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**THE 1982 LAW OF THE SEA CONVENTION: SOME
IMPLICATIONS FOR AIR OPERATIONS**

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INTRODUCTION

The 1982 United Nations Law of the Sea Convention (LOSC 82) established for the first time a comprehensive legal order for the sea. It clarified the regime of the territorial sea, set out navigation rights, recognised claims to exclusive economic zones, and created legal provisions for mining the deep seabed, as well as the protection and preservation of the marine environment.¹ Furthermore, it recognised the jurisdictional claims of some coastal and island nations by establishing the concept of the archipelagic state.²

The international legal regime ushered in by LOSC 82 has important implications for commercial shipping and naval operations. Yet, while this has been the subject of frequent reports in the Australian media, and a number of articles and books have been published on the subject, it is not generally known that, in addition to shipping, there are implications for operations by aircraft. This arises because the regime of international law which determines sovereignty over the seas also includes sovereignty over airspace. Therefore, it is important that the RAAF understands the legal issues which might affect the conduct of military air operations over these maritime areas.

This paper examines some important issues arising out of LOSC 82 which affect operations by RAAF aircraft. It begins by briefly reviewing certain legal concepts incorporated within LOSC 82. It then relates LOSC 82 to air law and concludes with a discussion on some important issues that concern RAAF operations.

The 1982 United Nations Law of the Sea Convention

A basic review of the LOSC 82 navigation regime requires an explanation of some of the special concepts which it incorporates. The most fundamental consideration is fixing a dividing line between land and sea, a distinction which is complicated by the tidal movements of the oceans and particular geographical features. Over time this has led to the development of the concept of the 'baseline'.

In general, baselines are drawn from the low water line along the coastline as marked on large scale maps.³ But this practice is not appropriate in all situations. Special rules have been developed for deeply indented coastlines, coasts with fringing islands, unstable coastlines, bays, gulfs, river mouths and reefs.⁴ Archipelagic nations also called for special consideration. In this case, under LOSC 82, straight baselines may be drawn around the outermost points of the outermost islands, thereby including solid land and extensive seaways within its boundaries. LOSC 82 stipulates that the ratio of the area of water to the area of land must be within the range of 1:1 to 9:1, just one of the important technical conditions on which states qualify as archipelagic

¹ Rothwell, D., 'The Law of the Sea as a Maritime Confidence Building Measure', in Bateman, S. and Bates, S. (eds.), *Calming the Waters: Initiatives for Asia Pacific Maritime Cooperation*, Canberra Papers on Strategy and Defence Number 114, Strategic and Defence Studies Centre, Research School of Pacific and Asian Studies, The Australian National University, Canberra, 1995, p 77.

² *United Nations Convention on the Law of the Sea (LOSC 82)*, Signed at Montego Bay, Jamaica, 10 December 1982, Article 46.

³ *United Nations Convention on the Law of the Sea*, Article 5.

⁴ *ibid.*, Articles 6 - 14.

nations. The method of establishing the baseline in the more important special cases is illustrated in Figure 1.⁵

