The security concerns of the United States regarding the presence of nuclear material and nuclear weapons on the oceans are basically twofold. On the one hand, the United States has a strong, clear and historic interest in ensuring that the activities of its warships are not improperly obstructed by other states, even if these ships are nuclear-powered or nuclear-armed. This interest causes the United States to insist on its prerogatives as a flag state over its warships. On the other hand, it has an increasingly strong interest in interdicting shipments of nuclear materials by potential proliferators, which may cause it to seek to intervene in the actions of the ships of other flag states. This chapter addresses each of these aspects in turn, and it considers how these important interests can be reconciled with each other and with the general fabric of international law.

II. U.S. Protection of its Warships

The 1982 U.N. Law of the Sea Convention (UNCLOS) embodies a carefully-negotiated balance between the interests of maritime states on the one hand, and coastal states on the other, concerning the passage and activity of warships in maritime areas adjacent to another state.

A. Territorial Seas

With respect to the territorial sea, Articles 17–32 of the UNCLOS make clear that the right of innocent passage applies to foreign warships, including those that are nuclear-powered or that carry other nuclear materials. Article 19 states that passage is “innocent” so long as it is not “prejudicial to the peace, good order or security” of the coastal state. It contains a list of non-innocent activities, including:
– “any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;”
– “any exercise or practice with weapons of any kind;”
– “any act aimed at collecting information to the prejudice of the defence or security of the coastal State;” and
– “any act of willful and serious pollution contrary to this Convention ...

But there is no suggestion that the presence of a nuclear-powered or nuclear-armed warship is per se inimical to a coastal state’s peace and security.

Article 21 states that a coastal state may adopt laws and regulations for various purposes, including “the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof,” but such measures must be in conformity with the other provisions of the Convention, and they cannot include regulation of the “design, construction, manning or equipment” of foreign ships unless giving effect to “generally accepted international rules or standards.”

In Article 22, the Convention states that nuclear-powered ships and ships carrying nuclear material must obey coastal-state traffic separation schemes, and Article 23 provides that such ships must observe precautionary measures as established by international agreements. But Article 24 makes clear that coastal states may not impose on foreign ships requirements “which have the practical effect of denying or impairing the right of innocent passage” or which discriminate “in form or in fact” among different states.

Article 30 states that a coastal state may require a warship to leave its waters if it does not comply with laws and regulations concerning passage through its territorial sea, and Article 31 imposes international responsibility for any resulting damage to the coastal state. Article 32 makes clear, however, that, with such specific exceptions, nothing in the Convention “affects the immunities of warships and other government ships operated for non-commercial purposes.”

B. High Seas

With respect to the high seas, Article 87 confirms that all states enjoy “freedom of navigation” and “freedom of overflight,” and Article 95