THE IMPACT OF THE 1982 LAW OF THE SEA CONVENTION ON THE CONDUCT OF PEACETIME NAVAL/MILITARY OPERATIONS

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INTRODUCTION

The 1982 Law of the Sea Convention (LOSC)[1] entered into force on November 16, 1994,[2] has been hailed as the most comprehensive treaty ever negotiated on the world's oceans.[3] Indeed, it sought to create a new order for the world's oceans[4] and, on the whole, has been generally acclaimed for having achieved this courageous aim. Foremostly, the LOSC is dedicated to the peaceful regulation of international maritime matters.[5] Accordingly, the LOSC provides a reliable basis upon which to assess matters pertaining to resource rights, pollution and environmental controls, and other peacetime uses of the seas. It does not, however, comprehensively deal with direct issues concerning naval/military operations, and, more specifically, with the question of the use of force in the maritime context. Such specific regulation, touching as it does on political sensitivities and balance of power paradigms, undoubtedly would have been too ambitious. Nonetheless, the LOSC is replete with ambiguity concerning military uses of the seas. The assumption of legal rights and duties that underpin this ambiguity must be understood if

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1. Third United Nations Conference on the Law of the Sea: Final Act, Nov. 1982, 21 I.L.M. 1261 [hereinafter LOSC].

2. This occurred one year after having received its 60th ratification in accordance with Article 308 of the LOSC.

3. *See* John Mordike & E.E. Casagrande, *The 1982 Law of the Sea Convention: Some Implications for Air Operations*, AIR POWERS STUDIES CENTRE, 1 (Royal Austl. Air Force, No. 51, Feb. 1997).

4. *See* Same Varayudej, *The Dispute Settlement System within the UNCLOS*, MARITIME STUDIES 19 (July-Aug. 1997) (citing A. O. Adede, *The Basic Structure of the Disputes Settlement Part of the Law of the Sea*, 11 OCEAN DEV. & INT'L L. 125, 128 (1982)).

5. *See* LOSC *supra* note 1, pmbl.

States are to act responsibly within the strictures of the LOSC. This is particularly so in recent times with the continuing ratification and accession of States to the LOSC,[6] coupled with the ongoing and increasingly bellicose maritime disputes in areas of the world such as the Spratly Islands.[7]

The purpose of this article is to identify and examine, in reference to the LOSC, the nature of those legal rights and duties concerning the conduct of naval/military operations and the use of force. It is a theme of this article that the LOSC does contemplate the use of "necessary" forceful measures to simultaneously affirm navigational rights and also to preserve sovereign coastal interests. Such a "balancing act" between these seemingly irreconcilable concerns is not surprising, given the historical legal debate over the theories of "*mare clausum*" and "*mare liberum*"[8] and the relative ascendancy of either theory at any given moment of time. The LOSC attempts, nonetheless, to facilitate this "balancing act" and seeks to buttress these rights with an implicit recognition that force may be appropriately applied in certain circumstances. Indeed, the text of the Convention must also be read in conjunction with an understanding of those rights to employ force more generally recognized by bodies such as the International Court of Justice (ICJ). Such judicial opinion has necessarily influenced the development of customary international law and is incorporated into the planning processes of many of the world's "blue water" navies and military forces generally.

This article will first briefly describe the hierarchy of maritime zones recognized by the LOSC. Allied to this description will be a short outline of the navigational rights recognized in each of these zones and the implications such legal regimes have on the naval/military use of the seas. Having established the legal framework applicable to the various maritime zones, the article will specifically examine the question of the use of force contemplated by the Convention. Indeed, within this analysis, two premier cases on maritime rights and self-defense, namely the *Corfu Channel*[9] and the *Nicaragua*[10] cases, will be closely considered. The conclusion is then made that these cases do support a legal justification for the use of force in certain, well-defined circumstances, which do have an immediate relevance in the maritime context. It will be contended however, that such rights to resort to force are always conditioned on principles of necessity and proportionality, which remain essential criteria for the legitimacy for any use of force. Having made such conclusions, the last part of this article will finally examine,

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6. *See generally* George Galdorisi, *An Operational Perspective on the Law of the Sea,* 29 OCEAN DEV. & INT'L L. 73-84 (1998).

7. *See* H.R. Sanguinetti, *Is China Preparing for a Military Solution to the Spratlys Dispute?,* 87 NAVAL REV. 27 (Jan. 1999).

8. *See generally* DANIEL PATRICK O'CONNELL, THE INTERNATIONAL LAW OF THE SEA, 1-28 (I. A. Shearer ed., 1982) [hereinafter O'CONNELL I].

9. Corfu Channel (Merits) (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) [hereinafter Corfu Channel].

10. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter Nicaragua].

in detail, the question of innocent passage of warships through foreign state territorial seas. Such a scenario provides the clearest interface between military navigational rights and coastal state sovereign interests, and the formula contained within the LOSC provides a valuable insight into the manner in which such legal rights are sought to be reconciled. The final part of this article thus provides a useful model upon which the competing legal priorities discussed previously may be meaningfully resolved.

I. MARITIME ZONES WITHIN THE LOSC AND THE IMPLICATION FOR NAVAL/MILITARY ACTIVITIES

The use of naval/military forces to "project power" and influence international relations has long been a traditional "weapon" in the diplomatic armory of States. Indeed, the very term "gunboat diplomacy," which now has general currency, is indicative of the historic use of naval forces as a coercive element in the achievement of national goals.

As a consequence of this usefulness, it is not altogether surprising that those States possessing strong global or even regional maritime forces have favored more liberal navigational regimes for the world's oceans. As one author has noted, the United States of America, for example, has "traditionally maintained a strong Navy to preserve the freedom of the seas and to support the global commitments associated with its forward Defense strategy. In peacetime, naval forces are routinely deployed overseas as a means of reassuring allies and deterring political adversaries."[11] Indeed, it has been formally acknowledged by United States officials that continued access to the "oceans throughout the world, including areas off foreign coasts at great distances from the United States, is vital to U.S. security and economic interests in global navigation, overflight and telecommunications."[12]

Such attitudes, as outlined above, are not restricted only to the United States Government. During even the Cold War, the Soviet Union shared with the United States a political desire to further expand the navigational rights of its own "blue water" maritime forces. While incidents sometimes occurred between these countries, there was a general consensus between the superpowers that it was in their mutual interest to concede "the legal right of the other to do what it is doing . . . [and] even welcome (albeit silently) the augmentation of State practice in support of the kinds of operations large navies undertake."[13]

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11. Scott C. Truver, *The Law of the Sea and the Military Use of the Oceans in 2010*, 45 LA. L. REV. 1221, 1228 (1985) (quoting former Secretary of Defense C. Weinberger, Annual Report to Congress (Feb. 1985)).

12. U.S. DEPT. OF DEFENSE, NATIONAL SECURITY AND THE CONVENTION ON THE LAW OF THE SEA i (2d ed. 1996).

13. Bernard H. Oxman, *International Law and Naval and Air Operations, in* 64 INTERNATIONAL LAW STUDIES: THE LAW OF NAVAL OPERATIONS 24 (Horace B. Robertson ed., 1991).

As a consequence of these political imperatives, the legal regimes, which were developed in respect of the maritime zones, were necessarily influenced by mutual superpower priorities in seeking the greatest scope of navigational freedom. Such broad interpretations were not, however, universally endorsed. The expansion of the territorial sea limit, for example, from three nautical miles to twelve nautical miles was a testament to the resolve of the smaller coastal States who endeavored to counter any perceived abrogation of their sovereign interests. However, as will be outlined, the smaller coastal States were not always successful in resisting encroachment on their sovereign rights. Indeed, in many cases, the promulgation of maritime zones under the LOSC provided significant legal concessions to the maritime forces of larger powers.

A. Baselines and Maritime Zones

The LOSC provides for a hierarchy of maritime zones. Within each of these off-shore zones, coastal and navigational rights are regulated. The relevant zones may be summarized as comprising internal waters, territorial sea, contiguous zone, exclusive economic zone, and high seas;[14] in addition, there are the cognate zones, comprised of the continental shelf and the archipelagic concept.[15] The differing legal regimes, which apply to each of these zones, do necessarily influence the planning and conduct of naval/military operations.

