

## Naval War College Review

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Volume 42  
Number 2 *Spring*

Article 5

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1989

# Troubled Waters off the Land of the Morning Calm: A Job for the Fleet

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### Recommended Citation

Boma, James R. (1989) "Troubled Waters off the Land of the Morning Calm: A Job for the Fleet," *Naval War College Review*: Vol. 42 : No. 2 , Article 5.  
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# Troubled Waters off the Land of the Morning Calm: A Job for the Fleet

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Lieutenant Commander James R. Boma, U.S. Naval Reserve

**I**t is early Sunday morning, 4 February 1990. A South Korean ferry, accompanied by a lone Republic of Korea (ROK) Navy Sea Hawk fast-attack gunboat, proceeds slowly in choppy seas on a routine resupply run toward the island of Paengnyŏng Do, one of the five precariously situated Northwest Islands.

*By authority of the 1953 Armistice Agreement, these remote islands, which lie north of a straight seaward extension of the demilitarized zone (DMZ) and perilously close to the North Korean mainland, are controlled by the United Nations Command and hence are under South Korean administration. Supported by armed-escorts, resupply missions have been conducted without incident since 1953.*

*During 1988, the Seoul Summer Olympics were a resounding international public relations success for the South, and the North's boycott of the event served to heighten the stark contrasts between the two systems. While the North's economy, on an essentially wartime footing for nearly four decades, is stagnant and seemingly able to subsist only through massive infusions of economic and military aid from communist allies, the South's is robust and booming.*

*In addition to the ideological incompatibilities of the two governments, Kim Il-sung, the aging patriarch of the North who has ruled that government since its inception, is beset by political problems resulting from his attempt to transfer the reins of power to his son and heir apparent, Kim Jong Il—doctrinal heresy to a dedicated Marxist-Leninist. Increasingly strident calls for forceful reunification, a lifelong promise of the elder Kim, have been emanating from P'yŏngyang and were capped on 1 January 1990 by a communique renewing earlier demands that the "puppet regime in the South" must obtain*

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permission from the North prior to entering the disputed waters adjacent to the Northwest Islands. As always, the South Koreans ignored this verbal barrage and have continued to maintain the tenuous, but vital, logistics lifeline to these isolated outposts.

The skipper of the *Sea Hawk* is alarmed when his radar operator reports contact on four high-speed surface craft, believed to be North Korean *Osa* or *Komar* missile boats, closing rapidly from the north. After radioing a frantic warning to the captain of the supply vessel, the *Sea Hawk* is struck topside by *Styx* missiles which explode, cutting the craft in two and killing all aboard, long before its crew is able to bring their largely defensive guns to bear.

The supply vessel immediately executes a turn to the south, but soon is overtaken by the North Korean boats which rake it from bow to stern with machine-gun and small-arms fire, killing three crewmen and seriously wounding the captain, who manages to radio a "Mayday" to the ROK Navy sector commander. A ROK Air Force F-5 fighter is scrambled immediately and reports that the supply vessel is under tow and appears to be heading for the North Korean port of Nampo.

Meanwhile, in Seoul, a North Korean defector reports that his reserve motorized rifle division has been mobilized for war. Overhead reconnaissance confirms this, showing massive troop movements southward and increased activity along the DMZ. Receiving this unwelcome news, the Commander in Chief, Combined Forces Command (CINC/CFC),\* a four-star U.S. Army general, alerts his U.S. and ROK forces and begins to increase their readiness for the expected North Korean thrust south across the DMZ.

In Pusan, a port on the southeastern coast of the Republic, the captain of the U.S.S. *Bunker Hill* (CG-53), an Aegis-class cruiser, is recalled from a port visit and ordered to proceed at "best speed" with two U.S. ships in company—the guided missile frigate *Rodney M. Davis* (FFG-60) and the destroyer *Fife* (DD 991)—to an operating area 40 miles due east of the North Korean east coast port of Wonsan to rendezvous with a carrier battle group proceeding to that area.

Arriving early on the morning of 6 February, the *Bunker Hill's* captain is troubled by a report from the pilot of the ship's helicopter that the flight crew has spotted the periscope of one submarine and confirmed the presence of another, classified as probable Romeo and Whiskey-class and believed to be North Korean. Both have submerged and appear to be closing the group's position. Requesting permission to "neutralize" this threat, the pilot asks that additional helicopters be dispatched to prosecute these contacts and search for others. Just then, the cruiser's air-search radar operator

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\*This commander is many-hatted, serving not only as CINC/CFC, but also as Commander in Chief, United Nations Command; Commander, U.S. Forces Korea; and Commander, Eighth U.S. Army, Korea. <https://digital-commons.usnwc.edu/nwc-review/vol42/iss2/5>

reports six fast-moving “bogies”—unidentified and presumed hostile aircraft—closing their position.

The Captain, feeling that old familiar knot in his stomach, calmly orders “General Quarters!” breathes deeply and picks up the secure encrypted red radio handset to inform his boss, Commander Task Group 75.1, who is embarked in his flagship, of the rapidly deteriorating situation and of his intent to engage the North Korean forces.

**W**hile the picture just painted is not comforting, it is, unfortunately, all too plausible a scenario which might be confronted in this region of unrelieved tension. It serves as an example of the very situation in which the mettle of the U.S. maritime strategy and our national resolve will be tested. “Freedom of the Seas” is not a mere slogan designed to arouse public passions and facilitate funding for a 600-ship navy. Rather, it forms the cornerstone of our ability to defend our vital interests, and those of our allies, in this “era of violent peace.”<sup>1</sup>

High-seas navigational freedoms and overflight rights have been increasingly burdened by the encroachments of numerous coastal states. With the advent of the Freedom of Navigation (FON) Program in 1979, as subsequently reaffirmed by President Reagan in 1983, the United States has assumed the mantle of guardian and enforcer, where needed, of the international community’s interests in the maritime common. One claim which appears to have exceeded recognized international peacetime norms is the 50-mile “military boundary zone,” proclaimed by the People’s Democratic Republic of Korea (North Korea) in 1977.

