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The Legal Efficacy of Freedom of Navigation Assertions

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The 1982 Law of the Sea Convention[2] (1982 LOS Convention) is a quintessential product of the modernist period. The emphasis of the 1982 LOS Convention is decidedly communitarian and its content is fully influenced by an evolved institutionalization of process. It is thus typical of the co-operative pragmatism of current approaches to international law.[3] The interaction of sovereign interests in exploiting and utilizing the sea and its resources are "managed" within its framework, and potential conflicts concerning such rights are intended to be resolved through emphatic utilization of dispute settlement mechanisms which will pay "due regard" to the sovereign participants.[4] The 1982 LOS Convention continues the codification process of its antecedents, especially the 1958 Conventions,[5] though it sets a "progressive" course with the inclusion of new concepts hitherto not recognized under the law including, in particular, the archipelagic concept as a juridical entity.

Given the holistic character of the 1982 LOS Convention, it is ironic, although not surprising, that security issues are not directly tackled. When it comes to such issues, the potential for a clash of sovereignty, or at least conceptions of the doctrinal substance of sovereignty, is likely. It is within this context that questions concerning the efficacy of freedom of navigation rights are, naturally, most pronounced. The United States, a notable absentee[6] from the Convention, is the most significant proponent of exercising navigational freedom through use of its

naval and air forces. This has been driven from a measured agenda to ensure that it is instrumental in creating advantageous customary norms.[7] Additionally, the US Freedom of Navigation Program is designed to influence interpretations of ambiguous provisions of the 1982 LOS Convention as a whole. In this latter respect especially, the concerns of the United States are shared by a number of other maritime powers who have either commenced their own navigational assertion programs[8] or have otherwise relied upon US practice.[9]

It is a critical time for preserving international navigational freedom. The increasing ratification of and accession to the 1982 LOS Convention means that navigational regimes are being established that will have a permanent impact upon political and strategic realities. The "game" is not necessarily being played according to established rules by many coastal States. There are discordant voices in opposition to maritime State strategies and the stakes for all remain impossibly high, thus the need for precise and resolute action. Naval and air forces remain at the forefront of this critical campaign and are the principal instruments for ensuring effective and peaceful resolution of these threats.

The Freedom of Navigation Program which was first authorized by the United States Government in the late 1970s has been criticized in both legal and normative terms. [10] Arguments have been rendered which criticize the legal efficacy of the program and question the apparent provocative nature of such assertions as unnecessary exercises of hegemonic power projection. Moreover, such criticism contends that the preservation of navigational freedom can be more effectively achieved through other, less invasive, means.[11] Indeed these arguments suggest that the exercise of the operational assertions may offend general principles of international law concerning "abuse of rights."[12] It is contended that such arguments are misplaced and that the freedom of navigation assertions undertaken by the United States and others do provide the most effective means of preserving the balance of interests reflected in the legal architecture of the 1982 LOS Convention. The current cacophony of claims made by some coastal States collectively to limit navigational freedom is strident in both frequency and depth. In this dynamic world of strategic norm creation and suppression, it is contended that navigational assertions are an essential means of addressing these suspect claims. More critically, such assertions are undertaken in concert with the jurisprudence of the International Court of Justice that has repeatedly endorsed the principle of navigational freedom and recognized the legitimacy of asserting such rights. This paper argues for the continued maintenance of the Freedom of Navigation Program as an essential means of preserving the integrity of the 1982 LOS Convention and seeks to demonstrate the risks involved in failing to be vigilant to contrary strategies designed to limit the freedoms so desperately won.

Law of the Sea Legal Regime

The 1982 LOS Convention is a very well subscribed treaty. As of this writing, 145 States have ratified or acceded to the Convention,[13] which list includes four of the permanent five members of the Security Council. Following the resolution of issues associated with Part XI of the Convention dealing with deep seabed mining,[14] President Clinton submitted the 1982 LOS Convention, together with the 1994 Agreement Relating to the Implementation of Part XI, to the United States Senate on October 7, 1994 for its consent, respectively, to their accession and ratification.[15] Notwithstanding its broad acceptability, the 1982 LOS Convention is not yet universally subscribed and thus is not, in its terms, binding on all. Moreover, the Third United Nations Conference on the Law of the Sea (UNCLOS III)[16] debates that led to the drafting of the 1982 LOS Convention were conducted under the aegis of a consensus negotiation practice that ensured that the convention was, in many respects, a "package deal" of concessions which resulted in a number of constructive ambiguities in the text.[17] Unlike the previous 1958 Conventions dealing with maritime regulation,[18] the 1982 LOS Convention does not permit the making of general reservations[19] and was intended to be a discrete enunciation of maritime regulation, thus further ensuring a compromised language in the text. Indeed, a recent commentary has identified over 60 terms, a dozen of which are critical, included within the 1982 LOS Convention that are either ambiguously used or not fully defined.[20] Significantly, the issue of the use of force in the maritime environment is barely tackled, which is not altogether surprising given the cold war environment prevailing at the time of negotiation. Accordingly, military subjects do not loom large within the text of the Instrument and assessment of State actions must be undertaken more specifically under general principles of international law.[21]

The Issue of Sovereignty

Article 2 of the 1982 LOS Convention confirms that coastal States exercise sovereignty over their territorial sea "subject to [the] Convention and other rules of international law."[22] That article provides a reliable touchstone for the conceptualization of nuanced "sovereignty" applicable in the territorial sea. Following the conclusion of the negotiating process it was evident that coastal State sovereignty over newly expanded territorial sea limits would be "subject" both to the positively stated terms of the Convention, especially the rights of innocent passage, and other, more general rules of international law. International legal discourse does not admit to a unified theory of sovereignty.[23] Since the treaties of Westphalia in 1648, both courts and publicists have wrestled with the significance

of the concept. The writings of Henry Wheaton[24] in the nineteenth century, and the determination of the Permanent Court of Justice of the early twentieth century in the *Lotus* case,[25] have recognized an absolute quality to the concept of sovereignty, upon which infringements could not be presumed.[26] Alternatively, the jurisprudence of the US Supreme Court of the early nineteenth century[27] and writers in the current period[28] equate "sovereignty" more with a collection or "bundle" of rights to which there are concomitant rights enjoyed by other "sovereign" States.[29] Within this paradigm, the enduring challenge of international law is the reconciliation of such rights. Modern theoretical conceptions seek to demystify the character of sovereignty in order to address questions of international community structure comprehensively. Hence, the theorist Hans Kelsen tackled the nature of sovereignty by positing that it was a conception premised upon an authority of order and nothing more.[30] However, as a manifestation of order he was able to perceive the international community equally possessing the mechanics of an order through an expression of collective will and thus was able to conclude that based upon its coercive predicate, international law exists as an equally binding legal order by which State sovereignty is necessarily limited. [31]