1. Baselines

While the LOSC prescribes the breadth of each maritime zone, the determination, in each specific instance, of the charted co-ordinates of these zones rests upon the initial establishment of "baselines" from which these zones may be plotted. Accordingly, the determination of the baselines has become a critical exercise.

Article 5 of the LOSC outlines that the "normal" method for baseline drawing is the low water line along the coast.[16] Article 7 provides for a system of straight baselines where a coastline is deeply indented or if there is a fringe of islands.[17] This Article of the LOSC simply reflects customary international law as outlined in the 1951 *Anglo Norwegian Fisheries* case,[18] including, as it does, the concession to long-term economic usage factors in respect of the drawing of the straight baseline.[19] Self-evidently, the drawing

14. LOSC, *supra* note 1, part II.
15. LOSC, *supra* note 1, part IV.
16. LOSC, *supra* note 1, art. 5.
17. LOSC, *supra* note 1, art. 7.
18. Fisheries Case (U.K. v. Nor.) 1951 I.C.J. 116 (Dec. 18) [hereinafter Anglo Norwegian Fisheries].
19. LOSC, *supra* note 1, art. 7(5).

of straight baselines can have the effect of increasing the area of sea which a coastal State may claim as a specific maritime zone. In addition, special rules for the drawing of baselines also apply to bays and the drawing of lines across the mouth of bays.[20]

2. Baseline Challenges—The Operational Interface

a. United States Navy Activities

Given the discretion accorded to States under the LOSC for determining the manner in which baselines can be drawn, global maritime powers such as the United States are vigilant in ensuring that coastal States draw baselines in a manner consistent (at least in relation to United States interpretations) with the LOSC.

Thus, to ensure that there is no easy acquiescence in excessively claimed baselines, the United States Navy (USN) is subject to a government directed "Freedom of Navigation" (FON) program.[21] Consistent with United States national policy, the USN will actively undertake transits in littoral areas where the drawing of baselines (or the claim of certain other maritime rights) is disputed. Occasionally, the USN (in concert with its allies) will schedule military exercises within areas considered to be "international waters" but which other coastal States contend they exercise overriding national sovereign rights. The Gulf of Sidra incidents in the early and late 1980s, wherein USN fighters downed a number of Libyan military aircraft which challenged such exercises, concerned disputed claims with Libya as to the status of the Gulf as an "historic bay."[22] Such actions serve to demonstrate the very real connection between the "dry" law of the Convention and operational realities.

Much like the development of customary international law generally, the "persistent objector" principle is very relevant to the recognition, or otherwise, of a historic bay. Customary law requires that a State demonstrate an open effective use of a "historic bay," coupled with acquiescence by other States for this claim to be legitimate.[23] In the context of the latter criterion, the United States' actions in respect to the Gulf of Sidra, and generally in relation to the FON program, can be better understood. Accordingly, while undoubtedly sometimes politically charged, the American approach to challenging what it perceives to be excessive maritime claims is consistent with

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20. LOSC, *supra* note 1, art. 10.

21. U.S. DEPT. OF DEFENSE, *supra* note 12, at 2.

22. *See* Dennis R. Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, NAVAL INST. PROC. at 26-31 (Jan. 1982); *see generally* George Galdorisi, *The United States Freedom of Navigation Program: A Bridge for International Compliance with the 1982 United Nations Convention on the Law of the Sea*, 27 OCEAN DEV. & INT'L L. 399-408 (1996).

23. *See Documents of the 14th Session Including the Report of the Commission to the General Assembly*, 2 Y.B. INT'L L. COMM'N 25, U.N. Doc. A/CN.4/143 (1962).

the decision in *Anglo Norwegian Fisheries.*[24] There, it was suggested that the general "toleration of a notorious claim"[25] was sufficient to render a claim valid. This is all the more relevant today when States are actively engaging in multiple conscious actions in order to crystallize nascent rules in favor of their own sovereign maritime interests.[26]

b. Internal Waters

Internal waters comprise those waters on the landward side of the baseline.[27] Internal waters can include ports, rivers, harbors, and bays of the coastal state. Within this zone, a coastal State enjoys complete sovereignty over the water column, seabed, and sub-soil. Accordingly, there exists no right for foreign vessels or aircraft to enter a coastal State's internal waters. A warship, therefore, is required to obtain diplomatic clearance to enter a port, though such warship always retains rights of sovereign immunity while in internal waters.

c. Territorial Seas

The first zone, which extends seaward from the baseline, is the territorial sea. The LOSC allows, under Article 3, every coastal State the right to establish the breadth of its territorial sea up to twelve nautical miles from its baseline.[28]

The majority of States now claim a territorial sea of twelve nautical miles. The final establishment of the breadth of the territorial sea within the LOSC represented a major achievement in the consensus process employed during the Third Conference on the Law of the Sea, and reflected an impetus that had been initiated by the smaller States. Significantly, this also represented a progressive development in the law. Prior to the Convention, it was generally accepted that the breadth of a territorial sea could only extend to a three nautical mile limit.[29] Indeed, until 1988, the United States insisted that the three-mile limit was the appropriate breadth under international law after having claimed such a limit since 1793.[30]

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24. *See generally* Anglo Norwegian Fisheries, 1951 I.C.J. 116.

25. A.V. Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea, in* 64 INTERNATIONAL LAW STUDIES THE LAW OF NAVAL OPERATIONS 111 (Horace B. Robertson ed., 1991).

26. For example, in relation to the Spratly Islands in the South China Sea as well as actions by Indonesia in relation to archipelagic sea lane designation in recent years.

27. LOSC, *supra* note 1, art. 8(1).

28. LOSC, *supra* note 1, art. 3.

29. MICHAEL B. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 173 (6th ed. 1987).

30. The three-mile limit was established by declaration in a letter from Thomas Jefferson, U.S. Secretary of State, to French and British ministers (Nov. 8, 1793), *in* THE WRITINGS OF THOMAS JEFFERSON 440-42 (Paul L. Ford ed., 1895), *cited in* Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, NWP 9 (Rev.A)/FMFM 1-10, at 1-

In the area of the territorial sea and the air space over that area, the coastal State has complete sovereignty subject only to the right of "innocent passage" for ships, but not for aircraft.[31] This proposition has been the basis for considerable academic debate and international litigation, and will be comprehensively addressed in the final part of this article.[32] Where the expansion of the territorial sea resulted in the overlap of international straits, a regime of "transit passage" applies.[33] This allows warships to travel in their "normal mode," *i.e.*, allowing flight operations and replenishment at sea activities. While Article 38(2) of the LOSC mandates that warships conducting "transit passage" will pass "continuously and expeditiously,"[34] the regime is less onerous than the requirements for innocent passage. Importantly, transit passage through international straits (and archipelagic sea-lanes which share a similar navigational regime) is guaranteed under Article 38 the LOSC and may not be suspended (even in times of conflict with respect to neutral vessels) by those States which border such straits.[35]

d. Contiguous Zone

In accordance with Article 33 of the LOSC, a coastal State may, in a zone contiguous to its territorial sea, exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration, and sanitary laws within its territory and territorial sea.[36]

The recognition of a contiguous zone, which is defined within the LOSC as extending for a distance of not beyond twenty-four nautical miles from the baselines,[37] was not a progressive development of the Convention. Rather, the concept had found its initial treaty prescription in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone,[38] and its terms were essentially repeated in the LOSC.

The significance of the contiguous zone principally relates to law enforcement actions rather than general questions of military/naval operations. However, many military forces are engaged in law enforcement activities relating to the protection of natural resources. Such actions have come to be characterized as coming within the realm of national security interests.[39]

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13 (Wash. D.C. 1989).

31. LOSC, *supra* note 1, arts. 17-26.
32. *See infra* Part III.
33. LOSC, *supra* note 1, arts. 37-44.
34. LOSC, *supra* note 1, art. 38(2).
35. LOSC, *supra* note 1, art. 42(2).
36. LOSC, *supra* note 1, art. 33(1).
37. LOSC, *supra* note 1, art. 33(2).
38. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205.
39. *See* Jack McCaffrie, *Potential Threats to Australian Maritime Security, in* OCEAN MANAGEMENT AND THE STRATEGIC DIMENSION 37 (Sam Bateman & Dick O. Sherwood eds., 1995) (Centre for Maritime Policy, University of Wollongong).

