

BEL MOD - DG JUR - LEGAD
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12 December 2024



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■ Overflight by military planes

In peacetime



■ Disclaimer : This briefing does not necessarily reflect the opinion of Belgian Defence or DG Jur

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■ **Airspace**

Chicago convention

- Convention on International Civil Aviation, signed in Chicago on 7 december 1944
- International Civil Aviation Organization (ICAO)
 - Specialized agency of the United Nations
 - Coordinates civil international air travel
- 19 annexes containing standards and recommended practices (SARPs)



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Article 1

Sovereignty

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 2

Territory

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

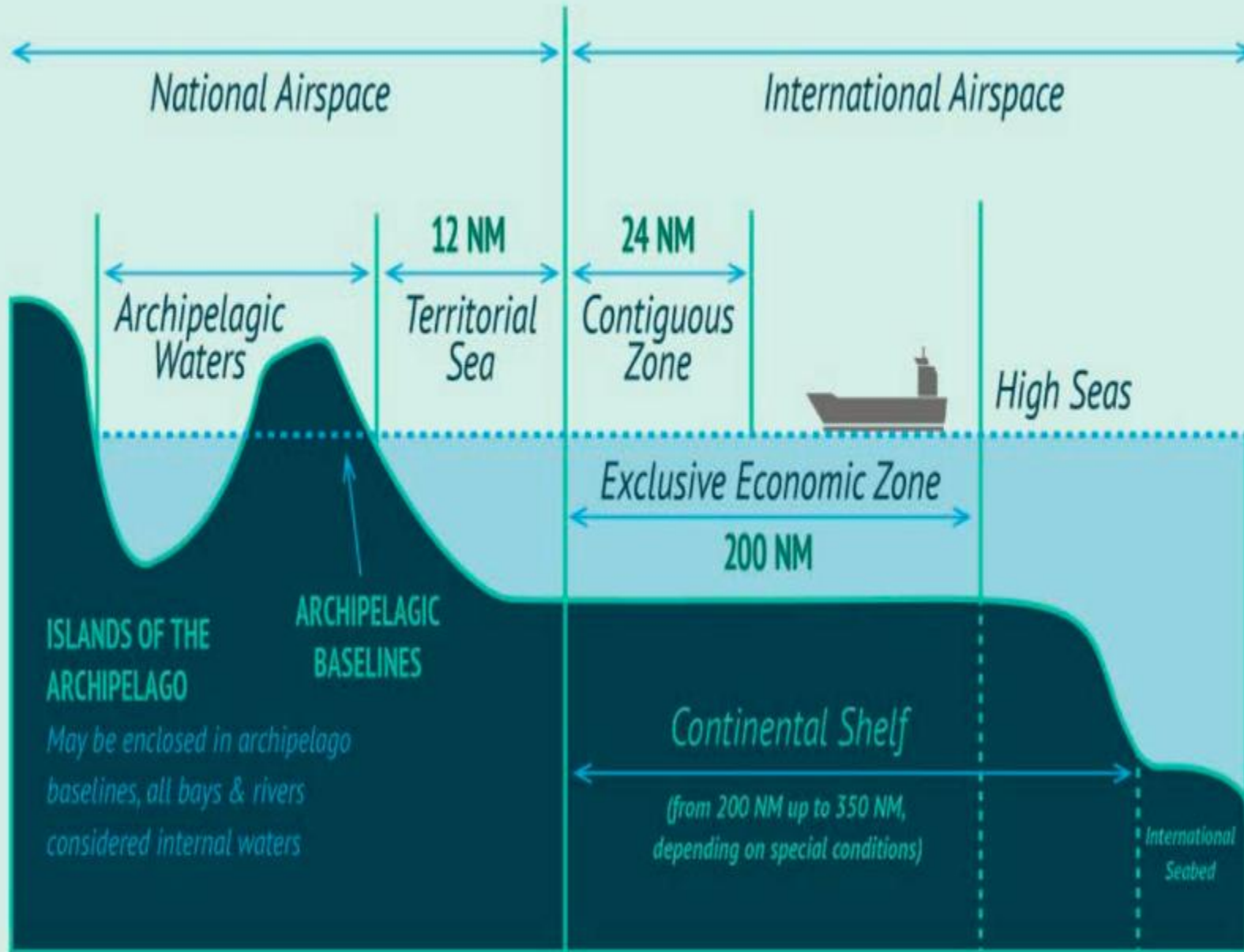
Horizontal extension of airspace

- National airspace
- and international airspace

Chicago convention , art, 1- 2
UNCLOS, Part II



UNCLOS Maritime and Airspace Zones



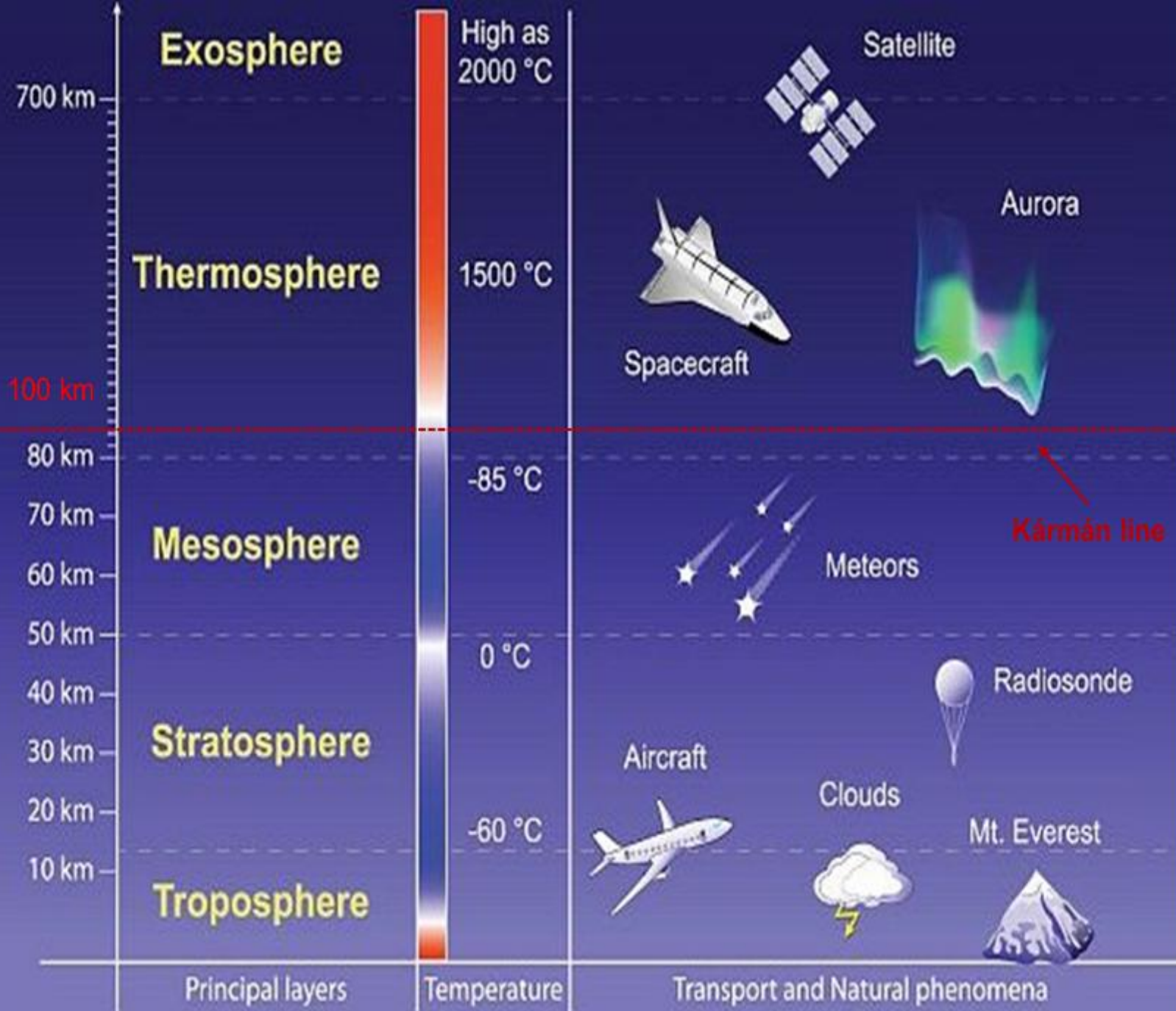
Horizontal extension of airspace

- National airspace
- and international airspace

Chicago convention , art, 1- 2
UNCLOS, Part II



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Vertical extension of airspace

No internationally agreed altitude at which a State's sovereignty over its airspace ends

↔ Outer Space Treaty

- Spatialist approach: f.e. *von Kármán* line
- Functionalist approach: determination by the nature and/or objective of the activity



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■ **Military planes...?**



■ What is a military plane?

- No relevant definition in relation to airspace usage in peacetime
- <-> *HPCR Manual on International Law Applicable to Air and Missile Warfare* (on the rules applicable during IAC)
- *“Military aircraft” means any aircraft*
 - *(i) operated by the armed forces of a State;*
 - *(ii) bearing the military markings of that State;*
 - *(iii) commanded by a member of the armed forces; and*
 - *(iv) controlled, manned or preprogrammed by a crew subject to regular armed forces discipline.*



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Civil and state aircraft

a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

b) Aircraft used in military, customs and police services shall be deemed to be state aircraft.

Civil versus State aircraft

Chicago Convention, Art. 3 b)

- State aircraft are defined not by ownership or control, but by a purely functional test
- *“there are no clear generally accepted international rules, whether conventional or customary, as to what constitute state aircraft and what constitute civil aircraft in the field of air law.”*
- Within the remit of ‘sovereign’ States to determine which aircraft are State and which are civil.