The monolithic and "mystical" nature of sovereignty expressed in the vocabulary of defense of measures to restrict and hamper navigational freedom, especially of warships, can be seen as representative of a particular schism of absolutist attitudes towards the legal nature of sovereignty. This essentialism seems to brook no heresy on the character of such claims. Notwithstanding this approach, it is evident that the sovereignty expressed to exist in the territorial sea of a coastal State is, in accordance with Article 2 of the 1982 LOS Convention, a disaggregated sovereignty. International law is now replete with authoritative expressions on the fractured nature of this sovereignty.[32] It was this realization within the *Corfu Channel* case that prompted Judge Alvarez to acknowledge the social interdependence between States and to conclude that sovereignty carried with it both rights and obligations, stating in his individual opinion that "we can no longer regard sovereignty as an absolute and individual right of every State as used to be done under the old law founded on the individualist regime."[33] The relationship between the coastal State and the navigating State is thus a relationship of intersecting rights and obligations. Accordingly, it is not possible to conclude that under either customary law or the 1982 LOS Convention, there is necessarily a "weighted" significance to be accorded the sovereign status of the territorial sea of a coastal State based upon appeals to mystical conceptions of what underpins the nature of sovereignty,[34] *a fortiori* with respect to international straits and archipelagic sea lanes.

The 1982 Law of the Sea Convention

UNCLOS III was ambitious in its goals. Addressing age old doctrinal antagonisms concerning theories of *mare clausum* and *mare liberum* naturally meant that there would be deep divisions between coastal State preferences, which sought to expand maritime jurisdiction, and those of the maritime States who sought to emphasize more liberal navigational regimes.[35] The 1982 LOS Convention itself is a statement *par excellance* in affirming a general theme of "balance" throughout its provisions. The Convention pits one principle against another in repeated provisions throughout its text. Thus coastal States were able to win consensus for a greatly expanded territorial sea limit (from three to twelve nautical miles) in exchange for rights of concisely defined innocent or transit passage. Similarly, the archipelagic concept was recognized in exchange for rights of archipelagic sea lane passage, as were rights of high seas navigation and freedoms within the newly established exclusive economic zone (EEZ). It is this thematic goal of "balance" that especially underpins the nature of the freedom of navigation programs.

Excessive Claims

As a result of the ambiguity in the language contained within the 1982 LOS Convention, and in conjunction with independent strategies designed to shape the development of the law, there have been a multitude of claims made by coastal States concerning their sovereign or jurisdictional rights within maritime areas, the legal basis of which is suspect. Thus, the broad language of the Convention regarding the drawing of baselines[36] has led a number of States to adopt an excessively generous approach to designating such co-ordinates. In this regard, for example, Vietnam draws it baselines in a manner that extend up to 50nm[37] around islands within the South China Sea and cannot, under any reasonable interpretation, be regarded as "generally following the direction of the coastline" as provided for in Article 7 of the 1982 LOS Convention[38] and supporting customary international law.[39] Similarly, a United Nations publication from 1994[40] identified a number of States that acted inconsistently with the terms of the 1982 LOS Convention. Such countries included Myanmar which adopted excessively long straight baselines (including one 222 nautical miles long),[41] as well as the Democratic People's Republic of Korea which had drawn straight baselines that did not follow the direction of the coast.[42] Moreover, the report noted a number of States that purported to require prior notification or authorization pending the exercise of innocent passage by vessels, especially warships. Such countries included, *inter alia*, Bangladesh, China, India, Iran and Maldives.[43] Critically, the report noted that such restrictions on

navigational freedom were inconsistent with the right of innocent passage for all vessels as guaranteed under the 1982 LOS Convention.[44]

States such as North Korea[45] assert that special "security zones" may be imposed in adjoining maritime areas which purportedly enable them independently and selectively to restrict navigational freedom on self-conceived terms relating to "security." Countries such as Brazil, India, Malaysia and Pakistan all seek to restrict naval activities within their EEZ's in terms not readily recognized under the 1982 LOS Convention.[46] The catalogue of "excessive maritime claims" is quite large. The following non-exhaustive list provides a representative outline of the types of claims made:

- Excessive and very broad claims for historic bay status,[47]
- Territorial sea limits beyond the 12nm range,[48]
- Imposition of a multitude of environmental or safety conditions on "innocent passage" which effectively denies the right,[49] and
- Denied transit passage rights within international straits.[50]

Perhaps the most striking challenge to navigational freedom comes from the recent adoption of legislation by the Indonesian Government in December 2002[51] that purported to restrict all passage through its archipelago to three north/south archipelagic sea lanes. Passage from east-west through the Indonesian archipelago is permitted, on the face of the legislation, to be with Indonesian Government permission only.[52] The legislation also provided that archipelagic sea lanes passage was only exercisable within a limited number of north-south archipelagic sea lanes that had been partially designated with the International Maritime Organization.[53]

Such legislation is inconsistent with a general right to engage in innocent passage through archipelagic waters as outlined in the 1982 LOS Convention.[54] Moreover, with respect to both innocent passage and the partial designation of archipelagic sea lanes, the legislation is contrary to the terms of the 1998 Resolution of the Maritime Safety Committee of the International Maritime Organization (IMO) which said, respectively, that "[e]xcept for internal waters within archipelagic waters, ships of all States enjoy the right of innocent passage through archipelagic waters and the territorial sea"[55] and "[w]here a partial archipelagic sea lanes proposal has come into effect, the right of archipelagic sea lanes passage may continue to be exercised through all normal passage routes used as routes for international navigation or overflight in other parts of archipelagic waters in accordance with UNCLOS."[56] The Explanatory Note to the Indonesian Regulations declared that designation of routes under which innocent passage could be exercised was a right reserved to the Indonesian Government notwithstanding the provisions of the 1982 LOS Convention.[57]