A perennial question relating to the interpretation of Article 33 concerns the extent of jurisdiction contemplated under this Article. Thus, one authoritative commentator has queried whether a literal reading of this Article only permits the enforcement of the specified classes of laws (customs, fiscal, immigration, or sanitary) within the contiguous zone once breaches had been committed within the territory or territorial sea.[40] The broader view is that breaches of one of the specified classes of laws which occur within the contiguous zone can be enforced in that zone where it is reasonably apparent that the offending vessel/aircraft is about to enter the territorial sea or has just left it.[41] Consistent with general principles of international law, warships enjoy sovereign immunity when in the contiguous zone (and elsewhere) and cannot be boarded or subject to coastal State jurisdiction.[42] Their actions can, however, be the subject of diplomatic complaint and claims for compensation.

e. Exclusive Economic Zone/Continental Shelf

The Exclusive Economic Zone (EEZ) was a progressive development under the LOSC. This zone, coupled with the Continental Shelf concept, does recognize sovereign economic rights relating to the exploration, exploitation, conservation, and management of living and non-living resources.[43] The zone may extend up to 200 nautical miles from the baseline.[44] Unlike some States, western nations generally recognize that foreign naval vessels may transit through this zone in the "normal mode" and may even conduct military exercises within a foreign State's EEZ, bound only by the obligation to have "due regard" to the legitimate resource rights of the coastal State and, of course, other State users.[45] Such an interpretation is mildly contentious, given the requirement for "peaceful uses"[46] of this zone mandated by Article 58 of the LOSC,[47] though it is quite ambitious to conclude, as some publicists do, that reference to "peaceful uses" of the high seas within Article 88 of the Convention necessarily prohibits all naval/military activity within international waters. Such an interpretation is

40. Lowe, *supra* note 25, at 112.

41. Such an interpretation places great emphasis on the "prevention" aspects of the Article, but is consistent with the general thrust of expansive interpretation employed by Superior Courts within Australia in such matters. *See, e.g.*, Rutu and Ladjilu v. Dalla Costa, 93 A. Crim. R. 425 (1997), where the Supreme Court of the Northern Territory took an expansive view on the reach of the Commonwealth Migration Act..

42. LOSC, *supra* note 1, art. 32.

43. LOSC, *supra* note 1, art. 56(1)(a).

44. LOSC, *supra* note 1, art. 57.

45. Francesco Francioni, *Peacetime use of Force, Military Activities, and the New Law of the Sea*, 18 CORNELL INT'L L.J. 203, 215 (1985).

46. LOSC, *supra* note 1, art. 88.

47. Article 58(2) adopts the provisions of Article 88, which mandates usage of the high seas only for "peaceful purposes." LOSC, *supra* note 1, art. 58(2).

certainly not a preferred one adopted by more measured considerations.[48]

Given the ascendancy of the EEZ concept, the significance of the Continental Shelf has somewhat diminished. However, the LOSC does continue to recognize this zone, which allows full sovereignty rights over the resources of the seabed of the coastal State.[49] Significantly, the LOSC acknowledges that the Continental Shelf can extend beyond the limits of the EEZ provided that certain geological criteria are satisfied.[50] Accordingly, military activities which do not impinge sovereign economic rights may also be conducted within this zone.

f. Archipelagic Status

The archipelagic concept was a progressive development of the LOSC. Consistent with the notion of "wawasan nusantara,"[51] Indonesia, in particular, sought recognition of the "unity" of the archipelagic nation under international law with consequential recognition of sovereign rights within archipelagic waters.[52] Thus, such archipelagic countries, which are principally located within the Pacific region, sought a concession relating to the drawing of baselines around their outermost archipelagic islands with increased rights in relation to the waters thus enclosed.[53] The regime that was reflected in the LOSC does accord a special legal significance to archipelagic nations and has created a legal regime which is *sui generis*. Not surprisingly, perhaps, given the progressive nature of the archipelagic concept, there exists an ongoing debate as to the precise contour of the rights and obligations inherent in terms of navigational rights through an archipelago. The relevance of archipelagic sea lanes passage in the naval context,[54] in particular, has been subject to considerable debate. The designation of such sea lanes pursuant to Article 53 of the LOSC is presently subject to consideration by the International Maritime Organization. The final determination of such sea lanes is critical given the capacity of archipelagic States to suspend all innocent passage through their archipelagic waters. Archipelagic sea lanes passage "in the normal mode"[55] is not affected by such suspension. Accordingly, it remains in the self-interest of all maritime powers to press for the designation

48. Francioni, *supra* note 45, at 223.

49. LOSC, *supra* note 1, art. 77.

50. LOSC, *supra* note 1, art. 76.

51. This is the Indonesian conception of the unity of nation as comprising both the land territory of their archipelago in conjunction with the enclosed archipelagic waters. *See* Dino Djalal, *The Geopolitics of Indonesia's Maritime Territorial Policy*, 24 INDONESIAN QUARTERLY 102, 102 (1996). This concept "seems to be related with the concept of Nationalism. . . . It amalgamates geographical phenomenon with political phenomenon." *Id.* at 102-03.

52. *Id.* at 102.

53. LOSC, *supra* note 1, art. 47.

54. LOSC, *supra* note 1, art. 49(4).

55. Normal mode connotes aircraft operations for organic aircraft, submerged transit for submarines and "security steaming" formation for a naval task force.

of the greatest number of archipelagic sea lanes in accordance with Article 53 of the LOSC.

g. High Seas

Those waters outside the above-mentioned maritime zones constitute "high seas."[56] Notwithstanding this, many navigational freedoms which were originally exercisable only on the high seas may now be exercised within "international waters," which are defined as those waters extending beyond the territorial sea of a coastal State.[57] Significantly, within the high seas (indeed, "international waters"), crimes of universal jurisdiction may be committed which may involve the use of military forces in their enforcement. Such crimes of universal jurisdiction include war crimes and piracy.

II. PEACETIME RIGHTS TO USE FORCE UNDER THE LOSC

The legal regime contemplated in the hierarchy of maritime zones under the LOSC does not directly regulate the application of force within those zones. Notwithstanding this, general customary international law does proscribe behavior that is inconsistent with the prohibition of force, as mandated under Article 2(4) of the United Nations Charter.[58] While, as has been outlined, naval and military forces may well be used as a diplomatic tool to demonstrate a "show of force" or "symbolic expression of support and concern,"[59] such actions in the maritime context run the risk of offending the general prohibition under customary international law on the use or threatened use of force in the conduct of international relations.[60] Accordingly, a State's maritime forces, when deployed for such purposes, must be careful to achieve the right balance between mere "presence" and overt "coercion." These points are indirectly addressed in the LOSC, but have been more fully expanded upon by the International Court of Justice in a number of court decisions.

A. Treaty Provisions

Article 301 of the LOSC, entitled "Peaceful Uses of the Seas," mandates in very general language that disputes relating to rights and duties assumed under the LOSC shall be settled peacefully, in accordance with principles of international law embodied in the Charter of the United Nations.[61] In this re-

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56. LOSC, *supra* note 1, art. 86.

57. U.S. DEPT. OF NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, 2-6 (1995).

58. U.N. CHARTER art. 2(4).

59. Oxman, *supra* note 13, at 30.

60. *See* U.N. CHARTER, art. 2(4).

61. LOSC, *supra* note 1, art. 301.

gard, the Article merely paraphrases Article 2(4) of the United Nations Charter by prohibiting the use or threat of use of force by any party in the exercise of rights or the performance of duties under the Convention.[62] The Article, therefore, is somewhat benign in its failure to precisely deal with the activities of maritime forces. The abdication of direct regulation of the use of force is made all the more complete with the inclusion, under Article 298 (1)(b), of an optional exemption from the compulsory settlement of disputes for "military activities"[63] and additionally, under Article 298(1)(c) for matters that have been referred to the Security Council.[64]

Notwithstanding the invocation of the prohibition on the use of force within the LOSC and deference made to the Security Council, it is contended that the Treaty does, in fact, contemplate the use of "necessary" forceful measures to affirm navigational rights and to preserve sovereign coastal interests. The legal justification for such measures must be gleaned from an assessment of the language used within the Convention in conjunction with an understanding of those rights to employ force recognized by bodies such as the International Court of Justice (ICJ). Remarkably, in two of the three premier cases decided by the ICJ on the use of force, namely *Corfu Channel*[65] and *Nicaragua*,[66] maritime navigational rights figured prominently in the decisions.