### The Freedom of Navigation Program

In his oceans policy statement of 10 March 1983, President Reagan emphasized the role of the United States as a leader in developing customary and conventional law of the sea. Broadly stated, the U.S. objective, both for reasons of self-interest and for interests common to all nations, is to “facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of resources.”<sup>2</sup>

Though earlier, mainly because of its deep seabed mining regimen, President Reagan had announced that the United States would not sign the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention), on this occasion he stated that because the Convention’s provisions dealing with the traditional uses of the oceans, including navigation and overflight rights, were in consonance with and represented customary practices, these rights would be recognized. But this recognition was expressly conditioned by the following important caveat: “so long as

the rights and freedoms of the United States and others under international law are recognized by such coastal states.”<sup>3</sup> Further, the President went on to state that the United States, as a matter of national policy: “will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention . . . [but will not] . . . acquiesce in unilateral acts of other states which are designed to restrict these recognized rights and freedoms.”<sup>4</sup>

As stated earlier, this was not a new development. Since the Carter administration initiated the program during March 1979, the United States has successfully conducted a systematic Freedom of Navigation Program to protect U.S. and international navigation and overflight interests on and over the seas against excessive maritime claims.

Several key terms and concepts, which have gained the force of international law through custom, past and present practices, with some codified in conventions and treaties such as the recent comprehensive 1982 LOS Convention, need to be discussed briefly to put the issues in context.

The territorial sea is a “belt of ocean which generally is measured seaward from the baseline on the coastal or island nation and subject to its sovereignty.”<sup>5</sup> (Unless special rules apply, the baseline is the low-water line along the coast as marked on that nation’s official large-scale charts.) The United States maintained its traditional 3-nautical mile territorial sea until 28 December 1988 when President Reagan proclaimed a 12-nautical mile territorial sea. As in the past, the United States continues to respect other nations’ territorial sea claims up to a maximum breadth of 12 nautical miles.<sup>6</sup> However, the United States has made it clear that it will not recognize aspects of such a claim which do not “accord to the U.S. its full rights in the territorial sea under international law.”<sup>7</sup> One such important traditional right is that of “innocent passage” on the surface through a nation’s territorial sea.<sup>8</sup>

Also, a contiguous zone of up to an additional 12 nautical miles, or a maximum of 24 nautical miles from properly drawn baselines, may be established for the limited purposes of preventing infringement of a coastal state’s “customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.”<sup>9</sup>

Finally, under the 1982 LOS Convention, a coastal nation may establish an exclusive economic zone (EEZ) of up to 200 miles from the baseline. In the EEZ, a state may regulate the exploration and exploitation of natural resources, the production of energy from the water, currents and wind, maritime scientific research, the establishment of artificial islands, and other similar resource-related activities.<sup>10</sup> However, with the exception of these purpose-oriented, express extensions of control into the contiguous zone and

the EEZ, traditional high seas freedoms of unrestricted navigation and overflight endure.<sup>11</sup>

In other words, the degree of control exercised by the coastal nation is inversely proportional to the distance from its shores. While the vessels of other nations have only the limited rights of innocent passage, including use of force only in self-defense, within the limits of a proper territorial sea, the rights of vessels and aircraft in the contiguous zone and EEZ are minimally regulated by the adjacent coastal nation. It is important to emphasize the unhampered nature of the right of innocent passage. There is no recognition under the 1982 LOS Convention nor by the United States of any right of a coastal nation to impose a precondition of permission or notice prior to the exercise of this fundamental right.

There are several other passage regimes which merit an explanation: archipelagic sea lanes passage and transit passage through international straits.

An archipelagic nation is constituted wholly of one or more groups of islands, e.g., the Republic of the Philippines. Within the limits specified by the 1982 LOS Convention, such nations may draw straight baselines joining the outermost points of their outermost islands. The waters enclosed within these baselines are called archipelagic waters. These archipelagic baselines are also the baselines from which the archipelagic nation measures seaward for its territorial sea, contiguous zone and exclusive economic zone. The United States recognizes the right of an archipelagic nation to establish archipelagic waters, provided that the baselines are drawn in conformity with the 1982 LOS Convention and the United States is accorded navigation and overflight rights and freedoms under international law in the enclosed archipelagic and adjacent waters.<sup>12</sup>

Two means are available to preserve archipelagic sea lanes passage. First, archipelagic nations may designate archipelagic sea lanes through their archipelagic waters suitable for "continuous and expeditious passage of ships and aircraft." All normal routes customarily used for international navigation and overflight are to be included in this scheme. If the archipelagic nation does not designate such sea lanes, the routes normally used for navigation and overflight, nonetheless, remain available to all nations for archipelagic sea lanes passage.

The right of archipelagic sea lanes passage is defined as "the exercise of the freedom of navigation and overflight for the sole purpose of continuous and expeditious transit through archipelagic waters, in the normal modes of operation, by the ships and aircraft involved."<sup>13</sup> This right of archipelagic sea lanes passage cannot be impeded nor suspended by the archipelagic nation

for any reason.

With regard to international straits, two situations exist. The first involves international straits overlapped by territorial seas, i.e., where the territorial seas of the adjacent coastal nations leave no high-seas corridor. In this instance, the ships and aircraft of all nations, including warships and military aircraft, enjoy the right of unimpeded transit passage through such straits. Transit passage is the exercise of the freedoms of navigation and overflight solely for the purpose of continuous and expeditious transit in the normal modes of operation utilized by ships and aircraft for such passage. "Normal modes of operation" means that submarines may transit submerged, and surface warships, consistent with sound navigational practices and security of own force considerations, may transit in formation, and launch and recover aircraft.

Transit passage through international straits cannot be suspended by the coastal or island nation for any purpose during peacetime. This principle of international law also applies to transiting warships of nations at peace with the bordering coastal or island nation, but involved in armed conflict with another nation. However, consistent with generally accepted international standards and to promote navigational safety, the coastal or island nation may designate sea lanes and traffic separation schemes which ships in transit must respect.<sup>14</sup>

With respect to the second category of international straits, those not completely overlapped by territorial seas and, in archipelagic waters outside archipelagic sea lanes, all surface ships enjoy the more limited right of innocent passage. Submarines must transit on the surface; launching and recovery of aircraft are not permitted; and weapons exercises may not be conducted. Innocent passage through such straits may not be suspended. Temporary suspension of innocent passage through archipelagic waters outside archipelagic sea lanes is permitted in specified areas when essential to the archipelagic nation's security, but only after prior promulgation of its intentions to do so, and the temporary suspension must be applied in a nondiscriminatory manner.<sup>15</sup>

A special status accrues to warships and military aircraft which, as mobile extensions of their sovereign, enjoy general immunity under custom, past practice and the provisions of the 1982 LOS Convention.<sup>16</sup> Their government may be ultimately held liable for damages, but the only self-help measure immediately available to the coastal state in the event of an alleged violation of applicable rules is to require that the offending ship leave its territorial sea.

