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'Peaceful Purposes' and Other Relevant Provisions of the Revised Composite Negotiating Text: A Comparative Analysis of the Existing and the Proposed Military Regime for the High Seas

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"PEACEFUL PURPOSES" AND OTHER RELEVANT PROVISIONS OF THE REVISED COMPOSITE NEGOTIATING TEXT: A COMPARATIVE ANALYSIS OF THE EXISTING AND THE PROPOSED MILITARY REGIME FOR THE HIGH SEAS*

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I. INTRODUCTION

During the course of the next few decades, technological developments will permit military planners to focus an increasing amount of attention on the utilization of transnational spatial areas for military purposes.[1] The areas most likely to be affected include outer space, the polar zones, and the oceans.[2] From the vantage of the strategic analyst, the militarization of such areas is attractive primarily because it would shift the locus of strategic conflict away from presently targeted inhabited areas[3] and, as a result, increase the operational utility of highly destructive nuclear weapons. Though a shift of this nature admittedly has a certain appeal, in the final analysis it could well have a debilitating effect upon the semblance of international tranquility which now exists. A shift of the locus of strategic conflict would remove a good deal of the existing uncertainty about the extent of the destructive consequences of thermonuclear war, and with such a removal may go whatever constraints against that or any other

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1. Gray, *The Strategic Forces Triad: End of the Road?*, 56 FOR. AFF. 771, 780 (1978) notes the increasing significance of technology in the development of space-based laser ballistic missile defense.

2. *See* Gelber, *SALT and the Strategic Future*, 22 ORBIS 283, 288-291 (1978).

3. A temporary strategic advantage may also result. *See generally* Evensen, *Present Military Uses of the Seabed and Foreseeable Developments*, 3 CORNELL INT'L L.J. 121 (1970).

type of conflict which have grown in response to the uncertainty. The superpowers may become less circumspect in their international political dealings if technology manages to shift the locus of strategic conflict to areas where thermonuclear war may be fought with only a modicum of personal and physical destruction. The end result could be an increase in the incidence of superpower confrontation and, thus, an increase in the likelihood of thermonuclear conflagration.

For those who keep abreast of militarily useful technological developments, as well as the evolution of strategic thinking, it will come as no surprise that there is already a discernible trend toward the militarization of both outer space and the oceans. In fact, for some time now the United States and the Soviet Union have been striving to perfect anti-satellite weapons (ASAT)[4] and improved devices for strategic anti-submarine warfare (ASW).[5] Reportedly, the Soviet Union also continues to work toward developing an operational charged particle beam weapon[6] which, conceivably, could be based on earth and utilized to destroy incoming intercontinental ballistic missiles (ICBMs), or stationed in outer space and directed against targets on earth or objects in outer space.

It seems certain that interest in these and other weapons systems designed for use in transnational spatial areas will intensify given the fact that the theoretical rationale which, to some degree, serves to stimulate strategic planning and militarily useful technological development has evolved from massive retaliation,[7] to mutual assured destruction,[8] and, presently, is moving in the

4. *See* Zedalis and Wade, *Anti-Satellite Weapons and the Outer Space Treaty of 1967*, 8 CAL. W. INT'L L.J. 454 (1978).

5. *See* Zedalis, *Military Uses of Ocean Space and the Developing International Law of the Sea: An Analysis in the Context of Peacetime ASW*, 16 SAN DIEGO L. REV. 575 (1979).

6. *See* Robinson, *Soviets Push for Beam Weapon*, 106 AV. WEEK & SPACE TECH. 16 (May 2, 1977).

7. This doctrine, formulated in the years immediately following the Second World War, was an articulation of the position of the U.S. that any threat to the stability of the Western Alliance System would result in immediate and complete extirpation of the Communist Bloc.

8. This doctrine developed in the late 1960's and 1970's following the precipitous growth of Soviet nuclear weaponry. The theory provides that nuclear conflict can be deterred by assuring potential opponents that any nuclear attack will be met with retaliation in kind. The objective is to hold the urban/industrial centers of the respective combatants hostage.

direction of counterforce capability.[9] With each previous stage of the doctrinal ontogeny, theorists have actuated demands for advanced weapons systems in the expectation that these systems would further deter strategic conflict. But, given the fact that deterrence is largely a product of the apprehension of destructive retaliation, should the acquisition of a counterforce capability lead to further militarization of transnational spatial areas, deterrence could be lost. The chances of conflict may increase since such militarization might well shift the locus of strategic conflict, thereby largely insulating urban/industrial centers from the direct impact of thermonuclear war. This would indeed be an ironic outcome to the evolutionary development of strategic doctrine.

In view of the short term and the long term international instability which may be generated by the militarization of outer space, the polar zones, or the oceans, it is imperative that the prescriptions of international law affecting military utilization of such areas be thoroughly examined in order to determine if adequate and effective restrictions or limitations on such activities exist. This study will initiate and hopefully stimulate continuing interest in such an examination by scrutinizing the international legal prescriptions which affect various military uses of the high seas. Though brief reference will be made to those international conventions which regulate most offensive and defensive strategic nuclear uses of the oceans, the specific objective of this study is to analyze the principles enunciated in both the 1958 High Seas Convention[10] and Parts VII and XI of the Revised Composite Negotiating Text (RCNT),[11] produced at the eighth session of the Third United Nations Conference on the Law of the Sea (UNCLOS III), in order to determine the extent to which the provisions of the RCNT, including those provisions which reserve the high seas to

9. This doctrine has been undergoing development since the advent of relative nuclear parity and "essential equivalence" between the strategic nuclear forces of the U.S. and the U.S.S.R. In general, the doctrine reflects the need to secure both the capability to absorb an initial nuclear strike and emerge with enough weapons to credibly threaten to destroy the opponents military, civilian, and industrial complex with a responsive strike unless capitulation is forthcoming, as well as the capability to launch an initial strike which eliminates the opponent's ability to meaningfully respond. *See* Wilson, *"Counterforce" Arms Attract U.S., Soviets*, WASH. POST, June 1, 1979, at A-1, col. 6.

10. The Convention on the High Seas, *done* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (effective Sept. 30, 1962) [hereinafter cited as 1958 High Seas Convention].

11. U.N. DOC. A/CONF.62/WP.10/REV.1, *reprinted in* 18 INT'L LEGAL MAT'LS 686 (1979).

use for "peaceful purposes," limit or proscribe military uses of the water surface, the navigable water column, the bed, and the subsoil of the high seas, not limited or proscribed by the 1958 Convention or any other international convention.

II. MILITARY USES OF THE HIGH SEAS

Before proceeding to discuss the applicable principles contained in the 1958 High Seas Convention, and noting in detail any possible changes to be made in the regime articulated in that Convention by the provisions of Parts VII and XI of the RCNT, it may prove beneficial, for purposes of analytical context, to describe generally and without regard to the limitations of international law, some of the possible military uses of the water surface, the navigable water column, the bed, and the subsoil of the high seas. Basically, all such military uses of the high seas fall into four general categories: 1) navigation or some other conceptually related, yet functionally distinct, use of the water surface or navigable water column; 2) deployment of *seabased* missiles for offensive or defensive strategic purposes; 3) deployment of *seabed based* surveillance devices and weapons systems for both strategic and tactical purposes; and, 4) various types of military research, including that dealing with the testing of weapons.

Navigational and related uses of the water surface and water column are perhaps the most typical and prevalent of all naval military activities on the high seas. In essence, such activities are performed as part of everyday naval operations or periodic conditioning maneuvers. The activities include transiting of surface ships and submarines as well as various anti-ship exercises,[12] conducted on the water surface, and ASW exercises,[13] conducted below the water surface in the navigable water column. Most operational and maneuver activities are designed to effectuate one of the traditional missions of sea control,[14] projection of power ashore,[15] or naval presence.[16] Generally speaking, while the projec-

12. *See generally* Turner, *The Naval Balance: Not Just A Numbers Game*, 55 FOR. AFF. 339 (1977).

13. *Id.*

14. The traditional missions of sea control include the capacity to assert one's own use of the seas and to deny that use to others. *Id.* at 342.

15. The projection of power ashore includes the ability to threaten and strike effectively military targets along the littoral of the enemy or deep inside its territory. *See* Turner, *Missions of the U.S. Navy*, 26 NAVAL WAR C. REV. 2, 8 (1974).

16. Naval presence includes the orchestrated, non-combat use of seapower to secure

tion of power ashore and the naval presence missions are performed by nuclear and conventional powered aircraft carriers, as well as cruisers and destroyers armed with ship-to-ship and ship-to-shore missiles, the assertion and denial aspects of the sea control mission are performed by submarines, aircraft, or ships capable of launching missiles, and attack submarines capable of launching torpedoes.

In addition to sea control, projection of power ashore, and naval presence, the fourth traditional naval mission is strategic deterrence. This fourth mission is presently fulfilled by Polaris/Poseidon missile launching nuclear submarines (SSBNs). However, seabased offensive strategic missile deployment will undoubtedly increase in the upcoming decades. Evidence of this can be seen in the fact that the vulnerability of the U.S. landbased intercontinental ballistic missile (ICBM) system[17] has stimulated some strategic theorists to suggest that the soon to be developed MX missile be deployed in pairs aboard several hundred conventionally powered submarines which would constantly navigate in the water column within two-hundred miles of the U.S. littoral.[18] This mode of deployment, however, has apparently not received serious consideration.[19] Another possible deployment scenario might involve placing ICBMs on stationary launching pads fixed to the ocean floor or on huge mobile track platforms capable of moving along the ocean

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an international political objective. *See generally* E. LUTTWAK, THE POLITICAL USES OF SEA POWER 1-38 (1974).

17. For the seminal writing on this matter, *see* Nitze, *Assuring Strategic Stability in an Era of Detente*, 54 FOR. AFF. 207 (1976).

18. *See* Greenberg, *Missiles at Sea*, WASH. POST, Aug. 7, 1979, at A-19, col. 2.