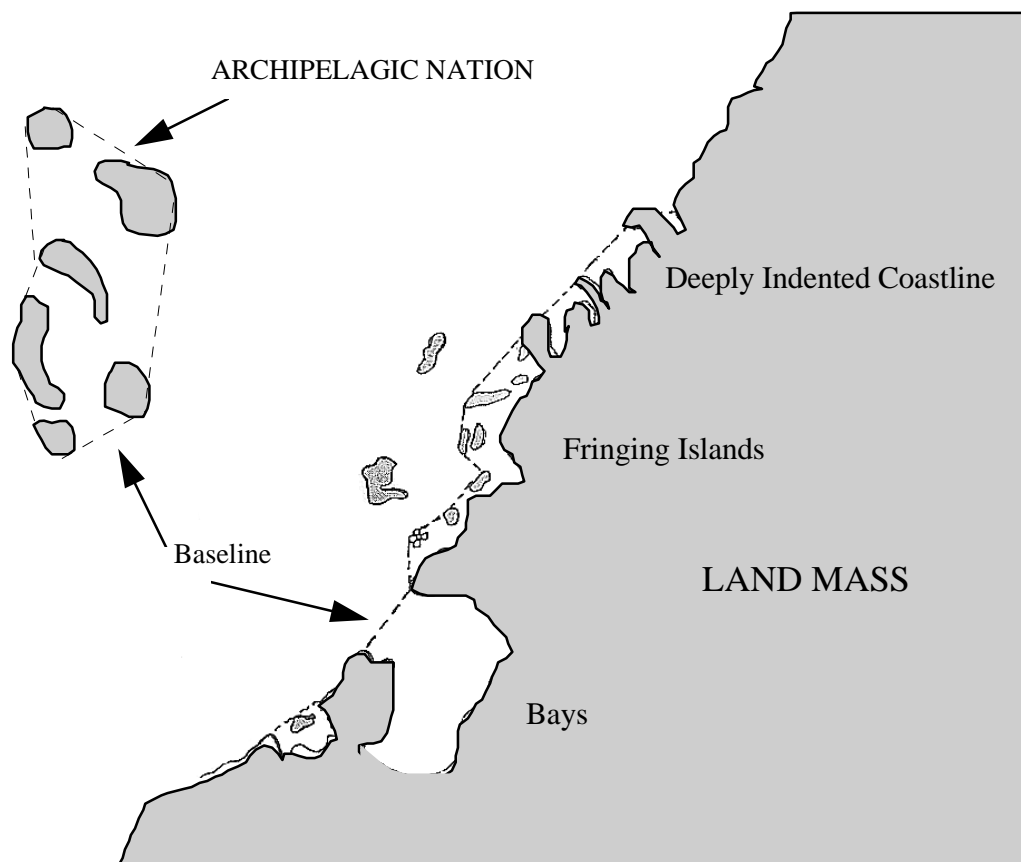


Figure 1 - Straight baselines in some special coastal situations.

Having established the concept of a baseline and adapted it to special cases, LOSC 82 prescribes certain maritime zones which are all drawn from the baseline:

- a. The *territorial sea* may extend seaward from the baseline for a maximum of 12 nautical miles.⁶
- b. The *contiguous zone* may extend seaward for a further 12 nautical miles beyond the outer limit of the territorial sea.⁷
- c. The *Exclusive Economic Zone (EEZ)* may extend seaward for a distance up to 200 nautical miles beyond the baseline.⁸

⁵ *Operations Law for RAAF Commanders*, DI (AF) AAP 1003, May 1994, para 1.13, p 1-3, Annex A to Chapter 1, p 1-7; & para. 1.18, p 1-4; & *United Nations Convention for the Law of the Sea*, Article 47.

⁶ *United Nations Convention on the Law of the Sea*, Article 3.

⁷ *ibid.*, Article 33.

⁸ *ibid.*, Article 57.

- d. The *Continental Shelf*, which is the seabed and subsoil of a nation that extends beyond the territorial sea to the outer edge of the natural limit of the land mass under the sea, is artificially limited to a maximum claim of 350 nautical miles from the baseline or 100 nautical miles from the 2,500 metre isobath (an isobath is the line indicating the ocean depth).⁹

An illustration of the maximum extent of the territorial sea, the contiguous zone and the EEZ is provided in Figure 2.

