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# PEACETIME USE OF FORCE, MILITARY ACTIVITIES, AND THE NEW LAW OF THE SEA

*Francesco Francioni†*

## INTRODUCTION

Resource exploitation was the central theme of the Third Conference on the Law of the Sea. The 1982 Law of the Sea Convention (the Convention) achieved conspicuous innovations in this area by recognizing the Exclusive Economic Zone (EEZ), expanding the Continental Shelf concept, and establishing an international regime for seabed mining.<sup>1</sup> In contrast, military operations and the use of force remain in the shadows of the new law of the sea. The Convention proclaims the need for peaceful use of the oceans and expressly prohibits the use of force.<sup>2</sup> Yet military activities in the oceans of the world continue and perhaps increase. Furthermore, the generalized widening of maritime jurisdiction is leading to a growing number of occasions for military confrontation between coastal states and naval powers.

In this situation, the question arises, "What will be the future regulation of the use of force and military activities in the sea?" This Article will focus on three issues. First, what is the impact of the new law of the sea, as defined by conventional and customary international law, on military activities and the use of force in the territorial sea and internal waters? Second, how are military activities compatible with the EEZ, and what international norms regulate the use of military force in this area? Finally, does the language of the 1982 Convention, with its emphasis on "peaceful use," impose any new obligation or limitation on the use of military instruments at sea?

These questions are especially germane in light of article 298(b) of the Convention. This article allows an exception to the compulsory

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1. United Nations Convention on the Law of the Sea, Apr. 30, 1982 (as approved Sept. 24, 1982), U.N. Doc. A/CONF.62/122, parts V-VI, XI (1982) [hereinafter cited as Convention].

2. *Id.* parts VII, XVI, arts. 88, 301. *See also id.* arts. 58(1) and 141, which call for peaceful use of the sea in the context of the exclusive economic zone and seabed mining.

settlement of disputes that may arise in law enforcement actions from military activities and the use of force.<sup>3</sup> By permitting signatory states to remove such matters from the scope of compulsory jurisdiction, the Convention clearly acknowledges the special status of military activities and the use of force by government ships. In so doing, it confirms the need to clarify the permissible scope of such activities in contemporary international law.

## I. MILITARY ACTIVITIES AND THE USE OF FORCE IN THE TERRITORIAL SEA

Under both customary international law and article 2 of the Convention, the territorial sea is a space characterized by the inherent sovereignty of the coastal state. In this area, the coastal state may therefore exercise some degree of interference with respect to foreign military operations. Two separate questions arise regarding the limits of military activity and the use of force in the territorial sea. First, are foreign military activities permissible at all? Second, what degree of force may lawfully be exercised (1) by the coastal state to repel intruders and (2) by the foreign navy to assert navigational rights against the coastal state's territorial claim?

### A. LEGITIMATE MILITARY USE OF THE TERRITORIAL SEA BY FOREIGN VESSELS

In the past, the question of permissible military activity by foreign ships in the territorial sea has largely been identified with whether foreign warships enjoy a right of innocent passage through the territorial sea. Under international law, innocent passage involves the transit of foreign ships in a manner which is not prejudicial to the peace, good order, and security of the coastal state.<sup>4</sup> The 1958 Geneva Convention did not afford much clarification on the issue of innocent passage; article 14 simply speaks of "ships."<sup>5</sup>

Reflecting this ambiguity, the International Law Commission (ILC) initially advocated the recognition of innocent passage to war-

3. *Id.* art. 298(b). Article 298 reads:

When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: . . .

(b) Disputes concerning military activities, including military activities by government vessels . . . and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction.

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

5. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958 (entered into force Sept. 10, 1964), art. 14, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as Convention on the Territorial Sea].

ships "save in exceptional circumstances,"<sup>6</sup> but later adhered to the principle of the coastal state's consent and prior authorization.<sup>7</sup> Until now, proponents of the traditional view that warships have the right of innocent passage have prevailed over dissenters who have maintained that the innocent passage of warships is incompatible with coastal sovereignty because warships have a different functional objective than merchant vessels.<sup>8</sup>

The Third Conference on the Law of the Sea contributed significantly to the solution of the problem of innocent passage: it struck a compromise by which states exchanged broader navigational rights to foreign vessels in exchange for the recognition of wider territorial waters and the extension of the coastal state's jurisdiction for resource exploitation. As part of that compromise, the Convention text makes clear that warships enjoy the right of innocent passage, but that they may not engage in military activities during such passage. Thus in defining those activities which are prejudicial to the peace, good order, or security of the coastal state, article 19(2) specifies activities, such as military exercises, firing of weapons, launching or taking on board aircraft, and threat or use of force, that have an unmistakable military nature and can therefore be carried out only by warships.<sup>9</sup>

These provisions of the Convention undoubtedly represent progress over the ambiguous language of the Geneva Convention. Not only does article 19 of the Law of the Sea Convention provide a solution to the controversial problem of innocent passage for warships, but it also clarifies the concept of innocent passage by identifying it through the list of prohibited activities. Therefore, inasmuch as the Convention's reasonable compromise corresponds to customary inter-

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6. Report of the International Law Commission to the General Assembly, 6 U.N. GAOR Supp. (No. 9), U.N. Doc. A/2693 (1954), *reprinted in* [1954] 2 Y.B. INT'L L. COMM'N 140, 161, U.N. Doc. A/CN.41 SER. A/1954/Add. 1.

7. Report of the International Law Commission to the General Assembly, 11 U.N. GAOR Supp. (No. 9), U.N. Doc. A/3/59 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 276, U.N. Doc. A/CN 41 SER. A/956/Add. 1. The commentary to this article pointed out that the principle of authorization and notification reflected the views and comments expressed by governments on the matter. 2 Y.B. INT'L L. COMM'N at 276-77. A convenient collection of such views can be found in M. WHITEMAN, 4 DIG. OF INT'L L. 404 (1965). For a recent restatement of this traditional view on the right of innocent passage of warships in light of the 1982 Law of the Sea Convention, see Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809 (1984); Ronzitti, *Il passaggio inoffensivo nel mare territoriale e la Convenzione delle Nazioni Unite sul diritto del Mare*, 68 RIVISTA DI DIRITTO INTERNAZIONALE [RIVISTA DIR. INT.] 32 (1985).

8. See, e.g., P. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION*; Harvard Law School Draft Convention on Territorial Waters, 23 AM. J. INT'L L., SPEC. SUPP. 295 (1927/1929); I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 206 (1979).

9. Convention, *supra* note 1, art. 19(2).

national law,<sup>10</sup> foreign military vessels enjoy the right of innocent passage; but no military operations other than simple navigation are permissible within the territorial sea.

Other rules of conventional or customary international law also limit military use of the territorial sea by foreign navies. First, under article 20 of the Convention, "submarines and other underwater vehicles are required to navigate on the surface and to show their flag."<sup>11</sup> This is a significant provision in light of the frequent incidents involving Soviet or unidentified submarines that have occurred in recent years off of the coasts of several Western countries, such as Sweden, Norway, and Italy.<sup>12</sup> This requirement is especially relevant for nuclear submarines which may, through unauthorized presence in foreign territorial waters, place the risk of radioactive pollution beyond the coastal state's power of control.<sup>13</sup>

Second, under customary international law, there is no right of overflight of the territorial sea, except as article 38 of the Convention allows overflight for transit passage over straits.<sup>14</sup> *A fortiori*, coastal states may altogether exclude any military operation by foreign aircraft in the airspace above their territorial waters.