19. Gray, *supra* note 1, at 785 notes three of the four multiple aim point (MAP) deployment modes given serious consideration. The ones listed include: 13-20 mile long buried trenches; dispersed and hardened horizontal or vertical shelters; and, deployment in pools of water. The fourth major mode is on strategic aircraft. Early reports indicated that the Administration favored the former mode of deployment. *See* Zelnick, *Paul Nitze: The Nemesis of SALT II*, WASH. POST, June 24, 1979, at G-1, G-4, col. 6. Some suggest the dispersed vertical shelter mode of deployment was abandoned because of Soviet insistence that it would violate the new SALT II accord. *See* Evans and Novak, *MX: Son of B-1?*, WASH. POST, June 18, 1979, at A-23, col. 5. Notwithstanding this, recent reports indicate that at the writing of this article (Fall 1979) the Administration has adopted a synthesis of the buried trench and vertical/horizontal shelter schemes. *See* Walsh, *Carter to Deploy MX in Utah, Nevada*, WASH. POST, Sept. 8, 1979, at A-1, col. 3. This would involve some 200 oval shaped roadways, each having 23 spur roads leading to buried launching platforms. One MX stationed at each of the 200 roadways would be shuttled between each of the 23 launching platforms. *See* Kaiser, *Complicated "Race Track" Scheme Favored for Basing New MX Missile*, WASH. POST, July 26, 1979, at A-3, col. 1.

floor from one location to another.[20]

The increasing vulnerability of ICBMs and intercontinental bombers has also rekindled interest in ballistic missile defense (BMD) systems.[21] In the next few decades there may be significant pressures to develop additional effective systems capable of intercepting incoming ICBMs.[22] If this happens, there may very well be an effort to take advantage of the natural benefits of a seabased strategic defensive missile system.[23] In short, a BMD system employing seabased weapons stationed aboard surface ships, submarines, or on submerged stationary or mobile launching platforms, would appear to provide the advantages of mobility and/or concealment, and, upon the defensive missile's impact with an incoming ICBM, interdiction at a spatial point above the ocean rather than above inhabited territory.

The third general category of high seas military activity involves the deployment of *seabed based* surveillance devices and weapons systems for both strategic and tactical purposes. While most of the seabed based surveillance devices presently deployed by the U.S. Navy are located along the Atlantic, Pacific, or Gulf coasts of the United States,[24] the coasts of certain allies,[25] or at various strategically located ocean choke points,[26] efforts have been made to obtain a much more ambitious long-range high seas detection capability.[27] In fact, within the past decade serious con-

20. This method was viewed as a possibility in Gehring, *Legal Rules Affecting Military Uses of the Seabed*, 54 MIL. L. REV. 168, 177 (1971).

21. *See* Foreign Aff. and Nat. Defense Div., Cong. Research Service, Library of Cong., EVALUATION OF FISCAL YEAR 1979 ARMS CONTROL IMPACT STATEMENT: TOWARD MORE INFORMED CONGRESSIONAL PARTICIPATION IN NATIONAL SECURITY POLICYMAKING 83 (1978) [hereinafter cited as ACIS].

22. *See* Wilson, *Air Force Suggests Reviving ABM to Protect MX*, WASH. POST, Aug. 7, 1979, at A-11, col. 1.

23. *See* Gehring, *supra* note 20, at 177.

24. The portion of the fixed acoustic detection array system, also known as Sonar Surveillance System (SOSUS), deployed along the East Coast is named "Caesar"; that on the West Coast is named "Colossus." A similar network is deployed in the Gulf. *See* K. TSIPIS, TACTICAL AND STRATEGIC ANTISUBMARINE WARFARE 80 (Appendix 1, Table 1, A(5)) (1974).

25. This system is known as "Barrier" and "Bronco." *Id.*

26. These passages are located between Bear Island and the northern shore of Norway; Greenland, Iceland, and the southwestern shore of Spain; Newfoundland, the Azores, and the southwestern shore of Spain; in the English Channel and around Gibraltar; near Italy and Turkey; and between Japan and Korea. *See* ACIS *supra* note 21, at 110.

27. One system, "Sea Spider," is a passive acoustic submarine detection unit composed of a single hydrophonic listening device three meters in diameter and anchored by

sideration was given, and one day may be given again, to a plan to augment the existing short-range fixed acoustic detection array system by deploying several active[28] detection devices of massive size. Collectively, the network was to be known as the Suspended Array System (SAS).[29] At the time of consideration, it was anticipated that one such device placed in each ocean would insonify all of the ocean space. If such a detection, identification, and localization system were functionally integrated with an effective weapons system capable of rapidly attriting enemy submarines, the invulnerability of the SSBN would be greatly jeopardized.

The most important seabed based weapons presently utilized are the physical contact, depression, and magnetic/acoustic mines. The physical contact mine is designed to be free floating, as well as moored, and explodes upon impact. Both the depression and the magnetic/acoustic mine, on the other hand, are moored to the ocean floor and are detonated by certain vicissitudes in the immediately surrounding water column. Augmenting these traditional weapons is the Captor anti-submarine mine, the latest and most effective addition to the seabed based weapons system.[30] Essentially, Captor consists of a submersible mine moored to the ocean floor. The mine itself contains a releaseable torpedo with an active and/or passive homing device possessing a target acquisition radius of approximately one kilometer.[31] Consequently, Captor is an effective weapon against all deep diving submarines[32]

three cables at a depth of about 5000 meters. The unit is reported to be nuclear powered and stationed a few hundred miles north of Hawaii. *See* K. TSIPIS, *supra* note 24, at 80. Another network, "Moored Surveillance System" (MSS), consists of command activated, long life sonobuoys dropped from the air which automatically moor to the ocean floor. Such sonobuoys may be moored in up to 3,000 fathoms of water and function for up to 90 days. *See* K. TSIPIS, *supra* note 24, 30, 80 (Appendix 1, Table 1, A(5)).

28. An active acoustic detection device consists of both electromechanical transducers, designed to convert electrical energy into acoustic energy which is then propagated through ocean space, and hyper-sensitive hydrophones or listening instruments that detect the sound emissions reflected from the transiting vessels. Passive acoustic detection devices, on the other hand, consist of nothing more than hydrophones. Due to certain natural impediments, the active device has a much more attenuated range than the passive device. *See generally* Stockholm Int'l Peace Research Inst., *Antisubmarine Warfare* in WORLD ARMAMENTS AND DISARMAMENT, SIPRI YEARBOOK 1974, 303-309 (1974).

29. *See id.* at 317. The active acoustic detection device was to sit on a giant tripod resting on the ocean floor at a depth of close to 5,000 meters. Each leg of the tripod was said to be ten kilometers apart.

30. *See* ACIS *supra* note 21, at 108.

31. K. TSIPIS, *supra* note 24, at 33.

32. Zedalis, *supra* note 5, at 591.

and, when coupled with the previously mentioned detection devices, could conceivably treaten the survival capability of some SSBNs.

The final major military use of the high seas which should be mentioned involves various types of research activity, including weapons testing, conducted either on the water surface, in the navigable water column, or the subjacent seabed and subsoil. It should be noted that the relative difficulty of conducting prolonged stationary subsurface activity at significant depths may well induce nations to initially utilize the submerged oceanic mountain plateaus, known as guyots, rather than refrain from such activity pending the resolution of technical and physiological problems endemic to man's use of the deep ocean environment. However, as military oceanography matures, we should witness a gradual movement of such stationary seabed activity from the guyots to the most perilous depths of the high seas.

A large portion of the present high seas military research is conducted from submersible vehicles, many of which are capable of both column navigation and bottom crawling. It may not be long, however, before such research is also conducted from large permanent aquahabitats, stationed on the ocean floor, which may eventually serve as underwater submarine depots. This could be a significant development in that it would probably increase the period of time all submersible vessels, including submarines, could engage in operational exercises without returning to home port. In addition to such uses, the underwater research stations could, in the future, prove to be a prime location for the testing of naval ordnance, including nuclear devices implanted on or below the bed of the high seas.

III. PRINCIPLES AFFECTING MILITARY USES OF THE HIGH SEAS

Many of the more significant military uses of the high seas mentioned in Section II are regulated by various international conventions which affect, *inter alia*, offensive and defensive strategic nuclear uses of the oceans. Specifically, the Seabed Arms Control Treaty of 1972 (SACT)[33] prohibits, and the recently negotiated

33. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, *done* Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337 (effective May 18, 1972).

Strategic Arms Limitation Treaty of 1979 (SALT II)[34] proposes to prohibit, respectively, the emplacement of stationary nuclear weapons or missiles on the ocean floor further than twelve miles from the coastline of the deploying state, and the development, testing, or deployment of stationary or mobile strategic nuclear missiles designed to be placed on, or able to move in contact with, any part of the ocean floor, including that portion subjacent to internal waters. These proscriptions are supplemented by the Limited Test Ban Treaty of 1963 (LTB),[35] which prohibits the testing of nuclear weapons on or beneath the surface of territorial waters or the high seas, and the Anti-Ballistic Missile Treaty of 1972 (ABM),[36] which prohibits the development, testing, or deployment of any seabased BMD system. At the present time, all other nuclear or conventional peacetime military uses of the high seas are governed only by the principles enunciated in the 1958 High Seas Convention.

In the balance of this study, attention is devoted to analyzing certain apposite principles articulated in the 1958 Convention and Parts VII and XI of the RCNT. The objective of this analysis is to determine the extent to which the legal regime proposed by the provisions of Parts VII and XI of the RCNT, including the provisions which reserve the high seas to use for "peaceful purposes," differs from the regime established by the 1958 Convention in that it will affect significant military uses of the high seas which are not now proscribed by the SACT, SALT II, the LTB, or the ABM Treaty, or in any way regulated effectively by the 1958 Convention. The analysis has particular relevance given the fact that

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34. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms, *signed* June 18, 1979, Selected Documents No. 12A, 26, 41 (Bureau of Public Affairs, Dep't of State). Article IX provides:

> 1. Each Party undertakes not to develop, test, or deploy:
>
> . . . .
>
> (b) Fixed ballistic or cruise missile launchers for emplacement on the ocean floor, on the seabed, or on the beds of internal waters and inland waters, or in the subsoil thereof, or mobile launchers of such missiles, which move only in contact with the ocean floor, the seabed, or the beds of internal waters and inland waters, or missiles for such launchers; . . . .

35. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *done* Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (effective Oct. 10, 1963).

36. Limitation of Anti-Ballistic Missile Systems, *done* May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503 (effective Oct. 3, 1962).

37. The 1958 High Seas Convention, *supra* note 10.

sonic detection devices and weapons capable of locating, identifying, and destroying SSBNs, the most secure component of the strategic triad, can be deployed in the waters or on the bed of the high seas. If the RCNT establishes a regime which does not proscribe activity which may jeopardize the SSBN, serious consideration should be given to negotiating amendments to the draft text or, if this is impossible, to undertaking an effort to have the objectionable part of the text rejected. Conversely, if the regime enunciated in the RCNT enhances the invulnerability of the SSBN by regulating activities which may either threaten the balance of strategic forces or shift the locus of strategic conflict, then consideration should be given to embracing the draft text. The analysis which follows will focus initially on both the provisions of the 1958 Convention and the provisions of the RCNT which are applicable to the water surface and the navigable water column of the high seas and, thereafter, upon the provisions of each respective document applicable to the bed and subsoil of the high seas.