B. Decisions of the ICJ

In 1949, the ICJ, in *Corfu Channel*, made certain observations concerning the use of force which, if taken at their highest, would allow for an independent, indigenous authority to use force outside the Charter system. While expressed in general terms, even those literalist academics[67] who advocate a narrow interpretation of Article 51 of the UN Charter[68] have felt compelled to "rationalize" the decision as applying only to the context of narrowly defined maritime rights.

1. The Corfu Channel *Case*

Corfu Channel was concerned with the transit of British warships through the Corfu Channel in 1946.[69] Against a background of some enmity,

62. *See* U.N. CHARTER, art. 2(4).
63. LOSC, *supra* note 1, art. 298(1)(b).
64. LOSC, *supra* note 1, art. 298(1)(c).
65. Corfu Channel, 1949 I.C.J. at 4.
66. Nicaragua, 1986 I.C.J. at 14.
67. *See generally* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963).
68. Article 51 recognizes the inherent right of individual or collective self-defense in the case of armed attack against a Member. *See* U.N. CHARTER, art. 51.
69. Corfu Channel, 1949 I.C.J. at 12-13.

Albanian shore batteries in 1946 fired upon two passing British warships. Subsequent naval orders were issued directing that four British warships traverse the channel. In October 1946, these vessels were dispatched in battle readiness, but in a manner which ostensibly preserved their peaceful appearance. In the course of the transit, two of the warships struck mines which were laid by persons unknown (although the court subsequently attributed knowledge to Albania).[70] British ships were dispatched a third time in "Operation Retail," which took place on November 13, 1946.[71] The specific purpose of this transit was to sweep Albanian territorial waters for mines so as to gather "evidence" of Albanian malfeasance.

a. First and Second Transits

The court chose to treat the first and second transits differently from the third. In respect of the first and second transits, the court considered that the ships were conducting "innocent passage."[72] In that regard, the court essentially dismissed the Albanian contention that it was the *purpose* of the transit which was to be assessed, and instead stated that it was the *manner* of the transit which was critical.[73] Thus, notwithstanding that it was a time of tension between Albania and Britain, the court held that a somewhat robust transit by Britain of four warships was still innocent passage, even though the ship's company were closed up in "action stations,"[74] and the purpose of the transit was intended to be a demonstration of force seeking to "test" Albanian attitudes.[75] Importantly, in what was the most significant aspect of the decision, the court went beyond a mere characterization of "innocent passage" and ultimately upheld the legality of the British transit on the second occasion on the basis that it was a "mission" that "*was designed to affirm a right which had been unjustly denied.*"[76]

2. Third Transit

In respect of the third transit, the court was more circumspect. The court had regard to the number of ships (including an aircraft carrier, cruisers, and other warships) and the manner of the transit which comprised extensive mine sweeping activities within Albanian territorial seas.[77] In such circumstances, the court did not consider that the manner of such activities could

70. *Id.* at 18, 22.
71. *Id.* at 33.
72. *Id.* at 31.
73. *See id.* at 30; Lowe, *supra* note 25, at 126.
74. Corfu Channel, 1949 I.C.J. at 30.
75. O'CONNELL I, *supra* note 8, at 313; DANIEL PATRICK O'CONNELL, INTERNATIONAL LAW AND CONTEMPORARY NAVAL OPERATIONS 24-25 (1972) [hereinafter O'CONNELL II].
76. Corfu Channel, 1949 I.C.J. at 30 (emphasis added).
77. *Id.* at 33-35.

constitute innocent passage and, indeed, considered that the actions of the British task force constituted an unlawful intervention, which in its nature was sustained by a threat of the use of force.[78]

a. "Affirming Rights Unjustly Denied"

The decision reached in *Corfu Channel* has caused considerable debate within the contemporary academic literature. The eminent jurist Waldock seized upon the court's decision concerning the second transit as representing the recognition of an independent right to use force in circumstances well below the "armed attack" criterion necessary for national self defense under Article 51 of the Charter.[79] Thus, Waldock considered that the decision permitted a State to "coerce another State into future good behaviour."[80] In short, he was of the view that the court, in that instance, allowed in relation to the second transit for the existence of a limited right of "forcible self help" without reference to the United Nations Security Council, or the provisions of the UN Charter. Notwithstanding such a potentially revolutionary interpretation, he did feel constrained to make a distinction between "a forcible affirmation of legal rights, which is legitimate, and . . . forcible self-help to obtain redress for rights already violated, which is illegal."[81] The distinction is hard to comprehend.

This recognition of an apparently new authority for the use of force has been stringently criticized. Brownlie, for example, emphatically rejected the implication that the case gave rise to any kind of prospective general entitlement to forcibly exercise legal rights. In support of his contention, he cites a respectable corpus of legal authority ranging from the Kellogg-Briand pact through to the UN Charter and the trend of general customary law concerning the prohibition on intervention.[82] Moreover, in attempting to confine the significance of the court's pronouncement, he notes that the attitude towards the third transit, disclosed by the court as representing an unlawful intervention and violation of sovereignty, is inconsistent with the very logic outlined by the court in respect of the reasoning employed when interpreting the second transit.[83] Such sentiments concerning the internal logic of the case are shared by other commentators, and indeed, on this point O'Connell opines:

> In that case the minesweeping operation was a separate episode, intended to acquire evidence of the minelaying as much as to clear the channel. Would the passage of the warships have been less an exercise of rights if they had been using paravanes during their transit, for the purpose of cut-

78. *Id.* at 35.

79. *See* C.H. M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUIL DES COURS 455, 501 (1952).

80. *Id.*

81. *Id.* at 502.

82. *See* BROWNLIE, *supra* note 67, at 287.

83. *Id.* at 288.

ting the mine cables and avoiding the mines?[84]

In his conclusions, however, Brownlie does recognize a degree of residual legitimacy for the proposition espoused by the court. Accepting the plain statement by the court as to the "affirmation of rights," he considered that the most plausible application for the apparent right to use a limited degree of force lay in its relevance to maritime matters.[85] He concludes that "the decision can be confined in its effects to rights of passage, and, prima facie, rights of passage in straits and territorial waters."[86]

If this, then, is the lingering legacy of the case, admitted by even its most trenchant critics, then it does have significant impact in facilitating an interpretation of the LOSC with respect to naval/military activities in respect of navigational matters. As a result of this case, it would seem that in respect of navigational rights, a level of force might well accompany the realization of such rights in circumstances where those rights are unlawfully denied. The authority for this proposition derives not from Article 51 of the UN Charter, but rather from an independent customary right which has been articulated by the ICJ. Care must, however, be taken with such a bold pronouncement. Consistent with general theory, and indeed subsequent pronouncements of the court itself, such forcible affirmation of navigational rights will always be conditioned by the principles of necessity and proportionality,[87] and, as will also be outlined in the final part of this article, the more nebulous principle of "humanity," which also has been actively promoted by the ICJ as an important influence on this particular equation. In light of these subsequent developments, the comments made by the court in the *Corfu Channel* case concerning the affirmation of rights must be treated carefully. As will be demonstrated in the next section, however, the ICJ itself has subsequently resiled from the more extreme implications of the *Corfu Channel* decision and has developed a more holistic test for determining such transit rights.

C. The Nicaragua *Case*

The ICJ, in the 1986 *Nicaragua* case,[88] subsequently addressed the general question on the use of force under international law. While not a central consideration, maritime issues did specifically figure in aspects of that case and the court's opinion on those aspects remains instructive on the shaping of naval/military policy in respect of navigational rights and coastal sovereignty. In that decision, the court essentially considered the extent of legal

84. *As cited in* I. A. Shearer, *Legal Constraints on Naval Operations and the Rules of Engagement,* Proceedings of the 8th RAN Legal Conference at 74.