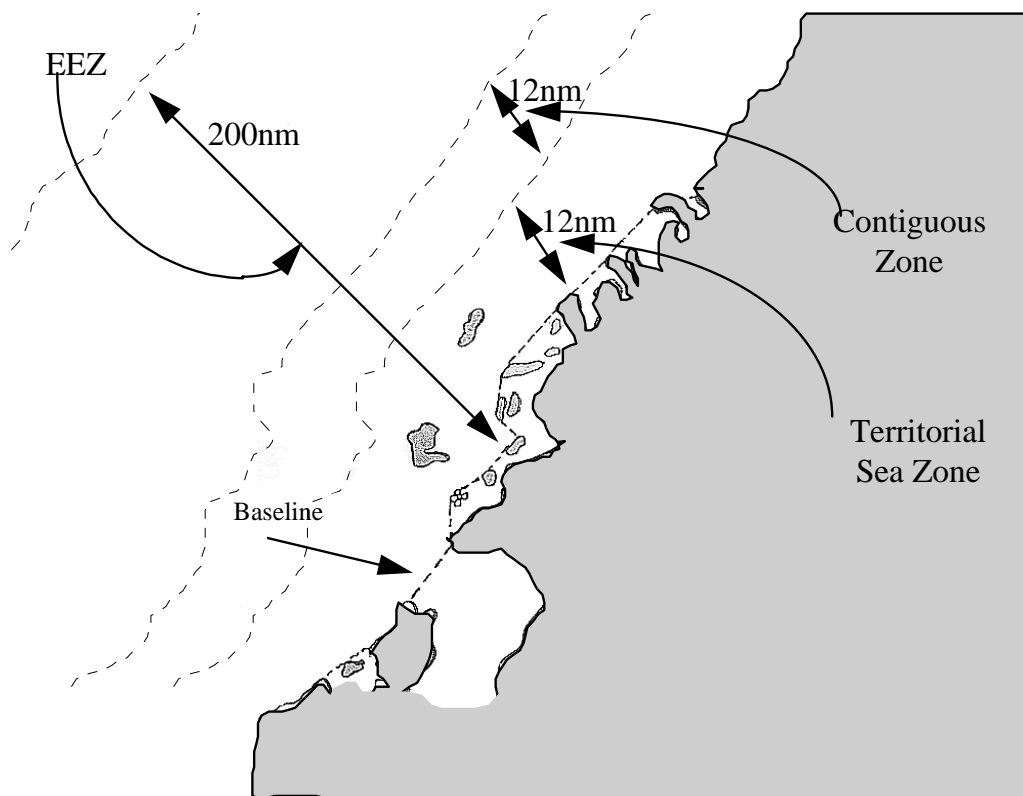


Figure 2 - Territorial Sea, Contiguous Zone, EEZ.

Under the terms of LOSC 82, what sovereign rights does a nation have within these zones and what is the impact on military air operations?

Continental Shelf

A state has resource rights to the soil and subsoil comprising its continental shelf, but navigation rights in the superjacent waters and airspace are not affected.

Exclusive Economic Zone

The specific legal regime of the EEZ is the area beyond and adjacent to the territorial sea. Within this zone, a state enjoys sovereign rights only in relation to natural resources. It may conduct exploration for them and exploit them, but it also has responsibility for the conservation and management of those resources. They include

⁹ *ibid.*, Articles 76-85.

the living as well as non-living resources in the sea, the seabed and its subsoil. Yet, while the state has these rights and responsibilities, it has no right to control access to its EEZ. Foreign states may exercise the navigation and overflight rights of the high seas within another state's EEZ with complete freedom, as well as many of the other traditional high seas freedoms. Foreign states may also lay submarine cables or pipes through the EEZ of another state.¹⁰

Contiguous Zone

It is within the area of its contiguous zone that a state enjoys some additional rights to exercise limited controls over the actions of other states, but only to the extent considered necessary to prevent or to punish any infringements of its customs, fiscal, immigration, or sanitary laws that may be committed within its territorial sea or its territory.¹¹ The contiguous zone is also included within the specific legal regime of the EEZ and, therefore, the navigation rights within a contiguous zone are identical with those in the EEZ: all foreign aircraft and ships enjoy the right to navigate in and over a state's contiguous zone.

Territorial Sea

While a coastal state enjoys limited rights within its EEZ and its contiguous zone, it is within its territorial sea that the state enjoys full territorial sovereignty. But, of course, this is not the only area where a state enjoys such sovereignty. Under the terms of LOSC 82, full territorial sovereignty is also enjoyed within the area encompassed by the state's baseline. In the case of a nation like Australia, this conforms with long-established customary practice because the area encompassed by Australia's baseline is predominantly the nation's land mass and its internal waters. However, as we have already pointed out when discussing the concept of the baseline, LOSC 82 also formalised, for the first time, the concept of the archipelagic state. In this special case, the baseline encompasses not only land but large expanses of ocean - archipelagic waters - which may cover an area in the range of one to nine times the area of the land. Therefore, in addition to their territorial seas and their land, archipelagic nations enjoy sovereignty over their archipelagic waters, which extends to the seabed and the subsoil below. Furthermore, as in the case of land and the territorial sea, sovereignty extends to the airspace above these archipelagic waters.¹² This is the foundation of the sovereign rights which may be claimed by some of Australia's near neighbours as archipelagic states, and which may have significant impact on the freedom of operation of RAAF aircraft.