US Freedom of Navigation Program

The US Freedom of Navigation Program was established in 1979 and has enjoyed bipartisan political support since that time.[58] Developed against the background of the debates at UNCLOS III, the program was conceived as a means to shape the development of the law in a manner consistent with ensuring the maintenance of navigational freedoms so desperately won through the negotiations.[59] American economic and strategic policy goals are *ad idem* in relation to ensuring maximization of maritime freedom[60] and such coalescence of interests are naturally similar with other maritime State goals. Such freedom critically underpins[61] existing US and coalition military strategy of deterrence, forward defense and alliance solidarity.[62] The Freedom of Navigation Program is a composite policy of both diplomatic exchange and physical operational assertion.[63] Moreover, the program is to be seen as an important element in an overall process of US supported bilateral and multilateral military efforts to foster consistency in recognition of maritime freedoms. Such efforts are contextualized in the transparency of the international military exercise programs which are conducted in all regions of the world. [64] The agreed maritime legal framework and associated rules of engagement issued for the conduct of such exercises seek to reinforce the strategic balance of interests reflected in both the 1982 LOS Convention and equivalent customary law. [65]

The thematic focus of the Freedom of Navigation Program is to consolidate US and, collaterally, coalition rights of global maritime mobility, particularly in relation to contentious "choke points" within strategic waterways (e.g., Strait of Malacca, Strait of Hormuz, etc.). The program is mandated by Presidential Directive to be "non-provocative," "even-handed" and "politically neutral" in its application.[66] In this regard, "non-provocative" does not necessarily equate with "non-confrontational" as the very essence of the program is to contest excessive claims.[67] As will be subsequently argued, such actions do not in themselves constitute a violation of United Nations Charter prohibitions under Article 2(4)[68] nor other norms proscribing intervention within the domestic jurisdiction of a State.[69]

The Freedom of Navigation Program is a critical part of an overall strategic focus of US policy with respect to maritime freedom. While not a party to the 1982 LOS Convention, President Reagan declared in 1983 that the United States would act consistently with the provisions of the Convention with respect to navigation and overflight rights, acknowledging that they were representative of customary international law.[70] Significantly, President Reagan counseled that the "United States will not . . . acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses."[71] Critically, US policy perceives its Freedom of Navigation

Program as an instrumental aspect of preserving the integrity of the 1982 LOS Convention. Thus the actions of US naval forces are rationalized as representing not only US strategic interests but also those of the international community generally.[72] As the commentator Richard Grunawalt has opined, "[t]o that end, the Freedom of Navigation Program encourages nations to modify their domestic laws and regulations so as to bring them into conformity with the Convention."[73]

Australian Freedom of Navigation Program

In the mid-1990s, the Royal Australian Navy (RAN) adopted an informal policy of asserting lawful navigational rights under the 1982 LOS Convention. The focus of this policy was specifically within the South Pacific/Southeast Asian region. Akin to the US program, the Australian approach is an amalgam of navigational assertion coupled with coordinated diplomatic exchange.

Australia's geographic proximity demands that it have free regional maritime mobility capacity. A key feature of that mobility is assured access through the Indonesian Archipelago so as to access important regional ports within Southeast Asia as well as North Asia. While access through the Indonesian Archipelago is necessarily a critical aspect, it is not the sole focus of the Australian program. In April 2001, an Australian naval task force of three ships transited the Taiwan Strait in order to travel efficiently between Hong Kong and South Korea. The Taiwan Strait lies within the so-called Chinese "security zone" which led to a non-violent confrontation with Chinese naval units.[74] Australian diplomatic responses to Chinese protests relied upon conventional rights contained within the 1982 LOS Convention and the matter was not permitted by either side to escalate beyond an oral diplomatic exchange.

Legal Critique of Freedom of Navigation Program

The approach taken by the United States in undertaking freedom of navigation assertions seeks to achieve two principal legal goals. Firstly, as a non-party to the 1982 LOS Convention, the United States is bound to ensure that customary international law develops in a manner consistent with its own strategic interests. The stated security goals of the United States in ensuring free access through maritime "choke points" and unencumbered exercise of navigational freedom do accord with the goals of almost all maritime States. To that end, such navigational assertions seek to create a "practice" necessary to shape the evolution of customary norms recognizable in accordance with Article 38 (1) (b) of the Statute of the International Court of Justice.[75] Such practice is accompanied by statements concerning US convictions as

to the state of *opinio juris* concerning the establishment of a permissive regime of transit through contested areas.[76]

The actions taken by those coastal States that maintain excessive maritime claims or that otherwise seek to impose restrictions on free navigation do not appear to have been taken in concert. The International Court of Justice (ICJ) has declared that freedom of navigation, in the form of a right of innocent passage through territorial seas and more generally through other foreign maritime zones, is a right possessed under customary law.[77] The Court has opined that the right is guaranteed to include "all the freedom necessary for maritime navigation"[78] which was not to be hindered by the coastal State. The 1982 LOS Convention, in the opinion of the Court, "does no more than codify customary international law on this point."[79] Having regard to the ICJ's pronouncements therefore, it seems an entirely vacuous process for such countries to be seeking to set a contrary "practice" which should crystallize into a rule of customary international law. Contemporary theory posits that in the face of a generally established rule of customary international law (as has been declared by the ICJ in this instance), there is a need for a "great quantity of practice to overturn existing rules of customary international law." [80] With a strong presumption against the change in law[81] there would need to be demonstrated an extremely widespread and uniform[82] practice in opposition to the existing rule for there to be any opportunity for even beginning an assessment as to the emergence of a contrary rule. The brief survey of the multifarious claims by some coastal States indicates that there is no such uniformity, but rather a sporadic and somewhat disjointed array of challenges. It is notable that during the latter stages of the UNCLOS III debates there was an unsuccessful attempt by approximately 29 States to impose a requirement for prior notification and/or authorization for innocent passage into the Convention.[83] Had such countries been uniform in their continued insistence on this requirement in subsequent years, there may well have been afforded a basis to assert that such a proposition had crystallized into a rule of customary law (assuming, of course, evidence of *opinio juris* and acquiescence by other States) but this has not been the case. While some States persist with claims for either prior notification or authorization, there is no widespread uniformity in practice on either element or indeed any particular claim or principle of law that would act to undermine the guarantees of navigational freedom contained within the 1982 LOS Convention relating to warships.

Alternatively an argument might be advanced that rather than relying on the specificity of claims regarding the restriction on navigation (i.e. security zones, prior permission etc.), opposing States may be able to frame a broader enunciation of the opposing "rule"[84] to collectively bring it within a single normative framework. Thus it might be contended that the rule is simply that "navigational freedom is

constrained by a number of factors" and the multifarious actions by coastal States would all be consistent with such a broadly stated rule. Such an approach would, however, be disingenuous. The reasoning employed by the ICJ in the *North Sea Continental Shelf* case insisted that a level of exacting uniformity was required before determining the existence of a new rule, especially one that seemed to be in conflict with an existing rule.[85] In the current scenario, coastal States which seek to restrict navigational freedom do so in widely inconsistent ways. Thus, some States purport to have discretion to deny innocent passage where others simply seek to be provided with information beforehand of an impending passage so as to "ensure" that such passage is innocent while not denying outright the "right" of innocent passage. In his analysis of customary law formation, Michael Akehurst has noted "practice which is marked by major inconsistencies at all relevant times is self defeating and cannot give rise to a customary rule."[86] On any level of analysis therefore, the development of a general customary rule contrary to the existing customary status quo concerning freedom of navigation is fraught with considerable difficulty.