85. BROWNLIE, *supra* note 67, at 287.

86. *Id.*

87. *See generally* Nicaragua, 1986 I.C.J. 14. at 94, ¶ 176.

88. *Id.* at 14.

principle concerning the prohibition on intervention in the internal affairs of States.[89] The case concerned allegations by the Nicaraguan Government that the United States government was supporting the "Contra" rebels through various operations (including the mining of Nicaraguan ports by the United States).[90] Counter-allegations by the United States government concerned the Nicaraguan government's support of rebel elements in neighboring Honduras, El Salvador, and Costa Rica.[91]

1. The Use of Force and the Nicaragua *Case*

Due to procedural objections, the ICJ considered the issues in this case in accordance with customary international law, rather than the United Nations Charter.[92] In any event, the court considered that the content of the law was essentially the same.[93] The court was concerned with determining what amounted to an "armed attack" for the purpose of justifying the application of force in self defense,[94] and, more pertinently, the options involving force that were open to a country acting in a situation short of an "armed attack."[95]

2. "Armed Attack"

As a general proposition, the court held that, consistent with the literal words of Article 51 of the UN Charter, a State could act in self-defense when subjected to an "armed attack."[96] The court then set a high threshold standard for determining the level of attack that was required, finding that the attack had to be of sufficient "gravity."[97] For situations where an attack may not have the requisite degree of "gravity," the court allowed that "proportionate countermeasures" could be employed by a State.[98] Controversially, the court determined that a third State might not assist a State who is the subject of something less than an armed attack.[99] There was, paradoxically therefore, no conception of collective "proportionate countermeasures" as there is with collective self-defense under Article 51 of the United Nations Charter.[100]

Notwithstanding the general controversy surrounding this particular as-

89. *Id.* at 18-19.
90. *Id.* at 21-22, 20.
91. *Id.* at 70, ¶ 126.
92. *Id.* at 97, ¶ 182.
93. *Id.* at 99, ¶ 188.
94. *Id.* at 101, ¶ 191. *See also id.* at 103-04.
95. *Id.* at 106, ¶ 201; *id.* at 110, ¶ 210; *id.* at 127, ¶ 249.
96. *Id.* at 102, ¶ 193.
97. *Id.* at 101, ¶ 191; *id.* at 103, ¶ 95; *id.* at 127, ¶ 249.
98. *Id.* at 127, ¶ 249.
99. *Id.*
100. *Id.*

pect of the decision, the application of the concept of "proportionate countermeasures" in the maritime context is particularly useful. Thus, the assertion of navigational rights is not something that would necessarily justify the use of force in self-defense under Article 51 of the UN Charter.[101] However, it can be fairly seen as attracting a justification for the use of force under the authority of "proportionate countermeasures" if such passage was sought to be denied. This avoids the somewhat tortuous reasoning that some academics have previously developed that equates denial of sea lanes or non-innocent passage by vessels or submarines as constituting an "armed attack" for the purposes of justifying any armed response.[102]

3. "Proportionate Countermeasures"

The concept of "proportionate countermeasures" as part of the continuum of the right of forceful response was a new one introduced by the court. What is significant about the reasoning employed by the court is that it allowed a State recourse to "proportionate countermeasures" in a number of circumstances where an "armed attack" was not necessarily established. While it is acknowledged that the court did not expressly admit that such "proportionate countermeasures" could themselves include an element of force, they certainly did not rule this out, and the better view is that this was what was intended.[103] The established author MacDonald has identified three grounds, enunciated by the court in *Nicaragua*, the violation of which would give rise to the right to proportionate countermeasures, namely:

(a) the prohibition against intervention;

(b) sovereignty; and

(c) freedom of maritime navigation and communication.[104]

Each one of these grounds will be examined as it relates to the maritime context.

(a) "The Prohibition Against Intervention"

The court affirmed that "non-intervention" is a principle of international law under which the legality of the use of force would be judged.[105] The principle of non-intervention was expressed by the court to be based upon the concept of "coercion."[106] Thus, it held that "a prohibited intervention

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101. However, the right of unit self defense would always apply to permit an individual warship to defend itself if attacked. *See* D. Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126 (1998).

102. *See, e.g.*, O'CONNELL I, *supra* note 8, at 297.

103. John Lawrence Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self Defense*, 81 AM J. INT'L L. 135, 138 (1987).

104. *See* R. St. MacDonald, *The Nicaragua Case: New Answers to Old Questions*, CANADIAN Y.B. INT'L L. 127 (1986).

105. Nicaragua, 1986 I.C.J. at 106-08, ¶¶ 202-205.

106. *Id.* at 107-08, ¶ 205.

must . . . be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. . . . Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones."[107] The court then ventured an observation that the principle is violated not only in respect of the use of direct force, but also by the application of *indirect force* including, for example, monetary support for subversive or terrorist activities.[108]

This point raises the question of "innocent passage" and, to an extent, brings into reexamination the opinion of the court in *Corfu Channel* and the court's apparent toleration, in that instance, of a naval "demonstration of force."[109] As the commentator Lowe has noted, the question of "naval demonstrations," while ostensibly peaceful, may have indirect and nefarious consequences that may implicitly violate the principle of non-intervention. Thus, a programmed transit by a naval force through the territorial sea of an antagonistic State at a time of civil unrest and subversive agitation, although ostensibly peaceful in its manner, must call into question the very issue which the court in *Nicaragua* was considering.[110] That issue is whether such a transit can be considered to have the necessary element of "coercion" to violate the principle of non-intervention. Such violation would give rise to a right by the coastal State to employ proportionate countermeasures to restore the *status quo ante*, even if the overt manner of the transit by the naval task force was consistent with the literal requirements of innocent passage.

Notwithstanding the conclusions reached by the court in *Nicaragua*, it would appear that the limits of application of the non-intervention principle in the maritime context extend only to the edge of the territorial sea. In the case itself, Nicaragua had asserted that USN maneuvers just outside the Nicaraguan territorial sea did constitute a threat to use force and thus did violate the principle of non-intervention.[111] Significantly, the court did not accept this particular claim and instead recognized that such maneuvers did not posses the requisite threat of the use of force.[112]

(b) "Sovereignty"

The court considered the principle of "sovereignty" in relation to the question of overflight of national airspace (which includes airspace above territorial waters). In particular, the court focussed on the aerial trespass of Nicaraguan national airspace by United States reconnaissance aircraft.[113] In the circumstances, the court considered that such actions constituted a viola-

107. *Id.*
108. *See id.*
109. *See supra* Part II.B.1.
110. Lowe, *supra* note 25, at 117.
111. *See* Nicaragua, 1986 I.C.J. at 53, ¶ 92.
112. *See id* at 118, ¶ 227.
113. *See id.* at 52-53, ¶ 91.

tion of national airspace and thus "sovereignty," though the court seemed unable to regard such activities as constituting a threat of force.[114] This is significant in that the court would *not* appear to allow the use of force under the aegis of "proportionate countermeasures" to counter such infringements.[115]

The attitude of the court in this instance is, as MacDonald aptly notes, consistent with established international opinion concerning the use of force to down civilian airliners which overfly national boundaries. The outraged world opinion following the shooting down of civilian flight KAL 007 by Soviet forces in 1983 is a testament to the political, if not legal, interpretation of such actions.[116] Indeed, as a result of this particular incident, the Convention on International Civil Aviation was expressly amended to ensure that the use of military force to down civilian airliners which strayed over national boundaries was reserved as a matter of absolute last resort, and only justified in circumstances of genuine national self defense.[117]

Notwithstanding these views, it is difficult to assume that a violation of airspace by a military aircraft (launched from a transiting naval vessel or otherwise) would, in every case, amount to only a "mere trespass," as viewed by the court in *Nicaragua*. Indeed, as MacDonald opines, the court's opinion must be rationalized on the particular facts before it, and he succinctly states "[i]t would be difficult to argue that low level overflight by squadrons of hostile aircraft over a capital city could not constitute a threat to the territorial integrity and political independence of a State."[118] Indeed, it would denude the content of "proportionate countermeasures" if force could not ultimately be employed to down *military* aircraft that strayed over national airspace (*i.e.*, over territorial/archipelagic waters). Indeed, if the concepts of "territorial integrity" or "political independence" are to have any meaningful significance in the context of sovereign airspace, then it must be contemplated that straying military aircraft may represent a sufficient enough threat to warrant the use of necessary and proportionate force to down such aircraft. Of course, such actions would only be permitted after the requisite international warnings and recognized signals had been made and interception and landing efforts attempted, but ultimately the use of such force must be contemplated and the application of such force justified in those very exacting circumstances.