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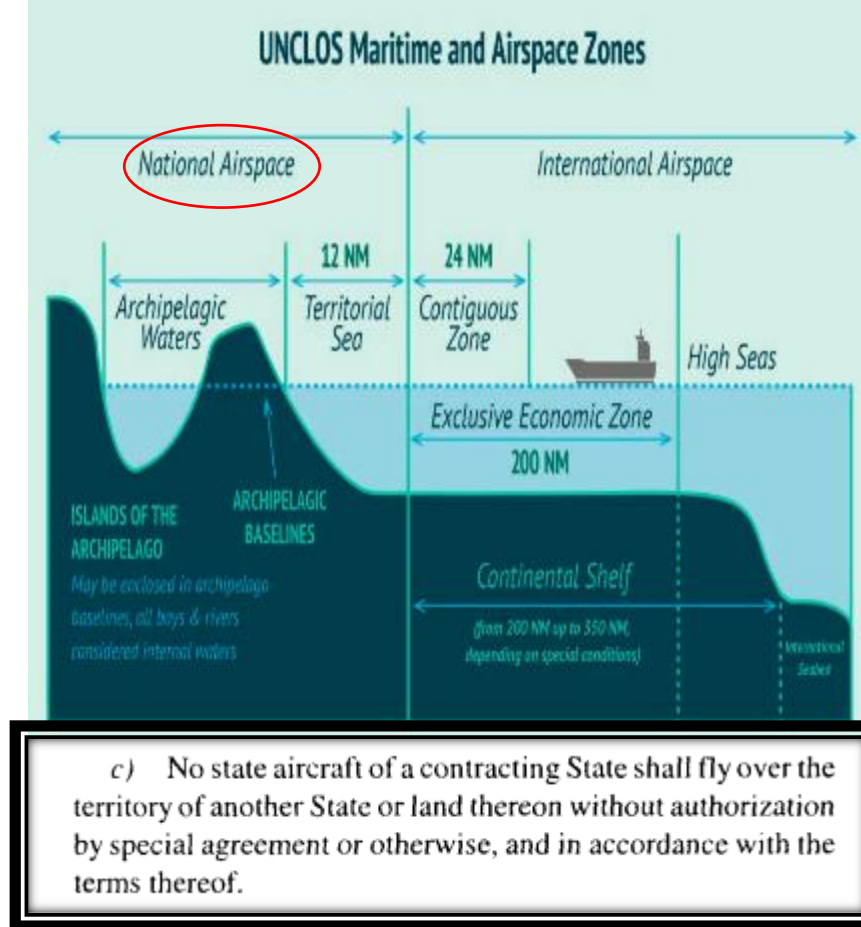
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■ Freedom of overflight

for State aircraft

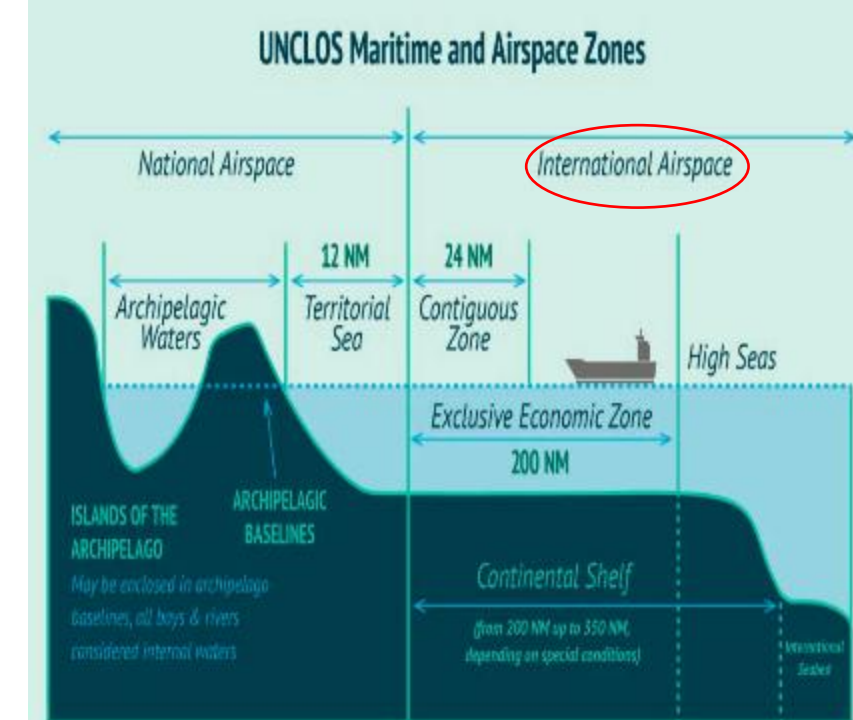
In national airspace

- No freedom of overflight
- Sovereignty in national airspace
 - Article 1 Chicago Convention + international customary law
- Article 3 c) Chicago Convention
- Ad hoc arrangements between States: **Diplomatic Clearances**
 - DiploClear – DipClear - DIC
 - Conditions will differ
 - Lengths of notice differ
 - Information to be given differs
 - Competent national authorities differ
 - Harmonized agreements exist
 - F.e. European Union Defence Agency's Diplomatic Clearance Technical Arrangement



In international airspace

- Freedom of overflight
 - Based on *mare liberum* (international customary law)
 - Codified in UNCLOS (Art. 87 (1) and 58 (1))
- For aircraft of all States
- Article 3 d) Chicago Convention
 - Due regard for safety
- Article 87 (2) UNCLOS
 - Due regard for interests of other States exercising their freedoms



d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.