Persistent Objectors

If there is little likelihood that there will develop a contrary general customary rule restricting navigational freedom, what then is the efficacy of the US Freedom of Navigation Program? Given that navigational freedom exercised in accordance with the terms of the 1982 LOS Convention is not yet a norm of peremptory status ("*jus cogens*") the existing international legal structure does permit *individual* States the right to opt out of the application of prevailing general international customary law. While strictly defined, the so-called "persistent objector" theory permits a particular State the opportunity to resist the application of customary international law but only in relation to that State. To qualify, a State must express a protest to a developing rule during its formulative stages (i.e., protest *ab initio*) and must be vigilant in maintaining its opposition to a developing rule.[87]

In view of the "persistent objector" principle, the utility of the US Freedom of Navigation Program can best be understood as testing the resolve of those States who may seek to develop opposition to the application of customary international law to them. It is notable that the 2000 International Law Association (ILA) Committee Report on the Formation of Customary (General) International Law relies upon the actual physical actions of States in the maritime environment to provide the most effective demonstration of State intent. Hence, the ILA uses the example of a State purporting to restrict navigational rights through its territorial sea as an illustration of the general need to discern the nature of the express or implied claim and response as to the applicability of a norm of international law. Thus the

authors of the report note that "if State A expressly claims the right to exclude foreign warships from passing through its territorial sea, and State B sends a warship through without seeking the permission of A . . . [and] . . . A fails to protest against this infringement, this omission can, in its turn, constitute a tacit admission of the existence of a right of passage after all."[88]

It is in this context that "actions" do indeed speak louder than "words." Some interpreters of sources doctrine have traditionally been insistent on pointing to "deeds" over "words" as the critical "practice" of a State for determining the legitimacy of a new rule of customary international law. In support of this proposition, the publicist Anthony D'Amato notes that "acts are visible, real and significant; it crystallizes policy and demonstrates which of the many possible rules of law the acting State has decided to manifest."[89] Such arguments have been diluted by other commentators who have opined that more general means are available to gauge State practice.[90] Akehurst, for example concludes that statements, in either abstract or concrete contexts, may also be constitutive of State practice.[91] This latter view is surely the correct one, indeed it has been observed that the ICJ in the *Nicaragua* case itself appeared to conclude that *both* State practice and sufficient *opinio juris* can be gauged from public statements made by States, or even international organizations in circumstances where such entities are purporting to declare the state of the law.[92]

While diplomatic statements may be acceptable for discerning the formulation of norms, the principal difficulty remains in identifying the specificity of the norm created. It is as much a matter of probative value than anything else in discerning the quality and content of a rule, and in the absence of a clearly directed public statement there is little value in its evidentiary effect.[93] Blanket verbal protests by maritime States could be met with equally blanket ripostes from coastal States contending their enduring resistance. In this flurry of statements and counter-statements it may be difficult to assess the cogency of any new rule or exception to a rule. As recognized by the ILA Committee, the matter only becomes truly tested when a transit is undertaken through contested waters and reactions gauged. Such a practical demonstration is necessary to determine the coherency of claims, especially in circumstances where a well subscribed multilateral instrument has established a rule in conflict. Indeed, as the ILA Committee report notes, the persistent objector rule is useful in an exceptional sense by allowing "the convoy of the law's progressive development . . . [to]. . . move forward without having to wait for the slowest vessel."[94] Such an approach can be supported upon a utilitarian basis in the maritime context, especially given the sophisticated level of the balance struck in the 1982 LOS Convention between coastal and maritime State rights and obligations.

It is in this context that the "relative normativity" theory[95] of interpretation of international legal "sources" finds useful application. The development of both "hard" and "soft" arguments within customary normative discourse concerning coastal State/maritime State interaction does require attention to the "more or less" calculus so resisted by traditional approaches. Accordingly, specific physical State action and counter-action in a very public and concrete manner plays a much more compelling role in the establishment of international legal norms. In essence, navigational assertions do carry with them greater normative significance with respect to this issue than only diplomatic exchange of notes.

The 1982 Convention and Legal Framework of Navigational Rights

As outlined in the introduction of this paper, the 1982 LOS Convention is a well-subscribed treaty. Given the widespread nature of its support, it may be wondered why the rights concerning freedom of navigation that are contained within the Convention are sought to be denied by some coastal States. The answer to this question is varied. Plainly, in the face of "constructively ambiguous" provisions, a coastal State may seek an interpretation that is advantageous to that State. Hence, arguments may be proffered in the case of innocent passage, for example, that read much into the terms of Article 19(1) that "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." Such terminology is on its face abstract enough[96] to permit a wide array of challenges, especially to warships. Such reasoning is, however, quite disingenuous. Article 31 of the Vienna Convention on the Law of Treaties[97] prescribes that "A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[98] With respect to the issue of warships and innocent passage, it is evident that the abstract propositions concerning "peace, good order or security" are necessarily informed by the detailed terms of Article 19(2) of the 1982 LOS Convention which provides a very specific contextual outline of those activities that a warship must observe to come within the definition of "innocent."[99] As with the remainder of the treaty, this prescriptive catalogue was the necessary "price" for expanded territorial sea jurisdiction and obviously provides a reliable basis for legal interpretation. As the Indian commentator Shekhar Ghosh acknowledged at the time of the UNCLOS III debates, "[t]he scope of coastal discretion has been undeniably reduced to an unavoidable minimum"[100] under this provision. In essence, the rights of navigational freedom were "won" in the context of ensuring a necessary balance with coastal State interests.