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114. *See id.* at 128, ¶ 251.

115. MacDonald, *supra* note104, at 139-40.

116. *Id.* at n.42; *see generally* Marian N. Leich, *Agora: The Downing of Iran Air Flight 655*, 83 AM. J. INT'L L. 319 (1989).

117. *See* Article 3 bis, Protocol Relating to an Amendment to the Convention on International Civil Aviation, signed May 10, 1984, 23 I.L.M. 705.

118. MacDonald, *supra* note 104, at 140.

c. "Freedom of Communications and Maritime Commerce"

The final principle highlighted by the court was the principle of "freedom of communications and maritime commerce."[119] The principle was assessed in the context of the laying of mines in Nicaraguan ports by agents of the United States. In essence, the majority judgement of the court concluded that such activities violated the right of foreign vessels to enjoy access to another State's ports.[120] Moreover, the laying of such mines within internal waters without sufficient notification was considered to violate the principles *underlying* Hague Convention No. VIII,[121] which were considered to apply by way of customary law.[122]

Such a conclusion is somewhat remarkable given the fact that the Convention is formally applicable only in the event of armed conflict, although admittedly, it was the "humanitarian" principles[123] which underpin this Convention which the court considered were attracted. As with the general reasoning already highlighted, the court would presumably permit "proportionate countermeasures" by other States when transiting mine-infested waters, even if those waters were the territorial seas of a foreign State.[124] This would seem to be confirmed by the "humanitarian" basis of the principles identified by the court. Such measures, although not consistent with innocent passage within the territorial sea, are justified pursuant to the stated principle of "freedom of maritime communication and commerce."[125] Significantly, the court referred to the LOSC[126] expressly in enunciating this principle, and emphasized that in accordance with the terms of the LOSC, "a State which enjoys a right of access to ports for its ships also enjoys *all the freedom* necessary for maritime navigation."[127]

Support for this principle in *Nicaragua* would seem to be in contrast with the court's negative attitude to the British mine clearing task group in *Corfu Channel*. In that regard, it is submitted that the court's decision in *Nicaragua* is the better authority. Aside from the internal logical inconsistency of the court's reasoning already highlighted,[128] the court's opinion in *Corfu Channel* was particularly influenced by the political aftermath of the Second World War. The court itself was at pains to legally restrict what it saw as forceful impulses that gave rise to unacceptable escalation in the

119. Nicaragua, 1986 I.C.J. at 111-12, ¶ 214.

120. *Id.* at 111-12, ¶ 214.

121. Hague Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541.

122. Nicaragua, 1986 I.C.J. at 112, ¶ 215.

123. *Id.*

124. This is assuming that innocent passage has not been suspended within the territorial sea in accordance with Article 25 of the LOSC.

125. Nicaragua, 1986 I.C.J. at 111-12, ¶ 214.

126. *Id.* at 111, ¶ 214.

127. *Id.* (emphasis added).

128. *See supra* notes 81-84, and accompanying text.

context of the Second World War.[129]

Moreover, the court was somewhat hamstrung by submissions from the U.K. Government in the "pleadings" to the case, wherein the British Government seemed to concede that mine sweeping activities did constitute an intervention, but were excusable in these particular circumstances.[130] Given such a submission, it is not altogether surprising that the court refrained from establishing a new exception to the principle of non-intervention.

In summary, therefore, it is submitted that *Nicaragua* does have a greater objectivity attached to it and is the better authority on this point. Accordingly, actions undertaken in the name of preserving maritime freedom, even within territorial waters, may be justified. Such actions or "proportionate countermeasures" can be asserted in order to allow actions necessary to ensure the integrity of the right of innocent passage.

D. The Content of "Proportionate Countermeasures"

On the authority of *Nicaragua*, it would appear that a coastal State may employ "proportionate countermeasures" to address a violation of any of the espoused principles.[131] Being "proportionate," such measures may themselves have a forceful element to them.

Some publicists have never doubted that a coastal State could employ force in such circumstances. O'Connell, for example, always maintained that force may be employed to preserve sovereign interests. He was compelled, however, to interpret such forceful responses in accordance with Article 51 of the UN Charter, which, as outlined above, was rather an imperfect manner of interpretation.[132] Thus, it was always difficult to conclude that violations of an obligation to observe "innocent passage" criteria would necessarily give rise, on every occasion, to an "armed attack," thereby permitting the use of force by the coastal State under Article 51 of the United Nations Charter.

It is preferable now to rely on the interpretation of the ICJ in the *Nicaragua* case and acknowledge that application of force as a "proportionate countermeasure" in certain circumstances is justified. However, the parameters or legality of the "proportionate counter measures" will be judged in accordance with the degree and nature of the threat.

As outlined above, overflight of territorial seas or archipelagic waters must give rise to a right to employ graduated force to preserve the territorial integrity of the State.[133] The issue of warship violation of the rules of innocent passage is a little more ambiguous. Official United States reaction to the seizure of the *USS Pueblo* by North Korean forces in 1968[134] was to deny the

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129. Corfu Channel, 1949 I.C.J. at 35.
130. *Id.* at 34.
131. *See supra* notes 99-105 and accompanying text.
132. O'CONNELL II, *supra* note 75.
133. *See supra* Part II.
134. On January 23, 1968, the *USS Pueblo* was captured by North Korean forces while

right of seizure, and rather, maintain that a coastal State would be permitted only to escort foreign naval vessels from the territorial sea. O'Connell concludes that the issue is "legally anomalous."[135] One might determine, though, that in the case of the *USS Pueblo* (an acknowledged electronic surveillance ship), that actions in seizing the vessel (if indeed it was in the North Korean territorial sea, which was flatly rejected by the United States) were "proportionate," given the particular compromise to national security that the presence of the ship may have represented.[136]

E. National Security

The LOSC itself, pursuant to Article 25, does anticipate that in the interest of "national security" a coastal State may temporarily suspend innocent passage through specified areas of its territorial sea/archipelagic waters if such suspension is essential for the protection of its security.[137] If a State imposes such a suspension, it must be for a temporary period only, and it must be non-discriminatory in its application.[138] This suspension does not apply to archipelagic sea lanes or international straits (*i.e.*, straits of Malacca) where the right of "archipelagic sea lane passage," transit passage, or at the very least, the right of non-suspensible innocent passage is preserved, even in a time of conflict.[139]

The authority to suspend innocent passage within a state's own territorial sea is specifically provided for in the LOSC. Given this, it would be difficult for a State to legally resist another State's reliance upon "proportionate countermeasures" to assert navigational freedoms within territorial seas/archipelagic waters where the coastal State has not formally suspended such passage in accordance with Article 25 of the Convention.

1. Summary on the Use of Force in the Maritime Context

Nicaragua is instructive in its analysis of customary law as it relates generally to the naval/military use of the sea. The criteria of "gravity" is introduced in relation to determining the legitimacy of measures of self defense. However, for the use of force which falls below the requisite level of gravity, the majority of the court did envisage that a State could use "pro-

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in the Sea of Japan. Eighty-three crew members were held captive for nearly a year. The ship was equipped with electronic surveillance equipment, and its mission was to track signals from North Korea in order to determine military capability. *See* Mary Anne Clancy, *Capture of Pueblo Recalled; Maine Man Endured North Korean Torture*, BANGOR DAILY NEWS, Nov. 11, 1998, *available in* 1998 WL 13321003.

135. O'CONNELL I, *supra* note 8, at 965.

136. *See id.* at 964 (citing BUTLER, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 10 (1969)).

137. LOSC, *supra* note 1, art. 25.

138. *Id.* art. 25(3).