Third, the Sea-Bed Arms Control Treaty prohibits states from placing nuclear weapons and weapons of mass destruction beyond the

10. *Id.* The conflict that emerged during the Conference concerned mainly the group of states who were insisting on prior notification and authorization and the Western maritime states who were insisting on the right of innocent passage without prior requirements. Albania, Algeria, Argentina, Brazil, Ecuador, Egypt, Guatemala, Kampuchea, Malta, and Turkey, among others, maintained the former position.

11. *Id.* art. 20.

12. For an example of submarine intrusions and incidents in territorial waters of Sweden and Norway, see *Red Submarines*, *Time*, May 9, 1983, at 57, col. 3. For submarine intrusions in Italy, see Ronzitti, *Sommergibili non identificati, pretese baie storiche e contromisure dello stato costiero: l'incidente del golfo di Taranto del 24-25 Febbraio 1982*, 66 RIVISTA DIR. INT. 5, 14 (1983).

13. In the 1980 *Yoron Jima* incident, the Japanese government considered control over such a risk so essential that Japan denied permission of passage to a disabled Soviet submarine which was being towed through Japanese territorial waters unless the Soviet Union disclosed the full potential of radioactivity including that of the submarine's armament. The Soviet government ignored the demand and continued its unauthorized passage. As a consequence, Japan filed a protest against the Soviet Union. The incident was caused by a fire which broke out on board the Soviet submarine causing the death of nine crewmen and injury to several others. See *N.Y. Times*, Aug. 22, 1980, at A3, col. 1; *id.*, Aug. 23, 1980, at A5, col. 5. For a legal comment holding that the Japanese were entitled to obtain the requested information under a rule of reciprocity (the Soviets have formulated a reservation to article 23 of the Geneva Convention), see Grammig, *The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea*, 22 HARV. INT'L L.J. 331 (1981). The Soviet position with respect to the coastal state's right to establish authorization procedures for the passage of foreign warships in territorial waters is discussed in W. BUTLER, *THE LAW OF SOVIET TERRITORIAL WATERS* 40 (1967).

14. Convention, *supra* note 1, art. 38.

twelve-mile coastal belt.<sup>15</sup> This prohibition does not apply to the coastal state, which retains the freedom of using or allowing its allies to use the seabed zone within the twelve-mile limit for the emplacement of such weapons.<sup>16</sup>

Finally, the Treaty of Tlatelolco, which follows the provisions of the 1963 Test Ban Treaty,<sup>17</sup> prohibits the emplacement of nuclear weapons in Latin America, including the territorial waters of the contracting parties.<sup>18</sup> The Treaty of Tlatelolco extends its prohibition to underwater tests, including the territorial sea.

## B. USE OF FORCE IN THE TERRITORIAL SEA

Apart from a situation of belligerency, the occasions in which the territorial sea has been the theater for acts of force arise in two typical situations. The first occurs when coastal states react against what they perceive as a provocative or offensive act by foreign ships. The second situation arises when a foreign state acts to assert navigational claims against the coastal state.

The *Pueblo* incident of 1968 exemplifies the first situation. In that incident, North Korean naval units used armed force in order to capture the United States' intelligence ship *Pueblo*. As a result of the seizure, North Korea held the crew for several months, until the parties signed an agreement which permitted the crew to be released upon U.S. acknowledgement of espionage activities, a recognition which the

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15. See Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea Bed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337 [hereinafter cited as Seabed Treaty]. Article II states that the twelve-mile zone "shall be co-terminous with the twelve-mile outer limit of the zone referred to in part II of the [Geneva] Convention of the Territorial Sea and the Contiguous Zone." See Convention on the Territorial Sea, *supra* note 5.

16. *Id.*

17. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater, Oct. 10, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43. Article I of the treaty expressly bans nuclear testing in territorial waters and the high seas, but makes no reference to tests under the seabed. Article I does ban all tests "in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the state under whose jurisdiction or control such explosion is conducted. One might wonder whether nuclear experiments in the subsoil of the oceans beyond national jurisdiction are prohibited by this Treaty. Since underground tests are prohibited when they cause radioactive effects outside the territorial limits of the state under whose "jurisdiction" or "control" the test is conducted, it seems reasonable to conclude that similar tests must be prohibited insofar as by definition, they are bound to cause radioactive debris in the international area. See Brown, *The Demilitarization and Denuclearization of Hydrospace*, 4 ANNALES OF ETUDES INTERNATIONALES 71 (1973). See also Schwelb, *The Nuclear Test Ban Treaty and International Law*, 59 AM. J. INT'L L. 642 (1963); Martin, *Legal Aspects of Disarmament*, 12 INT'L & COMP. L.Q. 1 (Supp. 7 1963).

18. Treaty of Tlatelolco, Feb. 14, 1967, 22 U.S.T. 762, T.I.A.S. No. 7137, commented on in Robles, *Mesure de Desarmament Dans Des Zones Particularies: Le Traite Visant L'Interdiction Des Armes Nuclearies en Amerique Latine*, — Hague Receuil 43.

United States immediately disavowed.<sup>19</sup> The Gulf of Sirte incident of August 1981 reveals a similar pattern of conflict during which Libya asserted the legality of the use of force to protect coastal rights and the United States defended the freedom of navigation of its fleet.<sup>20</sup>

The *Pueblo* and *Sirte* disputes exemplify the circumstances in which conflicting claims are likely to arise between coastal states and foreign military vessels. These precedents illustrate the difficult question of whether force is admissible, and if so, what degree of coercion may be used to enforce the coastal state's jurisdiction in its territorial waters.

Those who uphold the principle of "complete immunity" of foreign warships hold that no force is allowable to enforce jurisdiction. This principle derives from the combined interpretation of article 8 of the 1958 Geneva Convention of the High Seas, which gives complete immunity to warships on the high seas, and article 23 of the Geneva Convention on the Territorial Sea, which provides that if a foreign warship does not comply with a coastal state's regulations in the territorial sea, the coastal state may "require the ship to leave the territorial sea."<sup>21</sup> Since these provisions at once guarantee complete immunity and fail to contemplate coercive measures against the illegal presence of foreign warships in territorial waters, the conclusion is that *a fortiori* no use of force is admissible against a foreign warship in the territorial sea except in self-defense.<sup>22</sup>

Proponents of another view believe that it is necessary to determine the scope of the coastal state's lawful countermeasures by distinguishing between single violations of the coastal state's laws and

19. See the telegram sent by the Department of State to various diplomatic missions after the incident, reprinted in *Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT'L L. 754, 756 (1968); 58 DEP'T ST. BULL. 346, 352 (Mar. 1968). The Department of State view is maintained by Aldrich, *Questions of International Law Raised by the Seizure of the U.S.S. Pueblo*, in AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 2 (1969). But see Francioni, *Il caso del "Pueblo" e le norme internazionali sullo spionaggio*, 1969 DIRITTO INTERNAZIONALE 319, 336 (1969).

20. For a more complete account and analysis of the incident, see Francioni, *The Gulf of Sirte Incident (U.S. v. Libya) and International Law*, 5 Y.B. INT'L L. 85 (1980-81); Spinnato, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 OCEAN DEV. & INT'L L.J. 65 (1983/84); Francioni, *The Status of the Gulf of Sirte in International Law*, 11 SYRACUSE J. INT'L L. & COM. 311 (1984). The United States action was admittedly intended to challenge the legality of Libya's extension of coastal jurisdiction to include the entire Gulf of Sirte, which, by a declaration of 1973, was "closed" on the basis of alleged "historic titles." The *Sirte* incident is thus within the context of internal waters. The incident also raises the territorial sea question, however, since the American Sixth Fleet was just outside the boundary of the Gulf, an area that Libya claimed as territorial waters.