Many coastal nations have established what the United States and others deem to be excessive maritime claims, which are either too broad in extent, or seek to ban or place impermissible preconditions on the exercise of innocent passage, transit passage or archipelagic sea lanes passage. These claims, whether asserted by friends or potential adversaries, are inimical

to the interests of the United States and any other seafaring sovereign. These restrictions imperil the unrestricted movement of commerce and resources in the global market and are detrimental to the essential mobility of U.S. defense forces.

They are, therefore, susceptible to peaceful challenge under the FON Program.

### Nature of the North Korean Claims

On 22 June 1977, North Korea promulgated a 200-mile exclusive economic sea zone which was to take effect on 1 August 1977.<sup>17</sup> The language of this pronouncement was unobjectionable except for the practical consequences of its attempted establishment off the west coast of North Korea, where only approximately 100 miles of Yellow Sea separates the peninsula from its behemoth neighbor, the People's Republic of China. However, not wishing to press the issue with their sometimes fraternal comrades, the North Koreans have indicated through their subsequent enforcement practices that they will assent to a midline delineation of the EEZ in the Yellow Sea, which approximates a 50-mile zone.<sup>18</sup>

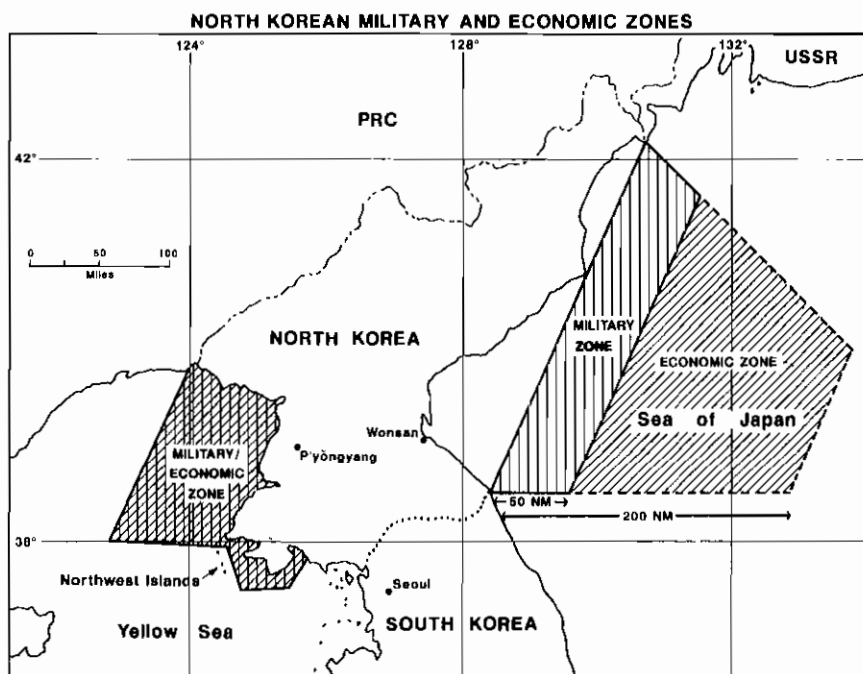
**Military Boundary Zone.** Following closely upon the heels of the announcement to establish the EEZ came the unexpected announcement of a 50-mile wide "military boundary zone," which was to take effect simultaneously on 1 August 1977. (See figure 1.) Purportedly to safeguard the newly promulgated EEZ and to "firmly defend militarily the national interests and sovereignty" of North Korea, the communique of the Supreme Command of the Korean People's Army provided, in relevant part, as follows: "The military boundary is up to 50 miles from the starting line of the territorial waters in the east sea [Sea of Japan] and to the boundary line of the economic sea zone in the west [Yellow] sea.

"In the military boundary (on the sea, in the sea and in the sky) acts of foreigners, foreign military vessels and foreign military planes are prohibited, and civilian ships and civilian planes (excluding fishing boats) are allowed to navigate or fly only with appropriate prior agreement or approval.

"In the military boundary (on the sea, in the sea and in the sky) civilian vessels and civilian planes shall not conduct acts for military purposes or acts impinging upon the economic interests."<sup>19</sup>

While a plain reading of the text would appear to exclude fishing boats from the category of civilian ships which required prior approval for entry, Japanese officials, during the course of subsequent unofficial fishing negotiations, were shocked to learn that North Korea actually intended that





foreign fishing within the military zone was “out of the question from the beginning.”<sup>20</sup>

### Problems with the North Korean Claims

Several ambiguities in the language of the announcement, when coupled with earlier imprecise language and erratic enforcement practices, have further ruffled these troubled waters.

***Improperly Drawn Baselines and Unrecognized Historic Bay Claims.*** One problem which pervades the North Korean claims is the vagueness of their pronouncements. Their baselines, from which all other claims are derived, i.e., territorial sea, contiguous and exclusive economic zones, have not been promulgated. The presumed baselines have been gleaned from the unofficial contacts referenced between North Korean officials and Japanese envoys. A recent *Notice to Mariners* captured this uncertainty in describing the North Korean east coast straight baselines in the following fashion: “Baseline is hypothetically calculated by State Department Geographer as straight line across Sea of Japan which joins seaward terminus of Korean Military Demarcation Line and PDRK boundary with the Soviet Union.”<sup>21</sup> (See figure 2.)