139. *Id.* art. 45(2).

portionate countermeasures" to protect certain fundamental interests. Implicit in the concept of "proportionate countermeasures" was the right to respond with force. This would apply to activities that not only expressly violated Article 2(4), but rather the principles of "non-intervention," "sovereignty" and "freedom of maritime communication and commerce," which were identified expressly by the court. Counter force would only be justified, however, where there is an element of threat of force, direct or indirect, though there would seem to be no right of collective countermeasures.

Consistent with the reasoning of the court in the *Nicaragua* case, it would seem the right of freedom of navigation is one which can be enforced in circumstances where it is unjustly denied, particularly when such denial also violates principles which underpin humanitarian law. While this aspect would be consistent with *Corfu Channel*, the court's enunciation of the principle of non intervention (with its emphasis on the indirect use of force and concept of coercion) could be regarded as conflicting with the court's general toleration of a "naval demonstration" in *Corfu Channel*. Accordingly, it is always a fine line between constituting an assertion of navigational freedom and a violation of the prohibition against intervention. Thus, in times of heightened tension (in particular), there is a basis for reviewing the *purpose* as well as the *manner* of the passage of naval vessels through the territorial sea of a coastal State.

III. TERRITORIAL SEAS (ARCHIPELAGIC WATERS) AND THE RIGHT OF INNOCENT PASSAGE

The perennial balance sought between coastal state sovereign rights and maritime navigational rights finds its apogee in the context of "innocent passage" by a warship through a foreign territorial sea (or archipelagic waters). It is within this maritime zone that the interface between competing rights is most pronounced. In view of this conflict, it was not surprising that the ICJ in *Corfu Channel* sought to provide "benchmarks" for determining the legitimacy of innocent passage. However, beyond establishing that a right of non-suspensible innocent passage existed for international straits, the court did very little to specifically define the essential nature of innocent passage and also refrained from unambiguously declaring that the right existed for warships within foreign territorial seas or archipelagic waters.[140] As a result, efforts were made in the LOSC to provide a more comprehensive "code" of what constituted "innocent passage" and also to confirm that such rights could be exercised by warships within territorial seas (and archipelagic waters). Examination of this "code" through this next Part provides a useful basis upon which to examine the attempted resolution of the conflicting legal rights. Such an examination provides a ready model within which the case law and views of publicists already canvassed in this article may be joined

140. Corfu Channel, 1949 I.C.J. at 30.

and more general conclusions concerning the application of the LOSC to military/naval activities may be made.

A. Section 3 of Part II of LOSC

Article 17 of the LOSC makes it clear that "ships of all States . . . enjoy the right of innocent passage through the territorial sea."[141] The general proposition of "passage" is then defined within Article 18 to be passage which is "continuous and expeditious."[142] This is then expanded in Article 19(1) of the LOSC, which provides that passage is "innocent so long as it is not prejudicial to peace, good order or security of the coastal State."[143]

The general formula of words "peace, good order or security" of a coastal State is not without its difficulties, especially for warships. Historically, there were prevailing views that passage by a warship through a foreign territorial sea was, by its very nature, prejudicial to the "peace, good order and security of the coastal State." Indeed, counsel for the United States in the North Atlantic Coast Fisheries Arbitration[144] asserted the argument against warships enjoying such rights when he pithily stated: "Warships may not pass without consent into this zone, because they threaten. Merchant ships may pass and repass because they do not threaten."[145]

Such attitudes have not held sway. Notwithstanding this, there does exist a residual attitude in some quarters that the concept of warship transit and "innocent passage" are somewhat contradictory.

B. "Prior Notification" and "Permission"

The mere presence of a warship within a foreign territorial sea remains a sensitive and politically-charged issue. Indeed, given the views of *Nicaragua* as to "coercion" and violation of the principle of non-intervention, such political concerns may arguably have a degree of legal authority which underpin their legitimacy. In view of this sensitivity, there has been a long emphasis by some States in establishing a legal requirement for warships to seek permission from the coastal State prior to undertaking innocent passage or, at least giving prior notification before undertaking such passage.

In his detailed factual analysis of the multi lateral conferences which led to the 1958 and 1982 Conventions, the publicist Ngantcha closely documented the political machinations which occurred during those Conferences, and the considerable efforts made to include provisions relating to the issue

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141. LOSC, *supra* note 1, art. 17.

142. *Id.* art. 18(2).

143. *Id.* art. 19(1).

144. North Atlantic Coast Fisheries Case (Gr. Brit. v. U.S.), Hague Ct. Rep. (Scott) 141 (Perm. Ct. Arb. 1910).

145. *Cited in* Lowe, *supra* note 25, at 119.

of warship notification and permission.[146] With equal force, however, other global maritime powers at these Conferences sought to maintain the *status quo* in resisting such a requirement. These latter views were somewhat vindicated in the opinion of the court in *Corfu Channel* (and subsequently in *Nicaragua*) and, indeed, in respect of the history of state practice in which there is no evidence of apparent acquiescence to the demands of states for prior notification or permission.[147]

In any event, requirements for prior permission or notification were not included "as black letter law" within either the 1958 Convention on the Territorial Sea and Contiguous Zone,[148] or the LOSC. On the other hand, the LOSC, in particular, does allow a coastal State under Article 21 to adopt laws "in conformity with international law"[149] relating to innocent passage and concerning a number of topics, including safety of navigation, pollution control, and economic resource rights. Such laws may well result in the indirect denial of innocent passage rights by prompting a coastal State to request a warship to leave the territorial sea if in breach of these laws, but this Article cannot be used to preemptively deny passage.

It should be noted, however, that the view regarding prior permission and notification retains a degree of currency within certain Asian interpretations. Indonesia appears to consider that such rights persist as a matter of customary international law.[150] However, the general view of Western nations is that innocent passage of warships is an undoubted right, and is not dependent upon the provision of prior notification or the obtaining of prior permission. Indeed, it was expressly recognized in the "Joint Statement of the Rules of International Law Governing Innocent Passage"[151] between the United States and the Union of Soviet Socialist Republics that warships had the right of innocent passage without the need for prior authorization or notification.

C. Innocent Passage Judicially Defined

Corfu Channel remains the most authoritative judicial statement on the definition of innocent passage. As may be recalled, the court approached its interpretation of the second and third transits differently when determining whether the British deployment was "innocent." In respect of the second transit, the court was able to determine that notwithstanding the "demonstration of force" that was intended by the transit, the vessels were engaging in

146. *See* FRANCIS NGANTCHA, THE RIGHT OF INNOCENT PASSAGE AND THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA 142-45 (1990).

147. *See id.* at 137.

148. 15 U.S.T. 1606 (1958).

149. LOSC, *supra* note 1, art. 21.

150. Djalal, *supra* note 51, at 111.

151. Signed at Jackson Hole, Wyoming, on Sept. 23, 1989, 28 I.L.M. 1444.

innocent passage.[152] The court seemed at pains to conclude that such passage was "innocent," and its reasoning does have something of a tendentious tone. Rather than provide any kind of definitive statement on the core features of innocent passage, the court chose merely to comment on the external indicia of the transit. Thus, notwithstanding Albanian objections concerning the political purpose of the transit, the court emphasized that the ships passed through the channel in line and in a continuous manner, and that their unloaded guns were trained "fore and aft," which was their traditional peacetime position.[153] One will look in vain for any further elaboration of the requirements for innocent passage. Accordingly, provided that warships transit in an ostensibly peaceful manner (with respect to the training of weapons and the like) then, on the authority of the *Corfu Channel* decision, the purpose of the transit is irrelevant, even if it may be perceived as amounting to something of a demonstration of force.[154] Where, however, the manner of transit exceeds being an assertion of navigational freedom, then it may not be regarded as constituting innocent passage.

Such an interpretation on what is constituted by innocent passage cannot, now, be considered to be good law. As maintained in the previous Part, as a result of *Nicaragua*, a more holistic approach needs to be adopted when determining whether, in a particular circumstance, passage may be considered to be innocent. It is contended that the *purpose* of a particular transit is relevant, indeed, almost critical, to the determination. The introduction of the element of "coercion" into the equation of determining whether a state-sponsored action violates the prohibition against intervention, must now impact upon the determination of what constitutes "innocence" in respect of maritime passage rights. While this new formula necessarily makes the task of determining "innocence" all the more difficult, it also allows the analysis to be more politically realistic. Indeed, in an effort to be more prescriptive, such considerations were included within the express terms of Article 19(2) of the LOSC, which goes far in distilling the character of what is now contemplated by the concept of "innocent passage."