The sovereignty rights within the continental shelf, EEZ, the contiguous zone, the territorial sea and the baseline are summarised in Table 1.

¹⁰ *ibid.*, Articles 55, 56 and 58.

¹¹ *ibid.*, Article 33.

¹² *ibid.*, Article 2 & Article 49.

Table 1 - Sovereignty within the continental shelf, EEZ, contiguous zone, territorial sea, and the baseline.

Zone	Sovereignty
Continental Shelf	Sovereign rights to explore and exploit the shelf's natural resources. The legal status of the superjacent waters and air space are not affected.
EEZ	Sovereign rights only in relation to natural resources, living and non-living in the sea, seabed and its subsoil. Also responsible for conservation and management of natural resources. Any state may lay submarine cables or pipes in another state's EEZ. No rights to control access to EEZ - all foreign states may exercise navigation and overflight rights at will.
Contiguous Zone	State has right to prevent or punish any infringements of its customs, fiscal, immigration, or sanitary laws and regulations that may be committed within its territorial sea or its territory. All foreign states may exercise navigation and overflight rights at will.
Territorial Sea	Full territorial sovereignty which extends to the seabed and its subsoil below as well as the airspace above.
Within the baseline - includes the special case of the archipelagic state	Full territorial sovereignty which extends to the airspace and, in the case of the archipelagic state, to the seabed and its subsoil below its archipelagic waters. ¹³

To achieve broad acceptance of LOSC 82, the establishment of the concept of the archipelagic state with due recognition of sovereign rights had to be balanced with the interests of maritime and trading nations. One instance concerned established navigation routes through seaways which were formerly considered international waters enjoying traditional navigation freedoms of the high seas, but, under the terms of LOSC 82, were now subject to the territorial sovereignty of an archipelagic nation. To accommodate the interests of states which had traditionally used these long-established routes, a compromise was reached. Accordingly, LOSC 82 includes provisions for the establishment of the concept of the archipelagic sea lane, a concept which provides freedom for ships and aircraft to transit through an archipelagic state at will, subject to certain conditions.¹⁴

Under these provisions, archipelagic states may designate sea lanes, and air routes above those sea lanes, which are suitable for the passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea. Specific conditions for transit through these archipelagic sea lanes do apply, however:

- a. The transit of ships and aircraft on or over these sea lanes is to be continuous and expeditious with the craft operating in their normal mode of operation while posing no threat to the security and sovereignty of the archipelagic state.

¹³ This sovereignty is subject to the rights of foreign states to exercise archipelagic sea lanes passage which is discussed below.

¹⁴ *Operations Law for RAAF Commanders*, para. 1.18, p 1-4.

- b. One specific requirement for civil aircraft is that, in accordance with the Chicago Convention, they must observe the rules established by the International Civil Aviation Organisation (ICAO) during flight.
- c. While military aircraft are not subject to the authority of the ICAO, they must fly with due regard for the safety of navigation.
- d. Furthermore, all aircraft - both civil and military - are to monitor the radio frequency assigned by the relevant air traffic control authority or the appropriate international distress radio frequency.¹⁵

Yet, by themselves, these provisions were deemed inadequate. To accommodate those nations that had traditionally used *specific* routes through what were formerly international waters, LOSC 82 stipulates that any designated archipelagic sea lanes should include *all* normal international navigation or overflight routes through or over the archipelagic waters. While there will undoubtedly be specific cases where this will be contested by states, if an archipelagic state does not designate archipelagic sea lanes or air routes, foreign ships and aircraft may exercise the right of archipelagic sea lanes passage through the routes normally used for international navigation.¹⁶ Serving as additional protection of the interests of maritime nations, LOSC 82 also stipulates that archipelagic states cannot hamper or suspend rights of sea lanes passage for any reason; access is completely free and not subject to any control by the archipelagic state. Indeed, if an archipelagic state is aware of any danger to navigation or overflight in a sea lane, they must assist the safe passage of aircraft and ships by giving the danger 'appropriate publicity'.¹⁷

In practice, sea lanes are to be designated as a series of continuous axis lines through archipelagic waters. Ships and aircraft using the sea lanes must not deviate more than 25 nautical miles from either side of the designated axis of the lane provided that they do not navigate closer to coastlines than 10 per cent of the intervening distance between the nearest points on islands bordering the sea lane.¹⁸ This is illustrated in Figure 3.