Beyond a textual interpretation of the terms of the 1982 LOS Convention, it is open to a coastal State to observe the positively stated obligations while still relying

upon "gaps" in the terms of the Convention to advance a restrictive agenda. In this context so called rights to insist upon prior notification before undertaking innocent passage might be asserted consistently with primary obligations under the Convention. Thus, under this paradigm, the "right" of innocent passage has not been infringed by insisting upon prior notification, rather it is contended to be merely a procedural "condition precedent" necessary to give effect to that right. Such an approach would, however, deny, in practical terms, a substantive right.[101] In asserting such a claim, a coastal State may seek to rely upon Article 31(3)(b) of the Vienna Convention[102] that provides that interpretation of a treaty's terms may be determined by "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Compliance with "prior notification" demands might therefore constitute a "practice" which will cement an interpretation of the 1982 LOS Convention that necessarily undermines navigational freedom by indirectly denying a unilateral right of passage. Such actions would be akin to the process of customary norm formulation, though they do not require the demonstration of *opinio juris*, merely acquiescence with respect to "subsequent practice." This article's reliance upon "practice" anticipates a level of State interaction. Accordingly, the demands of a coastal State in limiting freedom of navigation through its maritime zones if met with indifference by other States parties could conceivably permit the establishment of a specific interpretation to the Convention. While diplomatic protest is obviously a means of challenging such a development, the normally bilateral and confidential nature of such action means that there is a lack of visibility by all States party to the process. The assertion of navigational rights in a contentious zone remains a publicly visible event, which tangibly constitutes a "subsequent practice" that other States parties may overtly, or tacitly support, thus shaping an interpretation consistent with the underlying balance of preserving navigational freedom.

Criticism of the US Freedom of Navigation Program

In his analysis of US navigational assertions, William Aceves[103] takes issue with the manner in which the United States undertakes these assertions. His criticism stems from a reading of the constituent elements of customary norm generation and he argues that the program is overly provocative and inconsistent with more general requirements of international law to settle disputes peacefully.[104] He cites the requirements of Article 279 of the 1982 LOS Convention that in turn refers to Article 2(3) of the United Nations Charter, which mandates that all international disputes are to be settled in a peaceful manner. Additionally, he contends that US naval actions undertaken in the context of a freedom of navigation assertion have the

potential to offend general principles of international law, particularly the "abuse of rights" doctrine[105] by adopting an unnecessarily militarily confrontational approach to the resolution of points of law.

The critique by Aceves that navigational assertions are unduly confrontational, and thus potentially violative of Article 279 of the 1982 LOS Convention, as well as Articles 2(3) and (4) the UN Charter, is curious. As Aceves himself notes,[106] the issue of navigational assertions and innocent passage was considered by the ICJ in the *Corfu Channel* case which determined that a British transit of a naval squadron in full battle readiness in order to assert a right of innocent passage that Albania had sought to resist was justified as a mission designed to affirm a right which had been unjustly denied.[107] Admittedly, the Court subsequently condemned a later British transit through the channel to sweep for mines, however the reasoning employed by the Court was not predicated upon the fact of the transit, but rather, concentrated upon the number of ships and the manner in which the transit had been undertaken. Indeed, the Court expressly noted that the British government itself admitted that the transit was not innocent and thus the Court found that the transit was an impermissible intervention.[108]

The broader implications of the decision have been subject to significant controversy in subsequent years. While it may be fairly argued whether the *ratio* of the decision is broad enough to permit a general exception to the prohibition on the use of force, there does seem to be a consensus as to the significance of the ability to affirm rights operationally in the maritime context. Thus, the eminent publicist Ian Brownlie, who rejected any general implication of the decision, did feel constrained to acknowledge the import of the decision as to its facts, namely the right to use force to assert a right unjustly denied in the maritime context.[109] As such, even on its narrowest construction, the case stands as a specific precedent in support of the legality of the Feedom of Navigation Program, at least in circumstances where "innocent passage" is sought to be unlawfully denied.

The issue received indirect consideration some 40 years following the delivery of the judgment in the *Corfu Channel* case, in the 1986 decision of the ICJ in the *Nicaragua* case.[110] The decision of the Court in the *Nicaragua* case reviewed contemporary jurisprudence concerning the prohibition against intervention under international law that has significance for assessing the confrontational nature of navigational assertions.

The majority opinion of the Court in the *Nicaragua* decision confirmed that the principle of "non-intervention" did relate to the question of the use of force. Significantly, the Court determined that the central criterion for determining whether this prohibition had been violated turned upon a determination of the existence of "coercion."[111] The Court's assessment of this concept was somewhat holistic in seeking an objective assessment of whether the internal choices made by a State had been

influenced as a result of "coercion" by another State.[112] Such a formulation may indeed have an impact upon a navigational assertion and thus come within the terms of objections raised by Aceves in circumstances where it is the intention of the transiting State to "coerce" or intimidate a State to adopt behavior that it otherwise would not freely adopt. Such an interpretation does not arise, however, in the context of a "normal" freedom of navigation assertion. The purpose of such an assertion is not to intervene in the manner contemplated by the Court where it spoke of sponsoring armed bands or financing internal disruption.[113] The interplay of maritime and coastal States, particularly those that have ratified the 1982 LOS Convention, is quite the opposite, relating to an "external" settlement of rights concerning maritime areas. This is not to suggest that the maritime State should not be cognizant of internal political machinations at the time of a programmed transit, as such an assertion may have a destabilizing significance in the context of specific internal fractures. It is contended though that such circumstances are not typical. Moreover, where a State does have internal concerns regarding security issues, it may (if a party to the 1982 LOS Convention) temporarily and legitimately suspend all innocent passage through its territorial sea on a non-discriminatory basis.[114]

The criticisms raised as to the inherently threatening behavior of a navigational assertion are imprecise. This was particularly reinforced in the *Nicaragua* case where the majority opinion determined not only that innocent passage was a well established right of customary international law, but so were other navigational freedoms extending beyond the territorial sea. Indeed, the Court in that instance determined that the conduct of US naval exercises just beyond the territorial sea limits of Nicaragua was not, in itself, a violation of the prohibition of the threat to use force which Nicaragua had expressly contended, but rather was consistent with the exercise of maritime freedoms.[115]

Abuse of Rights

A further criticism of the Freedom of Navigation Program relates to the confrontational nature of such assertions as potentially constituting an "abuse of right" contrary to both Article 300 of the 1982 LOS Convention[116] and more generally under "general principles" of international law, of a type recognized under Article 38(1)(c) of the Statute of the International Court of Justice.[117]