## NORTH KOREAN BASELINES, AND SOVIET LINE ENCLOSING PETER THE GREAT BAY

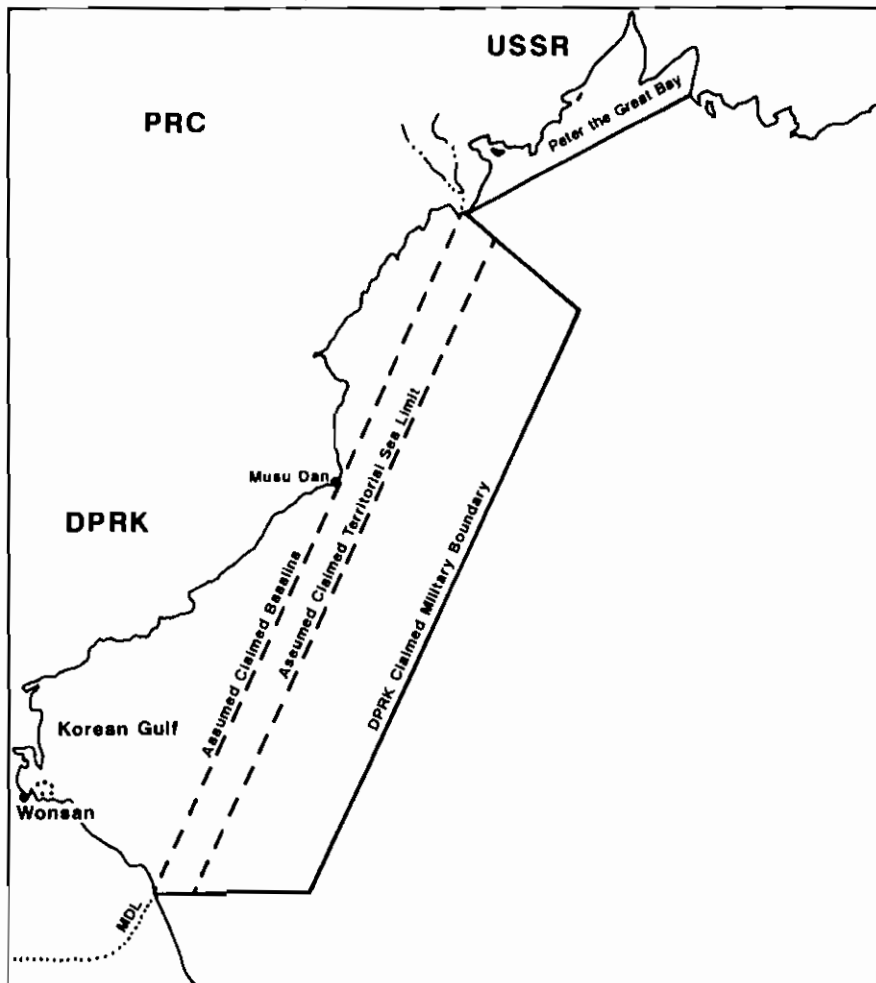


Figure 2

Under the applicable provisions of the 1982 LOS Convention, which reflects customary international practices, baselines, as outlined above, are normally drawn by following the low-water marks along the coast.<sup>22</sup> An exception to this general rule allows straight baselines only where the coast is deeply indented, which would result in a correspondingly untenable, serrated line at sea,<sup>23</sup> or where there is a fringe of islands along the coast in its immediate vicinity.<sup>24</sup> A glance at a chart will confirm that the North Korean coastal geography admits to neither limited exception to the general rule of coastally conforming baselines.

Also, the North Korean baselines conveniently encompass several supposed, although unarticulated, "historic bays," which have not been

recognized by the international community at large. Similar claims have been advanced by the Soviets (Peter the Great Bay), and the infamous “line of death” which Libya announced was an unsuccessful attempt to enclose the Gulf of Sidra.<sup>25</sup>

However, the North Korean bays do not meet the generally accepted norms codified in the 1982 LOS Convention, which provides that a bay is a “well-marked indentation in such proportion to the width of its mouth as to contain land-locked waters and constitutes more than a mere curvature of the coast.”<sup>26</sup> The Convention then sets forth technical tests for gauging the validity of a bay claim.

At this point, the “operator” reader may be thinking: “So what? Let the lawyers and cartographers immerse themselves in the excruciating minutiae of this line drawing evolution. Of what practical importance is this dispute?” Two important consequences flow from this baseline demarcation.

First, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the state.<sup>27</sup> Internal waters are, as a practical matter, as subject to the sovereignty of the coastal nation as its drier real estate and, consequently, as inviolate. In other words, no innocent passage or nonemergency transit of any kind is permitted without the prior permission of the coastal nation.

Second, and of possibly greater significance, the baselines, as has been previously mentioned, set the inner boundary which determines the seaward extent of the territorial sea, and the contiguous and exclusive economic zones. For example, off the North Korean east coast city of Wonsan, straight baselines extend internal waters 50 nautical miles seaward. Thus, impermissibly drawn baselines, while aesthetically pleasing on a chart, allow the coastal nation to exercise increased control over expanded internal waters, while their claims encroach seaward at the expense of the maritime common owned by all.

**Uncertainty of Territorial Sea Claims.** As was indicated, the North Koreans have established the breadth of their EEZ and military boundary zones, but not the precise coordinates of each. Although a 12-nautical mile territorial sea claim from the indicated baselines is presumed (as a result of their actions in the Pueblo incident of 1968), this has not been formally announced.<sup>28</sup> Additional corroboration of a nominal 12-mile territorial sea claim might be inferred from North Korea’s signing, but not ratification, of the 1982 LOS Convention when it opened for signature during December 1982.<sup>29</sup> But again, this is conjecture and, in light of consistently erratic and violent North Korean behavior, probably unwarranted.

**Military Boundary Zone.** The ambiguity regarding the precise coordinates of any of the North Korean claims logically extends to its 50-mile military

boundary zone. While the Department of Defense *Maritime Claims Reference Manual* indicates that the military boundary zone extends beyond the presumed territorial sea of 12 miles, or for a total of 62 miles from the baseline,<sup>30</sup> a "plain reading" of the express language of the announcement would seem to indicate that the breadth of the security zone off the east coast is 50 miles from the baselines, as appears to be the interpretation of one commentator.<sup>31</sup> The military boundary zone off the west coast is generally agreed to be coextensive with the economic sea zone, which is 50 miles, abutting China's similar "military warning zone."<sup>32</sup>

In any event, although North Korea has signed the 1982 LOS Convention, the 50-mile security zone clearly exceeds the maximum combined limits of a permissible territorial sea and contiguous zone (24 miles from baseline). Further, the absolute prohibition against foreign warships transiting this zone denies innocent passage in the territorial sea. Finally, high seas surface passage and unimpeded overflight rights in the contiguous zone and beyond to 50 miles are extinguished by this unilateral declaration. While the 1982 LOS Convention recognizes the right of a coastal state, after notification, to temporarily suspend innocent passage within its territorial sea for security reasons, bans on warships and prior permission regimes are neither authorized nor accepted international practice.<sup>33</sup>

In effect, the North Koreans are attempting to assert a degree of control not recognized under the Convention or past practices in a peacetime regime, except within a nation's internal waters.<sup>34</sup>