A. The Waters of the High Seas

Pursuant to the regime established by the four 1958 Geneva Conventions on the Law of the Sea, the internal waters of a coastal state are located landward of the baseline. Extending from the baseline seaward, perhaps as much as twelve miles, is the territorial sea. Article 1 of the 1958 High Seas Convention,[37] designates all waters beyond the outer perimeter of the territorial sea as high seas.[38] The RCNT, however, uses a different locational

38. Article 1 reads, *id.*, at 2314: "The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State." The International Law Commission's (ILC) draft article 26, initially considered by Committee II (High Seas) of the 1958 Conference, read, Report of the Int'l L. Comm'n to the General Assembly, 11 U.N. GAOR, SUPP. (No. 9) 7, art. 26, U.N. Doc. A/3159 (1956), *reprinted* (1956) 2 Y.B. INT'L L. COMM'N 253, 259, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1957) [hereinafter cited as 1956 ILC Report]: "1. The term 'high seas' means all parts of the sea that are not included in the territorial sea, as contemplated by Part I, or in the internal waters of a State. 2. Waters within the baseline of the territorial sea are considered 'internal waters.'" When Committee II of the 1958 Conference considered the ILC draft article 26, proposals were made by France, 4 U.N. Conf. Law of the Sea 116, U.N. Doc. A/CONF.13/C.2/L.6 & Corr.1 (1958); Romania and the Ukranian Soviet Socialist Republic, 4 U.N. Conf. Law of the Sea 123, U.N. Doc. A/CONF.13/C.2/L.26 (1958); U.K. and Northern Ireland, 4 U.N. Conf. Law of the Sea 38, U.N. Doc. A/CONF.13/C.2/L.47 (1958); and Brazil, 4 U.N. Conf. Law of the Sea 133, U.N. Doc. A/CONF.13/C.2/L.67 (1958). The Committee adopted the proposal of France to delete paragraph 2 of the ILC draft article 26 and, on proposal of Greece, U.N. Doc. A/CONF.13/C.2/L.54 (1958), referred paragraph 2 to Committee II (52 to 0, with 2 abstentions). The Plenary meetings of the Conference amended the Committee II draft so as to read like article 1 of the 1958 High Seas Convention.

definition. Specifically, article 86 of the draft convention defines the high seas as that body of water situated beyond an imaginary delineation two hundred miles from the baseline. Intervening between the outer boundary of the territorial sea and the landward boundary of the high seas is the economic zone, an area within which the coastal state has numerous exclusive economic interests.[39]

1. APPLICABLE PRINCIPLES OF THE 1958 HIGH SEAS CONVENTION

The nature of the legal regime presently governing the waters beyond the territorial sea is articulated in article 2 of the 1958 High Seas Convention. Article 2 provides:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, *inter alia*, . . . :
>
> (1) Freedom of navigation;
> (2) Freedom of fishing;
> (3) Freedom to lay submarine cables and pipelines;
> (4) Freedom to fly over the high seas.
>
> These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedoms of the high seas.[40]

In general, the language of article 2 denies validity to any effort by any nation to subject a portion of the high seas to its sovereignty[41] and declares the entire area open to use by all

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39. Article 86, RCNT, *supra* note 11, at 726 reads:

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

40. Article 2, 1958 High Seas Convention, *supra* note 10, at 2314. The final draft is identical to that reported out of Committee II. *See* 4 U.N. Conf. Law of the Sea 150-151, U.N. Doc. A/CONF.13/C.2/L.17/Add.1/Corr.1 (1958). Article 27, 1956 ILC Report, *supra* note 38, at 259, stated simply: "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas comprises, *inter alia*: (1) Freedom of navigation; (2) Freedom of fishing; (3) Freedom to lay submarine cables and pipelines; (4) Freedom to fly over the high seas."

41. In reference to the proscription of any state subjecting the high seas to its sovereignty, the ILC said, 1956 ILC Report, *supra* note 38, at 278, commentary 1 to article 27:

states.[42] Specifically, article 2 entitles all states to exercise on the high seas the freedoms of navigation,[43] overflight, fishing, laying of submarine cables and pipelines, and any other freedoms recognized by the general principles of international law.[44] The exercise of such freedoms, however, must be undertaken with reasonable regard for the exercise by other states of the freedoms similarly assured them.[45]

The most widely acknowledged unstated use of the high seas presently recognized by the general principles of international law is the right of all states to employ the high seas for military purposes. Military vessels are undoubtedly entitled to traverse the waters of the high seas pursuant to the freedom of navigation. The extent to which other military uses are permitted though is not made altogether clear by the Convention. In order to explicate the general nature of other permissible military uses, it may prove profitable to examine briefly two proposals submitted during the 1958 Geneva Conference for the purpose of restricting both military maneuvers and nuclear weapons tests conducted on the high seas.[46]

"No State may subject any part of the high seas to its sovereignty; hence no State may *exercise jurisdiction* over any stretch of waters" (emphasis added). Compare this with the more extensive statement of Mr. Colglough (U.S.A.) that the proscription meant that the "high seas were the property not of one nation, or of a few nations, but of the community of nations—he said that the high seas were not open to *regulation or appropriation* by any one nation or group of nations" (emphasis added). *See* 4 U.N. Conf. Law of the Sea 37, para. 4. U.N. Doc. A/CONF.13/C.2/SR.15 (1958). The notion of regulation is quite similar to the ILC's idea of jurisdiction. However, appropriation would seem to include most exclusive uses. Yet such uses have traditionally been viewed as consistent with the notion that the high seas may not be subjected to the sovereignty of one or a group of states.

42. As initially articulated by Hugo Grotius, the principle of *mare liberum* was said to rest on three bases. First, it was said that the vast areas encompassed made it impossible for any one nation to occupy the high seas. Second, the resources were said to be inexhaustible and thus there was no need to permit individual states to reduce the area to possession to prevent dispute. And finally, it was said that the readily accessible transportation lanes provided by the sea facilitated important inter-cultural exchanges. *See* H. GROTIUS, MARE LIBERUM 7-10, 22-44 (rev. ed. 1916). It seems that only the latter has endured the three-hundred and fifty years since Grotius produced his seminal work.

43. The freedom of navigation has historically been the most important inclusive use. *See* M. MCDOUGAL and W. BURKE, THE PUBLIC ORDER OF THE OCEANS 765-773 (1962). For case support, *see* Le Louis, 2 Dodson 210, 165 Eng. Rep. 1464 (1817), and The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826).

44. Article 27 of the 1956 ILC draft also contained "*inter alia*" language. Commentary 2 of article 27, 1956 ILC Report, *supra* note 38, at 278 states: "The list of freedoms of the high seas contained in this article is not restrictive. The Commission has merely specified four of the main freedoms, but is aware that there are other freedoms. . . ."

45. *See* M. MCDOUGAL and W. BURKE, *supra* note 43, at 772.

46. Both proposals were prompted somewhat by the commentary on article 27 of the

The first, known as the Three Power Proposal, grew out of the fact that major military powers found it essential to use portions of the high seas for conducting military maneuvers and target practice. Though such use resulted, of necessity, in the exclusion of simultaneous use by other states,[47] the nations conducting the maneuvers were, for the most part, reluctant to actually assert jurisdiction over foreign nationals within the maneuver zones or forcibly attempt to prevent such nationals from entering the areas of use.[48] This was undoubtedly the result of their realization that to do so would have constituted an effort to subject the area of use to sovereignty and would thereby have run afoul of the proscription stated in article 2 of the Convention. Despite this reluctance, the nature of the maneuvers did in fact result in the zones actually being put to extensive, long term, exclusive use.[49]

1956 ILC draft. Paragraph 1, sentence 3, of the commentary states that in exercising any high seas freedom a nation must refrain from any activity which might "adversely affect" the use of the high seas by nationals of another state. *See* commentary to article 27, 1956 ILC Report, *supra* note 38, at 278.

47. Mr. Colglough (U.S.A.) perspecaciously noted, 4 U.N. Conf. Law of the Sea 15, para. 13, U.N. Doc. A/CONF.13/C.2/SR.9 (1958), that any time state X exercises a freedom over spot 1, it is impossible for the use not to "adversely affect" the use of the same spot 1 by state Y. He said:

> It could not be held that the use of the high seas was invalid solely because some inconvenience would result for other users. Any use of the high seas by one state temporarily [denies] to other states some degree of ability to use the seas, just as the use of a road by a motor-car to some extent [restricts] its use by others.

48. *See Legality of Using the High Seas in Connection with Nuclear Weapons Tests in the Pacific Ocean*, U.S. Delegation Paper, U.N. Conf. Law of the Sea, 1958, US/CLS/Pos/48 (2)-(3), Annex II, Feb. 20, 1958, *cited* in 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 546, 549 (1965) [hereinafter cited as Delegation Paper]. *See also* M. MCDOUGAL and W. BURKE, *supra* note 43, at 769-770.

49. *See* Delegation Paper, *supra* note 48, at 549, where it is said:

> Apparently there has been no essential change in attitude in recent years even though rather substantial portions of international space [high seas] are being utilized as military aircraft target and maneuver ranges for *relatively long periods of time*. There are today numerous United States military aircraft practice zones over international waters in the Atlantic, Gulf and Pacific areas. . . .
>
> The British have similar military aircraft practice zones over portions of international waters near the British Isles. These are in such *regular use* the commercial aircraft must *regularly* detour them on flights to and from the continent (emphasis added).

The British practice should be noted carefully. The effect of regular use is to apparently exclude use by others on a permanent basis. However, this use alone, when unaccompanied by a claim to sovereignty or any active effort to preclude others from entering the area of use, was not perceived as an effort to subject the area to sovereignty, and, thus violative of freedom of the seas. Rather, since the use was intimately related with "national security," it was seen as a valued and reasonable use of the high seas.

At the 1958 Geneva Conference, several nations protested such use of the high seas.[50] Albania, Bulgaria, and the Soviet Union actually sponsored a proposal designed to prohibit such activities. The proposal would have provided that "[n]o naval or air ranges or other combat training areas limiting freedom of navigation may be designated on the high seas near foreign coasts or on international sea routes."[51] Although not comprehensive,[52] such language would have eliminated extensive, long term use of the high seas for maneuvers or target practice. The Conference delegates decisively rejected the Three Power Proposal.[53] In doing so they apparently acknowledged that naval maneuvers and target practice, though extensive and exclusive uses, were not violative of the international law of the seas.

The Eastern Bloc did not capitulate following the defeat of the Three Power Proposal.[54] Rather, it emerged more determined than ever to eliminate nuclear test detonations on the high seas.[55] To accomplish this objective, Czechoslovakia, Poland, Yugoslavia,

50. At the 1958 Conference the Soviet Union, 4 U.N. Conf. Law of the Sea 10, para. 12, U.N. Doc. A/CONF.13/C.2/SR.7 (1958), Romania, 4 U.N. Conf. Law of the Sea 16, para. 23, U.N. Doc. A/CONF.13/C.2/SR.9 (1958), and Bulgaria, 4 U.N. Conf. Law of the Sea 19, para. 6, U.N. Doc. A/CONF.13/C.2/SR.10 (1958), all expressed this view.