Another important navigation regime formalised by LOSC 82 is the right of innocent passage. Innocent passage allows all ships, including warships and, if they are navigating on the surface and flying their flag, submarines, to navigate through territorial seas and archipelagic waters. As the name suggests, innocent passage is any passage by a ship or submarine which is not prejudicial to the peace, good order or security of the coastal or island nation. Understandably, nations have the right to take action to prevent passage which threatens their security. They may also temporarily suspend rights of innocent passage in the interests of security,¹⁹ and this has occurred from time to time. For example, in 1995 France suspended the right of innocent passage in the territorial sea around Mururoa Atoll for a period of six months.

¹⁵ *United Nations Convention on the Law of the Sea*, Articles 39, 53, 54.

¹⁶ *ibid.*

¹⁷ *ibid.*, Articles 44 & 54.

¹⁸ *ibid.*, Article 53 (5).

¹⁹ *ibid.*, Articles 17, 18, 19, 20, 25 & 52.

Figure 3 - Ten per cent rule applied to archipelagic sea lane navigation.

The right of innocent passage, however, is only enjoyed by ships, not aircraft. While this enhances the scope of naval operations, it restricts aircraft operations. Effectively, the absence of innocent passage rights for aircraft to fly over archipelagic waters restricts their access to that airspace included in archipelagic sea lanes. For aircraft the only relaxation of this restriction is the special case of territorial seas which are also part of a recognised international strait; for example Torres Strait and Malacca Strait.

LOSC 82 makes provision for transit passage through straits which have been used over a long period of time for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ. Even though these straits may encompass the territorial sea and national airspace of bordering states, all aircraft and ships enjoy the right of international straits passage. Indeed, if LOSC 82 had not made special provision for the transit passage of international straits then some 135 straits throughout the world would have been subject to severely restricted passage rights because they would have been effectively closed by the territorial seas of bordering states.²⁰

In the case of international straits, the legal rights of the bordering states remain intact but the states must permit both ships and aircraft to have unimpeded transit passage of their territorial sea where it is part of the international strait. This is an important

²⁰ *National Security and the Convention of the Law of the Sea*, United States Department of Defense, 2nd edition, January 1996, p 5.

concession to aircraft which, unlike ships, do not enjoy innocent passage rights in another nation's territorial sea. Yet aircraft still have to observe one rule. While flying through airspace above international straits a similar requirement to the overflight of sea lanes prevails: aircraft must at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency. Understandably, the passage of both aircraft and ships must be continuous and expeditious and they must not threaten or use force against the sovereignty, territorial integrity or political independence of bordering states. Aircraft are, however, free to undertake activities 'incident to their normal modes' of transit which, if desired, could include air-to-air refuelling and formation flying. Significantly, the right of transit passage of international straits cannot be suspended for any reason.²¹