Diplomatic protests greeted this surprise announcement. As might be expected, South Korea vehemently opposed the North Korean claim as "unprecedented under international law."<sup>35</sup> The Commander in Chief, United Nations Command, speaking for that command as well as in his role as senior U.S. commander in the Republic, Commander, U.S. Forces Korea, registered a vigorous protest. The Japanese voiced disapproval, but in a somewhat muted fashion due to the economic reality that Japanese fishermen were then catching over 80,000 tons of fish annually in those waters off North Korea which were now encompassed within the EEZ and military boundary zone.<sup>36</sup> The Soviets, a growing blue water naval power, increasingly aware of the benefits accruing from unimpeded high seas freedoms, curiously, were content merely to report the North Korean announcement and Japan's disapproval.<sup>37</sup> China, perhaps due to the existence of its own indistinguishable military warning zone, issued no statement regarding the announcement.<sup>38</sup>

***Ambiguity Regarding Legal Impact of 1953 Armistice.*** Although not yet advanced directly in support of its military boundary zone, North Korea might plausibly argue that the Armistice signed at P'anmunjŏm in 1953 was

legally and, in fact, merely a ceasefire and that, technically, a state of war still exists on the peninsula. Also, there is ample historical precedent for such an argument. Many other countries, including the United States, have established in the past, or presently maintain, maritime defense or war zones. However, there are several salient characteristics of the North Korean zone which distinguish this from other such zones and would, therefore, tend to undermine any significant reliance on historical analogies.

Maritime security or warning zones find their modern origins in the sea defense zones promulgated by Japan during the Russo-Japanese War of 1904.<sup>39</sup> The Japanese zones and those adopted by the United States during World War II extended well beyond the limits of their respective territorial seas. However, they primarily imposed limits on the transit of foreign vessels during certain hours or in particular areas without imposing a total ban on such passage. Also, these zones were generally established at the outset of hostilities and terminated promptly at the conflict's end.

A more recent example would be the Maritime Exclusion Zone established around the Falkland Islands by British naval, primarily submarine, forces during the 1982 war. Unlike the North Korean claim, the British announced, in advance, the exact position of the zone and initially limited its application to Argentinian warships and aircraft which were deemed a threat to British forces in the area of operations. Subsequently, the British prohibited all such operations with the imposition of a Total Exclusion Zone. However, this zone was imposed only during the actual conduct of military operations, and was lifted at the conflict's end, with the exception of a ban on Argentine military traffic within 150 nautical miles of the Islands (the Falkland Islands Protection Zone).<sup>40</sup> Further, pending a permanent settlement of the conflict, a "prior permission" regime remains in effect for Argentine civilian vessels or aircraft within the Zone.

Whatever the reasonable limits are as to scope, notice and duration of such an arguably permissible zone, the North Korean claim was announced 24 years after the cessation of open hostilities, and the degree of control envisioned is surely beyond the reasonable spectrum of legitimate measures which might be undertaken by a state which no longer faces imminent or actual hostilities. Moreover, such vague "security" interests lend themselves to abuses which could significantly erode traditional high-seas freedoms if allowed to go unchecked.

Other nonhostilities-related sea defense zones are peacetime geographic demarcations which are primarily designed to provide a division of military effort between contiguous allies to meet armed attacks. In other words, they establish areas of anticipated naval operations or areas of respective responsibility in the event of hostilities and are contingent upon such an occurrence.<sup>41</sup> In contrast, the North Korean east and west coast military boundary zones go far beyond this in attempting to enforce routine

restrictions which should not be permitted in peacetime, even in an "era of violent peace."

The situation in this instance is further aggravated by the precarious status of the Northwest Islands. As previously indicated, although these islands are under South Korean administration, and the Armistice Agreement specifically prohibits the blockade, by sea or air, of the areas under the control of the other side, no sea lanes or aerial routes were provided to reach these outposts which lie well within 12 miles of the North Korean coast.<sup>42</sup>

### Analysis of U.S. Options

**General Considerations.** It is unclear under international law whether diplomatic protests alone are sufficient to thwart the unilateral actions of a coastal nation attempting to encroach upon the rights of all maritime nations to the unencumbered usage of the high seas. These troubling "creeping" claims through which nations attempted to dramatically expand their territorial seas, or to exercise previously unrecognized sovereign rights in offshore regions, were a key impetus to the convening of the convention which ultimately produced the 1982 LOS Convention. The drafters of the Convention sought to legitimize and codify the growing international consensus in favor of expanding territorial seas from the traditional "cannon shot range" of 3 miles to 12 miles, but to cap the gradual drift seaward at this limit.

Likewise, the provision of a contiguous zone extending an additional 12 miles beyond the seaward edge of the territorial sea provided recognition of limited law enforcement and territorial integrity concerns, while balancing these with the traditional high-seas freedoms of navigation and overflight in those waters. Finally, the provisions providing for the establishment of an exclusive economic zone permitted states to exploit and capture maritime resources within an expansive area, extending as far as 200 nautical miles from the baseline. Prior to the development of this novel concept, the only legal mechanism available to establish such control was the attempted exercise of the sovereignty associated with territorial seas by extending these claims seaward. The carefully considered EEZ regime again attempted to achieve the delicate balance between the coastal nation's resource needs and the interests of the remainder of states in minimal interference with the maritime common.

Security zones, such as the North Korean variant, are particularly troubling for they do not recognize even the limited, surface "innocent passage" rights in the territorial sea, but rather seek to ban foreign warships entirely. They also attempt to impose a permissive passage regime for nonmilitary vessels and aircraft. Not only this, but the *de facto* recognition

afforded if these claims are not physically challenged would have precedential effect and, over time, might spur other, perhaps, even more expansive claims of this sort. This would undermine the careful compromises and balancing of interests which the 1982 LOS Convention represents and lead to the proliferation of the very evils which the Convention seeks to avoid.

***The U.S. Role in the Assertion of Navigational Freedoms.*** The United States is a maritime power which presently depends, both for its own security and that of its interdependent allies around the world, upon the flexibility and speed of its forward deployed maritime and air forces. And, this dependence is not likely to lessen appreciably in the future. In the January 1988 report of the blue-ribbon Commission on Integrated Long-Term Strategy, *Discriminate Deterrence*, the authors stressed that for at least the next 20 years we will have an urgent need for "versatile, mobile forces, minimally dependent on overseas bases, that can deliver precisely controlled strikes against distant military targets."<sup>43</sup> Further, an identified long-term trend which bodes ill for such a strategy is "our diminishing ability to gain agreement for timely access, including bases and overflight rights, to areas threatened by Soviet aggression."<sup>44</sup> Thus, preservation of navigational and overflight rights is imperative to the rapid employment of our forward deployed forces which, in turn, ensure our very survival.