51. The Three Power Proposal, 4 U.N. Conf. Law of the Sea 124, U.N. Doc. A/CONF.13/C.2/L.32 (1958), was to be appended to the 1956 ILC draft article 27, *supra* note 40. The proposal was rejected 43 to 13, with 9 abstentions, 4 U.N. Conf. Law of the Sea 54, para. 5, U.N. Doc. A/CONF.13/C.2/SR.21 (1958).

52. It should be noted that this was not a blanket proposal. It was designed to proscribe only extensive activities near coasts or international sealanes. *See* remarks by Mr. Raduilsky (Bulgaria), 4 U.N. Conf. Law of the Sea 41, para. 9, U.N. Doc. A/CONF.13/C.2/SR.16 (1958), in reference to the Three Power Proposal (Albania, Bulgaria, and U.S.S.R.) to ban military maneuvers. He stated it "did not refer to areas of the high seas used for ordinary naval or air exercises of short duration. It was rather designed to establish international standards forbidding the designation of naval and air training areas for long periods on a unilateral basis."

53. Three Power Proposal, *supra* note 51, was rejected 43 to 13, with 9 abstentions.

54. Several delegates spoke against the legality of nuclear tests. Mr. Bierzanek (Poland) stated such tests created a "*de facto* sovereignty," 4 U.N. Conf. Law of the Sea 6-7, para. 12, U.N. Doc. A/CONF.13/C.2/SR.6 (1958); Mr. Tunkin (U.S.S.R.) said they violated paragraph 1 of the commentary to the ILC's draft article 27, 4 U.N. Conf. Law of the Sea 9-10, para. 11, U.N. Doc. A/CONF.13/C.2/SR.7 (1958); Ohye (Japan) expressed agreement with Tunkin's position in relation to article 27, 4 U.N. Conf. Law of the Sea 11, para. 2, U.N. Doc. A/CONF.13/C.2/SR.8 (1958); Mr. Ghelmegeanu (Romania) felt the tests "interfered" with other uses, 4 U.N. Conf. Law of the Sea 16, para. 22, U.N. Doc. A/CONF.13/C.2/SR.9 (1958); Mr. Zourek (Czechoslovakia) concurred with Tunkin's position, 4 U.N. Conf. Law of the Sea 24, para. 11, U.N. Doc. A/CONF.13/C.2/SR.11 (1958).

55. Such test detonations were later eliminated by the Limited Test Ban Treaty of 1963, *supra* note 35.

and the Soviet Union submitted what has come to be known as the Four Power Proposal. In short, the proposal was designed to prohibit all states from testing nuclear weapons on the high seas.[56] In response, several delegates insisted that since the question of banning test explosions was intimately related to the whole disarmament issue, consideration of such a proposal was beyond the bailiwick of the Conference.[57] Others, however, felt that since nuclear testing constituted use of the high seas, the Conference was authorized to consider the problem as part of the discussion on freedom of the seas.[58] The Four Power Proposal was ultimately countered with a proposal submitted by the United Kingdom.[59] The United Kingdom Proposal was later withdrawn, after lengthy debate, in favor of a compromise solution proffered by India to send the entire matter of nuclear weapons tests to the United Nations General Assembly.[60] The Indian compromise was adopted and the proposal to ban nuclear test detonations was never subjected to a vote.[61]

After the rejection of the Three Power Proposal and the expedient Indian compromise solution to the problem created by the

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56. The Four Power Proposal was designed to insert the following after the 1956 ILC draft article 27: "States are bound to refrain from testing nuclear weapons on the high seas." *See* 4 U.N. Conf. Law of the Sea 124, U.N. Doc. A/CONF.13/C.2/L.30 (1958).

57. *See* remarks of Mr. Weeks (Liberia), 4 U.N. Conf. Law of the Sea 21-22, para. 28, U.N. Doc. A/CONF.13/C.2/SR.10 (1958), Mr. Colglough (U.S.A.), 4 U.N. Conf. Law of the Sea 15, para. 13, U.N. Doc. A/CONF.13/C.2/SR.9 (1958), Mr. Randall (U.K.), 4 U.N. Conf. Law of the Sea 13, para. 28, U.N. Doc. A/CONF.13/C.2/SR.8 (1958).

58. Mr. Sikri (India), 4 U.N. Conf. Law of the Sea 12, para. 12, U.N. Doc. A/CONF.13/C.2/SR.8 (1958).

59. 4 U.N. Conf. Law of the Sea 132, U.N. Doc. A/CONF.13/C.2/L.64 (1958).

60. U.K. proposal was withdrawn at the 18th meeting of Committee II, 4 U.N. Conf. Law of the Sea 47, para. 19, U.N. Doc. A/CONF.13/C.2/SR.18 (1958). The Indian Proposal, 4 U.N. Conf. Law of the Sea 134, U.N. Doc. A/CONF.13/C.2/L.71/Rev.1 (1958), stated:

> *Recalling* that the Conference has been convened by the General Assembly of the United Nations in accordance with resolution 1105 (XI) of 21 February 1957, and
>
> *Recognizing* that there is a serious and genuine apprehension on the part of many States that nuclear explosions constitute an infringement of the freedom of the seas, and
>
> *Recognizing* that the question . . . is still under review by the General Assembly . . . and by the Disarmament Commission . . .
>
> *Decides* to refer this matter to the General Assembly for appropriate action.

61. The Indian proposal was adopted 51 to 1, with 14 abstentions, 4 U.N. Conf. Law of the Sea 52, para. 5, U.N. Doc. A/CONF.13/C.2/SR.20 (1958). On the general debate as to the legality of nuclear weapons tests, *see* Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 YALE L.J. 629 (1955); McDougal and Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1955).

Four Power Proposal, the delegates at the 1958 Geneva Conference immediately proceeded to adopt a joint proposal advanced by the United Kingdom and Ireland subjecting each permissible use of the high seas to the condition, mentioned earlier, that the use be undertaken with reasonable regard for the exercise by other states of the freedoms guaranteed them.[62] The adoption by the Conference of the proposal submitted by the United Kingdom and Ireland silenced those nations which maintained that international law did not countenance military uses of the high seas which are either lengthy in duration, yet spatially circumscribed (*i.e.*, maneuvers), or short in duration, but encompassing vast geographical areas (*i.e.*, nuclear tests). This is reflected in the present language of article 2 which essentially provides that any military use of the high seas is permissible as long as it is reasonable. Though every use inevitably precludes some other state from undertaking a simultaneous use of the same area, such use is not *ipso facto* unreasonable or in contravention of the provision proscribing subjection of the high seas to state sovereignty. If the benefits derived from the particular exclusive military use outweigh the inconvenience caused to inclusive areas of the seas,[63] and the utilizing state refrains from either exercising jurisdiction over foreign nationals within the area or preventing them from traversing the area, then the activity comports with article 2 of the Convention.

2. APPLICABLE PRINCIPLES OF PART VII OF THE RCNT

It should be noted at the outset that the regime established

62. The proposal of the United Kingdom, 4 U.N. Conf. Law of the Sea 134, U.N. Doc. A/CONF.13/C.2/L.68 (1958), was adopted 30 to 18, with 9 abstentions. It appended the following to article 27 of the ILC draft, *supra* note 38: "These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." Also appended to article 27 was a proposal submitted by Mexico, 4 U.N. Conf. Law of the Sea 115, U.N. Doc. A/CONF.13/C.2/L.3 (1958). Article 27, as amended by the U.K. and Mexican proposals, was adopted by Committee II, 50 to 4, with 12 abstentions, 4 U.N. Conf. Law of the Sea 56, para. 20, U.N. Doc. A/CONF.13/C.2/SR.22 (1958), and approved at the Plenary meetings 51 to 0, with 1 abstention, 2 U.N. Conf. Law of the Sea 20, para. 2, U.N. Doc. A/CONF.13/C.2/SR.10 (1958).

63. *See* M. MCDOUGAL and W. BURKE, *supra* note 43, at 772 where it is stated:

> Fair assessment of the relevant factors would indicate to the impartial observer that the exclusive use attendant upon weapons testing fully comports with the reasonableness criterion. . . .
>
> In contrast to [the] minimal effects upon inclusive use, the interest at stake for the United States is easily seen to be of the greatest significance for its security and for that of a good part of the world.

by the 1958 Convention and that contained in Part VII of the RCNT are quite similar. In fact, following the pattern of article 2 of the 1958 Convention, article 87 of the RCNT states in part:

> 1. The high seas are open to all States, ... 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*, . . . :
>
> (a) Freedom of navigation;
>
> (b) Freedom of overflight;
>
> (c) Freedom to lay submarine cables and pipelines, . . . ;
>
> (d) Freedom to construct artificial islands and other installations permitted under international law, . . . ;
>
> (e) Freedom of fishing, . . . ;
>
> (f) Freedom of scientific research, ...
>
> 2. These freedoms shall be exercised by all States, with due consideration for the interests of other States in their exercise of the freedom of the high seas, and also with due consideration for the rights under this Convention with respect to activities in the Area.[63A]

Following the enumeration in article 87 of the rights which all states are entitled to exercise, article 89 declares the invalidity of an attempt by any nation to subject a portion of the high seas to its sovereignty.[64]

In addition to the freedoms specified in article 2 of the 1958 Convention, article 87 of the RCNT provides that every state is entitled to conduct scientific research[65] and construct installations for the exploration and exploitation of that portion of its continental shelf extending beyond the economic zone.[66] Furthermore, although article 87 of the RCNT[67] does not contain language incorporating other unstated freedoms recognized by the general principles of international law, the fact that the recitation of express freedoms is prefaced by the words "*inter alia*" accomplishes the same result. The exercise of any of the freedoms, express or implied, is irrefutably subject to the condition that such be undertaken with "due consideration" for the interests of other states.[68]

63.[A] Article 87, RCNT, *supra* note 11, at 726.

64. Article 89, RCNT, *supra* note 11, at 727 states: "No State may validly purport to subject any part of the high seas to its sovereignty."

65. Article 87(1)(f), RCNT, *supra* note 11, at 726.

66. Article 87(1)(d), RCNT, *supra* note 11, at 726.

67. *See* article 87(1), RCNT, *supra* note 11, at 726.