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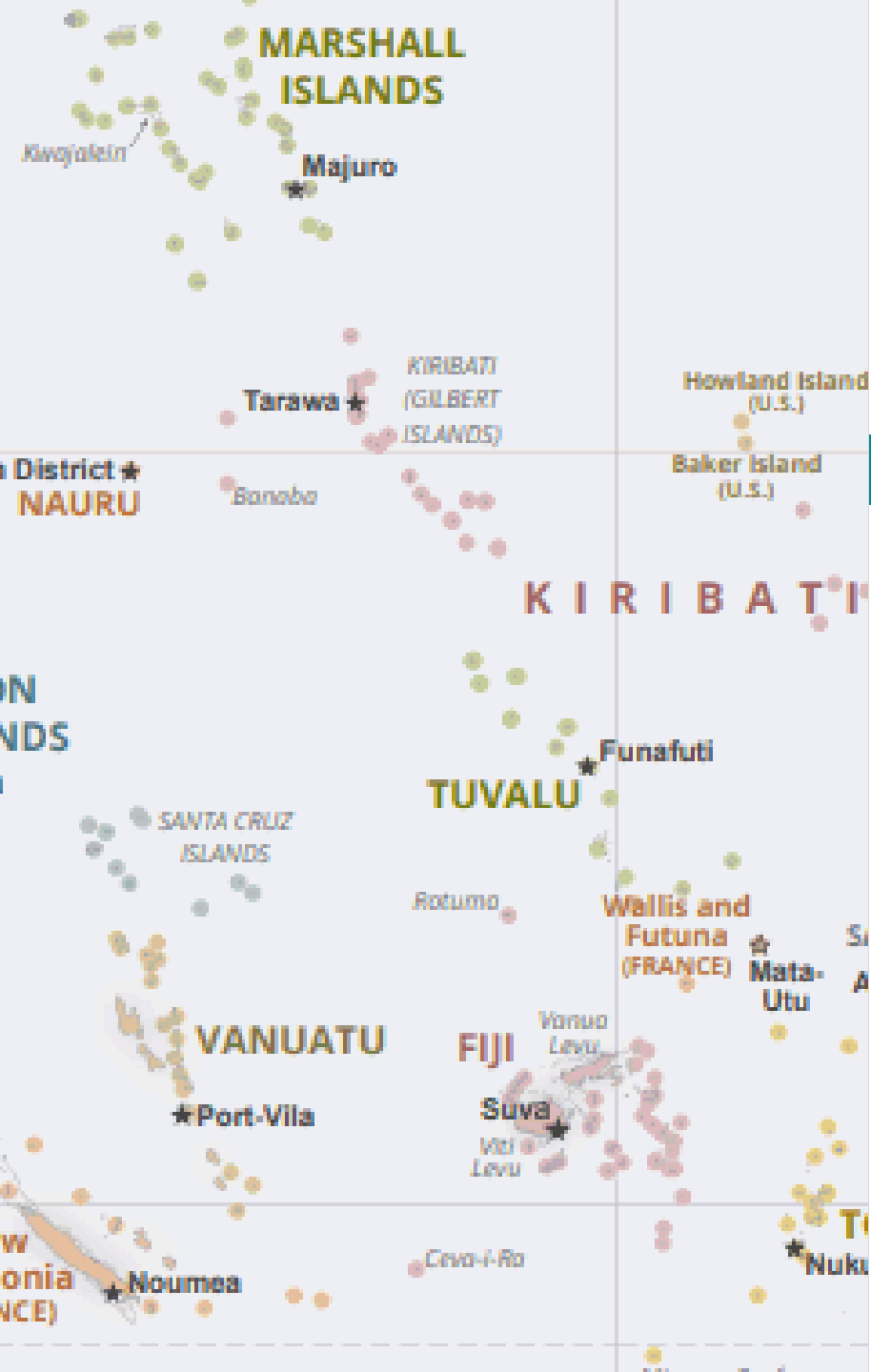
■ Transit and archipelagic sea lanes passage



Transit passage

- No freedom of overflight
- But also no requirement for diplomatic clearance for State aircraft
- Part III, section 2 UNCLOS + Customary international law (?)
- Straits used for international navigation
- Continuous and expeditious – without delay
- State aircraft: due regard for safety
- Refrain from engaging in activities that are not related to expeditious transit
- Continues during armed conflict