Likewise, in peacetime, the economic lifeblood of the Free World flows through the straits and waters of the world's seas on a daily basis. Further inroads into the freedoms of navigation and overflight could have the direst of consequences for ourselves and our allies.

Given the proven irascibility of the North Koreans, as pointedly demonstrated by the 1968 *Pueblo* incident and the downing of a U.S. Navy EC-121 aircraft the following year,<sup>45</sup> as well as the reality that alternative merchant routes and fishing grounds are readily available and more prudently used by commercial vessels, it is incumbent upon the United States, as the preeminent maritime power, to consistently and patiently ply these troubled waters in order to establish actual usage and to show peaceful contempt for the apparent North Korean "annexation" of international waters and airspace.

Further, as will be discussed below, it is this author's opinion that the objectives of the Freedom of Navigation Program will not be met by one-time transits. Rather, these rights should be continuously asserted on a regular basis if they are not to atrophy and ultimately disappear.

***Adverse Possession of the Maritime Common.*** The concepts of expanding territorial seas and the potentially more ominous unilateral restrictions on, or prohibition of, navigation and overflight are attempts to trespass upon

the historically recognized rights of all nations to the high seas. An analogy in U.S. domestic law is the concept of "adverse possession," where, under specified circumstances, long-continued possession of land may result in the acquisition of title, by a trespasser, that is good even against the rightful owner of the property. An essential element of the claim is that the possession be adverse to the true owner. In the domestic context, statutes govern the period of time in which the rightful owner must act to recover his land.<sup>46</sup>

The social policy which appears to justify the rather severe consequences for the true owner is premised upon the societal utility in seeing that an asset is being used in a productive manner which benefits the larger society as a whole.

However, in order for the trespasser to obtain the recognized property interest, it is necessary that his possession be open, notorious and contrary to the interests of the rightful owner. In other words, if the occupation is permissive, as under a lease or easement or, by analogy, conferred by a treaty or agreement, it is not contrary to the ownership rights of the true owner and, thus, has no legal effect.

Of course, in the international system, there is no statutory delineation of the period of adverse maritime encroachment, nor an effective tribunal where the matter might be conclusively resolved. However, this concept might offer some useful insights in defending against excessive maritime claims. The observed practices in defending against such claims appear to have striking parallels.

First, diplomatic protests are initiated to publicly disabuse the offending coastal state of any notion that acquiescence by default will be conceded. By thus opposing the claim as adverse to the maritime interests of the community of nations, it is next incumbent upon the true owner of the rights being infringed upon, that same community, to exercise and demonstrate the continuing utility of, and resolve associated with, this universal interest.

And because custom and practice have such major impacts in the international legal system, especially in the absence of governing treaty provisions to the contrary, this exercise is particularly important. Otherwise, new customs and practices may evolve and be legitimized in the dynamic international legal system, thereby further eroding existing rights.

In the international community, the responsibility for the assertion of these rights falls squarely upon the shoulders of the leading maritime power, the United States, which, in effect, serves as a trustee for their effective enforcement.

## Hypothetical Regimen for Assertion of Navigational Rights

***Assessment of Korean Situation.*** Before structuring forces which might be employed to assert navigational freedoms in the face of the North Korean



claims, a brief summary of the contemporary Korean political situation and North Korean forces will be provided.

As anyone who has had the opportunity to visit the Korean village of P'anmunjŏm will readily attest, although there has been a ceasefire in effect for 35 years, tensions remain very high and volatile between the two sides. Attempts at reconciliation and reunification have been pursued in earnest by the South Korean government, but the only solution which the North seems willing to explore is capitulation by the South to P'yŏngyang's "enlightened" leadership. Unfortunately, prospects for compromise between these two polar regimes are not hopeful.

Although the factual setting of the opening scenario was hypothetical, the North's unsettling internal pressures are all too real. Given the characteristic unpredictability and demonstrated irritability of the North, extreme caution is warranted in planning an operation of this type if a conflagration is to be avoided.

Also, the potential military capabilities of the North should not be underestimated. North Korea possesses a very large army, a respectable air force and a formidable coastal naval punch. Further, these forces are tied together by an effective command, control and communications (C<sup>3</sup>) network, and capable of being triggered by an impressive indicators and warning (I&W) system. If they so desire, the North Koreans are fully able to conduct a spirited defense of their coastal waters, including the full extent of their military boundary zone.

**Structuring of Forces.** In selecting the forces needed to accomplish the FON objectives in this area, it is important to keep firmly in mind that the purpose of this program is the peaceful assertion of navigational rights, and not unnecessary provocation. However, while the intention of the United States is to conduct peaceful transits through the disputed areas, the reaction, particularly in the case of North Korea, may provide a very warm reception. Therefore, it is essential that unit and national self-defense considerations be incorporated into all aspects of the planning process.

At first view, it might seem that a combined ROK-U.S. naval force would be best suited for these operations. However, in this writer's opinion, this would be viewed as highly provocative, in and of itself, to the North. It appears that it would be better under these circumstances to conduct a separate, coordinated program, with the ROK Navy responsible for maintaining the vital sea lanes to the Northwest Islands within the west coast zone, while the U.S. Navy assumes responsibility for the challenge of the east coast military boundary zone.

Because the South already conducts these resupply missions on a routine basis, the real question which needs to be addressed is the proper composition of the U.S. forces which might be employed.

Use of a carrier battle group, or multicarrier battle force, might seem very appealing from a self-defense perspective, especially in light of the considerable threat posed by North Korea. But, in this writer's view, this is not a viable option due to the general perception of the carrier-centered forces as offensively oriented strike assets. The high-speed, short reaction aerial threat posed to the North Koreans by this sort of force would seem dangerously likely to elicit an attack, which might escalate, at worst, to renewed hostilities on the peninsula itself. A contrary view might hold that because these assets are so dear to the United States, and inherently capable of exacting a terrible price for such a misstep, the North would not challenge their presence. However, this assumes a rational decision-making model, and past North Korean conduct would not warrant this optimism.