68. The language used in the 1958 text states "reasonable regard." This specific language was contained in a proposal submitted by the United Kingdom, *supra* note 62,

Perhaps the most conspicuous addition made by Part VII of the RCNT to the legal regime established by the 1958 Convention is the reservation of the high seas to use for "peaceful purposes." Article 88 of the RCNT[69] states that the "[h]igh seas shall be reserved for peaceful purposes." Though reservations of transnational spatial areas for "peaceful purposes" is by no means a novel conception in international law,[70] the ambiguity of the "peaceful purposes" provision has generated continuing debate as to the nature of the normative prescription it declares. Some suggest that the term "peaceful purposes" permits all nonaggressive uses, even though they may be of a military nature. Others insist that only non-military uses are consonant with the provision.[71] In the context of the instant draft convention, if only non-military uses are permitted, then the high seas may not be employed for any activity of a military nature, including the navigation of warships.[72]

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adopted in opposition to language used in sentence 3 of comment 1 to article 27 of the 1956 ILC draft, which sought to prevent any use that might adversely affect use by nationals of another state. Pursuant to the "adversely affect" test, the Eastern Bloc powers objected to many uses which were exclusive in nature, and sought to proscribe both military maneuvers and nuclear weapons tests. "Due consideration" seems to require any using state to be cognizant of the interests of others in using the area and to abstain from non-essential exclusive uses which substantially interfere with valued inclusive uses not really different from the 1958 Convention.

69. Article 88, RCNT, *supra* note 11, at 726.

70. "Peaceful purposes" is also used in article 1 of the Antarctic Treaty, *done* Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (effective June 23, 1961); Article IV of Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *done* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (effective Oct. 10, 1967) [hereinafter cited as Outer Space Treaty]; and the Statute of the International Atomic Energy Agency, *done* Oct. 26, 1956, 8 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3 (effective July 29, 1957).

71. For a non-military construction in reference to the Outer Space Treaty, *see* Markov, *Against the So-Called "Broader" Interpretation of the Term "Peaceful" in International Space Law*, 1968 COLLOQUIUM ON THE LAW OF OUTER SPACE 73 (1969). For a nonaggressive interpretation, *see* Dembling & Arons, *The Evolution of the Outer Space Treaty*, 33 J. AIR L. & COMM. 419 (1967).

72. It should be noted that even the non-military definition of "peaceful purposes" does not prohibit military activities if undertaken as an exercise of the right of self-defense. This is so for several reasons. First, since the fundamental objective of the international law decision-making process is to peacefully resolve competing state claims, construing "peaceful purposes" to prohibit military activities undertaken as an exercise of self-defense would increase instability and violence because unscrupulous nations would seek to take advantage of those observing the non-military prescription. Thus, this would essentially contravene the fundamental objective of the international law decision-making process. Second, self-defense is an "inherent" right which cannot be taken away absent the existence of some centralized decision-making body capable of replacing the present decentralized decision-making process. Finally, the inherency of the right means that it need not be mentioned in every convention, lest its absence in a particular convention lead to assertions that it was

On the other hand, if "peaceful purposes" simply prescribes a nonaggressive standard, then the high seas may legally be used for a whole host of activities of a military nature as long as none of the activities are aggressive.

When the "peaceful purposes" provision of article 88 of the RCNT is construed in the context of the whole draft convention so as to effectuate the general intention of the architects as evidenced by the preceding and subsequent provisions,[73] the inescapable conclusion is that it establishes a nonaggressive normative standard. One of the enumerated freedoms of the high seas guaranteed to all states is the freedom of navigation. This freedom is not restricted and in fact the RCNT contemplates navigation by military as well as civilian vessels.[74] Such use, however, would be clearly inconsistent with a non-military standard.[75] Military use of

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intended to be removed. In reference to the latter, *see* I FOR. REL. OF THE U.S. 1928, 36-37 (1942), where it is said in respect to the Kellogg-Briand Treaty:

> There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. The right is inherent in every sovereign state and is implicit in every treaty. . . .
>
> Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right of self-defense, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense since it is far too easy for the unscrupulous to mold events to accord with an agreed definition.

73. There are basically two schools of thought on the construction of treaties: the "plain meaning" school, and the "general purpose" school. The former uses as its primary operable premise the notion of univocalism, *i.e.*, that every term has but one meaning, that the meaning is easily identifiable, and that the meaning controls. The preferable method of construction is the latter. It seeks to effectuate the true intentions of the drafters by construing ambiguous provisions in the context of the total treaty. This approach is supported by article 31 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 May 23, 1969, 63 AM. J. INT'L L. 885 (1969). For further support, *see* Judge Anzilotti's dissenting opinion in, Interpretation of the 1919 Convention Concerning Employment of Women During the Night, P.C.I.J., ser. A/B NO. 50 (1932). On the plain meaning rule, *see* Gross, *Voting in the Security Council*, 60 YALE L.J. 209 (1951).

74. Article 95, RCNT, *supra* note 11, at 728 reads: "Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State." The provision implicitly contemplates the use of the high seas by warships. Moreover, articles 29-32, RCNT, *supra* note 11, at 709, establish the rules for warships passing through the territorial sea of a coastal state. Since foreign warships most frequently reach the territorial sea of a coastal state by traversing a portion of the high seas, it seems that these articles also contemplate some use of the high seas by military vessels.

75. The opposite, however, has been argued in relation to the Outer Space Treaty of 1967. *See* Finch, *Outer Space for "Peaceful Purposes,"* 54 A.B.A.J. 365 (1968). Many commentators feel that the Outer Space Treaty language permitting the use of military personnel and equipment on the moon and other celestial bodies requires that "peaceful purposes"

the high seas is a well established customary utilization recognized by the general principles of international law and incorporated in article 87 of the RCNT by virtue of the words "*inter alia*" prefacing the litany of express freedoms. To suggest that the "peaceful purposes" provision establishes a non-military standard is inconsistent with the language contemplating military navigation as well as that incorporating more extensive military uses. In light of the minimal interference caused to inclusive uses of ocean space by highly valued exclusive military uses, such a result seems desirable.

In recapitulation, Part VII of the RCNT situates the point of origin of the high seas some two-hundred miles from the baseline. The legal regime enunciated in article 2 of the 1958 Convention to govern the general character of the high seas remains intact with the waters being both open to all and beyond the efforts of any nation to subject them to sovereignty. The freedoms of the seas include those specifically enumerated in article 2 of the 1958 Convention and a few additional ones endemic to the general legal regime proposed by the RCNT. In addition, while the language in article 2 of the 1958 Convention, subjecting the exercise of all freedoms to the condition that the exercise be undertaken with "reasonable regard" for the interests of others, has been changed to read with "due consideration" for the interests of others, the change is basically semantical. The inclusion of a provision in Part VII of the RCNT articulating that the high seas is reserved for "peaceful purposes" simply obligates all utilizing states to refrain from aggressive uses.

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be defined to prescribe a non-aggressive standard. In light of the fact that most if not all celestial exploration is undertaken by military personnel utilizing military equipment, it can be cogently argued that the drafters included such language so as to avert suggestions that a non-military definition of the "peaceful purposes" clause precluded military personnel from exploring outer space. Thus, it is very possible to have a non-military normative standard for outer space, yet in recognition of the realities, permit military personnel to explore space. After all, military equipment can be used for activities of a non-military nature.

In relation to the RCNT, the same argument seems cauistric since it is not essential to use military personnel and equipment to navigate the oceans. Consequently, the existence of a provision permitting military vessels to use the high seas, accompanied by a provision reserving the high seas for "peaceful purposes," cannot mean that the latter prescribes a non-military normative standard with the former merely permitting the military, out of necessity, to use the high seas. Clearly, as the "peaceful purposes" clause is used in the RCNT, it means non-aggressive. For support, *see* Oxman, *The Third United Nation's Conference on the Law of the Sea: The 1977 New York Session*, 72 AM. J. INT'L L. 57, 73 (1978).

B. The Bed and Subsoil of the High Seas

What is commonly referred to as the deep seabed is, in a very general sense, that portion of the ocean floor and subsoil which lies beyond the continental shelf and subjacent to the waters of the high seas. Although not defined in the 1958 Convention, it is clear that the Convention implicitly situates the deep seabed at precisely the location mentioned since every coastal state is entitled to exercise control over that portion of the bed and subsoil which is a natural prolongation[76] of its littoral. Unlike the 1958 Convention, Part XI of the RCNT labels the deep seabed the "Area" and states that it extends seaward from the outer edge of the Exclusive Economic Zone (EEZ) or the continental shelf if the shelf extends more than two-hundred miles from the coastline.[77] Therefore, in spite of the fact that the continental shelf of a particular state may be attenuated, by definition the landward most boundary of the Area is located no closer than two-hundred miles from the littoral.

1. APPLICABLE PRINCIPLES OF THE EXISTING LEGAL REGIME

As already mentioned, pursuant to the 1958 High Seas Convention and Part VII of the RCNT, the *waters* of the high seas are open to all nations for purposes of navigation, overflight, fishing, laying of submarine cables and pipelines, and any other uses authorized by the general principles of international law.[78] Perhaps one of the most traditional, widely accepted, other uses of the waters of the high seas authorized by the general principles of international law is the right of all states to utilize the high seas for conducting reasonable military activities. In fact, as we have seen, military uses as extensive and exclusive as naval maneuvers and nuclear weapons tests have in the past been viewed as consonant with this principle.[79] Since article 2 of the 1958 Convention does not expressly apply to the bed subjacent to the waters of the high seas, this part of the study will examine the nature of the legal regime governing the uses of that portion of the bed which is situated beyond the outer perimeter of the continental shelf.

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76. *See* North Sea Continental Shelf Cases [1969] I.C.J. 3. *See generally* Brown, *The North Sea Continental Shelf Cases*, 23 CURRENT LEGAL PROB. 187 (1970).

77. *See* article 1(1), RCNT, *supra* note 11, at 702.

78. *See* Part VII, RCNT, *supra* note 11, at 726.

79. *Id.*

There can be little doubt that the legitimacy of an attempt by a state to subject a portion of the deep seabed to its own sovereignty is predicated upon the international legal character of the bed itself. Yet, few international legal issues have evoked disagreement as vast as that concerning the character of the deep seabed. One group of authorities maintains that the deep seabed is *res nullius* and therefore susceptible to being subjected to the sovereignty of one state or a group of states.[80] As a result, any state would legally be entitled, simultaneously with any exclusive use, and in order to perfect an explicit or tacit claim to sovereignty through effective occupation,[81] to assert jurisdiction over foreign nationals in the vicinity of the use and exclude those nationals from the area of use. Another group of authorities contends that the deep seabed is *res communis* and therefore open to exclusive use by all states, yet beyond legitimate subjection to sovereignty by any.[82] As a consequence, the international legal regime governing the deep seabed is said to be identical to that controlling the superjacent waters of the high seas, also viewed as *res communis*. The waters and the bed of the high seas are seen as identical, not *sui generis*.[83]

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80. *See* The Islands of Palmas Case, Hague Ct. Rep. 2d (Scott) 83 (Perm. Ct. Arb. 1932). Effective occupation is reflected by continuous and peaceful display of the incidents of sovereignty over a particular area. Specifically, it involves the taking of possession of a particular area and exercising exclusive jurisdiction therein. For the proposition that the deep seabed can be acquired, *see* Young, *The Legal Regime of the Deep-Sea Floor*, 62 AM. J. INT'L L. 641, 645 (1968).

