribed, although the area in which this type of passage can be accessed is regulated. Archipelagic sealanes passage must be in a designated lane, or failing such designation, in a route used by international navigation through the archipelago. As with transit passage, 'normal mode' is permissible, and such passage cannot be impeded or suspended. The right to

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<sup>24</sup> See M H Nordquist, *United Nations Law of the Sea Convention 1982: A Commentary* (vol 2, 1993) 342-48.

<sup>25</sup> For a discussion of normal mode see J Astley, 'The Law of the Sea and Naval Operations' (1997) 42 *Air Force Law Review* 119, 134-35; R J Grunawalt, 'United States Policy on International Straits' (1987) 18 *Ocean Development and International Law* 445; D G Stephens, 'The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations' (1999) 19 *California Western International Law Review* 283, 290-91.



archipelagic sealanes passage is only available in lanes, and if a vessel is outside a lane, it is entitled to pass through archipelagic waters under a right of innocent passage.

With respect to archipelagic sealanes passage, the issues discussed for transit passage are the same, although magnified by the circumstances of some archipelagos. While an aircraft-carrier battle group may pass through an international strait within a matter of hours, passage down an archipelagic sealane may take days, and therefore represent a much greater risk to the state whose waters the ships pass. Further, such waters may be far-less confined, as in the case of the waters of the Indonesian archipelago, where the benefit of a 50-mile-wide lane, or the use of undesignated sealanes, give transiting vessels great scope for surveillance while in their normal mode.

The legality of intelligence gathering by vessels and aircraft in the territorial sea raises a number of interesting questions. In the context of vessels, exercising a right of innocent passage through the territorial sea, it is clear that a vessel must only undertake activities that are incidental to its safe navigation, and not to engage in activities that are 'prejudicial to the peace, good order or security of the coastal State'. Aircraft have no right of innocent passage, but only rights of transit and archipelagic sealanes passage.

The situation for vessels and aircraft lends itself to potentially greater width in the context of transit and archipelagic sealanes passage. In these cases, the wider interpretation of normal mode would permit a flag state to collect not merely data that was incidental to safe navigation, but to operate equipment and sensors that would normally be used in the operation of the vessel or aircraft. Obviously, such equipment must not be operated in a manner that prejudices the security of the coastal state, but it clearly would give a transiting vessel a much wider range of options in respect of intelligence gathering. The Convention would seem to permit passive intelligence gathering as a consequence of the provisions, as a coastal state would be unable to ascertain what material the ship or its aircraft might have obtained, and is explicitly unable to take steps against the ship to ascertain what might have been collected.<sup>26</sup>

## **Navigation Beyond National Sovereignty**

Beyond the territorial sea, the Law of the Sea Convention also confirms there is freedom of navigation for all vessels. Article 87 provides:

1. The high seas are open to all States, whether coastal or land-locked.

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<sup>26</sup> Sovereign immunity is explicitly retained in the Law of the Sea Convention in a number of provisions. Art 32 provides that in the context of the regime of innocent passage: 'With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.' The exceptions referred to only require a vessel to be asked to leave a coastal state's territorial sea, and responsibility be attributed to the flag state for harm caused.

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

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

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

The impact of this provision finds its way into the regime of the EEZ by virtue of article 58, which expressly incorporates rights of freedom of navigation and overflight.

The issue of military activities, including surveillance, in the EEZ of another state is one not directly dealt with in the Law of the Sea Convention.<sup>27</sup> While the Convention makes it plain that military exercises and weaponry testing in the territorial sea of a coastal state would be contrary to the regime of innocent passage, there is no equivalent restriction articulated with respect to other maritime zones. However, neither is there any authorisation with respect to such exercises, with there being no inclusion of military exercises or related activities in the list of freedoms.

The lack of direct reference to military activities is not fatal to the case for the conduct of surveillance in the EEZ of another state. The rights listed in article 87(1) are by no means an exhaustive list, and are merely specifically enunciated examples. This is explicit in the use of the phrase '*inter alia*'. Further, the freedoms of the high seas are described as being subject to the conditions set down in the Convention and 'other rules of international law'. The use of this language makes it clear that the Law of the Sea Convention is not intended to be the only source of law in relation to the use of the high seas or EEZ.