In this author's opinion, aerial flights alone are insufficient for a meaningful challenge. First, the use of high-performance naval or air force aircraft would be perceived as a threat. Further, aircraft, by their very nature, are transitory and incapable of providing the duration of operations necessary to demonstrate credible resolve. Finally, the North Korean zone contains surface prohibitions as well, which must be contested. If overflight rights are to be asserted, it is recommended that this be accomplished independently of, but in a closely coordinated fashion with, the surface navigational exercises.

The clandestine warriors of the deep—submarines—are similarly rejected as an appropriate platform for this assertion proposal. Their effectiveness and very survival is predicated upon their "invisible invincibility." Surface transits by submarines in this area are rejected out of hand as both unnecessary and foolhardy. The conclusion drawn is that a surface force is essential, as well as best suited, for this mission, as possibly complemented by the referenced independent, coordinated overflight program.

Next, what units might comprise this SaG (surface assertion, vice action, group)? The recommended disposition would be centered around the impressive capabilities of an Aegis-class cruiser (CG-47), as supplemented by a *Perry*-class frigate (FFG-7), and a *Spruance*-class destroyer (DD-963). The Aegis' SPY-1A/B system possesses a substantial anti-air warfare capability, as well as ample command, control and communications and early warning performance.

To counter the significant North Korean submarine threat, a *Spruance*-class ship would provide adequate antisubmarine warfare protection for the group. To back up the other ships in the event of casualties, or to provide an additional level of force protection, the ASW and AAW capabilities of the *Perry*-class frigate make it an excellent candidate for this role.

In this force mix, the Harpoon missile-equipped ships would provide long range antisurface warfare protection against the potent North Korean

missile and torpedo-firing fast-patrol boats. Additionally, all three ships are capable of carrying and supporting LAMPS helicopters, which would add critical airborne early warning and stand-off ASW capability to the force. With the exception of the exercise of "innocent passage" within a territorial sea,<sup>47</sup> such aerial reconnaissance is fully consistent with high seas freedom of operations and in keeping with the desired defensive posture.

In the alternative, should greater capability be desired, a larger force might be readily found in the form of a battleship surface assertion group (BBSaG). This would provide additional punch to the group, especially in the area of ASUW. However, with the advent and proliferation of stand-off, antiship cruise missiles, the additional capabilities of this grouping are not necessarily decisive. Nevertheless, from a psychological viewpoint, the BBSaG would give greater pause for reflection and might intimidate would-be aggressors.

Air cover for the group would be optimally provided by a carrier battle group operating in associated support in waters well clear of the disputed area. The second choice would be to provide USAF, USN or USMC aircraft cover from nearby Japanese bases, although political and diplomatic considerations might preclude this. As a last resort, USAF or ROKAF assets from the Republic of Korea could furnish this protection, but the perceived escalatory potential of this option would seem to militate strongly against its adoption.

**Concept of Operations.** Once formed, the hypothetical SaG should transit the area in such a fashion so that the planned intended movement (PIM) of the formation is on a course which opens the North Korean coast as it transits through the military boundary zone. For example, the ships might get underway from Pusan and proceed north remaining within 25-40 miles of the South Korean coast. Upon entering the military boundary zone, the formation could turn northeast and proceed through the area until reaching the boundary of the zone. If the ships entered from the north, the initial track would be slightly southeasterly so that a gradual opening of the range to the coast could be achieved. The initial transits might be initiated at a range of 40-50 miles from the North Korean coast to provide the force with ample "sea room" in which to acquire and engage any detected threat. Further, this would minimize the provocational potential of the initial transit. Assuming that initial operations were successful, and relying upon gradual desensitization to these operations, successive transits might gradually close the coast.

However, under no circumstances is it recommended that these forces enter the claimed 12-mile territorial sea in order to assert "innocent passage" rights. In this writer's opinion, such an attempt would virtually guarantee an engagement. The legal justification for this nonassertion of the rights

of innocent passage would be couched in terms of the recognition of the state of belligerency existent between the North and the United Nations Command in the South. Diplomatic protests of the excessive baseline claims should expressly reserve the rights of innocent passage through the territorial sea. However, operational realities dictate that, as a practical matter, these rights have been suspended, but not extinguished, by the prolonged state of belligerency which the Armistice secured. Further, with the concurrence of South Korea, their Northwest Island resupply missions should be retroactively reported on a regular basis to document innocent passage transits on the west coast. To avoid the appearance of inconsistency, it may be pointed out that these transits are provided for within the implied terms of the Armistice Agreement.

The timing of these FON assertion exercises is a critical factor which warrants careful consideration by the operational planner. Obviously, these adversarial, but not purposely provocative, operations cannot take place in a vacuum. A propitious time to initiate the limited, hypothetical FON operations outlined, so as to minimize unexpected North Korean reaction, is to make it a part of regularly scheduled U.S. operations in the area, such as the annual "Team Spirit" exercise. This appearance of U.S. naval forces is a routine event which would not arouse undue apprehension on the part of the North, and it appears that FON Program goals are compatible with exercise objectives.

**Risk/Benefit Analysis.** It is clear that the risk in conducting these operations would be substantial, but the steps recommended, if implemented, should ameliorate any legitimate perceptions of provocation on the part of the North Koreans. In light of the sensitivity of this area, the political decision to proceed with this assertion of navigational rights operation would be very difficult. However, in this author's opinion, there are compelling reasons which would justify the risks entailed.

One important reason why the North Korean claims need to be resisted through physical assertion operations is to maintain the integrity and credibility of the FON Program. In light of the high risk/significant threat scenario outlined, it is hoped that North Korean claims would not be relegated to the "too hard" category. It is one thing to challenge the 200-mile territorial sea claim of a relatively benign South American neighbor, for instance, and quite another to face the unpredictable consequences of an encounter with the consistently erratic, aggressively minded North Koreans. This is not meant to imply that all FON operations undertaken to date have been "milk runs." Quite to the contrary, the recent Black Sea confrontation, the ongoing dangerous Persian Gulf operations, and the repeated forays below the Sidra "line of death" would quickly dispel any

such notion. However, it is essential that all excessive claims be routinely challenged in a deliberate, albeit cautious, manner. The adoption of this proposal would pay handsome dividends in the critical Northeast Asian area.

In this instance, a close ally's rights are directly threatened by the North Korean claims. The North Korean military boundary zone represents renewed pressure on the South's efforts to maintain the lifeline to the Northwest Islands and could ultimately serve as a pretext for an attack upon the resupply vessels and the islands themselves.