81. P. FAUCHILLE, TRAITE DE DROIT INTERNATIONAL PUBLIC pt. 11, 19 (1925); 1 J. WESTLAKE, INTERNATIONAL LAW 187-188 (1904); Hurst, *Whose Is the Bed of the Sea?*, 4 BRIT. Y.B. INT'L L. 34 (1923); 2 H. SMITH, GREAT BRITAIN AND THE LAW OF NATIONS 122 (1935). *See also* L. HENKIN, LAW FOR THE SEA'S MINERAL RESOURCES 25-29 (1968).

82. G. GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER 498-501 (1932); C. COLOMBOS, INTERNATIONAL LAW OF THE SEA 63-64 (1962).

83. The 1958 High Seas Convention, *supra* note 10, at article 2 begins: "The *high seas* being open to all . . . ." (emphasis added). "High seas" is defined in article 1 to include "*all parts* of the sea that are not included in the territorial sea or in the internal waters of a State" (emphasis added). Such broad language may support the *res communis* characterization by including the *seabed* as well as the waters within "all parts" of the sea. This conclusion seems even more compelling when one realizes that the delegate from Brazil desired to have the term "high seas" changed to read "*waters* of the high seas" (emphasis added) and then proposed to define "waters of the high seas" to mean "those waters lying between the outer limits of the territorial sea" (referring to the territorial seas of all States), 4 U.N. Conf. Law of the Sea 133, U.N. Doc. A/CONF.13/C.2/L.67 (1958). Mr. Pedreira (Brazil) had been particularly interested in delimiting not only the horizontal zones of ocean space, but also the vertical zones. He felt his proposal would accomplish this and confine the applicabity of the principles to the *water surface and column only*, leaving the seabed unaffected.

It seems, however, that when the primary concern is simply exclusive military utilization, it really matters little whether the deep seabed is characterized as *res communis* or *res nullius*. Both characterizations appear to entitle all states to *use* the deep seabed for their own exclusive purposes, even though this may involve emplacing installations or devices on the bed. It appears that any such permanent exclusive use of a portion of the deep seabed does not in and of itself contravene the proscription of claims to, or exercises of, sovereignty implicit in the concept that the deep seabed is *res communis*.[84] This conclusion seems ineluctable for several reasons. First, article 2 of the 1958 Convention clearly authorizes some exclusive permanent uses of the deep seabed by explicitly stating that the laying of submarine cables and pipelines is a freedom of the high seas; yet no one would seriously contend that such use would be violative of the proscription of sovereignty simply because the use is permanent in nature. Second, as already recounted, exclusive military uses of the waters of the high seas have never been perceived as violative of the proscription of sovereignty enunciated in article 2, even though some of these uses have been so regular in nature as to, in fact, be permanent.[85] Finally, if permanent use contravened the proscription

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See remarks of Mr. Pedreira, 4 U.N. Conf. Law of the Sea 42, para. 29, U.N. Doc. A/CONF.13/C.2/SR.16 (1958). Committee II rejected, 4 U.N. Conf. Law of the Sea 53, para. 19, U.N. Doc. A/CONF.13/C.2/SR.20 (1958), an earlier proposal of his designed to emphasize the same distinction between water and seabed, 4 U.N. Conf. Law of the Sea 133, U.N. Doc. A/CONF.13/C.2/L.67 (1958), forcing him to withdraw L.66. *See* 4 U.N. Conf. Law of the Sea 54, para. 7, U.N. Doc. A/CONF.13/C.2/SR.21 (1958). The rejection of one and the withdrawal of the other proposal may well indicate that what appears to be expansive language in articles 1 and 2 should be so construed. *But see* comment 2 to article 27 of the 1956 ILC Report, *supra* note 38, at 278. It reads:

> The Commission has not made specific mention of the freedom to explore or exploit the subsoil of the high seas. It considered that apart from the case of the exploitation or exploration of the soil or subsoil of a continental shelf . . . such exploitation has not yet assumed sufficient practical importance to justify special regulation.

84. Though few have gone so far, there have been instances where coastal states have, without incurring objection from others, engaged in activities much more intrusive than some exclusive use which has temporarily or permanently precluded other states from using the same area. *See, e.g.*, the passage of the Defence (Special Undertakings) Act of 1952, 19 Commonwealth Acts 64 (1952), by which Australia created a prohibited area of more than 6000 square miles, most of it high seas, used for conducting atomic weapons tests. All persons found within the area without permission were subject to criminal penalties. *Cited and discussed in* McDougal and Schlei, *The Hydrogen Bomb Test in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 680 (1955).

85. *See* Delegation Paper, *supra* note 49.

of claims to or exercises of sovereignty implicit in the concept that the deep seabed is *res communis*, there would technically have been no need to formulate specific prohibitions against the installation or emplacement of the deep seabed based weapons proscribed by the SACT and the proposed SALT II agreement, since the deployment of such devices would have already been proscribed by the notion that such permanent exclusive use is prohibited. Thus, while it can be said with some degree of accuracy that both the *res nullius* and the *res communis* characterizations permit most permanent exclusive military uses of the deep seabed, only the former possesses the potential for legitimizing claims to or exercises of sovereignty.[86]

86. As we have seen, even if the deep seabed is considered to be *res communis*, all states are entitled to use the bed for their own exclusive purposes, even though such use may involve emplacing installations thereon. Moreover, since this may be a reasonable use of the deep seabed, it seems that the utilizing state should be authorized legally to undertake efforts to protect its use comparable to those which a state exercising a right recognized by article 2 of the 1958 High Seas Convention is entitled to undertake in order to protect its right to use the waters of the high seas. Though efforts to actively exclude foreign nationals from a portion of the deep seabed would normally violate the proscription of exercises of sovereignty implicit in the *res communis* concept, when undertaken in order to protect the exercise of a recognized right on the deep seabed, such exclusions may indeed be consonant with international law.

As with every justice principle, the proscription of claims to, or exercises of, sovereignty offers little more than general guidance concerning the resolution of specific factual problems involving permanent uses of the deep seabed whenever such uses are unaccompanied by an explicit claim to sovereignty. Therefore, it is imperative that one appreciate both that the ultimate objective of the international legal decision-making process is to peacefully resolve competing state claims and that every general legal principle proceeds from a combination of several important factors which may be looked to whenever the factual circumstances being considered do not fall squarely within the ambit of the applicable principle. In the instant case, the several underlying factors which should be examined in order to determine whether any effort to protect such a use of the deep seabed is violative of international law include: the nature of the permanent exclusive use being protected; the extent of the area encompassed by such use; the degree to which such use interferes with uses of the immediately surrounding area by other states; whether the uses interfered with are exclusive or inclusive; and, if the uses interfered with are inclusive, the value of the inclusive uses as compared with the value of the exclusive use. A cogent argument can be made that circumscribed efforts to protect most permanent exclusive military uses of the deep seabed by excluding foreign nationals from the area of use are not violative of the proscription of sovereignty implicit in the existing concept that the deep seabed is *res communis*, since such use probably interferes most with other exclusive military uses of the seabed. Whether an effort undertaken to protect a permanent offensive military use of the deep seabed would violate the proscription of sovereignty may well turn upon whether the use with which such permanent use is interfering is defensible under article 51 of the United Nations Charter. U.N. CHARTER art. 51. If, however, the permanent offensive military use is substantially interfering with highly valued (*i.e.*, economic) inclusive uses of the seabed by other states, then efforts to exclude foreign nationals from the area of such ex-

2. APPLICABLE PRINCIPLES OF PART XI OF THE RCNT

Part XI of the RCNT proposes to establish an effective international legal regime to govern future uses of the seabed and subsoil beyond the EEZ or the continental shelf,[86A] if the shelf extends beyond the outer perimeter of the EEZ.[87] Specifically, activities designed to explore for and/or exploit the natural resources of the Area are to be subject to the regulation and supervision of an international body known as the "Authority."[88] Other activities are governed by a few rules of general applicability. In view of the fact that we are concerned only with the international legality of military uses of the Area, primary attention will be given to the provision which reserves the Area to use exclusively for "peaceful purposes,"[89] and the provision which prohibits any state from claiming or exercising sovereignty over, or appropriating, any part of the Area.[90] However, since some military utilizations may be research oriented, attention will also be devoted briefly to the principles contained in Part XI of the RCNT which are designed to govern marine scientific research in the Area. Each provision is a significant addition to the regime articulated in the 1958 High Seas Convention.

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clusive use would probably be seen as violative of the proscription of assertions of or claims to sovereignty over the deep seabed.

86A. The legal regime established by the RCNT to govern uses of the bed of the EEZ and that portion of the continental shelf extending beyond the outer perimeter of the economic zone is such that foreign state military uses are either not allowed or subject to coastal state proscription. *See* articles 58-60, RCNT, *supra* note 11, at 716-717. It appears, however, that while the coastal state may be entitled to use the bed of its EEZ and its continental shelf for defensive military purposes, military uses of such areas which adversely jeopardize the interests of a foreign state or the international community are not allowed. *See* article 59, RCNT, *supra* note 11, at 716.

87. This portion of seabed is known as the "Area." Article 1(1), RCNT, *supra* note 11, at 702 states: "'Area' means the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction."

88. *See generally* H. KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS AND READINGS 623-628 (1975); Adede, *The System for Exploitation of the "Common Heritage of Mankind" at the Caracas Conference*, 69 AM. J. INT'L L. 31 (1975); Goldie, *The Contents of Davy Jones's Locker—A Proposed Regime for the Seabed and Subsoil*, 22 RUTGERS L. REV. 1 (1967).

89. Article 141, RCNT, *supra* note 11, at 737 reads: "The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this Part."

90. Article 137(1), RCNT, *supra* note 11, at 736 reads:

> 1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or person, natural or juridical, appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights, nor such appropriation shall be recognized.

Article 141 of the RCNT[91] makes it explicitly clear that the Area is "open to use exclusively for peaceful purposes." The draft convention, however, fails to explicate the precise standard of use implicit in this reservation, and the *travaux preparatories* do not make up for this noticeable deficiency.[92] If the provision is construed to prohibit only aggressive uses of the Area specifically, those activities violative of article 2(4) of the United Nations Charter,[93] then, absent explicit restrictions, numerous activities of a military nature may well be consonant with the regime.[94] On the other hand, if the provision proscribes all military uses of the Area, then any activity of a military nature, whether aggressive or not, will undoubtedly contravene article 141.[95] It should be noted that the nonaggressive connotation of the "peaceful purposes" provision in relation to article 88 of the RCNT is not controlling since the applicability of that particular provision does not extend beyond the *waters* of the high seas. Moreover, as that specific provision is applied, it is accompanied by a provision implicitly recognizing the right of warships to traverse the high seas. Consequently, the only acceptable construction of the "peaceful purposes" provision as used in reference to the waters of the high

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91. *See* article 141, RCNT, *supra* note 89.