The general principle of "abuse of rights" may reasonably be regarded as having a settled place within the doctrine of sources comprising international law.[118] The principle essentially seeks to restrict a State from exercising its rights in a manner which significantly impedes the enjoyment by other States of their own rights or is exercised for an end different from that which the right was created in a manner

that causes injury to another State. The doctrine is an essential one to the functioning of international legal society if the notion of sovereignty is not to be regarded as being absolute. In his separate opinion in the *Corfu Channel* case, Judge Alvarez was able to give judicial expression to his theory of disaggregated sovereignty that he had been advocating for some twenty years. Hence, if sovereignty is to be accepted as a "bundle" of rights and duties, then a method for their reconciliation among States was essential. Premised upon a foundation of "social justice," Judge Alvarez advanced a theory of limitation on the "absolute nature" of the exercise of untrammeled sovereignty and considered that such an approach was mandated by the authority of the United Nations Charter.[119]

In the context of navigational freedom, it is unclear how the doctrine of "abuse of rights" might apply in a manner to impinge the assertion of navigational rights prescribed by the 1982 LOS Convention and reflected in customary international law. As has been outlined above, the jurisprudence of the ICJ has provided a framework for testing whether such transits could violate more general principles of international law concerning the prohibition on intervention which is determined on the basis of coercion. This element is singularly lacking in the context of the simple exercise of innocent passage or transit passage provided the criteria for such methods of passage are observed. Ironically, during the drafting of the predecessor Article 38 of the Statute of the Permanent Court of International Justice in 1920, it has been noted that the Italian commissioner to the negotiations expressly considered that the doctrine of "abuse of rights" had its place in the context of ensuring that coastal States actually recognized the principle of freedom of the seas.[120] It has been observed that the doctrine of "abuse of rights" is based upon conceptions of reasonableness in the exercise of rights.[121] In that regard, it seems to be a remarkable invocation of the doctrine to assert the legality of actions designed to extend the breadth of maritime zones beyond what the 1982 LOS Convention prescribes or to otherwise impose unilateral conditions on the exercise of navigational rights contrary to the terms of the Convention. While positivist theory does not ascribe a formal hierarchy among sources of international law,[122] principles of good faith (*pacta sunt servanda*) in accepting the balance of rights and duties under the 1982 LOS Convention surely dictate that the exercise of navigational rights in accordance with the tenor of the Convention must be accepted and cannot of themselves be a violation of the principle of "abuse of rights."

Conclusion

It is possibly an irresistible human impulse that compels States to be extremely protective about the sanctity of their maritime areas. Most assuredly what is "one man's

distant water is another man's maritime backyard"[123] and this has created what one author has termed "psycho-legal boundaries"[124] in popular perception. Such a sentiment does not accord with modern legal analysis of the nature of the "sovereignty" exercisable in offshore areas, which is of a disaggregated kind and which is necessarily limited by equally compelling rights of navigational freedom. This historical doctrinal struggle between freedom of the seas and protection of sovereign interests has found its most recent incantation within the terms of the 1982 LOS Convention and supporting, indeed largely identical, customary international law.

The 1982 LOS Convention does reflect the necessary balance of coastal and maritime interests throughout its composition. It provides for an extended sovereign range for coastal States through their adjacent maritime areas, yet preserves the necessary freedoms sought by maritime States to traverse these areas, thus achieving the economic and security priorities that were necessary for such States. The entry into force of the 1982 LOS Convention does provide a level of certainty for the realization of goals, yet notwithstanding high hopes[125] on the normative potential of the Convention, it was never going to be the last word on the reconciliation of interests.[126] As a result of both the ambiguity within the terms of the Convention and the determination of some States to press claims that are plainly contrary to its terms, it is necessary for those relying upon the integrity of lawful rights of free navigation to demonstrate an equal resolve. The operational aspect of the Freedom of Navigation Program has its place, indeed as has been argued in this paper, its critical place in the dynamic of international legal rule determination. The Program draws considerable support from ICJ jurisprudence and has been successful in ensuring conformity to legal standards.[127] It is ironic that international law is sometimes derided as being too ephemeral for realist approaches to international relations theory, yet the operational assertion aspect of the Freedom of Navigation Program reflects the very vibrancy of international legal discourse and ultimately is a testament to the power of the law.

Notes

1. Commander Dale Stephens is a Legal Officer in the Royal Australian Navy. The views expressed in this article are those of the author alone and do not necessarily represent the views of the Australian Government, the Australian Defense Force, or the Royal Australian Navy.
2. 1982 United Nations Convention on the Law of the Sea, Montego Bay, December 10, 1982, UN Doc. A/CONF.62/122 (1982), *reprinted in* 21 INTERNATIONAL LEGAL MATERIALS 1261 [hereinafter 1982 LOS Convention].
3. David Kennedy, *When Renewal Repeats: Thinking Against The Box*, 32 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 335, 389 (2000).
4. DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 204 (1987).

5. Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva, Apr. 29, 1958, 559 U.N.T.S. 285; Convention on the Continental Shelf, Geneva, Apr. 29, 1958, 499 U.N.T.S. 311; Convention on the High Seas, Geneva, Apr. 29, 1958, 450 U.N.T.S. 82; Convention on the Territorial Sea and Contiguous Zone, Geneva, Apr. 29 1958, 516 U.N.T.S. 205 [hereinafter 1958 Conventions].
6. The United States did not sign the 1982 LOS Convention during the two-year period that it was open for signature (December 10, 1982 – December 9, 1984) and has yet to accede to it. *See* text *infra* notes 14 and 15.
7. William J. Aceves, *The Freedom of Navigation Program: A Study of the Relationship Between Law & Politics*, 9 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 259, 307 (1996).
8. Australia has an informal policy of asserting lawful rights of navigational freedom which is discussed *infra*.
9. Professor Wolff Heintschel von Heinegg notes "the member States of the European Union, even though heavily dependent upon free sea lanes, have shown but a minor interest in upholding the achievements of UNCLOS. Rather, they have relied upon the United States and the US Navy's Freedom of Navigation program." Paper, Current Legal Issues in Maritime Operations, *delivered at* US Naval War College, June 26, 2003 (on file with author).
10. Aceves, *supra* note 7, at 264.
11. *Id.* at 318.
12. *Id.* at 321.
13. As of November 13, 2003. For current status of State parties see a consolidated table of ratifications/accessions, *available at* http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.
14. UN General Assembly Resolution A/RES/48/263 of 17 Aug 1994 and accompanying Annex "Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982," *reprinted in* 33 INTERNATIONAL LEGAL MATERIALS 1309 (1994).
15. Letter of Transmittal and Letter of Submittal Relating to the UN Convention on the Law of the Sea and "Agreement," *reprinted in* ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 32–42 (A. R. Thomas & James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies).
16. UNCLOS III debates extended from 1973 to 1982.
17. Richard J. Grunawalt , *Freedom of Navigation in the Post–Cold War Era*, *in* NAVIGATIONAL RIGHTS AND FREEDOMS AND THE NEW LAW OF THE SEA 16 (Donald R. Rothwell & Sam Bateman eds., 2000).
18. 1958 Conventions, *supra* note 5.
19. 1982 LOS Convention, *supra* note 2, art. 309
20. *See* George K. Walker & John E. Noyes, "*Words, Words, Words": Definitions for the 1982 Law of the Sea Convention,* 32 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 343 (2002) and George K. Walker & John E. Noyes, *Definitions of the 1982 Law of the Sea Convention—Part II*, 33 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 191 (2003).
21. Article 298(1)(b), 1982 LOS Convention, *supra* note 2, permits exclusion of military activities from compulsory procedures entailing binding decisions and there is very little specific concentration on these activities within the 1982 Convention.
22. *Id.*, art. 2.
23. David Kennedy, *Some Reflections on the Role of Sovereignty in the New International Order*, *in* STATE SOVEREIGNTY: THE CHALLENGE OF A CHANGING WORLD, PROCEEDINGS OF THE 1992 CONFERENCE OF THE CANADIAN COUNCIL OF INTERNATIONAL LAW 236 (1992).

24. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 17–23 (Richard Dana ed., 8th ed. 1866).
25. S.S. Lotus (France v Turkey), 1927 P.C.I.J. (ser. A) No 10.
26. *Id.* From an inter-jurisdictional perspective, see also Judgment of Holmes J. in American Banana Company, Plff. Err v. United Fruit Company, 213 US 347, 353; 29 S. Ct. 511 (1909).
27. The Antelope, 23 US (10 Wheaton) 66 (1825). S*ee also* Corfu Channel (Merits) (U.K. v. Alb.), 1949 I.C.J. 4 (April 19) (individual opinion of Judge Alvarez), at 40–44 [hereinafter Corfu Channel case].
28. Alejandro Alvarez, *The New International Law*, 15 TRANSACTIONS OF THE GROTIUS SOCIETY 35–51 (1929), whose views were given greater legal import in subsequent decades upon his election to the International Court of Justice.
29. Elisabeth Mann Borgese, *Sovereignty and the Law of the Sea*, *in* OCEAN GOVERNANCE: STRATEGIES AND APPROACHES FOR THE 21ST CENTURY 37 (Thomas A Mensah ed., 1996).
30. HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 72 (1942).
31. *Id*.
32. Borgese, *supra* note 29.
33. Individual opinion of Judge Alvarez in *Corfu Channel* case, *supra* note 27, at 43.
34. See Alfred P. Rubin, *Enforcing the Rules of International Law*, 34 HARVARD INTERNATIONAL LAW JOURNAL 149 (1993) where the author examines appeals to "naturalist" authority and provides an effective template of analysis in addressing arguments based upon this and the other traditional source category of positivism.
35. KEN BOOTH, LAW, FORCE AND DIPLOMACY AT SEA 95 (1985).
36. Article 7, 1982 LOS Convention, *supra* note 2, provides general and somewhat subjective criteria for the drafting of straight baselines.
37. Grunawalt, *supra* note 17, at 17.
38. 1982 LOS Convention, *supra* note 2.
39. *See generally* Fisheries (U.K. v. Nor.*),* 1951 I.C.J. 116.
40. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, The Law of the Sea: Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea, (United Nations) (1994) [hereinafter United Nations Practice of States].
41. *Id.* at 65.
42. *Id.*
43. *Id.* at 66.
44. *Id.* at 34.
45. Grunawalt, *supra* note 17, at 17.
46. George Galdorisi & Alan Kaufman, *Military Activities in the Exclusive Economic Zone: Prevailing Uncertainty and Defusing Conflic*t, 32 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 253, 282–283 (2002).
47. The United States has protested historic bay claims made by, *inter alia*, Argentina, Australia, Cambodia, Canada, Dominican Republic, India, Italy, Libya, Panama, Russia and Vietnam. *See* Table A1-4, "Claimed Historic Bays" in ANNOTATED SUPPLEMENT, *supra* note 15, at 96.
48. As of 1997, there were 15 States that claimed a territorial sea in excess of 12 nautical miles. S*ee* Table A1-6 "The Expansion of Territorial Sea Claims" in *id.* at 100.
49. Donald R. Rothwell, *Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice, in* NAVIGATIONAL RIGHTS AND FREEDOMS, *supra* note 17, at 90–91.

50. Yemen, for example, has sought to provide conditions for transit of the Bab-el-Mandeb strait including prior authorization. *See* United Nations Practice of States, *supra* note 40, at 103.
51. Indonesian Government Regulations Numbers 36 and 37 of 2002 which are titled respectively, "Rights and Obligations of Foreign Vessels When Exercising An Innocent Passage Via the Indonesian Waters" and "Rights and Obligations of Foreign Ships and Aircraft When Exercising Right of Archipelagic Sea Lane Passage Via The Established Archipelagic Sea Lanes" (translated copies of the Indonesian legislation in the author's files).
52. Article 2 of Regulation 36, *id.*, provides:

> (1) All foreign vessels may exercise the right to Innocent Passage via the Territorial Waters and Archipelago Waters for the purpose of passing from a part of the open sea or exclusive economic zone to the other part of the open sea or exclusive economic zone. . . . (2) The exercise of Innocent Passage Right as referred to paragraph (1) shall be carried out only by using the Sea Lanes commonly used for international sailing in compliance to Article 11.

Article 11 details a number of north-south routes only.
53. Article 3 of Regulation 37, *id.,* provides:

> (1) The Right of Archipelagic Sea Lane passage . . . can be exercised via a sea lane or via the air above a sea lane which has been described as an archipelagic sea lane for the purpose of the Right of Archipelagic Sea Lane Passage as described in paragraph 11. (2) In accordance with this regulation, the Right of Archipelagic Sea Lane Passage can be exercised on other Indonesian waters after those waters have been established as archipelagic sea lanes which can be used for the purpose of Right of Archipelagic Sea Lane Passage."