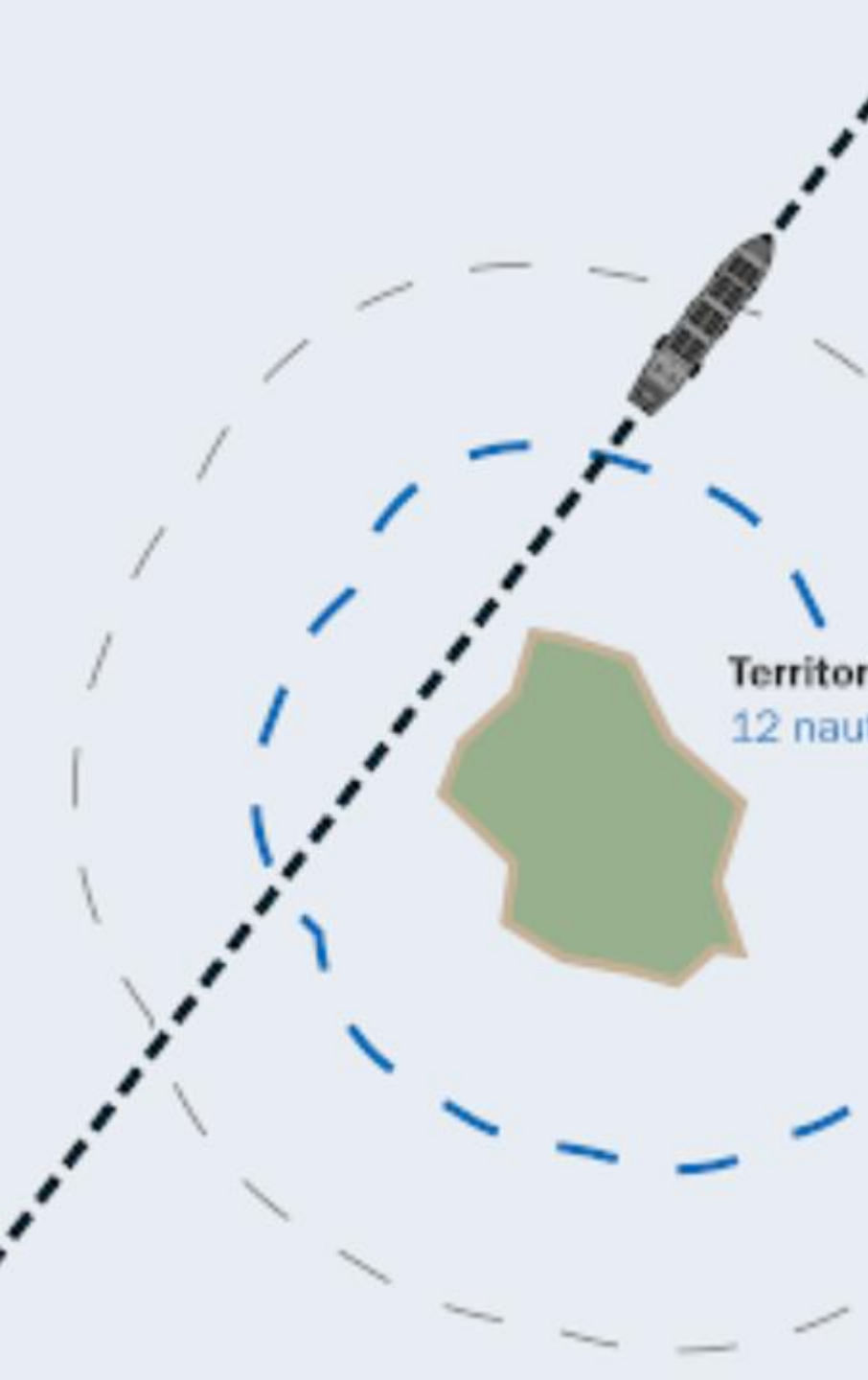




■ Archipelagic sea lanes passage

- Generally mutadis mutandis to transit passage





Innocent passage

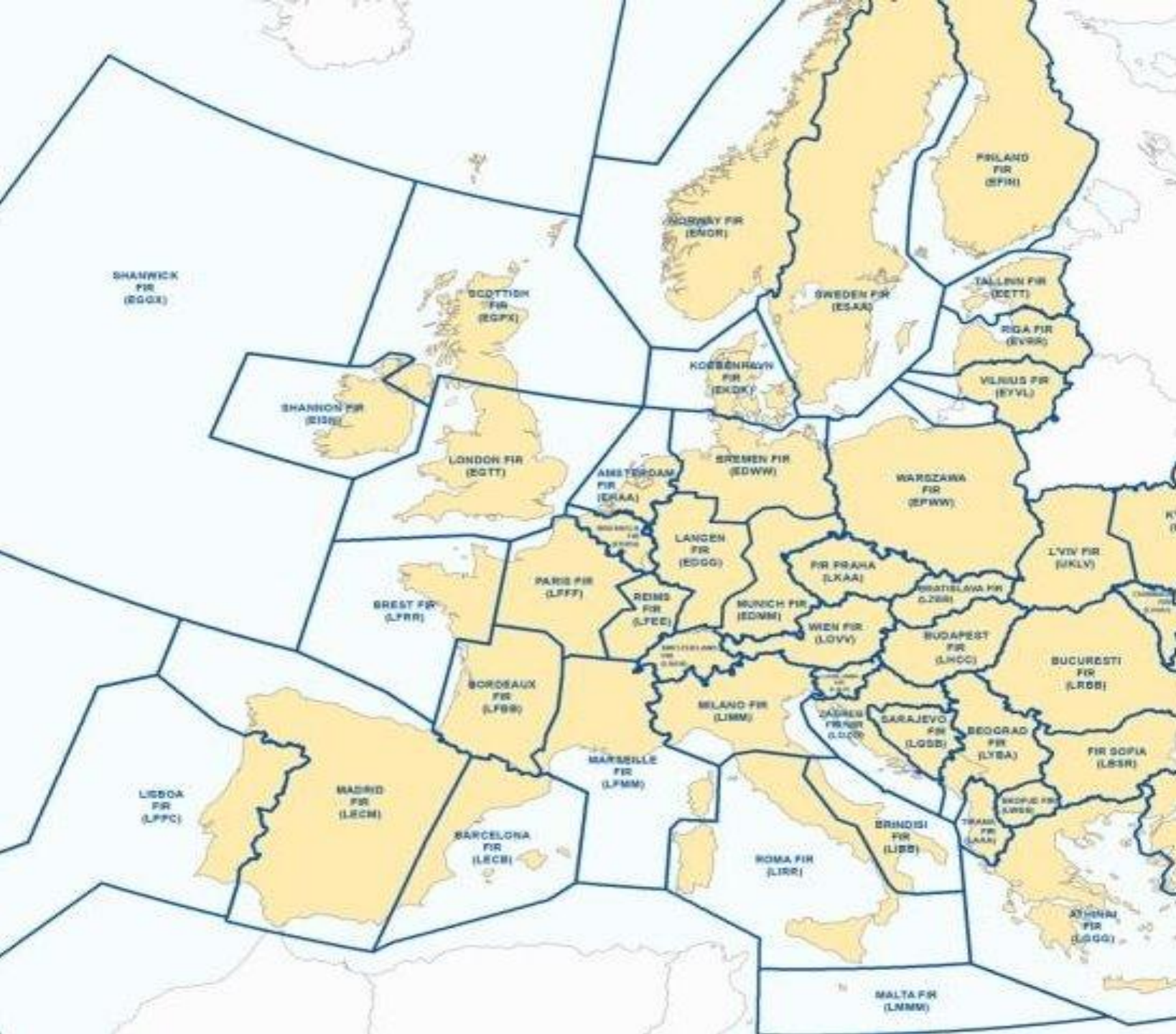
- Does not apply to aircraft





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FIR



FIR

Flight Information Region

Not linked to national borders

Not linked to sovereignty

Not linked to enforcement jurisdiction

A FIR offers air traffic service. At the least that includes flight information service and alerting service

The State operating a FIR may not suspend the freedom of overflight of other States in that FIR.



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Compare FIR and territorial sea on the map.

Disclaimer: This map is used for purely demonstrative purposes. It has not been checked on potential mistakes or inaccuracies.



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■ Must State A/C coordinate with ATS from FIR?