21. Convention on the High Seas, Apr. 29, 1958 (entered into force Sept. 30, 1962), art. 8, 13 U.S.T. 2312, T.I.A.S. No. 5200; Convention on the Territorial Sea, *supra* note 5, art. 23.

22. See Aldrich, *supra* note 19, at 3.

regulations with respect to navigation in the territorial sea and violations of international norms governing innocent passage. Only in the latter case, according to this view, could the coastal state be entitled to adopt coercive measures including the use of force.<sup>23</sup>

Both of these approaches, however, lead to unsatisfactory results. The first, which excludes force except in the extreme case of self-defense against armed attack, is too rigid and does not indicate what a coastal state may do if the foreign intruder continues to navigate in the territorial sea, despite the request to leave and without regard to how its continued presence may prejudice the coastal state's security. The second approach introduces an element of artificiality by adopting a double standard—international and internal—to appraise the effects of the foreign ship's violation of the coastal state's territorial sovereignty.

Conceptually and practically, one cannot separate the violation of the coastal state's regulations from the violation of "peace, good order and security" upon which innocent passage is contingent. Moreover, the 1982 Convention's list in article 19 of the activities that are not consistent with the "innocent" character of passage leaves little margin for the possibility that foreign vessels' operations may constitute a breach of coastal states' regulations without at the same time violating the innocent passage rules. Furthermore, article 19 says that passage of a foreign ship shall be considered prejudicial if it engages in "any other activity not having a direct bearing on navigation."<sup>24</sup> Finally, article 25(1) of the Convention allows ample police powers: "[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent."<sup>25</sup>

The special character of this police power clause is emphasized by its absence from part III of the Convention concerning passage through straits. In view of this clause, it seems that one must rely on the general rules of necessity and proportionality to decide when and to what extent the use of force is admissible to prevent or terminate a passage that the coastal state considers prejudicial.<sup>26</sup>

Under these general rules of international law, necessity means that the coastal states will have the initial burden of asking the foreign ship engaged in non-innocent activities to leave its territorial waters.

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23. Cf. Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 INT'L & COMP. L.Q. 73, 93 (1959); Ronzitti, *supra* note 12, at 14; Ronzitti, *supra* note 7; DeLupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L L. 53 (1984).

24. Convention, *supra* note 1, art. 19(2)(1).

25. *Id.* art. 25(1).

26. These principles have been developed in the law of state responsibility on the basis of the well-known precedent of the *Naulilaa* incident (Portugal-Germany), 2 R. INT'L ARB. AWARDS 1025. For the further development of the law of state responsibility which followed the decision in *Naulilaa*, see Ago, *Eighth Report on State Responsibility*, [1979] 2 Y.B. INT'L L. COMM'N 40.



Proportionality refers to the coastal state's subsequent options. If the foreign ship does not leave, the coastal state may employ a limited and controlled use of force to give ultimate warning, for example, by firing solid shells near the ship or exploding depth charges to make a submarine emerge and identify itself. The rule of necessity also justifies the use of force for the purpose of arresting and boarding the foreign vessel or submarine when necessary to prevent important information, material, or devices from being removed illegally from the territorial sea.

Force would be permissible when the foreign ship is engaged in espionage activities, as in the *Pueblo* affair, and even more so when such a ship has been testing the responsiveness of the coastal state's defense system, simulating an armed attack, or mapping the network of coastal defense for sabotage. Use of force with the intent of sinking the foreign vessel or of destroying the foreign submarine in territorial waters appears permissible only after all attempts to stop the intruder or to force him to leave have been exhausted.

The second question about military force in the territorial sea concerns the permissibility of force to assert navigational rights against coastal states' claims. Despite the impressive number of conflicting claims with respect to national jurisdiction over adjacent waters, the use of force to assert navigational rights against coastal claims fortunately has not arisen very often in practice. Even in the sensitive area of transit rights through international straits and archipelagic waters, nations have generally claimed freedom of navigation and rights of unimpeded passage by diplomatic statements and other peaceful steps rather than by military action.<sup>27</sup>

A notable exception is the *Corfu Channel* case, which involved a demonstration of force by the British navy to assert freedom of transit through the Channel. In its judgment of 1949, the International Court of Justice held that the mere assertion of navigational rights, even with a show of force by a foreign fleet of war, does not in itself constitute an illegal threat or use of force.<sup>28</sup> However, in rejecting the Albanian contention that the British warships had violated Albanian sovereignty by conducting a demonstration of force in the Channel, the Court based its reasoning on a set of quite strict conditions. First, the

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27. The closing of the Gulf of Aqaba in 1967 gave rise only to diplomatic protests, and the assertion of an archipelagic claim by Indonesia and the Philippines in 1958 and 1968, respectively, witnessed a remarkable level of self-restraint on the part of the British and United States navies. Rather than seeking confrontation, war fleets were diverted from the original route to more peripheral passages of the archipelago, or a procedure of prior notification was accepted as in the case of passage through the Philippine Strait of Balabac and Basilan passage. For a thorough review of pertinent practice, see D.P. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 107 (1975).

28. *Corfu Channel Case (Merits)*, 1949 I.C.J. 4.

warships had traveled with their guns unloaded and "trained fore and aft." Second, the fleet was not in combat formation. Third, there had been no maneuvering. On the basis of this evidence the Court concluded that, by passing in this manner through the narrow channel near the Albanian coast at a time of political tension, the British ships intended "not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing ships. Having regard, however, to all the circumstances of the case . . . the Court is unable to characterize these measures taken by the United Kingdom as a violation of Albania's sovereignty."<sup>29</sup>

The Court balanced its decision to favor innocent passage over territorial sovereignty, even in a situation of political tension, against the determination that actual intervention by the British navy in Albanian territorial waters to perform a mine sweeping operation was unlawful. In rejecting the United Kingdom's contention that its unilateral mine clearance operation was necessary for transit and to secure evidence (i.e., the presence and type of mines) of an international wrongful act, the Court said:

Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom's Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.<sup>30</sup>

The *Corfu* precedent, therefore, does not warrant the conclusion that threat or use of force may be permissible to challenge coastal claims that infringe upon free navigation. The only expression of "force" admissible under the standards set by the Court is that of "showing the flag" in the contested area. Other forms of military pressure, such as carrying out maneuvers along the coast, assembling a fleet in combat formation, or issuing an ultimatum or other open threat would constitute a violation of international law. Indeed, in both cases of innocent passage and conflicts like the Gulf of Sirte incident, the interested parties must respect the general obligation to seek a peaceful solution to their dispute in accordance with articles 2(3) and 33 of the Charter, to abstain from acts of force that endanger the peace, and to refrain from acts that aggravate a dispute.<sup>31</sup>

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29. *Id.* at 31.

30. *Id.* at 35.

31. U.N. CHARTER arts. 2(3), 33.

### C. USE OF FORCE IN INTERNAL WATERS

The internal waters of the sea are completely assimilated to the territory of the coastal state. Since foreign navies may invoke no right of innocent passage in these waters, military activities are *a fortiori* impermissible. By the same token, foreign states may exert neither use nor threat of force in this area of coastal jurisdiction for the purpose of challenging the title upon which the waters have been declared internal. The duty of maritime powers to seek peaceful solutions with respect to conflicts and disputes involving coastal claims are all the more applicable to internal waters. Furthermore, mere acts of expressive force, such as the showing of the flag, are unlawful in internal waters as long as the coastal state does not grossly abuse its rights by deceitfully appropriating large areas of the open seas as "internal waters."

