Part II

New Challenges to the Law of the Sea

B.

The principle of the freedom of the high seas
in the post 9/11 world
Chapter 6

INTELLIGENCE GATHERING ON THE HIGH SEAS

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1. INTRODUCTION

The present paper discusses the legal issues posed by intelligence gathering activities on and underneath the surface of the high seas. Related to the operational rights acknowledged by the law of the sea, intelligence can be used, inter alia, as an effective tool towards eliminating surprise. In areas of inclusive jurisdiction, such as the high seas, intelligence may be collected by ships sailing the international waterways. As regards submarine surveillance, the ocean floor beyond the outer limit of the territorial sea is ideally offered for the emplacement of listening or acoustic electronic devices, the so-called “sonar or communication systems”, which can observe and detect submerged transport.

User activities may be classified in two distinct categories of rights: a) operational rights and b) movement rights1. Under this scheme, military and other non-commercial uses, which are dealt with in this paper, fall within the notion of operational rights relating to the exploitation of the ocean space for specific functions and purposes. This category of rights includes, apart from resource-oriented activities, intelligence gathering, military exercises and manoeuvres, testing of military weapons, as well as scientific research. These specific operational rights correlate with national security activities and concerns. The other category of movement rights relates to mobility and includes navigation on the high seas outside the limit of the territorial sea, innocent passage through the territorial sea and transit passage through straits used for international navigation.

Based on the sharing of authority at sea among coastal and flag States, maritime zones may be classified in three distinct categories: a) zones of na-

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1 With regard to the two categories of user rights, see Ch. Pirtle, Military Uses of Ocean Space and the Law of the Sea in the Millennium, 31 ODIL 2000, pp. 7, 8 et seq.

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