Article 11 of the Regulation designates only three main north-south sea lanes.
54. 1982 LOS Convention, *supra* note 2, art. 52,
55. Resolution MSC.71(69)(adopted on May 19, 1998)—Article 6.5
56. *Id.*, art. 6.7.
57. The second paragraph of the Explanatory Note provides "Although foreign vessels enjoy innocent passage . . . in compliance to the provisions of the United Nations Convention concerning Law of the Sea of 1982, Indonesia reserves the right to determine the sea lanes that may be used by such foreign vessels to exercise innocent passage."
58. Grunawalt, *supra* note 17, at 15.
59. *Id.*
60. Bernard H. Oxman, Panel on the Law of Ocean Uses: United States Interests in the Law of the Sea Convention, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 167, 168 (1994).
61. Dennis Mandsager, David Grimord & Patricia Battin, *Cooperative Engagement and the Ocean: Policy and Process*, *in* OCEAN GOVERNANCE, *supra* note 29, at 39.
62. Grunawalt, *supra* note 17, at 11.
63. *Id.* at 17.
64. The RIMPAC biennial military exercise involves over 20,000 individual participants from the Pacific Rim region, including from Australia, Canada, Chile, Japan, South Korea and the United States.
65. For example, the Combined Exercise Agreement for the RIMPAC Exercise includes Exercise ROE that are reviewed by participating legal representatives for ongoing accuracy and are designed to be reflective of the navigational freedoms and obligations existing under the 1982 LOS Convention and at customary law.
66. Grunawalt, *supra* note 17, at 18.

67. *Id.*
68. Article 2(4) of the Charter of the United Nations, San Francisco, June 26, 1945, 1 U.N.T.S. xvi, [hereinafter UN Charter] provides "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."
69. *Id.*, arts. 2(3) and 2(7).
70. "United States Ocean Policy," Statement by the President, March 10, 1983:

> [T]he Convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law . . . the United States will exercise and assert its navigation and overflight rights and freedoms . . . in a manner that is consistent with the balance of interests reflected in the Convention.

Reprinted in 22 INTERNATIONAL LEGAL MATERIALS 464 (1983).
71. *Id.*
72. Grunawalt , *supra* note 17, at 15.
73. *Id.*
74. *See generally,* Fia Cumming, *The Day Our Boys Stared Down China*, SYDNEY SUN HERALD, Apr. 29, 2001, at 7 and also Tom Allard, *PM Defends "Innocence" Of Ships In China Row*, SYDNEY MORNING HERALD, Apr. 30, 2001, at 5.
75. The Statute of the International Court of Justice is annexed to the UN Charter, *supra* note 68.
76. Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH YEAR BOOK OF INTERNATIONAL LAW 1, 36–37 (1974–75).
77. Military and Paramilitary Activities (Nicar. v. US), 1986 I.C.J. 14 (June 27), at 111 [hereinafter Nicaragua case].
78. *Id.*
79. *Id.*
80. Akehurst, *supra* note 76, at 19.
81. *Id.*
82. North Sea Continental Shelf (FRG v. Den., FRG v. Neth.), 1969 I.C.J. 3 (Feb. 20), at 42–43, [hereinafter North Sea Continental Shelf case].
83. E. D. BROWN, THE INTERNATIONAL LAW OF THE SEA 67–68 (1994) details that late in the UNCLOS III deliberations two amendments were proposed, one explicit on this point and the other more indirect. Both were withdrawn.
84. The 2000 Final Report of the Committee of the International Law Association's Committee on Formation of Customary (General) International Law does accept that legal "principles" can constitute customary rules but that there needs to be evidence of a high degree of constant and uniform practice (at 8) [hereinafter ILA Report].
85. North Sea Continental Shelf case, *supra* note 82, at 42–43.
86. Akehurst, *supra* note 76, at 21.
87. *Id.* at 24; ILA Report, *supra* note 84, at 27–28.
88. ILA Report, *supra* note 84, at 10.
89. ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 88 (1971).
90. LEO GROSS, ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION (Vol.1) 393 (1984) notes that "auto interpretation" is a fact of international discourse and as there exists "no formal, institutionalized procedure to declare or formulate the will of the family of nations" a diffuse mechanism of customary norm assertion, identification and acceptance is a necessary feature of the decentralized character of the international legal order.
91. Akehurst, *supra* note 76, at 53.

92. HCM Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW 28 (1991).
93. ILA Report, *supra* note 84, at 5.
94. *Id.* at 28.
95. Prosper Weil, *Towards Relative Normativity in International Law?* 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 413 (1983).
96. Shekhar Ghosh, *The Legal Regime of Innocent Passage Through the Territorial Sea*, 20 INDIAN JOURNAL OF INTERNATIONAL LAW 216, 228 (1980).
97. Convention on the Law of Treaties,Vienna, May 23, 1969, 1155 U.N.T.S. 331, [hereinafter Vienna Convention].
98. *Id.*
99. Rothwell, *supra* note 49, at 80.
100. Ghosh, *supra* note 96, at 238.
101. Rothwell, *supra* note 49, at 75.
102. Vienna Convention, *supra* note 97.
103. Aceves, *supra* note 7.
104. *Id*. at 324.
105. *Id.* at 323.
106. *Id.* at 309.
107. Corfu Channel case, *supra* note 27, at 30.
108. *Id.* at 33–35.
109. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 287 (1963). See also the general discussion of the competing academic arguments in Dale Stephens, *The Impact of the 1982 Law of the Sea Convention on Peacetime Naval/Military Operations*, 29 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 283, 295–296 (1999).
110. Nicaragua case, *supra* note 77.
111. *Id.* at 107–8.
112. *Id. See also* Stephens, *supra* note 109, at 298–9.
113. *Id.*
114. 1983 LOS Convention, *supra* note 2, art. 25(3).
115. Nicaragua case, *supra* note 77, at 118.
116. 1982 LOS Convention, *supra* note 2. Article 300 mandates that States Parties ". . . shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."
117. Aceves, *supra* note 7, at 323.
118. Michael Byers, *Abuse of Rights: An Old Principle, New Age*, 47 MCGILL LAW JOURNAL 389, 431 (2002). *See* INTERNATIONAL LAW: CASES AND MATERIALS 129–30 (Lori Damrosch et al. eds., 4th ed. 2001).
119. Individual Opinion of Judge Alvarez, Corfu Channel case, *supra* note 27, at 40.
120. Byers, *supra* note 118, at 402.
121. *Id*. at 411.
122. INTERNATIONAL LAW, *supra* note 118, at 107.
123. BOOTH, *supra* note 35, at 44.
124. *Id*. at 117.
125. GEORGE V. GALDORISI & KEVIN R. VIENNA, BEYOND THE LAW OF THE SEA, NEW DIRECTIONS FOR US OCEANS POLICY 85 (1997).
126. BOOTH, *supra* note 35, at 88.
127. Susan Biniaz, *The US Freedom of Navigation Program, in* THE LAW OF THE SEA: NEW WORLDS, NEW DISCOVERIES 59 (Edward L. Miles & Tullio Treves eds., 1993).