If the case for freedom to undertake military surveillance in another state's EEZ can be made, it is clearly subject to some qualification. For this, the crux of the issue, is the meaning of the phrase 'with due regard'. This qualification is applied to high-seas freedoms generally in article 87(2), and it would seem logical that one must have due regard to the rights of others while navigating through the EEZ.<sup>28</sup>

<sup>27</sup> Eg see G V Galdoresi and A G Kaufman, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict' (2002) 32 *California Western Journal of International Law* 253; see also D Letts, 'Recent Australian Experience of the Law of the Sea and Military Operations' this volume.

<sup>28</sup> See F Francioni, 'Peacetime Use of Force, Military Activities, and the New Law

Undertaking surveillance of another state from that state's EEZ would not, in the ordinary course of events, be without due regard for other ships or aircraft. In the case of a ship, the act of navigating safely, with data-gathering sensors deployed would not necessarily interfere with other vessels' use of the waters, unless the use of a sensor, such as a towed array, in some way impeded fishing or navigation. With aircraft, it is submitted that the prospect of such inconvenience is even more unlikely.

One issue that could be relevant in assessing the legality of military surveillance from the EEZ, or high seas, relates to whether such surveillance might constitute a threat to international peace and security. The Law of the Sea Convention provides limited assistance through article 88, which provides: 'The high seas shall be reserved for peaceful purposes.'

A wide reading of this provision would, in theory, see great limitation of the uses of warships on the high seas, and the potential circumscription on intelligence gathering. When read with the Preamble, which invokes the Convention's role in the furtherance of peace and security in the world,<sup>29</sup> it suggests that only peaceful uses of the sea are permissible. By extension this could be drawn into the EEZ, as article 58 adopts the high-seas freedoms in the Convention, and explicitly includes article 88 in this list.<sup>30</sup> Similarly, the provisions with respect to marine scientific research under part XIII of the Convention indicate that marine scientific research can only be undertaken for peaceful purposes.<sup>31</sup> A case could be made that military surveillance from the high seas or another state's EEZ was incompatible with the Law of the Sea Convention.

Such an interpretation has not been favoured by many states or publicists.<sup>32</sup> The *San Remo Manual on Armed Conflicts at Sea*, which sought to update and consolidate the law of armed conflict at sea, makes it clear that armed conflict at sea can take place on the high seas, and in certain circumstances in the EEZ

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of the Sea' (1985) 18 *Cornell International Law Journal* 203, 215. See also Nordquist, above n 24, 553-65.

<sup>29</sup> The Preamble states in part: 'Prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world, ...' and 'Believing that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.'

<sup>30</sup> Galorisi and Kaufman, above n 27, 275-78.

<sup>31</sup> Art 240, Law of the Sea Convention, above n 12 provides: 'In the conduct of marine scientific research the following principles shall apply: (a) marine scientific research shall be conducted exclusively for peaceful purposes.'

<sup>32</sup> On this point see D J Attard, *The Exclusive Economic Zone in International Law* (1987) 75; F Orrego Vicuna, *The Exclusive Economic Zone: Regime and Nature under International Law* (1989) 110-13; Galdorisi and Kaufmann, above n 27, 274-76.

of a neutral state.<sup>33</sup> The *Manual* states that belligerents must have due regard to the uses to which another state may wish to put its EEZ and thus avoid damage to the coastal state. Clearly, if armed conflict can occur in another state's EEZ, it is difficult to assert that surveillance conducted in a passive way is contrary to international law.