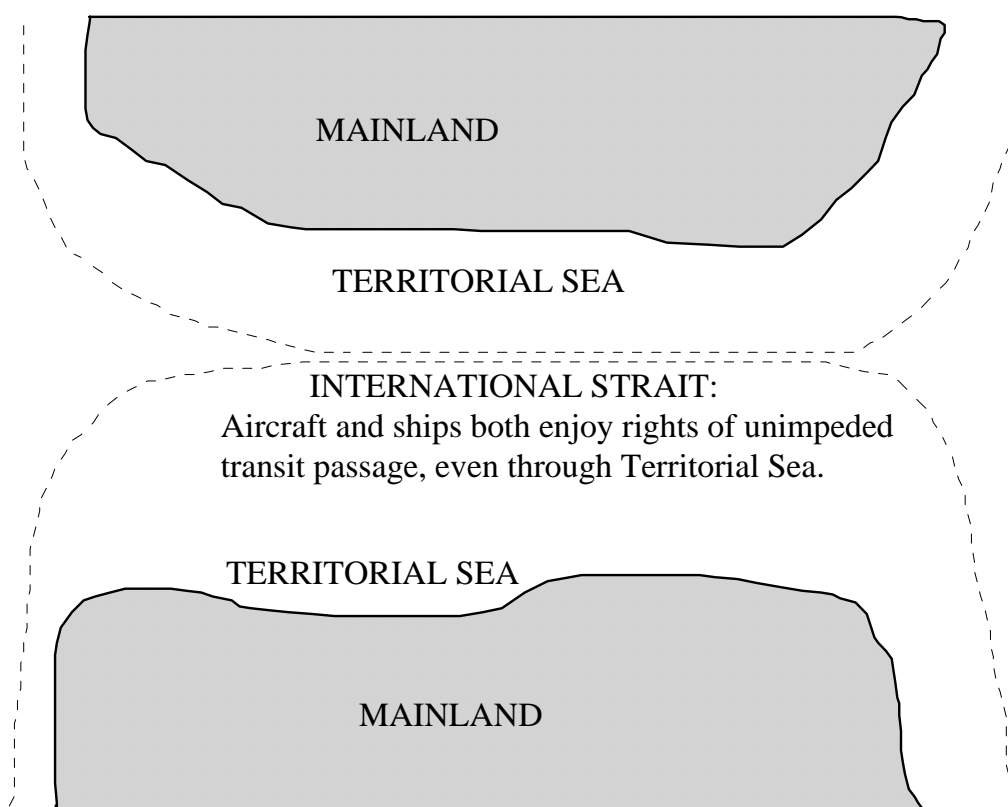


Figure 4 - The International Strait.

This has been a brief review of some of the more important navigation provisions of LOSC 82 which affect air operations. Its focus has been the sovereign rights recognised under the terms of LOSC 82, especially in relation to the newly-created case of the archipelagic state. This establishes the broad framework of rights and restrictions which affects international travel by ships and aircraft. But, in addition, aircraft must also operate under certain other protocols. To gain a better understanding of the legal regime under which aircraft operate we must turn to a review of air law. The start-point for any such a review is the Convention on International Civil Aviation of 1944, which is referred to as the Chicago Convention.

²¹ *United Nations Convention on the Law of the Sea*, Articles 34 - 45.

Chicago Convention.

Concepts of state sovereignty over land evolved over a long period of time. Likewise, rights of access to the high seas evolved as a result of a gradual increase in navigation for trade and exploration. The advent of aircraft early this century added a new dimension to the concept of sovereignty. The immediate assumption was that sovereignty over land implied sovereignty over the superjacent airspace. It was a principle that was readily adopted throughout the world and it became the fundamental plank on which air law developed. International law now recognises the legal status of airspace in the same way that it recognises a nation's sovereignty over its land, its territorial sea and, in the case of archipelagic states, its archipelagic waters.

The concept of territorial sovereignty, which includes airspace sovereignty, implies the right to regulate entry, exit and transit and, if considered necessary, the right to deny access to either personnel, aircraft or ships, whether crewed or not. In the case of aircraft, this fundamental right has been incorporated in, and modified by, the Chicago Convention.²²

The object of the Chicago Convention was to create a framework in which international aviation could function while recognising airspace sovereignty and the concomitant exercise of control over that airspace. Accordingly, the Chicago Convention expressly recognises five basic freedoms concerning travel by air. The first two freedoms were negotiated on a multilateral basis while the three other freedoms have been subsequently negotiated by states on a bilateral basis. The five freedoms are:

- a. ***The First Freedom.*** The right to fly across the territory of another nation without landing.
- b. ***The Second Freedom.*** The right to land for non-traffic purposes. 'Non-traffic purposes' are any purposes other than embarking or disembarking passengers, mail or cargo; for example, stops for refuelling or repair.
- c. ***The Third Freedom.*** The right to disembark passengers, mail and cargo in another nation.
- d. ***The Fourth Freedom.*** The right to embark passengers, mail and cargo in another nation.
- e. ***The Fifth Freedom.*** The right of an airline of one nation to embark passengers, mail and cargo in another nation and fly them to a third nation.