The fact that the unauthorized presence of foreign naval vessels in the area of internal waters constitutes a *prima facie* violation of the coastal state's territorial sovereignty is also significant in determining the range of coercive countermeasures that the coastal state may adopt against the foreign intruder. In this regard, it seems reasonable to make the lawfulness of the use of force depend upon the nature of the intrusion and the type of vessel involved. Covert naval operations, especially with submarines, such as those which have occurred in Scandinavian internal waters and more recently in the Gulf of Taranto, clearly present a significant threat to the coastal state's security.<sup>32</sup> The potential danger posed by unauthorized foreign naval operations is undisclosed. It may include such acts as emplacement of electronic devices to monitor coastal military activities, laying of navigational buoys on the seabed to guide an attack, visual and electronic inspection of the coast in view of the landing of special commando forces, and covert mining of certain areas to prevent access or transit for enemy navies. All these acts represent a serious threat to the coastal state's security, and it is within the scope of lawful countermeasures for the coastal state to use force in order to arrest and capture the intruder.<sup>33</sup> In case of necessity, even violent measures are permissible in order to disable and stop the foreign military vessel. Such necessity may arise not only in the case of self-defense, but also where the coastal state considers the recovery of data from an intruding ship essential for its security.

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32. See *supra* note 12 and accompanying text.

33. The coastal state may act under the "self-defense" provision of article 51 of the U.N. Charter, i.e., in its inherent right as a state under international law. It may also act as an exercise of police power within its territory. Under international law, a state may invoke the international doctrine of "hot pursuit" to chase an intruder beyond its territorial waters. See Convention on the High Seas, *supra* note 20, art. 23.

When a foreign military vessel openly violates internal waters, the same rules that govern the violation of innocent passage in the territorial sea apply. Under these rules, the coastal state must warn the foreign ship as a preliminary measure to any coercive act. The use of force will only be justified for the purpose of directing the vessel toward the open seas or of arresting and boarding the vessel in order to collect evidence of the unlawful mission. The coastal state may not use force to assert a territorial claim over its adjacent waters; such a conflict between the coastal state and opposing maritime powers must be settled according to the same principles of the U.N. Charter that apply to peaceful resolutions of disputes over territorial waters.

## II. MILITARY OPERATIONS AND THE USE OF FORCE IN THE EEZ

The extent to which the rules and practice governing military activities and the use of force in the territorial seas and coastal waters will apply in the EEZ raises two questions. The first question is whether the generalized establishment of the 200-mile zone of exclusive economic jurisdiction will affect the performance of peacetime military activities by foreign navies in the zone. The second question relates to the permissibility of the use of force by coastal states to counter foreign activities or claims which such states consider incompatible with their powers in the EEZ. This second question is particularly interesting in view of the wording of both article 2(4) of the Charter and article 301 of the Convention, which refer to the use of force against the "territorial integrity" of another state.<sup>34</sup> The answer to the second question depends on whether the term "territory" includes the EEZ. If it does not, one must then ask to what extent the use of force by the coastal state is permissible in its EEZ for the purpose of enforcing economic rights.

### A. FOREIGN MILITARY ACTIVITY IN THE EEZ

The Convention alone provides no easy answer to the question of how establishment of the EEZ may affect peaceful military activities by foreign navies. Rather, the Convention's provisions on the EEZ leave a large margin of ambiguity and uncertainty as to the nature, status, and scope of coastal states' rights within the zone. Such ambiguity is understandable in a legal instrument whose relevant provisions

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34. See U.N. CHARTER art. 2(4): "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." See also Convention, *supra* note 1, art. 301: "[S]tates parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State."

were drafted under the strain of opposing tendencies—on the one hand, to equate the EEZ with the high seas for purposes other than resource exploitation, and on the other, to favor extension of the functional jurisdiction of coastal states.

Article 58 of the Convention, which deals with the freedoms and rights that remain unaffected by the establishment of the EEZ, reflects the compromise between these opposing tendencies.<sup>35</sup> These rights and freedoms are identified in part by reference to article 87, which concerns “freedom of the high seas,”<sup>36</sup> and in part made explicit by article 58 itself, which safeguards “navigation and overflight[,] . . . laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms such as those associated with the operation of ships, aircrafts and submarine cables and pipelines, and compatible with other provisions of this convention.”<sup>37</sup>

Apart from spelling out freedom of navigation in the EEZ and in the upper adjacent air space, article 87 does not clarify which foreign naval military activities are lawful in the EEZ. Controversial activities include military maneuvers; weapons tests; the gathering of strategic information by intelligence ships or airplanes; launching, landing, or taking on board aircraft or any other military equipment or device. Some authors have implied that a systematic establishment of the EEZ unavoidably leads to a situation in which the military use of the zone by foreign navies, for purposes other than simple transit of warships, will effectively be hampered by the necessity of incrementally respecting the role of the coastal state in the exploration and exploitation of resources in the EEZ.<sup>38</sup> The majority of authors who have dealt with this rather specific issue, however, believe that military uses of the seas remain unaffected by the establishment of the EEZ.<sup>39</sup>

35. Convention, *supra* note 1, art. 58.

36. *Id.* art. 87.

37. *Id.* art. 58(1).

38. Conforti, *l'institution de la Zone Economique Exclusive en tant que Facteur de paix dans le Mediterranee*, in *MEDITERRANEE: ZONE DE PAIX* (1983); Benchikh, *La Mer Mediterranee, Mer Semi-ferme*, 84 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* [R.G.D.I.P.] 284, 290 (1980).

39. Queneudec, *Zone Economique Exclusive et Forces Aeronavales*, in *Colloque de l'Academie de droit international, LA GESTION DES RESSOURCES POUR L'HUMANITE: LE DROIT DE LA MER [THE MANAGEMENT OF HUMANITY'S RESOURCES: THE LAW OF THE SEA]* 319, 322 (1982); Labrousse, *Les Problemes Militaires Du Nouveau Droit de la Mer*, *id.* at 307, 313. *See also* ASPEKTE DER SEERECHTSENTWICKLUNG 80 (W. Vitzthum ed. 1980) (argues in favor of the more permissive thesis by reference to article 19 of the Convention which contains an express prohibition on military maneuvers in the course of innocent passage); Robertson, *Navigation in the Exclusive Economic Zone*, 24 *VA. J. INT'L L.* 865, 886 (1984); Oxman, *supra* note 7 at 838. Oxman is careful, however, in stating that although naval maneuvers in the EEZ are permissible in principle, in practice they may not be justifiable when they prevent the lawful enjoyment of natural resources by the coastal state. Oxman reaches this conclusion based on the article 58(3) clause which lays down the obligation to have “due regard to the rights and duties of the coastal states” in the EEZ.

Whether in the years to come the generalized establishment of the EEZ will substantially restrict foreign navies from military use of the zone is really a matter of speculation. Much will depend upon whether the current trend towards massive deployment of land-based weapons will change in favor of wider use of sea-based weapons, which presumably would result in an intensified encroachment by submarines and warships on foreign EEZs.