First, such an interpretation would be difficult to reconcile with the regime of innocent passage that is applicable to warships. Any warship may constitute a danger to states in its vicinity. By its very nature, such a ship is designed to engage in, or to assist other ships to engage in armed conflict. It may be difficult, if not impossible, to determine whether a transiting warship has activated passive sensors, and certainly inconsistent with international law to stop and board such a vessel to ascertain this, given the sovereign immune status of the vessel.<sup>34</sup>

None of the above analysis undermines the legitimacy of the voyages intended to be a threat to international peace as unlawful. Certainly, a ship purporting to exercise a right of innocent passage that was in another state's territorial sea for the purpose of intelligence gathering as a prelude to armed conflict would not be consistent with the Convention. An argument could also be made that a similar voyage that remained in the EEZ might also be unlawful, as its intention was to assist a manifestly unlawful act. However, in such a case it is the wider behaviour and motivation that would render such a journey unlawful, not the actual act of navigation itself. Consequently, routine intelligence-gathering flights or voyages through another state's EEZ would not of themselves be illegal, unless they formed a prelude to an unauthorised attack on another state.

### The Downing of the US Navy EP-3E Aries

On 1 April 2001, there was a mid-air collision off the southern coast of China between an aircraft of the People's Republic of China, a F-8-II 'Finback' fighter aircraft, and an American EP-3E Aries aircraft. The Chinese fighter crashed into the sea, resulting in the loss of its pilot, Wang Wei. The American EP-3E was severely damaged, and ultimately made an emergency landing at Lingshui airfield on Hainan Island in China. The aircrew of the American aircraft were arrested, and the incident sparked a diplomatic crisis. Thirteen days later the aircrew were released, as was the aircraft in June 2001, when it was airlifted from China by a leased Russian Antonov cargo aircraft.<sup>35</sup>

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<sup>33</sup> L Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995) [10].

<sup>34</sup> The issue of sovereign immunity within the territorial sea was considered above n 26. Other provisions also support sovereign immunity for warships and government vessels on non-commercial service beyond the territorial sea. Arts 42(5) and 236 explicitly refer to the doctrine with approval. In terms of intervention beyond the territorial sea, there is nothing to suggest the immunity of a warship is diluted in any way.

<sup>35</sup> The incident is described in S D Murphy (ed), 'Contemporary Practice of the United States Relating to International Law' (2001) 95 *American Yearbook of*

The collision followed a series of close passes and shadowing of American EP-3Es by Chinese fighters. The fighters were attempting to deter the American aircraft from passing close to the Chinese coast, and utilise the EP-3E's highly sophisticated intelligence-gathering capabilities. China regarded the flights as essentially 'spy flights' and considered them contrary to international law. The United States' attitude was the aircraft were in international airspace, and therefore were exercising their freedom of overflight in international law. Both states had been in dispute over similar flights for a considerable period of time prior to this incident, with it being the regular practice of Chinese fighter pilots in flying at extremely close range to American planes, ostensibly to deter them from continuing. Several near misses had occurred during earlier flights prior to the collision in this incident.

The collision between the United States and Chinese aircraft occurred in international airspace as recognised by both states.<sup>36</sup> It also took place outside a 24-nautical-mile security zone claimed by China, but not recognised by the United States.<sup>37</sup> While the EP-3E ultimately did enter Chinese national airspace, and landed on Chinese territory, it was also not disputed by both states that this incursion was motivated entirely by the distress the aircraft was in as a result of the collision. The key issue in this context relates to the activities undertaken by the aircraft prior to the collision.

The Chinese objection to the flights centred on their purpose. China considered the activities as being overt intelligence gathering by another military power, which were designed to provide detailed information that could be used in any conflict. Such activities therefore, according to China, undermined the international peace and security of the EEZ, and therefore were not lawful.<sup>38</sup> The Chinese Foreign Affairs Ministry stated:

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*International Law* 626; see Galdorisi and Kaufmann, above n 27, 292-94; see also <<http://home.wxs.nl/~p3orion/hainan.html>>.

36 China has proclaimed territorial sea baselines, which the United States has protested. The incident occurred more than 12 nautical miles from the Chinese baselines, so that its occurrence in international airspace was not in dispute. The baselines were proclaimed in 1996: Declaration of the Government of the People's Republic of China on the baselines of the territorial sea, (15 May 1996) <[http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN\\_1996\\_Declaration.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1996_Declaration.pdf)>. The American protest is cited in Naval War College, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (1997) 1-77.