92. The meaning of "peaceful purposes" received attention at an earlier session, 5 Third U.N. Conf. Law of the Sea 54-68, U.N. Doc. A/CONF.62/SR.66-68 (1976). One commentator, however, has stated that the clause permits the use of listening devices on the deep-sea floor. *See* M. JANIS, SEA POWER AND THE LAW OF THE SEA 85 (1976).

93. Article 2(4) states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ." U.N. CHARTER art. 2, para. 4.

94. *See* 5 Third U.N. Conf. Law of the Sea 56, 62, para. 81, U.N. Doc. A/CONF.62/SR.67 (1976), where Mr. Learson (U.S.) stated:

> The term "peaceful purposes" did not, of course, preclude military activities generally. The United States had consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations . . . . Any specific limitation on military activities would require the negotiation of a detailed arms control agreement. The Conference was not charged with such a purpose. . . .

95. *See* 5 Third U.N. Conf. Law of the Sea 56, para. 2, U.N. Doc. A/CONF.62/SR.67 (1976), where Mr. Valencia Rodriguez (Ecuador) stated: "It had already been recognized in many international bodies and agreements that the use of ocean space for exclusively peaceful purposes must mean complete demilitarization and the exclusion from it of all military activities." *See also id.* 54-56, para. 5-12, comments of Mr. Bakula (Peru). *See also* Rao, *The Legal Regime of the Sea-Bed and Ocean Floor*, 9 INDIAN J. INT'L L. 1, 17 (1969), where he contends that the majority of states define "peaceful purposes" to mean non-military. On earlier discussions *see* U.N. Doc. A/C.1/PV.1601, para. 71-72 (*May be* 171-172) (Trinidad and Tobago 1968); U.N. Doc. A/C.1/PV.1596, para. 32-36 (Romania 1968).

seas is the nonaggressive construction. There is no comparable military use expressly permitted by the draft convention in relation to the Area and, thus, no compelling analogy to be drawn.

As observed in relation to the waters of the high seas, ambiguities can frequently be removed simply by construing a troublesome provision in the context of the entire convention, seeking to effectuate the general intention of the drafters as evidenced in both preceding and subsequent provisions. Part XI of the RCNT contains two important provisions which cast some light on the meaning of "peaceful purposes" as utilized in article 141. First, article 136[96] pronounces the Area and its resources to be the "common heritage of mankind."[97] However, even when construed in conjunction with this provision, one still cannot state categorically that "peaceful purposes" means to proscribe all activities of a military nature. This is evident from the previous examination of both the deep seabed and the waters of the high seas, areas long acknowledged by many commentators to be the common heritage of all mankind (*res communis*), but areas where reasonable military uses, not accompanied by a claim to or exercise of sovereignty, have been permitted. Second, article 140(1) explicitly states, in part, that "[a]ctivities in the Area shall be carried out for the benefit of mankind as a whole."[98] Language of similar import in article I, paragraph 1 of the Outer Space Treaty of 1967[99] has prompted some scholars to suggest that any military activity conducted in outer space would transgress that specific provision because no military activity could possibly benefit mankind as a whole.[100] The same cannot be said about such language in relation to the Area since article 133(a) of Part XI goes on[101] to define "*activities in the*

96. Article 136, RCNT, *supra* note 11, at 736.

97. For the origin of this concept, *see* U.N. Doc. A/C.1/PV.1515-1516 (*Note verbale* from Ambassador Pardo 1967), U.N. Doc. A/6695 (1967), and G.A. RES. 2340 (XXII) (1967). *See generally* Arnold, *The Common Heritage of Mankind as a Legal Concept*, 9 INT'L LAW. 153 (1975).

98. Article 140, RCNT, *supra* note 11, at 737 reads: "Activities in the Area shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, . . . and taking into particular consideration the interests and needs of the developing countries. . . ."

99. Article 1(1), Outer Space Treaty, *supra* note 70, at 2412 states: "The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries. . . ."

100. *See* Markoff, *Disarmament and "Peaceful Purposes" Provisions in The 1967 Outer Space Treaty*, 4 J. SPACE L. 3 (1976).

101. Article 133(a), RCNT, *supra* note 11, at 736 states: "'Activities in the Area' means all activities of exploration for, and exploitation of, the resources of the Area." It appears

Area" as specifically referring to those activities designed to explore and/or exploit the natural resources located therein. It is clear that this language does not cover *all* conduct, let alone military conduct. Any contention that military devices or habitats installed on the sea floor and designed to provide a mechanism for exploring and/or exploiting ocean "space"[102] come within the ambit of the "benefit of mankind" provision by virtue of constituting exploration for and exploitation of a resource, *i.e.*, space, is incorrect. It is not only highly unlikely that surveillance or research constitutes the kind of exploration or exploitation contemplated, but article 133 of the RCNT goes on to specifically restrict the application of the provision to the seabed and subsoil, and defines "resources" to mean mineral resources,[103] not resources as metaphysical as space.

In addition to the reservation of the Area to use exclusively for "peaceful purposes" as provided in article 141, Part XI of the RCNT contains a provision establishing a similar standard which, though not affecting all activities, appears to at least cover mili-

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that a stronger case probably could have been made in favor of bringing surveillance devices within the purview of the "benefit of mankind" provision had the Informal Single Negotiating Text (ISNT) definition of "activities in the Area" been utilized. The relevant language covered "all activities of exploration of the Area. . . ." Nothing was said about the exploration having to be connected with "resource" exploration. Although this language has been changed in both the RCNT and the earlier ICNT, it still seems unlikely a convincing argument could have been made under the ISNT since surveillance was probably not the type of "exploration" contemplated by the provision and, nevertheless, the surveillance was not of the "Area" (seabed and subsoil) but rather of the ocean space immediately superjacent thereto. *See* Informal Single Negotiating Text (ISNT), U.N. Doc. A/CONF.62/WP.8, pt. I, art. 1 (iii), *reprinted in* 14 INT'L LEGAL MAT'LS 683 (1975). For the Informal Composite Negotiating Text (ICNT), U.N. Doc. A/CONF.62/WP. 10, *reprinted in* 16 INT'L LEGAL MAT'LS 1108 (1977).

102. *See* M. MCDOUGAL, H. LASSWELL and I. VLASIC, LAW AND PUBLIC ORDER IN SPACE 779-780 (1963). They designate the ocean a "spatial-extension resource" with the most distinctive characteristic being its utility as a medium of transportation and communication. After stating that the ocean, land, airspace and outer space constitute the most noticeable examples, they continue:

> The land masses obviously contain various stock and flow resources, as do the oceans and air space and outer space. The particular reference we make is, however, to the spatial or extension quality of the resource which makes it a highly advantageous medium of transportation and communication; for present purposes, the material aspects of the resources are relevant, not for their characteristics as flow or stock resources, but because they form a surface or extension which can be made use of for movement.

103. Article 133(b), RCNT, *supra* note 11, at 736 states in part: "'Resources' means mineral resources *in situ*."

tary research conducted on the floor of the Area or in the subsoil thereof. This provision is article 143(1). It states, in pertinent part, that "[m]arine scientific research in the Area shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole . . . ."[104] Although scholars who are not favorably disposed toward military uses of the deep seabed may feel constrained to interpret this provision as proscribing all research of a military nature, including weapons testing, careful examination fails to sustain such all encompassing construction.

The requirement in article 143(1) that marine scientific research be carried out "exclusively for peaceful purposes" does not appear to proscribe all scientific research of a military nature. This conclusion is derived from the consistency of such a construction with the interpretation of "peaceful purposes" as used elsewhere in the RCNT (articles 88 and 141), the absence of a provision explicitly prohibiting such traditional activity, and the fact that reading "peaceful purposes" as prohibiting scientific research of a military nature would produce the anomalous result of having one provision (article 143(1)) proscribe relatively innocuous research activity while provisions found elsewhere in Part XI (articles 136, 140(1), and 141) permit other extensive military uses consistent with principles of international law. Nor does it appear that the requirement that such activity be carried out for the "benefit of mankind as a whole" significantly affects the interpretation concerning the impact of article 143(1) on scientific research of a military nature. Though admittedly some may argue that no military activity can benefit mankind as a whole, it seems that scientific research is distinct from what is typically viewed as military activity. Specifically, while traditional military activity can benefit either the acting nation alone or the acting nation plus all others, except those against which it is directed, recent history has demonstrated that almost all scientific activity, albeit military in nature, produces some useful non-military applications. Moreover, it would be extremely difficult, if not impossible, to distinguish most military from most non-military scientific research. Certainly such an attempt could not turn upon the character of those conducting the activity, particularly since military scientists are generally in the forefront of scientific activities in transnational spatial areas. And, finally, as mentioned in

104. Article 143(1), RCNT, *supra* note 11, at 738.

relation to the requirement that marine scientific research be carried out exclusively for "peaceful purposes," construing any provision in article 143(1) as proscribing military research produces the anomalous result of outlawing innocuous activities while provisions elsewhere in Part XI permit other extensive military uses of the Area.

The mere fact that articles 141 and 143(1) of the RCNT cannot reasonably be construed as proscribing all activities of a military nature, or even military surveillance and research, does not necessarily mean that such activities may be carried on without legal restriction. In this respect, article 137(1) of the RCNT provides:

> No State may claim *or exercise sovereignty or sovereign rights* over any part of the Area or its resources, nor shall any State or person, natural or juridical, appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights, nor such appropriation shall be recognized (emphasis added).[105]

The effect of such language is to indicate clearly that no state may claim or exercise sovereignty over any portion of the Area. Though mere extensive and exclusive use apparently does not contravene the prohibition since, as noted in relation to article 2 of the 1958 Convention, all uses of ocean space necessarily operate to exclude any simultaneous use of the same area by another state,[106] there is little doubt that both the exercise of jurisdiction over foreign nationals located within the parameters of the Area and the assertion of any occlusive authority are strictly forbidden. The prohibition against any claim to or exercise of sovereignty does not *ipso facto* prevent military utilization of the Area. After all, most military activities constitute mere exclusive use and involve neither a claim to sovereignty nor an exercise sufficient to give rise to any claim to sovereignty.

Article 137(1) of the RCNT also contains a proscription of State appropriation of any portion of the seabed and subsoil thereof beyond the limits of national jurisdiction, a proscription which may well affect certain military uses of the Area. It seems rather self evident that the inclusion of appropriation among the list of prohibited state activities clearly indicates an intention to go beyond a simple denunciation of claims to, or exercises of, sover-

105. Article 137(1), RCNT, *supra* note 11.

106. *See* Part XI Section 3, RCNT, *supra* note 11, at 738.

eignty. If this were not so, there would have been no need to include a term perceived as a mere recitation of previously proscribed conduct.