While not particularly significant in terms of population, natural resources or potential economic development, these islands are of incalculable political significance to both countries. These outposts are the exposed nerves of South Korean sovereignty and territorial integrity.<sup>48</sup> By asserting navigational freedoms within the North Korean east coast military boundary zone, we not only uphold important international principles which are essential to our own security, but also voluntarily shoulder the burden with our steadfast friends in the South, who must, of necessity, regularly run the gauntlet on the west coast. This should alleviate significant pressure on the South. Similarly, Japan has chafed at the North Korean actions and would undoubtedly welcome reasonable efforts to check the bullying thrust of these claims, the effects of which fall heavily on them. The reaction from the mainland is difficult to gauge, but China is unlikely to protest this effort, due to estrangement from Kim Il-Sung's regime. While no reaction is the expected and desirable response, the Chinese will see this as a sign of renewed U.S. resolve in the region. The Soviets would probably align verbally with P'yongyang.

### General Recommendations Regarding the FON Program

In this writer's opinion, the following issues dealing with the general conduct of the FON Program should be addressed to ensure the continuing vitality of this essential component of national defense.

***Emphasis on Assertion vice Provocation.*** The purpose of the Freedom of Navigation Program is to conduct peaceful challenges to unlawful encroachments upon the maritime commons by coastal nations and to stem the attempted seaward expansion of national sovereignty. While these challenges, of necessity, normally involve Department of Defense vessels or aircraft in most instances, it is essential that operational planners understand and maintain the true innocent and unprovocative nature of these operations.

Prevailing domestic and international public perceptions of the FON Program seem to be that the program is usually employed as a subterfuge for setting up engagement scenarios with nations that have aroused our ire

over unrelated matters. Although understandable, these conclusions are dead wrong and entirely at odds with the true spirit and nature of this program.

***FON Program Results Should be Declassified and Published.*** The records of actual FON assertion operations are presently classified. While prospective FON projects need this protection for obvious security of own forces considerations, the same case cannot be made for past operations.

If one accepts the adverse possession analogy that is proffered, the actual successful challenge of an excessive claim is of little practical use if the international community and, conceivably, even the nation challenged are not aware of it. FON activities are not aimed simply at our adversaries, but are asserted worldwide against friend and foe alike. Unfortunately, because of the classification level, the only public knowledge of these activities focuses on those instances where a state chooses to respond in a hostile manner and the media pick up the trail.

While the annual publication of FON results might annoy our friends and further antagonize our foes, it would serve several very positive, important functions. First, it would demonstrate the evenhanded implementation of this program. Also, it would publicly document actual usage of the disputed areas, thereby demonstrating active nonacquiescence in the face of an excessive claim. The inherent balance and peaceful intentions of the program would be evident and avoid the "confrontational only" reporting bias, for which the media cannot be blamed in light of the security restrictions.

***Public Education.*** Naval officers, and others with expertise in this field, need to shoulder the responsibility of educating the public and policymakers on the important issues at stake in this arena and on the FON Program's peaceful aims in the face of these excessive and illegal maritime claims. The release of historical FON assertion data would contribute immeasurably to this process, which would hopefully culminate in public understanding, appreciation and support of this vital program.

A recent example is illustrative of the present problems in this area. In a front-page article reporting the February 1988 "bumping incident" in the Black Sea, a respected reporter commented: "The United States destroyer *Caron* and crniser *Yorktown*, sailing 7 to 10 miles off the Crimean peninsula Friday, had entered the 12-mile limit claimed by the Soviet Union. The Pentagon said the exercise was part of a Navy policy of asserting the right of passage in waters exceeding the 3-mile territorial limited [sic] recognized by the United States.

"When the American ships failed to respond to an order to leave, they were scraped by Soviet warships. . . ."49

Several problems leap out of this text. First, this is not a Navy, but a national program ordered by the President. Second, although the United States then had a 3-mile territorial sea, we recognize the right of a nation to establish up to a 12-mile territorial sea. That is not the issue! What was being asserted here was “innocent passage,” which is preserved within the confines of a nation’s territorial sea. In fairness to the reporter, it cannot be determined whether the errors emanated from him or from the Pentagon briefer. In any event, the message was garbled in transmission, and this probably served to reinforce public perceptions that the FON Program is merely a convenient vehicle for antagonizing the Soviets. If nothing else, it highlights the need for better dissemination of information about this program and the need for a concerted public education effort.

Although there is substantial risk involved; the United States as trustee for the rightful owners of the maritime commons, the members of the international community of nations, should conduct physical, peaceful challenges to the excessive maritime claims represented by the North Korean military boundary zones. By patiently, but firmly, asserting these rights, we serve our national strategy, which is built upon three pillars: deterrence, forward defense, and alliance solidarity.<sup>50</sup> We thus defend ourselves and our allies, while also ensuring that the interests of all nations in unencumbered access to these waters and the airspace above are safeguarded.

To build long-term public confidence in and support for the overall goals of the FON Program, it is recommended that historical FON assertion data be published and that both uniformed members and the general public be educated as to the critical role which this program serves in carrying out our maritime strategy and, consequently, our national military strategy.

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## Notes

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10. *Ibid.*, Arts. 55-75, pp. 18-27.

11. *Ibid.*, Art. 87, pp. 30-31.

12. NWP 9, paras. 1.4.3-1.4.3.1, p. 1-8, and 1982 LOS Convention, Arts. 46-54, pp. 15-18.  
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14. *Ibid.*, para. 2.3.3.1, pp. 2-3 to 2-4, and 1982 LOS Convention, Art. 52, pp. 16-17.
15. *Ibid.*, paras. 2.3.3.2 and 2.3.4.2, pp. 2-4 to 2-5, and 1982 LOS Convention, Art. 45, p. 13, and Art. 52, pp. 16-17.
16. *Ibid.*, para. 2.1, p. 2-1, and 1982 LOS Convention, Arts. 29-32, 95, 102, 107, 110, 111(5), 224, 236 (warships); NWP 9, para. 2.2, p. 2-2, and 1982 LOS Convention, Arts. 42(5), 107, 110(4), 110(5), 111(5), 224, 236, 298(1)(b) (military aircraft).
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24. *Ibid.*
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29. *Maritime Claims Reference Manual*, p.2-252 and 1982 LOS Convention, Art. 3, p. 3. (Provided for a 12-nautical mile territorial sea drawn "in accordance with this convention.")
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