37 Art 13 of the Law of the Territorial Sea and the Contiguous Zone (25 February 1992) provides that the Chinese exercise jurisdiction over security within the contiguous zone. This is rejected by the United States as inconsistent with art 33 of the Law of the Sea Convention, which has no reference to a security jurisdiction in respect of the contiguous zone. The 1992 US protest is cited in Naval War College, above n 36, 1-90.

38 A statement from the Chinese Embassy in Washington DC noted: 'The surveillance flight conducted by the US aircraft overran the scope of "free overflight" according to international law. The move also violated the United Nations Convention on the Law of the Sea, which stipulates that any flight in airspace above another nation's exclusive economic zone should respect the rights of the country concerned. Thus, the US plane's actions posed a threat to the

The act of the US side constitutes a violation of the UN Convention on the Law of the Sea (UNCLOS), which provides, among other things, that the sovereign rights and jurisdiction of a coastal State over its Exclusive Economic Zone, particularly its right to maintain peace, security and good order in the waters of the Zone, shall all be respected and that a country shall conform to the UNCLOS and other rules of international law when exercising its freedom of the high seas.<sup>39</sup>

For China, the collision that subsequently occurred was the result of an unlawful and unwanted activity, which the Chinese aircraft, like others before them, were doing their best to deter without the use of force.

The United States' view was that any activity that occurs in international airspace should be treated as legal, unless it involves hostilities against another friendly power. The use of passive systems to collect information from an area not subject to national jurisdiction is therefore entirely legitimate. The action by the Chinese pilots in flying at close range to American aircraft in international airspace was reckless, and endangered their lives as well as the lives of the EP-3E, pilots, as was tragically demonstrated on 1 April 2001.

While the Chinese objections are understandable, and in other circumstances intelligence-gathering flights could be a provocative prelude to an armed conflict, the American position probably more closely reflects the current content of international law. Freedom of navigation in international airspace is not regulated, at least for state aircraft. If there is no restriction on the flight path of such an aircraft, it is not tenable to restrict the use of sensors on board. To forbid its movement on the basis of its status as a military state aircraft would be detrimental to freedom of navigation, even on the high seas, which is manifestly not the intention of the Convention, state practice or the ICJ in the *Corfu Channel Case*.<sup>40</sup>

## Conclusion

The gathering of intelligence from the sea and air raises difficult questions for the international community. The Law of the Sea Convention largely avoids issues surrounding military activities. This is both an indication of the tension surrounding these issues, and avoidance itself has created difficulties. States have sought to assert restrictions, and these in turn present a risk to the international community. Incidents such as the downing of the US EP-3E raise international tensions and increase the likelihood of international conflict. The international community should endeavour to clarify the rights and duties of

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national security of China.' <<http://www.chinaembassy.org/eng/9585.html>>.  
<sup>39</sup> Chinese Ministry of Affairs Press Release (3 April 2001) <<http://www.fmprc.gov.cn/eng/9607.html>>.

<sup>40</sup> Ivan Shearer himself recognised this as the logical outcome of the Chinese argument in an unpublished paper presented to a conference organised by the Asia-Pacific Centre for Military Law at the University of Melbourne in February 2002: I A Shearer, 'Military Activities in the Exclusive Economic Zone: The Case of Aerial Surveillance', February 2002. Cited in Galorisi and Kaufman, above n 27, 293.

states in the context of navigation and intelligence gathering, to avoid incidents such as that in the South China Sea occurring.

Such clarification would also end the international debate surrounding the claimed security zones of many states. These zones claimed to require entering warships to give periods of notice, and an obligation to seek permission to enter, are asserted by a number of states. Clearly intelligence gathering, or even loitering in the waters just beyond a coastal state's territorial sea would fall foul of some of these zones, and some degree of clarity to indicate their legality or otherwise would be useful. At present, while the Convention does not authorise security zones, with the exception of a 500-metre safety zone around offshore installations,<sup>41</sup> there is no clear prohibition on such activities. Prohibition can be inferred from the rights granted elsewhere, as illustrated above. The need to clarify rights and obligations will only serve to reduce potential tension and misunderstanding between states.

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<sup>41</sup> These tiny zones are for navigational safety as much as anything else. See art 60, Law of the Sea Convention, above n 12.