D. Article 19(2)

While in the modern era it has been unassailably established that warship transit through a foreign territorial sea is not, in itself, inconsistent with innocent passage, the generality of the expression "peace, good order or security" continued to cause considerable disquiet as to its meaning. In an effort to provide greater direction, Article 19(2) of the LOSC included a specific outline of those activities which are deemed to be prejudicial, and thus not consistent with innocent passage. The list includes activities that are par-

152. Corfu Channel, 1949 I.C.J. at 31.
153. *Id.*
154. *See* Lowe, *supra* note 25, at 126; O'CONNELL I , *supra* note 8, at 313.

ticularly pertinent to naval vessels and in this regard provides, *inter alia*, prohibitions on:

a. the threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State;
b. any exercise or practice with weapons of any kind;
c. any act aimed at collecting information to the prejudice of the defense or security of the coastal State;
d. any act of propaganda aimed at effecting the defense or security of the coastal State;
e. the launching, landing or taking on board of any aircraft;
f. the launching, landing or taking on board of any military device;
g. any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; and finally
h. any other activity not having a direct bearing on passage.[155]

The question which is raised by this illustrative list of activities is how such concepts are to be interpreted as a matter of law. Thus, as one authoritative commentator has noted:

> At what point, for instance, do monitoring coastal installations and broadcasts, soundings on the seabed or the testing of the salinity or temperature of the water amount to the collection of information to the prejudice of the defense or security of the coastal State. . . . Is the towing of a military device such as a towed sonar array, put overboard before entry into the territorial sea and taken aboard after leaving the territorial sea, caught by . . . [the prohibition not to launch, land or take on board any military device].[156]

On the whole, however, the list does give greater clarity to the regime that applies. Many of the prohibited activities do have something of the "coercive" element within them. This necessarily corresponds with the interpretation given in *Nicaragua* to actions that may be characterized as constituting unlawful intervention in the internal affairs of a State.

E. Summary—The Legal Matrix for Innocent Passage

Article 19 of the LOSC has genuinely assisted in providing a reliable basis upon which to assess the meaning of innocent passage. The Article must, however, be interpreted in accordance with general customary international law. While *Corfu Channel* and *Nicaragua* gave emphasis to navigational rights, it is clear that within each case, there were very defined limits on the extent of the navigational regimes promoted.

In respect of submerged submarine transit within territorial waters or overflight of national airspace boundaries (which extend to the edge of the territorial sea limits), the options are somewhat straightforward. There sim-

155. LOSC, *supra* note 1, art. 19(2).
156. Lowe, *supra* note 25, at 117.

ply does not exist any right of innocent passage in these circumstances. Indeed, while overflight issues already have been canvassed in this article, and the conclusion made that there do exist residual coastal State rights to employ force, the situation with respect to submerged submarine transit is even more straightforward. Thus, in accordance with Article 20 of the LOSC, submerged submarine passage within the territorial sea is not consistent with innocent passage, and the inherent threat that such a platform represents will ultimately enable the use of direct force under the banner of "proportionate countermeasures" to remove such a threat. Certainly, as O'Connell highlights, State practice in relation to past Swedish and Norwegian reactions to submerged submarine contacts in their territorial sea would tend to bolster such conclusions.[157]

The issue relating to surface vessels is more problematic. The determination of what constitutes "innocent passage" in each circumstance requires critical evaluation of both the *manner* and *purpose* of each transit. The court in *Nicaragua* seemed unable to determine whether navigational or coastal State rights were to have preference. It would turn, it seems, on the issue of "coercion" inherent in any purported assertion of innocent passage, and the activities outlined in Article 19(2) will need to be interpreted according to that criterion.

The options open to a coastal State when faced with a deployment of naval vessels that is not "innocent" are somewhat ambiguous. The LOSC states, somewhat prosaically, in Article 25(1) that a coastal State "may take the necessary steps in its territorial sea to prevent passage which is not innocent,"[158] but the question remains as to the nature and level of the "necessary steps" which are available to a coastal State. If the decision in *Nicaragua* is applied in this context, then, of course, "necessary steps" may be interpreted as "proportionate countermeasures" and subject to the same constraints as have been already outlined. However, it is also open to conclude that the grounds for employing these "necessary steps" may possibly (on occasion) be broader than the grounds outlined by *Nicaragua* (*i.e.*, unlawful intervention) in that forcible action may be initiated in accordance with a literal reading of the Convention when a warship or aircraft violates the specific prohibition contained within Article 19(2). Even so, such measures must be proportionate and may well be restricted in the ordinary course to a simple request to the offending vessel or aircraft to leave the territorial sea or archipelagic waters. Ultimately, however, it is submitted that the use of necessary and proportionate force to seize or finally even sink such vessels may be justified as both a "necessary step" and a "proportionate countermeasure."

When determining the correlative rights that a coastal State has when acting in response to an act of "non innocent passage," the resort to force must be a "last" resort rather than the first option relied upon. While it is

157. *See* O'CONNELL I, *supra* note 8, at 297.

158. LOSC, *supra* note 1, art. 25(1).

submitted that the court in *Nicaragua* contemplated the application of force within the context of "proportionate countermeasures," it was also emphasized in that case,[159] and indeed in the earlier *Corfu Channel* case[160] and the subsequent *Nuclear Weapons*[161] case, that the "principle of humanity" necessarily applied to the determination of the question of the use of force in the maritime context. While emphasized in the three cases, the court each time refrained from providing any kind of elaboration on the content of the principle. Perhaps it is to have an effect like the celebrated "Martens clause"[162] in the realm of the *jus in bello* and, therefore, act as a measure of "public conscience." In any event, the principle is relevant and tempers the strict interpretation on the right to resort to force, a factor that must, it is submitted, be constantly included in the matrix of decision making concerning the application of force for both protecting sovereign coastal State interests and asserting navigational rights, such as the right of innocent passage.

CONCLUSION

The LOSC has been described as the "most ambitious multilateral law-making instrument ever attempted in the history of diplomacy."[163] It has brought a welcome level of legal certainty to an area of international law that has been subject to considerable uncertainty for centuries. This is particularly so in the establishment of a detailed regime concerning the various maritime zones which extend seaward of the land territory of States.

While the regulation of environmental and other peacetime uses of the seas may allow one to conclude that the Convention is somewhat benign in its regulation of the sea, the reality is somewhat different. Naval/military forces of all States do confront each other over imaginary lines on the ocean which have a very real significance on State-endorsed charts. The question concerning the use of force is not expressly dealt with in the Convention, although, as outlined in this article, the ambiguous nature of the language used within the LOSC reveals an acknowledgment that such issues would be necessarily relevant. One needs to turn to customary international law and the judicial decisions in a number of cases to glean the legal prescription for this contentious issue . In essence, all the cases and supporting customary international law point to a balancing of interests between State sovereign rights over maritime zones against navigational freedoms to sail or overfly those same zones. The right to use force to protect either of these interests is

159. Nicaragua, 1986 I.C.J. at 112, ¶ 215-218.

160. Corfu Channel, 1949 I.C.J. at 22.

161. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 257 (July 8).

162. Hague Convention No. IV Concerning the Laws and Customs of War on Land, Oct. 18, 1907, pmbl., 36 Stat. 2277, 205 Consol. T.S. 277.

163. I.A. Shearer, Should Australia have Ratified the Convention?, Paper Delivered at the Centre for Maritime Policy/International Law Association Seminar: The UN Convention on the Law of the Sea, Wollongong (Nov. 4-5, 1994).

ultimately acknowledged in certain narrowly defined instances. However, resort to such force is tempered with the absolute legal requirement that such force be both necessary and proportionate, and also, it would seem, that such force not offend "humanitarian" principles.

The LOSC was never going to comprehensively regulate or prohibit the application of force within the maritime environment. Even so, the Convention, with its detailed regime of navigational rights, has gone far in realizing its noble goal of preserving and supporting the peaceful use of the world's oceans, even in the context of considering the military/naval uses of the seas.