One should note that the attempt made during the UNCLOS III negotiations to introduce the principle of a coastal state's consent for the carrying out of naval operations other than navigation in the EEZ was not successful. This attempt arose from the strong dissatisfaction which some Latin American countries expressed in 1976-77 over the possibility that the EEZ would remain open to such military activities as firing of weapons, use of explosives, and military maneuvers.<sup>40</sup> Peru submitted an informal proposal which would have called on warships and military aircrafts to refrain from such "non-navigational" operations in a foreign EEZ. Even the compromise solution which the United Kingdom suggested within the Consultative Group on the Legal Status of the Economic Zone, i.e., to graft a reference to article 2(4) of the Charter onto what later became article 58, failed.<sup>41</sup> Contrary to such efforts to limit military uses, the legislative history of article 58 shows a gradual movement away from the original "restrictive" drafting of the Informal Single Negotiating Text (ISNT), which referred to "other internationally lawful uses of the sea related to navigation and communication,"<sup>42</sup> toward the more permissive wording of the final text which allows "other internationally lawful uses of the sea . . . such as those associated with the operation of ships, aircrafts and submarine cables and pipelines, and compatible with the other provisions of this convention."<sup>43</sup>

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With some uncertainty, this thesis is also supported by a German author who concludes that "article 58 Draft Convention adds not as much as could have been expected to the clarification of the rights and duties of warships in foreign exclusive economic zones and will cause uncertainties and even tensions in this respect." Wolfrum, *Restricting the Use of the Sea to Peaceful Purposes: Demilitarization in Being?*, 24 GER. Y.B. INT'L L. 200, 239 (1981).

40. See U.N. Doc. A/CONF.62/C.2/SR.53 (1976/77) (particularly, the references to Brazil and Peru therein).

41. Cf. E. RAUCH, POLITISCHE KONSEQUENZEN UND MÖGLICHKEITEN DER SEERECHTSENTWICKLUNG AUS DER SICHT DER UDSSR 88 (1977).

42. Informal Single Negotiating Text (ISNT) of May 7, 1975, art. 47, para. 1, U.N. Doc. A/CONF.62/WP.5/Part II, reprinted in THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: DOCUMENTS 27 (R. Platzöder ed. 1982) 1. The same wording appeared in the Revised Single Negotiating Text of 1976, art. 46, para. 1, reprinted in *id.*, 208.

43. Convention, *supra* note 1, art. 58(1). The major maritime powers were favoring the inclusion in the text of the simple phrase "other lawful use of the sea" which would have left the widest latitude of interpretation. The opposing position of developing countries was

From the text and legislative history of article 58, it seems difficult to infer that the establishment of the EEZ has involved a limitation on military operations of foreign navies other than pure navigation and communication. Nevertheless, the provisions of the Convention on this point, which also refer generally to international law to determine which uses of the EEZ are lawful, leave open the possibility that a pertinent legal regime could evolve that might favor coastal states' exclusionary powers and control over foreign naval operations in the EEZ. Such evolution appears more probable with respect to the so-called enclosed or semi-enclosed seas, such as the Mediterranean, where overlapping of the various EEZs is likely to facilitate closer forms of cooperation in the economic management of the EEZ. This may provide a reasonable ground for at least limiting large-scale maneuvers and the firing of weapons by foreign navies.

#### B. USE OF FORCE BY THE COASTAL STATE IN THE EEZ

No specific provision in part V of the Convention clarifies what use of force is permissible by the coastal state to counter unwelcome foreign activities in the EEZ. The only relevant provision is again the article 301 general prohibition of the threat and use of force by states.<sup>44</sup> Article 301, however, as well as its Charter counterpart article 2(4), is concerned primarily with the "international" use of force, i.e., force directed outside the territorial scope of the offending state against another state's territory or forces.<sup>45</sup> These provisions are difficult to apply to the EEZ, given its amphibious status (partly subject to the coastal state's sovereignty, partly subject to the freedom of the high seas), because law enforcement measures against foreign ships in the zone may be viewed either as an exercise of "domestic" police powers or as "international" acts of force or as both.

In addition to this theoretical significance, the characterization of a law enforcement measure has an unquestionable practical relevance. If one assesses the use of force under the stringent standard of article 2(4) of the Charter or article 301 of the Convention, use of force will pass the test of legality only in instances of self-defense or of absolute necessity.<sup>46</sup> If instead, one views law enforcement actions in the EEZ as manifestations of police power *within* the sphere of the coastal state's jurisdiction, the relevant legal parameters are more liberal. They will include the specific rules on freedom of navigation, immunity of foreign ships, and customary standards for the treatment of

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that the list of freedoms in the EEZ remain unaffected. See U.N. Doc. A/CONF.62/C.2/L.21/Rev. 1; U.N.Doc. A/CONF.62/C.2/L.82.

44. Convention, *supra* note 1, art. 301.

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

46. Convention, *supra* note 1; U.N. CHARTER art. 2(4).

aliens. The common feature of these rules is that they limit the exercise of local jurisdiction without involving a general prohibition on the use of force.

The realistic view is to admit the possibility that certain forcible measures in the EEZ fall outside the scope of article 2(4) of the Charter and article 301 of the Convention. The Convention itself supports this interpretation in specific provisions that contemplate enforcement action on the part of the coastal state. Article 73 and article 216, for instance, concerning, respectively, the protection of economic resources of the EEZ and pollution prevention, are examples of such provisions.<sup>47</sup>

Resort to coercive measures under these enforcement action provisions is an exercise of police power and should not be measured according to the strict standard governing the international use of force, at least as long as the force used remains limited to the functional objective of safeguarding the resources of the EEZ and its marine environment. On the other hand, when foreign vessels and activities in the EEZ are clearly outside the legitimate reach of coastal state's police powers, as in the case of foreign warships, one must assess the use of force strictly on the basis of article 2(4) and 301.

The distinction between domestic police powers and international law provides a general criterion to identify standards governing the use of force. It remains to describe what use of force has been considered unlawful in international practice. Historically, states have often proved ready to resort to violent measures to exclude foreign activities from their coastal zones of economic jurisdiction.<sup>48</sup> One of the best known cases is the "cod war" which broke out as a consequence of Iceland's unilateral decision to exclude foreign fishing vessels from a fishing zone of fifty miles from the baselines around its coasts. Although this case reached the International Court of Justice [I.C.J.] at a time when the EEZ had not yet fully ripened into a legal institution of customary international law, the Icelandic fisheries zone was clearly a forerunner of the EEZ.

The final judgment rendered by the Court on the 25th of July, 1974,<sup>49</sup> shed very little light on the question of whether Iceland could

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47. Convention, *supra* note 1, arts. 73, 216.

48. The doctrine of necessity has justified, in the past, destruction of foreign ships to prevent large scale damage to the marine environment and shores of the coastal state. The doctrine was invoked, for example, to justify the bombing of the *Torrey Canyon* by the British air force in 1967 and the destruction of a Greek oil tanker by the French navy off of the coast of Corsica in July 1981. This doctrine is now incorporated in art. 221(1) of the Law of the Sea Convention and article I of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, *done* Nov. 29, 1969, *reproduced in* 9 I.L.M. 25 (1970).

49. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3.



lawfully resort to force for the enforcement of its fisheries legislation. Although both plaintiffs (the United Kingdom and the Federal Republic of Germany) had asked the Court to declare Iceland responsible for its acts of harassment against British and German vessels fishing in the contested zone, the final decision avoided the issue.<sup>50</sup> The Court concluded that it could not declare Iceland liable because evidence of the specific damage caused by Iceland's patrol boats was insufficient.<sup>51</sup>

The I.C.J. had another opportunity to assess the limits of the use of force for the protection of coastal state's rights in areas of economic jurisdiction. In the continental shelf dispute between Greece and Turkey, the issue of the permissibility of military measures to support the respective claims was implicit in Greece's application for interim measures of protection.<sup>52</sup> The Court again did not take advantage of this opportunity; it chose instead to declare that the particular circumstances of the case did not require the adoption of provisional measures under article 41 of the I.C.J. Statute.<sup>53</sup>

Other precedents in international practice, however, shed some light on the issue of force in areas of economic jurisdiction. In the *Red Crusader* incident of May 1961, a British trawler attempted to escape from Danish fishing waters, where it had been caught by a Danish patrol boat. During the escape, the *Red Crusader* was hit by several gunshots fired by the pursuing Danish vessel. The Commission of Inquiry set up by Denmark and the United Kingdom rendered an opinion in which the violent action undertaken by the Danish ship was considered to have "exceeded legitimate use of armed force on two counts: (a) firing without warning of solid gun-shot; (b) creating danger to human life on board the *Red Crusader* without proved necessity, by effective firing at the *Red Crusader* . . . ." <sup>54</sup>

The *Red Crusader* incident is probably the most restrictive precedent on the scope of legitimate use of force in the enforcement of

50. Only a brief discussion of the relevant submission can be found at paragraphs 73-76 of the judgment rendered with respect to the Federal Republic of Germany.

51. Fisheries Jurisdiction, *supra* note 49. Among the violent acts committed by Iceland were the shooting at the British trawler *Everton* in 1973 and the shooting by the Icelandic gunboat *Thor* of another British trawler in July 1974 after a 12 hour pursuit. See Tracy, *The Enforcement of Canada's Continental Maritime Jurisdiction*, ORAE Report n. R 44, 67 (1975).

52. *Aegean Sea Continental Shelf Case*, 1976 I.C.J. 3.

53. Statute of the International Court of Justice, art. 41(1), 1977 U.N.Y.B. 1193 (entered into force Oct. 24, 1945): "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." Article 41(2) requires that the Court give notice of suggested provisional measures to the U.N. Security Council.

54. *The Red Crusader* (Den. v. U.K.), 35 INT'L L. REP. 485 (1962) (the Commission of Inquiry was composed of C. de Visscher, A. Gros, and Capt. C. Moolenburgh).

coastal states' fishing rights. It implies the existence of an international law standard prohibiting the use of force in the pursuit of an offending fishing vessel unless required by self-defense.

The American-Canadian Commission reached a similar conclusion in the well-known case of the *S.S. I'm Alone*.<sup>55</sup> The Commission was asked to decide whether the sinking by the United States Coast Guard vessels of the *I'm Alone*, a ship of Canadian registry engaged in rum-running, was justified on the bases of the right of hot pursuit and of the necessity of preventing the smuggling of liquors into the United States. The Commission examined the case on the bases both of the Anglo-American Liquor Convention of 1924, which allowed search and seizure of Canadian registered vessels within the four-hour sailing zone from the American coast, and of customary international law. Although the Commission left a certain margin for the use of moderate force short of intentional sinking, it held that the sinking of the *I'm Alone* breached both the Anglo-American Liquor Convention and international law.

Even in incidents involving illegal fishing or illegal trade by foreign vessels, which are not brought before international tribunals, the state of the ship against which force was directed has usually lodged strong protests. The naval forces or aircraft of several Latin American states, for instance, have shot at United States tuna vessels on various occasions to enforce their 200-mile coastal jurisdiction.<sup>56</sup>

Although the assertion of a 200-mile territorial sea complicated the issue of the permissibility of force in these Latin American cases, the United States invariably protested the action and reserved the right to claim compensation.<sup>57</sup> Similarly, the Soviet Union delivered a strong note of protest to the Argentinean Government in 1968 when

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55. 3 R. INT'L ARB. AWARDS 1609 (1949). See Fitzmaurice, *The Case of the I'm Alone*, 17 BRIT. Y.B. INT'L L. 82, 99 (1936). Fitzmaurice maintains that the narrow scope of permissible use of force determined by the Commission can be explained by the fact that the order to stop had been given outside territorial waters, in the area of special jurisdiction under the liquor treaties.

56. Among the most serious incidents were those involving (1) the *Artic Maid*, 27 March 1955, which resulted in seizure of the vessel and wounding of crew members by Ecuadoran patrol boats; (2) the *Normandie*, 13 December 1957, shot at by a Chilean aircraft 25 miles off the Chilean coast; (3) the *Jo Linda*, 23 February 1962, shot at by a Columbian warship at about 25 miles from the coast; (4) the *Lou Jean*, 28 April 1962, shot at and seized by El Salvador's naval units at a distance of about 15 miles from the coast. An account of these cases is given in 3 I.L.M. 26 (1964). For an examination of other incidents off Latin American coasts, see Note, *Territorial Waters and the Onassis case*, 11 THE WORLD TODAY 1 (1955); Kunz, *Continental Shelf and International Law: Confusion and Abuse*, 50 AM. J. INT'L L. 828 (1956).

57. See, e.g., 38 Fed. Reg. 34,799 (11 Dec. 1973 memorandum by President Nixon to the Secretary of State regarding withholding over \$2 million in funds provided for Ecuador and Peru under the Foreign Assistance Act of 1961, an amount equal to reimbursements made for fishing vessels seized by those two nations, noted at 13 I.L.M. 500 (1974)).

the Argentinean destroyer *Santa Cruz* hit the Soviet fishing vessel *Golfstrim* with a round of explosive shells fired within the 200-mile territorial sea.<sup>58</sup>

Episodes involving use of military force against foreign vessels usually engaged in fishing activities have also been frequent in the Mediterranean. Libyan aircraft attacked Italian fishing boats on various occasions at distances ranging between thirty and fifty miles from the coast. After the shooting of the Italian boats *Borghesa* and *Di Cristofaro* in 1973, the Italian government presented a note of protest to the Libyan foreign minister Jalloud and accepted his apologies to the Italian ambassador in Tripoli.<sup>59</sup>

The majority of precedents shows that the state of the flag has normally protested the use of force undertaken by the coastal state for the purpose of enforcing its economic jurisdiction. In the few cases in which the use of force has given rise to an international adjudication or conciliation procedure, the conclusions reached suggest that the use of military force, such as shooting and thereby endangering the ship's safety, wounding or killing members of the crew, or causing outright sinking of the vessel, is to be considered contrary to international law. On the other hand, a reasonable degree of force appears permissible where serious violations of the coastal state's rights require an immediate enforcement action in order to prevent further harmful consequences. Thus, the coastal state may act to secure evidence of the violation, to arrest the ship, or to compel it to discontinue the unlawful activity.

The precedents reviewed above, and particularly the *I'm Alone* case, support the view that shooting for the purpose of warning and arresting, or even with the intention of partially disabling the ship for persistent refusal to comply or attempted escape, is permissible. At the same time, none of the above precedents warrants the conclusion that, apart from self-defense and necessity, the use of deadly force with the intent of sinking a foreign vessel in the EEZ or of causing death or grievous bodily harm to the crew is consistent with international law.

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58. The Argentinean reply simply communicated that the matter could have been settled before local courts. United States policy in this period was characterized by a system of direct indemnification of American vessels arrested or fired upon in Latin American waters. The government was then reserving itself the right to claim back the relative sums at the intergovernmental level. See Note, *Seizures of United States Fishing Vessels—The Status of the Wet War*, 6 *SAN DIEGO L. REV.* 428 (1969).