Neither the RCNT nor the *travaux preparatories* developed in relation thereto contain any definitive statement as to the meaning of the term "appropriation."[107] It seems, however, safe to say that while the term may well have been designed primarily to proscribe efforts to remove mineral resources from the seabed, the fact that it is not so specifically limited leads to the conclusion that it also proscribes conduct or activities not extensive enough to constitute an explicit or tacit claim to sovereignty. Therefore, the mere fact that a certain military use is not sufficient to contravene the prohibition of claims to, or exercises of, sovereignty over any portion of the Area, does not mean such activity is authorized by international law. If the use amounts to an appropriation, then, despite the fact it may comport with all other principles enunciated in the draft convention, it is apparently prohibited.

In summation then, whether "peaceful purposes" is construed alone or in conjunction with the "common heritage" or the "benefit of mankind" provision, it lacks sufficient normative clarity to

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107. Before the first session of UNCLOS III, many seabed issues were debated by the U.N. Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction. In 1973, Subcommittee I forwarded a draft convention to UNCLOS III which contained several alternative provisions, 28 U.N. GAOR Supp. 21, 54, U.N. Doc. A/9021 (1973). Alternative draft article 4 read:

> (A) Neither the Area nor (its resources nor) any part thereof shall be subject to appropriation by any means whatsoever, by States or persons natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over the Area or (its resources or) any part thereof; nor, except as hereinafter otherwise specified in these articles, shall any state or any person, natural or juridical claim, acquire, or exercise any rights over the resources of the Area or of any part thereof. Subject to the foregoing, no such claims or exercise of such rights shall be recognized.
>
> (B) 1. No State shall claim or exercise sovereignty or sovereign rights over any part of the sea-bed or the subsoil thereof. States Parties to this Treaty shall not recognize any such claim or exercise of sovereignty or sovereign rights.
>
> 2. Similarly, the sea-bed and subsoil thereof shall not be subject to appropriation by any means, by States or persons, natural or juridical.

The precise meaning of "appropriation" was never clarified. Moreover, it never appeared in the 1971 Report, 26 U.N. GAOR, Supp. 21, U.N. Doc. A/8421 (1971), nor the 1972 Report, 27 U.N. GAOR, Supp. 21, U.N. Doc. A/8721 (1972). However, in 1971 Canada submitted a paper to the Committee, *International Sea-Bed Regime and Machinery Working Paper*, U.N. Doc. A/AC.138/59, *cited* in 26 U.N. GAOR, Supp. 21, 205 U.N. Doc. A/8421 (1971), which contained at 206 an article prohibiting "appropriation." In explanation it said:

> Bearing in mind *international experience with various uses of the high seas* . . . it would also be advisable to give a clearer indication in the treaty as to what might

proscribe all activities of a military nature within the Area.[108] Neither the RCNT nor the working documents indicate any consensus as to the meaning of the clause. Moreover, the "common heritage" provision merely operates to prohibit assertions of sovereignty over the Area, while the "benefit of mankind" provision governs only activities designed to explore and/or exploit the mineral resources of the seabed and subsoil of the Area.

Any explicit claim to sovereignty over a portion of the Area is proscribed. Claims implicit in any assertion that a portion of the Area is closed to foreign nationals, or the exercise of jurisdiction over such nationals found within a portion of the Area, are similarly proscribed. Since Part XI of the RCNT fails to expressly prohibit every possible exclusive use of the Area, it appears that many military uses continue unaffected unless it can be shown indubitably that "peaceful purposes" proscribes all activities of a military nature. Even if this cannot be demonstrated, those exclusive military activities *exhibiting some indication of permanency* are prohibited by the proscription of appropriation.

IV. APPRAISAL OF THE EXISTING AND THE PROPOSED REGIME

Any desirable international legal regime designed to govern possible military uses of the water surface, the navigable water column, the bed, and the subsoil of the high seas, must be comprised of three essential components. First, the regime must em-

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constitute a form of appropriation falling short of a claim or exercise of sovereignty or sovereign rights (a question which is closely related both to the scope of activities to be governed by the regime and to the reservation of the sea-bed for exclusively peaceful purposes). To this end "appropriation" might be defined to mean any *exclusive use or denial of the right of access* not provided for in the treaty (emphasis added).

Though denial of the right of access is surely appropriation, it will be demonstrated that to proclaim mere exclusive use an appropriation is unwise.

108. Mr. Bavand (Iran) recapitulated the various interpretations voiced at UNCLOS III, 5 Third U.N. Conf. Law of the Sea 56, 65, para. 24, U.N. Doc. A/CONF.62/SR.68 (1976):

Three trends of thought seemed to emerge. . . . Many States had taken the view that "peaceful purposes" meant the prohibition of all *military activities*, including activities by military personnel, on the sea-bed. Other States interpreted the principle as prohibiting all military activities for *offensive* purposes, but not, for instance, the use of military means of communication or the use of military personnel for scientific purposes. A third group of States maintained that the test of whether an activity was peaceful was whether it was consistent with the Charter of the United Nations and other obligations of international law (emphasis added).

body verifiable obligations. That is, the prescriptions articulated must be such that it is easy to verify the extent to which the obligations reflected therein are being complied with. Second, the regime must proscribe all activities which jeopardize the balance of existing strategic military forces. Lastly, the regime must not be such that it stimulates efforts to shift the locus of strategic conflict toward the high seas.

It would be difficult to obtain any significant military advantage by violating the principles of such a regime because the violations would be easily detected and thus could be compensated for quickly. Moreover, since the effect of strategic conflict would directly impact urban/industrial centers, such a regime should induce nations to act with moderation during periods of international crisis. Additionally, such a regime would assure the continued invulnerability and value of the SSBN and, thereby, preserve international stability and state security by maintaining the balance of a significant, and perhaps the most important, portion of the existing strategic force structure. Continued invulnerability of the SSBN should guarantee the existence of an adequate, assured retaliatory capability, while exposing urban/industrial centers to the effects of strategic conflict should serve to temper hasty international political decisions and encourage efforts for effective arms control and eventual arms reduction.

Measured against such desiderata, it appears that, with respect to the water surface and the navigable water column of the high seas, the 1958 Convention has already established, and Part VII of the RCNT proposes to leave intact, a relatively attractive international legal regime governing military utilization of such areas. A close reading reveals that neither document purports to articulate an unverifiable, totally proscriptive regime. Indeed, all reasonable military activities on the surface or in the navigable water column, including the deployment of virtually undetectable water column sonic detection devices and free floating anti-submarine mines, continue to be permitted. Given the possibility that a nation violating a regime proscribing such undetectable activity might mistakenly assume that, as a result of the violation, it obtained some temporary military edge convertible into an international political advantage, the fact that such undetectable activity is not proscribed should promote stability by encouraging nations to remain alert to all those difficult to detect, legally permissible activities which may prove menacing.

Notwithstanding the permissive regime established by the 1958 Convention and reiterated in Part VII of the RCNT, it appears that the military activities which are authorized will neither substantially threaten the status of existing strategic forces nor serve to accelerate technological and doctrinal trends toward shifting the locus of strategic conflict from presently targeted inhabited areas to the waters of the high seas. In fact, of the legally permissible existing and foreseeable military uses of the water surface and the navigable water column of the deep seas mentioned in Section II, only ASW activity presents any significant threat to the composition of strategic military forces[109] and provides the opportunity for redirecting the locus of strategic conflict. Naval maneuvers, weapons testing, and the deployment of Polaris/Poseidon missile launching nuclear submarines contribute more to than they detract from international stability. Yet, given the circumscribed range of water column sonic detection devices and free floating anti-submarine weapons, a regime which authorizes the deployment of ASW devices and weapons should neither jeopardize the invulnerability of the SSBN nor contribute measurably to the growing interest in militarization of the high seas.

With respect to the deep seabed and subsoil thereof, it appears that if the delegates to UNCLOS III adopt provisions similar to those found in Part XI of the RCNT, they will remedy many of the deficiencies in the provisions of the existing legal regime affecting military uses of such areas. The fact that even the *res communis* characterization sanctions all reasonable military uses of the bed and subsoil below the high seas which are not accompanied by efforts designed to subject the areas of use to state sovereignty means, essentially, that such areas may be used presently as sites for the erection of huge sonic detection devices capable of insonifying all of the ocean space, the deployment of sophisticated ASW weapons systems such as the Captor anti-submarine mine and its successors, the establishment of research aquahabitats with the capacity to serve as underwater submarine depots, and, but for the SACT, SALT II, the LTB, and the ABM Treaty,[110] the testing and deployment of seabed based stationary

109. *See generally* Baxter, *The Legal Aspects of Arms Control Measures Concerning the Missile Carrying Submarines and Anti-Submarine Warfare* in FUTURE OF SEA-BASED DETERRENT 209, 221 (1973).

110. *See* content for notes 33-36.

and mobile offensive and defensive strategic missile systems. If one of the superpowers should actually undertake such activities, a strategic asymmetry of sorts could well develop[111] and the deep seabed could well become the locus of strategic conflict.

Part XI of the RCNT would do two things to correct the deficiencies in the existing regime. First, it would establish a set of *conventional* principles directly applicable to the deep seabed. Secondly, it would go beyond the mere proscription of claims to or assertions of sovereignty reflected in the notion that the deep seabed is *res communis* by prohibiting all states from appropriating any portion of the Area. As a result, although exclusive *temporary* military uses would continue to be permitted,[112] all exclusive uses which *exhibited an indication of permanency* evidenced, perhaps, by installation or affixation to the seabed, would be prohibited.

It is quite clear that a proscriptive regime of the character of that found in Part XI of the RCNT would, unlike the existing permissive regime, preserve the balance of strategic forces and assure that the locus of strategic conflict would not be redirected from presently targeted urban/industrial centers toward the deep seabed. Moreover, even though the high seas is admittedly vast and susceptible to many inconspicuous military uses, such a proscriptive regime would establish easily verifiable obligations since any effort to successfully erect sonic detection devices, capable of insonifying ocean space, on the deep seabed, advanced long-range ASW weapons needed to effectively threaten the SSBN, or research aquahabitats which may be used for ominous military activity, would necessarily require a large scale task force stationed on the water surface working for a considerable period of time. As a consequence, it would be virtually impossible for such efforts to escape detection. Once such activity is detected, efforts could be undertaken to quickly restore the strategic balance. This feature should serve to militate against the temptation to circumvent the obligations reflected in Part XI of the RCNT.

111. *See* W. BURKE, TOWARDS BETTER USE OF THE OCEAN 88-89 (1969).

112. *See* content for notes 103-106.