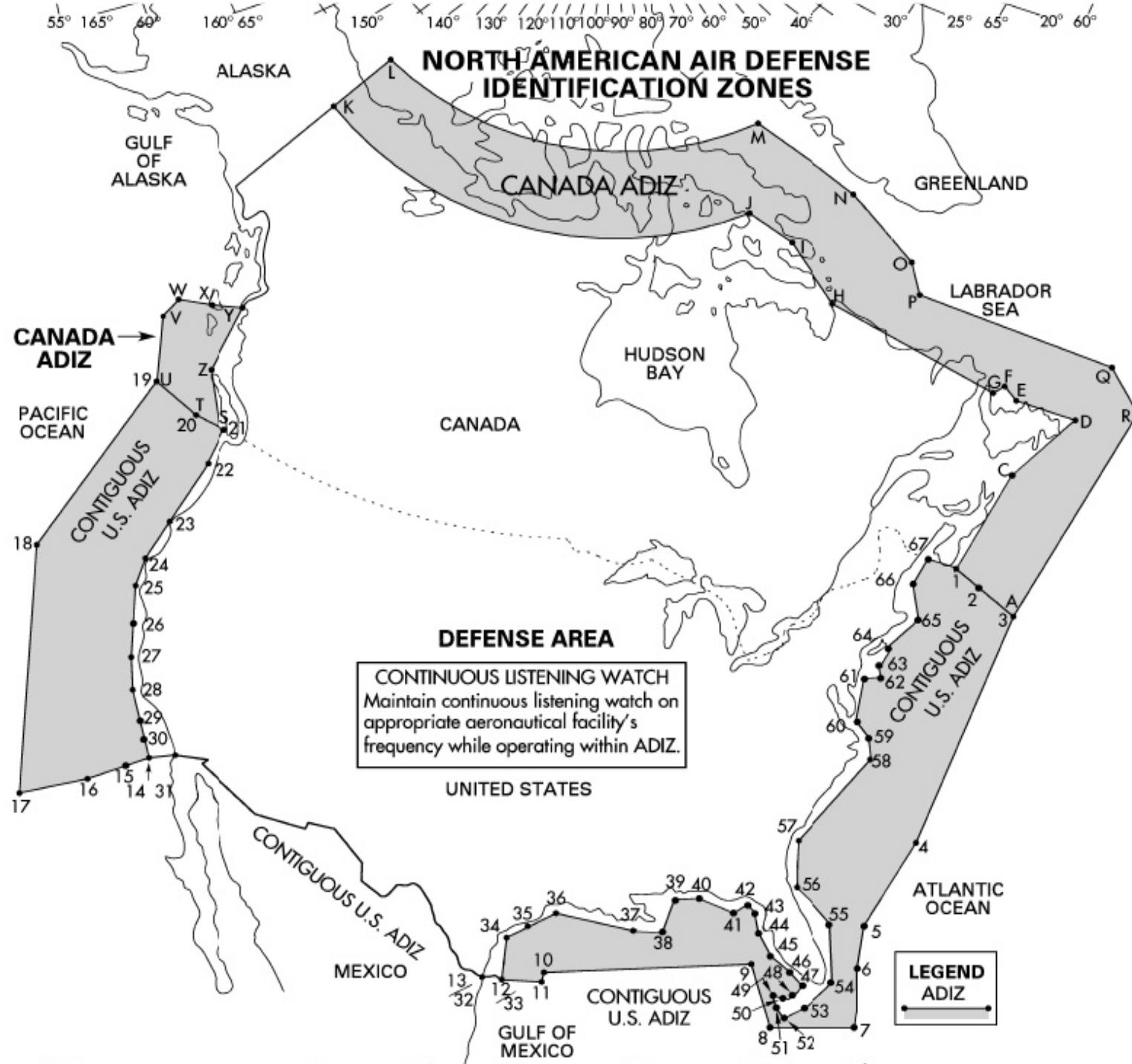
- Article 3 d) Chicago Convention: due regard for safety
- Article 12 Chicago Convention: adopt measures for 'every' aircraft
- What with increasingly congested airspace?
 - ICAO Cir 330 AN/190 Civil/Military Cooperation in Air Traffic Management
- State aircraft will operate in compliance with ICAO SARPs *to the maximum extend practicable*
- *Due to mission requirements* State aircraft can operate under due regard for safety
- When operating under due regard State aircraft
 - Might not necessarily report
 - Might not necessarily identify themselves
 - Are generally required to maintain safe distance from civil aircraft





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ADIZ



ADIZ: Air Defence Identification Zone

What's in a name?

- Air defence regions,
 - Air policing areas,
 - Zone of national defense,
 - ...
- No basis in international air law
 - No connection to Chicago Treaty
 - No extension of sovereignty
 - Not possible to limit freedom of overflight



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Basis for ADIZ in international airspace:

- UN Charter (art. 51) ?
- Freedom of overflight for all

Actions without specific prescriptive or enforcement jurisdiction

- *Scramble*
- *Identification*
- *Interrogation*
- *Shadow*
- *Record/report*
- *Show of presence*
-



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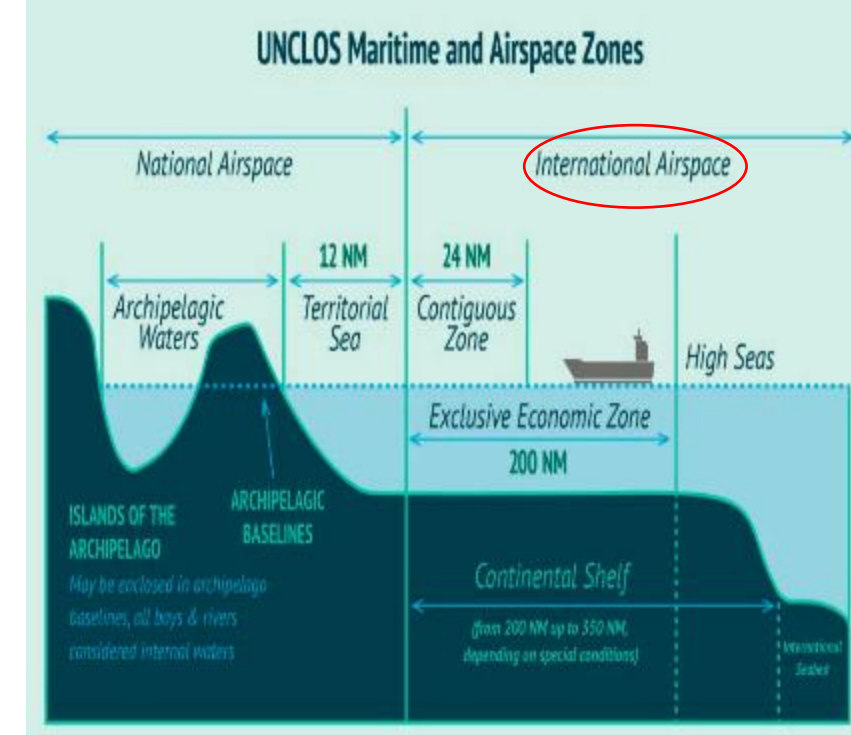