59. Rousseau, *Chronique des faits internationaux*, 78 *R.G.D.I.P.* 1096, 1176 (1974).

### III. THE "PEACEFUL USE" CLAUSES IN THE LAW OF THE SEA CONVENTION

The Convention adopted the principle of "peaceful use" or "peaceful purpose" in scattered provisions that deal with the open seas, the EEZ, and the seabed.<sup>60</sup> At the outset, one may ask whether the introduction of the "peaceful use" clauses in the Convention involves an exclusion or substantial limitation of peacetime military use of the oceans. If so, the exclusion or limitation of military activities would *a fortiori* exclude the use of force.

As a recurrent *leitmotif* in the text of the Convention, rather than the object of a specific section, the "peaceful use" clause appears to have general application. The most prominent "peaceful use" provision is article 88, which asserts that "[the] high seas shall be reserved for peaceful purposes."<sup>61</sup> Article 58 applies this general provision to the EEZ, insofar as it is compatible with the EEZ's legal regime.<sup>62</sup> Under the slightly different formulation of "peaceful purposes," the same principle applies to the use of the seabed beyond the limits of national jurisdiction<sup>63</sup> and therefore conditions the legality of several types of activities in the Area,<sup>64</sup> particularly the conduct of maritime scientific research<sup>65</sup> and the use of mining installations.<sup>66</sup> Because the above provisions cover the high seas, the international Area, and the EEZ, and because the requirement of "innocent passage" mandates that navigation in foreign territorial waters be "peaceful," practically no area of the sea escapes the application of the "peaceful use" principle.

This being established, it remains to clarify whether the "peaceful use" clause only represents a specific application of article 2(4) of the U.N. Charter,<sup>67</sup> which, in the law of the sea context, enjoins the threat or use of force against the territorial integrity or political independence of any state; or whether "peaceful use" involves an autonomous

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60. See, e.g., Convention, *supra* note 1, arts. 58, 88, 141, 301.

61. *Id.* art. 88.

62. *Id.* art. 58. Article 58(2) incorporates the mandate of article 88 by reference.

63. Convention, *supra* note 1, art. 141. Article 141 states that "[t]he Area shall be open to use exclusively for peaceful purposes by all States."

64. "For the purposes of [the] Convention . . . 'Area' means the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction. . . ." Convention, *supra* note 1, art. 1(1).

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

66. Article 147 provides that installations used for carrying out activities in the Area are subject to various conditions among which are that "such installations shall be used exclusively for peaceful purposes." *Id.* art. 147(2)(d).

67. "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 other manner inconsistent with the purposes of the United Nations." U.N. CHARTER art. 2(4).

normative concept entailing a specific obligation to restrict the use of the sea to peaceful purposes and thus bans military activities.

A minority of authors holds the latter view, as did the developing states in the Law of the Sea Conference.<sup>68</sup> One also finds support for this argument favoring the limitation of use of the sea to peaceful purposes by analogy to other international instruments that adopt the "peaceful use" clause to exclude militarization. Such instruments include the Antarctic Treaty,<sup>69</sup> the Outer Space and Moon Treaty,<sup>70</sup> as well as the Spitzbergen and Aaland Island treaties.<sup>71</sup>

The opposite view—that "peaceful use" or "peaceful purpose" must be understood as not limiting, much less excluding military activities in the oceans—received the strong support of the major maritime powers, especially the United States. The United States delegate vividly expressed his government's view in the course of the Law of the Sea Conference:

The United States had consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with the principles of international law. Any specific limitation on military activities would require the negotiation of detailed arms control agreement. The Conference was not charged with such a purpose and was not prepared for such negotiations. Any attempt to turn the Conference's attention to such a complex task would quickly bring to an end current efforts to negotiate a law of the sea convention.<sup>72</sup>

The question arises, "Which of these two diverging views on the normative value of the 'peaceful use' principle finally prevailed in the Law of the Sea Convention?" It seems unrealistic to interpret the "peaceful purposes" clauses of the Convention as affecting military fleets' navigation at sea, which is lawful under customary international law and the U.N. Charter.<sup>73</sup> On the contrary, military vessels enjoy a

68. Early Soviet literature points in this direction. See E. RAUCH, *supra* note 41, at 21. Cf. Malta, 5 UNCLOS III O.R. (67th plenary mtg.), para. 75; Ecuador, *id.*, para. 2. With reference to demilitarization of special zones, see Madagascar, *id.*, para. 14; Cuba, *id.*, para. 71; Bulgaria, *id.*, para. 66.

69. Antarctic Treaty, Dec. 1, 1959, art. 1, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

70. Treaty on the Exploration and Use of Outer Space, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205. The view that this treaty involves complete demilitarization of outer space is disputed. See J.E.S. FAWCETT, *INTERNATIONAL LAW AND THE USE OF OUTER SPACE* (1968); Poulantzas, *The Outer Space Treaty of 27 January 1967, A Decisive Step Towards Arms Control, Demilitarization of Outer Space and International Supervision*, 20 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 66 (1967). Poulantzas maintains that the principle of full demilitarization expressly applied to the moon and other celestial bodies applies as well to outer space, that is, the orbit surrounding the earth. *Contra* Stein, *Legal Restraints in Modern Arms Control Agreements*, 66 AM. J. INT'L L. 255, 261 (1972); Wolfrum, *supra* note 38, at 202.

71. Treaty Relating to Spitzbergen, Feb. 9, 1920, 2 L.N.T.S. 7; Convention Concerning the Non-Fortification and Neutralisation of Aaland Islands, Oct. 20, 1921, 9 L.N.T.S. 212.

72. 5 UNCLOS III O.R. (67th plenary mtg.), para. 81.

73. See Wolfrum, *supra* note 39, at 213 and literature cited therein.

privileged status under the Convention, both with respect to their complete immunity and to the monopoly they have on law enforcement action.<sup>74</sup> Therefore, it appears that only those military activities which fall into the category of aggressive acts, such as unlawful blockade, mining of sea ways, threat and use of force, and waging of war are *per se* prohibited. Article 301 of the Convention, under the title "peaceful use of the seas," indicates that "[i]n exercising their rights and performing their duties under this Convention, States parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations."<sup>75</sup>

Article 301 appears among the provisions of general application under part XVI of the Convention. Despite a slight difference in drafting, article 301 is obviously modeled on article 2(4) of the U.N. Charter. It contains the same reference to the prohibition of threat or use of force as well as the same indication of the protected values—territorial integrity and political independence—against which force must not be directed. Such a provision, with its qualified prohibition of the use of military force, would have had little meaning if the "peaceful use" principle was intended to ban military activities *per se* from the oceans.

Other textual arguments supporting interpretation of the "peaceful use" clause as not restricting foreign military activities outside national waters can be found in the provisions of the Convention regulating passage of warships in foreign territorial waters. Article 19 of the Convention contains a detailed list of the activities which are incompatible with the notion of "innocent passage."<sup>76</sup> Among them are typical military operations such as the "exercise and practice with weapons," launching, landing, or taking on board of any aircraft." If these and other operations are excluded by a special clause when a foreign ship transits through the territorial sea, it must logically be understood that such operations are permissible in the ocean beyond national jurisdiction.