The Chicago Convention also prepared the way for the establishment of ICAO, a United Nations agency responsible for the conduct of international civil air traffic. Accordingly, ICAO has promulgated rules which have reduced the need to seek diplomatic clearance to enter another nation's airspace to a procedural level. Aircraft

²² *Operations Law for RAAF Commanders*, para 1.9, p 1-2.

must file flight plans and obey the rules and directives of ICAO and any duly authorised air traffic control authority.

Significantly, while all aircraft must recognise the right of airspace sovereignty, the Chicago Convention applies only to civil aircraft. Aircraft used in military, customs and police services - referred to as 'state aircraft' in the Convention - are specifically excluded from its provisions.²³ Consequently, apart from the requirement to operate with 'due regard to the safety of civil aircraft', military aircraft are not bound by ICAO regulations. Therefore, military aircraft do not enjoy the right of overflight conferred on civil aircraft by transit agreements negotiated under the Chicago Convention. Nor do military aircraft enjoy a right of access to the procedures for seeking clearance to enter another nation's airspace. Military aircraft, which must bear external markings indicating both their nation of origin and their military status, must always seek diplomatic permission to enter another nation's airspace. However, notwithstanding this requirement, in some instances clearance might be granted under a general agreement which has been previously negotiated on a bilateral basis. The only exception to these rigid controls is an aircraft in distress, which is entitled to assistance, regardless of its classification.²⁴

Implications for the RAAF

LOSC 82 has formalised the sovereign territorial rights of coastal states as well as recognising their resource and environmental interests. In the first instance, this is of significance to the Australian Defence Force (ADF) because of its primary role in defending and protecting Australia's national interests. When Australia ratified LOSC 82 in August 1994 it also declared an EEZ which extended not only to the maximum allowable limit of 200 nautical miles from its continental baseline but also those baselines around all claimed Australian territory, including the Australian Antarctic Territory. This has produced a huge area - estimated to be equivalent to 1.5 times the size of the continent itself - for the nation to patrol, police and protect. In addition to the rights and responsibilities conferred under LOSC 82, Australia's domestic legislation, such as the Customs Act, Fisheries Act and Continental Shelf (Living Resources) Act, is effective within the outer boundary of the territorial sea. The RAAF and the Royal Australian Navy may be called on to fulfil the ADF's responsibility to protect Australian interests in these maritime areas, perhaps by augmenting Coastwatch patrols.

But it is not only the protection of Australia's sovereign interests that is of concern to the ADF. LOSC 82 has enunciated the sovereign rights of all states and this affects international navigation by elements of the ADF. In addition to LOSC 82, certain principles, which are of specific relevance to international aviation, have developed from customary international law and treaty law, being codified primarily in the Chicago Convention. Together with LOSC 82, the Chicago Convention makes a significant contribution to the body of jurisprudence known as air law. This is of significant interest to the RAAF and its operations beyond Australia's immediate territories.

²³ Article 3 (a) & (b).

²⁴ *Operations Law for RAAF Commanders*, paras. 2.1-2.2, p 2-1, para. 2.6, p 2-2, & para. 2.16, p 2-5; & Article 3 (c) of the Chicago Convention stipulates that state aircraft will not fly over or land on the territory of another state 'without authorisation by special agreement or otherwise'.

Even in peace there is an ongoing requirement for Australia to exercise in maritime areas within the region. This will inevitably involve transit over the seas and, in some cases, under the terms of LOSC 82, through the national airspace of regional neighbours. There are two methods by which this can be done:

- a. The first method, which may be adopted for convenience and safety considerations, is for aircrew to uniformly follow the civil procedural controls established by ICAO; this means filing flight plans and, where necessary, seeking formal diplomatic clearances to enter another state's airspace.
- b. The alternative method, which is the particular preserve of state and, therefore, military aircraft, is to fly with 'due regard' for the safety and rights of other users while utilising the air navigation freedoms of the high seas and, where available, transit passage through international straits and archipelagic sea lanes, as established by LOSC 82.

The first course is safe and simple. During peacetime when international relations are good, diplomatic clearances are generally a formality. The second course is more difficult and may require a longer and more expensive trip with the potential for some risk. There is also a danger that regional neighbours may misinterpret the legitimate exercise of air law navigation rights. Aircrew and commanders, however, must be aware of their rights with respect to 'due regard' flying.