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■ **Other restrictions?**

Danger areas

- Freedom of overflight in international airspace
= freedom for military exercises in international airspace
- The State responsible for the FIR cannot prevent military exercises
- Due regard for safety
- Due regard for freedoms of other States
=> coordination with the ATS authority in the FIR is advised, so the authority can issue a NOTAM
(see also Ann 11 Chicago Convention for considerations regarding the due regard requirements)
- Danger areas are not strictly enforceable





No-fly zone

By UNSC Resolution
“*when it appears to be
conducive to the
maintanence of international
peace and security*”
Art. 41-42 UN charter

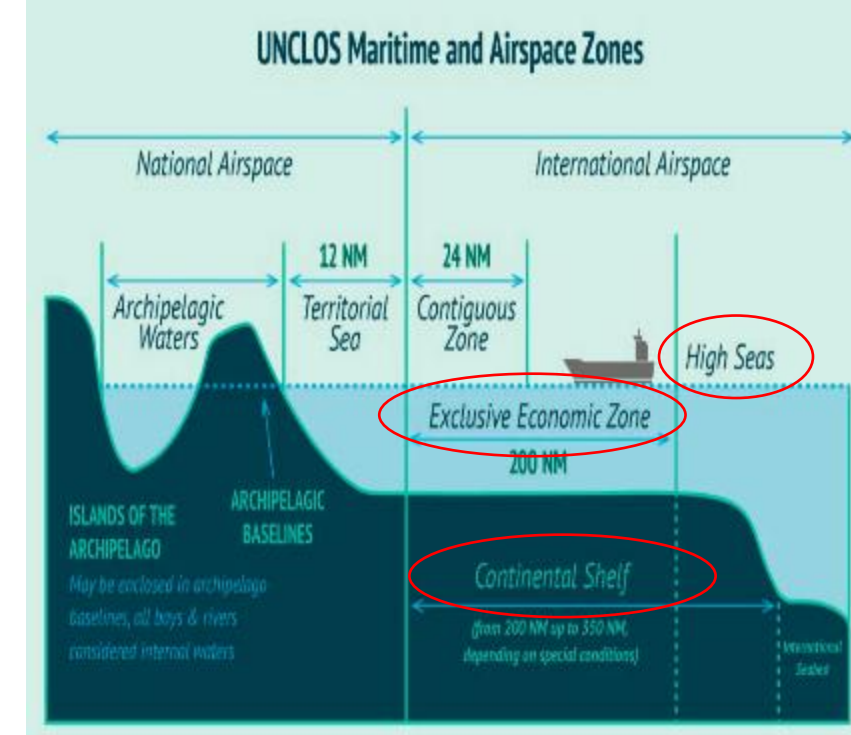


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Maritime constructions

- Artificial islands, installations and structures in the EEZ (Art. 60 UNCLOS)
 - Safety zone < 500m (Art. 60 (5) UNCLOS)
- Constructions on the continental shelf (Art. 77 UNCLOS)
- Others....

⇒ Freedom of overflight remains!





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■ Upholding Acquis

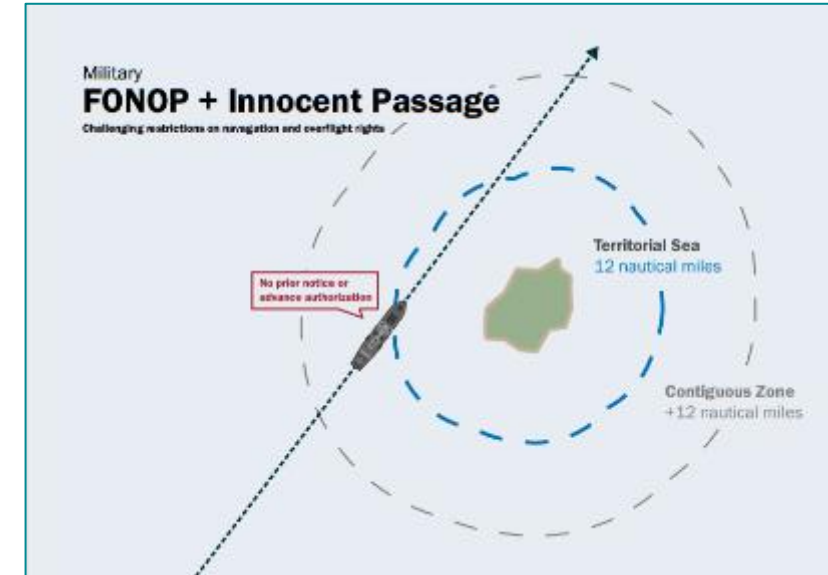
Upholding Acquis

How to enforce international law at sea (short of Use of Force)?

- Tribunals
- Counter-measures
- Retorsions
- Name and shame
- Use the rights

Example: FONOPS

- Goal: be a persistent objector to excessive claims
 - “Unlawful and excessive maritime claims are threat to legal foundation of rules-based international order”
 - “If left unchallenged, excessive maritime claims could permanently infringe upon the freedom of the seas enjoyed by all nations.”





■ Thank you