These conclusions apply also with respect to military activities on the seabed and ocean floor beyond national jurisdiction. Early negoti-

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74. T. Treves, *Le Nouveau Regime des Espaces Marins et la Circulation des Navires*, Colloque Objectifmer, mer Institutions face anxnouvelles donnes de la presence en muer 12 (1983); Treves, *La notion d'utilisation des espaces marins a des fins pacifiques dans le nouveau droit de la mer*, 1980 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 698 (author refers to the peaceful use clause as "soft law").

75. Convention, *supra* note 1, art. 301.

76. Article 19 thus differs from the corresponding article adopted at Geneva in 1958. See Convention on the Territorial Sea, *supra* note 5, art. 14.

ations following Malta's proposal for a declaration of the international seabed as the "common heritage of mankind"<sup>77</sup> proceeded from a widespread conviction that such proposals should lead to complete demilitarization of the seabed. The paramount concern in the mid-1960's was that the seabed should not become an area for military competition. However, as the problem of resource exploitation moved increasingly to the forefront of the international seabed negotiations, the issue of demilitarization of the ocean floor was removed from the General Assembly Committee for the Peaceful Use of the Sea Bed and Ocean Floor and became a subject for arms control negotiations within the Eighteen Nations Disarmament Committee (ENDC). The United States and the Soviet Union supported this formal separation of competence and set the stage for the subsequent development of the seabed arms control negotiations toward the adoption of the 1972 Sea Bed Treaty.<sup>78</sup> That Treaty does not prohibit the military use as such of the seabed; rather, it prohibits only the emplacement of nuclear weapons and weapons of mass destruction in the seabed beyond the coastal zone of twelve miles defined by reference to the 1958 Geneva Convention on the Territorial Sea.<sup>79</sup>

It appears from the above that, in principle, the "peaceful use" clause in the Law of the Sea Convention does not impair the exercise of sea power in its conventional military forms. Therefore, as far as the high seas and the international Area are concerned, states remain free to use the sea for navigation of their fleets of war, including submarines either submerged or on the surface. States also remain free to use the sea for military maneuvers, testing and firing of conventional weapons, emplacement of military devices on the seabed, and installation of defensive weapons and weapons for the conduct of conventional war.

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77. See U.N. Doc. A/6695, para. 2 (9 August 1967). Malta requested the inclusion of a supplementary item in the agenda of the Twenty-Second Session entitled "Declaration and Treaty Concerning the Reservation Exclusively for Peaceful Purposes of the Sea Bed and Ocean Floor Underlying the Seas Beyond the Limits of Present National Jurisdiction, and the Use of their Resources for the Interests of Mankind." See also U.N. Doc. A/C.1/PV 1515 (Provisional Verbatim Record of the meeting of the First Standing Committee regarding Malta's proposal for a treaty governing the exploitation and use of the seabed).

78. Sea Bed Treaty, *supra* note 15. For a drafting history of the Treaty and detailed analysis of its content, see L. MIGLIORINO, *FONDI MARINI E ARMI DI DISTRUZIONE DI MASSA* (1980) (with extensive bibliographic material). See also Treves, *Military Installations, Structures and Devices on the Seabed*, 74 AM. J. INT'L L. 808 (1980); L. Merciai, *La Demilitarisation des Fonds Marins*, 88 R.G.D.I.P. 46 (1984).

79. See *supra* note 15 and accompanying text. Other special limitations on the military use of the seabed can be derived from the previously noted 1963 Treaty on the prohibition of nuclear experiments in the atmosphere and underwater, see *supra* note 17, as well as from the Tlatelolco Treaty of 1967 that banned nuclear activities in Latin America, *supra* note 18.

This conclusion does not imply, however, that the "peaceful use" clauses will not produce any useful legal effects. Despite their lack of an autonomous normative content, such clauses may provide an interpretative criterion for the Convention and for the general principle of the freedom of the seas. Under such a criterion, whenever military activities come into conflict with peaceful uses, the former must yield to the latter. This is true not only with respect to the EEZ, where economic activities fall within the sovereignty of the coastal state, but also with respect to the area beyond national jurisdiction, where eventual exploration and exploitation of seabed minerals may well give rise to a problem of competition between military activities and economic use of ocean space. A standard of preference for economic use is not only logically justified in view of the necessary localization of resource-related activities, but above all permits at least some legal effectiveness to be given to the "peaceful use" clauses and to the ordinary meaning of their language. This is in accordance with article 31(1) of the Vienna Convention and with the general principle of effectiveness, or *effet utile*, under which, between two possible interpretations—one depriving a provision of any effect and the other permitting some legal efficacy—one must choose the latter.<sup>80</sup>

### CONCLUSION

The establishment of the EEZ, the adoption of straight baselines, and the closing of large gulfs as historic or "vital" waters has resulted in a constant widening of coastal states' maritime jurisdiction. The progressive development of both the customary and conventional law of the sea shows that this widening of maritime jurisdiction has been accompanied by an increased emphasis on peaceful use of the oceans and the need to ban the use of force at sea. The widening of maritime jurisdiction and emphasis on peaceful use, however, have not been directed toward the objective of reducing military uses of the sea and preventing or limiting military conflict. On the contrary, disputes concerning military activities are subject to the "optional exception" under the dispute settlement machinery which the Convention provides. This limits the possibility of the Convention's developing a body of rules capable of reconciling the widespread increase of exclu-

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80. Vienna Convention on the Law of Treaties art. 31(1), U.N. Doc. A/CONF.39/27 (1969), reprinted in 63 AM. J. INT'L L. 875 n. 275 (1969): "A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The principle of effectiveness, or *effet utile*, is discussed by Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 1949 BRIT. Y.B. INT'L L. 72.



sive claims to coastal jurisdiction with the continuing insistence by naval war fleets on unimpeded freedom of the seas.

Taking this basic tension between the maritime needs of coastal states and foreign powers as a starting point, this Article has described the present limits of military activities and force in the sea areas within national jurisdiction. With respect to the territorial sea, internal waters, and the EEZ, one must distinguish between use of force in the pursuit of "police powers" and the "transborder" use of force under article 2(4) of the Charter. Many of the precedents reviewed indicate that coastal states' action in repelling or arresting foreign intruders represents an exercise of police power which does not constitute a *prima facie* violation of article 2(4) of the Charter. At the same time, the legality of such actions must be judged in light of the general principles of necessity and proportionality. Armed force for the purpose of enforcement action should normally be deemed impermissible when the national jurisdiction claimed by the coastal state has given rise to international disputes. In such situations (e.g., the Gulf of Sirte incident), there is a duty to resolve the dispute by peaceful means in accordance with articles 2(3) and 33 of the Charter.

On the other hand, the threat or use of force by naval powers to challenge coastal states' claims over adjacent sea areas is acceptable to some extent. As the *Corfu Channel* case indicates, the simple action of "showing the flag" by foreign warships, without provocative acts or intimidation, is permissible, especially where such ships are crossing bays or other areas of the sea previously open to navigation. Even under these circumstances, however, conflicts and disputes must be submitted to procedures of peaceful solution under the U.N. Charter.

With respect to military activities within and beyond the limits of national jurisdiction, the relevant provisions of the Convention and its preparatory works reveal that the "peaceful use" clauses of the Convention have not created any new obligation to limit military uses of the sea. However, since every treaty must be interpreted so as to give useful effect to its provisions, such clauses do provide an interpretative criterion for the purpose of favoring peaceful activities whenever these activities conflict with exclusive claims to occupation of the sea areas for military purposes. This conclusion applies all the more to the EEZ which, through customary law as reflected in the Convention, is subject to the economic sovereignty of the coastal state.