Apart from operational and training reasons for flying other than in accordance with ICAO procedures there is another good reason for 'due regard' missions. This is to avoid establishing a mode of international practice which over time may become accepted by states and eventually become customary international law. To ensure that such laws do not develop, states have an obligation to exercise those rights which they regard as important. The United States follows this philosophy through its military Freedom of Navigation Program which ensures that it will routinely challenge claims by coastal states which do not conform with LOSC 82.²⁵ Indeed, some states have ignored the provisions of LOSC 82 by requesting prior notification of the innocent passage of warships in territorial seas. Some states have also made excessive baseline claims. If these claims remain unchallenged and if action is not taken to exercise existing navigation rights then coastal states will continue the process of jurisdictional creep which over a period of time will deprive other nations of currently recognised navigation rights.

The operational reasons for 'due regard' missions encompass many circumstances. Let us consider just one example. In times of crisis a neutral regional nation may not wish to grant diplomatic clearance for military aircraft. In such cases, military aircraft could still exercise their lawful air navigation rights by utilising the freedom of the high seas in international airspace, transit passage through international straits and archipelagic straits passage. During Operation E1 Dorado Canyon, the United States air strike against Libya in 1986, United States Air Force F-111 bombers took off from their base in England and entered the Mediterranean through the Straits of Gibraltar rather than obtaining diplomatic clearance from either France or Spain. Australia in

²⁵ United States Navy NWP1 - 14M, *The Commanders Handbook on the Law of Naval Operations*, Department of the Navy, Naval Doctrine Command, Norfolk VA, 1995, pp 2-9.

the future may face a similar situation if required to gain access to regional hot spots to our north.

The regime of archipelagic sea lane passage for aircraft is a creation of LOSC 82 without precedent. While the right is analogous to the right of transit through international straits there is one crucial difference. This difference relates to the length of the transit. While any air transit through international straits is relatively short, archipelagic sea lane passage can be an extensive flight. Therefore, the right to fly in the normal mode is critical. For operational reasons, it would be unlikely that air-to-air refuelling would take place over an international strait like the Straits of Gibraltar or the Malacca Strait but during a long transit through, for example, an Indonesian archipelagic sea lane, air-to air refuelling would be critical to a safe and successful flight.

Similarly, to ensure safe passage aircraft may have to fly in formation over archipelagic sea lanes. Aircraft in formations may not necessarily fly along a straight line at the fastest possible speed over the archipelagic sea lane. They may have to divert in case of bad weather and would travel at the most economic speed. All of these types of activities would be regarded as aircraft flying in their normal mode of operation as prescribed by LOSC 82. When air-to-air refuelling is being carried out aircraft would have to manoeuvre to take on fuel and this may include orbiting or turning around in the airspace over the archipelagic sea lane. As such operations have not been routinely carried out over archipelagic sea lanes, because such sea lanes have not previously existed, normal mode operations should be interpreted in the light of current modern air operations. Precedents for such normal mode operations exists with the practices of United States Navy aircraft carriers which have aircraft conduct air-to-air refuelling, formation flying and combat air patrols over the carrier and its battle group. Such aircraft carriers could well turn around and travel in an opposite direction to their transit to launch and recover aircraft.

As Australia does not have aircraft carriers, the Royal Australian Navy would depend on the fixed wing aircraft of the RAAF for air cover. Accordingly, in a hostile environment, RAAF P3C Orion aircraft, F-111 and air-to-air refuelled F/A 18 Hornets would be expected to support the fleet including possible protective convoys for Australian commercial shipping. All these types of operations could be regarded as normal mode transits for the purpose of long archipelagic sea lanes transit. Of course any such normal mode transit must be for the purpose of the aircraft formation, convoy or naval task force, utilising the archipelagic sea lanes in a continuous and expeditious manner.

If an international crisis arises far from Australia's shores, RAAF aircraft may be called upon to support United Nations or Coalition efforts to secure international peace. If regional nations do not support the operation the RAAF may have to exercise freedom of navigation rights under the terms of LOSC 82. Air commanders and aircrew must therefore have a good understanding of their international navigation rights as prescribed by LOSC 82, and its interaction with the Chicago Convention and ICAO procedures.